

MINUTES

Commission Meeting

October 25, 2005

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:

William A. Pruitt)	Commissioner
Ernest L. Bowden, Jr.)	
J. Carter Fox)	
Russell Garrison)	
J. T. Holland)	Associate Members
Cynthia Jones)	
Wayne McLeskey)	
Richard B. Robins, Jr.)	
Kyle J. Schick)	
Carl Josephson	Sr. Assistant Attorney General
Steven Bowman	Deputy Commissioner
Katherine Leonard	Recording Secretary
Wilford Kale	Senior Staff Advisor
Jane McCroskey	Chief, Admin./Finance Div.
Andy McNeil	Programmer Analyst, Sr.
Jack Travelstead	Chief, Fisheries Mgt. Div.
Rob O'Reilly	Deputy Chief, Fisheries Mgt. Div.
Jim Wesson	Head, Conservation/Replenishment
Eric Robillard	Head, Plans and Statistics
Sonya Davis	Fisheries Management Specialist, Sr.
Lewis Gillingham	Fisheries Management Specialist
Ellen Cosby	Fisheries Management Specialist
Joe Cimino	Fisheries Management Specialist
Lt. Col. Lewis Jones	Deputy Chief, Law Enforcement
MPO David Lumgair	Marine Police Officer
MPO Gary Fox	Marine Police Officer
MPO Steve Bennis	Marine Police Officer

Bob Grabb	Chief, Habitat Management
Tony Watkinson	Deputy Chief, Habitat Mgt. Div.
Chip Neikirk	Environmental Engineer, Sr.
Jeff Madden	Environmental Engineer, Sr.
Jay Woodward	Environmental Engineer, Sr.
Tracy West	Environmental Engineer, Sr.
Ben Stagg	Environmental Engineer, Sr.
Justin Worrell	Environmental Engineer, Sr.
Randy Owen	Environmental Engineer, Sr.
Hank Badger	Environmental Engineer, Sr.
Benjamin McGinnis	Environmental Engineer, Sr.
Elizabeth Gallup	Environmental Engineer, Sr.

Virginia Institute of Marine Science (VIMS)

Dr. John Wells
David O'Brien
Lyle Varnell
Roger Mann
Mark Luckenbach

Other present included:

Patsy Kerr	Roger L. Key	Helmut Linne von Berg
Chuck Flemming	Austin Magill	Jason Miles
Harrison Bresee	Tammy Halstead	Wayne Wesshol
Ellis W. James	Chuck Harding	E. L. Donaldson
Chris Moore	S. Lake Cowart, Jr.	James Fletcher
A. J. Erskine	Douglas F. Jenkins	Roger Graves
Susan Gaston	Scott Harper	Michael Congrove
Tommy Leggett	L. R. Carson, III	Buddy Conn
Jeffrey Crockett	Karen Hudson	Frances W. Porter
Donnie Thrift	Kelly Place	Tim Hayes
Pete Nixon	Michael A. Gordon	Andy Drewer
Roy Insley	Lawrence Latne	
and others		

Commissioner Pruitt called the meeting to order at approximately 9:35 a.m. Associate Members Schick and Bowden both arrived late and Associate Member Jones arrived at approximately 9:50 a.m.

Associate Member Garrison gave the invocation and Carl Josephson, Senior Assistant Attorney General and VMRC Counsel led the pledge of allegiance to the flag.

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

Approval of Agenda: Commissioner Pruitt asked for any changes to the agenda. Bob Grabb, Chief, Habitat Management told the Commission that a page two Item, **2F. DANVILLE DIVISION OF POWER & LIGHT, #05-1708** had been pulled from the agenda as the protest had not been resolved. Associate Member Garrison asked to be allowed some time after the Fisheries items to make some comments. Colonel Steve Bowman and Jack Travelstead did not have any changes for the agenda. **Associate Member Robins moved to approve the agenda, as amended. Associate Member Holland seconded the motion. The motion carried 5-0.**

MINUTES: Commissioner Pruitt asked for a motion to approve the September 27, 2005 meeting minutes. **Associate Member Fox moved to approve the minutes as presented. Associate Member Holland seconded the motion. The motion carried, 4-0-1. Associate Member McLeskey explained that he was abstaining, as he was not in attendance at the September meeting. Associate Member Bowden, Jones, and Schick had not arrived as yet.**

Associate Members Schick and Bowden arrived at this point in the meeting.

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

Bob Grabb, Chief, Habitat Management Division, gave the presentation for the page two items, A through E and G through K. His comments are a part of the verbatim record.

There were no questions of staff and there were no public comments.

Associate Member Garrison moved to approve the page two items A through E and G through K, as presented by staff. Associate Member Schick seconded the motion. The motion carried, 7-0.

2A. HENRICO COUNTY DEPARTMENT OF PUBLIC WORKS, #04-2089, requests a modification to their existing permit to allow for an additional 15 linear feet of riprap scour protection for their proposed replacement of the Hungary Road bridge over the North Run in Henrico County.

No applicable fees - permit modification.

2B. DEPARTMENT OF VETERANS AFFAIRS, #05-1548, requests authorization to install 4732 linear feet of bulkhead no greater than two (2) feet in front of an existing deteriorated bulkhead adjacent to their property situated along Jones Creek, Hampton Roads, and the Hampton River in Hampton.

Permit Fee.....\$100.00

2C. CITY OF NORFOLK, #05-1991, requests authorization to replace the Brambleton Street Bridge and existing 12" suspended waterline with a new 680-foot long by 91-foot wide bridge with associated railings and lights and 16" suspended waterline over Smith Creek/The Hague in Norfolk.

Permit Fee.....\$100.00

2D. DEPARTMENT OF THE NAVY, #05-1115, requests authorization to maintenance dredge, by the clamshell method and on an as-needed basis, 515,000 cubic yards of State-owned submerged lands to maintain depths from -15 feet below mean low water and -51 feet below mean low water, all berths and basins at the Norfolk Naval Shipyard, St. Helena's Annex and Southgate Annex on the Southern Branch of the Elizabeth River and to maintenance dredge a 1500-foot long by 50-foot wide channel to maintain a maximum depth of -5 feet below mean low water within Paradise Creek, in Norfolk and Portsmouth.

Permit Fee.....\$100.00

2E. CITY OF HAMPTON, #05-1121, requests authorization to maintenance dredge 12,000 cubic yards and remove 5,000 cubic yards of new material, by either hydraulic or clamshell method and on an as-needed basis, to obtain maximum depths of -9 feet below mean low water from a 420-foot long channel ranging in width from 70 to 100 feet within Salt Ponds and a 330-foot long by 100-foot wide entrance channel in the Chesapeake Bay in Hampton. All material will be placed above mean low water on the adjacent City of Hampton public beach.

Permit Fee.....\$100.00

2F. DANVILLE DIVISION OF POWER & LIGHT, #05-1708, requests authorization to install two (2) 12 kV power lines onto the bottom side of the Main Street Bridge in Danville, spanning approximately 500 feet of ordinary high water of the Dan River. This installation will serve to replace the lines being removed per the demolition of the Worsham Street Bridge.

Pulled off the agenda - protest unresolved.

2G. TOWN OF BIG STONE GAP, #05-2325, requests after-the-fact authorization to install a 0.99 MGD raw water intake in the Powell River to address a public water supply emergency due to drought conditions and a construction-related reservoir draw down of Big Cherry Lake in Wise County. Recommend approval of a 90-day permit in keeping with an October 4, 2005, News Release by the Governor’s office.

Permit Fee.....\$100.00

2H. RICHARD CONKLIN, #05-0897, requests authorization to construct a 213-foot long by 6-foot wide community pier with a 50-foot by 8.5-foot T-head and eight (8) finger piers to create 20 wet slips, adjacent to his property situated along Chincoteague Channel in the Town of Chincoteague, Accomack County. The proposed pier and boat slips will be for the exclusive use of the owners or tenants of the 20 townhomes in "The Landings" development. The applicant has agreed to remove 14 wet slips from the adjacent motel pier at the "Anchor Inn Motel Marina" prior to the completion of this project.

Permit Fee.....\$100.00

2I. PEACEFUL PONDS PROPERTY OWNERS ASSOCIATION, #05-2027, requests authorization to construct and backfill 960 linear feet of timber replacement bulkhead, aligned a maximum of two feet channelward of a deteriorating wooden bulkhead, with riprap scour protection and three access stairways at their property situated along the Chesapeake Bay in the Peaceful Beach area of Northampton County.

Permit Fee.....\$100.00

2J. BOY SCOUTS OF AMERICA – COLONIAL VIRGINIA CHAPTER, #05-1550, requests authorization to construct a 20-foot wide by 245-foot long timber bridge across Masons Old Mill Pond, a nontidal tributary of the Rappahannock River at their facility formerly operated as the Duplefun Campground at 623 Bayport Road in Middlesex County.

Permit Fee.....\$100.00

2K. TOLL ROAD INVESTORS PARTNERSHIP II, LP, #05-0197, requests authorization to modify an existing permit, to now construct two (2) temporary 62-foot by 62-foot, non-erodible crane/construction platforms, encroaching approximately 62 feet channelward of ordinary high water along both sides of Goose Creek, directly beneath the existing Goose Creek Bridge, Dulles Greenway toll road, in Loudoun County. Recommend approval with the standard in-stream construction conditions, and contingent upon the expiration of the public comment period that ends October 28, 2005.

Permit Fee.....\$100.00

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Commissioner Pruitt explained that the Commission would consider the next item before going into the closed session.

4. STEVE WHITE, #05-1558. Commission review of the September 19, 2005, decision of the Westmoreland County Wetlands Board to approve the installation of 147 linear feet of timber bulkhead, including return walls, no more than two feet channelward of an existing deteriorated bulkhead; the installation of 132 linear feet of riprap revetment; and the installation of 125 linear feet of marsh toe stabilization, adjacent to his property situated along Nomini Creek in Westmoreland County.

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

Associate Member Jones arrived to the meeting.

Mr. McGinnis explained that the project was located along Nomini Creek, southwest of McGuires Wharf, in Westmoreland County. A deteriorating timber bulkhead currently extends approximately 225 linear feet along the northeastern portion of Mr. White’s property. The backfill behind roughly sixty percent of the existing bulkhead had washed

out. This portion of the existing bulkhead was now backed by a thick stand of wetlands vegetation. The applicant, through his agent, originally submitted an application that was received by the VMRC on July 7, 2005. It was subsequently forwarded to the Westmoreland County Wetlands Board on July 8, 2005, for their action. Commission review of this case is being undertaken in accordance with the provisions of §28.2-1310 and §28.2-1311 (A)(2) of the Code of Virginia.

Mr. McGinnis stated that the Westmoreland County Wetlands Board held a public hearing on Mr. White's application on September 19, 2005. Mr. White was not present at the hearing, but was represented by his agent, Ms. Paphides. At that hearing the Board questioned the completeness of the drawings in Mr. White's application. The Board Chairman, Mr. Austin Magill, clearly stated, "I think this is an incomplete application" (page five of the verbatim transcript). Mr. Gary Ziegler, the County's new Zoning Administrator in charge of the Wetlands Board staff, later echoed Mr. Magill's statement by stating that he felt that the application was incomplete, and that in the future he hoped that these issues would be resolved at the staff level before the applications came before the board. The Board also noted that the alignment of the proposed shoreline features were not properly staked/flagged in the field, during site visits by the Board's Chairman and staff, as well as VMRC and VIMS representatives.

Mr. McGinnis explained that the Virginia Institute of Marine Science (VIMS) Shoreline Permit Application Report, dated September 14, 2005, stated that at the time of their site visit, the alignment of the structures was not staked and certain existing site conditions were not shown on the drawings, making it difficult to determine the proposed location of the structures. The cover page of their report also included a special note, which read, "Certain assumptions were used in determining the marine environmental impacts potentially resulting from this proposal. These were necessitated by information voids resulting from application noncompliance with the Virginia Code §28.2-1302 and the Joint Permit Application." Since this is not normally included on their reports, the special note was pointed out to the Board by VMRC staff during the public hearing. The report also stated that to avoid impacts to wetlands vegetation, the return walls for the bulkhead should be replaced in place. The report did not indicate that any other portions of the project were expected to adversely impact the marine environment.

Mr. McGinnis said that although several comments were made by the Board regarding the lack of information in the application and the failure to properly stake the project in the field, a motion was made and seconded to approve the project as submitted, with the condition that the proposed alignment be properly staked and verified by the Board's staff. The Board voted 4-0 (one member was not present during the vote) to approve the motion. The Board did not consider any form of mitigation or compensation for the permanent loss of tidal wetlands, consistent with the Commission's newly adopted Wetlands Mitigation-Compensation Policy (4VAC20-390).

Mr. McGinnis stated that it should be noted that the Commission previously reviewed the Board's September 20, 2004, decision to approve Ms. Lynda Stewart's (#04-1774) project based upon inaccurate and unclear drawings that the Board had also questioned during the public hearing. These two cases are also similarly linked by the fact that Ms. Mary Paphides, served as the agent for both Ms. Stewart and Mr. White. In Ms. Stewart's case, the Board also failed to consider any design alternatives, as suggested by VIMS. The Commission previously remanded the Stewart case back to the Wetlands Board for rehearing.

Mr. McGinnis explained that in this case, the Westmoreland County Wetlands Board approved a project based upon an incomplete application that they themselves questioned during the public hearing. The drawings lacked adequate benchmarks and distances, and the project alignment was not properly staked/flagged. As such, the project was approved without actually knowing the extent of wetland impacts. In addition, it will not be possible for the Wetlands Board staff to conduct a permit compliance check upon completion of the project. Although the Board approved the project with a condition that required the applicant to stake the alignment with verification by the Board's staff, their approval did not require any new drawings. Furthermore, since the extent of wetland impacts was unclear, this did not allow the Board to consider the need for mitigation or compensation for any permitted wetland loss.

Mr. McGinnis stated that based on the foregoing, it appeared the Board erred in its decision to approve an application without complete drawings as required by the wetlands zoning ordinance. Accurate, clearly referenced drawings are essential because they become part of the permit, once issued, and are the standard against which the permittee's compliance under that permit is measured.

Mr. McGinnis said that overall, staff felt that the basic concept for the project seems acceptable, but without knowing the exact extent of the wetland impacts the Board should have deemed the project incomplete and required additional information and drawings before considering the project for approval.

Mr. McGinnis explained that in light of the foregoing, and in accordance with §28.2-1313(1), staff recommended that the Commission remand this matter for rehearing and that the Board be directed to request revised drawings which accurately reference the project from set benchmarks, to require the applicant to properly stake the alignment of the project, and to consider requiring appropriate mitigation or compensation for the loss of any vegetated tidal wetlands that may be permitted in association with the proposed bulkhead return walls.

Associate Member Robins asked if with the scaled drawing submitted staff could not reconcile the site of the project. Mr. McGinnis responded yes, there were no appropriate landmarks used to delineate the project location.

Commissioner Pruitt said that the Commission did not like to take a Wetlands Board decision under review in this manner, but sometimes it was just necessary.

Austin MaGill, Wetlands Board Chairman, was sworn in and his comments are a part of the verbatim record. Mr. MaGill explained that unlike the others he was retired and had the time to actually go out to the sites and check them himself. He said that staff was a lot of help to the Wetlands Board. He said they would make a better effort to be more diligent on future applications.

Commissioner Pruitt said he recommended that the matter be remanded back to the Wetlands Board.

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

No applicable fees – Wetlands Board review.

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Commissioner Pruitt announced the Commission would continue with Item 5 and go back to Item 3 afterwards.

- 5. PORTOBAGO BAY HOMEOWNERS ASSOCIATION, #05-1546**, requests authorization to install and backfill 120 linear feet of timber bulkhead with return wall, encroaching over tidal wetlands, adjacent to their community lot situated along Portobago Bay in Caroline County. Commission Wetlands Permit required.

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

Mr. McGinnis explained that the project was located along Portobago Bay, just off the Rappahannock River in Caroline County, near the border with Essex County. The proposed timber bulkhead is adjacent to a community parcel owned by the association. This property currently includes approximately 108 linear feet of timber bulkhead with return walls, a concrete boat ramp, and a 22-slip community pier extending approximately 351 feet channelward of the existing bulkhead. The project design calls for the bulkhead to be placed along the same alignment as the existing bulkhead.

Mr. McGinnis said that the proposed bulkhead and backfill would permanently fill approximately 1440 square feet of non-vegetated wetlands. Although the area was clearly eroding, the proposed structure would be aligned 12.5 feet channelward of mean high water. The bulkhead would not, however, extend beyond mean low water. At this

time, the applicants had not submitted a proposal for compensation or mitigation for the tidal wetland loss resulting from the proposed project.

Mr. McGinnis explained that staff held a public hearing on this project on October 11, 2005. Five members of the homeowners association, along with their agent, were present at the hearing; however, no one voiced opposition to the project.

Mr. McGinnis stated that the Virginia Institute of Marine Science (VIMS) Shoreline Permit Application Report, dated September 14, 2005, stated that, if approved, the proposed project would result in the loss of approximately 1440 square feet of non-vegetated wetlands. VIMS identified the wetland type to be impacted as a sand/mud flat, which they stated was important in terms of productivity, nutrient cycling, and habitat value. As a preferred alternative, VIMS recommended the use of a riprap revetment constructed against the existing bank, because it dissipated wave energy, lessening the potential for the erosion of adjacent wetlands, as well as providing habitat for aquatic organisms. Additionally, VIMS stated that a riprap revetment would have a longer lifespan than a timber bulkhead. VIMS ended their comments by stating that a 3-foot high riprap revetment, constructed against the bank, would encroach no more than 6 feet channelward of mean high water, resulting in half the impacts of the proposed structure.

Mr. McGinnis said that the Department of Game and Inland Fisheries (DGIF) had stated that this project was within a reach of the Rappahannock River, which had been designated as a Bald Eagle Concentration Area, and was in an area designated as a Potential Anadromous Fish Use Area. Therefore, they recommended a combined time-of-year restriction, which precluded any construction activities, between January 1 and July 15. DGIF also recommended that an alternative be considered to the bulkhead design, such as a "living shoreline" treatment, as well as the implementation of erosion and sediment control measures, including the use of turbidity curtains. No other state agencies provided comments, and no individuals had voiced opposition to the proposal.

Mr. McGinnis said that it appeared that the applicants' proposed project was designed out of convenience to align with the existing bulkhead and provide construction access, and did not attempt to avoid or minimize impacts to tidal wetlands. Furthermore, the applicant had not offered any form of compensation or mitigation for the 1440 square feet of wetland loss. As such, and in consideration of the requirements of §28.2-1302 (9), as well as our Wetlands Guidelines and Wetlands Mitigation-Compensation Policy, staff could not support approval of the project, as proposed.

Mr. McGinnis explained that because of the conditions at the site, staff recommended approval of a riprap revetment constructed against the existing bank as suggested by VIMS. In staff's opinion, the habitat value provided in the interstitial voids of the riprap would offset the loss of habitat resulting from the filling of the sand/mud flat with riprap, and would not necessitate compensation or mitigation.

Mr. McGinnis said that should the Commission choose to approve the bulkhead, as proposed, staff recommended that the permit not be issued until an acceptable compensation plan to offset the wetland loss had been provided to staff, which was consistent with the Commission's recently adopted Wetlands Mitigation-Compensation Policy.

Associate Member Robins said that in the staff recommendation it was allowing the riprap as recommended by VIMS and not asking for any compensation. He asked if there was precedent for this being done.

Bob Grabb, Chief, Habitat Management, explained that by pulling back the project with riprap making it 3 feet high with a 1 to 2 slope it would eliminate one-half of the fill required for the bulkheading. In the past the Commission had encouraged placement of intertidal riprap since there was no natural rocky intertidal habitat in Virginia. He said that the Commission had been trading benthic habitat for rocky intertidal habitat and not charging for riprap.

Associate Member Garrison said he agreed with the Department of Game and Inland Fisheries with having a living shoreline. He said a bulkhead would take this away, whereas the riprap would allow for a living shoreline.

Associate Member Fox asked if there was information on the cost of the bulkhead versus the riprap. Mr. Grabb explained that on the Eastern Shore he thought that to bring in the rock for riprap was more expensive, but the bulkhead would need to be replaced more frequently than the riprap, which made the riprap more cost effective over the long term.

Associate Member Schick explained that in the Subaqueous Guidelines it does talk about living shorelines and it addresses mitigation for everything disturbed, but it does not address mudflats. He said he thought getting away from using the bulkhead was a good precedent to set, because it was a cost nightmare to replace. Mr. Grabb explained that in a wave climate with the bulkhead it usually required a riprap revetment toe to prevent the base of the bulkhead from eroding.

Roger Key, applicant representative, was sworn in and his comments are a part of the verbatim record. Mr. Key explained that trees were falling into the water and there was no vegetation, but when they put the bulkhead there and put vegetation into the area there would be more to gain. He said he did not understand the recommendation. He said his proposal was making more area with wetlands and he preferred to continue with the bulkhead and following that shoreline. He said his contractor agreed with this plan.

Lyle Varnell, representing the Virginia Institute of Marine Science, was present and his comments are a part of the verbatim record. Mr. Varnell stated that from an environmental aspect that in the past riprap had been used many times in this situation and if done properly, does well.

Associate Member Jones said that VIMS had compared the riprap versus bulkhead. She said according to VIMS there would be less erosion in the future with the riprap than with the bulkhead and there would be less loss of bottom.

Commissioner Pruitt asked if there were any comments in opposition.

Helmut Linne von Berg, an adjacent landowner, was sworn in and his comments are a part of the verbatim record. Mr. Linne von Berg said this was a common area used by all residents and they were concerned that the riprap would be a danger to children who used this area. He said he felt it would look better to see the bulkhead continued.

Mr. McGinnis said that a letter was received from Mr. Key on Friday and that had been added to the Commission's packet. He said there were comments from Mr. Key that he might want to address.

Associate Member Garrison asked if the bulkhead was approved, how would the applicant compensate for the loss of wetlands. Mr. Key said he did not know that the homeowners association would have anything to offer in compensation, but there was one property owner that might be willing to give property back if the bulkhead were approved. Commissioner Pruitt asked how much and what type of compensation. Mr. Key said it would be approximately 1,440 feet of non-tidal wetlands.

Edward L. Donaldson, resident, was sworn in and his comments are a part of the verbatim record. Mr. Donaldson explained that he had gotten lost because of bad directions and had just arrived and wanted to speak to the project. He lived just downstream of the project. He said that he had put riprap on his property approximately 3 years prior. He provided the plans prepared by the contractor for his project. He said it was put in and was still holding up and he felt in the long run was the best solution. He said rocks for the riprap could be trucked in by land, because that was the way he had it done. He said that it was hard to get a contractor to do this, but it could be done. He said the drawings for the project lacked information, such as there was no topographical elevation information, no information on how much dirt would be removed or how it will be blended to the adjacent lot. He said he believed that every stone should be turned and that there was some stones left that needed to be turned before this project should be done.

After much discussion, Associate Member Robins moved to approve the staff recommendations. Associate Member Schick seconded the motion. Associate Member Holland asked if there was to be no mitigation requirement. Associate Member Robins responded, yes. He further clarified the staff recommendations by explaining that the applicant's proposal was being denied, and that construction of riprap was being approved. He also stipulated that revised drawings would be required and approved by staff. Associate Member Schick asked if a proper landscaping and sloping was to be included on the drawings. Associate Member

Robins agreed to include this and stated it must be approved by staff as well. The motion carried, 8-0.

Wetlands Permit Fee.....\$10.00

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3. 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:

- 1) Item 15, Virginia Seafood Council, Ariakensis Project.
- 2) Mitchell versus VMRC.

The motion was seconded by Associate Member Holland. The motion carried, 8-0.

Associate Member Robins moved for the following:

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

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

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

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

Associate Member Holland seconded the motion. Associate Member Garrison held a Roll Call vote:

AYES: Bowden, Fox, Garrison, Holland, Jones, McLeskey, Robins, Schick and Pruitt.

NAYS: None

ABSENT DURING VOTE: None

ABSENT DURING ALL OR PART OF CLOSED MEETING: None

The motion carried, 9-0.

**Katherine Leonard, Recording Secretary
Virginia Marine Resources Commission**

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- 6. JOE MCCLURE, #05-1679**, requests after-the-fact authorization to retain his 12-foot by 12-foot shelter on a previously authorized private pier adjacent to property situated along Chisman Creek in York County.

Traycie West, Environmental Engineer, Sr., gave the presentation with slides. Her comments are a part of the verbatim record.

Ms. West explained that Mr. McClure's property was situated along Chisman Creek, just east and upstream of Smith's Marine Railway, in York County. Ms. West explained that Mr. McClure was not present today as he was in Ohio due to an emergency.

Ms. West said that staff received an anonymous complaint on July 7, 2005, that a shelter or boathouse was being constructed at the end of a pier on Chisman Creek. The caller did not know the address of the home where the construction activities were taking place. Staff was eventually able to identify the location of the structure, however, from the caller's description of the property. Staff was able to identify Mr. McClure as the property owner through his submission of an application in 2002 for authorization to remove an existing deteriorated pier and construct a new pier at his property. Staff telephoned Mr. McClure to arrange a site inspection. Mr. McClure was advised that he would be required to either submit an after-the-fact application requesting authorization to retain the structure or he could have it removed. During an inspection on August 11, 2005, staff noted the presence of an open-sided gazebo on the pier. Mr. McClure stated that he believed the structure "was not a big deal" and did not realize that it required authorization from this agency.

Ms. West said that staff did not issue a Sworn Complaint and Notice to Comply because Mr. McClure readily submitted an after-the-fact application with drawings following his telephone conversation with staff. That Joint Permit Application was received on July 21, 2005. The application stated that Mr. McClure had constructed a covered fish cleaning

station at the end of his pier. He also proposed to add a sink according to the application drawings. The sink has not been installed because Mr. McClure ceased construction activities after staff contacted him by phone.

Ms. West stated that when staff reviewed proposals to build over State-owned submerged lands, the Commission's Subaqueous Guidelines direct staff to consider, among other factors, the water dependency and necessity of the proposed structure. Furthermore, when considering authorization for such structures for private use, §28.2-1205 of the Code of Virginia stipulates that: "In addition to other factors, the Commission shall also consider the public and private benefits of the proposed project and shall exercise its authority under this section consistent with the public trust doctrine as defined by the common law of the Commonwealth adopted pursuant to §1-10 in order to protect and safeguard the public right to the use and enjoyment of the subaqueous lands of the Commonwealth held in trust by it for the benefit of the people as conferred by the public trust doctrine and the Constitution of Virginia."

Ms. West said that staff did not consider the roofed structure to be water dependent and therefore recommended denial of the covered roof structure. In addition, staff recommended that the Commission direct that it be removed within 60 days.

Ms. West stated that in the event the Commission were to grant after-the-fact approval for the roof structure, staff recommended an appropriate civil charge be considered based upon minimal environmental impact and significant degree of deviation or non-compliance.

Commissioner Pruitt asked for any comments from the public, pro or con. There were no comments. He then asked for discussion or a motion.

Associate Member Holland asked if the staff recommendation was the removal of the roof structure and the fish cleaning station. Ms. West said that the recommendation included everything, but she doubted a complaint would have been made for the fish stand alone.

Carl Josephson asked to comment to this issue and he explained that the judge in one of the recent appeals expressed his concern as to how extreme the water dependency issue was taken. He said he had responded at that time that the Commission did not hear cases for these diminimis items and he cautioned the Commission on taking this extreme action, but said it was up to the Commission what they considered diminutive.

Commissioner Pruitt asked how the applicant responded when told he was in violation. Ms. West said he was very cooperative and when he called just prior to the meeting to say he could not attend the meeting because of a business emergency, he was very apologetic and wished for the Commission to go ahead with the hearing today.

Associate Member Garrison said he hoped the Commission would not deny the sink, because when you fished, you need one.

Association Member Robins explained that it was important to look carefully at this issue as the Commission does not want to regulate diminutive structures and the sink is such a structure. He moved to accept the staff recommendation for removal of the roof structure within 60 days, but to allow the fish-cleaning table. Associate Member Schick seconded the motion. The motion carried, 7-0-1. Associate Member Garrison abstained from voting. Associate Member Jones asked if the applicant could reapply for a boathouse. Bob Grabb, Chief, Habitat Management responded, yes.

No applicable fees – Enforcement Action

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7. **DISCUSSION:** Consideration of appropriate enforcement measures to compel compliance in the case of Charles S. Bedford Jr., VMRC #03-0717.

Tracy West, Environmental Engineer, Sr., gave the presentation and her comments are a part of the verbatim record.

Ms. West explained that at the June, 28, 2005, Commission meeting, the Commission considered Mr. Charles Bedford's after-the-fact request to retain a 10-foot by 14-foot open-sided gazebo located at the end of his pier at his property situated along Willoughby Bay in Norfolk. The Commission voted unanimously to deny authorization for the structure and ordered that it be removed within 60 days.

Ms. West further explained that on September 12, 2005, staff noted that the structure had not yet been removed. Staff then contacted Mr. Bedford on September 26, 2005, and left a voice mail message requesting clarification regarding his plans to have the structure removed. Staff did not receive a response and as of October 18, 2005, the structure had not been removed.

Ms. West said that she had spoken with Mr. Bedford that morning. Mr. Bedford informed her that he had not been present to take care of the removal of the gazebo. He explained to her that since the various hurricanes had hit the United States, that the communication company he worked for was out of the state working on contracts with the Coast Guard and there had not been time. She stated that the staff recommendation had not changed, even with this additional information.

Ms. West stated that unless the Commission believed that Mr. Bedford should be provided additional time to remove the structure, staff recommended that this matter be referred to the Office of the Attorney General for appropriate enforcement action.

Ms. West also said that when she spoke with Mr. Bedford, he had indicated that he had all the documents necessary and he intended to rework the end of the pier and apply for a boathouse, thereby, deleting the gazebo.

Carl Josephson, Senior Attorney General and Counsel for VMRC explained that this matter could be resolved without referring it to the Attorney General by granting an extension of time and sending Mr. Bedford a forceful letter. He said that as to any enforcement action where no appeal had been decided by the court the defendant still has a right to offer defense on his behalf the same as if he were appealing. He said any correspondence sent to the Attorney General would need to include the record and if the matter was not resolved before he made his decision, then he could proceed with any action.

Associate Member Robins stated that the applicant's plan to rework his proposal was immaterial. He said he felt it would be appropriate for the Commission to send a demand letter with an extension of time and stating that if there still was no compliance by that deadline then the matter would be referred to the Attorney General.

Bob Grabb, Chief, Habitat Management, suggested that instead of referring to the Attorney General, as this was a Class 1 misdemeanor, criminal action could be taken by turning the matter over to the Commonwealths Attorney. Mr. Josephson stated that the Commonwealth Attorney would need to agree prior to taking that direction. He said that from conversations with another lawyer in the office who is familiar with environmental cases what was likely to happen, with no precedent to base this on, was the defendant would decide to challenge the validity of the order and then a judge would continue the case while the administrative appeal played out separately. Mr. Grabb said that there was no appeal of the Commission's decision was made by Mr. Bedford within the time allowed. Mr. Josephson stated that the Administrative Process Act allows the defendant to defend himself against any enforcement action under the Administrative Process Act the same as if he had appealed.

After much discussion, Associate Member Robins moved to grant a 30-day extension and failure to comply within that time would result with the matter being referred to the Attorney General. Associate Member Garrison seconded the motion. The motion carried, 8-0.

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8. **PUBLIC HEARING:** Consideration of changes to the Commission's Subaqueous Guidelines.

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

Mr. Watkinson explained that the Subaqueous Guidelines were last revised in 1986 and reprinted in September 1993. The purpose of these guidelines is to make available to applicants and the public-at-large the policies and procedures of the Marine Resources Commission for the permitting of activities directly affecting the subaqueous lands of the Commonwealth of Virginia. Most activities over, under, or on State-owned submerged lands require a VMRC permit. Section 28.2-1203 of the Virginia Code states that it shall be unlawful and constitute a Class I misdemeanor for anyone to build, dump, or otherwise trespass upon or over or encroach upon or take or use any materials from the beds of the bays and ocean, rivers, streams, creeks, which are the property of the Commonwealth, unless such act is pursuant to statutory authority or a permit by the Marine Resources Commission.

Mr. Watkinson said that the Guidelines are used to guide the Commission and its staff in the application of those policies and procedures and serve to inform citizens of the general terms and conditions under which subaqueous activities will be permitted in State waters. Nothing in those Guidelines, however, restricts or impedes the power of the Commission to review each application on its individual merits, apply only those conditions considered appropriate or to consider unusual or mitigating circumstances in the review of applications.

Mr. Watkinson stated that the updated Guidelines were intended to address changes in State Code related to permitting of activities involving State-owned submerged lands that involve such items as private piers, boathouses, enforcement procedures and consideration of the Public Trust Doctrine. In addition the proposed updates included the Commission adopted definition of water dependency and discussed specific activities such as dredging operations, filling and dredge material placement, structures such as piers, wharves and boathouses, marinas, bulkheads and riprap, jetties, groins and breakwaters, overhead and submerged crossings, riparian and non-riparian moorings and clarified the extent of Commission determined jurisdiction over non-tidal areas above which permits were not required from VMRC. The update also removed the royalty schedule that will be adopted separately.

Mr. Watkinson said that as amended, the updated Subaqueous Guidelines were reviewed and approved by the Habitat Management Advisory Committee. In keeping with the authority of §28.2-103 of the Code of Virginia, staff recommended adoption of the updated Subaqueous Guidelines as presented for consideration by the full Commission on this date.

There were no questions of staff. The public hearing was opened, but there were no comments regarding this matter.

Associate Member Garrison moved to approve the Subaqueous Guidelines. Associate Member Schick seconded the motion. The motion carried, 8-0.

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9. **DISCUSSION:** Updating the Commission's Royalty Schedule and Requesting Approval to Hold a Public Hearing.

Bob Grabb, Chief, Habitat Management, gave the presentation and his comments are a part of the verbatim record. Mr. Grabb explained that this was a request for a public hearing to be held at the November 22nd Commission meeting.

Commissioner Pruitt asked for a decision on the meeting dates for the November and December 2005 Commission meetings. He suggested that the November meeting remain the same, November 22nd, the fourth Tuesday and that the December meeting be moved up one week to the third Tuesday, December 20th. The board members agreed with his suggestion.

Associate Member Robins moved to approve the request for a public hearing. Associate Member Schick seconded the motion. The motion carried, 8-0.

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Lt. Col. Lewis Jones, Deputy Chief, Law Enforcement, introduced a new Marine Police Officer, Steve Bennis who would be assigned to the Southern Area. Marine Police Officer Bennis had come to VMRC after retiring from the City of Norfolk Police Department.

Bob Grabb, Chief, Habitat Management, introduced a new employee in his division. He said Elizabeth Gallup had been selected for the new Environmental Engineer, Sr., position and this was her first day. He said she had a Bachelor of Arts degree in Environmental Science and a Masters degree in Coastal Management. He went on to say she was originally from the area and hired for one of the two new positions the Commissioner approved for the division.

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The Commissioner adjourned the meeting at approximately 12:07 p.m. for lunch. The Commission was reconvened at approximately 1:00 p.m. Commissioner Pruitt had not yet returned to the meeting, therefore, Associate Member Garrison reconvened the meeting and assumed the duties of the chair.

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Wilford Kale – OCTOBER 27 & 28, 2005 FIELD TRIP: Mr. Kale reviewed the itinerary for the field trip for the Associate Members who would be attending.

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11. PUBLIC COMMENTS:

Kelly Place – Commercial Waterman was present and his comments are a part of the verbatim record. Mr. Place explained that the striped bass had been made a two-fishery as required by ASMFC. He said the ocean fishery had earlier access to the fish. He said the same amount of tags should have been issued, but the number for the ocean fishery was predetermined and not discussed; therefore, creating a large number of inequities. He said it had caused problems with the quota and equity between the 2 fisheries.

No action taken by the Commission.

James Fletcher – Commercial Waterman was present and his comments are a part of the verbatim record. He suggested that the Commission consider changing the Summer Flounder Regulation 4VAC-20-620-10 because of the increased fuel cost in the last year. He explained that 95% of the boats hold Virginia and North Carolina licenses, but the fish are mostly in New Jersey for whatever reason. He said there needed to be a method to allow these vessels in New Jersey to send the Virginia and North Carolina quota south. He said in Section I of the regulation it required a call to declare packing and he said it needed to be changed to calling in and declaring Virginia and North Carolina to be packing. He said he was requesting this change to provide a way to save fuel as the cost of fuel takes 25% of the waterman's income.

No action taken by the Commission.

Doug Jenkins – President of the Twin Rivers Watermen's Association, was present and his comments are a part of the verbatim record. He said that the Coan, Nomini and Lower Machodoc were being treated differently and they were not tonging areas. He said these areas had been changed to a tonging area from a hand scrape area. He said he was requesting that this be changed back the same as the Rappahannock River and James River. He said the change was made because of the complaints from private planters in the area and there are more planters in the Rappahannock. He said the staff needed to be instructed to change it back.

No action was taken by the Commission.

Associate Member Robins – Offshore Fishery Species

He said that he had discussed with John Graves of VIMS the Billfish Draft Consolidated Atlantic Highly Migratory Species Fishery Management Plan. He suggested that the Commission send a letter to NMFS since Virginia sports fishermen participate in this fishery. He said he had drafted a letter for NMFS including comments by Dr. Graves, which he was asking the Commission to adopt and send.

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10. SPECIAL PRESENTATION: S. Lake Cowart, Jr., former Associate Member whose term ended June 30, 2005.

Commissioner Pruitt made this presentation. He read the certificate of service into the record. He said that Mr. Cowart had served on the board for nine years and had been exemplary in his service. He further said that Mr. Cowart’s professional experience, knowledge, wisdom, and sense of duty had served the Commission well. He said Mr. Cowart was a true Virginia gentleman. He said that Mr. Cowart’s contributions had helped to increase the marine resources for current and future generations.

Mr. Cowart started out by remembering his father and his time with the board. He said he hoped that he had not caused Mr. Pruitt’s hair to turn gray. He said that his time with the board had been a true pleasure.

Associate Member Garrison thanked Mr. Cowart for all the inspiration he had given him in his time with the board. Mr. Cowart thanked him in return.

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12. PUBLIC HEARING: Proposed amendments to Regulation 4VAC20-252-10, Et. Seq. "Pertaining to Striped Bass".

Jack Travelstead, Chief, Fisheries Management, gave the presentation. Mr. Travelstead said that this was the second public hearing on this issue. He said at the September public hearing the general consensus of those attending was not supportive of the proposals and at the request of the Commission, staff had gone back to FMAC and the Ad Hoc Committee to develop new alternatives. He said a notice had been advertised with the old and new issues for a public hearing at this meeting. The proposed amendments will address 4 objectives.

- 1) Reduction of the harvest of large, coastal migratory striped bass
- 2) Lowering the average size of striped bass taken

- 3) Stabilization of the quota of tags for the Chesapeake and Coastal Area fisheries, and
- 4) Repair the inequitable distribution of striped bass harvests that result from taking large fish.

The following were solutions proposed previously and another alternative proposal recommended by the Ad Hoc Committee. Mr. Travelstead reviewed and discussed each of the following:

Ban all temporary transfers of striped bass tags in 2006 in both the Chesapeake area and Coastal area fisheries.

The ad hoc committee suggested this alternative, and the FMAC did not support it, as their vote was tied.

Quite often, fishermen, who previously used gear that tends to capture smaller striped bass, like pound nets and haul seines, now transfer their tags, temporarily to gill net fishermen. Because, gill nets are more mobile, they tend to be used to harvest the larger fish. Likewise, many upriver fishermen, who have access only to the smaller fish, tend to temporarily transfer their tags to Chesapeake Bay fishermen, who harvest larger fish.

Staff sees the following problems occurring. Since permanent transfers are more costly, the incentive to use these tags on still larger striped bass increases and the problems described above persist. Other fishermen would likely avoid the required agency approvals of transfers, give their tags to another fisherman and proceed to harvest large striped bass. Still others would not fish during the one-year ban, preferring to wait until the rule sunsets. Finally the one fisherman that had not used his tags will again fish, and what size he will harvest is unknown. The catching of larger striped bass most likely would continue in all the above situations.

Establish a two-tag system requiring 50 percent of the tags held by each fisherman to be used on small fish (18"-28"):

This measure was endorsed by the advisory committees. Under this proposal, one type of tag would be required on striped bass 18"-28" in the Chesapeake Area (28"-34" in the Coastal Area) and another type of tag must be used on any striped bass greater than 18" (28" in the Coastal Area). The four tag types would be distinguished by color and an engraved legend. Within each area, tags would be distributed in equal quantities in the first year, but the proportion could be adjusted in future years to achieve a lower average size striped bass.

Several seafood buyers expressed reservations about the proposal. They are concerned about having to examine each fish purchased to ensure it is properly tagged to avoid violation of the regulation. Shipping such illegally tagged fish across state lines could be a violation of the federal Lacey Act. To resolve this concern, enforcement could be more focused at the fisherman level. Individual harvesters could be identified through the tags serial number.

The two-tag system has the potential to reduce average fish size, but it also potentially creates a slot system causing bycatch discard problems. It is likely that some fishermen, in pursuit of the largest fish, could discard large numbers of smaller fish. That is, they will tend to use their 18"-28" fish tags on 26"-28" fish and discard those less than 26 inches. Some of the discarding can be minimized by use of appropriate gill net mesh sizes and by fishing in areas where the desired fish sizes are present.

Improving compliance with the tagging program:

Three measures were discussed and recommended:

a) making possession of Chesapeake Area tags in the ocean unlawful, b) repealing all transit permits, c) issuing Chesapeake and ocean tags sequentially. The advisory committees have endorsed a) and b) above and suggested a further requirement that all ocean fishermen fly a flag when fishing for striped bass.

Establish maximum gill net mesh sizes.

The most direct method of reducing average fish size is to prohibit the use of gear that is capable of harvesting the larger fish. Eliminating these large mesh gill nets will reduce the average size quickly and efficiently. It is a simple solution that can have immediate and direct results. The correct mesh size for the Chesapeake Area is 7 inches as determined by Dr. Hager's field data collections.

FMAC asked that it be phased in, by starting with an 8" maximum mesh in 2006 and then 7" in 2007, to allow watermen who use the larger 9" to adjust to the change in mesh size.

Adjust gill net mesh sizes for upriver use.

The advisory committees, with staff and VIMS support, have modified their recommendations to allow for the use of 5-6 inch mesh gill nets during the month of February in the upriver areas.

Mr. Travelstead said that finally the Commission needed to decide to make permanent an amendment made at the last meeting to allow for possession of striped bass, which had been tagged by VIMS.

Mr. Travelstead explained that, except for the ban on the temporary transfers, the staff endorsed all of the other solutions, and at least one of the two committees had done so also.

Commissioner Pruitt opened the public hearing.

Kelly Place, waterman, was present and his comments are a part of the verbatim record. Mr. Place explained that he provided the data for the study done by Dr. Hager. He said the financial incentive for watermen has been to catch the larger fish. He said that the 2-tag system and eliminating the temporary transfers would work and do the most to solve the problems. He said he was strongly opposed to the other two main proposals. He said as far as the 2-tag system and the ban on transfers, the ban would do more than the 2-tag system. He said the 2-tag system would be a law enforcement nightmare and put more pressure on the processors and law enforcement to make sure the right tag was used and would cause massive discard mortality. He said the 2-tag system was unenforceable and would continue to cause inequity. He said that he was urging the Commission to use its authority to establish equity, safety, sustainability and conservation, as provided in Section 28.2-203 of the Code of Virginia.

Donnie Thrift, upriver and upper Chesapeake Bay waterman, was present, and his comments are a part of the verbatim record. Mr. Thrift said he is against the 2-tag system and the change in the maximum size limits of the mesh size. He said that there should be more concentration on enforcing the existing laws. He said the problem is in the ocean fishery and the upriver/upper Bay fisherman get the short end of the stick. He said he has always been against transfers. He said banning the temporary transfer might help.

Jeff Crockett, President of the Tangier Watermen's Association, was present and his comments are a part of the verbatim record. He said that in March of every year there is a 28" limit already in effect. He said that the smaller mesh size will cause more mortality and the larger mesh size nets allow the fish to still breath until the nets are worked. He said if they are limited to 7" they would also use 6" mesh which will cause even more mortality. He said this was a matter for the Ad Hoc committee and should never have been heard by the Finfish Management Advisory Committee which is mostly made up of recreational fishermen. He said the Bay fishery already has too many restrictions. He said he was not for the 2-tag system nor the change in mesh size. He said the problem was in the ocean fishery and it needs more restrictions.

Doug Jenkins, President, Twin River Watermen's Association, was present and his comments are a part of the verbatim record. He said there is only one on the board who knows about the fishery. He said Kelly Place provided lots of information and he

respected both him and Jeff Crockett. He said this is not a future problem. He explained that the problem is with the lower Bay fishery using the larger nets and being allowed to catch an average 16 to 20 pound fish, which takes away from the upper Bay. He said the upper Bay fishery is given a reduced number of tags because of the ocean fishery. He said the upper Bay fishery had to go to smaller nets. He said he agreed with the ban on temporary transfers, but exceptions should be allowed because of health and military service. He said that to allow the catching of the larger size fish was not good for the resource. He said he had done a lot of fussing over the weight and mesh size. He explained that putting off the issue would not solve the problem and there was a need to try all recommendations and more to find something that will work. He said that Law Enforcement could not solve the problem so the board must do it.

Pete Nixon, President of the Lower Chesapeake Bay Watermen's Association, was present and his comments are a part of the verbatim record. Mr. Nixon said that he was tired of the issue. He said that two of the proposals he would not solve the problem. He also said that to eliminate the temporary transfers would not be good. He said the transfers gave some watermen work to do in the winter who could not afford permanent transfers. He said the maximum mesh size was needed and it needed to stay that way for a short time period, maybe 3 or 5 years. He said if there were dead fish then the nets were not being tended properly. He said the Commission should not be hasty in making a decision. He said the change in mesh size would take care of the problem and close the inequities. He said the split of the fishery caused the poundage inequity.

Mike Gordon, fisherman, was present and his comments are a part of the verbatim record. Mr. Gordon said that the Commission should not stop the transfers. He said the 2-tag system would not result in the change that the Commission is trying to achieve. He said the fishermen would just adapt.

C. D. Hancock, Coastal Watermen's Association, was present and his comments are a part of the verbatim record. Mr. Hancock said that he supported the elimination of temporary transfer as it will help solve the problem more than the rest of the recommendations.

Charles Amory, seafood processor, was present and his comments are a part of the verbatim record. Mr. Amory asked who would be responsible for the right tag being used on the right fish. Mr. Travelstead said the fisherman was on the hook for making sure the right tags were being used, not the buyer, which was spelled out in the draft regulation on page 17.

Associate Member Schick left the meeting at this point.

Associate Member Garrison closed the public hearing.

Associate Member Fox suggested taking each recommendation one at a time.

Mr. Travelstead started with the request for approval to make permanent the emergency action taken in September to allow for possession of striped bass tagged by VIMS by the fishermen.

Associate Member Fox moved to accept the staff recommendation. Associate Member Bowden seconded the motion. The motion carried, 7-0. Associate Member Schick had not returned to the meeting.

Mr. Travelstead next asked the Commission to address the flagging of vessels in the ocean fishery.

Associate Member Bowden suggested that since some boats do not have cabins, that the regulation stipulate that the flag be displayed prominently.

Associate Member Bowden moved to approve staff recommendation with the change suggested. Associate Member Garrison seconded the motion. The motion carried, 7-0. Associate Member Schick had not returned to the meeting.

Mr. Travelstead explained that the next item was endorsed by both committees, which was that after January 31, 2006 it would be unlawful for any person to possess Chesapeake area tags in the Coastal area.

Associate Member Robins moved for approval. Associate Member Garrison seconded the motion. The motion carried, 7-0. Associate Member Schick had not returned to the meeting.

Mr. Travelstead said the next item was an amendment to regulation 751, which was a provision to allow upriver use of smaller gill net mesh to take smaller fish. He said both VIMS and staff had endorsed this change.

Associate Member Garrison moved for approval. Associate member McLeskey seconded the motion. The motion carried, 7-0. Associate Member Schick had not returned to the meeting.

Associate Member Schick returned to the meeting at this point.

Mr. Travelstead said that the next issue is the gill net mesh size.

Associate Member Robins made a motion to accept the staff recommendation. The motion was never seconded.

The Commission, after some discussion and as recommended by Mr. Bowden, moved to the next issue of the 2-tag system and decided to come back to the mesh size issue after the 2-tag system.

Associate Member Bowden moved to go to the 2-tag system for the Ocean and Bay for 2 years and continue to study a weight based system. He said after that time the Commission could decide to continue with the tag system or not. Associate Member Garrison seconded the motion. The motion carried, 8-0.

Mr. Travelstead said there were two issues to still decide, gill net mesh size and the ban of temporary transfers.

Gill net mesh size:

Associate Member Bowden moved to the make the maximum gill net mesh size 9” in the Ocean and Bay fisheries for the months of November, December, February, and March. Associate Member Holland seconded the motion. The motion carried, 6-2. Associate Member Robins and Jones voted no.

Ban on temporary transfers:

Mr. Travelstead said that staff had not drafted any language for banning transfers, but the language for allowing transfers was in the draft regulation.

Associate Member Robins said that from testimony earlier, the transfers offer economic flexibility and what has been adopted already was adequate. He moved to not adopt the ban on temporary transfers. Associate Member Bowden seconded the motion. The motion carried, 8-0.

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- 13. PUBLIC HEARING:** Proposed amendments to Regulation 4VAC20-650-10, Et. Seq. "Pertaining to the Establishment of Oyster Management Areas", to define the boundaries of the Wreck Shoal-James River Oyster Management Area.

Associate Member Garrison left the meeting at this point.

James Wesson, Head-Conservation and Replenishment, gave the presentation and his comments are a part of the verbatim record. Mr. Wesson explained that this was approved last month as an emergency action. He said that at the beginning of the season a waterman had been unhappy with the new boundary line, but he had not heard anymore about it since. He explained that he went down to the docks and spoke with the watermen before the meeting to discuss the line and they had suggested another line, but that line would cross the sanctuary reef and was not acceptable. He said no one was present from the public for this issue. He said the emergency regulatory action already in place needed to be made permanent.

Commissioner Pruitt opened the public hearing, but no one made any comments regarding the matter.

Associate Member Jones moved to accept the staff recommendation. Associate Member Robins seconded the motion. The motion carried, 7-0. Associate Member Garrison was still out of the meeting during the motion and vote.

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14. PUBLIC HEARING: Proposed amendments to Regulation 4VAC20-950-10, Et. Seq."Pertaining to Black Sea Bass".

Associate Member Garrison returned to the meeting and Associate Member Holland left the meeting at this point.

Joe Cimino, Fisheries Management Specialist, gave the presentation and his comments are a part of the verbatim record. Mr. Cimino explained that this was the public hearing to make the emergency amendment, made last month, a part of the permanent regulation. He said that comments had been received from Mr. Harry Doernte expressing two concerns. The first being that allowing more than one alternate vessel to land a persons quota at a time could cause him to go over quota if more than one vessel came in at the same time. Mr. Doernte's second concern was that there was no waiting period for this procedure. He suggested a five-day waiting period. Mr. Cimino explained that this would not require any regulatory changes, since as explained last month, an application is required to allow an alternate vessel to land. The application must be reviewed by staff and approved by the Commissioner; this would prevent any overages of quota and make it unnecessary to have a waiting period

Commissioner Pruitt asked for any public comments regarding the matter and there were none.

Associate Member Schick moved to adopt the regulation as recommended by staff. Associate Member Jones seconded the motion. The motion carried, 7-0. Associate Member Holland was still out of the meeting during the motion and vote.

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Commissioner Pruitt called for a short break at approximately 3:30 p.m. Associate Member Holland returned to the meeting after the break, which ended at approximately 3:45 p.m.

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- 15. PUBLIC HEARING:** Virginia Seafood Council requests the Commission to allow the deployment of 10,000 triploid (sterile) Crassostrea ariakensis oysters on state-owned bottomlands in the Piankatank River.

Jack Travelstead, Chief, Fisheries Management gave the presentation and his comments are a part of the verbatim record. Mr. Travelstead presented letters from the Corps of Engineers and from the Nature Conservancy. He said the Chesapeake Bay Foundation letter was included in the Commission's packet.

Mr. Travelstead explained that the Virginia Seafood Council was requesting the Commission to deploy 10,000 triploid (sterile) Crassostrea ariakensis oysters, as spat on shell on state-owned bottomlands in the Piankatank River.

Mr. Travelstead said that the public notice had been advertised for a public hearing to be held at the October 25, 2005 Commission meeting, which was required in Section 28.2-826 of the Code of Virginia.

Mr. Travelstead explained that Section 28.2-826 of the Code of Virginia for approval of these types of projects was adopted by the General Assembly and made effective July 1, 2005. He said there were a few provisions that had been changed. He explained that the Commissioner had the sole authority to authorize the placement of Crassostrea ariakensis on state-owned bottomlands. He said the only thing required of the Commission was to hold a public hearing not less than 30 days nor more than 60 days before the Commissioner makes such a decision. He said the Commission could only advise the Commissioner on what action he should take, but, in the end, it was his decision.

Mr. Travelstead continued to explain that prior to the Commissioner's decision, he must consult with the Director of the Virginia Institute of Marine Science and the Fisheries Management Division.

He said that Dr. Wells and Dr. Mann, both of the Virginia Institute of Marine Science, were present.

Commissioner Pruitt asked Frances Porter to address the Commission at this point.

Frances Porter, representative for the Virginia Seafood Council, was present and her comments are a part of the verbatim record. Mrs. Porter explained that they were bringing this request to the Commission because of legislation changes recently passed in 2005 by the General Assembly. She said that they had conducted 4 projects since 2000, all of which were approved by the Commission. She said they have been cooperative in all ways with both the State and Federal governments. She said with these efforts they had been striving to restore a resource, which could clean the Bay and these efforts had been very successful. She said the Federal review had been both burdensome and excessive. She said the project manager who worked on prior projects was present to

discuss these Federal requirements. She stated that the studies continue, but there was need to move forward. She said there were ecological and commercial benefits with the introduction of the non-native oyster.

Mrs. Porter said that the Corps was the leading agency on native oyster restoration and also the lead agency on the non-native EIS and she was concerned that a conflict might exist. She said that there had been some new articles with comments from the Corps that had not been kind to the watermen or regarding the state's restoration efforts.

Tim Hayes with the Hunton and Williams Law Firm was present and his comments are a part of the verbatim record. Mr. Hayes stated that the Commission must preserve and protect the resource, but also help maintain an industry. He said in the early 1990's there was a study on the Gigas, which was not very successful. He explained that the General Assembly in 1995 started to look harder at the introduction of a non-native oyster. He said that 15 years later the General Assembly made a new policy decision to move from research to the development of a viable fishery. He said the process needed to be accelerated and moved forward, but with safeguards. He said this public hearing was being held to provide the Commissioner with information.

A. J. Erskine, former project manager for VSC was present and his comments are a part of the verbatim record. Mr. Erskine explained that in all permits that there have been conditions. He said there were 13 State and 15 Federal conditions. He said that they have complied with all conditions. He said that the two species would be a compliment to each other and they were not giving up on the native species.

Lake Cowart, representing the VSC and also an oyster processor was present and his comments are a part of the verbatim record. Mr. Cowart gave some history back to the 1960's when MSX had such a great disastrous effect on the oyster resource and industry until the present day. He said there were approximately 240,000 acres of public grounds including the Baylor grounds and 110,000 acres of leased ground. He said there needs to be an oyster that will grow on the bottom and there was need for VMRC to support the oyster being put overboard, not as an experiment, but put on the bottom uncontained like the native oyster.

Mr. Cowart explained that the markets have been maintained because the processors have had the Gulf as a source of product. He said that there has always been a concern by industry that a hurricane would happen and disaster would result. He said that this week some of the Gulf coast has a resource, such as Texas. He said that without a resource the infrastructure is threatened. He said at the present time waterfront is now at a premium and there could be a switch in land use. He said because the industry is not profitable the market will look elsewhere for a product. Also, he said that if the watermen can oyster it would reduce the pressure on other fisheries, such as crabs.

Paula Jasinski, representing NOAA and VIMS, was present and her comments are a part of the verbatim record. Ms. Jasinski explained there were research projects in the Chesapeake Bay with regards to the *ariakensis*. She said in 2005, nineteen contracts had been given to researchers for *C. ariakensis* research. She explained that VIMS and the University of Maryland had an on-going project where they would deploy 10,000 oysters at 4 sites for a 30-month program with strict biosecurity measures and in cages for complete recovery. She said that this project requested by VSC would duplicate their efforts.

John Wells, Director for the Virginia Institute of Marine Science, was present and his comments are a part of the verbatim record. Dr. Wells read into the record a letter, which he provided a copy to the Commission for its written record. He added that if this project were approved they had concerns with the location of the deployment being within the reef areas.

Commissioner Pruitt closed the public hearing.

Commissioner Pruitt asked if he could receive additional comments during the 60 days. Mr. Travelstead responded yes, but no decision could be made prior to 30 days. He went on to explain that the Commissioner must render a decision not later than December 24, 2005 nor earlier than November 25, 2005.

Commissioner Pruitt asked for comments from the Commission.

Associate Member Robins stated there were good presentations. He said that originally the EIS was to take 1 year, but it had been 3 years now and could be more. He said that the industry was running out of time. He said that there valid concerns with jurisdiction. He said there was a need to look at the Rivers and Harbor Act and look for avenues to challenge that authority. He pointed out that the Corps was willing to meet with the State and the VSC to discuss permitting requirements.

Associate Member Fox asked if there were other alternatives without the EIS. He said the delay is frustrating and some do not want a non-native oyster at all.

Associate Member Bowden said that he could not see the 10-fold goal happening. He said this would help the waterman and the industry and even if it was his head on the block he would make the same decision. He said in Chincoteague there is no industry, just a basket trade. He said there was a need to move forward. He said that this was not just a fight for the VSC and there is a need to do anything to expedite the process.

Associate Member Fox said that time is of the essence to clean the Bay. He said the native species is not recovering and he agreed with Mr. Bowden. He said the Bay would have to be cleaned up to get the *Crassostrea virginica* back.

Associate Member Garrison asked where was the Legislature and the Governor on this issue.

Tim Hayes explained that the Legislature came out strongly in 2005 and passed the legislation with little opposition. He said the legislation weighed in on our side. He said that Secretary of Natural Resources Murphy had been very supportive.

Associate Member Schick stated that with the pollution, water systems and such, we have made this a non-native environment. He said this oyster could make a change for the better, not in another 10 or 15 years, but now. He explained that the arguing must stop and a means to clean the Bay be found.

Associate Member Jones said if the Commissioner asked her advice she would recommend following the National Academy of Sciences which means waiting for the EIS. She said this was not an issue for Virginia; it was an introduction Baywide and could spread as far as Delaware Bay. She said it was an issue for the citizens of the Commonwealth and other states and a haphazard introduction would last forever with unintended bad effects. She said that the non-native may lack natural predators and the biological controls were lacking. She said the EIS would address the consequences and issues not yet addressed. She stated that there were lots of problems with the Bay that can be handled by following the Wetlands Guidelines and the Chesapeake Bay Preservation Act. She also said that it would be an introduction for now and the future generations.

Associate Member Robins said that he agreed with Dr. Jones there were other ways to clean the Bay, but there was more to this issue than biodiversity. He said the Code had authorized the Commissioner to make a decision. He moved to recommend that the Commissioner consult with the Attorney General to explore legal strategies to address issues and to establish an administrative resolution to expedite the commercial introduction of the non-native oyster. Associate Member Bowden seconded the motion. The motion carried, 7-1. Associate Member Jones voted no.

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16. REQUEST FOR PUBLIC HEARING: Amendments to Regulation 4VAC20-490, "Pertaining to Sharks".

Jack Travelstead, Chief, Fisheries Management, gave the presentation and his comments are a part of the verbatim record. Mr. Travelstead said that staff was requesting a public hearing be held next month.

Associate Member Garrison moved to approve the request for a public hearing. Associate Member Robins said that some of the amendments suggested would appear to be relaxing restrictions on the fishery, which is a sensitive fishery. He

further said that he wanted it to be added that consideration would be given to making this a limited entry fishery. Commissioner Pruitt and Associate Member Garrison agreed to this being made a part of the motion. Associate Member Schick seconded the motion. The motion carried, 8-0.

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PROPOSED REGULATORY ACTIONS: For Croaker, Spot, Speckled Trout and Gill Net, Pound Net, and Haul Seine.

Associate Member Garrison said he had some proposed regulation amendments that he planned to bring to the Finfish Management Advisory Committee (FMAC), which would then come before the Commission at the November to request a public hearing for the December meeting. He passed out a document setting forth his suggested regulatory actions.

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Jack Travelstead, Chief, Fisheries Management, stated that several issues were brought up during the public comment period and no action was taken.

Commissioner Pruitt said the board would take those matters under advisement and discuss them further at a future meeting.

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There was no further business, the meeting adjourned at approximately 5:02 p.m. The next meeting will be Tuesday, November 22, 2005.

William A. Pruitt, Commissioner

Katherine Leonard, Recording Secretary