

MINUTES

COMMISSION MEETING

October 30, 2018

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
Wayne France	
Chad Ballard	
John Tankard III	
John Zydron Sr.	
Christina Everett	Associate Members
Heather Lusk	
James E. Minor III	
Ken Neill, III	
Kelci Block	Assistant Attorney General
Jamie Hogge	Recording Secretary
Ellen Bolen	Deputy Commissioner
Dave Lego	Bs. Systems Specialist
Todd Sperling	Bs. Systems Manager
Linda Hancock	Dir., Human Resources
Robert O'Reilly	Chief, Fisheries Mgmt.
Pat Geer	Deputy Chief, Fisheries Mgmt.
Andrew Button	Head, Conservation and Replenishment
Stephanie Iverson	Fisheries Mgmt. Manager, Sr.
Alicia Nelson	Coordinator, RFAB/CFAB
Jill Ramsey	Fisheries Mgmt. Specialist
Jennifer Farmer	Regulatory Coordinator
Alex Aspinwall	Fisheries Mgmt. Specialist
Adam Kenyon	Biological Sampling Program Manager
Chris Davis	Fisheries Mgmt. Specialist
Lewis Gillingham	Director, SWFT
Nancy McElligott	Fisheries Mgmt. Specialist
Sara Blachman	Fisheries Mgmt. Specialist
Anna-Mai Christmas	Fisheries Mgmt. Specialist

Commission Meeting

**18178
October 30, 2018**

Rick Lauderman
Warner Rhodes
Allen Marshall
Zachary Widgeon
Thomas Straughan
Steve York

Chief, Law Enforcement
Deputy Chief, Law Enforcement
Marine Police Officer
Marine Police Officer
Marine Police Officer
Marine Police Officer

Tony Watkinson
Randy Owen
Jeff Madden
Justin Worrell
Jay Woodward
Mark Eversole
Mike Johnson
Rachael Peabody
Hank Badger
Bradley Reams
Allison Norris

Chief, Habitat Management
Deputy Chief, Habitat Management
Environmental Engineer, Sr.
Environmental Engineer, Sr.
Environmental Engineer, Sr.
Environmental Engineer, Sr.
Environmental Engineer, Sr.
Environmental Engineer, Sr.
Environmental Engineer, Sr.
Environmental Engineer, Sr.
Environmental Engineer, Sr.

Ben Stagg

Dir., Shellfish Aquaculture, Leasing
and Mapping

Daniel Faggert

Surveyor, Engineering/Surveying

Virginia Institute of Marine Science (VIMS):

Lyle Varnell

Emily Hein

Mark Luckenbach

Others present:

Roberto Sarmento
Connie Imler
J. P. Stevens
Sam Wood
Denny Cope
Mark Boswell
Adrienne Kofula
and others.

Jeanne Sarmento
Elycy Koppenhofer
Rich Calvert
Greg Carroll
Matthew Freeze
Chris Moore
Dean Nininger

Thomas James
C Leroy Imler
Bryan Peoples
Gary Grabb
Brian Rechtenbaugh
Beth Patrizzi
Elgin Nininger

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Commissioner Bowman called the meeting to order at approximately 9:31 a.m. All members were present during the meeting.

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Commissioner Bowman led the pledge and by request of Commissioner Bowman, Associate Member Tankard said the invocation.

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APPROVAL OF AGENDA: Commissioner Bowman asked if there were any changes from the Board members or staff.

Robert O'Reilly, Chief, Fisheries Management, requested to add to the agenda the recent recommended adjustments to the current 2018-2019 public oyster harvest season by the Shellfish Management Advisory Committee as well as an update on the harvest of the James River Seed oysters.

Associate Member Zydron moved to approve the agenda as amended. Associate Member Minor seconded the motion. The motion carried, 9-0. Chair voted yes.

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MINUTES: Commissioner Bowman asked if there were any changes or corrections to be made to the September 25, 2018 Commission meeting minutes.

Associate Member Zydron moved to approve the minutes as presented. Associate Member Neill seconded the motion. The motion carried, 9-0. Chair voted yes.

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

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2. PERMITS (Projects over \$500,000.00 with no objections and with staff recommendation for approval).

Tony Watkinson, Chief, Habitat Management, reviewed the page 2 item A for the Board Members. Mr. Watkinson's comments are a part of the verbatim record.

There were no public comments.

Associate Member Tankard moved to approve the page two item as presented. Associate member France seconded the motion. The motion carried 9-0. Chair voted yes.

- 2A. **SHIRLEY CONTRACTING COMPANY, LLC, #18-1148**, requests authorization to replace the existing eastbound and westbound bridge crossings with new six-lane bridge crossings over Queen Creek on Interstate 64 as part of the I-64 Capacity Improvements-Segment III Design Build project in York County. Staff recommends approval with sound attenuation conditions for driving steel hollow piles that include ramp-up procedures, cushion blocks, and a confined bubble curtain. Permittee shall also execute a transfer of this permit to the Virginia Department of Transportation upon their acceptance of the structures.

Fees:	\$ 100.00
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3. CONSENT AGENDA ITEMS.

Tony Watkinson, Chief, Habitat Management reviewed the page 3 item for the Board Members. Mr. Watkinson’s comments are a part of the verbatim record.

There were no public comments.

Associate Member France made a motion to move to approve the after the fact application as presented. Associate member Ballard seconded the motion. The motion carried 8-0-0. Chair abstained.

- 3A. **MARK RUTTER, #15-0816**, requests authorization to retain a second 5-foot wide open-pile private pier extending 15 feet channelward of mean low water with a 10-foot by 20-foot L-head deck along Adams Creek at 2310 Island Road in Gloucester County. The applicant has agreed to pay a civil charge in the amount of \$1,000.00 and a triple permit fee in lieu of further enforcement action.

Civil Charge:	\$ 1,000.00
Triple Permit Fee:	\$ 75.00
Total Fees:	\$ 1,075.00

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- 4. **CLOSED MEETING FOR CONSULTATION WITH, OR BRIEFING BY, COUNSEL.** The Commission held a closed session to discuss legal matters.

Associate Member Ballard made a motion of certification to recess for legal advice from Kelci Block. Associate Member France seconded the motion. The motion carried, 9-0. Chair voted yes. Meeting was closed at 9:39 a.m.

Meeting reconvened at 9:59 a.m.

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- 5. **BRIAN RECHTENBAUGH, #17-1334,** requests after-the-fact authorization to retain fill within vegetated tidal wetlands, and 150 linear feet of riprap revetment to aid in flood mitigation along a tributary to the Southern Branch Elizabeth River at 700 Seagrass Reach in the City of Chesapeake. The project requires a wetlands permit. Continued from the September 25, 2018, Commission meeting.

Rachael Peabody, Environmental Engineer, Sr., gave the briefing of the information provided in the staff’s evaluation, with PowerPoint slides. Ms. Peabody’s comments are a part of the verbatim record.

The Commission was acting as the wetlands board.

Ms. Peabody explained that at the September 25, 2018 meeting, the Commission reviewed a request by Mr. Rechtenbaugh to retain unauthorized fill within the jurisdictional wetlands on his private property. During the permit review process, staff gave the applicant three possible mitigation/compensation options for consideration. The options included removing the fill and restoring the wetlands onsite, building wetlands from uplands, or purchasing credits at a tidal wetlands mitigation bank.

The applicant requested Commission authorization to construct 1,400 square feet of new tidal wetlands within non-tidal forested wetlands located on his property. For this he needed both Commission authorization, for this mitigation alternative, and permission from the U. S. Army Corps of Engineers for the additional impacts to the non-tidal wetlands. He explained that the mitigation cost per square foot for purchasing non-tidal wetland credits from a non-tidal bank was considerably less than that charged by a tidal wetlands bank. Mr. Rechtenbaugh also requested the Commission consider a reduced civil charge of \$3,000.00 from the staff recommended charge of \$6,000.00.

During deliberations, the Commission expressed concerns about accepting mitigation for tidal wetlands losses within non-tidal forested wetlands. The Commission voted

unanimously to continue the matter until the following meeting and requested the applicant reconsider staff’s recommendations for either onsite restoration or the purchase of credits from a tidal wetlands bank as mitigation for the unauthorized fill.

Mr. Rechtenbaugh has chosen to request that the Commission approve retention of the unauthorized fill, and the purchase of 1,250 square feet of tidal wetland mitigation credits at the New Mill Creek Mitigation Bank, in Chesapeake.

Staff, therefore, recommends approval of the project as constructed with the purchase of 1,250 credits from the New Mill Creek Mitigation Bank. Staff additionally recommends that the Commission assess a civil charge of \$6,000.00 for the unauthorized fill of tidal wetlands based upon a finding of a moderate degree of non-compliance and a moderate degree of impact. If the applicant does not agree to pay the civil charge amount that the Commission decides to assess, or fails to pay it within 30 days of the date of this meeting, then staff recommends referral of this matter to the Office of the Attorney General to seek civil penalties pursuant to §28.2-1213 of the Code of Virginia.

Brian Rechtenbaugh, applicant, was present and sworn in. His comments are a part of the verbatim record. Mr. Rechtenbaugh agreed to pay the fee’s set forth in Staff’s recommendation.

Associate Member Tankard made a motion to accept staff recommendation. Associate Member Minor seconded the motion. The motion carried, 9-0. Chair voted yes.

Civil charge for unauthorized fill of tidal wetlands:	\$ 6,000.00
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- 6. DRUM POINT PROPERTIES, LLC, #16-1552**, requests authorization to construct a 114-foot long by 5-foot wide open-pile timber community pier with a 16-foot by 16-foot L-head platform, a 4-foot by 16-foot PVC kayak boarding dock and a 16-foot by 8-foot floating dock, along the Western Branch Elizabeth River, on Lot C of the Martins Point Subdivision, located off Bruce Road in the City of Chesapeake. This project requires a subaqueous and wetlands permit.

Rachael Peabody, Environmental Engineer, Sr., gave the briefing of the information provided in the staff’s evaluation, with PowerPoint slides. Ms. Peabody’s comments are a part of the verbatim record.

Ms. Peabody explained that the project is proposed on Lot C of the new Martins Point Subdivision along the Western Branch Elizabeth River in the City of Chesapeake.

The subdivision is currently under construction. The developer has proposed to construct a community pier and kayak launch in a lot reserved for shared community open space.

The stated purpose of the project is to provide safe recreational boating for the property owners of the new subdivision. No wet slips are proposed, as the pier has been designed for use by canoes and kayaks.

The proposed pier should not adversely impact tidal wetlands. Additionally, the applicant has reduced shading impacts by constructing the pier at least 4 feet above the wetland substrate. The project’s stated purpose of providing community recreational access is considered by staff to be a reasonable use of State-owned submerged lands.

Therefore, after evaluating the merits of the project and considering all of the factors contained in §28.2-1302(10)(B) and §28.2-1205 of the Code of Virginia, staff recommends approval of the project as proposed, finding that the anticipated public and private benefits exceed the anticipated public and private detriments. Staff additionally recommends the assessment of a one-time encroachment royalty of \$154.50 for the encroachment of the community pier over 515 square feet of State-owned subaqueous bottom calculated at a rate of \$0.30 per square foot.

Richard Calvert, an agent for the applicant was present and sworn in. His comments are a part of the verbatim record.

Mr. Calvert explained that the project was exclusively for kayaks and canoes. The project was not for powerboats.

No one spoke in support or opposition to the project.

The matter was before the Commission for discussion and action.

Associate Member Tankard made a motion to accept staff recommendation. Associate Member France seconded the motion. The motion carried,9-0. Chair voted yes.

Royalties: (Community pier 515 sf @ \$0.30/sf)	\$ 154.50
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7. **MARK E. BOSWELL, Oyster Planting Ground Application #2014-295**, requests authorization to lease up to ten (10) acres within Little Oyster Creek in Lancaster County. The application is protested by three nearby property owners.

Ben Stagg, Dir., Shellfish Aquaculture, Leasing and Mapping, gave the briefing of the information provided in the staff's evaluation, with PowerPoint slides. Mr. Stagg's comments are a part of the verbatim record.

Mr. Stagg explained that the use of cages, floats, and nets, for shellfish propagation, has resulted in increased public awareness of the leasing of bottomlands and highlighted the necessity for a more comprehensive review of lease application requests related to aquaculture activity. Such requests in populated areas raise new issues regarding public trust lands to include user conflicts, property values, aesthetics, navigation impacts, and suitable bottom types. Stewardship of public trust lands, while weighing the public and private benefits versus detriments, requires a multifaceted review of shellfish lease application requests.

Staff evaluates all protested applications on a case-by-case basis, considering all comments received concerning the area being requested. This request generated three letters of objection from nearby property owners. The protests include concerns about navigation and recreational uses of this area, the close proximity of the request to the adjacent highland and concerns about health issues, specifically *Vibrio*. One protestant indicated they had gotten a *Vibrio* infection from stepping on an oyster shell in 2016.

Two of the nearby property owners submitted riparian lease applications in the same area as a portion of this application. Those riparian applications have been surveyed, and the surveyed area of this application has been modified accordingly to accommodate those riparian leases.

The area was initially surveyed in early June of 2017. This apparently alerted the nearby landowners, who then submitted the two riparian applications previously mentioned, and the third protest. All three responses were received in late June of 2017. Also, staff discovered that a portion of the original survey impacted existing SAV (submerged aquatic vegetation) beds. A new survey was completed to exclude those bed areas to comply with our Submerged Aquatic Vegetation Guidance document. The resulting revised survey contains 7.51 acres.

The area, as currently surveyed, accommodates the riparian lease request of two of the protestants and removes any potential regular lease area near their shorelines. While bottom cages could have some minimal effect on navigation, should such placement cause more than a minimal effect, current VMRC regulatory language requires moving or removal of such structures. The applicant has also stated that he wishes to use this area for traditional on bottom cultivation and harvest and/or spat on shell planting. Therefore, after careful consideration of the protestant's concerns and modification of the surveyed area to

accommodate two riparian lease requests and to eliminate conflicts with existing SAV beds, staff recommends approval of an area containing 7.51 acres.

Mark Boswell, applicant, was sworn in. His comments are a part of the verbatim record. Mr. Boswell explained that his intentions for the lease is for traditional on bottom cultivation and harvest and/or spat on shell planting.

Dennis Cope, in support of the application, was sworn in. His comments are a part of the verbatim record.

Mr. Cope explained his opinion and reasons for being in support of the lease application.

There were two (2) people present that spoke in opposition of the project. Both were sworn in and their comments are a part of the verbatim record.

Those that spoke in opposition expressed the following concerns: limited water depth, interference with recreational water activities and navigation while water skiing, the health of the water on the creek and underwater grass beds.

The matter was before the Commission for discussion and action.

Associate Member Minor made a motion to accept staff recommendation. Associate Member Neill seconded the motion. The motion carried, 9-0. Chair voted yes.

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ITEM 11-2 License Status Review was heard prior to Item #8.

8. THOMAS H. JAMES III, Oyster Planting Ground Application #2017-184, requests authorization to lease 0.76 acres of Oyster Planting Ground in Nassawadox Creek adjacent to the Chesawadox subdivision in the Occohannock Neck area of Northampton County. The project is protested by nearby property owners.

Hank Badger, Environmental Engineer, Sr., gave the briefing of the information provided in the staff's evaluation, with PowerPoint slides. Mr. Badger's comments are a part of the verbatim record.

Mr. Badger explained that the proposed lease area is located on the north side of Nassawadox Creek, four tenths (0.4) of a mile north-northwest of the Village of Bayford. The application is adjacent to the Chesawadox subdivision, which has 27 riparian lots.

There are five lots with four piers that are within or adjacent to the proposed lease area. A small access channel is located approximately 100 to 175 feet offshore of mean low water (MLW) with controlling depths of two to three feet at MLW. The bottom is mostly a sand

mix inshore and mud offshore with a small amount of submerged aquatic vegetation (SAV) in one area that was mapped in the past five years. Although Nassawadox Creek has a large amount of clam and oyster aquaculture activity, there are no clam beds along the shoreline in this portion of the creek.

Mr. James has four oyster ground leases totaling 11.54 acres and seven applications totaling 49.95 acres on the bayside of Northampton County. Five of his applications are protested. The applicant intends to use the ground to grow aquaculture clams, which requires placing nets over the planted clams.

Mr. James's application for oyster planting ground was received on December 14, 2017, for one acre. The application was divided into three parcels to avoid access issues to the four nearby riparian piers.

This application is in an area that Mr. James had applied for in 2016 (VMRC #16-056) for 30 acres. The Commission denied the application on March 28, 2017, on the grounds that the proposed use was in conflict with adjacent riparian property owner's navigational access to their property and that leasing the small areas between existing piers for clam beds would create additional user conflicts.

Although Mr. James has reduced the size of his application from 30 acres to less than one acre, the issues are still the same. The area that the applicant has applied for is still between existing private piers. Staff still believes that leasing the small areas between existing piers for clam beds would create additional user conflicts and cannot support leasing in these narrow areas. Therefore, based on the Commission previous decision, staff recommends denial of Mr. James' request to lease oyster ground in this area.

If however, the Commission believes the leasing of some of the proposed area is warranted over the objections of the protestants, staff would recommend only leasing in the location of area #1 shown on survey plats. This portion of the application is along a marsh spit and there is no SAV in the area. In addition, this location would not be directly in front of someone's home. Staff further recommended that any leased area be located at least 50 feet away from existing piers. This would reduce the survey of area #1 to approximately 120 feet along the mean low water mark and would result in a lease area of approximately 0.17 acre, which would be subject to final survey dimensions.

Thomas James III, applicant, was present. Due to his religious beliefs, he was sworn in by an alternate oath. Mr. James's comments are a part of the verbatim record.

No one spoke in support of the project.

Joe Stephens, resident of Nassawadox Creek was sworn in and spoke in opposition of the application. Mr. Stephens comments are a part of the verbatim record.

Mr. Stephens was speaking on behalf of 18 others that were in opposition of the application. He expressed the following concerns: invasion of privacy due to the lease adjoining residential properties and the residential use of the waterway.

Mr. James was given the opportunity to rebut.

The matter was before the Commission for discussion and action.

Associate Member Zydron made a motion to deny the application as staff recommended. Associate Member Minor seconded the motion. The motion carried, 9-0. Chair voted yes.

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9. THOMAS H. JAMES III, Oyster Planting Ground Application #2017-183, requests authorization to lease 1.09 acres of Oyster Planting Ground in Nassawadox Creek in the Occohannock Neck area of Northampton County. The project is protested by nearby property owners.

Hank Badger, Environmental Engineer, Sr., gave the briefing of the information provided in the staff's evaluation, with PowerPoint slides. Mr. Badger's comments are a part of the verbatim record.

Mr. James requires areas that are in shallow water to grow his aquaculture clams. The two platted areas are located between MLW and approximately 100 feet offshore. The offshore application boundary line is adjacent to the small access channel.

As stated above, the Commission denied Mr. James's previous application on March 28, 2017, on the grounds that the proposed use was in conflict with adjacent riparian property owner's navigational access to their property and that leasing the small areas between existing piers for clam beds would create additional user conflicts.

Although Mr. James has reduced the size of his application from 11.50 acres to a little more than one acre, the issues are still the same. The area that the applicant has applied for is still adjacent to Mr. Nordstrom's property and between existing private piers. Staff still believes that leasing the small areas between existing piers for clam beds would create additional user conflicts and cannot support leasing in these narrow areas. Therefore, based on the Commission previous decision, staff recommends denial of Mr. James' request to lease oyster ground in this area.

If the Commission believes that the leasing of some of the proposed area is warranted over the objections of the protestants, staff would recommend only leasing in the location of area #1 on the survey plats south of Mr. Nordstrom's pending riparian survey. This portion

of the application is farther away from Mr. Nordstrom’s house. This would reduce the survey area to approximately 225 feet along the mean low water mark and would result in a lease area of approximately 0.4 acre, which would be subject to final survey dimensions. Staff further recommended that any leased area be located at least 50 feet away from existing piers.

No one spoke in support of the project.

Thomas James III, applicant, was present. Due to his religious beliefs, he was sworn in by an alternate oath. Mr. James’s comments are a part of the verbatim record.

There were two (2) people present to speak in opposition of the application. Both were sworn in and their comments are a part of the verbatim record.

Those that spoke in opposition expressed the following concerns: navigation, impact on natural habitat, location of lease adjoining residential properties and piers.

Mr. James was given the opportunity to rebut.

The matter was before the Commission for discussion and action.

Associate Member Lusk made a substitute motion to approve the application for the lease assignment of approximately 0.4 acres, referred to as Area 1 in the staff evaluation. This area is located south of the adjacent property owner’s riparian lease application. Associate Member Minor seconded the motion. The motion carried, 5-4. Associate Members Tankard, Zydron and Neill voted no. Chair voted no.

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ITEM 11-1 License Status Review was heard prior to Item #10.

10. PUBLIC COMMENT

Thomas James III

Mr. James, on behalf of himself and his friend Harry Bowen, asked the Commission to review the rules regarding applications for aquaculture leases on subaqueous bottom where submerged aquatic vegetation has previously been determined to be present. Commission Bowman responded that the Aquaculture Working Group is currently reviewing this matter.

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11. LICENSE STATUS REVIEW

(11-1) – Walter Brunk (MRC ID# 008949): – was present. His comments are a part of the verbatim record.

Marshall Reedy, Marine Police Officer, was sworn in and he gave the briefing of the information provided in the staff's evaluation. His comments are a part of the verbatim record.

July 17, 2018, Possession of Unculled crabs (114 undersized in one bushel): §28.2-708(A)

Disposition:

August 28, 2018, Northampton County General District Court

Fine: \$100.00

Steve York, Marine Police Officer, was sworn in and he gave the briefing of the information provided in the staff's evaluation. His comments are a part of the verbatim record.

December 29, 2017, Possession of Unculled Oysters (10 Quarts) 4VAC 20-260-40 A

Disposition:

January 25, 2018, Isle of Wight General District Court

Fine: \$150.00

Mr. Walter Brunk had an opportunity to explain to the Commission the violations.

GUIDELINE SUGGESTION: 2 PROBATION (§28.2-232 of the Code of Virginia)

Jennifer Farmer, Regulatory Coordinator, explained to the Commission the sanction guidelines, with PowerPoint slides. Ms. Farmer's comments are a part of the verbatim record.

Mr. Walter Brunk, a commercial fisherman registration licensee, was convicted on August 28, 2018 for one count of possessing unculled crabs (114 undersized in one bushel) (§28.2-708 A of the Code of Virginia) and on January 25, 2018 for possession for unculled oysters (4VAC 20-260-40 A).

The Commission's guidelines for sanctions specify that one conviction of possessing more than 20 undersized crabs per bushel (70 per barrel) and one conviction of possessing

unculled oysters, within a two-year period, should result in at least a two year probation. In accordance with §28.2-232 of the Code of Virginia, the guidelines suggest that Mr. Brunk be placed on probation for a period of two years from the date of this Commission meeting, October 30, 2018, through October 29, 2020. Any failure on Mr. Brunk's part to obey any of the laws or regulations relating to the Marine Resources of the Commonwealth during the two-year probation would result in Mr. Brunk appearing before the Commission for a hearing on license revocation.

Associate Member Minor made a motion for 1 year probation. Associate Member Neill seconded the motion. The motion carried, 8-0-1. Associate member Lusk abstained. Chair voted yes.

(11-2) – Dean Nininger (MRC ID# 0159): – was present and sworn in. Mr. Nininger's comments are a part of the verbatim record.

Thomas Straughan, Marine Police Officer, was sworn in and he gave the briefing of the information provided in the staff's evaluation. His comments are a part of the verbatim record.

**May 26, 2018, Fish/Set crab pots w/ cull rings obstructed (6 out of 9 pulled obstructed)
4VAC 20-700-20**

Disposition:

July 17, 2018 Westmoreland County General District Court

Fine: \$150.00

Thomas Wilkins, Marine Police Officer, was sworn in and he gave the briefing of the information provided in the staff's evaluation. His comments are a part of the verbatim record.

June 25, 2017, Improper marking of crab pots 4VAC 20-260-40 / §28.2-201 of the Code of Virginia

Disposition:

August 22, 2017, Westmoreland County General District Court

Fine: \$150.00

Mr. Dean Nininger had an opportunity to explain to the Commission the violation and answer questions that the Associate Members asked.

GUIDELINE SUGGESTION: 2 PROBATION (§28.2-232 of the Code of Virginia)

Dean Nininger, a commercial fisherman registration licensee, was convicted on July 17, 2018 for one count of fishing/setting crab pots w/cull rings obstructed (6 out of 9 pulled obstructed) (4 VAC 20-700-20), and one count of a crab pot buoy not properly marked (4 VAC 20-140-25 (A) and §28.2-201 of the Code of Virginia.

The Commission’s guidelines for sanctions specify that one conviction of obstructed cull rings and one conviction of a crab pot buoy not properly marked, within a two-year period, should result in at least a two year probation. In accordance with §28.2-232 of the Code of Virginia, the guidelines suggest that Mr. Nininger be placed on probation for a period of two years from the date of this Commission meeting, October 30, 2018, through October 29, 2020. Any failure on Mr. Nininger’s part to obey any of the laws or regulations relating to the Marine Resources of the Commonwealth during the two-year probation would result in Mr. Nininger appearing before the Commission for a hearing on license revocation.

Associate Member Minor made a motion for 1 year probation. Associate Member Tankard seconded the motion. The motion carried, 8-0-1. Associate member France abstained. Chair voted yes.

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- 12. **PUBLIC HEARING:** Proposal to amend Chapter 4 VAC 20-995- 10 et seq., “Pertaining to Commercial Hook-and-Line,” to modify and clarify existing language.

Pat Geer, Deputy Chief, Fisheries Mgmt., presented the information provided in the staff’s evaluation, with PowerPoint slides. Mr. Geer’s comments are a part of the verbatim record.

The commercial hook-and-line fishery is a relatively small sector for most species with the notable exception of cobia in which the gear accounts for 76% of Virginia’s harvest over the past three year (2015-2017) (Attachment 2). The species with the largest commercial hook-and-line harvest are cobia, striped bass, and summer flounder. Overall (for all species), the fishery averaged just over 88,000 lbs. of annual harvest, 1550 trips, and 166 participants during the past three years (Attachment 2).

Several inquiries have been addressed by staff in recent months concerning eligibility requirements for the license transfers and crew members. As a result, amendments to the regulation will include new definitions for immediately family and crew member lists to address license transfers and crew requirements, respectively.

Immediate family member will be defined as “spouse, sibling, parent, child, grandparent, or grandchild”.

Crew member list will mean “those individuals registered to participate in commercial hook-and-line fishing activities with one or more individuals who possess a valid commercial hook-and-line license”.

Section 20 subsection F 2 (page 3 of regulation) pertains to license transfer eligibility. The intent of the 2000 Commercial Hook-and-Line Task Force was to have **BOTH** the transferee **AND** the transferor be required to have reported sales of at least 1,000 pounds of seafood harvest during the course of the previous two calendar years. This is inferred by the present regulation but not specified. The proposed change will require the transferor to also meet this 1,000 pound harvest requirement. This was first suggested by the Commercial Hook-and-Line Task Force to insure the intent of the license would be available only for commercial fishermen, and not allow charter captains or recreational anglers to obtain a commercial hook-and-line license to circumvent daily recreational catch limits.

Eligibility requirements in Section 20 subsection A 1 (page 2 of regulation) has created some confusion by requiring licensed commercial fishermen to possess a 1996 commercial hook-and-line license or a like license in 1997 purchased prior to August 26, 1997. Modifying this section by removing the years 1996 and 1997 and instead state “possess a valid Commercial Fisherman Registration License and eligibility for the commercial hook-and-line license” will modernize the subsection relative to maintaining eligibility and eliminate transfer conflicts.

The final modification is section 30 subsection A 2 (page 4) to clarify requirements of crew member lists by creating the previously mentioned definition and requiring an approved crew list be maintained on board during all commercial hook-and-line fishing activities.

Staff recommends the Commission consider amendments to Chapter 4 VAC 20-995-10 et seq., to: 1) create definitions of “Immediate Family” and “Crew Member List”; 2) clarify existing language concerning transfers and eligibility as approved by the Commission in October 2000; 3) provide clarifying language on crew member lists and require a verified list be onboard the vessel during commercial hook-and-line fishing activities

The matter was before the Commission for discussion and action.

Associate Member Minor made a motion to move to approve staff recommendation. Associate Member Neill seconded the motion. The motion carried, 9-0. Chair voted yes.

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- 13. PUBLIC HEARING:** Proposal to amend Chapter 4 VAC 20-910-10 et seq., "Pertaining to Scup (Porgy)," to increase the trip limit from 18,000 pounds to 28,500 pounds for the commercial Winter II period fishery of October 1 through December 31.

Jill Ramsey, Fisheries Mgmt. Specialist, presented the information provided in the staff's evaluation, with PowerPoint slides. Ms. Ramsey's comments are a part of the verbatim record.

The scup fishery is managed cooperatively by the Atlantic States Marine Fisheries Commission and the Mid-Atlantic Fishery Management Council under the summer flounder, scup, and black sea bass fishery management plan (FMP).

The commercial fishery is managed by an annual coastwide quota divided into three periods: Winter I period (January 1 through April 30), Summer period (May 1 through September 30), and Winter II period (October 1 through December 31). For the Winter I and Winter II periods, quotas are managed through vessel possession limits, and landings are monitored by the NMFS. Addendum X to the FMP allows unused quota to rollover from the Winter I period into the Winter II period. Vessel possession limits for the Winter II period are increased by 1,500 pounds per each 500,000 pounds of scup that are rolled over.

For 2018, the Winter I period quota was established as 10,820,000 pounds and the Winter II period quota was established as 3,822,816 pounds. Based on the best available landings information from the NMFS, 5,943,861 pounds from the Winter I period coastwide quota remain unharvested. This remaining quota has rolled over to the Winter II period quota, resulting in a revised coastwide quota of 9,766,677 pounds. The increase in quota translates to a per trip federal landing limit of 28,500 pounds. Staff would like to change Virginia regulation in order to mirror the federal per trip landing limit and allow stakeholders to land 28,500 pounds of scup in Virginia during the Winter II period.

This item has been advertised in accordance with § 28.2-209 of the Code of Virginia for a public hearing. Staff has received no public comments to date.

Staff recommends the Commission amend Chapter 4 VAC 20-910-10 et seq., "Pertaining to Scup (Porgy)," to increase the trip limit from 18,000 pounds to 28,500 pounds for the commercial Winter II period fishery of October 1 through December 31.

The matter was before the Commission for discussion and action.

Associate Member Minor made a motion to move to approve staff recommendation. Associate Member Tankard seconded the motion. The motion carried, 9-0. Chair voted yes.

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- 14. **REQUEST FOR PUBLIC HEARING:** Proposed amendments to Chapter 4 VAC 20-950-10 et seq. "Pertaining to Black Sea Bass," to establish the commercial black sea bass fishery quota for 2019.

Jill Ramsey, Fisheries Mgmt. Specialist, presented the information provided in the staff's evaluation, with PowerPoint slides. Ms. Ramsey's comments are a part of the verbatim record.

The ASMFC and the MAFMC received a data update from the Northeast Fisheries Science Center, which included catch, landings, and survey indices through 2017. This update indicates that biomass continues to be high, and the 2015 year class appears to be above average. At the August 2018 joint meeting, the ASMFC and the MAFMC established, on an interim basis, a 3.14 million pound commercial quota. The commercial quota may be changed in spring 2019, pending the results of the upcoming operational stock assessment update.

Along with New Jersey, Virginia has a major share (20%) of the coastwide quota, under the ASMFC management plan (Table 1). The 2019 Virginia total black sea bass quota will be 20% of the coastwide commercial quota of 3.14 million pounds. Virginia will be allocated 628,000 pounds of the 2019 coastwide commercial black sea bass quota. The 2018 total Virginia commercial quota was 704,000 pounds. A total of 40,000 pounds is set aside for the bycatch fishery, while the remaining poundage is allocated to the directed or ITQ (individual transferable quota) fishermen. The 2019 directed commercial black sea bass fishery quota will be equal to 588,000 pounds.

Although the commercial quota may change in spring 2019, following a stock assessment update, staff must amend the regulation before the 2019 fishing year begins. Virginia's ITQ management system requires notification to each shareholder of his or her individual quota before the fishing year begins.

Staff recommends advertising for a public hearing to amend Chapter 4 VAC 20-950-10 et seq., "Pertaining to Black Sea Bass," to establish the commercial black sea bass fishery quota for 2019.

The matter was before the Commission for discussion and action.

Associate Member Tankard made a motion to move to approve staff recommendation. Associate Member France seconded the motion. The motion carried, 9-0. Chair voted yes.

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15. **REQUEST FOR PUBLIC HEARING:** Proposal to amend Chapter 4 VAC 20-1180-10 et seq., “Pertaining to Fishing Guides,” to clarify the exact number of Class A fishing guide licenses available for purchase from the Commission each year.

Sara Blachman, Fisheries Mgmt. Specialist, presented the information provided in the staff’s evaluation with a PowerPoint presentation for the Board members. Ms. Blachman’s comments are a part of the verbatim record.

The Commission established two categories of fishing guide licenses in 2009: a limited-sale Class A license that enables licensees to obtain reciprocity in Maryland waters and a Class B license that is open access, but that does not confer reciprocity to license holders. This arrangement arose from a compromise between the Maryland Department of Natural Resources, that was unwilling to grant Virginia fishing guides reciprocity unless the number of licensees were limited, and the Virginia Charter Boat Association, that was concerned with the consequences of limiting the growth of their industry.

Section 40 of Chapter 4 VAC 20-1180-10 et seq. defines the number of Class A fishing guide licenses available for purchase each year as not exceeding the number of persons who met one of the three following qualifications:

1. “purchased, as the licensee, a 2008 Virginia charter boat or head boat license before June 25, 2008”
2. “purchased, as the licensee, Virginia charter boat or head boat licenses in 2006 and 2007”
3. “or can document that he has served as captain of a vessel for at least 30 days from January 1, 2006, through June 24, 2008, operating in Virginia waters that was licensed as a Virginia charter boat or head boat and provides a certificate of insurance listing him as the captain of a Virginia charter boat or head boat or federal tax form W-2 or 1099, listing his income as the captain of a Virginia charter boat or head boat during the period January 1, 2006, through June 24, 2008. An additional form of documentation of the 30-day service as captain may include evidence that the applicant was enrolled during the qualifying period in a U. S. Coast Guard required random drug testing program for the business owning the qualifying vessel.”

There is no indication in our records that anyone provided the agency with the documentation necessary to have met the third qualification. According to the data in our Commercial Fishing License System (CFLS), 240 Virginia residents and 38 non-residents met the first or second qualifications. However, the first staff member to administer the Class A and Class B guide licenses following their creation in 2009, capped the number of resident Class A guide licenses at 218 and the number of nonresident licenses at 28. There is no documentation concerning how these figures were determined. The next fisheries management staff member to take over the charter licensing and permitting responsibilities,

calculated that 239 Virginia residents and 38 nonresidents met the regulatory criteria using CFLS data. Due to the fact there has not been overlap between the staff members serving as the point of contact for the charter industry, there has not been an opportunity to discuss these discrepancies or to reach a consensus.

Staff believes that adding the explicit numbers directly into the regulatory language would make the licensing process more transparent and ensure a consistent number of resident and nonresident Class A guide licenses are for sale each year, regardless of who is in charge of preauthorizing guide licenses for the agency.

Staff recommends the Commission approve advertising for a public hearing to amend Chapter 4 VAC 20-1180-10 et seq., "Pertaining to Fishing Guides," to clarify the exact number of Class A fishing guide licenses available for purchase from the Commission each year.

The matter was before the Commission for discussion and action.

Associate Member Minor made a motion to move to approve staff recommendation. Associate Member Ballard seconded the motion. The motion carried, 9-0. Chair voted yes.

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16. REQUEST FOR AN EMERGENCY AMENDMENT: The Shellfish Management Advisory Committee (SMAC) recommended adjustments to the current 2018-2019 Public Oyster Harvest Season and an update on the harvest of James River Seed Oysters.

Andrew Button, Head, Conservation/Replenishment, presented the information provided in the staff's evaluation, with PowerPoint slides. Mr. Button's comments are a part of the verbatim record.

Mr. Button explained that the rotational area currently open to harvest in the Rappahannock (Area 5) has not yielded the harvest that was anticipated by many Virginia public oyster harvesters and buyers. This is most likely the result of a number of factors. The lower than anticipated harvest coming from Area 5 of the Rappahannock has resulted in the majority of the hand scrape fisher leaving the Rappahannock for the James River. SMAC convened on October 18, 2018 to discuss possible adjustments to the 2018-2019 Public Oyster Harvest Season. The recommendations from SMAC were to condense the oyster season in the Rappahannock and to move up the opening of Area 3. Staff feels that this is a relatively "resource neutral" change, but does have concerns regarding the shift in fishing effort that may result from these recommended changes. This may need to be addressed with additional conservation minded adjustments.

In addition to the market oyster harvest, seed oyster harvest has continued at its recently elevated pace. One of the driving factors has been increased demand from out of state. The seed oyster season in the James River extends from October 1 through May 31. Of the total quota of 120,000 bushels, only 40,000 bushels shall be harvested from October 1 through December 31. Based on current harvest levels, it does appear that the October 1 through December 31 quota of 40,000 bushels may be reached early.

It is a legal process where Virginia harvesters of seed oysters sell to Virginia buyers who, in turn, sell to Maryland, but the Commission recently exercised its authority to conserve Virginia seed oysters, by enacting a regulatory amendment to Chapter 4 VAC 20-720-10 et seq., effective October 1, 2018, which allows the Commission to cease granting out-of-state transfer permits for the James River Seed Area when it determines that the seed areas are becoming depleted and the additional granting of such permits could seriously injure the seed areas. This regulatory amendment may need to be exercised.

Staff recommends the Commission exercise its authority under § 28.2-209 of the Code of Virginia, in order to protect the oyster resource and the oyster industry, and adopt the SMAC recommended changes to Chapter 4 VAC 20-720-10 et seq., “Pertaining to Restrictions on Oyster Harvest,” to adjust the opening dates of Rappahannock Area 3 from January 1, 2019 through February 28, 2019 to November 12, 2018 through January 10, 2019. Staff further recommends lowering the bushel limit in the Patent Tong areas from ten bushels per licensed harvester and requests advertising for a public hearing at the December Commission meeting to make these amendments permanent and to consider additional management measures.

After being briefed by staff and consulting with the full Commission, the Commissioner agreed to exercise his authority to cease granting out-of-state transfer permits for the James River Seed Area since some areas are becoming depleted and the additional granting of such permits could seriously injure the seed areas.

Associate Member Zydron made a motion to move to approve staff recommendations for an emergency amendment to 4 VAC20-720-10 et seq., “Pertaining to Restrictions on Oyster Harvest”, to adjust the opening dates of the Rappahannock Area 3 from January 1, 2019 through February 28, 2019 to November 12, 2018 through January 10, 2019 and to lower the bushel limit in the Patent Tong area from 10 bushels to eight bushels per licensed harvester. Associate Member Minor seconded the motion. The motion carried, 9-0. Chair voted yes.

Commission Meeting

**18198
October 30, 2018**

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There being no further business, the meeting was adjourned at approximately 2:30 p.m.
The next Commission meeting will be Tuesday, December 11, 2018.

Steven G. Bowman, Commissioner

Jamie Hogge, Recording Secretary