

## MINUTES

## Commission Meeting

June 28, 2011

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

Steven G. Bowman	Commissioner
Ernest L. Bowden, Jr. )	
J. Carter Fox )	
J. T. Holland )	
William Laine, Jr. )	Associate Members
J. Bryan Plumlee )	
Richard B. Robins, Jr. )	
Kyle J. Schick )	
John E. Tankard, III )	
Jack G. Travelstead	Chief, Fisheries Mgmt.
Paul Kugelman, Jr.	Assistant Attorney General
John M. R. Bull	Director-Public Relations
Katherine Leonard	Recording Secretary
Jane McCroskey	Chief, Admin/Finance
Linda Farris	Bs. System Specialist, MIS
Rob O'Reilly	Deputy Chief, Fisheries Mgmt.
Joe Grist	Head, Plans and Statistics
Stephanie Iverson	Fisheries Mgmt. Specialist, Sr.
Lewis Gillingham	Head, Saltwater Tournament
Sonya Davis	Fisheries Mgmt. Specialist, Sr.
Alicia Nelson	Fisheries Mgmt. Specialist
Allison Watts	Fisheries Mgmt. Specialist
Adam Kenyon	Fisheries Mgmt. Specialist
Warner Rhodes	Deputy Chief, Law Enforcement
Bruce Ballard	Assist. Area Supervisor, ES
Jennifer Baylis	Marine Police Officer
David Drummond	Marine Police Officer

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Tony Watkinson	Chief, Habitat Mgmt. Div.
Chip Neikirk	Deputy Chief, Habitat Mgmt.
Ben Stagg	Environmental Engineer, Sr.
Randy Owen	Environmental Engineer, Sr.
Justin Worrell	Environmental Engineer, Sr.
Dan Bacon	Environmental Engineer, Sr.
Hank Badger	Environmental Engineer, Sr.
Jay Woodward	Environmental Engineer, Sr.
Mike Johnson	Environmental Engineer, Sr.
Paul Rogers	Surveyor

Virginia Institute of Marine Science (VIMS):

Lyle Varnell

Others present included:

David Owen	Craig Palubinski	A. B. Southall, III	David Bushman
Rebecca Francese	Darrell Jenkins	Jeff Waldon	Juan Croftes
Corwin Chamberlain	Tom McMahan	Ellis W. James	Frances W. Porter
Kimberley Huskey	J. C. West	W. R. Britton, Jr.	David J. Adam
Walter Rogers	S. Pardue	Joe Kelly	Scott Harper
Kenneth Heath	Andy Lacatell	John Forrest	Ricky Hull
Eric Hilton	Troy Tucker	Mark Bender	Edward Bender

and others.

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Commissioner Bowman called the meeting to order at approximately 9:39 a.m. All of the Associate Members were present.

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At the request of Commissioner Bowman, Associate Member Robin gave the invocation and John Bull, Director of Public Relations, led the pledge of allegiance.

**ANNOUNCEMENT:**

Commissioner Bowman took the opportunity to thank Associate Members Holland and Bowden whose terms expired June 30, 2011 for their long and dedicated service on the Commission Board. He said each had served two terms (eight years), which was the maximum allowed; and they had both driven many miles from the Eastern Shore of

Virginia in order to do so. He added that there would be a small presentation of certificates for service at the next meeting for Associate Members Bowden and Holland, which would also include Dr. John McConaugha.

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Joe Grist introduced a new employee in the Plans and Statistical Department of the Fisheries Management Division. Mr. Grist said that his name was Adam Kenyon who came to work for the Virginia Marine Resources Commission from a position he held with the North Carolina Division of Marine Fisheries for the past seven years.

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

Commissioner Bowman asked for a motion by the Board.

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

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**MINUTES:** Commissioner Bowman requested a motion for approval of the May 24, 2011 Commission meeting minutes, if there were no corrections or changes. There were none.

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

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

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

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

**Commission Meeting**

Commissioner Bowman asked for questions of staff.

Associate Member Fox asked if item 2C was permanent unlike the others that were temporary. Mr. Watkinson responded yes. Associate Member Fox asked why no royalties were recommended for items 2E and 2F? Mr. Watkinson responded these were maintenance permits.

Associate Member Robins asked if the structures were lighted for Items 2B, 2C, and 2D. Mr. Neikirk stated that all Coast Guard requirements were to be met.

Commissioner Bowman opened the public hearing and asked if anyone wished to speak pro or con for these items. There were none.

Commission Bowman stated the matter was before the Commission.

**Associate Member Tankard moved to approve page two items 2A through 2F. Associate Member Laine seconded the motion. The motion carried, 9-0. The Chair voted yes.**

**2A. VERIZON, #11-0601**, requests authorization to replace an existing, overhead fiber optic line across the Piankatank River, immediately west of the Rt. 3 Twiggs Ferry Bridge between Mathews and Middlesex Counties in an area removed from Public Oyster Ground pursuant to Senate Bill 921 of the 2011 session of the General Assembly. The new fiber optic line will be installed using horizontal directional drill beneath the tidal wetlands, and trenched into the river bed using jet-assist plow method to a minimum depth of three (3) feet below the sediment surface. Recommend approval with the complete removal of the existing line, and a royalty in the amount of \$6,300.00 for the crossing of 2,100 linear feet of State-owned subaqueous bottom at a rate of \$3.00 per linear foot.

Royalty Fees (2,100 lin. ft. @\$3.00/lin. ft.).....	\$6,300.00
Permit Fee.....	\$ 100.00
Total Fees.....	\$6,400.00

**2B. VIRGINIA INSTITUTE OF MARINE SCIENCE, #11-0634**, requests authorization to deploy a water quality monitoring instrument within Public Oyster Ground in the Rappahannock River with a surface buoy for a period of 120 days at a site located approximately 1.2 miles southeast of Towles Point at 37° 37' 57.72" North Latitude and 76° 31' 45.84" West Longitude between Lancaster and Middlesex County.

Permit Fee.....	\$25.00
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**2C. VIRGINIA INSTITUTE OF MARINE SCIENCE, #11-0720,** requests authorization to install one, 16-foot long 6 inch diameter piling with an attached galvanized tower and a four (4) inch diameter PVC pipe situated within Public Oyster Ground in Spider Crab Bay at 37° 20' 54.66" N, 75° 48' 10.27" W in Northampton County. The structure will be approximately 13 feet tall (above mean high water) and will hold scientific instrumentation.

Permit Fee.....	\$25.00
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**2D. VIRGINIA INSTITUTE OF MARINE SCIENCE, #11-0630,** requests authorization to deploy a water quality monitoring instrument within Public Oyster Ground in the York River with a surface buoy for a period of 120 days at a site located approximately 1.3 miles south-southeast of the mouth of the Perrin River at 37° 14' 43.5" North Latitude and 76° 24' 33.12 West Longitude in Gloucester County.

Permit Fee.....	\$25.00
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**2E. JAMESTOWN-YORKTOWN FOUNDATION #11-0350,** requests authorization to install six (6) permanent day markers and maintenance dredge by hydraulic or clamshell method approximately 30,000 cubic yards of bottom material on an as-needed basis, approximately every five (5) years, to provide project depths of -17 feet mean low water in the basin/inner channel and the outer channel adjacent to the Jamestown Settlement Park situated along the James River in James City County. The dredge material would be disposed of overboard at the Dredge Material Management Area downstream of the channel. Staff recommended the standard dredge conditions and a time of year restriction prohibiting overboard disposal to protect anadromous fish species from February 15 through June 15.

Permit Fee.....	\$100.00
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**2F. BKEP MATERIALS LLC, #11-0451,** requests authorization to maintenance dredge an estimated 34,400 cubic yards of State-owned submerged lands on an as needed basis to maintain a maximum depth of -38-feet mean low water on the west side of their pier and -18-feet mean low water on the East side of the pier adjacent to the applicant's commercial facility along the James River in the City of Newport News. Staff recommends the standard dredge conditions.

Permit Fee.....	\$100.00
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- 3. CONSENT ITEMS:** (After-the-fact permit applications with monetary civil charges and triple permit fees that have been agreed upon by both staff and the applicant and need final approval from the Commission).
  
- 3A. SOUTHALL LANDINGS MARINA, #10-1731,** requests after-the-fact authorization to retain two additional previously unpermitted piers at their facility located adjacent to the Salt Ponds Channel in the City of Hampton. The applicant has agreed to the payment of triple permit fees in the amount of \$300.00 and a civil charge of \$1,200.00 in lieu of further enforcement action.

Tony Watkinson, Chief, Habitat Management, gave the presentation. Mr. Watkinson reviewed this item for the Board. His comments are a part of the verbatim record.

On August 12, 2010, staff received a Joint Permit Application (#10-1314) which requested authorization to maintenance dredge up to 8,000 cubic yards of material to restore depths of minus seven (-7) feet below mean sea level at the applicants facility located within the Salt Ponds in Hampton. During a site visit by staff, two additional piers not permitted under the original permit for the facility (JPA#85-0742) were observed. A Notice to Comply was issued on September 21, 2010, stating the applicant would have to submit an after-the-fact application in order for the additional slips to be considered. Staff received the after-the-fact application for the additional piers on October 21, 2010. Based on the information included in the application the applicant had shown the number of slips at the facility did not increase, but in fact were reduced from 196 to 189. They further explained that the original nine piers permitted in 1985 were slightly shifted and the lengths reduced because of the channel location. In order to accommodate the slips that were eliminated when the piers were shortened the applicant added the two additional piers at the north end of the project.

No objections for the two unpermitted additional piers had been received during the public review process or from any governmental agency.

Staff had identified that the environmental impacts from the permit deviation to be minor while the degree of non-compliance is moderate. The matrix for these two factors would indicate a civil charge of \$1,200.00. Staff recommended the Commission approve the application for the two additional piers with the applicant's agreement to pay a civil charge of \$1,200.00 and a triple permit fee of \$300.00 in lieu of any further enforcement action.

Commissioner Bowman asked for questions of staff. There were none. He opened the public hearing for comments pro or con. There were none. He said the matter was before the Commission.

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

Civil Charge.....	\$1,200.00
Permit Fee (Triple).....	\$ 300.00
Total Fees.....	\$1,500.00

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4. **CLOSED MEETING FOR CONSULTATION WITH, OR BRIEFING BY, COUNSEL.** On advice of VMRC Counsel, it was not necessary to have a closed meeting.

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5. **DAVID D. OWEN, #11-0531.** Commission review on appeal by the applicant of the May 12, 2011, decision by the Lancaster County Wetlands Board to deny an application to install a total of 155 linear feet of quarry stone marsh sill and 165 linear feet of quarry stone revetment at his property on James Cove of Carter Creek in Lancaster County.

Jay Woodward, Environmental Engineer, Sr., gave the presentation with slides. His comments are a part of the verbatim record. Mr. Woodward noted that he would present slides for orientation purposes only.

Mr. Woodward explained that the project was located on James Cove off the Eastern Branch of Carter Creek near the Town of Irvington in Lancaster County. The applicant owned approximately 350 feet of shoreline at mean low water along a convex shoreline, which was currently unimproved except for a 70-foot long private pier near the right (northern) property line. The shoreline was a mix of vegetated and non-vegetated wetlands and the adjacent upland was a mix of lawn and forested area, with several trees overhanging the shoreline on the left (eastern) side of the property. The application proposed a total of 320 linear feet of armor, both revetment and sill, and included proposed mitigation for 40 square feet of impacts to existing vegetated wetlands at a 1:1 ratio on the property at the point. The Lancaster County Wetlands Board considered the application at their May 12, 2011, public hearing and voted 5-0 to deny the request.

Mr. Woodward said that staff received a letter of appeal from Mr. Owens’s agent, Craig Palubinski of Bayshore Design on May 19, 2011. As a result, his appeal was considered timely under the provisions of §28.2-1411 of the Code of Virginia. In his letter, Mr. Palubinski stated it was his understanding that the Board denied the request based on a lack of detrimental erosion occurring along the applicant’s shoreline. He further stated that the permit drawings and the site photographs, presented to the Board during the

hearing, do in fact indicate that the shoreline and bank were eroding. He also stated that the Virginia Institute of Marine Science (VIMS) Shoreline Application Report for the project endorsed the opinion that the shoreline was eroding, as they specifically identify the severely undercut bank and exposed trees. He noted that the report was read into the record at the hearing. Mr. Palubinski indicated that he offered a modification to reduce the overall length of the project in light of concerns raised by the some of the Board members, but the modification request was denied by the Board.

Mr. Woodward stated that the Lancaster County Wetlands Board held their hearing on the application on May 12, 2011. Mr. Palubinski represented Mr. Owen in his capacity, as agent. At the beginning of the hearing, Chairwoman Edna Revere read the VIMS Shoreline Permit Application Report into the record. Their report was sent to Board staff via email on April 30, 2011, in a non-standard format due to database issues. The report indicated that the shoreline consisted of an undercut bank with some severely undercut and exposed trees, some fringe marsh and shallow near shore zone, and that the proposed revetment would sever the connection between the upland, shoreline, and deeper water areas and change the natural shoreline to rock, with a resultant loss in the ability to filter runoff and a change in the animals that can live along the shoreline. The report went on to describe the area, and indicated that the proposed compensatory wetlands mitigation area appeared to be at least in part a high marsh with salt bushes. The recommendations summary stated that the preferred approach would be to construct a sill/marsh toe structure along the entire shoreline, fill the area behind with sand, and plant marsh grass. They further recommended that the undercut trees be removed and the stable trees be pruned to allow sunlight to reach the intertidal area.

Mr. Woodward noted that Mr. Palubinski then addressed the Board, described the proposal and drawings, and submitted twelve annotated photographs taken of the shoreline at low tide. Mr. Palubinski stated there were less than 40 square feet of impact and described the proposed mitigation. He indicated the applicant's house was fairly close to the bank and the applicant wanted to preserve the bank and the trees. Board member Wayne Cannon began the discussion, stating that the shoreline was stable and he did not see anything to warrant what was being proposed. Board member Marsha Sitnik stated she did not understand the VIMS report regarding undercutting and indicated she did not see severe undercutting. Chairwoman Revere stated the vegetation at the site was beautiful and indicated she did see some undercutting around a tree on the bank. Board member George Crenshaw stated he felt James Cove was a very protected cove. Mr. Palubinski stated the sections marked by points one to eight on the drawing were the primary concern. Board member Cannon responded he felt there were too many things on the drawing that were not needed, and suggested a new drawing. Chairwoman Revere asked if Board member Cannon were suggesting tabling the application, to which he replied that he was rejecting the present application and drawing. Board member Crenshaw agreed. Mr. Palubinski asked if he could offer a modification, deleting points eight through seventeen, but retaining points one to eight. Board member Cannon stated points one to eight covered the area the Board had the most problem with. Chairwoman



Revere suggested tabling the application and coming back with revised drawings. Mr. Palubinski said he would still be asking for points one to eight if he revised the drawings. Member Cannon made a motion to deny the modified application for points one to eight, as well as, the original application submitted. Board member Sitnik seconded the motion to deny and the motion carried 5-0.

Mr. Woodward said that staff was present at the May 12, 2011, Lancaster County Wetlands Board public hearing. Based on that attendance, and staff's review of the record, as provided by the Board, staff could not agree that the Board denied the project based on a lack of detrimental erosion on the shoreline. It seemed to staff that the Board was concerned that the project was overdesigned for the amount of erosion perceived. As with all wetland applications in Lancaster County, the Board members had all gone to the site to look at the proposal prior to the hearing and saw firsthand the condition of the shoreline at the site of the proposed project. While the VIMS report indicated undercutting in areas, it also recommended against a revetment, and suggested a sill with sand fill and plantings, and selective tree removal and pruning to allow more sunlight to reach the intertidal area.

Mr. Woodward stated that Mr. Palubinski did offer a modification to reduce the impacts of the project, but the Board appeared to believe the modification to reduce the length of the project, as well as the original proposal, was not something the Board could support. The decision to deny was unanimous.

Mr. Woodward said that based on staff's review of the record and staff's attendance at the hearing, staff did not believe the Lancaster County Wetlands Board failed to fulfill its responsibilities under the ordinance, nor did staff believe that the Board's decision was unsupported by the record or was arbitrary, capricious or an abuse of the Board's discretion. Further, staff did not believe the substantial rights of the applicant had been prejudiced by the decision of the Board. Accordingly, staff recommended that the Commission uphold the Board's decision in this matter, and remind the applicant that he was entitled to reapply in modified form, pursuant to §28.2-1302(10) (3) (C) of the model Wetlands Zoning Ordinance.

Commissioner Bowman asked for questions of staff.

Mr. Schick asked if the modification of one to eight was the same as the drawing with the toe sill and revetment or the VIMS suggestions. Mr. Woodward said one to eight was in the location with the proposal and nine to seventeen would be deleted.

Associate Member Fox asked if there was to be any trees removed. Mr. Woodward said on the plan drawing the trees for removal or to remain are flagged and he said he thought some were to be removed. Associate Member Fox asked about the fetch in the area of the construction from one to eight. Mr. Woodward responded, it was a NW fetch which went into the Cove for one to eight.

Commissioner Bowman asked if the appellant or his representative wished to comment.

Craig Palubinski, agent, was sworn in and his comments are a part of the verbatim record. Mr. Palubinski stated that Mr. Owens was not at the Wetlands Board meeting, but he wished to comment, if allowed.

Commissioner Bowman said that in accordance to 28.2-1313, the Commission did not want to supplant the decision of the Wetlands Board by only considering what is in the record in accordance to law and the appellant's comments could prejudice the record.

Mr. Palubinski explained the various slides depicting areas of the project to show direction of the proposal and where the erosion is occurring. He said that at this location the living shoreline would not work. He said they were willing to reduce the rip rap revetment and to delete the section numbered ten to seventeen from the project. He said the appellant's house was 50 feet from the bank, which they wanted to protect. He said they submitted a modification to consider Board member Cannon's concerns, but Board member Cannon's motion was to deny the original and modified proposal. He said the second case they had heard at the same meeting was the same concern of lack of erosion to warrant the proposal and they approved a portion of the proposal. He said the Wetlands Board was not consistent with its decisions. He said they were requesting approval to help the appellant from further expense.

Commissioner Bowman asked for questions of Mr. Palubinski.

Associate Member Holland asked if on photo #4 it showed that the porch was 50 feet from the bank. Mr. Palubinski responded yes.

Associate Member Schick asked if they knew the rate of the erosion occurring at the present time. Mr. Palubinski responded he did not know.

Commissioner Bowman asked Mr. Owens if any of the testimony he heard was inaccurate or not clear. Mr. Owens stated no.

Commissioner Bowman asked if others wished to comment, pro or con. He asked if a Wetlands Board representative was presented. There were none. He announced the matter was before the Commission for discussion or action.

Commissioner Bowman read the Code Section 28.2-1302. Associate Member Schick asked if the appellant was willing to table the matter and resubmit a modified application with VIMS suggestions, but was not given the opportunity, could the Commission decide to remand the matter.

Commissioner Bowman explained there were two ways to look at this situation. He said the application was studied by the Wetlands Board, but they were operating on a moving

target to allow that tabling be considered. He said the appellant could reapply, which was a normal course of business. He stated he was not sure that anything was done in error.

Associate Member Fox said when he read the minutes the VIMS report was entered into the record as evidence and at the end of the meeting it was suggested that it be tabled. He said that Mr. Palubinski had said he still wanted one to eight, but as they were proposed and the Wetlands Board did not agree with them. He said that one to eight did not agree with the VIMS report and it did not appear that tabling it would have accomplished much according to the minutes. He referenced to 28.2-1313, but said it could not be reversed as the evidence was looked at diligently by the Wetlands Board. He said it was discussed, but there was an impasse with the applicant. He stated that correct procedures were followed. He said the appellant could reapply with the VIMS recommendations and the Wetlands Board would hear it again. He announced he was inclined to support the Wetlands Board's action.

Commissioner Bowman asked where this left the applicant, could he reapply with the VIMS recommendations. Mr. Woodward responded yes, the Code allowed him to start over.

Associate Member Robins said he had read the minutes and there was active erosion occurring and a plan was needed to protect the shoreline. He explained that the Wetlands Board discussed the matter and in accordance with 28.2-1313 he felt that no error had been made by the Wetlands Board. He said looking at the VIMS report it said this was a low energy site and an appropriate project should be used for the site. He said the Commission should not remand or reverse the decision of the Wetlands Board and the appellant should just work it out with the Wetlands Board through the normal process.

Associate Member Plumlee said he agreed with Associate Members Fox and Robins regarding the local Wetlands Board and it would be futile to bring the same proposal back. He said it was a diligent review and they could reapply with a new project. He said the VIMS recommendation would cost less and do a better job for the water quality and the upland and lowland areas. He reiterated that the Wetlands Board had made a proper decision.

Commissioner Bowman said the matter was before the Commission.

**Associate Member Robins moved to approve the staff recommend to uphold the decision of the Wetlands Board. Associate Member Schick seconded the motion. The motion carried, 9-0. The Chair voted yes.**

No applicable fees – Wetlands Appeal

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6. **GARY STULL, #10-0587.** Commission review on appeal by the applicant of the Norfolk Wetland Board's May 11, 2011, decision to deny the replacement of 148 linear feet 56 of bulkhead and return walls at his property situated along a man-made canal off the North Branch of the Lafayette River in the City of Norfolk.

Tony Watkinson, Chief, Habitat Management, gave the presentation. His comments are a part of the verbatim record. Mr. Watkinson said there was a request by the appellant to defer action. He said the Wetlands Board was scheduled to hear the matter again so a resolution could be reached with the Wetlands Board. He added that the Commission needed to vote on the deferral.

Commissioner Bowman asked about the hearing requirement of 45-days and if it would prejudice the matter to hold off on making a decision. Mr. Watkinson said it was allowed by Code for the City or applicant to request a continuance of this matter and the City had agreed.

Commissioner Bowman asked if this was a written request received by staff. Mr. Watkinson stated it was submitted by e-mail.

Commissioner Bowman stated the matter was before the Commission.

**Associate Member Holland moved to table the matter at the appellant's request. Associate Member Tankard seconded the motion. The motion carried, 9-0. The Chair voted yes.**

Continued at the request of the appellant.

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7. **WEST BAY HOMEOWNERS ASSOCIATION (HOA) #10-1251,** requests authorization to install jet-ski lifts at each of the 18 existing boats slips at three of the Association's community piers and to change the designation of the remaining pier (Pier 4) from a fishing pier to a recreation pier. The project is protested by an adjacent property owner.

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

Mr. Madden explained that West Bay was a gated residential community of 18 attached homes. The community was located approximately nine (9) miles south of the town of Wicomico Church and along Bells Creek. The Association maintained ownership of the riparian frontage and there were a total of four community piers on the property. Piers one through three had been designed to accommodate a total of 18 wet-slips, one for each

of the property owners. Until recently, the remaining pier, Pier 4 had been set aside exclusively for fishing.

Mr. Madden said that the Association was seeking authorization to install 18 low-profile jet ski lifts at the head of each of the assigned wet-slips, at the three piers set aside for boat mooring. The slips were for the private use of the property owners. The slips were not rented or leased to the public and there was no public access to the property. In addition, the Association would like to change the existing designation of the remaining pier (Pier 4) from a fishing pier to a more broadly defined recreation pier. They would like to launch kayaks at the pier and temporarily tie up jet skis for the day. The Association felt that if they allow this activity to occur at the fishing pier, they would be in violation of their current permit.

Mr. Madden stated that the project was protested by Mr. Jeffrey C. Warren and Ms. Frances P. Warren. The Warrens were the adjacent property owners immediately to the northwest of the gated community. The protestants had a clear view of Pier 3. The Warrens objected to the additional vessel traffic on the creek and were concerned that the jet skis would disturb the area wildlife and impact the vegetation in and around the creek.

Mr. Madden explained that the Virginia Institute of Marine Science had commented that jet skis could be operated in shallow water, at high speeds, and in remote areas not usually frequented by boats. The turbulence produced by the jet propulsion of a personal watercraft (PWC) may disturb plant growth and sediments along the shoreline, especially during acceleration or turns resulting in reduced water clarity, and aquatic plant abundance. They suggested that the applicant establish a 'no wake' zone, restrict jet-ski activity in near-shore areas and increase boater awareness.

Mr. Madden stated that since all of the additional encroachments resulting from the new jet-ski lifts were to be confined to areas channelward of mean low water, the Northumberland County Wetlands Board did not assert jurisdiction over this project.

Mr. Madden noted that the Health Department Bureau of Waste Water Engineering had no objection to the lifts nor had any other State agency objected to the project.

Mr. Madden said that the applicant had assured staff that the jet-ski operations would be conducted in a safe and responsible manner by owners and guests of those within the West Bay community. Staff had pointed out that the Association's shoreline would suffer the same degradation that the other area shorelines might experience, if the crafts were allowed to generate damaging wakes close to the shoreline. Boater awareness in the form of signage and education was an ongoing matter with the Association. The membership was aware that vessel operators were responsible for damaging wakes.

Mr. Madden explained that while the establishment of a 'no wake' zone would likely result in a significant reduction in wave induced impact to shore line; the Commission

lacked the jurisdiction to promulgate such a measure. The Northumberland Board of Supervisors would need to request that the Virginia Department of Game and Inland Fisheries imposed a 'no wake' zone.

Mr. Madden said that staff saw no reason why the fishing designation could not be revised to enable the Association's membership to better enjoy Pier 4. However, staff recommended that the Commission prohibit any overnight mooring of any watercraft at Pier 4.

Mr. Madden stated that after evaluating the merits of the project against the concerns expressed by those in opposition to the project, and after considering all of the factors contained in §28.2-1205(A) of the Code of Virginia, staff recommended approval of the project with the inclusion of a permit condition restricting overnight mooring at Pier 4.

Commissioner Bowman asked for questions of staff. Associate Member Fox asked if VIMS had suggested changing the types of vessels. Mr. Madden responded yes. He said only 2 individuals at this time want to utilize the lifts. Associate Member Fox asked if the neighbors could share. Mr. Madden answered they could not share as they are assigned slips.

Associate Member Schick asked if the standard rule was that the number of lots determined if one or two slips were allowed. Mr. Madden responded that it was the number of homes.

Tony Watkinson, Chief, Habitat Management explained that the community pier criteria for making a determination by staff was to allow two slips for each private pier lot or lots where a private pier would be allowed. He said here there would be nine lots that were actually waterfront and so it would be calculated 9 lots x 2 slips = 18 total slips. He added the same criteria had been utilized by staff in the past.

Associate Member Fox asked if it was one boat or one jet-ski, not both. Mr. Watkinson said the jet-ski was another amenity provided by the HOA.

Commissioner Bowman explained that a jet-ski lift was not much of an encroachment, as the lift was attached to the pier.

Associate Member Schick said a boat lift could handle 1,500 pounds and a jet-ski did not weigh that much, probably under 1,000 pounds. He said that it would set a precedent to restrict the weight, but better to not allow two boats and require conformity to the rules.

Associate Member Tankard asked about the VIMS recommendation for pier 3 and the near shore activity restriction. Lyle Varnell, VIMS, said that this relates to the 'no wake' zone and low energy use by jet-skis. Associate Member Tankard asked if it was near

shore or just to preclude the use of jet-skis. Mr. Varnell said it was hard to say yes or no, as closer to shore would have more impact and he was not familiar with the area.

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

Tom McMann, President of the Homeowners Association, was sworn in and his comments are a part of the verbatim record. Mr. McMann said that the docks are owned by the homeowners association and there are actually only a few who have interest in using them, but they want to allow those that do to have better use of their access to water. He said of the 18 slips only six boats were actively docked there and only two owners have expressed an interest in the lifts and maybe two more. He said right now no one owned a jet ski. He noted that the community did realize this was a privilege and would understand if there were conditions on the use, the 'no wake' zone, and education on the use of the lifts. He stated they were willing to do what was required. He said the pier 4 was well explained by staff and it was the pier adjacent to at least half of the residents and the owners do access this pier. He explained he launches his boat there and wants the ability to go back and forth from his residence.

Associate Member Fox stated his concern for the 18 slips and if approved limiting the number of jet-skis. Commissioner Bowman said the problem would be which slip to eliminate and if it would be considered arbitrary and capricious to make such a decision. He said there was a need to be careful or the worst case scenario would evolve.

Associate Member Tankard said that he agreed, but there had been incremental decisions made by the Commission in the past and adjoining property owners would have the right to protest.

Associate Member Robins asked staff what part the Commission took in getting the 'no wake' zone established. Mr. Madden explained that the County Board of Supervisors would have to make a request to the Game and Inland Fisheries Commission to establish a 'no wake' zone.

Associate Member Robins asked if the Commission could make this a condition of the permit for the County to request the 'no wake' zone. Mr. Watkinson said the Commission could require the applicant to ask that the County consider it.

After some further discussion, Commissioner Bowman asked if anyone opposed to the project was present to comment. There were none. He said the matter was before the Commission.

**Associate Member Schick moved to accept the staff recommendation and with the jet-ski lift; limit their use for personal watercraft and other non-motorized vessels.**

Associate Member Holland seconded the motion. The motion carried, 8-1. The Chair voted yes. Associate Member Plumlee voted no.

Permit Fee.....	\$25.00
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8. **JEFF WALDON, #10-1879**, requests authorization to construct a 40-foot long by 22-foot wide concrete low-water bridge crossing Gooney Creek in Warren County. The project is protested by an adjacent property owner.

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

Mr. Bacon explained that the project was located on Gooney Creek in Warren County, approximately five miles southwest of Front Royal. The area along this reach of the river was rural with the main road on the eastern side of Gooney Creek and the home sites on the western side of the creek. The only way to access the property with a vehicle was by a bridge or similar structure.

Mr. Bacon stated that the applicant is specifically seeking authorization to construct an approximately 40-foot long by 22-foot wide low water bridge so that he may gain access to his property with his vehicle rather than having to wade through the stream to get to his cabin.

Mr. Bacon said that the project was protested by Ms. Mary R. Blanton of Gooney Lodge Partners, LLC, who was the upstream adjacent property owner. In her letter dated January 7, 2011, and a follow up letter dated May 2, 2011, Ms. Blanton stated that she was objecting to the low water bridge due to flooding concerns. Ms. Blanton sent pictures of her property during one of those events. The Department of Conservation and Recreation, in a letter dated February 4, 2011, stated that they had no objection to the project, as proposed.

Mr. Bacon noted that the Department of Environmental Quality, in a letter dated December 13, 2010, stated that they had no objections to the project. The Virginia Department of Game and Inland Fisheries stated in an e-mail dated February 10, 2011, that they did not anticipate the project would result in adverse impacts to any natural resources. No other State agencies have commented on the project.

Mr. Bacon explained that the applicant had provided a copy of the County Land Disturbance Permit issued March 8, 2011, for the project.

Mr. Bacon said that while staff acknowledged the concerns raised by Ms. Blanton of Gooney Lodge Partners, LLC, Mr. David Bushman the designer and engineer of the



project had determined the flood elevation at Ms. Blanton's site would not increase due to a 10-year or 100-year storm event with the low water bridge in place. According to Mr. Bushman this assessment was based on his use of models developed by the U. S. Army Corps of Engineers.

Mr. Bacon noted that Ms. Blanton and Gooney Lodge Partners, LLC, had their own low water bridge that was approximately 150 yards upstream of the proposed structure. During a phone conversation with staff, Ms. Blanton stated that she used this low water bridge to gain access to her property. During the same conversation, staff asked Ms. Blanton if she was willing to negotiate terms with the applicant for the usage of her low water bridge so that he may access his property. Ms. Blanton informed staff that she did not want the applicant to use her low water bridge and that the applicant could park his car on the road and walk across the creek to gain access to his property. Staff also noted that Ms. Blanton's property was built in the floodplain leaving the structures susceptible to flood events.

Mr. Bacon stated that after evaluating the merits of the project against the concerns expressed by the protestant, and after considering all of the factors contained in §28.2-1205(A) of the Code of Virginia, staff recommended approval of the project, as submitted. Staff also recommended that the applicant countersink the proposed culverts to insure fauna passage via a low-water channel, and in order to maintain the authorized bridge structure in accordance with §28.2-1209 of the Code of Virginia, the permit shall include authorization for the removal of accumulated sediments and debris.

Commissioner Bowman asked for questions of staff.

Associate Member Plumlee asked about the bridges impacts to the river bottom as to whether it interrupted the flow of water to pass through. Mr. Bacon said no and the Game and Inland Fisheries Commission said they had no concerns.

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

Jeff Waldon, applicant, was sworn in and his comments are a part of the verbatim record. Mr. Waldon stated he would answer any questions.

Associate Member Tankard asked if with the low bridge was it possible for a log jam to occur.

David Bushman, Design Engineer, was sworn in and his comments are a part of the verbatim record. Mr. Bushman explained that he was a professional engineer. He said the water was low in the area and there would be no change even if it was totally blocked.

**Commission Meeting**

Commissioner Bowman asked for the slide showing the highway and asked if the applicant parked the car on the highway and just walked to his property. Mr. Walden said that he could pull over on the filled area. Commissioner Bowman explained that if you defined a highway it would include more than just the black top so he would be parking on the highway.

Associate Member Plumlee asked why this type of road was being proposed. Mr. Waldon stated it was because of the cost and another bridge would have to be very long.

Commissioner Bowman asked if anyone that was opposed to the project was present to comment. There were none. He stated the matter was before the Commission.

**Associate Member Schick said that he moved to approve the staff recommendation as the protest was not appropriate, as the protestant had a bridge and simply did not want the applicant to have one. Associate Member Tankard seconded the motion. Commissioner Bowman said the applicant had hired a professional engineer who did look at the project proposal completely. He added that appropriate information had been given to the protestant from an engineer. The motion carried, 9-0. The Chair voted yes.**

Royalty Fees (fill 880 sq. ft. @ \$1.50/sq. ft.).....	\$1,320.00
Permit Fee.....	\$ 100.00
Total Fees.....	\$1,420.00

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- 9. **DOMINION RESOURCES, INC., #10-1787**, requests authorization for construction-related impacts to tidal wetlands and for the crossing over State-owned subaqueous bottomlands of Proctors Creek, a tributary to the James River, in conjunction with the installation of a 30-foot wide vehicular bridge in association with a proposed industrial solid waste management facility for disposal of fossil fuel combustion products generated at the adjoining Chesterfield Power Station (CPS) in Chesterfield County. Both Tidal Wetlands and Submerged Lands Permits are required.

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

Mr. Stagg explained that the project was located in Chesterfield County near the James River, and would impact Proctors Creek and adjacent tidal wetlands. The applicant proposed to construct a 30-foot wide bridge/haul road over the creek and wetlands requiring both temporary tidal wetlands impacts during construction and permanent tidal

wetland impacts for the bridge pilings footprint. The stream width at the bridge crossing was 37.5 feet and the bridge was proposed at 20 feet above mean high water.

Mr. Stagg noted that Chesterfield County had not adopted the tidal wetlands ordinance; as a result the Commission is charged with acting as the wetlands board pursuant to Chapter 13, of Title 28.2 of the Code of Virginia.

Mr. Stagg said that the project would result in temporary impacts to 0.504 acres of tidal Palustrine Forested Wetlands associated with a temporary construction road. The road area would be restored and the applicant proposed to purchase wetland credits of 0.252 acres at an approved offsite wetlands bank (mitigation ratio of 0.5:1). There would also be permanent impacts to 1.05 acres of tidal Palustrine Forested Wetlands that would be restored and converted to tidal Palustrine Shrub-Scrub Wetlands for which the applicant proposed to purchase additional wetland credits of an additional 0.525 acres at an approved offsite wetland bank (mitigation ratio of 0.5:1). Finally there would be permanent impacts to 0.007 acres (305 square feet) of tidal Palustrine Forested Wetlands associated with the bridge pilings for which the applicant proposed to purchase tidal wetland credits of 0.014 acres (610 square feet) at an approved offsite tidal wetland bank (mitigation ratio of 2:1).

Mr. Stagg stated that the Department of Game and Inland Fisheries provided comments directly to the applicant during planning stages of the project and advised that studies should be conducted related to multiple species. The applicant provided the results of these studies indicating there were no species of concern, as listed by VDGIF. The Department of Environmental Quality stated issuance of a draft permit was imminent and would require wetlands restoration and credits, as noted above. No other agencies had commented.

Mr. Stagg explained that the applicant had agreed to remove the construction access road once the bridge was completed, restore the temporary wetland impacts associated with the access road, and to compensate for both temporary and permanent tidal wetland impacts by purchasing appropriate credits at both non-tidal and tidal wetlands banks. Shading impacts associated with the bridge should be minimal due to the height of the bridge structure.

Mr. Stagg stated that after evaluating the merits of the project, and after considering the standards and guidelines, as well as the purpose and intent of Chapter 13 of Title 28.2 and Chapter 12 of Title 28.2 of the Code of Virginia, staff recommended approval of the project, as submitted, for both tidal wetland impacts and encroachment over State-owned subaqueous bottomlands of Proctors Creek. Staff recommended acceptance of the purchase of credits, at the current per square foot rate, at an approved tidal wetlands bank, for the permanent impact to 305 square feet of tidal wetlands at a ratio of 2:1 (for a total of 610 square feet) and the payment of a royalty of \$2.00 per square foot for the

encroachment over 1,125 square feet of state-owned subaqueous bottomlands for a total royalty of \$2,250.00.

Commissioner Bowman asked for questions of staff.

Associate Member Plumlee asked if Department of Environmental Quality had reviewed the project. Mr. Stagg indicated that DEQ was reviewing the entire project to include the fly ash storage area. Associate Member Plumlee asked if DEQ had approved the entire project at this point. Mr. Stagg stated no.

Associate Member Fox asked about the road on the drawing and if it could be used instead of the bridge. Mr. Stagg stated there were restrictions on access. Associate Member Fox asked where the plant was located. Mr. Stagg showed him the location on a staff slide.

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

Corbin Chamberlain, representing the applicant, was sworn in and his comments are a part of the verbatim record. Mr. Chamberlain said he would answer any questions.

Associate Member Fox asked about the use of the road. Mr. Chamberlain explained that it was a public road, but conditional use restrictions on the size of trucks had been required by the County. He said that if they used the existing road with the required smaller trucks it would mean an increase of traffic of about 100 trucks per day.

Associate Member Plumlee asked if this would service this one facility. Mr. Chamberlain said it would be used by this facility, as well as others.

Commissioner Bowman stated the matter was before the Commission.

**Associate Member Laine moved to accept the staff recommendation with the permit conditions. Associate Member Fox seconded the motion. Associate Member Plumlee said that the VIMS Report, which was a handout, should be put into the record. The motion carried, 9-0. The Chair voted yes.**

Royalty Fees (1,125 sq. ft. @ \$2.00/sq. ft.).....	\$2,250.00
Permit Fee.....	\$ 100.00
Total Fees.....	\$2,350.00

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7. PUBLIC COMMENTS:

**Virginia Seafood Council (VSC)**

Frances Porter, Executive Director of VSC, for the last 25 years, requested the opportunity to comment and to announce her retirement. She expressed her concern for some unfinished business when in April 2009 it was decided by both State and Federal officials to discontinue the non-native oyster program. She said that there had been good results with the work with non-native oysters and increasing the native oysters, but it was not enough. She said the PEIS was not published yet and they had not been shown the dollar value of the oyster industry to the bay and industry. She introduced Kimberley Huskey, as the new VSC Director. Her comments are a part of the verbatim record.

Commissioner Bowman expressed the Commission's appreciation of Ms. Porter's passion for helping the oyster resource and industry. He noted that Mr. Travelstead would be giving a presentation later in the meeting on the native oyster restoration. He said he commended her on the job she had done as she was gentle lady and advocate for the industry members. He added that she would be missed and the new Executive Director would have big shoes to fill. His comments are a part of the verbatim record.

**Climate Change**

Ellis W. James, Norfolk Resident and Sierra Club member was present and his comments are a part of the verbatim record. Mr. James noted the commitment by Ms. Porter as he knew of her good works and he added his concerns as well. He went on to relay his concerns for VMRC's role in the Commonwealth as it would be impacted by Governor McDonnell's decision of not activating the Climate Change Commission. He explained that there had been hard work done with the formulating of these recommendations and it was a shame to lose that hard work. He said when the Secretary of Natural Resources was asked if he had seen the report and he had said he had not. He said the Secretary needed to learn all about the Chesapeake Bay. He said the VMRC was the last line of defense with a number of issues, such as oyster restoration. He said the continued indifference by the Administration meant there would be issues resulting with problems. He noted the sea level was rising, which impacted Norfolk now, as well as, Poquoson and Gwynn's Island. He encouraged the Board to continue to use common sense and good oversight to try to protect the Commonwealth. He added encouragement to continue the hard work.

**Associate Member Robins** said at the National Marine Spatial Planning Conference implementation of the ocean project, VMRC was well represented by Rob O'Reilly, as the regional planning bodies were established. He said that it was appropriate that

VMRC had a role in this group, as a Virginia representative had been requested. He reiterated that Rob O'Reilly had well represented the Commission.

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The Commission broke for lunch at approximately 12 noon and returned at approximately 12:49 p.m.

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- 11. PUBLIC HEARING:** Proposed regulation to establish a moratorium on River Herring (alewife and blue back herring), effective January 1, 2012, to comply with the provisions of the ASMFC Fishery Management Plan for Shad and River Herring.

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

Mr. Travelstead stated he had given an extensive review at the last meeting and would not go over it again, but would answer any questions.

Mr. Travelstead said that there were no long term data sets to justify a sustainable fishery. Of the comments received, all except for three, were supportive of the moratorium. He said in the additional comments received there were three of support. He said Walter Rogers, a pound netter, said he was not opposed but requested that VMRC fight for a small by-catch allowance through the ASMFC. He said that right now that was not allowed as the ASMFC was calling for a total moratorium. He said the Board was to meet and this would be brought up.

Mr. Travelstead said Dr. Eric Hilton and Dr. Troy Tuckey, of VIMS, were supposed to come to the meeting to speak to the Commission, but had not yet arrived. He noted that their information was in the packet.

Commissioner Bowman asked if there was a chart showing the decline of the fishery. Mr. Travelstead said there was one that went back to the 1920's.

Commissioner Bowman asked for questions of staff.

Associate Member Robins said the State should try to talk to the ASMFC on the by-catch issue. He said it would be more practical to have a by-catch because if they are caught with other species the fishermen did not want to be uncertain as to how Law Enforcement would decide to enforce there being no by-catch allowance. He said there could be 10,000 pounds of fish with maybe only five herring in it.

Commissioner Bowman stated he was proud of the Law Enforcement and it was useful for them to be able to use their discretion.

Mr. Travelstead noted that there were two regulations in the evaluation. He explained that Regulation 1260 imposed the moratorium. He explained also that Regulation 430-60(D), on page 4, provided for a two-inch mesh size in gill nets, but this section should be deleted, as it applied to river herring, if the moratorium were to be adopted.

Associate Member Fox suggested that Walter Rogers be allowed to speak.

Commissioner Bowman opened the public hearing.

Walter Rogers, Reedville, was present and his comments are a part of the verbatim record. Mr. Rogers said he understood the Commission's position, which was well explained. He said that several other species of fish were very similar in size and color to the herring and it was too hard for the fishermen to sort the herring out from the others. He said moratorium or not a by-catch allowance was there for the shad and the pound net fishery needed one for the herring. He said the chart showed a stable catch, which was not going down now.

Commissioner Bowman asked for questions.

Associate Member Robins asked about the length of the herring fishery. Mr. Rogers said from the 1<sup>st</sup> week in March through May, when the last one is caught.

Associate Member Tankard asked how often they were visited by Law Enforcement. Mr. Rogers stated not that often, maybe once a week. He said it was unnerving just to see the boat approach. He reiterated that the herring looks like every other fish. Associate Member Tankard asked if they were usually alive or dead. Mr. Rogers said they were live, but herring were more susceptible to mortality after handling and lose their scales.

Associate Member Fox asked where the herring were marketed. Mr. Rogers said usually for bait or the herring roe. He said they were marketed for catfish bait.

Mr. Travelstead said that Potomac River Fisheries Commission allows a by-catch for shad, but that will change because the ASMFC are going to start looking at shad and require the same moratorium or sustainability proof. He said it would be the same situation eventually. He said if it was to be discussed with ASMFC they could start looking at the gears used and this discussion would bring this to their attention.

David Adams was present and his comments are a part of the verbatim record. Mr. Adams said the herring fishery moratorium would impact 25% of his business for March, April, and May. He said the ASMFC was doing this because of the Magnusson-Stevenson Act. He said the fish stocks are less now than they were in the 1960's because

of the introduction of the blue catfish. He said the herring run was good at Walker's Dam, but there is not much in the way of data. He asked if this had been checked. Mr. Travelstead responded no. Mr. Adams suggested putting catch limit, season dates, etc. He stated he was against the moratorium. He stated also that VMRC should have done something sooner to prove sustainability and to keep a small commercial fishery and recreational fishery.

Bill Britton, Charles City, was present and his comments are a part of the verbatim record. Mr. Britton said he was a County Employee and on the Board of Supervisors and he was interested in continuing the fishery. He said he had been involved in all public hearings and most of those present represented the recreational fishery. He said he had fished at Walker's Dam with a drift net for 22 years and he had changed from a 100-foot net to a 300-foot net and done well. He said he did not catch a lot of fish maybe 2 to 5 gallon buckets per year (he noted that was 100 to 125 fish per bucket). He stated he agreed with Mr. Adams that the information was there, but the staff say it was very limited. He said there was information for the commercial fishery but not the recreational fishery. He suggested closing the commercial but not the recreational fishery and limit the season with other restrictions if the Commission had to do it. He reiterated that the hook and line be allowed and require reporting. He added that the staff needed to come out and see for themselves. He stated that what they did was sustainable.

Commissioner Bowman said that in Code Section 28.2-203, which he read, said to not discriminate between user groups. He stated the Commission could not close just the commercial fishery. Mr. Britton stated that the Commission should limit them all.

Associate Member Fox asked if catching and releasing was allowed. Mr. Travelstead responded, yes. He added that Virginia did not prohibit catch and release for any fishery.

Spud Parker, Reedville, was present and his comments are a part of the verbatim record. Mr. Parker said it was the same situation as the Greek government, two sides were telling them what to do. He said that staff did need to fight for a by-catch fishery. He said just like Mr. Rogers he was concerned with a complete moratorium, as it would put him out of business.

Mr. Britton suggested a moratorium by river by year and to obtain the information for proving sustainability. Commissioner Bowman stated that this would not satisfy the ASMFC.

Commissioner Bowman said the matter was before the Commission for discussion or action.

Associate Member Plumlee asked about an effective date of July 1<sup>st</sup> versus January 1<sup>st</sup>. Mr. Travelstead said it was to allow for notice time and for the most part for the spring fishery. He said January 1, 2012 was proposed.



Associate Member Fox asked them to work on the by-catch allowance carefully. Mr. Travelstead suggested that the Commission could ask the staff to continue to pursue it. Commissioner Bowman asked if it would be done by August 1<sup>st</sup>. Mr. Travelstead said it would take a long time for the ASMFC to come to any resolution.

Associate Member Robins said the stakeholders here have stated it well regarding the value of this fishery, historically and now; and, this was a culturally important species. He said there was a lack of evidence to prove sustainability even if only for one river. He said it was not provable now that it was a sustainable fishery, as there was no scientific evidence to argue. He added there were offshore concerns, too. He stated the staff had only recommended what they could, but he did feel they should continue to explore a by-catch allowance.

Associate Member Tankard stated if there was to be a by-catch allowance then it was needed for the commercial fishery, as well as the recreational fishery.

Mr. Travelstead said that this was a fishery known around the State. He said the herring was vulnerable even on the way from the ocean into the Bay. He stated mortality occurs even during migration to other areas. He said staff would keep an eye on the herring stocks even with the moratorium, and try to get funding for proving sustainability.

**Associate Member Plumlee stated he supported the moratorium and asked that a motion should be made to include a plan of direction to get sustainability of the fishery. He moved to approve the staff recommendation for Regulation 4VAC20-1260-10, et seq. to be made effective by January 1, 2012. He added for the staff to continue with the discussion for a by-catch plan. Associate Member Holland seconded the motion. The motion carried, 9-0. The Chair voted yes.**

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12. **PUBLIC HEARING:** Proposed amendments to Regulation 4VAC20-490-10 et seq., "Pertaining to Sharks", to establish an annual commercial quota, buyer reporting requirements, a control date, and other measures.

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

Mr. Grist explained that the ASMFC Spiny Dogfish and Coastal Sharks Management Board approved Addendum III to the Interstate Fishery Management Plan for spiny dogfish. The addendum divided the southern region quota for New York through North Carolina, or 42% of the Coast-wide quota into state-specific share. Virginia received 10.79% of the annual Coast-wide quota from May 1, 2011 through April 30, 2012, or 2,159,000 pounds.

Mr. Grist stated that on April 27, 2011, the ASMFC Spiny Dogfish and Coastal Sharks Management Board issued preliminary region and state quotas adjusted for overages from 2010-2011 fishing season for the 2011-2012 fishing season. The adjusted state-specific quota for Virginia for May 1, 2011 through April 30, 2012, is 2,148,224 pounds.

Mr. Grist said that the sub-committee reviewed data concerning the recent activity of spiny dogfish limited entry permit holders, and noted that some permit holders were not utilizing the permit to harvest spiny dogfish. The sub-committee recommended setting a management control date of April 30, 2011 for future spiny dogfish management decisions concerning the limited entry fishery.

Mr. Grist said the sub-committee recognized that some reporting by species was likely in error, where some harvesters reported dogfish unknown on their reports during a time of year that is historically only a spiny dogfish fishery, November through February. The sub-committee requested that any individual, who reported any dogfish type from November through February 2006 through 2008, be re-evaluated as if they had reported spiny dogfish specifically during that same time period. This recommendation would allow up to five harvesters into the spiny dogfish limited entry fishery.

Mr. Grist explained that the Commission had established an internal regulatory review committee with representatives for the Fisheries Management Division, Habitat Management Division and Law Enforcement. The committee's task is to provide consensus reviews and recommendations for the specific wording of regulations and amendments that are proposed for an upcoming public hearing.

Regulation Section	Page(s)	Description or Reasoning
<b>PREAMBLE</b>	<b>1</b>	<b>Effective date would be July 1, 2011.</b>
<b>4 VAC 20-490-20</b>	<b>1</b>	<b>Clarifies definition of commercial shark fisherman.</b>
<b>4 VAC 20-490-30 (C)</b>	<b>5</b>	<b>Exchange the word 'have' with possess.</b>
<b>4 VAC 20-490-30 (E)</b>	<b>5</b>	<b>Strike 'in state waters'. Unless present at the time of harvest, law enforcement cannot identify where shark was caught.</b>
<b>4 VAC 20-490-40 (F) and 4 VAC 20-490-41 (B)</b>	<b>6 and 7</b>	<b>Clarify definition for when to fillet a shark as the current provision is being circumvented and law enforcement does not know if the fins were truly removed after landing.</b>
<b>4 VAC 20-490-42</b>	<b>8</b>	<b>Clarify section title.</b>
<b>4 VAC 20-490-42 (A)</b>	<b>8</b>	<b>Establish commercial quota with new section A, rename following sections.</b>

<b>4 VAC 20-490-42 (B)</b>	<b>8</b>	<b>Strike ‘Exclusive Economic Zone’ as federal waters suffices.</b>
<b>4 VAC 20-490-42 (D)</b>	<b>9</b>	<b>Clarify as pertaining to state quota instead of interstate quota.</b>
<b>4 VAC 20-490-42 (E)</b>	<b>9</b>	<b>Clarify any spiny dogfish shall only be sold to a federally permitted dealer.</b>
<b>4 VAC 20-490-44 (A.3)</b>	<b>10</b>	<b>Additional qualification criteria for limited entry permit.</b>
<b>4 VAC 20-490-46</b>	<b>10-11</b>	<b>Quota monitoring requirements additions.</b>
<b>4 VAC 20-490-47</b>	<b>11</b>	<b>Establishes management control date</b>

Mr. Grist explained that proposal had been advertised in accordance with Code Section 28.2-209 for a public hearing.

Mr. Grist noted that no public comments had been received to date by staff.

Staff recommended adoption of amendments to Regulation 4VAC 20-490-10, to establish a state commercial quota, additional qualification criteria for the spiny dogfish limited entry permit, quota monitoring requirements, and a management control date.

Commissioner Bowman opened the public hearing.

John Forrest, commercial fisherman, was present and his comments are a part of the verbatim record. Mr. Forrest stated he had been a commercial fisherman since 1965. He said he had been involved in the rockfish fishery as he had had a problem during the spring dogfish season in 2006-2007. He said he had been catching dogfish as long as he had been catching rockfish. He said when his father was hurt in 2008 he could not fish as he had to take care for him and when he came back in 2009, he was told he did not have a permit to catch dogfish. He tried to get back into the fishery later when there were hardships exemptions available, which he attended the meeting to request but was told there were no more transfers. He stated the new regulations made it impossible to get a permit. He said he now fishes for striped bass in the ocean, but he needs to get back into the dogfish fishery. He said he had caught 5,000 pounds by himself on his vessel. He said he was concerned with the control date recommendation and asked to be allowed to purchase a permit.

Mr. Travelstead explained that staff had been dealing with this issue for over a year. He said there was a permit system, but the established quota was small. He said in the permit system there were too many who qualified. He said if the permits were transferred they might go from not being used to someone who would use them. He said there had been a series of steps taken to reduce the fishery as there cannot be a fishery with a 100 plus permits. He said if only the 30 or 40 active permittees stay in the fishery that was okay, but if more permits became active, such 60 or 80, the Commission may have to activate

the control date. He said staff sympathizes, but there needed to be consistency by VMRC. He said the Commission cannot help Mr. Forrest, if they do, then others would want theirs also. He said staff recommended adoption of the control date. Commissioner Bowman stated he agreed with staff.

Mr. Forrest stated he worked in 2007 after Christmas when he lost his nets and went to work on another boat; his catch was reported then. Mr. Forrest stated you could request a permit transfer for medical reasons, immediate family, or active military. Associate Member Robins said with the control date, if the harvest numbers justify the number of permits at some point then the Commission might be able to allow transfers.

Associate Member Plumlee asked if non-active permittees age out without a transfer does the permit get phased out and added to the inactive permits. Mr. Grist explained that it would be phased out unless transferred through a hardship. If a permit that is inactive is allowed to be transferred then the Commission would actually be adding to the activity. Mr. Grist also stated that if you plan for a future control date, this presents a problem as it could lead to false reporting, but with a control date set preceding the decision would prevent issues with false reporting. Associate Member Plumlee stated it was bad to throw dead fish overboard. Mr. Grist said he understood Mr. Forrest's concerns.

Joe Kelly, Chincoteague Fisherman, was present and his comments are a part of the verbatim record. Mr. Kelly stated the management plan was bad as the quota has been low for some years. He said the ability or inability to land the fish hinders future quotas. He said the Commission needed to look at how other states manage the fishery. He said if the fisherman has a commercial card he should be allowed to land these fish. He suggested the inactive permittees should be allowed to utilize agents, set a 30-box limit as this would help regardless of the number of permittees, and if they are allowed to catch dogfish here then offshore there would be other fisheries. He said management issues should be established to help the fishermen.

J. C. West, Gloucester Fisherman, was present and his comments are a part of the verbatim record. Mr. West stated he had not reported his catch correctly when he put just dogfish and not spiny dogfish and now he cannot get a permit. He said he had worked in the fishery for 40 years and he needed to get his permit back.

Commissioner Bowman said the matter was now before the Board.

Associate Member Bowden said that there was a lot of dogfish out there, but the quota was low. He said he was on the committee and they had set the requirements for catch very low, if they had just worked 60 days per year for three years and reported even just one pound of spiny dogfish. He said Mr. West did have a legitimate claim. He said this year was not good and they had tried to be fair. He said that so many individuals had permits that did not deserve them, but qualified. He said if there were 102 permits allowed and they all fished with the current quota the season would only last seven days.

He said he sympathized with the fishermen and if they can prove they are eligible then they must come before the Commission and pursue it. He said he wished the quota were more and this year was colder than usual. He stated two million pounds was not a lot of quota and he wished they could help everyone. He said if the quota was to be increased then there could be more permittees allowed.

Associate Member Robins asked about the control date and Mr. West's case. Mr. Grist said there would be a control date for future discussions that could include redefining the permit requirements and new criteria for getting into the fishery. He said the current criteria were not locked in for the future and there were unlimited options available if the control date was used.

Associate Member Plumlee said he was confused that there were 102 permits and staff was counting on them not being used. He said this was not equitable and a transfer should go to those who would be active. Mr. Grist explained that there were enough active permittees in the fishery now to catch the quota.

Commissioner Bowman asked for action.

**Associate Member Robins said that the historical context was important to this large scaled fishery in the 1990's. He moved to accept the staff recommendation for Regulation 4VAC20-490-10 to establish the quota and criteria for a control date. Associate Member Holland seconded the motion. The motion carried, 9-0. The Chair voted yes.**

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**13. RECREATIONAL FISHING ADVISORY BOARD RECOMMENDATIONS FOR PROJECT FUNDING.**

Sonya Davis, Fisheries Management Specialist, Sr., gave the presentation and her comments are a part of the verbatim record.

Ms. Davis said that a few years back the staff and RFAB changed from tow project review cycles to a single project review cycle that involved 4 meetings, from May to September.

Ms. Davis explained that the RFAB began this review cycle with 17 project proposals. The RFAB recommended the funding of four, totaling \$23,094. Funding recommendations for the other 13 projects would be provided in September.

Ms. Davis stated that the status of the funds available, for projects, as of March 31, 2011, from the VSRFDF, is \$703,079.

Ms. Davis said she would be glad to answer any questions about the four projects.

Associate Member Tankard asked about the project for Hope House and Oak Grove Nursing Home Fishing Excursions and Clinics. Ms. Davis said this was a project which provided fishing events by the Angler Club for mentally and physically challenged adults and seniors, who live in a nursing home.

Commissioner Bowman said that this was allowed by the Code of Virginia for the elderly and for the mentally or physically impaired individuals so that they could participate in this type of project. Associated Member Tankard commented that he agreed that this was a good project.

Commissioner Bowman opened the public hearing for comments. There were none. He said the matter was before the Commission.

**Associate Member Tankard moved to approve the recommendations by the RFAB and staff. Associate Member Holland seconded the motion. The motion carried, 7-0. The Chair voted yes. Associate Member Schick was absent during this presentation and Associate Member Plumlee had left the meeting for the rest of the day.**

The following four projects were recommended for approval by the RFAB:

- A) 2011 Sunshine Children's Fishing Program. Denny Dobbins, Portsmouth Anglers Club. \$7,194. Vote 8-0.
- B) 2011 Saxis and Morley's Wharf Fishing Piers Youth Fishing Tournaments (Year 10). Allen Evans, Eastern Shore of Virginia Anglers Club. \$2,000. Vote 8-0.
- C) 2011 Youth Developmental "Hooked on Fishing" Adventure (Year 4). Bob Hewlett, Virginia Charter Boat Association. \$9,700. Vote 8-0.
- D) 2011 Hope House & Oak Grove Nursing Home Fishing Excursions and Clinics. J. Stephenson, P. Anderson, Great Bridge Fisherman's Association. \$4,200. Vote 8-0.

\* \* \* \* \*

- 14. KEITH J. MUMMERT:** Appeal of decision denying his request for an exception to the two-year waiting period for a Commercial Fishermen Registration License.

Jack Travelstead, Chief Fisheries Management, explained that the appellant had requested a continuance.

**Associate Member Holland moved to approve the request to table this item. Associate Member Bowden seconded the motion. The motion carried, 7-0. The Chair was absent and Associate Member Plumlee had left the meeting for the day.**

Tabled at the request of the appellant.

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- 15. Review of federal funding for oyster restoration.**

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

Mr. Travelstead said staff met on June 27, 2011 for 2.5 hours with TNC, CBF, VMRC, and the Corps. He said agreements had been reached on the disagreements over expenditure plans with the \$2.5 million available. He said there were agreements on what would be done with \$1.6 million of the total available. He said if this money were not to be spent they could be lost forever and no one wanted that to happen.

Mr. Travelstead said the first part of the money would be spent on conducting a survey of the fossil shell deposit and second, the Corps would consider the using of the money to study the rotational harvest areas which were critical to the Oyster Restoration Plan. He said for this there would be modeling, science and surveys to document the ecological benefits of the rotational harvest areas. He said this would cost the Corps \$300,000 to prepare a research package. He said the remainder of the money would be requested to be held for future years. He said a letter had been sent to the Corps in which it told them that if this amount was less than \$300,000, it was not worth holding and could be given to the Baltimore Corps. He said staff wished to move forward on this with the Board's concurrence.

Mr. Travelstead explained that a Program Management Team was to be formed and made up of representatives from NOAA, the Corps, Virginia's Oyster Industry, the Nature Conservancy and the Chesapeake Bay Foundation. He said they would meet to design a long-term program and evaluate tributaries restoration proposals. He said a major area of concern was the existing Great Wicomico River sanctuaries that need rehabilitation. He

said all agreed that this rehab work should move forward. He said if they were not used then it may be held in abeyance for next year.

Mr. Travelstead stated this was a positive meeting and reinforced the goal to restore the native oysters.

Commissioner Bowman said the matter was before the Commission.

**After a little more discussion about procedures and role of Corps versus the Plan group, Associate Member Fox moved to endorse the policy position stated in the letter to the Corps of Engineers and copied to Senator Ralph F. Northam. Associate Member Tankard seconded the motion. The motion carried, 8-0. The Chair voted yes.**

Mr. Travelstead said the Corps Master Plan for oyster restoration would be provided to the public later this summer-fall and the Policy Team would be reviewing it and making comments. He also explained that in a press release, which he read, new oyster disease research involved in restoration and management plans said that reefs should be in pleased high salinities which had been the focus of the state oyster replenishment.

\* \* \* \* \*

**16. EDWARD H. BENDER:** Formal Hearing to appeal the Commission's decision to license and locate a pound net (0031) off Fisherman's Island.

Associate Member Robins recused himself from participation and voting for this hearing.

Commissioner Bowman announced the next hearing. He proceeded to review and read documents into the record regarding this hearing.

- 1) 5-10-11 Letter to the Commissioner from Edward H. Bender demanding a hearing of appeal regarding the Kenneth Heath pound net application and approval.
- 2) Code Section 28.2-216 (A & B) regarding Commission hearings.
- 3) 6-14-11 Response by Commissioner Bowman to Edward H. Bender's letter.

Commissioner Bowman explained that the petitioner would be heard first regarding the petition against the agency, ask questions of others and agency personnel. Finally, Mr. Bender would be allowed to provide rebuttal testimony to testimony provided by others.



Commissioner Bowman stated that he would not be participating in the motion vote unless there was a need for a tie breaker. He asked Mr. Bender how many speakers he would have to comment. Mr. Bender indicated two.

Commissioner Bowman swore in all parties that would be testifying for this hearing.

Edward H. Bender, was sworn in and his comments are a part of the verbatim record. Mr. Bender announced that he objected to Commissioner Bowman chairing the meeting. Commissioner Bowman asked him to explain why he objected. Mr. Bender explained that both he and Commissioner Bowman did not like each other and there had been problems before between the two. He went on to say that the only reason the hearing was being held today was because of a Court Order. Commissioner Bowman referenced Code Section 28.2-102 where it designates him as the Chairman of the VMRC Board, and that he would not vote unless there was a tie.

Mr. Bender said that he was 81 years old and he had been fishing in the Fisherman Island area since the 1970's where he had his traps. He referenced historically that he had his trap 100 feet south of the CBBT and the navy dock, which was before the 2<sup>nd</sup> span of the CBBT was built. He said this was at a time when it was not required to fish a fixed fishing device in order to keep the location for the trap. He explained also that the assignment of a responsible MPO for a region was divided by the CBBT. He said when Kenneth Heath requested the location south of the CBBT and the other Officer was unaware of his traps. He said this was no problem until Mr. Heath moved the location without the permission of the Officer.

Commissioner Bowman noted that Code Section 28.2-301 specified the length and spacing of devices that shall not be longer than 1,200 feet, a distance of 200 feet between each structure in a row, and distance of 300 yards between devices that are in separate rows. He noted that a violation of this Code Section would result in the device being required to be removed.

Mr. Bender explained that Mr. Heath's was 100 feet south of the CBBT and his was 100 feet north and they must be 300 yards apart. He noted also that they cannot be relocated except with the Marine Police Officer approval. He pointed out that Mr. Heath's was right in front of Mr. Bender's trap and took his expected catch. He stated he got a Restraining Order and it came before the Board and the Commission to let Mr. Heath stay. He took this to the Supreme Court and he won the case making Mr. Heath's net illegal. He added that originally he had not made Mr. Heath a party to the Restraining Order. He said he put his trap 100 feet North and Mr. Heath's was 100 feet South. He said he drove 7 poles into the bottom for his trap and the Marine Police Officers revoked his license and Mr. Heath was allowed to stay on the unlicensed stand location. He said he had been there since the 1970's, 100 feet from the Navy dock. The dock was gone but the poles still remain and the Bender net was 900 feet from the CBBT, but the Marine Police Officer said it was not. He said also that it had not been moved since 1970.

Commissioner Bowman asked if there was any net 900 feet from the CBBT. Mr. Bender said he was licensed for it, but there was no net.

Mr. Bender explained that the evaluation map showed one structure originally which was one trap and there were no Heath pound nets, but now the map showed it as it was added by the Commission.

Commissioner Bowman asked about the 4210 net and Mr. Bender responded it belonged to his daughter-in-law. Commissioner Bowman asked if he had an interest in the net and Mr. Bender responded yes. He explained he once owned them all and when the regulation regarding trout was changed, he divided them among the family in order to catch trout. He said this one was given to Tammy Bender. Paul Kugelman, Assistant Attorney General and VMRC Counsel asked if him if the 4210 was conveyed to his wife and then to the daughter-in-law. Mr. Bender responded yes. Mr. Kugelman asked Mr. Bender if he was involved with all of the conveyances. Mr. Bender said originally when it was conveyed to his wife.

Mr. Bender stated he was denied a hearing by Commissioner Bowman, from which he read the letter. He explained that the letter said that 900 feet intervals were correct and a map of the survey was attached. He said the map originally showed only Mr. Bender's nets and there were no structures for Mr. Heath until they were added by the Commission.

Mr. Bender explained that now with the new law there is a pound net notice published for the public comments and the description included footage as well as the latitude and longitude. He said the newspaper notice said 4,000 or 6,000 feet, plus the latitude and longitude, but the application said 2,000 and 4,000 feet plus the latitude and longitude. He asked who understands the Latitude and longitude, not the public as they only understand footage. He said he would have had to go out and check for the latitude and longitude. He noted the latitude and longitude only helps the Marine Police Officers. He said the only reason he knew about the notice was because his son told him and with the footage he did not feel he needed to protest it. He stated it was fraudulent and ¼ mile closer to the CBBT. He said the Commission used the latitude and longitude to permit the pound net.

Mr. Bender said that he took the map and drew a line on the map that was 6 5/8 inches long/75 feet of 4,000 which made it 700 feet from Tammy Bender's trap. He said Commissioner Bowman in his letter said it was legal and he asked how it had been determined that it was 900 feet from his trap.

Commissioner Bowman asked him to explain how he would accurately determine the footage with today's technology. Mr. Bender said he used a wheel to measure the distance, which he gave to the Marine Police Officer. He said to determine the 900 feet distance he would cut a piece of rope for the 900 feet to do the measuring and drop a buoy to mark the 900 feet. He said now they use the GPS to give the footage from the

next structure, but unlike him they were ¼ mile off. Commissioner Bowman said by the old method, an oak tree was used for a marker, which was very rudimentary. He said the Commission decided to use the latest technology that was available, such as the GPS. He reiterated that the staff used the best technology. Mr. Kugelman stated that Tammy Bender did not protest and his son had told him that it was north of him. He said if it was less than 900 feet, Mr. Bender did not measure it from the notice information showing Mr. Heath was not where it advertised.

Commissioner Bowman asked Mr. Bender when was did he tell someone at VMRC about his concerns. Mr. Bender said when he sent in his letter to Commissioner Bowman. Commissioner Bowman asked about when he told VMRC after his son had told him that Mr. Heath was putting in the poles. Mr. Bender said this was done long after the notice of the pound nets.

Mr. Bender stated again that he objected to Commissioner Bowman chairing the hearing. He asked if he was not voting why was he was still chairing. Commissioner Bowman reiterated that it was his job.

Commissioner Bowman asked if Mr. Bender's son wished to comment.

Edward Mark Bender, son, was present and his comments are a part of the verbatim record. Mr. Bender explained that it was late spring, early summer when Kenneth Heath applied for the two stands. He said when he went to the website and read the notice it said 4,000 – 6,000 feet above the CBBT. He said the latitude and longitude do not mean anything unless you are out on a boat. He said the description was vague and since it said north, they were not concerned. He said now it was the computer age and the printed description is sent out each year and some are wrong in the record. He said the print out said it was 100 feet south of the Navy dock which is how it had been since the 1970's. He said the footage was not what was in the notice, too vague a description.

Commissioner Bowman asked if he had seen the application and Mr. Bender said he had only seen the advertisement. He added he had looked at the website and the newspaper. He said he had known the location of his father's trap all of his life and he felt like they had been duped.

Commissioner Bowman requested that staff present all the information to be put into evidence. Mr. Kugelman agreed.

Commissioner Bowman said he would introduce Mr. Bender's information for the record that included the petition, # 11, a four page packet, which included two letters, one being his letter to Mr. Bender with one map and the notice of the application for the pound net.

Mr. Travelstead introduced the following information:

VMRC #1: 5/12/11 letter from Mr. Bender requesting the hearing.

VMRC #2: 5/18/11 letter from Commissioner Bowman denying the hearing with the attached survey done by staff to determine the distance between nets meet requirements of the law.

VMRC #3. The survey showed the pound net to be 1465 feet from Tammy Bender's net.

VMRC #5: Document showing that Mr. Bender enlarged the lawsuit to restrain the setting of the net by Mr. Heath.

VMRC #6: Notice prepared by staff for applicant's advertisement, which is required to run one day in the newspaper of the area of the net.

VMRC # 7 & 8: The two Heath applications with the distance indicated in the Notice.

Mr. Travelstead said that there was a 30-day comment period during which they received approximately a dozen protests from recreational fishermen. He said the letters were part of the record for the July 27, 2010 Commission meeting.

Commissioner Bowman asked if this issue was on the agenda which was posted on the website. Mr. Travelstead responded yes.

Mr. Travelstead explained that it was heard and only Mr. Heath made comments at the hearing. He said the Commission approved the latitude and longitude of the notice and the Commission was shown the maps, which showed the locations of the nets on both sides of Tammy Bender's nets.

Commissioner Bowman asked if any comments had been received from the Benders. Mr. Travelstead said that he did not receive any comments. He said VMRC #15 was the summary of the minutes for the public hearing held July 27, 2010.

Commissioner Bowman asked for Paul Rogers, surveyor, to comment.

Paul N. Rogers, Surveyor, was present and his comments are a part of the verbatim record. Mr. Rogers in response to Commissioner Bowman's questions said he was the surveyor of the site. He said he had worked for VMRC for 17 years and he had conducted the survey with the latest technology. He said the numbers he used were provided by Law Enforcement personnel.

Mr. Kugelman asked Mr. Rogers if he produced the document in the normal manner in which a survey was done and if it were a part of the VMRC records. Mr. Rogers responded yes to all questions.

Commissioner Bowman offered Mr. Bender the opportunity to question Mr. Rogers.

Mr. Bender asked Mr. Rogers if he used the latitude and longitude for the survey. Mr. Rogers responded yes. Mr. Bender asked if he was told the 4,000 and 6,000 feet information and if he had found any discrepancy why did he not tell someone it was wrong. Mr. Rogers said he only used the latitude and longitude. Mr. Bender said this was for the Marine Police Officers' benefit. Mr. Rogers said it was also for mapping purposes. Mr. Bender again reiterated that the public only use the footage and do not use a GPS.

Mr. Kugelman asked Mr. Rogers why he created the map. Mr. Rogers said Law Enforcement requested it. Mr. Kugelman asked when was it done. Mr. Rogers said he started it on April 20, 2010 when the Heath's application was received. Commissioner Bowman asked him who gave him the numbers. Mr. Rogers answered Sgt. Ballard.

Mr. Travelstead stated that Sgt. Ballard would be able to provide more history. He said in the packet VMRC #9 and VMRC #10 were the current licenses for Bender showing the stake gill net was 900 feet north. He added that VMRC #11 and #12 was the licenses showing Tammy Bender as owner of the pound net and her net was 1,000 north of the Navy dock. He stated, but this was not where the net was actually located as the survey showed it in an incorrect location. He added that that staked net and the Heath's net were a distance of 917 feet apart and the Tammy Bender's net was 1,450 feet from Heath's net.

Commissioner Bowman asked Mr. Bender if he had questions of Mr. Travelstead.

Mr. Bender asked Mr. Travelstead if it was 600 feet from what the license said and that made it a total 1,600 feet. He asked how long had it been there. Mr. Travelstead stated he did not know. Mr. Bender noted it had been there for 7 or 8 years in that same location.

Sgt. Bruce Ballard was present and his comments are a part of the verbatim record. Sgt. Ballard in response to questions from Commissioner Bowman said he had been 15 years with VMRC and he was the supervisor of other Marine Police Officers and he was responsible for the licensing of fixed fishing devices for District #24.

Sgt. Ballard said he received two applications on April 8, 2010 from Kenneth Heath for pound nets in the Fisherman Island area. He said Mr. Heath asked him to verify the distances of his nets from any others. He said he looked at his locations and put it on a chart, which showed enough footage to allow another net. He stated that new locations must be approved and he checked them and it all looked good.

Sgt. Ballard said he had told Mark Bender to contact Mr. Travelstead with any questions about the application, which was before the Commission approved it. He said it was not until recently that Mr. Heath started the installation and Mr. Bender came to the Belle Haven office to complain.

Commissioner Bowman asked if the numbers used were checked. He said he, Officer Haynie, and Officer Dunton had checked the information provided. He said they put it on the chart and found that Tammy Bender's net was in the wrong location.

Commissioner Bowman asked if he had taken the application for transfer made by Tammy Bender. Sgt. Ballard said he took the transfer and the form was completed. He said he received the transfer on March 14th and the location for the big trap had been the same so he had no reason to check it since there had not been any problems. He said he asked them if it was correct and the same. He said he was told yes and the application was signed.

Commissioner Bowman allowed Mr. Bender to question Sgt. Ballard. Mr. Bender asked if he had received the applications made by Mr. Heath. Sgt. Ballard said Mr. Travelstead had received the applications. Mr. Bender asked if the application was for 4,000 and 6,000 feet. Sgt. Ballard responded yes. Mr. Bender asked if he knew the requirements for the nets. Sgt. Ballard responded yes, he was aware. Mr. Bender asked if it was checked. Sgt. Ballard said he check the latitude and longitude to make sure of the distance. Mr. Bender asked if all of it was checked and if he could tell the footage was wrong. Sgt. Ballard (inaudible). Mr. Bender asked why no one said anything. Sgt. Ballard said the applications say approximately. He added that the 6,000 was actually 4,620 and the 4,000 was actually 2,470. Mr. Bender asked about what was the footage term. Sgt. Ballard responded the nearest landmark. Mr. Bender said that there were four different locations given. Sgt. Ballard said he was aware of the latitude and longitude. Mr. Bender asked if he knew of the discrepancy. Sgt. Ballard responded yes, sir. Mr. Bender stated that it did not meet the requirements of the notice.

Commissioner Bowman asked Mr. Heath to come forward and asked him to comment.

Kenneth Heath was present and his comments are a part of the verbatim record. Mr. Heath said he called Sgt. Ballard. He said the location he asked for he wanted to be 1,000 feet north of Bender's trap and south of the Tammy Bender's trap. He said he was told yes, he could. He said he took his GPS and a tape measure and when he was a 1,000 feet from Tammy Bender's trap he noted the latitude and longitude and never measured the bridge from north or south, as he was not told to give that information. He said the 1,000 feet was taken from numbers given to him by Sgt. Ballard. He added the GPS readings are on the spot.

Commissioner Bowman asked him how he knew. Mr. Heath said he had gone out and checked it 2 or 3 times and there was plenty of room. He said historically his brother and father had traps in this location and he wondered how Bender could have had his traps here in the 1970's. He said the wheel did not work when measuring distance for the traps as the beach had ripples and the wheel would go up and down over these ripples and the distance would be shorten. He said with the tape measure you could come up with a straight line and the GPS was even better to use. He suggested that the regulations be

changed and all the locations should be established with a survey by VMRC. He said they do it for the oyster ground leases.

Commissioner Bowman allowed Mr. Bender to question Mr. Heath.

Mr. Bender asked Mr. Heath if the wheel was not accurate. Mr. Heath responded no. Mr. Bender asked him why was he ¼ mile off on his measurements. Mr. Heath responded he was not. Mr. Bender said he had said 4,000 and 6,000 feet and that was off. Mr. Heath said that Tammy Bender's location was off. Mr. Bender asked if others were off. Mr. Heath said he agreed. Mr. Bender stated that the footage he put on the application was ¼ mile off.

Commissioner Bowman allowed Mr. Bender to give his rebuttal comments.

Mr. Bender said he had shown that the traps on the public notice were not 4,000 and 6,000 feet and not as it was required by law. He said this was a class 3 misdemeanor. He said the public notice said 4,000 and 6,000 feet so he did not protest it. He said he could read a GPS, but there was no reason. He said the notice gave the footage and the public depended on the public notice.

Commissioner Bowman stated that Mr. Bender was an advocate for the public, as was obvious from the testimony. He said none of the Benders had contacted anyone at VMRC to raise an objection and time had passed and the latitude and longitude was approved. He stated a public hearing had been held and the notice was on the website and in the newspaper.

Mr. Bender asked if Commissioner Bowman was not going to vote why he was commenting. Commissioner Bowman explained that he was just stating the facts. Mr. Bender stated if he would not be voting then he should not be commenting.

Commissioner Bowman said the pound net was based on the latitude and longitude provided. Mr. Bender noticed that it was improperly sited so the agency checked if it met the requirements for the regulation. He said the stake gill net was not set. He said the pound net to the south was not Mr. Bender's pound net, but he had interest in it. He said it was Tammy Bender's and she was not present. He stated the nets were in compliance and the agency had done all it could. He added that if there was a violation a notice to revoke it would be sent and then Mr. Heath could appeal it. He said the only concern was the survey by Law Enforcement and Surveying.

Commissioner Bowman announced the matter was ready for discussion or action.

Associate Member Bowden stated that Mr. Bender had used the wheel and was 600 feet off for the trap and if the trap is less than a 1,000 feet then no other net would be allowed there and 1,000 feet was hardly anywhere when you were on the water. He said there had

been problems in Virginia Beach and landmarks were used such as streets and still there were off. He said with a GPS he would have checked it if he had been out there and it will tell where it is located. He said the public needs to use the latitude and longitude. He said that Bender's trap was 600 feet away from where it was stated to be so mistakes are made. He said the application was available to the public and when Mark Bender asked, Sgt. Ballard referred him to the Newport News office. He said if Sgt. Ballard had said no, then Mr. Bender could have gone to his supervisor. He said Mr. Bender did not see the application and Mr. Heath did not do anything intentionally he only advertised what the Commission told him to do. He said that at that time there was plenty of time to address the problems and he felt there was any number of others that were also wrong. He said he felt there was no attempt to fool anyone and he said Mr. Bender had not once come forward. He noted that if the Bender net was where it was supposed to be the Commission could not say or do anything with the evidence that had been presented. He said it was clearly more than 900 feet, as it was required by law. He said what he or anyone else thought did not make any difference.

Associate Member Schick said with an accurate description all of it would be within legal distance. He said the GPS was correct and if he was on the river he would know where it was. He said if something came up in his area he would go out and check it with a GPS. He said he felt even if he came forward with a protest, it would not have changed anything as it would have no merit. He said he felt there was no intent to defraud.

Associate Member Tankard said Mr. Bender had gone by the 4,000 and 6,000 feet from land and had he known he would have protested it. He said he felt the Commission was doing it halfway of the law as they used the latitude and longitude, which is not used by all the public. He said the fact was that the 4,000 and 6,000 was off, which he had issues with it and the process should stick with them. He said Mr. Heath's suggestion to survey the location was an important one.

Commissioner Bowman requested action by the Board.

Associate Member Bowden asked if action or inaction was the same thing.

Commissioner Bowman asked for a motion three times.

Associate Member Tankard asked what the motion would be for. Commissioner Bowman said it would be to grant the petitioner's request or reject it. He asked VMRC Counsel whether a motion was necessary.

Mr. Kugelman referred to Code Sections 28.2-217 and 218 and explained that the Commission was not required to come to a conclusion, but to issue a decision based on the evidence. Commissioner Bowman stated a motion was needed.



**Associate Member Laine moved to deny the request. Associate Member Schick seconded the motion. The motion carried, 5-1-1. Associate Member Tankard voted no. Commissioner Bowman abstained; Associate Member Robins recused himself; and Associate Member Plumlee had left the meeting earlier for the remainder of the day.**

Petitioner's request was denied.

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There was no further business and the meeting was adjourned at approximately 4:14 p. m. The next meeting will be held Tuesday, July 26, 2011.

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Steven G. Bowman, Commissioner

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Katherine Leonard, Recording Secretary