

## FINAL MINUTES

## Commission Meeting

April 22, 2008

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 )	
John R. McConaugha )	Associate Members
F. Wayne McLeskey )	
Richard B. Robins, Jr. )	
Kyle J. Schick )	
J. Edmund Tankard, III )	
Carl Josephson	Sr. Assistant Attorney General
Jack Travelstead	Chief Deputy Commissioner
John M. R. Bull	Director-Public Relations
Katherine Leonard	Recording Secretary
Jane McCroskey	Chief, Admin/Finance
Sunita Hines	Bs. Applications Specialist
Rob O'Reilly	Deputy Chief, Fisheries Mgmt.
Jim Wesson	Head, Conservation/Replenishment
Joe Grist	Head, Plans and Statistics
Sonya Davis	Fisheries Mgmt. Specialist, Sr.
Joe Cimino	Fisheries Mgmt. Specialist, Sr.
Mike Johnson	Fisheries Mgmt. Specialist
Stephanie Iverson	Fisheries Mgmt. Specialist, Sr.
Laura Lee	Fisheries Mgmt. Specialist
Alicia Middleton	Fisheries Mgmt. Specialist
Holly Aber	Fisheries Mgmt. Technician
Suzanne Mills	Fisheries Mgmt. Technician
Mike Meier	Head, Artificial Reef Program
Rick Lauderman	Chief, Law Enforcement
Warner Rhodes	Deputy Chief, Law Enforcement
William Franklin	Marine Police Officer
David Deemer	Marine Police Officer

Bob Grabb	Chief, Habitat Management Div.
Tony Watkinson	Deputy Chief, Habitat Mgt. Div.
Chip Neikirk	Environmental Engineer, Sr.
Jeff Madden	Environmental Engineer, Sr.
Hank Badger	Environmental Engineer, Sr.
Ben Stagg	Environmental Engineer, Sr.
Jay Woodward	Environmental Engineer, Sr.
Benjamin McGinnis	Environmental Engineer, Sr.
Justin Worrell	Environmental Engineer, Sr.
Elizabeth Gallup	Environmental Engineer, Sr.
Randy Owen	Environmental Engineer, Sr.
Danny Bacon	Environmental Engineer, Sr.
Bradley Reams	Project Compliance Technician

Virginia Institute of Marine Science (VIMS)

Lyle Varnell	Rom Lipicus
David O'Brien	Jacques van Montfrans

Other present included:

Rebecca Francese	Spencer Headley	James Dean Close
Harry A. Marshall, Sr.	James Lane	Glenn Bottomiey
Traycie West	Clyde Roper	Ed Fisher
Ingrid Roper	J. T. Frese	Michelle Meredith
David Saunders	Barbara Saunders	Calvin L. Vann
Elizabeth Martingayle	Nancy Larned	Bob Larned
Jim Harvey	Doug Davis	Les Frena
Ellis W. James	Ed Blanton	Dave Lipscombe
Brian Alperin	Ron Pearson	Martin Warach
John W. Wilson, Jr.	Sylvia Bunsavage	John E. Bunsavage
Dana Sanford	Kristina Villam	Charles D. Thrift, Sr.
Charles D. Thrift, Jr.	Barbara McArthur	Jim Waterfield
Jim Harvey	John K. Tubbs, Jr.	Warren Veazy
Karen Shafter	Phill Roehrs	Mike Mundy
E. A. Wrenn	G. D. Ware	Dr. Ellen Woodruff
Betty Jean McMurrin	Donnie Thrift	Derek Thrift
Douglas F. Jenkins, Sr.	Roger Parks	David Nobles
F. L. Benson, Jr.	Ann Bender	Ken Smith
Freeland Mason	Gene Harrison Knoop	Kenneth R. Carpenter
Frank Kearney	Amy Firth	Patrick Lynch
Gerald Parks	Kathy Sturgis	Allison White
Andrew Sturgis	Chris Moore	Joe Palmer
John Soter	Lee R. Smith	Lee Anne Washington

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Nelson I. Ortiz  
Ken Diggs, Jr.  
Lee S. Flanders  
Peter Nixon  
Richard Crockett  
Bryan Riggs  
Willie West, Jr.  
John B. Graham, III  
Kristina Rohall

Robert Jensen  
Dennis Dalheim, Jr.  
Lester H. Moore, Jr.  
Frances Porter  
Dean Dise  
David Bradshaw  
Bob Pride  
Ken Diggs, Sr.  
Beth Brown

Charles Waddell  
Ty D. Farrington  
Harry Jackmon  
Don Crockett  
James D. Shackelford  
Jamie Crockett  
Tommy Leggett  
Todd Spencer

and others.

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Commissioner Bowman called the meeting to order at approximately 9:33 a.m. All Associate Members were present.

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

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**APPROVAL OF AGENDA:** Commissioner Bowman asked for any changes to the agenda. Tony Watkinson, Deputy Chief, Habitat Management, explained that there were several requests for a deferral and an addition to the agenda. He said that for Item 9, John Aellen, #07-1919, the applicant, had requested a deferral until May. He said that Carl Josephson was prepared to brief the Commission on the easements being granted for the Hampton Roads crossing project heard last month for Virginia Natural Gas, Inc., #07-1036.

Commissioner Bowman stated that this would be heard after Item 3, the consent item.

Mr. Watkinson stated that a deferral had been requested by individuals in opposition to Item 10, City of Virginia Beach, #07-2035. He explained that the City had agreed to this deferral as long as it was heard at the May Commission meeting.

Mr. Watkinson stated that the applicant for Items 5 and 6, Compton and Associates, #06-1000, had requested that these items be deferred until May.

Commissioner Bowman stated that these deferral requests would be discussed now.

**City of Virginia Beach, #07-2035, Item 10:**

Commissioner Bowman asked if anyone in opposition was present for this item.

Elizabeth Martingayle came forward and was sworn in. Her comments are a part of the verbatim record. Ms. Martingayle explained that she had spoken the day before at approximately 5:00 p.m. with Mr. David Hansen, who is with the City, who told her that if the Commission granted the deferral and agreed to hear it no later than May, then they would agree to it.

Rebecca Francese, agent for the City of Virginia Beach, was sworn in and her comments are a part of the verbatim record. Ms. Francese stated that she was not aware of any such agreement to a deferral and was ready to proceed with the matter today.

Commissioner Bowman stated that he had received a call at his home at 9:00 p.m. the night before, informing him that there would be no problem with a May motion.

**Associate Member Robins moved to approve the request for a deferral. Associate Member Bowden seconded the motion. Commissioner Bowman explained that this approval for a deferral was based on the information provided to VMRC as being true. The motion carried, 9-0. The Chair voted yes.**

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

\* \* \* \* \*

**Compton and Associates, #06-1000, Items 5 and 6:**

Commissioner Bowman asked for the applicant or his representative to come forward.

Nat Compton, applicant, was sworn in and his comments are a part of the verbatim record. Mr. Compton stated that he was requesting a deferral. He said originally he was told that he could not be granted a deferral. He said that the reason he was making this request was that he wished to obtain legal counsel to represent him in this matter. He said that his attorney could not be present at the hearing today. He also said that he had witnesses which he would have here next month to speak on his behalf.

Commissioner Bowman explained that because this was both a subaqueous violation and wetlands appeal, he as Commissioner could not grant a deferral. He said this would have to be done by the Board. He said in a discussion with Mr. Compton's attorney, Ms. Cynthia Ewing, they had discussed that Mr. Compton would not be allowed the use of the

alleged unlawful structures in the interim until they had been proven to be lawful. He said no benefits should be derived from an alleged unlawful structure.

**After further discussion regarding the conditions suggested by the Commissioner, Associate Member Tankard moved to approve the request for a deferral of the matter until next month. Associate Member McLeskey seconded the motion. Commissioner Bowman asked if this included the conditions suggested by him. Associate Members Tankard and McLeskey both agreed. The motion carried, 9-0. The Chair voted yes.**

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**MINUTES:** Commissioner Bowman asked, if there were no corrections or changes, for a motion to approve the March 25, 2008 meeting minutes. Associate Member Robins stated that for Item 6 for George DeMarco (#07-1164) he had been the one to vote no for the first motion (Page 28). **Associate Member Robins moved to approve the minutes, as amended. Associate Member McConaugha seconded the motion. The motion carried, 8-0-1. The Chair voted yes. Associate Member Bowden abstained because he was not present at the last meeting, as he was attending an important fishery meeting.**

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

Bob Grabb, Chief, Habitat Management Division, reviewed the eight page two items, 2A through 2I, for the Commission. He said that staff was recommending approval of these items. His comments are a part of the verbatim record.

Commissioner Bowman opened the public hearing and asked if anyone was present, pro or con to address these items. There were none, therefore, the public hearing was closed.

Commissioner Bowman asked for a motion for Items 2A through 2I. **Associate Member McLeskey moved to approve these items. Associate Member Schick seconded the motion. The motion carried, 9-0. The Chair voted yes.**

- 2A. **RICHARD KEELER, #08-0220**, requests authorization to construct a 42-foot by 12-foot bridge approximately 6 feet above Cedar Creek near where Route 604 crosses Cedar Creek at the Frederick County/Shenandoah County line. Staff recommends a royalty in the amount of \$756.00 for the encroachment over 504 square feet of State-owned submerged bottom at a rate of \$1.50 per square foot.

Royalty Fees (encroachment 504 sq. ft. @ \$1.50/sq. ft.).....\$756.00  
 Permit Fee.....\$100.00  
 Total Fees.....\$856.00

**2B. FAIRFAX COUNTY PARK AUTHORITY, #02-2050**, requests authorization to modify their previously authorized permit to include the additional maintenance dredging of approximately 10,000 cubic yards of sediment to restore maximum depths of minus five (-5) feet below mean low water from the marina entrance channel within Lake Accotink and the original streambed of Accotink Creek within the boundaries of Fairfax County.

Permit Fee.....\$100.00

**2C. FAIRVIEW BEACH, LLC, #06-1440**, requests a modification to their existing permit to include the installation of eight (8) 7-foot wide by 8-foot long, concrete, hexagonal boxes with riprap transition and to tie together two existing riprap breakwaters adjacent to their property situated along the Potomac River in King George County. Recommend a permit condition which will require the implementation of an acceptable monitoring plan.

Permit modification.

**2D. DEPARTMENT OF THE NAVY, #07-2694**, requests authorization to remove, replace, and modify the piers and buildings at the Lambert's Point Deperming Station situated on the Elizabeth River in the Cities of Portsmouth and Norfolk. The proposed project will significantly decrease the encroachment over State-owned submerged land as compared to the existing structures.

Permit Fee.....\$100.00

**2E. CITY OF WAYNESBORO, #07-2641**, requests authorization to install an 18-foot by 25-foot concrete outfall apron in the South River, to accommodate the replacement of an existing outfall at their wastewater treatment plant in the City of Waynesboro.

Permit Fee.....\$100.00

**2F. CITY OF WAYNESBORO, #08-0137**, requests authorization to install 96 linear feet of replacement waterline, by directional drill method, beneath the South River in the City of Waynesboro.

Permit Fee.....\$100.00

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2G. WESTERN BRANCH DIESEL, #08-0164, requests authorization to maintenance dredge 1,850 cubic yards of State-owned subaqueous material to maintain a previously permitted depth of minus six (-6) feet at mean low water, adjacent to their facility situated along the Western Branch of the Elizabeth River in the City of Portsmouth.

Permit Fee.....\$100.00

2H. HARPER AVENUE, LLC, #08-0452, requests authorization to maintenance dredge on an as-needed basis, approximately 100,000 cubic yards per dredge cycle, of State-owned subaqueous material from an approximately 750-foot by 900-foot basin to restore and maintain maximum depths of -36 feet at mean low water, adjacent to the Earl Industries facility situated along the Elizabeth River at its confluence with Scotts Creek in the City of Portsmouth.

Permit Fee.....\$100.00

2I. PERDUE FARMS INC., #08-0525, requests authorization to maintenance dredge 10,000 cubic yards of subaqueous material to restore maximum depths of -42 feet at mean low water in their existing mooring basins adjacent to industrial property at the confluence of Jones Creek and the Southern Branch of the Elizabeth River at 501 Barnes Road in Chesapeake. Recommend approval with the inclusion of our standard dredging conditions, including a pre-dredge conference and post-dredge bathymetric survey of the areas to be dredged.

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’s Board).

3A. HOLCOMB INVESTMENTS, #03-0087, requests application reactivation and after-the-fact authorization to retain 283 linear feet of vinyl sheet-pile replacement bulkhead and backfill at the Chesapeake Boat Basin commercial marina on Indian Creek at Kilmarnock Wharf in Lancaster County. The bulkhead was constructed after the draft permit documents were sent to the applicant for payment and signature, and later resent with a reminder. The applicant never returned the signed documents for final permit execution. The applicant has agreed to triple permit fees of \$300.00 and a civil charge in the amount of \$1,800.00 commensurate with minimal environmental impact and a major degree of deviation.

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

Mr. Grabb explained that on March 5, 2003, Commission staff sent the draft permit to Mr. Clay Holcomb, owner of the marina and agent for the bulkhead project, for signature and payment of the required fees. Royalties were assessed for the encroachment over State bottom, but were not being collected at the time. While reviewing the VMRC files in 2005, it was discovered that Mr. Holcomb never returned those documents. A reminder, with a new set of draft permit documents was sent to him on February 28 of that year.

Mr. Grabb stated that on March 5, 2008, staff received a new application for work at the Chesapeake Boat Basin and upon site inspection it was discovered that the replacement bulkhead had been built but the permit documents had never been finalized and had since expired. Staff informed Mr. Holcomb that he was in violation for constructing the bulkhead without a permit and that we would not entertain any new applications at the subject property until the matter was resolved. In a letter dated March 10, 2008, Mr. Holcomb returned the signed permit documents with a check for the \$100.00 permit fee. In his letter, he apologized for his tardiness and explained that there was a breakdown in communication between himself and his contractor. He assured staff that it would not happen again and he would be “Ever vigilant in making sure that all steps are accounted for in the permit process” in the future. Staff informed him that the permit had expired and that he would need to ask for a reactivation and extension of the permit documents and that any approval must now come from the full Commission, as he was in violation. The project was re-advertised and no adverse comments had been received. Staff had discussed this with Mr. Holcomb and he had agreed to pay triple permit fees of \$300.00 and a civil charge in the amount of \$1,800.00 in light of the minor environmental impact and significant degree of deviation, given his repeated tardiness in returning the necessary documents to finalize the permit process. Accordingly, staff recommended approval, as agreed to by both parties.

Commissioner Bowman asked for questions of staff.

Associate Member Fox asked why the finalizing of the permit was such a long, back and forth, process? Mr. Grabb explained that as these were legal documents the work was not authorized until the permits were signed by VMRC and the fees had been paid. He also explained as a part of the process the documents forwarded originally were not executed by VMRC and kept in a separate file. He said staff checks these files, as follow-up and also did site visits to see if the work had been done without the permit.

Commissioner Bowman asked if anyone was present, pro or con? There were none. He asked for discussion or a motion.



**Associate Member Tankard moved to approve the permit with the triple permit fees and the \$1,800.00 civil charge assessment. Associate Member McConaugha seconded the motion. The motion carried, 9-0. The Chair voted yes.**

Permit Fee.....	\$ 300.00
Civil Charge.....	\$1,800.00
Total Fee.....	\$2,100.00

(Note: The after-the-fact bulkhead occurred before the collection of royalty fees was resumed.)

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**4. CLOSED MEETING FOR CONSULTATION WITH OR BRIEFING BY COUNSEL.**

**No closed meeting was held.**

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**Virginia Natural Gas, Inc., #07-1036:**

Carl Josephson, Senior Assistant Attorney General and VMRC Counsel briefed the Commission on the easements involved with the project. His comments are a part of the verbatim record.

Mr. Josephson explained that there were two easement agreements. He said the Commission approval was necessary for one of the easement documents for the route of the pipeline. He said the second easement that involved the crossing of Baylor Grounds, authorized by the General Assembly in Section 28.2-1208 of the Code of Virginia, had to be executed by the Commission with the approval of the Attorney General and Governor. He explained that the Baylor crossing required the payment of fees of \$100.00 for each easement involving public service or gas pipelines and this required three for a total of \$300.00. He said this easement was good for 40 years.

Mr. Josephson explained further that the first easement approved by the Commission involved \$225,000.00 at the rate of \$0.50 per square foot.

Mr. Josephson stated that a Resolution had been prepared for the Commission's approval.

Commissioner Bowman asked Mr. John Daniel if he wished to make any comments.

John Daniel, Attorney for Virginia Natural Gas, Inc., was present and his comments are a part of the verbatim record. He said this matter had been properly addressed by Counsel.

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He said that they appreciated all that had been done by VMRC in this matter and these documents would conclude those efforts. He said the project was scheduled to start May 12<sup>th</sup> and he appreciated it being heard today, so that they can proceed by that deadline.

Commissioner Bowman asked for a motion from the Board.

**Associate Member Holland moved to adopt the Resolution. Associate Member McLeskey seconded the motion. The motion carried, 9-0. The Chair voted yes.**

**RESOLUTION OF THE VIRGINIA MARINE RESOURCES COMMISSION****Baylor Survey Easements, James River/Hampton Roads and Elizabeth River Reach.**

WHEREAS, Chapter 50 of the 2007 Virginia Acts of Assembly authorizes the Virginia Marine Resources Commission (“Commission”) to grant and convey to Virginia Natural Gas, Inc. (“VNG”), its successors and assigns, upon such terms and conditions as the Commission, with the approval of the Governor and the Attorney General, shall deem proper, certain permanent easements and rights-of-way of 100 feet width and a temporary right-of-way of a reasonable width as needed for the purpose of installing, constructing, maintaining, repairing and operating a submarine natural gas transmission system in and across the bed of the James River/Hampton Roads Harbor and the Elizabeth River Reach, including a portion of the Baylor Survey as described in said Chapter 50; and

WHEREAS, an attached agreement has been prepared to grant to VNG the permanent easements and rights-of-way and temporary rights-of-way authorized by Chapter 50 of the 2007 Acts of Assembly; and

WHEREAS, the metes and bounds of the permanent easements and rights-of-way to be granted, which conform to the metes and bounds as described in Chapter 50 of the 2007 Acts of Assembly, are described in the attached agreement pursuant to said Chapter 50, and reads as follows:

**James River/Hampton Roads Harbor Crossing, Baylor Ground Easement, Segment 2 Easement “A” in 2007 Acts of Assembly, Chapter 50.**

Beginning at a point in Hampton Roads Harbor generally located near the northwestern corner of Craney Island Disposal Area, City of Portsmouth on the southern line of the Baylor Ground designated “Public Ground No. 1” as shown on map compiled by Virginia Marine Resource Commission having a coordinate value of North 3,504,038.571 East 12,100,845.956 (coordinate values are based on Virginia State Plane Coordinate System, South Zone, NAD 1983/1994 HARN, and expressed in U.S. Survey feet); thence from said Point of Beginning running N04°37’18”W a distance of 577.81 feet to a point in the northern boundary of said “Public Ground No. 1”, thence

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turning and running along the aforementioned northern boundary line N76°00'38"E a distance of 101.35 feet to a point; thence turning and running leaving the northern boundary line of "Public Ground No. 1" S04°37'18"E a distance of 602.39 feet to a point in the southern boundary line of "Public Ground No. 1"; thence turning and running along the southern boundary line of "Public Ground No. 1" N89°59'58"W a distance of 100.33 feet to a point, the Point of Beginning.

The above described 100' Permanent Easement through Baylor Ground designated "Public Ground No. 1" contains 1.355 acres (or 59,012.32 square feet).

Elizabeth River Crossing, Baylor Ground Easement, Segment 2  
Easement C in 2007 Acts of Assembly, Chapter 50.

Beginning at a point in the Elizabeth River generally located near the eastern side of Craney Island Fuel Supply Depot, City of Portsmouth on the western line of the Baylor Ground designated "Public Ground No. 3" as shown on map compiled by Virginia Marine Resource Commission having a coordinate value of North 3,491,259.652, East 12,115,753.359 (coordinate values are based on Virginia State Plane Coordinate System, South Zone, NAD 1983/1994 HARN, and expressed in U.S. Survey feet); thence from said point of beginning running S69°05'52"E a distance of 3,943.73 feet to a point in the eastern boundary of "Public Ground No. 3", generally located near the southern portion of Old Dominion University, City of Norfolk; thence turning and running along the eastern boundary line of "Public Ground No. 3" S20°08'21"W a distance of 100.01 feet to a point; thence turning and running, leaving the aforementioned eastern boundary line of "Public Ground No. 3", N69°05'52"W, 3,893.34 feet to a point in the western boundary line of the Baylor Ground designated "Public Ground No. 3"; thence turning and running along the western boundary line N06°26'52"W a distance of 112.59 feet to a point, the Point of Beginning.

The above described 100' Permanent Easement through Baylor Ground designated "Public Ground No. 3" contains 8.996 acres (or 391,862.286 square feet).

WHEREAS, the easement locations, pursuant to the foregoing metes and bounds description, are depicted on plats entitled "Virginia Natural Gas- Hampton Roads Crossing- Plat To Accompany Right-Of-Way Agreement With The Commonwealth of Virginia- Newport News/Portsmouth, Sheet 1 of 2 and Sheet 2 of 2" and "Virginia Natural Gas- Hampton Roads Crossing- Plat To Accompany Right-Of-Way Agreement With The Commonwealth of Virginia- Norfolk/Portsmouth" by Rouse-Sirine Associates, Ltd., dated March 27, 2008; and

WHEREAS, the Commission deems the terms and conditions set forth in the attached agreement to be proper;

**Non-Baylor Survey Easements, James River/Hampton Roads and Elizabeth River Reach.**

WHEREAS, the aforementioned Baylor Survey Easements represent only those portions of VNG's proposed crossings of the James River/Hampton Roads Harbor and the Elizabeth River Reach that lie within the Baylor Survey; and

WHEREAS, pursuant to Virginia Code § 28.2-1208, the Commission is authorized, with the approval of the Attorney General and the Governor to grant easements over or under the beds of the waters of the Commonwealth outside of the Baylor Survey; and

WHEREAS, all easements granted pursuant to Virginia Code § 28.2-1208 shall be executed for, and in the name and on behalf of, the Commonwealth by the Attorney General and countersigned by the Governor; and

WHEREAS, in order to undertake and complete the construction of the submarine natural gas transmission line system in and across the beds of the James River/Hampton Roads Harbor and the Elizabeth River Reach VNG has requested the Commission to grant and convey unto it three additional forty (40) year easements and rights-of-way pursuant to Virginia Code § 28.2-1208

WHEREAS, an attached agreement has been prepared to grant to VNG the three forty (40) year easements and rights-of-way and temporary rights-of-way requested by VNG and authorized by the aforesaid Code section; and

WHEREAS, the metes and bounds of the three easements and rights-of-way to be granted are described in the attached agreement pursuant to Code of Virginia § 28.2-1208 and read as follows:

**Easement One: Segment 1, Elizabeth River Crossing (Non-Baylor)**

Commencing at a point being the northeast corner of property of United States of America, Craney Island Fuel Depot in the City of Portsmouth, Virginia and being a point in the western side of the Elizabeth River, said point having a coordinate value of N 3,491,837.366, E 12,114,800.394 (coordinate values are based on Virginia Coordinate System, South Zone, NAD83(1993) HARN and are expressed in U.S. Survey Feet); thence from said commencement point, S01°17'48"E, 214.32 feet to a point, the Point of Beginning; thence from said Point of Beginning turning and running into the Elizabeth River, S69°09'11"E, 1,014.23 feet to a point in the western boundary of Baylor Ground-Public Ground No. 3 as referenced on map provided by Virginia Marine Resource Commission; thence turning and running along the aforesaid western boundary of Baylor

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Ground S06°26'52"E, 112.53 feet to a point; thence turning and running, leaving the western boundary of the Baylor Ground N69°09'11"W, 1,025.13 feet to a point in the eastern boundary line of property of United States of America, Craney Island Fuel Depot; thence turning and running along the aforesaid boundary line N01°17'48"W, 107.96 feet to a point; the Point of Beginning.

The above described 100-foot wide "Easement One: Segment 1" contains 2.340 acres.

Easement Two: Segment 3, Elizabeth River Crossing (Non-Baylor)

Commencing at a point being the northeast corner of property of United States of America, Craney Island Fuel Depot in the City of Portsmouth and being a point in the western side of the Elizabeth River, said point having a coordinate value of N 3,491,837.366, E 12,114,800.394 (coordinate values are based on Virginia Coordinate System, South Zone, NAD83(1993) HARN and are expressed in U.S. Survey Feet); thence from said commencement point, S01°17'48"E, 214.32 feet to a point; thence turning and running into the Elizabeth River, S69°09'11"E, 1,014.23 feet to a point in the western boundary of Baylor Ground-Public Ground No. 3 as referenced on map provided by Virginia Marine Resource Commission; thence turning and running along the aforesaid boundary line S06°26'52" E 2.53 feet to a point; thence turning and running along the northern easement line of Baylor Ground Easement Segment 2, S69°05'52"E 3,943.73 feet through Baylor Ground-Public Ground No. 3 to a point in the eastern boundary of Baylor Ground-Public Ground No. 3 in the City of Norfolk; thence turning and running along the eastern boundary of Baylor Ground N20°08'21"E 6.07 feet to a point, the Point of Beginning; thence from said point of Beginning, turning and running, leaving the eastern boundary of Baylor Ground S69°09'11"E 1,853.36 feet to a point in the approximate mean low water line of the Elizabeth River and boundary of property owned by The Visitors of Old Dominion University; thence turning and running along the aforesaid approximate mean low water line and boundary line the following five courses and distances: S29°43'27"W 4.05 feet to a point; thence turning and running S42°33'03"W 27.00 feet to a point; thence turning and running S24°54'58"W 36.00 feet to a point; thence turning and running S30°47'03"W 26.70 feet to a point; thence turning and running S39°14'57"W 9.17 feet to a point; thence turning and running leaving the aforesaid approximate mean low water line and boundary line N69°09'11"W 1,831.46 feet to a point in the eastern boundary of Baylor Ground-Public Ground No. 3; thence turning and running along the eastern boundary of Baylor Ground N20°08'21"E, 100.01 feet to a point; the Point of Beginning.

The above described 100-foot wide "Easement Two: Segment 3" contains 4.227 acres.

Easement Three: Segment 1, Hampton Roads Crossing (Non-Baylor)

Commencing at a point in the northern boundary of property of United States of America, U.S. Army Disposal Area-Craney Island, City of Portsmouth and being a point in the

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southern side of the Hampton Roads Harbor, said point having a coordinate value of N 3,504,038.571, E 12,100,845.956 (coordinate values are based on Virginia Coordinate System, South Zone, NAD83(1993) HARN and are expressed in U.S. Survey Feet); thence from said commencement point leaving the northern boundary of property of United States of America, U.S. Army Disposal Area-Craney Island, turning and running through Baylor Ground-Public Ground No. 1 as referenced on map provided by Virginia Marine Resource Commission, along the western side of Baylor Ground Easement Segment 2, N04°37'18"W 577.81 feet to a point in the northern boundary of Baylor Ground-Public Ground No. 1; thence turning and running along the northern boundary of Baylor Ground-Public Ground No. 1, S76°00'38"W 10.51 feet to a point, the Point of Beginning; thence from said Point of Beginning turning and running, leaving the northern boundary of Baylor Ground-Public Ground No. 1, N04°39'29"W 4,931.14 feet to a point; thence turning and running N13°31'12"W 11,584.95 feet to a point; thence turning and running N14°25'35"W 2,770.12 feet to a point in the approximate mean low water line of Hampton Roads Harbor and the southern boundary of property of City of Newport News (Anderson Park); thence turning along the aforesaid approximate mean low water line of Hampton Roads Harbor and the southern boundary of property of City of Newport News (Anderson Park) the following five courses and distances: N55°40'55"E 25.50 feet to a point; thence turning and running N52°29'38"E 24.00 feet to a point; thence turning and running N48°04'55"E 21.35 feet to a point; thence turning and running N55°04'53"E 26.59 feet to a point; thence turning and running N65°39'24"E 10.25 feet to a point; thence turning and running, leaving the approximate mean low water line of Hampton Roads Harbor and the southern boundary of property of City of Newport News (Anderson Park) S14°25'35"E 2,809.92 feet to a point; thence turning and running S13°31'12"E 11,593.49 feet to a point; thence turning and running S04°39'29"E 4,922.46 feet to a point in the northern boundary of Baylor Ground-Public Ground No. 1; thence turning and running along the northern boundary of Baylor Ground-Public Ground No. 1, S76°00'38"W 101.34 feet to a point; the Point of Beginning.

The above described 100-foot wide "Easement Three: Segment 1" contains 44.323 acres.

WHEREAS, the easement locations, pursuant to the foregoing metes and bounds descriptions, are depicted on plats entitled "Virginia Natural Gas- Hampton Roads Crossing- Plat To Accompany Right-Of-Way Agreement With The Commonwealth of Virginia- Newport News/Portsmouth, Sheet 1 of 2 and Sheet 2 of 2" and "Virginia Natural Gas- Hampton Roads Crossing- Plat To Accompany Right-Of-Way Agreement With The Commonwealth of Virginia- Norfolk/Portsmouth" by Rouse-Sirine Associates, Ltd., dated March 27, 2008; and

WHEREAS, the Commission deems the terms and conditions set forth in the attached agreement to be proper.

\*\*\*\*\*

NOW, THEREFORE, BE IT RESOLVED:

1. That the Commission hereby authorizes the Chairman of the Virginia Marine Resources Commission, with the approval of the Governor and the Attorney General, to execute the attached agreement granting the above-described “Baylor Survey Easements, James River/Hampton Roads and Elizabeth River Reach” and rights-of-way and temporary rights-of-way on the terms and conditions as set forth in the attached agreement pursuant to 2007 Acts of Assembly, Chapter 50; and
2. That the Commission agrees to grant to VNG, pursuant to Virginia Code § 28.2-1208, subject to the approval of the Attorney General and the Governor, the three additional forty (40) year easements and rights-of-way and temporary rights-of-way described as “Non-Baylor Survey Easements, James River/Hampton Roads and Elizabeth River Reach,” above, on the terms and conditions as set forth in the attached agreement pursuant to Virginia Code § 28.2-1208; and
3. That, consistent with the requirements of Virginia Code § 28.2-1208, and subject to their approval of the attached agreement pursuant to Virginia Code § 28.2-1208, the Commission respectfully requests the Attorney General to execute the said attached agreement pursuant to Virginia Code § 28.2-1208 and respectfully requests the Governor to countersign the said attached agreement pursuant to Virginia Code § 28.2-1208.

\* \* \* \* \*

**City of Virginia Beach, #07-2035, Item 10:**

Commissioner Bowman asked that the Commission to return to this item. He asked Mr. Roehrs to come forward and address the Commission.

Phil Roehrs with the City of Virginia Beach was sworn in and his comments are a part of the verbatim record. Mr. Rohers explained that he arrived at the meeting today after this item was discussed. He stated that a citizen’s testimony was given that the City had agreed with the deferral of the item. He said he was not aware of any such agreement to defer and that the City was ready to hear the issue today, as the timing of the project was tight.

Commissioner Bowman stated that this was an unusual situation and that Mr. David Hansen, the City’s Chief of Finance and Technology had apparently told the citizen that the City would agree with the deferral when she spoke with him at close of business the previous day.

Mr. Roehrs stated that at close of business last night he had not been told that a deferral had been agreed to.

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Commissioner Bowman said that he too had received a call at 9:00 p.m. from the City the previous evening and that the deferral until May was okay. He asked Mr. Roehrs to go and contact Mr. Hansen to see if he had changed his mind and to return to this meeting to let the Board know what he had found out.

\* \* \* \* \*

5. **COMPTON AND ASSOCIATES, #06-1000.** Commission review, on appeal by the applicant, of the March 20, 2008, decision by the Suffolk Wetlands Board to deny the applicants' request for after-the-fact authorization to retain multiple previously installed floating piers and previously constructed pier and deck structures, as well as requesting after-the-fact authorization to retain an enclosed expansion of an existing restaurant at the applicants' marina/restaurant facility situated at the terminus of Ferry Road, along Bennetts Creek, a tributary to the Nansemond River. The applicant also requested and was denied authorization to install additional floating pier sections.

Deferred until the May Commission meeting.

6. **COMPTON AND ASSOCIATES, #06-1000,** requests after-the-fact Commission authorization to retain multiple previously installed floating piers and previously constructed pier and deck structures, as well as after-the-fact authorization to retain an enclosed expansion of an existing restaurant at the applicants marina/restaurant facility situated at the terminus of Ferry Road, along Bennetts Creek, a tributary to the Nansemond River in the City of Suffolk. The applicant also requests authorization to install additional floating pier sections. The project is protested by a nearby landowner and oyster ground leaseholder.

Deferred until the May Commission meeting.

7. **JAMES & JUNE HARVEY, #08-0059.** Commission review of the March 19, 2008, decision by the Chesapeake Wetlands Board to grant after-the-fact authorization to retain a 133 foot long timber retaining wall and backfill associated with an unauthorized artificial putting green, resulting in the loss of 850 square feet of vegetated tidal wetlands at their property on the Southern Branch of the Elizabeth River at 701 River Strand in Chesapeake.

Jay Woodward, Environmental Engineer, Sr., gave the presentation with slides. His comments are a part of the verbatim record. Mr. Woodward indicated that he had some slides to show the Board for orientation purposes only and no motion to open the record was needed. Commission Bowman agreed to the showing of the slides. Mr. Woodward further said that additional information had been provided for this hearing, which was not valid to the record nor included in it. He said the information in the Commission's packet



**Commission Meeting**

was correct. He also provided information which was a part of the record, but required display on an easel.

Mr. Woodward explained that on March 19, 2007, Chesapeake City staff made a site inspection at 701 River Strand, after receiving a citizen complaint of a possible Chesapeake Bay Preservation Area (CBPA) violation. That inspection revealed that an artificial putting green had been installed along the shoreline and within the Bay Act buffer at the property without prior approval. Subsequent review of VMRC files also indicated that the retaining wall bordering the putting green extended into the jurisdictional, vegetated, tidal wetlands and had not been authorized by the Chesapeake Wetlands Board. A public Show Cause hearing was held by the Wetlands Board on December 19, 2007. During that hearing, city staff presented their report to the Board, including site photographs and a time line of the history of the violation review, with a recommendation that the unauthorized retaining wall and backfill in the tidal wetlands be removed. The Board found that a wetland violation had occurred at the property, assessed a civil charge in the amount of \$2,000.00 and recommended a restoration hearing or a public hearing at their February meeting should an after-the-fact application be submitted. On January 11, 2008, VMRC received and transmitted an after-the-fact application (#08-0059) to the Chesapeake Wetlands Board.

Mr. Woodward stated that the after-the-fact application was considered by the Chesapeake Wetlands Board at their February 20, 2008, meeting. At the hearing, city staff reported much of the information which was presented at the Show Cause hearing in December. The Board was presented a letter by Mr. Jim Bradford asking for a 30-day continuance. In addition, Mr. Brent Nielson, Director of Planning, on behalf of the City Manager, asked the Board to continue the matter for 30 days so that their staff could be more educated on the case and so that the options that were being considered to resolve this matter could be clarified. He further asked that the staff report and minutes of previous meetings be sent to the City Manager's office in case the matter needed to be brought to City Council's attention. The Board later voted unanimously to continue the matter until their March 19, 2008, meeting.

Mr. Woodward said that at the March 19, 2008, hearing, city staff again provided background information on the case, including an overview of Sections 28.2-1310 and 1313 of the Code of Virginia, in order to remind the Board of VMRC review authority of local wetland board actions, and a summary report and matrix to provide an overview of history of wetlands and CBPA issues at the property. Staff presented their report, which included the VIMS shoreline permit application report dated February 12, 2008. The VIMS report stated "The subject property is currently protected by an expansive fringe marsh and therefore should not require additional structural shoreline protection. We do not recommend the use of bulkheads in this shoreline setting and would not have recommended this approach had we reviewed it prior to construction". After presenting their findings that the project resulted in an impact to 850 square feet of Type XII brackish water vegetated tidal wetlands, with no anticipated public or private benefit, staff

recommended denial of the application. They further recommended removal of the bulkhead and backfill within 30 days, as well as restoration of the disturbed wetlands.

Mr. Woodward noted that during the public hearing, Mr. Ellis W. James spoke in opposition to the application and agreed with the staff recommendation for denial of the application, as this was an egregious violation of the Wetlands Zoning Ordinance. There were five speakers in favor of the project, including Mr. Harvey, his son, Jim Harvey, III, a neighbor, Mr. Tom Peska, an engineering consultant, Mr. Jim Bradford, and his agent, Mr. Doug Davis. Testimony for the project included the confusion related to the permitting requirements for the structure, approval by the homeowners association, the benefit of the fill and bulkhead covering existing construction debris, the structural integrity of the retaining wall, and the offer of mitigation at a ratio of 1:1 for the lost wetland resource.

Mr. Woodward stated that Mr. Harvey III questioned how the agenda was framed. Assistant City Attorney Dana Sanford indicated that staff had framed the agenda logically, given the related wetlands and CBPA violations, and whether or not restoration was to be ordered by the Board.

Mr. Woodward said that Mr. Jim Bradford stated that allowing the improvements to remain in place was beneficial since the wetlands to be offered as mitigation were of higher value and stated the fill area acted as a BMP to improve water quality. Mr. Bradford further stated that the bulkhead was really more of a retaining wall to protect the landscaping from saltwater intrusion during storm events, every 10 years or so.

Mr. Woodward noted that Member Cahoon stated that the existing tidal wetlands buffer the property from erosion.

Mr. Woodward said that Mr. Davis disagreed with the findings in the staff report and stated that the type of wetlands impacted were Type VII, *Phragmites* wetlands, not Type XII, mixed wetlands as stated in the VIMS report. Mr. Davis spoke at length on the relative benefits of both wetland types. Mr. Davis explained that restoration of the area would result in more *Phragmites* and that with the mitigation offer, allowing the project to stay would result in *Alterniflora* wetlands and a functional BMP.

Mr. Woodward explained that Mr. Harvey then addressed the Board on his own behalf. Mr. Harvey reiterated the 1:1 mitigation offer and said that restoring wetlands on site would have less public benefit than the wetlands purchased at the mitigation bank. Mr. Harvey had said there were other bulkheads in the area and that his bulkhead was not for wave action, but to protect the back yard from salt water intrusion. Mr. Harvey said he was told by the U. S. Army Corps of Engineers where to build his pier and that a City inspector told him that their permits for piers always included bulkheads.

Mr. Woodward said that Chairman Lane had commented that if this application were brought forward before it was built; staff would have advised the applicant to pull the

bulkhead back to the wetlands edge. Mr. Davis stated that he would expect that and that he would not bring in an application like this for approval before the fact.

Mr. Woodward stated that the public hearing was closed after approximately ninety minutes. Following the public hearing, the Board discussed at length the after-the-fact nature of the request, the relative value of the existing, impacted *Phragmites* wetlands at the site compared to the *Alterniflora* wetlands at the bank for which the applicant was offering mitigation, the ratio of mitigation credits being offered, the confusion surrounding the construction of the bulkhead, the previous action of the Board in finding the structure in violation and the civil charge requirement.

Mr. Woodward explained that after the board discussion, Member Hinch voted to approve the request with mitigation at a ratio of 2.5:1 for the 850 square feet of impacted wetlands. The motion failed for lack of a second. Member Ottinger then moved to approve the project with mitigation at a ratio of 1.5:1 for the 850 square feet of impact (\$15,300 to purchase 1,275 square feet of credits at \$12 per square foot in an approved tidal wetland mitigation bank). Member Katchmark seconded the motion and it passed 5-2 with Chairman Lane and Member Hinch voting against the motion.

Mr. Woodward stated that VMRC staff was present at both the February 20, 2008, and March 19, 2008 Chesapeake Wetlands Board public hearings, as well as, the December 19, 2007, Show Cause hearing. It was clear from the record that the bulkhead/retaining wall and artificial putting green were not water dependent, that there was no active detrimental erosion at the site, and that 850 square feet of jurisdictional wetlands were filled without proper prior approval. While arguments were made that the wetlands impacted were of lesser value than those wetlands being offered to be purchased in a mitigation bank, staff did not believe this was adequate justification for authorizing unnecessary, non-water dependent development in tidal wetlands. The Board clearly felt that this structure would not have been approved as it currently existed had they had an opportunity to review an application prior to construction. The Board seemed to be persuaded to accept the compensatory mitigation under the assumption that restoration of the area would result in wetlands of lesser value without first considering removal of the structure that would not have been permitted had the applicant applied ahead of time.

Mr. Woodward said that based on the foregoing, staff believed that the decision by the Chesapeake Wetlands Board to grant after-the-fact approval of application #08-0059 was unsupported by the evidence on the record considered, as a whole. In addition, staff believed that their decision failed to prevent the despoliation and destruction of wetlands while accommodating necessary economic development in a manner consistent with wetland preservation that was their stated duty in Section 28.2-1301 of the Code of Virginia. As such, and in accordance with Section 28.2-1313 of the Code of Virginia, staff had no alternative but to recommend that the Commission reverse the Board's after-the-fact approval and deny the application. Staff believed that this recommendation was further supported by the requirements of the Commission's Wetlands Mitigation-

Compensation Policy and Supplemental Guidelines (Regulation 4VAC 20-390-10 et seq.) and the Specific Criteria therein which states: “In order for a proposal to be authorized to destroy wetlands and compensate for the wetland loss in some prescribed manner, the three criteria listed below must be met. If the proposal cannot meet one or more of these criteria, the activity shall be denied, or must occur in areas apart from the wetlands. Should it satisfy all three criteria, however, compensation for the wetlands lost was required. Since the proposed activity should stand on its own merits in the permit approval process, compensation should not be used to justify permit issuance.

1. All reasonable mitigative actions, including alternate siting to eliminate or minimize wetlands loss or disturbance must be incorporated in the proposal;
2. The proposal must clearly be water-dependent in nature; and,
3. The proposal must demonstrate clearly its need to be in the wetlands and its overwhelming public and private benefits”.

Mr. Woodward stated furthermore that staff recommended that the Commission direct the submittal of a restoration plan for the impacted area for review by VIMS and VMRC staff within 30 days, and the removal of the unauthorized bulkhead and associated backfill from the impacted jurisdictional, tidal wetland areas within 90 days thereafter.

Dana Sanford, Attorney for the City of Chesapeake Wetlands Board, was present and her comments are a part of the verbatim record. Ms. Sanford stated that both the Wetlands Board Chairman and Vice Chairman were present at the meeting. Ms. Sanford explained that the violation was heard and a fine was assessed in accordance with Section 28.2-1317(D) of the Code. She said a restoration order by the Wetlands Board or VMRC requiring the removal of the bulkhead would result in the Phragmites wetlands taking over the marsh, which protects the shoreline. She stated that the bulkhead was already in place and was a safe structure which would keep further damage to the wetlands from occurring and there were benefits to be gained by the 1.5:1 mitigation. She said at the restoration hearing the Wetlands Board considered the practicality, future effects, and the further damage that would result from the bulkhead removal.

Associate Member Schick asked about the detriments to the wetlands, when you consider the wetlands versus the bulkhead. Ms. Sanford stated that she did not know, but there were others present who could answer that.

Commissioner Bowman stated that the record showed that the violation occurred after considering the mitigation. He said he was troubled that there was no oversight and the mitigation occurred later. He said the Wetlands Board did not ask VIMS how this should be repaired. He said it also bothered him that this would set a precedent for others that

come after. He went on to say that he did not understand where it said a bulkhead comes with a pier.

Ms. Sanford stated that it was on the form. She said that the Wetlands Board was sympathetic in this case and the Corps had approved it. She said this was just one thing considered by the Board, among others.

Associate Member Fox stated that on the application for the pier, item 3-B-61, the pier was on the drawing, but not a bulkhead and the Corps approval was related to the drawing? Ms. Sanford said yes that Mr. Harvey had said that. Associate Member Fox asked if the building permit was in the record. Ms. Sanford responded yes. Mr. Woodward stated that there was a letter inserted into the record, item 3. Commissioner Bowman asked if this was a part of the Wetlands Board record. Mr. Woodward responded no, but it was a part of the Chesapeake Bay Board hearing record.

Commissioner Bowman asked for a motion to open the record. **Associate Member Holland moved to open the record for the introduction of the building permit. Associate Member McConaugha seconded the motion. The motion carried, 9-0. The Chair voted yes.**

Commissioner Bowman asked if there were any questions.

Associate Member Schick stated that Mr. Harvey had asked for a pier and walked away with a bulkhead, too.

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

James Harvey, III, attorney for the applicant, was present and his comments are a part of the verbatim record. Mr. Harvey stated that he was the attorney as well as the applicant's son. He said that consideration had been given by him over many months of the record and all permits, and all show a pier and bulkhead. He stated that there was an e-mail from the Wetlands Board staff that said the permit was issued in error and the Wetlands Board did discuss this. He explained that there was confusion all through the City, a conversation with the building inspector and when Mr. Harvey walked the site with the Corps' staff and they indicated where the pier could be located. He said that the site was filled with debris so it appeared to be already filled and so he was allowed to fill it. He said the Wetlands Board made the civil charge assessment to stop the setting of a precedent and it was economically better to do the same now. He said that the facts show that this was not done in a sneaky way as there was a misunderstanding, whereby, the applicant thought he had all the permits necessary. He stated that when he found out differently, he proceeded to correct the situation.

Mr. Harvey referenced the Code under which the Wetlands Board was acting and when they considered approving this project, they considered that it was low grade wetlands

being impacted and a preference to utilize the Wetlands Mitigation Bank. He reiterated that the Wetlands Boards considered and discussed everything necessary. He said they did not agree with the VMRC staff's comments, as everything was discussed over a number of months.

Mr. Harvey stated that the VIMS report was submitted and considered by the Wetlands Board. He said they had determined that these wetlands were a type 12, mixed-community. He said the Board said that it was not, but only 7 or 8 Phragmites (slide shown). He said that VMRC staff indicated that this was exclusively Phragmites. He said the Board members thought that these wetlands had caused this upland fill and that restoration would only cause the Phragmites to expand.

Commissioner Bowman asked if there were any further questions of Counsel. Associate Member Schick asked if the Corps said the pier had to be a certain distance or length? Mr. Harvey stated that they were told, when they walked the site, by the Corps' staff that the pier be located where it was now located. Associate Member Schick asked if anyone questioned the Corps authority. Mr. Harvey stated that they thought they were authorized.

Ms. Sanford stated that it was stipulated by the Corps and it was in an area that seemed to be filled.

Associate Member Robins explained that Section 28.2-1308 of the Code established the standards to be used by the Wetlands Board and VMRC provided the mitigation guidelines as set forth in Section 28.2-1301 of the Code. He said he felt that, in this case, mitigation was being used to justify approving the project. He stated that VMRC staff had pointed out an alternative site, water degradation, and the need to encroach on wetlands versus the public-private benefits.

Mr. Harvey stated that the statute takes precedent over a regulation. He stated also that the Wetlands Board was not mitigation driven and decided that unreasonable encroachment was not practical to the end that wetlands would have to be restored at the site.

Associate Member Fox again stated that the form may say pier and bulkhead, but the plan only described the pier. Mr. Harvey stated that they had agreed on that point, which was why it was necessary to assess the civil charge and the applicant had paid for it.

Commissioner Bowman asked what type of top was on the fill. Mr. Harvey stated that it was synthetic turf, which was the issue of the Chesapeake Bay Preservation Area/Resource Protection Area violation. Commissioner Bowman asked if the City discussed the putting green. Mr. Harvey said that they had, but this was part of the Chesapeake Bay Preservation Area/Resource Protection Area violation, which occurred one year ago.

Douglas Davis, a consultant, was present and his comments are a part of the verbatim record. Mr. Davis explained that they had discussed the bulkhead over many months. He said the discussion of jurisdiction was very confusing to the public.

Associate Member Schick asked if the building permit and drawing had been required. Mr. Davis responded yes. Associate Member Schick asked him to explain how functional phragmites spread into the upland fill. Mr. Davis explained that it takes long time and it grows in sandy areas, by accumulated leave and stems and it grows where wetlands exist. He stated that he supported the Wetlands Board's decision.

Associate Member McLeskey asked Mr. Davis to explain his background. Mr. Davis said that he had worked with the Corps as a Wetlands Scientist and before that with the Fisheries and Wildlife Service in the 1970's.

Commissioner Bowman asked if there was anyone in opposition who wished to speak.

Ellis W. James, Norfolk resident and Sierra Club Liaison with jurisdictional boards, was sworn in and his comments are a part of the verbatim record. Mr. James stated that a generak fear of Phragmites directed the way decisions were often made. He said he strongly objected at the Wetlands Board meeting because this was an egregious violation, which VMRC was required to review. He said the Wetlands Boards and VMRC staff have both strongly addressed this violation and provided supported evidence and guidelines. He said he urged the Commission to support the staff and require the restoration.

Lyle Varnell, VIMS, was present and his comments are a part of the verbatim record. Mr. Varnell explained that VIMS had provided the Chesapeake Bay Program with comments on restoration potential. He said that Phragmites are not the best wetlands, but they do have some value. He said this site was a brackish water mixed community, which was hard to see once it had been covered over. He said they had lots of experience in making determination of what was there, as they consider the adjacent areas and most likely what was here was Phragmites and what will be returning. He said there could have been better types of wetlands there also.

Commissioner Bowman asked if it was better to restore it or not. Mr. Varnell stated that would be a policy decision. He said there could have been valuable wetlands there and that they could put other species there for restoration, but the Phragmites would probably reinvade the area. Commissioner Bowman asked about the effects on water quality. Mr. Varnell stated that better wetlands would help with water quality.

Associate Member Tankard asked about storm impacts. Mr. Varnell stated that a hard, vertical face was not advantageous for the wetlands.

Associate Member Schick asked what was the function of the system. Mr. Varnell said that what was there now was not the same as wetlands or Phragmites. He said that

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wetlands were there or wanted to be there, but he was not aware of the conditions at the site prior to the violation.

Associate Member Fox stated that there had been reference to Section 28.2-1301 and 1313 and also Regulation 4 VAC 20-390-10, as well as the reference to Section 28.2-1308 by the applicant's counsel.

Carl Josephson, Senior Assistant Attorney General and VMRC Counsel, explained that VMRC can make regulations, as allowed by Statute in Section 28.2-1301(D) and should consider 1308. He said that the Wetlands Board works under Section 1302(10)(B), which says if all factors were met, grant the permit. He said the staff had briefed the Commission on the after-the-fact permit and the Wetlands Board Restoration hearing they considered granting the permit. He referred the Commission to 28.2-1302(10)(B) where it refers to public and private benefits exceeding the public and private detriments as well as conforms to 28.2-1308 and the Wetlands Guidelines, but not violate Title 13, Sections 28.2. He stated that the Commission shall deny this project if subsection 10B criteria had not been met. He said it was left to the Commission or Board to approve the after-the-fact request or make a decision that it be restored.

Commissioner Bowman asked for further discussion or a motion.

**Associate Member Schick stated that he agreed with the Chair that a precedent would be set and it cannot be determined if this was done this way to reach the applicant's ends. He said he did not see that the Commission could uphold the Wetland Board's decision. He moved to overturn the Wetlands Board decision. Associate Member Fox seconded. Associate Member Robins stated that the Commission had heard arguments in support of the Wetlands Board, but it must consider Section 128.2-1308 of the Code of Virginia. He said that the applicant's counsel felt that 28.2-1302 (9D) applied, which he then read into the record. He said he felt that these applications were brought up to justify violations. He referred to 28.2-1308 and said that VMRC would fail to do its job if it was approved when the Wetlands Board's decision was unsupported by the record. He said he felt it was appropriate to reverse the Wetlands Board's decision. He suggested modifying the staff recommendation and to require removal in 180 days. Both Associate Members Schick and Fox agreed to the amendment. Commissioner Bowman stated that if the Wetlands Board did not think it would have been approved if applied for, then it cannot be allowed. The motion carried, 9-0. The Chair voted yes.**

No applicable fees, Wetlands Review.

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**City of Virginia Beach, #07-2035, Item 10.**

Commissioner Bowman stated that Mr. Roehrs had returned to the meeting and was ready to tell the Commission what he had found out from his call to Mr. Hansen.

Mr. Roehrs stated again that he had been delayed in his arrival to the meeting today and that the City was prepared to proceed with this hearing. He explained that Mr. Hansen had communicated with the citizen that if the Commission deferred the matter that it be no longer than May, but that the City was not asking for the deferral.

Commissioner Bowman stated that the Commission had agreed to the May agenda and the City agreed. He stated that this was not a request made by the City and they preferred to hear it today. He said that Ms. Martingayle did not testify to the Commission that this was at the City's request, but that they had said that if it was approved by the Commission, they would agree to a deferral no later than May. He said the motion had already been made to hear the matter in May.

No further action was taken.

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8. **LUTHER CARTER, #07-2673.** Commission review on appeal by 39 freeholders of the February 28, 2008, decision by the Accomack County Wetlands Board to grant after-the-fact approval for the installation of a 10-foot long stone riprap marsh toe and a 96-foot long stone splash apron (installed landward of the existing marsh toe bulkhead) adjacent to Mr. Carter's property along Chincoteague Bay in the Town of Chincoteague, Accomack County.

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

Mr. Badger explained that the applicant's property was located in the northern portion of Chincoteague along Chincoteague Bay. Much of the shoreline in this area was comprised of a marsh fringe that was eroding along the waters edge resulting in an eighteen-inch scarp.

Mr. Badger said that the low-profile bulkhead at the site was approved by the Wetlands Board on August 28, 2003, and constructed in 2005. As required by the permit, the area behind the bulkhead was to have been filled and vegetated with wetlands plants. Because of wave action over the low bulkhead some of plants were washed out and Mr. Carter chose to fill the area with small riprap. This was done without proper authorization and the Board considered this a violation of their permit. The Wetlands Board staff worked with Mr. Carter to allow him to re-vegetate the area filled with riprap but it was determined that the area immediately behind the bulkhead would not support vegetation. As a result, the

Board allowed Mr. Carter to submit an after-the-fact application for the riprap splash apron behind the bulkhead, as well as 10 linear feet of riprap marsh toe stabilization, which was inadvertently installed by his neighbor on the north end of the property. It should be noted that the channelward encroachment of the bulkhead was also evaluated for compliance by the Board in October 2007. The encroachment of the bulkhead was determined to be in moderate compliance and no further action was taken by the Board regarding this aspect of the project.

Mr. Badger stated that on February 28, 2008 the Accomack County Wetlands Board held a public hearing on Mr. Carter's application. Mr. Carter was represented by his agent, Ms. Ellen Grimes. During the public hearing, the Board considered a letter from Mr. Todd Herbert, a VIMS Marine Scientist, information provided by the Accomack County staff, and testimony provided by Ms. Grimes. Mr. James Frese spoke in opposition to the project and provided additional testimony along with an exhibit package.

Mr. Badger explained that the VIMS report by Mr. Herbert stated that the preferred approach would be to remove the bulkhead and splash apron and install a marsh toe revetment, placed in front of the vegetated marsh. He also stated that if the applicant desired to retain the permitted bulkhead and unauthorized splash apron, it would be a less desirable approach and would require wetlands compensation.

Mr. Badger said that Ms. Grimes stated that the riprap marsh toe that was installed had worked and had created habitat.

Mr. Badger said that Mr. Frese stated that the proposed height of the splash apron would violate the Army Corps of Engineers permit. He continued to discuss at length the already permitted low-profile marsh toe bulkhead until Mr. Jack Bonniwell, Wetlands Board Chairman, asked Mr. Frese to address the current project before the Board. Mr. Frese emphasized his position that the original permitted marsh toe bulkhead was constructed in violation; therefore, by approving the splash apron the Board would be escalating an existing violation to the original permit.

Mr. Badger explained that the Board felt that the original permitted low-profile bulkhead was in moderate compliance and saw no need to reopen that issue. The Board discussed the need for the splash apron and saw photos of the water splashing over the bulkhead at high water. They felt that the stone apron would provide some protection from the down-cutting forces behind the bulkhead. They also felt that the removal of an already constructed permitted bulkhead, as recommended by VIMS, was not the appropriate approach in this case.

Mr. Badger said that the Board then discussed on-site and off-site mitigation and came to the conclusion that there was no opportunity, on Mr. Carter's property or nearby, for mitigation. A discussion then ensued on the use of the in-lieu fee. The Board used the

length of the bulkhead (96 feet) times the width of the stone apron (1.5 feet) for a total of 144 square feet at \$12.00 per square foot for a total in-lieu fee of \$1,728.00.

Mr. Badger stated that Board Member C. Lee Davis, then made a motion to approve the application with the following stipulations: 1) The applicant maintain the 1.5-foot of stone at all times and the height of the stone be no more than 8" above the existing bulkhead; 2) That the shell pathway that goes out to the bulkhead from Mr. Carter's home across the marsh be removed and planted with *Spartina alterniflora* (Cordgrass) and be maintained until the fall; and, 3) That an In-Lieu Fee of \$1,728.00 be included, as part of the permit approval. The motion was approved 4-0.

Mr. Badger said that on March 10, 2008, staff received a letter and petition for review from Mr. James Frese, on behalf of 39 freeholders of property in Accomack County. As such, the appeal was being considered timely under the provisions of Section 28.2-1311(B) of the Code of Virginia.

Mr. Badger explained that in his letter, Mr. Frese indicated that the Board did not fulfill its obligation to preserve and prevent despoliation of wetlands within its jurisdiction while accommodating necessary economic development in a manner consistent with wetlands preservation. He also felt that the Board's actions in this case to be unequal treatment and inconsistent with the treatment of other petitioners.

Mr. Badger added that Mr. Frese also had indicated that an 8-foot wide gravel path through the vegetated wetlands on Mr. Carter's property had not been authorized by the Wetlands Board and that the southern 6 feet +/- of the project was on the adjacent property.

Mr. Badger said that Section 28.2-1301(B) of the Code of Virginia, (Powers and Duties of the Commission) stated that, "The Commission shall preserve and prevent their despoliation and destruction of wetlands while accommodating necessary economic development in a manner consistent with wetlands preservation."

Mr. Badger stated that based on staff's review of the record transmitted by the Board and attendance at the hearing, staff believed that the decision to approve the after-the-fact installation of a stone riprap marsh toe revetment and the stone splash apron for the subject application was supported by the evidence on the record, considered as a whole. In reaching its decision to approve the stone marsh toe revetment and the stone splash apron, the Board weighed the potential for public and private detriments against the potential for private benefits, as required by 28.2-1302(10) (B) of the Code of Virginia. The Board found that the on-site erosion warranted protection of the applicant's property and used the County's new in-lieu fee amount to compensate for the lost of vegetated wetlands, after considering on-site and off-site mitigation.

Mr. Badger said that accordingly, staff recommended that the February 28, 2008, decision of the Accomack County Wetlands Board be upheld.

Commissioner Bowman asked for the appellant or representative.

Jim Frese, appellant, was sworn in and his comments are a part of the verbatim record. Mr. Frese explained that staff said there was no survey made, but he reviewed a slide that showed a survey rod to be present in the area and showed the bulkhead to be approximately 100 feet long, which encroached on the neighbor's property. He stated that a walkway had been installed sometime between 2000 and 2003. He said an application for a pier was received by VMRC, January 10, 2000, and it was not heard by the Wetlands Board, but a general permit was issued.

Commissioner Bowman asked if Mr. Frese lived near the site. Mr. Frese stated that he was 3 miles away from the project site. Mr. Frese said that the bulkhead had been hooked to the rock revetment, not along the line of the marsh. He explained that when 40 individuals came forward to appeal the decision in November, the Commission refused to hear it. He said the present application was being done to give credence to what had already been done.

Associate Member Tankard asked if any of the freeholders were close to the project site. Mr. Frese responded yes, and stated that the island was small and any freeholders of Virginia could appeal.

Commissioner Bowman asked if a representative of the Wetlands Board was present. Mr. Badger responded no.

Commissioner Bowman asked for further discussion or a motion.

Associate Member Bowden stated that he was disappointed that the Wetlands Board was not represented at the meeting.

**Associate Member Bowden stated that he felt this was a peculiar mess as someone wanted at the beginning to approve this and it was not a close vote. He said VIMS was opposed to it, in particular, the stone road and it was to give access to the water. He said if the Commission required its removal then we would substitute our opinion for theirs. He asked staff about the assessment of penalties. Mr. Badger explained that if it was restored to the original condition that there would be none. Associate Member Bowden said the roadway he felt was not an honest mistake, like the others might be. He said he felt there was no reversible error, not like an after-the-fact application approval. He asked who was going to make sure that the special conditions added, such as maintaining the roadway, were done. He said he felt there was no reversible error or no option to remand for a civil penalty. He said that he felt that VMRC could not do anything. Commissioner Bowman asked if he would make a motion to uphold the Wetlands Board decision. Mr. Bowden responded yes. Associate Member McLeskey seconded the motion. The motion carried, 9-0. The Chair voted yes.**

No applicable fees, Wetlands Appeal.

\* \* \* \* \*

9. **JOHN AELLEN, #07-1919**, requests authorization to install two (2) 125-foot long nearshore stone sills immediately channelward of two existing low-profile wooden groins and to repair one groin by installing stone along the landward end at his property situated along Onancock Creek in the Bailey Neck area of Accomack County. The sills will be nourished with beach quality sand. Both Commission subaqueous and coastal primary sand dune permits are required.

Deferred until the May Commission meeting.

10. **CITY OF VIRGINIA BEACH, #07-2035**, requests authorization to install a 48-inch diameter concrete stormwater outfall line that will discharge approximately 940 feet channelward of mean low water into the Atlantic Ocean from a new stormwater pump station to be constructed at the intersection of Atlantic Avenue and 61st Street in Virginia Beach. The project is protested by several nearby property owners.

Deferred until the May Commission meeting.

11. **URBANNA HARBOUR YACHT CLUB ASSOCIATION, #07-1620**, requests authorization to remove their existing open-pile piers with 129 boat slips and to construct 2750 linear feet of 8-foot wide floating pier with finger piers and mooring piles to create a total of 139 boat slips at their facility situated along Urbanna Creek in Middlesex County. The project is protested by several nearby property owners and residents of the adjacent subdivision.

Chip Neikirk, Environmental Engineer, Sr., gave the presentation with slides. His comments are a part of the verbatim record. Mr. Neikirk stated there had been five additional protest letters received that were not in the Commission packets.

Mr. Neikirk explained that the Urbanna Harbour Yacht Club facility was located along the eastern shoreline of Urbanna Creek across the creek from the Town of Urbanna. The facility was originally approved by the Commission in 1984 and consisted of three (3) long piers that basically paralleled the shoreline of the Urbanna Harbor Development, a residential subdivision. There were finger piers and mooring piles to create 129 boat slips. A permit was issued in 1999 that allowed the two most upstream piers to be connected by an elevated bridge section. Over time the piers and boatslips had evolved into a "dockominium" facility, where the docks were commonly owned and managed by a club association and the slips themselves were "sold" to individuals. The development along the Urbanna Creek shoreline included a mixture of residential and commercial properties.

Mr. Neikirk said that the existing piers located channelward of the Urbanna Creek Harbor Subdivision are owned by the Urbanna Harbour Yacht Club, a condominium. The original permit was issued to Mr. Ben Hurley in 1984 when the pier facilities and the undeveloped upland were owned by the same party. The development had changed ownership on several occasions since then. In 1993, Urbanna Creek Associates, L.P. deeded ownership of the marina facilities to Urbanna Harbour Yacht Club. This action served to separate the ownership of the piers from the subdivision and most of the adjacent highland property. Item 7 on Schedule A of the deed also granted the riparian rights associated with the waterfront lots of the Urbanna Harbor Subdivision to the Urbanna Harbour Yacht Club.

Mr. Neikirk stated that the Yacht Club Association was requesting authorization to remove the existing open-pile piers and to construct 2750 linear feet of 8-foot wide floating pier to replace the existing deteriorated piers. All of the piers were proposed to be connected and ten (10) additional boatslips were requested to be added to the facility for a total of 139 slips. The total encroachment of the pier varied but averaged approximately 150 feet channelward of mean high water. Urbanna Creek was between 600 and 800 feet wide at the project site and the water depths at the pier range between 6 and 10 feet deep at mean low water.

Mr. Neikirk said that the project was protested by several nearby property owners and residents of the subdivision adjacent to the facility. They were primarily concerned with the proposal to connect the two most downstream docks. There was currently a gap of approximately 90 feet in width separating the piers. The protestants were concerned that connecting the piers would eliminate access to their waterfront properties and the back side of the pier by small boats. They also believed that the connection would prevent construction access to their shoreline for any necessary shoreline construction.

Mr. Neikirk stated that the yacht club was aware of the protestants' concerns regarding the connecting of the docks. In a letter dated February 22, 2008, they explained that they wanted to connect the docks to provide easier access to the clubhouse and pool facility for the boaters using the downstream slips. They stated that these boaters must currently leave the Yacht Club pier and walk through the subdivision streets to access the pool, clubhouse, and other slips. They claimed that the elevated open-pile walkways connecting the floating piers to the shoreline provide access to small boats. The cross-sectional drawing depicted a 10-foot wide opening at a height of 5 ½ feet above mean low water. They also stated that the floating piers could be disconnected and temporarily moved to provide access to work barges for any required shoreline construction landward of the facility.

Mr. Neikirk said that in their report dated September 3, 2007, VIMS stated that although the impact area was significant, replacing piers and improving public safety was justified if the operation complied with all local, state, and federal regulations. They noted that floating piers were generally acceptable when located in water deep enough to allow them to float during all normal tide conditions. They also stated that Urbanna Creek was condemned for shellfish harvesting and ten (10) additional slips might not significantly

increase the current levels of marine pollution. They recommended the development of a marina management plan to minimize the environmental impacts associated with the use of the facility.

Mr. Neikirk explained that in their letter dated November 28, 2007, the Health Department informed staff that the project was in compliance with their "Sanitary Regulations for Marinas and Boat Moorings", and that they had no objection to the issuance of the permit.

Mr. Neikirk noted that the Department of Environmental Quality had determined that the water quality impacts should be minimal and temporary and that a Virginia Water Protection permit would not be required.

Mr. Neikirk also noted that the Department of Conservation and Recreation advised staff of the presence of a bald eagle nest in the vicinity of the project and recommended the applicant coordinate with the Department of Game and Inland Fisheries to ensure compliance with protected species legislation.

Mr. Neikirk said that no other State agencies commented on the project.

Mr. Neikirk explained that the project would not encroach on any public or privately leased oyster planting ground and noted that the area was currently condemned for the direct marketing of shellfish.

Mr. Neikirk said that based on the information provided by the applicant, it appeared that the riparian area associated with the subdivision was severed and was now possessed by the yacht club association. Accordingly, the waterfront lots landward of the pier might not have a riparian right of ingress and egress associated with their lots. Nevertheless, the waters landward of the pier remained State-owned and the general public, including the lot owners, had a right to access and use this area. The protestants also had raised a valid concern regarding the need to be able to access their property by water for the installation of shoreline stabilization structures.

Mr. Neikirk stated that staff also understood the applicant's desire to connect the piers, because it would provide improved access to the pool, clubhouse, and other slips at the facility without having to leave the pier and traverse the subdivision roads. It would also serve to limit the illegal mooring of vessels along the landward side of the pier. Apparently, this had been an issue in the past. In addressing the protestants' concerns, the applicants believed the proposed elevated walkway provided reasonable small boat access behind the piers and they had stated that they would be willing to temporarily move sections of the floating pier to provide any necessary construction access.

Mr. Neikirk said that the association representative had stated that the additional 10 boat slips were being proposed to help defray some of the costs associated with the replacement of the piers. Staff did not believe that this was compelling justification for the additional

slips. In fact, the deletion of the slips would allow some reduction in the overall length of pier.

Mr. Neikirk said that after evaluating the merits of the project and considering all of the factors contained in §28.2-1205(A) of the Code of Virginia, staff recommended approval of the project with the following special conditions:

- The total number of wet-slips shall not exceed 129 and the length of the pier shall be reduced by 160 linear feet. The two pump-out slips may remain but shall not be leased or sold.
- The two (2) elevated walkways leading from the shoreline to the slips shall contain an opening of at least 10 feet in width and minimum clearance of six (6) feet above mean high water.
- The Permittee shall provide reasonable assess to any barges and construction equipment required to conduct work along the shoreline of the lots landward of the pier.
- The applicant shall be required to develop an acceptable marina management plan.

Mr. Neikirk also said that staff recommended the assessment at a rate of \$1.50 per square foot for the encroachment of the pier and slips over State-owned submerged land. If approved as applied for, that assessment would be \$204,729 based on the encroachment over 136,486 square feet of State-owned submerged land. Should the Commission approve the project as recommended by staff, the recommended assessment would be reduced to \$193,209 based on the encroachment over 128,806 square feet of State-owned submerged land.

Commissioner Bowman asked for the applicant or representative to come forward.

Ed Blanton, Vice Chair for the Homeowners Association, was sworn in and his comments are a part of the verbatim record.

Dave Lipscombe, representative for the Homeowners Association, was sworn in and his comments are a part of the verbatim record.

Commissioner Bowman asked if they accepted the staff recommendation. Mr. Blanton responded yes, but did request that the amount of fees be reconsidered. Commissioner Bowman stated the Code established the procedure and it would be unfair for others to reduce the amount. Bob Grabb, Chief, Habitat Management, stated that there was one thing to offer if the Commission wanted. That was to take the portion of piers permitted in 1984, considering only the structure, for assessing the fees and the remainder to be assessed as established today, which involves the structure and the resulting shadow encroachment. He stated staff would agree to that.

Commissioner Bowman asked for questions by the Board members.



Associate Member Fox stated that there was a protest being made by a member of the Association. He said that this individual indicates that they had not been provided a study of the project and that it was not authorized by the membership. He asked if that was true.

Mr. Blanton responded that it was true, but these were only the early stages of planning the project. He said that when this originally started in 2006 there was a question raised about cost and they attempted to acquire this information from a contractor. He explained that the contractor wanted to know exactly what was being done before giving an estimate.

Mr. Lipscombe explained that they had held open houses to show what was being proposed and they were not proceeding blindly into this project.

Commissioner Bowman asked if anyone in opposition was present.

Ed Fisher, representing the Association Board of Directors, was sworn in and his comments are a part of the verbatim record. Mr. Fisher said the Board had not approved the project, but were strongly objecting to it. He said that the project as proposed would close off and deny access by the residents to the shoreline. He said if it were to be approved by the Commission, then it should be conditioned by leaving open the area by the yacht club.

Commissioner Bowman asked how much time for access would be needed, 48 or 72 hours? Mr. Fisher stated that they would need seven days, as they want to keep this for the residents who paid for it.

Associate Member Robins asked if the primary concern was for boat access for shoreline stabilization? Mr. Fisher stated that it was primarily.

Associate Member Schick asked if in the deed, the riparian rights were given up? Mr. Fisher said that was not clear, but the riparian area was transferred to the Yacht Club.

Associate Member Fox stated that the letter indicated that access was needed for fire emergencies. He stated also that 7 days was not enough. Mr. Fisher stated that one hour was not enough. Commissioner Bowman asked if fire service was available. Mr. Fisher responded yes. Associate Member Fox asked if this access was necessary by either the pier or land. Mr. Fisher responded both.

Clyde Roper explained that he was a member of the Association and owned a dock and slips with the yacht club. He said this being protested was not intended as a reflection on the board as they had done a good job. He said they were just protesting a particular portion of the project proposal. He provided a signed document with 19 signatures. He said there was one signature, a Mr. Gussey, who was just a slip owner. He utilized a staff slide to point out where the square dock area was heavily used, the access area was needed for fire emergency and he noted the area where there was a shoal, the water was shallower

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and should be dredged. He said he felt the closed area would devalue their property. He said that the Homeowners Association did not have representation on the Yacht Club board. He stated they were willing to work with the applicants.

Sylvia Bunsavage, Homeowners Association Member, was sworn in and her comments are a part of the verbatim record. Mrs. Bunsavage read into the record a letter from Mr. Bruce Woodruff, which was the same as in staff's record. She stated that Mr. Woodruff had a business meeting to attend and was not able to attend the Commission meeting. She stated that a Mr. James Ward was told he had riparian rights and if the docks are joined, this would encroach on his riparian rights. She said she agreed that improvements were needed, but no study was done, no inspection was done, it required approval by Corps and they should be involved, not all homeowners had seen the plans, and they objected to the fact that there would be more slips rented to pay for the changes. She said they were requesting that no approval be given until more information was provided to the homeowners and the Corps was included in this process.

John Bunsavage, Homeowners Associate Member, was sworn in and his comments are a part of the verbatim record. Mr. Bunsavage stated that they were opposed to the north and south piers being joined together, as the 96 foot opening had always existed. He said this would impact shoreline repairs and access by residents to the water. He said the two piers are supposed to be independent with all amenities. He said he felt the connection of the piers would impact their property values, as the connection was to defray construction costs. He said the Corps had stated that there should be no impact to this area in the case of fire and that it was used by all to access the water and further that no connection should be made.

Dr. Ellen Woodruff, resident, Yacht Club member, and Board member, was sworn in and her comments are a part of the verbatim record. Dr. Woodruff thanked staff for providing them with copies of the evaluation. She requested a staff slide of the site of the two piers to be connected. She said she felt that the lack of communication was a problem. She and other members of the yacht club, which is about 1/3 of the residents, had kept asking for information and it was not given to them. She stated that she had a few points to make. She said there were the fire and safety issues. She explained that where the split in the piers was located was a natural fire wall between the residents' homes and the boats tied up at the piers with their fuel tanks. She said as far as the riparian rights, they were told they had them and it was shown to be true with the 2005 documents. She said there would be traffic impacts. She explained that the ten slips would be sold and the connection of the piers would give members easier access to the pool. She said there was the ecological issue because of the pumpout station at the point of connection never has worked and the yacht club has accessed the residential water system and left it on at the pier wasting 10,000 gallons of water. She said the Health Department says they are in compliance and they have no objections to a permit being issued. She said how can they say that when the pump station does not work. She stated that the area is also condemned to shellfish harvest. She said they were asking that the permit be denied until such time as

communication between the yacht club and the residents was improved. She provided a hand out which was a membership directory. She thanked the staff and the Commission for the opportunity to hear this matter.

Commissioner Bowman stated that the applicant will be allowed two minutes for rebuttal comments.

Mr. Blanton explained that 45 letters of approval had been received for what they are doing. As far as communications, he said that Dave had set up a website and on April 12<sup>th</sup> at the annual meeting this was somewhat discussed.

Commissioner Bowman asked for further discussion or a motion.

Associate Member Robins asked VMRC Counsel if the yacht club had proper standing to do this project. Carl Josephson, Senior Assistant Attorney General and VMRC Counsel, said that if they were elected by law to represent this group, then he could only assume it was proper. Associate Member Robins asked about the severing of riparian rights.

Mr. Josephson responded that there was no documentation for the declaration referred to and he could not answer that question.

Associate Member Schick stated that he understood the applicant's concerns as he was a marina owner and the elected body was authorized to do the work. He stated that he was inclined to approve most of the project for the reasons given by staff in their recommendation, but not the number of slips. Mr. Neikirk explained that the reason given for the ten slips was to cover the cost did not justify allowing them to be constructed.

Associate Member Fox asked if this matter could be tabled to gather more information about the riparian rights of the landowners. Commissioner Bowman suggested asking VMRC Counsel and asked if they had riparian rights and should they be allowed to come back with proof. Mr. Josephson explained that the Commission was not making a property determination. He said the permit could be issued subject to determination of riparian rights and if this was violated, then it would become a court matter.

**Associate Member Schick moved to approve the project, as recommended by staff, and added that there be 30-day notice requirement to be given by the lot owners for the removal of the floating dock for providing access for barges and construction equipment required for working along the shoreline. He also said that a marina plan be required, to include a procedure for handling the 30-day notice. Associate Member Holland seconded the motion. Commissioner Bowman asked about the assessment of the royalties and whether to use the previous fee schedule or as it was now, which would include the assessment of fees for the bold footprint. Associate Member Schick agreed to assess the royalty fees for the bold outline encroachment of the piers and slips over State-owned subaqueous bottoms (less the direct shadow encroachment in square footage of the previously authorized piers) at the rate of**

**\$1.50 per square foot. The motion carried, 8-1. The Chair voted yes. Associate Member Fox voted no.**

Royalty Fees (encroachment 102,158 sq. ft. @ \$1.50/sq. ft.)...	\$153,237.00
Permit Fee.....	\$ 100.00
Total Fees.....	\$153,337.00

\* \* \* \* \*

The meeting was adjourned for the lunch break at approximately 1:12 p.m. and reconvened at approximately 1:45 p.m.

\* \* \* \* \*

**12. PUBLIC COMMENTS:**

**Request for exception to the limited entry criteria for the Black Drum Fishery:**

Andrew J. Sturgis introduced himself and asked that a black drum harvest permit transfer be approved.

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

Mr. Grist said that the Commission established criteria for granting these exceptions to the limited entry Black Drum fishery in 1994. He stated that Archie Bradford passed away and the request had met the March 1<sup>st</sup> deadline. He said this would be a one-in and one-out transfer by him to Andrew J. Sturgis of Belle Haven, Virginia, and the executor of Mr. Bradford's estate had also provided documentation approving the transfer request. He stated that the staff recommended approval of this request for transfer.

Commissioner Bowman asked for a motion.

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

**Blue Catfish:**

Douglas Jenkins, Twin River Watermen's Association, was present and his comments are a part of the verbatim record. Mr. Jenkins explained that Rom Lipcius had met with the Department of Game and Inland Fisheries Commission to discuss a request for funding to study what can be done to control this species of fish, a proven predator of the blue crab. He said the DGIF acknowledged their error in introducing this catfish to Virginia waters. He said that watermen would do the work and more watermen were needed for this

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program. He was requesting that the Virginia Marine Resources Commission give total support to this program. He said there were funds for one year. He said this would also involve the development of a future processing plant. He said the catfish was a wholesome, eatable fish. He said this would also help other fisheries, such as the shad and herring, if the species were gotten rid of.

No action was taken.

\* \* \* \* \*

**13. PUBLIC HEARING:** Consideration of proposed regulations for the 2008 crabbing season.

Jack Travelstead, Chief, Fisheries Management, gave a Power Point presentation. His comments are a part of the verbatim record. Mr. Travelstead explained that there were three additional packages of information provided with the notebooks. He said there were additional data, additional public comments not included with the mail-out packages, and finally ten draft regulations that were recommended to be amended or repealed. He explained that the comments included the recommendations of VIMS submitted by Dr. Wells, the Chesapeake Bay Foundation, the CCA, and a good number from individuals

Mr. Travelstead apologized for the lengthy presentation but that a good number of management measures were advertised by public notice to be heard at this meeting. Prior actions at the February and March meetings resulted in the adoption of several regulations that were previously recommended by the Blue Crab Regulatory Review Committee. Those regulations, which are now in effect, include increases in the peeler crab size limit, opening of the larger cull ring in Chesapeake Bay, the seaside of Eastern Shore and Pocomoke and Tangier sounds, elimination of license stacking, capping of the dredge fishery at 53 vessels, and closure of the Blue Crab Sanctuary during May. While these regulations are significant, it has been recognized, for some time, that additional action to reduce overfishing would be needed. The magnitude of those additional measures, however, could not be known, until the results from the 2007/2008 Winter Dredge Survey were available.

Mr. Travelstead explained that the Winter Dredge Survey for blue crab had been conducted since 1990 and was recognized as the most reliable indicator of blue crab abundance in Chesapeake Bay. The results of this bay-wide survey, with 1500 sampling stations, are also highly correlated with harvest levels. Results from this survey indicated that the abundance of exploitable (age 1+) crabs (2.4 inches and greater) had been low during the last 10 years. Since 1998 the annual bay-wide harvest had been well below the long-term average of 78 million pounds. Another reliable survey, the VIMS Trawl Survey showed similar trends of declining abundance, most notably of potential spawning crabs, since 1992.

Mr. Travelstead stated that the 2008 results of the Winter Dredge Survey were now final. The results indicated a continuing decline in the abundance of age 1+ (potential spawners) crabs in Chesapeake Bay. Age 1+ crabs level has currently dropped by 16.1 percent. Since 1991, the abundance of age 1+ crabs had declined by 73.7 percent. This 2008 value is the third lowest in the time series (1990 - 2008) and is substantially below the interim target abundance level of 200 million age 1+ crabs. Age 1+ crab abundance had now been below the interim target level for the last 14 bay-wide winter dredge surveys that were conducted from mid-December to mid-March.

Mr. Travelstead explained that the overall crab abundance (new recruits and age 1+) increased in 2008 due to an increase in age 0 crabs (new recruits). Abundance of the 2008 year class of new recruits ranks 12<sup>th</sup> among 18 bay-wide dredge survey indices, since 1990. The new recruits from the December – March survey are especially important to the fall fisheries.

Mr. Travelstead said that fishing mortality, expressed as an exploitation rate, increased in 2007 to 60 percent and was well above the overfishing threshold of 53 percent. Overfishing of the Chesapeake Bay blue crab stock had now occurred in seven of the last 10 years.

Mr. Travelstead stated that all reduction in harvest calculations were based on average (2004 – 2007) female-specific, Chesapeake area-specific, harvest data (in pounds). Staff estimates that the combined effects of the increase in peeler crab size limit, the opening of the 2 5/16-inch cull ring in Chesapeake Bay and other areas, and closure of the Blue Crab Sanctuary in May as an 11 percent reduction in female crab harvest. A combination of measures is necessary and must include a closure of the fall harvest of female crabs.

Mr. Travelstead explained that a fall closure was important for several reasons. First, it protects a portion of the most biologically valuable female crab, because they are the ones that are pregnant and would contribute to the spawning stock the following year.

Mr. Travelstead said that Maryland had proposed a fall closure in their waters. Failure to follow Maryland's fall closure with a similar fall closure in Virginia would subject the female crabs that were saved by Maryland's measures to harvest pressure, therefore, being lost.

Mr. Travelstead stated that when staff reviewed the landings by month it showed that November is one of the least productive harvest months, in pounds of crabs harvested. From 2004 to 2007, about 400 crabbers worked in November; 600 worked in October.

Mr. Travelstead noted that Governors Kaine and O'Malley were encouraging VMRC to adopt measures that would add to, not cancel out, the efforts of the other states. A fall closure would be necessary to achieve this in 2008. The crab dredge fishery averaged 12%, by number of crabs, of the total (male and female) Chesapeake harvest, from 2004

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through 2007. Since this fishery exploits mostly (97%) female crabs, it accounts for roughly 17% of the Chesapeake Bay areas harvest of female crabs.

Reasons to regulation this fishery:

- 1) Its harvests consist of the highest percentage of female crabs
- 2) The fishery is associated with a seasonally high degree of wastage;
- 3) The value of the harvested product is the lowest of any crab fishery;
- 4) The least number of fishermen (53) are associated with dredging;
- 5) There is strong public support for its elimination;
- 6) Some in-state processors have indicated they are no longer interested in dredged crabs;
- 7) Some of the crabs not dredged will be available to the spring pot fishery, where they will be more valuable;
- 8) Almost all dredge fisherman are also licensed in the crab pot fishery;
- 9) Participation in the dredge fishery has been declining for 14 years;  
and,
- 10) More than half of the dredge fleet worked less than 30 days annually, from 2004-2007, and harvested crabs, with an average total dockside value of less than \$12,000.00, per vessel.

Mr. Travelstead explained that while the Commission had advertised the winter dredge fishery options that include partial season closures or geographical area closures, each of these options resulted in significantly less reductions in female harvest. The difference then must be made up from other options, like an early closure of the fall crab fishery. Staff recommended a total closure of the winter dredge fishery.

Mr. Travelstead said that 6 ½ inch maximum size limit for females was originally supported by staff at a time when they thought Maryland would adopt a 6 1/2-inch maximum size limit on female crabs. While a maximum size limit on female crabs would provide an attractive size refuge for female crabs, it also presented enforcement difficulties and culling burdens on fishermen. Culling also can result in crabs being damaged or killed. Staff did not recommend the Commission adopt this measure.

Mr. Travelstead explained that CMAC members strongly support larger cull rings in the tributaries, as a measure to improve the quality of male crabs. The current size of cull rings is 2 3/16 and 2 5/16-inches. Staff estimated the 2 3/8-inch cull ring in the tributaries would result in a 5 percent reduction in female harvest. Since a requirement of new cull rings would require some time for their installation, if approved, staff recommended a July 1 or August 1 effective date. With a delayed effective date, the harvest reduction associated with this measure would only be 3 percent. At a time when some Virginia crab processors had proclaimed the Virginia product to be among the worst in quality requiring a larger cull ring was prudent. Also, keep in mind that all crabs saved by closure of the dredge fishery would still be vulnerable to harvest in the spring pot fishery. Staff

recommended adoption of a requirement for two 2 3/8-inch cull rings in every hard crab pot in the bay and its tributaries, effective July 1, 2008, to allow time for installation. He stated that staff did not have enough information on the appropriate size of cull rings for peeler pots and therefore, staff recommended that this measure be tabled for further study.

Mr. Travelstead said that like the maximum size limit, bushel limits were considered at a time when Maryland was contemplating them as well. The biggest problem with bushel limits was that rarely do they result in savings, unless it was set at very low levels. Imagine a crabber who sets a number of pots, but catches his bushel limit after fishing just a portion of them. He can hold those remaining crabs in their pots and return to them to start crabbing on the next day. An effective bushel limit would vary almost monthly and as there was an abundance of landing sites throughout Tidewater, the number of possible inspections by the Law Enforcement would be just a fraction of the total landings. Staff did not support bushel limits.

Mr. Travelstead explained that the Commission had proposed reductions in crab pots and peeler pots by up to 30 percent. Unfortunately, the relationship between pot numbers and harvest was not known. Implementation of a crab pot tagging program might improve that situation. One thing was certain the ratio between total effort and the catch per unit effort would not be 1:1.

Mr. Travelstead said that based upon the advice of the CMAC, staff recommended a 30 percent reduction in all pots, effective March 17, 2009. Assuming an 11 percent credit for measures adopted in February and March, a 17 percent reduction for total closure of the dredge fishery, and no recoupment an additional 6 percent reduction would be needed. This can be achieved through a closed season of October 27 - November 30 during which female crabs shall not be harvested. He explained that the failure to completely close the dredge fishery would place more economic burden on a greater number of individuals, who crab during the fall. Since fall harvested crabs were more valuable than winter dredged crabs, the economic impacts from a fall closure were greater. These fall impacts can be minimized, however, by closing the winter dredge fishery completely.

Mr. Travelstead stated that Maryland DNR was also contemplating a fall closure to protect female crabs. It was estimated that a closure on the order of October 20 was needed in Maryland, one week earlier than a Virginia October 27 closure. Another area of concern would be a large separation between state - specific closure dates, which may entice Maryland crabbers to move their operations to Virginia to avoid the earlier closure in Maryland. With these factors in mind, staff recommended adoption of an October 27 closure to the harvest of all female crabs.

Mr. Travelstead said that the Commission had proposed a reduction in the number of pots that may be set by licensed recreational fishermen. The current limitation is 5 pots per licensee. Without a crab license, a person is limited to two crab pots for household use. He explained that during times of low abundance, 5-pot recreational licensee pursued crabs



beyond their immediate area and the 2-pot unlicensed individual limit their activities to the end of their dock. It was not possible to quantify harvest reductions, in the recreational fishery, that would occur from lowering the per licensee pot limit. Staff had received over 260 written comments in support of lowering the five-pot limit to three pots. Such a limit will reduce the 5-pot recreational crabbing altogether and they could still set two crab pots without a license. The 5-pot recreational license is described in the Code of Virginia as a commercial gear license. Any limitations placed on harvests should include all crab fisheries. Staff recommended elimination of the 5-pot recreational crab license.

Mr. Travelstead stated that because of the low abundance of blue crabs, staff recommended that any person convicted of two blue crab conservation regulations in a twelve-month period would be summoned and required to come before the Commission.

Mr. Travelstead said that there had been a large number of written public comments on the proposed measures. Through April 16, 2008, staff had received 314 letters, emails, and notes. The vast majority of these comments supported the advertised proposals.

Recommendations of the Blue Crab Management Advisory Committee (CMAC):

- 1) The CMAC supported a statewide increase in cull ring size to 2 3/8-inches. Although this increase was advertised for only the tributaries, the CMAC, on a vote of 7 to 4, supported an extension of the rule to all state waters. While the new cull ring, in the tributaries after July 1, provides a maximum 3 percent reduction in the harvest of female crabs, staff will calculate estimates for the state wide proposal and have that for you on Tuesday.
- 2) Motions to close the entire dredge fishery and to close January – March dredging plus dredging on hard-bottom areas were defeated on votes of 2 to 7 and 2 to 4, respectively.
- 3) The CMAC endorsed a motion (7 to 1) to close hard-bottom areas to dredging from January 15 to February 28 and limit daily harvest to 21 bushels. Because the dredge fishery is so efficient, bushel limits offer little savings, as unharvested crabs from one day remains in the bottom and available for harvest during the remainder of the season. The savings are, in fact, recouped. Likewise, enforcement of closed areas, given the mobility of the gear, presents difficulties. Staff cannot, therefore, support this CMAC recommendation. Assuming no recoupment and perfect enforcement, which is unrealistic, this option achieves a maximum reduction of 9.1 percent. Such a small reduction would require a fall closing, then, of October 5, which would negatively effect far more fishermen. Also, those “saved” crabs from the October and November closure would be subjected to harvest by the efficient dredge fishery, further negating the intended conservation benefits.

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- 4) As a replacement for any fall closure, the CMAC recommended (8 to 3) a 30 percent reduction in the number of pots per licensee. As stated previously, the relationship between catch and effort for the crab pot fishery is unknown. Therefore it is not possible to understand the effects of a 30 percent reduction. Nonetheless, it is in line with the staff's support for the long term use of pot limits as a key management tool. While staff cannot support the recommendation for 2008, because of this deficiency, as well as the lack of a crab pot tagging program, we do believe it should be implemented in the Spring 2009 pot fisheries to limit the recoupment of crabs saved from the fall closure and winter dredge fishery closure. If the 2009 Winter Dredge Survey results are improved and overfishing is controlled in 2008, a 30 percent reduction in pots may reduce or eliminate the need for a closed fall season next year.
- 5) The CMAC did not support (3 to 8) reductions in recreational crab pots. Staff disagreed.
- 6) The CMAC also requested staff provide further information on scenarios to eliminate part time crabbers from the fishery, the effects of a 4-inch minimum male peeler crab size limit, limits on the use of recreational collapsible traps, and a moratorium on commercial license transfers.

Staff recommendations:

- 1) Statewide closure of the winter dredge fishery and repeal of all other crab dredge regulations.
- 2) Require two 2 3/8-inch cull rings in any crab pot placed, set or fished in the tributaries, including those of the Potomac River, but excluding the seaside of the Eastern Shore. This measure should be effective July 1, 2008.
- 3) A fall closure to the harvest, by any gear, of female crabs from October 27 through November 30.
- 4) A 30 percent reduction in crab pots and peeler pots per license, effective with the start of the 2009 crab season.
- 5) Elimination of the 5-pot commercial license for recreational purposes until the Winter Dredge Survey projects abundance of age 1+ crabs at over 200 million crabs.
- 6) Require summoning of any person to the Commission for a license revocation hearing, who has been convicted of two blue crab conservation violations in a 12 month period.

Commissioner Bowman asked for questions of staff.

Associate Member Robins stated that in order to conserve the females the measures should include the tributaries as was suggested for 2009 and VIMS supports this suggestion. He said that staff should continue to investigate this option. He stated that all of this is accounting driven and if the Commission did close the fall season, what would the compensatory results. Mr. Travelstead explained that the numbers were strictly math with no measures for recouping being provided. He said for cull ring measures there were no measures to counteract them. Associate Member Robins asked if immediate action regarding the spawning by the reduction in the number gears, a 30% closure, and the 2 3/8 inch Bay cull ring size would be effective. Mr. Travelstead stated that staff would not have any objections to other measures, but not pot limits in an effort to counteract the fall closure. Associate Member Robins stated there was a need to develop long term measures, such as pot tagging to help the State monitor the fishery to achieve a reduction of 30% in 2009. He said he would like to ask staff to develop a timetable for next month projecting 2009 allocation measures before they are established. Mr. Travelstead stated that if there were no more measures by March 17<sup>th</sup>, then what had been recouped would be lost. Associate Member Robins asked for comments from staff about the control date. Mr. Travelstead said the purpose of the control date was to establish a baseline for participation in the crab fishery. Those entering the fishery after that date may not be guaranteed a place in the fishery in the future.

Associate Member Tankard asked staff to explain what the results would be from closing the fall season. Mr. Travelstead explained that it would vary with the dates of closure. He said if it was a complete closure than there would be a 17% reduction in harvest and if close for the month of December only a 9% reduction. He said there was no recouping in the calculation as the dredge was a very efficient gear.

Associate Member Fox stated that if the staff were looking to do things now instead of 2009, why not cull rings. Mr. Travelstead explained that it was not advertised and it was not looked at. He said it was recommended by CMAC that it be made a Bay-wide measure. Commissioner Bowman suggested that emergency action could be taken today. He said the fall closure date would save crabs, since it was timed with the migration of crabs down the Bay. Mr. Travelstead stated that there was a large fishery in Maryland and the fall closure there would save a lot of crabs.

Associate Member Tankard said that with the current proposed measure there is hope to achieve the 34% reduction, but what actions will assure that it will be realized. Mr. Travelstead said that cull rings Statewide would do something next spring, because the survivors would need to reach the spawning period.

Associate Member Schick asked about the number of female crabs caught in the pot fishery. Rob O'Reilly, Deputy Chief, Fisheries Management responded that the number of

females was 70%. Associate Member Schick asked about the fall moratorium. Mr. Travelstead said that the fall closure was only for the females.

Associate Member McConaugha stated that there was a need to look at the fall-winter fishery. October is when the migration occurs and female crabs needed to be protected so that the resources were not overfished.

Associate Member Fox stated that the poor quality of the water was caused by all and by eliminating the 5-pot recreational license others would receive the message that the problem was greater than just overfishing. He said if the resources were abundant then the Commission would not be discussing overfishing.

Commissioner Bowman read a statement from the Governor into the record.

Commissioner Bowman opened the public hearing

Bob Pride of Poquoson, Virginia, was present and his comments are a part of the verbatim record. Mr. Pride stated that over-harvesting was a part of the problem. He said that environmental issues needed to be corrected, such as water quality and loss of habitat. He requested that a Task Force be established by the Governor. He said the proposed measures will not help unless other problems are solved. He said there was need to restore the Bay and leave it better than it was found.

David Nobles, State Coastal Conservation Association, was present and his comments are a part of the verbatim record. Mr. Nobles stated that VMRC had managed resources for the commercial fisheries and that it had worked for many years until now. He said VMRC now needed to look at the resource and to take action. He said there was a need to do better for the crabs than had been done for the oysters and now was the opportunity.

Ann Bender, Nassawaddox Waterman, was present and her comments are a part of the verbatim record. Ms. Bender explained that the Sand Dollar Seafood was one of the few picking houses left. She stated, as others had, that she was opposed to the new crab regulations, and requested it be tabled one month. She stated she disagreed with the statement about the quality of crabs. She said that 400 to 600 watermen would be affected and 53 if the winter dredge fishery is closed. She asked how they were to be compensated and what about a reduction in fees.

James Close, crab dredger, was present and his comments are a part of the verbatim record. Mr. Close stated that all the information he had seen presented made him feel that the crab dredgers were being targeted. He said that nothing was in the proposed measures for the peeler potters. He said they were being given a "bad rep". He said someone needs to look at the number of soft crabs that made it to market and did not get the chance to spawn. He stated that he may get in trouble for his comments, but he felt he could not remain silent

any longer and was speaking up. He said if you want to kill a population, you kill the children.

Tom Powers, recreational fisherman, was present and his comments are a part of the verbatim record. Mr. Powers explained that others had talked of water quality, predators, habitat loss, but he felt the major problem was overcapitalization. He stated that the CMAC did not support the elimination of the recreational crab pot license and did recommend a 30% reduction by June 1 be adopted. He provided a graph handout and read his comments into the record.

Lee Ann Washington, daughter of deceased waterman, George Washington and an attorney, was present and her comments are a part of the verbatim record. Ms. Washington explained that she was doing this on her father's behalf as he would have wanted her to do so. She referenced the Code of Virginia, Section 28.2-203.1, regarding crab management. She read this section into the record.

“Conservation and management measures shall prevent overfishing while achieving the optimum yield from each fishery. The “optimum yield” of a fishery means the amount of fish or shellfish which will provide the greatest overall benefit to the Commonwealth, with particular reference to commercial fishing for food production and to recreational fishing.”

She said she was requesting that the matter be tabled for one month or legal recourse would become necessary by the watermen.

Gerald Parks, Tangier crabber, was present and his comments are a part of the verbatim record. Mr. Parks stated that the Commission needed to look at the “Buster” crab as well as the female and put a ban on both. He suggested that a limit be established for the peeler potters at 5 bushels per boat.

Cecil Diamond, Reedville crabber, was present and his comments are a part of the verbatim record. Mr. Diamond stated that he had been a commercial crabber since 1968 and he felt that the crab dredge industry did not cause the problem with crabs. He said at one time there were 250 crab boats now there were only 53. He suggested that the matter be tabled for one month.

Greg Finney, Eastern Shore crabber, was present and his comments are a part of the verbatim record. Mr. Finney explained that the fishery was going to be lost, not the crabs, but the industry. He said the industry cannot stand any more regulations. He said in the early 90's when the crabs regulations were established, the watermen at the time said they would not work as overharvesting was not occurring as the effort was spread out. He said that overfishing was just a myth. He said that one half of the crabbers have dropped out now and only 3 were under the age of 55. He said the crabbers were being overregulated, as there were only a small number of crabbers. He said that he wanted to work with VMRC to come up with a viable solution. He stated that in the last five years there were

no full time crabbers left. He said that the measures proposed were drastic and asked that it be tabled until this could be discussed with Dr. Lipcius.

Joe Palmer, Virginia Beach waterman, was present and his comments are a part of the verbatim record. Mr. Palmer explained that he had listened to all and the reduction will happen but it should affect all watermen. He said 10% of the full-time crabbers (1,500 licensed) were active and should be allowed to hold a license for life. He said the number of licensees needed to be targeted by allowing transfers from father to son only. He suggested also that to fish the licensee must be in the boat, as he objected to the use of agents. He stated he agreed that cull rings being required State-wide would help reduce the catch with a decent responsible catch limit. He said they needed to be able to keep prices up and the resources available to sell to maintain a market.

Robert Jensen, Rappahannock River Preservation Society, was present and his comments are a part of the verbatim record. Mr. Jensen explained that he was a citizen of Virginia. He said he felt that regulations were necessary or no crabs would be left. He said that all must operate under the law and the science was good, so they must go with it.

Dean Dise, Tangier crabber, was present and his comments are a part of the verbatim record. Mr. Dise said he had been a crabber since 1989. He said he had sent a letter stating that from mid-March to mid December make the limit 10 barrels and close all hard bottom. He said to close the Winter Crab Dredge fishery would greatly affect those living on the island and they would be put out of work. He said you can get \$40/bushel of crabs during the winter and he suggested that there be placed on the crab fishery a limit of 25 bushels year around to keep from flooding the market and to keep it at a decent price. He said on Tangier a lot of watermen have gone to work as tug boat operators and right now there was a long waiting list. He said he had two kids and he needed at least \$2,500.00 per month to survive.

Amy Firth, waterman, was present and her comments are a part of the verbatim record. Ms. Firth explained that her father had crab dredged when the crabs were plentiful. She said that waste did not affect the females as they would spawn. She said that the jimmies also needed to survive because if there were none of them, the females could not reproduce. She stated she was opposed to the regulation for cull rings. She said she agreed that something was needed, but did not know what.

Johnny Tubbs, was present and his comments are a part of the verbatim record. Mr. Tubbs stated that he was opposed to all regulations. He said the watermen did not have unemployment or subsidies to collect and they would put them out of business. He said the crab dredgers were full-time fishermen while the others were weekenders.

Dr. Rom Lipcius of VIMS was present and his comments are a part of the verbatim record. Dr. Lipcius read the comments from VIMS by Dr. Wells into the record. He said the comments supported the regulations, as ecologically sound. He said that he realized the

burden placed on watermen, but there was also hope to help the resource. He said that the SAV had declined, habitat had been degraded and there was increased predation by striped bass and croakers. He said there was need to pursue ecosystem management of crabs.

Peter Nixon, CMAC member, was present and his comments are a part of the verbatim record. Mr. Nixon explained that negotiations were the same in Maryland as here and that is to save the females. He said the theory was not working. He said in Maryland there is a high demand by the market for the jimmie crabs, especially for the Washington DC area. He said in Maryland this was mostly a summertime crab fishery and the boats were tied up in September, whereas, Virginia was a year round fishery. He said the closures mostly affect the full-time watermen and a smaller number in Maryland. He said he spoke with Mr. Graham a processor who told him he would have to close for 6 months.

Mr. Nixon explained that he had been complaining about the crab harvest for 15 years and the agreement made at the Colonial Beach meeting did not address anything that had been heard. He said it was supposed to be a 15% reduction and was turned into 34%. He said the recommendations by CMAC were the least impacting and would reduce the number of peeler pots. He said the CMAC recommendations always got deluded by the time they were heard by to the Commission. He said only two closures were needed and no other measures were necessary. He said the exploitation rates would be reduced if the number of pots were to be reduced, as had been done in the past. He said that only Associate Members McConaugha and Robins had looked at this issue for the past 6 months and he felt the others could not make a decision. He recommended tabling the staff recommendations and to approve the CMAC recommendations which included a 30% pot reduction and to do it now. He had been told by staff that if the closure did not work this year, a closure would be necessary again next year.

Johnny Graham with Graham and Rollins, was present and his comments are a part of the verbatim record. Mr. Graham said he was the one crab processor left in Virginia. He said his family had served on all groups and panels to help to protect the blue crab resource. He stated that the market had changed from 25 years ago and in the 20 years with the regulations the watermen have had to change. He said the soft shell crab industry had grown for the peeler potters. He said the Virginia crabbers were getting the short end of the stick. He said Maryland and Virginia should equally share the suffering. He said Maryland had not mentioned any gear reduction. He said there had not been any summonses issued for the watershed area and the winter crab dredge fishery had been active for a century. He said CMAC did not want to close the dredge fishery, but have only temporary closures as regulations usually would become permanent. He said more time was needed to see what impacts would result from the regulations. He stated that the proposed regulations would produce a part-time fishery. He said they need full-time work, as the bills had to be paid full-time.

Wendy Turner, of Gwynns Island, was present and her comments are a part of the verbatim record. Ms. Turner recommended the out-of-state license be eliminated. She said if the

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limit is reduced, it will cause the market for crabs to go elsewhere. She said the part-time worker would not be hurt, but she was working to pay her mortgage.

Kenneth L. Turner, of Suffolk, Virginia, was present and his comments are a part of the verbatim record. Mr. Turner stated that the Commission should let the full-time crabbers work and the part-timers be eliminated. He said the cull rings allowed the smaller crabs to escape. He said that restrictions keep getting added and when they do not work more are added. He said that the Tangier watermen had no where else to go. He said they need some compensation, the same as the farmer. He asked the Commission to do something for the crab industry.

Dennis Dalheim, commercial crab dredger, was present and his comments are a part of the verbatim record. Mr. Dalheim stated he was opposed to the regulations and requested it be tabled or he would have to pursue legal recourse. He said he was one of the 53 dredgers who was being impacted by the rising fuel cost. He said let him decide when and if he can not make a living.

Ken Diggs, Jr., Virginia waterman, was present and his comments are a part of the verbatim record. Mr. Diggs stated that he was opposed to all the proposed regulations and asked that the matter be tabled for one month or he would pursue legal recourse. He said he had recently invested in a crab pot license, what about him?

Ty Farrington, Virginia fisherman, was present and his comments are a part of the verbatim record. Mr. Farrington stated he was opposed to the regulation and requested it be tabled for one month or he would pursue legal recourse. He asked about the Maryland fall closure date. Mr. Travelstead answered October 23<sup>rd</sup>. Mr. Farrington explained that the temperature affected migration and it was usually over by then and if Virginia's fishery were to close they would not get their part.

Nelson Ortiz, recreational fisherman, was present and his comments are a part of the verbatim record. Mr. Oriz said he had been here for the January meeting and water quality was discussed, but also need to continue to discuss water quality and sewage. He said the Board needed to look at the Menhaden fishery and free them up to do their job and the predators would have something to eat.

Doug Jenkins, Twin Rivers Watermen Association, was present and his comments are a part of the verbatim record. Mr. Jenkins requested that the Board table the matter for one month or he will look for other recourse. He said a message needed to be sent to the Governor and other politicians. He said the past Governor's did not do their job in cleaning the Bay and kept postponing it.

Ken Smith, Virginia Watermen's Associate, Lee Smith, Commercial Waterman, Roger Parks, Commercial Waterman, Jim Waterfield, Commercial Waterman, Ken Diggs, Commerical Waterman: All of the these individuals were present and they each stated that



they were opposed to the new crab regulations and requested that the issue be tabled one month or they would have to pursue other legal recourse. Their comments are a part of the verbatim record.

Commissioner Bowman closed the public hearing. He asked for discussion by the Commission.

Associate Member Bowden said that the watermen were the only ones hurting. He said back when there was a *pfisteria* scare in Pocomoke Sound, their seafood market collapsed. He stated that nothing happened to the one who caused it. He said there was one crab house on the Eastern Shore and that had been sold to a developer and it was still there but under a year-to-year lease. He stated that eventually that would probably be gone and developed. He said others need to pay, too, even if it meant stepping on a few big toes. He explained that there was pollution which results in poor water quality and increased predation. He said that 15 years ago 20 regulations were enacted that were supposed to stem the decline in crabs and it had continued to decline since them. He said if these regulations were approved, then somehow the watermen need to be compensated. He said if anyone else worked for 4 months and 20 days and were to be out of work the entire time, they would lose everything. He said that it seemed that staff could calculate what would be lost if the regulations were not adopted but they could not seem to calculate what would be gained if they were adopted. He said he could only support this action being taken, if it included compensation for the watermen. He said also that the government should be able to find funding for improving the water quality.

Associate Member Robins read his comments into the record and they are a part of the verbatim record. He said the crab resource, the crab industry and this Commission were now caught in a perfect storm of degraded environmental conditions including reduced water quality, substantial losses of early life stage habitat for blue crabs, including SAV and oyster reefs, predation associated with the fully recovered rockfish population, and a management plan that allowed overfishing to occur with regularity. In the long term the Commission must develop an effective effort control system to manage the resource and fishery for sustainability, both biologically and economically, which they are doing.

Associate Member Robins explained that pursuant to the release of the adverse findings of the 2006 bi-state blue crab stock assessment which indicated that overfishing was occurring consistently in the fishery, the Commission requested a comprehensive, scientific review of the State's management plan. Like the stock assessment the findings of the review were stark and recommended immediate corrective actions, including inter-management measures designed to correct overfishing in the near term and the development of an effort control system for a long term solution.

Associate Member Robins said the Blue Crab Committee had already met to review potential pot tagging systems and discussed issues that would need to be addressed in the development of that system. The Committee had also suggested additional long-term

measures, some of which were heard today, including upriver sanctuaries to better protect crabs from harvest throughout their life cycle. The interim Baywide goal was to increase the abundance of blue crabs, age 1+ to a level of 200,000,000 crabs.

Associate Member Robins stated that the Commission was now faced with an Executive Directive to close the winter dredge fishery and to close the fall season, which put the Commission in an impossible position. Clearly the best available science said that overfishing was occurring under the management plan and the winter dredge survey indicated that a 34% reduction in harvest was needed to constrain fishing exploitation to the target level. The status quo was consequently untenable and indefensible. The Commission's standards for fishery management plans under 28.2-203, the Code of Virginia, required that conservation and management measures "shall prevent overfishing" and this was not an optional measure. The necessary cuts were made even more extreme now by the fact that the relative abundance of crabs had declined in the recent dredge survey, only making the cuts more difficult. The Commission was being asked to achieve such a reduction using existing tools and a relatively rigid management plan, which was static and was not designed to be adaptive and responsive to changing environmental conditions. The proposed cures were relatively blunt and substantial economic impacts were unavoidable. The Commission was being asked to make a tragic compromise for the dredge fishery. The dredge fishery had operated since 1906 and the Commission was asked to close it in order to save the pot fishery. The dredge fishery accounted for 97% of female crab harvest and combined with the waste issues and the staggering 34% conservation hurdle was caught in the middle. If the Commission eliminated this fishery, as Mr. Bowden said, the Commission should work with the Governor's office to pursue emergency economic relief.

Associate Member Robins explained that the Blue Crab Committee had met one day after learning of the Executive Directive, and was asked to comment and vote on the proposed regulatory actions. The Committee voted to immediately reduce gears by 30% in the pot fishery in addition to other measures, rather than closing the fall season. The Committee voted for a major reduction in effort because too many pots were catching a depleted and diminished crab resource throughout the season, not simply at the end of the season. Furthermore, they pointed out that gear reductions would spread the burden across the part-time, full-time, and peeler pot fishery and not just the full-time, hard crab potter. They recognized the uncertainty between effort and exploitation that Mr. Travelstead spoke to earlier and because of this uncertainty they proposed a buffer by recommending the 30% reduction in gears. The Committee expressed additional concern over the fact that the fall closure allowed the peeler fishery and the pot fishery to continue unabated all season long until the end of the fall season. The fall closure together with the dredge closure would reduce a year-round fishery not just the 4 months. In the long term the Commission had already said that it was their interest to maintain a full-time pot fishery to the greatest extent practical. This would maximize full-time employment in the fishery and allowed Virginia to have a viable product for 9 or 10 months a year. The market based effort control system would ultimately allow the Commission to manage the resource for

conservation and economic benefits. Consequently, the fall season option, which the Secretary had indicated was absolutely critical for Virginia to cooperate by coordinating with Maryland to achieve this year's 34% reduction. This should be viewed as a one year emergency action and sunset by regulation at the end of the year. Some Committee members felt that reductions should be 20-30% in the peeler fishery and 10-15% in the hard crab pot fishery together with the Baywide 2 3/8 inch cull ring, which would provide a precautionary buffer to compensate for the fall closure. History clearly showed that if this fishery were to be restrained on one end, it would squeeze out on the other and the Commission could not afford to run the risk. Half measures would not recover the resource and would only bleed the industry to death. This year was the year that everyone in the fishery must endure the regulatory impacts collectively in order to get to the next year when an effort control system could be developed and implemented and allowing for transfers to provide economic relief and stability.

Associate Member Robins said he thought it was critical, as long term measures were looked at that the Commission be closely involved with the stakeholders so that appropriate bi-State options reflected the differences between the fisheries. The option that was preferred at this point and time and recommended by staff, raised some questions about the differences of impact between Virginia and Maryland and yet the Secretary had made it very clear that it was critical that this step be taken for this year.

Associate Member Robins again suggested that this be done for one year only because there was a need to go to an effective effort control system to bring the fishery to a point of sustainability and economic stability.

Associate Member McConaugha said that the data showed that the spawning stocks had been low for 10 years and historically when an industry did crash it never recovered. He said there were clear signs of a depressed population. He said that females need to mature to spawn. He said the short-term measures were needed. He said if the fishery were to crash, a long-term plan would not be needed. He said the cull ring measure for Baywide was important and to close the winter dredge fishery made sense. He said Virginia was responsible for saving the spawning stocks. He explained that a lot of these actions would affect next year's reproduction stock and next year the Commission could consider gear reduction. He said failure to act now would be the worst thing to do. He said he realized that livelihoods were at stake and he also felt that there was a need to push for compensation. He said in California when the salmon fishery was in trouble their Governor called the President and asked for help.

Associate Member Schick stated that VMRC had participated in habitat management with the SAV and oyster restoration, which had been prevalent, but now needed to go into more with other agencies. He said VMRC only controls what was in the Bay, not what goes into it and that DEQ and other agencies were in control of that. He said that he agreed with getting compensation for the watermen. He stated that half measures were worse than whole measures, as the entire Bay was on the edge of the tipping point. He said the

Commission can only do the best that it can. He asked what could be done to get the message to Richmond.

Associate Member Fox stated that he agreed with everything about the compensation. He said when anything impacts the watermen a request should be sent to the Governor for compensation and delaying for 30 days taking action would not accomplish anything. He said some of the measures do not go into effect right away and there were other measures that could still be considered. He said the added cull rings Statewide was a good idea and a reduction in the number of pots should be investigated. He said all comments lead back to impacts of the water quality. He said he had reviewed Ms. Washington's reference and there were other agencies that could do something, such as DEQ. He said he suggested that the Commissioner be very vocal with the other agencies.

Associate Member Holland stated that he agreed with the others and strongly recommended that there be compensation for the watermen.

Associate Member McLeskey explained that at the end of the war the WPA was formed to help the military returning from war, which could be done in this case with the watermen. He said they needed to be given alternatives. He suggested that the matter be tabled and to meet again, which would send a strong message to Richmond that the Commission was serious about finding gainful employment for the watermen.

Associate Member Tankard stated that this was a tough situation, especially for the watermen, but the resources were being overfished in a dead Bay. He said a message needed to be sent to Richmond and action needed to be taken today to provide crabs for the future. He stated the Commission had been thinking about it for months and action was needed for the staff recommendations. He said he wanted to compliment the staff on trying to do the best for all.

Commissioner Bowman stated that this was a difficult situation. He read from the Governor's statement. He explained that the agency needed to take action on this matter, as the winter dredge survey showed that action was needed and the current regulations had helped but had not worked. He said the concern with the crab dredge fishery was that 97% of the females were harvested and the elimination would result in an improvement. He said he encouraged the Commission to take action on the proposals, as the resource was on the verge of collapse. He stated that there was a need to leave the resource for all, now and in the future. He referenced the Code of Virginia, Section 28.2-201 where it said, "...promote the general welfare".

Commissioner Bowman asked for action by the Commission. **Associate Member Fox moved to approve staff recommendations: 1) Statewide closure of the winter dredge fishery and repeal of all other crab dredge regulations, 2) require two 2 3/8-inch cull rings in any crab pot placed, set or fished in the tributaries, including those of the Potomac River, but excluding the Seaside of the Eastern Shore. This measure should**

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be effective July 1, 2008, 5) elimination of the 5-pot commercial license for recreational purposes until the Winter Dredge Survey projects abundance of age 1+ crabs at over 200 million crabs, and 6) require summoning of any person to the Commission for a license revocation hearing, who has been convicted of two blue crab conservation violations in a 12 month period. He said to add to number one that compensation for those affected would be sought. He also added that emergency action be taken to add two additional ring sizes (2 3/16" and 2 5/16") to the crab pots and the peeler pots. Associate Member Schick seconded the motion. Associate Member Fox stated that items 3 and 4 needed to be discussed and action taken with a separate motion. The motion carried, 7-2. The Chair voted yes. Associate Members McLeskey and Bowden both voted no.

Commissioner Bowman asked for discussion or action for items 3 and 4.

Associate Member Robins moved to approve a fall closure to the harvest, by any gear, of female crabs from October 27, 2008 through November 30, 2008 and a 15% percent reduction in crab pots and 30% peeler pots per license, effective this year on May 1. Associate Member Tankard seconded the motion. Associate Member Bowden stated that he could not support the 30% reduction as the impacts on the watermen would result in financial failure and have more impact on the honest waterman than on others. Also, he said it would be hard to enforce. Associate Member Robins stated that putting the reduction at 15% was a sacrifice, considering the state of the resource. He said efforts were being made to get to a pot tagging system to improve the fishery's economic stability. Commissioner Bowman stated that the Commission did not like making these types of decisions, as the board was made up of volunteers, and he understood what Associate Member Bowden was saying, but the condition of the resource made this necessary. Associate Member Bowden reiterated that other factors caused the low levels of the resource, not overfishing. He said they could not go four months without work then also have to face a 30% reduction. He said it was bad enough with the closure in the fall for females. Associate Member Robins explained that this was for the 2008 fall season, only one year. The motion carried, 7-2. Associate Members McLeskey and Bowden both voted no.

Associate Member Robins moved to make effective July 1, a limit for the marking of crab pot buoys, to one identification number only, except for fishermen who also work in the Potomac River or in North Carolina. Associate Member Bowden said that this had not been advertised and needed to be addressed by others and he requested that it be added to the motion the advertisement of a public hearing. The motion carried, 8-0. Associate Member McConaugha was absent from the room.

Associate Member Robins suggested that staff develop a timeline for the development of a pot tagging system to be brought back to the Commission at the next meeting.

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**14. STRIPED BASS:** Review of the 2007 Commercial Fishery ITQ Program

Mike Johnson, Fisheries Management Specialist, gave the presentation with slides. His report is a part of the verbatim record.

There was some discussion of the board members, but no action was taken.

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There was no further business and the meeting was adjourned at approximately 6:00 p.m. The next meeting will be Tuesday, May 27, 2008.

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Steven G. Bowman, Commissioner

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Katherine Leonard, Recording Secretary