

MINUTES

Commission Meeting**November 25, 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:

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| Steven G. Bowman | Commissioner |
| Ernest L. Bowden, Jr.) | |
| J. Carter Fox) | |
| J. T. Holland) | |
| William E. Laine, Jr.) | Associate Members |
| John R. McConaugha) | |
| Richard B. Robins, Jr.) | |
| Kyle J. Schick) | |
| John E. Tankard, III) | |
| Carl Josephson | Senior, Assistant Attorney General |
| Jack G. Travelstead | Chief Deputy, Fisheries Mgmt. |
| John M. R. Bull | Director-Public Relations |
| Michele Guilford | Acting Recording Secretary |
| Linda Hancock | Director-Human Resources |
| Jane McCroskey | Chief, Admin/Finance |
| Erik Barth | Head, MIS Department |
| Todd Sperling | MIS, Bs. System Specialist, Sr. |
| Linda Farris | MIS, Bs. System Specialist |
| Rob O'Reilly | Deputy Chief, Fisheries Mgmt. |
| Joe Grist | Head, Plans and Statistics |
| Sonya Davis | Fisheries Mgmt. Specialist, Sr. |
| Alicia Nelson | Fisheries Mgmt. Specialist |
| Laura Lee | Fisheries Mgmt. Specialist |
| Joe Cimino | Fisheries Mgmt. Specialist, Sr. |
| Stephanie Iverson | Fisheries Mgmt., Manager |
| Bethany Eden | Fisheries Mgmt. Specialist |
| Lewis Gillingham | Director, SWFT, Fisheries Mgmt. |
| Warner Rhodes | Deputy Chief, Law Enforcement |
| Ray Jewell | Capt., NA Supervisor |

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Chip Dize
Steve Head

Marine Police Officer
Marine Police Officer

Bob Grabb
Tony Watkinson
Chip Neikirk
Hank Badger
Ben Stagg
Justin Worrell
Danny Bacon
Jay Woodward
Bradley Reams
Rob Butler
Randy Owen

Chief, Habitat Mgmt. Div.
Deputy Chief, Habitat Mgmt. Div.
Environmental Engineer, Sr.
Environmental Engineer, Sr.
Environmental Engineer, Sr.
Environmental Engineer, Sr.
Environmental Engineer, Sr.
Environmental Engineer, Sr.
Project Compliance Technician
Eng/Survey, Surveyor
Environmental Engineer, Sr.

Virginia Institute of Marine Science (VIMS)

Lyle Varnell

Other present included:

James E. Cornwell, Jr.
Randy Revercomb
Billy Bowen
Frank K. Evans
Chris Frye
David Serrano
Ryan Leon
Marshall B. Cox, Sr.
Cheryl McLeskey
Joshua Anderson
Rick Catun
Ernest George
John Crowling
Travis Beach
David Eason
Robert Robinson
Andrew M. Fodi, Jr.
Bob Reed
Ferrell McLain
Robert Law
Tom Powers
Mary Fabrizio
John P. Jones

David Ashburn
Darryl Hurley, III
Jack Smith
Michael A. Sisson
George Junkin
Elias K. Foury
Ellis W. James
Todd Beck
Jim Jennrette
Lewis Hicks
Kevin Mitchem
Steve Richardson
Deirdre Bell
Roger Parks
Ken Smith
Jason Carroll
Anthony Battista
Joe Shelton
Joseph Forrest
Lisa Bailey
Bob Pride
John Onufer
Frank Kearney

Ben Mears
Steven R. Bennett
John Halpins
David Hester
Michael Gilman
Chuck Roadley
Gerald G. Wheatley
Wayne McLeskey
Ray Cardone
Mike Remeo
Robert Smith
Paula Owen
Chandler Hogg
Bob Allen
Phil Hughes
Andrew M. Fodi, Sr.
Troy Crane
Gordon S.
Karen Ashworth
Dimitri Hionis
Bob Hewlett
Mark Henderson
Steve Wray

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Dale Carlson
Robby West

Mark Hodges
Charlie Gregory

David Albis
Mark Swingle

and others.

Commissioner Bowman called the meeting to order at approximately 9:30 a.m. He noted that all Associate Members were present.

At the request of Commissioner Bowman, Associate Member Holland gave the invocation and led the pledge of allegiance.

APPROVAL OF AGENDA: Commissioner Bowman asked for any changes to the agenda. Associate Member Holland requested that Item 8, Eastern Shore of Virginia Broadband Authority, #08-1716 be heard after Item 4 because of the individuals who had to travel a good distance to get to the meeting. Bob Grabb, Chief, Habitat Management requested time on the agenda for discussion of the Secretary of Natural Resources’ response to the issue of the Conveyance of Subaqueous Lands, Guidance on “unique circumstances.”

Commissioner Bowman asked for a motion. **Associate Member Robins moved to approve the agenda, as amended. Associate Member Tankard seconded the motion. The motion carried, 9-0. The Chair voted yes.**

MINUTES: Commissioner Bowman asked, if there were no corrections or changes, for a motion to approve the October 28, 2008 meeting minutes. Associate Member Holland noted that on page 47 for Item 17 on the certified scales issue that he had made the motion, but was also indicated as the one to second the motion. (In accordance with the verbatim record, the one to second the motion was Associate Member Schick and the minutes will be corrected accordingly.)

Associate Member Holland moved to approve the minutes, as amended. Associate Member Bowden seconded the motion. The motion carried, 8-0-1. Associate Member Robins abstained as he was not present at the October meeting. The Chair voted yes.

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

INTRODUCTION OF NEW EMPLOYEES:

Rob O'Reilly introduced Susanne Nester the Data Analyst with the Fisheries Management Administrative Office.

Todd Sperling introduced Linda Farris who filled the Business Applications Specialist with the MIS department.

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

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

Associate Member Holland asked that separate motions be done, since he would be abstaining from voting for item 2E, Baymark Construction Corporation, #08-1605.

Commissioner Bowman asked if there were any questions of staff.

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 2D.

Associate Member Robins moved to approve these items (2A – 2D). Associate Member Schick seconded the motion. The motion carried, 8-0. The Chair voted yes.

Commissioner Bowman asked for a motion for Item 2E.

Associate Member Robins moved to approve item 2E. Associate Member Schick seconded the motion. The motion carried, 8-0-1. Associate Member Holland abstained. The Chair voted yes.

- 2A. NORTHROP GRUMMAN SHIPBUILDING, #08-1998**, requests authorization to replace support pilings for bulkhead fendering on Drydock 12 with 14 groups

of four (4) pilings on 15-foot centers immediately channelward of the existing bulkhead adjacent to property situated along the James River in Newport News.

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| Permit Fee..... | \$100.00 |
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2B. PICKLE PROPERTY, LLC, #08-1155, requests authorization to dredge on an as-needed basis 84,500 cubic yards of State-owned subaqueous material to create maximum depths of -10 to -17 feet at mean low water; to construct a 13-foot wide by 462-foot long, commercial, floating concrete pier with an 8-foot wide by 50-foot long gangway and ten (10) 9-pile mooring dolphins; to construct a 13-foot wide by 50-foot long floating pier adjacent to an existing travel lift; to install seven (7) new support piles for the existing travel lift; to construct a 60-foot wide by 75-foot long wharf extending approximately 45 feet channelward of mean low water; to install approximately fourteen (14) 19-pile and two (2) 9-pile mooring dolphins; and to install approximately 130 linear feet of riprap marsh-toe sill channelward of mean low water, adjacent to their South Norfolk Aggregate and Marine Yard situated along the Eastern Branch of the Elizabeth River in the City of Norfolk. Staff recommends the inclusion of standard dredging conditions and the assessment of a royalty in the amount of \$33,300.00 for the new dredging of 74,000 cubic yards of State owned subaqueous bottom at a rate of \$0.45 per cubic yard.

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| Royalty Fees (Dredging 74,000 cu. yds. @ \$0.45/cu. yd..... | \$33,300.00 |
| Permit Fee..... | \$ 100.00 |
| Total Fees..... | \$33,400.00 |

2C. VIRGINIA INSTITUTE OF MARINE SCIENCE, CHESAPEAKE BAY NATIONAL ESTUARINE RESEARCH RESERVE, #08-1973, requests authorization to establish three (3) stations for long-term water quality monitoring purposes. One site is proposed east of Goodwin Islands in York County. A second site is proposed adjacent to the York River State Park pier on Taskinas Creek in James City County and the third site is proposed approximately 300 feet downstream of the remains of the Clay Bank pier in Gloucester County. Each site will require the installation of a single piling to support scientific water quality monitoring equipment. The proposed site adjacent to Goodwin Islands is located in Public Oyster ground set aside under §28.2-647 of the Code of Virginia.

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| Permit Fee..... | \$25.00 |
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2D. ONESTEEL, #08-1312, requests authorization to maintenance dredge, by mechanical method, with upland disposal at the Craney Island Dredge Material Management Area, up to 3,000 cubic yards of material from an existing berth to maintain maximum depths of minus -35 feet at mean low water adjacent to their facility on the Southern Branch of the Elizabeth River at 2649 South Military Highway in Chesapeake.

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| Permit Fee..... | \$100.00 |
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2E. BAYMARK CONSTRUCTION CORP., #08-1605, requests a one-time extension to Special Condition #19, which states “the dredging will be confined to the period of October 1 through November 30 in order to minimize the adverse effects to the clam and oyster industries that may be present in or near the project area.” This extension would give the permittee a one-time extension up thru December 15, 2008 to complete the maintenance dredging of the access channel from Cherrystone Channel (north of Cape Charles Harbor) to the Bay Creek Marina in Kings Creek, Northampton County. All other permit conditions would remain in effect. The two major adjacent oyster ground

No applicable fees, request for extension.

3. CONSENT AGENDA ITEMS: There were no consent items.

4. CLOSED MEETING FOR CONSULTATION WITH OR BRIEFING BY COUNSEL

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

Item 5. Gregory N. Packett, #08-1262

**Item 8. Eastern Shore of VA Broadband Authority, #08-1716
Hollowell versus VMRC**

Associate Member Tankard seconded the motion. The motion carried, 9-0. The Chair voted yes. Associate Member Robins moved for the following:

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

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

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

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

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

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

NAYS: NONE

ABSENT DURING VOTE: NONE

ABSENT DURING ALL OR PART OF CLOSED MEETING: NONE

Motion carried, 9-0. The Chair voted yes.

Michele Guilford, Acting Recording Secretary

8. **EASTERN SHORE OF VIRGINIA BROADBAND AUTHORITY, #08-1716**, requests authorization to install 82,000 linear feet of fiber optic cables across the mouth of the Chesapeake Bay from the City of Virginia Beach to Northampton County. The fiber optic cables will be installed within the existing Chesapeake Bay Bridge and Tunnel cable trays. The Authority has asked for Commission consideration of a reduced royalty assessment.

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

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Mr. Badger stated that as proposed, the Authority will be installing a conduit system to house two fiber optic cables that will extend from Virginia Beach across the Chesapeake Bay to the Town of Cape Charles. The total length of the project is approximately 30 miles. The construction of this portion of its system is necessary in order for the Authority to operate and fulfill its duties.

Mr. Badger explained that the Authority had requested a determination by the Commission on the Authorities' assertion that the project was authorize by statue and they were exempt from any royalties or rents in the issuance of a permit from the Marine Resources Commission.

Mr. Badger said that while staff readily acknowledged that the Authority was a "public body politic and corporate." Staff could not agree that that phrase was synonymous with county, city or town, which entities were exempt from royalties pursuant to section 28.2.1206E of the Code of Virginia.

Mr. Badger explained that although not specifically exempted from rents and royalties, staff believed that the Authority could make a good case for a reduced assessment given the fact that it was a public entity and public benefits would be derived from its project. In addition, Section 28.2-1208.A, enabled "public service corporations" to apply for a 40-year easement or lease for a set fee of \$100.00.

Mr. Badger said that as such, since the Authority could obtain a 40-year easement for \$100.00, staff would recommend the Commission consider approval and issuance of a 3-year permit for the cable crossing with a \$100.00 royalty assessment.

Commissioner Bowman asked the applicant if he wished to comment.

Jim Cornwell, applicant, was present and his comments are a part of the verbatim record. Mr. Cornwell stated they concur with the staff recommendation with the reduced fees and asked that the Commission approve this project.

Commissioner Bowman asked for any questions, there were none. He asked if anyone was present pro or con. There were none. He asked for discussion or action by the Board.

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

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| Royalty Fee (easement)..... | \$100.00 |
| Permit Fee..... | \$100.00 |
| Total Fees..... | \$200.00 |

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5. **GREGORY N. PACKETT, #08-1262.** Commission review on appeal of the August 28, 2008, decision of the Richmond County Wetlands Board which resulted in the denial of a request for a 16-slip community dock at his property situated along Totuskey Creek in Richmond County.

Randy Owen, Environmental Engineer, Sr., gave the presentation with slides. His comments are a part of the verbatim record. He explained that Richmond County did not have slides, but he did have drawings which he had scanned into the presentation. Carl Josephson, Senior Assistant Attorney General and VMRC Counsel stated that as long as the slides were for orientation purposes they would be allowed.

Mr. Owen explained that the project site was located approximately 0.25 miles downstream of the Route 3 bridge crossing of Totuskey Creek in Richmond County. The creek at this location is approximately 300 feet wide and is utilized seasonally by recreational boat traffic. The federal project channel extends upriver past the site, terminating at the Route 3 bridge.

Mr. Owen stated that the site was previously zoned agricultural and operated as a marine terminal for the shipment and receipt by barge of aggregates, timber and agricultural products. The property was rezoned in 2005 to Residential, Mixed Use (R-3) in keeping with the applicant's request to construct eight (8) two-story duplexes and a recreational building on the 17.15 acre site.

Mr. Owen said that Mr. Packett's current request for a 16-slip community dock was considered by the Wetlands Board on August 28, 2008. The Board previously considered and denied a request (VMRC #06-1975) for a similar dock on September 28, 2006. The Board also approved a separate request to armor the shoreline with riprap (VMRC #07-1525) on July 26, 2007.

Mr. Owen explained that Mr. Packett's letter of appeal was received on September 4, 2008, and as such is being considered timely under the provisions of §28.2-1311(B) of the Code of Virginia. In that letter Mr. Packett's counsel, Mr. John Daniel with Troutman Sanders LLP, noted their appeal pursuant to Section 28.2-1311 of the Code. Mr. Daniel further waived the provisions of Section 28.2-1311(B) that require the Commission to hear and decide the appeal within forty-five days of receiving the request for appeal.

Mr. Owen stated that at the hearing, the Board considered the comments provided by their staff and the testimony of Mr. Packett and his agent, Mr. Jeff Howeth, as well as the opposing testimony of Mr. Walt Sykes. Mr. Packett and his agent advised that the current request represented a reduction in potential adverse impacts compared to that of the former marine terminal. An exhibit presented to the Board suggested that the proposed dock even encroached ten feet less into the waterway than the barge mooring typically utilized at the former marine terminal.

Mr. Owen said that Mr. Sykes spoke in opposition to the project, expressing his concern for overcrowding the waterway with additional piers. He suggested that boaters already had reasonable access via the public boat ramp, which is located approximately 0.22 miles upstream of the project. The record contained a total of four letters in opposition to the project.

Mr. Owen explained that the Chairman expressed his concern over the number of slips proposed, believing that approval would be inconsistent with a past Board decision for a similar proposal. When asked, Mr. Packett declined to reduce the number of slips further. Another Board member stated that it was their (i.e. the Board's) responsibility to protect the environment and to consider the landowner's concerns regarding navigation on the creek.

Mr. Owen said that at the close of the public hearing, a motion was made and seconded to approve the project as submitted. That motion failed on a vote of two to two. The Chairman then advised that the project was denied for failure to obtain three affirmative votes as specifically provided in the Wetlands Act (Section 28.2-1307.C of the Code of Virginia).

Mr. Owen stated that following the decision, the Board briefly discussed their jurisdiction over the project. The Chairman and staff advised that each believed that the project required the Board's approval.

Mr. Owen said that based on our review of the record itself, we are unable to conclude that the Board erred procedurally in their review of this matter. The applicant's failure to obtain three affirmative votes on a motion to approve his project, as required by Section 28.2-1302.7.C of the Wetlands Act, clearly does not represent procedural error on the Board's part. In addition, staff questions whether this specific requirement of the Act is even open to debate or administrative interpretation.

Mr. Owen said that, however, regarding the Board's discussion on jurisdiction after the vote, however, staff must point out that the project as proposed will not directly impact either vegetated or non-vegetated tidal wetlands. As proposed, the dock only encroaches over subaqueous land. This is confirmed by the VIMS report and was pointed out by staff to the Board during the hearing.

Mr. Owen stated that in light of this fact, and in the absence of any direct statement from the Board in the record pertaining to the project's potential for "indirect" wetland impacts, staff recommended that the matter be remanded to the Board for further reconsideration. Staff further recommended that the Commission caution the Board to exert jurisdiction over the project only if a majority of its members clearly affirm that their decision was based on the project's potential for indirect impacts to tidal wetlands.

No questions of staff.

Commissioner Bowman asked for the applicant or his representative.

John Daniel, Attorney for Mr. Packett, was present and his comments are a part of the verbatim record. Mr. Daniel said they were before the Commission with an appeal of the Richmond County Wetlands Board decision. He said this matter was being heard in accordance to Section 28.2-1313, whereas the Commission can reverse or remand a decision of the Wetlands Board and because it is the responsibility of the Commission to review all decisions of the wetland boards. He said the first issue was the matter of the jurisdiction of the Wetlands Board to hear this matter. He said it was clear to them that the Wetlands Board had no jurisdiction. He said that he did not agree with the staff's recommendation to remand the matter back to the Wetlands Board. He said Chapter 13 of Title 28.2 sets forth the general regulations for how the wetlands are regulated, why the wetlands boards were created, and their duties and responsibilities are defined. He said it gives rise to the jurisdiction that the board might have. He said that 28.2-1302 of that act defines the terms, especially what a wetlands are, either vegetated or non-vegetated. He said in accordance with VIMS comments and report to the local board as well as the VMRC staff comments there are no wetlands impacted by the project. He said he felt they were considering this under Section 28.2-1302 of the Code and decided that if it were not listed as an authorized project then it needed a permit from them. He said it was true that it was not listed as an authorized project, but they were wrong to make this mean that it was under their jurisdiction, when there were no wetlands at all being impacted. He said in the minutes it said, "...he went on to explain how he felt it was the Wetlands Board purpose to protect the environment and to consider a landowner's concern regarding navigation of the creek." He said Mr. Owen who attended that meeting tried to explain to them about their jurisdiction, but the Wetlands Board did not seem to pay attention. He said the second issue, was the issue of direct and indirect impacts to be considered in regards to wetlands by the local board. He said he is familiar with the prior Attorney General opinions on this matter. He said he felt that those opinions were correct. He said that opinion states that the Wetlands Boards may consider indirect impacts to wetlands, but he added that the local board must find some direct impacts to wetlands. He said that some indirect impacts may be remote and some much more impacting and probably if you look there would be an indirect for every project. He said in his research of other projects where indirect impacts had been considered there was first and foremost a direct impact. He said they were asking that the Commission decide that because there is no direct impact on wetlands, that the local does not have jurisdiction over this matter and that the Commission reverse their decision. He said the catwalk in the original proposal that would have impacted wetlands had been removed from the proposal prior to the Wetlands Board hearing. He said finally, that there was a procedural error in that the absence of a board member being known 24 hours prior to the hearing, meant that an alternate must be appointed and there was supposed to be alternates available for this purpose. He said that the evidence was there to show that they knew that only 4 of the 5 members would be present and he noted that there was no alternate appointed for this purpose.

Associate Member Robins asked about the number of slips proposed. Mr. Daniel answered that he would answer the question if the subaqueous portion were going to be heard at this meeting.

Bob Grabb, Chief, Habitat Management Division, explained that the subaqueous portion is protested and had not been advertised and it was the Commission's policy to wait until the wetlands appeal had been resolved.

Mr. Daniel explained that he felt that it was advertised when the agenda was issued and he felt it could be heard at this hearing since it was the same project as considered by the Wetlands Board.

Commissioner Bowman stated that he was not prepared to hear the subaqueous portion of the project and to keep this hearing to the appeal issue only.

Commissioner Bowman asked VMRC Counsel to comment. Mr. Josephson said that the slips would be heard on the subaqueous portion and he was looking for some connection to the pier.

Associate Member Robins said because of the Chair's comments, he would withdraw his question.

Mike Sisson, Richmond County staff, stated he did not wish to comment.

Commissioner Bowman asked for any other comments, pro or con, for this project. There were none.

Commissioner Bowman said the slides presented were very telling with regards to jurisdiction. He further stated that the Wetlands Boards are made up of citizens that do the best they can and do a diligent job to try and fulfill the requirements of the Code of Virginia. He said he was concerned that the question of jurisdiction was raised after the motion was made instead of prior. He said from looking at the slides and from the testimony of staff that he did not believe there was any vegetated wetlands that would fall under the jurisdiction of the Wetlands Board and be impacted.

Associate Member Schick said he concurred with the Commissioner's statements. He said it was within the Wetlands Board purview to consider environmental impacts, but he did not see any direct impacts to wetlands in this case.

Associate Member Schick moved to overturn the Wetland Board's decision. Associate Member Holland seconded the motion.

Associate Member Fox asked Mr. Sisson to explain his comments in the minutes in regards to the pier not being a single use pier. Mike Sisson, Richmond County staff, was

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sworn in and his comments are a part of the verbatim record. Mr. Sisson stated that he had explained to the Wetlands Board that they could, by default, hear cases that involved multi-use piers that were not for private use only, if they wished to do so. He said that was his understanding.

Carl Josephson stated that the Wetlands Board has a jurisdictional area which they could consider as a part of the project where wetlands were impacted, but not just because it was a multi-use pier.

The motion carried, 9-0.

No applicable fees, Wetlands Appeal

- 6. **WATERVIEW LANDING, LLC, #08-0534.** Commission review on appeal by 31 freeholders, of the August 12, 2008, decision by the Middlesex County Wetlands Board to approve a revised proposal to construct an 8-foot wide by 210-foot long community pier with a 6-foot wide by 40-foot long pier-head and a 41-foot long canoe and kayak launching platform adjacent to property situated along Harry George Creek in Middlesex County. This matter was continued from the September 23, 2008, meeting.

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

Mr. Neikirk explained that this Commission review was continued from the September 23, 2008, meeting to provide Middlesex County with additional time to prepare and forward the complete record of the Wetlands Board hearings on this matter. In addition to the minutes of the three meetings and the board packet, PowerPoint presentation, and audio from the August meeting that were previously provided, the County has since provided the available portion of the audio from the May meeting and the entire audio from the June meeting. Mr. John Halpin, Wetlands Planner for Middlesex County, also sent us a letter dated October 31, 2008, stating that he had been advised by the Middlesex County Attorney that the signed minutes were the only documents that may be considered official under the Code of Virginia. Mr. Halpin also stated in his letter that the County does not have the manpower or funds to produce a verbatim transcript and that per their consultation with the Middlesex County Attorney, such a document could not be considered as official.

Mr. Neikirk stated that staff certainly understood the County’s fiscal constraints and had advised Mr. Halpin that a detailed written summary of the hearings could be provided in lieu of a verbatim transcript. Staff disagreed with the conclusions reached by the County concerning the completeness of the record. Section 28.2-1302(7)(B) of the Code of

Virginia states the board shall make a record of the proceeding, which shall include the application, any written statements of witnesses, a summary of the statements of all witnesses, the findings and decision of the board, and the rationale for the decision. Section 28.2-1312(B) states that, the Commission shall hear the appeal or conduct the review of the record transmitted by the board to the Commissioner. Although staff does not consider the record complete, staff attended and took notes at all three hearings and has listened to the audio of the hearings. Staff also has copies of all of the letters of protest that were submitted to VMRC and forwarded to the Board. Based on all of this, staff believes an adequate staff evaluation and recommendation can be provided. The Commission should note, however, that this effort on staff's part has resulted in an evaluation that is longer than usual. Finally, staff believed it was important to note that Section 28.2-1312(B) also states the Commission can take such additional evidence as may be necessary to resolve any controversy as to the correctness of the record. The following summary has been compiled from the minutes and audio provided by Middlesex County, VMRC staff notes taken at the hearings and the VMRC file.

Mr. Neikirk said that this application originally requested authorization to dredge 7,150 cubic yards of subaqueous material from a 4000-foot long by 30-foot wide channel to provide maximum depths of minus four (-4) feet at mean low water and to construct an 8-foot wide by 433-foot long community pier with 18 wetslips adjacent to a common parcel in the Waterview Landing subdivision situated along Harry George Creek in Middlesex County. The project was considered by the Middlesex Wetlands Board during three meetings that were held on May 13, June 10 and August 12, 2008. The project was revised between the June and August meetings to eliminate the dredging and all of the wetslips, and to reduce the length of the pier from 433 feet to 210 feet in length. A floating pier platform was added to support the launching and retrieval of canoes and kayaks.

Mr. Neikirk explained that the Middlesex Wetlands Board commenced the public hearing on this project during their May 13, 2008 meeting. The board received a briefing by their staff, Mr. Matt Kragel. Mr. Kragel stated that he believed only the pier fell within the jurisdiction of the wetlands board and he recommended approval of the project provided the pier was constructed at a height of 4 feet above the wetlands vegetation and no more than 5 feet wide. He also recommended that the pier be posted with appropriate signage and that adequate trash receptacles be required. Mr. Chuck Roadley of Williamsburg Environmental Group spoke on behalf of the applicants.

Mr. Neikirk stated that in their report dated, May 8, 2008, VIMS indicated that the pier will result in shading impacts and pollution associated with the storing and use of multiple boats. They recommended against overnight mooring unless it was authorized by the appropriate agencies and they recommended the use of garbage cans and the posting of signs listing community rules for the pier. They noted that the shoreline along Harry George Creek was mostly in a natural condition and that wildlife disturbance and erosion was anticipated with the proposed additional boat traffic. Nevertheless, they stated that a

community pier was appropriate because the existing waterfront lots contained extensive marshes and multiple private piers would be expected to have a greater impact than a single community pier provided the right to construct individual piers from the waterfront lots was waived. The VIMS report also noted several potential impacts associated with the proposed dredging and recommended the dredge cut include a buffer of 4 times the dredge depth off adjacent wetland areas.

Mr. Neikirk stated that the board received opposing comments from Mr. Russell Fitchett, Mr. Robert Gary, Mr. Harper Alexander, Mr. Randy Revercomb, Mr. Steve Fornash, and Mr. Bob Paxton. Mr. Fitchett stated that he was also representing Mr. Buettner. The concerns expressed by the opposition included:

- Pollution concerns associated with the additional boats and dredging due to the pristine nature and the limited tidal flushing of the creek.
- Noise and boat wakes associated with the additional boat traffic.
- Adverse impacts on the ecosystem of the creek including SAV, crabs, oysters, and bald eagles.
- Adverse impacts on wetlands due to the close proximity of the proposed dredge channel to existing wetlands. Several speakers felt the channel would not maintain the recommended buffer off vegetated wetland areas. They also felt the channel was not properly staked.
- Adverse impacts on existing piers due to the close proximity of the proposed dredge channel to their piers.
- They stated the previously dredged channel filled quickly and they anticipated the proposed channel would require frequent maintenance dredging that would add to the impacts.
- Several speakers questioned the number of truly waterfront lots in the subdivision. The number of waterfront lots was being used as a rationale for the number of slips originally proposed at the community pier. One speaker stated that there should be no more than one slip at the pier for each waterfront lot.

Mr. Neikirk said that Mr. Paxton noted that every property owner along the creek was represented at the hearing. He also questioned the need for the proposed bathhouse if the pier were to be used by the waterfront property owners. Mr. Gary stated that he was the owner of the remnant pier depicted in the plans that was to be removed. He said he planned to repair the pier and did not want the remains removed.

Mr. Neikirk noted that after some Board discussion, Chairman Smither stated that the project site was not properly staked as required by the board policies and he felt that the matter should be continued for a month to provide the applicant an opportunity to stake the project limits and to allow the Board members additional time to consider the public comments received during the hearing. They unanimously voted to continue the matter to

the June Meeting. During the June 10, 2008, meeting, the Board again received a staff briefing and recommendation from Mr. Kragel. Mr. Kragel again recommended approval of the pier provided it was constructed at a height of at least four feet above the wetlands and with a maximum width of five feet. He also continued to recommend appropriate signage and that easily accessible trash receptacles be required on the pier. He also stated that no overnight mooring should be allowed. Mr. Kragel reminded the Board that it was his opinion that their jurisdiction was limited to the crossing of the pier over the wetland fringe.

Mr. Neikirk said that Chairman Smither further stated that lengthy public comment was received at the May meeting and that he did not want any additional opposing comments unless those comments were something new.

Mr. Neikirk explained that Mr. Roadley represented the applicant and stated that he agreed with the staff recommendations but said he felt that overnight mooring restrictions should be considered and regulated by VMRC and other State agencies. Mr. Kragel said he agreed with that. Mr. Roadley also explained that the community pier would eliminate the potential for numerous private piers crossing the wide areas of wetlands and he also suggested that a no wake zone might be effective in reducing damage from boat wakes.

Mr. Neikirk said that Mr. Revercomb stated that the proposed dredge cut was close to wetlands and his pier and he presented a photo showing a stake near the wetlands along his property. Mr. Roadley apologized to the board and stated that the stake was placed in the wrong location. Mr. Revercomb also stated that he did not believe there were 12 waterfront lots in the subdivision. He explained that seven of the lots are located along a portion of the creek that ebbs dry at low tide.

Mr. Neikirk pointed out that Mr. Paxton said he did not believe the public and private benefits of the project exceeded the public and private detriments. He also questioned why the staff report presented to the Board had not included the negative portions of the VIMS comments. He said based on the potential adverse impacts noted in the VIMS report that the benefits of the project did not exceed the detriments. Chairman Smither asked Mr. Paxton to end his comments because he was becoming repetitive.

Mr. Neikirk said that Mr. Fitchett said he was concerned with the wetland and wildlife impacts. He said the boaters would dump their oil and trash in the creek. Chairman Smither also told Mr. Fitchett that his comments were repetitive and asked him to sit down.

Mr. Neikirk stated that Mr. Gary asked the Board if additional boats would be allowed to tie up along the 400-foot pier in areas not designated, as the proposed 18 slips. Chairman Smither said he would ask the applicant about that concern and after confirming that there were no others in the audience wishing to speak he closed the public comment on the application.

Mr. Neikirk said that Mr. Roadley then addressed the board again. He said the length of the pier and deed restrictions that prohibited construction of private piers would reduce potential wetland impacts. He said he did not believe land use and boating activities were issues for the Wetlands Board to consider. He also explained that the pier was long to avoid the impact of dredging and that there was no plan to allow additional boats to tie alongside the pier in areas outside of the slips. In response to a question from Chairman Smither, Mr. Roadley stated there were 18 lots proposed in Phase 1 of the development and a total of 106 lots in the subdivision. After conferring with Mr. Steve Thompson, one of the applicants, Mr. Roadley stated that it was the applicant's intention to limit access to the pier to the owners of the 18 lots in Phase 1 of the development.

Mr. Neikirk stated that Board member Hawksworth and Chairman Smither asked Mr. Neikirk if the Board could consider the number of proposed slips and the dredging portions of the project. Mr. Neikirk said he thought they could to the extent that they would impact tidal wetlands. He explained that it was presumed that additional slips increased the potential for incidental impacts and that some portions of the proposed dredge cut were close to wetlands.

Mr. Neikirk explained that Board member Brooks expressed concerns with the potential environmental impacts and said those impacts would be difficult to predict. Board member Taylor also expressed concerns over potential environmental impacts and said the potential impacts did not seem justified for just 18 slips. He said this creek was one of the last undeveloped creeks in the County and that he would like the applicants come back with a scaled back proposal.

Mr. Neikirk said that Board member Armstead asked how the applicant intended to minimize wetland impacts around the landward end of the pier from people dragging canoes and other items through the marsh. He also asked if the County would be responsible for conducting maintenance dredging of the Creek.

Mr. Neikirk said that Mr. Roadley said the project was not intended to provide access for canoes through the marsh, and suggested they might be able to install some fencing to minimize traffic through the marsh. He also stated that the developer or homeowners would be responsible for maintenance dredging; not the County.

Mr. Neikirk noted that Chairman Smither stated that he did not believe the benefits of the project exceeded the anticipated detriments. He also stated that when he worked for the Health Department, they did not even attempt to take a boat into this creek and added that they did not consider it to be navigable because it was so shallow.

Mr. Neikirk stated that Mr. Roadley requested a short recess so he could discuss the project with the applicants. Chairman Smither granted a five minute recess. Following the recess, Mr. Roadley requested the project be continued to a later meeting to allow the applicants an opportunity to meet with the opponents in an attempt to develop some

revisions to address their concerns. The Board voted to continue the matter to the August meeting. Following the vote, Chairman Smither addressed the audience. He stated that this matter would be continued to the August meeting and that they would hear from the applicant regarding any revisions. He said he was not going to allow another lengthy debate since the Board was aware of the opponents' concerns. He said he would only allow public input at the August meeting if it was something new.

Mr. Neikirk explained that on July 31, 2008, the applicants submitted their revised proposal. The revised proposal was considered by the Board during their meeting held on August 12, 2008. At the beginning of the discussion Chairman Smither stated that extensive public comments had been received during the May and June meetings and they were not going to receive any additional public comment on this matter. Mr. John Halpin, the new staff person for the wetlands board, provided a briefing of the revised proposal and recommended approval of the project with the same conditions as had been recommended during the May and June briefings. His PowerPoint presentation included the revised drawings depicting the shortened pier and the deletion of the dredging and boat slips.

Mr. Neikirk said that revised comments from VIMS were provided in a letter from Ms. Karen During to Mr. Halpin dated August 11, 2008. The revised comments stated that the anticipated environmental impacts had been significantly reduced by the proposed project modifications. They noted that the impacts associated with dredging and the construction of the spoil area had been eliminated, that the pier had been reduced in length and width, and that the 18 proposed slips have been eliminated and replaced with a canoe and kayak launch platform. They also noted that the applicant still intended to place deed restrictions on the waterfront lots that would prohibit the construction of individual private piers. They stated that there would still be minor shading impacts and possible solid waste pollution from the pier users. They continued to recommend the posting of signs listing community pier rules and the use and maintenance of sufficient garbage cans to limit solid waste pollution. They noted that if motorized boats were to use the pier without permanent mooring slips, it was unclear how temporary mooring would be enforced.

Mr. Neikirk said also that Mr. Roadley stated that the applicants had considered the comments expressed during the previous hearings and they had reevaluated the purpose and need for the project based on those concerns. He also stated that they had been made aware of an error in the depth soundings within the creek that would have resulted in an increase in the volume of material that needed to be removed to achieve the desired channel depths. For those reasons, he said the application had been revised. He said they had added a canoe and kayak launch platform on the pier to address a stated concern with people traversing the wetland area adjacent to the pier. He said there would still be a restriction prohibiting the construction of other private piers within the subdivision and that the proposed pier would be the sole point of access for the subdivision. In response to an inquiry from Chairman Smither, Mr. Roadley stated that the applicants were comfortable with the revised plans.

Mr. Neikirk said that Board member Hawksworth stated that he believed the applicants had done a great job of working with the community to address their concerns and that he felt the revised proposal was much more acceptable.

Mr. Neikirk stated that Board member Taylor stated that he was still not comfortable with the project.

Mr. Neikirk explained that Board member Armstead had asked if there was a ramp located in the wetlands. Mr. Roadley explained that there was no ramp in the wetlands and that the canoe and kayak launch platform was a floating pier section adjacent to the pier in the water.

Mr. Neikirk said that Chairman Smither stated that he was opposed to the original proposal but that the impacts had been significantly reduced in the revised proposal. The Board then voted 4 to 1 to approve the revised proposal with the conditions recommended by their staff.

Mr. Neikirk noted that on August 18, 2008, staff received a notice of appeal signed by 31 Middlesex County residents noting their appeal of the August 12, 2008 Board decision concerning the Waterview Landing proposal. Staff acknowledged the appeal by letter dated August 20, 2008. The appellants contend that the board erred by considering an amended application without receiving additional public comment on the revisions. They also stated that the VIMS report was only prepared one day prior to the hearing and that they never received a copy of the VIMS report or the revised application. They stated later in their notice of appeal, however, that the applicant provided them a proposed amended application one week prior to the hearing. They also alleged that the PowerPoint presentation presented during the August hearing depicted the original application and VIMS report rather than the revised application and VIMS report. The appellants' also stated the board deferred action at the June meeting to allow the applicants time to reach out to the adjacent landowners and incorporate their concerns into an amended application and that the applicant never contacted them prior to submitting the amended application. They added that they immediately expressed a concern regarding a perceived change that allowed access to the pier by all 106 potential lot owners in the subdivision instead of just the 18 waterfront property owners and that since no public comment was allowed on the amended application, that the board was unaware of this concern.

Mr. Neikirk said that the PowerPoint presentation provided to the board during their August 12, 2008 meeting did not include the revised VIMS comments. Apparently there was an issue transferring the revised PowerPoint presentation to the computer in the boardroom. Nevertheless, Mr. Halpin read the revised comments during his presentation and the information packet provided to the Board included the revised VIMS comments. The Board packet also included a letter from Mr. Paxton to Mr. Roadley dated August 5, 2008, that expressed the opponents' concern that the revised pier would be allowed to be

used by all the residents in the subdivision. The letter also stated that it is their opinion that the revised proposal is actually worse than then the original.

Mr. Neikirk explained that in their Notice of Appeal, the appellants raise three issues in support of their request to have the decision overturned or remanded to the Middlesex Wetlands Board.

1. They state that the amended application was dramatically different than the original application and that they were not allowed to comment on the revised application so the Board was not aware of their concerns with the revised application.
2. They state that the revised VIMS report was only received one day before the meeting and was not made available to the public nor was the revised VIMS report and amended application presented in the staff PowerPoint presentation. Because of this the appellants question whether the board had adequate access to the report prior to the meeting and vote.
3. Finally, they argue that the Board continued this matter during the June meeting at the request of the applicant to provide them an opportunity to reach out to the other landowners and attempt to incorporate their concerns into an amended application. They state that no such meeting was held and that they only received the amended application one week prior to the August 12, 2008 hearing. Because of this they argue that the board was unaware of their concern that the pier will be allowed to be accessed by the entire subdivision rather than just the 18 lots in Phase 1 of the subdivision.

Mr. Neikirk said that the Board received lengthy public comment on the original application during their May and June meetings. They also had Mr. Paxton's letter dated August 5, 2008 in their Board packet. Mr. Paxton's letter states the property owners' concerns with the revised proposal. Several of the Board members also expressed their opinion that the revised proposal significantly reduced the environmental impacts and addressed many of the concerns expressed by the concerned property owners.

Mr. Neikirk went on to say that the PowerPoint presentation delivered to the Board by Mr. Halpin during the August meeting did include the revised drawings but it did not have a slide with the revised VIMS comments. Nevertheless, Mr. Halpin read the revised VIMS comments during his briefing and those comments were included in the Board packet. Staff did not believe the Board is obliged to present copies of the VIMS reports to the public. Staff was also not aware of whether or not the opponents requested a copy of the revised report prior to the hearing.

Mr. Neikirk said that staff was not certain why the applicants and their consultants did not avail themselves of the opportunity to meet with the concerned citizens between the June and August meetings. It was clear, however, that the applicants carefully considered the concerns expressed by the citizens, VIMS and the Board because they made significant

changes to the proposal which in the opinion of the Board and VIMS significantly reduced the potential environmental impacts. They also forwarded Mr. Paxton 10 copies of the revised application by letter dated July 30, 2008 and requested any comments on the revision by August 6, 2008. Mr. Paxton's August 5, 2008 letter was in response to the revision and request for comments. This letter was included in the Board packet.

Mr. Neikirk stated that in light of the forgoing and after carefully reviewing the record transmitted from the Board, the audio from all three hearings, and notes taken by staff during the hearings, staff was not able to conclude that the Board erred procedurally during their review of this application, nor did the board decision fail to fulfill its responsibilities under the wetlands ordinance. Furthermore, considering the substantial amount of public testimony and written comment considered by the board it did not appear the rights of the appellants had been prejudiced as a result of the board action. Accordingly, staff recommended the Commission uphold the August 12, 2008 decision to approve with conditions the modified application.

Commissioner Bowman asked for questions.

Associate Member Robins asked why there was no mention in the record of no public comments being heard. Mr. Neikirk said that he believed it was mentioned after the motion was made at the June hearing.

Associate Member Tankard said that he felt the public comments that were made in the previous two meetings were addressed in the August meeting. Mr. Neikirk said that with the final revisions that were made, it was decided that all the residents would be allowed access to the pier, which was different from what was presented before. He said the protestors felt that they should be allowed to comment on that change.

Randy Revercomb, representing the appellants, was sworn in and his comments are a part of the verbatim record. Mr. Revercomb stated that there was no problem with the May and June meeting as to the way the Wetlands Board meeting proceeded. He said it was the applicant's agent had asked for a continuance and suggested that they get together with the protestants. He said by the time the agent got them documents it was the 7th week and it said that all residents would have access to the pier not just the waterfront land owners. He said he felt that there was distrust between all parties. He said they felt it should be remanded back to the Wetlands Board. He said at the final meeting, only the applicant and his representatives were allowed to address the matter and no one else was allowed to comment. He said that at that meeting the application that was being considered was the new application. He said it would not be any harm if the Commission remanded it back to the Wetlands Board and have them handle it properly.

Associate Member Robins asked about the record not reflecting any objections being raised. Mr. Revercomb stated that they were not allowed to comment.

Commissioner Bowman asked staff to comment. Mr. Neikirk stated at the beginning of the August Wetlands Board meeting it was announced that no further public comment would be taken.

Associate Member Schick asked if staff thought that was appropriate. Mr. Neikirk stated he felt the Wetlands Board believed that the revisions that had been made to the application took care of the objections.

Associate Member Tankard asked about the use being restricted to a certain number of residents and then being changed to all residents. Mr. Neikirk stated that he felt everyone realized that it would be open to use by all and nowhere in application had it indicated otherwise.

Chuck Roadley, Williamsburg Environmental Group representing the applicant, was sworn in and his comments are a part of the verbatim record. Mr. Roadley said he did not have a prepared presentation and would answer any questions.

Associate Member Tankard asked why they did not meet with the others as agreed. Mr. Roadley said they offered a second time, but Mr. Paxton said he did not feel a need to meet again as they had already wasted time with the other meetings. He said getting the information needed took time and caused the delay.

John Halpin, Middlesex County Planning staff, was sworn in and he stated he had no comments. He said it was not the fault of the landowners that information to be provided by the agent was not available until the 7th week. He said he thought it was fair that the Commission look at this matter and make a decision on how the citizens were treated.

Commissioner Bowman said everyone handles things differently, but he felt that from what the staff evaluation said that all considerations had been given to this matter so the Wetlands Board members and Middlesex County staff felt the concerns had been resolved. He said he understood that the protestants might not agree.

Associate Member Tankard stated he agreed with Commissioner Bowman's sentiments and said that this had to be looked at as a work in progress and there was progress made. He said you could look at Section 28.2-1313 of the Code and say that the Wetlands Board did neglect some of the rights of the appellants. He said if you look at the compromise made by the applicant and the progress made, there was resolution. He said in his opinion this should not be remanded back to the Wetlands Board.

Associate Member Schick stated that the Wetlands Board did give ample opportunity to discuss most of the issues and in the end the big issue was the number of people to use this pier. He said he did not see that remanding it back to the Wetlands Board would help the situation. He said he believed that the public knew that it was possible that all of the residents could be allowed to use the pier.

Commission Meeting

Associate Member Schick made a motion to uphold the Wetlands Board’s decision with the conditions imposed. Associate Member Holland seconded the motion. . Associate Member Robins said that he felt the Wetlands Board should have received public comment at the last meeting but he said he did not see any defect in the procedures. Associate Members Fox and Laine both expressed their concern that at the last meeting held by the Wetlands Board that no public comments were allowed. Commissioner Bowman stated that he agreed with Associate Members Fox and Laine that public comments should have been allowed. **The motion carried, 6-3. Associate Members Fox and Laine both voted no. The Chair voted no.**

No applicable fees, Wetlands Review

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7. **CHERRYDALE BY THE SEA, LLC, #08-0103**, requests authorization to change the use of their 1,400-foot long by 5-foot wide private pier to a community-use structure to serve the lot owners in the "Cherrydale" subdivision, and extend the existing 30-foot by 10-foot T-head an additional 700 feet to accommodate the mooring of up to 21 community boats. The project is situated along a small tributary to Ramshorn Channel adjacent to Lots #13, #14 and #15 in the "Cherrydale" subdivision of Northampton County. No riparian piers would be permitted in the subdivision if this is approved.

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

Mr. Badger explained that the Cherrydale by the Sea subdivision consisted of 734 acres, which have been divided into 21 large parcels for residential and agricultural use. Fourteen (14) of these lots are waterfront with riparian rights to access the water and potentially to construct private piers. Four (4) of the fourteen (14) waterfront lots, however, have very limited access to navigable waters.

Mr. Badger stated that the 14 riparian lots are on average 250 feet wide by 2,500 feet long. The large expanse of marsh on the eastern side of each of these lots averages 1,000 feet. If private piers were to be constructed to the closest water access point on each lot, the length of the piers would vary between 200 feet and 2,050 feet.

Mr. Badger explained that Cherrydale by the Sea originally applied in 2005 for a 1,400-foot long community pier with a 30-foot by 10-foot T-head. The pier was to be located on the line between lots 13 and 14. The Northampton County Wetlands Board denied their request for a community pier. This decision was based on the fact that the applicant was not willing to sever the riparian rights to construct private piers on the 14 waterfront lots. Mr. Badger stated that the Board had concerns over the cumulative adverse impacts to the large expanse of marsh within the subdivision.

Mr. Badger said that in January of 2006, the owner of Cherrydale by the Sea, Dr. Paul Forst, applied for a 1,400-foot long private pier with a 30-foot by 10-foot T-head on lot 14. Since this was a private pier for the owner of lot 14, no authorization was required from either VMRC or the local wetlands board. The U.S. Army Corp issued their Regional Permit #17. The pier was constructed later that year. During the construction of the pier a large area of vegetated wetlands adjacent to the pier was impacted by the contractor's equipment. The local Wetlands Board and Dr. Forst have been working to restore this area to pre-existing conditions.

Mr. Badger further said that in January 2008, staff received the current application for a community pier with mooring space for 12 boats. The applicant's original request did not exclude the rights of the 14 riparian lots to construct private piers. Because of the Northampton County Wetlands Board's concern with the cumulative adverse impact to wetlands from the building of private piers and the impact to wetlands that occurred from the construction of the one private pier on lot 14, the Board requested that the riparian rights to build private piers on all waterfront lots within the subdivision be severed.

Mr. Badger stated that the applicant agreed to sever the rights to build private piers on all 14 riparian lots, with the stipulation that the proposed community pier be large enough to accommodate the mooring of 21 boats. The applicant and the Wetlands Board were aware of VMRC's general policy to allow two slips at a community pier for each riparian lot that severs the right to a private pier. The Board agreed in principle and the project was re-noticed. The Board approved the modified community pier with space for 21 boat slips at their May 21, 2008 meeting with the stipulation that the riparian right to construct private piers on all waterfront lots be forever prohibited.

Mr. Badger said that the project was originally placed on the October 28, 2008, Commission's agenda by staff as a Page 2 item. At the request of Associate Member Tankard the project was removed from the October meeting and placed on the November 25, 2008, Commission meeting, as a Page 1 item. Associate Member Tankard thought it was appropriate for the full Commission to consider the large size of the T-head in such a small creek, the marginal nature of the riparian lots and the possibility of storm damage to small boats while moored to the proposed pier.

Mr. Badger explained that the Health Department stated that the project was in compliance with their Sanitary Regulations for Marinas and Boat moorings and it had been approved. The Division of Shellfish Sanitation advised that the project involved approved shellfish growing waters, and that proposed activities would require a seasonal closure from April through October in the section of the waterway occupied by the pier. Also they stated that if the project was approved, the facilities should be restricted to property owners and bona fide guests, and no overnight occupancy aboard boats moored there to should be allowed.

Commission Meeting

Mr. Badger stated that there were no privately leased shellfish grounds in the area. There were however, two small inter-tidal oyster rocks that will fall within the seasonal closure. The closest leased grounds were approximately 1.6 miles south of the proposed project. There are Public Grounds (Baylor) in Ramshorn Channel, however, the project would not encroach directly on these grounds.

Mr. Badger said that the Virginia Institute of Marine Science (VIMS) indicated that a community pier was appropriate for this subdivision. If the waterfront lot owners eventually built private piers, then multiple structures could have a greater impact potential than one community pier. VIMS usually recommended that the individual rights to build private piers be waived if a community pier is allowed. They also suggest that the number of mooring slips and length be limited to only what was necessary to support the intended use.

Mr. Badger stated that no State agency had expressed opposition to the project and no public protest had been received.

Mr. Badger in summary said that although staff was concerned with the issues that prompted Associate Member Tankard to request a full Commission review of this matter, §28.2-1203 (A)(5) states that the placement of private piers for non-commercial purposes by owners of the riparian lands in the waters opposite those lands were exempt from both the local Wetlands Board and the Marine Resources Commission. Each riparian lot within the "Cherrydale by the Sea" subdivision, no matter how limited the water access was, had the right to construct a private pier. This would include piers across large expanses of marsh to small guts that could be accessed only at half tide.

Mr. Badger further said that in the VMRC Subaqueous Guidelines, Section VII, *Criteria for Community Facilities for Boat Mooring, Specific Siting Guidelines*, clearly states that the number of slips will not necessarily be predicated by the number of units (lots) on the property. In this case staff believed there were ten (10) legitimate lots that might possibly construct private piers. Based on staffs general policy to allow two (2) slips at a community pier for each riparian lot that severed their right to a private pier, plus one (1) extra slip for guests, a total of 21 slips would appear reasonable.

Mr. Badger explained that the local Wetlands Board acknowledged the potential for riparian lot owners to eventually construct multiple piers across the extensive marsh. The applicant was, clearly willing to sever the rights to construct private piers on all 14 waterfront lots. This would include the right to build piers to nowhere, which would have crossed the marsh and could have been used as observation platforms. Staff still believed that multiple private piers had a greater potential impact than one community pier. Staff also believed it was difficult to predict if or when future residents would actually need space to moor 21 community boats.

Commission Meeting

Mr. Badger stated that in light of the foregoing, staff recommended the construction of the pier in two (2) phases. Phase one (1), would be for the northern 350 feet of pier which could moor up to 12 boats. If the demand for mooring space increased the applicant could request a Phase two (2), modification to his permit which would include the southern 350 feet of pier. Staff also recommended that the individual rights for private piers on all 14 riparian lots (lots 5-18) be severed if a community pier were to be approved. Staff further recommended a one-time royalty assessment for Phase One (1) in the amount of \$6,555.00 for the bold outline and pier encroachment over 4,370 square feet of State-owned subaqueous land at a rate of \$1.50 per square foot.

Commissioner Bowman asked for questions of staff

Carl Josephson, Senior Assistant Attorney and VMRC Counsel, said he had seen this recommendation on several occasions before for issues that were heard by the Commission. He asked if the Commission required that it be filed with the Commission to be a part of the record. Mr. Badger stated that the Commission usually required a "Declaration of Restricted Covenants", which was what was proposed here.

Associate Member Tankard asked if there were any other T-heads of this size in the area. Mr. Badger responded that there was one in Cherrystone Creek and he did not know if it was 700 feet, but it was a marginal wharf and another project of Dr. Forst in Kings Creek. He said he did not believe it was quite this large. Associate Member Tankard asked about staff's comments that the Commission had allowed two mooring placements for each lot. He explained that he was concerned with true waterfront and 'telescopic' access and he asked if there should be some equality and a graduated scale in regards to waterfront quality. Mr. Badger said that with the community pier you do have that option and this had been the Commission's policy with the allowing of two slips if you give up the individual pier. He further said that there were actually only 10 waterfront properties being affected here and for the other two it was not reasonable to expect any impact. He said the same was done for a project like this in Upshurs Bay.

Associate Member Robins asked VMRC Counsel asked if they had to keep using this policy considering the environmental sensitivity of the area here. Mr. Josephson stated that this was something that was not in the subaqueous guidelines, but a policy established by the Commission. Staff confirmed this. He continued by saying that the Commission could as far as administrative law principles have these policies and can change those policies when it was compared to what was done in other cases.

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

Ben Mears, representing the applicant, was sworn in and his comments are a part of the verbatim record. Mr. Mears said when considering the design of the dock and the waterway, he said it did look to be an excessive length. He said they considered the size of boats that would be utilizing this pier and they felt they needed about 35 feet per boat

in order to tie up parallel to the pier. He said it can get nasty, but not every northeasterly storm was that bad. He said in the northeasterly storms in the fall and when there were hurricanes that it was the worst. He said they were trying to keep some kind of control. He said the pier there is pile driven and it is intended to stay. He said they want to establish rules for events, such as hurricanes. He said they felt that everyone having a pier would not always mean the pier owners would be good stewards. He said they had addressed all the concerns expressed. He said a document had been drawn up by their attorney for the severing of riparian rights. He said they were asking that it be approved, as submitted. He said they had considered what staff recommended about doing it in phases, but they could not see it being done that way. He said they just wanted the permit which would be good for three years and then they could decide if they would do it in phases.

Commissioner Bowman explained that staff was concerned that structures would be built over the State-owned bottom that were unnecessary or would not be used.

Associate Member Schick asked about the missing cross supports for the pier on the drawing. Mr. Mears stated that he might have included them if it were his personal pier, but that he had omitted them here. He suggested that the Commission could require it if they wish.

Associate Member Fox asked if a requirement to limit the boat length and beam size would be acceptable. Mr. Mears said that they could do that. Associate Member Fox said he was concerned with the small area and interfering with navigation. Mr. Mears said that was also considered in their proposal.

Associate Member Tankard said they were talking 2 moorings per lot and he felt that the applicant wanted each lot owner to have one. Mr. Mears stated that the 2 mooring slips per riparian fit in with their plans.

Commissioner Bowman asked for discussion or action.

Associate Member Schick made a motion to approve the permit request, but added that they have a hurricane plan, mooring whips, cross supports and double bolting, the maximum size of boats to allowed to tie up at the dock would be 25 feet X 10 feet, and to approve the length of the pier, as requested. Associate Member Holland seconded the motion. Associate Members Robins said he was concerned with having a project of this size in a small pristine area, but it was preferable to having a lot of piers in the same area. Associate Member Tankard said he could support the motion. The motion carried, 9-0. The Chair voted yes.

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| Royalty Fees (encroachment 9,855 sq. ft. @ \$1.50/sq. ft (One-time Royalty)..... | \$14,782.50 |
| Permit Fee..... | \$ 100.00 |
| Total Fees..... | \$14,882.50 |

* * * * *

Conveyance of Subaqueous Lands, Guidance on “unique circumstances”

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

Mr. Grabb explained that at the September Commission meeting the Commission asked the Commissioner to seek the Secretary of Natural Resources suggestions regarding “unique circumstances” for determining appropriate compensation. He said the Secretary’s October 9, 2008 letter included the following suggested considerations:

First, the Secretary suggest that the Commission may want to only consider properties where there exists good information suggesting that the subaqueous land in question was filled prior to 1960. Establishing that such a considerable length of time had passed underscores the notion that alleged filling was indeed an act of the distance past and lends itself to uniqueness. This date also is suggested to remain consistent with Code of Virginia Section 28.2-1200.

Second, there should be no evidence that the current owner of the subaqueous lands in question engaged in any unauthorized filling of the land.

Third, the Commission may wish to consider the length of time the party appearing before the Commission has had ownership interest of the property. He suggest this given that it may stand to reason that the longer the length of time, the more compelling the assertion that the party was unaware of the Commonwealth’s claim of ownership of the subaqueous lands associated with the property in question. Additionally, the phrase “ownership interest” recognizes that the party before the Commission may have held it or acquired the property through different mechanisms, whether corporate or limited liability organizational forms. It also may suggest that the entities holding title to the property may have been owned by a common individual or group of individuals.

Fourth, the Commission should have sufficient information to know the circumstances through which the beneficial owner acquired the property in question. He suggest this in order to not penalize the transfer of property for liability, estate-planning, business succession planning, or other similar legitimate purposes. A look back should not simply stop at such a transaction.

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Fifth, given that some distant history suggests that governments – local, state, or federal – at times may have formally or informally “encouraged” filling, it seems reasonable that the Commission should consider any information presented that purports a governmental entity may have played some role in a landowner’s act of filling subaqueous bottom.

Sixth, it likely is reasonable to consider a chain of title presented that purports to convey through metes and bounds or courses and distances a description of the subaqueous property in question.

Finally, should the Commission determine that sufficient credible information has been presented and which constitutes “unique circumstances,” the Commission may wish to consider calculating the reduced compensation to the Commonwealth per Code of Virginia Section 28.2-1200.1(C) in an amount no greater than 50%. He offers this ultimate percentage as the highest price reduction that should be considered in even the most compelling case in order to protect the Commonwealth’s interest. Any price reduction is scaleable and should reflect, as best the Commission can judge, the extent to which the circumstances are truly unique.

Mr. Grabb explained that in the final paragraph of the letter from the Secretary said that these suggestions were not meant to supplant the wisdom of the Commission but meant to give guidance on the matter of “unique circumstances”.

Commissioner Bowman asked was this meant to be established as a guidance document. Mr. Grabb responded, no, that it was not mandated and the Commission was authorized by Code.

No action was taken.

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9. PUBLIC COMMENTS:

Kevin Mitchum, seafood wholesaler of Mathews, VA. Mr. Mitchem discussed his background in the crab wholesaler business and his political involvement regarding the crab industry. He provided the Commission with a handout of items he wished to consider when making their decisions.

Mr. Mitchum stated that the Commission should consider the crab wholesalers who have suffered by the cut back in crab harvest by being put out of work for 5 and a half months. He said he felt that wholesalers, like himself, who strictly deal in crabs should be included in the relief package. He asked that the Commission take that into consideration.

No action was taken.

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David Ashburn – request for his crab scrape license to be reinstated.

Commissioner Bowman asked staff to respond.

Warner Rhodes said Mr. Ashburn was summoned on October 30th for unculled oysters and his license and permit were confiscated until he appeared before the Commission. He said he was requesting them to be reinstated at this time.

Commissioner Bowman asked Mr. Ashburn to comment. He asked him if he agreed with Lt. Col. Rhodes comments.

Mr. Ashburn stated that was pretty much correct. He said when you have so many small oysters and you worked to cull the smaller ones out and then the officers come along and they are handled several times then you have a problem. He said he had never had an oyster ticket.

Commissioner Bowman asked what the staff recommended.

Lt. Col. Rhodes stated that staff recommended returning his license and permit to him.

Commissioner Bowman asked for a motion.

Associate Member Bowden made to motion to return them to him. Associate Member Tankard seconded the motion. The motion carried, 9-0.

Commissioner Bowman said they are keeping this under close oversight and warned him that if he had to come again for the same thing it would most likely result in the revocation of his license.

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10. PUBLIC HEARING: Proposed amendments to Regulation 4VAC20-1040-10 et seq., “Pertaining to Crabbing Licenses”, to control latent effort in the crab pot and peeler pot fisheries.

Rob O’Reilly, Deputy Chief, Fisheries Management, gave the presentation. His comments are a part of the verbatim record. He provided a powerpoint presentation, as he reviewed the data.

Mr. O’Reilly provided a revised copy of the draft regulation, which he explained was only a grammatical correction.

Mr. O’Reilly said that previously the Commission had identified three programs as necessary for long term management of the blue crab fishery: crab pot tagging, effort

transfers, and control of latent effort. Staff had been working with the Crab Management Advisory Committee (CMAC) to define and control latent effort. Latent effort could be a significant impediment to the full recovery of the crab resource. Activation of these licenses places additional harvest effort on the resource.

Mr. O'Reilly explained that staff had advertised in a public notice the proposals to prohibit those 2008 eligible crab pot and peeler pot fishermen from purchasing these respective licenses in 2009 and beyond.

Mr. O'Reilly said that staff had received a letter of support from the Chesapeake Bay Foundation and the staff and the committee all recommend using the data from the time period of 2004 to 2007 to establish the crab fishermen who were eligible for a license, and those that are not, would be put on a waiting list. He said there had been discussion about allowing some fishermen back into the fishery because of hardship from the waiting list.

Mr. O'Reilly explained that staff had since learned, with the benefit of improved science that the crab resource in 1997 was near the target exploitation. However since 1998 to the present, the resources had generally been overexploited.

Mr. O'Reilly said that the interim target abundance of 200 million age 1+ crabs had been agreed to by all 3 Bay jurisdictions as the first step. He said that after 1999 abundance remained very low through 2008. In May 1999, the staff presented a proposal on a license sales moratorium as a means to limit entry to the fishery and this moratorium on the purchase of additional license remains in effect.

Mr. O'Reilly stated that in 2007 the Commission sponsored the Blue Crab Regulatory Review Commission (BCRRC) and they felt that latent effort had the potential to offset or reverse any progress that is made towards the future successful management of the crab resource, since any increases in abundance would be an inducement for inactive harvesters to become active. He explained that staff felt that not all would come into the fishery immediately. He said they also felt that the Commission should develop an effort control system designed to prevent overfishing and constrain fishing mortality towards the exploitation target.

Mr. O'Reilly stated that the Crab Management Advisory Committee attendance had been greater than ever before as others besides the members of the committee had attended. The staff and CMAC had examined a variety of definitions of latent crab licensees that focus mostly on the level of use of that license over an extended period of time. Time periods of one year to eights were examined and after considerable discussion, the CMAC and staff decided to focus on the period of 2004 to 2007 as this was the same time period utilized in the modeling and assessment of the status of the resource and analysis of the effects of the previously adopted regulations. Although a quorum of members was not present, those present reached a consensus that latent effort should be defined as those

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crab pot and peeler pot licensees who had zero harvest of crabs during 2004 through 2007. Initially a few CMAC members were opposed to taking licenses from inactive crabbers, on the basis that a license was a right. These members also stated that some perennially inactive licensees may lose their jobs or some senior citizens may find they need to crab at some later time. The current proposal on latent effort would not remove a licensee's chance to participate in the crab fishery it would postpone their entry back into the fishery, until the abundance of age 1+ crab reach at least 200 million. Until that time CMAC recommended that the 524 latent crab pot licensees and 343 latent peeler pot licensees should be placed on a waiting list.

Mr. O'Reilly explained that by the 3rd meeting of CMAC most of the members supported the waiting list for those individuals who had a 2008 eligibility, for crab or peeler pot, but failed to report any harvest during the time period from 2004 through 2007.

Mr. O'Reilly stated that under the staff proposal, those individuals, whose licenses are defined as latent, would not be permitted to purchase crabbing licenses in 2009 and beyond, but would be placed on a waiting list. Individuals on the waiting list could be given the opportunity to reenter the fishery when it is determined that the interim restoration target of 200 million age 1+ crabs is attained for at least three consecutive years.

Mr. O'Reilly said that some on the CMAC had recommended that a small percentage of 5% of the latent licensees be allowed by an application process to reenter the fishery. This was to accommodate those who believed that some latent licensees remain dependent on their ability to crab in the future years, even though they have not used their license in recent years. Staff recognizes that this option, of providing 5% of wait-listing individuals with crab pots might be viewed by those on the waiting list who would not receive pots as inequitable treatment by the Commission. In the 3rd meeting of CMAC some members and a number of the public voiced concerns over allotting licenses to 5% of the waiting list. There were strong opinions that the active crab fishermen should get extra pots rather than providing those pots to a smaller group on the waiting list.

Mr. O'Reilly said that staff recommended the adoption of the amendments to Regulation 4VAC 20-1040-10, et seq., "Pertaining to Crabbing Licenses", that would prohibit those eligible in 2008 crab pot and peeler pot licensees from purchasing a 2009 or later license for those respective gears. Individuals that had worked in 2005 and 2006 would be allowed to obtain a license in 2008 and 2009. The amendment would also place those same individuals on a waiting list, until such time that the interim abundance target is attained, for three consecutive years.

Associate Member Robins stated that he wanted to clarify something that was discussed in regards to three groups and one was the ones that harvested after the control date and staff comments were that they should not be put on the waiting and he recalled it being discussed that they would be on the waiting. Mr. O'Reilly stated that they should not be

put on the waiting list, as they had made an investment. Associate Member Robins said his second comment was in regards to the draft regulation and there was language, Subsection 2, in reference to reentry once the resource has return to the modest target limit. He said this should be done in a way that the number of harvesters allowed back would not cause the resource to once again return to the level it was now. He suggested that a condition be added in the regulation that stipulates that staff would conduct an analysis to determine the number of harvesters on the waiting list to be allowed to reenter the fishery so the resource would not return to the same level it was today. He said that the number of fishermen to be allowed could be established, whether it was 100 or 200. Mr. O'Reilly stated that could be done. Commissioner Bowman agreed with Associate Member Robins suggestion of establishing a benchmark, stating that it was a good idea.

Associate Member Schick explained that the Potomac River Fisheries Commission did similar reports looking at latent effort and harvest and you could see how latent effort increased in several years until it was more of real effort. Mr. O'Reilly stated that no they had not looked at that, but the reason staff had highlighted 1997 was because of the higher abundance and higher effort which resulted in a higher catch per unit effort. He said but in the Potomac River they were looking at a smaller area and a smaller stock size. Associate Member Schick stated that he felt you could see this in 1998 and 1999 harvest data. Mr. O'Reilly said they did look at that somewhat on a month to month basis and you could see that occurring.

Associate Member Fox said in regards to Mr. Robins' suggestion limiting it to 100 might be okay for the 200 million level, but it might need to be different if it gets to a 300 million level for three years and he hoped that staff would consider that. Mr. O'Reilly said they looked at 1997 and 1998 to establish the level of return to 200 million, but if you look at 1994 where it was almost 200 million, it would be a different situation and that he did have a point there. Associate Member Fox said that probably some of the fishermen considered active during the time period 2004 through 2007 might not have worked all those years and it going forward would staff consider adding to the waiting list if they had fished in four years? Mr. O'Reilly explained that would be something for later consideration and that some of the committee members had resisted this, but once staff had explained that some of these individuals might be able to reenter the fishery and some would be able to reenter by using the transfer process and sometimes that transfer is expensive, but you can do it. He said as this goes forward it would be watched closely. Associate Member Fox said some would be added to waiting if there were some inactive, active crabbers. Mr. O'Reilly responded yes.

Commissioner Bowman opens the public hearing.

Ronnie Jett asked that the slide for the draft regulation be put up on the screen, which staff did.

Daryl Hurley, crabber, was present and his comments are a part of the verbatim record. Mr. Hurley said that he had a one hundred pot license and worked with his father. He further said that he had just invested in a boat and gear and was ready to buy a 300-pot license to buy. He asked if he would be able to buy it in 2009. Mr. O'Reilly said he could always purchase a license, but the dilemma would be there is no means of merging licenses, so the smaller pot license would have to be transferred to someone else and then he would have to get a larger pot license from someone else to him to get a 200-pot license. Mr. Hurley stated that there are only 100 transfers per year allowed. Mr. O'Reilly stated he would have to begin the process early and recommend to Mr. Hurley that he start today and go to the office downstairs to start this process. Mr. Bowden reminded that he should make sure the license he was acquiring was a license that during the required time period was active.

Ronnie Jett, crabber, was present and his comments are a part of the verbatim record. Mr. Jett said he felt that the Commission loses credibility when the fishermen who have done everything as required and now might lose their license. He further said that what Mr. Robins had suggested had not been advertised and was more restrictive. Associate Member Robins stated that VMRC counsel would need to respond to that question. He said that the committee had discussed this at length. He read from the public notice, which said, "the Commission purposes that persons who were eligible for crab pot or peeler pot licenses, as of January 1, 2008, as well as during the 2004-2007 seasons, but who reported no blue crab harvest, at any time, during 2004 through 2007, shall not be permitted to purchase crab fishery licenses in 2009 and beyond." He continued by saying that it does not say that exact language, but counsel could address this question. Mr. Jett said that the advertisement did not say anything about limited entry and rate of entry. He said staff when he spoke with them told him they did not have to buy their license, that was started in 2004 or 2005, every year to remain eligible and he felt the Commission was not standing by what they were told.

Commissioner Bowman said with your experience on the Board of Supervisors you ought to realize that things have to change from time to time. Mr. Jett stated than those individuals should be "grandfathered" or something.

Ken Smith, Virginia Waterman's Association, was present and his comments are a part of the verbatim record. Mr. Smith stated that he thought by this time we would not need to see any more graphs and tables to make a decision. He said it was not fair to penalize fishermen who followed the regulations and then make this change. He stated the fishermen did not cause this decline.

Associate Member Robins stated that in the CMAC meeting there was a lot of creative exemptions discussed and have some licenses set aside to allocate by hardships, lotteries, etc. He said in the CMAC there had been only a consensus. He said 5% could cause an increase in the harvest and then it would need to be paid back at a later time.

Mr. O'Reilly explained that Mr. Smith the ones that just started in 2008, that harvested and made an investment in the fishery would be hard to say no to.

Mr. Smith suggested that the matter be tabled until next month and take it back to CMAC. He said there needed to be a quorum to vote and he would make sure there was so they could review the two proposals heard by the Commission. Associate Member Robins stated that there had not been a quorum at the last two meetings and if a member misses too many, they know they can be removed. He said this had been under review for a year and these are only soft solutions. He said they were not taking the licenses, just being put on a waiting list. Mr. Smith said that the crabbers were finishing with all their pots and should be able to attend.

Tom Powers was present at the meeting and his comments are a part of the verbatim record. Mr. Powers said he had one issue, which was the transferring of license. He asked if all those on the waiting list use the transfer process what happens to the spot of that individual on the waiting list. He said he would suggest that this be including in the regulation and say that if you are on the waiting list and you become an active crabber as the result of a transfer, then that spot on the list just disappears. He was told by someone that this was the way it was already.

Carl Josephson, Senior Assistant Attorney General and VMRC Counsel, said that Mr. Travelstead had explained to him the question that had come up regarding Associate Member Robins recommendation. He said from what he was told he agreed with Mr. Jett and it would have to be advertised for public hearing.

Associate Member Robins said that if that had to be done, then it was an important amendment and he moved to defer it until the December meeting and readvertise to include that amendment.

Associate Member Schick suggested that the matter before the Commission now be continued and the other issues should be brought up at a later meeting, possible January or February.

Mr. O'Reilly reminded the Commission that the sales for 2009 licenses starts December 1.

Associate Member Robins said that being the license sales start December 1st, then the Commission needed to move ahead and have these other issues reviewed by the CMAC and be heard in the future.

Associate Member Bowden said that the way the fishery was now that it was more of a summer basket fishery. He said he had no problem with the staff recommendation, but when it comes back harvesters, the infrastructure, and market will be lost. He said it was hard to compete with the Asian market with their price of \$2.00 per pound. He said on

Tangier Island this had been a way of life working in the fishery and these watermen have left fishing to work on tug boats. He said this was not just happening on Tangier, but they were the most affected. He said there did need to be an amount set aside for hardship exemptions for the watermen, such as those on Tangier because of their location.

Commissioner Bowman said that the impacts on the infrastructure had been considered and the Commission had offered to help with this problem, but he did not think that the efforts of the Commission by itself had destroyed the market. He said should the resource rebound and he felt confident that it would, the Commission would take any measure it could to exploit that fishery but at a sustainable level.

Associate Member Robins said that he appreciated the concerns about hardships that Associate Member Bowden raised and this was something that was talked about by the Committee quite a bit, but it was not a simple matter. He said what the committee looked at the most was the full-time working watermen who had at one time been active in the fishery, but had gone to other jobs during the time period specified but had a history of the working in this industry. He said they had felt that a hardship exemption would be too difficult to do and if you look at where we are now with the limited access, the number of licenses have actually gone up and it had gone up because of hardship exemptions. He said he thought that the staff recommendation of an appeal process was a good approach. He said that if a waterman had to get back into the fishery, he still could by way of a transfer. He said one hundred transfers are allowed in a year and this meant there was a still a mechanism to get back into the fishery. He said that saying that you had to have some harvest during the four year period was a soft solution and they had looked at stricter options. He said they had looked at requiring a 1,000 pounds in any one year and the number on the waiting list would have been more. He said what staff had recommended was a good compromise.

Commissioner Bowman asked for discussion or a motion.

Associate Member Robins moved to accept the staff recommendation. Associate Member Fox seconded. Mr. Fox suggested that staff consider having a rolling 4-year term and added people to the waiting list who did not fish for four consecutive years then you might be able to have some licenses to give back to hardship people or by other mechanisms that might be determined. Mr. O'Reilly said staff would be updating the 2008 data and could it bring for the consideration of the Commission at a later date.

Mr. Jett asked if the item added to the staff recommendation that was not advertised was included in the approval. Mr. O'Reilly responded no.

The motion carried unanimously.

Mr. O'Reilly said that the item regarding the 4 crab dredgers and 9 crab and peeler potters was in the draft regulation, but the appeals process was not in the draft regulation.

Mr. Josephson stated that those items would be less restrictive as they would allow additional fishermen into the fishery.

Associate Member Robins moved to advertise for a public hearing at the January meeting to consider the mechanisms that would establish re-entry requirements for those on the waiting list; and before that meeting it would be reviewed by the CMAC. Associate Member Holland seconded the motion. Mr. Josephson stated that other items had been discussed and asked if these should be included in the advertisement so this problem does not come up again. Associate Member Robins stated that there was no need to add any other items. The motion carried unanimously.

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13. FAILURE TO REPORT COMMERCIAL HARVEST:

Stephanie Iverson, Fisheries Management Specialist, Sr., gave the presentation. Her comments are a part of the verbatim record.

Ms. Iverson stated that there were only 14 cases left over from the last Commission meeting. Commissioner Bowman asked her to call them. Ms. Iverson stated that only two of the watermen were present.

John Paul Jones

Ms. Iverson explained that Mr. Jones had been notified to come before the Commission but failed to appear before the board, but did have his reports up to date. She stated that staff recommended he be put on probation for two years probation.

Commissioner Bowman asked if Mr. Jones wished to speak.

Mr. Jones stated he had sent his reports and had no other comments. His comments are a part of the verbatim record.

Commissioner Bowman asked for a motion.

Associate Member Holland moved to accept the staff recommendation. Associate Member Bowden seconded the motion. The motion carried. Associate Member Schick was not present during the motion and vote.

Robert West

Ms. Iverson explained that Mr. West had been notified to appear before the Commission but failed to appear before the Commission and he had resolved his reporting. She said that the staff recommended he be put on probation for two years.

Commissioner Bowman asked Mr. West if he wanted to comment. Mr. West said he had no comments.

Commissioner Bowman asked for a motion.

Associate Member Holland moved to accept the staff recommendation. Associate Member Bowden seconded the motion. The motion carried. Associate Member Schick was not present during the motion and vote.

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11. **PUBLIC HEARING:** Proposed amendments to Regulation 4VAC20-950-10 et seq., "Pertaining to Black Sea Bass", to establish the 2009 commercial quotas for the directed and bycatch fisheries.

Alicia Nelson, Fisheries Management Specialist, gave the presentation and her comments are a part of the verbatim record. She provided a hand out of additional comments to the Commission.

Ms. Nelson explained that the commercial black sea bass fishery in Virginia was limited entry fishery. She said the bycatch fishery was managed by trip limits and the directed fishery was managed by an individual transferable quota (ITQ) system whereby each member received a percentage of the directed quota.

Ms. Nelson said that the 2009 coastwide recreational and commercial total allowable landings (TAL) for black sea bass will be 2.3 million pounds, which is 45% less than the 2008 TAL of 4.22 million pounds. She explained that Virginia's commercial portion was 20% of the coast-wide commercial quota and will be 218,683 pounds for 2009, whereas, the 2008 Virginia commercial black sea bass quota was 405,133 pounds.

Ms. Nelson said that staff met with members of industry on September 29, 2008 to discuss allocations options. She stated that the members suggested that an allocation system in which the bycatch fishery quota would be reduced from 40,000 pounds to 10,000 pounds and also recommended redistributing the 30,000 pounds from the bycatch fishery to the active directed fishery permit holders, based on their percentage share (ITQ) of the fishery. She said the members defined "active" as any directed fishery harvester who had landed at least 500 pounds in at least two of the past three years (2005 through 2007). To prevent the bycatch quota from being completely harvested, the members

suggested reducing the bycatch trip limit from 200 pounds or 10% of any summer flounder, Atlantic mackerel, scup, and loligo squid on board the vessel, to 100 pounds, with no 10% exception, after 75% of the quota had been harvested.

Ms. Nelson stated that staff had received a letter from Captain James Ruhle who suggested transferring the quota from the bycatch fishery after April 30th, based on his knowledge that the vast majority of bycatch landings by trawl vessels for the year would occur before this date. After April 30th, what remained of the 40,000 pounds could be transferred to the directed fishery, except for the 10,000 pounds. The additional handout was from Harry Doernte with his recommendations.

Ms. Nelson noted that the bycatch fishery was below 10,000 pounds in 2007 and with the upcoming increases in the flounder allocation in 2009, and the possibility of greater effort when the fishery opens, delaying allocation would help prevent unnecessary discards if the bycatch quota were harvested in the first months of the year.

Ms. Nelson explained that staff was recommending the adoption of Regulation 4VAC 20-950-10, et seq., "Pertaining to Black Sea Bass" that:

- 1) Establishes the directed fishery quota as 218,683 pounds.
- 2) Establishes the bycatch fishery quota as 40,000 pounds from January 1 through April 30 and 10,000 pounds from May 1 through December 31. On May 1, any extra quota gained from the reduction in the bycatch quota would be distributed to the active directed fishery members, based on their individual transferable quota share.
- 3) Reduces the bycatch trip limit to 100 pounds after 75% of the bycatch quota had been harvested.

Commissioner Bowman asked for the amount of quota. Ms. Nelson stated that there was a typo and the number for the entire fishery would be 218,000 pounds and then you subtract the 50,000 for the bycatch fishery and the hardship amount, which leave the rest for the directed fishery. She stated also that the draft regulation was correct.

Commissioner Bowman opened the public hearing.

Ken Smith, Virginia Watermen's Association, was present and his comments are a part of the verbatim record. Mr. Smith asked if the bycatch quota would be distributed equally. Ms. Nelson explained that the bycatch fishery was controlled by a 200 pound trip limit. She stated that the extra bycatch quota would be controlled by the trip limit as there was no ITQ. Mr. Smith asked again if it would be distributed equally. Ms. Nelson said it would be based on harvest of 500 pounds within the previous three years. Mr. Smith stated that he had received phone calls from the watermen who have quota but have been leasing it out so that there were complying and were entitled the same as the others. He explained that the latent effort people feel that their card an asset for them. He compared

it to the stock market and increasing dividend as it would not be just divided among stock holders, but to all of them.

Mark Hodges, waterman, was present and his comments are a part of the verbatim record. Mr. Hodges asked if the staff recommendation was to leave the 40,000 pounds until after April 30th. Ms. Nelson responded yes, after May 1 the remainder of the 40,000 pounds minus the 10,000 pounds for the bycatch fishery will be distributed as recommended by staff. Mr. Hodges asked if this would be based on what is caught be from January to April. Ms. Nelson explained that it would depend on the bycatch harvest not being larger than the previous year and that was to ensure that there would be a bycatch harvest later on in the year by giving them the 10,000 pounds out of the 40,000 pounds. Mr. Hodges explained that the directed fishery people came to staff because the quota has been reduced so much he was looking at a reduction under 50,000 pounds, which greatly impacted his business. He said that a reduced quota for the bycatch fishery would help the directed fishery people who depend on it for more than 50% of their business in order to keep their business going and not have to go out of business. He stated they did not agree with the staff recommendation.

Associate Member Robins stated that he did appreciate the concerns expressed because this meant a 45% cut, but if the Commission does not accept the staff recommendation, the bycatch would still occur but result in discards. He explained that staff's recommendation was allowing this bycatch to be retained during the first half of the year until the end of April and after that if there are still some left then they would be distributed. He said too low of a bycatch cap would mean more mortality and the resources are already in bad shape. He said the idea was to have those show up as landings rather than discards and the balance to go to the directed fishery. Mr. Hodges stated that why staff came up with the 10,000 because of the amount of bycatch that had been produced in the last year and it was not like taking away the bycatch quota a 100%, just trying to use some of the unused quota.

Commissioner Bowman asked for further comments and there being none asked the Commission for discussion or action.

Associate Member Robins asked staff if the 500 figure had been the basis for determining allocation.

Joe Grist, Head, Plans and Statistics, was present and his comments are a part of the verbatim record. Mr. Grist referred the Commission to a table in the evaluation for the bycatch harvest and explained that 2004 though 2008, 2007 was the first year that the catch was less than 10,000 pounds, thus the recommendation of staff with some caution and staff would be upping the flounder quota next year as it is the winter fishery, which is more than 70% of the flounder fishery if they are going to encounter an increase if we see one and it would be better to allow them to be landed than being discarded.

Commissioner Bowman stated that the matter was before the Commission for action.

Associate Member Robins stated that the recommendation of staff was prudent and he moved to accept the staff recommendation. Associate Member McConaugh seconded the motion. The motion carried, unanimously.

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12. PUBLIC HEARING: Proposed regulation to establish a Fishing Guide License and to limit the sale of that license.

Jack Travelstead, Chief Deputy, Fisheries Management, gave the presentation and his comments are a part of the verbatim record. Mr. Travelstead provided additional public comments as a handout, since it was received since the briefing was mailed out.

Commissioner Bowman stated that the Commission is required to do a lot of things with different, not easy or straight forward issues as variables come up that staff is not aware of when they decide to proceed. A lot of these things have come up in the last month. When staff decided to proceed there was one purpose for it and that was to achieve parity to work the waters of adjoining states not negatively impact anyone. Once this was started it was apparent that there were variables to be considered. Numerous calls were received and statements made that this was being done for the wrong reasons, but it was not the intent. He said he just wanted to make this statement before the Commission heard this matter. He stated he would be available for those who wished to speak with him on this matter.

Mr. Travelstead reviewed the handouts for the Commission. He said the first pages were some additional data provided by staff, then there was a letter from the State of Maryland, Secretary of Natural Resources with a copy of the existing agreement between the states, an e-mail from the Charter Board Association giving their position on the matter, letter from Tom Powers with a suggested alternative, other public comments from those supporting Mr. Powers suggestions and concerned with the advertised proposal, and a letter from Mr. Bennell dated November 21st listing what he felt were the six intended purposes of the proposed measures. He stated that there was no one proposal by staff as they were not sure what the Commission's objectives were and therefore staff had provided several suggested options.

Mr. Travelstead explained the State of Maryland had promulgated regulations in the mid-1990's to limit access to their charter boat fishery, and most of the Virginia charter boats had not had access to Maryland waters and that situation had continued. Periodically over the last fifteen years there have been attempts by this agency, by then Secretaries of Natural Resources, by legislative members of the Chesapeake Bay Commission and by the Virginia General Assembly to gain access for the Virginia charter boats to Maryland waters. The chief goal was to achieve access for some Virginia vessels to Maryland

waters and most recently the Charter Boat Association came to VMRC and said you have the authority under current laws to create a guide license and to limit the sale of that license. Staff believed that if that were to be done it would result in a situation where Maryland might agree to let Virginia fishermen into their waters. Staff had noted that if this guide license were limited, it might result in the achievement of other objectives. Better enforcement might be achieved of a federal rule that prohibits the taking of striped bass in the ocean beyond three miles by a license that could be revoked. With this license and various limited entry fisheries, it might be easier to manage that fishery and because of that the resource might be better off. If the purpose was singular to get access for our boats to Maryland waters, then there is an easy solution to that situation and if it goes beyond that then it becomes much more difficult. The option one now proposed is opposed by many for economic reasons. It eliminates some of the current charter fishermen and some fishermen who desire to get into the charter boat business and would be unable to do so.

Mr. Travelstead said that a couple of things had occurred since the last meeting that the Commission should be aware of. Number one the State of Maryland had come forward and said we will grant reciprocity to fish in their waters, if you limit the number of vessels that would fall under that agreement. This is a major concession by the State of Maryland and one that should not be allowed to get away as we have been trying to achieve this for 15 years and they have come forward and agreed to what we want. The second thing that is somewhat confusing from the e-mail from Percy Blackburn is that the Charter Boat Association no longer supports reciprocity with the State of Maryland. Staff does not know how to react. Staff has spent the last six months trying to achieve this and developing a series of regulations that staff thought would ultimately convince Maryland to agree. And now, it has happen, and now the Association says it really does not want it. They now want the Commission to proceed with limiting entry for other reasons. He did not believe that VMRC was ready to do this at this point other than for the purpose of achieving reciprocity. There was an excellent meeting with FMAC and a number of excellent discussions with members and the public. There was two and a half hours of public comments. A lot of concerns were expressed and it was extremely helpful to staff and so staff's recommendations have changed as a result. He said those that are opposed to what was being done were told to express their concerns. That the number of individuals who will benefit by gaining access to Maryland waters, is a small number maybe a dozen boats compared to the number of Virginia fishermen who will be impacted is large in number. He said they did not feel that it was fair. To avoid that situation, staff is recommending taking action at this hearing to take advantage of the offer from Maryland as regards reciprocity and create two fishing guide licenses that are valid state-wide. He said one would be limited entry as has been advertised and that license would be reciprocal with the State of Maryland's license. Maryland's condition for the agreeing to reciprocity was to limit the number of licenses. They do not want hoards of vessels coming up into their waters. The second license would be wide open, free access available to be purchased by anyone, anytime, without any condition only having to pay the fee; except the licensee would not be allowed in Maryland waters. This

would create a license, but tweaking the reciprocity agreement to allow only certain individuals to get that license. A number of other options have been discussed by FMAC and the public. If the Commission wants to go beyond the one just described, Option 1, there needs to be some considerable discussion about any of these other options and about what was hoped to be achieved by these other options. A subcommittee of Commission members and public might need to be formed to continue those discussions. The good thing that staff sees with the recommended Option 1, it does create a fishing guide license that begins to develop a history that can be built on that will describe how fishing guides or boat captains that there are in the State. That can not be done now because the boat owner must purchase the charter boat license, and he may not be the captain of the vessel or the owner may use multiple captains. Later on as things occur and changes may become necessary there will be that history to be used to develop a more defined limited entry.

Mr. Travelstead said that one other issue that staff had tried to solve is the enforcement issue in regards to the federal closure of the ocean waters to striped bass. The creation of a license can then be revoked by a violator. In option 1, a Virginia licensee's license could be revoked, but a Maryland licensee's license under the reciprocity agreement could not be. This problem had still not been resolved. The Commission is authorized to accept reciprocity agreements. He said this agreement could be amended to allow the Commission to revoke these licenses for violations on an individual licensee basis and that individual would not be allowed in Virginia waters.

Associate Member Fox asked if Maryland could do the same. Mr. Travelstead responded yes. He said such an amendment had not been discussed with Maryland and he did not know why they should object to it. It was a novel approach to get to a problem that some individuals have expressed their concerns. The FMAC was unanimous in their vote that the Commission not take action today to limit Virginia access and staff requested that the Commission honor that, except for allowing the reciprocity.

Commissioner Bowman asked for questions of staff by the Board.

Associate Member Fox asked how would a Virginia Charter Boat Captain get one of the eligible reciprocity guide licenses? Mr. Travelstead explained that he would have to qualify under the conditions that were advertised for limited entry. That is, if he is a Coast Guard licensed captain, had held a 2008 charter boat license purchased before June 24, 2008, option 2 was that he held a license in 2006 and 2007, option 3 he worked and can document 30 days worked in the charter boat fishery in 2006 and 2007, and can show proof of income or insurance certification that he insured as a captain on a charter boat. If that criteria were met then someone could get a guide license that was reciprocal. If he did not qualify, then would just be allowed to get the other guide license for Virginia waters only.

Associate Member Schick asked whether that would mean that someone would be able to buy a guide license and work on any boat that they wanted to, but if that were a charter boat license that would be tied to a particular boat. He asked if they would have to have both licenses. Mr. Travelstead responded yes. Commissioner Bowman said that to clarify the question was if you had a guide license could you work on any boat. Mr. Travelstead stated that the Code said a guide license would only be issued to the Captain on the vessel and when you had that you can go onto any boat. The owner would need to have the charter boat license to cover the passengers on the boat. That would not change. Associate Member Schick asked if there was a charter boat license and there were violations could the charter boat license be revoked. Mr. Travelstead said that it could be revoked it was only the Maryland boat that it could not be done since they did not have to have a Virginia charter boat license. Associate Member Schick asked if there were violations by residents from Maryland and North Carolina if the Commission could not enforce the laws. Mr. Travelstead stated that we could do it to Maryland, but we could not for someone from North Carolina, since there was no reciprocity agreement. For Maryland that would only be if the amendment were added to the reciprocity agreement as staff had recommended.

Commissioner Bowman opened the public hearing.

Captain Robert Hewlett, President of the Virginia Charter Boat Association, was present and his comments are a part of the verbatim record. Captain Hewlett asked staff if the reciprocity agreement with Maryland would be reviewable after a year. Mr. Travelstead said that there had been no mention of one year, but he had some discussion with Tom O'Connell in Maryland and he suggested that they want to review it periodically during the year to see how many Virginians are coming up to Maryland waters.

Commissioner Bowman asked if it would be fair estimate to have the same number come here as would go up there or thereabouts? He said the letter said that they want the Fisheries staff to meet with them to come up with a suitable number. Mr. Travelstead said that according to MDNR, we know that approximately 100 boats from Maryland go down to Virginia. About one half are working in mid-Bay and the rest are in Virginia Beach. There was a stipulation in the agreement that this could be reconsidered within 90 days. Virginia had lived with that for fifteen years and Virginia could say the same thing.

Captain Hewlett said that the reason the Association's position changed was because the FMAC beat up on the reciprocity agreement and there was a lot of comment. He said they wanted to level the playing field and now the Virginia waters are opened to Maryland boats. He stated further that the striped bass fishery was not being controlled and they were limited in December to one fish per customer, which made it hard for someone to pay \$650 per trip. He said that Maryland fish continually in Virginia's portion of the Bay. He said they have expanded their quota and season for rockfish. He said the Baywide fishery quota to cover any overages in Virginia and Maryland with their expanded season use up that Baywide quota that will hurt the Virginia fishermen. He

stated that they have been in competition with the Maryland fishermen who are in Virginia waters. He said they want to see more control so that we can see the actual number of boats that are fishing in the Chesapeake Bay or in the Virginia coastal fishery, so that it could be better understood where the quotas are coming from and better documentation of our quotas in hopes of getting additional quota. He said to also look at the flounder quotas for the same reasons. He said that it had been said that nothing would be done for our boats that was done for the others because of being sued and losing it. He said Maryland wanted a cap to guide licenses in order to get the reciprocity.

Commissioner Bowman stated that the exact wording is they wanted to get limited entry in the letter from Maryland to the Commissioner.

Captain Hewlett stated that this was why it had to be a limited entry. He said you have to take the number of boat that are fishing and the number that qualify and that's where you get your number for issuing the guide licenses. He said there are others who may want to get a license that even hold a charter boat license who do not actually fish, but there are some who do fish. He said they want whatever is fair to the Virginia charter boats.

Tom Powers was present and his comments are a part of the verbatim record. He said he was on the Finfish committee. He said the Maryland boats come down here and take the market from Virginia. He said in December, January, and February there is a world class market for striped bass and the Maryland boats come down here and take the market away. He said this could be protected by the limited entry. He said his recommendation to Jack was for a limited entry with a limited amount of growth. He said he did not know if Maryland would accept that, but if the purpose is to protect the Virginia fishery then reciprocity is not the way to go. He said they want to keep the number for both sides the same as it is now and that would 25% for Virginia and 25% for Maryland that would be able to come to the other state to fish and then you could maybe allow some growth, but there would be a need to look at it in detail and decide. As far as enforcement, if someone loses their reciprocity then how does law enforcement know this if he has a permit that says he can be in Virginia or may be a list is provided to them that says who has had the reciprocity revoked. Commissioner Bowman said that there is a database that is used right now for summonses for keeping up with repeat offenders. He suggested that this two tier proposal before it becomes effective that the reciprocity agreement has been fully worked out so that licenses can be revoked. He said right now there are more Maryland boats in Virginia waters and there are competition issues with that which will have to be looked at. He said he did not think Maryland would agree to the two-tier system because the Maryland charter boats who always work in Virginia Beach are going to sell their license to some in Maryland and they will not like that in Maryland.

David Hester, Coast Guard Licensed Charter Boat Captain, was present and his comments are a part of the verbatim record. Mr. Hester explained that he was new to this guide license issue. He said he runs a boat about 2 or 3 times a week. He said when this all came about he was in the process of purchasing a boat and he had documentation for

when he did this which he could provide. He said he bought it on June 19 when he wrote the check for the boat and the boat was insured, which he had documents for also. He said the boat was delivered on September 8 and he had the boat registered in Virginia by September 9. He ordered the boat June 19 and was built by Privateer Boat Company. He said he had issues with the control date. He said he fished Saturday near the Maryland line because the majority of the fish are up in the Maryland waters and if he could have he would have fished in Maryland. He said his problem was he could not purchase a license until he had the boat built and could provide the numbers on it. He said the guide license requirement would be like if he had a Virginia driver's license and went to Portsmouth he had to have another license. He said the Coast Guard Captain's license required a lot to get it. He said he went into buy a charter boat license and he was not asked to show that he was a Coast Guard licensed captain as it is not required in Virginia and he had heard that to get the guide license it is going to be required to have a Coast Guard captain's license. He said he had a problem with the control date also.

Commissioner Bowman stated that there had been some discussion modifying the control date. Associate Member Schick said it had been talked about that if someone had proof of purchasing a boat and were in the process after the target date then we would honor it. He said as far as the charter boat license is concerned they do not have to operate the boat as that goes with the boat. He may have two or three captains and that is why you need the Coast Guard license. The owner does not need a Coast Guard license but the operator of the boat does. If the boat is for fishing purposes or other purposes the proposed licenses is for that. The operator of the boat must have the guide license.

Rick Catun, Hatteras boat operator, was present and his comments are a part of the verbatim record. Mr. Catun said he appreciate being allowed to come to the hearing and for the fact that Commission had approached officials in North Carolina about have a reciprocity agreement with Virginia. He said he felt that North Carolina officials were not smart enough to take the offer. He said he did not agree that Maryland boats were trying to take Virginia's market and when they came to his State it actually helped the market. He said he did not agree with the comment. He said they do not do that either. He said only some of their boats come here for stripers.

Gerald Wheatley, Tangier, was present and his comments are a part of the verbatim record. Mr. Wheatley said he had just gotten his Coast Guard captain's license for his boat. He said he had his boat up on the railway, but what he wanted to do when he could was be able to take a few guest out to fish and get paid for it. He said he wants to get a charter boat license to make sure what he was doing was legal. He said now he was going over to Virginia Beach to check out a boat to buy. He said he wanted to know if he could get a charter boat license.

Commissioner Bowman stated this was a similar case to an individual's case earlier. He said what he was talking about was a small charter business.

Mr. Travelstead stated that if staff's recommendations were adopted he would be able to obtain the second guide license where he could work anywhere in Virginia.

Mr. Wheatley asked how he would find out when he could purchase this guide license. Commissioner Bowman stated that due to budget restrictions we have gone into internet publishing and things like that. He suggested he call him and he would let him know what is going on.

Todd Beck, Virginia Beach was present and his comments are a part of the verbatim record. Mr. Beck said he had submitted a letter to VMRC. He said he was looking to retire from the school system after 20 some years. He said two years ago he had started plans to become a charter boat captain and he was part-time now and when he retired he wanted to go full-time. He said he had purchased a boat at that same time to acquire the sea time so that he could get his Coast Guard license and he started his classes in September and he would not be complete with this until the 1st of the year. He said he was concerned with the control date. He stated he liked the idea of staff's recommendation for the two-tiers, as he was in Virginia Beach and had no desire to go to Maryland. He said he just wanted to be able to get into this business.

Al Bennell was present and his comments are a part of the verbatim record. Mr. Bennell said that he was also trying to get into the charter boat business and is concerned with the new requirements. He said he approved of the staff recommendation. He said he was concerned about the Maryland boats that fish offshore and they take the fishermen who want to go offshore which he felt loses him business. He said the license will get data to use as a management tool. He said also it will give the Commission an enforcement tool.

John Crowling was present and his comments are a part of the verbatim record. He said he was not in the charter boat business. He said the Maryland boats bring down their own customers and the ones in Virginia he knows do not feel that they take business. He said they suggested that the Commission form a committee to study this issue and to allow one of his group to participate. He said another thing of concern was that the guide license would give watermen another commodity to sell. He said head boats were a concern because of the shortage of dockage and they should be excluded from having a guide license.

Chandler Hogge, Newport News, was present and his comments are a part of the verbatim record. He said he had wanted to work on the water ever since he was a little boy. He said he is glad to live in Virginia and Virginia's fishery is the best on the east coast. He said we were the furthest north where the southern fish come and the furthest south that the northern fish come to. He said that is where we stand and we have got the best fishery. He said the reason for that was because of management up and down the east coast. He said that he and some he knows from Maryland and locally have worked hard in this business and he wants everyone to see what they want to accomplish by this guide licenses. He said it was not just the rockfish. He said five years ago he said he got

pushed out of a fishery because of the internet. He said they had caught tog fish and his family had been in the oyster shucking business. He said he had been pushed out of the tog fishery because of the internet and it had been overfished and he did not want that to happen again. He said not all the Maryland and North Carolina people are bad, that they just want something in place to protect the Virginia charter boat fishery. He said he did not think that reciprocity was it and that everybody had that already. He said everyone who wanted it has got what is called a provisional guide license. Those people close to the line use that license right now. He said he knew three that have it but do not use it and would be willing to lease it. He said he was concerned about the head boat. He said he ran two boats which are both certified. He said he is allowed over six people. He said his captains have to a U. S. Certified Coast Guard Masters, not a six-pack. He said it was very hard to find somebody that's got that license. He stated the guide license should go with the boat not with the operator. He said he purchases the guide licenses for his operators and he is concerned if he is given the guide license and he should quit he has got in his possession what he had worked hard for and paid for, not the operator. He said a drug consortium card should be required. He said he was concerned with a quota overage and make Maryland more accountable for the part of Virginia's quota they catch.

Travis Beach was present and his comments are a part of the verbatim record. Mr. Beach said that he was in the same position as others as he had just purchased a boat earlier this year and was working on getting his Coast Guard captain's license. He said he fell within those that did not meet the control date criteria. He said he has been a thorn in Mr. Travelstead this year, but the proposal by staff presented by Mr. Travelstead was one he could support. He said his only concern was whether the guide license went with the boat. He said he did not agree with that. Commissioner Bowman explained to him that it went with the captain and wherever he went.

Jason Carroll was present and his comments are a part of the verbatim record. Mr. Carroll said he was a mate on a charter boat. He said that he was concerned with the guide license and that it would become a commodity. Commissioner Bowman stated that he needed to approach the state of North Carolina about a reciprocity agreement. He said he was concerned about what is available to future charter boat captains. Commissioner Bowman said that there are a lot of limited entry that are the same way.

Bob Reed, Reedville Charter Boat Captain, was present and his comments are a part of the verbatim record. He said he was also a member of the Charter Boat Association but was not speaking for it. He said he was speaking for himself, as a charter boat captain. He said the Option 1 proposed by staff would work for him and over come the objections of those that want to do this in the future and this would solve the problem. He said their motive to go into this was not to sell their licenses.

Commissioner Bowman said he wanted to correct an earlier statement by him. He stated that there was no set number on the Virginia Baywide license and as long as you met the criteria you could get one of those.

Robert Smith, mate on charter boat in Virginia, was present and his comments are a part of the verbatim record. Mr. Smith said they work in Virginia and also in Hatteras. He said he was also in the process of getting his captain licenses and acquiring his hours to get his offshore endorsement. He said he was in the 50-ton class and the way it is now would eliminate him from being able to get his career started in the fishery. He said he did like staff's proposal presented at the hearing and he felt that was fair to him and those like him. He said he did support it.

Bob Pride, Charter Boat Association, was present and his comments are a part of the verbatim record. Mr. Pride said he did want to address where the association stands and it had changed since they had walked into this meeting. He said he wanted to explain the letter recently submitted by the Association and apologize for surprising the Commission with it. He said there was some misunderstanding with some of the membership and they wanted this to stay the way it originally was advertised by the Association. He said the primary objections was the excluding future entrance to be denied and resulting in higher price. He said they did not like that by public process it was creating wealth for some and restricting growth and economic growth of the charter boat fishery in localities where it enhance other businesses, such as hotels. He said Mr. Travelstead's proposal that he had just heard about at this hearing with the two-tier license state wide did make sense. He said what it does it takes care of reciprocity, gives an enforcement tool, it gives a little count of the charter boats, and it gives the public safety that is needed. He said it did not deal with protecting the industry, it does not give us conservation, and it does not help with getting a reciprocity agreement with North Carolina. He said it does eliminate all three of the objections because people can freely enter and it will cost the same price for everybody, there is no guide blast being given away, but the Maryland agreement might have some value and the restriction on growth would not be there because people would be freely able to get a guide license. He said the Association liked Mr. Travelstead's proposal and the opportunity to work out the other details by working with a group to see if there are other provisions that should be included. He said he had two modifications to the staff's proposal. He suggested that the individual that has operated a boat for 30 days be enrolled in a random drug test program. He said in regards to the enforcement and count issue that some type of paper should be issued to the Maryland boats that come to Virginia. Commissioner Bowman said a license will be issued on paper regardless of where they come from. Mr. Pride said this could be an amendment for the reciprocal deal. Mr. Travelstead said no license is now issued that is part of a reciprocity agreement. Commissioner Bowman stated that something tangible is needed if the Commission were going to revoke it. Mr. Travelstead said that the status of the individual in the reciprocity agreement is what is being revoked and that is what has been talked about. Commissioner Bowman how hard would it be to issue a permit. Mr. Travelstead said it would be about a 100.

Buddy Crown was present and his comments are a part of the verbatim record. He said this had become pretty complicated and the staff recommendation is a means of resolving

this. He said someone just getting in the business can get a license and now there is reciprocity agreement. He said all that had been said was very good.

Commissioner Bowman asked for discussion or action by the Board.

Associate Member Holland moved to adopt the Option 1 with the two-tier licenses. He said he was very pleased to make this motion and Jack should be sent to Washington to resolve some things. Associate Member Schick seconded the motion. He said fair competition breeds higher volume of business and any body who thinks that by having more participants in the industry the pie pieces get smaller, he said that only happens when there is a limited amount of pie. He stated that there is a lot of pie out there and the more boats that are here and working on a fair even competitive level will build one of the best industries. Associate Member Fox said he wanted to say that the one point that has not been mentioned today was the significant advantage to the people on his end of the Bay. He said that was that Maryland has a different rockfish season could be advantageous in using this reciprocity agreement and going into Maryland when their rockfish season was open. He stated that was another pat on Jack's back. Associate Member Robins said he was not sold that there was a consensus today and there were still some issues to be resolved. He said the agency issue needs to be discussed whether the permit follows the boat or the operator. He said it was obvious that there was resolution with the reciprocity with Maryland and also alleviating the objections and concerns related to entry, but he felt some details still needed to be worked out through a committee. Commissioner Bowman stated he would form a committee after this was finished. The motion carried 8-1. Associate Member Robins voted no.

Mr. Travelstead said the draft regulation was one that aligned with the original proposal it does not align with the Option 1 adopted by the Commission. He said that staff would revise the regulation with the current the amendments of Option 1 and bring it back for a motion to accept the language at the December meeting.

Commissioner Bowman asked Associate Members Robins and Laine to serve on the subcommittee. He said he wanted Jack to be the staff liaison for this subcommittee and to bring together those individuals from the charter boat industry and the hotel and motel community that should be on this subcommittee. He stated that he wanted to look at the issue raised by Associate Member Robins regarding "agency" and he wanted the subcommittee to look at what is to be done for those that are just coming into the industry and after the control date.

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14. **ERNEST L. GEORGE:** Request to license and locate a pound net in the Rappahannock River about two miles west of Windmill Point Light. The proposal is protested by the Windmill Point Condo Association homeowners.

Mr. Jack Travelstead, Chief Deputy, Fisheries Management, gave the presentation and his comments are a part of the verbatim record.

Mr. Travelstead explained that Mr. George had applied to the Commission to locate his pound net in the Rappahannock River on the north shore about 2 miles west of Windmill Point Light and ½ mile from the north shore of Windmill Point.

Mr. Travelstead stated that during the 30-day comment period that the agency received two letters in opposition to the application. He stated that one of these objections had been withdrawn as the pound net location had been changed and was now to be approximately 3,000 feet offshore. He said the second comment was from an individual who was representing the Condo association, but was not clear on what was being objected to only that they were 100% opposed. He said he had since spoken with Mr. Wilson who had submitted the letter on behalf of the association and he only indicated that he felt it would interfere with his recreational fishing.

Mr. Travelstead stated that because of the distance of the pound net that it will not impact the condominium residents. He further stated that staff did not see any reason not to approve this net.

Commissioner Bowman asked if Mr. George wished to comment.

Ernest George was present and his comments are a part of the verbatim record. Mr. George gave the Commission two photographs that he had taken from his vessel. He also said that he had previously given up a location for this same group and he did not feel he should be banned from this one.

Commissioner Bowman asked for any other comments. There were none. He asked for discussion or a motion from the Board.

Associate Member Schick moved to approve. Associate Member Bowman seconded the motion. The motion carried, 8-0. Mr. Holland was absent during this motion and vote.

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- 15. DIRK SANFORD:** Request to license and locate two pound nets in Chesapeake Bay between Lynnhaven Inlet and Cape Henry. The project is protested by onshore property owners, fishermen and others.

Jack Travelstead, Chief Deputy, Fisheries Management, gave the presentation and his comments are a part of the verbatim record. Mr. Travelstead referred the Commission to the public comments that had been received.

Mr. Travelstead said that there was a protest letter from Mr. Hionis in the packet. He said Mr. Hionis was objecting to the Sanford application based on the nets not meeting the distances required between pound nets, which are stipulated in Section 28.2-307 of the Code of Virginia. He said that the Code required that adjacent nets shall be 300 yards apart and the second part being that there be 200 feet between structures in the same row.

Mr. Travelstead provided a map prepared by the Engineering and Surveying Department depicting the location of the nets and determining that the first two Sanford nets would meet the minimum standard and are 315.3 yards from Mr. Hionis' nets. He explained that the second net to the west and offshore was not 200 feet beyond beyond the Hionis's nets but could be moved further offshore. He said the other two nets that Mr. Hionis had were not in use and would not be impacted.

Mr. Travelstead explained that in the past "fish trap lines" had been established and delineated as area suitable for fixed commercial gear. He said this was done to established liability. He said it was not now on the charts as the Corps no longer maintained this information. He said these nets were in a safe location.

Mr. Travelstead reviewed the list of concerns by the other protestors.

- Public safety and a hazard to navigation along the shore and enroute to Lynnhaven Inlet.
- Disruptive to boating, sailing, jet skiing, kayaking and swimming activities near and offshore.
- The area is largely recreations and should remain so.
- The nets will ennare birds and dolphins A high degree of dolphin mortality has been associated with the existing nets.
- Discarded bycatch will litter the beach.
- The nets violate the 300 yard required distance between existing pound nets.
- Commercial netting is inconsistent with tourism, the two hotels in the area, and the residential use of the beaches.

Mr. Travelstead explained that staff was not in total agreement with all the public comments, because the Code does say that nets can be located in this area. He said staff was concerned with the dolphin issue and the dolphin fatalities that have occurred and if the nets were to be allowed they would cause more of these mortalities. He said that in the public comments there was a letter from Mr. Mark Swingle of the Virginia Aquarium and Marine Science Center expressing concerns over the nets being located in important habitat of the bottlenose dolphins and the fatalities that have resulted from existing nets. He explained that there was also a group called the "Take Reduction Team" which makes recommendations to the National Marine Fisheries Service. He said this team was aware of this proposal for this sensitive area for the dolphins. He said a member of the Fisheries staff is on this team and he had told him that there would be discussion about not

allowing these nets in this area. He said staff was concerned that if it were allowed it could result in Federal regulatory action.

Mr. Travelstead noted that there were two more applicants that will be going through the public comment period and heard at the December meeting. One application is from Mark Sanford and the other one from Charles Gregory.

Mr. Travelstead said that staff was recommending that these additional nets not be approved for this area.

After some discussion, Commissioner Bowman asked Mr. Sanford if he wished to speak.

Dirk Sanford, applicant, was sworn in and his comments are a part of the verbatim record. Mr. Sanford stated that he was a fisherman, husband and father and he was asking for approval of two permit licenses. He said he currently he had other licenses in this area and he would like to get these additional nets. He said he wanted two locations so that he could fish one and forfeit the other in order to comply with the requirements of the weakfish or grey trout regulation. He said he had been a resident in the area for 15 years and these two nets border his property. He said further his family utilizes the beaches, parks and other amenities which this area provides just like everybody else.

Mr. Sanford said that individuals such as Mr. Etheridge, Mr. Fisher, Mr. Braithwaite and others have fished pound nets in this area for over a hundred years since the 1900's.

Mr. Sanford explained that the Corps in the 1900's had established the fish stake area referred to by staff and these two nets were within this area. He said that staff's comments that this area was not shown on the chart or maintained was not true.

Mr. Sanford stated that National Marine Fisheries Service operated under the Marine Mammal Protection Act and they had not stopped this activity. He said that NMFS will allow nets in this area, which is a category 2 area and they realized that there would be some dolphin mortality. He said they issued a Marine Mammal Authorization Certificate for this area so that there is protection from federal prosecution. He said that NMFS had a Take Reduction Plan and team. He said he would be in support of anything being tested for reduction of dolphin entrapment if he could still be allowed to fish.

Mr. Sanford said he had talked with a gill netter, sail boat operator, crabber and other who supported his getting these pound net locations and he selected these two areas because he felt they would be least impacted. He said that with these nets he would be providing employment for others in the area. He said he was requesting approval of his applications.

Associate Member Robins asked Mr. Sanford to address the concerns of staff and further federal regulations that could result because of the dolphins. Mr. Sanford explained that

there was no proof any more regulations and with the modifying of the leaders this would help the dolphin situation. He said they federal government realize that it was possible that dolphins would be caught. He said when they made up the turtle regulations and the requirement for the leader modification, they did not include the dolphins.

Commission Bowman asked for those who wished to speak in support.

Steve Snyder, resident in the area, was present and his comments are a part of the verbatim record. Mr. Snyder stated that he did not represent the U. S. Navy even though he was in uniform at the hearing. He said he was aware of Mr. Sanford's proposal and the concerns of the opposition. He said he as a resident was proud to share residence with those who make their living by working on the sea. He said he considered Mr. Sanford's efforts as an important part of the infrastructure that is enjoyed as recreational fishermen by the water. He said that he was representing the residents of the Cape Story by the Sea and when he moved into the area, he remembered looking out at the first sunset over the Chesapeake Bay and seeing these pound nets and saying that was an awesome interaction between the recreational enjoyment aspects and the commercial aspects that is shared between neighbors. He said he read some of the comments of the opposition regarding swimming and kayaking and he did both. He said he swims and kayaks around the nets and it did not impact either of those activities for him. He stated he was a member of Virginia Marine Science Museum and a donor to the Chesapeake Bay Foundation and he was aware of the dolphin impact and shared those concerns and should be researched. He said the Commission had asked an important question. He said he felt Mr. Sanford was trying to address the impacts of his nets to the dolphins. He said if this was going to be the primary concern then all the pound nets should be removed to eliminate that risk altogether. He said it should be one or the other so as not to discriminate against Mr. Sanford's plans. He said he strongly endorsed Mr. Sanford's plan to put the pound nets out.

Commissioner Bowman asked if he was speaking for the residents of the Cape Story by the Sea. Mr. Snyder said he was speaking as a resident of the Cape Story by the Sea.

Charles Gregory, pound netter, was sworn in and his comments are a part of the verbatim record. Mr. Gregory stated that he supported this fishery in this area. He said the Commission had in the past put a lot of restrictions on it. He said because of the great impact on himself as a crabber, he looked at this fishery and found these locations to make application. He said they did not want to impact the dolphins and the commercial fishery had had some bad publicity in regards to mammals. He said if Mr. Sanford's licenses are approved it would provide jobs and local fish buyers in the area needed these fish as there was not much activity of this kind in the Lynnhaven area. He said they did not want to impact the dolphins and were willing to accept any modifications that come along. He said the Commission needed to consider the positive aspects of this for the watermen. He said Mr. Hionis had nets down there and he should not be allowed

exclusive rights to that area. He said he had worked in this area with his grandfather in years past. He said it would not be fair to other watermen.

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

Dave Alphis, Cape Story Civic Association, was sworn in and his comments are a part of the verbatim record. Mr. Alphis said that he was representing the association and the president of the association. He said the civic association represented more than 600 homes located along this waterway and the residents use the Chesapeake Bay quite a bit. He said staff had mentioned the impacts to the dolphins, but he said this would have an impact on the human population. He said the concern of the civic association was of quality of life and safety issues and they were opposed to any additional pound nets in that area.

Mark Swingle, Virginia Aquarium and Marine Science, was sworn in and his comments are a part of the verbatim record. Mr. Swingle noted that there was a letter from this organization in the Commission packet. He said he was the Director of Research and Science at the aquarium and he had been there for almost 28 years. He said he was a resident at Cape Story as well. He said he was very knowledgeable of the area as a Cape Story resident for over 25 years. He said he also grew up in the Virginia Beach area, so he had been there all his life. He said as a member of the aquarium that they had been working with the pound net fishermen at Cape Henry as part of their operations over the years and continued to do so. He said that in that time they had fished with Mr. Etheridge on those nets and then Mr. Hionis and in that time those are the only nets that he was aware of that had been fished. He said they had experience with the pounds nets and they knew how they worked. He said to correct an earlier statement he wanted to say that as a member of the Take Reduction Team they do take those nets in the area very seriously. He said that the statement about no regulations being done for this area was that the team had told them that they thought they could take care of the dolphin issues without regulation. He said they had been working with Mr. Hionis on a project for the last two years to examine an alternative leader to fish in this area that may help solve the problem. He said from their studies that they have found that population of dolphins in the Cape Henry area are as dense as any on the east coast during the summer time. He said there are more dolphins in the Cape Henry than anywhere on the whole east coast of the U. S. He stated this was a very, very important place for the dolphins. He said these animals do have to swim around this gear. He said the number of 40 which had been stated was a conservative number for this gear. He said in this same time there were seven animals rescued from this gear before they died. He said the pound net leaders pose a danger for these animals in this area. He said the number for this gear is high for the east coast because it is a high risk area. He hoping from this study being done with Mr. Hionis that a leader can be found that will help the situation and that it will be adopted in the future and maybe reduce the risks in this area. He said the reason they were opposed to any more nets in this area was because of the additional risks caused by the additional nets. He said they do not know if this will work but we feel it will have an impact on the

dolphin mortalities. He said this will not be known until it had been looked at for a while. He said there was a question about the use of different types of nets and they had found that the dolphins got entangled in all types.

Associate Member McConaugha asked that since there was two years of data on the leader, what did he think it was doing.

Mr. Swingle explained that the first year there was no experimental leader and it was only used in the 2nd year. He said that in this second year that there had been five dolphin mortalities reported. He said that this gear will entangle dolphins or certainly reduce the mortality risk that exists now. He said until they have in place and operating for few seasons they will not know the final answer to that question. Associate Member McConaugha asked if these mortalities were in the nets or just in the area. Mr. Swingle said that some of the mortalities are pulled out of the gear and are really fresh. He said they perform autopsies on these animals when they are found and if pulled out of the gear that means direct evidence involving the gear. He said they test the tissue to see if they were entangled before they died. He said in addition to those in the gear, there are some that wash up on the beach in the vicinity of the gear and they have marks on them that match the line marks in the netting structure in these types of gear. He said there can be signs that they did come out of the gear.

Tom Powers, was sworn in and his comments are a part of the verbatim record. Mr. Power referred the Board to the Code of Virginia and the section with the State Constitution where it said...where there is adequate resources for recreational use the State shall develop it for business. He said in determining how much fixed gear should be allowed in the area, this section of the Code should be considered by the Commission.

Robert Lowe was sworn in and his comments are a part of the verbatim record. Mr. Lowe said he was speaking for various groups in the area. He stated that they did not have any advanced notice of this hearing and the neighborhood only found out about it in the last week and a half. He said they respect the commercial fisherman and understand that it had been done for 100's of years. He said that recreational activity had increased greatly in the area for the last 20 or 30 years. He said it was a very dense residential area and a lot more people were coming in to take a part. He said there was a safety issue that really needed to be of concern and then the dolphin issue. He said the City of Virginia Beach had plans to replenish the beach making it closer to the nets by 2010. He said in this area there was a density of dolphins and these dolphins provided visual enjoyment for those in the area. He said there should be concern over putting more nets in this area causing a danger to the dolphins. He said they were requesting that this request be denied and that they be notified of the hearing on the other applications next month.

Dr. John Onufer, resident of Cape Story by the Sea, was sworn in and his comments are a part of the verbatim record. Dr. Onufer said the attraction of this area has been the quietness and the attraction of the dolphins. He said they enjoyed the ability to enjoy the

water sports, which are not the same as the oceanfront as this provides calmer water. He said this was a beach for families, elderly people and just for people who enjoy water sports. He said the neighborhood is a modest one and a lot of the homes are small bungalows and the residents' recreational use of the area would be impacted. He said some of these homes are rented out as duplexes in order to supplement incomes. He said visitors will not return if there are a lot of nets to impact their enjoyment of the area and what it now has to offer to them. He stated that allowing these nets would impact the value of the neighborhood even though it may increase the fishermen's income in these critical economic times. He said the fundamental value of the neighborhood was the beach. He said that he was asking the Board to vote no to adding additional pound nets to the area.

Lisa Bailey, resident of Cape Story by the Sea was sworn in and her comments are a part of the verbatim record. Ms. Bailey stated she had been a resident for 15 years and have enjoyed the area and the recreational activities. She said she was at the hearing to oppose these new pound net applications and may need to be coming back for the other pound net applications.

Commissioner Bowman said it had not been decided whether it would be December or January, but there will be a public notice.

Ms. Bailey said that they were not opposed to commercial watermen and Mr. Sanford and his family were a part of this neighborhood. She said there was a need to share the Bay. She said she was opposed to these additional nets as they do not make sound public policy. She said the area had changed and it was not the same beach as it was 20 years ago. She said the population in the area was dense as people desire to live near the beach to take part in the activities there. She stated that her husband with letter had provided for the Board to show what is there in the neighborhood and what can be seen there. She said she had two additional photos to show how the beach is utilized. She provided appraisal documents from the City of Virginia Beach to show the density of the population in the area. She provided a map showing the various neighborhoods. She said that there are 2300 homes. She also reviewed various data to show the amount of activity that occurs with a local hotel and the Fort Story Park. She said there are also gill nets on the beach so there is also other commercial fishing here in this area. She has actually seen individuals using the waters with small boats get caught up with the nets. She read from the City Council staff member letter responding to their letter about navigational hazards the nets and poles cause. She said the letter said that the City had contacted the VMRC, but since the fixed gears were not located in the navigational channel did not seem concerned. She said that others would have been present at the hearing if they had known about it. She said they were asking that these fixed gear applications be denied.

Dimitri Hionis, pound netter and protestant, was sworn in and his comments are a part of the verbatim record. Mr. Hionis explained that in 2004 he had purchased Kenny Etheridge's nets. He said when he came to this area, he had asked about three other

locations and why there were no nets on them. He explained that back about 21 years the price of fish that were caught was about 30 to 40 cents and even until this day he was still getting about 40 cents, which was why the other locations were never fished. He explained that when Mr. Etheridge left the business he left without paying a lot of people because there was not enough money made from these pound nets. He said if additional nets are allowed to be placed in the area, he feels like his business will not be able to survive. He utilized the staff map to depict where his pound nets are located. He explained that he only used 4 nets as he has to forfeit 2 of them to keep the trout. He said in the last four years he had never caught any trout. He said one of his nets is less than 300 yards from one of his nets being applied for. He said if these are approved the fishery her will die. He stated he opposed to the new nets.

Dirk Sanford in his rebuttal comments explained that staff had not mentioned the letters that were in support of the applications. He said also that staff had said there were two hotels in the area when there is actually only one. He asked if his applications were denied could he apply for other nets, such a fyke nets, weir nets, gill nets, etc. and not have to go through the public review process and if when the modified leaders are proven to work would he be able to turn them into pound net sites.

Mr. Travelstead explained that the 30-day public interest review regulation only applies to pound nets and does not apply to other fixed gear, such as fyke nets, gill nets. Mr. Sanford asked if that included a weir net. Mr. Travelstead stated he was not familiar with a weir net. Mr. Sanford explained that it was similar to a pound net, but not as big. He stated that these were used up North and the leaders were larger and inside of them they have a big bag.

Commissioner Bowman stated that he was familiar with them. He said Mr. Sanford could get that type of license, but the laws could be changed. He said be careful what you ask for because even though the laws are not in place and VMRC does not hold a review of these licenses and locations; the public does have the right to make their concerns known as well.

Mr. Sanford said he agreed that everybody should have a part in this, as there is more than one user. He said that if there is so much concern over what happens to the dolphins then maybe the other nets should be looked at and maybe removed. He said he felt the pound netters get blamed for the dolphins and or birds or turtles who have died of natural causes and by other means, such as disease and ship strikes. He explained that back in the 70's and 80's when he would sail in the area he just sailed around the nets there and he never realized that it was a problem. He stated he wanted it understood that his nets were not in the Fort Story area. He said in the Fort Story neighborhood there have not been a lot more homes added, but older ones have been torn down and replaced. He said when people moved in the pounds nets were there. He said the Commission can either deny them or approve them, but if the locations are not right, then he would like some

help in finding another location where he could have them. He said he appreciated the opportunity to speak and for the Commission listening to him.

Commissioner Bowman closed the public hearing.

Associate Member Robins asked if there is a way that the application to seek consultation with NOAA or TRT. He asked could he have some kind of consultation with them.

Mr. Travelstead explained that Mr. Gillingham and Mr. Swingle who serve on the team and others that Mr. Sanford could contact and maybe even attend these meetings to see what goes on. Someone did confirm that these were public meetings.

Associate Member Holland moved to accept the staff recommendation.

Associate Member Bowden stated that he was a waterman and he and his family had lived in Virginia since the colonies were founded. He said he was sympathetic with the pound netters and such. He said he believed that if you had a pig farm moved next to you then you could complain, but if you came after the pig farm then you just need to adapt to the smell. He said he had been on a dolphin reduction panel before there was the TRT and he even was asked to serve with this group, but someone else does serve for his association. He said he was amazed that with that many takes drastic measures had not been taken. He said on the Eastern there had only been one confirmed take of a bottlenose dolphin and they have had drastic restrictions put on them. He said you could not think that this will not come to that area also. He stated that he was very supportive of the commercial fishery. He said if there were more takes, the restrictions would not be limited to just the pound netters in this area, but it would be a pound net wide restriction. He said this would not just affect Mr. Sanford but many others as well. He said as much as he wanted to support the commercial fishery, he could not support this.

Associate Member Robins stated in follow up to what Associate Member Bowden said the he did appreciate what Mr. Sanford was trying to do here as this was eminent opportunity for him and great commercial opportunity as well. He said when you balance this out he did not think this was in the public interest. He said there was an intense area of conflict there when you consider the amount of recreational traffic here. He said in addition there was the dolphin entanglement, as Associate Member Bowden said it is a significant risk and the entanglement in the gill nets have brought massive restrictions on it. He said he was also surprised that there had been that number of entanglements without additional restrictions on this area. He said that what is there seems to be “grandfathered” and would be foolhardy for the Commission to allow these nets and taking this risk.

Associate Member McConaugha seconded the motion. Commissioner Bowman said the regulation is clear and the Public Trust Doctrine must be considered. The motion carried unanimously.

Commissioner Bowman advised Mr. Sanford that he could appeal this decision with the Circuit Court.

16. RECOMMENDATIONS OF THE RECREATIONAL FISHING ADVISORY BOARD

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

Ms. Davis explained that on November 10, 2008 the Recreational Fishing Advisory Board approved 7 projects. She said that they were provided the estimated amount of funding as being \$338,487. She stated that because of the limited amount of funding available, they proposed the reallocation and established a rating for funding priority, which is included in the descriptions of each project. She said that to date, the Commission had not heard from the Town of Saxis indicating that they were ready to proceed with their contract and pier expansion. She reviewed the RFAB recommendations for reallocation and funding.

| RFAB Recommendation Summary | | Running Subtotals |
|--|------------------|--------------------------|
| Starting VSRFDF Balance as of 11/30/08 | | \$338,487 |
| Reallocation from Artificial Reef grant | \$290,000 | \$628,487 |
| C) Wallop-Breaux Match | -\$321,820 | \$306,667 |
| A) & B) Children's Fishing Clinics | -\$12,000 | \$294,667 |
| E) Game Fish Tagging | -\$86,698 | \$207,969 |
| D) Weakfish | -\$130,876 | \$77,093 |
| Reallocation from Saxis Fishing Pier | \$173,151 | \$250,244 |
| F) Summer Flounder Migrations | -\$83,605 | \$166,639 |
| G) Red Drum PSATs | -\$90,369 | |
| Funds available for obligations in 2009 | | \$76,270 |

Associate Member Holland asked if there was funding available so that an additional \$1,000 could be added to the Game Fish Tagging proposal to enable them to become involved in the Black Drum Tournament and include a project in which they would train the participants to tag the black drum. He said he felt this was a very important addition to the project.

Jon Lucy, co-project leader with Lewis Gillingham, explained that this had been discussed stated that they appreciated the offer of additional funding, but he felt because funding was so low for everyone that they could do this added activity with the current funding.

Commissioner Bowman stated that someone turning down funds was not normally heard. He asked for discussion or action by the Board.

Associate Member Holland moved to approve funding, as recommended. Associate Member Robins seconded the motion. The motion carried, unanimously.

The following 7 projects were recommended for approval by the RFAB in the funding priority ranking order listed:

A) 2009 Children's Fishing Clinic (Year 12). Rob Cowling, Newport News Rotary Club and Coastal Conservation Association-Peninsula. \$6,000. **Funding priority ranking of 2, Vote 7-0.**

B) 2009 Kiwanis Club Children's Fishing Clinic (Year 8). Wesley Brown, Capital District Kiwanis Club. \$6,000. **Funding priority ranking of 2, Vote 7-0.**

C) Federal Assistance (Wallop-Breaux) Matching Funds FY 2009. Jack Travelstead, VMRC. \$321,820. **Funding priority ranking of 1, Vote 7-0.**

D) Improving Stock Assessment of Weakfish (*Cynoscion regalis*) – Year 2. Y. Jiao, D. Orth, VPI & SU, and R. O'Reilly, VMRC. \$130,876. **Funding priority ranking of 4, Vote 7-0.**

E) 2009 Virginia Game Fish Tagging (Year 15). J. Lucy, VIMS and L. Gillingham, VMRC. \$86,698. **Funding priority ranking of 3, Vote 7-0.**

F) Migrations of Adult Summer Flounder from Chesapeake Bay: Implications for Stock Structure. M. Fabrizio, M. Henderson, VIMS. \$83,605. **Funding priority ranking of 5, Vote 6-1.**

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G) Use of Pop-Up Satellite Archival Tags (PSATs) to Determine the Fate, Movements, and Habitat Utilization of Red Drum Released from Virginia's Recreational Fishery. J. Graves, A. Horodysky, J. Lucy, VIMS. \$90,369. **Funding priority ranking of 6, Vote 4-3.**

The following project was not recommended for approval by the RFAB:

H) Seasonal Caloric Needs and Energy Intake of Chesapeake Bay's Predatory Fishes: Which Prey Fuel Growth and Reproduction? A. Horodysky, R. Latour, VIMS. \$40,060. **Vote 7-0.**

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17. REPEAT OFFENDER: Joseph Keith Forrest

Lt. Col. Warner Rhodes, Deputy Chief, Law Enforcement, gave the presentation and his comments are a part of the verbatim record. Lt. Col. Rhodes explained that there had been 4 violations since June 1 for no cull rings and for improper identification of the pots. He stated that Mr. Forrest had been convicted by the court.

Joseph K. Forrest

Mr. Forrest was sworn in and his comments are a part of the verbatim record. Mr. Forrest stated that these pots had been in the water prior to the changes to the regulations on May 1 and he explained that his boat had broken down, plus he had had health problems preventing him from getting his pots out of the water. He said everyone else had been so busy he had not been able to get any help for removing these pots. He stated that the day prior to this hearing, he had again received two more summonses.

Karen Ashworth was sworn in and her comments are a part of the verbatim record. Ms. Ashworth explained that his pots had been put in the water when the season started and after that his boat motor had blown up so that he could not get the pots. She said that when the law changed he had not been able to get the pots out. She also told the board about the two new summonses.

Commissioner Bowman asked if there had been any prior violations prior to this time. Lt. Col. Rhodes responded no.

After some further discussion, Commissioner Bowman stated that the matter was before the Commission.

Associate Member Bowden stated that the Commission was willing to work with Mr. Forrest because he had had no prior violations, but that he needed to get these pots out of the water or he would be in violation further because as of December 1, all

pots had to be removed from the water. He moved to put him on probation starting with the beginning of the crab season on March 17, 2009. He stated he did not want to see him come back again. Associate Member Robins suggested amending this motion to require the removal of the pots by December 1 or in 30 days. Associate Member Bowden did not agree to the amendment. Associate Member Holland seconded the motion. The motion carried, unanimously.

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There was no further business and the meeting was adjourned at approximately 5:55 p.m. The next regular meeting will be Tuesday, December 16, 2008.

Steven G. Bowman, Commissioner

Michele Guilford, Recording Secretary

Minutes prepared by:

Katherine Leonard, Recording Secretary