

MINUTES

COMMISSION MEETING

December 17, 2019

The meeting of the Marine Resources Commission was held at the Marine Resources Commission main office at 380 Fenwick Road, Bldg. 96, Fort Monroe, Virginia with the following present:

Steven G. Bowman	Commissioner
Wayne France	
John Tankard III	
John Zydron Sr.	
Ken Neill, III	Associate Members
Heather Lusk	
James E. Minor III	
Chad Ballard	
Christina Everett	
Kelci Block	Assistant Attorney General
Jamie Hogge	Recording Secretary
Dave Lego	Bs. Systems Specialist
Adam Kenyon	Deputy Chief, Fisheries Mgmt.
Andrew Button	Head, Conservation and Replenishment
Stephanie Iverson	Fisheries Mgmt. Manager, Sr.
Alicia Nelson	Coordinator, RFAB/CFAB
Ethan Simpson	Biological Sampling Program Manager
Chris Davis	Fisheries Mgmt. Specialist
Jill Ramsey	Fisheries Mgmt. Specialist
Jennifer Farmer	Regulatory Coordinator
Alexa Kretsch	Fisheries Mgmt. Specialist
Somers Smott	Fisheries Mgmt. Specialist
Olivia Phillips	Fisheries Mgmt. Specialist
Hank Liao	Lab Manager
Jessica Gilmore	Lab Specialist
Rick Lauderman	Chief, Law Enforcement
Warner Rhodes	Deputy Chief, Law Enforcement
Clayton Dameron	Marine Police Officer
Marshall Theilen	Marine Police Officer

Commission Meeting

Tony Watkinson	Chief, Habitat Management
Randy Owen	Deputy Chief, Habitat Management
Justin Worrell	Environmental Engineer, Sr.
Jay Woodward	Environmental Engineer, Sr.
Mark Eversole	Environmental Engineer, Sr.
Jeff Madden	Environmental Engineer, Sr.
Mike Johnson	Environmental Engineer, Sr.
Rachael Peabody	Environmental Engineer, Sr.
Hank Badger	Environmental Engineer, Sr.
Allison Lay	Environmental Engineer, Sr.
Ben Stagg	Dir., Shellfish Aquaculture, Leasing and Mapping
Daniel Faggert	Surveyor, Engineering/Surveying

Virginia Institute of Marine Science (VIMS):

Lyle Varnell	Emily Hein	Cecilia Lewis
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Others present:

Kathryn Waters	Julia Lewis	Nick Welz
Ben Watson	John Kempe	Tori Rice
Mike Oesterling	Whitney McNamara	Kay Wilson
Rich Calvert	George Trice	Stephen Hughes
Cak Smith	David O'Brien	Joe Gubeu
Chris Moore	Kim Huskey	Rebecca Francese
Ann Arseniu	Maurice Stinson	Thomas Gallivan
Warren Cosby	Misk Ostrander	John Harland
Jeff Dameron	and others.	

Commissioner Bowman called the meeting to order at approximately 9:34 a.m.

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

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

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

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MINUTES: Commissioner Bowman asked if there were any changes or corrections to be made to the November 26, 2019 Commission meeting minutes.

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

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

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

Tony Watkinson, Chief, Habitat Management, reviewed the three (3) page 2 Items A through C for the Associate Members. Mr. Watkinson's comments are a part of the verbatim record.

- 2A. **PLAINS ALL AMERICAN PIPELINE, LP, #19-1792**, requests authorization to mechanically maintenance dredge approximately 77,000 cubic yards of subaqueous material to a maximum depth of -40 feet at mean low water adjacent to an oil unloading pier situated along the York River in York County. The dredged material shall be placed in barges then slurried and hydraulically pumped into an on-site, upland disposal area for de-watering.

Fees:	\$ 100.00
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- 2B. GU HOLDINGS INC., #19-1335**, requests authorization to install a trans-Atlantic fiber optic telecommunications cable extending from a previously permitted and existing submerged conduit within the Atlantic Ocean adjacent to 920 Vanderbilt Avenue (Croatan Beach Municipal Parking Lot) in the City of Virginia Beach, and extending to the Commonwealth's three (3) nautical mile boundary of State-owned submerged lands. The submerged cable will be installed by a cable sea plow to a depth of approximately 1.0 meter below the seabed. Staff recommends approval with a royalty of \$46,464.00 for the encroachment under 15,488 linear feet of State-owned submerged bottom at a rate of \$3.00 per linear foot.

Royalties: (Encroachment of 15,488 L/F @ \$3.00 L/F)	\$ 46,464.00
Fees:	\$ 100.00
Total Fees:	\$ 46,564.00

- 2C. BRANCH-FLATIRON, JOINT VENTURE, #19-1748**, requests authorization to construct a 65 linear foot roadway crossing over Potomac Creek, a 60 linear foot roadway crossing of Accokeek Creek, and 60 linear foot roadway crossing of Austin Run using the cofferdam diversion method, with temporary construction causeways associated with the construction of the 95 Expressway Lanes – Fredericksburg Extension in Stafford County. Staff recommends the inclusion of a permit condition that the Permittee shall execute a transfer of this permit to the Virginia Department of Transportation upon their acceptance of the structure(s) authorized therein.

Fees:	\$ 100.00
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No one spoke in support or opposition of the projects.

The matter was before the Commission for discussion and action.

Associate Member France moved to approve the three (3) page 2 Items A through C as presented. Associate Member Neill seconded the motion. The motion carried 9-0. Chair voted yes.

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- 3. **CONSENT AGENDA ITEMS – There were no consent agenda items to be heard.**

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- 4. **CLOSED MEETING FOR CONSULTATION WITH, OR BRIEFING BY, COUNSEL.** No meeting needed.

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- 5. **JUSTIN JOHN, #19-1374.** Commission review of the November 18, 2019, Virginia Beach Wetlands Board decision to approve the filling of tidal wetlands for the installation of a replacement bulkhead at 896 Winwood Drive, situated along a canal tributary to Linkhorn Bay in the City of Virginia Beach.

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

Mr. Worrell explained that the applicant’s property was once protected by a vinyl bulkhead that is failing and in a severe state of disrepair. The structure has been compromised for several years, leading to the establishment of jurisdictional tidal wetlands on the landward side. Given the site conditions and the multi-faceted proposal, the applicant’s agent met on-site with City staff, Commission staff and a Virginia Institute of Marine Science (VIMS) representative on multiple occasions to discuss the proposal and alternatives. The application proposal includes 439 linear feet of replacement vinyl bulkhead, 82 linear feet of riprap and approximately 80 cubic yards of backfill. According to the application estimates, approximately 35 square feet of vegetated wetlands and 375 square feet of nonvegetated wetlands will be filled, 41 square feet of nonvegetated wetlands will be converted to riprap and approximately 543 square feet of vegetated wetlands will be established landward of the proposed riprap revetment.

At its November public hearing, the Wetlands Board received a staff briefing, including photographic slides of the property and copies of the application drawings. Correspondence from VIMS was read into the record, and a copy of the City’s Planning Department staff recommendation was provided to the Board. A motion to approve the application as submitted, including a condition that associated tree removal be replaced at a 1:1 ratio, received four (4) affirmative votes and two (2) negative votes.

By correspondence from Commissioner Bowman dated November 20, 2019, and in conformance with §28.2-1311 A 2 of the Code of Virginia, the Virginia Beach Wetlands Board was advised that the full Commission would be reviewing their decision to approve Justin John's application to install a replacement bulkhead.

Section 28.2-1313 of the Code of Virginia specifies when the Commission should modify, remand, or reverse wetlands board decisions. Based on our attendance at the hearing and our review of the complete record, staff feels that by neglecting the City's staff recommendation along with the VIMS comments, the Board's decision was not supported by all of the evidence provided. In addition, in accordance with the Commission's "Wetlands Mitigation-Compensation Policy," projects should stand on their own merits in the permit approval process, and wetlands compensation should not be used to justify permit issuance. In staff's opinion, too much credit was given to the proposal to establish additional tidal wetlands as compensation, while too little consideration was given to the initial impacts and alternative solutions. Therefore, in keeping with the provisions listed in §28.2-1313, it is Commission staff's opinion that the Board failed to fulfill its responsibilities under the wetlands zoning ordinance.

The Virginia Beach Planning staff routinely does an excellent job of providing thorough and comprehensive reports and recommendations to the Board, applicants, and the public. Their research, site investigations, and willingness to work with applicants / agents in developing viable shoreline solutions is a credit to the City, and a perfect example of how a local government can appropriately and efficiently balance its citizens' needs for property protection while maintaining and even enhancing tidal wetlands resources.

As such, staff recommends that the November 18, 2019, decision of the Virginia Beach Wetlands Board be formally modified by the Commission to incorporate the City's staff recommendation, thus requiring the applicant / agent to modify the proposal in order to obtain a City Wetlands permit. This modified plan would significantly reduce the length of the proposed bulkhead and backfill necessary, while incorporating a substantial living shoreline component in a suitable area of yard that is already transitioning to tidal wetlands. The relocated living shoreline would provide water quality benefits and better habitat than the vinyl bulkhead approved. Pursuant to §28.2-104.1 of the Code of Virginia, it is the policy of the Commonwealth to support living shorelines as the preferred alternative for stabilizing tidal shorelines. By incorporating the City's staff recommendation, we feel that the overall project will better achieve the Commonwealth's and City's goals of supporting living shorelines while allowing for private property protection.

Kay Wilson, Deputy City Attorney for City of Va. Beach spoke on behalf of the Wetlands Board and not city staff capacity. Ms. Wilson's comments are a part of the verbatim record.

Rich Calvert, applicant representative, was present and sworn in. His comments are a part of the verbatim record.

Mr. Calvert stated that the applicant does not approve of staff recommendation due to the encroachment into their back yard.

The matter was before the Commission for discussion and action.

Associate Member Tankard made a motion to approve staff recommendation that the November 18, 2019 decision of the Virginia Beach Wetlands Board be formally modified by the Commission to incorporate the City's staff recommendation, thus requiring the applicant / agent to modify the proposal in order to obtain a City Wetlands permit. Associate Member Minor seconded the motion. The motion carried, 9-0. Chair voted yes.

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6. **H. R. KEMPE, #19-0185**, requests authorization to install a 145 linear foot riprap revetment channelward of an existing bulkhead and install a 15-foot by 30-foot covered boatlift on a statutorily authorized pier along the Piankatank River shoreline at 8123 Riverview Drive in Gloucester County. The project is protested by an adjacent property owner.

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

Mr. Johnson explained that the project area is located along a high-energy shoreline and protected by a failing timber bulkhead. The bulkhead is approximately five (5) feet in height relative to the offshore substrate and shows evidence of failing with sinkholes forming on the upland side. The geography of the shoreline landward of the bulkhead is flat for a short, varying distance then a steep grade that extends up at least 20 feet in elevation.

Mr. Kempe does not have a pier on the property, and requests authorization to construct a private pier in his court apportioned riparian area with a buffer of approximately 12 feet between his pier and the riparian boundary. The pier, as proposed, would meet the exemption requirements as defined in §28.2-1203 A 5 of the Code of Virginia. As such, the pier is exempt from VMRC regulatory authority; however, the 450 square foot open-sided covered boatlift he is requesting does require a permit as the adjacent property owner is objecting, as well as the revetment.

Section §28.2-1203 A 5 of the Code of Virginia provides statutory authorization for private piers meeting certain design criteria. This section also authorizes the construction of open-sided boathouses measuring 700 square feet or less designed to cover a boat at private piers, provided they are not objected to by the adjoining property owners and are allowed by local ordinances. In this instance, since Mr. and Mrs. Gubeli are protesting the 450 square foot boathouse, a VMRC subaqueous permit is required. They are also objecting to the proposed revetment.

The Gubeli objections center on perceived potential encroachments into their riparian area, the ability to navigate small boats between the two piers, and impacts to aesthetics. Since the proposed pier is to be located within Mr. Kempe's court apportioned riparian boundary line and meets all of the other exemption requirements defined in §28.2-1203 A 5 of the Code, the pier is statutorily authorized and exempt from VMRC regulatory authority. Additionally, the U.S. Army Corp of Engineers required a buffer distance of 27 feet between the two piers for their permit to allow for safe navigation.

To the issue of aesthetics, the open-sided design of the roof structure, with the top of the roofline at 24 feet above the pier, should only minimally add to the visual obstruction presented by the proposed pier.

Mr. and Mrs. Gubeli have additionally objected to the proposed revetment with concerns of encroachment into their riparian area. Staff has worked with the applicant to show in their project drawings that the revetment would be located in their riparian area. Additionally, staff feels the use of a revetment to address the issue of bulkhead maintenance is appropriate, as a living shoreline may not be appropriate due to the high-energy nature of the shoreline and that the large bluff could preclude the ability of the property owner to grade the uplands back.

Accordingly, after evaluating the merits of the project against the concerns expressed by those in opposition to the project, and after considering all of the factors contained in §28.2-1205 of the Code of Virginia, staff recommends approval of the project as proposed.

John Kemp, applicant, was present and sworn in. Mr. Kemp’s comments are a part of the verbatim record.

Joseph Gubeli, property owner adjacent to the proposed project, was sworn in and spoke in opposition of the application. Mr. Gubeli’s comments are a part of the verbatim record.

The matter was before the Commission for discussion and action.

Associate Member Minor made a motion to approve staff recommendation for the approval of the project as proposed. Associate Member France seconded the motion. The motion carried, 9-0. Chair voted yes.

Fees:	\$ 100.00
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- 7. **ANN E. ARSENIU and THOMAS J. GALLIVAN, Oyster Planting Ground Application #2015-102**, request authorization to lease 75 acres of Oyster Planting Ground in the Chesapeake Bay near the mouth of Occohannock Creek, Accomack County. The project area has submerged aquatic vegetation (SAV).

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

Mr. Badger explained that the proposed lease is located seven (7) miles west of the Town of Exmore and north of the mouth of Occohannock Creek. The water depths encompassed in the proposed lease vary from approximately minus one half (-0.5) foot to minus three (-3) feet at mean low water. The bottom is mostly a sand mix with SAV, primarily eelgrass. Occohannock Creek has mostly cage oyster aquaculture activity from the mouth of the creek east (approximately 3.5 mile) to Morleys Wharf. There is also a small amount of clam aquaculture in the creek.

The applicants have 17 leases for a total of 688.78 acres, nine (9) on the bayside and eight (8) on the seaside of the Eastern Shore. They also have three (3) additional applications on the seaside for approximately 245 acres. The applicants intend to use the ground to grow aquaculture oysters in cages or aquaculture nursery clams in bags.

VMRC's SAV Guidance Policy "*Criteria Delineating Areas Where There is Potential for SAV Restoration*" which was adopted by the Commission at the August 22, 2017, meeting, states that new structures or leasing of oyster planting grounds on any SAV beds annually mapped by VIMS during at least one of the previous five (5) years should be avoided. In addition, potential areas for SAV restoration shall include all those areas of SAV identified and annually mapped by VIMS during at least one of the previous ten (10) years.

The density levels in the past five (5) years have varied from less than 10% in some areas to more than 70% coverage in others. The SAV coverage in 2018 alone shows density levels between 40% and 100%. The planting of shellfish in this area would directly impact the grasses present, and would inhibit any SAV restoration in the area.

The Virginia Institute of Marine Science's SAV maps indicate that there has been submerged aquatic vegetation in the area in the last ten years and that the area is recovering from a low point in 2013. Their 2018 map indicates the area has 40% to 100% density levels coverage in 85% of the application area. Staff, therefore, is unable to support the applicant's request to lease 75 acres of Oyster Planting Ground in this area and recommends denial.

In addition, based on VMRC's SAV Guidance Policy, staff would not be able to support leasing this area for a minimum of five years after the last VIMS SAV map showed no grass in the area. Staff, however, would be required to accept an application for the area unless the Commission sets an area aside not to be leased.

Ann Arseniu and Thomas Gallivan, applicants, were both present and sworn in. Their comments are a part of the verbatim record.

David O'Brien, NOAA Fisheries Service, was sworn in and spoke in opposition of the application. His comments are a part of the verbatim record.

The matter was before the Commission for discussion and action.

Associate Member Zydron made a motion to approve staff recommendation for the denial of the lease. Associate Member Minor seconded the motion. The motion carried, 7-1-1. Chair voted yes. Associate Member Tankard voted no. Associate Member Lusk abstained.

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8. PUBLIC COMMENTS:

Jeffery Dameron

Requested the Commission and staff reconsider the Spiny Dogfish limited entry eligibility that was established in 2012.

Warren Cosby

Mr. Warren expressed concerns regarding the crab licenses that were put on the waiting list years ago by VMRC if they were not used, but licenses were not returned.

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9. PUBLIC HEARING: Proposal to establish Chapter 4 VAC 20-1360-10 et seq., “Pertaining to Commercial Electrofishing”, to create a commercial electrofishing license and fishery.

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

Ms. Kretsch explained that the proposal to establish Chapter 4 VAC 20-1360-10 et seq., “Pertaining to Commercial Electrofishing”, is to create a commercial electrofishing license and fishery.

Blue catfish are a non-native species in Virginia, having been introduced to the James, York, and Rappahannock Rivers in the 1970s to create a new sport fishery. Since their introduction, the population has grown rapidly and they can now be found throughout

the waters of Virginia in densities as high as 544 catfish per hectare. Surveys from the Department of Game and Inland Fisheries (DGIF) show that the population of small blue catfish continues to grow, which is slowing the growth of larger blue catfish up to the trophy sizes prized by anglers.

From 2014 through 2017, experimental permits were granted to test the viability of commercial electrofishing for blue catfish. These experiments showed that electrofishing harvests a large amount of catfish per unit of effort, tested what electrical current and capture gears were most effective, and tested user conflicts between electrofishing and traditional hoop nets.

With electrofishing shown to be a viable and efficient harvest method for catfish, developing a fishery in Virginia could help curb the population growth.

In November 2019, staff met twice with the Finfish Management Advisory Committee (FMAC) to discuss a potential electrofishing catfish fishery. FMAC supported the electrofishing fishery and regulation as written.

Staff recommends establishing Chapter 4 VAC 20-1360-10 et seq., “Pertaining to Commercial Electrofishing”, to create a commercial electrofishing license and fishery for catfish.

There were four (4) people that spoke in support of the Commercial Electrofishing regulation, including recreational charter captains, commercial fishermen, and catfish processors. Their comments are a part of the verbatim record.

Those that spoke in support felt that Commercial Electrofishing is a clean fishery, no fishing gear would be left in the water unattended and would manage population of catfish.

There was one person that spoke in opposition. His comments are a part of the verbatim record.

He stated that he didn’t think it was a fair meeting due to not receiving mail or notification of the meeting.

The Commission discussed concerns for boater and swimmer safety where electrofishing is operating.

The matter was before the Commission for discussion and action.

Associate Member Tankard made a motion to approve staff recommendation, with an additional prohibition on electrofishing near public boat ramps, fishing piers, and swimming areas. Associate Member Minor seconded the motion. The motion carried, 9-0. Chair voted yes.

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10. **REQUEST FOR PUBLIC HEARING:** Proposal to amend Chapter 4 VAC 20-950-10 et seq., "Pertaining to Black Sea Bass," to consider the establishment of a February 2020 recreational black sea bass fishery. The proposed 2020 season extends from May 15 through December 31, but any harvest from a February fishery would lessen the number of fishing days during the May 15 through December 31 period.

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

Mr. Kenyon explained that, similar to 2018 and 2019, staff is requesting that the Commission consider a February recreational black sea bass fishery in 2020. If Virginia wishes to participate in this fishery, Virginia will be responsible for making 2020 recreational season adjustments to account for additional landings (pounds) that occur in February of that year. Virginia will not be required to make any season adjustments if the state does not wish to participate in the 2020 February fishery. If the Commission does not participate in the 2020 February fishery, the current season (February 1 through February 28, May 15 through May 31 and June 22 through December 31) will need to be amended to the open season (May 15 through December 31).

Staff requests the Commission approve advertising for a January public hearing to amend Chapter 4 VAC 20-950-10 et seq., "Pertaining to Black Sea Bass" to consider the establishment of a February 2020 recreational black sea bass fishery.

In November 2019, staff met with the Finfish Management Advisory Committee (FMAC) and discussed the potential for a 2020 February black sea bass fishery. FMAC does support a 2020 February fishery. There was also public comment in support of a February fishery as this gives recreational anglers further opportunities to go fishing when there are not a lot of other species available to catch.

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The matter was before the Commission for discussion and action.

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

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There being no further business, the meeting was adjourned at approximately 12:50 p.m. The next Commission meeting will be Tuesday, January 28, 2020.

Steven G. Bowman, Commissioner

Jamie Hogge, Recording Secretary