

MINUTES

Commission Meeting

March 23, 2010

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

Steven G. Bowman	Commissioner
Ernest L. Bowden, Jr.)	
J. T. Holland)	
William E. Laine, Jr.)	
John R. McConaugha)	Associate Members
Richard B. Robins, Jr.)	
J. Kyle Schick)	
John E. Tankard, III)	
David Grandis	Assistant Attorney General
John M. R. Bull	Director-Public Relations
Katherine Leonard	Recording Secretary
Jane McCroskey	Chief, Admin-Finance
Linda Farris	Bs. System Specialist, MIS
Rob O'Reilly	Deputy Chief, Fisheries Mgmt.
Jim Wesson	Head, Conservation-Replenishment
Joe Grist	Head, Plans and Statistics
Lewis Gillingham	Head, Saltwater Fishing Tournament
Joe Cimino	Fisheries Mgmt. Specialist, Sr.
Stephanie Iverson	Fisheries Mgmt. Specialist, Sr.
Alicia Nelson	Fisheries Mgmt. Specialist
Sonya Davis	Fisheries Mgmt. Specialist, Sr.
Mike Johnson	Fisheries Mgmt. Specialist
Laura M. Lee	Fisheries Mgmt. Specialist
Rick Lauderman	Chief, Law Enforcement
Warner Rhodes	Deputy Chief, Law Enforcement
Randy Widgeon	Area Supervisor, ES
Jamie Green	Assist. Area Supervisor, MA
Herbert Bell	Marine Police Officer
Victoria Rabenstine	Marine Police Officer

Bob Grabb	Chief, Habitat Mgmt. Div.
Tony Watkinson	Deputy Chief, Habitat Mgmt. Div.
Chip Neikirk	Environmental Engineer, Sr.
Ben McGinnis	Environmental Engineer, Sr.
Ben Stagg	Environmental Engineer, Sr.
Hank Badger	Environmental Engineer, Sr.
Elizabeth Murphy	Environmental Engineer, Sr.
Randy Owen	Environmental Engineer, Sr.
Jeff Madden	Environmental Engineer, Sr.
Jay Woodward	Environmental Engineer, Sr.
Dan Bacon	Environmental Engineer, Sr.
Bradley Reams	Project Compliance Technician

Virginia Institute of Marine Science (VIMS):

Lyle Varnell Carl Hershner

Other present included:

Delegate Harvey Morgan

Eric Ancarrow	Kelli Ancarrow	Frank Ancarrow	Phillip D. Lawnes
Allester Watts	Tammy Gelles	Tim Gelles	Scott Trainuim
Melville Reynolds	Bert Parolari	Gary Van Tassel	Bob Winstead
Jeff Watkin	Bob Winfree	Louise Hansch	Linda Forbes
Ken Ogren	Karen Collier	Jason Miles	John W. Registry
Kathryn Rellas	Patsy Register	Jeffrey H. Smith	Paul Mason
Nancy Honkins	Ted Hemmert	Anna Drake	James Barnett
Eyre Pyle	Anthony Bavuso	Bruce Julian	Scott Hardaway
Rhonda Nack	Leonard Haas	David Young	Scott Salter
Com Nealon	Ellis W. James	Richard Green	John Ridley
Chris Nelson	Craig Palubinski	Keith Skiles	Carl Laws
Katherine Lawson	Frances Porter	Scott Harper	A. J. Erskine
S. Lake Cowart	Tommy Mason	Charles Lewis	Danny Bunch
Henry Parker	Henry Parker, Jr.	Tom Gallivan	Thomas Walter Carl
D. Belvin	Kenneth Horsley	Jim Dawson	Kenneth Heath
Robert Jensen	Joe Keely	Keith Like	H. L. Doernte
Robert Croonenberghs			

and others.

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Commissioner Bowman called the meeting to order at approximately 9:35 a.m. Associate Member Fox was absent. Commissioner Bowman announced that there was a quorum present, so the meeting could proceed.

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At the request of Commissioner Bowman, Associate Member Schick gave the invocation and Bob Grabb the Chief of Habitat Management led the pledge of allegiance.

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APPROVAL OF AGENDA: Commissioner Bowman asked if there were any changes to the agenda.

Bob Grabb, Chief, Habitat Management explained that there was added item, 2H, Town of Cape Charles for the page two items, which he would review with the rest of the items. Commissioner Bowman asked if there were any other changes or additions by staff or the Board. Rob O'Reilly, Deputy Chief, Fisheries Management, requested time to discuss holding a public hearing in April to consider a request by the industry to extend the Newport News Clam Management Area harvest season through June 30th. He said the season would normally end April 30th. Commissioner Bowman announced this would be heard sometime during the fisheries items. Associate Member Robins asked if, as a result of the last Crab Advisory Committee meeting and with another committee meeting coming up prior to the April meeting, there would be any amendments to the crab regulations to be considered at a public hearing in April or action taken as an emergency. Mr. O'Reilly explained that the staff was waiting until after the Baywide Winter Dredge Survey was completed, which was affecting when to hold the management meeting. He said staff did intend to bring forward items for the April meeting so that would be something to talk about during the fishery management issues.

Commissioner Bowman asked for a motion. **Associate Member Tankard moved to approve the amended agenda. Associate Member Laine seconded the motion. The motion carried, 8-0. The Chair voted yes.**

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MINUTES: Commissioner Bowman requested a motion for approval of the February 23, 2010 Commission meeting minutes, if there were no corrections or changes.

Associate Member Robins moved to approve the minutes, as circulated. Associate Member Bowden seconded the motion. The motion carried, 8-0. The Chair voted yes.

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

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

Bob Grabb, Chief, Habitat Management Division, summarized the eight for the Board. His comments are a part of the verbatim record.

Commissioner Bowman asked for questions of staff. There were none.

As there were no other comments or questions, Commissioner Bowman opened the public hearing. There were no public comments and the public hearing was closed. He asked for action by the Commission.

Associate Member Holland moved to accept the staff recommendations for items 2A through 2H. Associate Member Robins seconded the motion. The motion carried, 8-0. The Chair voted yes.

- 2A. **SPOTSYLVANIA DEPARTMENT OF PUBLIC UTILITIES, #06-0427**, requests reactivation and a three-year extension of their permit to install a total of approximately 309 linear feet of sewer line, crossing a minimum of three feet under Massaponax Creek at 13 separate locations between Leavells Road (Route 639) and Piedmont Drive (Route 673), and to stabilize the stream crossings with a total of approximately 6,580 square feet of Class B riprap, associated with the Massaponax Sewer Interceptor Replacement, Stage II project in Spotsylvania County.

No Applicable Fees—Permit reactivation and extension.

- 2B. **U.S. ARMY TECHNOLOGY APPLICATIONS OFFICE, #09-1561**, requests authorization to install two (2) fiber optic cables impacting 30 linear feet of Beaverdam Run, 20 linear feet of Middle Branch Chopawamsic Creek and 25 linear feet of North Chopawamsic Creek in Stafford County. The fiber optic cables will be installed by directional bore method a minimum of ten (10) feet beneath the creek bottom.

Permit Fee.....	\$100.00
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- 2C. **JAMES G. STIKELEATHER, #09-1565**, requests authorization to install a private riparian mooring buoy at 37° 32' 2.22" North Latitude and 76° 20' 1.02" West Longitude and approximately 830 feet channelward of his property situated

along Fishing Bay at 589 Stove Point Road in Middlesex County. The mooring will encroach on "Additional Public Ground."

Permit Fee_____	\$25.00
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2D. FAIRFAX COUNTY DEPARTMENT OF PUBLIC WORKS, #10-0002, requests authorization to restore 1,700 linear feet of Flatlick Branch including stabilizing the channel and installing rock vanes, log vanes, cross vanes, J-hooks, and root wads in Cub Run Stream Valley Park in Fairfax County.

Permit Fee_____	\$100.00
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2E. VIRGINIA DEPARTMENT OF HEALTH, DIVISION OF SHELLFISH SANITATION, #10-0352, requests authorization to temporarily install eight (8) 3-foot by 2-foot by 19-inch oyster cages on Public Ground in the James Rivers stretching from the mouth of the Warwick River to Lake Maury in the City of Newport News. The cages will be deployed for a dye study which will run from April 12 until May 1, 2010.

Permit Fee_____	\$25.00
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2F. AT & T CORP., #10-0039, requests authorization to construct utility crossings through numerous waterways, utilizing the directional drill method, to install a total of 1534 linear feet of fiber optic cable, along an existing VDOT right-of-way, at a minimum depth of 120 inches below the streambed of ten jurisdictional creeks/rivers in Buckingham, Appomattox, Campbell and Pittsylvania Counties. Staff recommends a royalty of \$4,602.00 and the requirement that the Permittee develop and implement a "frac-out" bentonite spill contingency/ clean up plan to protect aquatic resources.

Royalty Fees (encroachment 1,534 lin. ft. @ \$3.00/lin ft.____	\$4,602.00
Permit Fee_____	\$ 100.00
Total Fees_____	\$4,702.00

G. QWEST COMMUNICATIONS, #10-0342, requests authorization to cross the Eastern Branch of the Elizabeth River with a temporary fiber optic cable, located approximately 40 feet east of the Norfolk Southern Railroad Bridge between the Cities of Norfolk and Chesapeake. The line will be directionally drilled below the tidal wetlands on the river banks and manually installed six inches into the river bed by divers. The temporary line will be removed in its entirety upon approval and installation of a permanent fiber optic cable in the same general area. Recommend approval pending expiration of the public notice and provided no

opposition is received, and with a royalty in the amount of \$5,415.00 for the crossing of 1,805 linear feet of State-owned subaqueous bottom at a rate of \$3.00 per linear foot.

Royalty Fees (encroachment 1,805 lin. ft. @ \$3.00/lin ft.---	\$5,415.00
Permit Fee.---	\$ 100.00
Total Fees.---	\$5,515.00

H. TOWN OF CAPE CHARLES, #08-0338, requests authorization to modify their previously issued permit to install five (5) offshore breakwaters in the Chesapeake Bay, west of Cape Charles Harbor. The requested modification is to lower the crest elevation of the first two of the five breakwaters from 7.0-foot to 5.0-foot above mean lower low water, and to increase the seaward slope from 2:1 to 1.5:1. The Town indicates they plan to install all five breakwaters to the full 7.0-foot crest elevation as money becomes available. All other permit conditions would remain in effect. Staff recommends approval pending successful expiration of the public comment period on March 28, 2010.

No applicable fees–Permit Modification

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3. CONSENT ITEMS: (After-the-fact permit applications with monetary civil charges and triple permit fees that have been agreed upon by both staff and the applicant and need final approval from the Commission).

COUNTY OF WARREN, #09-1142, requests after-the-fact authorization to retain a 60-foot long by 14-foot wide concrete boat ramp in the Shenandoah River at the end of Country Club Road in Front Royal, Warren County. The applicant has agreed to a civil charge in the amount of \$1,200.00 and triple permit fees.

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

Mr. Grabb explained that the County submitted a Joint Permit Application requesting authorization to install a 16-foot wide boat ramp at the site of their existing, deteriorated boat ramp on August 12, 2009. The application was deemed incomplete and staff sent a letter dated August 18, 2009, requesting additional information. Staff never received a response and a follow-up letter was sent December 17, 2009, advising the applicant that their application would be inactivated if we did not hear from them by January 17, 2010.

Mr. Grabb said that Mr. Lowrie Tucker, Deputy Building Official with the County, called staff on January 4, 2010, and explained that there was a mix-up with paperwork and the

ramp had already been installed. He had indicated he would send staff project drawings and a description of the work.

Mr. Grabb noted that staff received Mr. Tucker's letter on January 22, 2010. It had indicated that after receiving a letter of no permit required from the Army Corps of Engineers on August 26, 2009, and a letter of no permit necessary from the Department of Environmental Quality on August 17, 2009, work began on the boat ramp on September 4, 2009. Work was completed on September 8, 2009. No explanation was given for the fact that the ramp was installed without a VMRC permit other than that there was a mix-up in paperwork.

Mr. Grabb explained that a full public interest review had been completed by staff, regarding the unauthorized activity, including contacting the adjoining property owners and running a newspaper advertisement. No objections to the as-built project were received.

Mr. Grabb explained further that staff had solicited comments from the Virginia Department of Game and Inland Fisheries (DGIF) and the Virginia Department of Conservation and Recreation (DCR). DCR commented that the brook floater had been historically documented adjacent to the project location. DGIF had indicated that the federally threatened, state's threatened Madison Cave Isopod had also been documented from the project area; however, they did not anticipate that the project had resulted in any adverse impacts. They had also noted that the state's threatened wood turtle had been documented in the project area; however, they had not anticipated any impacts upon it. The North Fork Shenandoah River had been designated a Threatened and Endangered Species Water due to the presence of state's endangered brook floater and the state's threatened green floater; however, the main stem of the Shenandoah, below this confluence, was not designated potential habitat for either species and it was unlikely that any adverse impacts were caused by the work performed.

Mr. Grabb said that had the County of Warren provided the additional information requested in August 2009 letter, staff would likely have recommended approval for this project. As a result, staff recommended the Commission grant after-the-fact approval for the project in lieu of any further enforcement actions permitted by Code. The County had agreed to pay triple permit fees (\$300.00) and a civil charge of \$1,200.00 based on a finding of minimal environmental impact and a moderate degree of non-compliance.

Commissioner Bowman asked if the applicant or a representative wished to comment. There were none. He stated the matter was before the Commission for action.

Associate Member Tankard moved to accept the staff recommendation. Associate Member McConaugha seconded the motion. The motion carried, 8-0. The Chair voted yes.

Permit Fee_____	\$ 100.00
Civil Charge_____	\$1,200.00
Total Fees_____	\$1,300.00

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

Commissioner Bowman announced that Counsel had advised him that a closed meeting was not necessary.

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5. L. SCOTT TRAINUM, #09-0806. Commission review, on appeal of the February 11, 2010, decision by the York County Wetland Board to deny a request for a riprap, sill and breakwater shoreline stabilization project at property situated at the confluence of Cabin Creek and the Poquoson River in York County.

Randy Owens, Environmental Engineer, Sr., gave the presentation with slides. His comments are a part of the verbatim record. Mr. Owens explained that he had some orientation slides, which staff felt did not require the opening of the record. He stated that there were 200 plus slides in the Wetlands Board's record, and he had selected some pertinent ones to present at this hearing.

Mr. Owens explained that the project was located at 102 Creek Circle in the Seaford area of York County. The property, a vacant lot in the York Point Subdivision, is bordered by a man-made canal to the east, the Poquoson River to the south-southwest (SSW) and Cabin Creek to the west-northwest (WNW). The property previously existed as a low-lying marsh headland (1953) that was filled by a previous owner. In fact, the entire subdivision began around 1963 with the excavation of three canals into the tidal marsh surface. The dredge spoils were placed on the adjacent marsh to create numerous home sites.

Mr. Owens said that given the fill nature of the property, Mr. Trainum's shoreline was littered with construction debris, primarily large slabs of broken concrete, asphalt and brick. The shoreline was experiencing moderate erosion.

Mr. Owens stated that on December 15, 2008, Mr. Trainum's agent, Mr. Neville Reynolds with Vanasse Hangen Brustlin Inc. (VHB), met onsite with a representative from Virginia's Department of Conservation and Recreation – Shoreline Erosion Advisory Service (SEAS). Mr. Reynolds also consulted with the Virginia Institute of Marine Science–Shoreline Studies Program and with York County's wetlands staff for

additional advisory assistance.

Mr. Owens said that on June 10, 2009, VMRC received Mr. Trainum's Joint Permit Application (JPA) that was the subject of this appeal. The JPA sought authorization to repair an existing riprap revetment within a manmade canal, and install approximately 125 linear feet of new riprap, two headland breakwaters, one riprap spur, three sills and the placement of beach nourishment material to facilitate planting of *Spartina alterniflora*, *Spartina patens* and selected dune grasses for shoreline stabilization and habitat improvement at his property. Only select portions of the "project" fall within the jurisdiction of the local Wetlands Board.

Mr. Owens noted that the Board initially heard this application at its October 8, 2009 meeting. After a lengthy hearing, the agent agreed to table the matter in light of the Board's request to consider a reduction in the scope of the overall project. The matter was again tabled at their December meeting to allow the agent time to consider some last minute protest letters, with a final hearing conducted on February 11, 2010.

Mr. Owens said that by letter dated February 19, 2010, Mr. Reynolds noted their appeal of the Board's decision to deny JPA #09-0806. The appeal was considered timely pursuant to §28.2-1311.B of the Virginia Code.

Mr. Owens explained that the Board considered its staff briefings and the testimonies and exhibits provided by Mr. Trainum, his agent and that of 16 speakers in opposition.

Mr. Reynolds outlined the historical background of the property, its current hydrodynamic shoreline conditions and reviewed the project planning and agency coordination that led to the current design. He stated that Mr. Trainum's property has fetch exposures to the SW, S and SE of approximately 2.6, 1 and 2 miles. The proposed project will also replace the existing construction debris shoreline with an engineered shore protection plan based on a living shoreline design. Mr. Reynolds concluded that he believed the living shoreline approach for shoreline stabilization was consistent with the best management practices that are being encouraged by the regulatory and advisory agencies in Virginia.

Mr. Owens stated that the protestants' primary concern centered on the potential risk of the nourishment material to move and ultimately shoal the navigable channels leading into the man-made canal, the Poquoson River and Cabin Creek. They argued that erosion onsite was minimal or not evident, that a riprap revetment would provide adequate shoreline protection and that the proposed breakwater/sill project was unnecessary. They further testified that Mr. Reynolds had incorrectly characterized the storm wave climate typical of the area.

Mr. Owens said that SEAS advised, in a May 11, 2009 letter, that the existing broken concrete revetment was failing and should be replaced. They, as did VIMS in their

October 3, 2009 Shoreline Application Report, confirmed that Mr. Trainum's property was eroding, in part due to its inadequate shoreline treatment. VIMS concluded that the proposed "offshore breakwater with beach nourishment for the Poquoson River shoreline is consistent with the preferred approach for moderate to high energy sandy shorelines."

Mr. Owens noted that the general consensus of the Board, however, was that the potential risk for the project to shoal the adjacent navigable channels was too great. Several members of the Board acknowledged that they had approved similar projects in the past, applauded the living shoreline design and stated that they would likely have approved Mr. Trainum's request had it not been so heavily protested.

Mr. Owens said that at the close of the public hearing, the Board debated the issues and appropriateness of a living shoreline design for the subject property as well as the issue of an appropriate offshore distance for the sill and breakwater structures. Several of the board members suggested that they felt that the proposed structure was too far offshore.

Mr. Owens said that pursuant to the Board's October request, Mr. Reynolds then presented a slide detailing a modified design which served to reduce the project scope from a breakwater design to a sill along the Poquoson River shoreline. Although this modified proposal would reduce the project's impact and accomplish the applicant's desires for shoreline protection, Mr. Reynolds indicated that it was their preference for the Board to rule on the original project design.

Mr. Owens explained that a motion to deny the project, as proposed, passed unanimously. No basis or rationale for the motion was offered that was related to the use and development of the rock rubble intertidal wetlands at the site. In fact, most of the Board's focus seemed to be directed toward the comments of those in opposition, most specifically the concern regarding potential impacts on the nearby channels.

Mr. Owens said that staff was sympathetic to the protestants' concerns over the project's potential to adversely impact existing navigable channels. Other than photographs and testimony, however, they had not provided any specific evidence to support their objections related to the potential navigation channel impacts. In an attempt to address the concerns, Mr. Reynolds documented his firm's design and construction oversight of over sixty projects completed on the Eastern Seaboard of the Atlantic Coast. He further pointed out that numerous breakwater projects had been approved by the Board and constructed in York County over a ten-year period. Two of those projects, David Kashy (VMRC #08-1677) and Daniel Babcock (VMRC #09-1369), were permitted by the Board as recently as five months ago and are within sight (650yards) of Mr. Trainum's property.

Mr. Owens explained that in Section 28.2-1302 (10B) of the Code of Virginia provides that the Board shall grant the permit, if all of the following criteria were met:

(i) The anticipated public and private benefit of the proposed activity exceeds its

anticipated public and private detriment;

(ii) The proposed development conforms with the standards prescribed in §28.2-1308 of the Code of Virginia and guidelines promulgated pursuant to §28.2-1301 of the Code of Virginia;

(iii) The proposed activity does not violate the purposes and intent of this ordinance or Chapter 13 (§28.2-1300 et seq.) of Title 28.2 of the Code of Virginia.”

Mr. Owens explained further that Section 28.2-1302 (10C) of the Code of Virginia, states that if the Board finds that any of these criteria were not met, they shall deny the application but allow the applicant to resubmit the application in modified form. Although the Board suggested that the project’s risk to adjacent channels was unknown, they never expressly found that any of the three aforementioned criteria had not been met. Section 28.2-1308 of the Code of Virginia provides that the standards for the use and development of wetlands shall be concentrated in wetlands of lesser ecological significance and that wetlands of primary ecological significance shall not be altered. Although the project as proposed will impact the intertidal face of a rock rubble wetland, these wetlands are considered to be of lesser ecological value by VIMS and their alteration is, therefore, not inconsistent with the aforementioned criteria.

Mr. Owens said that the Wetland Guidelines further suggest that a shoreline protection strategy involving breakwaters or sills were normally justified only if active detrimental erosion existed. Although the erosion rate may be in question, both VIMS and SEAS had affirmed that erosion was occurring. In Mr. Reynolds' opinion, relocating either structure closer to shore would result in an unstable slope and that would then require a backshore revetment, or two structures.

Mr. Owens explained that staff was most concerned about the Board’s minimal treatment and discussion of the project’s potential to impact tidal wetlands within their jurisdiction, either pro or con. It appeared to staff that the basis for their denial rested primarily on impacts to subaqueous lands, areas within the Commission’s jurisdiction.

Mr. Owens said that after careful review of the record, staff was of the opinion that the criteria for denial required by §28.2-1302 (10C) of the Code of Virginia had not been adequately set forth by the Board. It appeared that the Board may have arbitrarily denied this breakwater/sill project given their history of supporting living shoreline projects and within sight of two recently approved breakwater projects. Accordingly, in light of no clear basis and rationale for denying the project based on its impacts to tidal wetlands, staff recommended that the Commission the matter be remanded to the Board with specific instruction to amplify the record, regarding their rationale for denial, as it relates specifically to tidal wetland impacts.

Mr. Owens said that staff further recommended that the Commission clearly note in this case that the majority of the project was outside of the Board’s jurisdiction (i.e., channelward of MLW) and that the protestants’ concern for potential adverse impacts to

navigation were rightly a matter for Commission jurisdiction pursuant to the provisions of Section 28.2-1205 of the Code of Virginia.

Commissioner Bowman asked for questions of staff.

Associate Member Robins asked if staff could clarify which plan view drawing the Wetlands Board's final action was based on. Mr. Owens responded it was the original plan view drawing.

Associate Member Schick asked if all the advisory agencies, such as SEAS and VIMS said that there was erosion occurring. Mr. Owen responded yes, they confirmed that erosion was occurring.

Commissioner Bowman asked if the recommendations by SEAS and VIMS were not accepted by the Wetlands Board. Mr. Owen said staff was concerned with the Board's lack of discussion regarding the projects potential impacts to tidal wetlands and that they did not address the VIMS comments. Commissioner Bowman asked if there were any similar projects recently approved by the Board in this area. Mr. Owen said that there had been two breakwater/sill projects approved by the Board within sight of the Trainum property.

Commissioner Bowman asked for the applicant or representative if they wished to comment.

John Daniel, Attorney for the Applicant, was present and his comments are a part of the verbatim record. Mr. Daniel said that Mr. Trainum and Mr. Neville Reynolds, designer and engineer for the project, were both present. He said Mr. Trainum lived in Newport News, but the property in York County was to be built on. He said that Mr. Reynolds designed and engineered the project for stability. He said that Mr. Trainum had had the latest 'green' technology incorporated into the residence and the property. He said there was to be grass roofing and irrigation on the property as well as shoreline stabilization with the latest technology. He said this type of design was used by VIMS at their campus to protect their shoreline. He said they were appealing the York County Wetlands Board decision to deny the application. He said that Section 28.2-1302 (10B) of the Code of Virginia establishes the criteria of what the Wetlands Board must consider to grant the permit, which are: 1) the anticipated public and private benefits exceed the public and private detriments. 2) project conforms with the standards in Section 28.2-1308 and the guidelines established pursuant to Section 20.2-1301. And 3) the project does not violate the purpose and intent of the ordinance. He said this was not considered. He said they agree with the policies of the Commonwealth to avoid harden shoreline. He said they followed the VIMS approach which was preferred by SEAS. He said that in the Wetlands Guidelines approval is mandated and the shoreline facilities are justified as there is shoreline erosion which is worsening with time. He said they desire a living shoreline.

Mr. Daniel said that the Wetlands Board exceeded their jurisdiction and considered factors outside their jurisdiction. He said they appreciated the public servants and volunteer boards, but they must stick strictly to the ordinance rules in order to protect vital resources. He said the Board was trying to do their best, but just got carried away with the moment. He said their area of concern was between the mean high water and mean low water. He said that below the mean low water was the concern of the VMRC as they must consider the subaqueous bottom. He said in the minutes their scope was too large when they consider the sand drift shoaling the channel.

Mr. Daniel said he appreciated the staff recommendation and the work of the VMRC staff. He said in the staff recommendation they indicated that the Wetlands Board had erred in some way and requested the decision be reversed in accordance with Section 28.2-1313 of the Code of Virginia. He asked that the Commission to reverse the Wetlands Board decision.

Commissioner Bowman asked for questions.

Associate Member Schick advised that from reading the minutes the Board considered rip rap on the property. He asked if that method of shoreline hardening would increase nearshore energy and increase the sediment.

Neville Reynolds was sworn in and his comments are a part of the verbatim record. Mr. Reynolds said that a living shoreline is a more dissipative land-water interface versus a defensive structure like a revetment. Associate Member Schick asked if a living shoreline would better absorb that energy and would not a revetment transfer that energy and sediment towards the channel and the adjacent properties. Mr. Reynolds responded yes and in the grand plan they were leaning towards a natural approach versus hardening.

Associate Member Tankard asked Mr. Daniel to explain their reason for requesting a reversal of the board's decision. Mr. Daniel stated that in Section 28.2-1313 of the Code of Virginia, the Wetlands Boards latitude was established as it lists issues to cause a remand and a reversal. He said that multiple elements can be found in this case.

Commissioner Bowman asked if the Wetlands Board representative was present.

James Barnett, County Attorney for the Wetlands Board was present and his comments are a part of the verbatim record.

Anna Drake, Liaison to the Wetlands Board and technical advisor, was present.

Mr. Barnett addressed the issue of the Board's jurisdiction and referenced an Attorney General Opinion by then Attorney General Baliles, to Mr. Pruitt in the case of groins that extended beyond the board's jurisdiction. He said it was the opinion at that time that the Wetlands Board in their consideration of a project could consider a project's impact

beyond their jurisdiction. He said the length could be considered in order to protect the wetlands. He said it was determined that it was essential that the project be considered as a whole. He said that the living shoreline should not be allowed, if it was not appropriate for this project, even if it was allowed elsewhere. He stated that 23.1-11 mirrored Section 28.2-1302 in that the board must consider all comments for and opposed and there was substantial opposition to the sand placement and what would happen. He explained that in the Wetlands Guidelines it states that they must consider the public and private benefits and detriments and whether the benefits outweigh the detriments. He said the testimony of the residents expressed concern with how the sand would end up in the channel. He said that there were two members on the Wetlands Board who hold PhD's related to the environment. He said the residents were experienced as to what happens in this area. He said in the minutes it was mentioned that one project that was approved did lose sand and did not work.

After some further discussion about the Attorney General Opinion and its requirement that the project be considered as a whole, Mr. Barnett stated that they were requesting that the Wetlands Board decision be upheld, but if not, that it be remanded back to the Board.

Commissioner Bowman asked for anyone in opposition who wished to speak. He reminded the speakers that they must confine their comments to what was said at the Wetlands Board hearing.

Gary Withrop, resident and protestant, was sworn in and his comments are a part of the verbatim record. Mr. Withrop explained some of his experience and background and that he was a long time resident. He said the severe weather conditions in this area was not true and had been overstated. He said there was no wave action in this area and maybe a 1/3 of them were higher than 5 feet and the rest were less. He said the area was very sheltered. He said that Hurricane Isabel did knock some houses off their foundation and there was some erosion here, but a revetment would be adequate in this location. He explained the proper use of a revetment would stabilize the shoreline.

Ken Ogren, resident at York Point and protestant, was sworn in and his comments are a part of the verbatim record. Mr. Ogren said he was concerned that they would put in a large amount of fill when they only need a revetment. He said the project was a risk to the channel and navigability and would affect property values.

Eric Ancarrow, long time resident and protestant, was sworn in and his comments are a part of the verbatim record. Mr. Ancarrow said he and his wife lived in the area for seven years and prior to that he had lived there with his parents. He said this was a deceptive legal issue and he agreed with Mr. Barnett that they should not just look at a small piece of the puzzle. He said there was no wave action. He said that for five decades there had been erosion in the area and the Wetlands Guidelines did not justify allowing damage to others' property. He said in this case it was unknown what would happen to the sand and there were viable alternatives that could be used and not impact the environment. He said

one viable alternative was a basic revetment which had been suggested. He said that they had never changed the project and the spur traps sediment flow and creates beaches. He said the plans were to bring 800 to 1,100 truckloads of sand to cover the property, which would require bulldozers and backhoes and result in pollutants and toxins being added to the environment. He said this would not stop erosion and only create a beach for a private resident. He stated approval of the project was not appropriate. He asked that the Commission not undermine the Wetlands Board and the people of York County.

Anthony B. Bavuso, resident and protestant was sworn in and his comments are a part of the verbatim record. Mr. Bavuso said he was an engineer. He stated that the proposal on the slide was significant, but it was not what came before the Wetlands Board. He stated that on the last proposal there had been minor changes. He said the Wetlands Board did consider the public and private benefits and detriments and did not believe the benefits outweighed the detriments. He stated the record shows they did consider this. He said that the VIMS and SEAS both agreed with the shoreline approach, but they did not consider the particular area. He said the Wetlands Board was supposed to consider the fact as to whether or not this was good for the area. He said the same engineering firm did the Yorktown project and the sand had to be replenished. He said there was no guarantee that this was the best practice as sand was being lost at Yorktown. He said the benefit did not exceed the detriment on others in the area. He said the Wetlands Board considered the potential damage. He said with a revetment present, it would maintain the status quo. He said there was no question that some measures were needed, but it did not warrant such a large scale project. He read from a letter sent to staff expressing his concerns. He said the resulting change in the wave action would cause him to have to make changes as well. He asked that the Commission allow the Wetlands Board's decision to stand. He said Mr. Barnett was correct that the Wetlands Board decision was based on the fact that the public and private benefits did not exceed the detriments.

Scott Salter, resident and protestant, was sworn in and his comments are a part of the verbatim record. Mr. Salter stated that he was concerned with Cabin Creek and his access to the Bay. He said he lived there for decades with no change on the property. He said they did need to remove the inappropriate materials and put stone as this would be no risk to his property and to the access to water. He said this would be building a beach for one person making Cabin Creek become Cabin Lake. He said he was asking that the Wetlands Board's decision be upheld as it was not arbitrary. He explained that a 1,000 truckloads of sand would not be good for the environment. He said the simple solution would be to replace the revetment and that would take care of the applicant and his neighbors.

Tim Gelles, resident and protestant, was sworn in and his comments are a part of the verbatim record. Mr. Gelles explained that the water depth was 36 inches at low tide and 8 and 12 inches of sand would make the shallow channel inaccessible.

Frank Ancarrow, resident and protestant, was sworn in and his comments are a part of the

verbatim record. Mr. Ancarrow said he was a resident since 1977, 30 plus years. He explained that most had been said and the attorney had been given the luxury to speak for a long time. He stated the Wetlands Board did right and had heard a lot of testimony which had not been heard by long-time residents. He said that Mr. Neville and SEAS say it was poorly protected, but it had still been maintained well. He said others had suggested a simple revetment and the property would be protected. He said the winds and the sand bar break the wave action. He provided some pictures during severe weather events. He said in November 2009 there was a 3-day storm with pounding surf and high water, but it was all that had ever been seen. He said winds usually come from the northeast and thunderstorms occasionally come there. He said this was a massive undertaking and the stakes in the pictures did not show the scale of the project. He said there was a risk of sand displacement and the Wetlands Board heard it. He stated that the breakwater system needed to be site specific and there were others with experiences with other projects where things had gone wrong. He said he agreed with Mr. Bavuso about the original proposal. He said he met with them on site in December 2008 and the changes made were slight. He said the recommendation by VIMS was not right for this site as the bottom type was not sandy to support the system. He said as far as the criteria of benefits exceeding the detriments, it was more of a detriment to the public. He said he felt the criteria were not met and they just want to protect the area they love. He asked the Commission to do the right thing and the breakwater was not right.

Elyse Pyle Bavuso, resident and protestant, was sworn in and her comments are a part of the verbatim record. Ms. Bavuso said that she did not have any letters behind her name but that she had lived there. She stated that if there was a five foot wave their house would be destroyed. She said that the flow of the Poquoson River when there was a southwest wind was the water was blown out so there was no water. She said she had lived there for many years and made many observations.

Commissioner Bowman asked Mr. Daniel for any rebuttal comments.

Neville Reynolds, contractor, was sworn in and his comments are a part of the verbatim record. Mr. Reynolds indicated that the site was experiencing erosion. He said the project would protect and restore the shoreline which was consistent with the guidelines. He said in regards to the circumstances of the revision, it was not given to the board to be approved. He said in the record, the revetment was considered and discussed, but discussed with agencies and told it would not be approved. He said they pushed for the living shoreline and the revised plan had gone through the process. He said alternatives were presented to the Wetlands Board and they just let the process run its course.

Associate Member Robins asked Mr. Reynolds to repeat his testimony regarding the three ways sand could be lost from a living shoreline project such as this. He further asked how the spur factored in to correcting this. Mr. Reynolds said that the project creates two pocket beaches and that the position of the breakwaters and spur allow those beaches to reside in a stable configuration.

Commissioner Bowman asked for Mr. Daniel's rebuttal comments.

Mr. Daniel stated that the Attorney General Opinion did not give the jurisdiction of VMRC to the Wetlands Board. He said he commended VMRC staff for requesting the reversal of the Wetlands Board decision. He stated that in Section 28.2-1313 it gives VMRC the authority to reverse the Wetlands Board's decision.

Associate Member Schick stated that the Attorney General Opinion said to look at the whole project as it refers to wetlands. He explained that he had read the minutes and there were valid issues for the Wetlands Board for VMRC to consider. He said he did not see where there was any scientific consideration by the Wetlands Board. He said he did not want to say that the comments did not have merit, but they were not in the area of the Wetlands Board's concerns. He said this was a small area when compared to navigation issues and the subaqueous portion which would be considered by VMRC. **After considering all the evidence and based on Section 28.2-1313 (E and F) of the Code of Virginia, precluding the fact that it was not capricious, he moved to reverse the decision of the Wetlands Board. Associate Member Holland seconded the motion.**

Commissioner Bowman asked for discussion. Associate Member Robins said that some of the concerns that had been brought to the Wetlands Board had merit, but raised some concern about jurisdiction and they must look at the wetlands impacts. He suggested that the applicant had gone to great lengths to obtain the best advice and the best science to justify that this was an appropriate site for a living shoreline project. He said that the public detriment was speculative, that the scientific information provided by VIMS and SEAS suggested that the project would not negatively impact the channel and that the decision was unsupported by the record. He said he supported the motion.

Associate Member Laine stated it was the right decision made by the Wetlands Board, just not articulated well. He said the VIMS report would be right for high energy areas but this was a low energy area. He said the property owners were concerned with sand filling in there properties and more sand would not be beneficial to them.

Associate Member McConaugha said he agreed with Associate Member Robins that harden shoreline structures, if applied, often caused more problems. He said it would be more natural this way, which was appropriate and should be successful.

Associate Member Tankard said that he sympathized with the residents and that they were right to be concerned. Their access to the Bay was dependent on a dredged canal, but the science disagreed with their position that the project would impact their channel. He concluded that he would have to side with the science over the public perception that this was a bad project.

Commissioner Bowman stated that he felt there was a need for caution when applying science, but he added that he did support the motion.

The motion carried, 7-1. Associate Member Laine voted no.

No application fees – Wetlands Review

* * * * *

6. **THE BLUEWATER GROUP, LLC, #07-2392**, requests authorization to reconfigure their existing Severn River Marina through the addition of fixed and floating piers and to extend the three existing main piers 125 feet channelward to a total length of approximately 490 feet channelward of mean low water. The revised configuration and expansion would result in a total of 125 slips at their facility situated along the Southwest Branch of the Severn River at 3461 Severn River Road in Gloucester County. The project is protested by several nearby property owners and leaseholders of oyster ground in the vicinity of the project.

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

Mr. Neikirk explained that the Bluewater Group, LLC is a Maryland company that owns 51% of S. C. Yachting, LLC, a Virginia company that owned the subject Severn River Marina. The Severn River Marina is located at the end of State Route 620 along the Southwest Branch of the Severn River, near the mouth of Willets Creek in the Glass area of Gloucester County. In 1989, VMRC issued a permit to a previous owner to redevelop and expand the old Glass Marina. That redeveloped marina operated for several years as Shelter Harbor Marina.

Mr. Neikirk said that the facility had three main piers oriented perpendicular to the shoreline and connected by a shore parallel pier that was located channelward of a vegetated wetland fringe marsh. The marina currently had 52 wetslips and provided, fueling, travel lift and repair services. A ships store on the upland provides boating supplies and some groceries.

Mr. Neikirk noted that the proposal called for the extension of the three main piers 125 feet channelward to a total distance of approximately 490 feet channelward of mean high water and also the reconfiguration and addition of wetslips within the area currently occupied by the marina piers. The revisions and additions would result in a total of 125 slips. The proposed slips included twelve (12) 35-foot slips, thirty-one (31) 40-foot slips, thirty (30) 45-foot slips, thirty (30) 56-foot slips, ten (10) 60-foot slips, eleven (11) boatlifts, and a single fueling slip. The overall footprint of the facility would extend 125 feet channelward (south) and approximately 40 feet west of the existing alignment. No additional encroachment was proposed along the east side of the facility.

Mr. Neikirk said that the project was protested by Mr. R. David Young, the adjoining property owner on the east side of the facility and several nearby property owners including Dr. Leonard W. Haas, Ms. Carol Tooley-Hall, Mr. Melvin C. Peay, Jr., Mr. and

Mrs. William Brewer, Mr. Joseph Fox, Ms. Martha Maclay, and Mr. and Mrs. Rowe. The Rowes were also oyster ground leaseholders.

Mr. Neikirk stated that four additional oyster ground leaseholders, Mr. Sam Rowe, Mr. Christopher C. Conway, III, Mr. Samuel C. Greene, and Mr. Roger Simmons had also objected to the proposal. The protestants questioned the need for the expansion and they were concerned that the additional boating activity and additional development would add pollution to the creek and adversely affect the environment. Some expressed a concern regarding additional traffic on the roads leading to the marina. Mr. Young also believed the facility may encroach upon his riparian area and he also questioned whether the sanitary facilities and sewage pump-out facilities were adequate. In e-mail correspondence he had also posed numerous questions to the U. S. Army Corps of Engineers, DEQ, and Gloucester County concerning the possible filling of non-tidal wetlands on portions of the property and he had questioned the legitimacy of certain reports filed with the Health Department. Dr. Haas, a neighbor and an Associate Professor Emeritus at VIMS, believed the expansion would lead to increased nutrient input into the adjacent waters.

Mr. Neikirk explained that the applicants had originally proposed to extend the piers 302 feet channelward of the existing pierheads and reconfigure the existing piers to create 80 new wetslips. Staff expressed their concerns over the channelward encroachment with the President of Severn River Marina, Mr. Ladas, during a site visit conducted on May 22, 2008. There was also discussion about what staff considered to be an inefficient use of the space within the existing marina footprint. After re-evaluating their needs and the marina layout, the applicants submitted a revised proposal, which reduced the channelward encroachment by 175 feet and reduced the number of proposed new slips to 73.

Mr. Neikirk said that in VIMS report, dated November 20, 2008, they stated that marina activities adversely impact water quality and the habitat ecosystem services of shoreline and coastal resources and that marina activities should be water dependent, if proposed over the water. They stated that there would be shading impacts to the near-shore waters and that wetslips and concentrated boat handling introduce petroleum products, toxicants, bacteria and garbage into the waterway. They also noted that boat wakes could exacerbate shoreline erosion. They recommended development of an oil spill contingency plan, the placement of sufficient garbage receptacles, and sufficient signage to encourage the use of pump-out facilities and proper handling of garbage. Regarding the upland development, they noted that appropriately designed and maintained BMPs could minimize the risk of polluted runoff entering the vegetated wetlands and waterway. Finally, they recommended the marina seek to retain its existing 'Clean Marina' status in Virginia's Clean Marina program.

Mr. Neikirk said that Mr. Ladas provided staff copies of a Stormwater Pollution Protection Plan, clean Marina Checklist, and their Marina Rules and Regulations list.

Many of the items in these documents were designed to address the potential environmental impacts noted by VIMS.

Mr. Neikirk said that the Department of Conservation and Recreation did not anticipate that the project would adversely affect any of their programs although their Division of Chesapeake Bay Local Assistance and Division of Soil and Water Conservation noted the applicability of the Chesapeake Bay Act requirements that were regulated by the local government.

Mr. Neikirk explained that the Department of Environmental Quality in their letter dated November 19, 2007 informed staff that they had determined the water quality impacts should be minimal and temporary and that a Water Protection Permit would not be required for this project.

Mr. Neikirk stated that the Health Department in their letter dated July 27, 2009, informed staff that the proposed project was in compliance with their "Sanitary Rules for Marinas and Boat Moorings." They added that a Certificate to Operate had been issued for 125 seasonal slips and 50 dry storage spaces. They also stated that the owner of the facility had entered into a Consent Order with the State Board of Health and that he must comply with the order to maintain an Operation Permit for the sewage system.

Mr. Neikirk said that Mr. Keith Skiles with the Health Department's Division of Shellfish Sanitation had stated that the size of the current seasonal closure would need to be increased due to the expansion of the marina. The current seasonal closure encompassed approximately 22 acres. The additional seasonal closure would extend further offshore and farther upstream and would encompass approximately 15 additional acres, or approximately 37 acres. Mr. Skiles determined that a reduction in the size of the proposal to a maximum of 100 slips with no additional channelward encroachment would reduce the size of the required seasonal to approximately 30.5 acres.

Mr. Neikirk stated that the marina was currently certified, as a "Clean Marina", under Virginia's Clean Marina program. Participation in the Virginia Clean Marina program was voluntary. To qualify for designation as a Clean Marina, a marina must develop and implement measures that prevent or reduce pollution from marinas, boatyards and recreational boats.

Mr. Neikirk noted that by e-mail, the Coast Guard on January 8, 2009 informed staff that they had no objection to the application but they noted that the end of the piers would need to be marked with two slow flashing amber lights. As currently proposed, the piers would extend approximately ¼ the distance across the waterway and staff did not believe the additional encroachment would result in an obstruction or hindrance to navigation.

Mr. Neikirk explained further that the proposal appeared to generally conform to many of the criteria listed in the VMRC "Criteria for the Siting of Marinas or Community

Facilities for Boat Mooring.’ The undesirable characteristics applicable to this marina site are that: the salinity is appropriate for shellfish growth, the waters are classified by the Health Department as approved or seasonally approved for shellfish harvesting, there are private oyster ground leases in the project vicinity, the maximum wave height is greater than 1 foot, and the waterway is used for other potentially conflicting uses. With regard to the undesirable characteristics, however, we are unaware of any significant shellfish harvesting activity in the potentially affected waters and the seasonal condemnation would only restrict shellfish harvest between April 1 and October 31. An existing wave screen and the proposed floating piers should serve to dampen wave impacts. Nearly every structure proposed in State waters had the potential to interfere with other uses of the waterway. In this case, since the encroachment would be confined to ¼ the width of the waterway staff did not believe the facility would significantly affect other uses of the waterway.

Mr. Neikirk explained that proposals for new marinas and expansions of marinas often raise difficult resource allocation questions. Staff felt the encroachment of the original proposal was excessive and that more efficient use could be made within the existing marina footprint. The revised proposal significantly reduced the proposed channelward encroachment, the footprint of the proposed facility, and the number of proposed new slips.

Mr. Neikirk stated, as noted by VIMS, there were environmental impacts associated with boating and marina operations. In an attempt to mitigate the potential environmental impacts, the marina had sought and received certification as a ‘Clean Marina’ by the Virginia Clean Marina program and the owners had implemented a variety of best management practices, rules, and policies designed to minimize the potential for environmental degradation.

Mr. Neikirk said that staff was always concerned when a project would result in a shellfish closure. In this case, the additional closure would be an expansion of an existing seasonal condemnation. Accordingly, the harvest of shellfish would only be restricted between April 1 and October 31 of any given year. Staff was unaware of any significant oyster production in the vicinity of the condemnation.

Mr. Neikirk stated that the proposal appeared to adhere to most of VMRC’s Marina Siting Criteria and staff generally believed it was more desirable to redevelop and expand an existing marina in lieu of developing a new facility in a more pristine area. The site plan associated with the redevelopment of the upland portion of the marina called for the elimination and renovation of some older buildings, improved storm water management facilities and the planting of vegetation. Staff understood the desire to increase the number of slips to help offset the costs associated with these improvements. Staff believed, however, that a significant expansion of the facility could be accommodated without the need to extend the marina an additional 125 feet channelward. Elimination of the three 125-foot pier extensions and the associated 25 slips would reduce the overall

footprint of the expansion by approximately 58,000 square feet and would still allow the marina to expand from 52 to 100 slips. Such a reduction would also reduce the size of the required seasonal condemnation by approximately seven (7) acres.

Mr. Neikirk explained that after evaluating the merits of the project against the concerns expressed by those in opposition to the project, and after considering all of the factors contained in Section 28.2-1205(A) of the Code of Virginia, staff recommended approval of the project conditioned upon the elimination of the three 125-foot pier extensions and their associated 25 wetslips. Staff would recommend approval of the marina reconfiguration such that a maximum of 100-slips could be obtained. Staff also recommended that the marina be required to update their marina management plan for incorporation into the permit document. No royalty was recommended in light of the exemption provided by Section 28.2-1206(B) of the Code of Virginia.

Commissioner Bowman asked for questions of staff.

Associate Member Schick asked staff where the 25 slips staff was recommending against were located and whether those were the largest slips being proposed. Mr. Neikirk identified the 25 slips located channelward of the existing pierheads and responded that there were some 60-foot slips located elsewhere. Associate Member Schick asked if the shellfish closure was the primary reason staff was recommending the reduction in slips and Mr. Neikirk stated that it was.

Associate Member Robins asked if the downsizing relates to the size of the condemnation area how much activity was reported on the affected oyster leases.

Mr. Neikirk explained that there was one bushel in 2006 and nine bushels in 2007 in the entire Severn River.

Commissioner Bowman asked if the applicant or their representative wished to comment.

John Daniel, Attorney for the applicant, was present and his comments are a part of the verbatim record. Mr. Daniel said they appreciated the time and opportunity to speak. He explained that the Bluewater group was established in 2006. He said the business included yacht sales, etc. He said there was a location in Maryland and a location at Cape Charles. He said the designer of the project was present. He said this location was a recent purchase of the Bluewater group. He said there were highland improvements being done to reduce the impacts to the RPA. He said in response to the protests the expansion had been reduced from 300 feet to 125 feet and the project was moved westerly. He said the staff had presented information for the existing site as well as the expansion proposal. He said this marina had a Clean Marina status, had been given local scrutiny, and been approved by other agencies and given permits. He said this project met the requirements Section 28.2-1305 of the Code of Virginia and they requested approval. He said that they concur with the majority of the staff recommendation and request consideration of the 125 slips. He said the project had already been reduced, this

was a seasonal condemnation, and there was no harvest from the leased ground in recent time. He said the impact was not changed by the seasonal closure and this was a desirable enterprise.

Commissioner Bowman asked for questions of Mr. Daniel. There were none.

Commissioner Bowman asked if anyone in opposition was present and wished to comment.

Dr. Leonard Haas, protestant, was sworn in and his comments are a part of the verbatim record. Dr. Haas explained that he worked at VIMS and had been involved in environmental studies. He stated he was qualified to comment. He referred the Commission to his comment letter, item 4G. He said that the nitrogen in the waste dumped into the water will impact the menhaden fishery and the clam harvest. He said the State needed to decide if it were to develop oysters to survive disease and if yes, then the leased ground will be needed to do that. He said that most of the current slips are not used and why did they need more. He said this area was used for boating by public and they prefer mooring in open water. He said this was pristine habitat and there was only an economic need for the project. He the Maryland tidal creeks conditions were bad and they are trying to clean them up with millions and millions of dollars. He said it was not necessary to allow this project in this creek. He said this would make this area in as bad of condition as Sarah's Creek.

Jeff Smith, protestant, was sworn in and his comments are a part of the verbatim record. Mr. Smith explained that he lived in Ordinary, Virginia, down the creek from the project. He said the main road from Rt. 17 was narrow leading down to the marina.

Commissioner Bowman explained that this was not an issue under VMRC's purview.

Mr. Smith stated that there were additional pollution concerns as the water fowl will be impacted.

David Young, protestant, was sworn in and his comments are a part of the verbatim record. Mr. Young provided the Commission with a binder and a copy of a draft letter from the Corps of Engineers. He said when this marina was expanded in 1995 and 1996 there was damaged to his property. He said he was concerned with the consequences of the expansion and that the value of his property will be impacted. He said in the VMRC minutes of September 1999 it said the staff recommendation was for 49 slips to eliminate the need for an additional seasonal condemnation. He said in February 2001 there were 4 additional slips, but with no overnight mooring. He said there were two public hearings rescheduled in October and November 2009 apparently because of VMRC was not happy about the additional closure. He said the staff recommendation was for 100 slips. He said an assessment by the Health Department was done December 8, 2009 and was based on two people per boat, but the with the size of slips it was not just for 2 person vessels.

He said currently there were 125 slips and staff recommendation was for 100 slips in order to keep the condemnation small. With the use of an aerial slide he pointed out that the boat repair yard was the result of illegally filled wetlands in 1996. He said the Corps was investigating and he had the document of the investigation plan written by Col. Backus.

Commissioner Bowman asked staff to comment. Mr. Neikirk explained that there were non-tidal wetlands in this area.

Mr. Young explained that in 1996 delineation of the marina changed and the VIMS shoreline report dated 2008 was outdated in respect to the rear area. He said Dr. Hershner of VIMS told him they would not be updating the report. He said in their response dated March 15, 2010, they said it was not incomplete and no other agencies had requested additional information. He said he and Dr. Haas met with the County and the entire project was to be shown in their plan. He said the VMRC jurisdiction was to consider the oyster ground lease, since they own them and there was no oyster propagation. He said the oyster ground lease must not be impacted as there was a shellfish resource existing. He said no marina report had been submitted until the VDH had requested it. He said he did not agree with this because of the sewage system problems. He questioned the number of slips proposed and the number listed on the approved site plan. He asked the Commission how they would fee if all this activity was occurring next to their property.

Del. Harvey Morgan, representative with the General Assembly, was present and his comments are a part of the verbatim record. Del. Morgan stated that he was not present at the hearing on behalf of the General Assembly. He said the applicant had exceeded his permit in 1996 but it was allowed since it did not exceed ten percent. He said Mr. Young was a very intelligent man and also very truthful. He said a 1988 letter from VIMS stated that any increase in slips in Willets Creek would increase the stress in the creek. He said the Chesapeake Bay Committee had a meeting at VIMS and were taken on a boat trip in the York River and shown the red tide. In the 1999 VMRC minutes the staff was concerned with the condemnation. He said in 2001, there was further expansion to the original facility. He said VIMS had expressed their concern over the expansion. He questioned why misbehavior should be rewarded with this marina. He said that testing of the area should be required and obeying of the rules should be required before allowing any more expansion. He stated that Dr. Croonenberghs had said a seasonal condemnation would be required. He said the VMRC regulation required that the use of the bottom be consistent and the Constitution and Bay Agreement require that the fisheries be maintained and enhance shellfish on the oyster grounds.

Del. Morgan said he questioned if the lease was being properly used by the marina. He said that Best Management Practices would enhance the water quality. He said there should be adequate upland area for all their needs without filling wetlands and subaqueous bottom. He said to transfer the control of oyster ground to accommodate marina development was unacceptable. He said the upland activities and the pollution

resulting from it was not considered in the staff evaluation. He said there needed to be a upland plan, erosion and sediment control plan, siting criteria, and consideration given to salinity, water quality, and the private lease in the proximity of the facility.

Del. Morgan said that the State Constitution required the Commonwealth to protect and the mission stewards of aquatic resources and protection of the waterways for current and future generation. He said Virginia did not want to be like Maryland where the EPA has mandated that they clean up the Bay in Maryland.

There were no questions.

Commissioner Bowman asked for rebuttal by Mr. Daniel.

Mr. Daniel said that there was a need to address was before the Commission today, as they had heard about other issues. The Commission must consider Section 28.2-1205 of the Code of Virginia, the Marine Siting Guidelines, and to consider the Constitution, Article II: 1) reasonable uses, 2) lease owner same as others; and 3) comments of adjoining property owners do not address the issues in 1205. He said in a court the reaction to comments would be different as they were not relevant. He said that they requested approval of the 125 slips.

Commissioner Bowman asked if there were questions.

Associate Member Robins asked about the narrative of the site plan, updates to storm water management and improvements to the upland regarding water quality.

Jason Miles, Engineer with Bay Design, was sworn in and his comments are a part of the verbatim record. Mr. Miles said that they met all designs in regards to the water quality. He said this project had been under more scrutiny than any he had known. He said all other approvals received and all requirements have been met.

Associate Member Robins asked if this would mean less impact. Mr. Miles said there were filtration units at the slips with the improved redevelopment which will reduce nutrients loading to water. He said the minimum was 10% and they had gone above that.

Associate Member Tankard asked about Dr. Haas' comments about more boats and more nitrogen. Mr. Miles said the sewage treatment was designed for 125 slips and the Health Department scrutinized it. Associate Member Tankard asked if it would add to the nitrogen. Mr. Miles stated not the new system design. He said this was looked at by the agencies because the increased sewage would increase the phosphorous and nitrogen. The new system was designed for 125 slips.

Mr. Daniel said this is not Mr. Miles assignment and it cannot come to the Commission without the Health Department scrutiny and approval. He said he assumed these issues were addressed.

Commissioner Bowman asked for any more questions. There were none, he said the matter was before the Commission.

Dr. Haas asked to be allowed to respond. He said the Health Department soil characteristics certifies sufficient to take that liquid volume. He stated that VIMS staff can answer the increased nitrogen load question.

Mr. Daniel noted that the VIMS report was in the packet.

Carl Hershner, VIMS, was present and his comments are a part of the verbatim record. Dr. Hershner stated that it would increase nitrogen and the system would control the bacteria not the nitrogen.

Associate Member Schick asked if the impact of the nitrogen was considered in the VIMS review and it was determined that the development's impact would be minor. Dr. Hershner responded yes.

Associate Member Tankard said that in October 1988 it said that 49 slips was all the creek could handle. He said that Dr. Haas commented that the nitrogen will increase. He said that the nitrogen would kill the Bay and must be reduced. He said that there was not significant harvest, but that is all over the Bay. He said that Del. Morgan was here representing the people on the creek and read from the Code, noted the requirements of the Constitution as far as public and private benefits. He said there is also the Public Trust Doctrine and he said he felt the creek had reached its limit.

Associate Member Schick said that the current BMP requirements and Clean Marina program did not exist in the past. He said over the 40 years it had improved under the Clean Marina Program. He said that the pollution of the waterway hurts the marina's bottom-line. He said the VIMS report of 20 or 30 years ago looked at everything in a different light from what it is like today. He said with a well run facility it was cleaner and greener then older, long ago operations. He said the public's use of the waterways was done through the marinas as it allows the general public from anywhere to take boat out on the water. He said sometimes this was their only means to use the waterway. He said the area was growing and there was a need for these slips. He said the project would improve the impact on the environment. He said the income from these slips would give money to the locality.

Associate Member Schick moved to approve the project, as submitted. Associate Member Holland seconded the motion.

Associate Member Robins made a substitute motion to accept the staff recommendation with the 100 slips. Associate Member Tankard seconded the substitute motion.

Associate Member Laine said that he had the same concerns as Associate Member Tankard regarding the nitrogen and agreed with the VIMS 1988 comments. He explained that the Health Department based their decisions on the amount of pathogens in the water. He said he would rather not see any expansion and agreed also with the staff recommendation.

Commissioner Bowman stated that he had strong feelings both ways and was trying not to be a hypocrite. He added that he supported the staff recommendation. He asked for a vote on the motion. Associate Member Laine asked which motion was being voted on. Commissioner Bowman stated it was the substitute motion accepting the staff recommendation. **The motion carried, 6-2. Associate Members Holland and Schick both voted no.**

Roll Call Vote:

Bowden	Aye	Robins	Aye	Tankard	Aye
Holland	No	Schick	No	Chair	Aye
Laine	Aye	McConaugha	Aye		

Commissioner Bowman noted that Associate Member Fox was absent.

Permit Fee____	\$ 100.00
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Commissioner Bowman adjourned the meeting for a lunch break at approximately 2:04 p.m. The meeting was reconvened at approximately 2:30 p.m.

- 7. **ROBERT WINFREE, #09-1536**, requests after-the-fact authorization to retain previously installed and unauthorized structures at his property situated along the James River in Surry County. The applicant seeks after-the-fact authorization for two concrete block breakwater structures, two concrete block groin structures, and 258 linear feet of concrete block bulkhead, all being located at 112 Eagle Bluff Drive in the Town of Claremont in Surry County. The proposal requires both a subaqueous permit and a beaches and dunes permit.

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

Mr. Stagg explained that the project is located along the James River at the southern limits of the Town of Claremont. The site is characterized as a sand beach up to the existing bulkhead and a sloped graded area landward of the bulkhead. Mr. Winfree had previously applied, in 2004, to place a riprap structure along the eroding bluff at this location. The proposal was landward of mean high water and therefore did not require a VMRC or a Wetlands Board permit at the time. The riprap was apparently never installed and the site continued to be the subject of additional erosion in the ensuing years.

Mr. Stagg said that staff received a phone complaint from a nearby property owner in early October, 2009, concerning construction activity and structures having been placed both along the shoreline and upon State-owned subaqueous bottomlands at this location. Staff contacted Mr. Winfree in mid-October, at which time Mr. Winfree acknowledged ownership of the property and his authorization of placement of breakwater, groin and bulkhead structures and bank grading by his contractor Dash Construction, although Mr. Winfree indicated he accepted full responsibility for the entire project.

Mr. Stagg stated that Mr. Winfree was informed that a considerable portion of the existing work required authorization from VMRC and possibly the Army Corps of Engineers and/or the Surry County Wetlands Board. Staff explained that to come into compliance all the structures could be removed and the area restored to its former contours, or that Mr. Winfree could submit an after-the-fact application seeking authorization to retain the structures as installed. Mr. Winfree indicated he wished to seek after-the-fact authorization and agreed to submit a Joint Permit Application by the week of October 19, 2009. A Joint Permit Application was received on October 22, 2009.

Mr. Stagg said that during a subsequent site visit staff noted the existence of two breakwater structures, two groin structures, a concrete block bulkhead structure, an open-sided pavilion structure and evidence of considerable bank grading. The bank grading and pavilion structure appeared to be landward of VMRC jurisdiction. The area immediately channelward of the bulkhead structure could be characterized as a non-vegetated sandy beach.

Mr. Stagg explained that a public interest review was conducted for the project, and other than the initial complaint by the nearby property owner, staff received no other objections.

Mr. Stagg stated that in VIMS' Shoreline Advisory Report, they noted the type of material used for all three structures was not normally recommended. Additionally, they noted that the bulkhead had already lost considerable material on the landward side, settling of the breakwater structures, height of the breakwater structures was not proper, and the lack of filter cloth for all the structures. They also noted some shoreline erosion along the channelward side of the bulkhead possibly from wave action, as well as, from flow erosion from a drainage pipe that extended through the bulkhead. The report also

said that the groins were not low profile in design. VIMS indicated that if they had been consulted in advance, they would have recommended a properly designed stone breakwater system with beach nourishment and appropriate plantings and a properly sloped upland bank with heavy woody vegetation. While a stone breakwater structure would be preferred, if a shoreline structure was considered necessary then they recommended, a stone rip rap revetment with a properly sloped upland bank, or as a less preferred alternative, and to allow for the reuse of the existing concrete block structures, that they could be used in conjunction with a tiered bank system with appropriate vegetation. Any of the above recommendations included the proper use of filter cloth in conjunction with all structures.

Mr. Stagg said that staff had considerable concerns with the type of material used for all the structures. The concrete blocks, while quite heavy, were not the type of material normally used for breakwaters, groins, or bulkheads. There did not appear to be any mechanism to tie the structures together, therefore, making them highly susceptible to movement during extreme storm events and/or hydrostatic pressure (for the bulkhead structure). While the structures appeared to have remained in place for quite a few months, recent storm events resulted in wave action going over the top of the bulkhead causing the loss of material immediately landward of the structure. It, also, appeared a considerable portion of the bulkhead structure now listed channelward, which could likely result in eventual failure. Also, since the initial site visit, staff had noted a slight subsidence of the channelward end of the groin structures and uneven settlement of the breakwater blocks. The groins did not appear to be providing much additional benefit of sand retention beyond the natural benefits of the existing cypress trees at this location. The bulkhead had partially failed as a functioning retaining wall for the upland graded material and as a shoreline erosion defense structure along the beach.

Mr. Stagg said that staff recommended the bulkhead block structure be removed and replaced with an appropriately designed rip rap revetment using the current alignment of the bulkhead, as the toe alignment of the rip rap. As an alternative, to allow for the use of the existing concrete block structures, the applicant could seek authorization for a tiered bench system along the bank. The breakwater structures did not appear to be retaining material, as they may be placed too far offshore, were not the proper elevation, and the type of material used was not appropriate and already showed signs of failure. As a result, staff recommended removal of these structures.

Mr. Stagg stated that should the applicant wish to seek authorization for properly engineered breakwater structures using granite stone, staff recommended submission of a new application seeking such authorization which could incorporate the block structures as core material. The groin structures also appeared to be retaining some sandy material, but were not constructed in conformance with standard low profile recommendations, were likely not properly spaced, and were not adequately tied together, therefore having a high probability of eventual failure due to separation of the individual block structures and eventual displacement. Staff recommended removal of these structures, again

leaving the applicant the option to apply for appropriately designed and spaced groin structures at this location. Additionally, since Mr. Winfree had previously applied for a riprap structure at this location in 2004, staff believed the applicant was fully aware of the permitting process required for the type of activities conducted at this site. Therefore, if any portion of the current structures were to be allowed to remain, staff recommended an appropriate civil charge based on moderate environmental impact and severe degree of non-compliance.

Commissioner Bowman asked for questions of staff.

Associate Member Tankard asked about the use of the beach. Mr. Stagg said it was used frequently during the summer and this would impact the use by jet skiers.

Associate Member Robins asked if the contractor noted was the one to do the work. Mr. Stagg responded yes, he thought so.

Commissioner Bowman asked the applicant if he wished to comment.

Robert W. Winfree, applicant was sworn in and his comments are a part of the verbatim record. Mr. Winfree explained that Hurricane Isabel had taken 45 feet of the beach and if there was anymore taken it would include the road. He stated that he was in a hurry to get this done prior to hurricane season and this bulkhead had been used in other areas. He said the breakwaters were put where they told him. He was only trying to protect his property.

Commissioner Bowman said that there were significant problems with a breakwater being in navigable waters. Mr. Winfree stated that was why he put the blocks on each end to show up at a normal high tide. Commissioner Bowman asked him what he wanted to do. Mr. Winfree said a storm two months ago had taken a grassy area. Commissioner Bowman said that looking at the dynamics he did not see how that helped.

Commissioner Bowman asked for discussion or action by the Commission.

Associate Member Robins stated that whatever was done needed proper engineering and design and the blocks presently there could possibly be used as the core of whatever is designed. He suggested that he resubmit a new application and incorporate the existing materials, but the breakwaters did need to be removed.

Mr. Winfree stated that the groins had sand behind them, which was good. He said he tried to be a good steward of the river and proponent for taking care of the water. He said he was trying to do something good.

Associate Member Schick moved that the blocks over subaqueous land be removed in 30 days and the blocks in the dune area be removed in 90 days. He moved further

that he could resubmit a plan, but he should hire someone that can draw up a plan. He said this would include the staff recommendations for the penalties and civil charges.

Associate Member Robins said that with the removal order there was no civil charge and he can come back before the Commission. He said he agreed with the 30 days for the groins removal and the 90 days for the removal from the dune area. He seconded the motion. The motion carried, 8-0.

No applicable fees–Removal order/Reapplication

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8. DEPARTMENT OF GAME AND INLAND FISHERIES, ET AL, #09-1804, requests authorization to replace and extend a 17-foot wide concrete boat ramp and to construct 150 linear feet of wave screen at the Ware House Public Landing situated along the Ware River at the end of Ware House Road in Gloucester County. The project is protested by nearby property owners.

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

Mr. Neikirk explained that the Ware House Public landing is located at the end of Ware House Road, on a point of land near the upper end of the Ware River, in the Courthouse area of Gloucester County. The property is owned by Gloucester County and the ramp facilities are operated by the Department of Game and Inland Fisheries.

Mr. Neikirk said that the proposal called for the replacement and extension of the existing 17-foot wide by 52-foot long concrete boat ramp. The new ramp was proposed to extend 18 additional feet channelward. The timber wave screens adjacent to the ramp were also proposed to be replaced with vinyl wave screens. A riprap revetment and a finger pier were originally proposed but had been deleted from the proposal.

Mr. Neikirk stated that the project was protested by Mr. and Mrs. Douglas Hegamyer and Mr. John Ericson and Ms. Felicity Rask. The Hegamyers did not specify the reason for their objection. In their letter, dated October 26, 2009, Mr. Ericson and Ms. Rask stated they believed measures should be taken to protect the nearby shorelines and suggested the establishment of a ‘No Wake Zone’ in the vicinity of the ramp. They also stated that vegetation should be restored around the landing with a barrier installed to prevent garbage and runoff from reaching the water.

Mr. Neikirk said that in the VIMS’ report, dated March 12, 2010, they stated that utilizing and improving existing ramps that serve multiple users was preferred from an environmental viewpoint. They anticipated minimal impacts to marine resources since

the ramp was being replaced in the same location. If feasible, they recommended the use of an open-pile design or concrete pavers, as an alternative to the concrete ramp. Finally, they recommended the use of sufficient garbage receptacles and appropriate signage to encourage their use.

Mr. Neikirk explained that the Health Department's Division of Shellfish Sanitation stated that the project was located in condemned shellfish growing waters and the project as described would not cause any increase in the size or type of the existing closure.

Mr. Neikirk said that the Department of Game and Inland Fisheries, Environmental Services Section of the Wildlife Diversity Division, noted in their comments, dated February 16, 2010, that bald eagles were documented in the project vicinity but that they did not anticipate any adverse impact to this threatened species. They recommended conducting the work during low flow conditions and the use of cofferdams or turbidity curtains to isolate the construction area, as well as, the employment of strict erosion and sediment control measures.

Mr. Neikirk stated that the Department of Conservation and Recreation did not anticipate that the project would adversely affect any of their programs although their Chesapeake Bay Local Assistance Division noted the applicability of the Chesapeake Bay Act requirements that were regulated by the local government. The Department of Environmental Quality determined that a Virginia Water Protection Permit would not be required. No other State agencies had commented on the proposal.

Mr. Neikirk noted that the project would not encroach on any public or privately leased oyster planting ground.

Mr. Neikirk said that the Ware House Landing boat ramp was an established public access facility. Staff generally believed it was preferable to repair or improve existing facilities in lieu of developing new facilities in the more pristine areas. Readily available public boat ramp facilities also reduced the need and pressure to construct private boat ramps.

Mr. Neikirk said that after evaluating the merits of the project against the concerns expressed by those in opposition to the project, and after considering all of the factors contained in §28.2-1205(A) of the Code of Virginia, staff recommended approval of the project conditioned upon the use of cofferdams or turbidity curtains and the employment of strict erosion and sediment control measures.

Commissioner Bowman asked for questions of staff. There were none. He asked for anyone who wished to make comments, either pro or con. There were none. He asked for action by the Commission.

Associate Member Schick moved to accept the staff recommendation. Associate Member Tankard seconded the motion. The motion carried, 7-0. The Chair voted yes. Associate Member Holland was not present during the presentation of this item.

Permit Fee____	\$ 100.00
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- 9. **LOUISE HANSCH, ET AL, #10-0202**, requests authorization to construct a 12-foot by 80-foot concrete boat ramp, extending up to ten (10) feet channelward of mean low water at property located along the James River, near Villa Drive (Lot 3B-2-2) in the Town of Claremont, in Surry County. The request requires both a subaqueous and beaches and dunes permit.

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

Mr. Stagg explained that the project is located along the James River within the Town of Claremont in Surry County. The site is characterized as a sand beach. The upland parcel is unimproved. The applicant has indicated that the proposed ramp will be placed on the existing grade at the site. There are no public ramps in the area, although there are other similar private concrete ramps located along the shoreline within the Town of Claremont. The applicants have indicated they own both 18-foot and 17-foot boats, a jet-ski and they have immediate relatives with sailboats and other watercraft. While the applicants do not live at the subject property, they do live nearby within the Town of Claremont. The proposed uses for the ramp are river fishing trips, sailing, and other recreational boating.

Mr. Stagg said that the project would impact approximately 480 square feet of previously undisturbed jurisdictional beach. Surry County had not yet adopted the beaches and dunes ordinance which was made available to them by virtue of recent Code changes that became effective on July 1, 2008. As a result, the Commission was charged with acting as the local dunes and beaches board pursuant to Chapter 14, Subtitle III, of Title 28.2 of the Code. The channelward ten feet (120 square feet) of the ramp also required a subaqueous permit.

Mr. Stagg explained that in the Virginia Institute of Marine Science (VIMS), Shoreline Permit Application Report, they provided the following comments: "To reduce the cumulative environmental impacts resulting from boat ramps, it is preferable from an environmental perspective to utilize existing ramps that serve multiple users if available, rather than construct new private ramps for the use of single users. If public ramps are not available, constructing an open-pile pier to obtain water access is an option."

“A boat ramp at this sandy, high energy location would appear to require much maintenance to keep sand from filling in the boat ramp area. It would be anticipated that placing a ramp at this location would result in future additional impacts for structures to divert sand away from the ramp. Due to the site conditions at this location and the fact the site appears vacant we do not feel a ramp at this location is warranted.”

“If the need for a private boat ramp at this location can be justified, reducing the proposed width would decrease the impact area. In addition, an open-pile design or the use of ‘pavers’ with void area instead of concrete would reduce the amount of impacts to marine and shoreline resources and reduce the potential for secondary impacts on adjacent wetlands that a concrete filled ramp may have by interrupting tidal currents and sediment movement.”

Mr. Stagg noted that no other agencies had commented on the proposal and the project was not protested.

Mr. Stagg explained that there were no public boat ramps in the immediate area. The closest ramp was 25.5 miles from the Town of Claremont at the VDGIF Wildlife Management area along Lawnes Creek. The footprint of the ramp would impact a jurisdictional beach; however, the structure was proposed to be built along the existing grade of the beach, and would provide the applicants with river access for small watercraft. The width appeared appropriate to accommodate safe access by trailer launch method.

Mr. Stagg stated that while staff concurred with the VIMS assessment that the structure may require some maintenance to remove sand accumulation after storm events, staff did not believe this site was appropriate for the use of pavers, as ramp material or the use of an elevated open-pile structure, as suggested. Pavers would not likely remain in place during severe storm events and other open-pile structures along this reach had historically experienced considerable damage during past severe storms.

Mr. Stagg said that staff believed the structure met the Code requirement to allow for development in a manner consistent with the protection of coastal beaches since, in this case, the contour of the beach would not be changed and its function should not be altered, nor would any vegetation be destroyed. The impacts to subaqueous lands would also be minimal in nature. Accordingly, staff recommended approval with the following condition: the channelward ten (10) feet (subaqueous portion) shall be constructed on the upland and installed from the upland to avoid the necessity for cofferdams and to prevent uncured concrete from being placed within the river.

Commissioner Bowman asked for questions of staff. Associate Member Laine asked if the angle of the boat ramp was enough for offloading a boat. Mr. Stagg explained that a number of houses have a boat ramp and only small boats use this ramp.

Commission Meeting

Commissioner Bowman asked if it had a good slope. Mr. Stagg said this area was used for access for the Williamsburg celebration.

Commissioner Bowman asked the applicant if she wished to comment.

Louise Hansch, applicant, was sworn in and her comments are a part of the verbatim record. Ms. Hansch stated that her family had had this land for 53 years and used small boats so they did need this ramp.

Commissioner Bowman stated that the matter was before the Commission.

After a little further discussion, Associate Member Robins moved to approve the staff recommendation. Associate Member Laine seconded the motion. The motion carried, 8-0. The Chair voted yes.

Permit Fee____	\$ 25.00
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- 10. VINCENT RADLEY, #09-0725**, requests permission to install eight (8) dolphin clusters with lights to mark a dredged channel proposed at his property at 6476 Fairview Drive situated along the Potomac River in King George County.

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

Mr. Bacon explained that the Radley property is situated along the Potomac River approximately one mile upstream of Fairview Beach in King George County. The nearshore area in front of the property is wide and naturally shallow. Water depths range from -3 feet at the end of Mr. Radley's existing 350-foot long pier to approximately -6 feet 680 feet beyond the pier terminus. From the Radley shoreline it is approximately 2.3 miles to the navigation channel and 3.5 miles to the Maryland shore.

Mr. Bacon said that Mr. Radley owned a Sea Ray 480 with a draft of around 4 feet. He had requested a permit to install dolphin clusters to mark the proposed dredged channel that would lead straight into his pier from the -6 foot contour some 1,000 feet offshore. Mr. Radley maintained the dolphin clusters would be necessary for safe ingress and egress to and from his pier.

Mr. Bacon stated that since the dolphin clusters were associated with the pier that originated from Mr. Radley's riparian property, staff considered the structures to be appurtenant to the shore of the Commonwealth. As such, a permit was required from the Commission pursuant to the authority conferred by Section 28.1-101 of the Code of Virginia even though the structures were in Maryland waters. The dredged channel

portion of this project was also included with this permit application, however, since that aspect did not involve any structures, staff deemed that the dredging did not require authorization from the Commission.

Mr. Bacon explained that although the dredging did not require a VMRC permit, staff recommended that Mr. Radley consider using landmarks or range markers to position the vessel in the straight dredged channel in order to eliminate the need for dolphin clusters. Furthermore staff felt that with currently available GPS navigation equipment, properly positioning a vessel in the channel should not be difficult. In response to those concerns, Mr. Radley initially withdrew his request for the eight dolphin clusters. On November 19, 2009, however, Mr. Radley, through his agent, requested that staff reactivate and continue to process his application for the eight mooring clusters to mark the dredged channel area.

Mr. Bacon stated that in the Virginia Institute of Marine Science, Shoreline Permit Application Report, they acknowledged that the dolphin clusters may be necessary for navigation, as part of the proposed dredging project. In that same report, however, VIMS also stated that not all waterfront property was conducive to navigation or appropriate for deep draft boats or deep draft boat traffic.

Mr. Bacon said that neither the Department of Conservation, the Department of Environmental Quality, nor the Virginia Department of Game and Inland Fisheries, had expressed any concerns with the project.

Mr. Bacon explained that when staff reviewed proposals to build over State-owned or regulated submerged lands, they considered, among other things, the water dependency and the necessity for the proposed structures. The intended goal of this review was to limit the encroachment of structures to the minimum amount necessary to reasonably achieve the intended purpose and need. In this case staff believed the use of landmarks or range markers along with the boats navigation system should be adequate to navigate the dredged channel in front of Mr. Radley's pier. The elimination of the mooring piles would reduce potential adverse impacts to the subaqueous bottom, as well as, address the general safety of the boating public and the potential of additional building materials entering the waterway during storm or ice events in the Potomac River.

Mr. Bacon stated that after evaluating the merits of the project and considering all of the factors contained in §28.2-1205(A) of the Code of Virginia, staff was compelled to recommend denial of the application, as proposed.

Commissioner Bowman asked for questions of staff. There were none. He asked if the applicant or his representative wished to comment.

Karen Radley was sworn in and her comments are a part of the verbatim record. Ms. Radley explained that the dolphins were to mark the dredge area at the dock to allow for safe ingress and egress.

Commissioner Bowman asked for questions. There were none.

Craig Palubinski, agent, was sworn in and his comments are a part of the verbatim record. Mr. Palubinski stated it was a tight channel and an exposed area with a long fetch to the east.

Associate Member Holland asked about the marking being enough. Mr. Palubinski indicated that it would be lighted.

Associate Member Robins asked how they felt about the staff recommendation for the range markers as a visual aid. Ms. Radley said that they usually do not use the structure at night. They needed the lighted ones as a standard visual aid for marking the entire dredge area.

Associate Member Schick stated the lights would be at different levels or straight across the dock, as suggested before.

Commissioner Bowman asked for anyone in opposition who wished to speak. There were none. He asked for discussion or action by the Board.

Associate Member Robins stated that he appreciated the applicant’s concerns. He said the staff recommendation for denial was reasonable as well as encouraging the use of an alternative marker. Associate Member Tankard seconded the motion. The motion carried, 8-0. The Chair voted yes.

No applicable fees–Permit Denied

MARK CROSSLAND, #09-0548, requested a 30-day extension to remove the flat roofed boathouse adjacent to his property on Quantico Creek in Prince William County. Mr. Crossland who was originally given until March 15, 2010 was given an extension until April 15, 2010 to remove the structure.

Bob Grabb, Chief, Habitat Management, explained that Mr. Crossland had requested an extension for 30 days in order to come into compliance with the order of removal.

Associate Member Schick moved to approve the 30-day extension request. Associate Member Robins seconded the motion. The motion carried, 8-0. The Chair voted yes.

11. PUBLIC COMMENTS

LOBSTER FISHERY

Joe Kelly, Eastern Shore Fisherman, was present and his comments are a part of the verbatim record. Mr. Kelly stated that there was a need to establish a Lobster Fishery Management Plan. He explained that from Maine to Maryland, the states all have a plan in place. He said right now a Virginia waterman could not land their lobster catch in any other State, but fishermen from other States can land theirs in Virginia. He said there needed to be a level playing field for all. He said he was requesting help.

Commissioner Bowman asked for staff comments. Rob O'Reilly, Deputy Chief, Fisheries Management explained that to have a plan you need to have landings in the amount of 40,000 pounds and in Virginia there have been only 25,000 to 26,000 pounds, and Virginia was de minimis. He stated that Virginia does comply with the ASMFC in regards to this fishery, concerning management requirements. He said that the staff would have to do some research.

Commissioner Bowman instructed staff to look into this issue.

Associate Member Bowden explained that Virginia was at the southern end of the lobster area and there were several boats that worked off of the Eastern Shore. He said that since there was no plan any boat can land their catch in Virginia. He said he had discussed this with staff and thought something should have been done a year ago. He said that Mr. Travelstead had suggested that this would be taken to the Fisheries Management Advisory Committee (FMAC). He said he would like to see this discussed by the Commission.

No action was taken.

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12. PUBLIC HEARING: Consideration of Regulation 4VAC20-1230-10, et seq. concerning warm water shellfish harvest restrictions and public health.

Dr. Jim Wesson, Head, Conservation and Replenishment, gave the presentation. His comments are a part of the verbatim record. He provided a handout from the FDA and their approval of the changes being made. He said there was a letter from a James River waterman concerned with still being allowed to use of ice and that has been resolved. He said the last handout was the restrictions of other states, just a more condensed version.

Dr. Wesson explained that the Commission has been working with the Division of Shellfish Sanitation for a number of years to come up with these restrictions for shellfish harvest in the warmer water months. He said these restrictions were adopted to protect

public health from natural pathogens in the water that can become significant health risks in humans if the shellfish are subjected to temperature abuse after harvest. These restrictions had previously been included in 4VAC 20-720-10, et seq., "Pertaining to Restrictions on Oyster Harvest." Since the Food and Drug Administration (FDA) continues to require additional restrictions to protect the public health, and more and more of these regulations pertain to all types of shellfish, staff would like to rescind the restrictions from Regulation 4VAC 20-720-10 and establish a new regulation that will be pertinent to all shellfish. The regulation advertised is very similar to what we had in Regulation 4VAC 20-720-10, et seq., with a few changes.

Dr. Wesson said that since the last Commission meeting two significant changes have been made:

>Oyster harvests after the morning curfew will be limited to a five-hour period (from the time leaving the dock to return to the dock) instead of three-hour period listed previously. The harvester will still be required to get a special permit from VMRC and have an approved GPS track logger to verify the trip.

>Second, icing on the boat will be allowed for the James River to extend the harvest period beyond the daily curfew. The icing method must be approved by the Division of Shellfish Sanitation.

Dr. Wesson said that the Division of Shellfish Sanitation had provided rationales for the changes and also provided information about what other States are doing.

Dr. Wesson said that there is an e-mail, dated March 12, from the Shellfish Growers Association regarding requirements for shellfish harvest and it summarizes much of the issue as it now stands with the FDA and the Interstate Shellfish Sanitation Committee.

Dr. Wesson stated that the staff recommended the current regulations in Regulation 4VAC 20-720-106 be rescinded and the new regulation 4VAC 20-1230-10, et seq., "Pertaining to Restrictions of Shellfish."

Commissioner Bowman expressed his concern with the acceptance of the GPS device by the Courts, when the Law Enforcement officers take a case to court. Dr. Wesson said the concern was the time period from when the boat leaves the dock until it is returned. He said the device works like a cell phone and utilizes the satellite, which is as accurate as you can get.

David Grandis said the question would be if it allowed to be used in the court. He said he needed to check it out. Dr. Wesson explained that there was only a written log used now and it had not stood up in Court.

Commissioner Bowman asked Counsel to look at this issue. He said he was agreeable to everything as regards to protecting public health, but he did not want to put the officers in a bad situation when they go to Court with a case. Dr. Wesson stated that we were inline with other States and the FDA was requiring us to meet these requirements. He said this would help to keep us from having another vibrio case.

Associate Member Schick asked if other States were using this device. Dr. Wesson stated that other States were requiring the watermen to call in, but they had a smaller summer fishery than Virginia does.

Associate Member Bowden asked if the tracking devices were inline with other States. Dr. Wesson stated this was a concession to industry to give them more time after the curfew times. Associate Member Robins stated that it seemed to him that the tracking device would be essential in monitoring and allow more flexibility for watermen to work with the tides and not be constrained by curfews. Dr. Wesson said they had agreed to the GPS track logger in staff discussions with industry to change the length of time from 3 hours to 5 hours.

Commissioner Bowman said he was still concerned with enforcement and he did not want problems for Law Enforcement in Court. Associate Member Robins asked if there had been problems with the GPS on the Marine Police vessels in case of violation of the striped bass fishery. Commissioner Bowman said he did not believe there had been since these were Federal consent cases. Captain Randy Widgeon said that it has been raised a couple of times in Court as far as whether or not the GPS is certified and by whom. He said it usually works out.

Dr. Robert Croonenberghs, Virginia Department of Health, Division of Shellfish Sanitation, was present and his comments are a part of the verbatim record. Dr. Croonenberghs stated that this was a serious and precarious situation for the shellfish industry. He said there was a need to do all that can be done to protect the industry from any more vibrio cases which include oysters and clams. He said there had only been one case since 2000 in Virginia. He said if there was another case he did not know what the FDA would do. He said they might not allow sales during the summer or require post harvest processing before selling to market. He said the tracking device is the key to giving the watermen a means of working with the tides. He said it was hard to enforce the use of ice. He said the maximum time that can be allowed is five hours and there was a need to know if they are within the time restriction.

Commissioner Bowman opened the public hearing.

Richard Green, James River waterman, was present and his comments are a part of the verbatim record. Mr. Green said that harvest in the summer in the James River was not a problem like in other areas as the ice had worked well. He said the packers and dealers had provided the ice as they harvested and then it was iced and boxed and taken to

market. He said the Division of Shellfish Sanitation was satisfied and they want the same in the James.

Tommy Mason, Chincoteague, was present and his comments are a part of the verbatim record. Mr. Mason said he had talked with Croonenberghs and he liked the five hours for Seaside which allowed them to work low tides for three to four hours.

Commissioner Bowman asked when this needed to be effective. Dr. Wesson stated by May 1. Commissioner Bowman stated that there was need to find out more about the legality of the GPS device. Dr. Wesson said that a permit is required and it could be put on the permit that they agree.

A. J. Erskine, KCB Holdings, was present and his comments are a part of the verbatim record. Mr. Erskine said it was critical to protect the industry because if there is another incident there would be no industry. He said the FDA was very serious, and industry did not want more regulations. He said the ones that are at the meeting will do right, but those that are not here do not care about regulations. He said there are more getting into the oyster industry and aquaculture so there was a need to be careful when making regulations, but it was crucial.

Tom Gallivan, Eastern Shore, was present and his comments are a part of the verbatim record. Mr. Gallivan said he agreed with AJ as there was a need to protect the industry. He said he agreed with the permit and accepted the use of the GPS solution. He said VMRC was getting more watermen into the industry last year with their projects. He said he agreed with the 5-hour limit.

Tom Walker, Eastern Shore, Walker Bros., was present and his comments are a part of the verbatim record. Mr. Walker said he had met two times with Dr. Croonenberghs. He said we need to move forward and work with staff, the Health Department and industry as Virginia cannot stand another case of Vibrio. He said everybody had been flexible.

Lake Cowart, Cowart Seafood, was present and his comments are a part of the verbatim record. Mr. Cowart said he wished to reiterate what the others have said. He said FDA is looking at our industry and we have a safe industry. He said Virginia cannot take anymore cases of Vibrio as it could result in no summer industry or post harvest processing which could kill the oysters and is very expensive. He said he did not like more regulations, but they were necessary.

Commissioner Bowman said he was pleased with the comments from industry and to see the Division of Shellfish Sanitation working with the industry. He said this would be added to the next month's agenda and still have the regulation in place in time.

Associate Member Bowden said on the Seaside there are a lot of small harvesters who have problems with the ice and there needs to be other options without a tracking device.

Dr. Wesson said staff was aware of this and it had been discussed. He said there was a need to involve the small harvesters on the Seaside. He said he was not at all comfortable with technology. He said watermen need to be involved in the discussion and to come back next month.

No action was taken.

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13. PUBLIC HEARING: Consideration of amendments to Regulation 4VAC20-960-10, et seq. to modify the open commercial fishing season.

Laura M. Lee, Fisheries Management Specialist, gave the presentation. Her comments are a part of the verbatim record. Ms. Lee explained that this was a public hearing.

Ms. Lee explained that Mr. Jim Dawson, a commercial tautog fisherman, had met with staff in January to inquire about the possibility of modifying the commercial fishing season. Mr. Dawson was interested in a commercial tautog fishing season that is open from November through April, which is Option 1 in Table 3. Such a closure would be more in line with the current start of the closed season for the recreational tautog fishery, which is May 1.

Ms. Lee said that the options presented in Table 3 were all previously approved by the ASMFC for reducing harvest exploitation in Virginia's commercial sector (as required by Addendum V to the Interstate Fishery Management Plan for Tautog) and would not need to be submitted for approval from the ASMFC.

Ms. Lee explained that staff recommended adoption of the amended Regulation 4VAC 20-960-10, et seq., to provide for a May 1 through November 12 commercial closed season.

Commissioner Bowman opened the public hearing.

Jim Dawson, Chincoteague waterman, was present and his comments are a part of the verbatim record. Mr. Dawson said that he was requesting the May 1 through November 12 closed season.

Harry Doernte, waterman, was present and his comments are a part of the verbatim record. Mr. Doernte stated he agreed with Mr. Dawson.

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

Associate Member Tankard moved to accept the staff recommendation. Associate Member Schick seconded the motion. The motion carried, 7-0. Associate Member Laine absent from the meeting.

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14. MODIFIED POUND NET LEADERS: Consideration of amendments to Regulation 4VAC20-20-10 et seq. to require year-round in areas west of the Chesapeake Bay Bridge-Tunnel. Request for public hearing.

Lewis Gillingham, Head, Saltwater Fishing Tournament, gave the presentation. His comments are a part of the verbatim record.

Mr. Gillingham stated that this was a request for a public hearing. The staff request was in response to the October hearing, when the Commission questioned as to why this was being done only for pound nets located east of the CBBT. For October public hearing only those Virginia Tidal waters located east of the CBBT had been advertised for regulatory modifications in the Notice. Staff indicated at that time this issue would be revisited before the Commission in early 2010 and would include those Virginia tidal waters located west of the CBBT.

Mr. Gillingham explained this was a request for the same restrictions for the west side of the CBBT.

Commissioner Bowman asked for action by the Board.

Associate Member Robins moved to advertise for the public hearing. Associate Member Tankard seconded the motion. The motion carried, 7-0. Associate Member Laine was absent from the meeting.

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15. GILL NET AND SPINY DOGFISH LIMITED ENTRY PROGRAMS: Consideration of amendments to the limited entry programs contained in Regulations 4VAC20-490 and 4VAC20-1190. Request for public hearing.

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

Mr. Grist stated that this was a two for one. He said the Gill Net Subcommittee had met and discussed the limiting of nets on any one vessel. The Committee recommended a vessel limit, whereby the combination of all gill net licenses on board a vessel could not exceed 12,000 feet, regardless of the number of Class A and Class B gill net permittees were on board the vessel. He said the subcommittee recommended that no agents be

allowed for the spiny dogfish limited entry permit. He said the subcommittee still supported no permit transfer, unless it was a case of the permittee's death.

Mr. Grist said that the FMAC had met the night before and wanted the Commission to consider allowing transfers in significant hardships cases, such as deaths and military service.

Mr. Robins suggested that the recommendation include an annual review of the transferability of the permit, as he could not see the fishery supporting 100 boats.

Mr. Grist said that they were just looking to get through this year for now and once the 2009-2010 data were available for review then this could be brought back to the Commission for them to look at the limited entry.

Rob O'Reilly, Deputy Chief, was present and his comments are a part of the verbatim record. Mr. O'Reilly explained that FMAC had wanted to consider this change in transferability, but he knew that the Commission understood how difficult it was to pin down a hardship. He suggested that the Commission only advertise for transfers in the case of a death, and at the public hearing any modification could be considered.

Commissioner Bowman asked for action by the Commission.

Associate Member Tankard moved to advertise for an April public hearing. Associate Member McConaugha seconded the motion. The motion carried, 8-0.

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15a. THE CLAM INDUSTRY REQUESTED AN EXTENSION TO THE HARVEST SEASON FOR THE NEWPORT NEWS CLAM MANAGEMENT AREA THROUGH JUNE 30, 2010. In accordance with current regulation the season would end April 30, 2010. This was a request for a public hearing in April.

Rob O'Reilly, Deputy Chief, Fisheries Management, gave the presentation. His comments are a part of the verbatim record.

Mr. O'Reilly explained that this was a request by industry to extend the Newport News Clam Management area harvest season through June 30, 2010. He said the season typically would close April 30, 2010.

Mr. O'Reilly stated this was a request for a public hearing.

Commissioner Bowman asked how the catch was. Mr. O'Reilly responded that it looked fine and Dr. Wesson had indicated that the stocks were sustainable as well.

Commissioner Bowman asked for action by the Commission.

Associate Member Tankard moved to accept the staff recommendation. Associate Member Schick seconded the motion. The motion carried, 8-0.

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16. REPEAT OFFENDERS.

Sergeant Jamie Green gave the presentation. His comments are a part of the verbatim record.

Christopher S. Nelson—was sworn in and his comments are a part of the verbatim record.

Sergeant Green explained that Mr. Nelson had been charged November 19, 2009 with unculled oysters which dredging in the Rappahannock River. He said he was convicted. He said all permits were forfeited until he appeared before the Commission.

Mr. Nelson apologized for what has happened. He said the undersized oysters were the fault of the culler as he thought he knew what he was doing as he had told him. He said he had never been ticketed before now. He said in the instance of the oversized oysters he was not aware that the Oyster Buyback Program was over and it was only a half bushel and threw them into the pile. He again apologized and promised to never do it again.

Sergeant Green stated that the staff recommendation was for 12 months probation starting immediately and if there were any other violations during that time he would have to come back to the Commission.

Commissioner Bowman asked for action by the Board.

Associate Member Laine moved to accept the staff recommendation. Associate Member Tankard seconded the motion. The motion carried, 8-0.

Kenneth Horsley—was sworn in and his comments are a part of the verbatim record.

Sergeant Green explained that Mr. Horsley was charged on February 22, 2010 with unculled oysters while he was working in the York River. He said he was convicted by the York County Court.

Sergeant Green stated that the staff recommendation was for 12 months probation starting immediately and if there were any other violations during that time he would have to come back to the Commission.

Mr. Horsely explained that there were only 8 bushels on the vessel and only one person received a ticket.

Commissioner Bowman asked for action by the Board.

Associate Member Robins moved to accept the staff recommendation. Associate Member Holland seconded the motion. The motion carried, 8-0.

Henry Charles Parker – was sworn in and his comments are a part of the verbatim record.

Sergeant Green explained that Mr. Parker was charged with possession of uncultured oysters while dredging in the Rappahannock River. He said the permits for Area 3 had been forfeited until he came before the Commission. He said he had worked the river all of his life and this was the first violation

Mr. Parker said he had a make shift cull handle and did not realize oysters were too large. He said he was 49 and worked the river all of his life and this was his first violation.

Henry Charles Parker, Sr., was present but he did not comment.

Sergeant Green said that the staff recommended 12 months probation starting immediately and any further violations occurring with that 12 months would require appearing before the Commission.

Commissioner Bowman asked for action by the Board.

Associate Member Tankard moved to accept the staff recommendation. Associate Member Laine seconded the motion. The motion carried, 8-0.

Carl O. Lawson – sworn in and his comments are a part of the verbatim record.

Sergeant Green explained that Mr. Lawson was charged with possession of uncultured oysters while dredging in the Rappahannock River. He said all permits for area 3 were forfeited until he appeared before the Commission.

Mr. Lawson said that it was not his fault, but it was the culler's fault. He said he had never had a violation for oysters.

Sergeant Green said that the staff recommended 12 months probation starting immediately and if any further violations occur during that time he must appear before the Commission.

Commissioner Bowman asked for action by the Board.

Associate Member Holland moved to accept the staff recommendation. Associate Member Tankard seconded the motion. The motion carried, 8-0.

Carl D. Belvin—sworn in and his comments are a part of the verbatim record.

Sergeant Green explained that Mr. Belvin was charged with possession of uncultured oysters while dredging in the York River.

Mr. Belvin explained that it was only his second violation charge.

Sergeant Green said that the staff recommendation was for 12 months probation and if any further violations occur within that time, he will have to come back before the Commission.

Commissioner Bowman asked for action by the Board.

Associate Member Holland moved to accept the staff recommendation. Associate Member tankard seconded the motion. The motion carried, 8-0.

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Christopher S. Nelson, waterman, explained that he had been give another summons for oysters being in a basket when they were supposed to tub out the oysters. He said he had been a culler for 8 years and this had never come up before.

Sergeant Green stated that this had not been adjudicated so it had not gone into the record yet.

Commissioner Bowman explained that in the Code of Virginia it was stipulated that it had to be a metal tub, not a basket.

No action was taken.

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There was no further business and the meeting was adjourned at approximately 4:55 p.m. The next regular meeting will be held Tuesday, April 27, 2010.

Steven G. Bowman, Commissioner

Katherine Leonard, Recording Secretary