

MINUTES

COMMISSION MEETING

January 22, 2019

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
Wayne France	
Chad Ballard	
John Tankard III	
Christina Everett	Associate Members
Heather Lusk	
James E. Minor III	
Ken Neill, III	
Kelci Block	Assistant Attorney General
Jamie Hogge	Recording Secretary
Dave Lego	Bs. Systems Specialist
Todd Sperling	Bs. Systems Manager
Robert O'Reilly	Chief, Fisheries Mgmt.
Pat Geer	Deputy Chief, Fisheries Mgmt.
Andrew Button	Head, Conservation and Replenishment
Stephanie Iverson	Fisheries Mgmt. Manager, Sr.
Jill Ramsey	Fisheries Mgmt. Specialist
Jennifer Farmer	Regulatory Coordinator
Alex Aspinwall	Fisheries Mgmt. Specialist
Lewis Gillingham	Director, SWFT
Sara Blachman	Fisheries Mgmt. Specialist
Anna-Mai Christmas	Fisheries Mgmt. Specialist
Jonathan Depaz	Fisheries Mgmt. Specialist
Alexa Kretsch	Fisheries Mgmt. Specialist
Ethan Simpson	Fisheries Mgmt. Specialist

Commission Meeting

**18222
January 22, 2019**

Rick Lauderman
Warner Rhodes
Brian Elliott
John Poch

Chief, Law Enforcement
Deputy Chief, Law Enforcement
Marine Police Officer
Marine Police Officer

Tony Watkinson
Randy Owen
Jeff Madden
Jay Woodward
Mark Eversole
Hank Badger
Bradley Reams
Rachael Peabody
Daniel Faggert

Chief, Habitat Management
Deputy Chief, Habitat Management
Environmental Engineer, Sr.
Environmental Engineer, Sr.
Environmental Engineer, Sr.
Environmental Engineer, Sr.
Environmental Engineer, Sr.
Environmental Engineer, Sr.
Surveyor, Engineering/Surveying

Virginia Institute of Marine Science (VIMS):

Lyle Varnell

Emily Hein

Mark Luckenbach

Others present:

Debra Melisi
Paul Bull
Jim Gunn
Ed Doyle
Chris Frye
Adena Schonfeld
Ann Ropp
Linda Schaffner
Dave Bugg
Scott Hardaway
and others

John Faver
John Saccker
Joseph Scott
Neville Reynolds
Philip Morston
Shelby White
Scott Smith
Craig Palubinski
Peggy Bugg
Cory Gray

Mark Williams
Gwen Davis
Rich Calvert
Megan Wood
Troy Hartley
Kristen Prossner
Jim Lang
Tyler Rosa
Angela Kirg
Wes Blow

Commissioner Bowman called the meeting to order at approximately 9:33 a.m. Associate Member Zydron was absent.

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

Pat Geer, Deputy Chief, Fisheries Mgmt., introduced four (4) new members of the Fisheries Management team. Mr. Geer also announced that Sara Blachman, Fisheries Mgmt. Specialist, was leaving the agency in February to continue her career at VIMS. Mr. Geer’s comments are a part of the verbatim record.

APPROVAL OF AGENDA: Commissioner Bowman asked if there were any changes from the Board members or staff. Tony Watkinson, Chief, Habitat Management, requested that Agenda Item #10 be removed by the request of the applicant. Mr. Watkinson’s comments are a part of the verbatim record.

Associate Member Tankard moved to approve the agenda as amended. Associate Member Minor seconded the motion. The motion carried, 8-0. Chair voted yes.

* * * * *

MINUTES: Commissioner Bowman asked if there were any changes or corrections to be made to the December 11, 2018 Commission meeting minutes.

Associate Member France moved to approve the minutes as presented. Associate Member Ballard seconded the motion. The motion carried, 8-0. Chair voted yes.

* * * * *

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

* * * * *

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

Tony Watkinson, Chief, Habitat Management, reviewed 3 page 2 items A, B and C for the Board Members. Mr. Watkinson recommended that Items 2A and 2B are heard and voted separately from 2C. Mr. Watkinson stated that the applicant for Item 2C was present and would be able to explain the project. Mr. Watkinson’s comments are a part of the verbatim record.

There were no public comments.

Associate Member France moved to approve the page two items A and B as presented. Associate Member Minor seconded the motion. The motion carried 8-0. Chair voted yes.

The Commission next received a briefing on item C, the City of Norfolk resiliency project. Mr. Neville Reynolds, representing VHB acting as the City’s consultant, provided the briefing information.

Associate Member Neill moved to approve the page two item C as presented. Associate Member Everett seconded the motion. The motion carried 8-0. Chair voted yes.

2A. VIRGINIA ELECTRIC AND POWER COMPANY, #18-1495, requests authorization to replace nine (9) existing transmission line support structures and 1.7 miles of transmission line, requiring 15 aerial crossings of approximately 2,286 linear feet of State-owned subaqueous bottom, eight (8) temporary crossings for construction access involving 235 linear feet of submerged land and 78 square feet of submerged lands for one (1) tower replacement, to facilitate construction of the Line 224 Pamunkey River Rebuild Project in New Kent and King William Counties. Recommend approval with our standard instream work permit conditions and a February 15 through June 30 instream work time-of-year restriction, of any given year, to protect anadromous fishes. Additionally, staff recommends an encroachment royalty of \$7,014.00 for the encroachment of the lines across 2,286 linear feet of State-owned subaqueous lands and the tower over 78 square feet of submerged land.

Royalties: (Encroachment of 2,286 lf. @ \$3.00/lf. & Encroachment of 78 ft. ² @ \$2.00/sf.)	\$ 7,014.00
Fee:	\$ 100.00
Total Fees:	\$ 8,114.00

2B. VIRGINIA ELECTRIC AND POWER COMPANY, #18-1496, requests authorization to replace seven (7) existing transmission line support structures and 1.3 miles of transmission line, requiring six (6) aerial crossings of approximately 1,473 linear feet of State-owned subaqueous bottom, six (6) temporary crossings for construction access involving 54 linear feet of submerged land and 470 square feet of submerged lands for one (1) tower replacement, to facilitate construction of the Line 224 Mattaponi River Rebuild Project in King William and King and Queen Counties. Recommend approval with our standard instream work permit conditions and a February 15th through June 30th instream work time-of-year restriction, of any given year, to protect anadromous fishes. Additionally, staff recommends an encroachment royalty of \$5,359.00 for the encroachment of the lines across 1,473 linear feet of State-owned subaqueous lands and the tower over 470 square feet of submerged land.

Royalties: (Encroachment of 1,473 lf. @ \$3.00/lf. & Encroachment of 470 sf. ² @ \$2.00/sf.)	\$ 5,359.00
Fee:	\$ 100.00
Total Fees:	\$ 5,459.00

- 2C. **CITY OF NORFOLK, #18-1554**, requests authorization to conduct a community-wide coastal resiliency project involving the Chesterfield Heights and Grandy Village communities, which will impact submerged lands by the construction of earthen berms, riprap revetments and living shorelines extending along 5,500 linear feet of Eastern Branch of the Elizabeth River and Ohio Creek shorelines and extending a maximum of 65 feet channelward of the mean low water, including oyster habitat restoration along the Eastern Branch of the Elizabeth River and a tide gate and pump system within Haynes Creek, in the City of Norfolk.

Fees:	\$ 100.00
-------	-----------

* * * * *

3. **CONSENT AGENDA ITEMS. There were no Consent Agenda Items to be heard.**

* * * * *

4. **CLOSED MEETING FOR CONSULTATION WITH, OR BRIEFING BY, COUNSEL.** No closed meeting was necessary.

* * * * *

5. **DEBRA MELISI, #18-1784.** Appeal by 28 freeholders of the December 11, 2018, decision by the Northumberland County Wetlands Board to approve the installation of a 125 linear foot riprap revetment, extending over a jurisdictional beach, adjacent to property situated along the Potomac River, at 145 Riverside Court.

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

Mr. Madden explained that the project is located in the Harbour Pointe subdivision, at the confluence of the Potomac River and the Chesapeake Bay, in Northumberland County. The only improvements to the beach on the subject property are two deteriorating groins, neither of which have been maintained. The Harbour Pointe Home Owner Association's (HOA)

property, a community beach, is located approximately 720 feet west of and upstream of the applicant's property.

Recent storm events have washed away the protective dune along the applicant's back beach, leaving an approximate seven foot high escarped bank. The applicant's home is located approximately 65 feet from the top of the scarp. Their fresh water well is situated approximately 15 feet from the top of the raw bank. The stated purpose of the project, as provided in the submitted application, is to protect the existing home and property from erosion.

The Northumberland County Wetlands Board considered the application at their December 11, 2018, public hearing. The project was approved unanimously.

Mr. Madden further explained, that after careful review of the record taken as a whole, staff is unable to conclude that the Northumberland County Wetlands Board erred procedurally in their decision to approve the 125-foot revetment along the Melisi property and that they made a decision consistent with the standards for use of the jurisdictional beach considering the evidence provided. In addition, the Board approved the project based on their experience with similar structures along the Potomac River. Staff recommends, therefore, that the Commission uphold the Board' decision to approve the project as proposed.

Mr. David Whidden provided testimony on behalf of the appellants.

Mr. Joseph Scott, agent for the applicant, explained the Project.

Ms. Debra Melisi provided testimony.

All comments are part of the verbatim record.

The matter was before the Commission for discussion and action.

Associate Member Neill made a motion to approve staff recommendation. Associate Member France seconded the motion. The motion carried, 8-0. Chair voted yes.

* * * * *

6. **DERRICK CARPINELLI, #18-1630**, requests authorization to construct approximately 103 linear feet of bulkhead, 10 feet of riprap revetment and 98 linear feet of flexamat stabilization, and install a 48-foot long by 6-foot wide open pile commercial pier with a 10-foot by 80-foot floating dock, along the Southern Branch Elizabeth River at 136 Battlefield Boulevard in the City of Chesapeake. This project requires a tidal wetlands and subaqueous permit.

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

Ms. Peabody advised that the Commission was acting as the Wetlands Board.

Ms. Peabody explained that the proposed project takes place along a commercial lot that contains a restaurant in the process of rehabilitation, which sits up to three (3) feet from the shoreline at its closest point. The subject shoreline is along the original streambed of the Southern Branch Elizabeth River, just north of the locks for the Intracoastal Waterway. The existing shoreline along the property consists of stone and recycled concrete riprap revetment and fill topsoil that has settled over time. The majority of the wetlands on site are volunteer salt bush that have grown within the riprap revetment. The neighboring property to the west is Great Bridge Lock Park, which contains a natural fringe marsh growing channelward of an existing bulkhead. The adjacent parcel to the east has a riprap shoreline.

The applicant has applied to construct a bulkhead, directly seaward of the building, and to construct a Flexamat stabilization system along the shoreline adjacent to the parking lot. Flexamat is a concrete grid mat system with cells that can be planted with vegetation. The Flexamat will be planted with native wetland and buffer vegetation. Additionally, the applicant is proposing to rebuild an existing floating pier to be used by restaurant patrons.

Although a living shoreline would be the ecologically preferable shoreline treatment along this property, the VMRC Wetlands Guidelines stipulate that alteration of the shoreline may be justified in order to "protect property from significant damage or loss due to erosion and other natural causes." The applicant has provided justification that a bulkhead is needed to stabilize the settling upland and the compromised restaurant. Furthermore §28.2-1308(A)(2) states that "development in Tidewater Virginia shall be concentrated in wetlands of lesser ecological significance, in vegetated wetlands that have been irreversible disturbed before July 1, 1972 and non-vegetated wetlands which have been irreversibly disturbed prior to January 1, 1983." Historic imagery indicates that this shoreline has been a rip rap shoreline since at least 1963. It is staff's opinion that the current shoreline represents "wetlands of lesser ecological significance" and complies with the standards for use and development of wetlands found in §28.2-1308 of the Code of Virginia.

In addition, after numerous discussions and revisions with staff, the applicant has revised his original design of a fully bulkheaded shoreline and reduced the bulkhead by 100 linear feet to include 100 linear feet of Flexamat and planting, instead. This system will introduce an additional 830 square feet of native plants to the site. The loss of 195 square feet of vegetated wetlands, from the bulkhead, requires mitigation at New Mill Creek Tidal Mitigation Bank.

The proposed commercial, open-pile timber pier and floating dock are consistent with VMRC’s "Criteria for the Siting of Marinas or Community Facilities for Boat Mooring." The pier is intended to provide access to restaurant patrons and, in staff’s opinion, will not adversely impact navigation. Vessel use in this reach of the upper Southern Branch Elizabeth River is considered light, given the culverted crossing of Battlefield Boulevard situated approximately 385 feet upstream.

Therefore, after evaluating the merits of the project and considering all of the factors contained in §28.2-1200 and §28.2-1302(10)(B) of the Code of Virginia and the Wetlands Mitigation-Compensation Policy and Supplemental Guidelines, staff recommends approval of the project as proposed contingent on receipt of the purchase of 195 tidal vegetated wetlands credits from the New Mill Creek Mitigation Bank.

Richard Calvert, agent for the applicant, was present and sworn in. His comments are a part of the verbatim record.

Mr. Calvert agreed to all fees and stipulations associated with the project.

No one else spoke in support or opposition of the project.

The matter was before the Commission for discussion and action.

Associate Member Minor made a motion to approve staff recommendation. Associate Member France seconded the motion. The motion carried, 8-0. Chair voted yes.

Royalties: (Encroachment of 1,088 sq. ft. @ \$1.00/ ft.)	\$ 1,088.00
Fee:	\$ 100.00
Total Fees:	\$ 1,188.00

* * * * *

- ELIZABETH PLACE BUILDING COMPANY LLC, #18-0475**, requests authorization to construct an 11-slip community pier, each slip with an uncovered boatlift, and a 230-square foot open-sided gazebo to serve a residential subdivision on the Western Branch Elizabeth River at 1815 Dock Landing Road in the City of Chesapeake. This project requires a tidal wetlands and subaqueous permit.

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

Ms. Peabody advised that the Commission was acting as the Wetlands Board.

The applicant proposes to construct an 11-slip open-pile community pier for the use of the homeowners in a new 12-lot subdivision, called Elizabeth Place. Of the 12 homes within the subdivision, five will be built adjacent to the water, but are not platted as riparian properties. The project includes an open sided gazebo, floating dock, and 11 boat slips for the use by members of the homeowner's association. The project will result in wetland shading impacts of 424 square feet as a result of the pier walkway and will encroach over 6,239 square feet of submerged lands.

The proposed 6-foot wide walkway over wetlands is consistent with the VMRC's Wetlands Guidelines which state that "utilization of open-pile type structures for gaining access to adequate water depths is generally preferred." Additionally, the proposed 11-slip community pier adheres to VMRC's "Criteria for the Siting of Marinas or Community Facilities for Boat Mooring" and the Commission's preference for a single, community-use pier over multiple riparian, private use piers.

Therefore, after evaluating the merits of the project and considering all of the factors contained in §28.2-1205(A) and §28.2-1302(10)(B) of the Code of Virginia, staff recommends approval of the project as proposed contingent on the applicant's agreement to a permit condition specifying that language prohibiting the construction of private piers at any individual riparian waterfront lot that may be platted for the subdivision and the restrictions be recorded in the covenants and restrictions of the property owner's association documents.

Staff feels that no compensation is necessary for the shading of tidal wetlands. Lastly, staff recommends a royalty of \$9,358.50 for the encroachment of the proposed community pier over 6,239 square feet of State-owned submerged land calculated at \$1.50 per square foot.

Richard Calvert, agent for the applicant, was present and previously sworn in. His comments are a part of the verbatim record. Mr. Calvert agreed to all fees and stipulations associated with the project.

The matter was before the Commission for discussion and action.

Associate Member Tankard made a motion to approve staff recommendation. Associate Member Ballard seconded the motion. The motion carried, 8-0. Chair voted yes.

Royalties: (Encroachment of 6,239 sq. ft. @ \$1.50/ sq. ft.)	\$ 9,358.50
Fee:	\$ 100.00
Total Fees:	\$ 9,458.50

* * * * *

8. **MARK E. WILLIAMS and GWEN WILLIAMS DAVIS, #18-0357**, request authorization to retain an 80-foot long by 4.5-foot wide private, non-riparian pier with a 104-square foot platform and adjacent 61-foot long by 18-foot wide enclosed boathouse, boat lift, and storage area in Healy Creek, emanating from an easement on riparian property belonging to Mr. Edward C. Doyle, Jr., at 1189 Horse Point Road in Middlesex County. Mr. and Mrs. Doyle object to the existing structures.

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

Mr. Woodward explained that in the fall of 2017, staff was contacted by Mr. Edward Doyle, the owner of riparian property at the confluence of Healy Creek and the Piankatank River at 1189 Horse Point Road in Middlesex County, inquiring about recent construction activities at a pier and boathouse on the creek adjacent to his property. Mr. Doyle indicated that the entire structure was unauthorized, was built into the creek off an easement on land belonging to him, and that the recent construction of a deck attached to the pier was undertaken by Mark Williams, the holder of the easement, and asked staff to investigate the matter. Our investigation revealed that a finger pier and wet slip at the structure had recently been decked over, and additional repairs including new support piles for the boathouse and pier had been done at the direction of Mr. Williams without prior application or authorization.

The work was done by a marine contractor in Deltaville, Mr. Brian Fletcher of Delta Marine, in 2015. While Mr. Fletcher had previously contacted staff about repairing a private pier at the site, we were not made aware that the pier originated from an easement and not from riparian property. We could find no record of a VMRC permit for the existing non-riparian private pier and boathouse emanating from the easement and, as such, the structures are considered by staff to be unauthorized. After much discussion over several months with both parties, staff indicated to Mr. Williams and his attorney, Mr. A. Davis Bugg, that the unauthorized structures would have to be removed from State-owned subaqueous bottom, or an after-the-fact Joint Permit Application (JPA) could be submitted in an effort to lawfully retain the existing non-riparian structures on the creek. Staff indicated that such a submittal in no way guaranteed approval by the Commission.

We received the JPA on March 12, 2018, and began the necessary public interest review. The application requested approval to retain all of the existing structures in the creek, including the recently added deck, and included plans and drawings of the as-built, existing structures. The JPA indicated that the boathouse and pier were build prior to 1967, and included a copy of a deeded easement dated October 10, 1967, which described a “covered pier which extends Eighty (80) feet into the waters of a cove of Healey’s Creek” on the east

side of land belonging to Edwin F. Conger, predecessor in title to Mr. Doyle. Upon receipt of the application, staff requested additional information as to when the pier and boathouse were constructed, by whom, and under whose authority. On April 24, 2018, staff received additional information from Mr. Bugg, indicating that the boathouse and pier was built by Mr. Williams' grandparents, and included a second copy of the deeded easement previously submitted with the JPA, as well as a second deed of easement, dated October 29, 1975, which references "a certain pier which extends into the waters of a cove of Healy's Creek", but there is no mention of a covered pier or boathouse. On July 24, 2018, staff received another letter from Mr. Bugg with additional documents, and estimated that the boathouse was built in 1973 or 1974, not prior to 1967 as stated in the JPA. Mr. Bugg's letter included yet another copy of the deed of easement which included the word "covered" above the word "pier" in the easement. The letter also included a copy of a personal note which Mr. Bugg purports that Mr. Conger intended the original easement to include the right to a covered pier – i.e. a boathouse, and further stated that the Virginia Marine Resources Commission is not the appropriate body to determine issues related to the easement, rather those issues should be resolved by the Circuit Court of Middlesex County. He closes the letter by indicating the VMRC should defer the matter until the Circuit Court makes a determination.

The non-riparian pier and boathouse belonging to the Williams' was built after 1962, and such structures are not exempt under §28.2-1203(A)5 of the Code of Virginia because they are not in fact riparian, but rather were built off of an easement of waterfront property by predecessors in title. Staff has received numerous and varying copies of the Deed of Easement granting access to the water. Other than the fact there is an easement for some type of pier, be it covered or not, any difference of opinion between the easement holder (applicant) and the property owner (protestant) regarding the extent of what the easement may include seems to be a case for them to resolve in the courts, and not appropriate for the Commission to decide. We can only make our recommendation on the appropriate use of State-owned submerged lands, not the easement.

In this case, the boathouse and storage area represent a substantial encroachment over State-owned submerged lands that are not necessary for access to the waterway from an easement granted to a non-riparian owner.

Accordingly, staff recommends after-the-fact approval of only the 4-foot, 6-inch wide open-pile pier which extends 65 feet, 6 inches channelward of mean low water onto the submerged lands of the Commonwealth, with a standard triple permit fee of \$300.00. Given the size of the boathouse, storage area and deck recommended for removal, and the fact that it has existed in this location for over 40 years, staff believes 90 days is a reasonable period of time for removal of all unauthorized structures. Should the Commission adopt this recommendation, and the applicant agree to comply, staff would not recommend a civil charge in this matter, given the long and involved history associated with the property and structures. Should the applicant not comply with any direction by the Commission for removal within the 90 day timeframe, staff would also recommend forwarding the matter

to the Office of the Attorney General for further enforcement action.

In the event the Commission chooses to issue an after-the-fact permit for the boathouse, storage area, and deck, staff would recommend any such approval include a civil charge for the applicants in the amount of \$1,000.00, given the minimal degree of noncompliance and minimal environmental impact associated with the after-the-fact permit.

Dave Bugg, attorney representing the applicants was present and gave his arguments. His comments are a part of the verbatim record.

John Favor, attorney representing the protestant Mr. Doyle, was present and sworn in. His comments are a part of the verbatim record.

There were two (2) people present that were sworn in and spoke in opposition. Their comments are a part of the verbatim record.

Commissioner Bowman asked the applicants' attorney if his client agreed to the fines proposed. The attorney stated that his client agreed to the fines proposed by staff recommendation.

The matter was before the Commission for discussion and action.

Associate Member Tankard made a motion to grant after-the-fact approval for all of the existing structures, contingent upon payment of a triple permit fee in the amount of \$300 and a one-time civil charge payment, as agreed, in the amount of \$1,000 in lieu of further enforcement action. Associate Member Lusk seconded the motion. The motion carried, 7-1. Chair voted yes. Associate Member France voted no.

Civil penalty: (After the fact)	\$ 1,000.00
Fee:	\$ 300.00
Total Fees:	\$ 1,300.00

- 9. NATIONAL AERONAUTICS AND SPACE ADMINISTRATION, #18-1590,** requests authorization to install two (2) sets of three (3) approximately 150-foot long stone offshore breakwaters and place approximately 1.3 million cubic yards of sandy beach nourishment material landward of the breakwaters along approximately 19,850 feet of shoreline situated along the Atlantic Ocean on and adjacent to Wallops Island. The sandy material will be mined from the north end of Wallops Island, where the original nourishment has accreted due to longshore transport. Both a Coastal Primary Sand Dune/Beach permit and a Submerged Lands permit will be required.

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

Mr. Badger explained that the Wallops Flight Facility (WFF) is located in the northeastern portion of Accomack County and is comprised of the Main Base on the mainland, and Wallops Island. The Island is bounded by Chincoteague Inlet to the north, Assawoman Inlet to the south (which has filled in), and the Atlantic Ocean to the east. The shoreline is protected by a stone riprap revetment from the middle section of the island's oceanfront and geotextile tubes on the southern end of the island.

The ocean has encroached substantially toward the launch pads, infrastructure, and the test and training facilities belonging to the National Aeronautics and Space Administration (NASA), the U.S. Navy, and Mid-Atlantic Regional Spaceport (MARS). At the present time, the southern launch pad is within approximately 300 feet of mean high water and the existing stone seawall is unprotected from storm wave action do to the lack of nourishment, placing the Wallops Island facilities at risk.

NASA and MARS are currently constructing new facilities on Wallops Island to support launching of orbital rockets that carry payloads to the International Space Station. The launches began last year.

A permit was issued by the Commission on February 22, 2011, to extend the existing Wallops Island rock seawall 4,600 feet to the south and place approximately 3,199,000 cubic yards of sand along 19,400 linear feet of their shoreline, extending the beach east a maximum of 240 feet beyond the seawall. The sand for the project was dredged from deposits in the Atlantic Ocean beyond Virginia's three-mile territorial limit. The shoreline was originally nourished in early 2012 and re-nourished in 2014 after Hurricane Sandy and other northeasters.

The long-term erosion rate along Wallops Island and Assawoman Island is approximately 14 to 17 feet per year. Since the original 2012 sand replenishment project was completed and again after the 2014 re-nourishment, the sand has eroded from the southern and middle portions of the shoreline and has moved or accreted to the northern section of the island, creating a beach and dune system out of an area that was partially over subaqueous bottom.

The County of Accomack has not yet adopted the model Coastal Primary Sand Dune Zoning Ordinance. As a result, the Commission is responsible for administering the provisions of the ordinance within that locality.

The project is protested by The Nature Conservancy (TNC). TNC owns 14 barrier islands along the Eastern Shore of Virginia collectively known as the Virginia Coast Reserve (VCR). Metompkin Island is their closest property to the project, which is 4 miles southwest

of Wallops Island. TNC recommends only re-nourishing the beach from deposits in the Atlantic Ocean as was in the original permit (#10-2003). They also believe that by not installing the stone breakwaters, the cost savings could be used to pay for the offshore sand dredging. Furthermore, if the breakwaters are permitted and constructed, a monitoring and data analysis plan should be required to determine their effectiveness and the extent of down drift impacts to both Assateague and Assawoman Islands.

The Virginia Institute of Marine Science (VIMS), in their report dated January 8, 2019, states the proposed project will significantly increase storm protection, especially directly leeward of the breakwaters, but is unlikely to provide the level of long-term protection necessary for the Wallops Island shoreline and upland infrastructure. The placement of six stone breakwaters with sand nourishment landward of each structure will have minimal direct impacts to state-owned subaqueous resources, and the additional nourishment of 19,850 feet of shoreline will result only in temporary and minimal impacts to the littoral marine environment. Therefore, minimal adverse environmental impacts will result within the footprint of these isolated shoreline stabilization actions. However, there is potential for remote and secondary impacts to marine resources dependent upon the proposed sand source and likely disruptions of littoral and longshore sand transport to adjacent shores due to the influences of the breakwaters.

VIMS adds that the continued and integrated geological and marine processes indigenous to the Virginia barrier islands creates challenging shoreline management problems and complicated scenarios from which to assess potential benefits or detriments to local natural resources. Accounting for these difficulties, they have confidence that (1) the breakwaters and beach nourishment will provide protection to Wallops Island, but for an unknown period of time; (2) the post-mining footprint and adjacent areas of northern Wallops Island will undergo relatively rapid changes that could affect the island and the adjacent inlet beyond natural processes; and (3) the breakwaters will have some unknown degree of effect on longshore sand transport rates and volumes, both north and south of their locations.

To reduce uncertainties and potential adverse environmental impacts, VIMS recommends that strong consideration should be given to again utilizing offshore sand for nourishment. This would eliminate direct impacts to beaches and dunes on northern Wallops Island and significantly decrease likelihoods of rapid geological alterations and responses of the affected and adjacent beach, dunes, and shoreface. If offshore sand is used, they further recommend consideration of management strategies and structures that semi-contain the sand within and around the proposed beach mining location at the north end of the island to prevent the possibility of an abnormally large volume of sand moving into Chincoteague Inlet.

VIMS concludes that some concerning environmental effects could be addressed by applying an additional number of breakwaters designed to contain all sand nourishment, and nourished to maximum capacity. This would stabilize the shoreline to the maximum extent possible while providing added protection for the Wallops Island shoreline and

infrastructure. Until a full build-out scenario such as this occurs, frequent and unknown degrees of impact to natural shoreline and island processes should be expected. Continued protection of Wallops Island will undoubtedly require future beach nourishment that will introduce other large sand volumes to this environment, with related unknown concerns and consequences.

The Department of Game and Inland Fisheries (DGIF) states they cannot support the project. They have concerns that the mining of sand from the north end of the island will impact Federal endangered nesting piping plovers and American oystercatchers along with loggerhead sea turtles and, therefore, cannot support the removal of sand from the proposed north end borrow area. They would prefer, if the project moves forward, that the sand be collected from areas other than the north end of Wallops Island where known Federal and State endangered and threatened species nest. They further recommend a time of year restriction for sea turtles from April 1 through November 30 or until the last turtle hatches.

The Department of Conservation and Recreation (DCR) documented the existence of Piping Plovers and Wilson Plovers and recommends coordination with the DGIF and USFWS.

Therefore, after evaluating the merits of the project and after considering all of the factors contained in §28.2-1403 and §28.2-1205(A) of the Code of Virginia, staff recommends approval of the project as submitted, conditioned on notification of the commencement and conclusion of each phase of project activity and submittal of all post-construction beach profile monitoring surveys. Staff also recommends that Chapter 5 of the original final PEIS “Mitigation and Monitoring” pages 365 to 378 be made part of the permit. This includes the monitoring of threatened and endangered species (Piping Plovers and sea turtles) and conducting post-construction beach profile monitoring surveys.

Staff further recommends a time-of-year restriction for the mining of sand and beach nourishment to avoid avian and sea turtle nesting season from April 1 through November 30 of any year or until the last turtle hatches or the nest has been determined to have failed.

With the ongoing monitoring and data analysis, staff would recommend that a long-term management plan be provided as part of any future permit application prior to any additional nourishment needs.

A representative for Wallops Island Flight Facility was present and sworn in. His comments are a part of the verbatim record.

There were two (2) VIMS representatives that were present. Each representative provided further information pertaining to the current status of the area and recommendations for other options to protect the shoreline.

The matter was before the Commission for discussion and action.

Associate Member Ballard made a motion to approve staff recommendation. Associate Member Minor seconded the motion. The motion carried, 8-0. Chair voted yes.

Fees:	\$ 100.00
-------	-----------

- 10. **LYNNHAVEN RIVER NOW, Oyster Planting Ground Application #2015-068**, requests authorization to lease approximately 75 acres within the Western Branch Lynnhaven River in the City of Virginia Beach. The application is protested by a City resident/oyster ground leaseholder. The application is also located in an area currently classified as restricted for the direct market harvest of shellfish.

Agenda Item #10 was pulled from the agenda by request of the applicant as stated by Tony Watkinson

- 11. **PUBLIC COMMENT:** There were no public comments.

- 12. **PUBLIC HEARING:** Proposal to amend Chapter 4 VAC 20-950-10 et seq. "Pertaining to Black Sea Bass," to improve the characterization of requirements necessary for qualifying for a directed commercial fishery permit for the black sea bass fishery.

Rob O'Reilly, Chief, Fisheries Mgmt., presented the information provided in the staff's evaluation for the Board members. Mr. O' Reilly's comments are a part of the verbatim record.

Mr. O'Reilly explained that staff received concerns from two Virginia commercial black sea bass directed fishery permittees, relative to the requirements to maintain that permit. Both individuals stated that the regulatory requirements described by 1.), below, applied to all aspects of this ITQ (Individual Transferable quota) fishery. Staff contends that the requirements described as 1.), below, were intended to apply to the initial development, in 2003, of this limited-access, ITQ fishery.

Chapter 4 VAC 20-950-10 et seq., "Pertaining to Black Sea Bass," established the initial permitting requirement for individuals to gain a commercial black sea bass directed fishery permit, as follows:

- 1.) That person should hold either a commercial fisherman registration license or a seafood landing license in addition to a federal black sea bass moratorium permit; and,
- 2.) That person shall have landed and sold in Virginia at least 10,000 pounds of black sea bass from July 1, 1997 through December 31, 2001.

The two individuals who contacted staff indicated there was one individual who no longer met the above eligibility requirements because that individual no longer had the federal black sea bass moratorium permit.

Staff recognizes that it is unlawful for any commercial black sea bass directed fishery permittee who relinquishes his federal black sea bass moratorium permit to harvest black sea bass from federal waters, and federal waters contribute nearly all of the Virginia commercial landings of black sea bass.

In order to better describe the intent of the regulation that originally established the VMRC commercial black sea bass directed fishery permit in 2003, and its associated ITQ system, staff is recommending the following amendments to the regulation:

4VAC20-950-46. Directed fishery and bycatch fishery permits.

A. It shall be unlawful for any person to participate in the commercial black sea bass fishery or to possess, harvest, or sell black sea bass, except as described in 4VAC20-950-60 and 4VAC20-950-70, without first qualifying for and obtaining either a directed fishery permit or a bycatch fishery permit from the commission, as described, respectively, in subsections B and C of this section, unless that person meets the requirements described in 4VAC20-950-48.2.

~~B. A person shall be considered eligible for a directed commercial black sea bass fishery permit by satisfying all of the following eligibility criteria:~~

B. Any person who qualified for a directed commercial black sea bass fishery permit, as of January 1, 2003, by satisfying all the eligibility criteria listed below, shall remain eligible for that permit, unless that person permanently transferred all of his shares of the directed fishery quota.

1. That person shall hold either a Commercial Fisherman Registration License or a Seafood Landing License in addition to a federal Black Sea Bass Moratorium Permit; and
2. That person shall have landed and sold in Virginia at least 10,000 pounds of black sea bass from July 1, 1997, through December 31, 2001.

C. Any person who meets the eligibility criteria of subsection B of this section but no longer meets the requirements of subdivision B 1 shall remain eligible to transfer shares of his quota in accordance with 4VAC20-950-48.1.

4VAC20-950-48.1. Individual transferable quotas.

A. Shares of the directed fishery quota, in pounds, held by any permitted fisherman in the directed fishery may be transferred to another person, and such transfer shall allow the transferee to harvest, possess and land black sea bass in Virginia in a quantity equal to the shares of the directed fishery quota transferred, provided that transferee satisfies the eligibility requirements described in 4 VAC 20-950-46 B 1.

B. Any transfer of black sea bass shall be limited by the following conditions.

4. Any person who receives a permanent transfer of quota but does not satisfy the eligibility requirements described in 4VAC20-950-46 B 1 shall remain eligible to transfer shares of his quota in accordance with this section.

These amendments will satisfy the intent of the commercial black sea bass ITQ system. At this time, 37 of the original 46 individuals who qualified for the directed fishery ITQ at the start of 2003 remain permitted for that directed fishery. Staff suggests that an ITQ system, whether the one established by the Commission for the limited-access commercial striped bass or black sea bass fishery does provide an ability for individuals to fish for that species or transfer some or all of their shares. Seven individuals are only able to transfer their shares of quota on a temporary or permanent basis. Thirty directed fishery permittees can either fish for and land black sea bass from federal waters or transfer shares of their quota.

Staff recommends the Commission approve these amendments to subsection 46. B. of Chapter 4 VAC 20-950-10 et seq., as described above.

No one was present that spoke in support of the project.

The matter was before the Commission for discussion and action.

Associate Member Minor made a motion to approve staff recommendation. Associate Member Tankard seconded the motion. The motion carried, 8-0. Chair voted yes.

* * * * *

Commission Meeting

- 13. PUBLIC HEARING:** Proposal to amend Chapter 4 VAC 20-950-10 et seq., "Pertaining to Black Sea Bass," to consider the establishment of a February 2019 recreational black sea bass fishery and to modify the recreational black sea bass permitting requirements. The proposed 2019 season extends from May 15 through December 31, but any harvest from a February fishery would lessen the number of fishing days during the May 15 through December 31 period.

Alex Aspinwall, Fisheries Mgmt. Specialist, presented the information provided in the staff's evaluation, with PowerPoint slides. Mr. Aspinwall's comments are a part of the verbatim record.

Mr. Aspinwall explained that in 2018, the Commission is asked to consider whether to approve a February recreational black sea bass fishery. This year, the Mid-Atlantic Fisheries Management Council and the Atlantic States Marine Fisheries Commission have made it very clear that any state that wishes to participate in the February black sea bass fishery will be required to make 2019 season adjustments that account for additional landings that occur in February. If Virginia wishes to participate in this fishery, Virginia will be responsible for making 2019 season adjustments that account for additional landings that occur in February 2019.

Last year, a VMRC recreational black sea bass permit was required for all individuals who wished to participate in the February recreational black sea bass fishery. The permit was never intended to be required of all individuals participating in the February black sea bass fishery, as head boats are a main participant of this fishery, and no one would 40 or so paid passengers to obtain a VMRC permit. Therefore, the language in Chapter 4 VAC 20-950-10 et seq. has been modified to require only the captain or operator of the vessel to obtain the black sea bass recreational permit. Staff asks that the captain or operator of the vessel be required to contact Law Enforcement Operations at 1-800-541-4646 before or immediately after the start of each fishing trip. The permittee shall provide Law Enforcement Operations with his name, MRC ID number, the point of landing, a description of the vessel, estimated return to shore time, and a contact phone number. Previously, the captain or operator of the vessel was only required to contact Law Enforcement Operations before returning to shore at the end of a fishing trip. Requiring black sea bass permittees to provide trip related information prior to the start of the fishing trip will allow staff to concentrate sampling efforts based on areas of landing.

Virginia provided a proposal to the ASMFC summer flounder, scup and black sea bass technical committee for further review of proposed season adjustments during the 2019 black sea bass season. The technical committee approved Virginia's proposal. Our proposal allows any season adjustments by the commission to occur during the May/June or September/October wave-period. Below, please find the amendments.

Chapter 4 VAC 20-950-45

E. From February 1 through February 28, it shall be unlawful for any person to possess or land any black sea bass harvested from a recreational vessel, unless the captain or operator of that recreational vessel has obtained a Recreational Black Sea Bass Permit from the Marine Resources Commission. The captain or operator shall be responsible for reporting for all anglers on the recreational vessel and shall provide his MRC ID number; the date of harvest; the number of individuals on board; the mode of fishing; and the number of black sea bass kept or released. That report shall be submitted to the Commission or to the Standard Atlantic Fisheries Information System no later than March 15 of the current calendar year. It shall be unlawful for any permittee to fail to report trips where black sea bass were caught, whether harvested, released, or possessed in accordance with this section, on forms provided by the commission or through the Virginia Saltwater Fisherman's Journal within seven days after the trip occurred. It shall be unlawful for any permittee to fail to report trips where black sea bass were targeted but not successfully caught, by March 15 of the current calendar year. Any permittee who did not participate in the recreational black sea bass season during February shall notify the commission of their lack of participation by March 15 of the current calendar year.

F. It shall be unlawful for any permittee to fail to contact the Marine Resources Commission Operation Station at 1-800-541-4646 before or immediately after the start of each fishing trip. The permittee shall provide the Operations Station with his name, MRC ID number, the point of landing, a description of the vessel, estimated return to shore time, and a contact phone number. Any authorized permittee shall allow VMRC staff to sample catch to obtain biological information for scientific and management purposes only.

Staff recommends the Commission approve the amendments, as described above, to Chapter 4 VAC 20-950-10 et seq. If approved the amendments would establish a February 2019 recreational black sea bass fishery and modify the recreational black sea bass permitting requirements.

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

The matter was before the Commission for discussion and action.

Associate Member Ballard made a motion to approve staff recommendation. Associate Member Minor seconded the motion. The motion carried, 8-0. Chair voted yes.

* * * * *

- 14. REQUEST FOR PUBLIC HEARING:** Proposal to amend 4 VAC 20-890-10 et seq., "Pertaining to Channeled Whelk," to modify the culling ring diameter measurement of channeled whelk to conform to the minimum length requirement of 5 ½ inches.

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

Ms. Kretsch explained that in 2017, Bob Fisher of VIMS published a study on the population and reproductive biology of channeled whelk in the Mid-Atlantic, including study sites in Maryland and Virginia waters. In this study, he modeled the shell length-width relationship for channeled whelk and found that the current culling ring selects for whelk of sublegal length.

Since 1997, Virginia's minimum shell length for channeled whelk has been 5 ½ inches. Once a size limit was in place, industry raised concerns about shell breakage, where the outer tip of the siphonal canal can break off with handling, which can make legal whelk appear undersized. To avoid questionable violations, the Commission established a tolerance of 30 whelk per barrel and 10 whelk per bag in 1998.

Around this time, Delaware opted to use an alternate measurement method and established a diametrical measurement of the shell whorl, as measured by a culling ring. Any channeled whelk shell that could pass through the ring of given size would be considered undersize. Virginia followed suit in 2000, setting a ring size of 2 ¾ inches based on a shell length-width relationship measured from commercially caught specimens and with industry input.

According to Fisher's study, the shell length-width relationship calculated shows that the current 2 ¾ inch whelk width corresponds to a shell length of only 5.3 inches. A 5 ½ inch whelk has a width closer to 2.85 inches. Based on this, staff recommends increasing the culling ring size to 2 7/8 inches diameter.

Staff has also heard industry concerns about the culling ring as size gauge. Due to the asymmetrical morphology of the whelk shell, manipulating the orientation of a shell in relation to the ring can cause whelk that are equal to or greater than the minimum width at the widest part of the shell to pass through. Massachusetts has addressed this issue by passing whelk through a chute of given width and at least 6 inches in length. Staff is currently working with Bob Fisher and industry to investigate alternatives to a culling ring. A public hearing in March would allow more time to research these alternatives and to work with law enforcement on how they currently enforce and could enforce channeled whelk size.

Currently, no federal conservation plan is in effect. Maryland has a minimum shell length of 6 inches and a minimum width of 3 3/8 inches for channeled whelk with no tolerance.

Delaware has a minimum shell length of 6 inches and a shell width of 3 1/8 with a tolerance of 5 channeled whelk per 60 pounds. North Carolina has no whelk regulations at this time. There has been no stock assessment for channeled whelk.

Staff recommends advertising for a March public hearing on amending Chapter 4 VAC 20-890-10 et seq., "Pertaining to Channeled Whelk," to increase the culling ring size for minimum width.

The matter was before the Commission for discussion and action.

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

* * * * *

15. REQUEST FOR PUBLIC HEARING: Proposal to amend Chapter 4 VAC 20-740-10 et seq., "Pertaining to the Snagging of Fish," to include a prohibition on the towing of cobia and striped bass.

Lewis Gillingham, Director, SWFT, presented the information provided in the staff's evaluation, with PowerPoint slides. Mr. Gillingham's comments are a part of the verbatim record.

Towing of fish, particularly of large striped bass, received high profile media attention last month as the late fall striped bass fishery peaked and the majority large cash payout striped bass tournaments were scheduled. Reasons for attaching a large striped bass to a rope and towing it behind the boat are varied. This practice allows the anglers continue to fish and maintain the quality of the catch, keeps the fish alive for substitution of a larger fish (high grading) and most recently, to keep the fish alive and force water into its stomach—added weight, added value at the scale. While fish towed behind the boat may remain alive, as a group if released (or substituted for a bigger fish) they surely suffer a higher mortality rate than a fish released immediately when landed. At least some of last month's contentions of the prevalence of striped bass being towed behind the boat can be attributed to anglers seeking to add weight to their catch. Trips resulting in a boat limit of large striped bass (one fish per angler) are rare. Additionally Fisheries staff did receive reports during the cobia season that anglers practicing sight casting would be seen towing their one fish over 50 inches. The assumption--the towed fish could be more ethically released when substituted for a larger cobia.

High-grading of recreationally caught fish, where a smaller legal-sized fish in the angler's possession is substituted for a just caught larger specimen to remain within the legal possession limit, is not a new situation. This is a well-established practice for freshwater largemouth bass fishermen with functioning livewells, particularly when fishing during a tournament with cash or prize rewards. In this scenario legal fish are placed in a livewell

and once a limit is reached any heavier fish caught are substituted for the smallest catch in the livewell. Some saltwater anglers have functioning livewells and follow this same procedure. Fish with a very small possession limit, such as striped bass over 28 inches (one fish per person) or cobia over 50 inches (one fish per vessel) are the most likely targets—especially when the angler is participating in a tournament offering cash or major prizes. But few livewells can accommodate large striped bass or cobia. In saltwater, anglers fishing at anchor or drifting, have traditionally placed large fish, such as black drum and cobia, on a stringer. Both of these species are caught primarily during the warmer months of the year. Initially this practice was done solely to preserve their catch but this practice also allows anglers to keep fish alive if they later decide to release their catch. In addition, some anglers will high grade catch once their legal limit has been reached, whether the fish is alive on a stringer or dead in their cooler, and send the smallest fish in their possession overboard.

Staff recommends the Commission approve advertising for a public hearing to amend Chapter 4 VAC 20-740-10 et seq., “Pertaining to the Snagging of Fish,” to include a prohibition on the towing of cobia or striped bass.

The matter was before the Commission for discussion and action.

Associate Member Tankard made a motion to approve staff recommendation. Associate Member Ballard seconded the motion. The motion carried, 8-0. Chair voted yes.

* * * * *

- 16. REQUEST FOR PUBLIC HEARING:** Proposal to amend Chapter 4 VAC 20-620-10 et seq., “Pertaining to Summer Flounder,” to modify the landing dates, possession limits and landing limits for summer flounder commercially harvested offshore (federal waters) and landed in Virginia.

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

Ms. Ramsey explained that every year, staff works with industry to establish management measures for the commercial offshore summer flounder fishery. For 2019, the Virginia summer flounder quota is 1,421,828 pounds, a 3.6% increase from 2018. This increase in quota, will allow for an increase in the period one landing limit. Staff is also requesting a modification to the landing dates in order to maximize the profitability for industry. For 2019, industry is requesting an 8,500 pound landing limit for period one and a season change to March 1 through April 19, 2019.

Staff recommends advertising for a February public hearing to amend Chapter 4 VAC 20-620-10 et seq., "Pertaining to Summer Flounder," to modify the landing dates, possession

Commission Meeting

**18244
January 22, 2019**

limits and landing limits for summer flounder commercially harvested offshore (federal waters) and landed in Virginia.

The matter was before the Commission for discussion and action.

Associate Member Minor made a motion to approve staff recommendation. Associate Member Neill seconded the motion. The motion carried, 7-0. Chair voted yes. Associate Member Lusk was not present during final vote.

* * * * *

There being no further business, the meeting was adjourned at approximately 2:49 p.m. The next Commission meeting will be Tuesday, February 26, 2019.

Steven G. Bowman, Commissioner

Jamie Hogge, Recording Secretary