

MINUTES

Commission Meeting

March 29, 2011

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 Laine, Jr.)	
J. Bryan Plumlee)	Associate Members
Kyle J. Schick)	
Richard B. Robins, Jr.)	
John E. Tankard, III)	
Jack G. Travelstead	Chief, Fisheries Mgmt.
David Grandis	Assistant Attorney General
John M. R. Bull	Director-Public Relations
Katherine Leonard	Recording Secretary
Linda Farris	Bs. System Specialist, MIS
Jim Wesson	Head, Conservation/Replenishment
Joe Grist	Head, Plans and Statistics
Lewis Gillingham	Head, Saltwater Tournament
Stephanie Iverson	Fisheries Mgmt. Specialist, Sr.
Joe Cimino	Fisheries Mgmt. Specialist, Sr.
Sonya Davis	Fisheries Mgmt. Specialist
Alicia Nelson	Fisheries Mgmt. Specialist
Allison Watts	Fisheries Mgmt. Specialist
Rick Lauderman	Chief, Law Enforcement
Warner Rhodes	Deputy Chief, Law Enforcement
Mathew Broderick	Marine Police Officer
Jamie Cranfill	Marine Police Officer

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Tony Watkinson	Chief, Habitat Mgmt. Div.
Chip Neikirk	Deputy Chief, Habitat Mgmt.
Ben Stagg	Environmental Engineer, Sr.
Jeff Madden	Environmental Engineer, Sr.
Justin Worrell	Environmental Engineer, Sr.
Dan Bacon	Environmental Engineer, Sr.
Hank Badger	Environmental Engineer, Sr.
Jay Woodward	Environmental Engineer, Sr.
Ben McGinnis	Environmental Engineer, Sr.
Mike Johnson	Environmental Engineer, Sr.
Bradley Reams	Project Compliance Tech.
Paul Rogers	Surveyor

Virginia Institute of Marine Science (VIMS):

Lyle Varnell	James Kirkley	Susanna Musick
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Others present included:

Todd R. hopper	Mark Bowden	Kim Bowden	Dennis Dietrich
Rebecca Francese	Bob Simon	Michael H. Gibson	Adam Melita
Karen Stull	Gary R. Stull	Kevin DuBois	Daniel F. Adams
Steve Wood	Doug Law	Craig Palubinski	Shannon Wilkins
Juan S. Cewron	Michelle Meredith	Myles Pock	Julia Sisler
Lee Rosendaj	Paul Schmidt	Hull	Bryan Ellis
Allester Watts	David White	David O'Brien	John Payne
Ellis W. James	M. Cookan	Joe Palmer	Leslie Parr
Connly Bass	Bill Swanner	Robert Sufficool	Sheldon Arey
Charles Amory	Craig R. Paige	Joe Benkert	M. Piersen
Chris Moore	Will Mitchell		

and others.

Commissioner Bowman called the meeting to order at approximately 9:35 a.m. Associate Member Fox was absent.

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

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

Tony Watkinson, Chief Habitat Management said that Item 6, Rudolf B. Wenleder, #10-1783, could be pulled from the agenda since the protest had been resolved and the application could be handled administratively.

Commissioner Bowman asked for action by the Board.

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

MINUTES: Commissioner Bowman requested a motion for approval of the February 22, 2011 Commission meeting minutes, if there were no corrections or changes. There were none.

Associate Member Plumlee moved to approve the minutes, as distributed. Associate Member Tankard seconded the motion. The motion carried, 7-0-1. The Chair voted yes. Associate Member Holland abstained as he was absent for the February Commission meeting.

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

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

Tony Watkinson, Chief, Habitat Management Division, summarized these items for the Board. He stated that there were fifteen items (A-O). His comments are a part of the verbatim record.

Commissioner Bowman asked for questions of staff.

Commissioner Bowman asked for Item M if the word ‘reduce’, which he said, should have been the word ‘include’ as the evaluation has written? Mr. Watkinson responded yes.

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Associate Member Plumlee stated that he would be abstaining for items a, b, c, e, and o because of a conflict of interest in all cases.

Commissioner Bowman opened the public hearing. There were no public comments, the public hearing was closed. He announced that the matter was before the Commission for discussion or action. He said the first motion would be for items d, f, g, h, i, j, k, l, m, and n.

Associate Member Schick moved to approve page two items, d, f, g, h, i, j, k, l, m, and n. Associate Member Tankard seconded the motion. The motion carried, 8-0. The Chair voted yes.

Associate Member Robins moved to approve page two items, a, b, c, e, and o. Associate Member Tankard seconded the motion. The motion carried, 7-0-1. The Chair voted yes. Associate Member Plumlee abstained because of conflict of interest concerns as these applicants were clients of the law firm where he works.

2A. DOMINION POWER, #11-0064, requests authorization to replace a buried 35kV power cable west of the Route 223 Bridge between Gwynns Island and the mainland of Mathews County including an area removed from Public Oyster Ground pursuant to Senate Bill 921 of the 2011 General Assembly. The new 35 kV power cable will be installed utilizing horizontal directional drilling beneath intertidal wetlands, and trenched into the subaqueous sediment surface using the jet-assisted plow method to a minimum depth of three (3) feet below the sediment surface. Recommend approval with the complete removal of the defunct power line, and a royalty in the amount of \$2,400.00 for the encroachment over 800 linear feet of State-owned subaqueous land at a rate of \$3.00 per linear foot.

Royalty Fees (crossing 800 sq. ft. @ \$3.00/sq. ft.).....	\$2,400.00
Permit Fee.....	\$ 100.00
Total Fees.....	\$2,500.00

2B. DOMINION POWER, #10-1762, requests authorization to replace an existing overhead power line across the Piankatank River, immediately west of the Rt. 3 Twiggs Ferry Bridge between Mathews and Middlesex Counties including an area removed from Public Oyster Ground pursuant to Senate Bill 921 of the 2011 session of the General Assembly. The new 35kV line will be installed using horizontal directional drill beneath the tidal wetlands and trenched into the river bed using jet-assist plow method to a minimum depth of three (3) feet below the sediment surface. Recommend approval with the complete removal of the existing line and two (2) support towers, and a royalty in the amount of \$6,300.00 for the crossing of 2,100 linear feet of State-owned subaqueous bottom at a rate of \$3.00 per linear foot.

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Royalty Fees (crossing 2,100 sq. ft. @ \$3.00/sq. ft.).....	\$6,300.00
Permit Fee.....	\$ 100.00
Total Fees.....	\$6,400.00

2C. GAYLON LAYFIELD, #11-0004, requests authorization to construct three (3) near-shore, quarry stone sills, totaling 185 linear feet, with a base width of 16 feet and spaced 15 feet apart, located approximately 20 feet channelward of a failing bulkhead to be removed. The area behind the sills will be nourished with 250 cubic yards of clean sand fill and planted with appropriate wetland vegetation adjacent to property located on Fishing Bay at 919 Stove Point Road in Middlesex County. Recommend approval with the assessment of royalty in the amount of \$97.20 for the nourishment over 1,944 square feet of State-owned subaqueous bottom at a rate of \$0.05 per square foot.

Royalty Fees (filling 1,944 sq. ft. @ \$0.05/sq. ft.).....	\$ 97.20
Permit Fee.....	\$100.00
Total Fees.....	\$197.20

2D. VIRGINIA DEPARTMENT OF GAME AND INLAND FISHERIES, #10-2018, requests authorization to install six (6) stone breakwater structures, each measuring 136 feet long by 29 feet wide and approximately 5 feet high, to include placement of up to 44,450 cubic yards of sand nourishment landward of the breakwaters at their property situated along the James River at the Hog Island Wildlife Management Area in Surry County.

Permit Fee.....	\$100.00
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2E. CITY OF VIRGINIA BEACH, #10-1651, requests authorization to construct a permanent dredged material offloading facility and basin, and a public canoe/kayak launching pier in Thalia Creek near Virginia Beach Boulevard. The facility will include a 20-foot long by 60-foot wide concrete dredge material transfer pier, including a 20-foot by 30-foot L-head, associated fender piles, and two seven-pile dolphin clusters. The transfer facility will require the mechanical dredging of 9,525 cubic yards of State-owned submerged bottom with anticipated future maintenance to establish maximum depths of minus six (-6) feet at mean low water that will connect to the existing City channel within the Western Branch of the Lynnhaven River in Virginia Beach. The canoe/kayak launching pier will consist of a 10-foot by 70-foot gangway leading to a 12-foot by 60-foot floating timber pier. Staff recommends approval for a five-year permit due to proposed maintenance dredge cycles.

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Permit Fee.....	\$100.00
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2F. SCOTT COUNTY PUBLIC SERVICE AUTHORITY, #10-1960, requests authorization to install an eight-inch ductile iron water line under three (3) separate waterways in the Clinchport Community in Scott County. Open-cut trenching, including temporary cofferdams for water diversion, will be utilized for an approximate 50-foot crossing of Mill Creek and for an approximate 50-foot crossing of Cove Creek, both situated along S.R. 65. Riprap will be placed over the trench installations and disturbed stream banks. Directional drilling will be utilized for an approximate 400-foot crossing under the Clinch River along S.R. 645. Staff recommends approval with our standard in-stream construction conditions.

Permit Fee.....	\$100.00
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2G. ZAPATA HAYNIE CORP-OMEGA PROTEIN, INC., #11-0028, requests authorization to mechanically dredge approximately 30,912 cubic yards of State-owned submerged lands to establish a maximum depth of -15 feet mean low water, construct and backfill a 478 linear foot, steel sheetpile replacement bulkhead aligned a maximum six (6) feet channelward of mean low water, construct a 12-foot wide by 150-foot long commercial pier, a 36-foot long by 30-foot wide pier extension and seven (7) cluster piles at the company's facility situated along Cockrell Creek in Northumberland County. Staff recommends an encroachment royalty of \$6,750.00 for the filling of approximately 1,350 square feet of State-owned submerged lands at a rate of \$5.00 per square foot, an encroachment royalty of \$4,680.00 for the encroachment of the pier and decking over 2,340 square feet of submerged lands at a rate of \$2.00 per square foot, a dredge royalty of \$ 13,910.40 for the new dredging of 30,912 cubic yards at a rate of \$0.45 per cubic yard and a \$99.54 encroachment royalty for the fender piles over 49.77 square feet of State-owned submerged lands at \$2.00 per square foot, for a total royalty of \$25,439.94.

Royalty Fee (fill 1,350 sq. ft. @ \$5.00/sq. ft.).....	\$ 6,750.00
Royalty Fee (encroachment 2,340 sq. ft. @ \$2.00/sq. ft.).....	\$ 4,680.00
Royalty Fee (dredge 30,912 cu. yds. \$0.45/cu. yd.).....	\$13,910.40
Royalty Fee (encroachment 63 piles @ \$2.00/pile).....	\$ 99.54
Permit Fee.....	\$ 100.00
Total Fees.....	\$25,439.94

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2H. WORMLEY CREEK MARINA, #10-1956, requests authorization to construct approximately 200 linear feet of replacement bulkheading and to replace 433 linear feet of fixed pier and 149 linear feet of L-head docks with approximately 458 linear feet of floating pier and 154 linear feet of L-head and T-head docking, resulting in a net reduction of five (5) slips, at their existing marina situated along Wormley Creek in York County.

Permit Fee.....	\$100.00
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2I. VIRGINIA RAIL EXPRESS, #10-1552, requests authorization to expand their rail service by adding a an additional track from Arkendale to Powell's Creek in Prince William and Stafford Counties (also known as Cherry Hill Third Track Project) that will include a 162 linear foot bridge crossing over Chopawamsic Creek, placement of a temporary causeway along 375 linear feet of the bank of the Potomac River for installation of an upland bulkhead, a bridge crossing over 600 linear feet of Widewater Creek and the installation of a third track on the existing bridge over 1,575 linear feet of Quantico Creek.

Permit Fee.....	\$100.00
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2J. VINCENT RADLEY, #10-1421, requests authorization to install two (2) 140-foot long and one (1) 160-foot long armor stone breakwaters, each with a base width of 24-feet and extending a maximum of 90-feet channelward of mean low water, construct one (1) 100-foot long by 20-foot wide stone spur extending a maximum of 90 feet channelward of mean low water and to nourish landward of the breakwaters with approximately 3,000 cubic yards of beach quality sand to be planted with American Beach Grass and Atlantic Coastal Panic Grass, adjacent to his property situated along the Potomac River in King George County.

Permit Fee.....	\$100.00
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2K. MICHAEL R. TURNER, #11-0080, requests authorization to install a 100 linear foot stone breakwater extending approximately 80-feet channelward of mean low water, construct two (2) stone spurs extending approximately 33 feet channelward of mean high water, construct 165 linear feet of riprap revetment extending a maximum of three (3) feet channelward of mean low water, and nourish landward of the breakwater with approximately 850 cubic yards of beach quality sand to be planted with American Beach Grass and Atlantic Coastal Panic Grass, and to extend an existing stone groin a maximum of 60-feet channelward of mean low water adjacent to his property situated along the Potomac River in King George County.

Permit Fee.....	\$100.00
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2L. LYON SHIPYARD, INC., #09-0700, requests authorization to dredge 13,750 cubic yards of State-owned subaqueous material by mechanical and hydraulic methods from two (2) existing marine railways at their property adjacent to the Campostella Bridge along the Eastern Branch of the Elizabeth River in the City of Norfolk and the future maintenance dredging, on an as-needed basis, of up to 10,000 cubic yards, per dredge cycle. All dredged material will be transported to and disposed of at an approved upland landfill. Staff recommends the inclusion of the standard dredging conditions and the assessment of a royalty in the amount of \$6,187.50 for the dredging of 13,750 cubic yards of State-owned subaqueous material at a rate of \$0.45 a cubic yard.

Royalty Fees (dredge 13,750 cu. yds. @ \$0.45/cu. yd.).....	\$6,187.50
Permit Fee.....	\$ 100.00
Total Fees.....	\$6,287.50

2M. NATIONAL OCEANIC & ATMOSPHERIC ADMINISTRATION, #11-0049, requests authorization to install and backfill approximately 800 linear feet of replacement bulkhead approximately three feet channelward of an existing, deteriorated bulkhead, adjacent to the NOAA Marine Operations Center situated along Smith Creek in the City of Norfolk. The proposed project also includes the installation of two (2) replacement composite pile mooring dolphins and a channelward relocation of two (2) existing floating pier platforms to accommodate the new bulkhead.

Permit Fee.....	\$100.00
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2N. NORFOLK DEPARTMENT OF UTILITIES AND ELIZABETH RIVER CROSSINGS, LLC, #11-0085, requests authorization to install, by horizontal direction drill, a 36-inch diameter raw waterline crossing beneath approximately 3,010 linear feet of the submerged bed of the Elizabeth River, immediately upriver of the Midtown Tunnel between the Cities of Norfolk and Portsmouth. The proposed waterline is intended to replace an existing 30-inch diameter waterline located downriver of the Midtown Tunnel, which falls within the project footprint of the proposed Midtown Tunnel expansion project.

Permit Fee.....	\$100.00
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2O. NORFOLK SOUTHERN RAILWAY COMPANY, #11-0102, requests authorization to maintenance dredge, on an as-needed basis, up to 35,000 cubic yards of State-owned subaqueous material per dredge cycle, to maintain maximum depths of -53 feet at mean low water on either side of Pier 6 and -38 feet at mean low water on the south side of Pier 5, at their Lamberts Point facility

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situated along the Elizabeth River in the City of Norfolk. Staff recommends the inclusion of the standard dredging conditions.

Permit Fee.....	\$100.00
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- 3. **CONSENT ITEMS:** (After-the-fact permit applications with monetary civil charges and triple permit fees that have been agreed upon by both staff and the applicant and need final approval from the Commission). No consent items.

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

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- 5. **GARY STULL, #10-0587.** Commission review on appeal by the applicant of the Norfolk Wetland Board's February 9, 2011, decision to deny the replacement of 148 linear feet of bulkhead and return walls adjacent to the applicant's property situated along a man-made canal off the North Branch of the Lafayette River in the City of Norfolk.

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

Mr. McGinnis explained that the proposed project is located along a man-made canal off the North Branch of the Lafayette River in the City of Norfolk. A deteriorated timber bulkhead currently lies along the applicant's shoreline.

Mr. McGinnis stated that the proposed project was revised several times, since first being submitted by Mr. Stull in April 2010. That original proposal included the replacement of portions of the existing bulkhead, as well as the installation of a timber boat ramp over a riprap revetment. Mr. Stull later hired Mr. Robert Simon of Waterfront Consulting, Inc., to serve as his agent, and the proposed project was resubmitted in September 2010, in modified form to include the installation of a new bulkhead landward of the existing failing bulkhead, while omitting the previously proposed riprap and boat ramp. In December 2010, Mr. Simon submitted a letter stating that they wished to replace the bulkhead within the same footprint as the existing bulkhead.

Mr. McGinnis said that Mr. Stull, through his agent, Mr. Robert Simon, sent a letter of notice of appeal to the Commission dated February 18, 2011, for the Norfolk Wetlands Board's February 9, 2011 decision to deny his project. The letter stated that the grounds

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for the appeal would be forthcoming the following week. To date staff had not received any further correspondence from Mr. Stull or Mr. Simon.

Mr. McGinnis explained that the Norfolk Wetlands Board considered the applicant's varying proposals at public hearings on May 12, 2010, August 11, 2010, November 10, 2010, December 8, 2010, and February 9, 2011. During the course of these hearings, the Board heard testimony from City staff, the applicant, his agent, as well as Mr. Robert Harrell, an applicant in a separate violation/project. Mr. Stull submitted his initial application on his own and represented himself at the May and August hearings. The Board deferred action on the project during both hearings to allow Mr. Stull to consider alternatives and for application incompleteness.

Mr. McGinnis said that Mr. Stull subsequently hired Mr. Simon to act as his agent, and a revised application was submitted in September showing a proposed bulkhead aligned approximately three feet landward of the existing deteriorated bulkhead in an attempt to avoid most of the wetland impacts identified by City staff. However, at the November 10, 2010 hearing on Mr. Stull's revised application, Mr. Simon asked the Board for a deferral to allow for the testimony of an expert with regard to tidal elevations. The deferral request was granted by the Board.

Mr. McGinnis stated that the Board again heard the matter at their December 8, 2010, meeting, where Mr. Simon questioned the Board's use of the elevation 2.69' (NAVD 88) as their upper limit of jurisdiction, when the City has previously used 2.1' (NAVD 88) on applications for five of their own municipal projects. Mr. Simon argued that his client should be afforded the same opportunity to use this lower elevation, which he believed would effectively remove the proposed fill within the vegetated tidal wetlands identified by City staff, from the Board's jurisdiction. Mr. Simon stated that he had submitted a revised application earlier that morning, which would align the replacement bulkhead within the same alignment as the existing bulkhead, since he did not believe this alignment would result in any wetland fill based upon use of the 2.1' elevation as the upper limit of Wetland Board jurisdiction. The Board's Chairman indicated that the Board and City staff had not had time to review the late submittal, and that a deferral would be appropriate. Mr. Simon agreed and also stated that a tide study on a separate project/violation (Robert Harrell, VMRC #10-1318) would be completed by then and could also be considered by the Board.

Mr. McGinnis explained that Mr. Stull's application was heard again by the Board on February 9, 2011, and began with a briefing by City staff. During the briefing, the Board was informed that Mr. Simon had submitted a letter in December indicating that they wished to align the replacement bulkhead in the same alignment as the existing, and that Mr. Simon's letter referenced attached drawings, which were in fact not attached to the December 8, 2010, letter/e-mail to VMRC, and subsequently transmitted to the Board. City staff sent an e-mail to Mr. Simon on December 13, 2010, requesting a copy of the missing revised drawings, but testified that they had not received the requested drawings

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nor had the City's request even been acknowledged by Mr. Simon by the February 9, 2011, hearing.

Mr. McGinnis explained further that the City staff recommended to the Board that in light of Mr. Simon's request for the Board to take action on a project they did not have plans to review, and Mr. Simon's unsupported assertion that the Board lacked jurisdiction over the project, that the Board deny Mr. Stull's application without prejudice. Such action would allow him to reapply once he and his agent were prepared.

Mr. McGinnis said that Mr. Simon again testified that his client should be afforded the same treatment the City provided itself through the use of the 2.1' elevation contour as the upper limit of Wetland Board jurisdiction. Mr. Simon argued that the City had not proven the reliability of the 2.69' elevation currently used by the Board throughout the Lafayette River system. The Board also heard testimony from Mr. Robert Harrell, who explained the ongoing process of his own tide study related to a violation case on his property which was being heard separately by the Board and during the same time period that Mr. Stull's application had been considered. Mr. Harrell argued that he believed it was incumbent upon the City, and not the citizens to properly establish the Board's jurisdictional elevation limits. After hearing the issues presented before them, the Board voted 4-2 to deny the project without prejudice.

Mr. McGinnis stated that neither Mr. Stull nor Mr. Simon have stated any grounds for their appeal of the Board's decision, even though staff had requested that information in a letter dated, February 23, 2011. Without their assertion as to how the Board erred in making its decision to deny, staff was unsure what the Commission was being asked to review on appeal.

Mr. McGinnis said that through his testimony before the Board at the December and February hearings, Mr. Simon had asserted that the Norfolk Wetlands Board lacked jurisdiction over Mr. Stull's project. However, Mr. Simon failed to substantiate his claim with a site specific tide study, similar to what was being done at Mr. Harrell's property. Mr. Simon also represented Mr. Harrell and was, therefore, well aware of the steps necessary to dispute the Board's use of the 2.69' elevation contour, as the upper limit of vegetated tidal wetlands. Instead, Mr. Simon chose to argue that the City had used a lower elevation in five of their own applications for various projects throughout the City, and that his client should be afforded the same opportunity. Mr. Simon either failed to recognize or chose to ignore the fact that the City was exempt from obtaining wetland permits, pursuant to Section 28.2-1302 (3)(10) of the Code of Virginia, which authorized "governmental activity in wetlands owned or leased by the Commonwealth or a political subdivision thereof." Although the City or their consultants on those five applications had improperly applied the 2.1' (NAVD 88) elevation as the upper limit of vegetated tidal wetlands, it was of no consequence since the Wetland Board lacked jurisdiction over those projects and was in no position to require the applications be revised.

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Mr. McGinnis explained that vegetated tidal wetlands were defined in Chapter 13 of Title 28.2 of the Code of Virginia as “lands lying between and contiguous to mean low water and an elevation above mean low water equal to the factor one and one-half times the mean tide range at the site of the proposed project...and upon which is growing any” listed wetland plant species. It had not been the practice of any Wetland Board to require a site-specific tide study to properly establish the landward limit of vegetated tidal wetlands. In some localities, such as Norfolk, a representative elevation had been established within certain water bodies to assess impacts and determine jurisdiction. By doing so, Norfolk had provided a line that can be surveyed on a property to clearly establish an upper limit of vegetated tidal wetlands acceptable to the Board without requiring a tide study of an applicant. In cases where an applicant disagrees with that elevation, the applicant had the option of disputing the jurisdictional boundary by commissioning their own site-specific tide study by a licensed surveyor or engineer. That had not been done in this case.

Mr. McGinnis stated that while staff was sympathetic with Mr. Stull’s failure to secure a permit to stabilize his shoreline, staff could not find that the Norfolk Wetland Board had erred in making their decision to deny his application. The applicant’s agent failed to submit revised drawings depicting their request to align the replacement bulkhead within the same alignment, as the existing bulkhead, and failed to properly support their argument that the Board lacked jurisdiction over the project. Furthermore, the applicant and his agent failed to submit any grounds for their appeal of the Board’s decision.

Mr. McGinnis said that in light of the foregoing, staff recommended that the Commission uphold the February 9, 2011, decision of the Norfolk Wetland Board, finding that the Board did not fail to fulfill its responsibilities under the wetlands zoning ordinance and that the substantial rights of the applicant had not been prejudiced because of the findings, conclusions, or decision of the Board.

Commissioner Bowman asked for questions of staff.

Associate Member Schick asked about the last drawing slide. Mr. McGinnis stated that the drawings that were submitted in September and were the ones they last submitted and denied. Associate Member Schick asked about it being placed three-feet behind the existing bulkhead. Mr. McGinnis stated that it would impact the wetlands.

Associate Member Plumlee asked if the 2.69 feet was in the Norfolk Wetlands Ordinance. Mr. McGinnis explained that the ODU study used was for the Lafayette and was 2.74’ and the tide study was done by a private engineer who determined it to be 2.69 feet and the Board adopted the lowered elevation. He said this was a small amount only 5/100’s of a foot, which is in the record. Associate Member Plumlee said that there was no discretionary amount used. Mr. McGinnis said for the Lafayette River the 2.69 had been used for years.

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Associate Member Tankard asked how the elevation determination was done. Mr. McGinnis said that a line was surveyed on the property at the upper limit of the wetlands that exist.

Associate Member Schick asked him to explain. Mr. McGinnis stated that the 2.69 foot elevation is the uppermost limit of vegetated tidal wetlands if vegetation is present and if there are none then the line is moved to where wetland vegetation does exist. Associate Member Schick said that the line is a starting point and then a determination is made at each site. Mr. McGinnis reiterated that if there are not wetland vegetation up to that surveyed line, then the jurisdictional line is moved channelward until wetland vegetation is present.

Commissioner Bowman asked for the applicant or his representative. He then read into the record the Code Section 28.2-1313 as to when the Commission is to modify, remand, or reverse the decision of the wetlands board. This is a part of the verbatim record.

Robert Simon, agent for the applicant, was sworn in and his comments are a part of the verbatim record. Mr. Simon explained that there had been five hearings and he also referenced the Harrell project. He said they were challenging the 2.69 feet used by the Board and had asked for documentation as to how it was determined and for the City to prove its validity. He said that they had not received a response. He said at the February meeting he discussed that there was a study named by 'Jim Georgio' that challenged the 2.74 that the Board had used previously.

Mr. McGinnis noted for the Commission that that Mr. Georgio's e-mail was not in the Wetlands Board record transmitted to the Commission.

Mr. Simon said that the survey staff should be directed to establish jurisdiction, because they cannot use one number for the whole river. He explained that since 2001 the City had used 2.1 in their applications and it was exempt from the Wetlands Board review, but there was still the Corps and VMRC. He said the City should have the same responsibilities as its citizens. He noted that the author of that study (Georgio) stated that the 2.69 should not be used everywhere. He said this project was not under the Wetlands Board jurisdiction as there was no contiguity to the MLW line. He said there were two VIMS reports which did not say there were wetlands impacts. He stated that VIMS is an advisor to the Commission. He said that the Board had challenged the applicant to prove them wrong. He said it was arbitrary and capricious applying the same number to all applications. He said that they were asking the matter be remanded or overturned and the Wetlands Board be directed to provide its own study. Mr. Simon said this number was used in the Harrell case and should be in this record.

Associate Member Plumlee said the VIMS report did not show the wetlands impact. Mr. Simon stated it could have been a site visit and/or desk review.

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Associate Member Schick stated that there had been an onsite study by the Wetlands Board staff. Mr. Simon said no other study was used except for the ODU one and that was incorrect. He said there was no study by the City.

Associate Member Schick asked what was being applied for here. Mr. Simon explained the same footprint of the existing bulkhead. He said they were challenging the use of 2.69 to determine jurisdiction. He said the City had adopted the results of the Georgio study and used it all over the Lafayette River.

Commissioner Bowman asked for comments from the City representative.

David Grandis, Assistant Attorney General and VMRC Counsel, stated that it was at the discretion of the Commission, as to whether to accept additional testimony.

Commissioner Bowman asked for a motion.

Associate Member Plumlee made the motion to accept additional testimony. Associate Member Tankard seconded the motion. The motion carried, 8-0.

Adam Melita, Norfolk Deputy City Attorney, was present and his comments are a part of the verbatim record. Mr. Melita explained that he had three points to make. He said in the transcript that Public Works used evidence on Page 5A1-21. The transcript indicates that 4 of 5 government activities were not heard by the Wetlands Board, but the 2.1 was applied to the 5th application. He said on page 5A1-21 there was evidence that the staff estimated it to be higher than 2.1, but it was not applicable as the project included wetlands being planted all the way to 4 feet and they had not ever applied the 2.1. He said the second point is the agent said 2.3 applied and there is no record that 2.3 is correct and it was not supported by the record. He said third, the 2.69 Georgio Study was for the Lafayette River and it was not applied to the entire City, only the Lafayette watershed area. He said the 2.74 originally used was derived from the ODU study, but the Wetlands Board elected to use the 2.69.

Mr. Melita stated it was not right to require the City to do a tide study for every project. Mr. Simon advised Associate Member Plumlee today that they want to put the bulkhead in the footprint of the existing bulkhead. He stated the application was for three feet landward and was denied. He reiterated that it was denied but without prejudice in order to allow the applicant to come back with another application.

Commissioner Bowman asked why the 2.69 was used when the author said not to use it except for the Edgewater Cove area. Mr. Melita said they thought it was acceptable to use even if the applicant said not to use it. He stated that staff can provide the factual information. Associate Member Plumlee asked if City staff did a presentation as he did not see in the transcript where they identified the wetlands. Mr. Melita stated that it is usually done by staff to make a final delineation and identify wetlands. Associate

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Member Plumlee asked if the homeowner must demonstrate that it was a lower elevation. Mr. Melita stated that there had been two scientific studies done, ODU and Georgio. He added that there had not been a study to disprove it. He stated the evidence in the record supports the 2.69.

Kevin DuBois, Wetlands Board staff, was sworn in and his comments are a part of the verbatim record. Mr. DuBois asked if there were questions.

Associate Member Tankard asked if there were wetlands present as there was nothing in the VIMS report. Mr. DuBois explained his credentials. He said the Norfolk survey crew established the 2.69 and determined that wetlands were present at the project site. He said the vegetation and elevation met the criteria of the law.

Associate Member Plumlee asked about the VIMS report. Mr. DuBois explained that staff provided independent testimony as VIMS is not always used and they do not always make a site visit. Associate Member Plumlee asked if the VIMS report was provided to the Wetlands Board. Mr. DuBois said he was not sure and he used staff slides.

Associate Member Tankard said that where the flags are he cannot see anything. Mr. DuBois said the area is mowed.

Commissioner Bowman allowed Mr. Simon time for rebuttal. Mr. Simon said that five of the Cities application used the 2.1, and the 2.3 elevation came from NOAA. He said the Board started with a bad number and still should not use another bad number which was a part of the record. He said they asked the Commission to rule on the 28.2-1313. He said they should consider the criteria of 1.5 times the elevation above the MLW. He said the method was approved by the Corps and NOAA and even the author (Georgia) said not to use the 2.69 number for other areas. He suggested using the 2.1 like the City had used, but was not proven. He said Mr. Harrell's study had cost over \$10,000 so far. He said the Harrell tide study is in the City's possession with a limit set at 2.35.

As there were no other comments, Commissioner Bowman stated the matter was ready for discussion or action.

Associate Member Tankard stated that it was contiguous to the wetland and MLW, but the bulkhead was problematic as well as the 2.69 used was a problematic number. He said this was a man-made canal and they were just replacing the bulkhead; he cannot see why it was denied.

Associate Member Plumlee said he was not satisfied that the City had demonstrated that they had jurisdiction at this site. He said in the VIMS report there was nothing about wetlands.

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Associate Member Robins said this was a request to reverse a decision based on the fact that there was no jurisdiction. He said that a standard was being used by the City and no study was provided to prove it incorrect. He said the owner can challenge it but they need an analysis. He said this practice is not inappropriate and if the 2.69 is not right, proof must be provided. He said that he agreed with staff and supported the Wetlands Board.

Associate Member Schick said he agreed with Associate Member Tankard that it was contiguous to MLW. He asked where is the jurisdiction and if it was the bulkhead. Commissioner Bowman asked VMRC Counsel to comment. Mr. Grandis responded he did not know.

Associate Member Plumlee said that VIMS had not identified the wetlands present, but the City staff did identify them. He felt it was not a practice, but was based on the site.

Tony Watkinson, Chief, Habitat Management, said the VIMS reports usually provide an impact table, but this one did not. He said it was not clear if it had been identified or just used the mowed law. He said the reports had gotten away from such details as it had been done in the past. He said in addressing contiguity staff looked at the function of the bulkhead, which was to keep the tide out. He said the bulkhead was in poor condition and there was no debate about it being contiguous. He said Mr. Simon said the hole is 2.3 in the bulkhead, but the holes are higher which makes it contiguous using the 2.69-foot elevation.

Commissioner Bowman said that the 2.69 was being used and the author (Georgio) had said only use it for one area. He said the City decided that they will use 2.1. He said citizens need to know the rules, as things do change. He said they need to explain why the number was derived as it was troubling that they use 2.69 for others and 2.1 for the City. He said the Code limited what the Commission could do with the Wetlands Board decision. He requested a motion.

Associate Member Tankard said in his opinion it should be remanded back to the Wetlands Board. He read from Code Section 28.2-1313, where it said prejudice...unsupported by the evidence...arbitrary, capricious or abuse of discretion. He said he moved to remand. Associate Member Plumlee seconded the motion. Commissioner Bowman asked if there should be instructions for the Wetlands Board. Associate Member Plumlee said they should consider the project presented to the Board and apply sufficient evidence of jurisdiction, as well as to establish a better record. The motion carried, 7-1. The Chair voted yes. Associate Member Robins voted no.

No applicable fees – Wetlands Appeal

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6. **RUDOLF B. WENLEDER #10-1783**, requests authorization to construct an 18-foot by 38-foot open-sided boathouse over an existing boatlift near the channelward end of his existing private, noncommercial, open-pile pier situated along the Ware River at 5595 White Hall Road in Gloucester County. The project is protested by the adjoining property owners.

Pulled from Agenda – Protest Resolved – To be handled administratively

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7. **GAMESA ENERGY USA, LLC, #11-0220**, requests authorization to conduct geological coring, sampling and assessment of geotechnical conditions, and to set acoustic doppler current profilers on the seabed within a study area in the lower Chesapeake Bay, west of Northampton County to determine the feasibility for the installation of a single 5 MW offshore wind turbine prototype. The sampling, coring, geotechnical and current assessment, consisting of grab samples, 4 inch diameter vibracores and 6 inch diameter borings, will support site constructability verification, foundation design, environmental conditions assessment, and the regulatory permit review for the turbine and buried cable route that will be the subject of a future application based on the selected site. The study area is located approximately three (3) miles west of the Town of Cape Charles and covers approximately 1.2 square miles with an additional cable corridor leading from the Study Area into and south of Cape Charles Harbor. The center of Study Area One is N 37°14'55.00", W 76°04'35.6".

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

Mr. Badger explained that the study area was located approximately three (3) miles west of the Town of Cape Charles and covers approximately 1.2 square miles with an additional cable corridor leading from the Study Area into and south of Cape Charles Harbor. The center of the study area is N 37° 14' 55.00", W 76° 04' 35.6".

Mr. Badger said the sampling, coring, geotechnical and current assessment, consisting of grab samples, four-inch diameter vibracores and six-inch diameter borings, would support site constructability verification, foundation design, environmental conditions assessment, and the regulatory permit review for the turbine and buried cable route that would be the subject of a future application based on the selected site.

Mr. Badger stated that the Virginia Pilots Association and the Virginia Maritime Association had expressed concerns to staff regarding the possible future placement of a turbine in the designated study area and staff had received a letter of objection dated March 16, 2011, from Captain J. William Cofer, President of the Virginia Pilot Association. They pointed out that the area was used as an anchorage and at the present

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time there were four ships anchored within the study area and six more just outside the area. They also stated that the area was used by ships during storm events.

Mr. Badger noted that the Department of Environmental Quality (DEQ) stated that the study would not require a Virginia Water Protection permit provided the applicant received a U. S. Army Corps of Engineers permit.

Mr. Badger said that the U.S. Army Corps of Engineers had issued their public notice for the application and were expected to issue a permit for the study in early April.

Mr. Badger said VMRC Fisheries Management Division stated that the proposed wind turbine siting area was situated along, and possibly within, the boundaries of Cape Charles Reef, and the disturbance to this area was a concern. Although this reef was not a VMRC maintained artificial reef location, it was an area frequented by fishermen.

Mr. Badger explained that since the applicant had sought information from the Virginia Institute of Marine Science (VIMS) prior to submitting the monitoring proposal. VIMS had not provided an advisory report for this project.

Mr. Badger said that staff was aware that there were possible navigational issues associated with the use of the area as an anchorage and that there would likely be other concerns associated with the siting of a wind turbine in this location. At this point, however, a turbine was not being proposed and staff was reluctant to pass judgment on a project that at this time did not exist. This request sought only authorization to study an area off Cape Charles to determine the feasibility for the installation of a single 5 MW offshore wind turbine prototype. No permanent structures were proposed in the application. Therefore, after evaluating the merits of 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, as submitted.

Mr. Badger added that staff also recommended that the applicant contact the Virginia Pilots Association, the Virginia Maritime Association and the U. S. Coast Guard to address their navigational concerns, before submitting a Joint Permit Application for any wind turbine location.

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

John Daniel, Attorney for the applicant, was present and his comments are a part of the verbatim record. Mr. Daniel said there were to be two turbines offshore and inshore in Cape Charles. He noted that there were several others present to speak for the project, if necessary. He said the Governor had even said something about Virginia being the "Energy Capital of the East Coast."

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Mr. Daniel explained that there were two studies and this application was for the first of those studies, which is the site suitability study. He said the second is on the land. He noted that three of the Board members were from the Eastern Shore. He went on to describe the project and said their goal was to get it done next year during the summer. He noted also that staff had helped to get it on the agenda today and that they had also been working on this for many months.

Mr. Daniel said when the Pilot Associations told them of their concerns, they discussed it with them and modifications resulted. He said for the original sites there was a careful study of the area to avoid impacting the fisheries species and the impacts to the Eastern Shore residents. He stated he supported the staff's efforts and was ready to answer any questions.

Association Member Plumlee said that it was a small area that would be sampled and asked if there would be 80 samples taken for the study and would this be brought back to the Commission. Mr. Daniel said that this needed deep water and they were working with Northum Grumman who knows about need for water. He said with 5 turbines there was a reference point and they need to know if the turbines were more powerful then the bottom type. He said they also need to know about tidal waves.

Association Member Plumlee stated it was a small footprint to sample. Mr. Daniel said there was a lot of waterway out there and they did not want to compete with others users in the area.

Associate Member Robins said once the steps of choosing the final site were complete and a decision can be made there could be other impacts. Mr. Daniel said they made modifications when the Pilot Association told them their concerns, if it were to be no more North and away from the area species and their flights.

Association Tankard asked if the turbine was to be built now. Mr. Daniel said no, nothing was to be built as they were only testing area by taking the borings.

Commissioner Bowman asked if anyone else, pro or con, who wished to comment. There were none. He said the matter was before the Commission.

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

Permit Fee.....	\$100.00
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8. **BUBBA'S MARINA, Notice-to-Comply #11-01.** Consideration of the request by Dimitrios Hionis to allow the placement of tables and chairs, including a bar/counter, and on-premises consumption of food, beer, wine and mixed beverages on the previously authorized deck constructed over State-owned submerged land. VMRC permit #01-1979 and the accompanying Declaration of Restrictive Covenant authorized the construction of the deck only as a commercial wharf to accommodate an open-pile building for a proposed wholesale/retail fish market and seafood unloading dock as proffered by Mr. Hionis in 2004.

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

Mr. Worrell explained that Bubba's Shellfish Company, a boat ramp, and Bubba's Restaurant are all located at 3323 Shore Drive, a commercial property generally identified as *Bubba's Marina*, situated along the Lynnhaven Inlet in Virginia Beach. VMRC permit #01-1979, authorized by the full Commission on February 24, 2004, and eventually permitted on December 17, 2004, detailed specific encroachment activities that would occur as a result of the construction of the Shellfish Company. The portion of the proposed facility channelward of the existing bulkhead (essentially about half of the entire facility) included an open-pile structure and commercial wharf permitted specifically for a wholesale/retail fish market, and a commercial seafood offloading dock.

Mr. Worrell said that as part of the application request before the Commission in 2004, the applicant and his agent, Tom Langley, proffered to restrict the use of the portion of the facility over State-owned submerged land to only seafood offloading, seafood processing, and a wholesale seafood market. The Commission approved the request with such a restriction, and a **Declaration of Restrictive Covenant** was then prepared by the applicant's attorney, signed by the applicant, and recorded with the Circuit Court of Virginia Beach. The Covenant affirms that "*said improvements extended over, under, upon, through or above state owned bottomlands will be used strictly and solely for the purpose of commercial fish and seafood offloading and processing.*" It further states that "*Grantors acknowledge that any non-conforming use, without obtaining specific approval therefore from the VMRC, is subject to the civil and criminal enforcement provisions of Chapter 12 of the Code of Virginia...*". A final copy of the Covenant was provided to the Commission before the final permit was released.

Mr. Worrell stated that in December of 2010, Mr. Hionis submitted a Joint Permit Application (VMRC #10-2025) to install and backfill a new bulkhead under the existing Bubba's Restaurant, directly on the western side of the existing boat ramp. A subsequent visit to the site in January of 2011, revealed the presence of newly installed enclosures (glass panel garage doors) on the existing wharf at the adjacent Shellfish Company facility. Staff then met with the store manager and Mr. and Mrs. Hionis on multiple occasions to inspect and photograph the facility. Staff noted the presence of tables, chairs, and a bar inside, with accompanying drink and food menus advertised on the

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walls. Staff further noticed that the enclosed wharf portion of the facility was named **The Back Deck Bar & Café**, which was on a front door entrance that was separated from the actual Shellfish Company market.

Mr. Worrell said that Mr. and Mrs. Hionis and staff reviewed the Commission's permit documents and the Declaration of Restrictive Covenant, and discussed the past and ongoing uses of the facility. Staff expressed concerns that the recent construction of the enclosures and the apparent use of the facility within the enclosures did not comply with the Commission's previous permit for commercial offloading activities out over State-owned submerged land. Mr. and Mrs. Hionis felt that they had not *changed* the overall use of the facility, but merely *added* an additional use that had become very popular and profitable during the summer months. By correspondence dated January 28, 2011, staff requested that Mr. and Mrs. Hionis explain in detail their recent activities at the Shellfish Company and further to provide a copy of all local and/or federal approvals granted.

Mr. Worrell explained that Mrs. Josie Hionis responded by letter dated-received February 11, 2011, and included a copy of the City's Building Permit for the enclosure structures, and a copy of the Virginia Department of Alcoholic Beverage Control (ABC) license. Mrs. Hionis explained the many purposes of the new enclosures such as additional security for the facility and a safer and more comfortable waiting area for patrons of the next-door restaurant. She indicated that seafood offloading would still occur as the new enclosures can be lifted up and down. She also explained that due to the economy, declining fishing industry, and their loss of commercial ramp business, they had created a more "detailing seafood market" out on the wharf and within the enclosures to "increase their revenues." Mrs. Hionis ultimately agreed to keep the facility in question closed until the matter had been resolved.

Mr. Worrell said that the staff learned that a building permit for the enclosures was granted by the City's Planning Department, however the owners never completed a standard Joint Permit Application (JPA) for the request. A JPA was normally required by the City's Waterfront Operations Division when reviewing any request for construction along the shoreline. In staff's experience of working with the City of Virginia Beach, it was very unusual for a waterfront construction project to receive a building permit without first receiving a review and/or approval from the Waterfront Operations Division. Furthermore, the City's Planning Department had advised that there is no formal approval for the subject facility to operate as a restaurant-type business.

Mr. Worrell stated that staff issued a Sworn Complaint on March 2, 2011, and sent a formal Notice to Comply on March 3rd. In the Notice to Comply staff provided an option for the submittal of an after-the-fact application to retain the glass door enclosures. Regarding the actual use of the facility over State-owned submerged land, staff did not feel that it was consistent with the Commission's permit nor the recorded Restrictive Covenant, and that such restaurant type activities should cease, including the removal of furniture and associated materials. Staff did not feel it was appropriate to entertain any

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type of after-the-fact request for additional structures on the wharf, or for a change in use/additional use of the facility, given the Commission's permit stipulations. Furthermore, with no accompanying formal approval from the City of Virginia Beach or the local Health Department, staff felt it would be inappropriate for the Commission to entertain such a request.

Mr. Worrell said that Mr. Hionis' attorney, Paul Schmidt, responded with correspondence dated March 10, 2011, stating that while the owners would agree to file an after-the-fact application for the enclosures, they ultimately felt that such food and beverage "consumptions" at the facility were in keeping with the Commission's permit and represent activities that were "customarily associated with the ordinary course of business with local seafood markets." Although Mr. Schmidt stressed that the City was aware of the additional use of the facility, no formal City-approval correspondence was provided. Mr. Worrell noted that a copy of a Department of ABC letter dated July 11, 2007, was also provided, further indicating that the ABC Board was aware of the owners' intentions to use the deck area as "designated room" to serve alcoholic beverages.

Mr. Worrell explained that the only other regulatory agency to comment on the matter was the Virginia Beach Department of Public Health. In correspondence dated January 25, 2011, they issued a "Notice of Alleged Violation" for "flagrant and/or continuing violations of the Commonwealth of Virginia, Board of Health Food Regulations, 12 VAC 5-421. The correspondence outlined the alleged violations and required immediate corrective actions including the proper submittal of prepared plans for a "food establishment."

Mr. Worrell noted that in 2004 staff recommended denial of the proposed seafood market and adjoining decking, as staff did not consider the proposed market portion of the facility to be water dependent. The Commission, however, ultimately authorized the construction of an open-pile commercial structure to accommodate a wholesale/retail fish market and a commercial seafood offloading dock. Given the recent construction of the enclosures, and the obvious use of the enclosed wharf portion out over State-owned submerged land, staff failed to see how such past or ongoing activities on the wharf were water dependent or even comply with the existing permit. Although the owners and their attorney did not refer to this facility as a "bar/restaurant," staff felt that was essentially what it had become.

Mr. Worrell said that on February 23, 2004, Mr. Hionis' agent, Tom Langley, submitted a letter to Commission staff to further clarify the intentions of the facility. That letter was included in the Commission book items and openly discussed by Mr. Langley and then Commissioner Pruitt during the February 24, 2004 hearing. Mr. Langley emphasized that both he and Mr. Hionis had signed the letter, and further proffered to restrict all uses of the wharf portion of the facility to commercial seafood offloading only. According to that correspondence, and the audio portion of that hearing, the watermen in this particular area of Virginia Beach desperately needed a commercial facility to offload their catch.

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This offloading facility was to benefit other working watermen in this traditionally commercial area of the Virginia Beach waterfront, not just Mr. Hionis and his establishment.

Mr. Worrell stated that while staff was not ultimately questioning if seafood offloading ever occurred at the facility, it was difficult to envision typical offloading activities occurring on the wharf decking, with or without the recent enclosures, given the addition of chairs, tables, and a bar/counter that support the restaurant-type activities. Offloading and the storage of materials such as nets, crates, pots, coolers, pallets, etc., did not appear consistent with the current condition and setup of the facility. Such commercial offloading was specifically cited as justification for approval during the 2004 Commission hearing.

Mr. Worrell said that the Commission permit specifically authorized a seafood wholesale/retail facility with adjoining decking for seafood offloading only. In staff's view, the Commission's approval of the commercial offloading facility at this location was an attempt to help preserve a "working waterfront" area, especially since such areas were unfortunately being lost to other shoreline development activities throughout the State. Activities such as the consumption of beer, wine, and prepared food items, were not identified at the hearing, nor approved by the Commission. The Declaration of Restrictive Covenant proffered by the applicant and his agent, strictly specified only offloading activities shall occur at the facility.

Mr. Worrell stated that as such, staff recommended that the Commission determine that such "consumption" activities were not to be allowed per the Commission's past authorization, that all materials utilized in the restaurant-type service be permanently removed from the portion of the enclosed wharf over State-owned submerged land, and finally that the Commission order all food and beverage type services in the enclosed wharf to cease permanently. Should the Commission determine that the owners could submit a future application to change the use of the commercial facility and wharf, staff recommended that the Commission require such an application to include formal approvals from the City of Virginia Beach and local Health Department, and a legally modified and/or withdrawn Restrictive Covenant. Regarding the recent installation of the enclosures, if the owners choose to submit an after-the-fact application to retain such structures, they should do so within the next 30 days. Staff would then subject such a request to a full public interest review and bring the after-the-fact application back to the full Commission for consideration.

Commissioner Bowman asked if there were questions for staff.

Associate Member Tankard asked if the food was prepared at the site. Mr. Worrell responded yes, it appears that some food is prepared on site and they have menus there. Commissioner Bowman added that they offer it for sale.

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Associate Member Tankard asked if a wholesale/retail fish market were different. He said the permit says wholesale/retail and the Covenant just says wholesale. Mr. Worrell said that this was all before his time and he could not answer that. He stated that retail did not mean restaurant.

Associate Member Robins said that what was in the staff recommendation now was to secure the City's approval and make modifications to the VMRC permit. Mr. Worrell stated he was not sure that the Covenant could be changed or withdrawn, but the Covenant was very specific. He stated that all restaurants need approval from the local level and the Health Department.

Associate Member Robins asked if an application could be filed again. David Grandis, Assistant Attorney General and VMRC Counsel said he can file a modified application as the uses necessitate different encroachments. He added if it was not consistent with the 2004 permit, then he can re-apply and the permit and the Covenant can be modified.

Associate Member Schick said that if the use did not comply with the 2004 permit and should they be required to remove the restaurant. Mr. Grandis said it would be up to the Commission and if they decided the permittee was not in compliance as to the physical encroachments with 2004 permit then the Commission could require them to remove it.

Paul Schmidt, Attorney for the applicant, was present and his comments are a part of the verbatim record. Mr. Schmidt stated that the restaurant and seafood market were on the Hionis property and they leased the adjoining property. He said the restrictive Covenant said that if the grantee does not conform and get proper approval for any use of wharf from the VMRC the grantee will be subject to civil and criminal action enforcement. They felt they had complied with the time line. The permit was signed in December and it read wholesale/retail offloading dock and any deviation must obtain approval from the Commission. He said seafood market and restaurant were not defined and people were eating what was obtained from the seafood market. He added they believe they were not operating a restaurant as there was no grill, no deep fat fryer or other restaurant equipment there for preparing food only a steamer and microwave. He emphasized it was being used as an offloading site for seafood and the deck that had been requested was larger, but it was modified by staff and made smaller. He said the mesh conveyor belt and forklift were used normally, but the size of the deck did not allow its use. He said since there was manual sorting of seafood it was hard to get employees to do this type of manual labor. He said they felt the deck was an extension of the seafood market and the use of the area evolved from the customers moving to the deck to consume the seafood. He provided a hand out with the definition of a seafood market, which he read. He said they think this is exactly what they are doing here. He explained that a public boat ramp was built by the City of Virginia Beach, which took business and profit from them. He said they had employed 130 people at the peak and since then only 55 people were employed. He said the seasonal use of the deck had increased the profits of the seafood market and they were able to hire 120 employees. He said now there was a depressed

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seafood market and for the last three years the economy has been bad. He said if they cannot continue with the use of the deck for the seafood market they would have to close the deck down, as the deck was popular with the seafood market business. He said they talked with the City and they have been required to install the handicap lift and also, they had talked with ABC Board and were granted a license for the deck. The Commonwealth knows, and the City knows. This is a major traffic area.

Mr. Schmidt stated they felt the use was in keeping with the surrounding area; it was the right location. He said this was a tourist area and they enjoyed the accommodation. He said with the permit and the Covenant and seafood market they felt that it was a genuine continuance of it. He said they need to stay in business and they were in compliance with 28.2-1205, but if they must, they would submit an after-the-fact application.

Commissioner Bowman asked for questions.

Associate Member Schick spoke about the definition of a restaurant, seafood market, and asked about the Virginia Beach zoning law. Mr. Schmidt said that the seafood market prepared food from the beginning. He stated he did not have a definition of a restaurant.

Associate Member Tankard asked about the doors and how could they offload? Mr. Schmidt said they were all removable as well as the railings. He said the garage door could be opened.

Commissioner Bowman asked if Mr. Hionis would be speaking.

Dimitrios Hionis, applicant, was sworn in and his comments are a part of the verbatim record. Mr. Hionis said that they have all of the permits from the ABC, Health Department and City. He said the inspectors come ten times a day. He said there's a handicap lift which was required by the City. He said the signs were all clear and he had owned a restaurant all his life. He said there was no kitchen, only a steamer and microwave and all the food is prepared as take out. He said when the people starting using the deck it added to his revenue.

Commissioner Bowman said the case was heard in 2004 and it was water dependent as there was fishing equipment for offloading seafood. He further said that it was not being used as permitted or as in the covenant for commercial seafood processing. He announced that staff was right about the violation and the ABC license did not mean the activity was authorized. He said he cannot say that what was done was the intent of the permit, but he did see a nice place of business. He added that jobs were provided. He said he was concerned with the City's understanding as to what is here and the main question is where this needs to go or where does Mr. Hionis want it to go.

Mr. Schmidt stated they were willing to apply after-the-fact with a stay put on the notice-to-comply. He said they were requesting lenience.

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Associate Member Tankard said the covenant said offloading wholesale seafood and this needs an after-the-fact application.

Associate Member Schick said he was not familiar with the City rules, but you did not need a hood to be a restaurant. He said he only had a microwave and the County required an occupancy license. He said this was not the intended use and they should cease and desist until the Commission makes a decision.

Associate Member Robins said from the evidence and testimony this was a departure from the original letter. There was to be no retail sales and it is a clear economic change at the site. He said it may have been an evolution in use, but it was an encroachment just the same. He said there were only a few locations where citizens could interact with the fishing industry. He said he supported the findings and an application needed to be submitted and a hearing held. He said this was a case of non-compliance and they must cease and desist with a proper delay allowed to get the application in and to hear it.

Associate Member Laine said there was no question in his mind that it was a violation of the letter and the permit. He said he did not know whether the City knew or not, but as for the matter of the VMRC permit issued in 2004 the Commission must consider an after-the-fact application if they want to keep it.

Associate Member Holland said he agreed with Associate Member Robins about pursuing an after-the-fact permit application and to grant time. He stated he would like to go visit the site.

Commissioner Bowman said he was concerned that VMRC by granting an after-the-fact permit was benefiting someone who was in violation of the permit and approved by the oversight agencies.

Mr. Watkinson said the application process takes 60 to 90 days unless they receive a protest or VMRC staff and City staff had issues with the application.

Commissioner Bowman said the public notice interest review process was included.

Mr. Watkinson said that it would go through the after-the-fact permit process to decide if it can continue to operate, but would be subject to any authority by the City of Virginia Beach. He said if allowed to continue, the City might consider their oversight. He said the spring season is approaching and would they be allowed to continue to use it or not?

Commissioner Bowman stated that matter was before the Commission.

Associate Member Robins said that finding that the use of the facility was inconsistent with the permit, the Commission ordered that the equipment not used for seafood offloading be removed by the end of a six-month time period allowing

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for time to get the after-the fact application processed and to obtain all permits necessary. He said that an after-the-fact joint permit application shall be submitted by not later than 30 days with evidence to be provided that all permits that are required from the City are also being obtained. Associate Member Holland seconded the motion. Associate Member Schick requested an amendment to the motion to say that a complete application is to be approved by staff. Mr. Worrell asked if this included a complete application with the City. Associate Member Robins stated that the Commission could not require the approval by the City in 30 days only evidence of an application with the City. Mr. Watkinson questioned the delay of six months. Associate Member Schick said it was for the same reason as it was not just dealing with VMRC, but dealing with any delay by the City. He said there would be no extension allowed past the six months that they were being granted. The motion carried, 6-1-1. The Chair voted no. Associate Member Plumlee abstained.

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The Commission broke for lunch at approximately 12:45 p.m. and reconvened the meeting at approximately 1:19 p.m.

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Note: Presentations combined, Items 9 and 10.

- 9. **MICHAEL H. GIBSON, #2010-003S**, requests authorization to lease approximately six (6) acres of Oyster Planting Ground in Powells Bay near Ballast Narrows on the seaside of Accomack County. The application is protested by Mark A. Bowden, an adjacent oyster ground leaseholder.
- 10. **MARK A. BOWDEN, #2010-040S**, requests authorization to lease approximately six (6) acres of Oyster Planting Ground in Powells Bay near Ballast Narrows, Accomack County. The application is for the same area applied for by Michael H. Gibson.

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

Mr. Badger explained that the proposed lease is located in Powells Bay, approximately three quarters (0.75) of a mile northeast of Wishart Point and about six (6) miles southwest of the Town of Chincoteague in northern Accomack County. The water depths vary from approximate mean low water near the small channel leading from Four Mouths to Wishart Point, to minus one (-1) foot along a small channel near the shoreline. The bottom is a mostly mud with a small amount of sand mixed in. There were shelled oyster

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rocks within the application area. Powells Bay was mostly used for traditional on bottom oyster cultivation.

Mr. Badger stated that Mr. Gibson has seven oyster ground leases for a total of 83.81 acres and one of those leases was in Powells Bay for 47.61 acres. Mr. Bowden has two leases in Powells Bay adjacent to the area that has been applied for totaling 10.0 acres. The leases were transferred to Mr. Bowden from Mr. Carroll Cherrix in June 2007.

Mr. Badger said that staff received Mr. Gibson's application on December 7, 2009, for 6 acres. The application was bounded by Mr. Bowden's oyster ground lease (Plat File #7088) on the west and public ground on the north and northeast.

Mr. Badger explained that staff had received a letter from Mr. Bowden, dated April 28, 2010, protesting Mr. Gibson's oyster planting ground application. In the letter Mr. Bowden stated that he thought he was already leasing the area. This assumption was apparently based on an old 1984 VMRC map that he received from the previous leaseholder (Mr. Cherrix). Although the lease boundaries were correct, the shoreline coverage from the older maps was not as accurate, as that which staff used today. The map appeared to show his lease (PF #7088) closer to Ballast Narrows and appeared to include the area of Mr. Gibson's application.

Mr. Badger said that Mr. Bowden also stated that for the last four to five years he had maintained the rocks by raking, culling and separating the oysters. He also claimed to have planted approximately 200 bushels of oyster and clam shells in the application area. Our aerial photographs show evidence of the area being actively worked.

Mr. Badger stated that on May 5, 2010, Mr. Bowden submitted a lease application for the same area applied for by Mr. Gibson. In accordance with §28.2-605 applications must be considered in the order in which they are received.

Mr. Badger said that after evaluating the 1984 VMRC map depicting Mr. Bowden's lease and comparing it to VMRC's most recent map of the area, it was understandable how Mr. Bowden might believe that his lease included at least a portion of the area currently being applied for. Prior to the mid-to-late 1970's VMRC's base maps did not have universally accurate shoreline information. Accordingly, the coordinated surveyed lease corners were the controlling factor in relocating a lease, not a line on a map that represented the shoreline. Section 28.2-607 of the Virginia Code and regulation 4 VAC 20-290-10 ET SEQ., required the leaseholder to accurately mark the boundary of his lease, while it was actively being worked.

Mr. Badger stated that staff was sympathetic towards Mr. Bowden's situation since he had already expended resources and time towards improving the ground in question, however staff believed the following points should be considered:

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- 1) Mr. Bowden's lease (Plat File #7088) has been assigned to him since 2007, however, Mr. Bowden did not ask for a new map of the area or for the ground to be resurveyed. Instead he relied on an outdated 1984 VMRC map of the area.
- 2) **§ 28.2-605. Application for assignment.** States that all applications shall be considered in the same order in which they were received. (Mr. Gibson's application should be considered first, if approved then Mr. Bowden's application would be inactivated. If Mr. Gibson's application were to be denied, then Mr. Bowden's application would be considered.)
- 3) **§ 28.2-616. Possession gives no preference as to assignment.** States that any person in possession of any general oyster-planting ground which had not been assigned according to law shall have no preference as to having it assigned to him. The ground shall be open to the first applicant.

Mr. Badger explained that based on the above three points, should the Commission determine that it was appropriate to lease the ground in question, staff reluctantly recommends that Mr. Gibson's Oyster Ground Application, VMRC, #2010-003 (4.82 acres by survey) be approved.

Mr. Badger further explained that since inaccuracies of VMRC's old shoreline may have contributed to Mr. Bowden's issue, staff believed it may be appropriate to allow Mr. Bowden a reasonable time to remove the oysters and shells he mistakenly placed and cultivated in the area prior to the Commission assigning the ground to Mr. Gibson. Although not directly analogous, this recommendation was loosely based on § 28.2-559 of the Code of Virginia, "Removal of oysters planted by mistake" which states:

“§28.2-559. Removal of oysters planted by mistake. When, by any resurvey of oyster-planting ground or survey reestablishing the lines of the Baylor survey made under the direction of the Commission, it appears that any holder, by mistake of any employee of the Commission, has had assigned to him and included in the plat of his assignment any portion of the public oyster beds, rocks, or shoals, the holder shall file a petition with the Commission for permission to remove such oysters or shells from such ground. The Commission may allow the holder a reasonable time, not exceeding three years, within which to remove such oysters, their progeny and their shells.”

Associate Member Holland said that according to the staff recommendation, if it were to be assigned to Mr. Gibson then Mr. Bowden would be given time to remove his oysters and shells.

Mr. Badger stated that the shoreline delineations were very bad so that VDOT was hired to do the shoreline survey years back.

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Associate Member Bowden said that survey references are lost, such as a tree. He said that there was no change that he had seen in the area and part of the confusion was the Commission's responsibility. He said the shoreline had not changed and you did not get a new map. He said out at the Barrier Island it had changed, but here at this location it is a stable environment. He said the staff admitted that the map caused the confusion and the ground was stuck up when it was surveyed and it was still staked.

Associate Member Tankard said that 28.2-607 said that the leaseholder shall mark the ground with accuracy when working. Mr. Badger stated that it was not accurately marked. Associate Member Bowden stated it was marked according to the map at the time. Mr. Badger responded yes.

Associate Member Plumlee said the line on the slide indicated that it was known as to where the line was. Mr. Badger said they found out with the staff's investigation that someone at sometime knew where the line was supposed to be located.

Commissioner Bowman asked staff to explain the line. Mr. Badger said there were shell piles and some were only in the disputed area.

Associate Member Plumlee asked if it were marked like the map. Mr. Badger said yes, if it was the 1984 map. He said Mr. Bowden took the lease in 2007 when the 1949 survey was in effect. Associate Member Plumlee said that in 2007 it was in effect and there was no resurvey done. Mr. Badger stated Mr. Bowden got the map from the previous leaseholder. Associate Member Plumlee asked if the Commission retained authority to use its own discretion.

Ben Stagg, Co-Chief Engineer, said that it was transferred to Mr. Bowden

Mr. Badger stated that it had been transferred four or five times. Mr. Badger read the Code Section 28.2-605.

Associate Member Plumlee asked if Mr. Gibson's application was complete. Mr. Badger stated yes, and the Commission needs to consider his application first. He said they need to hear from him first.

Commissioner Bowman asked Mr. Gibson to come forward to make any comments.

Michael H. Gibson, applicant, was sworn in and his comments are a part of the verbatim record. Mr. Gibson stated that he had worked here as public ground since 2005. He stated he had harvested 100's, 1,000's of bushels over the years. Commissioner Bowman asked if this information would be in the mandatory reporting and could it be checked? Joe Grist, Head-Plans and Statistics, said the information could be pulled up.

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Mr. Gibson stated that to him it appeared to be open for years, as the regulation said the markers determine where leases are located.

Associate Member Schick asked if there were any stakes marking the ground. Mr. Gibson state no.

Associate Member Holland asked if the Cherrix lease was transferred to Mark Bowden. Mr. Badger said yes, in 2007, two leases were transferred to him.

Associate Member Plumlee asked Mr. Gibson why he applied for the lease in 2009. Mr. Gibson said he was already working the areas and he wanted to expand his business to these areas that he had worked. Mr. Badger showed a staff slide with a 40-acre lease transferred to Mr. Gibson.

Commissioner Bowman asked Mr. Bowden to come forward and comment.

Mark A. Bowden, applicant, was sworn in and his comments are a part of the verbatim record. Mr. Bowden said that he had purchased the ground from Mr. Cherrix. He explained that he had been helping him since he was handicap and could not go out. He said Mr. Cherrix gave him the map. Mr. Bowden said he had a letter from Mr. Cherrix stating how he had helped him maintain the grounds until he bought them. He said his father had worked the water and he had wanted to go out and work. He said he had planted shells on the area being requested. He provided copies of pictures, which were shown to the Commission. He said the PVC pipe had been taken out by ice in the winter time. He said that Paul Rogers had surveyed it.

Commissioner Bowman asked him how many bushels of shells he had planted. Mr. Bowden said 2,000 plus bushels, plus stakes and oysters. He said he was building the rocks. He said he did not realize the map was inaccurate.

Associate Member Tankard asked him about the PVC pipe and Mr. Bowden stated it had always been there. Associate Member Tankard asked him if the 4.3 acres were stuck up. Mr. Bowden responded that they were already stuck up. Associate Member Tankard asked if he was keeping it stuck up. Mr. Bowden stated he had put one back.

Associate Member Plumlee asked how many acres were impacted. Mr. Bowden said 4.3 acres and the highest point was the most worked.

Associate Member Schick asked him if there was a marker in the marsh on the eastern side. Mr. Bowden said that was right.

There were no more questions.

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Associate Member Plumlee asked staff to explain why there was confusion and the map was inaccurate. Mr. Badger said in the early 70's the base maps were not on a grid and in the 70's we went to a grid system with state plan coordinates. He stated VDOT digitized the shoreline for the first set of grid maps. He said Mr. Bowden's map was one of the first sets to be digitized and they have had problems with the old VDOT shoreline. He added no field survey had been done since 1949. Associate Member Plumlee asked if in the 70's was the last time it was surveyed by VMRC. Mr. Badger stated it was the first and only time.

Associate Member Schick asked if a lease transfer did not require a new survey and a new map was given as part of the procedure. Mr. Badger stated that if he had asked he could have gotten a plat that would be accurate.

Associate Member Plumlee asked when the new information had changed the shoreline. Mr. Badger said it had been changed 2 or 3 times since then. Associate Member Plumlee asked if there was not a notice sent to the leaseholder. Mr. Badger responded no. He said the plat from the 1949 survey is the only survey and our maps show the latest shoreline.

Commissioner Bowman said the matter was before the Commission.

Mr. Badger reminded the Commission that a motion should be made for Mr. Gibson's application first.

Associate Member Tankard moved to deny the lease application of Michael Gibson. Associate Member Plumlee seconded the motion. The motion carried, 8-0.

Associate Member Tankard moved to approve the application of Mark Bowden for the 6 acres. Associate Member Plumlee seconded the motion. The motion carried, 8-0.

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Note: Heard prior to items 9 and 10.

11. PUBLIC COMMENTS:

Ellis W. James – noted for the Commission to watch what had happen in the Japan's disaster with the Tsunami, earthquake, and then the destruction of their nuclear plants. He explained that they had lost 6,000 fishing boats, lots of fishing villages, and a lot of their aquaculture that had been developed. He said we should learn from their tragedies and it will benefit us down the road.

Request by industry to change the time set for offloading flounder from 6 p.m. to a later time.

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Charles Amory, representing Amory Seafood, requested a change of the time to stop work on the unloading of flounder, from 6 p.m. until later, at least 7 p.m. He said they do not just have to offload Virginia's flounder, but also North Carolina's, since the change in North Carolina's quota and the limit of 200 boxes. He said in the Oregon Inlet they are unable to get in there.

Commissioner Bowman asked about 8:30 or 9:00 p.m. Mr. Amory stated that would be fine. Commissioner Bowman asked Law Enforcement staff if they had a problem with that being changed. Colonel Rick Lauderman, Chief of Law Enforcement, responded that they had no objection.

Jack Travelstead, Chief, Fisheries Management, said that there was over 100 North Carolina boats landing in Virginia because of the North Carolina quota and the businesses need time to get them all offloaded. He said in 2008 it was changed to 6:00 p.m. and it was 10 p.m. before that change. He said if Law Enforcement had no problem he suggested 9:00 p.m. be established in the regulation and that it should be stressed that the offloading must be stopped immediately at 9:00 p.m.

Associate Member Tankard moved to change it from 6:00 p.m. to 9:00 p.m. by emergency regulation and to advertise for a public hearing in April. Associate Member Bowden seconded the motion. The motion carried, 7-0-1. The Chair voted yes. Associate Member Robins abstained.

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- 12. PUBLIC HEARING:** Proposed amendments to Regulation 4VAC20-280-10 et seq., "Pertaining to Speckled Trout and Red Drum", to modify possession and size limits for Speckled Trout taken during the winter season, December 1 through March 31.

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

Mr. Gillingham explained that the Atlantic coastal states from Maryland through Florida manage speckled trout under Amendment 1 to the Fishery Management Plan (FMP) for Spotted Seatrout (1991). Management measures include a minimum size limit of 12 inches in total length, for both recreational and commercial fisheries, and the collection of catch and effort data from the recreational and commercial fisheries. A major constraint noted in the FMP is the lack of stock assessment data. The FMP recognizes that additional measures, such as creel limits, catch quotas, area closures and gear restrictions may be needed in the future. The Management Board reviewed a report from the Spotted Seatrout Plan Review Team in 2007 and concluded the Plan provided an adequate level of interjurisdictional management at that time.

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Mr. Gillingham said that all states from Maryland through Florida have adopted more stringent restrictions for speckled trout than required by the FMP (Table 1).

Mr. Gillingham stated that in Virginia, the Commission had adopted a 14-inch size limit for both the recreational and commercial fishery, a recreational possession limit of 10 fish for recreational anglers and commercial hook and line gear and a commercial quota of 51,104 pounds.

Mr. Gillingham explained that for Virginia, significant numbers of speckled trout migrate out of the Bay and move southward into North Carolina in the fall. This pattern was well known by both the commercial and recreational fisheries and each take advantage of this seasonal movement. Speckled trout tagged in Virginia were recaptured in North Carolina, and speckled trout tagged in North Carolina were recaptured in Virginia. But, not all speckled trout leave the Bay system. When an active American shad fishery existed, it was not unusual for the occasional speckled trout to be caught in a gill net set for shad in late February or early March. Some speckled trout appear to over-winter inside Rudee Inlet each year.

Mr. Gillingham said that there existed three warm-water discharges in Virginia tidal waters that offer speckled trout a winter refuge because of their location. The lesser of the three was located on the James River at Surry. The second was located on the lower York River, and, in some years, this location houses significant numbers of speckled trout. In both of these locations the trout tend to be fish much less than 5 pounds.

Mr. Gillingham stated that the third and easily best known warm-water discharge area was located on the Elizabeth River, where Dominion Power passed river water through its plant to cool its machinery and discharged it into a canal on their property to flow into the Southern Branch of the Elizabeth River. The effects of this warm-water discharge can be measured miles from the initial discharge from Dominion's property. Fish in this plume of heated water were unable to move outside the river for several months because surrounding waters were below their tolerance level.

Mr. Gillingham said that the fish tagged in the Elizabeth River during the winter season were most often recaptured in the Elizabeth River. Winter-tagged Elizabeth River speckled trout were also recaptured in the James, York and Mobjack systems later in the year. Some have been recaptured off the Eastern Shore Bayside and even up into the Maryland portion of the Bay. No recent recaptures of these fish have been recorded outside the Chesapeake Bay system.

Mr. Gillingham noted that in recent years, the notoriety and popularity of the winter fishery in the Elizabeth River had been expanding. Numerous fishing publications had extolled the Elizabeth River for its numbers of trophy-sized speckled trout. This fishery had become a destination location and attracts anglers from nearly all parts of Virginia and several surrounding states. This three-month winter trophy speckled trout fishery

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now accounted for the major portion of all Citations issued by the State's Virginia Saltwater Fishing Tournament, for speckled trout, compared to all other areas, for the entire year. The graph labeled VSWFT Speckled Trout Citations was located in the evaluation packet.

Mr. Gillingham said that the Tidewater Anglers Club sent a letter to the Commissioner expressing its concern for speckled trout in the Elizabeth River winter fishery (see attached letter dated September 10, 2009). The letter alleged speckled trout were already subject to heavy fishing pressure and requested the Commission act to preclude gill netting in this area during the winter. This item was put on the October 2009 FMAC agenda as a discussion item. At the last FMAC meeting this option and other restrictions were discussed by FMAC but the item was tabled for lack of a majority vote.

Mr. Gillingham explained that in the ensuing nine months, members of the Tidewater Anglers Club worked within the recreational community to develop a proposal that would restrict the rod and reel fishery. Their proposal would reduce the recreational possession limit from 10 fish to 5 fish and allow only one of the fish to be greater than 24 inches from December 1 through March 31. They solicited various area fishing clubs and received seven letters. Six letters supported the proposal and one did not. Staff has also received several emails on this issue. The letters and emails are in the evaluation packet.

Year	*CHL (All VA waters, only Dec-Mar)	All Commer. Gear (all VA waters, only Dec-Mar)	All Gear all Year (Elizabeth River only)	Total Harvest (All gear, all year) water, year)
2005	124	1,265	409	17,307
2006	1,375	1,627	423	48,224
2007	1,893	4,174	759	49,502
2008	469	1,087	1,077	47,007
2009	365	1,210	748	27,687

* All values in pounds

Mr. Gillingham also explained that due to the lack of additional agenda items a telephone poll of available FMAC members was conducted rather than convene a formal meeting. The results of the poll were included below:

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FMAC POLL

	Supports TAC Proposal	Do Not Support	Comments
1	X		
2	X		Would support Rec only
3	X		Supports unless opposed by CHL
4		X	Would support Rec only
5	X		
6	X		
7	X		
8			Doesn't matter CHL not catching speckled trout
9	X		Would support Rec only
10	X		

Mr. Gillingham said that one member was concerned commercial hook and line fishermen were unaware of the Tidewater Anglers Club proposal and requested prominent commercial hook and line fishermen should be contacted. Bill Reynolds (Eastern Shore) and Chris Ludford (Virginia Beach) were subsequently contacted and apprised of the public hearing.

Mr. Gillingham stated that there was no compelling evidence to suggest speckled trout were in jeopardy, but a logical case can be made that a reduction in the harvest of these fish, during a period when they were confined to a relatively small area and subject to increasing fishing pressure, would be prudent, for the long term sustainability of this trophy fishery. Additionally, the reduction in the possession limit from 10 to 5 fish and the allowance of only one fish 24 inches or greater from December 1 through March 31 would likely have little negative impact on the recreational fishery.

Mr. Gillingham said that staff recommended adoption of the amendments in 4 VAC20-280-10 that will establish a 5 speckled trout possession limit with only one of the 5 fish allowed to be 24 inches or greater for all rod and reel and hook and line caught speckled trout from December 1 through March 31. In the regulation Section 30 had been amended for the dates and Section 40 (A & B) for the possession and size limits.

There were no questions of staff by the Board members. Commissioner Bowman opened the public hearing.

Sheldon Arey, Recreational Fisherman, was present and his comments are a part of the verbatim record. Mr. Arey explained that he had been involved in the tagging program. He said the study by the Texas A & M stated that they had found that fish released over 24 inches enhanced spawning with a 76% survival rate.

Craig Paige, Paige Two Charters, Lynnhaven, was present and his comments are a part of the verbatim record. Mr. Paige explained that he supported the reduced number. He said

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he had worked in the Elizabeth River for 20 years and he said it would be like the buffalo or grey trout so do not wait. He said in the area there was world class fishing for a number of people here in Virginia and outside the State. He said there were 30-40 people per day. He supported 5-fish with 1-fish 24 inches or greater. He said if the Commission does not act now there will be problems in the future. He stated it was just one river and 4 months.

Being that there were no further public comments, Commissioner Bowman said the matter was before the Commission for discussion or action.

Associate Member Laine said the staff proposal was the most agreeable and he moved to amend the regulation to 5-fish with 1-fish 24 inches or greater. Associate Member Bowden seconded the motion. Associate Member Robins stated he had some concerns with the staff recommendation and Mr. Paige's suggestion, as it caused the fish to be subject to exploitation. The motion carried, 8-0. The Chair voted yes.

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- 13. HORSESHOE CRABS:** Request for public hearing to establish the 2011 commercial fishery quota and other harvest control measures.

Associate Member Robins recused himself from the hearing of this matter and left the meeting room.

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

Mr. Grist explained that the ASMFC is very interested in this species as it is a very important fishery up and down the coast. Also, there are other groups that are interested in protecting this species. It is important that Virginia stay on top of this in order to stay in good standing with the ASMFC. They have said that Virginia has been diligent in their managing of the species.

Mr. Grist stated that there have been two years of overages. In 2009 and 2010 the quota was exceeded. In 2009 the season was closed early on August 17, 2009. Changes were made in 2010 to the regulations including a reduction in the quotas to 137,168 crabs, as payback for the overage in 2009. The horseshoe crab quota was caught very quickly in 2010 and the fishery was closed on June 28, 2010.

Mr. Grist said that staff had met with industry on March 8, 2011 and March 28, 2011. He explained that the horseshoe crab harvesters were not required to sell to a horseshoe buyer and in 2010 several harvesters reported their landings as retail. These data are not available for quota tracking until the mandatory reports are submitted by these harvesters

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and the data made available several months later. In order to get more timely notice of landings sold as retail, staff recommended that the call-in requirements be added for anyone not selling their catch to a permitted buyer.

Mr. Grist said that staff recommended that the Commission establish the 2011 quota of 130,933 horseshoe crabs, a reduction in the landing limits for endorsement license holders, a requirement that all harvesters call-in daily, a Fisheries Management control date of December 31, 2010, a moratorium on all new licenses May 1, 2011, and an allocation of the annual quota by gear type; to be advertised for amending Regulation 4VAC20-900-10, et seq.

Commissioner Bowman said that the ASMFC liked the attempts made by Virginia to regulate this fishery and there was a need to get a handle on it. He said he wanted a thorough report on the reporting for all persons and/or gear types to be brought to the Commission. He said the fishermen, who do not report, will be brought before the Commission. He asked for a motion.

Associate Member Plumlee moved to advertise for a public hearing in April. Associate Member Holland seconded the motion. Associate Member Bowden said he attended the meeting on the 28th and he told those there from industry that if they would not do something, then the Commission would have to do it. He said the limit can be dropped to half when 50% of the quota is caught. He asked what would be done then, drop it to a quarter? Mr. Grist said that there would be a variety of options advertised, as to when to drop the limit. The motion carried, 7-0-1. The Chair voted yes. Associate Member Robins abstained, as he was involved in this industry.

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- 14. SHELLFISH HARVEST IN WARM WATER MONTHS:** Request for public hearing for amendments to Chapter 4VAC20-1230 et seq, "Pertaining To Restrictions on Shellfish" to clarify the use of ice during the warm water months, and other measures.

Jim Wesson, Head, Conservation and Replenishment, gave the presentation. His comments are a part of the verbatim record.

Mr. Wesson reminded the Commission that for the past several years, the Commission had added a number of restrictions for shellfish harvest during the warmest months of the year in order to protect the health of the public.

Mr. Wesson said that the curfew times for oyster harvest that were implemented in 2010, along with the special permits appeared to have worked well.

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Mr. Wesson explained that there had been some problems with the use of ice on the boat in the James River. Some of the harvesters used quantities of ice that were too small to cool the oysters. Amendments have been added to the regulation for more clarification. If this works this may be allowed in other areas.

Mr. Wesson stated that Law Enforcement had requested that since the tagging requirements pertain to all year, that the tagging part of the regulation be incorporated into a separate regulation.

Commissioner Bowman asked for questions and there were none. He said the matter was before the Commission and a motion was needed to advertise for a public hearing.

Associate Member Tankard moved to advertise for a public hearing in April. Associate Member Schick seconded the motion. The motion carried, 7-0. The Chair voted yes. Associate Member Robins had not returned to the meeting.

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15. BLUE CRAB: Review and Update.

Jack Travelstead, Chief, Fisheries Management, gave the presentation with slides. His comments are a part of the verbatim record.

Mr. Travelstead said that including this meeting there will be three meetings where there will be discussion on the blue crab management. He said that there is a lot of information in the evaluation including a lot of data put together by staff.

Mr. Travelstead noted that they still did not have the results of the 2010 winter dredge survey. He said this made it difficult to make any management decisions at this time. He said staff was asking for the advertisement for a public hearing next month to discuss two issues.

Mr. Travelstead said that there was a new crab assessment method which was undergoing a peer review today. He said this would become the best available science when it was completed. He stated this would play a major role in decisions that will be made in April and May and in April staff hopes they will have a clear depiction of this stock assessment method.

Mr. Travelstead said that staff had commissioned Dr. Jim Kirkley of VIMS to do a capacity analysis. He has been working on an analysis of the peeler and crab pot fisheries as it relates to the 200-300 crab licensees that are now on a waiting list and the Commission needs to see if the fishery can stand the return of these numbers of watermen to the crab fishery.

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Mr. Travelstead said there are two changes to the regulation that should be advertised for the public hearing in April. He said that there has been a dispute over the boundary line of the sanctuary. He said some watermen in the Northern Neck area had complained that they felt that were being left out. He showed the Board a map of the proposed lines for the crab sanctuary area on a map. He said the green line was what was proposed by VIMS, the red line was proposed by staff, and blue line proposed by VIMS (blue line excluded a triangular piece in the Lower Bay). He said the gray line shown on the map was a compromise agreed to by all. He said VIMS, VMRC, and the committee all agree with the compromise line.

Mr. Travelstead said the sanctuary will be closed on May 1 and a decision was needed in April to delay the closing until May 15. He said that the Tangier watermen wanted the northern area to remain open and the watermen in Virginia Beach wanted the lower area to remain open. He said that the staff recommended the request for two weeks in May be advertised for an April public hearing.

Associate Member Robins moved to accept the staff recommendation and advertise for an April public hearing, the two issues, the line change and to open the sanctuary for two weeks, May 1 through May 15. Associate Member Tankard seconded the motion. The motion carried, 8-0.

Mr. Travelstead said that there would need to be another public hearing in May as there were two additional issues to discuss. He explained that the new stock assessment and the winter dredge survey will be available in April. He stated this new information may change staff recommendations. He said that staff would be requesting a public hearing in May at the April meeting.

Mr. Travelstead explained that staff depended on the crab committee as this group of industry members, staff felt had their finger was on the pulse of the industry. He said as good as that group is, staff decided to do a survey of the industry and sent survey forms out to 1,600 industry members. He said that 40% were returned. He said that there were questions related to 12 issues for the watermen to respond to. He provided the Board with a handout for the survey results.

Commissioner Bowman asked for questions.

Associate Member Robins asked the staff to evaluate an extension of the crab pot season into December, some form of a bonus season to benefit the full-time crabbers.

Associate Member Schick asked if staff would consider increasing pot numbers to previous levels. Mr. Travelstead said staff will look at it.

Commissioner Bowman asked Dr. Jim Kirkley of VIMS to come forward and give his report. Dr. Kirkley gave his presentation, which is a part of the verbatim record.

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Associate Member Robins thanked him for explaining a complex document. He said he felt there were two issues. One was the relationship of the exploitation rate to the amount of harvest, number of permits, and yield. The second was there were 1,000 active licenses and a lot of latent effort also.

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There was no further business and the meeting was adjourned at approximately 3:30 p. m. The next meeting will be held Tuesday, April 26, 2011. (Note that today's meeting date had been changed because of the ASMFC meetings being held the week of the 4th Tuesday (March 22, 2011), which is the normal date for the meeting.)

Steven G. Bowman, Commissioner

Katherine Leonard, Recording Secretary