

MINUTES

COMMISSION MEETING

October 24, 2023

The meeting of the Marine Resources Commission was held at the Hampon Roads Convention Center, 1610 Coliseum Drive, Hampton, Virginia with the following present:

Jamie L. Green	Commissioner
John Cosgrove	Deputy Commissioner
Lynn Kellum	
William Bransom	
James E. Minor III	
Jeremy Headley	Associate Members
A.J. Erskine	
Patrick Hand	
Jeanette Edwards	
Kelci Block	Assistant Attorney General
Rachel Peabody	Director of Coastal Policy
Lisa Pyle	Recording Secretary
Jamie Hogge	Recording Secretary
Todd Sperling	Bs. Systems Manager
Pat Geer	Chief, Fisheries Mgmt.
Shanna Madsen	Deputy Chief, Fisheries Mgmt.
Jennifer Farmer	Regulatory Coordinator
Matthew Rogers	Chief, Law Enforcement
Allen Marshall	First Sgt., Law Enforcement
Ronald Cagle	Captain, Law Enforcement
Herbert Bell	Deputy Chief, Law Enforcement
Chris Miller	Marine Police Officer
Zach Widgeon	Director of Communication

Commission Meeting

**19149
October 24, 2023**

Randy Owen	Chief, Habitat Management
Justin Worrell	Deputy Chief, Habitat Management
Mike Johnson	Environmental Engineer, Sr.
Tiffany Birge	Environmental Engineer, Sr.
Adam Kenyon	Chief, Shellfish Management
Andrew Button	Deputy Chief, Shellfish Management

Below members of staff were present via WebEx:

Joe Grist	Deputy Chief, Fisheries Mgmt.
Jill Ramsey	Fisheries Mgmt. Specialist
Joshua McGilly	Fisheries Mgmt. Specialist
Alicia Nelson	Natural Resource Manager
Ethan Simpson	Biological Sampling Prog. Mgr.
Lewis Gillingham	Director, SWFT
Jay Woodward	Environmental Engineer, Sr.
Kirsten Travis	Environmental Engineer, Sr.
Khadijah Payne	Environmental Engineer, Sr.
Claire Gorman	Environmental Engineer, Sr.

Virginia Institute of Marine Science (VIMS):

Lyle Varnell	Mark Luckenbach
--------------	-----------------

Others present:

Tim Forrest	Andy Cortez	Dolores Paphitas
Tomoko Hamada	Michelle Conti	David Obrien
Randy Whittaker	Dan Fowler	Victoria Holmes
Chris Dollar	Pam Scrima	Richard Draper
Victoria Eisenberg	Jacey Hamelman	David Earl
Tom Moore	Andy Hall	Ross Kellum
Christi Medice	Dale Neal	Julie Kacmarcik
Bob Mandigo	Ben Stagg	Carl Conti
Debbie Campbell	and others.	

* * * * *

APPROVAL OF AGENDA. – Commissioner Jamie Green asked if there were any changes from the Board members or staff.

Associate Member Headley moved to approve the agenda as presented. Associate Member Minor seconded the motion. The motion carried, 6-0.

* * * * *

MINUTES: Commissioner Green asked if there were any changes or corrections to be made to the September 26, 2023, Commission Meeting minutes. Associate Member Edwards highlighted a correction.

Associate Member Edwards moved to amend the minutes. Associate Member Headley seconded the motion. The motion carried, 6-0.

* * * * *

APPROVAL OF AMENDED AGENDA. – Per correction to the September 26, 2023 minutes.

Associate Member Minor moved to amend the minutes. Associate Member Headley seconded the motion. The motion carried, 6-0.

* * * * *

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

* * * * *

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

Randy Owen, Chief, Habitat Management, reviewed the Page 2 item 2A for the Associate Members. Mr. Owen’s comments are a part of the verbatim record.

- 2A. **NORFOLK NAVAL SHIPYARD, #2023-1975 NORFOLK NAVAL SHIPYARD, #2023-1975** Requests authorization to install 578 linear feet of temporary steel containment retaining wall placed 25 feet channelward of the existing berth face structure; place sand fill over the existing submerged bottom in the vicinity of the containment wall to prevent pollutant release; install and backfill 378 linear feet of permanent steel bulkhead at the existing berth face; and to place sand fill and stone armor for scour protection between the permanent bulkhead and the temporary retaining wall as part of a reconstruction of Berths 40 and 41 at Dry Dock 8 serving the Norfolk Naval Shipyard, situated along the Southern Branch Elizabeth River in the City of Portsmouth.

No one spoke in support or opposition of the projects.

The matter was before the Commission for discussion and action.

Associate Member Erskine moved to approve the Page 2 item 2A as presented. Associate Member Bransom seconded the motion. The motion carried 6-0.

* * * * *

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

* * * * *

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

* * * * *

5. **WESTMINSTER-CANTERBURY ON CHESAPEAKE BAY, #2023-1120**
Commission review on freeholder appeal of the City of Virginia Beach's Wetlands Board's September 18, 2023, decision to approve a request to construct a new public beach access walkway adjacent to the proposed Westminster-Canterbury Chesapeake Bay campus expansion situated at 2350 Ocean Shore Crescent along the Chesapeake Bay in the City of Virginia Beach.

Tiffany Birge, Environmental Engineer, gave the briefing of the information provided in the staff's evaluation, with PowerPoint slides. Her comments are part of the verbatim record. After review of the record and attendance at the Wetlands Board meeting, staff did not find that the Board erred procedurally in their review of the matter, nor did staff find that the substantial rights of the appellants were prejudiced by the Board's decision. Staff recommends that the Wetlands Board September 18, 2023 approval of the proposed walkway be upheld.

Tom Forrest of Lynnhaven Colony Civic League spoke as an appellant; his comments are part of the verbatim record. He voiced his concerns related to the proposed design of the walkway as well as potential damage to the structure due to storms.

RJ Nutter, attorney representing Westminster Canterbury, spoke in opposition to the appeal. His comments are part of the verbatim record. He confirmed that VMRC staff and the City of Virginia Beach staff met on-site during the design process. He also assured staff that any impact on vegetated wetlands and primary sand dune was eliminated.

Victoria Eisenberg of the Wetlands Board of Virginia Beach spoke in opposition to the appeal. Her comments are part of the verbatim record. Ms. Eisenberg asked that the Commission uphold the Wetland Board's September 18, 2023 decision.

The matter was before the Commission for discussion and action.

Associate Member Bransom made a motion to approve staff recommendation. Associate Member Headley seconded the motion. The motion carried, 6-0.

6. **PUBLIC HEARING:** Proposal To Adopt Chapter 4 VAC 20-1410-10 Et Seq, "Utility Line Crossings Beneath or Over State-Owned Subaqueous Beds".

Mike Johnson gave the briefing of the information provided in the staff's evaluation, with PowerPoint slides. His comments are part of the verbatim record. Experience has shown that the installation of aerial and bored utility lines will not adversely impact natural resources under the jurisdiction of Virginia Marine Resources Commission (VMRC). In addition, these types of projects normally receive a subaqueous permit from the Commission following the standard public interest review with no protests.

To be a more efficient regulatory agency, and to accommodate Governor Youngkin's Executive Order #19, staff is proposing this general permit as a way to expedite projects where there are no direct impacts upon state-owned submerged bottomland resources under VMRC regulatory authority. This new general permit will allow time and cost savings not only to this agency but also the general public and utility companies. Therefore, the staff recommends the approval of this regulation as proposed.

The matter was before the Commission for discussion and action.

Associate Member Minor made a motion to approve staff recommendation. Associate Member Edwards seconded the motion. The motion carried, 6-0.

7. **PUBLIC HEARING:** Proposal to an update of the Commission's Subaqueous Guidelines developed pursuant to requirements of SB 1074 and HB 2181 by the 2023 General Assembly and §28.2-1203 A.9 of the Code of Virginia.

Randall Owen gave the briefing of the information provided in the staff's evaluation, with PowerPoint slides. His comments are part of the verbatim record. The Subaqueous Guidelines are used to guide the Commission and its staff in the application of their existing policies and criteria, and serve to inform citizens of the general terms and conditions under which subaqueous activities will be permitted in State waters.

Updates to VMRC's existing Subaqueous Guidelines are now required to align with the legislative actions associated with Senate Bill 1074 and House Bill 2181 (2023 General Assembly).

Additionally, the updates have been requested by the Office of the Attorney General as they are the current subject of litigation in Briar Oaks Properties, LLC vs VMRC and the Commonwealth of Virginia. Prior to July 1, 2023, VMRC had the proprietary authority and responsibility to issue permits for all activities that take place over, under, through, and on all submerged lands owned by the Commonwealth. After July 1, 2023, instream activities in non-tidal waters no longer require VMRC authorization provided that the person performing such activity obtains a Virginia Water Protection Permit (VWP) from DEQ and complies with all requirements of the Virginia Water Resources and Wetlands Protection Program.

The Commission will continue to require permits for encroachments over or under jurisdictional State-owned submerged lands.

The matter was before the Commission for discussion and action.

Associate Member Erskine made a motion to approve staff recommendation. Associate Member Bransom seconded the motion. The motion carried, 6-0.

- 8. DISCUSSION:** Commission review of application ADV-23-07 by the City of Virginia Beach in the amount of \$30,925 to reimburse for the removal and disposal three derelict vessels.

Rachael Peabody gave the briefing of the information provided in the staff's evaluation, with PowerPoint slides. Her comments are part of the verbatim record. Staff recommends approval to provide \$30,925.00 of reimbursement funding to the City of Virginia Beach from the VMRC's Abandoned or Derelict Vessel Grant Program funds. The application is consistent with the requirements outlined in the ADV Grant Policy Manual.

Associate Member Edwards asked if the owners of the vessels are held accountable. Ms. Peabody replied that while that is the goal of the program, there are a number of challenges to this. Ms. Edwards also asked what happens to the vessels when they are pulled up, to which Ms. Peabody responded that in VA Beach, the vessels are taken to a landfill. Ms. Peabody also remarked that there are a number of non-profit organizations working to find other ways to dispose of the vessels.

The matter was before the Commission for discussion and action.

Associate Member Headley made a motion to approve staff recommendation. Associate Member Edwards seconded the motion. The motion carried, 6-0.

9. **PETITIONER:** The Commission will render a decision under § 2.2-4023.1, on a Petition for Reconsideration pertaining to final decisions on oyster planting ground applications #2021-041 and #2021-062 that were approved at the September 2023 Commission meeting.

Adam Kenyon, Chief, Shellfish Management Division, gave the briefing of the information provided in the staff's evaluation, with PowerPoint slides. His comments are part of the verbatim record. The agency received a Petition for Reconsideration under § 2.2-4023.1 from a group of local citizens in the Broad Bay area. This petition requested that the Commission reconsider their September 2023 final decision to approve both leases #2021-041 and #2021-062. The Code of Virginia § 2.2-4023.1 requires the decision-making entity to do one of the following: (i) deny the petition, (ii) modify the case decision, or (iii) vacate the case decision and set a new hearing for further proceedings. The Staff presented information to the Commission that was previously presented in September, when the final decision was made. This information included that the applications were lawfully advertised under § 28.2-606, lease applications did not include any floating aquaculture, and there are already regulations in place that prevent on-the-bottom aquaculture from impeding navigation, including buoys or pole markings. Staff requested guidance from the Commission on the Petition for Reconsideration.

Eighteen members of the public, including individuals who submitted the petition, were sworn in and spoke in support of the petition. Their comments are part of the verbatim record.

Senator Bill DeSteph spoke in support of the petition. He remarked that the area is one of the last safe places for recreation and that there should be a balance between aquaculture and recreational use

Mr. Ben Stagg, Executive Director of the Shellfish Growers of VA, was sworn in and spoke in opposition of the petition. His comments are part of the verbatim record. Mr. Stagg stated that there was nothing new in the petition that the Commission didn't consider in September. He remarked that he does not see any conflict arising from the new oyster beds, and asked that the Commission deny the petition.

Bruce McLaughlin, applicant, was sworn in and spoke. His comments are part of the verbatim record.

The matter was before the Commission for discussion and action.

Associate Member Hand felt that the current notification system is insufficient. He brought up the fact that the leases are a century old and perhaps no longer relevant to activity in the area.

Associate Member Bransom remarked that the has complies with both the Code of Virginia and Virginia Administrative Code when it comes to notification. He also questioned whether the water depth is enough for recreation.

Associate Member Erskine said that there needs to be some responsibility of boaters when it comes to recreation in the area. He cited that there has been prior dredging of private channels in Virginia Beach to navigable waters for residents to use, highlighting considerations that have been made for the public.

Associate Member Headley made a motion to deny the Petition for Reconsideration. Associate Member Erskine seconded the motion. The motion carried, 5-1. Associate Member Hand opposed.

* * * * *

10. PUBLIC COMMENT:

Numerous members of the public were sworn in and spoke. Their comments are part of the verbatim record.

Andy Cortez alleged there is a conflict of interest among the board members and asserted that the Commission isn't here to promote a lifestyle or business growth, but rather to conserve Virginia's resources. He quoted the Governor's Code of Conduct.

Tomoko Hamada, of the Osprey Watch Alliance of Middle Peninsula spoke in regard to osprey population. She stated that the diet of an osprey consists of 90% fish and that the species can give clues as to the health of the bay. She claimed that Osprey chicks are dying of starvation due to the lack of menhaden, and that the problem was concentrated in the lower Chesapeake Bay.

Julie Kacmarcik stated that 83 osprey nests are monitored in Mobjack Bay, and that the number of chicks that are successfully reared has been declining. Ms. Kacmarcik cited the overharvesting of menhaden as the causal factor. She also alleged a conflict of interest among the board.

Shaun Gehan, attorney for Omega Protein, cited an osprey study done in 2021 by researchers at the College of William and Mary. He stated that there were discrepancies in the findings and maintained that fishing did not have an effect on the menhaden population in May/June 2021.

Francis Jenkins stated she would like to see the Commission conducting more studies to garner info on menhaden population.

* * * * *

- 11. **PETITIONER:** Petitioner Bill Dunn requests, "Petition for regulation to ensure proper gear type use in Virginia Waters pertaining to depth of current purse seine nets utilized and its relationship to the depth of waters within the Chesapeake Bay waters by the Menhaden purse seine net fishery."

Jennifer Farmer gave the briefing of the petition process, with PowerPoint slides. Her comments are part of the verbatim record.

Shanna Madsen gave the briefing of the information provided in the staff's evaluation, with PowerPoint slides. Her comments are part of the verbatim record.

The main concerns of the petition were improper gear type usage in waters that allow the nets to catch predatory game fish that are unable to escape through the bottom of the net; and improper use of purse seine nets by allowing them to scrape the sea bottom, causing massive amounts of SAV (Submerged Aquatic Vegetation), sea grass, and other bottom growth to be destroyed and washed ashore. The petition requested that the VMRC implement regulations of the depth of purse seine nets within the shallow waters of the Chesapeake Bay and offshore waters to meet the purse seine net design criterion in order to provide no contact with the seabed.

Ms. Madsen outlined the purse seine fishing method and highlighted the fact that the dragging of nets would pose a risk of damage to not only the nets themselves, but to processing equipment during off-loading. There was no staff recommendation, as it was the responsibility of the Commission to either grant or deny the petitioner's request.

Associate Member Kellum declared ownership of a business that engages in preparing purse seine vessels. She stated that she felt she could act on the matter fairly and objectively.

Associate Member Erskine asked what percentage of menhaden are removed via purse seine fishing. Ms. Madsen answered that the number is currently below the threshold and target.

Eleven members of the public spoke in support of the petition. Their comments are part of the verbatim record.

Christi Medice called for a reduction of the damage cause by purse seine nets. She highlighted the species that depend on the Chesapeake Bay for survival, and stated that the bay is the largest spawning nursery grounds in the US. She also stated that the average depth of the bay cannot support the size of the nets, and highlighted fish spills in July of 2023.

Steve Atkinson of the Virginia Saltwater Sport Fishing Association voiced concern about damage to the sea bottom from purse seine nets. He remarked that there are no existing studies on the impact of purse seine nets on the sea bottom. He also cited a by-catch study from 1995 which showed that some of the by-catch included blue crab, suggesting that the nets were touching the sea bottom.

Dale Neal stated that menhaden are the primary source of protein in Virginia waters, and commented on reduction of various species. He said that Virginia fisheries should be protected like other states.

Francis Jenkins stated that the petition would be a beginning step for working together, and urged the conduction of further studies with VIMS.

Tom Shorelock of the Hampton Roads Bird Club called for a reduction in the harvesting of menhaden and stated that there has been a 50% overall reduction in US bird populations, per Science Magazine.

Five people spoke in opposition of the petition. Their comments are part of the verbatim record.

Monty Deihl stated that boat captains know how to purse the nets without touching the sea bottom. He said that his processing plant can only accept soft material, and that anything hard passing through would destroy the equipment.

Thomas Moore, a 5th generation captain, stated that in ideal conditions, he can fish his net at 50-60ft. He stressed that in purse seine fishing, the length of the net is more important than depth, and that fish spills is a constant concern that is taken seriously.

Ross Kellum, of Kellum Maritime, reiterated that the depth of the net is not a function of the depth of the water, and that the length is more critical. He cited that weights at the bottom of the net are to sink the net below the level of the fish, not to the bottom of the bay. Associate Member Hand asked Mr. Kellum about by-catch, and Mr. Kellum asserted that predatory fish that are caught in the net swim down and away from the net. Shaun Gehan cited that the aforementioned 1995 by-catch study, which sampled 16.1 million menhaden, showed only a 0.04% by-catch rate.

The matter was before the Commission for discussion and action.

Associate Member Bransom asked Ms. Madsen how regulation may be created. Ms. Madsen responded that with the proposed petition, boats would no longer be able to fish in the bay. She stated that with the depths of the nets and the depth of the bay, there would be very few areas where the fishery would be able to operate.

Associate Member Erskine asked about a collaboration of stakeholders to look at ecological studies. Ms. Madsen cited a VIMS meeting in August where various stakeholders, managers, and committee members were present. Mark Luckenbach of VIMS commented on the design of a study for which they are in the process of procuring funding and legislation. He stated there is a 3-year timeline for the study.

Associate Member Bransom made a motion to deny the petition. Associate Member Headley seconded the motion. The motion carried, 5-0-1. Associate Member Erskine abstained.

* * * * *

Commission Meeting

**19160
October 24, 2023**

There being no further business, the meeting was adjourned at approximately 2:59p.m.
The next Commission meeting will be Tuesday, December 5, 2023.

Jamie L. Green, Commissioner

Lisa Pyle, Recording Secretary