

MINUTES

Commission Meeting

July 28, 2009

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. Carter Fox) | |
| J. T. Holland) | |
| William E. Laine) | Associate Members |
| Richard B. Robins, Jr.) | |
| J. Kyle Schick) | |
| Carl Josephson* | Assistant Attorney General |
| Jack G. Travelstead | Chief, Fisheries Mgmt. Div. |
| John M. R. Bull | Director-Public Relations |
| Katherine Leonard | Recording Secretary |
| Jane McCroskey | Chief, Admin and Finance |
| Erik Barth | Head, MIS |
| Linda Farris | Bs. System Specialist, MIS |
| Rob O'Reilly | Deputy Chief, Fisheries Mgmt. |
| Joe Grist | Head, Plans and Statistics |
| Alicia Nelson | Fisheries Mgmt. Specialist |
| Laura Lee | Fisheries Mgmt. Specialist |
| Joe Cimino | Fisheries Mgmt. Specialist, Sr. |
| Mike Johnson | Fisheries Mgmt. Specialist |
| Bethany Eden | Fisheries Mgmt. Specialist |
| Mike Meier | Head, Artificial Reef |
| Lewis Gillingham | Head, Saltwater Fishing Tournament |
| Rick Lauderman | Chief, Law Enforcement |
| Warner Rhodes | Deputy Chief, Law Enforcement |
| Herbert Bell | Marine Police Officer |
| Bill Laughinghouse | Marine Police Officer |

Commission Meeting

| | |
|-------------------|----------------------------------|
| Bob Grabb | Chief, Habitat Mgmt. Div. |
| Tony Watkinson | Deputy Chief, Habitat Mgmt. Div. |
| Chip Neikirk | Environmental Engineer, Sr. |
| Justin Worrell | Environmental Engineer, Sr. |
| Jay Woodward | Environmental Engineer, Sr. |
| Benjamin McGinnis | Environmental Engineer, Sr. |
| Ben Stagg | Environmental Engineer, Sr. |
| Hank Badger | Environmental Engineer, Sr. |
| Elizabeth Murphy | Environmental Engineer, Sr. |
| Dan Bacon | Environmental Engineer, Sr. |
| Randy Owen | Environmental Engineer, Sr. |
| Rob Butler | Surveyor |
| Royce Bridger | Draftsman |
| Bradley Reams | Project Compliance Tech. |

Virginia Institute of Marine Science (VIMS)

Lyle Varnell
Carl Hershner

Other present included:

| | | | |
|-----------------------|--------------------|-------------------|--------------------|
| Dona Storey | Bill Clegg | Alex Clegg | Austin R. Magill |
| L. R. Luton | H. Collins | Linda Espinosa | Emilio Espinosa |
| Joyce Adams | Yvonne Eure | S. Eure | Betsy MacInnis |
| Kathleen Phillips | Eunice Gladstone | Robin Barefield | Robert Hollowell |
| Frederick C. Phillips | Harry Polay | Marvin Weniger | John Sposa |
| John Clark | Chris Boynton | Charles Wrightson | Matthew Paluson |
| Gary P. Jani | James Gallagher | William McDonald | Henry Howell, Jr. |
| Sheila Sands | Sandy Sands | Louis Paulson | Mati Mundy |
| Kristen Danofrio | Keith Lockwood | Tuck Bowie | Andy Herr |
| Daniel Spivey | Renee Hudgins | David O'Brien | Jim Rudnick |
| April Tollenaere | Dave Hansen | Phill Roehrs | Jim Georgo |
| Becky Kubin | Scott Harper | D. Dunder | Mary Hill |
| Marie Hill | Thomas Dix | Paul Lerner | Vaughn Pruitt, Jr. |
| Cory Nesbor | Kanen Stanley | Welford Tate | Ruth Tate |
| Ashley Enriu | Douglas F. Jenkins | Paul Hern | Scott Bloxom |
| Frances Porter | Linsk M. Closure | Jeff Bonney | |

and others.

* * * * *

Commissioner Bowman called the meeting to order at approximately 9:40 a.m..

Associate Members McConaugha and Tankard were both absent. *Carl Josephson, Senior, Assistant Attorney General, and VMRC Counsel was absent due to illness, but was set up for teleconferce in order to provide legal assistance, as needed.

* * * * *

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

* * * * *

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

Bob Grabb, Chief, Habitat Management, stated that the project was completed, therefore, an extension for Item 12 for the U. S. Army Corps of Engineers was not necessary.

Commissioner Bowman asked for a motion to approve the amended agenda. **Associate Member Laine moved to approve the agenda, as amended. Associate Member Robins seconded the motion. The motion carried, 7-0. The Chair voted yes.**

* * * * *

MINUTES: Commissioner Bowman asked for a motion for the approval of the June 23, 2009 minutes, if there were no changes or corrections. **Associate Member Holland moved to approve the minutes, as circulated. Associate Member Fox seconded the motion. The motion carried, 7-0. The Chair voted yes.**

* * * * *

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

* * * * *

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

Bob Grabb, Chief, Habitat Management Division, summarized the ten page two items, 2A through 2J, for the Board. His comments are a part of the verbatim record.

There were no questions of staff.

Commission Meeting

Commissioner Bowman opened the public hearing. There were no public comments. The public hearing was closed. He asked for action by the Board.

Associate Member Holland moved to accept the staff recommendations for items 2A through 2J. Associate Member Schick seconded the motion. The motion carried, 7-0. The Chair voted yes.

2A. STAFFORD COUNTY, #06-2815, requests authorization to modify an existing permit by constructing an open-pile footbridge over Austin Run instead of a clear span bridge as proposed. The new bridge will be 10-feet wide and cross over approximately 50-feet of Austin Run, and is associated with the Government Island Historical Trail Improvement Project in Stafford County.

No applicable fees – Permit Modification

2B. QWEST GOVERNMENT SERVICES INC., #09-0450, requests authorization to install two (2) 150-foot, 1.5-inch HDPE conduits and one (1) 150-foot optic cable a minimum of 10-feet beneath the bottom of the Occoquan River, adjacent to VDOT property situated along the Occoquan River in Prince William County. The lines will be installed by directional bore method.

| | |
|-----------------|----------|
| Permit Fee..... | \$100.00 |
|-----------------|----------|

2C. TAZEVELL COUNTY PUBLIC SERVICE AUTHORITY, #09-0575, requests authorization to install a submerged sewer line beneath 747 linear feet of stream channel to facilitate construction of the Baptist Valley Sewer East Phase I Project in Tazewell County. Recommend approval with our standard instream permit conditions and the agreement to conduct any necessary mussel and fish surveys/relocations and adhere to any instream work time-of year restrictions as recommended by the Department of Game and Inland Fisheries.

| | |
|-----------------|----------|
| Permit Fee..... | \$100.00 |
|-----------------|----------|

2D. TOWN OF SMITHFIELD, #09-0649, requests authorization to construct up to six (6) pedestrian walkway bridges and two observation decks over tidal marches and streams; to construct an 8-foot wide by 101-foot long fishing pier, with a 12-foot by 40-foot T-head; to construct an 8-foot by 131-foot fixed kayak/canoe launch pier, to include a 16-foot by 20-foot floating dock with gangway access from the fixed pier to include two floating 5-foot by 15-foot kayak/canoe launch ramps along the floating platform all being along tidal stream tributaries of and within Cypress Creek in the Town of Smithfield in Isle of Wight County.

| | |
|-----------------|----------|
| Permit Fee..... | \$100.00 |
|-----------------|----------|

Commission Meeting

2E. RUTH B. CASSIDY, #09-0533, requests authorization to construct one 250-foot long by 30-foot wide offshore stone breakwater and three 150-foot long by 30-foot wide offshore stone breakwaters and nourish the beach with beach quality sand adjacent to her property situated along the Chesapeake Bay, north of the YMCA Camp in the Silver Beach area of Northampton County. Staff recommends the assessment of a royalty in the amount of \$2,325.00 for the beach nourishment fill of 46,500 square feet of State-owned subaqueous bottom at a rate of \$0.05 per square foot.

| | |
|---|------------|
| Royalty Fees (filling 46,500 sq. ft. @ \$0.05/sq. ft.)..... | \$2,325.00 |
| Permit Fee..... | \$ 100.00 |
| Total Fees..... | \$2,425.00 |

2F. NORFOLK SOUTHERN CORPORATION, #09-0382, requests authorization to replace existing timber approach trestles, with approximately 31-foot wide concrete/steel, open-pile, approach trestles extending channelward of mean low water, across the Eastern Branch of the Elizabeth River, approximately 275 feet on the north end and 660 feet on the south end of their existing V-2.8 railroad bridge and swing span, crossing between the City of Norfolk in the north and the Cities of Norfolk and Chesapeake in the south, immediately west of the mouth of the Indian River. The proposed project will also include the construction of temporary, open-pile work bridges to accommodate the proposed construction/replacement activities. Staff recommends the inclusion of a permit condition, which requires the removal of the temporary work bridges within 30-days of the completion of each of the north and south segments of the proposed project, and the assessment of a royalty in the amount of \$57,970.00 for the new trestles' bold-outline encroachment over 28,985 square feet of State-owned submerged land at a rate of \$2.00 per square foot.

| | |
|---|-------------|
| Royalty Fees (encroachment 28, 985 sq. ft. @ \$2.00/sq. ft.)..... | \$57,970.00 |
| Permit Fee..... | \$ 100.00 |
| Total Fees..... | \$58,070.00 |

2G. DEPARTMENT OF THE NAVY, #09-0552, requests authorization to create four (4) submerged cable trenches by dredging approximately 37, 290 cubic yards of State-owned subaqueous material to accommodate the installation of Y and Z power cable loops within an approximately 700-foot by 2,000-foot area adjacent to their Lambert's Point Deperming Station in the Cities of Portsmouth and Norfolk. The cables will be laid within the trenches and on the river bottom, as well as directionally bored beneath the station's main slip between Piers A and B. The proposed project also includes the backfilling of the cable trenches with approximately 10,500 cubic yards of non-magnetic gravel, as well the

Commission Meeting

construction of three (3), small, open-pile power/cable support platforms with sheds, along the northwest, southwest, and southeast perimeter of the proposed cable loop.

| | |
|-----------------|-----------|
| Permit Fee..... | \$ 100.00 |
|-----------------|-----------|

2H. E.I. DU PONT DE NEMOURS & COMPANY, #09-0769, requests authorization to install approximately 450 linear feet of streambank stabilization extending approximately 20 feet channelward of ordinary high water, consisting of a riprap scour-protection toe, fabric-encapsulated soil lifts, and woody debris fish habitat, adjacent to their property situated along the South River and Rockfish Run (Jones Hollow) in the City of Waynesboro. Staff recommends the assessment of a royalty in the amount of \$8,784.00 for the fill encroachment over 2,928 square feet of State-owned subaqueous bottom at a rate of \$3.00 per square foot.

| | |
|--|------------|
| Royalty Fees (filling 2,928 sq. ft. @ \$3.00/sq. ft.)..... | \$8,784.00 |
| Permit Fee..... | \$ 100.00 |
| Total Fees..... | \$8,884.00 |

2I. MGW TELEPHONE COMPANY, #09-0822, requests authorization to install two (2) fiber optic and one (1) copper communication cables crossing approximately 90 feet across and 26 feet above the Cowpasture River, immediately downstream of State Route 39 in Bath County. Staff recommends the assessment of a royalty in the amount of \$810.00 for the three utility lines' encroachment over a total of 270 linear feet of State-owned submerged land at a rate of \$3.00 per linear foot.

| | |
|---|----------|
| Royalty Fees (crossing 270 ln.ft. @ \$3.00/ln.ft.)..... | \$810.00 |
| Permit Fee..... | \$100.00 |
| Total Fees..... | \$910.00 |

2J. CITY OF NORFOLK, #09-0879, requests authorization to rehabilitate and extend two (2) separate, existing 30-inch diameter stormwater outfall pipes by an additional 90 linear feet into the Chesapeake Bay in the vicinities of Warwick Avenue and Inlet Road in the City of Norfolk. Approximately 239 cubic yards of State-owned subaqueous material will be dredged in order to accommodate the extension of these existing outfall pipes.

| | |
|-----------------|----------|
| Permit Fee..... | \$100.00 |
|-----------------|----------|

* * * * *

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's Board).
- 3A. **WILLIAM M. WINN, #04-0979,** requests after-the-fact authorization for additional pier, additional wave-screen structure, and additional encroachment of a bulkhead structure over State-owned bottomlands in excess of those authorized at the applicant's commercial marina facility situated along the James River at Jordan Point in Prince George County. The applicant has agreed to a civil charge of \$1,800.00 in lieu of any further enforcement as permitted by Code.

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

Mr. Grabb explained that the applicant's marina is located along the James River, at Jordan Point, near the Benjamin Harrison Bridge. Jordan Point Marina is a full service marina and service facility that was damaged extensively during Hurricane Isabel. On August 16, 2004, Mr. Winn obtained a permit (#04-0979) to undertake the repairs necessary to rehabilitate and repair the marina.

Mr. Grabb said that a routine compliance check on July 11, 2006, revealed considerable discrepancy between the permitted structures and the currently existing structures at the site. The applicant was informed of the discrepancies. Staff has been working with the permittee since then to address those issues.

Mr. Grabb stated that the applicant seeks to retain structures that were installed in conjunction with a previous permit issued for bulkhead replacement, piers and slip reconfiguration, and a wave screen structure. Portions of the replacement bulkhead were constructed up to 4 feet channelward of the old bulkhead (our permit allowed for up to 18-inches channelward), three floating piers with finger piers were constructed approximately 23 feet further channelward of the permitted location (primarily due to the omission of the gangway access required to access the piers in the original permit drawings), and a wave screen structure is 400 linear feet in length (versus the permitted length of 250 linear feet).

Mr. Grabb said that in subsequent written correspondence, Mr. Winn indicated that the bulkhead realignment was done to address a complete blow-out of a portion of the structure which would have cost him up to 30% more were he to have removed it to allow for the construction, as originally requested. He also stated that the slips were used and pre-constructed and he failed to adequately depict the gangway offset. He also noted, and staff confirmed, that the number of slips at the facility had not changed and still met the

current Health Department approval. Finally, the permittee noted that the wave screen was a complete miscalculation of the length needed (although he believed he had requested 350 feet instead of 250 feet).

Mr. Grabb stated that staff believed the piers, bulkhead and wave screen represented a minimal degree of environmental impact. Mr. Winn was well aware of the need for a permit, however, as one was issued for all three of the items noted above. The pier reconfiguration appeared to be a legitimate oversight by the permittee, however the bulkhead realignment was clearly done as a cost saving measure, and the wave screen was simply constructed considerably longer than that requested. Therefore, in staff's opinion, these two items constituted a major degree of non-compliance. Based on that, staff recommended and the permittee had agreed to pay, a \$1,800.00 civil charge in lieu of any additional enforcement action. Staff recommended that the Commission agree to accept the civil charge in lieu of further enforcement as provided by Code.

Mr. Grabb stated that a public notice had been done and staff had not received any adverse comments.

Commissioner Bowman asked if Mr. Winn was present. Mr. Grabb stated that Mr. Winn was not present.

Associate Member Fox stated that there was evidence of knowledge and experience in obtaining a permit by the applicant and he felt that the \$1,800.00 fine was not enough. He said he was concerned that the Commission would be setting a precedent and the small amount would only become a part of the 'cost of doing business'. He suggested a fine of \$6,500.00.

Associate Member Schick stated that the applicant had admitted that he was aware of the additional cost if the work were to be done with a permit and it seemed that forgiveness was a cheap way out. He stated that the applicant must agree to the amount of the fine. He asked who was the contractor?

Ben Stagg, Environmental Engineer, Sr., stated that staff did not know who the contractor was. Associate Member Schick stated that the contractor was an issue because he should know better, as a contractor. He asked how staff had determined the amount of the fine be set at \$1,800.00.

Mr. Grabb said he agreed with Associate Member Fox that two out of the three were not minimal offenses, because the breakwater and bulkhead were egregious actions. He said the applicant admitted that there would be added cost with a permit. He said the question was the breakwater which was supposed to be 250 feet but was made 400 feet. He said the piers were already there when Mr. Winn acquired the property. He explained there were three violations at \$600 each, which had been coordinated with Mr. Winn. As a

result of the Commission's concern, however, staff would recommend that this item be pulled and reheard at a later date.

Associate Member Schick asked if additional royalties were due? Mr. Grabb stated that was not the staff recommendation. Mr. Stagg reminded the Commission that they were exempt because it was a marina.

Associate Member Fox moved that this item be heard later. Commissioner Bowman asked if this included the contractor. Associate Member Fox stated yes. Associate Member Schick seconded the motion. The motion carried, 7-0. The Chair voted yes.

Continued until August 25, 2009 Commission meeting.

3B. COLUMBIA GAS OF VIRGINIA, #09-0749, requests after-the-fact authorization to retain a four-inch diameter gas line that was installed by directional bore method, beneath 20 linear feet of Rockfish Run (Jones Hollow) in the city of Waynesboro. Due to the emergency nature of the replacement activity, staff would not recommend the assessment of a civil charge, but would recommend triple permit fees in the amount of \$75.00, as well as a royalty assessment in the amount of \$180.00 for the gas line's encroachment beneath 20 linear feet of State-owned subaqueous bottom at the tripled rate of \$9.00 per linear foot as permitted by Code.

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

Mr. Grabb explained that in early May, Columbia Gas discovered a leak in their existing 4-inch diameter gas line crossing beneath Rockfish Run. Shortly thereafter, staff was contacted by the applicant's agent to discuss the emergency repair required and the steps necessary to gain emergency authorization from the Commission to complete the repair. Since the Commission did not currently have any mechanism to authorize such emergency requests prior to the initiation of repair activities, Columbia's agent informed staff that they would have to proceed with the repair and seek after-the-fact authorization. At the time, and given the emergency nature of the repair, staff agreed that was the appropriate course of action.

Mr. Grabb said that subsequent to receipt of the JPA, staff conducted a public interest review. No objections were received. Had the applicant been able to submit an application in advance of the start of the replacement activities, staff would have administratively issued a permit. In light of that fact, staff recommended approval of the applicant's after-the-fact request. Due to the emergency nature of the replacement activity, staff would not recommend the assessment of a civil charge, but would recommend triple permit fees in the amount of \$75.00, as well as a royalty assessment in

Commission Meeting

the amount of \$180.00 for the gas line’s encroachment beneath 20 linear feet of State-owned subaqueous bottom at the tripled rate of \$9.00 per linear foot. The applicant, through their agent, had agreed to the triple permit fee and royalty.

Commissioner Bowman stated that he felt because of the emergency situation that the applicant had done the best they could. Associate Member Fox stated that he agreed with Commissioner Bowman as there was no procedure established by VMRC to handle emergency situations. He also questioned whether the triple fees recommended by staff were justified.

Mr. Grabb explained that it was in the Code that triple fees could be assessed by the Commission. He said even if were not made triple fees, it would still be a \$25.00 permit fee and \$60.00 for a single royalty. He said staff recommended the triple fees.

Associate Member Fox moved to accept the staff recommendation. Associate Member Laine seconded the motion. The motion carried, 7-0. The Chair voted yes.

| | |
|---|-----------|
| Royalty Fees (triple)(crossing 20 ln.ft. @ \$9.00/ln. ft.)..... | \$ 180.00 |
| Permit Fee (triple)..... | \$ 75.00 |
| Total Fees..... | \$ 255.00 |

- 4. **CLOSED MEETING FOR CONSULTATION WITH, OR BRIEFING BY, COUNSEL.** Closed meeting held during the hearing of Item 5, U. S. Army Corps of Engineers/City of Virginia Beach, #09-0427.

- 5. **U.S. ARMY CORPS OF ENGINEERS/CITY OF VIRGINIA BEACH, #09-0427,** requests a permit modification to expand the beach nourishment proposal for the Cape Henry Beach area of Virginia Beach situated along the Chesapeake Bay. The modification request now includes the westernmost section of Cape Henry Beach, lying between Jade Street and the Lesner Bridge. The project is protested by a riparian property owner within the project limits.

Justin Worrell, Environmental Engineer, Sr., gave the presentation. His comments are a part of the verbatim record. The Commission was teleconferencing with Carl Josephson Senior, Assistant Attorney General and VMRC Counsel who was standing to assist with legal matters, as needed.

Mr. Worrell reminded the Commission that the existing permit only granted authorization to nourish the Cape Henry Beach between First Landing State Park (eastern limit) and

Jade Street (western limit). No protests were received regarding that proposal. The application did not include the beach area lying west of Jade Street, toward the Lesner Bridge, because the City of Virginia Beach did not legally have the necessary easements in place granting them a right of access or the right to impact certain properties within that area.

Mr. Worrell explained that the City was adamant that this modification request must be heard during the July Commission hearing because the federal contract must be awarded by July 31. The actual dredging and nourishment activities were slated to begin as early as August 10, 2009. The City further maintained that this particular beach area was severely eroding, and needed to be nourished for public safety reasons, a fact which is strongly disputed by the protestants.

Mr. Worrell said that on July 23, 2009, the Virginia Beach Circuit Court ruled in favor of a City condemnation suit, establishing easements and a right-of-entry over the final three riparian properties that had not agreed to earlier easements by the City. The protestants continue to feel that they neither wanted the nourishment nor felt that it was necessary because they believed that the shoreline was not eroding, but accreting. They questioned whether this application should have been added to the Commission's agenda.

Mr. Worrell said that when the modified permit application was received in July 2009, an expedited public interest review was undertaken.

Mr. Worrell said that staff had noted during the May hearing on the original nourishment request, that they had no objection to the nourishment of the State's public beaches using dredged sand from governmental navigation projects. The key concept, though, had always been that the nourishment would occur on the State's public beach. In this particular case, even though the proposed nourishment expansion would occur adjacent to existing riparian properties, staff was not concerned that the private riparian properties would grow in size, provided the same conditions of permit approval were applied to the modification request.

Mr. Worrell explained that these conditions would be an acknowledgement that any beach area created channelward of the mean low water mark, as shown on the City's survey of April 13-17, 2009, would belong to the State, and that the City ensured that the public would have access to those lands. Although staff was still concerned that the perception of the current riparian owners was that their property would be enlarged, restored, or reestablished to what might have been previously platted, the City previously agreed to handle any legal suits or private claims to any such created beach property, and/or address the adverse impacts such creations might have on the riparian rights of the adjacent properties.

Mr. Worrell stated that while staff did endorse the nourishment of the additional stretch of beach provided the original permit conditions were imposed, staff was still unsure if nourishment could be “forced” on existing riparian property owners that dissent.

Mr. Paulson and Mr. Howell had obviously contested the City’s efforts in this case, and had indicated that they intended to appeal the recent Court decision regarding the condemnation of the protestant’s properties for a future easement. Staff questioned if the Commission should go forward at this time without a final judgment concerning the dispute, assuming the Court’s decision was appealed. “Undoing” the results of beach nourishment would be problematic, and the existence of newly created beach areas would essentially sever the existing owners’ riparian rights. If the Commission decided to approve the permit modification, and then this decision was also appealed to the Circuit Court through the APA process, staff assumed that the City and the Corps would then have to decide whether to proceed to nourish this particular area at their own risk.

Mr. Worrell said finally that staff recommended that if the modification was granted to nourish the entire Cape Henry Beach area that it begin at the eastern end down by First Landing State Park. The littoral drift of sand along the shoreline in this area of the Chesapeake Bay was to the west, towards the Lynnhaven Inlet. Since sufficient material to nourish the entire shoreline to project dimensions was not likely to arise from the current maintenance dredging project, it would make sense to begin placing the dredged sand on the eastern end and let it drift naturally westward.

Mr. Worrell provided a handout of an additional protest received the previous day and a copy of the Court Order. He provided additional slides and explained that slides 5 through 8 were the properties of the protestants, as parcels 5, 7, and 8 belonged to Mr. Paulson and parcel 6 belonged to the Paige Avenue condos. He further explained that the Court order condemned the 4 properties and ordered access. He explained that Mr. Henry Howell had visited the office the previous day to inform staff of the protest on behalf of the owners of parcel 6.

Mr. Worrell stated that staff would recommend an alternative solution, given the new protest and map, where the Commission could consider allowing the beach nourishment to go from east to west continuing to parcel 9 and then continuing on to parcels 1 and 2, since 3 through 8 were all parcels under protest.

Commissioner Bowman asked if there were any questions of staff and there were none.

Commissioner Bowman asked if someone was present to speak for either the City or the Corps?

Keith Lockwood, representing the U. S. Army Corps of Engineers, was sworn in and his comments are a part of the verbatim record. Mr. Lockwood explained he was present mainly to provide answers to any technical questions. He said he did want to say that the bid opening had occurred and the staff’s recommendation going from east to west could

be accommodated as long as there were no significant changes or added cost they could modify the award. He said they usually moved from closer in and added the pipe as they moved along. He stated that if they had to stop and then start again there would be added mobilization time which would add cost and delay the bid opening. He said they were trying to use Stimulus funding for the dredging project and it would not be feasible to get the project done within the required time frame.

Mr. Lockwood said they were asking to be allowed to go from west to east as it now was proposed. He said he could answer any technical questions, but they needed to get this approved.

Commissioner Bowman asked if the dredging portion was the main concern of the Corps. Mr. Lockwood stated they needed Cape Henry Beach, but the primary goal was to get the funds and to open the channel.

Associate Member Fox asked if the bidding was done. Mr. Lockwood responded yes. Associate Member Fox asked if the bid was already approved. Mr. Lockwood responded yes. Associate Member Fox asked if they stayed away from the lots protested would they then have enough sand for what they had left to do. Mr. Lockwood responded yes. Associate Member Fox asked what happened if it were to be denied today. Mr. Lockwood said if they had to skip areas it would add to the work scope and cost. He said skipping adds to the mobilization cost and plus there would be an additional bid opening request to be made if they had to start with 1 and 2.

Chris Boynton, staff attorney with the City of Virginia Beach, was present and his comments are a part of the verbatim record. Mr. Boynton explained that in accordance with the Code Section 10.1-704 the beach was a priority to receive dredged materials for nourishment. He read from Section 20-400-10 in the Regulation which read,...beach quality sand available from the area... He provided photographs for the Commission.

Commissioner Bowman explained that these pictures demonstrated examples of erosion in the area. They were then entered into the Court record. He said that the Court had determined this was an emergency because of the erosion and allowed the City to have access to parcels 5, 7 and 8, which belong to Mr. Paulson and parcel 6 which belonged to the Paige Avenue Condos. He said Mr. Howell had provided evidence to the Court and testimony. He reiterated that the Court gave the City the easement over these properties and also determined it was an emergency.

Mr. Boynton said that Section 25.2-223 allowed for immediate access and the Court order allowed the project by the City, which could be appealed. He said the City had an agreement with the VMRC and the City's issues were only with the residents and not the State. He said the Court order was for this specific project. He said they were not convinced there were impacts to the property owners.

Mr. Boynton explained that there was a court order, an agreement undertaken for legal challenges, it was public policy to use the sand in this manner, and there was the existing easement for the City. He said he was requesting time later to rebut any testimony.

Commissioner Bowman asked for questions from the Board.

Associate Member Robins asked Mr. Boynton to describe the public interest in this matter. Mr. Boynton explained that the public's interest was that the erosion threat would be reduced by the widening of the beach, as well as protecting the general property in the City. He also said it would preserve and enhance the public beach.

Associate Member Schick asked if the beach improvement would help protect the non-waterfront properties from tide surges due to severe storms.

Phillip Roehrs, Coastal Engineer, was sworn in and his comments are a part of the verbatim record. Mr. Roehrs explained that yes it would, as any enhancement would help to preserve and protect the waterfront as well as further inland.

Commissioner Bowman read into the record the Court Order, which is a part of the verbatim record.

Carl Josephson stated that it should also be made a part of the record that this would include all 4 properties that were a part of the litigation.

Mr. Boynton stated that the request by Mr. Paulson and those he represented had sought an injunction to stop the City from crossing their properties, which was denied by an oral ruling.

Commissioner Bowman asked for anyone in support who wished to comment.

William Clegg, Harbor Gate Homeowners Association, was sworn in and his comments are a part of the verbatim record. Mr. Clegg said that the loss by erosion from the waves of the Bay can be seen. He provided photos, dated June 21 and June 22 showing the wave action from his condo balcony. He had one dated April 16th that showed the destruction of the dunes. He said he was a merchant marine and a naval officer for many years so he did have experience and knowledge about the waters. He said as a Board member for the Harbor Gate Homeowners Association he did testify at the court hearing where the City was granted the four easements. He stated that the four protestants had said that they would lose their riparian rights, but they still had recreational use of the beach regardless of its width. He said it was a small percentage of the property owners between the Lesner Bridge and Cape Henry Tower who were protesting the project. He said he was requesting approval of the project. He said it was time for the majority to win over the small minority. He asked that the members of the homeowners' association be

allowed to stand, which was done. He also said that he had a document with 50 signatures of individuals who supported the project, but could not attend the meeting.

Commissioner Bowman asked if there were any questions.

Associate Member Fox asked Mr. Clegg to point out the Harbor Gate property on a staff slide of a map, which he did. Commissioner Bowman said that the property identified on the map was number 2.

April Tollenaere, property owner, board member and supporter of the project, was sworn in and her comments are a part of the verbatim record. Ms. Tollenaere also read into the record a letter from Bryan Showinthal in which he explained his experience in the area, his knowledge of the eroding problems, and of his support for the project. When asked by Commissioner Bowman she said she did agree with the comments in the letter.

Fred Phillips, long time resident in the area and current resident of Harbor Gate, was sworn in and his comments are a part of the verbatim record. Mr. Phillips explained that he had lived at Harbor Gate since 2007. He provided a slide taken in 2005 to demonstrate the erosion impacts in the area. He said it would be short sighted not to take action now. He said he had seen his neighbor in Nags Head have his property damaged when the dunes were destroyed from severe storms. He said he would support any effort to protect the dunes.

Tuck Bowie, property owner and in support of the project, was sworn in and his comments are a part of the verbatim record. Mr. Bowie said that he was representing the Terry Brothers property which was parcel number 1. He said he had attended the court hearing and the City attorney argued well at the hearing. He said he agreed with Mr. Robins statement about the need to address a key issue which had to do with public interest. He said that it was to preserve the shoreline along the Chesapeake Bay here at this location. He said there would be evidence provided that the area was accreting and not eroding, but that was not true. He provided a photograph, dated May 5 at low tide where it showed that there was no longer a primary sand dune, as it was gone. He said this did not happen because of a hurricane, but because of a northeaster storm, which had occurred over the last year. He said he encouraged VMRC to consider what would happen if this area did not get the sand. He said, if for whatever legal reason the Commission felt that the areas under protest be excluded, he asked that parcels 1 and 2 be included in the project. He said the Commission should leave it to the City and the Corps to see if it can be done. He said if it was not done now in three more years their beach would be gone. He explained how there had been accreting in this area in the past, but now the beach was eroding. He said they needed some relief now while the opportunity was present and he would appreciate that being considered.

Commissioner Bowman asked for anyone in opposition who wished to comment.

Lou Paulson, property owner and attorney, was sworn in and his comments are a part of the verbatim record. Mr. Paulson said he was a property owner and was representing the parcels indicated on the slides as 5, 7, and 8 and Paige Condos indicated as parcel 6. He said that these properties do not need the sand. He said they did not want to interfere with others getting sand, and they had even offered the use of the easement across their properties at no cost. He said the VIMS 2005 Shoreline Study and the City study had concluded that the Cape Henry Beach had been accreting since 1853. He provided a picture from 2007 prepared by VIMS which showed the shoreline and the red line showed where the shoreline was in 1934 and the distance from the shoreline to the mlw was almost 800 feet in 2007 because of the accretion. He said that some of the properties were built on accreted land. He said the pictures shown by Mr. Boynton were pictures showing the impacts of hurricanes and there was always erosion. He explained that VIMS had done a study on dunes which showed that the Harbor Gate dune had grown a lot and because of this the beach had grow smaller. He stated that this was not an emergency and his beach was still accreting not eroding. He said with the channel being dredged they had displaced the water and added to the problem. He said the second issue was the jurisdiction that allowed for condemnation. He stated that strictly following the Constitution, you did not take private property unless there was need for the public's interest and that there would be proper compensation. He stated that the City did not tell the others what was being taken under the VMRC jurisdiction. He said the plan to add sand to the water would make this State-owned property. He said the City was taking their riparian rights. He said the Commission should allow them to finish their appeal by allowing it to be heard. He said the final issue was that the 135,000 cubic yards to be dredged would not provide the amount of sand needed if they were coming from the east. He said he was asking that they be allowed the opportunity to be heard at Court with their appeal.

Commissioner Bowman asked for any questions and there were none.

Henry Howell, III, Attorney for protestants, was present and his comments are a part of the verbatim record. Mr. Howell provided some documents on cases he would be referencing. He said he was representing three Paige Condo owners and this property was historically significant. He was asked to indicate on the staff slide the location of the property, which he did. He said the uniqueness of these properties went back to the Civil War. He said the Virginia government sold off these properties to pay off debts and sold to the mean low water to retain this private beach. He said this was private property owned by his clients. He said the first issue was riparian rights. He said these properties were acquired by Civil War Acts and then by the General Assembly down to mean low water. He said the Court had determined that it was because of the Commission that it was decided that this was an emergency and when it was said that it must be heard by the Commission. He said there had not been enough public interest time allowed. He stated that the Constitution protected the minority from the majority.

Commissioner Bowman stated that the Commission did not wish to question the Court Order and they needed evidence to the contrary to consider.

Mr. Howell said that riparian rights should not be condemned and provided hand outs of Court cases he wished to reference and actually read some into the record. He went on to discuss appraisal of a property which was \$8,000.00 and the owner being offered \$4,000.00. He stated that he had not been able to get in touch with Mr. Josephson and the owners had not had any discussion with him either. He stated that the City was using VMRC to manipulate the Court. He said the VIMS 2005 study showed that the dune had accreted over time and there was no emergency, it was only the dune growing. He said he needed to discuss this with Mr. Josephson. He provided photos of the dune. He said the Commission needed to wait another month and he asked the Commission to not be complacent and make a decision now.

Dona Storey, President of Cape Henry Towers Homeowners Association, was sworn in and her comments are a part of the verbatim record. Ms. Storey said that she represented the largest group of 199 families, who were not present.

Associate Member Fox asked her which parcel was the Cape Henry Towers. Ms. Storey responded number 3.

Ms. Storey provided a picture as a handout and said that she had not had time to get other photographs. She said that she had lived in this area for 33 years as she had also grown up in the area. She said that the homeowners association had voted against the special easement. She said that they allowed for crossing the beach in front of their property but no one was allowed to stop. She said that those from Jade Street east were not opposed and they were not opposed to the sand being given to others. She said the homeowners were interested in protecting the environmental and they had done environmental projects on the beach. She said from her 3rd floor condo her view was blocked by the dune, since it had gotten larger. She said their property was protected now. She said if the sand was put there, the City wanted to make this a public beach. She stated further that this was a residential property not a time share. She said that as the President of the homeowners association, she must represent them and they had voted against it. She said that they support the alternate proposal in staff's recommendation.

Commissioner Bowman asked if there were any questions.

Associate Member Robins asked about the easement. Ms. Storey explained that the public and the City were allowed to cross the beach, but they were concerned this would be made into a public beach. She said they agree with the current easement, but they did not want sand on their beach.

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

Mr. Boynton said that they were asking to be allowed to place the sand there to maintain the easement and have documented the use. He said there were enough public rights with the easement, but they were willing to fight this in court for placement of the sand on these properties. He said if the modification were to be granted it would impact the project and was not a feasible option.

Associate Member Robins asked if these arguments were heard in court and if the VIMS 2005 was provided to the court. Mr. Boynton responded yes, the 2005 report and aerial photographs. He stated that 7-year old data did not apply to today.

Associate Member Schick asked if there was erosion at parcels 3 through 8 in 2005. Mr. Boynton said that there was testimony and photographs provided at the court.

Mr. Josephson asked if riparian rights had been addressed at the court hearing. Mr. Boynton stated that riparian rights were not addressed in the petition and not argued at the court. Mr. Josephson suggested that a closed meeting be held.

Commissioner Bowman asked for others who wish to comment.

Robin Barefield, property owner, was sworn in and her comments were a part of the verbatim record. Ms. Barefield requested a staff slide of the entire area. She said that there would be consequences to the dredging and placement of the spoil on the beach. She said at the Cape Henry beach the sand had built up along there and there was no need to place sand and widen the beach. She said the City was adding the sand to keep the area free from development.

Robert Hollowell, fisherman, was sworn in and his comment are a part of the verbatim record. Mr. Hollowell explained that he fished at Great Neck Road and Oak Street and he wanted to know if he would lose his fishing rights if the nourishment were done. He said he had been fishing that area for 40 years. Commissioner Bowman stated that he could still fish. Mr. Boynton stated that it would not infringe on fishing rights in any way.

Mr. Hollowell provided a handout. He said he was concerned with the pumping of the sand in September and October as he was fishing in the area from the 9th to the 25th. He also said that the sand being pushed to the dune would narrow the beach.

Lyle Varnell, representative for VIMS, was asked to provide the VIMS perspective their report regarding then and now. His comments are a part of the verbatim record. Mr. Varnell stated that a representative had attended the meeting and testified at Court. He stated that two reports had been done, "Snap Shots" and an "Evolution Report". He stated that the term erosion was being used a lot. He said the pictures speak to the long term. He explained this was like a large "sand box" where the sand moved and the beach naturally accreted, as this was a dynamic shoreline. He said they documented the height growth of the dune to be 8 to 9 inches per year at the First Landing Park.

Associate Member Schick asked if in the long term there was more sand present than in the 30's and in the short term had there been more retraction versus growth. Mr. Varnell stated that had not been studied and he hesitated to answer.

There were no more questions.

Commissioner Bowman asked for discussion or action by the Board.

Associate Member Fox asked Mr. Lockwood about how much sand would be dredged. Mr. Lockwood responded 155,000 cubic yards of material from the entrance channel.

Mr. Roehrs explained the ultimate authority was that you could only place what was available depending on whether it was a 4-year versus 3-year cycle. He said the amount could be 130 to 140 k, but it was unknown until the contractor began and it was determined by a survey being done. He said there could be some shoaling of the channel.

Associate Member Schick asked if there was an estimate of the amount required to do the entire beach. Mr. Roehrs said that yes, but with areas of significant erosion the rates of fill would vary.

Associate Member Robins stated that the Commission would benefit from a closed meeting.

* * *

Associate Member Robins moved that the meeting be recessed and the Commission immediately reconvene in closed meeting for the purposes of consultation with legal counsel and briefings by staff members pertaining to actual or probable litigation, or other specific legal matters requiring legal advice by counsel as permitted by Subsection (A), Paragraph (7) of § 2.2-3711 of the Code of Virginia, pertaining to items:

Item 5, Corps of Engineers/City of Virginia Beach, #09-0427

Associate Member Holland seconded the motion. The motion carried, 7-0. The Chair voted yes.

Associate Member Robins moved for the following:

WHEREAS, the Commission has convened a closed meeting on this date pursuant to an affirmative recorded vote and in accordance with the provisions of The Virginia Freedom of Information Act; and

WHEREAS, § 2.2-3712.D of the Code of Virginia requires a certification by this Commission that such closed meeting was conducted in conformity with Virginia law;

NOW, THEREFORE, the Commission hereby certifies that, to the best of each member's knowledge,

- (i) only public business matters lawfully exempted from open meeting requirements under Virginia law, and
- (ii) only such public business matters as were identified in the motion by which the closed meeting was convened were heard, discussed or considered in the closed meeting by the Commission.

Associate Member Holland seconded the motion. Commissioner Bowman held a Roll Call vote:

AYES: Bowden, Bowman, Fox, Holland, Laine, Robins, and Schick.

NAYS: NONE

ABSENT DURING VOTE: McConaugha and Tankard

ABSENT DURING ALL OR PART OF CLOSED MEETING: McConaugha and Tankard

The motion carried, 7-0. The Chair voted yes.

Katherine Leonard, VMRC Recording Secretary

* * *

Commissioner Bowman asked for discussion or action.

Associate Member Robins said that they had heard a lot of testimony, which was important and compelling, there was public interest, a court order, public necessity and convenience use of , an emergency existed, an emergency did not exist, whether entry was warranted, and require compensation for the easement. He said it was not appropriate to counter a court order and at the end of the day there was the public interest over private interest. He moved to approve the application as applied for. Associate Member Holland seconded the motion. Associate Member Laine said that the City had given compelling arguments and there was also the public interest. He said he regretted the grievances by the owners, but the City took care of their concerns by ordinances. Associate Member Schick said he was concerned with the

others and the point was debated by Mr. Howell but it was not within the VMRC's authority. He said those concerns do need to be addressed. The motion carried, 7-0. The Chair voted yes.

No applicable fees – Permit Modification

* * * * *

The Commission recessed for lunch at approximately 12:21 p.m. to return at approximately 1:00 p.m. The meeting was reconvened at approximately 1:12 p.m.

* * * * *

- 6. **MR. AND MRS. ROBERT HALL, #09-0576.** Commission review of the June 15, 2009, decision by the Westmoreland County Wetlands Board to approve the Hall's request to install 130 linear feet of riprap revetment that will eliminate approximately 260 square feet of vegetated wetlands at their property adjacent to Murphy's Mill Creek.

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

Mr. Grabb explained that a letter had been received by staff from the applicant requesting this be remanded back to the Wetlands Board. He further explained that this request must be decided by the entire Commission, because staff could not do it administratively.

Commissioner Bowman asked if a representative for the Wetlands Board was present.

Austin Magill, the Wetlands Board Chairman, was present and his comments are a part of the verbatim record. Mr. Magill stated that they agreed with the matter being remanded back to the Wetlands Board.

Commissioner Bowman asked for action by the Board.

Associate Member Holland moved to remand the matter back to the Wetlands Board. Associate Member Schick seconded the motion. The motion carried, 7-0. The Chair voted yes.

Mr. Magill expressed his appreciation for the assistance provided to the Wetlands Board by the Habitat staff and encouraged the Commission to retain the Habitat staff, if budget impacts get worst.

Wetlands Review – Remanded back to the Wetlands Board.

* * * * *

7. **DEPARTMENT OF CONSERVATION AND RECREATION, #09-0431**, requests authorization to install 60 Prothonotary Warbler bird nest boxes on 3/4" conduit pipe in the Northwest River, and an unnamed tributary thereof, located a maximum of six (6) feet channelward of the shoreline of the Northwest River State Natural Area Preserve in Chesapeake. The project is protested by an adjoining property owner. This matter was continued from the June 23, 2009, Commission meeting at the request of the protestant.

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

Mr. Woodward explained that the project was located in the Northwest River, along the shoreline of the Northwest River State Natural Area Preserve in southern Chesapeake. The river was non-tidal but water levels fluctuate based on wind conditions. The project was similar in nature to a recently permitted project (VMRC #08-0533) on the opposite shoreline of the river by the Virginia Department of Game and Inland Fisheries, and the City of Chesapeake wherein nest boxes were installed adjacent to the shoreline of Northwest River Park. Those boxes were installed last spring in the Northwest River, Smith Creek and Indian Creek and according to officials at the Park were being used by the birds at a very high rate. The current project was being undertaken by Dr. Robert Reilly, of the Center for Environmental Studies at Virginia Commonwealth University in partnership with the Department of Conservation and Recreation, manager of the Natural Area Preserve (NAP). Both projects were designed to improve nesting habitat for the warblers, listed as a species of greatest conservation need, according to the Virginia Wildlife Action plan developed by DCR, as well as providing wildlife watching opportunities for the public.

Mr. Woodward further explained that Mr. L. Randolph Luton of Northwest River Farms, LLC., an adjacent property owner adjacent to the NAP was opposed to the project. Mr. Luton stated in his letter of protest that installing the nest boxes could ultimately lead to warblers using or nesting on his property. He was concerned that if the species became endangered in the future, this could result in problems should he seek to develop the property. He stated that he knew of several areas along the river, which did not have any possibility for future development which would be far superior habitat than that of his farm. In an attempt to address Mr. Luton's concerns, Dr. Reilly modified his request to move 14 of the 60 boxes to an interior tributary of the Northwest River, in an effort to distance the project from the protestant's adjacent upland property. It was staff's understanding, however, that Mr. Luton maintained his opposition to the proposal.

Mr. Woodward said that the Virginia Institute of Marine Science stated that the placement of the nest boxes in the water was necessary for successful breeding and research access

and stated no environmental impacts were expected if the boxes were installed and monitored, as proposed.

Mr. Woodward stated that the U.S. Army Corps of Engineers had issued a Nationwide Permit (4) for the project on April 16, 2009. No other state or federal agencies had commented on the project.

Mr. Woodward said that this project was almost exactly the same, as a previous project that appeared to be working as planned. The Prothonotary Warbler had been identified as a species of concern that warranted special attention to improve their populations. The nest boxes themselves represented a minor impact and encroachment on the State-owned, public submerged lands adjacent to the State Natural Area Preserve, and given their location, did not represent a hazard to navigation in the waterway.

Mr. Woodward stated that while there was no way to predict if this species would ever warrant protection under the Federal Endangered Species Act, staff believed that this project, as demonstrated by the prior project, will have a positive impact on the nesting and breeding, and therefore, an increase in population of this animal. Staff believed that the applicant had made a reasonable attempt to address the concerns raised by relocating a large number of the proposed nest boxes further away from the protestant's property.

Mr. Woodward explained that staff recommended approval of the project, as modified, with a permit condition that the nest boxes would be monitored annually and that they be repaired or removed if damaged or otherwise fall into disrepair to the point that they were no longer inhabitable.

There were no questions of staff.

Commissioner Bowman asked if there were a representative for the applicant who wished to comment.

Renee Hudgins, representative for the applicant, was sworn in and her comments are a part of the verbatim record. Ms. Hudgins explained that she was with the Coastal Virginia Wildlife Laboratory and that the warblers were migrants to the woodland wetlands. She said this was their habitat for breeding. She explained that the project was started 23 years ago for protection from predation by moving the nests to the poles over the water. She said that 1,700 nestlings had been produced and released. She said the project was increasing because the birds do well with this project. She said these projects funded by the U. S. Fish and Wildlife Service were not endangered and were doing better. She said she and her husband watch over these boxes and was licensed by the State as well as federally.

Commissioner Bowman asked when they hatch. Ms. Hudgins stated early May to mid-June. Commissioner Bowman asked if colonies changed. Ms. Hudgins explained that

they come to the wetlands to breed and the nest provided them with habitat. Commissioner Bowman asked if the trees would be better for them. Ms. Hudgins stated that the boxes provided protection from predators.

Mr. Woodward noted that the original proposal that was advertised was modified, but the protestant still protested.

Commissioner Bowman asked if those in opposition wish to comment.

L. Randolph Luton, protestant and property owner, was sworn in and his comments are a part of the verbatim record. Mr. Luton said he had no problem with providing food for resident birds and wildlife, but was opposed to this project because of the future impacts on their life here. He said he was not against the project, but this encouraged them to choose nest boxes rather than their natural habitat, trees. He said if these birds were to be classified "endangered" it could impact landowners and require additional real estate tax and any fines that can result on the owners if any harm comes to the birds. He said his property was purchased to farm and to improve as finances allowed. He said his dreams to expand the farm on the waterfront and the wetlands would be impacted. He said this was not the best location and there were alternate locations that would be better and not impact others. He explained that the Mattaponi and Pamunkey Rivers and wetlands would be excellent habitat for these warblers. He said they were asking for boxes in those areas. He said the bird's preferred habitat was woodland areas with trees and foliage as well as access to bugs and snails for feeding. He stated that warblers were cavity nesters. He asked if other areas had been considered and named off numerous areas.

Commissioner Bowman stated that any citizen can apply and he did not understand why the application was before the Commission. He asked Ms. Hudgins to answer.

Ms. Hudgins stated that this was ideal habitat for this species.

Commissioner Bowman asked Mr. Luton why he objected to this project. Mr. Luton explained that he objected because there was no way to guarantee that the population would not fail and end up on the endangered list. He said this would impact his property and he had worked hard for it.

Commissioner Bowman asked for questions from the Board.

Associate Member Fox explained that from the documents provided the warbler conservation status was less of a concern as it was 2 steps below threatened and 5 steps below endangered and extinction not even close.

Mr. Luton stated that the population was degrading at two percent a year. He said this is not the best area for the project as they need trees not marshland. He said he faced an

Commission Meeting

unknown future if the warbler were to be established in this area and then become endangered. He said he was requesting a change in location.

Commissioner Bowman asked the applicant's representative if there were any rebuttal comments. Ms. Hudgins stated the birds were not close to being endangered and the habitat was excellent, as the birds loved the area.

Commissioner Bowman asked if it were to be moved would the birds have less of a chance. Ms. Hudgins stated that they were doing better in Virginia and declining elsewhere.

Commissioner Bowman asked for comments from the Board.

Associate Member Robins stated that this was critical habitat that existed on the property and this was a positive and an active management of the NW River Park project utilizing a successful, remarkable approach. He moved to accept the staff recommendation. Associate Member Laine seconded the motion. Associate Member Fox said he was in favor of the motion and he was impressed that the applicant had modified the proposal to remove the boxes from across the property of Mr. Luton. Commissioner Bowman stated that no one knows what will come to an area. He said that there were bald eagles in this area because they like it there. He stated that this was a good project. The motion carried, 7-0. The Chair voted yes.

| | |
|-----------------|---------|
| Permit Fee..... | \$25.00 |
|-----------------|---------|

* * * * *

- 8. **CARL SALERA, #08-1281**, requests authorization to install a private, noncommercial, non-riparian mooring buoy in Mill Creek at 37° 35' 18.24" North Latitude and 76° 25' 31.14" West Longitude, approximately 900 feet channelward of a common deeded access parcel adjacent to The Winding Trail road in Middlesex County. The project is protested by several nearby property owners.

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

Mr. Neikirk explained that Mr. Salera owned an off-water lot in the Whispering Pines subdivision near the Topping area of Middlesex County. The subdivision bordered Mill Creek, a tributary of the Rappahannock River and it had at least two commonly-owned parcels designed to provide access to Mill Creek.

Mr. Neikirk further explained that the proposed mooring was sited approximately 900 feet channelward of one of the commonly owned access parcels in water with a mean low

water depth of approximately minus six (-6) feet. The proposed mooring site was in an embayment at the mouth of the creek. Development along the creek was primarily residential.

Mr. Neikirk stated that the project was protested by the owners of three waterfront properties along Mill Creek in the vicinity of the proposed mooring. They believed the mooring would adversely affect their view and the value of their property. They were also concerned that the granting of a permit for a non-riparian mooring would set a precedent and lead to additional moorings in Mill Creek and neighboring waters.

Mr. Neikirk said that in their letter dated September 11, 2008, the Coast Guard stated they had no objection to the project, but added that Mr. Salera would need to submit a Private Aids to Navigation application and that the vessel was required to be marked in accordance with their regulations when utilizing the mooring.

Mr. Neikirk also said that the project would not encroach on any public or privately-leased oyster planting ground, and no other agencies had commented on the proposal.

Mr. Neikirk explained that based on the navigation charts and the topographic map, the proposed mooring appeared to be sited in the deepest area of the embayment. Mr. Salera had apparently anchored his boat at this location for extended periods of time in the past and a single mooring most likely would not have a significant impact on navigation. Staff would be concerned, however, with the navigational impacts associated if multiple boats were to be moored in this area. A single mooring at the proposed location would probably have only minimal adverse impacts on navigation and the aesthetic concerns expressed by the nearby property owners. Additional moorings in this general area could, however, adversely impact navigation and would increase the adverse impacts on the neighbors. Since this request was not being made by an adjacent riparian property owner, staff believed it would be difficult to equitably allocate the limited area available in the creek for the mooring of deep draft vessels. As such, staff was reluctant to recommend approval of this request. Instead, staff suggested that Mr. Salera investigate mooring his boat at one of the local marinas. Regent Point Marina was located less than ½ mile from his property and specifically catered to larger sailboats. Staff understood that at this time they had slips available

Mr. Neikirk said that as an alternative, staff would be willing to entertain an application from the Whispering Pines subdivision for a limited number of moorings in this location should the property owners collectively desire to apply and allocate a small number of moorings.

Mr. Neikirk said that after evaluating the merits of the project against the concerns expressed by those in opposition to the project, and after considering all of the factors contained in §28.2-1205(A) of the Code of Virginia, staff was compelled to recommend denial of the project, as proposed.

Commissioner Bowman asked about the diameter of the buoy. Mr. Neikirk stated he did not know, but that the Coast Guard required it to be blue with a stripe and they were required to put the VMRC number on it. Commissioner Bowman asked if he was anchored there currently. Mr. Neikirk responded yes.

Commissioner Bowman asked if the applicant would like to speak.

Carl Salera, applicant, was sworn in and his comments are a part of the verbatim record. Mr. Salera explained that he considered the safety with having a buoy versus anchoring for the adjoining property owners and he selected the space so he would not impact their access to docks. He said because of the channel it would be a small space for a number of anchors. He said that there was no Homeowners Association and the protestants did not want any more mooring. He depicted on the slide the access on land and his highland.

Commissioner Bowman asked for questions from the Board.

Associate Member Holland asked if it would cure his problems. Mr. Salera stated yes, some, during storms just a little. He said he had to use 2 anchors and this area was pretty shielded from storms. Associate Member Holland asked how long was he anchored there. Mr. Salera responded two years.

Commissioner Bowman asked for anyone pro or con to speak.

Johnny Sposa, protestant and adjoining property owner, was sworn in and his comments are a part of the verbatim record. Mr. Sposa explained this project would impact navigation when visibility is impacted as fishermen access the area. He said he felt it would impact the property value and set a precedent. He stated that he paid a lot for waterfront property in order to have a view. He explained that he was concerned with how many could tie up to a buoy and stated that a marina was nearby for a boat to be kept. He stated he was requesting that his be denied. He read a letter from a neighbor, Reverend Robert S. Phipps of Topping, Virginia, who also objected, but because of health problems was not able to attend the meeting.

Welford Tate, protestant and property owner was sworn in and his comments are a part of the verbatim record. Mr. Tate said he was a property owner in the Montego Bay area and he wished to protest the buoy. He stated he purchased this property because of the unobstructed view. He also stated it was a \$1 million view. He said when the tax assessment is done they consider the view of the water and it could impact his property value. He said this was an unprotected area from weather and Mr. Salera leaves the boat unattended for a number of months and he had seen it on the bottom on low tide. He said he felt it would impact navigation and they did not want any more impacts to navigation. He said he was concerned with a precedent being set and the applicant's property was near a marina where he could dock his boat. He said he was requesting denial.

Commission Meeting

Commissioner Bowman allowed Mr. Salera to rebut.

Mr. Salera in his rebuttal stated that the boat had 4 ½ - foot draft and it was never on the bottom and never unattended, just not occupied.

Commissioner Bowman asked why he did not use the marina. Mr. Salera said he had never used the marina and never contemplated using the marina.

Commissioner Bowman asked for discussion or action by the Commission.

Associate Member Fox stated his concern for a precedent being set if this were to be allowed with no riparian rights in front of his lot. He said he thought it was better to oppose the project.

Associate Member Holland stated that he understood what Mr. Fox was saying, but because of the anchoring for two years, the buoy would provide safety.

Associate Member Fox moved to deny the application. Associate Member Robins seconded the motion. The motion failed, 3-4. Associate Members Bowden, Holland and Schick all voted no. The Chair voted no.

Associate Member Holland moved to allow the buoy. Associate Member Bowden seconded the motion. The motion carried, 4-3. Associate Members Fox, Robins, and Laine all voted no. The Chair voted yes.

| | |
|--------------------------------|----------|
| Permit Fee (mooring buoy)..... | \$100.00 |
|--------------------------------|----------|

* * * * *

Bob Grabb, Chief, Habitat Management, gave the presentation. His comments are a part of the verbatim record. Mr. Grabb explained that the next three items, 9, 10, and 11 were approved previously by the Commission. He stated that Mr. Josephson and the attorneys had prepared the resolutions and deeds for the Board's approval. He recommended that since Mr. Josephson was not at the meeting that these items be pulled and heard at the next month's meeting.

Associate Member Schick moved to table the items. Associate Member Holland seconded the motion. The motion carried, 6-0. Associate Member Robins was not present.

9. DECEMBER PARTNERS, LLC. Commission adoption of Resolution and approval of Deed conveying 32,631 square feet (0.749 acres +/-) of previously filled State-owned subaqueous lands in the City of Norfolk to December Partners,

LLC, and its successors and assigns, in accordance with Chapter 884 Acts of Assembly 2007.

Continued until the August 25, 2009 Commission meeting.

* * *

- 10. MOON OF NORFOLK, LLC.** Commission adoption of Resolution and approval of Deed conveying 108,466 square feet (2.49 acres +/-) of previously filled State-owned subaqueous lands in the City of Norfolk to Moon of Norfolk, LLC, and its successors and assigns, in accordance with Chapter 884 Acts of Assembly 2006 and limited by Chapter 879 Acts of Assembly 2007.

Continued until the August 25, 2009 Commission meeting.

* * *

- 11. FORT NORFOLK, LLC.** Commission adoption of Resolution and approval of Deed conveying 4,489 square feet (0.103 acres +/-) of previously filled State-owned subaqueous lands in the City of Norfolk to Fort Norfolk, LLC, and its successors and assigns, in accordance with Chapter 673 Acts of Assembly 2008.

Continued until the August 25, 2009 Commission meeting.

* * * * *

- 12. U.S. ARMY CORPS OF ENGINEERS, #99-0941,** requests an extension for an additional two weeks beyond the Commission's established ten-year expiration in order for them to complete the current maintenance dredging of the Greenvale Creek Federal Project Channel in Lancaster County.

Pulled from the Agenda – Project complete – No extension necessary.

* * * * *

- 13. MARY HILL AND MARIE HILL, #2006-176.** Applicant is requesting to lease approximately 160 acres of oyster planting ground within Chuckatuck Creek on both sides of the Chuckatuck Creek, Route 17, highway bridge in the City of Suffolk and Isle of Wight County. The application is protested by a nearby oyster ground leaseholder.

Commissioner Bowman left the meeting. Associate Member Holland was acting chair in his absence.

Associate Member Robins had returned to the meeting.

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

Mr. Stagg explained that staff received an oyster planting ground application to lease approximately 160 acres within Chuckatuck Creek, both upstream and downstream of the Route 17, bridge on November 1, 2006. The ground was to be located in both the City of Suffolk and Isle of Wight County. The application noted that any right-of-way associated with the bridge would be excluded. Public notices for the application were sent out on January 26, 2007.

Mr. Stagg stated that after a number of attempts by the Engineering/Surveying surveyor to have the applicant obtain the stakes necessary to survey the ground, a letter dated November 28, 2007, was sent to the applicants, from the Chief Engineer requesting that stakes be provided for this and other pending applications by Ms. Hill. This letter resulted in stakes being provided for other pending applications. The leases were surveyed over the next several months. The applicants were again notified by letter dated October 6, 2008, that the VMRC surveyor was once again having difficulty obtaining stakes in order to survey the application within Chuckatuck Creek. Stakes were eventually provided and the ground was surveyed on October 20, 2008.

Mr. Stagg said that soon thereafter staff received a phone call and protest from Mr. Robert Johnson, a nearby oyster ground leaseholder, of a portion of the area applied for.

Mr. Stagg stated that by letter dated, November 6, 2008, the applicants were notified that the ground had been surveyed in the field and they were provided with a map of the final configuration. It was noted that due to the narrow connection at two locations it was staff's position those areas not be leased, as well as any area within the VDOT bridge ROW. This resulted in the area being divided into five separate parcels for which a plat would be required for each parcel.

Mr. Stagg explained that staff received a phone call from Mary Hill in which she questioned why the areas had to be split into separate parcels, therefore requiring additional plat fees. Staff responded to this objection from Ms. Hill in a letter dated December 2, 2008. Staff indicated that one of the areas could remain attached due to its configuration, but that staff continued to recommend not leasing another long narrow connection that would make working that area difficult without encroaching on the leased bottom of others. Based on this scenario there would be four separate parcels. Staff also spoke with the protestant, Mr. Johnson, who indicated that if the narrow connection noted above, was not leased, he would drop his protest of the area to the east of this connection.

Mr. Stagg said that staff sent a letter, dated February 11, 2009, to the applicants indicating that if they were willing to drop the request to lease the narrow connection, staff could administratively issue the leases. No correspondence had been received from the applicant's since the February 11, 2009 letter from staff.

Mr. Stagg stated that while the Engineering/Surveying Department routinely allowed applications to include areas that may end up not being in one contiguous parcel, it was department policy to require a separate plat for each lease parcel. Therefore, due to the bridge ROW, private piers along the shoreline, and the narrow connection of parcels that would create a law enforcement issue related to working the ground, staff recommended approval of the application, as surveyed into four parcels to include one survey fee of 510.00 (to include one plat) and three additional plat fees of \$100.00.

Associate Member Holland asked if the applicant were present and wished to comment.

Mary Hill, co-applicant, was sworn in and her comments are a part of the verbatim record. Ms. Hill explained that she was not successful in retaining an attorney. She stated that the application that was submitted on November 1, 2006 was for 160 acres, which was one lease. She said that the oyster industry was a part of her family's heritage and that of her village. She stated that a protest had been received. She explained that staff had set up 73 corners for which she supplied 24 stakes and then 100 stakes. She said the protest was based on the length of time to have it surveyed. She stated that Robert Johnson also wanted the area.

Ms. Hill explained that the letter dated November 6, 2008 charged for 4 parcels because of a lack of connection. She said she spoke with personnel at VDOT regarding the right of way that they held at the Chuckatuck Creek Bridge and the easement stops at the shoreline. She said a lease for Mr. Parker goes under the bridge and property lines do go under the bridge. She was told on December 2, 2008 that the VMRC did not lease long, narrow areas and it was protested. She said she was told that this would make it difficult to harvest without encroaching on other leases. She said that she did not understand why it was not still encroaching when a lease was adjacent to another. She said on February 11, 2009 Mr. Johnson dropped his protest if the piece next to Dixon that was applied for to expand her father's lease was not pursued. She said they want this area because the oysters are coming back. She said she was praying that she will be granted the entire 160 acres in one piece and not cause more expense than already incurred.

Commissioner Holland asked for individuals who were in support and wished to comment.

Marie Hill, co-applicant and Mother of Mary Hill, was sworn in and her comments are a part of the verbatim record. Mrs. Hill stated that she was here to petition for the oyster ground. She explained that her husband had died in 1999 and he had oyster ground at that time. She explained further that he had left it to their daughter, Mary, to take care of it.

She said members of their family had always been oyster men and have depended on it to make a living. She said when Kepone destroyed all the oyster grounds they gave up their grounds and sought other means of making a living. She stated that they believe that the oysters are coming back and she was asking the Commission to do the right thing.

Associate Member Holland stated that the matter was before the Commission.

Associate Member Robins asked about the size of the strip of ground. Mr. Stagg stated that it was 35 feet wide and about 3/10 of an acre. Associate Member Robins asked if this was difficult to work and enforce. Mr. Stagg responded, yes. Associate Member Robins asked about lease number 11909. Mr. Stagg explained that was the only reason that the 2nd lease was separate from the 3rd lease. He also explained that it wasn't on the lease map given to her as there had been problems with Mr. Keeling not paying the rent and not giving them information on the use of the grounds. He said he was notified and provided them with the lease information, but it was deleted. He said when she applied for it he was paying the rent, but it was put back on the map. Mr. Stagg explained the VDOT right of way historically was not leased. He explained that Mr. Parker did go up to the bridge, but that was because he had it for 70 years which was before there were any easements granted. He said this was the last narrow bridge and that all the other bridges had been replaced. He said Mr. Parker's lease was still there and now the bridge was gone. Mr. Stagg said that on item 2, the application it was indicated that the Commission did not lease right of ways. He said that they did lease the 3/10 acre because the Law Enforcement Division had issues with it. He said staff could have required more separation of applications and they worked with Ms. Hill to get it done this way. He said there were no objections to applications 1, 2, and 3, and 4 was protested but he was not the first in line and he still protested the small, narrow strip.

Associate Member Fox said it was admirable to go into the oyster business and grow oysters considering the status of the oysters. He said the way it was done now the fees were less and he felt it was no loss to lose the small, narrow space.

Associate Member Fox stated that the 140 acres was a good thing and he moved to accept the staff recommendation, as leasing the bottom of the Commonwealth, they could lease or not lease whatever area they wanted. Associate Member Robins seconded the motion. He stated that with the applicant's history figuring in the community, he applauded their efforts, but that staff had done a good job in not allowing the small narrow lease. He said he supported the staff's recommendation.

Ms. Hill asked about the piece not shown on the map, which she had requested through the Freedom of Information Act. She said originally the number was 11909 and now there was a new number 17079. Mr. Stagg said that the lease number was new, but the plat file number had stayed the same.

The motion carried, 5-0-1. Associate Member Holland abstained and Commissioner Bowman was absent from the entire presentation.

* * * * *

14. PUBLIC COMMENTS:

VAUGHN PRUITT, JR – Reinstatement of Oyster Ground Leases

Thomas Dix, Attorney for Mr. Pruitt, was present and his comments are a part of the verbatim record. Mr. Dix explained that Mr. Pruitt had three oyster ground leases in Occohannock Creek on the Eastern Shore. He said in 2007 he had changed his mailing address and he received and paid his bill, but in 2008 he did not receive a bill, therefore his bill was not paid. He stated that a Marine Police Officer came to Mr. Pruitt and told him he had lost his leases. He said that Mr. Pruitt had 26.3 acres of oyster ground on which he had made an investment and he was requesting that it be reinstated. He stated that the Code required that he be notified, which he was not. He said he never received a certified mail notification.

Commissioner Bowman explained that the rent statement required that an address correction was the responsibility of the leaseholder and it was not the VMRC's fault. He said Mr. Pruitt needed to have a discussion with staff, but there was nothing in the Code for reinstating the leases. He suggested that he reapply for them.

Mr. Dix stated that Mr. Pruitt had received his rockfish tags and had gotten all his other correspondence.

Commissioner Bowman stated that these were in different databases. He asked staff if there had been any applications. Hank Badger explained that there was SAV present in one of the leases and originally there were 3 parcels so it cannot be made into one lease, but smaller leases because of the SAV.

Commissioner Bowman stated this was an administrative matter. Mr. Badger stated he was notified three times and all three were returned. Commissioner Bowman suggested that he reapply and work with the staff. He said the ground would be reduced because of the SAV. He said if there was a problem with the process to call him or staff.

ROBERT HOLLOWELL – Lynnhaven River – Haul Seiners required to work deeper waters from their boats because of SAV.

Commissioner Bowman asked staff to comment.

Jack Travelstead, Chief, Fisheries Management, explained that the law was made to address haul seiners fishing from boats and because of the damage to the SAV caused by

the boat propeller. He explained further that VMRC decided to move the boats further out into deeper water. He said Dr. Orth reported that the regulation had fixed the problems. He said that Mr. Hollowell was one of the few haul seiners that worked on the beach and worked his net from the shore, without a boat. He explained that Law Enforcement said that Mr. Hollowell was illegally fishing and had been for six years. He suggested that the language needed to be added to allow haul seining from the beach, not the boat and to advertise holding a public hearing in August.

Commissioner Bowman asked for action by the Board.

Associate Member Holland moved to advertise for a public hearing at the August Commission meeting. Associate Member Bowden seconded the motion. The motion carried, 7-0.

* * * * *

15. CRAB LICENSE BUY-BACK PROGRAM: Approval of procurement procedures and request for public hearing to amend Regulation 4VAC20-1040 to incorporate the buy-back program.

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

Mr. Travelstead explained that \$7 million in funding by NOAA had been granted to VMRC. He stated that the pot fishery was over capacity at 1800 licenses. He said this program would go a long way to providing incentive for watermen to exit the fishery.

Mr. Travelstead stated that this would be available to all of the pot fishery licensees and for those on the waiting list.

Mr. Travelstead said that staff was requesting approval of the procurement process and to request the advertisement of a public hearing to add language that a license purchased under this program was permanently eliminated or retired.

Mr. Travelstead said that there was \$6.4 million and from the largest license to the smallest license were eligible. He said funds were available at a rate of 50% for full-time crabbers; 30% for part-time crabbers; and 20% for those on the waiting list. He said that a full-time crab potter was defined as working at least 100 days and peeler potters at least 60 days.

Mr. Travelstead described the proposed procurement process. He said that if the Commission approved the procurement, letters would be sent out to the licensees during the first week of August.

Associate Member Holland asked if it would be advertised. Mr. Travelstead stated that there would just be a mail-out, as the costs for mailing were included in the Crab Disaster Fund.

Mr. Travelstead stated that staff did not want people to act in haste. He said that if applications or bids could not be made sense of, they can then be rejected, but that would not be determined until they were all received.

Mr. Travelstead said that an application form would be established and a form with frequently asked questions would be provided to all licensees.

Mr. Travelstead explained that the application deadline was November 1st.

Commissioner Bowman asked why just the pot fisheries. Mr. Travelstead stated that the pot fisheries had the most excess effort and the crab stocks have been overworked by these fisheries. He said the staff was requesting approval of the procurement procedures and approval of a public hearing to make the regulation change.

Commissioner Bowman asked for questions of staff.

Associate Member Robins stated the language for eligibility of forfeited license needed to be corrected, as they would still be able to get a license back by making application for a transfer from another licensee. Associate Member Holland stated that it said in the regulation 'that license'. Associate Member Robins said it needed to be clarified that they do not lose the right to reenter the fisheries by a transfer. Mr. Travelstead stated that it could be done.

Commissioner Bowman asked for action by the Board.

Associate Member Robin stated that this was a historical and remarkable opportunity to use federal funds to bring a fishery into alignment. He moved to approve the staff recommendation with the clarification made to the regulation. Associate Member Laine seconded the motion. The motion carried, 7-0. The Chair voted yes.

Associate Member Robins moved to approve the procurement procedures. Associate Member Fox seconded the motion. The motion carried, 7-0. The Chair voted yes.

* * * * *

16. **APPEALS:** Final Appeals from Individuals whose Crab License has been Placed on the Waiting List.

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

Mr. Travelstead explained that Michael Shackelford was unable to be present at this hearing, as he was in the hospital. Commissioner Bowman stated that this case would be continued until the August meeting.

Paul Herrick

Mr. Travelstead stated that the records had been checked and nothing was found. He said that Mr. Herrick now had eight books from a crab company, which was evidence of sales of crabs. He was crabbing during 2004 – 2007, but did not report. He said that a precedent would be set for failure to report.

Commissioner Bowman asked about failure to report. Mr. Travelstead reminded the Commission that in one case, where there was confusion and the crabber and agent each thought the other was reporting to the Commission, granted the appeal.

Associate Member Robins stated that he was recusing himself from this case.

Paul Herrick was sworn in and his comments are a part of the verbatim record. Mr. Herrick said he went through a bad divorce and lost his boat and everything. He said his nephew used his license and he had neglected to tell him to report and he did not. He stated he had also had health problems that kept him from using the license.

Jeffrey Parker was sworn in and his comments are a part of the verbatim record. Mr. Parker said he was not aware of the reporting requirement and, when he was asked, he did report in 2008.

Commissioner Bowman asked about fish harvest. Associate Member Holland asked him if he was aware of reporting and Mr. Parker said, when he found out he did report 2008 catch and just got his 2009 records to report. He said he was not fishing in 2009.

Commissioner Bowman asked for action by the Board.

Associate Member Schick moved to reinstate his license. Associate Member Holland seconded the motion. Mr. Holland suggested he get caught up in his records. Mr. Herrick responded yes. The motion carried, 6-0-1. Associate Member Robins abstained.

Jeffrey Scott Bonney

Mr. Travelstead stated that staff could not find any records for Mr. Bonney in the system.

Commissioner Bowman asked about receipts at the meeting last month. Mr. Travelstead stated he had receipts from a company for the qualifying period. He stated that there was no agent involved, he just failed to report and the Commission has denied these requests in the past.

Charles Jenkins, attorney for the appellant was present.

Jeffrey Scott Bonney, appellant was sworn in and his comments are a part of the verbatim record. Mr. Bonney was questioned by Mr. Jenkins. He said he had worked in the Back Bay area and he had worked in 2007. He explained that his wife was taking care of his reporting, but he had marital problems and he had worked during the qualifying time. He said it would be a hardship as he needed to support his family. He said that what his wife reported was “no work.”

Commissioner Bowman asked him if he actually worked and did the database show “no work.” Mr. Travelstead responded it would be blank.

Associate Member Schick asked if he worked in '08? Mr. Bonney responded yes. Associate Member Schick asked if he reported? Mr. Bonney responded no.

Associate Member Robins asked if he reported in 2004, 2005, and 2006. Mr. Bonney responded that he did not.

Commissioner Bowman stated to Mr. Bonney that he was personally responsible for his own reporting and if he was a good crabber he would have had good numbers, but the wife acted as the agent. He stated that Mr. Bonney had anticipated that someone else would do the paperwork.

Mr. Jenkins stated that Mr. Bonney was requesting that his license be reinstated and he will do the reporting properly.

Associate Member Robins said that he could not support the request and moved to deny it. Associate Member Laine seconded the motion. The motion carried, 7-0. The Chair voted yes.

Nina McClung

Mr. Travelstead explained that there was no activity during the qualifying period and that she was holding the license for her son, since her husband had passed away. The son was now 16 years old. This request did not meet the requirements for an appeal. He said it

was the same as the State holding it now on the wait list and it was not permanent as he could get his license when the stocks rebound.

Associate Member Robins asked about the status of other licenses of deceased individuals and if they were inactive. Mr. Travelstead explained that most cases the Estate came in and a transfer was done. He said some individuals had wills that directed a transfer to another. He stated that these licenses were of value and were usually transferred to a relative and then transferred again later to another waterman.

Associate Member Laine moved to deny. Associate Member Robins seconded the motion. The motion carried, 7-0. The Chair voted yes.

Clifton Lee, Jr.

Doug Jenkins was present and his comments are a part of the verbatim record. Mr. Jenkins stated he was here on behalf of Mr. Lee to request his license be reinstated. He stated that it was appealed in March and denied and Mr. Lee was 70 years old and unable to be at the meeting.

Mr. Jenkins provided a letter from Mr. Lee to the Commission requesting reconsideration of his request. He stated that the letter said that he needed his license in order to sustain his livelihood as other work was not available. He said it further stated that he admitted that there had been no activity, but he had sustained hurricane impacts and he now intended to use his license immediately. He said he felt that he had long ago paid his dues.

Commissioner Bowman asked the Commission for discussion or action.

No action was taken.

* * * * *

17. FAILURE TO REPORT: Cases Concerning Individuals Who Failed to Report Their Commercial Harvest.

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

Mr. Grist explained that last year 165 individuals were notified of their failure to report and asked to resolve this problem by February of 2009.

James C. Baker

Mr. Grist stated that Mr. Baker was not present. He stated that Mr. Baker was noticed for the October 2008 Commission meeting and Mr. Baker did contact staff, but he was unable to attend the meeting because of work. He said Mr. Baker was notified after that meeting that his license was suspended. He said in May 2009 a letter from the Administration and Finance was sent and he was given a deadline of June 8 to respond.

Commissioner Bowman asked if staff recommended holding the hearing. Mr. Grist stated that staff recommended the invalidation of his license and Mr. Baker could appeal the decision.

Commissioner Bowman asked what the Commission wanted to do.

Associate Member Holland moved to accept the staff recommendation. Associate Member Fox seconded the motion. The motion carried, 7 -0.

Richard Costin

Richard Costin, appellant, was sworn in and his comments are a part of the verbatim record. Mr. Costin explained that he thought that the other person he worked with would report for him and they did not.

Commissioner Bowman asked for action by the Board.

Associate Member Holland moved to accept the staff recommendation for a two-year probation. Associate Member Robins seconded the motion. The motion carried, 7-0.

* * * * *

18. REQUEST FOR APPROVAL: The Recommendations of the Recreational Fishing Advisory Board.

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

Mr. Travelstead explained that the Recreational Fishing Advisory Board reviewed 21 projects. Two had been withdrawn because other funding had been found and of the remaining proposals the RFAB recommends four, totaling \$18,299.00. He said that recommendations for the rest of the proposals would be provided in September. He said staff concurred with the four projects recommended for funding at this time.

The following four were recommended for approval.

- A) 2009 Sunshine Children’s Fishing Program. Denny Dobbins, Portsmouth Anglers Club. \$7,194. Vote, 7-0.
- B) 2009 Saxis Fishing Pier Youth Fishing Tournament (Year 8). Allen Evans, Eastern Shore of Virginia Anglers Club. \$1,325.00. Vote 7-0.
- C) 2009 Hope House & Oak Grove Nursing Home Fishing Excursions and Clinics. D. Hurst Macin, Great Bridge Fisherman’s Association. \$4,000.00. Vote 7-0.
- D) 2009 Youth Development “Hooked on Fishing” Adventure (Year 2). A. Fisher, R. Lockhart, Virginia Charter Boat Association. \$5,780.00. Vote, 7-0.

Commissioner Bowman asked for action by the Board.

Associate Member Fox moved to approve the recommendations. Associate Member Laine seconded the motion. The motion carried, 7-0. The Chair voted yes.

- 19. REQUEST FOR PUBLIC HEARING:** To amend Regulation 4VAC20-1090 and Regulation 4VAC20-1180 to establish non-resident fees for all recreational fishing.

Jack Travelstead, Chief, Fisheries Management, gave the presentation and his comments are a part of the verbatim record. He stated that this was a request for a public hearing. He said the staff recommended doubling the non-resident fees and to prohibit a boat-owner fishing license to non-residents.

Commissioner Bowman asked for action by the Board.

Associate Member Holland moved to advertise for a public hearing. Associate Member Fox seconded the motion. The motion carried, 7-0. The Chair voted yes.

- 20. REQUEST FOR PUBLIC HEARING:** To amend Regulation 4VAC20-252 to establish the 2009 recreational striped bass harvest controls.

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

Mr. O’Reilly explained that he would give more background information at the hearing next month. He said that for the last eight years there had been two underages, but the last was the most with 570,000 pounds.

Mr. O'Reilly stated that both FMAC and staff agreed to the 1-fish limit for December 2007 and 2008. He said now the recommendation was for a 2-fish limit for the entire month of December and maintenance of the no-take slot limit, as all agreed it was a good idea.

Mr. O'Reilly explained that staff recommended that a public hearing be advertised to discuss a 2-fish limit for all of December, 2009.

Commissioner Bowman asked for action by the Board.

Associate Member Holland moved to advertise for a public hearing. Associate Member Schick seconded he motion. The motion carried, 7-0. The Chair voted yes.

21. REQUEST FOR PUBLIC HEARING: To amend Regulation 4VAC20-610 to clarify commercial harvest reporting requirements.

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

Mr. Grist said that 2001 when the Commission adopted amendments for reporting, they did not provide for submitting the reports and it was left out of the regulation.

Mr. Grist stated that staff recommended advertising for a public hearing to discuss amending the regulation to include the requirements for the submission of the reports to the VMRC staff.

Commissioner Bowman asked for action by the Board.

Associate Member Holland moved to advertise for public hearing. Associate Member Schick seconded the motion. The motion carried, 7-0. The Chair voted yes.

22. REQUEST FOR PUBLIC HEARING: To establish a new regulation setting minimum distances between any net and a fixed fishing device, as directed by HB 2256 (2009 Session.).

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

Mr. Travelstead explained that this was a request for the advertisement of a public hearing. He said a new law established by the General Assembly, Section 28.2-307 of the Code of Virginia, required that the Commission by regulation establish the minimum distance between any net and the side and end of any fixed fishing device. He said this was made effective July 1st.

Mr. Travelstead said over the years that the staff had heard no complaints on this issue. He said one Northern Neck fisherman had been concerned with the setting of other gears at 300 yards and he would like it to be more. He said this cannot be done as all existing nets would then be illegal. He said this could be accommodated by instituting a process to grant requests for variances for greater than 300 yards to be handled either by the Commission or by the staff.

Associate Member Holland suggested that the Commissioner be authorized, unless there was a problem, then the Commission could hear the matter.

Commissioner Bowman stated that an emergency regulation was needed. He asked for action by the Commission.

Associate Member Robins moved to adopt the emergency regulation and to advertise for a public hearing. Associate Member Laine seconded the motion. The motion carried, 7-0. The Chair voted yes.

* * * * *

There was no further business and the meeting was adjourned at approximately 4:10 p.m. The next regular meeting will be Tuesday, August 25, 2009.

Steven G. Bowman, Commissioner

Katherine Leonard, Recording Secretary