

## MINUTES

## COMMISSION MEETING

April 23, 2019

The meeting of the Marine Resources Commission was held at the Marine Resources Commission main office at 380 Fenwick Road, Bldg. 96, Fort Monroe, Virginia with the following present:

Steven G. Bowman	Commissioner
Wayne France Chad Ballard Heather Lusk James E. Minor III Ken Neill, III	Associate Members
Kelci Block	Assistant Attorney General
Ellen Bolen Jamie Hogge	Deputy Commissioner Recording Secretary
Dave Lego	Bs. Systems Specialist
Robert O'Reilly Pat Geer Andrew Button Stephanie Iverson Adam Kenyon Nancy McElligott Jennifer Farmer Lewis Gillingham Anna-Mai Christmas Alexa Kretsch Ethan Simpson	Chief, Fisheries Mgmt. Deputy Chief, Fisheries Mgmt. Head, Conservation and Replenishment Fisheries Mgmt. Manager, Sr. Fisheries Program Manager Fisheries Mgmt. Specialist Regulatory Coordinator Director, SWFT Fisheries Mgmt. Specialist Fisheries Mgmt. Specialist Fisheries Mgmt. Specialist
Warner Rhodes Steve Bennis Robert Griffin Steven York Michael Nicholson John Poch Terril McKellips	Deputy Chief, Law Enforcement Lieutenant, Marine Police Officer First Sergeant, Marine Police Officer Marine Police Officer Marine Police Officer Marine Police Officer Marine Police Officer
Tony Watkinson Randy Owen Jeff Madden	Chief, Habitat Management Deputy Chief, Habitat Management Environmental Engineer, Sr.

**Commission Meeting**

Jay Woodward	Environmental Engineer, Sr.
Justin Worrell	Environmental Engineer, Sr.
Mark Eversole	Environmental Engineer, Sr.
Mike Johnson	Environmental Engineer, Sr.
Hank Badger	Environmental Engineer, Sr.
Allison Norris	Environmental Engineer, Sr.
Rachael Peabody	Environmental Engineer, Sr.
Ben Stagg	Dir., Shellfish Aquaculture, Leasing and Mapping
Daniel Faggert	Surveyor, Engineering/Surveying

Virginia Institute of Marine Science (VIMS):

Lyle Varnell	Emily Hein	Mark Luckenbach
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Others present:

Kenny Powell	Darrell Insley	Graylend Horn
Joseph Scott	Cynthia Hall	Mike Ware
Bob Simon	Rommel Taman	Becky Flibotte
Michael York	Charles Southhall	Deborah Stearns
David Stearns	Daniel Adams	Marie St. Clair
Robert Johnson	Jim Lang	Curtis Hickman
Crystal Thomas	Castle Craddock	Paul Pratt
Jessica Pratt	Ernest Styron	Jillian Cox
W.W. Parkerson	and others	

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Commissioner Bowman called the meeting to order at approximately 9:35 a.m. Associate Members Everett and Tankard were absent.

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

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Commissioner Bowman made an announcement that Associate Member Zydron has recently been elected into the Virginia Lawyers' Hall of Fame. Commissioner Bowman's comments are a part of the verbatim record.

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

Tony Watkinson requested to add a briefing evaluation on the impact of floating Aquaculture on SAV by Mark Luckenbach from VIMS to the Agenda.

**Associate Member France moved to approve the agenda as amended. Associate Member Zydron seconded the motion. The motion carried, 7-0. Chair voted yes.**

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**MINUTES:** Commissioner Bowman asked if there were any changes or corrections to be made to the March 26, 2019 Commission meeting minutes.

**Associate Member Zydron moved to approve the minutes as presented. Associate Member Minor seconded the motion. The motion carried, 7-0. Chair voted yes.**

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

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

Tony Watkinson, Chief, Habitat Management, reviewed 2 page 2 items A and B for the Board Members. Mr. Watkinson’s comments are a part of the verbatim record.

**2A. GRANITE/PARSONS/CORMAN, A JOINT VENTURE, #18-0425**, requests authorization to revise a previously issued permit for the construction of two (2) additional lanes on the High Rise Bridge over the Southern Branch Elizabeth River in the City of Chesapeake, by increasing the number of pier piles by 24, for a total of 138 pier piles.

**2B. CITY OF VIRGINIA BEACH, #19-0236**, requests authorization to maintenance dredge on an as-necessary basis approximately 150,000 cubic yards (per cycle) of State-owned submerged bottom within the City’s Rudee Inlet Outer Channel Deposition Basin, situated along the Atlantic Ocean in the City of Virginia Beach. The Basin will be hydraulically dredged to maximum depths of -22 feet mean lower low water, and the dredged sand will be utilized as beach nourishment for the adjacent City Croatan beach to the south and the City’s resort beach to the north.

Fee:	\$ 100.00
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Associate Member Ballard moved to approve the page two items A and B as presented. Associate Member Neill seconded the motion. The motion carried 7-0. Chair voted yes.

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

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4. **CLOSED MEETING FOR CONSULTATION WITH, OR BRIEFING BY, COUNSEL.** None.

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Mark Luckenbach, VIMS, presented a briefing on the impact of floating cages on SAV. Mr. Luckenbach’s comments are a part of the verbatim record.

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5. **LICENSE STATUS REVIEW**

**(5-1) Darrel W. Insley (MRC # 1440):** was present and sworn in. Mr. Insley did not testify.

Mr. Michael Ware, attorney, represented Mr. Insley. Mr. Ware agreed with 3 year probation that was explained in the Guideline for Sanctions. His comments are a part of the verbatim record.

Robert Griffin, Marine Police Officer, was sworn in. MPO Griffin did not testify. His comments are a part of the verbatim record.

**January 13, 2017, Taking Oysters Out of Season: § 28.2-508**

**Disposition:**

September 22, 2017, Newport News General District Court

Fine: \$500.00 – 12 months jail with 11 months suspended

Steven York, Marine Police Officer, was sworn in and he gave the briefing of the information provided in the staff's evaluation. His comments are a part of the verbatim record.

**January 13, 2017, Take oysters with Dredge/Handscrape from closed area: § 28.2-523**

**Disposition:**

September 22, 2017, Newport News General District Court

Fine: \$1,500.00 – 3 years penitentiary with 3 years suspended

***MATRIX GUIDELINE SUGGESTION: 3 YEAR PROBATION (§ 28.2-232 of the Code of Virginia)***

Jennifer Farmer, Regulatory Coordinator, explained to the Commission the sanction guidelines, with PowerPoint slides. Ms. Farmer's comments are a part of the verbatim record.

Mr. Darrell W. Insley, a commercial fisherman registration licensee, was convicted on September 22, 2017 for one count of taking oysters out of season (§ 28.2-506 of the Code of Virginia) and one count of taking oysters with dredge/scrape from a closed area (§ 28.2-523 of the Code of Virginia).

The Commission's guidelines for sanctions specify that one conviction of harvesting oysters or clams during a closed public season, should result in at least a three-year probation. In accordance with § 28.2-232 of the Code of Virginia, the guidelines suggest the Commission place Mr. Insley on probation for a period of three years from the date of this Commission meeting, April 23, 2019 through April 22, 2022. Any failure on Mr. Insley's part to obey any of the laws or regulations relating to the Marine Resources of the Commonwealth during the three-year probation would result in Mr. Insley appearing before the Commission for a hearing on a license revocation.

**Associate Member Zydron made a motion to approve staff recommendation for a 3 year probation as presented. Associate Member France seconded the motion. The motion carried, 7-0. Chair voted yes.**

**(5-2) Kenneth Powell (MRC # 009185):** was present and sworn in. His comments are a part of the verbatim record.

Mr. Michael Ware, attorney, represented Mr. Powell.

John Poch, Marine Police Officer, was sworn in and he gave the briefing of the information provided in the staff's evaluation. His comments are a part of the verbatim record.

**October 30, 2018, Remove oysters from polluted ground: § 28.2-810**

**Disposition:**

November 26, 2018, Newport News General District Court

Fine: \$50.00

***GUIDELINE SUGGESTION: 1 YEAR REVOCATION OF GEAR LICENSE & CONCURRENT 5 YEAR PROBATION (§ 28.2-232 of the Code of Virginia)***

Jennifer Farmer, Regulatory Coordinator, explained to the Commission the sanction guidelines, with PowerPoint slides. Ms. Farmer’s comments are a part of the verbatim record.

Mr. Kenneth Powell, a commercial fisherman registration licensee, was convicted on November 26, 2018 for one count of removing oysters from polluted ground (§28.2-810 of the Code of Virginia).

The Commission’s guidelines for sanctions specify that one conviction of harvesting oysters or clams from a condemned area, within a two-year period, should result in at least a one year revocation of the gear license and a concurrent five year probation. In accordance with § 28.2-232 of the Code of Virginia, the guidelines suggest the Commission revoke Mr. Powell’s gear license for a period of one year from the date of this Commission meeting, April 23, 2019 through April 22, 2020 and place him on a concurrent probation for a period of five years from the date of this Commission meeting, April 23, 2019 through April 22, 2024. The Code of Virginia also allows that the Commission prohibit the issuance, reissuance, and renewal of Mr. Powell’s gear license during this revocation period.

**Associate Member France made a motion to impose a 2 year probation. Associate Member Ballard seconded the motion. The motion carried, 7-0. Chair voted yes.**

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- 6. **DAVID L. STEARNS, #19-0188.** Commission review on appeal by 38 freeholders of the March 13, 2019, decision of the Norfolk Wetlands Board to approve the construction of 97 linear feet of replacement bulkhead within the same footprint, and to plant 375 square feet of non-vegetated wetlands on sand fill behind 42 linear feet of coir log, along the Lafayette River at 107 West Severn Road in the City of Norfolk.

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

Ms. Peabody explained that there was a request by a protester to continue the project hearing until the protester has had an opportunity to review the project.

There was no motion from the Commission to continue project hearing to another time. Ms. Peabody was instructed to continue with the presentation.

Ms. Peabody explained that on March 13, 2019, the City of Norfolk Wetlands Board unanimously approved a request by David L. Stearns to replace 97 linear feet of failing bulkhead within the same footprint and to construct a 375 square foot living shoreline. The proposed bulkhead will impact 14 square feet of non-vegetated wetlands and 375 square feet of vegetated wetlands will be planted. The proposed project takes place along a man-made boat basin at the head of a tributary to the Lafayette River. All proposed work is landward of mean low water and within the Board's jurisdiction.

The Board, which had a quorum, received a staff briefing, including photographic slides of the property, aerial imagery, and copies of the application drawings. In addition, staff presented the results of the Virginia Institute of Marine Science Center for Coastal Resources Management's (CCRM) shoreline management model for the project location. The Board debated alternative options for shoreline stabilization at the site. During the public hearing the Board heard comments in support of the project by the project agent, Bob Simon of Waterfront Consulting, and considered a letter of support by a neighbor. They also heard comments in objection to the project by Ms. J. Castle Craddock, an adjacent property owner. Cindy Hall, City Attorney, advised on the Board's authority related to their review of joint permit applications.

The staff report and presentation discussed the results of the CCRM shoreline management model for the project location. This tool is provided to local wetlands boards to receive property specific general shoreline management guidance to include recommended best management practices. For this project location the model recommended the following for the section of property that is currently bulkheaded:

“Replacement of the bulkhead with a riprap revetment landward of the bulkhead. If navigation or infrastructure limited, then replace the bulkhead in the same alignment or landward. Include vegetation buffers when possible.”

Staff presented evidence indicating that site specific details will not support the construction of a riprap revetment, as recommended by the model. These include the proximity of the project to three large storm water outfalls, the silty nature of the sediment, and the approved dredge channel that is proposed adjacent to the existing bulkhead. For these reasons, it was agreed that the project location is navigation limited and that the project location would not support a revetment. Based on testimony of staff and the agent, it was concluded a bulkhead reconstructed in the same alignment is consistent with the CCRM model recommendation for the project location, as the next preferred option. It was

also concluded that the living shoreline was the best option for stabilizing the small portion of undefended shoreline.

An adjacent property owner, J. Castle Craddock, objected to the project based on upland property lines disputes, stormwater flooding, and impacts to wetlands. In addition, she testified that a riprap revetment is the best alternative. Ms. Craddock also testified of her appeal to the reconstruction of the northern portion of the same bulkhead in 1999. Following a lengthy appeal process through the VMRC and Circuit Court, the project was ultimately approved.

Staff's final recommendation was "that the existing timber bulkhead is failing and losing soil, but there are no vegetated wetlands above the bulkhead that have been established. Other options for shoreline stabilization were discussed on site including a living shoreline and a riprap revetment. But with the location of the stormwater outfall, the consistency of the extremely soft mud flat, and the proximity to the proposed dredge channel, neither option seemed viable for this location. Staff has worked with the agent to minimize impact and address the soil erosion issue by replacing the failing timber bulkhead with vinyl in the same alignment and include a water quality component in this application." The City Attorney advised that the state law and local Ordinance indicates that property ownership is not a consideration for this Board to ascertain and they should not use this in their considerations for project approvals. After reviewing all of the testimony, the project drawings and the CCRM model, the Board unanimously approved the project as proposed.

Section 28.2-1313 of the Code of Virginia states that the Commission shall modify, remand or reverse the Board's decision if the Board in reaching its decision, failed to fulfill its responsibilities under the wetlands zoning ordinance; or the substantial rights of the applicant have been prejudiced because the findings, conclusions, or decisions of the Board are in violation of constitutional provisions, in excess of statutory authority or jurisdiction of the Board, made upon unlawful procedure, affected by other error of law, unsupported by the evidence on the record considered as a whole, or arbitrary, capricious, or an abuse of discretion.

Based on our attendance at the hearing and our review of the record, staff cannot find that the Board erred procedurally in their review of this matter, nor that the substantial rights of the appellants have been prejudiced by their decision. The Board conducted a thorough review of the project alternatives and carefully considered all testimony during the public hearing and the recommendations by the CCRM model.

As such, staff recommends that the March 13, 2019, decision of the Norfolk Wetlands Board be upheld.

There was one person that spoke in opposition of the project. She was sworn and her comments are a part of the verbatim record.

Cynthia Hall, Deputy City Attorney with the City of Norfolk was present as spoke on behalf of the City of Norfolk. Ms. Hall's comments are a part of the verbatim record.

Ms. Hall explained that the wetlands board voted appropriately. She also explained the various other options for shoreline stabilization that were discussed during the Norfolk Wetlands Board meeting and the decisions that were made based on the discussion. Ms. Hall requested that the Commission uphold the wetlands board decision.

The matter was before the Commission for discussion and action.

**Associate Member Minor made a motion to approve staff recommendation to uphold the decision of the Norfolk Wetlands Board. Associate Member Neill seconded the motion. The motion carried, 7-0. Chair voted yes.**

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- 7. GRAYLEND HORN, #18-1656**, requests authorization to construct two (2) 210-foot long by 19-foot wide (base width) quarry stone breakwaters, two (2) 45-foot long by 16-foot wide (base width) quarry stone spurs, and associated clean sand beach nourishment and wetland plantings to create a living shoreline along 600 feet of shoreline on the Rappahannock River off Pop Castle Road near the Town of White Stone in Lancaster County. The applicant has asked for consideration of mitigation alternatives for compensation of SAV impacts.

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

Mr. Woodward explained that on October 10, 2018, staff received an application from Mr. Horn proposing a 450-foot long by 24-foot wide (base width) quarry stone, continuous breakwater located 99 feet from the base of an existing, eroding bank at his property on the north shore of the Rappahannock River, approximately one-half mile upstream of the Rt. 3 Norris Bridge. The river is approximately 2 miles wide to the south in this location, with a fetch in a southeasterly direction of 8 miles to the mouth of the river and over 25 miles across Chesapeake Bay to the Eastern Shore. The 8-acre parcel is currently undeveloped and the exposed shoreline is experiencing severe erosion with the loss of many large trees and upland soils. It is the last untreated, unarmored property along this reach of the river, with the majority of the shoreline in this section above the bridge armored with riprap revetments, and several groin fields south of the bridge downstream in this reach.

There is an adjacent 37.9 acre oyster lease held by W. E. Kellum located over 300 feet offshore of the proposed breakwater. The project will impact a persistent, dense bed of submerged aquatic vegetation (SAV), predominantly *Ruppia maritima* or widgeon grass, that comes within approximately ten feet of the mean low shoreline at its closest, according

to the most recent 2013-2017 Virginia Institute of Marine Science (VIMS) mapping data.

The applicant initially contacted staff in the summer of 2018, prior to closing on this property, to discuss options to create a breakwater-type living shoreline. Staff met with Mr. Horn and representatives of the Shoreline Erosion Advisory Service (SEAS) of the Department of Conservation and Recreation to gather information on the design of a proper, effective breakwater-type project to stabilize the property while creating a “living shoreline” design to include stone, clean sand fill, and wetland vegetation. Staff informed Mr. Horn at the outset of the existence of the SAV bed offshore and that he would need to avoid, minimize, and mitigate SAV impacts to the extent possible. Further, that he would likely have to compensate for any direct impact his proposal would have on the SAV. Staff gave him no assurance that a VMRC permit would be granted for any project that resulted in impacts to SAV resources.

The recent resurgence of SAV in many segments of the Chesapeake Bay has been remarkable and is a positive indicator of improved water quality throughout the lower Bay. However, the presence of this resource has led to additional user conflicts with commercial fishing, aquaculture and even shoreline stabilization and development activities regulated by the Commission. §28.2-104.1 of the Code of Virginia encourages the use of living shorelines as the preferred alternative for stabilizing tidal shorelines in the Commonwealth. In certain cases, however, breakwaters, sills, and other hardening and fill activities have potential to impact SAV. The Habitat Management Division has always taken an avoidance first approach, but are aware that otherwise permissible nearshore projects have the potential to impact critical SAV resources.

The Commission’s *Subaqueous Guidelines* state, “Should a permitted project result in loss or impact to submerged aquatic vegetation (SAV), compensatory mitigation may be required. This may include transplantation of SAV from the area of impact or planting a new area. Compensation ratios and requirements will depend on the density, location, and species of SAV.” The project as currently proposed has been reviewed and found to meet the criteria for a stable, nearshore breakwater design, and the project meets the definition of a “living shoreline” as defined in Code. However, the project will also result in direct impacts to SAV resources that must be also be considered, pursuant to §28.2-1205 of the Code of Virginia. As such, staff recommends approval of the project, but with a requirement for SAV compensation.

Recent experience has shown that compensation by transplanting SAV has not been successful in the majority of cases within the Bay and tributaries. However, seeding techniques for eelgrass (*Zostera marina*) restoration have been successful in Virginia’s Coastal Bays and areas near the Bay mouth where water quality and sediment type are suitable. As a result, current division policy related to compensation for unavoidable SAV impacts has been to recommend an in-lieu fee assessed at a rate of \$2.00 per square foot for SAV loss at the time of permitting. This is then used for offsite eelgrass (*Zostera marina*) seeding activities that are undertaken by VIMS, which have demonstrated success

in the past. At 11,631 square feet of encroachment within the SAV bed, and considering an average bed density of 61% over the most recent five year period, staff would therefore recommend compensating for 7,095 square feet of SAV loss through an in lieu fee to fund additional VIMS seeding at a cost of \$14,189.82.

As a compensation alternative to funding additional seeding by VIMS, the applicant may be given the option to implement a nutrient reduction or sediment reduction project in or along uplands near the project site. Such projects, while considered out-of-kind mitigation, would serve to replace the nutrient and sediment reduction services provided by SAV. In such cases, the nutrient or sediment reduction should be shown to replace the amount of either sediment or nutrient reduction functions associated with the SAV that is lost due to a given project. Until new research is completed or studies have been identified to determine the sediment or nutrient reduction function of a given SAV species, best scientific and management estimates will be acceptable for determining the required amount of sediment or nutrient reduction. The proposed nutrient or sediment reduction mitigation should not, however, be one already required for property development or part of a specific shoreline project resulting in the SAV loss. Should such an alternative strategy be acceptable to the Commission in this case, provided the project is approved, the applicant would need to submit a nutrient or sediment reduction plan acceptable to staff before issuance of the final permit.

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

Mr. Scott presented a slideshow presentation to better explain and understand contents of project for living shoreline. Mr. Scott was in acceptance of the plan with less encroachment and explained other breakwater projects that had taken place in surrounding counties such as: Yorktown, Gloucester, Windmill Point to name a few. He also showed pictures of trees that have fallen into water due to the erosion of bank. The applicants goals and mitigated measures include: reduction of impact area from 37,750 sq ft to 12,175 sq.ft.; reduction of base width of stone and stabilization of the bank and appropriate planting in an effort to reduce upland run-off

There was one person that spoke in support of the project. He was sworn in and his comments are a part of the verbatim record.

Graylend Horn, applicant, was present and sworn in. Mr. Graylend's comments are a part of the verbatim record. Mr. Graylend requested approval of the project without SAV study.

There was no one that spoke in opposition of the project.

The matter was before the Commission for discussion and action.

**Associate Member Ballard made a motion to approve staff recommendation without the mitigation cost of \$2.00 sq. ft. Associate Member Lusk seconded the motion. The motion carried, 7-0. Chair voted yes.**

Fee:	\$ 100.00
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- 8. **ERNIE STYRON, #18-1076**, requests after-the-fact authorization to retain an existing 17-foot by 10.5-foot enclosed storage structure on an existing private pier along Sterns Creek at 2324 Sterling Point Drive in the City of Portsmouth.

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

Ms. Peabody explained that the Styron property is a private single family home with a pier located along Sterns Creek, a tributary to the Western Branch Elizabeth River, in Portsmouth. The pier consists of a 55-foot long by 5-foot wide walkway extending west from the upland that leads to 756 square-feet of platform, and a 10.5 foot by 17-foot enclosed storage structure. The applicant has applied to add an additional 16-foot by 4-foot finger pier with a boatlift. The size and square footage of the existing platforms exceeds the current threshold for private piers authorized by statute in §28.2-1203 of the Code of Virginia. Therefore, any additional platform or floating appurtenances requires a subaqueous permit. The applicant also requests to retain the existing unauthorized enclosed storage shed.

When reviewing after-the-fact applications, staff considers whether the project would likely have been favorably reviewed had the application been considered prior to construction. Historically, enclosed shed structures over state-owned submerged lands have been critically evaluated for water dependency. Furthermore, when considering authorization for such structures for private use, §28.2-1205 of the Code of Virginia stipulates that: “In addition to other factors, the Commission shall also consider the public and private benefits of the proposed project and shall exercise its authority under this section consistent with the public trust doctrine as defined by the common law of the Commonwealth adopted pursuant to §1-200 in order to protect and safeguard the public right to the use and enjoyment of the subaqueous lands of the Commonwealth held in trust by it for the benefit of the people as conferred by the public trust doctrine and the Constitution of Virginia.”

The Commission has wrestled with the issue of structures built over the water and the concept of water dependency for years. In fact, the Commission’s first Subaqueous Guidelines developed in 1979 stated the Commission will consider the water-dependency of projects and alternatives for reducing any anticipated adverse impacts. At the July 22, 2003, meeting, the Commission considered and adopted a definition of water dependency

that had been recommended by the Commission's Habitat Management Advisory Committee. That definition was subsequently included in the Subaqueous Guidelines adopted by the Commission in 2005.

The definition states:

*"As defined by the Commission, water dependent means "those structures and activities that must be located in, on, or over State-owned submerged lands." When applying this definition, both of the following questions must be answered affirmatively:*

- 1. Is it necessary that the structure be located over water? and,*
- 2. Is it necessary that the activity associated with the structure be over the water?*

*Use of the definition for water dependency does not necessarily preclude issuance of a permit for non-water dependent structures over State-owned submerged lands. At public hearing, the Commission may determine that, while a structure is not water dependent, it is a reasonable use of State-owned submerged lands. These types of projects are evaluated on a case-by-case basis."*

In at least two cases (Thomas C. Evelyn v. Commonwealth of Virginia Marine Resources Commission, October 25, 2005 and Stephan A. Palmer v. Commonwealth of Virginia Marine Resources Commission, April 4, 2006), the Virginia Court of Appeals has affirmed Circuit Court decisions upholding VMRC decisions to require removal of unpermitted structures that had been constructed on private, noncommercial piers.

In the Evelyn case, the Court of Appeals held that "the governing statutes limit a riparian owner's rights such that he may build, without a permit, only those structures "necessary" or essential to the placement of a private pier for the limited purpose of accessing navigable waters or vessels moored in those waters. The riparian owner may not build, without a permit, incidental appendages designed merely to enhance the primary purpose of the pier." The case consisted of an unpermitted 10-foot by 24-foot roof/deck with stairs over the pier's T-head.

The Palmer case involved the construction of an unauthorized 12-foot by 11-foot storage shed on Mr. Palmer's pier. The Court of Appeals affirmed the Circuit Court of Mathews' decision upholding the Commission's order to remove the shed from his pier. In this case the Court of Appeals concluded that the evidence was sufficient to support the Commission's denial of the after-the-fact request and specifically referenced the Evelyn case, the Public Trust Doctrine, the Commission's Subaqueous Guidelines and their water dependency definition.

It is important to note however, that the Commission considers projects on a case-by-case basis and factors other than water dependency are considered during their deliberations.

After review, staff finds it difficult to conclude that the storage shed itself is a water dependent addition to the authorized private riparian pier. We understand the applicants' desire to store their kayak and fishing gear in an easily accessible location and to have a

place to enjoy the water. However, we do not feel that a shed with sides is necessary for such kayak storage over water and is not necessary for the applicant’s use of the pier. While the shed is used to store some other water related articles, it could serve the same purpose if constructed on the Styron’s upland property rather than over State-owned submerged land. It is our opinion that an enclosed storage shed violates the public trust doctrine that serves to prevent further proliferation of unnecessary structures over the Commonwealth’s property. The shed located over the water also increases the threat of building materials and shed contents to enter the waterway during a storm. We have no objection to approval of the additional boat lift and finger pier.

Accordingly, staff recommends removal of the sides of the existing shed and only authorize a permit for the roof structure. Such a structure would be similar to a shelter roof that would qualify for statutory authorization if the size of the pier platforms did not exceed the current threshold for private piers.

The applicant has communicated they are not interested in the option to remove the shed sides, and would like to retain the structure as-built. If the Commission feels the shed is appropriate to authorize, staff further recommends that that approval of the shed be conditioned upon the payment of a triple permit fee of \$75.00 as provided for in §28.2-1206(D) of the Code of Virginia for after the fact projects.

Ernie Styron, applicant, was present and sworn in. His comments are a part of the verbatim record.

Mr. Styron gave an explanation of the use of boathouse and requested to grandfather the boathouse and approve the boatlift/pier application

There was no one that spoke in opposition of the project.

The matter was before the Commission for discussion and action.

**Associate Member Zydron made a motion to approve staff recommendation to approve new permits but leave the existing structures as they are. Associate Member Neill seconded the motion. The motion carried, 7-0. Chair voted yes.**

Triple Permit Fee:(\$25.00 x 3)	\$ 75.00
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- 9. **DAVID HOLLAND, Oyster Planting Ground Application #2015-173**, requests authorization to lease approximately ten (10) acres within Chisman Creek in York County. The application is protested by a resident who lives along Chisman Creek.

Ben Stagg, Dir., Shellfish Aquaculture, Leasing and Mapping, gave the briefing of the information provided in the staff’s evaluation, with PowerPoint slides. Mr. Stagg’s comments are a part of the verbatim record.

Mr. Stagg explained that an application from David Holland, requesting to lease approximately ten (10) acres of oyster planting ground within Chisman Creek, in York County, was received by the Engineering/Surveying Department on August 13, 2015.

While staff remains aware of potential navigation concerns related to the leasing of shellfish grounds, it does not appear leasing this area will impact navigation in the area. After careful review of the initial survey, and after consultation with Bay Design Group, the revised lease area additionally avoids SAV beds. Staff, therefore, recommends approval of 5.43 acres for assignment.

David Holland, applicant, was present and sworn in. His comments are a part of the verbatim record.

Mr. Holland explained that he intended to have more than a couple of bags hanging from the dock but stated that it will not be a commercial operation.

There was no one that spoke in opposition of the project.

The matter was before the Commission for discussion and action.

**Associate Member Minor made a motion to approve staff recommendation. Associate Member France seconded the motion. The motion carried, 4-3. Chair voted no. Associate Members Ballard and Lusk also voted no.**

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- 10. **JAMES WITHROW, Oyster Planting Ground Application #2016-203**, requests authorization to lease approximately 104 acres within Chisman Creek in York County. The application is protested by numerous residents in the immediate area. The application request also includes a considerable area that is currently classified as restricted for the direct market harvest of shellfish.

Ben Stagg, Dir., Shellfish Aquaculture, Leasing and Mapping gave the briefing of the information provided in the staff’s evaluation, with PowerPoint slides. Mr. Stagg’s comments are a part of the verbatim record.

Mr. Stagg explained that an application from James Withrow, requesting to lease approximately 104 acres of oyster planting ground within Chisman Creek, in York County, was received by the Engineering/Surveying Department on July 28, 2016. A portion of the requested area, at the time the application was received, contained areas that were seasonally condemned. However, based on current VMRC regulations, such areas can be considered for leasing.

While staff remains aware of potential navigation concerns related to the leasing of shellfish grounds, it appears leasing this area will not have more than a minimal impact to navigation in the area and should not impact other uses of the creek. Since the entire area of the survey is now in either open or conditionally approved waters, as classified by the Health Department, staff recommends leasing of 86.44 acres as shown on the plat of survey.

The applicant was not present.

No one spoke in support of the application.

There were four (4) people that spoke in opposition of the project. They were all sworn in and their comments are a part of the verbatim record.

Those that spoke in oppositions expressed concerns of navigational hazards and the danger to those using the area for recreational watersports due to the potential of structures on the bottom.

The matter was before the Commission for discussion and action.

**Associate Member Ballard made a motion to deny the application. Associate Member Zydron seconded the motion. The motion carried, 7-0. Chair voted yes.**

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- 11. BECKY Q. FLIBOTTE, Oyster Planting Ground Application #2016-151,** requests authorization to lease approximately 18 acres within Bennett Creek in the City of Poquoson. The application is protested by a nearby resident and leaseholder.

Ben Stagg, Dir., Shellfish Aquaculture, Leasing and Mapping gave the briefing of the information provided in the staff's evaluation, with PowerPoint slides. Mr. Stagg's comments are a part of the verbatim record.

Mr. Stagg explained that an application from Becky Q. Flibotte, requesting to lease approximately 18 acres of oyster planting ground within Bennett Creek in the City of Poquoson, was received by the Engineering/Surveying Department on May 23, 2016.

While staff remains aware of potential navigation concerns related to the leasing of shellfish

grounds, it appears leasing this area will not have more than a minimal impact to navigation in the area and should not impact other uses of the creek. As for the placement of cages on either of the two parcels, such placement is subject to the conditions of the authorizing regulation. If such placement creates more than a minimal impact to navigation, the leaseholder will be required to remove or relocate the cages to an appropriate location. Staff carefully avoided existing SAV beds in this area when conducting the survey. The remaining areas, as surveyed, are surrounded by existing leases. Accordingly, staff believes granting additional leases is in harmony with existing nearby leases and, therefore, recommends approval of two areas containing 2.28 and 6.35 acres respectively.

Becky Q. Flibotte, applicant, was present and sworn in. Her comments are a part of the verbatim record.

Ms. Flibotte explained the Protestants concerns in regards to SAV, public safety and the adverse impact on water quality. Ms. Flibotte felt that there is no adverse impacts on SAV.

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

Those that spoke in opposition expressed concerns of navigation issue due to the narrow channel, concerns for the public safety due to submerged structures placed at the edge of the channel.

The matter was before the Commission for discussion and action.

**Associate Member Minor made a motion to approve staff recommendation. Associate Member France seconded the motion. The motion carried, 7-0. Chair voted yes.**

\* \* \* \* \*

**12. REQUEST FOR PUBLIC HEARING:** Request for a May 28, 2019, Public Hearing for adoption of Chapter 4 VAC 20-1340-10 et seq., to establish and implement a fast-track permitting program and permit application requirements, in order to authorize the selection and use of appropriate sites for disposal of dredge material on State-owned submerged lands for projects in Tidewater Virginia. The regulation is required pursuant to Acts of Assembly 2018 Chapter 449.

Tony Watkinson, Chief, Habitat Management, gave the briefing of the information provided in the staff's evaluation, with PowerPoint slides. Mr. Watkinson's comments are a part of the verbatim record.

Mr. Watkinson explained that pursuant to Acts of Assembly 2018 Chapter 449, VMRC is required to development a regulation to establish and implement a fast-track permitting

program for dredge material disposal sites. The so-called “Section One” bill reads as follows:

*§ 1. That the Marine Resources Commission (the Commission) shall adopt regulations to establish and implement a fast-track permitting program that authorizes the selection and use of appropriate sites in Tidewater Virginia, as defined in § 28.2-100 of the Code of Virginia, for the disposal of material dredged in such region, with such regulations to be effective no later than July 1, 2019. The Commission's initial adoption of regulations necessary to implement the provisions of this act shall be exempt from the Administrative Process Act (§ 2.2-4000 et seq. of the Code of Virginia), except that the Commission shall provide an opportunity for public comment on the regulations prior to adoption.*

Because the U.S. Army Corps of Engineers (Corps) is no longer funded to dredge many federally authorized shallow draft channels important to Tidewater communities, local governments have identified the need to conduct the dredging themselves. The legislation for a fast-track permitting program, introduced by Delegate Keith Hodges, is intended to facilitate review of dredging and dredged material disposal siting for these dredging projects. To further support local governments the Virginia General Assembly established the Virginia Waterway Maintenance Fund in 2018 for shallow draft dredging projects. The Virginia Port Authority, through the Virginia Waterway Maintenance Grant Program, administers this fund. Applications for funding are limited to political subdivisions and governing bodies of Virginia localities. The legislature has allocated \$1.35 million per year for the fund.

Since Commission authority for any proposed dredge project is limited to the use of State-owned submerged lands, the draft regulation establishes the necessary application requirements and review procedures for fast-track permitting of dredging and dredged material disposal sites involving State-owned submerged lands for local governments in Tidewater Virginia. The draft regulation stipulates review of an application in 90 days will be considered a fast-track decision by the VMRC.

In certain instances, dredge material may be suitable for placement along shorelines and over State-owned submerged lands if the material is composed of sand for beach nourishment, the material is suitable for creation of living shoreline features, creating wetlands, or developing oyster reef habitat in acceptable locations. Material suitable for living shoreline features may require retention structures such as sills or breakwaters designed as part of the disposal plan.

Pursuant to Subaqueous Guidelines promulgated by the Virginia Marine Resources Commission, overboard disposal of dredged material into tidal waters is generally not permitted unless the material is uncontaminated and granular (sand size). When overboard disposal is authorized, areas to be used for placement of the material will be located to minimize impacts on commercially important bottom dwelling organisms such as oysters and clams, submerged aquatic vegetation (SAV), wetlands and other productive shallow

water habitats. Overboard disposal areas should be properly shaped and positioned to reduce scour and sedimentation.

The Subaqueous Guidelines recognize that quality dredged material is a valuable State resource and may be used for beach replenishment at public beaches. Sandy dredged materials of suitable quality may be placed on private beaches if a public beach placement site is not suitable or available. The Subaqueous Guidelines also indicate fill material may only be placed on submerged land for shoreline stabilization and/or wetland enhancement when the project can be shown to have positive aquatic resource benefits.

In addition to the Commission's Subaqueous Guidelines, §10.1-704 of the Code of Virginia directs that the beaches of the Commonwealth shall be given priority consideration as sites for the disposal of that portion of dredged material determined to be suitable for beach nourishment.

Currently §28.2-1205.2 of the Code of Virginia establishes a coordinated review process for beach replenishment projects using Chesapeake Bay Sand. The section of code establishes time limits for review and necessary application information. As such, it provides a template for the application requirements and review procedures in the draft regulation.

VMRC staff at a public meeting in our main office on March 12, 2019, presented an initial draft of the proposed regulation. The meeting was attended by three representatives from local planning district commissions, two from the Chesapeake Bay Foundation, one from the seafood/aquaculture industry, one from the University of William & Mary Coastal Policy Center and a representative from VIMS. Background leading up to the legislation for a fast-track permit was discussed, which focused on the Corps no longer dredging shallow draft channels, and the desire for local governments to assume this role along with the fact that funding is now provide by the State through the Port Authority. Commission staff explained that fast-track permitting can only apply to the Commission's authority to issue permits for use of State-owned submerged land and the fast-track provisions should apply to local government projects only. There seemed to be general agreement the regulation should only apply to local government projects, and with the list of information needed for fast-track review as well as the situations where the fast-track review would not apply. The draft regulation was generally well received. VMRC staff invited any additional comments the attendees wanted to provide following the meeting. To date no further comments have been submitted.

So that a regulation to establish and implement a fast-track permitting program can be adopted by July 1, 2019, as required by Acts of Assembly 2018 Chapter 449, staff recommends that the draft regulation contained in Chapter 4 VAC 20-1340-10 et seq. be scheduled for a public hearing at the May 28, 2019, Commission meeting.

The matter was before the Commission for discussion and action.

**Associate Member Neill made a motion to approve staff recommendation. Associate Member Minor seconded the motion. The motion carried, 7-0. Chair voted yes.**

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**13. PUBLIC COMMENT.**

Matt Hull, representing Mr. Adron Williams, requested the Commission to reconsider the decision made during the April Commission Meeting and reverse the ruling to revoke his license. Mr. Hull’s comments are a part of the verbatim record.

No motion was made. The request was therefore denied.

\* \* \* \* \*

**14. REQUEST FOR AN EMERGENCY AMENDMENT:** Proposal to amend Chapter 4 VAC 20-252-10 et seq., “Pertaining to the Taking of Striped Bass,” to eliminate the Bay, Coastal and Potomac River Tributaries Spring Trophy-size Striped Bass Recreational Fisheries.

Robert O’ Reilly, Chief, Fisheries Mgmt., gave the briefing of the information provided in the staff’s evaluation, with PowerPoint slides. Mr. O’Reilly’s comments are a part of the verbatim record.

Mr. O’Reilly explained that staff is requesting an emergency regulation that would eliminate the spring striped bass trophy-size fisheries originally established in 1995.

Concerning the condition of the striped bass stock, staff has every expectation that on April 30, the ASMFC will prescribe a reduction in harvest plan to lower the current fishing mortality rate, at a minimum. The current management plan requires that ASMFC to implement a rebuilding that would reduce the fishing mortality rate to the target fishing mortality rate (or lower) within one year. The fishing mortality rate has been above target for several years, and the striped bass stock was overfished from 2013 through 2017, according to the 2018 stock assessment.

Staff recommends the Commission adopt the emergency amendments described in sections of Chapter 4 VAC 20-252-10 et seq. Staff also recommends this emergency amendment be part of a May public hearing to incorporate the amendments as part of the permanent regulation.

The matter was before the Commission for discussion and action.

**Associate Member Neill made a motion to approve staff's request for an emergency amendment to the regulation and to advertise a May public hearing. Associate Member France seconded the motion. The motion carried, 7-0. Chair voted yes.**

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Item #18 was heard before Item #15.

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**15. PUBLIC HEARING:** Proposal to amend Chapter 4 VAC 20-490-10 et seq., "Pertaining to Sharks," to establish the May 1, 2019 through April 30, 2020 commercial spiny dogfish landings quota as 2,215,484 pounds. The current season quota is 4,123,239 pounds.

Robert O' Reilly, Chief, Fisheries Mgmt., gave the briefing of the information provided in the staff's evaluation, with PowerPoint slides. Mr. O'Reilly's comments are a part of the verbatim record.

Mr. O'Reilly explained that on October 25, 2018, the Atlantic States Marine Fisheries Commission (ASMFC) released a memo that established the 2019 fishery specifications for spiny dogfish. The ASMFC Spiny Dogfish Management Board approved a coast-wide commercial quota of 20,522,832 pounds for the 2019 fishing season (May 1, 2019 through April 30, 2020), of which, Virginia receives 10.795%. For the 2019 fishing season Virginia receives 2,215,484 pounds, a 54% decrease from the May 1 through April 30, 2018 season quota.

Staff recommends the Commission approve amendments to Chapter 4 VAC 20-490-10 et seq., "Pertaining to Sharks," to establish the May 1, 2019 through April 30, 2020 commercial spiny dogfish landings quota as 2,215,484 pounds.

The matter was before the Commission for discussion and action.

**Associate Member France made a motion to accept staff recommendation. Associate Member Minor seconded the motion. The motion carried, 7-0. Chair voted yes.**

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16. **PUBLIC HEARING:** Proposal to amend Chapter 4 VAC 20-450-10 et seq., "Pertaining to the Taking of Bluefish," to establish the 2019 Virginia commercial bluefish quota as 915,857 pounds. The 2018 Virginia commercial bluefish quota was 860,518 pounds.

Robert O' Reilly, Chief, Fisheries Mgmt., gave the briefing of the information provided in the staff's evaluation, with PowerPoint slides. Mr. O'Reilly's comments are a part of the verbatim record.

The Atlantic States Marine Fisheries Commission (ASMFC) and the Mid-Atlantic Fisheries Management Council (MAFMC) have established the 2019 coast wide bluefish commercial quota as 7.71 million pounds. Virginia receives 11.8795% of the coast wide quota and the 2019 Virginia bluefish commercial quota is 915,857 pounds.

Staff recommends the Commission approve amendments to Chapter 4 VAC 20-450-10 et seq., "Pertaining to the Taking of Bluefish", to establish the 2019 commercial bluefish quota as 915,857 pounds.

The matter was before the Commission for discussion and action.

**Associate Member Neill made a motion to approve staff recommendation. Associate Member Minor seconded the motion. The motion carried, 7-0. Chair voted yes.**

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17. **PUBLIC HEARING:** Proposal to amend Chapter 4 VAC 20-950-10 et seq., "Pertaining to Black Sea Bass," to establish the remainder of the 2019 recreational black sea bass fishery open season days. Earlier this year, Virginia was approved for a standard May 15 through December 31 open season, as well as a special February open season. The standard May 15 through December 31 open season length will be shortened by a minimum of 21 days to account for 10,082 pounds of black sea bass that were harvested during the special February 2019 recreational black sea bass fishery.

Pat Geer, Deputy Chief, Fisheries Mgmt., gave the briefing of the information provided in the staff's evaluation, with PowerPoint slides. Mr. Geer's comments are a part of the verbatim record.

Mr. Geer explained that on January 21, 2019, the Commission approved a February recreational black sea bass fishery with the understanding that any additional landings occurring in February of 2019 would result in a deduction of fishing days from the open season. Following approval by the Commission, the Virginia Marine Resources Commission (VMRC) staff were able to successfully monitor catch and collect biological data from the 2019 February black sea bass fishery.

A total of 4,398 fish of black sea bass were reported by private and for-hire boats. The total landings in February 2019 (10,082 pounds) were nearly 60% greater than the February 2018 landings (6,459 pounds). As specified by the Atlantic States Marine Fisheries Commission (ASMFC), the total landings in February 2019 will need to be deducted from the open season (May 15-December 31). Using a daily landings rate analysis, a closure of 21 days in wave 3 (May-June) would result in savings of 10,203 pounds, and a closure of 45 days in wave 4 (July-August) would result in savings of 10,083 pounds. A closure of 21 days in wave 5 (September-October) would result in savings of 10,133 pounds, and a closure of 61 days in wave 6 (November-December) would result in savings of only 4,841 pounds.

Staff requests the Commission approve amendments to Chapter 4 VAC 20-950-10 et seq., "Pertaining to Black Sea Bass," to establish the 2019 recreational fishery management measures, in accordance with the results from the 2019 February recreational season. Staff recommends the 2019 open recreational black sea bass season be May 15-31, and June 22 to December 31 to account for landings associated with the February season.

The matter was before the Commission for discussion and action.

**Associate Member Neill made a motion to approve staff recommendation. Associate Member Minor seconded the motion. The motion carried, 7-0. Chair voted yes.**

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**18. DISCUSSION:** Report on the Fisheries Management Advisory Committee’s (FMAC) discussions concerning striped bass harvest reduction options.

Robert O’ Reilly, Chief, Fisheries Mgmt., gave the briefing of the information provided in the staff’s evaluation, with PowerPoint slides. Mr. O’Reilly’s comments are a part of the verbatim record.

Mr. O’Reilly provided a detailed report on the Fisheries Management Advisory Committee discussions concerning striped bass harvest reduction options.

Some of the options that were discussed were:

- Option 1: Shorten season
- Option 2: Reduce mesh size: Bay - Less than or equal to 7”; Ocean - Less than or equal to 9”
- Option 3: Maximum mesh size March 26-June 15; Maximum size 28”
- Option 4: Maximum size of 36’ in VA Portion of Potomac

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**Commission Meeting**

**18309  
April 23, 2019**

There being no further business, the meeting was adjourned at approximately 4:13 p.m.  
The next Commission meeting will be Tuesday, May 28, 2019.

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Steven G. Bowman, Commissioner

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Jamie Hogge, Recording Secretary