

## MINUTES

## Commission Meeting

August 23, 2011

The meeting of the Marine Resources Commission was held at the Marine Resources Commission main office at 2600 Washington Avenue, Newport News, Virginia with the following present:

Steven G. Bowman	Commissioner
J. Carter Fox )	
William Laine, Jr. )	
Joseph C. Palmer, Jr. )	
J. Bryan Plumlee )	Associate Members
Richard B. Robins, Jr. )	
Kyle J. Schick )	
Whitt G. Sessoms, III )	
Jack G. Travelstead	Chief, Fisheries Mgmt.
Paul Kugelman, Jr.	Assistant Attorney General
John M. R. Bull	Director-Public Relations
Katherine Leonard	Recording Secretary
Jane McCroskey	Chief, Admin/Finance
Linda Farris	Bs. System Specialist, MIS
Rob O'Reilly	Deputy Chief, Fisheries Mgmt.
Jim Wesson	Head, Conservation/Replenishment
Joe Grist	Head, Plans and Statistics
Stephanie Iverson	Fisheries Mgmt. Specialist, Sr.
Lewis Gillingham	Head, Saltwater Tournament
Sonya Davis	Fisheries Mgmt. Specialist, Sr.
Joe Cimino	Fisheries Mgmt. Specialist, Sr.
Alicia Nelson	Fisheries Mgmt. Specialist
Allison Watts	Fisheries Mgmt. Specialist
Adam Kenyon	Fisheries Mgmt. Specialist
Renee Hoover	Fisheries Mgmt. Specialist
Rick Lauderman	Chief, Law Enforcement
Warner Rhodes	Deputy Chief, Law Enforcement
Randy Widgeon	Area Supervisor, ES
David Deemer	Marine Police Officer
Russell Phillips	Marine Police Officer

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Tony Watkinson	Chief, Habitat Mgmt. Div.
Chip Neikirk	Deputy Chief, Habitat Mgmt.
Jeff Madden	Environmental Engineer, Sr.
Ben Stagg	Environmental Engineer, Sr.
Hank Badger	Environmental Engineer, Sr.
Randy Owen	Environmental Engineer, Sr.
Dan Bacon	Environmental Engineer, Sr.
Jay Woodward	Environmental Engineer, Sr.
Justin Worrell	Environmental Engineer, Sr.
Juliette Giordano	Environmental Engineer, Sr.
Mike Johnson	Environmental Engineer, Sr.
Justine Woodward	Environmental Engineer, Sr.
Bradley Reams	Project Compliance Technician

Virginia Institute of Marine Science (VIMS):

Lyle Varnell	Rom Lipcius	Danielle McCulloch
Alison Smith	Gabriella Saluta	Katie Kincaid

Others present included:

Kate Queen	Brian Lockwood	C. John Keen	Jay McKenna
Rodney Smith	Roxanne Huckstep	Barbara Cox	Julian Cox
William Bram	Lisa Edwards	Tom Langley	Chris Moore
Ethan Currie	Andy Lacatall	J. C. Douglas	Kim Huskey
John Vigliotta	A. J. Erskine	Scott Harper	Ken Smith
Tommy Leggett	Bob Allen	James D. Chu	Ty Farrington
and others.			

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Commissioner Bowman called the meeting to order at approximately 9:39 a.m. Associate Member Tankard was absent and Associate Member Fox arrived late approximately 10:04 a.m. He stated for the record that there was a quorum so the meeting could proceed.

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At the request of Commissioner Bowman, Associate Member Robin gave the invocation and Jack Travelstead, Chief, Fisheries Management, led the pledge of allegiance.

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**APPROVAL OF AGENDA:** Commissioner Bowman asked if there were any changes from the Board members or staff. There were no changes.

Commissioner Bowman asked for a motion by the Board.

**Associate Member Robins moved to approve the agenda. Associate Member Plumlee seconded the motion. The motion carried, 7-0. The Chair voted yes.**

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**MINUTES:** Commissioner Bowman requested a motion for approval of the July 23, 2011 Commission meeting minutes, if there were no corrections or changes. There were none.

**Associate Member Laine moved to approve the minutes, as distributed. Associate Member Plumlee seconded the motion. The motion carried, 7-0-1. The Chair voted yes. Commissioner Bowman noted that Associate Member Fox wanted it on the record that he was abstaining, as he was not at the last meeting.**

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Commissioner Bowman, at this time, 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 with no objections and with staff recommendation for approval).

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

Mr. Watkinson read the information for the record regarding Items 2A through 2D. He noted a correction in the description for Item 2D. The time of year restriction should say from March 15 through August 15.

Commissioner Bowman asked for questions of staff. There were none. He asked for comments pro or con from those of the public in attendance and there were none. He said the matter was before the Commission.

Associate Member Plumlee announced he would be abstaining from voting for Item 2B, as his law firm represented VDOT from time to time.

Commissioner Bowman asked for a motion for Items 2A, 2C, and 2D.

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**Associate Member Schick moved to approve Items 2A, 2C, and 2D. Associate Member Robins seconded the motion. The motion carried, 7-0. The Chair voted yes.**

Commissioner Bowman asked for a motion for Item 2B.

**Associate Member Schick moved to approve Item 2B. Associate Member Robins seconded the motion. The motion carried, 6-0-1. Associate Member Plumlee abstained. The Chair voted yes.**

**2A. MARINE HYDRAULICS, INCORPORATED, #10-1974,** requests authorization to maintenance dredge up to 10,000 cubic yards of state-owned subaqueous bottom, on an annual dredge cycle, using both hydraulic and mechanical dredging methods, to maintain a depth of 38.14 feet below mean sea level, at their Lamberts Point Facility in the City of Norfolk.

Permit Fee.....	\$100.00
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**2B. VIRGINIA DEPARTMENT OF TRANSPORTATION, #11-0857,** requests authorization to replace the existing Route 60/Main Street Bridge in Clifton Forge with a 160.5-foot long by 51.5-foot wide clear span bridge impacting 8,164 square feet of the Smith River in Alleghany County. Staff recommends approval with VMRC standard in-stream construction conditions.

Permit Fee.....	\$100.00
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**2C. METROPOLITAN WASHINGTON AIRPORTS AUTHORITY, #11-0193,** requests authorization to cross 61 linear feet of Broad Run and a total of 168 linear feet (three locations) of Horsepen Run along the Dulles Greenway in Fairfax and Loudoun Counties for the installation of clear span bridges to accommodate the Metrorail Project Phase 2. Staff recommends approval with VMRC standard in-stream construction conditions.

Permit Fee.....	\$100.00
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**2D. CHESAPEAKE BAY FOUNDATION, #11-0204,** requests authorization to install six (6) offshore stone breakwaters on the north side of Port Isobel Island and maintenance dredge on an as-needed basis subaqueous material to maintain depths of minus five (-5) feet at mean low water from the entrance channel leading to the Port Isobel Education Center near Tangier Island in Accomack County. The dredge material will be placed in an upland disposal site. Staff recommends approval with a time-of-year restriction from March 15 through

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August 15 of any year to avoid potential impacts to colonial waterbird colonies.

Permit Fee.....	\$100.00
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**3. CONSENT ITEMS:**

**3A. SUNSET BOATING CENTER AND DRY STORAGE, #10-1709**, requests after-the-fact authorization to retain six (6) piles installed channelward of a 71-foot long section of a timber bulkhead at 800 South Armistead Avenue situated along Sunset Creek in the City of Hampton.

Tony Watkinson, Chief, Habitat Management, gave the presentation. Mr. Watkinson reviewed the information regarding this item. His comments are a part of the verbatim record.

On October 15, 2010, staff received a Joint Permit Application from Sunset Boating Center & Dry Storage requesting after-the-fact authorization to retain six (6) piles installed channelward of a failing bulkhead at the applicant’s property situated along Sunset Creek in the City of Hampton. In this case staff was not notified of the need for the work before the pilings were installed; however, as evidenced by the pronounced channelward “bowing” of the bulkhead and loss of soil landward of the bulkhead, the structure appears to have been in the process of failing before the support pilings were installed.

Subsequent to the submittal of the after-the-fact authorization for the installation of the six (6) pilings, VMRC received another application to install a new bulkhead two (2) feet channelward of the existing bulkhead to create a more permanent solution for the situation. This permit can be issued administratively upon resolution of the unauthorized pilings.

Staff has identified that the environmental impacts and degree of non-compliance associated with the unauthorized work to both be minor. The matrix for these two factors would indicate a civil charge of \$600.00. Staff recommended the Commission approve the application for the six (6) pilings based on the applicant’s agreement to pay a civil charge of \$600.00 and a triple permit fee of \$75.00 in lieu of any further enforcement action.

There was no one present for the applicant and no public comments pro or con.

Commissioner Bowman stated the matter was before the Commission.

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**Associate Member Laine moved to approve the application. Associate Member Schick seconded the motion. The motion carried, 7-0. The Chair voted yes.**

Civil Charge.....	\$600.00
Permit Fee (Triple).....	\$ 75.00
Total Fees.....	\$675.00

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Tony Watkinson, Chief Habitat Management, announced the addition of Justine Woodward to the Habitat staff. He noted that Ms. Woodward has received her Master Degree at the Virginia Institute of Marine Science and was with the Fisheries Plans and Statistics Department prior to taking the position with Habitat Management as an Environmental Engineer, Sr. He noted she would be giving presentations in the future.

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- 4. CLOSED MEETING FOR CONSULTATION WITH, OR BRIEFING BY, COUNSEL.** On advice of VMRC’s Counsel, it was not necessary to have a closed meeting.

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- 5. EAST BEACH LLC, #08-2261,** requests authorization to dredge 20 cubic yards of State-owned subaqueous material to create depths of minus three (-3) feet at mean low water, to accommodate the replacement and use of an existing, deteriorated boat ramp adjacent to the applicant’s property located on Little Creek, at the intersection of 24<sup>th</sup> Bay Street and Pretty Lake Avenue, in the City of Norfolk. The project is protested by both adjacent property owners.

Mike Johnson, Environmental Engineer, Sr., gave the presentation with slides. Mr. Johnson’s comments are a part of the verbatim record.

Mr. Johnson explained that the project site was located along Little Creek in the City of Norfolk, east of the Shore Drive Bridge, at the intersection of Pretty Lake Avenue and 24<sup>th</sup> Bay Street. The property was 50 feet wide at the shoreline and was located between two commercial marinas. A deteriorated concrete boat ramp currently existed and its use was precluded by concrete barriers.

Mr. Johnson stated that the East Beach LLC sought authorization to dredge 20 cubic yards of state-owned subaqueous bottom to create depths of minus three (-3) below mean low water. The area to be dredged would extend offshore 17 feet from mean low water. All dredging would be done from land with dredged material placed into watertight trucks and taken to Elbow Road Farms’ disposal site in Chesapeake, Virginia.

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Mr. Johnson said that the purpose of the project was to provide a boat launch facility to the residents of East Beach. This ramp would be for the benefit of residents of East Beach only, which was estimated to be 300 residences, and would have access limited to those individuals by use of a lockable gate. Limited offsite parking would be provided just north of the proposed boat launch, off of 24<sup>th</sup> Bay Street, which could service two vehicles with trailers.

Mr. Johnson noted that a public interest review had been conducted including a public notice in the *Virginian Pilot* on May 26, 2011. VMRC had received written protests from both adjoining property owners. Lisa Edwards, owner of Anchor Properties and Development located on the upstream side of the project site, cited concerns regarding the ownership of the property in question, the impact of dredging on the bulkhead located on her property, and local zoning ordinances requiring a 25-foot setback from the property line. William Braun, owner of the Pelican's Nest Marina located on the downstream side of the project site, also questioned the ownership of the property. He also believed usage of the boat ramp would result in an unsafe environment due to congestion and the close proximity of the proposed boat ramp to the slips at his marina. Finally, he cited the lack of parking facilities for the ramp that might negatively impact operations at his marina.

Mr. Johnson said that staff had discussed the concerns of the adjacent property owners with the applicant's agent, Tom Langley. Mr. Langley advised staff that there would be a policy for the use of the proposed ramp which would limit the use of offsite parking to an area provided on 24<sup>th</sup> Bay Street or alternatively, the residents would return their vehicles back to their residences. He stated no street side parking would be allowed. He believed the intended use of this ramp by smaller watercraft such as kayaks and jet skis should mitigate congestion issues. In response to the question of property ownership, the applicant provided a copy of a quit claim deed to staff indicating that they were the legal owners.

Mr. Johnson stated that the U.S. Army Corps of Engineers had already issued a Nation Wide Permit #19 for the dredging of subaqueous bottom and the Virginia Department of Environmental Quality did not require a Virginia Water Protection Permit for this project.

Mr. Johnson explained that the Norfolk Wetland Board had issued a permit for the installation of the concrete boat ramp and fixed pier which would impact 360 square feet of non-vegetated wetlands.

Mr. Johnson noted that in their Shoreline Application Report dated January 30, 2009, the Virginia Institute of Marine Science (VIMS) noted that the environmental impacts from the proposed boat ramp and tending pier were expected to be minor and that from a marine environmental viewpoint, utilizing ramps that serve multiple users and were placed in areas previously impacted are preferred to single user ramps or ramps placed in pristine habitat areas. They also noted that sufficient garbage receptacles should be located on the site to reduce solid waste in the waterway.

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Mr. Johnson stated that while staff was sensitive to the concerns raised by the adjoining neighbors, it appeared that any congestion associated with the installation and use of the boat ramp were also related to the encroachment of the two adjoining marina's piers and slips on the applicant's riparian area. Furthermore, since this was a private community ramp intended for small watercraft, the ramps use should be somewhat limited therefore minimizing any congestion while providing water access for community residents. As to the question of property ownership raised by both of the protesters, the applicant had provided a deed showing their ownership of the property in question. Any permit issued by the Commission would not grant the applicant any property rights he did not already possess.

Mr. Johnson said that after considering all factors contained in §28.2-1205 of the Code of Virginia, staff recommended approval of the project with the assessment of a royalty in the amount of \$9.00 for the dredging of 20 cubic yards of State-owned subaqueous land at a rate of \$0.45 per cubic yard.

Commissioner Bowman asked for questions for staff.

Commissioner Bowman asked about the closest other access. Mr. Johnson responded it was one mile away.

Associate Member Sessoms asked if there was concern with boat or car/trailer congestion. Mr. Johnson said yes.

Associate Member Schick asked if there was encroachment on the access ramp for the marina and he noted that one boat sticks out. Mr. Johnson said one of the issues was that there was no apportionment. Associate Member Schick asked if the walls stopped access. Mr. Johnson responded yes.

Associate Member Plumlee asked if the marina accessed the ramp. Mr. Johnson said he did not know.

Commissioner Bowman asked for the applicant or representative to comment.

Tom Langley, Langley and McDonald Engineering Firm representing the applicant, was sworn in and his comments are a part of the verbatim record. Mr. Langley said for the 2008 permit application there was a two year delay due to getting a clear title to the property. He said now they were proceeding with the project. He said that others used the ramps and they had discussed with Mr. Bond who said he did not object as long as they dredged the area between the ramp and their structures. They had said no, so now he was protesting the project. He said that it was for residents with a small boat as the water depth did not allow for anything bigger. Associate Member Plumlee asked if the boundaries had been surveyed. Mr. Langley responded yes. Associate Member Schick asked about who had put the barrier in the area. Mr. Langley stated he did not know and



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the President of the HOA could maybe answer. Associate Member Sessoms asked about the number of residents that could use the ramp. Mr. Langley responded, 300.

Commissioner Bowman asked for anyone who wished to comment in support. There were none. He asked if anyone wanted to speak in opposition.

William Bond, adjoining property owner and protestant, was sworn in and his comments are a part of the verbatim record. Mr. Bond said that they had been dealing with it a long time, the question of ownership. He said title assurance was not proof. Commissioner Bowman said that VMRC was not responsible for property apportionment decisions as they were decided by the Court. Mr. Bond indicated this was questioned and the survey said it was owned to mean low water. He reiterated the title assurance did not prove ownership. He stated that he and others were concerned about trailer parking and the congestion of boats in the fairway which would be tight. He added they were concerned that there was only dredging proposed in front of the ramp as the sides would fill impacting navigation. He said it would be a minimal expense to dredge. He said the applicant’s representative shows all the benefits, but it would impact others, such as himself, and it should benefits others as well. Commissioner Bowman asked him which pier came first. Mr. Bond answered the right one was first and the left one second. Commissioner Bowman asked if he was concerned about the fairway. Mr. Bond stated yes, it was discussed with others and he noted the paper street here was owned by another. Commissioner Bowman asked about the distance of access in the fairway. Mr. Bond stated 50 feet.

Commissioner Bowman stated the matter was before the Commission for discussion or action.

**Associate Member Plumlee moved to approve the project, as submitted. Associate Member Sessoms seconded the motion. The motion carried, 7-0-1. The Chair voted yes. Associate Member Fox abstained, as he arrived late to the meeting.**

Royalty Fees (20 cu. yds. @\$0.45/cu. yd.)	\$ 9.00
Permit Fee.....	\$ 25.00
Total Fees.....	\$ 34.00

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- 6. **ROBERT WHITE, JR., #07-1141**, requests authorization to install an approximately 240-foot long gapped, precast, concrete Beach Prism permeable breakwater system aligned an average of 38 feet channelward of mean low water, adjacent to his property situated along Ingram Bay in Northumberland County.

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Jeff Madden, Environmental Engineer, Sr., gave the presentation with slides. His comments are a part of the verbatim record. Mr. Madden said that he had one hand-out to add, which was a design map.

Mr. Madden explained that the project was located approximately three miles southwest of Reedville, immediately south of the confluence of Towles Creek and Ingram Bay. Mr. White's home, adjacent swimming pool and well were located on the southern portion of his property and were currently protected by a functioning 260-foot long riprap revetment. Four timber groins help to maintain a narrow beach channelward of the revetment, providing the toe of the revetment with some measure of scour protection. The northern half of Mr. White's shoreline was dominated by a wide, 240-foot long sandy beach. Although the beach terminated at the Towles Creek jetty there was, however, a 50-foot wide parcel separating Mr. White's property from the jetty.

Mr. Madden stated that Mr. White proposed to install 21 precast concrete structures called "Beach Prisms." The structures were similar in appearance to a concrete highway barrier with openings designed to dissipate wave energy. The units were four feet high by ten feet long and weigh 9,100 pounds. They were proposed to be spaced one-foot apart and extend from the tip of the northernmost groin, north for a distance of approximately 240 feet to the northern extent of Mr. White's property. The complex would be aligned along the curvilinear shoreline an average of 38 feet channelward of mean low water with a maximum encroachment of 44' 5" where the prism complex adjoined the existing northern groin. These units, by design, were permeable structures, intended to attenuate the wave energy striking the beach while allowing sand to percolate through. This complex would neither join up with the inlet jetty to the north nor be backfilled with beach sand.

Mr. Madden said that Mr. White intended to install this system to protect his beach from storm waves, which he felt might cause damage to his beach and adjacent tennis court.

Mr. Madden explained that Mr. White initially proposed extending the prism structures along the entire length of his property. In their Shoreline Application Report on the original request dated August 3, 2007 (2007 report), VIMS commented that the project area was a high energy location and that the site was not experiencing any erosion. The 2007 report noted that their 2006 Northumberland County Dune Evolution Report showed a net accretion of sand, between 1969 and 2002, along the Towles Creek Inlet jetty located immediately north of Mr. White's property. They also stated that aerial photographs of the site from 2002 correspond closely to the site conditions observed during their 2007 site visit. VIMS stated that the pocket beach shore morphology characterizing Mr. White's beach, was more conducive to a properly designed traditional breakwater(s). They were concerned with the use of non-traditional concrete modular structures in areas with high wave energy, as well as, the lack of any anchoring of the prisms to the substrate. They pointed out that a critical component of an effective breakwater system was the beach nourishment placed landward of the structures and

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noted that although the beach prisms might reflect some wave energy, it was the beach nourishment landward of a breakwater or sill that protected the shoreline. VIMS summarized their 2007 report by stating that there did not appear to be a need for any additional protective structures on the property. They added, however, that if a structure was authorized to be built along the shoreline, it should be a traditional breakwater extending from the groins northward and it should be nourished with beach quality sand.

Mr. Madden further explained that following the 2007 VIMS report, staff met with the applicant and VIMS at the project site to discuss the project. Mr. White agreed to reduce the scope of the project by reducing the total number of prism structures from 37 units stretching the whole length of his property, down to 21 units placed only along the northern portion of his property which did not have any riprap revetment and groins. In a revised report dated July 6, 2011, VIMS stated that the jetty at Towles Creek inlet appeared to be continuing to collect sand and maintain the beach. They questioned whether the beach prisms would contribute significantly to the protection already provided to the beach by the nearby jetty. If an offshore structure was authorized, they reiterated their recommendation to place beach sand landward of the structure.

Mr. Madden said that while staff understood Mr. White's desire to provide additional storm protection to his property, it appeared the beach was relatively stable and staff questioned whether the proposed Beach Prisms would contribute significantly to the protection of the beach and adjacent upland. Staff also shared the concern expressed by VIMS that the structures were not anchored and might become dislodged during storm events at this exposed location.

Mr. Madden stated therefore, after considering the merits of the project and after considering all of the factors contained in §28.2-1205(A) of the Code of Virginia staff recommended denial of the project as proposed. Although staff questioned whether any structures were necessary at this site, should the applicant still desire to construct additional shoreline protection, staff would recommend he strongly consider a properly designed riprap breakwater incorporating sufficient quantities of coarse sand placed landward of the breakwater. Should the Commission vote to approve the prism structures, as proposed, staff suggested the permit be conditioned to require development of a monitoring plan for these innovation structures in order to properly document any changes to the beach substrate contours or any movement to the structures.

Commissioner Bowman asked for questions of staff.

Associate Member Palmer asked if in the past there was overwash on the beach and to what extent. Mr. Madden said when there was a storm there was overwash at Towles Beach.

Commissioner Bowman said in the VIMS they had indicated there was no need for a structure to be placed here and asked if it was possible that a structure would change the

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topography of the beach and change the way the sand moves. Mr. Madden stated he would hazard to say that any man-made structure put in a natural environment would have some impact, but he was not sure how much.

Associate Member Sessoms asked if there was damage can the owner go back and refill. Mr. Madden stated that the Beach-Dune Ordinance said it can be re-nourished.

Associate Member Plumlee noted that VIMS said the prism had not been used in Virginia. He asked if they had found any other uses. Mr. Madden said he only knew of Wallops Island and a number of places in Maryland, but his agent could address this question.

Commissioner Bowman asked if the applicant or a representative was present and wished to make comments.

John McKenna, agent for the applicant, was sworn in.

Charles Kline, agent for the applicant, was sworn in and his comments are a part of the verbatim record. Mr. Kline said that the firm had been in existence for 30 years as Coastal Design. He said for the Ingram Bay site in Northumberland County they were planning to use innovative technology here. He stated that he had researched it a lot. He explained that morphology meant there was a change in the beach. He provided a powerpoint presentation. He said slide number one showed a groin field and the beach was protecting it now. He showed a slide of the 2006 Hurricane Ernesto. He said there was upland recession and loss of critical upland area after Ernesto. He stated significant overwash occurred. He said with Ernesto there were watermarks in the sand, the boathouse got knocked off its foundation, the swimming pool was filled with sand and all of this was observed by the applicant. He said this was to be a retirement home. He said slide #3 showed the tennis court which was impacted. He said slide #4 showed evidence of the beach being moved back. He said in theory the prism would change the wave action. He noted slide #5 was the design map.

Mr. Kline said he had documentation of the use of the prisms in Maryland. He explained that the proper spacing had been tested to find the optimal spacing for use. He stated that in Maryland there were a dozen such projects where the combined breakwater-sill system was studied. He said these structures did not topple and they are still there as they were placed in the right conditions. He noted that slide number six which was an emergency application showing a sample of what was not proposed. He said it was accreting in front of the structure.

Associate Member Schick asked if sand was not put there. Mr. Kline responded, yes.

Commissioner Bowman asked if he agreed with the staff recommendation to monitor the structures to see if they work or not. He said it would be a benefit for marketing. Mr.

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Kline stated yes, absolutely. Commissioner Bowman asked what was the problem? Mr. Kline stated this type of structure proposed needed to be applied properly with proper spacing. He said that the Commission needed to look at the use of this type of structure on a case-by-case basis.

Associate Member Schick said the application said it would be placed 35 feet away from mean low water and the slides document the filling success. Mr. Kline stated that at 30 to 40 feet out it did accrete, but the upstream and downstream ends were protected. He said he had reviewed the VIMS comments and took exception when they said it would topple over. He said that if they were placed on hard sand it would work as was shown by the Maryland projects. He said you would only use anchors if appropriate substrate was not used. He explained that from 2002 to 2009 they had seen a recession of the shoreline before and after the storm Ernesto, but in 2002 and 2007 they had seen a stable beach, just recessed backward which could endanger highland structures and impact the gut area.

Associate Member Schick asked if the owner would be bonded if the structure failed and needed to be removed. Mr. Kline said he was not aware of it.

Associate Member Plumlee asked if he had ever overseen this type of installation. Mr. Kline said no, but he had done similar types.

Associate Member Schick asked him why the applicant did not seek to use traditional structures. Mr. Kline noted it was the cost. Associate Member Schick asked if there had been an independent study done on the structures. Mr. Kline stated he did it.

Mr. John McKenna with Smith-Middleton was sworn in and his comments are a part of the verbatim record. Mr. McKenna stated that his company did the concrete precast for a project in New Jersey and in Virginia Beach, Virginia. He explained that the traditional structure was not proposed because it was applied there and the structures did not protect the property properly. He said the slots allow the water to flow and marine life to be there and the wave spray was deflected by the prism and over time the beach would level out.

Commissioner Bowman asked if anyone present wanted to comment in opposition. There were none. He asked for discussion or action by the Commission.

Associate Member Schick said he did like to see less expensive methods being used and if they were to work that would be great. He stated he was concerned with the new product and if the monitoring showed that it did not work if it could be removed and money was available to do so. He noted the applicant was not present to agree.

Associate Member Robins referenced comments by VIMS which questioned why a traditional offshore stone breakwater with a higher profile was not being proposed.

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Lyle Varnell, VIMS, said he had spoke with Scott Hardaway of VIMS and they were not here to argue against the new technology. He said the traditional method had a good track record, as it applied to Virginia's shoreline. He explained that it was a complex design meant to hold sand in place, as the fill and its elevation were both critical to its success. He said he agreed that there had been a change to the shoreline as the storm Ernesto had slammed the area. He stated that VIMS had noted in their comments that across the river the breakwaters had to be replaced with no change in elevation. He said they questioned its effectiveness should there be another storm like Ernesto and he felt there was no harm to be caused by these structures, but there needed to be sand supply. He said there were sand bars everywhere in the Chesapeake Bay. He said he and Dr. Hardaway had done a joint project and gained a lot of knowledge. He said the beaches do move as it was common on the Chesapeake Bay. He said if there was monitoring done it would give everyone interesting information. He noted that Mr. Kline had a good report and was good at what he did. He said they were concerned about how effective the structures would be and that was not known, as yet. He said if placed too far out the sand would not be affected. He reiterated that the traditional methods were proven if it is close enough to the shoreline and a sand supply existed or if it were to be filled with sand.

Associate Member Robin asked if the requirement for fill related to VIMS' objection. Mr. Varnell stated, of course as modeling has show what it will do.

Associate Member Sessoms said he agreed with Associate Member Schick that a performance was needed.

Mr. Varnell stated that they would work with the applicant to set up a monitoring program. Tony Watkinson, Chief, Habitat Management stated that the security bond had not been used because long ago there had been concern about the use of a bond and if the applicant did not do the work and the Commission would have to do the work. He stated the Commission could add a condition to the permit that it can order removal by legal means.

Commissioner Bowman stated that there is a Code Section for requiring removal and conditions could be added for the monitoring and the removal which would be handled by Code Section 62.1-194. Associate Member Schick stated that it should be added to the permit and the applicant should have to agree to it.

Associate member Plumlee asked about the issues of impacting recreational activity, navigation, and storm debris and asked if the life span was 30 to 40 years. Mr. Kline stated that they would be placed at a depth of two feet at mean low water and would not be a hazard to navigation or recreational use. He said they would use signage. He stated he had not seen any debris in the event of a storm. He said structures he had seen placed in the 1980's had not decayed.

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Mr. McKenna said they had looked at other sites and the structures were still in good condition. Commissioner Bowman asked how far back. Mr. McKenna stated the structure was installed in 1989 and he cleaned them up and they looked as good as new.

Associate Member Plumlee asked if they would put signs there warning swimmers. Mr. McKenna said the applicant was not present, but he was sure he would agree.

Associate Member Robins asked if anchored structures had been used at high energy sites. Mr. McKenna responded no, if required anchoring with the hard sand it would impact the substrate.

Commissioner Bowman stated the matter was before the Commission for discussion or action.

Associate Member Robins said he felt the project would provide modest protection and here was an opportunity to learn. He said he was concerned and felt a condition for a monitoring program be added with oversight by VIMS. He said he was also concerned with overtopping as there was less protection here with the modest levels.

Associate Member Schick stated he agreed with Associate Member Robins as he was concerned with the distance the structure was from mean low water and its effectiveness to trap sand. He added that if it did work that would be great, but he was concerned also that there was no scientific data. He said if the monitoring showed it needed fill, could it be required?

Associate Member Plumlee said there was no hazard created and their scientist said it would work in this location. He noted that VIMS was concerned that there was not much erosion occurring here and that the project would not work. He said he agreed with the monitoring being used to see if it works.

Associate Member Laine stated that this was an interesting opportunity to try something new. He said it had not been tried in Virginia and the risk was on the landowner. He noted that there were adequate remedies if it failed. He stated he would like to see this move forward.

Paul Kugelman, Assistant Attorney General and VMRC Counsel, asked what Code Section was being considered for adding a condition to the permit for removal if failed. He added without an injunction it could be obtained without the language.

Mr. Watkinson stated wording could be added to say 'approve subject to', if detrimental. Mr. Kugelman asked if this was fair to the applicant and only done if it affects the environment or others. Mr. Watkinson stated this was proposed on State-owned bottomlands and this was for a testing which he felt was a concern when you consider this was for the use of a public trust resource. He explained that there was a monitoring

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protocol developed with VIMS that had been used before and applied to alternative structures. He added the protocol document to the record. Commissioner Bowman asked if would be added to the permit. Mr. Watkinson said it could be added to the permit.

Associate Member Fox asked if they had worked with VIMS. Mr. Watkinson said they had done that.

Commissioner Bowman said the matter was before the Commission for action.

**Associate Member Sessoms moved to approve the project with the establishment of a monitoring protocol system and if the structures failed the Commission would use the legal remedies provided by Code. Associate Member Laine seconded the motion. Associate Member Robins said he would agree if it were added that the removal would be required if the failure caused detrimental impacts. Commissioner Bowman asked if the motion maker and the one that seconded the motion agreed. Associate Members Sessoms and Laine both agreed. Associate Member Plumlee stated that if it were creating hazards the Commission could require the removal. Mr. Kugelman said that Code Section 28.2-1210 provides for the removal, etc., but because of the wording of the Code he was concerned there was no binding effect in the Code. Associate Member Plumlee said that Code Section 28.2-1210, which he had not thought of, would work as it was broad enough to cover it if a situation arose, as the Commissioner could take action against any hazard that arose. He said he felt it was not necessary to make it a part of the motion. Mr. Kugelman stated he was just concerned that if it were to be taken to court and like staff said if it created a hazard determined by staff, it could be removed. Commissioner Bowman asked if Associate Members Sessoms and Laine both agreed to the third condition. They both agreed. The motion carried, 8-0. The Chair voted yes.**

Permit Fee.....	\$100.00
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- 7. PUBLIC HEARING:** Commission consideration to designate approximately 425 acres of subaqueous bottomlands at the confluence of the Poquoson River and Bennett Creek in the City of Poquoson as Not Appropriate for Shellfish Leased Ground that could be authorized by §28.2-603 of the Code of Virginia.

Ben Stagg, Environmental Engineer, Sr., gave the presentation with slides. His comments are a part of the verbatim record. Mr. Stagg noted for the record that he had 16 additional comments from the public.

Mr. Stagg explained that at the July, 26, 2011 Commission meeting, staff presented two protested applications for oyster lease ground in the name of Oyster Company of



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Virginia, LLC. Both applications were located within the City of Poquoson. At the hearing, staff recommended approval for a portion of the application within Lloyd's Bay and recommended denial of the second application at the mouth of Bennett Creek. Mr. Stagg explained that the staff recommendation for denial of the second lease application was based upon the fact that the area is used for a variety of uses by the public, was exposed to a northeastern fetch of up to 28 miles, and appeared to be inappropriate for on-bottom oyster aquaculture activities. In addition to recommending denial, staff also recommended the Commission consider delineating an area at the mouth of Bennett Creek and the Poquoson River as an area not appropriate for shellfish leasing.

Mr. Stagg stated that the Commission approved an even smaller area than staff recommended within Lloyd's Bay and concurred with staff's recommendation by voting not to lease any of the area requested at the mouth of Bennett Creek. The Commission also considered staff's additional recommendation to delineate the area noted above, as not appropriate for shellfish leasing. During the discussion the Commission decided that a public interest review for any such action should be conducted prior to the Commission taking action on the request. A public notice had been published in the Daily Press and a notice had been posted on the VMRC web site.

Mr. Stagg said that staff had received 15 letters in support of delineating an area in this location, as not appropriate for shellfish leasing. Staff also received two letters in opposition, stating concerns with a precedent being set by any such action.

Mr. Stagg noted that in Section 28.2-603 of the Code of Virginia stated the following concerning the leasing of State-owned subaqueous bottomlands: "*Waterfront that is not already assigned or reserved for riparian owners, ... may be occupied for the purpose of planting or propagating oysters, including the use of temporary protective enclosures in compliance with this chapter and Commission regulations, and may be leased by the Commissioner upon receipt of a proper application.*" Accordingly, staff had to assume that if an area was leased there was a potential that aquaculture structures might be utilized on the lease.

Mr. Stagg said that as noted at the July Commission meeting, staff continued to believe that due to the variety of existing public uses of this area and the considerable fetch exposure of this location, that the area was not compatible with traditional or cage aquaculture activities. Section 28.2-603 of the Code of Virginia stated that State-owned subaqueous bottomlands "may be leased by the Commissioner." Accordingly, the Commissioner and/or the Commission might also determine that certain bottom lands may not be leased. If the Commission agreed that the proposed area was not currently appropriate for leasing, it seemed prudent to delineate the area as such to both inform the public and to minimize repeated future attempts to lease the area. Such action would not preclude any person or company from requesting the Commission reconsider the designation and to allow the leasing of any or all of the area in the future. Staff, therefore,

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recommended the Commission designate an appropriate area in this location, as not to be leased.

Commissioner Bowman asked for questions and there were none.

Commissioner Bowman asked if there was anyone, pro or con, to comment.

Katherine Queen, resident on Beach Road, was sworn in and her comments are a part of the verbatim record. Ms. Queen stated she supported setting this area aside for not leasing. She said it would be redundant if others desired to lease the area and to keep having to hear it.

Julian Cox, resident, was sworn in and his comments are a part of the verbatim record. Mr. Cox stated he was speaking for himself and his wife. He said he supported the staff recommendation. He read his comments into the record, which spoke of user conflicts, hazards to navigation, safe access for others, and submerged aquatic vegetation. He stated that 70% was included in the SAV restoration area and the rest was in the channel. He expressed his concerns regarding water quality also. He said would be willing to give his adjoining lease back to State to be added to the area recommended by staff for no leasing. He said he supported VIMS, VMRC, and work with aquaculture. He said there were other suitable sites available. He added that the staff recommendation should be approved.

Bob Lockwood, adjacent property owner, was sworn in and his comments are a part of the verbatim record. Mr. Lockwood said he supported the staff recommendation, because of the fetch and other reasons given. He said there were no historical leases in the area and it was a highly recreational area, which also supported the SAV program by VIMS. He stated the Commission should approve the staff recommendation.

Frank Resie was sworn in and his comments are a part of the verbatim record. He stated he supported the staff recommendation to set aside the area.

Robert Cox, resident and protestant, was sworn in and his comments are a part of the verbatim record. Mr. Cox stated he supported the staff recommendation and appreciated the staff's efforts coming up with the straightforward solution. He said he had the same issues as others have stated in regards to leasing this area.

Roxanne Huckstep, resident was sworn in and her comments are a part of the verbatim record. Ms. Huckstep said that the City of Poquoson was starting a tourism push in the plan for the City.

Commissioner Bowman asked for those in opposition to comment.

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John Vigliotta, Wards Oyster Company/Mobjack Bay Seafood, was sworn in and his comments are a part of the verbatim record. Mr. Vigliotta said that Wards Oyster Company held 500 acres in the Ware River and kept 1,300 cages which were two feet high with buoys. He stated that in his area there were no other restrictions and there was recreational use, which the leases do not stop. He said he was concerned that a precedent would be set and because of the SAV there was area that could not be used. He said the concern with the fetch bringing in winds, in his area he was just as affected by winds that came from other areas. He noted that Hurricane Isabella impacted his operation, but did not move any of his cages. He said it the Commission's job to do this type of process for all lease applications and they can just not approve them. He said he was sympathetic with the residents, but in Virginia it was traditional to allow oysters and crabbing. He said anywhere you go someone could oppose it.

A.J. Erskine, representing Virginia Seafood Council, was sworn in and his comments are a part of the verbatim record. Mr. Erskine stated they strongly oppose not leasing and agree with Mr. Vigliotta. He said this was a productive shellfish State. He said what was being proposed was overstepping bounds and there were diverse activities in other areas. He said there could be just traditional shellfish growing done without cages. He said he felt the Commission should hesitate to remove the 425 acres from leasing.

Ethan Curry, Ship Point Oyster Company, was sworn in and his comments are a part of the verbatim record. Mr. Curry stated that there was a need to get along with neighbors. He said he was opposed to setting this area aside and agreed with the last speaker. He said maybe it was not right for this proposal, but it was not right to write it off for use traditionally.

Commissioner Bowman announced the matter was ready for discussion or action.

Associate Member Palmer said he was opposed to the staff recommendation as the amount of area available would be less for the watermen. He said Mr. Cox had a neighbor with 30 or 40 cages if not more and he wondered why Mr. Cox was concerned for another area. He said he agreed with Mr. Erskine and Mr. Vigliotta that it might be alright for other proposed uses, just not cages. He said in the Lynnhaven there was always activity such as this in someone else's backyard. He stated where does it stop? He said with ecotourism there might be someone who'd like to see what Virginia is known for—seafood. He said someone can kayak anywhere.

Associate Member Fox said he was in here in July and now hearing all the testimony, why was it an issue here. He said the Commission deals with applications for leases all the time, but technology changes. He said sometime changes may be more appropriate, but he did not see a need for action. He stated he was opposed.

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Associate Member Plumlee said he agreed with the other members that these should be handled on a case by case basis. He said this was a large parcel and too large to remove from the industry.

Associate Member Robin said at the July Commission meeting what the staff identified met with public expectation. He said that recreational and others did not work with cages. He asked staff what type of activity would work.

Mr. Stagg said that it was the Commission policy not to lease areas with SAV and staff consulted with VIMS if there was a conflict with the SAV goals. He said the staff recommendation for this big area was that it not be leased and if not set aside, then applications would have to be accepted. He said the leasing system had worked for years and this was not a historically leased area. He stated it was up to the Commission.

Associate Member Schick asked if the fetch meant no cages and other fisheries. Mr. Stagg stated that all other fisheries were allowed. Associate Member Schick asked if there was any spat on shell because of the sand and there was 40 to 45% of SAV. Mr. Stagg said yes, they could clam now as a similar area north of this was set aside for clamming. He stated that people could apply for a lease in this area.

Associate Member Palmer stated it was not for staff to decide whether something would work or not, but for the leaseholder to decide.

Commissioner Bowman stated that staff was correct in bringing this to the Commission. He said that there were residents that had expressed concerns and felt that it probably should not be leased. He said the Commission takes on these issues on a case-by-case basis, which was the Commission's current policy. He said he felt it was not appropriate to set this area aside.

Commissioner Bowman stated the Commission did not want to set a precedent as it was not appropriate to do so here. He announced the matter was before the Commission for discussion or action.

Associate Member Robins said he would agree that no action be taken and to continue to handle these protested applications for a lease on a case-by-case basis through the normal process.

Associate Member Fox stated that at the last month's meeting the protested application for lease was looked at on a case-by-case basis and the process worked well.

There was no motion made. The general consensus was that no action would be taken.

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## 8. PUBLIC COMMENTS:

**Ken Smith, President, Virginia Watermen's Association** asked the Commission to check into how the Virginia Institute of Marine Science spent the Federal Crab Fishery Disaster Funds that were allocated to a crab pot cull ring/terrapin excluder device study. His comments are a part of the verbatim record.

Jack Travelstead, Chief, Fisheries Management said staff was approached by Mr. Smith and they had advised him to contact Dr. Rom Lipcius.

**At the request of Associate Member Robins**, the consensus of the Commission was to agree to offer a comment to the National Park Service on their draft master use plan for the park that straddles both Chincoteague and Assateague, and to seek an explanation of the various use options under consideration, one which may impact the State's Horseshoe Crab Fishery. His comments are a part of the verbatim record.

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9. **PUBLIC HEARING:** Consideration of final blue crab regulations, including closure of the crab dredge fishery for the 2011-2012 season, (4VAC20-1140-20 et seq. "Pertaining to Prohibition of Crab Dredging in Virginia waters). Decision on licensing those individuals on the peeler pot and crab pot waiting list who have been inactive, at least since 2004 (4VAC20-270-10 et seq., "Pertaining to Crabbing"). Re-assignment of latitude-longitude coordinates that apply to Virginia Blue Crab Sanctuaries (4VAC20-752-20 et seq., "Pertaining to Blue Crab Sanctuaries").

Rob O'Reilly, Deputy Chief, Fisheries Management, gave the presentation with slides. His comments are a part of the verbatim record. Mr. O'Reilly provided three additional handouts.

Mr. O'Reilly explained that he could answers questions about last month's presentation and he would be providing additional information. He said there had been an extensive mailout to the members, which included the evaluation from July 2011, the current meeting evaluation and a copy of the peer-reviewed 2011 stock assessment. He said there are six items for the public hearing.

Mr. O'Reilly reviewed the abundance and the health of the stocks. He said there was a decline in the 2011 abundance and the number of juveniles dropped down from 2010. He noted in 1999 there was the lowest number of age-1+ crabs both males and females combined. He said there the 0 age abundance was average, for the 22-years of the Bay-wide winter Dredge Survey. He explained that in 2010 there was an increase in pounds (53%) compared to 2008, and with the conservation plan the dockside value rose to almost as much as a \$1.00 per pound. He added that in 2010 there was a Bay-wide

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harvest of 90 million pounds. He said the exploitation rate was under the target (46%), for the last two years, and there was a large (55 million to 90 million pound) jump in just one year. He said maintaining the exploitation rate at target in 2011 means there needs to be about a 25% reduction in the 2011 harvest from the 2010 level. He noted that the CPUE was up for three months for the PRFC and not slowing down. He said that the Maryland Department of Natural Resources reported that the harvest in Maryland had fallen back quite a bit through June. He said in Virginia 2011 there was a large upsurge because in the month of March the harvest was three times what it was in 2010. He said it was because of latent effort or new effort. He said there were 95 harvesters in the fishery in March. He added that April 2011 harvest was close to what it had been in 2010. He said there was not a full month of May harvest data but the projections indicate May 2011 harvest will be equal to May 2010 Virginia harvest. He said if the exploit rate stays close to the target it would be a well behaved fishery.

Mr. O'Reilly said, from 1999 to 2007, all but two years were associated with overfishing of the stock. He said in the 2008 the management plan included the use of the cull ring, the opening of the sanctuary area and the peeler size limit. He noted that closure of the crab dredge fishery, in 2008, accounted for a 38% reduction. He added that the crab dredge fishery was in the mainstem of the Bay with a little on the Seaside with no activity. He stated the crab dredge was an inefficient gear and the crab dredge fishery was initially closed for the 2008 – 2009 season. Staff showed that there was as much waste in the fishery as there was 24% recorded on-board from damage to the crabs caused by the crab dredge.

Mr. O'Reilly stated that there were Crab Disaster funds enough for 22 days of the Ghost Pot project and 13 of the 53 crab dredgers had left the waiting list to work in the peeler and crab pot fisheries. He said that the Blue Crab Management Advisory Committee (BCMAC) wanted to allow for a short Crab Dredge season of 27 days, from December 1 through March 31 to compensate for the shortened marine debris collection project for 22 days. Associate Member Robins asked if there were compensation measures in other crab fisheries offered. Mr. O'Reilly stated the BCMAC did not want any.

Mr. O'Reilly said that there were public comments by the Chesapeake Bay Foundation, Northampton Anglers Club, CCA of Virginia, 26 comments responded to the Fisheries Newsletter and 46 other individuals, most of whom did not want the Commission to allow a crab dredge season.

Mr. O'Reilly said that FMAC and staff recommended that the Crab Dredge season remain closed.

Staff did not complete their presentation and no public hearing was held.

No action taken – to be rescheduled.

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- 10. PUBLIC HEARING:** Consideration of amendments to Regulation 4VAC20-720-10 et seq., "Pertaining to Restrictions on Oyster Harvest" to establish the 2011-2012 public oyster seasons.

No presentation given by staff and there was no public hearing.

No action taken – to be rescheduled.

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The meeting was suddenly adjourned at approximately 2:00 p.m. because of an earthquake. The next regular meeting will be held Tuesday, September 27, 2011.

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Steven G. Bowman, Commissioner

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Katherine Leonard, Recording Secretary