



**Commission Meeting**

**18921  
March 22, 2022**

Tiffany Birge  
Daniel Faggert  
Ben Stagg  
Andrew Button

Environmental Engineer, Sr.  
Surveyor, Engineering/Surveying  
Chief, Shellfish Management  
Deputy Chief, Shellfish Management

Virginia Institute of Marine Science (VIMS):

Lyle Varnell            Emily Hein

Others present:

Mike Ware	Tim Lindsay	Madison Beatty
Fred Westphal	Mary Swift	Bryan Peebles
David Norris	Neville Reynolds	Jay Ford
Jim Holt	Terry O'Neill	Angela King
Walter Priest	Joel Petery	and others.

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Acting Commissioner Worrell called the meeting to order at approximately 9:32 a.m.

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Associate Member France led the pledge by the request of Acting Commissioner Worrell. Associate Member Tankard said the invocation.

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**APPROVAL OF AGENDA.** – Acting Commissioner Justin Worrell asked if there were any changes from the Board members or staff.

**Associate Member Zydron moved to approve the agenda as presented. Associate Member France seconded the motion. The motion carried, 6-0 Chair voted yes. Associate Member Minor was not present during vote.**

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**MINUTES:** Acting Commissioner Worrell asked if there were any changes or corrections to be made to the February 22, 2022 Commission Meeting minutes.

**Associate Member Zydron moved to approve the minutes as presented. Associate Member Tankard seconded the motion. The motion carried, 6-0. Chair voted yes. Associate Member Minor was not present during vote.**

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Acting Commissioner Worrell 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).

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

**2A. CITY OF NEWPORT NEWS, #21-2393**, requests authorization to install shoreline stabilization structures and clean sand fill channelward of mean low water adjacent to Riverview Park Farms, 105 City Farm Road, along the Warwick River in the City of Newport News. Components include: two (2) 170-foot offshore stone breakwaters, one (1) 150-foot riprap spur, and 10,000 cubic yards of clean sand fill sprigged with wetland, beach and backshore plantings to create 950 linear feet of living shoreline.

Fees:	\$ 600.00
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**2B. VIRGINIA DEPARTMENT OF WILDLIFE RESOURCES, #21-2589**, requests authorization to anchor up to three (3) barges, from mid-March through mid-September annually, to create up to 65,000 square feet of temporary bird nesting habitat in Hampton Roads adjacent to Fort Wool in the City of Hampton. Anchors and chains are to be left in place year round until the project is complete. When not in use, chains will be placed on the anchor footprint.

Fees:	\$ 600.00
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- 2C. NAVAL STATION NORFOLK, #21-1707,** requests authorization to construct a concrete wharf and approximately 1,483 linear feet of replacement steel bulkheading adjacent to Pier 3 and the Elizabeth River in the City of Norfolk. The new wall will be aligned a maximum of 8.5 feet channelward of the deteriorated bulkhead’s western facing reach, and 4 feet channelward of its north facing reach. Existing scour holes under the proposed concrete platform will be filled with VDOT #1 stone.

Fees:	\$ 600.00
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David Norris spoke on behalf of the Virginia Department of Wildlife Resources. His comments are a part of the verbatim record.

The matter was before the Commission for discussion and action.

**Associate Member France moved to approve the page 2 Items A through C as presented. Associate Member Ballard seconded the motion. The motion carried 6-0. Chair voted yes. Associate Member Minor was not present during vote.**

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- 3. CONSENT AGENDA ITEMS. – No Consent Agenda Items.**

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

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- 5. LICENSE STATUS REVIEW.**

**Timothy Lindsay (008278):**

Matthew Rogers, Chief, Law Enforcement, was sworn in. His comments are a part of the verbatim record.

06/09/2021 Working while revoked: **4 VAC 20-1280-30**

06/04/2021 Working while revoked: **4 VAC 20-1280-30**

04/05/2021 Working while revoked: **4 VAC 20-1280-30**

**Disposition:**

August 30, 2021 Newport News General District Court

***GUIDELINE SUGGESTION: TWO-YEAR REVOCATION OF ALL LICENSES AND PRIVILEGES (§ 28.2-232 of the Code of Virginia)***

Col. Matthew Rogers explained to the Commission the sanction guidelines, with PowerPoint slides. Mr. Roger's comments are a part of the verbatim record.

Mr. Timothy Lindsay was convicted on August 30, 2021 for three counts of working while revoked (4 VAC 20-1280-30).

Mr. Lindsay first appeared before the Commission as a natural resource offender during the March 2021 Commission meeting. The Commission decided to revoke all of Mr. Lindsay's licenses and privileges for a period of one year, beginning March 23, 2021 through March 22, 2022 and place Mr. Lindsay on a subsequent probation for two years, beginning March 23, 2022 through March 22, 2024, owing to a conviction of four oyster violations.

The Commission's guidelines for sanctions specify that two or more convictions crabbing without a license (without eligibility) within a two-year period should result in at least a two-year revocation of all licenses and privileges. In accordance with §28.2-232 of the Code of Virginia, the guidelines suggest to the Commission to revoke all of Mr. Lindsay's license and privileges for a period of two years from the date of this Commission meeting, March 22, 2022 through March 21, 2024. The Code of Virginia also allows that the Commission prohibit the issuance, reissuance, and renewal of any of Mr. Lindsay's licenses during this revocation period and may take discretionary action concerning the potential of a civil penalty.

Mike Ware, counsel for Mr. Lindsay, was present. His comments are a part of the verbatim record.

Mr. Ware explained that Mr. Lindsay thought that he could be a mate without violating his revocation.

The matter was before the Commission for discussion and action.

**Associate Member France made a motion for a 3 year probation of all Licenses and privileges in lieu of the recommended 2 year license revocation. Associate Member Ballard seconded the motion. The motion carried, 7-0. Chair voted yes.**

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6. **CHESAPEAKE LANDING HOMES ASSOCIATION #21-2318**, requests authorization to construct a 20-foot wide by 220 linear foot stone groin directly adjacent to an existing deteriorated timber groin at property (17 Thimble Shoals Court / Parcel #12006617) adjacent to the Chesapeake Bay in the City of Hampton. This project requires both a dune/beaches and a subaqueous permit.

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

Mr. Nettleton explained that the project location is south of the Buckroe Fishing Pier and north of Fort Monroe along the Chesapeake Bay shoreline. The beach area is privately owned by the Chesapeake Landing Homes Association (Association) and has been experiencing beach erosion. The beach is bordered by an existing concrete bulkhead, largely now buried by a vegetated dune, on the landward side and the groin would extend from the existing dune approximately 220 feet channelward.

The groin will consist of class III armor stone placed ovetop of non-woven geotextile filter fabric and will be 20 feet wide extending from the existing bulkhead to a point 26 feet channelward of mean low water. The groin will have a trapezoidal cross-section 4-foot high by 4-foot wide at the top with 2:1 side slopes. It will not be low-profile by design due to the use of large armor stone and to build the beach channelward to attain a beach width and grade that will allow for moderate wave energy dissipation. The landward approximately 20 to 30 feet of groin will be dug to a depth of 4 feet, to be no

higher than the existing bulkhead, and buried so that the dune may naturally build over the groin. Some dune vegetation will be impacted by this, but the agent advised that the primary dune will be avoided and protected during construction.

Staff notes that there is erosion ongoing at the site and that the existing timber groin has failed, which has contributed to beach loss. Therefore staff believes that an erosion control structure is appropriate in this area, and after consultation with VIMS, that a stone groin is acceptable and will function to catch sand in the applicant's beach area.

Accordingly, after evaluating the merits of the project and after considering all of the factors contained in §28.2-1408 of the Code of Virginia, staff recommends approval of the project as proposed with the following special condition:

1. Impacted dune areas shall be restored after construction. Dune restorations should match that of the adjacent dune and then be planted with appropriate dune vegetation. If rock is placed in an excavated dune area, the dune shall be restored over the rock after construction.

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

No one spoke in support or 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 Tankard seconded the motion. The motion carried, 7 0-. Chair voted yes.**

Fees:	\$ 400.00
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7. **CARL F. WESTPHAL JR. and MARY SWIFT, #22-0082.** Commission review on appeal by the applicants of the City of Hampton Wetlands Board's February 22, 2022, decision to deny an after-the-fact request to retain 112 linear feet of riprap revetment and a 216.5 square foot proposed living shoreline located at 12 Curle Road situated along a cove of the Hampton River.

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

Mr. Nettleton explained that on February 22, 2022, the City of Hampton Wetlands Board voted unanimously to deny a request by Carl F. Westphal and Mary Swift to retain 112 linear feet of rock riprap that was added ovetop of existing concrete rubble, to remove a gravel kayak ramp, and to construct a 16-foot long stone sill. The sill would be backfilled with clean sand and planted with 216.5 square feet of tidal wetlands vegetation. This represents the Board's third denial of the applicants' after-the-fact request to retain the revetment, and follows their denials of two previous applications (VMRC #21-2108 and #21-1396) at their December 21, 2021, and August 24, 2021, monthly meetings. All three applications sought after-the-fact authorization of the constructed revetment.

The applicants and their contractor consented to and have paid the civil charges assessed by the Board at their August 24, 2021, meeting for the after-the-fact construction. The Commission upheld the Board's denial of the original application (VMRC #21-1396), on appeal by the applicants, at its September 28, 2021, monthly meeting. The original application did not include the proposed living shoreline.

During the recent hearing, the Board heard comments from the applicants' agent, Walter Priest, that a living shoreline would not be appropriate for the entire site and that it would be prohibitively expensive to the homeowners. A cost estimate, prepared by Jim Cahoon of Bay Environmental, Inc., was provided at the previous hearing which stated that a living shoreline approach at this property would cost approximately \$70,000.00.

Mr. Priest further provided information that grading back into the upland property along the entire shoreline would destabilize the adjacent property owners' existing riprap shoreline treatments. He added that an offshore sill was not an option given the insufficient load bearing capacity of the existing substrate. Mr. Priest additionally pointed out that the VIMS Center for Coastal Resources Management's Decision Tree Model recommends that an existing rubble revetment should be replaced with a properly installed stone revetment, as had been constructed by the applicant.

VIMS Office of Advisory Services' comments dated February 8, 2022, suggest that a living shoreline could achieve the project goals at the site, specifically by constructing a sill close to mean low water and transitioning it to the neighboring riprap on both



adjacent properties. They further advised this would involve grading less than 35 feet into the upland yard. This report considered the site conditions of short fetch, shallow nearshore bathymetry, a large distance to upland structures, minimal boat wakes and small storm waves.

A letter submitted by the Chesapeake Bay Foundation, approximately one hour prior to the start of the 3<sup>rd</sup> hearing, stated that “CBF strongly supports the staff recommendation to deny this permit” and argued that the application did not meet the criteria for granting a permit.

At the conclusion of the February 22, 2022, meeting, the Board voted again to deny the applicant’s request. Prior to her motion to deny the current application, Board member Neubert stated that *cost was not a factor* and that it *was expensive to live on the water*. The Board appeared to deny the project because they felt that the applicants’ should construct additional living shoreline over that proposed.

Staff has carefully watched this project since its inception, originally submitted for consideration on June 28, 2021. After the initial denial, the applicant twice sought approval of a modified proposal that incorporates a living shoreline design, as recommended by the Board at their August 24, 2021 meeting. The current application provides 216.5 square feet of vegetated tidal wetlands as compensation for the net loss of 56 square feet of non-vegetated wetlands (mudflat) resulting from the after-the-fact revetment (3.9 : 1 ratio). This small amount of jurisdictional non-vegetated wetland impacts and mitigation ratio should be carefully considered by the Commission when deciding whether to modify, remand or reverse the Board’s most recent decision as charged by §28.2-1313 of the Virginia Code.

Carl Westphal Jr. and Mary Swift, applicants, were sworn in. Their comments are a part of the verbatim record.

Walter Priest, agent for the applicants, was present and spoke on behalf of the applicants. His comments are a part of the verbatim record.

No one spoke in support or opposition of the proposed project.

The matter was before the Commission for discussion and action.

**Associate Member Zydron made a motion to uphold the City of Hampton Wetlands Board February 22, 2022 decision to deny the after-the-fact permit. Associate Member Lusk seconded the motion. The motion carried, 5-1-1. Chair voted no. Associate Member Minor abstained.**

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**8. MIKE and LEA FRYE, #21-1689**, request authorization to construct a 36-foot long by 19-foot wide open-sided single-slip boathouse over an existing wet slip, adjacent to property situated along Monroe Creek at 543 Lafayette Street in Westmoreland County. The project is protested by an adjacent property owner.

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

Mr. Madden explained that Mr. and Mrs. Frye currently have an 80-foot long private non-commercial timber pier with an L-head, boatlift and associated catwalk. This structure is authorized by statute and is not the subject of this public hearing. The applicants would like to provide additional protection for their boat by constructing a 36-foot long by 19-foot wide open sided boat house over the existing boat lift.

Staff considered the protestant’s concern regarding the roof structure and the impact it may have on his property. While Commission staff is sensitive to the protestant’s concerns, the VMRC does not have the legal authority to delineate riparian areas. If the protestant wishes to contest this issue, then this is a civil matter that should be addressed in the appropriate court of law.

Had the boathouse roof proposal not been protested by the adjoining property owner, the proposed project would meet the statutory authorization provided for in §28.2-1203A5 of the Code of Virginia. Accordingly, after evaluating the merits of the project against the concerns expressed by the protestant, and after considering all of the factors contained in §28.2-1205 of the Code of Virginia, staff recommends approval of the project as proposed.

The applicant was not present.

The protestant was not present.

No one spoke in support or opposition of the proposed 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, 7-0. Chair voted yes.**

Fees:	\$ 100.00
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**9. PUBLIC COMMENTS. No public comments**

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**10. PUBLIC HEARING:** Proposal to amend Chapter 4 VAC 20-490-10 et seq., “Pertaining to Sharks”, to update the commercial smooth dogfish annual quota.

Jill Ramsey, Fisheries Mgmt. Specialist, presented the information provided in the staff’s evaluation, with PowerPoint slides. Ms. Ramsey’s comments are a part of the verbatim record.

Ms. Ramsey explained that Smooth Dogfish is one of the 40 shark species managed by the Atlantic States Marine Fisheries Commission’s (ASMFC) Coastal Shark Management Board. In May 2013, the Board adopted Addendum II to the Interstate Fishery Management Plan for Atlantic Coastal sharks. The purpose of Addendum II was to preserve historical distribution of smooth dogfish landings by setting state shares and to modify at sea processing requirements. Through this addendum, Virginia received 34.803% of the coastwide smooth dogfish quota.

In 2015, the National Marine Fisheries Service implemented Amendment 9 to the 2006 Consolidated Highly Migratory Species (HMS) Fishery Management Plan, which brought smooth dogfish under federal management and established Atlantic and Gulf of Mexico regional quotas. The 2022 Atlantic smooth dogfish quota is 3,973,902 dressed weight pounds. This coastwide quota remains unchanged from the 2017-2021 quota. For the 2022 fishing year, Virginia receives 1,383,026 dressed weight pounds.

If approved by the Commission, the smooth dogfish quota poundage number will be removed from Chapter 4 VAC 20-490-10 et seq. and be replaced with language that refers to the Interstate Coastal Sharks Fishery Management Plan. This will increase regulatory efficiency and expediency when NOAA publishes their final rule for the Atlantic smooth dogfish regional quota annually.

2022 Smooth Dogfish state allocations

	State-Share Percentages	State-Share (dw mt)	State-Share ( dw lbs)
ME	0.021%	0.4	817
MA	0.433%	7.8	17,195
RI	1.363%	24.6	54,163
CT	0.234%	4.2	9,282
NY	7.953%	143.4	316,037
NJ	18.828%	339.4	748,214
DE	0.339%	6.1	13,464
MD	6.703%	120.8	266,362
VA	34.803%	627.4	1,383,026
NC	28.583%	515.2	1,135,860
SC	0.742%	13.4	29,481
<b>TOTAL</b>	100%	1,802.6	3,973,902

Staff recommends the Commission approve amendments to Chapter 4 VAC 20-490-10 et seq., "Pertaining to Sharks," to update the commercial smooth dogfish annual quota.

No one spoke in support or opposition of the amendment.

The matter was before the Commission for discussion and action.

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

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- 11. **DISCUSSION:** Inter-State Fisheries Management. VMRC Fisheries Management Division routinely interacts with numerous inter-state fisheries agencies such as the Atlantic States Marine Fisheries Commission and the Mid

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Atlantic Fishery Management Council. This presentation is a primer for future presentations on how the Commission works with these agencies in decision making regarding management of many of the Commonwealth's fisheries.

Pat Geer, Chief, Fisheries Mgmt., presented the information with PowerPoint slides. Mr. Geer's comments are a part of the verbatim record.

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There being no further business, the meeting was adjourned at approximately 12:00 p.m. The next Commission meeting will be Tuesday, April 26, 2022.

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Justin Worrell, Acting Commissioner

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Jamie Hogge, Recording Secretary