

MINUTES

Commission Meeting

April 26, 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
Ernest L. Bowden, Jr.)	
J. Carter Fox)	
J. T. Holland)	
William Laine, Jr.)	Associate Members
J. Bryan Plumlee)	
Richard B. Robins, Jr.)	
John E. Tankard, III)	
Jack G. Travelstead	Chief, Fisheries Mgmt.
David Grandis	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
Lewis Gillingham	Head, Saltwater Tournament
Stephanie Iverson	Fisheries Mgmt. Specialist, Sr.
Sonya Davis	Fisheries Mgmt. Specialist, Sr.
Alicia Nelson	Fisheries Mgmt. Specialist
Allison Watts	Fisheries Mgmt. Specialist
Rick Lauderman	Chief, Law Enforcement
Warner Rhodes	Deputy Chief, Law Enforcement
Andrew Mister	Marine Police Officer
Thomas Wilkins	Marine Police Officer

Commission Meeting

**16302
April 26, 2011**

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

Virginia Institute of Marine Science (VIMS):

Lyle Varnell	Roger Mann	Rom Lipcius	A. Colden
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Others present included:

Helen Eggleston	Mike Eggleston	Ken Smith	Irv Spurlock
Catharine Spurlock	Stephanie Spurlock	Doug McMinn	Doug McMinn, Sr.
July McMinn	Jim Breeden	Gerald Negley	Don Abernathy
Mike Oesterling	J. Rawleigh Simmons	David Bennett	Diane Bennett
Rapah Nohis	James Hill	M. C. Jones	Connie Hill
Jenny Horner	Jim White	Kate Madary	Tommy Leggett
Frances Porter	Tom Gallivan	Pete Terry	Tom Walker
Glenn Hampton	Brian Owen	David Hudgins	Robert Rea
Maureen Rea	Susan Seward	Robert H. Hall	Tim McCulloch
Tim Rapine	Craig Palubinski	Michelle Meredith	Todd Pruitt
Ronald Perry	Jackie Shannon	John Vigliotta	Ernest Cross
Kelly Place	Dr. Dean Goodwil	Jeannette Adkins	Sam Cho
Ford Kiwmyer	Marlene F	Jackson Neal	Tim Yoon
Marianne Thomas	J. Adkins	Scott Harper	Travis Croxton
Ken Alexander	Davis Thaup	Chris Anderson	Greg Garrett
Julian Cox	Garland B. Jones	Robert Croonenberghs	
Keith Skiles	Misti Furr	Ellis W. James	Rachel Belch
David Lockett	Dan Sterling	Scott Lockett	Susan Gaston
Cory Nelon	Steven West	J. Crewe	D. Turner
Julie Henderson	Michael Insley, III	Michael Insley, Jr.	Michael Insley, Sr.
Joe Palmer	Betty Lett	Aaron Matthews	Chris Moore
Mark Ross			

and others.

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Commissioner Bowman called the meeting to order at approximately 9:45 a.m. Associate Member Schick was absent.

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At the request of Commissioner Bowman, Associate Member Robins gave the invocation and Tony Watkinson, Chief, Habitat 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.

Associate Member Robins suggested that a closed meeting would be necessary.

Commissioner Bowman said that this would be done just before lunch

Commissioner Bowman asked for a motion by the Board.

Associate Member Tankard moved to approve the agenda, as amended. Associate Member Robins seconded the motion. The motion carried, 8-0. The Chair voted yes.

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MINUTES: Commissioner Bowman requested a motion for approval of the March 29, 2011 Commission meeting minutes, if there were no corrections or changes. There were none.

Associate Member Robins moved to approve the minutes, as distributed. Associate Member Bowden seconded the motion. The motion carried, 7-0-1. The Chair voted yes. Associate Member Fox abstained as he was absent for the March Commission 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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Commission Meeting

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

Tony Watkinson, Chief, Habitat Management Division, summarized these items for the Board. He stated that there were eleven items (A-K). His comments are a part of the verbatim record.

Commissioner Bowman asked for questions of staff. There were none.

Commissioner Bowman opened the public hearing and asked anyone wished to speak pro or con for these items.

Associate Member Plumlee stated that he would be abstaining for item 2G, because they had been a client represented by his firm.

Commission Bowman asked for a motion for all items except 2G.

Associate Member Holland moved to approve page two items, except 2G. Associate Member Tankard seconded the motion. The motion carried, 8-0. The Chair voted yes.

Commissioner Bowman asked for a motion for item 2G.

Associate Member Holland moved to approve item 2G. Associate Member Tankard seconded the motion. The motion carried, 7-0-1. The Chair voted yes. Associate Member Plumlee abstained because of conflict of interest concerns as this was for a client of the law firm where he works.

- 2A. **MIDDLESEX COUNTY BOARD OF SUPERVISORS, #11-0327**, requests authorization to maintenance dredge 2,300 cubic yards of material from the Jackson Creek Federal Navigation Channel in Middlesex County. The channel will be restored to the authorized depth of minus ten (-10) feet at mean lower low water with material to be removed either by hydraulic or mechanical means and disposed of at a previously approved upland site designated as the Broad Creek Dredge Spoil site in Deltaville. Recommend approval with our standard dredging permit conditions.

Permit Fee.....	\$100.00
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- 2B. **CITY OF NORTON, #10-1720**, requests authorization to install a total of approximately 300 linear feet of 30-inch, concrete-encased, ductile iron sewer line under a cumulative total of five (5) separate crossings of the Guest River and Lost Creek along U.S. Business Route 23 in the City of Norton within Wise County.

Cofferdams will be temporarily placed in the waterways to allow for open-cut trench installation in the dry.

Permit Fee.....	\$100.00
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2C. CITY OF NORTON, #11-0150, requests authorization to install a total of approximately 271 linear feet of 24-inch, concrete-encased, ductile iron sewer line under 3 separate crossings of the Guest River along U.S. Business Route 23 in the City of Norton within Wise County. Cofferdams will be temporarily placed in the waterways to allow for open-cut trench installation in the dry.

Permit Fee.....	\$100.00
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2D. CITY OF NORFOLK, #10-0644, requests a modification to a previously authorized permit to now extend a previously authorized dredged channel in Broad Creek by 168 feet to the north, to provide access to additional riparian property owners, resulting in the additional dredging of 1,400 cubic yards of State-owned subaqueous material from within a 25-foot wide channel. The channel will be dredged to a maximum depth of minus five and a half (-5.5) feet at mean low water and will include a 30-foot turning basin at its northern terminus to be located approximately 200 feet south of Virginia Beach Boulevard, along with an additional red day beacon at the northern most turning point of the proposed channel extension.

No Applicable Fees – Permit Modification

2E. DEPARTMENT OF THE NAVY #10-1628, requests authorization to install additional riprap along an approximately 1,800 linear foot revetment adjacent to Pier D at their Craney Island Fuel Depot situated along the Elizabeth River in the City of Portsmouth, and to conduct a phased demolition and replacement of the existing Pier D with new segmented north and south piers, each to range from approximately 35 to 47 feet wide by 461 feet long connected by two (2) 6-foot wide by 173-foot long catwalks and a 34-foot by 46-foot central mooring dolphin. The proposed project also includes the replacement of the existing north and south pier approach ramps, fuel lines, fuel line supports, a 6-foot wide by 52-foot long section of catwalk linking the north pier with the existing north mooring dolphin, and portions of the fender system on the existing south mooring dolphin.

Permit Fee.....	\$100.00
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2F. MEADWESTVACO VIRGINIA CORPORATION, #11-0262, requests authorization to partially demolish and reconstruct the 25-foot long by 9-foot wide west abutment (“A”) of an existing low-water bridge, which crosses over the Jackson River at their property in Alleghany County across the river from their

main industrial plant site in the City of Covington. The replacement/repair activities are proposed to take place in the dry within temporary cofferdams constructed from the west river bank to the bridge’s Pier B. Recommend inclusion of the standard in-stream conditions and the assessment of a royalty in the amount of \$745.00 for the abutment’s encroachment over 149 square feet of State-owned submerged land at a rate of \$5.00 per square foot.

Royalty Fees (encroachment 149 sq. ft. @ \$5.00/sq. ft.).....	\$745.00
Permit Fee.....	\$100.00
Total Fees.....	\$845.00

2G. METRO MACHINE CORPORATION, #11-0429, requests authorization to construct an 84-foot long by approximately 52-feet 6-inch to 55-feet 10-inch wide, open-pile, concrete wharf immediately channelward of an existing bulkhead and between two existing access ramps for their dry dock “Speede,” adjacent to their shipyard facility situated at the confluence of the Eastern and Southern Branches of the Elizabeth River in the City of Norfolk.

Permit Fee.....	\$100.00
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2H. COLONIAL PIPELINE CO., #11-0141, requests authorization to conduct maintenance and inspection activities along the existing Colonial Pipeline #25, within the company's right-of-way at 16 stream locations in multiple Counties along the corridor between Mitchell Junction in western Cumberland County to the Company's Roanoke Delivery Station in Bedford. Staff recommends imposition of our standard instream conditions for any excavation associated with any anomaly repairs and a royalty of \$3.00 per linear foot for the encroachment resulting from anomaly repair along the line.

Permit Fee.....	\$100.00
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2I. REEDVILLE STEAMBOAT WHARF, INC., #10-1659, requests authorization to construct a 2,128 square foot, single-story, enclosed commercial structure with a 1,064 square foot portion, extending channelward of mean low water, which will replace the existing deteriorated cinder block structure at their location along Cockrell Creek in Northumberland County. Staff recommends an encroachment royalty of \$2,128 for the encroachment over 1,064 square feet of State-owned submerged lands at a rate of \$2.00 per square foot.

Royalty Fees (encroachment 1,064 sq. ft. @ \$2.00/sq. ft.).....	\$2,128.00
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Permit Fee.....	\$ 100.00
Total Fees.....	\$2,228.00

2J. FREDERIC A. and NANCY L. LUDWIG, #11-0036, request authorization to construct and backfill a 380-linear foot vinyl bulkhead, aligned a maximum of two (2) feet channelward of the existing bulkhead, construct six 48-foot low profile groins, and install a 32-foot long by 6-foot wide riprap sill, adjacent to property situated along Gardner Creek in Westmoreland County. Staff recommends a royalty of \$760.00 for the filling of 760 square feet of State-owner submerged lands at a rate of \$1.00 per square foot, and a royalty of \$105.00 for the total encroachment of the six groins channelward of mean low water at a rate of \$0.50 per square foot.

Permit Fee.....	\$100.00
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2K. ROBERT REA, ET AL, #11-0156, request authorization to construct a 125-foot long offshore stone breakwater and nourish the beach at property situated along the Chesapeake Bay adjacent to and southwest of the Marina Village subdivision in the Town of Cape Charles, Northampton County. Staff recommends the assessment of a royalty in the amount of \$57.00 for the beach nourishment over 1,140 square feet of State-owned submerged bottom at a rate of \$0.05 per square foot.

Royalty Fees (encroachment 1,140 sq.ft. @ \$0.05/sq. ft.).....	\$ 57.00
Permit Fee.....	\$100.00
Total Fees.....	\$157.00

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3. CONSENT ITEMS: (After-the-fact permit applications with monetary civil charges and triple permit fees that have been agreed upon by both staff and the applicant and need final approval from the Commission).

Tony Watkinson, Chief, Habitat Management, gave the presentations for the following two items. He reviewed both items for the Commission.

3A. ROBERT HART, #08-1387, requests after-the-fact authorization to retain a 5-foot 9-inch wide catwalk at his private use pier adjacent to his property at 18208 Possum Point Road situated along Quantico Creek in Prince William County. The applicant has agreed to the payment of a \$600.00 civil charge and triple permit fees in lieu of further enforcement action.

Commission Meeting

During a scheduled site visit at Mr. Hart’s property to discuss another project, Mr. Hart advised staff that the catwalk he installed on his pier was wider than he had applied for under Joint Permit Application #08-1397. In July of 2008, Mr. Hart submitted a Joint Permit Application to construct a 6-foot wide pier extending 120 feet channelward of mean low water with a 20-foot by 15-foot L-head and a 5-foot wide by 56-foot long L-shaped catwalk. Since the catwalk exceeds the maximum 5-foot width specified in §28.2-1203(A)(5) of the Code of Virginia, Mr. Hart’s pier now exceeds the 400 square feet of decking allowed under the same code section. As constructed, Mr. Hart’s pier-head decking in aggregate is 650 square feet.

Since the pier and catwalk requires a permit, staff requested submittal of an after-the-fact application. The requested application was received on March 1, 2011. Staff has completed a full public interest review and no opposition from the public or State agencies has been received. As such, given the minor degree of environmental impact and minor degree of non-compliance, staff recommended the Commission accept a consent agreement in lieu of any further enforcement action and issue a permit for the pier and catwalk in consideration of the applicant’s agreement to pay a triple permit fee of \$75.00 and a \$600.00 civil charge.

Mr. Watkinson noted that Mr. Hart was not present, but had agreed to the charges.

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

Associate Member Robins moved to approved 3A. Associate Member Tankard seconded the motion. The motion carried, 8-0. The Chair voted yes.

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

3B. KARL FINKELNBURG, #10-1954, requests after-the-fact authorization to retain a second 61-foot long by 5-foot wide, private, noncommercial, timber pier with a 110 square foot L-head, a jet ski davit lift and authorization to install a single, uncovered boat lift on the pier adjacent to Orchard Cove at his property situated near the confluence of Orchard Cove and Nomini Creek in Westmoreland County. The applicant has agreed to the payment of triple permit fees in the amount of \$300.00 in lieu of further enforcement action.

On December 13, 2010, staff received a Joint Permit Application requesting authorization to install 360 linear feet of riprap revetment, and a request to install a boat lift and associated lift piles at an existing 61-foot private pier adjacent to the applicant’s property at the confluence of Orchard Cove and Nomini Creek. At that time, staff noted that there were two piers on the applicant’s property, one on Nomini Creek and one on Orchard

Commission Meeting

Cove. Staff determined that the pier on Nomini Creek was authorized by statute. Mr. Finkelburg was notified that the Orchard Cove pier would required an after-the-fact permit to retain the pier as-built, as well as authorization to install the uncovered boatlift. During a follow-up site inspection with the applicant and his agent, Mr. Finkelburg provided a plat, showing that both of the piers were on the property when he purchased it in 2008. We have been unable to find any authorization for the second pier. No individual or agency has protested the proposed construction

A request for a second pier in a protected cove is not uncommon. As such, given the minor environmental impact and minor degree non-compliance, and the fact that the piers were constructed by the previous owner, staff recommends the Commission approve the pier without the need for a civil charge in lieu of any further enforcement action and issue a permit for the riprap and pier in consideration of the applicant's agreement to pay a triple permit fee of \$300.00.

Commissioner Bowman announced the matter was before the Commission.

Associate Member Laine moved to approve 3B. Associate Member Fox seconded the motion. The motion carried, 8-0. The Chair voted yes.

Permit Fee (Triple).....	\$300.00
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- CHESAPEAKE BAY OYSTER COMPANY, #11-0394**, requests authorization to retain a 24-foot pier extension and three (3) 10-foot by 4-foot by 2-foot fiberglass upweller tanks, and to deploy two (2) 20-foot by 8-foot floating upweller platforms for commercial aquaculture use at an existing commercial pier and boathouse facility on Mill Creek at 253 Locust Point in the Wake area of Middlesex County. The project is protested by numerous residents in the area.

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

Mr. Woodward explained that the Chesapeake Bay Oyster Company, LLC, (CBOC) is a commercial oyster aquaculture operation that had been in business since approximately 2006. They utilized a pier and boathouse facility that is located on a parcel owned by Mr. and Mrs. Spurlock on Mill Creek.

Mr. Woodward further explained that Mr. Irvine Spurlock is a partner in the business and his private residence is located adjacent to the parcel from which the pier and boathouse extend. The Mr. and Mrs. Spurlock also own a third inland parcel that is adjacent to the other lots. Based on staff's review of historic aerial photographs of the area, it appeared that the pier and boathouse facilities had existed since at least 1960, and had not changed

significantly since at least 1968. VMRC assumed the regulatory authority to authorize encroachments over State-owned submerged land in 1962. The existing facilities were located on a separate parcel from the Spurlock residence, adjacent to the site of a commercial wharf that is no longer in existence. The old wharf dated back to at least the 1940's. The structures in question have reportedly been used for seafood and other product loading and offloading at various times since it was constructed. Some of the neighbors argue this point but the age, construction materials, and the site location on a separate parcel adjacent to the commercial wharf all seem to support the statement that the pier had historically supported commercial activities. The structures located over State-owned, subaqueous land included the main pier, a two-slip boathouse, a smaller boatshed, and a building that currently houses a grader/sorter and other equipment. There are additional buildings on the adjacent upland including a cooler for holding oysters prior to transport, and storage for equipment and supplies.

Mr. Woodward said that staff first became aware of the activities at the site by virtue of a complaint received on or about November 12, 2010. Staff's first site visit occurred on November 16, 2010, and staff then contacted Mr. McMinn, the other business partner, to gather information. After a number of visits to the site, and a meeting with the residents of the area that were in opposition to the aquaculture activities at the site, staff ultimately issued a Sworn Complaint dated March 10, 2011, and Notice to Comply dated March 11, 2011. The Notice to Comply directed CBOC to remove a 24-foot pier extension, three fiberglass upweller tanks in the boat shed, and a floating pier section and ramp that had been installed, subsequent to VMRC assuming jurisdiction, without the benefit of permit. As an alternative, the notice directed the submittal of an after-the-fact Joint Permit Application.

Mr. Woodward stated that a Joint Permit Application (JPA) to retain the unauthorized structures was submitted. The JPA was received on March 22, 2011, and staff began the required public interest review. CBOC has voluntarily removed two floating upweller platforms ("FLUPSYs") and the floating pier and ramp section, and currently seeks authorization to retain the pier extension and tanks in the boat shed, and to re-deploy the two FLUPSYs to continue their business operation.

Mr. Woodward noted that CBOC had also provided correspondence describing their aquaculture operation. In general, the company purchases seed oysters and raises them in the upwellers to a size that allows them to be safely transferred to cages for on-bottom grow-out to market size on the company's nearby leased oyster ground. They cull and sort the live oysters by size during the grow-out period, both on the lease and inside the boathouse, with the smaller oysters going back on the lease and the market sized oysters getting packaged and stored in the upland cooler for later shipment. The CBOC's lease is located approximately 1,500 feet east of the pier and boathouse, near the mouth of Mill Creek. The 20.97 acre lease is used to grow the caged oysters in conformance with the VMRC on-bottom shellfish aquaculture regulation (4VAC 20-335-10 et seq.). CBOC

also sells seed oysters to other commercial growers and recreational “gardeners,” and they provide supplies and technical support to such growers, but these activities primarily occur on the adjacent upland property.

Mr. Woodward explained that the project is protested by numerous residents of Locust Point who did not feel the commercial nature of the operation is compatible with their residential neighborhood. They acknowledged that this activity has been on-going since 2006, but stated that it had recently increased to the point where it was no longer acceptable. They believed the pier is, and always had been a private pier and that commercial use of the facility should not be allowed. To date, staff had received eight letters or emails of opposition from landowners, as well as two from J. Rawleigh Simmons, one representing seven of the local residents, and another representing an eighth neighbor.

Mr. Woodward said that Mr. Simmons had also submitted copies of two letters that he sent to Mr. Matt Walker, Zoning Administrator for Middlesex County regarding local zoning issues. The majority of the letters of protest by the neighbors and their attorney, Mr. Simmons, were related to upland zoning issues, and uses of the land-based part of the operation that staff believed was beyond the jurisdiction of the Commission. These concerns included the intensive, commercial nature of the operation, traffic, damage to the private road, security, noise, smell, future growth and expansion of the operation, and reduced property values. The concerns specific to State waters include the increased number of snakes in the water, potential water pollution from washing and grading the oysters, and the navigational hazards presented by the on-bottom cages being used on the lease. Some suggested that the existing public landing near the company’s oyster lease could be used to load/offload rather than doing it at the existing Spurlock facility. A few of those commenting indicated that they were not opposed to aquaculture per se, but felt that a residential community was not the right place for a commercial aquaculture business.

Mr. Woodward added that staff had also recently received five emails in support of the permit request, citing the importance of this type of activity for the overall health of the Bay, the positive economic impact of CBOC on the local economy and the fact that Virginia was a pro-oyster farming state, with a lot of political support.

Mr. Woodward stated that the Virginia Department of Health, Division of Shellfish Sanitation had certified CBOC in a Certificate of Inspection dated November 1, 2010. That certificate was due to expire on September 30, 2011. It was staff’s understanding that the facility was inspected periodically to ensure compliance with that certification. The lease on which the oysters are being grown to market size was currently open for the direct marketing of shellfish. In addition the VDH Office of Environmental Health indicated the project was in compliance with their program.

Mr. Woodward explained that the Fisheries Management Division of the VMRC has issued a 2011 Oyster Aquaculture Product Owner license to Irvine R. Spurlock, Jr. and has issued a 2011 Oyster Aquaculture Harvester license to Douglas K. McMinn and five other individuals associated with CBOC, LLC.

Mr. Woodward said that the Virginia Department of Environmental Quality had indicated that the water quality impacts should be minimal and temporary in nature, and provided VMRC and U. S. Army Corps of Engineers issued the appropriate permits, a Virginia Water Protection Permit would not be required. The U.S. Army Corps of Engineers had informed staff via email that the work qualified for an after-the-fact Nationwide Permit #19.

Mr. Woodward said that in VIMS's Shoreline Permit Application Report, they indicated that the preferred approach for shellfish aquaculture operations was to limit activities over water to water-dependent uses and that shellfish aquaculture Best Management Practices should also be implemented to the greatest extent possible. They further stated that if they had reviewed the 24-foot pier extension, three tanks, and two floating upwellers before they were deployed, they would have predicted minor environmental impacts. They noted the use of both tanks and floating upwellers was a conventional practice for efficiently handling live oysters at different sizes, that the covered boathouses and pier had been shading the water column for several years, that the three fiberglass tanks were located under an existing cover with temporary construction that allowed for removal and that the additional shading from the two floating upwellers was relatively minor. Also, they indicated the boat basin was at a location that received regular tidal flushing and that water quality impacts were not expected from the number of tanks and floats or the proposed stocking density of small oysters less than 0.5 mm in size. They stated the volume and rate of water to be circulated through the proposed gear was not expected to adversely impact shoreline or bottom conditions. Finally, they suggested that other activities that were not inherently water-dependent were best performed in an upland area to limit adverse environmental impacts, such as high-pressure cleaning of gear, solid waste collection, and the repair and storage of materials.

Mr. Woodward explained that the Middlesex County Wetlands Board did not require a permit for the project since there were no proposed direct impacts to the intertidal wetlands under their jurisdiction. The structures currently located over the wetlands had been there for years and the pier extension, upweller tanks and FLUPSYs already were, or would be located channelward of mean low water.

Mr. Woodward stated that the County had not yet formally determined if all of the upland uses were consistent with their zoning ordinance. Mr. Walker, Zoning Administrator, have provided us with a letter dated April 13, 2011, stating that the project site was zoned "low density rural" and he included the applicable ordinance and table of permitted uses. Aquaculture was specifically listed, as a permitted use. In a follow-up telephone conversation, Mr. Walker stated that they would not apply the ordinance to facilities

located channelward of mean low water. He added that if the upweller structures were located on the upland, he would consider that use to be aquaculture.

Mr. Woodward said that while staff was normally reluctant to bring an item to the Commission without a formal endorsement of some sort by the locality involved, the subject permit request was for structures and activities over public, State-owned bottomlands. The Commission was authorized to issue permits for all reasonable uses of State-owned bottomlands, after considering the factors specified in §28.2-1205 of the Code of Virginia. The County had not made a final determination concerning the consistency of the activity with their local zoning ordinance, but they have stated that they did not apply their local zoning to structures or activities that occurred channelward of mean low water on State bottom. They had also indicated that if the upwellers were located on the upland that they would qualify under “aquaculture use” which was a use allowed under the current zoning classification. It was important to note that any decision by the Commission relative to the use of the structures over the water would not preclude the applicants from also having to comply with all applicable laws and local ordinances.

Mr. Woodward said that staff believed that aquaculture was a water-dependent use and was generally a reasonable and permissible use of State-owned bottomland. The traditional commercial oyster industry in Virginia had been in decline for many years and staff believed that oyster aquaculture provided a benefit not only to the industry, commercial markets, and working watermen, but may improve local water quality through the increased filtration capacity in areas where oysters were growing in dense populations associated with aquaculture. Unfortunately, a growth in the new oyster aquaculture industry, after years of decline in the traditional oyster industry, would likely result in conflicts with newer residential waterfront development, and staff was sensitive to these concerns. This issue was the subject of legislation introduced by Senator Norment (SB 1190) during the most recent General Assembly session. The legislation was tabled, however, Delegate Morgan has requested VMRC and the Virginia Department of Agriculture and Consumer Affairs convene a panel of stakeholders and study the issue. Some of the protestants have stated that they did not believe it was appropriate for VMRC to consider the matter prior to completing the requested study. However, staff believed the failure to act on the matter until after the study is complete would deprive the applicants of a timely consideration of their request.

Mr. Woodward explained that staff also believed that the majority of the protestants concerns had to do with local zoning authority and felt that the over-water activities which had been occurring at the site since at least 2006 were a reasonable and permissible use of state bottom. Accordingly, after considering all of the factors in §28.2-1205 of the Code of Virginia, and weighting all the concerns raised by those in opposition, as well as comments received in support of the request, staff recommended after-the-fact approval of the 24-foot pier extension, and the three fiberglass tanks within the boat shed, with a royalty for this portion assessed at triple the normal rate of \$1.50 per square foot in accordance with our schedule, for a total of \$972.00 for the resultant 216 square feet of

after-the-fact encroachment. We further recommend approval for the deployment of the two 20-foot by 8-foot floating upweller FLUPSY platforms requested, assessed at the rate of \$0.05 per square foot for a total of \$16.00, bringing the grand total of the royalty to \$988.00. Staff further recommends triple permit fees of \$75.00, given the after-the-fact nature of the request. We would encourage CBOC to abide with the applicable Best Management Practices and Environmental Code of Practices documents that have been developed for the Virginia Shellfish Culture Industry with funding from the Virginia Coastal Zone Management Program.

Mr. Woodward stated that staff did not believe a civil charge was appropriate in this case given the mitigating and complicating factors involved, but should the Commission feel it was warranted, staff would recommend an amount commensurate with a minimal degree of environmental impact from the pier and tanks, and a minor degree of deviation, given the cooperative nature of the applicants and voluntary removal of the FLUPSYs and other structures around the pier and boathouse prior to and during our review of the application.

Commissioner Bowman asked if the applicant or his representative wished to comment.

James C. Breeden, Attorney for the applicant, was present and his comments are a part of the verbatim record. Mr. Breeden said he had been in practice since 1969 and the oyster industry had declined because of disease. He said it was common practice for the watermen to crab in the summer and oyster in the winter. He said that Virginia was the leader in aquaculture and it would give hope to the industry. He noted that this facility had been active since 2003 not 2006. He noted also that the letter from Matt Walker for the county said this area was designated low density rural and second to rural is residential. He said that the raising crabs and oysters by watermen was done in this area historically and Middlesex County had included it in the comprehensive plan. He said the County was being careful in their determination.

Mr. Breeden said the 1949 map showed a commercial pier and staff had looked at the historical use of the area and structures that existed. He said that the Chesapeake Bay Oyster Company were good stewards of the Chesapeake Bay. He said there was a letter from Kenneth Wayne Williams, former Commission Board member that said he was in favor of the application and was glad to see a rebirth of the oyster industry. He said others that supported it were John Vigliotta, Thomas Kellum, et als, and they urge favorable consideration. He said there was a letter from the Virginia Seafood Council in support of the application being approved. He said that Mike Oesterling was a leader in aquaculture when he was with VIMS who supported it and he helped develop the Best Management Practices Guidelines. He said that Travis Croxton of Rappahannock River Oyster buys these oysters and received national recognition for these oysters. He said they support the CBOC. He said that the Accomack County Board of Supervisors wrote in favor of aquaculture. He added there were many other letters. He stated that Mr. McMinn could give more historical information.

Commissioner Bowman asked for all speakers to stand and then he sworn them all in at once.

Douglas McMinn, Sr. was sworn in and his comments are a part of the verbatim record. Mr. McMinn said that this was a family business. He said he totally agreed with what had been said and explained some of the history of the area, saying that this was his family heritage and in the 20's and 30's the watermen would bring their oysters here.

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

John Vigliotta, Mobjack Bay Seafood, was sworn in and his comments are a part of the verbatim record. Mr. Vigliotta explained that he was an aquaculturist and there was a need to retain these types of facilities. He said his application was heard in 2006 by the Board for his use of cages. He said he had always tried to work with his neighbors. He stated that there was a need for the facilities in this area to continue. He said the concerns of the neighbors can be addressed as there was a need to be concerned with any impacts. He said they need to be able to co-exist and prosper.

Ken Smith, President, Virginia Watermen's Association, was sworn in and his comments are a part of the verbatim record. Mr. Smith stated that CBOC helps the watermen to transition to aquaculture. He said Mr. McMinn had done demonstrations for others showing them what he does. He said this was an asset to the community and watermen. He stated that the Commission should allow this facility to continue.

Jeanette Atkins, Educator in Middlesex County, was sworn in and her comments are a part of the verbatim record. Ms. Atkins said that she was also a chemist. She went on to say that the CBOC meant a lot to the community and students. She said they had provided training for the students on the environment. She added that there were not a lot of jobs in the area and some students work there part-time and some have gone onto college. She stated that the CBOC was a good neighbor.

Frances Croxton, Rappahannock River Oysters, was sworn in and his comments are a part of the verbatim record. Mr. Croxton said he had worked with the CBOC for ten years, purchasing seed and product. He stated that this was the quietest and cleanest operation he had seen. He said there was no smell. He said CBOC was a pure benefit to workers and provided jobs in the area. He said the quality of the product had received international attention. He said it helped the watermen, improved the Bay, and it would be an economic impact to the area if it were to be stopped. He said the zoning was for low density rural and if they were required to put the tanks on the land it would be unsightly. He said the cold room has been there for three decades as well s being a commercial facility for decades.

Peter Nixon, Vice President for the VSC, was sworn in and his comments are a part of the verbatim record. Mr. Nixon explained that he was speaking on behalf of the VSC in support of the CBOC. He said the same thing happened to him when there was residential growth in his area and the complaints started about his use of his property. He said that Delegate Morgan introduced a bill under which he would be grandfathered as an existing operation. He said he contacted other localities who supported what he did. He said that barges were seen around the shoreline and were not permitted. He said the Commission was not looking at the crab shed houses, but they were here now looking at this one and he felt that this was overreaching their authority. He said he supported the operation by CBOC. He noted that the seafood industry continued to lose waterfront to development.

Tom Gallivant, Shooting Point Seafood, was sworn in and his comments are a part of the verbatim record. Mr. Gallivant explained that the facilities in Virginia are leaders in the aquaculture industry. He said the advertisement was for an extension of a commercial pier. He said even in the Commission's opening prayer it was said that the resource was diverse to be used by many people. He said this was a low impact facility on the visibility and it was no eyesore. He said if the protests are considered it would put the other industries in jeopardy and this has been here for ten years. Mr. Gallivan stated that time and money had been spent because of this and he hoped the Commission would send a message and support this facility.

Gerald Negley, Eastern Shore, was sworn in and his comments are a part of the verbatim record. Mr. Negley stated he was in support of the CBOC. He said that they provide education for the public and other industries are concerned that this will impact them. He said it was a beautiful system with no visual impact, good for the water quality, and the impact was good.

Mike Oesterling, retired from VIMS, was sworn in and his comments are a part of the verbatim record. Mr. Oesterling said he had sent in a letter of support. He said they did follow the best management practices for aquaculture. He said he had visited it a number of times and this facility exemplifies the BMP's. He said there is social management here as they are good neighbors. He said it was all kept in good repair and there were no smell or sounds.

Commissioner Bowman asked all those in support to stand for visual impact.

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

James R. Simmons, Attorney in Whitestone, was present and his comments are a part of the verbatim record. Mr. Simmons explained that he represented nine landowners who were in opposition to the application. He said that oyster farming has become the darling of the Bay and that other landowners are not given any consideration or whether it was in

an appropriate location. He said the letters of support set a precedent with the Commission and with other cases that will come. He said that oyster farming was considered a good thing but should not be allowed to operate in just any way. He said a determination needed to be made as to whether this facility was pre-existing. He said the pier had not been used commercially until now. He provided pictures. He said he had an affidavit from an elderly resident who had been here all her life and had knowledge of the area. He explained that historically owners of this property had not used the pier commercially. He said the pier was destroyed in the 1950's. He added that the public landing was used to off load seafood in the 1950's. He said Mr. Reynolds who previously owned the property purchased bigger and bigger boats resulting in the enlargement of the boathouse to accommodate his boats. He said that Mr. Hill was a resident whose pier and boathouse have been impacted by this facility. He said in 1972 the owner had applied for a dredging permit and on the application it stated it was not commercial. He said the U. S. Army Corps of Engineers had said it was for private use. He referenced Code Section 28.2-1205 which says that the Commission must consider impacts to the adjoining property owners. He said the County had said that this was over State bottom so they had no control. He reiterated that this was not a commercial pier.

Commissioner Bowman asked about the effects of this facility.

Mr. Simmons said there was increased traffic, delivery trucks, material stored there causing the neighbor to put a fence up for privacy.

Commissioner Bowman stated that these were all upland problems for the County and the Commission did not want to impede another jurisdiction.

Mr. Simmons stated that this issue was cause between jurisdictions and Middlesex County is pro-oyster farming. He said the County had said it was not in their jurisdiction, but this is a business in a neighborhood. He said the question is whether it was a commercial pier. He said here was a small business that had grown and the growth impacts the neighbors. He said this was an old subdivision and zoning did not address offshore. He said the residents did not want to protest earlier, but now it was too big and now permits exist that didn't. He said now the Commission was asked for approval of a commercial pier when it was not commercial. He said the Commission must either deny this or put conditions on them.

Mr. Dave Bennett, resident two houses down from facility, was sworn in and his comments are a part of the verbatim record. Mr. Bennett showed the Commission on a slide where he lived. He said the video showed that the CBOC operation was not appropriate for a residential area. He said it was the boat house that was in question and he had been there when there was not a floor in it. He noted that VMRC said it was commercial and the residents say that it was not. He said that he believed that aquaculture was good for the Bay. He said the County will not do anything about it. He

said there was a Senate bill that had been tabled in the past General Assembly. He said he felt that VMRC should not decide until the County decided where it stood and with what they want to do.

Associate Member Robins asked that if he was two doors down, how did it impact him. Mr. Bennett said it was the traffic, workers coming all the time, vehicles by their house and unknown, people and the roadway was not for two-way traffic.

Diane Bennett, resident, was sworn in and her comments are a part of the verbatim record. Ms. Bennett stated that she lived 250 feet away and was opposed to the application. She said in this boat basin Mr. Reynolds in 1974 used it for private mooring. She said there were 20 to 30 watermen who contributed to the economics of the area and residential areas provided revenue for the locality, which they need. She said this caused a decline in her property value with a business in the area. She said that aquaculture had just come to the area and most residents had lived there since the 20's and 40's. She said Middlesex did not tax the pier and dock as a commercial use and usually piers and boathouses were taxed as real estate. She asked who is authorized to zone the Middlesex waterfront to support the seafood industry. She suggested zoning districts in the County should be used. She said the locality had not kept up with the changes and needed to protect homeowners. She said aquaculture is defined to be on land. She said the County was not ready to make needed changes for the establishment of aquaculture. She said that Delegate Morgan had recognized a need for change for aquaculture.

James Hall, resident, was sworn in and his comments are a part of the verbatim record. Mr. Hall said his boathouse was on the right and there was only ten feet between the boathouses. He explained that there was a small road for access. He said in his 35 years living here, there was no business there and he objected to the application. He said there was waste from washing cages and equipment going into the water. He said he was not opposed to aquaculture or watermen.

Ralph Jones, resident, was sworn in and his comments are a part of the verbatim record. Mr. Jones said he could provide historical information as he had lived at Locust Point since he was five years old. He provided historical information as to Mr. Reynolds living next to his family property and that the pier had never been used for commercial purposes. He said he had never seen a commercial operation there and he felt it had not been proven that it was an existing commercial facility. He stated that this operation started in 2006. He said he was pro seafood and this was a good business, but this location was wrong for a business.

Mr. Simmons offered the affidavit for the record.

Associate Member Plumlee asked if they had any suggestions for time of operation. Mr. Simmons said no they did not as his clients do not like it. He suggested he could speak to his clients.

Commissioner Bowman asked Mr. Breeden for his rebuttal.

Mr. Breeden said that their hours already were limited and the sorter was only outside for demonstration purposes. He said they follow the best management practices. He said the noise from this sorter was 100 feet away and less than the noise that results from the use of a lawn mower. He said the workers commute in one vehicle as their vehicles are parked elsewhere two miles away. He said the staff had looked back and decided that it had been commercial for a long time. He said they even have people come there and give compliments on the operation. He said they request approval.

Mr. Simmons said that his clients had agreed to meet and discuss the matter.

Commissioner Bowman said this matter was ready for discussion or action.

Associate Member Plumlee said this area was not improperly zoned. He said this activity had been done for a number of years and had expanded in the last several years. He said they had limited hours, truck and vehicle usage, operations on water and the equipment was kept in a building.

Associate Member Tankard said protestants had talked about issues for upland use and this was not in the purview of VMRC. He noted that the applicant had done something about the traffic hours, they follow the best management practices, they are a leader in the industry, and Code Section 28.2-1205 does address the use of land for propagation of shellfish. He said there was good water here and good spat was provided for others. He said it was in the right place and the protests were regarding upland uses.

Associate Member Robins said for the history of the site there was conflicting comments by the speakers on the use of the pier. He said he felt that the impacts caused minimal detriments. He noted that the VIMS report said the impacts were minimal. He said the upwellers were important to the operation. He said he sympathized with the protestants, but the most significant impacts were on the upland. He said that Mr. Vigliotta whose operation is also close to a residential area stated that they must be sensitive to the impacts to others. He said CBOC had addressed the noise issue by keeping the equipment inside. He said the Commission cannot impose any requirements on this, but he suggested they needed to double efforts to reduce the noise. He said he felt that in accordance with Code Section 28.2-1205 this project's benefits outweighed the detriments.

David Grandis, Assistant Attorney General and VMRC Counsel, explained that this was not a local zoning issue and the Commission’s authority over state-owned bottom was in Code Sections 28.2-1204 and 28.2-1205. He said that it was Middlesex County’s choice not to exercise its authority, but the business would be bound to comply, if they did.

Associate Member Plumlee asked if the Commission could make the condition a part of the permit. Mr. Grandis stated that it was the applicant who could choose to impose it as the Commission could only restrict the uses over state-owned bottom.

Associate Member Fox explained that some of the equipment, such as the FLUPSY upwellers depended on water when in use. He added the sorter was the major source of noise.

Commissioner Bowman said that the law already exists in Code Sections 28.2-1204 and 28.2-1205 and in Code Section 28.2-1205(4) it says to consider adjacent or nearby property owners. He said the letter from the County said it was zoned as low density rural, which included aquaculture.

Commissioner Bowman asked for a motion from the Board.

Associate Member Holland moved to accept the staff recommendation with a time of operation period of 8 to 4 and that the sorter machine would be used only inside the building. Commissioner Bowman asked for a second to the motion. Associate Member Fox noted that the FLUPSY needed to operate 24 hours per day. Associate Member Holland said his motion only applied to the sorter machine. Associate Member Laine seconded the motion. The motion carried, 8-0. The Chair voted yes.

Royalty Fees (encroachment 216 sq. ft. @ \$4.50/sq. ft. (triple)).....	\$972.00
Royalty Fees (encroachment 320 sq. ft. @ \$0.05/sq. ft.).....	\$ 16.00
Permit Fee (Triple).....	\$ 75.00
Total Fees.....	\$988.00

* * * * *

4. CLOSED MEETING FOR CONSULTATION WITH, OR BRIEFING BY, COUNSEL.

Associate Member Robins moved that the meeting be recessed and the Commission immediately reconvene in closed meeting for the purposes of consultation with legal counsel and briefings by staff members pertaining to actual or probable litigation, or other specific legal matters requiring legal advice by counsel as permitted by

Subsection (A), Paragraph (7) of § 2.2-3711 of the Code of Virginia, pertaining to item(s):

Clark versus VMRC

Associate Member Holland seconded the motion. The motion carried, 8-0. The Chair voted yes.

Associate Member Robins moved for the following:

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

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

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

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

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

AYES: Bowden, Bowman, Fox, Holland, Laine, Plumlee, Robins, and Tankard.

NAYS: NONE

ABSENT DURING VOTE: SCHICK

ABSENT DURING ALL OR PART OF CLOSED MEETING: SCHICK

Motion carried, 8-0. The Chair voted yes.

Katherine Leonard, Recording Secretary

The Commission broke for lunch at approximately 12:20 p.m. and reconvened the meeting at approximately 1 p.m.

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6. **OLD DOMINION ELECTRIC COOPERATIVE, #11-0233**, requests authorization to temporarily deploy, for up to 26 weeks, three buoys having a support frame containing test screens for biofouling exposure testing approximately 1,300 channelward of mean low water near the end of Cobham Wharf Road in the James River in Surry County at the tentative location of a potential intake pipe for the proposed Cypress Creek Power Station. The project is protested by numerous residents of Surry County.

Commissioner Bowman recused himself from this hearing because of personal conflicts.

Associate Member Holland was acting chair.

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

Mr. Stagg explained that the proposed project was located approximately 1,300 feet channelward of mean low water, within the James River, at the end of Cobham Wharf Road near the end of the remnants of an old steamboat wharf site in Surry County.

Mr. Stagg explained further that the applicant was seeking to temporarily deploy three buoys, each having support frames with attached test screens for bio-fouling testing. These proposed screens would simulate the type of screen that would be required for any future intake pipe that Old Dominion Electric Cooperative (ODEC) would utilize for a proposed coal-fired electric generation facility within the Town of Dendron in Surry County. No application for any intake or outfall pipes related to the plant had been submitted by ODEC. This application only sought to place small test screen samples within the river to determine what types of screen coating may best address anticipated bio-fouling at this location. This site was currently the preferred intake pipe location for the facility being considered. The buoys would be placed at water depths of approximately 12 feet mean low water, with the actual test screens being placed at a depth of approximately 8.5 feet, mean low water. Each screen would have a 1-millimeter slot width. The applicant had noted that this depth was used in consultation with the U. S. Coast Guard to allow for a minimum of seven feet of clearance during low tide conditions. The proposed site was also approximately 4,000 feet from the shipping channel. The applicant proposed to retrieve the test screens at approximately five-week intervals for study and then redeployed for a total of 5 retrieval events. The study was tentatively set to end in late September or early October, depending on the initial deployment.

Mr. Stagg said that staff had received five letters of objection to the project. Mr. and Mrs. James M. Seay stated they objected to the installation of any intake pipe at this location and any associated upland structures required for the intake pipe. They anticipated adverse impacts to wildlife and recreational use of the waterway, again in association with an actual intake pipe. The Seays also noted errors in the adjacent property owner information in the original application.

Mr. Stagg stated that Ms. Vicki M. Roach objected to the proposed coal plant and believed that no permits should be allowed for activities within the James River until such time as the plant had received approval to be constructed. She also noted that the James River should be protected from any additional pollution. Staff also received a letter of objection from Ms. Rowlinda D. Copeland. She noted that a lawsuit had been filed related to other approvals for the plant and that to consider any permit application related to the plant was a waste of the taxpayers' money. Ms. Donna Hines stated her objections to any disturbance to wildlife and the citizens of Surry County.

Mr. Stagg noted that staff received a letter of objection from Ms. Helen Cooke Eggleston, an adjacent property owner, stating multiple concerns. Ms. Eggleston questioned whether the test screen coatings will have adverse impacts on marine life. She believed the test system looked too flimsy and fragile to sit in the James River for any extended period of time and that the system did not appear to mimic any future intake pipe conditions. She also noted that the original application did not correctly identify the adjoining property owners.

Mr. Stagg said that the staff had responded to all the protestants reminding them that the application was only for the placement of sample screens for testing purposes and that no application had yet been received for any intake or outfall pipes that may be needed for the proposed facility. The ongoing lawsuit related to local approvals and was not directly related to this request. Additionally, staff received additional information from the applicant, soon after the initial application was received, indicating an error in the adjoining property owner information, and they provided the correct adjoining property information at that time.

Mr. Stagg stated that the Department of Conservation and Recreation, the Department of Environmental Quality, and the Department of Game and Inland Fisheries had commented and did not object to the project. The U. S. Coast Guard reviewed the project and requested the applicant mark the buoys with a yellow slow flashing light pursuant to their Private Aids to Navigation application; CG2254. The U.S. Army Corps of Engineers had indicated the project qualified for their Nationwide Permit #5.

Mr. Stagg explained that while staff understood the protestants concerns about any future coal-fired electrical generation facility in Surry County and the potential installation of an intake pipe within the James River that was not the subject of the current request by the applicant. Additionally, the proposed buoy locations were immediately offshore of the

derelict pilings of the old wharf, would not be located near any marked channel, and would be removed within a matter of months after deployment. They had also received approval from both the Army Corps of Engineers and the Coast Guard, and no other State agencies had objected.

Mr. Stagg stated that based upon the foregoing, staff believed the impacts related to the project should be minimal. Accordingly, after evaluating the merits of the project against the concerns expressed by those in opposition, and after considering all the factors contained in 28.2-1205(A) of the Code of Virginia, staff recommended approval of the project with the condition that the applicant light the buoys, as required by the U. S. Coast Guard.

David Falk, representative for the applicant, was sworn in and his comments are a part of the verbatim record. Mr. Falk stated that an Environmental Impact Statement was being done in coordination with the Corps of Engineers. He stated also that the permitting process had started for the Power Plant in Surry. He said it would be near Dendron or near the site in Sussex County. He said this was for testing bio-fouling on screens for the outfall that could possibly be used. He said that bio-fouling usually affects the intake of the pipe. He explained that the study would be in only three not four sites. He noted that the screens to be used would be copper nickel alloy, water based epoxy coated, and control-untreated steel. He explained for the Commission the steps of the testing which would be done over a 26-week period. He added that no impacts were expected to native species of marine life.

Associate Member Holland asked for questions.

Associate Member Plumlee asked what would the test show. He asked would it check the quality of the material or life expectancy in the environment. Mr. Falk stated this was for the intake and the mesh would protect wildlife and they wanted to know the efficiency impacts. Associate Member Plumlee asked if they wanted to see what would grow on it or would be caught. Mr. Falk responded yes. Associate Member Plumlee asked would all plant designs require a direct intake pipe into the James River. Mr. Falk responded yes and the pipe would be trenched; it would only be the screen sticking up in the water.

Associate Member Holland asked if anyone in support wished to comment.

Robert Hall, resident, was sworn in and his comments are a part of the verbatim record. Mr. Hall announced he was not opposed. He said he fished there, but there was no recreational boating. He said there were no navigational concerns and the buoy lights were there to keep people out.

Associate Member Holland reminded the speakers to keep their comments to the pre testing of the screens, as this was not the project application for the intake pipe.

Misti Furr, Dendron resident, was sworn in and her comments are a part of the verbatim record. Ms. Furr stated that the company had not completed the application. She said they had applied to the local zoning and it was being contested in court. She added that it had not been properly advertised for public hearing. She said she could see that there were changes in the design and anchoring. She said she was concerned about the chemical agents to be used to prevent bio-fouling; the screens being used for testing; and that it might endanger to the protected species. She noted that the James River was the only river known for spawning sturgeon.

Kelly Place, Director of Research and Policy for the Virginia Watermen's Association was sworn in and his comments are a part of the verbatim record. Mr. Place said that he was concerned with the incomplete and misleading application by ODEC. He said he was surprised that the staff had accepted the application and the new revised drawing. He said the structure to be used will hold up with the currents. He noted that cinder blocks should not be used as they were inadequate with the currents in the area. He said he found out that three of the sites need to be reapplied for since there are new revised drawings, prepared by an Engineering firm in Kansas. He said this would be a lot of bio-fouling when compared to the King William Reservoir. He said it was not well provided and explained because it did not identify what bio-fouling species there would be. He said he felt the structure as designed would become inappropriate or broken and if it were to fall down it would make it a hazard. He said the chemicals of water would not be the same as for the intake and the temperature for the intake would be different. He said the structure's engineering concept which was presented would not be suitable for the James River. He explained that after the testing they would be back for further testing and it was pending litigation because it was not properly noticed for the Dendron public hearing. He stated the results of the testing would be tainted. He added that the Atlantic Sturgeon was being considered for an endangered species. He pointed out that the proposed length of the experiment was not long enough to see the reactions of the material.

Mr. Place stated that they needed to be required to reapply as the April to September experimental time causes quite a few major concerns.

Associate Member Holland requested that he present all his comments in writing to be made a part of the record.

Mike Eggleston, protestant, was sworn in and his comments are a part of the verbatim record. Mr. Eggleston explained that conditions for the testing would not be real world conditions and the bio-fouling would block the screen so the affluent could be released.

Associate Member Holland reiterated that the application was for the buoy not the power plant.

Helen Eggleston, protestant, was sworn in and her comments are a part of the verbatim record. Ms. Eggleston said there was a letter explaining her concerns in the record. She

said she wished to reiterate those comments along with Kelly Place's and all others' concerns. She said her main concern was if there was to be used any bio-fouling chemical agents to be used that would adversely impact the marine species. She noted that Mr. Hall was wrong about the recreational use, because jet skiing did occur in the area.

Ronald Perry, protestant, was sworn in and his comments are a part of the verbatim record. Mr. Perry said he was a resident of Newport News downstream from the applicant. He stated he was against the power plant and today was one tentacle of the final project. He said he was opposed to all the impacts. He noted that the Chesapeake Bay Foundation was opposed as by other individuals in nearby localities.

Mr. Falk in his rebuttal said that the late addition was for an anchor was submitted based upon a recommendation by their contractor who was recently hired. Associate Member Holland asked for questions.

Associate Member Fox asked if the structure could be overturned. Mr. Falk said the cinderblocks would be checked when they came out to the site every five weeks.

Associate Member Plumlee asked if the testing was reliable as there were concerns that it was futile to do the test and it would create water hazards. Mr. Falk said they had not done it, but the contractor has. He said after the deployment they will go back in a week to check it. He said they were doing a study with six by six screens. Associate Member Plumlee said if it were to collapse, would not this be a hazard for other uses. Mr. Falk said it was anchored and was not a hazard.

Associate Member Tankard asked if any chemicals would be applied at any time during the testing. Mr. Falk said no only.

Associate Member Holland asked for further questions and there none.

Associate Member Tankard moved to accept the staff recommendation. Associate Member Robins seconded the motion. He stated he appreciated the concerns of the protestors, related to any future intake structure at this site, but now it was only a test. He said that later the EIS will come into the process of a proposed project. The motion carried, 7-0. Commissioner Bowman recused himself from this hearing for personal conflicts.

Permit Fee.....	\$100.00
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7. **HARMONY INVESTMENTS and SUNSET BAY, LLC, #10-1864**, request authorization to construct and backfill 241 linear feet of bulkhead aligned a maximum of two feet channelward of a deteriorating bulkhead; install with backfill approximately 158 linear feet of bulkhead across the entrances to two (2) man-made boat basins and install 360 linear feet of floating dock/wharf adjacent to the above proposed bulkhead situated along Chincoteague Channel at 4001 Main Street (the Chincoteague Inn location) in the Town of Chincoteague. The project is protested by an adjacent property owner.

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

Commissioner Bowman returned to the meeting and resumed the duties of chairman.

Associate Member Plumlee recused himself from this hearing.

Mr. Badger explained that the project is located in the Town of Chincoteague, 800 feet southwest of the old drawbridge and 800 feet northeast of the Coast Guard Station at the Chincoteague Inn property. The site consisted of an existing restaurant with a man-made boat basin on the north and a smaller man-made boat basin just south of the restaurant. The southern portion of the property was an old boat railway with the remains of old bulkheads and piers which were still present.

Mr. Badger said that Harmony Investments was in the process of purchasing the property from Sunset Bay, LLC. The development would include a 120-bed hotel with a conference room, fitness center, pool and a restaurant for guests only. The floating dock/wharf would allow recreational boat mooring and boating access to the hotel and its amenities; and no overnight mooring was proposed. The Town zoning ordinance permits the operation of a hotel on the property.

Mr. Badger stated that Sunset Bay, LLC received a permit from VMRC (#07-1279) in 2007 to install a new bulkhead aligned a maximum of two (2) feet channelward of a deteriorating bulkhead around the restaurant and to install a bulkhead across the entrance of the northern man-made boat basin. Since the boat basin was man-made (out of upland property) VMRC did not take jurisdiction for the filling of the basin.

Mr. Badger explained that the original 2007 application proposed a bulkhead across the mouth of the northern boat basin angling out from the adjacent property's bulkhead to the northwest corner of the restaurant's bulkhead (identical to the proposed project). This would have filled 945 square feet of State- owned submerged lands and staff expressed concerns with the original alignment. The applicant responded by realigning the proposed bulkhead so that it would be a straight line continuance of the adjacent property's bulkhead across the mouth. With the new revised alignment, only the bulkhead and a small amount of backfill fell within VMRC's jurisdiction. Accordingly, that permit was

administratively issued. Although the bulkhead had not been installed, Sunset Bay, LLC still maintained an active permit for the above project.

Mr. Badger said that the project was being protested by Ms. Danuta Brzezinska who owed a home along a small, mostly intertidal cove on the south side of the proposed project. Ms. Brzezinska had concerns that the bulkheading would compromise the vegetated wetlands and wildlife along the cove. She also had concerns that the bulkheading, that would now surround the small cove, may funnel storm tides onto her property causing her property to flood.

Mr. Badger stated that staff did have concerns with the location of the bulkhead across the northern man-made boat basin. Staff questioned the need to fill an additional 945 square feet of state-owned submerged lands so that the applicant could locate the hotel closer to the water. The Town of Chincoteague did not have a zoning ordinance requirement that addressed the distance a structure must be set-back from the water, only that the structure could not be constructed over any bulkhead tiebacks.

Mr. Badger further stated that in regard to this specific application, VIMS stated that filling in wetlands and subaqueous areas for the singular purpose of creating waterfront upland property was generally undesirable. This concern was expressed by VIMS previously during the earlier review of the re-development of this parcel (VMRC #07-1279). They also stated that locating new buildings only in the available existing upland area was the preferred approach for the re-development of this parcel. VIMS recommended reducing the development footprint in wetlands and subaqueous land.

Mr. Badger noted that in an e-mail dated April 1, 2011, the Department of Game and Inland Fisheries documented the existence of Federal endangered and State-threatened species in the project area. However, based on the scope and location of the proposed work, they did not anticipate the project to result in adverse impacts upon those species and resources.

Mr. Badger said that the Health Department stated that the project was located adjacent to condemned shellfish waters, and the development alone would not cause an increase in the size or type of the existing closure. However, if the plan would ultimately involve a proposal for a discharge of treated sewage in the waters adjacent to the site, a prohibited area would be required.

Mr. Badger noted that the Accomack County Wetlands Board approved the wetlands portion of this project on January 27, 2011, with the stipulation that a mitigation plan be submitted prior to issuance of the wetlands permit and the impacts to be verified.

Mr. Badger also noted that no other State agencies had submitted any comments on the project.

Mr. Badger explained that although staff was sympathetic towards Ms. Brzezinska's concerns, only the portion of the project that was channelward of mean low water fell within VMRC's jurisdiction. Ms. Brzezinska's concerns were related to the small intertidal cove, above mean low water and therefore outside of VMRC jurisdiction. That portion of the project, however, was addressed and approved by the Accomack County Wetlands Board at their January 27, 2011 meeting.

Mr. Badger noted that the VMRC Subaqueous Guidelines state that the Commission would consider the water-dependency of a project and alternatives for reducing any anticipated adverse impacts. The Guidelines also stated that the filling of State-owned subaqueous land for the purpose of reclaiming or creating highland property was generally not permitted. If special circumstances warranted such filling, an appropriate royalty would be assessed on a square foot basis.

Mr. Badger said that Sunset Bay, LLC, in their original application (VMRC, #07-1279) applied for the same bulkhead alignment (across the mouth of the northern boat basin) as proposed in this application. Staff could not support the original alignment across the northern boat basin, since it would have filled 945 square feet of State-owned submerged lands for a non water-dependent use. As previously stated, the applicant realigned the bulkhead so that only the bulkhead and a small amount of backfill fell within VMRC's jurisdiction and a permit was administratively issued. Staff's position had not changed.

Mr. Badger stated therefore, after evaluating 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 approval of the project, provided the proposed bulkhead section that crossed the northern man-made boat basin was modified to show the alignment as permitted in their existing (#07-1279) permit. Staff also recommended the floating dock/wharf be reconfigured to follow the bulkhead across the northern basin and that the applicant provide revised drawings showing the above modifications.

Mr. Badger said that staff recommended a one-time standard royalty assessment for the upland fill based on a rate of \$3.00 per square foot for the upland creation (commercial bulkhead and fill) and \$1.00 per square foot for the floating dock/wharf encroachment. In calculating the royalty for the current application, staff recommended the subtraction of the \$1,560.00 already paid by Sunset Bay LLC for the filling of 520 square feet of State-owned submerged land (Permit #07-1279).

Commissioner Bowman asked if the applicant or their representative wished to comment. Brian Owen, agent for the applicant, was sworn in and his comments are a part of the verbatim record. Mr. Owen stated that an updated narrative was forwarded to the staff. He noted that there were site constraints on the property and they had just planned for the hotel and an appropriate amount of space for parking, as it was required by the local zoning law. He said the layout of the hotel would provide 120 beds. He stated that there was a need for increased hospitality facilities in Chincoteague. He added they would be

removing derelict structures with this project. He said the plans included the creation of a small area to plant *Spartina alterniflora* to enhance the area and not be a detriment. He said they could not see where this would be a detriment to the protestant’s property and cause flooding.

Commissioner Bowman asked for questions.

Associate Member Fox asked if the triangular portion, which was 945 sq. ft., had been considered for mitigation. Mr. Owen said the Nature Conservancy, VMRC, and the Corps accepted mitigation for a trust fund for this site.

Associate Member Bowden stated that the Nature Conservancy does not own this area and he asked where the mitigation was. Mr. Owens said the specifics of the mitigation would be decided when they receive the funds, which could be oysters or SAV. Associate Member Bowden asked if this would be a debris trap. Mr. Owens stated that there was moderate debris and the potential for it being a trap would be a maintenance concern.

Commissioner Bowman explained that a mitigation project should be in the vicinity of the project to have immediate impact to the area impacted and that staff still recommended not filling the 945 sq. ft.

Associate Member Fox stated the 945 sq. ft. use was not water dependent.

Commissioner Bowman asked if anyone in support wished to comment.

Glen Hampton, attorney for the real estate purchase, was present and his comments are a part of the verbatim record. Mr. Hampton stated that the triangular area was the only issue and if removed from the project the small area would not impact the project.

Commissioner Bowman asked for those in opposition who wished to comment. There were none.

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

Associate Member Holland moved to accept the staff recommendation. Associate Member Robins seconded the motion. The motion carried, 7-0. Associate Member Plumlee recused himself from the hearing, because of business conflicts.

Royalty Fees (filling 826 sq. ft. @\$3.00/sq. ft.).....	\$2,478.00
Royalty Fees (encroachment 3,790 sq. ft.	

@ \$1.00/sq. ft.).....	\$3,790.00
Minus Royalty paid by Sunset Bay LLC, 2007	\$1,560.00
Permit Fee.....	\$ 100.00
Total Fees.....	\$4,808.00

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- 8. CHRISTOPHER WILLIAMS and TIMOTHY CURRAN, #11-0317**, request authorization to add stone to three (3) existing breakwaters to increase their height and width and to join two (2) of the breakwaters to create a single 93-foot long by 22-foot wide breakwater, and to construct a 54-foot long riprap groin and place 420 cubic yards of sand, as beach nourishment, adjacent to their property situated along Purtan Bay, a tributary of the York River at 6865, 6871, and 6877 Riverview Park Circle in Gloucester County. Both Coastal Primary Sand Dunes and Beaches and Subaqueous Lands permits are required.

Chip Neikirk, Deputy Chief, Habitat Management, gave the presentation with slides. His comments are a part of the verbatim record.

Mr. Neikirk explained that the project site consists of four (4) properties located in the Riverview Park subdivision in Gloucester County. Three (3) of the lots are owned by Christopher C. and Kimberly F. Williams and one lot is owned by Timothy and Jeannie Marie Curran. The four (4) lots total approximately 165 linear feet of shoreline along Purtan Bay, an embayment along the York River. The shoreline consisted of a sandy beach that was currently protected by three (3) small breakwaters and two timber groins located under the two existing private piers. There are three (3) homes located on the properties. A retaining wall was located along a portion of the backshore of the existing beach and the property slopes gently upward to the homes.

Mr. Neikirk said that the applicants were seeking authorization to add stone to the three (3) existing breakwaters to increase their height and width. Two of the small breakwaters would be joined to create a single 93-foot long breakwater with a finished height of approximately 2.5 feet above mean high water. They also proposed to construct a new 54-foot long low-profile riprap groin extending 43 feet channelward of mean high water. Four-hundred and twenty (420) cubic yards of sand is proposed to be placed landward of the breakwaters, as beach nourishment.

Mr. Neikirk stated that there was an existing riprap revetment along the shoreline of the downstream adjoining property owner. The upstream neighboring shoreline consisted of a sandy beach and marsh and did not currently have any shoreline structures along its length. During a site visit conducted March 17, 2011, staff noted that the beach elevation was reduced and a scarp along the backshore of the beach was beginning to expose tree roots. The sheeting of the timber groins under the pier was no longer reaching the sand.

Mr. Neikirk said that the proposed structures would impact approximately 170 square feet of jurisdictional beach and approximately 1,740 square feet of State-owned submerged land. The beach nourishment would impact 3,650 square feet of beach area and approximately 1,850 square feet of submerged land. Gloucester County had not yet adopted the Coastal Primary Sand Dunes and Beaches ordinance which was made available to them by virtue of Code changes that became effective on July 1, 2008. As a result, the Commission was charged with acting as the local dunes and beaches board pursuant to Chapter 14, Subtitle III, of Title 28.2 of the Code for those portions of the project involving the jurisdictional beach area. The intertidal portion of the beach nourishment was exempt under the Coastal Primary Sand Dunes and Beaches ordinance.

Mr. Neikirk noted that in the VIMS (Center for Coastal Resources Management) report dated April 7, 2011, they stated that the intent of the project was not well defined and that there did not appear to be an erosion problem at the site. They questioned the need for the proposed terminal groin and stated that it may increase erosion on the neighboring property. They recommended maintaining the existing structures and adding beach nourishment when necessary.

Mr. Neikirk stated that staff discussed the project with Mr. Scott Hardaway, Director of the Shoreline Studies Program at VIMS. Mr. Hardaway believed joining the two breakwaters was a good idea to address erosion at the site. Mr. Hardaway and staff also discussed the terminal groin feature and he believes the low-profile design of the groin should minimize impacts on the adjoining property.

Mr. Neikirk noted that no other agencies commented on the application and no objections were received in response to the public notice and the notification of the adjoining property owners.

Mr. Neikirk said that staff believed the breakwaters were assisting in maintaining the beach along these properties and staff believed the proposed improvements to the breakwaters would increase their effectiveness. Staff understood the concern expressed by the VIMS Center for Coastal Resources Management regarding the terminal groin feature but believed the low profile design should minimize impacts on adjoining properties. Additionally, the neighbor did not object to the construction of the groin. The two timber groins located under the piers were no longer serving to trap sand and the breakwaters should make them obsolete. Accordingly, staff believed the timber groins should be removed before they deteriorate further and become hazardous.

Mr. Neikirk said after evaluating the merits of the project, and after considering all of the factors contained in §28.2-1403(10)(B) and §28.2-1205(A) of the Code of Virginia, staff recommended approval of the project with a condition that the two timber groins must be removed prior to the construction of the new groin. Also, staff recommended the assessment of a royalty in the amount of \$92.50 for the placement of the beach

nourishment material on 1,850 square feet of State-owned submerged land at a rate of \$0.05 per square foot.

Commissioner Bowman asked if the applicant or representative were present.

Craig Palubinski, agent for the applicant, was sworn in and his comments are a part of the verbatim record. Mr. Palubinski stated that the breakwaters are low and they propose to raise them from 1 to 1 ½ foot to 2 to 2 ½ foot so they will match the existing breakwater and make it all one. He said that with the sill they want to raise it to the height of the existing rock revetment at the channel end so as not to impact the wetlands and keep the water from washing behind the sill. He explained the groin is to block sand from going behind it to maintain the system because the sand will bypass it and continue up the shore.

Commissioner Bowman asked if anyone was present in support of the project. Opposed? There were none. He announced the matter was before the Commission discussion or action.

Associate Member Robins moved to accept the staff recommendation. Associate Member Tankard seconded the motion. The motion carried, 8-0. The Chair voted yes.

Royalty Fees (fill 1,850 sq. ft. @ \$0.05/sq ft.).....	\$92.50
Permit Fee.....	\$100.00
Total Fees.....	\$192.50

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9. PUBLIC COMMENTS.

Ellis W. James – Mr. Ellis said he wanted to call the attention of the Commission to Harrisburg, Pennsylvania where hydrofracturing was being used. He said that most of this was under the authority of the Department of Environmental Quality. He added also that VMRC should be aware of an occurrence in Pennsylvania and the impact of ingredients that had gone into the rivers and into the Chesapeake Bay. He said that VMRC and VIMS should be watching these activities.

Chincoteague – Black Narrows Bridge Relocation

Associate Member Bowden explained that when the bridge was relocated as well as the installation of new power lines, they failed to remove the old power line security dolphins when they removed the poles. He said since this was no longer an easement they must be

removed. He said the Town of Chincoteague did not have the authority to make them remove them.

Commissioner Bowman asked for staff comments.

Tony Watkinson, Chief, Habitat Management, said that it seems that if the poles were removed it would be appropriate for the dolphins to be removed as well.

Hank Badger, Environmental Engineer, Sr., said that the power company had contacted VMRC staff and they had been told to remove them. He said staff thought this had been done when they removed the bridge.

Associate Member Bowden said he had heard that the U. S. Coast Guard had determined them to be a hazard.

Mr. Watkinson stated that staff would make contact with them to request that all derelict structures and hazards to navigation be removed from near the Black Narrows Bridge in Chincoteague.

No action by the Board - to be handled administratively by Habitat Management staff.

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10. PUBLIC HEARING: Consideration of proposed amendment to Regulation 4VAC20-620-10 et seq., "Pertaining to Summer Flounder" to adjust the offloading time. The amendment was adopted as an emergency regulation on March 29, 2011.

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

Mr. Grist explained that an emergency regulation was passed at the March Commission meeting to change the unlawful time period for offloading summer flounder from 6 p.m. to 7 a.m. to 9 p.m. to 7 a.m. He said the public notice for this hearing was advertised as required by Code and a copy of the notice is in the record. He said this was a public hearing today to make this time change permanent .

Commissioner Bowman opened the public hearing and asked if anyone was present to comment, pro or con, on this matter. There were none. He closed the public hearing and asked for action by the Board.

Associate Member Holland moved to accept staff recommendation. Associate Member Bowden seconded the motion. The motion carried, 7-0. Associate Member Laine was absent during this hearing. The Chair voted yes.

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- 11. PUBLIC HEARING:** Proposed amendments to Regulation 4VAC20-900-10 et seq., "Pertaining to Horseshoe Crab" to establish the 2011 harvest quota, trip limits and triggers, gear-based quotas, and reporting requirements.

Associate Member Robins recused himself from this hearing because of his involvement in the horseshoe crab industry.

Alicia Nelson, Fisheries Management Specialist, gave the presentation and her comments are a part of the verbatim record. She explained that a public hearing had been advertised for this meeting and staff had not received any public comments.

Ms. Nelson explained that there were three tiers of horseshoe crab harvesters in Virginia: those with an Endorsement License, who may land up to 5,000 crabs per day; those with a Restricted Endorsement License, who may land up to 2,000 crabs per day; and those who hold a bycatch permit who may land up to 500 crabs per day. When it is projected that 50% of the annual commercial quota has been harvested, the landing limits for these same licenses and permit are lowered to one-half of the respective daily limit.

Ms. Nelson stated that on August 17, 2009, the horseshoe crab fishery in Virginia was closed. This was the first year that the commercial quota was exceeded since the ASMFC Addendum IV was adopted in 2006 by the Commission. The 2009 overage was tallied to be 15,327 so the 2010 quota was adjusted to 137,168 crabs to pay back the overage. Once the 2009 harvest data was finalized, the overage was discovered to be 35,051 resulting in an additional 19,724 crabs to be paid back, which would come out of the 2011 annual commercial quota.

Ms. Nelson explained that in 2010 the season had to be closed on June 28, 2010. The landings for 2010 totaled 139,006 crabs resulting in 1,838 crabs harvested over the quota. This added more to the overage payback that would impact the 2011 quota. After the reductions were made the 2011 commercial quota is 130,933 crabs.

Ms. Nelson noted that staff met with industry representatives at two meetings, March 8 and 28, 2011. Based on the discussions in the two meetings, the following recommendations were proposed by staff:

- a) Reduce the 2011 harvest quota to 130,933 horseshoe crabs;
- b) Require that all horseshoe crab harvesters call in daily harvest amounts;

- c) Reduce initial landing limits for both the restricted and unrestricted horseshoe crab endorsement licenses by 50%;
- d) Adjust the landing limit triggers from 50% to 80%;
- e) Initiate license and permit moratoria for new entrants;
- f) Establish a control date of December 31, 2010, to serve as a basis for the future development of horseshoe crab regulations;
- g) Sub-allocate the annual quota by gear types, as:
 - a. 42% of annual quota for dredge gears,
 - b. 13% of annual quota for trawl gears,
 - c. 23% of annual quota for hand harvester licensees,
 - d. 22% of annual quota for pound net and other gears.

Commissioner Bowman opened the public hearing and asked if anyone was present to comment, either pro or con.

Eric Mathews, commercial waterman, was present and his comments are a part of the verbatim record. Mr. Mathews said that he suggested that instead of 500 horseshoe crabs per boat that it be changed to 500 per card per person for the daily limit of horseshoe crabs.

Commissioner Bowman asked the staff to comment. Joe Grist, Head, Plans and Statistics stated that staff would agree to this, but recommended that a vessel limit of 1,000 horseshoe crabs be added. He noted that a public hearing might need to be advertised for the May meeting.

Commissioner Bowman asked if this would be less restrictive. Mr. Grist stated that would be up to the Commission.

Commissioner Bowman stated the matter was before the Commission.

Associate Member Bowden stated that he had attended both meetings and they had agreed to the 80% trigger to lower the trip limits, but Mr. Mathews made a good suggestion along with adding the staff recommendation for a vessel limit of 1,000 crabs. He moved to accept the staff recommendation with the added amendment of two permits per vessel with a total limit of 1,000 horseshoe crabs. Associate Member Laine seconded the motion. The motion carried, 7-0. Associate Member Robins had recused himself because of his involvement in the industry. The Chair voted yes.

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- 12. PUBLIC HEARING:** Proposed amendments to Regulations 4VAC20-1230-10 et seq., “Pertaining to Restrictions on Shellfish,” to clarify the use of ice during warm water months, and other measures; and 4VAC20-1250-10 et seq., “Pertaining to the Tagging of Shellfish,” to clarify the shellfish tagging requirements.

Jim Wesson, Head, Conservation and Replenishment, gave the presentation and his comments are a part of the verbatim record.

Dr. Wesson explained that the new Regulation 4VAC 20-1250-10, et seq., “Pertaining to the Tagging of Shellfish” would be for the year-round tagging requirement for both clams and oysters. He stated this was done as a result of a request from Law Enforcement. He said that Regulation 4VAC 20-1230-10, et seq., “Pertaining to Restrictions on Shellfish” was being amended to clarify the warm weather regulation and to establish that seed, both clams and oysters were not included.

Commissioner Bowman asked if there were any questions.

Associate Member Tankard stated that staff did not mention a time- of- year restriction. Dr. Wesson explained that the time restrictions were established for a time period of May 1 through September 30.

Commissioner Bowman opened the public hearing.

Commissioner Bowman asked Dr. Robert Croonenberghs if he had any comments.

Dr. Robert Croonenberghs, VDH-DSS, was present and his comments are a part of the verbatim record. Dr. Croonenberghs said it had been great working with VMRC staff to get these regulations done. He said they did want to recommend adding a word to Regulation 4VAC 20-1230-30(E) on page 3 of 9. He said it should be changed from ‘capable of 45°’ to ‘maintaining 45°’.

Chad Ballard, Ballard Fish & Oyster Co., was present and his comments are a part of the verbatim record. Mr. Ballard said they supported the regulations, but they did have one issue. He explained that in Regulation 4VAC 20-1230-30 where it says all land based shellfish transporting shall be completed in 30 minutes, they were asking for it to be changed to one hour. He said a majority of those transporting shellfish take at least 35 to 40 minutes to reach their destination and if it were to be changed to an hour then it would be easier to keep everyone all legal and not cutting it close or going slightly over the 30 minutes. He said it would be easier to enforce. Commissioner Bowman asked for Dr. Croonenberghs to comment. Dr. Croonenberghs said they would support this change if it leads to increased compliance with the regulation.

Tom Gallivan, Shooting Point, was present and his comments are a part of the verbatim record. Mr. Gallivan said they had a problem with the requirement of tagging at the harvest site. He said if someone were catching wild oysters this would work, but with the cultured oysters they go to specific areas in small open boats and return with a lot of weight and if there is inclement weather they need to return as soon as possible for the safety of the crew. He said in the regulation it says if there is no tag, then the officers can seize the shellfish. He said he spoke with Dr. Croonenberghs and it was not required by the Food and Drug Administration.

Commissioner Bowman said that it was an enforcement issue.

Mr. Gallivan said that consideration should be given to the aquaculturists since it was bringing in a lot of product. He said in his case the Marine Police Officer can watch and observe them going to a specific location as they are not going from creek to creek. He suggested adding may 'seize' the shellfish.

Commissioner Bowman asked Dr. Croonenberghs to comment. Dr. Croonenberghs said if only one harvest area is used one bulk tag is necessary but if they should go to another area then they would need two tags to identify each area. He said the identification of the harvest area was in flux.

Associate Member Fox asked if he knew where he was going could he fill out the tag before leaving port. Mr. Gallivan stated they did not know the amounts or time. He said they do that now. He said they have maybe a 24-foot skiff, a small boat, filled with equipment and people and if they go to more than one area it was not applicable.

Commissioner Bowman said use the discretion of the officer.

Dr. Croonenberghs said he was not sure, but if areas are in close proximity they could be included as one harvest as long as it was in the general area.

Julie Henderson, VDH-DSS, was present and her comments are a part of the verbatim record. Ms. Henderson stated that the time was not required on the tag and they would only need to add the quantity. Mr. Gallivan said it was on the tag.

Dr. Wesson said the wording now was to have them tagged as soon as possible after leaving the harvest area.

Kent Carr, waterman, was present and his comments are a part of the verbatim record. Mr. Carr said at the FDA and Health Department meeting it was decided that a bulk tag worked for a boat load, but if in separate bags it would need to be one tag for each 10 bags. He said the bulk tag would take care of this.

Tom Walker was present and his comments are a part of the verbatim record. Mr. Walker offered his thanks to the VMRC and Health Department for their efforts. He said the clam industry had asked to be included in this as there had been several *Vibrio* cases in clams. He said the industry is concerned.

Associate Member Robins suggested that it be changed to 'before offloading'.

Commissioner Bowman said that if they do something bad they only hurt themselves. He suggested that the Commission go with the suggestion made by Associate Member Robins and the Commission will hash it out in the fall.

Dr. Wesson suggested that it be 'as soon as possible after leaving the harvest area before going to another harvest area or offloading'.

Commissioner Bowman asked about all the modifications. Dr. Wesson said it was suggested that they be allowed 60 minutes rather than 30 minutes to transit, to use the word 'maintaining' the temperature at 45°, and the wording for the tagging be changed.

Commissioner Bowman asked for an action by the Board.

Associate Member Tankard moved to approve Regulation 4VAC 20-1230-10, as amended, and the new Regulation 4VAC 20-1250-10, as amended. Associate Member Bowden seconded the motion. The motion carried, 8-0. The Chair voted yes.

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- 13. BLUE CRAB:** Results of the winter dredge survey and new stock assessment. Request for Public Hearing to establish 2011 crabbing rules.

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

Mr. O'Reilly said that the stock assessment results were still not available for presentation, and he presented the 2010-2011 Winter dredge survey results. Mr. O'Reilly explained that the performance of the stock in 2011 was not as successful as what everyone expected based on the 2010 survey results. The Winter Dredge Survey began in 1989, and VIMS and Maryland personnel visit about 1,500 sites between December 1 and March 15 every year. The survey results provide the best available current information on the condition of the crab stock for management. He reviewed a number of figures and tables that explained the information provided by the 2010-2011 Winter Dredge Survey.

Figure 1 shows that 2011 total abundance (male and female crabs, combined) declined by 30% from the 2010 value. The total abundance of

460 million crabs consists of recruits (termed age-0 crabs), as well as spawning-age crabs (also termed age 1+ crabs).

Figure 2 indicates the number of recruits in 2011 was below the survey average.

Figure 3 showed the abundance of spawning-age crabs in 2011 (254 million crabs) exceeded the interim target of 200 million crabs, as in 2010 and 2009.

Figure 4 provides the annual percentage of the bay-wide stock removed by fisheries, compared to the target (46%) and maximum safe level of removal (53%).

Figure 5 provides a time series of Virginia blue crab harvest (pounds), as well as corresponding value, on an annual basis, from 1990-2010.

Figure 6 provides the information for the overwintering mortality estimate. The Baywide mortality estimate was 13.7%, which was a 24% increase from the 2010 mortality estimate.

Mr. O'Reilly said that the new blue crab stock assessment, which included Rom Lipcius from VIMS was still in peer review. The total abundance target and the exploitation target are both expected to change and will be more conservative than current targets. Staff recommended that the Commission wait until August, when the benchmark stock assessment results will be available, to make decisions on the issues of the winter dredge fishery and the waiting list.

Associate Member Robins said the Winter Dredge Survey results were not as good as last year, but it was still the 2nd highest in seven years. He noted that in figure 5 for the economic history the dockside values had increased about ten to 15 million dollars and the landings were up by about ten million pounds, which were dramatic improvements from just four years ago. He said the committee wanted to hold off until after the new assessment is received and discussed and then make their recommendations for changes to the crab regulations.

Mr. O'Reilly reiterated that the staff was discussing holding a public hearing in August after the stock assessment was made available.

Associate Member Robins said the Blue Crab Management was holding off for the new assessments and new reference points. He moved to advertise for an August public hearing. Associate Member Fox seconded the motion. The motion carried, 8-0. The Chair voted yes.

Mr. O'Reilly said that there was one other item that was just brought up this morning by Ty Farrington, member of the Blue Crab Management Advisory Committee. Mr. Farrington was requesting an alternate eight-hour work day for commercial crab pot and peeler pot harvest. The proposed permit would allow harvest from 4 a.m. to noon or 5 a.m. to 1 p.m. or one hour earlier than what is currently lawful from May through September. He said he and others do sell to buyers but they also do some self-marketing and the hot weather does impact the quality of crabs. He said this was discussed last year, but staff thought there was an issue with the permit that you could use or not. He added that this would have presented a problem for Law Enforcement.

Mr. O'Reilly said that staff wants to send a letter to the Blue Crab Management Advisory Committee to request advice or an opinion on this alternate time. He said in talking to staff he was told this permit could be issued by a licensing agent.

Mr. O'Reilly said that staff recommended that the Commission advertise for the alternate daily time permit (4 a.m. to noon or 5 a.m. to 1 p.m.) from May 1 through September 30.

Commissioner Bowman asked for a motion from the Board.

Associate Member Tankard moved to approve the advertisement of a public hearing in May to discuss the request by industry for an alternate eight-hour work day. Associate Member Robins seconded the motion. The motion carried, 8-0. The Chair voted yes.

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14. **PUBLIC HEARING:** Proposed amendments to Regulation 4VAC20-752-10 et seq., "Pertaining to Blue Crab Sanctuaries," to modify the boundary and closure date of the Blue Crab Sanctuary.

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

Mr. O'Reilly explained that this had been an issue since June 2002, when the Commission held a special meeting to revise the blue crab spawning sanctuary boundary in the Reedville area. This revision has still caused problems for about five crabbers who do not have GPS units. The Smiths addressed the Commission in November 2010, and the Commission decided to allow BCMAC to consider the issue and provide advice. BCMAC met several times and considered staff's proposal for a revised boundary line. However, this original staff recommendation would impact female crab migration. Dr. Lipcius of VIMS offered an alternate boundary line to protect female migration, and the BCMAC ultimately endorsed a compromise line. Mr. Smith initially agreed to this BCMAC-proposed line at the meeting, through he preferred the VMRC staff's line.

Later, Mr. Smith contacted staff and indicated he no longer supported the BCMAC line, but instead preferred the original VMRC staff line.

Mr. O'Reilly said that even Congressman Wittman was in attendance at the meeting.

Commissioner Bowman asked if Mrs. Smith had agreed on the boundary line. Mr. O'Reilly said he had been in communication with both and there were in agreement.

Commissioner Bowman opened the public hearing. There were no public comments and the public hearing was closed. He said the matter was before the Commission.

Associate Member Robins said the committee tried to strike a balance, but did not want to go too far. He said he was ready to make a motion.

Mr. O'Reilly said that staff recommended that the blue crab sanctuary close May 16, 2011 and that the new boundary line recommended by the BCMAC be accepted.

Associate Member Tankard moved to accept the staff recommendation. Associate Member Holland seconded the motion. The motion carried, 8-0. The Chair voted yes.

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15. DISCUSSION: Use of federal (NOAA, Army Corps of Engineers) funds for near-future oyster restoration projects.

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

Mr. Travelstead provided a hand out package to the Commission. He said over the last several years NOAA, ACOE and VMRC have been in a partnership and done restoration in the Pocomoke-Tangier Sounds, Rappahannock River, Lynnhaven River, and the Great Wicomico River.

Mr. Travelstead said that there were deeper pockets for oyster restoration and staff met with them to discuss the next phase of their program. He said that there was \$2 million from the Corps for restoration, but requiring a state match. He said that there had been a disagreement between the scientific community and industry was doubtful about the improvements in the Great Wicomico River.

Mr. Travelstead said that staff along with the committee met with the Corps and VIMS on Friday, April 22, 2011 in Reedville. He said that there was a two and a half hour discussion as well as a boat trip to look at the proposed restoration sites. It took five hours total. He said five members of SMAC were at the meeting and the committee was

reluctant to move forward with the Corps' plan. He said they were not convinced that what was happening in the Great Wicomico River was different from other areas. He said the five areas were not appropriate for various reasons. He said the Committee did not endorse the plan.

Mr. Travelstead said on a conference call on April 25, 2011 with the Corp, staff reiterated the committee's reluctance to accept the plan. He said one committee member suggested more willingness to create sanctuaries, but also to create harvest areas. He said that VMRC must consider the needs of the resource and the industry.

Mr. Travelstead stated that the Corps agreed to consider an alternate plan with a lesser match requirement as there was no State money and there was only the use of the shells to match the expenditure. Also, it was suggested that an alternate material be used for the base of the sanctuary reefs. He said that oyster shell is in short supply and is needed to maintain sanctuaries and the harvest areas.

Mr. Travelstead said there needed to be a determination on the number of shells that are at the Tribell Shoal area and the Corps will pursue a contractor to survey these areas.

Associate Member Fox indicated that rotational harvest areas are a successful part of restoration and should be considered as they serve as sanctuaries two out of every three years.

Commissioner Bowman said he was concerned if we forfeited areas that we may need. He said there are ecological benefits, but we need to remember the industry.

Mr. Travelstead said they were trying to convey to the Corps that even though there was no willingness on the State's part to participate in the current plan for the river, the State still wanted this partnership. He added that the Corps seemed receptive.

Commissioner Bowman said he appreciated the dialogue, as it is going in the right direction.

Associate Member Fox responded he agreed, but what the Commission's course of action now should be no action.

No action taken.

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16. REQUEST FOR PUBLIC HEARING: Establishment of the 2011 Commercial bluefish quota.

Allison Watts, Fisheries Management Specialist, gave the presentation. Her comments are a part of the verbatim record.

Ms. Watts explained that each year the Commission must establish the quota for Virginia's commercial bluefish fishery. She said that the ASMFC had established the states' quotas and Virginia's quota was 1,113,727 pounds. She said that the regulation must be amended to establish the quota. She said that staff recommended a May public hearing on this matter be advertised.

Commissioner Bowman asked for a motion by the Board.

Associate Member Robins moved to accept the staff recommendation. Associate Member Fox seconded the motion. The motion carried, 8-0 The Chair voted yes.

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17. REQUEST TO EXTEND: The public oyster harvest season in the James River Seed Area, including Deep Water Shoal State Replenishment Area, which may require emergency amendments to Chapter VAC 20-720 -10, et seq., "Pertaining to Restrictions on Oyster Harvest."

Jim Wesson, Head, Conservation and Replenishment, gave the presentation and his comments are a part of the verbatim record.

Dr. Wesson explained that the James River hand tong season ended April 30, 2011. He said that in the regulation the Commissioner can take administrative action, if an extension is requested.

Dr. Wesson explained that this was a unique river as there is an October 1 through April 30 season where only the hand tong is allowed, there is no bushel limit, and market and seed harvest is done in the same areas.

Dr. Wesson stated that the standing stock is followed by staff. He said that the Commission had made the 'Wreck Shoal' sanctuary much smaller and after the season opened had intended to mark it more appropriately, but did not get it done because of delays by the Coast Guard and the contractors. He said that hand tongers worked in the sanctuary until the signs were put there in March. He said that when new area was opened to harvest the hand scrapers worked above the hand tong line. He said there were problems all year. He said he believed there since there was significant harvest from Wreck Shoal, complaints from buyers that they were getting small oysters, and there was

more interest in seed oysters that the area should close to harvest. He said that Maryland wants to get the seed from this area for their public grounds. He said that VIMS and VMRC staff are both concerned with extending the season for either market or seed.

Dr. Wesson said the Commissioner can just extend the season, but if there are any changes then there would have to be an emergency regulation. He said staff recommends not extending the season beyond April 30, 2011.

Commissioner Bowman asked for VIMS to comment.

Dr. Roger Mann, VIMS representative, was present and his comments are a part of the verbatim record. Dr. Mann said that there is no running account of what is left. He said he would recommend against the extension until data like the crab data can be provided. He said he would suggest that the Commission err on the side of caution.

Associate Member Robins stated that current catch data is a problem. Dr. Mann said all the 26 years he has been here this has been a problem.

Commissioner Bowman asked for questions.

Kent Carr, waterman, requested an opportunity to speak. His comments are a part of the verbatim record. Mr. Carr explained that he was a 4th generation waterman and he agreed with Dr. Mann somewhat about the generation of statistics. He said it looks good out there now and it should be opened for two more months. He provided the Commission with a petition with approximately 120 signatures of the watermen, businesses, and the public. He said they want it to be open. He said he was glad the sanctuary was marked and since it has been marked nobody works there. He said the area opened to hand tong is too deep and the dredgers went in there. He said that some of the Marine Police said you could and some said you could not. He said that miscommunication was a problem. He said now it is fixed so there is no further problem. He said the seed looks good as there was a good strike. He said the market oysters are there. He said that Maryland wanted to buy from Bevans about 40,000 to 50,000 bushels of James River seed and it would provide a good income for the watermen. He said it would be creating jobs like the President wants. He said that the seed was needed in other rivers. He said the problem was the Commission was looking too much on aquaculture and not on this. He said replenishment of the shells was needed on Deep Water Light and Days Pt. He said the supply and demand for seed was the best seen in years. He said a lot of waterman came today now give them a couple more months as this was a bad year with the high fuel cost.

Commissioner Bowman stated that the scientists say no and if the Commission did not listen to them it would not be a prudent thing to do.

Mr. Carr said there was a supply of seed and they would have jobs if they could take advantage of it now. He said they are being run out of business and they had a right to complain. He said that Law Enforcement needed to check for cull size and the management area.

Associate Member Robins asked how many buyers, 5 or 6 and has the seed market picked up. Mr. Carr said that when Mr. Goddard with a buyboat came and bought some seed to take to Maryland it did not hurt for him to take some seed.

Dr. Wesson said that Maryland wanted to buy seed, maybe 40 to 50 thousand bushels. He explained that they had stopped planting shell and plant seed because shell is not available. He said the money was given to the counties to plant seed in Maryland. He said staff felt that we need to protect what we have and if we do not it will hurt the industry for the next year.

Associate Member Robins asked if the information would be better by next year for the reports by the buyers so the Commission could make a more informed decision.

Dr. Wesson said that could be explored.

Dr. Mann said that it cannot be done because it was an issue of accounting. He said the problem here was there were no numbers to argue for or against. He said get an average from the buyers and do something by next fall, but you could get an estimate in the next week or two. He said there is a need to find a middle ground, as there will be complaints if the Commission does not do the right thing.

Commissioner Bowman said if we go and say 40-50,000 bushels are harvested and then the stocks collapse, what would be said then.

Dr. Mann said if there was a better accounting then it could be debated.

Commissioner Bowman said without the data, it would be better to err on the side of caution.

No action was taken.

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Commission Meeting

**16347
April 26, 2011**

There was no further business and the meeting was adjourned at approximately 4:36 p. m.
The next meeting will be held Tuesday, May 24, 2011.

Steven G. Bowman, Commissioner

Katherine Leonard, Recording Secretary