

MINUTES

SEPTEMBER 25, 2001
NEWPORT NEWS, VA 23607

The regular Monthly meeting of the Marine Resources Commission was held on September 25, 2001 with the following present:

| | | |
|-----------------------|---|---|
| William A. Pruitt |) | Commissioner |
| Chadwick Ballard, Jr. |) | |
| Gordon M. Birkett |) | |
| Laura Belle Gordy |) | |
| Henry Hull Lane |) | Members of the Commission |
| F. Wayne McLeskey |) | |
| John W. White |) | |
| Kenneth W. Williams |) | |
| Carl Josephson | | Assistant Attorney General |
| Wilford Kale | | Senior Staff Adviser & Acting Commission Secretary |
| Erik Barth | | Head-IT |
| Andy McNeil | | Programmer Analyst, Sr. |
| Pat Leonard | | Executive Secretary |
| Linda Hancock | | Head, Human Resources |
| Bob Craft | | Chief-Finance & Administration |
| Jane McCroskey | | Deputy Chief-Finance & Administration |
| Debbie Brooks | | Executive Secretary |
| Steve Bowman | | Chief-Law Enforcement |
| Lewis Jones | | Deputy Chief-Law Enforcement |
| Warner Rhodes | | Middle Area Supervisor |
| Randy Widgeon | | Eastern Shore Supervisor |
| Ray Jewell | | Northern Area Supervisor |
| Kenny Oliver | | Southern Area Supervisor |
| Jeff Coston | | Marine Patrol Officer |
| | | Marine Patrol Officer |

Virginia Institute of Marine Science
Lyle Varnell Tom Bernard

COMMISSION MEETING**SEPTEMBER 25, 2001**

Robert Orth

Jack Travelstead
 Rob O'Reilly
 Roy Insley
 James Wesson
 Lewis Gillingham
 Ellen Cosby
 Chad Boyce
 Tracy Patton

Chief-Fisheries Management
 Deputy Chief-Fisheries Management
 Head-Plans and Statistics
 Head-Conservation and Replenishment
 Fisheries Management Specialist
 Fisheries Management Specialist
 Fisheries Management Specialist
 Fisheries Management Specialist

Tony Watkinson
 Chip Neikirk
 Randy Owen
 Traycie West
 Jeff Madden
 Mark Eversole
 Kevin Curling
 Ben Stagg
 Jay Woodaard

Acting Chief-Habitat Management
 Acting Deputy Chief, Habitat Management
 Environmental Engineer
 Environmental Engineer
 Environmental Engineer
 Environmental Engineer
 Environmental Engineer
 Environmental Engineer
 Environmental Engineer

others present:

Ken Shottie
 Wayne Olisen
 James B. Marshall
 Jay Taylor
 Joe Sensl
 Scott Wright
 Charles Rutter III
 William Snider
 Karen Duhring
 James S. Georgo
 George Caso
 Jack Kissinger
 Raymond
 Dan Haworth
 Kellim Platy
 Lawrence Latane
 Robert Taylor

Andrew Gurkin
 Michael C. Davis
 Gus Lowe
 Robert Tupper
 Charles Thompson
 Tom Griffey
 Andy Snyder
 Cecil W. Johnston
 Douglas F. Jenkins
 Sam Estep
 Russ Baxter
 Kwin DuBois
 Newster
 James Baxter
 Scott Harper
 David Brigg
 Russell Gaskins

COMMISSION MEETING

SEPTEMBER 25, 2001

Roger Parks
George Washington
Tom Powers

Tom Northam
Eugene Pruitt
Kelly Place, and others.

Commissioner Pruitt opened the September meeting at 9:30 a.m. Members present were: Associate Members Ballard, Birkett, Gordy, Hull, McLeskey, White and Williams. Commissioner Pruitt established that there was a quorum. Robert Craft, Chief, Administration and Finance gave the invocation and Associate Member White led the Pledge of Allegiance.

Commissioner Pruitt swore in the staff and those representatives of the Virginia Institute of Marine Science who expected to testify at the meeting.

1. MINUTES of previous meeting.

Associate Member White moved to accept the Minutes as distributed. Associate Member Hull seconded the motion, which carried 7-0. Associate Member Ballard abstained because he did not attend the August meeting.

APPROVAL OF AGENDA

Tony Watkinson, Acting Chief-Habitat Management, said that item No. 2-G, relating to the City of Franklin was pulled from the Agenda which some of the members may have received. Associate Member Hull approved the Agenda with modification. Associate Member Cowart seconded the motion, which was passed, 8-0.

Commissioner Pruitt announced that Robert Grabb, Chief-Habitat Management, has been called to active duty with the U.S. Coast Guard and could be on duty for up to one year. He is now serving in New York Harbor and is commander of the port security unit there. In light of that action, Commissioner Pruitt said he has named Tony Watkinson, Acting Chief and Chip Neikirk, Acting Deputy Chief.

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

Tony Watkinson, Acting Chief-Habitat Management, briefed the Commission on the following Page Two items for projects over \$50,000 for which there had been no objection and for which staff recommended approval.

COMMISSION MEETING

SEPTEMBER 25, 2001

2A. DOMINION VIRGINIA POWER, #01-0089, requests authorization to cross 3650 linear feet of State-owned submerged land with a 115kV aerial transmission line to replace and upgrade an existing transmission line across the Piankatank River, Healys Pond, Harper Creek, and Cow Creek Pond in Gloucester and Middlesex Counties. Recommend approval with the assessment of a royalty of \$3650.00 for the encroachment over 3650 linear feet of State-owned submerged land at a rate of \$1.00 per linear foot.

PERMIT FEE.....\$100.00
 ROYALTY3,650.00

2B. TOWN OF BIG STONE GAP, #01-0688, requests a modification to their existing permit to allow for the construction of a temporary sediment and dewatering basin within the South Fork of the Powell River to facilitate construction of a new concrete dam in Wise County. Recommend approval provided the structure is removed upon completion of construction, and that the streambed is restored to its pre-existing contours and condition.

2C. SEA SEA AND COMPANY, ET AL, #01-0471, requests authorization to widen the existing timber boardwalk at Riverwalk, from 6 to 12 feet in width, to construct a 12-foot wide boardwalk from Riverwalk to the existing Mamie Davis Park Wharf, and to construct a 12-foot wide boardwalk from the Mamie Davis Park Wharf to the channelward end of an existing rock jetty, along the Occoquan River in the Town of Occoquan.

PERMIT FEE.....\$100.00

2D. NOVA CHEMICALS USA, INC., #01-1348, requests authorization to dredge 18,780 cubic yards of new material and perform 16,990 cubic yards of maintenance dredging to achieve maximum depths of -35 feet below mean low water, to pave an existing earthen boat ramp, to construct a tending pier adjacent to the boatramp, and install two (2) osprey nesting platforms adjacent to their property situated along the Southern Branch of the Elizabeth River in the City of Chesapeake. Recommend a royalty of \$0.60 per cubic yard for the new dredging of 18,780 cubic yards.

PERMIT FEE.....\$100.00
 ROYALTY\$11,265.00

2E. CAMERON BAY, LLC, #01-0891, requests authorization to install by directional drill

COMMISSION MEETING

SEPTEMBER 25, 2001

method 72 linear feet of 8-inch sewerline inside a 20-inch casing beneath Swift Creek, a tributary to the James River in Chesterfield County. Recommend a royalty of \$72.00 for the crossing of 72 linear feet of State-owned subaqueous bottom at a rate of \$1.00 per linear foot.

PERMIT FEE.....\$100.00
ROYALTY.....\$72.00

2F. HAMPTON ROADS SANITATION DISTRICT, #01-1575, requests authorization to install a 30" sanitary sewer force main by horizontal directional drill method a distance of 689 linear feet within the VDOT R/W under Powhatan Creek, a tributary to the James River, in James City County.

PERMIT FEE.....\$100.00

2G. YORK COUNTY DEPARTMENT OF GENERAL SERVICES, #00-1673, requests authorization to construct a 247-foot long by 18-foot wide pier with a 250-foot long by 40-foot wide T-head and two (2) 20-foot by 20-foot mooring dolphins for mooring of dinner cruise ships, and a 76-foot long by 16-foot wide pedestrian observation pier with a 52-foot long by 16-foot wide T-head and two 20-foot by 20-foot mooring dolphins along the Yorktown waterfront situated along the York River in York County.

PERMIT FEE.....\$100.00

There being no comments, pro or con, Commissioner Pruitt placed the Page Two items before the Commission. Associate Member White moved to approve the Page Two items. Associate Member Hull second the motion, which carried unanimously.

3. BRIEFING By Ann Swanson, Executive Director, Chesapeake Bay Commission.

Ms. Ann Swanson, whose headquarters is located in Annapolis, MD, gave the Commission an overview of what the Chesapeake Bay Commission has accomplished during the nearly 20 years that she has been associated with the regional organization, comprised of state officials and public appointees from Virginia, Maryland and Pennsylvania. (Her remarks are part of the verbatim record.)

4. CRAB CREEK IMPROVEMENTS, L.L.C., #00-2197, requests authorization to dredge approximately 15,000 cubic yards of State-owned subaqueous bottom material to create primary and secondary access channels in Crab Creek, a tributary of the Lafayette

COMMISSION MEETING**SEPTEMBER 25, 2001**

River in the City of Norfolk. The project is protested by several nearby property owners.

Chip Neikirk, Acting Deputy Chief-Habitat Management, said that in June the Commission heard this case on an appeal of the Norfolk Wetlands Board decision. This is now the subaqueous portion of the project. The site is located along the northern shore of the Lafayette River with development along the creek primarily residential. The Association requests authorization to dredge 21,200 cubic yards of subaqueous and intertidal material to create approximately 15,000 linear feet of primary and secondary navigation channels. The applicants estimate that approximately 15,000 cubic yards of the material is subaqueous. The proposed channel depths range from two and one-half (2.5) feet to four (4) feet at mean low water with bottom widths between 10 and 30 feet. The subaqueous portions of the project, within the Commission's jurisdiction, are proposed to be at least three feet deep at mean low water with bottom widths of at least 15 feet.

Most of the creek is very shallow with mean low water depths of less than three feet. Deeper water is located toward the mouth of the creek. Many portions of the proposed channels are intertidal. The wetlands portions of the project were considered and approved by the Norfolk Wetlands Board, with some special conditions, last December. The Commission upheld that decision on appeal on June 28, 2001. This public hearing is to consider the subaqueous portions of the project.

Mr. Neikirk stressed that the project will not impact the nearby Public Ground No. 9 and the Lafayette River Oyster Reef is across the river from it. There have been protest letters and letters of concern received regarding certain aspects of the project. The primary concerns involved the impacts to vegetated and nonvegetated wetlands, shallow subtidal areas, water quality concerns associated with dredging long narrow canals, and potential impacts on shoreline erosion. He presented to the Commission a letter from Jay Taylor, representing Wetlands Watch, Inc. There also were letters supporting the project from several Norfolk citizens, State Sen. Nick Raras and the Norfolk City Council passed a resolution in support of the project.

The Virginia Institute of Marine Science (VIMS) stated that the project warrants careful consideration. Most of their concerns were related to the intertidal portion of the project. With regard to the subaqueous aspects, VIMS recommended the establishment of a "No Wake Zone." The Department of Environmental Quality is still reviewing the project and has not yet issued their Water Protection Permit. The Department of Health and the Department of Conservation and Recreation found the project acceptable.

The main channel is proposed to be dredged to a depth of minus four feet with a base width of 30 feet and a top width of approximately 42 feet. There are some secondary channels to be

COMMISSION MEETING**SEPTEMBER 25, 2001**

dredged to depths ranging from minus two and one-half feet to minus four feet with bottom widths ranging from fifteen to twenty feet. The dredging is proposed to be conducted by bucket method.

The applicants estimated that 15,000 cubic yards of subaqueous material would be dredged. The Virginia Institute of Marine Science questioned the Association's cubic yardage estimates and believes the Association did not take the side slopes into consideration when it calculated the dredging. After conferring with VIMS the staff estimated that approximately 28,000 cubic yards of subaqueous material. (Details of the slide presentation are part of the verbatim record.)

The most controversial aspects of this project involve the dredging of intertidal wetland areas. Those impacts have been considered and approved by the Norfolk Wetlands Board. The Department of Environmental Quality and the U. S. Army Corps of Engineers are still evaluating the project and if approved, they may place further conditions or restrictions on the project.

Staff believes the dredging proposed for the subaqueous portions of the creek is consistent with the Commission's Subaqueous Guidelines. Staff concurs with VIMS, however, that the dredging will increase the potential for increased shoreline erosion resulting from increased boat traffic. Accordingly, we recommend approval of the project with the following special conditions: dredging conditions which require a pre-dredging conference and a post-dredging bathymetric survey shall be included in the permit; a royalty of \$12,555 for the dredging of 27,900 cubic yards of State-owned subaqueous bottom material at a rate of \$0.45 per cubic yard; and that the Association shall be required to request that the City take the necessary steps to establish a "No Wake Zone" within the creek.

There were no questions and Commissioner Pruitt called upon a representative of the Crab Creek Improvement Association to address the Commission. Mr. Ken Stolle, attorney, said he felt the staff report was very thorough and would like to respond to the opposition at the appropriate time. He said the Association accepted the staff's recommendations.

Commissioner Pruitt then called for anyone opposed to the project to address the group. Mr. Jay Taylor, president of Wetlands Watch, formerly known as Citizens for the Preservation of Norfolk's Wetlands, said his group was primarily concerned with the intertidal portions and do not categoractly oppose dredging in the main stem, the jurisdiction of this Commission. But he said he had some ideas that might help and demonstrate why the shallow water environment is so important to the whole Chesapeake Bay. It is the preservation of areas of Crab Creek that will tell the tale as to whether there is success in Bay restoration.

Mr. Taylor said he wanted to present some steps that his group feels would minimize the

COMMISSION MEETING**SEPTEMBER 25, 2001**

impacts to Crab Creek and its ecology. He said the U.S. Fish and Wildlife Service in a letter to the U.S. Army Corps of Engineers said the shallow water areas, less than two feet in depth, are high value habitat, Resource Area No. 2. The Service's mitigation for Resource Area No. 2 is no net loss of in-kind habitat value. He also stressed the proposed "No Wake Zone," the most important constructive step that could be taken within your jurisdiction and asked the Commission to adopt that staff recommendation.

Some points of emphasis, he added, within his letter include the maximum dredge depths in the buffer. He also stressed the need for more detailed planning, noting the locations of loading and off-loading points for handling dredge material both inside and outside the creek and restoration of any wetlands disturbed during dredging operations and compensation for losses. Mr. Taylor also called for on-site inspections should be conducted during the operations and time-of-year restrictions imposed when appropriate. He also asked for a surety (performance) bond on the project (Additional details of his presentation are found in the verbatim record.)

Commissioner Pruitt asked what Mr. Taylor meant in his letter by adjoining property. Mr. Taylor said he was concerned about homeowners around the creek, particularly the shorelines. In some cases, he said, dredging would occur near the shoreline, where some damage could be done and the applicants should be required to take responsibly for that damage.

Ms. Cindy Hall, deputy city attorney for the city of Norfolk, said she was appearing to note City Council's support for the permit and the staff's recommendation. Mr. Stolle said he had nothing to add. He said the staff recommendations were consistent with the Commission's guidelines and would oppose any additional special conditions.

Commissioner Pruitt said the matter was before the Commission for action. Associate Member Gordy moved approval of the project with staff recommendations. Associate Member White seconded the motion, which was passed, 7-0, with Associate Member Ballard abstaining.

5. **HOWARD HACKMAN, #01-0828**, requests authorization to construct a 19' x 40' open-sided boathouse adjacent to an existing 12' x 32' boathouse adjacent to his property situated along Morris Creek in Mathews County. The project is protested by an adjacent property owner.

Kevin Curling, Environmental Engineer, explained that the existing boathouse is 384 square feet and the proposed boathouse would cover 760 square feet for a total of 1,144 square feet. (Explanation of photographs and drawings are part of the verbatim record.)

Morris Creek is a tributary to Stutts Creek in Mathews County. It is a rural residential area with

COMMISSION MEETING**SEPTEMBER 25, 2001**

most properties having a private pier and a few boathouses also are located along the creek. The creek is approximately 250-feet wide at the location of Mr. Hackman's pier.

Mr. Hackman desires to build a larger boathouse to protect a 1961, 33-foot wooden cabin cruiser. It is presently moored at a marina (Horn Harbor) within the county. The existing pier and boathouse were present when Mr. Hackman purchased the property two years ago. Mr. Hackman also desires to retain the existing boathouse to protect his wooden skiff.

The project is protested by the adjacent property owner, Mr. Lowe. His protests concern the appearance of such a large structure on an otherwise residential waterway. Specifically, he is concerned the new boathouse roof will be about six feet higher than the existing boathouse, it will not be in character with other open piers along the creek, and that possibly "temporary walls" using curtains to enclose the boathouse could be used.

Mr. Lowe, however, has verbally stated that if the proposed boathouse was placed on the opposite side of the pier, he would withdraw his protest.

In response, Mr. Hackman has indicated he does not want to remove the existing platforms on that side of the pier. He also states that there is less water on that side.

The Commission, in reviewing permits for encroachment over State-owned submerged land, strives to minimize interference with the rights of adjacent property owners and other permissible uses. We also carefully consider the necessity and water-dependency of a project as well as any viable alternatives to reduce impacts.

While Mr. Hackman has a need for a larger structure, his neighbor, Mr. Lowe, feels that, as proposed, it could interfere with his rights and enjoyment of the creek. As such, staff recommends denial of the project as proposed. Staff, however, could support approval provided the new boathouse were to be placed on the opposite side of the pier which would present less of an interference to the adjacent property owner.

Commissioner Pruitt asked Mr. Hackman to come forward and speak. Mr. Hackman said the reason he was proposing an addition to the boathouse was to preserve a boat, built in Horn Harbor by a local boatbuilder, Elton Smith, and has been in the same family for 60 years. It is a very unique boat, one of a kind. He said he would not request to build another boathouse, if the existing boathouse was wide enough to accommodate the new boat.

Mr. Hackman said he had four to six-inches or less water at each station on the East side of the pier, where Mr. Lowe said he could accept the new boathouse. The boat would be sitting on the hard bottom or might even be tipping over. Putting the boathouse on the far east side of his

COMMISSION MEETING**SEPTEMBER 25, 2001**

property would require building additional dock space and cover some grass that is growing back in the creek.

Mr. Hackman said Mr. Lowe's house faces due South and there is a tree buffer. He said Mr. Lowe would have to come out on his dock, turn around almost 90 degrees and look back at the boathouse. The new boathouse would not obstruct any views directly down the creek from his property unless you turn around 90 degrees.

Associate Member Ballard asked Mr. Hackman to explain the water depths. Mr. Hackman said at mean low tide at the proposed location the boat would just get into the boathouse and would probably be in a little mud. On the east side the boat would be hard a ground and possibly tip over.

Associate Member Williams asked where the boat was presently moored. Mr. Hackman said it was at Horn Harbor Marina, where it has been for 40 years.

Associate Member Ballard said he was curious that since there was so much shallow water at the site, the boat will be somewhat aground at low water at either location. That is not a real good environment for that boat, he said.

Mr. August H. Lowe, adjacent property owner and opponent to the permit application, said he had photographs taken from his dock (he presented for the record). He said his problem all along had been the size of the structure. The new roofline would be eight feet higher than the existing roofline. Initially, it was proposed to have a totally covered, 40-foot long side. Mr. Lowe said he told Mr. Hackman that if he wished to protect the boat from the western sun that the boathouse should be on the east side and the existing boathouse would protect it from the western sun.

Mr. Lowe said the proposal then came back for an open building, but the ridge line is still eight feet higher than the existing boathouse. He said the structure still could become closed. He said he had no opposition to Mr. Hackman's rights to access the water, but believed the proposal would create visual pollution and is not in character with existing structures along the creek, would disrupt shoreline integrity and could create a commercial, marina like environment that is not appropriate to the area.

He said he would not object if it was located on the eastern side of the pier and if the roof line were the same as the current roof line.

Associate Member Hull asked if Mr. Hackman were to remove the existing boathouse and replace it with a larger boathouse would he still object. Mr. Lowe said he would object to the

COMMISSION MEETING**SEPTEMBER 25, 2001**

largeness and the increased height.

Commissioner Pruitt said it was an interesting case and told Mr. Hackman he could respond. Mr. Hackman said regarding Mr. Lowe's objection to the height that it was placed there in keeping with the height of the boat. At extreme high tide, he said, the boat would not go through the roof. He said if he could remove the mast, while it is in the boathouse, he could lower the roof several feet. Mr. Hackman said there were existing boathouses on the creek, covered and enclosed.

Associate Member Hull asked if the other boathouses were double or single. Mr. Hackman said there were two closed double boathouses and one, open double boathouse with a room above. Associate Member White asked how far a boathouse was from him. Mr. Hackman responded it was about one-eighth of a mile. Mr. Lowe said the covered boathouse he had seen was around the neck of the creek and much further down Morris Creek and it must have been there before any zoning (regulations).

Associate Member Ballard asked if the boat in question was recently purchased. Mr. Hackman said he bought it last year and was moored at a regular marina and has been under cover its entire life.

Associate Member Gordy asked to see the slide showing Mr. Lowe's home. The photograph was viewed again. Mr. Curling explained the photograph.

Commissioner Pruitt placed the matter before the Commission. Associate Member McLeskey made a motion to uphold the staff's recommendation and deny the permit. Associate Member Hull seconded the motion, which was unanimously approved by the Commission, 8-0.

Commissioner Pruitt told Mr. Hackman he had several options of coming back with a different proposal or appealing (within 30 days) to Circuit Court.

6. **JAMES B. MARSHALL, #01-1029**, requests authorization to construct a 6-foot by 8-foot storage building near the channelward end of his existing private, noncommercial pier situated along the Piankatank River in Middlesex County.

Chip Neikirk, Environmental Engineer, showed photographs of the project site and related drawings. (Detailed comments on the slides and photographs are part of the verbatim record.)

Mr. Marshall's property is located in the Deerchase subdivision along the upper reaches of the Piankatank River in Middlesex County. The water is approximately three feet deep at the

COMMISSION MEETING**SEPTEMBER 25, 2001**

project site and the river is about 1500 feet wide at the location. Mr. Marshall's pier is 78-feet long and there is an existing small storage shed near the landward end of his pier.

Mr. Marshall proposes to construct a 6-foot by 8-foot storage shed on a proposed 8-foot by 16-foot landward extension of the "L-head" at his pier. In response to an inquiry from staff concerning the intended use and perceived need for the storage structure on the pier, Mr. Marshall stated the building is intended to store boating and fishing supplies.

The project is not protested and no State agencies have commented on the proposal. The project does not encroach over any public or privately leased oyster-planting ground.

Mr. Niekirk said when reviewing proposals to build over State-owned submerged lands the Commission's Subaqueous Guidelines direct staff to consider, among other things, the water dependency and the necessity for the proposed structure. The boathouse and pier are clearly water dependent and are statutorily authorized. Although the storage building is unprotested and the environmental impacts associated with it may be minimal, we do not consider it to be water dependent. Staff believes it would be more appropriate for Mr. Marshall to store his boating and fishing supplies on his upland property. In fact, the small storage building located at the landward end of Mr. Marshall's pier should be adequate to store some of his heavier supplies. In addition to limiting the encroachment over State-owned submerged land, locating the structure on the upland minimizes the potential for the building materials to enter the waterway during storm events or when the structures fall into a state of disrepair. Accordingly, we are unable to recommend approval for the construction of the storage building over State-owned submerged land.

Commissioner Pruitt asked for questions. Hearing none, he called Mr. Marshall to testify on his proposal. Mr. Marshall said he has owned the property since 1994 and has been carrying fishing equipment from the house to the pier. He said he was at the point to try to minimize work a bit, some of the steps he was taking. Mr. Marshall said he wanted to touch on three points in Mr. Neikirk's recommendation.

Regarding the storage shed as being non-water dependent, Mr. Marshall said his intent was to use it for fishing gear, tackle boxes and crab nets or lines. It would definitely be water dependent. He said he would not store gasoline or oil. Regarding the land-based storage shed nearby, Mr. Marshall said it was four feet by four feet, just large enough to store two crab pots. Regarding location of shed on the upland so that there would be no potential for building materials to enter the waterway during storm events, he said there would be little likelihood of problems with the shed on the pier. He said he would raise that section by eight inches to minimize high water potential.

COMMISSION MEETING**SEPTEMBER 25, 2001**

Commissioner Pruitt asked if there were any questions. Associate Member Ballard asked why he needed the (storage) structure? What are you really going to put in it. Mr. Marshall said he would also be putting lawn chairs, life jackets and small tables. Associate Member Ballard suggested the lawn chairs, etc. were why he really needed the storage shed. Mr. Marshall responded positively.

Commissioner Pruitt asked if there was anyone in attendance in opposition? No one came forward and he placed the case before the Commission for action. Associate Member Ballard said that he agreed with the staff that there was no water dependent use for the structure. He said Mr. Marshall's needs could be accommodated elsewhere. He said the Commission needed to stick with the policy of not permitting non-water dependent use structures to be built over subaqueous bottoms unless there is a compelling reason. And I do not see a compelling reason in this case. Associate Member Ballard moved to deny the permit and uphold the staff recommendation. Associate Member Hull seconded the motion, which was approved, 7-0 with Associate Member Birkett abstaining. Commissioner Pruitt reminded Mr. Marshall that he could appeal the action to the Circuit Court.

7. **ANDREW GURKIN, #00-1908**, requests authorization to excavate 6,000 square feet of submerged aquatic vegetation in conjunction with the dredging of 7,000 cubic yards of new material and 3,000 cubic yards of maintenance material to achieve a 30' wide channel and maximum depths of minus six (-6) feet below mean low water to access Dandy Haven Marina situated along Back River in the City of Hampton.

Tracy West, Environmental Engineer, explained that Dandy Haven Marina is located near Dandy Point and the Grandview Nature Preserve in Hampton. Langley Air Force Base is nearby to the west. The proposed expansion will result in the loss of approximately 6,000 square feet of submerged aquatic vegetation (SAV), Ms. West said.

The extensive SAV beds adjacent to the project site contain both eelgrass (*Zostera marina*) and widgeon grass (*Ruppia maritima*) with a 70-100% coverage which is the highest density classification documented by VIMS as part of their annual SAV survey. (Details and commentary on slides and project drawings are part of the verbatim record.)

Mr. Gurkin contends that his 15-foot wide channel is no longer adequate to provide safe navigational access to the marina due to the increased size and number of boats using his facility for mooring and maintenance of boats. Ms. West said that Mr. Gurkin has proposed a minus six feet with a maximum over dredge of one foot, but staff would recommend that the usual recommendation be adopted of a tolerance of plus or minus six-inches over dredge as was proposed previously in the Lafayette River dredging.

COMMISSION MEETING**SEPTEMBER 25, 2001**

Ms. West said the Virginia Institute of Marine Science (VIMS) 2000 survey data, shows that the channel dredging site is in the most dense area with 70 to 100 percent coverage of SAV. In order to offset the loss of SAV, Mr. Gurkin has, however, presented a mitigation plan which proposes to transplant a portion of the SAV from the impact area to an area near Langley Air Force Base. The proposed transplant site is adjacent to two other transplant sites that are demonstrating a measure of success according to data collected by VIMS. The plan includes transplanting and monitoring of the mitigation area. In addition, Mr. Gurkin has offered to donate any sprigs not transplanted to his mitigation site to Langley Air Force Base for their transplant efforts. Langley Air Force Base staff have submitted an application (01-1588) for SAV transplanting, utilizing either sprigs from the dredge impact area of the project, if approved, or from another donor bed if Mr. Gurkin is not granted authorization for his project. Staff is currently processing the Langley application.

In its December 2000 report and a recent report, VIMS stated that the proposal warrants careful consideration. VIMS staff recommended that the channel should not be widened unless it is determined that the project is absolutely necessary. VIMS also suggested that, should dredging be deemed necessary, that impacts can be minimized by not dredging between April and October.

Comments received from the Department of Conservation and Recreation indicated that a Bald Eagle nest is located in the project vicinity and the applicant should coordinate with the Department of Game and Inland Fisheries in order to comply with protected species legislation. Staff received 55 letters of support for the proposed dredging project.

Ms. West said, in summary, that submerged aquatic vegetation beds are valuable habitat for many aquatic organisms. These plant communities provide food and shelter for various species of fish, shellfish, invertebrates and waterfowl. Shedding blue crabs hide in SAV beds until their new shells have hardened; SAV beds are considered to be the primary settling habitat for young blue crabs; and beds are also utilized as nurseries by juvenile fishes.

Section 28.2-1205 of the Code of Virginia states that the Commission, when reviewing requests for authorization, shall consider the public and private benefits of the proposed project and its effects on six specific resources, including submerged aquatic vegetation. In addition, the goal stated in the "Submerged Aquatic Vegetation Policy for the Chesapeake Bay and Tidal Tributaries" (Chesapeake Executive Council, 1989) is to achieve a net gain in SAV distribution, abundance, and species diversity in the Chesapeake Bay and its tributaries.

The policy places emphasis on four components: (1) assessment of distribution and abundance, (2) protection of existing populations, (3) restoration of former beds, and (4) continued

COMMISSION MEETING**SEPTEMBER 25, 2001**

research and public education. The policy specifically states "The signatories, as appropriate, will use existing regulatory and resource management programs, and develop new programs, to limit permanent and irreversible, direct and indirect, impacts to submerged aquatic vegetation and their habitats. Only in rare circumstances will losses of submerged aquatic vegetation be considered justifiable." The commitment was reaffirmed by the Chesapeake Bay 2000 agreement and signed by the Chesapeake Bay Program executive council in 2000.

While staff recognizes that widening the channel to Dandy Haven Marina will allow for more convenient access to the facility, ingress and egress through the existing channel is currently possible. Furthermore, this location has functioned as a marina since the 1950's and the existing channel has served the patrons of Dandy Haven Marina adequately since that time. It should be noted that Dandy Haven Marina has been issued permits by staff in the past (91-1744 & 01-0410) to maintenance dredge the existing channel.

Ms. West said, as such, when considering the public and private detriments versus benefit, the loss of the SAV resource as well as §28.2-1205 of the Code of Virginia and the SAV policy, staff recommends denial of the proposal.

COMMISSION MEETING**SEPTEMBER 25, 2001**

However, should the Commission conclude that the dredging and the loss of the SAV to be in the public interest, staff recommends that Mr. Gurkin be required to compensate for the loss of the 6,000 square feet of SAV. A compensation plan has been proposed by the applicant and will result in the transplantation of approximately only 16% of the SAV that will be lost. Staff is prepared to evaluate the current mitigation proposal if requested. Associate Member Ballard asked if the staff would present its changes to the proposal. Ms. West acknowledged positively.

She explained that the mitigation site would be off Langley Air Force Base, near where Langley and the Chesapeake Bay Foundation have had transplant sites. The compensation plan calls for the use of the "peat pot method" for the transplant effort, which VIMS has recommended against, and that the pots be placed on 3-foot centers.

Staff in conjunction with Karen Duhring of VIMS conducted a thorough examination of this mitigation proposal. The impact area would be 6,000 square feet or 556 square meters. Using an average shoot density of 85 percent in the area or 300 shoots per square meter or 166,667 shoots available at the site for transplant.

The current proposal is to transplant a 12,000 square foot area using the "peat pot method" using 20 shoots per three-inch pots, 1,360 pots on three-foot centers. That will result in only 27,200 shoots planted only 16 percents of the total shoots to be used and 84 percent of the current SAV would be lost. It is important to note that in order rescue all of the shoots, using the VIMS recommended method of bare-root transplant, would require eight-tenths of an acre to be planted. Ms. West said that seemed extreme and she said it would probably be very difficult to find a suitable habitat that large in an area near where Mr. Gurkin could work.

Staff and VIMS developed a stronger mitigation strategy, using the VIMS recommended horizontal rhizome method or rapid single shoot method as opposed to the "peat pot" method. Using two shoots per planting on 10-inch centers and 100 percent coverage and not a checker-board pattern, a third of the total available shoots could be planted. All of the remaining shoots available could be donated to Langley Air Force Base and the Chesapeake Bay Foundation that are also planting in the same area as the mitigation area.

The Chesapeake Bay Foundation, in a permit issued this morning, has requested authorization to harvest 55,000 shoots for a transplant effort in several different areas around the Bay and Langley Air Force Base also has asked for 20,000 shoots for transplant. Should Mr. Gurkin be permitted by the Commission to donate shoots to these two organizations they would not have to go to donor beds to get the shoots. Twenty-two percent of the total SAV impact area would still be lost, but would capture quite a bit more than the applicant's original mitigation proposal.

COMMISSION MEETING**SEPTEMBER 25, 2001**

In closing, based on advice from VIMS, staff suggests that a revised compensation plan be included and the following information should be submitted:

- 1) For transplanting, the horizontal rhizome method or rapid single shoot technique should be utilized. These methods are preferred by VIMS because rapid expansion and exceptional growth has been reported, while peat pots are subject to being washed out if any portion of the pot is exposed. By utilizing one of the VIMS recommended techniques and planting pairs of shoots on 25cm (10") centers throughout the 12,000 square foot transplant area, 33% of the shoots can be saved.
- 2) Harvesting and transplanting of the SAV should be consistent with the Submerged Aquatic Vegetation Transplant Guidelines, Regulation 4VAC20-337-10 et seq. Staff recognizes that the techniques for minimization of impacts to donor bed will not apply in the instance, since the donor bed will be dredged away.
- 3) The monitoring plan shall include the elements listed in The SAV Transplant Guidelines, Section D, including an initial site visit between one month and one week after the initial transplanting, additional site visits in spring and fall to assess the success of the plantings and all monitoring parameters outlined in Section D.2. Mr. Gurkin should also be required to ensure that a minimum of 50% survival of the transplanted area for a monitoring period through December 31, 2004.

VIMS staff has also recommended that the dredged channel should be staked prior to SAV harvesting to ensure that only plants within the dredge cut will be harvested for mitigation purposes.

The Commission may wish to require a bond in an amount that would cover any replanting efforts during the monitoring period.

Commissioner Pruitt asked if there were any questions. Associate Member Ballard said VIMS had asked for a time-year restriction on the transplanting of Oct. 1 through Oct. 31. Ms. West said she did not include it specifically because Mr. Gurkin, if he is approved, will be starting shortly and that would be outside of October. Associate Member Ballard asked if VIMS had wanted the planting only in October. Ms. West said by the time the transplanting is done, Mr. Gurkin could not dredge until November. Associate Member Ballard asked if that was the only time or the ideal time?

Associate Member Ballard also asked about the bond, if there was a suggested appropriate amount? Ms. West said a preliminary assessment from an individual coordinating the activity at Langley Air Force Base said \$20,000 not including personnel payment for those diving.

COMMISSION MEETING**SEPTEMBER 25, 2001**

Associate Member Williams asked what happens if planting is done outside of the suggested October time. Dr. Robert Orth of VIMS said tests conducting in the spring, summer and fall showed that transplanting in the fall was much better. The problem in the spring time is a narrow window. In the fall, the window in October allows for a time to deal with transplant shock and also a period when the plant can begin growing before the winter when everything slows down. The summer time with its hot weather is detrimental to the growth of plants. (Details of Dr. Orth's presentation are part of the verbatim record.)

Associate Member Ballard asked how long it would take the transplant using the suggested VIMS and staff method. Dr. Orth said it could be done very rapidly. It could take roughly a week.

Commissioner Pruitt asked the applicant and his agent to come forward. Jim Georgio, engineer for JSG Development Consultants, P.C. said he wanted to address concerns for the justification of this channel. He said Mr. Gurkin had submitted a request for permit prior to getting consultants and the first thing he questioned was the reason for a 30-foot channel. The vessels and activities around the marine would justify a much larger channel. Many standards for sizing a small boat channel all look at issues such as the amount of traffic, width of the vessels using the channel. Much of the traffic in and out of the marina are vessels that range from 25 to 40 feet in length. The average vessel is approximately 35 feet in length and an average beam of 12 feet.

Most design references, Mr. Georgio said, would guide you to a four to five times a beam width for the desired channel bottom. A 48 to 50-foot or upwards to 60-foot would be justified for this channel. Since the 1950s when the marina was built, boats have increased in size and height and cross-currents are of a greater concern in dealing with larger vessels.

The current 15-foot channel is inadequate for safe navigation to this facility. Even Mr. Gurkin's 30-foot channel, which he is willing to accept to minimize environmental impacts, is marginal and will minimize the amount of SAVs impacted and will minimize the amount of dredging needed. (Photographs were presented and details regarding current SAV/channel status are part of the verbatim record.)

Mr. Georgio said a study was undertaken of the existing channel to determine where the bottom was located and the side slopes and the SAV beds. To minimize the impacts to the SAVs was to realign the new channel to take advantage of the deepest contours. The impacts are so minimal and much of them are right along the fringe of the channel. Mr. Gurkin is willing to accept a 30-foot channel against advice from consultants to minimize SAV impacts. He is proposing 4,500 cubic yards of dredging, or half of his original application. There was an error; there is only 4,500 cubic yards. If we used a 50-foot channel, there would have been a

COMMISSION MEETING**SEPTEMBER 25, 2001**

26,000 square foot impact to SAVs, but by minimizing, there is only a 6,000 square foot impact.

Mr. Gurkin is proposing creating the 12,000 square foot mitigation area in accordance with the VIMS report. We felt the "peat pot" method would give a large number of shoots planted, but we are not against what VIMS is recommending. It will cost him more money than what we proposed, but Mr. Gurkin is willing to accept the VIMS mitigation proposal. We are also confident that the material along the edge of the channel will creep back along the slope of the channel with about 2,000 square feet of SAV growing back. That is over and above the 12,000 square feet of mitigation that he is planting. We also expect that the donated material to the Langley project will constitute another two acres. We see the 6,000 square foot mitigation is only a temporary impact and ultimately there will be a net increase of SAV.

In closing, Mr. Georgio said the channel as it now is arranged presents some safety factors and the narrow channel also presents some threats to the existing SAV. Two large boats trying to navigate the channel would increase the chance of props scarring with increased turbidity. Widening the channel will permit safe navigation; the state bottoms will gain SAVs.

Commissioner Pruitt asked for questions and Associate Member Ballard asked for an estimated cost of the proposed mitigation program? Mr. Georgio said no detailed cost estimates has been prepared. He is prepared to go along with those recommendations and bear that cost.

Mr. Gurkin, co-owner of Dandy Haven Marina, addressed the Commission and called attention to the supplemental material presented. Almost 50 years ago when the original 15-foot wide channel was put in small wooden skiffs used the channel, now large power-cruisers use the channel and two-way traffic is common place. He said there are certain economic impacts to his customer base and the marina commands only 38 cents on the dollar when compared to the other marinas in the area. The City of Hampton also loses tax base.

The U.S. Army Corps of Engineers states that a minimum width for small boat traffic should be 50-feet or five times the beam of the widest boat expected to be berthed in the harbor. There are boats berthed at Dandy Haven that exceed 15 feet at the beam. "The proposed permit falls far short of this climate, but I felt minimization from 26,000 to 6,000 square feet would be acceptable," Mr. Gurkin said.

He said he is actively involved with various conservation groups. He said the time to act is now, and with cooperation of Langley Air Force Base needing source material, it is a good project.

Associate Member Ballard asked if persons were going to be hired to do the transplant work.

COMMISSION MEETING**SEPTEMBER 25, 2001**

Mr. Gurkin said the Baltimore Aquarium dive team that has done several successful transplants in this area before in 1998 and 1999 will be coming to do the Langley project. He said he will be covering their motel and meal costs because they are doing it on a volunteer effort. Mr. Gurkin said the work could be done during the proposed time frame.

Commissioner Pruitt asked for those persons supporting the project to stand.

Bill Snyder, chairman of the Hampton Wetlands Board, told the Commission that in his nine-years on the Board this is the most significant mitigation effort that has ever been proffered for subaqueous vegetation. He urged support for the application.

Commissioner Pruitt said no one supports Bob Orth's SAV program more across the bay and that VIMS, in its report, said the applicant has demonstrated that navigational hazards exist in the channel in its current condition. Commissioner Pruitt said he went into the channel and cannot believe that someone has not run into somebody. It is a dangerous place, he added. Mr. Snyder said two boats the size of his boat cannot pass in the channel.

Commissioner Pruitt said one disaster in the channel can do more damage than the dredging, but the applicant has agreed to this proposal and he is impressed with the people from Baltimore coming down to do the transplanting.

There being no opposition, Commissioner Pruitt placed the matter before the Commission. Associate Member Gordy moved the approval of the project with the staff recommendation. Associate Member Hull seconded the motion, noting that this is a case where human and environmental concerns can be brought together and the need for safety can be compensated with environmental mitigation.

Associate Member Ballard asked the makers of the motion to include two additional items: reducing the overdredge tolerance from one-foot to six inches and that the mitigation be performed from Oct. 1 to 31. He also asked for the consideration of a performance bond of \$25,000 throughout the monitoring period, ending Dec. 31, 2004. Associate Members Gordy and Hull accepted the additions.

Associate Member Ballard said he would support the motion, but that it was very, very important that we make it clear from the record that this is an exceptional case. Because Section 28.2-1205 requires that the Commission absolutely consider the effects on SAV before we approve a permit of this nature. He said he viewed the permit as a unique situation on a number of points: 1) there is an existing business, not a proposed business; 2) there is a public safety question; 3) there is a demonstrated transplantation or mitigation site that is up and running and known to work; and 4) there are on-going projects by Langley Air Force Base and

COMMISSION MEETING**SEPTEMBER 25, 2001**

the Chesapeake Bay Foundation nearby that can use the plants that would otherwise be destroyed. Associate Member Ballard said for those reasons he would support the motion and in no way is the Commission violating the spirit of 1205. Associate Member Gordy also thanked Ms. West for the materials provided, along with Karen Duhring of VIMS. She said it was very good.

Commissioner Pruitt called for a vote on the motion. The permit was approved unanimously by an 8-0 vote.

EXECUTIVE SESSION

Following the luncheon recess, Associate Member Balled moved that the meeting be recessed and that the Commission immediately reconvene in executive closed meeting for the purpose of consultation with legal counsel and briefings by staff pertaining to actual or probable litigation, or other specific legal matters requiring legal advice by counsel as permitted by subsection (A), Paragraph (7) of Section 2.1-344 of the Code of Virginia, pertaining to the agenda item relating to Ballast Water Discharge Reporting as well as legal issues pertaining to appeals from wetlands boards.

The motion was seconded by Associate Member Hull and carried unanimously.

The Commission returned from executive session: Associate Member Ballard then moved that:

WHEREAS, the Virginia Marine Resources Commission has convened an executive 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, §2.1-344.1 of the Code of Virginia requires a certification by this Commission that such executive meeting was conducted in conformity with Virginia law;

NOW, THEREFORE, be it resolved that the Commission hereby certifies that, to the best of each member's knowledge, (i) only public business matters lawfully exempted from open meeting requirements by Virginia law were discussed in the executive meeting to which this certification resolution applies, and (ii) only such public business matters as were identified in the motion convening the executive meeting were heard, discussed or considered by the Commission. The motion was seconded by Associate Member Williams and was carried unanimously.

COMMISSION MEETING**SEPTEMBER 25, 2001**

Commissioner Pruitt asked if there were any other legal matter for the Commission. There being none the Commission returned to its agenda.

8. PUBLIC HEARING: Proposed Ballast Water Discharge Reporting Regulation
4 VAC 20-395-10 et seq.

Tony Watkinson, Acting Chief-Habitat Management, presented an overview, referring to Chapter 312 Acts of the Assembly in 2001. It is a law that became effective July 1 and requires that the Commission adopt a regulation for the submittal of ballast water reporters for ships calling on Hampton Roads and voluntary guidelines that ships could follow to reduce the impact of discharge of ballast water into Virginia waters. The whole reason is to try to limit and try to eliminate the spread of non-indigenous species into the Bay. The prime example is the rappa welk.

No changes were made in the regulation between last month's meeting when the public hearing was set and today. The regulation defines the purpose, a number of terms are defined and it goes through the voluntary ballast water guidelines, taken directly from the federal guidelines promulgated by the Coast Guard. The federal law has no penalty for failure to report and thus only about 22 percent of the vessels entering U.S. waters report ballast water discharges. Mr. Watkinson explained the regulation also provides the filing requirements, including the federal reporting form. The regulations recognize the Hampton Roads Maritime Association's (HRMA) offer to act as the agency's agents in this case. HRMA serves the shipping community and have indicated it is willing to develop a reporting procedure where ships would file with the Association and then the information will be forwarded to the agency, Mr. Watkinson explained.

Copies of comments received by the agency were given to the Commission, including those from a shipping agent and the U.S. Coast Guard. Mr. Watkinson said one agent raised two issues: the fee that Hampton Roads Maritime Association is proposing to charge for filing the reports and the fact that the regulation precludes shippers from filing directly with the agency. Another individual expresses concern about the fee for services.

Commissioner Pruitt opened the public hearing. Mr. Jeff Kever, executive vice president, Hampton Roads Maritime Association, explained that the association was a non-profit, non-stock corporation with over 500 members, businesses engaged directly or indirectly with waterborne commerce. The Association monitors and reviews issues that impact the

COMMISSION MEETING**SEPTEMBER 25, 2001**

competitiveness of our port, ensure the port has proper facilities and services to make it the leading port on the East Coast of the United States. Through efforts over the past 81 years, one of the Association's most active committees is the Steamship Trade Committee, comprised of all the shipping agents and ship lines that do business in America. The Committee met in January, 2001 on the proposed legislation presented by Senator (William) Bolling. The group was advised of the Association's desire to facilitate in this process and that a fee would be charged. At that time, twenty persons were present and a motion was made and unanimously adopted to move ahead, Mr. Keever explained.

He said it is envisioned that the ballast water reporting system would be an automated process. It would be an e-mail notification directly to the vessel's agent and back from the vessel's agent. The completed form would be put into their vessel information system for reporting and record keeping. The completed form would be electrically forwarded to the VMRC and to the Smithsonian for the voluntary U.S. Coast Guard program now in place. The conformation of an arrival is by the Virginia Pilots Association, using integrated software between the two associations. The ship agent would be sent information about the Virginia Code requirement and the form needed. (Details of the program are part of the verbatim record.)

Commissioner Pruitt asked for questions. Associate Member McLeskey asked if the Maryland pilot boats cooperate in this endeavor. Mr. Keever said he had spoken to Maryland pilots, but the regulation only applies to vessels that port in Virginia. Associate Member Cowart asked if there was a charge for the service to the ships? Mr. Keever said a fee would be charged and the Committee endorsed the proposal. The fee is \$100.

Commissioner Pruitt asked about the opposition to the fee. Mr. Watkinson said there were three items received in opposition to the fee.

With no other questions offered, Commissioner Pruitt closed the public hearing and asked Mr. Watkinson if he had further comments. Mr. Watkinson said the Coast Guard had comments on the regulation, some of which were administrative in nature and it seemed would clarify portions of the proposed regulation. Mr. Watkinson explained, one item, a reference to the "captain of the port," should merely say, "Coast Guard" and another item regarding supervision by the captain of the port should be "an area agreed to by the captain of the port." (Details on the Coast Guard suggestions are part of the verbatim record.)

Associate Member Cowart asked if the Commission has the ability to access HRMA to determine if specific ship reports have been made. Mr. Watkinson said our regulation says it must go through HRMA, but there is no provision to allow a shipper to send it directly to the agency. Associate Member White asked if there was a potential for duplication. Associate

COMMISSION MEETING**SEPTEMBER 25, 2001**

Member Cowart suggested that if the wording was changed to "may go through HRMA" what ability does the agency have to determine if a ship had filed. Mr. Watkinson said if they submitted to the agency the ship would have satisfied the law.

Associate Member Ballard questioned Mr. Keever what it costs a ship to come into the port of Hampton Roads. Mr. Keever said he would pass the question along to representatives of two major steamship lines, American Container Line and Hapag-Lloyd, who were in the audience. Associate Member Ballard said he was trying to determine whether the \$100 fee was nothing or onerous. Mr. Keever said, in the Association's opinion, it is not and were told it is not a significant fee. Associate Member Ballard said the only written communication to the Commission indicated the fee is the end of the world. Mr. Raymond Newland, director for the Mid-Atlantic District of Hapag-Lloyd, said his firm is part of the 22 percent that are currently reporting. He said from a global and inter-state position, caution must be taken from state to state regarding fees and regulatory requirements. Just the pilot requirements alone are between \$5,000 and \$7,000 just to bring the ship into port and from \$8-10,000 just to park the vessel. One hundred dollars is not astronomical, but for them to do what they want to do there must be a charge. But when you add everything up, it determines whether we come into the port or not. Our owners are going to look at Virginia regulations, not Maryland or other states.

Associate Member White, acting for Commissioner Pruitt, placed the matter before the Commission. Associate Member Ballard said he had some concerns about the HRMA being the exclusive agent and the inability of shipowners to report directly to the Commission. He asked Mr. Watkinson to talk about draft amendments to the regulation that would allow for submittal directly to the Commission in lieu of HRMA, but still recognizing HRMA as the agent. (Details of the discussion are in the verbatim records.)

Associate Member Cowart asked if the agency has the ability to handle the forms, a system in place and the staff and manpower to do the job? Mr. Watkinson said the agency has no assigned staff. Mr. Bob Grabb, Chief-Habitat Management, had taken on the job drafting the regulations as a collateral task. Without staff, it is envisioned that the agency will track and receive the reports and will be no more than a go-between to the Smithsonian Environmental Institute. If the purpose of the legislation is to prevent another rappa welk from being in the Chesapeake Bay, it could be something that could potentially stop that, Associate Member Coward said. He asked if the agency has the statutory authority of assigning an agent for this task without giving the steamship companies an opportunity to come to the VMRC.

Commission Counsel Carl Josephson said it is more efficient from the agency's standpoint to have someone else handle this (the reporting). The problem is that, as drafted, it does not specifically authorize an agent to be designated by VMRC, but it does specifically say a report is to be filed with the Commission and shall be deemed to be filed if it is handled by such

COMMISSION MEETING**SEPTEMBER 25, 2001**

means. Mr. Josephson said his reading of the statute does not preclude shippers and vessels from filing directly with the Commission.

Associate Member Ballard said if the regulation were passed in its unamended form, then a steamship operator could read it and decide not to do it and send the report directly to the Commission. Mr. Josephson said another alternative would be for the shipping company to determine in consultation with lawyers that the Commission does not have the authority to send them to HRMA and decided not to do anything.

Associate Member Ballard said the Virginia Pilot Association knows exactly what ships are entering and leaving. That is the control that goes to HRMA and we should have a report from everyone. He said he was concerned that VMRC has lost the control when it is presented with an "if" one or the other. Mr. Josephson said the control that is lost in an after-the-fact kind of control because the agency will not receive the reports from HRMA until a month after they were filed; it would be late in the game before it is known who has filed what.

Associate Member Cowart said the purpose of the legislation is to end what happened with the rappa welk. It is an important piece of legislation from the seafood industry's point of view. He asked does statutory legislation give us the ability of assigning an agent without Commission participation and Mr. Josephson said that would not be allowed. Is this something that can be delayed or must it be acted upon now? He said the maritime association knows every ship that comes into the port and we do not.

Associate Member Williams asked if the HRMA only received its information on arrivals from the ships' pilots. Mr. Keever said only the arrival time was submitted from the pilots on a 24-hour basis, but the Association gets advanced notice of everything that is expected in the port.

Commissioner Pruitt said the Commission can delay. If it needs fine tuning, we do not have to have another public hearing. Associate Member Williams said he felt there were too many unanswered questions that need to be handled. He said he would recommend that the matter be tabled.

Commissioner Pruitt said there needs to be a committee from the Commission to fine tune this and return it next month. Associate Member Hull said he shared Mr. Williams' and Mr. Cowart's concerns and he did not think it was at a level of precision for a vote. Associate Member McLeskey asked that every effort be made to get the Maryland pilots to cooperate in Virginia waters with what ever association is ultimately used. Mr. Watkinson said Maryland is going through its own process to develop its own regulations for the reporting of ships that go through the Bay and ultimately wind up in Baltimore. The (Virginia) regulations as adopted do not require the reporting of ships that transit Virginia waters; it only requires reporting of ships

COMMISSION MEETING**SEPTEMBER 25, 2001**

that come to dock in Hampton Roads or the port of Richmond. Associate Member McLeskey said what he was suggesting was that maybe voluntarily the Maryland Pilot Association could help identify the boats in Virginia waters that go up to Baltimore.

Commissioner Pruitt named Associate Member McLeskey as chairman of the committee. Associate Member Ballard said he could serve as a member. If he is not available Associate Member White volunteered to serve. Other members would include the Commission's counsel, Mr. Watkinson, Mr. Keever, and either Mr. George Washington or Mr. Doug Jenkins, should Mr. Washington or Mr. Jenkins desire to be involved.

9. PUBLIC COMMENTS:

Mr. Kelly Price of Chincoteague asked the Commission to transfer the black drum permit from his late father, who died August 5, 2001. He said he worked along with his father. Associate Member White moved and Associate Member Hull seconded the motion to transfer the license. It passed unanimously .

10. PUBLIC HEARING: Proposed amendments to Regulation 4VAC 20-950-10 et seq., "Pertaining to Black Sea Bass" to establish trip limits and possession limits for the October 1 through December 31 fishing season.

Chad Boyce, Fisheries Management Specialist, explained that the Atlantic States Marine Fisheries Commission Summer Flounder, Scup, and Black Sea Bass Management Board, in consultation with the Mid-Atlantic Fisheries Management Council, has approved through emergency actions, modifications to the Black Sea Bass fourth quarter commercial fishery. These emergency actions will establish new possession limits for the fourth quarter commercial Black Sea Bass fishery, that runs Oct. 1 through Dec. 31, 2001.

Provisions for the emergency rule call for Virginia to approve either a 300-pound daily or a 2,000-pound weekly possession limit for Black Sea Bass, Mr. Boyce explained. Some issues that would arise from either of those decisions would be a compromise between setting limits that would allow the fishery to proceed throughout the entire designated fishing period and setting so low that they would significantly impact different user groups. For example, a commercial hook-and-in fisherman would prefer a 300-pound daily limit, but 300-pounds per day would not be profitable for a pot fisherman.

Staff has drafted the regulation and recommends the 2,000-pound weekly possession limit, in order to create a fairness among the various user groups and allow the fishery to continue throughout the entire fishing period.

COMMISSION MEETING**SEPTEMBER 25, 2001**

Commissioner Pruitt asked if there were any questions. There being none, he opened the public hearing. Harry Dougherty of Poquoson wrote the letter on behalf of nine fishermen. He said at no time was there a consideration of a 300-pound per day limit because it costs us in the neighborhood of \$500 per day to fish. The 2,000-pound per week is a requirement for us.

Mark Hodges, a full-time trout fisherman, previously opposed the limits the states' have passed for the second, third and fourth quarter because they unjustly favor the part-time fisherman. The full-time fisherman's work is based upon volume. If you're limited per week, the full-time fisherman is curtailed. He said no trip limit per day would be helpful. The 2,000-pound limit is the least that he said he would favor. Mr. Hodges said there is a part-time fisherman push in the ASMFC and the proposed landing limits are not fair to full-time fisherman.

Commissioner Pruitt closed the public hearing and placed the matter before the Commission. Associate Member Hull moved the adoption of the amended regulation, effective Oct. 1, 2001. Associate Member Cowart seconded the motion and it was approved by a 7-1 vote.

- 11. PUBLIC HEARING:** Proposed amendments to Regulation 4VAC 20-910-10 et seq., "Pertaining to Scup" to adjust the initial and final possession limits and the harvest trigger percentage for the November 1 through December 31 fishing season.

Chad Boyce, Fisheries Management Specialist, said this is a compliance issue, an Emergency Action, passed by the Atlantic States Marine Fisheries Commission. This action will establish a landings trigger of 70 percent and a modified daily possession limit for commercial scup for winter period II (November 1 through December 31, 2001).

The Emergency Action for scup will maintain an initial 2000-pound daily possession limit and establishes a 70 percent landing's trigger, which once met, would reduce possession limits to 500-pounds daily. The use of a landing's trigger should allow fishermen to harvest scup throughout the entire quota period. Staff recommends approval of the emergency action, Mr. Boyce said.

Commissioner Pruitt opened the public hearing, but there were no comments. He placed the matter before the Commission. Associate Member Hull moved the adoption of the amended regulation, effective Oct. 1, 2001. Associate Member White seconded the motion which was adopted unanimously, 8-0.

- 12. PUBLIC HEARING:** Proposed amendments to Regulation 4VAC 20-1010-10 et seq., "Pertaining to Dredging in Submerged Aquatic Vegetation" to prohibit the use of any

COMMISSION MEETING**SEPTEMBER 25, 2001**

dredge in Chincoteague Bay and Assateague Channel and Bay.

Chad Boyce, Fisheries Management Specialist, explained that the Chincoteague Bay SAV sanctuary was established in January 1998 through Regulation 4 VAC 20-1010-10 et.seq., "Pertaining to Dredging in submerged Aquatic Vegetation," in order to provide for conservation of SAV in Chincoteague Bay. The Chincoteague sanctuary includes all existing SAV mapped through 1997, as well as a 200 meter buffer zone. The buffer zone was added to provide a margin of error for watermen working in close proximity to the SAV beds since the area is not currently delineated by markers or buoys. At the time the regulation was established the Commission indicated that if significant damage to the beds was observed in subsequent years, it would consider closing the entire area to clam dredging.

Each year the area has been assessed by scientists from VIMS, through aerial photography and field sampling, in order to analyze the impacts of fishing activities in the area, if any, and to evaluate the status of the existing SAV beds.

The 1999 data showed evidence of linear scarring typically seen as a result of hydraulic (escalator) dredge activity, which is prohibited in Virginia and has been restricted in Maryland. The 2001 Virginia General Assembly passed legislation prohibiting watermen from having hydraulic dredges on board their vessels in Virginia waters, unless permitted by the VMRC. Additionally, several new, round scars, indicating the use of modified oyster/clam dredges were also observed in the SAV area. The use of these dredges in the sanctuary is again, a violation of the regulation pertaining to dredging in the SAV areas.

Staff was directed by the Commission to organize a meeting of clammers, law enforcement personnel, and VIMS scientists to discuss this issue and to develop possible management measures to curtail harmful clam dredging practices in Chincoteague Bay. On August 8, 2001, the Hard Clam Advisory Committee met to discuss the issues concerning the Chincoteague Bay SAV Sanctuary. Although there was not a quorum of the clam committee present, a number of clammers from the Chincoteague area were present and participated in the discussion, Mr. Boyce explained. There were no votes taken at the meeting.

VMRC staff and VIMS staff, with comments from the public, drafted a marking scheme to better delineate the SAV area. This scheme would use existing channel markers in the Bay and additional markers which would be placed if the Commission approves the regulation. Staff presented a brief slide presentation to the clam committee that showed the area involved and the possible options for better delineation. (Details of the plan are part of the verbatim record.) Recently law enforcement officers issued summons for people dredging in the area, but they were not prosecuted because the judge determined that the area was not significantly delineated and therefore, no fines or penalties could be imposed. The amended regulation, Mr. Boyce

COMMISSION MEETING**SEPTEMBER 25, 2001**

said, includes a marking scheme that can be used by law enforcement and watermen.

Commissioner Pruitt asked for questions from the Commission. There being none, the public hearing was opened. Ernie Bowden, Eastern Shore Working Watermen's Committee, said his group had met with the committee and agreed with a number of areas delineated. He said that several areas were a waste of time because they will be in 20-feet of water and the poles will not hold and the line is not needed. He also questioned several other areas, including one that Mr. Bowden suggested not be handled for at least a year.

Mr. Boyce said that some provisions in the drafted regulation would exempt any private or leased bottom from the prohibition on dredging. The public hearing was closed.

Associate Member Ballard questioned staff about areas outlined by Mr. Bowden. What about the discussions, he said? Mr. Boyce said there was some scarring in several of the areas noted by Mr. Bowden, but they may have been on private ground, but some scarring was near public ground. He also said there definitely was some scarring on the Western ground and that some of the lines could be altered and areas excluded from the present regulation.

Commissioner Pruitt called upon Randy Widgeon, Captain-Eastern Shore Area, Law Enforcement, and asked if he knew of immediate problems in the area. He responded negatively. Mr. Bowden wanted excluded this year. Associate Member Ballard was told that the dredging period opens December 1 and said maybe in another 30-days something could be worked out.

Roy Insley, Head, Plans and Statistics Department, said it was the agency's plan to use the rough coordinates and put poles in place and then the engineering staff would take accurate measurements so the exact coordinates would be part of the regulation. Dr. Robert Orth said it was essential to have the regulation in effect by December 1.

Steve Bowman, Chief-Law Enforcement, urged the Commission to decide on the specific coordinates before any regulation is adopted so that no confusion could be claimed in court.

Commissioner Pruitt said the Commission could wait and adopt the regulation next month after the details have been finalized. Dr. Robert Orth pushed for the plan, saying there is major agreement with most portions of Chincoteague Bay to be included in the sanctuary and only a few areas that need to be worked out. (Details of the discussion are part of the verbatim record.)

Commissioner Pruitt put the issue before the Commission. Commission Counsel Carl Josephson said he did not believe there were specific coordinates now. Mr. Boyce said the best

COMMISSION MEETING**SEPTEMBER 25, 2001**

option may be to get the survey conducted and then bring them back to the Commission. Mr. Josephson said the other alternative would be to adopt the regulation as presented and amend it at some future time with specific coordinates. He said the amendments would require another public hearing. Mr. Bowman said two amendments within a month would add to the court-perceived confusion.

Associate Member Ballard said he felt, more and more, that the Commission should wait until next month to consider precise coordinates. Commissioner Pruitt said the item would be carried over until next month.

- 13. PUBLIC HEARING:** Proposed amendments to Regulation 4VAC 20-720-10 et seq., "Pertaining to Restrictions on Oyster Harvest" to establish harvest restrictions for the 2001-2002 public oyster season.

James Wesson, Head-Conservation and Replenishment Department, Fisheries Management, said it is the same as last year, only changing the year in the existing regulation and one small change of a location in Tangier and Pocomoke sounds. Commissioner Pruitt opened the public hearing and asked if there were any comments. A letter from Harry Parks was distributed. Mr. Parks said watermen would like to exclude the bad weather days but still continuing with the 30 "working" days. He asked why the smaller boats have been taken out of the oyster restoration program because it was started with the small boats, the 38-40 footers.

Commissioner Pruitt said Dr. Wesson could work that out himself because it is determined by who will work. Dr. Wesson said the big boats were privately hired by lease owners. Oyster rocks in Tangier Sound will be open from December 1 through 31, Mr. Parks asked? Dr. Wesson answered positively and said the use of boats would be determined by who can work. Commissioner Pruitt said the watermen were asking for 30 working days, rather than 30 days in a single month. The question of small boats can be handled by Dr. Wesson depending upon which boats want to work and can be handled during the replenishment season which is settled in January. The public hearing was closed.

Associate Member Gordy asked how 30 "working" days would be determined. Maybe one boat would go out and others would not. She said watermen want to be exempt on the bad weather days. Associate Member Cowart asked if there was a way to determine the amount of resource in the area and how many boat days could be handled. Dr. Wesson said that had been done and that he believe less than 10 boat days was available.

Dr. Wesson said the areas closed in Tangier this year include those under active restoration through the U.S. Army Corps of Engineers plan. Some of the area has been reshelled and the

COMMISSION MEETING**SEPTEMBER 25, 2001**

rest is awaiting reshelling by the Corps. The biggest standing stocks are found in the areas that are proposed to be open.

Commissioner Pruitt placed the matter before the Commission. Associate Member Ballard moved to approve the proposed regulation with the same season as last year, but with harvest areas in Tangier Sound Management Area limited to the Hurleys area including the Tangier Sound Hand Tong areas and the Pocomoke Sound areas, as described. Associate Member Birkett seconded the motion, which was passed unanimously, 8-0.

- 14. DISCUSSION:** Request of the Coastal Conservation Association of Virginia to lower the possession limits on cobia and spadefish. Request for public hearing.

Lewis Gillingham, Fisheries Management Specialist, asked the Commission to set the issue for public hearing next month. Associate Member White moved the public hearing and Associate Member Gordy seconded the motion, which was adopted unanimously, 8-0.

- 15. RECOMMENDATIONS** of the Recreational Fishing Advisory Board pertaining to the funding of certain projects.

Jack Travelstead, Chief-Fisheries Management, said there were three proposals: to spend \$15,000 to the Artificial Reef program to cover the remainder of a contract for deployment of concrete pipe to six reef locations; approval to use funds allocated to the Reef Program for charter services to be used to cover fuel costs of the reef program vessel; and a proposed design of a sign to be used at all projects funded by the Virginia Saltwater Recreational Fishing Development Fund. Mr. Travelstead said the only question was whether the agency's initials "VMRC" should be placed on the sign.

Commissioner Pruitt said he wanted VMRC on the sign. Associate Member McLeskey asked if the Virginia Marine Resources Commission should be spelled out? Mr. Travelstead said he would work on it.

Commissioner Pruitt opened the public hearing. There being no comments, he placed the matter before the Commission. Associate Member Gordy moved the recommendations. Associate Member White second the motion, which was adopted unanimously, 8-0.

- 16. DISCUSSION:** Review of Striped Bass fishery, ITQ Program, and quota overages. Request for public hearing.

Jack Travelstead, Chief-Fisheries Management, said the ASMFC could be involved in this

COMMISSION MEETING**SEPTEMBER 25, 2001**

later. Commissioner Pruitt asked if there would be a Finfish meeting before the public hearing. Mr. Travelstead said there already had been four meetings on the issue and a solution has been endorsed. Associate Member Gordy moved the public hearing. Associate Member White seconded the motion, which was adopted unanimously, 8-0.

17. DISCUSSION: Review of Mandatory Harvest Reporting Program. Request for public hearing.

Stephanie Iverson, Fisheries Management Specialist, said the harvest reporting program did not have to come before the Commission next month. Therefore, she would delay the request.

18. REPEAT OFFENDERS

Steve Bowman, Chief-Law Enforcement, brought two repeat offenders before the Commission.

Mr. Wilson H. Hatter failed to appear even though Mr. Bowman said he was served personally by Capt. Oliver on August 30, 2001. Commissioner Pruitt recommended that everything be withheld until he appears. Associate Member Ballard moved that all licenses held by Mr. Hatter be revoked until he appears before the Commission. Associate Member White seconded the motion, which passed unanimously, 8-0. Associate Member Williams said he normally abstains on such matters, but decided to vote on this one after looking at the case. Commissioner Pruitt said he would not handle the matter personally.

Mr. Kenneth T. Heath came forward. Col. Bowman said that according to the guidelines he would have only two violations, since three occurred on two separate days. Since Mr. Heath holds a striped bass permit, the Commission can consider the matter after only one violation. Marine Patrol Special Agent John Croft explained the details of the undercover activity and how Mr. Heath of Health Seafood was involved. (Details of the report are part of the verbatim record.)

Mr. Tom Northington, counsel for Mr. Heath, said the waterman has had a license since he was 15-years old and rockfish tags since the beginning of the program. He said he had three tickets on two different days and did not contest the action in court and paid \$1,500 in fines. Mr. Northington said Mr. Heath acknowledged that he had "cut a corner" and had accepted the responsibility and did not lay the blame upon anyone else. He said that a period of probation would seem to be appropriate in this matter.

Associate Member Cowart asked him if he understood how many watermen used these rockfish tags appropriate and how many would like to have his tags? Mr. Heath said he had violated the regulations only on two occasions. Associate Member Hull asked why he did not

COMMISSION MEETING**SEPTEMBER 25, 2001**

go to court.

Mr. Heath responded that he confused the date. He said, however, that he did not contest what he had done.

Associate Member White asked Mr. Heath if he was aware of the severity of what he had done. Mr. Heath responded in the affirmative. Associate Member White further said that Mr. Heath lives in the area he represents and what Mr. Heath said about his personal problems was accurate. Associate Member White moved to place Mr. Heath on probation for two years, emphasizing that any future offense during probation would result in the loss of his waterman's license. Associate Member Gordy seconded the motion.

Commissioner Pruitt asked if there was further discussion. Associate Member Williams, who normally abstains on these matters, decided to vote in favor of probation because rockfish tags were involved. As a waterman to waterman, he told Mr. Heath that rockfish tags are a luxury and watermen who get the tags know what they are supposed to do. Associate Member Hull asked if two years was the maximum probation. Mr. Bowman replied in the affirmative.

Commissioner Pruitt asked Special Agent Croft if there was any contact with Mr. Heath after the summons were written. MPO Croft said only by telephone. Commissioner Pruitt asked about his demeanor and attitude. MPO Croft said Mr. Heath indicated he was sorry he got caught, but he did not deny his guilt, which is something different. He said Mr. Heath had a good attitude..

Commissioner Pruitt asked Capt. Widgeon if he had any dealings with Mr. Heath. Capt. Widgeon said nothing beyond some abandoned poles. Commissioner Pruitt said he felt Mr. Cowart and Mr. Williams had laid out the situation. Commissioner Pruitt said he personally had a unique background for this situation--all his people were watermen, he had been in law enforcement, his son is in law enforcement and he commands a law enforcement organization probably bigger than any sheriff's organization in Tidewater. He said he was personally disappointed in Mr. Heath, having known his folks and his grandfather. He said Mr. Cowart had put it clearly. He admonished Mr. Heath that if he comes back within the two year period, the Commission would take it.

Associate Member Hull asked how many licenses Mr. Heath had? Mr. Bowman said he has two pound net licenses, commercial registration and a striped bass permit. If he comes back on any other violation, not just rockfish, he will lose his license. Commissioner Pruitt said he has to be convicted in a court of law.

Commissioner Pruitt called for the vote on the motion, which passed unanimously, 8-0.

COMMISSION MEETING**SEPTEMBER 25, 2001**

Associate Member Gordy asked about the Commission's scheduled November meeting. Commissioner Pruitt said it was agreed to leave it as scheduled, but the Christmas meeting has been changed to the third Tuesday (Dec. 18).

There being no further business before the Commission, the meeting was adjourned at 4:15 p.m.

William A. Pruitt, Commissioner

Wilford Kale, Acting Commission Secretary