

## MINUTES

## Commission Meeting

March 27, 2012

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:

Jack G. Travelstead	Acting Commissioner
William Laine, Jr. J. Bryan Plumlee Joseph C. Palmer, Jr. Richard B. Robins Kyle J. Schick Whitt G. Sessoms, III Edward Tankard	Associate Members
Paul Kugelman, Jr.	Assistant Attorney General
John Bull	Director, Public Relations
Jane McCroskey Linda Farris	Chief, Admin-Finance Bs. Systems Specialist, MIS
Rob O'Reilly Joe Grist Jim Wesson Joe Cimino Stephanie Iverson Allison Watts Adam Kenyon Renee Hoover Sonya Davis Lewis Gillingham	Acting Chief, Fisheries Mgmt. Acting Deputy Chief, Fisheries Head, Conservation-Replenishment Biological Sampling Program Mgr. Fisheries Mgmt. Manager Fisheries Mgmt. Specialist Fisheries Mgmt. Specialist Fisheries Mgmt. Specialist Fisheries Mgmt. Specialist, Sr. Head, SW Fishing Tournament
Rick Lauderman Warner Rhodes Victoria Rabenstine Jennifer Baylis	Chief, Law Enforcement Deputy Chief, Law Enforcement Marine Police Officer Marine Police Officer

**Commission Meeting**

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

## Virginia Institute of Marine Science (VIMS):

Lyle Varnell

## Others present:

David A. Williams	Terry Hill	Ed Cunningham
Lynn Hume	Eric Berryman	Mike Megge
Charlie Natale	Steve Wood	Daniel Renshaw
Todd R. Hopper	Scott McInnis	Doug Law
Ann McKinney	Milton McKinney	Myles Pocta
Bryan Ellis	Wade Watson	Fred Parkinson
Steve Fawley	Lavonne Fawley	B. K. Wilson
John Faber	Virginia Morton	Thomas H. Best
Philip Bleeker	Wendy Brockenbrough	
Jim Brockenbrough	Reg Mahoney	Steve Reynolds
Mary Elizabeth Lynch	Mark King	Dave O'Brien
Phill Roehes	Rommel Tamayu	Mike Mundy
Scott Harper	Andy Baan	Marcia Tharp
Andy Lacatell	Ryland Gaskins	Chris Moore
Belinda Gaskins	Ida Hall	Michelle Peabody
Harry D. Doernte	Kim Huskey	John R. Smith
Bob Reed	Karen Reed	Peg Reed
Douglas Reed	Rick Lockhart	James Combs
Glenn Kelley	W. R. Davenport	Susan Gaston
Bill Davenport	Eileen Tullner	John Tullner
Timmy Daniel		

And others.

**Commission Meeting**

**16652  
March 27, 2012**

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Acting Commissioner Travelstead called the meeting to order at approximately 9:34 a.m. Associate Member Fox was absent.

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At the request of Acting Commissioner Travelstead, Associate Member Robins gave the invocation and Tony Watkinson, Chief, Habitat Management led the pledge of allegiance.

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

Rob O'Reilly, Acting Chief, Fisheries Management, stated that Item 20 could be removed as there were no cases of failure to report harvest to be heard.

Associate Member Robins asked that time be allotted during the Public Comment period to discuss the Atlantic Sturgeon being placed on the endangered species list and impacts on Virginia's fisheries.

Acting Commissioner Travelstead asked for a motion for approval of the agenda by the Board.

**Associate Member Robins moved to approve the agenda, as amended. Associate Member Schick seconded the motion. The motion carried, 7-0.**

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**MINUTES:** Acting Commissioner Travelstead requested a motion for approval of the February 28, 2012 Commission meeting minutes, if there were no corrections or changes.

As there were no changes, Acting Commissioner Travelstead asked for a motion to approve the minutes.

**Associate Member Laine moved to approve the minutes, as presented. Associate Member Robins seconded the motion. The motion carried, 6-0-1. Associate Member Tankard abstained as he was absent from last month's meeting.**

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Acting Commissioner Travelstead, at this time, swore in the VMRC staff and VIMS staff that would be speaking or presenting testimony during the meeting.

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- 2. **PERMITS** (Projects over \$500,000 with no objections and with staff recommendation for approval).

Tony Watkinson, Chief, Habitat Management, informed the Commission that there were no page two items to be heard.

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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).
- 3A. **STEPHEN FAWLEY, #11-1800,** requests after-the-fact authorization to retain an 18-foot by 20-foot low-water bridge crossing consisting of five (5) 30-inch culverts and to install a 6-inch concrete cap to make the current crossing permanent over Turley Creek in the Town of Broadway in Rockingham County. Staff recommends approval with triple permit fees in the amount of \$75.00.

Tony Watkinson, Chief, Habitat Management, gave the presentation. His comments are a part of the verbatim record. Mr. Watkinson reviewed the information provided in the evaluation.

On December 14, 2011, staff received a Joint Permit Application from Mr. Fawley requesting authorization to retain a low water bridge crossing which he constructed in November of last year to access his upland property where he was building a new residence. To access the construction site, Mr. Fawley was fording Turley Creek, a tributary to the North Fork of the Shenandoah River, which has a drainage area of approximately 8.7 square miles. Mr. Fawley contacted the County to ensure he was in compliance with local and state laws. Due to the fact that he was crossing the stream more than twice in a 6-month period, the County issued a stop work order prohibiting Mr. Fawley from fording Turley Creek until he installed a temporary stream crossing. Prior to Mr. Fawley constructing the bridge crossing, the County contacted the U.S. Army Corps of Engineers to determine if a permit was required from the Corps. The Corps informed the County that since the project required less than 10 cubic yards of fill, that it satisfied the criteria for a non-reporting Nationwide Permit. Unfortunately, the County official was unaware that a VMRC permit might be required and that an application needed to be submitted to VMRC until it was mentioned by the Corps. At that point, Mr. Fawley had already stockpiled materials on-site and was ready to begin construction. In order to access his upland construction site, Mr. Fawley installed the temporary culvert crossing in mid-November; however, he ceased construction prior to installing the concrete cap. He conducted the work himself and did not hire a contractor.

The County has approved the low water bridge crossing and noted that it is not located in a designated floodplain. The County is now fully aware that any proposed project sites in which the drainage area is greater than 5 square miles may require a VMRC permit, and that a Joint Permit Application must be submitted for formal review.

Staff conducted our public interest review, and there has been no opposition to the proposal. The Department of Game and Inland Fisheries identified Turley Creek as potential habitat for the state Threatened wood turtle but they do not believe the construction harmed any hibernating turtles. DGIF recommends that the landowner be made aware of the possibility of encountering wood turtles on site and become familiar with their appearance, status, and life history. If wood turtles are encountered, they must be immediately removed and relocated safely to suitable habitat near the closest perennial stream, and any relocations should be reported to DGIF. The culverts were countersunk into the streambed in conformance with DGIF’s standard recommendations for in-stream conditions. Given that the applicant had been working closely with the County during the construction of the bridge and the fact that the project appears to be warranted and reasonable, staff does not recommend a civil charge and recommends after-the-fact approval of the low water bridge with the assessment of triple permit fees totaling \$75.00 in accordance with §28.2-1206 D of the Code of Virginia.

Mr. Watkinson stated that Mr. Fawley was present.

Steve Fawley, applicant, was sworn in and his comments are a part of the verbatim record. Mr. Fawley explained that when he started construction of his house he did contact the Corps of Engineers so he was aware of a permit. He noted that the county did stop him because he needed the temporary crossing. He added that the county said that no permits would be necessary since the structure was not permanent.

Acting Commissioner Travelstead asked for questions and there were none. He asked if anyone else wished to comment and there were none. He stated the matter was before the Commission.

**Associate Member Robins moved to accept the staff recommendation. Associate Member Schick seconded the motion. The motion carried, 7-0.**

Permit Fee (ATF Triple).....	75.00
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**3B. NANCY WELLS DRURY, #11-0524,** requests after-the-fact authorization to retain one osprey pole which includes a 3-foot by 3-foot nesting platform situated adjacent to her property along the Chesapeake Bay at 4620 Peaceful Shores Drive in the Jamesville area of Northampton County. The applicant has agreed to pay a

civil charge in the amount of \$600.00 in lieu of further enforcement action. Staff recommends approval and acceptance of the aforementioned civil charge.

Tony Watkinson, Chief, Habitat Management, gave the presentation. His comments are a part of the verbatim record. Mr. Watkinson explained the information in the evaluation.

Staff received a Joint Permit Application from Mrs. Drury on April 11, 2011, to install a single osprey pole which included a nesting platform. Since the pole was channelward of mean low water a permit would be required from VMRC.

In early May 2011, Mrs. Drury informed staff that the pole had been installed in late April. She stated that the installation took place while she had a contractor on her property working on another project. Mrs. Drury stated she was concerned that getting someone back to install a single pole would take a year or longer.

As part of our standard review process we notified the adjacent property owners. Staff received a letter dated May 5, 2011, from Mr. Henry Ritter, who is an adjacent property owner protesting the project. Mr. Ritter was concerned the osprey pole would reduce his property value. In late February of this year, staff received a call from Mr. Ritter withdrawing his protest of the project.

Last year the nest was occupied by a pair of osprey. Mrs. Drury would like to keep the pole in hopes that the pair will return again this year.

Based on our evaluation of the project had the applicant waited until staff had resolved the protest and completed its review, staff would have administratively issued a permit for the project. Staff, therefore, recommends approval of the after-the-fact osprey pole, with a civil charge based on minimal environmental impact and a minimal degree of deviation. The applicant has agreed to pay a civil charge in the amount of \$600.00 in lieu of further enforcement action. Staff also recommends approval and acceptance of the aforementioned civil charge and the assessment of a triple permit fee of \$75.00 in accordance with §28.2-1206 D of the Code of Virginia.

Acting Commissioner Travelstead asked for questions. There were none. He asked if there were any comments from others. There were none. He stated the matter was before the Commission.

**Associate Member Tankard moved to approve the after the fact application and related charges. Associate Member Schick seconded the motion. The motion carried, 7-0.**

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

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4. **CLOSED MEETING FOR CONSULTATION WITH, OR BRIEFING BY, COUNSEL.** VMRC Counsel indicated that a closed meeting was not necessary.

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5. **GAMESA ENERGY USA, LLC, #12-0149**, requests authorization to install a single 5-Megawatt offshore wind turbine generator (WTG) prototype and its supporting infrastructure approximately three miles south west of Cape Charles Harbor in the lower Chesapeake Bay, west of Northampton County.

Hank Badger, Environmental Engineer, Sr., gave the presentation with slides. Mr. Badger reviewed the information provided in the staff evaluation. His comments are a part of the verbatim record.

Mr. Badger explained that the Gamesa Energy USA is a manufacturing company principally involved in the fabrication of wind turbines and the construction of wind farms. Gamesa develops, manages and sells wind farms, for which it also supplies wind turbines. The company has installed wind turbines in four continents and has over 20,000 Megawatts of production in development in Europe, Asia and America.

Mr. Badger stated that in joint development with Newport News Shipbuilding, the proposed project will advance the demonstration of Gamesa's new offshore (WTG) technology. The proposed turbine will be specifically designed for deployment in offshore wind environments worldwide and will also produce up to 5 MW of renewable wind power for delivery to the local Virginia transmission grid for public use.

Mr. Badger said that the project includes the installation of a steel mono-pile foundation and tower with a maximum blade tip height of 479 feet above mean sea level, stone riprap scour protection around the foundation base, and the installation of 15,219 linear feet of submerged power cable buried a minimum 6 feet below the seabed. The cable will connect the proposed wind turbine to the Cape Charles electrical grid through the Bay Coastal Railroad property in Cape Charles Harbor. The proposed wind turbine will be located at N 37°14'37.4", W 76°03'47.3" in approximately 53 feet of water.

Mr. Badger stated that the installation of the turbine is scheduled for late 2013 and the expected design life of the turbine is anticipated to be 20 years or more. The submarine cable systems design life is estimated to be more than 100 years, given the armoring and other protective elements.

Mr. Badger noted that if the wind turbine is no longer needed for new WTG technology efforts or renewable wind energy generation, the structural elements will be decommissioned, and removed, by Gamesa as shown in their Decommissioning Plan.

Mr. Badger explained that last year, during the permitting process regarding the possible future placement of a turbine in a designated study area, the Virginia Pilots Association and the Virginia Maritime Association expressed concerns. They pointed out that the general area is used as an anchorage and that the area is used by ships during storm events. In response, the study area was moved inshore to accommodate their concerns. Since the Virginia Pilots Association and the Virginia Maritime Association had original concerns, staff informed them on the proposed project. Staff has not received any objections or comments from either Association.

Mr. Badger said The Virginia Institute of Marine Science (VIMS) indicates the applicant addresses potential direct marine environmental impacts to the most practicable extent possible. They also state that the unavoidable adverse effects to the marine environment will occur during the construction phase but these are expected to be localized, short-term, and minimal. In fact, the turbine and scour construction may result in a vibrant and productive ecosystem that proves beneficial to local commercial and recreational fishing interests.

Mr. Badger explained that VIMS did suggest the issue of operational noise distributed locally throughout the water column remains a single issue of potential indirect affect that should be considered. While, water column noise originating from vessels large to small and various shoreline-based operations is common in Chesapeake Bay, a wind turbine supported by a hollow metal mono-pile presents a continuous and long-term sound generating point source of unknown level and frequency that will be new and unique to Virginia waters.

Based on the available scientific literature, and the fact that Chesapeake Bay is not pristine with respect to sound within the water column throughout the year, VIMS expects that the noise emanating from a wind turbine will not have significant adverse environmental effects on the littoral marine environment. However, they could not confidently state that this issue is of minimal concern. As a result, they suggest this issue can only be analyzed using an active offshore turbine and therefore recommend that the Commission and the applicant consider using this opportunity to address the issue of the amount and extent of the noise field surrounding the mono-pile.

Mr. Badger stated that the Department of Conservation and Recreation (DCR) states Bald Eagles and sea turtles use this section of the Bay and recommends coordination with DGIF. They also state the offshore project is within an Avian International Importance Zone. The Department of Game and Inland Fisheries (DGIF) states the project is consistent with the Virginia Coastal Zone Management Program's Fisheries Enforceable Policy. They also support the selection of the least environmentally damaging and most effective methods for the tower construction and cable installation, as proposed. The

Department of Historic Resources (DHR) states that the proposed wind turbine is acceptable. The Department of Environmental Quality (DEQ) states that the project will not require a Virginia Water Protection permit provided the applicant receives a U. S. Army Corps of Engineers permit.

Mr. Badger informed the Commission that the U.S. Army Corps of Engineers is anticipating issuing a nationwide permit for this project. The Nationwide permit used will be a new nationwide being issued on March 19, 2012 called Nationwide Permit 52 for Water-Based Renewable Energy Generation Pilot Projects.

Mr. Badger noted that the U. S. Coast Guard staff has expressed safety concerns with the vertical clearance between the tip of the turbine blade when it's at its lowest point and the water (14 meters or 46 feet). While they suggest a census of all vessels currently using Cape Charles Harbor and/or Little Creek to determine the maximum height of their mast and antennas to evaluate this, staff believes this is best addressed through their regulatory review.

Mr. Badger explained that the Cape Charles Wetland Board has approved their portion of the project at a hearing on February 29, 2012.

Mr. Badger said that the Fisheries Management Division states that the proposed wind turbine is acceptable provided there is no restrictive area around the structure. They also state the stone riprap scour protection around the foundation base could indirectly make an artificial reef that the local fishermen may use.

Mr. Badger noted that there were no protests to the current application received and aside from the comments provided no agency has expressed opposition to the project.

Mr. Badger said that staff believes, based on the application information, that since the U.S. Coast Guard considers the wind turbine a private aid to navigation, the Coast Guard must review the installation of the wind turbine. If the Coast Guard regulations require additional vertical clearance for safety then the applicant could request a modification to their VMRC permit.

Mr. Badger stated that while the Department of Conservation and Recreation (DCR) stated that the offshore project is within an Avian International Importance Zone the DEQ recently established and now administers the Small Renewable Energy Permit by Rule program under authority of Article 5 (§10.1-1197.5 et seq.) of Chapter 11.1 of Title 10.1 of the Code of Virginia that considered avian impacts. As such, Commission staff believes any avian impacts have been addressed as part of the Permit by Rule.

Mr. Badger explained that with regards to the VIMS's comments, the staff believes an acoustic monitoring study may be beneficial to both the Commonwealth and the wind industry that desire to use state and offshore waters for energy generation.

Mr. Badger said that 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 recommends approval of the project as submitted, with the special permit conditions listed below. Since this project represents a first of a kind in Virginia waters staff believes these permit conditions are necessary, especially with regard to the eventual removal/decommissioning, the posting of a bond, letter of credit or other financial instrument to fund removal (if required by the Commonwealth), and for potential transfer. Furthermore, while a royalty is also recommended, it is currently based on the established royalty schedule for encroachments over State-owned submerged land, which when developed did not specifically address this type of project. Since this is essentially a research turbine that will hopefully advance opportunities for offshore wind development, as well as the development of wind energy industry in Virginia, staff believes the proposed royalty is adequate especially combined with the acoustic study that staff felt should be required. While future turbines in Virginia Waters may require additional royalty considerations, staff believes this is addressed in the special conditions regarding a possible transfer of the permit or if a request is submitted to keep this turbine in place beyond the initial 20-year period for electrical generation.

- 1) Permittee shall notify the Commission of its date for the start of construction activities authorized herein, which shall represent the date from which applicable conditions will apply. Such notice shall be provided 30 days before any construction authorized herein is to begin.
- 2) Permittee agrees that any change in the physical features of the turbine, including but not limited to installation of new blades, nacelle or tower, authorized herein shall be allowed provided the Commission is notified 90 days prior to any change and this permit is administratively amended to reflect such change. However, any changes to the physical encroachment location shall be approved by the Commission. Replacement of components for repair purposes will not require Commission notification.
- 3) Permittee agrees the tower and turbine shall be decommissioned if the turbine ceases operations for twenty four consecutive months, assuming the lack of operation is not due to conditions beyond the control of the Permittee. The Permittee will provide notice to the Commission concerning such lack of operation and will have one year from that notice to complete the decommissioning plan that is made part of this permit. Any request for extension beyond the initial 20 year term shall be submitted to the Commission in writing no less than one (1) year prior to the 20<sup>th</sup> anniversary of the construction commencement date. If extended, the Permittee agrees that additional royalties may be required by the Commission for wind turbine permits in accord with the Commission guidelines in place at the time of extension.

- 4) Permittee agrees that a bond, letter of credit, or other financial instrument shall be established to fund the decommissioning plan. Funds from such bond, letter of credit, or other financial instrument shall be made payable to the benefit of the Commonwealth in the event the Permittee is unable to implement the decommissioning plan. The bond, letter of credit, or other financial instrument shall be established before construction commences. The minimum bond, letter of credit or other financial instrument shall initially be established at \$2,127,675.00 and shall be updated with a new estimate every five years. The Permittee may revisit the cost estimate at each period and adjust the amount as may be justified by changing market and other conditions in the wind energy industry.
- 5) Permittee agrees that no construction authorized herein shall begin until an interconnection agreement has been approved by the applicable provider for the distribution of electrical power within the local transmission system, or a special use of all electricity generated by the turbine authorized herein has been identified and there is no distribution to the local transmission system.
- 6) Permittee agrees that should this permit be transferred, the Commission may reassess the need for any additional royalty that may be assessed at the time of transfer based on the use of the turbine for power generation, or other experimental, commissioning or demonstration purposes. Any additional royalty shall be assessed in accord with the Commission guidelines in place at the time of transfer. In the event of any transfer of this permit a new bond, letter of credit, or other financial instrument shall be established to fund the decommissioning plan. Funds from the bond, letter of credit, or other financial instrument shall be made payable to the benefit of the Commonwealth in the event the new Permittee is unable to implement the decommissioning plan. Notwithstanding the above requirement no changes to the bond or additional royalties will be assessed from transfers to any of the Permittee's affiliates.
- 7) Permittee agrees to comply with all applicable Coast Guard regulations.
- 8) Permittee agrees to conduct an acoustical study to determine the level of sound in the surrounding water column generated by the operation of the permitted turbine and transmitted through the tower. Underwater sound levels will be measured within two (2) years of commencement of operation of the WTG at representative locations around the WTG to document the site-specific propagation characteristics of the underwater environment. The one time underwater measurements will be made at two distances from the WTG to allow for the evaluation of the decay or drop off rate of sound. The first or "close-in" distance will be based on approximately two rotor diameters (approximately 840 feet) of the WTG. The close-in distance will be adjusted in the field based on ambient sound levels and other factors as appropriate. The second and more distance

measurement location will be performed at approximately two to three times the close-in distance from the WTG. The measurements will be taken along headings from the WTG that are 120-degrees apart. At each location two readings will be taken, one at one-third (1/3) and the other at two-thirds (2/3) the depth of the water column to measure underwater sound levels. Ambient underwater sound levels will be measured with the WTG parked during the periods immediately preceding and following the operational measurements. Because the highest output of the WTG occurs at wind conditions that may not be safe for operation of a vessel and collecting measurements data, the program will be conducted considering the balance of wind speed required, weather conditions and safe vessel and measurement practices which should be in the range of 25% of nameplate output. The measurement program will also document non-acoustic data including, but not limited to: sea state, water temperature, salinity, current speed and direction, wind speed and direction, air temperature, and precipitation. A report will be prepared and provided to the Commission upon completion of the study.

Mr. Badger said that staff further recommends a one-time standard royalty assessment for the underground cable crossing of 15,219 linear feet of State owned submerged land at \$3.00 per foot, for the stone riprap scour protection at a rate of \$0.35 per square foot and for the steel mono-pile at a rate of \$5.00 per square foot for a total royalty of \$52,667.10.

Acting Commissioner Travelstead asked for questions of staff.

Associate Member Tankard asked where the fall fleet was located. Mr. Badger stated he did not know.

Associate Member Robins said the depth of the cable at 6 feet was more than adequate so as not to cause any conflict. He asked if the Coast Guard had suggested putting their restrictions on fishing activities. Mr. Badger responded no, that had not even been discussed as an issue. He said the staff recommendation was to not have a restrictive zone.

Associate Member Plumlee asked if the condition # 2 was decided by the Coast Guard and not VMRC. He also asked about the parent company. Mr. Badger said that Gamesa was working the project jointly with the Newport News Shipbuilding Company and Gamesa was world-wide out of Spain.

Associate Member Plumlee asked if the applicant agreed with the Coast Guard regulations as regards to the vertical height. Mr. Badger said it was normal to put this in the permit because of lighting issues and concerns.

Associate Member Plumlee asked if the study was volunteered or required and was there a date for the study to be returned after the project was done. Mr. Badger said that the

information would be used for future turbines placed in the Bay and VMRC had recommended it at VIMS suggestion and all had agreed. Mr. Watkinson said sound was an issue identified, but no study was known to have been done. He said staff wants to know and there was a need to know for the future increase there are some mitigations that staff would need to address. He said it would help with all impacts of future installations. He said it was proposed by staff and questioned by Gamesa as to whether there was a need, but they did agree.

Associate Member Plumlee asked if the response time for decommissioning the equipment was an issue since it would be coming from the Gulf. Mr. Badger said they would have to answer that.

Paul Kugleman, Assistant Attorney General and VMRC Counsel said that Mr. Plumlee's permit conditions would be good and prudent by the Commission, which will make it so the State can ask for an accounting, if necessary, without Federal intervention.

Acting Commissioner Travelstead asked if the applicant's representative wished to make comments.

John Daniel, attorney for the applicant, was present and his comments are a part of the verbatim record. Mr. Daniel said that the project was for a G11X turbine to be placed southwest of Cape Charles off of the Harbor on the Eastern Shore. He said there were a number of representatives here for the applicant who can comment or answer questions. He said that Gamesa personnel had consulted with VIMS when preparing the project and the permit is granted prior to doing the studies and results are positive about the construction site. He said they now asked for approval of the project. He explained that the G11X turbine was designed for the offshore environment. He said Mr. Watkinson and Mr. Badger were very attentive and questioned them during the development of the project. He said the project was for a single turbine and was the first turbine for the Commonwealth. He said they had reviewed the staff conditions and they are not indicative of any problems just for safeguards. He stated this was a new project. He noted that there were no protestants and it had gone through the public review process. He stated that VIMS had been involved all along with the development and VIMS does support alternative energy in the Commonwealth. He said the acoustic study had been suggested by VIMS and was a condition of the permit. He noted that the Army Corps of Engineers would be issuing their Permit 52 in March for the water-based energy project. He said the G11X turbine was advanced technology to provide renewable energy in a responsible and appropriate manner. He said the Commission had considered the Public Trust Doctrine. He said VIMS had suggested the Echo System be provided for the state's fisheries. He noted the cable would be submerged into the bottom six feet in order to avoid any problems for the public. He noted also that the Cape Charles Wetlands Board had approved the project. He stated there were not negative impacts noted by any other state agency. He said the staff recommendation included the conditions and they were requesting approval.

Acting Commissioner Travelstead asked for questions.

Associate Member Plumlee asked about the storm rating and ability to make repairs. Mr. Daniel stated there was concern with the equipment mobility and availability as it would be no small cost to mobilize. He said this was a sustainable investment and the applicant would not make this investment if they did not feel that it could be built to withstand storms.

Associate Member Plumlee asked if this was a new design or if it had been used elsewhere. Mr. Daniel stated it was an advance design and designed to go to market for the future for use as the industry matures.

Associate Member Tankard asked why had they picked the Cape Charles area for the project. Mr. Daniel explained that it was the best location to simulate offshore conditions and the water depths. He said due diligence had been done for this project. He further explained that the town had a breakwater and information was given to them by others as to using this site. He said the process had worked and it was a good location. Associate Member Tankard asked if they had considered the marine environment. Mr. Daniel responded, yes.

Acting Commissioner Travelstead asked for public comments.

Thomas Best, resident on the Chesapeake Bay, was sworn in and his comments are a part of the verbatim record. Mr. Best explained that he had not come for this issue, but wished to make some comments. He said he wanted to mention the following concerns:

- 1) FAA approval needed.
- 2) Need warning lights at the top of the 220 foot structure and also further up at the tip of the blade.
- 3) Local low-high frequency emitter would affect the birds.
- 4) Cable at six foot depth give out electra motor force from the electricity in the cable.
- 5) State, Local government receive tax revenue.
- 6) Directional shut down with high, extreme winds or did it keep running.
- 7) Water column disruption.

Mr. Watkinson said that Gamesa had done a lot of homework and the application that was posted on the agency website covered a lot of these questions. He also responded to some of the other concerns.

Acting Commissioner Travelstead said that this issue could have been made a page two item, as there were no protests, but because of it being a project of a unique nature it was being heard. Mr. Watkinson agreed and explained that staff felt the Commission needed

to be briefed on this particular project and because of the conditions that will be added to the permit staff felt they should be approved by the Board.

Acting Commissioner Travelstead asked for any other public comments and there were none. He stated the matter was before the Commission.

**Associate Member Schick made the motion to approve application 12-0149 as stated and with the conditions in staff’s presentation. Associate Member Robins seconded the motion. He said that the State is trying to achieve renewable energy and Counsel felt that all the conditions in the statute had been met. He said there had been constructive dialogue with VIMS and VMRC staffs and the results were in the evaluation. He said the conditions recommended by staff had been agreed to by the applicant and would be important to achieving a better understanding as it was an important project. He stated that other users had been considered by the proposed burying of the cable to avoid conflicts with other users. He said the concerns raised by the FAA--Pilot Association had been responded to by the applicant. He stated that he was pleased to support the motion. Associate Member Tankard stated that as the one remaining on the Board from the Eastern Shore he felt he should comment. He said the turbine was due to be done by late 2013. He noted that there were recreational and commercial fishing activities here in this area and the Plantation Light was important to fishermen as they head out from the Cape Charles area. He said some of these fishermen were unfamiliar with the area and they should be considered. The motion carried, 8-0. The Chair voted yes.**

Royalty Fees (crossing 15,219 lin. ft. @ \$3.00 lin. ft.).....	\$45,657.00
Royalty Fees (encroachment 269 sq. ft. @ \$5.00/sq. ft.).....	\$ 1,345.00
Royalty Fees (encroachment 16,186 sq. ft. @ \$0.35/sq. ft.).....	\$ 5,665.10
Permit Fee.....	\$ 100.00
Total Fees.....	\$52,767.10

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6. **ELIZABETH RIVER CROSSING OPCO LLC, #11-1116**, requests authorization to install a new Midtown Tunnel under 2,860 linear feet of State-owned subaqueous bottom as part of the Downtown Tunnel/Midtown Tunnel/Martin Luther King Extension Project. This project will require the dredging of 1,278,354 cubic yards of State-owned subaqueous bottom, placement of 737,715 cubic yards of fill, installation of a 315 linear foot bulkhead and backfilling 14,375 square feet of State-owned subaqueous bottom, installation of

three H-pile/sheet pile “support of excavation” walls extending 138 linear feet, 335 linear feet and 321 linear beyond mean low water, installation of 50 temporary 36” steel piles along an existing bulkhead/pier, installation of three temporary 37-pile mooring dolphins, and installation of three temporary piers encroaching over 38,680 square feet of State-owned subaqueous bottom along the Elizabeth River in the Cities of Portsmouth and Norfolk.

Mike Johnson, Environmental Engineer, Sr., gave the presentation with slides. Mr. Johnson reviewed the information provided in the staff evaluation. His comments are a part of the verbatim record.

Mr. Johnson explained that the project site is located on the Elizabeth River between the Cities of Portsmouth and Norfolk immediately downstream of the existing US Route 58 Midtown Tunnel. This section of the Elizabeth River is heavily industrialized with hardened shorelines on both sides of the river and is approximately 2,900 feet in width at the project location.

Mr. Johnson said that the installation of the new tunnel is part of the Downtown Tunnel/Midtown Tunnel/Martin Luther King Extension Project which has been designed to lessen traffic congestion between the two cities. The project is a public-private partnership between the State of Virginia and Elizabeth River Crossing Opco LLC. Because of the nature of this partnership the project does not qualify for the Virginia General Permit #1 for VDOT projects and therefore does require a VMRC Subaqueous Permit. Additionally, the Office of the Attorney General has determined that the project is exempt from Local Wetland Board review and from state royalties for impacts to state-owned subaqueous bottom.

Mr. Johnson further said that the installation of the new tunnel will require several temporary structures to facilitate construction including three piers encroaching over 38,680 square feet of state-owned subaqueous bottom, three 37-pile mooring dolphins and 50 steel piles along an existing bulkhead along the Virginia Port Authority facility in Portsmouth. All of these structures are proposed to be removed at the end of the project.

Mr. Johnson explained that the installation of a 315 linear foot bulkhead and backfilling of 14,375 square feet of State-owned subaqueous bottom converting it to uplands will be a permanent impact. This conversion will facilitate the installation of logistical support structures for the new tunnel.

Mr. Johnson said that the dredging of 1,278,354 cubic yards of State-owned subaqueous bottom will facilitate the installation of the new tunnel. Dredging is proposed to occur starting January, 2013, and to continue at predetermined intervals following a project schedule. For dredging activities, the subaqueous portion of the project is divided into three dredging units (DU): DU2 is located immediately channelward of mean low water on the Portsmouth side of the river, DU3 is located in the middle of the river and includes

the Federal Navigation Channel, and DU4 is located immediately channelward of mean low water along the Norfolk side of the river. Dredging operations will be conducted utilizing mechanical dredging methods and will follow a 24-hour per day operation schedule. Mechanical dredging methods will include the use of an Environmental Bucket when sediment characteristics allow. An Environmental Bucket is designed to fully close when removing part of the substrate to minimize the re-suspension of sediments into the water column; however they have limitations for use when the bucket cannot be fully closed due to tightly compacted sediments or foreign objects. If conditions are unsuitable for the Environmental Bucket then a typical Open-faced Dredge Bucket will be utilized.

Mr. Johnson noted that the dredge spoil will be disposed of at the Norfolk Ocean Disposal Site located outside of VMRC's 3-mile jurisdictional boundary. Dredge spoil from areas that have been identified as too contaminated for ocean disposal will be taken by land to an approved upland disposal site capable of accepting contaminated soils. To prevent dredging operations from impacting the existing Midtown Tunnel and minimize the dredging footprint three permanent "support of excavation walls" will be installed.

Mr. Johnson said that the placement of 737,715 cubic yards of fill includes the supporting base material, the tunnel, locking fill, ordinary fill, and armor stone to protect the tunnel from any potential ship interactions. The post-fill bathymetry depth profile will deviate from the pre-dredge bathymetry depth profile in some areas within the project boundary.

Mr. Johnson noted that the public comment and review was conducted on August 9, 2011. No protests were received as a result of the adjacent property owner's notification or newspaper legal advertisements in the Virginia Pilot.

Mr. Johnson also noted that the Virginia Department of Environmental Quality (DEQ) will be requiring a VWP Individual Permit for the project. All other agencies contacted for review stated that the project was acceptable or no comment was received.

Mr. Johnson explained that the Virginia Institute of Marine Science (VIMS) issued a report for the project on March 13, 2012. In the report VIMS stated that the Elizabeth River is utilized by anadromous fish including River Herring and American Shad during their spawning runs. River Herring are a complex of fish species including Blueback Herring, and Alewives. River herring and American Shad have been placed under a fishing moratorium by VMRC to comply with the requirements of the Interstate Fishery Management Plan for Shad and River Herring. Additionally, river herring are currently being considered for possible listing as federally threatened species later this year.

Mr. Johnson also explained that VIMS has identified that increased turbidities from dredging operations may impact the spawning of these fish by preventing their migration upriver to the spawning areas. Because of these potential impacts to spawning migrations, VIMS recommends a time of year restriction for dredging during the period of February 15 through June 15 as the most resource protective measure.

Mr. Johnson said that the applicant has stated during meetings to try and resolve this matter that due to logistical considerations the project schedule is linear in nature and that stopping dredging for 4 months of the year would cause timing issues. The dredging is proposed to proceed in steps whereby any excavation areas would be kept stable by preventing the surrounding sediment from slumping. The slumping of sediments from around the existing tunnel could allow it to shift causing severe damage. The applicant also states that any alteration to the existing project timeline would result in project delays and cost overruns resulting in additional burdens to the public.

Mr. Johnson stated that VIMS recognizes that this project has socioeconomic implications for the area and that a full time of year restriction for dredging operations may be prohibitive for the project due to the logistical requirements associated with the tunnel installation. As a result, VIMS has indicated that some mitigative measures may be permissible to eliminate the need for a time of year restriction for dredging activities in DU2 (Portsmouth side of the River) and DU4 (Norfolk side of the River). This mitigation should include a monitoring plan in the Elizabeth River that would measure the resulting turbidity plume resulting from dredging activities. If turbidity levels exceed the threshold levels defined by DEQ, then dredging operations should be suspended until levels fall below the threshold. Additionally, a turbidity curtain should be used in DU2 due to the presence of contaminated sediments whenever dredging operations are occurring in that dredging unit. However, a time-of-year restriction is still recommended for DU3 (the Federal Navigation Channel part of the river).

Mr. Johnson explained that as a result of coordination with Dr. Jim Wesson of VMRC, the applicant has also agreed to mitigate measures to protect the Virginia Port Authority Oyster Restoration Reef and the Scotts Creek Oyster Reef upstream of the project area. The applicant has agreed to the use of turbidity curtains placed around these oyster reefs to protect them from increased sedimentation during all dredging activities in the project area.

Mr. Johnson said that currently, the project is projected to be completed in 2016. Due to the extended timeline of the project the permit expiration date should be longer than the typical three year subaqueous permit generally issued by VMRC. Current traffic patterns between the Cities of Norfolk and Portsmouth are currently inadequate for the volume of traffic that currently utilizes the Midtown Tunnel and Down-Town Tunnel. In an effort alleviate this condition the Downtown Tunnel/Midtown Tunnel/Martin Luther King Extension Project was designed. The installation of an additional tunnel as part of the Mid-Town Tunnel is a key facet to this project and will facilitate a larger volume of traffic moving between the two cities resulting in decreased traffic congestion.

Mr. Johnson said that staff believes that the construction of an additional Midtown Tunnel is an appropriate use of State-owned subaqueous bottom and will result in an improvement in the traffic corridor across the Elizabeth River. The installation of temporary piers, mooring structures, placement of fill, and conversion of subaqueous

bottom to uplands should not cause any long-term deleterious impacts to the local ecosystem. The Virginia Institute of Marine Science has indicated however, that dredging operations could impact the river herring spawning migrations in the Elizabeth River. As the most protective measure for this resource VIMS made the recommendation that there should be a time of year restriction for dredging operations from February 15 through June 15. They have stated that if the Commission feels that a time of restriction for all dredging operations would not be appropriate due to logistical considerations then liberalizing the restriction to include only the Federal Channel part of the project could be acceptable with an appropriate monitoring and response plan to prevent dredging plumes from the other dredging units impacting the entire width of the river during the river herring spawning migrations. The applicant has responded that a time of year restriction would be a handicap to the project and would result in delays and cost overruns.

Mr. Johnson stated that, accordingly, after evaluating the merits of the project, and after considering all of the factors contained in §28.2-1205 of the Code of Virginia, staff recommends approval of the project with a permit expiration date in 2018. Additionally, a permit condition should be included requiring the use of a sediment plume monitoring plan when dredging operations are occurring in the DU3 during the recommended time of your restriction period, which includes the Federal Navigation Channel and requiring the cessation of dredging operations in this area while turbidity levels exceed levels recommended by the Virginia Department of Environmental Quality. This should allow the applicant to maintain their schedule with only minimal interruption, but provide some level of protection for anadromous species that would be migrating through the area.

Acting Commissioner Travelstead asked for questions. He noted that the applicant had agreed to the turbidity study.

Associate Member Plumlee said that VIMS's recommendation was to use hydraulic dredge when appropriate. Mr. Johnson stated that the mechanical dredge was preferable. Associate Member Plumlee asked if there was a time of year restriction. Mr. Johnson responded yes. Associate Member Plumlee asked if the applicant had responded. Mr. Johnson said that there was a timeline established for the project that needed to be adhered to.

Associate Member Palmer asked if there were two disposal sites, if the dredge material was contaminated. Mr. Johnson stated that had already been determined.

Associate Member Robins asked about the river herring in the area. Mr. Johnson said a survey show the fish utilize the upriver area for spawning.

Acting Commissioner Travelstead asked if the applicant's representative wished to comment.

Miles Pocta, applicant's representative, was sworn in and his comments are a part of the verbatim record. Mr. Pocta gave some background information and stated that this tunnel was needed as the existing tunnel was 50 years old and there was heavy vehicular use of the tunnel. He noted the US Department of Transportation had approved it and no EIS had been required as there would be no significant impact. He said the application had been submitted in July 2011 and the Army Corps of Engineers and Department of Environmental Quality were also evaluating the project. He noted the ACOE were issuing a draft permit in April. He said they had met with VIMS, VMRC, and NMFS to discuss ways to minimize impacts. He said that any changes suggested had resulted in modifications. He said there would be water quality monitoring and response for fish in location. He noted the staff recommendation was for approval until 2018 with permit conditions and they concur with the conditions.

Acting Commissioner Travelstead asked for questions.

Associate Member Plumlee asked about the time of year concerns suggested by VIMS. Mr. Pocta stated the time of year restrictions would be a severe handicap to the project and funding disruptions would protract the project and add cost. He said he additional monitoring in unit 3 was for a study for the impacts on fish resulting from the turbidity.

Associate Member Tankard stated the need was great as transportation was an issue. He asked if the old tunnel would be shut down or continued to operate.

Wade Watson, applicant representative, was sworn in and his comments are a part of the verbatim record. Mr. Watson stated the existing tunnel would be refurbished as well as the downtown tunnel and continued to be used.

Acting Commissioner Travelstead asked if there were individuals in opposition who wished to comment.

Thomas Best, protestant, was sworn in and his comments are a part of the verbatim record.

Acting Commissioner Travelstead stated the matter was before the Commission.

**Associate Member Tankard moved to approve the project. Associate Member Robins seconded the motion. He said this project was critical to the area and there was significant public interest to approve it. He stated that monitoring was to be done for the river herring as the moratorium was a concern of the staff. He said conditions were added to take care of the concerns but not to impact the completion of the project.**

The motion carried, 7-0-1. Associate Member Plumlee said he felt it would be best if he abstained, as there was an indirect conflict relating to his law practice. The Chair voted yes.

Permit Fee.....	\$100.00
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- 7. **CITY OF VIRGINIA BEACH, #11-1830**, requests authorization to maintenance dredge (mechanically or hydraulically) approximately 25,000 cubic yards of State-owned bottom on an annual as-needed basis to maintain maximum navigable depths of minus eight (-8) feet mean low water in the Long Creek municipal channel in Virginia Beach. All dredged spoils will be offloaded at either the Maple Street Placement Site or the Lynnhaven Inlet Placement Site and used for future beach nourishment. The proposal is protested by numerous adjoining property owners.

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

Mr. Worrell explained that the Long Creek municipal channel is located on the north side of Bay Island in Virginia Beach with a western limit near the West Great Neck Road Bridge, and an eastern limit near the confluence of Long Creek and Broad Bay along the shoreline of First Landing State Park. The Long Creek municipal channel is a conduit to the Lynnhaven Inlet and Chesapeake Bay for much of Virginia Beach’s boating public along Long Creek and Bay Island, and for the City’s eastern waterways such as Broad Bay, Linkhorn Bay, Crystal Lake, and Little Neck Creek.

Mr. Worrell further explained that previous Commission permits, #90-1502 and #91-0472, authorized maintenance dredging in the same Long Creek municipal channel footprint. Most recently, the City of Virginia Beach was authorized by Commission permit #00-0057 to annually maintenance dredge the same 60-foot wide municipal channel as necessary, to a maximum depth of minus eight (-8) feet mean low water. That permit expired in February of 2010. It had been reactivated and extended two times, allowing the permit coverage to extend to its maximum ten year limit based on the original permit issuance date. The permit had also been modified to include the option of either mechanical or hydraulic dredging.

Mr. Worrell said that according to Commission records, there have been only three episodes of maintenance dredging as part of the #00-0057 permit. Portions of the municipal channel were hydraulically dredged for one and one-half weeks in the fall of 2001, then mechanically dredged for two weeks in the summer of 2006, and hydraulically dredged for three weeks in the winter of 2009. The dredging events only included small sections of Long Creek where shoals existed, and during each event beach-quality sand

was offloaded by both hydraulic and mechanical methods at the Maple Street Site to be used for future beach nourishment. For the most part, the Long Creek municipal channel flushes itself and maintains adequate navigable depths, as evidenced by the three relatively small dredging events over the past 12 years.

Mr. Worrell stated that for past dredging events, the City notified staff of a shoaling event and provided corresponding bathymetric surveys. A pre-dredge meeting was then held at the offloading location with the City and its contractor to review the proposed dredging locations and any necessary offloading site and resource protection measures.

Mr. Worrell said that the Lynnhaven Inlet Placement Site is located on the western side of the Lynnhaven Inlet and not directly adjacent to Long Creek. It is directly adjacent to the City's Boat Ramp and Beach Facility situated along Crab Creek. As Crab Creek is also a City maintained municipal channel (permit #06-1128), it is mechanically dredged annually and offloaded directly onto the placement site for future beach nourishment projects. According to the City, this site has existed as a sand placement site since 1979. Similarly, the Maple Street Placement Site has existed since 1986, when an easement was granted to the City connecting the City-owned upland holding site to the shoreline of Long Creek, through the property currently occupied by the Marina Shores Marina. According to the specific language of the easement, it allows "for installation of equipment and utilities necessary for dredging operations, and for purposes of natural drainage." The City has indicated that they do not need Marina Shores' permission to use or access the easement for dredge disposal offloading.

Mr. Worrell noted that at times, the Corps of Engineers also utilizes the Maple Street Placement Site for disposal when they are hydraulically dredging portions of the Lynnhaven Inlet Federal Navigational Channel or the Federal Long Creek Canal. The City suggests that they may need to specifically utilize the Lynnhaven Inlet Placement Site if the Corps is otherwise occupying the Maple Street Site. The City also offered the scenario of offloading at the Lynnhaven Site if the specific dredging contractor was presently mobilized at the site during annual maintenance dredging activities in Crab Creek. Ultimately the City would like permission for either offloading location dependent on such site conflicts or selected contractor schedules.

Mr. Worrell said that as a part of VMRC's public interest review, staff notified 136 Adjoining Property Owners (as provided by the City of Virginia Beach) of the proposal to maintenance dredge the Long Creek municipal channel. We then received 18 protests to the proposal. It appears that a number of protestants have mistakenly combined this new application request with a previous application from the City of Virginia Beach and Marina Shores, #11-0397. That 2011 application sought to establish a permanent dredge transfer facility at the Maple Street Placement Site, including additional site dredging / excavation and a new bulkhead, which would have provided an offloading location for both governmental *and* non-governmental dredge projects. As that proposal was heavily protested by local citizens, the City never provided Commission staff with the necessary

information requested to complete the application, therefore that application was inactivated. Approximately one month ago, the Virginia Beach City Council officially resolved that the Maple Street Placement Site would no longer be considered as a potential transfer facility site for non-governmental dredge projects.

Mr. Worrell noted also that in addition to concerns regarding the potential creation of a permanent transfer facility at the Maple Street Site, staff received a variety of other concerns. Examples of such concerns included: the sand spoils are already too high at the Lynnhaven Inlet Placement Site, the dredged material would not be sandy material, the confinement berms at the Maple Street Site are not maintained properly and are not entirely located on City property, only hydraulic dredging and offloading should be authorized – not mechanical, offloading activities at either site disturbs the adjacent neighborhoods, current City zoning restrictions do not allow mechanical offloading at the Maple Street site, and that the City should not be permitted to dredge / offload without some time restrictions or parameters. Overall, the majority of the protestants generally recognized the City's need to maintenance dredge the municipal channel, however they specifically disagreed with the option of mechanical dredging and offloading and with the concept of an *as-necessary* dredging permit. There were also many stated concerns that the citizens distrusted the City's motives, and they were concerned that this permit, if granted, would lead to additional uses or misuses of the offloading sites in the future.

Mr. Worrell said that staff also notified all of the current oyster ground leaseholders in Long Creek, however, no responses were received.

Mr. Worrell said the Department of Environmental Quality has determined that no permit is necessary provided the U.S. Corps of Engineers permits the request. According to the Corps, they are currently processing the application for a Regional Permit #19, however it has not yet been issued. The Virginia Institute of Marine Science did not prepare a written report, however, they indicated by telephone that there were no concerns provided it was a City maintenance dredging request.

Mr. Worrell stated that while staff is sensitive to the protestants' concerns, most are related to upland, locality-controlled matters outside of the Commission's purview. The immediate jurisdiction for the Commission in this matter is the request to remove sub-tidal shoaling material that could cause navigational hazards in the Long Creek municipal channel. As for the operational concerns, mechanical dredging is quite common in Virginia Beach for both private and governmental projects. Although hydraulic dredging may be the preferred dredging method for the public at large, it is not always economically viable, nor are there readily available contractors in the Virginia Beach area with hydraulic capabilities that can immediately respond to a City channel shoaling problem.

Mr. Worrell said that staff does not feel that the protests and issues regarding the offloading methodology and the site characteristics of the two existing sand disposal sites

are germane to the Commission's jurisdiction. The sole purpose for both of the upland sites is to contain dredged sand, and they have historically been used for such purpose for over two decades. In the specific case of the Maple Street Disposal Site, we do not agree with the protestants' opinion that mechanically offloading here for this specific governmental project constitutes "the establishment of a mechanical offloading transfer station." Regardless of the offloading point utilized, staff does not feel that a Commission permit would establish a 'transfer facility' at either the Maple Street or Lynnhaven Inlet site. If in the future, a decision or ruling is provided by the City Attorney's Office or the local Circuit Court advising the City's Public Works Office that the Maple Street Site cannot be used for offloading, the City would then be instructed to solely offload at the Lynnhaven Inlet Placement Site. However at this time, staff does not feel it's appropriate for the Commission to decide, in place of the City of Virginia Beach, that existing offloading sites are now not acceptable for potential governmental offloading.

Mr. Worrell noted that this application, in its simplest form, is a governmental request to maintain a municipal navigational channel, while offloading its spoil material into governmental holding sites. The overall benefit of maintaining the municipal channel, either by mechanical or hydraulic methods, appears to exceed any of the related detriments as mentioned in the protest letters. In addition, staff does not feel that such maintenance dredging should be limited to certain days or time schedules, as a hazardous shoal in the permitted municipal channel footprint should be removed as quickly and efficiently as possible. This permit, if approved, will not authorize any other dredging or offloading other than what was specifically included in the application. Given the past permit history, if staff had not received protest letters from adjacent property owners, the request to maintenance dredge the Long Creek municipal channel would have been administratively permitted. Therefore, staff recommends approval of the maintenance dredging request as submitted with no restrictions on the two proposed offloading locations, nor any time of dredging / offloading restrictions. If permitted, the City would be required to comply with the following permit conditions:

- notify staff of any shoaling event by providing the corresponding pre-dredge bathymetric surveys.
- coordinate a pre-dredging meeting with staff and the contractor at the proposed offloading site.
- identify any necessary E&S measures at the offloading site.
- provide a post-dredge survey within 30 days of the completion of the dredging.

Acting Commissioner Travelstead asked for questions.

Acting Commissioner Travelstead stated that the protestants must remember that some things were outside of the VMRC's jurisdiction and the protestants are asked to address only what is VMRC's responsibility.

Associate Member Tankard asked if the spots shown in yellow were the dredging sites. Mr. Worrell responded yes.

Associate Member Sessoms asked if the VMRC had jurisdiction over the spoil sites. Mr. Worrell stated no, that was an upland area outside of the Commission's jurisdiction that contained beach quality material used for beach nourishment.

Acting Commissioner Travelstead asked for VMRC Counsel to comment.

Paul Kugelman, Assistant Attorney General and VMRC Counsel, read from Code Section 28.2-1202 where it said that the VMRC did not have jurisdiction landward of mean low water. He said that Code Section 28.2-1205 limited the jurisdiction of VMRC to the dredging of State-owned bottom and regarding upland disposal, the Commission's concerns would be limited to erosion of the material back into State-owned bottom. He noted that the Commission must consider the public/private benefits pursuant to the Public Trust Doctrine. He noted also they must consider other uses, nearby adjacent property owners, and impacts to water quality and the submerged aquatic vegetation.

Acting Commissioner Travelstead asked if the applicant's representative wished to comment.

Philip Roehrs, representing the City, was sworn in and his comments are a part of the verbatim record. Mr. Roehrs said there was flexibility in the project and dredging was performed in the past as needed when there was active shoaling in the area. He said they were responsible for the removal of the shoaling from the waterway. He said that in December a boat reported shoaling and the City did a survey to find the problem and then requested permission. He said it was a small amount, 300 cubic yards, and not enough for hydraulic dredging, but better-suited for mechanical dredging. He said the City set it up for hydraulic dredging at the Maple Street site. He said they would not be transferring the material but placing it at the Maple Street site for future beach nourishment.

Acting Commissioner Travelstead asked for anyone else in support to comment. Associate Member Palmer suggested a time limit on the speakers. Acting Commissioner Travelstead asked the speakers to limit themselves to less than three minutes.

Ann McKinney, supporter, was sworn in and her comments are a part of the verbatim record. Ms. McKinney said the property owners nearby were boat owners, who wanted the dredging and others who did not want it. She said the Commission must consider the public and private benefits and there was recreational boating occurring in this area, which means the channel is there for all residents and visitors to use. She noted that tourism was important to the area businesses and these small projects needed to be approved for all not just a few.

James Rugmore, resident and boat owner, was sworn in and his comments are a part of the verbatim record. Mr. Rugmore stated he could not get his boat out at low tide. He said there was a safety issue to be considered here as well. He said it was not economical to use the hydraulic dredging. He said he spoke for others here in asking for the approval of the dredging.

Acting Commissioner Travelstead asked if anyone in opposition wished to comments.

John Favor, attorney representing Mike Megge, was present and his comments are a part of the verbatim record. Mr. Favor said that Mr. Megge was a resident and boat owner. He referenced the Code which stated what the Commission must consider. He said they requested that the Commission restrict the offloading site and require the spoil be carried elsewhere and not allow for the transfer at Maple Street until legal issues were addressed, otherwise it should be denied. He noted that the City did not own the offloading area, just the holding basin. He said the City only is allowed easement access.

Mr. Kugelman asked if he had the easement document. Mr. Favor responded he did not have a copy, but the City Attorney did. He said the City was permitted access for dredging purposes only. He said the easement terms do not allow access by others. He noted that the owner's name was not on the application. He said the Zoning Board said no transferring of dredge spoil here at this location. He said the staff said that this was not a transfer station, but that is what is happening here. He said the Commission should not decide now as there was ongoing litigation started by the City. He said that this was not in the City's comprehensive plan and the City was not following the law so they are not entitled to a permit.

Associate Member Schick asked if taking it from the barge to a truck to the site was considered a transfer. Mr. Favor responded yes.

Associate Member Tankard said this had been used historically in the last 20 years. Mr. Favor stated he did not know, but staff said there is no active permit now and per the zoning, it was not appropriate and if done in the past it was illegal.

David Combs, resident in Shore Drive community, was sworn in and his comments are a part of the verbatim record. Mr. Combs stated that the coalition requested that this permit be denied. He said he agreed there was need for the maintenance dredging, but he protested the expanded scope. He stated it was maintenance dredged one out of every four years to acquire beach sand. He said they are requesting 25,000 cubic yards on an as needed basis, which exceeds what has been done in the last three or four times in seven years. He said that all prior times were beach grade sand. He stated that so much dredging would impact the area with the barge transport.

Ed Cunningham, resident of Long Creek, was sworn in and his comments are a part of the verbatim record. Mr. Cunningham said he was not opposed to the mechanical dredging

as Long Creek does need dredging. He said the mechanical dredging helps with the shoaling and he agreed with staff 95%. He said five percent he did not agree with. He said he opposed the transfer and was asking that the City not do it as it was not appropriate, because it was a conflict of interest. He said he built his home 46 years ago. He said he opposed the mechanical transfer at Maple Street. He said it was an industrial use, the City did not own it, the easement limited it to hydraulic dredging, the past committee study says to not use the site mechanically, a future SSD program does not allow mechanical use, there's a petition with 1,500 signatures that are opposed, and an adjoining civic league was opposed. He said he suggested modifying the permit to not allow mechanical transfer at the Maple Street site, and with VMRC approval it would give the City permission to hydraulically offload at the Maple Street site despite all concerns.

Associate Member Palmer asked if he had opposed it previously. Mr. Cunningham said when they used hydraulic he did not oppose it.

Andy Baan, protestant, was sworn in and his comments are a part of the verbatim record. Mr. Baan said he was concerned with the request for 25,000 cubic yards for a ten year permit.

Tony Watkinson, Chief, Habitat Management, stated it would be permitted for five years with an option for an additional five.

Mr. Baan said that it was a large amount of dredging and he doubted it would be used. He said the City being allowed to use Maple Street needed additional processing to involve more citizens. He said they should not be allowed carte blanche.

Lynne Hume, property owner, was sworn in and her comments are a part of the verbatim record. Ms. Hume said the agreement allowed for site negotiation. She said it allowed for hydraulic placement and this was a residential environment. She said she knew it was used in the past. She said she moved there in 2006 and was told they were allowed to work 24/7 to hydraulically offload. She said she cannot use in front of her property, if offloading were to occur, as proposed. She said she had checked and it was B2 zoning.

Acting Commissioner Travelstead reiterated the VMRC jurisdiction and reminded the protestants of the upland concerns being strictly locality-controlled issues.

Ms. Hume stated that Maple Street needed to be left out and they need to use hydraulic dredging and offloading only. She requested that the Commission protect the rights of others. She said if they are allowed to offload 25,000 cubic yards, how many barges would be required to access the area? She said DEQ had signed off on it and the change was made with no citizen input. She said it would give them carte blanche, if it was allowed here, and set a precedent. She said that 99.9% of the people who live here, use the area for recreational purposes.

Associate Member Palmer asked if she had raised objections before. Ms. Hume responded yes, she protested the noise and was told to call the Police.

Tom Best, protestant, was sworn in and his comments are a part of the verbatim record. Mr. Best stated there were no elevations for fill and a part of the dyke on his land was requested to be removed.

Acting Commissioner Travelstead stated it was a city issue.

Mr. Best said it did concern wetlands and there were tidal waters at the backside of the holding basin with rusty pipes that blocked the water flow. He stated the dyke was not built to specifications with a 2 ½:1 slope, on the drawings it was not what is there. He asked about the proposed silt fence and straw at the offloading site. He asked who would inspect it to make sure it met the permit requirements. He said the application did not address the environment and it was premature and amateur.

Mary Elizabeth Lynch, property owner, was sworn in and her comments are a part of the verbatim record. Ms. Lynch stated she did not protest originally when they did it hydraulically, but now it was proposed differently and she did object. She asked the Commission to consider denying it.

Acting Commissioner Travelstead asked for rebuttal comments from the applicant's representative.

Mr. Roehrs said the easement was not limited to hydraulic dredging. He said the easement was owned by the City of Virginia Beach and there was no where else to buy. He said he planned to place the material here, not transfer so it will be used for beach replacement. He said Mr. Best stated the dyke was on his property and he was not aware of this for all these years. He stated the dyke was on City property.

Acting Commissioner Travelstead said that as far as the easement issue, there was no mention of hydraulic or mechanical. Mr. Roehrs said the easement was conveyed to the Corps and they had used it for 30 years.

Associate Member Tankard said the testimony was about mechanical versus hydraulic and asked why the City was asking for so much. Mr. Roehrs said there was a large mobilization cost and demobilization charge and estimated to be approximately \$1.0 million to hydraulic dredge.

Acting Commissioner Travelstead asked about the number of barges. Mr. Roehrs said with 200 cubic yards it would mean 2 to 10; it would all depend on what contractor was hired.

Associate Member Tankard asked why the amount was 25,000 cubic yards. Mr. Roehrs said they could reduce it, but the prior permit was for 25,000 and they wanted to keep it the same. Mr. Worrell advised the Commission that the prior permit was for 20,000 cubic yards.

Associate Member Schick asked if it was economical to not use the mechanical as it was too expensive, if the quantity was larger. Mr. Roehrs said the amount justified the mechanical as it can be cost effective.

Associate Member Palmer asked if the hydraulic dredging had significant impact. Mr. Roehrs said it is normally a decrease in turbidity when dredging due to the suction, but the area impact is still quite large.

Mr. Watkinson said the mechanical dredging would stir up the bottom and with it being sand here the hydraulic dredging would not be as impacting to the environment.

Associate Member Robins asked about the method of dredging operations and other possible conflicts. Mr. Roehrs said with 200 cubic yards it would take a week or two to accomplish.

Acting Commissioner Travelstead stated the matter was before the Commission.

**Associate Member Sessoms moved to approve the project with staff recommendations. Associate Member Schick seconded the motion. He said he had experience with both types of dredges and they were noisy and he did not like living next to one. He said he was glad to see it, but he was also glad to see it go, as it was a necessary evil. Acting Commissioner Travelstead said he wished to clarify that the staff recommendations were included in the motion. Associate Member Plumlee said he appreciated all who had come to the hearing and spoke. He said there were safety concerns and he supported the motion. Associate Member Robins said the project was necessary and there were dredge concerns as well as spoil site concerns, which were a local issue and the City did need to resolve those matters as they were not the role of VMRC. He said he supported the motion. The motion carried, 7-0.**

Permit Fee.....	\$100.00
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- 8. NEABSCO LANDING LC, #12-0201**, requests after-the-fact authorization to retain a previously permitted travel lift and the associated 6-foot 8-inch by 50-foot finger piers (#95-1690) located 23 feet upstream from the permitted alignment and currently positioned approximately eight (8) feet from the western property line at their Hampton's Landing Marina situated along Neabsco Creek in Prince William County. An adjacent property owner protests this project.

**Commission Meeting**

9. **NEABSCO LANDING LC, #10-0917**, requests authorization to construct a 270-foot long by 6-foot 6-inch wide floating dock system at the channelward end of the upstream travel lift finger pier at their Hampton's Landing Marina situated along Neabsco Creek in Prince William County. An adjacent property owner protests this project.

Julliette Giordano, Environmental Engineer, Sr., gave the presentation with slides for both items 8 and 9 since they were related. Ms. Giordano reviewed the information provided in the staff evaluation. Her comments are a part of the verbatim record.

Ms. Giordano explained that the Hampton's Landing Marina, owned by Neabsco Landing LC, is located approximately a quarter-mile from the confluence of Neabsco Creek and the Potomac River. Hampton's Landing Marina is one of three operational marinas along Neabsco Creek. It is surrounded by residential development to the south and west and the Featherstone National Wildlife Preserve to the north; the two other operational marinas are located just down the creek to the east.

Ms. Giordano said that Mr. Terry Hill, the current operator of Hampton's Landing Marina became invested in the marina in early 1996. Prior to Mr. Hill's involvement, the Hampton Family had maintained full ownership since the 1950s. Since 1996, Neabsco Landing LC has received six VMRC permits authorizing marina improvements and dredging activities.

VMRC #95-1690 was issued Dec 16, 1996, and authorized the construction of a 75-foot long commercial pier with a 50-foot T-head, a 78-foot commercial pier extension with a 33-foot L-head, a 20-foot wide by 60-foot long concrete, commercial boat ramp extending a maximum of 20 feet channelward of MLW, and a 50-foot open pile tending pier. It was modified on September 15, 1998, to authorize construction of two (2) 50 linear foot travel lift piers in lieu of the previously authorized 20-foot by 60-foot concrete boat ramp and 50 linear foot open-pile tending pier. It was later modified "after-the-fact" at February 1, 2000, Commission hearing to retain the previously permitted 75-foot long commercial pier with a 50-foot T-head as constructed with different dimensions at 64 feet long with a 78-foot long T-head and also to retain a 10-foot by 10-foot open-sided, covered storage area. A \$1,200 civil charge accompanied the after-the-fact approval.

Ms. Giordano stated that Mr. Hill seeks authorization to retain the travel lift and associated finger piers previously permitted under the modification to permit #95-1690 as constructed in a different location 23 feet up creek from the permitted location. The current alignment of the western travel lift pier is situated approximately 8 feet from the western property line and a recently apportioned riparian boundary of Hampton's Landing Marina. The permitted alignment was 30 feet from the marina's western property line. Although the application indicates the pier is 6 feet from the riparian line, during a site visit on March 12, 2012, staff measured the distance to be approximately 8 feet from the pier to the riparian line.

Ms. Giordano said that an adjacent property owner, Mr. John Alvey III, protests this after-the-fact request. Mr. Alvey believes that the current location of the travel lift and finger piers interferes with his ability to use the down creek side of his riparian area. Mr. Alvey also objects to the pending application #10-0917 to construct a 270-foot long by 6-foot 6-inch wide floating dock system at the channelward end of the upstream travel lift finger pier. That application is pending and contingent upon the Commission's action on the after-the-fact request.

Ms. Giordano noted that Hampton's Landing Marina has a previously permitted travel lift and piers built to correct dimensions but in a different location. The issue of the travel lift and piers being in the incorrect location came to staff's attention while processing a second JPA (#10-0917) submitted by Neabsco Landing. Mr. Alvey protests that project as well. During staff's preparation to take this application to the Commission, staff discovered the discrepancy between the permitted and the as-built locations of the travel lift and finger piers. Before staff can move forward on the #10-0917 JPA, the revised location of the travel lift and piers must be permitted. Staff advised Mr. Hill to submit a new JPA requesting after-the-fact authorization to retain the travel lift and piers in their current alignment. Given the expired status of the permit under which the travel lift and piers were originally reviewed, a new application was necessary to process the after-the-fact request.

Ms. Giordano noted also that in 1996, VMRC issued a permit to Hampton's Landing Marina to expand and modify an existing marina configuration to include the relocation of an existing concrete boat ramp. After Mr. Hill became invested in the marina, he decided to maintain the boat ramp in its existing location and instead, install a travel lift and associated piers in the area proposed for the boat ramp. He submitted a permit modification in September 1998. When Mr. Hill requested the permit modification, two separate land parcels existed on the north side of Neabsco Road. The western parcel neighboring Mr. Alvey's property was 30 feet in width. The travel lift was to be located on the eastern edge of that parcel.

Ms. Giordano said that Hampton's Landing Marina underwent expansion and change after Mr. Hill became involved in 1996. In coordination with Prince William County, Mr. Hill developed a site plan for the expanding marina. This plan added several upland buildings. One of the proposed buildings conflicted with the permitted location of a travel lift pier. Mr. Hill also simultaneously consolidated the two land parcels on the north side of Neabsco Road into one larger parcel.

Ms. Giordano noted that Mr. Hill states that the relocation of the travel lift and piers from the permitted alignment was an oversight during a busy time of marina expansion and permitting. According to his recollection, consolidating the parcels and resolving the building-pier alignment conflict must have required locating the travel lift further west along the property than originally permitted.

Ms. Giordano said that on February 23, 2012, Mr. Alvey expressed during a phone conversation that his letter of protest to application #10-0917 also applied to this after-the-fact request. He believes that the current location of the piers and travel lift will limit navigation on the east side of his marina. He requests that the Commission deny the application so as to maintain a thoroughfare between the two marinas. Mr. Alvey's marina is currently non-operational. At a site visit on March 12, 2012, he expressed his plan to resume operations when the economy improves. A sunken barge also sits on State-owned bottom within Mr. Alvey's riparian area parallel and immediately adjacent to the riparian line. The barge has been there for at least 15 years. When staff asked about its removal, Mr. Alvey responded that he intends to remove it but proposed no timeline. The Commission has also referred enforcement matters related to an unauthorized mooring system and unauthorized dredging at Mr. Alvey's marina to the Office of the Attorney General and those matters are currently unresolved. No other comments were received in response to the public notice.

Ms. Giordano stated that in the Department of Conservation and Recreation report dated March 12, 2012, they state that they do not anticipate that the project will adversely affect any of their programs but they note the applicability of the Chesapeake Bay Act requirements that are regulated by the local government. They also note that the project must comply with the Virginia Erosion and Sediment Control Handbook and Virginia Stormwater Management Regulations. They also recommend coordination with Department of Game and Inland Fisheries (DGIF) concerning the location of Bald Eagle Concentration area near the marina. Prior coordination with DGIF and US Fish and Wildlife found it unnecessary for the applicant to obtain a Bald Eagle Take Permit for activities within the marina. No other agencies commented on the project.

Ms. Giordano said that staff believes that the installation of the travel lift and piers at the unauthorized location was possibly a result of their construction during a time of marina expansion and change. Neabsco Landing LC had one previous compliance issue addressed by the Commission in February 2000, which also occurred during the time of marina expansion. Staff feels that Mr. Hill has since worked diligently to comply with VMRC regulations and within the confines of several permits issued since 2000. Staff also believes that the current alignment of the travel lift and piers does not encroach into or hinder Mr. Alvey's ability to use the east side of his riparian area. These structures are located well within Hampton's Landing Marina's riparian area and provide no greater hindrance to navigation than the currently sunken barge. Additionally, the intended use associated with the structures should not result in the need for any vessels to navigate within Mr. Alvey's riparian area.

Ms. Giordano said that accordingly, 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 recommends approval of the project. Given the after-the-fact nature of the request, we also recommend a triple permit fee of \$300, as provided for in §28.2-1206(D) of the Virginia Code. Finally, should the Commission desire to accept the payment of a civil

charge in lieu of further enforcement actions, we would recommend the charge be based on a minimal environmental impact and moderate degree of deviation or non-compliance.

In addition to the after-the-fact authorization for the travel lift piers. Mr. Hill seeks authorization to install a 270-foot long by 6-foot 6-inch wide floating dock at the channelward end of the western travel lift pier. Mr. Hill states the floating dock will not exceed 270 feet in length and will likely be shorter to accommodate navigation within the marina. The primary reason for the floating dock is to provide additional staging space for vessels utilizing the travel lift. The floating dock will also serve to provide a protective buffer between the marina and Mr. Alvey's sunken, deteriorating barge that sits parallel and immediately adjacent to the riparian line of the Hampton's Landing Marina and Mr. Alvey's riparian area.

Ms. Giordano noted that Mr. Alvey protests this pier application because he believes that the current location of the travel lift and associated piers interferes with navigation on the east side of his riparian area and the proposed floating dock will further limit navigation.

Ms. Giordano said that Mr. Hill submitted his application in June 2010, to install a 270-foot long by 6-foot 6-inch wide floating dock system aligned along the up creek riparian line on the up creek side of the western finger pier. After review of the JPA, staff requested that Mr. Hill obtain a court approved riparian apportionment confirming the coterminous riparian boundary between the two marinas. Mr. Hill submitted the court approved apportionment to VMRC in October 2011.

Ms. Giordano explained that in response to the adjacent property owner notification letter, Mr. Alvey submitted a written protest to the project dated received November 30, 2011. In his letter, Mr. Alvey expresses concern over the "unpermitted travel lift piers" (currently being addressed under #12-0201) and the hindrance to navigation the travel lift and piers have on the down creek side of his marina. He believes that the Commission should not permit structures so close to the riparian line of adjacent marinas because it hinders navigation.

Ms. Giordano said that Mr. Hill has since revised the project to install the pier at the channelward end of the travel lift finger pier as opposed to along the property boundary between the two marinas. This provides an approximately 8-foot buffer between the riparian line and the floating dock system.

Ms. Giordano noted that no other comments were received in response to the public notice.

Ms. Giordano said that in the Department of Conservation and Recreation report Dated December 13, 2011, they state that they do not anticipate that the project will adversely affect any of their programs but they noted the documentation of a Bald Eagle Concentration Area near the marina. They recommend coordination with Department of

Game and Inland Fisheries. They also note that the project must comply with the Virginia Erosion and Sediment Control Handbook and Virginia Storm Water Management Regulations.

Ms. Giordano stated that in their response dated November 21, 2011, the Department of Environmental Quality found the proposed project to be acceptable. No other state agency comments were received.

Ms. Giordano said that the project, as currently proposed, has the floating dock and the associated pilings located entirely within Neabsco Landing LC's riparian area providing an 8-foot buffer between the coterminous boundary of Mr. Alvey's marina and Hampton's Landing Marina. Staff also notes that Mr. Alvey's sunken barge remains parallel and adjacent to the riparian line of the two marinas without a reasonable timeline for removal. Staff believes that this barge currently provides more of a hindrance to navigation within his marina than the pier aligned approximately 8 feet from riparian line. Mr. Hill has expressed the marina's need for additional staging space for vessels using the travel lift as well as his desire to provide patrons of his marina protection from the sunken barge.

Ms. Giordano explained that accordingly after evaluating the merits of the project against the concerns expressed by the opposition to the project, and after considering all of the factors contained in §28.2-1205(A) of the Code of Virginia, staff recommends approval of the project as proposed.

Acting Commissioner Travelstead asked if the riparian line had been set by the County. Ms. Giordano responded, yes.

Associate Member Robins asked about the distance between the boats and the floating pier. Ms. Giordano stated 80-90 feet.

Associate Member Schick asked if the boat sizes were 55 to 60 feet. Ms. Giordano responded, yes.

Acting Commissioner Travelstead asked if the applicant wished to comment.

Terry Hill, applicant, was sworn in and his comments are a part of the verbatim record. Mr. Hill stated that he had a problem with his neighbor, who never complies with anything. He said it was a problem with the barge being there for 30 years. He stated it was a hazard to navigation and the apportionment had cost him a lot. He said the problem was that the State had never taken any action against Mr. Alvey. He said he was asking to be allowed to use the entire riparian area. He said he asked that both applications be approved.

**Commission Meeting**

Associate Member Tankard asked if the dock safety issue was because of the barge. Mr. Hill said there had been two close incidences since the barge had been cut down to water level making it more of a hazard to use his dock for his purposes as well as safety.

Associate Member Plumlee asked about the travel lift. Mr. Hill said he operates a small business and he decided then to have a covered dock and travel lift.

Acting Commissioner Travelstead asked if anyone was present in opposition to comment. Being there were none, he stated the matter was before the Commission.

**Associate Member Schick moved to accept the staff recommendation for items 8 & 9. He said he was familiar with the projects and there was a lot new advanced technology that is being utilized here, which will help the environment. He said this was just an oversight and the structures here needed protection from the derelict barge located next door. Acting Commissioner Travelstead asked if there was to be a civil charge for minimal impact and moderate deviation by the applicant. Associate Member Schick suggested there be a civil charge of \$600.00 based on minimal impact and minor deviation. He stated that there was more to the story and it was just confusion not done deliberately. Associate Member Robins seconded the motion. He reiterated that the civil charge was for \$600.00. Associate Member Tankard asked if the barge would be allowed to remain on State bottom. Acting Commissioner Travelstead stated that would be discussed. The motion carried, 7-0.**

#12-0212

Permit Fee (ATF Triple).....	\$300.00
Civil Charge.....	\$600.00
Total Fees.....	\$900.00

#10-0917

Permit Fee.....	\$25.00
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**John Alvey** - violation and abandoned, sunk barge never followed through from past Commission actions.

In response to the Commissioner's request, Tony Watkinson, Chief, Habitat Management, reviewed the background and action regarding Mr. Alvey's activity. His comments are a part of the verbatim record.

Mr. Watkinson explained that there were Code Sections that apply to derelict structures and abandoned vessels on State bottomland. He said the process for removal of a derelict structure was handled by the Law Enforcement Division and the Habitat Management Division cannot issue a summons and take it to Court. He said the Habitat Management

process for removal by third parties involved the advertisement for removal and to request claims to the structure and the third party could pay for removal.

Mr. Watkinson said the John Alvey situation involved a non-functioning marina and the Commission had previously considered two cases regarding the piers and unauthorized dredging, which were referred to the Attorney General's office. He stated it was never heard by the Courts and the Assistant Attorney checked in the files and did not find anything. He said the Commission may need to request the Attorney General's office take further action. Acting Commissioner Travelstead asked if the Commission needed to renew the letter of request to pursue this violation.

Paul Kugelman, Assistant Attorney General and VMRC Counsel said he had received a letter from Habitat staff and he could not find anything in the Attorney General's office records. He suggested a letter be sent to Mr. Alvey ordering the removal of the structure in accordance with procedures and Code. He said if Mr. Alvey did not take any action then he suggested taking further action by the Attorney General's office. He asked if this was just the barge. Associate Member Schick said it included some piers, floating piers.

Mr. Kugelman said that regarding the barge, the Commission was authorized by Code Section 28.2-1210, which he read. He said the Commission needed to send a notice for Mr. Alvey to appear before the Board. Mr. Watkinson said that VMRC needed to go to him and asked him to remove it, but if he did not comply then the Law Enforcement Division should issue a summons and take this to Court to seek the Court to require him to remove it. He said after that then he felt the Commission should contact the Attorney General's office as this was not like an after-the-fact case because it could be a criminal case rather than civil.

Mr. Kugelman asked if Mr. Alvey acknowledged ownership. Ms. Giordano said she did not know the history for the unauthorized dredging and structures and did not find anything about the barge.

Associate Member Robins stated that since the barge was not before the Commission that the staff use the usual process and then proceed.

Acting Commissioner Travelstead asked if the motion was the staff recommendation.

Acting Commissioner Travelstead asked for a motion.

Associate Member Robins asked if the Commission should take prior action. Mr. Kugelman suggested that staff seek Mr. Alvey's acknowledgement of ownership and then take an extra step as staff recommended and send a notice. Associate Member Schick noted that when Mr. Alvey was before the Commission before he stated he felt that VMRC did not have authority.

**Associate Member Schick moved that the staff recommendation be taken. Associate Member Tankard seconded the motion. Associate Member Plumlee asked if this was the staff's recommendation. Acting Commissioner Travelstead stated yes. Associate Member Schick stated the other structures owned by Mr. Alvey should be included. The motion carried, 7-0.**

\* \* \* \* \*

**10. DISCUSSION:** Habitat Management Advisory Committee (HMAC) recommendation for update of the Civil Charge Matrix and factors to assess the degree of impact and degree of deviation or non-compliance to be used by Commission Staff and the Commission for determining Civil Charges as authorized by Code Section 28.2-1213 for encroachments in, on or over State-owned bottoms without the required permit from the Virginia Marine Resources Commission pursuant to Code Chapter 12 of Title 28.2.

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

Mr. Watkinson explained that the Commission had asked staff to reconvene the Habitat Management Advisory Committee (HMAC) to discuss a new matrix for civil charge assessments. He said that HMAC met and agreed on the recommended changes in the draft Civil Charge Matrix. He said the Civil Charges were capped at \$10,000 but the Courts can go to \$25,000 /day for Civil Penalties. He noted the HMAC felt the \$1,000 minimum charge up from \$600.00 was viewed as possible more of a deterrent. He said when you consider Code Section 28.2-1205, the Commission must consider other uses of State-owned submerged lands, not only environmental impacts. He noted all are impacted by non-compliance so HMAC agreed the Environmental Impact axis of the matrix should be changed to Impact. He noted the draft matrix now included factors to apply for considering the Degree of Deviation or Non-compliance and Impact. These factors had not been included in the previous matrix, but would help identify the proper civil charge to assess. He said, if approved, the staff would utilize the charges with agreements as consent items for after-the-fact applications to bring before the Commission for approval. If agreements could not be reached, after-the-fact applications would receive full briefings and would not be presented as consent items on the monthly Commission agenda.

Associate Member Plumlee said the increased amounts accounted for the multiple as previously used between categories in the matrix and the Commission wanted to deter non-compliance. He noted there were three levels, minor, moderate, and major.

Acting Commissioner Travelstead asked for questions.

Associate Member Robins said these were used as guidelines only in the past and there was a need for a minor and major so the Commission can deal with lesser amounts of charges. Mr. Watkinson said these were only guidelines as the Commission decides and the staff uses this as a staff recommendation for consent items, if not, then the Commission decides.

Acting Commissioner Travelstead asked for any public comments. There were none. He then asked for a motion to accept the staff recommendations.

**Associate Member Schick moved to approve, as presented. Associate Member Palmer seconded the motion. The motion carried, 7-0.**

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**Guidance for Civil Charge Assessments  
Pursuant to Section 28.2-1213 of the Code of Virginia**

The matrix below and factors to determine the degree of impact and degree of deviation or non-compliance are to be used by Commission Staff and the Commission when determining the appropriate Civil Charge that can be assess for unauthorized encroachments that occur in, on or over State-owned bottoms without the required permit from the Virginia Marine Resources Commission pursuant to Chapter 12 of Title 28.2 of the Code of Virginia. Civil Charges may be considered for multiple violations.

<b>Impact*</b>			
<b>Significant</b>	\$9,000	\$10,000	\$10,000
<b>Moderate</b>	\$3,000	\$ 6,000	\$ 9,000
<b>Minimal</b>	\$1,000	\$ 2,000	\$ 3,000
	<b>Minor</b>	<b>Moderate</b>	<b>Major</b>
	<b>Degree of Deviation or Non-compliance</b>		

**Deviation and Non-compliance Factors**

**Minor**

Small deviation relative to other authorized structures or requirements.  
Evidence of factors such that applicant/contractor would not have known project would result in violation. All other required permits issued.

Moderate

Some deviation or non-compliance.  
Evidence that factors ignored by applicant/contractor that a permit should have been required or should have known a permit was required. Received some permits but not all.

Major

Large amount of deviation or non-compliance relative to authorized structures or requirements.  
Evidence that applicant/contractor knew or ignored that permits were required and should have known a permit was required.  
No other permits issued.

**Impacts Factors**

Minimal

Small encroachment.  
Small affect on bottom lands and resources.  
No affect on other uses.

Moderated

Limited encroachment considering the surrounding waterway.  
Some affect or loss of bottom land and resources.  
Some affect on other uses.

Significant

Large encroachment.  
Significant affect or loss of bottom land and resources.  
Significant affect on other use.

\* Changed from "Environmental Impact" to "Impact" since all factors in Code Section 28.2-1205 can be considered.

\* \* \* \* \*

**11. PUBLIC COMMENT:**

**ATLANTIC STURGEON:**

At the request of Associate Member Robins, Rob O'Reilly, Acting Chief, Fisheries Management gave a brief update on the listing by the federal government of Atlantic Sturgeon to the endangered species list. He said the Atlantic States Marine Fisheries Commission will give States further guidance on whether a State specific Section 10 incidental take permit or Section 7 permit would be required. He explained that the ASMFC also asked States to participate in a letter to the National Marine Fisheries Service to delay the effective date for the endangered species listing of April 6, 2012 and to support the option of possibly delisting the species.

**SEASONAL CLOSURE OF THE CRAB SANCTUARY:**

Associate Member Palmer commented on the seasonal closure of the crab sanctuary and whether that was a one-time occurrence or whether it was written into regulation. Staff confirmed that the closure was written into regulation.

**REQUEST FOR EMERGENCY REGULATION TO REALLOCATE THE HORSESHOE CRAB QUOTA EAST OF THE COLREGS LINES:**

Associate Member Palmer also commented on and requested an emergency regulation to redistribute the horseshoe crab quota east of the colregs lines. Current ASMFC fishery management guidelines allow for only 40% of Virginia's State-wide quota to be allocated East of the COLGREGS lines. Virginia's quota is allocated by gear type, with the trawl fishery having its own quota, which can only be harvested East of the COLREGS lines after June 7. Currently the on-going dredge fishery is harvesting horseshoe crabs East of the COLREGS line, and there is a concern that the federal allowance East of the COLREGS line will be harvested prior to June 7, effectively making the trawl quota unattainable.

Mr. Grist responded that staff was aware of the situation through daily harvest monitoring. He stated that the request was for the welfare of the industry and provided the Commission an Emergency Regulation draft that re-allocated the horseshoe crab commercial landings quota, East of the COLREGS line, equitably between trawl and non-trawl gears.

**As a result of the discussion, Associate Member Plumlee moved to adopt the emergency regulation and make it effective March 29, 2012 and to advertise for an April Public Hearing. Associate Member Palmer seconded the motion. The motion carried, 6-0-1. Associate Member Robins abstain because of his involvement in the fishery.**

**BLACK SEA BASS POSSESSION LIMIT:**

**Michelle Peabody** requested the Commission allow vessels to possess both the Virginia and North Carolina harvest limits of black sea bass in Virginia waters, the same as was done at the last month's meeting for summer flounder.

Mr. Grist responded that staff was aware the request would be made, that the request was for the welfare of the industry, and provided the Commission with an Emergency Regulation draft that allowed for a vessel to possess, either or both, the North Carolina black sea bass limit and the Virginia sea bass limit, if lawfully licensed.

**After some discussion by the Commission, Associate Member Robins moved to adopt an emergency regulation and advertise for a public hearing in April. Associate Member Tankard seconded the motion. The motion carried, 7-0.**

**BLUE TILEFISH BY-CATCH QUOTA RESTORED TO 300 POUNDS:**

**Harry Doernte** asked the Commission to re-address the tilefish regulations adopted at the February Commission meeting. He asked that the 300-pound blueline tilefish by-catch be restored. Associate Member Robins suggested that the public hearing be advertised for the Golden/Tilefish and that the matter should be taken to FMAC for discussion. The general consensus was to send the matter to FMAC in April, and another public hearing should be held at the April 24, 2012 meeting.

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- 12. WILLIAM R. DAVENPORT, III:** Request to license and locate a pound net near Dividing Creek.

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

Mr. O'Reilly provided additional comments regarding this matter.

A summary listing of the comments in opposition to the net is listed below:

- 1) The net is placed at the expense of the recreational fishermen; blocks the movement of both boats and fish into and out of Dividing Creek.
- 2) This waterway is well traveled and populated and the net will have negative impact on aquatic species and vessel navigation.
- 3) The net interferes with migration of aquatic species.

- 4) The net is in line with the typical course into and out of Dividing Creek and for those headed to Indian Creek, Fleets Bay, the Rappahannock River, and Buoy 59a.
- 5) There has never been a net at this location in the last 60 years.
- 6) Mr. Davenport is not a resident of Dividing Creek or Northumberland County.
- 7) The net will effect sportfishing in the creek and limit the number of crabs in the creek
- 8) Area residents use this area for tubing, pleasure cruising and water skiing.
- 9) The net should be moved further south and westward.

A summary of comments in favor of the net are provided below:

- 1) The net is not near the navigation channel.
- 2) The Hall family fished pound nets at this location 1930-1970's; Mr. Christopher fished there in the 1980's; then Mr. Palmer Hudnall fished for 3-4 years.
- 3) This "deep hole" location has been fished by pound nets during most of the 20<sup>th</sup> century.
- 4) Pound nets are easier to navigate around than gill nets.
- 5) Pound nets allow fish to be released alive.
- 6) This pound net can supply bait for both recreational and commercial fishermen.

Mr. O'Reilly explained that based on the comments received a number of the public may be confused about the exact location of the net.

Mr. O'Reilly stated that as for the net's effects on marine and fishery resources, we believe these to be negligible. The net would be over 3900 feet from the mouth of Dividing Creek, which is itself almost 4000 feet wide. This leaves significant open water for the immigration and emigration of marine resources into that creek.

Mr. O'Reilly said that staff notes that the net is not located on or adjacent to any submerged aquatic vegetation. Staff also did not anticipate water quality problems.

Mr. O'Reilly noted that staff has recently received a petition, from approximately 140 individuals, in support of the placement of the pound net at the location proposed by Mr. Davenport.

Mr. O'Reilly said that historically there were 2,000 pound nets in the State, in 1987 there were 300 pound nets, and now there were only 90 pound nets in the entire State.

Mr. O'Reilly said that staff recommended approval of the application, as submitted.

Acting Commissioner Travelstead asked for questions. There were none. He asked if the applicant wished to make comments.

William R. Davenport, III, applicant, was sworn in and his comments are a part of the verbatim record. Mr. Davenport explained that he caught fish in order to feed his family and that this was a good location and good ground for a pound net. He said he had selected this location in order to stay out of the way of navigation to and from Dividing Creek.

Acting Commissioner Travelstead asked for questions.

Associate Member Tankard asked him to explain exactly to and from where? Mr. Davenport said Dividing Creek to the Rappahannock and anywhere else.

Acting Commissioner Travelstead asked for anyone present in support that wished to comment.

Ida Hall, was sworn in and her comments are a part of the verbatim record. Ms. Hall explained that some of the shoreline had moved in and the chart used by staff was outdated. She said she moved to the area in 1964 and she said that there were two nets in the area and she had been fascinated by fishing with pound nets. She said she agreed that commercial fishing had as much rights as recreational fishing. She said there had been a trap (Deep Hole Trap) here for years and there had been commercially harvested pound nets here for many years. She said that the recreational and commercial fisheries had been coexisting for years. She said that since the 1960's there had been a lot of boat traffic with no problems. She said the Davenports do know the area as they work in other fisheries. She said she hoped the Commission approved this request.

Acting Commissioner Travelstead asked for anyone present in opposition who wished to comment.

Bob Reed, protestant, was sworn in and his comments are a part of the verbatim record. Mr. Reed said that safety was his main concern and the world was changing. He said there was more than one creek as there were several smaller ones in the area. He said he expected more development in the area like retirement communities. He said there was no commerce in the area, some crabbing and gill netting outside of the creek. He noted that there were 242 boats, piers, and houses that use the area proposed for the pound net. He said it would impact the main usage of the channel. He added that staff and Mr.

Davenport did not see it as a problem, but he is using a 40' sloop and he went this way in order to get fuel.

Associate Member Robins asked how many boats were in the area on the weekends. Mr. Reed said during May when there is the striped bass season there is a lot, maybe 100 boats per day going in and out.

Associate Member Schick asked if there was no where that there was 22 feet of water. Mr. Reed stated at Channel Marker 3 and out, it was 22 to 23 feet and 15 to 27 feet. He said no small boat should need to go out there just to get fuel in the Rappahannock River area. He said they travel through the pound net location.

Associate Member Palmer asked how far was the channel marker from the end of the pound net? Mr. Reed responded 2,100 feet.

James Cones, protestant, was sworn in and his comments are a part of the verbatim record. Mr. Cones stated the chart was not accurate. Acting Commissioner Travelstead explained that the shoreline had changed, but the latitude and longitude for the pound net was correct as it had been charted by the Engineering and Surveying Department.

Rick Lockhart, protestant, was sworn in and his comments are a part of the verbatim record. Mr. Lockhart explained that he knew the area as he had lived there when his parents owned land. He said Mr. Reed was right as regards to safety. He said that there was a natural contour at the creek and the boats go that way. He said that a majority of the nets in the area were in the area of the Great Wicomico River and did not impact boating traffic. He said the pound net was to be located in 20 feet of water and the channel that was there was not on the chart. He said the boats having to go out further away from the land would be unsafe. He stated Mr. Davenport has a right to have the net, but suggested it be moved as far as south as possible. He said like Ms. Hall he had lived here when his parents had owned the land and there had been only two boats in Dividing Creek, his father's and one more. He said there were 50 to 75 boats there now and there was concern about safety. He said the first net in the Great Wicomico River had been struck by three boats last year. He said the north side was no problem, but on the south side there were problems. He said that other nets were away from Dividing Creek and none had been there for at least 25 years. He suggested moving the location further south.

Mr. Cones said there was not just one creek in the area of the pound net, but three and there was lots of traffic. He said he lives on James Creek and fished a whole lot. He said the pound net would present safety problems for a small 22 foot boat and they can only fuel in Indian Creek. He said there would not be any lights or reflectors so that the pound net could be seen. He suggested moving the pound net further south.

John Tullner, protestant, was sworn and his comments are a part of the verbatim record. Mr. Tullner said he lived on Prentiss Creek and he did respect the watermen and their

right to have a pound net. He said he had concerns about safety as a number of boaters access the Bay from Prentiss Creek and there are those who are not familiar with area who would not be safe. He said the location of the net was a problem.

John R. Smith, protestant, was sworn in and his comments are a part of the verbatim record. Mr. Smith said he was a Dividing Creek resident and he saw both sides, but he did not support the location as it would impact navigation and other fisheries. He said the local fuel source for boats was in Indian Creek to the south. He said usually boats that have 5 feet or less draft navigate in that area of the oyster ground to fuel. He said the Dividing Creek area was a known as a good place for boaters to seek protection from severe weather. He said he was concern that additional economic gain should be given to one person when there were so many negative impacts on other people. He said the Commission should carefully consider the public's interests.

Acting Commissioner Travelstead asked staff to comment about the chart. Ben Stagg, Environmental Engineer, Sr. stated that the location of the pound net was accurate even if the shoreline had changed. He said the depth of water there was 18, 19 or 20 feet.

Associate Member Tankard asked about the depth north west of the oyster ground lease. Mr. Stagg stated it was five feet inshore and 15 to 20 feet offshore.

Acting Commissioner Travelstead asked that the Law Enforcement staff comment. William Franklin, Marine Police Officer in the area said he had obtained all the exact coordinates for the pound net location. He said there was a pound net at Hurlett Point and north of Dividing Creek there were 50 pound nets between there and Smith Point. He said more than two feet of water was needed for a pound net and this was a good area for a net. He said it was ½ miles south of the Channel and the pound net would not be a problem. Associate Member Palmer asked if there were any gill nets in the area. Officer Franklin said yes, in the Bay and in Antipoison Creek. Associate Member Palmer asked if there were crab pots and Officer Franklin responded, yes. Associate Member Palmer asked about other fisheries. Officer Franklin said that there was the staked oyster ground. Associate Member Tankard asked if this was a rough area. Officer Franklin said that Smith Point and the Potomac were rougher and Windmill Point out there was rougher. Associate Member Tankard asked if the area was used to escape bad weather. Officer Franklin said he did not know.

Acting Commissioner Travelstead asked if Mr. Davenport had any rebuttal testimony and Mr. Davenport responded, no. Acting Commissioner Travelstead stated the matter was before the Commission.

Associate Member Schick said that he was a marina owner and taught boating safety and the federal government puts the markers there and they should be used, not just be familiar with them. He said he understood that the short cut saved time, but they need to

use the channel. He said where he is located boats going aground happen because individuals did not use the channel.

**Associate Member Schick stated that he felt there was no reason not to approve the pound net. He moved to approve the net. Associate Member Palmer seconded the motion. The motion carried, 7-0.**

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**13. PUBLIC HEARING:** Proposed amendments to Regulation 4VAC20-620-10 et seq., "Pertaining to Summer Flounder," to modify the commercial fishery possession limit for summer flounder.

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

Ms. Watts explained that at last month's meeting the Commission approved an emergency regulation that would modify the Virginia commercial vessel possession limit for summer flounder harvested from federal waters from 20,000 pounds, which equals the combined total of the Virginia landing limit of 10,000 pounds and the amount of the legal North Carolina landing limit or trip limit.

Ms. Watts stated that staff had not received any public comments.

Ms. Watts said that staff recommended the adoption of the amendments to the regulation 4VAC 20-620-10 to make them a permanent part of the regulation.

Acting Commissioner Travelstead opened the public hearing. There were no public comments. The public hearing was closed. He stated the matter was before the Commission

**Associate Member Plumlee moved to approve the amendments to the regulation. Associate Member Schick seconded the motion. The motion carried, 7-0.**

\* \* \* \* \*

**14. PUBLIC HEARING:** Proposed amendments to Regulation 4VAC20-900-10 et seq., "Pertaining to Horseshoe crabs," to establish time of day and harvest limits for the harvest of horseshoe crabs by gill net.

Joe Grist, Acting Deputy Chief, Fisheries Management gave the presentation. His comments are a part of the verbatim record. Mr. Grist provided a handout of the draft regulation.

Mr. Grist explained that at the last meeting the Commission adopted amendments to the regulation establishing the 2012 commercial quota as 152,495 horseshoe crabs and sub-allocating the annual quota by gear types, as follows:

Gear Type and Allocation Amount for 2012	Full Quota Year
Dredge Gear (40.348%)	61,528
Trawl Gear (12.488%)	19,044
Hand Harvest (22.095%)	33,694
Pound net (18.142%)	27,665
Other Gear (6.927%)	10,564
Sum	152,495

Mr. Grist said the new quota sub-allocation was endorsed by consensus during a horseshoe crab industry meeting in February. The industry members present noted that some harvesters may have taken advantage of the pound net and other category combined quota for 2011 by directing on horseshoe crabs with gill nets. The consensus opinion of the group was to restrict the harvest of horseshoe crabs by gill net to daylight hours only, with a daily landing cap of 250 horseshoe crabs when they are harvested by gill nets.

Mr. Grist stated that draft regulation 4VAC 20-900-10 would restrict the harvest of horseshoe crabs by gill net to daylight hours only and provided for the daily landing cap of 250 horseshoe crabs when harvested by gill nets.

Mr. Grist said that the staff recommendation was to adopt the emergency regulation amendments and make them a permanent part of the regulation.

Acting Commissioner Travelstead asked for questions.

Associate Member Tankard asked where the gill net fishery fell in the sub-allocation chart. Mr. Grist said that they were in the other gear category.

Acting Commissioner Travelstead opened the public hearing. There were no public comments. The public hearing was closed. He asked what was the pleasure of the Commission.

**Associate Member Laine moved to accept the staff recommendation. Associate Member Tankard seconded the motion. The motion carried, 6-0-1. Associate Member Robins abstained.**

\* \* \* \* \*

**Commission Meeting**

- 15. PUBLIC HEARING:** Proposed amendments to Regulation 4VAC20-950-10 et seq., "Pertaining to Black Sea Bass," to establish the 2012 recreational fishing season.

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

Ms. Watts explained at the last month's meeting staff had requested the Commission to advertise for the change to the recreational black sea bass fishery season to match what was allowed in Federal waters. The proposed 2012 recreational seasons would be from May 19 through October 14 and November 1 through December 31. The proposed change was noted to be on page three of the draft regulation.

Ms. Watts noted that the hand out of the draft regulation was only for the change in the effective date.

Ms. Watts said that staff recommended the adoption of the 2012 recreational black sea bass fishery season as May 19 through October 14 and November 1 through December 31.

Acting Commissioner Travelstead opened the public hearing. There were no public comments. The public hearing was closed. He asked for the pleasure of the Commission.

**Associate Member Robins explained that the staff briefing mentioned Wave I season to be changed from January to February. He said that MAFMC had already passed it, but the ASMFC still had to make a decision. He said he moved to accept the staff recommendation. Associate Member Tankard seconded the motion. The motion carried, 7-0.**

Acting Commissioner Travelstead noted that the Wave I issue was to be heard by the ASMFC at their August meeting.

\* \* \* \* \*

- 16. PUBLIC HEARING:** Proposed amendments to Regulation 4VAC20-1260-10 et seq., "Pertaining to River Herring," to clarify the moratorium on river herring and to make it lawful to import river herring when accompanied by a bill of lading or commercial invoice.

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

Mr. O'Reilly reminded the Commission that at the last meeting they adopted an emergency regulation to clarify the river herring regulation for two issues. He said the

first was the request by the Department of Game and Inland Fisheries to exclude those river herring caught by fishermen that were non-migratory taken from freshwater impoundments under their jurisdiction. He said the second issue was to clarify that river herring legally harvest in another state or nation may be imported for sale in Virginia provided that product is accompanied by a bill of lading or commercial invoice. These changes were noted to be on pages 1 and 2 of the draft regulation.

Mr. O'Reilly said that staff recommended the adoption of the proposed regulation s amended.

Acting Commissioner Travelstead asked for questions. There were none. He opened the public hearing. There were no public comments. The public hearing closed. He stated the matter was before the Commission.

**Associate Member Schick moved to approve the amendments as presented. Associate Member Plumlee seconded the motion. The motion carried, 7-0.**

\* \* \* \* \*

- 17. PUBLIC HEARING:** Proposed amendments to Regulation 4VAC20-960-10 et seq., "Pertaining to Tautog," to establish a control date for the future management of the commercial fishery.

Joe Cimino, Biological Sampling Program Manager, gave the presentation. His comments are a part of the verbatim record.

Mr. Cimino said that on December 6, 2011, the Commission established new conservation and measures for the commercial and recreational tautog fisheries to meet the requirements set in the ASMFC Addendum VI's to the Tautog Fishery Management Plan. It was noted that there was no quota coast-wide or state-wide in order to lower future harvest to 50.5%. These restrictions followed closely behind regulations adopted in January 2008 that complied with a 25.6% reduction. He said that in the process of devising options for both the Addenda reductions, staff met with members of the commercial industry and one possible option that was proposed was limited entry for the commercial fishery. It was noted at that time that the commercial tautog fishery had only a small number of participants.

Mr. Cimino said the use of a closed season has been used as a management tool in the past and a limited entry, quota based system may be a viable option for the future instead of an extended close season. The only management tool available is to increase the size limits and to have additional closed days. It was noted that the Commission has set control dates for several other fisheries to cap the existing effort level or avoid overcapacity.

Mr. Cimino stated that the establishment of a control date would provide criteria for future limited entry into the fishery, but other criteria would have to be established as well. The purpose of the amendment is to prevent additional overcapacity in this fishery and to reduce the possibilities of overfishing.

Mr. Cimino stated no public comments have been received by staff.

Mr. Cimino said that staff was recommending amending Regulation 4VAC 20-960-10 to establish December 6, 2011 as the control date.

Acting Commissioner Travelstead asked for questions. There were none. He opened the public hearing. There were no public comments. He stated the matter was before the Commission.

Associate Member Palmer said this was all being considered because of request by one individual who was not present at the hearing. He said it was already a limited fishery, as they were caught as a bycatch. He said he spoke with individuals in the Lynnhaven area just yesterday and they were opposed. He suggested just to veto it, as it was just one person and did not affect many people.

Associate Member Robins said he felt it should be discussed by FMAC to see if it were necessary and then come back to the Commission.

Associate Member Palmer said that there was no reason for it to go to FMAC as it had already been there many times. Mr. Cimino said although the Tautog issues had been heard by FMAC a number of times, the control date has not been before the FMAC and no one on the committee is involved in the fishery. He said in 2008 when there were cuts proposed, the industry met, it was discussed and there was good deal of interest. He said there have been no public comments received or any of the public at the hearings.

Associate Member Tankard asked what the downside of a control date was.

Associate Member Palmer said it was not necessary as it was an underexploited species. He said this was one person's suggestion that he felt just wanted to corral the market for himself and there was a need to spread it around.

Acting Commissioner Travelstead said this was just setting a control date and not limiting entry. He said it would just be putting the public on notice and only to be used, if necessary.

**Associate Member Robins said he could see Mr. Palmer's concerns and he wanted to know more, such as how many are in the fishery. He said the Commission's needs more information and suggested it be deferred to FMAC. He said he would make it motion to defer it to FMAC. Associate Member Schick seconded the motion.**

**Associate Member Plumlee asked if the date could be set retroactive. Paul Kugelman, Assistant Attorney General and VMRC Counsel said that he questioned this and spoke with staff who explained that this was advance notice for the public so that when it did occur the control date would be known.**

Mr. O'Reilly said that Code Section 28.2-204.1 allowed the Commission to limit a fishery and if it were an issue today, he would suggest the Commission go back to December 6, 2011 and that way no one after that date would be allowed to harvest tautog.

Associate Member Plumlee said he felt it was not a problem to look back at the date and no one was here that was interested. He said Mr. Palmer was right and that he hated to see one person driving the fishery. He stated he agreed with continuing the matter.

Acting Commissioner Travelstead asked if all agreed to defer the matter to FMAC and asked for a vote to the motion.

**The motion carried, 6-1. Associate Member Palmer voted no.**

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**18. PUBLIC HEARING:** Proposed amendments to Regulation 4VAC20-1250-10 et seq., "Pertaining to the Tagging of Shellfish," to clarify tagging requirements for shellfish.

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

Dr. Wesson stated that there had been a second vibrio case, which is going to require further harvest restrictions. He said staff needed additional time to meet with the Shellfish Management Advisory Committee and requested that the matter be deferred until the additional warm water restrictions can be heard at the same time at a May public hearing.

Acting Commissioner Travelstead said it was the consensus of the Commission to defer and re-advertise for a May Public Hearing.

No further action was taken.

\* \* \* \* \*

- 19. PHILLIP BLEEKER:** Appeal of decision to deny an exception to the two year waiting period for a Commercial Fisherman Registration License.

Joe Grist, Acting Deputy Chief, Fisheries Management, gave the presentation. His comments are a part of the verbatim record.

Mr. Grist explained that Mr. Bleeker had a commercial fishing license until 2008 when he transferred it to a family member, Patsy C. Mullins. He said that on February 14, 2012

Mr. Bleeker filed for reinstatement as a commercial fisherman and requested an exception to the two-year waiting period to receive his license.

Mr. Grist said that in the criteria to be approved for an exception of the two-year delay he had to demonstrate to the satisfaction of the Commissioner that he has fished a significant quantity of commercial gear in Virginia waters during at least two years of the previous five. He stated that it has been a long standing policy that an individual, who transfers his license to another person, cannot be eligible for a hardship. He noted that Mr. Bleeker has not been licensed to fish since 2006, more than the required five year period and that 4VAC 20-610-30D stipulates that under no circumstances will an exception be granted solely on the basis of economic hardship.

Mr. Grist stated that staff recommended that Mr. Bleeker's appeal be denied and the decision of the Commissioner to deny Mr. Bleeker's request for an exception be upheld.

Acting Commissioner Travelstead asked the appellant to come forward and comment.

Philip Bleeker, appellant, was sworn in and his comments are a part of the verbatim record. Mr. Bleeker explained that he had been involved in Virginia fisheries for sometime up until 2006. He said he did appreciate and understood the criteria that was in place, but he hoped the Commission would consider his long history and allow him to work as he had done for most of his adult life.

Acting Commissioner Travelstead asked Mr. Bleeker why he had given up his card. Mr. Bleeker stated he had obtained another job and at the time his family needed it and was under the impression that if you did not use it you lost it. He said in mid January he was laid off and he needed the work. He said he is able to start by getting 60 acres of oyster ground and he wants to move seed to it. He said he had been able to find shell on the bottom to put the seed.

Acting Commissioner Travelstead said the Commission did not want to start a situation where an individual can obtain a card to sell it and then do that again. Mr. Bleeker said he knows now it was a mistake to get rid of it. He stated he felt it was better to transfer it then risk losing it.

Acting Commissioner Travelstead asked if he had put in his application for the two year delayed entry. Mr. Bleeker stated he had and paid for it.

Associate Member Robins asked about the status of the use of the old license. Mr. Bleeker stated that they do use it or he would get it back. Associate Member Robins suggested that an applicant can obtain one by transfer.

Associate Member Schick asked if he worked the oyster ground. Mr. Bleeker said he had been surveying it, but his 45 foot boat could not get into the shallow areas. He said he used a smaller boat and found an area not silted over. Associate Member Schick asked if there had been any harvest. Mr. Bleeker stated again he had found some shell and oysters on the bottom.

Acting Commissioner Travelstead stated the matter was before the Commission.

Associate Member Palmer said the rules were there for a reason and he understood that he had lost his job, but he could have kept his license or can obtain a license with a transfer. He asked staff how many applications for the two year delay were pending. Mr. Grist responded at the most 50. Associate Member Palmer stated if they gave him his back, then they would have to do the same for the 50 others.

Associate Member Robins said that he must meet one of the criteria. Acting Commissioner Travelstead stated that the Commissioner made that decision.

Mr. Bleeker asked if he could buy one and have it transferred to him. Acting Commissioner Travelstead responded yes, that he met the transfer requirement. Mr. Bleeker stated he had lots of past history in the fisheries and he had thought the Commission would consider that long time history.

Acting Commissioner Travelstead stated that the Commission action would be no action and all of the Board members agreed. He added that the denial of the exception for a commercial license would be upheld.

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**20. FAILURE TO REPORT COMMERCIAL HARVEST.**

No cases to be heard.

\* \* \* \* \*

**Commission Meeting**

**16703  
March 27, 2012**

There being no further business, the meeting was adjourned at approximately 4:40 p.m.  
The next regular meeting will be held Tuesday, April 24, 2012.

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Jack G. Travelstead, Acting Commissioner

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Katherine Leonard, Recording Secretary