

MINUTES

COMMISSION MEETING

August 24, 2021

The meeting of the Marine Resources Commission was held at the Marine Resources Commission main office at 380 Fenwick Road, Bldg. 96, Fort Monroe, Virginia with the following present:

Steven G. Bowman	Commissioner
John Tankard III	
John Zydron Sr.	
James E. Minor III	Associate Members
Christina Everett	
Chris Newsome	
Kelci Block	Assistant Attorney General
Jamie Hogge	Recording Secretary
Erik Barth	Bs. Systems Manager
Todd Sperling	Bs. Systems Manager
Pat Geer	Chief, Fisheries Mgmt.
Adam Kenyon	Deputy Chief, Fisheries Mgmt.
Shanna Madsen	Deputy Chief, Fisheries Mgmt.
Andrew Button	Head, Conservation and Replenishment
Alicia Nelson	Coordinator, RFAB/CFAB
Jill Ramsey	Fisheries Mgmt. Specialist
Jennifer Farmer	Fisheries Mgmt. Specialist
Somers Smott	Fisheries Mgmt. Specialist
Alexa Galvan	Fisheries Mgmt. Specialist
Jonathan Depaz	Fisheries Mgmt. Specialist
Lewis Gillingham	Director, SWFT
Matt Rogers	Chief, Law Enforcement
Jamie Green	Deputy Chief, Law Enforcement
Matt Dize	Marine Police Officer
Patrick West	Marine Police Officer
Bill Hall	Marine Police Officer
Brian Elliott	Marine Police Officer
Clayton Dameron	Marine Police Officer

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Marshall Thielen

Marine Police Officer

Randy Owen
Justin Worrell
Mike Johnson
Mark Eversole
Jay Woodward
Jeff Madden
Ben Nettleton
Tiffany Birge
Daniel Faggert
Ben Stagg

Chief, Habitat Management
Environmental Engineer, Sr.
Environmental Engineer, Sr.
Environmental Engineer, Sr.
Environmental Engineer, Sr.
Environmental Engineer, Sr.
Environmental Engineer, Sr.
Environmental Engineer, Sr.
Surveyor, Engineering/Surveying
Dir., Shellfish Aquaculture, Leasing
and Mapping

Virginia Institute of Marine Science (VIMS):

Lyle Varnell

Emily Hein

Mark Luckenbach

Others present:

Gregory Jenkins
Jim Schrote
Grace Flick
Ginny Gills
Hap Chalmers
Dennis Pearce
Holly Jenkins
Mayo Tabb
Dylan Lambertson
and others.

Tim Trant
Lee Gibbs
Jennifer Johnson
John Gillespie
Wayne Savage
Tony Watkinson
Adam Priestley
Mike Oesterling
Jordan Clifford

Mark Wensell
Linda Gibbs
Kim Huskey
Thomas Hoar
Allison Jackura
Susan Jenkins
Elizabeth Staas
Raymond Britten
Chris Moore

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Commissioner Bowman called the meeting to order at approximately 9:35 a.m.

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Commissioner Bowman led the pledge by the request of Commissioner Bowman. Associate Member Tankard said the invocation.

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Commissioner Bowman introduced Mr. Chris Newsome as the new Associate Member.

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APPROVAL OF AGENDA. – Commissioner Bowman asked if there were any changes from the Board members or staff.

Randy Owen, Chief, Habitat Management, requested that Agenda Item 12 be heard after Agenda Item #5, License Statue Review and Agenda Item #3A be heard once all contractors arrive.

Associate Member Zydron moved to approve the agenda as amended. Associate Member Tankard seconded the motion. The motion carried, 6-0. Chair voted yes.

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MINUTES: Commissioner Bowman asked if there were any changes or corrections to be made to the July 27, 2021 Commission meeting minutes.

Associate Member Zydron moved to approve the minutes as presented. Associate Member Minor seconded the motion. The motion carried, 5-0-1. Chair voted yes. Associate Member Newsome abstained.

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Commissioner Bowman swore in the VMRC staff and VIMS staff that would be speaking or presenting testimony during the meeting.

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Randy Owen was asked to come forward along with Tony Watkinson. Mr. Owen recognized Mr. Watkinson for his time of service with Virginia Marine Habitat Division.

Ben Stagg was asked to come forward along with Hank Badger. Mr. Stagg recognized Mr. Badger for his time of service with the Virginia Marine Engineering Division.

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- 2. **PERMITS** (Projects over \$500,000.00 with no objections and with staff recommendation for approval).

There were no **PAGE 2 AGENDA ITEMS**.

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- 3. **CONSENT AGENDA ITEMS.**

- 3A. **CHAN PARK, #19-1076**, requests authorization to retain 80 linear feet of riprap sill with 300 cubic yards of sand fill and wetland plantings at property (132 Wynne Road) located along Boathouse Creek in York County. Recommend approval with triple permit fees and a civil charge of \$2,000.00, which the contractor has agreed to pay.

Randy Owen, Chief, Habitat Management, reviewed the Consent Items 3A and 3B for the Associate Members. Mr. Owen’s comments are a part of the verbatim record.

Jordan Clifford, contractor for the Park’s project, was present and sworn in. His comments are a part the verbatim record.

Mr. Clifford took full responsibility for the oversight and agreed to pay the triple permit fees and the civil charge.

No one spoke in support or opposition of the projects.

The matter was before the Commission for discussion and action.

Associated Member Tankard moved to approve the after the fact application with a reduced civil charge of \$1,000. Associate Member Everett seconded the motion.

The motion carried, 6-0. Chair voted yes.

Civil Charge:	\$ 1,000.00
Fees:	\$ 300.00
Total Fees:	\$ 1,300.00

3B. DENNIS PEARCE, #21-1077, requests authorization to retain 175 linear feet of oyster and riprap sill, extending a maximum of 27 feet channelward of the mean low water mark with 30 cubic yards of sand fill and native wetland plantings adjacent to 602 Wildely Road along the Chisman Creek in York County. Recommend approval with triple permit fees and a civil charge of \$2,000.00, which the applicant has agreed to pay.

Randy Owen, Chief, Habitat Management, reviewed the Consent Items 3A and 3B for the Associate Members. Mr. Owen’s comments are a part of the verbatim record.

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

Mr. Pearce agreed to pay the triple permit fee and civil charge.

No one spoke in support or opposition of the projects.

The matter was before the Commission for discussion and action.

Associated Member Tankard moved to approve the after the fact application as presented. Associate Member Minor seconded the motion. The motion carried, 6-0. Chair voted yes.

Civil Charge:	\$ 2,000.00
Fees:	\$ 300.00
Total Fees:	\$ 2,300.00

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

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5. LICENSE STATUS REVIEW.

Calvin Gibbs (MRC # 008098) was present and sworn in. His comments are a part of the verbatim record.

Bill Hall, Marine Police Officer, was sworn in. His comments are a part of the verbatim record.

February 8, 2019 Have in possession unculled oysters (10 quarts): **4 VAC 20-260-50**

Disposition:

April 10, 2019, Have in possession unculled oysters (10 quarts): **4 VAC 20-260-50**, Gloucester General District Court

Matt Dize, Marine Police Officer, was sworn in. His comments are a part of the verbatim record.

July 19, 2019 Failure to offload shellfish on day of harvest: **4 VAC 20-1230-40**
July 19, 2019 Failure to maintain temperature control of shellfish: **4 VAC 20-1230-31**
July 19, 2019 Leave dock prior to one hour before sunrise: **4 VAC 20-1230-10**
September 3, 2019 Failure to display license/permit: **§28.2-231**

Disposition:

March 5, 2020, Failure to offload shellfish on day of harvest: **4 VAC 20-1230-40**, Failure to maintain temperature control of shellfish: **4 VAC 20-1230-31**, Leave dock prior to one hour before sunrise: **4 VAC 20-1230-10**, Failure to display license/permit: **§28.2-231**, Isle of Wight General District Court

Brian Elliott, Marine Police Officer, was sworn in. His comments are a part of the verbatim record.

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August 12, 2019 Theft of oysters (15 bushels): **§28.2-527**
 December 20, 2019 Resist and interfere with oyster inspection (dumped 8 bushels):
§28.2-512
 December 20, 2019 Over legal limit of oyster (8 bushel): **4 VAC 20-720-80**
 December 26, 2019 Possession unculled oysters (8 quarts): **4 VAC 20-260-40**
 January 1, 2020 Willingly and intentionally impede lawful fishing: **§28.2-503.1**

Disposition:

April 7, 2021, Theft of oysters (15 bushels): **§28.2-527**; Newport News General District Court

February 16, 2021, Resist and interfere with oyster inspection (dumped 8 bushels): **§28.2-512**; Over legal limit of oyster (8 bushel): **4 VAC 20-720-80**; & Willingly and intentionally impede lawful fishing: **§28.2-503.1**; Newport News General District Court

September 28, 2020, Possession unculled oysters (8 quarts): **4 VAC 20-260-40**; Newport News General District Court

GUIDELINE SUGGESTION: 3 YEAR REVOCATION OF ALL SHELLFISH LICENSES AND PRIVILEGES (§ 28.2-232 of the Code of Virginia)

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

Mr. Calvin Gibbs, a commercial fisherman registration licensee, was convicted on April 10, 2019 for one count of possessing unculled oysters (10 quarts) (4 VAC 20-260-50), on March 5, 2020 for one count failing to offload shellfish on day of harvest (4 VAC 20-1230-40), one count of failing to maintain temperature control of shellfish (4 VAC 20-1230-31), one count leaving the dock prior to one hour before sunrise (4 VAC 20-1230-10), and one count of failing to display license/permit (28.2-231 of the Code of Virginia), on April 7, 2021 for one count of theft of oysters (15 bushels) (28.2-527 of the Code of Virginia), on February 16, 2021 for one count of resisting and interfering with oyster inspection (dumped 8 bushels) (28.2-512 of the Code of Virginia), one count of over the legal limit of oysters (8 quarts) (4 VAC 20-720-80), and one count of willingly and intentionally impeding lawful fishing (28.2-503.1 of the Code of Virginia), and on September 28, 2020 for one count of possessing unculled oysters (8 quarts) (4 VAC 20-260-40).

The Commission's guidelines for sanctions specify that two or more convictions of failure to follow warm water restrictions, within a two-year period, should result in at least a three-year revocation of all shellfish licenses and privileges. In accordance with § 28.2-232 of the Code of Virginia, the guidelines suggest that the Commission revoke all of Mr. Gibbs' shellfish licenses and privileges for a period of three years from the date of this Commission meeting, August 24, 2021, through August 23, 2024. The Code of Virginia also allows that the Commission prohibit the issuance, reissuance, and renewal of any of Mr. Gibbs' shellfish licenses during this revocation period.

Associate Member Minor made a motion for a 3 year revocation of all Shellfish Licenses and privileges. Associate Member Everett seconded the motion. The motion carried, 6-0. Chair voted yes.

Gregory B. Jenkins (MRC #4203) was present and sworn in. His comments are a part of the verbatim record.

Patrick West, Marine Police Officer, was sworn in. His comments are a part of the verbatim record.

October 2, 2019 Quota and harvest limits: **4 VAC 20-720-80**
October 3, 2019 Fish the tidal waters of the commonwealth without the required license: **§28.2-225**
November 13, 2019 Fish the tidal waters of the commonwealth without having obtained the required license: **§28.2-225**
November 15, 2019 Quota and harvest limits: **4 VAC 20-720-80**
November 15, 2019 Gear license: no hand tong license: **4 VAC 20-720-75**
November 19, 2019 Gear license: no hand tong license: **4 VAC 20-720-75**
November 19, 2019 Quota and harvest limits: **4 VAC 20-720-80**
December 4, 2019 Fish the tidal waters of the commonwealth of Virginia without having obtained the required license: **§28.2-225**
December 4, 2019 Gear license no hand tong license: **4 VAC 20-720-75**

Disposition:

April 29, 2021, Quota and harvest limits: **4 VAC 20-720-80**; Fish the tidal waters of the commonwealth without the required license: **§28.2-225**; Isle of Wight General District Court.

March 4, 2021, Fish the tidal waters of the commonwealth without having obtained the required license: **§28.2-225**; Gloucester General District Court.

January 7, 2021, Quota and harvest limits: **4 VAC 20-720-80**; Gear license: no hand tong license: **4 VAC 20-720-75**, Quota and harvest limits: **4 VAC 20-720-80**; Gloucester General District Court.

January 11, 2021, Fish the tidal waters of the commonwealth of Virginia without having obtained the required license: **§28.2-225**, Gear license no hand tong license: **4 VAC 20-720-75**; Mathews General District Court.

GUIDELINE SUGGESTION: 1 YEAR REVOCATION OF ALL LICENSES AND PRIVILEGES (§ 28.2-232 of the Code of Virginia)

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

Mr. Gregory Jenkins, was convicted on April 29, 2021 for one count of quota and harvest limits (4 VAC 20-720-80), and one count of fishing the tidal waters of the commonwealth without the required license (28.2-225 of the Code of Virginia), on March 4, 2021 for one count of fishing the tidal waters of the commonwealth without having obtained the required license (28.2-225 of the Code of Virginia), on January 7, 2021 for two counts of quota and harvest limits (4 VAC 20-720-80), two counts of gear license: no hand tong license (4 VAC 20-720-75), and on January 11, 2021 for one count of fishing the tidal waters of the commonwealth of Virginia without having obtained the required license (28.2-225 of the Code of Virginia), and, one count of gear license: no hand tong license (4 VAC 20-720-75).

The Commission's guidelines for sanctions specify that two or more convictions of harvesting oysters without an oyster resource user fee and gear license within a two-year period should result in at least a one-year revocation of all licenses and privileges. In accordance with § 28.2-232 of the Code of Virginia, the guidelines suggest that the Commission revoke all of Mr. Jenkins' licenses and privileges for a period of one year from the date of this Commission meeting, August 24, 2021, through August 23, 2022. The Code of Virginia also allows that the Commission prohibit the issuance, reissuance, and renewal of any of Mr. Jenkins' licenses during this revocation period.

Associate Member Minor made a motion for a 3 year probation of all Shellfish Licenses and privileges. Associate Member Zydron seconded the motion. The motion carried, 5-1. Chair voted no.

Joshua Wood (MRC #5433) was not present.

Patrick West, Marine Police Officer, was sworn in. His comments are a part of the verbatim record.

January 20, 2020 Fish the commonwealth tidal waters w/o fishing license: **§28.2-225**
January 21, 2020 Fish the commonwealth tidal waters w/o fishing license: **§28.2-225**
January 21, 2020 Theft of oysters: **§28.2-527**
January 22, 2020 Theft of oysters: **§28.2-527**
January 30, 2020 Fish the tidal waters of commonwealth w/o license: **§28.2-225**
January 30, 2020 Theft of oysters: **§28.2-527**
February 3, 2020 Theft of oysters: **§28.2-527**
February 3, 2020 Exhibition of license display to officers: **§28.2-231**
February 3, 2020 Fish the tidal waters of commonwealth of Virginia without the required license: **§28.2-225**

Disposition:

April 1, 2021, Fish the commonwealth tidal waters w/o fishing license: **§28.2-225**; Theft of oysters: **§28.2-527**; Fish the tidal waters of commonwealth of Virginia without the required license: **§28.2-225**; Newport News General District Court.

June 22, 2021, Theft of oysters: **§28.2-527**; Exhibition of license display to officers: **§28.2-231**; Fish the tidal waters of commonwealth of Virginia without the required license: **§28.2-225**; York County General District Court.

Brian Elliott, Marine Police Officer, was sworn in. His comments are a part of the verbatim record.

January 31, 2020 Possession of unculled oysters (10 quarts): **4 VAC 20-260-40**

Disposition:

September 28, 2020, Possession of unculled oysters (10 quarts): **4 VAC 20-260-40**; Newport News General District Court.

GUIDELINE SUGGESTION: 1 YEAR REVOCATION OF ALL LICENSES AND PRIVILEGES (§ 28.2-232 of the Code of Virginia)

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

Mr. Joshua Wood, was convicted on April 1, 2021 for three counts of fishing the commonwealth tidal waters without the required fishing license (§28.2-225 of the Code of Virginia), and three counts of theft of oysters (§28.2-527 of the Code of Virginia), on September 28, 2020 for one count of possessing unculled oysters (10 quarts) (4 VAC 20-260-40), and on June 22, 2021 for one count of theft of oysters (§28.2-527 of the Code of Virginia), one count of exhibition of license display to officers (§28.2-231 of the Code of Virginia), and, one count of fishing the tidal waters of commonwealth of Virginia without the required license (§28.2-225 of the Code of Virginia).

The Commission’s guidelines for sanctions specify that two or more convictions of harvesting oysters without an oyster resource user fee and gear license within a two-year period should result in at least a one-year revocation of all licenses and privileges. In accordance with § 28.2-232 of the Code of Virginia, the guidelines suggest that the Commission revoke all of Mr. Wood’s licenses and privileges for a period of one year from the date of this Commission meeting, August 24, 2021, through August 23, 2022. The Code of Virginia also allows that the Commission prohibit the issuance, reissuance, and renewal of any of Mr. Wood’s licenses during this revocation period.

Associate Member Minor made a motion for a 2 year revocation of all Shellfish Licenses and privileges. Associate Member Tankard seconded the motion. The motion carried, 6-0. Chair voted yes.

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- 6. **ELAINE McNURE, #21-0895.** Commission review of the Accomack County Wetlands Board’s June 24, 2021, decision to approve the filling of 100 square

feet of non-vegetated wetlands as part of a bulkhead replacement project along Chincoteague Bay on Lot #5A1-1-765 on Seaview Street in the Captain's Cove subdivision in Accomack County.

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

Mr. Nettleton request that the Commission and Associate Members open the record to add additional information pertaining to the project.

Associate Member Tankard made a motion to approve staffs' request to open the record. Associate Member Everett seconded the motion. The motion carried, 6-0. Chair voted yes.

Mr. Nettleton explained that the project is located on a vacant lot in the Captain's Cove subdivision along Chincoteague Bay in Accomack County, and was the subject of a past decision by the Board at its August 2020 meeting (VMRC #20-1160). A bulkhead was originally constructed on the property in 2002. The Board was aware that their August 2020 decision to approve the filling of tidal wetlands at this property was overturned by the Commission at its September 2020 meeting. At that meeting, the Commission voted unanimously to reverse the Wetlands Board decision for VMRC #20-1160 and deny the application to replace the same bulkhead, finding that the Accomack Wetlands Board erred in its approval of the project as submitted and did not give full consideration to the criteria for approval of an application as specified in the wetlands zoning ordinance.

In this new application, under a new property owner, the agent and applicant's original project drawings for this project, submitted on April 20, 2021, agreed with staff's past and current onsite observations and depicted MHW and MLW behind the failed wall. They submitted the same day, however, a sealed elevation survey of the property that did not depict the current location of MHW and MLW. Rather it provided a note that existing onsite elevations at the channelward toe of the wall exceeded an elevation equal to 1.5 times the tide range as measured from mean low water. If correct, this would represent the upper limits of tidal wetlands as defined in § 28.2-1302 of the model wetlands ordinance. The sealed drawings, therefore, suggests that both MHW and MLW are situated channelward of the bulkhead and that no jurisdictional wetlands are present behind the structure.

Based on current and past observations by VMRC, VIMS and Accomack County staff, the bulkhead has completely failed and it appears that both mean low water (MLW) and certainly mean high water (MHW) are located landward of the failed structure.

At its May 27, 2021 hearing, given the discrepancy noted between the original project drawings, the sealed drawings and staff's collective onsite observations, the Board chose to continue the matter and requested that the MLW datum for the aforementioned survey be provided. At its June 24, 2021, meeting, when asked, the agent refused to provide the requested datum, stating the surveyor told him it was proprietary. The Board chose to proceed with the hearing even though it understood that both its staff and VIMS questioned the validity of the project drawings depiction of MHW and MLW and the location of the jurisdictional tidal wetlands.

After consideration of the record before them, the Board, at its June 24, 2021, hearing voted unanimously (4-0) to approve the application contingent on the bulkhead being replaced in its existing footprint with the justification that if something is not done, the neighbor's property is going to be severely affected.

By correspondence on behalf of Commissioner Bowman, dated July 1, 2021, and in conformance with §28.2-1311 A 2 of the Code of Virginia, the Accomack Wetlands Board was advised that the full Commission would be reviewing the Board's decision to approve the subject application.

Section §28.2-1302.10.B of the wetlands zoning ordinance states that the Board shall grant the permit if all of the following criteria are met: (1) the anticipated public and private benefit of the proposed activity exceeds its anticipated public and private detriment; (2) the proposed development conforms with the standards prescribed in § 28.2-1308 of the Code of Virginia and guidelines promulgated pursuant to § 28.2-1301 of the Code of Virginia; and (3) the proposed activity does not violate the purposes and intent of this ordinance or Chapter 13 (§ 28.2-1300 et seq.) of Title 28.2 of the Code of Virginia. Section 28.2-1302.10.C further states that if the Board finds that any of the criteria listed in subsection B of this section are not met, the Board shall deny the permit application but allow the applicant to resubmit the application in modified form. Staff is of the opinion that the Board's decision on this matter fails to meet all three criteria in subsection B.

The Board determined that the filling of wetlands was acceptable for the creation of upland and did not fully consider other alternatives that would not cause the filling of

wetlands. Although mitigation was considered for the fill of non-vegetated wetlands in the form of a proffer (in-lieu fee), it was ultimately not required. Additionally, avoidance and minimization should be considered before mitigation. Though the Board stated that a living shoreline would not be appropriate for this site, they did not consider any other alternatives.

Section §28.2-1313 of the Code of Virginia specifies when the Commission should modify, remand, or reverse a wetlands board's decision. Based upon our attendance at the hearings and our review of the record, staff finds again that the Accomack Wetlands Board erred in its approval of a project to fill tidal wetlands on Lot 765, and did not give full consideration to the criteria for approval of an application as specified in the wetlands zoning ordinance. Further, given the Commission's September 2020 decision and guidance on this same property, staff believes that the Board's decision may be considered to be arbitrary and capricious pursuant to § 28.2-1313 of the Virginia Code.

As such, staff recommends that the June 24, 2021, decision of the Accomack Wetlands Board be reversed and the application to fill 100 square feet non-vegetated wetlands be denied. This is based upon the aforementioned staff findings and the faulty rationale for filling the marsh, as there were other methods to address shoreline erosion without converting tidal wetlands to uplands. As stated, this denial does not prevent the applicant from reapplying in modified form to address their erosion control need.

To ensure that the affected site is restored to predevelopment conditions, staff recommends the Commission direct the Board to hold a restoration hearing, pursuant to § 28.2-1317.D of the Code, to address the unauthorized bulkhead construction and backfill placed in jurisdictional wetlands.

Mr. Raymond Britten, agent for the applicant, was present and sworn in. His comments are a part of the verbatim record.

The matter was before the Commission for discussion and action.

Associate Member Everett made a motion to approve staff recommendation to reverse the Accomack Wetlands Board decision and deny the permit. Associate Member Minor seconded the motion. The motion carried, 6-0. Chair voted yes.

Restoration hearing:

Associate Member Minor made a motion to approve staff recommendation. Associate Member Tankard seconded the motion. The motion carried, 6-0. Chair voted yes.

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- 7. FISHING BAY YACHT CLUB, #21-0769**, requests authorization to remove and replace an existing fixed marina pier ("Middle Dock") with a new, 312-foot long, 32-slip floating pier and finger piers, and dredge 112 cubic yards of material to gain minus six (-6) of depth at the base of the new pier on Jackson Creek at the Fishing Bay Yacht Club at 1529 Fishing Bay Road in Middlesex County. The project is protested by an adjacent property owner.

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

Mr. Woodward explained that the Fishing Bay Yacht Club is a private, primarily sailboat yacht club located on Stove Point in Middlesex County with water frontage and facilities both on Fishing Bay and Jackson Creek. The Club has been in existence since 1949. The Club recently replaced two of the three piers on the Jackson Creek side of the property in 2014 (western pier) and 2017 (eastern pier). The current request is to replace the middle pier with a floating pier in the same footprint to provide safer, easier access for club members. The pier is proposed to be 40 feet longer, providing 4 additional slips, and the application includes 112 cubic yards of dredging at the landward base of the pier to maintain depths of minus six (-6) feet at mean low water. The dredged material is to be removed by a barge mounted excavator on-site with contained, approved upland disposal.

The Fishing Bay Yacht Club has been in existence in this location for over 72 years. VMRC records indicate permits dating back to 1977 for the Club on both the Fishing Bay and Jackson Creek sides of the Club, with no history of problems or noncompliance with previous permits. When the Club applied for the western pier in 1985 (VMRC #85-1303), a riparian apportionment was undertaken before the VMRC permit was issued, and that apportionment appears to be the basis of the current protest. That apportionment established the line between the conterminous owners, Moseley and the FBYC

(“Moseley/FBYC” line in the apportionment), but that apportionment ends at the line of navigability, the 8-foot depth contour. Ms. Moseley is concerned that the current request will be too close to an extension of the Moseley/FBYC line of separation, beyond the line of navigability, when in fact, no such line has been lawfully established. Furthermore, in discussions with County representatives, Ms. Moseley’s parcel is not currently zoned for either commercial use or special use as a yacht club. Any pier that would exceed her riparian area would need a VMRC permit, be it private or commercial use, and VMRC would not permit such a pier without it first being in conformance with local zoning.

It appears that the proposed replacement pier will be aligned on the eastern side of the extended boundary line between the Club and Moseley properties and will not interfere with navigation in Jackson Creek, as verified by the U.S. Army Corps of Engineers who thoroughly reviewed the proposal in light of the Federal Navigation Channel in Jackson Creek.

Accordingly, after evaluating the merits of the project and considering all of the factors contained in §28.2-1200, staff believes the overall benefits of the project outweigh any detriments and recommends approval of the project with a royalty in the amount of \$44,700.00 for the encroachment of the pier over 29,800 square feet of State bottom at a rate of \$1.50 per square foot and \$67.20 for the dredging of 112 cubic yards of bottom material at a rate of \$0.60 per cubic yard, for a total royalty of \$44,767.20, and with inclusion of the following standard dredging permit conditions:

1. A pre-dredging conference shall be held on site prior to the commencement of the dredging. The meeting shall be attended by the Permittee, the dredging contractor and a member of the VMRC staff. The meeting shall be held within seven (7) days prior to the commencement of dredging and shall include an inspection of the dredge material containment area, an inspection of the previously staked dredge area, and a discussion of the terms and conditions of the permit;
2. To the extent possible, while still providing navigational access along the creek, the Permittee shall deploy a silt curtain around the perimeter of the area being dredged;
3. The Permittee shall provide a post-dredging bathymetric survey of the dredged area within 30 days of the completion of the dredging. The survey shall be signed and dated as being accurate and true. The survey shall be referenced to mean low water and shall include at least four (4) evenly spaced transects across the width of the dredged channel with soundings taken at intervals not exceeding ten (10) feet;

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- 4. The post-dredge survey depths shall vary uniformly around the permitted dredge depths, with the average depth approximating minus seven (-7) feet at mean low water. Any areas dredged deeper than seven (7) feet at mean low water will be considered a violation of the permit and subject to enforcement action;
- 5. Maintenance dredging may be conducted through the expiration date of the permit, provided the Permittee notifies the Commission at least 15 days prior to the commencement of each dredging operation, and provides an updated pre-dredging survey. The maintenance dredging notification shall include a description of the disposal site and verification of authorization to use the site if it is on property not owned by the Permittee.

Mark Wensell, Rear Commodore of Deltaville Yacht Club, was present and sworn in. His comments are a part of the verbatim record.

Tim Trant, attorney for the applicant, was present. His comments are a part of the verbatim record.

Mayo Tabb, Former Commodore of Fishing Bay Yacht Club, was present and sworn in. His comments are a part of the verbatim record.

No one spoke in opposition of the project.

The matter was before the Commission for discussion and action.

Associate Member Minor made a motion to approve staff recommendation. Associate Member Zydron seconded the motion. The motion carried, 6-0. Chair voted yes.

Royalties (Encroachment over 29,800 SF @ \$1.50 S.F.; Dredge 112 C.Y. @ \$.60 C.Y.)	\$ 44,767.20
Fees:	\$ 300.00
Total Fees:	\$ 45,067.20

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- 8. JOINT BASE LANGLEY-EUSTIS, #21-0924**, requests authorization to install, up to 12 times per year, a 24-foot wide, temporary causeway extending 1,280-feet channelward of mean low water and to excavate 74 cubic yards of jurisdictional beach, to facilitate the temporary causeway installation, as part of military training exercises along the James River at the Anzio Beach area of Joint Base Langley-Eustis in the City of Newport News. This requires a dune and beach permit from the Commission.

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

Mr. Nettleton explained that the Anzio Beach area (Training Area 18) of Joint Base Langley-Eustis is situated along the James River and consists of pocket beaches created by a series of breakwaters and riprap revetments. Historically, the Department of the Army has conducted training exercises on these pocket beaches to install temporary causeways similar to what is being proposed for this project (VMRC #04-0071, #12-0972). Joint Base Langley-Eustis is requesting a new permit to continue this activity into the future.

The proposed causeway is composed of floating steel sections measuring 80 feet long by 24 feet wide, and are assembled using floating Modular Warping Tugs (MWT). After the 26 sections are assembled into a unit at an offshore staging area, they will be installed at Anzio Beach.

The applicants have requested that two areas of Anzio Beach be authorized in the permit for the installation of the temporary causeway. The first area has been the primary area where the temporary causeways have been installed in the past. Both the primary and secondary areas consist of shallow slope sandy beach.

To install the temporary causeway, an area measuring up to 40 feet wide and 90 feet long needs to be excavated to maximum sediment depth of five (5) feet using bulldozers. This area of excavation, also known as a "Duck Pond," will extend 65 feet landward of mean low water and require the excavation of up to 74 cubic yards of jurisdictional beach sediment to facilitate the landward connection of the temporary causeway.

Once the excavation of the Duck Pond has been completed, the pre-assembled causeway is guided into the Duck Pond by the MWT's and secured on the beach using excavated

sediment to fill around the causeway. The causeway, once fully installed, will extend 1,280 feet into the James River with the offshore ends secured by anchors. When the exercise is completed the pier will be removed from the beach, the excavated areas will be refilled, and their natural contours restored.

Staff understands the need to conduct military exercises to maintain a state of readiness. The excavation of the beach and dune area is temporary and if all of the excavated areas are returned to their previous natural contours, then staff feels the public benefits of the project outweigh any detriments caused by the temporary excavation and encroachment.

Accordingly, after evaluating the merits of the project, and after considering all of the factors contained in §28.2-1403(10)(B) of the Code of Virginia, staff recommends approval of the project with a permit condition to return all excavated areas to their previous natural contours at the end of each exercise.

Applicant was not present.

No one spoke in support or opposition of the project.

The matter was before the Commission for discussion and action.

Associate Member Minor made a motion to approve staff recommendation. Associate Member Tankard seconded the motion. The motion carried, 6-0. Chair voted yes.

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9. **VIRGINIA ELECTRIC AND POWER COMPANY, #21-1514**, requests authorization to rebuild overhead transmission Line 74 from the Chesapeake Energy Center to the Great Bridge area in the City of Chesapeake within the existing right-of-way and involving impacts to tidal wetlands and crossing Deep Creek, New Mill Creek and the Intracoastal Waterway on the Southern Branch of the Elizabeth River. Permanent impacts to tidal wetlands are to be compensated at the New Mill Tidal Mitigation Bank in the City of Chesapeake. Both tidal wetlands and subaqueous bed permits are required.

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

Mr. Woodward explained that the project is located along the Southern Branch of the Elizabeth River and is a rebuild of a 6.2 mile, 115kV overhead transmission line in the same ROW with new towers in intertidal wetlands and uplands, and crossing two jurisdictional waterways in the city of Chesapeake, Deep Creek and New Mill Creek. The line will also cross a man-made portion of the Intracoastal Waterway near the beginning of the transmission line at the Chesapeake Energy Center. Two support towers currently located in Deep Creek will be cut at a depth of 2 feet below the mud line and removed, with new towers located in adjacent jurisdictional tidal wetlands. In addition, two other upland towers will be relocated slightly to provide adequate clearance for the new I-64 High Rise Bridge project over the Southern Branch Elizabeth River, currently under construction.

The existing transmission line 74 has reached the end of its designed life and a rebuild of the line will ensure reliable electrical service for VEPCO's customers. The applicant has proposed measures to minimize impacts during construction and has offered to mitigate for the permanent loss of tidal wetlands at a 1:1 ration (1,049 square feet) at a nearby commercial mitigation bank, within the same hydrologic unit code and watershed. No opposition was raised during the public interest review and no objections were raised by reviewing agencies.

Accordingly, after evaluating the merits of the project and considering all of the factors contained in §28.2-1200 and §28.2-1302(10)(B) of the Code of Virginia, staff recommends approval of the project with all permanent tidal wetland impacts being compensated by purchasing credits at the New Mill Tidal Wetland Mitigation Bank, with restoration of all temporary impacts to tidal wetlands to pre-construction conditions, and with a royalty in the amount of \$5,364.00 for the encroachment over 1,788 linear feet of State-owned subtidal bottom at the standard rate of \$3.00 per linear foot.

Jenny Gills, representative for the applicant, was present and sworn in. Her comments are a part of the verbatim record.

No one spoke in support or opposition of the project.

The matter was before the Commission for discussion and action.

Associate Member Tankard made a motion to approve staff recommendation.

Associate Member Newsome seconded the motion. The motion carried, 6-0. Chair voted yes.

Royalties (Encroachment over 1,788 L.F. @ \$3.00 L.F.)	\$ 5,364.00
Fees:	\$ 300.00
Total Fees:	\$ 5,664.00

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10. CARROLL CHADWICH BALLARD, III, Oyster Planting Ground Application #2017-051, requests authorization request to lease approximately 250 acres within Cobb Bay in Northampton County. The request is protested by two (2) local watermen who contend that the area is used for public shellfish harvest and should not be leased.

Ben Stagg, Dir., Shellfish Aquaculture, Leasing and Mapping, gave the briefing of the information provided in the staff’s evaluation, with PowerPoint slides. Mr. Stagg’s comments are a part of the verbatim record.

Mr. Stagg explained that staff received the application on March 9, 2017, from Carroll Chadwick Ballard, III, seeking to lease approximately 250 acres within Cobb Bay in Northampton County. The request has been subjected to our normal public interest review, and the area was surveyed in July of 2021. The surveyed area contains 242.41 acres.

Staff understands that removal of shellfish ground that could support public harvest, and converting such areas into private leases, can raise concerns from working watermen. It does not appear that shellfish resources are present within the proposed lease footprint. The area could be made productive with proper shellfish husbandry activity.

Therefore, after careful review and consideration of the objections two local watermen, and after considering all of the factors in §28.2.625 and §28.2-1205A of the Code of Virginia, staff recommends approval of the application to lease 242.41 acres as depicted on the plat dated July 20, 2021, within Cobb Bay, in Northampton County, to Carroll Chadwick Ballard, III.

Kim Huskey, representative for the applicant was present and sworn in. Her comments are a part of the verbatim record.

No one spoke in support or opposition of the project.

The matter was before the Commission for discussion and action.

Associate Member Minor made a motion to approve staff recommendation. Associate Member Everett seconded the motion. The motion carried, 6-0. Chair voted yes.

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11. THOMAS NEAL HOAR, II, Oyster Planting Ground Application #2019-032, requests authorization to lease approximately 18 acres within Belmont Creek in Lancaster County. The request is protested by petition of ten (10) local highland property owners along the creek who contend the creek bottom is soft mud and concerns if bottom cages are placed in such a shallow waterbody.

Ben Stagg, Dir., Shellfish Aquaculture, Leasing and Mapping, gave the briefing of the information provided in the staff's evaluation, with PowerPoint slides. Mr. Stagg's comments are a part of the verbatim record.

Mr. Stagg explained that staff received the application on March 25, 2019, from Thomas Neal Hoar, II, seeking to lease approximately 18 acres within Belmont Creek in Lancaster County. The request has been subjected to our normal public interest review, and the area was surveyed in July of 2021. The surveyed area contains 8.58 acres

While staff understands upland property owner concerns when lease requests are near their property, in this case, staff attempted to mitigate those concerns as much as possible by reducing the surveyed area and avoiding the deeper channel area. The bottomlands within the surveyed area do appear to be generally suitable for traditional on bottom shellfish propagation.

Therefore, after careful review and consideration of the objections by local property owners, and after considering all of the factors in §28.2.625 and §28.2-1205A of the Code of Virginia, staff recommends approval of the application to lease 8.58 acres, within Belmont Creek, in Lancaster County, to Thomas Neal Hoar, II.

Thomas Neal Hoar, applicant, was present and sworn in. His comments are a part of the verbatim record.

No one spoke in support or opposition of the project.

The matter was before the Commission for discussion and action.

Associate Member Minor made a motion to approve staff recommendation. Associate Member Tankard seconded the motion. The motion carried, 6-0. Chair voted yes.

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- 12. **LYNNHAVEN OYSTER COMPANY, LLC, Oyster Planting Ground Lease #19157**, within Broad Bay in the City of Virginia Beach, requests pursuant to VMRC Regulation 4VAC20-1350-10 et.seq., a hearing to appeal staff’s decision to deny the renewal of their lease at the end of their ten-year lease period of July 26, 2021. The staff lease renewal denial is based upon criteria contained within the Guideline Document: Oyster Planting Grounds Lease Renewal Approval, Lease Renewal Denial, and Commission Hearing Procedure for Lease Renewal Denial previously adopted by the Commission.

Ben Stagg, Dir., Shellfish Aquaculture, Leasing and Mapping, gave the briefing of the information provided in the staff’s evaluation, with PowerPoint slides. Mr. Stagg’s comments are a part of the verbatim record.

Mr. Stagg explained that pursuant to the Code of Virginia, Chapter 6, 28.2-613: *Duration of lease, each assignment of general oyster-planting ground shall continue in force for 10 years from the date of assignment. Upon expiration of any initial or subsequent term of the assignment, the Commission shall, upon application of the holder, renew the assignment for an additional ten-year term. However, the Commission shall not renew or extend an assignment where there has been no reasonable plantings of oysters, clams or cultch or no significant oyster or clam aquaculture operation, during any period of the 10-year period immediately prior to the application for renewal, unless the Commission finds that there was good cause for the failure to produce or plant oysters, clams or cultch, or finds that the assignment is directly related to and beneficial to the production of oyster-planting grounds immediately adjacent to the assignment.*

The Code further provides additional criteria for Commission consideration for lease renewals. They include whether the renewal is in the public interest considering the factors contained in subsection A of the Code Chapter 12, 28.2-1205, the prevalence of the diseases MSX and Dermo, the public benefits and impacts of shellfish aquaculture, and whether the oyster-planting ground has traditionally produced commercial quantities of oysters or clams.

As provided for in Chapter 6, 28.2-613, the Commission adopted a regulation regarding such lease renewals that requires a \$150 fee per lease for Commission review at the end of each ten-year lease term. This regulation also provides information on the process of requesting a formal hearing for any lease renewal denial by the Commission. The regulation was adopted and became effective on October 1, 2019.

In addition, based on this section of the Code of Virginia, the Commission adopted effective April 1, 2021, a Guideline Document: Oyster Planting Grounds Lease Renewal Approval, Lease Renewal Denial, and Commission Hearing Procedure for Lease Renewal Denial. The document provides extensive additional information on minimum use requirements for production and planting, and provides additional information to shellfish leaseholders concerning other past uses that could be considered by the Commission during the renewal review process.

Based on the requirements of the Code of Virginia regarding the renewal of leases, and after applying the requirements contained within the Commission adopted use Guideline Document, staff cannot recommend renewal of this lease based on the information provided.

Therefore, after careful review and consideration all of the factors in §28.2.613 and §28.2-1205A of the Code of Virginia, staff recommends upholding the staff decision to deny the renewal of lease # 19157 in the name of Lynnhaven Oyster Company, LLC, and that the lease be terminated effective August 25, 2021.

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

No one spoke in support or opposition of the project.

The matter was before the Commission for discussion and action.

Associate Member Zydron made a motion to approve staff recommendation to deny the renewal of the lease. Associate Member Tankard seconded the motion. The motion carried, 4-1-1. Chair voted yes Associate Member Everett opposed. Associate Member Newsome abstained.

There was further discussion to set aside an area of approximately 60 acres within Broad Bay as an area not to be leased effective immediately.

Associate Member Tankard made a motion to approve staff recommendation to modify approximately 60 acres within the Broad Bay as an area not to be leased effective immediately. Associate Member Everett seconded the motion. The motion carried, 6-0. Chair voted yes.

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13. PUBLIC COMMENT. There were no public comment.

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14. PUBLIC HEARING: Proposal to amend Chapter 4 VAC 20-720-10 et seq., "Pertaining to Restrictions on Oyster Harvest" and Chapter 4 VAC 20-1250-10 et seq., "Pertaining to the Tagging of Shellfish" to establish the 2020-2021 areas of public harvest, public oyster harvest seasons, oyster resource conservation measures and to clarify when shellfish must be tagged by a certified dealer.

Andrew Button, Head, Conservation/Replenishment, presented the information provided in the staff's evaluation, with PowerPoint slides. Mr. Button's comments are a part of the verbatim record.

Mr. Button explained that prior to October 1st of each year, The Commission meets to establish, by regulation, Chapter 4 VAC 20-720-10 et seq., "Pertaining to Restrictions on Oyster Harvest", the areas of public oyster harvest, public oyster harvest seasons and oyster resource conservation measures if they wish these to be different from those which are established by 28.2-506 of The Code of Virginia. The Commission has no requirement to change the oyster season established by code, but may do so, per section 28.2-507 of the Code of Virginia, "in order to protect or promote the growth of oysters". Any changes to the season established in code should take into account this requirement. The Commission may establish methods and seasons of harvest in those areas described

in 28.2-524 of the Code of Virginia that “promote the oyster or clam fishery”. This is what allows The Commission to establish a season and area for dredging oysters in the Pocomoke and Tangier Sounds, as dredging is a benefit to the oyster fishery and not the oyster resource. There are two other areas described in Code Section 28.2-524 in the main stem of the Bay, one from Smith Point to Windmill Point and the second in the mouth of the Piankatank River, where an oyster season can be established that promotes and protects the fishery rather than the oyster resource as is required by Code Section 28.2-507.

The Proposed DRAFT 2021 – 2022 Public Oyster Harvest Season:

James River

Clean Cull:

Oct., Nov., Dec., Jan., Feb., Mar., Apr. – HT

Area 2, 3:

Oct. – HT**/**HS* (1st. half of the month HT; 2nd. half of the month HS with harvest ending at noon)

Nov., Dec. & Jan. – HS* (harvest ending at noon)

Feb. - HT

Area 1:

Oct. & Nov.– HT

Dec. & Jan. – HS* (harvest ends at noon)

Feb. - HT

Seed Oysters:

Oct., Nov., Dec., Jan., Feb., Mar., Apr. & May – HT

York River

York HTA

Oct., Nov., Dec., Jan. & Feb. - HT

Area 1 & 2:

Oct., Nov. – HT

Mobjack

Oct., Nov., Dec. & Jan. – HT

Feb. – HS* (harvest ends at noon)

Milford Haven

Milford Haven:

Dec., Jan., & Feb. – HT

Deep Rock:

Dec., Jan., & Feb. – PT

Rappahannock River

Area 1:

**Oct. (last 2 weeks), Nov., Dec. & Jan. – PT & **Feb. (first 2 weeks) – PT

Area 3:

Nov. & Jan. – HS* (harvest ends at noon)

Area 5:

Dec. & Feb. – HS* (harvest ends at noon)

Area 7:

Mar. – HT

Area 8:

Dec. – HS* (harvest ends at noon)

Area 9:

Oct., Nov. & Dec. – HT

Corrotoman HTA:

Oct., Nov. & Dec. – HT

Great Wicomico

Great Wicomico 1:

Dec. & Jan. – HS* (harvest ends at noon)

Blackberry Hangs

Oct. – **PT (2nd. half of the month)

Little Wicomico

Little Wicomico:

Oct., Nov. & Dec. – HT

Nomini

Nomini:

Oct., Nov., Dec. & Jan. – HT

Yeocomico

Yeocomico:

Oct., Nov., & Dec. – HT

Tangier-Pocomoke

Poco Area 1 & Tangier Area 1:

Dec. & Jan. – DR, Feb. – DR* (harvest ending at noon)

Poco. Sound 9, 10:

Dec., Jan. & Feb. – HT

Seaside ES:

Nov., Dec., Jan., Feb., & Mar. – HT/By Hand

The bushel/vessel limits remains the same as 2020-2021 public oyster harvest season.
HS, DR & PT: Eight (8) bushel limit - sixteen (16) bushel vessel limit.
HT/By Hand: Fourteen (14) bushel limit - 28 bushel vessel limit.

Chapter 4 VAC20-1250-10 et seq., “Pertaining to the tagging of shellfish” establishes the shellfish tagging requirements for all shellfish (clams and oysters) harvested in Virginia Waters. The National Shellfish Sanitation Program (NSSP), that Virginia is a participating member in, requires that all commercially harvested shellfish be tagged by a certified shellfish dealer prior to being sold or consumed. The proposed amendment to Chapter 4 VAC20-1250-10 et seq., will remove some ambiguous language so that this requirement is more explicitly clear to harvesters and for enforcement purposes.

Staff recommends adopting Amendments to Chapter 4 VAC 20-720-10 et seq., "Pertaining to Restrictions on Oyster Harvest" and Chapter 4 VAC20-1250-10 et seq., “Pertaining to the tagging of shellfish” to establish the 2021-2022 areas of public harvest, public oyster harvest seasons, oyster resource conservation measures and to clarify when shellfish must be tagged by a certified dealer.

Mr. Oesterling spoke to clarify the request for the wording change from ‘shellfish’ to ‘oysters’. If ice is used on clams and seed oysters, it would be detrimental to the product. His comments are a part of the verbatim record.

The matter was before the Commission for discussion and action.

Associate Member Minor made a motion to approve staff recommendation. Associate Member Everett seconded the motion. The motion carried, 6-0. Chair voted yes

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- 15. PUBLIC HEARING:** Proposal to amend Chapter 4 VAC 20-620-10 et seq., “Pertaining to Summer Flounder,” to establish fall 2021 commercial offshore summer flounder fishery management measures and to prohibit transfer of summer flounder between vessels at sea in accordance with interstate and federal regulations.

Alexa Galvan, Fisheries Mgmt. Specialist, gave the briefing of the information provided in the staff’s evaluation, with PowerPoint slides. Ms. Galvans’s comments are a part of

the verbatim record.

Ms. Galvan explained that VMRC works with industry every year to establish management measures for the commercial offshore summer flounder fishery. The 2021 coastwide quota, as announced by NOAA, is 12.49 million pounds. Virginia receives 21.3168% of the summer flounder coastwide quota. The 2021 Virginia summer flounder quota is 2,399,576 pounds. The total Virginia landings to date and remaining quota amount for 2021 allow for a larger landing limit for the fall period one directed fishery. Industry is requesting the current fall period one of September 8 through October 31 with an increased landing limit of 15,000 pounds. Virginia must also come into compliance with interstate and federal requirements prohibiting the transfer of summer flounder between vessels at sea.

Staff recommends the Commission amend Chapter 4 VAC 20-620-10 et seq., "Pertaining to Summer Flounder," to establish fall 2021 commercial offshore summer flounder fishery management measures and establish language to prohibit transfer of summer flounder between vessels at sea in accordance with interstate and federal regulations.

The matter was before the Commission for discussion and action.

Associate Member Minor made a motion to approve staff recommendation. Associate Member Tankard seconded the motion. The motion carried, 6-0. Chair voted yes

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There being no further business, the meeting was adjourned at approximately 2:51 p.m. The next Commission meeting will be Tuesday, September 28, 2021.

Steven G. Bowman, Commissioner

Jamie Hogge, Recording Secretary