

MINUTES

**OCTOBER 23, 2001
NEWPORT NEWS, VA 23607**

The regular Monthly meeting of the Marine Resources Commission was held on October 23, 2001 with the following present:

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

Virginia Institute of Marine Science
Lyle Varnell Eugene Burreson
Robert Orth

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Jack Travelstead
 Rob O'Reilly
 Roy Insley
 Lewis Gillingham
 Ellen Cosby
 Chad Boyce

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

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

Acting Chief-Habitat Management
 Acting Deputy Chief, Habitat Management
 Head-Engineering/Surveying
 Environmental Engineer
 Environmental Engineer
 Environmental Engineer
 Environmental Engineer
 Environmental Engineer
 Environmental Engineer
 Environmental Engineer

others present included:

Jeff Kever
 Robert Allen
 Ken McNelly
 Bob Nicholas
 Kelly Place
 Richard Welton
 Bill Formichelli
 Ray Shield
 Dexter Trump
 R. W. Jones
 M. E. Marshburn
 Douglas F. Jenkins
 John Balderson
 Harry Johnson
 Tom Powers
 Mark Snook
 Robert Taylor, and others.

Wilson Hatter
 William S. Reynolds
 Ron Jeffords
 Jim Haydon
 Bob Pride
 Tom Mitchell
 Irv Fenton
 Ed Nealon
 Jeremy Madaros
 C. E. Malin
 David Briggs
 Donnie Thrift
 Chris Ludford
 Timothy N. Bell
 Nelson Ortiz
 Christine Snook

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Commissioner Pruitt opened the October meeting at 9:30 a.m. Members present were: Associate Members Ballard, Birkett, Gordy, Hull, McLeskey, White and Williams. Commissioner Pruitt established that there was a quorum. Robert Craft, Chief, Administration and Finance gave the Invocation and Associate Member White led the Pledge of Allegiance. Commissioner Pruitt swore in the staff and those representatives of the Virginia Institute of Marine Science who expected to testify at the meeting.

1. MINUTES of previous meeting.

Associate Member Ballard said that in the Crab Creek case at the September meeting, he abstained, but the minutes that were circulated said the vote was 8-0 for approval. He wanted the minutes to reflect that he abstained. Commissioner Pruitt said the change would be made. Associate Member White moved to approve the minutes with the Ballard correction. Associate Member Hull seconded the motion, which was approved, 7-0.

**** APPROVAL OF AGENDA**

Tony Watkinson, Acting Chief-Habitat Management, said that item number 5 had been pulled from the agenda at the request of the applicant and would be deferred until the Commission's November 27 meeting. Associate Member Hull moved to approve the agenda as revised. Associate Member Gordy seconded the motion, which passed, 7-0.

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

Tony Watkinson, Acting Chief-Habitat Management, briefed the Commission on the following Page Two items for projects over \$50,000 with no objections and with staff recommendation for approval.

2A. AQUIA HARBOUR PROPERTY OWNERS ASSOCIATION, #01-0836, requests authorization to perform 10,000 cubic yards of maintenance dredging to achieve maximum depths of minus six (-6) feet below mean low water in Austin Run and Aquia Creek, Reaches A and B, and maximum depths of minus five (-5) feet in Aquia Creek, Reach E, to access Aquia Harbour Marina in Stafford County.

PERMIT FEE.....\$100.00

2B. KINDER MORGAN/PLANTATION PIPELINE, #01-1528, requests authorization

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to install 70 linear feet of 12-inch diameter petroleum pipeline approximately 30 feet below the North Anna River and to install 80 linear feet of 12-inch diameter petroleum pipeline approximately 30 feet below the South Anna River, both installations using the directional drill method, within right-of-way easements in Hanover and Caroline Counties. Recommend a royalty of \$150.00 for the crossing under 150 feet of State-owned subaqueous bottom at the rate of \$1.00 per linear foot.

PERMIT FEE.....\$100.00
ROYALTY.....\$150.00

2C. HENRICO DEPARTMENT OF PUBLIC UTILITIES, #01-1686, requests authorization to install, by directional drill method, 635 feet of 16-inch diameter water main under Tuckahoe Creek, a tributary to the James River, in Goochland and Henrico Counties.

PERMIT FEE.....\$100.00

2D. FEDERAL HIGHWAY ADMINISTRATION, #99-2108, requests modification of a previously issued permit to add additional breakwater structures and to install riprap impacting State-owned subaqueous bottomland at Mason Neck State Park and Mason Neck National Wildlife Refuge in Occoquan Bay, a tributary to the Potomac River in Fairfax County (part of the I-95 Woodrow Wilson Bridge project mitigation proposal).

PERMIT FEE.....N/A

2E. OCEAN MARINE, LLC, #99-1507, requests authorization to modify their existing permit to add a 100-foot long floating wave break at their facility situated along the Southern Branch of the Elizabeth River in Portsmouth.

PERMIT FEE.....N/A

2F. WAVERLY GAS PRODUCERS LLC, #01-1625, requests authorization to install 180 linear feet of 14-inch methane gas pipeline, by directional drill method, within VDOT R/W, a minimum of five (5) feet below the existing bottom of Bailey Creek, a tributary to the James River in the City of Hopewell and the County of Prince George. Recommend a royalty of \$180.00 for the crossing of 180 linear feet of State-owned subaqueous land at a rate of \$1.00 per linear foot.

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

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There being no comments, pro or con, Commissioner Pruitt placed the Page Two items before the Commission. Associate Member Hull moved to approve the items. Associate Member Gordy seconded the motion, which was adopted, 7-0.

3. **MR. AND MRS. DEVON FAIRHURST, #98-1078.** Reconsideration of the Fairhursts' after-the-fact application to retain a dockhouse built atop the private, non-commercial pier at their property situated along Parkers Creek, a tributary to Onancock Creek. The Circuit Court of Accomack County remanded and set aside the Commission's October 26, 1999, decision to deny the after-the-fact request.

Hank Badger, Environmental Engineer, showed slides and explained that the staff learned that Mr. and Mrs. Fairhurst had constructed a 16 by 10-foot, one story dock house on their existing private pier after Gerry Tracy, U. S. Army Corps of Engineers conducted a field inspection of the site.

Mr. Badger explained that on June 23, 1999, staff conducted its inspection of the project and determined that the new 10-foot by 16-foot dock house had not been authorized by VMRC. A Notice to Comply was issued to the Fairhursts on July 1, 1999. The Notice directed removal of the illegal dock house within 30 days and advised that failure to do so would result in this matter being placed before the full Commission, Mr. Badger said. In addition to the illegal dock house, the private pier also contained a 14-foot by 14-foot expansion to the T-head that was not part of the original Fairhurst pier application that was submitted in 1998.

Mr. and Mrs. Fairhurst, responded to the Notice to Comply by letter dated July 15, 1999. In that letter they indicated they were unaware a permit was needed, when no marsh or subaqueous lands were being disturbed. This rationale does not adequately explain why they also failed to obtain the required local county building permit for the structure. In their opinion, the dock house does not shade or cause any more runoff than the existing pier. Mr. and Mrs. Fairhurst then requested that staff agree to allow the dock house to remain in place until the matter could be heard before the full Commission.

Mr. Badger said that no protests had been received, and that the Virginia Institute of Marine Science said there were no environmental issues relative to the dock house structure. Accomack County has not issued a building permit, deciding to withhold action until the

Commission makes its determination. Obviously, if the structure is removed no building permit will be required unless it is relocated onto the adjacent upland.

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Mr. Badger said that during the October 26, 1999, hearing the Commission reviewed slides of the project, all documents in the official record and considered the testimony provided by Commission staff as well the applicants. After careful deliberation, the Commission voted 4 to 3 to deny the after-the fact application and directed the Fairhursts to remove the dock house within 90 days, finding that the dock house was a non-water dependent structure and could have been located on the adjacent upland. Mr. and Mrs. Fairhurst appealed the October 26, 1999, decision of the Commission to the Circuit Court of Accomack County.

On July 21, 2000, Judge N. Wescott Jacob heard the appeal in the Circuit Court of Accomack County. After consideration of the pleading, the agency record, supporting briefs, applicable law and authority, and the arguments of counsel, Judge Jacob set aside the Commission's decision and remanded the permit application to the Commission for reconsideration, but with no clear direction.

Mr. Badger further explained that when reviewing proposals to build over State-owned submerged land, staff considers, among other things, the water dependency and intended use of the proposed structures, as well as the degree of encroachment. The intended goal of this review is to limit the encroachment of non-water dependent structures to the absolute minimum amount necessary to reasonably achieve the intended use. "See Subaqueous Guidelines, Section 1.C.2, page 4," Mr. Badger said.

The proposed dockhouse is clearly a non-water dependent structure and could easily have been located on the adjacent upland property. As a result, staff recommended again that the Commission deny the after-the-fact request and direct removal of the dock house within a reasonable time period.

John Poulson, counsel for the Fairhursts, addressed the Commission, saying that Judge Jacob had said that the structure did not harm anybody. He also noted that while the Commission's policy might be to prohibit the construction of non-water dependent structures over State-owned subaqueous lands, there have been occasional exceptions. He presented a series of photographs of structures on the Eastern Shore that either have received permits from the Commission or he felt have been "permitted to exist" by the Commission. Clearly, Mr. Poulson said, exceptions to the policy have been made. He also suggested that the project was possibly out of the scope of the Commission's legal range, since it appeared, in several photographs, to be landward of mean low water.

Mr. Poulson also said that the Fairhursts could not construct the dock house on "high ground" in the proximity of the pier because Accomack County does not make any exceptions to the 100-foot setback requirement of the Resource Preservation Act. He also

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said that the dock house was in compliance with the Agency's subaqueous guidelines and stressed that it was important that the Agency apply and enforce the law equally.

Associate Member Gordy questioned whether the project fell within the Commission's jurisdiction. Commissioner Pruitt said that for years Parkers Creek has been considered state-owned bottom and property of the Commonwealth.

Associate Member Ballard said the purpose and use of the dock house was unclear. Mr. Poulson said it is used to store boat related equipment, including an extra motor, crab pots, life preservers and some folding chairs.

Commissioner Pruitt said he wanted to address some issues presented by Mr. Poulson, especially the reference to the Commission's "permitting to exist," in reference to some structures cited in his survey. Commissioner Pruitt said no policy is set in concrete and that all issues are considered on their merit and are discussed fully by the Commission. He also noted that the Commission is responsible for 5,220 miles of shoreline and subaqueous lands larger than the state of Delaware. He said the Commission only had about 60-plus uniformed officers, less personnel now than his predecessor had in 1981. He said the Commission was "not sitting back letting this stuff happen."

Associate Member Hull asked what Accomack County had done thus far regarding the project? Mr. Poulson said the County had not issued a building permit, but rather had decided to wait until the Commission took action. Mr. Hull said he had problems approving the permit until the County had taken its action.

Commissioner Pruitt asked if there was anyone who protested the project. There being none, he placed the matter before the Commission. Associate Member Gordy moved to approve the project and it was seconded by Associate Member White.

Associate Member Ballard said he could not support the motion. He said that if the Fairhursts had contacted the Commission before the dock house was built they would have been told that a non-water dependent structure did not conform to policy. He also said that Accomack County's no exception policy for RPA does not mean that the Commission would allow it. He also said that the Public Trust Doctrine is involved in state-owned subaqueous lands. "We are not only dealing with what people believe in now, but in the future. That is why we do not want non-water dependent structures built over State-owned subaqueous lands unless there is a compelling reason."

Commissioner Pruitt said his concern has been over the after-the-fact element. Associate Member Hull said he agreed with Mr. Ballard's comments. Associate Member Birkett questioned whether the Commission had jurisdiction, but indicated he would support Mrs. Gordy's motion.

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There being no further comments, Commissioner Pruitt called for the vote. The motion was approved by a 4-3 vote.

Tony Watkinson, Acting Head-Habitat Management, asked Commissioner Pruitt whether the motion included triple permit fees and an additional civil charge. He said that under the matrix being used the civil charge could range from \$600 to \$1,800 in lieu of any other legal action. Commissioner Pruitt said the fees and civil charge were not a part of the motion. Mrs. Gordy then moved the collection of \$75 in permit fees (equal to triple fees) and a civil charge of \$600, the minimum, which the Fairhursts would have to agree to. Associate Member Birkett seconded the motion, which passed by a 7-0 vote.

4. **TROY LANE, #00-1871**, requests after-the-fact authorization to retain a 48-foot long by 18-foot wide, open-sided, timber boathouse and construct a second 35-foot long by 16-foot wide, open-sided, private, noncommercial, timber boathouse addition adjacent to his property situated along Mill Creek in Northumberland County. The project is protested by an oyster ground leaseholder.

Jeff Madden, Environmental Engineer, presented slides and told the Commission that this case was tabled at the June 26, 2001 Commission meeting to provide the Northumberland County Board of Supervisors an opportunity to consider the matter. The boathouse was approved by the Board of Supervisors on August 9, 2001.

The project, located at the end of State Route 665, is about two miles southeast of Wicomico Church, along Mill Creek, a tributary to Ingram Bay in Northumberland County. Mr. and Mrs. Lane purchased the property in 1999. At the time of purchase, the property included two boathouse structures linked by a series of piers and catwalks. The boathouse complex included a smaller 28-foot long by 28-foot wide, enclosed, dual-slip structure and a larger 48-foot long by 18-foot wide, open-sided, single slip boathouse. Apparently, the smaller boathouse was constructed prior to 1953 and the larger structure was constructed around 1990.

The Lanes asked to retain the larger open-sided structure that currently protects a 36-foot, cruiser. The Lanes propose to demolish the smaller enclosed boathouse and to replace it with a 35-foot by 16-foot, open-sided, dual slip boathouse to house a 29-foot, Ulrichson Cabin Cruiser and a smaller fishing skiff.

Mr. Madden said initially, Mr. Leonard Pittman, the oyster ground leaseholder, objected to

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the new boathouse encroaching upon his oyster lease. In an attempt to address Mr. Pittman's concerns, the Lanes decided to move the site of the proposed 35-foot by 16-foot boathouse from the east (downstream) side of the larger boathouse, to the west (upstream) side. This was done so that the new structure would not encroach over Mr. Pittman's oyster lease. The Commission staff forwarded the revisions to Mr. Pittman for his review. In a letter dated August 27, 2001, Mr. Pittman responded to the new proposal by sustaining his objection and further commenting that, he felt the new location of the boathouse lacks sufficient depth for the Lane's boat.

Staff has verified that the depths at mean low under the footprint of the proposed boathouse range from minus one foot (-1) mean low water at the landward side to minus three (-3) mean low water at the channelward end of the proposed boathouse which should provide suitable depth except at extreme low tides.

To verify that the new structure would not encroach on Mr. Pittman's oyster ground, the applicant retained VMRC surveyor Mr. Dennis Hogge to survey the lease. His survey verified that the new structure would not encroach directly over Mr. Pittman's lease. However, on October 3, 2001, subsequent to Mr. Hogge's survey, staff received additional correspondence from Mr. Pittman who challenged the accuracy of the survey.

While Mr. Pittman's lease is at the current downstream boundary of permanent condemnation area No. 123, both his lease and the remainder of Mill Creek are currently open for the direct marketing of shellfish. Mr. Madden stated that neither adjacent upland property owner objects to the boathouse.

In summary, Mr. Madden said Mr. Lane is attempting to legitimize an illegal structure which was present on his property at the time of purchase. The boathouse was apparently constructed at least 11 years ago. While staff does not dispute that Mr. Pittman has a great deal of familiarity with the shoreline in the vicinity of his oyster lease, staff has every confidence in the recent survey and believes that the present location for the proposed 35-foot long by 16-foot wide addition will not be over Mr. Pittman's lease. Staff also believes that Mr. Lane has gone to great lengths to avoid direct impacts to Mr. Pittman's lease. Furthermore, the removal of the 700-square foot close-sided boathouse will uncover a portion of the lease that has been covered for decades.

Accordingly, staff recommends that the Commission approve the modified proposal. Staff also recommends that Mr. Lane be authorized to retain the existing 48-foot long, by 18-foot wide structure. Although the 48-foot long by 18-foot wide boathouse was constructed without a permit, it was constructed by the previous owner and removal by the Lanes does not seem necessary or appropriate.

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Mr. Madden said that the Northumberland County Board of Supervisors had approved a shed-roof extension without a second pitched roof as submitted by Mr. Lane. He stressed that Mr. Lane's modified proposal is not on Mr. Pittman's lease.

Associate Member Hull said he was personally aware of this situation and the permit request and said adjacent property owners did not object to the project. Commissioner Pruitt asked if there was anyone opposed to the project. No one spoke and he, therefore, placed the matter before the Commission.

Associate Member Hull made a motion to approve the project with the removal of the existing tin building and noted that the proposal did not infringe upon Mr. Pittman's oyster lease. Associate Member Gordy seconded the motion which was approved by a 7-0 vote.

- 5. THOMAS A. DINGLEDINE, #01-1262**, requests authorization to construct a 12' x 10' covered porch located 73 feet channelward of mean low water on an existing pier situated along Horn Harbor in Mathews County.

At the request of the applicant, the case was deferred until the Commission's November 27 meeting.

- 6. RICHARD HIXSON, #01-0782**, requests authorization to rebuild an existing 10' x 30' building at his property located 20 feet channelward of mean low water situated along Horn Harbor in Mathews County.

Kevin Curling, Environmental Engineer, presented a series of slides and explained that Horn Harbor is a major tributary of the Chesapeake Bay in Mathews County. It is surrounded by a rural area with many properties having older piers. Mr. Hixson's property is located near the head of Horn Harbor and the waterway is approximately 500 feet wide at the project site.

Mr. Curling said Mr. Hixson requested authorization to "reconstruct approximately 142 linear feet of deteriorating existing pier and to reconstruct an existing 30' x 10' storage type building at the landward edge of the pier." The "existing pier" is clearly a hazard or obstruction of the waterway and would be required to be removed under 28.2-1210 Code of Virginia, Mr. Curling said. The building does still exist, but given the condition of the pilings underneath the structure, it appears unsafe and unserviceable.

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Realizing that Mr. Hixson has an existing building that he was attempting to repair, staff inquired as to how the building would be repaired without the building being removed to replace the foundation. In response to this inquiry, Mr. Hixson submitted a repair plan that included driving new pilings around the outside of the building and placing new girders under the building between the new pilings. Since this required complete reconstruction of the building support structure, staff determined that this approach would require a permit.

Also, in response to a staff inquiry Mr. Hixson stated that the purpose of the building would be to "store miscellaneous boating equipment, such as flotation gear, sails, oars, inflatable rafts, etc." He was unable to produce any documentation to support his allegation that the building existed prior to 1962. Even if the applicant could prove the pier and storage building was originally constructed prior to 1962, when the agency assumed subaqueous permitting responsibility, staff believes the reconstruction of the building, as proposed, would still require a VMRC permit. The project is not protested and no State agencies have commented on the proposal, Mr. Curling said. The project does not encroach upon any leased oyster grounds. In summary, Mr. Curling explained that when reviewing proposals to build over State-owned submerged lands the Commission's Subaqueous Guidelines direct staff to consider, among other things, the water dependency and the necessity for the proposed structure. Furthermore, when considering authorization for such structures for private use, 28.2-1205 of the Code of Virginia stipulates that "In addition to other factors, the Commission shall also consider the public and private benefits of the proposed project and shall exercise its authority under this section consistent with the public trust doctrine as defined by the common law of the Commonwealth adopted pursuant to 1-10 in order to protect and safeguard the public right to the use and enjoyment of the subaqueous lands of the Commonwealth held in trust by it for the benefit of the people as conferred by the public trust doctrine and the Constitution of Virginia."

Although the storage building is unprotested and the environmental impacts associated with it may be minimal, and even though it may have had a water dependent use at one time, that use no longer exists. If Mr. Hixson wishes to retain the building for any historical significance, staff would recommend moving the building onshore, where it could be placed among other out buildings located around his property. In addition to limiting the encroachment over State-owned submerged land, locating the structure on the upland

minimizes the potential for the building materials to enter the waterway during storm events or when the structure again falls into a state of disrepair. Accordingly, the Staff was unable to recommend approval for the reconstruction of the storage building over State-owned submerged land. Furthermore, pursuant to 28.2-1210, the building and the remnants of the pier should be removed from the waters of the Commonwealth.

Mr. and Mrs. Hixson explained their reasons why they wanted to retain the structure and explained what they felt to be its historic significance.

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Commissioner Pruitt asked if there were any protesters to the project. There being none, he placed the matter before the Commission. Associate Member Hull said he felt the structure was worthy of keeping and moved to approve the permit. Associate Member Gordy seconded the motion.

Associate Member Ballard agreed that the building might be of some historical significance, but said it did not fall within the state subaqueous guidelines. He said there were no compelling reasons for the building to remain over State-owned subaqueous bottomland.

Associate Member Williams said the case was a double-edged sword. He said while it was not a permitted use, failing to put the building back would not be in the public interest. He said he would support Mr. Hull's motion, which passed by a 5-1 vote.

7. **ROBERT W. JONES, #01-0491**, requests authorization to retain unauthorized fill placed on State-owned subaqueous bottomland; and to construct an 85-foot long stone breakwater at his property situated along the James River in Isle of Wight County.

Benny Stagg, Environmental Engineer, showed slides and explained that the project site is located in the Morgarts Beach area of Isle of Wight County along the James River. The site is along a steep bluff exceeding 40 feet in height. Originally, Mr. Jones applied to place riprap along the toe of the bluff near the mean high water line and up the embankment approximately six (6) feet. This was approved by the Isle of Wight County Wetlands Board at its June 18, 2001, meeting. The original request did not require a VMRC permit.

Mr. Stagg said that subsequently, during the placing of the stone by crane from the top of the bank, a portion of the bluff collapsed under the weight of the equipment. The bank was then graded down to the river to include both the intertidal area and encroachment upon State-owned subaqueous lands. The County issued a Stop Work Order on all activities on

August 10, 2001, and informed VMRC of the status of the project. VMRC staff visited the site on August 13, 2001, and spoke to the contractor and Mr. Jones. A Notice to Comply was issued by VMRC on August 15, 2001, requesting removal of the unauthorized fill material and restoration of the shoreline to its previous condition within 60 days. Alternatively, the applicant was given the option to submit a written request to modify the previous permit application and seek approval to retain the fill area behind a breakwater that Mr. Jones explained he hoped to build.

Mr. Jones retained Stokes Environmental Associates, Inc., to act as his agent for design and continued permitting of the project. New permit drawings and information were then

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submitted by Stokes Environmental Associates, Inc. for a breakwater structure, use of the sand fill to create a tombolo behind the breakwater and riprap along the graded bank, Mr. Stagg said. This is intended to be similar to the breakwater structures with tombolos which are located immediately upstream of the project.

The Isle of Wight County Wetlands Board approved a modification to the original permit for the riprap placement and to retain the sand material in the intertidal area at their meeting on September 17, 2001. No other enforcement action was taken by the Wetlands Board.

Mr. Stagg explained that during processing of the original proposal VMRC staff, the Department of Conservation and Recreation, the Virginia Institute of Marine Science, and the Wetlands Board all advised Mr. Jones that his proposal would not likely address the erosion problems at the site. However, due to cost concerns and the location of an overhead power line near the edge of the bluff, Mr. Jones opted to pursue only the placement of riprap along the base of the bank.

Although the violation began as a result of the collapsed bank, grading continued which resulted in additional encroachment over non-vegetated wetlands and State-owned submerged lands. Since the applicant has just obtained a wetlands permit, staff feels he should have known that any additional work beyond the original permitted activities would require authorization. However, the applicant and contractor have been cooperative once they were informed that the activities were not authorized. In fact, no additional work, other than the installation of County required erosion control devices, has occurred at the site since the County issued the Stop Work Order.

The Virginia Institute of Marine Science (VIMS) originally stated that while the project would result in an acceptable amount of wetland encroachment, they strongly recommended the applicant seek professional engineering advice concerning the erosion of the bluff and proper design of the revetment. The project was re-evaluated by VIMS and they noted that while the impacts of the collapsed bluff are severe at present, the breakwater, once

completed should provide long-term beach stability and additional intertidal beach habitat. VIMS also recommends that the portions of the tombolo above mean high water be sprigged with salt meadow hay for additional sand stabilization.

The Department of Environmental Quality and the Department of Conservation and Recreation both find the proposal acceptable. No other agencies have commented on the project.

Mr. Stagg said, while the proposed grading of the collapsed bluff will still be somewhat steeper than normally recommended, the project, as currently proposed, should provide considerable protection of the upland bluff. The breakwater appears to be properly designed

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for the site. As such, staff recommends approval of the breakwater and use of the sandy material of the collapsed bluff to create a tombolo immediately inshore of the breakwater structure. If the Commission approves the breakwater and beach nourishment as submitted, staff recommends a royalty of \$137.50 for the filling of 2,750 square feet of State-owned subaqueous lands at \$0.05 per square foot, and the planting of salt meadow hay (*spartina patens*) upon the portion of the tombolo above mean high water. Additionally, the Commission may wish to consider an appropriate civil charge.

Mr. Jones addressed the Commission and explained how the bank had collapsed during the construction project and how the new proposal would be designed.

Commissioner Pruitt asked if there was any protest of the project. There being none, he placed the matter before the Commission.

Associate Member Ballard moved to approve the project with the staff recommendations including tombolo and the planting of salt meadow hay. Associate Member Williams seconded the motion, which was approved by a 7-0 vote.

8. **CITY OF FRANKLIN, #01-1378**, requests after-the-fact authorization to retain previously relocated aerial power lines within a VDOT easement over 173 linear feet of the Blackwater River in the City of Franklin and Isle of Wight County in association with a bridge relocation project.

Benny Stagg, Environmental Engineer, presented slides of the site and explained that it is located along the Blackwater River the center of which is the border between the City of Franklin and Isle of Wight County near the International Paper Plant. VMRC received a Joint Permit Application from the City of Franklin on July 30, 2001, seeking authorization

to relocate overhead power lines in conjunction with the proposed relocation of a highway bridge over the Blackwater River. On Friday September 21, 2001, staff received notification from the U. S. Army Corps of Engineers, that they had discovered that the power lines were already relocated.

Mr. Stagg said staff visited the site on September 27, 2001, and verified that the lines had already been relocated. A Notice to Comply was issued on October 3, 2001. The applicant was informed that in lieu of removal, staff would proceed to review the project for an after-the-fact permit. Dexter Trump of Franklin Municipal Electric in a phone conversation with staff indicated that he had obtained city permits and mistakenly proceeded with moving the lines before receiving authorization from VMRC.

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The Department of Environmental Quality and the Department of Game and Inland Fisheries both find the proposal acceptable. The U. S. Army Corps of Engineers has indicated that the project qualifies for their Nationwide Permit #12. No other agencies have commented on the project.

Mr. Stagg concluded by explaining the lines, as currently located are in conformance with the permit drawings in the original submission. All power poles are on the upland and no disturbance of State-owned subaqueous lands was necessary during installation. In this case, Staff would have recommended approval of the original proposal as submitted and continues to recommend after-the-fact authorization as constructed. The Commission may, however, wish to consider an appropriate civil charge.

Commissioner Pruitt asked if the project had any connection with the flooding several years ago by Hurricane Hugo. The answer was negative. He then asked if there were any protests to the project. Hearing none, Commissioner Pruitt placed the matter before the Commission.

Associate Member Gordy moved to approve the permit. Associate Member Hull seconded the motion which was approved by a 7-0 vote.

9. REGULATION ADOPTION: Proposed Ballast Water Discharge Reporting Regulation 4 VAC 20-395-10 et seq.

Tony Watkinson, Acting Head-Habitat Management, explained to the Commission the background on the proposed regulation. The regulation sets forth the requirements and procedures for the distribution and filing of Ballast Water Control Report forms with the

Commission. It also establishes the guidelines governing voluntary ballast water management practices to be followed by the operators of commercial vessels in Virginia waters. This regulation is necessary, he said, to fulfill the requirements that the Commission adopt such guidelines and forms consistent with the authority conferred on the Commission by Chapter 312 Acts of the Assembly 2001 (28.2-109 et seq. of the Code of Virginia).

As drafted, and required by 28.2111 of the Code, the regulation adopts the federal guidelines governing voluntary ballast water management practices and the Ballast Water Control Report form adopted by the United States Coast Guard as set forth in 33 C.V.F.R. Part 151. As such, a key component of this regulation is the reliance on the Hampton Roads Maritime Association (HRMA), which has offered its services to facilitate the distribution of forms to commercial vessels as they enter State waters as required by this Code section and to forward the report forms to the VMRC.

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Prior to the public hearing, there was very little comment on the draft proposal; however, staff received comments from two shipping agents expressing some concern over the fee HRMA proposed to collect for its service; as well as some concern that the regulation requires the reports to be filed through HRMA.

As a result of the Commission's September 25, 2001, public hearing on this matter, the Commissioner appointed a subcommittee to evaluate issues concerning the role of HRMA as potential agent for the Commission to distribute and receive ballast water reports.

A subcommittee meeting was held October 17, 2001. The meeting was attended by Associate Member McLeskey, Associate Member White, Mr. Jeff Keever and Commission staff. Comments from the Commission's legal counsel concerning fees and mandatory record keeping were relayed to the subcommittee by Commission staff.

Mr. Watkinson explained that as a result of the meeting, Associate Members McLeskey and White have recommended that the regulation be adopted as originally presented with only the amendments included at the public hearing as a result of comments provided by U.S. Coast Guard staff, but that an agreement between HRMA and the Commission be developed and implemented that would clarify HRMA's role as agent for the Commission. As such, HRMA would distribute and collect ballast water reports. It was felt that this would be the most efficient way to collect reports, avoid duplication and be the most effective way to get a complete list of all ships entering Virginia ports, and, therefore, the only viable way to effectively track compliance.

Furthermore, it was felt that an agreement between HRMA and the Commission would address the concerns over any fee that may be collected by HRMA for the services they would provide vessel operators and their agents.

Mr. Watkinson said, as a result of the subcommittee meeting and since the services of HRMA should streamline the reporting and filing process, Staff recommends adoption of the draft regulation as amended, effective November 1, 2001.

Associate Member Ballard moved adoption of the regulation. Associate Member Williams seconded the motion which was approved by a 6-0 vote.

10. PUBLIC COMMENTS:

Charles Amory of Amory Seafood in Hampton addressed the Commission, requesting that

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an emergency regulation be adopted to adjust the restrictions for the fourth quarter of the summer flounder fishery. His recommendations were to limit the landings of offshore fishing vessels to 7,500 pounds of summer flounder for each 10-day period with the first day beginning Nov. 1. These changes would establish provisions for the fourth quarter that are very similar and already in place for the first quarter. He said emergency adoption is necessary to prevent a glut of flounder on the market in the short period of time. Processing capacity in the state is not sufficient to handle the large volume of flounder that could be handled without adjusting the changes in the fourth quarter.

Jack Travelstead, Chief-Fisheries Management, described the provisions of the summer flounder regulation in place during the first quarter and recommended that they be adopted for the fourth quarter. He said the remaining amount of the 2001 quota for the fourth quarter will be about 700,000 pounds of summer flounder.

Commissioner Pruitt asked if there were other comments on Mr. Amory's request. There being none, he put the emergency request before the Commission.

Associate Member Ballard moved to adopt the emergency regulation. Associate Member Williams seconded the motion which was approved by a 6-0 vote.

There were no other public comments.

11. **ADOPTION of Draft Regulation 4VAC 20-70-10 et seq., "Pertaining to the Harvesting of Clams,"** in order to establish boundaries of SAV conservation areas, based on results of last month's public hearing.

Chad Boyce, Fisheries Management Specialist, explained the background of the proposed regulation which had been deferred from the Commission's September 25, 2001 meeting to allow staff time to determine delineations of the proposed submerged aquatic vegetation (SAV) areas to be protected.

Recently, several summons issued to individuals for illegally dredging within the existing SAV sanctuary were dismissed by the courts on the basis that the sanctuary is inadequately defined. Better marking of the SAV beds is possible at a cost, Mr. Boyce said. Using the existing channel markers, five additional markers are necessary to identify most of the sanctuary. VMRC and Virginia Institute of Marine Science (VIMS) staff have assessed the costs of deploying and maintaining such markers. VIMS has agreed to totally fund the costs of installing these markers. The only remaining alternative is to prohibit all dredging in Chincoteague Bay.

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Provisions described in amended Regulation 4VAC-20-70-10 et. seq. would provide that all private or leased grounds within the newly defined sanctuary areas be exempt from the prohibition on dredging.

Since the September 25, 2001, Commission meeting, Fisheries Management staff has met with VMRC law enforcement personnel, VIMS staff, and Chincoteague watermen to discuss the possibility of a compromise for the exact delineation of the SAV area located in the vicinity of Horntown Bay and Egg Marsh. Staff concluded this SAV area and all descriptive language should be removed from amended regulation 4VA 20-70-10 et. seq., due to the inability to work out a compromise with all parties involved. Both Fisheries Management and VIMS staff agree this area should be closely monitored in upcoming years for indications of dredge scarring activity. Additionally, it should be noted that this area currently is protected from dredging through regulation 4VAC 20-70-120, subsection B, which states that on the seaside of Northampton and Accomack counties, dredging on unassigned grounds shall be prohibited in waters less than four feet in depth at mean low water. This SAV area also contains four large areas of Public Ground (Baylor Ground), and dredging is prohibited on these grounds as well.

Mr. Boyce said taking everything into consideration, Staff recommends approval of the amended regulation 4VAC 20-70-10 et. seq., to include the re-defined SAV sanctuary boundaries as described, and a prohibition on dredging in Chincoteague Bay and Assateague Channel and Bay.

Commissioner Pruitt asked if there were any comments from the public. There being none, he closed the public hearing and placed the matter before the Commission.

Associate Member Balled moved that the amended regulation be adopted. Associate Member Hull seconded the motion which was adopted by a 6-0 vote.

12. PUBLIC HEARING: Request of the Coastal Conservation Association of Virginia to lower the possession limits on cobia and spadefish.

Rob O'Reilly, Deputy Chief-Fisheries Management, explained that the Coastal Conservation association of Virginia (CCAVA) had written the Commission requesting that the possession limits for Cobia be reduced to one-fish and to four-fish for spadefish. Additionally, CCAVA requested the spadefish possession limit apply to all commercial gear types (Currently, the only commercial gear restricted by a possession limit is

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commercial hook-and-line.)

These items were discussed during the September meeting of the Finfish Advisory Committee, but two motions to support additional restrictions for cobia and spadefish failed by a vote of 4 to 7, Mr. O'Reilly said. The Committee then voted, 7-4, to maintain the current limits for cobia and spadefish.

Currently, the coastwide harvest of cobia averages 90 percent recreational and 10 percent commercial and Virginia's ratio is similar, he explained. For the spadefish, Virginia's commercial landings were considerably less than 10 percent of the recreational catch with pound nets accounting for 92 percent of the commercial harvest from 1995 through 2000.

Mr. O'Reilly said that biologically, both fish would seem adequately protected under the current regulations, since each possess life histories that result in early maturity, medium to high egg production, spawning over a protracted period throughout their range and relatively fast growth. Cobia and spadefish range widely and reside in Virginia waters for only a few months of the year, and thus additional restrictions on Virginia fishermen would seem unwarranted. The CCAVA request, however, raises questions other than the overall health of each stock.

Both fish have enjoyed a rise in angler attention and the resulting fisheries now generate a significant economic impact to Virginia. As other recreational fisheries have summer-time closures (most notably striped bass, black sea bass and flounder), more anglers opt to target cobia and spadefish. Virginia sits at the northern-most end of each fish's range where these

fish are perennially abundant, so a reduction in coastwide abundance of either fish would likely be evident in Virginia waters.

There is some evidence to suggest additional restrictions by Virginia could directly benefit Virginia fishermen. Cobia tagged by the Virginia Cooperative Gamefish Tagging Program have demonstrated site fidelity, returning either annually or over a period of two to five years to the site of capture. In South Carolina, extensive tagging of cobia over a 12-year period also strongly supported an annual return by mature cobia, as 78 percent of the recaptured fish were caught in the same area. It is reasonable to assume a reduction in the possession limit from two to one fish in Virginia would save some cobia, whose spawning potential would contribute to future year classes and some of these individual fish may return to Virginia in following seasons.

As for spadefish, only limited tagging data suggest spadefish return to Virginia waters after a year or more at large; however, recaptures during the same fishing season do show these fish have a strong tendency to remain at or very near their capture site. A reduction in the possession limit could delay capture and may prevent local "hot spots" from becoming

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"fished out" early in the season.

The impact of Virginia's recreational fishery on the stock abundance of both cobia and spadefish could be considerable, based upon data for 1995 through 2000 from the Marine Recreational Fisheries Statistical Survey for the Atlantic coast. During this time period, catches of cobia in numbers of fish by Virginia anglers ranged from a low of 13 percent in 1998 and 1999 of the coastwide total to a high of 36 percent in 1995. Virginia anglers caught 30 percent of the coastwide total in 2000. Catches of spadefish by Virginia anglers ranged from a low of 13 percent of the coastwide total in 1997 to a high of 47 percent in 1998 and were 35 percent of the coastwide total in 2000.

The impact of Virginia's commercial fishery on the stock abundance of both cobia and spadefish would appear to be minimal, in comparison with recreational landings. From 1994 through 2000, Virginia commercial cobia landings averaged 12,723 pounds and ranged from a high of 21,942 pounds in 1995 to a low of 5,808 pounds in 1999. Except for catches of cobia by commercial hook and line, landings of cobia are incidental to other targeted species, as all commercial gear license holders are limited to a possession limit of two fish.

Similarly, the commercial fishery for spadefish is minimal with pound nets accounting for over 90 percent of the commercial landings. From 1994 through 2000, landings of spadefish ranged from a high of 30,748 pounds in 1997 to a low of 4,961 pounds in 1994 and averaged 18,834 pounds. Only commercial hook and line license holders are currently

restricted by the six-fish possession limit.

The recreational fishing community seems eager to embrace a reduction in possession limit for cobia, from two fish to one and to a somewhat lesser degree, a reduction from six spadefish to a possession limit of four fish. Commercial fishermen are reluctant to accept lower possession limits, especially since stocks of cobia and spadefish are considered healthy.

In summary, Mr. O'Reilly said, the staff recommends the adoption of a one-fish possession limit for cobia as specified in the draft regulation and a four-fish possession limit for spadefish. He presented to the Commission a packet of letters that were received from fishermen on the proposed regulation amendment.

Commissioner Pruitt then called upon Larry Snider, a representative of CCAVA, to explain why his organization had made the proposals and supported the reduction in the possession limits for cobia and spadefish. He presented a "power point" demonstration that the Association had surveyed recreational anglers and the comments stressed a reduction for cobia and some anglers even suggested labeling the cobia as a game fish which would

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eliminate the commercial sale of the species. He said the recreational fishery had expanded for both species, but felt that the reductions for recreational and commercial fishermen would give the species some biological protection as well extend the fishing opportunities. Mr. Snyder also expressed concern that commercial fishermen could start targeting spadefish in federal waters, which would drastically hurt the recreational fishery in Virginia waters.

About fifteen other persons spoke at the public hearing pro and con the proposal. For example, Chris Lunford said he did not see any need for new reductions for the commercial harvest since most of the catches were by recreational fishermen. Several tackle shop owners spoke in agreement with Lunford. Thomas Harold of the Portsmouth Angler's Club asked the Commission to lower the limits on both the recreational and commercial catches. Richmond Welton, Executive Director, CCAVA, said the possession limit reductions would help Virginia's recreational fishing industry.

Commissioner Pruitt ended the public hearing. Mr. O'Reilly said this issue was a unique situation where "less is more." Lowering the possession limit could enhance the opportunity of more fish later.

Associate Member Ballard said he was concerned about lowering the commercial possession limit. Therefore, he moved that the possession limits for recreational fishermen be lowered from two to one cobia. Associate Member Gordy seconded the motion.

Associate Member Hull said he believed the motion was a good compromise.

Commissioner Pruitt asked Mr. O'Reilly how many commercial fishermen were fishing for cobia. Mr. O'Reilly replied that it was mainly a by-catch fishery, but the number could be obtained. Commissioner Pruitt asked if the increase takes place in the commercial fishery will it be known. Mr. O'Reilly said the information could be obtained through the mandatory reporting process.

The Commission approved Mr. Ballard's motion by a 7-0 vote.

Associate member Ballard moved to reduce the possession limit on spadefish from six to four fish. Associate Member Hull seconded the motion, which passed by a 7-0 vote.

13. PUBLIC HEARING: Proposed modifications to the commercial striped bass fishery and ITQ program, to address quota overages.

Jack Travelstead, Chief-Fisheries Management, explained the draft regulation which would

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stop the temporary transfer of tags and require the double and triple tagging of the larger striped bass.

Virginia's commercial striped bass fishery has been managed by a harvest quota since 1990 when the fishery reopened following a total moratorium on harvest. Over the last 12 years the quota has increased substantially from 221,000 pounds to 1,701,748 pounds. The current quota 1,701,748 has not changed since 1997.

Beginning in 1998 the Commission implemented an Individual Transferable Quota (ITQ) system to allow fishermen to transfer their shares of the striped bass quota. This program allows fishermen to purchase additional quota and provides an economic incentive to those wishing to exit the fishery. Since 1998, a total of 275 permanent transfers and 235 temporary transfers of striped bass quota have occurred.

The current ITQ program is designed to provide each participating fisherman with an individual quota of tags, with one tag provided for each striped bass harvested. The total number of tags distributed to the fishermen is determined annually by dividing the total poundage quota (1,701,748) by the average individual weight of striped bass harvested the previous year. The resulting number represents the "quota of tags" and the tags are distributed to the fishermen on the basis of the percentage share of the quota of tags they hold. Both the total poundage quota and the tagging of each striped bass are compliance

requirements of the Atlantic States Marine Fisheries Commission Fishery Management Plan.

Mr. Travelstead said that the current issue focuses on the fact that while the poundage quota for Virginia has remained static since 1997, the total number of tags distributed to each fisherman has declined annually. This decline in number of tags issued is directly attributed to an increase in the annual average size of striped bass harvested commercially. Because fishermen, under the ITQ program, are provided an individual quota of tags, the incentive is to catch the largest available striped bass for each tag, the process known as "high grading." The result of this high grading has been a decrease in the number of tags issued to individual fishermen, which provides even further incentive to catch larger striped bass for each tag. However, not every fisherman practices high grading. Many watermen fishing stationary or less mobile gear (pound nets, fyke nets and haul seines) tend to catch striped bass nearer the overall average size. On the other hand, many gill net and commercial hook-and-line fishermen can more easily pursue the larger fish and in some instances harvest fish that are more than double the average size. The result of this is all striped bass fishermen receive fewer tags the following year; so for some, their poundage of striped bass is reduced annually while others make up for the reduction in the number of tags by catching still larger fish.

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This process of pursuing larger and larger striped bass, high grading, has not only produced an inequitable distribution of quota among striped bass quota share holders, it has produced other significant problems. First, the pursuit of larger fish has resulted in a significant migration of fishermen, particularly gill net fishermen, to the ocean fishery. This harvest of fish in the ocean violates the provisions of the ASMFC Fishery Management Plan, which provides Virginia with a harvest quota that is intended to be taken in the Chesapeake Bay and its tributaries. In 1996, the ASMFC allowed Virginia to combine its Bay harvest quota with its ocean quota, then 98,000 pounds, for purposes of monitoring and enforcement. But, it was never the intent of the ASMFC that the large percentages of quota now available be taken in the ocean, Mr. Travelstead stressed.

The second significant problem is the biological impact of the harvest of the larger and older striped bass. In recent years, the ASMFC has expressed concern about the increasing harvest of older striped bass. Virginia's quota is high as it is because it is intended to be directed on the non-migratory, resident and younger striped bass found in the Chesapeake Bay and its tributaries. Harvest in the ocean take significantly larger and older striped bass contributing to the problem.

The third significant issue is one of quota overages. As fishermen pursue larger striped bass it becomes increasingly difficult to predict total harvest and to prevent the fishery from exceeding its annual quota. In 2002, Virginia exceeded its harvest quota by 150,772 pounds or 8.86 percent. The overage in 2000 was not deducted from the 2001 quota, since ASMFC assigns only a single quota to the Chesapeake Bay jurisdiction (Virginia, Maryland and the Potomac River Fisheries Commission) and Maryland and the PRFC were under their quotas. In the future, should Maryland and the PRFC fulfill their quotas any overage of the Virginia quota would be deducted from Virginia's quota the following year. Importantly, there is preliminary evidence suggesting that the 2002 and 2003 quotas may be less than the 2001 quota, increasing the impact of any future quota average. The quota overage in 2001 is likely since, through July, 67.8 percent of the quota had been taken.

Staff met with the Finfish Management Advisory Committee (FMAC) on three occasions to pursue solutions to the above problems. Our goal has been to develop a single solution that corrects the inequities in quota distribution by providing a disincentive for high grading and at the same time reduces the ocean harvest, the take of larger and older striped bass, and the probability of a quota overage.

Of the seven alternatives advertised for public comment, only one of the options, in staff's opinion appears to provide a solution for all four of the problems identified. That option is the required use of multiple tags on striped bass exceeding certain sizes. While the other options may adequately address some of the issues, they fail to address the inequitable distribution of quota between ITQ holders. Regardless of what alternative is selected, Mr. Travelstead said there was a high probability that the striped bass fishery would be closed

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for the better part of December.

Commissioner Pruitt opened the public hearing and eight persons expressed their opinions with several supporting the staff recommendations and others asking that no action be taken at this time. After the public hearing was closed, Associate Member Hull said he was not prepared to make a motion, but rather made an observation that Virginia watermen are currently being penalized by the federal government with the current striped bass quota.

Associate Member Williams said to change the rules now would simply be wrong. Associate Member Birkett said the ASMFC will likely make a decision in April regarding future quotas.

Associate Member Williams moved to create a task force comprised of watermen and two Associate Members who will meet over the next several months to settle the problem. Associate Member Hull seconded the motion, which passed by a 7-0 vote.

Associate Member Hull recognized the birthday of Commissioner Pruitt and made a motion to sing Happy Birthday. The motion carried and the song was sung.

There being no further business before the Commission, the meeting was adjourned at 4:45 p.m.

William A. Pruitt, Commissioner

Wilford Kale, Acting Commission Secretary