

MINUTES

Commission Meeting**December 20, 2005**

The meeting of the Marine Resources Commission was held at the Marine Resources Commission main office at 2600 Washington Avenue, Newport News, Virginia with the following present:

William A. Pruitt)	Commissioner
Ernest L. Bowden, Jr.)	
J. Carter Fox)	
Russell Garrison)	
J. T. Holland)	Associate Members
Wayne McLeskey)	
Richard B. Robins, Jr.)	
Kyle J. Schick)	
Carl Josephson	Sr. Assistant Attorney General
Steven Bowman	Deputy Commissioner
Katherine Leonard	Recording Secretary
Wilford Kale	Senior Staff Advisor
Jane McCroskey	Chief, Admin./Finance Div.
Andy McNeil	Programmer Analyst, Sr.
Jack Travelstead	Chief, Fisheries Mgt. Div.
Rob O'Reilly	Deputy Chief, Fisheries Mgt. Div.
Jim Wesson	Head, Conservation/Replenishment
Lewis Gillingham	Fisheries Management Specialist
Joe Cimino	Fisheries Management Specialist
Lt. Col. Lewis Jones	Deputy Chief, Law Enforcement
MPO Lisa Gruber	Marine Police Officer
MPO John Johnson	Marine Police Officer
Bob Grabb	Chief, Habitat Management
Tony Watkinson	Deputy Chief, Habitat Mgt. Div.
Chip Neikirk	Environmental Engineer, Sr.
Jeff Madden	Environmental Engineer, Sr.
Jay Woodward	Environmental Engineer, Sr.
Tracy West	Environmental Engineer, Sr.
Ben Stagg	Environmental Engineer, Sr.

Justin Worrell	Environmental Engineer, Sr.
Randy Owen	Environmental Engineer, Sr.
Benjamin McGinnis	Environmental Engineer, Sr.
Elizabeth Gallup	Environmental Engineer, Sr.
Hank Badger	Environmental Engineer, Sr.

Virginia Institute of Marine Science (VIMS)

David O'Brien

Lyle Varnell

Other present included:

Tim Holloway	Dick Collins	Ronald W. Boone
Sammie Coates, Jr.	Samuel Coates	Kathryn B. Sweeney
Hugh Riley	John West	Tom B. Langley
Billy Ray Hill	B. Kay Wilson	Bruce Aitkenhead
Ranny Pack	Dan Phillips	Dan Rafferty
Dan Wagoner	Arthur Kamp	Doug Starrett
Jason Miles	John Bailey	Randy Thomas
Scott Graves	Curt Manchester	Alice Siegel
Sarah Harrison	Mel Ranson	Ellen R. Grime
Ellis W. James	Millad Robinson	Paul Peterson
Bob Williams	Bob Livengood	Rick Whiteside
Sarah Huddle	Willy Ray	Shep Moon
Kurt Hildebrand	Jim Frese	Tommy Leggett
Susan Gaston	Michael H. Gilsun	Chris Moore
Pete Bender	Russell Gaskins	Douglas F. Jenkins, Sr.
Roger Parks	Amanda Lawless	Justine Woodward
Kelly Place	Russell Burke	Robert Jensen
John W. Ripley	Daniel P. Bushy	Kent Carr
Tom Powers	Wilson Nelson	Carrie Albritton
Dale Taylor	Jimmy Shackelford	T. W. Baudin, Sr.
Frank W. Belvin	Carl D. Belvin	Carter C. Hall
James E. West	Ray West	Charles Lusky
Billy Davis	Danny Roger	John Forrest
Jade Little	Mike Insley	Rodney West
Michael Martin	Jerry Davis	David Owens
Carl Owens	Timothy Belvin	A. J. Erskine
William T. Belvin	Eric Gun	Roy Insley

and others

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Commissioner Pruitt called the meeting to order at approximately 9:34 a.m. Associate Member Jones was absent and Associate Member Schick arrived late at approximately 10 a.m.

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Associate Member Garrison gave the invocation and Commissioner Pruitt led the pledge of allegiance to the flag.

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

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APPROVAL OF AGENDA: Commissioner Pruitt asked for any changes to the agenda. Bob Grabb said that they had one additional Page Two Item, 2J, East Tennessee Natural Gas, #01-2113, request for an extension of an existing permit.

Associate Member Robins moved to approve the agenda, as amended. Associate Member Holland seconded the motion. The motion carried 6-0.

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MINUTES: Commissioner Pruitt asked for a motion to approve the November 22, 2005 meeting minutes. **Associate Member Robins moved to approve the minutes as presented. Associate Member Garrison seconded the motion. The motion carried, 6-0.**

Associate Member Schick arrived at this point of the meeting.

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

Bob Grabb, Chief, Habitat Management Division, gave the presentation for the page two items, A through J. His comments are a part of the verbatim record.

Associate Member McLeskey asked staff why there was a difference in the square footage rates in items 2E through 2I. Mr. Grabb explained that there was an adopted range depending on the nature of the project. Mr. McLeskey stated that he had not seen this scale. Mr. Grabb explained that a revised rent and royalty schedule had been adopted by the Commission at their November 22, 2005 meeting and was in the front of their books.

Tom Langley of Langley and McDonald Engineering was present and his comments are a part of the verbatim record. He explained that 2E was incorrect when it said 27 slips when it was actually 10 slips and 27 condominiums. He stated the second issue was the increased fees approved in November by the Commission and effective December 1st were being applied to this project. He said that no notice was sent to either the engineers or agents notifying them of this proposed change. He said that since it was based on the CPI index it seemed reasonable, but that was deceptive, it lacked specifics and was argumentative. He said that the over \$5,000 – 1/10 paid annually effects 2E and that would be an assessment of \$14,000 plus or \$1,400 per year with no time limit. He suggested that they pay a one-time \$14,565.75 royalty. He said the application was delayed from being heard prior to this change in rent and royalty fees in November because of the delay caused by the Health Department's untimely response. He explained that if not for the delay the matter would have been on the November agenda and the fee increase was not made effective December 1. He further explained that there was nothing said as to making the fees retroactive. He also said that having to have all other approvals prior to obtaining the VMRC approval caused an extensive delay in the processing. He said that the HMAC stipulation to require annual payments if more than \$5,000, should be a choice made by the permittee as to whether to pay a one-time or annual fee.

Commissioner Pruitt explained that on the advice of counsel he was suggesting that this item be carried over until the next meeting. In the alternative, Mr. Langley requested Commission approval, subject to any royalty assessment approval.

Associate Member Robins then moved to approve items A-J, except for E. Associate Member Garrison seconded the motion. The motion carried, 6-0-1. Associate Member Schick abstained from voting because of his late arrival.

Mr. Grabb stated that Mr. McLeskey was correct when he questioned the square footage rate. He said that item 2G should be \$3.00 per square foot.

Associate Member Robins moved to defer Item 2E until the January 2006 Commission meeting. Associate Member Fox seconded the motion. The motion carried, 7-0.

2A. ARLINGTON PLANTATION HOME OWNERS ASSOCIATION, #05-2026, requests authorization to install two 80-foot long offshore stone breakwaters and one (1) 50-foot long offshore stone breakwater with suitable sandy beach quality

nourishment situated along the Chesapeake Bay near the mouth of Old Plantation Creek adjacent to the association’s common area in the Arlington Plantation subdivision of Northampton County.

Royalty fee (beach nourishment fill 14,000 sq. ft. @\$0.05/sq. foot).....	\$700.00
Permit fee.....	\$100.00
Total fees.....	\$800.00

2B. VIRGINIA ELECTRIC AND POWER COMPANY, #05-2530, requests authorization to install, by directional drill, approximately 1.6 miles (8,450 linear feet) of new 230 kV electric transmission line under the Elizabeth River from the Sewells Point substation in Norfolk to the Churchland/Craney Island substation, in Portsmouth.

Permit fee.....\$100.00

2C. LAMBERT'S POINT DOCKS, INC., #05-2050, requests authorization to maintenance dredge, by hydraulic method, 22,000 cubic yards of State-owned submerged lands to achieve maximum depths of -34 feet below mean low water within a 1,600-foot by 2,600-foot basin around Piers N, L and P adjacent to their property situated along the Elizabeth River in Norfolk.

Permit fee.....\$100.00

2D. VIRGINIA INSTITUTE OF MARINE SCIENCE, #05-2482, requests authorization to install a 20-foot by 9-foot research float with three (3) anchors located at 37° 14'05" North Latitude W76° 24' 03" West Longitude and to install 4,260 linear feet of optic cable from the float to an electronic relay station located on Goodwin Island near the mouth of the York River in York County.

Royalty Fee (encroachment over 4,260 linear ft. @ \$3.00/ linear ft., plus a \$100.00 buoy fee).....	\$12,880.00
Permit fee.....	\$100.00
Total fees.....	\$12,980.00

2E. TANNER'S LANDING ASSOCIATES, LLC, #05-0480, requests authorization to install a 363-foot long by 8-foot wide open-pile community pier with 27 slips, six (6) with uncovered lifts, and associated finger piers, and to dredge, using mechanical dredging, 825 cubic yards of state-owned submerged lands to achieve maximum depths varying from minus five (-5) feet to minus six (-6) feet below mean low water within a 130-foot by 210-foot basin, to serve a 27-unit condominium complex located adjacent to the Granby Street Bridge situated along

the Lafayette River in Norfolk. Staff recommends an annual royalty of \$1,419.45 for the encroachment over 9,463 square feet of State-owned submerged lands at a rate of \$1.50 per square foot and \$371.25 for the dredging of 825 cubic yards of State-owned submerged lands at a rate of \$0.45 per cubic yard. Staff also recommends a pre-dredging conference and the submission of a post-dredging bathymetric survey of the dredged area within 30 days of the completion of the dredging.

Tabled until the January 24, 2006 hearing.

2F. VIRGINIA ELECTRIC AND POWER COMPANY, #05-2428, requests authorization to maintenance dredge up to 150,000 cubic yards of State-owned subaqueous bottomland, on an as-needed basis, adjacent to their intake channel for the Surry Nuclear Power Station within the James River in Surry County. Recommend approval with a time-of-year restriction from February 15 - June 30.

Permit fee.....\$100.00

2G. SANDERS YACHT YARD, #03-1630, requests authorization to modify their existing permit for two (2) commercial marina piers at their facility on Carter Creek in Irvington, Lancaster County. The reconfigured piers will result in a reduction of wet slips from 45 to 36, a reduction of finger piers from 21 to 17, a change from an 85-foot long T-head to a 70-foot long L-head on the southern pier, and the addition of a 185-foot long by 8-foot wide walkway which will connect the two piers. Recommend approval of the modified design with a royalty in the amount of \$1,480.00 for the additional encroachment over 1,480 square feet of State-owned bottom at a rate of \$1.00 per square foot, and that all terms and conditions of the original permit remain in effect.

Royalty fee (encroachment over 1,480 sq. ft. @ \$1.00/sq. foot)..\$1,480.00

2H. B.G. RANDOLPH. #05-2124, requests authorization to construct and backfill 563 linear feet of vinyl bulkhead a maximum of one (1) foot channelward of mean low water and an existing bulkhead for shoreline protection adjacent to property along Crystal Lake in the Lake Shore Park subdivision in Virginia Beach. Recommend a royalty in the amount of \$563.00 for the filling of State-owned subaqueous bottom at the rate of \$1.00 per square foot.

Royalty fee (filling 563 sq. ft @ \$1.00/sq. foot).....\$563.00
Permit fee.....\$100.00
Total fees.....\$663.00

2I. PACK LIMITED FAMILY PARTNERSHIP, #04-2454, requests authorization to modify a previously approved permit, specifically, to extend the previously authorized 322-foot bulkhead an additional 16 linear feet, up to two (2) feet channelward of an existing deteriorated bulkhead at their marina/hotel/restaurant facility along the Pagan River in the Town of Smithfield. Recommend a royalty of \$96.00 for the encroachment over 32 square feet of State-owned subaqueous bottomland at rate of \$3.00 per square foot. All other existing permit conditions will remain in effect.

Royalty fee (encroachment on 32 sq. ft. @\$3.00/sq. foot).....\$96.00

2J. EAST TENNESSEE NATURAL GAS, #01-2113, requests an extension of their permit to install a 29 gas pipeline crossings under 25 jurisdictional, State-owned subaqueous stream and river beds in five counties in southwestern Virginia associated with the proposed Patriot Project. The pipeline expansion and extension project traverses Smyth, Wythe, Carroll, Patrick, and Henry Counties. Recommend a one-year extension until December 17, 2006.

No applicable fees permit extension.

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3. CLOSED MEETING FOR CONSULTATION WITH OR BRIEFING BY COUNSEL.

Associate Member Robins moved that the meeting be recessed and the Commission immediately reconvene in closed meeting for the purposes of consultation with legal counsel and briefings by staff members pertaining to actual or probable litigation, or other specific legal matters requiring legal advice by counsel as permitted by Subsection (A), Paragraph (7) of § 2.2-3711 of the Code of Virginia, pertaining to:

- 1) Item 5, Alice Siegel, #01-0055, and 2) Item 6, Toni Sloan, #05-1639

The motion was seconded by Associate Member Holland. The motion carried, 7-0.

Associate Member Robins moved for the following:

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

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

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

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

Associate Member Holland seconded the motion. Associate Member Garrison held a Roll Call vote:

AYES: Bowden, Fox, Garrison, Holland, McLeskey, Robins, Schick and Pruitt.

NAYS: None

ABSENT DURING VOTE: Jones

ABSENT DURING ALL OR PART OF CLOSED MEETING: Jones

The motion carried, 8-0.

**Katherine Leonard, Recording Secretary
Virginia Marine Resources Commission**

- 4. KINDER MORGAN BULK TERMINALS, INC., #05-2232**, requests authorization to construct a 220-foot long extension to Pier IX, a new 1,200-foot long concrete pier (Pier X) and dredge approximately 383,200 cubic yards of bottom material to facilitate expansion of their marine terminal situated along the James River in Newport News. An adjacent property owner protested the project. Continued from the November 22, 2005, Commission hearing.

Randy Owen, Environmental Engineer, Sr., gave the presentation and his comments are a part of the verbatim record. Mr. Owen explained that there was no apparent resolution between the parties involved (Kinder-Morgan and Dominion Terminal Associates).

Mr. Owen explained that the Commission, at its November 22, 2005, hearing, approved the proposed dredging but continued the balance of this project until its December 20, 2005 meeting, believing there might be some benefit from the ongoing consultation between

the applicant and the protestant. On December 12, 2005, staff met with representatives of both parties, Kinder Morgan and Dominion Terminal Associates (DTA). The protestant, DTA, maintained its position that any property line setbacks necessary to achieve the 700-foot minimum pier clearance, recommended by the Virginia Pilots Association, should be equitably shared by both parties. Barring that, DTA felt that the applicant should compensate them for any encroachment into or diminishment of their riparian area or rights thereto.

Mr. Owen also explained that the applicant suggested that their current proposal did not appear to restrict DTA's potential for future expansions and suggested that DTA could expect their support if and when they chose to develop such plans. They asked DTA for their support of the project in an attempt to meet the area's energy needs. As of this date, it did not appear that the two parties had been able to resolve their differences.

Mr. Owen said that the project was located along the southwestern shoreline of Newport News on the James River. The purpose of the project was to expand their existing coal terminal operation, which currently involved receiving domestic coal by railcar for ship export, to additionally receive imported coal from overseas for transshipment to U. S. consumers. This coal was intended to supplement the declining reserves of domestic coal required as fuel for U. S. power generation plants. The expansion would allow Kinder Morgan to simultaneously load coal into ships and barges, unload cement ships and unload imported coal from Panamax and Cape sized vessels.

Mr. Owen said that Kinder Morgan specifically requested VMRC authorization to construct approximately 200 linear feet of concrete bulkheading, a 90-foot wide by 220-foot long extension to Pier IX, a new 57-foot wide by 1,200-foot long, open-pile concrete pier, two (2) turning dolphins and five (5) mooring dolphins with their associated 4-foot wide timber catwalks, and to dredge, by hydraulic or mechanical means, approximately 540,000 cubic yards of bottom material to facilitate the expansion of their marine terminal situated along the James River. All dredged material would be transported to and deposited within the Craney Island Disposal Facility.

Mr. Owen stated that the project was protested by DTA, the downstream adjacent property owner. DTA has an existing coal terminal facility that recently received VMRC authorization to expand their terminal to receive imported coal. DTA's primary objection appeared to center on a disputed 0.42-acre upland parcel that parallels Harbor Road. They suggested that Kinder Morgan's proposed conveyor system encroached over their property without their permission and that its operation would restrict their use of Harbor Road, the only viable access to their property. Additionally, they argued that a proposed transfer tower would reduce the storage capacity of an existing upland settlement pond owned by Kinder Morgan, which could result in flooding of DTA's property.

Mr. Owen explained that DTA had also expressed concern that Pier IX's extension and the construction of Pier X would negatively impact on their riparian area and use of their

property, and pose a safety hazard to vessels calling on DTA and the Virginia Port Authority, the upstream adjacent property owner.

Mr. Owen stated that the Virginia Institute of Marine Science (VIMS) Shoreline Application Report, dated November 11, 2005, stated that the primary adverse marine environmental impacts of the project would include loss of productive shellfish bottom, temporary impacts associated with dredging such as increased turbidity and loss of benthic organisms, increase in incidental discharges such as petroleum and paint leachate associated with increased ship usage, and potential increase in coal spillage into the waterway. To minimize the potential impact of dredging on shellfish, they recommended that no dredging be allowed during the months of July through September when spawning and spatfall normally occur.

Mr. Owen explained that VMRC's Fisheries Management Division advised that the area proposed to be dredged supported hard clam densities that average 0.52 clams per square meter (2,104 clams per acre). Should the dredging be approved, they recommended clam mitigation at the Middle Ground Light Clam Broodstock Sanctuary at a rate of 1.3: 1.

Mr. Owen stated that the Newport News Wetlands Board on October 31, 2005 unanimously approved the project. The Department of Environmental Quality had advised that they would likely waive their requirement for a Virginia Water Protection Permit.

Mr. Owen said that the Virginia Pilot's Association had recommended that a 700-foot minimum clearance be maintained between Pier X and any future pier DTA might build. They further advised, during a November 14, 2005 meeting with Kinder Morgan and VMRC, that the project as proposed did not negatively impact shipping in the adjacent federal project channel.

Mr. Owen stated that the United States Coast Guard (USCG) indicated that the proposed setback from the federal project channel was acceptable to them as well. The Army Corps of Engineers (USACE) advised that it was processing Kinder Morgan's application for an individual Section 10 permit and that the project as proposed did not appear to negatively impact navigation. The public comment period expired on November 26, 2005.

Mr. Owen said that DTA's objections to project components that negatively impact on the disputed 0.42-acre upland parcel and/or Harbor Road occur in an area outside the Commission's jurisdiction. Accordingly, this portion of the project would not require a VMRC permit.

Mr. Owen explained that the setback from the federal project channel and acceptance by the USCG, USACE and the Virginia Pilot's Association suggested that the project should not pose a significant hazard to shipping in the channel. Staff additionally had received

an executed adjacent property owner's form from the Virginia Port Authority that stated that they did not object to the project.

Mr. Owen further explained that the remaining DTA concern, which was within the Commission's jurisdiction, dealt with the minimum clearance necessary to allow tug and vessel access between Pier X and any pier DTA might want to build in the future. Since Pier X was originally proposed approximately 120 feet upstream of the shared property line, staff asked Kinder Morgan to consider relocating the structure to a point 350 feet upstream of this line. This request was made in an attempt to equitably split the 700-foot minimum clearance recommended by the Pilots Association between the two parties and avoid potential project impacts on DTA's riparian area.

Mr. Owen stated that on November 16, 2005, staff received revised project drawings relocating Pier X to a point 280 feet upstream of its southern property line. Kinder Morgan indicated that this was made possible by flipping its plans for the mooring of Panamax and Cape-sized vessels to the downstream side of Pier X. Since the smaller barges would now be moored on its upstream side, the minimum clearance necessary between Pier X and IX was less than that originally required to moor two Panamax or Cape-sized vessels between the two piers.

Mr. Owen said that in light of these concessions, staff felt that Kinder Morgan had made a good faith effort to address DTA's concerns. Accordingly, staff recommended approval of the project as modified. Should DTA feel that the project encroached into their riparian area, any permit issued by the Commission would not preclude them from having their rights adjudicated and/or apportioned in the proper court of chancery.

Mr. Owen said that staff additionally recommended that no dredging be conducted between July 1 and September 30 to protect shellfish spawning periods, that the applicant be required to purchase and plant 51,668 clams at VMRC's Middle Ground Light Clam Broodstock Sanctuary as compensation for the resource impacts, and that the Commission assess a royalty in the amount of \$243,000 for the new dredging of 540,000 cubic yards of State-owned bottom material at a rate of \$0.45 per cubic yard.

Bob Grabb, Chief, Habitat Management, was present and his comments are a part of the verbatim record. Mr. Grabb explained that Kinder-Morgan had agreed to flip the pier configuration and increase the dredging necessary. He further explained that it was originally planned for Panamax docking, which was why the Pilot Association required the 700' between any future piers by DTA and the Kinder Morgan's proposed pier. He said by Kinder Morgan flipping the pier configuration they eliminated the necessity for the 700' and barges only would be docked in this location.

Dan Wagner, Project Manager for DTA, was present and his comments are a part of the verbatim record. Mr. Wagner explained that the 700 feet between piers was necessary if there was to be berthing of boats at both piers. He said this proposal increases the

property rights of the applicant. He further said they maintain they have an ownership interest in the bottom to be dredged, but they are still researching this issue and will come back if this documentation is found. He stated that if appears Kinder-Morgan was very shortsighted in not purchasing enough property initially for their operation, which has now resulted in the necessity of this proposal. He explained that there have been meetings held with Kinder Morgan personnel, who still did not recognize the valid concerns of DTA. He requested that if the Commission should approve the project they should consider the rights of DTA and stipulate the pier be set back and parallel to the property line extended.

John Daniel, attorney representing Kinder-Morgan, was present and his comments are a part of the verbatim record. Mr. Daniel stated that the applicant had tried to come to some resolution to the dispute with DTA. He said that DTA cannot verify their statement of having water bottom rights and have not produced any backup documentation for their claim. He further stated that Kinder Morgan had complied with all that had been required of them.

Associate Member Robins explained that he felt a good faith effort had been made by the applicant to lessen the impact on DTA and accordingly he moved for approval. Associate Member Bowden seconded the motion. Associate Member Fox stated that he felt the pier should be offset from the property line an equal amount and he could not support approval at this time. Carl Josephson, Senior Assistant Attorney General and VMRC counsel, explained that only the Courts could make a property determination, not the Commission. He said if the dispute could not be resolved then it could be taken to court for resolution. Associate Member Fox then asked what decision the Commission was actually making at this hearing. Mr. Josephson said the Commission was deciding if the proposed project was a consistent and reasonable use of State-owned bottom in accordance with the Code of Virginia (Section 28.2-1205). The motion carried, 6-1. Associate Member Fox voted no.

Royalty fee(Dredging 540,000 cu. yds @ \$0.45/cu. yd.)....	\$243,000.00
Permit fee.....	\$ 100.00
Total fees.....	\$243,100.00

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5. **ALICE SIEGEL, #01-0055.** Commission consideration of a 39-foot by 43-foot private, non-commercial enclosed boathouse constructed in non-compliance (Sworn Complaint #02-16) with its VMRC permit at property situated along the Pamunkey River in King William County. Continued from the November 22, 2005, Commission hearing.

Randy Owen, Environmental Engineer, Sr., gave the presentation and his comments are a part of the verbatim record.

Mr. Owen explained that the Commission, at its November 22, 2005 hearing, continued this matter until the December 20, 2005 meeting, and directed staff to meet with the applicant's counsel in a final attempt to explore any sort of acceptable resolution to the violation. As directed, staff met with the applicant's counsel, Mr. Curtis Manchester, on December 7, 2005.

Mr. Owen said that staff reiterated its concern that any decision to approve the structure, as constructed, would likely set a dangerous precedent that could be used against the Commission in future case decisions for similar structures. To avoid being considered arbitrary and capricious, staff felt that the only alternative to requiring a relocation of the entire structure to the adjacent upland might be to remove a portion of the second floor flooring to open the area up to the boathouse proper. Such modification would largely eliminate any "habitability" or non-water dependent use of the structure, and would still allow the architectural exterior of the structure to remain as constructed. Mr. Manchester did not think this would be acceptable to his client, however, based on her stated desire to retain the area as a safe and secure area for her grandchildren to play.

Mr. Owen said that as an alternative, Mr. Manchester advised that his client might be willing to address the "habitability" issue by agreeing to prohibit certain uses on the second floor, such as overnight stays, the provision of heating and air conditioning, water and cooking. He indicated that he would prepare a draft resolution of various conditions and proffers for staff to review after further meetings with Ms. Siegel.

Mr. Owen said that such a draft proposal was received from Mr. Manchester on December 14, 2005. That document was included with the Commission's briefing packet. In essence, Ms. Siegel had agreed to prepare and execute a written Covenant that would prohibit overnight sleeping, heating and air conditioning, cooking appliances, running water and a fireplace. The Covenants would be recorded in the land records and would run with Chericoke Farm. Ms. Siegel had further agreed to future compliance inspections, removal of the false chimney and had expressed a willingness to pay a minimal civil charge in an amount not to exceed \$5,000. Lastly, she requested that the Commission ratify the permit previously issued by staff but reflective of the fact that the project cost, as constructed, far exceeded the staff's administrative threshold.

By way of summary, Mr. Owen explained that the project was located along the eastern shoreline of the Pamunkey River, approximately 11.8 miles downstream of the Rt. 360 crossing, on the Chericoke Farm in King William County. The shoreline along this reach of the river was rural in character and was predominantly wooded or agricultural. Boating activity was seasonal and considered to be light to moderate.

Mr. Owen stated that on January 16, 2001, staff received an application requesting authorization to construct a 75-foot long private open-pile pier with a 12-foot by 33-foot

L-shaped deck and a 33-foot by 45-foot long “A-roof boatlift.” Daniel R. Winall with Water’s Edge Construction submitted the application as the authorized agent for John T. Siegel (now deceased). The stated purpose of the project was to provide access to the river and mooring for a boat. The projected cost for that portion of the project over State-owned bottom was listed as \$28,000. In keeping with the provisions of §28.2-1207.A(1-3) of the Code of Virginia, staff on May 11, 2001, administratively issued the permit for the subject boathouse based on the cost estimate provided and the fact there was no opposition.

Mr. Owen explained that Mr. Bruce Arkema, representing Tom Evelyn, presented the initial evidence of the type of structure constructed by the Siegels during the Commission’s September 24, 2002, after-the-fact consideration of VMRC #00-0519. Staff was subsequently directed to investigate the permit status of the Siegel structure as well as a number of others Mr. Arkema presented. Pursuant to §28.2-1212.B of the Code of Virginia, staff on October 17, 2002, conducted an on-site compliance inspection in the applicant’s presence. That inspection revealed that the boathouse had been constructed out-of-compliance with January 1, 2001 permit drawings.

Mr. Owen further explained that a Sworn Complaint and Notice To Comply was issued on November 4, 2002, noting that the permit drawings depicted an A-frame structure with dormer style skylights/windows in the roof. It further noted that, contrary to the permit document, walkout porches had been constructed on the front and back of the upstairs section along with several windows. More importantly, the majority of the interior of the structure was finished off as living space, which was never indicated as a proposed use of the structure on the VMRC application. Such use was never authorized in the May 2001 Commission permit. The Notice To Comply further directed the applicant to submit final as-built drawings of the structure, to provide an accurate cost of the structure as well as a description of the purposes and uses to be made of the structure, how much it was used and an explanation of how and when the design of the structure changed from that which was originally permitted.

Mr. Owen stated that Patrick A. O’Hare with Reed Smith LLP, former counsel for the applicant, responded on November 27, 2002, with a detailed chronology of events that led to the structure’s constructed dimensions. Mr. O’Hare noted that the architectural firm of Talley & Suttentfield designed the boathouse. He further advised that Mr. Winall was retained as the builder. His responsibilities included obtaining all necessary permits and approvals from government agencies. Mr. Winall’s original contract with the applicant, dated April 19, 2001, identified a project cost of \$75,000, which was 2.7 times the original \$28,000 estimate provided to VMRC in the Joint Permit Application we received January 16, 2001. It also exceeded the \$50,000 estimate that was provided to King William County in an April 23, 2001, “Building Residential Application” they filed. The contract *erroneously* noted that that the \$75,000 cost estimate was based on current drawings submitted to VMRC for permit approval. Most importantly, however, was the fact that once the project cost exceeded \$50,000, neither the Commissioner nor staff had

the power to approve the permit in the first place. Any prior approval became null and void.

Mr. Owen said that a close review of King William County's Planning Department files revealed that a second application submitted on June 18, 2001, by Water's Edge Construction for a "Boat House and Pier" valued the structure at \$75,000. The Planning Department's files also included copies of a Zoning Application for a Special Exemption notarized April 23, 2001, a Land Disturbance/Zoning Permit Application filed April 23, 2001, an Electrical Plan, Pier/Foundation Plan and a First Floor/Deck Plan that depicted three storage areas, one work area and a stairwell to a second floor. These plans, with their level of detail and revised project cost estimates, were never submitted to VMRC. The final contract between Water's Edge Construction and the Siegels, dated June 22, 2001, identified a revised project cost of \$132,400 and specifically noted a "stairway to second floor living area." The contract further referenced a "second floor living area to consist of T-111 walls, 1 x 6 vaulted ceilings and 1 x 6 pine floor." Additionally, Mr. O'Hare provided correspondence, dated November 9, 2001, which identified cost overruns totaling \$50,786. Mr. O'Hare also acknowledged that the final project cost for the structure was \$178,150, a far cry from the initial \$28,000 and \$128,150 over that which the Commissioner or staff could even authorize. No record of these revised cost estimates could be found in the Planning Department's files. It appeared that King William County's Board of Zoning Appeals approved the Siegel's request for a 33-foot by 39-foot boathouse at their May 29, 2001 meeting based on the initial \$50,000 cost estimate submitted to the County on April 23, 2001.

Mr. Owen explained that the project as constructed deviated significantly from the January 1, 2001 permit drawings, and constituted a substantial violation of Chapter 12, Article 1, of the Code of Virginia. Additionally, the original contract, let alone the final project cost, exceeded the statutorily authorized limit that the Commissioner or his authorized representative could approve. As such, only the full Commission could have issued the permit to encroach upon the subaqueous beds, which are the Commonwealth's property. Accordingly, the structure that existed today did so without any VMRC authorization.

Mr. Owen further explained that when reviewing proposals to build over State-owned submerged lands the Commission's Subaqueous Guidelines directed 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 stipulated 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."

Commission Meeting

Mr. Owen said that while the wet slip portion of the boathouse was considered by staff to be water dependent, the unauthorized second floor and first floor living space areas were not. It did appear from staff's review of Mr. O'Hares's November 27, 2002, response that the applicant's desire for a second floor was clearly conveyed, from the start, to both her architect and builder. He further argued, however, that the responsibility for obtaining all necessary permits had rested with Mr. Winall. Staff noted that such language was absent from the final contract. Regardless, staff questioned whether the responsibility for compliance could be so easily transferred from the property owner to a contractor. In the event the Commission had further questions of the contractor himself, or his contract with the Siegels, staff had sent formal notification to Mr. Winall requesting his appearance at the December 20, 2005 meeting.

Mr. Owen stated that it should also be noted that the boathouse's constructed dimensions, 36-foot by 44-foot, exceeded the 33-foot by 39-foot footprint approved by the County's Board of Zoning Appeals. That approval was also contingent upon the applicant obtaining VMRC's permit prior to construction.

Mr. Owen said that after reviewing the draft proposal submitted on December 14, 2005, staff continued to find it very difficult to endorse this type of non-water dependent structure or to merely recommend its after-the-fact retention in its current state and configuration. Staff also had very little experience with the imposition of covenants and deed restrictions, and questioned their enforceability. The Seigel structure had already been the subject of a previous complaint and could easily be cited as precedent setting for similar structures proposed to be constructed on State-owned bottom. Accordingly, staff recommended that the Commission either direct the complete removal of all unauthorized portions of the structure, or in the alternative, some portion of the second floor flooring to diminish the potential "habitability" of that space. Any such removal or modification should be completed no later than April 30, 2006. Staff had no objection to the exterior of the structure remaining in its current condition, with or without the "faux" chimney. If approved in some form, however, staff believed that significant civil charges should be considered for both the applicant and the contractor/agent.

Curtis Manchester, attorney for Ms. Siegel, was present and his comments are a part of the verbatim record. Mr. Manchester explained that this was not an after-the-fact case but a compliance issue. He said the Joint Permit Application of 2005 was different from the one in 2001. He said it now requires more detailed drawings. He said in the Notice to Comply there was no environmental concerns only with the habitation of the second floor. He said Ms. Siegel was prepared to put forward a covenant of restrictive use for the VMRC staff and counsel's review. He explained that the chimney was not usable only a structural design to make the entire structure similar to all other structures on the property. He stated that the interior decking was being used for storage in winter and at times of floods. He said that the increased cost resulted from protective measures taken, such as using marine paint. He said they were requesting that she be allowed to keep the decking for storage so as to protect her possessions she needs to store there from theft.

Commission Meeting

He explained that she was not always there to oversee the property. He said she had agreed to accept the payment of a civil charge of \$5,000 and was requesting 60 days to get the documents reviewed and 90 days to get the work done because of the holidays. He further said that he had permission from the Contractor’s attorney to say on the contractor’s behalf that the 2001 requirements were complied with and he agreed to the civil charge proposed.

Commissioner Pruitt said that the applicant’s attorney had presented a good proposal.

After much discussion, Associate Member Holland moved to accept the proposal of the applicant and to add a civil charge for the contractor of \$5,000. Associate Member Fox seconded the motion. Associate Member Garrison then asked that the contractor be assessed a civil charge of \$10,000. Associate Members Holland and Fox agreed to the amendment. Associate Member Robins stated that he could not support the motion as it does not address the items that are not water dependent. Associate Member Schick also stated that he could not support the motion as someone in applying for this proposal hid the construction of the 2nd floor and that should be addressed. The motion carried 5-2.

Role Call Vote:

- Holland Aye**
- Fox Aye**
- Bowden Aye**
- Garrison Aye**
- McLeskey Aye**
- Robins No**
- Schick No**

Civil Charge on the applicant.....	\$5,000.00
Civil Charge on the contractor.....	\$10,000.00
Total charges.....	\$15,000.00

- 6. **TONI SLOAN, #05-1639**, requests after-the-fact authorization to retain a 57-foot long by 12-foot wide private, pre-cast concrete boat ramp, which extends approximately 13-feet channelward of mean low water, adjacent to her property along the Rappahannock River at the end of Beach Road near White Stone in Lancaster County. Deferred at the applicant’s request from the November 22, 2005, Commission meeting.

Jay Woodward, Environmental Engineer, Sr. gave the presentation with slides and his comments are a part of the verbatim record. Mr. Woodward explained that a letter had been received from the attorney for the applicant explaining that neither of them could be present at the hearing.

Mr. Woodward explained that on April 10, 2002, staff received an application from Ms. Sloan for a 54-foot long, private pier and uncovered boatlift adjacent to her property on the Rappahannock River (VMRC #02-0660). The proposed pier appeared to qualify for the authorization provided by Section 28.2-1203 of the Code of Virginia. As a result, Ms. Sloan received a "no permit necessary" letter, dated April 19, 2002, from staff. The agent for that application was Ms. Lucille Morelli. Ms. Morelli's husband, Mr. Bud Redmon, built the pier shortly thereafter.

Mr. Woodward further explained that on July 31, 2003, staff received a faxed drawing from the Lancaster County Wetlands Board depicting a 46-foot long by 16-foot wide concrete boat ramp downriver from the previously proposed pier on Ms. Sloan's property. The drawing apparently originated from L&M Contractors, but a formal permit request was never made to the Commission. The Lancaster County Wetlands Board deemed the ramp request incomplete at the time for a number of reasons, including the lack of an appropriate application appendix, no staking in the field, and lack of response to numerous requests for additional information. Consequently, the county never formally considered or approved the ramp request.

Mr. Woodward stated that on June 21, 2005, in response to notification of violation from the Lancaster County Wetlands Board, staff inspected the Sloan property and confirmed that a 30-foot long by 12-foot wide concrete boat ramp and 12-foot wide gravel roadway had been constructed across the beach and onto State-owned subaqueous bottom without prior local or state authorization. Ms. Sloan was sent a Notice to Comply (No. 05-10) on June 24, 2005. She was directed to remove the ramp within 30 days or submit an after-the-fact permit application within 15 days of her receipt of the Notice. An after-the-fact application was subsequently received on July 19, 2005. Ms. Christine Breddy of Gloucester Environmental, LLC submitted the application. In it, she indicated that Ransone's Nursery & Maintenance in Kilmarnock had constructed the ramp. Ms. Breddy submitted in an email that she was not involved in the placement of the ramp, but had been retained to submit the after-the-fact application.

Mr. Woodward said that the Virginia Institute of Marine Science indicated that the direct impacts of the ramp were relatively minor, but further stated that as far as the road was concerned open-pile structures, in beach areas, were generally preferred. However, they felt that removal of the road and replacement with an open-pile structure would result in additional impacts to jurisdictional areas and therefore found the after-the-fact authorization to be acceptable.

Mr. Woodward also said that the Virginia Department of Conservation and Recreation documented the presence of the federally threatened Northeastern beach tiger beetle in the project vicinity and recommended coordination with the United States Fish and Wildlife Service and the Virginia Department of Agriculture and Consumer Services regarding potential impacts to this insect species. The Department of Game and Inland Fisheries also indicated that the Northeastern beach tiger beetle was in the project area and believed the project may have resulted in adverse impacts to the species. However, in an email to the local wetlands board, the USFWS indicated that there were no tiger beetles in this area of White Stone Beach.

Mr. Woodward stated that the Lancaster County Wetlands Board approved the project on August 11, 2005, and agreed to accept civil charges of \$250 from the applicant and \$7,500 from the contractor, Mr. Mal Ransone, in lieu of any further enforcement action. The Board suspended \$7,000 of the charge to Mr. Ransone provided he was not found responsible for any other wetland violations for one (1) year. The Board concluded that the original agent and contractor for the pier were not responsible for the unauthorized ramp and road.

Mr. Woodward explained that the U. S. Army Corps of Engineers issued a Regional Permit (97-RP-19) on November 8, 2002, which included the stipulation that “You may not begin work until you have obtained a permit from the Virginia Marine Resources Commission and/or the local wetlands board.”

Mr. Woodward stated that while VIMS indicated that the environmental impacts of the ramp and road were “fairly minor,” staff was troubled that the applicant took it upon herself to have the work done without all necessary prior authorizations. Apparently, Ms. Sloan assumed that the Corps of Engineers permit was all that was required. She and her contractor must not have read the actual permit, or they chose to simply ignore the permit stipulation referenced above. Had the wetlands board and Commission staff been afforded an opportunity to comment on the proposal prior to installation, it was likely that a recommendation for modification to an open-pile design, or even denial would have been made. This was based on the potential impacts of the project, and the stated need, which was a ramp for a “jet ski” that is used at most two or three times per year. In addition, Ms. Sloan’s pier, that was damaged during Hurricane Isabel over 2 years ago, had yet to be repaired, and it did not appear that the lift at the pier had been used since the storm. Nevertheless, given the VIMS comments relative to the impact of replacing the structure, the approval of the ramp over the beach area by the local wetlands board, and the minor amount of encroachment and impact to subaqueous bottom resulting from the concrete slab sections channelward of mean low water, staff was recommending approval of the subtidal portion of the ramp. Staff was, however, recommending consideration of an appropriate civil charge from the applicant and contractor, given a minimal environmental impact but major degree of non-compliance. Staff noted that this was not the first violation for which Ransone’s Nursery & Maintenance had been found to be responsible. At the September 26, 2000 Commission meeting, it was determined that

Mr. Ransone constructed a community boat ramp for the Trails End subdivision (VMRC #00-1308) without the necessary VMRC permit. At that time, the Commission chose not to impose a civil charge. Mr. Ransone was also found to be responsible for noncompliance with a Lancaster County Wetlands permit in May of 2003, in the case of the Van Ness Family Trustee (VMRC #02-0966). In that case, Mr. Ransone was found to be responsible for installing a riprap revetment further channelward than the permit authorized, resulting in approximately 4,000 square feet of additional, unauthorized wetland impact. The Board accepted a \$2,000 civil charge from Mr. Ransone in that case.

Malcolm Ransone, contractor for the Ms. Sloan was present and his comments are a part of the verbatim record. Mr. Ransone explained that he was not the original contractor. He said the county told him that the permits were all issued and the work needed to be done immediately. He explained that Ms. Sloan also told him that all the paperwork was done. He said he was present at last month's meeting and had been trying to contact Ms. Sloan, but she had not called him back. Mr. Garrison asked him if he had checked on the permits and Mr. Ransone responded no.

Mr. Woodward explained the original agent had forwarded the application to County but it was incomplete and the most recent agent, Ms. Breddy submitted the after-the-fact application. He said the County authorized the project on August 11, 2005. He explained that the original agent had had difficulty finalizing the contract and had had problems with obtaining the payment so the project did not proceed and the ramp was not done. He further explained that the Corps had issued a permit for the ramp, which was built and in place at the current time.

Commissioner Pruitt stated that he felt the applicant was at fault and not the contractor. He explained that the current contractor inherited the problems and the applicant was responsible in this case.

Associate Member Garrison moved that the contractor be fined \$4,000 for non-compliance. Commissioner Pruitt called for a second and there was no second made, therefore, the motion failed for a lack of second.

Associate Member Schick stated that the applicant not being available to the agent was the problem, not the contractor. Associate Member Robins stated that the applicant was at fault because she had knowledge of all that was done before, but the builder did do the construction without all the permits so both should be held responsible.

Associate Member Robins then moved to approve the staff recommendations with a \$1,800.00 civil fine for both the builder and the applicant. Associate Member Holland seconded the motion. The motion carried, 5-1-1. Associate Member Garrison voted No. Associate Member McLeskey abstained from voting.

Royalty (filling 156 sq.ft. @\$.50/sq..ft.).....	\$78.00
Triple Permit fee.....	\$75.00
Civil Charge to applicant.....	\$1,800.00
Civil Charge to the contractor.....	\$1,800.00
Total due.....	\$3,753.00

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- 10. RONALD W. BOONE, #04-2187**, requests after-the-fact authorization to retain a second story 20-foot by 30-foot office, and authorization to increase the size of a previously authorized gazebo to 15-foot by 15-foot and the two (2) previously authorized shelters to 30-foot by 15-foot, all on the Ocean View Fishing Pier adjacent to property situated along the Chesapeake Bay in Norfolk.

Commissioner Pruitt said that the applicant had requested a deferral of this item until next month’s meeting so he could obtain legal counsel. He asked for a motion from the Commission.

Associate Member Holland moved to hear the matter at the January 2006 meeting. Associate Member Fox seconded the motion. The motion carried, 7-0.

Deferred until the January 24, 2006 hearing.

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- 7. CHRIS SEWARD, #05-2522.** Commission review of the Virginia Beach Wetland Board's November 21, 2005, decision to approve, without compensation for filled wetlands, a request to retain a previously unauthorized 71-foot bulkhead installed adjacent to the applicant's property situated along a manmade canal tributary to Back Bay in Virginia Beach.

Justin Worrell, Environmental Engineer, Sr., gave the presentation with slides. His comments are a part of the verbatim record. Mr. Worrell explained that giving the presentation would not be opening the record.

Commissioner Pruitt, after conferring with counsel, stated that the presentation by staff was needed.

Mr. Worrell explained that the applicant’s property was located at 304 Porter’s Island Road along a manmade canal with connection to Back Bay. A new residential dwelling was being constructed on this previously undeveloped parcel. There is an existing house

on the property directly to the east, but there are no existing shoreline protection structures on either side of the bulkhead.

Mr. Worrell said that the Virginia Beach Wetlands Board held a Show Cause Hearing at their September 19, 2005, meeting and determined that the unauthorized bulkhead and fill of wetlands was a violation of the Wetlands Ordinance. A \$3,000 civil charge was recommended for Mr. Seward and a \$5,000 civil charge against Mike Elliot, the contractor. City staff reminded the board members that this was not the first time Mr. Elliot had installed structures without first receiving a wetlands permit. The Board ordered Mr. Seward to submit an after-the-fact permit application, and that both Mr. Seward and Mr. Elliot appear at the November 21, 2005, meeting for after-the-fact consideration and a Restoration hearing.

Mr. Worrell said that at the November 21, 2005, meeting City staff presented photographic slides and as-built drawings sealed by a Professional Engineer (P.E.). Drawings from a much earlier application, never permitted by the Board, were also presented. Evaluations and comments from the Virginia Institute of Marine Science (VIMS) and the Virginia Beach Planning Department were read into the record.

Mr. Worrell stated that VIMS' comments stated that the unauthorized bulkhead filled an estimated 222 square feet of vegetated and non-vegetated wetlands, classified as a "Brackish Water Mixed Community," and that aligning the structure along the existing scarp, landward of wetlands, would have reduced those impacts. The Planning Department comments stated that although it was difficult to assess the amount of wetlands impacted given that the structure was currently in place, the wetland community had been altered and they estimated that approximately 165 square feet of wetland resource had been backfilled. While the Planning Department recommended after-the-fact approval, they questioned why the bulkhead was constructed two (2) feet seaward of the slope to begin with.

Mr. Worrell said that by letter, dated November 28, 2005, and pursuant to §§ 28.2-1310 and 28.2-1311(A)(2) of the Code of Virginia, the Chairman of the Wetlands Board was notified of the Commissioner's intent that the full Commission review the Wetlands Board's decision regarding this project. The Chairman was apprised that the Board's decision not to require compensation for the loss of wetlands did not conform to the requirements of the revised Wetlands Mitigation – Compensation Policy and Supplemental Guidelines: Regulation 4 VAC 20-390-10 Et Seq., adopted by the Commission at its May 24, 2005, meeting.

Mr. Worrell explained that during the lengthy discussion and presentation before the Board, Virginia Beach Planner Rick Scarper reminded the Board that they should address compensation issues related to the permanent loss of wetlands. Mr. Scarper advised the Board that there did not appear to be any area on Mr. Seward's property, short of retreating landward of the existing bulkhead, that would lend itself to the creation of

substantial wetlands to compensate for the area backfilled. Board member Mr. Plumlee also mentioned that compensation must be required for this type of wetlands loss, given the guidelines of the Mitigation and Compensation Policy. He further noted that not requiring compensation for this type of loss is not fair to new applicants whose proposals may necessitate compensation as a condition of permitting.

Mr. Worrell said that the contractor, Mike Elliot, argued that he built the bulkhead as close to the existing scarp as possible, and that there really were no substantial wetlands lost. However, the as-built, P.E. sealed drawings show the bulkhead was constructed and backfilled a maximum of three (3) feet channelward of the existing scarp. One photograph, originally submitted by the applicant at the September 19, 2005, meeting, was again entered into the record. This undated photograph clearly showed a vegetated scarp before the bulkhead was constructed. Mr. Elliott argued that neither he nor Mr. Seward should have to pay additional "fines," since they were both levied civil charges back in September. Board member Mr. Plumlee advised Mr. Elliot that any order to compensate would not be considered a fine, but an in-lieu fee, as directed by the guidelines of the Mitigation and Compensation Policy. This money is to be used by the City in a manner meant to offset permanent wetlands losses.

Mr. Worrell stated that Board Member Baum concluded that no restoration was necessary and that the applicant and contractor had been penalized enough. Mr. Baum then motioned that the Board members should "forget it." That motion was seconded, and by a vote of 4-2 was approved. The Board then voted to approve the after-the fact request to retain the bulkhead, with no compensation for the backfilling of wetlands, by a vote of 4-1.

Mr. Worrell explained that in Section 28.2-1313 of the Code, it states that the Commission shall modify, remand or reverse the Board's decision if the Board in reaching its decision, failed to fulfill its responsibilities under the wetlands zoning ordinance; or the substantial rights of the applicant have been prejudiced because the findings, conclusions, or decisions of the Board are in violation of constitutional provisions, in excess of statutory authority or jurisdiction of the Board, made upon unlawful procedure, affected by other error of law, unsupported by the evidence on the record considered as a whole, or arbitrary, capricious, or an abuse of discretion.

Mr. Worrell said that at the beginning of the meeting on November 21, 2005, the Board voted to approve an in-lieu fee system for impacts to wetlands such as these, when they could not be avoided as part of a permitted activity. Based on staff's review of the record, they were not questioning the Board's decision that the bulkhead violation did not need further restoration, nor that the bulkhead should remain in place; however, staff did question why in-lieu fees were not required for the loss of tidal wetlands as estimated by VIMS and the City of Virginia Beach. The decision to allow the permanent loss of vegetated and non-vegetated wetlands without requiring compensation appeared to be arbitrary and capricious.

Mr. Worrell stated that since July of this year, the Board had been routinely reviewing applications and permitting projects following the instructions detailed in the revised Mitigation and Compensation guidelines. Quite often it had resulted in proposals being pulled landward of the wetlands resource. Staff was of the opinion that had this original proposal been presented to the Board (before construction), it would have been pulled back and permitted with minimal impacts to wetlands, if any at all. However, in this case the Board seemingly ignored the guidelines and their own in-lieu fee structure created to offset losses such as bulkheading and backfilling over tidal wetlands.

Mr. Worrell explained that furthermore, staff feared that this decision to not require compensation could set a dangerous precedent in Virginia Beach where contractors, agents, or applicants would opt to intentionally construct a structure in tidal wetlands without Wetlands Board approval to avoid having to mitigate to reduce wetlands impacts, or compensate for permitted impacts. Therefore, staff recommended that the Commission remand this decision back to the Virginia Beach Wetlands Board for reconsideration in keeping with the revised Wetlands Mitigation – Compensation Policy and to require compensation for the permanent loss of the wetlands resource impacted.

Kay Wilson, Wetlands Board representative, was present and her comments are a part of the verbatim record. Ms. Wilson said that there was insignificant impact, therefore, the Wetlands Board voted to not require compensation. She further said that they followed the requirements of the law and were asking that the Wetlands Board decision be upheld.

Commissioner Pruitt left the meeting and Associate Member Garrison assumed the chair duties. Associate Member Garrison asked for any public comments and there were none. He then asked for a motion.

Associate Member Robins said that he agreed with staff that this would set a precedent and encourage others to circumvent the law by going ahead without a permit. He moved to support the staff recommendation and remand the matter to the Wetlands Board to reconsider compensation. Associate Member Garrison said that there has to be mitigation and there being no wetlands banks is no excuse as there are two wetlands banks in Virginia Beach. Associate Member Fox asked if the motion required compensation. Associate Member Robins explained that the Commission could only remand for them to reconsider compensation. Associate Member Schick seconded the motion. The motion carried, 7-0.

Wetlands Review, remanded back to the Wetlands Board

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8. **ROBERT WELLS, #05-1036.** Commission review, on appeal by the applicant, of the October 19, 2005, decision by the Northampton County Wetlands Board to deny a proposal to install a series of stone breakwaters with beach nourishment and marsh toe protection at his property situated along the Chesapeake Bay at the mouth of Hungars Creek in the Vaucluse Shores subdivision of Northampton County.

Hank Badger, Environmental Engineer, Sr., gave the presentation with slides. His comments are a part of the verbatim record. Mr. Badger explained that giving the presentation would not be opening the record. He said he could present color slides, but that would require opening the record. He said that staff requested that the record be opened.

Associate Member Holland moved to open the record. Associate Member Schick seconded the motion. The motion carried, 7-0.

Mr. Badger explained that Mr. Wells' property was located in the Vaucluse Shores subdivision on a small peninsula at the mouth of Hungars Creek. The property and project faced the Bay along an area with a mix of sand bars and shallows extending for the first 300 feet offshore. There was sparse submerged aquatic vegetation (S.A.V.) near the project area.

Mr. Badger said that the applicant sought authorization to install a series of stone breakwaters with beach nourishment and marsh toe protection, which would fill approximately 1,450 square feet of non-vegetated wetlands, 50 square feet of vegetated wetlands and nourish 1,375 square feet of sand flat. Only the sand flat and vegetated wetlands portion of the project fell within the board's jurisdiction.

Mr. Badger stated that on October 20, 2005, staff received a letter from Ms. Grimes on behalf of Mr. Wells, noting their appeal of the October 19, 2005, Northampton County Wetlands Board decision. As such, the appeal was considered timely under the provisions of Section §28.2-1311 (B) of the Code of Virginia.

Mr. Badger said that Ms. Grimes contended in her letter that the Board did not fully consider the VIMS report, which stated that erosion protection was warranted along the exposed shoreline and that a breakwater system in this situation was preferable to shoreline hardening. She noted there was a unique salt pond and Spartina alterniflora landward of the eroding shoreline that would be in jeopardy if the shoreline continued to erode. Ms. Grimes also stated that the newest member of the wetlands board, Mr. Lusk, did not have the benefit of a site visit as did the other members.

Mr. Badger explained that the Northampton County Wetlands Board opened their public hearing on June 15, 2005. Both VIMS and the Wetlands Board staff asked for

clarification of the project goal and more precise drawings. Ms. Ellen Grimes, agent for the applicant, asked the Board to continue the hearing until their August 17, 2005, meeting so more information could be provided as requested. The Board approved Ms. Grime's request.

Mr. Badger said that the Board continued the hearing at their August 17 meeting. No additional information or correspondence, however had been received. The Board then voted to send the applicant official notice that the application review process would be continued at the next Board meeting or the application would be inactivated.

Mr. Badger stated that the hearing was again resumed at the Board's regularly scheduled meeting on September 21, 2005. While the Board received the additional information they had requested at their June meeting, VIMS had not had time to evaluate the revised information. The hearing was then continued until the October 19, 2005, Wetlands Board meeting to give VIMS an opportunity to review the material.

Mr. Badger said that during their October 19, 2005, public hearing, the Northampton County Wetlands Board considered a report provided by the Virginia Institute of Marine Science (VIMS), as well as the testimony provided by the Wetlands Board staff and by the applicant's agent, Ms. Grimes.

Mr. Badger explained that VIMS stated in their report that while the impacts associated with the project would not be minimal, it was VIMS' opinion that erosion protection was warranted along this exposed reach of shoreline and that the impacts associated with this project were unavoidable. A breakwater system in this situation was preferable to shoreline hardening from a marine environmental viewpoint, in that it reduces the impacts to wetland resources that would be expected from a typical rock revetment. They continued by stating they were unable to quantify the amount of sand available in the system and therefore could not determine whether providing additional sand nourishment in the form of tombolos immediately behind the breakwater units would be advantageous.

Mr. Badger further explained that the Northampton County Wetlands Board's staff report indicated that there were no obvious erosion problems and there were no nearby erosion control structures influencing the project area. The home on the property was not being threatened by any evident erosion problems and vegetation was abundant. Their staff continued by stating that a natural spit would never become static no matter what erosion control structure was placed around it. In addition, there were inner wetlands that appeared to be fed during tidal surges on the very tip of the spit and it was unclear how the breakwaters would affect these wetlands.

Mr. Badger said that the County's 1974 Shoreline Erosion Report stated that the area was experiencing moderate erosion, with a rate of two to three feet per year. A 1998 report indicated that the erosion rate remained the same as in 1974. That report went on to suggest that non-structural approaches were not viable in Vaucluse, given that the degree

of erosion in some areas was so severe that either continued bulkheading or riprap structures would be recommended. It was noted that the report did not specifically address this particular parcel, only the Vauclose subdivision as a whole.

Mr. Badger said that Ms. Grimes provided a brief description of the project in which she stated the revised information and drawings were a compilation of recommendations from VIMS, the Shoreline Erosion Advisory Service (SEAS) and herself. She noted that the area was very dynamic and that soft hardening should allow the sand to freely move with the breakwaters placed offshore. The project would function similarly to a marsh toe protection for the point itself. She also reiterated that there was a single-family dwelling with a well and septic system on the property.

Mr. Badger explained that Board Member Bowdoin Lusk, who had not visited the site, stated he was very familiar with the area and even though two small marsh islands offshore had eroded there was basically no erosion on the bayside of the property. Mr. Lusk was of the opinion that the existing dwelling and property were not presently threatened and there was no real necessity for the project at this time.

Mr. Badger said that Board Member Sherman Stairs stated that the Bay shoreline was constantly changing. He also noted that the VIMS report stated that there was considerable erosion.

Mr. Badger said that Ms. Grimes noted that the erosion had been consistent even though the area had kept its appearance as a marsh and beach area.

Mr. Badger explained that Mr. Lusk then made a motion to deny the application. The motion was seconded by Board Member Preston Trower, III. The Board then voted unanimously to deny the application. It was the Board's opinion that the existing structures and property were not in jeopardy and therefore the project was not warranted at this time.

Mr. Badger said that based on staff's review of the record and our attendance at the hearing, staff believed that the Board's decision to deny the series of stone breakwaters with beach nourishment and marsh toe protection was not supported by the evidence on the record considered as a whole. The record in this case showed that the Board's decision was partly based on their determination that the project area was not eroding. However, both the VIMS report and the County's own Shoreline Erosion Reports from 1974 and 1998 stated that there was a moderate erosion rate of two to three feet per year in this location. To further explore this aspect, staff had contacted Scott Hardaway from VIMS in an effort to determine the "current" erosion rate at the project site. Mr. Hardaway evaluated the specific shoreline location and concluded that the erosion rate was approximately 2.8 feet per year at the project site.

Mr. Badger explained that in light of this information, staff recommended that the Commission remand this matter to the Northampton County Wetlands Board for rehearing and reconsideration, considering the moderate erosion rates stated by Mr. Hardaway and the County's own Shoreline Erosion Reports.

Tim Holloway, Environmental Planner and staff to the Wetlands Board, was present and his comments are a part of the verbatim record. Mr. Holloway said the Wetlands Board had the information regarding the 2 to 3 feet erosion rate, but still disapproved of the project. He said that remanding the matter would not be helpful and suggested that if the Commission disagreed with the Wetlands Board then the Commission should just overturn their decision. He stated that if the board cannot question the VIMS' report then why was there a need for a Wetlands Board.

Ellen Grimes, Coastal Resources, was present and her comments are a part of the verbatim record. Ms. Grimes said that she agreed with Mr. Holloway that it was more appropriate to overturn the Wetlands Board decision rather than remand it back.

Associate Member Holland moved to remand the matter back to the Wetlands Board advising them to reevaluate the proposal. Associate Member Fox seconded the motion. Associate Member Garrison stated a decision needed to be made by the Commission. Associate Member Schick said that he felt the same as Mr. Garrison and the reason for this was to protect the resource and this project would do that. Mr. Holland agreed with Mr. Schick. Associate Member Robins said it was an appropriate motion to remand and not substitute for the Wetlands Board. Motion carried, 7-0.

Wetlands Review, remanded back to the Wetlands Board

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- 9. WILLIAM HAMMOND, #05-1936.** Commission review of the October 27, 2005, decision of the Accomack County Wetlands Board to approve the construction of 284 linear feet of timber bulkhead, aligned channelward of a deteriorated wooden bulkhead and the backfilling of 1,020 square feet of vegetated tidal wetlands at his property situated along Chincoteague Channel at 2553 Main Street in the Town of Chincoteague.

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

Commissioner Pruitt explained that this was an orientation presentation and there was no need to open the record.

Mr. Badger explained that the property was located on the south-end of Chincoteague Island, approximately three quarters (3/4) of a mile northeast of the Harbor of Refuge along Chincoteague Channel and a man-made drainage canal from Fowling Gut. A deteriorating timber bulkhead currently extended approximately 280 linear feet along the west and south sides of Mr. Hammond's property.

Mr. Badger said that Mr. Hammond received a permit in 1974 (#74-0551) from the Accomack County Wetlands Board to construct a 100-foot long bulkhead approximately 200 feet west of Main Street and to backfill the property. The existing deteriorating wooden bulkhead appears to be the original bulkhead with some repair work completed years ago. The backfill behind the existing bulkhead along Chincoteague Channel had washed out over the years. This portion of the existing bulkhead was now backed by a stand of wetlands vegetation. Commission review of this case was being undertaken in accordance with the provisions of §28.2-1310 and §28.2-1311 (A)(2) of the Code of Virginia.

Mr. Badger said that the Accomack County Wetlands Board held a public hearing on Mr. Hammond's application on October 27, 2005. Mr. Hammond was not present at the hearing, but was represented by his agent, Mr. Raymond Britton. During the public hearing, the Board considered the Virginia Institute of Marine Science (VIMS) report, and the testimony provided by the agent and their staff.

Mr. Badger said that the failed bulkhead had allowed sufficient tidal influence to support the establishment of tidal vegetated wetlands along the shoreline facing Chincoteague Channel. In addition, a vegetated marsh existed along the canal on the southern property boundary. VIMS quantified this impact by stating in their report that the bulkhead and backfill would result in the filling of approximately 1,020 square feet of vegetated tidal wetlands and approximately 190 square feet of non-vegetated wetlands. The VIMS report also stated that in an attempt to reduce impacts, the applicant should realign the structure landward of the vegetated wetlands and cut off the existing failed structure at the marsh substrate. There was no immediate jeopardy posed to the residential structure on the property, as it is located approximately 75 feet from the shoreline.

Mr. Badger stated that the Board then asked Mr. Britton to respond to the VIMS report. Mr. Britton stated that if you moved the bulkhead landward of the vegetated wetlands, he thought you would lose all of the wetlands anyway to wave action within six months. In his opinion, the old bulkhead was protecting the little bit of vegetated wetlands that were there.

Mr. Badger said that Board Member C. Lee Davis felt the bulkhead had been functional and that the applicant had made an attempt to maintain it, but in recent years it had failed. Mr. Davis also stated that the applicant had a bulkhead and should have the right to replace it two (2) feet channelward, or at least in the same footprint as the original bulkhead.

Mr. Badger explained that Board Member Jim Frese stated he had been to the site and agreed that the existing bulkhead had failed. Mr. Frese felt that a small amount of vegetated wetlands had come in behind the bulkhead, which was above mean low water on Mr. Hammond's property. Mr. Frese indicated that the State should pay the applicant for the use of his property if he could not replace the existing bulkhead.

Mr. Badger said that the Commission staff read into the record a section of the Wetlands Guidelines, Section IV. This section stated that when an erosion control structure, such as a bulkhead or seawall, was deemed necessary, it should ordinarily be placed landward of any existing and productive marsh vegetation. Staff also stated that the Board was charged with the protection of wetlands and of minimizing the loss of wetlands.

Mr. Badger said that Board Member Jim Frese then made a motion to approve the project as proposed. Board Member Davis seconded that motion. The Board voted 3-1 to approve the project. The Board did not consider any form of mitigation or compensation for the permitted permanent loss of tidal wetlands. Given that approval, their decision was not consistent with the Commission's newly adopted Wetlands Mitigation-Compensation Policy (4VAC 20-390).

Mr. Badger also said that VMRC's Wetlands Guidelines, "Wetlands Mitigation-Compensation Policy, Specific Criteria" state that in order for a proposal to be authorized to destroy wetlands and compensate for the same in some prescribed manner, three criteria must be met. If the proposal cannot meet one or more of these criteria, the activity shall be denied, or must occur in areas apart from the wetlands. Should it satisfy all three criteria, however, compensation for the wetlands lost is then required.

These criteria are:

- 1) All reasonable mitigative actions, including alternate siting, which would eliminate or minimize wetlands loss or disturbance must be incorporated in the proposal.
- 2) The proposal must clearly be water-dependent in nature.
- 3) The proposal must demonstrate clearly its need to be in the wetlands and its overwhelming public and private benefits

Also, Mr. Badger said that the VMRC's Wetlands Guidelines state that when an erosion control structure, such as a bulkhead or seawall, is deemed necessary, it should ordinarily be placed landward of any existing and productive marsh vegetation. Placing a bulkhead behind a marsh preserves the marsh. The failed bulkhead has allowed sufficient tidal influence to support the establishment of tidal vegetated wetlands along the shoreline facing Chincoteague Channel. In addition, a vegetated marsh exists along the canal on the southern property boundary.

Mr. Badger said that even if deemed necessary and justified, the Board did not consider any form of mitigation or compensation for the permanent loss of tidal wetlands, consistent with the Commission's newly adopted Wetlands Mitigation-Compensation Policy (4VAC 20-390) or with our old Wetlands Mitigation-Compensation Policy Guidelines.

Mr. Badger stated that based on the foregoing, it appeared the Board erred in its decision to approve this application without any mitigation, which would include eliminating or minimizing the wetland losses. It also did not consider any form of compensation for the lost resource.

Mr. Badger said that to reduce the wetlands impact of the project, staff recommended that the Wetlands Board modify the application by realigning the bulkhead along Chincoteague Channel (west side) landward of most of the vegetated wetlands and that the existing bulkhead be cut off at the marsh substrate to help control the erosion of the existing marsh. Staff further recommended that the proposed bulkhead on the canal (south) side be replaced within the same footprint or landward of the existing wooden bulkhead and vegetated wetlands. These suggestions would eliminate the loss of a majority of the vegetated wetlands and would still protect the applicant's property and residential structure. As a result, staff recommended that this application be remanded to the Wetlands Board for reconsideration.

Jim Frese, representative for the Accomack County Wetlands Board, was present and his comments are a part of the verbatim record. Mr. Frese said they did not discuss mitigation because the Board of Supervisors had not approved a Wetlands Compensation Mitigation Policy. He said the Wetlands Board did not have any authority to require compensation until they do approve it. He said they considered the rights of the property owners and to impose fees they felt would be exceeding their authority.

Commissioner Pruitt stated that someone needed to speak with the Board of Supervisors. Mr. Badger said that a lot of counties had not yet adopted a Wetlands Compensation Mitigation Policy. He explained that Northampton County simply limited encroachment on wetlands.

Mr. Frese explained that the grass was developed from the failed bulkhead and they considered the effect on the west side and requiring it be put 2 feet out from the bulkhead then turning down the southside cutting off the jib.

Associate Member Bowden said that he had visited the site and that all wetlands were natural even when influenced by man. He said the Commission needed to let the Accomack County Board of Supervisors know that this was a serious matter and it should be remanded. He moved to remand the matter back to the Wetlands Board. Associate Member Holland seconded the motion. Associate Member Garrison then asked for the motion to be amended to include that Commissioner

Pruitt would meet with Accomack County. Associate Member Bowden agreed to the amendment. The motion carried, 7-0.

Wetlands Review, remanded back to the Wetlands Board

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11. **CUMBERLAND COUNTY, #05-0852**, requests authorization to dredge approximately 15,000 cubic yards of State-owned submerged land and construct a raw water infiltration intake structure in the James River in the vicinity of the mouth of Cobbs Creek. The intake is designed to withdraw a maximum of 53 MGD at a maximum rate of 0.25 feet per second as part of the Cobbs Creek Reservoir Project. An adjacent property owner protested the project.

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

Mr. Madden explained that the proposed project was within the James River in Cumberland County approximately nine miles downstream of the Bremono Bluffs power plant, three miles upstream of the Route 690 crossing of the James River, and approximately 2,000 feet downstream of the mouth of Cobbs Creek. The proposed intake structure was a component of the Cobbs Creek Reservoir project which is a pump storage facility that will provide 14.8 billion gallons of raw water storage within a 1,107 acre normal pool area. The reservoir project is a regional partnership effort between Cumberland, Henrico, Powhatan and Goochland Counties. While the reservoir itself is authorized by statute and does not require a permit from the Commission, the intake structure and associated excavation requires approval from VMRC.

Mr. Madden said that the intake consisted of three (3), 90-foot wide by 330-foot long infiltration beds with associated 48-inch intake/discharge pipelines and a maximum through bed intake velocity of 0.25 feet per second.

Mr. Madden stated that in order to countersink the infiltration beds flush with the river substrate, the applicant intended to construct a temporary cofferdam, dewater the site, and excavate approximately 15, 000 cubic yards of State-owned submerged bottom material with upland disposal. Upon the completion of the excavation, the 48-inch screen pipe headers would be covered with sand, gravel and riprap to match the adjacent substrate elevation. When activated, the system would withdraw an estimated 53 million gallons per day with an instantaneous, maximum withdrawal rate of 150 million gallons per day. The intake velocity is 0.25 feet per second.

Mr. Madden explained that with this system, raw water would be diverted from the James River when the river flow was adequate. Controlled reservoir releases back out through

the infiltration beds would be made during drought and other periods when the James River flows were inadequate to support regional demands. The system also included an emergency release valve to permit a discharge directly into Cobbs Creek.

Mr. Madden stated that Ms. S. Lynn Townsend, an adjacent property owner, who had protested the project, was concerned that the project would have a negative impact on fish and wildlife resources and the water levels of the James River.

Mr. Madden said that during the standard permit review process, the Department of Game and Inland Fisheries (DGIF) and the Department of Conservation and Recreation (DCR) expressed concern over the potential impact the intake construction would have on threatened and endangered aquatic resources in the project area. In their letter, dated November 7, 2005, DGIF noted that the James River in the vicinity of the project site might support Federal Species of Concern /State Endangered mussel species namely the brook floater (*Alasmidonta varicose*), Atlantic pigtoe (*Fusconaia masoni*) and the James spiny mussel (*Pleurobema collina*). To address this concern, the applicant conducted a mussel survey and reported on September 29, 2005, that the above-referenced species were not observed in the survey area. In spite of the survey results, DGIF maintained that the results of the survey do not entirely alleviate their concerns about the impacts from instream work associated with this project upon endangered species. DGIF pointed out that the mussel species of concern were rare and inherently difficult to find through survey work, especially during a one-time survey event. Accordingly, they recommended a time-of-year restriction from April 15 through July 31 and August 15 through September 30 of any year to protect the mussels. In addition to the potential impact to endangered mussel species, this section of the James River had been designated an Anadromous Fish Use Area. In addition to the time-of-year restriction for mussel resources, DGIF also recommended a time-of-year restriction from April 1 through June 30 to protect anadromous fisheries resources.

Mr. Madden explained that concurrent with VMRC review of this project, DEQ was also reviewing the project for a permit and was considering the proposed water withdrawal rules, and working with the applicant to address an alternatives analysis, the water demand projections of the participating counties, and the establishment of minimum instream flow in that section of the James River. Additional analysis was being conducted to address cumulative impacts, a reservoir mitigation/compensation plan and beneficial uses of surface water.

Mr. Madden also explained that the U.S. Army Corps of Engineers, Norfolk District (Corps) was also conducting an agency review of the project and they had requested an alternatives analysis, water supply/demand analysis, an analysis of the secondary need to provide low flow augmentation, instream flow withdrawal analysis and a functional analysis for instream mitigation. The Corps also believed that an Environmental Assessment should be prepared and reviewed before they took action on the request.

Mr. Madden stated that the Commission staff had been engaged in an ongoing dialogue with the applicant's agent over potential impacts to Cobbs Creek resulting from the discharge of water from the emergency outfall structure. Staff understood that the emergency outfall structure would only be used in the event that the infiltration beds became clogged and failed to allow water return to the James River. Such a failure could threaten a dam breach. Staff was concerned that, should it become necessary to open the valve, however, the creek bottom and the adjacent Cobbs Creek shoreline would be scoured out as a result of the rise in water level and or the erosion of the area resulting from the force of the water flowing from the blow off valve. The applicant had not yet been able to entirely address or allay those concerns. No other agency had voiced any objection to the project.

Mr. Madden said that a review of the outstanding concerns raised by the Corps and DEQ suggested that the majority of their issues were related to the construction and operation of the dam and the impoundment itself which was authorized by statute. Staff believed that the applicant had taken appropriate measures to determine whether or not there were endangered mussel species in the project area by conducting the mussel survey, which produced negative results. Staff believed that for DGIF to hold the applicant to a time-of-year restriction in the face of evidence to the contrary presented an undue burden on the applicant. However, staff maintained that there remained a need to require a time-of-year restriction for the protection of migrating and spawning of anadromous fish. Such measures should also address the concerns of the adjacent property owner.

Mr. Madden said that staff remained concerned over the fate of the area of Cobbs Creek below the emergency release valve should the need arise to engage that valve. Accordingly, staff recommended approval of the project with our standard instream construction conditions and a time-of-year restriction for any instream work between April 1 and June 30 of any year for the protection of migrating and spawning anadromous fish species. Staff also recommended that the Commission require an additional permit condition requiring that the applicant demonstrate that engaging the emergency release valve would not negatively impact Cobbs Creek should that become necessary.

John Daniel, attorney for Cumberland County, was present and his comments are a part of the verbatim record. Mr. Daniel explained that this project would provide water for Goochland also. Cumberland County continues to endorse the project and held hearings for the project. He said that 25 to 30 sites were considered, but 8 to 10 were eliminated. He said this project would impact 35 acres of wetlands and 14 miles of stream, all to be mitigated. He said there was consideration being given to mitigation sites. He said only 5 or 6 residential properties would be flooded and in this area. He said that of these few residents in the area, none had protested. He said there were no historical or archeological impacts. He said they were working on mitigation sites currently on streams and wetlands. He said the Corps was asking for an Environmental Assessment. He said the intake system was what was to be considered by the Commission. He also stated there other experts present to answer any questions from the Commission.

Associate Holland asked if there was any problem with the staff recommendations. Mr. Daniel said that they agreed with them.

Commissioner Pruitt asked for anyone in opposition present who would like to speak. There were none present.

Associate Member Holland moved to approve the project with staff's recommendations. Associate Member Garrison seconded the motion. The motion carried, 7-0.

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The Commission meeting broke for lunch at approximately 1:00 p.m. Associate Member Garrison reconvened the meeting at approximately 1:40 p.m. Associate Member McLeskey left at the lunch break and did not return to the meeting for the rest of the day. Commissioner Pruitt had not returned at this point so Associate Member Garrison assumed the responsibilities of chairman.

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12. BOY SCOUTS OF AMERICA - COLONIAL VIRGINIA COUNCIL, #05-2049, requests authorization to construct a 6-foot by 930-foot floating pier addition with seven (7) wetslips to replace and extend an existing open-pile pier to a total length of 1,190 feet channelward of mean high water adjacent to their property situated along McKans Bay on the Rappahannock River in Middlesex County.

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

Mr. Neikirk explained that a new Boy Scout facility was being constructed along McKans Bay in the Rappahannock River near Bayport in Middlesex County. The Rappahannock River is over three (3) miles wide at the project site and the nearshore water is shallow. According to the application, the minus four-foot (-4') mean low water contour is located 820 feet offshore. Development upstream of the property is sparse, however, there is a small waterfront residential development downstream of the proposed pier.

Mr. Neikirk said that the property was previously owned by Mr. James Perdue and operated as the Dublfun Campground. The property is approximately 300 acres with about 420 feet of water frontage on the Rappahannock River. There is an existing boat ramp and an open-pile pier that extends approximately 544 feet channelward of mean high water. The water is approximately two feet deep at mean low water near the channelward end of the existing pier.

Mr. Neikirk further said that the applicant's proposal was to remove 284 feet of the existing open-pile pier and construct 930 linear feet of 6-foot wide floating pier with a 6-foot by 86-foot T-head and finger piers and mooring piles to create six (6) wetslips near the channelward end. Six cluster pile dolphins were also proposed on the upstream side of the pier for mooring and ice protection. The slips were designed to moor deep draft sailboats averaging 40 feet in length. These sailboats are used in the Scouts' "Chesapeake Bay High Adventure Sailboat Program" and would be moored at the facility year round.

Mr. Neikirk said that staff had expressed a concern to the applicants regarding the length of the pier and its exposed location. In response, the applicants stated that the pier needed to be the requested length to accommodate their deep draft sailboats and that the pier manufacturer claimed the pier was designed to withstand continuous waves up to two (2) feet and higher temporary wave action. Staff had also suggested the applicants consider a mooring field for the boats, in lieu of the pier extension, but the applicants believed the pier was necessary to provide easier access and to facilitate loading and unloading of the vessels.

Mr. Neikirk said that in a paper titled "Design Wave Information for Chesapeake Bay and Major Tributaries in Virginia" Dr. David R. Basco found that a 35-mile per hour wind would produce a 2.5-foot wave with a period of three (3) seconds. A 35 mile-per-hour wind is not uncommon and one would certainly expect higher waves during stronger storms. Staff expressed this concern to the applicants and they were working with the manufacturer in an attempt to increase the structural integrity of the floating pier. The floating pier did not meet the siting criteria in the Commission's "Criteria for the Siting of Marinas or Community Facilities for Boat Mooring" (VR 450-01-0047), which stated that it was undesirable to site a facility where the maximum wave height exceeded 1-foot.

Mr. Neikirk said that the pier would not encroach over any public or privately leased oyster planting ground, and no opposition had been received from the neighbors or the general public in response to our public notice of this application.

Mr. Neikirk stated that VIMS had stated that there was no indication of submerged aquatic vegetation in the project vicinity but recommended the length of the pier be minimized as much as possible. They also stated that this was a high-energy location with a 3.5-mile fetch to the northeast and recommended that any pier be designed to withstand the expected wave heights at the site. They also recommended solid waste receptacles and adequate sanitary facilities be required. Finally they stated that vessel repair and maintenance should not be performed in the water.

Mr. Neikirk explained that the Health Department had not yet approved the plan for sewage facilities.

Mr. Neikirk also explained that Section 28.2-1205(C) states “No permit for a marina or boatyard for commercial use shall be granted until the owner or other applicant presents to the Commission a plan for sewage treatment or disposal facilities that has been approved by the State Department of Health.” The applicant was working with the Health Department and expected to secure the approval within a few days.

Mr. Neikirk said that the Department of Conservation and Recreation documented the presence of natural heritage resources in the vicinity of the project but they did not anticipate any adverse impacts to those resources. No other state agencies commented on the project.

Mr. Neikirk said that staff understood the applicants’ desire to lengthen the existing pier to facilitate the mooring of deep draft sailboats at their property. Unfortunately, staff was of the opinion that this was neither an appropriate site for such a long floating pier (1,190 feet) nor was it a good location to moor large sailboats. Although a long pier at this location would not interfere with traffic navigating up and down the Rappahannock River, it would interfere with small boats and associated nearshore activities, forcing those activities farther offshore in the vicinity of the pier. The site was very exposed, with a 3.5-mile northeast fetch. As such, staff remained very concerned with the ability of the long floating pier and the moored vessels to withstand the waves they would be exposed to during storm events. Should the floating pier or the boats break loose during storm events they could do considerable damage to other structures in the vicinity. Accordingly, staff was unable to recommend approval for the project as proposed.

Mr. Neikirk stated that should the Commission decide to approve all or some portion of the project, however, staff would recommend an assessment of a royalty in the amount of \$1.00 per square foot for any additional encroachment on State-owned submerged land.

Dick Collins, representing the applicant, was present and his comments are a part of the verbatim record. Mr. Collins said this was a new Boy Scout reservation in this location. He said this was a large boat program. The 38-40 foot boats drew 6 ½ to 7 feet at MLW. He said this was not a community pier, but only to be used by the Boy Scouts because of safety concerns. He said there was no opposition in the county as they had worked with the locality during the process of proposing this project. He said from conversations with the county they had wanted the project to be beefed up so they went back to the designer. He utilized the staff’s slide to explain the project site and history of the use of the area.

Joe Ellis, Raddison Design, was present and his comments are a part of the verbatim record. Mr. Ellis explained how the dock would be constructed to protect it from wave action resulting from activity in the area and weather events. He said that he had observed that Hurricane Isabel had damaged more fixed docks than floating docks. He said that they had tried to cooperate and make adjustments when staff brought them to their attention.

Associate Member Garrison asked if there was anyone present in opposition to address the Commission. There were none present.

After much discussion regarding the concerns of staff for the integrity of the floating dock, Associate Member Robins moved to defer the matter until the January hearing so that the applicant and staff could work on the design and location. Associate Member Garrison asked to amend the motion for 30 days or longer. Associate Member Robins did not agree to this amendment and said that 30 days should be enough. The motion carried, 5-1. Associate Member Garrison voted No.

Deferred until the January 24, 2006 meeting.

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13. **COLONIAL PIPELINE COMPANY, #05-2245**, requests authorization for the replacement or repair of petroleum pipeline (Line 27) segments at multiple stream crossings, as needed, in Cumberland, Powhatan, Chesterfield, Charles City, James City Surry and Isle of Wight Counties and the Cities of Richmond, Suffolk and Chesapeake. Both wetlands and subaqueous permits are required.

Randy Owen, Environmental Engineer, Sr., gave the presentation with slides. Mr. Owens explained that Chesterfield, Henrico and Richmond Counties had not yet adopted the Wetlands Ordinance. As such, the Commission was charged with acting as the Wetlands Board in those localities.

Mr. Owen explained that this project involved the inspection and repair of Colonial Pipeline Company's (CPC) existing Line 27, a 16-inch diameter underground pipeline, which traverses a corridor from their Mitchell Junction in western Cumberland County to their Norfolk Delivery Station in Chesapeake. The line had been in existence since the early 1960's.

Mr. Owen said that the proposed pipeline maintenance was required by recent U. S. Department of Transportation (USDOT) regulations. This new regulation required a baseline assessment of the existing line and was initiated with the running of internal line inspection tools commonly referred to as *smart pigs*. All anomalies of the pipeline detected required excavation, inspection and repair, as necessary, of the pipeline according to specific schedules. These repairs, depending on the severity of the anomaly, must be initiated immediately, or within 60 days, 180 days or 1 year from the date of discovery.

Mr. Owen stated that the location and extent of any repairs were not known at this time and would only be identified after the baseline inspection was completed in 2006. The type of repair varied with the severity of the anomaly and on-site conditions. The typical

repair involved the excavation, inspection and/or repair of the anomaly within a 30-foot wide by 60-foot long footprint. In streams with highly erodible substrates, scour protection (rip-rap or concrete revetment matting) was requested. For the larger subtidal crossings, the applicant's agent had confirmed that specific repair methodologies were unknown at the present time and would have to be engineered for site-specific conditions before work could commence.

Mr. Owen said that on September 23, 2005, staff received CPC's Joint Permit Application requesting Commission authorization for the potential repairs. A VMRC permit was required for any repairs undertaken channelward of ordinary high water in non-tidal streams, mean low water for tidal waterways and for tidal wetland impacts in Chesterfield and Henrico Counties and/or the City of Richmond.

Mr. Owen further said that the Commission was acting as the local wetlands board for the three aforementioned localities since they had not adopted the model wetlands ordinance. A public hearing was held in the Chesterfield County Administration's Building on November 10, 2005. There were no public comments for or against the application.

Mr. Owen stated that Line 27 did encroach beneath privately leased oyster ground in the Nansemond River. These leaseholders, however, had not objected to the project.

Mr. Owen explained that the Virginia Department of Game and Inland Fisheries (DGIF), in an email dated October 21, 2005, provided recommendations for each of the 27 stream crossings. Eighteen crossings were identified as confirmed or potential anadromous fish use areas. Accordingly, they recommended a February 15 through June 30 time-of-year restriction for any instream work.

Mr. Owen also explained that the Virginia Institute of Marine Science (VIMS) provided extensive comments in a letter dated November 1, 2005. They recommend that the applicant provide a detailed restoration plan for any tidal wetland areas impacted. The plan should include scaled, geographically referenced drawings and include a monitoring protocol and timeline. A minimum 5-year monitoring effort was recommended for all impacts to tidal freshwater wetlands and for all wetland impact areas, which pose a risk of Phragmites sp. colonization. They agreed with the DGIF recommendation for time-of-year restrictions for anadromous fish.

Mr. Owen said that the Department of Conservation and Recreation (DCR), in their letter dated November 18, 2005, noted that the project crossed the James River and the Chickahominy River in one or more locations. One of the James River crossings is in an area designated as a Virginia Scenic River, while the balance of the crossings serve as potential scenic river designation areas. As such, they recommended that attention be given to the planning and implementation of this project to insure that there were no adverse impacts to the scenic qualities of either river. No other State agencies had objected to the project.

Mr. Owen said that the proposed inspection and maintenance of Line 27 was required by federal regulation as well as by §28.2-1210 of the Code of Virginia. Staff considered the project's approval to be in the Commonwealth's best interest to avoid potential petroleum spills in tidal wetlands and/or State-owned submerged lands. As such, staff recommended approval of the project contingent on the following measures:

- 1) The applicant shall adhere to the Commission's standard instream permit conditions for all non-tidal stream repairs;
- 2) The applicant shall submit a detailed restoration plan for any tidal wetland impact areas necessary in Chesterfield County, Henrico County and/or the City of Richmond. The plan shall include scaled, geographically referenced drawings and include a monitoring protocol and timeline. A minimum 5-year monitoring effort is recommended for all impacts to tidal freshwater wetlands and for all wetland impact areas which pose a risk of Phragmites sp. colonization;
- 3) For crossings 1-4, 7-10, 12-16, 19-21, 24 and 27, the applicant shall adhere to a February 15 through June 30 time-of-year restriction for instream work to protect anadromous fish. This restriction shall not apply for repairs, which must be initiated immediately or within 60 days, as required by federal regulation;
- 4) For any subtidal repairs necessary with crossings 1-3, 5, 7-10, 12, 14, 16 and 19, the applicant shall first submit detailed project drawings, to scale, depicting the location of the anomaly, the type of repair proposed and the construction methodology (i.e., cofferdam type, temporary trestle or barge access, etc.). No work may commence in these areas until a permit modification request is considered and approved by the full Commission.
- 5) No permit for work involving State-owned submerged land shall be issued until all required permits from the local wetlands boards have been obtained.

Commissioner Pruitt returned to the meeting during the presentation.

Associate Member Fox asked why they needed a permit now and they do not just wait until it was deemed necessary. Mr. Owen explained that the applicant wanted to have the permit in hand to react even in emergency situations. Mr. Owen said they did not know how to handle a repair emergency and staff was not comfortable with granting them a blank check. He said this had been discussed with the applicant.

Associate Member Robins suggested that this be left to the Commissioner or staff to approve. Carl Josephson, Senior Assistant Attorney General and VMRC counsel, explained that request for approval of an application for permit must be reviewed and approved by the full Commission when the total project costs were \$50,000 or more.

Rick Whiteside, representing the applicant, was present and his comments are a part of the verbatim record. Mr. Whiteside said that in stipulation #4 they must respond within federal regulatory time restraints in order to not be shut down. He said they needed to be allowed to go to staff with a detailed design in an emergency for final approval, not to the entire Commission. He said they were required to respond in 30 to 60 days by the Federal Government.

Associate Member Robins then moved to approve the staff recommendation with the exception of stipulation no. 4. In the event of an emergency the Commissioner would have the authority to take action. Associate Member Holland seconded the motion. Associate Member Schick asked that the motion include wording that said "could come to the entire Commission". Associate Members Robins and Holland agreed to the amendment of the motion. The motion carried, 6-0.

Permit fee.....\$100.00

- 14. **PUBLIC COMMENTS:** No one from the public in attendance of this hearing asked to make any comments during this time.

- 15. **VIMS:** Presentation of the oyster abundance on Steamer Rock

Rom Lipcius, representative from VIMS gave the presentation and his comments are a part of the verbatim record. Dr. Lipcius explained these efforts were complimentary to Dr. Mann's, Dr. Wesson's and CBF's efforts. He went on to explain his background and experience. He said he has had a long-standing interest in habitat quality. He provided a slide presentation. He explained that the reef structure was 5 square meters of bottom, which was layered on the bottom in the year 2000. He said the reef structure was pulled up in May 2005 and it was noted that 4 settlements had occurred since its placement on the bottom. He said that only 3 of the 5 layers were retrieved and 120 samples were scraped from the structure. He said the holes in the structure provided increased settlement and water flow. He said they looked at the number of mussels as well as oysters, which are also important for filter feeding and cleaning the Bay. He said there were 1,085 oysters per square meter, a high density for oysters, and 9,000 mussels per square meter. He said in the Lynnhaven River where granite was used as an alternative structure material, there were 770 oysters per square meter, still high but not the same as the Rappahannock. He said a large number of mussels also were found at this location. He said that granite was suitable for spat set and had the highest set. He went on to say

that alternate reef habitat materials can be used in compliment to the shell used for restoration purposes.

No action was taken.

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16. Public Hearing: Request to make emergency pound net exemption permanent (Regulation 4 VAC 20-20-10 et seq.)

Rob O'Reilly, Deputy Chief, Fisheries Management, gave the presentation and his comments are a part of the verbatim record. Mr. O'Reilly explained there were actually two evaluations. He said the first was a public hearing to make the emergency action taken at the November meeting a permanent part of the regulation. He said the regulation amendment was to help the pound netters affected by an endangered species rule established by NMFS. He said staff recommended adoption of Regulation 4VAC 20-20-10, Et. seq., Page 2 and 5 (section D) which provided for an exemption, until such time the rule was modified. He said the second request was an emergency regulation to allow for an exemption in order that watermen not lose their pound net stands for failure to set and fish in 2005. He said these were all traditional fishermen. He said this would need to go to public hearing at the next meeting.

The public hearing was opened. No one was present to comment on this first issue (Ed Bender request).

Associate Member Robins moved to make the emergency action a permanent part of the regulation. Associate Member Bowden seconded the motion. The motion carried, 6-0.

On the second issue there were no public comments.

Associate Member Robins moved to approve the emergency regulatory changes by staff. Associate Member Bowden seconded the motion. The motion carried, 6-0.

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17. Public Hearing: Pertaining to requirements for harvesting horseshoe crabs in Virginia (Regulation 4 VAC 20-900-10 et seq.)

Associate Member Robins excused himself from this issue because of business conflicts.

Rob O'Reilly, Deputy Chief, Fisheries Management, gave the presentation and his comments are a part of the verbatim record. Mr. O'Reilly said that staff concurred with

Mr. Rolley's request. He explained that the ASMFC has been asked to look at horseshoe crabs and changes could occur. He said that New Jersey has already put in motion a plan for a moratorium and Delaware may also follow. He explained that there were three requests in Mr. Rolley's letter.

1) Establish a horseshoe crab dredge permit for conch-pot fishermen who prove economic dependence on the conch-pot fishery.

Subsection 4VAC 20-900-30 (E) provides an amendment that would create eligibility for a Horseshoe Crab Endorsement License to those harvesters who have landed at least 10,000 pounds of whelk , in one year, from 2000 through 2005.

2) Establish a daily trip limit of 2,000 horseshoe crabs for the crab dredge licensee.

Subdivision 4VAC 20-900-25 (D2) establishes this 2,000 horseshoe crab possession limit, for those harvesters who qualify for a crab dredge-specific Horseshoe Crab Endorsement License, as described in 4VAC 20-900 (E).

3) Raise the daily by-catch allowance to 500 crabs.

This by-catch allowance is currently 100 horseshoe crabs, as shown in subsection 4VAC 20-900-25 (E). Staff has amended the by-catch amount to 500.

Mr. O'Reilly said that staff recommended the adoption of the three amendments to Regulation 4VAC 20-900-10, Et. seq.

The public hearing was opened.

Pete Bender, fisherman was present and his comments are a part of the verbatim record. Mr. Bender said that there were horseshoe crab endorsement licenses for 4,000 crabs and he objects to any other permits to be issued. He said he had spoken with other licensees, and they felt the same as he did. He said the Commission wants them to totally utilize the quota. He said he had been making his living this way for 6 or 7 years. He suggested that the Commission raise the trip limit to 10,000 horseshoe crabs per trip instead of the 4,000, as it was now. He said this would allow them to catch up more of the quota. He said it would not be fair to give others permits because they cannot do any better as long as they have the limit they do. He said he suggested leaving it alone for another year, and if they do not catch the quota, then issue other permits. He said that before they were put under a limit they could catch 10-15,000 per trip.

The public hearing was closed.

Mr. O'Reilly said that staff was concerned because of actions possibly being taking by New Jersey and Delaware and if ASMFC starting looking at the quotas versus the harvest

for each state. He said Virginia's quota might be affected. He said that a lot of the harvest does not stay in Virginia and this amendment would change that. He explained it would be easier to take action now and have more harvesters.

Associate Member Bowden explained that this year Virginia was under threat. He said only 25% to 66% of the quota was harvested in 12 to 25 trips, for a total of 25,000. He said he understood Mr. Bender's side and this fishery was very important to the Eastern Shore. He said the Commission should consider an increase to 5,000 horseshoe crabs, but not 10,000, which would increase it 2 1/2 times.

Associate Member Bowden moved to accept the staff recommendation with a 5,000 horseshoe crabs per trip limit. Associate Member Holland seconded the motion. Mr. O'Reilly suggested that a trigger amount be added, about 85% of the quota. This suggestion was accepted as a part of the motion. The motion carried, 6-0.

Associate Member Robins returned to the meeting at this point.

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18. Public Hearing: Request to make emergency Winter II scup possession limit permanent (Regulation 4 VAC 20-910-10 et seq.)

Joe Cimino, Fisheries Management Specialist, gave this presentation and his comments are a part of the verbatim record. Mr. Cimino explained that this was a public hearing to make permanent the emergency action taken by the Commission at their November meeting, when the Winter II coastwide possession limit was lowered from 3,500 to 3,000 pounds.

The public hearing was opened. There were no comments from the public.

The public hearing was closed. Commissioner Pruitt asked for a motion.

Associate Member Robins moved to accept the staff recommendation. Associate Member Holland seconded the motion. The motion carried, 5-0.

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19. Public Hearing: Requested revision of requirements associated with transfers of crabbing licenses (Regulation 4 VAC 20-1040-10 et seq.)

Jack Travelstead, Chief, Fisheries Management, gave the presentation and his comments are a part of the verbatim record. Mr. Travelstead explained that, currently, the transfer

of a crab licensee required the sale of the vessel. He said that the industry and staff wished to eliminate that requirement, as the person utilized his vessel for more than just crabbing. He said on Tangier Island this was their primary mode of transportation. He said also that staff could not determine if the actual vessel used for transfer or if it was, that it was not transferred back to the individual at a later date.

Mr. Travelstead said that the Crab Management Advisory Committee had a meeting and even though there was not a quorum, they did discuss it. He said the industry does not see an increased effort resulting in this change and convinced staff that there would not be a high influx of effort. He explained that they suggested putting a cap on the number of transfers in one year. He said when looking back 5 years the average number of transfers was 100. He further said they suggested, that for certain instances, such as health, death, and transfer to family members, the cap would not apply.

Roy Insley, Watermen Association Consultant, was present and his comments are a part of the verbatim record. Mr. Insley explained that he had requested this change on the behalf of the industry. He stated that he supported the staff recommendation. He said he was concerned with the cap of 100 on transfers, because of the average age of the waterman being 53 years old more transfers would be needed than the cap would allow.

Associate Member Robins moved to accept the staff recommendation. Associate Member Bowden seconded the motion. The motion carried, 6-0.

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20. Emergency Regulation: Establishment of 2006 black sea bass directed and by-catch quotas and provisions (Regulation 4 VAC 20-950-10 et seq.)

Joe Cimino, Fisheries Management Specialist, gave the presentation and his comments are a part of the verbatim record. Mr. Cimino said this was the same situation as the Scup and the new quota amounts have been announced for the directed and bycatch fisheries of the black sea bass. He said that the Commission needed to take emergency action to change the regulation, 4VAC 20-950-10, Et. seq.

Associate Member Robins moved to accept the staff recommendation and adopt the emergency regulation, including the advertisement of a public hearing in January. Associate Member Schick seconded the motion. The motion carried, 5-0.

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- 21. Report:** on Mr. James Fletcher's requests to increase the Virginia commercial summer flounder possession limit and 10-day landing period.

Lewis Gillingham, Fisheries Management Specialist, gave the presentation and his comments are a part of the verbatim record. Mr. Gillingham stated that staff had received two letters from Mr. Fletcher requesting modifications in the existing regulation. Specially, Mr. Fletcher asked for a doubling of the possession limit in the directed offshore flounder fishery and a doubling of the landing period, from 10 days to 20 days. Mr. Fletcher also requested vessels be allowed to enter a Virginia port, offload a Virginia possession limit of summer flounder and have additional flounder on board which was intended for North Carolina. Staff recommended that the Commission take no action on this matter at this time.

Associate Member Robins moved to accept the staff recommendation. Associate Member Bowden seconded the motion. The motion carried, 4-0.

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- 22. Report:** on the feasibility of a cownose ray bounty system.

Rob O'Reilly, Deputy Chief, Fisheries Management gave the presentation and his comments are a part of the verbatim record. Mr. O'Reilly explained that this report was the result of the request by Mr. Garrison at last month's meeting. He said this was not a new issue. He said in the August 1979 Report by John Merriner and Joseph Smith they expressed serious concerns for the increase in the number of cownose rays. He said according to the report this same thing happened in 1960 and 1975 and was due to the warming trends of the water. He said that staff met with VIMS personnel who indicated they have had a long history with this issue. He said both VMRC and VIMS staff see a need for a harvesting system, but do not see it as cost effective. He stated that staff did not support taking any action on this now. He said currently VIMS has a grant for this issue and 40,000 pounds have been received to date, and they expect this grant to be extended. He said Bevans Oyster Company was involved and was looking at the marketability of the cownose ray. He said this was a single pup per year species, according to most literature sources.

After some discussion, it was decided that no action be taken at this time.

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25. **Review:** Of FMAC recommendation on management measures for sheepshead; a request for public hearing.

Jack Travelstead, Chief, Fisheries Management gave the presentation and his comments are a part of the verbatim record. Mr. Travelstead explained that a recreational fishery has developed for sheepshead and there was concern that it may be overfished, but there is not enough known about this fishery. He said that Dr. Jones had a 3 year study funded on this species. He said as a precautionary approach the Finfish Management Advisory Committee (FMAC) had suggested some harvest restrictions for the recreational fishery of a 4-fish limit with 1 greater than 33". He said that FMAC did not support any restrictions being placed on the commercial fishery. He explained that the staff was recommending a trigger or decision point of landings an average of the last 2 of 5 years plus 5%. He said they were recommending this measure rather than a quota or cap.

Associate Member Garrison explained that this recommendation of FMAC was passed on a slim margin. He said he would move that no action be taken or no public hearing be held until Dr. Jones' study is finished. Associate Member Bowden seconded the motion. Mr. Bowden stated that FMAC thought there was not a study and it should be taken back to FMAC at their next meeting as they may not support a public hearing. Associate Member Robins said he did not support the motion and that staff had made a good case for taking a precautionary step. Commissioner Pruitt asked when the study would be done. Mr. Travelstead explained that it was a 3-year study with interim reports each year.

Tom Powers was present and his comments are a part of the verbatim record. He explained that FMAC wanted these restrictions coupled with the study.

The motion carried, 6-0.

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26. **Request:** For public hearing on American shad by-catch provisions.

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

Commissioner Pruitt left the meeting, and Associate Member Garrison chaired at this point.

Mr. Travelstead explained that the proposal presented to the ASMFC Shad Management Board was approved for 2006 only and would be reevaluated beyond that year. They approved the following measures:

- 1) 10-fish per vessel per day

Commission Meeting

- 2) limit the bycatch area to the York, Rappahannock, and James Rivers, each, above the first bridges only
- 3) eliminated pound nets, fyke nets, and haul seines from the proposal

Mr. Travelstead said that the Virginia American Shad Restoration Team, consisting of VMRC, VIMS, VDGIF, and USFWS had met and recommended additional measures.

Mr. Travelstead said that staff was asking for a public hearing to be held in January 2006. He asked also that the advertisement include the recommendations of the Restoration Team:

- 1) permit requirement to identify all participants
- 2) call-in provision where watermen call in their catch
- 3) monitoring program to assess the effects of the harvest on the fishery

Associate Member Bowden moved to advertise for a public hearing to be held at the January 2006 meeting. Associate Member Holland seconded the motion. The motion carried, 6-0.

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- 23. Public Hearing:** Request to make emergency allowance of hand scrape harvests of oysters, in Potomac River tributaries to Virginia, permanent (Regulation 4 VAC 20-720-10 et seq.)

Associate Member Garrison continued to chair the meeting.

Dr. James Wesson, Head, Conservation and Replenishment gave the presentation and his comments are a part of the verbatim record. Dr. Wesson said that the Commission at the November 2005 meeting approved an emergency regulation. He explained that staff was opposed to the use of the more efficient gear. He further explained that the salinity lessens the further upriver, 10 – 14 ppt. He said that there is better spawning in 10 – 14 ppt, below 10 ppt there is a drop in spawning. He said that oysters live longer when the salinity is not high and when there is drought there is a better spatset, but at the same time more are affected by disease. He said in order for spawning to be successful there needs to be a male and female in close proximity. When monitoring these areas there may be 1 to 2 spatsets in a 8 to 10 year period. He said it is the same in Maryland. He said the harvest in the Potomac has only been 61 bushels so far this season.

Dr. Wesson explained that when the watermen are limited to hand tonging and it becomes not economical to continue to work in these areas they will leave oysters for broodstock and spawning. He said the more efficient gear used, the more oysters that are harvested. He said that in 2002 hand scrapes were allowed and there has not been a spatset in 2003,

2004, or 2005. He said it was critical that the Commission preserve and protect the oyster resource in these areas.

Dr. Wesson explained that upriver the public and private grounds are intermingled. He said the private leaseholders are concerned that any oysters on their private grounds will be taken when the scrapes get too close and the areas are not marked well.

Dr. Wesson stated that the staff has been working with Westmoreland County to restore the habitat and resource in the Nomini, Lower Machodoc and Yeocomico. They have rebuilt habitat and harvest areas, but there has been no spatset in 2003, 2004 or 2005.

Dr. Wesson said that staff recommended that the emergency regulation be allowed to expire and not made a permanent part of Regulation 4VAC 20-720-10, Et.seq.

Associate Member Garrison opened the public hearing.

Doug Jenkins, Twin River Watermen's Association, was present and his comments are a part of the verbatim record. Mr. Jenkins said that the staff was presenting wrong information and that the facts were better. He said that hand scraping in the lower part of the Potomac River this season has 200 plus bushels. He said in these areas spatset seldom occurs and is dependent on seed being transplanted from the James River and the transplanting of seed is not occurring. He said that all areas need to be opened and the reefs only benefit the private leaseholders. He said the Baylor Grounds were set aside for the public not the private interest. He said that the areas are small and out of 11 parcels only 5 are open to the general public. He said if it was confusing to the Marine Police Officers and staff, it was certainly confusing to the watermen. He said that they were asking that all areas be opened.

Roy Insley, Watermen Association representative, was present and his comments are a part of the verbatim record. Mr. Insley explained that the hand scrapes are 22" across the mouth, very small, 35 to 40 pounds. He said that hand tongs can weigh more and the hand scrapes are not damaging the rocks. He said it is a good cultivation tool to turn the bottom and shell for substrate. He said also that the watermen are an aging group, the average being 53 years old and they cannot continue to use the hand tongs. He said that with the cull law anything under 3 inches must be put back and oysters start to spawn at 2". He said he did not agree with the staff recommendation.

Kent Carr, 4th generation waterman, was present and his comments are a part of the verbatim record. He said that no seed has been transplanted so there are no oysters. He said the price per bushel to the waterman was \$2.00 and it should be \$3.00. He said that the staff has mismanaged the resource and they are not looking out for the waterman. He said because of federal funds, Wreck Shoals is closed to harvest. He said that there needs to be a lot of change. He said the hand scrape helps the resource and this has been the best year in the James River. He said the oysters are single, pretty oysters. He said a wise

decision was needed and the information from the staff was false. He said the federal funds are not being put in the areas where it is needed. He said the Commission needed to do something to benefit the watermen.

Tommy Leggett, Oyster Scientist for Chesapeake Bay Foundation, was present and his comments are a part of the verbatim record. Mr. Leggett said he supported the staff. He explained that the watermen are seeking a put and take fishery. He said the state is not given the money for that purpose and the watermen need to go to the General Assembly. He said he agreed that there is a need for seed in the small tributaries because of the sporadic recruitment.

Robert Jensen, Rappahannock River Preservation Society, was present and his comments are a part of the verbatim record. Mr. Jensen said that the Potomac Tributaries are being mishandled.

Dr. Roger Mann, VIMS representative, was present and his comments are a part of the verbatim record. Dr. Mann explained that allowing a more efficient gear to remove oysters will be more damaging and as the stocks are at a lower density already it will leave it at no density. He said he supported the staff to leave the areas opened to harvesting by hand tonging.

The public hearing was closed.

Associate Member Bowden said he could see both sides. He said the transplanting of seed was necessary as these areas were dependent upon it to keep going. He said he agreed that dredging was acceptable where it was already opened and no additional area should be opened.

Associate Member Garrison announced that the Governor had appropriated \$200,000,000 plus to clean the Bay. He stated that the watermen needed to go to their General Assembly representatives, not by letter or petitions, but in person and ask that some of that money be appropriated for oyster restoration.

Associate Member Fox said that with what was before the Commission at this hearing, he supported the staff.

Associate Member Robins said that the hand scrape takes away the concentration of oysters and to allow the hand scrape was not in the best interest of the industry in the long term.

Associate Member Schick said that depleting the resource was not beneficial in the long run.

Associate Member Garrison stated that more areas were opened right now than there had been in 20 years.

Commissioner Pruitt said he agreed with Doug Jenkins to allow the use of the hand scrape. He stated it would not hurt the resource but would help the watermen.

Associate Member Bowden moved to make the emergency action permanent for the rest of the season. Associate Member Schick seconded the motion. Commissioner Pruitt explained that this was to only apply to those areas already opened to hand tong. Associate Member Robins said that with the level the resource was down, he could not support the motion. The motion carried, 5-1. Associate Member Robins voted, No.

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24. Report: On the Shellfish Committee meeting of November 29, 2005, with a possible request for a public hearing.

Dr. James Wesson, Head, Conservation and Replenishment, gave the presentation and his statements are a part of the verbatim record.

Dr. Wesson explained that the first Shellfish Management Advisory Committee meeting was long and relatively contentious (minutes included) but there were two motions to open additional areas to harvest, which were as follows:

Motion 1. Open approximately one-half of the closed area in the mouth of the Rappahannock River (an area from the Route 3 bridge to a line from Mosquito Bar Light to Sturgeon Bar Light) to hand scraping from January 1 to February 28.

Motion 2. Open an area in the upper James River seed area encompassing the area from the current oyster management area west to a line across the river from the entrance marker for Tyler's Beach to Swash's Island.

Dr. Wesson gave a brief review of key oyster management decisions over the past fifteen years.

Dr. Wesson explained that oyster management and restoration of the public grounds in the state had been guided in recent years by the "Holton" or Blue Ribbon Oyster Plan, which was developed between 1989 and 1992, and was adopted by the Commission in 1992, and by the Chesapeake Bay Program Oyster Management Plans which were signed by the Governor in 1994 and 2002. The most important tenets from all of these plans were 1) incorporating long-term sanctuary areas within and around areas that were harvested, 2) dedicating a significant portion of the oyster replenishment funds to

restoration in these sanctuaries, and 3) conducting an annual quantitative survey of all of the public oyster grounds throughout the Bay to determine the cost benefit and success of restoration efforts and management decisions. Virginia has had a leadership role in all of these efforts and many of our programs have been models for the rest of the Bay.

Dr. Wesson stated that in 1992, when the Commission adopted the Blue Ribbon Oyster Panel recommendations, they also directed staff that all objectives and strategies would be guided by two long-term goals.

“1) The Commonwealth’s resources and oyster fishery shall be so managed as to insure no net loss of existing standing stocks of the native oysters.”

“2) The Commonwealth’s resources and oyster fishery shall be so managed as to achieve a doubling of the existing standing stocks of the native oysters over the next ten years.”

Dr. Wesson said that these guiding principles have been incorporated into staff’s management plans since 1992, and the EPA Bay Program 2000 Agreement, this second goal was raised to a Baywide goal for a 10-fold increase in standing stocks, by the year 2010.

Dr. Wesson said that when the Commission implemented the Blue Ribbon Oyster Plan in 1992, the plan recommended that harvest management play a large role in oyster management. In 1993, a very controversial decision was made to close to harvest all public grounds in Virginia, except for the upper James River and the Seaside of Eastern Shore. There were significant regulatory changes within the upper James River also, including changes in the culling size rules and tolerances, season length, time of day and gear restrictions, and an annual quota on seed and market oyster harvest. On Seaside, there were also significant regulatory changes to protect small oysters. Most of the regulatory changes in these areas remain in place today and are involved in the changes suggested by the Shellfish Committee motion.

Dr. Wesson explained that in the time period since most of the public grounds of the Bay were closed in 1993, more than 100 three-dimensional sanctuary reefs have been constructed and millions of dollars have been expended in oyster restoration efforts in Virginia involving many federal, state, and private partners. During this period as restoration projects were completed, many areas of the Bay were re-opened for harvest. In years of drought, when disease was having the greatest impact on standing stocks, areas had to be closed for recovery, and in years of greater rainfall, the Commission has opened areas opportunistically to take advantage of better survival. These yearly changes in harvest areas are often confusing for the watermen, but they have been based on quantitative stock assessments and generally some modest harvest has been gleaned from the small changes in standing stocks.

Dr. Wesson said that harvesting any oysters at all when the stock assessment results show almost no change and while large sums of Federal, state, and private monies were being expended had in itself been very controversial. Staff had worked closely with industry to incorporate them financially as contractors in as many of the restoration efforts as possible, and had maintained a controversial advocacy for harvesting in many of the Baywide partnerships that had been implemented for oyster restoration. It was extremely important to this advocacy that regulatory changes on harvesting are made based on the best science and that we not lose sight of the overarching goal of “no net loss” for the resource.

Shellfish Management Advisory Committee Motion 1: Open approximately one-half of the closed area in the mouth of the Rappahannock River (an area from the Route 3 bridge to a line from Mosquito Bar Light to Sturgeon Bar Light) to hand scraping from January 1 to February 28.

Dr. Wesson explained that in 1999, some of the Conservation and Replenishment Program oyster restoration efforts were showing potential promise, but efforts were limited by financial constraints to very small river systems. Our sister agency, the Department of Environmental Quality and the Coastal Zone Management Program became interested in the effort, and suggested using their strengths to build a large partnership effort to raise awareness of oysters for their water quality benefits, and to showcase restoration for both economic and ecological benefits in a larger, historical, oyster producing river. The Rappahannock River was chosen, and the Oyster Heritage Program was formed. This program was very successful in raising awareness of the oyster restoration effort and in securing more state, federal and private funds. Federal partners included NOAA with the Coastal Zone Management Program, the Army Corps of Engineers, and the EPA Chesapeake Bay Program. There were also increases in State and private funding. The partnership set a goal to restore 8 to 10, three-dimensional sanctuary reefs, and at least 200 acres of harvest areas. More than \$1.5 million per year were dedicated to this effort for 2000-2002, and the Oyster Heritage Program became a model for even larger oyster restoration partnerships that continue today. The Phase 1 portion of the effort resulted in 9 three-dimensional reefs and more than 300 acres of restored harvest areas.

Dr. Wesson explained also that the intent of the Oyster Heritage Program was to allow all of the restored areas to be left alone with no harvest until significant quantities of large oysters had accumulated on the area. Construction with new shell began in 2000. It generally takes at least 3 years for oysters to attain market size. The watermen requested that a portion of the restored area, west of the Route 3 Bridge on the north side of the river, be opened to hand scrapes in the fall of 2002. After much debate, and against the advice of most of the Program partners, this area was opened. Later that same fall, the watermen requested the south side of the river west of the Route 3 Bridge be opened and after great debate and much concern from the partners, that area was also opened to hand scraping.

Dr. Wesson said that the area above the bridge had remained as a hand scrape area since 2002, and the area below the bridge had remained closed to harvest. Both areas had received similar maintenance with fresh shells each year since 2002. Although the partners were concerned with the premature opening of the area above the bridge, they did acknowledge the value of the dataset comparing harvested areas to unharvested areas. This dataset was the only one of its kind in the Bay. The data showed that harvesting has lowered the density of large oysters, but it appeared to have not affected recruitment. However, that assumed the oyster larvae for recruitment in the harvested area most likely come from the oysters in the closed area below the bridge. All of the partners in the Oyster Heritage Program considered the one-time division of this area at the bridge as the only acceptable compromise, and they were all opposed to any harvesting of the area below the bridge. It was important that this area remained closed, continued to receive similar restoration effort as in the harvested areas, and that it continued to be monitored. There have been 3 years in succession with lower salinities than normal, and it was important to monitor these large oysters through time as salinities return to normal. The number of large oysters within the closed area had declined in 2005, as salinities had increased, but it is important to monitor whether these numbers stabilize or continue to decline. Moreover, these concentrations of oysters were the only large source of broodstock for providing spawning for the areas above the bridge.

Dr. Wesson said that the motion to allow harvest on half of the area below the bridge would remove the large oysters closest to the harvested areas, and would significantly compromise the data that could be collected. Staff and all of the Oyster Heritage Program partners unanimously opposed any harvesting in the areas below the bridge and recommended that this item not be considered in a public hearing.

Shellfish Management Advisory Committee Motion 2: Open an area in the upper James River seed area, which encompasses from the current oyster management area west to a line from the entrance marker to Tyler's Beach over to Swash's Island on the north shore.

Dr. Wesson explained that there had been a significant harvest of market oysters from the lower James River in 2004 and this season. Around 100,000 bushels were harvested in this area in 2004 and there may be that many again in 2005. This was more than Virginia's total public ground harvest for any year since 1990 and it was probably entirely from the natural variation in rainfall, with no help from our restoration efforts. The droughts in 2001 and 2002 resulted in good spatsets throughout the lower James (high spatsets in this area are the norm, not the exception) and the very high rainfall in 2003 and 2004 kept salinities extremely low and reduced the prevalence and intensity of oyster diseases in the area. Normally oysters in the lower James never reach market size in quantities that justify harvest effort, and this area had been a sanctuary with little commercial interest from 1993 to 2003. The VMRC--VIMS stock assessment observed these large oysters in 2003, and staff recommended having a harvest season in this area to capitalize on the opportunity before the oysters died from disease. This area is very

different from the mouth of the Rappahannock because, in this case, there was excellent VIMS research that had described the larval circulation pattern.

Dr. Wesson further explained that oyster larvae were produced by the high densities of oysters that live in the upper James and were transported downriver to the areas where oysters have survived in 2003 – 2005. Significant spatsets occurred in the higher salinity areas in the lower James each year, but they normally died very quickly because the broodstock in the upper James had never developed any natural resistance to diseases. The upper James seedbeds had the highest densities of oysters that still persist in the Chesapeake Bay. These areas are usually always bathed with freshwater events (often even resulting in freshwater die offs in heavy rains), which removed the diseases before there were significant mortalities. These oysters live and reproduce in place, but if they were harvested and moved to other areas in the Bay, where salinities were just slightly elevated, they very quickly succumb to diseases. Private industry had learned through many years of trial and investment that there was almost no return from moving these oysters to any area where salinities were greater than 10-12 ppt (which is near the maximum exposure within the upper James). Since 1992, the Commission seed transplanting efforts from this area had also been monitored, and most had been unsuccessful with an average cost to the State of more than \$100 per bushel of market oysters produced from the seed transfers.

Dr. Wesson said that the low salinities and unusual market harvest from the lower James on both public and private grounds had resulted in a false sense of hope for some, and a disregard for lessons learned by private industry many times in the past. There was great interest now from the watermen in moving seed oysters from the upper James to areas where there was almost no chance of success.

Dr. Wesson stated that the seed rock areas in the upper James were the last natural oysters rocks of their kind in the entire Chesapeake Bay and were a National Treasure—not just a state treasure. Only hand tonging had been allowed on these areas, and although there had likely been a small amount of damage to these rocks over the years, they were almost the same as in maps from 1909 and earlier. These reefs remained 3-dimensional naturally and they have built themselves on mud bases because of the high sediment load in the James River. If dredging were allowed on these seed rocks, sediment would quickly cover them over, and they would be irreversibly damaged for generations.

Dr. Wesson explained that there had not been very good seasons in both the Pocomoke-Tangier Sounds and the Rappahannock River where harvesting of oysters with dredges had been allowed.

Dr. Wesson stated that the staff was very much opposed to opening these areas to hand scraping and recommended that there be no public hearing held on either of these motions.

Commissioner Pruitt explained that Jim's presentation was very accurate as to what had occurred and what had been done. He said that he supported holding a public hearing to benefit the board members as well as the public. He went on to say that there were board members present now who were not present when this all began. Associate Member Garrison said that it would be fine to hold a public debate, but the way the Pocomoke-Tangier had been messed up he doubted it should be opened. Associate Member Bowden said he agreed with holding a public hearing to hear all the facts. Associate Member Schick also agreed that there was a need to talk about this issue.

Associate Member Bowden moved to hold a public hearing on this matter at the January 2006 meeting. Associate Member Schick seconded the motion. Associate Member Fox asked if the public hearing would be about the two issues and would there be discussion about the seed transplant program. Dr. Wesson said that the Program would be discussed at the February meeting. Commissioner Pruitt said that it could be part of the historical discussion next month. The motion carried, 5-1. Associate Member Robins voted No.

Dr. Wesson reminded the Commission that there was a second shellfish meeting on that same day and he needed approval to advertise the procurement process for a project that resulted from that meeting.

Associate Member Holland moved to approve the procurement methods for the project. Associate Member Schick seconded the motion. The motion carried, 6-0.

Dale Taylor was present and his comments are a part of the verbatim record. He said he worked for the state and helped to plant seed in Virginia and in the Potomac River. He said he watched the dredging and the planting operations. He said VIMS uses the dredge to check the oysters and VMRC has used the dredge to harvest seed. He asked why the State used the heavy dredges in the James River and that if it is okay for the state why not the watermen.

APPROVAL OF PROCUREMENT ACTIVITY FOR THE 2006 OYSTER REPLENISHMENT PROGRAM:

General:

Certain aspects of the procurement of seed, shell, and replenishment services differ from the Commonwealth's standard procurement procedures and therefore must be documented and approved by the Commission. The Commission will be exercising this option under Section 28.2-550 of the Code of Virginia.

This section of the Code states that:

The Commission, when it makes a determination in writing that competitive bidding or competitive negotiation is not feasible or fiscally advantageous to the Commonwealth, may authorize other methods of purchasing and contracting for seed oysters, house shells, reef shells, shell bed turning, and other goods and services for oyster ground replenishment which are in the best interest of the Commonwealth and which are fair and impartial to suppliers. It may establish pricing for its award and purchases; use selection methods by lot; and open, close, and revise its purchases according to changing conditions of the natural resources, markets, and sources of supply.

(Copies of the two notices are attached to these minutes.)

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There was no further business, the meeting adjourned at approximately 5:28 p.m. The next meeting will be Tuesday, January 24, 2006.

William A. Pruitt, Commissioner

Katherine Leonard, Recording Secretary

NOTICE

NOTICE OF INTENT TO PURCHASE OYSTER SPAT ATTACHED ON SHELL CULTCH (SPAT ON SHELL) FOR THE 2006 REPLENISHMENT PROGRAM

NOTICE is hereby given that the Virginia Marine Resources Commission (VMRC) intends to contract for the purchase of at least 3,000 bushels of bagged oyster shell with spat attached at a targeted rate of at least 10 spat/shell. These shells with spat attached will be produced, transported, and deployed by the participants onto oyster restoration sites within the Chesapeake Bay:

THE COMMISSION RESERVES THE RIGHT TO MAKE CHANGES IN THE PROGRAM AT ANY TIME.

GENERAL:

At least 600 standard Virginia bushels of clean, aged, oyster or hard clam shell will be loaded into mesh bags at the rate of 2 or 3 bags per bushel and be ready for inspection by VMRC personnel by June 1, 2006.

Selected participants will provide all the labor required to load bagged shells in at least two (2) tanks sufficient in size to hold a minimum of 100 bushels of shells per tank on at least three (3) occasions between June 1, 2006 and September 15, 2006.

According to procedures provided to the setting station by the Virginia Institute of Marine Science (VIMS) and VMRC personnel, tanks with shells will be filled with local bay water and provided with aeration in preparation for setting approximately 7.5 million eyed larvae per tank, per set.

After a 4 to 14 day husbandry period in the tank, oyster shell bags and attached oysters will be transported to sanctuary reefs designated by VMRC personnel, bags broken, and spat on shell deployed.

VMRC personnel will supervise the deployment of all oysters and shells on the receiving areas.

VIMS personnel will provide assistance to participants to optimize remote setting conditions and to standardize production among sites.

Participants will purchase eyed oyster larvae and provide bagged shells to complete at least 3 rounds of setting using two (2) tanks each time. Each tank is to contain at least 100 bushels, for a total of 600 bushels of spat on shell per site during the 2006 season.

The price per bushel of spat on shell will be \$25.00 plus a \$6.17 production fee for the first 600 bushels produced per site. If there are funds available for production of more than 600 bushels, the rate will be \$25.00 per bushel of spat on shell.

Payment to the contractor shall be made after each 200 bushel lot of spat on shell have been deployed and upon receipt of proper documentation by the Conservation and Replenishment Department office. Before any payments can be made a current Tax form (W-9) will have to be completed by the contractor and on file in the Marine Resources Commission Accounting Department.

In order to participate in providing at least 600 bushels of spat on shell for the 2006 season, you must submit in writing information describing the following qualifications for your facility:

- 1) A setting facility located on Virginia's portion of the Bay and tributaries with access to salinity levels adequate for oyster larvae survival and within 5 miles of a VMRC sanctuary reef.
- 2) At least one year's experience in setting eyed oyster larvae on shell at this facility.
- 3) At least 600 bushels of clean, aged oysters or hard clam shells.
- 4) Two tanks large enough to hold 100 bushels of shells within mesh shell bags, all equipment necessary to handle shell bags on land, and all the equipment necessary to transport spat on shell, both locally and throughout Virginia's portion of the Chesapeake Bay.

LOTTERY:

All persons will be ranked based on the description provided. The Virginia Marine Resources Commission is seeking five (5) participants for 2006. Selection of participants will first be based on experience in setting eyed oyster larvae on shells in the Chesapeake Bay. If more than five (5) participants have experience and all other qualifications, a lottery will be held to select the five (5) participants. If less than five (5) persons have experience, that number with experience will be selected and there will be a lottery for the remaining number of participants that meet the remaining qualifications. The lottery will be held on Friday, January 6, 2006 at 1:00 p.m. at the VMRC Conservation and Replenishment Department office that date. The address is: 2600 Washington Avenue, 3rd floor, Newport News, Virginia 23607. The lottery will be open to those individuals who wish to be present during the drawing.

RESPONSE DEADLINE:

Written responses describing your qualifications and interest in providing at least 600 bushels of spat on shell are due to the Conservation and Replenishment Department at the main office no later than 12 Noon, Wednesday, January 4, 2006.

CONTACT PERSON:

James A. Wesson
VMRC - FMD- CRD
2600 Washington Ave., 3rd floor
Newport News, VA 23607

757-247-2121

12/05/05(CRD06 OYSTER SPAT ON SHELL NOTICE)

NOTICE

NOTICE OF INTENT TO PAY A \$200.00 PER MILLION FOR EYED OYSTER LARVAE PRODUCED FOR THE 2006 REPLENISHMENT PROGRAM

NOTICE is hereby given that the Virginia Marine Resources Commission (VMRC) intends to contract to pay \$200.00 per million for up to 270 million hatchery produced eyed oyster larvae. These larvae will be produced and delivered to as many as six (6) spat on shell setting stations around the Chesapeake Bay:

THE COMMISSION RESERVES THE RIGHT TO MAKE CHANGES IN THE PROGRAM AT ANY TIME.

GENERAL:

Oyster broodstock will be provided to the contracted hatcheries by the Virginia Institute of Marine Science (VIMS).

Eyed oyster larvae will be produced and delivered to as many as six (6) spat on shell setting stations between June 1 and September 15, 2006.

Generally, eyed oyster larvae will be delivered in lots of 15 million.

VIMS personnel will provide assistance to participating hatcheries, to optimize setting competency and to standardize production among hatcheries.

VMRC personnel will document the delivery of eyed oyster larvae to the setting stations.

The price per million for eyed oyster larvae delivered to the remote setting station will be \$200.00. Larvae will be delivered in lots of 15 million. Hatchery contractors may supply from one to eighteen lots. Payment to the contractor shall be made after the delivery of the larvae to the setting locations and upon receipt of proper documentation by the Conservation and Replenishment Department office. Before any payments can be made, a current Tax form (W-9) must be completed by the contractor and be on file in the Marine Resources Commission Accounting Department.

Hatcheries interested in providing the eyed oyster larvae should provide, in writing to the Conservation and Replenishment Department the number of lots of 15 million larvae that

they could provide. To participate a hatchery must have a documented history of commercial production of shellfish larvae or seed for the Chesapeake Bay. Hatcheries interested in providing the eyed oyster larvae must provide a written description of their facilities and experience in commercial production of shellfish. If three (3) hatcheries express a desire to participate and are qualified, the total quantity may be divided among those expressing written interest in the project in accordance with their capabilities. A lottery will be held in the event that more than three (3) hatcheries express interest, as only 3 hatcheries can participate.

LOTTERY:

The Virginia Marine Resources Commission intends to contract with up to three (3) hatcheries interested in providing eyed oyster larvae. If more than three (3) hatcheries meet the experience in the production of commercial quantities of eyed oyster larvae, then a lottery will be held on Friday, January 6, 2006 @ 1:00 p.m. at the VMRC Conservation and Replenishment Department office on the 3rd floor. Building address is: VMRC, 2600 Washington Avenue, 3rd floor, Newport News, Virginia. Individuals who wish to be present during the drawing may attend, but attendance is not required.

RESPONSE DEADLINE:

Persons interested in participating in this project should submit their written response to the Conservation and Replenishment Department, at the main office, no later than 12 Noon, Wednesday, January 4, 2006.

CONTACT PERSON:

James A. Wesson
VMRC - FMD- CRD
2600 Washington Ave., 3rd floor
Newport News, VA 23607

757-247-2121

12/05/05(CRD06 EYED OYSTER LARVAE NOTICE)