

## MINUTES

**Commission Meeting****December 18, 2007**

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:

Steven G. Bowman	Commissioner
J. Carter Fox )	
J. T. Holland )	
John R. McConaugha )	Associate Members
F. Wayne McLeskey )	
Richard B. Robins, Jr. )	
Kyle J. Schick )	
J. Edmund Tankard, III )	
Jack Travelstead	Chief Deputy Commissioner
John M. R. Bull	Director-Public Relations
Katherine Leonard	Recording Secretary
Jane McCroskey	Chief, Admin/Finance
Sunita Hines	Bs. Applications Specialist
Rob O'Reilly	Deputy Chief, Fisheries Mgmt.
Joe Grist	Head, Plans and Statistics
Sonya Davis	Fisheries Mgmt. Specialist, Sr.
Joe Cimino	Fisheries Mgmt. Specialist, Sr.
Mike Johnson	Fisheries Mgmt. Specialist
Stephanie Iverson	Fisheries Mgmt. Specialist, Sr.
Laura Lee	Fisheries Mgmt. Specialist
Warner Rhodes	Deputy Chief, Law Enforcement
Amy Dodson	Marine Police Officer
David Drummond	Marine Police Officer
Keith Crandall	Marine Police Officer
Ed Clifton	Marine Police Officer

**Commission Meeting**

**14548  
December 18, 2007**

Bob Grabb  
Tony Watkinson  
Chip Neikirk  
Jeff Madden  
Hank Badger  
Ben Stagg  
Jay Woodward  
Benjamin McGinnis  
Justin Worrell  
Elizabeth Gallup  
Randy Owen  
Danny Bacon  
Bradley Reams  
Paul Rogers

Chief, Habitat Management Div.  
Deputy Chief, Habitat Mgt. Div.  
Environmental Engineer, Sr.  
Environmental Engineer, Sr.  
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Environmental Engineer, Sr.  
Environmental Engineer, Sr.  
Environmental Engineer, Sr.  
Environmental Engineer, Sr.  
Project Compliance Technician  
Surveyor

Virginia Institute of Marine Science (VIMS)

Lyle Varnell  
David O'Brien

Other present included:

J. Poulson	Newman T. Scott, Jr.	Kendall Bradley
Pete Conn	Adam Melita	Kevin DeBois
Lee Rosenberg	Jim Janata	Phil Kummer
Clark Henley	Rebecca Frances	Susan Gaston
Bruce Aitkenhead	W. A. Davis, III	Robert Reid
D. Bacot	J. Emory	Larry Smith
Dan Bacot, Jr.	Chuck Roadley	Tina McCloud
Susan Mitchell	Anita Cook	Jeff Watkins
Les Nara	Danny W. Miller, Jr.	Eva Floyd
Lee Chapman	Julie Bradshaw	Deborah Pinkard
Pat Zima	Dick Zima	Faye Jackson
Gerald Fisher	Charles Williams	Kelly Place
Wayne Webster	H. Scott	Leigh Meruk
J. C. Douglass	Shawn Stickler	Harold Jackson
Tim Hill	Susan Hill	Dan Jordan
Jim Breeden	Vera England	Chris Nolen
Larry Snider	Roger Parks	Douglas F. Jenkins, Sr.
Russell Gaskins	Kent Carr	

and others

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Commissioner Bowman called the meeting to order at approximately 9:39 a.m. Associate Member Bowden was absent and Associate Member McConaugha was late in arriving.

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Associate Member Schick gave the invocation and the pledge of allegiance followed.

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**SPECIAL INTRODUCTIONS AND CONGRATULATIONS:**

Joe Grist, Head of Plans and Statistics, introduced Laura Lee who received her Master’s Degree from North Carolina State University in Fish and Wildlife, followed by a career with the Rhode Island Marine Division and now had joined the VMRC staff in the Plans and Statistics Department.

Susan Mitchell, Director of Exhibits, Concessions and Vendor Sales, State Fair of Virginia representative expressed their thanks to the Virginia Marine Resources Commission for the agency participating in the fair this year. She explained that it had overall been very successful with a record attendance. She gave special thanks to Joe Grist and Ed Clifton for their outstanding efforts and accomplishments on behalf of the Commission and presented the Commission with an Award of Excellence for Outstanding Service in the Commonwealth Technical Building. Commissioner Bowman stated that this was the second year that the Commission had been given this award.

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**APPROVAL OF AGENDA:** Commissioner Bowman asked if there were any changes to the agenda. Bob Grabb, Chief, Habitat Management said that staff did not have any changes to the agenda. Commissioner Bowman stated that there was a request that Item 12, Richard J. Zima be heard before Item 5. Associate Member Robins requested time to discuss the advertisement of a public hearing for a blue crab issue to be heard immediately prior to or after the lunch break because he had to leave early because of a death in the family. When Commissioner Bowman asked the rest of staff, they indicated that there were no changes.

**Commissioner Bowman asked for a motion to approve the agenda. Associate Member Robins moved to approve the agenda, as amended. Associate Member Schick seconded the motion. The motion carried, 7-0. The Chair voted yes.**

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**MINUTES:** Commissioner Bowman asked, if there were no corrections or changes, for a motion to approve the November 27, 2007 meeting minutes. **Associate Member Robins moved to approve the minutes, as presented. Associate Member Holland seconded the motion. The motion carried, 7-0. The Chair voted yes.**

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Associate Member McConaugha arrived to the meeting at approximately 9:45 a.m.

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Commissioner Bowman swore in all VMRC and VIMS staff that would be speaking or presenting testimony during 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, reviewed items 2A and 2H for the Commission. He said that staff was recommending approval of these items. His comments are a part of the verbatim record.

Commissioner Bowman asked for questions of staff. There were none.

Commissioner Bowman opened the public hearing and asked if anyone was present, pro or con to address these items. There were none, therefore, the public hearing was closed.

Commissioner Bowman asked for a motion for Items 2A and 2H. **Associate Member Robins moved to approve these items. Associate Member Schick seconded the motion. The motion carried, 8-0. The Chair voted yes.**

**2A. AQUIA HARBOUR PROPERTY OWNERS ASSOCIATION, #06-0209,** requests authorization to maintenance dredge on an as-needed basis, up to 20,620 cubic yards of State-owned subaqueous material from within new and previously dredged portions of the natural limits of Aquia Creek, for the purposes of maintaining navigable channels of either 30 or 60 feet in width, with two to one side slopes and maximum controlling depths of minus five (-5) or minus six feet (-6) at mean low water respectively, beginning approximately 225 feet downstream of the point where Aquia Drive crosses Aquia Creek, and ending adjacent to a point approximately 350 feet downstream of the intersection of Coal Landing Road and Barge Lane in Stafford County. Recommend the assessment of a royalty in the amount of \$972.00 for the new dredging of 2,160 cubic yards of State-owned subaqueous material at a rate of \$0.45 per cubic yard and a time-of-

year restriction, which would preclude all dredging activities from March 15<sup>th</sup> to June 30<sup>th</sup> to minimize adverse impacts to anadromous fish.

Royalty Fee (dredging 2,160 cu. yds. @ \$0.45/cu.yd.).....	\$ 972.00
Permit Fee.....	\$ 100.00
Total Fees.....	\$1,072.00

**2B. CITY OF NORFOLK, #07-2147**, requests authorization to dredge approximately 1,500 cubic yards of State-owned subaqueous bottom material to create maximum controlling depths of minus four (-4) feet at mean low water, with an additional one-foot overdredge tolerance, within a 50-foot wide channel with 3:1 side slopes along the southernmost 350 feet of Haven Creek adjacent to a public boat ramp in the City of Norfolk.

Permit Fee.....	\$100.00
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**2C. BAE SYSTEMS NORFOLK SHIP REPAIR, #07-2033**, requests authorization to rehabilitate their existing North Wharf by installing a new concrete wharf within the same footprint, with a 37 linear foot section being extended four feet channelward of the existing wharf, adjacent to their ship repair facility situated along the Southern Branch of the Elizabeth River in the City of Norfolk.

Permit Fee.....	\$100.00
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**2D. RIVERHOUSE APARTMENTS, LLC, #07-1614**, requests authorization to install 711 linear feet of riprap revetment at the toe of an existing bulkhead and to replace an existing 10-foot wide marginal wharf with an 8-foot wide by 1,319-foot long, open-pile marginal wharf for pedestrian use and temporary (day use only) dockage, adjacent to their property situated along Haven Creek in the City of Norfolk. Recommend the assessment of a royalty in the amount of \$3,162.30 for the wharf's encroachment over 10,541 square feet of State-owned subaqueous bottom at a rate of \$0.30 per square foot, and the inclusion of a permit condition which precludes the permanent or overnight moorage of vessels at the proposed wharf.

Royalty Fees (encroachment 10,541 sq. ft. @ \$0.30/sq. ft.).....	\$3,162.30
Permit Fee.....	\$ 100.00
Total Fees.....	\$3,262.30

**2E. SUFFOLK DEPARTMENT OF PUBLIC WORKS, #07-2041**, requests authorization to remove and replace the existing Harvest Drive bridge, utilizing a 10-foot by 6-foot re-enforced concrete pipe culvert, to include dredging and widening of Kingsland Swamp up to 90 feet both up and downstream of the

bridge structure, and to place rip rap stabilization along the altered stream bank, within the City of Suffolk.

Permit Fee.....\$100.00

**2F. VIRGINIA NATURAL GAS, #07-1036**, requests authorization to install, by directional drill method, 6,744 linear feet of 24-inch diameter natural gas pipeline below the Elizabeth River in Norfolk. Staff recommends a royalty in the amount of \$20,232.00 for the encroachment under 6,744 linear feet of subaqueous bottom at a rate of \$3.00 per linear foot.

Royalty Fees (encroachment 6,744 lin. ft. @ \$3.00/lin. ft.).....\$20,232.00  
Permit Fee..... \$ 100.00  
Total Fees..... \$20,332.00

**2G. W3 MARINE, #07-2066**, requests authorization to repair, replace, and backfill 410 linear feet of existing bulkhead within the same alignment, adjacent to their ship repair facility situated along the Eastern Branch of the Elizabeth River in the City of Norfolk.

Permit Fee.....\$100.00

**2H. VIRGINIA ELECTRIC AND POWER COMPANY, #07-1739**, requests authorization to install ductwork extending over 5,536 square feet of State-owned subaqueous lands along the James River in conjunction with a proposed power plant upgrade for a wet flue gas desulfurization system at the applicant's Chesterfield Power Station in Chesterfield County. Recommend a royalty of \$11,072.00 for the encroachment over 5,536 square feet of State-owned subaqueous lands at a rate of \$2.00 per square foot.

Royalty Fees (encroachment 5,536 sq. ft. @ \$2.00/sq. ft.).....\$11,072.00  
Permit Fee..... \$ 100.00  
Totals Fees..... \$11,172.00

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**3. CONSENT ITEMS:** (After-the-fact permit applications with monetary civil charges and triple permit fees that have been agreed upon by both staff and the applicant and need final approval from the Commission's board).

**TOWN OF COLONIAL BEACH, #07-2357**, requests after-the-fact authorization to retain its municipal pier that was reconstructed after Tropical Storm Ernesto. The pier is adjacent to Town property situated along the Potomac River in Westmoreland County. The pier was reconstructed in its original configuration but the Town initiated repairs

without the proper authorization. The applicant has agreed to the payment of a \$1,200.00 civil charge and triple permit fees in lieu of further enforcement action.

Bob Grabb, Chief, Habitat Management, gave the presentation and his comments are a part of the verbatim record.

Mr. Grabb explained that the original pier was constructed prior to the Marine Resources Commission obtaining jurisdiction over the Potomac River waters adjacent to the Commonwealth of Virginia in 2005.

Mr. Grabb further explained that the Colonial Beach municipal pier was totally destroyed by Hurricane Isabel in 2003. The Town of Colonial Beach subsequently rebuilt it. That rebuilding did not require any Commission authorization or approval because the pier lies within Maryland and it occurred prior to the Marine Resources Commission obtaining jurisdiction over the nearshore Potomac River waters. In 2006, however, Tropical Storm Ernesto also damaged part of the municipal pier. The Town of Colonial Beach again repaired the damage from Ernesto in 2007. The pier was rebuilt in the same configuration that was present prior to the storm.

Mr. Grabb stated that according to the applicant, the repairs to the pier were accomplished under what they thought was a maintenance and repair authorization which did not require a Marine Resources permit. The Town also did not seek the emergency authorization provided by Governor Kaine's Executive Order (EO 34). The applicant had received numerous permits in the past from the Commission, but those were for various projects involving encroachments over State-owned submerged lands.

Mr. Grabb said that given that the pier was rebuilt in its pre-Tropical Storm Ernesto configuration, staff felt certain the project would have been approved. Staff had received no objections to the project in response to the public interest review, including running a newspaper notice for comment. Staff did, however, consider the degree of non-compliance to be moderate given the town's familiarity with the permitting process. In light of that, staff was recommending that the Commission endorse the Town of Colonial Beach's agreement to pay a civil charge in the amount of \$1,200.00 and triple permit fees of \$300.00 in lieu of any further enforcement action and that a permit be issued to reflect the existing pier configuration.

Associate Member Robins asked if this was only repair and no additional pilings were installed. Mr. Grabb responded yes, this was reconstruction and would have been permitted with the proper application.

**Associate Member Schick stated that in light of the Town's past dealings with Maryland and the no permit necessary situation, he felt the Commission should abate the civil charge. He moved to approve the project and only charge triple fees. Associate Member Robins seconded the motion. The motion carried, 8-0. The**

**Chair voted yes.** Commissioner Bowman stated that he supported the motion as he felt that the town’s actions were not intentional and that in the past they had a good track record.

Permit Fee (a-t-f Triple fees).....\$300.00

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**4. CLOSED MEETING FOR CONSULTATION WITH OR BRIEFING BY COUNSEL. No closed meeting was held.**

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**5. BARRY HELLMAN, #07-1893.** Commission review of the November 14, 2007 decision by the Norfolk Wetlands Board to approve the installation and backfilling of 40 linear feet of replacement bulkhead without compensation for the wetlands lost, at the applicant's property situated along a cove of the North Branch of the Lafayette River in the City of Norfolk.

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

Mr. McGinnis explained that the subject project was located along a man-made cove off the North Branch of the Lafayette River in the City of Norfolk. A deteriorating timber bulkhead with a concrete cap currently existed along the edge of the applicant’s shoreline. The proposed project included the replacement of an existing bulkhead within the same alignment. The backfilling of the higher, replacement bulkhead would result in the filling of vegetated wetlands within the jurisdiction of the Norfolk Wetlands Board.

Mr. McGinnis further explained that Commission review of this case was being undertaken in accordance with the provisions of §28.2-1310 and §28.2-1311 (A2) of the Code of Virginia.

Mr. McGinnis said that the Norfolk Wetlands Board held a public hearing on Mr. Hellman’s application on November 14, 2007. Mr. Hellman was not present at the hearing, but was represented by his agent/contractor, Mr. Chris Flint of Flint Construction Company. City staff provided the Board with a presentation of the proposed project, which included slides, a reading of the project’s VIMS report, and their own staff assessment.

Mr. McGinnis stated that the Virginia Institute of Marine Science (VIMS) Shoreline Permit Application Report, dated November 7, 2007, stated that the impacts from the proposed project had been minimized to the extent possible given the site conditions.



VIMS indicated, however, that as proposed, the project would result in the loss of 10 square feet of vegetated tidal wetlands.

Mr. McGinnis said that although they did not provide a specific recommendation to the Board for either approval or denial, City staff had stated that if the Board were to approve the project and determine that mitigation for the impacted wetlands was necessary, that in their opinion the assessment of an in-lieu mitigation fee would provide a superior benefit over on-site mitigation, which in their opinion would provide little lasting valuable benefit in this case. At the conclusion of the hearing, the Board voted unanimously to approve the project as proposed, but chose not to require compensation in any form for the loss of the 10 square feet of vegetated tidal wetlands. Although the Board stated that compensation would not be required, they did not discuss why they felt wetlands compensation either through replacement or the payment of the appropriate in lieu fee was not warranted in this case.

Mr. McGinnis said that the Commission's Wetlands Mitigation-Compensation Policy (4 VAC 20-390-10 et seq.), encouraged the compensation of all permitted tidal wetland losses. This regulation stated that if Virginia was to meet its Chesapeake 2000 commitment to achieve a no-net loss of tidal wetlands, wetland losses permitted through the tidal wetland regulatory program (administered either by local wetland boards or the Commission) must be replaced, no matter how small. In this case, the Norfolk Wetlands Board approved a project with impacts to tidal wetlands that certainly appeared to have been necessary and unavoidable. However, in staff's opinion, the Board's decision not to require compensation for the loss of vegetated tidal wetlands was not in keeping with the intent of the Commission's Wetlands Mitigation-Compensation Policy, therefore, it appeared the Board erred in its decision by choosing to permit the loss of vegetated wetlands without any compensation for those losses.

Mr. McGinnis stated that although the Board may have considered the permitted loss of 10 square feet of vegetated tidal wetlands to be de minimis, staff believed that the Commission's Wetlands Mitigation-Compensation Policy was clear that all permitted losses must be compensated for. In this case, using the Board's approved in-lieu fee structure at \$12.00 per square foot; the additional cost to the applicant would have been \$120.00.

Mr. McGinnis explained that in light of the foregoing, and in accordance with §28.2-1313 (1) of the Code of Virginia, staff recommended that the Commission remand this matter to the Board for rehearing and that they be directed to require replacement or compensation for the permitted loss of vegetated wetlands, in keeping with the provisions of the Commission's Wetland Mitigation-Compensation Policy.

Associate Member Robins asked if staff's concerns were only regarding the policy issue. Mr. McGinnis responded yes. He said although it was only 10 square feet the Wetlands

Board was bound by the no net loss commitment by the State, no matter what the amount might be.

Kevin DeBois, Wetlands Board staff member, was present and his comments are a part of the verbatim record. Mr. DeBois explained that the Wetland Board's staff provided the board with an evaluation a week prior to the hearing as it was in written form. He said at the hearing the staff tried to be brief, but the board had a clear record for larger projects. He said that staff read the Code into the record. He said further that staff trusts the board in their private deliberations as not everything was said into the record. He said the City of Norfolk was the leader in its adoption of the living shoreline policies and the City always supported mitigation in the larger projects.

Commissioner Bowman asked if this was a late hearing. Mr. DeBois stated no, staff was trained to be brief and more detailed where necessary. Commissioner Bowman asked if mitigation was brought up and discussed. Mr. DeBois responded yes, that staff did recommend mitigation, which staff made the board aware of, so the motion was amended.

Associate Member Robins asked if the staff used a standard for filtering out projects below a certain threshold. Mr. DeBois stated that the Wetlands Board considered mitigation in all cases, but they had never had such a small impact before come up. He said at the site visit two or three saltbushes were seen. He said the applicant was concerned that it had to be heard by the Wetlands Board, because there were no wetlands of primary ecological benefit.

Associate Member Fox stated that the record shows that wetlands were present. He said he was impressed by staff that they mentioned the presence of wetlands and the need for mitigation. He said these comments resulted in the motion being amended. He said because of the "no net loss" of wetlands policy there should have been some type of mitigation. He stated that the Norfolk board did have a wonderful record and spent a lot of time in fulfilling its duties.

Adam Malita, Assistant City Attorney for Norfolk, was present and his comments are a part of the verbatim record. Mr. Malita stated that considering the record as a whole he would not recommend the matter be remanded. He said the Commission needed to decide at this hearing if every square foot of wetlands was to be mitigated. He said that in several Sections of the Code and in the Guidelines it did not require that all square footage be compensated. He said there were phrases such as, if compensation is required...if appropriate...or where appropriate; it is always qualified, not mandatory. He said all other references allowed for discretion by the board. He said he believed that appropriate consideration and discussion was done by the Wetlands Board on this matter.

Commissioner Bowman said that the Commission was caught in between and the arguments were rational, but if they did have this discretion, where do you start saying no and where was the threshold. He went on to say the Commission liked mitigation in all

cases. He stated that he agreed that the Wetlands Board's past record was outstanding. He asked if the Commission was ready to take action.

**Associate Member McLeskey moved to uphold the Wetland Board's decision. Associate Member Holland seconded the motion. Associate Member Robins stated that he appreciated staff bringing this to their attention and based on the testimony he felt the Wetlands Board was committed to the policy and he supported the motion. Associate Member Schick stated that "no net loss" was the cornerstone for the policy. He further stated that anyone with waterfront property was responsible for protecting the wetlands and to compensate for its loss. He said the policy needed to be clarified and it was staff's responsibility to bring these matters to the Commission. Associate Member Tankard expressed his thanks to the staff. He said the Bay was almost dead and help was needed to make the Bay healthy. He said the wetlands needed to be protected. The motion carried, 6-2. Associate Members Tankard and Fox both voted no. The Chair voted yes.**

No applicable fees, Wetlands Board Review

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12. **RICHARD J. ZIMA, #07-2051**, requests authorization to remove an existing pier and construct a new private, noncommercial, open-pile pier extending 250 feet channelward of mean high water with an 18-foot by 38-foot open-sided boathouse near the channelward end of the pier and to install a piling to support an osprey nesting platform approximately 75 feet channelward of the new pier adjacent to his property situated along the North River at 7835 Berkshire Lane in Gloucester County. The project is protested by an adjoining property owner.

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

Mr. Neikirk explained that Mr. Zima's property was located along the western side of the North River between Elmington and Toddsbury Creeks in Gloucester County. The shoreline was generally low and development in the vicinity was primarily residential.

Mr. Neikirk explained further that Mr. Zima proposed to remove a deteriorated pier and to construct a new pier extending 250 feet channelward of mean high water with an 18-foot by 38-foot open-sided boathouse located near the channelward end. He also proposed to install a single piling to support an osprey nesting platform located 75 feet channelward of the proposed boathouse. According to the application, the channelward end of the pier would reach a mean low water depth of approximately minus six (-6) feet. Some pilings from an old steamboat wharf were located channelward of the proposed boathouse.

Mr. Neikirk said that the project was protested by the downstream adjoining property owners, Adrian and Arthur Hohler. The Hohlers were brothers who both currently live outside the United States. They were concerned that the pier and boathouse might adversely affect the view from their property. The proposed boathouse would encroach on oyster planting ground leased by the other adjoining property owner, Ms. Lorraine J. Ingles. She was notified of the project and had indicated that she had no objection to it.

Mr. Neikirk stated that staff did not believe the proposed pier and boathouse, nor the pole for the osprey nesting platform, would adversely affect navigation. In fact, these proposed structures appeared to be all located landward of the old steamboat wharf pilings. Since the pier was for private, non-commercial use, it did not appear to represent a hazard to navigation, and did not exceed the specified size restrictions, staff believed it qualified for the statutory exemption for private piers contained in §28.2-1203(A)(5) of the Virginia Code. Additionally, since Gloucester County did not restrict the construction of private boathouses, had the adjacent property owner not objected to the project, the boathouse would have qualified for the exemption for open-sided boathouses contained in the same Code section. Staff believed, the proposed open-sided design should minimize the visual impacts associated with the structure and there did not appear to be any objection to the proposed osprey nesting platform. Accordingly, after evaluating the merits of the project against the concerns expressed by those in opposition to the project, and after considering all of the factors contained in §28.2-1205(A) of the Code of Virginia, staff recommended approval of the project, as proposed.

Commissioner Bowman asked if the applicant was present.

Richard J. Zima, the applicant, was sworn in and his comments are a part of the verbatim record. Mr. Zima stated that he was only replacing the footprint and it runs out from his property, not veering off, as the protestants' objections stated. He said the protestants were living full-time in Europe.

Jeff Watkins with Riverworks and agent for the applicant, was present and his comments are a part of the verbatim record. Mr. Watkins stated he had no additional comments to add, but would answer any questions. There were no questions.

Commissioner Bowman asked for a motion.

**Associate Member Holland moved to approve the project. Associate Member Robins seconded the motion. The motion carried, 8-0. The Chair voted yes.**

Permit Fee.....\$25.00

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**Commission Meeting**

6. **SHORE LAND INVESTMENTS, LLC**, (Willie A. Davis III, Manager, and Newman Thomas Scott Jr.), Notice of Violation #07-25. Hearing concerning violations of Chapter 12, Subtitle III of Title 28.2 of the Code of Virginia, more specifically, the unauthorized dredging and filling of two small un-named tidal creek tributaries of Underhill Creek adjacent to the "Port Scarborough" subdivision in Accomack County. Continued from the November 27, 2007 Commission meeting.

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

Mr. Badger explained this was a hearing concerning violations of Chapter 12, Subtitle III of Title 28.2 of the Code of Virginia, more specifically, the unauthorized dredging and filling of two small un-named tidal creek tributaries of Underhill Creek adjacent to the "Port Scarborough" subdivision in Accomack County. This was continued from the November 27, 2007 Commission meeting.

Mr. Badger stated that this issue came to light after Habitat staff was notified by a nearby property owner that a workboat was creating a channel to a pier at the headwaters of a small tidal tributary to Underhill Creek. Habitat staff flew over the project on June 18, 2007, and observed and photographed two areas that had been illegally dredged. The dredged material appeared to have been moved by the boat's prop and was distributed or cast to either side of the created channels.

Mr. Badger said that the photographs and the location of the unauthorized dredging and filling of State-owned, subaqueous bottom were passed on to VMRC Law Enforcement staff for action. Officer David Drummond investigated the complaint and charged Mr. Newman Scott, Jr., the operator of the work boat, and Mr. Willie Davis, III., the manager for Shore Land Investments, LLC with violating §28.2-1203 of the Code of Virginia (Unlawful Use of Subaqueous Beds), which was a Class 1 Misdemeanor. The two cases were subsequently heard in Accomack County General District Court on October 3, 2007. Mr. Scott and Mr. Davis both pled guilty (nolo contendere) and were found guilty as charged. Each was fined \$250.00 plus court costs.

Mr. Badger noted that on October 23, 2007, staff issued a Sworn Complaint and a Notice of Violation for the unauthorized dredging and filling of two small un-named tidal creeks, tributaries of Underhill Creek, adjacent to the "Port Scarborough" subdivision in Accomack County. Staff did not believe it was appropriate to afford Mr. Scott or Mr. Davis the opportunity to submit after-the-fact applications, in light of the fact that this type of activity would most likely not have been approved by VMRC.

Mr. Badger stated that the VMRC survey staff visited the site by boat on October 30, 2007, at the approximate time of low water, to further document the current conditions of the disturbances. The survey staff found two channels approximately 600 feet long by 20

feet wide, each with depths of between -1.4 feet to -2.9 feet at mean low water. The dredged material had been displaced in a manner similar to that observed in side-casting and appeared to have covered a swath of State-owned bottom up to thirty-feet in width in some areas. Therefore, the total area impacted from both the dredging and filling was approximately 72,000 square feet or 1.65 acres. The total volume that was dredged without a permit was estimated to be approximately 1,714 cubic yards.

Mr. Badger explained that projects completed without a permit or constructed in a manner other than that authorized by a VMRC permit were illegal and could be subject to prosecution, both criminally (§28.2-1203) and civilly (§28.2-1212 and §28.2-1213). In lieu of seeking civil penalties, the Commission could also consider civil charges in amounts not to exceed \$10,000 for each violation. In the event that the Commission and the applicant could not agree on a civil charge, the case would be forwarded to the State Attorney General's Office with a request that they seek the appropriate civil penalties. Maximum penalties may reach up to \$25,000 for each day of violation upon such finding by the appropriate Circuit Court. According to the Attorney General's office, this was not a case of double jeopardy.

Mr. Badger further explained that Mr. Davis was the manager for Shore Land Investments, LLC and Mr. Scott either works for or was under contract to, Shore Land Investments, LLC. Shore Land Investments, LLC appeared to be owned by MLC Real Estate 2002, LLC. MLC was based out of Brookfield, Wisconsin and owned the property. "Port Scarborough" had 10 private lots for sale along a 33-acre peninsula. Lot sizes range from 1.1 to 11.9 acres with lot prices listed from \$369,000 to \$599,000.

Mr. Badger said that the VMRC survey showed that lots 1, 2, 3, 8, 9 and 10 had very limited water access before the channels were created (less than 0.4 of a foot at approximate mean low water). After the unauthorized dredging of the two channels, these lots now had access to approximate 2 feet of water at low tide. In other words, the illegal dredging would appear to have greatly increased the accessibility, and therefore the value of the six (6) waterfront lots.

Mr. Badger stated that the Accomack County Wetlands Board was advised of the violation. They did not, however, take jurisdiction, since the dredging violations were predominantly channelward of mean low water and therefore outside of their jurisdiction. Although areas of intertidal mudflat (i.e. non-vegetated tidal wetlands) were created as a result of the illegal activity, they arose from State-owned bottomland.

Mr. Badger said that the Virginia Institute of Marine Science (VIMS) indicated that the activity had resulted in significant impacts to wetland resources. The method of dredging used most certainly resulted in increased turbidity and suspended sediment loads well over traditional methods. In addition the side-casting of material was contrary to what would be recommended for any dredging project and had resulted in increased secondary impacts from the unpermitted activity. It was also reasonable to assume, given the

relatively undeveloped nature of the surrounding riparian areas and the presence of vegetated wetlands along the shoreline, that the dredging activity had disrupted a fairly diverse and productive mud flat and shallow water habitat. While the recovery time for organisms likely present in this productive community was unknown at this time, it might easily take years to recover. VIMS further stated that the narrow width of the waterway suggested that the dredging footprint may have exceeded the 4x buffer that was normally recommended for any dredging project to protect adjacent vegetated wetlands. Given the opportunity VIMS would have recommended against the dredging of wetlands to create navigational depths and it was unlikely that they would have recommended dredging in this area regardless of the method.

Mr. Badger said that the Department of Environmental Quality and the Corps of Engineers were both notified of the violation and they were proceeding independently.

Mr. Badger explained that the adverse impacts to the subtidal tributaries of Underhill Creek caused by the prop dredging were considerable. In the Subaqueous Guidelines, the overboard disposal of dredged material into tidal waters was generally not permitted and the sidelaying of dredged material would only be authorized under exceptional circumstances. As stated by VIMS, the method of dredging used most certainly resulted in increased turbidity and suspended sediment loads over traditional methods. Had staff had the opportunity to evaluate the project, it would never have recommended approval of this dredging methodology.

Mr. Badger stated that Mr. Davis and Shore Land Investments, LLC, had in the past 3 years applied for and received private pier permits from VMRC for Lots 1, 7 and 10. They also applied for, and received a permit from VMRC (#05-0368), to hydraulically dredge an entrance channel adjacent to their Corbin Hall subdivision along Chincoteague Bay in 2005. Therefore, staff did not believe that they could reasonably assume that the amount of disturbance to these environmentally sensitive areas would not have required additional authorizations from the same agencies that they had worked with in the past.

Mr. Badger said that unfortunately, staff believed that any attempt to restore the non-vegetated subaqueous lands and associated mudflats to their original contours would only result in even more disturbance. Over time, if left to fill in naturally, the areas should slowly recover and return to near pre-disturbance elevations. In this case, staff believed it was appropriate to view this case as constituting at least four (4) to six (6) separate violations. This would include the unauthorized dredging in two separate cove areas and the adjacent filling along both sides of the two dredge cuts. As such, if a civil charge were deemed applicable, considering the major degree of non-compliance and the significant environmental impact, civil charges of \$40,000 to \$60,000 would seem to be appropriate in lieu of any further enforcement action, especially considering the potential increase in value the lots had now accrued as a result of the illegal dredging. Should this not be deemed a sufficient economic penalty, staff would recommend this matter be referred to the Office of the Attorney General to seek civil penalties of up to \$25,000 per day for the

separate violations. The dredging itself appeared to have occurred over a 2-week period although the violation and impacts continue. Staff would also recommend that the Commission clearly state its intent to allow these impacted areas to return to their pre-dredged contours and elevations prior to your entertaining any new application to dredge, or maintenance dredge them in the future.

After further discussion and clarification questions of staff, Commissioner Bowman asked Officer David Drummond to come forward and testify.

David Drummond, Marine Police Officer, Law Enforcement, was sworn in and his testimony is a part of the verbatim record. Officer Drummond was asked to give specific details of the case. He said that he had received the complaint from Mr. Badger during the last week of June. He said according to Mr. Scott no exact date could be determined. He said Mr. Scott told him that he did this dredging about 4 to 5 days per week as it varied because of the tides. He said he was told that Mr. Davis and Mr. Scott were both interested in buying a larger boat and it was determined that they would keep them at the Davis' dock. He stated that the vessel named "Beverly Joy" was used to do the dredging. He said that he did testify at court and both Davis and Scott pled guilty.

Associate Member Tankard asked the officer how much time he had spent on the case. Officer Drummond responded about one week, 25 to 30 hours.

Commissioner Bowman asked the applicants' representative to come forward and introduced him to the Board.

John Paulson, Attorney, representing Shore Land Investments, LLC and Newman Scott, Jr. was present and his comments are a part of the verbatim record. Mr. Paulson explained that he was here looking for a reasonable compromise or resolution. He stated that this was an important issue and the facts needed to be put on the record. He explained that Shore Land had done a lot for Accomack County. He said all of the piers had been done in the correct way, which is the way they normally do things, with all being permitted; and, they only made the piers 50 feet long, no longer than was necessary. He said that the staff reports the facts differently and there were unsupported assumptions. He said from their perspective, it was not true that there was a hired boat. He said the intent was to gain water access where no lots existed with a consequence of accessibility. He said staff said six violations and this was legal fiction, not practical. He stated there were only two violations realistically. He explained that staff said this area did not have any water depth and at the Moore's dock there was historically 2 feet of water at MLW and it was always accessible by outboard. He said at the other dock it was 1 to 1-1/2' at MLW and its been that way according to the owner. He said the docks were put in from the water with a pontoon. He referenced the Virginia Tidal and Coastal Law, Section 18.5, Public Right to Navigation and stated that the State cannot impact this right. He referred to Sections 62.1-190 to 62.1-193, which gave the right to dredge sand and gravel on State bottom. He said when looking at Section 28.2-1203 regarding



encroachment on State bottom, can this be considered? He said it was the Eastern Shore way, to take a boat and dredge the bottom and no dredge gear or any other gear was used. He said they were concerned that what they did was somewhat illegal, but the only intent was to get access to the docks, nothing sinister had been done. He said the Commonwealths Attorney did not consider this a grievous crime and they do have the right to get to their dock and there was no increase in the value of the lot. He said again there was already a 2-foot channel there.

Mr. Paulson explained that the best lot's highest offer had been \$300,000.00, not what staff had indicated. He provided seven photos for the Commission to review, which he said were illustrative of the situation and were taken by Mr. Scott and Mr. Davis. He said Mr. Bradley a real estate appraiser would also speak to the effect on the lots.

Kendall Bradley, was sworn in and his comments are a part of the verbatim record. Mr. Bradley explained that his analysis put the value of the lots in the range of \$200,000.00 to \$450,000.00, lot number six being the prime lot, but a buyer would actually set the value based on their offer. He said that dredging does enhance the value, but there was already access and the dredging only changed the degree of access. He said he felt there was minimal impact.

Mr. Paulson asked Mr. Chuck Roadley to come forward.

Chuck Roadley with the Williamsburg Environmental Group was sworn in and his comments are a part of the verbatim record. Mr. Roadley stated that he was asked to make a site visit. He said he did not necessarily disagree with staff. He said the impacts were both temporary and long term. He stated he could not gauge what it was like in the area, but when a 17-foot outboard goes out on the river it still hits bottom as the area was still shallow. He said what Mr. Scott does not understand was why what had been done was wrong. Associate Member Fox asked for an estimate of time for the area to recover. Mr. Roadley responded anywhere from 6 weeks to 2 years, as it was vegetation, not bottom and the farms had created the sedimentation. Associate Member Tankard asked if Mr. Scott was trying to provide access. Mr. Roadley stated he only wanted to gain access to the pier.

No one was in opposition.

Mr. Paulson in his rebuttal stated that the Commission needed to look at the actual facts. He said there was already a channel up to the Parker's house at least and based on what was done, they only wanted access to the dock and the creek was shallow all over. He said they did not believe there was a violation because they were only trying to get access to the dock. He said they had come to the hearing to resolve this matter reasonably. He said they would even agree to replant the vegetation and also relocate the boat or sell it, so the boat would no longer go up the creek.

There was further discussion and questions between the board and the attorney and defendants regarding the dredging and how many days the violation occurred.

Commissioner Bowman stated that there was a lot of justification for what was done as it was a different situation on the Eastern Shore, but this case was of concern because the Code in Section 28.2-1203 says it shall be unlawful to do what was done upon or over the bottom as it was property of the Commonwealth, unless it was done with a permit. He said this was now a significant violation, which should be compensated with appropriate fines. He said the Commonwealths Attorney made determinations for criminal cases and the Commission's determinations were different. He asked what action the board wanted to take in this matter.

Associate Member Schick explained that this was different from a vessel hitting the bottom when a boat was taken where it was known it would not be able to access. He said that the LLC was disturbing state-owned bottom and it was not repairable. He said if this was allowed a precedent would be set for other developers of lots and would be continued. He said the penalties did not nearly cover the damages, not even the expenses for VMRC to enforce this law. He said the dredging of the area would have cost \$100,000.00 and would make a significant impact to the lots.

**Associate Member Tankard moved to assess a fine for a violation over a two week period for \$200,000.00. Associate Member Fox seconded the motion.**

Associate Member Robins said that after listening to staff and the attorney's statements he felt that saying this was not deliberate was false and that staff's recommendation was low and did not even cover the cost of doing business. He said it was appropriate to go higher than what staff recommended and he supported the motion.

Commissioner Bowman reminded the Board that they should consider what fines had been levied on other cases and he agreed that this was one of the worst, but the Commission needed to be consistent.

**In a substitute motion, Associate Member Holland moved to assess a \$100,000.00 fine. Associate Member Robins seconded the motion. Associate Member Robins asked for clarification for who was involved in the assessment. Commissioner Bowman stated that it was against Shore Land Investments, LLC. Associate Member Fox asked that the replacement of vegetation be included as their attorney had said they would agree to do the replanting. Associate Members Holland and Robins both agreed.**

**Commissioner Bowman asked for a roll call vote:**

**McConaugha AYE**

**Fox NO**

**McLeskey AYE**

**Robins AYE**

<b>Schick</b>	<b>NO</b>	<b>Tankard</b>	<b>NO</b>
<b>Holland</b>	<b>AYE</b>	<b>Chair</b>	<b>AYE</b>

**The substitute motion carried, 5-3. Associate Members Fox, Schick, and Tankard all voted no. The Chair voted yes.**

Civil Charge.....\$100,000.00

\* \* \* \* \*

7. **YORK RIVER YACHT HAVEN ASSOCIATES, #07-2052**, requests authorization to construct a 125-foot by 300-foot multilevel dry stack boat storage facility designed to accommodate 137 boats at their marina facility situated along Sarah Creek in Gloucester County. They also propose to construct 1,050 linear feet of replacement bulkhead, replace an open-pile pier and boathouse with reconfigured floating piers, install a 75-foot long fuel pier, and to dredge 257 cubic yards of subaqueous material to create a 20-foot wide channel with a maximum depth of minus seven (-7) feet to provide access into the facility. The project is protested by a nearby property owner.

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

Mr. Neikirk explained that the York River Yacht Haven Marina was located near the mouth of Sarah Creek, a tributary of the York River in Gloucester County. York River Yacht Haven was a full service marina with 305 boat slips. They proposed to construct a 125-foot by 300-foot automated dry-stack boat storage facility designed to accommodate 137 boats. To facilitate the construction of the building, they proposed to construct 1,050 linear feet of replacement bulkhead within two (2) feet of a deteriorated bulkhead, replace approximately 330 linear feet of open-pile pier with floating pier containing the same number of boat slips, install a 75-foot long fuel pier, and dredge 257 cubic yards of subaqueous material to create a 20-foot wide channel with a maximum depth of minus seven (-7) feet to provide access into the dry storage building. They also proposed to remove a 325-foot by 32-foot enclosed boathouse and replace the boathouse with a floating pier and uncovered boatslips.

Mr. Neikirk further explained that the proposed boat storage facility would not use the typical forklifts to launch and retrieve the vessels. Instead, boats would enter the building through a dredged canal and a computer controlled laser-guided overhead crane would remove the boat and transport it to an assigned location in the three-level rack. The facility was designed to handle vessels up to 36 feet in length and weighing up to 36,000 pounds.

Mr. Neikirk stated that the project was protested by a nearby property owner. The protestant was concerned with the potential environmental impacts associated with adding

additional boats in Sarah Creek. He posed several questions concerning the potential environmental impacts but added that he would have no objection provided the plans do not adversely impact water quality in the creek.

Mr. Neikirk said that during the Gloucester County Wetlands Board hearing on this application, Mr. Dan Bacot, owner of the marina, presented a list of Best Management Practices (BMPs) they intended to incorporate into the new facility. The BMPs included capturing the rainwater from the roof of the building to be used as wash-down water and for watering vegetation, utilizing a closed system for boat wash-down with waste water being recycled and eventually disposed of through HRSD, the dredged canal in the facility would be sloped for enhanced flushing, and they would be adding additional pumpout and bathroom facilities. Mr. Bacot also explained that the boats kept in the dry-storage building would not need to be painted with anti-fouling paint. The Board approved the portions of the project within their jurisdiction during their October 10, 2007 hearing and accepted the applicant's proposal to compensate for the filled wetlands by creating an on-site wetland compensation area.

Mr. Niekirk noted that in their report dated October 5, 2007, VIMS recommended that the construction of the replacement bulkhead should be as close to the existing bulkhead as possible, that the dredged canal should be sloped to improve flushing, and that BMPs should be employed to minimize runoff from the building, parking areas, and the wash-down operation. These recommendations appeared to have been incorporated into the plans. VIMS also concluded that there were no practical alternatives to lessen the direct impacts associated with the building footprint and approach canal.

Mr. Neikirk said that the Department of Conservation and Recreation did not anticipate that the project would adversely affect any of their programs although their Chesapeake Bay Local Assistance Division noted that the applicability of the Chesapeake Bay Act was regulated by the local government. The Department of Game and Inland Fisheries noted that the York River was an Anadromous Fish Use Area and recommended a time-of-year restriction between February 15 and June 30, as well as, adherence to instream BMPs during construction. No other State agencies had commented on the proposal.

Mr. Neikirk explained that while the proposed facility would increase the potential number of boats utilizing the marina and Sarah Creek, the number of wet slips at the marina would actually decrease. There were also environmental benefits associated with storing boats in a dry stack storage facility rather than in the water. Some of these benefits included: the elimination of the need to apply toxic anti-fouling paint, reduction in incidental spills of petroleum products and a reduction of bilge water discharges. The marina was also proposing to incorporate a number of BMPs to further reduce the impacts associated with the dry stack storage operation itself. Therefore, although there would be an increase in the number of vessels stored at the marina, staff was of the opinion that if the facility was operated as proposed, there should be only a minimal increase or potentially a net decrease in environment impacts associated with the facility.

Accordingly, Mr. Neikirk stated that after evaluating the merits of the project against the concerns expressed by those in opposition to the project, and after considering all of the factors contained in §28.2-1205(A) of the Code of Virginia, staff recommended approval of the project.

After some discussion and questions between staff and the Board members clarifying some portions of the operation, Commissioner Bowman asked if the protestants were present? Mr. Neikirk stated that there was only one protestant as others had withdrawn their objection.

Commissioner Bowman asked the applicant to come forward.

Dan Bacot, applicant, was sworn and his comments are a part of the verbatim record. Mr. Bacot stated that he was very excited about this project because of the high technology that was being utilized to minimize impacts to the environment as well as those living nearby. He said there was full fire suppression system to react if a fire should happen until the fire department responded to their call.

**Commissioner Bowman asked the board for a motion. Associate Member Holland moved to accept the staff recommendation. Associate Member McLeskey seconded the motion. The motion carried, 8-0. The Chair voted yes.**

Permit Fee.....\$100.00

\* \* \* \* \*

Bob Grabb, Chief, Habitat Management, requested on behalf of the protestant who had another meeting to attend later in the day, for Item 8 to be heard before lunch.

Commissioner Bowman stated that Associate Member Robins had one item he wanted to discuss prior to lunch also, as he had to leave early because of a death in his family. He said after that the staff would be asked to just read the staff recommendation into the record for Item 8, Dameron Properties, LLC.

**BLUE CRAB FISHERY: Request for public hearing at the January 22, 2008 Commission meeting by Associate Member Robins.**

Associate Member Robins requested the following:

That the Commission advertise for a public hearing at its January meeting to establish a control date of December 17, 2007, to serve as a basis for future development of blue crab regulations by the Commission. By establishing the control date, the Commission reserves the right to use landings and effort data collected under the Commission's Mandatory Reporting System, either received or postmarked on or before

December 17, 2007, as a basis for the development of regulations in any or all of Virginia's blue crab fisheries in order to strengthen the existing Blue Crab Management Plan. The Commission also reserves the right to consider any range of qualifying periods up to December 17, 2007 in the development of additional Blue Crab fisheries regulations.

His comments are a part of the verbatim record.

**After some further discussion, Associate Member Robins moved to advertise for a public hearing at the January Commission meeting. Associate Member Tankard seconded the motion. The motion carried, 8-0. The Chair voted yes.**

\* \* \* \* \*

- 8. DAMERON PROPERTIES LLC, #07-1592**, requests authorization to construct 130 linear feet of timber replacement bulkhead, install two (2) 20-foot by 10-foot floating piers, install a 2-inch PVC raw water intake line, 15 new free-standing mooring piles, and deploy 500 2-foot by 3-foot floating mesh bags associated with a proposed commercial oyster hatchery and grow-out facility on Carter Cove at the end of Rt. 222 in Weems, Lancaster County. The project is protested by an adjacent property owner.

Jay Woodward, Environmental Engineer, Sr., gave the presentation. His comments are a part of the verbatim record.

Mr. Woodward explained that the proposed project was located at a former oyster processing facility and staff believes the site is suitable for the planned aquaculture activities. The impacts from the replacement bulkhead, the floating docks, the mooring piles and the seasonal raw water intake line should be minimal. The floating grow-out bags would have a minor impact on the view from the adjacent upland, provided they were located entirely over the Edmonds/Woodson lease, secured and maintained properly, and are removed when not in use. As a result, staff believed the resulting encroachment is a reasonable use of State waters and bottom. A similar project was permitted at the mouth of Sara Creek (VMRC #02-2264, York River Yacht Haven) in 2003, with a number of special conditions. If approved, staff recommended similar conditions be incorporated into this permit.

Specifically, those conditions were that:

- 1) The permit and authorization to retain the aquaculture structures shall be valid for a period of five (5) years. After five (5) years, the Permittee may request the Commission re-evaluate the project and authorize the activity for an additional period of time.

- 2) The Permittee shall be subject to an annual reporting requirement on total production.
- 3) The public shall not be excluded from any areas not physically occupied by the authorized structures.
- 4) The Permittee shall maintain all structures and shall remove all structures upon their falling into a state of disrepair or upon cessation of their use as aquaculture structures.
- 5) The intake pipe shall be fitted with a 1 millimeter screen and the intake velocity shall not exceed 0.25 feet per second (fps).

Mr. Woodward further explained that in addition, staff recommended an annual royalty be assessed for the encroachment of the 2-foot by 3-foot floats a rate of \$0.005 per square foot for the area occupied, and a one-time royalty in the amount of \$780.00 for the filling of 260 square feet of State-owned subaqueous bottom associated with the replacement bulkhead at a rate of \$3.00 per square foot, given the commercial nature of the project, and \$360.00 for the encroachment over 240 square feet of State bottom associated with the floating piers at a rate of \$1.50 per square foot.

Commissioner Bowman asked if the applicant was present. Mr. Woodward responded, yes.

Chip Woodson, applicant was sworn in and his comments are a part of the verbatim record. Commissioner Bowman asked Mr. Woodson if he accepted the staff's recommendations. Mr. Woodson said he did.

James Breeden, Attorney for the Protestant, Anita Cook, was present and his comments are a part of the verbatim record. Mr. Breeden said he thought the earlier case on the Eastern Shore was very interesting until he remembered he needed to be in court at 2 p.m. He said that staff had been very helpful and they did not object to oysters being grown. He stated they did not object to the staff recommendation because it addressed all of their concerns.

Commissioner Bowman asked for a motion.

**Associate Member Robins moved to accept the staff recommendations. Associate Member Holland seconded the motion. The motion carried, 8-0. The Chair voted yes.**

Royalty Fees (Filling 260 sq. ft. @ \$3.00/sq. ft.).....	\$ 780.00
Royalty Fees (encroachment 240 sq. ft. @ \$1.50/sq. ft.).....	\$ 360.00
Permit Fee.....	\$ 100.00
Total Fees.....	\$1,240.00

\* \* \* \* \*

- 15. DECEMBER PARTNERS CONVEYANCE.** Commission consideration of the appropriate terms, conditions and just compensation for the conveyance of 32,631 square feet (0.749 acres) of previously filled State-owned subaqueous lands in Norfolk as authorized by Chapter 884, Acts of Assembly 2007.

Associate Member McLeskey stated that he would abstain from this matter because of a conflict.

Bob Grabb, Chief, Habitat Management, gave the presentation with slides. His comments are a part of the verbatim record.

Mr. Grabb explained that during the 2007 legislative session, the General Assembly authorized, and the Governor approved, the conveyance of certain previously filled subaqueous lands along the Elizabeth River in Norfolk, to December Partners LLC. Subject conveyance was to be "... upon such terms and conditions and the payment of an amount commensurate with the property interest being conveyed ...". The purpose of this hearing was to set and approve the terms, conditions and compensation amounts for that conveyance.

Mr. Grabb further explained that in the absence of specific direction from the General Assembly, the Commission in the past had normally recommended approval of the conveyances for a fee tied to the square footage of State-owned public trust land being conveyed. That fee was usually based on the prevailing royalty the Commission was assessing for newly filled land.

Mr. Grabb stated that the most recent example of this was the legislature's approval in 2006 (Ch 201 Acts 2006) of the conveyance of 1.2 acres (52,272 sq ft) of filled land comprising a causeway and island in the Rappahannock River (Butylo Wharf) to Mr. Jerry W. Ferguson. That conveyance was based upon such terms and conditions as the Commission, with the approval of the Governor, deemed proper. Subsequently, the Commission, at its meeting on July 25, 2006, approved the conveyance to Mr. Ferguson for a fee of \$143,748.00 at a rate of \$2.75/ sq ft.

Mr. Grabb said that during the last General Assembly session, however, Governor Kaine recommended, and the legislature approved, specific guidance on how to determine the amount of compensation due for the property interest being conveyed. That formula was given as an amount equivalent to 25% of the assessed value of the parcel, exclusive of any buildings or other improvements. Furthermore, the assessed value was established as the average of the local real estate tax assessments for the most recent ten years available for the specified parcel. If no such assessments were available, then the assessed value was calculated as the percentage, by square footage or acreage that the specified parcel represented of the larger parcel for which an assessment was available.



Mr. Grabb explained that the Governor and Legislature also provided the Commission with the ability to accept something less than 25% when unique circumstances existed. Any such determination to accept something less, however, must be justified in writing. The property described in the Act of Assembly and being conveyed to December Partners LLC, was formed by two parcels (2 and 3) which were taxed separately. There were currently no improvements on the property. The average assessment for parcel 2 over the last ten years was \$75,966.00, and 25% of that was \$18,331.50. The average assessment for parcel 3 over the last ten years was \$62,570.00. The previously filled area, however, represented only 82.68% of the larger parcel for which the assessments were available. Therefore, the assessment for the previously filled lands was 82.68% of \$62,570.00, or \$51,732.88, and 25% of that was \$12,933.22. The total then for the property interest being conveyed in the 32,631 square feet of previously filled lands contained in parcels 2 and 3, using the formula provided by the General Assembly, equaled \$31,924.72.

Mr. Grabb said that the Counsel for December Partners LLC would present what he believed were unique circumstances that warranted a credit for his clients in the amount of \$23,233.53, as permitted under §3 in the Act of Assembly. This credit would result in a compensation rate that was far below the 25% provided for in §2 of the Act. Their counsel would be asking the Commission to approve the conveyance for the total amount of \$8,691.19, which equaled or represented that valuation calculation minus his requested credit.

Mr. Grabb stated that once the Commission had determined the basic terms, conditions and amount of compensation to be paid, December Partners LLC and the Office of the Attorney General would work to prepare the appropriate documentation to reflect those items and affect the conveyance.

Associate Member Fox asked if the property taxes were paid. Mr. Grabb stated that Mr. Nolen representing the December Partners, LLC, would be able to answer that question. Associate Member Fox asked about the conveyance to Mr. Ferguson and if it was prior to the General Assembly action. Mr. Grabb stated that it was done prior to the General Assembly action and there was a difference in the size of the conveyance and the amount paid as it was done according to the Law and procedures used at that time.

Associate Member Robins asked how staff viewed the “unique circumstances” resulting from the General Assembly action. Mr. Grabb stated that the General Assembly can only convey the filled area, which will play a part in future conveyances. He explained that local assessments and any royalty paid earlier could be used as part of the payment and an argument could be made about the right to fill and the Public Trust being conveyed. Part of the attorney for the December Partners’ rationale addressed the real estate assessment, but the locality cannot assess taxes on State-owned bottom or property. He stated that staff recommended the 25% provided by the General Assembly be used in this instance.

Commissioner Bowman asked staff to convert the area into acreage. Mr. Grabb stated it would be one acre.

Commissioner Bowman asked the attorney to come forward.

Chris Nolen, representing John and Lisa Walker, was present and his comments are a part of the verbatim record. Mr. Nolen stated that they did not disagree with the calculations, but were asking for some credit to reduce the 25%. He said this was the first case since the General Assembly took this action and others like this would follow. He said the property was filled prior to 1960 and there was no clear title as it was State-owned bottom under the fill. He said it would cost the State to remove the fill so the General Assembly set up a process to deal with these cases. He explained that the General Assembly could not come up with a true value and the 25% was an arbitrary number picked by them. He said they were requesting credit for the taxes paid by the Walkers since 1993, which would be 14 years and equaled \$23,233.53. He said this had been a windfall for the State and the fill could not be removed for this amount. He stated this was the best way to calculate the credit, as the State owned this bottom, but the public had benefitted by the taxes paid. He said they were asking for a credit in the amount of \$23,233.53.

Associate Member Fox asked if a tax deduction was taken. Mr. Nolen stated he did not know. Associate Member Fox stated that it could be reduced by the tax deduction.

Associate Member Schick asked if they were asking to subtract this from the full value or the 25%. Associate Member Fox stated that it had already been deducted by 75%, so there had already been a credit. Mr. Nolen explained that he did not know what the General Assembly had taken into consideration to decide on the 25%. He said it was a policy decision.

**After further discussion, Associate Member Fox stated that he trusted that the General Assembly considered taxes paid when they went from 100% to 25%. He said the decision was the role of the Commission and the General Assembly had given the Commission the guidelines. He moved to accept the conveyance of the area at the amount of \$31,924.72. Associate Member Robins seconded the motion. He said he felt the General Assembly had considered the taxes paid. The motion carried, 7-0-1. Associate Member McLeskey abstained. The Chair voted yes.**

Conveyance Fees (0.749 acres).....\$31,924.72

\* \* \* \* \*

The Commission adjourned for lunch at approximately 12:40 p.m. The meeting was reconvened at approximately 1:15 p.m. Associate Member Robins left the meeting for the remainder of the day when the Commission adjourned for lunch.

\* \* \* \* \*

9. **TIM AND SUSAN HILL, #07-1230**, request authorization to retain twenty (20) 2-foot by 4-foot oyster aquaculture floats, a 10-foot by 12-foot floating work platform, and three (3) pilings that were installed without prior authorization and request authorization to deploy ten (10) additional 2-foot by 4-foot aquaculture floats and twenty (20) 2-foot by 8-foot aquaculture floats and to convert an existing pier to commercial use and establish a 34-foot by 25-foot area adjacent to the pier as a temporary storage and work area adjacent to his property situated along Pepper Creek at 350 Pepper Cove Way in Mathews County. The project is protested by several nearby property owners.

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

Mr. Neikirk explained that Mr. and Mrs. Hill's property included a point of land located near the head of Pepper Creek, a tributary of the Mobjack Bay near New Point Comfort in Mathews County. Mr. and Mrs. Hill submitted an oyster planting ground application this past January seeking an assignment of approximately three acres of oyster planting ground adjacent to their property. During a site visit conducted by VMRC Engineering and Surveying Department, they noted that the Hills had deployed numerous aquaculture floats and had apparently installed three new pilings and a floating pier in the waters near their property. Staff subsequently sent them a letter on May 2, 2007 directing removal of the unauthorized structures or submittal of an after-the-fact application seeking authorization to retain the structures by June 1, 2007. Staff received their after-the-fact application on May 23, 2007.

Mr. Neikirk stated that they were seeking after-the-fact authorization to retain twenty (20) two-foot by four-foot oyster aquaculture floats, a 10-foot by 12-foot floating pier used to access the floats, and three (3) free-standing pilings used to secure the floats and the floating pier. They were also seeking authorization to deploy ten (10) additional two-foot by four-foot aquaculture floats, twenty (20) four-foot by eight-foot floats and to establish a 34-foot by 25-foot area adjacent to the pier as a temporary storage and work area for the aquaculture operation. Finally, since the pier would be used to support the growing of oysters for commercial sale, staff informed the Hills that they would have to seek authorization to change the designation of their pier from noncommercial to commercial use.

Mr. Neikirk said that the project was protested by several nearby residents. They were concerned that the floats and operation would detract from the existing natural setting and that the floats would interfere with navigation and other uses of the creek. Several also expressed a concern over the proposed change in the classification of the pier from noncommercial to commercial.

Mr. Neikirk explained that in a letter to staff, the Hills explained that they had approximately 40,000 market sized oysters in the existing floats. They stated that they were primarily interested in growing the oysters to help the water quality of Pepper Creek and to provide themselves and their friends with some oysters. They added that they did not intend to attempt to expand beyond what was currently being applied for. When staff met with the Hill's they stated that they would like to be able to sell some of the oysters so that they could recoup some of the costs.

Mr. Neikirk stated that in their report dated November 12, 2007, VIMS noted that shellfish were an important component of the Chesapeake Bay ecosystem and that the adverse impacts associated with the project were expected to be minimal. Neither the Department of Conservation and Recreation nor the Department of Game and Inland Fisheries anticipated that the project would adversely affect any of their programs. The Department of Environmental Quality expected the water quality impacts would be minimal and stated that a Virginia Water Protection Permit would not be required. The Health Department stated that the project was in compliance with their Sanitary Regulations for Marinas and Boat Moorings. No other State agencies commented on the proposal.

Mr. Neikirk said that the County of Mathews did not require a wetlands permit since the activity was located channelward of their jurisdiction. Additionally, they stated that a zoning permit would not be required however they had determined that a building permit would be required for the pier portion of the project.

Mr. Neikirk noted that the project would only encroach on oyster planting ground leased by the applicants. There would be no encroachment on any public or other privately leased ground.

Mr. Neikirk said that given the proximity of the project to the applicants' shoreline, staff did not believe the project would adversely affect navigation.

Mr. Neikirk explained that aquaculture was still a relatively new use of public waters and concerns regarding potential conflicts would inevitably arise, as the industry grew. As with other structures and facilities authorized by the Commission, the structures associated with shellfish aquaculture certainly had the potential to interfere with other more traditional uses of the Commonwealth's water resources. On the other hand, staff recognized the numerous potential economic and environmental benefits associated with commercial shellfish production. The proper siting of such structures was therefore crucial, to minimize those impacts.

Mr. Neikirk further explained that the Hill's proposed operation was quite small for a commercial venture. This fact supported their statement that the activity was being undertaken more as a hobby and for environmental reasons than as a full-scale commercial venture. Although the Hills stated that they had approximately 40,000

market oysters in the existing floats, staff estimated that all of the existing and proposed floats could contain about 70,000 oysters (approximately 140 bushels of market sized oysters). The existing and proposed floats were located near the head of the creek and close to shore; away from the typical boating traffic in the creek, so impacts on other uses of the waterway should be minimized. Nevertheless, this was a new type of activity and unforeseen impacts and conflicts might arise. Accordingly, staff was reluctant to recommend approval of a permit that would authorize the structures to remain in perpetuity. Staff believed a review after five years would give the Commission an opportunity to reexamine the project and reevaluate any unforeseen impacts that may have resulted.

Accordingly, Mr. Neikirk said that staff recommended approval of the project with the following conditions:

- The permit and authorization to retain the structures shall be valid for a period of five years. After five years, the Permittee may request the Commission re-evaluate the project and seek authorization to continue the activity for an additional period of time.
- The public shall not be excluded from any areas not physically occupied by the authorized structures.
- The Permittee shall properly maintain all structures and markers and shall remove all structures within five (5) days upon their falling into a state of disrepair or upon cessation of their use as aquaculture structures.
- The structures must be marked and located in accordance with all applicable U.S. Coast Guard requirements.
- The fixed and floating piers shall not be used to support any commercial activity that is not directly related to maintaining and harvesting the shellfish contained in the authorized floats or from the Permittees' leased oyster ground.
- Should unforeseen conflicts arise, the Commission may elect to hold an additional public hearing at which time they may elect to revoke the permit and direct removal of any or all of the authorized floats.

Mr. Neikirk said given the after-the-fact nature of the request, staff also recommended the assessment of a triple permit fee and triple royalties for the aquaculture floats and floating pier that were installed without prior Commission authorization, as provided for by §28.2-1206(D) of the Code of Virginia. For the floats, staff recommended a one-time royalty be assessed at a rate of \$0.05 per square foot for the encroachment of the new floats over State-owned submerged land and at a rate of \$0.15 per square foot for the floats installed

prior to receiving Commission authorization. The royalty shall be based upon the area occupied by the floats (including the work area adjacent to the pier), not the physical dimensions of the individual enclosures. The Commission had typically assessed an annual royalty of \$0.005 per square foot for aquaculture activities, but given the small size of the area and the minimal royalty staff did not believe the annual royalty would be appropriate due to administrative costs that would result. Regarding the piers, staff recommended a one-time royalty be assessed at a rate of \$1.50 per square foot for the encroachment of the fixed pier over State-owned submerged land associated with its conversion to commercial use. For the floating pier that was installed without Commission authorization, staff recommended the royalty be assessed at the triple rate of \$4.50 per square foot.

Mr. Neikirk stated that should the Commission decide to condition their approval on the applicant's agreement to pay an appropriate civil charge in lieu of further enforcement action, staff would recommend the assessment be based on a minimal degree of environmental impact and a minimal degree of deviation or non-compliance.

Commissioner Bowman asked if the applicants were present.

Susan Hill, applicant, was sworn in and her comments are a part of the verbatim record. Ms. Hill read her statement into the record. She said that they were helping the ecology and it was economically feasible with no impacts to the neighbors. She explained there were other floats in the area of the creek and she was shocked at the protests, hopefully from not being informed. She said they apologized for not following the proper procedures.

Commissioner Bowman explained that Ms. Hill could have time to rebut after the others had commented. He asked if anyone was present in protest to the project.

Eva Floyd, protestant, was sworn in and her comments are a part of the verbatim record. Ms. Floyd provided pictures to the board of her property and the project site. She said the picture showed how the pier was in disrepair. She stated they only told her they would be selling oysters. She explained that they had added to the pier and put in additional poles without a permit. She said this was a small creek and there was a lot of activity in the summer including crabbers working in the area. She stated that this project would interfere with navigation. She said the applicants were there only on the weekends, not permanent residents. She said there was already other leases in the area which cluttered up the creek. She said this project would block access to their pier and make it difficult to get to the channel. She stressed that approval of a permit would only allow them to get away with a violation. She said the County told her they had to wait for VMRC to take action.

Associate Member Schick asked if the lease ground was marked with stakes. Mr. Neikirk said the stakes mark the corners of the lease.

Lee Chapman, protestant and resident of Pepper Creek, was sworn in and his comments are a part of the verbatim record. Mr. Chapman stated he was representing his family and his neighbor Jim Farinholt as well as all property owners on the one side of the creek. He said they were all in opposition. He said they were not notified of this project and only found out through the newspaper notice. He said they were opposed to the conversion of the pier to commercial and the work area. Commissioner Bowman asked him to point out his property on the slide. He did his as well as his neighbor, Mr. Farinholt.

Gene Going, protestant, was sworn in and his comments are a part of the verbatim record. Mr. Going explained that his daughter's residence was between the operation proposed and Mr. Chapman. He said he had watched as it had been developed, from being just one pole to what now exists. He stated his daughter was concerned with the impacts on the beauty and all were concerned about it being commercial. He stated also he felt he had to right to speak of their concerns.

Danny Mills, protestant, was sworn in and his comments are a part of the verbatim record. Mr. Mills stated that they do not object to it if it was only for personal use and there was not a lot of water to put cages. He stated also that he agreed with the others.

Tim Hill, applicant, was sworn in and his comments are a part of the verbatim record. Mr. Hill in his rebuttal stated they were here at their property for four or five days a week and would eventually become full-time. He said their partner was a full-time resident now. He said that Hurricane Isabel had damaged the pier and it was not in the channel or obstructing others. He said that they carefully laid out the lease ground with the surveyor. He said half of the floats were on their property and there was no building at the end of the pier where they worked with the oysters.

Commissioner Bowman asked how they operated.

Dan Jordan, partner to the Hills, was sworn in and his comments are a part of the verbatim record. Mr. Jordan explained that they worked them every three months utilizing a hoist, ½ ton pickup with a crane, and a 14-foot skiff boat. Commissioner Bowman asked where the oysters were taken and how many. Mr. Jordan explained that they did it 2 times a year to maintain them.

Mr. Hill explained that they worked them in the spring and fall, because of concerns of the higher temperatures in the summer and contamination.

Associate Member Tankard asked them to show him the property on a slide, which Mr. Jordan did, who also said that approval of the proposal would limit the project while using the containers on the bottom to conform and he would prefer to use floats.

Commissioner Bowman asked what action the Board wanted to take on this matter.

Associate Member Tankard said that he was a proponent of aquaculture and it was the future of the industry. He moved to adopt the staff recommendation. Associate Member Holland seconded the motion. Associate Member Schick stated that he was a business owner himself and changing to commercial did cause concerns, but this was the responsibility of the Hills to clear up the credibility issue. He said this would be reviewed in five years and any continued concerns could be addressed then. Commissioner Bowman asked about the fees. Associate Member Tankard stated that since it was after-the-fact there was to be triple royalty and permit fees. Associate Member Holland agreed. Commissioner Bowman stated that change always causes concern and aquaculture was something new. He said that the VMRC would be responsible and regulation so it did not inhibit others. He said if problems arose, the permit could be revoked. The motion carried, 7-0.

Royalty Fees (encroachment 360 sq. ft. @ \$1.50/sq. ft.).....	\$ 540.00
(a-t-f)(encroachment 120 sq. ft. @ \$4.50/sq. ft.)...	\$ 540.00
(encroachment 670 sq. ft. @ \$0.05/sq. ft.).....	\$ 33.50
(encroachment 1,350 sq. ft. @ \$0.05/sq. ft.).....	\$ 67.50
(a-t-f)(encroachment 300 sq. ft. @ \$0.15/sq. ft.)...	\$ 45.00
Permit Fee (a-t-f).....	\$ 75.00
Totals Fees.....	\$1,301.00

\* \* \* \* \*

**10. HAMPTON DEPARTMENT OF PUBLIC WORKS, #07-1853**, requests authorization to mechanically dredge 4,388 cubic yards of material to restore maximum depths of minus four (-4) feet below mean low water adjacent to City property situated along Cooper’s Creek and the Southwest Branch of the Back River in Hampton. The project is protested by several nearby property owners.

Elizabeth Gallop, Environmental Engineer, Sr., gave the presentation with slides. Her comments are a part of the verbatim record.

Ms. Gallop explained that the project site was located on Cooper’s Creek and the Southwest Branch of Back River at Gosnold’s Hope Park across from Langley Air Force Base in Hampton. This section of the shoreline along the Back River was primarily residential.

Ms. Gallop said that the applicant proposed to mechanically dredge 4,388 cubic yards of sediment to restore maximum depths of -4 feet below mean low water. The channel was originally dredged in 1984 under VMRC Permit #84-1669. Since then no maintenance dredging had occurred. A 2006 hydrographic survey of the area indicated that existing depths were inadequate for boaters to use the ramp at low tide. Dredged material would be offloaded and transported by truck to an adjacent upland location at a soccer field near the boat ramp for containment. Effluent would be discharged back into Cooper’s Creek



using a pump-out line from the containment area to the boat ramp area with a silt bag installed at the end of the line.

Ms. Gallop stated that staff had received five letters of protest from nearby property owners. The protestants were concerned that the City of Hampton was not continuing the dredging past the boat ramp into the man-made portion of Cooper's Creek and that the application did not address erosion along the banks of Cooper's Creek.

Ms Gallop noted that this project did not require a permit from the Hampton Wetlands Board given that no dredging was proposed in the Board's jurisdiction and the government exemption in the Code.

Ms. Gallop explained that the VIMS Shoreline Stabilization Report indicated that dredging re-suspended bottom sediments in the water column and they recommended a time-of-year restriction from July through September to lessen adverse impacts during the oyster spawning season.

Ms. Gallop said that while staff was sensitive to the concerns of the applicants, dredging the man-made portion of Cooper's Creek was out of the Commission's jurisdiction. Staff also had encouraged the City of Hampton to consider addressing the erosion along the banks of Cooper's Creek. Accordingly after evaluating the merits of the project against the concerns expressed by those in opposition to the project, and after considering all of the factors contained in §28.2-1205(A) of the Code of Virginia, staff recommended approval of the project along with the VIMS recommended time-of-year restriction from July through September for shellfish spawning.

Following some clarification questions for staff, Commissioner Bowman asked the representative for the City of Hampton to come forward.

Pete Conn, Kimley Horn and Associates, was present and his comments are a part of the verbatim record. Mr. Conn explained that this was maintenance dredging within the footprint in order to conform to the original channel. He said that every effort had been made to avoid any impacts to intertidal wetlands.

Jeff Flemming, City of Hampton representative, was present and his comments are a part of the verbatim record. Mr. Flemming explained that there was a private stream upriver that was not the responsibility of the City and they would only dredge where it was public property. He said they were addressing the erosion problem as a Capitol project and that was not a part of this proposal. He stated they understood that there was State money available to work on this problem and they were looking into seeking some of that funding.

Commissioner Bowman asked if there was anyone in opposition who wished to speak.

Larry Snider, resident near the ramp for 21 years, was present and his comments are a part of the verbatim record. Mr. Snider stated that he wished to commend the City for the project, but did object to the scope of the project. He said if the funds were available he would like to see the cart put before the horse. He said he supports the dredging, but he suggested getting the bank stabilized first, as there were trees along the shore being undermined by boating traffic. He suggested holding off the dredging, until the funds were available to stabilize the shore. He stated that Recreational Fishing Advisory Board funds might pay for this work to be done.

Associate Member Fox asked about whether the area had “no wake” signs. Mr. Snider said that there was a lot of jetskiing in the area and the sign was at the mouth where the area joins with Back River. He showed this on a slide.

Commissioner Bowman explained that this needed to be done before the end of the summer and the maintenance dredging and erosion were separate projects.

He asked the Board what action they wanted to take in this matter.

**Associate Member Holland moved to accept the staff recommendation. Associate Member McLeskey seconded the motion. The motion carried, 6-0. Associate Member Schick was out of the meeting at this time.**

Permit Fee.....\$100.00

\* \* \* \* \*

- 11. **STEVEN BLAND, #06-2484**, requests authorization to construct a 700-foot long by 5-foot wide private, noncommercial, open-pile pier crossing a tidal marsh and small unnamed tidal creek within the marsh and then extending 265 feet channelward of mean high water adjacent to his property situated along La Grange Creek at 183 Shell Court in Middlesex County. The project is protested by several nearby property owners.

Associate Member Schick returned to the meeting.

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

Mr. Neikirk explained that Mr. Bland’s property was located along LaGrange Creek in the Cedar Point Subdivision on Kilmer’s Point in Middlesex County. The property included an extensive marsh area with a small meandering tidal creek. The marsh was separated from LaGrange Creek by a narrow sandy beach.

Mr. Neikirk said that Mr. Bland proposed to construct a 5-foot wide open-pile private, non-commercial pier across approximately 700 linear feet of the marsh and then extending 285 additional feet channelward of mean high water into LaGrange Creek. The construction of a private, non-commercial, open-pile pier was typically statutorily authorized under §28.2-1203(A)(5) of the Code of Virginia provided the structure met certain size restrictions and was deemed not to be a navigational hazard. In this case, since the pier must cross the small tidal creek within the marsh, staff determined that the portion of the pier crossing the creek must be considered a bridge and that a permit would be required for that aspect of the project.

Mr. Neikirk stated that the project was protested by several nearby residents. They were primarily concerned that the pier crossed the beach area over which they believed they had an ownership interest, easement or other right to access, as owners in the adjacent Remlik Hall Subdivision and the Kilmers Point Property Owners Association. Mr. Gerald E. Fisher, President of the Kilmers Point Citizens Association, and some of the other Protestants presented surveys and documents in support of the claim that they had an ownership interest or at least a right to access the beach area. Mr. Bland also provided the Commission with documents and written arguments that supported his claim that he owned the beach area in question.

Mr. Neikirk explained that staff had consulted with Mr. Carl Josephson, Senior Assistant Attorney General, and asked for his view on the ownership question and his thoughts on how the Commission should proceed. Mr. Josephson reviewed the documents provided to staff, but he was unable to make a clear determination concerning the various rights either party might have concerning the beach area in question. He said those rights would ultimately have to be determined through appropriate litigation. With regard to processing the application, he questioned whether the Commission needed to address the ownership question, since the only portion of the project requiring a VMRC permit was the small bridge crossing of the tidal marsh creek. The crossing of the tidal marsh area did not fall within the jurisdiction of the Commission and the construction of the private, non-commercial, open-pile pier appeared to be statutorily authorized under §28.2-1203(A)(5) of the Code of Virginia. Neither the Commission's permit for the bridge crossing nor a "no permit necessary letter" for the pier extending into LaGrange Creek, would grant Mr. Bland any property rights he did not already hold. Additionally, neither of these documents would grant him any authorization to encroach on any other property rights, including riparian rights, held by others.

Mr. Neikirk stated that no State agencies had commented on the proposal.

Mr. Neikirk explained that the project would encroach on oyster planting ground leased by Shores and Ruark Seafood Company. They were notified of the application and had expressed no opposition to it.

Mr. Neikirk explained further that staff did not believe the pier would adversely affect navigation within LaGrange Creek.

Mr. Neikirk stated that staff believed the Commission's jurisdiction concerning this proposal was limited to the bridge crossing of the small tidal creek. The remainder of the marsh crossing was landward of the Commission's jurisdiction and the construction of the pier extending from the beach area appeared to be statutorily authorized under §28.2-1203(A)(5) of the Code of Virginia. The Commission was not charged with settling property disputes and could not apportion riparian rights associated with a parcel. These matters would need to be determined by the appropriate court.

Accordingly, Mr. Neikirk said that staff recommended approval of the bridge crossing and recommended further that the Commission find that the remainder of the project did not require a permit from this agency. Staff also recommended that the permit be conditioned such that no pilings were placed in the tidal creek and that the bridge maintain a minimum clearance of six (6) feet above the elevation of mean high water over the creek to provide continued access for any canoes or small boats navigating the tidal creek.

Mr. Neikirk said that staff also believed that Mr. Bland should be advised that if he constructed the pier extending from the beach and it was subsequently determined that he did not own the beach, he would not qualify for the statutory authorization contained in §28.2-1203(A)(5) of the Code of Virginia and that the Commission could direct removal of the pier or require Mr. Bland to seek after-the-fact authorization for a non-riparian pier.

After some discussion and questions for staff for clarification, Commissioner Bowman asked if the applicant was present to speak.

Steven Bland, applicant, was present and his comments are a part of the verbatim record. Mr. Bland stated that he agreed with the staff recommendations and requested approval of his project.

Commissioner Bowman asked if anyone else, pro or con, was present and wished to speak.

Jerry Fisher, Kilmer's Pt. Citizen Association and protestant, was sworn in and his comments are a part of the verbatim record. Mr. Fisher stated that he wished to summarize after the others had their turn to speak.

Clark Henland, protestant, was sworn in and his comments are a part of the verbatim record. Mr. Henland provided the Commission with a handout.

Commissioner Bowman reminded the opposition to only deal with the pier not the property rights. He further said that the applicant takes the risk if it were to be approved by the VMRC and later the case went against him in the courts.

Mr. Henland then provided the Board with a plat showing the location of the pier and a county plat showing the reserved area for rights of others. He said there had been an omission of facts and everyone should be truthful with VMRC. He stated the Bland Plat notes the rights of others so he cannot claim ownership. He said there was a public ramp nearby for all to use and the orientation of the pier would impact others access to this ramp, which was used a lot during the summer. He said he was concerned the application did not indicate the common area for all to use.

Vera England, protestant, was sworn in and her comments are a part of the verbatim record. Ms. England stated that she had been a resident in the area for 34 years. She said the proposed pier would impact access to the boat ramp and to navigation. She said it would especially impede small boat traffic from the boat ramp. She explained that the boat ramp was already boxed in by erosion on one side and another pier on the other. She said this would impact a valuable marsh area. She suggested shortening the pier if it were approved.

Charles Williams, protestant, was sworn in and his comments are a part of the verbatim record. Dr. Williams stated that he was 91 years old and a long time resident in the area. He provided a picture of the beach as it was in 1952. He said it was a wide, sandy beach and it could be walked for a ½ mile. He explained some of the history of the area. He stated the association was concerned with the loss of others rights to use the property and some of the reserved area had eroded away.

Commissioner Bowman explained that the Commission was not here to determine property rights only the issue of impacts to navigation, only the courts can decide those rights.

Dr. Williams asked about the pilings and the wetlands. Mr. Grabb explained that this fell under an exemption because it was above MLW, the pier and the pilings were not under the jurisdiction of either the Wetlands Board or VMRC.

Jerry Fisher spoke at this point. Commissioner Bowman asked if the association had taken this matter up with the courts or a panel. Mr. Fisher answered no. He said they did not know until now because of the pier proposal. He said the association fees are only paid voluntarily and they were proposing development of a park and also to rebuild the old pier. He said they have no money to obtain a court decision.

Associate Member Schick asked if a pier was already at this point. Mr. Fisher responded yes. Mr. Henland said that the poles are shown in the earlier plats. Commissioner

**Commission Meeting**

Bowman asked if there was a survey seal on the plat. Mr. Neikirk responded there was a survey seal.

Commissioner Bowman stated that Hurricane Isabel had destroyed the area and it should have been rebuilt and apparently a surveyor’s error will cost the association some money to clear up. He said the Commission was only looking at what was applied for and he sympathized with the other residents, but they can only act on the application. He stated that the applicant was not at fault here.

After some further discussion, Commissioner Bowman asked for a motion from the Board.

**Associate Member Holland stated he felt the board had no choice and he moved to adopt the staff recommendation. Associate Member McConaugha seconded the motion. The motion carried, 7-0.**

Permit Fee.....\$25.00

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- 13. **JOHN R. MCCLOUD, #07-1791**, requests authorization to construct an 8-foot by 10-foot open-sided shelter on the existing private, noncommercial pier adjacent to his property situated along a cove of the North River at 6 Little Cove Way in Mathews County. The project is protested by an adjoining property owner.

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

Commissioner Bowman left the meeting and Associate Member Holland acted as the chair while he was out.

Mr. Neikirk explained that Mr. McCloud’s property was located along a small cove that was a tributary of the North River near Cradle Point in Mathews County. There was a shallow and narrow opening that connected the cove to the North River. Development in the vicinity of the project was primarily residential. Much of the shoreline surrounding the small cove was currently wooded. Although there were numerous houses and piers along the shoreline immediately upstream from the cove, there were only two homes and the McCloud’s new pier located along the cove.

Mr. Neikirk said that Mr. McCloud proposed to construct an 8-foot by 10-foot open-sided roofed shelter on the channelward end of his recently constructed private, non-commercial pier. The stated purpose of the structure was to provide shelter from the sun. In 2005, staff determined that the McCloud’s pier and uncovered boatlift met the statutory authorization for private piers contained in §28.2-1203(A)(5) of the Code of Virginia.

Mr. Neikirk stated that the project was protested by Mr. and Mrs. Odell Jackson, the owners of the adjoining property located to the southwest of Mr. McCloud's lot. Staff had spoken with Mr. Jackson and he acknowledged that Mr. McCloud's project would not significantly affect the view from his property. He was concerned, however, that if Mr. McCloud was allowed to construct a shelter; other property owners in the vicinity would want to build similar structures. He stated that if other structures were allowed on the ends of the nearby piers located along the North River shoreline, they could significantly detract from the view he currently enjoyed from his property.

Mr. Neikirk explained that the proposed roof would not encroach on any public or privately leased oyster planting ground. No State agencies had commented on the proposal.

Mr. Neikirk said that prior to 2006, staff generally recommended against the construction of roofed structures on piers unless such structures were deemed to be water dependent. In 2006, however, the General Assembly amended §28.2-1203(A)(5), to provide statutory authorization for open-sided shelter roofs or gazebo type structures measuring no more than 400 square feet, provided such structures were allowed under local ordinance and provided that such structures were not opposed to by an adjoining property owner. In cases where an adjoining property owner objected to such a roofed structure, a VMRC permit was required. Since open-sided structures were allowed under the Mathews County ordinances and if the Jacksons were not objecting to the structure, it would meet the statutory authorization.

Mr. Neikirk said that staff was of the opinion that given the location of the proposed structure along a wooded cove and the position of the structure relative to the Jackson's property, that the proposed shelter should not significantly affect the Jackson's property. Accordingly after evaluating the merits of the project against the concerns expressed by those in opposition to the project, and after considering all of the factors contained in §28.2-1205(A) of the Code of Virginia, staff recommended approval of the project, as proposed.

Associate Member Holland asked if the applicant was present.

John McCloud, applicant, was sworn in and his comments are a part of the verbatim record. Mr. McCloud stated that a precedent had been set by two other boathouses in the area and one of them having been approved earlier in the meeting. He said the structure was only 80 square feet and would not impact anyone's view.

Associate Member Holland asked if anyone was present, pro or con, on this matter.

Fay Jackson, protestant, was sworn in and her comments are a part of the verbatim record. Ms. Jackson said she felt the structure would be an eyesore and would block her view. She said that an egret's nest had been in the area since 1989. She stated a precedent

would be set if this was approved as well as impacting the value of their property. She said she was requesting that the project not be approved.

Associate Member Schick asked her to show on the slide where her property was located in relation to the pier, which she did.

Odell Jackson, protestant, was sworn in and his comments are a part of the verbatim record. Mr. Jackson said it would impact their water view.

Associate Member Fox stated that the General Assembly authorized the 400 square foot structure, unless it was protested.

Associate Member Schick stated that the Commission did not allow this and the General Assembly had allowed this. He said in his opinion this was not water dependent. He suggested that they go to their delegates to asked for a change.

Associate Member Holland asked for any questions. He also asked the applicant if he wished to offer any rebuttal. There was none.

**Associate Member Tankard moved to accept the staff recommendation. Associate Member McLeskey seconded the motion. The motion carried, 6-0. Commissioner Bowman had not returned to the meeting.**

Permit Fee.....\$25.00

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**14. DANIEL W. FORREST AND DEBORAH PINKARD, OYSTER PLANTING GROUND APPLICATION #2007-010**, request to lease approximately 1.50 acres of shellfish ground within Whitehouse Cove, a tributary to Bennetts Creek in the City of Poquoson. The application is protested by Mr. David Barke, an adjacent highland property owner.

Ben Stagg, Environmental Engineer, Sr., gave the presentation with slides. His comments are a part of the verbatim.

Commissioner Bowman returned, but Associate Member Holland continued to Chair the meeting.

Mr. Stagg explained the proposed application was within Whitehouse Cove, a tributary to Bennetts Creek in the City of Poquoson. A portion of the application lies within a small cove area of which the adjoining upland property included the two applicants and the protestant.



Mr. Stagg stated that the Application for Oyster Planting Ground was originally submitted on February 13, 2007. The application was submitted to the normal public interest review, including publication in a newspaper of local circulation, the Daily Press. No surveying of the ground had taken place.

Mr. Stagg said that on May 9, 2007 staff received a letter of protest from Mr. David Barke. His objections included potential access issues to his property if oysters were cultivated within the small cove area near his upland property, and his note that he received additional correspondence from the applicant's attorney indicating that both applicants would fight any attempt by Mr. Barke to access White House Cove from his property. Mr. Barke further stated that he believed any attempt to cultivate oysters at this location would require the use of containers or cages marked with stakes, buoys or other gear, which would further restrict the area and be unsightly. Additionally, Mr. Barke sought clarification about cultivating oysters in polluted waters.

Mr. Stagg said that staff responded to Mr. Barke, by letter, on May 15, 2007. Staff noted that the applicants had indicated they sought to lease the ground and planned to use traditional on bottom shellfish cultivation techniques and Taylor floats. Staff further noted that the use of any structures that extend more than 12 inches off-bottom, to include Taylor floats and/or buoys to mark any structures would require additional permit authorization from the Commission. Staff indicated that there were other oyster leases nearby and that an area just east of this application had been leased in the past. Mr. Barke was informed that shellfish cultivation can take place in Health Department restricted areas but that the product must be relayed to clean areas for future harvest with the proper permits. Additionally, staff noted that the bottomland in this area is considered to be owned by the Commonwealth and therefore the general public does have the right to traverse the waters above those lands.

Mr. Stagg stated that staff initially obtained records from the City of Poquoson land records that appeared to indicate that Mr. Barke's property extended to mean low water. However, based upon additional certified plat information obtained from the applicants, along with a site visit near the time of low tide, staff had determined that Mr. Barke was not a riparian landowner. While Mr. Barke was a nearby property owner and may still object to the leasing of oyster ground at this location, he did not appear to have any bonafide riparian rights. Additionally, should the applicants wish to pursue the use of Taylor floats in this area, additional permits would be needed from the Habitat Management Division. Also under the new VMRC regulation (4VAC20-1130-10, ET SEQ) pertaining to temporary protective enclosures on leased grounds, the applicants would also need to obtain additional authorization for any enclosures on the lease ground greater than 12 inches in height. The protestant would be afforded the opportunity to comment on any such future permit applications at the time they were submitted.

Since the protestant was not a riparian property owner, staff believed that leasing the area requested by the applicants was appropriate and recommended approval of the application as submitted pending any surveying of the ground.

Associate Member Holland asked for the applicant to come forward.

Danny Miller, applicant, was present and his comments are a part of the verbatim record. Mr. Miller explained that he had worked with his father in years past tonging oysters, but with the decline in 1982 he stopped tonging. He said he had been a member of the Tidewater Oyster Gardeners Association and experimenting with oysters for personal use only, not commercial. He said he also got one of his neighbors to get involved. He said that he already had leases in the NW and SW Branches of Back River, but it would be more convenient to take the oysters to the York River. He said he did not intend to impact navigation. He said staff had done a good job in their presentation and presenting the facts.

Associate Member Holland asked for anyone else who wanted to speak on the application.

Deborah Pinkard, co-applicant, was present and her comments are a part of the verbatim record. Ms. Pinkard stated she purchased the property in March 2007 and he told the previous owner to tell a potential buyer that he had tried to get a pier for his use.

Associate Member Holland asked the Commission what action they wanted to take in this matter.

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

\* \* \* \* \*

Commissioner Bowman resumed his duties as Chair.

**16. PUBLIC COMMENTS:**

**Kent Carr**, Seafood Buyer, Harvester, was present and his comments are a part of the verbatim record. Mr. Carr explained that the public oyster harvest season for the lower James River Hand Scrape Areas would soon be ending on December 31, 2007. He said he was requested that the season be extended through April, 2008.

Jack Travelstead, Chief Deputy, Fisheries Management explained that a letter had been submitted from **Thomas Kellum** of W. Ellery Kellum Seafood, Inc. requesting a public hearing be held at the January Commission meeting to discuss and consider reopening the

lower James River Hand Scrape Areas for the months of February and March, 2008. He stated Mr. Carr was asking for emergency action, which would have not been necessary if someone had come forward at last month's meeting. He stated that staff questioned that this was an emergency in accordance with the Code. He further stated that a public hearing would give everyone an opportunity to be heard. He said that staff supported Mr. Kellum's request for a public hearing at the January meeting to discuss whether to reopen the lower James River for February and March to oyster harvest.

Associate Member Tankard stated that VMRC had adopted a strategy for managing the oyster fishery and it would be better not to second guess that strategy.

**Associate Member Holland moved to approve advertisement for a public hearing to discussion the reopening for February and March. Associate Member Schick seconded the motion. The motion carried, 7-0. The Chair voted yes.** Commissioner Bowman stated that the staff had made good points and he thought it would be a good idea to have the public hearing next month.

\* \* \* \* \*

17. **PUBLIC HEARING: AMENDMENTS TO REGULATION 4VAC20-620**, "Pertaining to Summer Flounder", to establish provisions for a by catch fishery during the fourth quarter, to move the second quarter quota to the first quarter, and to set the opening date of the fishery in the first quarter.

Joe Grist, Head, Plans and Statistics, gave the presentation. His comments are a part of the verbatim record. Mr. Grist stated this was a public hearing to consider amendments to Regulation 620 for Summer Flounder. He stated that staff had requested a public hearing for this month to consider these various changes.

Mr. Grist said that in Section 30 it provided for the allocation of the summer flounder harvest quota to the commercial fishery in Virginia. Currently 300,000 pounds was set aside for harvest in Virginia's waters. He explained that the landings were limited to 6.4% of the remaining annual harvest quota during the period of April 1 through June 30 each year and from October through December 31 of each year the landings were limited to 29.3%.

Mr. Grist said that in Section 40 the possession limits were defined and separated into two categories. He said these were the bycatch and the directed fisheries.

Mr. Grist stated that requests had been received from industry. One request by Mr. Amory, Mr. Daniels, Mr. McDonald and Mr. McLaughlin was to take the second quarter quota and add it to the first quarter. He said in addition Mr. Amory requested that the beginning date of the directed fishery in the first quarter should be changed to the last Monday in January from the fourth Monday in January.

Mr. Grist explained that during the second quarter the allotment was only 6.4% of the overall quota with a trip limit of 5,000 pounds for the directed fishery. He said as soon as the second quarter began the 100,000 pounds could be caught up very quickly. He stated that an 85% trigger was needed for the fourth quarter period. He said that by regulation, when it was projected and announced that 85% of the quota for this period had been caught, the fishery would convert to the bycatch fishery. He said staff needed more time for notifying the industry of the closing.

Mr. Grist explained that in North Carolina the directed fishery was open at the beginning of January the market is then flooded with flounder and the price per pound goes down. He stated that the price per pound drops to approximately \$1.00 in January. He said opening later during the first quarter would also allow Virginia to be open during Lent, when fish prices often rise due to demand.

Mr. Grist said that at the last meeting an emergency regulation was adopted at the request of industry that if some of the quota was left in the remaining time of the fourth quarter, then a bycatch fishery could be allowed during other parts of the year. He said staff supported this request at the last meeting, after it was calculated that quota was left to allow this to be done.

Mr. Grist stated that there were no triggers stipulated for the fourth quarter and staff was tasked with predicting when 100% of the quota would be harvested. He said the placement of triggers in the fourth quarter would alleviate some of the risk of exceeding the quota and would allow for reverting to a 10% bycatch fishery.

Mr. Grist said that one public comment had been received from a William Callaway of the F/V Sea Venture, who is against merging the first and second quarter quota.

Mr. Grist explained that the amendments recommended by staff would eliminate the second quarter (April 1 through June 30) directed offshore flounder fishery and merge the 6.4% of the quota allocated for that time period with the first quarter, open the first quarter directed fishery on the first Monday of February, and place defined triggers for closure of the fourth quarter fishery.

Mr. Grist stated that staff had advertised these proposed amendments.

Commissioner Bowman stated there had been a problem with keeping within the quota in the past, and where some states have had to close the fishery to harvest through the following year because of going over their allotments; Virginia had done whatever it could to avoid having to do the same. He said the only way to make sure the fishery does not go over the quota would be to put a marine police officer on every vessel, which was not feasible or a productive way to use the available manpower. He said the staff needed the indicator numbers to manage the quota and that the fishermen needed to help.

Commissioner Bowman opened the public hearing. There were no comments, the public hearing was closed. He asked for a motion.

**Associate Member Holland moved to adopt the staff recommendations. Associate Member Tankard seconded the motion. The motion carried, 6-0-1. Associate Member Schick abstained as he was out of the room during this presentation.**

\* \* \* \* \*

**18. PUBLIC HEARING: AMENDMENTS TO REGULATION 4VAC20-252, "Pertaining to Striped Bass", to establish new requirements and penalties for the tagging of striped bass and to establish the 2008 harvest quotas for commercial and recreational fisheries.**

Joe Grist, Head, Plans and Statistics, gave the presentation. His comments are a part of the verbatim record.

Mr. Grist explained that there had been an increase in the striped bass quota for 2008. He said the quota was 3,284,284 pounds, evenly split between each fishery. He said these quotas were put into Sections 55 and 150 of Regulation 252.

Mr. Grist said that the second issue was the commercial tags. He explained that the Law Enforcement officers were seeing Potomac Tags in the James and in the northern part of the Bay as well as Maryland tags. He said this was a problem for these officers and they had asked that language concerning the possession of striped bass tags on board be added to the regulation. He said that current regulations, effective 2007, allow for accounting for all tags issued, unlike years past when harvesters only had to sign a form stating missing tags were lost. He said also Law Enforcement had come across Virginia tags from the years, such as 2000 and 2001, that were reported lost and never turned in. He said that the tags from other jurisdictions would be confiscated and returned to them under the proposed amendments. He said that the question of when fish should be tagged had been addressed in Section 160 (G & H) by adding the wording, tag at area captured. He said some in industry had said there were weather concerns when tagging the fish, but Law Enforcement would be allowed to use their discretion.

Mr. Grist said that the penalties should be strengthened to show that VMRC is serious about enforcement of these regulations. He said in Section 120(D) it was written so that when an individual was found in possession of too many striped bass per the recreational limit, the striped bass would be confiscated if not tagged. He said in Section 160(H), provisions would provide for seizure of striped bass that were untagged, and any tags in possession equal to the amount of fish tagged, and the amount of striped bass confiscated would be applied to the individual's harvest quota. Further amendments provide instructions for the Marine Police to either auction off the catch, or provide the catch to the VMRC biological sampling program. He said when this goes to court and the

fisherman was found not guilty then they would be reimbursed for the value of the fish and tags confiscated. He said if they were found to be guilty by the court, then they would not be reissued any tags nor would the quota be transferrable. He explained that any tags reported as lost, would be paid for by the fisherman at rate of \$25.00, plus \$0.13 per tag.

Mr. Grist said that the tags were usually distributed the last week of January, but under the current regulation the fishermen do not have to turn them in until 30 days after they had caught their quota, and for those fishing December 31<sup>st</sup> that meant fishermen could wait until late January to turn in their tags, which staff needed to balance the books before issuing new tags and quota for the upcoming season. He said and if the tags were turned by 2<sup>nd</sup> week of January, the staff could balance the books for more individuals, and tags for the new year could be issued to more harvesters on the designated distribution day in a more timely manner.

Mr. Grist stated that all of these amendments had been advertised for public hearing.

Mr. Grist said that a Mr. Eddie Gaskins worked all his pound nets from different jurisdiction the same day in the upper Bay, catching striped bass from each jurisdiction in the same trip, and Mr. Gaskins wanted to continue to do. Another request was made by Donnie Thrift to be allowed to possess multiple tags in the Great Wicomico, where he had landed his striped bass from Virginia and the Potomac River. Both Area Supervisors from the Northern Area and Eastern Shore did not agree with this as there were frequent infractions in these areas and they supported the staff recommendations.

After some discussion on the usage of other jurisdictional tags, Commissioner Bowman asked Mr. Travelstead to comment. Jack Travelstead, Chief Deputy, Fisheries Management, explained that it was difficult to decide how tight to make the regulation. He stated that Mr. Gaskins asked that he be allowed keep all tags and the hook-n-line fisherman might fish in all jurisdiction.

Associate Member Schick stated that if a fisherman was not catching striped bass in one area would want to be able to go elsewhere. Mr. Travelstead stated that VMRC does not want other tags in the James River and he was not sure what the solution would be.

Mr. Grist suggested that the area be changed to a smaller area that keeps it west of Tangier Island. Associate Member Schick stated that most fishermen are coming out of Northern Neck. Associate Member Holland suggested moving the line to the southern most area.

Commissioner Bowman opened the public hearing.

Douglas F. Jenkins, Sr., President of the Twin River Watermen's Association was present and his comments are a part of the verbatim record. Mr. Jenkins stated that there was a

tagging problem for the watermen who fish nets on both the Potomac River and the Virginia tributaries. He explained that weather controls where they will work. If there are high winds on any particular day then they work the tributaries because they cannot work in the Potomac mainstream where the winds would be stronger and vice versa when the winds are calm. He said they need to have both tags on board as it would be too time consuming to have to come back to shore to get a different set of tags as well as too expensive with the high fuel costs. He stated that the regulations make crooks and thieves of the watermen. He said that there were not enough officers to enforce the regulations and he was upset when they want to change it to place of capture, it should say vicinity of capture.

Mr. Grist stated that in Section 160 (B)(3) there was wording to exclude the Potomac tributaries.

Kelly Place, waterman, was present and his comments are a part of the verbatim record. Mr. Place stated that some things he agreed with and some of the proposed changes caused him concern. He said that members of the board needed to go out with a waterman and see what he has to deal with. He suggested that make it a distance to be determined at the discretion of the officer from the dock and word it to say tag prior to the dock. He said normally it was a 20 to 30 minute run back to the dock. He said he agreed with Mr. Jenkins and it was unfair to penalize all the innocent as well as the guilty. He also suggested adding an hour to the work day. He referred to Section 28.2-203 of the Code, which says ...to promote the welfare of the industry. He added that some part of the amended regulations were good.

Commissioner Bowman closed the public hearing. He said when you consider the ¼ mile of landing, it would require immediate enforcement and where is the landing point. He stated it would be better to leave it the same.

Associate Member Schick asked if should the Commission consider “in vicinity” when it is safe. Commissioner Bowman stated that a judge would question that as he would need a specific time and specific location and he did not care if a quota was being maintained or not.

Jack Travelstead, Chief Deputy, Fisheries Management, stated that the language is strict, but it was supported by both staff and Law Enforcement. He said that currently “at place of capture” was causing confusion.

Commissioner Bowman stated that he thought it was working the way it was as he had no complaints when he was Chief of Law Enforcement. He stated that staff had some good ideas.

Associate Member Tankard stated that Mr. Jenkins had been in the fishery a long time. He said he remembered when fish were not there and now they were because of the Commission actions.

Mr. Travelstead asked if in paragraph G, they wanted to leave, as soon as possible before leaving the capture area. Commissioner Bowman stated it should say as soon as possible after capture.

Associate Member Fox suggested it say as soon as possible after capture, but before a ½ mile from dock.

Russell Gaskins, waterman, was present and his comments are a part of the verbatim record. Mr. Gaskins suggested it say before coming into the creek fish will be tagged.

After further discussion it was agreed that the existing verbage would be used as it was shown by staff in the presentation.

**Associate Member Holland moved to accept the staff recommendations. Associate Member McConaugha seconded the motion. Associate Member Fox asked if this included the modification of the Northern Neck line. Commissioner Bowman responded yes, just as it was described. Associate Member Fox asked what exactly was being approved. Commissioner Bowman stated that the approval was for what was published. He went on to say that if there was a problem with the language "... discretion of the officer", then it would come back to the board and be revisited. He said even if it needed to be done by emergency action. The motion carried, 7-0. The Chair voted yes.**

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**19. PUBLIC HEARING: AMENDMENTS TO REGULATION 4VAC20-150, "Pertaining to the Dredging of Conchs", to correct boundary markers for certain dredge areas.**

Associate Member McLeskey left the meeting for the remainder of the day at approximately 4:45 p.m.

Mike Johnson, Fisheries Management Specialist, gave the presentation. His comments are a part of the verbatim record. Mr. Johnson explained that the Law Enforcement Division had determined that certain markers (actually navigational buoys) within the conch dredge areas 2 and 4 had been removed.

Mr. Johnson said that in order to maintain legally defined boundaries, the changes to the boundary-marking system needed to be incorporated by amending Regulation 4VAC 20-150-10, Et seq.



Mr. Johnson stated that staff had not received any comments from the public. He further stated that staff recommended adoption of the amendments to the regulation.

Commissioner Bowman opened the public hearing. There were no comments, the public hearing was closed. He asked for a motion.

**Associate Member Tankard moved to accept the staff recommendations. Associate Member Holland seconded the motion. The motion carried, 6-0. Associate Member McLeskey had left for the day.**

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**20. REQUEST FOR PUBLIC HEARING (AMERICAN SHAD):** To repeal Regulation 4VAC20-530-32, "Spawning Reaches By catch Area Fishery", as required by the Interstate Fishery Management Plan for American Shad.

Joe Cimino, Fisheries Management Specialist, Sr., gave the presentation. His comments are a part of the verbatim record. Mr. Cimino explained that this was a request for a public hearing.

Mr. Cimino said that the February 28, 2006 Commission meeting, the Commission approved an upriver extension of the shad by-catch fishery for the shad spawning grounds of the James, Pamunkey, Mattaponi and Rappahannock Rivers. He said the establishment of these two permit-based by-catch fisheries was contingent upon the approval of the Atlantic States Marine Fisheries Commission (ASMFC) Shad and River Herring Management Board.

Mr. Cimino explained that the ASMFC Management Board had accepted three of the recommendations by the technical committee, which were:

- 1) An annual request to ASMFC be made to allow the permitted bycatch harvest.
- 2) An annual ASMFC technical committee review will be done.
- 3) Close the bycatch fishery on the spawning grounds.

Mr. Cimino further explained that the ASMFC Management Board did not agree with the fourth recommendation that the by-catch fishery for the entire James River should be closed, but only on the spawning grounds. The board did not endorse any stipulation that VMRC needed to quantify discards or harvest in areas under tribal government management.

Mr. Cimino said that in order to maintain compliance with the Interstate Fishery Management Plan for American Shad, Chapter 4 VAC 20 530-32 needed to be repealed, and any reference to the by-catch allowance on the spawning grounds needed to be eliminated.

Mr. Cimino stated that staff recommended advertising for a January public hearing, to amend Regulation 4 VAC 20 530-10, Et seq., "Pertaining to American Shad".

**Associate Member Tankard moved to accept the staff recommendation. Associate Member Schick seconded the motion. The motion carried, 6-0. The Chair voted yes.**

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**Commission's decision for the review of enforcement actions by the Wetlands Board.** (See November 27, 2007 Commission meeting minutes.)

At the end of the meeting the Commissioner reminded the Associate Members that staff had forwarded to each of them, a copy of the materials that Mr. James Frese had submitted along with his request that the Commission reconsider its position regarding appeals of local wetland board enforcement matters. The Chair was open to entertain a motion if anyone wanted to move to reconsider this matter at the next meeting. Hearing none, the matter died and the Commission's position remained as was previously communicated to Mr. Frese by letter dated November 28, 2007.

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There was no further business and the meeting was adjourned at approximately 4:50 p.m. The next meeting will be Tuesday, January 22, 2008.

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Steven G. Bowman, Commissioner

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Katherine Leonard, Recording Secretary