

MINUTES

Commission Meeting**August 26, 2008**

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
Ernest L. Bowden, Jr.)	
J. T. Holland)	
John McConaugha)	
F. Wayne McLeskey)	Associate Members
Richard B. Robins, Jr.)	
J. Kyle Schick)	
John E. Tankard, III)	
Carl Josephson	Senior, Assistant Attorney General
David Grandis	Assistant Attorney General
Jack G. Travelstead	Chief Deputy, Fisheries Mgmt.
John M. R. Bull	Director-Public Relations
Katherine Leonard	Recording Secretary
Sunita Hines	Bs. Applications Specialist
Rob O'Reilly	Deputy Chief, Fisheries Mgmt.
Joe Grist	Head, Plans and Statistics
Jim Wesson	Head, Conservation/Replenishment
Sonya Davis	Fisheries Mgmt. Specialist, Sr.
Alicia Nelson	Fisheries Mgmt. Specialist
Laura Lee	Fisheries Mgmt. Specialist
Mike Meier	Head, Artificial Reef Program
Joe Cimino	Fisheries Mgmt. Specialist, Sr.
Mike Johnson	Fisheries Mgmt. Specialist
Rick Lauderman	Chief, Law Enforcement
David Deemer	Marine Police Officer
Lisa Gruber	Marine Police Officer
Bob Grabb	Chief, Habitat Management Div.
Tony Watkinson	Deputy Chief, Habitat Mgt. Div.
Chip Neikirk	Environmental Engineer, Sr.
Hank Badger	Environmental Engineer, Sr.

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Ben Stagg	Environmental Engineer, Sr.
Benjamin McGinnis	Environmental Engineer, Sr.
Elizabeth Gallup	Environmental Engineer, Sr.
Randy Owen	Environmental Engineer, Sr.
Justin Worrell	Environmental Engineer, Sr.
Danny Bacon	Environmental Engineer, Sr.
Bradley Reams	Project Compliance Technician
Paul Rogers	Surveyor

Virginia Institute of Marine Science (VIMS)

Lyle Varnell
Bob Orth

Other present included:

Donald Honeycutt	J. T. Frese	Mike McGee	Donald B. Birch
Mary Lou Birch	Kevin Martingayle	Neal Insley	Stacey Hart
Richard Decatur	Margaret Decatur	Ann Heflin	Ray Heflin
Charles Couch	Betty Couch	Don Hearl	Tommy Mason
Donna Mason	Carl E. Meixner	Rich Howard	Walter Priest
David O'Brien	Lynne Ballerini	Ken Ballerini	Sarah Messersmith
Chris Nolen	Barry Truitt	James McConalty	Bob Smithson
Tom Langley	Briana Welton	Rebecca Francese	Mark Shackelford
Hank Jones	Charles Huffman	Barry E. Fisher	Bill Howell
Robert E. Croonenbergh		Chris Boyce	Harry Johnson
R. H. Meyers	H. Spence Murray	D. Northam	Ellis W. James
Richard Welton	Josee Hionis	Dimitri Hionis	Paul Schulz
Ernie George	Roger Parks	Ken Smith	Dirk Sanford
Margaret Sanford	Charlie Gregory	Noah Weisburg	Scott MacDanell
Patrick Lynch	Chris Moore	John Crooks	Susan Gaston
Doug Mennings	Nick Hionis	Cheryl McLeskey	Scott Harper
Don Allen	Eric Lawson		

and others.

Commissioner Bowman called the meeting to order at approximately 9:37 a.m. and announced that Associate Member Fox would not be at the meeting. He said that there was a quorum present and the Commission could proceed with the meeting.

At the request of Commissioner Bowman, Associate Member Robins gave the invocation and Bob Grabb led the pledge of allegiance.

APPROVAL OF AGENDA: Commissioner Bowman asked for any changes to the agenda. Bob Grabb, Chief, Habitat Management, stated that for Item 14, Mr. Donald Parks, #08-1224, informed him that he was out of the country and unable to attend the August meeting and had requested that it be continued until the September 23, 2008 meeting.

Commissioner Bowman asked for a motion. **Associate Member Robins moved to approve the agenda, as amended. Associate Member Tankard seconded the motion. The motion carried, 8-0. The Chair voted yes.**

MINUTES: Commissioner Bowman asked, if there were no corrections or changes, for a motion to approve the July 22, 2008 meeting minutes. **Associate Member Tankard moved to approve the minutes, as circulated. Associate Member Robins seconded the motion. The motion carried, 7-0-1. Associate Member McConaugha abstained because he was not present at the last meeting. The Chair voted yes.**

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

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

Bob Grabb, Chief, Habitat Management Division, reviewed the page two items, 2A through 2H, for the Commission. He said that staff was recommending approval of these items. He noted a change in item 2G, indicating that the staff recommended including a time-of-year restriction. His comments are a part of the verbatim record.

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.

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

2A. CITY OF VIRGINIA BEACH, #00-0057, requests authorization to reactivate and extend their previous permit to maintenance dredge approximately 20,000 cubic yards of subaqueous bottom, on an as-needed basis annually from the Long Creek municipal channel to restore maximum project depths of minus eight (-8) feet at mean low water. All dredged spoils will be offloaded at the Maple Street Site or the Lynnhaven Beach Facility and used for beach nourishment. Pre- and post-dredge surveys are required. The previous permit expired on May 28, 2008. If reactivated and extended, it will expire on February 28, 2010, the maximum of the Commission's allowance for a ten-year dredging permit.

No applicable fees – Permit Reactivation/Extension

2B. TOWN OF SALTVILLE, #08-1296, requests authorization to replace an 8” pile-supported gravity sewer line and a 10” force main across 116 linear feet of the North Fork Holston River immediately upstream of the Harper Lane Bridge in the Town of Saltville.

Permit Fee..... \$100.00

2C. PENINSULA PROPERTIES, LLC, #07-1650, requests authorization to construct a 6-foot wide by 65-foot long community pier with a 16-foot by 20-foot T-head platform, and a 4-foot by 12-foot aluminum ramp leading to a 12-foot by 70-foot floating platform with 4 mooring locations for three (3) townhouse units adjacent to property at 97 Marina Road situated along Sunset Creek in Hampton. Staff recommends a royalty in the amount of \$4,917.00 for the bold outline of the pier and four proposed mooring locations.

Royalty Fees (encroachment 3,278 @	
\$1.50/square foot.....	\$4,917.00
Permit Fee.....	\$ 100.00
Total Fees.....	\$5,017.00

2D. METROPOLITAN WASHINGTON AIRPORTS AUTHORITY, #08-1170, requests authorization to impact 3,368 square feet of Difficult Run as a result of the construction of the Dulles Corridor Metrorail Project in Fairfax County.

Permit Fee..... \$100.00

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2E. LOUDOUN MITIGATION, LLC, #08-0413, requests authorization to impact 2,356 linear feet of Piney Run for the installation of rock toe protection, J-hook rock vanes and root-wads, and to relocate the channel as part of a stream restoration project at the Pipken site near the intersection of Harpers Ferry Road and Branchriver Road in Loudoun County.

Permit Fee..... \$100.00

2F. NAUTICUS, CITY OF NORFOLK, #08-1081, requests authorization to install a data buoy approximately 1,200 feet south-southeast of Hospital Point in the City of Portsmouth, across the Elizabeth River from Nauticus. The buoy will be deployed in approximate position 36° 50' 40.10" N, 76 ° 18' 1.74" W and will be incorporated into the National Oceanic and Atmospheric Administration's Chesapeake Bay Interpretive Buoy System (CBIBS).

Permit Fee..... \$100.00

2G. HARPER AVENUE, LLC, #08-1277, requests authorization to dredge, on an as-needed basis, a maximum of 3,000 cubic yards of State-owned subaqueous material, per dredge cycle, to create maximum controlling depths of -27 feet at mean low water and widen the existing berth on the northwest side of Pier 1 at the Earl Industries facility situated along the Elizabeth River in the City of Portsmouth. Staff recommends a time-of-year restriction that precludes dredging from July 1st to September 30th, and the inclusion of our standard dredging conditions requiring pre- and post-bathymetric survey requirements. Staff further recommends the assessment of a royalty in the amount of \$1,350.00 for the dredging of 3,000 cubic yards of State-owned subaqueous material at a rate of \$0.45 per cubic yard.

Royalty Fees (dredging 3,000 cu. yds. @\$0.45/cu. yd.)..... \$1,350.00
Permit Fee..... \$ 100.00
Total Fees..... \$1,450.00

2H. COLUMBIA GAS TRANSMISSION CORPORATION, #07-2522, requests authorization to replace or repair, as needed, existing gas pipeline segments along a 60-mile section of Line VM-107 from Bickers Compression Station to Gochland Compression Station possibly requiring the excavation, exposure, and replacement of the pipeline along numerous stream crossings in Greene, Orange, Albemarle, Louisa, and Gochland Counties. Staff recommends a permit condition stating that the permittee agrees to notify the Commission of any line replacements at which time a royalty at the rate of \$3.00 per linear foot for the

encroachment under State-owned subaqueous bottom will be assessed.

Permit Fee..... \$100.00

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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).

Bob Grabb, Chief, Habitat Management, gave the presentation. He reviewed the consent item for the Commission and his comments are a part of the verbatim record. He stated that the staff was seeking approval of the terms of the consent agreement, which had been negotiated by staff and the parties involved.

Commissioner Bowman asked if there were any questions for staff. There were none. He asked if the applicants were present. The applicants were not present. He asked for action by the Commission.

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

CITY OF DANVILLE, #08-1030, requests after-the-fact authorization to retain 50 linear feet of replacement 16-inch sewer line installed a minimum of ten (10) feet above ordinary high water over the Sandy River in the City of Danville. Staff recommends no civil charge and the City has agreed to a triple permit fee of \$300.00

The applicant explained during a phone conversation the need for emergency repairs on a sewer crossing of Sandy River and asked if they could complete the repairs while they were submitting the Joint Permit Application. Staff informed them that we would not request that they stop work, but that they needed to submit the application for authorization for the sewer pipe replacement.

Staff has completed a full public interest review regarding the activity, including contacting the adjoining owners and running a newspaper advertisement. No objects to the as-built project were received. The sewer pipe was replaced as an aerial crossing utilizing support structures that were already in place, so in stream work was minimal.

Had the City of Danville Department of Public Works applied for the repairs in advance of completing them, staff would have recommended approval. The City of Danville did inform VMRC staff about the emergency situation. As a result, staff is recommending approval with only triple permit fees (\$300.00), which the city has agreed to pay.

Permit Fees (triple)..... \$300.00

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

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

Item 5. Birchwood Motel
Item 7. Thornton Hall of Norfolk, LLC
Item 10. Henry S. Jones, Jr.
Item 24. Dimitri Hionis

Associate Member Holland seconded the motion. The motion carried, 8-0. The Chair voted yes.

Associate Member Robins moved for the following:

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

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

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

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

Associate Member Tankard seconded the motion. Commissioner Bowman held a Roll Call vote:

AYES: Bowden, Bowman, Holland, McConaugha, McLeskey, Robins, Schick, and Tankard.

NAYS: NONE

ABSENT DURING VOTE: Fox

ABSENT DURING ALL OR PART OF CLOSED MEETING: Fox

Motion carried, 8-0. The Chair voted yes.

Katherine Leonard, Recording Secretary

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- 5. BIRCHWOOD MOTEL, INC., #05-2780**, requests authorization to install a 750-foot long, six (6) inch sewage discharge pipe under the already permitted 700-foot long by 5-foot wide community pier adjacent to their property along Chincoteague Channel in the Town of Chincoteague, Accomack County. The project is protested by a nearby oyster ground leaseholder and several property owners. The project was remanded to the Commission for rehearing by the Circuit Court of Accomack County.

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

Mr. Badger explained that at the February 27, 2007, Commission meeting, the Commission voted to approve a 700-foot long pier with a bridge over a small channel and four boat slips, but unanimously denied the discharge pipe from a proposed package sewage treatment plant designed to service an upland development given the imposition of an additional prohibited shellfish condemnation zone, and the potential for adverse impacts on water quality, shellfish harvesting, and public health. A permit was, however, issued for the pier and it had since been constructed.

Mr. Badger further explained that the applicant appealed the Commission's denial of the discharge pipe to the Circuit Court for Accomack County. The Honorable Judge Glen A. Tyler, in an opinion dated March 12, 2008, remanded the case to the Commission with directions to rehear the application, and make findings of fact given the evidence presented. In the Court's opinion the Commission's conclusions and decision went beyond the evidence presented at the February 27, 2008 hearing. Since the community pier had been permitted and constructed, this rehearing concerned only the six-inch sewage discharge pipe.

Mr. Badger explained that the project is located along Chincoteague Channel on South Main Street, just south of the Town of Chincoteague's Carnival Grounds. The proposed sewage discharge pipe from a community package sewage treatment plant is designed to

serve the Channel Breeze Townhomes and Condominiums/Birchwood Housing project. The Birchwood Housing project consists of a 28-unit, non-waterfront condominium project that lies across Main Street.

Mr. Badger stated that there was a large shoal along this section of Chincoteague Channel with water depths ranging from one-half (+0.5) foot above mean low water on the oyster rocks to minus six (-6) feet at mean low water near the channel. The Federal Project Channel is located approximately 230 feet west of the proposed outfall pipe. There is a small channel close to shore that has a controlling depth of approximately minus one-half (-0.5) foot at mean low water.

Mr. Badger continued to explain that the original application called for the installation of a six-inch sewage discharge pipe under the proposed pier that would serve the entire Birchwood Housing project. This consisted of four waterfront townhome units with the remaining housing project located across Main Street. The four (4) waterfront units, however, have a sewer line that ties them into an existing drainfield across Main Street at the Birchwood Motel. As a result, they would not be using the proposed outfall.

Mr. Badger said that the applicant had leased the oyster planting ground (Plat File # 8833, 1.92 acres) under approximately 470 linear feet of the proposed discharge pipe since 1995. Mr. Birch's family, however, had leased the oyster ground since the early 1930's. The eastside of Chincoteague Channel had historically been leased for the propagation of oysters and the oyster reefs can be readily seen in aerial photos. Thomas Mason, a nearby oyster ground leaseholder was directly impacted by the initial sewage discharge point and the resulting Health Department prohibited zone. In an apparent attempt to address the initial prohibition zone, the applicant revised his application prior to the Commission's February 27, 2007, meeting, by extending the outfall pipe northwest an additional 50 feet. By extending and altering the outfall location the Health Department was able to adjust the prohibited zone so that it did not directly impact Mr. Mason's nearby oyster ground. The oyster ground lease presently in the name of Donald B. Birch, however, would still be permanently condemned as it was located entirely within the proposed prohibited zone.

Mr. Badger stated that the project was protested by several nearby property owners as well as a nearby oyster planting ground leaseholder. The majority of the protestants expressed concerns over the number of long piers along Chincoteague Channel and limited boating access along the small channel near the shore. Mr. Thomas Mason, the nearby oyster planting ground leaseholder, fears that the sewage discharge would affect the condemned shellfish waters on his leased oyster grounds, resulting in a possible change from a condemned shellfish area to a prohibited shellfish area. A change from condemned to prohibited would prevent Mr. Mason, or any other leaseholder, from relaying their shellfish to approved waters for depuration. Mr. Mason stated that such a change would effectively eliminate any shellfish harvesting currently, or in the future.

Mr. Badger noted that the Virginia Institute of Marine Science commented on the community pier, however, they had never commented on the outfall structure or effluent itself. VIMS normally left those comments to the Health Department and the Department of Environmental Quality. In April 2005, the Department of Environmental Quality (DEQ) authorized Birchwood Housing Development to discharge effluent into Chincoteague Channel (Permit #VA0091596). On June 5, 2008, Robert Smithson, DEQ Environmental Engineer Senior, in an e-mail stated that the DEQ permit was based upon the application and subsequent correspondence from the applicant, dated February 24, 2005, that confirmed their intent to follow Health Department-Bureau of Shellfish Sanitation recommendations by extending the discharge outfall "to an average channel water depth of greater than one (1) meter" (an estimated 722 feet from shore). This correspondence was signed by the applicant, Donald Birch. Mr. Smithson continued by stating that the applicant did not have the option to discharge the effluent at the shoreline as that would have resulted in denial of the permit due to its impact upon shellfish resources (correspondence from Keith Skiles on Jan. 25, 2005). Furthermore, the Preliminary Engineering Report issued on June 29, 2005 by Raymond Barrows (DEQ) stipulated that "an outfall length sufficient to assure one meter of water over the end at all times and that VMRC and all other affected agencies approve the location." The Health Department-Bureau of Shellfish Sanitation stated that the project would affect condemned shellfish waters. While it would not cause an increase in the size of the total condemnation, a prohibited area (an area from which shellfish may be relayed to approved waters for self-purification is not allowed) would be required within a portion of the currently condemned area. The actual size and location/dimensions of the prohibited area were modified in light of the applicant's agreement to extend the outfall both channelward and upstream. The new boundaries of the prohibited zone included Mr. Birch's entire oyster ground lease (1.92 acres) as well as 13.78 acres of additional State-owned, leasable, subaqueous bottom for a total of 15.70 acres.

Mr. Badger explained that on May 30, 2008, VMRC's, Conservation and Replenishment Department Chief, Dr. James Wesson, conducted a shellfish survey of the area to be impacted by the outfall. Dr. Wesson's survey showed significant populations of both hard clams and oysters. Within the intertidal area, oyster densities varied from 400 to 800 per meter, with a relatively high percentage of market size oysters. In the sub-tidal areas there was a large population of hard clams with densities greater than 2 clams per meter or more than 8,000 clams per acre. By current standards this was regarded as a high density of clams. A large quantity of eelgrass was also found to exist in the sub-tidal area. Dr. Wesson had stated that relative to other areas in the coastal bays of Virginia, the shellfish populations within the area of potential "prohibited" condemnation would be considered high to very high.

Mr. Badger noted that the Accomack County Wetlands Board approved their portion of the project as submitted at their February 23, 2006, meeting.

Mr. Badger said that the U.S. Army Corps of Engineers had reviewed the project and issued a Regional Permit Number 19 for the community pier and a Nationwide Permit Number 7 for the effluent outfall pipe on December 6, 2006.

Mr. Badger noted that no other State agency had expressed opposition to the project.

Mr. Badger explained that on a related matter it may be noted that the Court of Appeals of Virginia recently affirmed the State Water Control Board's decision to deny a Virginia Pollutant Discharge Elimination System Permit to the Captain's Cove Utility Company. *State Water Control Board v. Captain's Cove Utility Company, Inc.*, Record Number 2735-07-1 (Virginia Court of Appeals, August 5, 2008). This case also involved condemnation of shellfish waters and potential impacts to both commercial and recreational uses in Chincoteague Bay. The Court found no authority for the proposition that the Water Control Board must allow an applicant to discharge into state waters. An unpublished opinion of the Court of Appeals has no precedential value, but its rationale may be considered and adopted to the extent it is persuasive. See, e.g. *Fairfax County Sch. Bd. v Rose*, 29 Va. App. 32, 39 (1999). In the Captain Cove decision, the Court of Appeals said "The Board has the statutory authority to prohibit discharges into state water, where such discharge would violate the general standard by interfering with the designated uses of that water."

Mr. Badger stated that staff believed this unpublished decision was persuasive and supported the Commission's authority to grant or deny any permit that may impact public use of State-owned land and the waters overlaying those lands. Code § 28.2-1205 authorized the Commission to consider the project's effect on, among other things, other reasonable and permissible uses of state waters and state-owned bottomlands and marine and fisheries resources of the Commonwealth in deciding whether to grant or deny permits for use of State-owned bottomlands.

Mr. Badger also noted that while staff acknowledged that the applicant received a permit from DEQ to discharge effluent into Chincoteague Channel three years ago, the applicant does not have a permit option of discharging the effluent at the shoreline as was suggested by the applicant's counsel in argument before Judge Tyler. In fact, DEQ stated it would have denied the permit due to its impact upon the shellfish resource if this was the case. The applicant, therefore, only had one option from DEQ and that was to discharge a sufficient distance offshore to assure one meter of water was over the end at all times. Even its deliberations, however, the Preliminary Engineering report issued June 29, 2005 by Raymond Barrows (DEQ), clearly stipulates that VMRC and all other affected agencies to approve the outfall location. Therefore, it would appear that DEQ's permit may not even be valid unless or until the applicant receives authorization from all other affected agencies, including VMRC.

Mr. Badger explained that further development, and redevelopment on Chincoteague, was clearly hampered by the lack of a central collection and water treatment system. The

Town had relied for the most part on individual septic systems with some exceptions (e.g. the Coast Guard facility and several other point source discharges). In an effort to address this shortfall, the Town of Chincoteague, in December 2006, selected Waste Water Management, Inc. (WWM) to be its consulting engineer in an effort to develop a public sewer system. Waste Water Management prepared and circulated a White Paper in December 2007 that identified a strategy to achieve an island wide public sewer system. The most environmentally friendly approach, and the recommended alternative for the disposal of treated effluent in the report, appeared to be deep well injection. In a deep well injection program, highly treated effluent was discharged into and through a well or wells that had been drilled into deep aquifers far below any local drinking water aquifers. If selected and pursued this alternative would most likely not require any condemnation or prohibited areas since wells would be drilled on the upland and the treated effluent would not be discharged into tidal waters. This long term approach had also seemed to meet with preliminary endorsement by both DEQ and EPA. Such an approach would seem to allow continued development and redevelopment on the island without unacceptable habitat and resource impacts.

Mr. Badger said that in granting or denying any permit for the use of State-owned land and the waters overlaying those lands, the Code of Virginia and the Commission's Subaqueous Guidelines direct VMRC to consider, among other things, the effect of the proposed project upon: other reasonable and permissible uses of State waters and State-owned bottomlands; marine and fisheries resources, wetlands, adjacent or nearby properties; anticipated public and private benefits; and water quality standards established by the State Water Control Board.

Mr. Badger stated that based upon the proposed method of construction, it appeared that the actual installation of the six-inch diameter discharge pipe could be accomplished with minimal impacts to State-owned subaqueous land. The sewage discharge, however, would directly affect condemned shellfish waters and require a new 15.70 acre prohibited area within a portion of the currently condemned area. Although the applicant had revised his application so that the prohibited area would no longer directly impact Mr. Mason's leased oyster ground, staff must consider the effect of the proposed project upon other reasonable and permissible uses. The prohibited area would still impact 13.78 acres of leasable State-owned subaqueous bottom as well as the lease presently held by Mr. Birch himself. This lease was granted for the purpose of shellfish propagation, not for development purposes. The lease confers no right on Mr. Birch to construct and operate a discharge injurious to the waters or natural resources of the Commonwealth, or the right to adversely impact the rights of others.

Mr. Badger said that if Mr. Birch let the lease revert back to the State, or if the lease was not renewed for lack of use, it would then become unavailable for others to lease. In addition, there were other areas not leased that would be impacted by the prohibition and would, therefore, be unavailable.

Mr. Badger stated that in light of the foregoing, and after evaluating the merits of the entire 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 denial of the application.

After some clarifying questions of staff, Commissioner Bowman asked if the applicant or representative wished to speak.

Kevin Martingayle, attorney for the applicant, was present and his comments are a part of the verbatim record. Mr. Martingayle said in response to the staff's report he wanted to clarify one statement. He said that no one misrepresented information to the Judge and the court decision was based on the VMRC record.

Neil Insley, co-attorney for applicant, was present and his comments are a part of the verbatim record. Mr. Insley said the lease ground issue was that Mr. Mason objected to the outfall because of his lease. The applicant reassessed the project and moved the location so that it did not affect Mr. Mason's lease. He said the grounds not leased were already in a condemned area and had not been leased for 100 years. He said that relaying was not cost effective for the leaseholder, if it was then none of these grounds could be leased. Mr. Mason's objection was now that the system would fail, but the Division of Shellfish Sanitation had looked at it as well as the Department of Environmental Quality when their permit was issued. He said this could have been addressed before now, when DEQ held their public hearing. He said that DEQ and DSS did test, scientifically so for VMRC to deny it for those reasons needed to be justified. This is an issue of VMRC involvement in this permitting process and it's already been addressed and VMRC only needs to look at the how and where. He said they were concerned that the VMRC staff's sampling was only done in the protestant's area, not the applicant's and that they did not look on the opposite side. He said staff called it random sampling, but it should have been done on the applicant's and the vacant bottom.

Mr. Inlsey said that staff referenced the Captain's Cove project, which was a huge development and that resulted in previously not condemned grounds to be condemned. He said the main difference here was that it was already condemned.

Mr. Insley said that a Memorandum of Understanding (MOU) between all agencies had been signed by VMRC to jointly hear all applications at one time, but it was not that way in this case. He said the staff proposing to deny it voided the MOU. He said DEQ had already done everything and issued a permit. He said if staff denied this one then a lot of others should be denied also, as other projects to be heard would take oyster ground away.

Mr. Insley said that Mr. Birch had done everything asked of him and even agreed that if the County should provide a system, he would hook up to it, when and if it became available.

Associate Member Robins asked if he thought that VMRC should defer to DEQ? Mr. Insley stated that the Commission could do that if all was to be done correctly. He said that VMRC should use other effects in their decision making, not speculation. He said in the MOU, the agencies agreed to a joint process and in accordance to 28.2-1201, the matter had already been adjudicated.

Associate Member Schick stated that the determination to move from condemned to prohibited was not DEQ, but VMRC. Mr. Insley explained that in accordance to 28.2-807 DEQ addressed reclassification and VMRC should have attended that meeting. VMRC's authority was in Section 28.2-1205 where it said they look at encroachments on State-owned bottoms. Associate Member Schick stated that the VMRC was charged to protect the resource and until it was heard here that could not be done. Mr. Insley stated that Captain's Cove was considered under the MOU, but Mr. Birch's had fallen through the hole. He said no one came to the public hearing at DEQ to protest it.

Associate Member McConaugha asked, if this was considered a top-notch system, then why was the area to be prohibited. Mr. Insley explained it was a precautionary action in case there was a system malfunction and goes beyond what was required by this project. Associate Member McConaugha stated that the shellfish, not relaying, was impacted. Mr. Insley stated that VMRC needed to establish a regulation and not decide by individual cases, but make it broader.

Associate Member Tankard stated that Mr. Smithson of DEQ said that the VMRC approval was needed. Mr. Insley stated only on the subaqueous bottom as all other issued had been addressed. Associate Member Tankard stated that they had not really approved Captain's Cove because it was upland discharge and then went into the water. Mr. Insley stated that Ms. Hart, the project engineer, could answer that.

Stacey Hart, Project Engineer, was sworn in and her comments are a part of the verbatim record. Ms. Hart explained that the system design was above ground wastewater treatment and then goes underground. She said in the case of the Landmark Project it was all above ground in a box with treatment of the water being done in the container and then sent into the water.

Associate Member Tankard asked if this system ever failed. Ms. Hart said there were more in the older areas where they used lift stations. This one had a generator and holding tank, so if there was a loss of power, it would still work.

Associate Member McConaugha asked about failure rate.

Don Hearl, Technical Consultant, was sworn in and his comments are a part of the verbatim record. Mr. Hearl explained that safeguards were built into the system to protect the environment. He said he only knew of one case of total failure and that was in the James River in 1985.

Associate Member Schick asked if it was considered total failure when there was a raw sewage spill. Mr. Hearl explained it was total failure if raw sewage had to be released because of the failure.

Associate Member McConaugha asked if for a smaller plant maintenance was required. Mr. Hearl explained that in the DEQ permit there were specific requirements for this system. He explained that they had to check the system 7days per week and the water had to be checked daily and documented. He further explained if this was not done, they would be in violation of the DEQ permit. He said there would be lots of oversight. He said spare parts were stocked and of the four facilities on Chincoteague Island there had not been any failures.

Associate Member McLeskey asked if the water from the outfall was drinkable. Mr. Hearl said that with today's standards it was fishable and swimmable, but he did not know if it was drinkable. He stated he would not drink it. He said that the DEQ regulations were 100 times stricter than the requirements for drinking water.

Associate Member McConaugha asked about the amount of output from the outfall? Mr. Hearl explained that it was approved for 12,500 gallons per day but could handle up to 35,000 gallons per day.

Commissioner Bowman asked if it was not catastrophic, then a moderate failure would not involve raw sewage. Mr. Hearl stated that he could not say it would not fail, but they would be able to address it quickly and it would need to be catastrophic to impact the environment.

Mr. Insley said that this could be resolved today equitably. He said they were here today because of the encroachment on State-owned bottom.

Commissioner Bowman asked who was present in support of the project. He swore all of them in at the same time. He also asked them to come forward to state their names for the record. They were as follows:

Barry Fisher	Mike McGee	Raymond Britton
Ken Ballerini	Jim Frese	Lynne Ballerini
Mary Lou Birch		

Jim Frese said he was on the Chincoteague Town Council and past member of the Wetlands Board. He said that Mr. Mason still had rights to his leased ground. He said the effluent that would come from the outfall was reported to be potable water. He said that rain water today damages the environment and this water from the outfall would be better than drinking water. He said he urged the Commission to approve it, as they did not want the deep well injection system on Chincoteague. He said that Chincoteague was not against the Birchwood project.

Donald Birch, applicant, was sworn in and his comments are a part of the verbatim record. Mr. Birch stated he had done everything he could to please people. He said there was no shell in the area and no one wanted to work the lease in that area.

Commissioner Bowman asked that the representative from DEQ to come forward and provide information on the status of their permit.

James McConalty, representing DEQ, was sworn in and his comments are a part of the verbatim record. Mr. McConalty stated that the permit will be issued with the agreement to put the discharge line at a one meter depth.

Associate Member McConaugha asked if they had done any scientific tests. Mr. McConalty explained they had not, the Division of Shellfish Sanitation made determinations for condemnation of shellfish areas.

Associate Member Schick asked if impacts on the resources had been considered by DEQ. Mr. McConalty responded yes, as far as the impact on shellfish or the size of the condemnation. He said they worked with the Health Department and VMRC as required by regulation.

Commissioner Bowman asked if Dr. Croonenbergh with the Division of Shellfish Sanitation was present.

Robert Croonenbergh, was sworn and his comments are a part of the verbatim record. Commissioner Bowman asked if an impact study had been done. Dr. Croonenbergh explained that they did not issue a permit. He explained even treating the effluent with an ultraviolet treatment which was and excellent and the best method there was still concern with viruses being present. He said this was why there was a prohibited area established as required by the Federal Drug Administration (FDA). He said man-made facilities could fail. He said to classify the waters whether restricted or not they use a computer model, which takes into consideration the depth and tidal flow. This was a theoretical model. He said they did do some dye testing in an area above the project site to check for sufficient dilution and they could not test the shallower areas, but the further downstream the dye went the more diluted it became.

Associate Member Robins asked if the study showing that the dye moved a considerable distance was of concern to VIMS. He further asked if the virus could be transmitted to the adjoining lease.

Dr. Croonenbergh responded yes, it could and VIMS was currently looking at the Hampton Roads area developing a study technique. He said the Health Department only tested for fecal chloroforms. He said that the preliminary data showed the virus was in the Hampton Roads area and historically this had not been a problem. He said it was a potential for not allowing relaying. He said VIMS was looking at how long of a

deuration time period was needed for the virus to be flushed out of the shellfish. He stated that they did not issue permits and could not take sides in any case, only provide information on what was there in the area.

Commissioner Bowman asked Dr. Wesson to come forward.

Jim Wesson, Head, Conservation and Replenishment Department, was asked to speak about the staff's sampling methods and findings. Dr. Wesson explained with the Captain's Cove case there was no MOU at that time. He said the two cases were like apples and oranges. He referred to staff's power point presentation. He said that staff checked the unassigned area by making 3 to 4 random grabs and they found oysters to be 400 to 800 per meter on the reef. He said that to look at more area would be an exhaustive effort. He said they found clams in the sandy, subtidal area and when checked at random it showed clams to be 2 per meter. Commissioner Bowman asked if he were comfortable with the survey and to explain his experience. Dr. Wesson responded yes, that he had been with the Commission for 15 years and had routinely done intertidal surveys. Commissioner Bowman asked if there was a viable shellfish resource. Dr. Wesson responded yes, oysters had come back to the area and clams had always been there. He said that others had noticed more shellfish in the area of Chincoteague. Associate Member Schick asked about the area on the upstream side of the project. Dr. Wesson stated that there were two habitat types that were looked at, which was the same as the other areas. Associate Member Schick asked if in the future it could be good habitat. Dr. Wesson responded yes and where shellfish could be relayed. Associate Member McConaugha asked about the risk of relaying. Dr. Wesson said it was not hard or expensive for oysters, but it was harder with clams. Associate Member Tankard asked about comments that there were no shellfish in the area. Dr. Wesson stated that they were probably right at that time, but now there were some in the area.

Commissioner Bowman asked if anyone in opposition wished to speak.

Donna Mason, protestant, was sworn in and her comments are a part of the verbatim record. Mrs. Mason stated that she was the wife of Tommy Mason and Donnie Birch's cousin. She explained that she was opposed to the effluent that was going to be put into the water. She said she wondered that if it was not used recreationally, then why was their pier being allowed. She read and provided three documents that commented on the viruses that concerned the Health Department. Associate Member Tankard asked about tourism impacts. Mrs. Mason stated there were businesses about a ¼ of a mile from the discharge.

Tommy Mason, protestant/leaseholder, was sworn and his comments are a part of the verbatim record. Mr. Mason said he disputed Mr. McGee's comments to the Judge that with the water in Chincoteague being polluted it was not feasible to move seafood. He said he also disputed the comment about no permits being issued, because in 2007 he did get a permit and moved approximately 75 bushels of oysters, which he sold to Ricky

Howard for \$50 to \$60 a bushel. He said he also planned to move more in 2008. He read from a document that said that there had been one case of infection attributed to Virginia's shellfish and another occurrence could close down the fishery. He also read from a document produced by VIMS that said you need excellent water quality for aquaculture. He said that Accomack County was proposing a sewage treatment which they plan to put on land not in the water which could be hooked into. He said the dye test did go all over because Mr. Bowden got calls from watermen who were concerned when they saw it. He said he spoke with someone at DEQ who told him that the shellfish leases that were now in the area could not be used. He said he was not against the condos and a motel being built on highland but there was already highland treatment for five lots. He said they needed to cut back or use the injection system. He said that clams were being harvested right today on the opposite shore and that an ariakensis project was also near there.

Associate Member Schick asked how much it cost to relay. Mr. Mason stated it was a very small cost, just labor to harvest and move them in baskets.

Carl Meixner, waterman, was sworn in and his comments are a part of the verbatim record. Mr. Meixner said he was concern about public health as well as the impacts on aquaculture. He said he had three small plots where he raised oyster and clams. He said two plots were in un-restricted areas and 1 plot was restricted and only could be relayed. He said there was a prolific number of clams and oysters on the other side of the channel, which were also of concern. He said he wanted the vertical pipe to be used for this project.

Commissioner Bowman asked for rebuttal by the applicant's attorney.

Neil Insley in his rebuttal he reiterated some of his earlier comments. He added that there was a lot of "what if's" heard today and it baffled the mind with what might happen if the outfall should fail. He said it seemed that VMRC was encouraging relaying which had an economic impact and also impacted VMRC because of the increased effort required from them. He said the Commission needed to determine the location of the pipe only, as the effluent had already been approved.

Commissioner Bowman asked for discussion or action by the Board.

Associate Member Schick said that VMRC had to look out for the public good, not just for now, but also in the future. He said this area would go from a restricted area to a prohibited one. He said the Commission was looking at more than just the pipe, it looked at the effluent.

Associate Member Robins said he had a problem with what counsel for applicant said about VMRC deferring to DEQ and DSS. He said in accordance with 28.2-1205 the Commission was required to look at and consider impacts on other uses of the water, the

marine resources, the water quality, the SAV in the area and the adjoining property owner. He said they did weigh the actions of DEQ, but also there was a need to look at the information provided at this hearing, such as the shellfish data, SAV being in the area and the DSS concerns about the risk of a virus being introduced. There would be consequences of the virus being introduced for the leases adjacent to the prohibited area. He said the 15.7 acres of oyster ground would be permanently closed.

Associate Member McConaugha stated that he agreed with Associate Member Robins. He said the Health Department did only a limited test and the Commission must consider others. He said the dye test only demonstrated a wider impact area.

Associate Member Tankard stated that from Dr. Strobes comments concern was acute around discharges and must be taken seriously, therefore, he would have to vote against the project.

Associate Member McLeskey stated that he came to the meeting with an open mind. He said the technology was there and it would be monitored closely. He also said there was economic value of the hotel and restaurant for the community.

Commissioner Bowman said that Dr. Wesson was the VMRC expert and the Birch lease did belong to the Commonwealth. He said in accordance with 28.2-1205 the Commission must weight the benefits and the detriments and consider the Public Trust for all of the public.

Associate Member Robins said in the case of Birchwood they had considered everything. He read Section 28.2-1205 into the record. He said the Birch lease was for shellfish propagation and gave the leaseholder no other rights. He said that the Department of Shellfish Sanitation was concerned about the risk of viruses and the shellfish survey showed this to be an unreasonable use of the 15.7 acres. He moved to deny the application. Associate Member Tankard seconded the motion. The motion carried, 7-1. Associate Member McLeskey voted no. The Chair voted yes.

No applicable fees – Permit Denied

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Commission Bowman announced that since a number of people had come long distances for the item numbers 11 through 17 for projects in the Aquia Creek, Stafford County, they would all be heard together at this time. After that the Commission would break for lunch.

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

Commissioner Bowman stated that he was advised by Counsel that the Commission could go ahead with their review of Item 14, Donald Parks.

Carl Josephson, Senior Assistant Attorney and VMRC Counsel, stated that the Board could go ahead with the after-the-fact approval, if that was what they were going to do.

Mr. Bacon reviewed slides for all the seven cases. He stated that all the applicant's structures were non-water dependent. He said some of them told staff that the structures went back to the early '60's just before or when VMRC was given its authority to issue permits for subaqueous projects. He noted that two of the applicants had refused to let him on their property for the site visit. He said he had received after-the-fact applications for all, there were no protests and staff did recommend approval.

Commissioner Bowman asked for questions of staff.

Associate Member Schick asked about the two applicants who refused to let staff make their site visit. Mr. Bacon stated that both the Crippens and Butterbaughs asked VMRC staff to leave their properties.

Associate Member Robins stated he was concerned that a precedent would be set, but that they all did predate the water dependence policy. Mr. Bacon responded his agreement to that statement and further said that they were just being heard to be legitimized.

Commissioner Bowman stated that some had added to the structures and one more recently purchased the property and assumed that it was permitted. He said as to civil charge, if they are approved and drawings had been received, he questioned whether it was appropriate to assess a civil charge. He asked if any of the applicants wished to address the Board.

Charles Couch, applicant, was sworn in and his comments are a part of the verbatim record. Commissioner Bowman asked if he agreed with staff's comments. Mr. Couch responded yes. He explained that he had bought the property in 1996. He said the structure was built in '61 and in 1987 that Stafford County authorized the alterations and enlargements. He said he had researched the County records and found this information in those records.

Associate Member Schick asked if the two applicants that refused staff access to their sites were present. Mr. Bacon stated that neither was present. Associate Member Schick suggested that they be treated separately from the rest.

Commissioner Bowman stated that separate motions would be necessary.

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- 11. **MR. AND MRS. RICHARD DECATUR, #08-1160**, request after-the-fact authorization to retain a 38-foot by 28-foot enclosed roofed structure including a 22-foot by 16-foot sitting room, a 7-foot by 11-foot storage area, a boatlift, and PWC lift adjacent to their property along Aquia Creek in Stafford County.

Associate Member Schick moved to accept staff recommendation with no civil charge. He stated that in doing so he was not supporting the permitting of non-water dependent structures and in the future it should be done appropriately. Associate Member Robins seconded the motion. The motion carried, 8-0. The Chair voted yes.

Permit Fee (Triple)..... \$75.00

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- 12. **CLARK CRIPPEN, #08-1179**, requests after-the-fact authorization to retain an 18-foot by 27-foot enclosed roofed structure including an 8-foot by 13-foot storage shed and a boat slip adjacent to his property along Aquia Creek in Stafford County.

Associate Member Schick moved to accept the staff recommendation including a civil charge of \$600.00 for minimal environmental impact and minor non-compliance. Associate Member Robins seconded the motion. The motion carried, 8-0. The Chair voted yes.

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

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- 13. **MR. AND MRS. RAYMOND HEFLIN, #08-1205**, request after-the-fact authorization to retain a 31-foot by 32-foot enclosed roofed structure including a 25-foot by 15-foot screened sitting area, a 6-foot by 11-foot storage area, and a boat slip adjacent to their property along Aquia Creek in Stafford County.

Associate Member Schick moved to accept the staff recommendation with no civil charge. Associate Member Holland seconded the motion. The motion carried, 8-0. The Chair voted yes.

Permit Fee (Triple)..... \$75.00

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- 14. **DONALD PARKS, #08-1224**, requests after-the-fact authorization to retain a 62-foot by 20-foot enclosed roofed structure including a 20-foot by 12.5-foot screened room, a 20-foot by 20-foot kitchen/sitting area, a 20-foot by 12-foot attached roofed structure, and a boatlift adjacent to his property along Aquia Creek in Stafford County.

Associate Member Schick moved to accept staff recommendation with no civil charge. Associate Member Holland seconded the motion. The motion carried, 8-0. The Chair voted yes.

Permit Fee (Triple)..... \$75.00

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- 15. **PHYLLIS MARCERON, #08-1252**, requests after-the-fact authorization to retain a 45-foot by 13-foot enclosed roofed structure including a 7-foot by 13-foot room, a 14-foot by 13-foot screened sitting area, and a boat slip adjacent to her property along Aquia Creek in Stafford County.

Associate Member Schick moved to accept the staff recommendation with no civil charge. Associate Member McConaugha seconded the motion. The motion carried, 8-0. The Chair voted yes.

Permit Fee (Triple)..... \$75.00

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- 16. **MR. AND MRS. CHARLES COUCH, #08-1305**, request after-the-fact authorization to retain a 35-foot by 40-foot enclosed roofed structure including a 34-foot by 10-foot living space, a 14-foot by 8-foot storage room, and two boat slips adjacent to their property along Aquia Creek in Stafford County.

Associate Member Schick moved to accept staff recommendation with no civil charge. Associate Member Holland seconded the motion. The motion carried, 8-0. The Chair voted yes.

Permit Fee (Triple)..... \$75.00

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- 17. **MR. AND MRS. LEO BUTTERBAUGH, #08-1426**, request after-the-fact authorization to retain a 50-foot by 40-foot enclosed roofed structure, which includes two 10-foot by 23-foot sitting/storage areas, an 11-foot by 10-foot room

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and three boat slips adjacent to their property along Aquia Creek in Stafford County.

Associate Member Schick moved to accept the staff recommendation with a civil charge of \$600.00 for minimal environmental impact and minor non-compliance. Associate Member Robins seconded the motion. The motion carried, 8-0. The Chair voted yes.

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

Commissioner Bowman adjourned the meeting for lunch at approximately 1:10 p.m. The meeting was reconvened at approximately 2:05 p.m. by Associate Member Holland. Commissioner Bowman was delayed in his return.

6. JBH LLC, #07-1948. Consideration of Mr. Honeycutt's compliance with the Commission's March 25, 2008 decision regarding the pier he constructed at 475 Wind Mill Point Road along the Back River in Hampton.

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

Ms. Gallup explained that at the March 25, 2008, Commission meeting, the Commission voted to approve Mr. Honeycutt's after-the-fact pier request with the stipulation that he remove all floating platforms, all non-water dependent amenities, and reduce his covered platform to a 20-foot by 40-foot open-sided boathouse. This work was to have been completed within 120 days of the Commission's decision. This followed the January 24, 2008 meeting where the Commission voted to defer their decision regarding the fate of Mr. Honeycutt's pier for 2 months to provide him with time to submit revised drawings reflecting the conversion of his covered platform into an open-sided boathouse.

Ms. Gallup stated that staff met with Mr. Honeycutt on his pier on July 14, 2008, after receiving a phone call requesting that we perform a compliance check. During the visit, staff noted that all floating platforms and non-water dependent amenities had been removed, and that he had begun removing large sections of the platform's flooring in an apparent attempt to create a dual-slip boathouse.

Ms. Gallup said that staff followed up the site visit with a letter dated July 23, 2008, stating that we did not believe he was in compliance with the Commission's decision. Staff also requested that Mr. Honeycutt submit actual proof of boat ownership since we felt the Commission's March decision was partially based on his testimony that he owned a 28-foot boat, and any additional scaled, revised drawings he believed were necessary to reflect the current state of his pier.

Ms. Gallup stated that staff understood the Commission's decision to be approval of a 20-foot by 40-foot open-sided, single-slip boathouse with the justification for square footage greater than 700 square feet based on his purported boat ownership. To date, Mr. Honeycutt had not submitted any proof that he owned a 28-foot boat.

Ms. Gallup noted that at the July 14 site visit, Mr. Honeycutt explained that he was unable to convert his platform into a single-slip boathouse with 5-foot wide finger piers because the roof would fail without the supports that are in the middle of the platform. Although Mr. Honeycutt had removed all of the unauthorized floating platforms and non-water dependent uses from his pier, the configuration of the remaining structure did not appear to be in conformance with the decision or staff understanding of what was expected by the Commission. As such, staff believed it was necessary that the Commission clarify and reiterate its March 25, 2008 decision that the platform be converted into a 20-foot by 40-foot open-sided, single-slip boathouse. Should the Commission allow any portion of the structure to remain in excess of the original authorization staff recommended that an additional civil charge in the amount of \$1,200.00 based on minimal environmental impact and moderate non-compliance?

Donald Honeycutt, applicant, was sworn in and his comments are a part of the verbatim record. Mr. Honeycutt explained that he could not make the change, because the roof would collapse. He said he needed it to eliminate the sun and that's why he made it open-sided. He stated he had complied with everything else he was asked to do. He said originally he had paid a contractor, who took his money and had told him all the permits were done. He said the structure was torn down by Hurricane Isabel and it was a bigger structure. He stated also that he should have been allowed the decking within the same area.

After some clarifying discussion, Commissioner Bowman asked for anyone in opposition who wished to speak. There were none. He stated the matter was before the Commission for action.

Associate Member Robins stated that there was a departure from the original application, but it does represent reasonable coverage for mooring the existing water craft. He moved to approve it. Commissioner Bowman asked about a civil charge as staff recommended. Associate Member Robins asked if there had been a civil charge previous? Ms. Gallup stated that staff originally recommended a civil charge if no changes were required by the Commission, but he was asked to change it, so

there was no civil charge assessed. Associate Member Robins stated that there would be no civil charge. Associate Member Holland seconded the motion. Associate Member Schick stated that this was not the right structure to be useful and should be rebuilt. The motion carried, 6-2. Associate Members Schick and Tankard voted no. The Chair voted yes.

Permit Fee..... \$100.00

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7. THORNTON HALL OF NORFOLK, LLC. Commission determination of whether any of the previously filled lands authorized for conveyance pursuant to Chapter 675, Acts 2008 (totaling 190,196 square feet or 4.367 acres), qualify as prior State-owned subaqueous lands and, if so, the appropriate terms, conditions and just compensation for that conveyance.

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 2008 legislative session, the General Assembly authorized, and the Governor approved, the conveyance of certain filled lands lying in the City of Norfolk to Thornton Hall of Norfolk LLC. These filled lands are variously described in historical documents as lying along Tanners Creek, Wayne Creek or the Lafayette River.

Mr. Grabb said that some question existed as to whether the filled lands were created by the filling of tidal marsh (i.e. wetlands) or by the filling of State-owned subaqueous lands. Given this situation, the Acts of Assembly afforded the potential grantee with the opportunity to request a written determination by the Commission of whether the filled lands were subject to the provisions of §28.2-1200 of the Code of Virginia. The purpose of this hearing was to make that determination.

Mr. Grabb stated that Counsel for the Grantee, Thorton Hall of Norfolk, LLC, Mr. Christopher R. Nolen with Williams-Mullen, had provided sufficient information and documentation to convince staff that the area being conveyed was formerly marsh, not State-owned subaqueous land. Furthermore, it appeared that the area had been filled sometime between 1965 and 1972 when the Tidal Wetlands Zoning Ordinance (§§28.2-1300 et. seq.) was first enacted.

Mr. Grabb noted that in the absence of any information to the contrary, staff recommended that the Commission make a determination that the Commonwealth had no right, title or interest in the filled lands described in Chapter 675 Acts 2008 finding that the subject property was not previously filled State-owned subaqueous land subject to the provisions of §28.2-1200 of the Code of Virginia.

Chris Nolen, attorney for the grantee, was present and his comments are a part of the verbatim record. Mr. Nolen said at the present time there is a 60-bed facility and they wish to clarify the question of a clear title to the site where this facility is located. He said there was no established process to be heard by VMRC. As this was possibly not State-owned property they could file action to acquire it. He said when he spoke with the Attorney General's office he was told that they would claim sovereign immunity and if they were taken to court they would appeal it. He said since there was no legal or administrative process, the General Assembly authorized VMRC to make this decision. He said that they had provided information and that this would be considered by VMRC.

Commissioner Bowman stated that the evidence was clear and the staff had been convinced. He asked if anyone pro or con wished to speak. No one wished to speak, therefore, he asked for discussion or a motion.

Associate Member Robins explained that with the staff's presentation and the fact that it did not appear to be State-owned bottom, he moved to find that the Commonwealth had no right, title, or interest in the filled lands described in Chapter 675 Acts 2008, finding that the subject property was not previously filled State-owned subaqueous lands subject to the provisions of Section 28.2-1200 of the Code of Virginia. Associate Member Tankard seconded the motion. The motion carried, 8-0. The Chair voted yes.

No applicable fees – Not State-owned Bottom

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8. **BAYMARK CONSTRUCTION CORPORATION, #08-0519**, requests authorization to construct two floating piers with T-heads and finger piers for the mooring of 79 boats within the footprint of the existing Bay Creek Marina along Kings Creek in the Town of Cape Charles. Although the proposed piers and boat slips were previously permitted in 2001, they were never constructed. The applicant has requested that the Commission set a reduced royalty assessment.

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

Mr. Badger explained that at the June 1995 Commission meeting, the previous owners were granted authorization (#93-0149) to dredge the marina and navigational channel leading into Kings Creek, construct one new pier and extend the three existing piers to create a total of 224 wet slips. The permit was then transferred from Brown & Root I, Inc. to Baymark Construction Corporation in 1999. The Commission subsequently approved a modification to Baymark's permit at their February 26, 2002, meeting. This modification was to realign the piers and boat slips to create a more efficient marina

layout and to construct six (6) open-sided and six (6) closed-sided shelters on the piers. All previous permit conditions remained in effect.

Mr. Badger further explained that at that time the Commission, under §28.2-1205 (E) of the Code of Virginia, also assessed an annual royalty of \$5,341.80 for the encroachment over 106,836 square feet of State-owned subaqueous land (piers only) at a rate of \$0.05 per square foot. Since this charge for private uses of State-owned submerged lands was under review at the time, the royalty was assessed but never collected.

Mr. Badger stated that Baymark's permit (#93-0149) was extended for the final time in 2000 for five years. That permit expired on June 30, 2005. Baymark had constructed four (4) of the six (6) piers and all of the open-sided and closed-sided shelters on the piers. Since the original permit expired after ten years in 2005, a new application was required for all work that was not completed. The new application falls under all the laws and regulations that are in effect today and was being reviewed on its merits. Had the applicant not requested that the Commission reduce the normal royalty assessment, this project would have been on the agenda as a Page 2 item since it was not protested.

Mr. Badger said that the Virginia Institute of Marine Science (VIMS) stated that floating piers were generally acceptable when located in water deep enough that they float during all normal tide conditions and that the applicant could demonstrate a need for the new mooring slips. No State agency had expressed opposition to the project and no protest had been received.

Mr. Badger stated that Chapters 899 and 1018, Acts of Assembly 2004, forgave all the outstanding royalty assessments and provided that the Commission shall not assess nor collect any rent or royalties, except dredging royalties, until July 1, 2005. The Commission resumed its longstanding practice of assessing and collecting, either annually or one-time, rents and royalties for private use of state-owned submerged lands, effective December 1, 2005.

Mr. Badger noted that in keeping with the recommendations of the Habitat Management Advisory Committee (HMAC), the Commission also adopted the policy where royalties were assessed based on the bold outline of the total area encumbered, not the actual shadow of the permitted encroachment, since this more closely represented the area of public bottom that was being converted to private use. Although a royalty range of \$0.20 to \$1.75 per square foot for Public Use Marinas was established by the Commission, a specific assessment within that range of \$1.00 was established to minimize debate and confusion.

Mr. Badger explained that in order to help the Commission understand the value of the State-owned bottomland in Kings Creek, staff went to Bay Creek's website. Staff found that slip membership deposits were equal to \$1,500.00 per foot of the length of the slip, with monthly dues at \$4.00 per foot of the length of the slip. They also had annual slips at

\$8.00 per foot, semi-annual at \$10.00 per foot, monthly at \$12.00 per foot and daily at \$2.00 per foot. The two proposed piers had 79 slips for boats ranging from 35-foot to 70-foot long (23 slips for 35-foot boats, 22 slips for 40-foot boats, 16 slips for 70-foot boats and 18 for 60-foot boats). If all the slips on the two proposed piers were rented on an annual basis the total rent would be approximately \$372,296.00. This does not count the existing 145 slips and four piers in the marina for which royalties were not collected, due to the State-wide moratorium on royalties from February 25, 1989 to June 30, 2005.

Mr. Badger said that in light of the foregoing, staff continued to recommend approval of the project, as proposed, with either a one-time standard royalty assessment in the amount of \$115,970.00 for the bold outline and the pier encroachment over 115,970 square feet (2.66 acres) of State-owned subaqueous land at a rate of \$1.00 per square foot or an annual royalty in the amount of \$11,597.00 at a rate of \$0.10 per square foot in perpetuity.

Tom Langley with Langley and McDonald Engineering and representing the applicant, was sworn in and his comments are a part of the verbatim record. Mr. Langley stated that staff had compared to what potentially would be the rent of the boatslip. He explained the breakdown of expenses incurred and that the total investment for the applicant would be five million dollars. He said the \$550,000.00 royalty based on today's fees was more than the cost of doing business. He said that with the expenses already incurred they were requesting relief from the royalty fees. He said that if an extension had been requested it would have been granted. He said this facility was valuable to the community. He said that if they were to be charged this royalty fee, then it should be based on the minimal amount of \$0.20/square foot which was within the range allowed by VMRC.

Associate Member Schick asked why an extension of the permit was not requested. Bob Grabb, Chief, Habitat Management explained that it had expired in 2005 and if it had been requested, a maximum of ten years would be all that was allowed.

Associate Member Tankard asked if this would not set a precedent? Mr. Langley noted that the guidelines do give a range. He again stated that the property was of benefit to the region.

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

Associate Member Schick stated that if the General Assembly were to bring back the subject of royalties and make all marinas exempt he would be all for it, but there were guidelines for it. He said paying royalties is a deterrent and maybe the royalties could be lowered because of previous permit.

Commissioner Bowman stated that the Commission had been applying these fees consistently on others and he would be uncomfortable do otherwise in this case.

Associate Member Tankard moved to approve the project as proposed with a one-time royalty in the amount of \$115,970.00 for the bold outline encroachment over 115,970 square feet of State-owned bottom at the rate of \$1.00 per square foot. Associate Member McConaugha seconded the motion. The motion carried, 5-2-1. Associate Members Schick voted no and Associate Member Holland abstained. The Chair voted no.

Royalty Fees.....	\$115,970.00
Permit Fee.....	\$ 100.00
Total Fees.....	\$116,070.00

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- 9. **H. SPENCER MURRAY, #07-0792**, requests authorization to modify his previously authorized permit by relocating and reconfiguring the single dredge and placement site into two smaller dredge and placement sites. The proposed project lies in the Chesapeake Bay at the mouth of Nassawadox Creek, Northampton County, approximately 500 feet west of the original authorized dredge area.

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

Mr. Badger explained that the channel at the mouth of Nassawadox Creek is shallow and had been shifting its location for more than 40 years. In the mid 1970's, the large sand spit that channeled the water flow at the mouth disappeared, causing the shifting channel to fill in. The controlling depth was now less than three (3) feet at mean low water.

Mr. Badger said that at the August 23, 2005, meeting the Commission granted the County of Northampton authority for the one-time placement of up to 75,000 cubic yards of hydraulically dredged beach quality sandy material arising from the Nassawadox Creek Federal Navigation Channel in an unconfined, 68-acre overboard site in the Chesapeake Bay, northwest of the mouth of Nassawadox Creek.

Mr. Badger said that unfortunately, the Federal Navigation Channel had not been dredged to date and there appeared to be no funding in the Federal budget for this project in the foreseeable future.

Mr. Badger stated that in response to this fact, Mr. Murray submitted a Joint Permit Application in April 2007 to hydraulically dredge on an as-needed basis a small channel (plug) at the mouth of Nassawadox Creek. The applicant proposed to dredge on average 1.25 feet of sandy material in an effort to achieve and maintain a maximum channel depth of minus four (-4) feet at mean low water.

Mr. Badger reminded the Commission, at its August 28, 2007, meeting, they authorized Mr. Murray to initially dredge up to 297 cubic yards of State-owned subaqueous bottom to create a 320-foot long by 20-foot wide channel into Nassawadox Creek, possessing maximum depths of minus four (-4) feet at mean low water. The Commission also agreed that the sandy dredged material could be placed overboard in an area 100 feet south of and parallel to the proposed channel. To date the dredging that was authorized had not been done.

Mr. Badger noted that on July 17, 2008, staff received a letter from Mr. Murray requesting a modification to the permit. He specifically requested permission to relocate the single dredge and placement site into two smaller dredge and placement sites. Site one would be 57-feet long by 20-feet wide and site two would be 53-feet long by 45-feet wide. The two overboard placement sites were proposed to be 100 feet south of the two proposed dredge sites and would contain up to 262 cubic yards of State-owned subaqueous bottom.

Mr. Badger said that the applicant maintained that a spring storm changed the location of the channel yet again, and that the amount to be dredged would be slightly less than that originally permitted. All other permit conditions would remain in effect.

Mr. Badger explained that as stated in our Subaqueous Guidelines, the overboard disposal of dredged material into tidal waters was not usually permitted unless the material was uncontaminated and granular (sand size). Furthermore, in keeping with §10.1-704 of the Code of Virginia, quality dredged material should be used for beach replenishment purposes whenever practicable.

Mr. Badger said that the Virginia Institute of Marine Science (VIMS) had indicated that dredging could cause a significant disruption of the marine environment, and it often must be repeated in order to maintain water depths. The existing benthic community would be disturbed in both the dredge and disposal areas. They indicated though that there was no submerged aquatic vegetation (SAV) or important shellfish resources in the vicinity and that the impacts were expected to be temporary and localized if the material was coarse-grain sand. VIMS also suggested that the proposed dredging was justified if it was necessary for safe navigation. Nevertheless, VIMS continued to suggest that the disposal of the dredged material in an upland site away from the shoreline was preferable to overboard disposal. They further stated that the placement of dredged material in a properly contained upland site removed the material from the system, so it was less likely to fill in the dredged area, thus extending the time between maintenance dredging events.

Mr. Badger stated that the Northampton County Wetlands Board did not require a permit for this proposal since the project was located channel ward of mean low water and therefore was outside their jurisdiction.

Mr. Badger said that the project modification was not protested, and no State agencies had commented on the project.

Mr. Badger explained that staff still found it difficult to support the overboard, sidecast placement of the dredged material given the VIMS comments and the fact that the Commission had already approved an overboard placement site for the Nassawadox Channel material. Since the Commission had already established a 68-acre overboard placement site in the Chesapeake Bay, northwest of the mouth of Nassawadox Creek for the Nassawadox Creek Federal Navigation Channel's dredge material, staff continued to recommend that the proposed sandy dredged material be placed within the same placement site. Even more preferable would be that the dredged material be used for more beneficial purposes by placing it along an existing eroding shoreline rather than merely being dumped in an overboard site offshore. In this case the proposed overboard placement sites are only one hundred (100) feet away from the proposed channel. Due to the large amount of sand transport occurring at the mouth of Nassawadox Creek, staff believed the material would invariably contribute to the filling of the proposed dredge areas thus further shortening the time between maintenance dredging events.

Mr. Badger stated that nevertheless, even though the small channel would most likely require continual maintenance dredging there appeared to be a documented need to dredge the mouth of Nassawadox Creek in an effort to maintain some limited navigational access. Accordingly, staff supported approval of the proposed dredging modification in the belief that the public benefits to the commercial and recreational boaters of Northampton County outweigh the environmental and philosophical detriments.

H. Spencer Murray, applicant, was sworn in and his comments are a part of the verbatim record. Mr. Murray explained that originally from their measurements, it would work. He stated they had small group of volunteers, \$16,000.00 from community support and a small dredge. He said side casting would cause minimal damage and it was a bad situation in terms of the sand, but they keep fighting it. He said he had tried to contact the Corps of Engineers, but were told that they were fully occupied with the hurricane situation in Florida. He said as far as they were concerned it was okay, if okay with us.

Commissioner Bowman asked for questions. There were none.

Associate Member Holland stated it was hard sand in the area and if a boat were to hit bottom it would tear it up. He moved to approve the modification as requested for one time only in order to remove the plugs. Associate Member McLeskey seconded the motion. The motion carried, 8-0. The Chair voted yes.

No applicable fees – Permit Modification

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- 10. HENRY S. JONES, JR., #2007-076S**, requests authorization to lease 7.25 acres of Oyster Planting Ground in Smith Island Bay near Smith Island in Northampton County. The project is protested by a nearby property owner.

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

Mr. Badger explained that the proposed lease was to be located adjacent to Smith Island, approximately one-half (0.5) mile northeast of the Cape Charles Lighthouse. The water depths varied from minus three tenths (-0.3) of a foot near the shoreline to more than minus two (-2) feet (MLW) in the small channel leading from Smith Island Bay into a small cove. On most of the lease the bottom was a mix of firm mud and sand. There was a small unused shell pile (0.27 Ac.) in the middle of the application. Smith Island Bay had a large amount of clam aquaculture activities bordering the proposed lease.

Mr. Badger said that Mr. Jones applied for an oyster planting ground lease in October 2007. That application was for twenty (20) acres which included an area that was a part of VMRC's Oyster Replenishment program (Shell Plant). Mr. Jones was informed by staff that the area used for oyster replenishment could not be leased. To avoid a conflict, Mr. Jones reduced the size of his application and it was now to be located a minimum of 300 feet south of the replenishment area.

Mr. Badger stated that staff received a letter from Mr. Bill Kittrell, Director of Conservation Programs for The Nature Conservancy (TNC), protesting the oyster ground application. TNC was concerned that the proposed lease would adversely impact the oyster reef that they partnered with VMRC's Conservation and Replenishment Department to develop. They also contended that the lease would encroach on TNC property.

Mr. Badger said that an oyster ground survey was made in July 2008 encompassing 7.25 acres. The proposed lease was a minimum 300 feet southwest of the Conservation and Replenishment Department's shell plant and in a minimum of minus three tenths (-0.3) of a foot of water at approximant mean low water, based on the real-time tidal station at Kiptopeake. (VMRC's long standing survey policy was to give the highland property owner the benefit when it pertained to where mean low water was located.)

Mr. Badger explained that to alleviate some of TNCs concerns, Mr. Jones was willing to remove from his application the small unused shell pile in the middle of the application; reducing the proposed lease by 0.27 acres. Therefore, the proposed lease would be 6.98 acres. Smith Island Bay had a large amount of clam aquaculture activities that bordered

the proposed lease. In fact, the Ballard Fish & Oyster Company's lease (Plat File #16613) had a large number of clam beds that were as close to the VMRC shell plant as Mr. Jones' proposed lease would be. Mr. Jones was active in the clam aquaculture business and had other oyster ground leases.

Mr. Badger stated that although The Nature Conservancy felt Mr. Jones's lease would encroach onto their highland property, staff was confident the lease survey begins channelward of mean low water. In fact staff believed the area within the survey was well beyond mean low water and could have been expanded. TNC also stated that the area behind Smith Island had been actively managed since they purchased the island in the late 1960's and that they had made substantial improvements to the rocks. This might be true, however, the rocks in question were channel ward of mean low water and owned by the Commonwealth. It appeared that since 1895, this area of Smith Island had moved westward more than 1,400 feet and the rocks in question were never a part of Smith Island. In fact after comparing aerial photos, quadrangle sheets and the 1895 Public Ground (Baylor) maps, it appeared that a marsh island north of the Oyster Replenishment's shell plant had risen from subaqueous lands which were the property of the Commonwealth. Under Section 8.2-1201, "Ungranted islands which rise from lands which are property of the Commonwealth. Any island or land that is owned by the Commonwealth, whether currently in existence or subsequently created, that now or hereafter abuts a barrier island of the Eastern Shore shall remain the property of the Commonwealth and shall be managed by the Commission."

Mr. Badger explained that even though Mr. Jones was willing to leave the small unused shell pile in the middle of his application vacant, staff believed a vacant doughnut hole could create an enforcement issue. Based on the above, staff recommended the Oyster Ground Application be approved, as surveyed, which include the small shell pile for a total area of 7.25 acres.

Mr. Badger stated that a letter from Rick Weeks of Department of Environmental Quality said there were buffer areas around the shellplants and that a lot of CZM monies had been invested.

After some clarification questions of staff by the Commission, Commissioner Bowman asked if Mr. Jones or his representative wished to speak.

Henry S. Jones, Jr., applicant, was sworn in and his comments are a part of the verbatim record. Mr. Jones explained that he was a clam farmer on the Eastern Shore. He said he was in the clam seed business and need a site to overwinter the seed. He said he had been looking for a site to meet these needs and met the requirements for overwintering the seed. He said he had other leases in the area, but they were not suitable. He explained that those areas were sandy bottom, but there was a water evaporation problems and this would allow the seed to freeze in the winter. He said he had been doing test beds for approximately two years in this area and found it would meet his needs. He said he had

originally applied for a large area, but when he realized there were problems he made changes in the request. He said as staff has said this area is below low water and he did not feel anyone had claim to this area, which The Nature Conservancy said it did. He said there were other leases that were closer to the island and marshes than this one. He said also that with the original Baylor survey a line had been established on the land and a survey determined that water had been here, but there had been a shift. He said if the shifting continued and starts to ebb out he will return the area to the State, as he had done with other leases. He said that he had seen the breaking of ice where a live oyster reef exists. He said he was willing to work with the State to establish oysters in this area, whether it was with advice, funding or whatever.

Associate Member Tankard asked him how long he had been in the business. Mr. Jones responded since 1991.

Commissioner Bowman asked if there was anyone present in support or opposed to this matter who wished to speak.

Barry Truitt, Chief Scientist with The Nature Conservancy, was sworn in and his comments are a part of the verbatim record. Mr. Truitt stated there were a number of reasons why this lease should not be approved. He said first of all it would compromise their riparian rights to this area which they purchased in 1970, just before he came to TNC in 1976. He said this area had been actively managed since that time by TNC, plus the two small leases in the center of the proposed lease. He said that it would complicate the management of the reefs and in enforcing their poaching problem. He said TNC in partnership with VMRC and NOAA had designated five locations as sanctuaries. He said that oysters have rebounded tremendously. He said that since 2002, thirty acres had been restored both on State-owned bottom and TNC land. He said that they were making strides in their efforts for enforcement of the poaching in 2006, 2007 and 2008. He said they supported aquaculture, but it was not appropriate adjacent to the restoration sites. He stated that they opposed the lease because it would impact future restoration efforts of the reefs. He said that in 2006 this area was identified for oyster restoration and funding was raised of \$1.1 million and a source of fossil shells had been located nearby. He said that in 2007 funding from NOAA had been granted for a 2/3 acre reef to be built amounting to \$211,000.00. He said the area would be better used for oyster restoration and with the partnership \$250,000.00 had been raised to build more reefs. He said they would hate to lose this area or any of it.

After some clarification questions, Commissioner Bowman asked if anyone else was present in opposition that wished to speak. There were none. He asked Mr. Jones if he had any rebuttal comments.

Mr. Jones stated he did not want to remove any oysters, just built it up and expand it. He said he disagree with the claim of ownership, since the shift in the land had changed

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ownership. He said as far as the poaching problem, he had had some problems on his other leases and he cured it and would do the same here.

Associate Member Tankard asked about his source of clam seed. Mr. Jones said it was out of State and local producers, such as Cherrystone.

Commissioner Bowman asked for discussion or action.

After some questions and discussion about ownership, Commissioner Bowman asked for action by the Board.

Associate Member Schick moved to accept the staff recommendation, which included the two rocks in the center making the lease 7.25 acres. Associate Member Bowden seconded the motion. Associate Member Robins asked if the motion could be amended to exclude the small portion in the center. Associate Member Schick stated he felt it would be a law enforcement nightmare and also impact the leaseholder. Associate Member Robins offered a substitute motion to approve lease, but to exclude the small area in the center. Commissioner Bowman asked for a second three times to the substitute motion and there was none. He asked for a vote for the original motion by Associate Member Schick. The motion carried, 5-2. Associate Members Robins and Tankard both voted no. The Chair voted yes.

Associate Member McLeskey left the meeting for the day at approximately 3:23 p.m. during the staff presentation of this item.

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18. PUBLIC COMMENTS:

Commissioner Bowman left the meeting. Associate Member Holland acting as the Chairman opened the public comment period to those who wished to address matters not on the agenda.

Gill Nets – Scott McDonnell, representing a Virginia Beach gill netting operation was present and his comments are a part of the record. Mr. McDonnell explained that they had had problems this year with working their gill nets and being able to tie up their boats in various areas usually available to them. He said Maryland gill netters are coming to Virginia and interfering with their working on the fishing grounds. He said a method to stop them was needed in order to preserve fishing grounds for the Virginia watermen.

Associate Member Bowden said he wanted to make comments on this, but he felt there was an even bigger problem. He said it involved the crab fishery and the striped bass fishery, because the Maryland watermen are participating in Virginia fisheries. He said Maryland does not allow Virginia watermen to do the same. He said that Maryland watermen were allowed to hold Virginia ITQ's for striped bass, but Virginia watermen

were not allowed to do the same in Maryland. He said that FMAC needed to look at all of this. He said it needed to be explored and it was more than just taking up space. He suggested turning this and the other issues he pointed out over to FMAC.

No action was taken.

Pound net site - Ernest George, pound netter, was present and his comments are a part of the verbatim record. Mr. George stated he wanted to relocate his pound net site for next year.

Jack Travelstead, Chief Deputy, Fisheries Management, said if did not set current site this year, he would lose it. He said if he wants to return to original site, then it would be necessary to buy a license. Mr. George said he did buy the license and set the net this year. Mr. Travelstead said it would be necessary to amend the regulation. He explained that for two years the regulation had been amended to not requirement the setting of nets, because of the hurricanes and the financial impact of resetting the nets. He said without the change being made to the regulation, Mr. George would lose the site. He said a written request would have to be submitted. He suggested Mr. George contact others in the fishery and to submit the request.

Associate Member Schick stated there should be an industry-wide situation to make an exemption. Mr. Travelstead responded an exemption had been done the last two years.

Associate Member Robins asked if it had been specific to the hurricanes. Mr. Travelstead responded yes, because of the resulting economic plight of industry.

No action was taken.

Blue Crab Regulations - Ken Smith, Virginia Watermen's Association, was present and his comments are a part of the verbatim record.

Commissioner Bowman returned at this time. Associate Member Holland left at this time.

Mr. Smith explained that for the past month the Watermen Associations have been uniting and making efforts to work with the Commission. He stated that the 22 management measures put on the blue crab fishery had not had any effect on improving the crab populations. He said that the scientists had said that it was difficult to determine why they had not worked, but again more measures were taken to limit the effort. He said they felt it was a negative approach to limit the effort in the fishery. He said that water quality was marginal and nothing was planned to fix that problem. He said that consideration of this needed to be taken by fisheries management. He said the Farm Bill will provide funding for action on non-point source pollution. He said they were

requesting that VMRC write to all of Congress and let them know the importance of the Farm bill.

No action was taken.

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19. DISCUSSION: Blue Crab Pot Tagging, Latent Effort Reductions, Effort Transfer Program, and use of agents; Request for Public Hearing in October 2008.

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

Mr. Travelstead explained that funding expected to be provided by the General Assembly for the crab pot tagging program’s second year would likely not be available because of current budgetary restraints. He further explained that industry was not in favor of funding the first year of the program. He said staff recommended that there be no advertising for a public hearing at this time and that staff would come back with recommendations for the issues of latent effort, transfers, and use of agents at the October meeting. The Crab Management Advisory Committee (CMAC) would again be meeting to review the current proposed regulatory actions.

Associate Member Robins stated that the CMAC meeting was scheduled for October 13th to discuss latent effort and transfers, which could be brought back to the Commission.

No action was taken at this time.

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20. REPORT: Submerged Aquatic Vegetation Status Report by Dr. Bob Orth of VIMS.

Dr. Bob Orth, VIMS, gave a PowerPoint presentation and his comments are a part of the verbatim record.

Jack Travelstead, Chief Deputy, Fisheries Management reminded the Commission that usually at this time they approve funding to continue with these studies. He said the total funding amount was \$20,000.00. He explained that half came from the CFAB funding and the other half came from the RFAB funding.

Associate Member Robins moved to adopt the staff recommendation. Associate Member Tankard seconded the motion. The motion carried, 7-0.

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Commission Meeting

21. **DISCUSSION:** Amendments to Regulation 4VAC 20-720-10, et seq., "Pertaining to Oyster Harvest Restrictions" to establish the 2008/2009 harvest restrictions; Request for a September Public Hearing. Request for approval of procurement procedures for the 2008 Lower Rappahannock River Oyster BuyBack Project. Request for approval of emergency action to amend Chapter 4VAC 20-720-106, "Public Health and Warm Water Harvest Restrictions" of the regulation.

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

Dr. Wesson explained that this was a request for advertisement of proposed amendments for establishing harvest seasons for 2008-2009. He stated that a Shellfish Advisory Committee meeting was scheduled for September 3rd to discuss the proposals. He explained that he also needed approval of the procurement procedures for the another Rappahannock River oyster buyback program as well the amendments to the warm water harvest restrictions in Regulation 4 VAC 20-720-10, which were in conflict with the Code. He said these amendments to the regulation would require emergency action. He said he had talked with the Division of Shellfish Sanitation and they had agreed with the proposed amendments. He said comment letters from both Cowart Seafood and Bevans Oyster Company had been received by staff.

Commissioner Bowman stated that separate motions were needed for the three requests.

The request for public hearing for the proposed public harvest seasons:

Associate Member Robins moved approve the request to advertise for a public hearing in September. Associate Member Tankard seconded the motion. The motion carried, 7-0.

The procurements procedures for the Oyster BuyBack Program:

Associate Member Tankard moved to approve the procurement procedures. Associate Member McConaugh seconded the motion. The motion carried, 7-0.

The warm water harvest restrictions:

Associate Member Robins moved to approve the staff's request for emergency action on the warm water harvest restrictions and for a public hearing in September. Associate Member Tankard seconded the motion. The motion carried, 7-0.

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- 22. **DISCUSSION:** Amendments to Regulation 4VAC 20-252-10, et seq., “Pertaining to Striped Bass” to establish 2008 recreational harvest restrictions; Request for an October Public Hearing.

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

Mr. O’Reilly explained that this was the 5th year of making this request and these were possible changes to the regulation at this point.

Commissioner Bowman asked for a motion to approve the request for a public hearing in October to establish the 2008 recreational harvest restrictions.

Associate Member Robins moved to approve the request to advertise for public hearing. Associate Member Tankard seconded the motion. The motion carried 7-0.

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- 23. **DISCUSSION:** Amendments to Regulation 4VAC 20-620-10, et seq., “Pertaining to Summer Flounder” requested by the industry to modify the open season and possession limits for the offshore commercial summer flounder fishery; Request for a September Public Hearing.

Jack Travelstead, Deputy Chief, gave the presentation. His comments are a part of the verbatim record.

Mr. Travelstead explained this was a request by four of the largest processors in Virginia to modify the regulation. He said there were numerous changes requested, some of which have not been reviewed by staff. He said it would be appropriate to hold a public hearing on this request at the September meeting.

Commissioner Bowman asked if staff would have enough time for their full review. Mr. Travelstead responded, yes, and it would also be taken to the Finfish Management Advisory Committee (FMAC) for their consideration.

Commissioner Bowman asked for a motion to approve the advertisement for a public hearing in September to consider the industry’s requests.

Associate Member Holland moved to advertise for a public hearing. Associate Member Robins seconded the motion. The motion carried, 7-0.

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- 24. DIMITRI HIONIS:** Consideration for the reinstating of forfeited priority rights for two (2) pound net sites; applicant failed to purchase the licenses within the lawful time period.

Jack Travelstead, Chief Deputy, Fisheries Management gave the presentation. Mr. Travelstead explained that Officer Bennis would be giving a powerpoint presentation on his investigation in this matter. He said he wanted to give the Commission some background information first.

Mr. Travelstead explained that Mr. Hionis had been purchasing 6 pound net licenses annually. He said in 2008 Mr. Hionis only purchased 4 nets. He stated the current regulation required that an applicant renew their pound net licenses during a certain time period. He said that any location not renewed during that time period was considered vacant and available for another individual to obtain.

Mr. Travelstead said that in Regulation 380 a fisherman could forfeit two licenses in order to be exempt from the closed fishing season for grey trout. He said it was in Regulation 20 that a time period was established for the pound fisherman to renew their license in order to keep the pound net location in the following year. He said a copy of that regulation was in the Commission's packets.

Mr. Travelstead said that there was a letter in the packet from Mr. Hionis requesting that the two locations be reinstated for him. He said also there was a more detailed description of events provided by Officer Bennis in the packet and a letter from Doug Mennings who was present when Mr. Hionis purchased the licenses. He stated that Mr. Mennings' comments were contrary to those of Mr. Hionis.

Officer Stephan Bennis, Marine Police Officer reviewed a powerpoint and his comments are a part of the verbatim record. Officer Bennis presented a timeline of occurrences and problems faced. He stated the end result was two new pound nets could be constructed in the area and with this there would be six. Commissioner Bowman asked if there was room for two new ones. Officer Bennis stated yes.

Richard Welton was sworn in and his comments are a part of the verbatim record. Mr. Welton said that he had worked for Mr. Hionis for a year and a half and that when Mr. Hionis received a letter from VMRC he got what was in the letter. He said the second year there was no letter sent out, but he did receive a call from Officer Clifton reminding him to purchase his licenses.

Dimitri Hionis was sworn in and his comments are a part of the verbatim record. Mr. Hionis stated that Mr. Welton was correct. He said that Officer Clifton called him this year and he went to the agent to purchase his licenses the same as the previous year. He said when he got the license document he did not look at it. He said he had forgotten to purchase two of the licenses. He said these two were then purchased by Mr. Sanford. He

said he contacted the agent to find out what happened and was told he was issued what he had asked for. He said he had \$1,000's invested in the nets and equipment, which he would not have forfeited just because of a \$20.00 license. He said that there was a witness to the transaction that said he purchased only four licenses. He said he wants his licenses and nets back because it was all a mistake.

Associate Member Tankard asked about the change in procedures. Commissioner Bowman explained to clarify that there had been a transition of selling licenses from the officers to agents. He said as the Chief of Law Enforcement, he had worked on making this change in order to remove the responsibility for handling of money from the officers. He said he felt it was not proper for them to be enforcing the laws plus handling the money.

Noah Weisburg, attorney for Dirk Sanford, asked that Mr. Sanford and the witnesses for Mr. Sanford to be allowed to testify

Dirk Sanford was sworn in and his comments are a part of the verbatim record. Mr. Sanford, when questioned by his attorney, testified that he had purchased the two licenses on July 7th and got them on July 24th. He testified that he had taken financial steps to use them by purchased netting, rope, twine and poles, plus, arrange for a contract to have the poles installed. He said what he had spent so far was approximately \$9,000.00. He said he would have liked to have started when he purchased the licenses. He said it would take about two weeks to prepare each site, a total of a month. When asked how he found out about the availability of the licenses, he explained that on June 1st he had contacted VMRC about getting some new locations and was told at that time by Erik Barth that these two sites were now available. He was asked about the locations and he said the 1st one was at Cape Story, 100 yards off the beach, and the second one, he was not sure, but believed it was at Bayberry Street, stand no. 2.

Commissioner Bowman said that anyone could inquire about this type of information, as it was considered public information.

Steve Wray, VMRC agent, was sworn in and his comments are a part of the verbatim record. Mr. Wray with Long Bay Marina said that he sold the licenses. When asked by Mr. Weisburg, he said that Mr. Hionis came into the business and said that Officer Clifton called him to remind him he needed to purchase his pound net licenses. He said he asked Mr. Hionis for his MRC ID number and then he could access the system. He said once he had the number he looked up the information for Mr. Hionis and asked him which ones he wanted. He said Mr. Hionis responded that it did not matter, as he was only fishing four. He said it only showed four and he read them off and Mr. Hionis selected 1, 2, 3, and 4. He said he then collected the money and issued the tags. He said that others were present at the time.

After further clarifying questions, Associate Member Schick asked if Mr. Wray had any connections to Mr. Sanford. Mr. Wray responded, no.

Charlie Gregory, pound netter working with Mr. Sanford, was sworn in and his comments are a part of the verbatim record. Mr. Gregory when asked explained that Mr. Hionis had approached him afterwards to discuss with him why they had taken advantage of him. He said he made efforts not to discuss it with him, so as to not get into a dispute.

Doug Mennings, salesman, was sworn in and his comments are a part of the verbatim record. Mr. Mennings, when asked what happened, explained that he was there making a sales call at the time Mr. Hionis was purchasing his licenses. He said that it all transpired as described by Mr. Wray. He said Mr. Hionis asked for the licenses. He said Mr. Wray asked Mr. Hionis what licenses he wanted and Mr. Hionis purchased those licenses. He said he did not know Mr. Sanford. He said he felt Mr. Wray did what he was supposed to do, just like he did for others.

Mr. Weisburg provided a copy of the printout of the licenses. Commissioner Bowman asked Officer Bennis to verify it and he did.

Associate Member Robins asked if on the screen it showed the 2 sites among the four purchased. Officer Bennis explained that 5 and 6 were surrendered, so number 6 was illegally fished.

Mr. Weisburg asked Officer Bennis if there were not any coordinates for one of the licenses and what was the physical description for 5 and 6. Officer Bennis responded no to the first question and said he did have information here for them, which was as follows: License 5, East of Lynnhaven, west of Fort Story, 1,400 feet, east of stand 4 in a northerly directly. License 4, ran in northerly direction, east of Lynnhaven Inlet. License 6, 1,800 yards east of stand 5, towards the park at Fort Story in a northerly direction.

Richard Welton said that numbers were not on the nets, which caused the confusion. He said that when Officer Clifton issued the licenses, he knew which ones needed to be forfeited. He said this time the wrong licenses were forfeited. He said they fished all four this year, even though the location of the 4th one was unclear. He said Mr. Hionis wanted to get all six sites back.

Mr. Weisburg stated that he urged the Board to follow the statute which he read it into the record. He stated that if they were not renewed between December 1 and January 1 they were considered vacant. He said it might be a mistake by Mr. Hionis, but he should be sure of what license he needs and be responsible for himself. He said the site was vacant and someone applied for it and had spent approximately \$9,000 so far getting the nets set up. He said with license 6 there was no discrepancy and they did concede that number

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four was a problem. He said it was up to the Board as to how this would be resolved. He reiterated that number six had been forfeited.

Associate Member Schick stated that there was a lot of confusion when Mr. Hionis was not given a letter and only told to renew them. He asked if the Commission could give Mr. Hionis a stand to help him out.

Commissioner Bowman stated that when the problem came up, that stand was frozen until this was resolved. He said there were still two available stands, but the problem was the investment on the stands that Mr. Sanford now has. He asked Counsel for his advice.

Carl Josephson, Senior Assistant Attorney General and VMRC Counsel said that Regulation 4 VAC 20-20-50 puts the responsibility on the individual. He said he did not see where there was evidence of fraud.

Associate Member Schick again asked if two more locations were possible. Commissioner Bowman explained that Officer Bennis and Mr. Welton knew of 2 more sites offshore of numbers 4 and 5. He said that there was plenty of room between numbers 3 and 4 near the State park.

Commissioner Bowman said that Counsel said that mistakes were made, but they could not be blamed on Mr. Sanford, as those stands that were Mr. Hionis were now the property of Mr. Sanford.

Mr. Weisburg said that stand number 6 was taken care of and Mr. Sanford was willing to work out the confusion over number 5 and take a location between numbers 3 and 4.

Mr. Welton said that clearly the site offshore can be moved inshore, as it was continuously fished. He said that there was a problem with all the stands because they needed better descriptions. He said a lot of money had been invested in the poles and Mr. Hionis was being asked to just walk away. Commissioner Bowman stated that Mr. Hionis could appeal the Commission's decision with the Circuit Court.

Commissioner Bowman explained that Counsel had advised him that the licenses were lawfully obtained by Mr. Sanford. He suggested that Law Enforcement staff (Lt. Col. Rhodes, Sergeant Clifton, and Officer Bennis) get with everyone and work out the problems. He stated that Mr. Hionis would be allowed to purchase two additional licenses and that the correct settings and locations would be established. Officer Bennis asked about stand number 3 and whether the latitude and longitude should be corrected? Commissioner Bowman responded, yes, so that it can be located.

No further action was taken.

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August 26, 2008**

There was no further business and the meeting was adjourned at approximately 6:00 p.m.
The next meeting will be Tuesday, September 23, 2008.

Steven G. Bowman, Commissioner

Katherine Leonard, Recording Secretary