

MINUTES

January 26, 1999
Newport News, Virginia 23607

The regular monthly meeting of the Marine Resources Commission was held in Newport News on the above date with the following present:

William A. Pruitt)	Commissioner
C. Chadwick Ballard)	
Gordon M. Birkett)	
Lake Cowart, Jr.)	
Sheppard H. C. Davis)	Associate Members
H. Grant Goodell)	
Laura Belle Gordy)	
Henry Lane Hull)	
John w. White, Sr.)	
Fred Fisher		Assistant Attorney General
LaVerne Lewis		Commission Secretary
Wilford Kale		Sr. Staff Adviser
Bob Craft		Chief-Finance and Administration
Jane McCroskey		Assistant Chief-Finance and Administration
Charlotte Smith		Executive Secretary
Steven G. Bowman		Chief-Law Enforcement
Lewis Jones		Assistant Chief-Law Enforcement
Randy Widgeon		Eastern Shore Area Supervisor
Ray Jewell		Northern Area Supervisor
Warner Rhodes		Middle Area Supervisor
Kenny Oliver		Southern Area Supervisor
Marina Libro		Marine Patrol Officer
Paul Newman		Marine Patrol Officer
Tim Marshall		Marine Patrol Officer
Richard Pruitt		Marine Patrol Officer
Dr. Gene Burreson		Director of Research
Tom Barnard		Virginia Institute of Marine Science
John Olney		Virginia Institute of Marine Science
Mark Luckenbach		Virginia Institute of Marine Science
Dr. Jim Wesson		Chief-Conservation and Replenishment

Commission Meeting

January 26, 1999
Newport News, VA 23607

Jack Travelstead
Rob O'Reilly
Lewis Gillingham
Roy Insley
Ellen Cosby
Tina Hutchinson

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

Robert Grabb
Tony Watkinson
Randy Owen
Jeff Madden
Heather Wood
Chip Neikirk
Jay Woodward
David Bower
Bennie Stagg

Chief-Habitat Management
Assistant Chief-Habitat Management
Environmental Engineer
Environmental Engineer
Environmental Engineer
Environmental Engineer
Environmental Engineer
Environmental Engineer, Sr.

Gerald Showalter
Hank Badger
Robert Butler
Debra Jenkins

Head-Engineering-Surveyor
Engineering-Surveyor
Engineering-Technician
Office Services Specialist

Others Present:

Anita Cook
Betty Grey Waring
Kenneth J. Crofton
Beverly Peters
Otis Cockrell
Jackie Stephan
Jeannie Butler
Charles H. Williams, III
Larry Lynch
Kathy MacKaye
J. Ryan
C. J. Lindemann
William M. Snider, II
Kelvin Somerville

H. R. Humphrey, Jr.
Doug Stamper
Debora Stearns
Julie Walls
Pat Thomas
Sherry Hamilton
Freeland Mason
Wileen Rowan
Kathryn Dove
Hal Goodman
Kevin Drucker
Cynthia Hall
Castle Craddock
Robert Read

Commission Meeting

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Lee Rosenberg
William L. Wood
Deborah Ratten
Mary Ann Johnson
Charles H. Williams, Jr.
Dave Grossman
Mark D. Vincenzo
K. Clark White
Farimae Tate
Phyllis Simonetta
Douglas F. Jenkins
Laurie Sorabella
Jan Marshall
Bill Brown, Jr.
Bets Nugent
Kathleen Rahman
Brooks Taylor
Roger Parks
Kelly V. Place
Jim Bierl

Dave Bugg
Pitilio Briggs
Dorothy Gilkerson
Steve Cox
Steve Stell
Warren M. Cosby, Jr.
Bob Orth
John B. Dawson
H. Jim Deibler
William Shewmake
Les Campagne
Yancey Powell
Charles Parks
R. Welton
Sue Carlyle
Shane Kasper
Russell Gaskins
Dale Taylor
Junior Wigginton

The meeting was called to order by Commissioner Pruitt. Members present. Gordon M. Birkett, Lake Cowart, Jr., Sheppard H. C. Davis, H. Grant Goodell, Henry Lane Hull, and John W. White, Sr. Associate Members Ballard and Gordy would be arriving later.

Associate Member Hull gave the invocation.

Associate Member White led the Pledge of Allegiance to the American Flag.

Commissioner Pruitt placed the approval of the agenda before the Commission. Colonel Bowman indicated that he had received a letter from Mr. Bender requesting removal of Item 17, and that the request for fixed fishing devices in the area of Sunset Beach in Northampton County, Virginia, be removed from the agenda. Associate Member White moved to accept the request. Associate Member Davis seconded the motion. Motion carried unanimously.

Associate Member Hull commented that he had attended a meeting with VIMS and other watermen regarding fisheries matters on opening one of the oyster rocks in the lower Rappahannock, and he wanted to brief the Commission on what happened at the meeting. Associate Member White seconded the motion. Motion carried unanimously. Associate Member Ballard moved that the agenda be approved with the amendments as stated. Motion seconded Associate Member Goodell. Motion carried unanimously.

Copies of the Minutes of the meeting held December 21, 1998, had been sent to the Associate Members prior to this meeting. Associate Member White moved to accept the minutes as distributed. Associate Member Hull seconded the motion. Motion carried unanimously.

Commissioner Pruitt requested that Heather Wood, an Environmental Engineer, approach the podium. Associate Member Goodell, a professor of Ms. Wood at the University of Virginia, presented her with a Certificate of Appreciation from the Stafford County Wetlands Board for her dedicated work with the Board. Comments are a part of the verbatim record.

Mr. Robert Grabb, Chief-Habitat Management, briefed the Commission on the seven page two items. Mr. Grabb explained that those projects involved applications for a permit for projects

over \$50,000 in cost, and that were subjected to a public interest review and no opposition had been received and staff recommended approval with the specified conditions in each item.

HAMPTON YACHT CLUB, #98-1507, requests authorization to realign three (3) existing permitted concrete floating finger piers and replace 42 fixed timber wetslips and a 37-foot long by 27-foot wide timber deck totaling 5,236 square feet with concrete floating piers to accommodate 43 wetslips and a 37-foot wide by 32-foot concrete floating deck totaling 6,510 square feet. The renovation will require the dredging of 1,600 cubic yards of State-owned submerged bottom to the minus eight (8) foot contour. All dredged material will be transported to Craney Island for disposal. Recommend the assessment of a dredge royalty in the amount of \$720.00 at \$0.45 per cubic yard, and annual encroachment royalty of \$325.50 at \$0.05 per square foot.

Dredge royalty 1,600 cu. yds @ \$0.45 per cu. yd. of State-owned submerged bottom.....	\$	720.00
Encroachment royalty (annually) for 6,510 ft. @ \$0.05 per sq. ft.....		325.00
Permit Fee.....		<u>100.00</u>
Total	\$	1145.00

LYNCHBURG DEPARTMENT OF PUBLIC WORKS, #98-2126, requests authorization to cross Blackwater Creek at eight (8) locations with aerial and submerged sanitary sewerlines. The 54-inch sewer line is designed to replace a 36-inch line and will cross a total of 148 linear feet of the creek near its confluence with Ivy Creek in the City of Lynchburg. Recommend approval with our standard in-stream construction conditions.

Permit Fee.....	\$	100.00
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YORK RIVER YACHT HAVEN, #94-1293, requests reactivation and extension of their permit to reconstruct and renovate facilities at their existing marina. The remaining work involves the construction of a marine office building which will encroach into an existing boathouse and the renovation and expansion of an existing marine store encroaching over a total of 1,827 square feet of State-owned submerged land adjacent to their property along Sarah Creek in Gloucester County.

Permit Fee Not Applicable

LYON SHIPYARD, #98-1289, requests authorization to install and backfill approximately 740 linear feet of steel sheetpile bulkhead adjacent to their facility situated along the Eastern Branch of the Elizabeth River in Norfolk. Recommend an annual royalty of \$466.00 for the

filling of 4,664 square feet of State-owned subaqueous land at a rate of \$0.10 per square foot.

Filling of 4,664 sq. ft. @ \$0.10 sq. ft. of State-owned subaqueous land (annually).....	\$ 466.40
Permit Fee.....	<u>100.00</u>
Total	\$ 566.40

COLONNA YACHTS, #98-1985, requests authorization to construct two (2) 150-foot long by 15-foot long concrete travel lift piers adjacent to their facility situated along the Eastern Branch of the Elizabeth River in Norfolk. Recommend an annual royalty of \$233.00 for encroachment over 4,650 square feet of State-owned subaqueous land at a rate of \$0.05 per square foot.

Encroachment over 4,650 sq. ft of State-owned subaqueous land @ \$0.05 per sq. ft. (annually).....	\$ 233.00
Permit Fee.....	<u>100.00</u>
Total	\$ 333.00

COLONNA YACHTS, #98-2040, requests authorization to construct and backfill a 465-foot section of existing timber bulkhead with a steel sheetpile replacement bulkhead adjacent to their facility situated along the Eastern Branch of the Elizabeth River in Norfolk. Recommend an annual royalty in the amount of \$108.50 for the filling of 1,085 square feet of State-owned subaqueous land at a rate of \$0.10 per square foot.

Filling of 1,085 sq. ft. of State-owned subaqueous land @ \$0.10 per sq. ft. (annually).....	\$ 108.50
Permit Fee.....	<u>100.00</u>
Total	\$ 208.50

U.S. ARMY CORPS OF ENGINEERS, #95-0432, requests authorization to place up to 120,000 cubic yards of dredge material per cycle, from the Metompkin Bay Channel of the Waterway on the Coast of Virginia (WCV) in the surf zone on the ocean side of Metompkin Island in Accomack County. Recommend a time-of-year restriction between April 1 and September 1 to avoid impacts to sensitive bird species in the area during this period.

Permit Fee.....	\$ 100.00
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There being no comments, pro or con, on the page two items, Commissioner Pruitt placed the

matter before the Commission.

Associate Member Davis moved to approved the page two items. Associate Member Birkett seconded the motion. Motion carried unanimously.

Associate Member Davis moved that this meeting be recessed and that the Commission immediately reconvene in executive closed meeting for the purpose of consultation with legal counsel and briefings by staff pertaining to actual or probable litigation or other specific legal matters requiring legal advice by counsel as permitted by Subsection (A), Paragraph (7) of Section 2.1-344 of the Code of Virginia, pertaining to agenda item 5 and pending litigation or other matters to be discussed. Associate Member Goodell seconded the motion. Motion carried unanimously.

The Commission returned from executive session and Associate Member Davis moved that:

WHEREAS, the Marine Resources Commission has convened an executive 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, §2.1-344.1 of the Code of Virginia requires a certification by this Marine Resources Commission that such executive meeting was conducted in conformity with Virginia law;

NOW, THEREFORE, BE IT RESOLVED that the Marine Resources hereby certifies that, to the best of each member's knowledge, (i) only public business matters lawfully exempted from open meeting requirements by Virginia law were discussed in the executive meeting to which this certification resolution applies, and (ii) only such public business matters as were identified in the motion convening the executive meeting were heard, discussed or considered by the Marine Resources Commission. Associate Member Goodell seconded the motion. Motion carried unanimously.

STEPHEN M. HIGH, #98-1364, Commission review on appeal of the November 24, 1998, decision of the Hampton Wetlands Board directing the restoration of 2,150 square feet of wetland vegetation on his property adjacent to Herberts Creek in the City of Hampton.

Jeff Madden, Environmental Engineer, briefed the Commission on a letter staff received from Eugene M. Jordan, dated December 30, 1998, representing the appellant, and requesting a continuance until the March 23, 1999, meeting to accommodate his Circuit Court schedule.

Commissioner Pruitt placed the matter before the Commission.

Associate Member Davis moved to accept the request for a continuance with the proviso that the applicant must appear at the next meeting. Motion was seconded by Associate Member Goodell. Motion carried. Associate Member Davis requested that the applicant be notified that there would be no more continuances. Mr. Madden indicated that he would advise Mr. Jordan.

Case Continued

DAMERON PROPERTIES, L.C., #97-0072, requests authorization to construct 373 linear feet of timber replacement bulkhead two (2) feet channelward of an existing, deteriorated bulkhead and construct a 140-foot long by 6-foot wide open-pile marginal wharf at their commercial property at the confluence of Carter Cove and Carter Creek in Weems, Lancaster County. Continued from the December meeting.

Jay Woodward, Environmental Engineer, informed the Commission that this project came before the Commission in November 1998. He said at that meeting there were several legal questions the Commission had for the Attorney General's Office, and the Commission voted to defer the matter until an answer was received. Mr. Woodward stated that the project came before the Commission again in December, and at that meeting, the applicant's attorney requested a continuance because they could not be present. In addition, the applicant's attorney was requesting that the matter be reopened to take additional testimony and to hear additional evidence. However, the Commission clearly stated on the record at the November hearing, that the hearing would be closed and no additional testimony was taken. Mr. Woodward then requested that the Commission make a decision as to whether or not to reopen the case before he proceeded with his briefing because additional information was in the Commission's briefing packets that was not considered during the November hearing. He said if the Commission decided not to reopen the hearing, items one through three, and item four, were the beginning of the Commission's packet from the November hearing which was a part of the record at that time.

Commissioner Pruitt then placed the matter before the Commission regarding the hearing of additional information. Associate Member Davis moved that the hearing had been held and the Commission generally did not have rehearings. Therefore, the Commission should confine themselves to the existing data in the record. Motion seconded by Associate Member Goodell.

Associate Member Hull commented that most of the material the Commission had not received before, and he requested that each side be given three minutes to tell why the information should be heard. After a brief discussion, the Commission agreed to give each side three minutes.

Commissioner Pruitt stated that a vote on the motion would be withheld and the Commission would hear from both parties for a limited time of three minutes.

A. David Bugg, Jr., attorney for the applicant, addressed the Commission. He said he would like the record reopened because when he came before the Commission he specifically discussed the applicant's request to build a bulkhead around the end of the point, which was filled from decades before. The concerns expressed at that time were over the additional encroachment which would result from constructing the new bulkhead in front of an old bulkhead. He said since that hearing, Mr. Cockrell had proposed to do the bulkheading with interlocking sheets of steel-pile. Mr. Bugg then corrected his letter that stated it would reduce the encroachment. He said he had misspoken. The steel bulkhead would require the same encroachment. The steel bulkheading would last longer, however, and when it was necessary to redo it, the new steel would slide down in front which would stop the continual two foot encroachment. He said the applicant would be willing to give up the land on the river side where there was a riprap revetment, and pull that back. Therefore, there would be no net gain in upland property. He said if the applicant could not replace his bulkhead at the point, it would go into the creek. Therefore, nobody could replace their bulkhead, and all the backfills for decades would go into the Creek.

John Ryan, attorney for the protestant Anita Cooke, addressed the Commission. He said he did not have any additional information except what he had submitted in writing to the Commission. He said they had recommended denial of the bulkhead for good reasons. VMRC staff recommended denial of the marginal wharf for good reasons. Other comments are a part of the verbatim record.

Associate Member Goodell commented that the Commission judged the projects on a case-by-case basis, and he did not feel this case would establish any danger of setting a precedent in either the acceptance or denial of this bulkhead.

Commissioner Pruitt then called for the vote. Motion carried unanimously not to accept any new evidence or information.

Mr. Woodward then reiterated that items one through three would not be included in the hearing. He said he could show the slides again, and proceed with a summary and recommendation of the project. Commissioner Pruitt suggested that he just give the summary and recommendation because the Commission was familiar with the property in question.

Mr. Woodward stated that the protestant continued to object to the proposed use of the upland property. He said he felt those issues were better addressed at the local level. He said the channelward, or eastern portion of the replacement of the bulkhead would encroach into Baylor Grounds. Staff continued to believe that was not authorized pursuant to Section 28.2-556 of the Code, as set forth in the four conditions of that Section. Accordingly, staff did not believe Section 28.2-556 of the Code would support the encroachment into Baylor Ground for that eastern section of the bulkhead, and recommended denial of the section adjacent to the Baylor which was approximately 100 linear feet on the eastern end of the Peninsula. Staff also believed that there was not enough documented need to support the 140 foot marginal wharf section proposed on the northern section of the property. Therefore, they were recommending denial of the additional marginal wharf. Staff also believed that repair of the L-shaped pier and repair of the 32 foot long marginal wharf would provide the applicant adequate facilities for mooring. Staff also recommended approval of the 273 linear feet of replacement bulkhead along the northern part on the Carter's Cove side of the property which would not encroach on Baylor Grounds. Staff recommend a royalty in the amount of \$546.00 for the encroachment, at the rate of \$1.00 per square foot. Mr. Woodward recommended that the eastern bulkhead that would encroach over Baylor should be denied, as well as denial of the 140 feet of new marginal wharf.

Associate Member Hull read Section 28.2-556 into the record. Comments are a part of the verbatim record. Associate Member Hull then moved that the Commission not address the issue of the actions taken by the local boards, but leave that matter to the courts. He also moved to deny the request for the 100 linear feet of replacement bulkhead that would encroach into the Baylor Survey on the basis that was not the most technical and preferable way for erosion control. He also recommended denial of the 140 foot marginal wharf because the applicant had not stated the purpose for which the wharf would be used. He also recommended that the existing facilities could be improved, and that the 273 linear feet of replacement bulkhead be approved, with royalty of \$546.00. The motion was seconded by Associate Member Goodell. A discussion followed regarding the 273 foot of encroachment on Baylor.

There being no further comments, Commissioner Pruitt placed the matter before the

Commission. Motion carried 5 to 1, with Associate Member Davis voting no.

Associate Member Davis commented that his objection was not on the points carried in the motion, but the point that he did not like the extra 273 feet.

Fill of 546 sq. ft. @ \$1.00 sq. ft. of State-owned subaqueous bottom.....	\$ 546.00
Permit Fee.....	<u>100.00</u>
Total	\$ 646.00

Heather Wood, gave special thanks to the Stafford County Wetlands Board. In addition, she thanked Mr. Woodward and Mr. Madden for their support and history on the area which made her job a lot easier.

DAVID STEARNS, #98-1505, Commission review on appeal of the December 9, 1998, decision of the Norfolk Wetlands Board to deny a permit to construct and backfill a 95 linear foot section of replacement bulkhead adjacent to his property situated along the Lafayette River.

Heather Wood, Environmental Engineer, presented information to the Commission members that was not included in their briefing package. She then briefed the Commission and presented slides on the project. Comments are a part of the verbatim record. Commissioner Pruitt questioned Ms. Wood regarding whether the applicant was appealing the project or the vote of the Wetlands Board? Ms. Wood responded that they had submitted a letter, and she was just giving an overview of the project. Commissioner Pruitt then suggested that the vote issue be addressed first, before continuing with the briefing.

Commissioner Pruitt asked if the Wetlands Board in Norfolk had seven members. Ms. Wood responded, yes. Mr. Pruitt then requested Ms. Wood to brief the Commission on the portion dealing with the vote. Ms. Wood then stated that the Norfolk Wetlands Board met three times. She said the final vote came on December 9, 1998. Five Board members were present at that meeting so they did have a quorum. She said a motion was made by Board Member McCrory to approve the application subject to staff recommendations. The actual vote on the motion was 3 to 2, with two descending votes. Unfortunately, four votes were needed to approve the project. Ms. Wood said staff received a letter from the Sterns' on December 15 noting their

appeal. They were basing their request for review on the grounds that the two descending votes by Board Members Old and Berkley were arbitrary and unsupported by the evidence on the record.

Commissioner Pruitt explained that this was the first time, he could recall, where the applicant was appealing based on two negative votes. He said the reason the proposal failed was that there were not four affirmative votes. Ms. Wood responded that she could go to the recommendation which would explain the issue because it was really a legal issue and had nothing to do with the merits of the case.

Ms. Wood said based on the review of the record, that staff did not believe the Board erred procedurally during their review and subsequent denial. She said while a motion to approve received a majority of the votes present, Section 28.2-1302, (7a) and (7c), of the Code clearly states that four affirmative votes are required to approve an application by a seven member Board. Applications that do not garner the majority of the votes are denied. She said the Code was clear on this issue. Staff, therefore, recommended that the Commission uphold the Norfolk Board's denial of the project without prejudice, leaving the Sterns' the option to reapply in modified form.

Associate Member Davis commented that it was not within the Commission's purview to figure out the mind set of the positive and negative votes. However, it was within the Commission's purview to follow the law under 28.2-1302, paragraph 7 regarding the affirmative votes required of a five or seven member board. Mr. Davis then moved to uphold the Wetlands Board decision without prejudice. Motion was seconded by Associate Member Hull.

An unidentified person from the audience requested the opportunity to address the Commission. Commissioner Pruitt responded that the Marine Resources Commission had ruled based on consultation in executive session with the Assistant Attorney General and that this was a legal point. Mr. Pruitt then explained that if the Commission's vote was affirmative, the case would go back to the Local Wetlands Board. If the vote failed, she would get an opportunity to speak. The unidentified person said she believed there was another legal argument to be made, and requested the opportunity to speak before the Board voted. A brief discussion followed.

Assistant Attorney General Fisher responded that he thought the way the motion was phrased it was undesirable, and he would be happy to discuss the issue again in closed session.

Associate Member Goodell requested that Mr. Fisher state his objection to the motion so that the motion could be clarified. Mr. Fisher stated that there was no question that the application was denied, and according to the appeal process, the applicant had the right to bring it before

the Commission for consideration. He said the Commission did not have the reason it was denied, therefore, he thought it should be remanded back to the Local Wetlands Board and the Commission could request that the Wetlands Board deny on a motion with the rationale as to why it was denied. At that time, the Commission would be in a position to review the Local Wetlands Board's action.

Mr. Grabb addressed the Commission and explained the process for remanding the matter back to the Local Wetlands Board on a motion to deny. Comments are a part of the verbatim record. Rationales for denial were not required. The basis and rationale were required for approval. Failure to garner the necessary votes to approve meant automatic denial.

Commissioner Pruitt then said he had great confidence in counsel, and he was a good attorney, but in this particular case, he would rule that the motion was a good and valid motion. Mr. Pruitt then called for the vote. He said if the motion was voted down, the Commission would hear the whole case, but if the motion passed, it would go back to the Wetlands Board as stated. Motion carried unanimously.

CAPT. JOHN S. BEACH MARINA, #98-0990, requests authorization to replace five (5) existing fixed piers with a floating pier system creating 76 wet slips adjacent to their facility situated along the Occoquan river in Fairfax County. The project is protested by an adjacent property owner.

Heather Wood, Environmental Engineer, briefed the Commission and presented slides. She explained the proposed site location and the proposed replacement for the five piers. Comments are a part of the verbatim record. In addition, she said the one remaining fixed pier would be reconstructed and extended from 53 feet to 108 feet. She said that fuel pumps would also be added to the remaining fixed pier. The marina's capacity, however, would actually be reduced from 94 wet slips to 76 wet slips was designed to accommodate vessels ranging in size from 26 feet to 34 feet. Ms. Wood said the project was protested by the Estate of Addie Ford, the adjacent property owner downstream. She said Mr. Steven R. Cox, executor of the estate, contended that the present and proposed location of the most downstream pier (Pier G), and a sunken vessel, encroached on the estate's property and riparian area. She said Mr. Cox also stated that the benefactors of Addie Ford's estate were planning to construct a marina adjacent to the Capt. J. S. Beach Marina in the future. Ms. Wood said that Mr. Cox was concerned that the new location of pier "G" would still encroach onto the estate's property and riparian area. Ms. Wood said in response to that concern, staff requested that the applicant submit a survey and site plan of the marina.

Ms. Wood said she did a site inspection with the surveys and determined that the existing pier appeared to encroach on the estate's riparian area, and that the new pier would also encroach on the property. Ms. Wood said she then went back to talk with the applicant in an attempt to resolve the dispute with the applicant's agent, Mr. Hall Goodman, and suggested that he consider moving pier "G" further upstream. The agent submitted revised drawings that indicated the existing boat ramp would be removed, and to relabel Pier "G" Pier "E." The pier would be relocated approximately 50 feet inside the downstream property line. Ms. Wood said the applicant's agent advised her that the protestants still had not withdrawn their objection to the project, and that was the reason the case was before the Commission.

Ms. Wood said the Virginia Institute of Marine Science indicated that the impacts resulting from the proposed project would be minimal and the Department of Environmental Quality and the Virginia Department of Health, Division of Wastewater Engineering, both had indicated that the proposed project was acceptable. The Department of Game and Inland Fisheries recommended a time of year restriction from February 15 to June 30 be imposed to protect anadromus fish spawning, if the pilings were removed mechanically.

Ms. Wood indicated that the applicant had cooperated with staff in an effort to resolve the encroachment concerns posed by the adjoining property owners by relocating the contested pier 50 feet upstream. In addition, the applicant proposed to only moor vessels with a maximum length of 26 feet at Pier "E" in lieu of the 35-foot vessels originally proposed. She said staff believed that the proposed project, as revised, should not impact the protestant's ability to construct and operate a marina on the adjoining property. Ms. Wood said given that the anticipated environmental impacts associated with the project appeared to be minimal, and that the capacity of the existing facility would be reduced, staff believed the project conformed with the Marina Siting Criteria contained in the Commission's subaqueous guidelines and the provisions of Section 28.2-1205 (a) of the Code of Virginia. Accordingly, staff recommended approval of the project with a time of year restriction between February 15 and June 30 to protect the anadromous fish species, and that the derelict vessel be removed prior to any construction. The applicant should also be required to submit an acceptable fuel spill contingency plan prior to permit issuance.

The applicant chose not to address the Commission, but said they were available to answer any questions.

Steven Randall Cox addressed the Commission. He said since the applicant was moving Pier "G" 50 feet, he no longer had any objections to the proposal.

Commissioner Pruitt placed the matter before the Commission for discussion or action.

Associate Member Hull moved to approved the project. Motion was seconded by Associate Member Cowart. Motion carried unanimously.

Permit Fee..... \$ 100.00

OCEAN EAST OWNERS ASSOCIATION, INC., 98-1075, requested after-the-fact authorization to retain 187 linear feet of bulkhead which was constructed approximately two (2) feet channelward of an existing deteriorated bulkhead and encroached on State-owned subaqueous bottom at their property situated along Sheepshead Creek in Accomack County.

Hank Badger, Environmental Engineer, briefed the Commission. He said staff conducted a field inspection on July 7, 1998, and determined that the new bulkhead was 2 feet channelward of the existing bulkhead and fell within VMRC's jurisdiction. On July 14, 1998, a Notice to Comply was issued to the Ocean East Association, Inc., directing removal of the illegal bulkhead and fill, and restoration of the creek bed to its pre-existing natural conditions within 60 days. Ocean East Association, Inc. was advised that failure to comply would result in this matter being placed before the Marine Resources Commission.

Mr. Badger said a letter, dated August 26, 1998, was received from Ms. Ellen Grimes, authorized agent for the Association, in response to our Notice to Comply. Ms. Grimes indicated in her letter that it was not until after the project had been completed, that Mr. Fluhart, Zoning Administrator for Accomack County, brought it to the attention of the Ocean East Owners Association, that the 187-foot bulkhead may have been installed without all of the necessary permits. Ms. Grimes then requested that Commission staff allow the bulkhead to remain in place until the matter could be heard by the full Commission. The Accomack County Wetlands Board held a public hearing on September 24, 1998, and approved the Ocean East Association's after-the-fact application with the Board's standard after-the-fact application fee of \$200.00 which is double the normal fee. Mr. Badger stated that the Virginia Institute of Marine Science had indicated that the individual and cumulative adverse impacts resulting from this activity were minimal. Mr. Badger then briefed the Commission and presented slides demonstrating the location of the project. Comments are a part of the verbatim record.

Mr. Badger said staff believed that Ocean East Owners Association was certainly at fault for not obtaining proper authorization for the bulkhead, but, there was apparently some confusion between the Association and the Contractor regarding who was responsible for obtaining the required permits. Mr. Badger said if a joint permit application had been filed in a timely

manner, as required, this project most likely would have been permitted as proposed. Mr. Badger said based on the applicant's cooperative attitude during staff's investigation and the minimal environmental impacts, staff was recommending approval and the assessment of a triple permit fee, and royalties for a total of \$861.00 as provided by Section 28.2-1206 (D) of the Code of Virginia. In addition, he said, staff also believed that a civil charge may be appropriate in lieu of restoration or further enforcement action.

Ellen Grimes, Coastal Resource Management, representing Ocean East Owners Association, Inc., addressed the Commission. Ms. Grimes said it was a basic miscommunication between the owners and the contractor.

Commissioner Pruitt asked if they accepted the staff's position? Ms. Grimes responded that they did accept staff's position, but she was not authorized to convey a yes or no decision.

Associate Member Goodell commented that this type of case came up more often where people go out and appropriate several hundred feet of State property, and then come before the Commission for an after-the-fact permit. He said the point was that a permit was required and no one bothered to find out if anybody had applied for one. Associate Member Goodell said this was flagrant disregard for the procedures in law. He then moved that the maximum fee be assessed. Motion was seconded by Associate Member Davis.

Associate Member White commented that he thought this was a case of well-intentional people not doing the proper things, as opposed, to unintentional people doing bad things. He said he felt the charges staff had recommended would be sufficient. A discussion followed between Commission members regarding the assessment of after-the-fact permit fees. Comments are a part of the verbatim record.

Ms. Grimes requested permission to address the Commission. The Commission agreed. She said the Ocean East Association group had no members that lived on the site, and there was only one person that was charged with the Association's duties, and because there were multiple people involved and it was difficult to get them together.

Mr. Grabb responded to Associate Member Goodell's comments regarding staff's recommendation for a civil charge. Comments are a part of the verbatim record.

Associate Member Goodell amended his motion and moved that a civil charge of \$500.00 and a triple permit fee of \$300.00 be assessed.

Commissioner Pruitt asked Mr. Davis if that would be acceptable as the seconder of the motion. Mr. Davis was not agreeable. Commissioner Pruitt declared that there was no first

motion, and the recent motion made by Associate Member Goodell would be an original motion. Associate Member Birkett seconded the motion.

Associate Member Hull asked Associate Members White and Gordy if they were familiar with that particular case, since it was located in their area, and if they had any input that would provide some assistance to the Board. Associate Member White commented that Mr. Badger had made it explicitly clear that this was a group of well-intended people that just did not carry out the letter of law.

Commissioner Pruitt called for the vote. Motion carried 6 to 1, with Associate Member Davis voting no.

Royalties.....	\$ 561.00
Civil penalty.....	500.00
After-the-fact permit fee (triple).....	<u>300.00</u>
Total	\$ 1361.00

OYSTER GROUND APPLICATION: Odis Cockrell applied for a half (0.50) acre oyster ground lease that is bounded on three sides by one of his leases on the Great Wicomico River. This is a parcel for which both A. Jackson Booth and Odis Cockrell had previously applied. The controversy was initially heard by the Commission in January 1994. The Commission's decision at that time was not to lease the area to either party. Odis Cockrell again applied for this same parcel in October 1998. Mr. A. Jackson Booth remains adamantly opposed to the assignment.

Associate Member Cowart stated that he would abstain from voting on this case because he was related to the applicant.

Gerald Showalter, Head-Engineering and Surveying, briefed the Commission on the information in the packets. Comments are a part of the verbatim record. He said the oyster ground application was made on October 14, 1998 by Mr. Odis Cockrell. He said in the past, it had been a riparian application, but Mr. Cockrell was applying for a half acre for general lease. Mr. Showalter explained that the proposed lease was surrounded by Mr. Cockrell's lease. Comments are a part of the verbatim record. Mr. Showalter said after hearing the case in 1994, the Commission chose not to lease this small area to either person. Mr. Showalter then read the 1994 motion into the record. Comments are a part of the verbatim record. He said Mr. Cockrell asked staff about making a new application for this area, Mr. Showalter said he

recommended against making another application for this parcel. He said he notified Mr. Booth about the application, and he was adamantly opposed to Mr. Cockrell's application. Mr. Showalter said he attempted to administratively deny the application, but Mr. Cockrell wanted to come before the Commission. Mr. Showalter said it was staff's recommendation that the half acre parcel remain unassigned because of the extreme controversy over that small area of land.

Associate Member Davis commented that it was his understanding that the first person who applied for the lease, received it. Commissioner Pruitt responded that if an application was protested, it came before the Commission. A discussion followed regarding the filing and consideration of applications. Comments are a part of the verbatim record.

Associate Member Hull asked who owned the adjacent upland property, and if the ground was leased before VDOT acquired the upland property for the new bridge. Mr. Showalter responded that he thought the half acre lease was attached to the highland. A store was there, which was owned by members of Mr. Booth's family, but Mr. Booth could better answer the question.

Odis Cockrell, applicant, addressed the Commission. He said he purchased the oyster house that belonged to his uncle, Earl Cockrell, in 1993. He said he was supposed to purchase the riparian lease in front of the oyster house. He said he was hindered from working his shoreline because of the half acre parcel. Mr. Cockrell said when he purchased the property, the half acre was abandoned, but now he would like to work the parcel. He said he felt Mr. Booth's objection was solely to inhibit him from working that ground.

Associate Member Goodell asked if the half acre in question was being worked by anybody? Mr. Cockrell responded no, that it was public ground and bare bottom, but it was a desirable bottom.

Alvin J. Booth, addressed the Commission. He said this parcel of land had been in the Booth family since 1920. Mr. Booth then explained to the Commission a letter dated 5/11/92 that he had received from Mack Rodgers, Chief Engineer and an employee of the Commission, at that time, which acknowledged that staff had received his application, and that the ground would be assigned in the order in which the application was received according to Section 28.1-109 and 28.1-118.1 of the Code of Virginia. He said he had fulfilled his obligation to the Commonwealth. Other comments are a part of the verbatim record.

Commissioner Pruitt reminded Mr. Booth that he had advised him that he had the opportunity to appeal the Commission's decision in 1994 to the Circuit Court, and that he could also appeal

the Commission's decision today if he was not satisfied. Mr. Booth responded that he understood that.

Mr. Booth stated that he had fulfilled all his obligations to the Commission. He was concerned that the Commission was side stepping what was in the Code of Virginia. Commissioner Pruitt explained that the Code was never side stepped. Other comments are a part of the verbatim record.

Associate Member Hull asked Mr. Booth how long was it before condemnation did he sell the property? Mr. Booth responded that it was approximately a year and a half. Associate Member Hull asked when he sold the property to the lady from Washington, did he try to obtain the oyster shore at that time. Mr. Booth said it went with the store. Associate Member Hull asked Mr. Booth why he didn't appeal the Commission's 1994 decision? Mr. Booth said he felt it was a fruitless matter and he did not want to waste time. Associate Member Hull commented that back in 1991 when he served on the Board of Supervisors for Northumberland County that a great deal of time was spent on the feud between Mr. Booth and Mr. Cockrell. Other comments were a part of the verbatim record.

Odis Cockrell readdressed the Commission and stated that he just wanted the use of the shore. He said he could put the parcel into production tomorrow.

Associate Member Davis read into the record 28.2-605, Application for Assignment. Comments are a part of the verbatim record. He said he felt according to that Section of the Code that Mr. Booth was done a disservice and should have received the ground the first time. He said he could go along with a motion, but that he felt the application date was the controlling factor.

Commissioner Pruitt commented that Mr. Davis was correct in his reading of the Code, which stated that the Commission considered applications in which they were received. It did not say the Commission had to approve or grant the request.

Associate Member Birkett asked if the shoreline was taken when VDOT took over the property to build the bridge? Associate Member Hull responded that he thought they did and that Mr. Bevins and Mr. Hardings applied for the shoreline. Mr. Cockrell responded that they bought the property from the estate. Other comments are a part of the verbatim record. A discussion between staff and Commission members followed regarding riparian rights.

Commissioner Pruitt commented that they were both nice people, and he felt it was a shame that their personal differences could not be worked out. Because of the personal animosities, he felt the property should not be leased to anyone under those circumstances.

Associate Member Goodell said he felt a way out of this would be for Mr. Cockrell to buy whatever interest Mr. Booth had, real or otherwise in the ground, and Mr. Booth could furnish a quick claim on the property. Mr. Cockrell said this was attempted in 1994.

Associate Member Hull moved that based on the conversation today, the precedence and the comments that were in the January 1994 Commission Minutes, that the oyster shore be left unassigned. Motion was seconded by Associate Member White. Motion carried 5 to 2, with Associate Members Cowart and Davis abstaining.

Commissioner Pruitt informed both parties that the ground would not be leased.

DISCUSSION: Commission consideration of the Draft Management Plan for the Ungranted State lands in Accomack and Northampton Counties recommended by the Virginia Coastal Land Management Advisory Council. Request for public hearing.

Bob Grabb, Chief-Habitat Management, briefed the Commission. He said each Commission member had been forwarded a copy of the Draft Management Plan. Mr. Grabb then explained the research that was done by the Virginia Institute of Marine Science (VIMS) which resulted in the cataloging of 28,507 acres of previously unknown and unclaimed State lands on the Eastern Shore, 27,722 acres were on the seaside and 785 acres on the bayside in the Counties of Accomack and Northampton. He said the Commission filed surveys of the unclaimed lands with the Clerks of Courts and the Commissioners of Revenue in July 1992. VIMS also indicated that there was an additional 43,385 acres of land, which had been claimed by owners other than the state, were subject to state claim. Mr. Grabb then briefed the Commission on the two statutes, Section 28.2-1200 and Section 28.2-1502 of the Code of Virginia, regarding public ownership. He also provided comments on the 1995 General Assembly's enactment of legislation (§§28.2-1500 et. seq. of the Code of Virginia) regarding the protection and management of those lands and their resource value. He gave information on the Virginia Coastal Land Management Advisory Council and the EPA grant. Comments are a part of the verbatim record.

Mr. Grabb said the draft management plan was a culmination of over two years of work by local citizens, private interest groups, local government officials, state agency personnel, representatives of educational institutions and local managers of federal wildlife areas. The draft report is entitled "A Proposed Comprehensive Conservation and Management Plan for the Ungranted State Lands in Accomack and Northampton Counties." Comments are a part of the

verbatim record. He said one of the key features of the plan was to continue to allow traditional recreational use of the ungranted lands. He said there was one area that presently had no conflict, but it involved about the possibility of the Marine Resources Commission imposing restrictions on recreational use around bird colonies, etc., in the future. Other comments are a part of the verbatim record.

Acting Chairman, Associate Member White, placed the matter before the Commission. It was the consensus of the Commission to wait for the public hearing for questions.

Associate Member Goodell commented that VMRC should contact all the universities that were doing any research on the Eastern Shore, and that all the universities be included when a detailed research and monitoring plan was developed. Mr. Grabb commented that they had worked with VIMS on the document, but the intent was to deal with the research and educational aspects of the ungranted lands, and to pull in anyone that had a presence on the Eastern Shore.

Associate Member Goodell moved that a public hearing be held on February 23, 1999, on the proposed comprehensive conservation and management plan for ungranted state lands in Accomack and Northampton Counties. Motion was seconded by Associate Member Davis. Motion carried unanimously.

PUBLIC HEARING: To consider increasing the James River Public Market Oyster Harvest bushel quota. Amending Regulation 4VAC-20-720-10 et. seq.

James Wesson, Chief-Replenishment and Conservation, briefed the Commission. He said this was a request to increase the market oyster harvest bushel quota for the James River. He said when the season was set in the regulation in August and September they did not have stock assessment done. Therefore, the staff set the quotas conservatively. Dr. Wesson said that harvest had increased to 9,000 bushel of market oysters. He said the stock assessment showed an increase in the standing stock in the James River this year. He said 90 per cent of harvest had come from Point of Shoals which showed an increase. Dr. Wesson said he did not think an additional 5,000 pounds would have any impact on the safety of the oyster resource in that particular area. He said the oystermen caught approximately 10 bushels per boat, per day, and an 5,000 additional bushels should take the oystermen through the end of the season.

Associate Member Davis asked if the increase in quota would have any impact on the oysters. Dr. Wesson responded no, because there were approximately 22 oysters per meter on Point of Shoals and it was a very healthy bar, and as long as the oystermen concentrated in that one

area, and threw the small oysters back there should not be any impact. Associate Member Davis asked if a good spatset had been in those areas. Dr. Wesson responded there was a good spatset throughout the entire area that they checked in the James River.

Associate Member Ballard asked if there was a need to say that the entire 5,000 bushels should come from Point of Shoals. Dr. Wesson responded no, and if you looked at the stock assessment, and the oysters per meter, that would dictate where the oystermen would go.

Acting Chairman, Associate Member White, opened the public hearing. There being no public comments, Acting Chairman White closed the public hearing, and placed the matter before the Commission.

Associate Member Davis moved to raise the quota to 5,000 bushels in the James River. Motion was seconded by Associate Member Birkett. Motion carried unanimously.

PUBLIC HEARING: To consider proposed regulations to prohibit possession of bay scallops taken from Virginia waters.

Jack Travelstead, Chief-Fisheries Management, briefed the Commission. He said this was a public hearing to consider a proposed regulation that would prohibit the possession of bay scallops taken from Virginia waters. He said it was important to note that the regulation specifically exempts the possession and take of bay scallops that were raised as a part of an aquaculture facility.

Dr. Mark Luckenbach, from VIMS, addressed the Commission. He said over the past three or four years, VIMS had received anecdotal evidence from the Virginia clam dredgers that there were scallops around the SAV beds in Chincoteague Bay. He said five years ago there were virtually no reports of scallops in that area. Dr. Luckenbach presented a slide that showed the areas and several probable reasons as to why the scallops were being established in the SAV beds. Comments are a part of the verbatim record. He said in the future they would provide a better density estimate and stock assessments, and they also needed to establish the timing of the reproductive season of the scallops. Other comments are a part of verbatim record.

The public hearing was opened. There being no comments, pro or con, Acting Chairman Associate Member White, placed the matter before the Commission.

Associate Member Davis moved to adopt the proposed regulation. Motion was seconded by Associate Member Ballard. Motion carried unanimously.

REQUEST from Tangier Watermen for emergency oyster season extension.

Commissioner Pruitt commented that letters from Mr. Sonny Parks and Mr. David Charnick had been received. In addition, several phone calls had been received. Mr. Pruitt stated that Associate Member Hull had also received a request from watermen in the Middle Peninsula of the Northern Neck area to consider opening an oyster rock in the lower Rappahannock. Mr. Pruitt stated that the Commission would consider the two issues together, and vote on them separately.

Associate Member Ballard asked if this would be an Emergency Regulation or debating to have a public hearing next month. Commissioner Pruitt responded that the way he understood the request was that the Tangier issue was for an extension of time that was lost because of weather conditions on Hurley's Rock.

Commissioner Pruitt commented that Mr. Ballard had made a good question. Mr. Pruitt then explained that the Commission passed a regulation, after a public hearing, to allow a limited season on Hurley's Rock and on some of the hand tonging rocks. In addition, there was a proposal from Dr. Wesson to transfer some oysters from the rocks in Tangier and Pocomoke Sound to the sanctuaries and reefs, and also off the lower Rappahannock to Gwynn's Island, and the disease resistant oysters to the Piankantank.

Jan Marshall addressed the Commission and explained the economic situation on Tangier Island. He said that crabbing was down and some of the crab dredgers were home taking the rigs off. Some the stores had put up "no credit signs" because they had carried people as much as they could. He said they just wanted the 10 days that they lost because of the weather and holidays. They just wanted to work. Mr. Marshall then read into the record some comments. Comments are a part of the verbatim record. He said he would like for the Commission to consider an Emergency Regulation because it was important to Tangier.

Commissioner Pruitt asked Mr. Marshall how many oysters did he catch the last day he worked. Mr. Marshall responded that it was approximately 15 bushels and stopped at 12:15 p.m.. He said nobody worked on Hurleys, and nobody worked their time limit. He said there were piles of oysters there that they would never be able to get because they were impossible to find in the survey. Commissioner Pruitt asked how much work was on the tonging rocks. Mr. Marshall responded that they could not get onto it. He said that Charles that worked for the Bay Foundation had a 150 count of marketable oysters in a hand dredge. He said if there

was that kind of a count, you would get something when you were tonging.

Commissioner Pruitt suggested to Dr. Wesson they should do something to break up the bottom. Mr. Pruitt then requested the individuals that were in support of Mr. Marshall's request to stand. (Approximately 12 persons stood).

Associate Member Ballard requested clarification as to what criteria they were operating under regarding the time limit or bushel limit. Dr. Wesson said a couple of years ago they started with the broodstock that they moved to Great Wicomico and again in 1997. He said the first 2500 hundred bushels were moved to Pungoteague, Great Wicomico, and Piankantank. He said they knew the broodstock had decreased the number of market oysters on all the rocks, and they realized that they would not get enough oysters there for another broodstock program. He said they did not have enough oysters left in Tangier after moving oysters the twice before. Dr. Wesson then explained how the watermen lost the 12 days. Comments are part of the verbatim record. He said when they set the season, it was known that there would be bad days. He said the issue whether you take the oysters this year or save them to work next year, because when the oysters were gone they were gone. He said when Hurley's was gone, it was gone.

Associate Member Ballard commented that during the public hearing it was stated that if they did not get the oysters, the Maryland people would. Dr. Wesson said that comment was made. He said he did not think it was a major issue.

A discussion followed regarding opening Hurley's and the number of days. Comments are a part of the verbatim record.

There being no further discussion, pro or con, Commissioner Pruitt placed the matter before the Commission.

Associate Member Cowart moved to extend the season two weeks, the first two weeks in February, Monday through Friday on Hurley's Rock only, with 15 bushels per man. Seconded by Associate Member Gordy.

A discussion followed regarding the future of oysters. Comments are a part of the verbatim record.

Irene Rollin, citizen from Hanover County, Virginia, addressed the Commission. She said she supported Dr. Wesson's efforts in trying to restore oysters in Virginia. She also felt that the oysters that were spawners from that area should be protected. She also thought the regulation

that was in place should remain.

Commissioner Pruitt asked Mr. Marshall if they expected any more boats in the fishery that would be counter productive. Mr. Marshall responded that if the Commission felt the 15 bushel limit would be too much, they would be willing to settle for 12 bushels. Mr. Pruitt commented that they needed to think about another plan for next year, because Dr. Wesson said if they caught the oysters now, there would not be any for next year.

For the record: Commissioner Pruitt commented that if 50 boats go out Monday, the first day, there was no need to call the Commission because once the limit was met, that was it. Associate Member Goodell commented that he knew someone would come back next year and request another area to be open because of a hardship. He said he wanted the record to be clear, that they did not need to come back next year, and say we want to open up this new oyster rock because of hardship.

Associate Member Ballard asked if the comments the Commissioner had raised were valid. He said it seemed that there were two possible ways to go. If the maker of the motion would consider an amendment as to whether it was possible to limit the additional season to the boats that were already in the fishery, and if there was a way to identify them, which would do away with the possible ten-day gold rush.

After a discussion regarding limiting the number of boats, Mr. Fisher said the best way would be to have a bushel limit.

Associate Member Ballard suggested that taking the number of boats that were initially in the fishery, 15 boats times 10 days that would be a 150 times the number of bushels per day 12 which would be 1800 bushels, and set that as the bushel limit. Mr. Marshall was agreeable.

Associate Member Cowart commented that his motion was for the first two weeks in February or 10 working days, not to exceed the end of second week. He also felt the 15 bushel limit per man, per day, was a part of the original motion. A discussion between staff and Commission members followed regarding what the rock could sustain. Comments are a part of the verbatim record.

Mr. Marshall suggested that if the watermen dropped below nine bushels, the Commission could end the season. If it was the first day, they would know their catch, when their taxes were paid, and the Commission could end the season, with a time limit from sunrise to 2:00 p.m.

Associate Member Cowart said the motion would stand, and the amendment would reduce the number of bushels to ten bushels per day, per boat, per man, and a 2,000 bushel cap for the two week season. The seconder, Associate Member Gordy, concurred.

Commissioner Pruitt stated that the new motion was as stated.

Associate Member Goodell suggested an amendment that if the season dropped below nine bushels, the season was terminated. The seconder, Associate Member Gordy, was acceptable to the amendment.

Associate Member Ballard asked how would Dr. Goodell's amendment be enforced? Mr. Pruitt responded that Captain Tim Marshall would be keeping up with the daily catch.

Associate Member Ballard asked for clarification on the motion regarding the 10 bushel limit. Mr. Pruitt stated that it would be an average and Mr. Marshall would know if it was dropping.

Commissioner Pruitt called for the vote. Motion carried 7 to 1. Associate Member Davis voted, no.

Dr. Wesson asked if that was an Emergency Regulation. Commissioner Pruitt responded yes, that was his understanding.

Commissioner Pruitt requested Associate Member Hull to present his recommendation to the Commission.

Associate Member Hull commented that he would like to go back and look at what the Commission did in November in reference to the Lower Rappahannock. He said that Mr. Freeland Mason, President of the Virginia Watermen's Association, arranged a meeting last Wednesday, at VIMS and hosted by Dr. Gene Burreson and Dr. Mann with some of the watermen. He then addressed the issue that, if under controlled circumstances, the rock in the Lower Rappahannock could be opened for a limited time. In addition, have VIMS and/or Dr. Wesson check the rocks before and after harvesting to see what was there. He said the watermen felt that working the rock would help the spatset.

Dr. Gene Burreson from VIMS addressed the Commission. He said he agreed with Dr. Hull that they had a meeting with five watermen, Dr. Hull, Roger Mann and himself. Dr. Burreson said Mr. Jenkins had some concerns regarding the letter he wrote to the Commission in November about the Maryland studies on the affects of bagless dredging. Comments are a part of the verbatim record. He also said Dr. Hull wanted to know if there was some way the scientists could get the information from working the beds and try to lay the issue to rest. He

said Michael Croxton was one of watermen had made that point a number of times. He said Deep Rock had not been worked for at least six to ten years. He said the real issue was can you work the bottom and get a testable hypothesis. Dr. Burreson also commented that the watermen had said that if you could take an area with the same circumstances and determine the affect of working the bottom and getting a spatset. He said there had been reasonable sets in the Rappahannock in the past few years, but you cannot depend on a set at any one time. He said the rocks were too small to divide and work one half and not work the other half. He said after the meeting, he had a conversation with Dr. Mann the next morning and decided that it was too risky to try. He said this was very important broodstock in the Lower Rappahannock. He said the question was what was the best use of those oysters in the Lower Rappahannock to harvest or use for broodstock. He said VIMS' position was that it was for broodstock.

A discussion followed regarding the broodstock and the Lower Rappahannock. Comments are a part of the verbatim record.

Associate Member Cowart asked if he knew how much broodstock was in the Lower Rappahannock. Dr. Burreson responded that a stock assessment was needed. He said there was a percentage of the broodstock surviving in that area.

Associate Member Goodell asked if there were any two oyster reefs that were closely similar where one could be dredged and one left alone for the test. Dr. Burreson responded that he did not think there were any in the Lower Rappahannock. He said if the experiment could be done, it would have to be in the James River.

Freeland Mason, President of the Virginia Watermen Association, addressed the Commission. He said at their meeting a guest spoke and asked what could they do to get the Lower Rappahannock open. He suggested that communication be established with VIMS, and they did that. He said they still disagreed with some of their conclusions, but the discussion would be continued.

Commissioner Pruitt asked Mr. Mason if he could address Dr. Goodell's earlier question regarding proximity of the rocks. Dr. Goodell asked if there were two rocks that were almost identical in terms of water depths, salinity, currents, and all the ecological factors so that one could be dredged, and the other not dredged, and the end results compared. Mr. Mason responded that he knew nothing about oystering.

Douglas F. Jenkins, representing Virginia Twin Rivers Waterman's Association, addressed the Commission. Mr. Jenkins indicated that the Association was concerned with the letter Dr.

Burreson had written to the Commission at the November Commission meeting which determined that the Lower Rappahannock could not be opened. Mr. Jenkins then read the contents of the letter into the record. Comments are a part of the verbatim record. He pointed out that in paragraph four of Dr. Burreson's letter regarding VIM's opposition to commercial harvesting of any oysters from the mouth of the Rappahannock. He said the Lower Potomac River lost all their stock, but the area was never closed, no sanctuary was placed there, no broodstock was placed there to have set again, and year before last the hand dredgers went there and harvested 28,000 bushels of oysters from that one area. He said all they were doing was asking to work those areas, and it would clean the shells up. Other comments are a part of the verbatim record. He said all they were asking was to be able to work those areas to clean the shells and give the spatset a better area to adhere to, if there was a spawn. He said when letters come before the Board, the Association would appreciate a copy. He said he felt Dr. Burreson's letter contained some misleading information.

Commissioner Pruitt said he personally shared a lot of their feeling on the issue. He said during some of the discussions they had, he had always felt that bagless dredging or any type of turning shell was a good concept. Mr. Pruitt asked Mr. Jenkins why was he inclined to be against the reef program that had proven itself already in spatset. Mr. Jenkins responded that he had commented many times that he had favored sanctuaries in the proper place. He said as low as the replenishment money was, he did not think it should be spent solely on the reefs. Other comments are a part of the verbatim record.

A discussion followed regarding the replenishment program. Comments are a part of the verbatim record.

Commissioner Pruitt asked if he had addressed Dr. Goodell's earlier question, and asked which rock he was talking about opening. A discussion followed regarding which particular rock the watermen wanted opened. Comments are a part of the verbatim record.

Mr. Jenkins said they would like to see a certain amount of harvest so that they could get back and cultivate the rocks.

Dale Taylor addressed the Commission. He said he was representing himself and gave comments about his background in the marine resources business. Comments are a part of the verbatim record. He said in the past six years the Commission had done nothing to help the oysterman except open a few rocks and allowed a harvest of a few thousand bushels. He said he did not understand how the Commission could year after year, do nothing for the watermen. He then suggested opening some of the rocks or closing it for five years, because they keep coming to the Commission and getting nowhere. Other comments are a part of the verbatim

record.

A discussion followed regarding the oyster season and harvesting. Comments are part of the verbatim record.

Commissioner Pruitt asked Mr. Mason to let the Commission know exactly what rock and the harvest limit they were requesting. Mr. Mason responded that they had no specific recommendation. However, based on what had been said, he did not think anything would be opened this year. He said they were hoping for a good comparative study that would prove a relevant data study from VIMS.

Dr. Mark Luckenbach from VIMS addressed the Commission and said if you make a decision to open that area for socio-economic reasons, and not a part of directing us in a particular experiment. He said Dr. Burreson pointed out reasons why that was not a good experiment. He felt in that direction, it would dictate a poor experimental design to VIMS. He said the experiment could not be done in that area. Dr. Luckenbach then gave examples of how the experiment would work. Comments are a part of the verbatim record.

Dr. Jim Wesson said he would like to clear up some things. He said they would have the largest harvest they have had in five or six years. He said they used all the monies from the general funds for the shell planting and moving seed. He said the reefs came from an entirely different competitive pool of money. He said they did not have great sums of money. Dr. Wesson said they had also had done bagless dredging. He said they had this same conversation in 1994, and they agreed to an area in the Rappahannock with the watermen, and found out that bagless dredging had no effects. He said that was because there were no sets in that area. Dr. Wesson said they had been turning over rocks every year in Seaside with the excavating machine and they had good results. He said nothing had been done right with bagless dredging in this program because it was always done in the winter months when it was convenient for the watermen. Dr. Wesson said he tried to get some watermen to work in Piankatank or the Great Wicomico to do a side-by-side test of some areas where they knew they would have a good spatset, an area that he was shelling, and an area that he could bagless dredge, but no one wanted to work for them in the summer because they were busy doing other things. Dr. Wesson said he was ready to go with a comparative study now, if he could get workers to work for him in July. He said there were areas in both the Piankatank and the Great Wicomico that could be divided up. He said Virginia at the present time was shell poor. He said it was unlikely they would see any good results with bagless dredging until they had good shells back in the area to turn over.

Commissioner Pruitt asked if there was anything that could be done this time of year when

there was nothing for the watermen to do. Dr. Wesson responded that there was nothing that he knew of. Commissioner Pruitt asked if the new money could get some new shells.

Associate Member Cowart asked what type of funding did they have coming this year. He said he had read in the newspaper about \$350,000 from State government. Dr. Wesson responded that would be after July 1, for the summer 2000. Mr. Cowart asked what was the total funding for the entire program. Dr. Wesson responded \$400,000 from State funds. A discussion followed regarding funding. Commissioner Pruitt said the Governor was proposing \$350,000 plus a \$150,000 match in a Federal Grant, which was above the normal operating budget. Associate Member Cowart asked if the reef funding came from the Federal Government. Dr. Wesson responded yes. He said this year he had an additional \$300,000 for reef work. For the record: Commissioner Pruitt noted that the funding would be for the Spring 2000.

Associate Member Cowart commented that in 1986 most of the oysters died in Virginia, and they have been in the rebuilding program since that time. He said he sympathized with the watermen. Other comments are a part of verbatim record. He said the large oysters in the Lower Rappahannock are an important source of broodstock for the future generation. The spatset from those oysters would go up exponentially with the large oyster. He said that was the key to survival, and the other key to survival was resistance to the diseases. Mr. Cowart said it was also important to work the bottoms, and bring the shells to the surface. However, moving the oysters at the expense of the broodstock, would never rebuild the industry. He said he did not think anyone had all the answers, but he felt it would be a mistake at this point for the Commission to move opposite of what the marine scientists and fisheries management were telling them, and open those areas to prove that oysters strike better on clean shells.

Commissioner Pruitt said he concurred with Mr. Cowart, but thought the socio-economic issue did enter into the decision from time to time. He said he also understood Dr. Luckenbach's position regarding having a limited fishery, tied into a scientific study, but felt he could accomplish something from a very limited harvest. He then placed the matter before the Commission.

Associate Member Hull commented that he was not totally persuaded by either argument completely in this case, but he did not know what the solution was, but he would like to think that something could be worked out to try and get some scientific data.

There was no action taken by the Commission, therefore, things would remain the same.

REPORT of the Pound Net No Fishing Zone Study Committee.

For the Record: Commissioner Pruitt commented that the Chairman of the committee had to leave and requested Mr. Travelstead make the report instead. Commissioner Pruitt also stated that there was a letter from Mr. William Eric Johnson, Esquire, Attorney at Law from Mathews County.

Jack Travelstead, Chief-Fisheries Management, briefed the Commission on the study report from the Committee. He said the Committee did reach a consensus on the issue, after two meetings and considerable debate, that there should be a prohibited fishing zone around pound nets. The final language, prepared by staff in response to the committee's actions, is as follows:

- A. The prohibited fishing zone around any pound net shall consist of that area bounded by two straight lines 100 feet from the left and right sides of the centerline of the head of the pound net, and within that zone.
- B. It shall be unlawful for a person who was fishing from a boat to anchor, drift, troll, or otherwise to fish within, or to cast into, to do so would be a violation of Commission regulation.

Mr. Travelstead said there was a brief discussion among the committee members about taking crabs that were attached to the pole or netting of a pound net, and that would be unlawful, unless permission had been obtain from the owner of the net.

The Committee further suggested that four buoys be placed at the corners no fishing zone two at the head of the net, approximately 100 feet on either side of the center and two at the opposite end. Again extending 100 feet to the left and right sides of the net. Mr. Travelstead said the buoys that would be used to mark that zone would be similar to buoys being used now to mark the ends of gill nets. A small staff with a 12-inch by 12-inch flag extended 3 feet above the surface of the water would be required. The Committee also suggested that it would be unlawful to tamper with the buoys that were marking the area.

Mr. Travelstead said in the beginning there were two issues that needed to be solved. The safety issue -- fishing lures and hooks getting caught in the webbing of the net and presenting danger to watermen fishing with the net; and boaters moving too close to the net and could get the prop of the engine caught up in the webbing of net, which would disable the vessel and create a serious situation with the tide running. The second issue regarding anglers fishing too

close to the net, it would disrupt the pattern of movement of fish along that leader, therefore, affect the pound netters' harvest.

Mr. Travelstead also stated that the buoys could not be precisely marked as a 100 foot distance.

Commissioner Pruitt asked if there was a consensus taken. Mr. Travelstead said there was a vote taken for the 100-foot distance on the proposal which carried 5 to 3.

Associate Member Goodell felt it was a loophole regarding the 100 foot distance. Comments are a part of the verbatim record.

Associate Member Davis asked if Law Enforcement had been consulted. Colonel Bowman responded that Mr. Travelstead had adequately addressed the issue.

Associate Member Ballard asked if the buoy system was optional. Mr. Travelstead responded that was correct.

Commissioner Pruitt said he had indicated to the recreational and the commercial industry that he would allow two brief speakers from each side, and they would be held to three minutes.

Mr. Shewmake addressed the Commission. He said there was some concern about the need for 100 foot distance, but the committee agreed that it was a good distance and a good faith effort to generate a great deal of cooperation and showed that the anglers were trying to work with the commercial fishermen. Other comments are a part of the verbatim record.

Mr. Jenkins addressed the Commission. Mr. Jenkins gave comments in support of a 300-foot no fishing zone. Comments are part of the verbatim record. He also mentioned his support for the letter Attorney William Johnson submitted for the 200-foot no fishing zone. He said as a waterman he felt a 100 feet was too close and would be a safety factor. Other comments are a part of the verbatim record.

Assistant Attorney General Fisher commented that he had read Attorney William Johnson's letter and he made a good argument.

Associate Member Davis commented that the Coast Guard Code was related to navigation devices and not fishing devices.

After hearing the report from the Committee, and comments by industry and the recreation community, Commissioner Pruitt placed the matter before the Commission.

Mr. Travelstead gave additional comments regarding Mr. Davis' concern. He then read the suggestions made by the Committee into the record.

A. The prohibited fishing zone around any pound net shall consist of that area bounded by two straight lines 100 from the left and right sides of the centerline of the head of the net, which extend in a parallel fashion from the channelward end of the head of the net to the opposite end of the leader of the net.

B. It shall be unlawful for any person fishing from a boat or vessel to anchor, drift, troll, or otherwise to fish within, or to cast into, the prohibited fishing zone of any pound net which is marked according to the provisions of paragraph C, below. If the zone is marked, the zone is enforced. Further, it shall be unlawful for any person to take or harvest crabs from any part of a pound net (which is marked according to the provisions of paragraph C, below), unless such person has the permission of the owner of the net.

C. When the owner of a pound net intends that the "no fishing zone" be enforced, it shall be marked with four buoys placed at the corners of the prohibited fishing zone such that two buoys are placed 100 feet from the centerline of the head of the net and extend no further than the channelward edge of the head of the net and two buoys are placed at the opposite corners extending no further than 100 feet from the shoreward end of the leader of the net. Each buoy shall consist of an upright anchored flagstaff bearing a blaze-orange flag, 12 inches high and 12 inches wide, and a staff of sufficient size to maintain the bottom of the flag at least three feet above the surface of the water.

D. It shall be unlawful for any person to tamper with any buoy marking the prohibited fishing zone or any pound net.

After a discussion between Commission members and staff, regarding exact location of the 100-foot no fishing zone, Mr. Travelstead indicated that in paragraph A, the sentence should read, which extends in a parallel fashion, 100 feet from the channelward end of the head of the net to the opposite end of the leader of the net, and make the same change in paragraph C, in the fourth line.

For the record: Commissioner Pruitt asked Mr. Fisher if the 200-foot no-fishing zone mentioned in the letter by Attorney Johnson referred to navigation. Mr. Fisher responded that the regulation was intended to control fishing near the pound, and that was within the Commission's authority. He said he believed there was a question regarding putting a buoy out, and whether it would interfere with navigation. He said he would have to say that was an

open question, but a defensible position to say the buoy was a part of the fishing structure. Commissioner Pruitt then asked Mr. Grabb about the buoys around the reefs. Mr. Grabb responded that there was a navigational permit that governed fishing structures, and when buoys were put out around the reefs, they fell within the navigational permit. If the Commission required the buoys in conjunction with the licenses in place of the fishing device, that would be covered under the navigational fishing license, if not, it would require an individual permit.

Mr. Travelstead said staff had briefly talked to the Coast Guard about this issue informally, and the Coast Guard had indicated that they did not have a problem with what was being proposed.

Assistant Attorney General Fisher commented that the question of the channel, would seem to be better, in that case, not to put it in the channel.

Associate Member Davis asked Colonel Bowman for his comments. Colonel Bowman responded that there would not be a problem if the two buoys were placed on the outside, and you have the regulation to indicate that it extends 100 foot outward, and if the periphery was well marked and there was a footprint to go by. He said he did not feel it was necessary to take the buoys all the way up channelward. He said as for permission to take crabs, he would like to have it written in the regulation that permission from the owner, in writing, was necessary. He also stated that unless it was exempted in the regulation, "fishing" should be more specifically defined.

Assistant Attorney General Fisher questioned the harvesting of crabs from the pound nets. He referred to paragraph C, that stated it was "unlawful to for any person to take or harvest crabs from any part of a pound net not marked..."

Commissioner Pruitt then allowed a recreational and a commercial watermen to re-address the Commission.

Mr. Shewmake addressed the Commission. He said there was a great debate on the location of the buoys. He gave further comments on the location of the buoys. Comments are a part of the verbatim record. He further stated that he did not see how Section 28.2-307 had any impact on the buoys.

Lynell Jenkins addressed the Commission. He said there was a misunderstanding of where the buoys would be placed. He said a simpler method would be to measure 100 foot off the widest point of the net, and that should work for everyone.

Associate Member Ballard addressed the issue that Colonel Bowman made regarding defining fishing as recreational fishing and allowing crab pots near the nets.

Mr. Welton responded that it was a safety issue for both sides.

Associate Member Goodell moved that the Commission accept the recommendations of the Fishery Management Division's Evaluation and the ad hoc subcommittee for a prohibited zone of 100 feet from the centerline parallel along the axis of the net, and should be unlawful for anyone to fish, crab, or conduct any other activity that might be construed as fishing within that zone, unless they had written permission from the owner of the net. In addition, it should be unlawful for any person to tamper with any buoy marking the prohibited fishing zone of any pound net. Associate Member Ballard seconded the motion. Mr. Ballard requested an amendment to add the language that Mr. Travelstead specified in making the placing of the buoys optional. Associate Member Goodell was acceptable to the amendment.

After considerable discussion, Commissioner Pruitt called for the vote. Motion carried 7 to 1. Commissioner Pruitt suggested that the motion be redrafted and reviewed by counsel for accuracy.

DISCUSSION: Consideration of 1999 Recreational Summer Flounder Measures for public hearing.

Robert O'Reilly, Assistant Chief-Fisheries Management, presented the Commission with additional information on a meeting held January 21 and correspondence from Donnie Wallace, of Wallace's Bait and Tackle. Mr. O'Reilly then presented slides and briefed the Commission regarding the compliance requirements mandated by Atlantic States Marine Fisheries Commission (ASMFC) and the Mid-Atlantic Fishery Management Council (MAFMC). He said the specific requirements for the 1999 recreational summer flounder fishery were mandated because anglers exceeded their quotas and fishing mortality rates in 1998.

- 1) a 15-inch minimum size limit (unchanged from 1998);
an 8-fish possession limit (unchanged from 1998);
a closed season of September 16 through May 28 (new for 1999);
or
- 2) a state proposal which would result in a 40% reduction in harvest.

He also presented data regarding staff's proposal for the size/possession limit and seasonal

closures which would result in the 40 percent reduction in coastwide flounder landings. Comments are a part of the verbatim record. Mr. O'Reilly said that Mr. Richard Welton of the Coastal Conservation Association requested that the final public hearing be held on the Eastern Shore because reduction would impact the Eastern Shore.

Associate Member Goodell moved that a public hearing be held to address the minimum size limits, possession limits, seasonal closure options to achieve a 40 percent reduction in 1999. Commissioner Pruitt commented that he thought a meeting should also be held on the Eastern Shore. Motion seconded by Associate Member Hull. Motion carried unanimously.

DISCUSSION: Consideration of measures affecting the harvest of horseshoe crabs. Request for public hearing.

Jack Travelstead, Chief-Fisheries Management, briefed the Commission. Mr. Travelstead said that staff was recommending that a number of measures be taken to public hearing that would affect the harvest of horseshoe crabs as described in the evaluation. He said ASMFC had completed the Management Plan on Horseshoe Crabs and adopted it in October 1998. He said the original plan proposed quotas, seasonal closures, and other measures, but none of those measures were adopted by ASMFC. He said the Plan was mostly a data gathering plan that would require monitoring and data collection by participants in the fishery and recommended that they be advertised for public comment and adoption. The plan also recommended a two-day closure per week during the spawning season as a voluntary measure. He said that measure would prohibit the harvest of horseshoe crabs two days per week during the period April 15 to June 15 within 1000 feet of mean low water. Mr. Travelstead stated that the other measure, not included in the Management Plan, the Commission was encouraged to adopt was a quota on the harvest and landing of crabs in Virginia. He said the ASMFC did not adopt a quota, but there were provisions in the Management Plan that called for the ASMFC to devise a quota and effort controls for the fishery to be in placed in the year 2000.

Dr. Goodell asked what was the quota. Mr. Travelstead responded that the ASMFC had not specified a quota at this time. Associate Member Goodell commented that in light of the Maryland Governor's restriction of the harvest of 750,000 pounds, he asked if Virginia should have some type of restriction on the total number of pounds landed. Mr. Travelstead responded that the number of pounds landed in Virginia for 1998 was 578,000 pounds and would go up. He said at the present time Virginia was the loop hole state because States to the north of Virginia had put in very restrictive regulations that have severely curtailed Virginia's harvest. Vessels were coming to Virginia and off loading protected crabs. He said because

they did not have a good stock assessment, he could not tell what was the necessary quota to protect the stock and he did not feel that the quota should go beyond last year's total until ASMFC completed their study and designed a proper quota program. Mr. Travelstead also stated that Virginia had one of the largest conch pot and eel pot fisheries on the Atlantic Coast. He said Virginia was the primary users of horseshoe crabs as bait.

Associate Member Ballard commented that there was no stock assessment and no hard evidence that the horseshoe crab was in any sort of danger. Mr. Ballard stated that he was always very, very, afraid of front running ASMFC's regulations. He thought that if Virginia implemented a quota, the first thing ASMFC would say, "you can't expand that quota." In addition, if ASMFC was going to have their regulations in place by 2000, as the major consumer state, he was cautious about Virginia putting in a harvest or landing quota.

Associate Member Goodell asked if a the quota could be worded in a way that it would be a temporary quota for one year and had a sunset clause that would expire by a certain date. Mr. Travelstead responded that could be done.

Associate Member Davis commented that he felt a quota was necessary because he was uncomfortable with Virginia being the dumping place for law violators from other states. Other comments are a part of the verbatim record.

Dave (indiscernible), from the National Audubon Society, briefly addressed the Commission regarding letters sent by Audubon Society. Comments are a part of verbatim record.

Kelly Place gave comments regarding capping the quotas at the 1997 levels. Comments are a part of the verbatim record.

Jim Robbin, President of the Virginia Beach Audubon Society, gave comments regarding horseshoe crabs. Comments are a part of the verbatim record.

After comments from the public, Commissioner Pruitt placed the matter before the Commission.

Richard Welton suggested that the advertisement state that the quota would be no lower than the 1997 landings.

Associate Member Goodell moved to have a public hearing on the consideration of measures affecting harvesting of horseshoe crabs, including quotas, and all measures necessary to comply with ASMFC's Fishery Management Plan regarding horseshoe crabs. Motion seconded by

Associate Member Cowart. Motion carried 7 to 1.

PUBLIC COMMENTS:

Richard Welton, Coastal Conservation Association, addressed the Commission and said he appreciated the Commission agreeing to having a hearing on the Eastern Shore. He then invited the Associate Members to try and attend the satellite hearing. He said the summer flounder recreational fishery was a 50 to 60 million dollar industry and there were a lot of people whose lives were affected. He said he felt the ASMFC's plan was a failure because the plan would not cut out the over harvesting.

Irene Rollin, representing Richmond Audubon Society, addressed the Commission. She asked if the public hearing next month would affect the regulations for this spring or next year. Mr. Travelstead responded that if the regulation was adopted it would go into effect March 1. She commented that she had not heard anything about the birds and wanted to know if they were being considered. She said ASMFC, in its final Plan, stated that the horseshoe crab harvest may be causing a potential decline in shore birds. She then requested the Commission consider the 11 species of shore birds that depended upon the horseshoe crabs egg density on the beaches. She also commented that she hoped the Commission would look at the 1997 level of harvest for caps. Other comments are a part of the verbatim record.

Associate Member Goodell asked if the Audubon Society had any hard data on bird populations as a result of overcrabbing. Ms. Rollin responded that they did, but she did not have the data here. Other comments are a part of the verbatim record.

Commissioner Pruitt then asked if there were any questions on the summary of legislation that was handed out. If there were, please contact any of the Division Heads or him. Mr. Pruitt said that Secretary Woodley was very concerned about the Davis Bills and concerned about the Bill sign off on emergencies.

Mr. Travelstead commented that the motion on the Pound Net No fishing Zone issue to adopt the language agreement must go to public hearing on part B only. Assistant Attorney General explained that the subcommittee had made recommendation, and the Commission had approved the language which should go out for the public hearing. The motion maker was agreeable to the recommendation.

Commissioner Pruitt stated the proposed language for the regulation would go for a public

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Newport News, VA 23607

hearing next month.

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

William A. Pruitt
Commissioner

LaVerne Lewis
Commission Secretary