

MINUTES

Commission Meeting

February 27, 2007

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

Steven G. Bowman	Commissioner
Ernest L. Bowden, Jr.)	
J. Carter Fox)	
J. T. Holland)	
John R. McConaugha)	Associate Members
F. Wayne McLeskey)	
Richard B. Robins, Jr.)	
J. Edmund Tankard, III)	
Carl Josephson	Sr. Assistant Attorney General
Jack Travelstead	Chief Deputy Commissioner
Wilford Kale	Senior Staff Advisor
Katherine Leonard	Recording Secretary
Jane McCroskey	Chief, Admin./Finance
Andy McNeil	Programmer Analyst, Sr.
Rob O'Reilly	Deputy Chief, Fisheries Mgmt.
Jim Wesson	Head, Conservation/Replenishment
Joe Grist	Head, Plans and Statistics
Joe Cimino	Fisheries Mgmt. Specialist
Stephanie Iverson	Fisheries Mgmt. Specialist, Sr.
Sonya Davis	Fisheries Mgmt. Specialist, Sr.
Lewis Gillingham	Fisheries Mgmt. Specialist
Mike Johnson	Fisheries Mgmt. Specialist
Richard Lauderman	Chief, Law Enforcement Div.
Warner Rhodes	Deputy Chief, Law Enforcement Div.

Commission Meeting

**14121
February 27, 2007**

Richard Haynie
Gerald Pitt

Marine Police Officer
Marine Police Officer

Bob Grabb
Tony Watkinson
Chip Neikirk
Jeff Madden
Randy Owen
Hank Badger
Ben Stagg
Jay Woodward
Benjamin McGinnis
Justin Worrell
Elizabeth Gallup

Chief, Habitat Management Div.
Deputy Chief, Habitat Mgt. Div.
Environmental Engineer, Sr.
Environmental Engineer, Sr.
Environmental Engineer, Sr.
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Environmental Engineer, Sr.
Environmental Engineer, Sr.

Virginia Institute of Marine Science (VIMS)

Lyle Varnell
David O'Brien
Roger Mann

Other present included:

Chris Pomeroy
Donald Birch
David W. Hudgins
Travis Thornton
Betty Pugh
Richard Howard
Edmund B. Wilestrich
Donna Mason
Reggie Stubbs
Karla Havens
Dudley Biddlecomb
Douglas F. Jenkins
Craig Paige
Doug Markler
Winston Thornton
Fred A. Kearney
Kelly Place

J. Stacey Hart
Mike McGee
Barry E. Fisher
Lynne Ballerini
Steve Pugh
John Johnson
Sherry Ashe
Manny DosSantes
William Judy
J. T. Frese
James Kirkpatrick
Roger Parks
Randy Lewis
Joe Shelton
Raymond L. Morgan
Bob Hutch

Don Hearl
William V. Birch
William E. Jones
Gregg Williams
Tommy Mason
Carl Meixner
Ken Kurkowski
Mike Kay
Edward Alleyne
Ellis W. James
Don Scott
A. J. Erskine
Gary Sawyer
Charlie Johnson
Frances W. Porter
Patrick Lynch

and others

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Commissioner Bowman called the meeting to order at approximately 9:30 a.m. Associate Member Schick was absent.

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Associate Member Holland gave the invocation and Associate Member Robins led the pledge of allegiance to the flag.

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Commissioner Bowman announced that Associate Member Robins had recently become a father again of a baby boy, named Richard B. Robins, III and congratulated him and his wife.

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

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APPROVAL OF AGENDA: Commissioner Bowman asked if there were any changes to the agenda. Associate Member Bowden requested that Item 9, Mr. and Mrs. Ronald Stott, #06-2223 be heard after item 4, because both items are projects involving the Eastern Shore area and the parties involved had come a long way to be present for these items. Bob Grabb stated that there was an additional page two item, which would be 2I, named, Pier Condominiums and deletion of a page two item, 2F, Marine Hydraulics for which staff had now received a protest that needed to be resolved.

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

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MINUTES: Commissioner Bowman asked, if there were no corrections or changes, for a motion to approve the January 23, 2007 meeting minutes.

Associate Member Holland moved to approve the minutes, as circulated. Associate Member Robins seconded the motion. The motion carried, 7-0-1. The Chair voted yes. Associate Member Fox stated he would be abstaining, as he was absent from the January Meeting.

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

Bob Grabb, Chief, Habitat Management Division, reviewed items 2A through 2E and 2G through 2I for the Commission. He said that staff was recommending approval of these items. There were no questions of staff.

Associate Member McLeskey announced that he would not be participating in the voting for a motion for Item 2B, as he was an adjoining property owner and he had a conflict of interest. He also announced that there was someone in the audience, a Mr. Jeff Gordon that wished to address this item.

Commissioner Bowman opened the public hearing.

Jeff Gordon, adjacent property owner and President of the local Civic Committee, was sworn in and his comments are a part of the verbatim record. Mr. Gordon explained that they did not object to the project. He said that when the dredging is done to achieve a 1:2 slope it undermines adjacent areas. He provided photos for the Commission's review.

Mr. Grabb stated that he did not dispute Mr. Gordon's statements, but the Commission only considers the beach replacement. He said Mr. Gordon's concern over the dredging was not within the Commission's jurisdiction. He said this was a civil matter between the Corps, the City, and the complainants.

Commissioner Bowman asked if the other parties were apprised of the matter. Mr. Grabb stated that this had been an ongoing discussion and the Corps and/or City need to be represented here to address this matter. He said everyone was aware of the problem

Associate Member McLeskey stated he would be abstaining as an adjacent property owner to the project area. He said that good dredging practices were needed. He asked if the City/Corps were exempt outside the sand trap.

Mr. Grabb stated that in accordance with Section 28.2-1203 the maintenance dredging project was authorized by statute. He said the Federal project included the sand trap. He said the Commission had required a weir be installed. Associate Member McLeskey asked if beyond the sand trap was considered a Federal Project. Mr. Grabb stated that the Corps was not authorized to dredge beyond the sand trap. He went on to state that the western edge of the sand trap was the area of contention and VMRC does not have jurisdiction.

Associate Member McLeskey stated that he supported the dredging of the channel, but encouraged the Corps and the City to be confined to the designated area.

Mr. Gordon explained that he believed they were staying within reason, but it was misleading to say there would be a slope when any wave action would flatten it. He said the permit was not accurate.

Commissioner Bowman stated that this was not within the VMRC jurisdiction, but there did seem to be an issue. He said that staff should speak with all parties and mediate and in the end it would just need to be accepted or taken to Federal Court.

Associate Member Fox explained that if this were a private project something could be done and he hoped communicating with the Corps would be meaningful.

Commissioner Bowman announced the public hearing was closed since no one else wished to speak and asked for a motion for Page Two Items 2A, 2C through 2E, and 2G through 2I.

Associate Member Holland moved to approve Items 2A, 2C through 2E, and 2G through 2I. Associate Member Fox seconded the motion. The motion carried, 8-0. The Chair voted yes.

Commissioner Bowman asked for a motion for Item 2B. Associate Member Holland moved to approve Item 2B. Associate Member Tankard seconded the motion. The motion carried, 7-0-1. Associate Member McLeskey abstained from voting because of previously stated reasons. The Chair voted yes.

2A. U. S. COAST GUARD, #07-0243, requests authorization to remove and replace Windmill Point Light in Lancaster County and Stingray Point Light in Middlesex County, in Chesapeake Bay at the mouth of the Rappahannock River. Each structure will consist of a 10-foot diameter circular steel-encased caisson foundation, reinforced with nine (9) steel H-piles and extending 10 feet above mean high water, and a 5-foot by 5-foot by 20-foot tall steel skeleton tower to support the Aid to Navigation (ATON) equipment. The new light structures will be constructed in same location of the existing, deteriorated structures, and all materials associated with the existing structures will be removed and disposed of in an upland location.

Permit Fee.....\$100.00

2B. ARMY CORPS OF ENGINEERS, #02-0523, requests a modification and extension the existing dredging permit for Rudee Inlet in Virginia Beach. The existing permit allows the placement of up to 150,000 cubic yards of sandy dredged material onto the beach lying north of the Inlet as a result of the ongoing hydraulic maintenance dredging of the Rudee Inlet Federal Project Channel and the associated sand trap and weir system. Requested modifications are as follows: the inclusion of the City of Virginia Beach as a co-applicant / co-permittee, the

placement of approximately 350,000 cubic yards of sandy dredged material onto the north side of the Inlet as a result of ongoing maintenance dredging, and the option of utilizing a sidecast dredging vessel in emergency situations to remove shoaling. A permit extension would increase the expiration date by five years, until October 31, 2012.

No applicable fees, Permit Extension and Modification.
Exempt Beach Nourishment, Public Beach

2C. RICHMOND DEPARTMENT OF PUBLIC UTILITIES, ET AL, #06-0294, requests authorization to construct a temporary work causeway and install 500 linear feet of submerged 60-inch diameter water line to facilitate the rehabilitation and replacement of a 54-inch treated water conduit situated adjacent to and within the James River between the Richmond Water Treatment Plant and the Byrd Park Pump Station in the City of Richmond. Recommend approval contingent on the removal of the work causeway upon project completion, our standard instream permit conditions, an instream work time-of-year restriction of March 1 through September 15 to protect anadromous fish and freshwater mussel species and any additional mussel or fish surveys/relocations, if necessary, as recommended by the Department of Game and Inland Fisheries.

Permit Fee.....\$100.00

2D. RICHMOND REGION 2007, #07-0044, requests authorization to construct a 24-foot wide by 500-foot long floating causeway within the James River, adjacent to the City of Richmond Intermediate Terminal (3101 Water Street), to support the temporary mooring of period vessels (*Godspeed, Schooner Virginia, Kalmar Nyckel & Lady Maryland*) in May 2007 as part of the Jamestown 2007 celebration. Recommend approval contingent on the removal of the causeway by June 15, 2007 and final approval from the Virginia Health Department.

Permit Fee.....\$100.00

2E. HANOVER COUNTY DEPARTMENT OF PUBLIC UTILITIES, #06-2945, requests authorization to directionally bore a 16-inch diameter sewer force main beneath approximately 250 linear feet of Totopotomoy Creek adjacent to McGregor Farm Drive to extend sewer service in Hanover County.

Permit Fee.....\$100.00

2F. MARINE HYDRAULICS, INCORPORATED, #04-1984, requests authorization to dredge, using either clamshell or hydraulic methods, 113,600 cubic yards of State-owned submerged land from a 633-foot by 140-foot wide basin to create maximum depths of -55 feet mean low for the installation of a drydock with an associated 200-foot long by 360-foot wide access channel to -40

feet mean low water to connect with the adjacent Federal Navigation Channel, install two (2) 30-foot by 15-foot anchor dolphins, and construct a 193-foot long new building with 1,202 square feet of associated backfill and 5,400 cubic yards of new dredging from within an adjacent 130-foot by 140-foot basin to create maximum depths of minute ten (-10) feet mean low water, at their property situated along the Elizabeth River in Norfolk. All dredge materials will be transported to and disposed within the Craney Island Dredged Material Management Area. Staff recommends a royalty of \$53,550.00 for the dredging of 119,000 cubic yards of state-owned submerged land at a rate of \$0.45 per cubic yard, \$6,010.00 for the filling of 1,202 square feet of stated-owned submerged lands at a rate of \$5.00 per square foot and \$900.00 for the installation of two (2) industrial dolphins at a rate of \$1.00 per square foot. Staff also recommends a pre-dredge conference prior to dredging, submission of a post-dredge survey, and a requirement that bulkhead construction and dredging cannot begin until the mitigation sites at the Eastern Branch of the Elizabeth River property has been graded and planted.

Pulled off the agenda, protest received.

2G. YORK COUNTY, #05-2531, requests authorization to modify a previously authorized project including the relocation of previously approved but not yet installed 40-foot by 6-foot aluminum ramp and a 65-foot by 13-foot floating canoe and kayak launching dock approximately 10 feet to the south and to add the dredging of 35 cubic yards of material, using clamshell method, from a 40-foot by 45-foot basin associated with the floating dock at the public ramp situated along Wormley Creek in York County.

Permit Fee.....\$100.00

2H. COUNTY OF GREENE, #06-2833, requests authorization to install 280 linear feet of 20-inch water main pipeline beneath multiple stream crossings along the edge of the VDOT Right-of-Way on U.S. Route 29 from its intersection with State Route 607 (Cedar Grove Road) north to Ruckersville in Greene County.

Permit Fee.....\$100.00

2I. PIER CONDOMINIUMS, #06-2853, requests authorization to remove and reconstruct a new 35-slip community marina for condominium owners, employing concrete encased floating dock modules, as well as the addition of 500 linear feet of riprap armor stone protection and 160 linear feet of floating wave attenuation barrier at their property situated along the Elizabeth River at the entrance to "the Hague" in Norfolk. Recommend the assessment of a royalty in the amount of \$64,191.00 for the additional encroachment over 42,794 square feet of State-owned subaqueous bottom at the rate of \$1.50 per square foot.

Royalty Fees (42,794 sq. ft. @\$1.50/sq. ft.).....	\$64,191.00
Permit Fee.....	\$ 100.00
Total Fees.....	\$64,291.00

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

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

VMRC versus Michael Jewett

The motion was seconded by Associate Member McLeskey. The motion carried, 8-0.

Associate Member Robins moved for the following:

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

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

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

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

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

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

NAYS: None

ABSENT DURING VOTE: Schick

ABSENT DURING ALL OR PART OF CLOSED MEETING: Schick

The motion carried, 8-0.

Katherine Leonard, Recording Secretary

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- 4. BIRCHWOOD MOTEL, INC., #05-2780**, requests authorization to construct a 700-foot long by 5-foot wide pier which includes a 30-foot by 8-foot L-head and 10 mooring piles to create four (4) community boat slips and install a six (6) inch sewage discharge pipe under the proposed 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 other property owners.

Hank Badger, Environmental Engineer, Sr., gave the presentation with slides. His comments are a part of the verbatim record. Mr. Badger stated that 2 additional items had been received since the information was mailed to the Commissioners. He said the two items included more information on the prohibited area and a revised drawing for the proposed pier.

Mr. Badger explained that the project was located along Chincoteague Channel on South Main Street, just south of the Town of Chincoteague's Carnival Grounds. The proposed community pier and sewage discharge pipe for a community package sewage treatment plant would be a part of the Channel Breeze Townhomes and Condominiums/Birchwood Housing project. The Birchwood Housing project consisted of 28 Town approved condominium units across Main Street.

Mr. Badger went on to explain that there was a large shoal along this section of Chincoteague Channel with water depths 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 approximately 280 feet west of the proposed pier and 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 stated that the original application called for the construction of a 700-foot long by 5-foot wide pier, which included a 30-foot by 8-foot L-head, 32 community boat slips, and installation of a six-inch sewage discharge pipe under the proposed pier for the entire Birchwood Housing project. The applicant had since revised his application so that

the community pier was now centrally located on the applicant's riparian property and the number of boat slips had been reduced from 32 to 4 slips.

Mr. Badger said that there were four waterfront townhome units with the remaining housing project located across Main Street. Three of the four riparian units had been sold (units #1, #2 and #3) and the applicant owned unit #4. The owners of units #1, #3 and #4 (the applicant) had agreed to not construct private piers provided they have the opportunity for a slip on the community pier. The owner of unit #2 had not severed his riparian rights or agreed to not build a private pier at this time. These four (4) units had a sewer line that tied into an existing drainfield across Main Street at the Birchwood Motel and would not be using the proposed outfall.

Mr. Badger stated that the applicant leases the oyster planting ground under the proposed project. The initial sewage discharge point directly impacts a nearby oyster ground lease and the resulting Health Department prohibited zone. That may have changed somewhat due to recent alterations in the outfall location.

Mr. Badger said that several nearby property owners and the affected oyster planting ground leaseholder protested the project. The majority of the protestants had concerns with the number of long piers along Chincoteague Channel and limiting boating access along the small channel near the shore.

Mr. Badger explained that Mr. Thomas Mason, the nearby oyster planting ground leaseholder, feared the sewage discharge would affect the condemned shellfish waters on his leased oyster grounds, resulting in a change from a condemned shellfish area to a prohibited shellfish area. The change from condemned to prohibited would prevent the leaseholder from relaying his shellfish to approved waters for self-purification. Such a change would effectively eliminate any shellfish harvesting currently, or in the future.

Mr. Badger stated that the Virginia Institute of Marine Science (VIMS) had indicated that the individual and cumulative adverse environmental impacts resulting from the community pier were expected to be minimal, as the proposed structure was open-pile and the shading would not impact the vegetated wetlands. VIMS staff generally recommended that community piers serve, as the only pier access, and discouraged the construction of additional private piers. The Department of Environmental Quality (DEQ) authorized Birchwood Housing Development to discharge effluent into Chincoteague Channel (Permit #VA0091596) effective April 13, 2005. The Health Department-Division 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 relay to approved waters for self-purification is not allowed) will be required within a portion of the currently condemned area.

Mr. Badger said that the actual size and location/dimensions of the prohibited area had apparently been modified in light of the applicant's agreement to extend the outfall both channelward and upstream. At this point, however, it was unclear exactly what the new boundaries of the prohibited area might be. The addition of boat slips would not cause an increase in the closure zone beyond that required by the discharge alone. The Health Department also informed staff that the applicant had submitted an approved plan for sanitary facilities and been granted a variance to their Sanitary Regulations for Marinas and Boat Moorings.

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

Mr. Badger also said that the U.S. Army Corps of Engineers had reviewed the project and issued their Regional Permit number 19 for the community pier and their 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 said that staff originally had four major issues of concern with this application. Three had been addressed. They were:

- 1) A portion of the proposed community pier would encroach into one or more of the adjacent property owner's riparian areas. After discussing the matter with the applicant, Mr. Birch was willing to move the pier to the center of his property to alleviate this concern.
- 2) The applicant's original request was for the mooring of 32 community boats slips at the proposed pier. The original riparian property was less than 157 linear feet wide. Mr. Birch revised his request down to four boat slips. One for each of the four waterfront townhomes as requested by staff.
- 3) Our field inspection revealed a small channel close to the shoreline that was used by some of the applicant's neighbors. The proposed pier would preclude the use of this channel. Mr. Birch has agreed to bridge the channel, leaving a 15-foot wide opening with a clearance of 6 feet at mean high water as requested by staff.

Mr. Badger said that in granting or denying any permit for use of State-owned land and the waters overlaying those lands, the Commission's Subaqueous Guidelines directed staff to consider, among other things, the effect of the proposed project upon: other reasonable and permissible uses of State waters and State-owned bottom lands; 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. Based upon the proposed method of construction, it appeared that the installation

of the six-inch diameter discharge pipe could be conducted with minimal impacts to State-owned subaqueous land. The sewage discharge, however, would affect condemned shellfish waters and could impact a nearby oyster leaseholder's right to harvest his shellfish now or in the future. A new prohibited area would be required within a portion of the currently condemned area. Until recently a large portion of Mr. Mason's leased oyster ground would have been impacted by this prohibition.

Mr. Badger stated that while staff acknowledged that the applicant received a permit from DEQ to discharge effluent into Chincoteague Channel nearly two years ago, the Commission must consider the effect of the proposed project upon other reasonable and permissible uses. In spite of the applicant's considerable efforts to revise his project to minimize the direct impacts to Mr. Mason's lease, the addition of a new prohibited area within the condemned area and the potential affect on Mr. Mason's oyster planting ground, staff found it was difficult to support the discharge request.

Mr. Badger said that staff recommended, however, approval of the community pier with a bridge over the small channel, leaving a 15-foot wide opening, with a clearance of 6 feet at mean high water and four boat slips, as agreed to by the applicant. If approved, however, staff would recommend a royalty based on the total square footage of the bold outline footprint including the pier and mooring area, at a rate of \$1.50 per square foot.

Associate Member Robins asked if the leases adjacent to the discharge were active and productive. Mr. Badger stated that Mr. Tommy Mason would be able to respond to that question. Associate Member Robins asked if some of the 4 property owners that could have a private pier had agreed, in writing, to not put in a pier. He asked if there would be anything in writing to this effect. Mr. Badger responded, yes.

Associate Member Fox asked if the prohibited area would be considered in the fees. Mr. Badger responded that it does not include that area. Associate Member Fox asked why not include it? Bob Grabb, Chief, Habitat Management, responded that the schedule used only the bold outline of the project because it limited the use to that individual. He went on to say that this was never done or discussed in the past, but the Commission might want to revisit the rent/royalty schedule and consider making that change.

Chris Palmeroy, Attorney representing the applicant, was present and his comments are a part of the verbatim record. Mr. Palmeroy stated that this was an important project for the family and the applicant and a large investment had been made already. He said the applicant has made efforts to minimize the impacts and asked that the project be approved. He said the DEQ permit with conditions had been issued. He said the applicant had gone beyond what anyone else would have done and the water would actually be improved. He said Mr. Mason's lease was already condemned and the prohibition would have been in his lease. He said the applicant had worked with the Commission and with the Health Department and accepted that all the changes be made a

part of the permit as well as the added expense. He provided a binder of exhibits to the Commission.

Commissioner Bowman stated that at the time of the conversation water quality and the effects of the projects on Mr. Mason's lease was a concern.

Mr. Palmeroy stated that the relay records of the Commission showed no relaying in the last two years. He asked that Mike McGee be allowed to come forward and make comments on the applicant's behalf.

Mike McGee, leaseholder, was sworn in and his comments are a part of the verbatim record. Mr. McGee stated that he had been in the seafood business for 37 years and as a part of his seafood business he handled more clams and oysters than anyone else on the island. He said he did not want any harm to come to this industry, but he has leases along that channel and had asked the Commission for permission to work it. He said they worked it but did not find that many clams. He said all the clams died and he actually lost money. He said he has shelled his ground there and he has never been able to grow any shellfish. He said Mr. Birch should get to do his project. He said that DEQ has said that there would no longer be any wastewater treatment plants allowed in Chincoteague.

Mr. Palmeroy stated that the applicant relied on the approval of the permit by DEQ to move forward. He said that they were asking for the approval of the pier as recommended by staff and considering the unique situation, approval of the outfall. He said the project would improve the area and the permit could have a special condition included that the use of the outfall would cease, if there was a problem to develop in its use and they would agree to hook up to the public sewer if and when that became available.

Commissioner Bowman stated he thought that it was a requirement by the county or local governing body to hook up to the public sewage system, if it was available.

Mr. Palmeroy stated that all depends on the requirements in the town or county. He also said that Mr. Birch would agree to a 4-inch pipe versus the proposed 6-inch if that was what the Commission wanted him to do.

Associate Member Tankard asked if Mr. Birch would continue to keep his lease even though it becomes prohibited. He also asked how dependent it would be on electricity and he was concerned with the weather and its impact on the electrical supply. Mr. Palmeroy stated that everything was Class I reliability, as it was a condition of the DEQ permit that they meet the state's highest standards. He said also that Mr. Birch would retain his lease (Mr. Birch nodded his head in the positive to the question).

Associate Member Fox asked if there would be a backup system.

Don Herald, Environmental Consultant was sworn in and his comments are a part of the verbatim record. Mr. Herald stated that there was a requirement for a backup generator, as well as backup for all other equipment in the treatment plant.

Associate Member Tankard asked about the location of the Birch's property.

Stacy Hart, Engineer, was sworn in and her comments are a part of the verbatim record. Ms. Hart indicated on a slide where the Birch's property was located. Associate Member Tankard asked if there was any other alternative to the outfall. Ms. Hart said that all other possibilities were exhausted and financially not feasible. She noted for the board that it was required that it be inspected every day and daily reports given to the State or they would be in violation.

Commissioner Bowman asked what limited them from disposal of the sewage by other means. Ms. Hart stated the consistency of the soil limits them. She said when the septic systems in this area that now exist fail they would be required to go to a peat system.

After further discussion, Commissioner Bowman asked if anyone was present in opposition wishing to speak to the Commission.

Tommy Mason, Chincoteague Island resident, was sworn in and his comments are a part of the verbatim record. Mr. Mason stated that he was growing oysters and had just harvested some clams the day before. He said he was very interested in looking out for the water quality, as he serves on committees and panels. He said his leases were to the north of the discharge and to the south he has an aquaculture business. He said also that he was working with the Virginia Seafood Council with the ariakensis project. He said the discharge means a new restricted area would be established. He said a letter from the Commissioner of the Health Department was sent to DEQ. He said in the letter it said the viruses discharged by the outfalls were the same as what was seen on cruise ships.

Commissioner Bowman read a portion of the Health Department letter, so that it would be in the verbatim record. Mr. Palmeroy said he had not seen the letter, but felt that it was a generic document.

Mr. Mason said that these types of systems were known to break down. He asked who would pay if this did occur. He said he had no problem with the building of condos or the pier, but he did have a problem with the outfall discharge. He said that there were a lot of shellfish beds that were leased in the area. He stated he was in the tourist business and the seafood business and he pumps his sewage across the street. He said Mr. Birch should be able to do the same thing and not pollute the Bay anymore than it is now. He said this was all wrong and the Commonwealth of Virginia is spending a lot of money to clean up the Bay. He said he had a million clams planted on his ground and they are not dying like Mr. McGee has said. He said the aquaculture business was growing on the

Chesapeake Bay and if the ariakensis oyster were to be approved there would be another industry.

Associate Member Robins asked about his lease across the channel from the project and whether he was actively working on his ground. Mr. Mason said he and others were growing clams and he is involved in the Virginia Seafood Council Ariakensis Project. Associate Member Robins asked about some adjacent leases and whether they were active. Mr. Mason said that they were in his father-in-law's name, who had passed away in recent years, and he had in the past taken shellfish from these leases, but not for a couple of years. He said these leases were in polluted waters and he had to relay them for depuration, which was feasible to do every few years.

Carl Meixner, protestant and leaseholder, was sworn in and his comments are a part of the verbatim record. Mr. Meixner explained that this project would adversely impact his leases. He said the water moved 4 times a day and he had 3 small plots to plant shellfish. He said he felt this was another nail in the coffin for private ground leaseholders to use their grounds as well as the use of any public grounds.

Reginald Stubbs, protestant and leaseholder, was sworn in and his comments are a part of the verbatim record. Mr. Stubbs said the original drawings show only half of his property. He said the Commission should be concerned with the aesthetics as well as what is on the bottom if they are going to continue approving this and similar projects. He said he was requesting that the project not be approved in Chincoteague because the same thing will happen here that has happened in other areas of the Bay.

Commissioner Bowman explained that DEQ had issued their permit, but the criteria and parameters they look at were different than what the VMRC had to consider. He said the Commission was concerned with the impacts on the shellfish resource as well as the shellfish industry. He said there have been changes in the prohibited area since it started. He asked Dr. Croonenberghs to explain how much difference.

Dr. Bob Croonenberghs, representing the VDH-Division of Shellfish Sanitation, was sworn in and his comments are a part of the verbatim record. Dr. Croonenberghs said the difference was about 50 yards and the area was moved northward. He said the Division of Shellfish Sanitation felt comfortable with 100 meters up and downstream from the discharge point. Commissioner Bowman asked Dr. Croonenberghs how frequently were the samples taken for checking the water quality. Dr. Croonenberghs responded that they were taken monthly.

After some further discussion about how the Health Department made their determinations in establishing these prohibited areas, Associate Member Robins stated that they have been told about all the back up equipment and the concerns of an acute virus occurring. He asked if this was a foolproof system proposed in this project.

Dr. Croonenberghs said that nothing man-made was full proof, but this system was a step up from the chlorine system. He said the Ultraviolet System (UV) was a high quality system and more effective at killing viruses than the chlorine system.

Mr. Palmeroy in his rebuttal said that the letter written in 2005 by the Health Commissioner stated that they were comfortable with the project. He stated that the leaseholders could still relay in the areas not in the prohibited zone. He said that the Health Department had stated that the UV system was an excellent system and the treatment efficiency was not an issue to be considered by the Commission. He said they were asking for approval of the project.

Associate Member Bowden stated the biggest concern was water quality. He also stated that this was a big tourist area as well as there being a lot of seafood industry activity. He said that shellfish grew well there as far as he could see and there was a good survival rate. He explained also that there had been a lot of money spent on oyster restoration. He said that the water quality in the area was good and should not be messed up. He stated that Mr. Birch should have gotten all his permits before he started, as all of the agencies have different jobs.

Associate Member Robins agreed with Associate Member Bowden that water quality was the main concern. He explained that the Code required VMRC to consider the shellfish resources. He said he was convinced that the consequences of the discharge system could be considerable and that any highland requirements should not justify putting this outfall into the waterway. He said the leased areas were the property of the State and he shared the concerns regarding environmental impacts.

Associate Member Robins moved to accept the staff recommendation to approve the pier, as proposed and to deny the overboard discharge. Associate Member Bowden seconded the motion. Associate Member Fox asked if this included the approval of the construction of the bridge. Associate Member Robins responded yes. Commissioner Bowman explained the Board tried to do the best they could and they do share concerns about water quality, as this is a unique ecosystem. He said that this type of area would not be seen in Smithfield and he could support a discharge there, but not here at this location. The motion carried, 8-0. The Chair voted yes.

Royalty Fees (5,075 sq. ft. encroachment @\$1.50/sq. ft.)...	\$7,612.50
Permit Fee.....	\$ 100.00
Total Fees.....	\$7,712.50

- 8. **ROBERT B. HART, ET AL, #06-1551.** Commission review of the Prince William County Wetland Board's November 14, 2006, decision to approve the installation of 355 linear feet of vinyl bulkhead, and to grant after-the-fact authorization for the installation of 90 linear feet of gabion basket retaining wall and the placement of fill over approximately 3,550 square feet of tidal wetlands, adjacent to two properties situated along Quantico and Swans Creeks in Prince William County.

Bob Grabb, Chief, Habitat Management, gave the presentation and his comments are a part of the verbatim record. Mr. Grabb explained that staff had received a letter of request from Prince William County to continue this issue until the regular March 2007 Commission meeting in order for them to complete the preparation of the record.

Associate Member Holland moved to approve the request for a continuance until the March Commission meeting. Associate Member McConaugha seconded the motion. The motion carried, 8-0. The Chair voted yes.

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- 9. **MR. AND MRS. RONALD STOTT, #06-2223.** Commission review of the Accomack County Wetlands Board's January 25, 2007, decision to approve the construction of an access road, which will impact 70 square feet of vegetated wetlands, without consideration of any mitigation for the permanent loss of tidal wetlands involved, along Fowling Gut at 2934 South Main Street in the Town of Chincoteague, Accomack County.

Associate Member Bowden stated that he was very familiar with the case and he had met with both sides. He said that Mr. Stott had agreed he would mitigate for the wetlands and suggested that the Commission remand the matter back to the Wetlands Board.

Ronald Stott, the applicant, stated that he agreed.

J. T. Frese, Chairman for the Wetlands Board, stated that they also agreed.

Associate Member Bowden moved to remand the matter back to the Wetlands Board. Associate Member Tankard seconded the motion. The motion carried, 8-0. The Chair voted yes.

No applicable fees, remanded back to the Wetlands Board.

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- 10. T. H. CRITTENDEN AND SON, INC. #06-1523**, requests authorization to construct a 35-foot by 16-foot community-use concrete boat ramp adjacent to their property situated along the Rappahannock River in Middlesex County. An adjacent property owner has protested the project.

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

Mr. Neikirk explained that this project was located along the Rappahannock River, in the North End Wharf region of Middlesex County. The Rappahannock River is over three (3) miles wide at the project site and the nearshore water is very shallow. The shoreline was typically steep and approximately 25 feet high along this portion of the river, but the boat ramp was sited within a ravine. According to the application, the channelward edge of the ramp would reach a mean low water depth of 18 inches.

Mr. Neikirk explained that the 16-foot by 35-foot concrete boat ramp, as proposed, would provide access to the 20 to 25 lot owners in the North End Subdivision. According to the applicant's agent a boat ramp was installed at this location in the 1950's, but washed out about 10 years ago.

Mr. Neikirk stated that Mr. Robert Rudd, the adjoining property owner on the downstream side of the proposed ramp, protested the project. He was concerned that the ramp would lead to increased traffic and was not appropriate in a residential neighborhood.

Mr. Neikirk said that VIMS stated that the ramp was located along a sandy beach at a natural drainage ravine and that the site was not an ideal location since natural sand movement might bury the ramp and the shallow nearshore water depths limit the size of boats that can be launched at the ramp. They also noted that significant improvements would be required on the upland to provide vehicular access to the site.

Mr. Neikirk said that the Health Department stated that the project was in compliance with their Sanitary Regulations for Marinas and Boat Moorings. The Department of Conservation and Recreation found the project acceptable but noted that the Chesapeake Bay Preservation Act required submittal of a "Water Quality Impact Assessment."

Mr. Neikirk stated that there would be significant grading and bank stabilization required on the landward side of the ramp to provide vehicular access to the site, however, Middlesex County would be responsible for evaluating and monitoring those impacts. Although the shallow nearshore waters would limit the use of the ramp to shallow draft vessels, the environmental impacts associated with the ramp should be minimal. Accordingly, after evaluating the merits of the project against the concerns expressed by those in opposition to the project, and after considering all of the factors contained in §28.2-1205(A) of the Code of Virginia, staff recommended approval of the project with

the assessment of a royalty of \$160 for the encroachment of the ramp on 320 square feet of State-owned submerged land.

Commissioner Bowman asked if the applicant or a representative were present.

Karla Havens, Mid-Atlantic Resources Consultant, was sworn in and her comments are a part of the verbatim record. Ms. Havens explained that the Corps had issued their permit and the Wetlands Board had approved it as well.

No one in opposition was present.

Associate Member Holland moved to approve the staff recommendation. Associate Member Fox seconded the motion. The motion carried, 8-0. The Chair voted yes.

Royalty Fees (320 sq. ft. encroachment @ \$0.50/sq. ft.).....	\$160.00
Permit Fee.....	\$100.00
Total Fees.....	\$760.00

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The Commission broke for lunch at approximately 11:52 p.m. and returned at approximately 12:50 p.m.

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Wilford Kale, Senior Policy Analyst announced that a Special Commission Meeting was to be held Monday, March 12, 2007 from 2:00 p.m. until 7:30 p.m., with a dinner break at 4:30 p.m. until 6:00 p.m. He said the meeting was to be a teleconferenced meeting from TNCC in Hampton to the Southwest Community College in Richland. He said the hearing was for one item and that was Consol Virginia Coal Company's request to be allowed to install an outfall in the Levisa Fork in the Town of Grundy, Virginia. He further said that this would be a public comment hearing only and a final decision would be made at the regular Commission meeting on March 27, 2007.

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Three items were heard together, Items 5, 6, and 7:

Chip Neikirk, Environmental Engineer, Sr., gave the presentation with slides. Mr. Neikirk explained that the slides were for orientation purposes only and were not a part of the Wetlands Board record. He further explained that he felt this did not require a motion to open the record.

5. **COLONIAL ARMS APARTMENTS, LLC, #06-2604.** Commission review of the Mathews County Wetland Board's December 6, 2006, decision to approve the construction of 178 linear feet of riprap revetment along the channelward face of a dune situated along the Chesapeake Bay at 1086 Sand Bank Road in Mathews County.

Mr. Neikirk explained that this project was located along the Chesapeake Bay, in the Sand Bank area of Mathews County. Sand Bank was a small residential beachfront community with a mixture of older and newer homes with an east-facing beach situated between Dyer Creek and Horn Harbor, approximately three miles north of New Point Comfort. The nearshore waters were shallow with a sandy substrate. This property was located near the northern end of the Sand Bank beach. A new house had recently been constructed on the property.

Mr. Neikirk went on to explain that the project involved the proposed construction of 178 linear feet of riprap revetment along the beach. The proposed riprap was to be placed on the channelward side of a mound of sand that would be scraped and pushed from the landward portion of the beach. Apparently, during Tropical Storm Ernesto, a large amount of sand was relocated from the channelward portion of the beach landward toward the house.

Mr. Neikirk said that the project was heard by the Mathews County Wetlands Board during their December 6, 2006, public hearing. Two other projects, which involved revetments in the Sand Bank area, were heard later in the meeting.

Mr. Neikirk stated that Chairman Kurkowski asked Mrs. Sherry Ashe, Mathews County Wetlands Administrator to read the VIMS report prepared by Ms. Julie Bradshaw dated November 28, 2006. The report summarized the project by stating that the applicants proposed to construct a 178-foot dune and use riprap to harden the crest and foreface (seaward side) of the reconstructed dune on their beach on the Chesapeake Bay. The report stated that placing a structure on the beach or dune was undesirable from a marine environmental viewpoint and that as proposed, the structure was expected to interrupt the natural movement of sand on the beach, eventually leading to loss of the beach. The report added that dunes and beaches were sand reservoirs that acted as natural barriers to erosion, as well as providing a unique habitat to marine organisms. The report strongly recommended the use of an offshore breakwater system and artificial beach nourishment rather than the proposed structure. The report concluded by explaining that properly designed breakwaters provided protection to the beach and dune, which subsequently contributed significantly to erosion protection for the shoreline.

Mr. Neikirk said that the agent for the project, Mrs. Betty Pugh of SBH Construction, then addressed the Board. She explained the purpose of the project was to construct a revetment landward of mean high water and stated that the project was needed to protect the property from further invasion of sand and water as a direct result of storm surge. She

said recent storms, including Tropical Storm Ernesto, had flooded the property with sand and water to a point that it was nearly inaccessible. She said this system would prevent the flooding of water and sand that was currently closing in on the house and access road. She said the neighbors were in favor of the project, and claimed that a revetment, built for the previous property owner, along the southern end of the property had been successful. She claimed the beach near the existing revetment was thriving and increased in width after the recent storms. Finally she stated that a breakwater system was discussed with the applicant, but he felt it was not a financially acceptable alternative.

Mr. Neikirk explained that Boardmember Broderson asked Mrs. Pugh if she knew where the upper limit of the beach was located on the property. She stated that she was uncertain, but that sand was pushed under the house in recent storms and that the porch of the house was approximately 60 feet from mean high water. She added that a breakwater system would be an enormous undertaking and quite an expense for the property owners.

Mr. Neikirk stated that Boardmember Broderson then asked Mrs. Pugh if the proposed revetment would be in line with other revetments along the beach. She stated that it would be. Boardmember Broderson then surmised that the difference between the proposed revetment and the existing revetments were that the existing revetments were installed with the landward edge adjacent to upland rather than on the beach. Mrs. Pugh agreed.

Mr. Neikirk said that Boardmember Broderson then asked about the plan to use sand as the core of the revetment, instead of using all rock. Mr. Pugh, the contractor, stated that using sand as the core would cut down on the amount of rock required. He said they would attempt to establish grasses on the landward side of the revetment. He said that the revetment would not stop the tide from getting to the lot but that the revetment would stop the tidal wave action from washing sand all over the lot. In response to another question from Boardmember Broderson, Mr. Pugh said that the proposed revetment would actually be lower in height than the adjacent revetment. He said that sand, dirt and the cloth would hold the structure together. He said that sand was used to support the landward side of the existing revetment. Chairman Kurkowski added that he thought a project approved in 2004 for the Sterlings was similarly constructed.

Mr. Neikirk explained that Chairman Kurkowski asked if there were any other people wishing to speak either in favor or in opposition to the project. There being none, he closed public comment on the application.

Mr. Neikirk said that Boardmember Broderson stated that he felt the Board needed to be aware that they were in the process of making a precedent setting decision. He said there were a lot of miles of shoreline in Mathews County along the Chesapeake Bay that were eroding at a rapid rate. He said Bethel Beach had trees on it 20 years ago and that now there was barely any beach left. He said if they don't start doing something now there would be a lot of folks along Route 14 that would have waterfront property. He said the

Board needed to consider whether this was a future solution for properties along the Bay. He added that an offshore breakwater might be nice but that he was not convinced how practical it would be in this environment. Finally, he stated that if they attempted to move the structure off the beach that it would be landward of the residential structures and this might be the only practical answer to the entire east side of shoreline in Mathews County.

Mr. Neikirk said that Chairman Kurkowski then commented on the massive size of the breakwaters along the beach at Yorktown and stated that they would be considerably smaller than what would be required in front of these properties. He said he expected that a breakwater at this site would require a base width of 18 to 20 feet with stone greater than 250 pounds. He then asked Mr. Pugh what such a structure would cost. Mrs. Pugh said that he expected the cost would be about triple what was being proposed.

Mr. Neikirk explained that Boardmember Broderson had asked him if he was aware of any privately constructed breakwaters of such a size. Mr. Neikirk responded that there were breakwaters on the York River and near Windmill Point that were quite large.

Mr. Neikirk explained that Mrs. Ashe stated that there was submerged aquatic vegetation (SAV) offshore of these properties and that she was not sure if the breakwaters could be constructed without impacting the SAV. Chairman Kurkowski added that he felt the breakwaters would have to be placed in SAV.

Mr. Neikirk said that Boardmember Broderson stated that he felt there was an advantage to a continuous line of defense. He said the breakwaters would allow the other properties' structures to be breached, making them more vulnerable.

Mr. Neikirk said that Boardmember Walden stated that she understood that a breakwater would be nice but that they had to consider the homeowner's ability to do what they could to save their property. She said this might not be the ultimate solution but it was what they could afford.

Mr. Neikirk stated that Boardmember Broderson noted that the VIMS report stated that the structure would interrupt the natural movement of sand and eventually lead to the loss of the beach, but he said the existing structures had been in place for years and the beach had survived reasonably well. He added that in the best of all possible worlds there would not be houses there and they could just let the shoreline go, but there were and they need to provide a measure of protection to make those properties viable. On that basis, Boardmember Broderson then made a motion to approve the application, as proposed.

6. **MARK BYRD, #06-2649.** Commission review of the Mathews County Wetland Board's December 6, 2006, decision to approve the construction of 386 linear feet of riprap revetment along the channelward face of a sand dune situated along the Chesapeake Bay at 1088 Sand Bank Road in Mathews County.

Mr. Neikirk explained that this project was located along the Chesapeake Bay, in the Sand Bank area of Mathews County. Sand Bank was a small residential beachfront community with a mixture of older and newer homes with an east-facing beach situated between Dyer Creek and Horn Harbor, approximately three miles north of New Point Comfort. The nearshore waters were shallow with a sandy substrate. This property was located near the northern end of the Sand Bank beach and a new house had recently been constructed on the property. The lot was immediately north of the Colonial Arms Apartments, LLC project previously considered by the Board.

Mr. Neikirk stated that the project involved the proposed construction of 386 linear feet of riprap revetment along the beach. The proposed riprap was to be placed on the channelward side of a mound of sand that would be scraped and pushed from the landward portion of the beach. Apparently, during Tropical Storm Ernesto, a large amount of sand was relocated from the channelward portion of the beach landward toward the house.

Mr. Neikirk said that he project was heard by the Mathews County Wetlands Board during their December 6, 2006, public hearing. Two other projects that would involve revetments in the Sand Bank area were heard during the meeting.

Mr. Neikirk said that Chairman Kurkowski asked Mrs. Sherry Ashe, Mathews County Wetlands Administrator to read the VIMS report prepared by Ms. Julie Bradshaw dated November 28, 2006. The report summarized the project by stating that the applicants proposed to construct a 386-foot dune and use riprap to harden the crest and foreface (seaward side) of the reconstructed dune on their beach on the Chesapeake Bay. The report states that placing a structure on the beach or dune is undesirable from a marine environmental viewpoint and that as proposed, the structure is expected to interrupt the natural movement of sand on the beach, eventually leading to loss of the beach. The report adds that dunes and beaches are sand reservoirs that act as natural barriers to erosion, as well as providing a unique habitat to marine organisms. The report strongly recommends the use of an offshore breakwater system and artificial beach nourishment rather than the proposed structure. The report concluded by explaining that properly designed breakwaters provide protection to the beach and dune, which subsequently contribute significantly to erosion protection for the shoreline.

Mr. Neikirk stated that the agent for the project, Mrs. Betty Pugh of SBH Construction, then addressed the Board. She explained the purpose of the project was to construct a revetment landward of mean high water and stated that the project was needed to protect the property from further invasion of sand and water as a direct result of storm surge. She

said recent storms, including Tropical Storm Ernesto, have flooded the property with sand and water to a point that it was nearly inaccessible. She said this system would prevent the flooding of water and sand that was currently closing in on the house and access road. She said the neighbors were in favor of the project, and claimed that a revetment, built on a portion of the adjoining property when Mr. Byrd owned the Colonial Arms Apartments, LLC property has been successful. She claimed the beach near the existing revetment was thriving and increased in width after the recent storms. Finally, she stated that a breakwater system was discussed with the applicant, but he felt it was not a financially acceptable alternative.

Mr. Neikirk noted that Chairman Kurkowski asked if there were any other people wishing to speak either in favor or in opposition to the project. There were none so he closed the public hearing on the application. Boardmember Broderson made a motion to approve the project as proposed and Boardmember Walden seconded the motion.

7. EDMOND B. WEBSTER, #06-2652. Commission review of the Mathews County Wetland Board's December 6, 2006, decision to approve the construction of 477 linear feet of riprap revetment along the channelward face of a sand dune situated along the Chesapeake Bay at 912 Sand Bank Road in Mathews County.

Mr. Neikirk explained that this project was located along the Chesapeake Bay, in the Sand Bank area of Mathews County. Sand Bank was a small residential beachfront community with a mixture of older and newer homes with an east-facing beach situated between Dyer Creek and Horn Harbor, approximately three miles north of New Point Comfort. The nearshore waters are shallow with a sandy substrate. This property was located near the southern end of the sand bank beach, adjacent to the New Point Campground property.

Mr. Neikirk said that the project involved the proposed construction of 477 linear feet of riprap revetment placed along the beach. The proposed riprap was to be placed on the channelward side of a mound of sand pushed from the landward portion of the beach. Apparently, during Tropical Storm Ernesto, a large amount of sand was relocated from the channelward portion of the beach landward toward the house.

Mr. Neikirk stated that the project was heard by the Mathews County Wetlands Board during their December 6, 2006, public hearing. The two other projects involved revetments in the Sand Bank area were heard earlier in the meeting.

Mr. Neikirk said that Chairman Kurkowski asked Mrs. Sherry Ashe, Mathews County Wetlands Administrator to read the VIMS report prepared by Ms. Julie Bradshaw dated November 28, 2006. The report summarized the project by stating that the applicants propose to use riprap to harden the crest and foreface (seaward side) of the reconstructed dune on their beach on the Chesapeake Bay. The report stated that placing a structure on

the beach or dune was undesirable from a marine environmental viewpoint and that as proposed, the structure was expected to interrupt the natural movement of sand on the beach, eventually leading to loss of the beach. The report added that dunes and beaches were sand reservoirs that act as natural barriers to erosion, as well as providing a unique habitat to marine organisms. The report strongly recommended the use of an offshore breakwater system and artificial beach nourishment rather than the proposed structure. The report concluded by explaining that properly designed breakwaters provided protection to the beach and dune, which subsequently contributed significantly to erosion protection for the shoreline.

Mr. Neikirk said that the agent for the project, Mrs. Betty Pugh of SBH Construction, then addressed the Board. She explained the purpose of the project was to construct a revetment landward of mean high water and stated that the project was needed to protect the property from invasion of sand and water. She said the existing house on the property was approximately 20 feet from mean high water. She stated that a breakwater system was discussed with the applicant, but he felt it was not a financially acceptable alternative.

Mr. Neikirk also said that Boardmember Broderson asked Mrs. Pugh about an apparent discrepancy between the location of the house in the plan view drawing and the existing site condition. The drawing depicted the house as being 151 feet landward of the proposed revetment, but the house was only about 20 feet landward of mean high water. Mrs. Pugh said she had made a mistake and acknowledged that the house was much closer. She said she would agree to provide new drawings.

Mr. Neikirk said that Mr. Clements addressed the Board on behalf of Morgan RV resorts, the adjoining property owner to the south and new owner of the New Point Campground property. He noted that there were some gabion baskets off their property that appeared to be effective and he said he was concerned that the 30-foot riprap return adjacent to their property might adversely impact their property. He added that the campground property had some existing dunes that were their best line of defense against storms. He suggested that angling the return might minimize the impact of the return on their property. Mr. Pugh, the contractor, said he didn't think angling the return was necessary.

Mr. Neikirk stated that Chairman Kurkowski explained the Board did not consider engineering and that they could not answer any engineering questions.

Mr. Neikirk said that Boardmember Broderson stated that he remembered that the previous owner of this property was involved in a violation 10 to 12 years ago and the Board required him to restore the dune. He asked if that fact had any bearing on this application. Mrs. Ashe said she didn't think the previous violation or required restoration had any bearing on the current application. She said the previous owner rebuilt the dune but that dune was destroyed in subsequent storms.

Mr. Neikirk stated that Boardmember Broderson reviewed some photographs of the site and noted that the beach transitioned into a stand of *Phragmites* (Common Reedgrass). He explained that it was not possible to align the revetment landward of the beach.

Boardmember Broderson made a motion to approve the application conditioned on getting new drawings with new measurements and benchmarks confirming that the alignment of the revetment was similar to that of the preceding projects in this area.

Mr. Neikirk stated that he would do a summary and recommendation for all three items together.

Mr. Neikirk explained that Section 28.2-1401(B) of the Code of Virginia, "Powers and Duties of the Commission" stated that, "The Commission shall preserve and protect coastal primary sand dunes and beaches and prevent their despoliation and destruction. Whenever practical, the Commission shall accommodate necessary economic development in an manner consistent with the protection of these features."

Mr. Neikirk also explained that in addition, the Coastal Primary Sand Dunes/Beaches Guidelines, Section IV, stated that, "No permanent alteration or construction upon any coastal primary sand dune shall take place which would, impair the natural functions of the dune, physically alter the contour of the dune or destroy vegetation growing on the dune. Activities contrary to these standards will be permitted only if the Commission finds that there will be no significant adverse ecological impact from the proposal, or that granting a permit for the proposal is clearly necessary and consistent with the public interest"[emphasis added]. Although this section is specifically related to coastal primary sand dunes and the dune on this property was removed by recent storms, Section VI of the guidelines states that Section IV is also applicable to beaches.

Mr. Neikirk said that the VIMS report clearly stated that the project was expected to interrupt the natural movement of sand on the beach, eventually leading to loss of the beach. The report said that dunes and beaches were sand reservoirs that act as natural barriers to erosion, as well as providing a unique habitat to marine organisms. As an alternative to the revetment, if a structure was permitted, the report suggested the construction of an offshore breakwater system. The report added that properly designed breakwaters provide protection to the beach and dune, which subsequently contribute significant erosion protection for the shoreline.

Mr. Neikirk said that staff also received a copy of an email from Ms. Bradshaw (VIMS) to the Wetlands board dated November 28, 2006. The email appeared to be in response to a question from the Board regarding the viability of the proposed structures and an elaboration on her VIMS report. Staff did not see a copy of the email in the record of the hearing transmitted by the Board, nor was the email mentioned in the transcript of the hearing.

Mr. Neikirk stated that the Board considered the construction of an offshore breakwater in lieu of the proposed revetment during the review of the Colonial Arms Apartments, LLC and Byrd applications, but quickly dismissed it as a viable alternative based on their presumption that the construction of a breakwater system would be cost prohibitive. The only information in the record concerning the cost of a breakwater system was an estimate by the contractor during the previous public hearing that a breakwater would be about three times the cost of the proposed structure. There was no specific breakwater design considered during the review of this project. Staff would assume that the cost of a properly designed breakwater would exceed the cost of the proposed veneer of riprap along the channelward face of a recreated dune, but without a specific proposal it was difficult to estimate the cost. Additionally, the value of the house and the property it was designed to protect must also be considered. Furthermore, the value of preserving the beach system must be considered.

Mr. Neikirk said that the Board also felt that the breakwater system would adversely affect the SAV in the nearshore waters, however, no specific design for breakwaters was presented, so it was impossible to evaluate the possible impact of the breakwaters on SAV.

Mr. Neikirk explained that the agent for the project finally stated the purpose of the project was to protect the property from further invasion of sand and water. This lot had also apparently changed dramatically in recent years. The beach now extended all the way to and beyond the house and transitions into a high *Phragmites* marsh and freshwater pond. One of the natural processes of a beach was the movement of sand by natural wind and wave action throughout the beach system. According to the agent, the stated purpose of this project was to interrupt that process.

Accordingly, and based on the foregoing, Mr. Neikirk said that staff recommended the Commission remand this matter back to the Mathews County Wetlands Board with direction to more fully evaluate the merits and costs of a properly designed breakwater system and to specifically consider the email from Ms. Bradshaw to the Board, which questioned the structural integrity of the proposed structures.

Ken Kurkowski, representing the Wetlands Board, was sworn in and his comments are a part of the verbatim record. Mr. Kurkowski explained that he understood that the offshore breakwater was not affordable. He said that it was too expensive for the dynamics of the area. He also said that any breakwater would have to be put on SAV. He said the application was not made to consider offshore structures and he did not remember the e-mail prior to the meeting.

Sherry Ashe, Wetlands Board Staff, was sworn in and her comments are a part of the verbatim record. Ms. Ashe explained that the e-mail was not reviewed because there were 15 applications for consideration at the hearing and it was not included in the information for the Board to consider.

Commissioner Bowman asked the VIMS personnel to explain the VIMS' rationale.

Lyle Varnell, representing VIMS, was present and his comments are a part of the verbatim record. Mr. Varnell stated that VIMS had made a good recommendation and had information on the shoreline to help review the project.

Commissioner Bowman asked for a motion to open the record.

Associate Member Tankard made a motion to open the record. Associate Member Fox seconded the motion. The motion carried, 8-0. The Chair voted yes.

Mr. Varnell provided a hand out and reviewed it with a staff's slide. He stated that the shoreline had changed since the 1930's. He said the offshore breakwater would create a beach, if that were wanted. He said but if all that was wanted was to protect a house then a trapezoidal system was needed. He said this was a small area and options were limited and there was exposure to storm events. He said also that it all depended on the goals of the property owner. He said that a structure with height would moderately protect the shoreline from wave energy. He explained that rocks could be used to make a rock structure or sand could be used, but sand was a more expensive option, as it would require maintenance.

Associate Member Robins asked if there had been similar projects. Mr. Varnell stated that an Eastern Shore project on the bayside was heard just recently. Commissioner Bowman asked if VIMS had been contacted. Mr. Varnell responded no.

Mr. Varnell stated that there was concern that if the headland were gone, then the shoreline would be endangered. He said the headland needed to be armored.

Associate Member Fox asked why was this being considered by the Commission? Mr. Neikirk stated that the Commission was responsible for reviewing the Wetlands Board decision. Associate Member Fox asked if Mathews County did not consider something. Mr. Neikirk responded yes. Commissioner Bowman stated that VIMS had offered an alternative that was not considered by the Wetlands Board.

Carl Josephson, Senior Assistant Attorney General and VMRC Counsel explained that the Commission could modify, remand, or reverse if the Wetlands Board failed in their responsibilities. He further explained that since the permits were granted, no rights were prejudiced. Commissioner Bowman stated that the question was, did the Wetlands Board do their job thoroughly?

Associate Member Tankard moved to remand all three cases back to the Wetlands Board, pursuant to Section 28.2-1401 of the Code of Virginia. He said the Wetlands Board did not consider cost and effectiveness of the other options. Associate

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

No applicable fees, all three items (5, 6, and 7) were remanded back to the Wetlands Board.

11. PUBLIC COMMENTS: No public comments were made.

12. PUBLIC HEARING: Proposed amendments to Regulation 4VAC20-620-10 Et seq. to establish the 2007 Summer Flounder recreational fishing measures.

Rob O'Reilly, Deputy Chief, Fisheries Management gave the presentation. His comments are a part of the verbatim record. Mr. O'Reilly provided letters of comments as a hand out. He also reviewed various tables on the powerpoint presentation, especially how the options would accomplish the required reduction. He explained that the Commission at the last meeting asked that all the options be advertised for the public hearing

Mr. O'Reilly explained that the options chosen during a January 9, 2007 meeting with anglers from various geographical areas and representatives from the Wachapreague charter boat industry and the Chincoteague and Virginia Charter Boat Associations, were as follows:

Option	Min. Size Limit	Possession Limit	Closed Season
1	19	6	NONE
2	18-1/2	5	Jan 1 through Mar 31 July 23 through July 28
3	18-1/2	3	NONE
4	18	2	Jan 1 through Mar 31 July 16 through July 31

Mr. O'Reilly explained that the Atlantic States Marine Fisheries Commission (ASMFC) had established the 2007 recreational flounder landings target as 407,525 fish, which means a 53% reduction from 2006. He said a part of this was a reduction being assumed by all States for both the recreational and commercial fisheries in total allowable landings

(17.112 million pounds) in 2007. He explained that this reduction for Virginia was also tied to the overage in 2006 of 616,000 fish.

Mr. O'Reilly reviewed Sections 4VAC 20-50, 4VAC 20-60, and 4VAC 20-70 of the draft regulation. He said in the draft regulation the changes reflected were those recommended by staff. He said in Section 50, the minimum size limit was shown as changed from 16-1/2 inches to 18-1/2 inches. He explained that in Section 60 the possession limit was shown as changed from six to five fish. He said finally in Section 70 where the season was established, it was shown to have been changed from open year round to closed January 1 through March 31 and July 23 through July 28. He stated that the Potomac River Fisheries Commission regulated the mainstem of the Potomac River and for several years those rules were the same for the Potomac River tributaries.

Mr. O'Reilly stated that Option 4 was the most unfavorable or unacceptable, as it represented the lowest possession limit but posed the greatest risk for exceeding the target. He also said that FMAC met and reviewed the preferences for these 4 options, as submitted by the public, and discussed the options. He explained that the committee voted 8-0-2, in favor of Option 2.

Associate Member McLeskey left the meeting during the staff presentation.

Commissioner Bowman asked that Mr. O'Reilly review the vote count. Mr. O'Reilly stated that there was a group record for the clubs and municipalities and individual votes separately.

Associate Member Tankard stated that when he calculated the closed season reduction for Option 2, he came up with 56.554443% not the 53% shown on Table 8. Mr. O'Reilly explained the table further for the Commission.

Associate Member Fox asked if the July closure would present any enforcement problems, because the average fishermen might not be aware of the closure. Mr. O'Reilly explained that in 1999 there was a 7-day summer closure and in 2000 and 2001 it was longer and he did not recall an enforcement problem. He stated that this regulation has been the most advertised regulation of all.

Commissioner Bowman opened the public hearing.

Craig Paige, representing Paige II Charters, was present and his comments are a part of the verbatim record. Mr. Paige stated that 90% of all species targeted are the Bay Flounder. He said the Great Bridge Charter Boat Association, which has a large membership, met and Option I received the most votes. He said this was a big tourist area and individuals from all the other states come here to fish. He said the closed season affects the income of tackle stores and charter boats, as a large percentage of fishing for flounder was done in July and August. He said, in fact, it would affect the tourist

business for the whole Chesapeake Bay area. He said they were against the 18-1/2 inch size limit and felt it would be a nightmare to enforce. He said they really favored a larger minimum size limit of 19 inches with a 6-fish limit. He said a one-week closure would also be a problem for enforcement, as everyone would not get word of the closure. He stated that not having a closed season would fix that problem.

Randy Lewis, motel and restaurant owner in Wachapreague was present and his comments are a part of the verbatim record. Mr. Lewis said the Seaside is different from the Bayside in catching fish. He said on the Seaside the catch occurred earlier. He said that 19" was a big jump from 16 1/2" can be a big deal when fishing. He said that when a person gets their card they are given a copy of the rules. He stated there was a lot of data, but it was confusing. He said on the Eastern Shore the charter boat industry, the town, and recreational anglers were in favor of Option 2. He further said that the January to March closed season did not affect them, as there was not much fishing for flounder but rather for striped bass. He said also that in March the weather was too bad.

Mr. Lewis stated that different regulations were required for the Eastern Shore. He said that Maryland and North Carolina's regulations were different and that difference was what attracted people to other states. He stated that Option 2 would be the best for the Eastern Shore.

Lee Atkinson, recreational fisherman was present and his comments are a part of the verbatim record. Mr. Atkinson stated that 90% of the revenue came from the recreational sector. He said he agreed with what he had heard and with staff that Option 2 was the easiest one. He said that he could live with the January – March closure.

Gary Sawyer, North Carolina resident and recreational fisherman was present and his comments are a part of the verbatim record. Mr. Sawyer stated that he had fished in Virginia for 25 years and the fish were gone. He said he would be willing to set out a year to save the fish. He said he did not know how the recreational catch was obtained. He stated the trawlers were the ones who caught the fish and they should be stopped as well.

The public hearing was closed.

Associate Member McLeskey explained at the Rudee Inlet Marina individuals there voted 112 to 74 for Option 1.

Associate Member Bowden stated that he had to defend the commercial fishermen, because the recreational fishermen are not under the same restrictions and would not want to be treated the same. He said the recreational fishermen were fortunate. He also said that he did not agree with the statement that the 18-1/2 inch size limit was not enforceable. He said he really did not like any of the options and the data was not right. He stated that what had been said about Seaside being different was true and he agreed

with Doug Jenkins that the current regulations had eliminated the river fishery. He said whether it was 18 or 19 it did not matter and it was doing the best for the most people. He said from what he had heard, Option 2 was the most acceptable and he felt it was the fairest one, if there was such a thing.

Associate Member Robins stated that as far as the equity issue, staff has done the best for making it balanced.

Associate Member Tankard moved to accept the staff recommendation for Option 2. Associate Member Holland seconded the motion. Associate Member McConaugha stated that Option 2 was the best for equity and maintaining a fishery. Carl Josephson, Senior Assistant Attorney General and VMRC Counsel asked if the July closure included the Seaside, as the draft regulation only referred to the Chesapeake Bay? Mr. O'Reilly responded it was meant to be Statewide. He said it would be corrected to include the Seaside. The motion carried, 7-1. Associate Member McLeskey voted no. The Chair voted yes.

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- 13. PUBLIC HEARING:** Proposed amendments to Regulation 4VAC20-950-10 et seq., to establish the 2007 commercial Black Sea Bass harvest quotas and other restrictions.

Joe Cimino, Fisheries Management Specialist, gave the presentation. His comments are a part of the verbatim record. Mr. Cimino explained that the Commission, by emergency action, adopted changes to the gear restrictions by increasing the size of the escape vents in sea bass pots from 2.375 to 2.5 inches, which made the State regulation the same as the Federal regulation. He said there were no comments received on this issue.

Mr. Cimino further explained that the Commission had also extended the time frame for alternate vessel authorization from 30 days to 60 days, as requested by industry. He said that 9 favorable comments were received for this amendment.

Mr. Cimino stated that the Commission, at its last meeting, adopted an emergency amendment to establish the 2007 commercial black sea bass harvest quotas for the Directed and Bycatch fisheries.

Mr. Cimino said that staff was recommending the permanent adoption of the 3 amendments approved last month as emergency actions.

Mr. Cimino said that staff had met with industry on February 21st and discussed another quota allocation plan. He stated that staff supported the recommendation resulting from the industry meeting. He explained that this plan would be taking portions of the hardship and bycatch quotas and allocating it to the directed fishery to allow for the

harvest of the entire State quota. He explained that staff was recommending the advertisement of a March public hearing to address the proposal for an alternate quota allocation program.

Commissioner Bowman stated that two motions would be necessary.

Associate Member Robins moved to accept the staff recommendation to advertise for a March public hearing on the alternate allocation scheme. Associate Member McLeskey seconded the motion. The motion carried, 7-0-1. Associate Member Fox abstained, as he was not present during the presentation. The Chair voted yes.

Commissioner Bowman opened the public hearing for comments on the emergency actions taken last month. There were no comments. The public hearing was closed.

Associate Member Robins moved to accept the staff recommendation to make the emergency amendments to Regulation 4VAC 20-950-10, et seq. permanent. Associate Member Holland seconded the motion. The motion carried, 8-0. The Chair voted yes.

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14. PUBLIC HEARING: Proposed amendments to Regulation 4VAC20-530-10 et seq. to establish the provisions for a 2007 American Shad commercial bycatch fishery.

Rob O'Reilly, Deputy Chief, Fisheries Management, reviewed a powerpoint presentation. His comments are a part of the verbatim record.

Mr. O'Reilly explained that this was a public hearing and last month emergency amendments were adopted by the Commission to establish the 2007 American Shad commercial by-catch fishery and limited spawning reaches by-catch fishery, as they were in 2006. He noted for the Commission that only anchor and staked gill nets could be used by qualifying fishermen. He said a vessel by-catch limit of 10 fish and a by-catch limit of 5 fish for the spawning reaches were established.

Mr. O'Reilly stated that following the January Commission meeting the Atlantic States Marine Fisheries Commission (ASMFC) reviewed Virginia's proposal and approved the status quo management measures for the 2007 American Shad by-catch fisheries. He said the ASMFC rejected the more liberal measures proposed by the Finfish Management Advisory Committee (FMAC).

Mr. O'Reilly said that there were 77 by-catch permits in 2006 and of the 77 only 13 actually harvested American Shad, with a few discards being reported. He said in the spawning reaches there was a possibility for 11 fishermen to qualify, but only 3 permits

were issued, and no harvest was reported. He said that meant 880 pounds or 254 American Shad were harvested for 2006.

Mr. O'Reilly said that the Technical Committee made a number of points regarding the State's request. He said of these the two important concerns were the by-catch in 2006 was very low whether based on VMRC or VIMS estimates, even if there was excessive under reporting and the second was the note by VIMS that the 2006 spawning run of American Shad throughout the Bay was weak compared to previous years, and that additional effort may be extended if the run were stronger in 2007. He noted for the Commission that the ASMFC made these decisions on a year-by-year basis.

Mr. O'Reilly said that Dr. John Olney had said that data produced from the by-catch fishery could be useful in better characterizing the status of these stocks. He said that Dr. Olney had monitored the American Shad in the James, York and Rappahannock Rivers for a number of years. He further said that the data supports Dr. Olney's conclusions and his recommendation that all discards should be reported.

Mr. O'Reilly stated that the ASMFC technical committee supported the need for better quantification of the by-catch of the American Shad and for this reason staff supported a continuation of by-catch fisheries for 2007.

Mr. O'Reilly stated that on pages 2 and 3 of the draft regulation, the 2006 changes were shown and approval by the Commission would be extending these through 2007.

Associate Member McLeskey left the meeting during the presentation.

Commissioner Bowman opened the public hearing. There were no public comments. The public hearing was closed.

Associate Member Holland moved to accept the staff recommendation. Associate Member Robins seconded the motion. The motion carried, 7-0. Associate Member McLeskey was not present. The Chair voted yes.

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- 15. PUBLIC HEARING:** Proposed regulation to establish a February 1 start date for the season for the relay of shellfish from private grounds.

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

Mr. Travelstead explained that Robert Johnson, a member of the oyster industry, had made a reasonable request for the earlier opening of the relay season. He explained that by allowing the leaseholders to relay earlier, they could avoid predators, such as the cow

nose ray, and avoid oyster mortality brought on by warmer weather. He said he had spoken with Dr. Croonenberghs of the VHD-Division of Shellfish Sanitation and he had agreed, as well as the Law Enforcement Division. He said this change would not affect the reharvesting because the water temperature must be 50 degrees at least the 15 days for the shellfish to properly depurate. He said this way the first half of the process was over.

Associate Member McLeskey returned to the meeting at this point.

Commissioner Bowman opened the public hearing. There were no public comments. The public hearing was closed.

Associate Member Tankard moved to approve the season change. Associate Member Robins seconded the motion. The motion carried, 7-0-1. Associate Member McLeskey abstain as he was not present during most of the presentation. The Chair voted yes.

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- 16. PUBLIC HEARING:** Pursuant to Section 28.2-826 of the Code of Virginia to accept comments on the proposal of the Virginia Seafood Council to place the non-native oyster Crassostrea ariakensis in state waters.

Jack Travelstead, Chief Deputy Commissioner, gave the presentation. His comments are a part of the verbatim record. Mr. Travelstead explained that this was not a regulation request. He said the Code of Virginia required the approval of the Commissioner, but only after a public hearing is held. He said the Commissioner must make the decision within 30 days of the hearing but not later than 60 days after the hearing (between March 31 – April 30). He explained that the board could provide comments.

Mr. Travelstead stated that this proposal was no different than the last 2 proposals that were approved. The previous proposal was approved with the following conditions:

1. All test oysters must be removed from the water, on or before June 1, 2007.
2. Test animals shall be deployed in the numbers, locations and manner, as specified in the VSC proposal dated February 9, 2007.
3. The VSC shall report semiannually on the progress of the trials.
4. Project participants shall prepare emergency management plans and inventory control plans specific to each test site.

5. A project manager shall be employed by the VSC and shall be responsible for the collection of project information from the participants, record keeping and emergency management plans.
6. Each participant shall attest to his willingness, in writing, to assume full financial responsibility for retrieving any oysters lost during the project.
7. All test oysters shall be produced as genetic triploids, under VIMS supervision.
8. All information produced from this study shall be made available for use in the *C. ariakensis* oyster EIS.
9. All test oysters shall be deployed in a manner that is fully consistent with the current probability risk assessment model or its successor, should that model be improved upon.

Mr. Travelstead stated that 2 comment letters had been received from Dr. B. F. Wells, Dean and Director of VIMS and Mr. Tommy Leggett, Chesapeake Bay Foundation (CBF).

Frances Porter, representing the Virginia Seafood Council, was present and her comments are a part of the verbatim record. Ms. Porter stated that the 2006 project would soon be concluded. She said that there were still no EIS guidelines to provide guidance and they were requesting approval of a 2007 project that was similar to the current project.

Ms. Porter said that information had been gained as well as confidence from the previous studies. She stated that Dr. Stan Allen would provide the seed oysters. She said they had found the *ariakensis* to be fast growing and that there was a market demand for them. She stated that each year the permit had required more conditions and they had met them all. She said individually and collectively the participants were all good stewards.

Ms. Porter said they had met with the Corps and made NOAA aware of this year's proposal. She said the federal meetings had been favorable to date and they continue to negotiate. She said they felt they were being penalized for doing a good job when the Federal agencies were requiring that native oysters be utilized for comparative purposes.

Ms. Porter said this new project was proposed to start June 2007. She said they were lining up the participants and James Kirkpatrick would be the Project Manager.

Associate Member Holland asked how many oysters would be distributed. Ms. Porter stated 1-1/2 million to 15 growers. She said that at present there were only 13 participants.

Associate Member Tankard asked about the number of native oysters to be distributed. Ms. Porter (with assistance of unknown audience member) responded 10,000 for each site.

Commissioner Bowman opened the public hearing.

Dr. Roger Mann, representing the Virginia Institute of Marine Science (VIMS), was present and his comments are a part of the verbatim record. Dr. Mann stated that all the participants had done well. He read a paragraph from Dr. Wells letter where it said, "I support the project as presented..." He said he served on the panel with other Federal Agencies and he goes in support of the project, as it is stated in the letter. He said that when other members of the VIMS staff reviewed this project, even though there were many varying views, they all supported the project and that was a really amazing thing to happen. He provided the board with the original of the VIMS comments letter.

Commissioner Bowman stated that he must make the decision in accordance with the Code of Virginia, Section 28.2-826.

Associate Member Fox noted that after July 1, 2007, the Commission could approve the overboard testing of diploid (fertile) ariakensis oysters, however, this was not what was here for approval. Commissioner Bowman said that he was correct. Associate Member Fox said that he was ready to recommend that the Commissioner approve the proposed project.

No action was taken.

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- 17. BLUE CRAB:** Request adoption of emergency regulation to open the blue crab potting season on March 19th and request for public hearing to expand the Blue Crab Spawning Sanctuary and eliminate the prohibition on the harvest of dark sponge crabs.

Jack Travelstead, Chief Deputy Commissioner, gave the presentation. His comments are a part of the verbatim record. He provided a powerpoint presentation with various tables to assist in his presentation.

Mr. Travelstead explained that the Crab Management Advisory Committee (CMAC) had met on several occasions during the past 12 months to review the status of the blue crab. He said that the first issue concerns the timing of the opening of the crab pot season. He said the second issue concerns the effectiveness of the regulation that prohibits the harvest of dark-colored (late stage) sponge crabs. The committee felt that the crab prices might be stabilized at higher levels with an earlier opening. He said also that with the cold winter the processors might not be ready for an early start date, but felt this was not a

big issue. He said that earlier that when the crab dredgers heard about the change, they were confused and thought that the Commission was going to close their season earlier. He said when it was explained to them that this would only affect crab potters, they withdrew their objection. He explained that the CMAC recommended that the Commission open the crab pot season two weeks earlier than the current April 1 opening date by Emergency Regulation. He said an emergency regulation would be necessary. He said that when it was decided to bring this matter up that all the Presidents of the Watermen's Associations were notified of the discussion to be heard today. There are several regulations that would need to be changed because of this change in the start date, including, the regulation that establishes the 51-bushel limit and the regulation which prohibit the placement of fish pots prior to the crab pot season. He said they would have to be changed as well to reflect the change from the April 1st date.

Mr. Travelstead explained that the committee discussed the sponge crab issue and Rom Lipcius of VIMS had found in his studies that the regulation protecting the dark colored sponge crab had not been beneficial. He noted that Dr. Lipcius studies indicated the harvesting and culling significantly impacted the mortality of these crabs, especially for the sponge and in some cases the female crab. He said the committee recommended repealing the regulation and replacing it with a new measure. Staff felt that lifting the regulation would only encourage a new fishery on those crabs especially in an area like Virginia Beach where there was a large concentration. He said the Committee recommended that the area off Virginia Beach be closed.

Mr. Travelstead stated that Jeff Crockett, President of the Tangier Watermen Association said they supported this action. He said also that Lewis Whittaker, crab fisherman and crab shedder, had called into the office and indicated he was opposed to it, but did not give any reason.

Mr. Travelstead stated that staff was asking for approval to hold a Public Hearing in March.

Commissioner Bowman stated that the Commission would consider a motion for the request for a March public hearing on the sponge crab issue at this time.

Associate Member Robins moved to approve the advertisement of a March public hearing to consider repealing the prohibition on the harvest of the sponge crab and to consider expanding the crab sanctuary to include the area off Virginia Beach to the North Carolina line. Associate Member Holland seconded the motion. The motion carried, 8-0. The Chair voted yes.

Associate Member Fox expressed his concern that in the meantime sponge crabs would be caught in the area off Virginia Beach. Mr. Travelstead stated this was a summertime prohibition and would not impact the sponge crabs at the present time. Associate Member McConaugha explained that sponge crabs were usually in the area in June.

The Commissioner opened the public hearing for the early opening date change for crab pots.

Doug Jenkins, Twin Rivers Watermen's Association, was present and his comments are a part of the verbatim record. Mr. Jenkins stated that they were in favor of the early opening. He said that last year the market was flooded with crabs from other States. Commissioner Bowman asked Mr. Jenkins if it was worth it to take this action this year, just giving the potters 2 weeks. Mr. Jenkins said it should be changed and continued. He stated that the PRFC and Maryland have different regulations, and VMRC was just holding the watermen back in Virginia. He also suggested that if the time limit were to be changed then change it from 8 hours to 9 hours. He said that extra hour would be beneficial to the watermen.

The public hearing was closed as no one else asked to speak.

Associate Member Bowden stated that the controlling factor was just the market and as far as the water temperature it was cold now, but the shallower areas would warm rapidly. He said that everyone he spoke with wanted the earlier opening. He said if you make the opening date Monday that really means harvesting begins, for those that are honest, on Tuesday and there would be some who would put their pots out on Sunday to get around it. He suggested it should be opened Saturday, March 17th and would make that a motion at the appropriate time.

Associate Member Robins stated he wanted to be conservatively neutral, but he was concerned about how much effort would be done in 2 weeks and the impacts on a resource that was already at a low level. He said if this was done this year, then it would be a benefit to gather all the information on the catch and report it back as early as possible to the committee. He said he wondered if the 51 bushels was appropriate. He said he would like to see these catch results, as the Commission might need to review the limit next year.

Associate Member Bowden moved to accept the staff recommendation for the early opening date, amending the necessary regulations to open the season on Saturday, March 17th to allow for setting the crab pots. Associate Member Robins expressed his concerns on the harvesting starting on Saturday. Commissioner Bowman said he was concerned about how Law Enforcement would handle it and felt that this could not be enforced strictly as to whether it was harvesting or placement of pots. The motion carried, 8-0. The Chair voted yes.

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**18. COWNOSE RAY INFRASTRUCTURE ASSISTANCE PROGRAM:
Approval of procurement procedures.**

Dr. James Wesson, Head, Conservation and Replenishment, gave the presentation. His comments are a part of the verbatim record. Dr. Wesson explained that at the January meeting the Commission approved the 2007 Oyster Replenishment Plan and the associated Procurement Procedures. He said that in that plan, \$200,000 was set aside for a cownose ray project. He said that the impacts on the oyster and replenishment efforts by the cownose ray had been discussed at many Commission meetings. He said the Blue Ribbon Oyster Panel has recommended that everything possible be done to stimulate a fishery and uses for the cownosed ray. The Marine Products Board and the Virginia Sea Grant Advisory Program have done a tremendous job in finding and developing potential markets and uses for the ray.

Dr. Wesson explained that a notice has been prepared to provide \$0.30 per pound of whole fish for any processor that handles the ray. He stated that processors could apply for assistance in lots of 30,000 pounds (\$9,000) until the \$200,000 were expended. He said that if there were to be more interest in this project than the total 666,667 pounds that can be purchased, then a lottery would be held to divide the lots that were requested by participants.

Dr. Wesson said that staff was asking for approval of the project and the associated procurement procedures.

Commissioner Bowman asked if the Commission had the authority to do this project. Jane McCroskey, Chief, Administration and Finance, responded that the authority could be found in the Code of Virginia, Section 28.2-550.

Associate Member Robins asked about the language in the notice regarding the small business enterprise requirement to be registered and if an individual or company would be precluded from participating if it was not registered. Mrs. McCroskey responded that the agency was required to consider the SWAM requirements and wanted to encourage those that were eligible to register.

Associate Member Bowden asked if this was a requirement by Governor Kaine. Mrs. McCroskey read the definition of a small business, "...250 or fewer employees or an average gross income of \$10 million or less averaged over the previous three years..."

Associate Member Robins stated that he would be abstaining, as he would possibly be participating in the project.

Associate Member Fox moved to accept the staff recommendation to approve the Cownose Ray Project and the procurement procedures. Associate Member Holland

seconded the motion. The motion carried, 7-0-1. Associate Member Robins abstained. The Chair voted yes.

19. BLUEFISH: Request for public hearing to establish the 2007 commercial harvest quota.

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

Mr. Grist explained that the current VMRC Regulation 4 VAC 20-450-10 et seq., "Pertaining to the Taking of Bluefish," established the commercial 2006 quota as 1,124,334 pounds, and staff was requesting that this regulation be amended to establish the new 2007 commercial quota.

Mr. Grist said that the National Marine Fisheries Service announced in a January 30 2007 letter the coast-wide quota for bluefish by the ASMFC Bluefish Management Board. The coast-wide commercial quota equals 8,574,939 pounds and the recreational harvest limit equals 18,823,384 pounds. Virginia's commercial quota will be 1,018,660 pounds, or 11.8795% of the coast-wide commercial allocation.

Mr. Grist stated that though the 2007 commercial quota was slightly lower than the 2006 quota, it had been quite some time since Virginia commercial landings had been near one million pounds. In recent years, Virginia had transferred substantial amounts of its bluefish quota to other states (North Carolina and New York), as these transfers were allowed under the plan and allow better utilization of the Virginia quota.

Mr. Grist stated that staff recommended advertising a 2007 bluefish commercial quota of 1,018,660 pounds for a March 2007 public hearing.

Associate Member Holland moved to accept the staff recommendation and to advertise for a March 2007 public hearing. Associate Member Fox seconded the motion. The motion carried, 8-0. The Chair voted yes.

20. FAILURE TO REPORT COMMERCIAL HARVEST – John T. Johnson

Stephanie Iverson, Fisheries Management Specialist, Sr. gave the presentation and her comments are a part of the verbatim record.

Ms. Iverson explained that Mr. Johnson had been consistently out of compliance since 2002. She explained also that Mr. Johnson only reports when prompted multiple times by VMRC staff.

Ms. Iverson stated that Mr. Johnson submitted his reports for the majority of the year well after the 5th of the month due date. She said in 2002 he submitted his reports for January and March through October in November of that same year, but only after staff contacted him. She stated that in 2003, his reports for April through December were not received until January of the next year and that was when staff had him come in to address the non-compliance. She went on to say that in 2004 and 2005 his reports were delinquent as in previous years.

Ms. Iverson explained that on Tuesday, January 30, 2007, Mr. Johnson called in and explained to staff that he had been physically unable to attend the January Commission meeting, which resulted in his license being revoked.

Ms. Iverson said that Mr. Johnson was now current with his reporting and that staff was recommending a 2-year probation. She further said that if during his probation, he should incur any violation of this or any other regulation or law, he should be brought back before the Commission to consider revocation of his license.

Associate Member Robins asked about his January 2007 report. Ms. Iverson said that he had turned that into staff and he was current.

John T. Johnson, defendant, was sworn in and his comments are a part of the verbatim record. Mr. Johnson explained that he had been diagnosed with a sleeping disorder, which meant he would fall asleep whenever he tried to read. He stated that he had arranged for someone else to take care of his paperwork so that he would be in compliance from now on.

Commissioner Bowman asked when was his condition discovered? Mr. Johnson explained that he had been diagnosed 4 of 5 years ago. Commissioner Bowman explained how important the data was to management decisions and that the staff should not have to monitor his reporting.

Associate Member Tankard explained that this was a case that fit all the criteria set forth in Section 28.2-232 of the Code of Virginia and because of the severity of the non-compliance moved that Mr. Johnson's license be revoked for 6 months with 2 years of probation after that time. Associate Member Robins seconded the motion. He said the reporting of the data was important, but he wished to amend the motion and make it 90 days revocation of license and 2 years of probation. Carl Josephson, Senior Assistant Attorney General and VMRC Counsel explained that in accordance with the Code the total time was limited to 2 years. Commissioner Bowman stated

this would mean it would be a 90-day license revocation and a 1 year and 9 months (21 months) probation period.

Associate Member Bowden stated that Mr. Johnson had not been before the Commission and if asked if he had been put on probation? Ms. Iverson stated that he was not officially on probation. Associate Member Bowden said that in the past they were always given warnings first and he agreed there should be the 2-year probation, but that action should have been taken earlier to bring him before the Commission. Commissioner Bowman stated that staff had tried to deal with it, but it had not worked.

Associate Member Robins restated that the amended motion was to revoke his license for 90 days followed by a 21-month probation period. Associate Member Tankard seconded the motion. Associate Member McConaugha asked if the suspension now counted towards that time. Mr. Josephson stated that it did not count, as it was done just because he did not show up at the last month's meeting. The motion carried, 6-2. Associate Members Bowden and McConaugha both voted no. The Chair voted yes.

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There was no further business and the meeting was adjourned at approximately 3:54 p.m. The next meeting will be Tuesday, March 27, 2007.

Steven G. Bowman, Commissioner

Katherine Leonard, Recording Secretary