

## MINUTES

## Commission Meeting

March 25, 2008

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

Steven G. Bowman	Commissioner
J. Carter Fox )	
J. T. Holland )	
John R. McConaugha )	Associate Members
F. Wayne McLeskey )	
Richard B. Robins, Jr. )	
Kyle J. Schick )	
J. Edmund Tankard, III )	
Carl Josephson	Sr. Assistant Attorney General
Jack Travelstead	Chief Deputy Commissioner
John M. R. Bull	Director-Public Relations
Katherine Leonard	Recording Secretary
Jane McCroskey	Chief, Admin/Finance
Sunita Hines	Bs. Applications Specialist
Rob O'Reilly	Deputy Chief, Fisheries Mgmt.
Joe Grist	Head, Plans and Statistics
Sonya Davis	Fisheries Mgmt. Specialist, Sr.
Joe Cimino	Fisheries Mgmt. Specialist, Sr.
Mike Johnson	Fisheries Mgmt. Specialist
Stephanie Iverson	Fisheries Mgmt. Specialist, Sr.
Laura Lee	Fisheries Mgmt. Specialist
Alicia Middleton	Fisheries Mgmt. Specialist
Holly Aber	Fisheries Mgmt. Technician
Suzanne Mills	Fisheries Mgmt. Technician
Mike Meier	Head, Artificial Reef Program
Rick Lauderman	Chief, Law Enforcement
Warner Rhodes	Deputy Chief, Law Enforcement
Bill Hall	Marine Police Officer
Bill Laughinghouse	Marine Police Officer
Bob Grabb	Chief, Habitat Management Div.
Tony Watkinson	Deputy Chief, Habitat Mgt. Div.

Chip Neikirk	Environmental Engineer, Sr.
Jeff Madden	Environmental Engineer, Sr.
Hank Badger	Environmental Engineer, Sr.
Ben Stagg	Environmental Engineer, Sr.
Jay Woodward	Environmental Engineer, Sr.
Benjamin McGinnis	Environmental Engineer, Sr.
Justin Worrell	Environmental Engineer, Sr.
Elizabeth Gallup	Environmental Engineer, Sr.
Randy Owen	Environmental Engineer, Sr.
Danny Bacon	Environmental Engineer, Sr.
Bradley Reams	Project Compliance Technician
Rob Butler	Surveyor

Virginia Institute of Marine Science (VIMS)

Lyle Varnell	Rom Lipicus
David O'Brien	Roger Mann
Julie Bradshaw	Ken Moore
Jacques van Montfrans	

Other present included:

Don Honeycutt	Matt Boynton	Stephen VanEssendelft
Paul Groover	Bill Estell	Lesa Archie-Barnes
Doug Taylor	Peter Bulkeley	Rick Palmer
Bruce Aitkenhead	Cathie Franer	Lynne Rhode
John Daniel	Les Flores	Marty Williams
Wesley Hatchell, Sr.	Wayne Rainier	Donald R. Smith
Gary Pierce	Larry B. Carter	J. B. Blake
Jim Kibler	Sammy Coates	George B. DeMarco
Robert Winstead	Ellis W. James	Earl Pryor
James Kirkpatrick	Robert J. Ulses	Douglas F. Jenkins
Ken Smith	Roger Parks	Tom McDermott
Kent Carr	Frank Kearney	Nelson Ortiz
W. C. Tice	Bob Allen	Scott Harper
Lee A. Washington	James Eskridge	Kenneth Carpenter
Frances W. Porter	Robert Jensen	Peter Nixon
A. J. Erskine	Patrick Lynch	Joyce Holland

and others

\* \* \* \* \*

Commissioner Bowman called the meeting to order at approximately 9:35 a.m. Associate Member Bowden was absent.

\* \* \* \* \*

Associate Member Robins gave the invocation and Associate Member Schick led the pledge of allegiance.

\* \* \* \* \*

**APPROVAL OF AGENDA:** Commissioner Bowman requested (because he was sick with the flu) that two fisheries items be moved forward so that he could be present for those hearings. He said the Commission would adjourn for lunch at 11:30 p.m. and two public hearings (Item 15, Public Hearing for Blue Crab regulations and Item 16, Public Hearing for the VSC Ariakensis Project) would be held when the meeting was reconvened, followed by the rest of the Habitat items and then the remaining Fishery items.

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

\* \* \* \* \*

**MINUTES:** Commissioner Bowman asked, if there were no corrections or changes, for a motion to approve the February 26, 2008 meeting minutes. **Associate Member Holland moved to approve the minutes, as presented. Associate Member Schick seconded the motion. The motion carried, 8-0. The Chair voted yes.**

\* \* \* \* \*

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

\* \* \* \* \*

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

Bob Grabb, Chief, Habitat Management Division, reviewed the eight page two items, 2A through 2H, for the Commission. He said that staff was recommending approval of these items. His comments are a part of the verbatim record.

**Commission Meeting**

Commissioner Bowman asked for questions of staff. Associate Member Fox asked staff to explain what a “log camel” was. Mr. Grabb explained that it was part of the fender system for the navy pier.

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

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

**2A. PRINCE WILLIAM COUNTY DEPARTMENT OF TRANSPORTATION, #08-0012**, requests authorization to replace the existing 36-foot long, 25-foot wide, 2-lane, single- span bridge, with a 73-foot long, 94-foot wide, 4-lane single-span bridge with sidewalks impacting 161 linear feet of Little Bull Run associated with Phase 4 Old Carolina Road widening and bridge replacement project. Utility lines will be relocated by directionally boring them a minimum of three (3) feet below the natural creek bed.

Permit Fee.....\$100.00

**2B. PLANTATION PIPE LINE COMPANY, #08-0025**, requests permission to install by the directional drill method 1,300 linear feet of 12-inch petroleum pipeline 30 feet beneath Aquia Creek in Stafford County. Staff recommends a royalty of \$3,900.00 for the encroachment under 1,300 linear feet of State-owned subaqueous bottom at a rate of \$3.00 per square foot.

Royalty Fees (encroachment 1,300 l. ft. @ \$3.00/l. ft.).....\$3,900.00  
Permit Fee.....\$ 100.00  
Total Fees.....\$4,000.00

**2C. CHESAPEAKE BAY BRIDGE AND TUNNEL DISTRICT, #07-2648**, requests authorization to place armor rock adjacent to existing trestle bents, tunnel islands, and bridge piers on an as-needed basis over the next five years, as part of a scour protection plan to ensure the continued safe operation of the Chesapeake Bay Bridge Tunnel connecting the City of Virginia Beach and the Eastern Shore. This permit will include activities and construction currently covered under the existing permit #98-0901, which will expire on July 31, 2008. The CBBT District is required to conduct a post-construction monitoring program, initiated immediately after construction and one-year post-construction, which includes a detailed analysis of rock placement and adjacent bathymetry.

Permit Fee.....\$100.00

**2D. DEPARTMENT OF THE NAVY, #07-2707**, requests authorization to replace the log camel fendering system, including the installation of new brackets, 37 pilings, and 18 log camels, adjacent to the pier head and north side of Pier 7 at Naval Station Norfolk, situated along Hampton Roads in the City of Norfolk.

Permit Fee.....\$100.00

**2E. NORFOLK NAVAL SHIPYARD, #07-2695**, requests authorization to install and backfill approximately 1000 linear feet of steel sheet-pile bulkhead a maximum of 12 feet channelward of existing deteriorated bulkheads within Wet Slip 1 adjacent to Berths 3 and 4, and the head of the wet slip, and to install a 19-pile mooring dolphin adjacent to Berth 3 near the mouth of the wet slip, at the Norfolk Naval Shipyard situated along the Southern Branch of the Elizabeth River in the City of Portsmouth. The proposed project will also include the temporary removal and then reinstallation of existing floating piers at the head of the wet slip to accommodate construction.

Permit Fee.....\$100.00

**2F. ROANOKE COUNTY DEPARTMENT OF COMMUNITY DEVELOPMENT, #07-2623**, requests authorization to conduct a stream restoration/enhancement project on approximately 3,125 linear feet of Mudlick Creek, to include upland bank grading and stabilization, stream channel modifications; and the installation of rock vane structures, riprap bank toe stabilization, a stone wall for bank stabilization, and the select placement of rootwads along Mudlick Creek's bank, all of which is proposed within Garst Mill Park in Roanoke County. In addition, the proposed project includes the installation of a 12-foot wide clear-span bridge to replace an existing stream ford and pedestrian bridge.

Permit Fee.....\$100.00

**2G. SKANSKA USA CIVIL SE, #08-0036**, requests authorization to construct 890 linear feet of steel sheet-pile bulkhead two (2) feet channelward of an existing, deteriorated bulkhead and mean low water at their commercial property on the Southern Branch of the Elizabeth River at 121 South Dominion Boulevard in Chesapeake. Recommend approval with a royalty in the amount of \$8,900.00 for the filling of 1,780 square feet of State bottom at a rate of \$5.00 per square foot.

Royalty Fees (filling 1,780 sq. ft. @\$5.00).....\$8,900.00  
Permit Fee.....\$ 100.00  
Total Fees.....\$9,000.00

Commission Meeting

2H. **CHESAPEAKE DEPARTMENT OF PUBLIC WORKS, #08-0231**, requests authorization to replace the existing George Washington Highway (Rt. 17) bridge over Deep Creek, with a 144-foot long, 60-foot wide, 4-lane, 2-pier structure, and relocate all associated utility lines (communication, natural gas and power) from the east side of the existing bridge to the west side of the proposed bridge. The utility lines will be directionally drilled a minimum of three (3) feet below the natural creek bed.

Permit Fee.....\$100.00

\* \* \* \* \*

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

3A. **PETER W. BULKELEY, ET AL, #05-1065**, requests after-the-fact authorization to retain a 5-foot wide by 87-foot long shared-use, non-riparian pier with an 8-foot by 45-foot L-head, an uncovered boat lift, a 5-foot wide finger pier, and associated mooring piles for water access into the Eastern Branch of the Lynnhaven River from properties in the Robin Hood Forest subdivision in Virginia Beach. The pier currently extends from 2741 Spigel Drive but serves owners of 2735 and 2729 Spigel Drive in accordance with past deeded easements. Recommend a triple permit fee of \$300.00 with no civil charge and no royalties as this pier only serves two private properties.

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

Mr. Grabb explained that according to Commission records and the records provided by the applicant, this pier had existed in some form since 1989 and was modified in 1991. Although the Commission was aware of the pier’s existence, the pier was never officially permitted by the Commission. There was evidence which indicated that the application requests, actually submitted to the City of Virginia Beach, were never forwarded to the Commission for review. There were also existing deeds (the earliest dating back to 1983) that contain specific language allowing the two non-riparian properties, 2735 and 2729 Spigel Drive, the right to construct and access the pier extending from an easement overlaying a portion of 2741 Spigel Drive.

Mr. Grabb said that the U. S. Army Corps of Engineers had approved the after-the-fact request and the City of Virginia Beach Waterfront Operations Division had stated that they did not require a permit. All owners of the three properties on Spigel Drive had now agreed to be parties to the application and understood that any further modifications or changes of use would require the Commission’s approval. Staff had completed a full

public interest review regarding the request, including contacting both adjoining property owners to the actual riparian property, 2741 Spigel Drive. A newspaper advertisement had been published and no responses were received. Ultimately, staff recommended approval of the existing, shared-use, non-riparian pier and that no royalties be assessed provided the pier continued to only serve the two private properties. Furthermore, staff felt that civil charges were not warranted given the pier’s history, use, and records of local review and approval. The applicant had agreed to the assessment of a triple permit fee of \$300.00.

Commissioner Bowman asked for discussion or action by the Commission.

**Associate Member Holland moved to approve as recommended by staff. Associate Member Schick seconded the motion. The motion carried, 8-0. The Chair voted yes.**

Permit Fee (Triple).....\$300.00

\* \* \* \* \*

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

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

Birchwood Motel versus VMRC and other legal matters

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

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

**NAYS: NONE**

**ABSENT DURING VOTE: Bowden**

**ABSENT DURING ALL OR PART OF CLOSED MEETING: Bowden**

**Motion carried, 8-0.**

---

**Katherine Leonard, Recording Secretary**

\*\*\*\*\*

- 5. VIRGINIA NATURAL GAS, #07-1036**, request authorization to install, by the directional drill method, 80 linear feet of natural gas pipeline beneath Newmarket Creek in Hampton and 1,064 linear feet beneath Salter's Creek in Newport News and install, by the directional drill and jetting methods, 21,470 linear feet of pipeline beneath Hampton Roads in Newport News and Portsmouth with four tie-ins resulting in displacement of 211,274 cubic yards of sediment. This matter was continued from the February 26, 2008, meeting.

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

Ms. Gallup explained that at the February 26, 2008, Commission meeting, VNG asked that the Commission consider their request for a deferral until the March meeting in order for them to have time to consider further modification of their proposal in response to concerns raised by staff and VIMS. Since then, staff had met with VNG on two occasions to discuss their proposed changes and received a letter and plan view drawing, dated March 11, 2008, outlining their proposed modifications. Another revised drawing

was sent to staff by e-mail on March 19, 2008 with a note that the final drawings would not be completed for at least another two weeks.

Ms. Gallup said that VNG was now asking to directionally drill the majority of the line across Hampton Roads harbor, with one segment being trenched by mechanical dredge methods that would require the displacement of 29,400 cubic yards of sediment. The stitch points (five total, including the two at either end of the proposed trench segment), which were necessary to connect the individual pipeline segments, would also be trenched resulting in the displacement of an additional 248,000 cubic yards of sediment. Material from the trenched segment and the stitch areas was proposed to be side-cast and subsequently recovered for use in filling the trenches and covering the stitch points once the pipeline had been laid. Since the previous proposal proposed to trench the entire segment next to Middle Ground Sanctuary by using a hydraulic jet sled, this latest revision represented a marked improvement over the original plan.

Ms. Gallup stated that in spite of the changes, the current proposal still had the potential to cause significant environmental impacts to the aquatic environment and fishery resources that staff believed could be further minimized. A major question and point of concern was the fate of the material that VNG proposed to side-cast next to the trenched areas. Thus far, VNG had not been able to provide staff with specific information regarding the amounts, location and square footage of side-cast areas to be impacted, information on or an analysis of the local currents to help determine what percentage of, or to forecast where the side-cast material may be transported, a detailed work schedule specifying how long the side-cast material would be in the water and therefore subject to currents, the sources of any backfill material that would be required to refill the trenches should the side-cast material be lost, and an agreement to conduct comprehensive bathymetric surveys of the area before, during, and after pipeline installation. In the absence of this information, it was difficult for staff and VMRC advisors at VIMS to quantify the exact extent of impacts that might result from the project. These concerns were shared by VIMS based on their review of the current plan.

Ms. Gallup said that in addition, VNG's March 11, 2008, letter noted that the mechanically dredged trench area might be extended further shoreward. Staff was particularly concerned that this proposed extension of trenched line would extend into an area with metal-contaminated sediments. Sediment cores were taken along the length of the proposed line and core B1-A had levels of arsenic and nickel that would be of concern should that material be re-suspended in the water column. Based on the latest information staff had, the trenched line extension could include the area where core B1-A was taken. Again, no detailed drawings had been provided to show this possible extension.

Ms. Gallup stated that while this proposal was an improvement over the original, staff was still concerned about impacts from any mechanically dredged areas and would prefer that horizontal directional drilling be used along the entire line with all dredged material

being removed to an approved upland site for disposal. Side-casting the material dredged from the trenches could possibly more than double the impacts to shellfish and benthic resources. In addition, the potential loss of side-cast material due to movement by currents is also of concern since VNG estimated that it may be in the water as long as 6-8 weeks from initial dredging until the pipeline segments were recovered. VNG had not proposed a plan detailing their response actions should the material no longer remain next to the trenches after the pipe had been laid. Staff also could not rule out that additional dredging might be necessary should the side-cast material re-enter the trenches before the pipeline had actually been installed.

Ms. Gallup explained that in light of the foregoing, and after considering all of the factors contained in §28.2-1205(A) of the Code of Virginia, staff still recommended that the Commission require VNG to install the natural gas pipeline in Hampton Roads Harbor by the directional drill method, with stitch points being hydraulically dredged and the resulting dredged material being removed from the system to an approved upland disposal site. Should the Commission allow the stitch points to be excavated by mechanical methods, staff recommended that clean fill or cover material be brought in rather than side-casting the dredged material on the adjacent bottom. Furthermore, staff would recommend that VNG be required to mitigate for all clam impacts in an amount to be determined by our Fisheries Management Division at a rate of 1.33:1. This mitigation rate would be for any dredge and side-cast areas impacted, as well as any anticipated impacts due to the migration or dispersal of material due to currents. Staff also recommended that a time-of-year restriction from February through September for any in water dredge or backfill activities associated with the stitch points be imposed to protect both shellfish and anadromous finfish species.

Ms. Gallup said that finally, staff recommended the Commission assess a royalty in the amount of \$3.00 per linear foot for the encroachment beneath State-owned subaqueous bottom. In the event the Commission should authorize dredging by any method, staff recommended a royalty be assessed in the amount of \$0.45 per cubic yard. Final royalty amounts would be determined once staff received final project drawings.

Ms. Gallup noted that this crossing was associated with two permanent easements that were passed by the 2007 General Assembly (H.B. 3005) and signed by Governor Kaine on February 19, 2007. In 2007, Chapter 50 Acts authorized permanent easements and rights-of-way across and in the beds of the Hampton Roads Harbor (Lower James River) and Elizabeth River Reach, including a portion of the Baylor Survey, to VNG for the installation of a natural gas pipeline. VMRC was given the authority to grant and convey these easements and rights-of-way in a form and in accordance with an instrument approved by the Attorney General and Governor.

Ms. Gallup said that the VMRC permit for the Elizabeth River Crossing was approved at the December 18, 2007, Commission meeting and was executed on January 8, 2008. To

date, neither staff nor the Attorney General's Office had received proposed easement documents from VNG for either the Elizabeth River Crossing or the Hampton Roads Harbor crossing. Staff had provided VNG with an example of the language to be used in an easement. Once the Attorney General's Office had approved the basic easement documents, normal procedure was for Carl Josephson, Senior Assistant Attorney General to prepare a resolution for the Commission to approve the easements. The easements were then sent back to the Attorney General for final approval and then on to the Governor for signature.

Ms. Gallup stated that since the 2007 legislation references easements, A and B, (along with a temporary easement, C) it would seem appropriate for VNG to prepare two separate easements for approval. Consistent with prior approvals of this kind, staff would recommend fees in the amount of \$29,506.16 for the easement over Public Ground #1 (1.355 acres) in Hampton Roads and \$195,931.14 for the easement over Public Ground #3 (8.9959 acres) in the Elizabeth River. While the above-referenced easements were authorized by the legislature, §28.2-1208 of the Code of Virginia empowered the Commission, with the approval of the Attorney General and Governor, to also grant easements in the waters of the Commonwealth outside of the Baylor Grounds. Although VNG had not yet submitted any formal request for such an easement, they had indicated they might make a request for such approval. Processing an easement request pursuant to that Code section would likely involve a review process similar to that undertaken for the permit. If the Commission were to approve that easement, the same legal process described above would be followed. The only difference was that the Code sets the cost for this type of easement to a natural gas company at \$100.00 for a 40-year easement.

Commissioner Bowman asked for questions of staff.

Associate Member Robins asked about the rationale for requiring a time-of-year restriction for the dredging. Ms. Gallup explained that it was because of the dredged material being side-cast. Mr. Grabb explained that it would not be necessary if the dredged material were taken away and clean material was used to fill over the pipeline. Associate Member Robins asked about the sampling for contaminants showing up in one location. Commissioner Bowman suggested that VIMS answer this question. Associate Member Schick asked that if clean material were to be brought in and used, this would not be an issue? Ms. Gallup responded yes.

David O'Brien, VIMS, was present and his comments are a part of the verbatim record. Associate Member Robins asked that he explain how the method of dredging affected the level of risks. Dr. O'Brien explained that the reason this project was being heard today was because the method proposed was for mechanical dredging and that if it had been hydraulic dredging, then it would have been a page two issue. He said the side-casting of the dredged material was of concern, because of the fact that the materials were left on the bottom and the currents that were present in the area caused sediment movement.

Associate Member McConaugha asked if there were contaminants anywhere else other than the one location where they were found. Dr. O'Brien explained that he did not know, as the information was provided by the applicant.

Associate Member Schick asked if clean material were brought in and the side-casting proposal removed would the time-of-year restriction be needed. Dr. O'Brien explained that if sand was used it would not be necessary.

Associate Member Fox stated that all that was being talked about were the risks of the proposal and the Commission was required to look at the public benefits of the proposal. He asked, "What were the public benefits?" Mr. Grabb explained that the applicant's representative could answer this, but he felt it was that gas service was being provided for the Southside. Commissioner Bowman noted that it was a part of Governor Kaine's Energy Plan.

Commissioner Bowman asked the applicant's representative to address the Commission.

John Daniel, Attorney for VNG, was present and his comments are a part of the verbatim record. Mr. Daniel provided posters of the project. He said there were three others present to speak also. He said that last month they had requested that the matter be deferred until the March meeting to allow them time to discuss how to adjust the project to comply with the comments and concerns of VMRC staff and VIMS staff so that the Commission could approve their permit. He said he felt that a consensus had been reached in regards to a majority of the issues. There were issues remaining regarding a 5,300-foot section in the northern end of the pipeline that they are proposing to mechanically dredge. He said that in August, 2006 the State Corporation Commission directed VNG to make plans to provide a Hampton Roads crossing in order to increase reliability of gas service to a growing area and ¼ million people on the Southside. He said the Governor's Energy Plan was in response to the energy needs by maximizing service. He said the plan was both broad and detailed. He said the Hampton Roads crossing was named specifically in that plan. He said they looked at other future alternative sources. He said they met with VIMS and VMRC staffs collectively and the VNG was committed to being good stewards. He said that with all their projects they work to provide balanced projects to meet all needs and responsibly to make sure all consideration was given to Section 28.2-1205, which sets forth the Public Trust Doctrine. He said this was not just a water crossing, but it was crossing 17 miles, seven of which were on land, 90% being municipal areas avoiding all other properties; employing environmentally sound techniques; and assuring that no wetlands were impacted while the construction occurred. He said there were no protestors as VNG had provided a good outreach program to explain to everyone regarding VNG's stewardship. He said various groups were contacted, such as the Chesapeake Bay Foundation, Virginia Pilot's Association, the Sierra Club, Watermen's Associations, etc. He said they were looking for common ground between a number of scientists who have different perspectives in how to proceed with the project. He said that staff had asked for more information and he

had some of this information for the Commission in a handout. He said they had discussed other methods such as jet sledding utilized in the Northern Coastal States that VIMS did not like. He stated that the most sensitive area was Middle Ground and that was why directional drilling was proposed and accepted. He said that other areas and methods had all been considered. He said the fourth and final proposal was before the Commission at this hearing. He said the project had gone from 42% directional drill to 75% directional drill. He said the area beneath Middle Ground will be directionally drilled which was what they had been asked to do since the area was the most environmentally sensitive. He said the more directional drill you use the more stitch points you are going to have. He said the need to hydraulically dredge the stitch points had never been an issue before and they had always planned on mechanically dredging the stitch points. He said they had talked a lot about the potential for B1-A to have arsenic. He said the area they propose to dredge is over 500 feet south of B1-A. He explained how you measure arsenic and nickel.

Rick Palmer, Marine Contractor working for VNG, was sworn in and his comments are a part of the verbatim record. Mr. Palmer explained that he had been a marine contractor for 15 years. He stated that this was a significant project and he did not say that directional drilling could not be used, only that there were significant risks using this method.

Mr. Daniel stated that the June 2009 completion date was already established and they were currently getting the materials, such as pipe together as this was a tight schedule to accommodate that date. He said the schedule accommodated a June to September time of year restriction.

Bruce Aitkenhead, with Malcolm Pirnie, was sworn in and his comments are a part of the verbatim record. Mr. Aitkenhead said that sidecast material should stay in place because it was 70% sand. He explained in the 5,300 foot area, 500 feet would be under construction at one point and time. He said that the fish migration pattern could be altered for an unsuitable area, which meant they were not impacted. He said that they would be talking with staff in regards to mitigation.

Associate Member Fox stated that it was preferred that the dredged material be removed. Mr. Aitkenhead answered that it would be less impact on the environment, but more expensive. Associate Member Fox asked how much more expensive was it. Mr. Aitkenhead responded that others could answer that question. Mr. Daniel stated that it was all economics and all the modifications that had been done to the proposal so far had caused the cost to increase. He said that they did not have hard contracts at this stage. Associate Member McConaugha asked if the 500-foot areas were active at one time and the side cast was done in 6 to 8 weeks. Mr. Grabb stated that if the Commission looked at the timeline, it would show that the pipe being buried would be last so the material would be overboard 6 to 8 months based on the VNG information.

Associate Member Fox asked if toxins were found in area B-1-A were there any other dangerous elements found in any other sites. Mr. Aitkenhead stated that 24 core samples were tested and only in B-1-A was any metal that did not meet the threshold. He said they contacted DEQ and it was below their threshold. He said in the rest of the cores none were detected. Associate Member Fox stated that the samples were taken before any modifications were made, and he asked were they still representative of the situation? Mr. Aitkenhead responded yes, because they were still on the original alignment.

Les Flora, Project Manager for VNG, was sworn in and his comments are a part of the verbatim record. Mr. Flora explained that the project schedule required that the pipe be fabricated on land and be towed to the trenches. He said that only 500 feet of trench would be under active construction at one time. He said the trench digging would be done from May until March with the pits being uncovered for 14 months and the side-cast materials to remain at the site for the entire construction time period. He said that most of the trenching would take place during the winter months. Associate Member Tankard asked why not do it all with directional drilling, was it the cost? Mr. Flora explained that it would add \$5 million to the \$8 million for a total of \$13 million. Associate Member Fox asked about taking the dredged material to Craney Island and replacing it with clean material. Mr. Flora explained that would add \$25 million taking it to Craney Island making it cost \$38 million, increasing it almost 50%. Associate Member Robins asked about mechanical dredging and replacing with clean fill and if it renders the project unviable. Mr. Flora said that the cost of this type of fill would be \$75 per cubic yard, which would affect the individual rate cost to be paid by the customers and the State Corporation Commission looks at this. He said there were others who were partners in this project and must bear the increased cost and it might mean that they could not participate.

Associate Member McConaugha asked what would happen if there was a storm and the sidecast material moved. Mr. Daniel responded that there was an obligation on the part of the marine contractor to replace the material.

Mr. Palmer explained the process of laying the pipeline. Associate Member Tankard asked if the barges could be out further rather than having the tugboats so close to shore? Mr. Palmer answered that they would ground the boat taking it closer to shore in the Northern section of the pipeline.

Associate Member Fox stated that 5,000 feet were proposed to be dredged. He asked if they could cut that segment in half and directionally drill a longer segment? Mr. Palmer answered that the shorter they make the pipe the less feasible it all becomes. Mr. Schick stated that he had a similar question.

After further discussion about alternatives to directional drilling and side-casting, Commissioner Bowman asked if anyone was present to support the project or, if anyone was present against the project?

Ellis W. James, Norfolk Resident, was sworn in and his comments are a part of the verbatim record. Mr. James stated that he was opposed to the project. He said he had listened to all that was said and he had two concerns. He said that dates and deadlines are important, but should not be the driving force in this matter. He said he was disappointed in some of the comments about it was not feasible to bring in materials because of a need to meet deadlines. He said displacements and contaminants were important considerations to the manner proposed to perform this work. He said that directional drilling was best for the project and he was aware of the complications presented by others. He said he was concerned with how this pipeline would affect the Super Port that was proposed for Craney Island.

Mr. Daniel in his rebuttal said that VNG had tried to be good stewards and pursuant to Section 28.2-1205 had considered the private and public benefits. He said that accommodations had been for other matters, such as the resource, and efforts had been made to protect them. He said they were asking for approval of the proposal, as presented.

In further discussion, there were still concerns expressed for the side-casting of the dredge materials and comments that new clean fill being brought in would be much better. Associate Member Schick wondered if the applicant was asking about easements at this time. Mr. Daniel responded that they would be asking for that based on the Commission's action today. Associate Member Fox stated that he understood the public and private benefits of the proposed project and the possible environmental concerns. He said he was comfortable with the project as proposed other than the 5,200 feet where VNG proposes to mechanically dredge. He said he was inclined to let VNG have the option to directionally drill where they can in that portion and hydraulically dredge where they can, test the fill, and use new fill. Associate Member McConaugha said you triple the impacts where you mechanically dredge. Associate Member Robins said that the applicant had gone a long way in addressing the concerns about benthic habitats and that the lingering concerns were legitimate and substantial. He acknowledged what the applicant had done and that mechanical dredging was appropriate if the spoils were replaced with clean fill. He said that the time of year restriction suggested by staff might jeopardize their schedule and clean fill would allow the Commission to waive the time of year restriction.

Commissioner Bowman asked Mr. Daniel if he had any further comments before a decision was made and noted that this was out of the ordinary.

Mr. Daniel said that they were concerned that with the replacement materials the cost would increase by \$20 million when you consider that it would be necessary to bring in 275,000 cubic yards at a cost of \$75.00 per cubic yard.

Associate Member Fox asked about recapturing the material above surface and reusing it since it was largely sand. Mr. Daniel consulted with representatives from VNG and said

the bottom line was logistically the number of barges would not be available to accommodate those quantities of material. He said the Mr. Palmer did not have that resource. Associate Member Fox asked if it could be stored on Craney Island and brought back out. Mr. Daniel was not sure of the feasibility of doing that and Craney Island becomes a mobilization station for the pulling of the pipe and was not sure if it was an option logistically. Mr. Palmer responded that material was pumped to Craney Island by hydraulic dredge and that material takes a long time to become stable. He said that sand piles could potentially be mined, but that taking material from the pit and storing it on Craney Island was not a feasible option. He explained that material from the rehandling basin was not available to be reclaimed.

**After further discussion, Associate Member Holland stated that this was a complicated and complex issue, but the public would benefit and with staff, VIMS and VNG working together it had come a long way to resolving the concerns. He moved to approve the project, as proposed by VNG. Associate Member McLeskey seconded the motion. After some further discussion about increased cost, Associate Member Robins said that based on the testimony, requiring clean fill was not consistent with public interest because of the increased cost to the public that would result. Commissioner Bowman asked for a vote on the current motion. Associate Member Fox asked that the motion be amended to require that the 5,300 feet be hydraulically dredged and refilled or directionally drilled at the discretion of the applicant. Associate Member Holland did not accept the amendment. The motion carried, 5-3. Associate Members Fox, McConaugha, and Tankard all voted no. The Chair voted yes.**

Roll Call Vote:

Bowden	Absent	Fox	No	Holland	Aye
McConaugha	No	McLeskey	Aye	Robins	Aye
Schick	Aye	Tankard	No	Chair	Aye

Royalty Fees (To Be Determined)

Permit Fee.....\$100.00

\*\*\*\*\*

The Commission meeting was adjourned at approximately 12 noon. The meeting was reconvened at approximately 12:54 p.m.

\*\*\*\*\*

- 15. PUBLIC HEARING:** Proposed amendments to Regulation 4VAC20-752, "Pertaining to Blue Crab Sanctuaries," to close the sanctuary from April 15 through September 15. The current closure is June 1 through September 15.

Rob O'Reilly, Deputy Chief, Fisheries Management, gave the presentation with slides. His comments are a part of the verbatim record. Mr. O'Reilly explained that this was a public hearing to amend Regulation 4VAC 20-752-10 to close the Sanctuary earlier than June 1 and possibly as early as April 1.

Mr. O'Reilly explained the sequence of the changes in the size of the sanctuary area since 1942, when it was 146 square miles until today it was now 1,022 square miles. In 2007 the Commission established the sanctuary out to the 3 mile limit and down to the North Carolina line. He said that the hearing was regarding the mainstem area and because of concerns for the female crab population.

Mr. O'Reilly said that the Blue Crab Review Committee was recommended many measures, one being changing the closing date from June 1 to May 15. He stated that this measure was to protect the female crabs prior to spawning.

Mr. O'Reilly explained that VIMS previously (2002) provided a sponge crab distribution map. He said Dr. Lipcius had stated that once the female crabs were in the sanctuary 70% were protected.

Mr. O'Reilly stated that the National Marine Fisheries Service water codes would include areas 306 through 309. He explained that the sanctuary included 74% of the mainstem of the Bay and there were harvest areas outside of this area.

Mr. O'Reilly said that in 2007, for the first time since 1994, the season started before April 1. He said the catch was lower in the spring with higher effort and in the fall the effort was lower with the catch per trip higher than summer. He said that the CMAC recommended going to public hearing to consider April 15, May 1, and May 15, as starting dates for the closures of the sanctuary. He explained with the use of a chart the distribution of females in early spring was temperature driven. He said that one member of CMAC had recommended that the sanctuary be cut into two parts (upper Bay, lower Bay) with the upper portion being exempt from the early closure and the lower portion getting the early closure. He stated that recommendation was not supported by the CMAC. He said that April harvests represented a greater proportion of the total harvest, in the last two years, as compared to earlier years, when total harvests were much higher. He noted that May was very similar, in terms of harvest, for all years.

Mr. O'Reilly said that 87 public comments had been received and showed that the public was well informed. He said of the 87, eight-three were from individuals and 4 from organizations. He said 71 supported the April 15 as the starting date, 1 the May 1 starting date, and one person wanted a narrower spring corridor for female crabs.

Mr. O'Reilly stated that staff recommended approval of the amendments in Subsection 30, subdivisions B and C that established a closure of the sanctuary, from May 1 through September 15.

Mr. O'Reilly explained that staff had met with Maryland and PRFC representatives, in regards to the April public hearing and there had been two additional items to be advertised in addition to those already proposed. Staff requested that consideration be given to establishing a bushel limit by area and/or season. In addition, staff requests that the Commission consider a closed season, to reduce the female crab harvest, to conserve female crabs for spawning.

Commissioner Bowman opened the public hearing.

James Eskridge, Tangier, was present and his comments are a part of the verbatim record. Mr. Eskridge said that the waters warmed up later in the upper Bay than the lower and the early closure would be bad for them. He said the Commission should consider them and their location.

Commissioner Bowman stated that the Commission was trying to do what was best for all and considered everyone's interest.

Joe Palmer, Virginia Beach, was present and his comments are a part of the verbatim record. Mr. Palmer stated that if it were to be closed April 15<sup>th</sup> there would be increased burden on the inshore harvest areas, which were smaller areas. He suggested leaving the area ½ mile from shore for the insiders to work.

Mr. O'Reilly explained that the recommendation was for May 1<sup>st</sup>. He said that the CMAC said that April was a problem, overall, and May would be less of a problem. He said he had heard about how it was harder up the Bay, but that part of the problem was that it was a movable fleet and they did move to other areas.

Peter Nixon, CMAC member, was present and his comments are a part of the verbatim record. Mr. Nixon brought in samples of the crabs to show the poor quality and said that they were not worth picking. He said that changing of the dates of closure would not solve this problem. He provided samples of the various sized cull rings. He said the 2 3/8-inch cull ring would help and this was the size that was used in the past. He also showed them a 2 5/16 inch cull ring. He said the 2 3/8 inch ring was needed to get the quality of crabs needed for marketing. He said these would also allow the smaller crabs to escape. He said all the rest of the recommendations were wasted effort.

Commissioner Bowman closed the public hearing and asked for discussion or a motion by the Board.

Associate Member Robins stated that the interim measures that had been taken by the Commission would reduce the 2008 harvest. He said that CMAC and the Blue Crab Review Committee both discussed and recommended May 1<sup>st</sup>, giving one month of protection for the females crabs prior to spawning. He moved to accept the staff recommendation. Associate Member McConaugha seconded the motion. The motion carried, 8-0. The Chair voted yes.

Associate Member Robins moved to advertise, as recommended by staff, the two recommendations by PRFC and Maryland, to consider a bushel limit by area or season and closed seasons to preserve female crabs. Associate Member Tankard seconded the motion. The motion carried, 8-0. The Chair voted yes.

\* \* \* \* \*

16. **PUBLIC HEARING:** To accept comments on a proposal of the Virginia Seafood Council to place overboard and to continue investigations of the marketability of the non-native Ariakensis oyster.

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

Mr. Travelstead stated that the Commission was mandated by Code to hold a public hearing, as set forth in Section 28.2-826. He further stated that the Commissioner would have to make this decision, but not before 30 days after the public hearing and not later than 60 days. He explained that the Board could vote on recommendations and consultation with VIMS is required to occur.

Mr. Travelstead said that four comments had been received from Chesapeake Bay Foundation, Ms. Masters, The Nature Conservancy, and the Rappahannock River Preservation Society. He said that others would be speaking, Ms. Porter representing VSC and Mr. Erskine.

Mr. Travelstead explained that the timing of the study would mean that the results of the EIS would not be available, as it was due out in draft form in Mid-June, 2008. He said the next stage of the EIS would be a final public meeting for both Virginia and Maryland, with the final printing and distribution by Mid-October, 2008. He said that finally a record decision was to be made by Mid-December, 2008.

Associate Member Robins asked about the bio-security concerns that were expressed by the Fish and Wildlife Services. Mr. Travelstead stated that Dr. Mann of VIMS could answer that question.

Roger Mann, VIMS, was present and his comments are a part of the verbatim record. Dr. Mann stated that he had only just seen the letter today. He said the proposed trial does

involve risks. He said they were concerned that if any of the oysters were left on the bottom they would revert back so that they could reproduce. He said with the triploid there were three chromo-cells, no viable eggs and they were sterile, which should mean there was zero chance of reversion. He said that it would be rare for such an occurrence to happen. He said he was not defending either side, as a risk model was done by himself and Dr. Luckenbach and there were errors in it. He said they had to do some guessing and a modest number were not accounted for. He said there was a risk, but a very, very small risk. He said with a million oysters in lots, can you account for all of them? He said you could not. He said the VSC and its participants had done a remarkable job. He said that such a small risk was acceptable because of the scientific information that can be gained. He said the new proposal would not provide a lot of new science, only address the shelf life issue and marketing. He said it would not make or break the companies involved, but they had invested some of their own monies into the project. He stated that the oyster aquaculture industry would grow. He said the Commissioner's decision was a social one, which was not the scientist's job. He said 1.3 million animals were not needed to derive the amount of science to be gained. Associate Member Holland asked how many years had the study been done? Dr. Mann responded this would be the 6<sup>th</sup> or 7<sup>th</sup> year.

Frances Porter, representing VSC, was present and her comments are a part of the verbatim record. Ms. Porter said the VSC was requesting permission for the project in 2008 and 2009. She said it was their intention that the non-native species compliment the native species. She explained that they needed the 1.3 million oysters to support the market that had been developed over the years and the shelf life of the non-native oyster would be investigated. She said that of all the oysters tested last year, none were found to be left behind. She stated that the EIS study had been ongoing for 4 ½ years and would not be final until late December, 2008. She said the information that would be gained from this proposed project would be useful and the non-native species would be good for the Bay, as it was resistant to MSX and Dermo. She stated that there was high demand for these oysters by the market. She stated that all participants had done well in all phases and they had met every test and requirements while being excellent stewards of the product.

Ms. Porter, in response to NWFS comments explained that the sites where the reversion incidences were likely to occur had been changed.

Ms. Porter said that the Corps of Engineers was the lead agency in the EIS and were pushing hard for completion of the EIS. She explained that native oysters had been included in the study, as required of them, and they had realized some success. She said they were hoping that the two species would compliment each other.

Ms. Porter stated that they were asking for a project in 2008 that was almost identical to the one in 2007. She asked to be allowed to speak after the others had commented.

Kent Carr, waterman and seafood buyer, was present and his comments are a part of the verbatim record. Mr. Carr stated that he had been asked to speak, but he would need more information on it. He said what comments he had heard from the watermen were good.

Robert Jensen representing the Rappahannock River Preservation Society was present and his comments are a part of the verbatim record. Mr. Jensen stated that he supported the project and encouraged the Commission to continue with it.

A. J. Erskine representing Bevans Oyster Co., Cowart Seafood, was present and his comments are a part of the verbatim record. Mr. Erskine said they supported the project. He said that they had used the native oysters in the project with moderate success. He said the ariakensis do survive and it was more of a gamble with the native species. He said the project was set up so that small size oysters were deployed and were removed by the 2<sup>nd</sup> year. He said that all the oysters found by VIMS had shown no reversion in the reproductive system.

Associate Member Fox asked about the growth and survival of the ariakensis. Mr. Erskine explained that the shells were thin and they filtered year round. He said the ariakensis shuck out at 11 to 13 pints to the bushel and the native oysters eight and nine pints to the bushel. He said the ariakensis grow out to market size in 9 months and the native oysters 12 to 18 months. He said that the survival rate for the ariakensis was 95 to 100% and the native oysters 50 to 75%.

Ken Smith, Virginia Watermen Association, was present and his comments are a part of the verbatim record. Mr. Smith stated that they were in favor of anything that would help the Bay. He questioned whether the 1.3 million oysters needed were only for the ariakensis. He asked if these were being sold as non-native or Bay oysters.

Mr. Erskine, when asked to respond, stated that the product was labeled as a new species of oyster and as triploid oysters.

Commissioner Bowman stated that he would be making the decision in the time slot required and was still accepting comments until that time.

Associate Member Fox said that he had heard little opposition, the risks were small, they grow faster, shuck out more, and there was less mortality. He said the economic feasibility needed to be tested and Secretary Bryant had also said this was needed. He said that based on this, he recommended a motion to endorse the project.

**Associate Member Fox moved to endorse the project. Associate Member Robins seconded the motion.**

Associate Member Robins stated there had been strict protocols. He said the future was aquaculture. He said with the previous tests the ground work had been laid out and it was important not to interrupt it at this phase. He said it should be allowed to continue, which would add to the understanding of this non-native species. Associate Member Tankard said that he supported the motion, but he did not feel that we should turn our backs on the native species as he had seen successes on the Eastern Shore with the native oyster. Associate Member Schick stated that he respected the Federal comments, but the viability of the ariakensis for marketing this non-natives species was not their concern. He said there were efforts being made to make both species viable for aquaculture.

**The motion carried, 7-0-1. The Chair abstained.**

Commissioner Bowman left the meeting for the rest of the day due to illness. Associate Member Holland acted as the Chair in his absence for the rest of the meeting.

\* \* \* \* \*

6. **GEORGE DEMARCO, #07-1164**, consideration of whether his existing clam aquaculture operations qualify under Regulation Number 4 VAC 20-335-10 ET SEQ "Pertaining to On-bottom Aquaculture Activities." He also seeks after-the-fact authorization to retain a 6-inch raw water intake extending approximately 375 feet channelward of mean high water and authorization to deploy approximately 1300 linear feet of staked netting for predator exclusion purposes, on a seasonal basis, around the perimeter of his 200,000 square foot clam aquaculture grow-out area adjacent to his property situated along Pepper Creek in Mathews County.

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

Mr. Neikirk explained that in 2006 VMRC received an inquiry from the Virginia Institute of Marine Science (VIMS) concerning what appeared to be a clam aquaculture operation at the mouth of Pepper Creek in Mathews County. VIMS was concerned because the activity appeared to have displaced an area of submerged aquatic vegetation (SAV). Staff reviewed the aerial photography from the annual VIMS SAV survey and our oyster planting ground maps. Staff also reviewed additional aerial photography and flew over the site in September 2006. Based on staff's review, it was concluded that Mr. Demarco had indeed deployed nets or cages on his leased oyster planting ground. Staff also found that he had deployed a vertical net perpendicular to the bottom around the perimeter of his aquaculture operation. Apparently that net was being used to as a predator exclusion net to keep out cownose rays from the area. The fenced off area measured approximately 750 feet long by 250 feet wide.

Mr. Neikirk said that staff then sent Mr. DeMarco a certified letter dated February 14, 2007, advising him that the structures he had deployed on his leased oyster planting ground constituted an illegal encroachment over State-owned submerged land in violation of Chapter 12 of Title 28.2 of the Virginia Code. That letter also directed him to remove the illegal structures within 45 days.

Mr. Neikirk stated that staff met with Mr. DeMarco and his son, Andrew on February 28, 2007. They explained that they believed that the planting of the clams and the placement of nets over the clams was authorized under the VMRC "On-bottom Shellfish Aquaculture" Regulation Number 4 VAC 20-335-10 et seq. Staff explained that this regulation, which became effective in 1998, allowed the placement of aquaculture structures on the bottom and extending up to one foot above the substrate. However, the regulation specifically excluded the placement of new aquaculture structures on existing stands of SAV. The DeMarcos argued that the area where their aquaculture was being conducted did not support significant SAV growth. Staff agreed to contact Dr. Orth of VIMS to arrange an onsite evaluation of the site. That site inspection was conducted on May 11, 2007 at which time SAV was noted in the area.

Mr. Neikirk said that the predator exclusion net was removed and Mr. DeMarco submitted an application on May 16, 2007, seeking authorization to re-deploy the net on a seasonal basis and authorization to retain a 6-inch diameter water intake pipe extending approximately 375 feet channelward of mean high water adjacent to his property. The intake pipe also extended through an area of SAV and provided water for his land based aquaculture raceways which were used to get the clams to a suitable size for planting in the field. Mr. DeMarco also asked that the Commission determine whether or not his on-bottom aquaculture activities were authorized under Regulation # 4 VAC 20-335-10 et seq.

Mr. Neikirk explained that in a letter dated February 8, 2008, Dr. Robert Orth of VIMS described the annual SAV monitoring program he had conducted since 1984. He described the SAV beds at the mouth of Pepper Creek, in the vicinity of the aquaculture operation, as consisting of eelgrass and widgeongrass with the eelgrass dominating in the deeper waters to a depth of one meter at mean low water. He said the widgeongrass dominated the shallow water and extended landward to near mean low water with neither persisting in the intertidal zone. He also explained that during their 20+ years of monitoring, the SAV beds had been quite dynamic, especially in 2005 when heat stress killed many of the plants. He said this area had been recovering steadily and that the overall pattern had been one of SAV presence along the lower shores of Pepper Creek every year. Finally, he stated that locating the aquaculture operation in the intertidal and very shallow subtidal region or further into Pepper Creek would minimize adverse impacts on SAV beds.

Mr. Neikirk said that VIMS also prepared a report dated November 30, 2007, for the after-the-fact request to retain the water intake pipe and the proposal to re-deploy the

predator exclusion net around the perimeter of the aquaculture operation. They stated that the pipe would displace 11 square feet of vegetated wetlands and 190 square feet of subaqueous bottom. They said elevating the pipe would reduce those impacts but it might be impractical. With regard to using a gill net as a predator exclusion net, they noted that the net device would isolate a 200,000-square foot area of submerged and wetland habitat from not only cownosed rays but other marine organisms. If permitted, they recommended that it be reduced to the minimum size necessary.

Mr. Neikirk stated that the Department of Conservation and Recreation noted the presence of a bald eagle nest in the project vicinity and recommended coordination with the Department of Game and Inland Fisheries. They did not anticipate any adverse impacts on their programs.

Mr. Neikirk noted that in an e-mail dated March 17, 2008, the Department of Game and Inland Fisheries expressed a possible concern regarding the entanglement of animals in the predator exclusion net and they were still evaluating those possible effects based on additional information staff recently received concerning the net.

Mr. Neikirk stated that no other State agencies had provided comments on the project.

Mr. Neikirk explained that all of the activities were located on oyster planting ground that was first leased to Mr. DeMarco in 1969. In reviewing the annual VIMS SAV aerial photographs, the first apparent on-bottom aquaculture activity occurred in 1998. There were small patches of activity in each of the subsequent years with significant expansions in 2003 and 2004. The water intake line was first visible in the 2002 aerial photographs. Mr. DeMarco claimed to have approximately 3 million clams planted under the nets and that his typical grow-out time was approximately four (4) years. This was longer than the typical grow-out time experienced by Eastern Shore growers and even for previous operations in the York River. Mr. DeMarco said that he preferred to grow a slightly larger product because there were so many small clams on the market. He said the clams were typically harvested by rake.

Mr. Neikirk noted that no comments were received from the adjoining property owners or in response to the agency's public notice.

Mr. Neikirk stated that there were several issues that must be addressed by the Commission concerning this project. The first and most important was whether or not the on-bottom aquaculture activity was authorized under the "On-bottom Shellfish Aquaculture" Regulation Number 4 VAC 20-335-10 et seq. Based upon staff's review of the site and the evaluation conducted by Dr. Orth, it was apparent that beds of SAV existed at the site prior to the initiation of any significant aquaculture activity. Although there was a dramatic die off of SAV in 2005, the areas surrounding the aquaculture operation were recovering. Given the presence of SAV at the project site, staff was of the opinion that the aquaculture activities were not authorized by the "On-bottom Shellfish

Aquaculture” Regulation. If SAV was present at the site and the activity was not authorized by the on-bottom regulation, then the deployment of the nets over the planted clams was a violation of Chapter 12 of Title 28.2 of the Virginia Code. In that case, the Commission could either direct removal of the netting or agree to accept an after-the-fact application to allow the activity to continue under some conditions or circumstances.

Mr. Neikirk stated that staff certainly recognized the numerous potential economic and environmental benefits associated with commercial shellfish production, but SAV provided a crucial habitat for a variety of species including commercially important blue crabs. Submerged aquatic vegetation was also listed in §28.2-1205(A) of the Virginia Code as one of the specific factors the Commission was charged with considering when evaluating an application for a permit to use state-owned bottomlands. Staff believed it was critical to avoid impacts to SAV to the maximum extent possible.

Mr. Neikirk said that given VIMS’ evaluation of the site and after reviewing Mr. DeMarco’s oyster lease, it appeared that the activity could be relocated further into the creek to avoid the more persistent beds of SAV. Accordingly, staff recommended the Commission direct the applicant to remove the cover nets from their current location and to submit an application to conduct that activity on the most upstream section of his lease. A portion of that area may even be allowed under the on-bottom regulation so he could work in that location. Given the value of the clams currently planted, staff recommended that Mr. DeMarco be permitted two years to vacate the current area; allowing time for the shellfish to grow out and be harvested. Mr. DeMarco had continued to plant new clams in the area while staff had been reviewing this application. If the Commission agreed to let Mr. DeMarco harvest the crop that was currently planted, staff recommended that they specifically prohibit the covering of any new clams with protective netting in the area.

Mr. Neikirk said that since the impacts associated with the water intake appeared to be relatively minor, staff recommended approval of the after-the-fact request to retain the pipe with an imposition of a triple permit fee and triple royalties as provided for in §28.2-1206(B) of the Code of Virginia. Given the potential environmental impacts and potential impact on other uses of the State waters, staff was unable to recommend approval of the predator exclusion net.

Associate Member Robins asked for clarification on the areas where Mr. DeMarco could continue to work since this was done prior to the regulation. Mr. Neikirk pointed out the various areas on staff slides. Associate Member Robins noted that the regulation says that no new structures can be placed on existing stands. Mr. Neikirk again utilized the staff slides and noted the locations where the activities could be continued because it was exempt from the regulation.

Associate Member Holland asked for the applicant or his representatives to speak.

John Daniel, Attorney, representing Mr. DeMarco. Mr. Daniel introduced Ms. Lynn Rhode who was to do the presentation on Mr. DeMarco's behalf.

Lynn Rhode, representing Mr. DeMarco, was present and her comments are a part of the verbatim record. Ms. Rhode explained that they agreed with the staff recommendation in regards to the intake pipe, but disagreed with staff that the use of the exclusion net not be allowed. She explained that Mr. DeMarco used these nets to protect his shellfish from the cow nosed rays and that blue crabs could get through them. She said that the operation occurred prior to the regulation that was effective in 1998. She stated that operators on the Eastern Shore had been "grandfathered" from the requirements of the regulation and they felt he should be treated the same. She said that he had moved out of the Mobjack Bay area because of the SAV, as clams cannot be grown in SAV. She explained that the nets must be placed flush on the bottom. She said that in 2002 he moved the nets so they could be placed flush on the bottom. She noted that algae had grown on the nets and they provided habitat and food for the blue crabs. She stated that they did not agree that the nets interfered with the crab resource, but actually helped. She said that the water quality had improved because of this operation and habitat had been provided. She said that Mr. DeMarco was a small, responsible operator. She said in answer to the VIMS suggestion that the operation be moved closer to shore, Mr. DeMarco explained to her that the salinity was too low for the clams to survive and also that closer to the shore would allow the clams to freeze in the winter. She provided slides for the Board to review. She stated that she made a site visit and found that there was not much SAV in the location of the nets.

Associate Member Robins asked for a staff slide of the site activity and an explanation of how the salinity differed.

George DeMarco, applicant, was sworn in and his comments are a part of the verbatim record. Mr. DeMarco stated that he kept a log of the salinity data for this operation. He said he had found that where the operation was located was where the salinity was best for the shellfish and on the other side of the point it was not.

Ken Moore, VIMS, was present and his comments are a part of the verbatim record. Dr. Moore explained that the dark areas in the photographs were the eelgrass and widgeon grass. He explained also that the shallow areas were dominated by widgeon grass which does not reach its peak abundance until August. He said there would be very little evidence of widgeon grass in March. He also noted there was a significant die back of SAV in 2005. He said they cannot fly over the areas more than once a year, but explained that the coverage maps take into account the presence of widgeon grass. He said he conducted a study at Cherrystone Aquafarms and found no significant clearing of the water due to the aquaculture activity. He said they did find that the clam beds were point sources of nitrogen and the eelgrass/widgeon grass would not grow under the nets.

Associate Member Robins asked him to explain about salinity. Dr. Moore stated that salinity typically changes about 0.5 parts per thousand per kilometer. He said it is unlikely that salinity would change 4 parts per thousand within the project area. He also noted that tide changes affect the salinity.

Associate Member Fox asked Mr. Neikirk about the on-bottom shellfish aquaculture regulation and how it affected activities in place prior to 1998. Mr. Neikirk provided the history and purpose of the regulation and explained that aquaculture activities that met the regulation and were in place prior to the effective date of the regulation in 1998 were allowed to remain but not allowed to expand into new areas containing SAV. Associate Member Fox asked staff if they agreed with Ms. Rhode's contention that Mr. DeMarco's nets were in the same location as they were in 1998. Mr. Neikirk stated that the photos did not show that. Ms. Rhode elaborated on her assertion and explained there were more and different nets but that they were in the same general location.

Mr. DeMarco stated that the inside of the net served as a sanctuary for small animals. He noted that he had noticed the presence of widgeon grass within the enclosure during August and September and said he saw more this past summer than he had ever seen before. He said that no nets were placed on eelgrass. He said they wait until October or November to plant their clams after the eelgrass defoliates and dies back. In response to a question from Associate Member Schick, Mr. DeMarco said he currently has about three million clams planted and that his operation employed he and his son, plus a couple of part-time employees.

Associate Member Robins asked VMRC Counsel how he would interpret the on-bottom shellfish aquaculture regulation. Carl Josephson, Senior Assistant Attorney General and VMRC Counsel said first that he would defer to any consistent agency interpretation but added that when the agency mentions an area they were typically referring to the footprint.

Associate Member Robins said that this case appeared to be a collision of interests between an important aquaculture activity and a persistent area of SAV, a critically important habitat. He said that it appeared that a portion of the area was "grandfathered" under the regulation and that other areas appeared to have expanded since 1998. He added that he would like to allow the activity to continue while protecting the densest areas of SAV and suggested allowing the aquaculture activity to continue on the upstream portion of the lease.

Mr. Neikirk explained that if the regulation was determined not to apply, that there was no current application for a permit to conduct the clam aquaculture activity. He said an application would be required. He added that staff felt the Commission could give Mr. DeMarco an understanding of the area that they feel was appropriate to apply for.

Associate Member Fox suggested and Mr. Robins agreed that the water intake pipe appeared to be a good dividing line.

Mr. Josephson said that the regulation could be interpreted to allow the planting of clams on an area whenever SAV was not present. Bob Grabb, Chief, Habitat Management, explained that staff utilized the maps prepared by VIMS to determine the presence or absence of SAV. He said that there were variations in SAV abundance throughout the year.

Associate Member McConaugha asked Mr. Grabb what had been “grandfathered” at Cherrystone. Mr. Grabb discussed the development of the on-bottom shellfish aquaculture regulation and explained that the growers could not expand into new areas containing SAV. He said the regulation would allow Mr. DeMarco to continue to use the area he occupied in 1998.

**Associate Member Schick said that a loose interpretation had been used for the Eastern Shore. He said the expansion of this operation occurred where SAV did not exist, but did occur at times. He said small operations should not be shut down if they were working and this was not new, as it was located here. He moved that the area being used be “grandfathered” and be allowed as stands. Associate Member McLeskey seconded the motion. Associate Member Fox asked whether they were only approving the perimeter of the area being used, realizing that the lease extends much further down. Associate Member Schick responded yes, it was pertaining to that area applied for. He said if he wanted any other area he would need to come back and apply for it. Associate Member Fox asked if we would allow Mr. DeMarco to keep the pipe and the predator net. Associate Member Schick responded yes, the pipe and the predator net. Associate Member Tankard stated that Associate Member Schick had made some good points and the watermen were just as important as the SAV. He suggested that the approval now exclude the net, which could be applied for later. Associate Members Schick and McLeskey agreed. The motion carried, 6-1. Associate Member Robins voted no.**

Mr. Daniel noted for the Board that the net was important to the operation and was needed. Associate Member Holland responded that it could be heard next month. Mr. Neikirk noted that the exclusion net was included on the application before the Commission.

Mr. Daniel said they were requesting the net be considered now. Associate Member Schick asked if this was a temporary installation. Mr. DeMarco responded that he used it from Mid-May to November. He said the nets were anchored in a manner to allow them to rise and fall with the tide. He continued by saying that the nets did not have any adverse impacts on the SAV and was good for the environment and the small operator.

**Commission Meeting**

Associate Member Robins asked if there could be discussion on the use of the exclusion nets. Mr. Neikirk said that he was aware of only two or three had been approved by the Commission. He added that they had not typically been approved on the Eastern Shore.

Associate Member Tankard said he is familiar with the aquaculture industry on the Eastern Shore and that he believed they had found that frequent cleaning and changing of the on-bottom nets was helpful at limiting cow nosed ray predation.

Associate Member McLeskey asked if any problems had been identified with the predator net. Mr. Neikirk said staff had not received final comments from the Department of Game and Inland Fisheries because the accurate mesh size of the net was only determined last week and that was an important factor concerning the impacts. He added that staff was looking at it mainly from the public trust standpoint and noted that the net would cordon off approximately four acres of state-owned subaqueous bottom.

**After some further discussion, Associate Member Schick moved to approve the net, as requested. Associate Member McConaugha seconded the motion. The motion carried, 5-2. Associate Members Fox and Tankard both voted no.**

Permit Fee.....\$100.00

\* \* \* \* \*

- 7. **JBH LLC, #07-1948**, requests authorization to retain a 180-foot long by 5-foot 10-inch wide, private, non-commercial pier with a 40-foot by 20-foot covered platform, a 12-foot 10-inches by 3-foot ramp over a 6-foot by 5-foot platform leading to a 14-foot by 16-foot 8-inches by 14-foot floating platform and a 10-foot by 12-foot floating platform adjacent to property at 475 Wind Mill Point Road situated along the Back River in Hampton.

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

Ms. Gallup explained that this property was located on Back River in the Fox Hill neighborhood of Hampton. This section of the shoreline along the Back River was primarily residential.

Ms. Gallup stated that staff was visiting a nearby property in June 2007 and noticed a pier across Harris Creek that appeared to have a covered area larger than 400 square feet containing a bar and table. Staff visited the site on August 2, 2007 and measured a 180-foot by approximately 6-foot wide pier with a 20-foot by 40-foot covered platform, a 13-foot by 3-foot ramp over a 6-foot by 5-foot platform leading to a 14-foot by 16-foot floating platform and a 12-foot by 12-foot floating platform. The covered deck contained

a dining table, sitting area with sofa, a bar, and a TV. Staff issued a sworn complaint and notice to comply dated August 6, 2007. The notice to comply directed JBH, LLC to remove the covered platform and discontinue all non-water depended uses with 30 days of receipt of the notice. The LLC chose to submit an after-the-fact Joint Permit Application.

Ms. Gallup said that staff received an incomplete JPA on August 29, 2007 and received the additional information to complete the JPA on September 20, 2007. Mr. Donald Honeycutt was the agent for the LLC and lived at the 475 Wind Mill Point address. In his application he indicated that Hurricane Isabel in 2003 had destroyed his previously existing pier. He explained that he pulled up the remains of the old pier and replanted marsh grass. He then hired Routon Construction out of Poquoson and paid them \$5,000.00 to construct a new pier and secure all necessary permits. The pilings were delivered and Routon Construction informed him that they had gotten all of the permits. Mr. Honeycutt paid them another \$5,000.00 and never heard from them again.

Ms. Gallup noted that in January 2004, Mr. Honeycutt said that he began to build a new pier by himself. He put in poles up to the edge of the marsh and hired Tidewater Dockmasters to install the rest of the pilings. In his application, Mr. Honeycutt indicated that after Tidewater Dockmasters installed the pilings he finished the pier by himself by March 2004. He installed the roof over the 40-foot by 20-foot platform in the summer of 2004.

Ms. Gallup said that a search of VMRC records had failed to reveal any authorization for any previously or currently existing piers at 475 Wind Mill Point Road. According to the City of Hampton, no building permits were issued either. Not only does the pier exceed the statutory authorization contained in the Code, but it accommodated various non-water dependent uses. Mr. Honeycutt, or the LLC, did not apply to rebuild the pre-existing pier after Hurricane Isabel under the Governor's Emergency Authorization. His pier as it exists today was also larger than that usually permitted by the Commission.

Ms. Gallup explained that after considering all of the factors contained in §28.2-1205(A) of the Code of Virginia, staff recommended that JBH, LLC be directed to reduce all L or T-head platforms and appurtenant floating platforms to the 400 square feet authorized by Code. This would bring the structure into conformance with the authorization for private piers contained in Section 28.2-1203 of the Code of Virginia. Should the Commission choose to allow Mr. Honeycutt to retain a pier larger than that authorized by Code, staff recommended a civil charge in the amount of \$6,000 be considered based on minimal environmental impact and maximum non-compliance in lieu of further enforcement. Staff also recommended that Tidewater Dockmasters, the firm that installed the pilings necessary to support the excessive structure, also be assessed a civil charge in the same amount.

**Commission Meeting**

Donald Honeycutt, applicant, was sworn in and his comments are a part of the verbatim record. Mr. Honeycutt explained that he did not have a revised plan. He said there was a dispute over riparian boundaries between the property owners, and they will have a marine survey done to clear the matter up, as well as going to court to establish the riparian apportionments. He said he did not know what to do at this point, but he was removing all items objected to and making a boathouse. He said he needed two months to find out the results of the survey and make an open-sided boathouse. Associate Member Fox asked if all the floating platforms were removed. Mr. Honeycutt stated that all but one, which he wants to make into a boathouse. Associate Member Schick asked about the dimensions of the boathouse. Mr. Honeycutt said that he would make it 20-foot by 40-foot, which was a 100 feet more than was allowed. He added the original pier was destroyed by Isabel. Associate Member Fox asked if there was a permit. Mr. Honeycutt responded that he had hired a contractor, who told him he had gotten the permits, but he did not do so. Associate Member Fox asked staff to confirm that there was no permit issued to which they responded none.

Associate Member Robins asked VMRC Counsel about the riparian apportionment. Carl Josephson, Senior Assistant Attorney General and VMRC Counsel responded that he did not see how a decision by the Courts would be done in two months. Mr. Honeycutt said he was waiting for the survey so he could tell what affect this would have on his property lines. Mr. Josephson stated that the Commission did not have to wait and could order the removal of the structures that remain.

After some more discussion, Associate Member Schick stated that the Commission could take action regardless of the Court’s decision, if it granted the after-the-fact permit and required the removal of the floating dock with the boat slip. He asked staff if it was 100 square feet less, what it would mean as far as a permit. Bob Grabb, Chief, Habitat Management Division, responded that it would be exempt from a permit under the Code. Associate Member Schick asked since there was a 38-foot boat, if the slip could be allowed. Mr. Grabb said that a 20-foot X 40-foot structure was not unreasonable.

**Associate Member Schick moved to grant the after-the-fact permit, requiring the removal of the floating piers and non-water dependent items and allowing a boathouse structure to be only 20 feet by 40 feet. Also, he added it all must be completed in 120 days. Associate Member Robins seconded the motion. The motion carried, 7-0.**

Permit Fee.....\$100.00

\* \* \* \* \*

8. **LOCUST HILL INVESTMENT GROUP, LLC, #06-2839**, requests authorization to construct a community pier, without wetslips, extending 115 feet channelward of mean high water at an easement over property owned by Mr. and Mrs. Faulkner at the end of State Route 634 at the confluence of Whittings Creek and the Rappahannock River in Middlesex County. The pier is intended to serve the owners of the Heron Landing Condominiums and is protested by a nearby resident.

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

Mr. Neikirk explained that the Heron Landing Condominiums were a 16-unit development currently under construction on a hill near the confluence of Whiting Creek and the Rappahannock River in Middlesex County. Although the development was located near the water, it did not include any waterfront property. There was a public dock and boat ramp at the end of State Route 634, approximately 500 feet from the development. The community pier was proposed to extend from a 10-foot wide easement over property owned by Mr. and Mrs. Faulkner between the end of the road and the mouth of Whiting Creek.

Mr. Neikirk stated that the pier was proposed to extend 115 feet channelward of an existing riprap revetment and included a 6-foot by 24-foot pier-head and two platforms for the launching of kayaks and for crabbing. The total area of pier-head and deck area excluding the main stem of the pier was 378 square feet. No outer mooring poles or slips were proposed. The stated purpose of the pier was to provide water access for boat loading, kayak launching, and crabbing for the Heron Landing Condominium owners.

Mr. Neikirk said that the project was protested by Mr. Wesley Hatchell, a nearby property owner. He stated he was concerned with the location of the pier near the Whiting Creek channel and he also expressed a concern related to the precedent this pier might provide for other community piers in the County.

Mr. Neikirk said that in their report dated March 13, 2008, The Virginia Institute of Marine Science stated that they anticipated that environmental impacts would be minimal, but recommended the placement of adequate trash receptacles for the disposal of solid waste.

Mr. Neikirk said that in a letter dated March 12, 2007, the Health Department informed VMRC that the project was in compliance with the "Sanitary Regulations for Marinas and Boat Moorings", with a condition that a sign be posted on the pier stating that no temporary or long term mooring of motorized vessels was permitted.

Mr. Neikirk stated that the Department of Game and Inland Fisheries submitted a letter dated February 7, 2007, stating that the pier and ramp located at the end of

State Route 634 was not owned or managed by their agency and suggested the structures might be maintained by the Department of Transportation. Since the project was located at the end of State Route 634 and there was no parking area, staff contacted the Virginia Department of Transportation, but they did not provide any comments. No other State agencies provided comments on the project.

Mr. Neikirk explained that the proposed pier would not encroach on any public or privately leased oyster planting ground and it was located in an area currently prohibited for shellfishing. Since the pier was located close to the Whiting Creek Federal Project Channel, staff waited for the Corps of Engineers to complete their review of the project before staff completed their review. The Corps approved the project on January 9, 2008. Their permit was conditioned on the pier maintaining a minimum distance of 50 feet of the edge of the channel.

Mr. Neikirk noted that the condominium project was not located along the water and although they had acquired an easement over nearby waterfront property, they did not appear to have any inherent right to construct a pier for water access. Nevertheless, since the pier did not include any slips and was designed only to support low impact activities, it appeared that the environmental impacts should be minimal. Additionally, based on the findings of the Corps of Engineers, it did not appear that the project would adversely affect navigation. Therefore, it appeared that the pier would be a valuable asset to the condominiums while having only a minimal adverse impact on the environment, navigation and other public uses of the waterway.

Mr. Neikirk said that after evaluating the merits of the project and 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 \$309.60 for the encroachment of the pier over 1032 square feet of at a rate of State-owned submerged land at a rate of \$0.30 per square foot.

Associate Member McLeskey left the meeting during the presentation by staff. He returned after the public comments.

Associate Member Holland asked that a representative for the applicant come forward.

Earl Pryor, a member of the Locust Hill, LLC, was sworn in and his comments are a part of the verbatim record. Mr. Pryor stated that he had lived in this area for 60 years. He said the property owners had acquired a right of way from the Nursing Home to construct the pier. He stated that no parking was allowed at that end of the road. He said that they wanted to be allowed to construct the pier for their use with small boats, such as kayaks. He said 14 other residents in the community who would utilize the pier.

Associate Member Schick asked if anyone in the association actually had waterfront property. Mr. Pryor stated that two people in the association had their own pier.

Associate Member Holland asked for anyone in opposition who wished to speak.

Wesley Hatchell, protestant, was sworn in and his comments are a part of the verbatim record. Mr. Hatchell said that he lived in Middlesex County on Whiting Creek. He explained that the project was adjacent to a public pier owned by VDOT. He said there was no room for parking or restrooms at the site. He said the stakes indicate the pier would be at the edge of the channel. He said he was told that individuals would be driving golf carts to access this area and there was no room for parking golf carts. He said the condominiums were not attached to waterfront property. He said he did not oppose them using the water, but he did not want them accessing it in this manner.

Donald Smith, creek property owner, was sworn in and his comments are a part of the verbatim record. Mr. Smith stated that most of what he wanted to say had been covered. He said the pier would impact the channel and it could not be dredged. He said the public boat ramp was in that location and others would be unable to use it. Associate Member Fox stated that the Corps had approved it conditioned on the pier ending 50 feet from the channel. Mr. Smith said the drawing showed it up to the channel. Associate Member Robins noted that site plan drawing, item 2-3, showed the pier 80 feet long and 50 feet from the channel, which complies with the Corps' approval.

Mr. Hatchell said that the channel moved every five years as much as 50 feet in each direction. He said if the pier was allowed and the channel moved they would not be able to have a channel.

Associate Member Holland asked for a motion.

Associate Member Schick asked if there was a sketch showing the location of the channel and the proposed pier. Mr. Neikirk said there was a drawing prepared after Mr. Henderson, with the Corps of Engineers, conducted a site visit. Mr. Neikirk also noted that the Corps' approval included a condition stating that if future operations by the Corps required relocating or removing the pier that the permittee would be required to do so.

**After some further discussion, Associate Member Schick moved to approve as proposed and in accordance with the staff recommendations. Associate Member Robins seconded the motion. The motion carried, 5-1-1. Associate Member Tankard voted no. Associate Member McLeskey abstained because he was absent during the presentation and the testimonies.**

Royalty Fees (encroachment 1,032 sq. ft. @ \$0.30/sq. ft.)..	\$309.60
Permit Fee.....	\$100.00
Total Fees.....	\$409.60

\* \* \* \* \*

9. **THOMAS MILAN, #07-1824, Notice of Violation #07-26.** Formal Restoration Hearing regarding the unauthorized prop-dredging of approximately 300 cubic yards of State-owned subaqueous bottom adjacent to his property in the Pembroke Manor subdivision, situated along Thalia Creek in Virginia Beach.

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

Mr. Worrell explained that the property was located just north of Pembroke Mall and Princess Anne High School situated along Thalia Creek, a tributary to the Western Branch of the Lynnhaven River in Virginia Beach. Characteristics of the upper limits of the Lynnhaven River, such as Thalia Creek, included expansive intertidal mudflats and submerged bottom sediments consisting of more silty, fine-grained textures than the sandy textures found nearer the Lynnhaven Inlet.

Mr. Worrell said that the City of Virginia Beach Wetlands staff identified and began processing the wetlands violation associated with this project in March of 2007. At that time the City requested Mr. Milan's presence at a Show Cause Hearing and required further details regarding the dredging and filling of tidal wetlands. Almost a year later, and after four separate Show Cause Hearings – including a total of \$6,700 assessed and paid as civil charges, the City of Virginia Beach Wetlands Board finally approved a complete after-the-fact application and restoration plan on February 25, 2008. That approval basically required the removal of all fill (riprap and prop-dredged sediment) from the intertidal area and additional excavation of the property's back yard to achieve intertidal elevations that would support the planting and growth of a total of approximately 4,722 square feet of wetlands vegetation including saltmarsh cordgrass (*Spartina alterniflora*) and saltmeadow hay (*Spartina patens*). In addition to the restoration and creation of vegetated wetlands, the Board required that a 50-foot wide riparian buffer be established landward of the wetlands using approved "bayscaping" techniques.

Mr. Worrell stated that when VMRC staff received and reviewed the after-the-fact application drawings required by the Board, it became apparent that Mr. Milan's activities were not just isolated to areas within the Board's jurisdiction. The application drawings created by Mr. Milan's agent, Waterfront Consulting, Inc., provided pre-dredge and post-dredge survey information clearly depicting that prop-dredging also occurred well channelward of mean low water. Waterfront Consulting estimated that approximately 300 cubic yards of State-owned submerged bottom had been displaced.

Mr. Worrell said that staff issued a Notice of Violation on November 17, 2007, advising Mr. Milan that his activities channelward of mean low water were considered a violation of §28.2-1203 of the Code of Virginia and requested additional information related to his activities. Staff met with Mr. Milan once at a City-sponsored informal meeting and once at his property. Staff also received written correspondence from Mr. Milan as requested

in the Notice of Violation. Staff advised both Mr. Milan and Waterfront Consulting that this violation would be presented to the Commission after the City of Virginia Beach Wetlands Board had acted on his after-the-fact application and issued a formal restoration order.

Mr. Worrell stated that Mr. Milan had admitted to prop-dredging the entire area to help create deeper water adjacent to his pier and property. He indicated that no one aided in his activities and that no other materials were used other than his 16-foot boat and 55 horsepower outboard motor. He insisted that the operation was quite simple in that he would just position his boat with anchor ropes attached to upland stakes and pier piles, and that the activities always occurred during periods of high water. Mr. Milan stated that these activities occurred during the first “couple of months” of 2007, however, he had provided no specific dates or number of days.

Mr. Worrell said that the Virginia Institute of Marine Science (VIMS) evaluation addressed the impacts to both the intertidal and subtidal habitats. Regarding the subtidal, the evaluation stated that dredging shallow water areas destroys important habitat and alters tidal flushing to the extent that pockets of poor water quality could develop. Furthermore, VIMS contended that prop-dredging created significant turbidity in the water column, especially when the sediment included fine-grained material, which can adversely affect water quality for extended periods of time.

Mr. Worrell explained that the U.S. Army Corps of Engineers indicated that they were currently evaluating this case as an unauthorized activity with the intent to issue an after-the-fact permit with mitigation conditions. No enforcement action would be pursued by the Department of Environmental Quality provided that the Corps ultimately issues a nationwide permit.

Mr. Worrell said that while the majority of Mr. Milan’s dredging efforts seem to have been concentrated in the tidal mudflats, according to the pre-dredge and post-dredge bathymetric survey data, his activities also clearly altered and displaced approximately 300 cubic yards of State-owned subaqueous bottom. Staff did not recommend after-the-fact permitting of the dredging, nor would staff have recommended permitting this type of activity had it been presented in an application form before the fact. Also, staff did not endorse attempting to fill the dredged area to its pre-existing contours, as this would certainly result in further disturbance to the marine habitat.

Mr. Worrell stated that although it remained unclear as to how many days or hours Mr. Milan spent prop-dredging the area, staff felt that the impacts to State-owned bottom should be cumulatively considered as one significant violation. Unfortunately, there appeared to be no other recourse than to recommend that civil charges be considered for Mr. Milan based on a *significant* degree of environmental impact and a *major* degree of deviation and non-compliance, in accordance with the Commission’s civil charge matrix. Furthermore, staff also recommended the assessment of \$540.00 in royalties for the

unauthorized dredging of 300 cubic yards of material at triple the maximum allowable rate of \$0.60 per cubic yard.

Associate Member Holland asked if the applicant was present.

Thomas Milan, applicant, was sworn in and his comments are a part of the verbatim record. Mr. Milan stated that he was not denying he did wrong, but he did not know he was in the wrong. He explained that he did the dredging with his vessel. He said he agreed with the \$10,000.00 fine and he was hiring a consultant. He said he had \$20,000.00 in restoration costs that were ordered by the City.

Associate Member Schick asked if he knew how many times or days he did the dredging? Mr. Milan stated that he had done this a few times over the winter. Associate Member Schick asked if it could be 10 times. Mr. Milan stated that that would be the most.

Associate Member McLeskey asked if the City of Virginia Beach was dredging out in front of this property. Mr. Milan responded yes.

Associate Member Tankard asked if this was something that was new to him. Mr. Milan said yes it was and he would need an extension for paying off any fines because of what he was doing in response to actions against him by the City.

Associate Member Holland asked for Commission action.

**After more discussion, Associate Member Tankard stated that larger projects were usually involved with more area, but this was a significant violation. He moved to accept the staff recommendations which included the assessment of a \$10,000 fine. Associate Member Robins seconded the motion. After some discussion with the applicant and at his request, Associate Member Schick suggested that the applicant be granted an extension for payment of the fees until the end of August, 2008. Associate Members Robins and Tankard both agreed to the amendment. The motion carried, 7-0.**

Royalty Fees (dredging 300 cu. yds. @ \$.1.80)(triple).....	\$ 540.00
Civil Charge.....	\$10,000.00
Total Fees.....	\$10,540.00

\*\*\*\*\*

- MARJORIE MASEK, #07-2050**, requests authorization to remove a deteriorated enclosed boathouse and construct a similarly sized 28-foot by 34-foot enclosed boathouse adjacent to her existing private pier situated along Back Creek in Gloucester County.

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

Mr. Neikirk explained that Ms. Masek's property was situated along Back Creek, a tributary of the North River in the Ware Neck area of Gloucester County. Her property was located along the northwest shoreline of the creek and the old boathouse that was proposed to be replaced extends approximately 75 feet channelward of mean high water. Her existing pier extended approximately 50 feet channelward of the boathouse. Development along the creek was primarily residential.

Mr. Neikirk stated that Ms. Masek proposed to remove a deteriorated 28-foot by 34-foot two-slip enclosed boathouse and construct a new 28-foot by 34-foot two-slip enclosed boathouse in the same location. The existing boathouse was very low. The height of the new boathouse would be increased to 17 feet above the pier decking at the peak of the roof. New finger piers were proposed within and outside of the boathouse to provide access.

Mr. Neikirk said that according to her agent, Ms. Masek did not currently own a boat but her son had a 20-foot Proline and her daughter owned a 23-foot Mako. The boathouse was intended to provide a protected mooring for those vessels.

Mr. Neikirk explained that Ms. Masek believed the existing boathouse was constructed in the 30s or 40s. It was in a deteriorated condition and was damaged during Tropical Storm Ernesto. Ms. Masek said they attempted to do some structural repairs after Tropical Storm Ernesto but the current contractor had advised her that the structure needed to be completely replaced.

Mr. Neikirk said that the boathouse would only encroach on oyster planting ground currently leased by the applicant and staff did not believe the project would adversely affect navigation. No one had objected to the project in response to the VMRC public notice and the adjoining property owners indicated they had no objection to the proposal. No State agencies commented on the project.

Mr. Neikirk explained that In 1998, the General Assembly amended §28.2-1203(A)(5) of the Virginia Code to provide statutory authorization for the construction of open-sided boathouses measuring 700 square feet or less and designed to cover a single boat at a private, non-commercial pier, provided the boathouse was not objected to by the adjoining property owners and allowed by local ordinances.

Mr. Neikirk stated that in recent years the Commission had generally been reluctant to issue permits for enclosed boathouses except in situations where the boat intended to be moored within the boathouse was constructed of wood or another material that warranted the additional protection afforded by an enclosed boathouse. In this case, the applicant

did not own a boat. Furthermore, the two boats she admitted might be moored within the boathouse (her son and daughter's) were both constructed of fiberglass.

Mr. Neikirk said that although a deteriorated enclosed boathouse was currently located at the site, staff was unable to conclude that the construction of a new enclosed boathouse was warranted or necessary. The mere pre-existence of a structure on State-owned submerged land did not guarantee any right for replacement structures to remain at the site in perpetuity. Subsequent requests should be evaluated on a case-by-case basis and with due deference to the laws at the time.

Mr. Neikirk stated that after evaluating the merits of the project and considering all of the factors contained in §28.2-1205(A) of the Code of Virginia, staff was compelled to recommend denial of the enclosed boathouse. Staff would certainly be willing to recommend approval of an open-sided boathouse designed to cover two boats provided the square footage of the structure did not exceed 700 square feet.

Bob Winstead with Riverworks and representing the applicant was sworn in and his comments are a part of the verbatim record. Mr. Winstead explained that this boathouse had been in this location for 100± years and there was a similar one across the creek. He said the proposed structure would be within the footprint of the old one. He said there had been no protests and it was in very bad shape, not repairable at all. He said that Jeff Watkins with Riverworks had recommended the entire replacement. He went on to say that he did not see the necessity for a permit because of the Governor's Executive Order with there being no change in size. He said there were two boats that would be kept there. He said that 700 square feet was not enough area to put these boats in and have an open-pile pier in the boathouse to be able to access the boats.

Associate Member Tankard asked if there was a reason for it being enclosed. Mr. Winstead stated that it was just to protect the boats. Associate Member Holland asked what the proposed size was. Mr. Winstead stated 900 square feet.

Marjorie Masek, applicant, was sworn in and her comments are a part of the verbatim record. Ms. Masek stated that she came to this area to be near the water and her research showed that it was originally built in 1912 and later the boathouse was added. She said that this was one of the attractions to the property. She said she had kept it up and in 1998 she had the entire dock repaired and the boathouse stabilized. She said when Isabel hit other structures were washed by the water to her dock and they damaged the pier. She said Jeff Watkins would do the work and the only change would be to heighten the structure. She said she possessed two boats, plus one her grandson had and the water depth was 5 ½ feet at mean low water. She said it was advantageous to the property to replace it as it was. She said she hoped the Commission would approve it.

Associate Member Holland asked if any one else wish to speak. There were none, the matter was before the Commission.

**Associate Member Schick stated that there had been no complaints, the County allowed it, and the structure previously existed, therefore, he moved to approve the request as applied for. Associate Member McLeskey seconded the motion. The motion carried, 7-0.**

Permit Fee.....\$100.00

\* \* \* \* \*

**11. WHITE SAND HARBOUR PROPERTY OWNERS ASSOCIATION, #07-1956**, requests after-the-fact authorization to retain seven (7) 8-foot long by 7-foot wide, open-topped, precast, concrete, hexagonal, offshore breakwater structures and associated support piles, and authorization to replace the remaining existing rectangular breakwater structures with "hexagonal breakwater" structures as needed adjacent to their community property situated adjacent to the Potomac River in Northumberland County.

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

Mr. Madden explained that White Sand Harbour was a residential subdivision located approximately 14 miles east of Heathsville at the confluence of Cubitt Creek and the Potomac River and with a NNE fetch of approximately 25 miles.

Mr. Madden stated that in May of 2005, the Property Owners Association (POA) submitted an application seeking authorization to place approximately 2,400 cubic yards of beach nourishment in association with the deployment of three (3) sections of concrete, precast, rectangular, near-shore breakwaters, referred to by the designer as "Breaker Boxes." These structures were to be deployed approximately 80 feet channelward of mean low water. In all, this totaled 36 individual boxes and a 45-foot long concrete spur, installed adjacent to the community's common area. The wetlands portion of the project was approved by the Northumberland County Wetlands Board on July 17, 2005. The entire project was also authorized by the U.S. Army Corp of Engineers on July 18, 2005.

Mr. Madden said that prior to July 1, 2005, structures that encroached channelward of mean low water along the Potomac did not require permits from the Marine Resources Commission, if the structures were placed entirely in Maryland Waters. As such, staff determined that the Commission had no jurisdiction over the project when the White Sand Harbour application was first reviewed in May 2005. Effective July 1, 2005, however, Section 28.2-101 of the Code of Virginia was added which broadened the Commission's authority to include jurisdiction over all structures and improvements built or proposed by riparian property owners along the Potomac River. While this did not convey ownership of the subaqueous bottom from the State of Maryland to the Commonwealth of Virginia, it did mean that as of July 1, 2005, any structure or

improvement in the Potomac River beyond the mean low water line appurtenant to the Virginia shoreline required a permit from VMRC. Had the project design and materials not been changed, staff would likely not have raised the jurisdictional issue at all since the initial application was prior to the law changing

Mr. Madden explained that in September 2005, the first three (3) breakwaters, (composed of rectangular concrete units) were deployed as originally proposed. The individual concrete units were floated down from an upriver access point and scuttled in place. The near-shore area, inboard of the breakwaters, was also nourished with beach quality sand. Subsequently the breakwater system was apparently extensively damaged by Tropical Storm Ernesto in September 2006. The POA then undertook repairs including altering the design of the breakwater structures

Mr. Madden said that at the present time, the Association would like to retain the seven (7) 8-foot long by 7-foot wide precast hexagonal units replace portions of the damaged break water system and furthermore, be allowed to replace additional portions of the failing breakwater with new hexagonal breakwater units (“Hex Boxes”), as the need arises in the future.

Mr. Madden explained that during a routine compliance inspection on July 9, 2007, Commission staff noted what appeared to be seven (7) hexagonal pre-cast concrete structures that had been incorporated into the breakwater system. In addition, there appeared to be concrete debris littering the river bottom associated with various broken breakwater units. Following that inspection, a Notice to Comply was forwarded to the Association and a JPA requesting after-the-fact authorization quickly followed. A public interest review was conducted. No individual or agency objections to the after-the-fact request were received.

Mr. Madden said that according to the applicant, in October 2006, following tropical storm Ernesto, a decision was made by the POA to remove portions of the damaged “Breaker Box” system and replace them with a newly developed “Hex Box” unit that was being marketed by Seament Solutions, the designer of the original rectangular “Breaker Box” units. Seament Solutions believed the new design to be an improved unit as compared to the original “Breaker Box” design. Since the new hexagonal replacements had a smaller footprint, and no additional beach nourishment was proposed, the POA believed that no additional authorization was required.

Mr. Madden stated that the Virginia Institute of Marine Science, in their Shoreline Permit Application Report, recommended the use of traditional stone breakwater structures in this high energy environment. However, their report pointed out that since there appeared to be some accretion behind the existing structures, there may be some merit in allowing the structures to remain. This would enable further monitoring to assess the sustainability of these structures to be performed. VIMS also recommended additional beach

nourishment to reduce the impact on the downdrift littoral system as a result of the breakwater system. No other agency has objected to the project.

Mr. Madden said that staff continued to be concerned over the use of these non-traditional modular systems deployed in high energy systems where the use of a properly designed riprap breakwater structure was both preferred and likely more cost effective over the long term. However, in consideration of the timing of the original application and the reasons the POA opted for the hex box installation initially, staff believed the applicant should be allowed to retain the seven hex boxes which were deployed after the Commission assumed jurisdiction in the Potomac River, under the condition that ALL of the concrete debris must be removed from the River within 90 days. Should the POA wish to deploy any additional hex boxes, or any subsequently designed structures, a permit application would be required and must be approved before any such action could occur. Should the Commission elect to authorize retention of the existing hex box structures, staff recommended an appropriate civil charge and triple permit fees in lieu of any further enforcement action based on a minimal degree of non-compliance and a minimal degree of environmental impacts.

Associate Member Robins asked if the rationale for the civil charge was because of a departure from the original structures. Mr. Madden responded yes.

Associate Member Schick asked if there would filling done as recommended by VIMS. Mr. Madden stated that it was not mentioned by the applicant.

Bill Estell, Treasurer for the Association and Agent, was sworn in and his comments are a part of the verbatim record. Mr. Estell stated that staff had made an excellent presentation, but he did want to add some more pictures, which he displayed on the overhead projector. He said that the Corp of Engineers issued a permit for this in 2005 and Northumberland County was interested in the beach nourishment. He said that VMRC and Wetlands wanted a breakwater. He said that they met all conditions and it was completed in December 2005. He said that VIMS was concerned about the box breakwater and wanted rocks to be added, but the finances were not available as it was estimated to cost \$800,000. He showed a slide which demonstrated the effectiveness of the breakwater for accumulating sand. He explained that Ernesto devastated the waterfront in Northern Neck. He said it destroyed seven of their rectangular boxes with the wave driven debris. He said these were replaced with smaller, flow-through boxes using 40 square feet instead of the original 80 square feet. He said this was less of an impact on the bottom. He said once these were finished, two Northeasters then caused 5 more to be broken. He said they felt they fell under the Corps' permit issued in 2005 to replace and repair them and there were no changes from the other permit or minor changes. He said in July 2006 the staff from VMRC made a site visit and he was made aware of the jurisdictional changes by staff. He said they filed an after-the-fact application in August 2007. He said they have not been able to repair or modify the breakwaters and now it is two months away from hurricane season. The Corps's permit

**Commission Meeting**

stipulates that no access is allowed on the beach until September 15<sup>th</sup> because of the mating season for Tiger Beetles. He said that he had never seen one and as far as he knew no one else had either. He said he hoped to get approval before the hurricane season as there have been no protests or objections.

Mr. Estell explained that financially they were not able to go any other direction and they requested the Commission issue a permit allowing them to retain the boxes replaced and to replace the 5 broken boxes immediately before June 1<sup>st</sup> and the start of hurricane season. Also, they would like to be able to replace other boxes, as needed, and that no civil charge be assessed since they were carrying out the Corps' permit

Associate Member Holland asked if there were questions. Associate Member Robins asked if the applicant could replace more than the five boxes. Mr. Madden stated that no application or drawing was received. Bob Grabb, Chief, Habitat Management, stated that they can authorize all the hex boxes, but if there was another version, then that was a problem.

Associate Member Robins asked if it should be approved now and require reapplication if there is a modification. Mr. Grabb stated that if it had been applied for prior, staff could have approved, but the after-the-application was for hex boxes and replacement of other boxes as needed with hex boxes. Associate Member Schick asked if the rectangular boxes were the same size as the hex boxes. Mr. Estell responded no, but will be placed in the footprint. He said the contractor can explain this more.

Warren Veazey, contractor, was sworn in and his comments are a part of the verbatim record. Mr. Veazey explained that they would use the existing hex boxes to repair the middle portion and the rectangular boxes to replace the broken rectangular boxes. He said one would be a hex breakwater and the other a rectangular breakwater.

Associate Member Fox asked if the boxes had bottoms. Mr. Veazey said yes with small holes. Associate Member McLeskey asked how they were secured to the bottom. Mr. Veazey said that they used wooden pilings around them and in the hex holes concrete pilings were used and then were joined together.

Associate Member Holland asked for a motion by the Commission. **Associate Member Schick explained that the news does get around slow in his area, as even the County did not know of the change in jurisdiction when they were doing a project. He moved to recommend approval of the application including additional repairs, as necessary. He stated that for anything else they would have to come back with a modification. He said the civil charge would be waived and only the triple permit fee would apply. Associate Member Robins seconded the motion. The motion carried, 7-0.**

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

\* \* \* \* \*

12. **SE VENTURES, #07-1698**, requests after-the-fact authorization to retain one (1) 117-foot long and two (2) 65-foot long hex-shaped concrete breakwater boxes positioned approximately 65 to 80 feet channelward of mean low water, and to install approximately 1,080 cubic yards of beach quality sand material adjacent to property at Eagle Bay situated along the Potomac River in King George County.

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

Associate Member McLeskey left the meeting at approximately 5:38 p.m. for the rest of the meeting.

Mr. Bacon explained that the Eagle Bay Subdivision was an undeveloped residential subdivision approximately 2.5 miles east of Fairview Beach. The Eagle Bay property shoreline was approximately 1,500 feet in length with a sloped bank down to a narrow beach with no forested buffer. It had an unobstructed fetch of approximately 10 miles to the NNW and 12 miles to the NNE. The shoreline of the property downstream of Eagle Bay was undeveloped and forested to the edge of the beach with cliffs of approximately 20 to 30 feet in height, showing some sign of upland erosion. The upstream property was developed with no forested buffer to the shoreline.

Mr. Bacon stated that the shoreline was already protected by several different methods. The upland edge was hardened with a cement “jersey type” retainment wall. There were also several concrete groins on the property as well as the hex and rectangular breakwater boxes offshore. Seament Shoreline Systems Inc., which was owned and operated by Ed and Warren Veazey, designed and managed the installation of all the shoreline hardening structures at the site.

Mr. Bacon said that in April of 2004, SE Ventures (Ed Veazey owner and developer of the Eagle Bay Subdivision) submitted an application (VMRC #04-1017) to install six (6) 100-foot breakwaters approximately 80-feet channelward of mean low water, 600 linear feet of concrete retaining wall, and six (6) concrete groins.

Mr. Bacon explained that prior to July 1, 2005, structures that encroached channelward of mean low water along the Potomac did not require permits from the Marine Resources Commission since the bed of the Potomac lies entirely in Maryland waters. As a result, staff determined that the Commission had no jurisdiction over the project when the SE Ventures application was first reviewed in 2004. Effective July 1, 2005, however, §28.2-101 of the Code of Virginia was added, which broadened the Commission’s authority to include jurisdiction over all structures and improvements built or proposed by riparian property owners along the Potomac River. While this did not convey ownership of the

subaqueous bottom from the State of Maryland to the Commonwealth of Virginia, it did mean that as of July 1, 2005, any structure or improvement in the Potomac River beyond the mean low water line and appurtenant to the Virginia shoreline, required a permit from VMRC. Had the structures been built prior to July 1, 2005, they would not have required authorization from VMRC.

Mr. Bacon stated that the four (4) downriver breakwaters were installed in January 2005. They were constructed of the rectangular concrete units, as proposed. Then, in December of 2006, a 117-foot breakwater was installed upriver of the L-shaped pier. This breakwater was constructed using hex-shaped reinforced concrete breakwater units which were different than those originally proposed. In January of 2007, two (2) 65-foot breakwaters were installed. These smaller breakwaters also utilized the different hex-shaped units. Since the larger 117-foot hex box breakwater was installed in December 2006, and the two (2) smaller 65-foot hex box breakwaters were installed in June of 2007, after the law changed, staff maintains that a modification request or a new Joint Permit Application needed to be submitted since authorization, i.e. a permit, had never been granted and Virginia was now exerting jurisdictional authority over structures placed in the Potomac River. Had the project design, placement and materials not been changed, staff would likely not have raised the jurisdictional issue at all since the initial application was submitted prior to the law changing. The latitude is not unlimited and certainly may not have extended in perpetuity.

Mr. Bacon said that after observing the structures during a routine site inspection nearby, a Notice to Comply was sent to SE Ventures on July 12, 2007. The notice directed either removal of the unauthorized structures within 30 days of their receipt of the Notice, or submittal of an after-the-fact application to retain all or a portion of the unauthorized structures within 15 days of the receipt of the Notice to Comply. On July 30, 2007, staff received an after-the-fact application from SE Ventures to keep the hex type breakwater boxes and to add additional sand as nourishment behind the boxes.

Mr. Bacon stated that in a letter accompanying his after-the-fact application, Mr. Ed Veazey explained that he did not think that he needed a new permit or modification to install the hex type boxes, maintaining that NPN letter never expired, and that the footprint from the hex type box was less than that of the original rectangular seabox<sup>™</sup>. Mr. Veazey also stated that he had received permission from the Army Corp of Engineers to install the hex type breakwaters instead of the rectangular seabox breakwaters they had permitted. Staff assumed this was from the Baltimore District COE but neither Mr. Veazey nor the Corps had explained why VMRC was not notified. The after-the-fact application was then subjected to a standard public interest review process.

Mr. Bacon explained that the VIMS report, dated September 19, 2007, stated that they were still concerned with design of the hex type breakwaters because of wave reflection, scouring and differential settling. During a site visit, Julie Bradshaw from VIMS, noticed scouring in front of the bulkhead and that the footing of the bulkhead was exposed. They

concluded the scouring was from the wave reflection and a lack of wave dissipation due to the vertical face of the bulkhead. VIMS was concerned that the same type of scouring may occur in front of the vertical walled hex breakwater boxes. If permitted, VIMS recommended that a well-designed monitoring program be required and implemented to determine the performance and sustainability of this type of breakwater. No other state agency, adjacent property owner or local residents were opposed to the project.

Mr. Bacon stated that the “unauthorized” or “unpermitted” installation of the 117-foot and two (2) 65-foot hex type breakwater boxes adjacent to Eagle Bay was a result of SE Ventures decision to substitute the rectangular seabox™ structures he applied to install with a hex-type breakwater box design without the necessary prior approval or request to modify their original project through the standard Joint Permit Application and public interest review process. The work was also initiated and completed in 2007, nearly two years after Virginia assumed regulatory authority to permit structures in the Potomac River.

Mr. Bacon said that although their benefit may be limited, as demonstrated by the conditions at the site, removal may be more problematic than allowing them to remain. Accordingly, and given the intervening change in jurisdiction along the Potomac shoreline, staff recommended approval of the after-the-fact request to retain one 117-foot long and two 65-foot long fiber-reinforced concrete hex-shaped breakwater boxes extending approximately 100 feet channelward of mean low water, but to deny the backfill of approximately 1,080 cubic yards of beach quality sand adjacent to property at Eagle Bay. This recommendation for denial was based on the presence of the existing seawall and groins that already act to hold sand along the shoreline creating a small beach area.

Mr. Bacon stated that in addition, if approved, staff recommended the assessment of triple permit fees, and a civil charge of \$1,800 based on minimal environmental impact and a major degree of deviation or non-compliance associated with the project. Staff also recommended that the permittee be required to remove and replace any broken breakwater boxes within 30 days of receiving notice from the Commission. If a different type of breakwater box was desired to be utilized in the future, a Joint Permit Application must be submitted for staff review and Commission approval.

Associate Member McConaugha asked if they used the rectangular boxes would they be in compliance. Bob Grabb, Chief, Habitat Management, said that with the change in the law a new project required a permit if it was not the same as the no permit necessary exemption that was issued.

Associate Member Holland asked if the applicant would speak.

Warren Veazey, applicant, was sworn in and his comments are a part of the verbatim record. Mr. Veazey said that the Corps issued a permit and VMRC issued a no permit

necessary letter. He said that VMRC did not send them any notice that the law had changed and the permits were no longer valid. He said he did not understand why a permit was needed and it was not “grandfathered”. He said the Corps approved the splitting of the breakwaters and there was no mention of a permit from VMRC being necessary. He said he did not see a violation as they were not notified of the change in jurisdiction. He said that VIMS originally in 2004 wanted beach nourishment, now they do not.

Associate Member Holland asked for discussion or a motion.

Associate Member Robins asked VIMS to comment on the beach nourishment issue. David O’Brien, VIMS, said originally they did recommend beach nourishment. He said this was a complicated multiple erosion control system and now they want to remove the groin. He said that it was VMRC that said no beach nourishment, not VIMS. He said he did not agree that the system’s success had been proven, but this would be an opportunity to see and they recommended a monitoring plan be developed. Associate Member Robins asked if VIMS would monitor. Mr. O’Brien stated that they would not monitor, but would give them guidance only.

**After further discussion, Associate Member Tankard stated that after hearing the testimony he moved to approve the permit for the after-the-fact application; allow for beach nourishment with the removal of the groins; not assess fees or civil charges; and allow for monitoring of the structures to determine effectiveness. Associate Member McConaugha seconded the motion. The motion carried, 6-0.**

Royalty Fees (beach nourishment 1,808 cu. ft.  
@ \$0.05/cu. ft.....\$487.50

\* \* \* \* \*

- 13. **OYSTER PLANTING GROUND APPLICATIONS IN MOBJACK BAY; WILLIAM KENTON CARR, #06-063, SHARON CARR, #06-062, AND SHARON CARR AND KENT CARR #06-064, AND KENT CARR SEAFOOD, CO., #06-065; ALONG WITH A PETITION PURSUANT TO THE CODE OF VIRGINIA, 28.2-632, REQUESTING GROUND IN THE SAME AREA OF THE ABOVE REFERENCED APPLICATIONS BE SET ASIDE AS PUBLIC CLAMMING GROUNDS BY THE COMMISSION.** The above-referenced applications are protested by the petitioners and/or others with concerns related to potential conflicts with clamming activities in the area.

Ben Stagg, Chief Engineer, gave the presentation and his comments are a part of the verbatim record.

Mr. Stagg explained that four Applications for Oyster Planting Ground were originally submitted on March 22, 2006. The applications were subjected to the normal public interest review, including publication in a newspaper of local circulation, the Gloucester-Mathews Gazette Journal. The ground had not yet been surveyed.

Mr. Stagg said that staff received a petition on May 22, 2006 requesting that the area encompassed within all four applications be set aside as public clamming ground pursuant to §28.2-632 of the Code of Virginia Section. The petition appeared to be in conformance with the Code Section, noted above. Staff also received a letter of opposition from Marion G. Trush with concerns about the leasing of this area that may be currently used by local watermen for clamming and haul seine activities.

Mr. Stagg stated that while the area was used by local watermen for clamming activities, it did not appear that haul seine activities actually occurred in this area. The offshore areas of the applications also encompassed areas that historically had been leased in the past. There were actually three current active leases in this same area. Staff had not been able to find any record of the inshore area, more shallow area having been leased in the past.

Mr. Stagg said that staff held a meeting at the Gloucester field office in an attempt to resolve this issue with the applicant and Mr. Sammy Coates who represented the petitioners. While Mr. Carr indicated he would be willing to abandon a considerable inshore portion of the applications, Mr. Coates indicated that he believed the watermen he represented were steadfast in requesting that the entire area encompassed by the Carr applications be set aside as public clamming ground.

Mr. Stagg explained that while staff routinely attempted to work with applicants and protestors during the application review process, in this instance no compromise had been made. Staff normally supported the leasing of historically leased areas. Since Mr. Carr had offered a proposed compromise line, staff was also presenting that as one possible solution, although it did include some areas that had never been leased in the past. However, this compromise would still preserve a large inshore portion that could either be removed from the applications and remain vacant, or if the Commission deemed warranted, set aside as public clamming ground as allowed by §28.2-632 of the Code of Virginia. Should the Commission choose to set aside additional public clam ground in this area, staff would prepare a survey plat defining the approved area, to exclude submerged aquatic vegetation, and that would be presented to the full Commission for final approval at a future meeting.

As there were no questions of staff, Associate Member Holland asked for the applicant to come forward and speak. Kent Carr, commercial waterman and seafood buyer, was present and his comments are a part of the verbatim record. Mr. Carr said he was a 4<sup>th</sup> generation waterman. He said that these grounds were lease originally and he should have the right to lease them. He said he was staying under the 250 acres per application

as required. He said the Mobjack Bay was a large area and there were plenty of clamming grounds for the watermen to use in it. He said the watermen have not worked here as it has been leased. He said the inshore area would be good for clam aquaculture and offshore he could plant seed oysters. He said oysters were needed to help the Bay, to clean it up and provide oysters for market. He said he had oyster ground in the James River and he had paid watermen to work it for him and provide oysters for his market. He said the market was not strong and he needed to be able to maintain a continuous supply of oysters to keep it.

Associate Member Holland asked for others to speak.

Sammie Coates, clammer, was sworn in and his comments are a part of the verbatim record. Mr. Coates said that he had a petition with the required number of signatures requesting that this area being requested for leasing be set aside as public clamming grounds. He said he had worked in this area for years. He said that there were no buyers interested in buying clams from the polluted water for the coming season. He said that they need the work and the Commission needed to give the watermen somewhere to work.

Associate Member Holland asked for questions.

Associate Member Fox asked if the area he was requesting was on the left side of the line on the map. Mr. Coates said it was all of that area where there were no stakes. He said he had worked there for 20 years and could make \$200.00 per day.

Associate Member Holland asked for action by the Commission.

Associate Member Schick asked if the catch reports proved this activity. Mr. Stagg said that information was not available quickly, but the Marine Police Officers say that this area is worked by some watermen. Carl Josephson, Senior Assistant Attorney General and VMRC Counsel, said that under the law the Commission could either lease or reserve this area as public clamming ground, but also, do what was best for the Commonwealth.

Mr. Stagg said that staff had received a memorandum from the Mathews County Administrator in support of the local watermen. He said they requested that should the entire area requested be leased, that they be notified as they needed to hold a public hearing on it. He said staff had advertised in the newspaper these applications for lease as required by Code in 2006.

Associate Member Robins asked when these leases became available. Mr. Stagg said they had reverted back to the State in the last eight to ten years for non-payment or non-renewal. Associate Member Robins asked when the application was made. Mr. Stagg responded 2006. Associate Member Tankard stated that this type of information was slowed to get around on both shores.

**Associate Member Tankard moved to approve the pieces of ground that have historically been leased and leave the remainder of the area applied for, as vacant ground for the public to use. Associate Member Fox seconded the motion.**

Associate Member Schick asked if the area was not used over two years does the law allow it to come back to the State to be leased and made productive. He said if there was no activity reported with the catch reports, then it should be leased to be made productive. Rob O'Reilly, Deputy Chief, Fisheries Management, said that the exact area harvested was not being reported as the area description was more general. Mr. Stagg stated that if the area was left vacant anyone could come in and apply for the bottom, unless it was to be set aside. He said this inshore area was public bottom not Baylor. He said the watermen want it all reserved for them and if not, then it would have to be leased, if it were applied for.

**Associate Member Schick made a substitute motion to approve the leasing of the oyster grounds, as applied for. Associate Member McConaugha seconded the motion. The motion failed 2-4.**

**Roll Call Vote:**

<b>Fox</b>	<b>No</b>	<b>Holland</b>	<b>No</b>	<b>Robins</b>	<b>No</b>
<b>Schick</b>	<b>Yes</b>	<b>Tankard</b>	<b>No</b>	<b>McConaugha</b>	<b>Yes</b>

**Associate Member Holland asked for a vote for the original motion by Associate Member Tankard. The motion carried, 5-1. Associate Member Schick voted no.**

\* \* \* \* \*

**14. PUBLIC COMMENTS:**

**Kent Carr**, waterman and seafood business owner was present and his comments are a part of the verbatim record. Mr. Carr requested that the Commission consider the extension of the hand tong season in the James River, which ends April 30<sup>th</sup>, through to the end of June. He said this would give the watermen work to do instead of harvesting the crabs, which would help the crabs.

Jack Travelstead, Chief Deputy, Fisheries Management, explained that the Blue Ribbon Oyster Panel recommendation was to set the harvest seasons one time a year and not to change it periodically. Associate Member Robins stated that he was on this panel and it was a clear consensus by the panel that the Commission avoid "piece-mealing" changes in the seasons.

No action was taken.

**Tom McDermott**, resident of Buckroe Beach in the City of Hampton, was present and his comments are a part of the verbatim record. Mr. McDermott explained that at the last meeting the Commission approved the City of Hampton’s proposal to construct a pier in the Buckroe Beach area immediately adjacent to the subdivision where he lived. He stated that the Deputy City Attorney had stated that a City ordinance would be changed by City Council allowing him to utilize the area of the pier with his boat within 100 feet of the structure. He said it says that in the Commission minutes from the February meeting. He said that the ordinance now says no boat launching with 300 feet of the structure or be guilty of a class one misdemeanor. He said the City Council rejected the request for the ordinance change. He said that he felt that the Commission had based their approval on this change being made so as to not infringe on the rights of the residents of that subdivision to access the water. He said that he was looking for help in this matter.

Associate Member Robins said that he remembered that this would be done. He asked VMRC Counsel to comment.

Carl Josephson said that the City said this, but no one can bind legislation ahead of time. He said this would have to be a court decision. Associate Member Schick asked if this could be made a requirement of the permit. Mr. Josephson stated it could not.

Mr. McDermott stated that he thought the Commission’s decision was based on this riparian issue. Mr. Josephson explained that the decision was based on a variety of other reasons and could not say it was based on this issue.

No action was taken.

\* \* \* \* \*

**17. DISCUSSION:** Establish the 2008 commercial harvest quota for the Bluefish; request for a public hearing.

Joe Grist, Head, Plans and Statistics, gave the presentation. His comments are a part of the verbatim record. Mr. Grist stated that this was a request for a public hearing.

**Associate Member Robins moved to approve. Associate Member Tankard seconded the motion. The motion carried, 6-0.**

\* \* \* \* \*

**18. DISCUSSION:** Recommendations of the Recreational Fishing Advisory Board (RAFB).

Sonya Davis, Fisheries Management Specialist, Sr., gave the presentation. Her comments are a part of the verbatim record.

Ms. Davis explained that in November the RFAB approved the expenditure of \$173,151 for this project. The Commission review of the expenditure was delayed until the Town of Saxis had the appropriate permit and at the February 26, 2008 Commission meeting, the Board authorized the public fishing pier expansion.

Ms. Davis stated that staff recommended the funding of this project.

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

\* \* \* \* \*

**19. STRIPED BASS:** Review of the 2007 Commercial Fishery ITQ Program.

Jack Travelstead, Chief Deputy, Fisheries Management, requested that due to the lateness of the meeting that this matter be deferred until the next month's meeting. The Board agreed with his request.

No further action was taken.

\* \* \* \* \*

There was no further business and the meeting was adjourned at approximately 6:49 p.m. The next meeting will be Tuesday, April 22, 2008.

\* \* \* \* \*

---

Steven G. Bowman, Commissioner

---

Katherine Leonard, Recording Secretary