

## MINUTES

**Commission Meeting****March 22, 2005**

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:

William A. Pruitt )	Commissioner
Ernest N. Bowden, Jr. )	
S. Lake Cowart )	
Russell Garrison )	
J. T. Holland )	Associate Members
Cynthia M. Jones )	
F. Wayne McLeskey )	
Richard B. Robins, Jr. )	
Kyle J. Schick )	
Carl Josephson	Sr., Assistant Attorney General
Col. Steve Bowman	Deputy Commissioner
Katherine Leonard	Recording Secretary
Andy McNeil	Programmer Analyst, Sr.
Wilford Kale	Senior Staff Advisor
Jane McCroskey	Chief, Admin./Finance Div.
Jack Travelstead	Chief, Fisheries Mgt. Div.
Rob O'Reilly	Deputy Chief, Fisheries Mgt. Div.
James Wesson	Head, Conservation/Replenishment
Roy Insley	Head, Plans and Statistics
Stephanie Iverson	Fisheries Management Spec., Sr.
Lewis Gillingham	Fisheries Management Specialist
Ellen Cosby	Fisheries Management Specialist
Tara Scott	Fisheries Management Specialist
Kelly Lancaster	Fisheries Management Specialist
Lt. Col. Lewis Jones	Deputy Chief, Law Enforcement
Captain Randy Widgeon	Eastern Shore Area Supervisor
Captain Warner Rhodes	Middle Area Supervisor
Captain Ray Jewell	Northern Area Supervisor
Captain Kenny Oliver	Southern Area Supervisor
MPO Keith Nuttall	Marine Police Officer

**Commission Meeting**

**13119  
March 22, 2005**

MPO Thomas Moore

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.

Jay Woodward

Environmental Engineer, Sr.

Ben Stagg

Environmental Engineer, Sr.

Traycie West

Environmental Engineer, Sr.

Justin Worrell

Environmental Engineer, Sr.

Randy Owen

Environmental Engineer, Sr.

Hank Badger

Environmental Engineer, Sr.

Benjamin McGinnis

Environmental Engineer, Sr.

Virginia Institute of Marine Science (VIMS)

Tom Barnard

Lyle Varnell

Roger Mann

Other present included:

Walter Hodges

Doug Martin

Roger McKinley

Linda F. Bell

Roger Parks

Warren Bell

Jean White

Arnold White

Mary Evans

Gordon Evans, Sr.

J. Rawleigh Simmons

Patrick Boone

Bob Livenwood

J. T. Weakley

R. Summers

Dan Wagoner

Ron Pack

Ranmy Pack

Eric Speth

Harrison Bresee

Rebecca Francese

Chuck Joyner

Jim White

Elizabeth Connito

Charles E. Bainley

Matt Overton

Bill Cage

T. Judson Wright

James Brawley

Anne Smith

Jan Marshall

Steve Pruitt

Tammy Mason

Jeff Harmon

Douglas F. Jenkins, Sr.

Russell Gaskins

Jan Haigh

A. J. Erskine

Joe Shelton

Bob Reed

Dan Bacot

Tommy Leggett

Tom Powers

Robert Johnson

Frances W. Porter

Susan S. Gaston

Phil Olekszyk

Kelly Place

and others

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Commissioner Pruitt called the meeting to order at approximately 9:35 a.m. Associate Member Jones and McLeskey both arrived late at approximately 9:50 a.m.

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Associate Member Garrison gave the invocation and Carl Josephson, Senior Assistant Attorney General, led the pledge of allegiance to the flag.

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

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**Approval of Agenda:** Commissioner Pruitt asked for any changes to the agenda or a motion. Bob Grabb, Chief, Habitat Management, said that there was an additional page two item, which would be item L, Buchanan County Public Service Authority, #05-0371. Lewis Jones, Deputy Chief, Law Enforcement, asked that Item 21, Repeat Offender, be moved forward as early as possible as it involved only one individual who was present. **Associate Member Holland moved to approve the agenda with the changes. Associate Member Schick seconded the motion. The motion carried, 6 - 0.**

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**21. REPEAT OFFENDER: (This item was heard at this point in the meeting at the request of staff.)**

Lt. Col. Lewis Jones, Deputy Chief, Law Enforcement Division, gave the presentation. His comments are a part of the verbatim record. He said Mr. West was brought before the Commission to consider revoking his licenses and permits. He said that Mr. West had been to court on appeal, January 21, 2005, and was convicted and fined for the charges. When asked to explain the fines involved, Lt. Col. Jones said Mr. West was only fined for the untagged striped bass for \$436.00 and nothing for the under and over sized fish. He said also that Mr. West was very cooperative with the Marine Police Officer. He further explained that Mr. West had not been before the Commission before this time.

J. C. West, Jr., Commercial Waterman - Convicted of possession of untagged striped bass and oversize and undersize striped bass in violation of Regulation 4VAC 20-252-10.

J. C. West, Jr. was present and his comments are a part of the verbatim record. Mr. West explained that the quantity of the striped bass in the targeted croaker catch was so great they worked several hours trying to remove and throw back the striped bass, but did not get them all removed. He explained that normally they would have some striped bass tags on board the vessel but on this occasion they did not as they did not expect striped bass to be in the vicinity at this time of year. He said this was very unusual for the striped bass to even be in the area at that time of year.

Associate Member Bowden asked Mr. West if he tried to sell the striped bass. Mr. West responded, no.

Associate Member Bowden said that in this case probation was appropriate. Mr. West did not attempt to sell the striped bass and it was unusual for the rockfish to be in the area this late in the year. He felt this case should be treated as a repeat offender, not as a violation of the rockfish regulation.

Associate Member Bowden made the motion to consider this a 1<sup>st</sup> time repeat offense and give Mr. West 6 months probation. Carl Josephson, Senior Assistant Attorney General and Counsel for VMRC, explained that the first time with 3-offenses required a 12-month probation.

**Associate Member Bowden moved for a 12-month probation. Associate Member Cowart seconded the motion. The motion carried, 6-0.**

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**MINUTES:** Commissioner Pruitt asked for a motion for the February 22, 2005 meeting minutes. **Associate Member Cowart moved to approve the minutes as presented. Associate Member Garrison seconded the motion. The motion carried, 6-0.**

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Associate Members Jones and McLeskey both arrived at the meeting at approximately 9:50 a.m.

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- 2. **PERMITS:** Bob Grabb, Chief, Habitat Management, gave the presentation on Page Two items, A through L, and his comments are part of the verbatim record. Page Two items are projects that cost more than \$50,000, are unprotested, and for which staff is recommending approval.

There were no questions of staff and no one was present from the public to comment either pro or con.

**Associate Member Schick moved to approve the page two items, 2A through 2L. Associate Member Garrison seconded the motion. The motion carried, 8-0.**

**2A. PACK FAMILY LIMITED PARTNERSHIP, #04-2454,** requests authorization to install and backfill up to 322 linear feet of fiberglass bulkhead; construct a 20-foot by 320-foot marginal wharf adjacent to the proposed bulkhead; construct new floating piers and finger piers to create 24 wetslips for boats up to 50 feet in length, one (1) slip for a boat up to 100 feet in length, and 12 transient slips; and install up to 14 new pilings up to ten feet channelward of existing piles at slips 2-14 to accommodate larger vessels. All proposed activities are at and adjacent to their existing marina/restaurant/hotel facility along the Pagan River in the Town of Smithfield.

Royalty Fees (Dredge 3,200 cubic yards @\$0.45/cu. yd.).....\$1,440.00  
Permit Fee.....\$100.00  
Total Fees.....\$1,540.00

**2B. DOMINION VIRGINIA POWER, #04-2685,** requests authorization to install by directional drill, embedment plow and direct burial, a new 35 KV electric power transmission cable under the Nansemond River in the City of Suffolk.

Permit Fee.....\$100.00

**2C. DEPARTMENT OF THE ARMY, #04-2889,** requests authorization to install by directional drilling, approximately 175 linear feet of 8-inch diameter waterline crossing of Dogue Creek, adjacent to U.S. Army Garrison, Fort Belvoir in Fairfax County.

Permit Fee.....\$100.00

**2D. DOMINION TERMINAL ASSOCIATES, #04-2850,** requests authorization to construct a 15-foot wide by 420-foot long addition and a 65-foot wide by 610-foot long addition to an existing 1,060 foot long concrete pier to facilitate installation of a new conveyor belt and traveling hoppers necessary to accommodate self-unloading vessels and bulk carriers at their existing facility on the James River in Newport News.

Permit Fee.....\$100.00

**2E. JAMESTOWN-YORKTOWN FOUNDATION, #04-2280,** requests authorization to maintenance dredge approximately 9,000 cubic yards and 13,000 cubic yards of new material to provide maximum project depths of minus 17 feet MLW in the basin/inner channel area and minus 19 feet MLW in the outer

channel area of Jamestown Settlement Park situated along the James River in James City County. The applicant proposed to place all of the dredged material in an unconfined manner in a previously used area of the James River just downstream. Recommend a one-time approval for this dredging contingent on a time of year restriction that prohibits any overboard disposal between February 15 through June 30 to protect anadromous fish species.

Permit Fee.....\$100.00

**2F. DICKENSON COUNTY BOARD OF SUPERVISORS, #05-0179**, requests authorization to construct a 200-foot long by 4-foot wide suspension bridge across the Pound River and a 55-foot long by 4-foot wide timber truss bridge across Cane Branch to facilitate construction of the Haysi-Breaks Trail in Dickenson County.

Permit Fee.....\$100.00

**2G. VIRGINIA COMMONWEALTH UNIVERSITY, #04-2266**, requests authorization to construct a 10-foot wide by 161-foot long open-pile timber pier with two (2) 1,476 square foot partially-enclosed, three slip boathouses, a 12-foot wide by 24-foot long floating research platform and a 705 square-foot T-head dock for use by the Virginia Commonwealth University Life Sciences program and the Department of Game and Inland Fisheries Law Enforcement and Fisheries programs at property situated along the James River approximately one mile downstream of the Benjamin Harrison Bridge in Charles City County.

Permit Fee.....\$100.00

**2H. DOGWOOD, L.L.C., #04-1363**, requests authorization to install a 37-foot by 60-foot clear span bridge over Falls Run, a tributary to the Rappahannock River, to serve as the main entrance into the Carriage Hills at Falls Run subdivision in Stafford County. The bridge will span approximately 20 feet of State-owned subaqueous bottom and remain a minimum of 15 feet above ordinary high water.

Permit Fee.....\$100.00

**2I. NEW RIVER REGIONAL WATER AUTHORITY, #04-2106**, requests authorization to cross the New River with a 24-inch diameter water line which will be suspended on the Rt. 636 bridge superstructure at an elevation of 35 feet above ordinary high water near Austinville in Wythe County. All construction will occur from the bridge and there will be no disturbance to the riverbed or banks. The water line will be part of a regional water system serving Carroll County, Wythe County and the Town of Wytheville.

Permit Fee.....\$100.00

**2J. HENRY COUNTY PUBLIC SERVICE AUTHORITY, #02-0479,** requests authorization to install, by directional drill method, 125 linear feet of a 10-inch force main sewer line located a minimum of 7 feet beneath the existing stream bed of the Smith River in Henry County. This installation is part of the Lower Smith River Sewer Project that will allow closure of Henry County Public Service Authority’s Lower Smith River Wastewater Treatment Plant, while directing sewage to the City of Martinsville for treatment.

Permit Fee.....\$100.00

**2K. WISE COUNTY PUBLIC SERVICE AUTHORITY, #05-0055,** requests authorization to install a submerged waterline beneath 42 linear feet of the North Fork Pound River at two locations near State Route 671 and 707 in Wise County. Recommend approval with our standard instream permit conditions.

Permit Fee.....\$100.00

**2L. BUCHANAN COUNTY PUBLIC SERVICE AUTHORITY, #05-0371,** requests authorization to install an aerial waterline across the Levisa River at two locations, as attachments to the North and South Bridges, adjacent to Riverside Drive (US Route 460) in the Town of Grundy.

Permit Fee.....\$100.00

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**3. CLOSED SESSION.** No closed session was held.

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**4. GAPS MARINA, #02-0408.** Continuation of the public hearing on the applicant’s request to repair and replace an existing, previously undocumented 26-slip commercial marina adjacent to property situated along Slough Creek in Northumberland County. Adjacent property owners protested the project.

Jeff Madden, Environmental Engineer, Sr., was present. His comments are a part of the verbatim record.

Commissioner Pruitt explained this matter had been tabled at the last meeting in order to allow the protestant of the project an opportunity to address the Commission. He stated that only the protestant, and the applicant in a rebuttal statement, would be allowed to

address the Commission at this time. He said it was not necessary to rehear all the testimony heard at last month’s meeting.

Both Gordon Evans, Sr. and Mary Elizabeth Evans, protestants were present. Mrs. Evans comments are a part of the verbatim record. She had some photos that she shared with the Commission. She asked that the 2<sup>nd</sup> largest building be brought back closer to the land. She said the marina had been in operation for 34 years and that Mr. Jett, one of the previous owners, had told them that he had his permits when he was questioned about this structure when it was first built. She said she has tried to get in touch with the current applicants to discuss the project with no success.

Patrick Boone, the applicant made rebuttal comments, which are a part of the verbatim record. Mr. Boone said Mrs. Evans should have protested the project earlier. In response to Mr. Schick’s question if he intended to repair the building, Mr. Boone responded, yes.

**Associate Member Holland moved to accept staff recommendations. Associate Member Schick seconded the motion.** Associate Member Robins agreed that the permit process may have been railroaded initially, but the Corps of Engineers had decided the project was “Grandfathered” and he supported the motion for that reason. Associate Member Cowart stated that the Evans were not given the opportunity to speak to the project before it was constructed, but there was a need to consider if the project request was reasonable. He said he could not support the motion. Associate Member Schick suggested to the applicant that in the future, should there be a need to tear it down and rebuild the structure, that it be moved back at that time. He said to require that now would make the project cost a lot more. **The motion carried, 7-1. Associate Member Cowart voted no.**

Permit Fee.....\$100.00

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- 5. **SLOOP POINT, LLC, #04-2559**, requests authorization to construct a 75-foot long by 6-foot wide community pier extension with two (2) 10-foot long by 5-foot wide finger piers and 13 mooring piles to create five (5) additional wet slips, and to construct a 75-foot long vinyl sheet-pile bulkhead and quarry stone breakwater to protect the slips and install 145 linear feet of vinyl sheet-pile replacement bulkhead at an existing community marina facility at the Sloop Point development at the confluence of Mulberry Creek and the Rappahannock River in Morattico, Lancaster County. Three nearby residents protested the project.

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

Commissioner Pruitt left the meeting at 10:16 a.m. Associate Member Cowart was acting as chair for this matter.

Mr. Woodward explained that the project was located on property formerly known as RCV Seafood, which lies on a peninsula of land between House Cove, Mulberry Creek and the Rappahannock River in upper Lancaster County. In March 2003, a VMRC permit was issued to Mr. Weston Conley of RCV Seafood for mooring facilities and shoreline structures on the cove side of the property in anticipation of the conversion of the facility to an 18-unit waterfront, residential condominium development. The permit authorized maintenance dredging, a boat ramp, riprap, replacement bulkhead, and piers and pilings to create eight (8) additional slips for a total of 18 slips to serve the condos. Although the permit authorized 18 slips, the drawings depicted only 13 slips. When staff brought this discrepancy to the attention of the applicant's agent, staff was told that the remaining slips would be provided along a proposed pier extension. Revised drawings depicting the remaining slips were never provided, and the permit document was executed on March 5, 2003.

Mr. Woodward said that the original request was for the addition of five (5) slips and a protective bulkhead and riprap breakwater structure that would extend 75 feet to the east of the point, and 145 linear feet of vinyl sheet-pile replacement bulkhead behind the previously authorized slips. In an attempt to address the concerns of the protestants, the agent submitted a revision on January 26, 2005, that would move two of the five proposed slips into the basin. This would reduce the pier and breakwater structure to three slips, extending 45 feet from the point. The revision was forwarded to the protestants for their consideration. None of them, however, have withdrawn their opposition as a result of these revisions.

Mr. Woodward stated that three property owners with land across the cove had protested the proposed pier and breakwater extension for the five (5) additional slips. Mr. Roger Parks, a commercial waterman with a crab shedding facility across the cove, was concerned that the structure would impact tidal flow in the area, resulting in siltation and adverse impacts to living marine resources in the creek and cove. Mr. Parks felt that the applicant had options on the riverside portion of the property for additional slips that would have less impact.

Mr. Woodward said Ms. Linda Bell owned three-plus acres with 180 feet of waterfront on Mulberry Creek at the mouth of the cove. She was concerned that the proposal would adversely impact the tidal flow and wildlife, as well as her view and property value. Mr. Woodward said that Ms. Alva Lee Barnes lived adjacent to Ms. Bell and was concerned that the additional boat traffic coming into the cove would generate damaging wakes. She suggested that installation of channel markers and speed limit signs, to guide boat operators and remind them to watch their wake, would help address her concerns.

Mr. Woodward explained that the Virginia Institute of Marine Science indicated that the cumulative impacts expected to result from the 75-foot pier and breakwater extension were not desirable from an environmental perspective. They felt five additional slips would increase incidental pollution and shoreline erosion in the area. VIMS also indicated that tidal exchange into House Cove might be affected and recommended that any new slips be contained within the previously approved maintenance dredge area and that there be no overnight occupancy of vessels at the facility.

Mr. Woodward said that the Department of Health indicated that the project was in compliance with the Sanitary Regulations for Marinas and Boat Moorings and had therefore approved the project. The Department of Conservation and Recreation did not anticipate that the project would adversely impact any natural heritage resources in the area. The Department of Game and Inland Fisheries indicated there were several bald eagle nests within one to two miles of the project site, but they did not anticipate a significant adverse impact on bald eagle nesting. They did recommend a time-of-year restriction from February 15 to June 30 to minimize impacts to anadromous fish species.

Mr. Woodward stated that since the proposed project would only impact State-owned bottom, a permit was not required from the Lancaster County Wetlands Board.

Mr. Woodward explained that given the VIMS comments and the concerns raised by the protestants, staff recommended denial of the proposed pier and breakwater structure, regardless of the length. Staff did not object to the bulkhead replacement adjacent to the existing pier and slips, and given the Commission's previous decision, staff did not object to a maximum of 18 slips within the boundaries of the existing boat basin. Staff believed it was incumbent upon the applicant to redesign the layout of the existing boat basin to facilitate the addition of the five (5) additional slips needed to accommodate the 18 condominium units.

Roger McKinley, representative for the applicant and Project Manager, was sworn in and his comments are a part of the verbatim record. Mr. McKinley said that the applicant was originally granted a permit for 18 slips in February 2003. This permit expires in February 2006. He explained that the bulkhead and riprap were added, but not the 5 slips. He said as a permit was given in 2003 it had not been necessary to bring the matter to the Commission. He said this was a revision to locate 5 slips on the cove. He utilized staff slides in his presentation. He said the 96-foot pier was in accordance with the 2003 permit. He read the Commission's letter authorizing the 5 additional slips.

Mr. McKinley stated that Mr. J. Rawleigh Simmons, Attorney for the Applicant, wished to speak after the others had made their comments.

Commissioner Pruitt returned at 10:37 a.m., but Associate Member Cowart continued as acting chair.

Associate Member Cowart swore in all protestants who indicated they wished to address the Commission.

Linda Bell, protestant, was sworn in and her comments are a part of the verbatim record. Ms. Bell said that she was directly affected by the breakwater and pier. She further said that she opposed the 5 piers and had only received the 3-pier revision when she arrived at the hearing. She said the cove is impacted by traffic now and there were other options available to the applicant. She said that there were other boats in the cove and that she had a 21' boat. She said she was concerned that these residents might want even larger boats and there was just not enough room. She said she comes from the DC area and this was her retirement home. Associate Member Garrison asked if she would be interested in a breakwater at the end of the point. Ms. Bell said no, that would change the ingress and egress of the water and create more mud and dirt. Associate Member Robins asked her to point out where her property was. Ms. Bell, utilizing a staff slide of the creek and cove, responded that she was right in the middle.

Roger Parks, protestant, was sworn in and his comments are a part of the verbatim record. Mr. Parks stated he was strongly opposed to the breakwater because it would change the flow of the water in the cove. He expressed concern that the dredging would occur during the crab shedding season. Mr. Woodward responded that it was maintenance dredging, and that was prohibited during that time.

J. Rawleigh Simmons, Attorney for the applicant, was present and his comments are a part of the verbatim record. Mr. Simmons stated that the water depth in the area limited the size of the project, but that this was a good project. He said the applicant had complied with the staff recommendations. He said they were requesting approval of the revised project.

Roger McKinley, representative for the applicant and Project Manager, made rebuttal comments.

Associate Member Cowart asked for a motion.

**Associate Member Garrison moved to approve the project as recommended by staff. Associate Member Holland seconded the motion. Associate Member Bowden said that Mr. Parks' concerns were true and legitimate. Mr. Bowden explained that he wanted to amend the motion to require the last 2 slips to be removed from where they were proposed and placed on the other side. Associate Member Garrison said he did not agree to the amendment.**

**Associate Member Robins offered a substitute motion. He moved to accept the staff's recommendations with the amendment suggested by Associate Member Bowden to put the 2 slips channelward and to allow the construction of the pier extension. Associate Member Jones seconded the motion. Associate Member Schick**

**asked if this allowed for the pilings. Associate Member Robins stated he would accept an amendment to allow for the pilings as a part of the 18 slips. Associate Member Jones agreed to the amendment. The motion carried, 5-4. Commissioner Pruitt and Associate Member Cowart both voted yes. Associate Members Schick, Holland, Garrison, and McLeskey all voted no.**

Permit Fee.....\$100.00

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- 6. **CITY OF NORFOLK, #04-1403**, requests authorization to dredge, by clamshell method, a maximum of 28,500 cubic yards of State-owned submerged land to create a 6,400 foot long channel with widths varying between 25 and 40 feet and possessing maximum depths of minus five (-5) feet below mean low water, and permission to maintenance dredge up to a maximum of 15,000 cubic yards of subaqueous material on an as-needed basis, adjacent to properties situated along the western shore of Broad Creek in Norfolk. Several local residents protested the project.

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

Associate Member Cowart left the meeting at approximately 10:55 am.

Ms. West explained that Broad Creek was a shallow tributary to the Eastern Branch of the Elizabeth River. A majority of the creek possesses mean low water depths averaging around one and a half feet. Depths downstream of the Interstate 264 bridge range from 3 feet near the bridge to six feet near the mouth of the creek. The channel as proposed would taper from a 40-foot width near the mouth to 25-foot width at the upstream terminus. As proposed, the channel would be dredged to a depth of minus five (-5) feet at mean low water and would connect with controlling depths near the mouth of the creek. Access to the creek is limited by clearance under the railroad bridge adjacent to the I-264 bridge. Vertical clearance under that bridge was reported to be 7 feet at mean high water.

Ms. West said that the dredging would be conducted mechanically, by clamshell method, with all dredged materials being transported to Craney Island for disposal. The material to be dredged was predominately comprised of silt and sand.

Ms. West stated that no wetland areas were to be impacted by this proposal. The entire project would take place in State-owned subaqueous bottom areas. There were no oyster ground leases in the waterway.

Ms. West said that this project proposal represented a revision from the original project proposal that was first submitted for review in 2001. That application, which was

inactivated, proposed impacts to wetlands and excessive channel widths, both of which had been eliminated with the current project design.

Ms. West stated that to date, staff had received seven (7) applications for dredging of ancillary access channels and/or construction of piers to connect to this channel. While all the proposed piers qualified for statutory authorization under Section 28.2-1203(A)(5) of the Code of Virginia, staff had held all associated dredging projects in an inactive status pending the Commission's decision on the City's dredging proposal.

Ms. West said that Wetlands Watch, Inc., a citizens action group, was opposed to the project. Their objections concerned the potential cumulative impacts of ancillary dredging projects on the shallow water habitat areas within the watershed. Wetlands Watch wanted the Commission to impose a prohibition on further dredging within Broad Creek, with the exception of future maintenance dredging of this proposed channel and any small homeowner channels accessing this proposed channel. They also believed that mitigation for impacts to shallow water habitat should be required and that a "No Wake Zone" should be established within Broad Creek.

Ms. West said that the Virginia Institute of Marine Science (VIMS) noted that the water quality and benthic community impacts associated with the project appeared to be temporary in nature. The Department of Environmental Quality planned to issue their permit in the coming weeks.

Ms. West explained that staff believed the proposed dredging project was reasonable. There were no wetland impacts proposed. Through several revisions, it appeared the applicant had attempted to minimize the adverse impacts associated with the project. Ms. West further explained that staff did not believe that a restriction on possible dredging projects within Broad Creek was an appropriate course of action at this point in time. Since any future requests for dredging would be subjected to a full public interest review upon receipt of the required permit application, the public would have an opportunity to evaluate the impacts associated with each dredging proposal. Further, the establishment of "No Wake Zones" was not within the purview of this agency. The City of Norfolk would have to request their establishment through an application to the Department of Game and Inland Fisheries.

Ms. West stated that, accordingly, staff recommended approval of the project with the provision that requirements for a pre-dredging conference and a post-dredging bathymetric survey be included in the permit. In addition, the applicant should be advised that any channel or basin area dredged deeper than the allowable six-inch overdredge tolerance would be considered a violation of the Commission's permit and subject to enforcement action.

Charles B. Joyner, City Engineering office representative, was present and his comments are a part of the verbatim record. Mr. Joyner explained that dredging on the other side of

the creek to serve only one property owner was not feasible at this time. Mr. Joyner said they were working with VDOT regarding access under Interstate 264, but that their process takes longer. Associate Member Garrison asked what they would do if VDOT did not give their approval. Mr. Joyner said that they would exhaust the appeal process to the fullest at that point.

No one in opposition was present to comment on the project.

**Associate Member McLeskey moved to approve the City of Norfolk permit request #04-1403, with staff recommendations. Associate Member Robins seconded the motion. The motion carried, 6-0-1. Associate Member Schick abstained from voting because of business conflicts. Associate Member Cowart had not yet returned to the meeting.**

Permit Fee.....\$100.00

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- 7. **DAVID EBERWINE, #03-0107**, requests authorization to construct a 14-foot by 14-foot octagonal gazebo at the end of an existing pier adjacent to the applicants property situated along Bennett Creek, a tributary to the Nansemond River in the City of Suffolk.

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

Mr. Stagg explained that the project was located along Bennett Creek, a tributary to the Nansemond River upstream of the Route 17 Bridge in the City of Suffolk.

Mr. Stagg said that on January 21, 2003, Mr. Eberwine submitted a Joint Permit Application, seeking authorization to construct a 5-foot by 96-foot open-pile private pier, to include a 14-foot by 14-foot octagonal head; a 12-foot by 48-foot floating tending dock and 47 feet of 4-foot wide catwalk pier, as well as, to install three mooring pilings to create one wet slip adjacent to his property. At that time, the project qualified for a permit exemption provided by Code and on April 21, 2003 a no permit necessary letter was sent to the applicant.

Mr. Stagg stated that on June 23, 2003, Mr. Eberwine submitted a request to modify his previous application to include the construction of a 14-foot by 14-foot octagonal gazebo. Mr. Eberwine stated that he wished to have this structure to provide shelter for his 78-year old father who lived on the adjoining property. He noted that his father had a history of multiple skin myelomas and had had numerous cancerous tumors removed as recently as March of 2002. Additionally, Mr. Eberwine noted that his mother was also undergoing radiation therapy and cancer treatments. According to Mr. Eberwine, construction of the

gazebo would provide his mother and father with critical sun protection since both suffer from cancer.

Mr. Stagg explained that staff subsequently requested additional information, specifically the precise dimensions and height of the proposed structure. Based on the information provided on September 3, 2003, the actual roof dimensions would be 17 feet by 17 feet and a height of 15 feet above the pier deck.

Mr. Stagg further explained that as adopted by the Commission at its July 2003, meeting, water dependent meant *those structures and activities that must be located in, on or over State-owned subaqueous lands*. This definition does not prohibit the Commission from issuing a permit for structures over State-owned submerged lands that are not water dependent, provided the Commission determines that the use is a reasonable one and sets forth a rationale for such a finding on a case by case basis.

Mr. Stagg said it should be noted that the Commission had previously denied similar structures and ordered the removal of roof structures on piers that were constructed without proper authorization. Two such cases were the Evelyn case (#00-0519) in New Kent County and Dr. Bauer (#02-2020) in Hampton. The Evelyn decision was appealed and the Circuit Court had upheld the Commission action ordering removal, specifically noting that structures on piers (other than boathouse roof structures) were clearly not authorized by 28.2-1203(A)5 nor were they water-dependent by their nature. The court further stated that without the water dependency criteria, riparian owners would be allowed unfettered rights to construct non-water dependent structures, of whatever nature, on piers built over the Commonwealth's submerged bottomland. The Court also noted that its decision was consistent with the public trust doctrine. In Dr. Bauer's case the Commission directed the removal of the unpermitted roof structure within 60 days. Dr. Bauer had already complied with that order.

Mr. Stagg stated that the City of Suffolk Wetlands Board had indicated that the project did not require a wetlands permit and no other agencies had commented on the proposal.

Mr. Stagg informed the Commission that the oyster ground leaseholder was notified of the proposal and staff did not receive any comments, pro or con, from them.

Mr. Stagg said that based on the criteria adopted by the Commission for water dependency and in an attempt to maintain consistency with the public trust doctrine, and past Commission actions, staff recommended the request for the gazebo structure be denied.

David Hawthorne Eberwine, applicant, was sworn in and his comments are a part of the verbatim record. Mr. Eberwine said they were requesting the roof for his parents at the end of the pier and because he felt the gazebo enhanced the pier. He said he had a ½ mile of property. He explained that the newspaper advertisement had resulted in no

objections. He said that this request should be considered as an exception to the Code. He said this same thing had been done by others without proper permits and yet they were following the proper procedures to seek approval.

Associate Member Cowart returned at approximately 11:12 a.m.

No one was present at the hearing in opposition to the project.

**Associate Member Schick moved to deny the project as proposed. Associate Member Garrison seconded the motion. Associate Member Robins stated that the gazebo was not water dependent and he could not support it. The motion carried, 7-0-1. Associate Member Cowart abstained.**

No fees applicable, permit denied.

\* \* \* \* \*

- 8. WALTER HODGES, #03-2515**, requests authorization to dredge 1,624 cubic yards of subaqueous material to create a 170-foot long by 20-foot wide access channel and a 122-foot long by 106-foot wide boat basin with a 29-foot by 35-foot spur possessing maximum depths of minus five and a half feet (-5.5') at mean low water; construct a 215-foot long by 6-foot wide open-pile private pier with a 42-foot long by 8-foot wide T-head; 40-foot long by 4-foot wide finger pier; a 30-foot long by 4-foot wide finger pier; a 34-foot long by 32-foot wide open-sided dual slip boathouse, and a 42-foot long by 21-foot wide open-sided single slip boathouse, adjacent to his property situated along the Western Branch of the Elizabeth River in Portsmouth.

Tracy West, Environmental Engineer, Sr., gave the presentation with slides. Her comments are a part of the verbatim record. Ms. West summarized the project and said that Mr. Hodges was putting in a new pier to replace the old pier.

Ms. West stated that Mr. Hodges' property was located on the Western Branch of the Elizabeth River in Portsmouth, upstream of the Churchland Bridge, near the mouth of Stearns Creek. He had requested authorization to construct a large open-pile private pier, two boathouses, and to dredge a boat basin and access channel.

Ms. West said that the applicant purportedly owned several vessels, including 32-foot and 39-foot antique dead-rises, a 20-foot center console Wellcraft, a 21-foot Wellcraft bowrider, and two Boston Whaler skiffs. The smaller vessels were currently on trailers on Mr. Hodges' property. The larger vessels were either moored at the pier or in a nearby boatyard.

Ms. West explained that the pier was designed to allow Mr. Hodges to moor up to four of his vessels in slips and included an additional guest slip area. Three of the four slips were proposed to be covered by one single slip and one dual slip boathouse. The dual slip boathouse would also contain boatlifts in each slip.

Ms. West said that the applicant also proposed to dredge around the proposed pier to provide maximum depths of -5.5 feet below mean low water to accommodate the 4-foot drafts of the two antique deadrisers. The basin would connect with the -5 foot contour through a 20-foot wide access channel. All dredged material would be transported to and disposed within the Craney Island disposal facility.

Ms. West stated that a petition protesting the project was submitted in July 2004. Sixty-two residents of the area signed a petition against the construction of the proposed boathouses, noting the size of the structures and the change in character of the waterway that would result as the reason for their opposition.

Ms. West said that the pier T-head totaled 288 square feet of encroachment. In keeping with the guidelines adopted by the Commission in July 2003 for the evaluation of piers that did not meet the statutory exemption provided in Section 28.2-1203.A.5 of the Code of Virginia, staff did not include the two (2) 4-foot wide finger piers in the total square footage calculation.

Ms. West said that Mr. Hodges' agent had stated that the 39-foot deadrise would be housed in the single slip boathouse to protect it from the elements. In a telephone conversation with staff, Mr. Hodges stated that the dual slip boathouse would house the two Wellcrafts. Given that the dual slip boathouse provided two 30-foot slips, it appeared that the 32-foot antique deadrise would remain unsheltered.

Ms. West stated that the Virginia Institute of Marine Science had stated that they expected adverse impacts to water quality and the benthic community resulting from the proposed dredging to be temporary.

Ms. West said that the Department of Environmental Quality had waived the requirement for a permit from their agency pursuant to Virginia Water Protection Regulation 9 VAC 25-210-220.B. The Army Corps of Engineers issued a LOP-2 permit. The Department of Conservation and Recreation had no comments and no other State agencies had commented on the project.

Ms. West said that given the VIMS comments, and the fact that the dredged material would be transported to Craney Island for disposal, staff did not object to the proposed dredging in principle. However, it was unclear why the entire boat basin must be dredged to depths of -5.5 feet. While staff supported the proposed depths at the northern end of the pier to accommodate the deadrisers, staff could not support depths of -5.5 feet throughout the whole basin. The Wellcraft vessels and Boston Whalers to be moored in

the western two slips had a maximum draft of probably 32" with the motors down. In addition, guests could moor along the finger piers to the east of the large slip, thereby allowing for a reduction in depth and dimension of the basin along the entire eastern side of the pier. As such, staff recommended that the boat basin be redesigned to be more consistent with the depths and dimensions actually required to accommodate the uses anticipated by the applicant.

Ms. West stated that the construction of two boathouses also appeared to be excessive. Since the stated purpose of the larger single-slip boathouse was to protect one of the antique deadrises, a staff recommendation of approval for that structure appeared warranted. The proposed pier, while representing a reduction from the applicant's original request, still exceeded what had been deemed reasonable and necessary by the General Assembly. Although the proposed design dimensions attempted to adhere to Section 28.2-1203(A)(5) of the Code and the Commission's adopted guidelines where possible, by keeping the spine of the pier to a 6-foot width and proposing 4-foot wide finger piers around each of the slips, the T-head portion still seemed excessive. If the applicant reduced the width of the eastern portion of the T-head to 6 feet in width, the pier portion of the project would constitute an encroachment of less than 250 square feet.

In summary, Ms. West explained that staff recommended approval of the single-slip boathouse and the proposed dredging, provided the portion of the basin south of the T-head and east of the pier, labeled guest mooring area was eliminated, and the depth of the portion of the basin south of the T-head and west of the pier was reduced to more closely reflect the needs of the vessels proposed to be moored at that location. Further, staff recommended denial of the dual-slip boathouse and a reduction of the T-head to no more than 250 square feet.

Walter Hodges, applicant, was sworn in and his comments are a part of the verbatim record. Mr. Hodges explained that he was okay with and agreed to the staff recommendations. He said he wished the protestant had come to him before now. He stated he just wanted to cover his workboat which was a "Deadrise" and needed protection from weather.

Thomas Judson Wright, protestant, was sworn in and his comments are a part of the verbatim record. Mr. Wright said that the freeholders, he represented did not want any boathouses. He said the Commission in 2000 and 2001 denied similar requests and he expected consistency from the board. He said other deadrises do not have covers and maintaining them with paint protects them. He said he did not object to the dredging or the pier, only the boathouse. He said the petitioners were relying on him to speak for them. He requested the project be approved, except to deny the boathouse.

Walter Hodges in his rebuttal statements said that there were numerous other boathouses in the area. He said that from his property you could not see Mr. Wright's property. He said that he did not object to Mr. Wright's pier. He explained that the picture shown was

not representative of the area. He said that he did not block anybody’s view. He said that the wooden deadrise vessels do not like water and need to be protected. He said his hobby was restoring old boats. He said that his request was reasonable and again indicated he agreed with the staff’s recommendations.

**Associate Member Garrison said that staff had done a good job in their efforts to resolve this matter. He stated that he had owned a “Deadrise” himself and they do not like sweet water and do need to be sheltered. He moved to accept the staff’s recommendations. Associate Member Holland seconded the motion. Associate Member Schick stated that the question of whether a boathouse should be there is a local issue not a VMRC issue. The motion carried, 8-0.**

Permit Fee.....\$100.00

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- 9. HENRICO COUNTY DIVISION OF RECREATION AND PARKS, #04-2253**, requests authorization to construct an open-pile timber pier with an enclosed, three-slip boathouse and storage/office area for use by the Henrico County Police and Fire Departments at their property situated along the James River adjacent to Osborne Park.

Randy Owen, Environmental Engineer, Sr., gave the presentation with slides.

Mr. Owen explained that the project was located on the north side of the James River, approximately 1/4 mile upstream of the Osborne Park public boat landing and adjacent to a proposed County Park. The James River is approximately 750 feet wide at this location and is extensively utilized by both recreational and commercial boat traffic including large cargo ships calling on the Port of Richmond. The adjacent shipping channel lies only 91 feet offshore of the proposed boathouse, which would be constructed to the minus four (-4) foot mean low water contour.

Mr. Owen said that the County’s application requested authorization to construct a 4-foot wide by 97-foot long open-pile timber pier with a 36-foot wide by 47-foot long (1,692 square foot) enclosed three-slip boathouse. The proposed boathouse also included a request for an 11-foot wide by 15-foot long (125 square foot) storage/office area.

Mr. Owen stated that after reviewing the subject application, staff advised the applicant’s agent, Mr. Jamie Brawley with Landmark Design Group, that the proposed storage/office area was considered a non-water-dependent component of the boathouse. Mr. Brawley was asked to provide additional justification for that structure and explain why it could not be constructed on the adjacent upland.

Mr. Owen said that the Virginia Institute of Marine Science Shoreline Application Report stated that given the regular use of this reach of the James by both recreational and commercial boat traffic, the addition and use of the three slips was not anticipated to have significant adverse impacts on the aquatic environment.

Mr. Owen informed the Commission that the Health Department advised that the project had no impact on their existing programs and that the applicant had submitted an approved plan for sanitary facilities. No other State agencies had raised any objections to the proposal.

Mr. Owen explained that when reviewing proposals to build over State-owned submerged lands, the Commission's Subaqueous Guidelines direct staff to consider, among other things, the water dependency and the necessity for the proposed structure. While a boathouse was clearly a water dependent structure, the proposed storage/office area was not considered to be water dependent.

Mr. Owen said that the County advised staff in a letter dated February 21, 2005 that the storage area would be utilized to house rescue equipment, boat gear, floating booms and other supplies necessary for the containment of spills or other environmental emergencies on the river. Additionally, the area would be utilized as a small office area for completing equipment check sheets and reports.

Mr. Owen said that most rapid response equipment needed for emergencies (e.g. backboards, life jackets, defibrillators, air packs, medical supplies, etc.) were pre-stored on the response equipment, whether you were talking about a fire engine, ambulance or water-borne responder (i.e. boat). They were typically not loaded when the call was received. In staff's opinion, the storage of extra equipment, office supplies, boat forms, oil spill booms and containment equipment, etc. could easily be accommodated onshore in a structure designed for that purpose.

Furthermore, Mr. Owen said that staff must point out that this section of the James River regularly experiences moderate to severe flooding. As designed, the deck of the pier and storage/office area would be constructed only three (3) feet above mean high water. At this elevation, staff believed that it was susceptible to damage or destruction by future flood events given its design elevation and the enclosed nature of the construction. As a result staff believed that it would be more appropriate and prudent to construct the storage/office area on the existing upland.

Accordingly, Mr. Owen said that staff recommended approval of the proposed pier and enclosed three-slip boathouse but denial of the proposed storage/office area.

Jamie Brawley with Landmark Design Group and agent for the county was sworn in and his comments are a part of the verbatim record. Mr. Brawley said that he agreed that the storage was not water dependent. But he explained that it would be used for storage of

emergency equipment as there was no room on the vessel to store it. He said the equipment being in close proximity to the vessel was important in order to make quick responses when necessary. He said they were only asking for enough storage space for the essential equipment. He further said that there would be nothing stored that was combustible or dangerous.

No one in opposition was present to comment on the project.

**Associate Member Robins explained that he agreed that the building was not water dependent, but also agreed that the items to be stored there were for rescue and emergency needs. Therefore, he moved to approve the project as proposed. Associate Member Schick seconded the motion. Associate Member Garrison asked that the motion be amended for it to be 5 feet above sea level. Associate Members Robins and Schick agreed to the amendment. The motion carried, 8-0.**

Permit Fee.....\$100.00

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**Lt. Col. Lewis Jones, Deputy Chief, Law Enforcement introduced the field area supervisors and explained their areas of responsibility to the Commission.**

Captain Randy Widgeon, Area Supervisor for the Eastern Shore, Oceanside Eastern Shore, Tangier and the aerial operations involving the agency plane.

Captain Warner Rhodes, Area Supervisor for the Middle Area, which include the area from the York River to the northern side of the Rappahannock River.

Captain Ray Jewell, Area Supervisory for the Northern Area, which include the area from the south side of the Rappahannock River up to the Potomac River tributaries.

Captain Kenny Oliver, Area Supervisor for the Southern Area, which include the area from the York River to the James River, Hampton Roads and Oceanside.

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The Commission broke for lunch at approximately 11:47 a.m. and returned at approximately 12:35 p.m.

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- 10. WILLIAM CAGE, #04-1605, requests after-the-fact authorization to retain a storage shed and hot tub that were illegally constructed on his existing pier, and authorization to add an additional 16-foot by 15-foot deck area to the existing pier**

adjacent to his property situated along the Western Branch of the Elizabeth River in Portsmouth. An adjacent property owner protested the project.

Tracy West, Environmental Engineer, Sr., gave the presentation with slides. Her comments are a part of the verbatim record. Ms. West explained that Mr. Boytek, the protestant, had called the office earlier and informed staff that he would not be able to attend. She further stated that he still felt his protest was valid.

Ms. West explained that Mr. Cage's property was situated along the Western Branch of the Elizabeth River upstream of the Route 17 Churchland Bridge, in the City of Portsmouth.

Ms. West said that prior to Hurricane Isabel, staff received an anonymous complaint regarding additions to a pier at 451 Riverside Drive in Portsmouth. Staff was initially unable to locate the property due to unclear driving directions. An additional anonymous complaint was registered with this agency after Hurricane Isabel. Staff was then able to obtain a more complete description of the property location. Soon thereafter, staff conducted a cursory evaluation of the pier structures from the street and contacted the property owner, Mr. Cage.

Ms. West stated that on June 9, 2004, following a previous telephone conversation with Mr. Cage, staff attempted to inspect the pier. At the request of Mrs. Cage, staff left the property prior to completing the inspection. A Sworn Complaint and a Notice to Comply were then issued on June 17, 2004. The Notice directed removal of all unauthorized structures within 60 days of their receipt of the notice. In lieu of removal, the applicant was given the option of submitting an after-the-fact application with drawings that accurately reflected the dimensions of all unauthorized structures and included a statement explaining who performed the work and why the work was conducted without the necessary authorizations and permits.

Ms. West said that on July 6, 2004, VMRC received the Joint Permit Application from Mr. Cage in which he requested authorization to retain the pier addition and the associated structures as they currently exist.

Ms. West said that Mr. Cage stated that he began work on the pier in September 2003 prior to Hurricane Isabel. He maintained that the gazebo had been in place since approximately 1949 and that a shed had also previously existed on the pier. In order to evaluate Mr. Cage's claims, staff examined a series of aerial photographs from 1977 to 2002. Although a gazebo appeared to have been in place on the pier since at least 1977, staff was unable to identify any other features that resembled a roofed structure on the pier.

Ms. West stated that Mr. Cage believed that his actions initially qualified as maintenance and repair of a previously existing structure. Once he began the project, however, he

found that the shed required complete removal and replacement. Apparently, he did obtain a building permit from the City of Portsmouth to both rebuild the shed and expand the pier.

Ms. West said that according to VMRC records, Mr. Cage previously submitted a Joint Permit Application to expand the existing pier shortly after he acquired the property in 1999. Authorization for the construction of a 16-foot pier extension, a 46-foot long by 4-foot wide catwalk and an uncovered boatlift was sought. Based on the law at that time, staff determined the work qualified for statutory authorization under Section 28.2-1203 of the Code. Since staff was prohibited from conducting an inspection, the actual dimensions of the additions have not been determined. Nevertheless, it is clear from aerial photography that the additions were not constructed in the same configuration as the application drawings. While these items do not represent violations per se, they are further evidence of the property owner's departure from the project plans that were submitted to this agency for our review.

Ms. West explained that the applicant's after-the-fact request was subjected to VMRC's standard public interest review. As a result of that, staff received a protest letter from Mr. Marty Boytek, an adjacent property owner. Mr. Boytek stated that Mr. Cage's pier had been expanded significantly and it was impeding his ability to utilize his own pier. His letter further stated that the current existing enclosed shed replaced a small (approximately 5' by 10') shower area that formerly existed on the pier.

Ms. West said that when reviewing proposals to build over State-owned submerged lands, the Commission's Subaqueous Guidelines directed staff to consider, among other factors, the water dependency and necessity of the proposed structure. Furthermore, when considering authorization for such structures for private use, §28.2-1205 of the Code of Virginia stipulates that: "In addition to other factors, the Commission shall also consider the public and private benefits of the proposed project and shall exercise its authority under this section consistent with the public trust doctrine as defined by the common law of the Commonwealth adopted pursuant to §1-10 in order to protect and safeguard the public right to the use and enjoyment of the subaqueous lands of the Commonwealth held in trust by it for the benefit of the people as conferred by the public trust doctrine and the Constitution of Virginia".

Ms. West explained that effective July 1, 2003, the legislature clearly imposed limits of what had essentially been an unbridled right of riparian property owners to construct private non-commercial piers within their riparian area. The statutory exemption provided for private, non-commercial, piers by Section 28.2-1203.5 of the Virginia Code was changed. That Code Section now specifically limits any T-head, L-head or other pier protrusions to a maximum of 250 square feet. When staff reviews proposals that exceed this amount of square footage on State-owned submerged land, staff considers, among other things, the water dependency and the necessity of the proposed structures. The

intended goal of that review is to limit the encroachment of structures to the minimum amount necessary to reasonably achieve the intended use.

Ms. West stated that Mr. Cage's pier/deck expansion clearly exceeded the statutory authorization provided for in Section 28.2-1203.5 of the Virginia Code and given staff's inability to conduct a thorough inspection, staff could not give an exact figure of the permitted encroachment that the Cage's presently enjoyed. Staff had been unable to identify any water-dependent need for the additional pier decking, as it appears a portion of the expansion exists primarily to support a hot tub. In staff's opinion, the hot tub does not qualify as a water-dependent use.

Ms. West said that except for the comments offered in Mr. Boytek's letter, staff has been unable to find any independent evidence that a roofed structure, other than a gazebo, previously existed on the pier. Even so, the current shed represented a significant departure from pre-existing conditions. In addition, the Commission has consistently maintained that removal and replacement were different from maintenance and repair. Once Mr. Cage removed the alleged pre-existing shed/shower, any replacement structures required authorization from this agency.

Ms. West stated that the applicant was obviously aware that authorization for encroachment over State-owned subaqueous lands was required given that a Joint Permit Application requesting authorization for the addition to the pier was submitted in 1999. Had Mr. Cage submitted a Joint Permit Application prior to initiating construction, staff would have brought the application before the Commission, most likely with a staff recommendation of denial. It was possible that Mr. Cage anticipated this.

Ms. West said that in light of the forgoing, staff recommended denial of the deck addition and his retention of the storage shed and hot hub, with the additional requirement that all the illegal structures must be completely removed within 60 days.

Ms. West stated that should the Commission be persuaded to permit Mr. Cage to retain any of the illegal structures, staff would recommend triple permit fees and a significant civil charge based on a substantial degree of non-compliance.

William A. Cage, applicant was sworn in and his comments are a part of the verbatim record. Mr. Cage provided photos for this presentation. He explained that he was not trying to skirt the law. He said that he loved the water and that this was his dream property. He said that the pilings there were for a shed and the photo shown by staff did not show this. He said that the roof was deteriorating and he was just replacing it. He said he wanted to keep the shed in that location to provide safety for the children to eliminate the necessity for crossing the roadway. He said the shed included a shower. He further explained that the roof would shed water and adding the siding improved the appearance. He said that Mr. Boytek was not objecting as of the hearing date. He said he did not add any square footage, actually there was less. He said the hot tub was mostly on

the old pier only some of it was on the new decking. He said he had his Corps permit and a building permit. He said he did not remove the old shed but incorporated it into the new building. He said there were still walls from the old shed. He said he built this based on the permit and he did not try to circumvent the law.

Ms. West said that Mr. Boytek was unable to attend. Mr. Cage said he had resolved Mr. Boytek's problem. No one was present in opposition to comment on the project.

Associate Member Shick said he felt that the shed was prior to the law changes. Carl Josephson, VMRC Counsel, stated that there was confusion. That the 2002 law changes affects the size and configuration and had nothing to do with the shed.

Associate Member Garrison asked how to get the 250 square foot rule appealed as it is such a small area. Commissioner Pruitt explained that this had been discussed and it had been referred to the Habitat Management Division committee. Mr. Josephson explained that the General Assembly had authorized piers up to a certain size. He said beyond that they required the Commission's review and approval. Associate Member Cowart asked if this size included the appendage. Mr. Josephson said it was the width of the pier. Bob Grabb, Chief, Habitat Management Division, explained that credit was given for the pier. He said statutory authority was within the riparian area and other criteria did not require a permit. He said if the encroachment is over 250 sq. ft. the entire Commission's approval was required. Mr. Josephson explained that Section 28.2-1203 of the Code states the exemption and Section 28.2-1205 of the code gives the Commission its authority.

Associate Member Robins said the question was water dependency and the shed and hot tub were clearly not water dependent.

Commissioner Pruitt asked for a motion.

**Associate Member Schick moved to accept the staff recommendations and deny the deck addition and retention of the shed and hot tub. Associate Member Robins seconded the motion. Carl Josephson reminded the members that the staff recommendations included removal of structures in 60 days. Associate Member Schick amended the motion to include the 60 days removal requirement. Associate Member Schick also amended the motion to include retention of the shed. Associate Member Robins withdrew his second because of the retention of the shed amendment.**

Associate Member Garrison asked if a substitute motion would be appropriate. Commissioner Pruitt responded, yes. **Associate Member Garrison moved to deny the deck addition and hot tub, but to allow retention of the shed and to include that the deck addition and hot tub must be removed in 60 days. Associate Member Schick seconded the motion. The motion carried, 7-1. Associate Member Robins voted no.**

No fees applicable, enforcement action.

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- 11. DAVID CONNITO, #04-0841**, requests authorization to construct two (2) 4-foot by 16-foot catwalk piers and boatlifts, and a 10-foot by 16-foot floating dock addition to his open-pile private pier along the Nansemond River in the City of Suffolk.

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

Mr. Stagg explained that the project site was located along the western shore of the Nansemond River near Paxton Point in the City of Suffolk. This application highlighted the difficulties encountered when staff was attempting to resolve discrepancies in project design and size that did not meet statutory requirements for authorization and for which justification by the applicants or their agents was insufficient to demonstrate a clear water dependence or need.

Mr. Stagg said that when this application was first submitted on April 8, 2004, Mr. Connito, through his agent Robert Livengood of L&L Marine, sought authorization to construct a 5-foot by 300-foot private, non-commercial open-pile pier including a 10-foot by 15-foot L-head; a second 10-foot by 17-foot L-head; a 4-foot by 12-foot catwalk pier; a jet ski lift; and a 23-foot by 26-foot roof structure that extended over the wet-slip and the second larger L-head. The pier, jet ski lift, catwalk pier (64 square feet), and uncovered L-head (150 square feet) complied with the statutory authorization provided in §28.2-1203.A.5 of the Code since the pier was less than 6 feet in width and the L-head and catwalk protrusion combined were less than 250 square feet. The second 10-foot by 17-foot L-head and the 23-foot by 26-foot roof structure did not, however, because of the threshold and because the roof covered part of the pier.

Mr. Stagg said that on May 10, 2004, the agent submitted revised drawings which reduced the uncovered L-head from 10-foot by 15-foot to 9-foot by 15-foot (or from 150 square feet to 135 square feet) in a further attempt to have the entire pier qualify for the permit exemption provided by Code. Since the applicant continued to request a roof structure over a portion of the pier, however, the project still required a permit.

Mr. Stagg stated that on May 20, 2004, the agent submitted yet another revision. This revision though, reflected an entirely new pier configuration. Surprisingly, these revisions did not reflect further reductions in the encroachments sought, but rather a marked increase and expansion of the applicant's request. The 9-foot by 15-foot L-head from the last revision (135 square feet) was now increased to 16-foot by 18-foot (288 square feet). In addition, while the second covered L-head and jet-ski lift had been eliminated, they were replaced by a larger footprint 18-foot by 37-foot (666 square foot)

**Commission Meeting**

open-sided boathouse, which included 46-foot of 4-foot wide catwalk pier (186 square feet). The previously requested 4-foot by 12-foot finger pier (48 square feet) and a jet ski lift were retained, but relocated along the main pier. In spite of these expansions, the project as proposed, qualified for permit exemption because the boathouse was purportedly designed to house a single boat, was under 700 sq ft, and was unopposed; and the 4-foot wide catwalk piers, and the L-head minus the 5-foot pier stem (198 square feet) seemed to meet the criteria adopted by the Commission in July of 2003. As a result, a “no permit necessary” letter was issued on May 26, 2004.

Mr. Stagg explained that two months later, on August 24, 2004, staff received another request from Mr. Connito’s agent requesting to again modify his application. The agent said the applicant now wanted to delete the boathouse roof and associated catwalk pier, to relocate and enlarge the previously requested 12-foot finger pier to 16 feet in length; to add a second lift and another 4-foot by 16-foot finger pier, and to install a new 10-foot by 16-foot (160 square foot) floating pier adjacent to the previously authorized 16-foot by 18-foot L-head. The agent provided no explanation for the deletion of the boathouse, but seemed to imply that with the deletion of the 688 square feet of boathouse, they hoped to use that authorized encroachment in other ways. He also stated that the applicant now wished to place a jet ski on one lift and a sailboat on another lift, and wanted to use the floating dock as a storage platform for a second sailboat as well as rigging, boarding and other sailboat paraphernalia.

Mr. Stagg stated that this project had been what one would consider a moving target from the outset. As such, staff would not be surprised if the Commission received additional justification and rationale for the project during the public testimony.

Mr. Stagg explained that as adopted by the Commission at its July 2003 meeting, *water dependent means those structures and activities that must be located in, on or over State-owned subaqueous lands*. Furthermore, in order to be water dependent, the Commission must determine (1) that it is necessary that the structure be located over water, and (2) that it is necessary that the activity associated with the structure be over the water (emphasis added). The Commission was careful to caveat the definition with an acknowledgement that this did not prevent the Commission from issuing a permit for non-water dependent structures, *provided* that the Commission determined that the use was a reasonable one and they were able to set forth a rationale for such a finding on a case-by-case basis.

In preparation for the meeting, Mr. Stagg said that staff conducted a site visit of Mr. Connito’s property. What staff found at that site inspection was that the second 4 ft wide catwalk pier Mr. Connito applied for in his latest revision, was already installed along with the second lift. The installation of the second lift and catwalk pier were not authorized, and this addition now brought the total encroachment of “existing” encroachments to 326 square foot. Based on the Commission’s criteria, the two (2) 4-foot finger piers would not be counted if you determine that the additional catwalks are

necessary to accommodate a water dependent use. If so, that would bring his encroachment down to 198 sq ft. Our aerial photos also reveal that the floating pier he wished to install was already adjacent to the pier near the landward end. If channelward of mean low water, it already required a permit in that location. If the applicant testified that it was landward of mean low water, it would be a use of tidal wetlands for which he does not have a Suffolk Wetland Board permit. If the applicant wished to install a third lift to serve the small boats he indicated he owns (i.e. a 10-foot power boat, and two (2) 14-foot sailboats), he could certainly install that lift on the inboard side of the inshore finger pier, or on one side or the other of his L-head. The 16-foot by 18-foot L-head, previously authorized, certainly appeared adequate for the rigging and gear of his sailboats. He already had a step down ladder on one side of the L-head to provide water level access.

Mr. Stagg went on to say that as a riparian property owner, the applicant already enjoyed, actually exceeded in this instance, the statutory "right" afforded him by the legislature. Based on the information provided thus far, staff could see no basis or rationale for authorizing a further expansion of the encroachment that already exists.

Mr. Stagg said that as a result, staff would recommend denial of the floating pier, and that the Commission direct that it be removed from its existing location if channelward of mean low water. If landward, staff believed the applicant should be directed to immediately make application to the Suffolk Wetlands Board requesting after-the-fact authorization to retain it. Staff also recommended that the Commission find the second 4-foot by 16-foot catwalk pier served a water dependent activity and grant after-the-fact approval for its retention. Staff did not believe that a civil charge was warranted in this situation.

Robert Livengood of L & L Marine and agent for the applicant, was sworn in and his comments are a part of the verbatim record. Mr. Livengood explained that the applicant tried not to go over the 250 sq. foot originally which is why there are several sketches. He said they came in and spoke with staff and nothing was done behind the Commission's back. He said the design was to ensure the children's safety. He said some time ago when he requested information, what he received did not show the 250 sq. foot limitation and now that had been changed. He said the footprint is smaller over state bottom and it is smaller in square footage. He said he met with staff to get clarification of what constituted water dependent items. He said that staff records reflect that over 250 sq. feet had been approved. He said the applicant wants to play by the rules. He explained the floating dock was necessary for the safety of the people.

Commissioner Pruitt said at this hearing there have been several examples of water dependency. He further explained that staff was looking at it and working on it. He said that the Commission tries to be fair, but applicants do not always get what they want.

Associate Member Jones said that too much encroachment was the objection. She said if the configuration was changed, such as less wide decking, it would still provide access to the floating pier. Mr. Stagg said if the square footage was reduced, the floating dock could be allowed. He said the L-head was there which was an after-the-fact issue. He said that an NPN letter had been approved.

Elizabeth Connito, applicant, was sworn in and her comments are a part of the verbatim record. Mrs. Connito explained that they moved into the house in 1999 and now had a 13.9-foot sailboat. She said the floating dock was used for sailing lessons and for on and off access to the boat. She explained there were 2 finger piers and the closest to the floating dock was used to tie up the sailboat and the other for storage of the jet ski. She said they used the jet ski to get to her children in case of emergency. She said they were requesting approval of the entire proposal.

Commissioner Pruitt said the Commission must look at the total square footage which must include the original square footage.

No one in opposition was present to comment.

**After much discussion, Associate Member Schick moved to accept the staff's recommendations. Associate Member Holland seconded the motion. The motion carried, 7-0-1. Associate Member McLeskey abstained.**

No fees applicable.

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**12. ARNOLD L. WHITE, #04-2083**, requests authorization to place a 14-foot 6-inch tall, illuminated, wooden lighthouse replica atop a pre-existing duck blind platform as a private aid to navigation adjacent to his property situated along Palmer Cove, an embayment of the South Yeocomico 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 the abandoned duck blind platform was located approximately 330 feet offshore in Palmer Cove, an embayment of the South Yeocomico River. According to navigation charts, the platform was roughly along the 2-foot contour. According to our Marine Police, the blind was last licensed in 1996.

Mr. Madden said that staff was made aware of the apparent violation after being informed by our Marine Police that Mr. White had erected a flagpole and a lighthouse structure on the abandoned duck blind. The structures were placed on the duck blind after Mr. White

received the permission from the widow of the previous owner of the blind, Mr. William Trigg.

Mr. Madden explained that on May 18, 2004, Mr. White was sent a certified letter advising him that staff had been unable to locate any permits authorizing the construction of the lighthouse. At that time, Mr. White was also informed that any encroachment over State-owned submerged lands required an application and a public interest review. Subsequently, Mr. White contacted Commission staff and agreed to remove the flagpole and the lighthouse. The removal of the unauthorized structures was later confirmed by a site visit on July 21, 2004. At that time Commission staff considered the violation resolved.

Subsequent to the resolution of the violation, Mr. Madden stated that Mr. White filed a Joint Permit Application to replace the lighthouse atop the abandoned platform claiming that the abandoned duck blind was a potential hazard to navigation. Mr. White believed that the lighthouse would warn boaters of the location of the abandoned duck blind.

Mr. Madden said that the Virginia Department of Game and Inland Fisheries (DGIF), was concerned over potential impacts to osprey or other birds that may be utilizing the duck blind as a nesting/ roosting platform. Since DGIF considered the nest inactive, they indicated that removal of the nest should only occur if the nest posed a safety hazard to humans or birds. They made no mention of the fact that since the blind was last licensed in 1996, it appeared to be an abandoned structure. Section 29.1-347 of the Code of Virginia clearly requires that such abandoned structures be removed.

Mr. Madden said that the United States Coast Guard and the U.S. Army Corps of Engineers had both approved the project. The Virginia Department of Health considered the project acceptable, and no other State agency had protested the project

Mr. Madden stated that staff had received a letter of support from Mr. Thomas J. Chapman who believes the construction of the lighthouse on the abandoned platform eliminates a potential lethal hazard to boaters.

Mr. Madden said that since the platform was last licensed as a duck blind in 1996, it appeared to be an abandoned structure and an unauthorized encroachment over State-owned submerged lands. Should the Commission concur that the platform is a hazard or obstruction to navigation or there were other reasonable and permissible uses of the waters, staff would recommend that it be removed in its entirety, rather than authorize the installation of a lighthouse replica. Staff felt this action was required under Section 28.2-1210 of the Code of Virginia and whether it was Ms. Trigg or Mr. White who removed the structure, should be a matter for DGIF to address.

Furthermore, Mr. Madden said staff did not believe installation of a replica lighthouse was an appropriate use of State-owned submerged lands or consistent with the

Commission’s responsibility to protect and safeguard the public’s right to the use and enjoyment of the subaqueous lands of the Commonwealth held in trust by it for the benefit of the people as conferred by the public trust doctrine and the Constitution of Virginia.

Arnold White, applicant, was sworn in and his comments are a part of the verbatim record. Mr. White said he agreed this was an unusual request. He said it seemed simple when it started. He said he wanted to thank the staff for their help in this matter. He said everyone was behind this for boating safety. He said there was 9 feet of water around the duck blind. He said a light was needed there to alert others. He explained that Mrs. Trigg’s father put the duck blind there and that since 1996 it had not been used. He said the pilings for the duck blind were in great shape and the platform was in good shape. He said it was a question of boater safety and the cost would be worth it if one person’s life were saved. He said the Coast Guard permit said he was responsible for the light, not the blind and he was willing to be responsible for the light. He agreed that if the light was not maintained he would be responsible for its removal. He said he did not know he was doing anything illegal until he was notified by staff.

No one in opposition to the project was present to comment.

**After a great deal of discussion, Associate Member Cowart moved to allow the applicant to install the lighthouse as the lighthouse, was water dependent, but, if the light was not maintained, the applicant would be responsible for the removal of both the lighthouse and the structure. Associate Member Bowden seconded. Associate Member McLeskey requested the motion be changed so the applicant was not made responsible for the duck blind structure. Associate Members Cowart and Bowden both accepted the change. The motion carried, 8-0.**

Permit Fee.....\$25.00

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Commissioner Pruitt announced a 10-minute break.

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Commissioner Pruitt announced that Dr. Cynthia M. Jones of Old Dominion University was named “Outstanding Faculty Member” by the Governor and the General Assembly, which is the highest honor for college and university professors.

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**13. PUBLIC COMMENTS:**

**Edward F. Jewell**, clammer, requested that the clam relay area in Hampton Roads, Condemnation No. 7A be open to clean clam harvest on May 1.

Roy Insley, Head-Plans and Statistics, was present and his comments are a part of the verbatim record. Mr. Insley explained that the Health Department was in control of openings of condemned shellfish areas and Dr. Croonenbergh who heads the Division of Shellfish Sanitation is out on extended sick leave. He said that Daniel Powell says the area is no longer condemned because of high fecal chloroform levels. He said that he was being told that 7A was an administrative closure and if VMRC and the HD agreed on boundaries the area could be opened.

Commissioner Pruitt instructed Mr. Insley to contact Rob Witman who is second in charge after Dr. Croonenbergh.

Associate Member Cowart asked if this was closed as a sewage treatment buffer or because of the Newport News Shipbuilding. Mr. Insley explained that most of the outfalls in the area had been consolidated some years ago, but there were still outfall areas like the Newport News Boat Harbor.

Mr. Insley said that there was no need for a motion. Commissioner Pruitt instructed Mr. Insley to call and find out what can be done.

Associate Member Bowden said opening this area would be financially beneficial for all. He said the same action was needed for the James River and Newport News Management areas because the season ends May 1 and need to be extended through May 31<sup>st</sup>.

Mr. Insley said first of all it needed to be established that it can be opened.

No further action was taken.

**Jan Marshall**, Commercial Waterman, was present and his comments are a part of the verbatim record. Mr. Marshall said he was before the Commission to request 4 more days to work in the Tangier-Pocomoke Sound Dredge areas. He said they had been given an additional week to make up for time lost to weather earlier this year, but they still missed 4 of the additional days and would like to be given back these days.

Commissioner Pruitt asked how the catch was going. Mr. Marshall explained they were catching their limit before 1 p.m. each day. He said two areas had had dog stones on them until recently and they were going away. He said that 5 boats have gone to the James River to work, but 8 boats were still at home and wanted to work.

Associate Member Cowart said he thought it was too late.

Jim Wesson, Head-Conservation and Replenishment Department, said he was not in favor of the last extension. He said that some of the Tangier watermen have gone to the James River, so they all have an alternative area to work.

Associate Member Bowden said that he could see both sides. He said Dr. Wesson was not in favor of the last extension and there have already been two. He said we do not want to hurt the consistent productivity. He said he was not in favor of another extension and did have to favor the resource this time versus the watermen.

No action was taken.

**Doug Jenkins**, President of the Twin River Waterman Association, was present and his comments are a part of the verbatim record. Mr. Jenkins said that the Twin River Waterman's Association and the Virginia Waterman's Association both were concerned about the Commission plans to put the James River seed for this year on Russ' Rock and Bowlers Wharf. He said some of that seed needs to be transplanted to Morattico Bar as this area was far enough to avoid freshwater and high salinity. He asked the Commission to consider splitting the 10,000 bushels proposed for upriver and put some on Morattico.

Associate Member Cowart asked Dr. Wesson to comment. Jim Wesson, Head-Conservation and Replenishment Department, said that it was considered, but it is hard to make decisions when it comes to the James River seed oysters. He said the seed proposed is larger because of the salinity and actually close to market size. He said salinity above 12 will kill them and most likely it will get to 12 at Morattico. He said it was okay to put some at Morattico as suggested by Mr. Jenkins, if that was what the Commission wanted to do.

Associate Member Cowart asked if it could be split 3 ways. Mr. Jenkins said yes.

Carl Josephson responded that it would only need the Commission's approval. Dr. Wesson explained this would follow the same procurement procedures that were already approved last month.

**Associate Member Cowart moved to split the proposed bushels among the 3 areas, Russ', Morattico, and Bowlers. Associate Member Robins seconded the motion. The motion carried, 8-0.**

**Robbie Johnson** was present and his comments are a part of the verbatim record. Mr. Johnson said that he could not stay for the public hearing on the ariakensus project and he wanted to let the Commission know that he supported the Virginia Seafood Council project. He asked the Commission to approve this project. He said the non-native oyster is very controversial on the east coast, but the western side of the country was using the non-native species and taking over the market.

**Associate Member Schick** asked that Tony Watkinson give a report for the Habitat Management Committee meeting held the previous day, March 21<sup>st</sup>.

Tony Watkinson, Deputy Chief, Habitat Management, gave the report and his comments are a part of the verbatim record. Mr. Watkinson explained that the committee reviewed the updates that were being done on the Subaqueous Guidelines; discussed water dependency and the 250 square foot rule; and, scheduled a meeting for the next month to continue the discussion of the guidelines. He said at the next meeting staff will be requesting a public hearing in May or June to approve the proposed amendments to the guidelines. In said that in regards to the Wetlands Guidelines supplement a public hearing needed to be scheduled in April or later, but staff was ready to hear the matter. He said the item of most interest to the Wetlands Guidelines supplement is to encourage the Wetlands Boards and VMRC to seek compensation through a mitigation bank or requiring the applicant to make the compensation or replacement whenever possible. He said in order to meet the “no net loss” goal that had been set, in regards to protecting the wetlands, this needed to be done.

**Associate Member Schick moved to hold the public hearing on the Wetlands Guidelines next month (April). Associate Member Cowart seconded the motion. The motion carried, 8-0.**

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**14. PUBLIC HEARING:** Proposed amendments to 4 VAC 20-950-10 et seq., “Pertaining to Black Sea Bass,” to repeal the closed recreational fishery season for 2005.

Jack Travelstead, Chief, Fisheries Management, gave the presentation. His comments are a part of the verbatim record. Mr. Travelstead said that all states must comply. He said the season is the same on the Atlantic Coast. He referred the Commission to the changes in the draft regulation that were on page 3.

Mr. Travelstead explained that staff recommended amending 4 VAC 20-950-10 ET. SEQ., “Pertaining to Black Sea Bass” and repealing the closed recreational season for black sea bass for 2005.

The public hearing was opened. There was no one present from the public to make comments.

**Associate Member Robins moved to accept the staff’s recommendations. Associate Member Bowden seconded the motion. The motion carried, 8-0.**

\* \* \* \* \*

- 15. PUBLIC HEARING:** Proposed placement of cownose ray excluder fences on Public Grounds 13, 14 and 21 in the Great Wicomico River as part of the oyster restoration activities of the VMRC, ACOE, VIMS and CBF.

Dr. James Wesson, Head-Conservation and Replenishment, gave the presentation and his comments are a part of the verbatim record. Dr. Wesson explained that a one-acre enclosure for public ground 13, a 0.6 acre enclosure for public ground 14, and a 2.2 acre enclosure for public ground number 21 in the Great Wicomico River was requested. He further explained that cultchless oysters would be placed within these enclosures, which would be maintained from May through October.

The public hearing was opened.

Tommy Leggett, representative for the Chesapeake Bay Foundation (CBF), was present and his comments are a part of the verbatim record. He said that CBF supported the project. He said there was a need to protect the broodstock.

Roger Mann, representative for Virginia Institute of Marine Science (VIMS), was present and his comments are a part of the verbatim record. Dr. Mann said that VIMS supported the project.

**Associate Member Jones, moved to accept staff's recommendation. Associate Member Schick seconded the motion. The motion carried, 8-0.**

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- 16. PUBLIC HEARING:** Request of the Virginia Seafood Council (VSC) to place overboard one million triploid *Crossostrea ariakensis* oysters to determine the feasibility of culturing the oysters to market size in 12 months.

Associate Member Cowart said he would excuse himself from participating in the public hearing as he was a member of the Virginia Seafood Council.

Jack Travelstead, Chief, Fisheries Management, gave the presentation. His comments are a part of the verbatim record. Mr. Travelstead explained that this was the 3<sup>rd</sup> trial and they were at the end of the 800,000 oysters trial. He said that the industry had learned a lot, but still needs to know if the species can be grown to marketable size in 12 months. He said that conditions in the last trial hindered VSC from finding this out. He said the animals were not put over until October 2003, which was too late. He said if they are put out on June 1, then they will have the 12 months. He said it should be noted that this could be decided by the Commissioner pursuant to Section 28.2-825 of the Code of Virginia. He explained that because of the significance of this project, the Commissioner was deferring this matter to the entire Commission. He provided a handout of the Ad Hoc Panel report, which he explained recommended approval with some conditions. He

said the conditions were on the last page of the report and were similar to staff's recommendations. He said that VSC has already agreed to these conditions. He said Roger Mann, a member of the Ad hoc Panel, Frances Porter of VSC, and Mr. Eskrine, the project manager, were all present. He said Mr. Eskrine had a power point presentation to show the Commission.

Associate Member Garrison asked if this was the native or Asian strain of oyster? Mr. Travelstead said it was a non-native species, but the triploid version. He explained that triploid meant they were sterilized.

Associate Member Garrison asked if there were other projects. Mr. Travelstead explained that this was a two-prong approach. He said there was a native oyster program, as well as a cooperative program with the Corps of Engineers to restore the native oyster. He said the Commission had just approved the exclusion fences for the cooperative program. He said the second program was the trials being done by VSC for introducing the non-native species. He said an EIS is being done for investigating the risks for planting fertile non-native oysters, but it would not be completed until the end of the year.

Associate Member Jones asked if they were following the National Academies of Science guidelines. Mr. Travelstead explained they had looked at 3 approaches and proposed to allow some projects, which the VSC is doing. Associate Member Jones asked if all oysters from the last trial had been recovered. Mr. Travelstead said that some were still in the water. Associate Member Jones asked if there were any escapes and Mr. Travelstead responded, no.

Associate Member Jones asked if tests had been done on the reproductive state. Dr. Stan Allen, representative from VIMS, was present and his comments are a part of the verbatim record. Dr. Allen stated test are done to verify that the number of triploids was maintained. Associate Member Jones asked if this was a field test. Dr. Allen responded yes. He said the animals were tested to see if they were making gametes in the triploids. Associate Member Jones asked if only one year keeps them from reproducing. Dr. Allen explained the animals are less ready to spawn the first year. Dr. Jones asked what are the risks. Dr. Allen explained that the risk was that two fertile animals might get too close and reproduce. He said that the oyster needs close proximity to one another to reproduce and so are spread out to reduce the probability of a successful spawn.

The public hearing was opened.

Frances Porter, representative for VSC, was present and her comments are a part of the verbatim record. Mrs. Porter stated that she wanted it amended that it was the 4<sup>th</sup> project. She said they were confident that this was the right oyster for the Chesapeake Bay. She said the federal government is watching the project and each permit has conditions which have all been met by VSC. She said this was a responsible growout and they have worked well with the Federal agencies. She said they have shared all

information and participated in all talks about the project. She said they had contributed to the development of the EIS. She stated that the project manager had been very conscientious and had a presentation available for the Commission to view.

Associate Member Robins asked if the VSC had any issues with complying with the Ad hoc panel permit requirements. Mrs. Porter said she had not seen them, but did attend the meeting.

Tommy Leggett, representative for CBF, was present and his comments are a part of the verbatim record. Mr. Leggett stated that the CBF is involved in projects to restore the native oyster and are dedicated to restoring the native oyster. He said CBF supports the 4<sup>th</sup> field trial so as to make responsible decisions. He said it took many, many years for the native resource to collapse and will take a while to come back.

The public hearing was closed.

Commissioner Pruitt stated that the Virginia Seafood Council was proceeding with this project in a responsible and scientific way.

**Associate Member Robins commended the VSC for distinguishing themselves in their efforts. He moved to approve the project. Associate Member Garrison seconded the motion. Associate Member Jones requested an amendment to the motion that the Ad hoc Panel and VMRC recommendations be merged as there were 2 conditions in VMRC's that were not in the panel's. Associate Members Robins and Garrison both accepted the amendment. The motion carried, 7-0-1. Associate Member Cowart did not participate in the vote.**

\* \* \* \* \*

**17. REPORTING VIOLATION:** Failure to properly report commercial harvest in accordance with Regulation 4 VAC 610-10 et seq.

Commissioner Pruitt left the meeting at this point. Associate Member Cowart acted as the chair in his absence.

Kelly Lancaster, Fisheries Management Specialist, gave the presentation. Her comments are a part of the verbatim record. Mrs. Lancaster explained that this was a case of a violation of the Regulation 4VAC 20-252-10 and Michael B. Shackelford was being brought before the Commission. She explained that his 2004 reports were not received until January 2005. She said earlier in the year the staff had sent him a reminder. She further explained that he had failed to provide the required tag information on his reports. She said he had been before the Commission several times in the past in violation of Regulation 4VAC 20-610-10. She said that normally this type of violation results in 6 months probation, but in the case of Mr. Shackelford, who has made this a habit, the staff

recommended one (1) year probation. She said that if during this probationary period another violation should occur then the immediate suspension of his licenses, special permits, and surrender any unused tags will be required as well as coming back before the Commission.

Associate Member Cowart asked Mr. Shackelford to address the Commission.

Michael B. Shackelford, Commercial Waterman, was present and his comments are a part of the verbatim record. Mr. Shackelford explained that he was keeping better records this year. He also explained that he had somehow lost track last year and was putting himself at the mercy of the Commission.

Associate Member Cowart asked for a motion.

**Associate Member Garrison moved to accept staff's recommendations. Associate Member Holland seconded the motion. The motion carried, 7-0.**

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**18. DISCUSSION:** Requests for emergency and future regulations to support alternatives contained in a proposed NMFS Rule pertaining to bottlenose dolphin and sea turtle conservation.

Rob O'Reilly, Deputy Chief, Fisheries Management, gave the presentation and his comments are a part of the verbatim record. Mr. O'Reilly stated that Associate Members Bowden, Holland and Robins had been a great help in this matter. He reviewed the powerpoint presentation he had prepared which showed how the NMFS proposed Rule would directly affect Virginia's gill net fisheries. He said that the Rule was intended to conserve bottlenose dolphins and sea turtle stocks, while they are in Virginia's waters. He gave the Commission a revised draft Regulation 4VAC 20-1080-10. He said that there were 5 emergency regulations being requested by staff to help the fisheries to be most affected by the proposed Rule of NMFS.

4VAC 20-170-10, et. seq., Pertaining to the Removal of Nets  
4VAC 20-252-10, et. seq., Pertaining to the Taking of Striped Bass  
4VAC 20-320-10, et. seq., Pertaining to the Taking of Black Drum  
4VAC 20-430-10, et. seq., Pertaining to the Marking and Minimum Mesh  
Size of Gill Nets  
4VAC 20-1080-10, et. seq., Pertaining to Monkfish (Goosefish)

Mr. O'Reilly explained that on February 4, 2005, Commissioner Pruitt sent a letter to Mr. David Bernhart who is chief of NMFS Protected Resources in which he outlined the problems and concerns associated with the NMFS proposed rule. He said the public

comment period ended February 8, 2005 and Mr. Bernhart told the staff there were several other public comments, in addition to the Commission's.

Mr. O'Reilly stated that Associate Member Bowden also spoke with Mr. Bernhart and expressed similar concerns. He said that Mr. Bernhart agreed to meet with staff and industry on February 24 to discuss these issues, even though the public comment period had ended. He said that staff, Associate Members Bowden and Robins and several industry members met with Mr. Bernhart and his staff and Mike Tork. He explained that Mr. Bernhart did not say that it could be changed as suggested, but suggested remedies.

Mr. O'Reilly said that staff had sent the emergency regulations to Mr. Bernhart at NMFS.

Mr. O'Reilly stated that staff recommended the adoption of the 5 emergency regulations in accordance with Section 28.2-210 of the Code. He said that staff also requested that an April public hearing be established for public comments on these emergency regulations. He said that staff would forward the final emergency regulations to NMFS and wait to see what the provisions of the final Rule were.

Associate Member McLeskey left the meeting at approximately 3:56 p.m. for the day.

The public hearing was opened. There were no public comments.

Commissioner Pruitt asked for a motion.

**Associate Member Robins said that he commended Associate Members Bowden and Schick and staff for the excellent presentation on the Endangered Species Act. He made the following motion.**

**“WHEREAS, the proposed federal rule brought by NMFS under the Endangered Species Act and Marine Mammal Protection Act, 50 CFR 223 and 229, “Taking of Marine Mammals Incidental to Commercial Fishing Operations; Bottlenose Dolphin Take Reduction Plan; Sea Turley Conservation; Restrictions to Fishing Activities” would result in substantial and undesirable regulatory discards of striped bass in Virginia’s ocean rockfish fishery, and**

**WHEREAS, the proposed rule would result in substantial economic impact on Virginia’s valuable ocean rockfish fishery, and**

**WHEREAS, the proposed rule would eliminate the gillnet fishery for black drum on the seaside of Eastern Shore, a fishery of significant cultural and economic importance to Accomack and Northampton Counties, and**

**WHEREAS, NMFS has implicated long gillnet soak times in mortality of marine mammals and sea turtles, and**

**WHEREAS, regulations already promulgated by this Commission in compliance with the ASMFC Striped Bass Interstate Fishery Management Plan have reduced effort in Virginia’s ocean fishery for striped bass by 68 to 81 percent, resulting in a measurable and documented conservation equivalency to the proposed rule, and**

**WHEREAS, the Commission has met with representatives of the NMFS Southeast Office and anticipate that the NMFS will make exemptions for Virginia’s ocean rockfish fishery and black drum fishery that are more consistent with Virginia’s fishing practices, while affording adequate protection for marine mammals and sea turtles, and**

**WHEREAS, the Commonwealth’s interests are best served by specifically addressing unique and discrete fishing threats to sea turtles and marine mammals in Virginia’s territorial sea by state regulations, and**

**WHEREAS, the proposed state regulations are expected to afford adequate protection to marine mammals and sea turtles,**

**NOW THEREFORE, I move that the Marine Resources Commission adopt a conservation equivalency to the proposed federal rule, comprising the previously adopted reductions in Virginia’s ocean striped bass fishery, together with the adoption by emergency regulation of amendments to state regulations 4 VAC 20-(170, 252, 320, 430 and 1080) as proposed by staff.”**

**Associate Member Cowart seconded the motion. The motion carried, 7-0.**

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**19. DISCUSSION:** Request from the summer flounder industry to extend the safe harbor provision of Regulation 4 VAC 20-620-10, et seq. to the Virginia portion of the Intracoastal Waterway.

Commissioner Pruitt said that the Commission would wait on any presentation and asked for a motion since this was just a request for a public hearing in April.

**Associate Member Garrison moved to approve the staff’s request for a public hearing. Associate Member Holland seconded the motion. The motion carried, 7-0.**

\* \* \* \* \*

**20. DISCUSSION:** Requests for exceptions to the limited entry criteria for the Black Drum fishery.

Stephanie Iverson, Fisheries Management Specialist, Sr., introduced Tara Scott to the Commission and said that she would be making this presentation.

Tara Scott, Fisheries Management Specialist, gave the presentation and her comments are a part of the verbatim record. Ms. Scott explained that commercial permits were required to participate in the Commercial Black Drum Fishery for those who met the following criteria.

1. The applicant shall be a registered commercial fisherman and shall have held a Black Drum Permit in at least one year from 1988 to 1993;
2. The applicant shall have documented catch of black drum in at least one year for which a Black Drum permit was held from 1988 to 1993; and
3. The applicant shall have reported, in accordance with this regulation, any black drum fishery activity in 1992 and 1993, if a Black Drum permit was held in those years.

Ms. Scott explained that the Marine Resources Commission can grant exceptions to the limited entry in the Black Drum Fishery, based on scientific, economic, biological, sociological, and hardship factors. Any person requesting an exception shall provide in writing an explanation for an exception and all pertinent information relating to the criteria listed above.

Ms. Scott said that the Commission established the three eligibility requirements for the black drum fishery in 1994 in order to prevent overcapitalization and improve economic benefits to full-time participants in the fishery. Several fishermen that previously held permits in 1993 failed to meet the criteria and were denied their request to renew their permits in 1994. In 1993 there were 114 permitted fishermen and only 62 people were eligible to receive black drum permits in 1994. There are currently 67 permitted fishermen in the black drum fishery. Out of those 67 fishermen, an average of 35 have been active in the fishery each year. In 2004 only 26 permitted harvesters reported catch.

Ms. Scott said that the commercial harvest quota of 120,000 pounds was established in 1992. An average of 61,000 pounds of black drum has been annually harvested since 1995. Although 64,823 pounds of black drum were harvested last year (54% of the quota) the quota has not been exceeded since 1994, when 153,202 pounds were harvested.

Transfer Requests:

**Dimitri Hionis**

**CRL 23164974161**

**VA Beach, VA**

Mr. Kenneth Etheridge has sold his pound net sites, gear, and boats to Mr. Hionis and would like to transfer his black drum harvester permit as well to Mr. Hionis.

**Cecil Jones, Jr.      CRL 6935045265      Nassawadox, VA**

Stephen Bunch would like to transfer his black drum harvester permit to Cecil Jones, Jr. Mr. Jones fished years ago and would like to start back commercial fishing for black drum.

**Shawn Green      CRL 3739055346      Bena, VA**

Jamie Green is getting out of the fishing business to become a Marine Police Officer and would like to transfer his black drum harvester permit to his brother Shawn Green.

Ms. Scott explained that in previous years the Commission had similar requests, on the basis of a one-in one-out situation. Staff recommended the approval of the requests of Mr. Hionis, Mr. Jones, and Mr. Green because they are transfers and can be treated as one-in one-out situations.

Commissioner Pruitt requested a motion from the Commission.

**Associate Member Holland moved to approve the requests for exemption. Associate Member Garrison seconded the motion. The motion carried, 7-0.**

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There was no further business, the meeting adjourned at approximately 4:12 p.m. The next meeting will be Tuesday, April 26, 2005.

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William A. Pruitt, Commissioner

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Katherine Leonard, Recording Secretary