

MINUTES

Commission Meeting**April 26, 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
Katherine Leonard	Recording Secretary
Wilford Kale	Senior Staff Advisor
Jane McCroskey	Chief, Admin./Finance Div.
Erik Barth	Business Manager, Sr.
Todd Sterling	Business Systems Spec., Sr.
Andy McNeil	Programmer Analyst, Sr.
Sylvia Jackson	Fiscal Technician
Dorine Richard	Fiscal Technician
Jack Travelstead	Chief, Fisheries Mgt. Div.
Rob O'Reilly	Deputy Chief, Fisheries Mgt. Div.
Roy Insley	Head, Plans and Statistics
Kelly Lancaster	Fisheries Management Specialist
Lt. Col. Lewis Jones	Deputy Chief, Law Enforcement
MPO Perry Flinchum	Marine Police Officer
MPO James Moore	Marine Police Officer
MPO Jamie Green	Marine Police Officer
MPO Phillip Koury	Marine Police Officer
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

Other present included:

B. Kay Wilson	Ruth D. Jackson-Mashburn	
Gil Marshburn	Karla Havens	David Fitch
Richard Hicks	Franklin Fency	Christine Breddy
Patty Fitch	Susie Fulmer	Kathy Grainer
Richard King	Carl Eason	JoAnn Whitson
Pamela Schenian	Thomas Stierhoff	Jim Whitson
David Shank	Wayne Webster	Dale Sprenkel
Alan Biddison	Lois Biddison	Roger Bowers
Bob Liverigood	Bill Kopcsak	Jeff Kelly
William Robert	Scott Rae	Ed Bowdon
Glen BuBois	Steven Pyle	Leonard Hoerneman
John H. Hunt	Robert M. MacLeod	William Johnson
Mary K. Hoerneman	Carol VanGusten	John H. Usut
Nancy Greene	Ronald Lang	Jack Petralia
Louise Petralia	D. J. Sulick	Dick Schreyer
Page Hunt	Nancy Collings	Paul Lassanske
Tom Light	Robert Collings	Abraham Habtu
Keith Lockwood	Mathews Byrne	Robert Morrison
Page Morrison	Pearce S. Grove	Edward Ewell
Melody Lipengod	Jim Haugh	Douglas F. Jenkins, Sr.
Ken I. Like	Tom Powers	William Davis
Sammie Coates	Sammie J. Coates	Bryan Peek
Russell Gaskins	Susan Gaston	Lawrence Latane

and others

Commissioner Pruitt called the meeting to order at approximately 9:32 a.m. All Associate Members were present.

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Associate Member Garrison gave the invocation and Commissioner Pruitt 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. There were no changes. **Associate Member Garrison moved to approve the agenda. Associate Member Cowart seconded the motion. The motion carried, 8 - 0.**

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MINUTES: Commissioner Pruitt asked for a motion for the March 22, 2005 meeting minutes. **Associate Member Robins moved to approve the minutes as presented. Associate Member Holland seconded the motion. The motion carried, 8-0.**

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Jane McCroskey, Chief, Administration and Finance, introduced new employees to the division. She introduced Todd Sterling, working in Information Systems; Sylvia Jackson, working in Licensing; and Dorine Richard, working in Accounts Payable.

Lt. Col. Lewis Jones, Deputy Chief, Law Enforcement, introduced new employees to the division. He introduced Jamie Green, Phillip Koury, and James Moore, all Marine Police Officers. Officer Green works in the Middle Area; Officer Koury works in the Southern Area; and Officer Moore works in the Southern Area.

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2. PERMITS: Tony Watkinson, Deputy Chief, Habitat Management, gave the presentation on Page Two items, A through H, and his comments are part of the verbatim record. Page Two items are projects that cost more than \$50,000, are unopposed, and for which staff is recommending approval.

Mr. Cowart explained that he would not be voting on item 2B because of business conflicts and requested that a separate motion be made for that item.

No one was present from the public to comment either pro or con.

After some discussion, Associate Member Holland moved to approve the page two items, 2A through 2H, excluding Item 2B. Associate Member Garrison seconded the motion. The motion carried, 8-0.

Associate Member Holland moved to approved the page two item, 2B. Associate Member Garrison seconded the motion. The motion carried, 7-0-1. Associate Member Cowart abstained.

2A. CITY OF NORFOLK, #04-2358, requests authorization to construct a 64-foot long by 30-foot wide concrete community boat ramp with 30 linear feet of riprap scour protection and two (2) open-pile access piers, 75-foot by 8-foot and 90-foot by 10-foot, and a 67-foot by 26-foot concrete community boat ramp with 26 linear feet of riprap scour protection adjacent to their property situated along Willoughby Bay in Norfolk.

Permit Fee.....\$100.00

2B. COWART SEAFOOD CORP., #05-0707, requests authorization to construct a 60-foot long by 25-foot wide floating commercial upwelling system adjacent to property situated along the Coan River in Northumberland County.

Permit Fee.....\$100.00

2C. BAYMARK CONSTRUCTION CORP., #04-2843, requests authorization to construct two (2) 250-foot long offshore stone breakwaters with beach nourishment adjacent to their property along the Chesapeake Bay, north of the six (6) previously permitted breakwaters in the Town of Cape Charles.

Permit Fee.....\$100.00

2D. ARLINGTON COUNTY DEPARTMENT OF PUBLIC WORKS, #98-0357, requests authorization to construct an elevated, pedestrian/bike trail crossing; and to install 1603 linear feet of 48-inch diameter, concrete encased, sanitary sewer line; along a 2,700 linear foot stretch of Four Mile Run. The proposed project is associated with the County's Four Mile Run Bike Trail and Sanitary Sewer Project.

Permit Fee.....\$100.00

2E. TOLL ROAD INVESTORS PARTNERSHIP II, LP, #05-0197, requests authorization to widen both existing Goose Creek Bridge road crossings by approximately 18 feet each, into the median of the existing Dulles Greenway toll road, crossing approximately 255 linear feet of Goose Creek in Loudoun County.

Permit Fee.....\$100.00

2F. WASHINGTON GAS, #04-1576, requests authorization to install a 12-inch natural gas line by directional drill method under a 670-foot section of the Occoquan Reservoir in Prince William and Fairfax Counties.

Permit Fee.....\$100.00

2G. U.S. HOME CORPORATION, #04-0690, requests authorization to construct a pre-cast concrete span bridge, 66 feet wide by 96 feet long, over Catoctin Creek to provide access to residential properties in the Wright Farm subdivision in Loudoun County. The bridge will span approximately 17 feet of State-owned submerged ground and remain a minimum of 5 feet above ordinary high water. During construction, approximately 140 linear feet of the creek will be temporarily diverted to allow the installation of bridge footers in the creek banks. Jersey barriers, along with plastic sheeting and sandbags, will be used to create the diversion, and filter fabric and riprap material will line the bottom of the temporary channel.

Permit Fee.....\$100.00

2H. FAIRFAX COUNTY PARK AUTHORITY, #02-0869, requests authorization to construct three (3) bridge crossings, ranging in width from 45 to 55 feet, over State-owned submerged land within Accotink Creek, a tributary to Pohick Bay, as part of the construction of a recreational trail near Annandale in Fairfax County. Temporary cofferdams will be placed in the creek to allow the installation of concrete support footers, and riprap will be installed along the banks and channel ward of ordinary high water for shoreline stabilization.

Permit Fee.....\$100.00

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3. CLOSED SESSION.

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

Item 13, U. S. Army Corps of Engineers, #02-0523; the Palmer, Evelyn, Jewett, and Mitchell appeals; and matters pertaining to Section 28.2-1203 of the Code of Virginia.

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

Tony Watkinson, Deputy Chief, Habitat Management, asked that other members of the Habitat staff be allowed in the closed session.

Associate Member Garrison moved for the following:

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

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

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

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

Associate Member Cowart seconded the motion. Commissioner Pruitt held a Roll Call vote:

AYES: Bowden, Cowart, Garrison, Holland, Jones, McLeskey, Robins, Schick and Pruitt

NAYS: None

ABSENT DURING VOTE: None

ABSENT DURING ALL OR PART OF CLOSED MEETING: None

The motion carried, 9-0.

**Katherine Leonard, Recording Secretary
Virginia Marine Resources Commission**

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4. **J. CARTER LUCK, ET AL, #04-1745.** Commission review on appeal by the applicants of the March 21, 2005, decision by the Virginia Beach Wetlands Board to approve a modified form of a permit to construct and backfill 357 linear feet of bulkheading and mechanically dredge approximately 6,700 cubic yards of material at their properties situated along the Western Branch of the Lynnhaven River in Virginia Beach.

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

Mr. Owen explained that the project was located on Lots 1, 2, 5, 6, 12, 13 and parcel C, along an unnamed cove of the Western Branch of the Lynnhaven River in the Laurelwood and Little Neck Subdivisions of Virginia Beach. The primary purpose of the project is to provide navigational access to seven property owners on the cove, which was last dredged in 1960. Additionally, the applicants wish to construct 357 linear feet of vinyl sheetpile bulkheading and two private piers.

Mr. Owen said that at the Wetlands Board's March 21, 2005 meeting, the Board received a staff briefing, including photographic slides of the project. In addition, comments from the Virginia Institute of Marine Science (VIMS) and the City's Planning Department were read into the record.

Mr. Owen explained that Commission staff had received two separate letters of appeal by individual applicants. The first letter of appeal was received on March 29, 2005, and the second letter of appeal was received on March 31, 2005 and both are considered timely under the provisions of §28.2-1311(B) of the Code of Virginia.

Mr. Owen said that the first letter, from Mr. R. Edward Bourdon, Jr. on behalf of his client Ms. Ruth D. Jackson-Mashburn, stated that a basis exists for modifying, remanding or reversing the Board's decision in accordance with §28.2-1313 of the Code. In support of this argument, Mr. Bourdon noted that his client had, and has recently purchased additional, riparian rights on the cove, had obtained approval from the U. S. Army Corps of Engineers and the Department of Environmental Quality, and believed that the impacts associated with his client's request would be diminimus and limited to heavily silted wetlands of lesser ecological significance. He maintained that minimal environmental benefit would be realized by maintaining his client's basin in its "silted over" condition.

Mr. Owen said that the second letter of appeal, from Mr. Brent R. Haden on behalf of Mr. Gilbert T. Bland and Joyce Williams, maintained that his client's property is riparian and that a permit should have been granted with respect to their property.

Mr. Owen explained that VIMS had indicated that greater than half of the project's 3,300 square feet of impacts to non-vegetated wetlands would result from the proposed dredge channel to the Williams/Bland property. They stated that it was undesirable, from a

marine environmental perspective, to dredge to -5' MLW through intertidal sand/mudflat and upland merely to create navigable access for one lot. Accordingly, they recommended terminating the project at the proposed boatlift on the Edwards property and to extend the Jackson/Mashburn pier to deeper water to reduce impacts to non-vegetated wetlands.

Mr. Owen stated that the Planning Department also originally recommended lengthening the Jackson/Mashburn pier but later withdrew that recommendation. They did recommend that 4' to 5' of additional buffer be maintained between the dredge cut and the adjacent marsh. The additional recommendations were made in light of the Chesapeake Bay Preservation Act.

Mr. Owen said that the applicants' agent, Mr. Tom Langley, represented them at the Wetlands hearing. Five of the seven applicants attended the hearing and four of those five provided testimony to the Board. There were no other speakers, pro or con, from the general public.

Mr. Owen said that Mr. Langley characterized the project as a community dredge project with 100 percent of the residents in the cove participating. After addressing several of the comments provided by VIMS and Planning, he provided a 1961 subdivision plat that depicted the Williams/Bland property as waterfront. Mr. Langley advised further that the Jackson/Mashburn pier could not be extended channelward due to restrictive covenants contained in the deed of sale.

Mr. Owen said that Ms. Ruth Jackson-Mashburn testified that she had purchased a portion of the mudflat in front of her home from Mr. Carter Luck to provide pier access to the dredge project. She and Mr. Luck stated that this purchase limited the length of the pier to prevent blocking his view out to the Lynnhaven River.

Mr. Owen said that Mr. Gilbert Bland stated that his property had been taxed as waterfront property for over forty years. He asked the Wetlands Board to support the project. His neighbor, Mr. William Edwards, testified that water depths adjacent to his and Mr. Bland's property averaged -3' to -4' at MLW in 1970.

Mr. Owen explained that following the public testimony, a motion was made and seconded to approve the project in modified form finding that the anticipated public and private benefits of the proposed activity exceeded its anticipated public and private detriments. That motion, however, called for the termination of the project at the proposed boatlift on the Edward's property and the extension of the Jackson/Mashburn pier length as necessary to eliminate dredging impacts to non-vegetated wetlands for this portion of the project. The motion passed on a vote of 4 to 2 with one abstention.

Mr. Owen explained §28.2-1313 of the Code provided that the Commission shall modify, remand or reverse the Board's decision if the Board in reaching its decision failed to

fulfill its responsibilities under the wetlands zoning ordinance; or the substantial rights of the applicant have been prejudiced because the findings, conclusions or decisions of the Board are in violation of constitutional provisions, in excess of statutory authority or jurisdiction of the Board, made upon unlawful procedure, affected by other error of law, unsupported by the evidence on the record considered as a whole or arbitrary, capricious or an abuse of discretion.

Mr. Owen stated that based on staff's review of the record, staff was unable to conclude that either the Board erred procedurally in their review of this matter, or that the substantial rights of the applicant had been prejudiced by that decision. The Board clearly recognized the significant ecological value of the sand/mudflat habitat as stated in its Wetlands Guidelines.

Mr. Owen said that it appears that the Board's decision to approve the project in modified form and limit the impacts to non-vegetated wetlands was based on the comments provided by VIMS and the Planning Department and ultimately a finding from the Guidelines that state that alteration of the shoreline was ordinarily not justified for purposes of creating waterfront property from lots or subdivisions not naturally contiguous to waters of navigable depth or waters, which can only be made navigable by substantial alteration or destruction of marine resources. As such, staff concurred with the aforementioned findings and recommended that the Commission uphold the March 21, 2005 decision of the Virginia Beach Wetlands Board in this matter.

In Commissioner Pruitt's absence, Associate Member Cowart asked for questions and there were none.

Carl Eason, Attorney for Gilbert T. Bland, one of the seven applicants in the case, was present and his comments are a part of the verbatim record. Mr. Eason said that the Wetlands Board made two errors pursuant to Section 28.2-1313(2) of the Code of Virginia. He said that that question was, is the Bland property waterfront? He said that it is clear that it is waterfront and he referenced Section 28.2-1202 pertaining to the rights of owners to extend to mean low water mark and to the Wetlands Board transcript on page 3, testimony of Mr. Couch, in which he says the plat says there is a right to access water. He said that the Wetlands Board did make an error of law. He further referenced Section 62.1-164 of the Code where VMRC was given the authority to allow for erection and abatement of private wharves, piers, and landings. He also cited that in Carr versus Kidd, a 2001 Supreme Court Case where an allowance was established for accretion of property, which was caused by natural forces. He said to modify the project as suggested by the Wetlands Board would limit their access to the water. He referred the Commission to the motion of the Wetlands Board by Ms. Lowe on page 24 of the transcript. He also discussed the letter of April 1960 to a Mr. Smith from the Corps of Engineers, which showed that the area was previously dredged. He asked the Commission to either determine that by law these people have the right of way or to remand the matter back to

the Wetlands Board for reconsideration in accordance with statute. He said he urged the Commission to do that.

Edward Bourdon, Attorney for Ruth D. Mashburn-Jackson, one of the seven applicants, was present and his comments are a part of the verbatim record. Mr. Bourdon said that he wished to adopt Mr. Eason's statements and agreed that Carr versus Kidd did apply. He explained that the Wetlands Board did error in its determination that she had no riparian rights. He said the plat of Laurel Wood shows that and her plat shows she does have riparian rights. He said no one on the Wetlands Board was opposed to the project. He explained that Mr. Langley's statements to the wetlands board that the applicant bought additional land in order for her to extend the pier, which made it seem that she did not have riparian rights, was in error. He said his client went to Mr. Luck to buy additional riparian rights. He said the applicant went to the Zoning Board for a variance and they raised no objection until just before the Wetlands Board meeting. He said that out of 105,000 cubic yards of non-vegetated wetlands impacted in the City of Virginia Beach, this impact was a very small fraction. He said his client was willing to reduce the pier to 4 feet wide instead of the 6 feet. He said the Wetlands Board never asked for mitigation and his client was willing to do so. He said his client's riparian rights were not clear to the Wetlands Board. He said that his client had been in the permit application process for two years. He requested that the Commission remand the matter back to the Wetlands board because of time and the willingness of the applicant to mitigate. He says he knows his client has riparian rights and she is willing to deal with any reasonable issues.

Kay Wilson of the City Attorney's office representing the Virginia Beach Wetlands Board was present and her comments are a part of the verbatim record. Ms. Wilson stated that dredging was a complicated issue for the Wetlands Board. She also referenced Section 28.2-1313 from which the Commission derived its authority to reverse, remand, or uphold the Wetlands Board's decision. She said that the members of the Wetlands Board listened to VIMS and followed the Wetlands Guidelines as they must do. The board followed the VIMS recommendation to pull back the dredging. She said in Ms. Lowe's testimony, she stated that they followed VIMS' recommendation and the VMRC guidelines; Mr. Bland no longer had any navigable water and would have to pier out to navigable waters; to establish these riparian rights it would be necessary for them to go to the Circuit Court to get that determined; Ms. Jackson-Washburn could pier out; the agreement between Ms. Jackson and Mr. Luck was a private issue not a Wetlands Board concern; it was the Wetlands Board's obligation to protect the wetlands; and VIMS wanted no dredging in this area. She said that the Wetlands Board agreed to VIMS' request. She said in response to Mr. Bourdon's question, the Langley representative could have deferred to answer the question regarding the additional property purchased. She said that an ample decision had been made as recommended by VIMS. Associate Member McLeskey asked if this had any connection to the dredge project being done by the City. Ms. Wilson responded that she only knew about this case and could not answer the question. Associate Member Schick asked if this was applied for as maintenance or new dredging? Ms. Wilson responded that there was some discussion on this, but that

being that it was 45 years ago, the Wetlands Board did not consider it maintenance dredging. Associate Member Schick asked if VIMS was told about the previous dredging and Ms. Wilson said they were aware of it and they said that it did not have any bearing on their recommendation.

Mr. Eason in his rebuttal asked that Tom Langley be allowed to speak to the board as he thought that Mr. Langley would be able to address Mr. McLeskey's question. Associate Member Cowart said because this would be new information, he had to ask for a motion to allow the record to be opened as requested by the appellant's attorney, Mr. Eason. **Associate Member McLeskey moved to allow the record to be opened. Associate Member Schick seconded the motion. The motion carried, 7-1. Associate Member Jones voted, No.**

Tom Langley of Langley and McDonald Engineering, was sworn in and his comments are a part of the verbatim record. Mr. Langley, in response to a question by Mr. McLeskey regarding the Lynnhaven Dredging Project and the connection to this project, explained that this was an ongoing project and request for proposals had been sent out. He said they will be dredging the City's channel and this would also serve this project. Associate Member McLeskey asked if the property owners in the vicinity of this dredging project had been invited to participate at the property owner's expense. Mr. Langley said that they had been. Associate Member McLeskey asked if this invitation had been extended to property owners in the past. Mr. Langley explained that there had not been this same invitation, but that the property owners had been allowed to piggyback so as to save on the mobilization costs of the dredging equipment and taking advantage of the placement site. He said that in regard to the maintenance dredging or new dredging question of Mr. Schick, he said that the 1960 plat showing that it had been previously dredged was handed out at the Wetlands Board meeting.

Mr. Eason explained to Mr. Schick that the maintenance dredge was documented with the 1960 plat and proved that Mr. Bland's property did have riparian rights and did run contiguous with a navigable watercourse. He also said that the Carr versus Kidd Supreme Court decision established that accretion by natural forces should not take away a person's riparian right. He said the Wetlands Board made its decision based on the confusion that riparian rights were being established by this dredging that did not exist before now. He said given this reasoning for such a motion by the Wetlands Board, his clients were asking that the Commission remand the case back to the Wetlands Board.

Mr. Bourdon in his rebuttal said that his client did have riparian rights before they made the purchase of an extended area to avoid some of the dredging, not to purchase their riparian rights. If what Ms. Wilson said was true about his client acquiring riparian rights by the purchase, he would agree with her, but that's not true, they already had riparian rights.

Commissioner Pruitt returned to the meeting. Mr. Pruitt reminded the Commission that they were dealing with an appeal and should only look at the portion that the Code assigned to them to do. He said they did not need to look at the particulars. He asked Mr. Josephson to comment.

Carl Josephson, Senior Assistant Attorney General and VMRC Counsel explained that primarily the appellants were proposing that there was an error in law and whether there are riparian rights or whether waterfront existed authorized some difference from the Guidelines and standards of the Wetlands Act. The Commission was not authorized to make property rights decisions and only the Circuit Court could make such a decision. He said the Commission must take into account the wetlands standards and Wetlands Guidelines to the extent allowed. He explained as for the property issues, it was the responsibility of the appellants to take this to court. He said Ms. Wilson was right when she said the appellants needed to address the property issue.

Associate Member McLeskey explained that he had done business with both Langley and McDonald and Mr. Bourdon but he felt he could participate in this case without bias and he was not getting any financial benefits from this project.

Associate Member McLeskey moved to remand the matter back to the Wetlands Board to be reconsidered, as there was a lot of confusion in the record from the Wetlands Board. Carl Josephson, Senior Assistant Attorney General explained that this was an appellant hearing and a determination had to be made as to whether the Wetlands Board met its responsibilities and confusion was not a sufficient legal basis. He further explained that the Commission cannot answer the property issue and neither can the Wetlands Board.

Associate Member Robins stated that the Commission must look at the Code for a defect and he did not see evidence of prejudice or that the Wetlands Board failed. He said they acted consistent with the VIMS recommendations and considered testimony on all sides. He said that he did not see a compelling reason to remand it back to the Wetlands Board. Associate Member Schick said that he agreed with Mr. Robins.

Associate Member Schick moved to accept the staff's recommendation to uphold the local Wetlands Board's decision. Associate Member Jones seconded the motion. The motion carried, 6-1-1. Associate Member McLeskey voted, No and Associate Member Garrison abstained.

Fees not applicable, Wetlands Appeal.

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5. **INDIAN CREEK YACHT AND COUNTRY CLUB, INC., #04-2444**, requests authorization to construct a 148-foot long by 8-foot wide, commercial pier extension with an 80-foot long by 8-foot wide T head, seven tending piers and associated mooring piles to create 15 additional wet slips at their marina situated within a cove of Dividing Creek in Northumberland County. Numerous property owners protested the project.

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

Mr. Madden explained that the Indian Creek Yacht and Country Club, Inc. is a marina located approximately four (4) miles southeast of the town of Kilmarnock on the north shore of Dividing Creek. The existing 22-slip marina is located adjacent to the Indian Creek Country Club in the Indian Creek Estates subdivision in Northumberland County.

Mr. Madden further explained that the applicant wished to construct a 148-foot long by 8-foot wide extension to the main pier, an 80-foot long by 8-foot wide T-head, and ten (10) tending piers and mooring piles in order to accommodate 15 additional wetslips.

Mr. Madden said that eleven adjacent property owners protested the proposed expansion. The protestants believed the expansion would obstruct their view, potentially decrease their property values, and restrict the safe passage of vessels into and out of the cove. In addition, the protestants believed the expansion would result in additional noise, light and water pollution. The protestants suggested a better alternative would be to construct a pier on the southwest side of the applicant's property.

Mr. Madden stated that the Yacht Club had determined that there was a demand for additional wetslips as a result of the destruction of individual piers by Hurricane Isabel. In addition, the applicant indicated that their membership had experienced a 50% increase since the last expansion. Reportedly at least eight (8) members of the Yacht Club with boats in excess of 35 feet have expressed an interest in mooring their vessels at the club's new pier.

Mr. Madden said that the Virginia Institute of Marine Science (VIMS) indicated that there was a large shoal of submerged aquatic vegetation in the vicinity of the marina. Their November 11, 2004, report stated that direct impacts to SAV should be avoided by siting the pier extension and all new pilings in water depths greater than minus six (-6) feet MLW. Furthermore, VIMS recommended that additional soundings be provided to ensure that all of the finger piers and pilings would be located out of the shallow SAV habitat.

Mr. Madden said that the Virginia Department of Health had stated that they have no objection to the issuance of the subject permit. The Department of Environmental

Quality has indicated that the water quality impacts should be minimal and /or temporary in nature. As a result, they have no objection to the project.

Mr. Madden stated that the Northumberland County Wetlands Board at their meeting on December 2, 2004, approved the initial proposal, which included a 198-foot long pier extension with a 110-foot T-head. The Board confined their deliberation to the project's impacts on adjacent intertidal wetlands and concluded that the impacts were reasonable and justified. The Northumberland County Board of Supervisors subsequently approved a Conditional Use permit, but with a modified version of the pier extension, which was identical to that under consideration at this time.

Mr. Madden explained that while Commission staff appreciated the fact that the applicant was attempting to address a demand for public access to Dividing Creek, staff was concerned that the current proposal constituted an excessive encroachment into the mouth of the cove.

Mr. Madden said that the project drawings (Item 2-1), noted that the cove was 445 feet wide. The pier extension and pilings outboard of the T-head would be located 216 feet channelward of mean low water. If constructed as proposed, the yacht club would control 48% of the width of the cove. Staff believed that this degree of encroachment was inconsistent with Section IV articles (4) and (5) of the Commission's Subaqueous Guidelines, which state that structures should be within their riparian area and encroach no more than one-third the distance across the waterway.

Mr. Madden said that in addition, while it appeared that the pier extension might be sited in water deep enough to reduce the potential for direct impacts to SAV during routine small boat operations, there existed a potential for more direct impacts. According to VIMS, the SAV was only 70 feet from the inboard side of the pier extension. This standoff distance seemed insufficient to ensure that 35+ foot long vessels would be able to maneuver in and out of slips without impacting the SAV beds. It also provided only a very narrow corridor between the SAV shoal and the existing slips at the head of the pier.

Mr. Madden said that the applicant had maintained that the proposed pier extension was the only practical alternative to meet their needs. Staff was not persuaded and believed the encroachment was excessive in light of the protests that had been received. Furthermore, staff does not believe the project is consistent with the Commission's Subaqueous Guidelines and, as such, staff recommended denial of the project as proposed.

Bill Kopcsak, Attorney for the applicant, was present and his comments are a part of the verbatim record. Mr. Kopcsak said that originally golfing was a big part of the club, but growth in the surrounding area and other golf courses has necessitated increasing the yacht club portion of the business. He said the demand is there, as there is a waiting list for those interested in docking their boats. He said that the main concern of the protestants was that they did not want to look at any more boats. Photos were distributed

to the Commission. He said that the marina was built in the 1950's, expanded in 1966 and in 1983 they added 10 slips. He said he and the Board of Supervisors felt that to move where there was a marina, it was unrealistic to expect no expansion. He said many revisions had been done by the applicant in order to appease the protestants. He said that they would be providing a state-of-the-art pump out station for public use as well as the Yacht Club members. He said there would not be any encroachment on public or private oyster grounds. He said the photo shown of the SAV was taken several years back and now there was no SAV in that location at the present. He said the Yacht Club goal was to champion the environment, not harm it. He distributed an overlay drawing to the Commission showing what has been eliminated from the original proposal. He said there are only five property owners protesting the project, not the eleven as told to the Commission. He said that in November 2004 VIMS scientists asked for more soundings to show that no encroachment was on SAV. He said that VIMS responded to their sounding report that there was no encroachment on the SAV by this project. He said the Corps of Engineers have approved the project. He said they are right on the money to all codes and guidelines with this proposal. He said that he had others present in support of the project. He said they have obtained all other agencies' approval and the Yacht Club board had approved the funding of this expansion. He said that the staff seems to rely on the guidelines, which are not laws or regulations. He said in the guidelines when you talk 1/3 of the water body, you are talking about the creek and the project does not take that much of the creek.

Commissioner Pruitt swore in the following speakers supporting the project.

Dr. Robert McCloud, at one time the Commodore and involved with the Yacht Club for many years, was present and his comments are a part of the verbatim record. Dr. McCloud said the location of the pilings on the handout were only approximate as to location and it would be established by the contractor as to their exact location. He said that the 1/3 of the water body rule applied except when there was unusual configuration of the creek and that was actually what you had here.

Commissioner Pruitt, in response to a statement made by Dr. McCloud, said the permit, if approved by the Commission, would establish where the pilings would be located, not the contractor.

Bill Johnson, retired Colonel and involved with the yacht club for eleven years was present and his comments are a part of the verbatim record. He said as a service to the public they offer boating lessons to children and adults. He said they have increased to four safety boats, which is also part of the contribution of the club to the public.

John Hunt, supporter of the project, was present and his comments are a part of the verbatim record. Mr. Hunt said that they need the 3 larger slips and the smaller slips for the sailboats. He said that the outboard pilings would be eliminated.

Katherine Grainer, property owner, was sworn in and her comments in opposition to the project are a part of the verbatim record. She said she has been in this area all her life, first with her parents and now she owns property herself. She said she is very familiar with the area and what has been changed and done in the area. She said that the T-head was supposed to be reduced to only 80 feet, but with the pilings it makes it more like 120 feet. She said she felt the number of protestants told to the Commission by Mr. Madden was correct and not just 5 as stated by Mr. Kopcsak. She provided overhead pictures for the Commission in her presentation. She said she represented the five property owners closest to the project. She said this project would increase the noise pollution and the lighting at night was distracting. She said they were also concerned with their property value being affected. She said there are other facilities to provide slips for boat owners. She said they are concerned with the public pump-out station being provided and she understood that the Health Department required personnel to monitor and operate it seven days a week. She said the Yacht Club was closed on Mondays and they would need someone to oversee the use of the pump-out station on that day. She said in regards to the SAV, VIMS had indicated they are concerned with the SAV in the area and the property owners were also concerned. She said they were concerned with navigation in that area which would harm the SAV and the fringe marsh because of the siltation that would result from boats being operated in that area. She said that a large part of the creek was condemned already and they are concerned because the whole marina would be in a condemned area. She said they felt the marina expansion would affect any potentially productive oyster grounds in the area. She said the last issue they have was with navigation. She said the pier as proposed would affect the sailing class and the 1/3 rule would be violated. She said that this pier as proposed would mean that Mr. Bullock would have to dock his boat differently and his was the largest boat in the area. She said she was concerned that the finger pier and associated pilings would put boats in the shallower water adjacent to her property and there would not be enough depth for the larger boats. She said they were opposed to the project as proposed and there was a need to try to work out a compromise with the property owners.

Mr. Kopcsak in his rebuttal said this was an issue because the property owners do not want it in their backyard. He said there are no other protestants, other than Mr. King, present at this hearing.

Associate Member Bowden asked if there were pilings proposed near the proposed finger pier. Mr. Hunt said that they would be eliminating those pilings on the west side of the dock. Mr. Bowden explained he did have a problem with the expansion on the SAV side. He said that he had operated very large and small boats. He said with a 40-foot boat it would be impossible to avoid the SAV. He said he would support a motion or make a motion that would require the reduction of the slips from 40 feet to 30 feet and that the T-head be cut down to 30 feet on that side therefore making it a total of 70 feet. He said he felt this would still allow for enough expansion of the facilities at the marina.

Associate Member Jones explained that the pier would take up more than 1/3 of the cove entrance and to be fair by extending the pier they were trying to avoid the SAV. She also said that because SAV was not presently there they still needed to protect the habitat for the potential of having SAV there, which was necessary for the preservation of the fisheries. She said she was surprised with the golf course being next to the water the water quality was very good, which showed that there was apparently good management practices being done by the marina.

Association Member Garrison suggested that the applicant, protestors, VIMS and VMRC staff have a meeting downstairs to see if a resolution could be reached in this matter with the proposals made today. No action was taken on this suggestion.

Mr. Kopcsak explained, in response to Mr. Garrison's suggestion, that VIMS had clearly addressed the issue in November 2004 when they requested the soundings report. He said when this information was provided to them, they came back and said it was fine. He said they would accept the compromise to reduce the slips size and to reduce the width of the T-head.

Associate Member Schick moved to approve the project as compromised. Associate Member Holland seconded the motion. Associate Member Robins asked that the motion be amended to include the installation of navigational aids at the shoal in accordance with U. S. Coast Guard requirements. Associate Member Jones asked for clarification of the motion. Associate Member Schick explained that the motion approved the project as compromised, requiring that 10 feet be cut off the T-head on the west side to make it 30 feet and to require 30-foot slips. Associate Member Robins suggested that the pilings on the channel ward side not be allowed because of the encroachment concerns that had been expressed. Associate Member Schick and Holland both agreed to the amendment. Commissioner Pruitt allowed Ms. Grainer, protestant, to speak to the motion. Ms. Grainer offered a compromise to get rid of the slips on the right of the pier and to shift the project 30' to be closer to the 1/3 rule. Associate Members Schick and Holland did not accept her recommendation. Associate Member Jones asked if the additional slip at the edge of the existing pier was considered. Associate Member Schick responded yes, it was allowed. The motion carried, 8-0.

Permit Fee.....\$100.00

Commissioner Pruitt said that the Commission had done a good job, compromising to resolve this item.

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6. **RON BLACKBURN, #05-0020.** Commission review of the Gloucester County Wetlands Board's March 9, 2005 decision to approve a permit to construct an 18-foot wide by 200-foot permanent roadway across vegetated tidal wetlands for access to property situated along Kings Creek along State Route 653.

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

Mr. Neikirk explained that Mr. Blackburn's project involved two (2) parcels of land that are situated along Kings Creek adjacent to State Route 653 in the Achilles area of Gloucester County. The project called for the construction of an 18-foot by 200-foot solid fill road with two (2) 20-inch culverts across tidal wetlands to provide access to the property for the stated purpose of timber management and silviculture activities. The two parcels total 16.16 acres. VIMS estimated that construction of the road would result in the filling of 3,000 square feet of tidal wetlands. Mr. Blackburn presented a more detailed survey of the road location to the Wetlands Board during the March 9, 2005, hearing, that survey indicated that the road would impact 1,355 square feet of wetlands. Since the survey was only presented at the hearing, VIMS did not have an opportunity to verify the revised estimated wetland impacts.

Mr. Neikirk said that the wetlands Mr. Blackburn proposed to cross are located on the southeast side of the property between the forested upland and State Route 653. The other sides of the property abut privately owned parcels. State Route 653 crosses over the Kings Creek wetlands just west of the project site.

Mr. Neikirk said that the project was first heard during the February 9, 2005, Gloucester Wetlands Board meeting. The board tabled the matter until their March 9, 2005, meeting with a request that Mr. Blackburn provide a more specific site plan and that he flag the location of the road at the project site. At the February 9, 2005 and March 9, 2005 public hearings Mr. Scott Rea, Gloucester County Environmental Programs Manager, briefed the Board with a PowerPoint presentation. The briefing included a description of the proposal, several images of the project site and a summary of the VIMS Shoreline Permit Application Report. VIMS stated in their report that since the exact location of the project could not be determined from the drawings and the site had not been marked in the field, their estimated impacts were based on best professional judgment. To eliminate or reduce the wetlands impacts, they suggested seeking alternate points of access or using temporary mats to traverse the marsh. They suggested that any solid fill required to traverse the marsh be removed upon completion of the proposed logging operation, and that the elevations be restored to pre-construction conditions. They further suggested that monitoring be conducted to determine the need for restoration of elevations and vegetation.

Mr. Neikirk said that Mr. Blackburn represented himself during the hearing. He said that Mr. Blackburn said that in his opinion the proposed site of the road crossing was the area

that would have the least wetland impacts. Mr. Blackburn had said that the two 20-inch culverts were the same size used by VDOT at the road crossing of Kings Creek nearly adjacent to his property. He also stated that in addition to the State Route 653 crossing near his property, the marsh had already been crossed with a private road to access the adjoining property owned by the Deaton Land Trust

Mr. Neikirk stated that the Board asked Mr. Blackburn if he had approached his neighbor, Mr. Deaton, concerning use of his property to access the lots. Mr. Blackburn said he had not because Mr. Deaton's crossing was down the road and he didn't want to cross Mr. Deaton's land to get to his property. He stated that he wanted a permanent access to his property.

Mr. Neikirk said that Mr. Blackburn had explained that various management activities such as, clearing dead wood, spraying, thinning, and replanting necessitated intermittent access in addition to the 30 to 35 years between harvests. He reiterated that he wanted permanent access.

Mr. Neikirk said that Chairman Roberts then asked for comments from the public and when there were none he closed the public hearing and asked for a Board discussion.

Mr. Neikirk said that a motion to table the matter until the March 9, 2005, meeting was made and the board requested that Mr. Blackburn provide a specific site plan showing where the road was proposed and to mark the location of the proposed road at the site. That motion was seconded by Boardmember Hayes and approved unanimously.

Mr. Neikirk explained that discussion on the application continued at the March 9, 2005, meeting. Alternate Board Member Hogge was not present since Board Member Borden was in attendance. The 2004 General Assembly amended the Wetlands Ordinance (§28.2-1303) to provide for alternate wetlands board members to replace those that are absent. Staff is uncertain whether the Board erred procedurally when the regular member replaced the alternate member during the continuation of this hearing.

Mr. Neikirk said that the Board looked again at the powerpoint presentation at the March 9, 2005 meeting.

Mr. Neikirk said that Board Member Priest moved to approve the application. Board Member Borden seconded the motion.

Mr. Neikirk said that Board Member Sibley said that he would be willing to approve a temporary structure not a permanent road crossing.

Mr. Neikirk said that the Board expressed concern that approving the application would affect other lot owners' rights to cross this marsh to access their property. He said that

the board was also concerned that the project might be considered a precedent or present a question of equity when considering similar projects for the adjoining lots.

Mr. Neikirk said that the board then asked Mr. Blackburn if he owned the subject property. Mr. Blackburn stated that he didn't own the property but that the owner was his client and that he also managed the property behind this tract. Mr. Blackburn stated that he no longer owned the property.

Mr. Neikirk said that although his first motion to approve the project was still apparently on the floor, Board Member Priest made a second motion to "approve this application". Board Member Borden again seconded the motion.

Mr. Neikirk said that following the second motion there was further discussion about the current ownership of the property. Mr. Blackburn stated that a client of his now owned the property. Mr. Blackburn said he sold the property to Mr. Quiejo with a condition that he follows through with getting approval for the road. Board Member Priest added that condition to his second motion requiring that the property owner sign the application and he permit be issued in his name.

Mr. Neikirk said that the second motion was approved by a four to three vote with Board Members Sibley, Teagle and Roberts voting against the motion and expressing a concern over approving a permanent crossing.

Mr. Neikirk said that the Wetlands Ordinance states that a Wetland Board shall "preserve and prevent the despoliation and destruction of wetlands within its jurisdiction while accommodating necessary economic development." Furthermore when considering an application, Wetlands Boards are directed to consider among other things the anticipated public and private benefits and the anticipated public and private detriments associated with the proposal and to consider whether the proposal conforms with the standards prescribed in the ordinance, as well as, the Wetlands Guidelines.

Mr. Neikirk said staff believed the Board attempted to consider Mr. Blackburn's need for the project and explored several alternatives to access the property without crossing the wetlands. In order to fully evaluate the private and public benefits and detriments of the project, however, staff believed the Board should have had information on the value of the timber on the property, whether any other use was intended for the property, the cost associated with obtaining an easement over other property, and why access to the property could not have been obtained with temporary structures. Although Mr. Blackburn stated that "they do not grant right-of-ways", staff does not believe the board fully evaluated the possibility of acquiring a right-of-way over the Warwick Investors property which Mr. Blackburn apparently managed. Another option that did not appear to have been evaluated involves gaining access over the crossing owned by the adjoining property owner, Mr. Deaton. Although Mr. Deaton's crossing was partially washed out, the bulk of the wetland impacts have already occurred. That crossing could possibly be

restored or improved and used to provide access to all four tracts separated from Route 653 by Kings Creek.

Mr. Neikirk said that VIMS identified the wetlands at the project site to be a “Brackish Water Mixed Community.” The Wetland Guidelines classify this type of wetland as a “Group 1 Vegetated Community” which merits the highest order of protection. Even if the Wetlands Board had more fully evaluated the proposal and concluded that the project was warranted, staff believes it was incumbent on the Board to consider wetlands compensation for all unavoidable impacts. When considering wetlands compensation, the Board is guided in its deliberation by the Wetlands Mitigation-Compensation Policy contained in the Wetlands Guidelines.

Mr. Neikirk stated that staff recommended the project be remanded to the Wetlands Board with direction to more fully weigh the anticipated public and private benefits of the project against the anticipated public and private detriments, and to more fully explore options to eliminate or further minimize the wetlands impacts. If after a thorough re-evaluation of the project the Board concludes the project is warranted, we recommend that the Board utilize the Wetlands Mitigation-Compensation Policy to develop appropriate conditions for wetlands compensation. Staff also believed it would be prudent to seek a legal opinion concerning the replacement of alternate members during continued hearings.

Commissioner Pruitt asked for clarification from staff on their concerns regarding the use of alternate members during continued wetlands hearings. Mr. Neikirk said that there was an allowance made by the General Assembly for an alternate to attend in the absence of a regular board member at the Wetlands Board meetings. He said in this case there was two hearings and an alternate attended the first Wetlands Board meeting and the regular member who was absent from the first meeting, attended the second meeting. Carl Josephson, Senior Assistant Attorney General and Counsel for VMRC explained there was a Supreme Court case decision relating to this issue. He further explained that the regular member who attended only the second meeting could be the one to decide if he had seen and heard enough to make a decision on the case.

The applicant was not present at the meeting.

Dr. Bill Roberts, Wetlands Board Chairman, was present and his comments are a part of the verbatim record. He said they would welcome the matter be remanded to them. He said they also champion protection of the wetlands. He said the amount of wetlands impacted in this project was minimal. He said they had typically permitted 300 to 400 sq. feet encroachments on wetlands. He said they did not understand why this was being heard by the Commission. He said that he was one of the members who had voted no. He said they would be glad to do whatever the board would suggest.

Scott Ray, representing Gloucester County, was also present, but did not comment.

Commissioner Pruitt asked for a motion.

Associate Member Garrison moved to accept the staff's recommendation to remand the matter to the Wetlands Board. Associate Member Schick seconded the motion. Associate Member Cowart explained that the Wetlands Board needed to consider mitigation, alternative locations, and temporary structures. Commissioner Pruitt said that this needed to be added to the motion. The amendment was accepted by Associate Members Garrison and Schick. The motion carried, 8-0. Commissioner Pruitt told Mr. Roberts they did not take this lightly when staff asked for such a review of the Wetlands Board decision and he felt that they had done the right thing bringing this to the attention of the Commission. He said that in this case he felt the Wetlands Board needed to reconsider this matter.

Fees not applicable, Wetlands Appeal.

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The Commission broke for lunch at approximately 1:03 p.m. They returned from lunch at approximately 1:45 p.m.

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(This item was heard early at the request of Dr. Wittman.)

- 16.** Briefing by Dr. Rob Wittman, Virginia Department of Health, Division of Shellfish Sanitation, pertaining to Condemned Shellfish Area 7A (Hampton Bar Area).

Dr. Rob Wittman, Assistant Director for the Virginia Department of Health, Division of Shellfish Sanitation, gave the presentation. His comments are a part of the verbatim record.

Roy Insley, Head, Plan-Statistics, was present and his comments are a part of the verbatim record. Mr. Insley said that a few weeks ago there was discussion to open the Hampton Roads Relay Area and staff contacted the Division of Shellfish Sanitation. He said that the watermen said that if they could open this area to clean harvest, they would be able to get more profit. He said he and others were told by the Health Department that there was potential for the area to be opened.

Rob Wittman, Assistant Director for the Division of Shellfish Sanitation, was present and his comments are a part of the verbatim record. Mr. Wittman said according to the history of the area it had been closed for various reasons. He said that because the clam

holds onto the noro viruses, which are harmful to humans and not to the shellfish the Health Department wanted to assure good science was used before opening the area. He said they wanted to be very careful, so as not to sacrifice the industry. He said they had contacted VIMS, FDA, Center for Disease Control, and Consolidated Laboratory to look at this issue. He said they needed to study what was the impact of the sewage treatment, where did the viruses end up, what was coming out of the pipe, etc. He said they were writing the framework and everyone agreed. He said they would probably be able to open the area in 2006. He explained that viruses were different from bacteria. He said one virus can make you sick, whereas, it took a multitude of bacteria to do the same. He said they want to open the area, but they want to do it right and involve all knowledgeable scientists, plug in data and summarize it, thereby, coming up with the correct answers. Associate Member Garrison said that in the past watermen had approached the Commissioner and volunteered to supply the samples. Mr. Wittman said they want to use help, but they must be able to monitor it. Associate Member Garrison said the staff would be advised to provide names to Mr. Wittman. Associate Member McLeskey asked if the Health Department had looked at the Lynnhaven River area. Mr. Wittman explained that they must examine the cause of the pollution and eliminate that cause. He said they are doing a plan currently and they can open a fair amount of the area, especially in Broad Bay. He said it would take a while to remove the inputs and see if it works. Commissioner Pruitt asked if the virus hurt people but not the clam? Mr. Wittman said yes. Commissioner Pruitt asked if they were considering opening the area this year? Mr. Wittman said no, because there was no good data because of the lack of information on viruses. He said they want to and they want to start quickly. He said they need samples for all temperatures, cold, hot, cool, wet, etc. weather conditions.

Commissioner Pruitt asked if there were any commercial clammers present?

Edward Ewell, Clam Harvester, was present and his comments in support of opening the area are a part of the verbatim record. Mr. Ewell said that the clammers were hurting because the clams are scarce and fuel cost had increased. He said in the past 20 years there have been no raises and no increases in price. He said this is the worst year in 30 years he had seen in all the years he worked as a commercial clammer. He said in talking with Health Department personnel they told him there had been no bacteria for quite a while.

Mr. Wittman said that the FDA sets the requirements for all closures.

Associate Member Cowart said that the Shellfish Sanitation Division was user friendly and tries to help and do what needs to be done. He said this was a real problem that the virus concentrated in the clam. He said if the polluted clams were to be sold and someone took sick and it was traced to Virginia, the state would be removed from the certified shippers list. He said the Health Department was addressing the problem and the Commission appreciated Mr. Ewell bringing the matter to their attention. He said nothing can be done this year because of concerns for public health.

Commissioner Pruitt suggested Mr. Ewell get with Mr. Wittman at his office to continue his discussion. He said the Commission cannot open the area without the Health Department, Division of Shellfish Sanitation's approval.

Mr. Ewell said that the same study was done five years ago. Mr. Insley said Mr. Ewell was probably talking about the hydraulic study that was done when the Middle Ground Clam Broodstock area was established. That was done with VIMS' computer modeling to determine where the clam larvae would settle out. He suggested that data could be used for this study. He said Plans/Statistics would work with this current study to get that information. Mr. Ewell asked how long would this study take and Mr. Wittman responded that they would work as hard and as quickly as they can, but at the same time they must be concerned with preserving the public's health.

No further action was taken.

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7. **GWYNN'S ISLAND BOATEL, #04-2050**, requests authorization to hydraulically dredge 1530 cubic yards of subaqueous material to provide maximum depths of minus six (-6) feet at mean low water, and to maintenance dredge the area on an as-needed basis, to add finger piers and mooring piles to create five (5) wet-slips at the channel-ward end of an existing L-head pier, and to construct a new T-head pier with ten (10) wet-slips extending 180 feet channel-ward of an existing bulkhead at their facility situated along Milford Haven in Mathews County. Two nearby property owners protested the project.

Chip Neikirk, Environmental Engineer, Sr., gave the presentation with slides. His comments are a part of the verbatim record. Mr. Neikirk explained that a petition in support of the project had been added to the Commission notebooks.

Mr. Neikirk explained that the Gwynn's Island Boatel facility was owned by Mr. David Fitch and is situated along the southern shoreline of Milford Haven in Mathews County. He said that the facility provided dry stack storage for 171 boats and was located adjacent to the U.S. Coast Guard's Milford Haven Station, and approximately 450 feet east of the Gwynn's Island Bridge. Development along the shoreline was a mixture of residential and commercial properties. The existing facilities included three staging piers without slips. The longest of the piers extended approximately 125 feet channelward of mean high water.

Mr. Neikirk said that Mr. Fitch proposed to hydraulically dredge approximately 1,530 cubic yards of subaqueous material to provide maximum depths of minus six (-6) feet at mean low water and to construct finger piers and install mooring piles to create five (5)

wetslips at the channelward end of the existing “L-head” pier. He also proposed to construct a 6-foot wide by 160-foot long floating pier with an 80-foot by 20-foot “T-head” with finger piers and mooring piles on the west side of the pier to create 10 wetslips. Mr. Fitch stated that the slips are needed to temporarily moor recently launched vessels or those awaiting removal from the water. He added that these slips would not be rented.

Mr. Neikirk said that this property was the subject of a violation in 1991 when the original developer of the boatel, Mr. Robert Payne, owned the property. That violation involved unauthorized dredging and the construction of a pier that exceeded the dimensions in the original VMRC permit #85-0845. The violation was eventually resolved with Mr. Payne removing the illegal pier, paying a \$10,000 civil charge and entering into a consent decree that prohibited him from making any commercial use of the illegally dredged area until February 25, 1997. Additionally, Mr. Payne was advised the Commission would consider any future dredging outside the scope of the original dredging as new dredging and subject to dredging royalties.

Commissioner Pruitt asked why they were being given this information. Mr. Neikirk said that it was just to provide some history of the facility.

Mr. Neikirk said that Mr. Alan Biddison, an adjoining property owner and Mr. Jason Leahy, a nearby property owner were protesting the project. They both noted some apparent discrepancies in the drawings, questioned the need and intended use of the open space along the proposed pier, and expressed concerns with the impact of the proposal on the environment, navigation and aesthetics.

Mr. Neikirk explained that the piers associated with this facility were situated within a basin, dredged from a sand bar that separated the highland from the 14-foot deep channel in Milford Haven. The channel was approximately 200 to 250 feet wide in front of the marina. The dredging proposal included the removal of a finger of sand that remained along a portion of the north side of the dredged basin that impeded access from the channel to portions of the dredged basin, as well as the existing and proposed piers. The T-head of the floating pier, as proposed, was to be located at the channelward edge of this bar. Accordingly, while the pier should not impact navigation, boats moored along the channelward end of the T-head and activity associated with docking at the T-head might encroach into the currently navigable portion of the channel.

Mr. Neikirk said that VIMS stated that the project was acceptable from a marine environmental viewpoint but suggested that the dredging should be avoided during the months of July, August, September, December, January, and February if there were productive shellfish grounds in the vicinity.

Mr. Neikirk stated that the Department of Environmental Quality has determined that the water quality impacts will be minimal and temporary and decided that a Virginia Water

Protection permit would not be required. The Health Department found the project acceptable and stated that the area was condemned for the direct marketing of shellfish and that the project will not cause an increase in the size of the closure. The Department of Conservation and Recreation stated that they have documented the presence of natural heritage resources in the vicinity but they do not anticipate any adverse impact on those resources. The Department of Historic Resources stated that the facility was adjacent to the earthworks associated with "Fort Cricket Hill" but noted that the plans called for fencing off the earthworks and routing the pier access around the earthworks.

Mr. Neikirk said that the pier and dredging would encroach on private oyster ground leased to Mr. Robert Payne. Mr. Payne was notified of the application but he had not commented. Staff was not aware of any significant shellfish resources in the immediate vicinity that might be affected by the project.

Mr. Neikirk said that staff had discussed the need and intended use of certain aspects of this proposal with Mr. Fitch. He stated that the 10-foot by 80-foot "T-head" was proposed to "cap-off" the floating pier and that he would like the ability to temporarily moor two vessels along the channelward side of the pier and possibly install a sewage pump-out facility on the "T-head." He said he would like to dredge on the east side of the proposed floating pier to allow small boats to moor alongside and possibly to have kayaks and canoes launch from that side of the pier. Finally, he reiterated that he did not intend to rent the slips.

Mr. Neikirk said that the staff understood the applicant's desire to remove the finger of sand between the basin and the Milford Haven channel. Providing a certain number of temporary slips to moor boats recently launched or awaiting retrieval also appeared to be reasonable. It seemed to staff, however, that there was a great deal of underutilized area in this proposal. Additionally, staff was concerned that the mooring and boat traffic associated with the T-head might interfere with navigation in the Milford Haven channel. Finally, the proposed dredging to a depth of minus six (-6) feet along the east side of the proposed pier did not appear to be warranted for the intended use of temporary side-to-mooring of small boats and the launching of kayaks. Accordingly, staff recommended the project be approved with a condition that the total length of the T-head pier not exceed 140 feet channelward of the existing bulkhead and that the dredging on the east side of the pier, landward of the relocated T-head be deleted. Staff also recommended that the standard dredging conditions, which required a pre-dredging conference and post-dredging bathymetric survey be included in the permit. Finally, staff recommended a dredging royalty of \$0.45 per cubic yard be required for all dredging outside the scope of that was initially authorized by VMRC #85-0895.

Associate Member McLeskey asked if they intended to charge rent? Mr. Neikirk responded that this could be made a condition of the permit to not rent.

Commissioner Pruitt swore in the applicant and his other speakers.

David Fitch, applicant, was present and his comments are a part of the verbatim record. Mr. Fitch said that he bought the property in 2002. He said he envisioned providing a clean operation and preservation of a historical landing. He stated that he would not charge for the added dockage. He explained that the proposed floating dock and other proposed construction would provide an additional 3 tie up spaces. He said they were being considered for the cleanest marina award and the final walkthrough for this was to be done in May. He said he had a petition with signatures by individuals in support of the project. He said that he had been working with local watermen in his planning. He provided an overhead presentation for the Commission. He said that staff concerns about the unused space along the pier fairway was one and one-half times the largest boat. He stated the turning basin must be 35' to allow for egress and ingress. He further stated that eliminating space will limit the use of the pier and deleting the dredging on the east side of the pier would eliminate access to the proposed pier and they would not be able to use one side. He said there was 425 feet of property and he just wanted to get to twenty-five feet of it. He asked the Commission to approve this project as submitted.

Richard Hicks a tugboat Captain with Safe Harbor Marine Services was present and his comments in support of the project are a part of the verbatim record. Mr. Hicks said there was much need for the addition of the dock space.

Franklin Fency, supporter for the project, was present and his comments are a part of the verbatim record. Mr. Fency said that he resided ¼ mile from the marina. He said that he has known the applicant for a long time and he knew him to be a man of his word. He said the applicant was trying to make his business more efficient and he was a good steward of his waterfront property.

Commissioner Pruitt asked for any speakers in opposition to the project.

Lois Biddison, adjacent property owner, was sworn in and her comments are a part of the verbatim record. Ms. Biddison said that she was the fifth generation of her family to reside at this property. She said that they have a lease next to Mr. Payne's and it was an excellent environment for oysters. She said that she was objecting to the environmental impacts particularly the dredging, which would cause siltation. She said it would destroy the subtidal bottom and SAV that was coming back. She said she was concerned with the increased boat traffic, erosion, impacts to marine resources and the water quality. She said the owner of the facility had changed but the Milford Haven area had not. She said the Boatel had no natural deep water access. She said that this was next to a large residential area and the adjacent property owners were opposed.

Roger Bowers, stepson of Ms. Biddison, was sworn in and his comments are a part of the verbatim record. Mr. Bowers explained that there was no certified survey of the revolutionary artifacts. He provided handouts for the Commission. He said they had opposed the project in 1986, 1991, and 1998 and each time it was denied by the Commission. He said the applicant claimed that the facility was not increasing on the

water side, but their website claims they are adding on. He said the facility was overdeveloped, boats stay there overnight and they do perform boat maintenance. He said that nature was responding to the illegal activity of the past and now they propose more dredging, which would go into the oyster ground lease. He stated that no studies were done and the Army Corps of Engineers said that was needed. He said the Department of Historic Resources wanted a survey. He said the application had errors and was incomplete. He said the applicant had tried to turn the business around and does not show an economic need. He said that he was asking the Commission to deny the project.

Allen Biddison, husband of Ms. Biddison, was sworn in and his comments are a part of the verbatim record. Mr. Biddison said that Mr. Neikirk did a thorough job. He said they need to go back to the permit that was approved by VMRC. He said the original request for a 150-boat dry boat facility was denied and VMRC approved a 100-boat dry boat facility and four feet dredging depth with no maintenance dredging allowed. He said that was a small facility and now they were asking for more. He said that the Commission had consistently said no before and what had changed now? He said there was no justification for anymore than they already have now.

Robert Morrison, property owner in Gwynn’s Island area, was sworn in and his comments in opposition are a part of the verbatim record. He said he could look out over Milford Haven and observe the boatel. He said he totally disagreed with the project. He said there was tremendous historical interest in this area, which was not well known to most Americans. He said that he agreed with the Biddison presentation.

Page Morrison, wife of Mr. Morrison, was sworn in and her comments in opposition are a part of the verbatim record. Ms. Morrison said that she agreed with her husband.

David Fitch, applicant, in his rebuttal said that he was not Mr. Payne, but it always came back to him. He said his proposal would serve the customer base. He said that VIMS, DEQ and the Health Department had all approved the project. He said the Health Department determines how many boats can be stored and they permitted 171 boats.

After some further discussion, Associate Member Schick moved to approve the request with staff’s recommended conditions. Associate Member Garrison seconded the motion. The motion carried, 8-0.

Royalties (Dredging 1,008 cu. yds. (after reduction)	
@ \$0.45/cu. yd.).....	\$453.60
Permit Fee.....	\$100.00
Total Fees.....	\$553.60

8. **THOMAS HINKEL, JR., #04-2296**, requests authorization to construct a 6-foot by 50-foot floating T-head extending 20 feet channelward of his existing private, noncommercial pier at his property situated along Put-in-Creek in Mathews County.

Chip Neikirk, Environmental Engineer, Sr., gave the presentation with slides. His comments are a part of the verbatim record. Mr. Neikirk explained that a letter of protest had been received that day, which expressed the protestant's concern for the impacts of the project on navigation. He said he also received 3 calls in protest the day before.

Mr. Neikirk said that Mr. Hinkel's property was situated along the eastern shoreline of Put-in-Creek adjacent to Town Point Landing in Mathews County. Put-in-Creek was a tributary of the East River and was approximately 550 feet wide at the project site and the channel was approximately nine (9) feet deep at mean low water. Development along this portion of the shoreline was primarily residential.

Mr. Neikirk said that Mr. Hinkel proposed to construct a 6-foot by 50-foot floating pier channelward and perpendicular to his existing private, noncommercial pier. Mr. Hinkel's existing 5-foot wide pier extended 120 feet channelward of mean high water and included approximately 500 square feet of open-pile finger piers and decking near the channelward end. As proposed, the floating pier and associated access ramp would extend the pier to a total distance of 140 feet channelward of mean high water and would add an additional 348 square feet of decking. The mean low water depth at the channelward end of the pier was stated to be minus six and one-half (-6.5) feet.

Mr. Neikirk said that since the combined area of the existing decking and the proposed floating pier far exceeded 250 square feet. Therefore, the pier did not meet the requirements of the statutory authorization for private piers provided in §28.2-1203(5) of the Code of Virginia. In fact, since the combined area was more than 500 square feet, the "Private Pier Guidance Criteria" adopted by the Commission on July 22, 2003 mandated that the full Commission to consider the application.

Mr. Neikirk said that Mr. Hinkel currently owned four boats that were regularly moored at the pier; a 44-foot Gulfstar Sloop, a 23-foot Sakonnet day sailor, a 22-foot Shamrock, and a 17-foot Key West. Mr. Hinkel had stated that he intended to purchase a 50 to 55-foot Trawler, which he intended to moor on the channelward side of the proposed floating pierhead.

Mr. Neikirk said that the pier did not encroach over any public or privately leased oyster planting ground. No state agencies had commented on the proposal and staff did not believe the proposed pier addition would adversely affect navigation.

Mr. Neikirk explained that Section 28.2-1203(5) of the Code of Virginia codified the waterfront property owner's riparian right to construct a private noncommercial pier in

the riparian waters opposite their shoreline, provided the piers met certain size restrictions and did not interfere with navigation. Staff was unaware of any current decision or opinion, however, which stated that a riparian property owner's rights include a right to moor any and all vessels he may own at his private pier. If the Commission determined that the mooring of Mr. Hinkel's five boats at his pier was a reasonable exercise of his riparian right of navigation or was otherwise an appropriate private use of the State-owned bottomlands, staff was of the opinion that the pier addition was reasonably sized to accommodate the existing boats and the boat he intended to purchase at this time.

Christine Breddy of Gloucester Environmental, representing Mr. Hinkel, was sworn in and her comments are a part of the verbatim record. Ms. Breddy said that they were requesting approval of the project by the Commission.

No one in opposition was present to comment. Commissioner Pruitt asked for a motion from the Commission.

Associate Member Garrison moved to accept the staff's recommendations. Associate Member Schick said that the Commission should look at how many boats are justified to be docked by the property owner at a private pier. Associate Member Schick seconded the motion. Associate Member Cowart asked staff for a recommendation regarding the number of boats that would be reasonable. Mr. Neikirk stated that staff felt it was an issue for the Commission to decide. Associate Member Cowart explained that he could not support the motion since there was a need to determine that what was being granted did not infringe on the rights of others. Associate Member Robins explained that he agreed with Associate Member Cowart. The motion carried, 6-2. Both Associate Members Cowart and Robins voted, No.

Associate Member Jones said she also agreed with Associate Member Cowart regarding the number of slips. Commissioner Pruitt suggested referring the matter to the Habitat Management Committee. Carl Josephson, Senior Assistant Attorney General and Counsel for VMRC explained that the Commission was entitled to determine reasonable use, as there was no law to prevent this from being done. He further explained that the Commission could make such a decision giving a reason for such action and also set up some guidelines.

Permit Fee.....\$100.00

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9. **JEFFREY B. KELLY, #04-2520**, requests after-the-fact authorization to retain a six to eleven foot wide by 26-foot long armor stone groin, extending 15 feet channelward of mean low water and into Public Oyster Ground No. 1 (Baylor Survey), adjacent to his property situated along Lower Machodoc Creek in Westmoreland County.

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

Mr. McGinnis explained that the project was located on the western side of Lower Machodoc Creek near its confluence with the Potomac River and northwest of Cabin Point Creek in Westmoreland County.

Mr. McGinnis said that the applicant sought after-the-fact authorization to retain a 26-foot long groin, which extended approximately 15 feet channelward of mean low water and into Public Oyster Ground No. 1 (Baylor survey). The groin was constructed of armor stone, and varied in width from about six feet at the channelward end, to about eleven feet at mean high water. The stone groin extended out perpendicular from a riprap revetment which was constructed landward of mean high water.

Mr. McGinnis stated that on August 23, 2004, while conducting a site inspection at nearby property, the Westmoreland County Wetlands Board staff observed a stone groin on Mr. Jeffery Kelly's property. A search of County records confirmed that Mr. Kelly had not previously applied for, nor been granted, a wetlands permit to install the groin. On September 14, 2004, the Westmoreland County Wetlands Board staff sent a Notice to Comply letter to Mr. Kelly, and copied VMRC staff. This letter gave the applicant the option to remove the unauthorized groin, or to submit an after-the-fact application to retain the intertidal portion of the structure. Mr. Kelly elected to submit an after-the-fact application, which was received by VMRC staff on November 5, 2004, and subsequently forwarded to the Wetlands Board.

Mr. McGinnis said that following a public hearing on January 24, 2005, the Westmoreland County Wetlands Board unanimously approved Mr. Kelly's request to retain the intertidal portion of the groin, which encroached on non-vegetated wetlands.

Mr. McGinnis said that in addition to the after-the-fact nature of the applicant's request, this groin encroaches upon Public Oyster Ground No. 1, a portion of the Baylor survey. Section 28.2-556 of the Code of Virginia provided an exclusion for erosion control structures built within the Baylor survey. There were, however, several critical provisos. In essence, Section 28.2-556 states that if the Commission, after consulting with VIMS and DCR, found that there was erosion at the site, that the erosion was increasing the sediment load into public waters, that the erosion control device was an acceptable means of erosion control, and that the protection of water quality outweighed the value of that portion of the Baylor grounds, the Commission could choose to permit the erosion control

structure. If approved, the public oyster ground then ceased to be included as Baylor grounds in the area occupied by the erosion control structure.

Mr. McGinnis stated that the Virginia Institute of Marine Science (VIMS), in their Shoreline Application Report, dated January 20, 2005, indicated that the project's cumulative adverse impacts to the marine environment were minimal. The VIMS report goes on to say, however, "given that the shoreline in question had already been hardened, there was no significant erosion on the site, and the need for the groin was not clear." This is a critical finding.

Mr. McGinnis said that comments were solicited, but none were received from the Department of Conservation and Recreation. No other State agencies had raised concerns or objections to the project.

Mr. McGinnis said that while the environmental impacts associated with the groin had been and were expected to be minimal in extent, the VIMS report clearly states that there was no significant erosion at the site and that the groin did not appear to be needed. Given the VIMS assessment and the requirements of Section 28.2-556 of the Code of Virginia, staff did not believe the Commission was empowered to authorize Mr. Kelly's after-the-fact request. Accordingly, since the stone groin cannot be permitted in light of Section 28.2-556 of the Code, staff recommended the Commission deny Mr. Kelly's after-the-fact request and order the removal, within 60 days, all portions of the groin which extended channelward of mean low water and into Public Oyster Ground No. 1 (Baylor survey).

Associate Member Cowart asked if staff was sure this was in the Baylor Survey. Mr. McGinnis explained that the border on the shoreline followed the MLW. Associate Member Schick asked if the groin was not built, would the sand movement not have occurred and the movement of the Baylor line not have happened. Mr. McGinnis said that the structure was actually on the public oyster ground. Associate Member Garrison asked if removal of the structure would do more damage. Mr. McGinnis responded that there were actually no oysters present to be impacted, it was just the fact that the structure was on the oyster ground. Associate Member Garrison asked if a fine was in order. Mr. McGinnis said only if the project was approved.

Carl Josephson said that staff was presuming the decision of VMRC and the Commission had to make that decision.

Jeffrey Kelly, applicant, was sworn in and his comments are a part of the verbatim record. Mr. Kelly apologized for this happening and he appreciated the opportunity to speak to the Commission. He said neither of his neighbors' properties was protected. He said he first repaired the existing riprap. He said there was damage to his property because of Isabel and the fact that an upriver neighbor had not protected his property. He said when they contacted the contractor he said they could put the riprap back and he also suggested

a little jetty. The contractor said that it was not a big deal and if not done now, it would be several months. He said he would abide by what the Commission decided he must do. He said it has in fact gathered sand between his and another property.

Associate Member Schick asked who was the contractor. Mr. Kelly reluctantly said the contractor's name was Robert Gallow.

Commissioner Pruitt asked if anyone else wanted to speak to the Commission on this matter.

Douglas Jenkins, property owner in Coles Point, was sworn in and his comments are a part of the verbatim record. He said that everyone knew that he was very interested in preserving the oyster resources and he had worked in the area for a number of years, but had never seen any oysters along the shoreline because of the location, weather, and shifting sand.

Commissioner Pruitt said that removing it would not accomplish anything and asked for comments from staff. Mr. McGinnis said that it had built up sand there and the staff was not opposed to the project, but that the law required that this project be subjected to consideration by the Commission because it was public shellfish ground.

Associate Member Garrison moved to approve the after-the-fact request, as the removal would be more harmful and to let the contractor know that he was in the wrong and this would be looked at in any future work by him. Associate Member Cowart seconded the motion. Associate Member Schick asked if there was a need for civil penalties being assessed? Associate Member Garrison said no. Associate Member Cowart said that wording needed to be added to the motion that in addition to the code referenced by the staff, it should also be noted that Section 28.2-630 gave the Commission the authority to allow this structure in the Baylor grounds if it was known to be unproductive and Mr. Jenkins had supplied that information to the satisfaction of the Commission in his testimony. Commissioner Pruitt said that this should be added to the motion. Associate Member Garrison agreed to this amendment of the motion. The motion carried, 8-0.

Permit Fee.....\$25.00

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- 10. ROBERT LIVENGOOD, #04-2584**, requests authorization to replace an existing pier and boathouse with a new 5-foot by 148-foot open-pile private, non-commercial pier, including a 16-foot by 26-foot intermediate L-head; one (1) 4-foot by 74-foot catwalk pier; one (1) 4-foot by 22-foot crossover pier; one (1) 4-foot by 64-foot catwalk pier which will include a 10-foot by 12-foot L-head; and a 77-foot by 24-foot open-sided, two-slip boathouse at the applicant's property situated along Cypress Creek, a tributary to the Pagan River in the Town of Smithfield.

Associate Member Jones left the meeting for the rest of the hearing at approximately 3:35 p.m. Commissioner Pruitt left the meeting at this point and Associate Member Cowart acted as chair in his absence.

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

Mr. Stagg said that the project site was located along the northern shore of Cypress Creek upstream of Business Route 10 in the town of Smithfield. Mr. Livengood's existing pier structures at this location include an existing 600 square foot open-sided boathouse and additional pier/deck protrusions of 927 square feet for a total footprint of 1,527 square feet.

Mr. Stagg explained that as originally submitted, Mr. Livengood's proposed pier structure included a 1,488 square foot open-sided boathouse (measuring 24 feet by 62 feet) to cover a single slip. The new pier/deck protrusions totaled 1160 square feet. The applicant subsequently submitted revised drawings which requested an even larger open-sided boathouse of 1,848 square feet to encompass two wet-slips. The total footprint of the current request (boathouse and pier/deck protrusions) is now 2,420 square feet.

Mr. Stagg said that Mr. Livengood submitted a letter requesting that his project, as currently submitted, be approved, maintaining that the intermediate L-head was designed to accommodate his parents who required golf cart transport due to degenerative arthritis and because one had had extensive back surgery twice within the last year. Mr. Livengood also said he wanted to use both the intermediate L-head and a second 10-foot by 20-foot L-head to store an existing and proposed jet ski. The applicant indicated that while he currently owns a vessel of 46 feet in length, the larger slip of 60 feet in length was designed to accommodate the purchase of an unspecified larger vessel at some point in the future. As it stood, the applicant maintained that his 46-foot vessel had a beam, which prevented it from fitting within the existing boathouse.

Mr. Stagg said 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. Furthermore, in order to be water dependent, the Commission

must determine (1) that it was necessary that the structure be located over water, and, (2) that it was necessary that the activity associated with the structure be over the water. 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.

Mr. Stagg said that the staff believed the two jet-skis did not need pier storage. They could be accommodated with lifts constructed adjacent to either the four-foot catwalk pier and/or adjacent to the intermediate L-head in an arrangement similar to that proposed for the Connito's, which was considered by the Commission at the March hearing. Mr. Livengood served as the Connito's agent. The Commission agreed in the Connito case that placing jet skis on a pier for storage or maintenance did not qualify as a water dependent activity.

Mr. Stagg said that the applicant currently enjoyed a structure that totalled 1,527 square feet of encroachment, by virtue of it predating recent changes in the Code. The proposed new structures would result in a total impact of 2,420 square feet (an additional 893 square feet over the existing footprint).

Mr. Stagg said that since the applicant currently only owned a boat 46 feet in length, staff recommended reducing the length of the larger wet slip to 52 feet in length. This would reduce both of the four-foot catwalk piers to a similar 52 feet in length. Staff further recommended elimination of the offshore L-head since the applicant could accommodate jet-skis on lifts adjacent to the proposed pier. Staff recommended approval of the intermediate L-head as proposed and with staff's proposed reductions, the total footprint of the structures would be 1,716 square feet, far in excess of the current code authorization. It was, however, only 189 square feet larger than what presently existed.

Associate Member Cowart asked for questions of staff by the Commission.

Commissioner Pruitt returned to the meeting. Commissioner Pruitt asked if the applicant was present and wanted to speak?

Robert Livengood, property owner and applicant, was sworn in and his comments are a part of the verbatim record. Mr. Livengood said that Mr. Stagg did a really good job in his presentation. He said he bought the property in 1992. He said they were outgrowing what was there. He gave the Commission a picture of the boat they hoped to purchase. He said as far as the recommendations by staff, he had no problem with eliminating the jet ski storage. He said the small deck that was 10 X 12 was changed to 10 X 10 and with the 4' finger pier there was an extra 6 feet. He said he was omitting the floating dock, but he did need a small structure for a small paddleboat for a child. He said he downsized at the end. He provided two handouts for the Commission. He said the 4-foot finger pier was water dependent and deducted 160' to 832 square feet. He said on the second page

of the handout the total square footage of the revised proposal was 1,100 square feet and it was bigger than the existing structures because of storage needed for more boats and larger boats.

Commissioner Pruitt asked if there was anyone else present to speak to the project. No one else, pro or con, was present.

Mr. Stagg said the applicant had agreed to reduce the L-head to 6 feet X 10 feet with the existing 4-foot catwalk. He said that staff had no problem with a step down for a paddle boat.

Associate Member Robins said that the applicant had compromised on the boathouse, but with the boatlift, there was less visibility as it was over 70' in length and it would change the character of waterway. He said he would approve the project with a shortened roof.

After further discussion, Associate Member Holland moved to approve the project based on the revision provided on page two of the handout provided by the applicant but with a roof. Associate Member Garrison seconded the motion. The motion carried, 7-0.

Permit Fee.....\$100.00

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- 11. **DALE SPRENKEL, #04-1976**, requests authorization to construct a 150-foot long private, open-pile pier with a 684 square foot open-sided, non-commercial boathouse at his property situated along the York River in James City County. An adjacent property owner protested project.

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

Associate Member Cowart left the meeting during the discussion.

Mr. Owen explained that Dr. Sprenkel's property was located on the southern shore of the York River, approximately 3.7 miles downstream of the York River State Park public boat ramp in James City County. The York River, at this location, was approximately 1.8 miles wide. A wide shallow sand/mudflat existed along the shoreline with the minus three-foot (-3') mean low water contour located approximately 650 feet offshore.

Mr. Owen also explained that on August 18, 2004, staff received Dr. Sprenkle's application requesting authorization to construct a 150-foot long private, open-pile pier with a 16-foot wide by 16-foot long L-head, a 5-foot wide by 10-foot long step-down

platform, 56 linear feet of timber catwalk and an 18-foot wide by 38-foot long (684 square foot) open-sided, non-commercial boathouse. The purpose of the project was to provide access to the water and mooring for his 32-foot long powerboat. The remnants of a previous pier, which was destroyed by Hurricane Isabel, were visible on-site.

Mr. Owen stated that depth soundings provided by the applicant indicated that the pier, as proposed, would extend to a depth of minus 3 feet at mean low water (MLW). A March 7, 2005 site visit, however, confirmed that the pier actually extended to water depths less than one foot at MLW. Similar length piers had been constructed by nearby property owners and several boathouses exist immediately downstream of Dr. Sprenkel's property.

Mr. Owen said that Pierce and Rita Grove, the downstream adjacent property owners, protested the project. In their letter, received November 18, 2005, they stated that the A-frame roof design of the proposed boathouse would adversely affect their view of the river. They concluded that they would not object to a flat roof design, similar to those that existed immediately downstream of their property.

Mr. Owen further said that Section 28.2-1203(A)(5) of the Code of Virginia conferred authority for the construction of private, non-commercial piers by owners of riparian lands in the waters opposite those lands, provided the pier did not exceed six feet in width and any L or T head construction platforms or protrusions (beyond the 6-foot width of the pier) do not exceed 250 total square feet. As originally submitted, the L-head, step-down platform and catwalks resulted in 502 square feet of encroachment over State-owned subaqueous land. As such, the proposed pier was not statutorily authorized by Code and it did not conform to the Commission criteria, which permitted staff to administratively approve it, even if it were unprotested.

Mr. Owen said that by letter dated October 13, 2004, staff asked Dr. Sprenkle to provide additional justification for a structure of this size. In that letter, staff further explained that his pier could qualify for the statutory exemption should he agree to reduce the proposed catwalk's width to four feet. By letter received February 22, 2005, Dr. Sprenkel advised that he was unwilling to reduce the catwalk's width. In his opinion, a 4-foot wide catwalk would not allow for the safety of children and elderly guests.

Mr. Owen said that when reviewing proposals to build over State-owned submerged land, staff considered, among other things, the water dependency and the necessity of the proposed structures. The intended goal of this review was to limit the encroachment of structures to the minimum amount necessary to reasonably achieve the intended use. Staff continued to question the applicant's need for a structure that exceeds the statutory authorization for private piers.

Mr. Owen said that from a purely, safety standpoint, the applicant's vessel should be boarded or off-loaded while in the water from either the L-head or step-down platforms and vessels should never be boarded while they are still in the lift. If they wanted to do

so, however, such passengers could easily board the vessel from the 6-foot wide width of the main stem of the pier.

Mr. Owen said that as for the pier, it would not adversely affect navigation. It was also staff's opinion that the boathouse appeared to be reasonably sized. In fact, had the adjacent property owner not objected to the project, it would have qualified for the authorization contained in Section 28.2-1203(A)(5) of the Code of Virginia. The open-sided design of the boathouse should also serve to minimize the visual impacts associated with the structure.

Mr. Owen said that in conclusion, staff believed that a pier and boathouse designed to the specifications outlined in 28.2-1203(A)(5) of the Code should meet the applicant's needs. Accordingly, staff recommended approval of the pier and boathouse contingent on the reduction of the proposed catwalks to four feet in width.

Dale Sprenkle, applicant, was present and his comments are a part of the verbatim record. Mr. Sprenkle said that this should be the easiest case to be heard at this meeting. He explained that when he contacted contractors they said he would not want a flat roof as it would not hold up. He said he was requesting a pitched roof in order to hide the boatlift mechanism. He said he had bought a new boat. He said there were other similar structures up and down the river. He said on advice of the contractor, he also needed a 5-foot walkway on the upriver side for safer access. He said there was only an 8-hour window of opportunity to take the boat out because at other times there was a low tide.

Commissioner Pruitt asked if anyone else wished to speak, pro or con.

Pierce F. Grove, was sworn in and his comments in opposition to the project are a part of the verbatim record. Mr. Grove said that he was a long-time resident and the community was close. He said he was not opposed to the pier, only the pitched roof proposed. He said the applicant never tried to discuss his project with the other property owners. He said that a flat roof or just a dock were what was seen in the area. He said the community dock was to the right. He said these structures do not have a lot of visual impact. He said that was why he bought property in the area. He said he recommended denial and for the applicant to be told to resolve the matter with the staff and neighbors.

Associate Member Cowart returned to the meeting at this time.

After further discussion, Associate Member Schick moved to accept staff's recommendation and add that the walkway be made four feet wide to allow access to the boat. Associate Member Robins seconded the motion. The motion carried, 6-0-1. Associate Member Cowart abstained from voting because of his absence during the discussion.

Permit Fee.....\$100.00

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12. **JAMES L. WHITSON, #04-1023**, requests authorization to add a 10-foot by 19-foot deck, a 19-foot by 5-foot finger pier, a 32-foot by 5-foot finger pier, and a 32-foot by 16-foot open-sided boathouse adjacent to his property situated along the Hampton River in Hampton. An adjacent property owner protested the pier and boathouse.

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

Ms. West explained that Mr. Whitson's property was situated along the Hampton River between the Pembroke Avenue Bridge and the Mercury Boulevard Bridge in the City of Hampton. Mr. Whitson currently had a pier and moored his 26' boat at his property. He proposed to add a 19-foot by 10-foot extension and a 32-foot long by 16-foot wide open-sided boathouse surrounded by 5-foot wide walkways. The proposed addition to the pier and the 5-foot wide walkways would add 415 square feet of encroachment, for a total encroachment of 653 square feet.

Ms. West said there were several piers along this portion of the waterway and two previously authorized boathouses at nearby properties. The Stierhoff's pier and boathouse were authorized under VMRC # 02-1159 and had been constructed. In addition, another boathouse on this street at the property of David Shank, VMRC #04-1022, had been authorized under §28.2-1203 of the Code of Virginia but not yet constructed. No protest letters were received during the processing of either of those applications. This project, however, was protested by and Barbara May, adjacent property owners. Mr. and Ms. May had expressed concerns that the proposed boathouse would block their view of the river.

Ms. West said that the provisions of §28.2-1203 of the Code of Virginia cannot be used to authorize the expansion of the pier because it exceeded the 250 square foot maximum. Although the 512 square foot open-sided boathouse met the 700 square foot provision set out in §28.2-1203 of the Code, it was not statutorily authorized due to the protest from the adjacent property owner.

Ms. West explained that the stated purpose of the pier extension was to allow the Whitson's to moor their 26-foot boat, which drew approximately 20". The Whitson's had offered, in writing, to reduce the width of the walkways around the boathouse to four feet.

Ms. West said that in accordance with the Commission's approved Private Pier Guidance Criteria, which was adopted at the July 2003 Commission meeting, staff did not include small walkways built in conjunction with open-sided boathouses in the total square footage calculation provided the width did not exceed four feet. Even with this

concession, the 190 square foot addition to the pier resulted in a total 398 square feet of encroachment. The stated purpose for the additional deck was for fishing and crabbing, jet ski storage, placement of a dock box, and for loading and unloading their fishing equipment from their vessel. In addition, Mrs. Whitson stated during a recent telephone conversation that the channelward end of the pier might occasionally be utilized as a guest slip.

Ms. West said that during the initial review, staff suggested that the Whitson's consider a realignment of the boathouse, placing it parallel to the shoreline in the same footprint as the current slip for their vessel. Mr. Whitson submitted a drawing to this effect and the new design was subjected to a public interest review. The two adjacent property owners did not object to the new design. Based on this, staff was prepared to issue a "no permit necessary" letter for the boathouse since it would have met the statutory requirements of §28.2-1203 of the Code. Unfortunately, several other nearby property owners, Mr. Tom Stierhoff and Mr. David Shank and Ms. C. Sue Phillips, submitted letters stating that they believed placement of a boathouse parallel to the shore would be inappropriate since their boathouses are perpendicular to the shoreline. Given the comments by these neighbors, the Whitson's elected to revert back to their original request.

Ms West said that under the provisions of §28.2-1203 of the Code of Virginia, statutory authorization for any T-head, L-head or other pier protrusion was limited to 250 square feet. The pier, as proposed, even with the proffer of a reduction in walkway width, still exceeded the statutory authorization limitations. When reviewing proposals to build over State-owned submerged land, staff must consider the water dependency and the necessity of the proposed structures. The intended goal of this review was to limit the encroachment of structures to the minimum amount necessary to reasonably achieve the intended use.

Ms. West explained that regardless of the orientation, the subject boathouse appeared to be reasonably sized. In fact, if the adjacent property owner had not objected to the project, or if the Whitson's had left it shore parallel, it would have qualified for the authorization contained in Section 28.2-1203 (A)(5) of the Virginia Code. The open-sided design should also minimize the visual impacts associated with the structure.

Ms. West said that as such, staff recommended approval of the boathouse with the provision that the catwalks around the boathouse be no greater than 4-feet wide. Staff also recommended denial of the pier addition as proposed. Since the encroachment of the protrusions to their existing pier was 208 square feet, staff would have no objection if they added a finger pier on the eastern, channelward, end of the pier provided that addition did not result in a total of over 250 square feet of pier protrusions.

Commissioner asked for questions of staff from the Commission. There were none.

Joann Whitson, applicant was sworn in and her comments are a part of the verbatim record. Commissioner Pruitt asked her if she heard staff's recommendation. Ms. Whitson said they were close. She had a powerpoint presentation for the Commission to use in her talk. Ms. Whitson said that she had pictures of the neighborhood. She said she proposed a hip roof so as to line up with others in the area and had agreed to the 4-foot finger pier on the left hand side of the pier. Associate Member Schick asked if she wanted 3 pilings? Ms. Whitson responded, yes, and there were some already existing. She said she wanted to extend the 6-foot walkway to 10 feet to match the finger pier so they could access the boat's engine for repairs. She said this would make it 258 square feet, just 8 over the 250. Associate Member Holland asked how did it compare to the staff's recommendation. Ms. West responded this proposal was an addition of 8 square feet more than staff recommended. Associate Member Schick asked if the six foot walkway could go to the end of the slip and if that was 10 feet X 5 feet? Ms. West said staff would accept that extension as part of the spine of the pier.

Thomas Stierhoff was sworn in and his comments are a part of the verbatim record. Mr. Stierhoff said he had a dock, boathouse, and roof approved and there were no objections at that time. He said that he supported the project and after today had more appreciation for the work of the Commission.

Associate Member Holland moved to approve the project as revised by the applicant. Associate Member Schick seconded the motion. The motion carried, 7-0.

Permit Fee.....\$25.00

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- 13. **U.S. ARMY CORPS OF ENGINEERS, #02-0523**, requests after-the-fact authorization for the overboard disposal of 9,000 cubic yards of beach quality sand material by the sidecast dredging vessel *Fry* in its recent removal of a shoal in the entrance channel portion of the Rudee Inlet Federal Project Channel in Virginia Beach.

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

Mr. Worrell explained that the Rudee Inlet was located along the southern end of the Virginia Beach resort area and provides access to the Atlantic Ocean from Lakes Wesley and Rudee. Rock jetties and a steel weir (under construction) protect the Inlet from a continuous shoaling problem. Because the 110-foot wide entrance channel is federally authorized by Section 107 of the Rivers and Harbors Act, routine channel maintenance dredging to project depths of ten feet (10') with an allowable two-foot (2') overdepth does not require authorization from the Commission. This dredging was provided

statutory authorization by virtue of Section 28.2-1203A.3 of the Code of Virginia. The overboard placement of dredged material however, enjoys no such exemption, and required Commission approval.

Mr. Worrell explained that during its September 2002 meeting, the Commission authorized the placement of 150,000 cubic yards of sandy beach quality material, hydraulically dredged from the entrance channel, on the downdrift beach immediately north of the north jetty. The U.S. Army Corps of Engineers (Corps) then requested a four-foot (4') overdredge tolerance in the entrance channel to help prevent continuous shoaling. The Commission authorized that modification at the October 2002 meeting with the requirement that the additional dredged material must be hydraulically placed onto the beach.

Mr. Worrell said that as a result of another emergency situation, the Commission, during their November 2002 meeting, authorized a one-time permit modification to allow the Corps to remove a developing shoal from the entrance channel by using the sidecast dredge "Merritt". This activity resulted in the overboard placement of 7,000 cubic yards of sandy dredged material on either side of the channel.

Mr. Worrell said that on February 3 of this year, the Corps again informed staff of their intent to remove a developing shoal from the entrance channel by using the sidecast dredge *Fry*. They did not seek approval for the placement of the material overboard. Dredging commenced on February 8, and continued until February 18, 2005. The sandy material was purportedly relocated approximately 100 feet away from both sides of the entrance channel, channelward of the existing jetties.

Mr. Worrell said in staff's February 5 response to the Corps, staff reiterated the fact that a permit was not necessary to dredge the channel to remove the shoal. The Corps' stated intent to place the dredged material overboard, outside of the entrance channel and onto State-owned submerged bottom, however, did require Commission approval. The Corps' provided several reasons for their decision to use the sidecast method of dredging. These included the inability of the City's dredge to access this particular area, the unavailability of other Federally owned hydraulic dredging vessels, and the expense and time it would cost to hire private contractors to do the job. Staff ultimately advised the Corps that if they used the sidecast dredge without Commission approval, it would be considered a violation of their permit.

Mr. Worrell said a condition of the Commission's original permit required that the dredged material removed from the channel be placed on the adjacent downdrift beach.

Mr. Worrell explained that Section 10.1-704 of the Code of Virginia say that "The beaches of the Commonwealth shall be given priority consideration as sites for the disposal of that portion of dredged material determined to be suitable for beach nourishment." The Rudee Inlet entrance channel interrupts the longshore, littoral

transport of material north along the oceanfront toward Cape Henry. Notwithstanding the recent "Operation Big Beach," the City routinely nourished the resort strip with an annual truck haul of approximately 100,000 cubic yards of sand excavated from borrow pits. The material in the channel is clearly suitable beach quality material and is a valuable State resource in its own right. It is not a waste material that needs disposal. The sidecast dredging method precluded 9,000 cubic yards of beach quality material (900 tandem wheel dump trucks) from being used in the City's beach nourishment. In addition, a large percentage likely moved right back into the channel where it has to be removed again.

Mr. Worrell stated that environmentally, the Virginia Institute of Marine Science indicates that while the water quality impacts and disturbances to State-owned submerged bottom were largely temporary in nature, they clearly stated that the preferred method would be clamshell or hydraulic dredging.

There is no debate that sand shoaling, turbid currents, and beach erosion create very dynamic and problematic conditions in and around Rudee Inlet. Nevertheless, this is not a navigational issue, and it's really not an environmental issue given the dynamic nature of the entrance channel. It appeared to be more of a short-term economically driven decision than anything.

Recently, the Commission has authorized several activities such as the weir replacement, jetty extension, and the construction of a deposition basin in the hope of helping to protect and maintain the Inlet. Staff is concerned, however, over the trend that seems to be developing regarding the Corps' dredging and disposal methods of the entrance channel. This is the *second* request for an additional *one-time* modification to the original dredging and disposal permit for the channel.

While staff agreed that a developing shoal in the entrance channel can present a significant and dangerous situation, staff feels there are frequently other dredging and disposal options available that would result in less impacts to the adjacent State-owned submerged bottom and would result in the retention of a much needed, and valuable State resource for the City's beaches. We caution against approval of this after-the-fact request which would lead to further legitimization, unless you are certain that this was the only option available.

There is no argument that the use of the Corps owned *Fry* was likely the cheapest option. However, that should not have been the controlling factor. Staff is not convinced that a private dredging contractor, such as Great Lakes Dredging or Norfolk Dredging, could not have been awarded a contract to dredge and place the material directly on the beach. The Corps admits that their use of the *Fry* was primarily because that was all they had available. If not a hydraulic operation, staff was unsure why the material could not have been placed in barges for transport to an offload site where the material could have been trucked to the beach for nourishment.

Mr. Worrell said that staff felt that the Corps should be treated just as the Commission would treat any other private dredging contractor who opted to dispose of their dredged material overboard on State-owned submerged bottom without Commission authorization, regardless of the situation or circumstances. Given the fact that the Corps intentionally opted to act without Commission authorization, and that a valuable sand resource was not captured or utilized for beach nourishment as directed by State Code and a Commission permit condition, we feel the Commission may wish to consider an appropriate civil charge based on minimal environmental impact and a moderate to significant degree of non-compliance.

Commissioner Pruitt said that staff did a good job, but this must be looked at as an emergency situation.

Keith Lockwood, representing the Corps, was sworn in and his comments are a part of the verbatim record. To support their statement that this was an emergency situation, Mr. Lockwood referred the Commission to articles in the *Virginian Pilot*, which reported that the City needed to make this a safer area and then the article regarding the death resulting from this shoaling. He said this was definitely an emergency because the shoaling in this area went from 13' to 5' in one month and had resulted in a death. He said that the last time they requested a modification the Commission asked the Corps to come up with alternative disposition and that was being done now. He said hopefully the changes being made by the City would reduce this type of shoaling occurring again. He said the Currituck dredge that is usually used for this type of dredging, was being repaired. He said they met with DEQ, EPA, Fish and Wildlife, Dept. of Conservation and Recreation, and the City of Virginia Beach so they knew what was being proposed. He said personnel from DEQ in written comments said they did not have provisions for acting on an emergency situation and would forgo any actions against the project because of this emergency situation. He said VIMS said that this action would have temporary impacts and agree with this finding. He said he issued a public notice on February 3rd. He said this emergency came up after the Commission's January meeting and was done prior to the February meeting and it would have been after-the-fact anyway. He said they were making efforts towards long-term management of the Rudee Inlet area. He said that they had not had to go back since the area had not been shoaled back in.

Associate Member McLeskey said he wanted to compliment the Corps in its quick reaction to this emergency situation.

Associate Member Cowart asked if the Commission was in this meeting. Mr. Lockwood said actually this was not a physical meeting, but e-mails were used. He said they did contact Randy Owen and subsequently Justin Worrell.

Associate Member Holland said that he did not feel that any action was necessary from the Commission as the whole matter was a response to an emergency situation.

Commissioner Pruitt asked if a motion was needed. Carl Josephson responded that the Commission could issue an after-the-fact permit.

Associate Member Holland moved to approve the after-the-fact permit modification. Associate Member McLeskey seconded the motion. Associate Member Robins explained that he agreed that the shoal was very critical and he did not think the Commission should discourage the Corps of Engineers. The motion carried, 7-0.

Fees not applicable, Permit Modification.

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- 14. **DISCUSSION:** Habitat Management Advisory Committee (HMAC) update - Changes to the Commission's Wetlands Mitigation/Compensation Policy: 4 VAC 20-390-10 ET SEQ., to achieve a no-net loss of wetlands in the tidal wetlands regulatory program and Subaqueous Guidelines revisions.

Tony Watkinson, Deputy Chief, Habitat Management, gave the presentation and his comments are a part of the verbatim record. Mr. Watkinson asked that the matter be deferred until the May Commission meeting because staff needed to advertise a Public Notice to hold a public hearing on the matter next month.

No one was present to comment. **Commissioner Pruitt announced that the public hearing on this matter would be held next month. No further action was taken.**

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15. PUBLIC COMMENTS

Doug Jenkins, President of the Twin Rivers Watermen Association, was present and his comments are a part of the verbatim record. Mr. Jenkins said he had talked with staff and suggested that they allow dredging for the seed in the James River for the 2005 Oyster Replenishment Program.

Associate Member Cowart explained that the staff could not get workers to do the job for the amount of money offered. He further explained that the reason they did not want to use dredges was that the upriver area was soft bottom and dredging causes too much damage to the bottom. He also said that starting in May to catch seed they would miss the window of opportunity to get the job done.

Mr. Jenkins said that there were funds, and seed was needed in the Rappahannock to provide something for the harvesters next year. He said the watermen need to have input into the program. Commissioner Pruitt said that it was not the Commission's fault when they do not want to work for the money. Mr. Jenkins suggested that the watermen be offered the same amount as the transporter, \$2.50/bushel and have watermen on the advisory committee.

Commissioner Pruitt said that staff would look into the meeting situation and get the meetings started again. Jack Travelstead said staff would have a report for next month.

This matter was discussed again at the end of the meeting.

Edward Ewell, Commercial Clammer, requested that the Commission look into a ten percent allowance for clams and to remove the requirement for a gauge for larger clams. He said that the crabbers were no longer using the large clams as bait and all other fisheries have a ten percent allowance versus the clam allowance of two percent.

Commissioner Pruitt said this matter would be referred to the Clam Management Committee with staff from Fisheries Management and Law Enforcement.

Associate Member Garrison said there was a meeting on the 16th. Roy Insley said that the Clam Management Commission was not well attended because the members sat in the audience in order to boycott the meeting, as they did not want to have to fill out the conflict of interest forms. Carl Josephson, Senior Assistant Attorney General, said he had not looked into that matter as yet and would do it as he had promised.

Commissioner Pruitt stated that if a quorum was not in attendance to a meeting, then staff should leave and not have a meeting. He said there needs to be a quorum and he wants minutes prepared.

No further action was taken.

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17. Public Hearing: Proposed regulations pertaining to the use of gill nets in Virginia waters for the conservation of bottle-nosed dolphin and sea turtles.

Rob O'Reilly, Deputy Chief, Fisheries Management, gave the presentation and his comments are a part of the verbatim record. Mr. O'Reilly explained that this public hearing was being held in order to make permanent the 5 emergency regulations passed by the Commission as an alternative to the NMFS proposed rule for protecting the bottle nosed dolphin and the sea turtles. He said that the Black Drum and Striped Bass fisheries, if the proposed rule was passed, would be most impacted. The regulation amendments

allowed for larger mesh size to be fished in coastal waters. He said that NMFS had grave concerns regarding a Monk fishery starting up in Virginia waters. He noted for the Commissioners that provisions on Page 2 of the draft Regulation 1080, Sections A and B, limits the forming of a fishery because it limits landings to a federally permitted individual. He explained that NMFS said they were still looking at dolphin related conservation measures proposed by us. He said that the second regulation 4VAC 20-430-10 established maximum size gill nets to be used in coastal area as ≥ 7 -inch, but provides for the exception for striped bass and black drum fisheries. He said that 4VAC 20-320-10 and 4VAC 20-252-10 were reviewed last month. He said that 15 or so Black Drum fishermen were working in the coastal area, and, since 2000, only 6 of those 15 had substance present in the coastal area. These six harvested 74% to 97% of the total harvest. He said in 4VAC 20-252-10 no changes had been made since last month. He said on pages 11 & 12 there was a provision for the exception to the mesh size limits and on page 12 there were tending requirement exceptions. He went on to explain Regulation 4VAC 20-170-10, noting that page two paragraph C established a 24-hour soak time requirement.

Mr. O'Reilly said that staff recommended that the provisions of all the emergency regulations (170, 252, 320, 430 and 1080) be made permanent.

Commissioner Pruitt opened the public hearing. There were no comments from the public on this matter.

Associate Member Robins moved to adopt all the regulations as amended by staff. Associate Member Bowden seconded the motion. The motion carried, 7-0.

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18. Requests for Black Sea Bass quota under the hardship provisions of Regulation 4VAC20-950.

Jack Travelstead, Chief, Fisheries Management, gave the presentation. His comments are a part of the verbatim record. Mr. Travelstead explained that last year the Commission added a hardship exception to the regulation for medical and other hardships that prevented the fisherman from participating in the fishery. He said there were three requests from individuals who meet the criteria for giving them quota under the hardship provision.

1. Brian Peele: Mr. Peele worked aboard the F/V Miss Joanne from 1999 to 2001. He purchased his own vessel, the F/V Captain's Gig, in 2001 and 2002, but did not land sufficient sea bass in 2001 to qualify for the permit. Mr. Peele landed 4,455 pounds of sea bass in 2001 and 17,322 pounds in 2002.

2. David L. Portlock: Since 2000, Mr. Portlock has been a commercial hook and line fisherman. In 2001, he harvested 7,395 pounds of sea bass and 8,052 pounds in 2002.
3. Robert W. Crisher: Mr. Crisher has set pots and used hook and line to harvest sea bass. He is a 26-year veteran of fishing. He harvested 7, 523 pounds in 2001.

Mr. Travelstead said that the staff recommended approval of these requests.

Associate Member Garrison moved to approve the requests. Associate Member McLeskey seconded the motion. The motion carried, 6-0-1. Associate Member Robins abstained because of a conflict of interest.

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19. Keith Like: Proposal to license and set a pound net at a new location, in Chesapeake Bay, 1000 feet north of the concrete ships off Kiptopeke State Park. The location was protested during the 30-day public comment period.

Jack Travelstead explained that Mr. Like was requesting new pound net locations 1000 feet north of the concrete ships in the Chesapeake Bay. Mr. Travelstead said that one protest had been received from Mr. Joe Hicks during the Public Comment Period. He said that staff recommended approval.

Commissioner Pruitt asked if anyone was present in opposition. There was no one present.

Associate Member Schick moved to approve as recommended by staff. Associate Member Garrison seconded the motion. The motion carried, 7-0.

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20. Failure to report commercial harvests in accordance with Regulation 4VAC20-610.

Kelly Lancaster, Fisheries Management Specialist, gave the presentation and her comments are a part of the verbatim record. Mrs. Lancaster explained that Mr. Ferguson had turned in his reports to staff, which caught him up. Therefore, staff did not recommend any further action be taken and that she had offered him assistance in order that he would not fall behind in the future.

No further action was taken by the Commission.

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- 21. Requests for public hearing: a) VIMS request to deploy *Crassostrea ariakensis* oysters in Virginia waters for experimental purposes, b) Proposed amendments to Regulation 4VAC20-110 to adjust size limits for lobster, c) Establishment of the summer period (May 1 through October 31) quota for Scup.

Commissioner Pruitt explained that this was a request for public hearings at the May Commission meeting and read the three items into the record.

a) VIMS request to deploy up to 42,000 *Crassostrea ariakensis* oysters in Virginia waters as part of a proposal entitled, "Comparative performance of triploid *Crassostrea ariakensis* and *Crassostrea virginica* in bottom habitats in Virginia and Maryland." A copy of the proposal is attached. Section 28.2-825 of the Code of Virginia requires a permit be issued for the placement of the non-native oyster.

b) Proposed amendments to Regulation 4VAC20-110 to adjust the size limits for lobster. Addendum III of the ASMFC Lobster Fishery Management Plan requires a 3 3/8 inch minimum carapace length for lobster and a 5 1/2-inch minimum carapace length for female lobsters. Currently, Virginia's minimum size for lobster is 3 1/4 inches and there is no maximum size.

c) Proposal amendments to Regulation 4VAC20-910 to establish the 2005 summer period commercial harvest quota for scup.

Associate Member Cowart moved to approve the requests for public hearing. Associate Member Robins seconded the motion. The motion carried, 7-0.

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Douglas F. Jenkins, Sr.

Mr. Jenkins requested that the Commission consider renegotiating with the hand tongers to get the seed for the Rappahannock River in May.

Associate Member Cowart responded that it would be worth looking at and asked that Commissioner Pruitt, Jack Travelstead, and Jim Wesson try to renegotiate with watermen. Mr. Travelstead reminded the Commission that the procurement procedures had already been approved by them. Commissioner Pruitt suggested a motion be made to approve the price of \$2.50/bushel of seed oysters to the catcher.

Commission Meeting

**13209
April 26, 2005**

Associate Member Bowden made the motion to approve a \$3.00/bushel of seed oysters for the catcher, but for staff to negotiate for the \$2.50 per bushel. 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 5:37 p.m. The next meeting will be Tuesday, May 24, 2005.

William A. Pruitt, Commissioner

Katherine Leonard, Recording Secretary