

MINUTES

Commission Meeting

January 23, 2007

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

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

Bob Grabb	Chief, Habitat Management Div.
Tony Watkinson	Deputy Chief, Habitat Mgt. Div.
Chip Neikirk	Environmental Engineer, Sr.
Jeff Madden	Environmental Engineer, Sr.
Tracy West	Environmental Engineer, Sr.
Randy Owen	Environmental Engineer, Sr.
Hank Badger	Environmental Engineer, Sr.
Ben Stagg	Environmental Engineer, Sr.
Jay Woodward	Environmental Engineer, Sr.
Benjamin McGinnis	Environmental Engineer, Sr.
Justin Worrell	Environmental Engineer, Sr.
Elizabeth Gallup	Environmental Engineer, Sr.

Virginia Institute of Marine Science (VIMS)

Lyle Varnell
David O'Brien

Other present included:

William A. Thrall	Keith Lockwood	Betty Grey Waring	Bill Sorrentino
Rebecca Francese	Spencer Godwin	Bob Livengood	Larry Waite
Ken Brooks	Adolf Wais	Eileen Thrall	Stephen Powell
Barry Kean	Dale Henderson	Timothy Belvin	James W. Akers, Jr.
Michael T. Credle	Mary O. Credle	Leonard Madison	Bryce Cook
Ray Algharie	Marty Moynihan	Randy King	Robert Strickland
Sam McKinney	Jane Locke	John Locke	Ian Bates
Vanessa Vaildejuli	James Peterson	James Wilson	Robert C. Morrison
Page C. Morrison	Jan Cartz	Alan Biddison	Lois Biddison
John B. Thompson	Charles Marcel	David Marcel	David Host
Susan Fulmer	Patricia Fitch	David Fitch	Robert Hart
Michael Hart	Joe Ivers	Bob Michael	Pam Michael
D. Wahl	Carol Bracker	Jean Widenmyer	Kervin Curling
Cheryl Sonderman	Molly Nealer	D. Braswell	William Bracker
Bob Winstead	Tom Dombrowski	Alice Shelton	Chris Frye
Tim Hogan	Ellis W. James	Richard Biemiller	Russell Gaskin
Douglas F. Jenkins, Sr.		Roger Parks	Tommy Leggett
Claire Hudson	Patrick Lynch	James Kirkpatrick	David Russell
Michael Schwarz	William E. Palmer	Bob Hutchinson	Frances Porter
Kelly Price			

and others.

Commissioner Bowman called the meeting to order at approximately 9:37 a.m.
Associate Member Fox was absent due to illness.

Traycie West gave the invocation and Col. Rick Lauderman led the pledge of allegiance to the flag.

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

APPROVAL OF AGENDA: Commissioner Bowman asked if there were any changes to the agenda. Bob Grabb stated that there was a correction to the description for Item 2B, which he would correct when he presented that item. Jack Travelstead explained that there was an additional fisheries item to add to the agenda and that was to consider a request from industry to change the Private Ground Shellfish Relay Season starting date. He said he had talked with Dr. Croonenberghs at the VHD-Division of Shellfish Sanitation about the request and Dr. Croonenberghs said they agreed with the proposed seasonal change. Commissioner Bowman stated this would be made Item 24.

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

MINUTES: Commissioner Bowman asked, if there were no corrections or changes, for a motion to approve the December 19, 2006 meeting minutes.

Associate Member Robins moved to approve the minutes, as circulated. Associate Member Holland seconded the motion. The motion carried, 8-0. The Chair voted yes.

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

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

Commissioner Bowman opened the public hearing and asked if anyone was present pro or con for these items wishing to address the Commission. No comments were received.

Commissioner Bowman asked for a motion for Page Two Items 2A through 2G. Associate Member McLeskey moved to approve Items 2A through 2G. Associate Member Schick seconded the motion. The motion carried, 8-0. The Chair voted yes.

2A. COLUMBIA GAS TRANSMISSION CORPORATION, #06-1754, requests authorization to replace and/or repair existing gas pipeline segments along Line VM-107 possibly requiring the excavation, exposure, and replacement of the pipeline along numerous stream and river crossings in the Counties of Prince George, Sussex, Southampton, Surry, and Isle of Wight and the Cities of Suffolk and Chesapeake.

Permit Fee.....\$100.00

2B. CITY OF NORFOLK, #06-2504, City of Norfolk #06-2504 requests authorization to install 25 temporary and 20 permanent mooring dolphins associated gangways, three (3) temporary 240-foot by 40-foot floating platforms/barges in Area C, two (2) temporary 300-foot by 40-foot floating platforms/barges, two (2) 100-foot by 40-foot floating platforms/barges, and one (1) 200-foot by 40-foot floating platforms/barge in Area B, along the Norfolk waterfront in the Elizabeth River and the Eastern Branch of the Elizabeth River in Norfolk to support events associated with Sail Virginia 2007 and the 400th Anniversary of Jamestown.

Permit Fee.....\$100.00

2C. W. F. MAGANN CORPORATION, #06-2140, requests authorization to dredge 96,000 cubic yards of new dredging and 20,000 cubic yards of maintenance dredging of State-owned subaqueous lands from a 600-foot by 500-foot area to minus fourteen (-14) feet below mean low water adjacent to his property situated along the Western Branch of the Elizabeth River in Portsmouth. Dredged materials will be disposed of at the Craney Island Dredged Material Management Area Staff recommends requirements for a pre-dredge conference, submission of a post-dredge survey, and \$43,200.00 for the dredging of 96,000 cubic yards of State-owned subaqueous lands at a rate of \$0.45 per cubic yard.

Royalty Fees (Dredging 96,000 cu. yds. @ \$0.45/cu. yd.)..\$43,200.00
Permit Fee..... \$ 100.00
Total Fees..... \$43,300.00

2D. NAVAL FACILITIES ENGINEERING COMMAND, #06-2348, requests authorization to install a floating boat barrier exclusion device at the Norfolk Naval Shipyard along the Southern Branch of the Elizabeth River in Portsmouth. Staff recommends that the barrier be marked in accordance with the requirements of the U.S. Coast Guard.

Permit Fee.....\$100.00

2E. WESTERN VIRGINIA REGIONAL JAIL AUTHORITY, #06-1412, requests a modification to their previously issued permit to install aerial utility crossings of 125 linear feet of electrical line and 125 linear feet of telecommunications cable across the Roanoke River at the jail facility near Goodwin Church in the City of Salem.

No applicable fees, permit modification.

2F. JANE M. WELLS, ET AL, #06-2044, requests authorization to install a private riparian mooring buoy at 37° 25’ 5” North Latitude, 76° 19’ 59” West Longitude, approximately 865 feet channelward of their property situated along Fishing Bay at 651 Stove Point Lane in Middlesex County. The mooring will encroach on “Additional Public Ground.”

Permit Fee.....\$ 25.00

2G. DAVID LEE, #06-2509, requests authorization to install a private riparian mooring buoy at 37° 31’ 40.5” North Latitude, 76° 20’ 2.3” West Longitude, approximately 700 feet channelward of their property situated along Fishing Bay at 123 Stove Point Lane in Middlesex County. The mooring will encroach on “Additional Public Ground.”

Permit Fee.....\$ 25.00

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

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

**5. RAPPAHANNOCK RIVER ESTATES CIVIC ASSOCIATION,
#06- 1243,**

9. ROBERT B. HART, ET AL, #06-1551

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

Associate Member Robins moved for the following:

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

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

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

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

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

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

NAYS: None

ABSENT DURING VOTE: Fox

ABSENT DURING ALL OR PART OF CLOSED MEETING: Fox

The motion carried, 8-0.

Katherine Leonard, Recording Secretary

4. **ARMY CORPS OF ENGINEERS, #03-1365**, requests authorization to modify an existing permit which authorizes the overboard placement of dredged material, to allow for the placement of that material past the current time-of-year restriction of February 15 through June 30, which was imposed to protect anadromous fish species. The request is to allow placement of the dredge material through March 31, 2007, to allow for the removal of a shoal, which is causing a draft restriction for ships along the Dancing Point – Swann Point Channel area.

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

Mr. Stagg explained that the project is located within the James River in the Dancing Point – Swann Point Channel area within Surry County. The dredged material disposal area is inshore of the federal project channel at this location.

Mr. Stagg stated that the applicant originally applied for a permit for overboard disposal along portions of the federal project channel from Tribell Shoals to Hopewell in 2003. After a standard public interest review and Commission approval, the permit was issued in June of 2004, with a time-of-year restriction on overboard placement from February 15 through June 30 of any year. Subsequently, on July 12, 2004, the applicant requested a permit modification to permit overboard disposal during the time-of-year restriction along the Goose Hill Channel portion of the federal project channel. That request was in conjunction with a proposed anadromous fish migration study to help determine impacts to those species. After another public interest review the Commission granted the request for calendar year 2005 only.

Mr. Stagg said that the applicant was currently requesting another time-of-year modification to allow overboard disposal of material along the Dancing Point – Swann Point Channel area due to shoaling which has resulted in draft restrictions for ships traversing this section of the river. Both the Department of Game and Inland Fisheries and the Virginia Institute of Marine Science have historically opposed allowing overboard disposal within this reach of the river from February 15 through June 30 of any year. The Game Department has commented that they still oppose any shortening of this restriction. They further indicate that in light of the warm winter this year, fish may be expected to migrate even earlier than normal. In addition, their comments indicate that the fish study conducted, as noted above, was inconclusive related to anadromous fish along this section of the river due to a number of factors. The Virginia Institute of Marine Science (VIMS) had indicated that although, this extension request will overlap the period of up-river spawning migrations of anadromous fishes, particularly American shad, the overboard disposal should not impact spawning or reduce survival of eggs and larvae, since the disposal area is not within the actual spawning or nursery area. Noting that the previous study results were inconclusive concerning fish migration in this area, and in light of the current warm winter season, VIMS indicated that replication of the

study was necessary before a relaxing of the time-of-year restriction along this reach of the river would be warranted.

Mr. Stagg stated that the Army Corps of Engineers indicated that part of the reason for this extension request, in addition to the shoaling problem itself, was that they could not get their dredge contractor onsite while they were in the process of attempting to get another contractor to do the work, it was unlikely that they could award a contract and have the work done before February 15 of this year.

Mr. Stagg said that while restriction of commercial shipping along the James River was a serious issue, in light of comments from Game and Inland Fisheries and the Virginia Institute of Marine Science, staff could not support the request to relax the current time-of-year restriction beyond March 1st. Should the Commission deem the Corps' request to be warranted given the current situation, staff recommended the Corps be required to undertake another anadromous fish study similar to the previous study, with protocols being reviewed in advance by both VDGIF and VIMS, specifically along this reach of the James River to be able to answer this question definitively. Should the Commission grant a waiver, staff would recommend it be one-time only, and that consideration of any further waivers be clearly conditioned on the outcome and results of the new study.

Associate Member Robins asked about the disposal site for the dredged material. Associate Member Tankard asked if this was an upland disposal. Mr. Stagg explained that a study had been done on other options, but as this was an emergency request a spoil site used before was approved for this project.

Commissioner Bowman asked how long the study would take to complete? Mr. Stagg said that VIMS could better answer the question, but with the current protocols it would speed it up. Lyle Varnell, representing VIMS, explained that Mr. Stagg was correct and the study would have to be done in conjunction with the dredging.

Betty Grey-Waring, Chief of Operations and representative for the Corps, was sworn in and her comments are a part of the verbatim record. Ms. Grey-Waring stated that this was an important project and was a 90-mile area. She said this was important to the economy and that it would not benefit the Corps at all. She explained that it was a challenging project given the topography. She said that the contract and EIS were necessary to dredge. She said this involved one shoal, which was located at Dancing Point-Swan Point. She said as a result of the summer storms there had been severe shoaling in the area causing the emergency situation. She said the funding for this project was not received until December 2006 and the old contract was not renewed, therefore a new one would have to be sought. She said so far the bids coming in were too high and they could not get the work done by February 15th. She said they were asking for the time-of-year restriction to be relaxed and the dredging would not restrict fish movement.

Keith Lockwood, Fisheries Scientist representing the Corps, was sworn in and his comments are a part of the verbatim record. Mr. Lockwood presented some slides, which showed the profile of the area after the dredge survey was done in 2006. He said they did the survey in January 2007 again and found that the situation had gotten worse so they could not wait until July, which was the original plan. He said the time-of-year restriction was there because of VIMS' concern with the fish migration and not anything else. He said there had been significant shoaling affecting the commercial boat traffic going to Richmond. As an example, he provided slides showing vessel movement while dredging was being done in New York waters. He said that dredging the channel would not impact fish traveling upriver and it was a good area to study to be done in conjunction with the dredging. He said it was important to remove the shoaling for boat traffic.

Stephen Powell, Project Management representing the Corps, was sworn in and his comments are a part of the verbatim record. Mr. Powell said they had tried to avoid this from occurring as the channel was restored in January 2006, they were advertising for a contractor, and it was not a normal happening. He said at the rate of shoaling they will need to return to this area in the summer or fall.

Martin Moynihan, Executive Director for the Port of Richmond, was sworn in and his comments are a part of the verbatim record. Mr. Moynihan said they supported the Corps request regarding the time of year restriction for dredging. He provided a handout of his comments. He said this was the first time they had to put a draft restriction on vessels transitting the James River.

Robert Strickland, Logistics Manager representing Honeywell was sworn in and his comments are a part for the verbatim record. He said that the draft restriction was hurting their operations and the restriction added to their cost.

Nathaniel Green, a James River Ship's Pilot for 19 years, was sworn in and his comments are a part of the verbatim record. He said he worked in the James River and the shoaling impacted them and required restricted draft. He said the storms affect all in the Hampton Roads area and he would hate to see any delay in this project getting done. He said if it was not done now the shoaling would only get worse, which could cause further draft restrictions.

David Host was sworn in and his comments are a part of the verbatim record. Mr. Host said he supported the Corps' request, as it made good sense and the Commission should approve the waiver. He said in a year's time there could be approximately 100 vessels traveling the James River.

No one in opposition was present.

Associate Member Robins asked if the proposed study already had protocols that were transferable for the adjacent area. Mr. Varnell said that was correct. He said it would

save some hoops that would have to be jumped through. He said storm events happen here and the study should be continued so it would provide information for giving better advice. He said plume studies are done and the noise from the project is also a concern because of its impact on fish migration. He said the study tells us that it may not affect the entire river.

Associate Member Robins stated that this data needed to be well documented as it will serve the Commission in making management decisions and it would be appropriate to require the study by VIMS with the protocols in place, as a permit condition.

Commissioner Bowman stated that all questions have been answered and the Commission was sensitive to the needs of the species. It was evident there was a problem to be concerned about and for getting the best science.

Associate Member Robins moved to allow the time of year restriction date to be extended through March 21, 2007. He said further that the approval would include the requirement of the study being done in conjunction with the dredging with the protocols provided by VIMS, if it could be done timely and the dredging did occur, as scheduled. Associate Member McLeskey seconded the motion. The motion carried, 8-0. The Chair voted yes.

No applicable fees, modification of permit.

- 5. RAPPAHANNOCK RIVER ESTATES CIVIC ASSOCIATION, #06-1243,** requests authorization to install 45 mooring buoys and 11 timber pilings to establish a community waterfront mooring plan and a designated swimming area adjacent to their property situated along the Rappahannock River in Essex County. Several nearby property owners protested the project.

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 approximately 7.3 miles downstream of Tappahannock in Essex County. The Rappahannock River at this location is approximately 2 miles wide. The entire Rappahannock River Estates shoreline, approximately 800 linear feet, is held in common by 100+/- property owners within the subdivision. There are no private riparian waterfront lots. Although they had not established a homeowners association, a civic association with officers, met monthly during the summer recreational season. This group had oversight and maintained the existing infrastructure within the common area. This area included a concrete boat ramp with tending pier, the beach, timber groins, a community pier, and a beach pavilion.

Mr. Owen stated that representatives from the Association and the subdivision had worked with staff over the past 29+ months, to remove 25 or more unauthorized boat and jet ski moorings which have historically been used by the residents without permits from VMRC. The residents agreed to this enforcement action voluntarily during staff's review of a previous application (VMRC #02-1656) that sought authorization for a 40-slip community pier. The application was subsequently withdrawn due to staff concerns and heavy opposition from residents within the subdivision.

Mr. Owen said that following resolution of the violation, the Association appointed a pier subcommittee to work with VMRC staff on the development of a mooring plan for the community. The current application now sought authorization to install 15 jet-ski moorings, 30 boat moorings and 11 timber piles to establish a roped-off swimming area.

Mr. Owen stated that eight property owners from within the Rappahannock River Estates Subdivision protested the project. At least two of the current opponents previously sought authorization for the 40-slip community pier on behalf of the Association. In their letters, the protestants suggested that they might be willing to remove their objection if the moorings would be made available to all property owners within the subdivision.

Mr. Owen also stated that the Virginia Institute of Marine Science had advised that the extent of the project's impacts are unquantifiable, as they are dependent to some degree on individual behavior. They conclude that from a marine environmental viewpoint, these potential adverse impacts would be lessened by minimizing the number of boats moored, by providing and maintaining trash receptacles to encourage proper disposal of trash, and by encouraging proper wastewater disposal. The Department of Conservation and Recreation stated that the project was not anticipated to adversely impact natural heritage resources documented in the project area. The Virginia Department of Health advised that the applicant has submitted an approved plan for sanitary facilities. No other State agency had commented on the project.

Mr. Owen said that from the start, staff encouraged the Association to develop a community mooring plan that would equitably provide moorings for any property owner within the subdivision and safeguard a designated swimming area. The Association's preference was to limit the moorings to only those residents who had paid their annual dues.

Mr. Owen stated that the protestants not only contest this but further believe that the Association has no legal right to make application on behalf of Rappahannock River Estates. While a legal homeowners association has not been established, and likely never will, it is staff's opinion that the Association is the appropriate authority to make application to VMRC for the proposed moorings and swimming area. Any Commission decision approving a permit application by the Association would not affect whatever legal right any of the subdivision residents may have to seek to enjoin the Association

from going forward with, or completing, the project on the commonly owned property or to seek any other legal remedy that may be deemed appropriate by a court of law.

Having said that, however, Mr. Owen said that staff does agree with the protestants that the moorings should be available for any subdivision resident given their shared ownership of the common area. The project as designed appeared to provide for a community mooring plan and swimming area that was safer for the residents over that which previously existed without VMRC authorization. Accordingly after evaluating the merits of the project against the concerns expressed by those in opposition to the project, and after considering all of the factors contained in §28.2-1205(A) of the Code of Virginia, staff recommended approval of the project as submitted for use by any property owner within the Rappahannock River Estates Subdivision. As such, the allocation of the buoys would become a community responsibility.

Additionally, Mr. Owen explained that staff recommended inclusion of our standard permit conditions for mooring buoys, listed below, and a royalty of \$1,125.00 for the installation of 45 riparian mooring buoys over State-owned submerged land at a rate of \$25.00 per buoy. It should be noted that the Commission has not adopted a fee schedule for riparian, community-use mooring buoys. Currently the Commission assesses \$100.00 per buoy for private non-riparian users.

It was noted by Mr. Owen that the standard conditions were included in the staff's recommendation and a part of the written evaluation, which were in the members' notebooks and are listed below:

Standard VMRC Permit Conditions for Mooring Buoys

- The mooring buoys shall be marked in accordance with the "Uniform State Waterway Marking System" which requires the mooring to be white with a blue stripe around the middle. Additionally, the Permittee shall affix the numerals 06-1243 to each buoy for identification purposes.
- The Permittee shall remove all buoys within 90 days of receiving written notification from the Commission.
- The Permittee shall annually provide all vessel registration numbers prior to occupancy of the buoys.
- The Permittee shall notify the Commission annually of their intent to continue to occupy the moorings.

Bryce Cook, Association representative, was sworn in and his comments are a part of the verbatim record. Mr. Cook said he was serving as voice for the people as the Association was taking responsibility for the project. Associate Member Bowman asked if the

apportionment was done? Mr. Cook responded that the Community would be deciding how it would be used. Associate Member Robins asked if individuals were required to belong to the Association. Mr. Cook stated that only those individuals in the neighborhood could use it.

Rahim Afsharie, resident, was sworn in and his comments are a part of the verbatim record. He said that he agreed with the staff’s recommendation that all people in the community should be allowed to use it.

Commissioner Bowman stated that the Commission only approved the structures and did not assign anything, as that was up to the property owners.

Associate Member Robins asked VMRC Counsel how would a dispute over issuing the permit to the Association be resolved. Carl Josephson, Senior Assistant Attorney and VMRC Counsel explained that the Commission did not determine property rights and that it was a civil matter.

Associate Member Robins moved to accept the staff’s recommendations. Associate Member Holland seconded the motion. The motion carried, 8-0. The Chair voted yes.

Royalty Fees (45 mooring buoys @\$25.00/buoy).....	\$1,125.00
Permit Fee.....	\$ 100.00
Total Fees.....	\$1,225.00

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- 6. **GWYNN’S ISLAND BOATEL, #06-2522**, requests authorization to remove all existing piers and construct four (4) new floating piers of various lengths to a maximum length of 190 feet channelward of mean high water to support the dry stack storage operation, fueling, sewage pump-out, and to create 18 wet slips and seven (7) staging slips and to dredge 3,700 cubic yards of subaqueous bottom material to provide maximum depths of minus six (-6) feet at mean low water adjacent to the Gwynn’s Island Boatel facility situate along Milford Haven in Mathews County. An adjacent property owner 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 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. The facility currently provides dry stack storage for 171 boats and is located adjacent to the U.S. Coast Guard’s Milford Haven Station, 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 include three staging piers without slips. The longest of the piers extends approximately 125 feet channelward of mean high water.

Mr. Neikirk further explained that in 2004, Mr. Fitch applied to dredge 1,530 cubic yards of subaqueous bottom material to create maximum depths of minus six (-6) feet at mean low water, add five slips to an existing pier, and to construct a new 180-foot long pier with 10 slips. During their April 26, 2005 meeting, the Commission considered the application and approved it in a modified form. Specifically, the Commission reduced the length of the proposed pier to 140 feet channelward of the existing bulkhead and denied the dredging on the east side of the proposed pier. The dredging and construction authorized under VMRC #04-2050 has not begun and the 1,100 cubic yards of dredging associated with that permit would be conducted in conjunction with the dredging proposed under the current application. The piers and slips authorized under VMRC #04-2050 replacement piers are proposed in the current application.

Mr. Neikirk said that in the current application, Mr. Fitch's proposal included the hydraulic dredging of approximately 3,700 cubic yards of subaqueous material to provide maximum depths of minus six (-6) feet at mean low water within a 100-foot by 200-foot area east of the area authorized to be dredged under VMRC #04-2050. When coupled with VMRC #04-2050, the total material dredged would be 4,800 cubic yards, resulting in the basin being extended approximately 180 feet toward the east. Four floating piers are proposed to replace the existing fixed piers. The piers were intended to support fueling, sewage pump-out, launching and retrieval operations, temporary storage of boats recently launched or awaiting retrieval, and 18 wetslips. Six of the wetslips were designated for transient use.

Mr. Neikirk said that the adjoining property owners, Mr. and Mrs. Alan Biddison protested the project. They were opposed to any expansion of the facilities and stated that no need for the expansion was cited in the application. They noted possible adverse impacts to existing shellfish resources and questioned whether the proposed transient slips for larger vessels would necessitate additional openings of the Gwynn's Island Bridge. Finally, they suggested that any use of the eastern side of the proposed fueling pier might encroach on, as well as adversely affect, the U.S. Coast Guard Milford Haven Station.

Mr. Neikirk explained that the U.S. Coast Guard Milford Haven Station was the adjoining property owner on the west side of the property. They had stated in a letter to Mr. Fitch that they had no objection to the proposal, but requested that Mr. Fitch require boats using the fuel and pump-out pier stay within the extended property lines and not tie up in a manner that would impede navigable traffic.

Mr. Neikirk stated 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 impedes 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 was proposed to be located approximately 40 feet landward of the existing 6-foot mean low water contour. According to soundings provided in the application the channelward end the T-head was situated in water that was currently only two feet deep at mean low water.

Mr. Neikirk said that VIMS stated that the additional slips could be expected to add incrementally to the pollutant load on the creek and recommended the marina continue their participation in the "Clean Marina Program" to lessen the potential adverse impacts. They also recommended that dredging be avoided during the months of July, August, September, December, January, and February if there were productive shellfish grounds in the vicinity. They noted, however, that the proposed dredging of the sandy material normally should not stay suspended in the water column for very long. Finally, VIMS states that the other aspects of the dredging including the proposed depths and buffers were acceptable from a marine environmental viewpoint.

Mr. Neikirk stated that the Health Department found the project acceptable and stated that the area was condemned for the direct marketing of shellfish and that the project should not cause an increase in the size of the closure. The Department of Historic Resources did not comment on this application, but during the review of the previous application they stated that the facility was adjacent to the earthworks associated with "Fort Cricket Hill" and noted that the plans called for fencing off the earthworks and routing the pier access around the earthworks. No other State agencies have commented on the project.

Mr. Neikirk said that the pier and dredging would encroach on private oysterground leased to Mr. Robert Payne. When staff attempted to notify Mr. Payne his letter was returned as undeliverable. He did not comment on the previous application. Staff is not aware of any significant shellfish resources in the immediate vicinity that might be affected by the project. Shellfish relaying activities are conducted approximately 1/3 mile east of the facility.

Mr. Neikirk explained that staff had discussed the need for the expanded facilities with Mr. Fitch. He stated that he will receive a Boating Infrastructure Grant to provide six (6) transient slips and diesel fuel at the facility provided he can secure the necessary permit. He has also received a conditional use permit from Mathews County to expand his dry storage capability. The proposed expansion and reconfiguration of the piers is designed to accommodate those new uses.

Mr. Neikirk noted that when the previous application to expand the facilities was considered during the April 26, 2005 public hearing, the Commission agreed with staff's recommendation to reduce the length of the proposed pier to 140 feet channelward of the

existing bulkhead and to not allow any dredging on the east side of the easternmost proposed pier. The reduction in the length of the pier was based on the cross-sectional drawing that indicated that the proposed 170-foot pier would reach the edge of the natural channel; accordingly staff felt that a 170-foot pier might adversely affect navigation. Additionally, since the stated use for the east side of that pier was for canoe access and side-to mooring of small boats, staff did not believe the additional dredging was warranted.

Mr. Neikirk said that the current application was designed to support the expanded dry storage operation and the mooring of transient vessels. Although staff had navigational concerns with the length of the pier proposed in the previous application, soundings in the current application indicate that the proposed piers would not encroach on water that was currently deep enough to accommodate typical boat traffic. In fact, the dredging was proposed to extend 40 feet beyond the end of the proposed pier. Accordingly after evaluating the merits of the project against the concerns expressed by those in opposition to the project, and after considering all of the factors contained in §28.2-1205(A) of the Code of Virginia, staff recommended approval of the project with the inclusion of our standard dredging conditions, which required a pre-dredging conference and post-dredging bathymetric survey. Additionally, staff recommended a dredging royalty of \$0.45 per cubic yard be required for all dredging outside the scope of that initially authorized by VMRC #85-0895.

David Fitch, owner of Gwynn's Island Boatel and applicant, was sworn and his comments are a part of the verbatim record. Mr. Fitch stated he was here with his wife, Pat. He stated that a permit had been approved previously for a pier, slips, and dredging in order to accommodate 7 boats. He said the Commission reduced the size of the pier when they approved the permit and approved part of the requested dredging, but it was never done. He said at the present time he was trying to add storage to his facility because of the requests from his clients. He said he had applied to the Health Department and was now applying for a 160-foot transient dock and the upgrading of the highland structures. He said in September 2006 the County approved his special use permit and he hired Kevin Curling to assist him in applying to the Commission. He said that in their written comments the Coast Guard said they had no issues and asked that the mooring be restricted on one side of the pier and only use it for fueling purposes.

Kevin Curling, Environmental Consultant, was sworn in and his comments are a part of the verbatim record. Mr. Curling provided a powerpoint presentation to assist with his presentation. He explained the various structures and their necessity. He explained that the shellfish closure already existed for that area and the marina was in the prohibited area. He said, when he spoke to Dr. Croonenbergh of the Division of Shellfish Sanitation, he was told that shellfish could be relayed from grounds within these polluted waters. He said the Coast Guard sewage treatment plant had made it necessary for the condemnation to be established. He provided some photos of an existing mooring pier in front of the boatel. He said there was a historical site with a cannon, which was called

“Cricket Hill” and the Corps required the fencing around it. He said in this area there was a boat ramp, restaurant, condo units, etc.

Associate Member Tankard asked if it was a marina or a boatel. Mr. Curling responded, that it is a boatel-marina. Associate Member Tankard asked what percentage of each was there. Mr. Curling explained the boatel dry storage was for 171 boats and could only be used if the space had been reserved. He said the wetslips were for boats being stored for a weekend. He said 6 slips were for the marina and the rest for the boatel.

Commissioner Bowman asked if anyone was present in opposition?

John Thompson, Attorney representing the Biddisons, was present and his comments are a part of the verbatim record. Mr. Thompson explained that they intended to show deficiencies in the application process and provided handouts to the Commission. He read the project description and stated that there was no reference to the upland use. He handed out more pictures and stated that these were different from the staff’s slides. After reading a portion of the Code, he stated that the Commission could not grant the permit. He referred to and read the definition of marina. He read the Regulation 4VAC 20-360-20 about best management policies. He said the number of slips determined the effect on shellfish growing areas, which was not considered by the Commission. He said the closest grounds were approximately 1/3 mile away. He read from Regulation 4VAC 20-360-70, which sets forth specific marina siting guidelines, which he also said was not considered by staff. He said the disposal was to be in the parking lot, but staff had not given that any consideration. He said there was no solid waste recovery plan done and he read from the Regulation again, 4VAC 20-360-80 which sets forth the best management practices. He referred to 4VAC 20-360-20 where there is a checklist and criteria, which he also said had not been considered by staff.

Commissioner Bowman asked staff if these items were considered. Mr. Grabb responded that they were considered just not referenced in the report. He said that most of the concerns were upland issues and the responsibility of the local zoning board. He further said that the Health Department was not adding to the current condemnation.

Allen Biddison, Protestant was sworn in and his comments are a part of the verbatim record. Mr. Biddison said they wanted to know exactly what the Commission was approving. He provided a handout to the Commission. He said this was an area, which included both residential and commercial development. He said that the Narrows Marina, a large marina, was just on the opposite side of the bridge from this boatel, and the applicant had indicated that no marinas were in the area. He said there was no need for this boatel. He said the additions would also increase the vehicular traffic. He said there was no effort to establish trees or grasses along the shoreline to control runoff and in the past, the boatel had been in violation of the best management practices. He said the previous owner had been told that the drainage ditch was inadequate, but the current owner was still using it. He said all of this would further cause a loss of the oyster

resource. He said this was not a location for a larger marina and the Commission should not overlook the past and only look at the current application.

Lois Biddison, Protestant was sworn in and her comments are a part of the verbatim record. Ms. Biddison explained that the biggest impact on them was using their property and accessing the water. She said that with the increased boat traffic there would be erosion along their shoreline. She said this would have an impact on the oyster resources and the proposal was in the oyster rocks and there was a need to protect these oyster grounds. She asked, if the State had given up on it? She stated that the VIMS report indicated there would be minimal impacts if there were no additional moorings or long term moorings and she felt that there were more detriments than benefits to this project. She explained that in losing the resources in small increments it did not seem significant but in the future it would be more significant. She said this project would adversely impact the Milford Haven area.

Bob Michael, protestant was sworn in and his comments are a part of the verbatim record. Mr. Michael stated that he was a Williamsburg resident, but did enjoy boating in the area with all its beauty. He said with the increased traffic, the area would lose its tranquility and beauty. He stated that what was already there was equal and right for the Milford Haven area. He said also that with the increased traffic of larger vessels, this increased pollution concerns as well as safety issues.

Robert Morrison, protestant was sworn in and his comments are a part of the verbatim record. Mr. Morrison explained that his wife, Paige, was a resident of Gwynn's Island and her family had history in the area. He said they were strongly opposed to the project and agreed it would bring more revenue into the County, but there would be more boats and more bridge openings, causing traffic jams. He said further that this would put more wear and tear on an old bridge dating back to 1939. He said this was not a project by a good neighbor. He asked that the project not be approved.

Elaine Isabel, protestant was sworn in and her comments are a part of the verbatim record. Ms. Isabel said she lived in the County and was concerned with the increased impacts. She said she went to the Mathews County office and was told by them that no impact study had been done for this project. She said it would impact the community as at the present time there were no traffic lights, which would change, and would further impact family life in this area.

David Fitch, in his rebuttal, said that he had built the bathroom to comply with Health Department requirements and all he had done so far was done so that this project would be in compliance with everything, and it was.

Associate Member Schick stated that this was a good project and the Commission's approval would not stop the problems, but would help to resolve them. He said there

were a lot of issues here that were the responsibility of the County. He said he felt the boatel was environmentally friendly and was needed in Mathews.

Associate Member Schick moved to approve the project as recommended by staff. Associate Member Holland seconded the motion.

Associate Member Robins asked VIMS about the impacts. David O'Brien, VIMS representative, stated that the comments made by them had addressed all the concerns and they could not quantify them, but they do exist. Associate Member Robins asked about the clean marina program. Mr. O'Brien said that there was 100% sand being hydraulically dredged and there should not be sediments or plumes in connection with the dredging.

Associate Member Tankard stated that he had a problem with the process, as there was now a 450-boat usage versus the 171 approved by the Health Department. He said he felt that there would be shoreline erosion and environmental issues, and, he was concerned with the dredging portion of the project.

Associate Member Robins asked for an amendment to the motion to require that the Health Department approval be applied for so that it would agree with what the County had approved. Associate Member Schick stated he did not accept the amendment.

The motion carried, 7-1. Associate Member Tankard voted no. The Chair voted yes.

Royalty Fees (dredging 3,700 cu. yds. @ \$0.45/cu. yd.).....	\$1,665.00
Permit Fee.....	\$ 100.00
Total Fees.....	\$1,765.00

The Commission broke for lunch at approximately 12:29 p. m. The meeting reconvened at approximately 1:10 p.m.

- MALLARD BAY PROPERTY OWNERS ASSOCIATION, #05-2254,** requests authorization to construct two (2) 30-foot long T-head pier extensions, two (2) 32-foot L-head extensions and five finger piers to create a total of 11 additional wetslips at their existing 18 slip community pier facility, an 80-foot community crabbing pier with an 800 square foot T-head and a 170 square foot canoe launch platform adjacent to the association's common area situated along the Great Wicomico River in Northumberland County.

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

Mr. Madden explained that Mallard Bay is a 169-lot subdivision located approximately four miles upstream of the Route 200 Bridge crossing of the Great Wicomico River, approximately six miles south of Heathsville, in Northumberland County.

Mr. Madden said that on June 1, 1988, the original developer, "The Bay Company", was granted authorization to construct a 215-foot long by 10-foot wide, community mooring facility which included a 68-foot long by 8-foot wide T-head, two finger piers and associated mooring piles to accommodate ten wetslips. The permit also included a boat ramp and a second 70-foot long community access pier (without slips) located further upstream. At the time, no restriction on future private pier construction was imposed.

Mr. Madden also said that on May 4, 2000, under the name of the "Mallard Bay Home Owners Association", the association received authorization to utilize the remaining mooring space inboard of the existing ten wetslips to create eight additional wetslips, raising the total number of wetslips at the T-head pier to 18. The applicant now sought to further expand the existing 18-slip T-head community pier facility by constructing two, 30-foot long by 8-foot wide extensions to the T-head and two, 32-foot long by 6-foot wide L-head extensions, as well as finger piers and mooring piles to create 11 additional wetslips along the outboard side of the existing T-head. Upon completion, the T-head community pier would then have a total of 29 wetslips.

Mr. Madden stated that in addition to the expansion of the T-head pier, the association was requesting authorization to build a third community pier immediately downstream of the existing T-head community pier. The third pier would have an overall length of 80 feet and a width of 6 feet; an approximately 170 square foot floating canoe/kayak launch deck; and a 40-foot long by 20-foot wide T-head, intended for crabbing.

Mr. Madden said that at the present time there were 34 riparian waterfront lots within the subdivision that front on the Great Wicomico River. Twenty-three of these waterfront lots had their own private piers. Eleven remaining lots were without piers. The homeowners of these eleven lots were not restricted from exercising their riparian rights to build a private pier, as there were no subdivision covenants.

Mr. Madden explained that in a letter, dated January 26, 2006, the applicant explained the need for the expansion by pointing out that each of the homeowners in the subdivision had a right to enjoyment of, and access to, the common areas, including the community pier. The applicant added that without the proposed expansion, the association could not continue providing the members with the water access the owners were rightfully entitled to.

Mr. Madden stated that VIMS had indicated that the impacts to the marine environment could be greatly reduced. Due to the lack of a restrictive covenant on private pier construction, the community piers were not performing their function of reducing the proliferation of private piers in favor of a single structure. VIMS was concerned that increased boat traffic could accelerate erosion along the shoreline. Additional boats also increased the likelihood of petrochemical spills and solid waste and chemical discharges. VIMS had also questioned the necessity for a separate crabbing pier. The Virginia Department of Health had indicated that the project was in compliance with the Sanitary Regulations for Marinas and Boat Moorings. No other agency had protested the project.

Mr. Madden explained that community piers, which provided wet slips raised difficult resource allocation questions. While staff agreed that the homeowners had some rights associated with the commonly owned shoreline at both common areas, these rights probably only included some limited right to access the water. Staff did not believe that the common interest in the development automatically included the right to a wet slip at the community pier. This sentiment was conveyed in the Commission's Marina Siting Criteria, which specifies, "the number of slips would not necessarily be predicated by the number of units on the property." Staff believed that the members' right to water access was clearly satisfied by both of the existing piers, the wet slips available through the association's lottery system, and the boatramp.

Accordingly, Mr. Madden stated that after evaluating the merits of the project against our Subaqueous Guidelines, the concerns expressed by VIMS, the number of private piers along the shoreline, the potential negative impact on the marine environment, the lack of a clear purpose for the crabbing pier and all of the factors contained in §28.2-1205 (A) of the Code of Virginia, staff recommended denial of the project as proposed.

Kenneth Brooks, Chairman of the Pier Committee, was sworn in and his comments are a part of the verbatim record. Mr. Brooks explained they had met with the members of the community and it was supported by the 169 lot-owners. He explained also that there was a need for this added structure because of the growth of the community. He stated that there was interest in boating, fishing, and other water related activities. He said that there were members of the Community, which were involved in various environmental interest and projects.

Associate Member Tankard asked if this was a planned community? Mr. Brooks responded yes. He provided the Commission with a letter of support from Barbara and Bob Smith, which he also read into the record. He said they supported the crab and kayak pier, as members of the Community.

Commissioner Bowman asked if there was any deed restriction for those who could have riparian rights of their own. Mr. Brooks stated that he had been asked this by staff and no one wants to give up their rights.

Associate Member McLeskey asked if there were platted waterfront lots. Mr. Brooks explained that there were 34 with a couple of fringe lots out of the 169 lots.

Barry King, President of the Homeowners Association, was sworn in and his comments are a part of the verbatim record. Mr. King confirmed Mr. Brooks' statement that there was a need for this project because of the community's growth. He said also that it was not right to restrict someone else's rights at this point as it would have been more appropriate to have done that at the point of sale where a covenant could have been put into the deed. He said there was concern with smaller boats launching in the same area as the larger boats and the smaller boats were being used by older, less agile individuals. He said they had made changes in the plan to resolve some of the protests. He said this also relieved the boat traffic at the boat ramp. He said that there had been no objections from private or government sectors.

There were no comments in opposition to the project.

Associate Member Robins stated that there was appropriate encroachment there now, as there were already 2 docks there and he supported the staff recommendation to deny the project, as applied for.

Associate Member Tankard moved to accept the staff recommendation to deny the project in accordance with Section 28.2-1205 of the Code of Virginia. Associate Member Robins seconded the motion.

Associate Member Holland made a substitute motion to grant approval for the crabbing pier and canoe launch platform for the community's use. Associate Member Schick seconded the motion. Associate Member Robins said that he would not support the substitute motion. The motion carried, 6-2. Associate Members Robins and Tankard both voted no. The Chair voted yes.

Roll Call Vote:

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

Royalty Fees (encroachment 1,450 sq. ft. @ \$1.50/sq. ft.).....	\$2,175.00
Permit Fee.....	\$ 25.00
Total Fees.....	\$2,200.00

Bob Grabb announced that this would be the last Commission meeting for Traycie West, as she would be leaving the Commission on February 2 to take a position with the Navy.

He further said that she had been with the Marine Resources for more than 10 years and had been a real asset to the Division and Agency.

Commissioner Bowman commended her on a job well done in her time with the Commission and wished her good luck.

Ms. West spoke of her time with the Commission and thanked the Commission.

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- 8. YORK COUNTY DIVISION OF PARKS AND RECREATION, #06-0770**, requests authorization to install a 66-foot long by 14-foot wide floating pier, a 45-foot long by 6-foot wide aluminum ramp and 85 linear feet of riprap adjacent to property situated along Queens Creek in York County. The project is protested by nearby residents.

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

Ms. West explained that the York County Division of Parks and Recreation proposed to replace an existing deteriorated public fishing pier at New Quarter Park, situated along Queens Creek in York County, with a new facility that will accommodate both fishing and canoe/kayak launching. The existing pier, which included both fixed and floating portions, was damaged during Hurricane Isabel. The floating portion was unusable due to storm damage and was removed. In addition, the applicant proposed to install a riprap revetment at an existing eroding scarp. Only a portion of the riprap encroached onto State-owned submerged lands.

Ms. West said that the Queens Lake Community Association, representing upstream property owners, protested the pier portion of the project. The Association believed that the proposed pier would impede navigation and represents a hazard to sailboats by reducing the area needed for tacking. They also stated that, in the past, the pier had been an attractive nuisance for unsupervised children. In addition, they were concerned with conflicts between fishing lines and passing vessels and that canoes and kayaks would not be able to launch safely. Lastly, they noted that a member of the Association routinely used hand tongs to harvest for oysters in the area near the pier and they were concerned that the pier expansion would impact this resource. There is no associated lease for the ground referred to by the protestants. As a result of the concerns expressed by the Association, and given that the proposed pier facility would encroach channelward 12 feet further than the previously existing structure, staff requested that the applicant further clarify the impact that the proposed structure might have on navigation within the waterway. Even with the additional encroachment, the facility would be located approximately 25 feet from the toe of the existing navigation channel. The creek is over 200 feet wide at this location.

Commission Meeting

Ms. West stated that the U.S. Coast Guard stated that they had no concerns. No other agencies had commented on the project.

Ms. West explained that when reviewing proposals to build over State-owned submerged lands the Commission's Subaqueous Guidelines direct staff to consider, among other factors, the water dependency and necessity of the proposed structure. Furthermore, when considering authorization for such structures, §28.2-1205 of the Code of Virginia stipulates that: "In addition to other factors, the Commission shall also consider the public and private benefits of the proposed project and shall exercise its authority under this section consistent with the public trust doctrine as defined by the common law of the Commonwealth adopted pursuant to §1-200 in order to protect and safeguard the public right to the use and enjoyment of the subaqueous lands of the Commonwealth held in trust by it for the benefit of the people as conferred by the public trust doctrine and the Constitution of Virginia."

Ms. West said that based on the width of the waterway at the site and the distance from the end of the proposed pier to the edge of the channel, it did not appear that the pier expansion should represent a hazard to navigation. Furthermore, the pier would provide public access. Staff believed the public benefits outweigh the detriments and after evaluating the merits of the project against the concerns expressed by those in opposition to the project, and after considering all of the factors contained in §28.2-1205(A) of the Code of Virginia, staff recommended approval of the project, as proposed.

Commissioner Bowman asked if the applicant or representative were present to comment on this project. The applicant or representative indicated that there were no further comments but that they could answer any questions from the Commission. There were no questions.

No one else indicated a desire to address the matter with the Commission.

Associate Member Holland moved to accept the staff's recommendations. Associate Member Tankard seconded the motion. The motion carried, 8-0. The Chair voted yes.

Permit Fee.....\$100.00

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

adjacent to two properties situated along Quantico and Swans Creeks in Prince William County.

Ben McGinnis, Environmental Engineer, Sr., gave the presentation with slides. His comments are a part of the verbatim record. Mr. McGinnis noted that a letter had been received from Tim Hayes, attorney for Robert Hart, which he proceeded to read into the record. He said that in the letter Mr. Hart was objecting to the hearing being held because the notice of appeal had been delayed due to the holidays and that the hearing of the matter was being held 57 days instead of the 45 days, as required by law.

Commissioner Bowman asked for VMRC Counsel's advice and Carl Josephson, Senior Assistant Attorney General and Counsel for VMRC stated that a motion would be necessary in regards to Mr. Hart's objection to proceed with the hearing.

Associate Member Robins moved to proceed with the hearing. Associate Member McConaugha seconded the motion. The motion carried, 8-0. The Chair voted yes.

Ben McGinnis explained that the project was located at the juncture of Quantico and Swans Creeks in Prince William County, and involved unauthorized activities undertaken at the adjoining properties of Mr. Robert Hart and Mr. Daniel Revermann. This was a residential area located along an elevated bluff. The Quantico Marine Corps Base is located on the opposite shoreline across Quantico Creek.

Mr. McGinnis said that on March 27, 2006, Prince William County Wetlands Board staff observed that the unauthorized filling of tidal wetlands had occurred at the two properties. The unauthorized filling included the placement and backfilling of approximately 355 linear feet of temporary hay bale/silt fence bulkhead over tidal wetlands and state-owned subaqueous land along Quantico and Swans Creeks, and the installation of 90 linear feet of a stone-filled, gabion-basket retaining wall along Swans Creek. After discussing the violation at their meeting on April 12, 2006, the Prince William County Wetlands Board sent separate letters to Messrs. Hart and Revermann directing them to restore the site to its original condition within thirty days. In the alternative, they were also given the opportunity to submit an after-the-fact application for the unauthorized work and any additional work required to complete the project. Wetlands Board staff worked with the applicants and their authorized agent, Virginia Waters and Wetlands, Inc., while an application was being prepared. They accepted receipt of the jointly submitted after-the-fact application on June 21, 2006, which requested authorization for the unauthorized fill and retaining wall, as well as a request to install 355 linear feet of vinyl bulkhead to replace the temporary hay bale/silt fence bulkhead. On July 26, 2006, Board staff sent a letter requesting additional information that was required before they could consider the application complete. After having received the additional information, the Wetlands Board scheduled a public hearing to consider the after-the-fact request to retain the unauthorized gabion wall and fill material, and to replace the temporary hay bale/silt fence bulkhead with a vinyl sheet bulkhead.

Commission Meeting

Mr. McGinnis said that the Commission's review of this case was being undertaken in accordance with the provisions of §28.2-1310 and §28.2-1311 (A)(2) of the Code of Virginia.

Mr. McGinnis explained that the Prince William County Wetlands Board held a public hearing on the after-the-fact application on November 14, 2006. Both Mr. Hart and Mr. Revermann were in attendance at the meeting, and were also represented by their agents, Messrs. Joe Ivers and Ira Poplar-Jeffers of Virginia Waters & Wetlands, Inc. The Board listened to a staff report, which included a history of the project, the results of a geographical information system (GIS) impact analysis conducted by County staff, and a brief summary of the environmental impact assessment provided by the Virginia Institute of Marine Science (VIMS).

Mr. McGinnis stated that the VIMS Shoreline Permit Application Report, dated November 13, 2006, stated that the unauthorized gabion basket wall resulted in the loss of 270 square feet of non-vegetated tidal wetlands, and that the unauthorized fill resulted in the loss of 3,550 square feet of non-vegetated tidal wetlands and 6,401 square feet of subaqueous bottom. Their report also indicated that the unauthorized gabion basket retaining wall had impacted an additional 540 square feet of non-vegetated wetlands, but that its environmental impact would be considered relatively minor. VIMS, in an e-mail dated November 14, 2006, later revised down their subaqueous bottom impact figures for the unauthorized fill to 4,798 square feet. The reported impacts to tidal wetlands, however, remained unchanged. The VIMS report concluded with a recommendation that the unauthorized fill be removed and the site be restored to its previous conditions. The environmental impact assessment provided in the VIMS report essentially corroborated the GIS analysis conducted by Prince William County staff, which calculated the total impact of the unauthorized fill to both tidal wetlands and subaqueous bottom to be 8,348 square feet.

Mr. McGinnis said that during the public hearing, Mr. Hart testified that he was aware of the need for a permit for the planned installation of the bulkhead, but did not believe he needed a permit for the placement and backfilling of the temporary hay bale/silt fence bulkhead, and the installation of the gabion-basket retaining wall. Mr. Hart testified that they estimated the total impact to be 2,235 square feet, which included impacts from the unauthorized fill and gabion basket retaining wall. According to their application, the 2,235 square feet of impact was calculated from the difference of an approximate mean low water shoreline depicted in a 2003 survey and the current alignment of the hay bale/silt fence bulkhead and fill, as shown in a 2006 survey. Mr. Hart's testimony also indicated that there were no impacts to State-owned subaqueous bottom, since they believed that their project was located landward of mean low water. The applicants and their agent also questioned the accuracy and validity of the impact figures in the VIMS report and the results of the County's GIS analysis.

Mr. McGinnis said that during the nearly four-hour long hearing, the Wetlands Board spent a significant amount of time discussing and trying to determine the amount of impact to tidal wetlands they would need to use to calculate the assessment of in lieu mitigation fees. The Board's Chairman, Mr. Anthony Thrall, indicated he would abstain from voting because he lived nearby, but argued that the impact was far less than what was reported by VIMS and the GIS analysis, based upon his familiarity with the area as a neighboring property owner. The applicants, their agent, and several members of the Board attempted to discredit the impact assessments provided by VIMS and the County based upon what they had perceived to be assumptions and estimations. At the conclusion of their public hearing, the Board moved to approve the installation of the 355 linear feet of vinyl bulkhead, and to grant after-the-fact authorization for the installation of the 90 linear feet of gabion basket retaining wall and the placement of the entire amount of fill over tidal wetlands. The motion passed 6-0-1 with Chairman Thrall abstaining. The Board's decision was contingent upon several conditions, most notably that the applicants agreed to pay a civil charge in the amount of \$1,200.00 in lieu of further enforcement action, an after-the-fact application fee in the amount of \$500.00, and an in lieu mitigation fee of \$20,115 to mitigate the loss of 2,235 square feet of non-vegetated tidal wetlands at a rate of \$9.00 per square foot.

Mr. McGinnis explained that in the opinion of the VMRC staff, the Prince William County Wetlands Board, in this case, failed to fulfill their responsibilities under the Wetlands Zoning Ordinance by authorizing the after-the-fact despoliation and destruction of tidal wetlands within their jurisdiction. The Board failed to discuss the necessity for the unauthorized fill and whether they would have authorized this permanent loss of tidal wetlands had the applicants requested a permit prior to the start of the project. Furthermore, the Board failed to explore the option of requiring restoration of the lost wetland resource, and chose to disregard the impact assessment provided in the VIMS report when calculating the in lieu mitigation fees, instead choosing to base the assessment of those fees on the 2,235 square feet of wetland impacts identified by the applicants, rather than the 3,550 square feet cited by VIMS, without sufficient evidence or justification for the applicants' figure.

Mr. McGinnis said that it was important to note that under the Commission's Wetlands Mitigation – Compensation Policy (4 VAC 20-390-10 et seq.), the Wetlands Board is required to first determine the necessity of a project and then avoid/reduce all unnecessary impacts to tidal wetlands before considering any type of compensation or mitigation for the loss of tidal wetlands resulting from a project. Staff was present at the Board's hearing, and in their opinion it appeared that the Board focused their efforts on calculating the monetary assessment of an in lieu mitigation fee and civil charge, rather than on the necessity of the unauthorized fill, its resultant impacts on tidal wetlands, and the option to require restoration of the lost wetland resource.

Mr. McGinnis explained that in light of the foregoing, and in accordance with §28.2-1313 (1) of the Code of Virginia, staff recommended that the Commission reverse the decision

of the Prince William County Wetlands Board to grant after-the-fact authorization for the unauthorized fill and the installation of a vinyl bulkhead to replace an unauthorized hay bale/silt fence bulkhead. Staff recommended that the applicants be required to remove the temporary bulkhead and fill material, and to restore the site to previous elevations and conditions within 60 days. Staff would, however, recommend that the Commission uphold the Board's decision to grant after-the-fact authorization for the installation of the gabion basket retaining wall situated along Swans Creek, with the Board's previous conditions and civil charge assessment. Staff made this recommendation based upon the comments provided in the VIMS report, which stated that the gabion basket wall appeared to have addressed the erosion problem on the adjacent bank and had a relatively minor environmental impact.

Commissioner Bowman asked if the VIMS' and the GIS calculations were accurate. David O'Brien, representing VIMS, stated that the County did the computations and VIMS confirmed them with a GIS calculation and they were comfortable with the County's numbers.

Robert Hart, applicant, was sworn in at the same time as his agent.

Joe Ivers, agent for Mr. Hart, was present and his comments are a part of the verbatim record. Mr. Ivers said the record of the Wetlands Board was terrible. He said there was a lot of discussion on the emergency situation and some of the summary he did not agree with at all. He said the staff did not recommend restoration.

Mr. McGinnis stated that the record did have several errors, and that some comments were actually made by someone other than the one indicated in the transcript.

Commissioner Bowman instructed staff and suggested that the other parties go back to the recording and do a comparison with the transcript. He suggested the Commission consider continuing the matter. He asked for a motion.

Robert Hart, applicant, explained that this project was done because of an emergency situation. He stated that he deplored the transcript and the Wetlands Board would not provide him with his records. Commissioner Bowman stated that the Commission does not manage how the Wetlands Board fulfills its administrative duties.

Associate Member Holland moved to continue the matter until the next meeting. Associate Member Bowden seconded the motion. Commissioner Bowman asked if the motion included that the meeting would be next month. Associate Member Holland said that was a part of the motion. The motion carried, 8-0. The Chair voted yes.

No applicable fees, Wetlands Review and continued until next month.

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10. **ROBERT LIVENGOOD, 04-2584**, requests after-the-fact authorization to retain a previously constructed additional pier and an open-sided dual slip boathouse larger than those previously authorized at his residence situated along Cypress Creek in the Town of Smithfield in Isle of Wight County.

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

Mr. Stagg explained that the project was located along Cypress Creek, a tributary to the Pagan River in the Town of Smithfield in Isle of Wight County.

Mr. Stagg said that in November of 2004, the applicant submitted a Joint Permit Application seeking 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 62-foot by 24-foot open-sided boathouse at his property. The applicant subsequently submitted revised drawings, which requested a larger open-sided boathouse (74-foot by 24-foot) to accommodate two wet slips. The proposal was subjected to our normal public interest review and it was the subject of a public hearing before the Commission on April 26, 2005. Staff recommended a reduction of the larger of the two proposed wet slips to a length of 52 feet with a similar reduction in the two parallel 4-foot wide finger piers and elimination of the offshore L-head that was proposed for jet-ski or paddle-boat storage. Nevertheless, the Commission approved the application as requested by the applicant to include the dual slip boathouse.

Mr. Stagg stated on that on October 9, 2006, a complaint was received by the Governor's Office from Mr. Mike Credle, a nearby property owner, concerning the construction of a large boathouse at this location. Based on this complaint a compliance check was initiated. This compliance check revealed several discrepancies in the as-built structure compared to the permit drawings that were approved by the Commission. The as-built structures include two triangular pier sections within the boathouse totaling 90 square feet that were not shown in the permit drawings. The intermediate L-head is one-foot longer and one-foot narrower than the permit drawings (11 square feet less than the permit drawings). The dual slip boathouse is two feet longer than the permit drawings (48 square feet larger than authorized).

Mr. Stagg explained that following a subsequent inspection by staff on November 7, 2006, during which Mr. Livengood was present, he indicated that he wished to seek after-the-fact authorization and would provide revised drawings of the structures, as built. A Sworn Complaint and a Notice to Comply were sent to Mr. Livengood on November 9, 2006. Mr. Livengood, on November 22, 2006, submitted revised drawings with a

detailed tabulation of the as-built structures along with a letter of explanation concerning the altered dimensions of the structures.

Mr. Stagg stated that this project had raised the concerns of a nearby property owner as noted above. His objections include, the size of the entire structure and its impact on the viewshed in the area. The applicant, a marine contractor by trade, was well aware that any variations from the approved permit drawings required a modification. The current structures as they now exist represent a footprint of 2,463 square feet or 63 square feet more than the 2,400 square feet approved by the Commission. The triangular deck sections represented additional pier decking beyond that authorized, although they were within the total footprint noted above.

Mr. Stagg explained that in spite of the protestant's concerns, no one objected to the original proposal. It was also true that the environmental impacts of the additional structures was minimal, and that staff likely would have recommended approval had Mr. Livengood sought approval of a modification to the permit previously approved by the Commission. Notwithstanding those facts, staff had considerable difficulty in accepting any level of noncompliance from a reputable marine contractor and agent who does this for a living. While the environmental impacts were minimal and the permit compliance was moderate, the degree of deviation was significant considering the Commission's previous review of this matter, the objections expressed by the nearby property owner, and

Mr. Livengood's knowledge of permit requirements. As such, staff believed any after-the-fact approval should carry an appropriate civil charge.

Commissioner Bowman asked if Mr. Livengood was present to speak to this matter.

Bob Livengood, applicant, was sworn in and his comments are a part of the verbatim record. Mr. Livengood explained that he had worked with staff for 14 years in his capacity as a marine contractor. He said until the protest was made he did not realize it was 2 feet over. He said he was trying to keep it small and he was an experienced residential marine contractor. He said he had used 50-foot piles to keep the structure stable and it was difficult to get them installed. He said the roof was up when the complaint was received and he was only trying to align the roof with the pilings. He said the pilings were not always straight and once they were in they could only be cut off to the bottom, not removed. He said he did not realize it was 2 feet off until the complaint came in and he was sorry it was done that way, but it was in the same footprint and it helped him to access his vessel.

Michael T. Credle, protestant was sworn in and his comments are a part of the verbatim record. Mr. Credle said there were 3 other individuals who were opposed.

Commissioner Bowman asked that when the permit had been approved, why these other did not protest. Mr. Credle stated that the other individuals were intimidated by Mr.

Livengood and afraid to protest. Commissioner Bowman asked Mr. Credle how he knew this, and he responded they told him so. He continued to explain they were the most affected by the project and were not notified and something similar could have been done so it would not impact their view.

Commissioner Bowman asked for any discussion or a motion. **Associate Member Holland moved to approve the after the fact application, as it was a minimal impact and minor violation and to levy a \$250.00 Civil Charge. Associate Member McLeskey seconded the motion. The motion carried, 8-0.**

Civil Charge.....\$250.00

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11. NOTICE OF VIOLATION #06-28. Public Hearing concerning the City of Hampton's unauthorized dredging of State-owned submerged bottom at the end of their Sunset Creek boat ramp situated along Sunset Creek in Hampton.

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

Ms. Gallup explained that this project was located on Sunset Creek, off of the Hampton River, in the City of Hampton.

Ms. Gallup stated that on November 30, 2006, VMRC received a call from Mr. Earl Hall with Bluewater Yacht Sales regarding illegal dredging being conducted by the City of Hampton at their public boat ramp on Sunset Creek. Associate Commissioner Robins reported to Commission staff that Mr. Hall called him, as well. Staff spoke with Mr. Hall on November 30 and he indicated that when the City of Hampton installed a concrete mat at the end of their ramp, they had made the ramp too shallow. Mr. Hall stated that the City was digging mud out of the boat ramp and hauling it away in dump trucks.

Ms. Gallup explained that after attempting to contact Chuck Fleming in the City's Public Works Department, staff conducted a site visit on the afternoon of November 30. At that time, it appeared that the City was finished with their work. Mr. Fleming returned staff's call on December 1, 2006, after he had spoken with the City's Parks and Recreation Department. Parks and Recreation informed Mr. Fleming that they had been operating under a permit and had used a backhoe to smooth out stone and push it back into a hole that had formed at the end of the ramp. Staff also spoke to Don Levenworth in the Parks and Recreation Department who indicated that the City was operating under VMRC Permit #05-1090.

Ms. Gallup said that staff conducted a follow-up site visit with Mr. Fleming, Mr. Levenworth, and Mr. James Wilson of Parks and Recreation on December 11, 2006. As a

result of that visit, including discussions with city staff and photos provided by Mr. Hall, it was apparent material had been excavated at the end of the ramp that was not authorized by Permit #05-1090. As such, staff issued a Notice of Violation on December 15, 2006. The Notice directed the City of Hampton to submit a written explanation of the circumstances surrounding the dredging, including the name of the persons who performed the work, when the work was accomplished, and under whose authority the work was undertaken.

Ms. Gallup said further that staff received a response to our Notice of Violation by letter dated December 21, 2006. That letter reiterated that the City was operating under VMRC Permit #05-1090. That permit, however, only authorized the placement of bedding stone and a 20-foot by 20-foot articulated concrete mat at the end of the boat ramp. The permit did not authorize any removal of the stone or subsequent maintenance dredging. The City's letter also detailed that the stone placed under permit #05-1090 had moved due to power loading of boats and created a shoal approximately 15 to 20 feet in front of the boat ramp. Jim Wilson indicated in a January 10, 2007 phone call that on two occasions the City had spread the stone around to flatten out the shoal, but that this did not stop the problem and the stone piled up again. In order to solve their problem, a Public Works crew admittedly removed approximately 5 cubic yards of material and hauled it away on November 29, 2006. According to Jim Wilson, before the stone was removed there were approximately 8 to 10 inches of water at low tide. Current conditions are approximately 1 foot of water at low tide.

Ms. Gallup stated that while it appeared that the stone that was placed at the end of the boat ramp under Permit #05-1090 was causing a problem for City residents using the boat ramp, the previously issued permit did not authorize excavation or dredging. The City of Hampton has obtained many permits from VMRC in the past and should be well aware of the need to obtain permits before performing any work. Although no restorative or remedial actions appeared warranted at this time, staff recommended that should the Commission wish to grant after-the-fact authorization for the dredging performed, that they consider an appropriate civil charge based upon minimal environmental impact but a moderate degree of non-compliance in lieu of the need for any further enforcement action.

James Peterson, Assistant City Manager, was sworn in and his comments are a part of the verbatim record. Mr. Peterson, in order to not waste the Commission's time, deferred to Mr. James Wilson of the Parks and Recreation Department to address this issue.

James Wilson, City of Hampton, Parks and Recreation Dept., was sworn in and his comments are a part of the verbatim record. Mr. Wilson explained that they were responding to what they considered an emergency. He said the City had received numerous requests to do something because it was damaging boats and he had the #3 stones removed that were causing the problem. He provided the Commission with 2 photos as a handout.

Commission Meeting

Commissioner Bowman asked him if he had any experience in dealing with the VMRC permit process. Mr. Wilson stated only as it relates to boat ramps and he did not realize that he needed any approval to correct a problem.

Ian Bates, Bluewater Yacht Sales, was sworn in and his comments are a part of the verbatim record. Mr. Bates explained that he was concerned with this filling at the boat ramp because every time repairs were being made to it the blowing of the stones caused the stones to get into their access area. He stated he had and he knew of other service managers who have had to replace props on boats because of it. He suggested that the Commission require the City to go back further from their access and remove all of it. He also said that the Commission should look at the method if this or something similar comes before them again.

Commissioner Bowman asked staff if this was a violation to remove material outside the footprint. Mr. Grabb stated that could be difficult because it would have to be proven as to who was responsible. Commissioner Bowman said that in other words, it could not be required unless it could be determined to be their responsibility. He asked Mr. Bates if he had spoken with the City officials. Mr. Bates said that he had done that to the best of his knowledge.

After further discussion, Associate Member Robins stated there were separate issues being discussed. He said this was a non-compliance issue because to backhoe, a permit was necessary. He said he agreed that there was an emergency, but the City of Hampton should have contacted VMRC. He said since this was a minimal impact and moderate degree of non-compliance, he moved to approve the after-the-fact permit application and to assess a \$600.00 penalty fee. Associate Member Schick seconded the motion.

Commissioner Bowman stated that he agreed with the motion, except for the fact that a penalty would be levied against another governing body, which was all tax dollars paid by the citizens. **The motion failed, 2-6. Associate Members Robins and Schick both voted yes.**

Associate Member Holland offered a substitute motion for consideration and moved to grant the after-the-fact application, but to not levy a penalty fee against the City of Hampton and suggested the City work with Bluewater Marina to resolve the problem presented by them. Associate Member Bowden seconded the motion. The motion carried, 7-1. Associate Member Robins voted no. The Chair voted yes.

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Commission Meeting**2. DISCUSSION: Staff Update on House Barge Issue.**

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

Mr. Grabb explained that the Commission directed the Habitat Management Division and the Habitat Management Advisory Committee (HMAC) to investigate the House Barge issue and report back to the Commission during the January Meeting. An HMAC meeting was held on November 30, 2006. During the meeting the committee received a staff briefing and discussed the issue. The Committee determined the issue needed to be studied further and decided to hold a second meeting to obtain additional information from other governmental agencies and interested parties. A second meeting was held on January 9, 2007. In addition to the staff and Committee members those present included:

Charlie Sledd (DGIF), Chet Bigelow (DEQ), Mike Gregory (DEQ), John Walters (USCG), Bob Croonenberghs (VHD), Jimmy Ward (Attorney representing Bay Marine), Barry Miller (Bay Marine), Darlene Walden (Bay Marine), Dirk Wiley (Catamaran Cruisers), Mathew Long (NMMA), Lewis Lawrence (MPPDC), Lawrence Latane (Richmond Times-Dispatch)

Mr. Grabb said that during the second meeting, staff briefed the Committee and most of the parties attending the meeting made comments. The Committee meeting resulted in several items they wanted reported back to the Commission. Items are, as follows:

1. There was a general consensus that the issue was important and warranted further study.
2. A concern was expressed that it may be difficult for VMRC to regulate "use by design." In other words, it may be difficult to define a house barge or to differentiate between a house barge and a large boat that is used as living quarters. Others felt it might be better to regulate these structures/vessels based on their primary use rather than their particular design.
3. Local governments may have some authority to regulate use in the near shore waters. The Committee felt this should be investigated and if they have authority to regulate live-aboard activities on either boats or house barges, the Commission might want to consider notifying localities of this possible activity.
4. The greatest environmental concern appears to be related to water quality.
5. The structures may conflict with other public and private uses of the waterway and the Commission should carefully consider the potential Public Trust implications and the possible impacts on waterfront property owners when considering whether to regulate house barges. If such structures are regulated and

allowed in certain situations, the committee felt the public should be fairly compensated for the private use of State-owned bottom. Some members felt the royalty schedule should be re-examined.

6. Some members were concerned with attempting to regulate house barges in the absence of data concerning their impacts. Others felt it was appropriate to regulate with a precautionary approach.
7. The Commission might want to consider revising or adopting regulations and policies concerning mooring and anchoring to address certain issues with house barges and live aboards.
8. There should be further investigation into the implications of DEQ's definition of a houseboat and the possible regulation of discharges from such.
9. There should be an investigation of how house barges have been regulated by other state and federal agencies.
10. The Commission might want to recommend that DEQ investigate the potential water quality impacts associated with a concentration of house barges or live aboards in a marina or other confined space.

Mr. Grabb stated that Associate Member Schick serves as chairman of the HMAC and he deferred to him for any further comments.

Associate Member Schick stated that a big concern of HMAC was on the approach to this issue. He referred to an article in the Times, which talked about a "cheap alternative to waterfront houses". He said New Jersey had a problem with this in that state as it was becoming popular to put summer homes on barges and if you added a steering wheel and refrigerator it was considered a boat. He further said that some of these structures were being built under the U. S. Coast Guard guidelines, but some were not.

Associate Member Holland asked if a review was conducted for methods being utilized by other States. Commissioner Bowman stated that the committee had been charged to do that. He said staff had done a good job, as the Commission did not go looking for this problem of examining whether this was a boat or not. He said he felt that if the Game Commission said it was a boat then it was a boat. He explained that there were water quality issues, which the Dept. of Environmental Quality was responsible for, as well as the Health Department. He stated the Commission had examined the big picture and the staff had produced a good paper, but there were others involved with more authority.

Commissioner Bowman left the meeting for the rest of the day and Associate Member Holland assumed the chair duties.

After some further discussion, Associate Member Holland thanked the staff. Mr. Grabb said if the Commission wanted staff to continue researching other states they would do so.

No action was taken.

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13. PUBLIC COMMENTS: Associate Member Holland opened the public comment period by asking if there was anyone wishing to speak.

Richard B. Miller, #06-0529

Richard B. Miller was present and his comments are a part of the verbatim record. Mr. Miller provided the Commission with a handout, which included an application and drawing that was considered by the Commission at the September 2006 meeting and a document that set forth the fees that were calculated when it was approved.

Mr. Miller said he was asking for some relief or elimination of these fees, as he should not be charged for what was open-water, but only where the slips are and only on the structure. He said with the structure only his fees should be \$3,900.00, but when the space was taken into consideration his fees became \$5,000.00. He said he was asking that the Commission consider this request.

Associate Member Holland asked if the staff was aware of his concerns. Mr. Miller responded that when he spoke with Ms. West she indicated to him that the staff only followed the guidelines that had been recently established with a range of \$0.30 to \$2.50/square foot.

Associate Member Holland asked if the staff had a recommendation? Tracye West, Environmental Engineer, Sr., explained that she and Mr. Miller had been addressing this for 2 to 3 months and how the calculations were done by the established guidelines. She said he had asked if the staff could reduce these fees and he was told that staff could not, as they could only do as the guidelines dictated. She further said that he was told that he would need to take this to the Commission and bring the issue up at the public comment period.

Associate Member Robins stated that the guidelines had been established in December 2005 and asked Ms. West if that was what staff followed? Ms. West responded yes. Associate Member Robins stated that the fees should stay the same as they were in accordance with the guidelines adopted by the Commission and that all others since that time had been charged the same way.

Carl Josephson, Senior Assistant Attorney General and VMRC Counsel, stated that no motion would be necessary. No further action was taken.

Thomas L. Walton, Rappahannock Waterman, asked that the Commission reopen public oyster grounds in the upper Rappahannock River to the harvest of oysters for another month. His comments are a part of the verbatim record.

Associate Member Holland asked if the Commission wished to take any further action. No motion was made to take any action on this request.

Timothy Belvin, Waterman, also requested that the upper Rappahannock River be reopened to public grounds oyster harvest as there was an enormous amount of dog stones covering the oysters and the areas needed to be cultivated, thereby, removing the dog stones and bringing the oysters back to the top. He said he was making the request so the watermen would be provided a way to make a living. His comments are a part of the verbatim record.

No action was taken

Alice Firman, a waterman's wife, requested that the Commission consider a request to open the Lower James River to oyster harvest on the public grounds for another month.

No action was taken

James Ward, Attorney at Law, was present and his comments are a part of the verbatim. Mr. Ward said that he was representing his client, Mr. Barry Miller who was the owner of Bay Marine who offers the house barges, which were discussed by Mr. Grabb. He said they were again requesting the Commission refrain from using a name brand in any way as it affected his client's business. He said they appreciated the Committee's time. He further said that there were plenty of definitions on what this is and the Middlesex County limits living aboard vessels, as marinas will be looked at closely. He said the issue of mooring piles should be applied to all types of boats and they believe they have a boat. He said the Commission does not need to be looking at this matter, as there were other government bodies that have jurisdiction over this matter.

No action was taken.

Associate Member McLeskey left the meeting at this point.

Doug Jenkins, representing the Twin River Watermen's Association, was present and his comments are a part of the verbatim record. Mr. Jenkins said that he was commenting in regards to Item 17 the Oyster Restoration Program. He said at the Shellfish Management Advisory Committee meeting there were some who questioned the purchasing of private ground seed oysters versus the public ground seed oysters. He said they need more seed

than this proposal would provide because of the high price that would be paid and there would be more seed to move to the growout areas, if it was taken from the public grounds. He said as there were limited funds, it should be spent wisely.

(See 17. Discussion: Request for the Approval of the 2007 Virginia Oyster Restoration Program and Approval of the Procurement Procedures.)

As no one else requested to speak, Associate Member Holland closed the public comment period.

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- 14. PUBLIC HEARING:** Proposed amendments to Regulation 4 VAC 20-510-10 et seq., "Pertaining to Amberjack and Cobia", to allow for the culture of cobia by permitted aquaculture facilities.

Jack Travelstead, Chief, Fisheries Management, gave the presentation and his comments are a part of the verbatim record.

Mr. Travelstead said that last month, staff briefed the Commission on the recent announcement that Virginia Cobia Farms will invest \$30.33 million to develop a new technology and method of farming cobia in Saltville, Virginia. Virginia Cobia Farms is a joint venture between MariCal, Inc, an aquatic life science biotechnology company, and Blue Ridge Aquaculture, the largest indoor Tilapia farm in the United States.

Mr. Travelstead explained that the current regulation on cobia prevents aquaculture of this species, by prohibiting the possession of any cobia less than 37 inches, total length. The regulation also prohibited the commercial harvest of more than two fish per person. These regulations were intended to protect wild cobia stocks and not to hinder cobia aquaculture. The amended regulation would establish an application process for a cobia aquaculture permit and exempt its holder from the size and possession limits previously mentioned. As a part of this process, staff would conduct field inspections. The amended regulation would also allow these facilities to collect cobia that would serve as broodstock for the hatchery portion of the aquaculture facility.

Mr. Travelstead explained that he had talked with a Mr. Russell who had requested that the proposed aquaculture permit have a 10-year term rather than the 3-year term, as proposed by staff. The ten-year term was more in keeping with Virginia Cobia Farms' financial planning process. Since this permit was rather simple and would not be widely applied for, staff would have no objection to the requested 10-year term.

Mr. Travelstead stated that staff recommended adoption of the amended regulation and the amendment for establishing a ten-year permit term.

Associate Member Holland opened the public hearing.

David Russell, Virginia Cobia Farms, was present and his comments are a part of the verbatim record. Mr. Russell explained that \$400,000 had already been invested and it was expected that \$30 million would be invested over a period of years. He further explained that he was in favor of the changes, but that the industry not be limited to 3 years as recommended by staff, but to change that to 10 years.

Associate Member Holland asked what would be the projected amounts to be raised. Mr. Russell explained that it was projected to be 50-100,000 pounds the first year, 1 million pounds the second, ten million pounds the third and 100 million pounds from then on.

There was no one else to address this issue therefore the public hearing was closed.

Associate Member Robins moved to adopt the regulation as presented by staff. Associate Member McConaugha seconded the motion. The motion carried, 6-0. Associate Member McLeskey was not present.

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- 15. PUBLIC HEARING:** Proposed amendments to Regulation 4 VAC 20-70-10 et seq., "Pertaining to the Harvest of Clams", to allow the possession of more than 250 clams by any boat licensed to take blue crabs with a dredge, when that vessel is also licensed to take clams with a dredge.

Associate Member McLeskey returned to the meeting at this point.

Dr. James Wesson, Head, Conservation and Replenishment, gave the presentation and his comments are a part of the verbatim record.

Dr. Wesson explained that this was a proposal offered to the Commission by Associate Member Bowden. He reviewed a powerpoint presentation to assist him. He said there was no established description for the clam dredge in regulation and many of them had been adapted for the Seaside into a gear with very long teeth and a metal box that is more of a digging device. He said in this way the clams are actually "kicked" out of the bottom by the propeller of the boat. He said this gear was also used on private ground year round, which is not controlled by regulation. He said he had received comments from watermen that the density of clams had dropped and that this gear was unregulated. He said that scientists also considered this gear to be inappropriate.

Dr. Wesson said that because of controversy in the early 1990's, funds had been requested to study this issue and the funds came from the Virginia Coastal Zone Management Program. He said that the way it was then the crab dredge license could be held at the same time as the clam dredge license, allowing the crab harvester to keep the

clams that were caught or vice versa. He said this “metal-box” dredge caused a lot of damage to the clams, which were killed and discarded. He said this method of harvest also shortens the shelf life of the clams.

Dr. Wesson stated that in 1995 more private grounds were being worked than were public grounds. He further stated that in 1995 it was recommended and changed by the Commission to not allow clams on board boats that harvested crabs. He said that it was also recommended that a study be done looking at the “metal-box” dredge, which was never done. He said that when considering clam dredging on private grounds, the staff had made efforts to limit the leasing of private grounds for purposes of stripping off the wild clam stocks and only to have the ground be returned to the State once that was done. He said when looking at the gear license sales there had been a significant decrease since 1994-95.

Dr. Wesson said that in 2005 there was another request for a study to assess clam dredging and the VMRC plane was utilized. He said the study started in September 2005 and ended in August 2006. He explained that during the time period December to March a GPS had been utilized to locate the boats and species being harvested. He said there was less dredging there now and averaged approximately 1.4 boats/day for the whole year and none of these were seen on the private clamming ground. He said on clam public grounds boats were averaging 5.3 per day in 1995 versus 2.9 per day in 2005 and crab boats were averaging 6 boats per day in 1995 to less than 1 per day in 2006. He said the locations were also noted for the study.

Dr. Wesson said that it appeared that during the public season there was often dredging being done on private grounds and the private grounds were not being marked. He said it was up to the dredger to be sure to stay on public grounds.

Dr. Wesson said that he had received complaints that some dredgers were working in areas that were shallow and this was confirmed. He said the regulation requires dredging to only occur in waters more than 4 feet at mean low water and often dredgers were in waters much shallower.

Dr. Wesson stated that Commission records show only 700,000 clams are being harvested per year, which makes it a small fishery. He said clam aquaculture is leading the nation, so it is hard to tell why the wild stocks are so low. He said staff is recommending that no changes be made to the regulation and they have concerns as to whether this dredging should even be continued. He said with the stocks going down, there should be no relaxation of the regulations and they should actually be made stricter.

Associate Member Bowden said he felt that the staff had been misinformed and he felt he was more knowledgeable about this situation.

Associate Member Holland opened the public hearing.

Kelly Price, Chincoteague Dredger and representing the Eastern Shore Watermen's Association, was present and his comments are a part of the verbatim record. Mr. Price said he wanted to know if staff had ever been on a dredge boat. Dr. Wesson responded that he had in 1994 and 1995. Mr. Price said that in 1995 because of concerns for the loss of eelgrass they had to give up clamming grounds and have stayed out since that time and the eelgrass was still gone even though no dredging had occurred. He said he has been limited to working in one spot for 2 years and his catch increased. He said this issue was discussed three years ago and voted on by the Commission to allow watermen to keep both crabs and clams, but somehow that was never changed. He said this was their livelihood and he did not understand why the Commission wanted to cause the watermen to become extinct.

Associate Member Tankard asked if in his 17 years the catch gone up or down at all. Mr. Price responded, yes, that it was just like any other species. He said you have your good days and your bad ones, but now it was on the upswing. He said to work in deep water the dredge has to be pulled around and he has told Dr. Orth that the eelgrass came back where dredging had been allowed. He said the dredge would not catch all the clams.

Associate Member Bowden stated that the condition of the oysters was worse than the clams when you look at the information provided. He said the clam prefers the harder bottom and crabs prefer the sticky bottom, in other words a sandy bottom. He said at the present the clam market was in good shape and other than the dredgers, no one was catching clams, as the waders were not there anymore. He said no one was hand harvesting. He said the Seaside was a unique environment as the bays were shallow, where the conventional tong requires 9 feet or more to work with it. He said there was no comparison between the oyster dredging and that done on Seaside. He said that where the clams were caught off the private grounds, it was the fault of the leaseholder for not marking it. He said there was a need to address one issue at a time and that was the dredge size and weight issue. He said with regards to the 4-foot issue that was a Law Enforcement issue and needed to be given more priority and to enforce through example. He said he was at the meeting with Mr. Price and he left that meeting with the opinion that there had been a unanimous vote to hold a public hearing. He said at the time Mr. Josephson had looked at this issue and decided that a judge could side with the waterman, that you could do both with 2 licenses; and, the Commission added the greater than 4 feet requirement.

Associate Member Holland closed the public hearing.

Associate Member Bowden moved to allow anyone with both licenses to keep a bycatch of clams in excess of 250 clams, while in possession of crabs. Associate Member Schick seconded the motion. Carl Josephson stated that the draft regulation does address this change.

Associate Member Robins asked what concerned the staff. Dr. Wesson explained the dredge harvest was lower than it was historically when more watermen were working. He said he spoke with the Northampton watermen and their concern was that the universal number of clams was lower than in the past. He said the lower Seaside area was different from the upper area.

The motion carried, 7-0.

Associate Member Bowden said he agreed with staff's concerns regarding the dredge size. He said the Crab Management Advisory Committee should hold a meeting to discuss this issue.

Dr. Wesson suggested that an Ad hoc Committee made up of members of industry from the Seaside be held on this matter. Associate Member Bowden said he agreed with exploring the dredge issue and setting up the Ad hoc Committee.

Associate Member Holland stated that the Commissioner would be informed of the board's decision.

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16. DISCUSSION: Request to adopt emergency regulation establishing the 2007 Black Sea Bass commercial directed fishery and bycatch fishery quotas.

Joe Cimino, Fisheries Management Specialist, gave the presentation and his comments are a part of the verbatim record.

Mr. Cimino explained that the State of Virginia was given a 20 per cent of the coast-wide commercial quota for black sea bass. He stated that staff had received letters from 2 individuals regarding the distribution of the quota and also that staff had met with industry regarding this issue. At this time, he said, staff is proposing to allocate 90 per cent of the State's commercial black sea bass quota to the Directed Fishery and 10 percent to the By-catch Fishery. He explained that the quota for 2007 would be divided up where the Directed Fishery would have 412,470 pounds and the By-catch Fishery would get 45,830 pounds. He explained also that the landings from the past 3 years showed that the By-catch Fishery had remained under the 2007 quota allocation. He stated that emergency action had been necessary because the quota allowances had not been approved until December 20, 2006. He explained that certain specific gear changes for federal waters had been made where any pot or trap fishes in federal waters is required to have two escape vents in the trap and, if using circle vents, the size of the vent must be changed from 2.375 inches to 2.5 inches; and, the gear restrictions amendment needed to be changed so the State's regulation would reflect current federal regulations. He explained also that a request from industry had been received to extend the alternate vessel authorization period from 30 days to 60 days. He said the alternate vessel

authorization framework was put in place last year, to allow Directed Fishery permit holders to catch their quota without a formal transfer. He said also that industry originally requested a 30-day period, but now felt it was too short. He stated that staff supported this extension.

He said staff was requesting that emergency action be taken to amend Regulation 4VAC 20-950-10 Pertaining to Black Sea Bass, to include the 2007 quotas for the Directed and By-catch fisheries, amended gear restrictions, and the extended time frame for alternate vessel authorization to 60 days. He said that staff was also requesting a public hearing be held at the February 2007 Commission meeting, in order to make these changes permanent.

Associate Member Robins moved to adopt the emergency regulation and approve the advertising of a public hearing for the February meeting setting forth all the options for distributing the quotas. Associate Member McConaugha seconded the motion. The motion carried, 7-0.

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20. **DISCUSSION:** Request for February public hearing to consider a 2007 Virginia Seafood Council Proposal for the Deployment of the Non-native Oyster, Crassostrea ariakensis.

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

Mr. O'Reilly explained that this was a request by the Virginia Seafood Council to hold a public hearing at the February Commission meeting for a 5th year for the Ariakensis project. He said at this point there was no written proposal that had been submitted to VMRC and when this was received that would determine if the public hearing would be in February or March. He explained that in Mr. Travelstead's evaluation he had mentioned the criteria and referenced the Code giving the Commissioner the authority to consider this request. He said in the Code it has specified that the decision on this proposal must be made no earlier than 30 days and no later than 60 days. He also noted that Mr. Travelstead in his evaluation had mentioned that there was a Chesapeake Bay Program Ad hoc Panel made up of scientists that he said should be allowed to review this proposal before the public hearing was held, but this would depend on when the proposal was received. He said staff was asking for approval for advertisement of this hearing with a contingency that the scheduling of the public hearing will depend on when the written proposal was received.

Associate Member Robins moved approve the staff's recommendation. Associate Member Schick seconded the motion. The motion carried, 5-0. Both Associate Members McConaugha and McLeskey were absent during the motion.

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Associate Member McConaugha returned to the meeting during this presentation.

- 17. DISCUSSION:** Request for the Approval of the 2007 Virginia Oyster Restoration Program and Approval of the Procurement Procedures.

Dr. James A. Wesson, Head, Conservation and Replenishment Dept., gave the presentation and his comments are a part of the verbatim record.

Dr. Wesson explained that the oyster replenishment plan for this year was being presented a month earlier than was normal, a request made by industry at a previous Commission meeting. There was an interest in an earlier presentation so that any seed movement could be prepared for by industry somewhat earlier. The program for 2007 will be similar in size as 2006, but some of the focus areas will be different. Staff has included a statement of the procurement methods at the end, and these methods must be approved, along with the plan.

Dr. Wesson explained that the seed transferred last year from the James River were lost to the Cow Nose Rays. He said that staff felt that the James River seed should not be used this year, as there was a decline in the standing stocks. He said the count last year was 600 to 700 and this year it was less than 400. He said also the Dermo test results were higher in number, therefore these seed oysters had no disease tolerance. He said the Great Wicomico River had a good spatset of 2,000 to 3,000 count and this was the only area where seed was available for transplanting. He said there had been a lot of federal monies invested in the GWR and the team of partners representing the USACOE, NOAA, and the Chesapeake Bay Foundation had put a lot of shell onto the public ground areas. He said now that there was decent broodstock the group wanted to track it. He also said that the broodstock there had genetic markers and disease tolerance to build up a larger population. He said this group also did not want to move any seed from the public grounds to allow for 2 or more spatsets to occur. He said the only other option was to move private ground seed, which had been done in the past. He said this seed was more clustered and possibly more protected from predation, but they need to see. He said the \$12/bushel would allow for the purchase of seed and transplanting, plus the private leaseholder would have monies to put shell back. He said the public grounds seed cost would not be much different as the cost was \$6-7/bushel for the seed as well as transplanting it, plus having the cost to put shell back on these public bottoms one the seed has been taken would be another cost added.

Dr. Wesson explained that staff was recommending 20,000 bushels of seed for the Coan, Yeocomico and Rappahannock Rivers and to have the Commission close these areas to harvest for the next season, when this comes up in late summer.

Dr. Wesson explained that there were two types of seed programs, shellplanting, and Aquaculture Training. He said the projects proposed by staff were being done to build up an industry infrastructure. He said for the Cow Nose Bay Projects, staff would bring that item back to the February 2007 Commission meeting. He said the Corps wants to be involved, but there were currently no federal funds available for 2007. He said that could change.

Associate Member McLeskey left the meeting for the day at this point.

Associate Member Holland opened the hearing to the public for comments.

Douglas Jenkins, President Twin Rivers Watermen's Association, was present and his comments are a part of verbatim record. Mr. Jenkins said that there was concern with spending so much money for private ground seed, as the private grower will benefit more than the watermen, when the Baylor grounds are for the public's benefit.

Tommy Leggett, representing the Chesapeake Bay Foundation, was present and his comments are a part of the verbatim record. Mr. Leggett stated that the Chesapeake Bay Foundation supported the program.

Paula Jasinski, representing the Chesapeake Bay Program, was present and her comments are a part of the verbatim record. Ms. Jasinski stated that the Chesapeake Bay Program supported the staff's proposal. She said the program was committed to making the Great Wicomico River restoration efforts a success by asking that no seed be moved from the public grounds.

Associate Member Robins stated that he would be abstaining from participation in the vote as he had a financial conflict of interest because of his involvement in the program.

Associate Member Schick stated that there was seed proposed for the Coan and Yeocomico and he hoped that these areas would be opened again in 2008. He said he hoped this would be a good project, which could be expanded.

Associate Member Tankard moved to approve the plan as well as the procurement procedures. Associate Member McConaugha seconded the motion. The motion carried, 5-0-1. Associate Member Robins abstained for reason stated previously. Associate Member McLeskey left the meeting during the presentation.

**The 2007 Virginia Oyster Restoration Program Plan
and the Associated Procurements Procedures.**

FUNDING SOURCES	MATCHING REQUIRED	AMOUNT
Non-federal		
General Funds (GF) State		\$1,195,500
The Nature Conservancy (TNC) – Seaside	\$50,000	\$ 57,250
Total Non-federal		\$1,257,750
Federal		
NOAA-VIMS -- Industry		\$ 500,000
NOAA-VIMS—Sanctuary		\$ 274,018
CZM – Seaside Heritage Program		\$ 60,000
U. S. Navy – Naval Weapon Station		\$ 68,000
Total Federal		\$ 902,018
Grand Total		\$2,154,268

BAY & TRIBUTARIES**Seed Transfer: Natural**

There was a modest spatset in most areas of the Bay in 2006. The only exception to that was in the Great Wicomico River, where there was a large spatset. Because of the higher salinities in the Bay, the disease pressure also increased. This resulted in extremely high mortalities and high disease levels in the seed oysters in the James River (Attachment 1). James River seed oysters were moved to the Nomini and Rappahannock Rivers in 2006, but these oysters would be a very poor choice in 2007. The VIMS fall disease report is attached (Attachment 2).

The spatset in the Great Wicomico River is relatively large, with counts on many bars in excess of 1,000 oysters per bushel (Dredge Survey, Attachment 3). A tremendous amount of money and effort has been expended by the Army Corps of Engineers, the NOAA-Chesapeake Bay Office, VIMS, CBF, and our Agency, over the past 4 years, to

add shell, add broodstock that can be traced in the system, and to protect the broodstock in the Great Wicomico. It is still uncertain as to whether this spatset has resulted from these efforts, but all of the partners are adamant that none of this spatset is removed from the public beds until this project is fully evaluated. The only acceptable option for moving seed in 2007 would be for VMRC to buy seed from private leaseholders that also received this great spatset. We purchased seed from private grounds in the Great Wicomico River in 2003. The costs per bushel are higher for this because we try to provide enough money for the leaseholder to reshell his grounds, and allow some profit from the activity. VMRC paid \$12.00 per bushel in 2003, and staff believes that the cost will be the same in 2007. Several watermen in both the Blue Ribbon Panel meeting and the Shellfish Management Advisory Committee meeting preferred that the money be spent on public seed in the Great Wicomico River, since the cost per bushel would be less, and more seed could be moved.

The Native Oyster Restoration partners have concerns over even removing the private seed from the system, and they believe that if we do not provide a market for the seed, that most oysters will remain in the system, because there is no one else that will buy them. This is possibly true; however, the industry bought into this big project in the Great Wicomico River based on the fact that they would be able to use these seed oysters if the project was successful, and many leaseholders reshelled their private grounds in 2003 to be ready for a spatset. Staff is also interested in whether the seed, which are more clustered, will survive cow nose ray protection better than the seed from the James River. Staff believes that it is prudent to move some seed oysters from this area in 2007, to test their survival ability with rays and disease pressure. VMRC will purchase up to 20,000 bushels of seed oysters from private leases in the Great Wicomico River and transplant these seed to the Rappahannock River and the Potomac Tributaries.

Great Wicomico River seed to:

5,000 bushels @ \$12.00/bushel to the Coan River	\$ 60,000.00
5,000 bushels @ \$12.00/bushel to the Yeocomico River	\$ 60,000.00
10,000 bushels @ \$12.00/bushel to the Waterview area of the Rappahannock River	\$120,000.00
Total	\$240,000.00 (GF)

Staff will monitor survival of these seed oysters, and will recommend keeping the seed plant areas closed until the majority of the oysters have reached market size. Therefore, those areas will likely have to be closed to harvest in 2007, since the seed that is being moved is currently so small.

Seed Transfer: Spat on shell

Staff will also continue the new collaborative effort between VMRC-VIMS-NOAA and the private oyster industry to produce oyster spat on shell. We will attempt to expand this effort more than five-fold over last year.

VIMS, VMRC and private industry are working together on a model for oyster replenishment that provides economic development opportunity for industry as well as benefits for restoration. This model incorporates remote setting of eyed larvae of wild, disease resistant, or polyploid oyster varieties on cultch at industry sites. The spatset on shell can be used for restoration programs, public bed “put and take” fisheries and some of the product (especially triploids) could be used for extensive aquaculture on private leased beds.

Remote setting at industry sites requires large-scale hatchery capabilities to produce billions of eyed larvae. The hatchery producers in Virginia are interested in developing capabilities themselves to meet the demand for eyed larvae. Remote setting also requires developing the infrastructure throughout sites in Virginia. A number of seafood harvesters and processors have expressed interest in managing the setting and deployment of spat on cultch. The process requires oversight and monitoring, and VIMS and VMRC are working cooperatively to provide due diligence for all projects.

Hatchery production

Over the next few years, hatcheries will have to be spurred to develop capacity to produce eyed larvae. As part of this development, VMRC will use NOAA funds to purchase eyed larvae from hatcheries. Virginia hatcheries will be given infrastructure assistance to expand and improve their oyster production facilities. More than 1.4 billion eyed larvae will be needed for the 2007 program if all projects are to be completed. A notice will be advertised among all hatcheries for participation in the project with a set price of \$200.00 per million for up to 1.4 million eyed larvae. A second solicitation will be advertised for an additional \$200.00 per million of eyed larvae. This second \$200.00 per million (for up to 750,000 million eyed larvae) will be for those hatcheries within the State that make improvements in their hatchery facilities to meet the anticipated growth in the need for oyster eyed larvae. Oyster broodstock will be VIMS disease resistant strains, wild stock or both – whatever is appropriate for the ultimate destination of the spat-on-cultch.

Ultimately, for public-private oyster restoration, industry-setting sites will purchase eyed larvae from hatcheries as part of their overall operating costs of producing spat-on-cultch. Ideally then, the hatchery component of public-private oyster restoration in Virginia will be perpetuated by larvae sales themselves, without need for financial assistance.

Setting stations

Over the next couple of years, these same NOAA funds will be used to establish 8-10 or more setting stations located at industry sites throughout Virginia. It is these setting sites that will generate demand for eyed larvae. Through empirical trials led by VIMS and VMRC over the next three years, staff will try to optimize the remote setting process at all locations and to transfer this expertise to industry. Ultimately, setting sites will operate by purchasing eyed larvae from hatcheries, set them on cultch prepared on site, and transport the spat on cultch to restoration sites. As experience grows and with increased efficiencies, industry may choose to plant “extra” spat on private beds, add value by “nursing” the spat on bottom for some time, or plant public grounds to provide potential benefits to the public fishery.

In 2006, we advertised for remote setting stations and had a great deal of interest. Six spat on shell producers were chosen and approximately 270 million eyed larvae were set on 3,600 bushels of shell. These shells had been placed in bags, which were placed in large tanks. The tanks were filled with Bay water and oyster eyed larvae were added. After several days, the bags of shells, with spat attached, were loaded in boats, taken to reef sites, the bags cut open, and the shells released. The set rate of the first year was 10%, with about 27 million oysters being placed on the 6 locations. We monitored survival through the fall, and will again monitor these oysters through 2007. Initial results with these oysters, as well as results from earlier trials and ancillary projects have been encouraging enough for us to ramp up even further in 2007. Staff will advertise for 2 to 4 additional remote setting stations.

Federal funds will be needed initially to purchase spat for restoration purposes. The principal federal investment will be spat on cultch for restoration. Staff is “creating demand” for spat on cultch (and therefore, also, eyed larvae) by using federal dollars to purchase seed for restoration. Spat “sales” will become the performance measure for the program. This partnership is trying to make oyster restoration entrepreneurial driven. In this way, we think we can maximize their efficiency of the program and provide the best return for the federal investment. Projected production for the program is 2.5 billion eyed larvae, translating to about 250,000,000 spat on cultch. It will take several years to get to that point.

For 2007, there will be a number of projects. Staff had originally projected an increase from 270 million eyed larvae on 3,600 bushels of shells in 2006 to 405-million eyed larvae on 5,400 bushels of shells in 2007. All of these animals will be targeted for sanctuary areas in the State, with most scheduled for the Great Wicomico River.

5,400 bushels of spat on shell for sanctuary areas	\$274,018 (NOAA)
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An additional project is being funded by the U. S. Navy at the Yorktown Naval Weapons Station. They have offered funding for an additional 2,000 bushels of spat on shell with the oysters to be placed on the sanctuary reef that had earlier been built in Felgates Creek.

2,000 bushels of spat on shell to Felgates Creek \$68,000.00 (Federal)

Several preliminary spat on shell projects have shown encouraging evidence that these oysters possibly because of their configuration and growth pattern, appear to survive better with cow nosed ray predation. Spat on shell plantings have also shown growth rates that are extremely rapid, with potential marketability in less than 2 years. Because of these results, staff has received approval from NOAA to use funds that had been previously earmarked for shell planting, for the production of spat on shell for industry. Staff is proposing to have the remote setting locations produce up to 8,000 bushels of spat on shell for industry seed planting, for basically a “put and take” fishery. This will require hatcheries to produce an additional 600 million eyed larvae in 2007. If this project can be completed, oysters will be placed at three locations:

2,000 bushels of spat on shell in the Coan River \$75,000 (NOAA)

2,000 bushels of spat o shell in the Yeocomico River \$75,000 (NOAA)

4,000 bushels of spat on shell in the Rappahannock River
near Waterview \$150,000 (NOAA)

Again these areas will have to be closed for harvest for at least the 2007-2008 season. In total, between the Great Wicomico River seed planting and the spat on shell seed planting, approximately 28,000 bushels of seed will be planted at a cost of approximately:

\$540,000.00

Private Industry: Spat on Shell

NOAA has also agreed to support an incentive for private leaseholders to plant “spat on shell” on their leases. Staff will advertise for interest by private leaseholders in a cooperative effort where NOAA funds are used to pay for the oyster eyed larvae, if the leaseholder bags the shell, sets the shell, places it on their private lease, and provides data on the success of the growout of the oysters to harvest. Staff will advertise for participation in lots of 200 bushels, which will each require 15 million eyed larvae. A total of \$50,000 is available. At a cost of \$200.00 per million eyed larvae, or a total of \$3,000.00 assistance per set, an additional 3,333 bushels (16.67 sets) of spat on shell will be produced. If more people apply for this assistance than funds are available, staff will hold a lottery for participation.

3,333 bushels of spat on shell for private industry, spat on shell \$50,000 (NOAA)

Shell Planting:

About 550,000 bushels of shucking house shells are available to plant on the western shore of the Bay and 20,000 bushels on the Eastern Shore.

Chesapeake Bay:

It is likely that many of the shucking house shells will be used in the redesign of the harvest and sanctuary areas of the Rappahannock River. The Virginia Oyster Heritage Program partners are working on that now, but locations are unknown currently. All of the shells will be used to maintain good, public oyster bottom.

550,000 bushels of house shells within the Bay	\$620,000.00 (GF)
	\$150,000.00 (NOAA)

Seaside: Eastern Shore

The availability of shell limits the areas that can be shellplanted on the Eastern Shore. There is a small quantity of shucked conch shells in the Oyster area, and there are sources of fossil shells in areas of Northampton County that can be harvested for replanting.

Two grants are available for shellplanting on Seaside.

The Nature Conservancy and VMRC will be testing small reef balls in the Smyth Island – Magothy Bay area to determine whether small reef balls can slow down or stop the movement of sand and sediments that cover normal shellplants. A cement company will be donating approximately 300 small, 18” diameter reef balls that will be constructed by schools in the Charlottesville area. Half of the reef balls will be placed around reefs and shell on TNC property and half of the reef balls will be placed around shellplants on public bottom. Staff will be seeking permits for both of these areas.

60,000 bushels of shell in Magothy Bay and Smyth Island area	\$57,250.00 (NOAA)
	\$50,000.00 (GF)

Seaside Heritage Program

Oyster restoration on various rocks in Accomack and Northampton Counties.

20,000 bushels of conch shells	\$60,000.00 (CZM)
50,000 bushels of dredged shells	\$40,000.00 (GF)

Watermen Aquaculture Training Program:

VMRC conducted a small, oyster aquaculture training project for 10 watermen on the Western Shore in 2006. Each waterman was provided with 50,000 oyster seed and all the equipment necessary to grow them to market size. All of the participants have taken the project very seriously, and have been very involved with the project. Other watermen that have seen this activity and have asked for another training program this year. We propose to advertise for 10 more participants, this year from both the Eastern and Western Shore of the Bay.

\$5,000/watermen for seed and materials

10 watermen @ \$5,000.00

\$50,000.00 (GF)

Cow-Nose Ray Control or Marketing Project:

We are holding \$200,000.00 of General Funds for the development of a project with industry to begin catching commercial quantities of the cow-nosed ray. This will be an attempt to find a self-sustaining market for the ray. The details have not been totally worked out, but we will bring it back for approval and the procurement methods in February or March.

Cow-nose Ray Project

\$200,000.00 (GF)

This year's plan was presented to the Blue Ribbon Oyster Panel and to the Shellfish Management Advisory Committee. It had been designed in light of some of the direction given by the Blue Ribbon Oyster Panel, with a goal of having every dollar spent resulting in at least a dollar of return for the investment. Both the BROP and The SMAC had comments regarding the high costs of the seed, but both groups were generally supportive of the Replenishment Program for 2007.

APPROVAL OF PROCUREMENT ACTIVITY FOR THE 2007 OYSTER REPLENISHMENT PROGRAM:

General:

Certain aspects of the procurement of seed, shell, and replenishment services differ from the Commonwealth's standard procurement procedures and therefore must be documented and approved by the Commission. The Commission will be exercising this option under Section 28.2-550 of the Code of Virginia.

This section of the Code states that:

The Commission, when it makes a determination in writing that competitive bidding or competitive negotiation is not feasible or fiscally advantageous to the Commonwealth, may authorize other methods of purchasing and contracting for seed oysters, house shells, reef shells, shell bed turning, and other goods and services for oyster ground replenishment which are in the best interest of the Commonwealth and which are fair and impartial to suppliers. It may establish pricing for its award and purchases; use selection methods by lot; and open, close, and revise its purchases according to changing conditions of the natural resources, markets, and sources of supply.

For the harvest and movement of wild seed oysters and excavated shells, the Commission will set the per bushel price to be paid. For the production of eyed larvae and spat on shell, the Commission will set a price per million larvae and the price per bushel of spat on shell. Loading, transporting, and planting costs for spat on shell will be set by the Commission based on handling costs, the type of activity, and the distance for transporting to the activity site. For the turning and cleaning and dredging of public oyster bottoms, the Commission will set at per hour or per day rate to be paid. For the purchase of hatchery-spawned, aquaculture-produced, broodstock oysters and scallops, the Commission will set the price. Public notices will be posted, and all interested parties may apply. Selection of contractors will be done using the lottery method.

The Commission will also set the price for the purchase of house shells. The prices are currently estimated to be \$0.50 per bushel for conch shells, \$0.35 per bushel for clam shells, and \$0.625 per bushel of oyster shells at the shucking house. Loading, transporting and planting costs will be set by the Commission based on handling costs, the type of activity, and the distance for transporting to the activity sites. Letters were sent to all licensed shucking houses inquiring as to the availability of shell. All houses that responded positively will provide shells to the 2007 program until the total dollar limit for this activity is met. If funds are sufficient, all available house shells in the state will be purchased for the Oyster Replenishment Program. If funding sources do not allow the purchase of the entire shell market, house shell contracts and/or contract amounts will be based on geographical location, mobilization cost, and shell planting locations which provide the greatest benefit to the oyster industry and to the Commonwealth.

For participation in the Private Industry, Spat on Shell Program, public notices will be posted, and all interested leaseholders may apply. Selection of participants, will be based on the participant's ability to produce spat on shell and if there are more qualified participants than there is funding, selection will be by lottery.

For participation in the Aquaculture Training Program, public notices will be posted, and all interested watermen may apply. Selection of participants if more than 10 watermen apply, will be by lottery.

The agency anticipates that all other 2007 oyster replenishment activities will be done using the Invitation for Bid or Request for Proposal process in accordance with the Virginia Public Procurement Act.

If the conditions of the oyster resource changes, or if the Conservation and Replenishment Department Head encounters unanticipated/unscheduled situations with the Oyster Replenishment Program, planned procurement activities may be changed, and one or more of the alternative methods of procurement listed above may be utilized to facilitate the completion of the 2007 Replenishment Program.

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18. DISCUSSION: Request for Approval of Procurement Procedures for the 2007 American Shad Restoration Program

Rob O'Reilly gave the presentation, and his comments are a part of the verbatim record. Mr. O'Reilly explained that the Commission, for the last 14 years, has had a project to restore the American Shad, and approval by the Commission of the procurement procedures, for obtaining the services of watermen to participate in the American Shad Restoration Program, was required. Mr. O'Reilly also explained how the Commission's authority to approve such procurement was found in Section 28.2-550 of the Code of Virginia. He stated that the Notice describes the program in detail. The notice reads, as follows:

NOTICE OF REQUEST FOR PUBLIC PARTICIPATION IN THE 2007 SHAD RESTORATION PROJECT

The Marine Resources Commission invites WRITTEN RESPONSE as to the availability of as many as 10 individuals for capturing American shad (shad) from the Pamunkey River (unless otherwise directed by the Virginia Department of Game and Inland Fisheries, VDGIF) for the 2007 shad restoration project. Project dates will be approximately March 8 through mid-May, 2007.

PROJECT DESCRIPTION: A total of nine individuals will be selected as permitted project participants, and one individual will be selected as project alternate. All scheduling, on a weekly and seasonal basis, will be established by the Virginia Department of Game and Inland Fisheries project coordinator. The need for participation by alternates in the project will be determined by the Virginia Department of Game and Inland Fisheries project coordinator.

For fishing days during the March 8 through mid-May, 2007 period, permitted project participants shall be paid at the rate of \$225.00 per fishing day, with a fishing day generally occurring between the hours of 12:00 Noon and 12:00 midnight.

Listed below are specific evaluation criteria, ranked by order of importance. Each respondent must indicate his or her experience or ability to meet each of these criteria. The Commission will consider each written response to these evaluation criteria on a case-by-case basis to determine the most qualified individuals who will receive permits or alternate status for the American Shad Restoration Project. In the event there are more than 10 equally qualified respondents, selection for the project will be made through a lottery system. The lottery will be held on March 1st at 2:00 P.M. in the 4th floor small conference room (Library) of the Marine Resources Commission, 2600 Washington Avenue, Newport News. Those wishing to be present are invited to attend. Notification of individuals chosen for this project will be in writing by mail.

EVALUATION CRITERIA

1. You must have participated in one or more of the 1992 through 2006 American shad restoration projects of the Virginia Department of Game and Inland Fisheries and Virginia Marine Resources Commission. Priority will be given to those individuals who have previously participated in this project more than one year.
2. You must have the appropriate equipment: a boat and two 4 1/2 - 5 1/2-inch mesh drift gill nets.
3. You must be available to fish for shad during most of the days between early-March and mid-May.
4. You must have experience in fishing for shad in upriver areas, using drift gill nets.

DISCUSSION: Request for a Public Hearing to Establish the 2007 Shad Bycatch regulations.

Rob O'Reilly, Deputy Chief, Fisheries Management Division, gave the presentation with a powerpoint presentation, and his comments are a part of the verbatim record. Mr. O'Reilly stated that staff was requesting a public hearing be held at the February 2007 Commission meeting to consider a 2007 bycatch fishery for shad and to amend the regulation. He explained that in 2006 the ASMFC allowed a limited bycatch shad fishery. He said the results of the 2006 fishery were in the Commission's packet.

Mr. O'Reilly explained that two options, for 2007, were presented by letter, dated November 15, 2006 to the ASMFC. He said the ASMFC Technical Committee met on December 4th and considered the harvest results of the 2006 Bycatch Fishery, with the options proposed for 2007 and they decided to approve a limited fishery continuing in 2007 with the same limited fishery, as was done in 2006. He said the ASMFC

Management Board would be considering these options at their meeting on January 30th. The options are, as follows:

Option One: Requested approval for the identical management measures that had been in place during 2006 (status quo option).

Option Two: Voted for unanimously by the FMAC last fall, it sought more liberal management measures. This second option (FMAC option) would maintain the boundaries that applied to the 2006 fishery, in 2007, but drift gill nets and pound nets would be added as eligible gear types. This second option also sought a more liberal possession limit, for American shad, in that each permitted fisherman would be allowed a maximum of 10 American shad per day in both areas, rather than the 10 per vessel in the by-catch area and 5 per vessel in the spawning grounds, as for the 2006 by-catch fisheries.

Mr. O'Reilly stated staff was requesting a public hearing be advertised with 3 options: 1) That in 2007 the bycatch fishery remain the same as 2006, 2) The FMAC's proposal to allow some liberalizing with gears and catch limits, or 3) That there be no Bycatch Fishery in 2007.

Associate Member Bowden stated that the timing was bad, as this would normally be in place in February, but at least one was approved. He said that emergency action was necessary and appropriate, so that the watermen could start as soon as possible. He said the normal process meant that they could not start until March 1. He said he moved to approve the emergency regulation.

Associate Member Robins asked if they were approving the status quo, no liberalization. Mr. O'Reilly responded yes. Associate Member Robins asked if the fishery would be ready to start. Mr. O'Reilly responded that that there were sparse amounts in the Bay usually at this time, as the data usually shows more in March, and he said he felt it would be more prudent to keep it at status quo.

Carl Josephson, Senior Assistant Attorney General and VMRC Counsel stated that an emergency regulation delegated what the regulation would be for another agency. He said if the Commission chose to adopt the emergency regulation that it be made contingent on the decision to be made by the ASMFC.

Associate Member Bowden suggested that the emergency regulation could be done in such a way as to delegate the Commissioner authority to adopt whatever the ASMFC adopts.

Associate Member Holland stated that the status quo should be adopted as an emergency regulation.

Associate Member Robins stated that a public hearing would have to be advertised for February. He made a substitute motion and moved to approve procurement procedures for the 2007 Shad Program; and, adopt the emergency regulation for a status quo Bycatch Fishery and a public hearing be advertised with the 3 options per staff recommendation. Associate Member Bowden seconded the motion. The motion carried, 6-0.

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19. DISCUSSION: Request for a March 2007 public hearing to establish the Bluefish Rock Artificial Fishing Reef.

Mike Meier, Head, Artificial Reef Program, gave the presentation with slides. His comments are a part of the verbatim record. Mr. Meier explained that staff was asking for approval for a new artificial fishing reef in the Chesapeake Bay. He said they were requesting approval to hold a public hearing at the March 2007 Commission meeting, for the final presentation.

Mr. Meier explained that staff had received the Corps' permit to establish a reef 3.2 nautical miles East of Grandview in Hampton, in water depths from 20 to 24 feet. He said the configuration was a square, 1,400 yards per side. He said the Corp's permit allowed for the deployment of concrete and other materials, as may be specifically approved by the District Engineer.

Associate Member Holland asked for a motion. Associate Member Robins moved to approve for the advertising of March 2007 public hearing. Associate Member Schick seconded the motion. The motion carried, 6-0.

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18. DISCUSSION: Request for a Public Hearing to Establish the 2007 Shad Bycatch regulations.

Rob O'Reilly, Deputy Chief, Fisheries Management, requested that the Commission reconsider this item to clarify the motion.

Associate Member Bowden stated the original motion needed to be amended to say that the emergency regulation would be effective February 1st.

Associate Member Robins moved to reconsider Item 18, the Shad Bycatch emergency regulation. Associate Member Bowden seconded the motion. The motion carried, 6-0.

Associate Member Robins moved to amend the Shad Bycatch emergency regulation and make the effective date February 1, 2007. Associate Member Bowman seconded the motion. The motion carried, 6-0.

21. DISCUSSION: Request for public hearing to establish the 2007 recreational summer flounder fishery management measures.

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

Mr. O'Reilly reviewed the various tables for the Commission. He said that staff was recommending that a public hearing be advertised with the 4 options, which are as follows:

Option	Minimum Size Limit	Possession Limit	Closed Season(s)
Option 1	19 inches	6 fish	None
Option 2	18 ½ inches	5 fish	January 1 –March 31 AND July 23 through July 28
Option 3	18 ½ inches	3 fish	July 25 or July 26
Option 4	18 inches	2 fish	January 1 - March 31 AND July 16 through July

Concerning option 2, with a 6-day summer closure, Mr. O'Reilly said that the ASMFC technical committee wanted a closed season for at least 2 weeks, but staff said no to establishing a continuation of the January 1 – March 31 closure into April or establishing a long fall closure to equal the 6-day summer closure. He said most landings occur in June, July, and August. Ultimately, the ASMFC approved the option and stated it was conservative.

Associate Member Holland asked for a motion. Associate Member Schick moved to approve the request to advertise for a public hearing. Associate Member Robins seconded the motion. The motion carried, 6-0.

22. DAVID WRIGHT: Request for Black Sea Bass hardship exemption

Joe Cimino, Fisheries Management Specialist, gave the presentation. His comments are a part of the verbatim record.

Mr. Cimino explained that Regulation 4VAC 20-950-48, sets aside 17,000 pounds of the annual commercial fishery black sea bass quota for distribution to all qualified applicants granted an exception by the Commission from the requirements of Subdivision 46 (B). Exceptions may be granted on the basis of medical condition, or other hardship, which limited the applicant's ability to fish for sea bass during the qualifying period.

Associate Member Holland asked if the staff recommended approval. Mr. Cimino responded yes.

Associate Member Robins moved to accept the staff recommendation in granting a hardship permit for Mr. Wright. Associate Member Bowden seconded the motion. The motion carried, 6-0.

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23. FAILURE TO REPORT COMMERCIAL HARVEST:

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

Ms. Iverson stated that all parties were not present at the hearing. She said Patrick Johnson was present earlier.

Carl Josephson, Senior Assistant Attorney General and VMRC Counsel, asked staff what was supposed to happen when the parties were not present. Ms. Iverson explained that the staff recommended that their licenses be suspended until they do appear before the Commission.

Associate Member Robins moved that Patrick J. Johnson's (884793 1911) license be suspended until he appeared before the Commission. Associate Member Bowden seconded the motion. The motion carried, 6-0.

Associate Member Robins moved that John T. Johnson (629793 1091) and Richard J. Johnson's (619701 4907) licenses both be suspended until they appeared before the Commission. Associate Member Bowden seconded the motion. The motion carried, 6-0.

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24. INDUSTRY REQUEST: For Seasonal Change to the Private Ground Shellfish Relay Season as Established by the Code of Virginia, Section 28.2-816.

Rob O'Reilly, Deputy Chief, Fisheries Management, gave this presentation and his comments are a part of the verbatim record.

Mr. O'Reilly explained that staff had received a letter from Robert Johnson requesting that the private relay season be opened early, February 1st. He said Mr. Johnson has explained that he wanted to be able to remove his shellfish out of harms way, before the cow nose rays could get at them. He said Section 28.2-816 of the Code of Virginia, sets forth the private ground relay season as April 1 until November 1st.

Mr. O'Reilly explained that Mr. Travelstead had addressed this request with Dr. Croonenbergs at the Virginia Department of Health-Division of Shellfish Sanitation and he agreed with the proposed change.

Mr. O'Reilly stated that the advertisement of this proposed action should be made state-wide and requested a public hearing. Associate Member Holland asked when the regulation would be effective. Mr. O'Reilly stated February 28 or March 1st depending on how the Commission wanted to handle it.

Carl Josephson, Senior Assistant Attorney General and VMRC Counsel, stated that the regulation should be made so it will continue beyond the current year.

Associate Member Robins moved to advertise as recommended by staff to change the dates to February 1st until November 1st. Associate Member Tankard seconded the motion. The motion carried, 6-0.

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There was no further business and the meeting was adjourned at approximately 6:00 p.m. The next meeting will be Tuesday, February 27, 2007.

Steven G. Bowman, Commissioner

Katherine Leonard, Recording Secretary