

## MINUTES

**Commission Meeting****November 22, 2005**

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

William A. Pruitt )	Commissioner
Ernest L. Bowden, Jr. )	
J. Carter Fox )	
Russell Garrison )	
J. T. Holland )	Associate Members
Cynthia Jones )	
Wayne McLeskey )	
Richard B. Robins, Jr. )	
Kyle J. Schick )	
Carl Josephson	Sr. Assistant Attorney General
Steven Bowman	Deputy Commissioner
Michele Guilford	Acting Recording Secretary
Wilford Kale	Senior Staff Advisor
Jane McCroskey	Chief, Admin./Finance Div.
Andy McNeil	Programmer Analyst, Sr.
Jack Travelstead	Chief, Fisheries Mgt. Div.
Rob O'Reilly	Deputy Chief, Fisheries Mgt. Div.
Jim Wesson	Head, Conservation/Replenishment
Eric Robillard	Head, Plans and Statistics
Sonya Davis	Fisheries Management Specialist, Sr.
Lewis Gillingham	Fisheries Management Specialist
Ellen Cosby	Fisheries Management Specialist
Stephanie Iverson	Fisheries Management Specialist, Sr.
Lt. Col. Lewis Jones	Deputy Chief, Law Enforcement
MPO Tom Moore	Marine Police Officer
MPO George Daniel	Marine Police Officer

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

Virginia Institute of Marine Science (VIMS)

David O'Brien  
Lyle Varnell

Other present included:

John A. Coggershall	Dr. John B. Lapetina, Jr.	Dr. John B. Lapentina, Sr.
Ann Lapetina	Tom Langley	Donna Phaneve
Craig Young	Glen A. Davenport	Curt Manchester
Alice H. Siegul	Bruce Aitkenhead	Leroy Holt
Derek A. Mungo	Philip Briggs	Kathryn B. Sweeney
Jenny Sigismondi	Gerry Mahohn	Harrison P. Bresee, III
Tara Grant	Ryan Wine	Michael Shearer
Wayne Rodehorst	Burt Parolari	David Sheve
Chuck E. Bnily	Arthur Kane	Walt Hurley
Dan Wagoner	Sherry Spring	Susan Borkerd
Kevin DuBois	Jim Janata	John Padgett
Bob Beil	Vince Behm	Bill Rice
C. T. Woodcock	Melvin C. Roy	Ellis W. James
Bill Northington	Jay Krushiwski	Joe Krushiwski
Thomas Lipinski	James Fletcher	Susan Gaston
Douglas F. Jenkins, Sr.	Hillary Goodwill	Roger Parks
Russell Gaskins	Michael B. Haverty	Jenna Sells
Kelly Place	C. D. Starrett	R. Flower
Randy Thomas	Tom Powers	Frances Power
John Gaston		

and others

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Associate Member Garrison, acting Chairman, called the meeting to order at approximately 9:30 a.m. Commissioner Pruitt was expected to arrive at approximately 11:00 a.m. Both Associate Members Holland and Bowden arrived late.

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

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**APPROVAL OF AGENDA:** Associate Member Garrison asked for any changes to the agenda. Colonel Steve Bowman explained that Commissioner Pruitt had been detained and would be late arriving and had asked him to ask the Commission to add one item at the end of the meeting to discuss the Ariakensis issue. Bob Grabb explained that a letter had been received from Ms. Toni Sloan regarding Item 9 on the agenda asking that the hearing on this item be postponed indefinitely because of the distance to the meeting and so she could seek counsel. He stated that when staff spoke with her they indicated that because of the matter being after-the-fact they would support a one-time deferral of the matter until the December 20<sup>th</sup> meeting.

**Associate Member Robins moved to approve the agenda, as amended, including the deferral of Item 9 until the December 20th meeting. Associate Member Schick seconded the motion. The motion carried 6-0.**

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**MINUTES:** Associate Member Garrison asked for a motion to approve the October 25, 2005 meeting minutes. **Associate Member Robins moved to approve the minutes as presented. Associate Member Jones seconded the motion. The motion carried, 6-0.**

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Associate Members Bowden and Holland arrived at this point in the meeting.

Associate Member Garrison swore in all VMRC and VIMS staff that would be speaking or presenting testimony during the meeting.

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

Bob Grabb, Chief, Habitat Management Division, gave the presentation for the page two items, A through F. His comments are a part of the verbatim record. He explained that there was an additional item that the representatives for Cox Communication were requesting to be added to the page two agenda because of budgetary conflicts. He said that staff did not support this request, because staff had not received VIMS' assessment of the project and the request was just made late Monday afternoon. He said Mr. Robert Beil, Project Manager, a representative for Cox, was present at the meeting. After some discussion, it was the general consensus of the board to hear the additional item. It was made Item G.

Robert Beil, Project Manager for Cox Communications, was present and his comments are a part of the verbatim record. Mr. Biel asked that the Cox Communication request be considered at this hearing and that staff be allowed to make its presentation and provide information regarding VIMS.

**Associate Member Fox moved to hear the staff presentation on Item G, Cox Communication. Associate Member Holland seconded the motion. The motion carried, 8-0.**

Tracy West, Environmental Engineer, Sr., stated that the staff recommendation for Item G., Cox Communication was for approval if there was a time of year restriction condition as recommended by the Department of Game and Inland Fisheries, that an archeologist be present during the installation of the pipe and the Department of Historic Resources be notified of any historical finds, and because of verbal approval received by staff from Ms. Mason of VIMS. Her comments are a part of the verbatim.

Carl Josephson, Senior Assistant Attorney General, asked staff if this item met all other criteria for being considered a page two item. Ms. West said yes and stated there were no protests received for this project.

**After further discussion, Associate Member McLeskey moved to approve Items A through G. Associate Member Robins seconded the motion. Associate Member Fox recommended that the approval be dependent on the receipt of the VIMS letter for Item G, Cox Communications. Associate Member Robins recommended that the motion be amended to include the stipulations recommended by staff for Item G. Cox Communications in regards to the Dept. of Game and Inland Fisheries and the Department of Historic Resources. Associate Member McLeskey said that he agreed with the amendments and asked when would the VIMS letter be sent to the Commission. David O'Brien, VIMS representative, stated that at the end of the Thanksgiving weekend. The motion carried, 8-0.**

**2A. SANDERS YACHT YARD, #04-2767**, requests authorization to dredge 3, 400 cubic yards of State-owned subaqueous bottom material from Carter Creek, by clamshell bucket with contained upland disposal, to obtain maximum depths of minus six (-6) feet at mean low water for the previously authorized Sanders Yacht Yard and Crockett’s Landing Marina facilities in Irvington. Recommend approval with the requirement for a staked, 20-foot buffer channelward of mean low water, a pre-dredge conference and post-dredge bathymetric survey, and a royalty in the amount of \$1,530.00 for the removal of the material at a rate of \$0.45 per cubic yard.

Royalty Fees (2,400 cu. yds @\$0.45/cu. yd.).....\$1,530.00  
Permit Fee.....\$ 100.00  
Total Fees.....\$1,630.00

**2B. CITY OF RADFORD, #05-2098**, requests authorization to cross Plum Creek, a tributary to the New River, in four (4) locations with force main and interceptor pipelines associated with the proposed Gibsondale Sewer Project on the east side of the City of Radford near State Route 11. The pipelines will be protected by steel encasement pipe and will be buried a minimum of two (2) feet below the natural creek bed. Recommend approval with the inclusion of our standard instream permit conditions.

Permit Fee.....\$100.00

**2C. DANVILLE DIVISION OF POWER & LIGHT, #05-1708**, requests authorization to attach two (2) 12 kV power lines below the Main Street Bridge in Danville, spanning approximately 500 feet of ordinary high water within the Dan River. This installation will serve to replace the lines being removed with the demolition of the Worsham Street Bridge.

Permit Fee.....\$100.00

**2D. FAIRFAX COUNTY DEPARTMENT OF PUBLIC WORKS & ENVIRONMENTAL SERVICES, #05-1752**, requests authorization to replace a 12-inch diameter, steel encased, sanitary sewerline, crossing beneath approximately 745 linear feet of Little Hunting Creek in Fairfax County. The sewerline replacement will be along the same line and grade as the existing sewerline. Recommend approval with standard in-stream conditions and a time-of-year restriction, which precludes construction activities between February 15 to June 30 to protect anadromous fish.

Permit Fee.....\$100.00

**2E. HENRICO COUNTY DEPARTMENT OF PUBLIC WORKS, #05-2131,** requests authorization to install a submerged 48-inch diameter sewer force main beneath Four Mile Creek one-half mile east of the US RT 5/I-295 interchange in Henrico County. Recommend our standard instream permit conditions.

Permit Fee.....\$100.00

**2F. FREDERICK JONES, ET AL, #05-0726,** requests authorization to install a single piling to support an osprey-nesting platform approximately 100 feet channelward of the Permittees' property situated along the Piankatank River near Cherry Point on Gwynn's Island in Mathews County. The piling will encroach on "Additional Public Ground."

Permit Fee.....\$25.00

**2G. COX COMMUNICATIONS HAMPTON ROADS, #05-1997,** requests authorization to install, using both directional drill and trenching, 4,500 linear feet of fiber optic cable under the York River between York and Gloucester Counties. Staff recommends a time-of-year restriction from February 15 to June 30 to protect spawning of anadromous fishes which was recommended by DGIF, that an on-site underwater archaeologist be present during installation where submerged historic resources may be encountered, and that the Department of Historic Resources be notified if historic resources are encountered.

Permit Fee.....\$100.00

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**3. CLOSED MEETING FOR CONSULTATION WITH OR BRIEFING BY COUNSEL. No closed meeting was held.**

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**4. JOHN B. LAPETINA, JR., #05-0663.** Commission review of the Norfolk Wetland Board's October 12, 2005, decision to approve a permit to install a swimming pool within a coastal primary sand dune situated along the Chesapeake Bay in Norfolk.

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

Ms. West explained that Mr. Lapetina's property is located along the Chesapeake Bay in the Oceanview area of Norfolk. The project calls for the construction of a 38-foot by 28-foot garage/carriage house with a second story deck and a 28-foot by 14-foot swimming pool. A portion of the carriage house, deck and pool will be constructed within a jurisdictional coastal primary sand dune.

Ms. West said that the Norfolk Wetlands Board approved a similar project on April 13, 2005. The Commission reviewed that decision at its meeting on June 28, 2005, and ultimately chose to remand the application back to the Board for reconsideration. The Commission's remand order included certain specific items that the Board should address if, after Mr. Lapetina had pursued all available options for avoidance and minimization of dune impacts, the project remained within a jurisdictional dune area. A modified project proposal was reheard on October 12, 2005, and approved by the Board.

Ms. West stated that the Norfolk Wetlands Board considered Mr. Lapetina's revised plans at their October 12, 2005, meeting. Testimony during the hearing stated that the structural encroachment had been moved landward by approximately 7 feet. When comparing the original plan with the revised proposal, it is clear that the pool had been reoriented, thereby resulting in a reduction in the encroachment of the pool into the dune area.

Ms. West explained that the VIMS report was read into the record. VIMS reiterated their previous concerns, stating their opinion that the entire proposal should be relocated landward of the jurisdictional dune.

Ms. West said that the Board's staff, Mr. DuBois', quoted the Beaches and Dunes Guidelines and repeated his opinion that the landward extent of the dune had been artificially enhanced due to the homes adjacent to this undeveloped parcel because wind blown sand tends to be directed between structures, so that sand would be deposited deeper on undeveloped lots.

Ms. West said that Mrs. Martha Wakefield the adjacent property owner addressed the Board. She stated that when her family constructed the swimming pool on her property, the excavated sand was placed on the adjacent parcel. Mrs. Wakefield did not specify when the pool was constructed, however, it is present in a 1974 aerial photograph shown to the Board. As such, it predates the 1980 Coastal Primary Sand Dunes and Beaches ordinance. Mr. Lapetina now owns that property.

Ms. West stated that Mr. Ellis James also addressed the Board and expressed his opposition to the project.

Ms. West explained that Mr. DuBois again recommended approval of the project as proposed with special conditions requiring the placement of sand fencing and a

construction limits fence, replanting all impacted vegetated areas with beach grasses, and restrictions on the placement of construction debris within the dune area.

Ms. West said that upon review of the record provided, staff does not believe that the decision to approve the project is consistent with the Guidelines, that the record supports a determination that the placement of a garage, second story deck, and a swimming pool within a jurisdictional dune area constitutes necessary economic development, or that there will be no significant ecological impact from the proposal. Staff also does not believe that the Board complied with the Commission's directives as conveyed in the letter of finding dated June 30, 2005.

Ms. West said that while the Wetland Board staff maintained its position that the dune location on the undeveloped lot was an artifact of the adjacent structures, a critical evaluation of the projects proposed impacts to the jurisdictional dune areas, regardless of their origin, remains a requirement of Section 28.2-1403(9) and cannot be diminished. Jurisdiction, per se, was not the issue.

Ms. West explained that the Commission gave explicit directions that Mr. Lapetina should explore all options for avoiding and minimizing impacts to the jurisdictional dune area before the Board rescheduled a rehearing. Other than the reorientation of the pool and the seven foot landward relocation of the proposed structures as presented on the plans considered by the Board, there was no other information presented to the Board outlining the applicant's efforts to pursue any additional alternatives or variances to avoid and minimize impacts to the dune, especially those noted in the VIMS report.

Ms. West said that in addition, the Board was instructed to specifically address whether a garage/carriage house and swimming pool had an inherent need to be within a jurisdictional dune and whether the garage and pool structures constituted necessary economic development. The wetlands board staff did state that Mr. Lapetina desired that the garage/carriage house and his home be connected by a breezeway. Although it was clear that his desire for the breezeway drove the location of the project footprint, there was no discussion as to whether a swimming pool and garage themselves had an inherent need to be located within a jurisdictional dune area.

Ms. West stated that the applicant's property appears to have sufficient non-jurisdictional area within which to accommodate the placement of the desired structures without impacting the jurisdictional dune at all. With some design alterations, he might be able to accommodate his desire to construct a breezeway to connect the garage, or even construct a swimming pool.

Ms. West explained that the Guidelines specifically state that alterations to the coastal primary sand dune are ordinarily not justified for activities that have no inherent need to be immediately adjacent to the shore and for which there is sufficient room landward of



the coastal primary sand dune. The Guidelines also state that structures with large areas in contact with the ground, such as swimming pools, should be discouraged.

Ms. West said that given the above, staff recommended that the Commission reverse the decision of the Norfolk Wetlands Board and deny the application based on a finding that the decision to approve the project as proposed is contrary to the Guidelines.

Ms. West also said that staff would like to reiterate that we would be able to support a reversal of the location of the garage/carriage house and the pool provided that portion of the garage/carriage house placed within the jurisdictional dune area was elevated on piles and the seaward encroachment of all structures were in line with Mr. Lapetina's adjacent home and the adjoining structure to the east.

Derick Mungo, representative for the City Attorney's office, was present and his comments are a part of the verbatim record. Mr. Mungo asked that Mr. DuBois, Wetlands Board Staff, be allowed to present the board's case.

Kevin DuBois, Wetlands Board Staff representative, was sworn in and his comments are a part of the verbatim record. Mr. DuBois explained that he had a graphic to explain the proceedings and actions taken by the Wetlands Board. Carl Josephson, Senior Assistant Attorney General and VMRC Counsel asked if this was a demonstrative exhibit of the Wetlands Board meeting record. Mr. DuBois responded, yes.

**Associate Member Robins moved to open the record to include the information. Associate Member Holland seconded the motion. The motion carried, 8-0. Mr. Josephson explained that since this was a demonstrative exhibit comparing information already in the record of the Wetlands Board meeting, it was not necessary to open the record. He said that any other new information would require a decision by the board to open the record. Associate Member Robins amended his motion to allow for the review of this new information. Associate Member McLeskey seconded this motion. The motion carried, 8-0.**

Mr. DuBois said he wanted to review the staff information regarding the June 30<sup>th</sup> letter. He said the applicant in an effort to comply had re-oriented the proposal. He explained that City staff met with the applicant to review the application to minimize the encroachment before the Wetlands Board hearing and this was not a part of the board's record. He said that some of the VIMS recommendations could not be done to minimize the encroachment on the sand dune, because of elderly parents who required easy access to all structures. He said that the letter stated that scaled, engineering drawings were needed and this had been done. He said the letter stated that the board did not consider and satisfy criteria in Section 28.1403 of the Code of Virginia and the Coastal Sand Dune and Beaches Guidelines. He said in staff notes, which were a part of the record, showed this was done. He explained, that because of information from VIMS as to the artificial formation of some of the dunes by nature between structures, the Wetlands Board staff

felt that there was minimal encroachment on the natural sand dune. He said that the board had allowed minimal encroachment on the backside of a primary coastal sand dune for necessary economic development. He said the project was approved with special conditions. He said the Wetlands Board did comply with VMRC recommendations, the applicant made adjustments to the proposal to reduce impact, and it was approved in accordance with Section 28.2-1408.

Mr. Josephson asked if what the Wetlands Board did was consider private construction on private property to fulfill the standard for necessary economic development. Mr. DuBois responded, yes.

Associate Member Schick asked if the applicant had considered putting these structures on his second lot. Mr. DuBois said that he did not believe there would be enough room.

Mr. Mungo said that they were asking that the Commission uphold the Wetlands Board decision. He said it was not necessary for the Commission to substitute its decision with the Wetlands Board decision as the Wetlands Board had met all that is required of them when making this decision.

Dr. John Lapetina, Jr., was sworn in and his comments are a part of the verbatim record. Dr. Lapetina said that he had worked hard with the Wetlands Board to minimize the impacts of his project. He said he was doing this for his elderly parents to provide them a living space adjacent to his residence. He said he was paying a lot of money each month for the privilege of living next to the Bay.

Mr. Ellis James stated that he had attended the Wetlands Board meeting and asked to be allowed to speak at this hearing. No one on the Commission board offered a motion to further open the record.

Bob Grabb, Chief Habitat, explained that the staff was mainly concerned with the encroachment of the pool on the backside of the primary coastal sand dune when modifications to the entire project could be made by the applicant to eliminate this encroachment. He said the house could be justified as fulfilling the standard for necessary economic development, but not the pool.

**Associate Member Holland moved to uphold the Wetlands Board decision. Associate Member McLeskey seconded the motion.**

**Associate Member Robins said that he had several concerns regarding the project and offered a substitute motion, thereby moving to deny the application, which would allow the applicant to reapply with a modified proposal. Associate Member Jones seconded the motion. The motion failed, 2-6. Associate Members Robins and Jones both voted yes.**

**Associate Member Garrison asked for a vote on the original motion by Associate Member Holland. The motion carried, 6-2. Associate Members Robins and Jones both voted no.**

No applicable fees, Wetlands Review.

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- 6. **OLD POINT COMFORT, #05-0590**, requests authorization to construct a 30 slip pier facility with four (4) uncovered boatlifts, a 13-foot by 5-foot floating dock to accommodate five (5) personal watercraft, and a 53-foot by 72-foot covered pavilion with restrooms, a covered open-air area, an uncovered open-air area, and a pump-out surrounded by associated floating piers, and a 177-foot long by 1-foot wide floating walkway, and to install 309 linear feet of steel sheet bulkhead aligned no greater than two (2) feet channelward of an existing deteriorated bulkhead, and dredge 1,090 cubic yards of State-owned submerged lands to achieve maximum depths of minus six (-6) feet below mean low water within an approximately 200-foot by 95-foot area adjacent to their property situated along the Hampton River in Hampton. The facility is designed to serve 30 condominium units on the adjacent upland.

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

Ms. West explained that the project is located at the property of the former Jones Marina, between the Hampton Yacht Club and Georgetown Condominiums, in the downtown area of Hampton. The upland property proposal was to develop a 30-unit condominium complex with an accompanying 30-slip community marina facility. The proposed facility would include a marina clubhouse and recreation amenity with restrooms and a large deck area. Part of the deck area would be covered with a retractable canopy. The facility was to be used for tenant activities such as fishing, socializing, cookouts, holiday gatherings and weddings. The proposed facility will also be available by lease to outside groups. A deteriorated sheltered area currently exists at the facility. This building served to provide ice and other services to the working watermen who utilized the former Jones Marina in the past.

Ms. West said that initially, both adjacent property owners protested the project and those protests were resolved by the applicant's efforts. There were no other protests to the project.

Ms. West said that the Commission previously considered development at this property. During their March 22, 1999, meeting, the Commission unanimously voted to authorize the reconstruction of the marina and the replacement of the existing deteriorated sheltered area with a 3,400 square foot restaurant facility. At that time, staff recommended denial

of the restaurant facility, noting that it was not a water-dependent structure. The property owner at the time expressed his intent to allow the facility to remain a commercial marina that served commercial watermen. The Commission noted during their discussion of the proposal that a restaurant would be an economic benefit to the downtown Hampton area, that the impacts were anticipated to be minimal, and that this area was already developed. As a result, the project was unanimously approved. A permit (VMRC #99-0057) was issued to Riverbend Management for the project. That permit expired on March 23, 2002 and the facility was never constructed.

Ms. West stated that with regards to the current proposal, the Virginia Institute of Marine Science has stated that the uses associated with the pavilion do not appear to be water-dependent and should be located on the upland. VIMS also suggested the use of zonation mooring at the facility to reduce the amount of dredging.

Ms. West said that the United States Coast Guard, the Virginia Department of Health and the Department of Environmental Quality have all stated that the project is acceptable.

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 for private use, §28.2-1205 of the Code of Virginia stipulates that: "In addition to other factors, the Commission shall also consider the public and private benefits of the proposed project and shall exercise its authority under this section consistent with the public trust doctrine as defined by the common law of the Commonwealth adopted pursuant to §1-10 in order to protect and safeguard the public right to the use and enjoyment of the subaqueous lands of the Commonwealth held in trust by it for the benefit of the people as conferred by the public trust doctrine and the Constitution of Virginia."

Ms. West further explained that when considering the water dependency of a proposed structure, the proposal must be evaluated as to whether it and the activities associated with it must be located in, on, or over State-owned submerged lands. The pavilion clearly cannot be considered a water dependent structure. In addition, it is staff's opinion that, unlike the previously authorized restaurant which the Commission considered to represent a public benefit due to its economic value to the City of Hampton as well as its serving as a public amenity, a pavilion designed to serve only the non-water dependent needs of the residents of a condominium complex, as well as a facility which can be utilized to generate income for the condominium residents as a space for lease, cannot be viewed as a public benefit.

In addition, Ms. West said that staff could not support the 177-foot long floating walkway located adjacent to the bulkhead. That walkway appears to be an unnecessary encroachment over State-owned submerged lands given that the residents can easily walk along the upland to travel between the piers.

Ms. West explained that as a result, staff recommended approval of the piers, slips, bulkhead, and dredging, but denial of the pavilion and the 177-foot long floating walkway. Should the Commission elect to approve the pavilion, staff recommended that the structure be redesigned to eliminate the bathrooms and floating piers surrounding the pavilion facility. There was no inherent need for the bathrooms to be over the water. The floating piers surrounding the pavilion could be used for side-to mooring and have the potential to become unauthorized slips at the facility.

Tom Langley, representing Langley and McDonald Engineering, was sworn in and his comments are a part of the verbatim record. Mr. Langley stated that there were some other people present to speak in support of the proposal. He explained that the slide shown by staff and taken from the Langley and McDonald's website did not accurately depict the proposal being heard by the Commission. He said the existing structures were in great disrepair and this proposal will clean up the area. He provided slides for his presentation. He said the proposed dredging was to be done in a way not to interfere with the Georgetown dockage. He said the floating walkway would provide a single access to the piers and was a more efficient design. He said the pavilion was proposed to be placed in the footprint of the proposed Restaurant that never was constructed and actually took up less area. He said they had received all other permits required and this was the last one needed.

Susan Borkard, representing the City of Hampton, Dept. of Economic Development, was sworn in and her comments are a part of the verbatim record. Ms. Borkard said an overall development plan was approved by the City Council. She said this project is pivotal to this plan and their other developments in the city. She explained that this project would contribute to the development of the city's business district as well as provide more high value economic development, which results in higher revenues for the city. She also said that the pavilion is a complement to the overall project and contributes to the waterfront, which is considered a valuable resource.

Sherry Spring, representing the Downtown Hampton Development Partnership, was sworn in and her comments are a part of the verbatim record. Ms. Spring said she represented her group in support of the project. She said this would encourage other private development in the downtown Hampton area. She said they were asking that the project be approved.

Vince Behm, representing the Hampton Yacht Club, was sworn in and his comments are a part of the verbatim record. Mr. Behm said they were in support of this project. He said they were requesting a post dredge sounding to make sure that there is no spill onto their property and that the cut of the bulkhead be placed on the applicant's property. He said that the applicant had verbally agreed to these requests, which he was sure would be honored.

Wayne Rodehorst, representing the Georgetown Condominiums, was sworn in and his comments are a part of the verbatim record. Mr. Rodehorst explained that he had objected to the project originally, but the applicant had worked with him and resolved his protests. He said that they had no further objections.

Donna Phaneve, representing the Phaneve Design Group, was sworn in and her comments are a part of the verbatim record. Ms. Phaneve explain the plan was to insure transparency of the project as much as possible. She said it was important for them to provide an open-air pavilion with a complimentary design for the downtown waterfront area, which would be an amenity available for the community to use.

Mr. Langley explained that the pipes would have freeze protection and also a pump out station will be provided.

Bill Northington, developer for Old Point Comfort, LLC, was sworn in and his comments are a part of the verbatim record. He explained that the type of condominiums planned were for the benefit of the downtown Hampton area. He said the density of the project requires them to provide certain amenities, such as the praviilion. He said they have cleaned up the waterfront with the removal of the numerous creosole pilings. He said the desire was to provide an attractive and beneficial project for the downtown waterfront.

Associate Member Robins asked for clarification by Mr. Langley for the need for the floating walkway. Mr. Langley said that this was to provide easier access to the gangways and the piers.

Associate Member Garrison stated the proposed project was supported by the locality and would clean up the area and provide a facility that would benefit the City of Hampton. He felt it was a project that should not be turned down.

Associate Member Schick asked what size platform would be acceptable. Ms. West said she could not answer. Mr. Schick asked even with elimination of the pavilion, did staff still feel the platform was excessive. Ms. West responded yes.

Associate Member Schick said that this proposal would benefit the community, but he did have a problem with the pavilion and the problems allowing it could cause in the future by setting a precedence for others to make such requests of the Commission. He said he supported the platform for a gathering place.

**Associate Member Schick moved to approve the project, eliminating the pavilion and to allow the platform in a reduced size. Associate Member Robins asked that the motion be amended to say that the platform size would be subject to the staff's approval. Carl Josephson said that the motion could be amended in this way and if an appropriate size could not be agreed upon, then it would come back to the Commission. Associate Member Fox seconded the motion.**

Associate Member McLeskey explained that he supported the applicant’s proposal and offered a substitute motion to approve the project as proposed. Associate Member Garrison seconded the motion. The motion was defeated, 3-5. Associate Members Schick, Fox, Robins, Jones, and Bowden voted no.

Associate Member Garrison asked for a vote on the original motion offered by Associate Member Schick. The original motion carried, 5-3. Associate Members McLeskey, Garrison, and Holland voted No.

Royalty Fee (1,090 cu. yds. @\$0.45/cu. yd.).....	\$490.50
Permit Fee.....	\$100.00
Total Fees.....	\$590.50

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Associate Member Garrison called for a ten-minute break. Commissioner Pruitt arrived at this point.

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- 5. **ALICE SIEGEL, #01-0055.** Commission consideration of a 39-foot by 43-foot private, non-commercial enclosed boathouse constructed in non-compliance (Sworn Complaint #02-16) with its VMRC permit at property situated along the Pamunkey River in King William County.

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 is located along the eastern shoreline of the Pamunkey River, approximately 11.8 miles downstream of the Rt. 360 crossing, on the Chericoke Farm in King William County. The shoreline along this reach of the river is rural in character and is predominantly wooded or agricultural. Boating activity is seasonal and considered to be light to moderate.

Mr. Owen stated that on January 16, 2001, staff received an application requesting authorization to construct a 75-foot long private open-pile pier with a 12-foot by 33-foot L-shaped deck and a 33-foot by 45-foot long “A-roof boatlift.” Daniel R. Winall with Water’s Edge Construction, the authorized agent for John T. Siegel (now deceased), submitted the application. The stated purpose of the project was to provide access to the river and mooring for a boat. The projected cost for that portion of the project over State-owned bottom was listed as \$28,000. In keeping with the provisions of §28.2-1207(A)(1-3) of the Code of Virginia, staff on May 11, 2001, administratively issued the permit for the subject boathouse based on the cost estimate provided and the fact there was no opposition.

Mr. Owen said that Mr. Bruce Arkemai, representing Tom Evelyn at the Commission's September 24, 2002, after-the-fact consideration of VMRC #00-0519 permit application, presented the initial evidence of the type of structure constructed by the Siegels. Staff was subsequently directed to investigate the permit status of the Siegel structure as well as a number of others presented by Mr. Arkemai. Pursuant to §28.2-1212.B of the Code of Virginia, staff on October 17, 2002 conducted an on-site compliance inspection in the applicant's presence. That inspection revealed that the boathouse had been constructed in non-compliance with the permit drawings dated January 1, 2001.

Mr. Owen explained that a Sworn Complaint and Notice To Comply were issued on November 4, 2002, noting that the permit drawings depicted an A-frame structure with dormer style skylights/windows in the roof. It further noted that, contrary to the permit document, walkout porches had been constructed on the front and back of the upstairs section along with several windows. More importantly, the majority of the interior of the structure was finished off as living space, which was never indicated as a proposed use of the structure on the VMRC application. Such use was never authorized in the May 2001 Commission permit.

Mr. Owen said that the Notice To Comply further directed the applicant to submit final as-built drawings of the structure, to provide an accurate cost of the structure as well as a description of the purposes and uses to be made of the structure, how much it was used and an explanation of how and when the design of the structure changed from that which was originally permitted.

Mr. Owen said that Patrick A. O'Hare with Reed Smith LLP, former counsel for the applicant, responded on November 27, 2002, with a detailed chronology of events that led to the structure's constructed dimensions. Mr. O'Hare noted that the architectural firm of Talley & Suttentfield designed the boathouse. He further advised that Mr. Winall was retained as the builder. His responsibilities included obtaining all necessary permits and approvals from government agencies.

Mr. Owen stated that Mr. Winall's original contract with the applicant, dated April 19, 2001, identified a project cost of \$75,000, which was 2.7 times the original \$28,000 estimate provided to VMRC in the Joint Permit Application we received January 16, 2001. It also exceeded the \$50,000 estimate that was provided to King William County in an April 23, 2001, "Building Residential Application" they filed. The contract erroneously noted that the \$75,000 cost estimate was based on current drawings submitted to VMRC for permit approval. Most importantly, however, is the fact that once the project cost exceeded \$50,000, neither the Commissioner nor staff had the power to approve the permit in the first place. Any prior approval became null and void.

Mr. Owen explained that a close review of King William County's Planning Department files revealed that a second application submitted on June 18, 2001, by Water's Edge Construction for a "Boat House and Pier" valued the structure at \$75,000. The Planning



Department's files also included copies of a Zoning Application for a Special Exemption notarized April 23, 2001, a Land Disturbance/Zoning Permit Application filed April 23, 2001, an Electrical Plan, Pier/Foundation Plan and a First Floor/Deck Plan that depicted three storage areas, one work area and a stairwell to a second floor. These plans, with their level of detail and revised project cost estimates, were never submitted to VMRC.

Mr. Owen stated that the final contract between Water's Edge Construction and the Siegels, dated June 22, 2001, identified a revised project cost of \$132,400 and specifically noted a "stairway to second floor living area." The contract further referenced a "second floor living area to consist of T-111 walls, 1 x 6 vaulted ceilings and 1 x 6 pine floor." Additionally, Mr. O'Hare provided correspondence, dated November 9, 2001, which identified cost overruns totaling \$50,786. Mr. O'Hare also acknowledged that the final project cost for the structure was \$178,150.

Mr. Owen said that the project as constructed significantly and substantially deviates from the VMRC permit drawings dated January 1, 2001 and constitutes a substantial violation of the Code of Virginia, Chapter 12, Article 1. Additionally, the original contract, let alone the final project cost, exceeds the statutorily authorized limit that the Commissioner or his representative can approve. As such, only the full Commission could have issued the permit to encroach upon the subaqueous beds, which are the Commonwealth's property. Accordingly, the structure that exists today does so without any VMRC authorization.

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

Mr. Owen stated that while the wet slip portion of the boathouse is considered by staff to be water dependent, the unauthorized second floor and first floor living space areas are not. It does appear from staff's review of Mr. O'Hare's November 27, 2002, response that the applicant's desire for a second floor was clearly conveyed, from the start, to both her architect and builder. He further argued, however, that the responsibility for obtaining all necessary permits rested with Mr. Winall. Staff notes that such language is absent from the final contract. Regardless, staff question whether the responsibility for compliance can be so easily transferred from the property owner to a contractor.

Mr. Owen further stated that it should also be noted that the boathouse's constructed dimensions, 36' by 44', exceeds the 33' by 39' footprint approved by the County's Board of Zoning Appeals. That approval was also contingent on the applicant obtaining VMRC's permit prior to construction.

Mr. Owen said that with respect to the fate of the structure itself, staff found it difficult to endorse this type of non-water dependent project or to recommend its after-the-fact retention. The structure had already been the subject of a previous complaint and could easily be viewed as precedent setting for similar structures proposed to be constructed on State-owned bottom. Accordingly, staff recommended that the Commission direct the complete removal of all unauthorized portions of the structure no later than April 30, 2006. If the applicant wished to move the entire structure onto the adjacent upland, staff would be amenable to reconstruction of a replacement boathouse structure similar to that initially applied for.

Curtis Manchester of the Reed-Smith Law Firm, representing Mrs. Siegel, was present and his comments are a part of the verbatim record. Mr. Manchester explained that this case involved personal architectural details and this is not an after the fact case, but a non-compliance issue. He said the Commission has only raised concerns for architectural design and increased cost. He said that there is no other boathouse to be seen from this property for 10 miles. He explained that Mr. Evans was much further downriver and he had not complained about the structure only that he wanted one also. He said the applicant spoke with the adjoining property owners and they supported the project. He said that no one had raised a protest against the project. He said that this was not Ms. Siegel's main residence so she was not there all the time only on occasions where family would also visit there. He said she said since the house was built in 1830, she had worked hard to restore all the other structures so they would be historically and architecturally cohesive. He said this was a replacement for a boathouse destroyed by a hurricane and an architect had been hired to design it. He stated that the applicants had never built a boathouse and they relied on the contractor to get any permits, including the VMRC permit. He provided a copy of the joint application. He said the staff had never asked about the gap and the 14-foot roofline and the contractor submitted the architect's design as well as other required information. He said that staff had not said that the structure exceeded the footprint. He said the county had approved the dimensions. He provided a copy of the permit as well. Associate Member Robins stated that the permit was an item included in the staff's packet. Mr. Manchester stated that the permit says the structure will be constructed in accordance with the plan. He explained that the VMRC staff could approve projects with cost up to \$50,000.00. He said the Siegels were working with estimates and as the project proceeded in the process of getting all approvals, those costs had increased to \$75,000.00. These cost increases were a result of Mrs. Siegel wanting more architecture to match the other structures. He explained that was why the pitch of the roof on the boathouse was changed, and the porch roofs were expanded for that same purpose. He said there was no intent by the applicants to be in violation because others had told her that if it stayed within the footprint, VMRC was not interested in the

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architectural aspects. VMRC staff never made any site inspections during the time of construction, only staff from the county did. He said the 2<sup>nd</sup> story was only used for family gatherings and in the winter for storage. He said there were no amenities for habitation only for the purpose of using the boat. He said the guidelines say nothing about flooring and there is no harm done to the public. He said the guidelines tell the Commission to consider private benefits as well.

Mr. Manchester explained that architectural design is not an enforcement issue and removal would not be assisting the public. He said it would be economically wasteful. He said nothing addresses any increased cost or a need to return to the VMRC because of it. He said the cost estimates at the time of application were valid. He said they were asking that the Commission to rule to not seek further enforcement action nor require removal. He said they asked that the staff be instructed to resolve this issue. He said if there were technical violations considered by the Commission, then there should be a minimal fine and no enforcement action.

Alice Siegel, applicant, was sworn in and her comments are a part of the verbatim record. Ms. Siegel said this project was started in 2002. She said she trusted her architect to make a good plan and the second architect changed the plan to match the house and be historically correct. She said she has historical pride for the Pamunkey area and wants to keep it historically correct for now and the future. She said she had received approval from the county, the Wetlands Board and VMRC. She said all construction was within the dimensions of the permit and she felt no violation had occurred. She said it had all been built in accordance with the permit.

Associate Member Holland said he would like to see staff meet with the applicant and work this all out. He said the project had been kept within the footprint and height and width. **After much discussion, Associate Member Holland moved to approve staying within the footprint and for a meeting of staff with the applicant to be held in an effort to find a resolution, thereby, bringing back a recommendation to the next meeting for the Commission's consideration. Associate Member Fox seconded the motion. Associate Member Bowden said he could support the motion for the 30 days to work on a solution, but when it comes back there needs to be a hard decision made at that time. Associate Member Schick said he could see room for negotiation because it is a beautiful structure. He further said that it was not just an architectural issue but an intentional deception on someone's part on how the building would be used as information was left off the application. The motion carried, 8-0.**

No applicable fees.

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Commission broke for lunch at approximately 1:00 p.m. and returned at approximately 1:40 p.m.

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**13. SPECIAL PRESENTATIONS:**

Colonel Steve Bowman, Deputy Commissioner, announced some special presentations. He introduced Special Agents Logan Gregory and Sara Block, both from NOAA.

Special Agent Logan Gregory, representing NOAA, made a presentation to John Croft for his efforts in the long time investigation, Tangle Web. He also made a presentation to James Simpson for his part of the investigation as well.

Colonel Steve Bowman, Deputy Commissioner, made special presentations to James Simpson and Paul Newman in recognition of their long and dedicated service. Both have retired from the Virginia Marine Resources Commission, Law Enforcement Division.

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- 7. **HURLEY LLC, #04-1649**, requests authorization to construct 1,175 linear feet of 5-foot wide open-pile pier with finger piers and mooring piles to create 59 additional wet-slips adjacent to the Grey's Point Campground situated along Meachim Creek in Middlesex County. Several property owners along Meachim Creek protested the project

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

Mr. Neikirk explained that the Greys Point Campground is located along the easternmost branch of Meachim Creek and the Rappahannock River near the Norris (Route 3) Bridge in Middlesex County. The proposed slips are to be constructed within the eastern branch of Meachim Creek. The creek was approximately 650 feet wide at the project site. Most of the other properties along this portion of the creek are residential.

Mr. Neikirk said that the applicants propose to construct 670 linear feet of open-pile pier with 10 slips, roughly parallel to the shore. A 250-foot long T-head pier would extend from that with finger piers and mooring piles to create an additional 39 new slips. A 190-foot long extension of an existing pier was also proposed with finger piers and mooring piles to create another 10 slips. The combined total increase was 59 slips. At the most constricted point, the piers would encroach across approximately one-third the width of the creek. The majority of the proposed slips were located near a newly developed portion of the campground. There were currently 104 other existing wet-slips at the campground. The slips were available for rent to individuals renting campsites at the facility. The

owner, Mr. Hurley stated that there was a waiting list for slips and the long-term seasonal campers typically rented the slips on an annual basis.

Mr. Neikirk stated that several property owners along Meachim Creek protested the project. They were primarily concerned with the encroachment of the piers into the creek and the affect on navigation. Some expressed a concern associated with additional boat traffic and possible adverse environmental impacts. The application was revised in an attempt to address the concerns of staff and the protestants. The revisions reduced the number of proposed slips from 100 to 59 and realigned and reduced the channelward encroachment of the piers.

Mr. Neikirk said that the Virginia Institute of Marine Science (VIMS), in their revised report dated November 15, 2005, stated that although the number of proposed slips had been reduced from 100 to 59, there was still a significant increase in marina operations at this location and that there should be a demand for the slips to justify potential impacts. To minimize impacts they suggested locating the slips in water with a depth of at least minus three (-3) feet at mean low water to avoid the need for future dredging. They also stated that there should be adequate sanitary and pumpout facilities, as required by the Health Department and no overnight occupancy of the vessels. Finally they recommended the applicant develop a marina management plan to minimize incidental pollution associated with normal marina operations.

Mr. Neikirk also said that the Health Department, Division of Wastewater Engineering, had found the project acceptable. The cove was presently seasonally condemned for shellfish harvesting and the Division of Shellfish Sanitation stated that no additional closure would be required as a result of this proposal, provided no overnight occupancy was allowed on the moored boats. The Department of Environmental Quality stated that the water quality impacts should be minimal and temporary and that a Virginia Water Protection Permit would not be required. The Department of Conservation and Recreation documented the presence of Natural Heritage Resources in the vicinity of the project but stated that they did not anticipate that the project would adversely affect those resources. No other State agencies had commented on the proposal.

Mr. Neikirk explained that the proposed structures would not encroach on any public oyster planting ground, however, they would encroach on a riparian lease assigned to the applicant and would be close to an area recently leased to Ms. Elizabeth Benton. Ms. Benton did submit a letter of objection to the project. As currently proposed, staff did not believe the project would adversely affect navigation within the cove, however, it appeared that approximately six (6) additional slips could be constructed along the marginal wharf, thereby allowing the 250-foot T-head pier to be reduced by approximately 36 feet. Staff also questioned the need to extend the marginal wharf approximately 80 feet west of the landward end of the proposed T-head pier.

Mr. Neikirk stated that the usage of boat slips associated with this campground facility was somewhat different than that associated with a typical marina or a community pier. The campground was closed between mid-November and April 1<sup>st</sup> and no boats were moored at the slips while the facility was closed. Additionally, the boats using the facility were typically small, trailerable vessels. As VIMS noted in their report, however, there was still a potential for cumulative and secondary impacts associated with increased boating activity. Since the usage of the facility was limited to smaller vessels and the facility was closed more than three months each year, and since the proposal would not result in an automatic increase in the size of the area presently seasonally condemned for shellfish harvesting, staff believed the additional slips were justified provided they are constructed in a manner which would minimize the encroachment of the piers and provided the use of the facility was carefully managed by the owners of the facility.

Mr. Neikirk stated that accordingly, staff recommended approval of the project with the following special conditions:

- The six (6) slips located near the channelward end of the T-head pier shall be relocated to the marginal wharf and the T-head pier subsequently reduced to a length of 214 feet.
- The 80-foot by 5-foot extension of the marginal wharf west of the T-head pier shall be eliminated.
- The applicant shall be required to develop an acceptable marina management plan prior to permit issuance.
- The applicant agrees to prohibit the overnight occupancy of any vessels moored at the facility.

Walter Hurley, representing Grey's Point Campground, was sworn in and his comments are a part of the verbatim record. Mr. Hurley explained that this was a straightforward project. He said staff's recommendation to move the six slips to marginal water depths would cause a problem and questioned the reason for that suggestion.

**Commissioner Pruitt asked the Commission to allow the staff and Mr. Hurley to meet and discuss this issue and return to this item later in the meeting. All members agreed with this suggestion.**

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8. **PORPOISE COVE MARINA, #02-1354**, requests authorization to maintenance dredge 5,080 cubic yards of subaqueous material to obtain maximum depths of minus six (-6) feet at mean low water and to construct 145 linear feet of timber bulkhead, a 240-foot long boathouse containing 18 wetslips and to remove an existing pier and construct a new 175-foot long pier containing 10 wetslips in conjunction with the renovation of the Porpoise Cove Marina situated along the

Piankatank River in Middlesex County. Several nearby property owners protested the project.

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

Mr. Neikirk explained that the Porpoise Cove Marina is located on a small cove adjacent to Moore Creek, a tributary of the Piankatank River near Deltaville. Historical topographic maps indicate that Porpoise Cove had at times been a tributary of Moore Creek, however, the current entrance channel was apparently dredged around 1970 and there was no longer any connection to Moore Creek. With the exception of the marina, the property along Porpoise Cove is residential.

Mr. Neikirk said that the Commission issued a permit to a previous owner in 1992 to redevelop the marina through the demolition of an existing 65-slip facility and the construction of 33 new covered slips and 20 new open slips. The dredging of 600 cubic yards of subaqueous material within the cove to provide maximum depths of minus three and one-half (-3.5) feet was also authorized. Only a portion of that work was completed and the permit was transferred to the current owners, Mr. Leroy Holt and Ms. Andrea Holt, on May 7, 1997. The expiration date of the permit was extended three times, and finally expired on November 24, 2001.

Mr. Neikirk stated that the current application was to obtain authorization to construct an 18 slip boathouse and a 175-foot long pier containing 10 open slips, construct 145 linear feet of bulkhead and to dredge 5,030 cubic yards of subaqueous material to provide depths of minus six (-6) feet within the entrance channel and along the existing slips, minus five (-5) feet within the existing boathouse and depths of minus four (-4) feet in the area of the proposed slips. If approved, the marina would be authorized to have a total of 49 slips (28 covered and 21 open).

Mr. Neikirk said that several nearby property owners protested the project and many are residents along the cove. Their concerns included adverse environmental impacts from the additional boats, additional noise and lighting, and aesthetic concerns. Several expressed concerns regarding the encroachment on a deeded 300-foot buffer area located on the applicants' upland property. Some suggested the marina should be required to repair a bulkhead located on the western side of the entrance channel and remove all the old piers and pilings prior to being allowed to construct any new facilities.

Mr. Neikirk stated that the Virginia Institute of Marine Science (VIMS), in their revised report dated November 15, 2005, noted the revision to significantly increase the volume of dredging could potentially impact nearby shellfish resources and submerged aquatic vegetation. To minimize those impacts, VIMS suggested a time-of-year restriction on the dredging, development of a dredge material management plan and erosion and sediment control measures at the containment area. They also recommended the applicant develop

a marina management plan to minimize incidental pollution associated with normal marina operations.

Mr. Neikirk said that the application remained in a pending status for an extended period of time while the applicants worked with the Health Department to develop an acceptable plan for sanitary facilities. By letter dated February 18, 2005, the Health Department informed us they had approved the applicants' plan for sanitary facilities. They also stated that the marina was located in condemned shellfish growing waters and that the proposal would not cause an increase in the size of the closure. The Department of Conservation and Recreation stated that the project would not adversely affect any natural heritage resources. They added that the Piankatank River had qualified for designation as a state scenic river and recommended that the applicants work to maintain the scenic quality of the area. No other State agencies had commented on the proposal.

Mr. Neikirk further said that the dredged channel would encroach on oyster planting ground leased by the Moore Creek Channel Association. Staff contacted the leaseholders and they stated they had no objection to the project. The channelward end of the entrance channel is located approximately 350 feet downstream of an oyster reef constructed by the Commission.

Mr. Neikirk also said that the 5,030 cubic yards of dredging was to be conducted hydraulically with the dredged material being pumped into "Geotubes" and dewatered on the upland. Since there is a limited amount of upland available for disposal purposes, staff believes the applicant will need to carefully plan and perhaps stage the dredging operations.

Mr. Neikirk said that staff certainly understood the protestants' concerns regarding the degraded nature of this facility and the slow pace of redevelopment. Staff also understood their concern over potential environmental impacts associated with increased boating activities. The proposal appeared, however, to generally adhere to our Marina Siting Criteria and staff generally believed it was more desirable to redevelop an existing marina in lieu of developing a new facility in a more pristine area.

Mr. Neikirk explained that accordingly, staff recommended approval of the project with the following special conditions:

- All remaining derelict pilings and structures shall be removed prior to the construction of any new facilities.
- The applicant shall be required to develop an acceptable marina management plan prior to permit issuance.
- Dredging shall only be conducted between March 15 and June 30 or during October and November to minimize potential impacts on shellfish resources.
- A pre-dredging conference and a post-dredging bathymetric survey shall be required as conditions of the permit.



- A sediment curtain shall be deployed and maintained around the perimeter of the disposal area whenever dredge disposal operations are occurring.
- A royalty of \$0.45 per cubic yard will be assessed for all new dredging.

Leroy Holt, applicant, was sworn in and his comments are a part of the verbatim record. Mr. Holt said that he was agreeable with the staff comments. He said in regards to the treeline the area was bermed to above mean high water.

Virginia S. Mundel, adjoining property owner, was sworn in and her comments are a part of the verbatim record. Ms. Mundel said that she is the largest property owner and never received any notifications regarding projects and meetings and only found out by hearsay. She said that there was a condition on the deed that a buffer zone had to be maintained and it looked like they were moving it.

Gerry Nichols, adjoining property owner, was sworn in and her comments are a part of the verbatim record. Ms. Nichols was a resident across the cove. She said she is concerned that the buffer zone was not being kept up. She said the proposal shows the buffer was being moving westward. She said the 1962 deed says any owner of the marina had to maintain the channel, which was not done by previous owners. She said other property owners had been affected by this neglect of the channel. She said they were concerned about the water quality being affected by this proposal.

Mr. Holt said it was a 65-slip marina and that had been reduced. He said it was simply an anchorage for boats and strictly a resort. He said the deed requirement was to simply allow for access down to the beach and to not store boats and trailers and such. He said Ms. Kelly had ripped her entire property. He said the wall is to be taken out and a jetty installed.

Associate Member Robins said the main concerns seem to relate to the old derelict structures and staff had addressed that issue. He said he was inclined to support it.

**Associate Member Garrison moved to approve the project with staff recommendations. Associate Member Robins seconded the motion. The motion carried, 8-0.**

Permit Fee.....\$100.00

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9. **TONI S. SLOAN, #05-1639**, requests after-the-fact authorization to retain a 57-foot long by 12-foot wide private, pre-cast concrete boat ramp, which extends approximately 13-feet channelward of mean low water, adjacent to her property

along the Rappahannock River at the end of Beach Road near White Stone in Lancaster County.

Deferred until the December meeting at the request of the applicant (included with the motion for approval of the agenda at the beginning of the meeting).

\* \* \* \* \*

Vicky DeBerry, Court Reporter, was sworn in.

- 10. KINDER MORGAN BULK TERMINALS, INC., #05-2232,** requests authorization to construct a 90-foot by 220-foot long extension to Pier IX, and a new 57-foot by 1,200-foot long concrete pier (Pier X) as well as dredge approximately 540,000 cubic yards of subaqueous bottom material to create maximum depths of -52 feet below mean low water as part of a proposed expansion of their marine coal terminal situated along the James River in Newport News. The adjacent downstream property owner protested the project.

Randy Owen, Environmental Engineer, Sr. gave the presentation and his comments are a part of the verbatim record.

Mr. Owen explained that the project is located along the southwestern shoreline of Newport News Point on the James River. The purpose of the project was to expand the existing coal terminal operation, which currently involved receiving domestic coal by railcar for ship export, to additionally receive imported coal from overseas for shipment to U. S. consumers. This coal was intended to supplement the declining reserves of domestic coal required as fuel for U. S. power generation plants. The expansion would allow Kinder Morgan to simultaneously load coal into ships and barges, unload cement ships and unload imported coal from Panamax and Cape sized vessels.

Mr. Owen stated that, specifically, Kinder Morgan requested VMRC authorization to construct approximately 200 linear feet of concrete bulkheading, a 90-foot wide by 220-foot long extension to Pier IX, a new 57-foot wide by 1,200-foot long, open-pile concrete pier, two (2) turning dolphins and five (5) mooring dolphins with their associated 4-foot wide timber catwalks, and to dredge, by hydraulic or mechanical means, approximately 540,000 cubic yards of bottom material to facilitate the expansion of their marine terminal situated along the James River. All dredged material would be transported to and deposited within the Craney Island Disposal Facility.

Mr. Owen said that Dominion Terminal Associates (DTA) the adjacent downstream property owner had protested the project. DTA was an existing coal terminal facility that recently received VMRC authorization to expand their terminal to receive imported coal. DTA's primary objection appeared to center on a disputed 0.42-acre upland parcel that parallels Harbor Road. They suggested that Kinder Morgan's proposed conveyor system

encroached over their property without their permission and that its operation would restrict their use of Harbor Road, the only viable access to their property. Additionally, they argue that a proposed transfer tower would reduce the storage capacity of an existing upland settlement pond owned by Kinder Morgan, which might result in flooding of DTA's property. DTA had also expressed concern that Pier IX's extension and the construction of Pier X will negatively impact on the riparian use of their property and pose a safety hazard to vessels calling on DTA and the Virginia Port Authority, the upstream adjacent property owner.

Mr. Owen stated that the Virginia Institute of Marine Science (VIMS) Shoreline Application Report, dated November 11, 2005, stated that the primary adverse marine environmental impacts of the project would include loss of productive shellfish bottom, temporary impacts associated with dredging such as increased turbidity and loss of benthic organisms, increase in incidental discharges such as petroleum and paint leachate associated with increased ship usage, and potential increase in coal spillage into the waterway. To minimize the potential impact of dredging on shellfish, they recommended that no dredging be allowed during the months of July through September when spawning and spatfall occur.

Mr. Owen explained that the Fisheries Management Division of VMRC advised that the proposed dredge site supported hard clam densities that average 0.52 clams per square meter (2,104 clams per acre). Should the dredging be approved, they recommended clam mitigation at the Middle Ground Light Clam Broodstock Sanctuary at a rate of 1.3: 1.

Mr. Owen said that the Newport News Wetlands Board unanimously approved the project on October 31, 2005. The Department of Environmental Quality had advised that they would likely waive their requirement for a Virginia Water Protection Permit.

Mr. Owen said that the Virginia Pilots Association had recommended that a 700-foot minimum clearance be maintained between Pier X and any future pier DTA may build. They further advised, in a November 14, 2005 meeting with Kinder Morgan and VMRC, that the project as proposed did not negatively impact on shipping in the adjacent federal project channel.

Mr. Owen further said that the United States Coast Guard (USCG) indicated that the proposed setback of 370 feet from the federal project channel was acceptable to them as well. The Army Corps of Engineers (USACE) advises that it was processing Kinder Morgan's application for an individual Section 10 permit and that the project as proposed did not appear to negatively impact navigation. Their public comment period expired on November 26, 2005.

Mr. Owen explained that DTA's objections to project components that negatively impact on the disputed 0.42-acre upland parcel and/or Harbor Road were in an area outside the

Commission's jurisdiction. Accordingly, this portion of the project would not require a VMRC permit.

Mr. Owen stated that the project's setback from the federal project channel and acceptance by the USCG, USACE and the Virginia Pilot's Association suggested that the project should not pose a significant hazard to shipping in the channel. Staff additionally had received an executed adjacent property owner's form from the Virginia Port Authority that stated that they did not object to the project.

Mr. Owen explained that the remaining DTA concern within the Commission's jurisdiction, therefore, deals with the minimum clearance necessary to allow tug and vessel access between Pier X and any pier DTA might want to build in the future. Since Pier X was originally proposed approximately 120 feet upstream of the shared property line, staff asked Kinder Morgan to consider relocating the structure to a point 350 feet upstream of this line. This request was made in an attempt to equitably split the 700-foot minimum clearance recommended by the Pilots Association between the two parties and avoid potential project impacts on DTA's riparian area. On November 16, 2005, staff received revised project drawings relocating Pier X to a point 280 feet upstream of its southern property line. Kinder Morgan indicated that this was made possible by flipping its plans for mooring Panamax and Cape-sized vessels to the downstream side of Pier X. Since the smaller barges would now be moored on its upstream side, the minimum clearance necessary between Pier X and IX was now less than that originally required to moor two Panamax or Cape-sized vessels between the two piers.

Mr. Owen said that in light of these concessions, staff felt that Kinder Morgan had made a good faith effort to address DTA's concerns. Accordingly, staff recommended approval of the project as modified. Should DTA feel that the project encroaches into their riparian area, any permit issued by the Commission would not preclude them from having their rights adjudicated and/or apportioned in the proper court of chancery.

Mr. Owen said that in addition staff recommended that no dredging be conducted between July 1 and September 30 to protect shellfish spawning periods, that the applicant be required to purchase and plant 51,668 clams at VMRC's Middle Ground Light Clam Broodstock Sanctuary as compensation for the resource impacts, and that the Commission assess a royalty in the amount of \$243,000 for the new dredging of 540,000 cubic yards of State-owned bottom material at a rate of \$0.45 per cubic yard.

Arthur Camp with Camp, and Frank Law Firm and representing Kinder Morgan, was present and his comments are a part of the verbatim record. He said they had met with Kinder Morgan the previous Friday and discussed the concessions. He said that staff had worked hard on the project and done a very good job.

John Padgett with McQuire-Woods and representing DTA, was present and his comments are a part of the verbatim record. He said the documents were only prepared last

Wednesday and the concessions packets were not distributed until last Thursday and DTA staff have not had the opportunity to review all the documents. He said they did not object to the pier extension and the bulkhead. He explained that with the new pier even with the 700-foot buffer they would not be able to build a pier on their property. DTA said they wanted a compromise so they would have room to build if they desired and asked Kinder Morgan to move the pier 350 feet. He suggested more time be given because of their concerns and because of the other concerns that are not within VMRC's jurisdiction. He said they still had not had time to research whether an easement existed in the river in front of their property, which their attorney says does exist and VMRC staff says does not. He said he objected to the fact that Kinder Morgan would be allowed to build on their property. He requested 30 days to allow them to review and research how this all would effect their riparian rights.

Mr. Camp in his rebuttal said that time was money and they needed a vote by the Commission as to whether this project could go forward. He said that the changes do not put any burdens on DTA, only accommodations. He said they have riparian rights to be considered here, also. They had made concessions, and did not know what else could be discussed. He said that they needed to know this month what the Commission would decide.

Associate Member Robins asked Mr. Padgett how many piers were planned for the space between Kinder Morgan's new pier and DTA's existing pier. Mr. Padgett said they hoped to build as many as necessary depending on the needs of their business. He said the value of the property was based on how they could use it. He said they felt that Kinder Morgan would be dictating how they could use their property.

**Associate Member Robins moved to defer the matter until the December 20, 2005 meeting. Associate Member Schick seconded the motion. The motion carried, 8-0.**

Bob Grabb stated that the other key consideration was the dredging and DTA did not object to it, therefore, the Commission could consider approving it. Mr. Padgett said they need to confirm whether there were some easements and asked for another week to research it. He said that if there proved to be no easements, then the dredging would be no problem. Mr. Grabb says there were two easements in the early 80's and from research by staff they do not cover any subaqueous lands.

Mr. Camp stated going ahead with this portion would be okay as long as the dredging did not affect where they would be allowed to place the pier. He said they would not be able to move the pier either north or south.

**Associate Member Garrison moved to approve the dredging portion of the proposal. Associate Member Holland seconded the motion. The motion carried, 8-0.**

Royalty Fee (540,000 cu. yds. @ \$0.45/cu. yd.).....\$243,000.00

(A decision on the remainder of the project was deferred until December 20, 2005 meeting.)

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The Commission continued its consideration of Item 7 at this point.

- 7. **HURLEY LLC, #04-1649**, requests authorization to construct 1,175 linear feet of 5-foot wide open-pile pier with finger piers and mooring piles to create 59 additional wetslips adjacent to the Grey’s Point Campground situated along Meachim Creek in Middlesex County. Several property owners along Meachim Creek protested the project.

Mr. Neikirk said that the applicant agreed to cut back the pier extension of the marginal wharf and turn it, but that the depth would not be enough along the marginal pier to move the slips. He said staff agreed with Mr. Hurley regarding the slips because he had agreed to reduce the pier.

**Association Member Garrison moved for approval of the proposal as agreed to by staff and the applicant. Associate Member Schick seconded the motion. The motion carried, 8-0.**

Permit Fee.....\$100.00

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- 11. **DOMINION VIRGINIA POWER EASEMENT AND RIGHT-OF-WAY AGREEMENT.** Commission consideration of a resolution between the Commonwealth of Virginia, acting by and through the Chairman of the Marine Resources Commission, and Virginia Electric and Power Company, pursuant to Chapter 483, Acts of Assembly, 2004, conveying an easement over a portion of the Elizabeth River as described in a proposed agreement and accompanying plat.

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

The Resolution reads as follows:

**RESOLUTION**

**WHEREAS**, Chapter 483 of the 2004 Acts of Assembly authorizes the Virginia Marine Resources Commission to grant and convey to Virginia Electric and Power Company, its successors and assigns, upon such terms and conditions as the Commission, with the approval of the Governor and the Attorney General, shall deem proper, a permanent

easement and right-of-way of 50 feet width and a temporary right-of-way of a reasonable width as needed for the purpose of installing, constructing, maintaining, repairing and operating a submarine electric transmission cable system in and across the bed of the Elizabeth River, including a portion of the Baylor Survey, the centerline of which permanent easement is described in said Chapter 483; and

**WHEREAS**, the attached agreement has been prepared to grant to Virginia Electric and Power Company the permanent easement and right-of-way and temporary right-of-way authorized by Chapter 483 of the 2004 Acts of Assembly; and

**WHEREAS**, the metes and bounds of the permanent easement and right-of-way to be granted, which conforms to the metes and bounds of the centerline of the easement authorized to be granted as described in Chapter 483 of the 2004 Acts of Assembly, is described in the attached agreement and reads as follows:

The permanent easement beginning at Point A having a Virginia State Grid NAD27 Northing Coordinate 211,418.17 and an Easting Coordinate 2,630,170.72 being a point at mean low water along the property line dividing Grantors' property and land now or formerly owned by the United States of America (Craney Island Station), in the City of Portsmouth; thence N 66° 47' 51" E 254.38 feet to a point; thence along a curve with a radius of 975.00 feet and a length of 334.92 feet to a point; thence N 47° 06' 57" E 946.99 feet to a point; thence along a curve with a radius of 1,525.00 feet and a length of 523.86 feet to a point; thence N 66° 47' 51" E 4,131.51 feet to a point; thence along a curve with a radius of 975.00 feet and a length of 361.42 feet to Point B having a Virginia State Grid NAD27 Northing Coordinate 214,456.54 and an Easting Coordinate 2,635,910.59 being a point in the pier head / property line of a parcel of land now or formerly owned by the Norfolk International Terminal ; thence N 88° 40' 04" E 71.23 feet along said property line to a point; thence along a curve with a radius of 1,025.00 feet with a length of 431.98 feet to a point; thence S 66° 47' 51" W 4,131.51 feet to a point; thence along a curve with a radius of 1,475.00 feet and a length of 506.68 feet to a point; thence S 47° 06' 57" W 946.99 feet to a point; thence S 66° 47' 51" W 510.55 feet to a point in the property line dividing property now or formerly owned by the United States Of America and Grantor's land; thence S 86° 53' 02" W 29.13 feet along said property line to the point of the beginning and containing 7.1517 acres; and

**WHEREAS**, the easement location, pursuant to the foregoing metes and bounds description, is depicted on a plat entitled "Plat to Accompany Right-Of-Way Agreement With The Commonwealth Of Virginia" by Waterways Surveys & Engineering, Ltd. Dated April 20, 2004 and attached to and made a part of the attached agreement; and

**Commission Meeting**

**WHEREAS**, an August 17, 2004 real estate appraisal for the above-described easement and right-of-way, prepared for Virginia Electric Power Company, which appraisal estimated the market value for this grant to be One Hundred Fifty Five Thousand, Seven Hundred Sixty Four dollars (\$155,764) is now more than one year old, Virginia Electric Power Company has arranged for a more recent real estate appraisal for the above-described easement and right-of-way; and

**WHEREAS**, Virginia Electric Power Company is willing to provide, as the monetary sum in consideration for the grant of the above-described easement and right-of-way, the higher of either the above-mentioned sum or the estimated market value of the more recent real estate appraisal; and

**WHEREAS**, the Commission deems the terms and conditions set forth in the attached agreement to be proper;

**NOW, THEREFORE, BE IT RESOLVED** that the Commission hereby authorizes the Chairman of the Virginia Marine Resources Commission, with the approval of the Governor and the Attorney General, and upon receipt of the more recent real estate appraisal, to execute the attached agreement granting the above-described permanent easement and right-of-way and temporary right-of-way to Virginia Electric and Power Company on the terms and conditions as set forth in the attached agreement, including, as monetary consideration from Virginia Electric and Power Company, the higher estimated market value as determined in the August 17, 2004 real estate appraisal or the more recent real estate appraisal.

Carl Josephson, Senior Assistant Attorney General and VMRC Counsel explained that this was approved by the General Assembly in 2004 and authorizes the Virginia Marine Resources Commission to execute an agreement to convey an easement in the Elizabeth River to the Virginia Electric and Power Company and its successors. He further explained that staff had confirmed the dimensions as set forth in the agreement. He stated that the Commissioner would execute this agreement with the approval of both the Governor and Attorney General. He said that its final approval would be dependent on the receipt of a more recent appraisal, since the amount indicated now was more than a year old. He said he recommended the approval of this resolution.

There were no comments from the public.

**Associate Member Holland made the motion to approve the recommendation of Counsel. Associate Member Garrison seconded the motion. The motion carried, 7-0. Associate Member Fox was not present during the motion.**

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**12. PUBLIC HEARING:** Consideration of a revised Rent and Royalty Schedule for the use of State-owned submerged lands.

Bob Grabb, Chief, Habitat Management, gave the presentation and his comments are a part of the verbatim record. Mr. Grabb explained that this was a public hearing and these HMAC recommendations had been discussed by the Commission at the past two meetings. He said there were a few recommendations for legislation that HMAC was asking the Commission to support. He further explained that the Commission had advertised and posted these notices in accordance with the Commission's normal process and there had been only one comment received to date.

Mr. Grabb said that the staff recommended that the Commission adopt the revised rent and royalty schedule pending receipt of any other comments. (A copy of the approved Rent and Royalty Schedule is attached.) He said staff also requested that the Commission endorse the three legislative changes recommended by HMAC, which are as follows:

(1) Raise the permit fees and breakpoint set forth in §28.2-1206(B). Permit fees are currently \$25 and \$100, depending on project cost (less than or greater than \$10,000.00), and have remained unchanged since 1970.

(2) Raise the administrative action level set forth in §28.2-1207(A)(1) from \$50,000 to \$100,000 to more accurately reflect present day dollars. This ceiling was last raised from \$10,000 to \$50,000 in 1980.

(3) Raise the range for new dredging which is currently set by code at \$0.20 - \$0.60 per cubic yard. The committee felt the recommended range should be raised to \$0.45 - \$1.20 per cubic yard to reflect the increase in the CPI-U since it was last raised from \$0.10 - \$0.30 per cubic yard in 1982.

Commissioner Pruitt opened the public hearing. No one from the public commented.

Commissioner Pruitt asked for a motion from the Commission.

**Associate Member Schick moved to approve the revised rent and royalty schedule and the recommendations of HMAC. Associate Member Holland seconded the motion. The motion carried, 7-0. Associate Member McLeskey was not present during the motion.**

**NOTE: revised rent and royalty schedule is attached at the end of these minutes.**

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**14. PUBLIC COMMENTS:**

**Roy Insley** – representing the Virginia Watermen’s Association was present and his comments are a part of the verbatim record. Mr. Insley explained that the watermen are concerned with restrictions in 4VAC 20-1040-10. He said that was the requirement to sell the vessel with the transfer of a crab license. He further said the Virginia watermen used their boats for many other fisheries not just crabs and it was burdensome to have to sell their boat. He said sometimes they use them recreationally with their family. Some older watermen are hanging onto their licenses and not using them in order to keep their boats. He said that when he worked with it, it could be an administrative nightmare. He said he was asking for a public hearing at the next meeting.

Commissioner Pruitt said he agreed with this request and would agree with a motion to hold this public hearing.

**Associate Member Fox moved to hold a public hearing next month regarding this matter. Associate Member Garrison seconded the motion.**

Jack Travelstead, Chief, Fisheries Management Division was present and his comments are a part of the verbatim record. Mr. Travelstead explained that the intent was to limit the number of transfers and there were some criteria for transferring. He said he agreed with Roy Insley that it was an administrative nightmare to try to do this and enforce it. He said another system was needed to look at these inactive licenses, if the species comes back, then there will be more activity in this fishery than desired.

**The motion carried, 7-0-1. Associate Member McLeskey abstained as he was not present during the presentation.**

**James Fletcher** – representing trawlers and fishermen all up the east coast was present and his comments are a part of the verbatim record. He said he was asking for a public hearing to be held to consider amending the landing requirements for flounder when they are caught up North where they seem to be concentrating. He said he brought this up last month, but since then he spoke with other watermen and they said they would like the allowable catch limit to be doubled and that they be given 20 days in which to land them in Virginia. He said they were very interested in saving on fuel costs.

Jack Travelstead, Chief, Fisheries Management, was present and his comments are a part of the verbatim record. Mr. Travelstead said they had not time to evaluate this matter being brought to the Commission by Mr. Fletcher. He said the restrictions were 10,000 pounds in ten days in two trips. He said most watermen did this in one trip. He said their main concern was to not go over the established quota. He explained that the fishery would be closing in about 20 days, as the quota would be caught for this season.

Commissioner Pruitt asked if holding a public hearing in January would allow staff enough time to evaluate this matter and come back then with a recommendation. Mr. Travelstead agreed with his suggestion.

**Russell Gaskins and Lee Hawthon** – watermen were present and their comments are a part of the verbatim record. These gentlemen were both interested in opening the lower Rappahannock River to the harvesting of oysters.

Commissioner Pruitt explained that a Shellfish Management Advisory Committee meeting was to be held by staff in the next two weeks.

**Associate Member Garrison** – suggested that the Commission ask the General Assembly to propose legislation to offer a bounty for cow nose rays to alleviate the problems of overpopulation of the rays on other fisheries.

James Wesson, Department Head, Conservation and Replenishment, was present and his comments are a part of the verbatim record. He said it is well known the problems that have been encountered in the oyster industry as well as other seafood industries.

Associate Member Schick asked what contributed to this increase in the cownose rays. Dr. Wesson said it was due to decrease in the shark population, which was the ray's main predator. He said the pound net fishery also contributed to the mortality of the cownose rays in the past.

Commissioner Pruitt left the meeting at this point, Associate Member Garrison assumed the duties of chairman.

Associate Member Bowden said with the number of cownose rays seen today, he could retire on the bounty money. He said it used to be on a bad day you would see maybe 15 rays, now on a good day you only see maybe a hundred. He said one industry that Jim Wesson did not mention was the menhaden and they also once contribute to the mortality of the cownose rays.

Kelly Place, waterman, was present and his comments are a part of the verbatim record. Mr. Place explained that Dr. Orth in his 1976 studies had addressed the effects of the cownose rays on SAV. He said even though this was a native species, if the numbers have become such a problem, then it would be good to try to create a balance.

After further discussion, Associate Member Garrison asked Jack Travelstead to have this issue put on the next month's agenda.

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- 15. PUBLIC HEARING:** Consideration of proposed amendments to Regulation 4VAC20-490, 10 Et. Seq., "Pertaining to Sharks" establishing commercial and recreational fishing limitations and limiting access to the commercial shark fishery.

Rob O'Reilly, Deputy Chief, Fisheries Management, gave the presentation and his comments are a part of the verbatim record. Mr. O'Reilly explained that he had a number of handouts, a revised draft regulation, some information on the landings of sharks from both state and federal waters, and some information on specific sharks and a follow up letter from NMFS to the one from Dr. Hogarth in July. He said that Commissioner Pruitt received 134 letters asking that more stringent limits to be established on the large coastal sharks, at the least the same as the federal regulations, and regulations to protect pupping and nursery habitat.

Mr. O'Reilly said that a lot of this started with a letter from Dr. Hogarth that was received in July by the Commissioner. He said the main theme of the letter was consistency. He said the letter pointed out that certain aspects of Virginia's regulation differed from federal regulations. He said the first was that the limit in Virginia for large coastal sharks was 7,500 pounds of shark carcasses per vessel per day versus the federal limit of 4,000 pounds. He said the second was there was no minimum limit on the recreational fishery and the federal regulation has established a 54-inch fork length. He said the third item mentioned in Dr. Hogarth's letter was to remind Virginia that the sandbar and dusky sharks have a nursery habitat in the Bay. Staff looked at different conservations measures, but not at prohibiting the fishery in Virginia and not to put any more stringent restrictions on the recreational and commercial groups than was done by the Federal government.

Mr. O'Reilly reviewed the amendments in the draft regulation.

Mr. O'Reilly explained that the various sharks had been grouped in the appropriate groups. They are as follows:

"Large coastal shark group",  
"Pelagic shark group",  
"Prohibited shark group", and  
"Small coastal shark group".

Mr. O'Reilly said that the recreational harvest would be restricted to the three groups, the large coastal, small coastal, or pelagic group or the Atlantic sharpnose shark and bonnethead shark. He said recreational fishermen have been limited to one shark per vessel rather than 1 per person, which was the way it had been for the large and small coastal and pelagic groups. He said that for the Atlantic sharpnose shark and bonnethead shark the limit would be one per person. He explained that a minimum size limit of

54-inch fork length and 30-inch carcass length had been included because unless in the form of a carcass, the recreational fishery could not keep the shark in good shape.

Mr. Rob O'Reilly explained that the commercial limits included a minimum size limit of 58 inches fork length or minimum size limit of 31 inches in carcass length and this would only apply to areas west of the COLREGS line. He said there had been a 200 lb. minimum limit, which had been omitted. He said a 4,000 pounds per day dressed weight limit of large coastal sharks had been established. He said that it was 7,500 pounds. He explained that watermen could not fillet a shark at sea but were allowed to remove the head and fins, while retaining them with the dressed carcasses. He said there were no limits for pelagic or small coastal sharks and it was prohibited to retain, possess or purchase any sharks listed as prohibited.

Mr. O'Reilly explained that there were no changes advertised for the spiny dogfish, so no changes were recommended for that species of shark.

Mr. O'Reilly explained that FMAC did not support limited entry and staff felt they were not ready to start the limited entry, but it was good that this was brought forward. He said the guidelines in the regulation were provided, so that if eventually limited entry were necessary, then the guidelines would be established in the regulation.

“At such time the status of shark stocks or their fisheries warrant the establishment of a limited access program, for participation in the commercial fishery for sharks, a control rule may be enacted that limits participation in the commercial fisheries for sharks to those individuals who participated in that fishery on and before December 31, 2004. The control rule may also include eligibility requirements based on past harvest amounts.”

Mr. O'Reilly explained that this was added to make the state's regulation the same as the federal regulations. He noted that it would be unlawful for any person to engage in finning.

Mr. O'Reilly explained that staff recommended adoption of the final draft regulation discussed by staff. He said in the second letter NMFS was supportive of Virginia's efforts. He said they did ask that when the federal quota closes that Virginia should also close theirs and staff did not support this measure. He said that the letter asked for complementary measures, not to mirror the federal measures.

Associate Member Robins said that the reason he suggested the limited entry be put in place was so there would be a management tool available to the Commission if there was a necessity for it. He said he was very satisfied with FMAC and staff's efforts and the setting of a control date. He further stated that he did not feel it would be appropriate for Virginia to adopt the federal seasons for harvesting sharks.

Commissioner Pruitt returned to the meeting at this point. Commissioner Pruitt opened the public hearing.

Ellis W. James, Member of the Sierra Club was present, and his comments are a part of the verbatim record. Mr. James stated that he supported the proposal by staff. He said that today there have been reports nationally of the big fish of the ocean being in trouble. He said if the shark were allowed to be destroyed or any fishery for that matter, then the way of the watermen would be gone also. He said it must end or be stopped, this desire of today's society to catch and devour everything. He stated that some believe in the maintaining of a certain lifestyle, but at the same time the Commission must meet their responsibility to manage these fisheries.

Tom Powers was present and his comments are a part of the verbatim record. Mr. Powers said he agreed with staff that there is need for an identification guide. He said nowhere is the spiny dogfish described in scientific terms. He said nowhere in the catch limits was there a recreational size limit at this point and time, which he suggested needed to be in the regulation. And he said the third thing, he would suggest was to also allow the recreational fishermen to remove the head and fin so it can be stored in a cooler.

Mr. O'Reilly said spiny dogfish is defined in the definitions. He said smooth dogfish had been removed because there were no restrictions on it. He said that on page 9 there is allowance for removal of the head and fin by the recreational fishermen. He explained that the Commission had not advertised for the spiny dogfish so action could not be taken.

**Associate Member Bowden made the motion to accept the staff's recommendation. Associate Member Holland seconded the motion. The motion carried, 7-0. Associate Member Schick was not present for the motion.**

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- 16. SCUP: Request for emergency action to reduce the Winter II period commercial trip limit to 3,000 pound.**

Jack Travelstead, Chief, Fisheries Management gave the presentation and his comments are a part of the verbatim record. Mr. Travelstead explained this a normal procedure done every year and to comply with the interstate management plan.

**Associate Member Robins made the motion to approve the request as recommended by staff. Associate Member Jones seconded the motion. The motion carried, 7-0. Associate Member Schick had still not returned to the meeting.**

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17. **DOUGLAS F. JENKINS, SR.** (President of Twin Rivers Watermen's Association): Request for a change in the oyster plan.

Douglas F. Jenkins, Sr., Twin River Watermen's Associate, was present and his comments are a part of the verbatim record. He said that last month he had requested that the Potomac River tributaries be open to the harvest of oysters by hand scrape by December 1, 2005. He said it would be best to allow for the harvest of oysters before the waters freeze and before oyster diseases kill them.

Mr. Jenkins explained that the watermen would like to open the lower Rappahannock River to the harvesting of oysters. He said it would benefit the oyster rocks to use a light dredge to harvest oysters on them.

Mr. Jenkins asked that the watermen be allowed to keep the seed oysters as well as the market in the James River. He said it takes a lot effort to harvest oysters with hand tongs.

James Wesson said that there was a Shellfish Management Advisory Committee scheduled the next week.

Mr. Jenkins said he was requesting the opening of the Potomac Tributaries to hand scrape by emergency action.

**Associate Member Bowden moved to allow hand scraping in the Potomac River tributaries, effective December 1, 2005. Associate Member McLeskey seconded the motion. The motion carried, 7-0. Associate Member Holland was not present during the motion.**

Commissioner Pruitt said the matter on opening the lower Rappahannock River needed to be discussed by the Shellfish Management Advisory Committee. Mr. Travelstead said that the staff and others, especially at the federal level, were opposed to the opening of this area. He went on to explain that this is the only area where it had not been worked and shows there was no difference. He said this supports an argument to keep other areas open to harvest that would not be there if it were to be open to harvest.

Roy Insley said from the time he worked at VMRC and from what he had seen, he felt there was room for compromise. He suggested that maybe just one side of the area, either the northside or the southside, might be a possible compromise. Commissioner Pruitt said that there might be a compromise to be made in this issue and it can be discussed at the Shellfish Management Advisory Committee meeting on November 29<sup>th</sup>.

No further action was taken.

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**18. RECOMMENDATIONS FROM THE RECREATIONAL FISHING ADVISORY BOARD.**

Sonya Davis, Fisheries Management Specialist, Sr., gave the presentation and her comments are a part of the verbatim record. She said the status of the fund is approximately \$869,407.00. She went on to say that what she was bringing today was the nine (9) recommendations of the RFAB for projects costing \$572,406.00. She reviewed the recommendations for the Commission.

The recommendations are as follows:

The Recreational Fishing Advisory Board (RFAB) has completed its reviews of pending applications and on November 14, 2005, developed final recommendations for funding.

Each of the projects submitted during this review cycle has been subjected to a staff review and an RFAB public hearing. Written comments received from the public are attached. In addition, the research project was subjected to professional peer reviews.

Funds for any projects approved by you for expenditures from the Virginia Saltwater Recreational Fishing Development Fund will not be available until January.

Staff concurs with the funding recommendations as submitted by the RFAB.

The following projects were recommended for approval by the RFAB:

A. 2005 Saxis Fishing Pier Youth Fishing Tournament. Allen Evans, Eastern Shore of Virginia Angler's Club. \$1,500. VOTE: Unanimous

B. 2005 Morley's Wharf Youth Fishing Tournament. Allen Evans, Eastern Shore of Virginia Angler's Club. \$1,500. VOTE: Unanimous

C. 2006 Children's Fishing Clinic. Rob Cowling, Newport News Rotary Club and Coastal Conservation Association. \$6,000. VOTE: Unanimous

D. 2006 Virginia Game Fish Tagging. Jon Lucy, VIMS and Claude Bain, VMRC. \$60,823. VOTE: Unanimous

E. Artificial Fishing Reef Structure Acquisition and Deployment. Mike Meier, VMRC. \$200,000. VOTE: Unanimous

F. 2006 Kiwanis Club Children's Fishing Clinic. J. Wesley Brown, Capital District Kiwanis Club. \$6,000. VOTE: Unanimous



H. Wallop-Breaux Matching Funds. Jack Travelstead, VMRC. \$261,583. VOTE: 8-1  
COMMENTS: RFAB would like the Commission to continue pursuit of general funds and/or commercial funds to meet the state match requirement in the future.

I. Administration of the Recreational Saltwater Boat Decals. Jane McCroskey, VMRC. \$10,000. VOTE: Unanimous

COMMENTS: Amount should be sufficient to cover Commission expenses until DGIF takes back the task of issuing the decals. The projected date from DGIF is December 1, 2005.

L. Undercover Law Enforcement Funds for Covert Fisheries Operations. Lieutenant John Croft, VMRC. \$25,000. VOTE: Unanimous

COMMENTS: RFAB would like to see commercial funds used in the future to help support this effort. The RFAB commended the accomplishments of this team.

The following projects were not recommended for approval by the RFAB:

K. 2005 Artificial Fishing Reef Pocket Location Guides. Mike Meier, VMRC. \$50,000. VOTE: Unanimous

COMMENTS: RFAB felt that the information was already available in the Anglers Guide and on the Internet. They did not want to duplicate effort with limited funds.

The following project was tabled for further review by the RFAB:

G. Sheepshead Population Dynamics in Chesapeake Bay, Virginia. Dr. Hongsheng Liao, Dr. Cynthia M. Jones, Old Dominion University. \$64,545. VOTE: 8-1

COMMENTS: RFAB would like to review any Commission regulatory action before considering funding this research. Also, some feel this research may not benefit the upper bay and rivers angling community.

Item J. was withdrawn by the applicant

The following 2004 project is requesting line item budget changes and all were recommended for approval by the RFAB:

York County, Smith Landing Waterfront Improvement Project (Contract RF 04-16 for \$701,000). Request to add 6 additional expenditures not in the original budget proposal. With the additional 6 expenditures, they anticipate the total project cost to be \$613,108. A total cost savings of \$87,892 from the original approved grant. The VSRFDF would receive a savings of \$65,919 and the County would receive a savings of \$21,973.

A seventh item was added after the RFAB meeting, making the total cost of the project \$619,108. RFAB members were contacted by phone for approval. A list of the new expenditures and budget is attached. VOTE: Unanimous

Associate Member Robins asked if there was funding for the Sheepshead project. Ms. Davis responded yes.

Associate Member Garrison said the Sheepshead project should be funded as the information would be important to the Commission. Associate Member Robins said that this would be valuable information for Virginia and he supported funding this project. Associate Member Bowden said everyone he had talked with supported the Sheepshead project.

Commissioner Pruitt asked for any comments from the public.

**Tom Powers** - was present and his comments are a part of the verbatim record. He said the anglers who support limiting the catch on sheepshead want this study done, so if it becomes necessary to regulate this species the information will already be available. He said he supported the Smith Point ramp project as it was in bad shape and the funding was needed so they could complete it and get it done right.

**Association Member Robins moved to approve the projects recommended with an amendment to approve Item G., the Sheepshead Project. Associate Member Fox seconded the motion. The motion carried, 7-0-1. Associate Member Jones excused herself from the presentation because of the project she had requested, which would make it a conflict for her to participate.**

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**19. REQUESTS FOR PUBLIC HEARING:**

- A. Ed Bender's request to amend Regulation 4VAC20-20-10, Et. Seq., "Pertaining to the Licensing of Fixed Fishing Devices" to allow certain exceptions to the requirements to maintain a priority right to a net's location.

Jack Travelstead, Chief, Fisheries Management, gave the presentation and his comments are a part of the verbatim record. Mr. Travelstead said the last two items are requests for public hearings. He said Mr. Bender's request needs to be looked at closer and staff asked that emergency action be taken at this hearing. He said there are federal pound nets rules and because of the pound netters interaction with endangered species it prohibits pound net leaders being set during certain times of year and takes the best portion of the season away from the fishermen. He said that Mr. Bender would lose the best part of the season because he had not set all of his nets this year. He said our regulation says if you do not set your nets during certain times of year then you lose your

priority right to the location. He said the reason for the request for emergency action is that the 2006 pound net licenses go on sale soon. He said that staff was asking for a December 1, 2005 effective date for the emergency regulation.

Associate Member Fox asked if this would become permanent. Mr. Travelstead said only until such time as the Federal regulations were changed and there was talk of such an amendment. He said this would probably be only for one year.

**Associate Member Holland made the motion to approve the emergency action as requested. Associate Member Garrison seconded the motion. The motion carried, 7-0. Associate Member Jones was not present.**

B. Vernon Rolley's request to amend Regulation 4VAC20-900-10 Et. Seq. "Pertaining to Horseshoe Crab" to improve access to horseshoe crabs for bait in the whelk fishery.

Mr. Travelstead said that originally Mr. Rolley's request was to be a request for emergency action at this hearing, but staff felt that it would be better if a public hearing were advertised for next month on this issue.

**Associate Member Garrison made the motion to approve the advertisement for a public hearing. Associate Member Holland seconded the motion. The motion carried, 6-0-1. Associate Member Robins abstained and Associate Member Jones had left the meeting.**

\* \* \* \* \*

**Commissioner Pruitt** requested clarification of action taken at the October 25, 2005 Commission meeting pertaining to the Virginia Seafood Council's request for the introduction of the non-native oyster (*C. ariakensis*) into Virginia waters.

Commissioner Pruitt gave all of the Associate Members present a copy of Mr. Robins' verbatim motion for their information. He said some of the public were confused by the motion and he asked Mr. Robins to look it over.

Mr. Travelstead said at the last meeting Commissioner Pruitt said he would continue to accept public comments. He said in the last two weeks the Commissioner had met, and would continue to meet with various interest groups. He said they had met with various Federal Agencies and conservation groups at VIMS the previous day. Commissioner Pruitt said they were trying to get VSC to meet with NOAA. Commissioner Pruitt said the motion was to explore all options, not necessarily that it would be put into the waters. Associate Member Robins agreed with Commissioner Pruitt's interpretation of his motion from last month.

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Commissioner Pruitt said that in his meeting with the Federal representatives, he found that they were interested in the industry and that was why he wanted to get them to meet with Frances Porter and other representatives from the Virginia Seafood Council.

After some further discussion, no action was taken at this time.

\* \* \* \* \*

There was no further business, the meeting adjourned at approximately 4:45 p.m. The next meeting will be Tuesday, December 20, 2005.

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William A. Pruitt, Commissioner

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Katherine Leonard, Recording Secretary

**RENT AND ROYALTY SCHEDULE**

Adopted November 22, 2005

Effective December 1, 2005

**Permit Fees, Rents and Royalties**

Some fees and royalties are defined by statute while others are within the discretion of the Commission. All rents and royalties are subject to change. Rents and royalties are due and payable only after the proposed project is approved.

Current permit fees, which have remained unchanged since 1970, are specified in §28.2-1206.B of the Code of Virginia as the following.

Projects \$10,000 or less                   \$25.00 application fee  
Projects more than \$10,000           \$100.00 application fee

Current dredging fees, which were last adjusted in 1982, are specified in §28.2-1206.C of the Code of Virginia as the following.  
Dredging (New)                           \$0.20 - \$0.60 / yd<sup>3</sup>

**RENT AND ROYALTY ASSESSMENTS**

<b><u>CATEGORY/ACTIVITY</u></b>	<b><u>SUB-CATEGORY</u></b>	<b><u>ADJUSTED RANGE</u></b>	<b><u>RECOMMENDED ASSESSMENT *</u></b>
Placement of Fill	Private Beach Nourishment	\$0 - \$1.00 /ft <sup>2</sup>	\$0.05 /ft <sup>2</sup>
	Riprap	\$0 - \$0.35 /ft <sup>2</sup>	0
	Conversion of Subtidal Habitat to Wetlands	\$0 - \$0.50 /ft <sup>2</sup>	0
Timber Jetty/Groin/Boat Ramp	Upland Creation	\$0 - \$0.75 /ft <sup>2</sup>	\$0.50 /ft <sup>2</sup>
	Private	\$0.25 - \$5.25 /ft <sup>2</sup>	\$1.00 /ft <sup>2</sup>
	Commercial		\$3.00 /ft <sup>2</sup>
	Industrial		\$5.00 /ft <sup>2</sup>

<u>CATEGORY/ACTIVITY</u>	<u>SUB-CATEGORY</u>	<u>ADJUSTED RANGE</u>	<u>RECOMMENDED ASSESSMENT *</u>
Crossings	Overhead, Suspended, Trenched or Directionally Drilled	\$3.00 / linear ft	\$3.00 / linear ft
Open-Pile Structures	Heavy Industrial/Commercial	\$0.35 – \$3.50 /ft²	\$2.00 / ft²
	Commercial Recreational Private Use Marinas (Dockminiums)	\$0.30 - \$2.50 / ft²	\$1.50 / ft²
	Public Use Marinas (Marinas/Fishing Piers)	\$0.20 - \$1.75 / ft²	\$1.00 / ft²
	Non-Commercial Mooring (Community Piers w/o slips)	\$0.10 - \$1.00 / ft²	\$0.30 / ft²
Isolated Structures	Non-Riparian Mooring Buoys/Piles (Commercial)	\$200.00 – \$1,000.00 ea	\$500.00 ea
	Non-Riparian Mooring Buoys/Piles (Private)	\$100.00 - \$500.00 ea	\$100.00 ea

\* Annual rental equal to 1/10 single royalty assessment can be prescribed if the minimum single royalty assessment, not including that assessed for dredging, exceeds \$5000.00