

MINUTES

Commission Meeting**May 24, 2005**

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

William A. Pruitt)	Commissioner
Ernest N. Bowden, Jr.)	
S. Lake Cowart)	
Russell Garrison)	
J. T. Holland)	Associate Members
Cynthia M. Jones)	
Richard B. Robins, Jr.)	
Kyle J. Schick)	
Carl Josephson	Sr. Assistant Attorney General
Katherine Leonard	Recording Secretary
Wilford Kale	Senior Staff Advisor
Jane McCroskey	Chief, Admin./Finance Div.
Terri Short	Business Manager, Sr.
Debbie Sparks	Business Manager
Andy McNeil	Programmer Analyst, Sr.
Dorine Richard	Fiscal Technician
Linda Hancock	Human Resources Mgr.
Jack Travelstead	Chief, Fisheries Mgt. Div.
Rob O'Reilly	Deputy Chief, Fisheries Mgt. Div.
Roy Insley	Head, Plans and Statistics
Kelly Lancaster	Fisheries Management Specialist
Nancy Smith	Fisheries Management Technician
Todd Watkins	Fisheries Management Technician
Joey Thompson	Admin and Program Specialist
Linnett Curtis-King	Office Services Specialist

Commission Meeting

**13211
May 24, 2005**

Jim Wesson	Head, Conservation/Replenishment
Lt. Col. Lewis Jones	Deputy Chief, Law Enforcement
MPO James Todd	Marine Police Officer
MPO Chris Beuchelt	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.
Justin Worrell	Environmental Engineer, Sr.
Randy Owen	Environmental Engineer, Sr.
Hank Badger	Environmental Engineer, Sr.
Benjamin McGinnis	Environmental Engineer, Sr.
Rob Butler	Surveyor

Virginia Institute of Marine Science (VIMS)

Tom Barnard
Lyle Varnell
Mark Luckenbach
Roger Mann

Other present included:

Ellis W. James	Patsy Kerr	Paul Steele
Sally Torglen	Robert Vitek	Leigh Vitek
Wayne Webster	Stuart Gill	George Marshall
Kevin DuBois	Jim Janata	Lee Rosenberg
Deborah Painter	Chuck Roadley	Phil Roehrs
Chris Frye	Terry R. Emerson	Morson Lee
Cindy Hall	Earl Burton	Mark Scerbo
Robin Markham	Kent Carr	Chris Jett
Andrew G. Bury, Jr.	Harrison P. Bresee	Lester Hudgins
Pat Gensler	Tim Kuayd	Bryan Blackmore
Frances Porter	Douglas F. Jenkins	Russell Gaskins
Jim Hayden	Tom Powers	Chris Moore
Kelly Place	Tommy Legett	Sonya Davis

and others.

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Commissioner Pruitt called the meeting to order at approximately 9:40 a.m. Associate Member McLeskey was absent.

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Associate Member Garrison gave the invocation and Carl Josephson led the pledge of allegiance to the flag.

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

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Approval of Agenda: Commissioner Pruitt asked for any changes to the agenda or a motion. There were two changes. Bob Grabb, Chief, Habitat Management told the Commission that Item 2 H, Department of the Navy, #04-2704 had been pulled from the agenda because the staff had received a letter of protest from the Virginia Port Authority. Carl Josephson, Senior Assistant Attorney General and VMRC Counsel requested that the Closed Session be held at the end of the meeting. **Associate Member Schick moved to approve the agenda, as amended. Associate Member Holland seconded the motion. The motion carried, 7 - 0.**

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MINUTES: Commissioner Pruitt asked for a motion to approve the April 26, 2005 meeting minutes. Carl Josephson, Senior Assistant Attorney General and VMRC Counsel, asked for a correction to be made on page 13172, deleting “which were established by the Supreme Court”. **Associate Member Holland moved to approve the minutes as corrected. Associate Member Schick seconded the motion. The motion carried, 7-0.**

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- 2. **PERMITS** (Projects over \$50,000 with no objections and with staff recommendation for approval). Bob Grabb, Chief, Habitat Management made the presentation for the page two items and his comments are a part of the verbatim record.

Associate Member Schick moved to approve items A-N, except H, which had been pulled by staff. Associate Member Robins seconded the motion. The motion carried, 7-0.

2A. UPPER OCCOQUAN SEWAGE AUTHORITY, #05-0527, requests authorization to install approximately 350 linear feet of 16-inch diameter, high density polyethylene (HDPE) pipe, crossing or running along the stream bottom of Rocky Run at four separate locations, to be used as a temporary utility crossing for bypassing sanitary sewage during repair activities on the Rocky Run Interceptor (sanitary sewer) in Fairfax County.

Permit Fee.....\$100.00

2B. BAY CREEK MARINA & RESORT, LLC, 04-2844, requests authorization to install three (3) 150-foot long breakwaters, three (3) 180-foot long breakwaters and one (1) 230-foot long stone offshore breakwater and nourish the beach adjacent to the Marina Village subdivision situated along the Chesapeake Bay in the Town of Cape Charles, Northampton County. An approved SAV Mitigation Plan was required. The plan shall include monitoring and replanting, as necessary, for a period of three (3) years. The construction activity will be confined to the period of September 15 through January 31 and a turbidity curtain shall be placed around the area under construction in order to minimize the adverse effects to any aquaculture activities that may be present in or near the project area.

Permit Fee.....\$100.00

2C. TOWN OF CAPE CHARLES, 01-0050, requests reactivation and an extension until April 24, 2008, for a previously issued permit to install four (4) offshore stone breakwaters totaling 785 linear feet, 290 linear feet of stone armor protection adjacent to an existing 290-foot long storm water outfall and 45,000 cubic yards of beach quality sand nourishment, (acquired from an upland source) along the Public Beach in the Town of Cape Charles. The applicant also requests a modification to allow the potential use of concrete blocks within the toe of the breakwater structures. The Phase I breakwater has been completed.

No fees-permit reactivation and extension

2D. CITY OF VIRGINIA BEACH, ET AL, # 05-0209, requests authorization to install a 48-inch concrete or polyethylene storm water outfall line from the existing 79th Street pump station to a discharge point approximately 2,000 feet offshore. Installation will require mechanical dredging and the construction of a temporary trestle system alongside the excavation in the ocean. Minimal amounts of riprap will be placed over four (4) submerged manhole covers, and the outfall point will remain approximately 12 feet below the surface at mean low water.

Permit Fee.....\$100.00

2E. DOMINION VIRGINIA POWER, #05-0392, requests authorization to install by embedment hydro-plow method, a submerged 35kV electrical transmission line across the James River between Surry County and Charles City County to maintain electrical service to area residents. Recommend approval contingent on a minimum embedment depth of 41 feet MLW within the 300 foot wide federal project channel.

Permit Fee.....\$100.00

2F. KELLOG BROWN & ROOT, INC, #04-1326, requests authorization to install 360 linear feet of riprap bank stabilization and approximately 70 linear feet of submerged sewer line along/beneath the Levisa Fork and to construct three (3) clear-span bridges across Bull Creek, Poplar Creek and Levisa Fork to facilitate construction of the Coalfields Expressway, Section A, in Buchanan County. Recommend inclusion of our standard in-stream work conditions to minimize impacts to these waterways during construction activities and an in-stream time-of-year restriction from March 15 through July 31 for all work in the Levisa Fork to protect the State endangered variegate darter and the existing warm water sport fishery.

Permit Fee.....\$100.00

2G. CITY OF NORFOLK, #04-2358, requests authorization to dredge 3,200 cubic yards of material to achieve maximum depths of minus five and a half (-5.5) feet below mean low water within a 39,800 square foot area in association with the repair and reconstruction of the 13th Street community boat ramp adjacent to their property situated along Willoughby Bay in Norfolk. All dredged materials are to be placed at the Craney Island facility. Staff recommends a pre-dredge conference and a submission of a post-dredge bathymetric survey.

No fees - permit modification

2H. DEPARTMENT OF NAVY, #04-2704, requests authorization to install 12,000 linear feet of a floating barrier supported by plat anchors, lighted marker buoys, and warning signs, to serve as a protective waterfront barrier system and line of demarcation for the western boundary of the Naval Station Norfolk (NAVSTA) restricted waters situated along Hampton Roads in Norfolk. VMRC #01-0001 a similar project was approved by the Commission on January 23, 2001.

No action taken, pulled from the agenda.

2I. NAVAL FACILITIES ENGINEERING COMMAND, #04-2701, requests authorization to replace Pier 11 at Naval Station Norfolk (NAVSTA) with a 1500-foot long by 93-foot wide concrete pier, a 633-foot long by 50-foot wide relieving platform, 656 linear feet of riprap revetment, dredge to -52 feet below MLW a basin associated with Pier 11, construct a 957 foot long bulkhead no greater than 2 feet in front of the existing deteriorated bulkhead, a concrete sheet-pile breakwater in front of piers D, E and F, adjacent to property situated long the Elizabeth River in Norfolk. Dredged materials will be disposed of at the Craney Island Disposal Area.

Permit Fee.....\$100.00

2J. CITY OF NORFOLK, #05-0631, requests authorization to install a 320-foot long by 40-foot wide breakwater between 7th View and 8th View Streets, and three (3) 260-foot long by 38-foot wide breakwaters west of the Little Creek jetties adjacent to properties situated along the Chesapeake Bay in Norfolk.

Permit Fee.....\$100.00

2K. COLUMBIA GAS OF VIRGINIA, #05-0636, requests authorization to install an 8" natural gas pipeline, using the directional drill method, under 2,200 linear feet of the Western Branch of the Elizabeth River adjacent to the Route 17 Churchland Bridge in Portsmouth.

Permit Fee.....\$100.00

2L. YORK COUNTY DEPARTMENT OF GENERAL SERVICES, #04-1406, requests a modification to their previously issued permit to install three red and one green navigation markers in the Poquoson River in York County. The markers will be in conformance with U.S. Coast Guard requirements.

No fees - permit modification

Commission Meeting

- 2M. **APM TERMINALS VIRGINIA, INC., #02-1913**, requests a modification to their previously issued permit to install 4,000 linear feet of riprap beneath the wharf facility and along the slope of the dredge cut at their facility situated along the Elizabeth River in Portsmouth.

No fees - permit modification

- 2N. **NORFOLK AND SOUTHERN RAILWAY COMPANY, #05-0598**, requests authorization to maintenance dredge on an as needed basis, a maximum of 35,000 cubic yards of State-owned submerged lands per cycle, to reach maximum depths of -53 feet below mean low water adjacent to Piers #5 and #6 at their Lambert's Point facility situated along the Elizabeth River in Norfolk.

Permit Fee.....\$100.00

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- 4. **CITY OF VIRGINIA BEACH, #03-0641:** Briefing on the status of the Rudee Inlet Infrastructure Improvements project.

Phil Roehrs, representing the City of Virginia Beach, was present and his comments are a part of the verbatim record. Mr. Roehrs provided a powerpoint presentation for the Commission. He said the project which was authorized by permit issued by this Commission included the extension and rehabilitation of the north jetty at Rudee Inlet; replacement of the timber weir with steel on the southside; and some rehabilitation also to the south bank of the Inlet in the throat area or in the narrow area of the inlet. He reviewed a chronological list of key events to update the Commissioners. He said the project was almost done and the anticipated contract completion date was June 26, 2005.

After some discussion, Commissioner Pruitt thanked Mr. Roehrs for his cooperation and presentation. He asked Mr. Roehrs to let the staff know when the work was completed. He felt that Mr. Roehrs would not need to return for any further reports. No further action was taken.

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- 5. **ROBERT VITEK, #05-0214.** Commission review, on appeal by the applicant, of the April 13, 2005, decision by the Norfolk Wetlands Board to deny a permit to install 300 linear feet of riprap and fill 4,500 square feet of vegetated wetlands at his property situated along Mason Creek in Norfolk.

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

Ms. West explained that Mr. Vitek's property was located along Mason Creek in Norfolk. The project called for the installation of 300 linear feet of riprap and the filling of an estimated 4,500 square feet of jurisdictional wetlands. The stated purpose of the project was to protect the property from erosion and further degradation due to municipal stormwater run-off and back up from Mason Creek, and to raise the property to an elevation that prevented flooding except during catastrophic events.

Ms. West said that Mr. Vitek submitted his application in response to discussions with the Wetlands Board during previous violation proceedings. During the April 13, 2005, wetlands board meeting, the wetlands board staff person presented a history of the activities that had taken place at the property, including a summary of the violation. Staff would like to emphasize that, while the history of the Board's interactions with Mr. Vitek was a part of the record and was intricately tied to the application, only the denial of the application was before the Commission for consideration. Enforcement actions undertaken by Wetland Boards were appealed directly to Circuit Court.

Ms. West stated that during the April 13, 2005, public hearing Mr. Kevin DuBois, staff to the Norfolk Wetlands Board, presented an in-depth history of the activities that had occurred at the property since the violation was initially discovered in the fall of 2004, as well as a review of historic aerial photographs that indicated the presence of the wetlands area since at least 1974. At the end of his presentation, Mr. DuBois presented Mr. Vitek's project and read the VIMS technical assessment into the record. VIMS stated that the direct impacts to the marine environment could be reduced, noting that there was no evidence of active detrimental erosion at the site. VIMS recommended that the project be reduced in scope to include only stabilization of 100 linear feet of the stormwater ditch adjacent to the outfall. Mr. DuBois went on to highlight VMRC guidelines that state the filling of wetlands to create uplands was undesirable. He further noted that the applicant could repair the ditch bank with other, less deleterious methods and, therefore, he recommended that the Wetlands Board deny the application.

Ms. West explained that Mr. Vitek addressed the Board and stated that the property had deteriorated over the last few years. He discussed the constriction at the mouth of Mason Creek and stated that he believed Mason Creek was acting as a stormwater retention basin, that it was not draining properly, and that was resulting in the development of wetlands on his property. He also refuted that the historic aerial photographs were sufficient evidence to substantiate that wetlands existed on his property.

Ms. West said that the Board weighed the information presented during the hearing and unanimously voted to deny the application as proposed.

Ms. West stated that Mr. Vitek noted his appeal by letter dated April 21, 2005. As a result, staff considered the appeal to be timely. In his letter of appeal, Mr. Vitek stated that he believed the Board erred in its decision to deny his application because they failed to take into account important benefits of the project and accepted inaccurate detriments. He outlined the public and private benefits that he believed were not properly considered by the Board, i.e. property values, utilization of property for recreation, control of local mosquito, rat, and snake populations, and easier access for City crews to perform maintenance on the stormwater ditch. Mr. Vitek also believed he was unfairly characterized by the Wetlands Board staff as being uncooperative and a repeat offender. It was noted that several of the points brought forth in Mr. Vitek's appeal letter were new information and were not discussed during the Wetland Board hearing.

Ms. West said that upon review of the record, staff had concluded that the actions of the Norfolk Wetlands Board were consistent with the guidelines and best management practices stated in both the Wetlands Guidelines and the Shoreline Best Management Practice booklets. As a result, staff recommended that the Commission uphold the decision of the Norfolk Wetlands Board.

Ms. West went on to state that should Mr. Vitek persuade the Commission that the Board did not fully consider the benefits of his project and relied upon inaccurate detriments, then staff would recommend that the case be remanded to the Norfolk Wetland Board for rehearing and reconsideration with instructions to consider the additional points brought forth in Mr. Vitek's letter of appeal.

At the request of Mr. Vitek, the City's representative was allowed to address the Commission first. Cindy Hall, Deputy City Attorney for the City of Norfolk and the Wetlands Board representative, was present and her comments are a part of the verbatim record. Ms. Hall explained that the staff had given a detailed description of what had occurred at the Wetlands Board meeting. She said that all points were well discussed, site visits made, and they delayed the meeting to give Mr. Vitek time to prepare. She said the board recommended that the applicant reapply if he was not happy. She said that an alternative was even rejected by the applicant. She concluded by saying she was asking the Commission to uphold the Wetlands Board's decision.

Robert Vitek, the appellant was sworn in and his comments are a part of the verbatim record. Mr. Vitek requested the Commission open the record as he felt what he needed to say to defend his case he had been denied the opportunity to address at the Wetlands Board hearing therefore it was not in the record provided by the Wetlands Board.

Associate Member Robins said that he had read the verbatim transcript and it was his opinion that there was a thorough review by the Wetlands Board. **Mr. Robins moved to not open the record as requested. Associate Member Garrison seconded the motion. The motion carried, 7-0.**

Robert Vitek then continued with his testimony. Mr. Vitek felt that he would not be able to address his case with the limits placed on him and as a result of some research he had done on stormwater and the fact that it was on his property and not non-tidal wetlands, he felt that the Wetlands Board did not have any jurisdiction in this matter.

Carl Josephson, Senior Assistant Attorney General and VMRC Counsel said that jurisdiction could be discussed and asked the City to respond to the jurisdictional question. Cindy Hall said that Kevin DuBois had delineated the wetlands and the Corps had confirmed it. She referred to testimony by Mr. Vitek in the Wetlands Board verbatim record in which he confirmed the delineation of the Wetlands Board staff.

Commissioner Pruitt then closed the hearing. He told the appellant that he needed to address the stormwater issue with the proper city personnel or take the matter to the Circuit Court. He explained that VMRC did not substitute for the Wetlands Board. He also said he believed that the record showed that the Wetlands Board had acted correctly.

Mr. Vitek asked for a recommendation for how to introduce his matter. Associate Member Cowart recommended he reapply with a modified proposal. Mr. Josephson agreed with Mr. Cowart, that he would need to put in another application to get it introduced.

Commissioner Pruitt asked for a motion.

Associate Member Schick moved to uphold the Wetlands Board in their decision. Associate Member Robins seconded the motion. The motion carried, 7-0.

By way of explanation, Associate Member Robins stated that the Wetlands Board had followed their staff and the VIMS recommendations in making their decision. He said it was a strong case for the Wetlands Board as they even offered an alternative. He said in accordance with Section 28.2-1313, he did not see that the appellant was prejudiced by the decision, or that the Wetlands Board had made an error in law.

No fees - wetlands appeal.

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6. **W. T. THOMPSON, #05-0469.** Commission review of the April 7, 2005, decision by the Northumberland County Wetland Board to approve Mr. Thompson's request to install 205 linear feet of riprap and backfill that will eliminate 2,820 square feet of vegetated wetlands at his property adjacent to Ball Creek in Northumberland County.

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

Mr. Madden explained that the project was located along Ball Creek, approximately five miles from the town of Kilmarnock, in Northumberland County. The applicant, through his agent Mr. Glen Lester, was seeking authorization to install 205 linear feet of Class IA riprap revetment on an alignment landward of mean low water but within a portion of an existing pocket marsh on his property. Included in the proposal was a request to backfill the revetment and raise the elevation of the property, which would eliminate 2000 square feet of wetlands behind the installed riprap. According to the application, the purpose of revetment was to “prevent further soil erosion.”

Mr. Madden said that the project site was located at the end of an unimproved road, which accessed a very low lying parcel of property that included a well established pocket marsh. Much of the marsh and adjacent upland grassy area had been mowed close to the ground. There were two buildings on the property, a white clapboard sided house and a storage building. There was also a well on the property that supplied potable water to the house. This well was approximately 90 feet from the house in the area to be filled. According to the agent, the house was not a primary residence, but was rented and used seasonally by a local hunt club.

Mr. Madden stated that pursuant to Section 28.2-1310 of the Code of Virginia, the Commissioner, by letter dated April 13, 2005, informed the Chairman of the Northumberland County Wetlands Board that he was recommending Commission review of the Wetlands Board’s decision in this matter. The need for the review was based on the Commissioner’s concern that the decision was unsupported by the evidence on the record considered as a whole and appeared to be contrary to the Standards for Use and Development of Wetlands contained in Section 28.2-1308 of the Code of Virginia.

Mr. Madden said that upon convening the Board’s April 7, 2005, public hearing on Mr. Thompson’s request, the April 5, 2005, Virginia Institute of Marine Science (VIMS) Shoreline Permit Application Report was read into the record by the Wetland Board staff, Ms. Robin Markham.

Mr. Madden said that the report quantified the direct impacts to the jurisdictional wetlands from both the riprap revetment and fill at 2,820 square feet. The report pointed out the Board’s legally defined jurisdiction and VIMS’ inability to accurately delineate the precise extent of the wetlands due to the high water conditions and the frequent mowing of the marsh. VIMS did, however, recommend a landward realignment of the structure to reduce the amount of fill required and encroachment of the structure into the saltmeadow community. VIMS stated that further field evaluations and/or a topographic survey would be required to locate the precise jurisdictional boundary and the extent of tidal marshes to be impacted by the project. The report also acknowledged the need to balance the environmental impacts and the desire of the applicant to save property, but only if alteration of the shoreline was justified based on significant loss or damage due to erosion or natural causes.

Mr. Madden stated that the Board members then discussed the high water conditions at the site, the low elevation of the property and the extent of wetlands on the property. There was speculation that salt water might be seeping into the well and that the marsh could easily extend up to the house with sea level rise. Mr. Lester reiterated that the well was the water source for the house and further stated that he understood that VIMS was in favor of the proposed alignment. VIMS refuted this assertion. Mr. Lester also commented that the house had been rented and the area hunted, since the 1950's. According to the agent, the property has subsided a great deal in just the last five years. A discussion followed over the need to save the house and to protect the water source.

Mr. Madden explained that at the close of the public hearing, a motion was made by Mr. J. C. Curry to approve the project as submitted. Mr. Vanlandingham seconded the motion and the motion was approved unanimously.

Mr. Madden said that staff believed that the Board's decision to approve the application as submitted was unsupported by the evidence on the record considered as a whole. The VIMS report clearly recommended several measures that would reduce the impacts to vegetated wetlands. The report also recommended that the Board consider further investigation to determine the actual areal extent of the Board's jurisdiction in the matter.

Mr. Madden said that Section IV Article B of the Commission's Wetland Guidelines, under the heading of Specific Criteria for Evaluating Alterations of Wetlands, stated that filling in wetland areas for the singular purpose of creating waterfront upland property was undesirable. The VIMS report estimated the impacts to the Type II Saltmeadow Community from the riprap and fill to be at 2820 square feet. The Commission's Wetlands Guidelines rank the Saltmeadow Community second in productivity only to that of the Type I Community dominated by *S. alterniflora*. The Wetlands Guidelines further recommend that Type II marshes not be unnecessarily disturbed.

Mr. Madden said that the application stated that the project was intended to curb soil erosion. Section IV Article (A) of the Guidelines, states that shoreline protection structures are justified only if there is active, detrimental shoreline erosion which cannot be otherwise controlled. VIMS had subsequently assured Commission staff that, in this case, there was no active detrimental erosion occurring on the property at the site of the proposed revetment and fill.

Mr. Madden explained that based on a review of the record, staff believed that the Board failed to adequately consider the above-referenced guidelines and entertain any less damaging alternatives, such as a more landward realignment of the revetment, other measures to protect the property, or whether or not the project was justified due to the lack of active detrimental erosion at the project site. Furthermore, the record did not reflect any evidence to suggest that the house was threatened by erosion or loss of property. Staff also believed that the Board erred in not considering any compensation for the permitted wetland losses.

Accordingly, staff believed that the Board's decision to approve the project as submitted was inconsistent with both the Wetlands Ordinance and the Commission's Wetland Guidelines. As a result, staff recommended the Commission overturn the Wetland Board's April 7, 2005, decision in this matter and deny the project as proposed, leaving the applicant recourse to resubmit in modified form.

Robin Markham, Deputy Zoning Administrator and staff liaison for the Wetlands Board, was present and her comments are a part of the verbatim record. She agreed that information was given to the Wetlands Board that there was no active erosion. She said the Wetlands Board was trying to protect the well and house.

Associate Member Garrison asked if the marsh grass could be mowed or cut? Ms. Markham responded, yes, to cutting, but not to remove the root mass.

Bob Grabb, Chief, Habitat Management, referred the Commission to Section 28.2-1302(3), which provides exemptions for certain activities. He said that VMRC had maintained that Section 28.2-1302(3)(5) permitted haying which was interpreted to mean that cutting the marsh grass was okay, but not the taking of the roots. Associate Member Garrison asked if this would not kill the wetlands. Mr. Grabb responded no, but it does make it difficult to identify the species of wetlands involved.

Commissioner Pruitt then questioned whether the Wetlands Board had considered mitigation. He said it would be easier to remand, but not to overturn. He said the board was required to listen to VIMS, but not mandated to do what they say.

Associate Member Cowart stated that the Wetlands Board tried to do a good job and he had a problem with overturning their decision. He suggested the matter be remanded for the board to consider mitigation or compensation, and less damaging ways to do the project.

Associate Member Robins moved to remand the matter back to the Wetlands Board and instruct them to review the VIMS comments regarding a realignment of the revetment and to give consideration to requiring compensation. Associate Member Garrison seconded the motion. The motion carried, 7-0.

No fees-wetlands appeal.

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Commissioner Pruitt announced that the Tom Barnard of VIMS would be retiring. Bob Grabb presented Mr. Barnard with a certificate of service. Mr. Barnard was retiring after 33 years of service with VIMS. He had been working with VMRC since 1972 when the wetlands act went into effect

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7. **URBANNA HARBOUR YACHT CLUB, #05-0725**, requests after-the-fact authorization to retain four (4) uncovered boatlifts that were installed without VMRC authorization within existing slips at their facility situated along Urbanna Creek in Middlesex County.

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

Mr. Neikirk explained that the Commission had approved the Urbanna Harbour Yacht Club pier facilities in 1984. That permit authorized the construction of three (3) long piers that basically paralleled the shoreline of the Urbanna Harbor Development with finger piers and mooring piles sufficient to create 135 boat slips. The facility was located along the southern shore of Urbanna Creek across from the Town of Urbanna. Along the creek the development consisted of a mixture of residential and commercial properties.

Mr. Neikirk stated that over time the piers and boatslips had evolved into a “dockominium” type facility, where the docks were commonly owned and managed by a club association and the slips themselves were “sold” to individuals. Over the past several years, individual slip owners had constructed a variety of unauthorized improvements to the piers and slips including the construction of dock extensions to create sitting areas and to support dock boxes, as well as, the installation of boatlifts within the slips themselves.

Mr. Neikirk said after conducting a site visit with two club members, staff sent Urbanna Harbour Yacht Club a Notice to Comply on January 25, 2005. The notice documented the existence of at least 28 individual deck areas, four (4) finger piers, and five (5) boatlifts that had been constructed without VMRC authorization. The notice directed the Club to remove all unauthorized additions to the pier by March 31, 2005, or alternatively, to submit an after-the-fact application seeking authorization to retain the structures. After numerous conversations with staff, the Club elected to begin restoring the violations related to the deck extensions and submitted an after-the-fact application to retain four of the unauthorized boatlifts. The after-the-fact application was received on March 30, 2005. The deadline for removal of the unauthorized deck areas was subsequently extended to May 23, 2005.

Mr. Neikirk said that since the individual slip “owners” had constructed the violations, the Club had attempted to resolve the violations by directing the “owners” to remove their individual infractions. Staff conducted a site inspection on May 3, 2005, and noted that all but six (6) of the dock extensions had been removed at that time.

Mr. Neikirk stated that the after-the-fact request to retain the boatlifts was not protested and no state agencies had commented on the proposal. The lifts were located within

Commission Meeting

existing slips and did not encroach over any public or privately leased oyster planting ground.

Mr. Neikirk said that on Friday, May 20, 2005 staff received a call from the club in which they reported that the remaining construction violations had been removed. Staff had not been able to conduct a field check to confirm the information received, but felt sure that it had been done. In the event staff makes a site inspection and finds the removal requirement has not been done, then the staff would recommend denial; but if the staff finds the removal has been done, then staff would recommend approval of the boatlifts, no civil charge be assessed, and only a triple permit fee be charged.

Commissioner Pruitt asked if anyone from the club was present or anyone else either pro or con was present and wanted to speak. No one was present to comment.

Associate Member Garrison moved to accept the staff's recommendation. Associate Member Robins seconded the motion. The motion carried, 7-0.

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

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Commissioner Pruitt announced that the Commission would continue until 12 noon when they would break for lunch and return by 1 p.m.

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- 8. **STUART W. GILL, #05-0520**, requests after-the-fact authorization to retain 67 linear feet of timber tongue-and-groove bulkheading that were illegally constructed at his property situated along Morattico Creek in Richmond County.

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

Mr. Owen explained that on March 10, 2005, staff received Mr. Gill's after-the-fact application requesting authorization to retain an unauthorized bulkhead that was illegally constructed at his property situated along Morattico Creek in Richmond County. Mr. Gill filed the application at the direction of Mr. Chris Jett, staff to the Richmond County Wetlands Board. The County had previously verbally requested Mr. Gill to stop work until all required permits were in place.

Mr. Owen said that telephone conversations between staff, the applicant and Mr. Jett revealed that Mr. Morson Lee, a marine contractor in the Northern Neck area, had performed the work. The Department of Professional and Occupational Regulation's website indicated that Mr. Lee's contractor's license expired on June 30, 2002.

Mr. Owen stated that, by certified letter dated April 1, 2005, staff advised Mr. Gill that the work performed by Mr. Lee would require a permit from the Commission and that the bulkhead had been constructed in violation of Chapter 12 of Title 28.2 of the Code of Virginia. By copy of that letter, Mr. Gill and Mr. Lee were both advised that the matter would be scheduled for the Commission's consideration at a future date and that their failure to appear at this hearing may constitute a second and separate violation.

Mr. Owen said that staff received certified service on Mr. Gill's letter on April 4, 2005. Mr. Lee's letter was undeliverable to the original address provided by the County. The Commission's Marine Police Officer served Mr. Lee with a notice of the violation on April 15, 2005.

Mr. Owen said that both parties were directed to appear at the Commission's May 24, 2005 monthly meeting by certified letter dated May 13, 2005. Staff received certified service on the applicant's letter dated received May 18, 2005. Additionally, on May 13, 2005, staff asked Law Enforcement to have Mr. Lee served with the Notice to Appear by a Marine Police Officer.

Mr. Owen stated that staff inspected the site on May 11, 2005. The bulkhead, as constructed, encroached over approximately 134 square feet of State-owned subaqueous land and was currently not backfilled. Several of the tieback rods were not installed on the deadmen and the wall had a slight channelward "lean" to it. The return walls were not properly tied back and should be extended into the upland and anchored to prevent failure. Additionally, the support piles appeared to be inadequately sized.

Mr. Owen said that by letter dated March 14, 2005, the Richmond County Wetland Board advised Mr. Gill that since the bulkhead was constructed channelward of mean low water, no wetlands board authorization was required. They noted, however, that Richmond County Building and Zoning permits were still required before continuing with any additional construction and backfilling.

Mr. Owen said that the Virginia Institute of Marine Science indicated that although the bulkhead was poorly constructed, its alignment, i.e. within two feet of the existing deteriorated wall, was generally acceptable.

Mr. Owen explained, that in response to staff's original letter, Mr. Gill stated that Hurricane Isabel had damaged his bulkhead. He indicated that he spent many frustrating hours trying to find a contractor to make the necessary repairs. When Mr. Lee agreed to do the work, he entrusted Mr. Lee to perform the repairs in accordance with all applicable laws and construction practices. He acknowledged that the legal responsibility to obtain the necessary permits was ultimately his.

Mr. Owen said that Mr. Lee finally contacted staff on Friday, May 20, 2005 regarding the April 1, 2005 letter, which required a written explanation for why the work was

performed without the required authorization. He said Mr. Lee at that time spoke with Bob Grabb.

Mr. Owen explained that Mr. Gill had been very cooperative with staff and was eager to resolve this matter with the Commission. Staff acknowledged that many property owners had difficulty obtaining a marine contractor in a timely fashion in the aftermath of Hurricane Isabel. Staff agreed with Mr. Gill, however, that the requirement to obtain all necessary permits and authorizations for marine construction ultimately rested with the property owner.

Mr. Owen said that with respect to Mr. Lee, however, staff believed that there was no excuse for a licensed marine contractor to undertake work without the required permits. Additionally, staff was very concerned that Mr. Lee was continuing to operate as a marine contractor without a current state license.

Mr. Owen said that accordingly, staff recommended approval of the bulkhead contingent on the installation of proper tiebacks and an extension of the return walls into the upland. Staff further recommended triple permit fees and an appropriate civil charge, given the minimal impact and moderate degree of noncompliance, against both the applicant and the contractor, as well as a formal complaint regarding the contractor being sent to the Virginia Board of Contractors for his role in this matter.

Stuart Gill, applicant was sworn in and his comments are a part of the verbatim record. Mr. Gill said that the staff was right. He said the bulkhead was damaged when Hurricane Isabel hit and it was difficult to get a contractor. He said it all started out as a repair to fix the end of the bulkhead. He contracted with Mr. Lee who had been recommended to him by others he had worked for before. He was advised by the contractor to repair the whole wall and put a cap on it. The contractor suggested going out two feet instead of doing the repair. He said he felt responsible for not making sure everything was permitted and that the contractor told him they were within 24 inches and that would be okay. He said he was just trying to protect his property by doing the maintenance work on the bulkhead.

Morson Lee, Jr., contractor for the applicant, was sworn in and his comments are a part of the verbatim record. He said he lost his contractor's license and was working to get it back. He said he was trying to help Mr. Gill and what Mr. Gill said was correct. He said he would be willing to help Mr. Gill finish the work and correct what the Commission wanted done. Associate Member Robins asked what kind of license he had. Mr. Lee said a Class A license. Associate Member Garrison asked if he was familiar with the permitting processes. Mr. Lee said he was just doing the work as he had done when he worked for another company.

Commissioner Pruitt asked the board for a motion.

Commission Meeting

Associate Member Garrison stated that this type of case had come before the Commission before and the staff had tried to get the information out to the public to be fair, but this was just a flagrant violation. He said further that Mr. Gill had been misled by a contractor who did not even have a license. **Mr. Garrison moved to fine the contractor, Mr. Lee, \$20.00/foot for 67 feet equaling \$1,340.00; not fine the applicant, but require that the proper tiebacks be installed and that the size of the pilings be at least 8 inches in diameter, which was all to be completed within sixty days by Mr. Gill; and to charge Mr. Gill with triple permit fees. Associate Member Schick seconded the motion.** Carl Josephson reminded the Commission that Mr. Lee needed to agree with the civil charge. He further explained that the Commission was authorized to work with an individual on a civil charge in lieu of other sanctions or enforcement actions being brought against the individual. Associate Member Robins asked if the civil charge had to be taken from the table provided to the Commission. Mr. Josephson stated that the table was only a guideline for the Commission and the amount of the fine for the violation was left to the discretion of the Commission, whether it was set at \$1.00 or \$10,000.00 per violation. Associate Member Holland reminded the Commission that Mr. Lee needed to agree with the fine before voting. Mr. Josephson said that the Commission could go ahead with this action and then if Mr. Lee did not agree they could take other actions against Mr. Lee. **The motion carried, 6-0-1. Associate Member Cowart abstained because he was absent during the discussion.**

Commissioner Pruitt instructed staff to get with Mr. Gill and Mr. Lee and discuss this matter with them.

Applicant only	
Permit Fee (ATF Triple).....	\$300.00
Contractor only	
Civil Charge (67 feet @\$20/foot).....	\$1,340.00

9. **ANDREW G. BURY, #01-2196**, requests authorization to modify an existing permit to allow the construction of a 24-foot by 48-foot enclosed boathouse at the channel-ward end of a 128-foot private pier in lieu of the previously authorized 24-foot by 40-foot enclosed boathouse at the channel-ward end of a 95-foot pier adjacent to his property situated along Urbanna Creek near Oakes Landing in Middlesex County. A Middlesex County resident 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 Mr. Bury's property was situated along the southern shoreline of Urbanna Creek adjacent to the Oakes Public Landing near Saluda in Middlesex

County. On July 17, 2002, a VMRC permit was issued to the previous property owner, Mr. Dale Foley, for the construction of a 24-foot by 40-foot enclosed boathouse adjacent to a 95-foot long private pier. That permit was subsequently transferred to Mr. Bury on April 9, 2003. To date, neither the pier nor the boathouse had been constructed. The expiration date of the permit was July 31, 2005, however, Mr. Bury had requested a three-year permit extension.

Mr. Neikirk said that Mr. Bury proposed to construct a 24-foot by 48-foot enclosed boathouse in lieu of the currently authorized 24-foot by 40-foot structure. Additionally, he proposed to construct the larger boathouse adjacent to a private pier that would extend 33 feet further channelward. Although water depths were not stated in the application, the general permit map prepared by the Corps of Engineers indicated that the mean low water depth at the channelward end of the proposed pier was approximately minus four (-4) feet.

Mr. Neikirk said that Urbanna Creek was approximately 500 feet wide at the project site. With the exception of the public landing, development along this portion of the creek was primarily residential. There were also other enclosed boathouses in the vicinity of this project.

Mr. Neikirk stated that in response to an inquiry from staff, Mr. Bury stated that he and his wife had not decided on a specific vessel, but that they intended to purchase a 40 to 42-foot long boat. He added that the larger boathouse was designed to accommodate a boat in that size range. He also stated in his letter that the proposed boathouse was significantly smaller than Mr. Fuccella's dual-slip boathouse located across the creek from his property.

Mr. Neikirk said that Mr. Bury's current permit was originally issued to the previous property owner, Mr. Foley, to provide a protected mooring for Mr. Foley's 33-foot boat. That application was not protested. Additionally, the Commission in 2000 approved the large Fuccella boathouse located across the creek, which was referenced by Mr. Bury in his letter. It was designed to cover Mr. Fuccella's four boats ranging in size from 16 feet to 43 feet. That request was also unprotested.

Mr. Neikirk said that a county resident, Ms. Vera England protested the project. She stated that she often visited the Oakes Public Landing and was concerned with the visual impacts of the larger structure situated further channelward into the creek. She noted that the applicant's property was high enough that the boathouse would not obstruct their view but believed the view of the general public visiting the landing would be obstructed. She added that she was concerned with the proliferation of boathouses in general, but stated that the location of this boathouse adjacent to the public landing was of particular concern to her. Finally she stated that the County had been working hard on their planning policies to preserve the viewshed of the rivers for the general public. Staff had confirmed that Middlesex County's Comprehensive Plan does state that "boathouses or similar

structures should not be permitted to disrupt the scene or interfere with neighboring viewsheds.”

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

Mr. Neikirk said that typically when reviewing boathouse proposals, staff encouraged the applicant to reduce the size of the structure to that which was necessary to adequately protect the applicant’s boat. In this case, the applicant did not even own a boat. Nevertheless, he had stated that he intended to purchase a boat in the 40 to 42-foot range. While staff believed the boathouse was reasonably sized for a boat in that size range, staff was hesitant to say that a boathouse was justified based upon a speculative purchase. Furthermore, when an enclosed boathouse project was protested based on visual impacts, staff generally recommended the boathouse be constructed without sides in an attempt to minimize any obstruction while still accommodating the applicant’s desire to provide a protected mooring for their boat.

Mr. Neikirk stated that accordingly, given Mr. Bury’s lack of a current documented need for the larger enclosed boathouse, staff recommended that the proposed modification be denied. Should the Commission determine that a larger boathouse was justified based upon the boat Mr. Bury intended to purchase, staff recommended the Commission consider authorizing an appropriately sized open-sided boathouse in lieu of the currently authorized smaller enclosed structure.

Andrew Bury, applicant, was sworn in and his comments are a part of the verbatim record. Mr. Bury explained that he was requesting a 33-foot dock extension and an additional 8 feet for the boathouse. He said he currently owned an 8-foot runabout, but planned to purchase a larger boat. He said he felt his request was consistent with other boathouses in the area and smaller than one boathouse on the creek. He provided overhead slides for his presentation to the Commission. He said he had spoken with his adjacent property owner, Mr. Ward, and resolved his concerns. He said that all the other boathouses on the creek were not enclosed. He said as far as Ms. England’s concern, the trees already presented an obstruction to the view.

No one was present to comment in opposition to the project. Commissioner Pruitt asked for discussion or a motion.

Associate Member Holland moved to grant the 8-foot addition to the boathouse and 128 feet for the total pier size. Associate Member Garrison seconded the motion. The motion failed, 3-4. Associate Members Bowden, Cowart, Jones and Robins all voted No.

Commissioner Pruitt asked for another motion. Associate Member Robins moved to approve the project with the modification that the boathouse be open-sided. Associate Member Bowden seconded the motion. The motion carried, 4-3. Associate Members Garrison, Holland and Schick voted, no.

No fees-permit modification.

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Commissioner Pruitt recessed the meeting for the lunch break at approximately 12:00 p.m. The meeting reconvened again at approximately 1 p.m.

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10. MARK SCERBO, #04-2237, requests authorization to install quarry stone riprap revetment along seven (7) existing groins adjacent to his property located at the mouth of the Coan River in Northumberland County. An adjacent property owner protested the project.

Associate Member Cowart excused himself from the case, because of conflict of interest.

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

Mr. Madden explained that Mr. Mark Scerbo and Ms. Helen Scerbo were the owners and operators of the Lewisetta Marina. The marina was located at the end of Route 624 on a peninsula of land at the confluence of the Coan River, Wrights Cove, Kingscote Creek, and the Potomac River approximately 12 miles north of the town of Heathsville. At present there were seven (7) existing groins along the shoreline in various states of repair ranging in length from 30 feet to 130 feet. Prior to Hurricane Isabel there were a total of ten (10) groins on the property. The three (3) that were destroyed were located along the western tip of the property. In addition to trapping sand along the shoreline the groins were intended to prevent sand from migrating around the spit and into the marina's commercial boat basin.

Mr. Madden said that the Scerbos would like to place core stone at a 1:2 slope along both sides of each of the seven (7) groins. The applicant had indicated he intended to place the stone a maximum of three (3) feet above the substrate. After achieving the proper slope with the core stone, the applicant intended to place Class II stone weighing 300 +/- pounds along the 1:2 slope created by the core material. The base width would be a maximum of 6-feet on each side of the groins

Mr. Madden said that the adjacent property owner immediately west of the project site, Mr. William G. Allen, protested the project. Mr. Allen was concerned about the area of

the Scerbo property in the vicinity of the structures identified as Groins # 1 and #2. In his December 3, 2004 letter, Mr. Allen indicated that he was not sure which of the groins were gone and which of the structures remained to be stabilized but recommended that Groin #1 be denied. Mr. Allen was also concerned over the continued development of the Lewisetta Marina and the impact such development was having on his property.

Mr. Madden said that the Virginia Institute of Marine Science (VIMS) indicated that no significant adverse impacts were expected if the groins were installed as proposed. VIMS recommended, however, that the applicant be required to place Class II stone on top of the small core material to reduce the potential for the riprap to be scattered as a result of heavy wave action.

Mr. Madden said that the Northumberland County Wetland Board approved those portions of the project within their jurisdiction during their November 4, 2004, public hearing finding that the placement of the stone constituted no significant environmental impact. As a condition of approval, the Board required the applicant to use Class II stone on top of the core material.

Mr. Madden said that no other agency had commented on the project and no public or private oyster planting grounds would be impacted by the proposal.

Mr. Madden said that while staff was sensitive to the issues raised by the protestant, it appeared that the environmental impacts associated with this project would be minimal. The applicant assured the Wetlands Board at their hearing in November 2004, and subsequently Commission staff, that if approved, he intended to comply with the VIMS recommendation to place Class II stone atop the core material.

Mr. Madden said that accordingly, staff recommended approval of the project pending receipt of revised drawings that reflected the use of Class II stone as armor on top of the smaller core material.

Mark Scerbo, applicant, was sworn in and his comments are a part of the verbatim record. Mr. Scerbo said that the staff presentation was fine. He said that deterioration was a problem in this area. He said it was necessary to break the wave action so as to protect the sandy beach behind the groins. He said he needed to get the work done essentially to keep the beaches intact. He said the stone would keep the groins standing, but it kept eroding away. He said he had lost 21 feet in front of his house.

No one was present in opposition.

Commissioner Pruitt asked for a motion. **Associate Member Garrison moved to accept staff recommendation and to further define the core #1 material size as being between 50# and 150#. Associate Member Holland seconded the motion. The motion carried, 6-0-1. Associate Member Cowart abstained.**

Permit Fee.....\$100.00

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Memorial to the Honorable C. Chadwick Ballard, Jr., deceased October 24, 2004:

Senator Frank Wagner spoke in honor of Mr. Ballard and read into the record SJR 359 Resolution. He made a presentation to Mrs. Ballard, Jr. and Mr. and Mrs. Ballard, Sr. with a copy of the resolution.

Mr. C. Chadwick Ballard, Sr., spoke in regards to his son’s feeling of his time serving on the board and with Commissioner Pruitt. He also spoke about the history of how he got into the seafood aquaculture business. His comments are a part of the verbatim record.

Associate Member Rick Robins read a statement into the record.

“I will remember Chad Ballard today as a leader.

Everyone who knew Chad, whether in industry, state government, or his community, knew Chad as a leader. As you have already heard today, Chad was widely respected by the legislature for his leadership on fisheries and habitat related issues, and his contributions to the Commonwealth are now a matter of record.

Chad’s leadership in the industry had far reaching implications for his company, his community and the Commonwealth. In business, Chad’s leadership demonstrated vision, dedication, perseverance and integrity. When he started his clam aquaculture business in 1985, the modern clam industry was in its infancy and still existed partly in theory. As an entrepreneur, Chad had the vision and perseverance to see his business model through to success. Due largely to Chad’s outstanding leadership:

- Virginia now leads the nation in the value of its clam aquaculture production
- 90% of Virginia’s clams are produced by aquaculture
- Clam aquaculture provides over 400 jobs on the Eastern Shore of Virginia
- And Cherrystone AquaFarms is a leading national distributor of clams in the US market

In my opinion, Chad, perhaps better than anybody, understood the importance and opportunity for industry to work in close coordination with the scientific community, the regulatory agencies and the legislature. Chad worked within those spheres to great effect, and his legacy continues to testify to his leadership in all of these areas.

Chad’s leadership here on the commission reflected his passion for justice and the rule of law. Chad developed a commanding knowledge of the Public Trust Doctrine, which he

frequently invoked in order to protect Virginia's interests. He left the commission with one of the finest examples of a servant leader the Commonwealth has ever had.

Today we remember one of Virginia's finest and most dedicated sons."

Associate Member Cowart said he was pleased to say he had served with Mr. Ballard for 8 years and 3 months. He read the inscription on the Certificate of Distinguished Service into the record and presented it to the family.

Commissioner Pruitt announced a short recess at approximately 1:34 p.m. and returned at approximately 1:45 p.m.

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- 11. OYSTER POINT PROPERTIES, LLC, #05-0741**, requests after-the-fact authorization to complete a private pier extending 243 feet channel-ward of mean high water with an 8-foot by 51-foot L-head, a 5-foot by 51-foot finger pier, an uncovered boatlift, a single piling to support an osprey nesting platform and a 26-foot by 51-foot open-sided boathouse adjacent to his property situated along the Piankatank River at Horse Point in Middlesex County.

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

Mr. Neikirk explained that pursuant to a report from Middlesex County staff and a subsequent phone conversation with Mr. Hudgins of Oyster Point Properties, LLC, staff conducted a site visit on March 2, 2005, and confirmed the construction of the unauthorized pier and partially completed open-sided boathouse. A Notice-to-Comply was issued to Mr. Hudgins on March 16, 2005. The notice directed removal of the unauthorized structures by May 16, 2005, or the submittal of an after-the-fact application to retain the structures by March 31, 2005. The after-the-fact application was received on March 31, 2005.

Mr. Neikirk said that the pier and boathouse extended from a 3.2-acre parcel situated along the Piankatank River at Horse Point in Middlesex County. The Piankatank River was approximately 2,800 feet wide and according to the application drawings, the channelward end of the pier reached a depth of -11 feet at mean low water. The 5-foot wide pier had been completed and it extended 243 feet channelward of a riprap revetment. An 8-foot wide by 51-foot long L-head had been constructed on the channelward side of the boathouse and a 5-foot wide by 51-foot long L-head had been constructed along the landward side of the boathouse. With the exception of the roof sheathing and shingles, it appeared that the 51-foot by 26-foot open-sided boathouse had been completed. The eaves of the boathouse were approximately 15 feet above the deck

level and nearly 23 feet above the elevation of mean low water. The peak of the boathouse roof was approximately 27½ feet above mean low water. The 6x6-inch poles supporting the boathouse were attached to the pilings with two carriage bolts per support.

Mr. Neikirk stated that in a letter accompanying the application, Mr. Hudgins explained that he was merely replacing a deteriorated pier and boathouse and claimed that his contractor, Terry Emerson of Middle Peninsula Marine Construction, told him that no permits were necessary because he was replacing structures damaged during Hurricane Isabel. Mr. Hudgins added that he and the contractor estimated the size of the old pier and boathouse by counting pilings. The 2002 VGIN aerials show the old pier as extending approximately 205 feet channelward of the riprap revetment with an L-head on the channelward end of the boathouse measuring approximately 6 feet by 14 feet. The old boathouse measured 26 feet by 40 feet. It was not possible to estimate the height of the previous structure based on the aerials. A survey of the property dated April 26, 2004, that Mr. Hudgins included with the application, depicted a 190-foot long pier and a 24-foot by 38-foot boathouse. The survey closely corresponds with staff's estimates based on the aerial photos.

Mr. Neikirk said that Mr. Hudgins also explained in his letter that he purchased the property in May 2004, as a single-family residence but with the intent to use it as rental property. He also planned to construct two additional residences on the property, also for short-term rental purposes. In the application, he did not identify any particular boat that he owned that would use the pier and boathouse but stated that the tenants would use the structures. Staff consulted with Ms. Amy Easterbrook of Middlesex County and determined that there were no proposals pending to subdivide the property.

Mr. Neikirk explained that a resident of Mathews County (across the river) originally anonymously reported the violation to Middlesex County staff, however, no one had objected to the project based on VMRC's public notice nor notification of the adjoining property owners.

Mr. Neikirk said that the proposed pier and boathouse did not encroach over any public or privately leased oyster planting ground. No State agencies had commented on the proposal.

Mr. Neikirk explained that although the pier and boathouse would not likely interfere with navigation in this wide portion of the Piankatank River, staff was unaware of any compelling reason why the new pier needed to extend nearly 40 feet channelward of the old pier and to a depth of minus eleven (-11) feet at mean low water.

Mr. Neikirk stated that in accordance with the Governor's Executive Orders 56, 58, and 66 related to structures damaged during Hurricane Isabel, had the applicant filed the necessary application to rebuild the damaged structures prior to December 31, 2004, the pier and boathouse could have been reconstructed in place with the same or smaller

Commission Meeting

dimensions as had previously existed. The Executive Orders did not allow for any increase in size. The current pier was nearly 40 feet longer with approximately 650 square feet of additional pierhead. The boathouse was approximately 11 feet longer than the previous boathouse.

Mr. Neikirk said that when reviewing after-the-fact applications, staff considered whether the project would likely have been favorably reviewed had the application been considered prior to construction. Even though Mr. Hudgins did not identify a particular boat to justify the size of the boathouse, in the absence of any objections from the public, staff would likely have authorized the reconstruction of the previously existing 26-foot by 40-foot open-sided boathouse. Additionally, a 5-foot wide pier extending 190 feet channelward of the riprap revetment with the previously existing 6-foot by 14-foot L-head would qualify for the statutory exemption for private, noncommercial piers provided in §28.2-1202(a)(5) of the Code of Virginia provided it was used strictly for noncommercial purposes.

Mr. Neikirk said that staff did not believe the applicant had presented a compelling reason for extending the pier nearly 40 feet channelward of the previous pier, nor had he provided a compelling reason to construct the larger L-heads nor the larger boathouse. Although Mr. Hudgins may desire to subdivide the property, rent the houses and use the pier as an amenity for the rental property, staff did not believe the pier should be considered for commercial use until he had received the necessary authorization from the County and possibly the Health Department. As such, staff considered the current pier to be private and noncommercial in nature.

Mr. Neikirk said that accordingly, staff did not believe the expansion of the pier and boathouse was either reasonable or necessary and staff was compelled to recommend denial of the after-the-fact application as proposed.

Mr. Neikirk explained that as an alternative, staff could support a 26-foot by 40-foot open-sided boathouse located on the landward side of the 5-foot wide finger pier. If this alternative was unacceptable to the applicant, staff recommended he be directed to remove the unauthorized boathouse, reduce the length of the pier to a maximum of 215 feet channelward of the riprap revetment, and remove all but 250 square feet of pierhead. Staff had no objection to the requested uncovered boatlift or the piling to support an osprey-nesting platform.

Mr. Neikirk said that should the Commission decide to approve any portion of the after-the-fact request, staff would recommend the Commission impose triple permit fees as provided for in §28.2-1206(D) and consider appropriate civil charges to accompany the after-the-fact approval.

Patrick Gensler, attorney for the applicant, requested that his witnesses be sworn in at this point, Lester Lee Hudgins, Jr. and Terry Emerson.

Lester Lee Hudgins, Jr., applicant, was present and his comments are a part of the verbatim record. Mr. Hudgins apologized for the fact that he was before the Commission on an after-the-application matter. He explained that he had acquired the property with the sole purpose of subdividing the land into 3 parcels and putting cabins on each lot. He said he planned to restore the existing house and repair other damages resulting from Hurricane Isabel. He stated he had a lot of difficulty just getting a contractor. He said the 232-foot pier was completed in October 2004. He said the other work was subcontracted out and to date he had spent \$47,000.00 for the pier and partial boathouse up to the point he received the stop work and compliance order. He said the contractor told him that no permit was required when replacing structures that were hurricane damaged. He said this was a commercial venture for him. He said he owned a 42-foot boat, which required 4 to 4 ½ feet of draft. He said the area was exposed to weather.

Terry Emerson, contractor, was present and his comments are a part of the verbatim record. Mr. Emerson said that because of the damage to the piers the proposal was based on estimates made by him as to how he would replace the damaged structures. Associate Member Garrison asked him how long he had been in business. Mr. Emerson said that he had been in business 16 years, 5 of those he owned his own business. Commissioner Pruitt asked where his business was located. Mr. Emerson responded in Middlesex County. Associate Member Robins asked if he had told the applicant that no permit was necessary. Mr. Emerson responded yes, based on hearsay. He said they were just rebuilding because of the storm damage. Associate Member Schick asked since they were putting more back, did they just assume that it was still okay. Mr. Emerson said the rebuilding was based on estimates.

Patrick Gensler, attorney, was present and his comments are a part of the verbatim record. Mr. Gensler reviewed some of the staff photos and provided a similar drawing to show where the original structures were estimated to be located. He said this structure does not interfere with public use and the Piankatank River was 320 feet wide at this point. He said this was all built prior to the Executive Order deadline of December 31, 2004. He said in balancing the public and private detriment, this was a reasonable use. He said there were no other reasonable uses, no tidal wetlands impacts, and no SAV impacted. He said this was believed to be reasonable even as a private pier. He said they were asking the Commission to approve the application as submitted.

No one in opposition was present. Commissioner Pruitt asked Mr. Neikirk if there were any protests on file. Mr. Neikirk responded, No.

Commissioner Pruitt said he felt the applicant did not intend to do anything wrong and also agreed that there was confusion at the time the Executive Order was issued. He said that if applied for properly it would probably have been permitted. He told Mr. Emerson that he needed to get up-to-date on the rules, as it was his responsibility.

Commission Meeting

Associate Member Robins stated he felt that the owner was repairing the damage and nothing was done intentionally. He further said that the contractor gave the applicant some bad advice and should know better. **Associate Member Robins therefore moved to approve the project with a triple permit fee charge against the applicant and a civil charge against the contractor for moderate non-compliance. Associate Member Garrison expressed concerns that too many of these after-the-fact applications were being approved. Associate Member Jones asked that the motion be amended to include a stipulation to say it was for non-commercial purposes. Associate Members Robins and Schick agreed to the amendment. Motion carried, 6-1. Associate Member Garrison voted No.**

Applicant only
Permit Fee (ATF Triple).....\$300.00

Contractor only
Civil Charge.....\$1,200.00

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Commissioner Pruitt requested that this item be heard prior to Item 12 as the parties involved had been waiting all morning to be heard.

- 13. **SHARON CARR, #04-056**, oyster ground application for 250 acres in the James River in the City of Newport News near the James River Bridge. The application is protested.

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

Mr. Badger explained that the ground applied for was immediately upstream of the James River Bridge offshore from Huntington Park in the City of Newport News. The application included an area that was previously leased by J. H. Miles and Co., Inc. (Plat File 15267, 205.00 acres) and the remainder consisted of previously vacant ground. The application has been surveyed and actually contains 233.13 acres. The Miles lease reverted to the Commonwealth on November 7, 2000, for their failure to provide documentation of significant production of oysters and/or clams, reasonable plantings of oysters, clams or cultch, or significant oyster or clam aquaculture operations during any portion of the ten-year period immediately prior to the application for renewal (Code of Virginia, Section 28.2-613).

Mr. Badger said that the area of this application was within the Thomas Rock Hand Scrape Area of the James River and was open to public harvest from December 1, 2004 through March 31, 2005.

Commission Meeting

Mr. Badger stated that on April 4, 2005, Mr. George H. Marshall wrote the Commission requesting that the assignment of this area be denied. He stated he believed this area should be kept open to the public and that he believed that over 1,000 bushels of oysters were caught in this area between December 1, 2004 and March 31, 2005. Staff responded on April 27, 2005, and informed Mr. Marshall that based on information provided by our Law Enforcement Division, that it was unlikely that his estimate of a harvest of 1,000 bushels of oysters from this area was accurate. Additionally, a portion of this area (approximately 80 acres) was condemned and not open to harvest during that time period. Upon receipt of staff's letter, Mr. Marshall called and indicated to staff that he wished to maintain his objections as previously submitted.

Mr. Badger said that there was considerable Public Ground in this immediate area of the James River as well as areas of vacant bottom that were available to the public subject to regulation to time-of-year harvest restrictions. This area had been vacant since November of 2000 and was available for application by the general public, including Mr. Marshall. Since most of this area was previously leased, and a portion remained in a condemned area that would exclude public harvest for direct market, staff recommended approval of the application as submitted.

Associate Member Cowart asked what part of the acreage applied for was originally leased? Mr. Badger stated that 28 acres were not in the Miles lease. Associate Member Cowart asked how long the lease was held by Miles? Mr. Badger explained that it reverted back to the State when the ten-year lease expired. Associate Member Cowart asked if it had been planted with shell by the leaseholder? Mr. Badger said it probably it been planted by Miles.

Kent Carr, representing the applicant, was present and his comments are a part of the verbatim record. Mr. Carr explained that he had been a waterman all his life. He said this year he had begun buying from other watermen. He said he needed to be able to keep a supply of oysters during the summer months to keep his market. He said that he had some leased ground in the Severn River, but it was condemned. He said he was asking for ground originally leased by Miles and there were no public rocks involved.

Commissioner Pruitt asked Mr. Carr, how many oysters were there? Mr. Carr responded he worked there last year and this year watermen did not catch their limit. He said he bought some of them, about 10 to 17 bushels. He said he was not cutting out the watermen as a portion of the ground was in polluted waters. Commissioner Pruitt commented that the oysters there belonged to everyone. Mr. Carr explained that when it was surveyed, they did not find many oysters, but saw it as a good prospect. He said the grounds were available to be leased, so he had applied for it. He said he did not agree that 1,000 bushels were caught there, but could not say that there were none there. He said the shells had sunk and seed oysters were available upriver. He said it was a gamble for him, but he would like the chance to lease this area.

Commissioner Pruitt asked if anyone was present in opposition.

George Marshall, waterman protesting the lease application, was sworn in and his comments are a part of the verbatim record. He presented the Commission with a petition signed by watermen against the leasing of this area. He said he could show anyone where the oysters were and where they had been caught. He said the lease had reverted back to the State and the area should not be leased. He said the Commission would be taking oysters away from all of the watermen. He said he had worked the water all his life. He said they did not have anything against the Carrs. He said the watermen just did not want the area leased to anyone. He said they were asking that the area be set-aside for the public.

Associate Member Cowart stated that if it had been replenished by the State and was traditionally worked by the waterman then he would agree to set it aside, but it was originally leased. He said that J. H. Miles Co. had spent money in the past from about 1890 until it reverted in 2000. He stated Mrs. Carr came forward with an application and she should have the opportunity to lease the area. He stated that if they do get the lease they must do something with the ground.

Commissioner Pruitt suggested that it be left open another season, then the Commission could consider leasing it. Associate Member Cowart explained that the salinity might go up and kill the oysters that were there. He said historically this had happened.

Mr. Badger suggested that the Commission stipulate holding the application for one year, but if the Commission does hold off leasing the ground, the State could be stuck with the survey cost.

Associate Member Bowden stated that it was productive ground and the applicant had not talked about plans for replenishment. He said he could not agree with leasing the entire 250 acres, just some of it.

Associate Member Robins asked what the precedent was for areas that revert back to the State? Roy Insley, Department Head, Plans and Statistics, said that this was a natural strike area. He said he was familiar with the area and to his knowledge there was no planting done or harvesting. He said this area should have been made a part of the Baylor Survey. His comments are a part of the verbatim record.

Carl Josephson, Senior Assistant Attorney General and VMRC Counsel, explained that what's in the Code must govern the Commission's decision. He said in Section 28.2-607, it said, that any assignment made must be in the public's interest.

Doug Jenkins, Twin River Watermen Associate, was present and his comments are a part of the verbatim record. He said this had been the Commission's policy and he agreed that Section 28.2-607 applied. He said the application was advertised for public response and the public had put in an objection. He said the Commission needed to decide whether to leave the area for the public to use or to let it go to a private leaseholder. He said the watermen were always going to object when there were oysters on the bottom and he knew watermen who had worked the area.

Associate Member Bowden moved to deny the request as presented and to allow the applicant to reapply with a more reasonable amount of acreage. Associate Member Holland seconded the motion. Associate Member Cowart said that he could not support the motion. He said the Commission could lease the 222 acres originally leased by Miles. He said that all the others had the same opportunity to apply for the ground. **The motion carried, 4-3-1. Associate Member Garrison abstained. Commissioner Pruitt said he voted, yes, because of what Mr. Josephson read in 28.2-607 regarding public interest governing the Commission's decision, thereby, breaking the tie-vote.**

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12. **PUBLIC HEARING:** Consideration of changes to the Commission's Wetlands Mitigation/Compensation Policy: 4 VAC 20-390-10 ET SEQ., to achieve a no-net loss of wetlands in the tidal wetlands regulatory program.

Tony Watkinson, Deputy Chief, Habitat Management, gave the presentation. His comments are a part of the verbatim record.

Mr. Watkinson explained that at its June 6, 1989, meeting the Commission adopted the existing Wetlands/Mitigation Compensation Policy as VR 450-01-0051. That policy was now listed in the State Administrative Code as 4 VAC 20-390-10 ET SEQ.

Mr. Watkinson said that this policy was adopted to encourage compensation for permitted wetland losses in certain instances following a determination that wetland impacts associated with a proposed project were justified and had been minimized as required by the standards for use and development of wetlands provided by the Code of Virginia. The policy also provided supplemental guidelines for compensation requirements and development of compensation plans.

Mr. Watkinson explained that since adoption of the original policy, however, most wetland projects had been permitted without compensation. In fact, the data VIMS has collected over the last 11 years (1993 – 2004) has shown a total permitted loss of 132 acres of tidal wetlands. During the same period only 20.3 acres of compensatory mitigation were required. Of the losses that are not compensated, most are associated with shoreline stabilization projects where each individual project may account for only a few hundred square feet of impact. Under the current policy, compensation for these

losses had not usually been required since the policy suggested that where on-site replacement for noncommercial projects was not feasible, compensation for small wetland losses (less than 1,000 square feet) should be avoided in an attempt to eliminate loss of the natural marsh to the maximum extent possible.

Mr. Watkinson further explained that the need to compensate for all permitted wetland losses was emphasized by the Commonwealth's commitment to the restoration of the Chesapeake Bay. In 2000, Virginia, as a Chesapeake Bay Program partner committed to "achieve a no-net loss of existing wetlands acreage and function in the signatories' regulatory programs." If Virginia is to meet that goal, wetland losses permitted through the tidal wetland regulatory program, no matter how small, must be replaced. As such, revisions to the existing policy were deemed necessary.

Mr. Watkinson stated that as drafted and approved by consensus of the Habitat Management Advisory Committee, the proposed policy suggested that the Commission and/or wetlands boards require compensation for all permitted wetland losses, but especially vegetated wetlands. Key changes in the policy eliminated the previous threshold of 1,000 square feet for non-commercial projects and recognized the Code change (Section 28.2-1308) that allowed the use of mitigation banks to satisfy compensation requirements. Furthermore, the policy recognized the potential for use of in-lieu fees to fund wetland restoration or creation projects. The use of in-lieu fees should be the last form of mitigation used to offset permitted wetland losses and must be the result of an agreed upon permit condition between the applicant and the Commission or wetlands board provided the applicant can demonstrate that on-site or off-site compensation options were not practical and no compensatory mitigation banks had been established in the project watershed. The policy stipulated that the sequence of acceptable mitigation options should be as follows: On-site, off-site within the same watershed or mitigation bank in the watershed, or through a proffered payment of an in-lieu fee if on-site and off-site compensation were shown by the applicant to be impractical considering the project location. The revised policy, however, maintained the essential requirement that proposed activities, which resulted in wetlands loss, should stand on their own merit in the permit approval process, and that compensation should not be used to justify permit issuance.

Mr. Watkinson said that the staff recommended adoption of the revised Mitigation/Compensation Policy and Supplemental Guidelines as a component of the guidelines the Commission shall promulgate pursuant to Section 28.2-1301 of the Code of Virginia.

Commissioner Pruitt opened the hearing to the public.

Ellis W. James, representing the Sierra Club and a Norfolk resident, was present and his comments are a part of the verbatim record. Mr. James said that staff had done a good job presenting the issue. He referred and read two letters, one from Fairfax County and

Commission Meeting

one from Judy Hinch in support of this action. He stated that the Commission must pass this significant, next step regulation and to make sure that staff effectively and forcefully communicated the intent of this action to the Wetlands Boards.

Commissioner Pruitt told him that he had made a good presentation. He said the Wetlands Boards do not get enough credit for how their decisions effect water quality. He said this was an important part of the water quality program in the Commonwealth.

Tom Barnard, representing the Virginia Institute of Marine Science, was present. His comments are a part of the verbatim record. Mr. Barnard said the best way to save the wetlands was to avoid impacting any wetlands. As an example, he said in the case of a bulkhead it could be placed landward, if necessary, to avoid impacting the wetlands.

Associate Member Robins moved to adopt the revised guidelines pursuant to Section 28.2-1301 of the Code of Virginia. The motion was seconded by Associate Member Schick. Mr. Schick asked that it be added that wetlands were to be created not just maintained and that the mitigation banks would benefit the State. Associate Member Jones said she was glad to see this action being taken. She said being able to mitigate could stop the damage being done to the wetlands and that protecting the habitat was absolutely necessary to the preservation of the fisheries. **The motion carried, 7-0.**

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14. PUBLIC COMMENTS

Russell Gaskins, waterman, was present and his comments are a part of the verbatim record. Mr. Gaskins asked the Commission to consider hearing the Fisheries Management items at a scheduled time during the day. He said the Habitat items have been going on until 3 and 4 p.m. on the meeting days and he had come late morning because he was interested in the fisheries which were heard, in the past, after lunch, usually around 1 p.m. He said if they were to be continued to be heard so late, he would prefer to know so that he could work in the morning and not miss a day of work, therefore, arriving at a more appropriate time to the meeting.

After some further discussion, Commissioner Pruitt said that he would instruct Mr. Grabb and Mr. Travelstead to get together to see what could be worked out to resolve this matter raised by Mr. Gaskins.

No further action was taken.

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15. PUBLIC HEARING: VIMS request to deploy Crassostrea ariakensis oysters in Virginia waters for experimental purposes.

Jack Travelstead, Chief, Fisheries Management, was present and his comments are a part of the verbatim record. Mr. Travelstead explained that Dr. Luckenbach had a short presentation for the Commission. He further explained that the Commission had approved a number of experiments for non-native oysters. He said that the bio-security measures developed for those projects have become the gold standard. He said that the VIMS proposal went beyond what had been done before with regards to biosecurity measures set for the VSC projects. He explained that these measures were listed in the evaluation. He said staff recommended the project, which would provide further understanding of the animal. He said this research was important and would provide necessary information for the Environmental Impact Statement being prepared by the Corps of Engineers.

Mark Luckenbach, Marine Scientist representing VIMS, gave a powerpoint presentation. His comments are a part of the verbatim record. Mr. Luckenbach said that the EIS requires population models. He said the current data obtained by the aquaculture studies were controlled. He explained that quarantined experiments have limitations and they were currently being done in Virginia and Maryland. He reviewed the powerpoint presentation for the Commission. He said this was a 30-month project. He said producing triploids was not perfect and was designed to minimize possible reproduction.

After some further questions and discussion, Commissioner Pruitt opened the public hearing. No one else commented. The public hearing was closed.

Associate Member Robins moved to approve the request. Associate Member Holland seconded the motion. The motion carried, 6-1. Associate Member Jones voted No.

16. PUBLIC HEARING: Proposed amendments to Regulation 4VAC20-110 to adjust size limits for lobster.

Rob O'Reilly, Deputy Chief, Fisheries Management, gave the presentation. His comments are a part of the verbatim record. Mr. O'Reilly explained that the state was required to have a larger minimum length for lobster. He explained that currently the regulation was for 3 1/4 " and the ASMFC Plan required 3 3/8" minimum length. He said that in addition there was a requirement for a larger maximum size solely for the female. He said the staff had not received any comments from the public and that the staff requested approval of the amendments to Regulation 4VAC 20-110-10, et. seq. to make the state in compliance with the ASMFC requirements.

Associate Member Cowart was acting chair, in Commissioner Pruitt's absence.

The public hearing was opened. No one was present to comment. The public hearing was closed.

Associate Member Holland moved to approve adoption of the amended regulation. Associate Member Bowden seconded the motion. The motion carried, 5-0. Associate Member Jones was absent from the meeting.

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- 17. PUBLIC HEARING:** Establishment of the summer period (May 1 through October 31) quota for Scup.

Joe Cimino, Fisheries Management Specialist, gave the presentation. His comments are a part of the verbatim record. Mr. Cimino explained that the ASMFC in April had announced a change in the 2005 summer period quota of 7,862 pounds for Virginia. He explained that in order to make the regulation reflect this increased amount, staff recommended approval of the amended regulation.

Associate Member Cowart, acting chair, opened the public hearing. The public hearing was closed, as there were no public comments.

Associate Member Holland moved to approve the adoption of the amended regulation and increase the quota to 7,862 pounds. Associate Member Garrison seconded the motion. The motion carried, 5-0. Associate Member Jones was absent.

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- 18. PUBLIC HEARING:** Request for extension of the safe harbor provisions described in Regulation 4VAC20-620-10 ET SEQ.

Rob O'Reilly, Deputy Chief, Fisheries Management, gave the presentation. His comments are a part of the verbatim record. Mr. O'Reilly explained the amendment to the regulation was shown in the page two definitions of Regulation 4VAC 20-620-10. He said that Mr. Tim Daniel requested the safe harbor stipulation originally for summer flounder. He explained that no one else had made a similar request, but he was sure that there had been problems for others. He said that Mr. Daniel had experienced a lot of problems in the Oregon Inlet area. He stated that staff checked with law enforcement and they accepted this amendment. He said that staff recommended extending the safe harbor to allow vessels to tie up for bad weather and to make this a permanent part of Regulation 620.

Associate Member Cowart, acting Chair, opened the hearing to the public. There were no public comments and the public hearing was closed.

Associate Member Holland moved to approve the adoption of the amended regulation. Associate Member Garrison seconded the motion. The motion carried, 5-0. Associate Member Jones was absent.

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19. RECREATIONAL FISHERY ADVISORY BOARD (RFAB): Project recommendations from the RFAB for approval by the Commission.

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

Commissioner Pruitt returned to the meeting.

Mr. Travelstead explained that the Recreational Fishing Advisory Board (RFAB) had completed its reviews of pending applications and had developed its final recommendations for funding. He further explained that each of the projects submitted during this review cycle had been subjected to a staff review, a professional, anonymous peer review, and a public hearing. He said that the funds for the projects recommended by the RFAB, were subject to the Commission's approval. In response to Associate Member Robins question about when the funds will be available he said they would not be available until September 2005.

The RFAB recommended the following:

- A. 2005 Kiwanis Club Children's Fishing Clinic. Wesley Brown. \$6000.00 requested. RFAB recommends full funding at \$6000.00.
- B. Estimating Relative Abundance of Young-of-year American Eel, in the Virginia Tributaries of the Chesapeake Bay. Marcel Montane, VIMS. \$29,929.00 requested.

RFAB recommends 50% funding at \$14,964.50. Staff recommends the remainder of the project costs be met from the Marine Fishing Improvement Fund at \$14,964.50.

- C. Establishment of a Chesapeake Bay Trophic Interaction Laboratory Services Program. Chris Bonzek, VIMS. \$95,000.00 requested. RFAB recommends full funding at \$95,000.00.

- D. Enhancing SAV Habitat: Research and Education for Restoration. Dr. Bob Orth, VIMS. \$93,966.00 initially requested. VIMS has since found an alternative source of funding for this project. The RFAB took no action.
- E. Investigation of Mycobacteriosis in Chesapeake Bay Striped Bass Large Scale Field Survey and Molecular Diagnostics. David Gauthier, VIMS. \$78,448.00 requested. RFAB recommends full funding at \$78,448.00.
- F. Visual Function in Chesapeake Bay Sportfishes: striped bass, weakfish, spotted seatrout, Atlantic croaker, spot, and red drum. Andrij Harodysky, VIMS. \$42,838.00 requested. RFAB recommends full funding at \$42,838.00.
- G. What is the cause of menhaden recruitment failure? Quantifying the role of striped bass predation. Drs. Cynthia Jones and Nathan Smith, ODU. \$76,186.00 requested.

RFAB recommends 50% funding at \$38,093.00. Staff recommends the remainder of the project costs be met from the Marine Fishing Improvement Fund at \$38,093.00.
- H. Virginia Saltwater Angler's Guide – 3rd Edition, Claude Bain, VMRC. \$208,500.00 requested. RFAB recommends full funding at \$208,500.00.
- I. Estimating Relative Juvenile Abundance of Recreationally Important Finfish and Crustaceans in the Virginia Portion of Chesapeake Bay. Dr. Herb Austin, VIMS. \$386,030.00 requested. RFAB recommends full funding at \$386,030.00.

Mr. Travelstead said that the two items, B & G were approved for 50% funding by RFAB as it was beneficial to both the commercial and recreational fisheries and it was proposed that the other 50% should come from the Marine Improvement Fund. He explained that funds were normally set aside for mileage and meals for RFAB members and that these funds had been exhausted. He said that the Board recommended designating an additional \$5,000.00 for these purposes. He stated that staff was recommending approval for the funding of the projects, except D, for which alternate funding had been found and, also, the \$5,000.00 for the mileage and meals reimbursement.

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

Kelly Place, waterman, was present and his comments are a part of the verbatim record. Mr. Place asked if the Commercial Fishing Advisory Board had approved those funding expenditures? Mr. Travelstead said since B had been approved in the past by the CFAB with no objections and it was such small amounts they did not present this to the Commercial Fishing Advisory Board.

Commission Meeting

The public hearing was closed to the public.

Associate Member Cowart asked for a motion from the board.

Following some clarifying questions by the Commission, Associate Member Robins moved to approve items A, B, C, E, F, G, H, and I including the request for the \$5,000 funding for the travel reimbursements of the Recreational Fishery Advisory Board members. He also said that the motion included the 50% funding of items G & B with Marine Fisheries Improvement Funds. Associate Member Holland seconded the motion. The motion carried 5-0. Associate Member Jones was absent.

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Commissioner Pruitt returned to the meeting. He asked for any new staff to be introduced. Mr. Travelstead introduced Sonya Davis, who would be returning to VMRC and working with the Recreational Fishing Advisory Board.

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- 20. OYSTER ISSUES:** Update on seed transfer and other oyster issues raised by Doug Jenkins at April 26th Commission meeting.

Jim Wesson, Head, Conservation and Replenishment, gave the presentation. His comments are a part of the verbatim record and were in response to Mr. Jenkins request to increase the price for the watermen to get the James River seed moved to the Rappahannock River. He said the watermen were working clean culls for private grounds, which was more lucrative for them and easier working conditions. He said when he spoke to them most had gone onto other work, such as crabbing and were not interested in doing the work at any price. He said this could still be done in the fall.

He said the second issue was planting shells on live oysters. He said that was being done and it's done all the time. He said with the Oyster Heritage Program earlier in the program they were rebuilding areas with large amounts of shells, but now there was only maintenance shellplanting being done. He said shells needed replacing each year because harvesting and predators reduce the amount of shell. Shell for cultch is very important to the oyster reproduction. He said maintenance shellplanting of about 1,000 bushels per acre was about 1 shell thick and was not harmful, but necessary to maintain the habitat.

Associate Member Cowart asked about the Shellfish Committee meetings. Mr. Wesson explained that in the last few years attendance had been very poor, so staff was going out to the field to seek advice. Associate Member Cowart asked if these meetings would be reestablished and how often held. Mr. Wesson explained staff would try again to hold these meetings, maybe two meetings a year, August and January. One, for the replenishment program and one, before the public harvest seasons were established.

Associate Member Jones returned to the meeting.

Douglas Jenkins, Twin River Watermen Association President, was present and his comments are a part of the verbatim record. He said he spoke with Ronny Bevans and he said if we would harvest the seed, he would provide the trucks and planters to get the work done. He said that Mr. Bevans said that he was glad there were funds and the area did need some seed. He further explained that he had something he wanted to ask the Commission to consider. He said currently only two or three tongers were working and making about \$35.00 per bushels for clean culls. He said there were only a few tongers still working and not too many were left to hand tong anymore. He said the small dredge was what was needed to work the oyster ground. He said allowing a small dredge in the area would help the older watermen. He said he was concerned with getting the seed from the James River to be transplanted to other areas for harvesting by the watermen. He said that hand tonging was something of the past, which watermen realize and management must realize this also. He said that Dr. Wesson said the dredge would damage the rocks and he did not agree. He said there were areas in the James River where you cannot catch oysters with hand tongers. He said to leave the oysters there they would just die. He said the Commission should consider allowing the dredge to be used. He said a small dredge would not cause damage and you could get watermen to work for the program if they could use this dredge. He said he would like to see some seed moved now rather than wait until the fall. He said that if there were more funds more seed could be moved in the fall. He also said it would be good to see the advisory committee reinstated and active. He said like other committees if someone does not attend, then they would be replaced. He said regarding another issue that he did not agree with planting shell over live oysters. He said Maryland did not do it nor did anyone else. He said it is not a good policy to cover up live oysters. Commissioner Pruitt asked Mr. Jenkins if he was saying he could not get tongers to work? Mr. Jenkins said that there were no tongers to do the work, but there would be workers if they would be allowed to dredge the oysters.

Associate Member Cowart said he was concerned with using a dredge in the upriver area where the rocks were softer and only a thin crust of shells were present. He said they did not dredge soft bottom on their leased ground, only hard bottoms. He said he felt that the ground could be ruined for the future. He said there needed to be a study done before a dredge was allowed upriver to prove that the dredge would not be destructive of these oyster rocks. He said he believed there was a small group of tongers in Gloucester that could work, but they are presently crabbing.

Commissioner Pruitt asked for any action by the Commission. Commissioner Pruitt asked Dr. Wesson to comment. Dr. Wesson said that there had not been good strike in the Piankatank and Great Wicomico Rivers, where the bottom was hard, to move to other areas in recent years. Associate Member Bowden said he had dredged oyster ground himself on the Eastern Shore and did not agree that it would be damaging to the bottom. He suggested trying it this fall as a test. Dr. Wesson said that staff had considered

Commission Meeting

moving some Seaside Eastern Shore seed oysters to areas over on the western shore. Mr. Jenkins said he still did not want to wait. He said the seed should be moved in June to areas in the Rappahannock River.

No action was taken.

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21. LICENSE FEE COMMITTEE: Report of License Fee Committee and request for public hearing.

Jack Travelstead, Chief, Fisheries Management, gave the presentation. His comments are a part of the verbatim record. Mr. Travelstead said the Committee met three times and they spent a lot of time in their deliberations. He said the Committee looked at each individual license fee and the fishery to determine what their recommendation should be, rather than recommending an across the board percentage increase. He said they decided not to increase the oyster license fees because of the depressed condition of the industry. He said for others, they recommended the maximum increase. He said for the permits issued by the agency, for which no fees were currently charged, they asked staff to develop a plan for those permits. He said staff looked at each individual permit to determine what increase should be applied to them. He said there was a table provided in the Commission packet. (A copy of the table is attached.)

Associate Member Cowart asked if the table would be incorporated into the notice. Mr. Travelstead said that the table would be included in the notice.

Associate Member Holland asked if any changes would be made, or if it was to be advertised as it was in the table. Mr. Travelstead said the notice would be worded in such a way to allow for changes.

Associate Member Bowden said he did not agree that the exemptions being advertised like they were done now, but it should be shown at the maximum amount it could be increased. He said to advertise the exemptions would make the public believe that the Commission had already determined that it was an exemption.

Associate Member Robins, as he had served on the committee, explained how the Subcommittee did their review and came to these conclusions. He said they recommended multiple hearings and to advertise all options including an option for changes to be made by the Commission.

Associate Member Bowden asked if the Commission could change what was advertised?

Carl Josephson, Senior Assistant Attorney General, said what was proposed to be advertised was a strawman and that the Commission would be determining at the public hearing what the fees would be.

Associate Member Holland said he was still concerned that the notice would produce confusion among the public.

Associate Member Robins moved to advertise public hearings on the Eastern Shore, Northern Neck, Gloucester, and a final one in July at the regular meeting and the notice be composed in a way to allow the Commission to make changes. Associate Member Garrison seconded the motion. Associate Member Bowden requested that all zeros be changed so the public would feel that they could make comments or suggestions. He suggested showing the maximum fee amount allowed for consideration. Mr. Travelstead responded that the staff could add the maximum as well as the option recommended by the subcommittee. Associate Member Robins and Garrison agreed to the amendment to the motion. The motion carried, 7-0.

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3. CLOSED SESSION:

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

Legal matters pertaining to pending appeals, Jewett, Evelyn and Mitchell.

The motion was seconded by Associate Member Cowart. The motion carried, 7-0.

Associate Member Robins moved for the following:

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

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

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

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

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

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

NAYS: None

ABSENT DURING VOTE: Associate Members McLeskey and Schick

ABSENT DURING ALL OR PART OF CLOSED MEETING: Associate Member McLeskey.

The motion carried, 7-0.

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

There was no further business, the meeting adjourned at approximately 5:05 p.m. The next meeting will be Tuesday, June 28, 2005.

William A. Pruitt, Commissioner

Katherine Leonard, Recording Secretary

Type of License	Year Established or last changed	% change in CPI	Current Price	Number sold in 2003	Proposed Fee (\$) (rounded down)	Actual % Change	Projected New Revenue (\$)
Commercial Registration	1993	27%	150.00	2726	190.00	27%	109,040.00
Commercial Registration-Senior	1995	21%	75.00	326	90.00	21%	4,890.00
Delayed Entry	1993	27%	150.00	19	190.00	27%	760.00
Delayed Entry-Senior	1993	21%	75.00	0	90.00	21%	0.00
Total Registration							114,690.00
Oyster							
by Hand	1979	153%	10.00	163	NC	0%	0.00
Patent Tong	1979	153%	35.00	31	NC	0%	0.00
Dredge	1979	153%	50.00	93	NC	0%	0.00
Ordinary tong	1979	153%	10.00	0	NC	0%	0.00
Patent tong - double	1979	153%	70.00	0	NC	0%	0.00
Hand Scrape	2000	7%	50.00	24	NC	0%	0.00
Total Oyster							0.00
Shucking House							
401	1979	153%	7.50	11	18.00	153%	115.50
402	1979	153%	20.00	21	50.00	153%	630.00
403	1979	153%	45.00	4	113.00	153%	272.00
404	1979	153%	75.00	3	189.00	153%	342.00
405	1979	153%	125.00	3	316.00	153%	573.00
406	1979	153%	175.00	0	442.00	153%	0.00
407	1979	153%	275.00	1	695.00	153%	420.00
Total Shucking							2,352.50
Crabs							
Ordinary Trotline	1979	153%	8.00	27	20.00	153%	324.00
Patent Trotline	1979	153%	31.00	4	78.00	153%	188.00
Dredge	1979	153%	58.00	207	146.00	153%	18,216.00
Scrape	1979	153%	16.00	112	40.00	153%	2,688.00

Double Scrape	1979	153%	32.00	169	80.00	153%	8,112.00
Dip Net	1979	153%	8.00	50	20.00	153%	600.00
Crab pot 100	1979	153%	29.00	561	73.00	153%	24,684.00
Crab pot 150	1979	153%	48.00	93	121.00	153%	6,789.00
Crab pot 200	1979	153%	48.00	43	121.00	153%	3,139.00
Crab pot 300	1979	153%	48.00	860	121.00	153%	62,780.00
Crab pot 500	1979	153%	100.00	156	253.00	153%	23,868.00
Crab Peeler Pot	1993	27%	29.00	937	36.00	27%	6,559.00
Shed Tank < 20	1993	27%	7.50	314	12.50	\$5	1,570.00
Shed Tank > 20	1993	27%	15.00	170	20.00	\$5	850.00
Crab Trap	1979	153%	5.00	1,822	12.00	153%	12,754.00
Horseshoe Crab hand	1999	10%	15.00	16	20.00	\$5	80.00
Total Crabs							173,201.00
Clams							
by Hand	1979	153%	15.00	142	24.00	66%	1,278.00
Patent Tong	1979	153%	35.00	122	58.00	66%	2,806.00
Patent Tong - double	1995	21%	70.00	8	84.00	21%	112.00
Dredge - hand	1993	27%	15.00	2	19.00	27%	8.00
Dredge - power	1993	27%	35.00	22	44.00	27%	198.00
Dredge	1979	153%	50.00	0	83.00	66%	0.00
Surf Clam	1994	24%	100.00	0	124.00	24%	0.00
Scallops	1990	41%	50.00	0	70.00	41%	0.00
Conch Dredge	1979	153%	35.00	16	58.00	66%	368.00
Channeled Whelk	2000	7%	48.00	51	51.00	7%	153.00
Total Clams							4,923.00
Finfish							
Pound Net	1979	153%	25.00	173	63.00	153%	6,574.00
Stake Net	1979	153%	15.00	108	37.00	153%	2,376.00
Gill Net 600	1979	153%	10.00	1618	25.00	153%	24,270.00
Gill Net 1200	1979	153%	15.00	1443	37.00	153%	31,746.00
Cast Net	1979	153%	8.00	18	13.00	66%	90.00

Fyke Net	1979	153%	8.00	156	13.00	66%	780.00
Trot Line	1979	153%	12.00	67	19.00	66%	469.00
Dip Net	1979	153%	6.00	7	9.00	66%	27.00
Haul Seine <500	1979	153%	29.00	42	73.00	153%	1,848.00
Haul Seine >500	1979	153%	88.00	35	222.00	153%	4,690.00
Commercial H & L	1993	27%	25.00	167	31.00	27%	1,002.00
Commercial H & L - Striped bass	1993	27%	25.00	63	31.00	27%	378.00
Purse <70+	1979	153%	\$3/ton 150 MAX	0	379.00 max	153%	0.00
Purse >70+	1979	153%	\$5/ton 600 MAX	14	1500 max	153%	12,000.00
Fish/Eel pot 100	1979	153%	12.00	237	19.00	66%	1,659.00
Fish/Eel pot 300	1994	24%	20.00	117	24.00	24%	468.00
Fish/Eel pot 300+	1994	24%	50.00	37	62.00	24%	444.00
Total Finfish							88,821.00
Commercial Fish Pier	1979	153%	50.00	11	83.00	66%	363.00
Seafood Buyer - B or T	1979	153%	25.00	286	63.00	153%	10,868.00
Seafood Buyer - POB	1979	153%	50.00	196	126.00	153%	14,896.00
Seafood Landing	1996	17%	150.00	253	175.00	17%	6,325.00
N R Harvester	1993	27%	350.00	117	444.00	27%	10,998.00
Total Buyer							43,450.00
Non-Commercial Gear							
Crab pot	1993	0%	29.00	482	29.00	0	0.00
Crab trotline	1993	27%	8.00	58	13.00	\$5	290.00
Crab trap	1993	27%	5.00	89	10.00	\$5	445.00
Gill net	1993	27%	7.50	589	12.50	\$5	2,945.00
Total Non-commercial							3,680.00
Recreational							
Individual	1993	27%	7.50	84,614	12.50	\$5	423,070.00
10-day Temp	1993	27%	5.00	6,613	5.00	0%	0.00
Recreational boat	1993	27%	30.00	39,050	38.00	27%	312,400.00

Charter <6	1993	27%	150.00	254	150.00	0%	0.00
Charter >6	1993	27%	150+ 4.00 pp	56	150 + 5.00 pp		1,458.00
Rental (7.50 pb -\$500 max)	1993	27%	7.50	21	12.50	\$5	479.00
Pier	1993	27%	450.00	26	571.00	27%	3,146.00
Total Recreational							740,553.00

Total Commercial increase	427,437.50
Total Non-commercial gear	3,680.00
Total Recreational	740,553.00
Grand Total	1,171,670.50