

## MINUTES

## Commission Meeting

November 28, 2006

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

Steven G. Bowman	Commissioner
Ernest L. Bowden, Jr. )	
J. Carter Fox )	
J. T. Holland )	
John R. McConaugha )	Associate Members
Richard B. Robins, Jr. )	
Kyle J. Schick )	
J. Edmund Tankard, III )	
Carl Josephson	Sr. Assistant Attorney General
Jack Travelstead	Chief Deputy Commissioner
Wilford Kale	Senior Staff Advisor
Katherine Leonard	Recording Secretary
Andy McNeil	Programmer Analyst, Sr.
Rob O'Reilly	Deputy Chief, Fisheries Mgmt. Div.
Jim Wesson	Head, Conservation/Replenishment
Joe Grist	Head, Plans and Statistics
Joe Cimino	Fisheries Mgmt. Specialist
Stephanie Iverson	Fisheries Mgmt. Specialist, Sr.
Sonya Davis	Fisheries Mgmt. Specialist, Sr.
Lewis Gillingham	Fisheries Mgmt. Specialist
Mike Johnson	Fisheries Mgmt. Specialist
Richard Lauderman	Chief, Law Enforcement Div.
Warner Rhodes	Deputy Chief, Law Enforcement Div.
Herbert Bell	Marine Police Officer
Jamie Cranfill	Marine Police Officer
Ian Ridderbos	Dispatcher
James Tucker	Dispatcher
Bob Grabb	Chief, Habitat Management Div.
Tony Watkinson	Deputy Chief, Habitat Mgt. Div.

**Commission Meeting****November 28, 2006**

Chip Neikirk	Environmental Engineer, Sr.
Jeff Madden	Environmental Engineer, Sr.
Tracy West	Environmental Engineer, Sr.
Randy Owen	Environmental Engineer, Sr.
Hank Badger	Environmental Engineer, Sr.
Ben Stagg	Environmental Engineer, Sr.
Jay Woodward	Environmental Engineer, Sr.
Benjamin McGinnis	Environmental Engineer, Sr.
Justin Worrell	Environmental Engineer, Sr.
Elizabeth Gallup	Environmental Engineer, Sr.
Sean Briggs	Project Compliance Technician

## Virginia Institute of Marine Science (VIMS)

Lyle Varnell  
 David O'Brien  
 Ryan Carnegie  
 Roger Mann  
 Scott Hardaway  
 Russell Burke  
 Mike Oesterling

## Other present included:

R. Forrest Scott	Janice Scott	Barbara Redd	Ben Bracey
D. W. Perkinson	Dean Parker	Jerry Ferguson	Scott Nichols
George Kranda	Neville Reynolds	Robert Gresham	James R. Green
Jeff Watkins	Leonette Smolinski	Audrey D. Leonard	Lewis Leonard
Laurie Morissette	Lynn Perkinson	Charles Ward	John Weinsnecht
James C. Breedon	Ken Brooke	James R. Hill, Jr.	Tim Hayes
Sandy Rowe	Robert Merhige	Marilyn C. Schaum	Jerome Schaum
William McGhee	Dan McGhee	Robert Holloway	Patrick Lynch
Ben Benson	Roger Park	Russell Gaskins	Dr. Nick Cavitt
John Wyatt	Douglas F. Jenkins	Robert Weagley	Buddy Carson
Bill Pope	L. R. Carson, III	Rockelle Seitz	Chan Chandler
Carolyn Walton	Elijah Lee Wilson, Jr.	Allie Walton	John Ridley
William F. Neba	Sammie Joplin	A. W. Willis	Larry Taylor
A. J. Erskine	Joe Shelton	Gene Brown	George Marshall
Bill Spriggs	Jackie Partin	John C. Partin, MD	Paula Jasinski
Julian Cox	Rolf F. Zierow	Catherine H. Zierow	Donnie Stroke
Francis W. Porter	Jeffrey Crockett	M. Scott Bloxom	Tom Powers
Stuart Diehl	Kevin Wade	Kelly Place	Susan Gaston

and others

**Commission Meeting**

**November 28, 2006**

\*\*\*\*\*

Commissioner Bowman called the meeting to order at approximately 9:36 a.m. Associate Member McLeskey was absent.

\*\*\*\*\*

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

\*\*\*\*\*

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

\*\*\*\*\*

**APPROVAL OF AGENDA:** Commissioner Bowman asked if there were any changes to the agenda. Bob Grabb stated that the applicant for Item 2A. Cove Point Condominiums, #05-2207 had asked to have their application for a permit removed from the agenda, as they were still considering the modification. Associate Member Robins requested that an Item 20 be added to consider emergency regulatory action for the Spiny Dogfish.

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

\*\*\*\*\*

**MINUTES:** Commissioner Bowman asked, if there were no corrections or changes, for a motion to approve the October 31, 2006 meeting minutes.

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

\*\*\*\*\*

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

Bob Grabb, Chief, Habitat Management Division, reviewed items 2B through 2D for the Commission. He said that staff was recommending approval of these items.

**Commission Meeting**

**November 28, 2006**

Associate Member Fox asked what the purpose of the project was for Item 2C. Elizabeth Gallop, Environmental Engineer, Sr., stated that it was a driveway for a private residence.

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

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

**2A. COVE POINT CONDOMINIUMS, #05-2207**, requests authorization to modify an existing permit to include the installation of floating wharf and finger pier sections instead of fixed sections for the private use marina situated along Little Neck Creek in Virginia Beach. Recommend no additional royalties provided that the design changes occur as proposed within the previously configured bold outline.

No applicable fees, withdrawn at the request of the applicant.

**2B. TRANSCONTINENTAL GAS PIPE LINE CORPORATION., #06-1751**, requests authorization to install, by dry crossing methods, 42-inch diameter looping pipeline a minimum of five feet under multiple stream crossings in Pittsylvania County and beneath Whipping Creek in Campbell County and to replace existing 30-inch diameter pipeline with new 42-inch diameter pipeline at two stream crossings beneath Cub Run in Fairfax County. Staff recommends a royalty of \$1,476 for the encroachment under 492 linear feet of State-owned bottom at a rate of \$3.00 per linear foot. Staff also recommends a time of year restriction of March 15 – May 31 in Whipping Creek due to the presence of orangefin madtom.

Royalty Fees (encroachment 1,260 l.ft. @ \$3.00/l.ft.).....	\$1,476.00
Permit Fee.....	\$ 100.00
Total Fees.....	\$ 1,576.00

**2C. JAMES K. HAMILTON, ET AL., #06-2209**, requests authorization to install a 42-foot long by 30-foot wide bridge culvert consisting of four 72-inch diameter pipes countersunk 6-inches below pre-construction stream elevation and filled with grouted VDOT Class II riprap impacting 1,260 square feet of Cabin Run in Warren County. A temporary cofferdam and bypass pump system will be utilized to maintain stream flow. Staff recommends a royalty of \$1,890.00 for the encroachment over 1,260 square feet of State-owned bottom at a rate of \$1.50 per square foot.

**Commission Meeting**

**November 28, 2006**

Royalties Fees (encroachment 1,260 sq. ft. @ \$1.50/sq. ft.).....	\$1,890.00
Permit Fee.....	\$ 100.00
Total Fees.....	\$1,990.00

**2D. OGORCHOCK, LLC, #06-2180**, requests authorization to construct two (2) 6-foot wide, concrete travel lift piers, extending a maximum of 250 feet channelward of mean low water, install two (2) breasting dolphins and 116 linear feet of low-profile, free-standing bulkhead for marsh toe stabilization, and dredge 6,780 cubic yards of State-owned subaqueous material to provide maximum depths of minus nine (-9) feet at mean low water to provide additional barge loading access at the Concrete Precast Systems commercial facility on the Southern Branch of the Elizabeth River at 1320 Yacht Drive in Chesapeake. The dredged material will be transported to and disposed of within the Craney Island Rehandling Basin in Portsmouth. Recommended the standard dredging conditions and a royalty in the amount of \$8839.00 for the encroachment over 2,894 square feet at a rate of \$2.00 per square foot and for the dredging of at a rate of \$0.45 per cubic yard.

Royalty Fees (encroachment 2,849 sq. ft. @ \$2.00/sq. ft.).....	\$5,788.00
Royalty Fees (dredging 6,780 cu. yds. @ \$0.45/cu. yd.).....	\$3,051.00
Permit Fee.....	\$ 100.00
Total Fees.....	\$8,939.00

\* \* \* \* \*

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

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

13. Commission consideration of Draft Deed and Draft Resolution for Conveyance authorized by Chapter 201 Acts of Assembly

**The motion was seconded by Associate Holland. 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

**Commission Meeting**

**November 28, 2006**

**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 Bowman held a Roll Call vote:**

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

**NAYS: None**

**ABSENT DURING VOTE: McLeskey**

**ABSENT DURING ALL OR PART OF CLOSED MEETING: McLeskey**

**The motion carried, 8-0.**

\_\_\_\_\_  
**Katherine Leonard, Recording Secretary**

\* \* \* \* \*

**13. COMMISSION CONSIDERATION** of Draft Deed and Draft Resolution for Conveyance authorized by Chapter 201 Acts of Assembly 2006.

Commissioner Bowman explained that Counsel has told him that Item 13 can be taken after the closed meeting, as it will just take several minutes to brief the Commission. He asked for a motion to proceed with this item. His comments are a part of the verbatim record.

**Associate Member Robin moved to take Item 13 after the closed meeting. Associate Member Schick seconded the motion. The motion carried, 8-0. The Chair voted yes.**

**Commission Meeting****November 28, 2006**

Carl Josephson, Senior Assistant Attorney General and VMRC Counsel stated that the two documents, the deed and the resolution had been provided to the members prior to this meeting. He said the Commission needed to adopt and approve the resolution, which was authorizing execution of the deed for the conveyance 1.20 acres in Mathews County to Mr. Jerry W. Ferguson. He said the Commission would need to make a motion. He said the form of the deed was subject to approval of the Attorney General and the terms and conditions of the deed were subject to approval of the Governor. His comments are a part of the verbatim record.

**Associate Member Holland moved to accept the deed and resolution for conveyance authorized by the General Assembly. Associate Member Robins seconded the motion. The motion carried, 8-0. The Chair voted yes.**

Mr. James Breedon, Attorney for Mr. Ferguson, was present and his comments are a part of the verbatim record. Mr. Breedon showed the board some of the oysters he had brought with him that had come from the Rappahannock River in the Butylo area. He said he had himself eaten a couple of the oysters. His comments are a part of the verbatim record.

\* \* \* \* \*

**ITEMS 4 & 5, WILLIAM ROWE, #06-1387:**

Tim Hayes, Attorney for William Rowe and John Daniel, Attorney for Laurie Morissette, were both present. Mr. Hayes said that if Mr. Rowe agreed to accept conditions offered by the appellants in his subaqueous permit, the appellants would agree to withdraw their appeal. His comments are a part of the verbatim record.

Commissioner Bowman asked that VMRC and VIMS staffs meet with the attorneys on both sides for a short time in the Commission meeting room to discuss this issue and return to the meeting at the conclusion of this short meeting.

\* \* \* \* \*

In the interim, Commissioner Bowman asked that Lt. Colonel Warner Rhodes, Deputy Chief, Law Enforcement, introduce the division's new employees, who are:

James Tucker, who started at VMRC in August of this year, as a dispatcher at Operations; and was retired from the Air Force, and

Ian Ridderbos, who started at VMRC in October of this year, as a dispatcher at Operations; and had transferred from VDOT. He said prior to that Mr. Ridderbos had worked for 11 years in the Emergency Medical Service (EMS).

## Commission Meeting

November 28, 2006

\* \* \* \* \*

Bob Grabb, Chief, Habitat Management, explained that from the information provided there was a possibility of an agreement being reached on whether to include the two conditions to the subaqueous permit. He said it was a question of whether there would be acceptance by all. He said staff was requesting they be allowed to proceed with Item 5 and if necessary, then continue with Item 4. He further explained that the wetlands and subaqueous issues were separate in jurisdiction and Item 5 could be considered first, followed by Item 4. His comments are a part of the verbatim record.

**Associate Member Robins moved to consider Item 5 next. Associate Member Fox seconded the motion. The motion carried, 8-0. The Chair voted yes.**

5. **WILLIAM ROWE, #06-1387**, requests authorization to install a series of headland breakwaters which include a 120-foot long trapezoidal spur/breakwater; a 170-foot long trapezoidal breakwater; a 140-foot long trapezoidal breakwater; a 50-foot section of a 120-foot long sill/breakwater and the placement of 5,000 cubic yards of beach nourishment adjacent to his property situated at the mouth of Presley Creek, along the Potomac River in Northumberland County. Numerous residents of Presley Creek protested the subaqueous application.

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

Mr. Madden explained that the applicant's property is located at the confluence of Presley Creek and the Potomac River. The property is a peninsula connected to the mainland by a narrow, 50-foot wide isthmus (neck of land). The isthmus has been improved with a revetment and a gravel bed, which provides vehicular access to the property. The applicant's western property line forms the eastern boundary of the mouth of Presley Creek.

Mr. Madden also explained that Mr. Rowe contracted Coastal Design & Construction Inc. to address the ongoing erosion of the shoreline. They proposed a "living" shoreline utilizing a series of strategically placed breakwaters and beach nourishment. The scope of this project includes the rehabilitation of the storm damaged causeway, a 50-foot intertidal spur on the east end of the property followed by a 120-foot spur breakwater, a 170-foot breakwater, a 140-foot breakwater, a 120-foot sill/breakwater, nearest the mouth of Presley Creek and the placement of 5000 cubic yards of sand for beach nourishment.

Mr. Madden said that portions of the project which extend beyond the mean low water line, include: the 120-foot long by 25-foot wide, spur/breakwater closest to the isthmus; the adjacent 170-foot long by 25-foot wide breakwater, a 140-foot long by 25-foot wide breakwater and a 20-foot long by 25-foot wide section of a sill/breakwater at the western end of the property. Each of the structures will be located in water depths ranging from



**Commission Meeting****November 28, 2006**

minus one-foot (-1')(MLW) to minus two-foot (-2')(MLW) and achieve a maximum crest elevation of four feet above the mean low water elevation. Each of the structures would be nourished with sandy material and sprigged upon the completion of construction.

Mr. Madden stated that numerous area residents had protested the entire project, both the wetlands and subaqueous components, as they were concerned that the construction of the headland breakwater system would result in negative impacts to the mouth of Presley Creek. The protestants believed that the net sand transport in the littoral system along the reach of the Potomac River that includes the project site is easterly, as such, they felt the construction of the breakwater system would result in significant negative impacts to Presley Creek. The protestants maintained that accumulation of sand to the west of the system would result in an accretion of sand in the mouth of Presley Creek causing it to close off thereby adversely affecting both navigation and tidal exchange. The protestants believed that a dredged and maintained channel constructed through the applicant's property and a jetty system to ensure that the mouth of Presley Creek remained open was necessary. The protestants also believed that a previous owner of the property built a causeway at the eastern end of the property along the isthmus which functioned as an inlet for Presley Creek. They would like to see the causeway breached and a bridge installed enabling the creek to re-establish a second inlet on the east side of the property.

Mr. Madden said that the Virginia Institute of Marine Science had commented that the formation of a spit extending westward on the Rowe property suggested that the net sand movement in the system was to the west. This conclusion was supported by geo-rectified images and close-up photographs of the area depicting a dynamic though persistent inlet on the west end of the Rowe property. Research conducted by VIMS also indicated that there was no evidence that there had ever been an active inlet at the location of the present causeway. In addition there was no evidence that the inlet had ever completely closed, or that the project, as proposed would cause the inlet to close. No other State agency has protested the project.

Mr. Madden stated that while staff was sensitive to the concerns of the property owners on Presley Creek and acknowledged that a long-term solution for Presley Creek may include dredging, that matter was not before the Commission for consideration nor was a proposal to breach the causeway. Based on the input from our scientific advisors at VIMS, staff must agree that the project as proposed should not result in the closure of the mouth of Presley Creek. If so, then the project as proposed should not have a negative impact on the properties upstream or inside the inlet in Presley Creek. Based on the foregoing, staff recommended approval of the project, as proposed.

Tim Hayes, Attorney for William Rowe, the applicant, was present and his comments are a part of the verbatim record. Mr. Hayes explained that Mr. Jim Gunn with Coastal Design was present. He said the intent of the project was to protect the property as well as provide tidal interchange. He said he had visited the site and because of the dynamics of the site the project was necessary to stabilize valuable property. He stated that Mr.

**Commission Meeting****November 28, 2006**

Rowe owned a significant portion of the property on Presley Creek and did appreciate the concerns of the protestants. He said Mr. Rowe had been working with them while still trying to achieve his desires and goals. He said that the first item of concern was VIMS' comments that structures were causing the silting in Presley Creek and if this did happen an amended application could be submitted. He said second, VIMS could be allowed on the property at all times to determine if this was occurring. He said the applicant was willing to accept the staff recommendation and the VIMS report. He said they also felt the conditions were good and pointed out as well the applicant's efforts to resolve the problems.

Associate Member Fox asked that VIMS respond. Lyle Varnell, VIMS representative, was present and his comments are a part of the verbatim record. Mr. Varnell responded that VIMS had provided a detailed report and had a presentation, which Scott Hardaway who was present, and could give to the Commission. Associate Member Fox asked if the suggestion to put holes in the causeway would cause more silting in the channel versus a solid causeway. Scott Hardaway, VIMS representative, was present and his comments are a part of the verbatim record. Mr. Hardaway stated that nature did not like 2 inlets, as it would minimize the flow and in a short time one of the holes would close up. Associate Member Fox asked if it would make it worse instead of better. Mr. Hardaway responded yes.

Commissioner Bowman read the staff recommendation, which reads, "...Based on the input from our scientific advisors at VIMS, staff agrees that the project as proposed should not result in the closure of the mouth of Presley Creek..." He asked if this was right? Mr. Hardaway responded yes.

John Daniel, Attorney for Laurie Morissette, was present and his comments are a part of the verbatim record. Mr. Daniel pointed out that this was a difficult task for all parties, but they were able to come up with conditions to add to the permit. He said he felt that both parties wanted to do what was best for the creek. He said there was a good compromise made and agreed to by the applicant and a majority of the protestants. He stated he did not agree with VIMS, as there was spontaneous boat traffic, it was important to maintain tidal interchange. He said they would support approval of the permit with the proposed conditions. He said with the second condition the scientific advisor (i.e., VIMS) was responsible to oversee this project and check it a few times a year.

Mr. Varnell said that they could not agree to being made a part of the permit. He said they were willing to advise and consult and sample and review data, but not be made a part of the permit as a condition, as that was not VIMS role.

Commissioner Bowman stated that he understood what VIMS had said and VIMS does a good job, as well as Scott Hardaway, but this project might validate the research and science that had been done. He said the question was, are we really providing a service to private property owners or in keeping with the public trust. Mr. Varnell explained that

**Commission Meeting****November 28, 2006**

VIMS does monitor all shorelines, but they do so on a large scale, as they are mandated to look at the larger picture. He explained that looking at the smaller picture takes away from the big picture. He said that under normal conditions in a final decision, they were not the decision making body. He stated that Mr. Hardaway looked at all shoreline changes, as that was their normal operating procedures. He said they do not judge the VMRC, as the normal operating procedure was to provide data. He said there were no funds for aerial flights to monitor this on a yearly basis, but they can provide their data and review any other data that is provided.

Associate Member Schick said the inspections are on VMRC instead of VIMS. Commissioner Bowman asked for staff's comments.

Bob Grabb, Chief, Habitat Management, explained that VMRC looks at a permit request and normally imposes or recommends conditions when offered by the agencies. He said in this case the scientific advisors said the structure would not have an impact, therefore staff did not recommend any conditions for the permit. He suggested that the permittee could be required to monitor and provide VMRC with the data and then advice from VIMS could then be sought. He said staff understood VIMS concerns, if they were made a partner. He said when the structure goes in as proposed and then does have adverse impacts, the applicant could apply with a proposal to correct it.

Tim Hayes stated that VIMS wouldn't be making the determination, as they, would only have an observational role. He said the applicant did not agree with VIMS' recommendation and it was not right to require the applicant to do the monitoring the changes.

Associate Member Holland stated that it be required that VMRC not VIMS be put into the second condition. He said it was wrong to put VIMS out front and substitute them for VMRC. Mr. Grabb responded that was already in the permit. Mr. Daniel suggested that it be included to say, "in consultation with VIMS" and this condition be added to the permit in addition to the existing one in the permit. Commissioner Bowman agreed.

**Associate Member Schick moved to approve #06-1387 permit application by William Rowe, as amended with drafts and substitution and information by supporting staff. Associate Member Holland asked that the motion include his suggestion that VMRC be substituted for VIMS in the second condition. Associate Member Holland seconded the motion. Associate Member Fox asked if this included Associate Member Holland's amendment, to which Commissioner Bowman responded yes. The motion carried, 8-0. Chair voted yes.**

Royalties Fees (encroachment 8,500 sq. ft. @ \$0.05/sq. ft.).....	\$425.00
Permit Fee.....	\$100.00
Total Fees.....	\$525.00

## Commission Meeting

November 28, 2006

\* \* \* \* \*

4. **WILLIAM ROWE, #06-1387.** Commission review, on appeal by 25 or more freeholders, of the October 10, 2006, decision by the Northumberland County Wetlands Board to approve the rehabilitation of a previously permitted intertidal riprap revetment, the installation of a 50-foot long intertidal riprap spur; a 120-foot long riprap spur/breakwater; a 170-foot long riprap breakwater; a 140-foot long breakwater; a 120-foot long sill/breakwater and the placement of 5,000 cubic yards of sandy material adjacent to his property situated at the mouth of Presley creek, along the Potomac River in Northumberland County.

John Daniel, Attorney for Laurie Morissette, stated that as a result of Item 5's decision they would withdraw their appeal.

**Associate Member Holland moved to accept the withdrawal. Associate Member Schick seconded the motion. The motion carried, 8-0. The Chair voted yes.**

\* \* \* \* \*

6. **BURWELLS BAY IMPROVEMENT ASSOCIATION, #06-1231.** Commission review, on appeal by the applicant, of the October 30, 2006, decision by the Isle of Wight County Wetlands Board to deny the applicants' request to construct a 5-foot by 300-foot open-pile pier to include a 10-foot by 75-foot L-head; a parallel 5-foot by 50-foot "dock landing" section near an existing boatramp; and three (3) 2-foot by 12-foot finger piers along the L-head to create 6 slips, with lifts, for use by members of the Association at their property situated along the James River (Burwells Bay) at 14477 Burwells Bay Road in Isle of Wight County.

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

Mr. Stagg explained that the site of this application is adjacent to a parcel of upland property owned by the Burwells Bay Improvement Association at the end of Burwells Bay Road in the northern end of Isle of Wight County along Burwells Bay (James River). The parcel of land is commonly referred to locally as the "Public Acre," "County Acre" or just the "Acre." The Association submitted a Joint Permit Application on May 25, 2006, requesting authorization to construct a 5-foot by 300-foot open-pile, community use pier with a 10-foot by 75-foot L-head; a parallel 5-foot by 50-foot "dock landing" section near an existing boat ramp, and three (3) 2-foot by 12-foot finger piers along the L-head to create 6 slips with lifts.

Mr. Stagg further explained that the Isle of Wight County Wetlands Board first heard the project at their August 26, 2006, meeting. After conducting the public hearing they voted

**Commission Meeting****November 28, 2006**

to deny the project. Their decision, however, did not include any rationale for that decision. An appeal by the applicant was heard at the September 26, 2006, Commission meeting. The Commission voted unanimously to remand the case back to the Wetlands Board for reconsideration and a decision based upon a clear rationale, specifically related to those areas within the Wetlands Board's jurisdiction.

Mr. Stagg said that the Association's application to construct the pier and lifts described above, was first received on May 25, 2006. The Isle of Wight County Wetlands Board held their first public hearing on this application on August 21, 2006. Mr. David Epperley, representing the Association, explained the request to the Board. There was some discussion concerning the existing piling field at the site and if they would present a problem for boaters if the pier were constructed as requested by the Association.

Mr. Epperley indicated he did not believe they would cause any problems. Some discussion followed about why the pier could not be located along the southern end of the "Acre" where there were less remnant pilings. Mr. Epperley said the Association discussed this alternative, but they believed the pier would be more useful situated along the existing boat ramp. In addition, the other area was used for swimming by Association members.

Mr. Stagg stated that Mr. Forrest Scott spoke in opposition to the application. He stated that construction of the Association pier as proposed would interfere with their intent to rebuild the previously existing structures. Mr. Scott was asked if they had access through the "Acre" to the water. He indicated they did not. They only had an easement for a prior septic system that was installed in the Association property. VMRC staff was then questioned about the status of the destroyed structures. The board was informed of the applications received from the Scott family after Hurricane Isabel.

Mr. Stagg said that at the County Board meeting their staff recommended denial of the project based mainly on the potential danger related to boating to the remnant pilings of the old pier and building. VMRC staff reminded the Board that navigation issues related to this application and the remnant pilings would be addressed by the Commission before any subaqueous permit was issued and that the primary focus of the Wetlands Board should be on any wetland impacts associated with the proposal. The public hearing was closed and a motion and second were made to deny the project. No reason for the motion was given. There was no additional discussion, and the board voted 3-0 to deny the application with one abstention.

Mr. Stagg said further that the decision of the Isle of Wight County Wetlands Board was appealed by the applicant and was heard by the Commission at its September 26, 2006 meeting. The Commission subsequently remanded the case back to the local Wetlands Board for reconsideration and a clear rationale for their decision, specifically related to those areas within their jurisdiction.

**Commission Meeting****November 28, 2006**

Mr. Stagg explained that as a result of the Commission's decision, the Isle of Wight County Wetlands Board heard the project at their October 30, 2006, meeting. A public hearing was held at which the applicant's representative, Mr. Epperly, briefly indicated that nothing had changed and that the Association still requested approval of the project as presented.

Mr. Stagg told the Commission that Mr. Woodrow Crook, attorney representing the Scott family, indicated that he understood the deficiencies in the board's previous action and requested that their decision contain a clear rationale. He further requested that the Board deny the project, citing potential litigation issues and his client's intent to reconstruct a structure at this location upon State-owned subaqueous land within the riparian area of the Burwells Bay Improvement Association. When the Board asked about the status of any reconstruction Mr. Crook indicated that his client's plans were not yet "approved".

Mr. Stagg said that the Virginia Institute of Marine Science Shoreline Permit Application Report indicated the proposal would have minimal individual and cumulative adverse impacts. The shoreline along this reach was primarily a nonvegetated sand beach. The Virginia Department of Health and Office of Environmental Health had both indicated that the project was acceptable. No other agencies had commented on the proposal.

Mr. Stagg went on to explain that the Isle of Wight County Wetlands Board then entertained a motion to deny the project based on the following motion: "...the Wetlands Board having considered the documents and materials in the previous hearing; the public record included in the agenda packet; the staff's briefing and recommendations presented at this hearing; the evidence presented at this hearing on behalf of the applicant, David Epperly and the protestor, Woodrow Crook; the comments of the other state agencies consulted in the matter and under Chapter 13, Title 28.2 of the Code of Virginia, particularly the provisions of Sections 9 and 10 of the Wetlands Ordinance relating to the Commission's responsibilities; the matters to be considered; and, criteria for determining whether to grant or deny a permit, I move to deny the permit on the facts of the litigation and safety issues that were presented in the previous agenda and public hearing held. Also, based on the finding that the anticipated public and private benefit of the proposed activity does not exceed its anticipated public and private detriment based on all the factors". The Wetlands Board's motion passed 5-0.

Mr. Stagg stated that while the Isle of Wight County Wetlands Board cited a litany of items contained within the model wetlands ordinance, staff believed the actual record of both public hearings did not support any of the conclusions contained within the motion based on impacts to wetlands within the Board's jurisdiction. In addition, Staff was unaware of any pending legal action between the Scott family and the Association, no application had been submitted to VMRC concerning any attempt to construct structures at this location by anyone other than the Association, and the only safety issues at this site appeared to be related to the remaining remnant derelict pilings for which the Scott family continued to assert an ownership interest. In a separate action, Commission staff had

**Commission Meeting****November 28, 2006**

directed removal of those pilings, pursuant to Section 28.2-1210(A) of the Code of Virginia, as they posed a hazard to the general public.

Therefore, Mr. Stagg stated that staff recommended the Commission overturn the Board's decision to deny the project finding that the denial had prejudiced the substantial rights of the applicant, that the decision was unsupported by the record considered as a whole, and that there would be minimal impacts to jurisdictional wetlands involved. Staff further recommended that the Commission direct the Board to issue the necessary permit.

**Associate Member Holland moved to accept the staff recommendation. Associate Member Robins seconded the motion. Commissioner Bowman stated that he understood the Wetlands Board's action, but if it did exceed its authority, he believed that the intent was well founded. He said there had been few appeals from them, but the law was the law. The motion carried, 8-0. The Chair voted yes.**

No applicable fees, Wetlands Appeal

\* \* \* \* \*

7. **BURWELLS BAY IMPROVEMENT ASSOCIATION, #06-1231**, requests authorization to construct a 5-foot by 300-foot open pile pier to include a 10-foot by 75-foot L-head; a parallel 5-foot by 50-foot "dock landing" section near an existing boatramp; and three (3) 2-foot by 12-foot finger piers along the L-head to create six (6) slips, with lifts, for use by members of the Association at their property situated along the James River (Burwells Bay) at 14477 Burwells Bay Road in Isle of Wight County. Forrest R. Scott and the Bracey family protested the subaqueous application.

Ben Stagg, Environmental Engineer, Sr., gave the presentation with slides. His comments are a part of the verbatim record. He explained that this was the same presentation as the last item, but not including the appeal. He further explained that the attorney was requesting an abeyance on the 60-day removal order and to extend it so that an application for a permit could be submitted.

Mr. Stagg explained that the site of this application was adjacent to a parcel of upland property owned by the Burwells Bay Improvement Association at the end of Burwells Bay Road in the northern end of Isle of Wight County along Burwells Bay (James River). The parcel of land is commonly referred to locally as the "Public Acre," "County Acre" or just the "Acre." The Association submitted a Joint Permit Application on May 25, 2006, requesting authorization to construct a 5-foot by 300-foot open-pile, community use pier with a 10-foot by 75-foot L-head; a parallel 5-foot by 50-foot "dock landing" section near an existing boat ramp, and three (3) 2-foot by 12-foot finger piers along the L-head to create 6 slips with lifts.

**Commission Meeting****November 28, 2006**

(Mr. Stagg noted in a previous staff evaluation, a brief history of the previous ownership, activities and structures at this location was warranted.) The portion of land now owned by the Burwells Bay Improvement Association was previously owned by the County and was considered a public landing area. The Association obtained ownership of the property from the County in 1959. There did not appear to be any transfer of ownership of any of the offshore structures included with this transaction. Going back even further, however, on July 6, 1925, Mr. Edwin T. Poole received from the Circuit Court “the right and privilege of erecting a wharf at the County landing at Burwells Bay on the condition, however, that the public shall have the right to use said wharf by the payment of the following charges: to wit, for packages, ten cents for each hundred pounds, or fractinnal (sp) part thereof, freight in ton lots at a rate of one dollar for each ton, for excursions of passenger boats at the rate of ten cents for each passenger or guest landed.....”. The wharf that was authorized was to begin 30 feet south of the northern property line and extend channelward 400 feet (more or less) with a 40-foot by 40-foot L-head, based upon the drawing submitted to the Court. It is unclear if this is what was actually constructed, but according to the history of the structures at this location as provided by the Scott family (current owners of the structure remnants) everything that existed at the site was destroyed by the 1933 Hurricane.

Mr. Stagg continued to say, that a new building was constructed at this location, in 1934, again by Mr. Poole, using some of the original pilings. Mr. Poole added an additional walkway channelward of the building and “bath houses” for both men and women. The structure built in 1934 apparently had dimensions of approximately 64 feet by 64 feet and was approximately 125 feet channelward of mean low water. That new building was well in excess of anything the Court had authorized. Mr. Poole continued to conduct business there until his death in 1945. After his death, the structure was apparently rented for two years and then sold to Tommy Sadler. It was resold to Aston Young and then to a Mary Wells. Dr. Darden then purchased the structures in the 1960’s and rented it to Nelson Moody. By this time the bathhouses were gone and most of the offshore pier was gone. In the early 1980’s Mr. Darden sold the structures to Mr. John Read, who placed the ownership into the name of Le Bay Inc. It was then used as a storage space for his construction business. The Bracey and Scott families obtained ownership in 1989 and they subsequently renovated the building for use as a family retreat. Throughout these transfers, it appears that only the structures themselves were conveyed. It does not appear that any riparian rights were acquired when the Scott and Bracey families purchased the structures.

Mr. Stagg explained that in 1995, VMRC received an application from the Scott and Bracey families requesting authorization to construct a 110-foot long by 7-foot wide non-riparian pier with a 40-foot by 30-foot T-head platform that would extend channelward of the existing structures. Staff recommended denial of the additional structures, as requested, due to their size and a lack of water dependency. The Commission, however, approved that application. During Hurricane Isabel the entire structure was destroyed leaving only a remnant piling field. The Scott family applied to rebuild the structure



**Commission Meeting****November 28, 2006**

citing Governor Warner's Executive Orders # 58 and # 66. Staff wrote Mr. Scott in August of 2004, indicating that VMRC did not believe the structures met the requirements of the Executive Orders. Mr. Scott was sent an additional letter on December 3, 2004, informing him that if he wished to pursue reconstruction of any structures at this location the submission of a regular Joint Permit Application would be required. To date, no application had been submitted.

Mr. Stagg stated that while VMRC had not received any direct objections from either the Bracey or Scott families, it was apparent from the testimony provided during both public hearings at the Isle of Wight County Wetlands Board meetings that they object to the current proposal by the Association. Their objections included safety and access concerns in the event they were able to obtain approval to reconstruct any structures in the footprint of the old "Dancehall" building and associated pier.

Mr. Stagg stated that the Virginia Institute of Marine Science Shoreline Permit Application Report indicated the proposal would have minimal individual and cumulative adverse impacts. The Virginia Department of Health, Office of Environmental Health, had indicated that the project was acceptable. No other agencies had commented on the proposal.

Mr. Stagg said that staff believed that the only safety issues at this site appeared to be attributable to the remaining remnant derelict pilings for which the Scott and Bracey families continued to assert an ownership interest. In a separate action, Commission staff had directed removal of these pilings pursuant to Section 28.2-1210 (A) of the Code of Virginia, finding that they posed a significant hazard to the general public, as they currently exist. The Association owns the upland at this location and the proposed pier and slips appeared to be within their riparian area. Therefore, staff recommended approval of the pier and slips, as proposed. Staff also recommended a royalty of \$4,860.00 for the encroachment over 3,240 square feet of State-owned subaqueous bottomland at a rate of \$1.50 per square foot.

After some discussion, Commissioner Bowman stated that the applicant and Mr. Crook were not present. He further explained that Hurricane Isabel with the high winds removed the structure from the pilings. Mr. Stagg demonstrated the extent of the damage with a staff slide.

Commissioner Bowman asked if anyone was present in opposition.

R. Forrest Scott, representing the Bracey family of Windsor, Virginia was sworn in and his comments are a part of the verbatim record. Mr. Scott provided a handout to the Commission of his comments. He said they were objecting to the location, as it would interfere with the construction of a pavilion that they were proposing. He said there were 10 brothers and sisters and they had gotten all the permits. He said this would have historical value and be used personally as well as by the Association and other civic

**Commission Meeting****November 28, 2006**

projects. He said the “acre” was built in 1926 and established by the court for county residents to use. He read his statement into the record. He said the association has been secretive in some their activities and had lost a lot of its members. He said they were never sent notices of association meetings, where decisions were made.

Commissioner Bowman stated this was a difficult situation. He said the Commission had authorized the addition to the dance hall. At the time the Commission acted in good faith and were of the impression that the owners had riparian rights. He went on to explain that there were two issues. He said the pier was before them and he believed the applicant had the right to build the pier. What was needed by the opponent, is clarification by the court of their riparian rights.

Mr. Stagg said according to the Epperlys the Scotts and Bracey’s may have paid the dues, but the Association never cashed their checks, so they were not considered members. He said this was stated publicly at the County hearing.

Commissioner Bowman asked for discussion or a motion.

Associate Member Fox asked if the Scott family had riparian rights as members of the Association. Carl Josephson, Senior Assistant Attorney General and VMRC Counsel responded that the Association held the riparian rights not the individuals.

Associate Member Robins asked about exhibit 2-1, appendix for the application. He said it shows the proposed pier being parallel to the offshore pilings and the protestant’s drawing shows it crossing the piling field. He asked which was right? Mr. Stagg stated that they did not have that drawing and if correct, the association drawing showed it going out beyond the pilings. He said the Association drawing was wrong on the dance hall, as access would be in an area around the pilings and the pilings would impact access to some slips.

Associate Member Schick stated he did not see the 40 x 30 T-head, which was approved in 1995, as it might be the difference. He said it does not look like it crossed the pilings field.

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

Commissioner Bowman stated that the Commission’s decision could be appealed by the applicant or Mr. Crook.

Royalty Fees (encroachment 3,240 sq. ft. @\$1.50/sq. ft.).....	\$4,860.00
Permit Fee.....	\$ 100.00
Total Fees.....	\$5,960.00

## Commission Meeting

November 28, 2006

\* \* \* \* \*

8. **MR. AND MRS. ANTHONY KLUSEWICZ, #06-1470**, request authorization to construct two (2) 50-foot by 12-foot riprap breakwaters with 1000 cubic yards of sandy material placed landward of the breakwaters as beach nourishment adjacent to their property situated along the Piankatank River in Gloucester County. Two nearby property owners protested the project.

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

Mr. Neikirk explained that Mr. and Mrs. Klusewicz's property is situated along the Piankatank River in the Riverwatch Subdivision in Gloucester County. Development along this portion of the shoreline is primarily residential. The shoreline includes a 15 to 20-foot tall bank with a narrow sandy intertidal zone. The shoreline faces generally north and the Piankatank River is approximately 1 mile wide at the project site. They propose to construct two (2) 50-foot by 12-foot riprap breakwaters with 1,000 cubic yards of sandy material placed landward of the breakwaters, as beach nourishment. The proposal also calls for the construction of 185 linear feet of riprap revetment and the construction of a private pier extending 200 feet channelward of mean high water with an 18-foot by 36-foot open-sided boathouse. The revetment is proposed landward of mean low water and therefore does not fall under the jurisdiction of the Marine Resources Commission. Additionally since the pier and boathouse are noncommercial and the boathouse is open-sided, under 700 square feet in size, and is not opposed by either of the adjacent property owners, they meet the statutory authorization for private piers and boathouses contained in §28.2-1203(A)(5) of the Code of Virginia.

Mr. Neikirk stated that Mr. Charles Jett, Jr., an adjoining property owner and Mr. Clem Carlise, President of the Riverwatch Homeowners Association both protested the breakwaters and nourishment. Mr. Jett is concerned that the beach nourishment may not remain behind the breakwaters and that the breakwaters may disrupt the natural movement of sand along the shoreline. He also states that the lot is very deep and no structures are threatened by erosion. Mr. Carlise states that the Riverwatch Homeowners Association is strongly opposed to the project, but he does not provide their reasons.

Mr. Neikirk explained that in the VIMS report, dated July 11, 2006, they stated that the breakwaters should be effective in addressing the erosion at the property, but added that it would be preferable if the breakwaters were part of a system designed to treat all of the properties within this reach of shoreline. They also questioned the need to grade the bank and install a riprap revetment at the toe of the bank.

Mr. Neikirk further explained that the Department of Conservation and Recreation found the project acceptable, but noted the applicant will need to submit a water quality impact

**Commission Meeting****November 28, 2006**

assessment for review and approval by the local government in accordance with the Chesapeake Bay Preservation Act requirements and that the grading and land disturbance must be conducted in conformance with the Virginia Erosion and Sediment Control Handbook.

Mr. Neikirk said that properly designed breakwaters with beach nourishment were generally considered to be a desirable method to address shoreline erosion since the breakwaters are designed to maintain a sandy intertidal beach habitat landward of the breakwaters. Although VIMS questioned the need for the revetment and the breakwaters, the contractor argued that the revetment was still needed to protect the bank during storm events. During the Gloucester Wetland Board hearing the contractor stated that he would need to grade the bank to a much flatter slope, if the revetment were not allowed. He further said that such grading would disrupt more of the riparian boundary, because the lot was narrow it would be difficult to transition such a deep cut into the adjoining lots.

Mr. Neikirk said that staff agreed it would be preferable to treat the entire shoreline with a comprehensive plan. Unfortunately, it was often difficult to coordinate the development of a comprehensive plan when there were multiple private owners along of the reach of shoreline. Staff would, however, strongly encourage the development of such a plan. The current proposal appeared to be a reasonable approach to protect the applicants' property. The proposed breakwaters could be incorporated into a comprehensive plan, should one be developed in the future, to treat the entire reach.

Accordingly, Mr. Neikirk said that staff recommended approval of the construction of the breakwaters and associated beach nourishment with a condition the applicants provide a detailed plan for the planting of the intertidal area created landward of the breakwaters. Additionally, staff recommended the assessment of a royalty of \$175.00 for the encroachment of the beach nourishment on 3,500 square feet of State-owned submerged land at the rate of \$0.05 per square foot.

Jeff Watkins, Riverworks Design, contractor for the applicants, was sworn in and his comments are a part of the verbatim record. Mr. Watkins stated that the applicants accepted the staff recommendation and conditions.

There was no one present in opposition to the project.

**Associate Member Holland moved to accept the staff recommendation. Associate Member McConaugha seconded the motion. The motion carried, 7-0-1. Associate Member Schick abstained, as he was absent during the presentation and only returned as the motion was being made.**

Royalty Fees (encroachment 3,520 sq. ft. @ 0.05/sq. ft.).....	\$175.00
Permit Fee.....	\$100.00
Total Fees.....	\$275.00

## Commission Meeting

November 28, 2006

\* \* \* \* \*

9. **JAMES HILL, #03-1145**, requests authorization to retain a previously constructed and unauthorized second riparian pier and a previously unauthorized concrete boat ramp at his property situated along Streeter Creek, a tributary to Hampton Roads in the City of Suffolk.

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

Mr. Stagg explained that the site of this application was along Streeter Creek in the northeast corner of the City of Suffolk. A Joint Permit Application was submitted by Mr. Hill on May 30, 2003 requesting authorization to add a 5-foot by 48-foot pier extension to the channelward end of an existing pier at this location, along with two boatlifts. At that time staff noted the drawings depicted two existing piers on either side of an existing boat ramp. Mr. Hill was notified in an August 11, 2003 letter that no record could be found for authorization of any piers or boat ramp at this location. The letter further explained that the Code of Virginia only allowed for permit exemption for a single riparian pier per upland property. A second riparian pier required a permit from VMRC.

Mr. Stagg further explained that staff was contacted by phone by the applicant, who agreed to remove the older upstream pier. The applicant indicated that the boat ramp had been in existence for many years and staff believed it could predate Commission authority for permitting. Therefore, a letter was sent, dated September 8, 2003 indicating that the proposed addition to the downstream pier did not require any additional authorization, provided that the upstream pier was removed.

Mr. Stagg stated that VMRC received a request to install a third boatlift along the previously authorized pier extension on June 8, 2006. Staff noted that the drawings still indicated the existence of the second pier. Staff again wrote to Mr. Hill on June 19, 2006, reminding him that the upstream pier was to be removed pursuant to our earlier letter of authorization for the downstream pier addition. Mr. Hill responded by indicating that he now wished to retain both piers and would like to seek after-the-fact approval and submitted a revised Joint Permit Application. Mr. Hill later provided information that both piers and the boat ramp would be for private, residential and non-commercial use by both Mr. Hill and his immediate family, some of whom live adjacent to this property. This particular location appears to be one of the first developed parcels along Streeter Creek and apparently there has been a pier and some type of boat ramp at the site for many years, dating back to the late 1940's or early 1950's. The upstream pier appears to be the older of the two piers. It appears that the second downstream pier was built to better accommodate launching of boats at the ramp, as the older pier is not aligned parallel to the ramp. Additionally, the older pier appears to be close to the property line, while the newer pier is more centrally located along the shoreline.

**Commission Meeting****November 28, 2006**

Mr. Stagg said that staff was uncertain of the age of the boat ramp, but it might pre-date the passage of the tidal wetlands act. Nevertheless, it appeared that additional concrete had been added to the ramp over the years and therefore authorization of the subaqueous portion was recommended to bring the entire structure into compliance with current law.

Mr. Stagg also said that staff had not received any comments during the public interest review nor had any State agencies commented on the project. The City of Suffolk Wetlands Board indicated by letter, dated November 7, 2003, that piers were exempt from the Wetlands Ordinance; and as such, they took no further action on the request.

Mr. Stagg stated that while the applicant indicated he wished to retain the second pier, it did not appear, in light of the existence of the downstream pier with boatlifts, that its existence was necessary to accommodate access to the water at this location. Therefore, staff recommended after-the-fact approval of the boat ramp, but recommended the Commission direct removal, within 90 days, of the second, older, upstream pier at this location.

James Hill, applicant, was sworn in and his comments are a part of the verbatim record. Mr. Hill explained that in 1983 both piers were there and both were changed and the boat ramp added. He said that in 1998 there was a barge, which had sunk in the location where the pier was located. He provided pictures. He said the barge was removed and he put in the pier in 1998 in that location. He said only his family and he used it all the time and had the only access. He said in 2003 he added to the other pier and it was in August 2003 he was notified that he could not have two piers. He said when Hurricane Isabel came through he simply dropped the ball. He further explained that he applied for the boat ramp, which was put exactly where the barge had been. He said he also had a floating dock, which was good to have there for his elderly parents to access their boat. He said it did not impact anything as the Suffolk Water Treatment was directly across from them. He said he was requesting permission to keep that pier.

Associate Member Fox asked to clarify, if there were two piers. Mr. Hill responded yes with the addition. He entered another picture into the record.

Commissioner Bowman asked what the square footage was of the other pier. Mr. Stagg explained that the mainstem was 5 X 48 and 40-foot long. He said the L was 48 feet long. He said that if this were approved as requested revised drawings were necessary, as the current drawings do not show it.

There was no one in opposition present.

**Associate Member Robins stated that the one structure predates VMRC authority and he felt there were no navigational impact or impacts to others. He moved to approve the project with the requirement that revised drawings be submitted. Associate Member Holland seconded the motion. Commissioner Bowman stated**

Commission Meeting

November 28, 2006

that one of the piers predated the Code giving VMRC its authority and there were no impacts and not much encroachment. The motion carried, 8-0. The Chair voted yes.

Permit Fee.....\$25.00

\* \* \* \* \*

Commissioner Bowman announced that the Commission would break for lunch at 12:30 p.m., after this item and plan to return from lunch at approximately 1:15 p.m.

\* \* \* \* \*

- 10. **MATTAWOMAN ESTATES, #05-2601**, requests authorization to construct a 320-foot long by 5-foot wide pier which includes a 20-foot by 10-foot L-head and seven (7) mooring piles for the mooring of up to five (5) community boats, situated adjacent to community property along Mattawoman Creek in the Wilsonia Neck area of Northampton County. An adjacent property owner protested the project.

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

Mr. Badger explained that the Mattawoman Estates is a five-lot subdivision in Wilsonia Neck near the mouth of Hungars Creek and the Chesapeake Bay. Wilsonia Neck is a mix of farmland and residential subdivisions. The community property faces west and overlooks the creek and the bay. Three families (Charles and Linda Ward, Joey and Catherine Weinbrecht, and Charles Ray Forrest) own the five parcels that are not directly connected to Mattawoman Creek. However, Mattawoman Estates does own in fee simple and in common, a 50-foot wide riparian parcel that does connect to the creek. The proposal is to construct a five-slip community pier on that parcel to serve the five land-locked properties.

Mr. Badger said that Mr. Jerome Shaum, an adjacent waterfront property owner, objected to the community pier. Mr. Shaum’s concerns focused on his riparian rights, the need for five boat slips when there are only three property owners and the original developers intentions (calling the 50-foot wide parcel a boat landing not a pier or wharf). Mr. Shaum preferred that the applicant construct a boat ramp instead.

Mr. Badger stated that the Virginia Institute of Marine Science had indicated that the individual and cumulative adverse environmental impacts resulting from the community pier structure should be minimal. The Northampton County Wetlands Board approved their portion of the project, as submitted at their January 18, 2006, meeting. The Health Department informed staff that the applicant had submitted an approved plan for sanitary

**Commission Meeting****November 28, 2006**

facilities and had been granted a variance. As a result, the Department did not object to the issuance of the subject permit. No other State agencies had raised concerns or objections to the project.

Mr. Badger did say that given the concerns of Mr. Shaum, and the fact that the common riparian parcel was only 50-feet in width, staff informed the applicants that a formal riparian apportionment by the Circuit Court would be necessary to determine the riparian boundaries between Mattawoman Estates and their adjacent property owners. Only then would staff be able to determine if the proposed pier would impact the legitimate property rights of the adjacent waterfront property owners. A riparian apportionment agreement between Mattawoman Estates and the two adjacent property owners was recorded in the Clerk's Office of Northampton County on October 20, 2006, along with a survey showing the approved riparian allocation and coterminous boundaries of the applicant's property.

Mr. Badger stated that staff also required the applicant provide a drawing showing the proposed pier, and how the mooring of five community boats and any access to and from the pier would be confined to their riparian area. The applicant submitted a drawing dated October 24, 2006, showing that five boats could be moored and access the community pier without encroaching on the adjacent riparian areas.

Mr. Badger explained that as a result of the riparian apportionment agreement, the fact that all five parcels owned in common the 50-foot wide riparian parcel, and that the pier, moorings and access can be contained within their apportioned riparian area without encroaching upon the adjacent riparian areas, and after considering all of the factors contained in §28.2-1205(A) of the Code of Virginia, staff recommended approval of the project as currently submitted.

Charles Warden, representing the Mattawoman Estates, was sworn in and his comments are a part of the verbatim record. Mr. Warden provided a written statement as a hand out. He said they had satisfied all of the VMRC requirements and were requesting approval.

Mr. Bob Merhige, attorney for the Shaums, was present and his comments are a part of the verbatim record. Mr. Merhige said there were two main concerns of his clients. He said one concern was the length of the pier, which was longer than their pier on the right. He said second, the number of boat slips would be appropriate for 5 lots, but there were not that many and it would negatively affect their property. He said they had never planned to live near a mini-marina and this would set a precedence for the future and create a situation where you buy a lot inland with the right of way to the water. He said too many boats would be allowed and any boat in the water had a negative impact and was not in the best interest of state policy.

Mr. Jerome Shaum, protestant and adjacent property owner, was sworn in and his comments are a part of the verbatim record. Commissioner Bowman asked if the boat issue came up in the apportionment. Mr. Shaum said he did not think of that and it only



**Commission Meeting**

**November 28, 2006**

covers the footprint there. He said he moved forward in good faith and asked that the Commission consider his counsel’s request.

Mr. Warden in his rebuttal stated that the 320 feet was necessary to access good water depth. He said they felt since they were all contributing (1/5 of cost) they had the right to get a boat slip each.

Bob Grabb, Chief, Habitat management explained that good points had been made and the apportionment was done. He said the 5 boat slips could be accommodated within the area approved by the court without encroaching on the adjoining property owner’s area. His comments are a part of the verbatim record.

**Associate Member Robins stated that this was a reasonable use and was within the boundaries as well as being reasonable with square footage. He moved to accept the staff recommendation. Associate Member Schick seconded the motion. The motion carried, 8-0. The Chair voted yes.**

Royalty Fees (encroachment 2,225 sq. ft. @ \$1.50/sq. ft.).....	\$3,337.50
Permit Fee.....	\$ 100.00
Total Fees.....	\$3,437.50

\* \* \* \* \*

- 11. DENNIE PERKINSON, #06-0418**, requests authorization to construct a 40-foot by 16-foot open-sided boathouse with associated finger piers at an existing private pier adjacent to his property situated along Back Creek in York County. An adjacent property owner protested the project.

Tracy West, Environmental Engineer, Sr., gave the presentation with slides. Her comments are a part of the verbatim record. She said the protestant was not present.

Ms. West explained that Mr. Perkinson’s property is situated along The Thorofare, near the Goodwin Islands, in York County. The waterway is over 2,000 feet wide at this location. Mr. Perkinson has applied to lengthen his existing pier and construct a boathouse at the terminus. There is at least one other boathouse in the immediate vicinity of the Perkinson’s property and several others along this portion of the waterway.

During their evaluation of the application, Ms. West said that staff concluded that the pier expansion and four-foot wide finger piers surrounding the proposed boathouse appeared to be authorized by statute pursuant to §28.2-1203(A)(5) of the Code of Virginia. As such, a “no permit necessary” letter was issued for the construction of the pier on July 24, 2006. Since the boathouse was the subject of a protest letter from the adjacent property owner, however, that portion of the project was not statutorily authorized and must be

**Commission Meeting**

**November 28, 2006**

considered by the Commission. Mr. Duane Heitkemper, the adjacent property owner, had expressed concerns that the proposed boathouse would obstruct his view.

Ms. West stated that there were no oyster ground leases affected by the proposal.

Ms. West said that the subject boathouse appeared to be reasonably sized and would have qualified for the authorization contained in §28.2-1203 (A)(5) of the Virginia Code had it not been protested by the adjacent property owner. In addition, the open-sided design should minimize the visual impacts associated with the structure. After evaluating the merits of the project against the concerns expressed by those in opposition to the project, and after considering all of the factors contained in §28.2-1205(A) of the Code of Virginia, staff recommended approval of the project as proposed.

Mr. Perkinson, the applicant, and his contractor, Mr. Robert Holloway were both present and sworn in. Mr. Holloway stated that there was a power point presentation available, if desired. He said it showed the various other boathouses in the area. He stated that the protestant was objecting to a boathouse just like the one he had and that their view would be impacted.

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

Permit Fee.....\$25.00

\* \* \* \* \*

The Commission broke for lunch at approximately 12:30 p.m. The meeting reconvened at approximately 1:15 p.m.

\* \* \* \* \*

- 12. **BAY WATCH, LTD, #06-1448**, requests authorization to construct a 20-foot long by 5-foot wide community pier with a 150-foot long by 5-foot wide L-head situated along Pitts Creek and adjacent to lot number 12 in the “Bay Watch Subdivision” in Accomack County. The project is protested by nearby property owners.

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

Mr. Badger explained that the project was located along Pitts Creek, a small tributary of the Pocomoke River, one mile south of the Virginia/Maryland State Line. Pitts Creek is primarily surrounded by farmland and marshland. The creek is approximately 100 feet

**Commission Meeting****November 28, 2006**

wide and possesses depths of -8 feet at mean low water (MLW). A public boat ramp on Pitts Creek is less than 2 miles west of the project site by road. The proposed community pier is designed to serve a new thirty-six (36) lot residential subdivision. According to the application drawings, only thirteen (13) lots appear to be bonafide waterfront riparian properties. The applicant has not severed the riparian rights or placed any deed restrictions on those thirteen lots to preclude the construction of individual private piers as part of this application.

Mr. Badger stated that Bay Watch was also seeking authorization to permit the overnight mooring of up to four (4) boats alongside the proposed community pier.

Mr. Badger said that in an effort to provide water access to the property owners within the subdivision, Bay Watch had placed a community pier access easement across lot #12. This access easement extended only as far as the mean low-water mark, since the Commonwealth of Virginia owned the subaqueous bottom in Pitts Creek. The applicant sold lot #12 in May 2006 to a Mr. and Mrs. Stephen J. Busch with the above- referenced pier access easement. As riparian owners Mr. and Mrs. Busch have certain rights to use the adjacent waterway, such as the right to access navigable waters, and to build a private pier, subject to regulation by the state. Although there is an upland easement on their property, in this case it does not appear that Mr. and Mrs. Busch have given up any of their riparian rights in the area of the proposed community pier.

Mr. Badger explained that several nearby property owners along and near Pitts Creek protested the project. They had expressed concerns over the number of private riparian piers that may be built along with the community pier, that the increase in boat traffic might have an impact on the vegetated wetlands, the impact to wildlife resources, and the change this facility might bring to this otherwise pristine area.

Mr. Badger stated that the Virginia Institute of Marine Science had indicated that the individual and cumulative adverse environmental impacts resulting from the community pier should be relatively minor. They generally recommend, however, that community piers serve as the only pier access and would discourage the construction of additional private piers. While the Department of Health had recommended that the permit application be approved, they had indicated that the Certificate to Operate would not be issued until the State Health Commissioner had rendered a decision on their application for variance to Section 12 VAC 5-571-120-C of their regulations, and that the owner be prohibited from allowing any vessel temporary or long-term dockage at the pier until the Certificate to Operate had been issued.

Mr. Badger also stated that the Department of Game and Inland Fisheries (DGIF) anticipated no significant adverse impacts to threatened and endangered wildlife resources under their purview.

**Commission Meeting****November 28, 2006**

Mr. Badger said that the Accomack County Wetlands Board approved their portion of the project, as submitted, at their August 31, 2006 meeting.

Mr. Badger stated that staff generally supported a community pier approach as opposed to numerous private piers in an attempt to provide a central point of water access for communities with riparian property. One community pier was typically preferred over numerous individual private piers given the cumulative environmental and aesthetic impacts involved. In this case, however, the thirteen (13) riparian lots within the subdivision could construct their own private piers pursuant to §28.2-1203(A)(5) of the Code of Virginia.

Mr. Badger said that the applicant did not own a platted community riparian parcel nor did it appear they had obtained the riparian rights necessary to support the proposed community pier from the owners of lot #12, Mr. and Mrs. Busch. In addition, a standard condition in a VMRC permit states, "that the permit grants no authority to the Permittee to encroach upon the property rights, including riparian rights, of others." As a result, staff could not support the permitting of a non-riparian community pier within the riparian area of lot #12.

Mr. Badger further said that in the event that the applicant was unable to acquire sufficient riparian area to accommodate the pier, staff would recommend that the L-head be reduced to no more than 20 feet to keep it within the area opposite the easement. Should the applicant be able to acquire sufficient riparian area, however, staff could support a community pier with an L-head no greater than 100 feet in length. This length was based on that which was deemed reasonable to support the mooring of approximately four (4) boats in the 17-foot to 20-foot range alongside to. Furthermore, staff recommended that any permit not be issued until the applicant had obtained a Certificate to Operate from the Department Health. Staff also recommended a royalty based on the total square footage of the bold outline footprint including the pier and mooring area, at a rate of \$1.50 per square foot.

Associate Member Fox asked about the staff recommendation and why there was no recommendation for others to give up their riparian rights. Mr. Badger explained they could not do that, as the lots were already sold. Associate Member Fox stated that meant there could be up to 12 private piers. Mr. Badger stated that it could be 14 even.

Associate Member Tankard asked if the slips and pier was for the lots on the water. Mr. Badger responded yes, but others could use them, as there were 4 slips for that purpose. He said the pier would have to go out over the marsh in order to get to water and that would be quite expensive. He said he would not be surprised to see either single or joint use piers being proposed, resulting with up to 7 piers.

**Commission Meeting****November 28, 2006**

Associate Member Schick stated that they could enlarge the pier and give up their riparian rights. Mr. Badger said he doubted that would happen, as that would affect the value of the property.

John Daniel, Attorney for Bay Watch, was present and his comments are a part of the verbatim record. Mr. Daniel stated that the developer was Ben Benson. He said Mr. Benson had worked with staff regarding the protests and he had shortened the pier from 150' to 100'. He also stated that they could not go back and acquire releases for riparian rights. He said that the Health Department said if they provided a privy system a certificate would be issued. He said that the applicant concurs with the staff recommendation.

Commissioner Bowman asked if there was anyone present, pro or con.

Bob Gresham representing himself and his wife, who owns the property, was sworn in and his comments are a part of the verbatim record. Mr. Gresham stated that they had submitted a letter stipulating their objections and a map outlining their property, which was west of Benson. He said they were pleased with the VIMS' report that recommended a community pier and discouraged individual piers. He said they felt there would be adverse ecological and environmental impacts. He stated that most do not realize the value of their surroundings until they were gone. He said the run off would pollute and destroy the waterways and this unusually deep creek as the marsh has protected it so that it has remained the same for 300 years. He said the County recognized the diversity of the marsh in this area and the freshwater marsh in the upper Pitts Creek area. He said the County in its plans stated that the preservation needed to be considered, but they did not have any funds for it. He said they were pleased with the concession made to shorten the pier, but still concerned with the increased boat traffic and overnight mooring, safety issues and toxic spillages into the creek. He said they agreed to the community pier, but the owners and association need to relinquish their riparian rights, as the community will belong to the association, therefore, its members.

William McGhee, representing Richard Godwin, was sworn in and his comments are a part of the verbatim record. He stated that Mr. Gresham made a very good presentation and they echo his remarks with regards to the ecological and environmental impacts. He said they were concerned with the changes that would occur because of this activity to this pristine area. He said Mr. Godwin owned quite a bit of the property in the area and he felt that his rights were diminished as well. He stated Mr. Godwin was opposed to the project.

Audrey Leonard, a resident of Pitts Creek was sworn in and her comments are a part of the verbatim record. Ms. Leonard stated that Mr. Gresham's comments were very good and that she had also submitted a letter. She said her family being in this area goes back to 1685 and she was speaking for her family. She said there was a need to preserve this area for future generations, limit the impacts, and the rights of the general public need to

**Commission Meeting****November 28, 2006**

be considered as well as individual rights. She said she was concerned with the impacts on the marsh, wildlife and the marine resources.

Leanette Smolinski, resident in the area, was sworn in and her comments are a part of the verbatim record. Ms. Smolinski stated that there may not be any immediate impacts, but there would be eventually. She said the Commission was given an opportunity to keep one creek unpolluted. This was a unique situation, as it could be stopped before it was started by not allowing any piers.

John Daniel, in his rebuttal, stated that the same comments were made at the other hearings. Mr. Daniel explained that staff had found ways to address these concerns and had worked with the applicant. He said the applicant tried to do something to address this by reducing the length of the pier. He stated that they concurred with the staff recommendation and requested approval.

Associate Member Robins asked if overnight mooring for vessels was temporary and could this use be controlled. Mr. Daniel stated that it was necessary as this might occur on weekends or 2 to 3 days for a guest. He said they did not know what was considered long term, but they did request this, as it was important to the project.

Associate Member Tankard said that if they granted the pier, there would be a greater number of docks and possible end up at 17. Associate Member Bowden said he agreed with Associate Member Tankard.

Associate Member Fox stated that all the protestants wanted to maintain the pristine conditions of the creek, but the time for stopping that was when the County did the zoning and allowed the highland project. He said the Commission must look at the rights of the owners.

**Associate Member Holland moved to accept the staff recommendation. Associate Member Schick seconded the motion.**

Associate Member Schick stated that the damage was already done by the County when they allowed the small lots, thereby cluttering the waterways. He said the law allows for the right to a private pier and they had no other choice.

Associate Member Tankard stated he did not want to aid and abet and he was familiar with the area and did not want to add to the loss.

Associate Member Robins stated that he agreed with Associate Member Fox as this was a unique case because the area was ecologically unique and sensitive. This will help deter other docks as they would be very costly. Associate Member Holland stated he agreed with Associate Member Robins.

**Commission Meeting**

**November 28, 2006**

Commissioner Bowman stated that the horses were already out of the barn and the developer had worked with the concerns in reducing the pier. He said they could deny it, but there was still the possibility of 12 other piers and he supported the motion.

**The motion carried, 6-2-0. Associate Members Tankard and Bowden voted no. The Chair voted yes.**

Royalty Fees (encroachment 2,100 sq. ft. @ \$1.50/sq. ft.).....	\$3,150.00
Permit Fee.....	\$ 100.00
Total Fees.....	\$3,250.00

\* \* \* \* \*

**14. PUBLIC COMMENTS** – There were no public comments.

\* \* \* \* \*

**15. RECOMMENDATIONS OF THE RECREATIONAL FISHING ADVISORY BOARD**

Jack Travelstead, Chief Deputy Commissioner, gave the presentation, and his comments are a part of the verbatim record. The Recreational Fishing Advisory Board (RFAB) had completed its review of pending applications, and, on November 13, 2006, developed final recommendations for funding. Each of the projects submitted during this review cycle had been subjected to a staff review and an RFAB public hearing. Any written comments received from the public were provided in the Commission packet. In addition, new projects were subjected to a peer review process. Staff concurred with the funding recommendations, as submitted by the RFAB.

**The following projects were recommended for approval by the RFAB:**

**A. Federal Assistance (Wallop-Breaux) Matching Funds FY 2007.** Jack Travelstead, VMRC. \$225,000. VOTE: 9-0

COMMENTS: The RFAB commends the Commercial Fishing Advisory Board and Commission for utilizing \$100,000 of the Commercial Fund to assist with the match requirement.

**B. 2007 Children's Fishing Clinic (Year 10).** Rob Cowling, Newport News Rotary Club and Coastal Conservation Association. \$6,000. VOTE: 9-0

**C. 2007 Kiwanis Club Children's Fishing Clinic (Year 6).** W. Brown, A. Nogiec, Capital District Kiwanis Club. \$6,000. VOTE: 9-0

**Commission Meeting****November 28, 2006**

**D. 2007 CCA Tidewater Youth Fishing Day (Year 10).** T. Johnson, D. Hickman, B. Dieffenbach, Coastal Conservation Association, Tidewater Chapter. \$6,000. **VOTE: 9-0**

**E. Sheepshead Population Dynamics in Chesapeake Bay, Virginia (Year 2).** H. Liao, S. Haga, C. Jones, ODURF/CQFE. \$65,777. **VOTE: 7-2**

**COMMENTS:** The RFAB requested that the investigators provide recommendations for fisheries management relative to the sheepshead population, following the conclusion of this 2<sup>nd</sup> year study.

**F. Artificial Reef, Funding for Deployment of Structure 2006-2007.** Mike Meier, VMRC. \$200,000. **VOTE: 9-0** G.2007 Virginia Game Fish Tagging (Year 13). J. Lucy, VIMS and C. Bain, VMRC. \$64,787. **VOTE: 9-0**

**H. Ocean View Recreational Fishing and Education Pier.** Stanley Stein, Assistant City Manager, Norfolk. \$215,850. **VOTE: 9-0**

**COMMENTS:** The City of Norfolk has submitted a joint permit application with the VMRC, Habitat Management Division. This location does not require a permit from the VMRC or the local wetland board. This location does require a permit from the U. S. Army Corps of Engineers. It may or may not require a permit from the Virginia Department of Environmental Quality.

**K. A Genetic Assessment of the Potential for Local Depletion of Atlantic Menhaden (*Brevoortia tyrannus*) within Chesapeake Bay.** J. Graves, J. McDowell, R. Latour, A. Lynch, VIMS. \$57,172. **VOTE: 8-1**

**L. Utility of Alternative Reefs to Simultaneously Enhance Recreational Fish Production and Oyster Restoration.** Rom Lipcius, VIMS. \$128,071. **VOTE: 9-0**

**COMMENTS:** The RFAB removed \$28,000 for underwater video equipment from the original budget.

**M. Prey Availability and Enhanced Production of Artificial Reefs for Recreational Fish and Native Oysters.** Rochelle Seitz, VIMS. \$64,430. **VOTE: 9-0**

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

**I. Monitoring Mycobacteriosis in Chesapeake Bay Striped Bass *Morone saxatilis*: Tracking the State of the Epizootic.** D. Gauthier, W. Vogelbein, K. Reece, VIMS. \$59,312. **VOTE: 9-0**



**Commission Meeting****November 28, 2006**

**COMMENTS:** The Recreational Fund has been the major contributor for these types of projects for the last few years. The RFAB would like to see other funding sources participate in the funding of this research.

**J. Submerged Aquatic Vegetation (SAV) as essential fish habitat in lower Chesapeake Bay:** Linking variation in SAV, forage animal production, and sportfish abundance. J. E. Duffy, R. Latour, J. van Montfrans, VIMS. \$69,268. VOTE: 9-0

**COMMENTS:** The Recreational Fund has been a major contributor for SAV projects in the past. The RFAB understands the importance of SAV as fish habitat. The RFAB does not believe the information gathered from this study will directly benefit the recreational fishing community.

**RFAB Travel Budget.**

**The reimbursement funds** were low. The RFAB is requesting a \$10,000 increase to cover mileage and meals for the Advisory Board members. Mr. Travelstead stated these types of requests do not come up often.

Associate Member Robins asked about Item L and the reduction in funding. Mr. Travelstead responded that the applicant would be providing those funds.

**Associate Member Robins moved to accept the staff recommendation. Associate Member Tankard seconded the motion. The motion carried, 8-0. The Chair voted yes.**

\* \* \* \* \*

**16. PUBLIC HEARING:** Proposed amendments to Regulation 4 VAC 20-252-10 et seq., "Pertaining to the Taking of Striped Bass" to establish a weight-based individual transferable quota program for the commercial fishery.

Jack Travelstead, Chief Deputy Commissioner, gave the presentation and his comments are a part of the verbatim record. Mr. Travelstead provided a revised copy of the draft regulation reflecting changes recommended by staff.

Mr. Travelstead explained that the staff at the last meeting apprised the Commission of the issues associated with the current two-tag-based striped bass management program and the problems that may be solved by converting the Individual Transferable Quota (ITQ) program to a weight-based system.

Mr. Travelstead stated that to ensure proper enforcement of a weight-based ITQ, staff was recommending adoption of the following measures.

**Commission Meeting****November 28, 2006**

- 1) Require those fishermen who self-market their striped bass harvest to provide the Commission with receipts describing those sales. Such receipts will provide a second source of harvest information for quota auditing purposes. It also may result in a database of self-market sites, particularly restaurants and out-of-state markets. Once known to staff, these sites may also be available for auditing.
- 2) Prohibit the issuance of tags to striped bass fishermen until all previously issued tags are accounted for. Under a weight-based ITQ, tags are no longer a limiting factor as they were under the tag-based program. When fishermen use all of their tags, but have not harvested all of their poundage quota, they may request more tags. Accounting for all of the previously issued tags will help eliminate abuses of the quota system.
- 3) Require fishermen to return all unused tags to the Commission, within 30 days of their quota being harvested. Again, this is a simple measure designed to prevent abuse of the weight-based system.
- 4) Establish a processing fee of \$25.00 plus the cost of each tag, to replace lost tags. Proper accounting of the tags issued each fisherman is one way to prevent abuse of the weight-based ITQ. The administrative burden of accounting for over 150,000 tags is substantial. It is also hoped that the processing and replacement fees will result in better accounting of the tags by the individual fisherman.
- 5) Prohibit transfers of less than 200 pounds; Prohibit transfer of quota from December 1 through February 1; Prohibit transfers of quota unless all prior information is verified by the Commission. Moving from a tag-based to a weight-based ITQ substantially increases the administrative oversight responsibilities of staff. While the tag-based program was largely self-enforcing, the weight-based ITQ will require monitoring of over 500 separate quotas. The above measures will provide staff with some additional time necessary for these responsibilities. Thus, we recommend prohibitions on frivolous and last minute transfers that will detract from staff's primary responsibilities.
- 6) Condition temporary transfers with an agreement that the temporary transferor of quota is responsible for harvest quota violations by the transferee. Temporary transfers are valid only for the current quota year, after which, the quota reverts to its original owner. When a fishermen receives quota on a temporary basis, and exceeds that quota, he pays no penalty for the overage, because the quota ownership reverts to the original holder. To ensure this situation does not occur, the permanent holder of the quota must be responsible for his quota, even when he temporarily transfers it to another. In all likelihood, this provision will reduce the number of temporary transfers, as owners of quota will not be willing to be responsible for any overage.

**Commission Meeting****November 28, 2006**

- 7) Penalty Schedules for exceeding harvest quota that include deductions of harvest in excess of the assigned quota, suspension and revocation of permits for up to three years. Staff's version of the penalty schedule is more restrictive than that offered by the Special Striped Bass Review Committee. The Committee, for example, suggested no penalty for the repeated overage of a quota that is less than 3 percent. Staff agrees a first offense should not be penalized, but repeated offenses, even at this small level, should result in a deduction of the overage the following year. For the most severe violations, staff had recommended a 3-year revocation of striped bass permit. We now propose to reduce that to 2-years, in order to be consistent with provisions of the Code that authorize the Commission to revoke licenses for up to 2 years.

Associate Member Fox asked about the locations of the spawning areas. Mr. Travelstead explained they were the same, as in 1980 when first adopted, and the areas were identified by VIMS, based on the egg-larval studies.

Commissioner Bowman said that, in regards to the temporary transfer, the penalty to the transferor needed to be in the document, in black and white. Mr. Travelstead stated that a new ITQ form had been developed by staff for this purpose.

The public hearing was opened.

Jeff Crockett, President of the Tangier Watermen's Association, was present and his comments are a part of the verbatim record. Mr. Crockett stated that nothing being done today would stop the catching of the big fish, thereby causing an even bigger fish problem. He said the Bay watermen he spoke with were against this, and there was no way to enforce it. He said it would be necessary to come back next year to address the temporary transfers.

There was no one else wishing to speak, therefore, the public hearing was closed.

There was further discussion about the catching of the big fish and temporary transfers.

Associate Member Schick asked if the elimination of transfers would cause problems? Mr. Travelstead explained that fishermen that access smaller fish usually transfer tags to fishermen who go for big fish in the Bay, as this added to their profit. He said the transferee could make more money that way, and that added to the problem. He also said it would help, but the Committee did not endorse it.

Associate Member Fox asked if taking action with this proposal was necessary now. Mr. Travelstead explained that staff needed time to get ready administratively. Associate Member Fox stated that it could be modified later. Mr. Travelstead stated that the regulation was a work in progress, as changes were made every year. He further stated

**Commission Meeting****November 28, 2006**

that he wanted to maintain the Special Striped Bass Committee and meet with them periodically.

**After some further discussion, Associate Member Fox moved to adopt the staff recommendation and to direct staff to consider the comments regarding the temporary transfers and work to resolve the problems to be considered at future meeting. Associate Member Bowden seconded the motion. The motion carried 8-0. The Chair voted yes.**

\* \* \* \* \*

17. **PUBLIC HEARING:** Proposed amendments to Regulation 4 VAC 20-20-10 et seq., "Pertaining to the Licensing of Fixed Fishing Devices" to exempt 2006 licensees from certain provisions necessary for license renewal in 2007.

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

Mr. O'Reilly explained that it was proposed to exempt pound net fishermen who have not set nets in 2006, so that they can get their 2007 license. He further explained that after Ernesto, only 3 of 25 stands in the Northern Neck remained. He said on page 5, paragraph D the exemption requested is stated. He read, "Current pound net licensees shall not be required to fish their pound nets or establish a complete system of nets and poles in 2006, in order to renew their licenses or maintain their priority rights to such locations in 2007."

After some discussion, the public hearing was opened. There was no one present to comment to this issue.

**Associate Member Fox moved to adopt the staff recommendation. Associate Member Bowden seconded the motion. The motion carried, 8-0.**

\* \* \* \* \*

18. **PUBLIC HEARING:** Proposed amendments to Regulation 4 VAC 20-720-10 et seq., "Pertaining to Restrictions on Oyster Harvest" to open to oyster harvest certain parts of the Lower Rappahannock River and the Virginia tributaries of the Potomac River.

Dr. James Wesson, Department Head, Conservation and Replenishment, gave the presentation with a power point presentation, which he reviewed for the Commission. Dr. Wesson provided the Commission with an additional handout, which was a letter from Cowart Seafood.

**Commission Meeting****November 28, 2006**

Dr. Wesson explained that in the public comment period of the October Commission meeting, members of the oyster industry again asked for all or portions of the lower Rappahannock River to be opened to harvest as well as all or portions of the Virginia tributaries of the Potomac River. There have been public hearings held, on both of these areas on several occasions. Staff remains opposed to opening the lower Rappahannock River closed area and the closed areas of the Potomac tributaries. Oyster harvests were much higher in 2004 and 2005 than we had seen for years, many new harvesters entered the oyster fishery, but in 2006 the environmental conditions became more normal and oyster stocks declined, leaving an expanded industry with little to harvest. The higher salinities in 2006 resulted in higher disease pressure combining with the almost nonexistent spatsets in 2003 and 2004, and very light spatset in 2005 do not bode well for harvest in 2006, 2007, and probably 2008. A light spatset has occurred in most areas in 2006, but certainly not in high enough numbers to result in a future harvest similar to 2004-2005. The sanctuary areas that are under consideration for opening will continue to protect broodstock, which may provide spawn and maintain some harvest in the future, albeit at much lower levels than staff would all like to see.

Dr. Wesson continued to explain that there was a request to open all of the lower Rappahannock River to harvest, as well as a request to open most of the southside of the River. At the Blue Ribbon Panel meeting, a second proposal was discussed, requesting opening an area in the center of the lower river that incorporated both the north and south sides of the river. A very significant portion of the currently closed area would be opened to harvest with either proposal. There were many issues involved with this discussion that have presented in previous debates, but they will be summarized again below.

Dr. Wesson stated that the Virginia Oyster Heritage Program was initiated in 1999 with many partners, in an effort to restore a large river system with a combination of 3-D reef sanctuaries and 2-D harvest areas. Many partners came together to combine significant funds in this effort. Since 1999, NOAA has contributed more than \$6 million to this area, the Army Corps of Engineers \$1 million, and the VMRC Recreational Fishing Funds, EPA Chesapeake Bay Program, Chesapeake Bay Foundation, and many other smaller entities have contributed financially to the effort. It was envisioned that a system of small oyster sanctuaries could be constructed that would provide enough broodstock and spawning potential to maintain reproduction success within the entire area. Due to the dire oyster situation during the drought periods of 2001-2002, areas within this program were opened to harvest prematurely. Harvest above the bridge was opened to handscrapes, which are a more efficient harvesting gear than had previously been used in this area. Below the bridge was kept closed with the argument from the industry at the time to compare that closed area with the harvested area. The Oyster Heritage Program had intended to develop some "triggers" for opening the harvest areas in the entire restoration area, but the premature opening short changed that effort. The area below the bridge has remained closed to harvest and has received maintenance restoration shelling in equal amounts with the harvested area above the bridge. The partners that have contributed to the Oyster Heritage Program would like this area to remain closed until

**Commission Meeting****November 28, 2006**

either another strategy had been developed for the entire lower Rappahannock River or until a predetermined stock density “trigger” had been reached.

Dr. Wesson said that the differences in oyster populations between harvested and unharvested areas had been monitored since the area above the bridge was opened. Over time there had been an increase in the number of large oysters on the unharvested side. The average density of large (market) oysters in the unharvested area was more than twice as large as in the harvested area, but densities on both sides were low relative to what is believed to be necessary to result in consistent reproductive success. Oysters achieve fertilization success based on a combination of large oysters (large oysters have greater fecundity) and the close proximity of these oysters to each other (fertilization success decreases the further oysters were apart). In the unharvested areas, there were more clusters of large oysters than in the harvested area. Harvesting, by its nature, removed oysters from higher density areas first and in the process works counter to oyster fertilization success. In other mobile species, such as fish or crabs, males and females in low densities can move and find one another, but in oysters this cannot occur. The only way that the likelihood of fertilization can improve was by allowing aggregations of oysters to accumulate and become denser.

Dr. Wesson noted that a spat set had occurred in the lower Rappahannock, on both sides of the bridge in 2006. It was impossible to determine the source of the spat, however, there were many other areas of the Bay that had very little spat set in 2006, including areas further up the Rappahannock. The management strategy in place appeared to at least be maintaining some reproductive success.

Dr. Wesson explained that it had been suggested that pulling the dredges over the harvested area, above the bridge, somehow enhanced the spatset in that area, and that a similar test could be done in the lower Rappahannock. This argument about “working the bottom” had been around for many years. In the mid-1990’s, several experiments were set up by VIMS and VMRC staffs to test that statement. These tests were conducted in areas where spat set was more dependable than in the Rappahannock. In those tests, individual bars were divided into portions and then areas within the bar were randomly chosen to receive fresh shell, have bagless dredging during the summer, or have nothing done on them. In all cases, the area receiving the new shell had the best spatset, and there was no discernable difference between the areas worked with bagless dredges or by doing nothing.

Dr. Wesson said that harvesting oysters and dredging shell in the winter would have little impact on shell quality the following summer. The shells would be back in the sediment or fouled by that time. As a further test on this “working the bottom” concept, old shells were dredged from the bottom and taken to the VIMS hatchery. These shells were placed in tanks with fresh shells, oyster larvae was added, and in all cases spat set was at least 10 times higher on the fresh shells than on old shell. Oyster larvae prefer fresh shell or live oysters, which is why we plant shells every year. Maryland DNR has conducted similar

**Commission Meeting****November 28, 2006**

test on dredged versus undredged areas, and in no case has there been clear evidence of an improvement of spatset resulting from harvesting activity.

Dr. Wesson said that what staff had observed in the Bay this year further supported that harvesting activity had little or no effect on spat set. In the lower James River, where industry dredged for 6 months in 2004 and 2005, there has been almost no spat set in 2004, 2005, and 2006. If dredging had an impact, it should have been evident there. There was almost no spatset in the Rappahannock River above the area under discussion now, even though this area was dredged heavily in 2004-2006. Most telling, the only two rivers with significant spat set in 2006 were the Great Wicomico and Piankatank Rivers, both of which have had no harvesting for a number of years.

Dr. Wesson stated that oysters were constantly being challenged in the Chesapeake Bay by two diseases. Both diseases caused the most significant mortality in higher salinity years and in higher salinity portions of the Bay, when the oysters reach 2-3 years of age. This age corresponds with the age that oysters reach market size. Because oysters with disease cannot be visually or physically separated from those that do not have disease, only by living beyond the 3-inch size can they be separated. In an evolutionary sense, those that survive and get larger than 3 inches should be more disease tolerant, and one would hope that they would pass this tolerance on to the next generation. Harvesting 3-inch oysters actually “short circuits” this process, and removes the oysters that contain the most desirable genetic material for future generations. Large sanctuaries, in higher salinity area, such as the lower Rappahannock, are absolutely critical to the process of developing disease tolerance over time, some current work at VIMS actually suggests that the larger oysters that are 4-6 inches in length, which have lived beyond the intense disease pressure time period when they were 2-3 years old, actually have lower intensities of disease within them. This suggested the development of disease tolerance in older, larger oysters. Sanctuaries must be left alone for 5 or more years to begin developing significant aggregations of these larger oysters.

Dr. Wesson said that the circulation of oyster larvae within the Rappahannock had been a point of concern. Management and scientists have only a modest understanding of circulation within the lower Rappahannock, however, even when there was a river such as the Great Wicomico or James where there was a relatively good understanding of circulation, very few predictions can be made of spat set location or quantity. As an example, spatset was extremely erratic in the James this year. There was little pattern at all between bars that had spatset and bars that did not. In the Great Wicomico River, where a large effort is being expended to track larvae from a known genetic source of oysters at a known location, there was a significant spatset throughout the river—but apparently only a minimal contribution from the marked animals. We cannot with any confidence suggest the sources of oyster larvae in the lower Rappahannock, but, in fact, we have received some spatset in this area, which may have resulted from our management efforts.

**Commission Meeting****November 28, 2006**

Dr. Wesson stated there appeared to be no biological basis for opening any area below the Rappahannock River Bridge. Staff believed that there may be ways to rearrange sanctuary areas in the near future, but a significant portion of the entire area both above and below the bridge would have to be maintained as sanctuaries. The two goals of the management strategy in this area were to maintain some harvest for the long term, while at the same time allowing oysters in areas with no harvest to be selected for disease tolerance, with those oysters growing and contributing the most to the reproduction in the area.

Dr. Wesson explained that certain portions of the Potomac tributaries were opened to hand scrapes in the 2005-2006 season. Most of the large oysters were harvested from these areas and there was no spatset between 2003 and 2005, so the entire area was closed for the 2006 season. This area had lower salinities than the mouth of the Rappahannock, and spatsets were less dependable. Small areas within these tributaries had been closed to harvest for a number of years and, as in the Rappahannock, small aggregations of large oysters had accumulated. For all the reasons mentioned above for the Rappahannock, these small sites were critical for spawning success in the area. There was almost no spatset in the mainstem of the Potomac in 2006, but there was a fairly good spatset in the Coan and Yeocomico Rivers in Virginia. It was likely that the oysters that had been left alone had provided this modest spatset. Since only spat and a few small oysters were on the other oyster rocks that were open in 2005, staff still believed that they should remain closed for at least the remainder of this year.

Associate Member Robins said that in the staff recommendation it had spoken to redesigning a plan. Dr. Wesson explained that he was trying to set up a meeting of the Oyster Heritage Program partners to look at the possibility of redesigning the project. Associate Member Robins asked if this could be accomplished in just over 6 months and prior to the next season. Dr. Wesson stated he had spoken with the lead agency in this partnership, the Department of Environmental Quality, about meeting soon to see if they could come up with something, giving the Blue Ribbon Oyster Panel something to start with in their efforts.

Associate Member Tankard said there had been several numbers stated previously on the total funding spent on this program and he wanted to find out the actual amount. Dr. Wesson stated that it was \$9 million. Associate Member Tankard asked if it was intended that this area be left alone? Dr. Wesson responded, longer than it was, as it was still in the building phase in 2002 when it was opened.

Associate Member Fox asked what the number of oysters was that was left to be harvested and provide economic gain. Dr. Wesson said that in the Potomac tributaries you were looking at several hundreds and in the Lower Rappahannock maybe at the most 10,000, if it were to be reopened. Associate Member Fox stated in revenue for the waterman that would be \$30 to \$35 per bushel. Dr. Wesson stated that would be only the start, as other revenue would result as well. Associate Member Fox said that if \$8-9



**Commission Meeting****November 28, 2006**

million was invested and it had resulted in only \$300,000 worth of oysters. He continued to say that it only showed that it was not working, but that this could have been caused by the fact that the oyster was in such bad condition, therefore, hope was low and it would take a long-term fix here.

Associate Member McConaugha asked how much density would be needed to realize 70% to 80% fertilization. Dr. Wesson stated that there had not been much done to study that in this area, but there was a lot of information on the James River. He stated maybe if the beds had 300 per meter or more. He stated also the disparity was gigantic. He said a project in the Great Wicomico River was being undertaken utilizing broodstock of known genetic marking and there had been only 1% or 2% return in the spat that had been examined. Dr. McConaugha said that from what was known for invertebrates, that the 1% or 2% return on the spat on shell was a good set, even significant.

Associate Member Bowden stated that a portion of that \$9 million was spent on studies, not necessarily being put onto the bottom. Dr. Wesson said that was what was spent and put on the bottom. Associate Member Bowden asked about the size difference for the two areas in the Rappahannock, what was actually on the rocks. Dr. Wesson stated about the same. Associate Member Bowden asked if the two-fold difference was mature oysters. Dr. Wesson stated that was in density. Associate Member Bowden asked how many had been harvested above the bridge. Dr. Wesson stated 5-8,000 each year in production occurred. He said it was an important fact that oysters were living long enough to reach harvest size. He said that one wild card had occurred in 2003 and that was a severe anoxic event, which was not foreseen, causing the loss of a big spatset from 2001-2002 that affected the lower river more than the upper.

Associate Member Bowden said that the infrastructure was being lost and was just about gone on the Seaside of Eastern Shore. Dr. Wesson stated that the EIS was being done now. Associate Member Bowden said that what had been done was not working and he could agree with Kellum's proposal. He stated the industry, as well as the resource, need to be preserved.

Commissioner Bowman stated that last month VIMS was asked to study this issue and give the Commission their evaluation at this public hearing. He asked Dr. Mann to comment.

Dr. Roger Mann, representing the Virginia Institute of Marine Science, was present and his comments are a part of the verbatim record. Dr. Mann provided the Commission with a copy of their comments. He said it was VIMS position that the area should remain closed.

Dr. Mann said it was the job of the partners to determine the purpose or expectations and what triggers there should be for opening or closing, not the scientists. He said there is not presently a management plan. He said the industry has come here asking for

**Commission Meeting****November 28, 2006**

something and it is being expected that a decision on this can be made in 30 days and that is not the way to manage a resource. He said he felt it was a impasse in that the industry was in trouble because the James River was not producing and they want something, but at the same time doing it with no long term plan. He said something will be lost if opened and there was a need to get organized. He said they are seeing a significant number of large oysters in the lower Rappahannock River and as in the past they should be dead. He said there are oysters in that area 4 – 5 – 6 years and older. He said they are healthy and showing the lowest intensity of disease, certainly a unique oyster. He said if the area is opened, it will be lost and this was a terrible way to manage.

Commissioner Bowman stated that maybe he was to blame, considering the dire straits of the industry and the resource. He said there was a need to obtain the best science. He stated that the Blue Ribbon Oyster Panel was up and running and he hoped they would be a think tank where strategies could be developed to best use the funds, the EIS, and the resource. Dr. Mann said he hoped the Blue Ribbon Oyster Panel would do this and make some plans. Commissioner Bowman stated that was a mutual goal of all.

Associate Member Tankard wanted to know if other areas had seen this same thing. Dr. Mann said that there were small populations in the Potomac Tributaries. He said the Lynnhaven Bay had had a gradual resurgence of oysters, which normally would be expected to die. He said the Lower Rappahannock River had not been harvested for 20 years and the Lynnhaven was approximately the same. He said the James had been harvested continually and was very susceptible to diseases.

The hearing was opened to the public for comments.

Tommy Kellum, W. Ellery Kellum Seafood in Weems, Virginia, was present and his comments are a part of the verbatim record. Mr. Kellum explained that his original proposal was for the entire south side of the lower river, excluding rocks at the mouth (Spike). He said he agreed with Mr. Tankard in having something for the future. He said he was working his grandfather's business and he wanted his son to have the same opportunity. He said he disliked the word science, but he did appreciate VIMS efforts and their report. He said he came to VMRC in 1996 and heard the same discussions and he supported keeping the area closed. He said they needed the 25% block of area to harvest and monitor. He asked, what damage would there be done if harvesting in only 25% of the area was allowed? He said in November there was 15 days they could have worked and in December there would be 16 days. He stated, how much damage could be done in 16 days? He said the same arguments were being used. He said he had bought 4,000 bushels of oysters to date harvested by watermen in the upper Rappahannock. He said none of this concern was expressed at the Oyster Heritage Program meeting nor was VIMS consulted on the sites selected. He said he appreciated the work done on disease by VIMS, but he had 125 employees and he was responsible for their livelihood. He said The Oyster Heritage Program was beneficial but not worth \$9 million and these oysters were not a result of those funds. He said he agreed that 25% of the area was the way to

**Commission Meeting****November 28, 2006**

go and he felt he had been too aggressive with his first proposal, but sometimes you had to ask for more than you expected to actually be given. He said he wanted to clarify that his proposal did not include the reef sanctuaries. He said he did not realize the reefs were not protected by Code and that needed to be done so they were protected.

Doug Jenkins, President of the Twin River Watermen's Association, was present and his comments are a part of the verbatim record. Mr. Jenkins stated that Jeff Crockett had to leave and asked that he speak for him also. He asked for the graph depicting the harvested and nonharvested areas. He said that the bagless dredging that staff spoke of was different from dredging daily, bringing the oysters up off the bottom, culling out the small and shells, and then returning the small oysters and shells back to the water. He said it was as different as night and day. He said staff said that Maryland in a study had not see any results. He said he had read a pamphlet put out by Maryland DNR and it said it did. He said he was a member of the BRPOP and Dr. Mann at a meeting had admitted their efforts were unsuccessful. Mr. Jenkins said that mismanagement and diseases had caused the problems of the oyster industry.

Mr. Jenkins stated that in Maryland's portion of the Potomac River it had been opened to harvest and they were catching their limit by 10 a.m. He said on Virginia's side the Yeocomico and Coan Rivers were both closed to harvest. He said there were too many chiefs and not enough braves. He said in the past the Replenishment Officer had worked with industry. He said the Replenishment Officer worked to replenish the oyster bars, not close them. He said that representatives from the Watermen's Association had done a survey with only the Corps personnel present. He said they found the oysters to be smothering from silt, toad blisters, and seagrass. He said they were asking that the lower Rappahannock, Yeocomico, and Coan Rivers be opened not for the sake of the industry but for the health and welfare of the oyster rocks. He said this would be done at no cost to the scientists or stakeholders. He said they need to do their research elsewhere. He said they needed to leave the Baylor grounds alone to survive for the future. He said there had always been enough broodstock to come back on its own and that will continue. He said he has been around a long time and he has seen more than these others, VIMS or VMRC staff.

Lionel Jenkins, representing the watermen in his area, was present and his comments are a part of the verbatim record. Mr. Jenkins said that his son has worked in the Potomac and caught 39 bushels and another waterman caught 44 bushels, which they brought down and sold to shucking houses. He said oysters have been caught in the Potomac the whole year. He asked how long does an old oyster live. He said watermen his age were not as strong as some that were 25 years old. He said the younger are better. He said he started oystering 37 years ago. He said if the lower Rappahannock were opened and the watermen could not find any oysters, they would quit. He said millions of dollars had been spent and had only resulted in failure. He said after 19 years the area should be able to stand a short season and it would prove once and for all if the scientist were right or not. He said here was an opportunity to prove something and one month would not hurt.

**Commission Meeting****November 28, 2006**

He said the panel needed to find out who was right. He said he was asking that Tommy Kellum's proposal be approved.

Julian Cox, Poquoson Resident and Oyster Gardener, was present and his comments are a part of the verbatim record. Mr. Cox said he was opposed to the opening of the areas being requested. He said he had submitted a letter, which he had written based upon a 1988 report by Hargis and Haven. He said the report said that it took a thousand years to build the reefs and when harvesting started the reefs were destroyed within 10 years, which was a small segment of time. He stated that the damage done at this point was irreversible and we're now looking at remnants of what did exist. He said we need to protect and restore them and that was not going to happen instantly nor was it going to be cheap. He said that values were changing and cleaning the bay is the best management effort. He stated that the public reefs were his too and the remaining oysters need to be protected. He said he supported the staff recommendation.

Tommy Leggett, representing the Chesapeake Bay Foundation, was present and his comments are a part of the verbatim record. He said he agreed with some of the comments from the public and it was a difficult subject. He said the Chesapeake Bay Foundation and Oyster Heritage Program needed to design a plan and present it to the Blue Ribbon Oyster Panel, as no one wants the area to be closed forever. He said the panel could possibly evaluate a management plan and complete it before the next season. He said that there was also a need to explore the use of hatchery seed for public rocks, as this was very viable and was being done in Maryland. He further said that this was the bulk of the harvest in Maryland. He said with the lower salinity in the lower bay it could be even more successful.

John Partin was present and his comments are a part of the verbatim record. Mr. Partin explained that he had observed the buy boats working in the James in the past and when he returned to the area 10 years later he was surprised at the decimation of the bay. He said the management of the oyster resource should be driven by the scientific information. He said it seemed to take a long time to return from the brink and models would predict how long to keep areas closed before they can be disturbed.

Paula Jasinski, representing NOAA, was present and her comments are a part of the verbatim record. Ms. Jasinski said that she appreciated Mr. Kellum's proposal, but she supported VMRC. She explained that NOAA had invested time and money in oyster restoration. She said that she hoped that the panel could come up with something before next season for the resource and for restoration. She said the Chesapeake Bay Program panel was formed to develop a long-term plan. She explained that they had addressed sanctuaries and had suggested 10% of sanctuaries and only 1% had been set aside as of now.

A. J. Erskine, representing Cowart Seafood and Bevans Oyster Company, was present and his comments are a part of the verbatim record. Mr. Erskine said that both companies

**Commission Meeting****November 28, 2006**

had submitted letters and they are currently working on a project and are concerned they will be encroached upon. He said in the Yeocomico and Coan you are talking about a few hundred oysters and in the Rappahannock you are talking about thousands. He said it was necessary to maintain some level of broodstock. He said that some areas of the Yeocomico and Coan were harvested in 2005 and the remaining oysters would provide broodstock.

Kevin Wade, representing J & W Seafood and Island Seafood, was present and his comments are a part of the verbatim record. Mr. Wade said he appreciated the comments and science, as he had been working in the industry for 25 years. He said he supported Mr. Kellum's proposal, as it would resolve the dispute of harvesting and non-harvesting.

William Nelson, watermen, was present and his comments are a part of the verbatim record. Mr. Nelson said that he had been a waterman for 25 years. He said that most scientists were talking in circles and most of it was theory. He said when they started harvesting in the Rappahannock River in 1996, the first year there were not many oysters and you could catch the 4-bushel limit. He said there was a 10-bushel limit now and you can catch that also. He said the combination of Jensen's reefs and the watermen putting back the small oysters and spreading them out is putting oysters back. He said staff's graph shows the same amount of oysters in both the harvested and non-harvested areas. He said the young oysters were providing the spawn, not the broodstock or older oysters, which were just lying there and dying or being eaten by predators. He said that Jensen's reef could not be harvested. He said staff believed their reefs were providing the spawn for upriver, but it was probably going out into the bay. He said they just wanted to make an honest day's work, so open the area so they can work. He said the hurricanes will wipe out the reefs and millions of dollars were spent for nothing. He said they just want to see somewhere to work.

Associate Member Bowden stated that it took 125 years to destroy the oyster resource and MSX devastated the oyster stocks and there is not any more known from the studies. He said he did not see where Mr. Kellum's request would damage anything and could very well help. He said it would be okay to open 25%, but not all of the area.

Associate Member McConaugha stated that there was no data that larger oysters were providing spawn, at least no physical data. He said the lower part could be the source for the upper portion. He said more information was necessary for the waterflow on the bottom, before allowing the larger oysters to be taken. He said it appeared that there was some disease resistance developing and it should be studied. He said he was not convinced that this can be done on short notice and that the Commission should wait for the Blue Ribbon Oyster Panel to provide a management plan for next year.

Associate Member Fox stated that in the Potomac Tributaries there were small cut up parcels and some spat set and he felt it would be detrimental to work it. He went on to state that he was torn about how to proceed in the Rappahannock and he agreed with

**Commission Meeting****November 28, 2006**

Dr. McConaugha about the need to have data. He said it did seem that there was something valuable here in regards to disease resistance. He said he was impressed with Mr. Cox's statement, that these were his oysters too. He stated that maybe a compromise was here, but we do not see it yet.

Associate Member Schick said that there were statements made that the science was not working and opening it up could get this information for science. He said the Blue Ribbon Oyster Panel's job was important and this would affect more than the Rappahannock. He said a long-term plan needed to be made.

Associate Member Tankard stated he was the same age as Mr. Kellum and he also has small children. He said he felt that for the children's future it was better that the sanctuary was not harvested. He said he felt the information says there is a bright spot. He said it would be a great asset for his children in the future to leave it protected.

Associate Member Robins stated a management plan was needed. He said at the Blue Ribbon Oyster Panel meeting there was an opportunity to produce a comprehensive management plan. He said the Commission allowing the harvesting in the upper river had short-circuited the Oyster Heritage Program plans. He said we need to be clear about how and why and where harvesting does occur. He said to open the area to harvest with only a 30-day processing time was not wise.

Commissioner Bowman said that when the request by industry was made he had thought it would be best to look at it. He said he did want to see the Blue Ribbon Oyster Panel see this all the way through. He stated in considering the opening of the Lower Rappahannock that staff and VIMS had not shown that it could be supported. He stated that there were hard decisions to be made in the position of Commissioner.

Associate Member Bowden stated that this needed to move forward and he understood all that had been said. He said he felt everyone was trying to do what was best and if there was creditable science he would agree to go that way, but that is not the case here. He said that Mr. Kellum's proposal, with the modifications suggested, was being careful and this was a chance he was willing to take.

**Associate Member Bowden moved to accept Mr. Kellum's plan with the change in boundaries and limits suggested at the last meeting. Associate Member Holland seconded the motion.**

**Associate Member Robins, in a substitute motion, moved to accept the staff recommendation with a modification that the Commissioner reconvene the Oyster Heritage Program to redesign and develop a plan. Associate Member Tankard seconded the motion. The motion carried, 5-3. Associate Members Bowden, Holland and Schick all voted no. The Chair voted yes.**

**Commission Meeting****November 28, 2006****Roll Call Vote:**

<b>Bowden</b>	<b>No</b>	<b>Robins</b>	<b>Yes</b>
<b>Fox</b>	<b>Yes</b>	<b>Schick</b>	<b>No</b>
<b>Holland</b>	<b>No</b>	<b>Tankard</b>	<b>Yes</b>
<b>McConaugha</b>	<b>Yes</b>	<b>Bowman</b>	<b>Yes</b>

\* \* \* \* \*

**19. REQUESTS FOR PUBLIC HEARING:**

- a) Proposed regulations on the use of recreational gill nets in tidal freshwaters.

Jack Travelstead gave the presentation, and his comments are a part of the verbatim record. He said the 2007 General Assembly may be looking at jurisdictional issues raised by fishermen, and staff was recommending not holding a public hearing until February 2007.

Commissioner Bowman said he agreed, as the General Assembly would be making changes in ways that would make it necessary to come back again to this issue.

Mr. Travelstead said that he agreed with the legal interpretation, and the Department of Game and Inland Fisheries was considering making their changes now.

**Associate Member Holland moved to hold a public hearing at the February 2007 meeting. Associate Member Tankard seconded the motion. The motion carried, 8-0. The Chair voted yes.**

- b) Proposed regulations to place clam and oyster harvests under the Mandatory Reporting Program and to establish clam and oyster aquaculture licenses.

Dr. James Wesson gave this presentation and his comments are a part of the verbatim record. Dr. Wesson explained that the General Assembly considered getting rid of the collection of the oyster taxes and the industry wanted to keep them. He said it will also be adding to mandatory reporting the oyster harvest done by watermen, aquaculture and private ground information, and creating an oyster and clam aquaculture license to better track harvest from the private grounds. He said this would require amending three regulations; 4 VAC 20-1090-10, Et seq., "Pertaining to Licensing Requirements and License Fees", 4 VAC 20-610-10, Et Seq., "Pertaining to Commercial Fishing and Mandatory Harvest Reporting", and 4 VAC 20-200-10, Et. Seq., "Pertaining to the Requirements for Reporting Oyster Transactions and Payment of Taxes".

**Commission Meeting****November 28, 2006**

Commissioner Bowman stated this new license was supported by industry and gave VMRC more control.

Dr. Wesson explained that this would also allow the aquaculture industry to be supported by the Virginia Marine Products Board in promoting this segment of the shellfish fishery.

Commissioner Bowman asked for a motion. **Associate Member Schick moved to hold a public hearing at the December meeting. Associate Member Fox seconded the motion. The motion carried, 8-0. The Chair voted yes.**

\* \* \* \* \*

**20. DISCUSSION:** Consideration of Emergency Regulatory Action for the Spiny Dogfish fishery.

Rob O'Reilly gave the presentation, and his comments are a part of the verbatim record. Mr. O'Reilly stated that this emergency action was justified, as it was for the welfare of the industry, and, with the timing, it cannot wait until mid January. He said in the state waters there would be direct and bycatch fisheries. He said there was a 6 million-pound annual limit, which Virginia would share with other states from New York to North Carolina during the time period November 1st through April 30<sup>th</sup>. He said staff was requesting adoption of the emergency regulation, to be made effective the day after this hearing, and requesting a public hearing be held next month.

Scott McDonald, owner of Spot's Seafood, Inc. of Virginia Beach, was present, and his comments are a part of the verbatim record. Mr. McDonald said that they needed this emergency regulation, as the watermen needed it to sustain them.

**Associate Member Robins moved to approve the emergency regulation to be effective November 29, 2006 and to advertised for a public hearing in December. Associate Member Bowden seconded the motion. The motion carried, 8-0. The Chair voted yes.**

\* \* \* \* \*



**Commission Meeting**

**November 28, 2006**

There was no further business and the meeting was adjourned at approximately 5:08 p.m. The next meeting will be Tuesday, December 19, 2006.

(Note: December's regular meeting date was changed at the October 31, 2006 Commission meeting, from the 4<sup>th</sup> Tuesday, December 26<sup>th</sup> to the third Tuesday, December 19<sup>th</sup>.)

---

Steven G. Bowman, Commissioner

---

Katherine Leonard, Recording Secretary