

MINUTES

Commission Meeting**December 16, 2008**

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)	
William E. Laine, Jr.)	Associate Members
John R. McConaugha)	
Richard B. Robins, Jr.)	
Kyle J. Schick)	
John E. Tankard, III)	
Carl Josephson	Senior, Assistant Attorney General
Jack G. Travelstead	Chief Deputy, Fisheries Mgmt.
John M. R. Bull	Director-Public Relations
Katherine Leonard	VMRC Recording Secretary
Jane McCroskey	Chief, Admin/Finance
Linda Farris	Bus. System Specialist, MIS
Rob O'Reilly	Deputy Chief, Fisheries Mgmt.
Joe Grist	Head, Plans and Statistics
Jim Wesson	Head, Conservation/Replenishment
Sonya Davis	Fisheries Mgmt. Specialist, Sr.
Alicia Nelson	Fisheries Mgmt. Specialist
Laura Lee	Fisheries Mgmt. Specialist
Mike Meier	Head, Artificial Reef Program
Joe Cimino	Fisheries Mgmt. Specialist, Sr.
Stephanie Iverson	Fisheries Mgmt., Manager
Bethany Eden	Fisheries Mgmt. Specialist
Holly Aber	Fisheries Mgmt. Technician
Lewis Gillingham	Director, SWFT, Fisheries Mgmt.
Justine Woodward	Fisheries Mgmt. Technician
Rick Lauderman	Chief, Law Enforcement
Warner Rhodes	Deputy Chief, Law Enforcement
Russell Phillips	Marine Police Officer

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James Simms	Marine Police Officer
Bob Grabb	Chief, Habitat Mgmt. Div.
Tony Watkinson	Deputy Chief, Habitat Mgmt. Div.
Chip Neikirk	Environmental Engineer, Sr.
Hank Badger	Environmental Engineer, Sr.
Ben Stagg	Environmental Engineer, Sr.
Justin Worrell	Environmental Engineer, Sr.
Danny Bacon	Environmental Engineer, Sr.
Jay Woodward	Environmental Engineer, Sr.
Bradley Reams	Project Compliance Technician
Randy Owen	Environmental Engineer, Sr.
Benjamin McGinnis	Environmental Engineer, Sr.
Elizabeth Murphy	Environmental Engineer, Sr.

Virginia Institute of Marine Science (VIMS)

Lyle Varnell

Other present included:

Charles S. Prentace	John B. Walsh	Conway Shield	Carl Eason
Donn Leavenworth	Edward C. Richardson	Earle Hall	Darrell A. Parker
Watson M. Allen	John M. Altman, Jr.	James Bradley	Carol D. Regan
Jim Janata	Bert Sanford	Nicole Sanford	Jim Georgo
Bill Kirby	Alfred Mcgness	D Mcgness	John Lain
Peter W. McGurl	David O'Brien	Ellis W. James	David May
Alice May	Gay Parker	Fay Clark	Richard Taylor
Bob Livingood	Randy Abbitt	Roger Parks	Bob Pride

and others.

Commissioner Bowman called the meeting to order at approximately 9:33 a.m. He noted that all Associate Members were present and there was a quorum so that the meeting could proceed.

At the request of Commissioner Bowman, Associate Member Robins gave the invocation and Carl Josephson, Senior, Assistant Attorney General led the pledge of allegiance.

APPROVAL OF AGENDA: Commissioner Bowman asked for any changes to the agenda. He explained that Item 16 would be heard prior to the Habitat permit issues to expedite the issue for the waterman, who needs to get back to his job on a tugboat right after this hearing.

Commissioner Bowman asked for a motion. **Associate Member Robins moved to approve the agenda, as amended. Associate Member McConaugha seconded the motion. The motion carried, 9-0. The Chair voted yes.**

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MINUTES: The minutes from the November Commission meeting were not ready in time for this meeting.

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16. CASES CONCERNING FAILURE TO REPORT COMMERCIAL HARVEST

James Thomas, waterman, was sworn in. **Mrs. James Thomas**, wife, was sworn in and her comments are a part of the verbatim record.

Joe Grist, Head, Plans and Statistics, was sworn in and he explained that Mr. Thomas had not received the certified letter for whatever reason, but he had been served by the Marine Police. He said that Mr. Thomas had been in contact numerous times since, but as a tug boat worker had not been able to come before the Board. He stated that Mr. Thomas had cooperated with staff and staff recommended a warning be given with no probation.

Mrs. Thomas explained that she usually maintained the reporting when he was working on the water and there was a misunderstanding and it was her fault, as he is away so often and she was having some health problems, which resulted in some reports not being submitted for 'no' activity.

Commissioner Bowman asked if they understood the importance of keeping up their reporting and they both responded yes; and Mrs. Thomas stated that it would never happen again.

Associate Member Bowden moved to accept the staff recommendation. Associate Member Robins seconded the motion. The motion carried, 9-0. The Chair voted yes.

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

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

Bob Grabb, Chief, Habitat Management Division, reviewed the page two items, 2A through 2B, for the Commission. He said that staff was recommending approval of these items. His comments are a part of the verbatim record.

Commissioner Bowman asked if there were any questions of staff. There were none.

Commissioner Bowman opened the public hearing and asked if anyone was present, pro or con to address these items. There were none, therefore, the public hearing was closed.

Commissioner Bowman asked for a motion for Items 2A through 2B.

Associate Member Tankard moved to accept the staff recommendation. Associate Member Laine seconded the motion. The motion carried, 9-0. The Chair voted yes.

- 2A. **VERIZON VA., INC., #08-1891**, requests authorization to install by directional bore method a 6-inch plastic conduit (approximately 630 feet long) for fiber optic and copper cables under Chincoteague Channel from Marsh Island to the Chincoteague Town dock and boat ramp area in the Town of Chincoteague. The conduit will be buried a minimum of 20 feet below the channel bottom. Staff recommends the assessment of a royalty in the amount of \$1,155.00 for the encroachment over 385 linear feet of State-owned subaqueous bottom at a rate of \$3.00 per square foot.

Royalty Fees (encroachment 385 linear feet @ \$3.00).....	\$1,155.00
Permit Fee.....	\$ 100.00
Total Fees.....	\$1,255.00

- 2B. **JACK COLLINS, #03-2064**, requests reactivation and extension of his permit which the Commission approved on January 25, 2005, and which authorizes the construction of a ten-foot wide by 60-foot long steel and timber single-span bridge across Wolf Creek, with two (2) concrete footers, to connect an easement over land belonging to Mr. Harry Thompson, adjacent to SR 642 in Bland County. Recommend approval with a new expiration date of January 31, 2011.

No applicable fees – Reactivation and Extension

3. **CONSENT ITEMS:** (After-the-fact permit applications with monetary civil charges and triple permit fees that have been agreed upon by both staff and the applicant and need final approval from the Commission's Board).

- 3A. **HONEYWELL HOPEWELL PLANT, #08-0431,** requests authorization to maintenance dredge up to 40,000 cubic yards of State-owned subaqueous bottomland, within the James River adjacent to the applicant's industrial operation at 905 East Randolph Road in the City of Hopewell. The dredged material is to be deposited in a previously used overboard disposal site directly across the river from the plant site.

Bob Grabb, Chief, Habitat Management, gave the presentation. Mr. Grabb stated this was not the usual page three Consent item, but an agreement for a royalty assessment for the use of State-owned bottom for a disposal site.

Mr. Grabb explained that the Honeywell-Hopewell plant was located along the James River shoreline within the City of Hopewell in an area of numerous industrial facilities. The area of proposed dredging was along an existing bulkhead, water intake pump house, and pier facility that had undergone numerous previous maintenance dredge cycles since at least 1979 (the facility was previously known as Allied Signal). As proposed, the dredging would be to a depth of -28 feet along the pier to allow for large ships to be loaded with plant product. The dredged material removed at this location had historically been pumped to an overboard disposal site in a deep area across the river from the plant site. At one time, due to Kepone contamination, overboard disposal of dredge material in this area was preferred to upland disposal. This approach was a conscious attempt to confine any Kepone to the aquatic environment and out of the terrestrial environment. However, more recent analysis has determined that Kepone levels are now low enough that this rationale is no longer paramount.

Mr. Grabb explained also that flood events and normal river flow resulted in siltation along the plants pier and intake area and required routine maintenance dredging. Staff had previously requested the applicant explore upland disposal sites for the dredged materials. The most recent study for alternative sites for disposal of the dredged material was conducted in 1995. In light of evidence of potential sturgeon use of this reach of the James River, the historical loss of submerged aquatic vegetation in this area of the river, and other negative impacts to the existing benthic habitat of the river bottom associated with overboard disposal, a renewed effort to obtain suitable upland disposal sites seemed warranted.

Mr. Grabb said that the Virginia Institute of Marine Science had commented, along with the Department of Game and Inland Fisheries, that a time-of-year restriction be required to protect anadromous fish species. VIMS had also indicated that recent studies showed the presence of adult sturgeon in this reach of the river.

Mr. Grabb stated that the Department of Environmental Quality had noted that provided the applicant received permits from both VMRC and the Army Corps of Engineers, the requirement for a Virginia Water Protection Permit was waived. The Department of Conservation and Recreation and the Department of Historic Resources did not object to the project. No other agencies had provided comments.

Mr. Grabb explained that staff had initially recommended approval of this item as a page two project with the assessment of a royalty in the amount of \$1.00 per square foot based on the area of State-owned bottomland impacted by the disposal operations. Although this would have been the first such royalty for the private use of public trust lands for dredged material placement, this was also the first such request for a private project of this scope and scale since the Commission resumed royalty assessments and collection in 2005. Admittedly, the applicant was caught off guard by this additional assessment.

Mr. Grabb said that the applicant agreed that they would be obtaining a financial benefit in return for the use of State-owned bottomlands. While they admitted that the decision to charge for such uses of public trust lands might be justifiable from a policy perspective, they did not think that the rates should be set through the permit process, but rather by specifically amending the Commission's Rent and Royalty Assessment Schedule. Because of time constraints necessitating the dredging in the first place, and the impending time-of-year restriction, they had proffered to pay \$10,000.00 for the one-time use of the overboard disposal site currently being requested.

Mr. Grabb stated that staff had routinely maintained that disposal of dredged material at appropriate upland sites was almost always preferable to overboard disposal. The most recent study of alternative upland sites for this project area was well over ten years old. Staff further understood that in this particular request the applicant had no expectation of a royalty imposition since none had been assessed in numerous previous dredge authorizations for the overboard disposal of the material. Staff concurred with the applicant's suggestion that the assessment of royalties for this type of overboard disposal were best addressed by the full Commission through a specific amendment to the Rent and Royalty Assessments Schedule. Therefore, staff recommended a one-time approval to maintenance dredge the area along the existing pier to depths of -28 feet mean low water and to depths of -17 feet mean low water at the water intake flume area adjacent to the plant pump house, with disposal of the dredged material in an area directly across the river, as shown on permit drawings with the following standard dredge conditions:

Permittee agrees to notify the Commission a minimum of 15 days prior to initiating the dredge activities authorized by this permit.

A pre-dredging conference shall be held on site prior to the commencement of the dredging. The meeting shall be attended by the permittee, the dredging contractor, and a member of the VMRC staff. The meeting shall be held within seven (7) days prior to the commencement of dredging and shall include an

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inspection of the dredge material containment area, an inspection of the previously staked dredge area, and a discussion of the terms and conditions of the permit.

The Permittee shall provide a post-dredging bathymetric survey of the dredged area and the overboard placement area within 30 days of completion of the dredging. The survey shall be signed and dated as being accurate and true. The survey shall be referenced to mean low water and shall include a transect at the channelward end of the dredge cut and at 50-foot intervals along the dredged area to the landward terminus of the dredged area. Accurate bathymetric data from each transect shall be used to establish the top width of the dredge cut ($\pm 1'$) and shall include a depth measurement exterior to both sides of the dredge cut. Also, the survey shall show the depth and square footage of the disposal area used.

Mr. Grabb said that staff also recommended a time-of-year restriction prohibiting dredging from February 15 through June 30 of any year to protect anadromous fish species, and that the applicant be required to investigate appropriate upland disposal sites and provide documentation of the feasibility of use of such sites prior to any future dredging requests submitted. Furthermore, staff recommended the Commission agree to accept a one-time payment of \$10,000.00 for the use of the overboard disposal site area; as depicted on the application drawings.

After some clarifying questions of staff by the Board members, Tim Hayes, Attorney for the applicant, was asked if he wished to comment and he stated he had no comments.

Commissioner Bowman asked if anyone else was present either pro or con who wished to address this matter. There were none. He asked for discussion or a motion.

Associate Member Schick moved to accept the staff recommendation. He suggested that the Habitat Management Advisory Committee meet to look at this and come back to the Commission with a recommendation or recommendations on how to access royalties on these types of issues.

Royalty Fee (encroachment one-time payment).....	\$10,000.00
Permit Fee.....	\$ 100.00
Total Fees.....	\$10,100.00

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4. CLOSED MEETING FOR CONSULTATION WITH, OR BRIEFING BY, COUNSEL. No closed meeting was held

Carl Josephson, Senior, Assistant Attorney General announced that in the appeal case of Harrison versus VMRC and Boone regarding the Harrison Pier in Norfolk that the

Supreme Court denied hearing the appeal, therefore, the Circuit Court decision to uphold the VMRC decision still applied.

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5. **CAROL DAVIDSON REGAN, #08-1349.** Commission review on appeal by 26 Norfolk freeholders of the October 8, 2008, decision by the Norfolk Wetlands Board to approve a proposal to impact and fill vegetated tidal wetlands to accommodate the construction of a single-family residence, private driveway, utilities, and a 5-foot wide by 35-foot long, elevated walkway, adjacent to her undeveloped, non-riparian property situated along Edgewater Haven in the City of Norfolk.

Ben McGinnis, Environmental Engineer, Sr., gave the presentation with slides. He explained that he would be showing slides that were for orientation purposes only.

Mr. McGinnis explained that the project was located on three (3) 25-foot wide by 110-foot deep, undeveloped lots in the City of Norfolk near Edgewater Haven, a tributary to the Lafayette River. Access to the site was limited to an unimproved City right-of-way, which was located completely within jurisdictional, vegetated tidal wetlands. In addition, more than sixty percent of Ms. Regan's property was within the jurisdictional limits of, and was populated with tidal wetlands vegetation. Ms. Regan's property, however, was considered to be a non-riparian parcel since it was separated from Edgewater Haven by the City's unimproved right-of-way.

Mr. McGinnis said that the proposed project included the filling of approximately 4,848 square feet of vegetated tidal wetlands to accommodate the construction of a three-story residence and driveway. The project also included temporary impacts to 1,210 square feet of vegetated tidal wetlands to accommodate the installation of a sanitary sewer line within the City's right-of-way. The applicant's proposal also included an offer to grade down a section of her upland property as a form of on-site compensation for a portion of the proposed loss of tidal wetlands.

Mr. McGinnis stated that the Norfolk Wetlands Board considered the applicant's proposal at a public hearing during their regularly scheduled meeting on October 8, 2008. The Board heard testimony from the applicant, Ms. Carol Davidson Regan, and her agent, Mr. Jim Georgo of J.S.G. Development Consultants; as well as Ms. Nicole Sanford, Mr. James Sumner, and Mr. Ellis W. James, all of whom spoke against the proposed project.

Mr. McGinnis explained that at the conclusion of the hearing, the Board voted 5-2 to approve the project as proposed with an assessment of in-lieu fees to compensate for the remaining impacts not addressed by the proposed on-site mitigation plan. In addition, the Board stipulated that revised drawings be submitted for any changes (increases) to the

impacts as a result of requirements from other City departments and that the in-lieu fee assessment shall be adjusted accordingly.

Mr. McGinnis said that staff received the letter of appeal and petition signed by 26 Norfolk freeholders on October 15, 2008. The freeholders' appeal was considered timely under the provisions of Section 28.2-1311 (B) of the Code of Virginia. The appellants contended that the Board failed to fulfill its responsibilities under the Wetlands Zoning Ordinance and that their decision to approve the project was unsupported by the evidence. The appellants cited the following summarized points in the appeal letter:

1. *The project is not water-dependent and should have therefore been denied based upon its failure to satisfy the criteria for water-dependency, as required under the Commission's Wetlands Mitigation/Compensation Policy (4 VAC 20-390-10 et seq.).*
2. *The project fails to identify all permanent impacts including curbs, gutters, lighting, and drainage within the unimproved right-of-way, as could be required by the City's Department of Public Works for development of the property.*
3. *Section 28.2-1302 of the Code requires the Board to consider the impact of the project upon public health, safety, and welfare. A City Fire Inspector has indicated that the Fire Department may be unable to reach the proposed residence, placing additional risk on neighboring residences from the spread of fire or sparks. The existing vegetated wetlands on the Regan property act as a natural protective barrier against floods and tidal storms, which protect many of the surrounding residences, as evidenced by photographs presented at the hearing.*
4. *The Board took into consideration and expressed empathy that property taxes have been paid on the property for numerous years. There was an overwhelming amount of weight given to the issue of tax payment in comparison to the minimal amount placed on the regulation of wetlands development. The applicant can file for a tax abatement with the City.*
5. *Approval of the project sets a frightening precedent for all of Tidewater, and shows an inconsistent stance on the environment by the city when considering the City's stewardship of the environment through such projects as the adjacent Larchmont Library/Birdsong Wetlands restoration site. This also sets a precedent for development of additional undeveloped lots on either side of the applicant's property.*
6. *The Board was appeased by the applicant's willingness to provide mitigation for the permanent loss of vegetated tidal wetlands, thus jeopardizing the ecological balance of the Edgewater Haven/Lafayette River. The proposed on-site location for wetlands compensation, as proposed will remain above the elevation that defines wetlands jurisdiction. The Board also failed to consider total impact to wetlands as a result of requirements to develop the entire Richmond Crescent right-of-way, paved to a width of 26 feet, and impacting an additional 2,058 square feet of wetlands.*

7. *The Board appeared to minimize the credentials of their professional staff by ignoring their findings, and instead placed the applicant's feelings and nostalgia for the property above the staff's findings.*

Mr. McGinnis stated that the appellants' letter went on to state that there was overwhelming evidence that the proposed development should not have been approved by the Board, as demonstrated by the project assessments provided by their professional staff and the Virginia Institute of Marine Science. They asked that the Board's decision be reversed and that the application be denied since the Board failed to fulfill its responsibilities under the Wetlands Zoning Ordinance and that the decision was not supported by the evidence. In addition, one of the appeal petitioners, Mr. William R. Turner, III, submitted his own letter, dated October 13, 2008, echoing the comments in the appeal letter authored by Ms. Nicole Sanford.

Mr. McGinnis explained that at the October 8, 2008, public hearing, City staff provided the Wetlands Board with a presentation on the proposed project, which included slides, a reading of the project's VIMS report, and their own staff assessment. That assessment stated that the project was not consistent with the standards for permit issuance. It went on to say that the wetlands in question are of primary ecological significance, and are a valuable protective barrier against floods and tidal storms, and that residential housing is not water-dependent. On the basis of the latter point alone, the City staff's assessment informed the Board that the Commission's guidelines state that the project must be denied.

Mr. McGinnis said that the Virginia Institute of Marine Science (VIMS) Shoreline Permit Application Report, dated October 2, 2008, stated that the project was not water-dependent and that filling wetlands to create uplands was undesirable, pursuant to the Commission's Wetlands Guidelines. VIMS classified the wetlands vegetation on the subject site, as a Saltmeadow Community (Type II wetlands). The report included reminders about the criteria for consideration of the need to impact wetlands including water-dependency, public/private benefits, and the proper sequence for consideration of mitigation measures beginning with avoidance, minimization, and ending with compensation. Although VIMS clearly stated that the project was not water-dependent, they did provide potential alternatives to help minimize impacts should the project be approved.

Mr. McGinnis explained that following the staff presentation at the Wetlands Board hearing, the applicant's agent, Mr. Jim Georgo, provided a brief overview of the proposed project. He also provided a brief historical background, as well as some slides, which included recent and historical photographs of the subject property. Mr. Georgo argued that the subject property was maintained as a mowed lawn for many years, and that wetlands did not previously exist on the site until the City planted wetlands vegetation within the unimproved right-of-way after having conducted maintenance work on the adjacent bulkhead along Edgewater Haven in the late 1990's. Mr. Georgo presented the

Board with City of Norfolk tax assessments for Ms. Regan's property as well as several adjacent developed and undeveloped lots in an attempt to show that the City taxed Ms. Regan's property as a buildable lot. Mr. Georgo also questioned whether the wetlands in question were of primary ecological value, and stated his opinion that the wetlands were a lesser valued Saltbush Community (Type IV) rather than the Saltmeadow Community (Type II) identified by VIMS.

Mr. McGinnis said that Mr. Georgo went on to discuss water-dependency and stated that Norfolk's staff was taking the Commission's mitigation policy out of context. He stated that it was his belief that the mitigation policy was only to address minor losses that accumulate over time as a result of shoreline stabilization structures, and that the policy did not apply to the development of residential property since the policy did not specifically address anything outside of shoreline stabilization structures. Mr. Georgo stated that not allowing the development of a residence on this property would constitute a taking of Ms. Regan's property by the government.

Mr. McGinnis stated that the Wetlands Board then heard testimony from Ms. Nicole Sanford, who owned the property immediately behind Ms. Regan's undeveloped property. Ms. Sanford stated that she was concerned about the potential for increased flooding and the loss of the natural vegetated buffer, which separated and helped to protect her property from Edgewater Haven. Ms. Sanford provided printed photographs of several recent flood events as a result of storms and higher than average tides. Mr. James Sumner, a nearby property owner also spoke against the project and echoed Ms. Sanford's previous comments to the Board. Ms. Sanford and Mr. Sumner both suggested that Ms. Regan seek a tax abatement from the City to recoup that portion of the taxes paid on the property assessed as a buildable rather than an unbuildable lot. Mr. Ellis W. James, a Norfolk resident, stated that Norfolk's staff had not taken the Commission's mitigation criteria out of context and urged the Board to reject the application.

Mr. McGinnis explained that the applicant, Ms. Regan, also testified before the Wetlands Board. She stated that she was disturbed to hear her property referred to as wetlands, and that any wetlands on her property were a result of the work the City had done in 1998.

Mr. McGinnis explained also that following public comments, Norfolk staff returned to the podium to discuss several issues brought up by Mr. Georgo. City staff discussed a court case (W.B. Hall, Jr., et al. v. Virginia Marine Resources Commission), copies of which were provided to the Board, of similar circumstances, where the Virginia Beach Wetlands Board denied the construction of a residence within tidal wetlands. That case was appealed to and subsequently upheld by the Commission, and then appealed to the Second Judicial Circuit in 1984. City staff informed the Board that the Court had ruled not just wetlands of primary ecological significance deserved protection by Wetlands Boards. In that case, the Court found that the decision to deny the permit was supported by the evidence was not arbitrary or capricious, that it achieved the goals of the Wetlands Act, and it did not constitute an unconstitutional taking of property.

Mr. McGinnis stated that regardless of that decision, City staff went on to state that they disagreed with Mr. Georgo's assertions that the wetlands on Ms. Regan's property were not Type I wetlands, and that wetland grasses such as *Spartina Patens* and *Distichlis Spicata* were present in the footprint of the house and driveway area proposed to be permanently impacted. They also went on to state that Mr. Georgo was correct in that the Commission's Wetlands Mitigation/Compensation Policy did not specifically address residential housing because that type of development does not meet the standard for water-dependency.

Mr. McGinnis said that the Board continued by discussing the proposed project and posed several questions to the applicant, agent, and their staff. Ms. Cynthia Hall, Norfolk Deputy City Attorney and Counsel to the Board then reminded the Board that in deciding whether to grant or deny a permit what the Board must consider and what criteria must be met to grant the permit pursuant to Chapter 13 of Title 28.2 of the Code of Virginia.

Mr. McGinnis stated that Board member Janata then stated that he was concerned about setting a precedent for this type of development on similar properties. Board member Robinson stated that he had visited the site and that if possible the project should be minimized. He went on to state that he felt that the impact was modest in low-grade wetlands. He also seemed to suggest that the project was justified because the property had been taxed as a buildable lot by the City. He ended his comments by stating that the applicant would have to work through some hurdles with other City departments, and that if the impacts change then the requirement for mitigation should change corresponding with the increase or decrease in impacts. Mr. Robinson followed up his comments by moving to approve the project as proposed, with an assessment of in-lieu mitigation fees at a rate of \$12 per square foot for all permanent impacts not compensated for in the proposed plan. His motion included a stipulation that revised drawings be required should the impacts change as a result of requirements by other City departments, and that mitigation fees be adjusted accordingly. The motion was seconded by Board member Stevenson-Clark. Board member McCrory stated that the project as presented was unacceptable, but that with the requirement for in-lieu fees that it was "doable." Mr. McCrory's statement effectively reflected that he allowed the mitigation to justify his approval of the project, contrary to the explicit requirement against doing so in the Commission's Wetlands Mitigation/Compensation Policy. A vote was taken and the motion passed 5-2.

Mr. McGinnis stated that VMRC staff strongly disagreed with Mr. Georgo's contention that the requirements of the Commission's Wetlands Mitigation-Compensation Policy do not apply to the development of residential homes within tidal wetlands. Staff drafted the language in the revised policy for Commission adoption and specifically mentioned its application to shoreline stabilization structures since those were typically considered permissible uses in tidal wetlands, whereas the construction of a residence was clearly not water-dependent and cannot demonstrate the need to be within tidal wetlands, and would therefore be an impermissible use in tidal wetlands. The policy was in no way intended

to be exclusive to shoreline stabilization structures, and should be applied to all proposals to develop jurisdictional tidal wetlands.

Mr. McGinnis said that VMRC staff agreed with the appellants and the City's staff that the existing wetlands located within the City's right-of-way and Ms. Regan's property provides a valuable buffer against flooding and tidal storms for the surrounding neighborhood and Ms. Regan's own upland property. When considering the number of properties that may be unreasonably impacted by increased risk of flooding and tidal storms versus the sole private benefit of constructing a residence for Ms. Regan, staff believed that the proposed public/private benefits of the project clearly did not outweigh the public/private detriments.

Mr. McGinnis stated that based upon the comments in the record, at least two members of the Board used the proposed on-site mitigation and the assessment of in-lieu mitigation fees to justify their approval of the proposed impacts. Staff can only assume that the other three members that voted to approve the project similarly allowed the mitigation component to influence their decisions. It was important to note that the Commission's Wetlands Mitigation-Compensation Policy strictly stated that "*since the proposed activity should stand on its own merits in the permit approval process, compensation should not be used to justify permit issuance.*" Furthermore, the Board failed to fully evaluate and account for all of the potential impacts that may result from development requirements from other City departments. Their approval represents a blank check to the applicant, since it allows the project to be significantly modified to accommodate those requirements without further consideration by the Board. Those potential requirements from the City's Public Works, Utilities, and Fire Departments will more than likely fail to consider or seek to avoid additional wetland impacts.

Mr. McGinnis pointed out that in the opinion of staff, the Norfolk Wetlands Board, in this case, failed to fulfill their responsibilities under the Wetlands Zoning Ordinance by authorizing the despoliation and destruction of tidal wetlands within their jurisdiction. The project was clearly not water-dependent, and on this basis alone should have been denied without further consideration pursuant to the Commission's Wetlands Mitigation-Compensation Policy (4 VAC 20-390-10 et seq.). Furthermore, staff saw no circumstance in which residential housing can demonstrate its need to be developed in wetlands, nor that the public and private benefits of this project outweigh the public and private detriments, as was required by the policy. Staff believed that any decision outside of denial would be non-compliant with the intent of the State's Wetlands Zoning Ordinance and the Commission's above-referenced regulation, and would set a dangerous precedent to allow residential development within wetlands throughout all of Tidewater.

Mr. McGinnis explained that in light of the foregoing, and in accordance with Section 28.2-1313 (1) of the Code of Virginia, staff recommended that the Commission reverse the decision of the Norfolk Wetlands Board, finding that the Board failed to fulfill its responsibilities under the Wetlands Zoning Ordinance. Staff felt that a reversal rather

than a remand to the Board was warranted in this case since the project was clearly non water-dependent, and should not be permitted.

Commissioner Bowman asked for questions. Associate Member Schick asked if VMRC counsel concurred with the Norfolk staff's citing of the court. Commissioner Bowman explained that counsel had indicated that he could not respond as he had not looked at it.

Commissioner Bowman asked that staff from VIMS make comments. Associate Member Schick asked if these were valuable wetlands. Pam Mason, representing VIMS, responded yes. Associate Member McConaugha asked about the bulkhead. Ms. Mason stated it was a short bulkhead, but it had been filled behind which raised the elevation somewhat. She said the general rise in sea level could affect it also.

Associate Member Fox asked if the Regan land went to the water or the right-of-way. Mr. Stagg responded it did go to the City's right-of-way.

Commissioner Bowman asked if the appellant would speak. Nichole Sanford, property owner directly behind the Regan's property, was sworn in and her comments are a part of the verbatim record. Ms. Sanford said she was concerned with tidal flooding. She stated she had lived there for seven and a half years and the flooding was crazy; and the roads did flood. She said that flooding occurred regularly and not just when there are storm events, but also at extreme high tides. She said her property and others needed to be protected and some of the houses have basements. She said if the wetlands are taken, then they cannot do their job, where would the water go? She said she did not want it made worse than it already was. She provided some photos showing the flooding at different times when there were storms or normal high tides.

Alfred Megrass, appellant and resident, was sworn in and his comments are a part of the verbatim record. He said he had signed the petition, but did not go to the meeting. He said he was against the development of this property.

Commissioner Bowman stated that VMRC counsel had advised him that if he was not at meeting he would have to make comments on the Wetlands Board record, because the Commission was only taking into consideration what was in the record. Mr. Megrass stated that they mowed their lawns and any new development would destroy the wetlands. He said if allowed, it would set a precedent and others would have to be given the same. He said from the evidence he saw he could not believe the Commission would not consider that. He said the bulkhead's height had not changed and flooding occurred before the City came in there.

Herbert Sanford, resident, was sworn in and his comments are a part of the verbatim record. Commissioner Bowman reminded him that comments have to relate to the testimony given at the Wetlands Board hearing. Mr. Sanford stated that flooding did occur and not just during storms. He said when the North East winds occur it would

flood. He said to develop there would require a lot of fill and flooding would just have to go elsewhere and if it were downgraded it would develop into a swamp. He said the Commission should consider the wildlife that depended on the area and the law.

Ellis W. James, Norfolk resident, was sworn in and his comments are a part of the verbatim record. Mr. James stated that he did attend the Norfolk meeting and this should never have been approved. He said he was familiar with the area as he had grown up in the area. He said the loss of wetlands would be detrimental to the whole area. He said Norfolk needs to make a decision to address those problems and the Commission needed to do what was right.

Commissioner Bowman asked Ms. Regan or her representative to address the Commission. Carl Eason, attorney for Ms. Regan was present and his comments are a part of the verbatim record. Mr. Eason explained that there was history with the mother for developing. He said she had been given a permit, but that it had been allowed to expire. He said the Corps of Engineers had visited the site and delineated the wetlands. He said their expert said that the wetlands were the type of lesser value. He said the City's outfall pipe is inoperable and causes the water to backup. He said the wetlands were planted and it was established as a buildable lot. He said the wetlands were planted on City property and they cannot cause the land to be landlocked.

Mr. Eason stated that when the property was obtained it was subdivided into two lots and in 1998 there was a buildable permit. He explained that the court looked at cases on a case by case basis. He referenced a case of Hall versus VMRC, at which time Judge Russo had said that the owner cannot be stopped from developing for ordinary purposes. He said in Norfolk it was zoned for residential and that must be considered against the development of artificial wetlands. He stated the Wetlands Board members are a learned body. He said the Commission needed to apply the law correctly as is shown in the record. He said in accordance with Wetlands Ordinance and Section 28.2-1308, there were three charges and to consider the public versus the private benefits and detriments, and if the purpose of the Act is fulfilled. He noted that in the Statute it said that for wetlands you must stay out of primary, significant wetlands. He said VIMS said it was Type 2, but the agent said it was type 3 or 4, which were not significant. He stated the Wetlands Board said it was not significant, but modest and low grade. He said the Code presumed that some development, to the extent practicable, was reasonable. The Commission needed to apply the standards. He said the objections of the freeholders did not follow the standard.

Mr. Eason stated that the landowner cannot be deprived of their rights. He explained that the Corps delineation of wetlands was on the record. He said the Board did consider all of the comments by Norfolk staff, VIMS, and the agent. He asked did VMRC supplant the Wetlands Board decision or look at the record and make a decision. He said the footprint was 1,800 feet and the driveway would cause minimal impact. He said that not

all situations were rigid and the Board must consider all practical solutions. He noted that they were not filling to create waterfront, as there was some upland filling and grading.

Mr. Eason stated that the applicant had historically had a buildable lot. He said the wetlands had been developed and there was failure to maintain the outfall. He reiterated that these were not natural wetlands and this was a taxable buildable lot.

Associate Member Robins asked if the existence of the Corps permit gave them the right to build on the lot. Mr. Eason stated it was historical progression, but the permit had expired. Associate Member Tankard asked if Mr. Georgo was an expert on wetlands. Mr. Eason deferred the question to Mr. Georgo. Associate Member Schick asked that if the wetlands quality was accepted from the Corps or VIMS. Mr. Eason stated that in the VIMS report they said it was type II vegetation and not a primary ecological type. He referred to page 79 of the transcript on record, where it said "low grade."

James Georgo, agent for the applicant, was sworn in and his comments are a part of the verbatim record. Commissioner Bowman asked what were his qualifications for determining the quality of the wetlands. Mr. Georgo explained that he was a civil engineer and had worked with environmental projects. He said he was not certified.

Commissioner Bowman asked if the applicant wished to speak. Mr. Eason responded they had no further comments, but would answer questions.

Commissioner Bowman asked if the City of Norfolk was represented.

Charles Prentace, Deputy City Attorney, was present and his comments are a part of the verbatim record. Mr. Prentace stated that the City and Wetlands Board were represented at this hearing.

Commissioner Bowman asked for questions. Associate Member Schick asked if the opinion of the Wetlands Board staff was that the wetlands present in the area were low grade.

Kevin DuBois, City of Norfolk, was sworn in and his comments are a part of the verbatim record. Mr. DuBois stated that he was a certified professional wetlands scientist.

Associate Member Schick referred to the Wetlands Board transcript, page 79, line 20 where it said that there was modest impact and low grade wetlands. Mr. DuBois stated that in his opinion these were high quality and had existed for a long time. Associate Member Schick asked if the easement was a part of the lot. Mr. DuBois stated that the staff had provided a delineation prior to work done on the seawall. Associate Member Schick asked if this was approved by the Wetlands Board. Mr. DuBois explained that this was the city's right of way and the Wetlands Board was not involved. He said after the work was done the city tried to replace the wetlands. He said the wetlands were there

prior and not introduced; the wetlands were only restored. Associate Member Schick asked if he was aware of the mother's permit. Mr. DuBois explained that the delineation was not done properly by the Corps at the time and he felt was not important to this case. Associate Member Tankard asked that if the pipe were gone did that change the drainage. Mr. DuBois said he did not know about the pipe other than the existing ones on other streets. He said closing the pipe could change the drainage and cause flooding, but even without the pipe it would flood anyway. Associate Member Tankard asked to explain the upland wetlands present. Mr. DuBois said that there was saltbush and others and these were not aggressive enough to move up and take over other grasses, but that would be reversed with upland vegetation. Associate Member Schick asked if highland wetlands can be impacted by low grade wetlands. Mr. DuBois explained that Bermuda grass creep into wetlands and these types of grasses are able to survive mowing and natural vegetation is not. He said that the wetlands are stressed by mowing. Commissioner Bowman asked for the slide which shows the impacted area with flagging. He asked Mr. DuBois if higher value wetlands were in the picture. Mr. DuBois responded yes.

Mr. Eason stated that when Mr. DuBois stated that the Corps' delineation was incorrect, this was opening the record and he was raising an exception. Commissioner Bowman stated that the exception was so noted. Mr. McGinnis pointed out that this was in the Wetlands Board record, on page #6-V-1 regarding the Corps delineation where they said that it may have been incorrect.

Commissioner Bowman asked for discussion.

Associate Member Tankard stated that when Section 28.2-1313 of the Code is considered, the Wetlands Board did fail in its responsibilities established by the Wetlands Zoning Ordinance, when emphasis was placed on the tax role and tax payment as well as the City taking the property. He said that there were a significant type wetlands.

Associate Member Schick referred to Section 28.2-1308 where it says that wetlands of primary significance are not to be altered. He said that development of Tidewater Virginia as plotted in 1909 did not apply today. He said that the nationwide permit delineation of wetlands is suspect and the permit had expired. He said the area served to be important to the environment and to the manmade structures. He said that deciding based on for mitigation was inappropriate and the project was not water dependent.

Associate Member Schick moved to accept the staff recommendation.

Associate Member Robins stated that there were problems with the Wetlands Board decision. The rationale used by them was that it was low grade wetlands and VIMS had contradicted that and the City staff had testified that it was high value wetlands. He said that they should not use the tax value. He stated the wetlands were valuable to the area and mitigation should not be used to justify the impacts. He said in the guidelines and the Code it said consideration was to be given to wetlands.

Associate Member Fox said the Wetlands Board should have looked at whether the public-private benefits exceeded the detriments and there was no evidence of this being done in the record.

Associate Member Robins seconded the motion. The motion carried, 9-0.

No applicable fees – Wetlands Appeal

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6. GREGORY N. PACKETT, #08-1262, requests authorization to construct a 16-slip community dock at his property situated along Totuskey Creek in Richmond County. The project is protested by several property owners.

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

Mr. Owen explained that the project site was located approximately 0.25 miles downstream of the Route 3 Bridge crossing of Totuskey Creek in Richmond County. The creek at this location was approximately 300 feet wide and is utilized primarily by recreational boat traffic. The designated federal project channel extends upriver past the site, terminating at the Route 3 Bridge.

Mr. Owen further explained that the site was previously zoned agricultural and operated as a marine terminal for the shipment and receipt by barge of aggregates, timber and agricultural products. The property was rezoned in 2006 to Residential, Mixed Use (R-3) in keeping with the applicant's request to the County to construct eight (8) two-story duplexes and a recreational building on the 17.15 acre site. The 600'+ feet of shoreline had been set aside as a common area for this development. An L-head pier also already existed on the upstream portion of the project and was included in the County's approval of the master site plan during the rezoning hearing.

Mr. Owen said that Mr. Packett sought Commission authorization to construct an additional 16-slip open-pile community dock, measuring 5' wide by 202' long, with eight (8) finger piers and seventeen (17) mooring piles. It was staff's understanding that he would not build the project himself. Rather, Mr. Packett hoped to market the property with the intent of providing each resident owner with their own wet slip.

Mr. Owen stated that the Commission, at its November 25, 2008, hearing, overturned the Richmond County Wetlands Board's denial of this project due to the project's lack of direct impacts to tidal wetlands.

Mr. Owen said that to date, staff had received four letters in opposition to the project. The protestants' primary concerns center on the overall size of the project and its

potential for adverse impacts to navigation on the creek. Some suggested that the prospective property owners could easily launch and retrieve their boats at the public boat ramp located at the foot of the Route 3 Bridge. They also questioned the equity in providing slips for off-water lots.

Mr. Owen explained that the Virginia Institute of Marine Science, in their Shoreline Situation Report, dated August 22, 2008, stated that the proposed community mooring facility increased the potential for the introduction of pollutants into Totuskey Creek. They concluded that it would be preferable to minimize the number of slips to correspond to the number of boats that might typically be expected to be present if the shoreline were subdivided into private riparian lots.

Mr. Owen stated that the Health Department informed staff that the applicant qualified for an exemption to the requirement for sewage holding pump-out facilities and that they had no objection to the project. The applicant currently had an alternate pump-out agreement with a nearby marina. The Health Department had advised, however, that their approval was restricted to the proposed community dock only and that they had not authorized the mooring of vessels at the existing L-head pier.

Mr. Owen stated that the project would not encroach onto any leased oyster ground.

Mr. Owen said that high-density waterfront developments raise difficult resource allocation questions. These questions became increasingly complex when a limited length of shoreline was shared in common by various owners. While staff agreed that these owners had some rights associated with the commonly owned shoreline, these rights probably only included some limited common right to access the water.

Mr. Owen explained that staff did not believe that this common interest in a development automatically included a right to construct a pier or to moor a vessel thereto. This opinion was clearly expressed in the Commission's "Criteria for the Siting of Marinas or Community Facilities for Boat Mooring" (VR 450-01-0047), which states for community piers that, "the number of slips will not necessarily be predicated by the number of units on the property" and that, "projects that by their cumulative impact will result in dense concentrations of boats in one area will be critically evaluated as to their impacts on natural resources."

Mr. Owen explained further that the Criteria further states that in the process of providing mooring facilities to serve such developments, private benefits are realized but public detriments are often increased. As the number of slips requested increases, automatic shellfish closures may result, water quality can deteriorate, habitat values can be irrevocably affected and the character of the water body can be permanently changed. For high density developments, staff typically recommended that the number of slips be limited to two times the number of private piers which could have been constructed had the property been developed as single family waterfront lots. This assumed that each

private pier would typically moor two boats. This recommendation did not include riparian properties which proposed duplexes, condominiums or townhomes, which typically had less waterfront frontages. Richmond County had advised staff that a maximum of three single-family lots could have been located along the shoreline in this development.

Mr. Owen stated that consistent with past Commission policy and actions, staff cannot support the proposed wet slip mooring of vessels for non-riparian lot owners. Accordingly, and since there was a potential for additional adverse environmental impacts from increased boat use associated with this project, staff recommended that a maximum of seven (7) wet slips be authorized at the proposed community dock and that the length of the pier be reduced accordingly. This recommendation provided for one additional transient slip and was based on a prohibition on the mooring of vessels at the existing smaller L-head pier. Although Mr. Packett had advised staff that this structure was on an adjacent parcel, it was part of the County's site plan approval and did not have approval from the Health Department for boat moorings. Should the Health Department approve any mooring(s) at this pier, Commission approval should be conditioned on a corresponding reduction at the community pier.

After some discussion, Commission Bowman asked if the applicant or his representative wished to speak.

John Daniel, attorney for the applicant, was present and his comments are a part of the verbatim record. Mr. Daniel stated that he had recently been at VMRC with a Wetlands Board appeal and VMRC had reversed their decision and VMRC had approved other projects on subaqueous bottom like this. He said he wondered why staff recommendation was made so one size fits all by equating number of units with slips. He said that Totuskey Marina was approved in November of 2000 by VMRC and determined to meet criteria in Section 28.2-1205 of the Code. He said they had administratively considered the criteria of this same section were met when building 16 slips for residents of a development of duplexes and if you relinquish riparian rights then have the right to get 16 slips. He said Richmond had approved the rezoning of this area from general agriculture to mix-residential in January 2006. He said Mr. Packett and the Board of Supervisors had agreed and it was approved. He said there was no minimum size restriction required on the lots. He said the site was designed to fit the purposes of the plan for 16 residents and 2 slips.

Mr. Daniel said the proposal was less impacting. He said the staff recommendation was ignoring prior approvals by VMRC of the same proposal. He said there was another parcel of land owned by Mr. Packett that he had not included in the project. He said that he does plan to build a pier on this property also, but it was not a part of what was being heard today.

Mr. Daniel said that correspondence to Mr. Packet from Mr. Jett expressed his concerns about the size of the lots. He said there was no minimum lot size requirement, but Mr. Packet had negotiated and agreed to the 150 feet. He said this proposal was less impacting on the environment and water quality. He said there was a Plan Use being developed. He said this was fitting into Richmond Counties plans to provide varying housing with amenities.

Associate Member Schick asked if the back lots were designed to get water frontage so as to provide water access. Mr. Daniel said that there were eight 2-story duplex units away from the shore and they would be relinquishing their rights and promoting the county housing plans.

Associate Member Tankard asked about the fewer impacts in the proposal. Mr. Daniel said that VMRC was simply looking at the subaqueous bottom portion which was public property. He said the marine terminal impacted more subaqueous area than what was now proposed. He said it was less impacting than what was previously approved.

Commissioner Bowman asked if anyone in opposition was present and wished to comment. There were none present.

Commissioner Bowman asked if there were any further comments.

Gregory Packett, applicant was sworn in and his comments are a part of the verbatim record. Mr. Packet explained that in 2002 there was approval for 2 barges to sit there as Chesapeake Corporation was in the area. He said that area residents had a problem with the terminal being there. He said he had talked with the County and they said they preferred the community pier. He said the County has approved it. He said that VMRC recommended approval since there was zero impacts on wetlands. He said he was abiding by all rules.

After some further clarifying questions, Commissioner Bowman asked if this would be a hazard to navigation. Mr. Owens stated that the Corps would not have approved it if it had encroached in the channel.

Commissioner Bowman stated that it seemed to him that it was a positive impact for the economy and the environment. He asked for discussion and action.

Associate Member Schick said that there was no existing dock and it had been converted from an industrial site which was good for both the environment and the area. He moved to approve the project as requested by the applicant. Associate Member Holland seconded the motion. Associate Member Fox asked that the motion be amended to include fees for community fees. Bob Grabb, Chief, Habitat Management stated that no royalties were collected during 1988 through 2005 for the marine terminal. Associate Member Schick stated that only the royalties not

previously paid be assessed for the project. Associate Member Holland stated he accepted the amendment.

Tim Hayes, Attorney, stated that no royalties were previously charged and it was built in the old footprint.

Associate Member Holland asked about the amount of the royalties. Mr. Owens stated it would \$1.50 per square foot. Associate Member Schick agreed to the adding of the fees, but to exclude the L-head. Associate Member Holland agreed. The motion carried 9-0.

Royalty Fees (encroachment 5,050 sq. ft. @ \$1.50/sq. ft.).....	\$7,575.00
Permit Fee.....	\$ 100.00
Total Fees.....	\$7,675.00

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The Commission broke for lunch at approximately 12:30 p.m. The meeting was reconvened at approximately 1:04 p.m.

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- 7. **HAMPTON PARKS AND RECREATION, #08-1542**, requests authorization to remove and replace the existing Sunset Creek boat ramp with a 32-foot wide by 100-foot long concrete, dual access ramp extending to minus five (-5) feet below mean low water with two 6-foot wide by 90-foot long timber access piers, dredge approximately 50 cubic yards of built-up material at the end of the existing ramp, and install a 5-foot wide Class I riprap toe protection at the end of the proposed ramp adjacent to City property situated along Sunset Creek.

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

Ms. Murphy explained that this property is located on Sunset Creek in Hampton. This section of Sunset Creek shoreline contained a mixture of residential and commercial properties.

Ms. Murphy said that the City proposed to refurbish an existing public boat ramp. They proposed to remove the existing armortech mat and replace it with a 32-foot wide by 100-foot long concrete, dual access ramp extending to minus five feet below mean low water, remove the two existing timber access piers and replace them with two 6-foot wide by 90-foot long access piers, and install 5-foot wide Class I riprap toe protection at the end of

the proposed ramp to prevent washout that occurs due to the practice of power loading. The City was also proposing to remove approximately 50 cubic yards of built up material to prevent it from being washed into the adjacent property owner's riparian area.

Ms. Murphy stated that the City in their application indicated that the new ramp was designed according to current Virginia Department of Game & Inland Fisheries recommendations for boat ramps.

Ms. Murphy noted that the project was protested by Bluewater Yacht Sales which was located directly adjacent to the boat ramp. In a letter dated November 25, 2008 Bluewater's attorney detailed their concerns about the project. As in past, protests to any City work at the boat ramp, Bluewater maintained that Hampton agreed to sell them the boat ramp property if Bluewater agreed to restore a historic building on their property. Bluewater had restored the property and maintained that the City had not held up its end of the deal. Staff continued to maintain that this was a civil issue, outside any Commission jurisdiction or purview.

Ms. Murphy said that the November 25 letter also detailed how the Sunset Creek boat ramp improvements would impact the use of Bluewater's travel lift which was capable of handling vessels as long as 90 feet. Bluewater stated that access to their travel lift was limited by the boat ramp as it currently exists, and should the proposed boat ramp improvements be constructed, it would prevent that use even further.

Ms. Murphy explained that the Bluewater's travel lift pier was approximately 9 feet from the proposed timber pier at the City's boat ramp which would be replaced in the same location it currently exists. Bluewater asserted that their travel lift could accommodate vessels as long as 90 feet. However, the finger pier on their pier adjacent to the lift was only 70 feet away. This finger pier also appeared to extend 18 feet past the extended property line and possibly into the City's riparian area. This required vessels to navigate between it and the boat ramp to make their way to the lift. In essence, it appeared that Bluewater might have a self-imposed hardship regarding access to their travel lift.

Ms. Murphy noted that in their Shoreline Permit Application Report, the Virginia Institute of Marine Science stated that the adverse marine environmental impact of the project was not expected to be significant. No other agencies had provided comments on the project.

Ms. Murphy said that based on the fact that the City of Hampton continually applied for permits to maintain their boat ramp at Sunset Creek, staff believed that a complete overhaul of the ramp was necessary. The extended concrete mat and removal of built-up material should help solve the problem of loose stone moving around at the end of the ramp. Staff suggested that the City look into posting signs prohibiting power loading at the ramp, or any other measures that might help educate boaters about the problem. As a result, and after considering the protest by the adjoining property owner as well as all of

the factors contained in §28.2-1205(A) of the Code of Virginia, staff recommended approval for the project, as proposed.

After some discussion, Commissioner Bowman asked if the applicant or representative wished to speak.

John Lain, Attorney for the City, was present and his comments are a part of the verbatim record. Mr. Lain explained that the City had tried to maintain this boat ramp and are requesting now that they be allowed to refurbish it totally. He said the pier did encroach into the City's area. He stated this was a straight forward case and this boat ramp benefits the public. He said they were asking that the Commission grant the permit. He said there are others here also for this project.

Commissioner Bowman asked if there was a case in court regarding the riparian area. Mr. Lain responded no and that even if there were it should not interfere with was being decided by VMRC here.

Associate Member Schick asked how much further the ramp go out than the existing ramp. James Bradley, Landmark Design, was sworn in and his comments are a part of the verbatim record. Mr. Bradley answered that it would be 28 feet further out beyond the toe. Associate Member Schick asked if there would be a rock apron. Mr. Bradley responded, yes. Associate Member Schick asked why it was going further out. Mr. Bradley said that power loading was used here and the Game and Inland Fisheries Commission recommended getting further out to deeper water. Associate Member Schick asked why they did not bring it in closer and change the slope. Bradley said there would be additional costs and retaining walls would be necessary. He said that there had been complaints about the rocks used previously and wanting them removed.

Associate Member McConaugha asked about the amount of use of the boat ramp. Donn Leavenworth, City Parks and Recreation Department, was sworn in and his comments are a part of the verbatim record. Mr. Leavenworth explained that only the boat ramp was open to the public and in the summer and during striper season there were 1,000's people using it on the weekends and this provided access to Hampton River and the Bay. Associate Member McConaugha asked about what parking was available. Mr. Leavenworth responded that there was parking at the boat and additional parking nearby also. He said this was the primary boat ramp in the area.

Commissioner Bowman asked if there was anyone present in support of the project.

Peter W. McGurl, adjoining property owner to the east, was sworn in and his comments are a part of the verbatim record. Mr. McGurl explained that he ran a C-3 commercial boat repair business and he had no objection to the ramp being there. He said the boat ramp was there when he bought the property. He said the ramp was heavily used in the summer and during the striper season. He said that those that used it were courteous and

it was an excellent facility. He said to retain and just upgrade the ramp would be a partial fix and it had not worked three times it was done before. He said the plan now is the right one and he supported the proposal.

Commissioner Bowman asked if the protestant or his representative wished to speak.

Tim Hayes, attorney for the protestant, was present and his comments are a part of the verbatim record. Mr. Hayes provided a handout prepared by Tom Langley to be added to the record. He referred to the letter dated November 21 that staff referred to with its attachment that he said was important to the conflict between the City of Hampton and Bluewater. He stated that they realized the importance of this ramp to the community and did not dispute the repairing of the boat ramp, at least temporarily. He stated that the City had agreed to transfer this area to Bluewater for a fair price once a new location was found if Bluewater would repair the Herbert House, which had been done. He said there was a problem treating this as a civil matter, as suggested by staff, and apart from the permit request the City's property complaint about Bluewater's piers were at odds with the agreement to transfer the property to Bluewater. He said there was an alternative and that was to make the project smaller as they did not dispute the ramp being in the area. He said they felt that VMRC's approval would close the door to the Bluewater and City agreement to transfer the area. He introduced Mr. Hall who wished to speak also. He asked that he be allowed to speak again after Mr. Hall.

Commissioner Bowman asked if there were questions.

Associate Member Schick said that he had figured there was 13-foot wide corridor accessible to the travel lift between the finger pier and boat ramp. Mr. Hayes responded that Mr. Hall could better address that matter.

Associate Member Fox said that staff had said that the adjacent piers were in the same location and on the drawing provided the right one appeared to be in a different location. He said the City wanted to expand the ramp further to the right and eliminate the existing pier and put one over further to the right.

Earl Hall, Bluewater Yachts was sworn in and his comments are a part of the verbatim record. Mr. Hall provided a little historical information. He said they do sales, service and some new construction. He further said that access to the travel lift was important to their business. He said the piers on the east and west were approved by the Corps. He provided a picture showing some of their business activity. He said that this was a mini shipyard and they serviced vessels at the facility. He gave some history of the structures at the site. He said it was when the rocks were put there and power loading was used that it became an issue and caused problems. He said they had a problem with extending the ramp anymore channelward, but had no problem with fixing it up. He said there are two ramps there and the City proposes to move one pier to the east and widen the ramp to the property line and extend the piers. He said this would limit their hauling boats to the

upland since most of them must be serviced on the upland and inside a building. He said they had two permits approved by VMRC, one being the travel lift, was approved and the other was approved for repair. He said they can accommodate a 90-foot boat, but with much care because of the space available now. He said the typical size boats they work on are 50 to 75 feet and if this were approved as proposed they would be limited to 45-foot boats. He said this would close their business down and they employ 95 to 100 people which was good for the economy and they brought revenue to the City. He stated he had been surprised by the City's proposal as it would interfere with the agreement they had and impact the community.

Associate Member Tankard asked about staff comments that the travel lift could accommodate 90-foot vessels, but according to staff the area was about 70 feet. Mr. Hall explained that they had to take special care to get the larger boats in there.

Associate Member Robins asked Mr. Hall to explain the business or volume of business and travel lift activity. Mr. Hall stated that the travel lift was the core of their business as the larger boats come to them by way of the water versus being trucked. He said last year they hauled up about 700 boats on the travel lift and did about 2,500 services at the facility. He stated some of the minor services can be done with the boat still in the water. He said he had economic concerns because the larger boats make up more of their work. He said the small boat business had basically flatlined or stopped.

Associate Member Schick asked him how much space would be needed to bring in the larger boats. Mr. Hall stated that even now it was a tight squeeze and in a normal low tide they have no more than 6 feet of water depth. He said this was a high silting area and if they stopped using this area the silting would get worse. He said the propeller of the larger boats do go over the riparian lines of the City. Associate Member Schick asked if he would need to accommodate a 6-foot draft. Mr. Hall stated at least that much. He said the extension will block them from hauling in large boats.

Associate Member Fox asked if he was concerned with the left pier being extended beyond the travel lift. He said the Langley and McDonald drawing did not show it beyond the lift. Mr. Hall stated that the application request was for a 50 foot extension. Ms. Murphy explained that two piers would be removed and one put back which would be equal to Bluewaters' pier, but over further to the right.

Commissioner Bowman explained that in regards to the civil issue, if it were to be litigated, VMRC would not want to help either side. He asked if this would require the matter to be tabled until the court decides. Carl Josephson, Senior, Assistant Attorney General and VMRC Counsel stated that the civil issue was not before the VMRC so as to impact it. He said even if VMRC did take action, it would not be legally binding to cause the litigation to go one way or the other. He said that if it were to be approved by VMRC then they could bring an injunction to stop any work on it until the civil issue were to be resolved.

Mr. Hall said he felt that spending \$200,000 to fix or rebuild it would taint the results of the civil issue and prejudice the outcome. He suggested that there be a minimum allowed to be done until it was resolved.

Mr. Hayes stated that he had not implied that the judge was bond by this decision.

Commissioner Bowman asked if anyone in opposition were present. There were none.

Mr. Lain stated that this action would have nothing to do with the civil action. He said he understood there was no agreement only a resolution to sell if an alternate site was found; no date on it. He said there could be an injunction put on VMRC, but their decision would have no impact on Mr. Hall. He said that they needed to quit just bandaging it and fix it correctly. He said they were trying to correct a headache for many years. He stated this was a good permit application and a good public benefit. He said they were asking that this not be deferred but approved.

After some further clarifying questions, Commissioner Bowman asked for discussion or action.

Associate Member Fox stated the left pier was not the concern and it was the ramp that needed to go back 10 feet where it would be a minus 4 feet water depth.

Associate Member Robins stated that this needed to be managed because of the competing uses in the area. He said the City had documented the need. He said it should be approved, but not in a way to encroach on the business activity. He stated there should be no more channelward encroachment.

Associate Member Schick said that the area was not designed for the types of vessels utilizing it. He said the City was just throwing good money after bad. He said it was the government's role to make it a safe and secure environment to live and work and to not take away from the adjoining business. He said they are spending money to encourage new business, but they also need to look after the existing businesses. He said he was supporting the repair of the ramp and the moving of it to the right.

Associate Member Tankard stated that he agreed with Mr. Schick that it should not impact the local business. He moved to allow the City to replace the existing boat ramp at the existing location and to increase the length of the pier to 90 feet. He said there would be no further encroachment channel ward by the ramp. Associate Member Robins seconded the motion. He asked that an amendment to the motion be made to limit the length of the pier from going beyond the travel lift. Associate Member Tankard agreed to the amendment and stated that revised drawings be submitted and approved by the staff. Associate Member Holland asked for an amendment to require the removal of the rock. Ms Murphy stated that the City

believed the 2005 permit allowed them to remove it and some had been removed. Both Associate Members Robins and Tankard agreed. The motion carried, 9-0.

Permit Fee.....	\$100.00
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- 8. **STEVEN C. WANN, #08-1360**, requests authorization to construct a private, noncommercial, open-pile pier with an uncovered boatlift, a 5-foot by 10-foot elevated platform to support two solar panels, and a 10-foot by 30-foot pier head extending 568 feet channelward of mean high water adjacent to his property situated along the Severn River at 9607 Glass Road in Gloucester County. The project is protested by several nearby property owners.

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

Mr. Neikirk explained that the project was located along the Severn River in the Glass area of Gloucester County. Mr. Wann proposed to construct a 5-foot wide private, noncommercial pier with an uncovered boatlift extending 568 feet channelward of mean high water. A 5-foot by 10-foot elevated platform was also proposed to support two solar panels and an associated battery box to provide power for the boatlift. The outer mooring poles associated with the pier to reach a mean low water depth of more than 8 feet. The Severn River was approximately 2,700 feet wide at the project site and the development along the shoreline is primarily residential. The site was exposed to a fetch of approximately 1 mile in the northerly direction and several miles in an easterly direction.

Mr. Neikirk said that the riparian area associated with Mr. Wann’s property was recently apportioned by the Circuit Court of Gloucester County. The Court used the minus four (-4) contour as the “edge of navigable waters” in their apportionment of the riparian area. As proposed, the pier and associated mooring poles would extend approximately 110 feet beyond the “edge of navigable waters” used by the court to establish Mr. Wann’s riparian area. Accordingly, since the pier extended beyond the riparian area of Mr. Wann’s property, staff did not believe the entire pier was statutorily authorized under §28.2-1203(A) (5) of the Code of Virginia. Therefore, staff maintained that a VMRC permit was required for that portion that extended beyond the riparian boundary.

Mr. Neikirk stated that the project was protested by Mr. William Kirby, the adjoining property owner located on the northwest side of the property and several other nearby property owners also located northwest of the project site. The protestants’ concerns included adverse impacts on aesthetics, navigation, and a concern that the pier might become hazardous to their properties in the event it is damaged or destroyed in a storm. In addition, Mr. Kirby believed the pier would interfere with his right to hunt from a

licensed duck blind that he had constructed near the boundary line separating his and Mr. Wann's riparian areas. Mr. Kirby also questioned the need for the pier to reach the requested depth since both of the boats identified in the application by Mr. Wann were catamarans with retractable dagger boards. He also noted that the larger boat was not registered to Mr. Wann.

Mr. Neikirk said that there was a wide shallow sand bar in front of Mr. Wann's property. According to the soundings included with the application, the minus one (-1) foot contour is located approximately 400 feet channelward of mean high water. From that point channelward, the water depths increased rapidly at a rate of approximately one-foot (1') every twenty feet. Accordingly most of the length of the requested pier was crossing water shallower than one-foot (1') at mean low water.

Mr. Neikirk stated that Mr. Wann was requesting to install the solar panels because he believed they would be less expensive than running electrical wire down the length of the pier to power the boat lift. The elevated platform was designed to protect the panels from water damage during storms.

Mr. Neikirk noted that no state agencies had commented on the project.

Mr. Neikirk explained that the pier would extend over oyster planting ground currently being applied for by both Mr. Wann and Mr. Kirby, the assignment of which was a separate issue.

Mr. Neikirk said that staff believed the majority of Mr. Wann's pier was statutorily authorized under §28.2-1203(A) (5) of the Code of Virginia. The portions of the project requiring Commission authorization were the elevated deck and associated solar panels, as well as the portions of the pier extending channelward of the riparian area apportioned to Mr. Wann's property by the Circuit Court of Gloucester County. Mr. Wann's riparian area extended to the minus four (-4') foot mean low water contour. The proposed pier and associated mooring poles extended approximately 100 feet channelward of the apportioned area with the most channelward piling located near the minus nine (-9') foot contour.

Mr. Neikirk explained that in his application, Mr. Wann identified two boats that would be using the proposed pier. One was a 27-foot Trimaran with a draft of four and one-half (4.5) feet. The other was a 44-foot Catana Catamaran with a draft of seven (7) feet. Mr. Wann's agent, Mr. Dawson, had stated that he believed it was Mr. Wann's intention to purchase the 44-foot catamaran or a similar vessel. It was staff's understanding that both of the listed boats utilized retractable dagger boards and that the draft was significantly less with the dagger boards retracted. A typical 27-foot trimaran draws between 2 and 3 feet and the 44-foot Catana draws about 4 feet with the dagger boards retracted. As a result, staff did not believe there was sufficient justification to extend the pier to the minus nine (-9) foot mean low water contour. Furthermore, it was difficult to use the

potential purchase of a larger vessel as justification to extend beyond the Court apportioned riparian area. Staff was aware, however, that the depth contours change quickly once you get beyond the wide sand bar in front of Mr. Wann's property and that some encroachment beyond the minus four (-4) foot contour may be necessary to create slips with adequate depth throughout the slip.

Mr. Neikirk stated that staff was generally reluctant to redesign proposed structures; however, in this case staff believed the pier could be reconfigured to take better advantage of the existing depth contours while shortening the overall length of the pier. For example, the pier-head could be re-aligned more parallel with the depth contours and/or the slips could be aligned parallel with the main stem of the pier.

Mr. Neikirk explained that 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 was unable to support the construction of the pier, as currently proposed. Staff would recommend approval of a pier with associated mooring poles extending a maximum distance of 500 feet channelward of mean high water which would reach a depth of approximately minus seven (-7) feet at mean low water and including the proposed solar panels and platform, provided all other dimensions of the pier met the size restrictions specified §28.2-1203(A) (5) of the Code of Virginia for private piers.

Commissioner Bowman asked if the applicant wished to speak.

Conway Shield, Attorney for the applicant, was present and his comments are a part of the verbatim record. Mr. Shield stated that Mr. Wann was an avid sailor and had extensive experience in sailing. He further stated that Mr. Wann had purchased the property for this purpose. He said the shoal was not good for the project. He said that Judge Shaw decided on the riparian apportionment and picked the line not the applicant. He explained that Chuck Dawson the engineer had designed the pier so that it would go outside the shallows. He said it were turned to the left, it would not have to be so long. He said there was a bill of sale for a new boat, 27' and 44'. He stated the larger boat needs water depth to operate and it was explained to staff that there was a need for more than 7 feet and they were requesting 8 feet. He said depth was absolutely necessary and he was not trying to impact the use of the duck blind. He said the solar panels were because of the length of the pier and to get the power needed for the boats.

Associate Member Tankard said that there had been mentioned of dagger boards and from his knowledge as a sailor that it was the rudder that was used to steer a boat.

Steven C. Wann, applicant was sworn in and his comments are a part of the verbatim record. Mr. Wann explained that rudders are not that deep, but these boats do not have a rudder, so you need the dagger boards that can be retracted for getting into shallow water

and into a slip. He further explained that when you are going a slow speed it keeps the boat from going lateral because of the winds and currents.

Associate Member Fox asked that he explain the modification. Mr. Wann explained that the modification, by moving the dolphins down the pier to allow for the 7-foot water depth, he needed to get the boat into the slip with the dagger boards. He said this was the least problematic solution he could come up with to help with the concerns of Mr. Kirby for his duck blind. He said as far as the length of the pier, he was not interested in having a pier any longer than was necessary, as he did not want to spend extra money. He was trying to get the shortest possible pier to meet his needs.

Associate Member Holland asked him to review the original drawing and explain his reasons for that proposal. Mr. Wann said that he preferred it because he had more room to maneuver the vessels. He said with the smaller of the vessels he could come in at a straight line. He said he did not have the problem of his neighbor's pier influencing how he accessed his pier when there were certain winds. He said with the dolphins in the location they were proposed, he could come in with the larger vessels from more than one direction depending on the wind and currents. He said this was the best solution even though it was more money.

Commissioner Bowman asked if there was anyone in opposition who wished to speak.

Alice H. May, resident in the area, was sworn in and his comments are a part of the verbatim record. Ms. May stated that this was a small waterfront and she recognized the applicant's right to have a pier, but it should not impact others' right. She said they had view of the Severn River from their property, a 170 degree panorama. She said this pier would take away 45 percent of that view. She said they bought this home because of the view. She said there was an osprey nest on the duck blind and they liked to watch their activity. She said this would impact the osprey. She stated the timber treatment would impact the water and the resources.

David L. May, resident was sworn in and his comments are a part of the verbatim record. Mr. May explained that he owned two lots 56 and 56B. He said he suggested that a battery be stored on shore and brought out on the pier as it was needed. He said the panels would impact his view. He said he made a large investment when he purchased his property and had lived there 18 years. He said that his view was a resource and in the dictionary it can be converted into money. He said the pier would be southeast of their property and debris from this structure would end up on their property. He said after Hurricane Isabel a lot of the debris ended up on their property. He said that lights would be required and the pier would shade the bottom. He said there were boats that go from the shore to the duck blind. He said that dockage elsewhere would cost less. He stated this was not good use of the marine resources.

Gay R. Parker, adjoining property owner, was sworn in and his comments are a part of the verbatim record. Mr. Parker said there were only two boats stored at the pier in the picture. He said he was concerned with high winds and sail boats. He said he was also concerned that his view would be impacted entirely of the Severn River.

Fay Clark, resident, was sworn in and her comments are a part of the verbatim record. Ms. Clark said she was opposed to the request. She stated the piers there now impacted her view and this would impact it even more. She said she was also concerned about the noise pollution and that it would diminish their home's value. She said they purchase it 40 years ago and asked that their peaceful view not be taken away.

Bill Kirby, adjoining property owner, was sworn in and his comments are a part of the verbatim record. Mr. Kirby stated that he was concerned with his property being damaged, his view being impacted, that this was a hazard to navigation. He said that his main issue was his duck blind. He said the court had approved line L9 for riparian rights. He suggested that the pier be moved to the downriver side of the property and then a 514 foot dock could be built with 8 feet water. He said that the catamarans do slip sideways with heavier winds and have to leave the dock very slow at 2 to 3 knots. He said the cost of the dock was \$71,000 and other piers had been destroyed by hurricane. He said they needed to consider storing the boat at the marina. He said the staff recommendation to make a 68 foot cut did not solve the problem and allow him to use the duck blind. He said the pier went past the duck blind 158 feet. He stated that any location would impact the view and he felt that the applicant's rights should not supersede their rights.

Mr. Shield stated that there were only 2 solar panels and they should stand up to any storms. He stated also that the applicant was not married to the length. He said the duck blind, the shoal, and the judge dictated where the structure could go.

Commissioner Bowman asked if there were questions.

Associate Member Robins asked about the staff recommendation for the length. Mr. Neikirk explained that this was before the larger boat was involved and it was 500 feet to mean high water. He said with the 8-foot contour, the pier needed to be 538 feet.

Associate Member Holland moved to approve the project as applied for with two solar panels. Associate Member Robins seconded the motion. He said he was sympathetic with the protestants, but the applicant also had the right to wharf. He said the apportionment was approved and the applicant made his case with the nature of the boat's use. The motion carried, 9-0.

Permit Fee.....	\$100.00
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9. **DEEP CREEK LANDING MARINA, #08-1866**, requests authorization to remove two existing fixed piers and replace them with an 8-foot wide by 111-foot long floating pier with a 10-foot by 20-foot platform, a 4-foot by 15-foot ramp, an 8-foot by 50-foot T-head platform, and four 4-foot wide finger piers with 9 boat slips and an 8-foot wide by 136-foot long floating pier with a 10-foot by 15-foot platform, a 4-foot by 15-foot ramp, an 8-foot by 50-foot T-head platform, and 5 4-foot wide finger piers with 10 boat slips; and install a new 8-foot by 45-foot floating platform with a 3-foot by 15-foot aluminum ramp at their fuel dock at their property located at 200 Old Marina Lane situated along Deep Creek in Newport News. The Marina has asked for Commission consideration of a reduced royalty assessment for the increase in square footage of State-owned bottom to be encumbered.

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

Ms. Murphy explained that this property was located on Deep Creek in the Harborview Estates neighborhood in Newport News. Deep Creek, along this section of shoreline, was primarily residential. The applicant was proposing to replace two of their existing fixed piers with floating piers and install an additional floating pier at the fuel dock. The new floating piers would not be in the same location as the currently existing fixed piers.

Ms. Murphy stated that the bold outline approach was used to determine the royalty amount recommended for the private use of the public bottoms being encumbered. Based on that, staff was recommending a royalty of \$1,597.50 at a rate of \$1.00 per square foot for the proposed floating pier at the fuel dock, including the area that would be occupied by boats moored at the pier while fueling. Staff was also recommending a royalty of \$19,895 at a rate of \$1.00 per square foot for the bold outline of the proposed floating dock replacement. These rates were in keeping with the Rent and Royalty Schedule that became effective on December 1, 2005.

Ms. Murphy said that on November 14, 2008, staff received an e-mail from the applicant requesting to be placed on the December Commission agenda to ask for consideration of reduced royalty fees for their project. Based on conversations with staff, the applicant felt that a royalty fee of \$24,492.50 was too high given that they were replacing existing structures. They understood why the royalty was assessed, but felt they should be subject to a lower rate since they were improving the waterfront and replacing existing structures.

Ms. Murphy said that staff had been able to find three permits for the subject property, with the oldest being from 1992. Neither staff nor the applicant had been able to determine that any royalties were ever paid at the piers where the work was proposed. In addition, the proposed replacement floating piers were not being put back in the same design or footprint as the existing fixed piers so staff did not consider this to qualify as maintenance and repair.

Ms. Murphy explained that staff was unable to recall any similar situation where the Commission granted a reduced royalty rate for such a project. In the past, the Commission had declined to assess a royalty for the replacement of an existing, previously permitted part of a project when the bold outline was assessed for the replacement of the structure and royalties were previously part of the pier encroachment. An example was The Pier Condominium, VMRC #06-2853, where the Condominium Association replaced the piers around its complex along the Elizabeth River at the entrance to The Hague in Norfolk. They had been assessed a royalty when the piers were first constructed, and were credited for that square footage when the bold outline of the repairs and new work were assessed. This reduction in royalty rate would not apply to Deep Creek Landing because they had never paid any royalties for the piers as they exist today.

Ms. Murphy said that in addition, at the July 25, 2006, Commission meeting a discussion item was presented because the Warwick Yacht & Country Club had not felt that installing boatlifts should incur a royalty when the marina replaced their finger piers and installed new lifts. The Club had applied to remove existing wet slips and install boat lifts and finger piers in the same footprint under VMRC #06-0590. The Commission agreed by a vote of 6-0 that applicants should be exempt from royalty fees when only cradle and rail boatlifts were to be installed in pre-existing slips. Again, this situation did not apply to Deep Creek Landing although it was an illustration of another case where a marina asked for royalty fees to be waived or reduced.

Ms. Murphy stated that in the current economic climate, staff understood that a royalty payment was an added expense to the cost of the project. Unfortunately, staff did not see how one marina could be offered a reduced royalty fee without setting precedent for other marinas in Virginia to request similar relief. In addition, the royalty assessment in this case did not appear excessive. Coincidentally, while the existing fixed piers did not appear to be deteriorating, staff had been advised by the applicant that a floating pier design would make it easier for their customers to access their boats.

Ms. Murphy said that as a result, and after considering all of the factors contained in §28.2-1205(A) of the Code of Virginia, staff recommended that the applicant's project be approved as proposed and the Commission assess a royalty in the amount of \$21,492.50 for the encroachment over 21,492.5 square feet of State-owned submerged land at a rate of \$1.00 per square foot for the replacement of the two fixed piers with floating piers and the addition of the floating pier at the fuel dock.

Commissioner Bowman asked if the applicant wished to speak.

Randy Abbott, applicant was sworn in and his comments are a part of the verbatim record. Mr. Abbott stated that he had been a resident of Newport News for 56 years and ten years ago he purchased the marina. He said at the time it was a dump and did have a lot of problems that impacted the environment. He said he had cleaned this up. He said

Commission Meeting

he spent money that was not really necessary and this helped the State. He said he did not have to do the pumpout facility and in the last five years the Health Department had checked and it checked out excellent. He said he was asking the VMRC to consider a reduction in the fees as there would not be additional subaqueous bottom impacted.

Commissioner Bowman asked if he was aware of the royalties. Mr. Abbott said he purchased it 25 years ago and bought out his partners 8 years ago. He said he was not aware of the royalties. Commissioner Bowman stated he agreed that it was a dump and asked how much the pumpout coast. Mr. Abbott stated \$20,000.00. He said his partners did not want to spend anything for improvements and a lot of the slip renters had left the facilities.

Associate Member Schick asked if he had gotten any grant money for the pumpout. Mr. Abbott responded he got some.

Associate Member Robins stated that Warwick Yacht Club was exempt because it was within the footprint. He said this was similar but not exactly in the footprint. Ms. Murphy stated the fuel dock was slightly larger and it was being spread out in general and not in the exact configuration.

Associate Member Holland asked what was the new square footage. Ms. Murphy stated 19,895 square feet. She said it was a reduction from the old square footage of 20,068 square feet.

Associate Member Schick asked why the marine repair was not exempt. Bob Grabb, Chief, Habitat Management, explained that a marina was exempt if 51% of business was sales.

Mr. Abbott stated that dealer yard and motor repair were 45% of this income.

Commissioner Bowman asked if there was anyone present in opposition to the project. There were none.

Associate Member Schick moved to exempt royalties for reconstruction as it was identical and took less space. He said this replacement was in kind for modernization but to charge the royalty fees for the fuel dock. Associate Member Holland seconded the motion. The motion carried, 9-0.

Royalty Fees (encroachment 1,597.5 @ \$1.00/sq. ft.....	\$1,597.50
Permit Fee.....	\$ 100.00
Totals Fees.....	\$1,697.50

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- 10. CITY OF HOPEWELL, #08-1648**, requests authorization to construct a 5-foot by 100-foot open-pile public pier to include a ten-foot by sixteen-foot T-head at a City-owned park located at 205 Appomattox Street along the Appomattox River in the City of Hopewell. The project is protested by an adjacent property owner and another city resident.

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

Mr. Stagg explained that the proposed pier was to be located within the Appomattox River at a City park located directly behind the old Patrick Copeland School at 205 Appomattox Street. Staff originally received an application on August 29, 2008, from Mr. John George requesting authorization to construct a 5-foot by 100-foot dock with a 10-foot by 16-foot T-head platform for “use of citizens and to allow groups to sample water in the river.” Staff, having made a pre-application site visit with Mr. George (a local contractor) believed the project applicant should have appropriately been the City of Hopewell. Mr. George was contacted noting this fact along with a request for drawings (which were missing in the original submission). A drawing was provided on September 3, 2008, which staff deemed to be inadequate and a request was made for more detailed drawings. A more detailed drawing was received on September 24, 2008, along with clarification that the City of Hopewell was indeed the correct applicant. Adjacent property owners were notified of the project in a letter dated October 1, 2008, and a public notice was published in the Hopewell News soon thereafter.

Mr. Stagg said that staff had received letters of concern from an adjacent property owner, and another resident of the City. Staff had also received two phone calls from City residents with additional questions about the project.

Mr. Stagg stated that the adjacent property owner, Ms. Barbara R. Parker, indicated in her letter, dated October 12, 2008, that she had concerns about trespassing upon her property by park users and their pets, homeless “camps” being set up only feet from her property, trash left on her property, noise, and the lack of necessity for a pier at this location since the City had a marina nearby. She also expressed concern about a gas line on the property and its proximity to the proposed pier construction.

Mr. Stagg said in her letter dated October 10, 2008, Ms. Katherine Podlewski, a City resident, indicated that while she was not in opposition to the project, she did have concerns. Those concerns included the apparent discrepancy between the applicant and/or the agent for the project as submitted, her belief that the pier length was excessive, disturbance of the river bottom during construction which could result in contamination from PCB’s, Kepone, and other pollutants, as well as disturbance of the upland area, and the existence of a gas line in the general area, but not shown on the drawings.

Mr. Stagg said that staff visited the site on October 23, 2008, with City staff and members of City Council, as well as Ms. Parker and Ms. Podlewski, to discuss the project and concerns. The City indicated they would be willing to construct a security fence along the common property line with Ms. Parker, including extending the fence into the river. Staff noted that such a change would require revised drawings, and a new public notice, since this represented an additional impact to State-owned subaqueous lands. There was some additional discussion about the length of the pier and its configuration. There was also agreement by the City to look at this issue.

Mr. Stagg stated that on November 6, 2008, VMRC received revised drawings that included a proposed security fence that extended up to 20 feet into the Appomattox River. The pier configuration remained the same as the original request. On November 14, 2008, staff requested additional information concerning the security fence to include height, depth, and the type of material to be used. Staff noted again that a new public notice would be required due to the addition of the proposed fence. The City responded that they wished to move ahead with the pier only, and that they were still working with Ms. Parker to address her concerns.

Mr. Stagg said that staff received an email from the City Manager, Mr. Ed Daley, on November 18, 2008, indicating that the City strongly supported this project, that they were working with Ms. Parker, and that the project was part of the City's effort to increase visibility and usage of the river.

Mr. Stagg said that staff received correspondence from the City on November 25, 2008, which contained copies of an apparent vote by council approving a request by Friends of the Lower Appomattox River (FOLAR) to seek funds for the construction of a water quality monitoring station and pier at the site of the old Patrick Copeland School on June 10, 2008. The request included a suggestion that the funds come from a previous environmental fine imposed on local industry as the funds were earmarked to improve the quality of life and the environment in Hopewell. The motion to approve and file the request was unanimous (6-0). It also included a copy of a petition of council members noting continued support of the motion passed in June, dated November 21, 2008. This petition was signed by five of the six council members.

Mr. Stagg noted that the Department of Conservation of Recreation and did not object to the project. The Department of Game and Inland Fisheries recommended that in order to protect anadromous fish species a time-of-year condition for any construction activities between February 15 through June 30 of any year should be added to the permit. The City of Hopewell Wetlands Board indicated that no permit would be required since this was a governmental activity.

Mr. Stagg explained that the Virginia Institute of Marine Resources report stated that, provided the pilings are driven, as proposed (and not jetted) and that no dredging was proposed, the potential for Kepone resuspension was insignificant. They further stated

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that, overall, the project was expected to have only minor adverse impacts on the marine environment.

Mr. Stagg said that while staff was sensitive to the concerns raised by the adjacent property owner related to the upland issues, but those concerns were beyond the jurisdiction of VMRC. Furthermore, it did appear the City was working with Ms. Parker to address her concerns. The gas line on the property was not within the construction footprint of the proposed project. Also, if citizens of the City had concerns related to the best use of the park property, they were best addressed directly with City Council. Since the pier did not appear to be a hazard to navigation as proposed, it would be an amenity to City residents, and would also be used in conjunction with water quality monitoring. Staff recommended approval, as proposed, with the time of year restriction for construction activities from February 15 through June 30 of any year.

Commissioner Bowman asked if a representative for the City was present and wished to speak.

Wayne Walton, City Council, was sworn in and his comments are a part of the verbatim record. Mr. Walton explained that there was a planned educational trail along the river from Petersburg and Hopewell.

Associate Member Tankard asked about the public’s need and demand for a pier. Mr. Walton stated there was a need for this for individuals to use. He said the funds came from a Special Environmental Project. He said this was a free pier and amenity to the City and goes with a plan for downtown Hopewell. He said the trail will be 22 miles long and 12-15 miles had been completed already. He said it would be an economic benefit to the region.

Commissioner Bowman asked if anyone pro or con was present to speak to this issue. There were none.

Associate Member Holland moved to accept the staff recommendation. Associate Member Fox seconded the motion. The motion carried, 9-0.

Permit Fee.....	\$100.00
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- KENT FARMER, #08-1640**, requests authorization to install a 10-foot wide by 36-foot long by 8-inch thick reinforced concrete boat ramp and two (2) 36-foot long low profile timber retaining walls adjacent to his property situated along the Rappahannock River in Caroline County. Both Wetlands and Subaqueous permits are required.

Dan Bacon, Environmental Engineer, Sr., gave the presentation with slides. His comments are a part of the verbatim record. Mr. Bacon stated this was both a wetlands and subaqueous hearing.

Mr. Bacon explained that the project was located on the Rappahannock River, approximately one quarter mile downstream of the Route 301 crossing, in Caroline County. The shoreline along this reach of the river was rural mixed residential in character and is predominantly wooded/field or agricultural. Boating activity was seasonal and considered to be light to moderate.

Mr. Bacon explained further that the boat ramp and retaining walls, as proposed, would result in the filling of 180 square feet of non-vegetated wetlands (rubble/rip-rap) and 130 square feet of State-owned subaqueous land. The ramp would be for Mr. Farmer's own personal use.

Mr. Bacon said that the Commission was acting as the local wetlands board for this project since Caroline County had not yet adopted the model wetlands zoning ordinance.

Mr. Bacon stated that since the ramp would encroach on State-owned submerged land and tidal wetlands, Commission authorization was required for this project pursuant to both Chapters 12 & 13, Subtitle III, of Title 28.2 of the Code of Virginia.

Mr. Bacon stated also that the Virginia Institute of Marine Science, in their Shoreline Situation Report, dated December 4, 2008, advised that the direct adverse impacts of the project should be avoided if possible. If not, the impacts expected should be minimal. No other State agencies had commented on the project and the project was not protested to date.

Mr. Bacon explained that adverse impacts to the marine environment associated with the proposed construction were considered by VIMS and staff to be minimal in nature. After taking into account all the guiding principles in § 28.2-1205(A) for subaqueous impacts, and § 28.2-1302 (10) (B) for wetlands impacts, staff recommended approval of the project as proposed. Further, staff recommended a royalty in the amount of \$65.00 for the encroachment of the ramp over 130 square feet of State-owned subaqueous land at a rate of \$0.50 per square foot.

Commissioner Bowman asked if the applicant or his representative were present.

Bud Allen the project agent was present but did not comment.

Commissioner Bowman asked for action by the Board.

Associate Member Holland moved to accept the staff recommendation. Associate Member Tankard seconded the motion. The motion carried, 9-0.

Royalty Fees (encroachment 130 sq. ft. @ \$0.50/sq. ft.....	\$65.00
Permit Fee.....	\$25.00
Total Fees.....	\$90.00

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12. PUBLIC COMMENTS

Bob Pride, Coastal Conservation Association, was present and his comments are a part of the verbatim record. Mr. Pride stated that they were requesting a control date be established for application for fixed fishing devices.

Commissioner Bowman asked for comments from the VMRC Counsel. Carl Josephson, Senior, Assistant Attorney General, stated that he could see establishment of control dates for other issues in the future.

Mr. Pride stated that any fixed fishing device should go through a public notice review. Mr. Josephson stated that there was nothing that said this could not be done.

Associate Member Bowden stated that it needed to go to the Finfish Management Advisory Committee for their consideration and review of a control date.

Commissioner Bowman asked for a motion.

Associate Member Holland moved to take the matter to the Finfish Management Advisory Committee. Associate Member McConaugha seconded the motion. The motion carried, 9-0

Impacts of Crab Regulations on the Funding of Virginia Marine Products Board.

Associate Member Bowden stated that the actions taken for the crab regulations had just about bankrupted the Virginia Marine Products Board as it took away approximately \$30-\$40,000 from their budget.

Rob O'Reilly, Deputy Chief, Fisheries Management explained that the licenses that had been affected had not been purchased as yet. He said he would guess it involved 40 to 50%. Commissioner Bowman stated that the information should be obtained from Administration and Finance.

Associate Member Bowden stated this should all be reconsidered because of the adverse effects on another agency. He stated that the Marine Products Board's efforts had been started on the cow nosed rays.

Commissioner Bowman requested staff obtain a report, contact the Marine Products Board, and have the report for the next month's meeting.

Mr. O'Reilly stated that the license fees were increased in 2007 so the loss may not show up in the 2004 to 2007 time period.

Associate Member Robins suggested that other funding be investigated to replace the loss of funding.

Commissioner Bowman stated that there was legislation to equalize fees and this might be an increase, such as the non-resident license.

Associate Member Bowden suggested utilizing the Waterway Improvement Funds.

Commissioner Bowman instructed staff to get the report together and have the Marine Products Board write a letter regarding the impacts.

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13. REGULATION 4VAC20-1180-10 et seq. "Pertaining to Fishing Guide Licenses," Final Approval.

Jack Travelstead, Chief Deputy, Fisheries Management, gave the presentation. His comments are a part of the verbatim record. Mr. Travelstead provided a hand out of the draft regulation in order to clarify the regulation as approved at the last meeting. He said there were a few changes made by staff that were not of substance.

Mr. Travelstead said that on page three of the regulation an additional permit is established under the current license reciprocity agreement that would be required of Maryland Charter Boats. He said the permit will give enforcement a means to respond to violations by the Maryland Charter Boats. He said they will have to retain this permit on board the vessel. He said the Class A licensees will be eligible under the Reciprocity Agreement with Maryland to fish in Maryland waters. He said the Class B licensees will be limited to Virginia waters. He said the new reciprocity agreement had been sent Maryland officials and they seemed to like it, but they were still doing some review of it with their attorneys. He stated that both the Class A and B licenses cost \$100.00 and the reciprocity permit for Maryland vessels would be free.

Mr. Travelstead said that the regulation established allowances for transfers and there was waiting list established for those who qualify for a Class A license. He said this regulation was effective January 1, 2009. He said they would be notifying the public by putting this information on the website, sending letters to 300 individuals, most of whom qualify for a Class A license, notifying Charter Boats who have a Charter Boat Striped

Bass Permit, and getting word out to as many Maryland vessels as possible. He said these licenses will go on sale on Monday since the licenses are required as of January 1, 2009.

Commissioner Bowman stated that Law Enforcement will allow tolerance for the first couple of weeks, while individuals are getting their licenses and/or permits.

Mr. Travelstead explained that arrangements had been made for selling the licenses at Operations and also, all of this could be done by mail.

Commissioner Bowman asked about this all being done at the point of sale. Mr. Travelstead stated that no it could not because of the qualifying requirements such as proof of possessing a Coast Guard License. He reminded the Commission this was not a public hearing, only approval of the final regulation as approved at the last meeting.

Commissioner Bowman asked for a motion.

Associate Member Holland moved to adopt Regulation 4 VAC 20-1180-10, Et seq. Associate Member Tankard seconded the motion. The motion carried, 9-0.

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14. REQUEST FOR PUBLIC HEARING: Proposed amendments to Regulation 4VAC20-270, to remove the prohibition on the setting of fish pots, March 12-16, in the Potomac River tributaries.

Rob O'Reilly, Deputy Chief, Fisheries Management, gave the presentation. His comments are a part of the verbatim record. Mr. O'Reilly explained this was regarding the setting of fish pots and he would provide more information at the next meeting.

Commissioner Bowman asked for a motion.

Associate Member Robins moved to approve the advertisement of a public hearing. Associate Member Holland seconded the motion. The motion carried, 9-0.

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15. REQUEST FOR PUBLIC HEARING: Industry request to establish a control date for the gill net fishery.

Joe Grist, Head, Plans and Statistics, gave the presentation. His comments are a part of the verbatim record. Mr. Grist stated that staff was recommending that a control date be set. He said this was a request for a public hearing.

Commission Bowman asked for a motion.

Associate Member Robins stated that there needed to be a range of dates advertised. He said Associate Member Bowden had a suggestion.

Associate Member Bowden said that it had been suggested that the control date be yesterday. He moved that it be advertised to say, as early as, December 23, 2005. He said this would allow the Commission to consider other dates.

Associate Member Bowden moved to advertise the control date to say, as early as December 23, 2005. Associate Member Robins seconded the motion. The motion carried, 9-0.

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There was no further business and the meeting was adjourned at approximately 4:13 p.m. The next regular meeting will be Tuesday, January 27, 2009.

Steven G. Bowman, Commissioner

Katherine Leonard, Recording Secretary