

MINUTES

OCTOBER 22, 2002
NEWPORT NEWS, VA 23607

The regular Monthly meeting of the Marine Resources Commission was held on October 22, 2002, with the following present:

William A. Pruitt)	Commissioner
Gordon M. Birkett)	
S. Lake Cowart, Jr.)	
Laura Belle Gordy)	Members of the Commission
F. Wayne McLeskey)	
Kenneth W. Williams)	
Carl Josephson	Assistant Attorney General
Wilford Kale	Senior Staff Adviser
Virginia S. Chappell	Recording Secretary
Jane McCroskey	Deputy Chief, Administration and Finance
Erik Barth	Director, MIS
Andy McNeil	Programmer Analyst Sr.
Col. Steve Bowman	Chief-Law Enforcement
Lt. Col. Lewis Jones	Deputy Chief-Law Enforcement
First Sgt. Dan Eskridge	Northern Area Supervisor
Capt. Warner Rhodes	Middle Area Supervisor
Capt. Kenny Oliver	Southern Area Supervisor
Capt. Randy Widgeon	Eastern Shore Area
M.P.O. Thomas K. Fitchett	Marine Police Officer
M.P.O. David Drummond	Marine Police Officer

Virginia Institute of Marine Science:

Thomas Barnard, Jr.	Dr. Eugene Bureson
Lyle Varnell	Dr. Robert Orth
Lisa Calvo	Mark Luckenbach
Jack Travelstead	Chief-Fisheries Management
Rob O'Reilly	Deputy Chief-Fisheries Management

Commission Meeting

**12105
October 22, 2002**

Cory Routh
Mike Meier
Roy Insley
Ellen Cosby
Dr. James Wesson

Fisheries Management Specialist
Artificial Marine Habitat
Head-Plans and Statistics
Fisheries Management Specialist
Head-Conservation & Replenishment

Robert Grabb
Tony Watkinson
Gerry Showalter
Hank Badger
Kevin Curling
Mark Eversole
Jeff Madden
Chip Neikirk
Randy Owen
Ben Stagg
Tracy West
Jay Woodward

Chief-Habitat Management
Deputy Chief-Habitat Management
Head-Engineering/Surveying
Environmental Engineer Sr.
Environmental Engineer Sr.
Environmental Engineer Sr.
Environmental Engineer Sr.
Environmental Engineer Sr.
Environmental Engineer Sr.
Environmental Engineer Sr.
Environmental Engineer Sr.
Environmental Engineer Sr.

Lawrence Latney

Richmond-Times Dispatch

others present included:

Jim Haydon
Griffith Seafood, Inc
Lisa Calvo
David S. Slaw III
Scott Webb
Keith Aldridge
Lee Nottingham
Douglas F. Jenkins
Tom Walker
Kelly Place
David Wright
Jack Stallings
Carl Eason
Bob Simon
Shawn Guerett
Alan Moore
Tom Barnard
Kevin DuBois
Daniel Moyer

Joe Grist
Gene Burreson
Thomas H. James III
Kirk Webb
Steve Bunce
Bowdy Lusk
G. Floyd III
Mike McGee
Pete Costanzo
Frances W. Porter
Jimmy Martins
Harry Doernte
J. H. Lipscomb, Jr.
Bert Parolari
Brad Sisson
Mark Kalmins
Lee Hill
Brandon Bate
Kristen Brennan

Leslie Justice
Stephen Powell
Terry Getchell
Charles Amory
Hank Jones
Kemper Goffigan

Dan Brummel
Stephen Powell
Mike Alderson
Mark Hodges
Ernest Hall

Commissioner Pruitt apologized to the public that the meeting would begin approximately an hour late due to there not being a quorum present. He explained that Associate Member Cowart was en route and Associate Member Williams would not arrive until noon. The meeting of the Commission began at 10:35 A.M. Associate Members present were: Birkett, Cowart, Gordy and McLeskey. Associate Member Williams arrived at noon.

Rev. Gerry Showalter gave the Invocation and Commissioner Pruitt led the Pledge of Allegiance. Commissioner Pruitt swore in the staff and those representatives of the Virginia Institute of Marine Science (VIMS) who were expected to testify at the meeting.

APPROVAL OF AGENDA

Commissioner Pruitt called for changes/deletions to the proposed Agenda. Commissioner Pruitt requested that Item Number 3, REPORT OF HARD CLAM AQUACULTURE TASK FORCE, be moved to the first item after lunch. Associate Member Gordy moved to approve the agenda. Associate Member Birkett seconded the motion, and the motion carried unanimously.

APPROVAL OF SEPTEMBER 24, 2002 MINUTES

Associate Member Birkett moved to approve the Minutes of the September 24, 2002 Commission Meeting as distributed. Associate Member Gordy seconded the motion; motion carried unanimously.

Commissioner Pruitt swore in Commission staff members and Virginia Institute of Marine Science staff members.

PERMITS (Projects over \$50,000.00 with no objections and with staff recommendation for approval).

Mr. Robert Grabb, Chief-Habitat Management, briefed the Commission on the Page Two items. Mr. Grabb’s statements are a part of the verbatim record.

W. F. MAGANN CORP., #02-0729, requests authorization to install 152 linear feet of bulkhead, fill 53,265 square feet of State-owned, submerged land, install three (3) 7-pile mooring dolphins, and dredge, by clamshell method, 5,107 cubic yards of State-owned subaqueous bottom from a 325-foot long by 150-foot wide area to achieve maximum depths of minus nine (-9) feet below mean low water adjacent to their property situated along the Western Branch of the Elizabeth River in the City of Portsmouth. Recommend a royalty of \$3,480 for the filling of 1,740 square feet of State-owned land at \$2.00 per square foot, and \$2,298.15 for the dredging of 5,107 cubic yards at \$0.45 per cubic yard.

PERMIT FEE..... \$ 100.00
ROYALTIES.....\$5,778.15

DEPARTMENT OF CONSERVATION AND RECREATION, #02-1475, requests authorization to dredge 14,000 cubic yards of subaqueous material from the mouth of Deep Creek to provide a 2,400-foot long by 50-foot wide channel possessing maximum depths of minus six and a half (-6.5) feet at mean low water and to install five (5) offshore breakwaters along a 1,250 section of shoreline adjacent to Belle Isle State Park in Lancaster County. The fine dredged material from the channel will be contained within geotextile tubes along the shoreline and the coarse dredged material will be used to cover the tubes and create a beach 75 to 150 feet wide behind the proposed breakwaters. The upper portions of the proposed beach will be planted with smooth cordgrass, saltmeadow hay and beach grass.

PERMIT FEE.....\$ 100.00
ROYALTIES..... N/A

DEPARTMENT OF THE NAVY, #02-1623, requests authorization to construct two (2) mooring dolphins adjacent to Pier 10 in Little Creek Harbor at NAVPHIBASE Little Creek to stabilize the floating dry dock *USS Dynamic* in Virginia Beach.

PERMIT FEE.....\$100.00
ROYALTIES..... N/A

CHESTERFIELD COUNTY PARKS & RECREATION, #02-1294, requests authorization to relocate and channelize the Otterdale Branch, a tributary to Swift Creek Reservoir, by relocating the channel to a 6-foot by 12-foot corrugated pipe arch with an 8-

inch thick concrete bottom as part of an extension of Mount Hermon Road in Chesterfield County.

PERMIT FEE.....\$100.00
ROYALTIES..... N/A

CARILION HEALTH SYSTEM, #02-1465, requests authorization to widen an existing bridge with the addition of a 100-foot long by 15-foot wide open-pile span over the Roanoke River in the City of Roanoke. Recommend standard instream conditions and a royalty of \$1,500 for the encroachment over 1,500 square feet of State-owned bottom at a rate of \$1.00 per square foot.

PERMIT FEE.....\$ 100.00
ROYALTIES.....\$1,500.00

BRANSCOME, INC., #02-1503, requests authorization to initially dredge, by clamshell method, 450 cubic yards of new material from a 600-foot long by 20-foot wide area and to maintenance dredge 600 cubic yards of material from a 200-foot long by 30-foot wide area, to achieve maximum depths of minus ten (-10) feet below mean low water adjacent to their property situated along the Southern Branch of the Elizabeth River in the City of Chesapeake. Disposal will be on the upland. Recommend a royalty of \$202.50 for the dredging of 450 cubic yards at a rate of \$0.45 per cubic yard.

PERMIT FEE.....\$ 100.00
ROYALTIES.....\$ 202.50

CITY OF SALEM, #02-1669, requests authorization to install a 134 linear foot, 24-inch water main with concrete encasing under the Roanoke River in the City of Salem. Staff recommends standard instream construction conditions and a time-of-year restriction from March 15 - June 30 to protect the Roanoke Logperch.

PERMIT FEE.....\$ 100.00
ROYALTIES.....\$ N/A

Commissioner Pruitt asked for comments from the audience, pro or con, on the proposed Page Two items. There being no comments offered, Commissioner Pruitt placed the items before the Commission for consideration.

Associate Member Gordy moved for approval of the Page 2 Items as recommended by staff. Associate Member McLeskey seconded the motion; motion carried, 5-0. For the record, Associate Member Cowart abstained from voting on 2A.

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NICHOLAS VANDERGRIFT, #02-1496. Commission review on appeal by the applicant of the September 11, 2002, decision by the Norfolk Wetlands Board to deny after-the-fact authorization to retain a brick and wrought iron fence within a coastal primary sand dune, situated along the Chesapeake Bay in the City of Norfolk.

Bob Grabb, Chief, Habitat Management Division, addressed the Commission. He said the appeal was received in a timely manner; and the law required the Commission to hear or conduct a review of that appeal within 45 days, however, staff had not received the record from the City of Norfolk; therefore, staff was unable review the appeal or make a recommendation. The City indicated they had not received staff's acknowledgement letter requesting the appeal record. Mr. Grabb said staff recommended the Commission open the hearing and entertain a motion to continue the hearing until the November Commission meeting. He indicated that the applicant's counsel and a representative from the City were in attendance.

Carl Eason, attorney, representing Mr. Sigman, the property owner, was present and stated his opposition to continuing the matter. He said that environmental approval was obtained from the City of Norfolk on March 1. He submitted a site plan showing the location of the house and also the top of the bank, with the dune behind it and a cross-section of the fence. He said the only condition that was required was that the City do some on-site field construction inspections; then the City did a site inspection and signed off on the approvals on the footers. He said Mr. DuBois came to the site and said they needed a wetlands permit and further stated that the wetlands board was going to cite them with a dunes violation. Mr. Eason's comments are a part of the verbatim record.

Kevin DuBois, Staff to the Norfolk Wetlands Board, was present. Mr. DuBois said he requested a transcript from the Clerk's Office, but they said they wouldn't have one available by the deadline to include in the Commission Members packets. They were still in the process of preparing it. He said Mr. Vandergrift called the wetlands board staff to come and look at the property and determine whether a permit would be necessary. He said he met with him on-site and discussed with him the proposed action. Mr. DuBois said he told Mr. Vandergrift that because he was converting a portion of the jurisdictional dune from natural dune vegetation, it would require a permit from the Norfolk Wetlands Board. Mr. DuBois' comments are a part of the verbatim record.

Carl Josephson, Counsel to the Commission, stated they were dealing with a Chapter 14 issue, i.e. Sand Dunes. He said Code Section 28.2-1411(b) says the Commission shall hear and decide on review of the appeal within 45 days upon receiving the Notice of Appeal; however, a continuance may be granted by the Commission.

Associate Member Gordy moved to continue the application of NICHOLAS VANDERGRIFT, #02-1496 to November 1, at 10:00 a.m., to hear from the City of Norfolk . The motion was seconded by Associate Member Cowart, and carried unanimously.

VANDERGRIFT CASE CONTINUED TO NOVEMBER 1

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STEVE PALMER, #02-0689, requests authorization to retain an 11-foot long by 12-foot wide storage shed located at the channelward end of a private, non-commercial pier adjacent to his property situated along West Landing Creek in Mathews County. The project is protested by two (2) residents in the vicinity. Continued from the July 23rd Commission meeting.

Kevin Curling, Environmental Engineer, briefed the Commission on the project and presented slides depicting the project site.

Mr. Curling said Mr. Palmer applied for a 134-foot long pier and 16-foot by 42-foot open-sided boathouse on January 24, 2001. On February 9, 2001, Mr. Palmer received a letter from Commission staff, stating that the pier and boathouse met the exemption provided in Section 28.2-1203(A)(5) of the Code of Virginia. On February 19, 2002, staff was notified that a non-permitted structure had been erected on the pier. Mr. Palmer was notified, by letter on February 22, of a site inspection to be conducted on March 6. Due to a conflict with Mr. Palmer's law practice, staff was unable to meet with Mr. Palmer at his property until March 12.

During the inspection, it was determined that the pier had been built, the roof over the boat slip had not been built, but an 11-foot by 12-foot storage shed had been constructed on the pier. Staff explained to Mr. Palmer that the exemption provided in Code was for the pier and the very specific structure of a single-slip, open-sided boathouse under 700 square feet and that any other structures erected over State-owned submerged lands required a permit.

Since a permit had not been issued for the storage building, it was considered a violation of Chapter 12 of Title 28.2 of the Code of Virginia. A Sworn Complaint was filed on March 12 and a Notice To Comply was sent, by certified mail, to Mr. Palmer on March 13, 2002. The Notice To Comply requested that the storage shed be removed or that an after-the-fact application be submitted for review within 60 days. An application was received on April 15, 2002.

This case was originally scheduled to be heard at the July Commission meeting. The hearing

was continued to the October Commission meeting. Mr. Palmer also requested that Ms. Pamela Rae Brummel, one of the protestants, be present at the hearing. A subpoena was served on Ms. Brummel.

The project is protested by Mrs. Margaret Williams, a resident of West Landing Creek and by Ms. Pamela Rae Brummel, a citizen responding to the Public Notice. Mrs. Williams, who is a nearby resident on West Landing Creek, feels that the private benefits gained by Mr. Palmer's use of the shed are a detriment to her public enjoyment of the area. Mrs. Brummel, of Grimstead in Mathews County, is concerned with the legal ramifications of issuing after-the-fact permits for activities that may, or may not, normally be permitted.

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

Mr. Curling said that while Mr. Palmer uses the shed to store water related articles, such as an outboard motor, life jackets, etc., the shed itself was not a water dependent structure, and could be situated on the adjacent upland. In addition, the articles in the shed are easily portable and they too could be readily stored on the upland. He said staff could not recommend approval for the storage shed over State-owned submerged land, and recommended the Commission direct its removal within 30 days.

He said that should the Commission elect to issue an after-the-fact permit for the storage shed however, staff would recommend triple permit fees and a civil charge based on a minor environmental impact and a moderate to major degree of non-compliance, since Mr. Palmer had submitted an application and received specific instructions for the pier and boathouse less than 12 months prior to his constructing the shed.

Steve Palmer, applicant, was sworn in by Commissioner Pruitt.

Mr. Palmer presented pictures depicting the shed on his pier, and pictures of the inside of the shed showing various items stored inside. He said since his pier was approximately 100 feet long, it was not convenient for him to carry items back and forth. He further stated that he thought the shed would not be of any significance, so he built the shed on his pier. Mr.

Palmer requested he be allowed to retain his shed.

Mr. Palmer said he received a letter from Mr. Curling, which said he had an unauthorized structure on his pier. Mr. Curling told him that the structure could have a roof only, no sides, and could be no more than 700 feet, and for the purpose of sheltering his boat. Mr. Palmer's comments are a part of the verbatim record.

Pamela Rae Brummel, protestant was present and spoke in opposition to the project. Ms. Brummel stated that her only objection was Mr. Palmer's attitude that because he was an attorney, he could get away with building the shed without a permit. Ms. Brummel's statements are a part of the verbatim record.

The Commissioner placed the matter before the Commission for consideration and action.

Associate Member Cowart stated that he did not believe the Commission would have granted the permit had it come with the initial application and he did not favor granting it as an after-the-fact permit.

Associate Member Gordy reminded the Commission that they had refused applications in the past that that were not water dependent.

Associate Member Birkett said that the Commission's charge was to consider the matter from an environmental standpoint, and he felt the added structure did not render any further damage to the environment. He further stated that the applicant being an attorney had no bearing on his decision and he asked that be noted in the record.

Commission Pruitt stated that applications had to be dealt with on an individual basis and they were dealing with an after-the-fact permit.

Associate Member Cowart said that the Public Trust Document in Virginia entrusts in the Commission stewardship over the bottomlands for use by the citizens of the Commonwealth. The Subaqueous Guidelines do not support the project; Staff does not support the project, and it is an after-the-fact permit and under Code Section 28.2-1205, one of the things that must be considered is the effect on adjacent property, and, therefore, **Associate Member Cowart moved to deny the after-the-fact application, and order the removal of the structure within 30 days. Associate Member Gordy seconded the motion. Associate Members Birkett and McLeskey voted in opposition to the motion. The vote being a tie vote, Commissioner Pruitt voted in favor of the motion, and the motion passed 3-2.**

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At this point, Associate Member Williams arrived at the meeting.

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JOHN BELL, #02-1720, requests authorization to retain 75 linear feet of riprap revetment which has been constructed channelward of an existing timber bulkhead adjacent to the applicant's property situated along the Rappahannock River in Middlesex County.

Chip Neikirk, Environmental Engineer, briefed the Commission and presented slides depicting the project site.

Mr. Neikirk said Mr. Bell's project involved the placement of 75 linear feet of riprap revetment, the toe of which extends ten (10) feet channelward of a deteriorated timber bulkhead. The revetment was apparently constructed at the same time Mr. Bell's neighbor installed a similar structure.

Mr. Bell's neighbor, Mr. Loving, however, received a VMRC permit (#01-0426) to construct a riprap revetment channelward of his deteriorated bulkhead last year.

He further stated that Mr. Bell's violation was first noted by the Middlesex County Wetlands Board. They held a Show Cause hearing and provided Mr. Bell with the opportunity to submit an after-the-fact application. On October 8, 2002, the Wetlands Board approved the after-the-fact application contingent upon Mr. Bell's payment of a \$500 civil charge in lieu of further enforcement action. The civil charge was in addition to the County's \$550 after-the-fact application fee.

During the Show Cause hearing held by the Wetlands Board, Mr. Bell stated that he was aware of the permitting requirements and that he regretted moving forward with the project prior to obtaining the necessary authorization. He said that the only access to the property is through his neighbor's yard and he wanted to have the work completed at the same time as his neighbor to avoid having to disturb the property twice.

Mr. Bell's and Mr. Loving's revetments were both constructed by Bayside Marine Contractors. Mr. Neikirk said staff has spoken with Mr. Randy Redmond, owner of Bayside Marine Contractors, regarding the violation and Mr. Redmond has been advised that his involvement in this matter would also be considered during the public hearing on this matter.

Mr. Redmond stated that he was aware that the project would likely require a VMRC permit, but elected to proceed since he was on-site and to avoid disturbing the upland a second time. He also stated that he felt he could always apply for an after-the-fact permit if it became necessary. Mr. Bell's comments are a part of the verbatim record.

The revetment does not encroach over any public or privately leased oyster ground and neither of the neighbors or the general public has objected to the project. Although Mr.

Lazarus, an adjoining property owner, did not object, he did express his concern that he and other nearby landowners were required to obtain permits prior to constructing their shoreline projects.

The Virginia Institute of Marine Science stated that the individual and cumulative adverse impacts resulting from the activity are minimal and no other state agencies have commented on the project.

Mr. Neikirk said the environmental impacts associated with the project are minimal and staff generally recommends approval of properly designed riprap revetments placed channelward of a deteriorated bulkhead; however, staff is very concerned with the property owner's and the contractor's blatant attempt to circumvent the permit review process.

He said Mr. Bell was obviously aware of the permit process because his neighbor applied for a permit for essentially the same type of structure and Mr. Bell even signed off, as an adjacent property owner, on his neighbor's application. Mr. Redmond has also acknowledged that he, too, was aware of the need to obtain a permit.

Mr. Neikirk said the authority to levy civil charges in lieu of further enforcement action provided in §28.2-1213 of the Virginia Code, appears to be an appropriate mechanism to deal with violations of this type, and the project would likely have been authorized had an application been properly submitted prior to construction.

He said staff recommends approval of the after-the-fact request, conditioning that approval on the applicant's agreement to pay a civil charge in lieu of further enforcement action, and should Mr. Redmond not agree to payment of the civil charge, staff would recommend the matter be forwarded to a Commonwealth Attorney for criminal prosecution as a Class 1 misdemeanor as provided by §28.2-1203 of the Code of Virginia.

John Bell, applicant, stated the he had no access without going on Mr. Loving's property. Mr. Bell apologized and said he was not trying to circumvent the process. Mr. Bell's comments are part of the verbatim record.

Commissioner Pruitt placed the matter before the Commission for consideration and action.

Associate Member Williams moved to approve the after-the-fact request with a civil charge of \$1,800.00 based on a minimal environmental impact and a major degree of deviation or non-compliance associated with the project imposed on John Bell and \$1,800 to be imposed on Randy Redmond, the contractor. Included in the motion was the stipulation that if the civil charge was not agreed to, the matter would then be referred to the proper authorities. Associate Member Cowart seconded the motion. The motion carried 5-0. Associate Member McLeskey abstained, stating that he was

out of the room during part of the case.

PERMIT FEE.....	\$ 25.00
CIVIL CHARGE, JOHN BELL, APPLICANT.....	\$1,800.00
CIVIL CHARGE - RANDY REDMOND, CONTRACTOR..	\$1,800.00

Commissioner Pruitt said the General Assembly would need to address the issue of water dependency.

ANN RICHARDSON, #02-1473, requests authorization to construct a 16-foot by 36-foot enclosed, private, noncommercial boathouse at the channelward end of a 70-foot private pier adjacent to her property along Meachim Creek in Middlesex County. The project is protested by an adjacent property owner.

Chip Neikirk, Environmental Engineer, briefed the Commission and showed slides depicting the project site.

He said Ms. Richardson proposed to construct a 16-foot by 36-foot, enclosed boathouse adjacent to a private pier designed to extend 70 feet channelward of mean high water. Staff had previously determined that the proposed pier met the statutory authorization for private piers contained in Section 28.2-1203 (A)(5) of the Virginia Code. The peak of the proposed boathouse reaches a maximum height of 17 feet above mean high water.

The project is protested by Mr. George A. Christie, an adjacent property owner. Mr. Christie is concerned with the potential aesthetic impacts associated with the boathouse. In his letter, Mr. Christie stated that he had a line of sight easement over a portion of Ms. Richardson’s lot, which ensured an unobstructed view of Meachim Creek. He believes the boathouse will obstruct much of his view of Meachim Creek in the direction of the Rappahannock River.

The boathouse will encroach over a portion of private oyster ground leased to Melvin and Kevin Blake. Staff notified the Blakes by letter dated August 6, 2002. To date, they had not responded to staff’s letter.

No state agencies have commented on the project.

Although there are numerous enclosed boathouses along Meachim Creek, an open-sided design would minimize the visual obstruction associated with the structure.

Mr. Neikirk said staff recommends approval of the project with a condition that the

boathouse be open-sided.

The applicant was neither present nor represented.

Commissioner Pruitt asked if there were any persons present in opposition to the project.

Carl Eason, attorney, spoke on behalf of his client, Chris Christie. He stated that his client objects to the project, and that his client had negotiated a deed from a common grantor, Clarence and Michael Paul. He said both his client and the applicant, who owns the adjacent property, bought property from this Common Grantor, the Pauls. He said when the Pauls sold the property there was a deed restriction put in which said, no construction of any permanent structure within an easement area allowed that would interfere with the view of the Grantee other than 1) a pier, 2) mooring piles, 3) a boat lift. He said that's an enforcement of a private issues rights. He asked the Commission to deny the application due to the significant size. Mr. Eason's comments are a part of the verbatim record.

Associate Member Birkett stated that it was his opinion that there was no obstruction of view, based on the elevation of the land and the height of the roof, therefore, that was not a valid objection and since there are numerous boat houses on the creek, as testified by staff, he saw no reason why the permit should not be granted; he therefore moved to grant the permit. Associate Member Gordy seconded the motion.

Associate Member Gordy questioned whether the applicant would be interested in an open sided boat house.

Associate Member McLeskey questioned whether the applicant would agree to a four foot side measured down from the eaves.

Associate Member Birkett amended his motion to include partially sided four foot down from the eaves.

Associate Member Cowart questioned whether the covenant and deed issues should be resolved before considering issuance of a permit for the boat house.

Carl Josephson, Counsel to the Commission, stated that in past private disputes, the Commission has taken the position to not act until legal issues are resolved. Mr. Josephson said that even if the Commission granted the permit, the protestants were within their rights to go to court and seek an injunction.

Commissioner Pruitt asked for a vote on the motion that was on the floor, which was to approve the permit, with the stipulation that the boathouse be partially sided four foot down

from the eaves. **The motion carried 4-1, with Associate Member Cowart voting in opposition to the motion.**

PERMIT FEE.....	\$ 25.00
ROYALTY.....	N/A

The Commission recessed for lunch at 12:30 p.m. and reconvened at 1:25 p.m.

U. S. ARMY CORPS OF ENGINEERS, #02-0523, requests a modification to their previously issued permit to allow for a four foot (4') overdredge tolerance for the entrance channel portion of the Rudee Inlet Federal Project Channel in Virginia Beach.

Randy Owen, Environmental Engineer, briefed the Commission and presented slides depicting the project site. Mr. Owen's comments are a part of a verbatim record.

The project is located at Rudee Inlet in Virginia Beach. The Rudee Inlet Federal Project Channel was approved by the Chief of Engineers in 1986 under Section 107 of the 1960 River and Harbor Act. The entrance channel is currently authorized to a depth of ten feet (10') with a two foot (2') overdepth, a width of 110 to 72 feet and a length of 1,605 feet.

The project was just approved by the Commission at its September 2002 meeting. Specifically, the Commission authorized the placement of up to 150,000 cubic yards of suitable sandy dredged material annually on the downdrift beach lying north of Rudee Inlet in Virginia Beach. That authorization, however, was contingent on the Corp's strict adherence to a two foot (2') overdredge tolerance.

Mr. Owen said the Corps has advised that a dredge cut to fourteen feet (14') in the entrance channel is necessary to maintain the required ten foot (10') channel and combat high shoaling rates.

The Virginia Institute of Marine Science advises that the additional dredge depth requested by the Corps should have minimal additional environmental impacts.

Mr. Owen said staff maintains its position that the Corp's request for a fourteen-foot (14') dredge cut represents a four-foot (4') overdredge tolerance and, therefore, requires Commission authorization pursuant to Section 28.2-1203 of the Code of Virginia. He said staff recommends approval of the Corps' request.

Associate Member McLeskey questioned whether the application was for the channel only or

included the sand trap.

Mr. Owen responded that the Corps had agreed to maintain the sand trap at project depth, plus two feet, which is in keeping with the exemption provided for in the Code and therefore does not require any authorization.

Associate Member Birkett said that if the weir was in good shape, it would prevent sand from going in the sand trap and would cut down on the dredging that has to be done there periodically. He said if it is allowed to continue, the sand trap will continue well up into the highland. He said the Commission needs to consider something to compel the upkeep of that weir.

Associate Member Cowart questioned whether the Corps was doing everything they were supposed to under the present permit.

Commissioner Pruitt asked if a representative from the Corps was present to address the matter.

Steven Powell, Project Manager for the Rudee Inlet Federal Navigation Project, said the weir is not part of the Federal responsibility, but is the responsibility of the City.

Commissioner Pruitt said the Commission's concern was if the Commission approves the Corps' request, it will ultimately contribute to the problem on the highland property and create lawsuits.

Commissioner Pruitt asked if a representative from the City of Virginia Beach was present.

Jay Burnis, Engineer with the City of Virginia Beach in Beach Management was present. Mr. Burnis said the City had issued a notice to proceed to redesign the inlet on October 7 and the Engineers are in the process of gathering data. He said one of the components of the redesign is they are going to replace the weir and raise the elevation slightly, with construction to start in the fall of next year. Mr. Burnis' comments are a part of the verbatim record.

Commissioner Pruitt asked Mr. Burnis to pass along to his superiors that they are concerned about the upland property. Mr. Burnis said he would pass that along.

Associate Member McLeskey moved to approve the application for dredging of the four foot overdraft on the channel. The motion was seconded by Associate Member Williams, and carried unanimously.

NO FEES

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REPORT OF THE HARD CLAM AQUACULTURE TASK FORCE

Jack Travelstead, Chief-Fisheries Management Division, briefed the Commission on the recommendations of the Hard Clam Aquaculture Task Force, which met on October 17, 2002. He said there were 15 of the 16 members present at the meeting. The following is a summary of the discussion/recommendations of the Task Force.

- The Task Force reviewed, modified and adopted a list of problems/issues, which will be examined over the next 12 months.
- The Task Force unanimously agreed that hard clams created from southern broodstock should not be imported into Virginia because of their high susceptibility to QPX disease.
- Currently, there is no method to distinguish hard clams produced from southern broodstock from those produced by northern broodstock. VIMS indicated that genetic markers that may be used to distinguish parental stocks may be available in one year, and tests to distinguish the stocks are about three years away.
- Several members of the Task Force supported the creation of websites, newsletters and fact sheets to better inform the clam industry of the available science on QPX-susceptible clams.
- Though not conclusive, several committee members indicated that the Virginia hard clam seed producers do not produce sufficient product of the preferred size (4-6mm) and at the right time to satisfy Virginia clam growers. Most of Virginia's clam seed producers are also clam growers and therefore compete against other Virginia clam growers for local seed. Smaller clam seed (4-6mm) is available from Southern hatcheries at a time that is preferred by Virginia growers. Most Virginia hatcheries now produce a larger clam seed (10-12 mm) for sale. Compared to 4-6 mm seed, this larger seed is more expensive and shows lower survival than the smaller seed.
- The Task Force examined examples of paper trails documenting the use of northern broodstock clams from Island Fresh Seafood in South Carolina and Cedar Creek Shellfish Farms in Florida. Several task force members suggested that paper trails of this type should be sufficient to allow importation of northern broodstock clams into Virginia. Others believed that paper trails could be easily falsified and unproven since no genetic test to determine the source of the seed clam is currently available.

- Most Task Force members supported a provision which would restrict the importation of northern broodstock clams from southern hatcheries to those which use only northern broodstock during the time that seed is being produced from southern broodstock. This would reduce the possibility of cross contamination with southern clams and the possibility of cheating. There was no objection to a southern hatchery raising southern clams after the last shipment of Northern clams.
- The Task Force also suggested that each bag of clams imported to Virginia should be labeled to indicate the state of origin and quantity of clams and be available for inspection by the Marine Police.

The Task Force voted 6 to 4, with one abstention, to send these recommendations to the Commission. One dissenting voter suggested that southern hatcheries that wish to spawn and raise northern clams should secure their broodstock from VIMS which should certify their northern genetics. It was noted that a test of that type is not available.

Mr. Travelstead brought to the Commission's attention a draft emergency regulation that had been prepared in the event the Commission should want to adopt it at today's meeting. He said significant changes to the regulation outline the paper trail requirements that a facility and importer would have to meet in order to bring in northern brood stock seed clams from South Carolina and Florida.

First, it requires that the hatchery or facility in the south certify that northern broodstock clams which are absent of all diseases are used to produce the seed clams that are to be exported to Virginia. The certification would have to be accompanied by evidence that the facility took possession of northern stock hard clams within the previous 12 months. Every year a facility to the south would have to show that they received and imported into their state adult hard clams from the north that they would use as broodstock and they would only use them for one year.

Second, the facility would have to certify that the seed that are coming back into the state were produced from those broodstock.

Third, only hard clams of northern broodstock are being held in the facility and used for spawning during that entire time period.

Finally, disease free certification by a shellfish pathologist, is required.

Mr. Travelstead said staff recommended adoption of these provisions. He said that if it could be proven that any hatchery has falsified documentation then the Commissioner would have the authority to ban the importations of any animal from that hatchery. Mr. Travelstead's statements are a part of the verbatim record.

Gene Burreson, from VIMS, said the issue is to do the best job they can to certify that that broodstock is from the north. He said there is there is no genetic test to certify broodstock origin, and can only be done through a paper trail. Mr. Burreson's statements are a part of the verbatim record.

There was no one present in opposition to the proposed changes to the regulation.

John Scott Webb, was present and spoke in favor of the changes to the regulation. Mr. Webb's statements are a part of the verbatim record.

Associate Member Gordy moved that the Commission adopt Emergency Regulation 4VAC 20-754-10 ET.SEQ, with the effective date to be October 27th. Associate Member Williams seconded the motion, and the motion carried unanimously.

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TANGIER OIL COMPANY, #01-0588, requests authorization to retain a 12-foot by 7-foot gas shed, a 14-foot extension to the new fuel pier and to retain the old fuel pier, which was to be removed along Mail Boat Harbor in the Town of Tangier.

Bob Grabb, Chief-Habitat Management Division, stated that the applicant has requested that this item be deferred to the November 26th Commission meeting. Mr. Grabb's statements are part of the verbatim record.

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PUBLIC HEARING: Proposed amendment to Regulation 4 VAC 20-720-80.C., "*Restrictions on Oyster Harvest.*"

Jack Travelstead, Chief-Fisheries Management Division, briefed the Commission on the proposed amendment.

He said in the current regulation, if a fisherman who is dredging for oysters in Tangier Sound violates any oyster rule, his license can be revoked immediately for the rest of the season.

The Tangier watermen, in the public comments period for the September 24, 2002 Commission meeting, requested that Regulation 4VAC 20-720, Subsection 80-C be amended. The Tangier watermen felt that this subsection was too severe, and that they had been singled out for penalties that were more stringent than other areas. Presently, a single violation is equal to immediate revocation, which is actually contrary to the policy that the

Commission has set forth for every other fishery. This part of the regulation allows the revocation of the dredge gear license if the regulation is violated. This subsection of the regulation has been in effect since oyster dredging was allowed in the Tangier-Pocomoke Sounds in the mid-1990's.

Mr. Travelstead said staff recommends that the provision be removed from the regulation. He said there is concern that removal of this penalty would result in a significant increase in violations, and staff would like to issue a warning that if there is significant increase in violations in the dredging areas and significant failure to report, staff would be inclined to come back to the Commission and ask that this provision be reinstated.

Associate Member Cowart questioned whether this included **any** violation, and Mr. Travelstead responded that was correct.

Associate Member Cowart said there are oysters that are not being reported and taxes that are not being paid on them. He said the Commission needs to get a handle on it and he felt revocation of licenses should be on the first offense if the oyster catch is not reported and taxes fail to be paid.

There were no comments from the public, pro or con.

Associate Member Cowart moved to not revoke a license for all offenses, with the exception that one offense of non- reporting of catch, you would lose your license. The motion was seconded by Associate Member Williams, and carried unanimously.

Colonel Steve Bowman, Chief-Law Enforcement Division, questioned whether the revocation procedure would take place at the issuance of the summons or after the conviction.

Colonel Bowman's statements are a part of the verbatim record.

Rob O'Reilly, Deputy Chief-Fisheries Management, responded that the revocation is at issuance of the summons.

Associate Member Cowart moved to advertise for public hearing a regulation which would cover oysters caught in this state on public beds and the opportunity to revoke a license if, in fact, those oysters were not reported as being caught and the taxes were being evaded. The public hearing is to be held at the November 26, 2002 Commission meeting. The motion was seconded by Associate Member Gordy, and carried unanimously.

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Commissioner Pruitt left the meeting at this point due to his schedule. Associate Member

Birkett presided as Chairman in Commissioner Pruitt's place.

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PUBLIC HEARING: Proposed amendment to Regulation 4 VAC 20-430-20, *"Marking Procedures for Drift and Anchor Gill Nets."*

Associate Member Williams stated that he was asked by some watermen, who were unable to be present at the meeting, to table this item to the November Commission meeting.

It was the consensus of the Commission to continue on with the public hearing.

Acting Chairman Birkett, opened the Public Hearing.

Ellen Cosby, Fisheries Management Specialist, briefed the Commission.

Last month the Commission approved the regulatory amendment to repeal the requirement of matching numbers or symbols on gill net end-marker flags and balls, in response to FMAC's appeal to resolve a problem.

Ms. Cosby stated that this is an additional request by industry that the Commission also repeal or modify the provision requiring that end-marker flags on the same gill net, or the flag and floating ball on the same net be of identical color. She said the matching color of flags and balls were helpful in identifying the ends of the nets, and the color-code identification system also assists commercial crab potters, haul seiners, and other gill netters in the placement of their gear and she said staff recommends no change to Regulation 4VAC 20-430-1- et.seq. Ms. Cosby's statements are a part of the verbatim record.

Jack Travelstead, Chief-Fisheries Management Division, recommended that there be no changes to the wording of the regulation.

There was no one present who wished to address the Commission, pro or con.

Associate Member Gordy moved to follow staff's recommendation that no changes be made to the regulation. Associate Member McLeskey seconded the motion, and the motion carried unanimously.

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STRIPED BASS: Discussion of management program for 2003 coastal fishery. Request for public hearing.

Rob O'Reilly, Deputy Chief-Fisheries Management, briefed the Commission on the management program for the 2003 coastal fishery.

Effective May 29, 2002, the Commission established a 98,000-pound commercial striped bass harvest quota for the coastal area of Virginia, by emergency regulation. At that time, the 2002 harvest of striped bass was greater than 600,000 pounds, and the coastal commercial fishery for striped bass was closed. Those emergency provisions were established as permanent provisions under Regulation 4 VAC 20-252-10 et seq., at the June 2002 meeting of the Commission.

This action was in response to a decision made by the Atlantic States Marine Fisheries Commission (ASMFC) to establish a separate coastal area commercial striped bass quota for Virginia. The ASMFC determined in May 2002 that Virginia could no longer manage its striped bass commercial fisheries along the coast and in the Chesapeake System under a single quota, as it had done since the reopening of Atlantic States striped bass fisheries in 1990

During several FMAC meetings, starting this past June, staff has provided a number of different options for allocation of the coastal striped bass commercial quota. At this time ITQ's or shares apply only to the 1,701,748-pound Chesapeake System quota. For that reason, the 98,000-pound quota represents a new allocation.

Divide the 98,000-pound coastal area (Virginia's portion of the federal territorial sea, out to the 3-mile limit line, and Seaside of Eastern Shore bays and inlets) quota among current ITQ holders. Under this option, each of 523 ITQ holders (as of February 2002) would receive 12 tags, in addition to their allotment of Chesapeake System tags (one tag = one striped bass). This option does not provide a reasonable harvest quota to the traditional coastal commercial striped bass fisherman.

Divide the 98,000-pound coastal area quota only among recent coastal area harvesters. There were 177 striped bass harvesters in the coastal fishery during either 2001 or 2002, and 74 of this total harvested from the coastal striped bass fishery in both years. This option would provide 34 tags to 177 harvesters or 83 tags (striped bass) to 74 harvesters. The same lack of representation in providing tags to traditional coastal harvesters characterizes this option. Only 56 currently permitted harvesters participated in the coastal fishery during years of modest harvests from this area (1993-97) and during either 2001 or 2002.

Divide the 98,000 – pound coastal area quota only among those who harvested striped bass during the 1993-97 period. Of the current 500+ ITQ permittees, only 78 harvested striped bass from the coastal area during one or more years of the 1993-97 period. However, greater than 70% of these fisherman only harvested from this area during one or two years of the 1993-97 period and more than one-half of those fishermen harvested very few fish from the

coastal area, indicating most of their tags were used in the Chesapeake Bay and its tributaries.

Divide the 98,000 – pound coastal area quota only among those who landed striped bass in recent years (2001 or 2002) and have a history of harvesting striped bass from the coastal area during the 1993-97 period.

A total of 56 currently permitted ITQ holders participated in the coastal fishery at least one year during 2001-2002 and 1993-97. Only 22 current permittees harvested from the coastal area during at least three years of the 1993-97 period and one year of the 2001-02 period.

At its August meeting, the FMAC unanimously chose the last two options for allocation of the coastal area quota:

- 1) Divide the 98,000-pound Coastal Area quota only among Coastal Area harvesters who have a history (1993-1997) of harvesting from the Coastal Area, and;
- 2) Divide the 98,000-pound Coastal Area quota only among recent (2001-2002) Coastal Area harvesters who also have a history (1993-1997) of harvesting from the coastal area.

More specifically, the FMAC chose the most restrictive requirements associated with either option, as a starting point for allocation.

Of these two strategies for allocation, FMAC has not yet recommended a preference. The FMAC has also recommended that any harvesters who have transferred out of the fishery by their August meeting should not be eligible for coastal fishery tags. FMAC, by vote of 6-4, recommended that each current Chesapeake System ITQ holder receive 12 coastal area tags in 2003.

Staff has derived an allocation strategy, for either option cited above and will provide this information to FMAC. Coastal Area striped bass will be offered to either 22 or 18 current ITQ holders, depending on which allocation strategy you approve. Using these strategies, either 278 tags would be offered to 22 harvesters, or 340 tags would be offered to 18 harvesters.

Staff expects that some harvesters will not want Coastal Area tags or may not want a full share (278 or 340 tags). In these cases, and depending the strategy, a sequence of harvesters would be offered any remaining shares (tags) of the Coastal Area. A full share would be 340 tags, and 20 tags would be the smallest amount that could be held by a harvester.

Mr. O'Reilly said staff recommended advertising the two options preferred by FMAC, for initial allocation of the Coastal Area commercial striped bass quota of 98,000 pounds. Option 1, would provide shares of the quota to those harvesters who landed striped bass from the

Coastal Area during three years of the 1993-97 period, and option 2, would provide the initial offer of tags to those current ITQ holders who harvested during either 2001 or 2002 and 3 years of the 5-year period (1993-97).

Associate Member Birkett recommended that all four allocation options be advertised for the public hearing.

Associate Member Cowart moved to advertise for a public hearing, to be held at the November 26, 2002 Commission meeting. Associate Member Gordy seconded the motion, and the motion carried unanimously.

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BLACK SEA BASS: Discussion of management program for 2003. Request for Public Hearing.

Jack G. Travelstead, Chief-Fisheries Management Division, briefed the Commission.

Virginia's commercial black sea bass fishery operates almost entirely in federal waters (3-200 miles). The black sea bass fishery is managed by the National Marine Fisheries Service (NMFS) through a quarterly quota management program. There are three major gear types in this fishery: bottom trawl, hook and line, and fish pot or trap. Amendment 13 allocated state-by-state quotas. Virginia was allocated 20% of the allowable coast wide quota, and along with New Jersey was allocated the largest available portion of the quota, which equated to approximately 666,400 pounds of black sea bass per year for 2003 and 2004. Mr. Travelstead said that starting next year the fishery along the Atlantic Coast for black sea bass will be managed by a state by state quota system, and it will be up to each state to determine how it will manage the quota it has been assigned under the federal management plan.

Mr. Travelstead said staff has been working with the sea bass industry and the NMFS to develop various management options for the 2003 and 2004 fisheries. Two public information meetings have been held at VMRC and were well attended by industry. One group of fishermen favors a limited entry (IFQ) program based upon recent landings histories for each vessel. The second group favors an open entry fishery using quarterly quotas and trip limits, similar to the program currently in place.

Mr. Travelstead said staff does not recommend unlimited entry. He said staff favors the use of an IFQ to manage the fishery.

Acting Chairman Birkett placed the matter before the Commission for consideration and

action.

Associate Member Cowart moved to advertise for public hearing on black sea bass. The Public Hearing is to be held at the November 26, 2002 Commission meeting. Associate Member Gordy seconded the motion, and the motion carried unanimously.

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PUBLIC COMMENT PERIOD

Doug Jenkins, President of the Tangier Waterman's Association, requested that Virginia have a shad fishery, or at least a by-catch fishery. He said the shad fishery had been closed too long, since the early 1990's, and asked the Commission to advertise for a public hearing.

Associate Member Cowart requested Mr. Travelstead address the matter.

Jack Travelstead, Chief-Fisheries Management Division, said that he would not recommend opening the shad fishery, and further stated that ASMFC would have to agree to open the fishery. Mr. Travelstead explained that the deadline to request approval from ASMFC is October, so the deadline has passed for this year. He also said staff does not have the data to present to the ASMFC describing fishing mortality rates that would allow the fishery to be opened.

Associate Member Cowart moved to start the process of gathering data so staff can request ASMFC open the shad fishery. Associate Member McLeskey seconded the motion.

Mr. Travelstead requested the Commission send the issue to the Fisheries Management Advisory Committee.

Associate Member Cowart revised his motion, to request the Fisheries Management Advisory Committee look into the issue and give a report at the January 2003 Commission meeting, so staff can submit the information to ASMFC. The motion carried unanimously.

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Associate Member Cowart requested the Commission establish a committee, with Jack Travelstead or Rob O'Reilly to head up this committee, to come back with a regulation to limit the weight of the hand scrape for consideration to apply to everywhere. Associate Member Cowart requested that the following people be on the committee:

Jim Wesson
Doug Jenkins
George Washington
Rufus Ruark
Joe Neal
Tommy Kellum

Kenneth Wayne Williams

Associate Member Cowart put his request in the form of a motion. The motion was seconded by Associate Member Gordy, and carried unanimously.

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Associate Member Williams mentioned the death rate of oysters in the Rappahannock River and asked if the Commission could move the season up in these areas in order to keep the death rate down.

The Commission requested Jim Wesson address the matter. Dr. Wesson said he has completed a survey and most of the mortality has already occurred. The Commission directed Dr. Wesson is to bring a report back to the Commission.

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Jack G. Travelstead, Chief-Fisheries Management Division, stated he had received a request from Jeff Crockett for a 15-day extension on the crab pot season, to extend it to December 15. He said the fall run down the Bay has been late this year because the weather has been mild and crabs have been extremely abundant, and as a result, the markets are glutted. Mr. Travelstead asked that it go to a public hearing next month.

Mr. Travelstead said he did not recommend the extension.

The Commission agreed with Mr. Travelstead, and no action was taken on the matter.

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The Commission recessed to November 1, to hear the case of **NICHOLAS VANDERGRIFT, #02-1496.**

The Commission meeting recessed at 3:30 p.m.

Commission Meeting

**12129
October 22, 2002**

William A. Pruitt, Commissioner

Virginia S. Chappell, Recording Secretary