

**NOVEMBER 1, 2002  
NEWPORT NEWS, VIRGINIA**

This November 1, 2002 meeting of the Marine Resources Commission, which was a continuation of the meeting held on October 22, 2002, was held with the following present:

William A. Pruitt )	Commissioner
Chadwick Ballard, Jr. )	
Gordon M. Birkett )	
S. Lake Cowart, Jr. )	
Russell Garrison )	Members of the Commission
Laura Belle Gordy )	
Cynthia M. Jones )	
F. Wayne McLeskey )	
Carl Josephson	Assistant Attorney General
Wilford Kale	Senior Staff Adviser
Katherine Leonard	Recording Secretary
Andy McNeil	Programmer Analyst Sr.
Col. Steve Bowman	Chief-Law Enforcement
Lt. Col. Lewis Jones	Deputy Chief-Law Enforcement
Robert Grabb	Chief-Habitat Management
Tony Watkinson	Deputy Chief-Habitat Management
Gerry Showalter	Head-Engineering/Surveying
Hank Badger	Environmental Engineer Sr.
Kevin Curling	Environmental Engineer Sr.
Mark Eversole	Environmental Engineer Sr.
Jeff Madden	Environmental Engineer Sr.
Chip Neikirk	Environmental Engineer Sr.
Randy Owen	Environmental Engineer Sr.
Traycie West	Environmental Engineer Sr.
Jay Woodward	Environmental Engineer Sr.

**Virginia Institute of Marine Science:**  
Thomas Barnard, Jr.

**Commission Meeting**

**12131  
November 1, 2002**

others present included:

Bob Simon  
Kevin DuBois

Carl Eason

James Janata

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Commissioner Pruitt called the meeting to order at 10:00 a.m. Associate Member Williams was absent.

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Bob Grabb, Chief-Habitat Management, asked Commissioner Pruitt if staff would need to be sworn in? Commissioner Pruitt, after asking Counsel's advice, swore in Commission's staff members.

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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.

Tracy West, Environmental Engineer, gave the presentation and presented slides. Staff presented two additional slides. Ms. West explained that since the record had already been opened, staff felt they should be allowed. Nevertheless, the slides were for orientation purposes only.

She stated the project site was located at 2412 Bay Oaks Place, adjacent to the Chesapeake Bay. The stated purpose of the after-the-fact fence was to keep a dog in the yard. The fence was originally scheduled for the August Wetland Board meeting, but due to a power failure at City Hall, all agenda items were continued to the September meeting.

She summarized the Wetlands Board hearing. Stating that Mr. Kevin DuBois, Norfolk Wetland Board staff person, provided a staff briefing to the Board and stated that there appeared to be some confusion regarding whether a permit was or was not required for the installation of the brick and wrought iron fence. Mr. DuBois further explained that, under the conditions of the 1994 permit that authorized the construction of the homes, a uniform line of development was established. The dune area seaward of the homes was to be planted with dune grass. According to discussions between Mr. DuBois and Mr. Vandergrift (the contractor), the fenced-in area was to become lawn. Mr. DuBois reminded the Board that the authorization for the construction of the homes permitted significant encroachment into the

dune area. As part of that approval, there was a specific mitigation requirement that the impacted areas of the jurisdictional dune be resprigged with dune vegetation. Mr. Vandergrift was constructing the fence within the area that was supposed to be sprigged as part of that mitigation requirement. She said the Wetlands Board asked several questions regarding the location of the dune crest zone and inquired how the fence was initially brought to staff's attention. She explained that according to Mr. DuBois, staff found the fence while conducting a site visit on another property in the area. Mr. DuBois also referred to a letter of complaint that had been submitted by two nearby property owners. Those neighbors were concerned that the fence structure did not meet the conditions set out in the original permit. Comments from the Virginia Institute of Marine Science (VIMS) and the recommendation from Norfolk Wetlands Board staff were read into the record. Mr. Vandergrift then addressed the Board and stated that he had received his building permit and thought everything had been approved. He again stated that the purpose of the project was so the lady can put her dog outside while they were gone. He stated that he thought the fence would have a minimal impact since there is a large dune in front of the house. Board member Janata asked if approval of this fence could lead to other proposals for fence installation. Mr. Vandergrift stated that the next-door neighbor had already approached him regarding installation of a similar fence.

Ms. West then summarized what had occurred in the case before this hearing today. The notice of appeal, which was submitted by Mr. Carl Eason on behalf of his client, Mr. Kennis Sigmon, was received on September 20, 2002. According to Mr. Eason's letter, Mr. Sigmon is the actual property owner and Mr. Vandergrift is the builder. It is unclear exactly when Mr. Sigmon purchased the property or why Mr. Vandergrift was listed as the applicant.

She said that according to VIMS comments, the individual and cumulative adverse impacts resulting from the construction of the unauthorized fence could have been avoided. VIMS stated that 444 square feet of primary coastal sand dune had been impacted and 148 square feet of dune habitat has been permanently filled and lost.

She further explained that although the appeal would normally have been considered by the Marine Resources Commission on October 22, 2002, the Norfolk Wetlands Board was unable to provide the verbatim transcript for Commission review. At the meeting, the Commission chose to consider the arguments offered by Mr. Eason and testimony from Mr. DuBois regarding the appeal. The Commission then moved to continue consideration of the appeal until a November 1, 2002, special meeting.

She stated that it was Mr. Eason's assertion that the issuance of a Building Permit for the structure meant that either Wetlands Board approval was not required or that the City improvidently granted authorization for the fence. Mr. Eason further believed that the Norfolk Wetlands Board assertion that the brick fence was too far into the dune is not supported by the 1994 permit, which authorized the construction of a timber bulkhead

12 feet into the jurisdictional dune. The fence is located approximately 4 feet from the back of the house.

Ms. West gave a summary of staff's recommendations. She stated that based on our review of the record of information that was before the Norfolk Wetlands Board on September 11, 2002, we were unable to conclude that the Board erred procedurally or that the substantial rights of the applicant were prejudiced by their decision. The Board maintained that the project required their authorization since the fence encroached beyond the uniform building line that was established by the Board when the authorization for the homes was originally granted. In addition, the fence was constructed in the mitigation area which was established as a condition of the initial dune permit issued for the houses in August 1995. As such, it appears that the Board decision was appropriate and should be upheld. During the October 22, 2002, Commission meeting, counsel for Mr. Sigmon introduced a multitude of new information that was not presented to the Board when they rendered their decision. In keeping with past Commission actions, staff recommends that the Commission remand the application to the Board so they may consider the new information brought forth by Mr. Sigmon's counsel.

Ms. West also stated that should the Commission elect to not remand the application back to the Wetlands Board for consideration of the additional information provided by Mr. Eason that staff recommended that the Commission uphold the decision of the Norfolk Wetlands Board to deny the after-the-fact authorization of the proposed brick and wrought iron fence. Furthermore, the Norfolk Wetlands Board staff should be instructed to proceed with a restoration order to include, but not be limited to, the removal of the fence and the resprigging of the jurisdictional dune area that was impacted by the unauthorized construction.

Carl Josephson, Counsel for the Commission, made a statement that he did not understand why the application was in the name of Nicholas Vandergrift, instead of the applicant, Kennis Sigmon. Ms. West said that she had asked but did not get a satisfactory explanation.

Mr. Carl Eason, Attorney for the applicant, Mr. Sigmon, asked for Slide #2 to be shown again while he made his comments Mr. Eason entered into the record a site plan. Mr. Eason stated he disagreed with Mr. DuBois on the purpose of the bulkhead and he questioned why the permit was signed off by the City. He stated further that: A. It's not a primary sand dune; B. The Applicant is willing to resprig the area; and C. The fence is in the permitted area. Associate Member Garrison, stated the applicant had been asked if once the fence was installed was it the idea to keep that dune grass or replace it with lawn grass. He said he remembered he said lawn grass. Is this dune grass or lawn grass? Mr. Eason stated it's going to be whatever the Commission recommends. He stated he was recommending that it be dune grass because that's already out there. Associate Member Jones, asked if it keeps filling back up and even flows through the fence, why have the fence? Mr. Eason said that was true,

but the applicant was willing to resprig the area. Mr. Eason's comments are a part of the verbatim record.

Mr. Josephson commented that the Commission needed to make sure that the site plan is made a part of the record.

Mr. Robert Simon of Waterfront Consulting, Inc., project consultant, answered Associate Members Ballard's question regarding the bulkhead. His comments are a part of the verbatim record.

Associate Member McLeskey, stated that he had gone out to the property the day before and took some pictures which he wanted to share with the board. Commissioner Pruitt thanked Mr. McLeskey for his taking such an active role in his position as a board member. Mr. Eason stated he had no objection to the photos being shown.

Mr. Kevin Dubois, Wetlands Board Staff, was present. Associate Member Ballard asked if the bulkhead is what was also being referred to as the wall. Mr. Dubois responded yes. He also clarified that the wall or bulkhead that had been approved in the 1994 permit had been removed. In fact, it was specifically removed at the request of the previous owner. The wall did not work. Its original purpose had been to keep the dune from collapsing back onto the property during construction. He was concerned that the Commission thought the wall was still there. It is not.

Mr. DuBois stated that the new evidence introduced by the applicant's attorney that should be reviewed by the Wetlands Board. He then asked that the Commission remand the matter back to the Board for review. Mr. DuBois comments are a part of the verbatim record.

Mr. Pruitt then raised a concern that had been expressed at the last meeting. That concern was that occupancy of the house would be held up until this issue had been resolved. Mr. DuBois responded that there was a written statement that it would not hold up occupancy of the house, that the only thing that might hold it up would be any outstanding inspections.

Mr. Pruitt asked the board for any further questions or a motion at this point.

Associate Member McLeskey, questioned if the temporary occupancy permit would cause problems for the changing of the title and obtaining financing. Mr. Eason said he was familiar with this issue and it would be a problem when the title was changed. Mr. DuBois also addressed this and stated the temporary permit was only meant to address Mr. Eason's concerns about occupancy.

**Associate Member McLeskey then moved to remand the matter back to board with the assurance that it can be occupied, would not interfere with the financing or cloud the titling of the property, and that the fence issue would not hold any of this up and if becomes necessary a court order would require the fence to be removed. Mr. Josephson, stated that the Commission cannot take any action relating to a court order. He stated the Commission could only modify or reverse the Wetlands Board's decision, uphold the Wetlands Board's decision, or remand the matter back to the board for reconsideration.**

**Associate Member Ballard asked if the motion then was only to remand the case back to wetlands board. Commissioner Pruitt responded positively.**

**Associate Member Garrison seconded the motion. The motion carried unanimously.**

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Mr. Pruitt requested that, at this point in the meeting, that Bob Grabb explain the matter that may require a special public hearing in the western part of the State.

Bob Grabb, Chief-Habitat Management, explained that 2 pipeline projects were being processed for permits. The one being discussed today, he referred to as the Patriot Pipeline, which is requiring an expansion and extension of a transmission line. All total with the two pipelines, 271 streams are involved. Only 25 streams and 29 crossings were under the Commission's jurisdiction. That did involve a major crossing of the New River and other minor crossings.

He further explained that because it was protested, had a large number of interested parties in the area surrounding the project, and several congressional and legislative concerns have been raised, it had been requested that a hearing be held in the western part of the state so that the interested parties would not have such a long distance to travel. Mr. Grabb explained that since our other normal hearings were not acceptable it was necessary to have a special board meeting. Mr. Grabb suggested that the hearing be held in Patrick County.

Commissioner Pruitt explained that the Secretary of Natural Resources had made this request and that he had assured the Secretary that a quorum would be attending the hearing. He further stated that the Secretary thinks this is a good gesture. As a courtesy to Senator Reynolds the Secretary wanted to look into holding the hearing offsite.

Commissioner Pruitt suggested considering a date sometime during the first or second week of December, probably a Tuesday or Wednesday, so as not to interfere with anyone's weekend plans. He also stated that it would have to be an evening meeting, so it would

require an overnight stay. He further stated that the exact date of the hearing, where to hold the hearing, logistics of getting everyone there, possibly by bus, arrangements for recording the meeting, and accommodations would have to be decided on and arranged.

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The Commission after some discussion decided to change the December 24, 2002 meeting to the third Tuesday of the month, December 17, 2002.

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Wilford Kale, Senior Staff Advisor, announced that the ASMFC 2002 meeting was being held on November 18 in Williamsburg at the Jamestown Festival Park. He explained that the Associate Members and spouses were invited to attend the 5 p.m. reception, which will be held after the Jamestown Festival Park tour which is at 3 p.m.

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**EXECUTIVE SESSION.**

Associate Member Ballard moved that the meeting be recessed and the Commission immediately reconvene in closed meeting for the purpose of consultation with legal counsel and briefings by staff members pertaining to actual or probable litigation, or other specific legal matters requiring legal advice by counsel as permitted by Subsection (A), Paragraph (7) of § 2.2-3711 of the Code of Virginia, pertaining to: John T. Siegel's, #02-0055, request for authorization to construct a 39-foot by 43-foot private non-commercial, enclosed boathouse adjacent to his property situated along the Pamunkey River in King William County. The motion was seconded by Associate Member Birkett and carried unanimously, 8-0.

**Associate Member Ballard moved for the following:**

**CERTIFICATION OF CLOSED MEETING  
OF THE VIRGINIA MARINE RESOURCES COMMISSION**

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

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

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

knowledge,

(i) only public business matters lawfully exempted from open meeting requirements under Virginia law, and

(ii) only such public business matters as were identified in the motion by which the closed meeting was convened were heard, discussed or considered in the closed meeting by the Commission.

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

**AYES: Ballard, Birkett, Cowart, Garrison, Gordy, Jones, McLeskey, and Pruitt.**

**NAYS: None**

**ABSENT DURING VOTE: Associate Member Williams.**

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

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

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Clerk/Secretary  
Virginia Marine Resources Commission

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The Commission meeting adjourned at 12:15 p.m.

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William A. Pruitt, Commissioner

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Katherine V. Leonard, Recording Secretary