

MINUTES

October 26, 2004
Newport News, VA

Commission Meeting

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

William A. Pruitt)	Commissioner
Chad Ballard)	
Ernest N. Bowden, Jr.)	
S. Lake Cowart, Jr.)	
Russell Garrison)	Associate Members
J. T. Holland)	
Cynthia Jones)	
F. Wayne McLeskey)	
Kyle J. Schick)	
Carl Josephson	Sr., Assistant Attorney General
Col. Steve Bowman	Deputy Commissioner
Wilford Kale	Senior Staff Advisor
Katherine Leonard	Recording Secretary
Andy McNeil	Programmer Analyst, Sr.
Jane McCroskey	Chief, Admin./Finance Div.
Jack Travelstead	Chief, Fisheries Management Div.
Rob O'Reilly	Deputy Chief, Fisheries Mgt. Div.
Chad Boyce	Fisheries Management Specialist, Sr.
Jim Wesson	Head, Conservation/Replenishment
Roy Insley	Head, Plans and Statistics
Lewis Gillingham	Fisheries Management Specialist
Joe Cimino	Fisheries Mgmt. Planner
Stephanie Iverson	Fisheries Mgmt. Supervisor
Lt. Col. Lewis Jones	Deputy Chief, Law Enforcement
MPO David Lungair	Marine Police Officer
MPO Thomas Fitchett	Marine Police Officer
Bob Grabb	Chief, Habitat Management Div.
Tony Watkinson	Deputy Chief, Habitat Mgt. Div.
Chip Neikirk	Environmental Engineer, Sr.

Jeff Madden	Environmental Engineer, Sr.
Jay Woodward	Environmental Engineer, Sr.
Ben Stagg	Environmental Engineer, Sr.
Tracy West	Environmental Engineer, Sr.
Justin Worrell	Environmental Engineer, Sr.
Randy Owen	Environmental Engineer, Sr.
Hank Badger	Environmental Engineer, Sr.
Benjamin McGinnis	Environmental Engineer, Sr.

Virginia Institute of Marine Science (VIMS)

Lyle Varnell
Tom Barnard

Other present included:

Robert Cook	Barry W. Miller	Russ Collins
Harrison Bresce	Connie Conley	George Shelton
J. N. Vick	G. J. McGee	Weston Conley
Cecil Bonly	B. Kay Wilson	John Ward
Dennis H. Dietrich	Robin Markham	Austin R. Magill
Dan Bacot, Jr.	Donna A. Hautz	Wayne Couch
Arlington Chisman	Parc Engebriksen	Mike McGuire
Jeff Gordon	Tom Barnard	Stephan Kirkand
Jim Breeden	James Bsankey	E. L. Stone
Jay Foster	David Henley	Brenda Gregory
Phill Roehrs	Mike Jewett	Charlie Kerns, Jr.
M. Vernon Kerns, III	Carl Eason	Bob Simon
Roger Parks	David Parks	Alice Palivoda
Mike Anderson	Rick Bartlett	Bonnie Leigh Jones
Jeffrey J. Bliemel	Kenneth Somerset	Karen Brauer
P. Moses	James Graves	Scott Bloxom
Courtney Fisher	Harriet Jennings	Ed Jennings
Frank Bradley	David J. Wood, Jr.	Jennifer Winkler
Tom Wilson	David Waddell	Russell W. Gaskins
Douglas F. Jenkins, Sr.		William T. Daniels
Donnie M. Thrift	Elgin Ninger	R. Hall
Susan Gaston	James Hampton	Les Rickman
Joe Stephenson	Frank Daniels, Jr.	Michael F. Barrow
Bobby Carin	Dusty Crump	Bobby Weagley
Tom Powers	Charles Drych	Art Hodges
George Trice	Mark Hodges	Leslie Crockett
Jeff Deem	Jeffrey Crockett	L. R. Carson, III
Gary O. Pruitt, Sr.	Frances Porter	Kelly M. Place
Jim Ruehl	Vicki DeBerry	and, others

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Commissioner Pruitt called the meeting to order at approximately 9:32 a.m. All Associate Members were present.

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

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

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Approval of Agenda: Commissioner Pruitt asked if there were any changes to the agenda. Bob Grabb, Chief, Habitat Management, explained that Item 5, Sam Daniels was pulled since the appellant had withdrawn his appeal and that Item 14, Alice Palivoda, was also pulled off the agenda because the protestants had withdrawn their objections. He further explained that the attorney for Bay Marine, Item 8, and Conley Properties, Item 10, had asked that these two items be considered earlier and together, since he was representing both at this meeting and had another meeting to attend. Bob Grabb, Chief, Habitat Management, asked that items 6 & 16 both Virginia Beach items be moved up also. Jack Travelstead, Chief, Fisheries Management, explained that there was an additional fisheries item requested by the Commission last month to be given by Jim Wesson, Head, Conservation and Replenishment regarding the Blackberry Hangs area. Their comments are all a part of the verbatim record.

Associate Member Holland moved to approve the agenda with the requested changes. Associate Member Cowart seconded the motion. The motion carried, 8 - 0.

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- 1. MINUTES:** (previous months minutes will be presented for approval at the November meeting.)

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- 2. PERMITS:** Tony Watkinson, Deputy Chief, Habitat Management, gave the presentation on Page Two items, A through H, and his comments are part of the verbatim record. Page Two items are projects that cost more than \$50,000, are

unprotested, and staff is recommending approval. His comments are a part of the verbatim record.

Associate Member McLeskey announced that he would abstain from voting on items 2C and 2G, because of business conflicts. His conflict of interest form has been made a part of the record, which further explains.

Commissioner Pruitt asked if there was anyone to address the Commission on any of these projects, either pro or con. There was no one present to comment.

Associate Member Cowart moved to approve items 2C and 2G. Associate Member Holland seconded the motion. The motion carried, 7-0-1. Associate Member McLeskey abstained from voting on these two items.

Associate Member Garrison moved to approve items A through B, D through F, and H. Associate Member Holland seconded the motion. The motion carried, 8-0.

2A. SETTLER'S RIDGE, LLC, ET AL, #04-1856, requests authorization to install up to 416 linear feet of 8-inch and 12-inch sanitary sewer impacting Cornelius Creek, a tributary to the James River in Henrico County. Staff recommends standard instream construction conditions.

Permit Fee.....\$100.00

2B. YORK RIVER YACHT HAVEN ASSOCIATES, #02-2264, requests authorization to modify the dimensions of the aquaculture racks deployed within their 28.4-acre oyster lease adjacent to the Sarah Creek entrance channel along the York River near Quarter Point in Gloucester County. The modified racks would measure 8 feet wide by 12 feet long and extend to a height of 3 feet above the substrate. The currently authorized structures measure 3 feet wide by 6 ½ feet long with a height of 3 feet above the substrate.

No applicable fees, permit modification

2C. HARBOR POINT INVESTORS, LLC, #04-1950, requests authorization to mechanically maintenance dredge a maximum of 6,800 cubic yards of subaqueous material, on an as-needed basis, to provide maximum depths up to minus -40 feet at mean low water within a 750-foot by 204-foot area adjacent to property situated along the Southern Branch of the Elizabeth River in Portsmouth. Staff recommends submission of a post-dredge bathymetric survey. Material will be disposed at the Craney Island Rehandling Basin.

Permit Fee.....\$100.00

2D. TOWN OF LURAY, #03-1233, requests after-the-fact authorization to retain emergency repairs to the upstream end of Pier # 1 supporting the VDOT Route 211 bridge crossing Hawksbill Creek in Page County which had been undermined by erosion.

Permit Fee.....\$100.00

2E. METRO MACHINE CORPORATION, #04-2036, requests authorization to install two (2) new mooring dolphins, a new tower crane foundation and crane, and to enlarge two exiting mooring dolphins at property situated at the confluence of the Eastern and Southern Branches of the Elizabeth River in Norfolk.

Permit Fee.....\$100.00

2F. CITY OF HAMPTON, #04-1993, requests authorization to replace and extend by 100 feet an existing deteriorated timber jetty with a new 445 linear foot vinyl and timber jetty on the south side of the Salt Ponds Entrance Channel in Hampton.

Permit Fee.....\$100.00

2G. MARINE HYDRAULICS INCORPORATED, #04-1807, requests authorization to maintenance dredge, by clamshell method on an as-needed basis, a maximum of 10,000 cubic yards of State-owned subaqueous material, to provide maximum depths up to -40 feet below mean low water within a 1,420 foot long by 450-foot wide mooring basin adjacent to their property situated along the Elizabeth River in Norfolk. All dredged material will be transported to and disposed within the Craney Island Rehandling Basin. Staff recommends submission of a post-dredge bathymetric survey.

Permit Fee.....\$100.00

2H. LYNCHBURG DEPARTMENT OF PUBLIC WORKS/ENGINEERING, #03-1825, requests authorization to construct a 120-foot long by 12-foot wide covered pedestrian bridge that will span 40 feet of Blackwater Creek near U.S. Business Route 29 and Rivermont Avenue in the City of Lynchburg. The bridge will be an open truss, prefabricated steel structure, including a timber deck and a pitched metal roof that will provide access to the historic Point of Honor from both sides of Blackwater Creek.

Permit Fee.....\$100.00

3. Closed Session: No closed session was held.

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The following items are in chronological order in accordance with the agenda, not in the order they were actually heard. Staff had, for various reasons, requested certain items be heard together and earlier in the meeting.

4. COMMISSION CONSIDERATION of a resolution recommending approval of a transfer of 8± acres of subaqueous land in accordance with Chapter 454 Acts of Assembly, 2004.

The Commission received a briefing from Senior Assistant Attorney General Carl Josephson regarding the transfer of 8± acres of state-owned subaqueous bottoms to the City of Norfolk as authorized by Chapter 454 Acts of Assembly, 2004. The Act authorizes the Governor to convey these state-owned lands to the City of Norfolk after consultation with the Commission and the Attorney General. Mr. Josephson explained that the conveyance was deemed necessary by the City for the proposed construction of a passenger terminal to serve cruise ships calling on Hampton Roads. The Commission reviewed the proposed deed of transfer and determined that the terms and conditions therein were proper and acceptable. Mr. Josephson read into the verbatim record the following portion of the Resolution, "NOW, THEREFORE, BE IT RESOLVED, that the Commission hereby consents to the conveyance of the above described property to the City of Norfolk on the terms and conditions as set forth in the attached deed".

Associate Member Ballard made a motion to adopt the resolution, which was seconded by Associate Member Cowart. By a vote of 7-0-1 (Associate Member Jones was absent from the meeting room during the motion and vote), the Commission adopted the following resolution recommending approval of the transfer of the described subaqueous lands to the City of Norfolk, in accordance with the terms and conditions contained in the deed. Senior Assistant Attorney General Josephson agreed to communicate the Commission's action to the Attorney General.

The resolution reads as follows:

RESOLUTION

WHEREAS, Chapter 454 of the 2004 Acts of Assembly authorizes the Governor, upon consultation with the Marine Resources Commission and the Attorney General, to convey to the City of Norfolk, Virginia, certain subaqueous land, further described below, lying in the Elizabeth River in Norfolk; and

WHEREAS, the subaqueous land authorized to be conveyed is an extension of the property of the City of Norfolk, and is more particularly described as follows:

An irregular-shaped lot, piece or parcel of land situate, lying and being in the downtown section of the City of Norfolk, Virginia, said parcel being further described as follows: all the subaqueous lands bounded on the north by the City Hall Avenue Canal, said canal being shown on a plat entitled, "Plat of Merchants & Miners Transportation Co.'s Property," said plat being dated February 14, 1911, and being on file in the Department of Public Works in the Division of Surveys in the City of Norfolk, Virginia, as file number [1-4-52](#); on the east by Boush Street and Matthews Street; on the south and west by the Pierhead Lines (Port Warden Lines) of the Eastern Branch of the Elizabeth River, said parcel being further described as follows: beginning at a point that is the intersection of the northern line of Main Street extended westwardly to its intersection with the western line of Matthews Street, said point of intersection being shown on a plat entitled, "Exhibit A," said plat prepared by the Division of Surveys and being on file in the Department of Public Works in the Division of Surveys in the City of Norfolk, Virginia, in Tube 507; thence, from the point of beginning thus described, the following two courses and distances along said western line of Matthews Street: S 19-10'-42" W, 360.00 feet, more or less, to a point; thence, S 35-34'-43" W, 219.23 feet, more or less, to a point on the Pierhead Line (Port Warden Line) running along the northern shore of the Eastern Branch of the Elizabeth River; thence, the following three courses and distances along said Pierhead Line (Port Warden Line): N 42-04'-56" W, 257.80 feet, more or less, to a point; thence, N 25-52'-55" W, 800.08 feet, more or less, to a point; thence, N 15-19'-53" W, 230.00 feet, more or less, to a point on the northern boundary of said parcel; thence, S 82-16'-46" E, 586.82 feet, more or less, to a point; thence, S 76-00'-00" E, 525.00 feet, more or less, to a point; thence, S 10-11'-42" W, 34.00 feet, more or less, to a point; thence, S 79-48'-14" E, 16.13 feet, more or less, to a point on the western line of Boush Street; thence, the following two courses and distances along said western line of Boush Street; S 25-57'-05" W, 197.08 feet, more or less, to a point; thence, S 21-18'-27" W, 225.00 feet, more or less, to a point; thence, N 68-41'-33" W, 42.21 feet, more or less, to a point; thence, S 21-18'-27" W, 25.00 feet, more or less, to a point; thence, N 68-08'-18" W, 60.00 feet, more or less, to the point of beginning.

The above-described parcel contains 15.00 acres, more or less, eight acres, more or less, of which are subaqueous lands; and

WHEREAS, the property to be conveyed is depicted on a scaled drawing which is attached hereto; and

WHEREAS, the Attorney General has caused the attached deed to be prepared to convey such rights, title and interest, and all riparian rights appurtenant thereto to the City of Norfolk; and

WHEREAS, the Commission deems the terms and conditions therein set forth to be proper;

NOW, THEREFORE, BE IT RESOLVED that the Commission hereby consents to the conveyance of the above-described property to the City of Norfolk on the terms and conditions as set forth in the attached deed.

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5. **SAM DANIELS, #04-1514.** Commission review on the appeal by Mr. Daniels of the July 19, 2004, decision by the Isle of Wight County Wetlands Board to deny an application to install up to 170 linear feet of riprap revetment landward of mean low water at his property situated along Brewers Creek, a tributary to Chuckatuck Creek in Isle of Wight County.

Bob Grabb, Chief, Habitat Management, announced earlier in the meeting that the appellant had withdrawn his appeal so this agenda item was pulled.

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6. **DUNCAN McGILLIVARY, # 04-1703.** Commission review of the Virginia Beach Wetlands Board's September 20, 2004 decision to approve a permit to construct 203 linear feet of bulkhead involving a coastal primary sand dune and beach at the applicant's property situated along the Atlantic Ocean in the Sandbridge Beach section of Virginia Beach.

Randy Owen, Environmental Engineer, Sr., gave the presentation with slides.

Mr. Owen explained that the project was located at 3064 Sandfiddler Road in the Sandbridge Beach section of Virginia Beach. Sandbridge was a beach cottage community of approximately 250 +/- oceanfront homes situated along approximately five miles of the Atlantic Ocean shoreline.

Mr. Owen said that the applicant sought authorization to construct 112 linear feet of steel sheetpile bulkhead with 123 linear feet of return walls on a vacant oceanfront lot. As proposed, the project would impact approximately 10,080 square feet of coastal primary sand dune and beach.

Mr. Owen explained that the proposed bulkhead would be 27 feet channelward of the adjacent bulkhead to the north. The adjacent property to the south was a 50-foot wide

paper street (Whiting Lane) and public beach access. Immediately south of this there was an unbulkheaded oceanfront cottage.

By letter dated September 28, 2004, and pursuant to §§ 28.2-1410 and 28.2-1411(A)(2) of the Code of Virginia, Mr. Owen said that the Chairman of the Wetlands Board was notified of the Commissioner's intent that the full Commission would review the Wetlands Board's decision regarding this project. The Chairman was apprised that the Board's decision on this matter lacked a finding that the property was in clear and imminent danger from erosion and storm damage as required by §28.2-1408.1 of the Virginia Code.

Mr. Owen stated that at their hearing, the Board considered the testimony of Robert Simon, Vice-President of Waterfront Consulting, Inc. and agent for the applicant. Mr. Simon asked the Board to consider the fact that the property was subdivided and recorded by the City as a private lot. Additionally, he reminded the Board that the City had established a public beach easement with the Sandbridge Beach property owners, which included the right to build and maintain bulkheads. He concluded that the bulkhead was necessary to protect the property from hurricanes and northeasters and added that continued funding for the beach nourishment program was not guaranteed.

Mr. Owen said the Virginia Institute of Marine Science comments that were entered into the Board hearing record stated that the proposed bulkhead would capture a significant quantity of recent public beach nourishment material, which would compromise the ability of the City's beach nourishment program to provide the designed shoreline protection. They indicated that the bulkhead's seaward alignment would encroach into potential dune formation areas, prevent dune formation processes from occurring and increase the vulnerability of the structure to wave attack. VIMS concluded that the bulkhead should not be approved since it would destabilize the beach, increase the loss of sand and remove a significant quantity of sand that might otherwise mitigate the effects of future storm events.

Mr. Owen explained that the Virginia Beach Planning Department comments stated that the application was inconsistent with State policy inasmuch as the project would permanently alter the dune/beach resource. Accordingly, they recommended denial of the project.

Mr. Owen further explained that at the close of the public hearing, a motion was made and seconded to deny the project. The rationale for the motion included a finding that the anticipated public and private detriments exceeded the anticipated public and private benefits. Further, the motion found that the project did not conform to the standards of the Coastal Primary Sand Dune Model Ordinance and violated its purposes and intent.

Mr. Owen said that a substitute motion to approve the project as proposed was made and seconded. That motion passed by a vote of 4 to 3 with little further discussion. The

maker of the motion found that the anticipated public and private benefits exceeded the anticipated public and private detriments, that the project did conform to the standards of the Coastal Primary Sand Dune Model Ordinance, and did not violate its purpose and intent.

Mr. Owen said that Section 28.2-1408.1 of the Virginia Code required the Board to “make an on-going determination in the Sandbridge Beach subdivision to determine which structures or properties were in clear and imminent danger from erosion and storm damage due to severe wave action or storm surge.” Based on staff’s review of the record and verbatim transcript, it was clear that the Board failed to fulfill this requirement even though reminded by counsel.

Furthermore, Mr. Owen said that the staff believed that the Board's decision to approve the project was unsupported by the evidence on the record considered as a whole. The VIMS report clearly indicated that the project would destabilize an extensive area of the coastal primary dune and beach and was ill advised. As a result, staff could not agree with the Board's findings that the potential public and private benefits of the project outweighed the potential public and private detriments, as stated in the prevailing motion.

Mr. Owen explained that in reaching their decision, the Board failed to consider less damaging alternatives, such as a more landward bulkhead alignment, which might have achieved the project purpose and minimized the impact on the coastal primary sand dune and beach. Accordingly, staff recommended that the matter be remanded to the Board with specific instruction to determine first if the subject property was in clear and imminent danger as required by §28.2-1408.1 of the Virginia Code given the City’s ongoing commitment for beach nourishment at public expense. If they reached that conclusion, however, the Board should then reexamine the proposed bulkhead alignment in light of the VIMS position that it’s seaward alignment would compromise the ability of the existing beach nourishment program to provide the designed shoreline protection.

Associate Member Ballard was chairing the meeting as the Commissioner had left the meeting room.

Kay Wilson, Associate City Attorney of Virginia Beach, was present and her comments are a part of the verbatim record. Ms. Wilson explained that the Sandbridge area was a unique area and was recognized as such by the General Assembly of Virginia. She said that the board did consider all the evidence and when they approved this project and she felt that such action by the Wetlands Board was in compliance with the Zoning Ordinance, VMRC guidelines, Chapter 14, 28.2-1400 and 28.2-1408.1. She said that the Wetlands Board cannot impose arbitrary and unreasonable conditions. She said the City was asking that the Commission uphold the Wetlands Board decision in this matter.

Carl Eason, Attorney for Mr. McGillivray, was present and his comments are part of the verbatim record. Mr. Eason said that the record supported the Wetlands Board decision

and they were asking that the decision of the Wetlands Board be upheld. He said he had a photo that he could show the Commission, but it would mean opening the record. Associate Member McLeskey asked if the board's decision was upheld, what would happen to the properties to the north and south of the project, more erosion. Mr. Eason explained that was not determined by the board, but there was an obligation to maintain the tie lines and returns as both sides have a return.

Associate Member Ballard explained to the Commission that a motion to open the record was necessary. No motion was made to open the record. Review continued on the record transmitted by the board.

No one else was present to comment on this project. Associate Member Ballard asked for a motion on the matter.

Associate Member McLeskey moved to accept the staff's recommendation to remand the matter (#04-1703) back to the Wetlands Board, as it was unclear as to the effects of the project on the properties adjacent to this project on both the north and south sides and they needed to consider the matter more before approving the project. Associate Member Garrison seconded the motion. The motion carried, 7-0.

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- 7. **LYNDA STEWART, #04-1774.** Commission review of the September 20, 2004, decision by the Westmoreland County Wetlands Board to approve the construction of 355 linear feet of riprap revetment installed channelward of a deteriorating timber bulkhead, adjacent to her property situated along Nomini Bay in Westmoreland County.

Bob Grabb, Chief, Habitat Management, reported to the Commission that no records had been received by the Commission from the Wetlands Board to date and therefore the Commission had nothing to review. He said that staff had received revised drawings. He explained that staff recommended remanding the case back to the Wetlands Board. He said the Wetlands Board's chairman was present at the hearing. Mr. Grabb's comments are a part of the verbatim record.

Austin Magill, Chairman for the Westmoreland County Wetlands Board, was present and his comments are a part of the verbatim record. Mr. Magill apologized for the delay in the record being sent to VMRC and said that he agreed with the staff recommendation.

Associate Member Holland moved to adopt staff recommendation to remand the matter back to the Wetlands Board. Associate Member Garrison seconded the motion. The motion carried, 8-0.

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8. **BAY MARINE, #01-1302.** Restoration hearing to consider the unauthorized construction of a 290-foot by 6-foot commercial pier with four (4) unauthorized boatlifts, the installation of a sewage discharge pipe and diffuser extending approximately 268 feet channelward of mean low water, a 5-foot by 80-foot T-head, and 18 wetslips exceeding their authorized dimensions adjacent to their marina situated along Broad Creek in Middlesex County.

Chip Neikirk, Environmental Engineer, Sr., gave the presentation with slides.

Mr. Neikirk explained that Bay Marine LTD, principally owned by Mr. Barry Miller, serves as agent and performs all service and construction for a marina facility owned by Mr. Miller's parents, Virgil and Myrtle Miller. The marina was situated along the northern shore of Broad Creek in the Deltaville area of Middlesex County. In 1993, the Commission approved a request by Mr. Miller to develop a marina at this site. That permit, (VMRC #92-1130) which was issued in the name of Bay Ventures, authorized the construction of a 260-foot long pier containing 43 wetslips with an 8-foot by 60-foot "T-head," a 260-foot long pier containing 22 wetslips with an 8-foot by 30-foot "L-head," 225 linear feet of bulkhead, and 1,167 cubic yards of dredging. The dredging and bulkhead were completed, and one of the piers was mostly completed prior to the expiration of the permit in 1996.

Mr. Neikirk said that in 2001, Mr. Miller submitted a new application (VMRC #01-1302) in the name of Bay Marine, requesting authorization to construct a 280-foot pier with 50 wetslips in the location of the previously authorized, but never constructed, eastern 260-foot pier with 22 wetslips. Mr. Miller also sought authorization to install a sewage discharge pipe and diffuser extending from a private sewage treatment plant, beneath and approximately 10 feet beyond the previously constructed pier.

Mr. Neikirk said also that Bay Marine's 2001 application had remained in a pending status for an extended period of time because staff continued to wait for the Health Department's approval of his sewage treatment plan. Section 28.2-1205(C) of the Virginia Code states "no permit for a marina or boatyard for commercial use shall be granted until the owner or other applicant presents to the Commission a plan for sewage treatment or disposal facilities which has been approved by the State Department of Health."

On April 7, 2004, in response to a report from Middlesex County, Mr. Neikirk explained that the staff visited the project site and determined that the pier, sewage discharge pipe and diffuser requested under VMRC application #01-1302 had been constructed prior to issuance of the permit. A Sworn Complaint and Notice to Comply were issued on April 19, 2004. The Notice to Comply described the violation and directed removal of the unauthorized structures within 30 days of Mr. Miller's receipt of the letter. As an alternative to immediate removal of the illegal structures, Mr. Miller was advised that he could immediately vacate the occupied slips and revise the current application to reflect

the after-the-fact nature of the project and seek authorization to retain the illegal structures. The Notice to Comply letter further directed that any after-the-fact request must be accompanied by a statement from he and his contractor explaining why the work was conducted without the necessary permit and that he must present a plan for sewage treatment or disposal facilities that had been approved by the Department of Health. Finally, he was advised that acceptance of an after-the-fact application in no way guaranteed that his project would be approved. He was also reminded that work performed without the required authorization was subject to civil charges of up to \$10,000 per violation. The letter also noted that we could consider the continued mooring of any vessels at the unauthorized pier to constitute a separate violation, subject to additional penalties. During subsequent site visits staff identified additional violations related to the western pier, and obtained more detailed measurements on the eastern pier.

Mr. Neikirk explained that the western pier, constructed under VMRC permit #92-1130, was authorized to extend a total of 260 feet including the 8-foot by 60-foot T-head. The pier also included finger piers and mooring piles to create forty-three (43) 28-foot long wetslips. While the pier was five feet wide, it was 268 feet long and included a 5-foot by 80-foot T-head. The T-head was also apparently constructed after the VMRC permit had expired. Accordingly, the pier was 8 feet longer than authorized, and the T-head was 20 feet longer than originally authorized. Additionally, the 18 most channelward slips were approximately 10 feet longer than authorized.

Mr. Neikirk further explained that the eastern pier, applied for under VMRC #01-1302, was actually six (6) feet wide and 290 feet long. Finger piers and mooring piles had been installed to create thirteen (13) wetslips and boatlifts had been installed in four (4) of the slips. Six boats were moored at the pier on September 17, 2004. In addition to being constructed without the necessary permit, the pier was one (1) foot wider and already ten (10) feet longer than that applied for. Additionally, Mr. Miller had not sought authorization to install any boatlifts.

Mr. Neikirk stated that the Virginia Institute of Marine Science stated that given the area's commitment to commercial and recreational boating access in Broad Creek, the direct impacts resulting from the proposal should be minimal. They recommended that a marina management plan be developed and implemented to address additional point and non-point pollution issues. The Health Department continued to recommend denial of the project due to a lack of documentation verifying compliance with their "Sanitary Regulations for Marinas and Boat Moorings." The U.S. Coast Guard had stated that they required that the ends of the pier be marked with a slow flashing amber light. Although staff did not receive written comments from the Department of Environmental Quality, they confirmed that the sewage outfall had received a VPDES permit.

Mr. Neikirk said that the Commission's Notice to Comply letter, dated April 19, 2004, directed Mr. Miller to either remove the illegal pier and sewage discharge pipe and associated diffuser or to immediately vacate all occupied slips and revise his application

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to reflect the after-the-fact nature of the project. These actions were to be completed within 30 days of his receipt of the notice. Mr. Miller received the notice on April 20, 2004. On August 17, 2004, a letter was sent to Mr. Miller advising him that staff had not received any correspondence from him and that staff had conducted site visits on May 27, 2004, and July 7, 2004. Staff explained in the letter that they had confirmed at these site visits that the structures remained and some of the illegal boat slips continued to be occupied. As a result, the letter directed him to appear before the Commission for a formal restoration hearing during the regularly scheduled public hearing on September 28, 2004. Shortly after his receipt of the letter, Mr. Miller called staff and informed them that he would attend the hearing and that he was still working with the Health Department to obtain their approval for his sewage treatment and disposal facilities. He also told staff that the boats still moored at the pier would be removed by the following weekend. A site visit conducted on September 16, 2004, confirmed that six (6) boats were still moored to the pier.

Mr. Neikirk stated that on September 26, 2004, Mr. Miller delivered a letter to the Commission in which he requested after-the-fact authorization to retain the structures in their as-built condition. He also stated that he had worked with multiple agencies and attempted to follow all permits and guidelines. He said recently the permit for pier number two and the discharge line expired and that he regrets that it was not renewed at the proper time. Staff was puzzled by this statement since a VMRC permit was never issued for the discharge line and although pier number two (the eastern pier) was authorized by VMRC Permit #92-1130, which had expired in 1996, the eastern pier was significantly different from what was permitted. Additionally, the application submitted in 2001 specifically sought authorization to construct the eastern pier and the discharge line, an apparent acknowledgement that those structures were not currently authorized.

Mr. Neikirk continued by saying that during the Commission hearing in 1993 regarding Mr. Miller's original request, several people expressed concern regarding the length of the proposed piers. After a lengthy discussion, the Commission approved Mr. Miller's request with several special conditions. One of those conditions reduced the length of the piers from a total of 270 feet to 260 feet channelward of a proposed bulkhead. Mr. Miller's piers now extend 268 feet and 290 feet channelward of that bulkhead. Therefore, even if Mr. Miller mistakenly thought his 2001 request had been authorized, the eastern pier was ten feet longer and one foot wider than that applied for and boatlifts, which were not even applied for, had been installed in four of the slips. Additionally, the western pier, which was mostly constructed under VMRC #92-1130, was completed after that permit expired, was eight feet longer, had a T-head that was 20 feet longer than authorized and had 18 slips that were approximately 10 feet longer than authorized.

Mr. Neikirk said that in accordance with §28.2-1205(C) of the Virginia Code, the Commission could not issue a permit for this work until Mr. Miller presented to the Commission a plan for sewage treatment or disposal facilities that had been approved by the Health Department. Accordingly, even if staff were persuaded to recommend after-

the-fact approval for the project, they could not do so until Health Department approval had been obtained. Therefore, given Mr. Miller's failure to comply with staff's directives during the extended time since the Notice to Comply was issued, staff was compelled to recommend removal of the pier and restoration of the affected area.

Mr. Niekirk explained that should Mr. Miller obtain Health Department approval prior to this restoration hearing or should the Commission be persuaded to grant after-the-fact approval of the project pending his receipt of Health Department approval, staff would recommend the following conditions:

- The length of the western pier be required to be brought back in compliance with VMRC permit #92-1130
- The eastern pier be reduced to a total length no greater than 260 feet channelward of the bulkhead
- Submittal of an acceptable Marina Management Plan
- The ends of the piers be lighted in accordance with all U.S. Coast Guard requirements

In closing Mr. Neikirk said that staff would recommend the Commission impose a triple permit fee as provided by Code and consider conditional approval on the applicant's agreement to pay a civil charge in lieu of further enforcement action. Staff believed the amount of the civil charge should be determined with the Commission's revised civil charge matrix, based on a major environmental impact and a major degree of deviation or non-compliance associated with the project. The Commission was reminded that Mr. Miller was advised that failure to vacate the unauthorized slips could be considered as separate violations subject to additional civil charges.

James Breeden, Attorney for the applicant, was present and his comments are a part of the verbatim record. He explained that the applicant did not wish to offer any excuses and agreed that he was guilty. He said that the applicant agreed that a civil charge of \$10,000.00, which was in accordance with Section 28.2-1213(b), was appropriate; \$2,500.00 for the applicant's failure to remove the boats was appropriate; and triple permit fees were appropriate. He said also that they proposed the following:

- Remove the 80-foot long "T-Head" at the channelward end of the western pier, thereby reducing the length of the pier to no more than 260 feet,
- Reduce the length of the eastern pier to a total length of 260 feet channelward of the bulkhead, by removing approximately 30 feet of pier,
- Develop an acceptable marina management plan,
- Provide documentation verifying that the Health Department has approved their plan for sewage treatment or disposal facilities at the marina,
- Install lights on the channelward end of the piers that satisfy the requirements of the Coast Guard.

For point of clarification, Commissioner Pruitt stated that the Commission delegated Bob Grabb the authority to issue the notice of compliance in accordance with Section 28.2-1212 of the Code of Virginia.

Associate Member Ballard then asked if it would be appropriate for the Commission to agree with the recommendations of the applicant's attorney to continue the matter. Carl Josephson, Sr., Assistant Attorney General and counsel, stated it was appropriate to make a motion that complied with Mr. Breeden's recommendation.

After careful deliberation, the Commission then voted unanimously to accept Associate Member Ballard's motion to issue an order directing completion of the specified restoration work proffered by Mr. Miller's counsel prior to December 21, 2004. The motion also included the approval of the request for a continuance on this matter until the December meeting and to consider after-the-fact approval of the remainder of the unauthorized work in light of his offer to pay \$12,500.00 in civil charges and triple permit fees in lieu of any further enforcement action. Associate Member Holland seconded the motion. The motion carried, 8-0.

* * * * *

9. **JAMES W. FIRTH, #03-0849.** Formal restoration hearing concerning ongoing unauthorized activities at a former seafood offloading facility located at the terminus of Lawson Road on Bennetts Creek in Poquoson.

Vicky Deberry, court reporter for Mike McQuire was sworn in by the Chairman.

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

Ms. West explained that in 2003, Mr. Michael Jewett submitted an application (VMRC #03-0849) to rehabilitate an old seafood offloading facility located at the end of North Lawson Road. Mr. James and Mrs. Susan Firth of York County owned the facility at the time of the application. Although the deed was transferred to Mr. Jewett in August 2003, staff never received a formal request to transfer the application. Hence it was still in the name of James Firth.

Ms. West continued to explain that in the original application, Mr. Jewett stated that the facility would be used for the mooring of recreational vessels and commercial skiffs, the storage of crab pots, gill nets and other fishing equipment, repair and construction of small boats and canoes, storage of small boats, and would include a small shop for stained glass and other craft work.

Ms. West said that the Commission's staff had not issued a permit for any work at this facility due to several outstanding issues that have yet to be addressed. Nevertheless, Mr.

Jewett had continued construction at the facility in the absence of a permit from this agency and without the appropriate local approvals. He had reconstructed the access pier to the facility, added a 34-foot long by 5-foot wide walkway on the east end of the structure, and sleeved damaged support piles with what appeared to be plastic drums filled with concrete.

Ms. West stated that in response to adjacent property owner notification letters, staff received protest letters from Mr. Michael Maguire and Mr. Jeff Bliemel, City Engineer for the City of Poquoson. Letters were initially received in the spring of 2003. Mr. Maguire submitted additional information regarding his concerns with the project over the next few months. Mr. Maguire stated in his letters that Mr. Jewett had no access to the pier since the associated upland was his property, and not a public landing. Mr. Maguire further stated he had not, and would not grant an easement over his property for access to the facility.

Ms. West explained that Mr. Bliemel initially stated that the City of Poquoson staff believed the structural integrity of the facility was uncertain and unsafe. In follow-up correspondence, Mr. Bliemel outlined the actions the City had taken in an attempt to properly assess the structural integrity of the facility. The City of Poquoson staff also issued a stop-work order. To date, and in the absence of information to the contrary, it was the opinion of the City Engineer that the building was not sound and represented a potential hazard to public health and safety.

Ms. West said that staff questioned whether the intended uses for the facility as outlined in Mr. Jewett's application represented water dependent activities. In addition, staff continued to wait for the Health Department approval. In light of Section 28.2-1205(C) of the Virginia Code which states that "no permit for a marina or boatyard for commercial use shall be granted until the owner or other applicant presents to the Commission a plan for sewage treatment or disposal facilities which had been approved by the State Department of Health."

Ms. West stated that in addition to the unresolved issues associated with the upland property dispute and a lack of proper local approval it was possible that construction of the original facility had never been properly authorized. Had the upland been a designated public landing, Section 62.1-165 states that any person wishing to construct a wharf at or on any county landing must obtain authorization from the circuit court of the locality. Proof of such authorization had not been brought forth.

Ms. West said that Commission staff had issued a Sworn Complaint, Notice to Comply, and Stop Work Order on June 17, 2004. The Notice to Comply described the violation and directed removal of all unauthorized structures and the submission of a written explanation of all unauthorized construction activities that had taken place at the facility. In addition, staff requested information regarding the status of the upland property and whether proper local authorizations had been obtained. All materials were to be

submitted within 30 days of Mr. Jewett's receipt of the letter. The Stop Work Order stated that all activities at the facility should be immediately discontinued until all permits had been obtained. To date, Mr. Jewett had not removed the unauthorized additions to the facility nor had he provided any of the information listed in the Commission's Notice to Comply. He had also continued construction at the facility despite the issuance of the Stop Work Order.

Ms. West explained that the City of Poquoson inspectors had informed Commission staff in September that Mr. Jewett had now installed solar panels at the facility. As a result of his continued activities and refusal to heed staff's directions, a notice directing Mr. Jewett to appear before the Commission for a formal restoration hearing was issued.

Ms. West said that the issues surrounding this application were numerous and complex. The upland property dispute was replete with conflicting deed information, contrary accounts of local history, and personal discord between the parties. It was unknown whether the initial construction of the facility was ever properly authorized. In the opinion of the City Engineer, the structural integrity of the facility was suspect. Local approvals (CBPA, zoning, utility hook-ups, etc.) for a commercial repair facility had not been obtained. It was questionable whether some of the proposed uses for the facility stated in the application were water dependent. Some of the uses, like the stained glass studio, were clearly not water dependent. Necessary accompanying state approvals from the Department of Health had not been obtained. In accordance with §28.2-1205(C) of the Virginia Code, the Commission could not issue a permit for this work until Mr. Jewett presented to the Commission a plan for sewage treatment or disposal facilities that had been approved by the Health Department.

Ms. West explained that the Commission's Notice to Comply, dated June 17, 2004, directed Mr. Jewett to remove the illegal walkway, discontinue all construction activities at the facility, and the submittal of a written account of the circumstances surrounding all construction activities that had taken place so far. These actions were to be completed within 30 days of his receipt of the notice. Mr. Jewett received the notice on June 21, 2004. To date, none of the information requested has been submitted and the walkway was still in place.

Ms. West said that because of Mr. Jewett's failure to comply with staff's directives during the extended time since the Notice to Comply and Stop Work Order were issued, staff was compelled to recommend that the Commission direct Mr. Jewett to IMMEDIATELY CEASE ALL ACTIVITIES AT THE FACILITY until the following issues were resolved—

1. The ownership of the upland property had been decided.
2. Proof that the facility was properly authorized under the Code of Virginia had been provided to VMRC staff.

3. The information requested in the Notice to Comply dated June 17, 2004, had been provided to VMRC staff.
4. All required local permits and authorizations had been obtained.
5. All required state permits and authorizations had been obtained, including this agency and Department of Health.

Ms. West continued by saying that should Mr. Jewett not resolve these issues in a period of time deemed appropriate by the Commission, and given the opinion of the City Engineer for the City of Poquoson that the structure represented a hazard to public safety, staff recommended the Commission consider ordering the removal of the entire structure in conformance with Section 28.2-1210 of the Code of Virginia. Further, in conformance with Section 28.2-1212 of the Code, the Commission may wish to consider requiring a reasonable bond or letter of credit in an amount and with surety and conditions satisfactory to it securing the Commonwealth compliance with the conditions set forth in any Commission restoration order.

Ms. West stated that should Mr. Jewett continue activities at the facility in contradiction to Commission directives, staff recommended that the matter be immediately referred to the Attorney General's Office for the appropriate enforcement action.

Michael Jewett, owner of Watkins Dock in Poquoson, was present and his comments are a part of the verbatim record. Mr. Jewett said that he had not seen the documents that had been provided to the Commission. He said he needed a continuance granted to be able to respond and obtain an attorney. He explained that he had been trying to correspond with the City of Poquoson for two years with no response. He asked for a two-month continuance. Commissioner Pruitt reiterated to Mr. Jewett, if the continuance was granted by the Commission, that all work must stop. Mr. Jewett agreed to stop work.

James Firth, the individual named on the application, was not present.

Associate Member Holland moved to give a 30-day continuance to get a progress report with the stipulation that all work must cease. The motion failed for lack of second.

Associate Member Cowart asked if the name of the applicant was correct. Tony Watkinson, Deputy Chief, Habitat Management explained that the purchase was finalized after the application was made, but no formal request to change the name had been received by staff.

Mike Maguire, adjacent property owner, was present and desired to comment. Commissioner Pruitt explained that if the Commission granted the continuance no further testimony would be taken at this hearing.

Associate Member Jones moved to approve a 30-day continuance until the November 23rd Commission meeting; stipulating that all work be stopped and that if Mr. Jewett did not appear after the 30 days with an attorney, the Commission would go ahead with the hearing at that time. Associate Member Cowart seconded the motion. The motion carried, 7-1. Associate Member Garrison voted No.

Mike Maguire asked the Commissioner if he could submit written comments. Commissioner Pruitt responded, yes, and informed him that he would be allowed to speak at the hearing in November.

Commissioner Pruitt broke for lunch after the James Firth case was heard at approximately 12 noon. Associate Member Ballard reconvened the meeting after lunch in Commissioner Pruitt’s absence at approximately 1:17 p.m.

- 10. **CONLEY PROPERTIES, LLC, #04-0732**, requests authorization to construct a 10-slip community pier, which will extend 66 feet into Carpenters Cove of Mulberry Creek and include a 157-foot long T-head, four (4) finger piers, two (2) uncovered boatlifts and ten (10) associated mooring piles in the Town of Morattico, Lancaster County. The adjacent property owners protest the project. Tabled from the September 28, 2004, Commission meeting.

Jay Woodward, Environmental Engineer, Sr., gave the presentation with slides.

Commissioner Pruitt left the room and Associate Member Ballard assumed the duties of chairman.

Mr. Woodward explained that the project was located approximately 300 feet across Carpenters cove from the former RCV Seafood property, which Mr. Conley recently sold. That property was currently being developed as Sloop Point, an 18-unit, residential condominium complex for which the Commission approved maintenance dredging, a boat ramp, bulkheading, and piers for 18 wet slips at their February 25, 2003 meeting (VMRC #02-2046). The Commission’s approval included a time-of-year restriction on the dredging to minimize impacts to a commercial crab shedding facility across the cove. The current proposal was intended to provide slips for six individuals with boats ranging from 16 to 25 feet in length that were displaced by the Sloop Point development. Between 8 and 12 commercial and recreational vessels are currently moored in the cove, without the proposed 18 wet slips at Sloop Point being occupied. The proposed community pier will be located immediately adjacent to a commercial crab shedding facility, owned by Roger and David Parks.

Mr. Woodward also explained that the protestants objected to the project, because they believed it would adversely effect their existing shedding operation by increasing the number of boats in the small cove, thereby degrading water quality from boat traffic, fuel spills, cleansers, etc. They also own a licensed peeler trap, which is located very close to the proposed pier. They feel this trap would also be impacted. The Parks had also expressed concerns with a proposed gravel road leading to the pier that would impact approximately 900 square feet of tidal wetlands. The Lancaster County Wetlands Board approved that portion of the project, however, contingent upon adequate compensation, at their July 8, 2004, meeting.

Mr. Woodward stated that the Virginia Institute of Marine Science had indicated that increasing the number of boats in the cove could result in adverse impacts to the marine environment via the discharge of pollutants and shoreline erosion caused by boat wakes. VIMS has recommended several measures to minimize the impacts of the proposal, such as reducing the size of the pier and slips, not allowing overnight occupancy, or permitting in-the-water maintenance of the boats. The Department of Health has approved the project, with a requirement for a commercial privy, which would also act as a sewage dump station, until the applicant can secure a pump-out agreement with the development across the cove when that facility is constructed. The project is in approved shellfish growing waters, but the Health Department advises that a change in classification will not be required. The project will also impact an active oyster planting ground lease, but the leaseholder has not objected to the proposal.

Mr. Woodward also said that the Department of Environmental Quality is not requiring a Virginia Water Protection Permit because they believe the water quality impacts will be minimal and temporary in nature. The Department of Conservation and Recreation indicates that, while several natural heritage resources (e.g. bald eagles) are in the project area, they do not anticipate adverse impacts due to the scope of the activity and distance from the resource. The Department of Game and Inland Fisheries noted the presence of two bald eagle nests approximately one mile from the project, but they too did not anticipate significant adverse impacts since the project was located outside of the primary and secondary management areas for both nests.

Mr. Woodward stated again that the local wetlands board had approved the project at their July meeting, conditioned upon there being compensation for the wetlands to be impacted by the road leading to the pier.

Mr. Woodward explained that while staff appreciated the efforts of the applicant to offer wet slips, ostensibly at no charge to those persons who were displaced by the sale of the property across the cove, the proposal would lead to a net increase of six (6) boats in State waters and over State-owned bottom once the condo slips were occupied. In addition, the proposed slips would be in a close proximity to the existing crab shedding facility and peeler trap. Because of the VIMS comments and the objections raised by the adjacent property owners, who had a vested interest in protecting water quality in the cove, staff

could not support the additional slips for the applicant's non-riparian neighbors. Since the applicant currently had three (3) vessels and has stated his intent to purchase a fourth, staff believed a private pier with four (4) slips to serve his personal needs was appropriate.

Accordingly, Mr. Woodward said that staff recommended denial of the community pier as proposed and recommended approval of a private, non-commercial use pier with a maximum of four (4) slips at a location which minimized impacts to both the shedding facility and the peeler trap in the cove.

James Breeden, attorney for Mr. Conley, was present and his comments are a part of the verbatim record. He asked that his witnesses for this matter be sworn in.

Mrs. Karla Havens, agent for the applicant, was present and her comments are a part of the verbatim record. Mrs. Haven said she wanted to thank staff for a very thorough presentation. She said they had received approval from the Wetlands Board and the Virginia Institute of Marine Science and the Corps had issued an RP19 two months ago.

George Shelton, resident of the project area, was present and his comments are a part of the verbatim record. Mr. Breeden asked Mr. Shelton to give some personal history and also for the locality. Mr. Shelton explained that this was the only dockage in the area they can use. He said it was a deadend cove with minimal traffic. He explained that there were no large boats, such as a yachts, only little boats, a Seahawk and sailboat. He said there was the applicant's little boat as well. He explained further that there was no night traffic.

Gerry McGee, owner of two properties in the area, was present and his comments are a part of the verbatim record. Mr. McGee explained that he had moored his sailboat at the RCV Seafood Processing location for approximately 20 years. He said that his family had continued to use the boat since 1967. He said that being allowed to tie up there was a service Mr. Conley provided to the community at no cost. He said that if he could not tie his boat up there, he would have to get rid of it.

Commissioner Pruitt returned to the meeting and resumed his duties as chair.

Associate Member Ballard asked Mr. Breeden if there were watermen in the area now. Mr. Breeden responded, not any more, only those on the downstream side. Associate Member McLeskey asked if there would be any overnight mooring or living on the boats. Mr. Breeden responded no and the rules do not allow it. Mr. Breeden put into evidence a picture of the project area. Commissioner Pruitt explained that the picture would have to be held in the Commission records for 30 days.

Roger Parks, crab shedding operator, was present and his comments are a part of the verbatim record. Mr. Parks provided the Commission with some pictures. Commissioner

Pruitt asked what Mr. Parks' main concern was about the project. Mr. Parks explained that he did not have enough water for his boat, that he was only 26 feet from the last boat slip. He said the intake pipe was right beside where he ties up his boat. He further explained that at low tide there was not enough water for his own boat. He said he was sandwiched between 36 boat slips and it was a muddy mess.

David Parks, crab shedding operator, was present and his comments are a part of the verbatim record. Mr. Parks said that this area or cove was not used for boats during a hurricane as indicated. He said they either went up to Junior Barrick's or the Lancaster boat ramp. He said he works with his father. He said there are two fishing party boats and one gillnetter using this area. He said that the crabbers no longer offload at RCV. He explained that gasoline would be necessary to operate boats even if it was only a 5-gallon can.

Associate Member Ballard explained that he was certainly sympathized with the watermen being located in the middle of other boat moorings. He said that a request for 8 slips for small boats without any marina amenities seemed reasonable; therefore, he made the motion to approve 8 slips. Associate Member Garrison seconded the motion. The motion carried, 7-0-1. Associate Member Cowart was absent from the room during the motion and voting.

Permit fee.....\$100.00

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- 11. **TIMOTHY MCCULLOUGH, ET AL, #04-1598**, requests authorization to dredge a 400-foot long by 35-foot wide access channel, a 70-foot by 70-foot turning basin, and construct two (2) low-water bulkheads, 120-foot long and 196-foot long, adjacent to property situated along The Thorofare in York County.

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

Ms. West explained that the applicants were located on a cove situated off The Thorofare in York County. The applicants would like to dredge an access channel and turn-around basin adjacent to their properties. The channel was proposed to connect to the mooring basin at the adjacent Dandy Development Company. The Commission, during the September 2004 meeting, authorized dredging at this facility. Mr. McCullough, who also owns the Dandy Development Company, intended to utilize the same upland disposal area. There appeared to be enough capacity to accommodate the dredged materials from both projects.

Ms. West said that the proposed channels were to be 35 feet wide and to be dredged to -6 feet below mean low water. Existing depths within the area are reported to be -2.5 feet

below mean low water. Staff was unable to find any record of authorized dredging within the cove in the past, however, given the unnatural shape of the cove and the surrounding upland, it appeared that the area had been previously altered.

Ms. West went on to say that the opening into the existing cove was only 35 feet wide with wetlands vegetation on each side. Since an adequate protective buffer could not be maintained between the dredge cut and the existing marsh, the applicant proposed to install low-profile bulkheads along each side of the dredge cut at the cove entrance. The bulkheads would serve as marsh toe protection and were designed to prevent the vegetated wetlands from slumping into the dredge cut.

Ms. West stated that staff believed that portions of the project appeared to be excessive to accommodate the apparent needs of the applicants. Specifically, the overall 35-foot width of the proposed access channel appeared unwarranted for three vessels. A 20-foot to 25-foot wide channel should be adequate to allow passage of Mr. McCullough's 43-foot vessel, which had a beam of 14.5 feet and a 4.5-foot draft. Further, a 35-foot wide channel dredged to a depth of -6 feet below mean low water for access to Mr. Volz property appeared disproportionate for accommodating his 22-foot vessel with a 1.5-foot draft. In fact, given that the existing depths within the cove were reported to be -2.5 feet below mean low water, it was questionable whether a channel to Mr. Volz property was even necessary.

Ms. West explained that in response to the concerns of staff and VIMS, the applicant responded that the width of the channel was necessary to accommodate a 30-foot wide barge. In the opinion of the contractor, this size barge was the minimum necessary to provide a stable platform for clamshell dredging operations.

Ms. West stated that the Virginia Institute of Marine Science had stated that the 35-foot wide access channel to Mr. Volz property and the dimensions of the turning basin appeared to be excessive. VIMS noted that lengthening the existing pier and reorienting the boathouse would reduce the amount of dredging required.

Ms. West said that the applicants did not address VIMS' comment regarding the size of the turning basin adjacent to Mr. McCullough's pier. Given the size of his vessel, however, it appeared the turning basin dimensions were not unreasonable.

Ms. West said that the York County Wetlands Board considered the application at their September 9, 2004, meeting and approved the installation of the low-profile bulkheads as proposed.

Ms. West said that because of the limited options available to the applicant, staff was in support of the low-profile bulkheads designed to serve as marsh toe protection at the entrance to the cove. However, it appeared that the channel was over-designed for the demonstrated needs of the applicants. It was too wide and portions of the channel were

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too deep. Staff, therefore, recommended denial of the project as proposed. However, should the Commission choose to approve the dredging project in some form at this location, staff recommended a reduction in the overall design. The channel width should be reduced to a maximum of 25 feet and that depth of the channel extending to Mr. Volz's property should be reduced to no greater than -3 feet below mean low water. Further, staff recommended a royalty in the amount of \$0.45 per cubic yard for the dredging and submission of a post-dredge bathymetric survey.

Mr. Dennes H. Dietrich, agent for the applicants was sworn in and his comments are a part of the verbatim record. Mr. Dietrich said that the neither of the applicants was present. He explained that he needed 30 feet for barge stability with the equipment excavator onboard, but 35 feet was necessary to maneuver. He said Mr. Volz could accommodate his need for dockage at the marina, but should the marina be sold Mr. Volz would not have dockage for his boat. He agreed that they could reduce the channel to 30' wide with 3-foot depth and this could be sufficient. He said that the recommendation by staff to use a hydraulic dredge would not work as 2/3 of the dredged material would be water and he was not experienced with hydraulic dredging. He explained that it would be better for the environment to dredge with a bucket.

Associate Member Cowart asked if the bulkheads would protect the wetlands and both Ms. West and Mr. Dietrich said that the bulkhead design should protect the wetlands.

No one else was present, pro or con, to comment.

Associate Member Ballard asked for a motion from the board.

After many questions and further discussion, Associate Member Garrison moved to approve the project in modified form. Specially, Mr. Garrison moved to authorize a 200-foot long by 35-foot wide access channel and a 70-foot by 70-foot turning basin to maximum depths of -6 feet below mean low water and the construction of a 120-foot long and 196-foot long low profile bulkhead to serve Mr. McCullough's property. Mr. Garrison, also, moved to authorize a 200-foot long by 30-foot wide access channel to maximum depths of -3 feet below mean low water beginning at the McCullough turning basin and terminating adjacent to Mr. Volz's pier and boathouse. Associate Member Ballard asked if the royalty fees recommended by staff were acceptable. Associate Member Garrison responded, yes. The motion carried, 7-0. Commissioner Pruitt was still absent from the meeting.

Royalty Fee (1,653.69 cu. yds. @ \$0.45/cu. yd.).....	\$744.16
Permit Fee.....	\$100.00
Total Fees.....	\$844.16

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- 12. SOMERSET CHESAPEAKE WATCH, LLC, #03-1423**, requests authorization to construct three community piers with finger piers and mooring piles to create 28 wetslips adjacent to their condominium development situated along Hunton Creek in Middlesex County. The project is protested by several nearby property owners.

Chip Neikirk, Environmental Engineer, Sr., gave the presentation with slides.

Commissioner Pruitt returned to the meeting and assumed Chair responsibilities.

Mr. Neikirk explained that the Chesapeake Watch development was a 28-unit condominium development currently being constructed along Hunton Creek, a tributary of the Rappahannock River in Middlesex County. The developer was seeking authorization to construct three community piers with 28 wetslips with the intent of providing each condominium owner with their own wetslip. The 21.2-acre development included a small peninsula of land with approximately 1300 linear feet of water frontage along the western shore of Hunton Creek. The condominiums were concentrated on the peninsula, at the top a steep 15-foot high bank.

Mr. Neikirk said that Hunton Creek was a relatively small creek with mean low water depths averaging between four (4) and five (5) feet. The mouth of the creek was approximately 50 feet wide and was protected with timber and stone channel jetties. Frequent maintenance dredging was required to keep the area at the mouth of the creek open. The creek is approximately 200 feet wide at the center of the project and narrower along both sides of the peninsula. The current land use along the shoreline of Hunton Creek is primarily agricultural and single-family residential with the eastern shoreline currently more heavily developed than the western shoreline. In fact, a review of the 2002 aerial photography reveals that there are approximately 34 piers and boathouses along the 4200 feet of shoreline along the eastern side of the creek and only about eight piers and boathouses along the western side of the creek.

Mr. Neikirk explained that the applicant sought authorization to install three (3) T-head piers extending a maximum of approximately 70 feet channelward of mean low water. Piers "A" and "B" include finger piers and mooring piles to create nine (9) slips each and pier "C" was proposed to provide 10 slips. The proposed piers and T-heads were eight (8) feet wide.

Mr. Neikirk said that several residents in the vicinity have protested the project. The majority of those expressing opposition to the project resided in the River Bank Acres development, which is adjacent and immediately north of the Chesapeake Watch property. They are primarily concerned with the encroachment of Pier "A" on the cove separating their properties and the close proximity of Pier "A" to their community boat ramp facility. They also question the equity of providing slips for off-water lots.

Mr. Neikirk stated that the Virginia Institute of Marine Science stated that the individual and cumulative impacts of the project were difficult to quantify and were directly related to the care and concern exercised by the boat owners and operators. They further stated that the potential for increased pollution and shoreline erosion would likely increase with the density of boats using the pier. The Health Department informed staff that the applicant had submitted an approved plan for sanitary facilities and that they had no objection to the project. They also stated that although the project involved approved shellfish growing waters, the proposed activities should not require a seasonal closure provided use was restricted to property owners and bona fide guests and there was no overnight occupancy aboard boats moored thereto. They further stated that if the uses changed, a seasonal closure might be necessary in the future. The Department of Environmental Quality stated that a water protection permit would not be required for this project, and the Department of Conservation and Recreation did not anticipate any adverse impacts on natural heritage resources or threatened and endangered species.

Mr. Neikirk explained that while there were privately leased shellfish grounds within Hunton Creek; the project would not directly encroach on any leases. The leaseholders were notified of the project and nine had objected to the proposal.

Mr. Neikirk said that the siting criteria checklist in the Commission's "Criteria for the Siting of Marinas or Community Facilities for Boat Mooring" (VR 450-01-0047) identified three criteria associated with this facility as undesirable. Specifically, the salinity was suitable for shellfish growth, the water quality was high as evidenced by the approved designation for shellfish harvesting and the creek was presently used for other potentially conflicting uses such as, swimming, crabbing, and fishing. Although staff was unaware of any data regarding the creek's flushing rate, the restricted and continually shoaling mouth of the creek suggested flushing could be inadequate to maintain water quality within the creek. Finally, the regulation stated 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. Neikirk further said that the high-density waterfront developments raise difficult resource allocation questions. These questions become increasingly complex when a limited length of shoreline is shared in common by various owners. While staff agree that these owners have some rights associated with their commonly owned shoreline, those rights probably only include some limited common right to access the water. Staff does not believe that this common interest in a development automatically includes a right to construct a pier or moor a vessel thereto. This opinion is clearly expressed in the Commission's Marina Siting Criteria. As a result, staff is often left with trying to determine what constitutes "reasonable" access for the owners of such developments.

Mr. Neikirk said further complicating the issue is our inability to predict with any certainty, the adverse impacts that could result from the increased boating activity. At

this time, the multitude of physical and use factors involved make predicting the carrying capacity of the creek virtually impossible. In cases where there is a potential for significant environmental impacts, and where the public and private benefits are ill defined, staff believes it prudent to proceed with caution. For high density developments, staff typically recommends that the number of slips be limited to the number which could have been constructed had the property been developed as single family lots. Under current zoning practices in Middlesex County approximately nine single-family lots could have been located along the shoreline in this development. The current density of piers along the eastern side of the creek is approximately 1 pier for every 125 linear feet of shoreline. If this density is used as a guide for this development, approximately 10 piers could be built along the development's 1300 feet of shoreline.

Accordingly, Mr. Neikirk said that since there was a potential for adverse environmental impacts associated with the proposal and those impacts were difficult to quantify, staff recommended the Commission proceed cautiously when authorizing additional slips along the creek. Although the mouth of the creek is restricted and flushing may be limited, the creek has maintained sufficient water quality to be designated as approved waters for the direct marketing of shellfish with the current concentration of boats. Staff is reluctant, however, to recommend approval for facilities that would increase the concentration of boats beyond the current density of boats along the creek. Accordingly, staff recommended that a single pier be allowed with a total of 10 wetslips. Furthermore, to reduce encroachment on adjoining property owners, staff recommended that the pier be centrally located on the waterfront.

Jim Graves, partner, was sworn in and his comments are a part of the verbatim record. Mr. Graves explained that this was a high-end development and they envisioned to be primarily second homes for part-time occupancy, costing \$400,000 to \$600,000. He explained that for this price, the home buyer expected water access. He said that the 10 slips recommended by staff did not meet their needs. He said that they would agree to eliminate Pier C, if they had to reduce slips.

Robert Cook, property owner on the east side of the creek, was sworn in and his comments are a part of the verbatim record. Mr. Cook said that if the applicants put piers in as proposed, they would funnel all traffic to the east side of the creek. He said the mooring piles in the middle of the creek were unprotected and dangerous. He said the 70-foot pier would force traffic on the other side and interfere with navigation.

Russ Collins, President of the Riverbank Acres Homeowners Association, was sworn in and his comments are a part of the verbatim record. Mr. Collins said they too had concerns with the piers. He explained that the location of Dock A was not clear as to where it was proposed to go and they felt it could interfere with their pier and boat landing area. He further explained that the project would interfere with their rights to access water for future residents of the interior. And finally he said that there were 43 boats moored there presently and if you add 28 more that would mean 71 boats in the

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creek, which would impact the summer activities at the mouth and inside the creek. He said their community had zero impact and then pointed out their location on the slide.

Jim Graves in his rebuttal explained that it should not be expected that all 28 boats would be there at all times as these were 2nd residences and there were other docking facilities in the area. He said typically there would be small skiffs. He said that they also planned to offer educational programs for residents on the safe operation of boats in the creek. In response to Mr. McLeskey’s questions regarding the size of boats he expected, Mr.Graves responded he did not believe there would be any larger than 30 feet. He further explained that the area was not good for larger boats because of the prevailing water depths.

After further discussion, Associate Member Ballard moved to approve the 10 piers recommended by staff. Associate Member Jones seconded the motion. Associate Member Garrison expressed concern with the motion for allowing any more as it would be detrimental to the creek. Associate Member Ballard said he would add to the motion that there be 10 slips on a centrally located pier. Associate Member Jones agreed with the addition. Associate Member McLeskey asked if the Commission could restrict the number of boats. Bob Grabb, Chief, Habitat Management, said the Commission could only authorize the structures. Carl Josephson, Sr., Assistant Attorney General, stated that the Commission can restrict use of the piers and any violation would be a Class I Misdemeanor with a penalty of \$25,000 per day. Associate Member Cowart said that he supported the motion by Mr. Ballard. He further explained that Hunting Creek was a small creek with limited access and he agreed with Mr. Ballard that the inland property owners did not have rights like the riparian owners. The motion carried, 8-0.

Permit Fee.....\$100.00

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- 13. TOWN OF CAPE CHARLES, #04-1839**, requests authorization to construct a 407-foot long by 10-foot wide public fishing pier with a 20-foot by 20-foot T-head and a 40-foot long by 10-foot wide roof structure for shade, over the mid-point of the proposed pier, along Cape Charles Harbor, south of the harbor jetty in the Town of Cape Charles, Northampton County. The existing timber walkway along the jetty will also be repaired.

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

Mr. Badger explained that the proposed project was located south of the jetty near the mouth of the Cape Charles Harbor. There was an existing walkway along a portion of the rock jetty from which people currently fished. The proposed pier would be 100 feet north of the Federal Navigation Channel leading into Cape Charles Harbor.

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According to the Commission’s definition of water dependency, in order for a structure to be considered water dependent, it must be necessary for that the structure and the associated activity to be located over the water. Using these criteria, staff concluded that the construction of the public fishing pier was clearly water dependent. The 40-foot long by 10-foot wide roof structure over the mid-point of the proposed pier, however, was not water dependent and could be constructed on the adjacent upland.

Mr. Badger said that the United States Coast Guard was requiring that the pier and associated structure not obstruct the line of visibility to the Cape Charles City Range B range line and that the pier lighting be shielded so that it did not shine or cast glare into the pilothouse of the vessels transiting the federal navigation channel.

Mr. Badger stated that the Virginia Institute of Marine Science (VIMS) indicated that the individual and cumulative adverse environmental impacts resulting from this activity would be minimal even though a portion of the project may result in the shading of patches of submerged aquatic vegetation (SAV). The Department of Environmental Quality, the Department of Conservation and Recreation, the Department of Game and Inland Fisheries and the Health Department all found the project to be acceptable. The Cape Charles Wetlands Board indicated that the project qualified for exemption from the Wetlands Ordinance as a governmental activity on Town property.

Mr. Badger reiterated that staff believed the proposed roof structure failed the Commission’s test of water dependency. As an alternative, staff recommended that the roofed structure be relocated to the intersection of the existing timber walkway with the jetty and proposed pier. Furthermore, since the U. S. Coast Guard required that the pier and associated structure not obstruct the line of visibility of the Cape Charles City Range B range line, staff recommended the T-head be moved approximately fifty (50) feet to the east to clear the line of visibility, and that the pier lighting be shielded so that it did not shine or cast glare into the pilothouse of any vessels transiting the federal navigation channel.

Frank Bradley, representative for the Town of Cape Charles, was sworn in and his comments are a part of the verbatim record. Mr. Bradley explained that they had no problem with moving back the T-head and recognized that the roof was not water dependent. He further explained that they were only trying to provide an enhancement by providing weather protection for the fishermen who would use the pier.

Associate Member Holland moved to approve the project according to the staff’s recommendations. Associate Member Garrison seconded the motion. The motion carried, 8-0.

Permit Fee.....\$100.00

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14. **ALICE PALIVODA, #04-1305**, requests authorization to install a 12-foot wide by 60-foot long concrete boat ramp, extending 30 feet channelward of mean low water, for the launching and retrieval of watercraft adjacent to her property along Williams Creek, a tributary of the Upper Machodoc Creek, in King George County. The trustees on the behalf of the estate for the adjacent property were protesting the project.

Bob Grabb, Chief, Habitat Management, announced that the since protestants had withdrawn their objections the matter could be handled administratively. No action by the full Commission was necessary.

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15. **DEPARTMENT OF GAME AND INLAND FISHERIES, #04-1852**, requests authorization to repair a timber jetty and to dredge 2,505 cubic yards of subaqueous material from a boat basin and a proposed “sand trap” adjacent to the Wake Public Landing along Mill Creek in Middlesex County.

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

Mr. Neikirk explained that the Wake Public Landing was located at the end of State Route 627, near the confluence of Mill Creek with the Rappahannock River, approximately two miles downriver of the Norris Bridge in Middlesex County. The proposed dredging and jetty repairs were designed to restore access to the public boat ramp facility that had experienced significant shoaling in recent years. The boat ramp was currently closed and in an unusable condition.

Mr. Neikirk stated that approximately 1,780 cubic yards of sandy material was proposed to be dredged from the actual ramp and an area channelward of the ramp measuring approximately 80 feet wide by 200 feet long. The dredging was designed to provide maximum depths of minus five (-5) feet at mean low water and would connect to the minus four (-4) foot mean low water contour. They also proposed to repair and replace the 130-foot long timber jetty with steel sheet piles. Finally, the department proposed to dredge 725 cubic yards of material from a 20-foot by 100-foot area immediately east of the jetty to create a 5-foot deep “sand trap.” The sand trap would originate approximately eight (8) feet channelward of mean low water and only connect to the minus two (-2) foot mean low water contour. The area channelward of the ramp was dredged in 1981; however, the sand trap area has never been previously dredged.

Mr. Neikirk said that there were no protests; however, a nearby oyster ground leaseholder had raised some concerns regarding the potential impact of sedimentation from the dredging on his nearby oyster aquaculture operation. Mr. Doug McMinn, of Chesapeake

Bay Oyster Company, had leased ground within approximately 50 feet of the channelward end of the proposed dredge area. He had requested that the dredging not be conducted during the July and August time period to minimize impacts to his oysters. He believed the proposed turbidity curtain should be sufficient to minimize sedimentation and impacts throughout the remainder of the year. He added that he would like to be notified in advance of the dredging so he could monitor the situation. There are other privately leased shellfish grounds in the vicinity of the project. The leaseholders were notified of the project and had not objected to the proposal.

Mr. Neikirk stated that the Virginia Institute of Marine Science questioned the need for the proposed sand trap and believed repairs to the jetty should minimize the movement of sand into the boat ramp area. The Health Department found the project acceptable and the Department of Conservation and Recreation did not anticipate any adverse impacts on natural heritage resources or threatened and endangered species.

Mr. Neikirk continued by saying that although the proposed sand trap area was relatively small, it was approximately three (3) feet deeper than the existing adjacent contours. The Commission's Subaqueous Guidelines stated, "Dredging for small craft channels should be no more than one foot deeper than adjacent natural water bodies and only as wide as necessary to safely navigate in order to avoid creating water circulation and flushing problems." Additionally, staff was concerned that dredging an area to a depth of minus five (-5) feet only eight feet channelward of a publicly owned beach area could create a significant public safety hazard.

Mr. Neikirk explained that staff had asked the applicant if any studies had been conducted on the littoral drift of sand in the vicinity of the ramp that would support the proposed sand trap. Mr. Brawley of Landmark Design Group said that no studies had been conducted. They merely thought that the sand trap would reduce the dredging frequency.

Mr. Neikirk said that the impacts associated with the repair of the jetty and the dredging of the area channelward of the boat ramp should be minimal provided care is taken to minimize sedimentation on nearby shellfish resources. Staff believes there are potentially significant adverse environmental impacts associated with the proposed sand trap and are very concerned that the dredged hole could become a safety hazard for unsuspecting beach goers. Staff also questioned the need for the sand trap since maintenance dredging had not been required since 1981. The existing jetty is very deteriorated and staff believes that the proposed jetty repairs will address the movement of sand westward into the boat ramp area.

Accordingly, Mr. Neikirk said that staff recommended approval of the jetty repairs and the dredging of the boat ramp and the area channelward of the boat ramp. Staff recommended denial; however, of the dredging to create a sand trap. Staff, also, recommended that no dredging be allowed during July and August, that a turbidity curtain be required to be deployed during all dredging activities and that the applicant be required

to notify Mr. McMinn a minimum of 15 days prior to the commencement of any dredging operations.

Frank Bradley, representative for the Department of Game and Inland Fisheries, was present and his comments are a part of the verbatim record. He offered a picture of the project for Commission review. Furthermore, he said they plan to provide additional sand storage and that the area will be marked and sloped. He said they felt the sand trap was necessary for the project. He said they had not dredged there for sometime and they had to dredge the area immediately around the boat ramp annually.

Associate Member Ballard asked if the sand trap could be built at a later time, because he did not want it done unless it was really necessary. Mr. Bradley said that it could, but they were trying to use state funds wisely.

Commissioner Pruitt asked if anyone was present in opposition to the project. No one in opposition was present.

Associate Member Garrison moved to approve the project, but stipulated that the permittee be attentive to safety while the dredging was being done. Associate Member McLeskey seconded the motion. The motion carried, 7-0-1. Associate Member Jones stated that for the record she wanted it noted she was not present during this presentation.

Commissioner Pruitt announced a brief recess at 2:50 p.m. for 7 minutes. The Commission meeting was reconvened by 3:03 p.m.

Associate Member McLeskey left the meeting for the rest of the day at this point.

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16. UPDATE STATUS REPORT on Rudee Inlet weir construction by City personnel.

Phill Rhoehrs, representing the City of Virginia Beach, was present and his comments are a part of the verbatim record. Mr. Rhoehrs provided hands outs and gave a power point presentation. He presented a chronological progress list. In response to Associate Member Garrison's questions about the 120-day delay, Mr. Rhoehrs explained that all permits are secured prior to bid advertisement and then there is a 4-6 week time period for the contractor to secure bonds and to execute the contract. He said there was a bust bid, so that caused a 30-day delay and they did not readvertise. Associate Member Garrison asked about the delay securing the steel for the project. Mr. Rhoehrs explained that the steel was obtained from Germany, which was delayed. Associate Member Garrison asked Mr. Rhoehrs if they would be done by the May 2005 deadline. Mr. Rhoehrs responded, yes.

Associate Member McLeskey asked counsel if he could participate in the discussion. Carl Josephson, Sr., Assistant Attorney General and counsel for VMRC, responded that he could participate if it was in the best interest of the community. Mr. McLeskey said he would like the Commission to hear from Jeff Gordon. And he asked Mr. Roehrs who made the decisions for when the dredging was to start. Mr. Roehrs responded it was the Superintendent of the Dredging Operations.

Jeff Gordon, resident and representative for the Croatan Beach Erosion Group, was present and his comments are a part of the verbatim record. He reported that the south side weir and jetty, which were supposed to be started prior to the north side work because of the danger to the area, had not been done. He said he spoke with the contractor, Waterfront Marine and their time frame was 1 week to build and to install sheet piling would take about 1½-weeks. He said he was concerned that if the trestle material were not on site the contractor would move the staging to their North Carolina site. He further explained that time had been lost because of the delay on the dredging part of the project and the contractor working simultaneously on a golf course in Norfolk. He said the contractor was not concentrating on getting the work done and there was high risk to properties in the area if they did not get moving. He presented pictures of the dredge.

Commissioner Pruitt returned to the meeting and Associate Member Ballard briefed him on what had transpired during this absence.

Associate Member Garrison stated that the project must be completed by the deadline in May 2005. No further action was taken.

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17. PUBLIC COMMENTS:

Commissioner Pruitt announced that Walter Cole Burroughs, Sr. passed away the past Saturday and asked everyone for a moment of silence in Mr. Burroughs' honor.

Tom Powers, a member of the Finfish and Crab Management Advisory Committees, was present and his comments are a part of the verbatim record. Mr. Powers explained that he was requesting that the Commission consider allotting funds from the Recreational Fisheries License Fund for the Artificial Reef Program to investigate with a diver the possible removal of Rogue Rock near the bay bridge tunnel. He explained that recently a vessel went aground on this rock and the prop shaft was damaged. He said there had been talk about marking it with a buoy in the past but the liability, if the buoy was not maintained, was seen as a problem. He said this had been a problem for a long time and, if it were left there, it would continue to be a problem, possibly causing a fatality. He said he thought the Commission would have to approve the expenditure. He said the cost

of the diver would be approximately \$7,000 and the removal of the rock would cost under \$10,000.00.

Commissioner Pruitt explained that he thought that VDOT would be responsible for this situation.

Associate Member Garrison suggested that VMRC Law Enforcement personnel should inform whoever would be responsible at VDOT in order to follow up on Mr. Powers' suggestion. No further action was taken.

Douglas F. Jenkins, Sr., President of the Twin River Watermen's Association, was present and his comments are a part of the verbatim record. Mr. Jenkins expressed his concern with the large number of rockfish in the rivers that were eating other species of fish and crabs. He suggested that the Commission needed to request a larger allotment from the overall coastal quota. He further explained that the Commission was responsible for taking some sort of action whether it was to notify the Governor or someone else. No further action was taken.

Charlie Kerns, Jr. and Donna Hautz (plus another unknown individual) were present to express their concerns over the approval of a permit (#04-0725), which they opposed.

Bob Grabb, Chief, Habitat Management, explained to the Commission that they were concerned about a proposed private, non-commercial pier which staff did not feel interfered with navigation and were prepared to issue a No Permit Necessary Letter to the applicants, Levis and Wheeler.

Commissioner Pruitt suggested that all three individuals meet with Carl Josephson, MRC counsel. They did so immediately following this discussion. No further action was taken.

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Commissioner Pruitt suggested that since many people were in attendance for the Pound Net Siting and Striped Bass Information Hearing that they be heard first and finish with the rest of the fisheries items after those items are heard.

The following items are in chronological order in accordance with the agenda:

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- 18. PUBLIC HEARING:** a) consideration of emergency amendments to the Black Sea Bass regulation to adjust bycatch trip limits for 2004, b) consideration of amendments to the Black Sea Bass regulation for the 2005 fishing year.

Jack Travelstead, Chief, Fisheries Management, gave the presentation and his comments are a part of the verbatim record. Mr. Travelstead said that the staff was requesting that the Emergency Regulation approved by the Commission last month be continued for 2004 and that a Public Hearing be advertised for the following changes suggested by the industry for the 2005 fishing year.

1. Raise the directed/bycatch quotas. The correct figures for this are: Directed Fishery 7,298 pounds increase in quota and 1,405 pounds increase in quota for the bycatch fishery.
2. Increase the directed fishery by dividing the total pounds increase by the number of shares equally among the 46 boats. This would result in more poundage for those vessels that reported less catch. Staff did not believe this option was beneficial and there was need for additional industry comment.
3. Increase the bycatch fishery trip limit to 10% of the weight of other fish on board the vessel.

He explained that telephone calls indicated concern about the 10% and that it would allow more to be caught than the directed fishery resulting in more dead fish being thrown back by the fishermen. He said that the photos given to Commissioner Pruitt for the board to review, which were provided by the industry, show the problem and staff believed the 10% bycatch allowance would be of help.

4. Almost unanimous support for transfer of quota in directed fishery. The state-by-state quota system would be continued for 3 years and because of this staff agreed with the quota transfers. Staff recommended that this occur on a permanent or leasing basis. Staff also recommended that a cap on the amount of quota held by one person be set at 20%.
5. Vessel participation verification. The vessel trip report is the least accurate as the vessel trip report was an estimate made by the captain. The industry recommended verifying the vessel trip reports by the dealer reports. This would need to be done by December 1. If the vessel trip report cannot be documented and verified then the higher amount of the two reports would be used.

Carl Josephson, Sr., Assistant Attorney General, questioned if all the above had been advertised by notice. Mr. Travelstead confirmed that it had been done.

After some further discussion, the public hearing was opened.

James Ruhl, fisherman, was present and his comments are a part of the verbatim record. Mr. Ruhl said that the bycatch needed to be redefined by VMRC and should be associated

with a targeted species. He further explained that the directed quotas could not be allowed for bycatch vessel as there is a rule prohibiting it from being done.

Associate Member Bowden moved to make the emergency regulation amendments permanent for the rest of 2004 and to advertise the public hearing for the restrictions for the 2005 Black Sea Bass Season. He further added that the medical exception be added to the bycatch quota if not used by November 1 of any year. Associate Member Holland seconded the motion. The motion carried, 7-0.

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19. EXCEPTIONS TO LIMITED ENTRY: review of draft regulations, recommendations of the Finfish Management Advisory Committee; request for public hearing.

Commissioner Pruitt asked Mr. O'Reilly if this was just a request for a public hearing and when did staff want to hold the hearing.

Rob O'Reilly explained that this was a request to advertise for a public hearing for the November 23rd meeting.

Associate Member Ballard moved to adopt the recommendations of staff and go to public hearing on this issue. Associate Member Holland seconded the motion. The motion carried, 7-0.

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20. POUND NET SITING: review of draft regulations, request for public hearing.

Commissioner Pruitt stressed to the public attendees that this was just a discussion between the board members and staff to decide on holding a public hearing, therefore, no public comments would be accepted at this hearing. He said their comments would be heard at the public hearing.

Jack Travelstead, Chief, Fisheries Management, gave the presentation and his comments are a part of the verbatim record. Mr. Travelstead explained that there are two issues. One was the proposed regulation for public hearing on the recommendations of the Finfish Committee as described at September's meeting. The draft regulation was modeled after a regulation for review of activities on state-owned bottomland developed by the Habitat Division. He said that they proposed a 30-day comment period, which was different from Habitat's but other factors used for reviewing were the same. He said that Tom Powers had suggested wording for the proposed regulation. He explained that Mr. Powers wanted to set up provisions in the draft regulation, which would authorize the Commission to consider conflicts caused by a pound net. He said that he thought the

Commission already had this authority. Commissioner Pruitt said he had read Mr. Powers' suggestion and agreed with Mr. Travelstead that he thought the Commission already had the authority. He stated that he would ask Carl Josephson, Counsel for VMRC, to research the matter. Mr. Travelstead further explained that the second issue was the 21 comment letters received from the Beach Cove Villa residents and one additional letter expressing their concerns for a pound net located in front of their condos at Windmill Point. He said that they were requesting the Commission review this issue at the November meeting and staff recommended holding a public hearing on that also. He said that the pound net owner would be notified of the hearing. Commissioner Pruitt said that the second issue would be handled as a separate issue. He asked for a motion from the Commission on the first issue.

Associate Member Cowart moved to advertise for public hearing the Finfish Committee's recommendations, excluding Tom Powers' wording. Associate Member Bowden seconded the motion. The motion carried, 7-0. Commissioner Pruitt said that the hearing would be held at the November meeting.

Commissioner Pruitt asked for a motion on the second issue.

Associate Member Jones moved to hold a public hearing for the Beach Cove Villa protestants regarding a pound net located in front of their condominiums. Associate Member Bowden seconded the motion. Associate Member Ballard questioned the basis for a public hearing and asked if they should wait until the proposed regulation was approved or not. Mr. Josephson asked if these pound nets sites were reviewed annually. Mr. Travelstead responded, yes. He explained that this was a "grandfathered" or existing net, but there were provisions under the law for Commission consideration. Mr. Josephson said that the Commission had the authority to review pound net sitings. Commissioner Pruitt explained that this was a user conflict issue that needed to be handled like a Habitat Management issue.

Associate Member Garrison said that he felt that there was no case if it was already there. He said that it could only be considered if it was a new location. He further explained that he felt that it was not fair if the net location was established before the condominium was present.

Carl Josephson explained that the merits of the issue could be discussed at a public hearing and because these are annually renewed then the pound net sitings can be reviewed. He further explained that if they were not renewed annually, then it would be questionable as to whether a review could be done by the Commission.

Associate Member Schick clarified what was being discussed. He said that if there was a new net set out in 2004, when someone had an objection to the location of the net they had no avenue to object, and now they do.

Associate Member Jones stated that when it was a new siting, in order to be fair to all parties, the Commission needed to review the issue when there was conflict. She said that the Commission should be able to consider existing use and conduct of use, but that this review should never be used to drive out historical and properly fished gears.

Associate Member Bowden agreed with Associate Member Jones in what she said about fishing rights as well as everyone else's right to be heard in such an issue. He said he wanted a public hearing held so he could hear all the facts.

Motion carried, 6-1. Associate Member Cowart voted no.

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21. REVIEW: Marine Fishing Improvement Fund, Virginia Saltwater Recreational Fishing Development Fund, and current license and permit fees.

Jack Travelstead, Chief, Fisheries Management, gave the presentation. Mr. Travelstead said that the General Assembly had given the Commission the authority to charge a fee for permits and transfers of such permits, not previously charged for, and to increase the license fees. He also explained some of the recommendations of the Roundtable Committee. He said that many fees have not been changed since 1979 and the Commission could now increase them as much as 79%. He said that the Roundtable Committee had reviewed all existing licenses and permits. He said since there is presently no fee charged for permits issued by the Commission they had suggested that the permits cost or the cost for transferring the permits should be set at \$25.00. For the license fee, he said the Committee had suggested that the Commission go back to 1992-93 when the Commercial Fisherman Registration Card was first established and not to 1979 when some of the licenses were established. He explained that the staff was not clear of the next step. Commissioner Pruitt said that the General Assembly was expecting some action by the Commission and suggested that a public hearing be held to move the matter forward.

Associate Member Garrison moved to hold a public hearing so they could proceed with the process. Associate Member Holland asked what the hearing was about. Commissioner Pruitt suggested that the Commission needed to advertise what the General Assembly approved for the Commission to do in raising the license fees and charging for permits and their transfers. Associate Member Ballard stated that a public hearing could be held, but it does not mean the Commission had to take any action. **Associate Member Garrison agreed to include the Commissioner's suggestion in the motion. Associate Member Schick seconded the motion. Associate Member Ballard asked when staff recommended holding the public hearing. Mr. Travelstead said December. The motion carried, 7-0.**

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22. **SCUP:** request to adjust the commercial harvest trip limit for the Winter II period from 2,000 pounds to 3,500 pounds. Emergency regulation required.

Joe Cimino, Fisheries Management Planner, gave the presentation. He explained that the NMFS had approved an increase in the trip limit for the SCUP Winter II period from 2,000 to 3,500 pounds. He said the Winter II period runs from November 1 through December 31. He said that NMFS just made the announcement of their decision on October 7nd.

Associate Member Ballard moved to adopt the emergency regulation. Associate Member Cowart seconded the motion. The motion carried, 7-0.

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23. **INFORMATIONAL HEARING:** Public comment concerning revisions to the Striped Bass regulation to modify the Individual Transferable Quota Program from a tag based quota to a fish weight quota.

Rob O'Reilly, Deputy Chief, Fisheries Management gave the presentation. Mr. O'Reilly said that there were two questions that needed answering. One, was there a broad industry acceptance of the use of the weight quota? And secondly, if the change was accepted was there agreement on the fee increases. He said he had gotten quite a number of calls opposed to the change and wanting the status quo. He said Joe Palmer agreed with changing to the weight system but felt that it would be a bookkeeping nightmare. He said that Kenneth Wayne Williams had called staff and said that he was adamantly against the change and wanted to keep the status quo.

Commissioner Pruitt explained that he had received calls from quite a few fishermen who were attending Mr. Burroughs funeral right now and were not present at the hearing but said they were opposed to the change.

Mr. O'Reilly explained that in the current system tags were distributed to the fishermen, which was easily enforced. He explained that the problem was that too many larger fish were being targeted in the lower Bay and this was hurting the river fishermen, as the larger fish were not in the rivers for them to catch and their boat size restricted them to working in the rivers. He also explained that the pound netters were limited to smaller size fish because their nets were stationary. He said the last early closure was in 2000 and there could be others, and this would leave some holding tags. He had a power point presentation with graphs and tables that he reviewed with the board members.

Commissioner Pruitt clarified for Mr. Schick that this was an informational hearing for the public today, which had been decided on last month.

The hearing was opened to the public.

Frank Daniel, Jr., fisherman, was present and his comments are a part of the verbatim record. Mr. Daniel said he wanted it left as it was, because he felt the system worked.

Jeff Crockett, President, Tangier Watermen's Association, was present and his comments are a part of the verbatim record. Mr. Crockett explained that he and those he represented wanted things to remain the status quo. He said that targeting is best and the rockfish management system was a success story. He said the fishermen had to use the larger mesh nets which meant the smaller fish could easily escape. He said changing to a weight based system would encourage small fish to be caught, and the discarded fish would be thrown back dead. He said when targeting a certain year class, less fish were caught. He said weight is already being controlled as well as tagging. He further stated that everyone including Doug Jenkins agreed with the current program, since a change would cost them.

George Trice, Poquoson Waterman, was present and his comments are a part of the verbatim record. Mr. Trice said that he agreed with Mr. Crockett that the system did not need changing. He said that if it works, do not change it. He suggested that the recreational fishermen be required to tag fish.

Pete Nixon, President, Lower Chesapeake Bay Watermen's Association, was present, and his comments are a part of the verbatim record. Mr. Nixon asked why fix a system, if it is not broken. He explained that this had all been discussed before and he agreed with Jeff Crockett.

Russell Gaskins, President of the Virginia Watermen's Association, was present and his comments are a part of the verbatim record. Mr. Gaskins explained that 90% of those he represented want to leave the system as it is now.

Donnie Thrift, Chesapeake Bay and Rappahannock River Rock Fisherman, was present and his comments are a part of the verbatim record. Mr. Thrift explained that the current system was working better than it had before. He asked that the Commission not change it. He explained that he was an upriver fisherman who doesn't think he is at a disadvantage.

Douglas F. Jenkins, Sr., President of the Twin Rivers Watermen's Association, was present, and his comments are a part of the verbatim record. Mr. Jenkins said that he was also a Finfish Management Advisory Committee member. He said to leave the ITQ as it was, because the system was broke it just needed to be adjusted. He asked the Commission to not raise the fees. He explained that the fishermen upriver wanted more tags. He said the number of tags issued depended on the average weight the year before; therefore, the fishermen were getting less tags the next year. He said there was a way to make the current system better, if everyone was willing.

Eddie Gaskins, Little Wicomico Fisherman, was present, and his comments are a part of the verbatim record. Mr. Gaskins said that the system now in place works, and everyone he spoke with about it said to leave it alone. He said it made no sense to change for only 10 dissatisfied fishermen, when there were 500 fishermen affected by a change.

Bill Reynolds, Eastern Shore Working Watermen's Association member, was present, and his comments are a part of the verbatim record. Mr. Reynolds explained that everyone he spoke with about it did not want a change made. He said Mr. Jenkins made some valid points. He said it had never been a fair system because it was a limited entry fishery. He said nothing was going to make it fairer and there should be no changes at this time.

Kelly Place, Coastal Watermen's Association, was present and his comments are a part of the verbatim record. Mr. Place said that he did not agree with the others. He explained that the quota had been determined by the average for all classes by the Federal people. He further explained that the lack of effort on smaller fish or other year classes was causing the overcrowding of rockfish. And he said that as a result the smaller fish were developing myco-bacterial sores.

Elgin Niniger, fisherman, was present and his comments are a part of the verbatim record. Mr. Niniger explained that he had his son with him today. He said it all had been said already, but he had come a long way and wanted to say a couple of things. He said the fishery only went over the quota 1 year and that something must be getting done right. He said to leave the system like it is.

Jeff Deem, Finfish Management Advisory Committee member, was present and his comments are a part of the verbatim record. He said he was backing Doug Jenkins in this matter. He said the weight basis is not the way to go. He agreed that there was an over abundance of rockfish. He further said that there was a need to find a balance.

G. G. Crump, upriver fisherman, was present, and his comments are a part of the verbatim record. He said he did not agree with changing the system.

Commissioner Pruitt stated that the staff was working hard on this issue. In response to a question from the audience, had the governor been made aware of this issue, he said that the governor's office was aware of everything. He called for a very short break.

After the short break, the Commissioner Pruitt asked the Commission what they wanted to do.

Associate Member Bowden said that there was a need to correct the inequity. He did not support working the 7 plus year class of fish exclusively. He agreed there was a problem in the bay. He said eventually the ASMFC were going to catch on to the fishermen targeting the larger fish only. He explained that continuing most effort on the 7 or 8 plus

year class fish would diminish the stocks in the future. And, he said the Commission could not continue to ignore it and not do something. He said the fishery could end up with a slot fishery. He explained that it was a hot topic with the ASMFC, Virginia's quota. He said that his organization was in agreement with Mr. Reynold's and he had not heard opposition to the weight system. He said this was an opportunity for the Finfish Committee to look at the issue or to set up a committee to evaluate it. He said back home all except one was in favor, and he had been in favor all along.

Associate Member Bowden moved to set up a committee with Dusty Crump and other commercial members of the Finfish Committee. He recommended they be given the job to consider concerns that people are not aware of and to do something in case a problem should arise with ASMFC. Associate Member Holland seconded the motion.

Commissioner Pruitt accepted additional public comments at this point.

Jeff Crockett suggested that the MRC set up a sample trip with ASMFC to show them about discards from small mesh nets and not set up a committee. Associate member Bowden expressed concern with this suggestion because it could be more hurtful than helpful and that the ASMFC does not understand the problem. Mr. Crockett said that all that were present at the meeting were not for the change. He said that Mr. Bowden's suggestion was taking them backwards.

Pete Nixon said Mr. Crockett had summed it up and he also agreed with Mr. Bowden that VMRC cannot preempt the ASMFC, but he questioned going there until there was need, and it was possible that federal funds would be used to cover the cost.

Associate Member Ballard said he saw an opportunity to look at it in more detail and to see if the Commission can come to a conclusion to head off an ASMFC problem. He said more information was better than less.

Commissioner Pruitt said there was no problem debating, but if the Commission puts Mr. Crump on the committee why not other watermen association presidents. He said that 99% of the representatives were present at the meeting and that expanding the committee would be no problem. Associate Member Bowden expressed concern that too large of a committee would make it impossible to reach a consensus.

Associate Member Cowart said that he did not hear support for a weight based system at this meeting, and he could not support the motion.

The motion carried, 5-2. Associate Members Schick and Cowart voted no.

Commissioner Pruitt stressed a need to include all Watermen Associate Presidents. Associate Member Bowden agreed to include this in his motion but he did not want

to include all the presidents and he would leave it to Mr. Pruitt who would serve. Associate Member Holland agreed with the change in motion. The amended motion carried, 6-1. Associate Member Cowart voted no. Commissioner Pruitt promised that he and Mr. Bowden would work together to get the best committee

Associate Member Jones explained that the ITQ usually restricted the weight, but not in this case. She said from a biologist standpoint there was concern with the larger fish being caught so exclusively, because it was proven that bigger, older fish are better for recruitment. She said that fishing the larger, female fish would cause a drop in the recruitment and there was a need to change the distribution of the weight of the fish caught.

Associate Member Garrison stated that Virginia needed to work towards a better relationship with the ASMFC.

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PROPOSED ADDITIONAL PUBLIC OYSTER HARVEST SEASONS: James River; York River; and Lower and Upper Chesapeake Bay; request for a public hearing in November.

Dr. James Wesson, Head, Conservation and Replenishment Department, requested that the Commission consider having public hearings to open additional public grounds to oyster harvest.

He explained that at last month's meeting there had been a request to consider opening the area known as Blackberry Hangs in the upper Chesapeake Bay. He said that at that time, the Commission asked staff to check the area for oysters. He stated that when the staff had checked this area they had found a small amount of oysters and he said that staff had no objections to this area being opened.

In addition, he said that staff wanted to request consideration of opening areas on the northern side of the York River, extending the James River Hand Scrape Area up to Browns, Thomas, and White Shoals, and opening Deep Rock in the lower Bay to patent tonging for area watermen. He said the staff had found some market oysters in all of these areas due to two years of unusually low salinities.

He said that staff recommended that the hand scrape areas be opened from December 1 through January 31 and the patent tong area be opened from February 1 through March 31.

He said that staff was requesting this hearing for November's meeting.

Associate Member Cowart made the motion to go to public hearing with staff's recommendations. Associate Member Ballard seconded the motion. The motion carried, 7-0.

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The next meeting will be held November 23, 2004. Earlier in the meeting, there was discussion on whether to change the November and December Commission meetings due to the holidays. It was the general consensus that the November meeting not be changed and at the suggestion of Commissioner Pruitt the Commission members agreed to move the December meeting date forward one week and hold the meeting on the third Tuesday, which is December 21, 2004.

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There was no further business, the meeting adjourned at approximately 5:37 p.m.

William A. Pruitt, Commissioner

Katherine Leonard, Recording Secretary