

MINUTES

Commission Meeting

APRIL 25, 2006

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

William A. Pruitt)	Commissioner
Ernest L. Bowden, Jr.)	
J. Carter Fox)	
Russell Garrison)	Associate Members
Cynthia Jones)	
Richard B. Robins, Jr.)	
Kyle J. Schick)	
Carl Josephson	Sr. Assistant Attorney General
Steven Bowman	Deputy Commissioner
Katherine Leonard	Recording Secretary
Wilford Kale	Senior Staff Advisor
Jane McCroskey	Chief, Admin./Finance Div.
Andy McNeil	Programmer Analyst, Sr.
Todd Sperling	Programmer Analyst, Sr.
Jack Travelstead	Chief, Fisheries Mgmt. Div.
Rob O'Reilly	Deputy Chief, Fisheries Mgt. Div.
Jim Wesson	Head, Conservation/Replenishment
Joe Cimino	Fisheries Management Specialist
Sonya Davis	Fisheries Management Specialist, Sr.
Ellen Cosby	Fisheries Management Specialist
Mike Meier	Head, Artificial Reef Program
Stephanie Iverson	Fisheries Mgmt. Specialist, Sr.
Warner Rhodes	Acting Deputy Chief, Law Enforcement Div.
James Vanlandingham	Marine Police Officer
Russell Phillips	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.
Tracy West	Environmental Engineer, Sr.
Ben Stagg	Environmental Engineer, Sr.
Justin Worrell	Environmental Engineer, Sr.
Randy Owen	Environmental Engineer, Sr.
Benjamin McGinnis	Environmental Engineer, Sr.
Hank Badger	Environmental Engineer, Sr.
Elizabeth Gallup	Environmental Engineer, Sr.
Sean Briggs	Project Compliance Technician

Virginia Institute of Marine Science (VIMS)
David O'Brien
Lyle Varnell

Other present included:

John Slusser	David Woolard	Andy Mauck
Bill DuPaul	Eleanor Lassiter	Robert Lassiter
David Hay	Charles E. King, Jr.	Janet Loyd
Robert Holloway	Ben Mears	G. T. Haskins
Bill Gaulman	Kitty Haskins	Frank W. Ivey
Jack Booth	Patsy Kerr	Tommy Leggett
Pete Sullivan	Larry Hoffman	Everett Nuttall
Robert Ottagson	Andy James, Jr.	A. J. Erskine
John Vigliotta	Dan Bacot, Jr.	Brian Parker
Ken Kurkowski	R. Wade Thomas	Felicity Ericson
John Ericson	Chris Lowie	Chris Frye
Blair Farenholt	Ray Friend	Jak Paul
Cam Williams	Nan Summers	Elizabeth Ould
Mylar Pocta	Paul Dickson	Joe Sisler
S. Lake Cowart	Tom Langley	Rebecca Frenege
Neal Insley	Roy Insley	Bob Williams
Lorie Pruitt, Jr.	Susan Gaston	Dan Young
Patricia Burrows	Burke King	Grace Moran
Jennifer Downin	Dian Muhlendorf	William Wilson
Cary Wilson	Earle Hall	Jack White
Douglas K. McMinn	Wade Walker	Tom Walker
Scott Harper	Michael Jewett	Douglas F. Jenkins, Sr.
Russell Gaskins	Chris Moore	Ellis W. James
Tom Powers	Harrison Bresee	

Commission Meeting

**13717
April 25, 2006**

Charles Dryden
Frances Porter

David Nobles
C. D. Hancock

Donald Starke
Kelly Place

and others

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Commissioner Pruitt called the meeting to order at approximately 9:37 a.m. Associate Members Holland and McLeskey were both absent. Associate Member Jones arrived at approximately 11:45 a.m.

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Traycie West gave the invocation and Carl Josephson 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 he had two items to add, one, the status of the Buckroe Beach Pier violation and the Tanner’s Point Association violation. Associate Member Robins requested that Item 7, Bevans Oyster Company be heard prior to hearing Item 6, Wards Oyster Company.

Associate Member Robins moved to approve the agenda as amended, reversing items 6 and 7 because of the complexity of the cases and since item 6 was an after-the-fact application; and, adding the two items indicated by Habitat staff. Associate Member Bowden seconded the motion. The motion carried, 5-0.

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MINUTES: Commissioner Pruitt asked for a motion to approve the March 28, 2006 meeting minutes.

Associate Member Fox moved to approve the minutes as presented. Associate Member Garrison seconded the motion. The motion carried, 5-0.

Bob Grabb said that in last month’s meeting Mr. Veazey, Sr., made a presentation and suggested experimenting with new technology. As a result, the Commission agreed to allow the testing with setting the proper standards for the experiment and evaluations to be done by VIMS and VMRC staffs, resulting in progress and final reports being brought back to the Commission. He explained that Mr. Veazey felt that the motion as it read in the minutes was incorrect and he was supposed to be allowed to also utilize his box design structures. He also explained that staff felt the motion, as it was in the minutes

was correct, as staff had compared it with the audio recording. He stated that the minutes were only a summary of the hearing actions and not verbatim. He said Mr. Veazey wanted to address this issue with the board.

Commissioner Pruitt stated that he felt that this was a separate issue from the approval of the minutes. Since the board had made a motion and a second, this indicated that they approved the motion as it was. He also said that if Mr. Veazey should come to the hearing he would be allowed time at the end to address the Commission on this matter.

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

Bob Grabb, Chief, Habitat Management Division, gave the presentation for the page two items, A through M. His comments are a part of the verbatim record.

Commissioner Pruitt asked if anyone was present pro or con on these items to address the Commission. No one asked to speak.

After some discussion, Associate Member Schick moved to approve Page Two items, A through M. Associate Member Garrison seconded the motion. The motion carried, 5-0.

2A. KINGSMILL RESORT, #04-1519, requests authorization to install 23 drive-on slips for personal watercraft along the landward side of an existing concrete floating dock at their Kingsmill Resort Marina along the James River in James City County. Recommend a royalty of \$3757.50 for the encroachment over 2,505 of State-owned bottom at a rate of \$1.50 per square foot.

Permit Fee.....\$100.00

2B. VIRGINIA ELECTRIC & POWER COMPANY, #06-0180, requests authorization to dredge 161,500 cubic yards of State-owned subaqueous bottom material to provide maximum depths of -38 feet at mean low water, and construct a 368-foot long by 50-foot wide, pile-supported, concrete pier with a 20-foot wide, pile-supported access trestle, a 10-foot wide, pile-supported, enclosed conveyor system, three (3) breasting dolphins, and four (4) mooring dolphins, all of which is associated with a proposed coal vessel unloading facility on the Southern Branch of the Elizabeth River at the Chesapeake Energy Center. Recommend approval with the requirement for a pre-dredge conference and post-dredge bathymetric survey. Further recommend a one-time royalty in the amount of \$135,520.00 for the dredging of 161,500 cubic yards of State-owned subaqueous bottom material at a rate of \$0.45 per cubic yard (\$72,675.00) and for

the encroachment over 31,422.5 square feet of State-bottom at a rate of \$2.00 per square foot (\$62,845.00).

Royalty Fees (dredge 161,500 cu. yds. \$0.45/cu. yd.).....	\$ 72,675.00
Royalty Fees (encroachment 31,422.5 l. ft. @\$2.00/lin. Ft.)	\$ 62,845.00
Permit Fee.....	\$ 100.00
Total Fees.....	\$135,620.00

2C. DEPARTMENT OF THE ARMY, #06-0270, requests authorization to annually install a temporary 3,000-foot elevated causeway system (elevated pier) for training exercises adjacent to the Omaha Beach and Utah Beach Training Areas at Fort Story along the Chesapeake Bay in Virginia Beach. Recommend approval pending expiration of the 10-day day review period, provided subsequent to the local wetlands board decision on April 17, 2006.

Permit Fee.....	\$ 100.00
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2D. JEFF HEBENSTREIT, #05-2416, requests authorization to dredge approximately 350 cubic yards of State-owned submerged bottom to obtain maximum depths of 5.3 feet below mean low water; install 122 linear feet of riprap, a maximum of 2.5 feet channelward of the existing revetment; install a 64-foot stone marsh revetment, a maximum of 3 feet channelward of mean low water; remove an existing pier and construct a 6-foot wide by 74-foot long private pier with an 8-foot by 43-foot floating dock, two, 4-foot wide finger piers, a 22-foot by 54-foot open-sided boathouse with lift, and two upland access walkways; and relocate an existing open-sided boathouse with lift alongside the proposed pier. All components of the proposal will occur adjacent to the applicant’s property along Broad Bay in the East Alanton subdivision in Virginia Beach. All dredged materials will be offloaded at a nearby boat ramp into sealed dump trucks and transported to the Higginson & Buchanan landfill in Chesapeake. Recommend a royalty of \$157.50 for the dredging of 350 cubic yards at a rate of \$0.45 per cubic yard.

Royalty Fees (Dredge 350 cu. yds. @\$0.45/cu. yds.).....	\$ 157.50
Permit Fee.....	\$ 100.00
Total Fees.....	\$ 257.50

2E. U.S. FISH AND WILDLIFE SERVICE, #05-1112, requests authorization to remove an existing pier and associated pilings and construct a new 11-foot wide by 116-foot long timber pier, including a 10-foot by 30-foot aluminum ramp for Wildlife Service Staff access only (a portion of the pier will be open to the public for fishing); remove an existing timber bulkhead and install 145 linear feet of open-cell concrete block structure, extending a maximum of 5 feet channelward of

the normal water level; and install three riprap breakwaters, varying in size from 154-180 feet in length, with a maximum base width of 12 feet and extending approximately 1-foot above the normal water level, for increased shoreline protection adjacent to the Back Bay National Wildlife Refuge situated along Back Bay in Virginia Beach.

Permit Fee.....\$ 100.00

2F. CITY OF RICHMOND, #06-0371, requests authorization to replace an existing low water bridge crossing of Gillies Creek along Gennie Scher Road with a 105-foot long by 45-foot wide clearspan bridge in the City of Richmond.

Permit Fee.....\$ 100.00

2G. U.S. COAST GUARD, #06-0269, requests authorization to install a 55-foot by 35-foot drive-on floating dock for the mooring of three (3) USCG training vessels adjacent to their existing facility situated along the Western Branch of Wormley Creek in York County.

Permit Fee.....\$ 100.00

2H. DEPARTMENT OF THE NAVY, #05-2544, requests a modification to a Commission authorized project for construction activities at the Magnetic Silencing Facility to authorize the addition of a 60-foot by 25-foot temporary construction platform, at a height of 10 feet above MLW, to be used to stage spools of sensor cables during installation located adjacent to property situated along Hampton Roads in Norfolk. The platform will be lighted in accordance with USCG regulations and will be removed no later than August 31, 2006.

No applicable fees, permit modification

2I. COUNTY OF YORK, #02-0220, requests a modification to their previously issued permit to install a 130-foot long by 26-foot wide breakwater, three (3) 80-foot long culverts, and to excavate 390 cubic yards of sandy deposition material to depths not to exceed 1-foot below mean low water from within a 400-foot by 60-foot area in front of the proposed breakwater, to be used as beach nourishment behind the breakwater, in order to provide a clear and open channel between Yorktown Creek and the York River in York County.

No applicable fees, permit modification

2J. VIRGINIA TECH FOUNDATION, #06-0487, requests authorization to install 173 feet of steel sheet bulkhead at a maximum of 2 feet in front of an existing failing timber bulkhead adjacent to their property situated along the Hampton

River in Hampton. Staff recommends a royalty of \$306.00 for the filling of 306 square feet of State-owned submerged bottom at a rate of \$1.00 per square foot.

Royalty Fee (Fill 306 sq. ft. @\$1.00/sq. ft.).....	\$306.00
Permit Fee.....	\$100.00
Total Fees.....	\$406.00

2K. VIRGINIA DEPARTMENT OF TRANSPORTATION, #06-0330, requests authorization to impact 40 linear feet of Beaverdam Creek during repairs to Hibbs Bridge in Loudoun County. The streambed around the pier and abutments will be excavated approximately 12 inches and riprap will be installed to prevent erosion and scour.

Permit Fee.....	\$100.00
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2L. TOWN OF WARSAW, #06-0151, requests authorization to construct a new 8-inch diameter sanitary sewer effluent diffuser that will extend 64 feet into Totuskey Creek approximately 2,500 linear feet downstream of Route 3. This extension and relocation is to facilitate improvements to the Town of Warsaw WWTP in Richmond County and is in keeping with a DEQ Consent Order and VPDES permit that DEQ has recently issued. Recommend an instream time of year restriction from March 15 through June 30 (for pipeline installation) to minimize adverse impacts on anadromous fish.

Permit Fee.....	\$100.00
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2M. WESTBAY PROPERTY OWNERS ASSOCIATION, #05-2856, requests authorization to install a total of 18 uncovered boat lifts (six lifts on each of the three existing community piers), and construct a total of four (4) 8-foot long by 4-foot wide catwalk extensions on Piers 1 and 2. In addition, the Association is requesting authorization to retain and change the use of an existing 95-foot long by 6-foot wide private, noncommercial pier to a community fishing pier with associated fish cleaning station, which extends a maximum of 84 feet channelward of mean low water adjacent to the applicant's property situated along Bells Creek in Northumberland County. Staff recommends a royalty of \$13,170.00 for the encroachment over 8,780 square feet of State owned submerged bottom at a rate of \$1.50 per square foot.

Royalty Fees (Encroachment 8,780 sq. ft. @ \$1.50/sq. ft.)	\$13,170.00
Permit Fee.....	\$ 100.00
Total Fees.....	\$13,270.00

- 3. **CLOSED MEETING FOR CONSULTATION WITH OR BRIEFING BY COUNSEL. There was no closed meeting.**

- 4. **OCEAN VIEW BUILDERS, #06-0366.** Commission review, on appeal by 74 freeholders of property within the City of Virginia Beach, of the March 20, 2006 decision by the Virginia Beach Wetlands Board to approve a proposal to construct a residential duplex on property along the Chesapeake Bay in the Ocean Park subdivision in Virginia Beach.

Bob Grabb, Chief, Habitat Management explained that Ocean View Builders had submitted a letter requesting a deferral until the June 2006 Commission meeting. He said the reason for the request was that they are trying to resolve the matter with the petitioners.

David Hay, Attorney for the Petitioners, was present and his comments are a part of the verbatim record. Mr. Hay stated that they agreed with the request for a deferral until the June meeting.

Associate Member Robins moved to defer the matter until the June meeting as requested. Associate Member Bowden seconded the motion. The motion carried, 5-0.

- 5. **COWART SEAFOOD CORPORATION, 06-0645,** requests authorization to deploy 4-foot wide by 6-foot long by 12-inch high, individually buoyed, oyster aquaculture cages on privately leased oyster grounds, occupying four (4) separate areas in the Coan River totaling approximately 24.5 acres of suitable hard bottom. The cages will be deployed in water depths ranging from approximately three (3) to eight (8) feet at mean high water and at a maximum cage density of 350 cages per acre. The four sites will be located along the west shore of the Coan River, across from Walnut Point along an approximately 5,000 feet of shoreline, beginning at Stevens Point and extending southeast. A nearby property owner protested the project.

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

Mr. Madden explained that the project was located within four separate sites totaling approximately 24½ acres of state-owned subaqueous bottom within the Coan River in Northumberland County. The applicant proposed to deploy 4-foot wide by 6-foot long by 12-inch high, individually buoyed, oyster aquaculture cages, in water depths ranging from

approximately minus one and one half (-1½) to minus six (-6) feet mean low water and at a cage planting density of 350 cages per acre. All of the proposed deployment sites lie within oyster planting grounds leased by Cowart Seafood Corp. The site closest to the mouth of the Coan River straddles two oyster leases totaling 16.39 acres near Stephens Point. The largest site, a 10-acre area and a smaller 3-acre site are located on a 38.49-acre lease located along the west shore of the Coan River and south of Public Ground #92. The smallest site was located on a 10.93 acre lease located upstream of the mouth of the Coan River. The proposed cages will be stocked with seed oysters and placed within the defined sites at a density of 350 cages per acre. Each cage is to be marked with a green or blue buoy that will include an identification number, which would reference Cowart Seafood Corp. and their assigned cage number. The applicant had stated that they expected that maintenance, including cage cleaning, crab removal, oyster splitting, etc., would occur approximately every three to five weeks during the spring, summer and fall, with less routine maintenance scheduled during the winter months. The applicant anticipates a 12-18 month grow out time, from seed to harvest size. Following completion of the period for grow out, the cages will be retrieved and brought back to the oyster house for processing. The empty cages would then be cleaned, and either stored for later use or restocked with seed and redeployed.

Mr. Madden further explained that the applicant's cages would qualify for deployment under the Commission's regulation, entitled, "Pertaining to On-Bottom Shellfish Aquaculture, Activities" (4VAC 20-335-10 et seq.), because the cages would not extend higher than 12 inches from the bottom substrate. However, since the applicant proposes to individually mark each cage with a tethered buoy, thereby, using the entire water column itself, a permit is required.

Mr. Madden stated that Mr. Cowart of Cowart Seafood Corporation had also expressed an interest in utilizing the proposed cages, not just for native oyster aquaculture, but also to stock and grow out non-native triploid *Crassostrea ariakensis* in some cages, in conjunction with ongoing projects of the Virginia Seafood Council.

Mr. Madden said that Ms. Janet B. Loyd, co-owner of a waterfront parcel with her brother Mr. R. Bruce Burgess, protested the project. The Loyd/Burgess property was located immediately south and downstream of lease #14244, the southernmost and smallest area under consideration. Ms. Loyd was concerned that the possible deployment of 700 buoyed oyster cages downstream off her property would devalue her property and negatively impact her view. She was also concerned that the cages would encroach on her riparian area, have a negative impact on area wildlife, and pose a safety hazard to boaters. In addition, she believed that the placement of the buoyed cages in the nearshore area, close to her property line, could restrict her choices for the location of any future pier structures built off of her property.

Mr. Madden said that initially, Mr. Thomas Spradlin who owned the property at Stevens Point adjacent to lease #13486, the most northern site proposed for cage deployment,

protested the project. Mr. Spradlin believed that the deployment of the buoys in the nearshore environment could potentially devalue his property and posed a hazard to boater safety and navigation. However, staff had recently received correspondence from the applicant and Mr. Spradlin suggesting that an agreement was worked out wherein the applicant agreed to establish a 200-foot buffer area offshore of the Spradlin property and place the cages along the deeper contours of lease #1386 and #11533 before deploying cages closer to the inshore limit of the 200-foot buffer. Cowart Seafood Corp also agreed to use buoys which are less noticeable and fewer in number if feasible. The applicant also agreed to not request a permit to deploy cages on a nearby lease # 1387.

Mr. Madden explained that each of the four proposed sites were located in waters which did not fall within any shellfish condemnation areas established by the Department of Health-Division of Shellfish Sanitation. The Virginia Department of Health Bureau of Wastewater Engineering stated that the project was in compliance with their Sanitary Regulations for Marinas and Boat Moorings

Mr. Madden said that staff had received letters of support from Mr. R. Bruce Burgess (co-owner with Ms. Loyd of the property adjacent to lease #14244), the Northumberland County Economic Development Commission, and the Chesapeake Bay Foundation. Each of the supporters endorsed the efforts of Cowart Seafood Corporation to restore the oyster industry in Northumberland County.

Mr. Madden noted that The Virginia Institute of Marine Science indicated that the environmental impacts associated with the proposed project would be temporary due to the suspension of bottom sediment resulting from cage deployment and recovery. Staff had also received an individual letter of support from Dr. Roger Mann, Director of Research and Advisory Services at VIMS. According to VIMS, there was no reported submerged aquatic vegetation in the vicinity of any of the four proposed deployment sites. No other State agency had commented on the project.

Mr. Madden explained that as the project was currently proposed, the cages, at a density of 350 cages per acre would occupy 21.8 percent of the total area requested by the applicant. However, the applicant had stated that the cages would most likely be deployed in clusters, separated by fairways, to allow for access to the cages at times of deployment and for maintenance and retrieval. These clusters would represent a more densely packed arrangement, occupying a much larger percentage of the total area within smaller portions of the requested deployment sites. An example provided by the applicant in their application showed as many as 20 cages within an approximate 30-foot by 48-foot area, representing coverage of approximately 33 percent of the bottom within each cluster of cages. At the proposed cage planting density, and particularly with the placement of cages within clusters, staff believed that the placement of the individually buoyed cages at the four sites proposed would preclude most, if not all access to these areas by the public and other user groups.

Mr. Madden stated that while the deployment of cages near the Loyd/Burgess property line did not appear to hinder Ms. Loyd's ability to exercise her riparian rights, the Commission did not have the legal authority to determine the extent of Ms. Loyd's riparian area nor could the Commission resolve a private property issue surrounding the potential devaluation of her property. A Court of Chancery was the proper tribunal to make such an apportionment and determination in a suit drawn independently of this public hearing.

Accordingly, Mr. Madden said that staff was recommending approval of the project with the following conditions:

- The corners of the deployment sites shall be surveyed and the dimensions of the sites shall not exceed the dimensions identified in the staff evaluation. The survey of the sites shall become a part of the VMRC permit.
- No cages shall be deployed in waters less than minus 1.5-feet mean low water.
- The permit and authorization to retain the structures shall be valid for a period of five years. After five years, the Permittee may request the Commission re-evaluate the project and authorize the activity for an additional period of time.
- The Permittee shall submit annual reports of production.
- Should a water column leasing procedure be implemented, the project shall be re-evaluated and if deemed acceptable, converted to a lease upon termination of the initial five (5) year permit.
- The public shall not be excluded from any areas not physically occupied by the authorized structures themselves.
- The Permittee shall properly maintain all structures and markers and shall remove all structures upon their falling into a state of disrepair or upon cessation of their use as aquaculture structures.
- Should the applicant wish to deploy triploid *Crassostrea ariakensis* the applicant must submit an emergency plan for the removal of the animals in the event of an impending natural disaster, which could result in their dispersal.

Mr. Madden also said that staff further recommended an annual rental at a rate of \$0.005 (1/2 cent) per square foot for the total area as surveyed by the applicant as prescribed above. Should the surveyed area equate to the estimate provided in the application the annual amount would be \$5,336.10 for the occupation of the water column and encroachment over 24.5 acres (1,067,220 square feet) of State-owned subaqueous bottom.

The royalty shall be based upon the total area of the sites, not on the physical dimensions of the cages.

Associate Member Fox shared his written comments regarding oyster aquaculture. Mr. Fox read the following:

“We have three similar cases before us today – all involving oyster aquaculture. While oyster aquaculture is a relatively new thing, in general, shellfish aquaculture is a “good thing” and should be encouraged. Aquaculture raised oysters are a renewable resource that can provide water quality and habitat benefits in addition to substantial economic benefits to the oyster industry, an industry that is trying to survive after so many years of almost non-existent conventional harvests. In the cases at hand support has given support VIMS and the Chesapeake Bay Foundation, among others,. Since the oyster aquaculture is a new and evolving thing, a flexible process needs to be developed to simplify the application process and allow for equipment and location changes as circumstances dictate. At the same time we must recognize that there are potential user conflicts that may arise because of the aquaculture activities, and we need to have a process to resolve these conflicts.

- Navigation conflicts must be considered.
- Conflicts with other fisheries using the same area must be considered.
- Visibility issues must be considered – certainly no one wants to look at 350 floats/acre in front of their house.
- SAV beds must be avoided.”

“To address these conflicts issues, I encourage the staff to:

- Make a study of other areas – in the United States and beyond – where the problem has been already addressed. There is no need to reinvent the wheel, if we can gain from the experiences in Washington State, Long Island Sound in New York, France, and Japan among others. Roger Mann and Stan Allen at VIMS have broad exposure to what happens with oyster aquaculture elsewhere and I’m sure they can provide guidance. Give us a report on what you find from your study and what you think will work in Virginia.
- Consider whether the “one-foot rule” is reasonable or overly restrictive.
- Does a float truly move the case to a water column permit from a simple use of an existing oyster lease?
- How can the application process for oyster aquaculture be simplified and made flexible until consensus can be reached on how best to raise the oysters?
- Consider another acceptable way to mark the cages. Perhaps larger floats at the corners of the area with signing of “Warning Oyster Aquaculture Area” or the like.”

“I encourage the industry to:

- Try to anticipate and resolve conflicts before applying. Certainly SAV beds need to be avoided, and navigation cannot be seriously affected by your activities.
- Figure out a way to recover the cages without having to put floats on each one. Again, no one wants to see 350 floats/acre in front of their house.
- Figure out how to clearly mark the cage areas to help prevent incidents with sailboats and other deep draft vessels.
- Work with the VMRC staff to inform them of contemplated changes to gear and locations, if you find that the existing one do not work.”

- “I encourage other oyster producers who are continuing to use the old methods, to learn about the aquaculture methods. I don’t believe the old methods will work much longer, and the new methods will give you oysters to sell that mature faster and therefore are less vulnerable to disease. Times change, and your methods need to change, too.

- I encourage pleasure boaters to have an understanding that the public waters must be shared with all users. No single user group can assume that all waters everywhere are available for its activities.”

“Finally, remember that oyster aquaculture, in general, is a good thing for the waters of Virginia. We just need to have a simple process to encourage the practice while giving consideration to the other users of the waters who may have conflicts.”

Associate Member Fox asked why the permittee was required to submit an annual production report. Bob Grabb, Chief, Habitat Management, responded that Chapter 16 of the legislation regarding water column leasing contained a requirement for an annual report. Staff recommendation was patterned after that legislation. Associate Member Fox asked about the additional charge for the use of the water column. Mr. Grabb explained that again in Chapter 16 there was a requirement for payment for use of water column above the lease.

A. J. Erskine, Aquaculture Manager for Cowart Seafood, was sworn in and his comments are a part of the verbatim record. Mr. Erskine explained that it was very important to establish their own resource to meet the needs of the market rather than utilize other States’ resources. He said the cages were needed because of the concerns for predators versus the traditional method of planting loosely on the bottom. He further said that the bridle system with the buoy was established for easier retrieval of the cages.

S. Lake Cowart, Jr., applicant, was sworn in and his comments are a part of the verbatim record. Mr. Cowart explained that they needed to be able to raise oysters and also protect

them from predators such as the rays. He said the oyster business had evolved and there was a need to recognize the need to move to aquaculture. He said they needed to also protect their oysters from decreased oxygen in the summer as well in the winter from freezing.

Janet Loyd, protestant, was sworn in and her comments are a part of the verbatim record. Ms. Loyd explained that she was not opposed to aquaculture or the use of cages, but she was concerned with the proposed method of marking the cages with buoys. She said she felt this would affect her property value, her view, and would restrict her access to the water. She stated that 350 cages would mean 700 buoys and restrict boating, requiring everyone to go further offshore. She said the cages would also be visible at low tide. She said she was told that the buoys were necessary for retrieval of the cages. She said aquaculture would affect other resources and wildlife. She said she understood that the buoys would either be blue or green in color. She questioned whether the materials to be used for cages would introduce chemicals into the water.

Mr. Cowart in his rebuttal comments said that at this time Mrs. Loyd’s property does have a house on it, but no year round resident and they were not putting the cages in front of that property. He said they would need hard clay substrate for the aquaculture operations, because you could not just place the structures anywhere. He said they were making their cages so as not to be above the 12-inch height limit. He said currently there were no piers at the property and no boating except for canoeing and kayaking. He said the cages needed to be kept below the water. As to the materials used for the cages, he said they used galvanized wire mesh, which was also used for crab pots. And finally, he said it was all at the Cowart Seafood property.

After some discussion and further questions, Associate Member Robins said that he commended Mr. Fox on his comments and supported them. He said the future of the shellfish industry was bleak and the Commission had spoken in the past in support of aquaculture, both economically and ecologically. He said that the Commission needed to get some guidance and he hoped this would be a topic for future discussion by the Blue Ribbon Panel II. He said he felt that the applicant should be commended for his efforts to resolve the user conflicts. He said there needed to be a way for the oyster operation to adapt to changes in weather when they occur, such as, low oxygen levels and freezing weather. He said there was only a small amount of bottom that was viable for this activity. He stated that he felt that in this case this was a good project with the environment benefiting. He suggested a study be done to look into long-lining with corner markers as an alternative to buoys. **Associate Member Robins moved to approve as recommended by staff. Associate Member Garrison seconded the motion. The motion carried, 5-0.**

Royalty Fees (Encroachment 501,450 sq. ft. @\$0.005/sq. ft.)...	\$5,336.10 (annually)
Permit Fee.....	\$ 100.00
Total Fees.....	\$5,436.10

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Commissioner Pruitt left the meeting at this point, and Associate Member Garrison chaired in his absence.

7. **BEVANS OYSTER COMPANY, #06-0649**, requests authorization to deploy 4-foot wide by 6-foot long by 12-inch high, individually buoyed, oyster aquaculture cages on privately leased or sub-leased oyster grounds, occupying four (4) separate sites in the Yeocomico River and Wilkins Creek totaling approximately 20 acres of suitable hard bottom. The cages will be deployed in water depths ranging from approximately one and a half (1.5) to six and a half (6.5) feet at mean low water, and at a maximum cage planting density of 250 cages per acre. Two of the four separate sites are located within Westmoreland County, and include approximately four acres in the Yeocomico River approximately 1,000 feet west of the mouth of Parkers Creek, and eight acres in the Yeocomico River approximately 1,300 feet southwest of the mouth of Parkers Creek. The remaining two sites are located within Northumberland County, and include approximately four acres in the Yeocomico River approximately 2,300 feet southeast of Horn Point, and four acres in Wilkins Creek approximately 800 feet south of Mundy Point.

Ben McGinnis, Environmental Engineer, Sr., gave the presentation with slides. His comments are a part of the verbatim record. Mr. McGinnis said that there had been some changes since the evaluation was mailed out the previous week.

Mr. McGinnis explained that the project was located within four separate sites, totaling approximately 20 acres of State-owned subaqueous bottom, within the Yeocomico River and Wilkins Creek areas, two sites each in Westmoreland and Northumberland Counties. The applicant proposed to deploy 4-foot wide by 6-foot long by 12-inch high, individually buoyed, oyster aquaculture cages on privately leased or subleased shellfish grounds, in water depths ranging from approximately one and a half (1.5) to six and a half (6.5) feet at mean low water, and at a cage planting density of 250 cages per acre. Both sites within Westmoreland County were located in the Yeocomico River, within a 33.93-acre plot of oyster planting ground leased by Mr. Ronald W. and Ms. Shirley E. Bevans, and in close proximity to Parkers Island and the mouth of Parkers Creek, to the west. The two sites included an approximate 4-acre plot adjacent to the nearby shoreline, and an approximate 8-acre plot located further channelward, near Public Oyster Grounds #4 and #5. The remaining two sites were located within Northumberland County on an approximate 4-acre site in the Yeocomico River, within a 125.75-acre plot of oyster planting ground leased by Mr. Ronald W. and Ms. Shirley E. Bevans, east-southeast of Horn Point, near the Red "2" day marker. The second Northumberland site encompassed approximately 4-acres on Wilkins Creek, immediately south of Mundy Point, within a

5.19-acre plot of oyster planting ground leased by Mundy Point and Watt Point Farms, Inc. and subleased by Bevans.

Mr. McGinnis also explained that the proposed cages would be stocked with oyster seed and placed within the defined sites at a density of 250 cages per acre. It was proposed that each cage would be marked with a "regulation" size buoy of green or blue color that would include an identification number, which would reference Bevans Oyster Company and their assigned cage number. The applicant had stated that they expected maintenance, including cage cleaning, crab removal, oyster splitting, etc., would occur approximately every three to five weeks during the spring, summer, and fall, with less routine maintenance scheduled during the winter months. The applicant anticipates a 12-18 month grow out time, from seed to harvest size. Following completion of the grow-out period, the cages would be retrieved and brought back to their oyster house for processing. The emptied cages would then be cleaned, and either stored for later use or restocked with seed and redeployed.

Mr. McGinnis stated that the applicant's proposed cages would qualify for deployment pursuant to the Commission's regulation, entitled, "Pertaining to On-Bottom Shellfish Aquaculture Activities" (4 VAC 20-335-10 et seq.), primarily because the cages would not extend higher than 12 inches from the bottom substrate. Since the applicant proposed to individually mark each cage with a tethered buoy, however a permit will be required for the placement of the proposed cages since they in effect utilized the entire overlying water column.

Mr. McGinnis said that Bevans Oyster Company had also expressed an interest in utilizing the proposed cages, not just for native oyster aquaculture, but also to stock and grow non-native triploid *Crassostrea ariakensis* in some cages, in conjunction with ongoing projects of the Virginia Seafood Council.

Mr. McGinnis said that each of the four proposed sites were located within waters, which did not fall within any shellfish condemnation areas established by the Virginia Department of Health-Division of Shellfish Sanitation. The Virginia Institute of Marine Science (VIMS) Shoreline Permit Application Report, dated April 10, 2006, stated that, three of the four sites currently proposed could impact Submerged Aquatic Vegetation (SAV), which had been previously observed within portions of each of these sites during their most recent (2004) survey. The sites where impacts to SAV beds might occur included both sites in Westmoreland County, along with the 4-acre site located within Wilkins Creek in Northumberland County. There did not appear to be any evidence of any SAV beds within the proposed site off of Horn Point. VIMS recommended that the aquaculture sites be located outside of SAV beds as shown on their 2004 SAV survey maps. The VIMS report also indicated that there would be a temporary impact due to the suspension of bottom sediment resulting from cage deployment and recovery. In addition to the comments provided in the VIMS report, staff had received, by e-mail, an individual letter of support, dated April 18, 2006, from Dr. Roger Mann, Director of Research and

Advisory Services at VIMS. Staff had also received late comments, by e-mail dated April 21, 2006, from Dr. Robert J. Orth, Professor of Marine Science at VIMS, which indicated that the SAV beds observed adjacent to and possibly within the proposed deployment sites generally consisted of widgeon grass, which grew in water depths between one to two feet at mean low water. As a result, Dr. Orth suggested that areas greater than two to three feet in depth would not typically support this type of SAV and would be suitable for the placement of the proposed cages. The Department of Game and Inland Fisheries, in an e-mail to staff dated April 7, 2006, stated that they did not anticipate any significant adverse impacts upon threatened or endangered wildlife resources under their jurisdiction. No other State agencies had raised concerns or objections to the project.

Mr. McGinnis stated that the Westmoreland County Board of Supervisors, by resolution adopted April 10, 2006, along with County Administrator, Mr. Norm Risavi, by letter dated April 11, 2006, had offered Westmoreland County's support for the proposed project. In addition, the Chesapeake Bay Foundation, in a letter dated April 11, 2006, had offered its support. Staff had not received any comments or objections from any adjacent property owners or members of the general public.

Mr. McGinnis said that as currently proposed, the cages at a density of 250 cages per acre, would occupy approximately 14 percent of the total deployment area requested by the applicant. However, the applicant had stated that the cages would most likely be deployed in clusters, separated by fairways, to allow for their access to the cages at times of deployment, maintenance, and retrieval. These clusters would represent a more densely packed arrangement, occupying a much larger percentage of the total area within smaller portions of the requested deployment sites. An example provided by the applicant in their application, showed as many as 20 cages within an approximate 30-foot by 48-foot area, representing coverage of approximately 33 percent of the bottom within each cluster of cages. At the proposed cage planting density, and particularly with the placement of the cages within clusters, staff believed that the placement of the individually buoyed cages at the four proposed sites would preclude, most, if not all access to these areas by the public and other commercial fisheries.

Mr. McGinnis stated that based upon the VIMS comments and Section 28.2-1205(A)(6) of the Code, staff did not support the deployment of the cages within beds of SAV. In considering Dr. Orth's comments, staff believed that if the deployment of the cages was limited to areas with water depths greater than two (2) feet at mean low water, potential impacts to SAV beds would be minimized.

Accordingly, Mr. McGinnis said that staff recommended approval of the applicant's request with the following conditions:

- The corners of the deployment sites shall be surveyed and the dimensions and area of the sites shall not exceed the dimensions and area identified in this staff evaluation. The survey shall also exclude all areas with water depths less than

two (2) feet at mean low water (MLW) to eliminate potential impacts to SAV beds. The survey of the sites shall become a part of the VMRC permit.

- No cages may be deployed within beds of SAV.
- The permit and authorization to retain the structures shall be valid for a period of five years. After five years, the Permittee may request the Commission re-evaluate the project and authorize the activity for an additional period of time.
- The Permittee shall be required to submit annual reports of production.
- Should a water column leasing procedure be implemented, the project shall be re-evaluated and if deemed acceptable, converted to a lease upon termination of the initial five (5) year permit.
- The public shall not be excluded from any areas not physically occupied by the authorized structures.
- The Permittee shall properly maintain all structures and markers and shall remove all structures upon their falling into a state of disrepair or upon cessation of their use as aquaculture structures.
- The structures must be marked and located in accordance with all applicable U.S. Coast Guard requirements.
- Should the applicant wish to deploy triploid *Crassostrea ariakensis* the applicant must submit an emergency plan for the removal of the animals in the event of an impending natural disaster, which could result in their widespread dispersal.

Mr. McGinnis said that staff further recommended an annual royalty for the occupation of the water column and encroachment over State-owned subaqueous bottom at a rate of \$0.005 (1/2 cent) per square foot, based upon the total area of the approved sites, as reflected by the required survey, and not the physical dimensions occupied by the individual cages. In addition, because of problems encountered in the placement of our newspaper advertisement, if the Commission approved all or portions of the applicant's request, staff would recommend that approval be made contingent upon the completion of the public comment period ending on April 27, 2006, without receipt of any objections from any adjacent property owners, the general public, or other concerned entities.

A. J. Erskine, Aquaculture Management for Bevans Oyster Company, was sworn in earlier for the previous case and his comments are a part of the verbatim record. Mr. Erskine said that they would be happy to comply with the SAV restrictions. He said they did not object to using the blue and green buoys. Associate Member Robins asked if the staff recommendations were acceptable. Mr. Erskine responded yes, but they do need some emergency sites. Associate Member Fox asked staff what would happen if protests were received prior to the public comment deadline. Mr. McGinnis said the matter would

be brought back to the Commission. He further said that nothing had been received to date, but the applicant had requested it be heard at this hearing.

Jack White, New Point Oyster Company, was sworn in and his comments are a part of the verbatim record. Mr. White said that he was opposed to the restrictions being imposed and the compensation of \$217/acre for the use of the water column. He said a lot of research was done by Maryland to show that oysters help remove harmful nutrients. He said the Patent Office recommended using aquaculture for cleaning up nutrients. He said that he was concerned with the one-foot height limit as it was necessary to allow 4-inch clearance off the bottom. He said there was a need for modifications to allow for changes as the profile restriction was too low. He said containers were necessary and proven by trial and error over the years to protect the shellfish from predators, such as conchs, crabs, and rays. He said Ms. Loyd's comments relate to fish aquaculture not to oyster aquaculture. He said there were no chemicals introduced into the water by the equipment.

Associate Member Garrison asked if there was anyone else to speak, pro or con. There were no more. He asked what was the pleasure of the Commission.

Associate Member Robins moved to approve the project with the staff recommendations and the modified recommendation to restrict the placement of cages in water depths of 2 feet or less so as to avoid encroachment on the SAV beds. Associate Member Schick seconded the motion. The motion carried, 5-0.

Royalty Fees (Encroachment 871,200 sq. ft. @ \$0.005/sq. ft.)	\$4,356.00 (annually)
Permit Fee.....	\$ 100.00
Total Fees.....	\$4,456.00

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Commissioner Pruitt returned to the meeting and resumed the duties of chair.

- 6. **WARD OYSTER CO., #05-2241**, requests after-the-fact authorization to retain 566 deployed aquaculture cages and authorization to deploy additional 4-foot by 4-foot by 2-foot high aquaculture cages at five locations on his leased oyster ground in the Ware River in the vicinity of Jarvis Point and Schley in Gloucester County. A maximum of 2500 cages are proposed to be deployed in water between four (4) and six (6) feet deep at mean low water. The cages, as proposed, were to be deployed as two-cage units and marked with a small buoy. Numerous residents in the vicinity protested the project.

Chip Neikirk, Environmental Engineer, Sr., gave the presentation with slides. His comments are a part of the verbatim record. Mr. Neikirk explained that he had added an additional protest letter in the Commission notebooks that was not included in the mailout packages.

Mr. Neikirk explained that the Ward Oyster Company was located along the northern shoreline of the Ware River along Ware Neck in Gloucester County. Mr. John Vigliotta owned Ward Oyster Company and also ran the Mobjack Bay Seafood Company out of the facility. Mobjack Bay Seafood Inc. was a wholesale and retail company and was not directly in the aquaculture business. The company sold and distributed both cultured and wild-caught oysters and clams.

Mr. Neikirk further explained that the Ward Oyster Company was seeking authorization to retain 566 cages that were currently deployed and authorization to deploy additional cages for a total of 2,500 cages at five locations in the Ware River in conjunction with his wet storage and aquaculture operations. The square cages had 4-foot long sides, were two (2) feet tall, and it was proposed that the cages would be deployed as two-cage tethered units marked by a single buoy at the surface. The buoy's approximate size would be one-half of a traditional crab pot buoy.

Mr. Neikirk said that Mr. Vigliotta had stated in his application that he intended to raise oysters to market size from an initial size of 2-millimeters. The small oysters would first be placed in the cages with a ½-inch wire mesh insert. At this smaller size the cages would hold approximately 5,000 oysters. Once the oysters were approximately 2-inches in size, the oysters would be moved to cages with a 1-inch mesh and grown to market size. At this larger size, the cages would hold between 1,500 and 2,000 oysters. The cages, which are designed to provide protection from Cownose Rays and other predators, will be deployed year round. The cages would be periodically removed by means of a 16-foot by 32-foot barge for cleaning, grading, and culling. Mr. Vigliotta stated that the cages should not go more than four (4) months without cleaning and grading. His plan called for starting with 500 to 1,000 cages and growing to a maximum of 2,500 cages to maintain an inventory of 10,000,000 oysters. The proposal was to deploy the cages at five sites within the Ware River. All of the sites were located in water depths ranging between minus four (-4) and minus six (-6) feet deep at mean low water.

Site number 1 measures 100 feet by 150 feet and is located approximately 150 feet upstream (north) of the Ward Oyster Company property and approximately 300 feet offshore. A maximum of 100 cages and 50 floats are proposed at this location. If all 100 cages were deployed at this site, the cages would cover approximately 10 percent (10%) of the bottom.

Site number 2 also measures 100 feet by 150 feet and is located approximately 650 feet downstream (south) of the Ward Oyster Company property and approximately 300 feet offshore. A maximum of 100 cages and 50 floats were proposed at this location. Similar to site number 1, deployment of all 100 cages at site number 2 would occupy approximately 10 percent (10%) of the river bottom.

Site number 3 was an elongated diamond shape with two sides measuring 300 feet and two sides measuring 600 feet. This site was located between 700 feet and 950

feet offshore and was channelward of the applicant's designated relay area. A maximum of 300 cages (150 floats) were proposed at site 3. Deployment of all 300 cages at this site would encroach on approximately three percent (3%) of the river bottom within the site.

Proposed sites 4 and 5 both measured 200 feet wide by 800 feet long and were located on the downriver side of Jarvis Point. Site 4 was approximately 1,500 feet off the mainland and 1,200 feet off Jarvis Point. Site 5 was located approximately 3,300 feet off the mainland and 2,600 feet off Jarvis Point. A maximum of 1,000 cages (500 floats) were proposed for deployment at each of these sites. Deployment of all 1,000 cages would occupy approximately 10 percent (10%) of the river bottom at each site.

Mr. Neikirk explained that the Ward Oyster Company was involved in three separate activities that involve the deployment of cages on their leased oysterground.

(1) They relay shellfish from polluted waters and depurate the clams in cages within a designated area on their leased bottom. This relaying activity is conducted in accordance with 4 VAC 20-310-10 ET SEQ. The cages are sealed, deployed, recovered and seals broken under VMRC supervision. The deployment of cages associated with this activity does not require a subaqueous permit because it is authorized under a separate section of Title 28.2 of the Code of Virginia, administered by the Fisheries and Law Enforcement Divisions.

(2) They also use the cages for "Wet Storage" of clean clams and oysters. The wet storage occurs in the same types of cages but the cages are deployed in areas outside of the designated relay area in what the Health Department calls a "Wet Storage Area." The Wet Storage Permit from the Health Department is basically a certification that the waters are clean enough to safely store a marketable product. That permit, however, only designates that the water was approved for the storage of shellfish. It does not authorize the deployment of any structures and it is not a permit to do so. Accordingly, a subaqueous permit is required for the use of cages for the wet storage of shellfish.

(3) Finally, the company uses the same size cages for the grow-out of seed oysters to market size. The deployment of these cages for aquaculture also requires a subaqueous permit.

Mr. Neikirk stated that Mr. Vigliotta has stated that he believed his current deployment of cages for wet storage was authorized since he had received a wet storage permit from the Health Department and a permit from the Marine Resources Commission to import clams from certain locations outside of Virginia. Neither of those permits, however, authorized the deployment of cages. About the time staff began receiving inquiries from the general public regarding whether Ward Oyster Company had the necessary permits to conduct

their operations, Mr. Vigliotta contacted staff and asked if he needed a permit to deploy the cages. Soon after he was told that permits were required, staff received his permit application.

Mr. Neikirk explained that the Commission's "On-bottom Shellfish Aquaculture Regulation", 4 VAC 20-335-10 ET SEQ, authorized the deployment of certain aquaculture structures on leased bottom provided they extended no more than one (1) foot off the bottom and had no more than a minimal impact on navigation. Structures conforming to the regulation do not need a subaqueous permit. The rationale for this regulation was that structures located on the bottom and extending no more than one (1) foot above the substrate, were not considered to be much more of an impediment to other uses of the waterway than those encountered when the leased bottoms were shelled and worked using traditional methods. Since Ward Oyster Company's cages were two (2) feet high and since they had tethered buoys extending into the water column, they did not meet the requirements of the "On-Bottom Regulation" and a subaqueous permit was required. The economic benefits of an aquaculture operation of this size are significant. Additionally, cultured oysters provided many of the same environmental benefits as wild stocks. They filter large volumes of water, which may remove excess nutrients and improve local water clarity. Additionally, the structures and the oysters themselves would provide substrate and habitat for other species.

Mr. Neikirk said that the General Assembly had passed various resolutions recognizing the value of the shellfish aquaculture industry and had directed studies to identify unnecessary regulatory burdens and to streamline the permitting process. To date, the Commission had only been able to use its subaqueous permitting process to authorize the deployment of aquaculture structures. Both the industry and VMRC believed it would be more appropriate to regulate aquaculture activities through the use of a water column lease program. In fact, the 2004 General Assembly enacted water column leasing legislation, however, it was contingent on funding and the necessary funding was never provided. Accordingly, the legislation never took effect.

Mr. Neikirk explained that numerous nearby residents protested this project. Their concerns included impacts on navigation, aesthetics and other uses of the waterway. They cited some environmental concerns and noted that the application was unclear and difficult to understand. Although not the specific subject of this application, some expressed concern over the ongoing clam relay operations.

Mr. Neikirk said that Tommy Leggett submitted a letter on behalf of the Chesapeake Bay Foundation in support of the project. In his letter Mr. Leggett stated that farm raised oysters were a renewable resource that could provide water quality and habitat benefits. He also noted that although the Chesapeake Bay Foundation's aquaculture operation on Sarah Creek originally encountered some opposition, they had not received any recent complaints from boaters or watermen that use the creek.

Mr. Neikirk informed the Commission that staff had met with some of the protestants and noted that they were generally less concerned with the cages proposed to be deployed downstream, near Jarvis Point. The original application only proposed the deployment of 1,500 cages near Jarvis Point and 1,000 cages were proposed at the upriver sites. After meeting with staff, Mr. Vigliotta agreed to propose 2,000 cages be deployed near Jarvis point reducing the number of upriver cages to 500. In addition to moving many of the proposed cages to the Jarvis Point sites, Mr. Vigliotta suggested additional conditions to address some of the concerns addressed by the protestants. He developed the idea to deploy the cages in paired units to reduce the number of floats to a maximum of 1,250. He also agreed to limit the number of cages stored on the upland to a maximum of 600. He agreed to switch to an electric pressure washer and pump to reduce noise and agreed to only operate the business between 8:30 a.m. and 6:00 p.m. during the week and 8:30 a.m. to 1:00 p.m. on Saturday. Mr. Vigliotta also said that he would be willing to change the color of the buoys to blue or brown to minimize visual impacts. Finally, he said he agreed to have the project reviewed again by the Commission after an initial five (5) year time period.

Mr. Neikirk said that in their report dated April 12, 2006 the Virginia Institute of Marine Science (VIMS) noted the presence of submerged aquatic vegetation (SAV) in the shallow waters near the Jarvis Point sites. They added that the proposed deployment in waters with a minimum depth of minus four (-4) feet at mean low water would minimize the likelihood of the cages being placed on SAV, but recommended careful placement and management to avoid direct impacts to SAV. The Health Department stated the project was in compliance with their Sanitary Regulations for Marinas and Boat Moorings and the Department of Conservation and Regulation stated that the project should not adversely affect their programs.

Mr. Neikirk stated that it was proposed that all of the cages be deployed on oyster ground currently leased by Ward Oyster Company. It was unfortunate that the water column leasing legislation was never funded and could not be utilized to evaluate and authorize aquaculture activities of this type. Staff believed such a lease program would have benefited both the public and the applicant.

Mr. Neikirk said that although the project may interfere with certain public uses within immediate areas, staff recognized the potential for numerous economic and environmental benefits associated with the commercial production of 10 million oysters. Some types of boating and fishing activities would be impacted by the presence of the cages and buoys, however, that was often the case with other structures and facilities authorized by the Commission. The proper siting of the structures was therefore crucial, to minimize those impacts. Sites 1 and 2 were located only about 300 feet channelward of the shoreline and staff believed the deployment of the cages and associated activities so close to the shoreline had a greater potential to adversely affect the nearby property owners than those cages located further offshore. Unfortunately, the location of the minus six (-6) foot contour limited the option to move sites 1 and 2 further channelward

because the structures might then adversely affect navigation. Site number 3 appeared large enough to accommodate all of the cages proposed for sites 1 and 2 in addition to those currently proposed for site 3. In fact, if all 500 cages were deployed at site 3, the cages would occupy less than five percent (5%) of the available bottom.

Mr. Neikirk explained that the proposed deployment of the cages into waters deep enough to avoid direct impacts to SAV, would still be outside of the main channel of the Ware River. The deployment areas in the vicinity of Jarvis Point had been sited to avoid a shallow “short-cut” through the submerged point. Therefore, staff did not believe the proposed structures would significantly affect navigation traversing the Ware River. Nevertheless, this was a new type of activity and unforeseen impacts and conflicts may arise. Accordingly, staff was reluctant to recommend approval of a permit that would authorize the structures to remain in perpetuity and believed that a review after five years would give the Commission an opportunity to re-evaluate the project and any unforeseen impacts that might result from it. The water column leasing legislation had a similar provision.

Accordingly, Mr. Neikirk said that staff recommended approval of the project with the following conditions:

- Sites 1 and 2 shall not be authorized, but the cages proposed for those sites may be deployed at site 3.
- The corners of the deployment sites shall be surveyed and the dimensions of the sites shall not exceed the dimensions identified in this staff evaluation. The survey of the sites shall become a part of the VMRC permit.
- No cages may be deployed in waters deeper than six (6) feet or shallower than four (4) feet at mean low water.
- No cages shall be deployed within beds of SAV.
- The permit and authorization to retain the structures shall be valid for a period of five years. After five years, the Permittee may request the Commission re-evaluate the project and authorize the activity for an additional period of time.
- The Permittee shall submit annual reports of production
- Should a water column leasing procedure be implemented, the project shall be re-evaluated and if deemed acceptable, converted to a lease upon termination of the initial five (5) year permit.

- The public shall not be excluded from any areas not physically occupied by the authorized structures.
- The Permittee shall properly maintain all structures and markers and shall remove all structures upon their falling into a state of disrepair or upon cessation of their use as aquaculture structures.
- The structures must be marked and located in accordance with all applicable U.S. Coast Guard requirements.

Finally, Mr. Neikirk said that staff recommended the assessment of an annual royalty for the encroachment of the structures over State-owned submerged land at the rate of \$.005 (1/2 cent) per square foot. The royalty shall be based upon the area of the sites requested, not the physical dimensions occupied by the individual cages.

Associate Member Jones arrived at the meeting at approximately 11:45 a.m.

Commissioner Pruitt asked if the applicant or his representative wished to address the Commission.

John Vigliotta, applicant, was sworn in and his comments are a part of the verbatim record. Mr. Vigliotta explained that he was first of all concerned with the fact that his application was being presented as an after-the-fact application. He said that he had his wet storage permit and felt that he was permitted because of his permits to import shellfish for introduction into Virginia waters. He said there was no clear policy for wet storage. He said he made his application in an effort to clear this whole matter up. He said he was requesting to be allowed to increase the number of cages he currently used to 2,500. He said he would be willing to provide a site visit for any of the board members to demonstrate that his efforts have been good to the environment, the community, and for his business.

Associate Member Robins asked him how long he had been working with the cages in that location. Mr. Vigliotta responded, 5 years. Associate Member Robins asked if sites 1 & 2 were needed for his business. Mr. Vigliotta asked for one of the slides presented by staff to use with his response. He said that Site 1 was in front of Mr. Haskins' property and he had always worked with him to be a good neighbor. He further said that the cages were 300 feet offshore. He explained that Site 1 was for winter storage only. He further explained that from April to November he used only Sites 4 & 5, but exposure to the elements was greater at these sites in the winter for the resource and also for the safety of his workers. He said Messrs. King, Sr. and Jr., were both present to comment.

Associate Member Robins asked that if he only needed site 1 on a seasonal basis and would it be appropriate to include a seasonal covenant for its use? Mr. Vigliotta

responded yes. Associate Member Robins asked if it would not be used from May to November. Mr. Vigliotta responded yes.

Commissioner Pruitt asked if there were any supporters of the project present to address the Commission.

Doug McMinn, Chesapeake Bay Oyster Company, was sworn in and his comments are a part of the verbatim record. Mr. McMinn stated that he supported the project. He said he had spent a lot of time at this business and had seen no conflicts. He stated that Mr. Vigliotta tried to be correct in all he did. He said the half-cent fee for water column leasing, totaling maybe \$5,000 per lease would eliminate the average watermen. He said they all tried to stay within their leases and within the one-foot rule as they have modeled these operations after the ones on Seaside Eastern Shore. He said aquaculture had been very successful on Seaside. He said on the Rappahannock River there was talk of starting a co-op. He said oysters were valuable to the environment and it was reported that one female oyster produced millions of spawn. He said that using buoys versus longline did not work everywhere. He said in the Rappahannock River the longline was used because the sites were so exposed to the elements. He said the only reason there was a water column lease requirement was because of the crab pot buoy. He said that black on buoys was found to be the best.

Charles E. King, Jr., adjacent property owner, was sworn in and his comments are a part of the verbatim record. Mr. King said that Mr. Vigliotta was a good neighbor and he was not trying to keep anyone from having access to the water. He said he knew that Mr. Vigliotta would be willing to work with all the protestants.

Andrew "Andy" James, Jr., an upriver property owner, was sworn in and his comments are a part of the verbatim record. Mr. James explained that he was a licensed Coast Guard Captain and owned a 25-foot boat. He said he went to Mr. Vigliotta and he was assured that he would not restrict anyone's access and he's known him for 20 years. He said he supports the project as long as he does what he has told him. He said the channel to the little creek should remain accessible. He stated that aquaculture was the wave of the future and Jarvis Pt. was an excellent spot for cages.

Tommy Leggett, representative for the Chesapeake Bay Foundation, was sworn in and his comments are a part of the verbatim record. He said the CBF supports and promotes native oyster farming. He said it was good for the Bay, ecologically. He said it would help the State achieve its goal to increase the oyster population by ten-fold. He said a good compromise was needed in order to get this project approved.

Dan Bacot, Jr., Sarah's Creek Shellfish, was sworn in and his comments are a part of the verbatim record. Mr. Bacot explained that sites 1 and 2 would be very important for wintertime use and for the safety of the workers.

Ken Kurkowski, Middle Peninsula Aquaculture, was sworn in and his comments are a part of the verbatim record. Mr. Kurkowski said that he had worked in partnership with Mr. Vigliotta in the past and if Mr. Vigliotta had known about needing this permit he would have gotten it. He asked that the Commission approve the application.

S. Lake Cowart, Cowart Seafood Corporation, was sworn in and his comments are a part of the verbatim record. Mr. Cowart stated that Mr. Vigliotta was a man of his word and he hoped that the Commission would look favorably on his application. He said aquaculture provided ecological benefits by cleaning the waters and making the Bay healthier. He said he was asking the Commission to give a solution to all the parties present.

Jack White, New Point Oyster Company, was sworn in and his comments are a part of the verbatim record. Mr. White explained that he buys oysters from Mr. Vigliotta and they were of the best quality and a sustainable resource. He said the industry does not need any more impediments put on it. He said this operation does a lot for the environment.

John Ericson, a Ware River property owner, was sworn in and his comments are a part of the verbatim record. Mr. Ericson explained that Mr. Fox was correct in supporting aquaculture. He said something needed to be done now before it was too late. He said Wards Oyster Company was a very clean business and community minded. He said in the past there was a lot of commercial activity on the Ware River but because of increased sediment it all left the area. He said the residents were just not used to this type of activity being in the area.

Blair Farinholt, a Gloucester resident, was sworn in and his comments are a part of the verbatim record. Mr. Farinholt explained that he had used his property year round since 1937. He said he was not totally against the project. He further said this was a quiet area as there was only one other business in the area. He said he was aware of Mr. Vigliotta's work in the past and he has had some minor conflicts. He said the statement was not true that this area was mostly residential. It is residential. There are only two businesses in the area. He said that he had been a realtor since 1963 and also did appraisal work. He stated that sites 1, 2, and 3 would have adverse impacts on the residential properties and suggested that sites 4 & 5 only be approved.

Commissioner Pruitt allowed those in opposition to address the Commission at this point.

Andy Markup, a Richmond attorney with Troutman Sanders, and representing several of the protestants, was present and his comments are a part of the verbatim record. Mr. Markup said that his family had come from the Ware Neck area and he was very familiar with it. He stated that from what's been said there was more agreement than he thought. He said that staff had only presented the benefits. He explained that there was no objection to sites 4 and 5. He said the 500 cages from sites 1, 2, and 3 could be moved to sites 4 and 5. He said that site 3 was the worst site as it was close to the boat ramp.

He said that site 3 was adjacent to the relay area, which has already been complained about. He said that he heard about the weather and the safety of workers. He said from what he had seen, watermen work in all types of weather. He said that they were concerned also with the barge operation and its impact. He stated that oysters are not like flowers they can be moved either before or after bad weather happened. He requested that all individuals present in opposition, but not addressing the Commission directly, to stand and be recognized. He said that there was no requirement for everything to be perfect, only to balance all the needs.

Bill DuPaul, Ware Neck resident, was sworn in and his comments are a part of the verbatim record. Mr. DuPaul said he was not representing VIMS, but was here as a private citizen. He explained that his pier was adjacent to site 2. He further explained that he was not against aquaculture for it was environmentally and culturally acceptable. He provided a powerpoint presentation to assist in his presentation. He said the relay cages block his access to his pier. He stated that when the Commission looked at the project they needed to consider the relay activity. He said he could not favor the aquaculture project when there were to be 3,000 cages in the river, which made for a lot of buoys. He said the environmental consideration for culture oysters was not the same as the wild oysters. He said it was a disturbing view to all residents.

Burt King, a nearby resident to Wards Oyster Company, was sworn in and his comments are a part of the verbatim record. Mr. King thanked Mr. Vigliotta for the good dialogue over the past several months. He said his grandparents had owned property in the area since 1933. He said in his letter of March 9th, he had expressed several concerns. Some had been addressed, but several remained. He said that sites 1, 2, and 3 were too close to residents, either close to shore or directly in front of their properties. He said that site 2 was downriver to his pier and impeded his access. He said he was concerned over the staff recommendations for sites 1 & 2. He said the number of cages at site 3 should be cut back drastically. He said there were 2,500 cages requested in addition to the relay cages. He stated that 3,000 cages affected the view and the long-term impact would be the metal in the water. He explained the Ware River area was too densely populated to allow more cages. He said he recommended it be approved at sites 1 & 2, reduce the number of cages at site 3 and just reduce the overall number of cages.

Tom Haskins, resident and adjacent property owner, was sworn in and his comments are a part of the verbatim record. Mr. Haskins explained that he was adjacent to site 1 and had watched this business grow from a simple seafood operation. He said dead shellfish were smelly and there was always noise from the trucking. He said he opposed any increase in the number of cages as it would affect property values and impede access. He said it was only 150 feet from shore and that affects his riparian rights. He said there was a lack of a comprehensive plan for the seafood industry. He said he was against the plan as proposed and suggested moving sites 1 & 2.

Raymond Friend, upriver resident, was sworn in and his comments are a part of the verbatim record. Mr. Friend said that he was concerned about the increase in the number of leases in Ware River in the last two weeks. He said this especially concerned him if the only viable use of a lease was aquaculture. He stated he could understand wanting the business to grow, but there were also a lot of residents spending a lot of money. He said everything would increase from traffic, barges, trucks and workers, which are mostly low income. He said he could also see an increase in the number of crabbers working in the area. He said the residents would lose and this must be considered.

Commissioner Pruitt allowed Mr. Vigliotta to make further comments in rebuttal to what was said.

John Vigliotta in his rebuttal comments explained that he had a small pier to offload the oysters and Mr. Kellum had permission to use this pier also. He asked if the concerns over property values should limit his rights. He said he operated a barge in this area and there was 150 feet of direct access marked in front of Mr. DuPaul's pier. He said if they find cages that have overturned, they correct that as soon as possible so as not to lose any animals. He said he was currently moving all the cages from the shallower area to deeper water and there were currently only 20 cages left to move. He said in 1991 he had 8 trucks coming in and out, now there were only 5. He said there were less clam resources to relay and only 3 planters were still relaying any clams. He said during the summer months he was only using 100 to 200 cages.

Associate Member Bowden stated that everything we do along the shoreline affects the environment and the desire for an unobstructed view has caused the shorelines to erode away. He said everything we do winds up in the water. He said there was a need to move forward with aquaculture because oysters whether wild or cultured, were good filter feeders and important to cleaning up the Bay. He said with all the concessions made by Mr. Vigliotta he felt there was already a compromise in place.

Associate Member Robins stated that he agreed with some of what Mr. Bowden said in the fact that concessions had been made and there was a list available of the compromises. He said Mr. Vigliotta would need at least one site for inclement weather use. He moved to approve the permit allowing site one with a seasonal restriction prohibiting its use, May 1 through October 31st; to deny site two; and to approve sites 3, 4, and 5, which were all to be marked as required by the Coast Guard and with the conditions recommended by staff. Associate Member Garrison seconded the motion. He said that he seconded the motion based on the closeness of site one to the facility and the applicant's efforts to be a good neighbor and steward, he needed site one with the seasonal limitation. Associate Member Robins pointed out that the statement made by some that he was trying to restrict access by other residents was addressed by one of the staff conditions. The motion carried, 6-0.

Royalty Fees (Encroachment on 501,450 sq. ft. @ \$0.005)	\$2,507.25 (annually)
Permit Fee.....	\$ 100.00
Total Fees.....	\$2,607.25

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The Commission broke for lunch at approximately 1:19 p.m. and returned at approximately 2:00 p.m.

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- 8. **DAVID C. ROGERS, #06-0051**, requests authorization to remove and re-construct a 135-foot long by 5-foot wide pier, and a 670 square foot platform that presently supports a 17.5- foot by 13.5-foot one story dock house adjacent to his property along Hungars Creek in Northampton County. The proposed project will replace the existing pier, platform and dock house within the existing footprint.

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 on the north side of Hungars Creek in the Vaocluse Shores subdivision at 3350 Vaocluse Lane. Mr. and Mrs. Rogers are in the process of restoring the manor house and grounds. The Rogers also wish to recreate the pier and dock house, as it existed in the 40's, 50's and 60's. "Vaocluse" was a large working farm that was subdivided around 1970. The manor house and grounds were sold as part of the subdivision. Aerial photos show the pier and a dock house in 1949. Mr. Rogers believes the structures were built sometime around 1940. The dock house had glass windows, interior pine paneling and was still used similar to an enclosed porch. The creosote pilings under the pier and platform had severely deteriorated over the years and needed to be replaced. The applicant's contractor had informed Commission staff that in order to replace the pilings, the pier, platform and dock house would need to be removed. The applicant would then like to construct a new pier, platform and dock house within the existing footprint.

Mr. Badger stated that under §28.2-1203(A)(5) of the Code, the placement of an open-pile private pier by owners of riparian lands in the riparian waters opposite such lands for non-commercial purposes, did not require authorization from the Marine Resources Commission, provided the pier did not extend beyond the established navigation line, did not exceed six (6) feet in width and any L or T-head, platform or protrusion did not exceed 250 square feet.

Mr. Badger explained that once a structure was completely removed from the waters of the Commonwealth, long-standing Commission policy was that a new application was required and the laws and regulations that currently were in effect would apply. The

applicant's 135-foot long by 5-foot wide pier would not have required authorization from the Marine Resources Commission had the platform not exceeded the 250 square feet exemption by 420 square feet. Reconstructing the dock house would require a permit from the Marine Resources Commission and that aspect was not considered water dependent.

Mr. Badger further explained that the Virginia Institute of Marine Science (VIMS) indicated that the individual and cumulative adverse environmental impacts resulting from this activity would be minimal, since it was a replacement within the same footprint. The Health Department had informed staff that the applicant was in compliance with the Sanitary Regulations for Marinas and Boat Moorings and no State agency had raised objections to the project and the project was not protested.

Mr. Badger said that the U.S. Army Corps of Engineers had reviewed the project and had determined that this project qualified for their Nationwide Permit number three (3) for repair or replacement.

Mr. Badger went on to say that even though the pier and dock house had been in existence since the 1940's, long-standing Commission policy was that once a structure was completely removed from the waters of the Commonwealth its reconstruction required a permit since it was not considered then to be maintenance and repair. At that point, there was no "grandfather" provision and the project was evaluated in accordance with the current laws and regulations.

Mr. Badger explained that when evaluating the water dependency of a project, staff considered the following;

- 1) Is it necessary that the structure be located over water?
- 2) Is it necessary that the activity associated with the structure be over the water?

Mr. Badger further explained that both questions must be answered in the affirmative in order for a project to be considered water dependent. Using these criteria, staff concluded that the construction of the private pier was clearly water dependent. The 17.5-foot by 13.5-foot one story dock house, however, failed the Commission's test of water dependency and could be constructed on the adjacent upland. Therefore, staff recommended that the dockhouse be denied.

Mr. Badger stated that in 2006 the General Assembly had amended the Code of Virginia and on July 1, 2006, the platform size allowed would be increased to a maximum of 400 square feet. It would further authorize the addition of open-sided shelter roofs and gazebo-type platforms if unprotested and allowed by local ordinance.

Mr. Badger stated that in conclusion, staff recommended that given the impending law change, that the Commission approve a platform (protrusion) not to exceed 400 square

feet and that the applicant be permitted to construct an open-sided shelter or gazebo-type structure, since there was no opposition and the county had no ordinance prohibiting such structures.

Benjamin Mears, agent for the applicant, was sworn in and his comments are a part of the verbatim record. Mr. Mears explained that Mr. Rogers was out of the country. He stated that the structure had deteriorated and they wanted to tear it down and replace it entirely. He said they were following the procedures, it was not an after-the-fact request, and there were no objections. He said they wished to restore the pier and platform to the original 1930 design. He said that there were a lot more structures larger than this in the area and they just want to tear it down and put it in exactly as it was before.

No other public comments were made, either pro or con.

Associate Member Robins said he appreciated the staff recommendations and it was not water dependent but it had existed for 60 years. He said there was nothing to be gained in denying the request as it does make sense to approve it with the same dimensions. Associate Member Jones said she agreed with Associate Member Robins. Associate Member Schick said there was a need to support the renovation work as long as procedures are followed and the law can be flexible. Associate Member Fox said he agreed with Associate Member Schick that there was a lot of history there and it meant something to restore history.

Associate Member Robins moved to approve the project within the same given dimensions. Associate Member Jones seconded the motion. The motion carried, 6-0.

Permit Fee.....\$100.00

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- 9. **LAWRENCE FUCCELLA, JR., #06-0342**, requests after-the-fact authorization to retain a 9-foot by 20-foot timber deck constructed on top of his existing boathouse situated along Urbanna Creek at 529 Ivy Shores Boulevard in Middlesex County.

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

Mr. Neikirk explained that Mr. Fuccella's property was located along Urbanna Creek, across from the Saluda public boat landing. The existing pier and boathouse extended 208 feet channelward of mean high water. The creek was approximately 650 feet wide with maximum depths of minus six (-6) feet at mean low water in the vicinity of the proposed structure. There were several other private piers and boathouses in the vicinity.

Mr. Neikirk said that at the March 2000, Commission meeting, the Commission considered and approved an application submitted by Mr. Fuccella for authorization to construct a 60-foot by 20-foot addition to an existing 25-foot by 60-foot enclosed boathouse. Last year while reviewing an application for a boathouse on the other side of Urbanna Creek, staff noticed that a deck had been constructed on top of Mr. Fuccella's recently completed boathouse addition. Staff contacted Mr. Fuccella and conducted a site visit on November 1, 2005. During the site visit staff measured the dimensions of the deck and informed Mr. Fuccella that the deck was not authorized and that staff considered its construction to constitute a violation of Chapter 12 of Title 28.2 of the Code of Virginia.

Mr. Neikirk said that following this site inspection, a Notice to Comply was sent to Mr. Fuccella on January 19, 2006. The notice directed either removal of the unauthorized deck by March 15, 2006, or submission of an after-the-fact application to retain all or a portion of the deck by February 15, 2006. The notice also specified that any request for after-the-fact consideration of the work must be accompanied with a written statement explaining why the work was conducted without the necessary permit. On February 15, 2006, staff received an application from Mr. Fuccella requesting after-the-fact approval to retain the deck.

Mr. Neikirk explained that in the letter accompanying his after-the-fact application, Mr. Fuccella explained that he was unaware that a permit was required for the deck since it was constructed in the same footprint and extended no higher than his authorized boathouse. He also stated that he did not intentionally violate any Commission rules. The stated purpose provided in the application for the deck was to provide a sitting area to enjoy the views of the creek and to provide a protected location for the placement of dock furniture.

Mr. Neikirk said that staff could acknowledge that the view of Urbanna Creek from atop Mr. Fuccella's boathouse was outstanding, however, staff noted that Mr. Fuccella might also enjoy these stunning views of the creek from the large deck adjacent to his house, as well as, the deck and gazebo located along the steps leading to the pier.

Mr. Neikirk stated that the project would not encroach on any public or privately leased oyster ground. No protests had been received and no State agencies had provided comments on the proposal.

Mr. Neikirk explained that when reviewing proposals to build over State-owned submerged lands the Commission's Subaqueous Guidelines directed staff to consider, among other factors, the water dependency and necessity of the proposed structure. Furthermore, when considering authorization for such structures for private use, §28.2-1205 of the Code of Virginia stipulated that: "In addition to other factors, the Commission shall also consider the public and private benefits of the proposed project and shall exercise its authority under this section consistent with the public trust doctrine

as defined by the common law of the Commonwealth adopted pursuant to §1-200 in order to protect and safeguard the public right to the use and enjoyment of the subaqueous lands of the Commonwealth held in trust by it for the benefit of the people as conferred by the public trust doctrine and the Constitution of Virginia.”

Mr. Neikirk went on to explain that staff did not consider the deck to be water dependent and believed it was an unnecessary addition to an already large structure. Additionally, Mr. Fuccella already had several decks on his private property that provided outstanding views of the creek and a more protected area for deck furniture. As such, staff recommended denial of the project and recommended that the Commission direct removal of the deck within 60 days.

The applicant was not present and there was no opposition to the project.

Associate Member Schick stated that this was definitely a violation and he moved to accept the staff recommendation and require removal of the structure within 60 days. Associate Member Garrison seconded the motion. The motion carried. 6-0.

No applicable fees, request denied.

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10. BLUEWATER YACHTING CENTER, #05-2195, requests authorization to construct a marina manager's office building with a 64-foot by 5-foot deck that will encroach up to one (1) foot channelward of mean low water at their property situated along Sunset Creek in Hampton. Two nearby residents protested the project.

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

Ms. West explained that the Bluewater Yachting Center was located at a marina facility located at the confluence of Sunset Creek and the Hampton River in Hampton. The waterway accommodated a mix of residential, commercial, and industrial uses, with several marinas in the immediate vicinity. As proposed, the majority of the proposed marina manager's office was located on the marina's upland property. A portion of the deck surrounding the building, however, and the associated support pilings would encroach onto State-owned submerged lands channelward of the bulkhead at the marina.

Ms West further explained that the details of this project had changed numerous times since the initial submission of this Joint Permit Application on September 19, 2005. At least five sets of revisions had been submitted to the agency for review. The final project design submitted consisted of support pilings and an upper deck area, which would extend one-foot channelward of the existing bulkhead, resulting in 64 square feet of

encroachment. According to the applicant's agent, Mr. Tom Langley, the purpose of the pilings was three-fold. Due to construction difficulties encountered during the installation of the bulkhead at this facility, which was authorized under VMRC permit #97-0916, the existing bulkhead may not be able to withstand pile driving and other associated construction related activities taking place on the upland. In addition, the pilings would be utilized as support for the deck and as fender piles for the adjacent wet slip.

Ms. West stated that two nearby residents protested the project. They both objected to the building's encroachment over State-owned submerged lands and were concerned about the currently proposed and potential future uses of the proposed building.

Ms. West said that the Virginia Institute of Marine Science (VIMS) stated that the encroachment did not appear to be water dependent and recommended that the structure be relocated entirely on the upland property. No other agencies had commented on the proposal.

Ms. West explained that when reviewing proposals to build over State-owned submerged lands the Commission's Subaqueous Guidelines directed staff to consider, among other factors, the water dependency and necessity of the proposed structure. Furthermore, when considering authorization for such structures for private use, §28.2-1205 of the Code of Virginia stipulated that: "In addition to other factors, the Commission shall also consider the public and private benefits of the proposed project and shall exercise its authority under this section consistent with the public trust doctrine as defined by the common law of the Commonwealth adopted pursuant to §1-200 in order to protect and safeguard the public right to the use and enjoyment of the subaqueous lands of the Commonwealth held in trust by it for the benefit of the people as conferred by the public trust doctrine and the Constitution of Virginia." When considering the water dependency of a proposed structure, the proposal must be evaluated as to whether it and the activities associated with it must be located in, on, or over State-owned submerged lands. Following these criteria, the deck cannot be considered a water dependent structure.

Ms. West said that staff had no objections to driving pilings immediately channelward of the existing bulkhead in order to provide additional structural support for the building. Given the difficulties encountered during installation of the bulkhead, it appeared that additional support for the structure was warranted. Their dual use as fender piles also appeared to be reasonable. However, staff could not support the placement of the deck area over State-owned submerged lands. Staff therefore recommended approval of the installation of the pilings but not for the proposed deck. Staff recommended that the applicant either reduce the width of the deck area accordingly, or relocate the entire building further landward to eliminate the unnecessary encroachment over State-owned submerged lands.

Tom Langley, Langley and McDonald representative for the applicant, was sworn in and his comments are a part of the verbatim record. Mr. Langley said that letters received

from the protestants removed whatever objection there was for the project. He said that having the manger’s office in a central location was good for the marina operation as they could see the entire marina from there. He said the pilings would be beneficial in supporting the bulkhead, which had always been a problem. He said the office being in that location was water dependent because it was good for the operation of the marina.

There were no public comments, either pro or con.

After some discussion regarding the small amount of encroachment that would result from the proposed deck, Associate Member Robins explained that based on the testimony and the reasonable dimensions of the structure, he moved to approve the project. Associate Member Schick seconded the motion. Mr. Schick stated that staff did the right thing in bringing the matter to the Commission for a decision. The motion carried, 6-0.

Royalty Fees (Encroachment 64 sq. ft. @ \$1.00/sq. ft.)....	\$ 64.00
Permit Fee.....	\$100.00
Total Fees.....	\$164.00

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Commissioner Pruitt left the meeting at this point and Associate Member Garrison chaired the meeting in his absence.

11. PERRY ROBERTS, #05-2053. Consideration of the contractor’s involvement in the enlarged and expanded private pier that was reconstructed at Mr. Robert’s property situated along Aquia Creek in Stafford County.

Ben McGinnis, Environmental Engineer, Sr., gave the presentation with slides. His comments are a part of the verbatim record. Mr. McGinnis explained that he could present the information heard at last months meeting and had the slide presentation if the Commission wished to review the project. Associate Member Garrison asked that staff show the slides.

Mr. McGinnis gave some background and presented the slides as requested by Associate Member Garrison. Mr. McGinnis explained that at the last month’s meeting the Commission requested that Mr. Sullivan be asked to attend this meeting to answer their questions regarding the violation.

Associate Member Schick asked what exactly was Mr. Sullivan’s part in this case. Mr. McGinnis explained that he was the agent and contractor.

Associate Member Fox asked if the structure not applied for had been removed. Mr. McGinnis responded the new construction had been removed.

Associate Member Garrison asked for comments from Mr. Sullivan.

William L. Sullivan, agent and contractor for the project, was present and his comments are a part of the verbatim record. Mr. Sullivan explained that Mr. Perry Roberts had contacted him to perform this work as the structure had been damaged from various storm events. He said he met with Mr. Perry to explain what was to be done for permitting the work since it appeared that he did not know the process. He said the County was contacted and a second application was made. He said the Wetlands Board had approved the permit and a building permit was also issued. He thought everything had been done properly. He was contacted by the County and told that the structure was larger than it was originally and ordered to stop work for an investigation, which he did.

Mr. McGinnis explained that staff originally considered the project maintenance and repair work. He said the L-structure was removed by order of the Commission and that the replacement structures were larger than originally built. Associate Member Jones asked how much larger was it? Mr. McGinnis explained that he did not have the exact dimensions and showed her the differences utilizing a staff slide.

Associate Member Schick asked if he saw the structure before the demolition? Mr. Sullivan responded no, that another company had been contracted for that portion of the job. Associate Member Schick asked when the demolition was done? Mr. Sullivan responded that he believed it was March or April 2005. Associate Member Schick asked him if he had made any measurements? Mr. Sullivan responded no, that they had been provided to him by Mr. Roberts.

Associate Member Robins asked how he explained the differences on the plan view from what was actually built? Mr. Sullivan said the owner had made changes that were similar in size.

Associate Member Garrison asked if he explained the permit process in October or November 2004. Mr. Sullivan responded, yes. Associate Member Garrison asked him how long he had been in business. Mr. Sullivan responded, 4 years. Associate Member Garrison asked if he had moved the pilings? Mr. Sullivan responded, yes.

Associate Member Garrison asked what action the Commission wanted to take in this matter. Associate Member Schick stated that this was another of many cases where the contractor did not follow the rules. He said that on the forms provided by VMRC it stated that any alterations require a permit. He further said that the violation was unacceptable and the Commission should pursue a fine structure similar to that imposed on the owner.

Associate Member Robins stated that the builder did depart from the design plan and he made a motion to impose a \$1,800.00 fine for the contractor. Associate Member Jones seconded the motion. The motion carried, 6-0.

Civil Charge against the contractor.....\$1,800.00

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Bob Grabb, Chief, Habitat Management presented the two additional items and his comments are a part of the verbatim record.

Buckroe Pier – Mr. Grabb explained that the City of Hampton was applying to reconstruct the pier. He said the original owner was Mr. Abbott, but the City was purchasing it in the near future. He said that Mr. Boone, who had reconstructed the Harrison Pier in Ocean View, was awarded the contract to reconstruct the Buckroe pier to pre-Isabel condition. He stated that Mr. Boone had installed a trestle to use in the construction and because he did this without a permit from VMRC, he was sent a Notice to Comply and directed to remove the trestle in ten days. He said the response received by staff was that it would take 2 weeks to accomplish this removal. He said that Mr. Boone, Sr. had written a letter requesting that they be allowed to retain the trestle as Mr. Boone, Jr had misled them. Mr. Grabb said that the City stopped the work. He explained that the City had allowed Mr. Boone to install test pilings for the restaurant and when a site visit was made there were 28 pilings, which had been installed.

Mr. Grabb further explained that the City Attorney had informed staff that the City would take possession of the property the next day. He said once the City took possession they would be exempt from a permit because they were a government entity. He said that the staff still wanted the trestle to be removed and an application submitted for it.

The Commission concurred with this approach.

Tanner’s Landing Association – Mr. Grabb explained that this project review was done in December 2005 and then reheard in January at the request of the permittee for reconsideration of the fees charged. He said that the approval was conditioned on a pre-dredge conference being held and a bathymetric study being done. He said neither was done and the dredging was almost completed after two weeks. He said the permit had not even been completely executed. He said also that instead of the spoil being taken to Craney Island as required it was trucked and the spoil wound up on wetlands.

Mr. Grabb stated that staff recommended holding a restoration hearing at the May Commission meeting requiring the applicant to explain why the work was started without a permit and without complying with all conditions. He said staff was requesting the approval by the Commission to proceed with this action.

Associate Member Robins moved to hold a restoration hearing at the May meeting. Associate Member Fox seconded the motion. The motion carried, 6-0.

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12. PUBLIC COMMENTS:

Eleanor Lassiter – Ms. Lassiter explained that she had a problem with a pier built by another individual on her property. She said each time she has gone to court they keep telling her that this actually is state-owned property. She said she did not object to this individual having a pier, just not on her property. She said she just wants it to be moved. She wanted to know how this could be state property and how she could get her property back.

Carl Josephson, Senior Assistant Attorney General and VMRC Counsel explained to Ms. Lassiter that she needed to discuss this matter with her attorney. He said that he was not familiar with the deed or plat and it still might not mean she owned the property. He explained to her that she would need to do some research into whether there was a King's Grant or some means of conveyance granted by doing a title search.

S. Lake Cowart – Mr. Cowart requested that he Commission seek an Attorney General's Opinion into the status of the legislation for the water column leasing (28.2-1600 – 1623), as Tim Hayes said that there was a Sunset Clause for the legislation if there was no funding provided by July 1, 2006.

Carl Josephson, Senior Assistant Attorney General and VMRC Counsel explained that the Commission could not ask for an opinion, but the Commissioner could.

Associate Member Garrison stated that this information would be given to the Commissioner.

Associate Member Jones left the meeting at this point.

Douglas F. Jenkins, Sr. - Mr. Jenkins said that at the last meeting he had requested permission to sample the seed that had been transplanted by the state for this year's program. He said he had tried to contact the Fisheries Management office and did not get a call back.

Jack Travelstead, Chief, Fisheries Management explained that he had tried to return Mr. Jenkins' call several times without success. He said he could meet with Mr. Jenkins after the meeting in regards to this matter

Commissioner Pruitt returned to the meeting at this point.

Michael Jewett – Mr. Jewett said that he was under a Restoration Order approved by VMRC at its January 25, 2005 Commission meeting, to remove a structure in the Poquoson River because it was built without a VMRC permit. He said that he and his wife live at the dock and because of the City and State they were unable to get any utilities hooked up for his boat, which he lives on. He stated he was asking that the

Commission reconsider his case or drop the matter. He read a prepared statement, which is a part of the verbatim record.

No action was taken.

Associate Member Garrison asked about the boundary lines where the jurisdictions were separated for VMRC and the Department of Game and Inland Fisheries. He wanted to know if action could be taken in cooperation with the DGIF to change a regulation that allowed gill nets in upper James River spawning areas in the Appomattox area.

Jack Travelstead, Chief, Fisheries Management explained that from City Point in Hopewell to the fall line in Richmond recreational gill nets were allowed to catch gizzard shad which was allowed year round and would have to be acted on by DGIF. He said the striped bass was a bycatch and were being killed when they were thrown back.

No action was taken.

James River Hand Tong Public Oyster Harvest Season Extension:

Jack Travelstead, Chief, Fisheries Management explained that several requests had been made to the Commission for extending the Hand Tong Oyster Harvest Season in the upper James River. He said in the regulation the Commissioner was authorized to take this action. He said the Commissioner had approved and signed the notice the previous day.

No further action was taken.

Blue Crabs: Jack Travelstead, Chief, Fisheries Management, explained that there had been calls and a petition received by VMRC today regarding setting a catch limit for blue crabs. Two weeks ago a request, from some industry members, was made that a 25-bushel/vessel limit be enacted for the State. There had also been calls opposed to the reduction in such a limit, since that request was made. He said he did not think anyone was present to address that issue.

Commissioner Pruitt asked if anyone was present to discuss this issue.

Russell Gaskins, Virginia Watermen's Association, explained that he had not attended the meeting for this purpose but came forward to speak on his own behalf. Mr. Gaskins explained that there were lots of crabs and they were easily catching their limit, but the price per bushel of crabs was \$8 to \$10, which was what the buyers were paying, and it was not enough to make a living. He said the crab buyers want to keep the season open, but a lot of crabbers have quit. He said as long as the buyers had a plentiful supply they did not want to pay a higher price. He said he would be agreeable to the reduction in the limit to 25 bushels/vessel.

Associate Member Bowden said everyone he spoke with regarding this issue wanted the limit reduction from 51 bushels per vessel to 25 bushel per vessel. He explained that the Commission, with its regulatory actions, had created this situation. He said that his group wanted an earlier start date before April 1, to overcome this situation. He said it was too late in the season for the 25-bushel limit to be effective and he suggested that this be referred to the Crab Management Advisory Committee.

Commissioner Pruitt stated that this matter would be referred to the Crab Management Advisory Committee.

No further action was taken.

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Associate Member Jones returned to the meeting at this point.

13. REQUEST TO CONSTRUCT AN ARTIFICIAL FISHING REEF NEAR THE MOUTH OF THE POQUOSON RIVER. Tabled from the March meeting.

Mike Meier, Head, Artificial Reef Program gave the presentation and his comments are a part of the verbatim record.

Mr. Meier explained that at the February Commission Meeting, approval was requested for construction of the new Poquoson Reef. The request was tabled for one month. On March 1st, a Public Notice was sent out advertising that development of the Poquoson Reef site, as shown above, would be re-heard at the March 28th Commission Meeting. This notice was published in the Richmond Times-Dispatch, Daily Press and Virginian-Pilot.

Mr. Meier said that in accordance with the Commission request, staff also initiated further contacts within both the commercial and recreational sectors, concerning the siting of the Poquoson Reef. An article covering the proposed reef appeared in the March 23rd issue of the Gloucester-Mathews Gazette Journal. A second article in the Daily Press, also covering the proposal, appeared on March 27th.

Mr. Meier stated that C.D. Hancock of the Coastal Watermen's' Association was contacted for advice concerning the original proposed site. A meeting was set up with local watermen and held on March 21st. Four commercial representatives attended; Bryon Hubbard, John Dryden, Charles Dryden and Kelly Place. Joe Kalista and Mike Meier represented the Artificial Reef Program. The criteria for selecting the site were discussed. The commercial representatives felt they could not agree with the site requested. They referenced crab potting, clamming and gill net operations in the immediate area that would be negatively impacted. Concern was also expressed for scallop vessels drawing

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10 to 12 feet of water that transit the area. The Corps of Engineers permit would require a minimum MLW clearance of 12 feet.

Mr. Meier explained that staff extended offers at compromise. These consisted of cutting down the area of the site by as much as two thirds as well as developing a clam brood stock area within the structures that would comprise the reef. These offers were turned down, as any part of the immediate area was considered too valuable to lose. An alternate location was suggested that would place a smaller reef at either side of the intersection of the Poquoson and York River channels. Staff expressed the opinion that these sites may well be feasible, but further Coast Guard evaluation would be required, as they were both adjacent to the York River channel.

Mr. Meier stated that at the March 28 Commission Meeting, the development of this reef site was re-heard, with support being expressed by the recreational sector and continued concern expressed by the commercial sector. At that meeting, the Commission voted to table the Poquoson reef while another site, off the southeast side of the channel, could be investigated.

Mr. Meier said that on April 12th, an ad-hoc “artificial reef committee” meeting was held at 6 PM in the fourth floor meeting room at VMRC. In attendance were:

Commercial Representation Recreational Representation

E. T. Firth, Jr. – waterman	Tom Powers - PSWSFA
E. T. Firth, Sr. –waterman	Frank Kearney - PSWSFA
Nathan Dryden – waterman	Irvin Fenton – PSWSFA
John Dryden – waterman	
Bryon Hubbard – waterman	
C. D. Hancock – waterman	
Lyell Jett – Menhaden Ind.	
Alan Hinson – Menhaden Ind.	
Susan Gaston – Menhaden Ind.	

Mr. Meier said that at that meeting, an alternate site on the southeast side of the Poquoson entrance channel was discussed. The site appeared to be located in Ballard oyster ground but it was not. The Menhaden Industry representatives immediately expressed concern over the location, as it would interfere with their fishing operations. Moving the site to the north, toward the York River channel, also would interfere, as would moving it to the east. Moving the site to the west or south, in shallower water, also would not be acceptable to the watermen present.

Mr. Meier stated that after comparing and contrasting the merits of various sites, moving the site to the north-west side of the channel was revisited. An area to the north of the originally proposed area was acceptable to local watermen. The same area was not

avored by the menhaden industry representatives; however, it was less of a problem than the other locations that had been examined. As a concession, staff offered to scale down the proposed reef area by 2/3. This would provide 110 acres for reef development. The commercial representation in attendance indicated they could agree to this last site. The recreational interests were agreeable to this last site but preferred a reduction of only 1/2 of the original site's area. This site, were it square in configuration, would measure 730 yards on each side. The center of this latest proposed site would be located at approximately 37-13-15 N / 76-20-05 W. The term "approximately" is used here, as the actual site would have to be adjusted to meet channel clearance requirements as directed by the United States Coast Guard.

Mr. Meier stated that staff recommended approval to proceed with the construction of the Poquoson Reef in the referenced location, scaled down to 1/3 of the original proposal.

Commissioner Pruitt explained that staff had done what was asked of them last month. He stated no further public comments would be accepted, since a public hearing on this matter was held previously.

Associate Member Schick moved to approve ½ of the original site for the Poquoson River reef. Associate Member Garrison seconded the motion. Associate Member Robins stated that staff was to be commended for working with all parties and the original site was 300 acres, which was cut down to half in area and a good compromise. The motion carried, 6-0.

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14. PUBLIC HEARING: Requiring a human waste receptacle to be aboard all shellfish harvesting vessels; an NSSP requirement.

Jack Travelstead, Chief, Fisheries Management, gave the presentation and his comments are a part of the verbatim record. Mr. Travelstead reminded the Commission of the emergency action taken at last month's hearing for establishing a regulation for the NSSP requirements for a human waste receptacle to be aboard all shellfish harvesting vessels. He explained that this had caused some concerns by some watermen. He said that in the regulation there was an allowance for a 5-gallon bucket with a lid to be used to meet this requirement.

There were no public comments.

Associate Member Robins asked if it was typical to have a penalty for a fisheries regulation to require a Class I Misdemeanor. Mr. Travelstead said this was not typical of the VMRC regulations, but because this was a health related regulation it was required. Associate Member Robins commented that the Class 1 Misdemeanor was appropriate.

Associate Member Jones moved to support adoption of this regulation, 4VAC 20-1100-10. Associate Member Schick seconded the motion. The motion carried, 6-0.

- 15. **PUBLIC HEARING:** Proposed extension of the hard clam season in the James River and establishment of a control rule to establish seasons in future years.

Jack Travelstead, Chief, Fisheries Management, gave the presentation and his comments are a part of the verbatim record. Mr. Travelstead said that emergency action was taken on this matter at last month's meeting. He explained this was a request that came up each year, and this year the extension was requested to extend the season through April 30th. He said in order to have something in place to change the closing date of the season, without the Commission's review each time, staff had included a trigger catch amount. If the previous year's catch of clams per tong-hour was under 174, then the season would end on March 31st for the current year; otherwise April 30th would be the closing date.

Commissioner Pruitt opened the public hearing. There was no one present to speak to this matter, so the public hearing was closed.

Associate Member Robins moved to approve the regulation as recommended by staff. Associate Member Bowden seconded the motion. The motion carried, 6-0.

- 16. **REQUEST FOR A PUBLIC HEARING:** Establishing the 2006 commercial bluefish quota.

Joe Cimino, Fisheries Management Specialist, gave the presentation and his comments are a part of the verbatim record. Mr. Cimino explained that the commercial bluefish quota needed to be established for 2006, and staff was asking for approval to advertise for a public hearing in May at the Commission's regular meeting. It was pointed out that there were different quota amounts established by the NMFS and ASMFC.

Associate Member Robins moved to approve staff recommendation for a public hearing in May. Associate Member Bowden seconded the motion. The motion carried, 6-0.

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**13761
April 25, 2006**

There was no further business, so the meeting was adjourned at approximately 4:05 p.m. The next meeting will be Tuesday, May 23, 2006.

William A. Pruitt, Commissioner

Katherine Leonard, Recording Secretary