

MINUTES

**AUGUST 28, 2001
NEWPORT NEWS, VA 23607**

The regular Monthly meeting of the Marine Resources Commission was held on August 28, 2001 with the following present:

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| William A. Pruitt |) | Commissioner |
| Gordon M. Birkett |) | |
| Laura Belle Gordy |) | |
| Henry Hull Lane |) | Members of the Commission |
| F. Wayne McLeskey |) | |
| John W. White |) | |
| Kenneth W. Williams |) | |
| Carl Josephson | | Assistant Attorney General |
| Wilford Kale | | Senior Staff Adviser & Acting |
| Commission Secretary | | |
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 | | |
| Erik Barth | | Head-IT |
| Andy McNeil | | Programmer Analyst, Sr. |
| Pat Leonard | | Executive Secretary |
| Linda Hancock | | Head, Human Resources |
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| Bob Craft | | Chief-Finance & Administration |
| Jane McCroskey | | Deputy Chief-Finance & Administration |
| Debbie Brooks | | Executive Secretary |
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 | | |
| Steve Bowman | | Chief-Law Enforcement |
| Lewis Jones | | Deputy Chief-Law Enforcement |
| Warner Rhodes | | Middle Area Supervisor |
| Randy Widgeon | | Eastern Shore Supervisor |
| Ray Jewell | | Northern Area Supervisor |
| Kenny Oliver | | Southern Area Supervisor |
| Brian Tittermary | | Marine Patrol Officer |
| Andy Dutton | | Marine Patrol Officer |

Virginia Institute of Marine Science
 Lyle Varnell Tom Bernard
 Walter Priest Robert Orth

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Jack Travelstead	Chief-Fisheries Management
Rob O'Reilly	Deputy Chief-Fisheries Management
Roy Insley	Head-Plans and Statistics
James Wesson	Head-Conservation and Replenishment
Lewis Gillingham	Fisheries Management Specialist
Ellen Cosby	Fisheries Management Specialist
Chad Boyce	Fisheries Management Specialist
Cory Routh	Fisheries Management Specialist
Tracy Patton	Fisheries Management Specialist
Bob Grabb	Chief-Habitat Management
Randy Owen	Environmental Engineer
Tracy West	Environmental Engineer
Hank Badger	Environmental Engineer
Jeff Madden	Environmental Engineer
Mark Eversole	Environmental Engineer
Kevin Curling	Environmental Engineer
Ben Stagg	Environmental Engineer
Jay Woodaard	Environmental Engineer
Chip Neikirk	Environmental Engineer
Michael Meier	Head, Artificial Reefs
Andy Cortez	Special Agent, U.S. Fish & Wildlife
Service (USFWS)	
Rick Perry	Special Agent, USFWS
others present:	
Joseph Darby	Ray Todd
Andrew Gurkin	R. P. Walken
Scott Ayers	R. Wayne Ragland
Carolyn Ragland	Beverly Taylor
Victoria Cosiu	Stephen King
Bill Kirby	J. Winston Vaughn Jr.
Horace Pratt	William J. Meagher
Jeff Watkins	Lee Anderson
Jeanne Butler	Jim Haydon

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George Craighton
Barbara Lock
Joann Kirby
Dewey Atkins
Charles Dietz
Irby Brown
Don Miles
Nancy Turpin Shaffer
H. M. Gettings
Kelly Place
John C. Partin
Clinton O. Harton
Georga Wilkie
Bob Reid
Alan Naigec
R. E. Jenkins
Scott Harper
Mary Jane Stokes
William L. Scott

Kay Wilson
James O. Lowe
Alice Atkins
Betty Dietz
Sandra Canepa
Ilsa Brown
Elton Turpin
Dan Bacot
Kelley Platz
Jackie Partin
Tom Powers
Sycl Letz
Bruce Gallup
Richard Matthews
Karla Haynes
Sherry Hamilton
Bob Winstead
H. S. Stokes
Richard Brydges

and others.

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Commissioner Pruitt opened the August meeting at 9:35 a.m. Members present were: Associate Members Birkett, Gordy, Hull, McLeskey, White and Williams. Commissioner Pruitt established that there was a quorum. Associate Member Hull gave the invocation and Associate Member Birkett led the Pledge of Allegiance.

1. MINUTES of previous meeting.

Associate Member White moved to accept the Minutes as distributed. Associate Member Gordy seconded the motion, which carried 6-0.

**** APPROVAL OF AGENDA**

Robert Grabb, Chief-Habitat Mangement, reported that the case of Mr. and Mrs. Devon Fairhurst (#98-1078) originally scheduled to be item No. 5 in the agenda had been rescheduled for the Commission's October meeting. Also, the York River Yacht Haven, originally agenda item No. 8, had reached an agreement with staff on its permit, allowing the item to be moved to the monthly page two list. Associate Member Hull moved to approve the agenda with the changes. Associate Member White seconded the motion, which passed unanimously.

Col. Steve Bowman, Chief-Law Enforcement, at the Commissioner's invitation, introduced two special agents from the U. S. Fish and Wildlife Service: Rick Perry, senior resident agent in charge of the Richmond field office and Andy Cortez. The agents came to the meeting to present specific certificates and to praise Marine Patrol Officers Bryan Tittermary and Russal A. "Andy" Dutton for their work in support of Lacy Act investigations and migratory bird treaty act enforcement on the Eastern Shore. Agent Cortez said Tittermary and Dutton's "knowledge of the community, the commercial fishing industry and their expertise as law enforcement professionals, have earned them respect and admiration of the public and their peers. Since 1998, they have been instrumental in the detection and protection of Lacy Act violations involving the interstate shipment of illegal crabs and rockfish and all of the cases have resulted in stiff fines and/or imprisonment. In addition, they have assisted special agents in the investigation of serious migratory bird hunting violations. Their knowledge of the waterways, of the fish and wildlife resources of the Eastern Shore is nothing short of extraordinary." Mr. Cortez said Officers Tittermary and Dutton are making a direct contribution to the conservation of our nation's fish and wildlife resources. The two officers received commendations from the U.S. Fish and Wildlife Service.

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

Robert Grabb, Chief-Habitat Mangement, briefed the Commission on the following six Page-two items for projects over \$50,000 for which staff had conducted a public interest review and there were no objections.

2A. ISLE OF WIGHT COUNTY, #00-1878, requests authorization to modify their existing permit to extend a 40-foot long floating gangway an additional six (6) feet channelward at the existing Jones Creek boat ramp facility in Isle of Wight County.

PERMIT FEE.....\$ 100.00

2B. GREENSVILLE COUNTY WATER AND SEWER AUTHORITY, #01-1169, requests authorization to install a 12-inch water line, by directional bore method, for a distance of 700 feet, a minimum of 23 feet below the Meherrin River in Greensville County. Recommend a royalty of \$700.00 for the crossing under 700 feet of State-owned subaqueous bottom at a rate of \$1.00 per linear foot.

PERMIT FEE.....\$ 100.00

2C. TOWN OF PENNINGTON GAP, #01-1244, requests authorization to install by directional bore method a submerged 16-inch water line beneath 102 linear feet of the Powell River and beneath 60 linear feet of the North Fork of the Powell River adjacent to the Pennington Gap Water Treatment Plant in Lee County.

PERMIT FEE.....\$ 100.00

2D. CITY OF SALEM, #01-1050, requests authorization to install a 16" well water main and an 18" finished water main under the Roanoke River. Recommend a time-of-year restriction from March 15 to June 30 to protect the Roanoke Logperch and the orangefin madtom and recommend our standard instream conditions.

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PERMIT FEE.....\$ 100.00

2E. COLONNA'S SHIPYARD, INC., #01-1327, requests authorization to dredge 16,000 cubic yards of State-owned subaqueous material at marine railway #2 and #3 adjacent to their property situated along the Eastern Branch of the Elizabeth River in the City of Norfolk. Approval subject to the expiration of the public notice. Recommend a royalty of \$7,200.00 for the encroachment over 16,000 cubic yards of State-owned subaqueous land at a rate of \$0.45 per cubic yard.

PERMIT FEE..... \$100.00
ROYALTIES.....\$ 7,200.00

2F. TOWN OF MOUNT JACKSON, #01-1052, requests authorization to install, by the open end method, approximately 280 linear feet of 12" diameter ductile iron pipe water transmission line, a minimum of 36" beneath the North Fork of the Shenandoah River in Shenandoah County. The proposed crossing is associated with a plan to update the Municipal Water Supply System.

PERMIT FEE.....\$ 100.00

2G YORK RIVER YACHT HAVEN, #01-0905 requests authorization to remove a total of six (6) existing slips and construct a 290-foot by 10-foot floating pier, extending in a southerly direction from their existing fuel pier, to provide 11 new permanent slips along the east side, with the west side of the new pier reserved for transient mooring space. Additionally, shellfish aquaculture upweller units are proposed to be installed within the floating pier sections at their marina along Sarah Creek in Gloucester County.

PERMIT FEE.....\$ 100.00

There being no comments, pro or con, Commissioner Pruitt placed the page two items before the Commission. Associate Member White moved to approve the page two items. Associate Member Hull seconded the motion, which carried unanimously.

3. GEORGE WILKIE, #01-0693. Commission review, on appeal by the City of Virginia Beach and 44 freeholders of property within the City, of the June 18,

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2001, decision of the Virginia Beach Wetlands Board to approve, in modified form, a permit to construct two duplexes with decks, paved parking areas and utilities installation at property identified as lots 13 & 14, Block 36, adjacent to the Chesapeake Bay in the Ocean Park section of Virginia Beach. Continued from the July 24, 2001, Commission meeting.

4. **ELTON W. TURPIN, JR., #01-0153.** Commission review, on appeal by the City of Virginia Beach and 44 freeholders of property within the City, of the June 18, 2001, decision of the Virginia Beach Wetlands Board to approve, in modified form, a permit to construct one duplex with deck, paved parking area and utilities installation at property identified as lot 12, Block 36, adjacent to the Chesapeake Bay in the Ocean Park section of Virginia Beach. Continued from the July 24, 2001, Commission meeting.

Randy Owen, Environmental Engineer, said that since these matters had been previously handled together, he would present them in the same manner. Commissioner Pruitt reminded the Commission that the cases had to be voted on separately. This was an unusual appeal, Mr. Owen noted because the City of Virginia Beach had joined with Mr. Scott Ayers, on behalf of 44 freeholders, in the appeal of the June 18, 2001, Virginia Beach Wetlands Board decisions to grant permits to Mr. George Wilkie and Mr. Elton W. Turpin Jr. to construct a total of three duplexes involving a coastal primary sand dune.

The projects are located on three undeveloped lots in the Ocean Park section of Virginia Beach, just west of Lynnhaven Inlet. The city of Virginia Beach had nourished the beach adjacent to the projects in 1987, 1991 and 1997. Mr. Owen showed a series of photographs that also were presented to the Board. Mr. Owen said that the Virginia Institute of Marine Science described the sites as a well vegetated coastal primary sand dune and additionally described a dune-like feature (seaward of the primary dune) which was called an artifact of beach nourishment. VIMS indicated that the existence of the dune-like feature is dependent upon the recurring beach nourishment in this area, Mr. Owen said.

VIMS added that the duplexes, if constructed, would destabilize the existing dune system, isolate that portion of the dune from its normal processes and said the project was undesirable and could not be supported. It also said it would establish a new line of development seaward of the primary dune. The applicants have maintained that the so-called dune-like feature, Mr. Owen explained, is really the primary dune and not the dune located immediately landward.

Mr. Owen said that the City Planning Department concurred with the VIMS position

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and reminded the Board that the General Assembly in adopting the Dune Act (in 1980) stressed the importance of dunes and the role they play as a natural barrier to coastal flooding. The Planning Department recommended denial of the projects in this location because they would destabilize the dune and prevent it from performing as a natural barrier to coastal flooding. (Details of the sites and associated slides are in the verbatim record.)

At the hearing the applicants were represented by their agent, Mr. Billy Garrington, and by their counsel, Mr. R. J. Nutter. Mr. Garrington reminded the Board that they had recently, in the spring of this year, denied Mr. Wilkie's original proposal and he had agreed to resubmit a new application, the one before you today. Mr. Wilkie's new application had replaced the original spread footing foundation with an open-pile design, Mr. Owen said.

Mr. Nutter, their counsel, told the Board that collectively his clients had resided on these properties since the mid-1960's and their goal was to realize the development potential of these undeveloped lots, while attempting to preserve the dune's ecology. He asked that the Board approve the projects.

Mr. Owen said the one speaker in opposition was Mr. Scott Ayers, who is the petitioner along with the signatories. Mr. Ayers said he felt any development of these properties should be held landward of the (VIMS) designated sand dune. Mr. Ayers also reminded the Board that the definition of a coastal primary sand dune, pursuant to the Code of Virginia, shall not include any amount of sand that is deposited via beach nourishment. He presented photographs and a letter from L. Donelson Wright, Dean/Director of VIMS to Del. Leo Wardup in support of his position.

At the conclusion of the public testimony, Mr. Owen said the Board debated the projects at length. There was a motion to approve the project with seven modifications: cantilevered decks; all disturbed sections of the dune were to be revegetated and bonded for two growing seasons; any parking would be the minimum required by the Zoning Ordinance; any materials used for parking or driveways would be approved by the Coastal Zone Administrator; no sand could leave the site; that a new site plan would be submitted prior to the issuance of any permits; and that any access-way would be via an exterior stairway. The motion was identical in both cases and each passed by a vote of 4 to 3.

Mr. Owen said that letters of appeals were received from Ms. Kay Wilson, Assistant City Attorney and from 44 freeholders of property with Mr. Scott Ayers as their petitioner. Both appeals were received within ten days as required by the Code of Virginia and the staff considers the appeals to be timely.

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The Assistant City Attorney states, in her letter, that the City is basing its appeals on the grounds set forth in 28.2-1413 of the Code. Specifically the City alleges that the Wetlands Board, in reaching its decision, failed to fulfill its responsibility in the Coastal Primary Sand Dune Zoning Ordinance and that the substantial rights of the City were prejudiced because the findings, conclusions and decisions of the Board were in violation of constitutional provisions, in excess of statutory authority or jurisdiction, made upon unlawful procedure affected by other areas of law, or unsupported by the evidence on the record considered as a whole, and were arbitrary, capricious or an abuse of discretion.

Mr. Ayers' letter of appeal, Mr. Owen said, alleged that the Board's decision to approve the project was in direct conflict with sections 28.2-1400 and 1408 of the Code and did not reflect the intent of sections 28.2-1413, subsections one and two. The petitioners pointed out that the Code of Virginia is specific in its definition of a coastal primary sand dune when it relates to beach nourishment and concurred with the VIMS position that the replenishment was incorrectly used to determine the building setbacks on these properties.

Based upon staff's review of the record and the verbatim transcript, Mr. Owen said, the staff agreed with the city that the Board's decision on the matter is unsupported by the evidence on the record considered as a whole. Both the Planning Department and the VIMS reports clearly indicated that the project would destabilize the existing dune system and would compromise its natural ability to function as a barrier to coastal flooding for existing homes. Accordingly, we must disagree with the Board's finding that the potential public and private benefits of the project outweigh the potential public and private detriments, as stated in the Board's motion.

In reaching its decision, Mr. Owen said, the Board also failed to adhere to section 28.2-1408 of the Code, which states that no permanent alteration of or construction upon any coastal primary sand dune shall take place which would impair the natural functions of the dune, or physically alter its contour, or destroy vegetation growing thereon, unless the Board determines that there will be no significant adverse ecological impact or that the granting of the permit is clearly necessary and consistent with the public interest considering all material factors. The standards for the use of coastal primary sand dune further state that alteration of a coastal primary sand dune is ordinarily not justified where construction is proposed onward or seaward of the dune crest.

Lastly, the staff believes that the Board may have adopted an unlawful procedure

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when it directed the applicant to submit revised drawings for review and approval by staff (Coastal Zone Administrator). This review and approval would occur after the hearing and a decision reached. Mr. Owen said the revised work would have an additional impact on the dune that was neither publicly advertised for the hearing, nor considered by VIMS, the Board or its staff.

Accordingly, the staff recommended that the matter be remanded to the Virginia Beach Wetlands Board for further consideration in light of the findings.

Commissioner Pruitt asked if there were any questions from Commission members. Associate Member White asked what was the corduroy-type design mentioned for parking? Mr. Owen said it is where timbers are strung together by cables and laid on the existing grade of a dune.

Associate Member Hull asked if the vegetation on the dune was natural or planted? Mr. Owen said that Mr. Wilkie has testified that he and the Turpins have worked to maintain the dune and have fertilized and sprigged and the City has sprigged the toe of the dune artifact. Mr. Owen said he was sure that there also was some natural vegetation.

Commissioner Pruitt said he was unclear about the staff's statement of the Board's unlawful procedure. What is the difference when the Commission has a hearing on a subaqueous matter and the applicant has submitted a proposal and the Commission says we approve this and you get the modified drawings back to the staff. Mr. Owen said there was parking proposed on-site, but one of the conditions was that they eliminate the fill associated with the design. The answer is that you would have to fill an area to accommodate the parking and that would be an additional impact beyond the public advertisement. (Detailed discussion is in the verbatim record.)

Commissioner Pruitt asked for the City representative to speak. Mr. Rick Mathews, counsel for the appellant, state that Virginia Beach is appealing the decision of its own wetlands board because of the serious concerns that city government has about the impact of the decision upon development along the Chesapeake Bay. Mr. Mathews was engaged by the City to eliminate any perceived conflict for the City Attorney's Office which routinely represents the wetlands board.

Mr. Mathews said the total impact of city government's concern about the case is because the houses behind the primary dune line exceeds in broad areas up and down the Chesapeake Bay. If you have a case such as this, where you allow development channelward of the primary dune line, you have made it untenable for the Board to deny similar requests in the future. He said there were numerous developments platted decades ago that are now on the water or under the water. There will be people who own particular pieces of property who will want applications

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on these lots. The importance of this case is how the primary dune line plays within the provisions of the statute as amended in 1998. The City is very active in beach replenishment along the Bay front. The sand dredged from Lynnhaven Inlet is spread out on the beach. The records show the coastal primary dune line as it relates to the replenishment project. Clearly, under statute, what the City has put there--staff used the term artifact--cannot be considered the primary dune by the statute.

In the record, there is a disagreement between the city and VIMS about what is the primary dune line. No where in the record is there anything approaching the expertise in determining what the primary dune line is about, than what you have with VIMS, the Commission staff or the city's staff. Mr. Mathews said the other dune site is replenishment and cannot be considered as the primary dune.

The proposed development is seaward of the primary dune. Not only does it disturb the primary dune, but it is also built in front of it. The procedures that should be followed in this case talk about impacting the natural functions of the dune as described in the Act, Mr. Mathews said. He said the development would impact the dune; physically alter the contour of the dune and destroy vegetation growing on the dune. The development is going to do all three.

When the Virginia Beach Wetlands Board made its considerations there was considerable discussion about equities--emotional equity. The emotional equities are that these people have owned this land for years, have been taxed for years and we should do something to make this work. That was the driving force of the wetlands board, Mr. Mathews said. This should not be done, particularly when you are dealing with properties platted at the turn of the (last) century. The people have their houses and property. Now because of beach replenishment there is more beach in front, call it artificial accretion, they want to take the opportunity to make some money on it. The law was enacted where it cannot occur in situations where it adversely effects the primary dune line. It cannot happen here, where the equities of these owners may be more emotionally appealing, any more that it can be allowed to happen further down the beach, where the applicant may be a developer who has bought up 50 more lots seaward of the primary sand dune.

If you read the record on page 28, you can see the basis upon which the Board made its motion: The anticipated public and private benefit exceeds the public and private detriment. Mr. Mathews questioned, what public benefit? The project, he said, is totally devoid of any public benefit. Two individual property owners building three duplexes seaward of the primary dune line to make a profit. The record is devoid of any public benefit. Therefore, there is no public benefit that will exceed public detriment. The public detriment, Mr. Mathews said, is stated in the planning staff

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report, the VIMS report, and the Commission staff report review. It is not only this property, but the creation of the precedent involving all the platted lots further up the beach.

Mr. Mathews cited Mrs. Lowe, one of the dissenting members, who read from the Code regarding what can be done on a coastal primary sand dune. He said there is nothing in the record that shows there is no significant adverse ecological impact; all the evidence in the record is to the contrary. What about the granting of the permit that is clearly necessary and consistent with the public interest? He said, there is nothing in the record considering the public interest. Mrs. Lowe said that she could not support it. She was correct, Mr. Mathews said, the others were wrong.

Considering appeals, the City wants a reversal. Did the Board fail its responsibilities under the coastal primary sand dune ordinance? Yes, it did, he said. Were the substantial rights of the appellant--the city government representing the citizens of Virginia Beach--injured? Yes, Mr. Mathews said because the action is unsupported by the evidence of the record as a whole and is arbitrary, capricious and is an abuse of discretion. It is clear from the record that the wetlands board did what it did because of a feeling of sympathy to help some older folks. It is understandable, but it is not right and is not in compliance with the law.

Commissioner Pruitt asked the freeholders representative to come forward. Mr. Scott Ayers, the representative, said he wanted the record to note that his family has owned property in the area since 1939. He also showed that in 1987, before the beach replenishment, he could jump off his front deck directly into the water. The area has seen sand come and go.

Mr. Ayers said it is the freeholders' desire to see the fragile primary coastal dune system protected for the benefit of the bay front shoreline. It is our contention that the Virginia Beach Wetlands Board, in the two cases under appeal, as defined in 28.2-1413, items e and f, acted in an arbitrary and capricious manner, with an abuse of discretion and that their findings were unsupported by the evidence in the record. It is our position that any development activity that would impact the coastal primary sand dune as defined in the Code should be prevented. Furthermore, it is our contention that evidence presented to the Board by city staff and the Virginia Institute of Marine Science clearly establishes that the development activity proposed by the applicants would be destructive of the coastal primary sand dune system. Therefore, Mr. Ayers asked for a reversal of the wetlands board's decisions.

Commissioner Pruitt called upon the representative of Mr. Wilkie and Mr. Turpin, attorney, Mr. R. J. Nutter, who said it was his job to tell the Commission the basis

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upon which the Virginia Beach Wetlands Board acted. He initially wanted to clear up a few facts. Mr. Wilkie and Mr. Turpin's families have owned these properties since the mid and late-1960's. They were platted many years ago. These lots have been on high and dry land, not at or under water as Mr. Mathews earlier indicated. Mr. Ayers said it is his clients' contention that the dune line, described earlier as a "dune-like artifact," is the primary sand dune. This "thing" is the primary sand dune and property owners have been required to build over it. Signs have been posted by the City on it, Mr. Nutter said.

Mr. Nutter said the Commission may need to rule on the submittal of additional evidence. Commissioner Pruitt asked if the Virginia Beach Wetlands Board has been aware of the signs? Mr. Mathews said it was the first time he had seen it. Commissioner Pruitt asked for a motion to accept new evidence. Associate Member Gordy moved to accept the new pictures. Associate Member Williams seconded the motion, which passed unanimously.

Mr. Nutter showed pictures of signs posted by the City along the "feature" his clients' call the primary sand dune and has been treated by this Commission in other applications as the primary sand dune. The sign said, "Please keep off dunes, see Code 610 and 611." The feature, he said, is suddenly now not a primary sand dune, but the signs still are posted and people are threatened with criminal prosecution for going on this "dune-like artifact." Mr. Nutter said his point is consistency. If this (the more upland dune) is the primary sand dune, then the case takes on an entirely different light. If his clients are required, however, as VIMS and the City Planning Department wish you to hold, but which the wetlands board disagreed, that this (the more upland dune) is the primary sand dune, then the city has some merit to the argument. That is the principle point of this case.

This line is part of the sand replenishment program. He explained that the City, however, has said that the dune in the front is no longer the primary sand dune because the sand that the City has deposited along the beach front has helped create that dune. Mr. Nutter said his clients do not deny the fact that the dune has been replenished by and preserved by the sand placed there. The sand placed there blows everywhere. This is a case, where this activity, is what the statutory amendment is all about.

Mr. Nutter said the impact of the decision was important to the families. They have paid full taxes on these properties. These lots are appraised for \$150,000 each. These taxes represent forty (40) percent of their gross income. This is not a case where the Board felt sorry for these people, but the Board is charged with protecting people's constitutional rights. These front lots were platted sometime ago and if the primary

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sand dune is back here (the rear dune), then there is a total take of these lots. The real term for emotional equity is constitutionally protected property rights because they have been paying taxes, at a huge rate, for many years. That is the impact on this family. Can the Board balance the environmental protection provisions with someone's constitutionally protected rights? Mr. Nutter claimed that if the Board ruled in favor of the (City), the owners would prohibit 100 percent use of the properties.

Let us go to the definition. The uncontested facts are: the dune along the front in prior applications has been considered the primary sand dune because it meets the definition of coastal primary sand dune. The amendment to the Code, but for this sentence, we would not be here today. The front dune meets the definition unless the last sentence changes it. The last sentence says for the purpose of this ordinance, coastal primary sand dunes shall not include any mound of sand, sandy soil or dredge spoil, deposited by any person for the purpose of temporary storage, beach replenishment, beach nourishment, nor shall the slopes of any mound be determined as the landward limits of a coastal primary sand dune.

Several words are important: deposited by any person. The front "feature" which has additional sand is precluded from being a primary dune, Mr. Nutter said. It says deposited by a person, not by nature, having been blown there. This feature was not created by man, and has been helped and replenished by man. There is no question, but our position all along has been that this is the primary sand dune and the dune behind it is not the primary sand dune. Because the construction is being proposed, 42-feet back from the top of that feature (front dune). When we went to the Board initially, we debated this issue and we went over at great length what is the primary sand dune.

Mr. Nutter said Associate Member White asked earlier what is the difference in the two applications. Mr. Nutter said his clients were proposed initially to build on grade. The Board, at the first hearing, said the (rear) dune was important "too" and asked the applicants to elevate the structure. There was no objection. The Board said an amended application would be required, but one Board member said that was not necessary and moved for approval. The motion was defeated by a vote of 4-3. The applicants then refiled to apply to elevate the structure above (the rear) dune and will be the only structure elevated above it. There is an adjacent public walkway that was plowed down by the City for public access vehicles. Several other homes go into it. The primary sand dune (rear dune) roughly runs the length of three lots, Mr. Nutter said.

Mr. Nutter said the amendment in the state Code, read directly, if beach replenishment is deposited by man cannot be counted as a primary sand dune. That

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makes perfect sense, he said, but that is not the intention. No one wanted to jeopardize the beach replenishment efforts of the City. Mr. Nutter said the City's case assumes that if this (front) is not the primary sand dune then the rear dune is the primary sand dune. That fact will eliminate the use of several properties and is known as a taking by governmental act, Mr. Nutter said. The Board, however, wanted to find an answer to protect a person's property rights while preserving a fragile area and that is why they wanted this (home) elevated.

This (rear) dune cannot be the primary sand dune because the definition for a primary sand dune is a mound of unconsolidated sandy soil that is contiguous to mean high water, Mr. Nutter said, pointing to lines on slides of mean high water and mean low water. If this is not the primary sand dune (front) the rear dune does not become the primary sand dune unless it meets the definition, Mr. Nutter stressed.

Making the rear dune the primary sand dune results in the total take of these properties, he said. It also means there is no primary sand dune and there is no jurisdiction for the City. Thus, the Wetlands Board did not pick that (rear) dune as the primary dune and protect the (front) primary sand dune completely, Mr. Nutter said. That is the situation presented.

Mr. Nutter said the state's intention was to make sure that sand replenishment activities do not allow the property owner who lives behind those to tear down the primary sand dune. You have to construe the facts most favorably toward the Board on this issue. When you weighed all the information the Board made the right decision, Mr. Nutter said. The evidence was supported in the record, he added.

Mr. Mathews made the contention that there is no evidence of public benefit on the record. The Board was sitting there represented by counsel and staff. At no time did anyone object that there was no evidence on the record to support the decision. The Board made a decision; it disagreed with its staff. We were brought here on appeal, but the Board did consider the property owner's interest and rights. There were two hearings and at both hearings the Board questioned staff and the representatives of the Virginia Institute of Marine Science.

Mr. Nutter added that there is evidence from VIMS and on page 19, Mr. (Walter) Priest concedes that this feature (front dune) has been taken over by a natural process that has shaped it into a natural dune feature. That is not what this exclusion in the Code talks about. This feature, while it has been replenished, it is a natural process.

The cases of the two property owners are identical except a few features. Mr. Pruitt

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questioned this earlier about the changes from pilings supporting decks to cantilevered decks requested by the Board. Mr. Nutter said he did not believe that made it an unconstitutional or unlawful process. Parking on Mr. Turpin's lot, eliminated one feature on the change.

Mr. Nutter said he would concede that the (front) dune has received part of the replenishment activity and been aided. He said that Mr. John Daniel, former Secretary of Natural Resources, has been co-counsel and raised a point that if the City's replacement efforts were to continue and it was held that blowing sand upon this (front) dune changes it from a primary sand dune then property owners are going to be discouraged from getting sand. Why would they want to jeopardize that dune feature and restrict development of their property? For a number of reasons, this is a case about two little people who want to do with their property like others have been allowed to do.

Commissioner Pruitt asked if there were any questions for Mr. Nutter. There being none, he asked Mr. Mathews and Mr. Ayers to respond.

Mr. Mathews said there was one point that jumped out at me, a comment of common sense. The statute says one does not get the benefit from artificial accretion. He noted the house line (and the large distance from the water) suggested that the homes were that far back because (the rear) dune was the primary sand dune. He said the equity argument should not effect the case. In the tax situation, there is a board of equalization, but the property owner has to make a decision. If the owner asked for a reduction in taxes, then the argument will come back to haunt them if they say they are being denied use of their property. But the applicants are now saying that because we paid the taxes it is not fair for the Commission to follow the statute.

The appealable argument has been made that this is a constitutional taking and that the Commission should prevent a constitutional taking, which has an appropriate forum. It is the duty and responsibility of the Board and this Commission to follow the statutory guidelines it is given and if the court later decides that it is a taking and the court awards compensation. It is not a relevant argument for this Commission to consider.

Commission Pruitt asked for Mr. Ayers to comment. Mr. Ayers said his family has been on the beach since the late 1930's. The houses that you see in a row were there for a purpose because until 1986 what has been described as the primary dune was the primary dune, the water came right up to the slope. The sand fences are no longer there. This is an ongoing evolution.

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Commissioner Pruitt asked Mr. Ayers about a picture. It is a bulkhead or sand?

Walter Priest said there is a closeup in his report that shows it is the front face of the sand bulldozed from the beach and sprigged by the City of Virginia Beach.

Commissioner Pruitt then thanked everyone for the presentations. Those of you who have lectured us on our duties, he said the Commission does not get involved in those things that we are not supported to get involved in. One of those items, he said, facing us today and made it difficult is that we are not here to consider how we would have voted if we had been on the Wetlands Board. We are here today to consider if the Wetlands Board followed the Code of Virginia.

The matter is before the Commission, the Wilkie case will be heard first. Associate Member McLeskey said he had viewed the site but is confused about what is the primary dune. He said he understood that the dune closest to the high water mark is the primary dune and if it is not, can it be removed?

Mr. Priest said the material here (in the front) is an artifact of the beach nourishment program. In 1987 that feature did not exist and the beach was flat and the primary dune was the dune adjacent to Mr. Wilkie's and Mr. Turpin's property. It is my contention that the front dune is not the primary sand dune as defined by the Code of Virginia. It would be up to the City if it wanted to remove it, but that would seem to be counter productive.

Mr. Tom Bernard, also of VIMS, said the area Mr. McLeskey was referring to is a foredune and part of the original dune and is part of the primary dune, but is not the crest of the dune. It would take a permit to remove it. Associate Member McLeskey said it still is confusing as to whether the (front) dune could be removed. Mr. Bernard replied that it is part of the area seaward of the primary dune and is the part of the primary dune and is the front slope of the primary dune.

Associate Member McLeskey asked then what was the stripe in the left of the picture. Mr. Owen said it was the City's access way to get the trucks on the beach to empty trash cans. Associate Member McLeskey asked if the access way breached the dune. Mr. Owen responded yes.

Associate Member Hull questioned whether on the extreme left of the picture (slide) the building is built out beyond the primary the dune or onto the artifact? Mr. Owen said the building is built behind the bulkhead, which was constructed on the beach after the Dune Act was established, but before it was modified to include the beach as part of the jurisdiction. Since the dune was gone because of storm activity, the City

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administratively issued a permit, he said.

Associate Member Hull asked another question. Where does the primary dune end and where does the artifact end? Mr. Owen asked Mr. Priest to answer the question.

Mr. Priest said the primary dune continues over to a return wall (shown in the photograph).

Associate Member Hull asked if the home with the elevated walkway has an elevated deck built out over the dune. When was that constructed, he added. Mr. Priest said he did not know.

Associate Member Williams asked where mean high water was? Mr. Priest said high water was the line that denotes the change in the color of the beach.

Associate Member Gordy said she does not understand how the City can make a road through the dune. She said she does not think anyone knows where the primary dune really is. She also said she did not know why the City put the sign on the first dune if it is not the (primary) dune. There is a lot here that I do not understand, Associate Member Gordy said.

Mr. Owen said the City's access road is exempt from the permitting process. He said he did not know why the sign was placed in its location.

Commissioner Pruitt asked if there were any other questions. There were none. He placed the matter before the Commission. Associate Member Gordy said that after studying the matter carefully and listening to everyone, moved to uphold the decision of the Wetlands Board. Associate Member Hull seconded the motion, which passed unanimously.

Commissioner Pruitt said that was the Wilkie case and now the Turpin case. Associate Member Gordy moved the same motion and Associate Member Hull seconded it. The motion was passed like the Turpin case by a 6-0 vote.

- 5. HORACE PRATT, #01-0842**, requests authorization to construct a single-family home at his property situated along the Chesapeake Bay in the City of Hampton. A Coastal Primary Sand Dune/Beaches permit is required.

Traycie West, Habitat Engineer, presented slides of the application and said Mr. Pratt's property is located in the Malo Beach section of Hampton. Mr. Pratt wishes to construct a single-family home on a currently undeveloped lot on North First Street.

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This is one of only two undeveloped lots on the block. Mr. Pratt's lot and the adjacent undeveloped lot are at the northern end of a coastal primary sand dune that extends south towards Buckroe Beach. Mr. Pratt's original proposal included a request to relocate the sand dune 25 feet seaward in order to accommodate his proposed home. The staff explained to Mr. Pratt that displacement of dunes was discouraged by the Coastal Primary Sand Dune and Beaches Guidelines. Mr. Pratt then agreed to modify his proposal.

In order to minimize dune encroachment, Mr. Pratt requested and was granted a roadside setback variance by the City of Hampton. That variance reduced his roadside zoning setback from 39 to 30 feet. Even with the setback variance, however, a portion of the home will still be placed in the coastal primary sand dune. The Pratt home will encroach approximately 3.5 feet into the back face of the dune, resulting in approximately 99 square feet of dune impacts. In addition, the support pilings for the second story deck are proposed to be placed on top of the dune crest, Ms. West explained. (Details of the slide presentation of the application are in the verbatim record.)

The City of Hampton has not yet adopted the Model Coastal Primary Sand dunes and Beaches Ordinance. As a result, the Commission is charged with implementation of the ordinance for the city.

Mr. Pratt has clearly attempted to minimize his project impacts to the dunes by seeking and obtaining a setback variance from the City of Hampton. However, staff believes that impacts to the back face of the dune can be completely eliminated, however, by shortening the depth of the garage by 3.5 feet to four feet. The portion of the second and third stories (first and second living floors) could be supported by pilings or a cantilevered support system.

In addition, the proposed stairs from the second story deck to the beach terminate atop the dune at the 8-foot contour line, Ms. West said. While the Guidelines support bridging the dune with open-pile structures in order to gain access for water-dependent activities, the structures should be designed in a manner that minimizes alteration of the dune slope. Beach access from the second story of the home may actually concentrate pedestrian traffic over the dune when accessing the beach. Therefore, staff would suggest that the stairs be relocated to come down the side of the house or that the structure be extended down to the beach face rather than terminating on the dune slope.

On Monday, August 9, staff held a public hearing in the City of Hampton. Three neighbors attended the hearing and expressed concern about relocating the dune.

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Staff explained that the proposal to relocate the dune was no longer on the table, that Mr. Pratt had obtained a variance and the house would be moved closer to the road.

The Virginia Institute of Marine Science has stated that the proposal warrants careful consideration. The VIMS staff recommends that the concrete parking slab not be placed within the jurisdictional dune area and that the second story deck be supported by a cantilevered system, rather than with pilings. In addition, the beach access stairs should be elevated above the dune and extended over the dune vegetation with the landing seaward of the existing dune toe. VIMS staff also recommends that all disturbed areas be replanted in the fall with American beach grass, Ms. West explained.

In summary, Ms. West said, according to the Commission's Coastal Primary Sand Dune and Beaches Guidelines, the placement of a part of an open-pile supported home within a portion of the jurisdictional back face of the dune is considered to be the least deleterious to the functions of the dune so long as significant amounts of sand is not excavated. The Guidelines also clearly state that concrete slabs do not allow for the natural migration of the dune and are not recommended.

Mr. Pratt has attempted to minimize the impacts of his project on the dune by obtaining a setback variance from the City of Hampton. Nevertheless, staff believes that impacts to the back face of the dune can be almost completely eliminated by shortening the garage area by 3.5 to 4 feet and utilizing a cantilevered support for the upper stories and deck. In addition, the staff believes that the impacts to the dune by the current placement of the stairs is unacceptable. Landfall of the stairs should be directed to the sides of the property in an area outside or apart from the dune.

In absence of further modification, the staff recommends denial of the application as it currently is, finding that the project neither meets the criteria set forth in 28.2-1203 Code of Virginia and does not conform with the Standards for Use of Coastal Primary Sand Dunes.

However, with slight modifications, the staff could recommend approval. These modifications would include: that the concrete slab be shortened by 3.5 to 4 feet and the breakaway walls be moved landward in order to eliminate all encroachment into the jurisdictional dune area; that the second and third stories of the home in the area of the slab reductions be supported by either cantilevered or pilings; that, in accordance with VIMS recommendations, that the second story deck is also supported by a cantilevered design; that the stairs from the second story deck be redesigned to terminate on the side of the building rather than on the dune and that Mr. Pratt construct an elevated walkway for beach access. In the alternative, the stairs

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terminate at the toe of the dune, rather than the 8-foot contour line, and that in accordance with VIMS recommendations, any disturbed areas are stabilized by planting beach grass.

Associate Member Gordy asked if the staff had discussed the proposals with the applicant? Ms. West said she had discussed it with Mr. Pratt and Mr. Todd, the builder. She said she would rather let Mr. Pratt discuss it directly, but it is her understanding that he believes the requests by staff are reasonable.

Commissioner Pruitt asked if there were any more questions. There being none, he asked Mr. Pratt to address the commission.

Mr. Pratt told the Commission that he agreed with the staff recommendations. He said he would agree to move the concrete slab 3.5 feet towards the street and we will make other modifications as they have recommended and he asked that the Commission approve this request.

Associate Member Gordy asked Mr. Pratt if he agreed with all the suggested recommendations. He replied yes.

Commissioner Pruitt asked if there was any opposition. There being none, he placed the matter before the Commission. Associate Member Williams moved to approve the application with the proposed staff and VIMS recommendations. Associate Member Gordy seconded the motion and it passed by a 6-0 vote.

6. TODD BUILDERS, INC., #01-0919, requests authorization to construct a single-family home and 60-feet of timber bulkhead at their property situated along the Chesapeake Bay in the City of Hampton. A Coastal Primary Sand Dune/Beaches permit is required.

Ms. West told the Commission, using slides, that this property is also located in the Malo Beach section of Hampton. Mr. Ray Todd wishes to construct a single-family home on a currently undeveloped lot situated along North First Street. The lot is one of three adjacent undeveloped lots and one of only six undeveloped lots on the eastern side of the street in the vicinity.

The City of Hampton has not yet adopted the Model Coastal Primary Sand Dunes and Beaches Ordinance. As a result, the Commission is charged with implementing the provisions and reviewing the application.

On August 9, the staff held a public hearing in the City of Hampton and three

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neighbors attended the hearing, but none expressed any concerns regarding this proposal, provided the bulkhead did not extend out onto the beach any further than the existing structures.

The proposed home is of open-pile design, Ms. West said. The proposed bulkhead is to create an off-street parking area, on-street parking is not permitted along North First Street. Mr. Todd has proposed to align the bulkhead with the adjacent properties north of his parcel, which will result in encroaching approximately 35 feet onto the beach.

In searching past Commission actions concerning placement of bulkheads along this portion of North First Street, staff was able to identify permits issued by the Commission for four of the five homes along this area. The three most northern properties, (840, 838 and 836) received permits from the Commission for parking areas and homes either in the late 1980's or early 1990's. The timber bulkhead parking areas in these areas are between 18 and 25 feet in depth onto the beach.

Staff could not locate a permit file for 834 N. First Street, however, 832 was located. According to the staff evaluation of 832, the bulkhead was placed prior to the submission of the application in 1985 for the house and prior to the passage of the reach revisions in 1984. The staff evaluation in 1985 indicated that the area between the bulkhead and the street was functioning as a septic drain field and parking area. There are no dimensions on the drawings, but staff measured and found it to be 42 feet.

The permit file also contained aerial and ground photographs from 1981 showing the placement of the pilings for the house at 834 and an existing bulkhead across both 834 and 832, indicating installation of these facilities was likely initiated before the Dune Act became effective in 1980.

The Virginia Institute of Marine Science recommends that the project warrants careful consideration, although the VIMS staff does acknowledge that there are no alternatives that would reduce the adverse impacts of the proposal.

In summary, the proposed project does not accommodate the Beaches and Dune Guidelines and it is not sound policy to encourage development within an active beach and dune zone. The majority of the City's bay front shoreline, however, has similar structures and attempting to halt development on the remaining Malo Beach lots would seem to serve no practical purpose. As a result, staff believes that the proposal does not violate the standards embodied within the Beaches and Dunes Ordinance. As a matter of equity, it is also probably unreasonable to preclude the

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owners of the remaining undeveloped lots from enjoying the same benefits and rights as their neighbors.

The proposal is also similar to almost 20 previous dune and beach applications which the Commission has reviewed for single-family homes along the Malo Beach section of Hampton since the passage of the dune ordinance in 1980. All previous applications were approved as submitted or in modified form.

Given the fact that the City prohibits on-street parking on North First Street, the Commission has authorized the placement of bulkheads for construction of parking areas in several instances since 1980. Since City sewer services now have been installed, however, there is no longer a need for septic drain fields behind the bulkheaded parking areas.

As a result, staff recommends approval of the placement of the house, finding that the proposal satisfies the criteria set forth in §28.2-1403 Code of Virginia and conforms with the standards for use of coastal primary sand dunes and beaches.

However, staff recommends that the bulkhead's seaward encroachment be reduced only to the amount necessary to park vehicles off the street. Given the encroachment of the nearby parking areas to the north, a seaward encroachment of 20 feet from the street appears to be reasonable.

Staff also recommends that the permit be conditioned to include a requirement that any sand excavated from the beach during construction of the house be placed back into the beach system, forward of the proposed bulkhead and, therefore, retained within the beach system.

Commissioner Pruitt asked for any questions. There being none, he asked the applicant Mr. Ray Todd to address the Commission. Mr. Todd said he found the recommendations acceptable and would cooperate fully.

Commissioner Pruitt asked if anyone was in opposition to the application. Associate Member Williams moved to approve the application following the staff recommendations. Associate Member Birkett seconded the motion and it passed by a 6-0 vote.

7. **WILLIAM J. MEAGHER, #01-0607**, requests authorization to construct a 63-foot long by 6-foot wide non-commercial, open-pile crossing and two mooring piles adjacent to his property situated along Callis Creek in Mathews County. The project is protested by an adjoining property owner.

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Kevin Curling, Habitat Engineer, said Mr. Meagher's property--2.45 acre lote--contains a sand spit upland portion which is separated from his mainland by a tidal marsh and pond. Mr. Meagher is proposing to build a walkway over state-owned submerged land to the sand spit and put two mooring piles adjacent to it. The walkway would be used as a boat mooring. (Explanation of slides are part of the verbatim record.)

The project is protested by Mr. James Shinault, whose protest centers on the deeded restrictions on a sight eastment on the sand spit and also over any encorachment over the extended property line separating the two properties, Mr. Curling said.

Even without this crossing, Mr. Meagher has other alternatives available to access the sand spit by viture of an ingress/egress eastement across other lots, he said. In addition, if Mr. Meagher wishes a direct access to the sand spit, staff would recommend than an open-pile, elevated crossing be constructed landward of mean low water over the marsh. Such a structure would likely comply with the exemption provided in 28.2-1302(3)(1) Code of Virginia.

Mr. Curling said, in addition, Mr. Meagher has 45 feet of shoreline on the opposite side of his property which already contains a pier. As a result, there appears to be little justification or rationale for a second pier to serve this parcel.

The Commission, in reviewing permits for encroachment over State-owned submerged land, strives to minimize interference with the rights of adjacent property owners and other permissible uses. The staff also carefully considered the necessity and water-dependency of a project as well as any viable alternatives to reduce impacts.

In summary, Mr. Curling said, although small, the crossing still effectively removes a portion of State-owned submerged land from the public's use. Strictly speaking, gaining access to the sand spit has no inherent water-dependency. Mr. Meagher has an existing pier to provide navigable access and mooring space for his boat is accommodated elsewhere on the property. Since alternatives exist that are permissible under current legislation and will not require permits from either the local wetlands board or the Commission, approving a permit for this project would seem to represent an unnecessary encroachment over State-owned submerged lands. Therefore, the staff recommends denial of the application as submitted.

Commissioner Pruitt asked if there were any questions for Mr. Curling. There being none, he called for Mr. Jeff Watkins and Mr. William Meagher to address the Commission.

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Mr. Meagher told the Commission that the creek which wraps his property is a mud flat at low tide and rockfish season. He offered some photographs for the Commission and noted that his property was exposed and the proposed mooring site was better for normal tide cycles and when he is not at his property. (Explanation of the slides is part of the verbatim record.)

He noted that there is a 930 foot walk by the deeded easement to get to the (sandy) point and it is accessed almost daily. The dual purpose was to have an open-pile walkway over water and that deeper draft boats could use the two mooring pilings.

Mr. Meagher said the protest letter was more of a letter to him to stay within the conditions of the deed and that the structure would be no more than three feet above mean high water and will not encroach upon the property line extended. Those conditions in the protest letter are easily met.

Mr. Watkins added that the Corps of Engineers has been contacted about the permit and the options and the Corps asked that the walkway not go over the wetlands because the marsh would be shaded. In the past, he said, there are properties with small crabbing piers at other locations also on a peninsula that also have a second pier. This would not be the first piece of property to have two piers--a river pier and then a harbour pier for storms.

Commissioner Pruitt asked if anyone wanted to speak in opposition. He said it seemed as though efforts were made to work out problems with your neighbor.

Associate Member Gordy moved approval of the project. Associate Member White seconded the motion and it carried by a 5-1 vote.

8. **DONALD R. MILES, #01-0829**, requests authorization to construct a 35-foot by 20-foot open-sided private boathouse adjacent to his existing private pier situated along the York River near the mouth of Sarah Creek in Gloucester County. The project is protested by an adjacent property owner.

Chip Neikirk, Environmental Engineer, presented slides and a description of the proposal. He noted that it is approximately 700 feet to the opposite shore of the creek in the area. The minus six foot contour is about 200 feet off shore and Mr. Miles' pier extends 150 feet channelward of mean low water to reach the minus four foot contour.

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Development along this stretch of the river is primarily residential except for the marina which is in Sarah Creek. He noted that the pier has been constructed with the boatlift on the opposite side of the pier than was depicted in the application drawings. The 16-foot L-head and the boatlift were statutorily exempted. The plan is now to put the boathouse on the other side of the pier. The boathouse is designed to be 16 feet landward of the end of the pier.

The peak of the hip-style roof, Mr. Neikirk said, is proposed to be 12-feet above the elevation of the pier and 18 feet above the elevation of mean low water. (Details of the slide presentation are part of the verbatim record.) The boathouse is designed to shelter a larger vessel, a 30-foot boat.

The pier does cross some submerged aquatic vegetation, but the boathouse is located channelward of the current SAV and is in approximately 4-feet of water.

The project is protested by Ms. Evangeline P. Fary, an adjacent property owner. She expressed primary concern that the boathouse will restrict her view of the York River and the Yorktown shoreline.

In summary, Mr. Neikirk, said that had the adjacent property owner not objected to an open-sided boathouse design, it would have qualified for the exemption provided in the Virginia Code. As proposed the open-sided design and hip-style roof should minimize the visual impacts associated with the structure. Furthermore, the navigational and environmental impacts should not exceed those associated with the existing pier and uncovered boatlift, which are already statutorily authorized. Accordingly, staff recommends approval of the project as proposed conditioned upon the receipt of a revised plan-view drawing showing the reverse design with the boathouse on the other side of the pier.

Commissioner Pruitt asked if there were any questions. There being none, Mr. Donald R. Miles, applicant was asked to address the Commission.

Mr. Miles offered some extra ground-level photographs, which were computer-enhanced by placing a roof on the proposed boat house. (Details of the photograph descriptions are part of the verbatim record.) He said the elevation of the views is important in the case. The elevation of the roof of the boathouse is about equal to the elevation of the adjacent yard, so any obstruction could not be seen. Mr. Miles said, in his view, the low-profile hip-roof offers a minimal obstruction.

Mr. Miles noted that a closed boat house, which had earlier been pointed out by Mr. Neikirk, is owned by the family of those making the protest of his project.

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Associate Member Hull asked specifically who owns the boat house? Mr. Miles responded that the family is objecting, but not the lady herself.

Commissioner Pruitt asked if anyone was in opposition. There being none, he put the matter before the Commission. Associate Member White moved approval of the application. Associate Member Gordy seconded the motion, which was approved by a 6-0 vote.

After a lunch recess the Commission continued with the agenda.

9. **BARBARA HIGGINBOTHAM, #99-0842**, requests after-the-fact authorization to retain a 46-foot long by 44-foot wide portion of a commercial pier and Commission consideration of failure to remove an approximately 20' x 32' open-sided gazebo on her property situated along Back Creek in York County.

Ms. Tracyie West, Habitat Engineer, said the property is adjacent to Mills Marina in the Seaford area of the county. In early May, 1999, Ms. Anna Drake, of the York County Wetlands Board, was contacted by the York County Zoning Office and apprised that construction activities were taking place at Ms. Higginbotham's property. County and VMRC staff subsequently investigated and found that Ms. Higginbotham was in the process of demolishing a previously existing commercial pier. At the time, she stated that she was removing the old structure because it was a safety hazard. She was informed that while removal of an existing structure did not require authorization from this agency, rebuilding a pier was not considered to be maintenance and repair and that submittal of a Joint Permit Application would be required.

Ms. Higginbotham submitted an application to replace the commercial pier on May 12, 1999. In that application, she stated that the project purpose was to replace the existing pier and maintain its use as an off-load pier for commercial watermen. In addition, the application stated that there were no existing or proposed slips, only transient mooring, and that "work boats would be staying for short periods of time," Ms. West explained. Although it was unstated in the application, Ms. Higginbotham informed staff that she intended to allow the watermen to off-load at the facility during the week and planned to host wedding receptions at the facility on the weekends.

Ms. West said the application was subjected to a public interest review. By letter dated June 4, 1999, the Virginia Department of Health granted an exemption for the requirements to install pump-out facilities and sewage dump station facilities at the

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location. Their letter specifically stated that boats with installed toilets and with an overboard discharge or sewage holding tanks were not allowed to use any services at her pier, including mooring (except in an emergency). The letter also stated that the boat moorings would serve only commercial seafood vessels or bonafide house guests and that no overnight moorings of boats were allowed.

Subsequently, the VMRC staff administratively issued the permit to Ms. Higginbotham. Based on her application and permit drawings, the permit authorized the replacement of a commercial pier with a 66-foot long by 44-foot wide open-pile commercial pier with a 164-foot long by 10-foot wide extension and a 30-foot wide L-head. Ms. Higginbotham stated several times that she was merely replacing what previously existed at the site, Ms. West said.

In early May 2000, Ms. Higginbotham called to request a compliance inspection because a new contractor had requested that VMRC verify compliance of the structure before he began any additional work. On May 26, 2000, staff inspected the pier and found that Ms. Higginbotham had constructed an additional 2,024 square feet that was not authorized by her permit. Ms. Higginbotham stated at that time that she believed she was within the original footprint of the pier because her new structure was built over old pilings, Ms. West said.

A sworn complaint and Notice to Comply were issued on May 31, 2000, she explained. The Notice directed removal of all unauthorized portions of the structure within 30 days. Ms. Higginbotham failed to comply with the notice and staff briefed the Commission on this matter at your July, 2000 meeting. At that time, the Commission directed removal of the portions of the pier that were unauthorized or submittal of an after-the-fact application within 60 days. The Joint Permit Application was submitted.

Ms. West said it should be noted that the scope of the project has now changed significantly from the original application. Ms. Higginbotham has verbally stated on several occasions that she now intends to have a restaurant at the site. Conversations with York County officials have confirmed that Ms. Higginbotham is pursuing a County zoning designation that will allow an eating facility in association with her marina.

As a result of a public interest review (of the new application), staff received notice from the Virginia Department of Health in October 2000, recommending denial of the project because VDH had not received an application for sewerage facilities. Its previous exemption was no longer applicable because of changes to the scope of the project. On March 23, 2001, staff received notice from VDH that Ms. Higginbotham's plan for sewerage facilities had been approved and that VDH was no longer recommending denial.

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Following a routine inspection at a nearby site, staff stopped by Ms. Higginbotham's property in order to finalize preparations for bringing this project back before the Commission, Ms. West said. During the site visit, staff noted what appeared to be new construction on the pier and found access to the pier gated and locked. Staff flew over the property on June 14, 2001 and noted that a large open-sided gazebo had now been constructed. Staff issued a new sworn complaint and Notice to Comply on June 15, 2001. In subsequent telephone conversations, Ms. Higginbotham stated that she believed that the gazebo was authorized by her permit because there had been a building on the pier in the past and because her application drawings mentioned that a building previously existed. Issues regarding VDH approval and the second violation had prevented staff from bringing this item back to the Commission until now.

Ms. West said since the pier was already razed when staff initially investigated the project, staff was unable to verify Ms. Higginbotham's assertion that she was replacing what previously existed or confirm that the dimensions provided on Ms. Higginbotham's drawings were correct. However, it is the responsibility of the applicant to provide drawings that accurately reflect their proposal. VMRC permits specifically state that all activities authorized by the permit must be accomplished in conformance with the plans and drawings submitted. All drawings are attached and made a part of each permit and then become the standard by which compliance is measured. Staff examined several aerial photographs and it appears that Ms. Higginbotham applied for more than what existed prior to her ownership of the facility and then constructed more than was authorized by her permit. (A series of slides was showed and descriptions of them are part of the verbatim record.)

In regards to the gazebo, it should be noted that the text of the permit issued by staff describes reconstruction of a commercial pier only. Neither the advertisement that was placed in the newspaper nor the text of the permit mentions construction of a gazebo. In addition, no drawings of any proposed roofed structures were submitted with the JPA. Ms. Higginbotham had already been advised by staff that while removal of structures over State-owned submerged lands did not require permits, reconstruction is new construction and is not considered maintenance and repair and it does require authorization. In addition, she had ample opportunity to correct staff when reviewing and signing the draft permit if she felt the permit was not inclusive of the entire project that she believed she had brought forth for review.

York County Zoning Ordinance 24.1-462 outlines the requirements for the placement of a restaurant at a commercial marina. Requirements include that the restaurant shall be designed and operated as an accessory component and that the marina

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shall, at a minimum, have 20 in-water slips capable of accommodating boats a minimum of 16-feet in length and that any proposed outdoor dining areas shall be clearly depicted on plans submitted to the County.

Since Ms. Higginbotham's application did not request authorization for the installation of mooring piles or slips, her drawings do not actually indicate slips, and her application specifically states that there are no slips, staff requested and received a mooring plan for the pier as it is constructed now. The mooring plan indicates there are 36 moorings at the existing pier. Staff also reviewed plans on file in York County and an outdoor dining area is not indicated.

In summary, the current pier configuration is in excess of what was authorized and appears to be excessive for the originally stated purpose of the project, which was to allow for the off-loading of seafood. Since staff has found access to the pier to be locked, it is unlikely that watermen are still off-loading at the facility.

The gazebo was constructed without authorization from this agency while Ms. Higginbotham had an unresolved violation with the Commission. In addition, it is likely constructed over the portion of the pier that was the subject of the unresolved violation for which staff is recommending removal. Also, since Ms. Higginbotham has not indicated on the zoning plans she submitted to York County that she intends to use the pier and gazebo areas for dining, the need for the excess pier and gazebo structures remains questionable.

Based on the foregoing, staff recommends that the Commission direct Ms. Higginbotham to remove the unauthorized portions of the pier and the gazebo within 60 days, but that her existing permit be amended to allow "temporary" mooring of boats at the authorized portion of the pier for restaurant patrons, Ms. West said.

If the Commission is inclined to grant approval of the previously unauthorized structures, staff recommends an appropriate civil charge be assessed for each violation.

Commissioner Pruit asked if there were any questions from the Commission. He then asked for the applicant or agent to speak. Sid Letz, her agent, addressed some of the concerns expressed in the staff presentation. One item, he said, was that Ms. Higginbotham had changed from off-loading boats to a restaurant project. He said that when she first proposed the project there was no County sewage project at that time. Like many businesses when utilities are upgraded business plans are changed to accommodate that change and to further increase the probability of a business. When sewage became available she decided she wanted some type of on-site

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restaurant.

Not familiar with the regulations, you gave her 60 days to respond. Mr. Letz said she contacted him within the 60 days and he contacted Ms. West, but told her he could not submit a plan in three days and said an extension would be granted. He said he measured mean high water and mean low water to make sure everything was precise. The fence that was located was at the request of her insurance company to keep people from going out on the pier after hours. It was a liability issue. When she is not there, the fence is locked.

Mr. Letz said he asked a question prior to the meeting about the so-called gazebo. His client said it is the same dimensions of that building that she torn down. He said he asked Ms. West if it was torn down and had we put in a new permit, would it have been approved. Her answer was yes. The pier itself had it been put in scope and sequence, likewise would probably have been approved. That comes from personal experience, he said, having worked for the Corps of Engineers for a year, 1990-1991 before going into business myself and he has seen many like projects approved. She has done a wonderful job of turning a very delapidated building into a very nice place that brings in tax dollars for the community and is aestically pleasing.

Regarding the roof, Mr. Letz said he asked Ms. West about it after she contacted Ms. Higginbotham. He said he asked whether modified drawings should be submitted and she said it was not necessary. That is why no drawing is here, he said.

Associated Member Gordy asked Mr. Letz if he meant his client did not know she was to have a permit for the gazebo? He said the gazebo is smaller than the dock. Associate Member Gordy said it looks as though the old dock only came up to the gable of the building and the new dock is wider and the gazebo is not in the same location. Mr. Letz said everything was put in the old location.

Associate Member Gordy one of her reasons was to let the watermen off-load, but if the gate is locked, how can the watermen get in. Mr. Letz said the gates were not up then and the gates were a more recent addition. It was not originally like that. At every point along the way, something has dictated, he said. He said everything has been done that the staff has requested. He said he was told the gazebo would have been approved. He said Ms. West said it would have been approved.

Associate Member Gordy asked Ms. West if the project would have been approved or probably been approved. Ms. West said she told them it "probably" would have been approved since there was a building there originally. Associate Member Gordy said she was amazed that people do not get permits or find out what permits are needed.

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Mr. Letz said many people come to him and do not know what is necessary nor that the VMRC and the other agencies exist.

Mr. Letz said that before he went to the Army Corps of Engineers he would not have known what was needed to get a permit. When he went to the Corps he said he was amazed at the regulations that people have to go through.

Associate Member White asked how long Mr. Lefthelm had been in his business. He responded that he began his business in 1991. Mr. White asked if he learned through trial and error. Mr. Letz said no because when he was at the Corps he worked with Mr. Bruce Williams, "one of the best regulators of all times."

Associate Member Gordy asked if contractors, before they built, find out what permits are needed. Mr. Letz said yes they do, but some citizens do not know. There is some ignorance there.

Commissioner Pruitt asked Ms. Higginbotham what was her ultimate plan. She said that since York County has authorized marinas--only marinas--to have restaurants, she is going forward. Sewage is currently being installed. The intent was to do what you have to with the property until at such time it gets city sewage.

Regarding the size of the pier, she said when she was before the Commission earlier, the insurance company had told her that it would be easier to cut the stringers and headers and drop it and put new strings and headers in. She said she was told she could not do that and that she could go with the original footprint. (Ms. Higginbotham's comments regarding some of the slides in the staff presentation and her own photographs are part of the verbatim record.)

Associate Member Hull asked when she acquired the property. She responded two and a half years ago, almost three. He asked if the small building was there. She said yes. It was a freezer and a shed which was torn down. The concrete slab for the freezer remains. She said she replaced just the roof and not the sides, thinking I could replace it since it was in such bad repair.

Commissioner Pruitt asked if watermen would be allowed to continue to tie-up at the pier. Ms. Higginbotham said the fence had been replaced and mooring pilings had to be installed. She said on and off the watermen have been there. Commissioner Pruitt asked if commercial tie-ups were part of her long range plan? She said no. She said there would be mooring for a marina and restaurant. She said her facility was beside Mills Marina. She said she thought she could go back to the original footprint. She said she had mismeasured when she said 66 feet.

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Commissioner Pruitt said all the Commission wants is a completed project that is in compliance with the law. The Commission did not do anything to her, she said. She went out and did the work. Ms. Higginbotham said that when she left last time the Commission told her she could apply for an after-the-fact permit and that is what she did.

Mr. Letz asked her if the permit is complete and meets everything that she intends to do or has done? She said yes.

Commissioner Pruitt asked if there were any further questions or anyone who wished to speak to the application pro or con. He asked Ms. West if she had anything to add and if she stood by her original summary. Ms. West responded affirmatively.

Commissioner Pruitt asked Mr. Bob Grabb, Chief-Habitat Management, if there was any environmental damage because of this project. Mr. Grabb said no, but that it is very similar to the Pride of Virginia seafood project that the agency went to court on, dealing with the issues of maintenance and repair and reconstruction. The court upheld VMRC that someone cannot go back to something that pre-existed 30 years ago and invoked the maintenance and repair provisions.

Commissioner Pruitt asked if Ms. Higginbotham had come in with a completed plan, what would have been your recommendation. Mr. Grabb said that assuming for the moment that she had come in several years ago with a plan to displace the watermen and create a restaurant facility, I am not sure what kind of recommendation we would have approached. But as Ms. West indicated even the maintenance and repair would have been for the existing structure and not the expansion that was authorized. It has been piecemeal to the point that today we have been told this is the bottom line and what has been proposed.

He said he was not sure that an applicant could not come in later and say they want to change and create the slips. There is a public boat ramp adjacent to the facility; there is traffic here and we asked for a mooring plan because it is an adherent component to a restaurant facility. He said the staff has been playing catch-up since the beginning on this issue.

Associate Member McLeskey asked if the restaurant was complete? Ms. Higginbotham said it is only mooring at this point. Associate Member Gordy asked if the project had been on-going since 1999. She said sometimes it is easier to get after-the-fact permits and she is not one for after-the-fact. Associate Member Gordy moved that Ms. Higginbotham be told to remove the unauthorized portion of the pier

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and the gazebo.

Associate Member Hull seconded the motion, but then asked why when all of this was going on, nothing in writing and no approvals did she have the gazebo built. Ms. Higginbotham said she did have approval. She said York County has been going through rezoning, trying to decide what to do with marinas and restaurants. That has held her up, she said, and she assumed she could build the building back. On the permit, there is an existing building, she said and she thought she could build it back. (Details on the exchange are part of the verbatim record.)

Ms. Higginbotham said she agreed with Mr. Hull now that she knows the regulations. It should not have been handled that way and each board when it was repaired should have been handled individually. Ms. Higginbotham said she was guilty for not knowing the regulations.

Commissioner Pruitt asked if Mr. Letz had read Mr. Grabb's letter of 1999. He said yes and that he and Ms. Higginbotham had discussed it at length. Commissioner Pruitt said it was the permit that she should have been operating under.

Associate Member Williams asked when she was before the Commission earlier. He said she was directed to get an agent. Mr. Williams said she had gotten an agent, but the building was still built. Mr. Letz said he became her agent after everything was done.

Associate Member Williams said he agreed with Associate Member Gordy that the watermen were using it earlier. But when did you change your mind? Was it after the sewer was obtained? Ms. Higginbotham responded yes. Associate Member Williams said that in his heart he believed what she did was from ignorance and not knowing. Mr. Letz said she thought she could tear down a building and as long as it was not any bigger she could build on top of it and leaving the walls out was even better. She kept it under the original footprint. It is a good project and probably would have passed muster.

Commissioner Pruitt said there was a motion on the floor and Associate Member Gordy repeated her motion. Associate Member Williams asked what was the unauthorized portion.

Commissioner Pruitt asked who did the work? Ms. Higginbotham responded it was Mr. Bill James and that she personally laid the deck.

Associate Member McLeskey offered a substitute motion. He said he believed she

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had acted in good faith, but maybe not in the way we would have liked her to do. He said his recommendation and motion would be a civil penalty of \$10,000. Mr. Grabb said assuming approval of the after-the-fact and the entertainment of a civil charge of \$10,000, Ms. Higginbotham would have to agree to it. Associate Member Birkett seconded the motion.

Commissioner Pruitt asked if there was any discussion on the substitute motion to approve the after-the-fact with a \$10,000 civil charge. Mr. Grabb said the alternative would bring it back to the Commission. Ms. Higginbotham said she is a single-individual starting a business and that she would agree to it and mortgage what she has. She pleaded with the Commission to lower that fine. She said she is now facing sewage payments. She said she is guilty for not knowing what she was doing, but asked that the Commission consider a lesser amount.

Commissioner Pruitt asked if there was any thoughts on her request. He asked what the matrix called for. Associate Member White asked what was the maximum.

Mr. Carl Josephson, Commission counsel, explained the matrix which is broken up into two axes: one is the significance of the environmental impact and the other is the relative degree of non-compliance. He said the Commission is not bound by it, but adopted for guidance. Mr. Josephson said the way to use the matrix is to determine the degree of environmental impact on one hand and the degree of non-compliance on the other hand and find the intersection and start from there.

Associate Member White said he believed there was no environmental impact and asked what are the parameters and dollar figure. Mr. Josephson said if there was significant environmental impact and major degree of non-compliance the Commission would be up to \$10,000. If it was moderate in both cases, it would be \$3,600 and minimal in both cases, it would be \$600.

Commissioner Pruitt asked Associate Member McLeskey if he wanted to make any changes after hearing the discussion. He said he had sympathy for the lady and did not believe her actions were intentional. He said he knew it would cost considerably more than \$10,000 to remove the structures. He said he would change his motion and since it was moderate would make it \$5,500. Associate Member Birkett said he accepted the change. The Commission voted to approve the substitute motion which carried, 5-1.

Commissioner Pruitt asked Ms. Higginbotham if she agreed to the civil charge. She responded affirmatively. Commissioner Pruitt then told her to get with Ms. West and make sure she understood what after-the-fact means and if she had any concerns

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between now and adjournment to come back to the Commission.

- 10. RIVER OAKS CIVIC ASSOCIATION, #01-1014**, requests authorization to construct a 5-foot wide open-pile community pier extending 50 feet channelward of mean low water adjacent to a 40-foot easement across the property of Dewey and Alice Atkins which is situated along the Rappahannock River in Essex County. The project is protested by several adjoining property owners.

Mr. Kevin Curling, Environmental Engineer, presented slides of the proposed project and an explanation to the Commission (The details are part of the verbatim record.) He explained that the River Oaks subdivision contains a "common" beach and river access lot. There are an existing boat ramp and pier built by the community residents sometimes in the 1970's.

The River Oaks Civic Association, Inc. was incorporated in 1982. Based upon the articles of incorporation all owners in the subdivision can be members. A deed of easement between the Association and Dewey and Alice Atkins was prepared by Alexander Dillard in 1985, according to Mr. Curling. The easement granted ingress and egress across the Atkins' lot to the Association. It further stipulated that the Association was to maintain the ramp and pier, or the easement would terminate. The Association also holds the deed to the 2.5 acre common lot. Based on comments in several of the letters, all property owners in the subdivision still maintain an undivided interest in the common lot and an individual easement to the boat ramp and pier.

Mr. Atkins., the riparian property owner, is also a member of the Association, and is fully aware of the plans and is "in complete agreement with this being done."

As background, the River Oaks Community association received a permit in 1982 (VMRC#81-0811) to construct two timber jettys and a community pier extending 35 feet channelward of mean low water. This permit clearly shows the 100-foot wide community lot and the existing ramp on Mr. Atkins property. The jettys were to be built on either side of the common lot and the pier was to be located in the center of the common area. Presently, this is one jetty where the pier should have been and no pier was ever built in accordance with this permit.

The project is protested by Mr. Robert E. Jenkins, Mr. Herman Gettings and Mr. Timothy N. Tressler and his wife, Mrs. Grace R. Tressler, who are River Oaks residents. Their protests concern the location of the pier and ramp on the easement property and much of the long history surrounding their location and construction.

The existing pier is a remnant of a pier that at one time extended 146 feet

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channelward of mean low water and held eight wet slips. Permits for the pier extension and wet slips were issued in the name of the River Oaks Boat Club in 1992 and 1994. Sections of the pier were found in violation during a compliance inspection February 25, 1999. The Civic Association was served with a Notice to Comply on March 18, 1999. On May 4, 1999, the Boat Club requested authorization to remove "their" part of the pier. However, by August 1999, only a section in the middle of the pier had been removed. Staff considered the pier in this state to be unserviceable and directed the Boat Club to remove the remainder of the pier. Staff further informed the Boat Club and the Civic Association that they would both be held responsible for any violation of State law. The pier was removed and the property returned to its current condition prior to December 1999.

In April 2001, staff was notified that the Association would be undertaking some repairs to the boat ramp. At this time, based on the information provided, it was determined that both the ramp and pier were above mean low water and no permit would be required from the Commission for repairs to the ramp. A No Permit Necessary letter to this effect was issued on May 8, 2001.

As proposed, the pier extension would be for use as a temporary tending pier for the boat ramp. The Virginia Department of Health has indicated that the project is acceptable. The Virginia Institute of Marine Science has responded that "adverse impacts resulting from this activity will be minimal."

In this case, it appears that construction of the pier should have little impact on marine resources. Furthermore, considering the fact that the River Oaks Civil Association, Inc. has a deeded financial responsibility to maintain the structures on the easement lot, it appears to be the correct applicant since Dewey and Alice Atkins, as the riparian property owners, have consented to the project. Thus, staff recommends approval of the application as submitted.

Associate Member White, acting for Commissioner Pruitt, asked if the Commission had any questions. The applicant, Mr. Curling said, would be Mr. Wayne Ragland, president of the Civic

Association. Mr. Ragland said that many, many property owners have given much to improve the beach and the easement area. The ramp and pier have been maintained and repaired by the Association. The 50-foot pier extension would afford a safer launching of boats from the ramp.

In the protests, there are concerns about liability and ownership, Mr. Ragland explained. The liability that the Boat Club posed on the community through its private pier was greater than anything we propose to undertake. The extension would lessen

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the liability by providing safer access to the area. The ramp at this time is eight-feet longer than the end of the pier. An extension would get us further away from the ramp and lessen a chance of boat damage. Mr. Ragland said future repairs would be done in a timely manner.

Associate Member Hull asked if those supporting the application would please stand. Twelve property owners stood in response. Associate Member White then recognized the opponents.

Mr. Herman Gettings said that 20 years ago there was no beach; it was a swamp. Many of these people standing up voted against us building this boat ramp because they did not belong to the organization at the time. Mr. Gettings said he has been president or vice president of the Association for much of its existence. He said he spent much personal money on the project.

The Association, he said, made the Boat Club tear down its pier. (Details from Mr. Gettings on the background of the property and pier are part of the verbatim record.)

Mr. Gettings said his major concern was who was going to be responsible for the extended pier. If you extend it, he said, there will be other problems from "ski boats."

Commissioner Pruitt asked for other opposition speakers. There being none, Mr. Ragland was given an opportunity for rebuttal. Mr. Ragland said that the Boat Club never offered to give the Association the pier before it was eventually torn down.

Commissioner Pruitt asked who favored the application? Mr. Ragland said 13, including himself, were present at the Commission meeting.

Commissioner Pruitt said Mr. Gettings had suggested that the 50-foot extension could cause a hazard to navigation. Mr. Ragland said the 50-foot extension would handle two boats using the boat ramp.

Commissioner Pruitt asked who could use the pier and boat ramp? Mr. Ragland said every land owner in the subdivision and their guests can use it any time they want. He said Mr. Gettings used to lock the boat ramp and the pier.

Associate Member Gordy asked who actually owns the land? Mr. Ragland said the 40-foot where the ramp and pier are located is owned by Dewey Atkins, who has given an easement for every land owner to use it. He said the pier is for everyone in the community.

Associate Member McLeskey asked who pays the real estate taxes on the land? Mr.

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Ragland said it was the River Oaks Civic Association, including the improvements. Mr. McLeskey asked about liability insurance? Mr. Ragland said there was no liability insurance there. Each land owner has their own insurance and the community beach is jointly owned by everybody in the subdivision and there are about 70 lots in the subdivision.

Associate Member Birkett asked how many members were in the Civic Association? Mr. Ragland responded there were 27, and all are land owners. However, the land owners are not required to join the association and some land owners are not members. Mr. Birkett asked if the Association was incorporated and Mr. Ragland responded positively. Mr. Birkett said if there was any liability involved, it would be against the corporation and not the individuals. Mr. Ragland said he was not sure.

Carl Josephson, Commission counsel, said in most situations the liability would be to the Association. Associate Member Birkett said the fear of an individual suit in a liability case would be unfounded.

Commissioner Pruitt granted, Mr. Gettings, the protester, the opportunity to speak again for two minutes. (The details are part of the verbatim record.) He said his lawyer could not be present because of the short notice. The best thing is to settle this in court, Mr. Gettings said.

Associate Member Gordy made a motion to approve the application. Associate Member Hull seconded the motion, which was carried, 6-0.

- 11. COUNTY OF ROCKINGHAM, #01-0233**, requests after-the-fact authorization to install, by the open cut method, 30 linear feet of 8" diameter sanitary sewer pipe beneath Cub Run, a tributary to the South Fork of the Shenandoah River.

Mr. Mark Eversole, Environmental Engineer, presented slides and accompanying narrative of the proposed project. The total project consists of 2,700 linear feet of gravity sewer and over a mile of force main and a new pump station and is associated with an upgrade of the county's wastewater treatment system. (Other details of slides and presentation are part of the verbatim record.)

An application was received on February 12, 2001 on behalf of Rockingham County, but was deemed incomplete and additional information was requested. Revised plans were received on April 12. Notice of opposition to the project by a nearby property owner was received on April 25 and the agent was advised of the protest and they ultimately resolved the concerns raised by the protestants, Mr. and Mrs. Shifflett.

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Notification of the withdrawal of the protest was received on June 15, 2001, Mr. Eversole said.

On June 12, 2001 the County called to inform staff that the crossing at Cub Run had been performed, he said. The county expressed a desire to appear before the Commission to explain what happened. As a result, the staff agreed to withhold any enforcement action pending Commission action on the application itself.

Mr. Eversole said the application was submitted in a timely fashion, well ahead of the anticipated crossing of Cub Run. No additional objections surfaced in response to the public notice, and staff would have recommended approval of the project. Since the projected cost at the crossing was less than \$50,000, a permit could have been issued administratively.

In his letter of June 12, 2001 to the county, Mr. Robert Cummings, the applicants' agent, sites various factors including the resignation of his project manager and engineer associated to this application. He attributes much of the confusion, which led to the contractor performing the stream crossing prior to VMRC authorization, to the loss of key personnel during the permitting process.

While staff believes that the applicant and its agent are certainly at fault for not obtaining authorization prior to installing the crossing of Cub Run, there does not appear to have been any attempt to circumvent the permitting process, Mr. Eversole explained.

Had the application been complete when originally submitted, and the nearby property owner not objected, a permit would most certainly have been issued well in advance of the contractor's approach to the crossing. As such, staff recommends approval of the project, with the assessment of triple permit fees as provided by Code. Staff is not inclined to recommend civil charges due to the nature of the violation and the cooperation exhibited by Rockingham County and its agent.

Mr. Eversole said Mr. Stephen King, director of public works from Rockingham County, was present to address the Commission

Mr. King said the county was told that all permits were in place. He also said the county was fully aware of the requirements for permits. When the county became aware that no permit had been received from VMRC, the agency staff was contacted and attempts were made to stop the work, but the crossing had already taken place. He said the county should have gotten the permit and the county's consultant failed to do it.

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Commissioner Pruitt asked if there were any other comments, pro or con. There being none, he placed the matter before the Commission. Associate Member Williams made a motion to approve the project with staff's recommendation of triple fees. Associate Member McLeskey seconded the motion, which was approved by a 6-0 vote.

- 12. PRINCE WILLIAM COUNTY SERVICE AUTHORITY, ET AL, #01-1022,** requests authorization to install by the open-cut method, a six-inch diameter ductile iron sanitary sewer force main, a minimum of 3-feet beneath Kettle Run, immediately downstream of the Kettle Run Road Crossing, in Prince William County. The project is protested by an adjacent property owner.

Mr. Mark Eversole, Environmental Engineer, presented slides and narrative of the project. (The discussion on the slides is part of the verbatim record.) He said Kettle Run, a tributary to Broad Run and the Occoquan River, is approximately 30 feet wide at the proposed crossing.

The area can best be described as a former agricultural area subdivided and developed as has the Manassas area and most of Northern Virginia that continues to experience rapid growth. This project consists of new sewer transmission lines that will extend sanitary sewer service to new residential communities. It is also associated with an upgrade of the Prince William County sanitary sewer system, Mr. Eversole said.

Adjacent property owners were notified and a public notice was placed in the Prince William Journal. While no opposition was received in response to the public notice, a letter of opposition from Mr. Harry Fitzwater Jr., an owner of adjacent property was received July 23, 2001. Mr. Fitzwater's objection to the project is based, in part, on an ongoing legal dispute he has with the Virginia Department of Transportation. In conversations with VMRC and the County, Mr. Fitzwater has made reference to the manner in which he felt the recent rebuilding of the Kettle Run Road bridge was mishandled. Apparently, a dispute continues over the amount of land that was "taken" by VDOT, from the farm owned by the Fitzwater Family L. P., to improve the bridge. As the sewer pipe will be placed within the newly acquired VDOT right-of-way, the land dispute prompted his continued objection, Mr. Eversole explained.

The Department of Game and Inland Fisheries recommends the standard instream permit conditions and the Department of Conservation and Recreation recommends relocation of any freshwater mussels (Yellow Lance) that may be found within the work area.

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Based upon the proposed method of installation, field observations of the sewer line installation, and the proposed erosion control measures and stabilization already being used on the upland portions of this project, Mr. Eversole said it appears that installation of the six-inch diameter pipe can be conducted with minimal impacts to State-owned subaqueous land. Therefore, staff recommends approval of the project with our standard instream permit conditions, and also a condition that the county or the permittee work with DCR to relocate any Yellow Lance mussels encountered.

Mr. Eversole said Mr. Darby of the Prince William County Service Authority is present. The protester, however, is not, but Mr. Eversole said he had earlier contacted Mr. Fitzwater and he maintained his protest.

Commissioner Pruitt asked Mr. Darby to speak if he wished. Mr. Darby said he was there to answer questions. Commissioner asked if there was anyone present in opposition. There being no one, he placed the matter before the Commission.

Associate Member McLeskey made a motion to approve the permit with staff recommendations. Associate Member Birkett seconded the motion, which was approved by a 4-0 vote with two abstentions--Ms. Gordy and Mr. Williams.

13. DISCUSSION: Enactment of a Ballast Water Discharge Reporting regulation pursuant to Ch. 312 Acts of Assembly 2001. Request for public hearing.

Bob Grabb, Chief-Habitat Management, said there were several key provisions in the draft regulation. A key matter is that the Commission must adopt ballast water discharge reporting requirements for ships entering Virginia ports, which would be mandatory although it is now a voluntary system. The mandatory aspect would be the requirement to report within 72-hours of discharge of ballast water in Virginia or before sailing. It is meant to address the introduction of non-indigenous invasive species. A key component of the draft regulation, he said, is the reliance on the Hampton Roads Maritime Association to assist us in implementing this program, given they represent a large percentage of the industry and the shipping agents, using the port of Hampton Roads and Richmond.

Mr. Grabb recognized Mr. Jeff Kever, executive vice president, Virginia Maritime Association in the audience. The Association will basically shoulder the brunt of the reporting requirements and will route the information to the agency, which will forward it every quarter to the Smithsonian Environmental Research Center. If the draft is approved, it will be sent to several industry groups that have contacted the agency. He asked for a public hearing in September.

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Commissioner Pruitt placed the matter before the Commission. Associate Member Gordy moved to set a public hearing for September 25. Associate Member Williams seconded the motion, which was passed by a 6-0 vote.

- 14. DISCUSSION:** Request by VIMS that the Commission set aside and leave unassigned a 300-500 acre area in South Bay on the seaside of the Eastern Shore in support of their enjoining SAV restoration efforts.

Gerry Showalter, Head-Engineering/Surveying Department, told the Commission that VIMS had asked for the area in South Bay near Wreck Island. Staff has discussed the request with Dr. Bob Orth and it was agreed to set aside 400 acres for five years, after which it can be reconsidered.

Mr. Showalter presented photographs to the Commission (Details of the presentation are part of the verbatim record.)

Commissioner Pruitt asked if a public hearing was required? Mr. Showalter said the process was similar to setting aside clam ground; the Commission can act now. Commissioner Pruitt said the only problem is that people can come in later. He asked if the request had been discussed in committees. Does the public know? Mr. Grabb said it was to set aside from leasing. There are currently no requests pending.

Commissioner Pruitt said he misunderstood. He asked Dr. Bob Orth of VIMS if he wished to speak. Dr. Orth said VIMS and VMRC were on the threshold of a once in a lifetime opportunity, to reestablish sea grasses to some of the coastal bays. There have been discussions about the sea grass return to Chincoteague Bay, but the bays south--Hog Island, Cobb Island, South Bay and McGluithy--have remained unvegetated since 1933 when all the grasses were lost due to a disease and the big August 1933 storm.

VIMS has been working with VMRC closely to reestablish sea grasses in other bays and beginning in 1998 in South Bay there were some small test plots and about everything we have put in have grown. In 1999 we broadcast about 140,000 seeds of eel grass and in 2000 more plots were seeded, Dr. Orth said. Today six of eight test plots are doing very well. The fact is, with the exception of a few areas, the seeds have done well.

If the areas are aside, we are anticipate putting a large portion of the 6.6 million seeds in this South Bay area. It is an unbelievable opportunity to restore a lost habitat. There are some pitfalls and some illegal activity nearby, Dr. Orth said, and we need to work closely with the aquaculture programs. If we cannot do something in five years, we will have to draw back. Hopefully, we can get your support today. We will

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broadcast the seeds and they will settle and are incorporated into the sediment, he explained.

Commissioner Pruitt asked if there were any questions for Dr. Orth or Mr. Showalter. Associate Member White moved to set aside the 400 acres for a period of five years. Associate Member Hull seconded the motion, which passed by a 6-0 vote.

15. PUBLIC COMMENT

Mr. Andrew Gerkin from Dandy Haven Marina said at next month's Commission meeting there will be a presentation of a permit application for dredging and some mitigation for some SAVs. He presented some economic impacts generated by the marina and some customer letters and gave them to the staff. He invited Commission members to the site in Hampton.

Commissioner Pruitt asked for additional public comment. There being none, he told the Commission that next month, the members have been invited by Tommy Leggett to view the oyster gardening program on Sarah's Creek in Gloucester County. The Commission would meet Monday (the day before the Commission) at 2:30 p.m. Ann Swanson of the Chesapeake Bay Commission will be joining us and appropriate staff will be there. Arrangements can be made for Monday night accommodations if necessary.

Associate Member Hull asked if plans had been set for the holiday schedule for the November and December meetings. Commissioner Pruitt said that will be discussed next month.

16. PUBLIC HEARING: Proposed amendment to Regulation 4 VAC 20-670-10 et seq. Creating a recreational eel pot license and restrictions on its use.

Rob O'Reilly, Deputy Chief-Fisheries Management, presented the Commission with six more comments on the license. Three are in favor and two have questions and one was opposed. Mr. O'Reilly offered several corrections to the evaluations. He said there would be a marking system for this recreational gear and the first recreational gear license offered since 1993. The license would be \$10 and not more than one license per individual. It would be unlawful to use more than two eel pots when used for recreational purposes. The pots will be marked by either the driver's license number or the last four numbers of the social security number preceded by the letter "R".

Tom Powers, representative of the Coastal Conservation Association of Virginia, said

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the CCA takes a neutral position, but personally he supports it. It was initiated by a recreational angler on the Northern Neck and many striped fishermen would like to catch their own bait.

Since there were no additional comments, Commissioner Pruitt placed the matter before the Commission. Associate Member Hull made a motion to approve the proposed amendment. Associate Member White seconded the motion, which passed by a 6-0 vote.

- 17. DISCUSSION:** Request for public hearing to adjust the trip limits for the fourth quarter commercial black sea bass fishery and for the Winter II period commercial scup fishery.

Chad Boyce, Fisheries Management Specialist, said the Atlantic States Marine Fisheries Commission has approved emergency actions for black sea bass and scup. These emergency actions establish a landing trigger of 70 percent and modified daily possession limit for the commercial scup winter II period (November 1 through Dec. 31, 2001). This will create an initial 2,000 pound daily possession limit and once met, would reduce the possession limit to 500 pounds daily.

The emergency action for black sea bass provides states with the option of establishing a 2,000- pound weekly, or 300-pound daily possession limit for black sea bass from October 1 through December 31, 2001. Mr. Boyce said the public hearing is needed for the September meeting.

Associate Member Gordy made a motion to take the proposals to public hearing September 25. Associate Member Williams seconded the motion, which was approved by a 6-0 vote.

- 18. DISCUSSION:** Request for public hearing to amend Regulation 4 VAC 20-720-10 et seq., to establish harvest restrictions for the 2001-2002 Public Oyster Harvest Season.

James Wesson, Head-Conservation and Replenishment Department, told the Commission that 2000-2001 needed to be changed to 2001-2002 in the regulation and there will be a modification to the area in Tangier that was harvested last year.

Commission Pruitt put the matter before the Commission. Associate Member Hull made a motion to take the matter to public hearing in September. Associate Member Birkett seconded the motion, which passed by a 6-0 vote.

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Tracy Patton, Fisheries Management Specialist, said that Mr. Delbert L. Daisey can no longer use his black drum permit and would like to transfer it to Mr. William C. Thomas. Although Mr. Thomas does not meet the criteria required to obtain a permit, the case can be treated as a one-in and one-out situation. The Commission has approved similar requests in the past. Thus, staff recommends the approval of Mr. Thomas' request.

Commission Pruitt asked if there were any comments or questions. There being none, he placed the matter before the Commission. Associate Member Williams made a motion to approve the request. Associate Member Birkett seconded the motion, which passed by a 6-0 vote.

20. BRIEFING: Status of Recreational Summer Flounder.

Jack Travelstead, Chief-Fisheries Management, told the Commission that 10 days earlier it was felt this issue was very important. At that time the National Marine Fisheries Service sent information that through June 30, 2001 Virginia had exceeded the recreational summer flounder harvest target by 30 percent. It is also known that in July and early August, the recreational summer flounder fishing was very good. Therefore, Virginia is going to be far over the target quota. The target for Virginia for the calendar year was only 664,000 fish and through June, 860,000 fish had been harvested with more expected during the second half of the year.

Based upon that information, staff thought the Commission might need to limit the harvest for the remainder of the year or close down the fishery. However, after meeting with the Finfish Management Advisory Committee and looking at the data, staff believes no action should be taken. The harvest during the remainder of the year (September through December) only represents 12 to 20 percent of the total annual harvest. The economic impacts of cutting off the fishing would be devastating. To moderately regulate it, would mean placing regulations into effect by mid-September, but much of the damage would already have been done. Therefore, next year, because we have gone over, we will be facing tougher regulations.

The good news is that harvest in other states is up, but not to the degree of Virginia. That will help mitigate Virginia's overage, just as in 1999 Virginia's underage will effect the other states. Virginia will ask the other states to help this year. We do not believe any action should be taken.

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Commissioner Pruitt said he heard no response from the Commission.

- 21. DISCUSSION:** Proposed amendment to Regulation 4 VAC 20-1010-10 et seq., to establish new boundaries for the Chincoteague Bay Crab Sanctuary. Request for Public Hearing.

Chad Boyce, Fisheries Management Specialist, presented an overview after the Commission asked the state to consider delineating the SAV problem areas in the Chincoteague Bay. Staff has met with VIMS personnel and watermen through the Hard Clam Advisory Committee and discussed possible options. The original presentation to the Committee was amended. The regulation would add three additional markers denoting SAV sanctuary.

Dr. Bob Orth of VIMS has seen some additional scarring and ways to delineate that area. A public hearing is requested for September. Commissioner Pruitt said he felt the advertisement should be the strictest possible, which would allow the Commission to adopt lesser regulations if possible.

Dr. Orth reminded the Commission that at its May meeting he discussed the additional scarring and without marking made it difficult for enforcement. (Details in this discussion are part of the verbatim record.) During the Clam Committee meeting, Dr. Orth said he was concerned about other areas and the VIMS staff believes that other areas need protection. He said he would like the public hearing to consider broader areas.

In 1997, the total area was 18,000 acres with 8,900 protected and 9,100 open for clamming. Under a broader proposal protecting eastern and western shores of the Bay, would be 9,693 acres and 8,430 open for clamming. This is a difference of only 700 acres, Dr. Orth explained and eight markers would be required at a cost of about \$5,000.

Commissioner Pruitt asked if there were any questions. Associate Member Gordy moved that a public hearing be set in September. Associate Member White seconded the motion, that was approved by a 6-0 vote.

Carl Josephson, Commission counsel, suggested that in the written version of the regulation that the boundaries be clear and the entire area be enclosed by written boundaries.

- 22. Discussion** by Peter Paul about a project to memorialize crew members of USS

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Cole.

Commissioner Pruitt recognized Mr. Peter Paul, who discussed his proposal to create a living reef as a memorial to the men and women who died on the USS Cole last fall, by using the ships of the idle fleet as source material. He said he has gotten support from many people, more specifically Secretary of Natural Resources John Paul Woodley, who extended the support of the State of Virginia and asked him to contact Commissioner Pruitt.

In background, Mr. Paul said it is fitting to honor those persons who gave their lives and call the reef the USS Cole Memorial Reef. The letter that prompted support of Governor Gilmore, the director of the environmental compliance of the U.S. Navy. He said it could be the largest artificial reef in the United States. The Cole Reef would honor the living and the dead with new life, Mr. Paul explained.

He said that there were numerous organizations giving support to the idea. Mr. Paul said he wanted the Commission to play a leadership role in getting the two key component agencies--MARAD and the U.S. Navy on board. He said the concept should be made public through press facilities. He said discussions would be needed for shared funding, project leadership and community involvement.

Mr. Paul gave the Commission a package of information on the pros and cons of the project. He is still waiting U.S. Navy comments. There are no losers here; everyone stands to be a winner. He then called upon the Commission to support the project.

Commissioner Pruitt said Secretary Woodley did not mention funding for the project and that Mr. Paul needed to contact the General Assembly. He said the proper letters should be prepared for endorsement of the project. Mr. Paul said it would be a many-million dollar effort. Commissioner Pruitt said he liked the concept and would put it before the Commission for endorsement.

Associate Member Hull asked the name of Mr. Paul's organization? Mr. Paul said he was representing himself and as a member of the Coastal Conservation Association of Virginia, which has offered administrative support. Commissioner Pruitt asked Mr. Travelstead what the Commission needed to do today, beyond having Mr. Mike Meier working with Mr. Paul. Mr. Travelstead said it would take a face-to-face meeting with representatives of the organization that Mr. Paul mentioned in his letter. Commissioner Pruitt said he would like a motion of support.

Associate Member White made the motion of the Commission's support for the concept of Mr. Paul's project. Associate Member Hull seconded the motion, which

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was approved by a 6-0 vote.

23. REPEAT OFFENDERS

Col. Steve Bowman, Chief-Law Enforcement brought forward two individuals. He said that yesterday the agency received a request for a continuance from the attorney of record for Mr. Kenneth T. Heath. Commissioner Pruitt said this was his second continuance and he must come before us in September.

The first case was of Mr. Costas Kambouropoulos, who is represented by Mr. Richard Brydges, counsel of record. Last month, Col. Bowman provided a briefing to the Commission concerning the parameters under which an individual can be brought before the Commission. Normally, we have the situation of three-time repeat offenders. This is a different situation. Also, the Code of Virginia provides for individuals to be brought before the Commission individuals who may have perpetrated direct harm to the natural resources by one individual act. He said he was guided by a document--the report from the law enforcement committee--coauthored by Associate Members Peter Rowe and Tommy Leggett in 1996. It directs the law enforcement division to bring forth individuals under these circumstances.

This case was primarily handled by Special Agent Andy Cortez of the U.S. Fish and Wildlife Service. The two persons before the Commission today (Mr. Kambouropoulos and Mr. Sang Tran) have only a seafood buyers, place of business, licenses and were detected and apprehended through special investigative efforts through us and U.S. Fish and Wildlife or by the agency's special investigative unit.

Agent Cortez told the Commission that the Lynnhaven Inn Inc., Costas Kambouropoulos and Henry Braithwaite, his seafood buyer, were subjects of a grand jury investigation and under the federal rules of secrecy I cannot divulge any other details about the investigation other than the summary today, which was read in open court at the time of his sentencing.

In the winter of 1998, Lynnhaven Inn Inc., trading as Lynnhaven Seafood Marina, engaged in the buying and selling of seafood in Virginia Beach and elsewhere. Mr. Costas Kambouropoulos owned Lynnhaven Inn Inc. At that time and now, the VMRC had enacted certain regulations governing commercial fishing of striped bass, designed to protect this natural resource from depletion. As a part of this regulatory scheme, only licensed commercial fishermen possessing a striped bass fishing permit were allowed to fish for striped bass. They were assigned an annual quota of fish and received tags that were required to be threaded through the fish when they were caught. Transfers of tags were permitted only if notarized by VMRC. Under these regulations, it was unlawful to fish for striped bass without a special

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permit, to land striped bass that were not properly tagged and/or possess more fish than you have tags, to possess untagged striped bass for sales and to transfer quota shares without property documentation. Each of these provisions were violated in the transaction. (Details of the case presented by Mr. Cortez is part of the verbatim record.)

In a plea agreement, Mr. Kambouropoulos entered a guilty plea on behalf of Lynnhaven Inn for illegally trafficking striped bass. The company was fined \$10,000 in U.S. District Court, Norfolk, Va. on March 12, 2001. Additionally, on Feb. 26, 2001, Mr. Kambouropoulos and Mr. Braithwaite entered a guilty pleas on U.S. District Court for unlawfully trafficking striped bass and each was fined \$1,500.

Commissioner Pruitt asked for other questions. Being none, he called upon Mr. Brydges to speak on behalf of his client. Mr. Brydges said Mr. Kambouropoulos was not engaged in the fishing business and was only buying. He denied he knew anything about what his employees were doing. Mr. Steve Frucci handled the negotiated plea to a misdemeanor. Mr. Brydges said that three years ago when Mr. Kambouropoulos went in to talk with Agent Cortez we offered our complete and full support and cooperation in any ongoing investigations and any proposed. He said Mr. Kambouropoulos has kept that promise The plea agreement was for a petty offense and was the only offense for which Mr. Kambouropoulos has ever been charged. He added that two people were present wishing to testify how meticulous Mr. Kambouropoulos was in the handling striped bass.

David Johnson, fisherman/firefighter, said he had known Mr. Kambouropoulos as a fish buyer. He said Mr. Kambouropoulos is meticulous in the tagging of striped bass. We would put good tags on his conveyer belt and the tags would be broken and would require us to retag the fish. With other fish, some watermen brought in too many tags and he said he would not buy them.

Kelly Place, commercial waterman, said he has known Mr. Kambouropoulos for about 10 years. He said he had placed fish on the conveyer belt and at least seven tags were broken, but he would not take them. To his credit he did not take them. He has been cautious as he has learned the system. Place said he was privy to Mr. Kambouropoulos' employees who were taking used tags and broken tags and using them a second time.

Mr. Brydges asked Mr. Kambouropoulos several questions regarding his activities in the seafood business (The discussion is part of the verbatim record.) Mr. Brydges said the fine has been paid and he has been a model citizen and a model fish handler. Mr. Kambouropoulos said in the future there will be much attention to the people who bring in fish.

Commissioner Pruitt asked if there were other instances involving this business. The response was negative. Commissioner Pruitt also asked for the options. Col. Bowman said it ranged from revocation of license to probation for up to two years.

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Associate Member White said he had listened to the narrative, VMRC personnel and his attorney and made a motion to place Mr. Kambouropoulos on a one-year probation. Associate Member McLeskey seconded the motion. Associate Member Hull said he supported Mr. White's motion, which was carried 5-0 with one abstention (Associate Member Williams).

The second case brought by Col. Bowman was Mr. Sang Tran who had nine violations on three separate occasions--October 13, 2000, November 4, 2000 and November 14, 2000. (Mr. Sang was found guilty in court of all nine charges and fined \$2,100 with \$200 suspended.) Mr. Sang is represented by Mr. Gene Jordan.

Lt. John Croft, special agent in charge of the Division's criminal investigation unit. In June of 2000, Operation Tacklebox was begun to detect individuals and firms violating the fishing laws of the Commonwealth. He said he worked in an undercover capacity as a recreational fisherman who sold regulated species to seafood businesses. The contact was with Mr. Sang, the co-owner of Hampton Oriental Market in Hampton. (Details of the case are part of the verbatim record.)

Mr. Jordan, attorney for Mr. Sang, said Mr. Sang and his wife had a small business. Mr. Sang's primary concern now would affect his ability to buy crabs during this season. Once Mr. Sang understood the charges, Mr. Jordan said, there would be no more problems. He is asking for some consideration and that he be placed on probation and would not be denied an opportunity to buy seafood.

Commissioner Pruitt asked how long Mr. Sang was on probation from the court. Mr. Jordan said it was two years. Commissioner Pruitt asked if there were other questions.

Associate Member Hull asked Mr. Sang did he understand these regulations? The response was positive. He said he did it because (the undercover agent) sold cheap.

Associate Member Gordy asked Mr. Jordan if Mr. Sang understands how serious the charges were? I do not think he comprehended initially, but he fully understands it now, Mr. Jordan said.

Associate Member Hull asked Mr. Sang how long he had been in the United States. Mr. Sang responded 22 years. He said he was a naturalized citizen. Associate Member Hull asked if someone came in to sell cheap would it buy now? Mr. Sang said not now.

Associate Member McLeskey made a motion to place Mr. Sang on probation for two years. Associate Member Gordy seconded the motion, which passed by a 5-0 vote with one abstention (Associate Member Williams).

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Commissioner Pruitt said any violation of the probation would automatically bring him back before the Commission and the license will be taken.

Attorney Steve Frucci returned to correct the record involving Mr. Kambouropoulos. He said earlier it had been stated that Mr. Kambouropoulos made an Alford Plea and that was wrong. Secondly, there had been an indication that Mr. Braithwaite was working with the government in New York City on other cases and that is not correct.

There being no further business before the Commission, the meeting was adjourned at 4:07 p.m.

William A. Pruitt, Commissioner

Wilford Kale, Acting Commission Secretary