

Commission Meeting

September 28, 1999

MINUTES

**September 28, 1999
Newport News, VA 23607**

The regular monthly meeting of the Marine Resources Commission was held in Newport News on the above date with the following present:

William A. Pruitt)	Commissioner
C. Chadwick Ballard)	
Gordon M. Birkett)	
Lake Cowart, Jr.)	
Sheppard H. C. Davis)	Associate Members
Laura Belle Gordy)	
Henry Lane Hull)	
John W. White)	
Kenneth Wayne Williams)	
Carl Josephson		Assistant Attorney General
Wilford Kale		Sr. Staff Adviser
LaVerne Lewis		Commission Secretary
Bob Craft		Chief-Finance and Administration
Jane McCroskey		Assistant Chief-Finance and Administration
Steven G. Bowman		Chief-Law Enforcement
Lewis Jones		Assistant Chief-Law Enforcement
Randy Widgeon		Eastern Shore Area Supervisor
Warner Rhodes		Middle Area Supervisor
Kenny Oliver		Southern Area Supervisor
Ray Jewell		Northern Area Supervisor
Doug Thompson		Marine Patrol Officer
Lyle Varnell		Virginia Institute of Marine Science
Walter Priest		Virginia Institute of Marine Science

Commission Meeting

September 28, 1999

Dr. Jim Wesson	Chief-Conservation and Replenishment
Jack Travelstead	Chief-Fisheries Management
Rob O'Reilly	Assistant Chief-Fisheries
Roy Insley	Head/Plans Statistics
Mike Meier	Fisheries Management Specialist
Jim Peters	Fisheries Management Specialist
Tina Hutchinson	Fisheries Management Specialist
Bob Grabb	Chief-Habitat Management
Tony Watkinson	Assistant Chief-Habitat Management
Chip Neikirk	Environmental Engineer
Jay Woodward	Environmental Engineer
Randy Owen	Environmental Engineer
Ben Stagg	Environmental Engineer
Tracy West	Environmental Engineer
Heather Wood	Environmental Engineer
Jeff Madden	Environmental Engineer
Hank Badger	Environmental Engineer
Gerald Showalter	Head/Engineering Surveyer
Others present:	
Jeff Watkins	Bruce Gatti
Treke Dickman	Mike
M. Ghapaai	Cynthia Hall
Richard M. Hamlet	Steve Jorgensen
Chatherine Jorgesen	Lee Rosenberg
Richard Harrison	Kathy Smedley
Chris Clifford	Doris Byrne
Barbara Krumpen	Jackie Tridennick
Gayle Cozzins	Dorothy Speights
Jan Mize	Eunice Wellbrock
Frank Muguira	Marie Stamps
Ron Anderson	Doris Blanchard
Alease McGolrick	Chuck Joyner
Jan Eversen	Leo Oliver

Commission Meeting

September 28, 1999

Don Russell
Steve Wally
JoAnn Johnson
Roger White
Nita Rippli
Ivy Mitchell
Pat Thomas
Ed Haughton
Deborah Sterns
Charles & Theresa Embler
Robert Teravafinch
W. L. Wood
James Brawley
Richard Blackwell
Sherry Hamilton
Tyla matteson
Sterling Lee Bonlestz
Ron Keys
Ken Stolle
R. Kirk adams
Stanley O'Bier, Sr.
Dennis H. Pietrich
Jeannie Butler
Ed N. Falon
John fenders
Jeff Cory
J. Mason
Allen Jenkins
Kevin Smith
Charles Rowe
Herb Tom
Mike E. Croxton
Roger Mann
Kelly Place

Beverlee R. Peters
Bob Hesser
Carroll Johnson
Clifton Rowe
Nanette Fulmer
Charles G. Perry
Bill Snider
Phil Roulten
Bob Ramsey
Robert T. Grace
Richard F. Finney
Elisabeth H. Brewer
Brad Talley
Leonard Mayo
Walter Johnson
Tom Gear
Sherl Montgomery
Mary P. Wright
Preston Smith
Charles Williams
Stanley L. O'Bier, Jr.
Ed Gatewood
Lyle Varnell
Jim Owens
Dave Bugg
Tom Powers
Richard Stilwagin
Harry Jenkins, Jr.
Douglas Jenkins
Everett Watson, Jr.
Vaughan Pruitt
Frank McLaughlin
Russell Gakins
Ryan Parks

The meeting was called to order by Commissioner Pruitt. Members present: C. Chadwick Ballard, Gordon M. Birkett, S. Lake Cowart, Sheppard H. C. Davis, Laura Bell Gordy, Henry Lane Hull, Kenneth Wayne Williams and John W. White, Sr.

Gerald Showalter gave the invocation.

Associate Member Cowart led the Pledge of Allegiance to the American Flag.

Commissioner Pruitt established that there was a quorum.

Commissioner Pruitt introduced Governor Gilmore's recent appointee to the Commission, Associate Member Kenneth Wayne Williams from Middlesex County. Comments are a part of the verbatim record.

Mr. Pruitt congratulated Associate Member Laura Belle Gordy for her reappointment by Governor Gilmore to the Commission for another four-year term.

Copies of the Minutes of the meeting held August 24, 1999, had been sent to the Associate members prior to this meeting. Associate Member White moved to approve the Minutes as distributed. Associate Member Birkett seconded the motion. Motion carried, with Associate Member Cowart abstaining because he was not present at the meeting.

Associate Member Davis suggested that a discussion on moving the Commission Meeting dates for the holidays. The Commission agreed to move the November meeting to November

Commission Meeting

September 28, 1999

16, 1999, and to move the December meeting to December 21, 1999.

Commissioner Pruitt commented that after some research, pictures of all the former Commissioners were found and a ceremony was held with Secretary Woodley attending along with other guests. Mr. Pruitt then asked Associate Member Hull to introduce the grandson of one the former Commissioners. Associate Member Hull introduced Dr. and Mrs. Lee from Irvington who was the grandson of Mr. W. McDonald Lee, that served as the Commissioner from April 1, 1906 until March 30, 1914; and from March 1, 1922 until February 28, 1926.

Dr. Lee addressed the Commission. He commented that it was an honor to be present today. He said he felt was reliving a part of the past, since his grandfather must have held similar meetings over 90 years ago. Other comments are a part of the verbatim record.

Approval of the agenda. Associate Member Ballard moved for approval of the agenda, as presented, with one exception. He said the Mayor of the City of Norfolk was present to address item 8, the City of Norfolk. However, there was a City Council meeting scheduled at noon, and he requested that the item be moved up and heard after the consent agenda. Motion was seconded by Associate Member White. Motion carried unanimously.

There being no further comments on the agenda, Commissioner Pruitt placed the matter before the Commission. Associate Member Hull moved to accept the agenda as amended. Motion seconded by Associate Member White.

Bob Grabb, Chief-Habitat Management, briefed the Commission on the ten page two items. Mr. Grabb explained that those projects involved permit applications for projects over \$50,000 in cost, for which a public interest review had been conducted and there were no protests, and for which was recommending approval.

MARINE RESOURCES COMMISSION, #99-1157, requests authorization to construct an artificial fishing reef constructed of concrete rubble, concrete igloos and tetrahedrons, brick and other suitable construction materials, maintaining a minimum clearance of 15 feet from mean

low water, in the Chesapeake Bay at a location 5.55 nautical miles SSW of the entrance to Cape Charles Harbor with the center of the reef location being 37-10-15 N, 76-02-59 W.

No permit fee required

MARINE RESOURCES COMMISSION, #99-1158, requests authorization to construct an artificial fishing reef constructed of concrete rubble, concrete igloos and tetrahedrons, brick and other suitable construction materials, maintaining a minimum clearance of 15 feet from mean low water, in the Chesapeake Bay at a location 2.8 nautical miles NW of the mouth of Nassawadox Creek with the center of the reef location being 37-29-33 N, 76-00-57 W.

No permit fee required

CITY OF ALEXANDRIA, #99-1482, requests authorization to rehabilitate seven (7) existing culvert tunnels crossing Cameron Run, a tributary to the Potomac River.

Recommend standard instream construction conditions.

Permit fee.....\$ 100.00

U.S. GEOLOGICAL SURVEY, #99-0728, requests authorization to place an 800-foot long cable, 1¼" in diameter, across the Rappahannock River to support a stream-gauging station in Spotsylvania and Stafford Counties.

Permit fee.....\$ 100.00

FAIRFAX COUNTY WATER AUTHORITY, #99-1029, requests authorization to place a raw water suction pipeline not to exceed 96", at least 38' below the bed of the Occoquan River and Little Occoquan Run for a subaqueous length of 250', combined for both crossings, in Prince William and Fairfax Counties.

Permit fee.....\$ 100.00

FOUNDATION TO SUPPORT ANIMAL PROTECTION, #99-0810, requests authorization to construct a 420 linear foot aluminum sheet pile replacement bulkhead with concrete riprap scour protection and a 24-foot long by 5-foot wide open-pile ramp adjacent to their property situated along Smith Creek in the City of Norfolk. Recommend a royalty of \$840.00 for the filling of 840 square feet of State-owned subaqueous bottom at a rate of \$1.00 per square foot.

Royalty of \$840.00 for filling 840 sq. ft. of State-owned subaqueous bottom @ \$1.00.....	\$ 840.00
Permit fee.....	<u>100.00</u>
Total	\$ 940.00

NAVAL FACILITIES ENGINEERING COMMAND, #99-1199, requests authorization to demolish Piers 21 and 22 and to replace Pier 21 with a 1,500-foot long by 95-foot wide precast concrete pier at the Norfolk Naval Station situated along the Elizabeth River in the City of Norfolk.

Permit fee.....	\$ 100.00
-----------------	-----------

CITY OF NORFOLK, #99-1566, requests authorization to construct a 200 foot long riprap groin spur and place 3,000 cubic yards of sand material for beach nourishment purposes adjacent to Willoughby Beach east of 8th View Street along the Chesapeake Bay.

Permit fee.....	\$ 100.00
-----------------	-----------

U.S. ARMY, #99-1458, requests authorization to dredge 6,000 cubic yards of accumulated sand and silt material from within a reservoir created by an existing diversion dam, and add an additional 104-foot long by 16-foot wide riprap revetment to the downstream side of the dam on the New River at the Radford Army Ammunition Plant in Montgomery County. Recommend approval with the inclusion of our standard instream work conditions for the construction activity.

Permit fee.....	\$ 100.00
-----------------	-----------

U.S. DEPARTMENT OF THE ARMY, #99-0679, requests authorization to construct a boat launch ramp and upgrade and extend an existing pier, increasing the number of wet slips from 14 to 16, adjacent to their existing facility at Gunston Cove in Fairfax County.

Permit fee.....	\$ 100.00
-----------------	-----------

There being no comments, pro or con, on the page two items, Commissioner Pruitt placed the matter before the Commission for action.

Associate Member White moved for approval of all page two items. Motion was seconded by Associate Member Cowart. Motion carried unanimously.

Commissioner Pruitt requested that Lt. Col. Jones introduce the five new Marine Patrol Officers.

Lt. Colonel Jones introduced Ed Guy, Robert Simmons, Jeff Copperhite, Sandie Thierjung, and Otis Harris. He also congratulated Jeff Stonehill on his first attendance to the Commission Meeting.

VOLVO PENTA PROPERTIES, INC., #98-1685, requested an after-the-fact permit modification for the construction of two (2) uncovered commercial boat lifts at their facility situated along Chuckatuck Creek in Suffolk. The applicant had agreed to pay a civil charge of \$2,400.00 in lieu of further enforcement action.

Bob Grabb, Chief-Habitat Management, briefed the Commission on the consent order process. Comments are a part of the verbatim record. He said the applicant had submitted an application for the project, and the project had been subjected to the public interest review process, and no opposition was received. Mr. Grabb said staff was prepared to recommend approval of the project. However, a final site inspection was done and it was determined that the two uncovered boat lifts had already been installed. As a result, the application was processed as an after-the-fact permit for modification to retain the two lifts. Mr. Grabb said, in this particular case because the project was uncovered boat lifts, there was minimal environmental impact and a moderate deviation. Accordingly, staff recommended that the permit be issued contingent upon an assessment of \$1,200.00 for each lift. This amount was based on minimal impact to the environment and moderate deviation for each lift. He said Volvo Penta had agreed to civil charge of \$2,400.00 in lieu of further action.

Associate Member Davis moved to approve staff's recommendation because he felt it was fair, and Volvo Penta should pay a penalty in this case. Motion was seconded by Associate Member Williams. Motion carried unanimously.

Civil charge \$1,200.00 for each lift..... \$2,400

Commissioner Pruitt explained the administrative procedures that should be followed when addressing the Commission. Comments are a part of the verbatim record.

CITY OF NORFOLK, #991281, requests authorization to dredge 185,000 cubic yards of subaqueous bottom and construct two mooring dolphins and a 974-foot long subaqueous steel sheetpile bulkhead to accommodate the mooring of the U. S. S. Wisconsin adjacent to Nauticus situated along the Elizabeth River. The project is protested by the Harbour Place Condominium Association.

Heather Wood, Environmental Engineer, briefed the Commission and presented slides. Comments are a part of the verbatim record. Ms. Wood presented background information on the project site, project drawings and the proposed construction of the subaqueous bulkhead. She said the applicant proposed to dredge, by mechanical method, 185,000 cubic yards of State-owned bottom from the existing slip to obtain maximum depths of between -31 and -39 feet at mean low water. Ms. Wood stated that the project was protested by the Harbour Place Condominium Association. She said the Association was concerned that the existing slip was not large enough to accommodate a vessel the size of the U. S. S. Wisconsin, and that mooring the ship at the proposed location would decrease their property value. The Association was also concerned that a vessel of this size should not be moored within a confined residential area, but in an area where the full length of the ship could be viewed. The Association suggested that the area along the Elizabeth River, between the Berkeley Bridge and Harbor Park was an alternative site for mooring the vessel. This alternative was supported by the members of the Freemason Street Area Association and the residents of Freemason Harbour Condominiums.

Ms. Wood said the City of Norfolk held a meeting in July 1999 with the residents of Harbour Place Condominiums. The project was approved by the Norfolk City Council and the City Planning Commission. The project was also supported by the Nauticus Advisory Board, the Hampton Roads Naval Museum Foundation, and the Navy League.

Ms. Wood said staff conducted a patent tong survey on August 17, 1999, of the proposed dredge area, and discovered that there was a 1.83 acre pile of oyster shells and that 1.14 acres was located in the proposed dredge area. The Conservation and Replenishment Division estimated that approximately 1,050 cubic yards of shell was located at the site and recommended a 1:1 compensation, with clean shell to be placed on one of the Commission's 3-dimensional oyster reefs.

Ms. Wood said that the Virginia Institute of Marine Science had indicated that they had no objection to the project as proposed provided that the dredged material was adequately disposed of and that any unnecessary resuspension of the material in the water column was avoided. The Department of Environmental Quality did not anticipate any restrictions on the use of the Rehandling basin at Craney Island, and based on the sediment data submitted, the fund proposed project to be acceptable. The Health Department also indicated that the project was acceptable. The Department of Conservation and Recreation also stated that the project would not adversely impact the Peregrine Falcon population in the area.

In summary, Ms. Wood said that the proposed project was a part of the City's ongoing effort to revitalize the downtown area. The U. S. S. Wisconsin would be open to the public and would be located adjacent to Nauticus, the National Maritime Museum. The City also considered alternative mooring sites, including the two sites adjacent to Harbor Park. According to the City, mooring of the Wisconsin at those sites would require dredging a larger portion of the river channel between Town Point Park and Harbor Park and relocation of several submerged utility cables. Ms. Wood said staff was sensitive to the concerns of the Harbour Place Condominium residents. However, Ms. Wood said the proposed bulkhead and dolphin construction should make dredging the existing berthing area an acceptable location to moor the Wisconsin. Accordingly, staff recommended approval of the project with the condition that the City place 1,050 cubic yards of clean shell on the Commission's oyster reefs as 1:1 compensation for the estimated 1,050 cubic yards of shell that would be excavated from the proposed dredge area. The shells should be planted at a time and location approved by staff.

Associate Member Davis said that the compensation seemed to be low, and asked if staff was satisfied with the proposed mitigation. Ms. Wood responded yes, because the compensation was based on the amount of shell that was there, and there appeared to be very little oyster set. Associate Member Davis then asked what situations would merit more than a 1:1 compensation. Ms. Wood responded that were done in areas where there was significant marine habitat resources.

Associate Member Cowart asked if there was a possibility of capturing and utilizing the shells for the State's replenishment process. Ms. Wood responded yes, but the sediment in that area along with the shells were dark, grey, mud sediments, silty clays, and they had a foul odor. She said because of the industrial nature of the Elizabeth River in that particular area, staff was concerned that capturing (if it could even be done) along, with the possibility of contaminated sediments, and then transplanting them to another location would not be environmentally sound.

Commission Meeting

September 28, 1999

A discussion between staff and Commission members followed regarding the nature of the shells and the demand for shells to build reefs in the State. Comments are a part of the verbatim record.

Associate Member White asked if there was any noticeable spatset on any of the shells. Ms. Wood responded there was very little and she presented the comments from Dr. Wesson's survey group. She said that overall in that area they recorded an average of 18.3 liters of oyster shell per meter, approximately 16 live oysters per meter, and 0.3 clams per meter. The clam density would be considered low and the oyster density was moderate in comparison to other shellfish areas in the Bay. As a result, the impact of the dredging on the shellfish population would be relatively low. In addition, most of the survey area consisted of mud with little evidence of live oysters or clams.

Commissioner Pruitt then asked if the Mayor of Norfolk wished to address the Commission. Mayor Paul Fraim addressed the Commission. He said he had 8 members present with him, which included attorneys and engineers to answer any questions from the Commission. He said this was a matter that was unusual for the Commission and an unprecedented occurrence in Navy history that was to be undertaken by the City of Norfolk. He said the City of Norfolk had contracted with the United States of America to provide a lay berthing facility for the inactive battleship, U. S. S. Wisconsin. He said this process had been going on for approximately two years and had been scrutinized by every government official of different levels of government. Mr. Fraim then gave background information of the U.S. S. Wisconsin. Comments are a part of the verbatim record. Mr. Fraim said the project had received support from Senator John Warner, Senator Chuck Robb, and the entire Congressional delegation including Congressmen Pickett, Scott, Sisisky, and Bateman. He said the project had also received letters of support from all of the surrounding mayors and the Navy Veterans Association. He said the City of Norfolk had held public hearings, and no opposition was heard at the last public hearing. Mr. Fraim said he also had copies of the adoption of the resolutions by the City Council.

Deputy City Attorney Cynthia Hall then addressed the Commission. She said she had a few additional items to bring before the Commission regarding the environmental reports on the impacts to the project. The Department of the Navy Sea Systems Command had issued a finding of no significant impact for lay berth facilities and services for the ex-Wisconsin. The Corps of Engineers had sent a letter indicating that they did not expect any regulatory problem with the proposed project, and they expected to receive the Corp of Engineers permit for the dredging by Friday. Ms. Hall said the City had done an additional cost evaluation for mooring the vessel at the alternative site suggested by the Harbor Condominium Association. The cost

would be an additional 8 million dollars over the proposed cost of the project. She said it would involve significantly more dredging and resulting in significantly more environmental impact.

Assistant Attorney General Carl Josephson asked if the relocation of the Wisconsin from the application location to the proposed place would be consistent or inconsistent with the contract with the United States? Ms. Hall responded that it would be inconsistent because the contract with the Navy was for the berthing location at Nauticus. Specifically, the Navy had specific and technical operational requirements for mooring the vessel, which would not fit at the Harbor Park location.

There being no one in opposition, the Commissioner placed the matter before the Commission. Associate Member White said in light of no opposition, he moved for approval of the project. The motion was seconded by Associate Member Ballard.

Associate Member Davis raised the issue of a study being done to save the shells or a means to save the shells, and he felt the compensation was insufficient.

Mr. Grabb, Chief-Habitat Management, responded that there were two issues raised; one concerned the amount of shells and the second was their possible use for the repletion program. Mr. Grabb said the material was inner harbor material that was contaminated and he did not think DEQ would allow the material to be removed and placed in the water at another location. He said they did not have depth core spaced throughout the area where the shell pile was located. He said the only way to ascertain the amount of shells would be to require the applicant, prior to dredging, to provide core samples that would delineate more precisely the depth of the shell resource. He said from staff's and DEQ's perspective, the material with its potential contamination from the inner harbor would basically have to go to an upland site. The nearest upland site. A discussion followed.

Commissioner Pruitt requested that the Virginia Institute of Marine Science address the issue.

Mr. Walter Priest addressed the Commission. He said he shared the concern on the shortage of shells. He said the ideal situation would be to try and segregate the material during the dredging process and try to prevail upon the Corps to somehow separate the shell resource. Mr. Pruitt asked what did he think about their environmental condition. Mr. Priest responded that he had not seen the data that DEQ had presented, but the weathering process could do a lot to improve the suitability of the material.

Associate Member Ballard asked if the Corps managed the Craney Island facility. A yes response was received from the audience.

Commissioner Pruitt called for the vote. Motion carried unanimously.

Permit Fee.....\$ 100.00

JOHN W. GIBBS, JR. #99-0020. Continuation of the Commission's consideration of Mr. Gibb's request for authorization to construct a 75-foot by 20-foot riprap breakwater and place 500 cubic yards of sandy material landward of the breakwater, as beach nourishment, adjacent to his property along the Rappahannock River in Middlesex County. The project is protested by three nearby property owners.

Chip Neikirk, Environmental Engineer, provided a brief summary of last month's hearing and the developments that had happened since then. Mr. Neikirk also informed the Commission that a fax was received yesterday from Mr. Gibson M. Wright, a partner of Mr. Gibbs.

Mr. Neikirk said that during the August 24, 1999, meeting testimony on behalf of the applicant was received from Mr. Hahn and Mr. Chris Clifford opposing, testimony was received from Mr. Robert Montague, Dr. David Basco, Mr. Bradley Talley, and Mr. Perry. Dr. Basco, a private consultant, hired by Mr. Talley and Mr. Perry, recommended that a portion of the sand behind the two existing breakwaters be removed to detach and reduce the height of the tombolo. In addition, Dr. Basco also recommended that six groins be constructed downstream of the breakwaters in lieu of the proposed breakwater. He said three of those groins should extend from Mr. Gibb's property and three would extend from Mr. Talley's property. Dr. Basco's final suggestion was to use the sand removed from behind the existing breakwaters as beach nourishment to refill the created groin field.

Mr. Neikirk said staff requested Mr. Scott Hardaway, a VIMS costal geologist specializing in shoreline processes, to prepare a report on this project. That report was provided during last month's meeting. Mr. Hardaway's report stated that the breakwater would not affect Mr. Talley's property, provided the recently constructed riprap revetment was property built. Mr. Hardaway noted that Mr. Talley's proposed groins and the groins along Mr. Perry's property should be nourished with sand. In addition, to minimize the impact of Mr. Gibbs's proposed breakwater, Mr. Hardaway suggested placing additional sand downdrift of the breakwater to "feed" the downdrift properties. Mr. Hardaway also indicated that sand was the key to an

effective shoreline protection strategy along this reach of shoreline and suggested that a cooperative effort among the landowners would be necessary to make any shoreline protection strategy work. He said staff recommended last month that the project be approved with a condition that Mr. Gibbs be required to place 150 cubic yards of beach quality sand downdrift of the breakwater. However, the Commission voted last month to postpone action on this project until the September meeting, to afford the applicant the opportunity to meet with the protestant and his representatives in an attempt to reach a comprehensive shoreline management design.

Mr. Neikirk said a meeting was held on the applicant's property and five alternatives were developed. The alternatives ranged from a complete seven breakwater system for the entire development to deleting the proposed breakwater and constructing only a riprap revetment along Mr. Gibb's shoreline. Mr. Neikirk presented slides showing the seven alternatives. Comments are a part of the verbatim record.

Mr. Neikirk said Mr. Gibbs' preferred option was alternative three, the construction of the 75-foot by 20-foot breakwater with a maximum height of one foot above the mean high water elevation and without the construction of the sand tombolo on the landward side. To minimize the downdrift impact, this option also included the removal of 15 feet of the sand tombolo behind the adjacent upstream existing breakwater and the placement of 500 cubic yards of sand downdrift of the proposed breakwater. Dr. Basco had originally recommended that the sand tombolo behind each of the existing breakwaters be reduced, however, the property associated with the most upstream breakwater had been sold. Mr. Neikirk said that staff recommended approval of the revised proposal with an additional condition that the sand proposed for beach nourishment be inspected by staff prior to placement along the beach and a royalty assessment of \$175.00 for fill as a result of beach nourishment at \$0.05 per square foot.

Associate Member Ballard asked if the tombolo that was proposed in alternative three would eliminate or reduce the size of the tombolo. Mr. Neikirk responded they were proposing both. He then explained that Mr. Gibb's partner, Mr. Wright had agreed to remove 10 to 15 feet behind the tombolo.

Associate Member Davis asked why the alternative three proposal was not acceptable to the protestants. Mr. Neikirk responded that he could not explain exactly, but the protestants preferred that no breakwater be constructed and a riprap revetment be used.

Gibson Wright addressed the Commission. He said they made this proposal as a compromise in good faith. He said they met with the opponents and they were not willing to bulge because they preferred an inferior solution which was groins. He said Mr. Gibbs and he were

developers of the property. He said the two breakwaters that were in place were working. Mr. Wright said in good faith they would like to nourish the opponents' beach. He said he was not convinced that by leaving the tombolo in place it would harm their beach. However, he would revise their offer and agree to putting a feeder beach and leave the tombolo in place.

Associate Member Davis commented that the sand would wash away over a period of time. Mr. Davis said although Mr. Wright had agreed to nourish the beach now, but what would happen in five to ten years. Mr. Wright responded that he should put some breakwaters in place to keep the beach.

Brad Talley and Charles A. Perry were sworn in and addressed the Commission.

Mr. Talley said they were willing to accept option five, which was to use a revetment with some beach nourishment. Mr. Talley then presented pictures that showed the erosion which occurred on the downriver side of the breakwaters. Mr. Talley said the two breakwaters and tombolos, and loss of sand would flow downriver which would cause erosion to the downriver side of the breakwater. He said he did not see any difference in what was happening now and moving the problem downriver towards his property. He said he put a revetment in and it saved his toe from the last hurricane, but his beach had washed away and he would have to put groins in to refurbish the beach. He said Mr. Wright's proposal would look good, but as soon as the storms came the sand would move downriver and there would be nothing to replenish it. He said before the breakwaters were installed, he had approximately 15 feet of beach above the high tide level before the breakwaters were installed.

Charles A. Perry addressed the Commission. He said Dr. Basco, their expert who spoke last month, concluded that the existing breakwaters were too close to the land, too high, and the tombolo was too high. He said Dr. Basco said, "A large amount of sand would be trapped and starve the downdrift beach groin system" for a long time in the future. He said Mr. Talley and himself were the persons downdrift that would be affected. He said he felt the Commission should be considering moving the existing breakwaters that were too close to the land and lowering the breakwaters. Mr. Perry said they were very grateful for the work that Riverworks had done, but Riverworks was working on behalf of the applicants. He said Riverworks placed before them five alternatives in writing that were generated by the applicants. They then requested that they consider all the options. They considered all the options and chose option 5, and faxed their response to Mr. Wright. When no response to their fax was received, Mr. Talley contacted Mr. Wright about option 5, and Mr. Wright said to Mr. Talley that option five was a joke. Mr. Perry said they had presumed that they were negotiating in good faith, and that the applicant had put forward five options and said please consider all these options. They

accepted option 5 with slight modification, and they also selected two other alternatives of the five options. Mr. Perry said option five was a major compromise on their part. He then requested the Commission consider the damage already done to their properties and they were looking to the Commission for protection.

Associate Member Birkett asked Mr. Talley if he intended to put in some groins on his property. Mr. Talley responded yes because he had lost a considerable amount of beach from the breakwaters blocking the sand. He said upriver behind the breakwaters was probably lowered two feet in depth. Mr. Talley said he would put three groins in to try and block some sand and regain what he had lost. Mr. Birkett asked if he had a cost on putting the three groins in. Mr. Talley responded that he did not know the lumber cost but he had received an estimated of \$20.00 per foot to install the groins.

Associate Member Birkett asked Riverworks how much the breakwaters cost. Riverworks responded approximately \$15,000 or less which would equate to the three groins.

Associate Member Davis said it was his understanding from the last meeting that the Commission had requested that the two parties get together and come up with a compromise. The applicants presented five options, the opponents accepted option five, and now the applicants were not acceptable to their choice. Mr. Clifford responded yes.

Commissioner Pruitt requested that Mr. Clifford be sworn in to the last response that he gave. Associate Member Hull asked Mr. Talley and Mr. Perry how long had they owned their properties. Mr. Perry said he had lived there approximately 27 years. Mr. Talley responded that he had owned the property for two years and he was building a house. Associate Member Hull asked if he had any documentary evidence as to the extent of the erosion that had occurred during the time he had owned the property. Mr. Talley said the pictures he provided could demonstrate the erosion. Associate Member Hull commented that the pictures showed the present condition and asked if he had pictures from when he first purchased the property which would reflect the difference. Mr. Talley said he would have to look at the book. He said they had some damage to the toe in January of 1998 from the northeaster, but the beach stayed there because there was sand coming down the river.

Associate Member Ballard asked the applicant if he was acceptable to the five compromises offered. Mr. Perry responded that he did not accept any of the proposals as presented.

Commissioner Pruitt asked Mr. Wright if proposal five was a joke. Mr. Wright responded that he thought it was. Mr. Pruitt asked who made the proposal.

Commission Meeting

September 28, 1999

Jeff Watkins, agent and contractor for the job, responded that they made five proposals with Mr. Scott Hardaway on the site, and they put them in writing. The fifth proposal was out of the jurisdiction of the Commission which was a revetment. He said they put everything on the table and said we would have to do one of the five things. If they were not allowed to have the breakwaters and the beach for protection, they would have a revetment. He said the opposition said they would take the revetment but they wanted 500 cubic yards of sand to come down in their groins. Therefore, Mr. Gibbs and Mr. Wright would have no beach, but Mr. Talley and Mr. Perry would get a beach. Mr. Watkins said Mr. Hardaway said that the breakwaters were not causing the erosion on the adjacent property owners property, but it was the lack of sand.

Commissioner Pruitt asked how he felt about staff's proposal. Mr. Watkins said they would accept it.

Commissioner Pruitt placed the matter before the Commission.

Associate Member Davis commented that Scott Hardaway was a knowledgeable person, but he would propose that the amount of sand be increased.

Associate Member Gordy commented that she thought the applicant was willing to give 500 cubic yards of sand instead of 100. Mr. Watkins responded that was true.

Associate Member Ballard commented that there were a number of elements of alternative three that seemed to be in dispute as to what alternative three was. For example, staff recommended 500 cubic yards of sand placement, but the faxed letter from Mr. Wright to Mr. Talley gave them 600 cubic yards of sand. Also in staff's recommendation they cited removal of 15 feet of sand from the tombolo, and the faxed letter said a removal of 10 feet. Mr. Watkins responded that they would accept staff's recommendations and they offered an apology for the difference in the numbers. Mr. Ballard commented further that according to staff's recommendation, the applicant would be required to replace 500 cubic yards of sand downdrift to Mr. Talley and the groins could capture and remove the 15 feet tombolo which would bring even more sand downdrift. He said it seemed like staff had the right recommendation. Associate Member Ballard then moved that staff's recommendation be approved. Motion was seconded by Associate Member White.

Associate Member Williams requested clarification on the motion. Mr. Pruitt explained that the parties came before the Commission in August and they couldn't agree on anything. He said the Commission postponed the proposal for a month to allow the parties to get together. They agreed to consult Scott Hardaway, a noted expert on the subject. The applicants came up

Commission Meeting

September 28, 1999

with five alternatives. Staff working along with them, came up with this recommendation to the Commission based on what both parties had to say.

Associate Member Davis called the question. Motion carried 7 to 1. Mr. Cowart abstained from voting because he was not at the last meeting and did not have the background to vote on the motion.

Beach Nourishment fill of 3500 sq. ft.	
@0.05 sq. ft.....	\$ 175.00
Permit fee.....	\$ <u>100.00</u>
Total	\$ 275.00

Commissioner Pruitt asked Associate Member White to act as Chairman.

WALTER JOHNSON, #99-0972, Request by 25 or more freeholders of property in the City of Hampton for Commission review of the July 27, 1999, decision by the Hampton Wetlands Board to approve the installation of a 15-inch pipe culvert and fill for construction of a driveway at property situated along a manmade ditch with connection to Long Creek in the City of Hampton.

Tracy West, Environmental Engineer, said she would like to show some slides with the Commission's concurrence. However, she said staff did not consider showing the slides as opening the record because the slides merely provided the Commission with an orientation to the project site the Wetland Board members already had. Ms. West comments pertained to the location of the property, location of the proposed driveway, Fox Hill subdivision drainage ditch riprap flanking, cross sectional drawing showing the 15-inch pipe culvert, the fill, the 5/8-inch water line, 3/4 inch sanitary sewer line. Comments are a part of the verbatim record. Ms. West said that staff had received letters and petitions from over 100 freeholders of property within the City of Hampton. The appeal was considered timely under the provisions of the Code. The petitioners indicated that a culvert in the ditch would increase flooding in that area. She said they also questioned the necessity of the culvert and that the undeveloped lot could be reached without crossing the ditch and filling of the wetlands. Mr. Johnson's original application requested authorization for a 20 foot driveway crossing wetlands. Staff's recommendation was to reduce the driveway to a 16 ft driveway and reduce the impacts from 40 square feet to 30 square feet. Ms. West said VIMS had stated the individual and cumulative impacts resulting from the project would be minimal.

Walter Johnson, applicant, and Richard Blackwell, were sworn in.

Richard Blackwell, addressed the Commission. He said that Mr. Johnson was the owner and developer of the property and he was just here to argue Mr. Johnson's position. He said there was no other access to the City road except across the manmade ditch, and that was the only way Mr. Johnson could develop his property. He said the environmental issue was minimal. He felt that the real issue was that the neighbors did not want the house built or the pipe placed there.

Associate Member Hull asked how long Mr. Johnson had owned the property. Mr. Johnson responded that they started the project approximately 16 years ago and it had been a battle ever since. He said before they could proceed with the project, they had to pay for labor and material for one mile of 8-inch sewer main for all of Fox Hill. Other comments are a part of the verbatim record.

Associate Member Davis asked how many lots Mr. Johnson had developed. Mr. Johnson responded that he had developed 51.

Gail Cozzens spoke in opposition to the project. She then requested everyone in opposition to the project to stand and then she requested Mr. Steve Jorgensen to represent the group.

Steve Jorgensen presented documents for the record.

Associate Member Ballard asked if by accepting the documents they were offering if that would be considered opening the record. Mr. Carl Josephson, Assistant Attorney General, responded that it was within the Commission's discretion whether they wanted to accept the documents, but it would be considered as opening the record.

Acting Chairman White called for a vote from the Commission on whether to accept the documents. The Commission voted not to accept the documents. Associate Member Williams abstained from voting on the issue.

Mr. Jorgensen proceeded with his presentation. He said the Grandview Association believed that the permit approved by the City of Hampton Wetlands Board should be disapproved and the decision overturned. Mr. Jorgensen gave several reasons why the Commission should reverse the decision of the Hampton Wetlands Board. Comments are a part of the verbatim record.

Commission Meeting

September 28, 1999

Bill Synder, Chairman of the Wetlands Board, said he was present to represent the Wetlands Board should the Commission need to speak with him.

Anita Ripple addressed the Commission. Ms. Ripple said she was in agreement with Mr. Jorgensen. In addition, she gave comments regarding the development of Lot 51. She said the development of this lot would also open up a pollution trail into the Chesapeake Bay. Other comments are a part of the verbatim record.

Commissioner Pruitt asked if she presented that same statement to the Wetlands Board. Ms. Ripple responded yes. Mr. Pruitt explained that the Commission was determining if the Wetlands Board adhered to the Code of Virginia, and was not rehashing the merits of the project. Ms. Ripple responded that she felt the Wetlands Board did not do a thorough investigation.

Associate Member Cowart questioned the comment made by Ms. Ripple regarding whether the lot was filled to build a lot, which he thought was illegal.

Commissioner Pruitt asked staff if they could answer Mr. Cowart's question. Ms. West responded that she could not address the issue regarding whether the fill put on the lot was illegal and placed in wetlands, because she did not know. Ms. West said what was before the local wetlands board at the July 27, hearing was simply the cropping of the tidal ditch. However, she said a staff member was present from the City of Hampton who may be able to address the issue further as to whether the fill on the lot was illegal.

Commissioner Pruitt asked Ms. Madison if she was representing the Wetlands Board or a private citizen. Ms. Madison responded that she was a member of the Wetlands Board in opposition.

Tyler Madison then addressed the Commission as a member of the Hampton Wetlands Board and voiced her opposition to the permit at 1732 Beach Road. Ms. Madison gave comments regarding the impact of the proposed construction and its affect on the wetland area. She said the tidal ditch was a valuable ecosystem, and this particular area of Hampton was vital in flood control. Ms. Madison also gave comments regarding changes along the coast exacerbated possibly by global warming, and the diminishing of tidal and nontidal wetlands which act as sponges and absorb excess rainfall and protect homes from flooding, and the loss of wetlands in Hampton in general. Other comments are a part of the verbatim record.

Commission Meeting

September 28, 1999

Associate Member White asked if the sole responsibility of the Commission was to determine if the Wetlands Board erred. Commissioner Pruitt responded that was correct. Mr. Josephson concurred. A brief discussion followed regarding the legal responsibility of the Commission regarding of the Wetland Board's decision. Comments are a part of the verbatim record.

Commissioner Pruitt asked the Chairman of the Wetlands Board if he would like to address the Commission. Mr. Synder responded only if the Commission had questions and that the Board stood behind their decision.

Mr. Johnson addressed the Commission in rebuttal. He said he would like to correct some statements made. He said there was 51 lots platted many years back. They were approved and supposedly grandfathered in.

Associate Member Davis asked if they had placed the fill on the lot. Mr. Johnson said they had their permits and had started filling.

Associate Member Williams asked how many lots were approved for the permit. Mr. Johnson responded that there were 51 lots.

Commissioner Pruitt placed the matter before the Commission.

Associate Member White commented that he did not think anyone had proved conclusively that the Wetlands Board had erred. Associate Member White then moved to uphold the decision of the Hampton Wetlands Board. Motion was seconded by Associate Member Birkett.

Associate Member Davis commented that the Commission was charged with protecting the wetlands and there was significant wetlands impact associated with this project.. He said without all the Commission members actually viewing the property, it would be difficult to make a decision. He said both sides admitted that the wetlands were impacted and a member of the Wetlands Board stated that in opposition. Mr. Davis said he could not support the motion, because he felt the Commission was failing in their primary duty to preserve the wetlands.

Associate Member Ballard commented that according to the Code of Virginia, the Commission's responsibility was to modify, reverse or remand the decision of the Hampton Wetlands Board and determine if the Wetlands Board had failed to fulfill its responsibility under the Wetlands Zoning Ordinance. He said there were people with some very good

points, but they failed to convince the Wetlands Board. Mr. Ballard said there was no evidence that the Wetlands Board did not hear their testimony. In fact, the people said they gave their testimony to the Wetlands Board and the Board considered their testimony and came to their decision. Mr. Ballard said he did not see how he could not support the motion based on the testimony he had heard.

Associate Member Hull agreed with Mr. Ballard's comments, and it was obvious that the Commission was charged to preserve the wetlands, but the Hampton Wetlands Board voted 4 to 1 for approval of the project. Therefore, he was not convinced that the hearing was conducted improperly, and he supported the motion.

There being no further discussion, Commissioner Pruitt called for the vote. The motion carried 7 to 1, to uphold the decision of the Hampton Wetlands Board.

DAVID STEARNS, #99-0234. Commission review on appeal by 52 freeholders of property within the City of Norfolk of the August 11, 1999, decision of the Norfolk Wetlands Board to approve an application to replace and backfill 82 feet of existing bulkhead adjacent to the Stearns' property situated along the Lafayette River.

Commissioner Pruitt explained that this case was remanded back to the Norfolk Wetlands Board, had been heard by them, and was now being appealed again to the Commission. He then proposed that a brief statement be given of the last Board meeting by staff and that both parties be limited to 15 minutes each for their presentation.

Heather Wood, Environmental Engineer, commented that she had slides if the Commission would like to review them again. In addition, there was a 13 minute video presented by Mr. Steve Walls, a representative and consultant for the 52 freeholders, that was presented at the Wetlands Board. She said the Commission had not seen the video and it was now part of the record.

Commissioner Pruitt placed seeing the video before the Commission. Associate Member Ballard responded that the Commission had heard the video described and he said the Commission's primary responsibility was to consider whether the Wetlands Board erred in their decision.

Associate Member Davis was concerned that Associate Member Williams had not seen the pictures. Commissioner Pruitt commented that he felt Mr. Williams should abstain on this

case. Mr. Williams was amenable to abstain on this matter.

Ms. Wood gave brief background information on the proposed project to the Commission. Comments are a part of the verbatim record. She said the Norfolk Wetlands Board held a public hearing on August 11, 1999, to accept comments and to review additional information on the proposed project. The City staff again recommended approval of the project, with the condition that the area channelward of the south end of the bulkhead be graded, fertilized, and re-sprigged with saltmarsh cordgrass, and that the existing concrete rubble be used as marsh toe stabilization. Supporting testimony was provided by Mrs. Deborah Stearns and Ms. Beverly Peters, attorney for the Stearns'. Opposition comments were provided by Mr. Eric Schwartz and Mr. Ken Stolle, counsels for the freeholders, and Mr. Steve Walls, a consultant with Environmental Specialties Group, Inc.

Ms. Wood said that after the Wetlands Board heard testimony from all parties and their legal counsels, they voted 6-0 to approve the project as proposed with the conditions recommended by City staff.

Ms. Wood said staff received the letter and a petition signed by 52 freeholders noting an appeal of the Norfolk Wetland Board's decision of August 11, 1999. The appeal was considered timely under the provisions of Section 28.2-1311(B) of the Code of Virginia. She said the appellants based their appeal on the grounds that the Wetlands Board failed to consider less intrusive and destructive methods that could be used on the site to prevent erosion. The petitioners also were concerned that the Stearns' lacked title to the property upon which the bulkhead would be repaired.

Ms. Wood said the Board addressed the property ownership issue and determined that Section 49-6 of the City Code did not require an applicant to prove ownership when filing an application. The Board again considered the VIMS report which indicated that the impacts had been reduced based on the bulkhead being replaced along the same alignment as the existing bulkhead instead of two feet channelward as had been originally proposed. VIMS also suggested that placing the bulkhead landward of the wetlands could likely further minimize impacts to the wetlands. The City staff indicated, however, that doing so would result in the slumping of the wetland area into the basin and contributing to siltation in the basin.

Ms. Wood said staff did not believe the Board erred procedurally in their review or approval of the Stearn's application. She said the Wetlands Board considered the testimony provided by staff, the applicant, the applicant's attorney, and the attorneys and consultant for the protestant, and 52 freeholders, as well as the comments by VIMS. Accordingly, staff recommended the

Commission Meeting

September 28, 1999

Commission uphold the Norfolk Wetland Board's decision to approve the proposal.

Associate Member White asked if the circumstances were the same as they were during the last Commission hearing. Ms. Wood responded yes, the only additional information being the video.

Associate Member Williams indicated that he would abstain from voting because he did not have the full facts from the last meeting.

Ms. Cynthia Hall indicated that the Chairman of the Norfolk City Wetlands Board was present today and would like to address the Commission, if possible.

Eric Schwartz, attorney for Mrs. Craddock, addressed the Commission. Mr. Schwartz commented that it was Mrs. Craddock's position that the entire proceeding conducted by the Norfolk Wetlands Board in August was illegal and should not be upheld today. Mr. Schwartz said that this case had been before the Commission twice. He said in January the case was remanded to the Norfolk Wetlands Board. The applicants revised their application and submitted a new one, the Wetlands Board considered that application in April and approved it.

The April application was appealed by 46 freeholders to the Commission. The Commission, in June, voted to remand the April application to give the applicants the opportunity to submit a revised application. The specific provision contemplated that the applicants could propose to put the bulkhead landward of the existing vegetated wetlands. In August, the applicants submitted the same April application to the Norfolk Wetlands Board. The Local Wetlands Board again voted to issue a permit. Mr. Schwartz then provided information regarding the Code of Virginia's statutory scheme for the appeal of the Commission's decision. He said, according to the Code of Virginia, the Commission's decision could be appealed through the Circuit Court, but the same case could not be brought back to the Commission. He said the Commission's decision could not be reviewed by the Wetlands Board, because the Wetlands Board did not have the authority to review the Commission's decision.

A discussion followed between the opponent's attorney and the Commission regarding the two applications. Comments are a part of the verbatim record.

Associate Member Cowart requested clarification. He said he believed the Commission sent the case back to the Norfolk Wetland's Board for them to consider all the environmental factors involved in the case. He said he was not aware that the Commission had directed the applicants to change the application, or to remove the bulkhead landward of the existing bulkhead.

Commissioner Pruitt directed staff to respond to Mr. Cowart's question.

Assistant Attorney General Josephson informed the Commission that their packages contained a letter, dated June 4, 1999, to Mr. Harrison from Tony Watkinson, Deputy Chief, remanding the case. Mr. Josephson quoted the letter, "after careful deliberation, the Commission voted to remand the matter to the Norfolk Wetlands Board for further consideration of alternatives, which could minimize wetlands impact."

Mr. Grabb, Chief-Habitat Management, responded that the Board could have considered a revised application for riprap. He said he thought if the applicant had decided to put the bulkhead landward of the wetlands at the margin of the Board's jurisdiction, the Board could have considered a revised application because that was what VIMS recommended. Mr. Grabb further stated that the 82 foot bulkhead running on the canal qualified for maintenance and repair, and did not require a permit. However, the permit before the Wetlands Board was the 32 foot extension of the return wall that would occur at the point. He said the Commission remanded the application to the Norfolk Wetlands Board with a request that other alternatives be considered less environmental impact. The applicant chose to proceed with the original proposal. An additional hearing was held, the protestants' environmental consultant provided additional information involving environmental impacts. The Wetlands Board rendered a unanimous decision to approve the permit, and that was the decision being appealed before the Commission. A brief discussion followed.

Beverly Peters, attorney for the Stearns, addressed the Commission. She said she considered the letter from staff regarding further consideration for alternatives to minimize the wetlands impact. Ms. Peters said the Stearns elected not to modify their application. Ms. Peters presented the three options that the Stearns had: (1) replace the bulkhead in the exact same alignment with a return, the bulkhead would not require a permit, but the return would. The impact involved 300 square feet of perched vegetated wetlands, which would not have colonized if not for the failure of the bulkhead; (2) place the bulkhead landward of vegetated wetlands, which would require no permit. However, it would impact 300 square feet of vegetated wetland because erosion and scarping would continue and would ultimately completely erode the unprotected perched wetlands. Plus, there would be additional losses of wetlands in front of the deteriorating bulkhead because it would slump; (3) install a riprap structure which the opponents proposed. Ms. Peters said the City staff person, Mr. Rosenberg, said the soil in that area would not support the weight of the stones. If they did the installation, it would require more excavation, which would effectively remove the wetlands any how. She said the Wetlands Board was faced with those options and their impacts, and they balanced the

Commission Meeting

September 28, 1999

needs and desires of the Stearns to protect their property, their backyard and to use the waterway. The Wetland Board then approved the Stearns permit. Ms. Peters said this application was for a remand to consider further alternatives. It was not a requirement for the Stearns to modify their application. The Stearns chose to keep their same application, and the Wetlands Board again voted to support the Stearns'.

Commissioner Pruitt placed the matter of the Chairman of the Wetland Board's presentation before the Commission. Associate Member Ballard moved to hear the Chairman's testimony. Mr. Ballard said in deciding whether the Wetlands Board gave a fair hearing in August his testimony could be germane. Motion was seconded by Associate Member Gordy. A discussion followed regarding history of the application and the consistency of hearing the testimony. Comments are a part of the verbatim record.

Commissioner Pruitt called for the vote. Motion carried.

Chairman Harrison addressed the Commission. He said the Wetlands Board considered all the alternatives and the fact that the bulkhead would be replaced along the same alignment, which was standard procedure. He said the return was changed to give the Board some justification or mitigation for the wetlands being lost. If the bulkhead was pulled back, it would wash down and the basin would help it. The Board felt that the best decision was to leave the bulkhead as originally proposed and accept the proposal. The vote was 6 to 1.

The City Attorney requested consideration to address the Commission. Commissioner Pruitt ruled in favor and requested the advice from the Assistant Attorney General Josephson. Mr. Josephson agreed.

Ms. Cynthia Hall, Assistant City Attorney from Norfolk, addressed the Board. Ms. Hall reemphasized the contents of the letter sent by staff in June. She felt it was not a directive for either the applicant or the Wetlands Board to actually find another alternative. She said she thought the major issue was the erosion at the location. She said all the parties spent a significant amount of time addressing the erosion issue because of the deteriorated bulkhead. She said their understanding of the letter was that the Commission wanted them to consider alternatives. She then assured the Commission that the Wetlands Board did consider all the alternatives, and the Board decided that the most appropriate decision in this particular situation was to keep the proposed alignment exactly as in the previous alignment. She said she did not want the Commission to think that the Norfolk Wetlands Board violated any directive by the Commission or disregarded any request of the Commission.

Commission Meeting

September 28, 1999

Associate Member Davis commented that he remembered the motion which was to pursue alternatives, and there was no alternative submitted. He said he was particular distressed about the Assistant City Attorney's behavior and outward familiarity with the Stearns' attorney. Other comments are a part of the verbatim record.

Ms. Hall responded that she was shocked by his accusations, and reiterated that she would not be a part in any unethical responsibilities. She then assured the Board that Ms. Peters and herself were merely conferring on the status of the case.

Associate Member Hull then publicly apologized to Ms. Hall on behalf of the Commission.

Commissioner Pruitt then requested that Mr. Schwartz to address the Commission.

Mr. Schwartz remarked that when reviewing a Wetland Board's decision, the scope of the Commission's review was defined in Virginia Code Title 28.2-1313. In addition, other issues could also be considered, such as, whether or not the Wetlands Board violated its statutory authority, pursued an unlawful procedure or another error of law, and whether their decision was unsupported by the evidence on the record considered as a whole." Mr. Schwartz said he felt the procedure the Board followed was completely unlawful. He further stated that if the applicant wanted a review of the Commission's decision, the opportunity was described in Virginia Code 28.2-1315, which states if you are dissatisfied with the Commission's decision it could be taken to the Circuit Court. He said he felt that staff's letter was incomplete, but that the Commission clearly suggested consideration of other alternatives. He said the vegetated wetlands were thriving, and were not eroding into the channel. He then requested that Ms. Craddock's updated position statement be made a part of the record. Mr. Schwartz then proffered Mr. Walls and Mr. Stolle for some comments.

Commissioner Pruitt ruled that the Commission would hear from Mr. Stolle, but not Mr. Wall since his opinion from the last meeting.

Ken Stolle addressed the Commission. He said he was assisting in providing legal representation to the freeholders that appealed the case. Mr. Stolle gave comments regarding the Commission's decision to remand this case back to the Norfolk Wetlands Board. Comments are a part of the verbatim record. Mr. Stolle then asked the Commission to overturn the board's decision finding that it was inappropriate for them to reconsider the application that had already been considered by the Commission. He asked the Commission to deny the current request.

Commission Meeting

September 28, 1999

After consulting with the Assistant Attorney General, Commissioner Pruitt said the Commission had heard sufficient testimony from both parties. Mr. Pruitt then placed the matter before the Commission.

Associate Member White commented that, based on the guidance the Commissioner had given earlier regarding their change in appeal cases, he felt the Wetlands Board had erred procedurally.

Commissioner Pruitt informed the Commission that the matter before them now was either to overturn or uphold the Wetland Board's decision.

Assistant Attorney General Josephson also reminded the Commission that they could also modify, remand or reverse the Wetland Board's decision.

Associate Member White then moved to reverse the Wetlands Board's decision. The motion was seconded by Associate Member Davis.

Associate Member Ballard requested Associate Member White to state his rationale for the motion. Associate Member White responded that he thought the Wetlands Board erred procedurally.

Associate Member Davis then called the question. The motion carried unanimously, 7-0, to reverse the Wetlands Board's decision. Mr. Williams abstained from voting.

ROBERT T. GRACE, ET. AL., #99-1145-13. Commission's review of the August 6, 1999, decision of the Northumberland County Wetlands Board to approve the construction of two timber jetties to maintain a 60-foot long channel excavated through 1,500 square feet of intertidal wetlands and filling of 1,440 square feet of State-owned submerged lands as mitigation for the excavation adjacent to the applicant's property situated along Dividing Creek in Northumberland County.

Jeff Madden, Environmental Engineer, briefed the Commission and presented slides. Comments are a part of the verbatim record. Mr. Madden said the Northumberland Wetlands Board held a public hearing and the VIMS report was read into the record. Testimony was received from the applicant's agent, Mr. Roger McKinley. Mr. McKinley indicated that he had been advised by the Corps' Northern Neck Field Office that filling the natural channel might

increase tidal flushing into and out of the cove. Based on that information, the applicant proposed to mitigate for the wetland losses by filling 1,440 square feet of the natural channel and redirecting the flow of water through the man-made channel. No one spoke in opposition to the project. While, the Board discussed the VIMS recommendation to construct a pier over the cove, they rejected that recommendation because they understood that Mr. Corey did not approve of the construction of the pier over the wetland area. The Board then approved the project as revised, endorsing the Corps' advice that the tidal flushing would be improved by filling the natural channel. The Board also approved the construction of jetties and the filling of the subaqueous bottom at a 1:1 ratio for compensation for the loss of wetlands.

Mr. Madden said staff notified the Chairman of the Wetlands Board, Mr. George Rue, that pursuant to §28-2-1310 and 28.2-1311(A)(2) of the Code of Virginia, the Commission intended to review the project. He said staff believed that the Board erred in granting the applicant authorization to fill State-owned submerged lands as compensation for the loss of tidal wetlands. Staff also believed that the Wetlands Board failed to acknowledge that an exchange of one habitat for another conflicted with the wetland guidelines. Mr. Madden said staff felt that the Board could have minimized impacts to areas within their jurisdiction by authorizing the dredging of a narrower portion of the spit. In addition, staff felt a suitable parcel of adjacent upland could have been chosen to provide 2:1 compensation for the wetland losses resulting from the dredging. Accordingly, staff recommended that the decision of the Northumberland County Wetlands Board in the matter of Robert T. Grace et al, be reversed.

Associate Member Davis asked if staff was recommending a 2:1 compensation rate. Mr. Madden responded that staff had recommended a compensation, and that the compensation not be subtidal, and that a suitable wetland site be chosen. A discussion followed regarding compensation. Comments are a part of the verbatim record.

Robert Grace, the applicant, addressed the Commission. He said he had met with staff, and talked to him on several occasions about the application. Mr. Grace said staff, his contractor and the Corps, tried to modify their existing plan so it met VMRC requirements. He said he had submitted a revised addendum to the original plan. He said they had moved the fill to a new location and proposed a better than 2:1 compensation plan. Mr. Grace then asked that the Commission not reverse the ruling of the Wetlands Board, but remand it back to Board for them to consider the new plan.

Associate Member Davis asked if staff was comfortable with remanding the matter back to Wetlands Board. Mr. Madden responded that, in light of the fact that more information had been brought to the Commission's attention, staff would not object to a remand.

Commissioner Pruitt placed the matter before the Commission.

Associate Member Hull commented that he had inspected the site and he thought Mr. Grace's suggestion offered the best solution in order to get the matter back to the Northumberland Wetlands Board. Mr. Hull then moved that the matter be remanded to the Wetlands Board. The motion was seconded by Associate Member White.

Associate Member Davis requested clarification on the motion. He said it was his understanding that the issues raised by staff be considered and the new proposal by Mr. Grace be considered.

Motion carried unanimously.

PRIDE OF VIRGINIA SEAFOOD PRODUCTS, #99-0277, requests after-the-fact authorization to retain an 81 1/2 foot long by 84-foot wide commercial timber wharf adjacent to property situated along Cockrell Creek in Northumberland County. The project is protested by an adjacent property owner.

Associate Member Cowart stated that he would abstain from discussion or voting in this matter because of the business relationship he had with Mr. O'Bier's company.

Associate Member Hull also commented that he would likely abstain because of his involvement in the current House of Delegates race because several of the parties involved had supported him in the campaign.

Jeff Madden, Environmental Engineer, briefed the Commission and presented slides. Comments are a part of the verbatim record. Mr. Madden provided a summary of the violation. He said Captain Ray Jewell of the VMRC Law Enforcement Division, first informed staff of the possible unauthorized construction activities at the Pride of Virginia property. Pursuant to the procedures outlined in § 28.2-1212(B) of the Code of Virginia, staff contacted the owner and President of the Pride of Virginia Seafood products, Mr. Stanley O'Bier, and made arrangements to meet with Mr. O'Bier on February 5, 1999, to discuss the violation. At that meeting, staff observed that 72 pilings had been driven, and that of those, approximately 47 were positioned and driven in areas channelward of mean low water. The remaining 25 pilings had been driven into the adjacent shoreline and upland property. Mr. O'Bier was unable

to produce a VMRC permit for the pilings that had been driven on State-owned submerged lands. Mr. O'Bier argued that a permit was not required because the project qualified as maintenance and repair. Mr. Madden said a long discussion ensued as to the Commission's definition of the policy for maintenance and repair. Staff then explained that in order for a project to be considered maintenance and repair, construction must involve repairs to an existing serviceable structure that was in place, with no increase in the aerial footprint. Also, once a pier or structure was removed in its entirety, any replacement or reconstruction was considered to be new work and subject to a public interest review and permit process. This was consistent with the Commission's policy.

Mr. Madden said staff clearly recommended that the contractor stop driving any more piles until the Chief of the Habitat Management Division could be briefed and had an opportunity to evaluate the results of the data and discussions which occurred at the February 5, 1999, meeting. As a result, Mr. Madden said he left the site with what he believed to be a clear understanding that the contractor would suspend work until the situation was clarified and/or resolved.

Mr. Madden stated that on February 8, 1999, staff was again informed that construction activities had continued over the weekend. He said Mr. O'Bier was contacted and questioned why he had not heeded to staff's recommendation to stop work. Mr. O'Bier indicated that he never agreed to stop work and he had no intentions of doing so. Therefore, a Sworn Complaint, a Notice to Comply and Stop Work Order were prepared and executed. The Order was then routed to VMRC's Law Enforcement Division personnel for service. On February 17, at 11:00 a.m., Sgt. Dan Eskridge attempted to serve the Stop Work Order at Mr. O'Bier's Callao office. Mr. O'Bier refused to sign or accept the order. Mr. O'Bier also indicated to Sgt. Eskridge that unless a court order could be produced, he would not sign anything. Mr. Madden said it was only after a Uniform Summons was issued at 5:00 p.m. that same day did Mr. O'Bier finally cease work.

Mr. Madden said that violations under §28.2-1203 of the Code of Virginia and were Class 1 misdemeanors, criminal violations, that were prosecuted by the Commonwealth's attorney in the General District Court. As a result, Mr. O'Bier's case was heard on March 8, 1999, in the General District Court of Northumberland County. At that time, the judge found that there was sufficient evidence to find that State-owned subaqueous bottom had been encroached upon without a permit. However, the judge postponed sentencing for six months and directed Mr. O'Bier cease all further activity on the wharf and that he submit a Joint Permit Application for the Commission's review and consideration. Subsequently, on September 20, 1999, the judge ruled that Mr. O'Bier had substantially complied with his advisement and

dismissed the underlying charges.

Mr. Madden said the adjacent property owner continued, Mr. Williams, to maintain his objection to the project. Mr. Williams felt that the construction would adversely affect his ability to access the slips adjacent to his property that were approved by the Commission in June of 1998.

Mr. Madden said that Mr. O'Bier had testified as an opponent to the Reedville Marina application during the public hearing for Mr. Charles Williams' project. At that hearing in, a direct exchange between Mr. O'Bier and Associate Commissioners Ballard and Davis, Mr. O'Bier was advised that his proposed reconstruction would not qualify as maintenance and repair, and that permits were required. Mr. Madden said staff believed that Mr. O'Bier demonstrated a willful disregard for the authority of the VMRC patrol by not accepting the stop work order and continuing to work after he was made aware that he should stop work on the wharf. Prior testimony by Mr. O'Bier had made it clear that his intention was to rebuild the preexisting pier to its original dimensions and configuration. Mr. Madden said Mr. O'Bier had displayed an obvious contempt for the public interest review process by forwarding his latest revised drawings at the eleventh hour. Based on those drawings, Mr. O'Bier now proposed to construct an enclosed warehouse on the pilings instead of the open-pile wharf which had been continually represented to staff and was advertised to the public.

Mr. Madden said in light of the foregoing, and in consideration of the fact that sufficient evidence had been found to render a finding of guilt for his encroachment over State-owned subaqueous bottom without a permit by the General District Court of Northumberland County, staff recommended denial of Mr. O'Bier's after-the-fact request. Staff also recommended that the Commission enter an order directing removal of all pilings driven channelward of mean low water. Mr. Madden said such removal and restoration should be in lieu of any further enforcement action or civil penalties as permitted by the Code. Mr. Madden further stated that once the areas was satisfactorily restored, staff would be willing to entertain an application for the construction of a more reasonably sized and modest commercial pier that would facilitate Mr. O'Bier's commercial seafood operation.

David Bugg, counsel for Mr. O'Bier, addressed the Commission. Mr. Bugg said it appeared that staff had an issue regarding whether the project was maintenance or replacement. Mr. Bugg presented pictures that showed a former pier in structure the area of the violation. Mr. Bugg then requested that the County permit issued in January 1997 to reconstruct the pier be made a part of the record

Commissioner Pruitt asked where were the wetlands were in the picture? Mr. Bugg responded that he did not believe any wetlands were impacted by the project. Mr. Pruitt asked what was the jurisdiction of the Northumberland County Wetlands Board. Mr. Bugg responded that anytime there was a project that touches in the area where vegetation may be, they would have jurisdiction. A discussion followed.

David Bugg continued with his briefing. For the record, Mr. Bugg presented pictures from the *April 1999, issue of The National Fisherman's Magazine* that showed a building on the property along with some old tanks.

Associate Member Davis asked when the old pier was removed. Mr. Bugg responded that they began removing it in January 1997 or shortly after the wetlands card was issued. He said that work continued as money was available. Mr. Bugg said the removal had been accomplished by time the pictures were taken in 1998 which pertained to the Williams application. In essence, the continued until all of the pilings were installed. Mr. Bugg said there were two issues before the Commission; whether a permit should be granted under §28.2-1205, and the possible issue of a civil charge. He said he did not think staff had followed the statutes in this case. Mr. Bugg gave information regarding applications and after-the-fact applications that should be considered under §28.2-1213. Comments are a part of the verbatim record. Mr. Bugg said none of the State advisory agencies had objected to the project. Mr. Bugg offered more pictures for the record.

Associate Member Davis asked if there was approximately 30 feet to turn around a boat. Mr. Madden responded 29 feet. A discussion between staff and the Commission followed.

Mr. Bugg said the area appeared to allow ample room for both of the projects, and that they could co-exist in the proposed footprint that the Pride of Virginia had proposed. He said there remained issues surrounding the violation and some of the concerns by Mr. Williams that the project would be approved proforma. He said staff had not reviewed the factors that the Commission should consider when approving an application. Staff had ignored 28.2-1213(D) which concerned removal and restoration regarding the loss of resources or that anything would be damaged by this project. Comments are a part of the verbatim record. Mr. Bugg then addressed Mr. O'Bier's wrongful conduct. Comments are a part of the verbatim record. He indicated that the affidavits in the Commission packages from Kenny Eades and Rod Rhodes, who were in charge of the project, reiterated that no wetlands permit was necessary because this was considered a reconstruction project. Northumberland County responded by indicating that no wetland permit was necessary. He asked that copies of the application from Mr. Bowles regarding the Fleeton Machine Works, that was located next to

Commission Meeting

September 28, 1999

the project, and Reedvill Steamboat Landing on the other side of the project which was owned by the Pride of Virginia be made a part of the record. Mr. Bugg said in previous projects involving commercial piers, that staff had provided a letter stating that if the project was maintenance work with no additional encroachment over State owned bottom, no authorization was be required from VMRC.

Commissioner Pruitt asked why Mr. O'Bier did not take the same course as Mr. Bowles. Mr. Bugg responded that he did not believe he needed to get a permit. Other comments are a part of the verbatim record.

Mr. Bugg further indicated that staff was crucifying Mr. O'Bier because he did not get a permit, even though staff had taken an inconsistent position that was partly responsible for Mr. O'Bier's thought that he did not need a permit. He said according to affidavits filed by Jack Shelton and Mr. Louis Whitaker, that it was not clear that they should not stop work and it was not their understanding that the project had to stop. He then provided comments as to why Mr. O'Bier did not accept the service by Deputy Jewell. Comments are the part of the verbatim record. Mr. Bugg indicated that the project should be approved. He said if the concerns of the nearby property owners were to be addressed, one line of the pilings and a piece of the dock could be taken out and Mr. Williams' problems would be solved. He then addressed the staff's position that the February 5, 1999 meeting, there was a clear understanding at the that work should stop. Comments are a part of the verbatim record. He said the criminal charges were dismissed, no state agency had objected, and the only objection by Mr. Williams was in relation to his slips.

Mr. Bugg gave comments concerning the drawings that were only recently submitted..

Commissioner Pruitt asked when the drawings were submitted. Mr. Bugg said staff had requested a drawing showing the space utilization on the pier and they responded within a week to ten days. He said at the June 1998, Commission Meeting it was not brought home to Mr. O'Bier that he needed to come to the Commission for a permit.

Mr. Pruitt commented that he agreed that Mr. O'Bier and Mr. Bowles had a great reputation, but that was not the issue. He said the General District Court found that there was sufficient evidence to find Mr. O'Bier guilty of a Class I misdemeanor for illegal encroachment over State-owned subaqueous bottom. Mr. Pruitt stated that the sentencing was postponed to direct Mr. O'Bier to cease all activity on the wharf and submit a joint permit application for Commission review and consideration. Mr. Pruitt said the Commission would address the penalty portion and then address the issuance or consideration of a permit based on Mr. Bugg's comments. He said Mr. O'Bier would get a fair deal on the violation of encroachment over

Commission Meeting

September 28, 1999

State-owned subaqueous bottom. Mr. Pruitt said Mr. O'Bier was before the Commission for two reasons. One, did he flagrantly violate any laws; and two, did Mr. O'Bier disregard a uniformed sworn officer of the State of Virginia when he went to his office. Mr. Pruitt said two of the Commission members had abstained, but he would not abstain unless there was a lawful conflict of interest. If there was a tie vote he would render his decision. If there was no tie vote, the Commission would render the decision.

Associate Member Ballard said he found Mr. Bugg's argument that, after the June hearing of 1998, Mr. O'Bier was confused on whether he needed a permit to be very disingenuous. He said the verbatim transcript of the hearing clearly put Mr. O'Bier on notice and he was advised to look very carefully into the situation as to whether he needed a permit or not.

Charles Williams, protestant, addressed the Commission. He said the main problem he had on the project was the encroachment in the area of the slips that the Commission gave him permission to put in. Mr. Williams said he was concerned about hurting his business and the people that had leased a slip from him. He said he understood more about permits from the County because he had received a letter from the County and a permit from them was all that was necessary. He said he had to compromise on the former 18,000 square foot building that he had to tear down and scale back with an 1,800 square foot building restaurant structure to satisfy the Commission. He said he had not seen the pictures that were submitted for the record earlier and he felt he should be privy to that information if it would affect his business. He said he would like to work with Mr. O'Bier and his business and hoped they could be able to work together.

Commissioner Pruitt commented that it sounded like Mr. Williams would be willing to withdraw his protest if Mr. O'Bier would do certain things. Mr. Williams responded that he would like to see up front what was going on.

Associate Member Davis asked if Mr. O'Bier had done the project properly, would Mr. Williams have received notice of the proposed construction. Mr. Pruitt responded that was correct. Mr. Davis further commented that even though Mr. O'Bier was warned by the Commission that he would need permits, he chose to go ahead and disregard the warning of two Commission members.

Associate Member Birkett asked Mr. Williams if his primary protest was the encroachment on his present boat slips. Mr. Williams responded yes. A discussion between Commission members and Mr. Williams followed regarding the slips. Comments are a part of the verbatim record.

Stanley O'Bier addressed the Commission and responded to an earlier question regarding boats being tied up to the docks. He said the boats were commercial trap boats and they did not extend beyond the dock.

There being no further comments, pro or con, Commissioner Pruitt provided Mr. Bugg with an opportunity to address the Commission in rebuttal.

Mr. Bugg addressed the Commission in rebuttal. He said the Pride of Virginia would be more than willing to accept a permit stipulation that stated when a boat was moored, nothing would hang out beyond the property line. He said he did not think it would be a problem of maneuvering boats when a pound net trap boat was tied up. He then gave comments regarding the type of boats that would be loading/unloading at the dock. Comments are a part of the verbatim record. He said he thought the two projects could co-exist as proposed.

Associate Member White asked Mr. Bugg if he would be willing to offer a proffer that the proposal would not block access to those slips. Mr. Bugg responded that was too broad and too vague to commit to. They had said, however, that they would not use the sides and that the boats would not hang over and there was enough room.

Commissioner Pruitt commented that he understood Mr. Williams' concerns because this was an after-the-fact request and the Commission had not had an opportunity to study the proposal other than what staff had presented.

Associate Member Ballard gave comments regarding the proposed building on the wharf and how it was unlikely to get approval from the Commission. He also questioned why a wharf of that size was needed.

Commissioner Pruitt suggested that Mr. O'Bier and Mr. Williams go into the Commission Library to try and work out a solution and they return to the Commission. Mr. Bugg said he had no objection. Mr. Williams, however, was unclear on what was going on. He asked if issue of penalties would be addressed and whether or not an agreement could be reached with the applicant's proposal. Commissioner Pruitt said the issue of the penalty was still on the table, and that Mr. Ballard had made out some good points. Mr. Pruitt then explained that the two were not far apart and he thought they could work out a solution. Mr. Williams responded that he did not think it was fair to him for the applicant to bring a proposal to the Commission on what they wanted to do, and he had not had the opportunity to review the proposal. Other comments are a part of the record.

Commission Meeting

September 28, 1999

Associate Member Davis commented that he felt Mr. Williams was being imposed upon and that he had no notice and no knowledge and the proposed building was huge and he felt it was a hardship on Mr. Williams.

Associate Member Gordy commented that she felt Mr. Williams should be telling Mr. Bugg what he could live with and the Commission would consider the after-the-fact nature of the request.

Associate Member Williams commented that he felt the two sides could work out a solution, but if Mr. Williams would like to get an attorney, he should be allowed to do so.

Associate Member Williams moved that if the two parties desired, the hearing could be postponed for a month. Associate Member Davis seconded the motion provided that the following two issues be satisfied; the parties work out a compromise and that the flagrant disregard of the Commission and its officer be addressed.

Associate Member Ballard asked if the stop order remained in effect. Commissioner Pruitt responded yes. Mr. Ballard asked if everyone was clear on the stop work order.

Mr. Williams asked what was the benefit of deferring the penalty portion of the discussion. Associate Member Davis commented that he would also like to see it done now.

Assistant Attorney General Josephson commented that it was a matter within the Commission's discretion, and they could separate the issues. He was not sure you could get the whole picture and be able to give an appropriate civil charge, however, when they needed to agree to the civil charges.

Motion carried with Associate Members Cowart and Hull abstaining.

Mr. Charles Williams asked what were the instructions. Commissioner Pruitt explained that the instructions were if Mr. Williams wanted an attorney he could get one and meet with Mr. Bugg. But both parties were to meet and be present and anyone else that wanted to be present. The parties should discuss the application that was before the Commission and if a compromise was reached, it should be brought back to the Commission. If an agreement could not be reached, the Commission would decide on the current proposal.

Associate Member Hull commented that while he had abstained, and he would be happy to

meet the parties.

SHELTER HARBOR MARINA, #98-1180, was requesting authorization to install an intermediate mooring pile at each of their existing 49 wetslips and add fender piles along portions of the existing along portions of the existing piers at their facility along Willetts Creek in Gloucester County. The project is protested by an adjacent property owner.

Chip Neikirk, Environmental Engineer, briefed the Commission and presented slides. Comments are a part of the verbatim record. He gave background information on the location and the finger moorings. Staff then recommended approval of the project with the condition that fender piles not be installed along the L-head pier and between the eastern and center piers, and landward and on the west side of the furthest west pier.

Dan Worman, an attorney, addressed the Commission. He also stated that Mr. Enders and Mr. Dietrich were present. He said their only objection was the outboard piles along the face of the piers that ran along the shoreline and areas where the traveling pier was located. He said the purpose of the proposed project was to provide a safe place to keep the boats from riding up against the members for pumping out and for people getting on and off the boats, and people that wanted to spend the night.

Dennis Dietrich, agent for the applicant, addressed the Commission. He said Mr. Enders would like the finger piles on the inside, and not to add a permanent type mooring. Other Comments are a part of the verbatim record.

John Enders addressed the Commission. He said they applied for the mooring and fender piles mainly to supplement what was not installed originally. He said they requested the fender piles for safety reasons. Other comments are a part of the verbatim record.

Mr. Worman readdressed the Commission and emphasized the points made by Mr. Dietrich and Mr. Enders. Mr. Worman then requested the Commission approve all the piles as requested.

The protestants were not present.

Acting Chairman White placed the matter before the Commission.

Commission Meeting

September 28, 1999

Associate Member Davis then moved to approved staff recommendation. Motion was seconded by Associate Member Birkett.

Associate Member Ballard requested staff to explain why they did not want the fender pilings. Mr. Niekirk responded that the concerns were the approval of the 49 slips, and that there was seasonal condemnation based on the 49 slips, of one-eighth mile around it. He said they were also concerned with the temporary overnight and a couple days mooring in the various areas, other than the 49 slips. If the Health Department came out and counted the boats, it might necessitate a larger seasonal condemnation around the facility. Without the fenders piles in the area necessary for the travel lifts, fuel, and pumpout piers, the facility was self regulating and no one would tie up there. Associate Member Ballard asked if there were active shellfish resources in the area. Mr. Neikirk said it was open for the direct marketing, but he did not know how much activity was there.

A discussion followed between Commission members and staff regarding enforcement of slips. Comments are a part of the verbatim record.

Mary Wright of the Health Department's Division Shellfish Sanitation Department addressed the Commission. She said the closure that would be imposed would not be an eighth of a mile as stated in her letter. It was a line running between two survey markers. She said they did not attempt to count temporary closures on the 4th of July because they could not deal with that situation, and as a matter of policy they just used the number of slips that had been approved.

Associate Member Davis restated his motion. Mr. Davis said he supported staff recommendation. Motion carried unanimously.

For the Record: Associate Member White did not vote because he was acting as Chairman.

Permit fee.....\$ 25.00

COUNTY OF FAIRFAX, #99-0424, has requested authorization to construct a 196-foot long bridge over Sugarland Run, a tributary to the Potomac River in Fairfax County as a part of the Wiehle Avenue Road extension, Phase III. The bridge will cross approximately 25 feet of subaqueous State bottomlands of Sugarland Run. Additionally, a temporary construction bridge is proposed which will be removed upon completion of the road project. The project is

protested by numerous individuals in the surrounding area.

Ben Stagg, Environmental Engineer, briefed the Commission and presented slides. Comments are a part of the verbatim record. Mr. Stagg said the proposed structure would provide a link between Dranesville Road and Fairfax County Parkway. He said the temporary construction would be removed and the area restored. The temporary bridge would impact about 500 square feet of stream and the permanent bridge would impact 2730 square feet. He said the impact was shady for both the temporary and permanent construction.

Mr. Stagg said a letter was received Friday that was included in the Commission package from Bob Hesser in which he indicated his concerns. Mr. Stagg said the Department of Conservation and Recreation indicated that they anticipated no adverse impacts, but they recommended informing FEMA of the proposal. The Department of Game and Inland Fisheries recommended implementing the standard erosion and sediment practices. The Department of Environmental Quality indicated water and quality impacts were probably minimum. Mr. Stagg said the original proposal was to install culverts. The County resubmitted the proposal to expand the entire stream which would result in no instream construction impacts, and the only permanent impacts would be shading of the stream. The stream should not have any flooding on the area as the pilings would be on the main stream. Accordingly, staff recommended that the project be approved as proposed with standard conditions for construction of stream crossings as outlined in the *Virginia Erosion and Sediment Control Handbook*.

Larry Etter, with the Fairfax County Department of Public Works and Environmental Services addressed the Commission. He said this project was an important link in the County transportation network. He gave other comments in support of the project. Comments are a part of the verbatim record.

Mike Rolband from Wetlands Studies and Solutions that processed the application for the project addressed the Commission. He said the project had been approved by the U. S. Corps of Engineers and a waiver was issued under Section 401 by DEQ. The only permit needed was the Clean Water Act and Subaqueous lands approval by VMRC. He said the plan provided a Storm Water Management and Best Management Practices for the runoff. Other comments are a part of verbatim record. Mr. Rolband presented information representing the mitigation plan.

Bob Hesser, Vice President of King Stream Home Association, addressed the Commission. He said his lot was where the bridge started. He said the County had not given him the

Commission Meeting

September 28, 1999

opportunity to find out what they wanted. The Association had requested an economic impact study and noise study, traffic studies, but they were never done. He said the Association wanted someone to do a good study to determine what would happen to the erosion. He said there was a lot of information missing and he would like to have an environmental study done. Other comments are a part of the verbatim record.

Bruce Gaddy, a property owner that would be affected by the road, addressed the Commission. He gave comments regarding an oil spill that affected Sugar Land Run in 1993. Comments are a part of the verbatim record. He said he would like to see a overall review done with Loudon and Fairfax Counties and VDOT to determine the best solution for east west traffic. Other comments are a part of the verbatim record.

Commissioner Pruitt placed the matter before the Commission.

Associate Member Hull commented that he felt the two parties in opposition had raised enough issues to keep him from voting for the project.

Mr. Rolband, addressed the issues that concerned the opponents regarding missing information from the application. He said the application had been accepted as complete by VMRC, Corps of Engineers, and DEQ. He said the reason the letters in the application were old was because the application requested that they submit documents related to previous applications on the project. He said there were numerous opportunities for public involvement from several public hearings that authorized the bond vote by the voters. Mr. Rolband said all public roads were ultimately turned over to the State, except in certain cities, and two Counties. In addition, he said the project went beyond projects for mitigation, regarding avoidance and minimization. Other comments are a part of the verbatim record.

Associate Member Hull further commented that he was concerned about how the streams were being protected and how it was being addressed. He said he needed more information to go forward.

Mr. Rolband commented that they were bridging on the temporary and permanent construction.

Commissioner Pruitt asked if the original application would have any instream disturbance. Mr. Rolband responded yes because it was a box culvert. Mr. Pruitt commented that he had no problem with the project.

Commissioner Pruitt then placed the matter before the Commission.

Associate Member Gordy moved to approve the project as presented. Motion was seconded by Associate Member Ballard.

After a discussion between Commission members regarding the justification of the project, the question was called. Motion tied 4 to 4.

Mr. Pruitt commented that he felt the County had covered all their bases and addressed the environmental issues that the Commission had responsibility for, and that the Board of Supervisors should have addressed the issues of the protestants. He then voted yes for the project. As a result, the project was approved by a vote of 5-4.

Permit fee.....\$ 100.00

Commission adjourned for a five-minute recess.

Commission back in session.

Bob Grabb, Chief-Habitat Management, addressed the Commission. Mr. Grabb said after the meeting had started today that Coastal Design and Construction withdrew their application which was Item 12. However, he said since staff was seeking policy level guidance, he would like for the Commission to agree that this item be placed on the agenda at either the October or November. He said it involved be a policy level question as to whether or not it was a good policy to allow SAV to be excavated for replanting and if it should be permitted to be taken out of State. Commission agreed to place this matter on the November agenda.

PUBLIC HEARING: 1999-2000 PUBLIC OYSTER HARVEST SEASON

Dr. Wesson, Chief-Conservation and Replenishment, briefed the Commission and presented slides. He gave information on how Hurricane Floyd's record setting rainfall had affected the Piankatank salinity. Comments are a part of the verbatim record. He said at the September 14, Shellfish Advisory Committee Meeting, they discussed using the hand scrape in the

Rappahannock and keeping the 2:00 p.m. time limit, with a six bushel limit per man harvest limit. Dr. Wesson said the Virginia Watermen's Association put in a proposal that two additional areas in the Rappahannock River above the Norris Bridge and the area below the Rappahannock River on the south side be opened from November 15 to January 15.

Dr. Wesson said because they were successful with the restoration efforts. He said because of the funding options available in grants, they had to target the small rivers, where a reef would have an impact or a signal could be received. Dr. Wesson said Dennis Tracey had taken an interest in oyster restoration and they had received small grants from the Coastal Zone Program from NOAA. He said they had done work on the Eastern Shore using the Coastal Zone funds. However, Mr. Tracey thought they should focus on a larger project that would show results of what could be done on a larger project. The Rappahannock River was considered because of the large number of public grounds and that the area had been closed since 1993, where some natural restoration had been seen. He said the oysters there were living with the disease and there was a very low mortality rate and a good spatset had taken place. He said the whole project was based on allowing the oysters that had recovered on their own to repopulate the areas where the restoration would take place.

Dr. Wesson talked about the conceptual sites for eight reefs and funding from DEQ, Coastal Zone Program and matching funds from the Corps of Engineers. Comments are a part of the verbatim record. Dr. Wesson said they had more monies coming to the watermen to be partners in the restoration project for cleaning the beds prior to the shelling, which would be several years of work for the watermen. Dr. Wesson said as soon as the oysters had spawned for two or three years and the harvest areas were ready, the areas would open for harvesting. Therefore, they were very opposed to opening any of the areas at the mouth of the Rappahannock.

Dr. Wesson said they also discussed at the September 14 meeting the reporting of the oyster harvest. He said the Committee also felt that because of the fees involved, all the oyster harvest had not been reported which would potentially result in the passing of regulations on seafood safety, especially in the new areas.

Dr. Wesson said the watermen on Tangier Island were satisfied with the two proposed areas, Thorofare and Johnson Rocks. He said they had also looked at other areas to be open.

Associate Member Davis asked if the transferring of oysters program, would be used this year. Dr. Wesson said it was too early to determine that because the fall surveys had not been done. He said they would not take oysters from Tangier this year.

Commission Meeting

September 28, 1999

Dr. Wesson said all other areas would remain the same: Seaside - three- month season, and open Little River; James River - would remain the same, except that if the quota had not been met by April 30, the Commissioner could authorize the continuation of the season until the quota had been met. He said there should be a large amount of seed to move out of the Piankatank this winter to repopulate some of the other areas.

Commissioner Pruitt opened the public hearing.

Doug Jenkins, President of Twin Rivers Watermen's Association, addressed the Commission. He said he was concerned about the complete restoration program. He said the letter from VIMS bothered him because watermen that depended on oyster harvesting and processing knew this had been a bad summer for the life of oysters. He gave comments about the mortality of oysters in the Great Wicomico and Corrotoman. Comments are a part of the verbatim record.

Mike Croxton gave comments in reference to his oysters in the floats that died this summer and said he felt they should be allowed to work the river. Other comments are a part of the verbatim record.

Dale Taylor gave comments in reference to opening of oyster rocks and the selling of fishing licenses. Other comments are a part of the verbatim record.

Freeland Mason, of the Virginia Watermen's Association, addressed the Commission. He said it was no secret that the watermen were distrustful of staff. He said the opening of 5 acres made him feel like this proposal was a setup and he thought the rocks should be monitored because he felt there was a regulation that said once the oysters fell below 50% the river should be closed.

Tony Ashburn addressed the Commission and asked what grounds was Mr. Mason talking about opening. Dr. Wesson explained that the area from the bridge up was open. He said the hand scrape area was around Smoky Point area around the point above and below with the intent was to get the seed plant. Mr. Ashburn asked why the watermen could not work and they needed a season to work. Comments are a part of the verbatim record.

Jeannie Butler from DEQ addressed the Commission. She gave her comments in support of the Oyster Heritage Program. She also gave support for the new multi-million dollar project for the Coastal Zone in the Rappahannock River and, that program was based on the

Commission Meeting

September 28, 1999

Rappahannock remaining closed and protecting the oyster. Ms. Butler said at the same time she was pleased that the sanctuary would increase oyster harvest in those areas, and they saw this program as an important balance. Comments are part of the verbatim record.

Russell Gaskins, a pound netter on the Rappahannock River, addressed the Commission. He said he did not understand why the oysters could not be caught, because Dr. Wesson had told them the oysters at the mouth of the river had Dermo and MSX. Other comments are a part of the verbatim record.

Dale Taylor readdressed the Commission. He gave other comments regarding the oyster packers.

Commissioner Pruitt closed the public hearing.

Dr. Wesson commented that the statement made, "that we're not doing better," was not true. He said they caught more oysters last year than the four years previous, the harvest reached 50,000 bushels for the first in a long time. Dr. Wesson said that the Chesapeake Bay Basin experience the worst drought of the Century. He said no one says disease free, they were looking for disease tolerant oysters. Dr. Wesson said the oysters that were moved in 1997 did better than the oysters moved in 1998. Dr. Wesson said the best strategy they had was to use the best broodstock and put them on the seed beds, and take those oysters and repopulate other areas harvested in the put and take areas. He said the area in the mouth of the Rappahannock was a small area compared to entire length of the Rappahannock. He said this project had received the Governor's support and approval, and had received congressional interest. He said Virginia was struggling with managing the two diseases.

Associate Member Hull requested Dr. Mann give his views on the proposal.

Dr. Mann addressed the Commission. He said VIMS' position was to keep the lower Rappahannock closed. He said there were not many oysters in that areas, but the numbers were increasing. He said he was comfortable with the way he surveyed the area, it fitted the standard formula which fisheries management councils around the world used. Dr. Mann said if the broodstock oysters were taken out at this time, it would be taking out the cornerstone of that study. He felt that they were on the right course and should stay the course by keeping below the Rappahannock Bridge closed.

Associate Member Hull asked if it was feasible to open a couple of rocks to see if there were oysters on the rocks. Dr. Mann responded that there was a bagless dredge study that was

Commission Meeting

September 28, 1999

started last year that was done in the Piankatank. He said the hand scrape would allow you to get to a depth that the hand tong would not. Other comments are a part of the verbatim record.

Associate Member Cowart commented that he had served on the Commission for three years and if he had wanted to put the watermen out of business, he would have voted to open everything in the State of Virginia. He said there was broodstock in Virginia that had survived the diseases. He said there were only two choices, either bring nonnative oysters into the State and get it approved by the powers to be or develop disease resistant oysters in order to have a industry in the future. He said that the Virginia Seafood Council came before the Commission nine years ago and requested nonnative oyster work, and it was not approved. They came back two or three years later after the blue ribbon studies and other studies were made and asked for nonnative oyster study to be made. He said Mr. Stan Allen had developed a process at that time that allowed the nonnative oyster to be put overboard and not reproduce. He said Maryland had an abundant resource for several years because they had the right salinity for growing oysters. Other comments are a part of the verbatim record.

Associate Member Williams commented that he was totally opposed to putting the reefs in the mouth of Rappahannock. He said everything had not been working and he thought a different opportunity should be looked at to see if that would work. Associate Member Williams commented that the Rappahannock Rocks could be left closed, but to open Beverly's and Deep Rocks.

Associate Member Davis commented that taking the oysters was not the answer. He said that it was important to reserve the large oysters for the future watermen. Other comments are a part of the verbatim record.

Commissioner Pruitt placed the matter before the Commission for action.

Associate Member Davis moved to approve Dr. Wesson's program. Motion was seconded by Associate Member Cowart.

Associate Member Hull commented that he was disappointed that a resolution could not be reached for the sake of the watermen and the public that supported them. He said he would like to see at least one rock opened for semi-scientific analysis.

Commissioner Pruitt asked if Associate Member Williams' proposal to open Beverly's and Deep Rock or both, in lieu of Butler's Rock and the one off of Deltaville could be used. Dr. Wesson responded that he was certain that they would go to those areas to get more broodstock

to rebuild the Great Wicomico, which would provide work for watermen after the season. A discussion followed regarding the opening of the different rocks. Comments are a part of the verbatim record.

Associate Member Cowart offered an amendment that would direct that staff try to have a broodstock program to take effect in November or December and hopefully, staff could work the surveys so that the process would be done in one or two months. Associate Member Davis was acceptable to the amendment, but he did not want staff to feel they had to do the survey. He said the program was more important than surveying one or two rocks. He said he was acceptable to the amendment with the proviso that a report by the staff as to whether a program could be done be brought to the Commission next month.

Associate Member Williams requested the motion to be restated.

Associate Member Davis moved to approve Dr. Wizen's recommendation for the amendments to Regulation 4VAC 20-720-10 ET. SEQ. for the 1999-2000 public oyster harvest season, to direct staff to try to do a broodstock program in November or no later than December 15th and to report back to the board next month as to whether a broodstock program could be done. Motion carried.

Commissioner Pruitt commented that staff would work very closely with Dr. Mann and Dr. Brambaugh.

Associate Member Davis gave some comments regarding the balance of the committees and that he was concerned with the unbalanced representation for all the constituents in the State. He said he was agreeable to Associate Member Cowart's comments and that an industry committee would probably be a more balanced representation. Other comments are a part of the verbatim record.

Wilford Kale, Senior Staff Adviser, gave a report on all the different Agency Advisory committees, Boards that were established under the Code of Virginia, Senate Joint Resolution, and by the Commissioner of the Virginia Marine Resources. Comments are a part of the verbatim record. Mr. Kale gave the four primary reasons the committees were established:

- (1) To provide technical advice to the staff on fisheries' issues including the specifics of fisheries' fishing gear, how fisheries operated, and how they might

be affected by the proposed regulation changes;

- (2) To serve as a sounding board on staff's proposals and to get a feel about how the industries would react;
- (3) To provide an opportunity for fishermen to raise areas of concern in areas where the staff was unaware; and
- (4) To provide a forum for the various watermens' groups to discuss regional differences and to attempt to form a unified response to proposals.

Mr. Kale then gave staff's recommendations. He said that the nine-member public board should not become involved in the membership questions regarding these advisory committees. He said the Fishery Advisory Committee and the committees were responsible to the Chief of Fisheries Management Division and the Commissioner. He said the original purpose of those Advisory Committees should be retained. The purpose of the Committees was to advise the Fisheries Management Division and the Commissioner on how best to plan, develop, promulgate and implement fishery management plans. For the other advisory committees and boards mentioned, the responsibility for appointments was clearly vested in the hands of the Commissioner.

The Commission had a discussion regarding the makeup of the committees. Comments are a part of the verbatim record.

Kelly Place spoke from the audience regarding the committees. Comments are a part of the verbatim record.

Tom Powers also spoke from the audience regarding the CCA getting some participation to join the committees. Comments are a part of verbatim record.

Commissioner Pruitt commented that he had received some good advice from Associate Member Ballard and he would look at the renaming of the advisory committees and attendance of all the committees' members.

DISCUSSION: A revision of the opening of the fourth quarter to landings from the offshore summer flounder fishery: Request for public hearing.

Commission Meeting

September 28, 1999

Lewis Gillingham, Fisheries Management Specialist, briefed the Commission on the recommendation for a public hearing. Comments are a part of the verbatim record.

Associate Member White moved to advertise for public hearing. Motion was seconded by Associate Member Davis.

Associate Member Davis asked if the public hearing could be held in November. Mr. Gillingham responded because the request was to open the fourth quarter November 1, the issue would need to be considered at the October meeting.

Motion carried unanimously.

PUBLIC HEARING: Amendment of Regulation 4VAC 20-890-10 et seq., "pertaining to Channeled Whelk", to establish a limited entry fishery for Virginia waters.

Rob O'Reilly, Assistant Chief - Fisheries Management, presented the situation that developed at the Finfish Advisory Committee, regarding a request by Pete Nixon, President of the Lower Chesapeake Bay Watermen's Association, to have a meeting with industry on the information in the **Notice**. Mr. O'Reilly said a meeting would held on Monday, October 4, 1999 to discuss his concerns. He then requested a public hearing. A brief discussion followed.

Tom Powers, CCA, gave three comments he felt should be a part of the **Notice**: (1) a section regarding restricting the setting of the pots 300 yards or some reasonable limit from the bridge tunnels, structures, jetties and piers to avoid conflicts with recreational fishermen; (2) institute a pot tagging system; (3) consider adding the rapa whelk as an allowable catch for this fishery.

Mr. O'Reilly commented that the pot tagging issue had been discussed with Law Enforcement and because buoys were marked, Law Enforcement did not feel it was necessary use the tagging of the pots. Colonel Bowman said Law Enforcement concurred with the comments made by Mr. O'Reilly.

LAW ENFORCEMENT DIVISION EVALUATION PERTAINING TO REPEAT OFFENDERS, 9/28/99.

Colonel Bowman, Chief-Law Enforcement, briefed the Commission on the proposed policy

Commission Meeting

September 28, 1999

regarding individuals who were placed on probation for mandatory reporting violations or violations of Virginia seafood laws; and that the violations be tracked so that a subsequent violation resulted in them being summoned to appear before the Commission for a possible license or permit revocation.

Colonel Bowman then read the policy for the record and said the Assistant Attorney General had approved the policy: The Attorney General's Office also recommended that the probationer be advised of the conditions of his probation as well as served written notice of the conditions of probation at the time of the hearing.

"It shall be the policy of this Commission that when an individual is placed on probation for failure to report harvest as required by law or repeated violations of Virginia's seafood laws, a subsequent violation of either the mandatory reporting regulation or a violation of Virginia's seafood laws shall constitute a violation of the probation and shall be summoned before the Commission to show cause why his or her licenses and /or permits should not be prevoked."

Colonel Bowman said this was a policy that was under Section 2.28-232 of the Code and that would allow the Commission to handled the suspension and revocation of licenses as the Commission saw fit.

Assistant Attorney General Josephson said if this would be a Commission policy, a vote by the Commission was necessary.

Associate Member Davis moved to adopt the policy as recommended. Motion was seconded by Associate Member Williams. Motion carried unanimously.

There being no pubic comments, pro or con, the meeting adjourned.

William A. Pruitt
Commissioner

Commission Meeting

September 28, 1999

LaVerne Lewis
Commission Secretary