

MINUTES

Commission Meeting**October 23, 2007**

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

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| Steven G. Bowman | Commissioner |
| Ernest L. Bowden, Jr.) | |
| J. Carter Fox) | |
| J. T. Holland) | |
| John R. McConaugha) | Associate Members |
| F. Wayne McLeskey) | |
| Kyle J. Schick | |
| J. Edmund Tankard, III) | |
| Carl Josephson | Sr. Assistant Attorney General |
| Jack Travelstead | Chief Deputy Commissioner |
| John M. R. Bull | Director-Public Relations |
| Katherine Leonard | Recording Secretary |
| Jane McCroskey | Chief, Admin/Finance |
| Sunita Hines | Bs. Applications Specialist |
| Rob O'Reilly | Deputy Chief, Fisheries Mgmt. |
| Jim Wesson | Head, Conservation/Replenishment |
| Joe Grist | Head, Plans and Statistics |
| Sonya Davis | Fisheries Mgmt. Specialist, Sr. |
| Joe Cimino | Fisheries Mgmt. Specialist, Sr. |
| Lewis Gillingham | Fisheries Mgmt. Specialist |
| Mike Johnson | Fisheries Mgmt. Specialist |
| Alicia Middleton | Fisheries Mgmt. Specialist |
| Col Rick Lauderman | Chief, Law Enforcement |
| Warner Rhodes | Deputy Chief, Law Enforcement |
| Doug Thompson | Marine Police Officer |
| Chip Little | Marine Police Officer |

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| Bob Grabb | Chief, Habitat Management Div. |
| Tony Watkinson | Deputy Chief, Habitat Mgt. Div. |
| Chip Neikirk | Environmental Engineer, Sr. |
| Jeff Madden | Environmental Engineer, Sr. |
| Randy Owen | Environmental Engineer, Sr. |
| Hank Badger | Environmental Engineer, Sr. |
| Ben Stagg | Environmental Engineer, Sr. |
| Jay Woodward | Environmental Engineer, Sr. |
| Benjamin McGinnis | Environmental Engineer, Sr. |
| Justin Worrell | Environmental Engineer, Sr. |
| Elizabeth Gallup | Environmental Engineer, Sr. |
| Danny Bacon | Environmental Engineer, Sr. |
| Bradley Reams | Project Compliance Technician |

Virginia Institute of Marine Science (VIMS)

Lyle Varnell
David O'Brien
Roger Mann

Other present included:

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| Ron West | Glenn Croshaw | Mike McCarthy | Beth Hedgepeth |
| Karla Havens | Cory Gifford | Jeanie Bryant | Ashley Bryant |
| Ashley Bryant | William Bryant | Brad Brown | Matt Sabo |
| H. Spencer Murray | Jeff Walker | Anita Zalameda | Joe Zalameda |
| Don Baker | Grace Cartwright | Linda Horn | Ron Horn |
| Mike White | Gary Heisler | Roberta Anderson | Chris Moore |
| Kirk Havens | Craig Palubinski | Betty Grey Waring | Tom Carlson |
| Douglas F. Jenkins, Sr. | | Roger Parks | Ellis W. James |
| Robert Jenson | Russell Burke | Patrick Lynch | Rom Lipicius |
| Eric Weller | Karl Mertig | Scott Harper | J. Georgiadis |
| Dr. John E. Larmar | Victor Allay | Philip E. Prisco | Karen Brauer |
| Sally Smith | Jeff Lunsford | Paul Michael | Katie Nunez |
| Julian Cox | Bob Meyers | Ed Matheson | Richard Harr |

and others

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Commissioner Bowman called the meeting to order at approximately 9:39 a.m. Associate Member Robins was absent.

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Associate Member Holland gave the invocation and Carl Josephson, Senior Assistant Attorney General led the pledge of allegiance.

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APPROVAL OF AGENDA: Commissioner Bowman asked if there were any changes to the agenda. Bob Grabb, Chief, Habitat Management said that staff was requesting that Item 9, County of Middlesex, #07-2010, be removed from the agenda, at the request of the applicant. There were no other changes.

Commissioner Bowman asked for a motion to approve the agenda. Associate Member Tankard moved to approve the agenda, as amended. Associate Member McLeskey seconded the motion. The motion carried, 8-0. The Chair voted yes.

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MINUTES: Commissioner Bowman asked, if there were no corrections or changes, for a motion to approve the September 25, 2007 meeting minutes. **Associate Member Holland moved to approve the minutes, as presented. Associate Member Fox seconded the motion. The motion carried, 8-0. The Chair voted yes.**

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

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

Bob Grabb, Chief, Habitat Management Division, reviewed items 2A through 2J for the Commission. He said that staff was recommending approval of these items. He read Item 2 J which was a new item added on after the final agenda was completed. He also added comments to both item 2C and item 2E: 2C's approval recommendation was contingent on no protests being received as a result of the public comment period, which

expired October 24, 2007 and 2E, the dredged material was to be disposed of at the Craney Island spoil site.

Commissioner Bowman asked for questions for the staff. Associate Member Fox asked if the work proposed for Item 2J was all repair. Mr. Grabb responded that it was renovation and repair with the number of slips being done for conservation.

Commissioner Bowman opened the public hearing and asked if anyone was present, pro or con to address these items. There were none, therefore, the public hearing was closed.

Commissioner Bowman asked for a motion for Items 2A through 2J. **Associate Member Holland moved to approve these items. Associate Member Schick seconded the motion. The motion carried, 8-0. The Chair voted yes.**

2A. VIRGINIA DEPARTMENT OF TRANSPORTATION, #02-0950, requests a permit modification to allow for the installation of three (3) 24-inch diameter mooring piles in Chincoteague Channel, south of the swing span bridge, to allow for the temporary mooring of barge-mounted construction equipment, in association with construction of the new Chincoteague Channel and Black Narrows Channel Bridges in Accomack County. The pilings will be removed upon completion of the bridge replacement activities previously authorized.

No applicable fees - Permit Modification

2B. TOM LANGLEY, ET AL, #07-0704, requests authorization to modify an existing dredging permit, approved by the Commission as a Page 2 item during the August 28, 2007 hearing, by relocating a 100 square-foot section of the project footprint. The project is designed to serve three residential properties in the North Alanton subdivision, situated along Broad Bay in Virginia Beach. Staff recommends no further royalties be assessed provided there are no modifications in the project depth or dredge volume.

No applicable fees – Permit Modification

2C. VIRGINIA BEACH DEPARTMENT OF PUBLIC WORKS, #07-1775, requests authorization to relocate and install, by the directional drilling method, multiple utility lines (including water, sewage, and power) under an approximate 400-foot section of Linkhorn Bay, directly adjacent to the existing Laskin Road Bridge in Virginia Beach. All utility lines will remain a minimum of 9 feet below the existing Bay bottom. This project, known as the Laskin Road Advance Utility Relocation, will relocate existing utilities in conflict with future road and bridge expansion improvements.

Permit Fee.....\$100.00

2D. COURTLAND FARMS LOUDOUN, LLC, #06-2468, requests authorization to install, by the directional drill method, 119 linear feet of 6-inch HDPE pipe encased in an 8-inch HDPE sleeve at least 10 feet beneath Little River as part of the Courtland Farms Forcemain Project in Loudoun County. Staff recommends a royalty of \$357.00 for the encroachment under 119 linear feet of State-owned subaqueous bottom at a rate of \$3.00 per linear foot.

Royalty Fees (encroachment 119 lin. ft.@ \$3.00/lin. ft.).....\$357.00
Permit Fee.....\$100.00
Total Fees.....\$482.00

2E. CITY OF NEWPORT NEWS, #07-1336, requests authorization to maintenance dredge 3,881 cubic yards of sediment from the Leeward Marina and Boat Channel to maximum depths of -9.5 feet below mean low water adjacent to property situated along the James River in Newport News.

Permit Fee.....\$100.00

2F. FAIRFAX COUNTY PARK AUTHORITY, #07-1831, requests authorization to install a 38.2-foot by 19.64-foot concrete low-flow stream crossing in Horsepen Run as part of a trail improvement project near the intersection of Centreville Road and McLearen Road in Fairfax County.

Permit Fee.....\$100.00

2G. NA DULLES REAL ESTATE INVESTOR, LLC, #07-1941, requests authorization to install, by directional drill, 50 linear feet of sanitary sewer force main beneath Broad Run near the Route 7 and Route 28 interchange in Loudoun County. Staff recommends a royalty in the amount of \$150.00 for the encroachment under 50 linear feet of State-owned submerged bottom at a rate of \$3.00 per linear foot.

Royalty Fees (encroachment 50 lin. ft.@ \$3.00/lin. ft.).....\$150.00
Permit Fee.....\$100.00
Total Fees.....\$250.00

2H. VULCAN CONSTRUCTION MATERIALS, # 07-1323, requests authorization to construct a 100 linear foot open-pile railroad bridge over Fontaine Creek, a tributary to the Meherrin River, to facilitate improved loading capabilities at their Skippers Quarry facility in Greensville County. Recommend our standard instream work conditions and a royalty for the bridge crossing at a rate of \$2.00 per square foot.

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| Royalty Fees (bridge crossing 100 lin. ft. @ \$3.00/lin. ft.)... | \$3,200.00 |
| Permit Fee..... | \$ 100.00 |
| Total Fees..... | \$4,200.00 |

2I. VIRGINIA INSTITUTE OF MARINE SCIENCE, #07-1024, requests authorization to deploy a variety of data collection instruments and buoys within a 600-foot by 1,200-foot area near the center of the York River between Clay Bank in Gloucester County and Bigler Mill in York County. A single piling is proposed to be located near the center of the area at 37° 20' 30.4" North Latitude and 76° 37' 28.5" West Longitude. The proposed area is southwest of the marked navigation channel and mean low water depths within the proposed area are between 10 and 19 feet. With the exception of the single piling and any buoys or marker floats, the instruments will extend a maximum of four (4) feet above the substrate. Staff recommends approval conditioned upon the applicant marking the site in accordance with U.S. Coast Guard requirements.

Permit Fee.....\$100.00

2J. DEPARTMENT OF THE ARMY, #05-0927, requests authorization to repair and replace two boat ramps, a travel lift, steel bulkheads, eight pier sections, and 106 total wet slips, previously constructed channelward of Mean Low Water at the Dogue Creek Marina, adjacent to U.S. Army Garrison, Fort Belvoir situated along Dogue Creek in Fairfax County. The proposed project will include the construction of two 16-foot wide by 70-foot long concrete boat ramps, with two 6-foot wide by 70-foot long tending piers, and one 6-foot wide by 70-foot long tending pier with a 6-foot wide by 42-foot long L-head platform; two 7-foot wide by 5-foot long travel lift piers; one 12-foot wide by 112-foot long floating rowing pier; the installation of approximately 340 linear feet of vinyl/timber bulkhead aligned no more than 18-inches channelward of the existing steel sheet-pile bulkhead. The proposed project will also include the construction of four 6-foot wide floating main pier sections with a channelward encroachment varying between 140 and 190 feet, to include 106 total wet slips, four 6-foot wide by 54-foot long T-head platforms, 49 total 4-foot wide finger piers varying in length between 16 and 20 feet, associated mooring piles, and necessary water, electric, and sanitary sewage lines, conduits, lights, hookups, and pump-outs.

Permit Fee.....\$100.00

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3. CONSENT ITEMS: (After-the-fact permit applications with monetary civil charges and triple permit fees that have been agreed upon by both staff and the applicant and need final approval from the Commission's board).

BEVANS OYSTER COMPANY, #07-0074, requests after-the-fact authorization to retain the modifications made to a previously authorized commercial pier at their property situated along the Northwest Yeocomico River in Westmoreland County. The modifications included an increase in the width of the pier from four (4) to six (6) feet and an increase in width of the T-head from four (4) to 11 (eleven) feet. The applicant had agreed to the payment of a \$1,800.00 civil charge in lieu of any further enforcement action.

Bob Grabb, Chief, Habitat Management, gave the presentation. His comments are a part of the verbatim record.

Mr. Grabb explained that the permit was approved by the Commission as a “page 2” item at their May 30, 2007 meeting. The permit was issued in June after the payment of assessed fees and royalties were received.

Mr. Grabb stated that as authorized, the pier was to have been constructed to a length of 174 feet. In order to address subsequent concerns expressed by a neighbor, the pier was only built to a length of 130 feet; however, the pier was constructed wider and with a wider T-head than that authorized. According to the applicant, the width of the pier and T-head were increased to accommodate a conveyor belt to load oyster bags onto barges for their aquaculture operations and for the safety of personnel working on the pier during barge loading operations.

Mr. Grabb said that the applicant had received numerous permits in the past from the Commission for various projects involving encroachments over state-owned submerged lands. As a result, staff felt that Bevans Oyster Company was well aware of the need to obtain approval for the modification, which increased the width of the pier and added a T-head structure.

Mr. Grabb stated that given the stated need for the increased pier and T-head width, had a modification request been submitted for review, staff felt certain the project would have been approved. Staff had not received any objections to the project in response to the VMRC public interest review, which included a newspaper notice for comment. The increased encroachment had resulted in minimal additional environmental impacts. Staff did consider the degree of non-compliance to be major given the company’s familiarity with the permitting process. In light of that, staff was recommending that the Commission endorse the Bevans Oyster Company offer to pay a civil charge in the amount of \$1,800.00 in lieu of the need for any further enforcement action and that their existing permit be modified to reflect the change to the pier and T-head width as constructed.

The public hearing was opened. Commissioner Bowman asked if anyone was present, pro or con to address this matter. There were none.

Commissioner Bowman closed the public hearing and asked for a motion.

Associate Member Holland moved to endorse the civil charges and fees recommended by staff and accepted by Bevans Oyster Company. Associate Member Fox seconded the motion. The motion carried, 8-0. The Chair voted yes.

Civil Charge.....\$1,800.00

4. CLOSED MEETING FOR CONSULTATION WITH OR BRIEFING BY COUNSEL

Commissioner Bowman announced that a closed meeting was not necessary, on advice of the VMRC Counsel.

5. POQUOSON MARINA ASSOCIATES, LLC, #07-1569. Commission review on appeal by 61 Poquoson freeholders, of the September 19, 2007, decision by the Poquoson Wetlands Board to approve a proposal to fill and dredge tidal wetlands, as part of a planned redevelopment project for the Poquoson Marina property situated along White House Cove in the City of Poquoson.

Commissioner Bowman asked about a recent correspondence received from Wilcox and Savage and if staff had received it. Bob Grabb, Chief, Habitat Management, responded yes. Mr. McGinnis provided a copy of the letter as a hand out to the Board.

Commissioner Bowman asked if all parties agreed with remanding the matter back to the Wetlands Board. Mr. McGinnis stated that the Wetlands Board had not indicated to staff that they agreed.

Tom Carlson, Vice Chairman for the City of Poquoson Wetlands Board, was sworn in and his comments are a part of the verbatim record. Mr. Carlson explained that if all did agree with remanding the matter, then the Wetlands Board also agreed to it.

Carl Josephson, Senior Assistant Attorney General and VMRC counsel asked if a representative of the freeholders was present. Commissioner Bowman stated that it was indicated by someone in the audience that the freeholders wanted to be heard. (The individual that spoke did not come forward and was not identified.)

Ben McGinnis, Environmental Engineer, Sr., gave the presentation with slides. His comments are a part of the verbatim record. Mr. McGinnis explained that the slides were

a part of the Wetlands Board's record. He also explained that the VIMS letter was in the packet as item number 7F.

Mr. McGinnis explained that the subject project was located at the existing Poquoson Marina site situated along White House Cove in the City of Poquoson. The existing property included a 158-slip commercial marina, upland boat storage, restaurant, hair salon, a City-owned public pier and boat ramp, a VMRC fisheries laboratory, and until recently a mobile home park. In addition, the applicant had a contract to purchase an adjacent residential property currently owned by Mr. Edward G. Wilson, which will be incorporated into the overall development plan for the site.

Mr. McGinnis explained that the applicant planned to redevelop the existing marina and upland property and had proposed to fill and dredge both vegetated and non-vegetated tidal wetlands through the installation and backfilling of a bulkhead channelward of an existing bulkhead and riprap revetment, and by dredging up to the proposed bulkhead to obtain maximum depths between minus six (-6) and minus seven (-7) feet at mean low water. The proposed project also included the relocation of an existing public boat ramp and the replacement, realignment, and addition to the marina's existing piers and wet slips.

Mr. McGinnis stated that the Poquoson Wetlands Board considered the applicant's proposed project at a public hearing on September 19, 2007. The Board took testimony from the applicant, agent, five members of the public that spoke against the proposed project, and one that spoke in favor of it. The Board voted 5-2 to approve the project; however, it was unclear whether the motion to approve the project included any of the permit conditions recommended by City staff.

Mr. McGinnis said that the day after the Wetland Board's decision, staff received a letter of appeal, dated September 20, 2007, from Poquoson City Manager Charles W. Burgess, Jr., on behalf of the City of Poquoson. The City's letter stated that their appeal was based upon the fact that the Board's decision was made without benefit of a Virginia Institute of Marine Science (VIMS) report, that the 1:1 wetland mitigation ratio proposed by the applicant and accepted by the Board was inconsistent with past Board actions, the Board did not require the permit be withheld until all property transfers were complete, and that the Board failed to require impacts to wetlands be avoided as required by the model Wetland Zoning Ordinance adopted by the City.

Mr. McGinnis explained that by letter, dated October 16, 2007, Poquoson City Manager Charles W. Burgess, Jr., withdrew the appeal on behalf of the City of Poquoson, stating that after further evaluation, they believed the Wetlands Board acted accordingly in the absence of a VIMS report. Mr. Burgess' letter does not, however, speak to the City's earlier concerns including the Board's inconsistent application of the mitigation requirement and their failure to seek to avoid wetland impacts.

Mr. McGinnis said that nevertheless, staff received a second letter of appeal and petition signed by 61 Poquoson freeholders on September 28, 2007. The freeholder's appeal was also considered timely under the provisions of Sections 28.2-1311 (B) of the Code of Virginia. Their letter stated that they supported the City's appeal and believed that the Board rushed to judgment without considering the technical advice that would have been provided in a VIMS report. Although the City of Poquoson had since withdrawn their appeal, staff believed that the issues originally raised by the City's appeal remained valid, in light of the freeholders' stated support of the City's earlier appeal.

Additionally, Mr. McGinnis stated that the freeholder's appeal stated that the approval of the higher (8.4 feet above MLW) bulkheads would result in adverse impacts to public health, safety, and welfare, including an increased risk of flood damage to nearby property owners and an impairment to State waters resulting from the large amount of backfill placed behind the bulkheads within the Resource Protection Area (RPA). Their letter went on to state that approval of the new boat ramp location, in lieu of reconstructing the boat ramp at the existing location, did not avoid wetland impacts since the relocation of the ramp would result in the filling of the existing ramp and adjacent wetlands. Furthermore, the protestants believed that the new boat ramp location adversely impacts the surrounding neighborhood due to its proximity to residential properties, that the new ramp will result in a navigational hazard within the narrow man-made channel, and that the applicant had not proposed adequate upland parking to accommodate the new boat ramp, resulting in further impacts to wetlands as the City of Poquoson attempts to find a separate location for an additional boat ramp in the White House Cove or Bennett Creek vicinity.

Mr. McGinnis said that at their September 19, 2007, public hearing, the Poquoson Wetlands Board began by receiving a staff briefing that included a short presentation of the proposed project and wetland mitigation plan. While City staff did not provide the Board with either a recommendation for approval or denial, they did recommend several conditions in the event the project was approved. These included that the permit be withheld until final acquisition of City property, that the wetland mitigation area be subject to a 5-year inspection/monitoring period, that a bond or letter of credit be required during the monitoring period, and that a temporary access easement be conveyed to the City to ensure continuous access to the wetland mitigation area during the monitoring period.

Mr. McGinnis explained that although it was not reflected in the draft transcript/minutes of the subject hearing, City staff had also informed the Board that a VIMS report had not been received. The Board's record included a letter dated September 14, 2007, from VIMS, which explained that a VIMS report could not be provided because the application was incomplete and that the applicant's submission of additional information had not been provided in time for VIMS to fully evaluate the proposed project prior to the hearing.

Mr. McGinnis stated that following the Wetlands Board's staff presentation and a procedural statement by the Board's Chairman, Mr. Brad Brown of Poquoson Marina Associates, LLC, provided a brief overview of the proposed project and the existing site conditions. Mr. Brown went on to state that "fragmented" wetlands would be replaced by "open-water" habitat and that their proposed wetland mitigation plan met the "no net loss" requirement mandated by VMRC, effectively attempting to use the proposed mitigation to justify the impacts.

Mr. McGinnis said that Mr. Brown closed by summarizing what he believed were the economic and environmental benefits of the proposed project, including increased tax revenues and property values, and "first-class" water quality. Mr. Brown then briefly referenced an impact/mitigation summary table that they had provided to the Board to help explain the square footage of proposed impact and mitigation. Interestingly, a 50% reduction to both vegetated and non-vegetated wetland impacts were credited when the impacts were in an area currently occupied by riprap, rather than using the total square footage of impact within the Board's jurisdiction.

Mr. McGinnis said also that the Board then opened the floor to allow for public comments and heard testimony from five Poquoson citizens who spoke against the project including Mr. Harold Levinson, Mr. Corey Gifford, Mr. Dennis Pearce, Mr. Julian Cox, and Mr. Ed Matheson. Separately, each spoke to various and often similar concerns including the location of the new boat ramp and its lack of adequate parking, the proposed height of the bulkhead and its required backfill within the Resource Protection Area (RPA), a lack of coordination with the Department of Conservation and Recreation regarding the Chesapeake Bay Act and impacts to the RPA, water quality, and the preservation of natural resources. In general, their concerns were summarized in the freeholder appeal that was signed by each of these gentlemen. In addition, Mr. Levinson submitted to the Board a letter and petition from Mr. Joseph Zerillo, who was unable to attend the Board's hearing on this matter. Mr. Zerillo's letter echoed many of the same concerns. The Board also heard from Mr. Don Baker, who had stated that he liked what he saw and was in favor of the proposed project.

Mr. McGinnis explained that following the closure of public comments, the Board discussed the proposed project and posed questions to the applicant. Chairman Prisco began by stating that he had reviewed the applicant's preliminary Water Quality Impact Assessment (WQIA) and felt that more data was needed to support the preliminary findings. The applicant responded by stating that the preliminary WQIA met all current requirements and was sufficient for that period of the project. Further discussion focused on the relocation of the boat ramp and the amount of available parking proposed for the ramp's new location, but also continued to include water quality and impacts within the RPA. Vice-Chairman Carlson expressed concern that the Board was spending too much time discussing water quality and other issues outside the Board's jurisdiction and reminded the audience that the height of the bank would be determined by the City's Board of Zoning Appeals. The Board further discussed the necessity for a final WQIA.

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Although the public comment period had ended, Mr. Harold Levinson asked the Board how they could approve a project if they did not know what they were approving.

Mr. McGinnis stated that following the discussion a motion was made by Board Member Paul W. Michael, Jr., to approve the project. The motion was seconded and passed 5-2, with the Chairman and Vice-Chairman voting against the motion. There appeared to be confusion, however, over whether the motion included any conditions. City staff certified to the best of their ability in the draft minutes that the motion included a condition that the bulkhead be constructed to the height of the bank. The maker of the motion, Mr. Michael, however, has since submitted to City staff a signed document, dated October 11, 2007, stating that his motion was to approve the application as submitted, to include on-site mitigation of the vegetated impacts on a 1:1 ratio and to mitigate the non-vegetated impacts by payment into the Board's in-lieu fee fund based on a 1:1 ratio. By approving this motion, it appeared that the Board accepted the applicant's wetland impact summary, including the previously mentioned 50% reduction, rather than waiting to obtain a scientific assessment by VIMS. Furthermore, the Board strayed from its standard practice of requiring mitigation on 2:1 basis for all wetland impacts.

Mr. McGinnis explained that in VMRC staff's opinion, the Poquoson Wetlands Board, in this case, failed to fulfill their responsibilities under the Wetlands Zoning Ordinance by authorizing the despoliation and destruction of tidal wetlands within their jurisdiction. The Board failed to have any significant discussions regarding the necessity of the proposed wetland impacts and whether they could be minimized or avoided altogether. In staff's opinion the impacts resulting from the proposed bulkhead and backfill can be significantly minimized or avoided by realigning the proposed bulkhead landward of the existing riprap revetment along the western portion of the property, and by using a dredge slope that protected existing wetlands while incorporating a zonation mooring plan for the proposed marina. The Board also chose to approve the project without the benefit of a sound scientific assessment by the Virginia Institute of Marine Science.

Mr. McGinnis said that the Board's decision to accept the proposed mitigation for wetland impacts at a 1:1 ratio appeared to have been inconsistent when considering the Board's history of requiring a 2:1 ratio for such impacts. Furthermore, the Board's acceptance of a 50% reduction to wetland impacts involving existing intertidal riprap, appeared to have no basis and unjustly relieved the applicant of the responsibility of mitigating the actual total wetland impacts, as required by the Commission's Wetland Mitigation – Compensation Policy (4 VAC 20-390-10 et seq.).

Mr. McGinnis stated that it was important to note that under the Wetlands Mitigation – Compensation Policy, the Wetlands Board was required to first determine the necessity of a project and then avoid/reduce all unnecessary impacts to tidal wetlands before considering any type of compensation or mitigation for the loss of tidal wetlands resulting from a project. It appeared that the applicant used the proposed mitigation to at least partially justify the proposed impacts. This combined with the Board's failure to address

the necessity of the impacts and discuss possible avoidance or minimization measures appears to indicate that the Board accepted the mitigation as justification for the applicant's stated wetland impacts.

Mr. McGinnis explained that while staff was sympathetic to the remaining concerns of the freeholders, staff does not believe that those issues fell within the jurisdiction of the Wetland Board. In particular, the issues surrounding the proposed fill outside of tidal wetlands, within the RPA, associated with the proposed bulkhead, fell within the jurisdiction of the City's Board of Zoning appeals, through that body's local enforcement of the Chesapeake Bay Act. Furthermore, neither the Code of Virginia nor any Commission regulation required a Water Quality Impact Assessment for review by any Wetland Board.

In light of the foregoing, and in accordance with §28.2-1313 (1) of the Code of Virginia, Mr. McGinnis stated that staff recommended that the Commission remand this matter with direction to the Poquoson Wetlands Board for rehearing, finding that the Board failed to fulfill its responsibilities under the Wetlands Zoning Ordinance. Specifically, staff recommended that the Board be directed to not schedule an additional hearing on this matter until the application was considered complete and VIMS felt that it had adequate information to provide the Board with an assessment of the proposed project and its resulting impacts. Staff also recommended that the Board be directed to consider the necessity for the proposed filling and dredging of tidal wetlands, all avoidance and minimization options, and the Commission's requirements under the Wetlands Mitigation-Compensation Policy along with the Board's standard practice of requiring mitigation for all unavoidable impacts at a ratio of 2:1.

Mr. McGinnis said that furthermore, while staff could agree to the application of a 50% reduction to the impact calculations for vegetated wetlands with a riprap matrix, when the balance was then re-classified as non-vegetated wetlands, staff would not agree to that application for existing non-vegetated wetlands comprised of riprap. Finally, staff recommended that the Board be directed to consider the total impacts to tidal wetlands without agreeing to, or granting a reduction to the actual wetland impacts based upon the presence of riprap.

Commissioner Bowman, after consulting with Counsel, allowed the freeholders the first opportunity to speak.

Ed Matheson, Poquoson Resident and representative for a group of citizens, was sworn in and his comments are a part of the verbatim record. Mr. Matheson stated that they wanted to keep the character of the area intact. He explained they were concerned with the bulkhead and the loss of the second boat ramp, which provided the citizens with access to the water. He said the applicant had said they would be providing greater access, but the project, as proposed, failed to do that. He said that they endorsed the City's concerns as this was a complex proposal and the first for the City. He said the

project involved wetlands which would be replaced with a bulkhead and then backfilled. He said the Wetlands Board should have included in its discussion VIMS and others; and, for the amount of wetlands to be lost, the mitigation should be appropriate. Finally, he said the project approval should not be effective until after the City's properties were transferred.

Commission Bowman asked if there were any questions for Mr. Matheson. Associate Member Fox asked about the two boat ramps. Mr. Matheson explained that one was a private boat ramp, which required the payment of a fee to use it, and the second one was a public boat ramp, which did not require a fee to use. He said the new location of the boat ramp would not be accessible to water as it was not in an ideal location near Whitehouse Cove. He said they were concerned with the change in the complexion of the site. He stated they supported the upgrade and repair of the bulkhead, but were opposed to other aspects, such as impacting the access by citizens to the water, the necessity for filling in the RPA, and impacts of the heightened bulkhead to the adjacent property owners.

Harold Levinson, Poquoson resident, was sworn in and his comments are a part of the verbatim record. Mr. Levinson stated that he had prepared a package for the Commission that he wished to provide to them. Commissioner Bowman asked if this was a part of the Wetlands Board record. Mr. Levinson explained that the only item that was not included was a letter submitted by him to the Commissioner. Mr. McGinnis stated he reviewed the packet and that the October 9th letter was not in the Wetlands Board record as it was after the hearing. He said it was up to the Commission as to whether to accept it or not. After conferring with VMRC Counsel, Commission Bowman stated that a motion was necessary to open the record.

Associate Member Tankard moved to open the record. Associate Member McLeskey seconded the motion. The motion failed by a vote of 3-5. Associate Members Bowden, Fox, Holland, McConaugha, and Schick all voted no.

Mr. Levinson continued with his presentation. He said that the other citizens should not be penalized so that the applicant would be the only one to benefit. He stated the backfilling and dredging were potentially disastrous for this area and the Bay area.

Corey Gifford, Poquoson Resident, was sworn in and his comments are a part of the verbatim record. Mr. Gifford stated that the staff spoke to a lot of what he wanted to speak to. He said the bulkhead site was of concern to him because the current bulkhead was controlling erosion or stabilizing the bank and the added height was not needed. He said also that the Wetlands Board did not get the technical advice it needed to make a decision. He referenced that it said in the Code that filling was not a right. He said the bulkhead height should be the same as the bank. He said there was advice from DCR but that was ignored, which was in the Wetlands Board staff's report. He said the drawing (item 7Giii(13)) should be checked as the heights were incorrect. He said the Zoning

Board must approve an encroachment into the RPA. He said he was glad to see the City's letter and there was a need for a caveat that property transferred should be completed prior to the project being approved.

Dennis Pearce was sworn in and his comments are a part of the verbatim record. Mr. Pearce asked if the appeal was the last resort or if it goes back to the Wetlands Board can that be appealed. Commissioner Bowman stated that VMRC continually reviewed all Wetlands Board decisions. Carl Josephson responded yes, that the Commissioner and staff will review the decision and others have the right to appeal any decision by the Wetlands Board. Mr. Pearce said when the agent said there was 272 sq. feet of vegetated wetlands it was a gross understatement. He said he was glad to see VIMS was going to be involved.

Julian Cox, resident on Bennetts Creek in Poquoson, was sworn in and his comments are a part of the verbatim record. He stated that his letter to the Wetlands Board was item 7G-iii-6. He said his biggest concern was to get the project done right and to use all of the technical advice. He said the level of pollution should not be allowed to increase, as the area was already the worst in Poquoson. He referenced the Wetlands Act of 1972 and how it stipulated using the best technical advice. He read it into the record. He explained that the massive filling was to build condos and that does not comply with the Wetlands Act. He said the Corps should be allowed to comment. He said the project would cause pollution when the sediment from filling runs off into the river. He said that their water quality assessment does not address water quality and other impacts that are not just at the project site, but elsewhere in the river. He said the Zoning Board appeal review was very important. He said at the hearing there was an opportunity to add it to the wetlands permits, but it was not done. He said the City was concerned about the RPA filling. He said the Wetlands Board needs to get the best available advice, especially from VIMS.

Glen Croshaw, attorney for the applicant with Wilcox and Savage Law Firm, was present and his comments are a part of the verbatim record. He stated that they did not object to the remand, but do object to any conditions. He said it should be remanded for a full hearing so that everyone had a say and there would be a complete record.

Associate Member Tankard asked what conditions they were concerned about. Mr. Croshaw explained that they want to comply with all that was required and were not seeking special privileges. He said that the VIMS report should be considered.

After some more discussion about the record, Commissioner Bowman asked if there was any further discussion on this matter.

Associate Member Tankard stated he felt the matter should be remanded back to the Wetlands Board with certain conditions. He asked the Commissioner if he could go ahead with a motion. Commissioner Bowman responded, yes.

Associate Member Tankard moved to remand the matter back to the Wetlands Board with certain conditions: 1) Application be made complete and VIMS to be provided with the information; 2) Board needed to discuss the necessity of filling tidal wetlands and how to avoid the filling; and 3) Board needed to reconsider and review the mitigation policy standard and the practice of a 2:1 ratio. Associate Member Bowden seconded the motion.

Associate Member Fox asked that a condition be added that the Wetlands Board would consider the issue of limiting access to the water by taking 2 boat ramps away and replacing them with one. Commissioner Bowman stated that it was outside of the jurisdiction of the Wetlands Board. Carl Josephson, Senior Assistant Attorney General and VMRC Counsel responded that there were certain factors that they can use to make a determination, which were in the Code of Virginia. He further said that this was not one of them. Commissioner Bowman stated that the Wetlands Boards have done a great job with the volume of projects they must consider and he said he took his hat off to the local Boards. He said sometimes an error was not made intentionally.

The motion carried, 8-0. The Chair voted yes.

No applicable fees – Wetlands Appeal.

* * * * *

6. DIMITER J. GEORGIADIS, #07-1432. Commission review, on appeal by the applicant, of the September 13, 2007, decision by the Lancaster County Wetlands Board to deny his application to install 120 linear feet of quarry stone riprap revetment on a coastal primary sand dune at his property situated on the Rappahannock River in Lancaster County.

Jay Woodward, Environmental Engineer, Sr., gave the presentation with slides. His comments are a part of the verbatim record. Mr. Woodward explained that the slides he was using were for orientation purposes only. He said that the Wetlands Board members do not have access to aerial photographs, but they do make site visits.

Mr. Woodward explained that the project was located on a south-facing shoreline, approximately two miles upstream of Windmill Point at the mouth of the Rappahannock River in Lancaster County. The property was on a sandy reach of shoreline lying between Deep Hole Point and the mouth of Windmill Point Creek. There was a four-mile fetch due south to the Middlesex County shoreline, and over a 40-mile fetch to the southeast to the mouth of Chesapeake Bay. This area had been subject to significant alterations recently, as a result of both Hurricane Isabel and Tropical Storm Ernesto. Along this shoreline many properties experienced sand overwash and upland erosion during those storm events. Most of the parcels along this reach are unarmored or have

groins and/or revetments at the beach-upland interface. The subject application was considered twice by the Lancaster County Wetlands Board.

Mr. Woodward stated that Mr. Georgiadis' letter of appeal, dated September 20, 2007, was received on September 21, 2007. As a result, his appeal was considered timely under the provisions of Section 28.2-1411 of the Code of Virginia, noting his appeal of the Lancaster County Wetlands Board decision on his application. In his letter, Mr. Georgiadis stated that the Board did not fulfill its responsibilities to accommodate necessary economic development and that they did not take into consideration his testimony regarding the preservation of his property. He also stated that his project conformed to the standards prescribed in Section 28.2-1408, that the Board ignored portions of the VIMS and SEAS reports and that they denied his project because "if we approved the project it would be a violation of the dune ordinance." Mr. Georgiadis indicated that he was not mailed anything after the August 9, 2007, board hearing, which told him what to do, nor was he asked to waive his rights to a timely hearing since the Board deferred their decision until their next public hearing.

Mr. Woodward said that on August 9, 2007, the Lancaster County Wetlands Board held their first hearing on Mr. Georgiadis requested authorization to install a stone revetment on a jurisdictional beach and sand dune at his property fronting on the Rappahannock River. During that hearing, Ms. Edna Revere, Chairwoman, read portions of the Commission's "Coastal Primary Sand Dunes/Beaches Guidelines" and the VIMS shoreline permit application report into the record. She noted that since the project would result in 1,440 square feet of impact to the beach/dune area, according to the VIMS report, that compensation would be required if the Board approved the request. Board Member Al Anderson asked the applicant and his agent about the need for the project. Mr. E.D. Cockrell (misspelled in the minutes as "Conklin"), agent and marine contractor for the project, stated that he had previously installed a riprap revetment on the property immediately to the west. This proposal would simply tie into that revetment. To do so, however, the dune would have to be removed. Mr. Georgiadis addressed the Board and stated that the proposal was needed to protect his property from erosion and noted that he had lost 8 to 9 feet of his yard. He stated that he was willing to replant a relocated sand dune if necessary.

Mr. Woodward said that Mr. Marshall Sebra, Environmental Codes Compliance Officer, and staff to the Board, indicated that the U. S. Army Corps of Engineers had determined that this area did not support the endangered Northeastern beach tiger beetle, and therefore a Corps of Engineers permit was not required. Mr. Cockrell stated that the dune did not exist until after Tropical Storm Ernesto pushed sand onto the property. Board Member Anderson noted that since the sand was left undisturbed and it had now become vegetated, it was a dune. Chairwoman Revere again reiterated dunes were not to be impacted if it could be avoided and suggested following the VIMS report and moving the revetment landward of the jurisdictional dune. Mr. Cockrell acknowledged that he could put the project behind the dune but he would have to reconfigure it and send in revised

drawings. Board Member Anderson then moved to table the project to provide the applicant an opportunity to submit revised drawings for a better plan of action. That motion passed 4-0.

Mr. Woodward stated that at the September 13, 2007, public hearing, the Board continued their review and discussion of the Georgiadis request. Neither Mr. Georgiadis nor his contractor, Mr. Cockrell were in attendance. Mr. Georgiadis' agent, Ms. Karla Havens of Mid-Atlantic Resource Consulting, was present and represented the applicant. Chairwoman Revere and Member Anderson recapped last month's meeting, stating that the Board had tabled the item to provide the applicant an opportunity to come up with a more suitable plan that would not destroy the jurisdictional dune. Chairwoman Revere noted that the applicant had the Department of Conservation and Recreation's Shoreline Erosion Advisory Service (SEAS) look at the proposal and provide their advice on the request. Member Anderson noted that this was an opinion of the original proposal, and did not constitute a revised plan, which was what the Board asked for at the August meeting. Member Cannon noted that the VIMS report offered alternatives, including a marsh toe revetment, to protect the existing dune.

Ms. Havens then addressed the Board and brought up 3 issues: (1) She stated that she was not notified of the Board's action at the August meeting. She acknowledged, however that both Mr. Sebra and VMRC staff told her verbally that the application had been tabled to provide an opportunity to modify the request to avoid dune impacts; (2) She stated that she met with SEAS on-site. During that visit, Mr. VanLandingham from SEAS recommended an offshore breakwater with beach nourishment and suitable vegetative planting as an alternative. When she stated breakwaters were too costly and not what her client wanted, Mr. VanLandingham told her that "a riprap revetment is a valid choice"; and (3) She stated that she had ten years of experience with the Dunes Ordinance while working with the Norfolk Wetlands Board and it was no different than the Wetlands Ordinance. If impacts were proposed then people needed a permit. Ms. Havens stated that the Board was probably uncomfortable about issuing Dunes Permits since they did not usually issue them. In her opinion, the process was no different from the Wetlands Ordinance process, just a different section in the State and Local code.

Mr. Woodward also said that Chairwoman Revere responded that the Ordinance clearly stated that there should be no disturbance to the dunes. Ms. Havens stated that subsection 4 (a) of the Ordinance listed 12 exemptions where someone could alter a sand dune. Member Cannon asked if the applicant would consider a trapezoidal structure (breakwater) and Ms. Havens said her client did not want such a structure. Chairwoman Revere stated she could not see how the Board could approve a complete destruction of the dune. VMRC staff clarified that if the revetment were placed behind the dune, revised drawings would still be required and that a permit from the Board would be required if the structure were still within the landward jurisdictional limits of the dune. Ms. Havens said a revetment behind the dune would not protect the dune. Member

Cannon stated that Tropical Storm Ernesto only benefitted the applicant by increasing the dune.

Mr. Woodward said that Board Member Anderson stated that the applicant was asked for an alternative plan and one was not submitted. He then moved to deny the project, as proposed, on the basis that it would be a violation of the Lancaster County Sand Dune Ordinance. He further stated that the applicant could appeal that decision to VMRC. The motion unanimously passed 5-0.

Mr. Woodward stated that staff was present at both the August 9 and September 13, 2007, Lancaster County Wetlands Board public hearings. Based on that attendance, staff could not agree that the Board failed to fulfill their responsibilities pursuant to Chapter 14, Coastal Primary Sand Dunes and Beaches, of the Code of Virginia. Staff also did not believe that the Board exceeded their jurisdiction, based on the VIMS report. Staff did believe, however, that the Board properly noticed and held both meetings lawfully. At the August hearing the applicant was told in person that his request did not meet the provisions of the ordinance and that direct impacts to the dune and beach should be avoided. The item was tabled to give him an opportunity to come back the following month, after consulting with his agent, with a more acceptable alternative. There was no requirement to individually notify an applicant's agent when the applicant and his contractor were in attendance of the board meeting.

Mr. Woodward explained that dunes, by their very nature, were somewhat ephemeral, but the dune in question had become naturally stabilized with vegetation and was currently providing the applicant with some degree of shoreline protection. Staff believed that the applicant had alternatives to further protect his property without destroying this valuable resource. He could install a breakwater in front of the jurisdictional dune and beach or an upland revetment behind the dune. The Board clearly offered those alternatives to the applicant at both hearings and he chose not to pursue either. As a result, and based on staff's review of the record, staff believed the Lancaster County Wetlands Board fulfilled their responsibilities under the ordinance and did not substantially prejudice the rights of the applicant to protect his property from erosion using other, less damaging alternatives. Based on the foregoing, staff recommended the Commission uphold the Board's denial of application #07-1432.

Commissioner Bowman asked for questions of staff. Associate Member Tankard asked if the 8 to 9 feet of property lost by the applicant were the result of the dune. Mr. Woodward explained that his statement was that the 8 to 9 feet lost was the result of the Tropical Storm Ernesto and Hurricane Isabel.

Commissioner Bowman asked if the applicant or his agent were present.

Karla Havens was sworn in and her comments are a part of the verbatim record.

Ms. Havens explained that the Wetlands Board limited its review to the environmental consequences and did not follow the guidelines. She said in their summary of the meeting there were omissions made. She said that VIMS said that the revetment was a suitable structure, which was most important in the board's consideration. She said she had met with SEAS and the beach profile was too steep to use the breakwater. She stated that even at mlw the grade was large, 6-8 feet height. She said that an offshore breakwater would not keep water out. She said in the minutes it had shown that the board was not comfortable with the dunes ordinance and did not understand what it meant. She said a revetment would not resolve the problems as the property was lower behind the dune. She referred to the record, item 5-9-ii, and explained that no private benefits and detriments were considered and it was not heard timely within the 30 days. She stated the applicant was not asked to waive his right to an immediate hearing at the August meeting. She said that a notice of actions taken at the August meeting was not sent out to the parties involved. She said they asked the applicant to consider alternatives, they had contacted SEAS, and the VIMS assessment said that the riprap revetment was a valid choice.

Jim Georgiadis, applicant, was sworn in and his comments are a part of the verbatim record. Mr. Georgiadis explained that he had worked all his life and the property was an investment. He said unlike the dune, his primary resources were his house, land, and family. He said the rip rap protected the dune, but was not protecting his property. He said if he had realized what would happen when it was put there, he would have moved it. He stated that the slides were deceptive and did not show the actual contour of the land.

Commissioner Bowman asked if there were members of the Wetlands Board present. There were none.

Carl Josephson, Senior Assistant Attorney General and VMRC Counsel, asked VIMS personnel if the mound satisfied the definition of a dune in the guidelines. David O'Brien, representing VIMS, said yes and there was also beach there.

Commissioner Bowman asked Mr. O'Brien to clarify the statement by VIMS on the revetment. Mr. O'Brien stated that another member of VIMS staff could answer the question.

Karen Duhring, representing VIMS, was present and her comments are a part of the verbatim record. Ms. Duhring explained that she did the site assessment and when she prepared the report she seemed to have used the wrong words. She should have said that with a suitable site there should be a revetment installed to be less intrusive. She said she agreed with the applicant that the dune provided limited protection. She explained that the first alternative would be to relocate the house about 100 feet, if it was possible, and the second alternative would be to enhance the dune with beach nourishment. Finally, she said that the third solution would be to install a structure 120 feet along the shoreline,

such as a revetment. She said the offshore design would not be adequate, as the slope was not considered and it would be important to a breakwater for it to be effective.

Commissioner Bowman asked if there was a motion. He said the Commission was here to review whether the Wetlands Board had fulfilled their requirements and not to exchange the Commission decision for that of the Wetlands Board. Mr. Josephson referred to and read Section 28.2-1413 of the Code of Virginia into the record.

Commissioner Bowman asked if there was a motion.

Associate Member Tankard stated that he sympathized with the applicant, but he felt the Wetlands Board upheld their jurisdiction. He moved to uphold the Wetlands Board decision. Associate Member Fox seconded the motion. The motion carried, 8-0.

No applicable fees – Wetlands Appeal.

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7. **WILLIAM P. BRYANT III, #02-2393**, requests authorization to construct a 6-foot by 200-foot open-pile private pier extension with a 3-foot wide catwalk to create one wetslip and to construct a 17-foot by 34-foot open-sided covered boathouse over the wetslip at the applicant's property situated along the Warwick River in the City of Newport News. The application is protested by an adjacent property owner.

Ben Stagg, Environmental Engineer Senior, gave the presentation with slides. His comments are a part of the verbatim record.

Mr. Stagg explained that the proposed pier was located near the end of Moyer Road in the City of Newport News. The proposed pier would cross a man-made canal and then cross a wetland island to reach the Warwick River. The applicant owned the portion of the island that the pier would traverse and was therefore considered to be a riparian property owner.

Mr. Stagg stated that a Joint Permit Application was originally submitted on December 13, 2002. Staff subsequently informed Mr. Bryant by letter, dated January 3, 2003, that his request for a boathouse would require the approval of the adjoining property owners and that they were being notified of the proposal. Staff subsequently received an objection from the adjacent property owner which had never been resolved.

Mr. Stagg said that Mr. Bryant proposed to cross the man-made channel with moveable gangways. While this portion of the project was deemed to be outside the jurisdiction of

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VMRC, it was this aspect of the project that had been the root cause for the delay in final action by staff.

Mr. Stagg stated that staff had received a letter of protest from Mr. Jeffrey S. Lunsford, dated February 2, 2003, in which he expressed numerous objections to the project. Those objections included the impact to the man-made canal, issues related to the project being beyond the scope of the Army Corps' RP-17, and alleging that previous pier work by Mr. Bryant was done without the proper authorizations. Staff responded to Mr. Lunsford on March 3, 2003, noting that the man-made canal portion of the project was beyond the jurisdiction of VMRC, and informing Mr. Lunsford that the navigational concerns he raised should be addressed to the Army Corps of Engineers and the U. S. Coast Guard. Staff further referenced a phone conversation with Mr. Lunsford in which he noted a verbal objection to the boathouse, and noted further that his letter contained no such objection.

Mr. Stagg said that numerous correspondence were exchanged between staff and Mr. Bryant and Mr. Lunsford in 2003 related to the drawings, the canal crossing and the boathouse. By letter dated April 5, 2004, Mr. Lunsford submitted a revised list of objections to include, that the proposed boathouse would greatly interfere with his viewshed of the river, marsh and wildlife impacts, that the drawings were not to scale and did not correctly depict the conditions, a lack of information concerning any utilities required for the pier and boathouse, no structural engineering drawings, discrepancies in the adjoining property information, possible bald eagles nesting nearby, and numerous concerns related to the bridging over the man-made canal.

Mr. Stagg stated that staff responded to Mr. Lunsford by letter dated, April 20, 2004. Acknowledgement of Mr. Lunsford's objection to the boathouse was noted. Additionally, staff agreed to investigate if all the proper adjoining property owners had been notified. Staff again noted that the application drawings did not have to be prepared by a professional draftsman, nor were structural engineering drawings required. Staff further noted that any construction would require a building permit from the City of Newport News and would be required to meet current City building codes. If a bald eagle nest was within the area, a time-of-year restriction could be required for construction. Staff again reiterated that since the project did not appear to meet the RP-17 requirements, the application and additional information provided by the applicant had been forwarded to the Army Corps for concurrent review, to include issues related to the man-made canal crossing.

Mr. Stagg said that staff subsequently had numerous phone conversations with both Mr. Bryant and representatives of the U. S. Coast Guard concerning this project. On April 26, 2006, staff received a copy of a Public Notice from the U. S. Coast Guard specifically concerning the bridge crossing over a navigable waterway of the United States (the man-made canal). This notice included a revised drawing depicting a proposed drawbridge structure over the man-made canal. This change was apparently made as a result of

discussions between Mr. Bryant and the Coast Guard. Additional discussion with the Coast Guard, to include a memo dated November 6, 2006, noted that VMRC staff was reluctant to present this application to the full Commission until the Coast Guard had approved the canal crossing. Unfortunately, the Coast Guard was unwilling to go on record that they recommended approval of the canal crossing until VMRC takes permit action on the application. After considerable internal staff review and discussion, the decision was made to present this project to the Commission for final action. Should the Commission approve the project, Mr. Bryant would still need Coast Guard authorization to bridge over the man-made canal. Should he not receive that approval, it was highly unlikely that he would continue with this project.

Mr. Stagg noted that no other agencies had commented on the project.

Mr. Stagg said that since the boathouse portion of the request remained protested, a permit was required, and staff conducted VMRC's standard public interest review.

Mr. Stagg explained that the Commission had no jurisdiction over the man-made canal, and that issue was being addressed by the U. S. Coast Guard in a separate action. Since the City of Newport News did not restrict the construction of open-sided boathouses, and had the adjacent property owner not objected to the project, it would have qualified for the exemption contained in §28.2-1203(A)(5) of the Code. The proposed open-sided design and the distance offshore from the existing residential homes should minimize any visual impacts associated with the structure. Accordingly, after evaluating the merits of the project against the concerns expressed by the adjoining property owner, and after considering all of the factors contained in §28.2-1205(A) of the Code of Virginia, Mr. Stagg said that staff recommended approval of the project, as proposed.

Commissioner Bowman asked whether the applicant was present.

William P. Bryant, III, applicant was sworn in and his comments are a part of the verbatim record. Mr. Bryant stated that he had tried to get the pier years ago, but was told to go to the canal and he had done everything asked of them. He provided the Commission with an additional handout from a neighbor who supported the project. He stated he had gone to great lengths to appease the opposition. He explained that there was a 15 foot opening at the canal and the canal goes all the way through.

Commissioner Bowman asked for anyone in opposition who wish to speak.

Jeff Munsford, protestant, was sworn in and his comments are a part of the verbatim record. Mr. Munsford explained that the canal allowed all to access the waterway. He said there were four others, besides himself. He said that he and some of the others had discussed dredging as they could not access it now with a barge. He said the additional pier would eliminate access by barge to build a pier. He said the canal had a lot of traffic.

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He said the boathouse built beyond his pier would block his view. He said this project would change the usage of the property.

Commissioner Bowman explained that except for the boathouse, the rest was out of the VMRC jurisdiction. He said if a deed restriction was established that would have prevented any changes as it was not within the State's jurisdiction as they can only consider the impacts to the State-owned subaqueous bottom.

Associate Member Tankard stated that Mr. Bryant said that a dock could be added. Mr. Munsford responded no, it was the only possible project by Mr. Bryant as the canal was cut to provide other properties access to water. Associate Member Tankard asked Mr. Munsford to point out his property lines, which Mr. Munsford did utilizing the staff's slide.

Dr. John LeMar, property owner on the other end of the canal, was sworn in and his comments are a part of the verbatim record. Dr. LeMar explained that he was on the other end of the canal and he did not receive a notice of the hearing. He said he had protested the original proposal. He said there was no notice of the drawbridge also. He said as he was not on the Warwick River, this canal was his only access. He depicted his property on the staff slide and stated he had a boathouse. He said he bought the property there in 1976 and it had been the same for years and the canal was for others to use. He expressed his concern for the safety of those boating in the canal and especially the ones that jet ski in the area. He said the 15 foot height of the bridge did concern him as there were no signs warning of its danger mentioned or safety considerations included. He said he was opposed to the bridging across the canal. He said the area was a natural wildlife setting.

Mr. Bryant in his rebuttal explained that Mr. Lunsford had built a screen porch on his pier and did not ask for his approval. He stated that Mr. LaMar did not need to access this end of the canal. He said he tried to make changes by modifying part of the pier. He said a Coast Guard permit was included.

Commissioner Bowman explained that portion was not under the VMRC jurisdiction. He asked for Commission action.

Associate Member Holland moved to accept the staff recommendation. Associate Member Schick seconded the motion. Associate Member Fox stated that a lot of the discussion was about issues that were not under VMRC's jurisdiction. The motion carried, 7-1. Associate Member Tankard voted no. The Chair voted yes.

Permit Fee.....\$100.00

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8. **DISCUSSION:** Status of the Nassawadox Creek Federal Project Channel and the H. Spencer Murray application, #07-0792, that was approved by the Commission at the August 28, 2007, meeting.

Hank Badger, Environmental Engineer, Sr., gave the presentation. His comments are a part of the verbatim record. Mr. Badger stated that all parties were present and he had the slides for the application by Murray.

Associate Member Holland stated it was unclear to him what was finally approved. He said this was a temporary approval for dredging the Federal Project channel and overboard disposal of the materials was approved because of the Federal Project. He said he wanted clarification before a final vote was made.

Spencer Murray, applicant, was sworn in and his comments are a part of the verbatim record. Mr. Murray stated that others were present from the Corps, County Board, the Wetlands Board, et als. He said he was representing 300 residents and that there was no intent to hamper the federal channel project. He said the Corps' permit would not exist once the federal project was funded.

Bob Grabb, Chief, Habitat Management, stated that was not included in the VMRC permit, but it could be added. Commissioner Bowman stated he was concerned with continuity. Mr. Grabb stated that staff had a copy of the Corps' permit and the applicant was willing to add it to the VMRC permit. Mr. Murray stated that he did agree.

Associate Member Holland asked Mr. Murray if he was happy with the permit as it was issued. Mr. Murray responded yes.

Associate Member Holland stated that there was no need to continue with this matter and moved to add the condition to the temporary permit, "for the purpose of opening the Federal channel". Associate Member Bowden seconded the motion.

Associate Member Tankard stated that 300 feet was too restrictive and some flexibility was needed in the dredging of the channel, as the channel can change naturally so that it cannot be followed in a straight line. He said that the flexibility would allow for a good job. Mr. Grabb stated that the permit had the dimensions as 300' X 20'. He said the permit covers the 300', but outside of that was not in the permit. Mr. Murray explained that the channel did change as it was a dynamic area and they did need some flexibility. Mr. Grabb explained that in permit condition number 21 the area was specified and it could be flexible as long as it was approved by VMRC. Associate Member Holland stated they would have to come back to VMRC to discuss any changes. Mr. Grabb stated that any changes, even if the channel was changed by nature, needed VMRC approval.

Commissioner Bowman said that if too much latitude were allowed it would set a precedent and other parameters may be involved. He said he felt there was no problem

with giving a certain area as it was controllable and there was no problem with holding a hearing as soon as possible, if it became necessary. He reiterated that there would be a problem with making it too broad.

Associate Member Schick asked if this were a one time dredging. Commissioner Bowman responded yes. He continued by saying that now it was within a certain area and if problems arose, then it needed to come back to the Commission.

The motion carried, 7-0-1. Associate Member Fox abstained as he was not present at the August meeting. The Chair voted yes.

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- 9. **COUNTY OF MIDDLESEX, #07-2010**, requests authorization to install two (2) pilings on an existing public dock to support equipment designed to facilitate the offloading of seafood at the public pier situated along Broad Creek at the end of Timberneck Road in Middlesex County. The project is protested by the adjoining property owner and other County residents.

Pulled from the agenda.

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The Commission broke for lunch at approximately 12:15 p.m. and reconvened at approximately 1:05 p.m.

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SPECIAL PRESENTATION FOR CLAUDE BAIN, DIRECTOR FOR THE SALTWATER FISHING TOURNAMENT PROGRAM, ON HIS RETIREMENT.

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- 10. **CHRIS CLIFFORD, #07-2124**, requests after-the-fact authorization to retain three 16-foot wide riprap breakwaters that were constructed in a manner that did not conform to the terms and conditions of his previous permit. The three breakwaters measure 70 feet, 83 feet, and 110 feet in length instead of the 50 foot length approved. They also were constructed utilizing different construction techniques and materials than those originally authorized. Mr. Clifford also seeks authorization to construct a fifth breakwater with a combination of a precast concrete barrier with quarry stone placed along the channelward side of the barrier adjacent to his property situated along the York River near the mouth of Carter Creek in Gloucester County.

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

Mr. Neikirk explained that the project was located along Blundering Point, a spit of land situated along the York River at the mouth of Carter Creek in Gloucester County. The York River bordered the property along the southwest facing shoreline and an extensive marsh and Carter Creek were located along the northeast side of the property.

Mr. Neikirk said that Mr. Clifford received a permit from VMRC to construct four (4) 50-foot long riprap breakwaters along the York River side of the parcel in 1998. Only the two upriver breakwaters were visible in aerial photographs taken in 2002, indicating that these two breakwaters were the only breakwaters completed prior to the June 30, 2001, expiration of the permit.

Mr. Neikirk stated that after receiving a report that heavy equipment was working along the Cliffords' shoreline, staff reviewed the permit documents and available photography and discovered that work had been conducted and was apparently continuing several years after the expiration of the permit. Staff contacted Mr. Clifford and conducted a site inspection on June 6, 2007. During the site visit staff noted that three riprap breakwaters had been constructed and a fourth breakwater was under construction at the site. All of the breakwaters were approximately 16 feet wide and the locations of the completed breakwaters appeared to generally conform to the permit requirements. One of the breakwaters was approximately 50 feet long as permitted. The other two completed breakwaters were 70 and 83 feet long. Additionally, a fourth breakwater, which had not yet been completed, was comprised of a row of timber pilings measuring approximately 110 feet in length. Mr. Clifford explained during the site visit that he drove the pilings to create a timber breakwater which allowed the sand to form a tombolo landward of the pilings to provide construction access to build the riprap breakwaters.

Mr. Neikirk said that staff also noted that the breakwaters had been constructed with a mixture of quarry stone and concrete blocks rather than all quarry stone as specified in the permit. It was also revealed during the site inspection that a short row of the concrete blocks had been installed adjacent to the upstream breakwater. Mr. Clifford stated during the site inspection that the blocks were placed as a test and were intended to be removed. Recent aerial photographs indicated that while the concrete blocks had been removed from the area near the upstream breakwater, a new riprap structure appeared to have now been constructed between the third and fourth breakwaters.

In summary, Mr. Neikirk said that although Mr. Clifford received a VMRC permit to construct four riprap breakwaters totaling 200 feet adjacent to his property in 1998, only two of the breakwaters were constructed prior to the expiration of the permit. Three of the breakwaters were longer than originally authorized, currently totaling 300 feet, and the construction technique and materials used varied from that which was authorized.

Mr. Neikirk explained that on July 11, 2007, the Cliffords were served a Notice to Comply which directed removal of the unauthorized structures by August 14, 2007. As an alternative, the Notice also provided the Cliffords the option of submitting an after-the-fact application to seek authorization to retain all or a portion of the illegal structures. The notice directed submittal of the after-the-fact application by July 15, 2007. Since there was a delay in serving the notice, however, staff informed Mr. Clifford that VMRC would extend the deadline for submittal of the application to July 23, 2007.

Mr. Neikirk stated that as of September 3, 2007, the illegal structures had not been removed and staff had not received an after-the-fact application to retain the unauthorized breakwaters. Accordingly, staff concluded that the Cliffords did not wish to avail themselves of the opportunity to submit an after-the-fact application and staff sent the Cliffords a letter directing their appearance at a restoration hearing scheduled for October 23, 2007. On September 17, 2007, Mr. Clifford contacted the Habitat office and stated that he had submitted an application back in July. Staff informed him that it had never received the application, and suggested he go ahead and resubmit it. On September 21, 2007, Mr. Clifford submitted a new copy of his after-the-fact application. That after-the-fact application was not accompanied by a statement explaining why the work was conducted without the necessary permit, as directed in the Notice to Comply. Nevertheless, today's hearing was to consider the after-the-fact application rather than a restoration hearing. He explained that only recently staff received a letter from the applicant explaining why the work was conducted without the necessary permit, which was the final requirement of the notice to comply.

Mr. Neikirk said that the after-the-fact application sought authorization to retain and complete the three illegally constructed breakwaters, as well as, authorization to construct a fifth breakwater along the shoreline. The fifth breakwater was designed to be constructed with a precast four and one-half (4.5)-foot tall concrete barrier with a four and one-half (4.5) foot wide by three and one-half (3.5) foot tall wedge of granite riprap installed on the channelward face of the barrier. As with the other breakwaters, no beach nourishment was proposed to be placed landward of the breakwaters. Instead, Mr. Clifford's proposed structure would allow the natural drift of sand along the shoreline to create a tombolo landward of the breakwater. The Cliffords were the principle owners of Riverworks, Inc, a shoreline contracting company experienced in breakwater construction. Mr. Clifford apparently constructed the breakwaters himself. No other contractors were involved.

Mr. Niekirk explained that the project might encroach on private oyster planting ground leased by Ms. Corinne Gentile. She was notified of the proposal, but staff had not received any comments. No one had objected to the project in response to VMRC's public notice and the adjoining property owners were also notified and had not objected to the project.

Mr. Neikirk stated that the Virginia Institute of Marine Science noted that certain information was lacking in the application including the size of the stone to be used in the breakwater and whether the concrete had any exposed re-bar. Although there appeared to be an adequate supply of sand along the shoreline, they still recommended the breakwaters be nourished and they recommended that filter cloth be used under the breakwaters. Finally, VIMS noted that there were limited details concerning the fifth breakwater which utilized an atypical design consisting of a concrete barrier with a wedge of stone along the channelward face. Since there was little information available concerning the effectiveness and integrity of this design, VIMS recommended a more typical stone breakwater be constructed. If the fifth breakwater was constructed as proposed, they recommended that a detailed monitoring plan also be required. Mr. Neikirk explained that letters from DEQ and DGIF had been received just the past Monday; and, he gave the members copies as handouts. There were no other agency comments.

Mr. Neikirk said that the Gloucester County Wetlands Board determined that a Wetlands Permit was not required since there was no beach nourishment proposed and no direct impact on wetlands within their jurisdiction.

Mr. Neikirk stated that staff believed the construction of breakwaters along this shoreline and point was a reasonable approach to address erosion, as evidenced by the issuance of the permit in 1998. Staff was very concerned, however, by the applicant's failure to comply with the terms and conditions of the earlier permit. He continued to work on the structures long after the permit had expired and the design and length of the breakwaters differed significantly from the specifications in the permit. Had Mr. Clifford requested an extension of the permit prior to permit expiration, it most likely would have been administratively approved. Additionally, had a modification been sought to change the design, materials or construction techniques, the permit could have been modified, provided the revisions were determined to be acceptable. The failure of an experienced shoreline contractor to secure a permit extension and modification illustrated a blatant disregard for the permit process.

Mr. Neikirk said that staff often required that structures such as breakwaters and groins be nourished with clean sand to minimize impacts to downriver properties. Adding sand to the system allowed sand to bypass the structures and continue its natural long shore transport to beaches downriver of the site. In this case, there appeared to be an abundant supply of sand in the area near the shore where the breakwaters were proposed and the property was on a point of land, so there should be no impacts to downriver properties. Like VIMS, staff also questioned the long term integrity and potential effectiveness of the 5th breakwater. Although there could be some value in studying an alternative and perhaps more cost effective breakwater design, staff did not believe that such a long structure on the terminal end of a breakwater system was the most appropriate site to conduct a study. Staff believed a more typical breakwater comprised entirely of riprap with a minimum size of class 2 armor stone would be more appropriate.

Mr. Neikirk said that staff understood that being a shoreline contractor with access to heavy equipment afforded the applicant the opportunity to conduct the work as time permits. Staff believed, however, that the extended time period for construction along this shoreline would likely increase the adverse impacts associated with the construction due to the prolonged period of heavy equipment traversing the intertidal area. Every effort should be made to complete this project in a timely manner.

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

- The fifth breakwater must be constructed on filter cloth utilizing all riprap with a minimum of class 2 stone used as the armor stone. Pilings shall not be used to create a “soldier pile” breakwater prior to creation of the riprap breakwater.
- The pilings used in the fourth breakwater must be either removed or cut flush with the sediment prior to the placement of the riprap to construct the breakwater. The fourth breakwater shall also be constructed on filter cloth and entirely of riprap with a minimum of class 2 stone used for the armor material.
- The fourth breakwater shall be completed or the existing pilings removed within one year.
- If beach nourishment is desired to provide construction access and to enhance the breakwaters, separate permits must be obtained from the Gloucester County Wetlands Board and the Commission.
- The Permittee shall provide a detailed plan for planting the tombolos, landward of the breakwaters with appropriate wetland vegetation.
- The riprap that has been placed between the third and fourth breakwaters shall be removed within 30 days.

Mr. Neikirk said that with the special conditions, staff believed the project would be consistent with all of the factors contained in §28.2-1205(A) of the Code of Virginia. Accordingly, staff recommended approval of the after-the-fact request with the assessment of triple permit fees as provided for in §28.2-1206(D) of the Virginia Code. Furthermore, staff recommended the Commission consider conditioning the approval on the applicant’s agreement to pay an appropriate civil charge in lieu of further enforcement action.

After some discussion clarifying the number of violations and such, Commissioner Bowman asked if the applicant was present.

Chris Clifford, applicant, was sworn in and his comments are a part of the verbatim record. Mr. Clifford explained that he built the breakwaters in front of a marsh area, not in front of his house, as he was attempting to save the marsh, which was one of the VMRC's jobs. He said he kept looking for a successful structure by trying variations of the breakwater. He said originally the application was for 4 breakwaters, 50 feet long and 50 feet apart. He said the neighbor's shoreline was eroding and the sand was moving towards his property. He stated the breakwater was to stop that sand. He said that breakwater failed to do that as it was too close to the shore and it put a dune around a cedar tree and filled the marsh. He explained the 2nd one was not effective and there was a natural build up of sand. He said he had shortened this one hoping to not build a dune. He said he decided to move further offshore the next time and it was not his intent to hurt the environment or river, he was just trying to protect the marsh area. He said the third one was longer and further from the second breakwater. He stated that for other breakwaters his company built, they used different techniques depending on the locations. He agreed he was guilty of a violation of the permit and to have done it after the permit expired. He explained now it was necessary to wait for the effects of the structures to begin. He explained also that he had been recycling pilings that had been removed from his other jobs. He said at the third structure he was storing the pilings hoping he would be allowed to continue. He said staff had told him that breakwaters had served well and he asked Mr. Neikirk to repeat for the Commission what he had said to him about them.

Mr. Neikirk said that he had said, "VMRC had allowed breakwaters and from his personal experiences they had worked." He said he also said "that he believed the current breakwater was slowing the migration of the sand and would keep Carters Creek open."

Associate Member Tankard asked about the storage of the rocks after the notice to comply was sent to him. Mr. Clifford stated he had taken them out, but only put them further out and did not get rid of them. He said they would not be harmful to anything.

Associate Member Schick asked if creosol pilings had been placed on a structure. Mr. Clifford responded no, it was all salt treated.

Associate Member McLeskey asked if he was familiar with the Corps' project using sand at Cape Henry. Mr. Clifford responded no, he did not know about it. He explained he felt he could only try to do something, as during Hurricanes Isabel and Katrina the structures had failed and that had taught him something.

Associate Member Tankard asked if there were four or five breakwaters. Mr. Clifford responded five and when he was done he wanted to start growing oysters and he was not talking commercially. He said he had seen how strike occurs on the structures and it might help the oysters to return to the Bay.

Commissioner Bowman explained that VMRC must ensure compliance with permits and when he had talked with Mr. Clifford he thought he would comply. He stated any change

must be permitted. He said as a contractor it was Mr. Clifford's responsibility to set a good example. He asked for any discussion.

Associate Member Schick stated that others wanted to experiment and they had been denied. He said the techniques being tried had not been proven or endorsed by VIMS. He said these structures should be removed, as it was not anyone's right to experiment. He said there was no excuse for this activity.

Associate Member Tankard moved to accept the staff recommendation. Commissioner Bowman asked if the motion included a civil charge. Associate Member Tankard responded, yes. Associate Member Fox offered a suggestion of \$3,600.00 total for 2 violations at \$1,800.00 each. He said this was for a minor environmental impact and a major non-compliance. Associate Member Tankard accepted the amendment. Associate Member McConaugh's seconded the motion. Associate Member Schick stated that he had heard that the pilings were creosol and he wanted an amendment to the motion to include the inspection of the pilings to determine if they should be removed. Associate Members Tankard and McConaugh agreed to this amendment. The motion carried, 7-1. Associate Member Schick voted no.

| | |
|---|------------|
| Civil Charge (2 violations @ \$1,800.00 ea.)..... | \$3,600.00 |
| Permit Fee..... | \$ 300.00 |
| Total Fees..... | \$3,900.00 |

* * * * *

- 11. **RONALD H. HORN, #07-2144**, requests after-the-fact authorization to retain an 8-foot wide, 132-foot long open-pile pier with flared landing, a 16.2-foot by 24-foot open sided boathouse, a 12-foot by 13.5-foot L platform and a 1,166 square foot U-shaped floating dock, adjacent to property situated along Williams Creek in King George County.

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

Mr. Bacon explained that Mr. Horn's property was located in a residential neighborhood near Dahlgren Naval Base. Williams Creek was approximately 700-feet wide from shore to shore.

Mr. Bacon stated that on an August 9, 2007 staff went on a site visit with Julie Bradshaw of VIMS to conduct a shoreline permit application inspection; for a modification request related to a bulkhead project authorized earlier in the year. At that time staff noticed that the pier on the property had been rebuilt and was much wider than normally allowed. It also had numerous appurtenances that exceeded those authorized by Code. A review of

VMRC records revealed that no authorization for the pier structures had been applied for or been granted.

Mr. Bacon said that staff sent a Notice to Comply letter to Mr. Horn on August 27, 2007. That Notice directed the removal of the unauthorized structures within 30 days of receipt of letter, or the submittal of an after-the-fact application seeking authorization to retain all or portions of the unauthorized structures within 15 days of his receipt of the Notice to Comply. On September 25, 2007, staff received Mr. Horn's after-the-fact application to retain the aforementioned structures.

Mr. Bacon said that in a letter accompanying his after-the-fact application, Mr. Horn explained that he bought the property in its present configuration in 1998. He subsequently applied for a permit to replace the deteriorated timber bulkhead in front of his property. As far as their rebuilding of the pier, Mr. Horn and his contractor Mr. White stated that they did not think they needed a permit to replace the stringers and the boards on the pier, or that the addition of an L-platform required a permit. Mr. Horn assured staff that the covered boat slip was not part of the renovation. Based on the information provided, however, that covered slip was apparently constructed after Mr. Horn bought the property, and in the absence of proper authorization. Mr. Horn installed the floating pier in 2005 and stated that a vendor at a show told him that floating pier did not require a permit.

Mr. Bacon noted that the unauthorized construction of the 8-foot wide by 132-foot long, open pile pier with flared landing, 16.2-foot by 24-foot open-sided boat slip, 12-foot by 13.5-foot L platform and a 1,166 square foot U-shaped floating dock appeared to all have been done after Mr. Horn purchased the property. The newest work was done in 2007 while the floating dock was installed sometime in 2005. Although the unauthorized structures exceeded the limits set forth in § 28.2-1203 (A)(5) of the Code, based on the VMRC's public interest review, however, no opposition to this project had surfaced and the structures did not seem to represent a navigational hazard.

As a result, Mr. Bacon stated that staff recommended approval of Mr. Horn's after-the-fact request subject to the assessment of a triple permit fee, and his agreement to pay a civil charge of \$3,600 based on moderate environmental impact and a moderate degree of deviation or non-compliance.

Mr. Bacon stated that the applicant, agent, and the contractor were all present.

Commissioner Bowman asked that they come forward if they wished to address the Commission. He swore in Mr. Horn, Mr. Palubinski, and Mr. White at the same time.

Greg Palubinski of Bayshore Design and agent for the applicant, was present and his comments are a part of the verbatim record. Mr. Palubinski stated that the applicant accepted the staff recommendation including the civil charge and triple permit fees.

Robert White, contractor for the applicant, was present and his comments are a part of the verbatim record. Mr. White explained that the covered slip was already there on site.

Ronald Horn, applicant, was present and his comments are a part of the verbatim record. Mr. Horn stated that the structures were already present when he purchased the property and he was misinformed about the floating dock not needing a permit by a sales person at a promotion show. He said they noticed that the dock surface was rotting and replaced it. He said it was not his intention to extend the dock. He said he failed to check out the permits for the various structures.

Mr. Palubinski stated that the application was for the replacement of the boathouse, floating dock and the slip.

Mr. Horn stated he did not know redecking needed a permit.

Associate Member Schick asked if he was a general contractor. Mr. White responded, yes, but he had been doing more marine contracting. Commissioner Bowman asked if he had been before the Commission prior to this time. Mr. White responded no.

After some more discussion about the project, Associate Member Holland moved to accept the staff recommendation. Associate Member Tankard seconded the motion. Associate Member Fox stated he wanted the civil charge amended from \$3,600.00 to \$5,500.00. Associate Member Holland stated he accepted the amendment. The motion carried, 8-0.

| | |
|-------------------------------------|------------|
| Civil Charge..... | \$5,500.00 |
| Permit Fee (A-T-F triple fees)..... | \$ 300.00 |
| Total Fees..... | \$5,800.00 |

Bob Grabb, Chief, Habitat Management, reminded the Commission that the applicant must agree to the assessment of the civil charge, otherwise it will be sent to the Attorney General's office for further enforcement action.

Commissioner Bowman asked Mr. Horn if he accepted it. Carl Josephson, Senior Assistant Attorney General and VMRC Counsel reiterated that if that was not acceptable then the matter would be taken to the Attorney General's office for further enforcement action. Mr. Horn responded, yes.

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12. PUBLIC COMMENTS:

Eric Weller, Clammer, was present and his comments are a part of the verbatim record. Mr. Weller requested that the Commission extend the private ground relay season. He

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said he had spoken with Mr. Farrington of the Shellfish Sanitation and they had said it was up to the Commission, as long as the water temperature remained 50° or above.

Commissioner Bowman asked the staff to comment. Jack Travelstead, Chief Deputy Commissioner, responded that an emergency regulation would be necessary and that VMRC was not inclined to do that. He stated that staff did not consider this an emergency situation.

No action was taken.

Douglas F. Jenkins, President of the Twin Rivers Watermen's Association, was present and his comments are a part of the verbatim record.

Mr. Jenkins explained that he had two issues to address. He said the first was an Executive Order by the Secretary of Commerce, which would establish the striped bass and red drum, as game fish. He said the overharvesting was done by the recreational fishery. He stressed that the Commission send a letter to the Secretary of Commerce and Secretary of Natural Resources objecting to this action.

Associate Member Bowden stated that he was already considering converting to a Democrat because of President Bush. He said he agreed that the hook and line recreational fishery had the greatest mortality. He said mortality for the commercial industry was under 20 percent and the recreational fishery was approximately 80%. He said this was an attempt to bypass the Magnuson Act with an Executive Order. He stated he agreed with Mr. Jenkins that a letter should be sent to the Secretary of Natural Resources and the Secretary of Commerce that Virginia was opposed to this action.

Commissioner Bowman explained that the Code of Virginia had protections in it, so as not to discriminate against the user groups and that would continue.

Mr. Jenkins' second issue was the opening of the Lower Rappahannock River the results of which proved that closing the areas was harmful. He said it was found that there were not a large number of larger shellfish, as they had died. He said he was concerned about the amount that had died, that could have been harvested. He said he was requesting a permit to check the oyster bottoms in the Potomac River tributaries and everyone was welcome to come with him.

Commissioner Bowman agreed to the permit and asked staff to comment.

Dr. James Wesson explained that in the Rappahannock River there was a small number of oysters found. He said in the Northern Neck area the survey was done by VMRC and VIMS' staffs. He said the disease tests were being done and in one to two weeks the information should be available. He said because of a major drought, in the James River, it looked very bad. He said the high salinity killed oysters and there was mortality in the

James. He also explained that when these droughts occur, the spat set was usually higher, but not this year. He said in the area worked before, the spatsets were small.

Associate Member Bowden asked how many oysters were bought in the Lower Rappahannock by the State. Dr. Wesson responded approximately 500 bushels in the first two weeks. He said the project was going into the third week. Commissioner Bowman asked if Mr. Jenkins' request was okay. Dr. Wesson stated that VMRC and VIMS' staffs would be conducting the patent tong survey in the area soon and others were welcome to come along.

Robert Jensen representing the Rappahannock River Preservation Society was present and his comments are a part of the verbatim record. Mr. Jensen stated that the matter was no longer in litigation. He provided the board members with a handout of a proposal for the Hampton Roads area. He said if the Commission were going to use the material for general reefs, it would benefit the oyster resource as well. He explained that he still wanted to place the materials in the Hampton Roads area, especially for small boaters because of the close proximity. He suggested that it be made a sanctuary and harvest be prohibited there. He said the U. S. Navy needed to know something now as the pilings were being withdrawn this week.

No action was taken.

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- 13. PUBLIC HEARING:** Proposed Amendments to Regulation 4 VAC 20-910-10, et seq., "Pertaining to Scup," to adjust the commercial fishery possession limit for the Winter II (November-December) period.

Alicia Middleton, Fisheries Management Specialist, gave the presentation. Her comments are a part of the verbatim record.

Ms. Middleton explained that the summer flounder, scup, and black sea bass fisheries were managed by the Atlantic States Marine Fisheries Commission (ASMFC) and the Mid-Atlantic Fishery Management Council (MAFMC), in consultation with the New England and South Atlantic Fisheries Management Councils. Recommendations from ASMFC and MAFMC were provided to the National Marine Fisheries Service (NMFS) and often provided the basis for regulatory action.

Ms. Middleton stated that staff recommended the adoption of the proposed amendments to Regulation 4 VAC 20-910-10, et seq., to establish the Winter II period possession limit as 3,500 pounds.

Commissioner Bowman opened the public hearing. There were no public comments. The public hearing was closed.

Associate Member McConaugha moved to change the poundage to 3,500 pounds as recommended by staff. Associate Member Tankard seconded the motion. The motion carried, 7-0. Associate Member Fox had left at approximately 2:29 p.m. for the rest of the day.

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14. PUBLIC HEARING: Continuation of provisions of Regulation 4 VAC 20-20-10, et seq., "Pertaining to Licensing Fixed Fishing Devices", that suspend the requirements to set and fish a pound net, in order to renew a license and maintain priority to that location next year.

Rob O'Reilly, Deputy Chief, Fisheries Management, gave the presentation. His comments are a part of the verbatim record. He provided a handout of the pound net fisherman's letter to the Commission.

Mr. O'Reilly referred the Commission to the draft regulation on page 4, paragraph D, where it showed the change to the date, from 2006 to 2007. He said that since 2003 and Hurricane Isabel, this type of request had been allowed. He also explained that because of the damages to the nets incurred from Tropical Storm Ernesto, several of the fish pounds had not been set for 2007.

Mr. O'Reilly stated that staff recommended that the Commission not require pound net licensees to set and fish their nets in 2007, in order to maintain their licenses and priority rights for these nets for 2008.

Associate Member Tankard asked if these were full time or part time pound net fishermen. Mr. O'Reilly explained that this was a full time operation, costing \$20-30,000 per net. He said there was a cap of 161 nets since 1994. He said some new entrants get into the fishery, usually a few every year. He stated that Captain Jewell of the Law Enforcement Division had informed him that 16 of the 30 Northern Neck stands could be reestablished in 2007.

Commissioner Bowman opened the public hearing. There were no public comments and the public hearing was closed. He then asked for a motion.

Associate Member Bowman moved to accept the staff recommendation. Associate Member Schick seconded the motion. The motion carried, 6-0. Associate Member Holland was not present.

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- 15. DISCUSSION:** Amending Regulation 4 VAC 20-960-10, et seq., "Pertaining to Tautog", to establish ASMFC-mandated harvest reduction measures, for the commercial and recreational tautog fisheries; Request for a November public hearing:

Associate Member Holland returned to the meeting.

Joe Cimino, Fisheries Management Specialist, Sr., gave the presentation. His comments are a part of the verbatim record. He stated that this was a request for a public hearing.

Mr. Cimino explained that two separate addendums to the ASMFC Fishery Management Plan (FMP) were initiated in 2007 to address concerns for the coastal tautog stock. According to the most recent peer reviewed stock assessment, spawning stock biomass levels for tautog continue to remain low, coastwide. Addendum IV to the FMP, approved in February 2007, established spawning stock biomass target and threshold reference points, allowing the ASMFC to determine whether or not the stock is overfished. This addendum also established a new rebuilding fishing mortality rate of $F = 0.20$, to initiate rebuilding of the stock to the spawning stock biomass threshold and target levels. A fishing mortality rate of 0.20 translates to an annual harvest (or exploitation) rate of 0.17. That is, 17% of the stock can be removed by fishing, annually. Because of the extraordinary contribution to the fishing mortality rate by the recreational fishery (approximately 90% of the total coastwide; and approximately 99% of the total Virginia harvest), Addendum IV required that all reductions in the fishing mortality rate apply to the recreational sector only. However, since the fishing mortality rate includes all fishing pressure, reduction schemes need to take into account what percentage of the landings the commercial fishery contributes. For example, it was noted that some States in New England had a developing commercial fishery that contributed a significant proportion of the landings. One State would have had to reduce their recreational landings by over 40%, to account for the commercial and recreational harvest reduction.

Mr. Cimino said that in August, Addendum V to the Tautog FMP was approved. This addendum incorporated the reduction targets, rebuilding targets and implementation schedules that were initiated by Addendum IV. Addendum V allows States the flexibility to make the needed reduction, from either the recreational or commercial fishery or both. This addendum also changed the base period from which reductions are to be made. The base period for Addendum V was 2003 through 2005 (Addendum IV was only 2005). States would need to reduce their harvest, by 25.6% of the average total tautog harvests during 2003 through 2005.

Mr. Cimino stated that Addendums IV and V to the Tautog FMP required States to maintain current or more restrictive fishing regulations during calendar year 2007 and implement management measures to meet a fishing mortality rate of 0.20 by January 1, 2008.

Mr. Cimino noted that the addendum specifically required a 25.6% reduction in the overall harvest or exploitation rate (which combines recreational and commercial fisheries removals) for each state. This means reducing the coastwide harvest from 21.35% to 17%, on an annual basis.

Mr. Cimino also explained that on two occasions, staff held an Ad Hoc Committee meeting that included individuals who were active in the recreational tautog fishery. The committee and staff originally drafted eight management options that would meet the reduction requirements (during the Addendum IV process). Through a series of group e-mails and a second meeting, staff and the Ad Hoc Recreational Committee adjusted the original options of Addendum V, and pared down the number of options to five. The Ad Hoc Recreational Committee favored equal harvest reductions for both the commercial and recreational fisheries.

Mr. Cimino said that staff developed reduction options, for the commercial fishery, and solicited opinions on these options, from commercial fishermen who landed tautog in 2006. Only three individuals responded. All three stated that the commercial fishery should not have to take reductions at this time. In 1997, the commercial fishery was required to close from May 1 through August 31. This closure has been in place since 1998.

Mr. Cimino said the matter was also brought before FMAC, at the September 17, 2007 meeting. FMAC voted 7 to 4, with 2 abstentions, to exclude the commercial fishery from the ASMFC mandated reduction. This means it would only affect the recreational fishery.

Mr. Cimino explained that the ASMFC Tautog Technical Committee meeting they had reviewed all state proposals, and Virginia's options were accepted. New options can be devised without the need for further review by the Technical Committee, as long as they are based on the same methodology, as was used for the previously approved options. For Virginia, the commercial fishery accounted for an average of 2% of the overall harvest, during 2003-2005, so an overall reduction of 26.1% would need to be achieved by the recreational fishery, to account for the commercial fishery. This number was derived by dividing the required overall reduction percentage by the recreational portion of the harvest. If the recreational fishery was to account for the full mandated harvest reduction, one additional day would need to be added to the three options in Table 1.

Mr. Cimino stated that staff recommended advertising the options in Tables 1 and 2, for a November public hearing. These options were to establish the ASMFC-mandated harvest reduction measures. Also, wording would be needed and added to the notice of the public hearing that there would be consideration given to alternate options.

Commissioner Bowman asked what action would be taken by the Commission.

Associate Member Holland moved to accept the staff recommendation for a public hearing in November. Associate Member Tankard seconded the motion. The motion carried, 7-0.

The following were the tables discussed by the staff:

Table1. Options for reducing Virginia’s recreational harvest by closed days and possession limits* .

| | Closed Days | Possession Limit | Reduction Percentage |
|----------|---------------------------------|------------------|----------------------|
| 1 | April 16-May 15 & December 1-14 | 5 | 25.65 |
| 2 | March 31- April 30 | 5 | 26.08 |
| 3 | April 11-30 | 4 | 25.99 |

* Recreational options are numbered in order of preference by ad hoc committee; one additional day would need to be added to each option, if the recreational fishery was to take the entire reduction.

Table 2. Options for reducing Virginia’s commercial harvest by closed days and possession limits.

| | Closed Days [◇] | Reduction Percentage |
|----------|--|----------------------|
| 1 | September 1 - November 12 | 26.28 |
| 2 | April 1 - April 30 | 26.35 |
| 3 | April 16 - 30, September 1 - October 24 | 25.82 |
| 4 | April 16 - 30, September 1 - October 2, December 17 – 31 | 25.75 |

◇Current commercial closure is May 1- August 31

- 16. **DISCUSSION:** Amending Regulation 4 VAC 20-1040-10 et seq., “Pertaining to Blue Crab”, to decide whether an extension of the moratorium on the sale of licenses should be continued; Request for a November public hearing.

Jack Travelstead, Chief Deputy Commissioner, gave the presentation. His comments are a part of the verbatim record. Mr. Travelstead explained that Regulation 4VAC20-1040 established a cap on the sale of crabbing licenses. That cap would expire on January 1, 2008, unless it was to be extended by the Commission. The cap on crabbing license sales has been in place since 1999 and was one of the more important management measures controlling fishing effort. The regulation also allowed for transfers of crabbing licenses under certain conditions. Mr. Travelstead also explained that the Virginia’s crab management program was now the subject of a review by a panel of scientists. The panel was evaluating the effectiveness and importance of each regulation and in their final report, would note deficiencies and areas where improvements could be made. The final report was expected to be completed by the end of the year.

Mr. Travelstead explained that in the meantime, staff believed it was necessary to continue the current cap on license sales. Prior to the start of the 2008 Crabbing Season, any changes can be made if the scientific and subsequent Advisory Committee reviews determined that a different course of action was more prudent. Until those issues were determined, the moratorium on crabbing license sales should be continued. Staff recommended a continuation of the cap on crabbing license sales through 2010 and that a public hearing should be held on this proposed amendment to Regulation 4VAC20-1040 at the Commission’s November meeting.

Commissioner Bowman asked what action did the Commission want to take in this matter.

Associate Member Holland moved to accept the staff recommendation for a public hearing. Associate Member Schick seconded the motion. The motion carried, 6-0. Associate Member McLeskey was not present, as he had left the meeting for the day.

There was no further business and the meeting was adjourned at approximately 2:40 p.m. The next meeting will be Tuesday, November 27, 2007.

Steven G. Bowman, Commissioner

Katherine Leonard, Recording Secretary