

## MINUTES

## Commission Meeting

May 22, 2012

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:

Jack G. Travelstead	Commissioner
J. Carter Fox	
William E. Laine, Jr.	
Joseph C. Palmer, Jr.	Associate Members
J. Bryan Plumlee	
Kyle J. Schick	
J. Edward Tankard, III	
Whitt G. Sessoms, III	
Paul Kugelman, Jr.	Assistant Attorney General
John Bull	Director, Public Relations
Linda Farris	Bs. Systems Specialist, MIS
Rob O'Reilly	Acting Chief, Fisheries Mgmt.
Joe Grist	Acting Deputy Chief, Fisheries
Jim Wesson	Head, Conservation-Replenishment
Joe Cimino	Biological Sampling Program Mgr.
Stephanie Iverson	Fisheries Mgmt. Manager
Allison Watts	Fisheries Mgmt. Specialist
Adam Kenyon	Fisheries Mgmt. Specialist
Renee Hoover	Fisheries Mgmt. Specialist
Sonya Davis	Fisheries Mgmt. Specialist, Sr.
Lewis Gillingham	Head, SW Fishing Tournament
Warner Rhodes	Deputy Chief, Law Enforcement
John Richardson	Marine Police Officer
Matt Dize	Marine Police Officer

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Tony Watkinson	Chief, Habitat Mgmt.
Chip Neikirk	Deputy Chief, Habitat Mgmt.
Jeff Madden	Environmental Engineer, Sr.
Jay Woodward	Environmental Engineer, Sr.
Ben Stagg	Environmental Engineer, Sr.
Justin Worrell	Environmental Engineer, Sr.
Randy Owen	Environmental Engineer, Sr.
Hank Badger	Environmental Engineer, Sr.
Mike Johnson	Environmental Engineer, Sr.
Justine Woodward	Environmental Engineer, Sr.
Juliette Giordano	Environmental Engineer, Sr.
Bradley Reams	Project Compliance Tech

Virginia Institute of Marine Science (VIMS):

Lyle Varnell

Virginia Department of Health-Division of Shellfish Sanitation (VDH-DSS)

Dr. Robert Croonenberghs

Keith Skiles

Julie Henderson

Others present:

John Poulson	John Kirkpatrick	Carl Eason
Kevin Dubois	Jamie Chapman	Scott Parrham
Cameron Thurman	Sandra Campbell	George Burbank
Nona Jordon	Carolyn Buzek	Susan Clarke
Cody Tatum	Kathy Tatum	Adam Melita
Cee Rixenberg	Andy Dillard	Tammy Hillstad
Peter O'Shaughnessy	Rebecca O'Shaughnessy	Gayle E. Cozzens
Arne Hasselquist	Whitney Garganus	Marion Mayo
Mo Wilson	Nan Wilsix	Steven Hughes
Jim Janata	Janet Janata	Laura Winberg
Darlan SESCO	Mamie Kliman	Ernest Guganus
Leonard Mayo	Sebastian Plucinski	Harry Mirium
Gileg Macer	Camilla Childers	Sam Martin
Stephanie Harris	Syble Stone	Gail Heage
Ken Benessa	Wayne Coleman	Bill Kunz
John Bosco	Jon S. Winebarger	Ben McGinnis
Fred J. Klinkenberger, Jr.	Lynn James	Jim Reid
Jim Hornung	Scott Little	Anne Butcher
Don Butcher	Tamara Dunkelberger	Eric Wishon
Jugmiki EnJ	Larry Curtis	Latine Caldos
Joe Caldos	T. E. Dunkelberger	Bill Kerry

**Commission Meeting**

Jamie Ross  
J. Bergen  
Robert Moody, IV  
Melody Artz  
Lloyd Riggs  
Tray Bonnville

Brian Owen  
Randy Biagas  
Barbara Ritchie  
Andy Lacatell  
Marian Riggs  
J. Amos

R. Hagen  
Ellis W. James  
Chris Stolle  
Kevin Riggs  
Billy L. Bonnville  
Kim Huskey

and others.

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Commissioner Travelstead called the meeting to order at approximately 9:35 a.m. Associate Members Robins was absent.

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At the request of Commissioner Travelstead, Associate Member Tankard gave the invocation and Tony Watkinson, Chief Habitat Management led the pledge of allegiance.

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**APPROVAL OF AGENDA:** Commissioner Travelstead asked if there were any changes from the Board members or staff. There were none.

Commissioner Travelstead asked for a motion for approval of the agenda by the Board.

**Associate Member Tankard moved to approve the agenda. Associate Member Fox seconded the motion. The motion carried, 7-0.**

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**MINUTES:** Commissioner Travelstead requested a motion for approval of the April 22, 2012 Commission meeting minutes, if there were no corrections or changes. There were no changes.

Commissioner Travelstead asked for a motion to approve the minutes.

**Associate Member Plumlee moved to approve the minutes. Associate Member Palmer seconded the motion. The motion carried, 6-0-1. Associate Member Sessoms abstained as he was absent from last month's meeting.**

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Commissioner Travelstead, at this time, swore in the VMRC staff and VIMS staff that would be speaking or presenting testimony during the meeting.

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- 2. **PERMITS** (Projects over \$500,000 with no objections and with staff recommendation for approval).

Tony Watkinson, Chief, Habitat Management, informed the Commission that there was one page two item to be heard. He reviewed item 2A for the board. His comments are a part of the verbatim record.

Commissioner Travelstead asked for a motion from the Board.

**Associate Member Schick moved to the page-two item, as read. Associate Member Plumlee seconded the motion. The motion carried, 7-0.**

- 2A. **PLAINS MARKETING, LP, YORKTOWN TERMINAL, #12-0407**, requests authorization to mechanically maintenance dredge approximately 36,000 cubic yards of subaqueous material to maintain maximum navigable depths of -40 feet at mean low water adjacent to an existing petroleum loading/unloading pier situated along the York River in York County. Recommend approval with our standard dredge conditions. All dredge material will be slurred in a tending barge and hydraulically pumped ashore to a bermed upland placement area on site.

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).

Tony Watkinson, Chief, Habitat Management reviewed the one consent item. His comments are a part of the verbatim record.

- 3A. **DAVID BETTIS, #12-0494**, requests after-the-fact authorization to retain a 130-foot long by 5-foot wide private, noncommercial pier, including a 10-foot long by 16-foot wide L-head platform, a 10-foot long by 3-foot wide finger pier, and associated mooring piles, adjacent to his property at 1348 Bayville Street, which is bordered by a City platted street, situated on Willoughby Bay in the City of Norfolk. Staff recommends approval.

**Commission Meeting**

In 2001, Mr. Tom Carlson, the homeowner at the time, submitted a Joint Permit Application (#01-1149) requesting authorization to construct a private, noncommercial pier adjacent to his residence situated on Willoughby Bay. Unfortunately, staff did not recognize while reviewing the application that the proposed pier would encroach on a city right-of-way (i.e. paper-street) and we issued a “No Permit Necessary” letter. Mr. Tom Carlson was later granted an amendment to his City of Norfolk building permit which authorized an additional 34 feet of pier. Mr. Bettis bought the property in December 2003, and the construction of the pier was completed in 2004.

On April 2, 2012, we received a Joint Permit Application from Mr. Bettis requesting authorization to retain the existing pier. The impetus for this application was at the request of a prospective buyer of Mr. Bettis’ property. The prospective buyer had contacted VMRC staff in February 2012, to inquire about the legal status of the pier. While staff conducted a second review of the situation, staff recognized that the pier encroached within a City right-of-way and therefore required an encroachment permit from the City of Norfolk which was not obtained prior to the construction of the pier. Additionally, although the pier would otherwise have met the exemption requirements for private, non-commercial piers as outlined in § 28.2-1203 (A)(5) of the Virginia Code; the existence of the City right-of-way between the Bettis’ property and Willoughby Bay necessitates the issuance of a VMRC permit since the property is not truly a riparian parcel.

Mr. Watkinson informed the board that the public interest review has been completed, and no complaints have been received. Norfolk City Council approved the encroachment permit at their May 8, 2012, meeting.

Mr. Watkinson explained that staff would have administratively issued a permit for the pier in 2001; however, a “No Permit Necessary” letter was mistakenly issued due to staff oversight. Accordingly, staff recommends approval of the after-the-fact application.

Commissioner Travelstead asked if there were any questions for staff. There were none. He asked for a motion.

**Associate Member Fox moved to approve the application. Associate Member Schick seconded the motion. The motion carried, 7-0.**

Permit Fee.....	\$25.00
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**4. CLOSED MEETING FOR CONSULTATION WITH, OR BRIEFING BY, COUNSEL. No closed meeting.**

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- 5. SEBASTIAN PLUCINSKI, #11-1384**, requests after-the-fact authorization to retain seven (7) galvanized metal fence posts with concrete bases and to install eight (8) fence lines consisting of 2-inch diameter galvanized fence posts with interconnecting chain extending landward of mean high water to a pond located behind the natural dune system, and install eight (8) pilings at the mean low water line at the terminus of the property lines of four separate parcels along the Chesapeake Bay on White Marsh Beach in the City of Hampton.

Mike Johnson, Environmental Engineer, Sr., gave the presentation with slides. Mr. Johnson reviewed the information provided in the evaluation. His comments are a part of the verbatim record.

Mr. Johnson explained that the properties on which Mr. Plucinski proposes to install the fence lines are located on White Marsh Beach, which is south of Grandview Beach and north of Salt Ponds Inlet in the City of Hampton. The lots are undeveloped.

Mr. Johnson stated that the City of Hampton has not adopted the Coastal Primary Sand Dunes and Beaches ordinance. As a result, the Commission is charged with acting as the Local Dunes and Beaches Board pursuant to Chapter 14, Subtitle III, of Title 28.2 of the Code.

Mr. Johnson said that on August 1, 2011, staff received a complaint that several metal and wood poles with interconnecting cables and rope had been placed on lots owned by Mr. Plucinski along White Marsh Beach. Staff conducted a site visit with Mr. Plucinski and Mr. David Imburgia, (Local Wetlands Board Planner) of the City of Hampton, later that same day. Upon inspection, staff found two fence lines consisting of metal and wood poles connected by chain and rope starting in the dune line and extending 102 feet and 146 feet towards the surf zone. Staff then verbally informed Mr. Plucinski that the installation of these fence lines constituted a violation of §28.2-1406 of the Code of Virginia.

Mr. Johnson noted that on August 8, 2011, a Notice to Comply was sent to Mr. Plucinski. The Notice to Comply directed Mr. Plucinski to completely remove the posts and connecting chains and ropes by September 1, 2011. As an alternative to removal, the notice stated that Mr. Plucinski could submit an after-the-fact application by September 1, 2011, if he wished to seek authorization to retain the installed structures. Staff conducted a site visit on August 31, 2011, and determined that seven galvanized metal poles were still present on site.

Mr. Johnson said that after September 19, 2011, Mr. Plucinski did submit an after-the fact application requesting after-the-fact authorization to retain the seven galvanized metal fence posts which were installed without authorization from VMRC and the City of Hampton Zoning board. The application also requests authorization to install a total of eight fence lines consisting of 2-inch diameter galvanized fence posts with

interconnecting chain extending landward of mean high water to a pond located behind the natural dune system and to install 8 wood piles immediately landward of mean low water on the channelward terminus of the property lines of the previously identified lots.

Mr. Johnson explained that following staff's initial review of the application Mr. Plucinski was informed on September 29, 2011, that the application was incomplete and he was provided a list of additional information that would be required to make his application complete. On February 21, 2012, additional information was supplied to VMRC by the applicant and staff determined that it was appropriate to hold a public hearing on the violation and after-the-fact application.

Mr. Johnson said the project is protested by numerous adjacent and nearby property owners who cite that the fences would preclude them from accessing their property, constitute a safety hazard, are damaging the local ecosystem and are aesthetically unappealing.

Mr. Johnson noted that according to plats provided by Mr. Plucinski and easement language on deeds, it appears to staff that there may be designated points for other property owners to utilize Mr. Plucinski's property to access their property. There is an ongoing civil suit between property owners on White Marsh Beach and Mr. Plucinski concerning the existence of one of these designated access routes.

Mr. Johnson stated that according to §28.2-1403(10)(A)(2) of the Code of Virginia "In deciding whether to grant, grant in modified form, or deny a permit, the board shall consider, among other factors, the following: The impact of the proposed development on the public health, safety and welfare." Staff recognizes that fences along the beach could prevent rescue personnel from responding in a timely manner to any emergencies that may occur south of the proposed fence lines and should be considered in deciding on whether or not to issue a permit. As such the public and private benefit must be balanced against any public or private detriment.

Mr. Johnson explained that at the time of another public hearing for the Shri Ganesh LLC application, the applicant had received local zoning approval for the project, according to verbal confirmation by City of Hampton officials. Following the issuance of the VMRC permit however, staff has learned that the City of Hampton Zoning Board of Appeals revoked their permit stating that the construction of the bollards with a below grade horizontal support element constituted a fence which are not allowed on unimproved properties. Unfortunately, staff has not been able to procure these records from the City of Hampton. Currently, Mr. Plucinski has not applied for local zoning approval for his proposed project. Because the City of Hampton zoning laws does not allow fences on unimproved properties, staff believes it is unlikely that Mr. Plucinski will be able to secure the necessary permits from the City of Hampton.

Mr. Johnson stated that staff is sensitive Mr. Plucinski's desire to protect his property from trespassers and his concern regarding any liability which may be incurred as a result. Staff is concerned that the installation of fences could represent a potential safety hazard and the existing structures need to be addressed. It is also unclear whether such fences can be justified given the possible existence of points of access for adjacent property owners which is currently in litigation. Additionally, Mr. Plucinski has not applied for local zoning permits and it appears to staff that he may not be able to procure these authorizations as currently designed.

Mr. Johnson said that while staff would typically consider an application incomplete pending local approval and resolution of the property right issues and litigation, there is a current violation on site that staff believes needs to be resolved.

Mr. Johnson explained that after evaluating the merits of the project, and considering all of the factors contained in §28.2-1403(10) (B) of the Code of Virginia, staff recommends that the proposed project be denied. In addition, staff recommends that the Commission order the existing poles be removed and the natural grade of the beach be restored. In this case staff does not feel the project is consistent with the public interest considering all material factors, nor do we believe the public and private benefit exceed the public and private detriment.

Mr. Johnson said that should the Commission decide to approve the project then staff recommends the consideration of a civil charge of \$3,000.00 based upon a minimal impact and major degree of non-compliance. Staff believes the degree of non-compliance should be major due to Mr. Plucinski's knowledge of the requirements for a Beach and Dune Permit since he testified in favor of the Shri-Ganesh LLC application during the public hearing last year.

Commissioner Travelstead asked for questions of staff.

Associate Member Plumlee asked if the notice went out prior to the application being received and the application was not received until April 2012. Mr. Johnson responded yes and the additional information was received February 2012.

Associate Member Sessoms asked what was the purpose of the fence? Mr. Johnson stated he thought it was to protect Mr. Plucinski's property from trespassers. Associate Member Sessoms asked if this would be blocking the public's right of way. Mr. Johnson said that there was in the deed an established private right of way in the subdivision for several lots to the south, which could be blocked by the fence.

Associate Member Plumlee asked Mr. Kugelman, VMRC Counsel if this was to a show cause hearing for failure to comply or consideration of an after-the-fact application for a permit. Paul Kugelman, Assistant Attorney General, said first to consider granting a

permit, but if it was not granted, to consider staff's recommendation to take enforcement action.

Associate Member Palmer asked if the City collected the trash in the area. Mr. Johnson stated that there was no public trash receptacle.

Commissioner Travelstead asked if the applicant was present or his representative.

Sebastian Plucinski, applicant, was sworn in and his comments are a part of the verbatim record. Mr. Plucinski provided a hand out to the Board. He stated that there were differences in what had been presented and the application. He said the red line shows where the posts are erected and on the application it states that the posts are on his property. He stated the presentation by staff was wrong. He said he had been working with the City and the metal post was determined to be a violation. He said the City said that the line with the rope was not a violation. He said he did go to get a zoning permit and was told he had to do the joint permit application first and the application said that what was approved by VMRC would need City approval. He said he had a 3-foot gap to all for access by walkers and the State's employee had accessed the property with no problem.

Associate Member Plumlee why the application was in his name not the company name. Mr. Plucinski said it was in the company name and he was the president. Mr. Johnson informed the board that the application listed Mr. Plucinski and the Company as the applicant.

Mr. Plucinski said that he also represented two other companies that owned property. There was no post where there was public access and the easement. He stated that there was no public beach here only private. He said the green line on the map showed the approximate 20 foot right of way established in the 1930's. He said because of erosion the location of the 20-foot right of way was in dispute and there had not been a court decision. He said if this decision goes against him then he would not put anything there. He said he was just posting to the end of his property because without the right of way being posted people tend to go outside of the right of way to get to the beach. He said that in the past VMRC staff had come out to the area for a site visit and stated that there was no violation. He said his boat had been vandalized so he put more signs up and those were vandalized. He said he then added the post and chain not even thinking this was a violation. He said the vandalism continued so he put the metal post and concrete, and the posts were driven into the ground. He said he then applied to VMRC and the City and he was told it was a violation if he did not remove the chain and the post the City determined was not a violation. He said the reasons he did all of this was because of the vandalism, the alcohol, drugs, littering, unauthorized vehicles and just lack of respect for him and his property. He said the police do not patrol the area because it is private property. He said he had spoken with a majority of the property owners and they all agree that they do not want strangers there because of safety concerns.

Paul Kugelman, Assistant Attorney General and VMRC Counsel asked if it was his property or the corporation. Mr. Plucinski stated it was the corporation. He said he had asked VMRC for help with his problems, but was told that they cannot help.

Commissioner Travelstead asked for questions.

Associate Member Plumlee asked about when the chain disappeared or was it stolen. Mr. Plucinski said yes, shortly after he installed it. Associate Member Plumlee asked if the chain was there when this was taken to court. Mr. Plucinski responded no, not at that time.

Associate Member Sessoms asked what was allowed on the dunes and beaches. Tony Watkinson, Chief, Habitat Management answered that only sand fencing for beach stabilization and only with a permit for other structures.

Associate Member Fox asked if the applicant intended to put the lines parallel to the water at the right of way. Mr. Plucinski said he did not think that was necessary as he was just showing where the property was located and wanted to only do minimal marking.

Associate Member Palmer stated he could sympathize with his trying to protect his property as he had a similar situation. He asked how long had the public been using this area. Mr. Plucinski said for 30 years. He said there were a lot more golf carts now and the walkers were only going on the beach. Associate Member Palmer asked if he reported the boat damage to the police and if there were other boat owners in the area. Mr. Plucinski said yes, he did report it to the police and there were two or three others in the area. Associate Member Palmer asked if anyone had been prosecuted successful. Mr. Plucinski stated one individual was warned that action would be taken if they returned.

Associate Member Plumlee asked if a survey of the area had been submitted. Mr. Plucinski said no survey and when they tried to prosecute the judge was not clear on the signage.

Associate Member Schick asked if when the barriers were put up did the activity in the area diminish. Mr. Plucinski said some of the post did limit the vehicles depending on their size, but the cars and trucks just go around. He said he wanted to work with other residents to resolve the dispute, but not all of them agreed. Associate Member Schick asked if there were other signs. Mr. Plucinski said yes, a sign to note that no public was allowed and to pick up the trash.

Associate Member Tankard asked if this post was okayed by the City. Mr. Plucinski said yes. Associate Member Tankard asked what he had said to other property owners who use this area for access in the past. Mr. Plucinski said he told them he was willing to work with them.

Commissioner Travelstead asked if other wished to speak in favor. He asked if anyone wanted to speak in opposition.

James Chatman, property owner in opposition, was sworn in and his comments are a part of the verbatim record. Mr. Chatham provided three handouts. Associate Member Plumlee asked if he would use the slide. Mr. Chatman said the slide did not show what was actually there and more accurate information was needed. He said he asked that VMRC accept the staff recommendation. He said the fence blocks his access to his properties and the pipe should be moved as it blocks the Pine Street right of way. He said the sand in the area moves daily and it was not true the damage to the beach was caused by the golf carts. He said he had boats there and had not had any vandalism. He said the plans for posts and chains were dangerous.

Mr. Johnson said there was a revision of the project dated April 10. Mr. Chatman said he did not know about that. He said the applicant should have provided an accurate survey of the location. He said when the posts and chains were put in the area he disregards the rights of others. He said he requested that the application be denied and the applicant be found in violation.

Associate Member Fox asked if he accepted the access by others for the parties and other activities. Mr. Chatman said he had not seen the parties and other activities and he said the area had been used for 50 to 70 years. He said the majority did not agree about the lawlessness in the area and this was a family beach. He said there had not been any problems until this occurred. He provided a handout of Bonita Drive. Associate Member Sessoms asked if it was parallel to the water would it be a problem. Mr. Chatman stated that they needed the access of Bonita Drive.

Associate Member Laine asked if he had to trespass sometimes to access his property. Mr. Chatham responded yes as Bonita Drive goes into the water. He reiterated that a survey was needed.

Associate Member Plumlee asked if he was involved in the injunction. Mr. Chatman stated yes. Associate Member Plumlee asked if a survey was submitted for the injunction. Mr. Chatman responded no. Associate Member Plumlee asked if there was one entered today. Mr. Chatman said no.

George Burbank, resident for 6 years and protestant, was sworn in and his comments are a part of the verbatim record. Mr. Burbank said he was a marine science teacher and since Isabel the sand grain had changed and it can change virtually overnight from sand to gravel in 24 hours. He said he had sought funding to do research but there was no funding. He said the beaches retreat five feet a year and in ten years that was 50 feet. He said that storms result in the beach going backwards and forwards and you cannot fix the access of right of way. He said the 4 X 4 posts were not removed by vandals but by weather events because post put into sediment will be removed by storms. He said that

storms moved the grasses and Isabel did change the dynamics of the area. He said he did not see any carts go on the dunes and as there was drift in the area there was a need to protect the beach.

Associate Member Fox said the area was fragile and it was helpful that there were no carts on the beach. Mr. Burbank stated that the carts did not cause the problems and a study was needed. He said the carts impact the sand by putting ruts there which in turn fill in with sand. He said the carts are actually good for beaches.

Associate Member Plumlee asked him how often he was out there. Mr. Burbank said he had not been there during the recent winter and he does have a golf cart. He added that during the summer he was around there 2 or 3 times a week.

Cameron Thurman, beach resident and protestant, was sworn in and his comments are a part of the verbatim record. Mr. Thurman said he sees the beach everyday from his house. He said he was not aware of one of the lots until he saw the plat today. He said these limits were in violation of the City zoning and the fence would not prevent vandalism. He stated it was not practical to build a permanent structure as this was a moving platform and the beach changes all the time. He said any barriers limits access by others and the tides limit access by others. He said that other access had been suggested by the applicant, but others would have to go over the pond. He said the fishing pier in the area had been destroyed by Isabel and anything put here would be destroyed by weather conditions which would be a safety hazard. He said the character of the beach was a crown jewel for all and this would be destroyed by a fence making it an eyesore.

Associate Member Sessoms asked about the removal of the access at Bonita Drive and the right of way. Mr. Thurman said the 1930's plat showed the right of way and at the present time it was high water. He said the waterline changes all the time. Associate Member Sessoms asked if the Bonita Drive was a legal access. Mr. Thurman said he had not seen it on the plat as Bonita Drive, but State Park Drive.

Commissioner Travelstead asked staff to comment. Mr. Johnson said on the plat it said Pine Drive. Commissioner Travelstead asked if it was on record at high water line. Mr. Johnson said there was no mention of high tide line.

Associate Member Schick said the plat showed a 20 foot walkway at mean high tide. Mr. Johnson said that Pine Drive was a 20 foot road.

Peter O'Shaughnessy, resident and protestant, was sworn in and his comments are a part of the verbatim record. Mr. O'Shaughnessy said the applicant had been telling lies in his testimony. He said when the applicant said no cement that was not true as the poles were encased in it. He noted the chain was not vandalized but was removed when he was told to. He said the applicant said there was drunkenness, but there had not been any changes of DUI and the only truck on the beach was the applicant's. He said the golf carts that

went on the dunes were the applicant's carts. He said most of the people in the area obey the laws and the City does not allow fencing. He said the golf carts were good as they compact the sand. He said he had to trespass in order to gain access to his property. He said there was a claim of a new high water mark, but there were no maps or survey to show it. He said the applicant was not telling the whole truth. He said the primary purpose of the fence was not a public benefit pursuant to Code. He said VMRC had ordered removal by September 30, 2011 and the application was not received until after that date. The fence post as applied for was for the purpose of blocking access. He said the applicant can access his property by a legal route, but it was a handicap for residents that need a golf cart. He said the individuals who were opposed had not been given a key for access. He noted the picnic table and umbrella were destroyed by the weather. He said the Association members tried to clean up the beach and if you access the beach then you need to take care of it and clean it. He said this was all payback for those in opposition to the applicant building his house. He said this was now in court and he asked that the Code be considered as to the public benefit and detriment.

Associate Member Plumlee asked if he was involved in the court case. O'Shaughnessy said yes. He noted the City was remaining neutral and there were three property owners involved. Associate Member Plumlee said that no survey had been submitted by anyone. O'Shaughnessy said they were going to get a survey done and the Hampton Court had issued an injunction in favor of other residents. Associate Member Plumlee said he was not questioning the decision only that a survey had not been done. O'Shaughnessy said it had not gone to court but was advised to get a survey.

Arne Hasselquist, property owner and protestant, was sworn in and his comments are a part of the verbatim record. Mr. Hasselquist said that the applicant had not cooperated. He said the injunction had stopped the problems and the owners do police the area. He noted that this was a golf cart community. He said the City had ruled and denied his permit and fined him. He said the application had not been submitted on time.

Commissioner Travelstead asked for rebuttal by Mr. Plucinski.

Mr. Plucinski said that the Commissioner was not authorized to act on where the right of way was located and he was not blocking it. He said the Court would make that decision. He said he was only asking to protect his property. He said the 20 foot right of way was on the 1936 plat.

Commissioner Travelstead stated the matter was before the Commission.

At this time there was further discussion regarding there being no survey, the city's position and the fact that it was under litigation at the present time. Mr. Johnson stated it was staff recommendation that since this was in litigation it should not be approved.

Associate Member Tankard moved to deny this application and assess a civil charge. Associate Member Schick said it should be denied with an order for removal of the existing posts as it impacts access for instances of emergency. He said the obstruction was not water dependent and prior to marking it needed to be marked. He said there was insufficient information and it was the wrong design. Associate Member Laine seconded the motion. Associate Member Fox said he was in favor of the motion and once the court decision is made the access problem would be resolved. He said the applicant can come back when it was resolved. He said an owner has the right to mark the corners of his property and he has the right to do so. He said that the access area was unknown so he agreed with the removal of the posts as it was a violation of the law. Associate Member Palmer noted that a civil penalty was to be included. The motion carried, 7-0.

Associate Member Plumlee moved that the \$3,000.00 civil penalty be applied based on the matrix that since there was minor impact and moderate deviation. He said there was evidence that the applicant knew approval was necessary. Associate Member Palmer seconded the motion. Mr. Watkinson said that a civil charge was allowed if the applicant agrees, but a civil penalty must be done by Court action. He said the Commission could go up to \$10,000.00 and the Court up to \$25,000.00 for a civil penalty. Associate Member Plumlee corrected the motion to say civil charge not civil penalty. He said he took this from the matrix and it should be \$2,000.00 not \$3,000.00. Associate Member Palmer stated he agreed to the change of the motion. Associate Member Schick suggested the applicant be given the opportunity to remove it and to allow him a week to do it. Associate Member Plumlee said it should be to remove it in one week or pay it. Associate Member Palmer said he agreed to the 7 days. Mr. Kugelman said that the Commission did have jurisdiction and the evidence showed that the applicant knew he needed the permit but did it anyway. He said the applicant must agreed to the assessment and be informed of the Commission's order for removal. He added if it were not removed then there would be court action. Associate Member Plumlee restated the motion to be a \$2,000.00 civil charge based on a minimal impact and moderate deviation and to be allowed 7 days to remove the structure so as not to pay the civil charge. The motion carried, 7-1. The chair voted yes and Associate Member Fox voted no.

Civil Charge.....	\$2,000.00
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Note: The removal of the structure within seven (7) days would be allowed in lieu of a civil charge.

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- 6. VININGS MARINE GROUP LLC AND EAST BEACH LLC, #07-1161.** Commission review on appeal by the applicant of the April 11, 2012, decision by the Norfolk Wetlands Board to deny their request to modify an existing wetland permit to impact approximately 3,720 square feet of vegetated and non-vegetated wetlands with on-site mitigation of 2,450 square feet of vegetated wetlands as the result of the construction of the Harbor House at East Beach apartments, super yacht facility, and associated facilities at their property situated along Fisherman's Cove (Little Creek) in the City of Norfolk.

Commissioner Travelstead said the appellant would be allowed to speak first and then anyone in support would be heard. He said any additional evidence not in the record would need to be approved by the Commission with a motion. He said the Wetlands Board would be heard second and the appellant would be allowed rebuttal.

Paul Kugelman, Assistant Attorney General and VMRC Counsel said that in Code Section 28.2-1312 it set forth the appeal review process and to vote to hear other testimony expands the record which could result in consequences for the parties involved.

Associate Member Plumlee said he needed to recuse himself from this hearing because of business conflicts relating to his law firm who represent the appellant. He left the hearing.

Commissioner Travelstead asked for questions. There were none.

Justine Woodward, Environmental Engineer, Sr., gave the presentation with slides. Staff reviewed the information provided in the evaluation. Her comments are a part of the verbatim record.

Ms. Woodward explained that the subject project is located on an undeveloped site in the City of Norfolk situated along a portion of Little Creek known as Fisherman's Cove. The site is actually comprised of two separate parcels of land. The waterfront parcel is owned by Little Creek Partners Limited Partnership, an affiliate of Vinings Marine Group, while the upland parcel is owned by East Beach, LLC (Marathon Development Group, Inc.). Little Creek Partners Limited Partnership, also owns the two adjacent marinas on either side of the subject property. In addition to its undeveloped nature the site also includes a man-made slip, which was previously excavated from the upland to accommodate the Sea Belle. The Sea Belle was an old ferry vessel that was initially brought to the site to serve as a waterfront restaurant. The Sea Belle sat abandoned in this slip for many years and was removed by Little Creek Marina, Inc. (which became Little Creek Partners Limited Partnership) in exchange for portions of the upland property owned by the City of Norfolk.

Ms. Woodward said that in 2004, the Norfolk Wetlands Board authorized the filling of the Sea Belle slip as part of an application (VMRC #03-2301) originally submitted by

Little Creek Marina, Inc. to expand their upland dry storage facilities. Obviously that filling and expansion never occurred.

Ms. Woodward stated that the Norfolk Wetlands Board considered a new proposal at a public hearing on December 12, 2007. The proposal was initially heard in July 2007; however, the application was determined incomplete at the time. The proposal included the filling of the former slip, with the installation of a riprap revetment channelward of that fill, and the installation of a low-profile bulkhead further channelward to accommodate the creation of tidal wetlands. The project included the construction of a floating pier to serve as an expansion of Vinings Marine Group's marina operations and was intended to accommodate "super yachts." The upland property, including the filled slip, was proposed to be developed with a multi-level apartment complex with a section on the first level reserved for support facilities for the proposed super-yacht pier. The Board heard testimony from the agent and their engineering and environmental consultants, as well as members of the public that spoke against the proposed project. In the end, the Board voted 4-2 to approve the project as proposed.

Ms. Woodward said the December 12, 2007 decision of the Board was appealed to the Commission by numerous residents in opposition to the project. The Commission voted to uphold the decision of the Norfolk Wetlands Board during the January 2008 meeting (Commission staff evaluation dated January 22, 2008 and letter of notification attached). The permit was subsequently issued by the Norfolk Wetlands Board in February 2008. During its meeting on December 8, 2010, the Norfolk Wetlands Board granted a permit extension and the permit drawings were also updated to include a change in construction material from a steel sheet pile bulkhead supporting the toe of the created wetland to a vinyl product. The current permit is valid until February 5, 2014.

Ms. Woodward stated that the applicant provided updated drawings as part of a modification request submitted in August 2011. The modified drawings show the revised locations of several support facilities servicing the super yacht pier located within the first floor of the building footprint. The modifications were apparently necessitated by the required widening of an access road to serve as a fire lane. The overall design changes contained no additional direct impacts to tidal wetlands than what was previously authorized by the existing wetland permit issued in 2008. The applicant was required to appear before the Norfolk Wetlands Board during a public hearing to request the permit modification primarily due to the proposed change in use of the wetlands area permitted to be filled.

Ms. Woodward noted that the Norfolk Wetland Board initially considered the applicant's current modification request at their January 11, 2012, meeting. The Board received a briefing from the Wetlands Board staff, and received supporting testimony from Mr. Buddy Gadams of East Beach LLC, and Mr. Ray King, the Attorney for Vinings Marine Group LLC. Mr. Carl Eason provided oral arguments in opposition to the request, on behalf of his client, the East Beach Home Owners Association. Two members of the

general public also spoke in opposition to the proposed project. In addition to providing a brief overview of the permit history associated with the site, Wetlands Board staff indicated that the current proposal would reduce the water dependency aspect of the project from 45% (currently permitted) to 20%. Staff further stated that this number included the super yacht crew lounge as a water dependent structure; however, it did not include the fire lane. Following staff's presentation, the applicant entered into the record a statement signed by the City of Norfolk Fire Inspector acknowledging that the emergency access road shown on the plans were designed in response to his request to allow for emergency access to the super yacht facility. The application was ultimately deemed incomplete due to a lack of detail concerning the water-dependency of the support facilities associated with the super yacht facility, and the questions concerning the sequence of construction of the apartment complex and super yacht facility.

Ms. Woodward said that at the request of the applicant, Wetlands Board staff prepared a letter on February 1, 2012, providing guidance on information required to complete the application. The information requested included: amended plans accurately showing the existing property boundaries consistent with the recorded plat, a revised JPA signature page signed by both Vinings Marine Group LLC and East Beach LLC, a legal agreement between the two entities demonstrating shared use of the two properties, additional information regarding a dilapidated bulkhead along the western shoreline, and a legal agreement documenting the party responsible for the perpetual maintenance of the wetland mitigation area and future shoreline stabilization. The applicant submitted the requested documentation on March 19, 2012.

Ms. Woodward said further that the Norfolk Wetlands Board, once again considered the applicant's modification request at a public hearing on April 11, 2012. The Board considered its staff briefings, and the testimonies and exhibits provided by Mr. Buddy Gadams of East Beach LLC, Mr. Peter Anzo of Vinings Marine Group LLC, Senator Northam, and that of 8 speakers in opposition, including Mr. Carl Eason, who spoke on behalf of his client, the East Beach Home Owners Association. The Wetlands Board staff provided an overview of the project, including a brief history of the site, a review of the proposed project plans, and a comparison of the water dependency of the current proposal compared to the previous request. Following the testimony of Mr. Buddy Gadams of East Beach LLC, the Board asked him to specifically address: 1) the anticipated public and private benefits 2) how the proposal meets the requirement that it must be clearly water-dependent in nature 3) the consideration given to alternatives to minimize wetlands impacts associated with the super yacht facility and proposed development. Mr. Gadams listed several anticipated public benefits including: the public boardwalk, generated tax revenue for the City of Norfolk, and the accommodation of super yachts. He further stated that the site is a prime location for the super yacht facility, and that efforts were made to minimize impacts to wetlands as much as possible. He said when the permit was initially approved, the project was considered 45% water-dependent, and as a result of the changes made to widen the fire lane, the water dependency increased to 60%. Other areas on the site were considered for development, however, the western tip of the property has

considerably more wetlands, and the adjacent submerged lands are also shallower and would require dredging. Mr. Gadams further stated that the water is much deeper in front of the Sea Bell slip, and would not require dredging to accommodate super yachts. Subsequently, Mr. Peter Anzo of Vinings Marine Group LLC stated that there was interest to construct a super yacht facility at this site because the only current locations large enough to support super yachts are located in downtown at Waterside and in Portsmouth; there isn't a facility in the immediate area to accommodate super yachts and as a result, business is being lost. Mr. Anzo also asserted that the proposed site location will accommodate super yachts without the need for additional dredging, and that this project will create jobs that have been lost due to a decline in occupancy at the adjacent marinas.

Ms. Woodward said that the protestants' central argument was that the proposal had not avoided the existing tidal wetlands resource. Mr. Eason, on behalf of his client, the East Beach Homeowners Association, argued the legal standard by which the Board is tasked with evaluating the proposal at hand. Upon referencing the Wetlands Mitigation-Compensation Criteria, Mr. Eason argued that alternate siting was not adequately addressed. He questioned the reason for filling the tidal wetlands to develop the site as opposed to considering the adjacent marina complex as alternate siting or relocating the fire lane. Mr. Eason highlighted the original VIMS assessment prepared for the 2007 application, which states that none of the proposed structures can be considered water dependent in nature. After referencing *Palmer vs. Marine Resources Commission*, Mr. Eason contended that this proposal did not meet the legal standard of constituting a water dependent activity, and accordingly, the Board was mandated to deny the application in its current form.

Ms. Woodward explained the subsequent concerns cited by the others speaking in opposition to the project included: the future maintenance of the created wetlands, a lack of public benefit, the high density aspect associated with the residential complex and the associated negative impacts on the surrounding community and its inconsistencies with the broader vision of development within East Beach. Senator Northam, who spoke neither in support nor against the proposal, referenced a sea level rise study that will be conducted by VIMS in pursuit of a collaborative effort to understand the best way for the City to utilize its shorelines in light of sea level rise; furthermore, he stated that more information will be available once the study is completed in time for the 2013 session. Senator Northam asked the Board to carefully consider this application.

Ms. Woodward noted that at the close of the public hearing, the special conditions drafted by staff in anticipation of an approval (as is customary with any application) were read directly into the record and were agreed to by the applicant. A motion was made to deny the permit modification request on the grounds that it did not satisfy all three criteria outlined in *Wetlands-Mitigation Compensation Policy*. The motion passed with a vote of 4-1.

Ms. Woodward said that staff received a letter of appeal on April 12, 2012, from Mr. John W. Daniel, II, on behalf of his client, East Beach LLC and Vinings Marine Group LLC. That appeal letter was considered timely under the provisions of Section 28.2-1311 (B) of the Code.

Ms. Woodward explained that the Commission's *Wetlands-Mitigation Compensation Policy* states that in order for a proposal to be authorized to destroy wetlands and compensate for the wetland loss in some prescribed manner, the following criteria must be met:

1. All reasonable mitigative actions, including alternate siting, which would eliminate or minimize wetlands loss or disturbance, must be incorporated in the proposal.
2. The proposal must clearly be water-dependent in nature.
3. The proposal must demonstrate clearly its need to be in the wetlands and its overwhelming public and private benefits.

Ms. Woodward stated that while staff acknowledges that the Board asked the applicant to specifically address the three criteria stated above, and subsequently used this as a rationale for denial, staff is most concerned about the Board's minimal discussion of the criteria, particularly with respect to the water-dependent aspect of the facilities in support of the super yacht pier. Specifically, the Board members did not discuss the issue of water dependency with respect to the area occupied by the proposed emergency access lane. Nor did they address the fact that if the fire lane is considered water-dependent, then the water-dependency aspect of the proposed modification actually increases to 60% from what was previously permitted (45%) in 2008.

Ms. Woodward explained that after careful review of the record on this matter, it is staff's opinion that the Board rendered a decision without giving full consideration to the water dependency aspect of the fire lane; nor did there appear to be any further evaluation of the fact that the filling of the wetlands fringe was associated with the reclamation of a previously excavated basin as was highlighted in the Commission review of the 2008 appeal. Additionally, the Board's decision appeared unsubstantiated primarily due to a lack of dialogue amongst the Board members during the January 11, 2012 and April 11, 2012 hearings and for the motion at the last hearing. Accordingly, staff recommends that the Commission remand the matter to the Board with specific instruction to amplify the record regarding their rationale for a decision considering the necessity for a fire lane, and the ecological significance of the wetlands along the fringe of the excavated basin in consideration of the standards for use and development of wetlands contained in Section 28.2-1308 of the Code of Virginia. However, if the Commission concludes that the evidence on the record considered as a whole is inconsistent with the Board's determination on the matter, especially the necessity for the fire lane and the nature of the fringe wetlands in the excavated basin, then the Commission may elect to overturn the

April 11, 2012, decision of the Norfolk Wetlands Board and direct the Board to approve the modification request to the existing wetlands permit and to include the proposed permit conditions considered during the Board hearing.

Associate Member Fox asked about the super yachts pier location. Ms. Woodward showed the location on the map. Associate Member Fox asked if it was perpendicular to the shoreline. Ms. Woodward responded yes.

Associate Member Palmer asked if there other uses for the area. Ms. Woodward said it was authorized for super yachts only. Associate Member Palmer asked if there were any additional slips at this location. Ms. Woodward said no, it was just a single floating pier.

Associate Member Schick said the Wetlands Board's decision was appealed to VMRC in 2008 and VMRC upheld the Wetlands Board's approval. He said when the modification to add the fire lane for the Fire Department was heard by the Wetlands Board it was denied. Ms. Woodward said it was all the same except for the fire lane request. Associate Member Schick asked if the Fire Department made the request. Ms. Woodward stated yes, the applicant had provided a letter from the City of Norfolk Fire Inspector.

Associate Member Laine asked if the applicant could go ahead with the original project. Ms. Woodward said they cannot as the plans approved by the Planning Commission are different. She added the representative from the City of Norfolk could comment.

Associate Member Sessoms asked if the Wetlands Board considered the water dependence, as the letter from the Fire Department was requesting it for the Super Yacht Facility. Ms. Woodward said the Wetlands Board did not discuss that because of a lack of evidence.

Commissioner Travelstead asked if the appellant or his representative wished to comments.

John Daniel, Attorney for the Vining Marine Group, was present and his comments are a part of the verbatim record. Mr. Daniel said they agreed with the staff recommendation and they did a good job with the presentation. He noted this was an appeal of the Wetlands Board decision and that the VMRC subaqueous permit had been approved. He noted also that this project impacted 3,720 square feet, which had not changed. He said in 2008 the Commission approved the 3,720 square feet of wetlands being impacted. He said it was also approved by the Wetlands Board, DEQ, and the Army Corps of Engineers. He noted that the modification had been approved by DEQ and the ACOE, but the Norfolk Wetlands Board had held their hearing and denied it. He said there needed to be some discussion on what had changed. He provided a picture of the proposed project site with the Sea Belle present to be viewed with the overhead projector. He said the City Ordinance was adopted to transfer the property to Little Creek Marina in

order to clean up the area. He noted that even the City assumed that the wetlands area would be filled. He said that in 2004 the filling of the wetlands for the dry storage was approved. He said the City had discussed rezoning and that was done for the East Beach property dry storage facility. He said in 2008 the Wetlands Board heard the original project for approval. He said neighbors protested it for the Wetlands Board hearing and the Norfolk Wetlands Board appeal was upheld by VMRC. He said there were no impacts and they had five approvals. He said in 2008 the City staff defended the Wetlands Board permit because the nature and character of the wetlands to be filled was not of primary ecological significance. He noted in 2012 that there had been numerous approvals by the City, zoning, etc. He said the Fire Marshall's request said they needed access for emergency vehicles to get to the Super Yacht Facility. He said the Fire Marshall's letter gave the reasons for the needed fire lane. He referred to Code Section 28.2-1302 where it said what the permitted uses of wetlands were, which he read. He said in the event of a fire it would impact the public health, which was applicable here.

Associate Member Fox noted the letter was not on letterhead for the City of Norfolk, which was strange that the Fire Marshall did not use City letterhead. Mr. Daniel said he agreed, but maybe the Fire Marshall did not have any. He stated he did not write it.

Mr. Daniel read from Code Section 1302(10) (B) the board shall grant the permit if all of the following criteria are met: the anticipated public and private benefit of the proposed activity exceeds its anticipated public and private detriment. He referenced 28.2-1308 which said approval was pursuant to Ordinances and Guidelines. He said that ecological impacts were considered for all permits. He said the model ordinance had not changed since 2004 when it was approved by the Wetlands Board. He stated that there was no finding of ecological significance of these specific wetlands in any of the former approvals by the Wetlands Board. He read Wetlands Mitigation Regulation-Compensation Policy 4VAC 20-390-10. He stated that if it did not meet one of those requirements then it must be denied, but it did meet all the criteria. He explained that an alternative site was considered, but a deal was made for that property to not infringe on the functional wetlands. He said the alternative site would require dredging. He said that a permit has been issued for the subaqueous impacts with respect to the superyacht facility. He said now there was an article in the Virginian Pilot that read, Norfolk Wetlands Board denied the fire lane that was needed to access the Super Yacht Facility for emergency. He said this makes it water dependent, which goes from 45% to 60%. He said they are requesting that the Commission reverse the Norfolk Wetlands Board decision. He said if it were remanded it would cause this to continue. He said a reversal would reconfirm the January 22, 2008 decision by VMRC.

Commissioner Travelstead asked for questions. There were none. He asked if support comments should be heard, which would open the record.

Mr. Daniel said no to opening the record and to stay within the bounds of the record. He requested rebuttal time.

Associate Member Schick asked if the change in zoning was pushed by the applicant. Mr. Daniel responded not to his knowledge. Mr. Daniel said the change from the Boatel/dry storage project to the Super Yacht project was a change in zoning, and he stated that he did not know who initiated it, and that it was a two year process. He added it was finally approved in 2008.

Associate Member Tankard asked what a super yacht facility was. Mr. Daniel said it was to provide at least 120 feet of space for a Yacht and allow the applicant to compete in the market. Associate Member Tankard asked if this was for temporary layover. Mr. Daniel said it was for temporary layover.

Associate Member Sessoms asked if the Rudee Bridge limited the size of the boat. Associate Member Schick stated there was limited super yacht space until you get to Washington DC.

Associate Member Palmer asked if the site had not been excavated would the area have been considered wetlands. Ms. Woodward said yes. Associate Member Palmer asked about the wetlands in that location. Ms. Woodward said that if it had not been excavated the area would still be highland.

Commissioner Travelstead asked if the City representative wished to comment.

Adam Melita, City Attorney, asked that the record be opened. Commissioner Travelstead asked if it was information not in the record. Mr. Melita said it was some of Mr. Daniel's comments.

Paul Kugelman, Assistant Attorney General and VMRC Counsel, said that the Commission must vote on opening the record and Mr. Daniel can be allowed to cross examine on the new evidence.

Associate Member Fox asked if this was to open only one item. Commissioner Travelstead stated it was up to the Commission.

Mr. Daniel said he did not object if it dealt with the wetlands permit for 3,720 square feet, which was the issue here.

Mr. Melita said it was about the Planning Commission's proceedings regarding information from the applicant about the Fire Marshall's request.

Commissioner Travelstead requested a motion.

**Associate Member Tankard moved to open the record, but to keep it specific to this issue. Associate Member Fox seconded the motion. The motion carried, 6-0.**

Mr. Melita was sworn in and his comments are a part of the verbatim record. He said he wished to correct the record for Mr. Schick's question regarding the chronology for the permit and the Fire Inspector's request. He said in 2007 the original permit proposal was heard by the Wetlands Board and upheld in 2008 by VMRC. He referenced a new site plan that was included in the record, close to the end of the package. He said there was no representative at the Planning Commission meeting from the City Fire Marshall's office or anyone from the City requesting anything along the lines of a fire lane. He said the zoning approval, which was for a slightly difference project than what was approved by the Wetlands Board in the 2007, was granted at the end of 2009. The fire lane does not appear in the 2007 Wetlands Board permit. He said that an application modification was approved by the Zoning Board, but not the Wetlands Board. He said the December 13, 2011 letter from the Fire Marshall was signed by Mr. Wallace.

Kevin DuBois, Wetlands Board staff, was sworn in and his comments are a part of the verbatim record. Mr. DuBois said he wanted to answer Mr. Fox's question regarding the Fire Marshall's letter.

Commissioner Travelstead asked Counsel if this was a new record. Mr. Kugelman said a motion to open the record was necessary. Mr. DuBois stated it was to correct the record.

**Associate Member Fox moved to open the record. Associate Member Tankard seconded the motion. The motion carried 6-0.**

Mr. DuBois stated the statement was prepared by the applicant, but signed by the Fire Marshall.

Associate Member Palmer asked if it was WayneWallace. Mr. DuBois responded yes.

Associate Member Fox asked if the Fire Marshall did sign it. Mr. DuBois responded yes.

Mr. Kugelman asked if it was a fabrication? Mr. DuBois said Mr. Marshall admitted to signing it, but not writing it.

Mr. Daniel stated that Chief Wallace did sign it and not under duress.

Associate Member Tankard asked if the Planning Commission heard about the letter dated September 13, 2011. Mr. DuBois explained that there was a lot of discussion on what was planned and whether it was water dependent or not. He said they were asked if they can show that it was water dependent and this was made a part of the record for the April 2012 hearing.

Commissioner Travelstead asked if for any rebuttal testimony by Mr. Daniel.

Carl Eason, attorney for the East Beach Homeowner's Association, requested time to speak.

Mr. Daniel stated that this would be opening the record. He said the only parties involved in the appeal now are the appellant and the City. Mr. Kugelman read from Code Section 28.2-1312, that no additional evidence can be taken that is outside of the scope of the review. Commissioner Travelstead announced the board agreed.

Mr. Daniel said he was done and Mr. Melita did help with the chronology. He said nothing had been heard advocating ecological significance of the wetlands. He would argue that the criteria had been met and there were multiple approvals. He asked the Commission to consider a reversal of the Wetlands Board's decision.

Commissioner Travelstead stated the matter was before the Commission.

Associate Member Schick said when it heard in 2008 by VMRC, they upheld the Wetlands Board decision and he did not see that anything had changed. He said the Wetlands Board decided to approve this because the wetlands were not of any value and non-functional. He stated that these were man-made wetlands. He said it was right to do as the zoning was approved. He said they have every right to develop to the highest and best use of the zoning regulation, which was put upon them, not at their request, and it was a need facility in the region. He stated there was no reason for further action by the Wetlands Board.

**Associate Member Schick moved to overturn the Wetlands Board decision and not remand it back to them. Associate Member Palmer seconded the motion.**

Associate Member Tankard stated that from the transcripts that Mr. Eason made some logical arguments with respect to questions surrounding the water-dependency associated with this development and there were some questions surrounding the timeline and how decisions were made. He said the applicant had a new plan in 2008 and the Planning Commission approved it in 2009. He said in the deliberation there was meager discussion. He said the staff recommendation included remanding it back to the Wetlands Board and it was their City and they would know best. He said from the testimony there was more going on here.

Associate Member Fox said he agreed with Mr. Tankard's suggestion that it be remanded. He agreed also with Mr. Tankard that there was meager discussion by the Wetlands Board. He said the Wetlands board could change their mind, if they were to see more reasons for the change. He said he agreed to it being remanded and to give the City another shot at it.

Associate Member Sessoms said he could understand the frustration of the applicant and if it goes back to the Norfolk Wetlands Board can the applicant come back quickly if the

City maintains its prior decision. Mr. Kugelman said the Commission must understand that if goes back and is heard, they can come back and appeal it to VMRC. He stated that there was no quick way to expedite an appeal.

Mr. Kugelman stated an appeal would have to be heard in two months.

Mr. Watkinson said the Wetlands Board would have to go through the same public review notice and hearing. He said it can be appealed in accordance with the Code and heard by the Commission in 45 days, but the Wetland Board would have 60 days from receiving a complete application.

Associate Member Schick said the applicant should not have to do this as the fire lane caused the modifications. He said the Norfolk Wetlands Board made a good decision, but did not consider the fire lane and its water dependence. He still says the Commission should reverse the decision.

Associate Member Palmer said he had been to the site, and that it is not what he would consider wetlands because they did not exist prior to the Sea Belle being there, and the Commission needs to consider it now and be done with it.

Mr. Watkinson said the staff recommended conditions should be included in the Wetlands Permit and this should be added to the motion.

Commissioner Travelstead explained the motion was to overturn the Wetlands Board decision and to approve the permit with the conditions stated by staff.

**The motion carried, 3-2. Associate Members Fox and Tankard both voted no. Associate Member Plumlee recused himself for the hearing. Associate Member Laine had left during this hearing.**

No applicable fees – Wetlands Appeal

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- 7. CELEBRATE VIRGINIA NORTH, LLC, #00-1816**, requests authorization to extend their permit authorizing an aerial gondola crossing of the Rappahannock River, approximately one (1) mile west of the Interstate 95-bridge in Stafford County and the City of Fredericksburg for an additional five (5) years.

Juliette Giordano, Environmental Engineer Sr., gave the presentation with slides. Staff reviewed the information provided in the evaluation. Her comments are a part of the verbatim record.

Ms. Giordano explained that the Celebrate Virginia development includes a northern component in Stafford County and a southern component across the Rappahannock River in the City of Fredericksburg. Celebrate Virginia, North, LLC is a proposed master-planned community development to be situated on 1,642 acres in Stafford County. The three primary components of the northern development include an 85-acre commercial development along State Route 17, an 830-acre corporate office facility, and a tourism resort featuring three 18-hole golf courses on 650 acres along the Rappahannock River. Celebrate Virginia, South, is the mixed use development planned on the southern bank of the Rappahannock River in the City of Fredericksburg. The primary proposed components of this development include an entertainment district, a water park resort, a National Slavery Museum, residential subdivisions, and a convention center.

Ms. Giordano said that the proposed aerial gondola crossing over the Rappahannock River will offer an alternative means for patrons to travel between the golf resort and commercial/corporate establishments on the Stafford County side and the mixed tourism/commercial/residential development on the City of Fredericksburg side of the Rappahannock River. Existing bridge crossings over the Rappahannock River include the I-95 bridge crossing and the Falmouth Bridge (Route 1) crossing in the City of Fredericksburg east of I-95. The gondola will provide an alternate crossing of the Rappahannock River and serve to ease congestion on the primary roads for citizens traveling between the Celebrate Virginia developments on either side of the river.

Ms. Giordano noted that the original Joint Permit Application (JPA) was received September 28, 2000, and the application was deemed complete in January 2001. The application was subjected to VMRC's standard public interest review process and the Commission approved the permit at their May 28, 2002, meeting.

Ms. Giordano stated that the permittee has requested three (3) permit extensions to maintain an active permit. Poor economic conditions have prevented them from constructing the gondola to date.

Ms. Giordano said that the permit is scheduled to expire on May 28, 2012, which will be ten years from the original date of issuance. Staff has a long-standing policy not to administratively extend permits beyond ten (10) years. Our rationale for the ten year maximum permit life is due to the likelihood that after ten years environmental conditions and other factors associated with a project may have changed, warranting the re-evaluation of the proposal. Accordingly, staff cannot administratively extend the permit beyond the current expiration date.

Ms. Giordano said the permittee has confirmed that the project's Army Corps of Engineers permit (NAO 2007-692) and their Department of Environmental Quality permits (VWP #00-1816 and VWP #07-0245) are active and have not expired. The permittee has also confirmed that they are in good standing with the holders of several

conservation easements for the gondola crossing to include the Virginia Outdoor Foundation, the Northern Virginia Conservation Trust, and City of Fredericksburg.

Ms. Giordano noted that subaqueous permits are generally issued for three years with the option for a permittee to extend the permit up to a maximum of ten years, provided the permit does not expire before the extension request. At the end of ten years, if the project has not been completed, the permittee must typically re-apply and the proposal is subjected to a new public interest review.

Ms. Giordano said that the Celebrate Virginia, North, LLC permit has reached its ten year maximum life, and staff would typically recommend the permittee re-submit a new JPA and subject the project to another public interest review. The permittee, however, has demonstrated that the additional state and federal permits are active and that they remain in good standing with the easement holders neighboring the project. Staff has also confirmed that site conditions at the proposed gondola crossing remain unchanged from the original date of the permit. The permittee continues to agree with original terms and conditions of the current permit. Thus, staff recommends that the Commission approve the five-year extension request and authorize a new permit expiration date of May 28, 2017. Staff also recommends that this be the final extension permissible under the original permit. Staff feels that a new JPA and public interest review would be prudent should Celebrate Virginia, North, LLC, not complete construction of the gondola crossing before the expiration of this permit extension.

The applicant did not comment. There were no public comments.

**Associate Member Palmer moved to accept the staff recommendation. Associate Member Tankard seconded the motion. The motion carried, 5-0.**

No applicable fees – Request for Permit Extension

Mr. Watkinson asked the Commission if they felt the staff procedures to normally only issue extensions up to ten years was appropriate, but if there were unusual circumstances for an extension beyond that time they could be brought to the Commission for action. Commissioner Travelstead agreed this process was appropriate.

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- 8. **LLOYD C. RIGGS, JR., Notice to Comply #12-03.** Review of the unauthorized expansion of the “Ram Island Clubhouse” including a second story, power poles and power line, and attached decking and piers located in a section of Back Bay, generally east of Shipps Cabin Road in the Pungo area of Virginia Beach.

Chip Neikirk, Deputy Chief, Habitat Management, gave the presentation with slides. Staff reviewed the information provided in the evaluation. His comments are a part of the verbatim record.

Mr. Neikirk explained that on September 30, 2011, the Virginia Coastal Program of the Department of Environmental Quality (DEQ) forwarded a complaint to VMRC related to what appeared to be a residential structure under repair/construction in Back Bay. A local citizen had originally complained to the Back Bay National Wildlife Refuge. The Refuge forwarded that complaint to DEQ, and then DEQ contacted our office. The complainant identified the facility as the old Ram Island Gun Club and stated concerns with a lack of local approval for ongoing repairs and expansions, and raised questions regarding appropriate wastewater disposal. The complainant also advised that the structure was being rented to tourists.

Mr. Neikirk said the structure is located on the western side of Back Bay, in an area locally known as the old Princess Anne County region of the City of Virginia Beach. This southern region of Virginia Beach is much more rural than the northern region of the City, and development even along the shorelines of Back Bay is not very intense.

Mr. Neikirk stated that from the information staff has gathered, the original hunting club existed in some basic form since around 1900, built apparently on some semblance of a small marsh island. Over time the marsh island apparently eroded away, leaving behind an open-pile structure that has changed ownership several times, eventually evolving into more of a residential type structure that exists today. A review of the City's archived aerial photographs, with the earliest ones dating back to 1937, indicate the presence of a physical structure; however the structure appears to be surrounded by water. Subsequent photographs from the 1940's and 1950's also reveal similar conditions of a freestanding structure in the Bay. If in fact the structure was built on a marsh island around the turn of the 20<sup>th</sup> century, it appears that the island had eroded away by 1937.

Mr. Neikirk said staff was not previously aware of the structure and immediately started to inquire about the facility and its location. The City of Virginia Beach provided Mr. Kevin Riggs' contact information as the person responsible for the structure (it was later revealed that Mr. Lloyd Riggs, Jr., Kevin's father, was the actual owner).

Mr. Neikirk said that staff initially contacted Mr. Kevin Riggs in early October of 2011. Mr. Riggs identified himself as the owner/representative for the structure, stating that his family purchased the facility around 2004. He stated the facility was primarily used by the family for their private use, but did admit that it had been rented to the public in the past. He indicated that the house had water service from a well under the structure and had a toilet and sinks that he thought emptied into an underwater septic tank. Mr. Riggs later advised that he had no permits or approved plans for the second story which was being built to enclose a previously existing second level deck.

Mr. Neikirk explained that by letter dated October 24, 2011, staff requested numerous details regarding the history and use of the structure. The correspondence specifically detailed the Commission's jurisdiction over State-owned submerged bottomlands since 1962, indicating that any additions after that date would have required Commission authorization. Mr. Riggs was asked to provide all details, plans, and associated permits to the Commission within 15 days. Mr. Riggs was also advised to halt all construction on the facility until further information was provided, and that staff would attempt to coordinate a site visit to view the structure.

Mr. Neikirk stated that on November 17, 2011, staff viewed and photographed the structure by boat with a Department of Game and Inland Fisheries representative after previously advising the Riggs family of the visit. Staff noted that a second story was currently under construction, and that the first level of the facility appeared storm damaged. The first level also had decking on all four sides with longer access piers and pilings that formed multiple slips on the western side. A portion of the connecting overhead power line (extending to the north and connecting to the Shippo Island Clubhouse property) was hanging very low above the water level. Mr. Kevin Riggs met staff at the boat ramp immediately after the visit. He expressed concerns and frustration that our inquiries were causing other agencies and the City to look more closely at his structure. He also did not seem willing to accept the concept of State-owned submerged bottomlands, arguing that all actions associated with the use and construction of the facility were "grandfathered in" given the age of the facility and its location and condition when his family purchased it. Staff reminded Mr. Riggs to please provide the requested response to our letter from October 24, 2011, and we advised him that we were trying to coordinate with other regulatory agencies to sort out jurisdictions and permit requirements.

Mr. Neikirk explained that staff normally coordinates new applications and compliance matters with other regulatory agencies and contacted the local Virginia Beach Health Department and the Department of Environmental Quality specifically regarding the water use and wastewater disposal issues. Initially, it seemed as though both agencies were unsure of what enforcement options were available. After numerous conversations with several local and Richmond Health Department representatives, the Health Department ultimately determined that they would have no involvement, as there was no specific on-site upland system that was failing. The Health Department identified the local Virginia Beach DEQ office as the agency responsible for addressing a potential sewage "point-discharge" into Back Bay. Although DEQ had initially indicated they would not be involved with a review of this matter, in December of 2011 they met with the Riggs family and required that the structure's bathroom toilet be removed and replaced with a self-contained, camping-style toilet, from which the contents would be transferred to the upland for proper disposal. The DEQ did not inspect the replacement of the toilet, but they received an e-mail and pictures from Mr. Kevin Riggs stating that it had been replaced on January 27, 2012. The DEQ further advised staff that they were not

concerned with the overboard disposal of “grey-water” from the facility’s shower or sinks.

Mr. Neikirk said that while initially reviewing this matter with the City of Virginia Beach, the Permits and Inspections Department determined that this matter should be reviewed by the Virginia Department of General Services (DGS) located in Richmond, given that the structure was actually located over State-owned property, and not City-owned or private property within the City of Virginia Beach. Contact with DGS confirmed that their agency would essentially serve as the building inspector for the structure as it exists on State-owned lands, similar to their inspection and approval process for State Park facilities. In February of 2011, having received no written response or plan-details from the Riggs family, staff attempted to coordinate a second site visit including the Director of the Division of Engineering and Buildings of the DGS, Mr. Bert Jones. Upon contacting Mr. Kevin Riggs to inform him of a visit, Mr. Riggs stated that his family did not need to answer any further questions from the Commission. He argued that the City, the DEQ, and the local Health Department had no further concerns or requirements, and that his research had concluded that the structure stood over private property, granted by the Governor of Virginia around 1880. Staff requested that Mr. Riggs submit such evidence and / or copies of any deeds or surveys for the Commission to review. During a meeting on February 6, 2012, Mr. Riggs provided copies of a 2004 Deed of Sale, an excerpt of a 1914 Governor’s land grant document, and an excerpt of an 1879 Governor’s land grant document. Staff immediately forwarded those copies to the Attorney General’s office for review.

Mr. Neikirk noted that on February 17, 2012, Division Chief Tony Watkinson sent the Riggs family correspondence advising of the State’s position related to the submitted deeds. Mr. Watkinson advised that in accordance with advice received from Assistant Attorney General, Mr. Paul Kugelman, Jr., the submerged bottomlands immediately under and surrounding the Ram Island Clubhouse structure belong to the Commonwealth of Virginia since the upland/marsh land associated with “Ram Island” had previously eroded away, and as such, the Commission has jurisdiction over those submerged lands. Portions of Mr. Kugelman’s legal advice were included in the correspondence. The Riggs family was further advised that a second site visit would occur on February 24, 2012, to help gather information regarding the dimensions and the condition of different components of the structure. The Riggs family was invited to attend the site visit scheduled for February 24, 2012. They were further advised that the Commission would continue to pursue enforcement procedures to bring the structure into compliance. Also in the letter, we again requested the details of the history and use of the structure, including plan drawings that we had previously requested in our October 24, 2011 correspondence.

Mr. Neikirk said that on February 24, 2012, staff visited the site by boat to collect photographs and approximate dimensions. On board the marine police boat were Officer Bob Park, Deputy Chief Chip Neikirk, Engineering and Surveying Chief Ben Stagg,

Environmental Engineer Justin Worrell, and Bert Jones from DGS. Mr. Lloyd Riggs and his son, Kevin Riggs, had initially agreed to accompany staff by boat; however, Mr. Kevin Riggs called while we were in route to the boat ramp and said he would not be available. While circling the facility by boat, staff utilized GPS instruments to obtain approximate dimensions of the structure, attached docks, and the existing power line and poles. Staff observed that certain portions of the first level structure appeared to be unlevel and damaged. Staff also observed that a portion of the power line was hanging down extremely close to the water. Officer Park did not even attempt to navigate under the line that was hanging down approximately 6 – 8 feet above the water's surface. Staff noted that construction of the second story had continued since the previous visit in November, 2011.

Mr. Neikirk explained that near the end of the inspection, Mr. Bert Jones of DGS stepped out onto an existing finger pier while attempting to collect a measurement and inspect a corner support pile. Immediately, Mr. Kevin Riggs came down from the second story addition confronting Mr. Jones and accusing him of trespassing. He advised that he had called the City of Virginia Beach Police to meet us all at the boat ramp and to arrest us for trespassing. He also advised that he had someone "watching" us from land. Mr. Lloyd Riggs then immediately came to the structure by boat and picked up Mr. Kevin Riggs. Once back at the ramp, Officer Park and the Virginia Beach Police helped to diffuse the situation and attempted to calm Mr. Kevin Riggs. After explaining the purpose of the visit, and the authority of the Virginia Marine Resources Commission and the Department of General Services, the City Police declined to arrest anyone. Both Mr. Lloyd Riggs and Mr. Kevin Riggs were advised that they would soon be receiving correspondence with further instructions.

Mr. Neikirk stated that a Sworn Complaint was prepared on March 7, 2012, pursuant to the February 24<sup>th</sup> site visit. The Sworn Complaint specifically denoted all of the exterior components of the facility that appear to have been added since approximately 1990 (based on known aerial photography) without Commission authorization. The Sworn Complaint also specifically references the unauthorized overhead power line and poles connecting to the nearby "Shipp's Cabin Lodge" upland property.

Mr. Neikirk said that a Notice to Comply was also issued on March 7, 2012, and directly served to the Riggs family by Officer Jeff Copperthite later that evening. The Notice to Comply itemizes the unauthorized components associated with the facility and explains that since no previous records of Commission authorization exist, all expansions and attachments to the original one-level "Ram Island Clubhouse" after 1962 are now considered to be violations pursuant to Section 28.2-1203 of the Code of Virginia. The Riggs family was again instructed to immediately cease all construction and remove all unauthorized components within 30 days. An option was provided to submit an after-the-fact Joint Permit Application for the unauthorized components with the exception of the overhead power line, as that is considered to be an immediate navigational and safety

hazard. Such an after-the-fact application would have to be submitted within 30 days and must include all plans and details as requested in previous agency correspondence.

Mr. Neikirk stated that after visiting the structure the DGS decided to delegate inspection and building code enforcement duties to the City of Virginia Beach. On May 9, 2012, the City of Virginia Beach Permits and Inspections Administrator, Cheri Hainer, issued a Notice of Violation to Mr. Lloyd Riggs for construction without permits. The City detailed the past history of complaints regarding the activities at the structure (dating back to February 2010), noted that no permits have been issued for any construction, and identified the structure as being advertised as a summer rental residential dwelling with no certificate of occupancy. The City further acknowledged that the State's Building Official from the DGS had delegated authority to the City for all building code related enforcement on the structure existing over State-owned property. Given that the structure is currently being used and occupied as a dwelling unit, the City will now require a full site plan review, including a review and approval by the Health Department for potable water access and approved sewage treatment. Ultimately, the City advised the Riggs family that no further work is to be completed to the structure, and that "the structure is not to be occupied until all appropriate agency and department reviews have been approved, permits have been issued, and where applicable inspected and approved and a certificate of occupancy is granted."

Mr. Neikirk stated that it should be noted that staff has learned of recent rental advertisements for this structure on-line and in outdoor-oriented publications. A three-bedroom, two-bath "Lodge on Back Bay" was advertised for rent in the April 2012 issue of Woods and Waters Magazine. Also at the same time, a two-bedroom, one-bath "Tranquil Retreat Located in Back Bay" was advertised on the Vacation Rental by Owner website. Within the details of this online listing, it appears that past rentals of this structure date back to at least 2008. Both advertisements included the same picture and phone number and also offer boat rentals.

Mr. Neikirk explained that investigating complaints of unauthorized construction and/or activities over State-owned submerged bottomlands is never a simple and straightforward process. While staff was not previously aware of the existence of the "Ram Island Clubhouse," once the information was conveyed to our agency, we investigated and researched the claims just as we would have any other complaint. Unfortunately in this matter, the owners of the structure have not cooperated with staff, and they have refused to provide requested information and plans and have even accused the agency of planning to take control of their structure. On numerous occasions, Mr. Kevin Riggs specifically advised staff to "let the matter go," and to stop coordinating a review of the matter with the City and other agencies. Mr. Kevin Riggs became increasingly aggravated with our investigation of the matter and even refused any such access to the facility for the simple purpose of measuring its dimensions. While the Riggs family is likely frustrated and concerned by this investigation, their lack of cooperation has made the investigation and potential resolution more difficult and complicated.

Mr. Neikirk said that for approximately eight months, the Riggs family has chosen not to provide the information requested or respond to the directions of Commission staff which is further complicated by their ongoing construction of the unauthorized second story, and their refusal to provide any details regarding the history and use of the structure. In addition, the Riggs family chose not to submit an after-the-fact application for recently constructed portions of the facility, and they have not removed the hazardous overhead power line as specifically directed. While we did receive a call from Mr. Kevin Riggs that he would respond to our Notice to Comply we have only received a letter from his attorney Mr. John Daniel asking the Commission take no enforcement action on this matter for four months so that they may research title information and issues associated with the structure. In a follow up conversation with Mr. Daniel we had offered to consider deferral of the matter if the power line was removed in two weeks, but that was not accepted.

Mr. Neikirk said that regardless of the actions taken by sister agencies and the City's final actions, the Commission is responsible for authorizing encroachments over State-owned submerged lands. Based upon advice provided by Assistant Attorney General, Paul Kugelman, Jr., the structures and power line are located over State-owned submerged land. In accordance with Chapter 12 of Section 28.2 of the Code of Virginia, the structures either need a Commission permit, or they need to be removed. Staff recognizes the fact that the original one-level Ram Island Clubhouse structure pre-dated VMRC's assumption of subaqueous permitting authority in 1962. As such, we are not recommending the removal of that basic structure, however since an after-the-fact application has not been received, we are recommending removal of all components and additions, including the attached power line, installed after 1962 require Commission authorization.

Mr. Neikirk explained that it is clear to staff, and apparently the City of Virginia Beach, that this entire facility is being used as a commercial rental facility - a commercial facility that has no permits for any recent additions or expansions, and has no local approval for occupancy. It is also clear that the Riggs family is currently attempting to rent the facility based on current advertisements in publications and on the internet. However, the City of Virginia Beach clearly stated in its recent Notice of Violation that there is to be no occupancy of the structure whatsoever.

Mr. Neikirk said that staff has been very patient with the Riggs family while attempting to resolve the violations related to this commercial structure, its use, and connected power line. Unfortunately, since the Riggs family has chosen not to abide by the requirements of the Notice to Comply, nor submit an after-the-fact Joint Permit Application, staff must recommend that the Commission find the Riggs family in violation of §28.2-1203 of the Code of Virginia, and that the resolution of this matter be referred to both the Attorney General's Office to seek compliance with the Notice to Comply through the appropriate court, including possible civil penalties. Staff specifically recommends requiring the immediate removal of the second story addition, the associated decking on all sides of the

structure, and the overhead power line and poles. Even if the Riggs are able to demonstrate to the satisfaction of the Office of the Attorney General that they own the submerged lands under the structure or a court subsequently finds they own the submerged land, unless such private ownership of the submerged bottomlands also included the area immediately under the existing power line, the safety hazard of the line should be immediately addressed and removed. Given the time which has elapsed since our investigation began and the fact the City has declared the structure uninhabitable, staff does not believe it is appropriate for the Commission to postpone enforcement of this matter while the owners conduct title research. Should the Commission determine that some additional time should be provided to conduct such research, staff would still recommend the matter be referred for enforcement action and the Commission could request that the Office of the Attorney General withhold initiating enforcement measures for a period of time deemed appropriate by the Commission.

Commissioner Travelstead asked for questions. There were none. He asked if the applicant or his representative were present.

John Daniel, Attorney for the applicant, was present and his comments are a part of the verbatim record. Mr. Daniel said he was shocked to be standing before the Commission today because the letter regarding the hearing was only received last week. He said he met the Riggs about three weeks ago and noted that the property is a vacation place. He said the staff report was riddled with assumptions and presumptions that are not true and that the presentation presents the applicants as the “Bonnie and Clyde” of subaqueous lands. He said they are standing on principle and that they may have been unresponsive to the Commission for that they apologize. He read a portion of a letter from the Department of Environmental Quality (DEQ) thanking the Riggs for addressing an issue regarding sewage disposal. He said the Riggs were not obstructionists or against government authority. He said he met with staff and Mr. Kugelman and talked about the issues which all revolve around the issues of ownership. He explained that staff said that when the island had eroded away it became the Commonwealth’s property. He said that all of the issues have to do with ownership. He stated that the Riggs have a deed and a chain of title that goes back to a Governor and that means something. He said he was not sure exactly what it means but noted that the Code mentions both crown grants and special grants. He said they were asking for time to establish the ownership of the property. He added that the Riggs believe that they own it and they need an expert to trace back the ownership. He said the problem here is the presumption that the State owns the property according to the staff’s analysis of the statutes. Mr. Daniel noted that the Commission staff did not consult with the Office of the Attorney General until February. He said the presumption that it was owned by the Commonwealth was wrong. He said the City has told him he cannot occupy property. He said there was an assumption that it is commercial property but it has not been rented for 2 ½ years. He said the Riggs had no idea the property was still being advertised in a local publication. He said they did post it on the internet in hopes of paying Mr. Daniel. He told them not to pay him and to take the advertisement off the internet. He said it was not commercial

property and the Commission just presumed it. He said they agree that the power line is a hazard that needs to be resolved. He said there had been power to this property for 70 years the power was cut off because the Commission got involved. He noted that Mr. Riggs had called for a work order to repair it. He said Mr. Riggs may very well own the property. He acknowledged that everything had just gotten off on the wrong foot and said the staff is likely as frustrated as his clients but no one knows who owns the property. He cited a Supreme Court case called *Jenkins v. Bayhouse Associates* which involved a special grant from the Governor and issues regarding "The Commons". He noted that Bart Theberge from VIMS was an expert witness in the case.

Paul Kugelman, Assistant Attorney General and VMRC Counsel asked for the citation for that case. Mr. Daniel said it was #266-VA39. He said they need more research to establish ownership before the City and State take action and presume ownership by the State. He said he did not know how long it would take, but all they wanted to know was who owned the property. He asked the Commission not to jump to conclusions based upon an assumption of ownership. He said he would be happy to work with Mr. Kugelman to research the ownership issue.

Commissioner Travelstead asked what their plans might be to address the hazard presented by the power lines. Mr. Daniel stated that he felt Dominion Virginia Power has the authority to set a pole without a permit.

Mr. Kugelman noted that Dominion Virginia Power would actually need a permit to install a pole on State-owned bottomlands.

Associate Member Schick asked if Mr. Daniel stated that power has been provided to the facility for 70 years. Mr. Daniel responded yes, before the Commission. He said they are willing to participate in any solution.

Commissioner Travelstead said if they were to be allowed four months to conduct the title search it would be with the understanding that the hazard must be removed. Mr. Daniel asked why it could not be repaired instead of being removed. Commissioner Travelstead said that repairing the line would eliminate the hazard. Mr. Daniel said the cost has changed to move the meter and it would cost \$2,500.00. He said the Riggs are willing to risk the payment to address the power line with the belief that the title search will prove them to be the owners. He said they would have a pole set, the line repaired and a meter added. Commissioner Travelstead questioned whether they felt the ownership may include the area of the power line. Mr. Daniel said there may be a crown grant that covered that much of the area and that is where the information is lacking.

Commissioner Travelstead asked for questions. He said he had been willing to allow the four months to do the necessary title work and that he had asked staff to make that offer if they agreed to remove the power line hazard that would still exist while the title research was conducted. He said it may be appropriate to still make that offer and allow the power

line hazard to be addressed in some other way. He said the Commission will need to decide how long to allow for the title search, 6 months or probably less.

Associate Member Sessoms said he was familiar with the area and felt it would be appropriate to allow the line to be tightened up to a height, determined by Dominion Virginia Power. He suggested most boats in that area are less than 10 feet in height. He suggested four months would be appropriate for the title research.

Mr. Daniel said he did not know how long it would take, one or two months might be appropriate. He said they would do their best to have the research done in one month and then share the information with the VMRC Counsel to try and resolve it before coming back to the Commission. Mr. Kugelman said the applicant would do the title search and share the information with him. He noted that the State does presume ownership unless shown otherwise. He said the grant would have to convey more than just land and that the State would own bottom unless the grant conveyed otherwise. He added the power line still remains an issue and he suggested they need to check with the U. S. Coast Guard. Mr. Daniel said that they would take care of the power line hazard.

**Associate Member Schick moved that the Commission allow two months for the title research and to repair the line without installing new poles by tightening it up. His motion also directed the placement of signs with the elevation on it and reflective tape placed on the poles. Associate Member Tankard seconded the motion. Mr. Daniel said it would take time and he appreciated the change of mode. Associate Member Schick said they wanted to keep the cooperation going. Mr. Watkinson suggested there should be a time frame for getting the line raised. Mr. Daniel suggested 21 days. Associate Members Schick and Tankard both agreed. Associate Member Schick suggested getting the marking done as soon as possible, at least before the Memorial Day weekend. Mr. Watkinson clarified that this was approval for the repair and not a permit or final decision on the power line. He said Code Section 28.2-1200 said action needed to be taken.**

Commissioner Travelstead stated the motion was to grant the Riggs two months for the title search and that information would be shared with the Commission's Attorney, they would have 21 days to elevate the power line to a safe level, and signage to be done as soon as possible.

Associate Member Fox stated that the Commission would know something by the July meeting. Commissioner Travelstead responded yes. He stated he was not sure if it would be on the July meeting however.

**The motion carried, 5-0.**

\* \* \* \* \*

**Commission Meeting**

9. **MR. and MRS. JON KIRKPATRICK, #11-0629**, request authorization to retain an unpermitted 27-foot by 12-foot closed sided, one story dock house over a portion of their pier situated adjacent to their property along Chesconessex Creek at 18192 Robins Lane in Accomack County. The applicants have also applied to retain a reconstructed private pier that now exceeds the statutory exemption under §28.2-1203(A) (5).

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

Mr. Badger explained that the Kirkpatrick's own a farm on the north side of Chesconessex Creek, 2.3 miles northwest of the Town of Onancock. The property has approximately 560 linear feet of shorefront.

Mr. Badger said that on May 4, 2011, staff received a Joint Permit Application (JPA) from JoAnn and Jon Kirkpatrick to replace and expand their existing pier and a small platform on the landward end of the pier adjacent to the bulkhead. The existing T-head would remain. The JPA drawings showed a boat house on the T-head that was only 10 feet deep with decking on three sides.

Mr. Badger stated that on May 16, 2011, staff conducted a field inspection of the project and determined that there was a 12-foot by 27-foot closed sided dock house on the T-head within VMRC's jurisdiction. A letter was sent to the Kirkpatrick's on May 24, 2011, asking them to provide any permit information they may have relating to the construction of the dock house. Staff also asked for plan view and cross sectional drawings of the dock house and decking, and the date the dock house was constructed.

Mr. Badger noted that Mr. Kirkpatrick did not reply until August 12, 2011. In that letter dated August 8, 2011, he stated that the pier and platform had since been replaced and that they did not have a permit for the dock house. He also stated that the dock house started out as an open-sided roof structure in the mid 1970's and was enclosed in the late 70's or early 80's to keep the bugs out. Mr. Kirkpatrick continued by stating a decision to build the dock house was not planned, it just evolved over the years and if they had thought a permit was needed back then they would have applied. The Kirkpatrick's hope the Commission will allow them to keep the structure given the many years it has existed and the fact that it is situated on their existing pier.

Mr. Badger said that a Notice to Comply was issued to Mr. and Mrs. Jon Kirkpatrick on October 27, 2011, which directed removal of the unpermitted closed-sided dock house and restoration of the pier to preconstruction conditions within 30 days. In lieu of removal of the dock house and restoration of the pier at this time, staff agreed to withhold further enforcement pending Commission review and action on the revised application.

Mr. Badger said that staff recently received a letter from Mr. and Mrs. Kirkpatrick dated May 9, 2012. In that letter, the Kirkpatrick's state they are willing to remove an abandoned crab shed that is located on Chesconessex Creek if the Commission allows them to retain their dock house. A \$10,000.00 quote to remove the crab shed has been received from a local contractor. They feel this could benefit both parties and serve to mitigate any adverse impacts associated with their structure.

Mr. Badger noted that the Health Department has stated that if there is any gray water created from the dock house, then the water would need to be either pumped back into the homeowner's septic system or the drain would need to be permanently plugged.

Mr. Badger said that Accomack County was unable to locate a building permit for the structure but they have stated that they do not plan to take any action concerning the lack of permits since the structure is over 30 years old.

Mr. Badger explained that the applicants after-the fact request has been subjected to a public interest review. No other State agencies have commented on the project. No protests have been received related to the project.

Mr. Badger said that when staff reviewed proposals to build over State-owned submerged land the Commission's Subaqueous Guidelines direct staff to consider, among other things, the water dependency and the necessity for the proposed structure. Furthermore, when considering authorization for such structures for private use, §28.2-1205 of the Code of Virginia stipulates that: "In addition to other factors, the Commission shall also consider the public and private benefits of the proposed project and shall exercise its authority under this section consistent with the public trust doctrine as defined by the common law of the Commonwealth adopted pursuant to §1-200 in order to protect and safeguard the public right to the use and enjoyment of the subaqueous lands of the Commonwealth held in trust by it for the benefit of the people as conferred by the public trust doctrine and the Constitution of Virginia."

Mr. Badger said that the Commission has wrestled with the issue of structures built over the water and the concept of water dependency for years. In fact, the Commission's first Subaqueous Guidelines developed in 1979 stated the Commission will consider the water-dependency of projects and alternatives for reducing any anticipated adverse impacts. At the July 22, 2003, meeting, the Commission considered and adopted a definition of water dependency that had been recommended by the Commission's Habitat Management Advisory Committee. That definition was subsequently included in the Subaqueous Guidelines adopted by the Commission in 2005. The definition states:

*"As defined by the Commission, water dependent means "those structures and activities that must be located in, on, or over State-owned submerged lands." When applying this definition, both of the following questions must be answered affirmatively:*

- 1. Is it necessary that the structure be located over water? and,*
- 2. Is it necessary that the activity associated with the structure be over the water?*

*Use of the definition for water dependency does not necessarily preclude issuance of a permit for non-water dependent structures over State-owned submerged lands. At public hearing, the Commission may determine that, while a structure is not water dependent, it is a reasonable use of State-owned submerged lands. These types of projects are evaluated on a case-by-case basis.”*

Mr. Badger noted that in at least two cases (Thomas C. Evelyn v. Commonwealth of Virginia Marine Resources Commission, October 25, 2005 and Stephan A. Palmer v. Commonwealth of Virginia Marine Resources Commission, April 4, 2006), the Virginia Court of Appeals has affirmed Circuit Court decisions upholding VMRC decisions to require removal of unpermitted structures that had been constructed on private, non-commercial piers.

Mr. Badger said that in the Evelyn case, the Court of Appeals held that “the governing statutes limit a riparian owner’s rights such that he may build, without a permit, only those structures “necessary” or essential to the placement of a private pier for the limited purpose of accessing navigable waters or vessels moored in those waters. The riparian owner may not build, without a permit, incidental appendages designed merely to enhance the primary purpose of the pier.” The case consisted of an unpermitted 10-foot by 24-foot roof/deck with stairs over the pier’s T-head.

Mr. Badger explained that the Palmer case involved the construction of an unauthorized 12-foot by 11-foot storage shed on Mr. Palmer’s pier. The Court of Appeals affirmed the Circuit Court of Mathews’ decision upholding the Commission’s order to remove the shed from his pier. In this case the Court of Appeals concluded that the evidence was sufficient to support the Commission’s denial of the after-the-fact request and specifically referenced the Evelyn case, the Public Trust Doctrine, the Commission’s Subaqueous Guidelines and their water dependency definition.

Mr. Badger said it is important to note that the Commission considers projects on a case-by-case basis and factors other than water dependency are considered during their deliberations.

Mr. Badger said that in 1999, the Commission initially denied an after-the-fact application by Mr. and Ms. Fairhurst to retain a 16-foot by 10-foot enclosed structure built on their pier without prior authorization. That project was appealed to the Circuit Court and remanded to the Commission for reconsideration. It was subsequently approved by the Commission during the October 23, 2001, meeting with triple permit fees and a civil charge in lieu of further enforcement action. This project was considered prior to the Commission’s adoption of their water dependency definition.

Mr. Badger stated that at the December 20, 2005 meeting, the Commission approved an after-the-fact request by Ms. Siegel to retain an enclosed living area constructed within a boathouse. The Commission approval was conditioned upon a prohibition on overnight occupancy/sleeping, heating and air conditioning, cooking appliances, running water and a fireplace. The approval was also conditioned upon the applicant and contractor's agreement to pay civil charges in lieu of further enforcement action.

Mr. Badger explained that in 2006, the General Assembly amended § 28.2-1203(5) of the Code of Virginia to provide a permit exemption for the construction of open-sided shelter roofs and gazebo structures measuring less than 400 square feet on private noncommercial piers, provided they are not prohibited by the locality and the adjoining riparian property owners do not object to the proposal. By doing so, the General Assembly appears to have expressed their opinion that such structures are a reasonable amenity to a private noncommercial pier in cases where such structures are allowed by local ordinance and the neighbors have not objected. More recently staff has issued permits for the installation of screens in such structures, provided solid walls are not constructed, and objections from the public have not been received. It is staff's opinion that the mere installation of screening does not significantly affect the view through the statutorily authorized open-sided structures and they allow for greater enjoyment of the structure by the property owner.

Mr. Badger stated that Mr. and Mrs. Kirkpatrick have suggested to the Commission a unique mitigation plan (the removal of an abandoned crab shed) however, staff cannot support their request. Staff believes the after-the-fact project should stand on its own merits. It is important to note that should the Commission decide to accept the applicant's offer to remove the old "crab shed" structure as some form of mitigation, § 28.2-1210 (A) of the Code of Virginia requires the Commission try and identify or locate the owner of the property. If after a diligent search the Commission cannot ascertain the identity, the Commission may have the property removed from State waterways after giving notice by publication once in a newspaper of general circulation in the area where such property is located.

Mr. Badger said that the replacement and expansion of Mr. and Mrs. Jon Kirkpatrick existing pier and a small platform on the landward end of the pier adjacent to the bulkhead exceeds the statutory exemption under §28.2-1203(A)(5) of the Code of Virginia, nevertheless staff could have administratively authorized the pier reconstruction and deck expansion. However, since the pier and platform was constructed before a permit was issued, staff believes even the approval of this portion of the request should include triple permit fees and a minimal civil charge.

Mr. Badger stated that with respect to the enclosed living area at the channelward end of the pier, staff continues to find it difficult to endorse this type of non-water dependent project or to recommend its after-the fact retention, even though the structure has been there for 30 years. Section 28.2-1203(A)(5) of the Code of Virginia now confers authority

to construct open-sided shelter roofs or gazebo structures on private piers provided the structure does not exceed 400 square feet and the adjacent property owners do not object. The Kirkpatrick's dock house roof does not exceed 400 square feet and the project is not protested. Therefore, the roof alone could be authorized under the above code section provided the sides were removed. If the sides were removed, staff could then also support the installation of screens in the open-sided roof structure.

Mr. Badger said that accordingly, in light of the Commission's decision to define water dependent activities or structures, legislative changes regarding the extent of reasonable size structures on piers, and court decisions related to non-water dependent structures, staff recommends that the Commission deny the after-the-fact request to retain the enclosed living space and direct the complete removal of dock house's closed sides and all non-water dependent utilities, equipment and appliances within 90 days. Staff recommends after-the-fact approval of the pier replacement and small platform with a triple permit fee given the after-the-fact nature of the request and contingent on the applicant's agreement to pay a civil charge of \$1000.00, based upon a minimal degree of impact and a minor degree of deviation, in lieu of further enforcement action. If the sides of the dock house are removed as recommended, staff further recommends the Commission authorize the screening of the remaining open-sided structure.

Mr. Badger added that should the Commission decide to allow any or all of the enclosed living space to remain, staff recommends such a decision be conditioned upon the Kirkpatrick's' agreement to pay a civil charge of \$9,000.00 based upon a moderate degree of impact and major degree of deviation. The civil charge would be in lieu of further enforcement action.

Commissioner Travelstead asked for questions.

Associate Member Palmer asked if there were other dock houses in the area. Mr. Badger stated no, but there was the crab shed in the creek.

John Poulson, Attorney for the applicants, said the applicants wanted to be totally cooperative and he provided a letter from the applicant as a handout for entering into the record. He said he represented the applicant. He had Mr. Kirkpatrick testify.

John Kirkpatrick, applicant, was sworn in and his comments are a part of the verbatim record. Responses to his attorney's questions: Mr. Kirkpatrick said he was a business owner and farmer in the area. He said that there was no commercial activity at this location. He said this was basically rural type property and not urban. He said he had approximately 550 feet of waterfront. He said his property was at the head of Chesconessex Creek. He said that there is very little commercial fishing activity or boating in the area and the boathouse is not used for any other use of the bottom. He said he purchased the property in 1971 and the existing dock was already there, which he redid in 1974 after doing some work to the house. He said in the early 80's he added the

dockhouse. He said this resulted from his mother-in-law enjoying the use of the dock, but complaining about the insects. He said they started with the A-frame and over the years added to it so that it was the way it is now. He said his two daughters store marine equipment in it. He said he did not apply for a permit back in the 70's and 80's because he did not know about any permits. He said he did apply for a permit from VMRC for some ditch work and found out he did not need a permit and did not completely ignore the permit procedure. He said in the spring 2011 he wanted to do some additional work to the dock and hired a professional marine contractor and he made the applications. He said the boathouse had been shown on the application. He said he probably would not have made the application for the project if he had known how complicated it was, but he was not trying to hide anything from anyone. He estimated the cost of the dock house to be \$35,000-\$40,000 and there is no sewage or bathroom facilities will be in it. He said he farmed his land and tried to be a good steward of the land. He said that south side Chesconessex is west of his property and there is an old abandoned crab shed in the area. He suggested that they remove the crab shed as mitigation if a permit were to be granted. He said the crab shed had deteriorated over the years and is located near the harbor, and staff has received complaints about it. He said he would be willing to secure a contract for its removal at a cost of \$10,000.00.

Commissioner Travelstead asked for questions.

Associate Member Tankard asked how much bigger was the shed then his boathouse. Mr. Kirkpatrick response was not audible

Commissioner Travelstead asked Mr. Poulson if there was any further comments. Mr. Poulson said that any comments from Mrs. Kirkpatrick would confirm what Mr. Kirkpatrick had already testified to.

Commissioner Travelstead asked for anyone present in opposition who wished to comment. There were none.

Mr. Poulson said he would like to make a few more comments. He said that staff had discussed some of the history of docks and boathouses. He had research other cases of docks and boathouses that had been approved by the Commission in the past. He provided photographs of some of them. He said the Fairhurst project was approved by the Commission because it was at the head of the creek and there was not much activity in the area. He said on the bayside there had been an octagonal dock house close to the Smithfield plant, which had been approved. He had pictures of others that had been granted permits. He said near his home there had been one that had been approved and the Siegel House which the Commission had been deceived about the scope of it was heard in November and December 2005, but was approved. He stated he had the minutes for both of those meetings. He said it was supposed to cost \$28,000, but actually ended up costing them \$175,000. He said when it was approved it done so with conditions that there would be no overnight occupancy or living facilities in it. He said in a recent case

the Commission approved a bar and café for a facility which was only to be used as a seafood receiving wharf. He provided articles about the final case. He said the Commission had approved projects that were non-water dependent and look at other circumstances to allow it. He said they had looked at unique circumstances in giving these approvals. He said in this case the structure had existed for 30 to 35 years, for private purposes only, no impacts to other users, no impacts to the environment or wetlands and there was 560 feet of waterfront surrounded by a farm. He added there had not been any protests. He said the applicants had been honest not hiding from anybody and thought they did not need a permit. He said it was through the hiring of a professional marine contractor that an application was made. He said it would have financial impact on the applicants to have to remove it. He said the staff recommendation was to allow them to keep it with a \$9,000.00 civil charge and if they have to they will pay it. He said they ask the Commission to allow them to keep it.

Commissioner Travelstead asked for questions. There were none. He stated the matter was before the Commission.

Associate Member Schick said he has long been opposed to allowing non-water dependent structures. He said that the structure has been there a long time and the applicants have not tried to hide anything. He said he would support them keeping it if they were to pay a fine, but no cooking, or overnight occupancy or restaurant would be allowed.

Associate Member Tankard said he had known the applicants for a long time and they were fair and honest people and if asked to do they will do it. He said he felt the Commission should take advantage of the alternative offered. The old crab shed was deteriorated and would continue to become more so, making it a hazard. He said from the slide it could be seen in the middle of everything. He said that he personally did fish in the area.

**Commissioner Travelstead asked if Mr. Schick was making a motion. Associate Member Schick stated he was but he wanted to add that if they are allowed to keep it there would be no cooking, overnight occupancy or restaurant. He said they would be required to pay the \$9,000.00 civil charge. He asked if they were allowed to do the removal of the crab shed was it acceptable. Commissioner Travelstead asked for a second. Associate Member Sessoms seconded the motion.**

Mr. Watkinson said that with the removal of the crab shed, staff could probably work something out with Mr. Poulson. He stated he felt that the applicants would have to bear the cost for advertising in case someone has a claim on the shed and he did not know as far a liability what it would mean in the future for the applicants. He said it seems that it could be done, but if it did not work it would go back to the \$9,000.00 civil charge to keep their structure.

**Commission Meeting**

Mr. Kugelman asked how much it would cost to remove the crab shed. Mr. Poulson said it was exactly \$10,600.00. Mr. Kugelman stated the maximum fine that the Commission could assess was \$10,000.00.

Mr. Badger noted that if you add the civil charge for the pier and dock the Commission could come out ahead with the removal of the crab shed.

Mr. Kugelman said he understood, but he was concerned if the Commission could do this. Mr. Poulson suggested calling it mitigation or whatever. Mr. Kugelman stated that he did not see why the VMRC jurisdiction would not allow this mitigation to be done.

Commissioner Travelstead said the motion was silent on the pier portion of the civil charge and the staff recommendation was for triple permit fees and a minimal civil charge.

Associate Member Schick stated the Commission could forego on pier civil charge and add the assessment the triple permit fee.

**Commissioner Travelstead said the motion was to include the triple permit fee and removal of the crab shed, but if not, then they would pay the \$9,000.00 civil charge for the building and \$1,000 civil charge for the pier. Mr. Watkinson stated this should be made a part of the motion. Associate Members Schick and Sessoms both agreed. Associate Member Palmer said he was concerned with the Back Deck Bar and Café (Virginia Beach) and if he could he would have required the removal.**

**The motion carried, 5-0.**

Permit Fee (ATF Triple).....	\$ 300.00
Civil Charge.....	\$9,000.00
Total Fees.....	\$9,300.00

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- 10. **MARVIN WILSON, #12-0120**, requests after-the-fact authorization to retain a 438 square foot enclosed gazebo with 7-foot 7-inch high screen sides, including several panels with 3-foot 6-inch high partial wooden walls, and two 7-foot 7-inch high full wooden walls adjacent to his property situated along the Potomac River at 2 Potomac View Lane in Stafford County.

Juliette Giordano, Environmental Engineer, Sr., gave the presentation with slides. Staff reviewed the information provided in the evaluation. Her comments are a part of the verbatim record.

Ms. Giordano explained that Mr. Wilson's property is located on Marlborough Point along the Potomac River in Stafford County, approximately a quarter-mile north of the confluence of Potomac Creek and Potomac River. The Maryland-Virginia boundary hugs the shoreline along this stretch of the river. The area along this stretch of shoreline is residential with private piers and associated platforms and boathouses along many of the riverfront properties. The shoreline adjacent to the Wilson property is a sandy beach supplemented by two riprap groins. Neighboring properties have similar sandy shorelines and a few have riprap revetments or bulkheads.

Ms. Giordano said that in 1992, the Wilson's submitted a Joint Permit Application (JPA) requesting authorization to construct a private pier and bulkhead. We issued a 'No Permit Necessary (NPN) letter because VMRC, at the time, did not have jurisdiction in Maryland waters. A 2005 amendment to Section 28.2-101 of the Code of Virginia granted the Virginia Marine Resources Commission jurisdiction over any structures or improvements in the Potomac River proposed by riparian owners on shores appurtenant to the Commonwealth. This stretch of shoreline sits exposed along the Potomac River with a significant north to northeast fetch of almost 14 miles. Over the years, the Wilson's have had to rebuild their pier and dock structure almost annually because of storm damage.

Ms. Giordano stated that in 2009, Stafford County staff documented the open-sided thatched roof structure on the Wilson's pier. Ms. Giordano noted that the applicants advised her that the structure had sides in the 2009 photo, but they are not evident in this photo. During a compliance visit to a neighboring property in August 2011, staff discovered that the previously open-sided structure had since been enclosed with screens, partial wooden walls, and full wooden walls. A follow-up site visit on October 27, 2011, with Stafford County Staff person Michael Lott, confirmed that a 23-foot 8-inch long by 15-foot 1-inch wide by 7-foot 7-inch high enclosure had been installed under the previously existing thatched-roof structure. The enclosure included 7-foot 7-inch high screen sides including several panels with 3-foot 6-inch high partial wooden walls and two 7-foot 7-inch high full wooden walls. In addition, the enclosure shelters non-water dependent appurtenances including a refrigerator and microwave.

Ms. Giordano said that staff found no record of prior Commission authorization for either the roof structure or the more recent enclosure. A Sworn Complaint was filed documenting that the enclosed structure appeared to represent an unauthorized encroachment and was therefore considered a violation of §28.2-1203 of the Code of Virginia. A Notice to Comply, dated December 6, 2011, was then sent to the Wilsons directing that they either remove the unauthorized structures or submit an after-the-fact application for review.

Ms. Giordano noted that staff received a JPA on January 31, 2012, within the 60 day window for compliance, requesting after-the-fact authorization to retain the 438 square foot gazebo with the 7-foot 7-inch high screened walls with two (2) 7-foot 7-inch high full wooden walls and several screen panels with 3-foot 6-inch high partial wooden walls.

Ms. Giordano said that in the letter accompanying the after-the-fact request, the Wilson's explain that they built the enclosure under the presumption that their project fell within Maryland waters and was not under the jurisdiction of VMRC. They request authorization to retain the full and partial walls as protection from the Northern winds experienced along this stretch of the river.

Ms. Giordano then reviewed slides of the plan and cross section view drawings submitted with the Wilson's JPA and ground shot photographs taken by staff February 21, 2012.

Ms. Giordano stated that staff had not received any comments or protests in response to the public interest review. The JPA contained three letters of support for the Wilson's gazebo structure from neighboring and nearby property owners.

Ms. Giordano explained that the Department of Conservation and Recreation comments identify the close proximity of a national heritage resource, the Bald Eagle, at Bull Bluff and Crow's Nest Conservation Sites, to the Wilson's property. They recommend coordination with the Department of Game and Inland Fisheries.

Ms. Giordano corrected the record concerning the Stafford County Department of Planning and Zoning comments. The Stafford County Department of Planning and Zoning did provide comments which found the project acceptable.

Ms. Giordano explained that though located within the boundary of Maryland waters, the Wilson's enclosed gazebo falls within Commission's jurisdiction as a result of amendments to Section 28.2-101 of the Code of Virginia in 2005.

Ms. Giordano said that when staff reviews proposals to build over State-owned submerged lands the Commission's Subaqueous Guidelines direct staff to consider, among other factors, the water dependency and necessity of the proposed structure. Staff can support the Wilson's after-the-fact request to retain the screens enclosing their roofed gazebo. Authorizing the screens will offer the Wilson's protection from insects and may help to dissipate the significant northern winds while only minimally adding to the visual obstruction associated with the gazebo structure. Staff, however, does not support the Wilson's request to retain the full and partial wooden walls. As evidenced by the furnishings within the gazebo, the full and partial walls increase the potential for non-water dependent uses over State-owned submerged lands. The wooden walls also increase the visual impacts associated with the structure whereas the fine screen mesh does not. Had Mr. Wilson submitted an application prior to construction of the walls, staff would not have recommended authorizing any of the wooden siding.

Ms. Giordano stated that after evaluating the merits of the project and considering all of the factors contained in §28.2-1205(A) of the Code of Virginia, staff recommends approval of the screen walls but is compelled to recommend denial of the full and partial wooden walls. Accordingly, we recommend that Mr. Wilson be directed to remove the

entire wooden sides of the gazebo within 30 days. Following removal of the wooden siding, a permit would be issued for the screened gazebo.

Ms. Giordano said that should the Commission decide to approve any portion of the after-the-fact request, including the screening, we would recommend the Commission impose triple permit fees as provided for in §28.2-1206(D) and consider appropriate civil charges to accompany the after-the-fact approval, in lieu of any further enforcement as permitted by Code. Staff recommends a civil charge of \$3,000 based on moderate impact and minimal degree of non-compliance or deviation considering this is in the Potomac River and the changes to State Code in 2005.

Commissioner Travelstead asked for questions. There were none. He asked if the applicant wished to comment.

Marvin Wilson and Nan Wilson, applicants, were sworn in and their comments are a part of the verbatim record. Mrs. Wilson said that they had never had to have a permit for rebuilding their pier or gazebo and added on the screens. She said they did not know they were in Virginia's jurisdiction and now required a VMRC Permit. She noted that they had a refrigerator and microwave in the gazebo since the early 1990's. She said the gazebo had always had partial walls on the back of the gazebo, but the walls cannot be seen in the 2009 photo. The only changes they made since the 2009 photo were to add screens. She said they were requesting to be "grandfathered" for all the work on their gazebo because this was done primarily when they were under Maryland's jurisdiction. She said they had had the partial walls for a long time because of the bad winds.

Commissioner Travelstead asked how long the solid walls had been present on the gazebo. Mr. Wilson explained that the gazebo has always had solid walls; they gave the old walls made of plywood to their neighbor. Mr. Wilson noted that the Hydrilla in the river makes the bugs a nuisance which is why they needed the screens.

Ms. Wilson commented that they have had the partial walls for a long time due to the strong winds experienced along the river. She said they needed the screens and wanted to apply to request they be allowed the partial walls.

Commissioner Travelstead asked for questions.

Associate Member Fox asked when the house was built. Mr. Wilson stated in 1992. He also said they applied for a permit at the time and received notice that that they did not need a VMRC permit at that time.

Associate Member Fox asked what was done since 2005. Mr. Wilson said the new walls and screen.

Commissioner Travelstead asked for further questions. There were none.

Tony Watkinson, Chief, Habitat Management, said in 2005 when the law changed granting Virginia jurisdiction in the Potomac River. He said he recognized that aspects of the Wilson’s gazebo enclosure existed prior to the Code change, but said that the additions to the Wilson’s gazebo enclosure since 2005 would require a permit.

Commissioner Travelstead stated there would be a triple permit fee and the \$3,000.00 civil charge.

Mr. Wilson said they would be glad to pay to be able to keep it for his wife.

Mrs. Wilson said they want to keep the walls and are willing to pay a fine.

**Associate Member Schick said that the full walls were prior to the law being changed giving jurisdiction to VMRC and he moved to approve the after-the-fact permit as requested without a civil charge, but to charge a triple permit fee. Associate Member Palmer seconded the motion. He said he agreed with Mr. Schick and could understand the confusion caused by the law change. The motion carried, 5-0.**

Permit Fee (ATF Triple).....	\$300.00
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**11. PUBLIC COMMENT.** No public comments.

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**15. PUBLIC HEARING:** Proposed amendments to Regulation 4VAC20-1230-10 et seq., “Pertaining to Restrictions on Shellfish,” to establish safer public and private warm-water oyster harvest measures, for public health safety.

Jim Wesson, Head, Conservation and Replenishment, gave the presentation. His comments are a part of the verbatim record. He provided blue hand out copies of the evaluation and the draft regulation that had been changed. He explained that the Division of Shellfish Sanitation had suggested the change, as a result of a model study and could defend setting the curfew times for June, July, and August at 10:00 a.m., if ice was not used.

Dr. Wesson said that icing during harvest was now an option for all the Bay and Eastern Shore that watermen could use.

Dr. Wesson said that a change was made to the regulation that added the word ‘only’ on pages 5 and 6, subdivisions G, H, and I.

**Commission Meeting**

Commissioner Travelstead asked for questions for staff.

Associate Member Tankard asked if the Eastern Shore aquaculture on seaside should be excluded and treated as a separate area.

Robert Croonenberghs, Director of VDH-DSS, said that it might work but first it must be proven for *vulnificus* as that was not accepted, as yet. There has to be proven techniques under specific techniques. Commissioner Travelstead asked what the time frame was for this research. Dr. Croonenberghs stated that was unknown. Commissioner Travelstead said that the ISSC’s approval would be necessary, also.

Associate Member Tankard asked if it was clearly Virginia oysters involved in the recent occurrence of infection. Was it proven by the tagging? Dr. Croonenberghs stated the proof was much stronger than it is for most cases and accepted by the review committee of the ISSC and ISSC reviewed that committee’s findings. He said Virginia did question the findings, but that Delaware had done its inspection of the shipper which indicated it was only oysters from Virginia. He said Virginia did question whether there was a strong tracking record needed for from and to, etc. He said the Delaware program was questioned intensely, but Virginia cannot do anything and accept it.

Commissioner Travelstead asked for anymore questions, which there were none. He stated the matter was before the Commission.

**Associate Member Fox moved to accept the staff recommendation. Associate Member Schick seconded the motion. The motion carried, 5-0.**

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- 16. **PUBLIC HEARING:** Proposed amendments to Regulation 4VAC20-1250-10 et seq., “Pertaining to Tagging of Shellfish,” to establish a method of identifying harvested shellfish, according to its original Virginia harvest area, at any time of the year, to include tags to identify harvested oysters for shucking or post-harvest processing only.

Jim Wesson, Head, Conservation and Replenishment gave the presentation. His comments are a part of the verbatim record.

Dr. Wesson explained that Regulation 1250 established the tagging requirements and everyone seems to be on board with the change. He said the harvest tags were to have the time start and ended on it, a check box on the tag to indicate the use of ice, and the least area information to be put on the tag. He said on this regulation the “restricted use” tag requirements were established. He added that there staff had not received any public comments.

Associate Member Fox said that initially there was concerns expressed, but they were resolved. Dr. Wesson stated yes, since the VDH-DSS had held their meetings.

Commissioner Travelstead stated the matter was before the Commission.

**Associate Member Tankard moved to accept the staff recommendation. Associate Member Fox seconded the motion. The motion carried, 5-0.**

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**12. PUBLIC HEARING:** Establishment of the spiny dogfish commercial harvest quota for the upcoming fishing season, May 1 through April 30.

Joe Grist, Acting Deputy Chief, Fisheries Management, gave the presentation. His comments are a part of the verbatim record.

Mr. Grist explained that ASMFC Management Board recently approved a 35.6 million pound commercial quota for May 1, 2012 through April 30, 2013 fishing season. The southern region states, New York through North Carolina, were allocated 42% of the seasonal quota. Virginia was allocated 10.79% or 3,853,167 pounds of the seasonal quota.

Mr. Grist said that Virginia's commercial spiny dogfish landing for the previous season began on May 1, 2011, and was closed December 7, 2011. Spiny dogfish landings for that period exceeded the state's commercial quota allocation of 2,148,224 pounds by 88,435 pounds.

Mr. Grist stated that staff recommended amendments to Subsection A of Chapter 4VAC20-490-42, page 8 of 11, as follows:

“For the 12-month period of May 1, 2012 through April 30, 2013, the spiny dogfish commercial landings quota shall be limited to 3,764,732 pound.”

Mr. Grist noted that this proposal had been advertised, in accordance with Code Section 28.2-209 for a public hearing. Staff had not received any public comments to date.

Commissioner Travelstead asked for questions for staff and there were none. He asked for any public comments and there were none. He stated the matter was before the Commission.

**Associate Member Palmer said he was happy for the industry to see the increase in numbers. He moved to approve the staff recommendation. Associate Member Schick seconded the motion. The motion carried, 5-0**

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**13. PUBLIC HEARING:** Establishment of daily trip limits for Spanish mackerel to comply with the ASMFC fishery management plan.

Joe Grist, Acting Deputy Chief, Fisheries Management, gave the presentation. His comments are a part of the verbatim record.

Mr. Grist explained that the ASMFC South Atlantic State/Federal Management Board adopted the Omnibus Amendment for Spot, Spotted Seatrout, and Spanish Mackerel on August 4, 2011. The amendment places all three species under the requirements of the 1993 Atlantic Coastal Fisheries Cooperative Management Act and the 1995 Interstate Fishery Management Program Charter.

Mr. Grist further explained that prior to the passing of the ASMFC Omnibus amendment management of the Spanish Mackerel fishery in Virginia virtually mirrored the SAFMC management plan. During an ASMFC compliance plan review of Virginia regulations pertaining to Spanish Mackerel it was noted, the Virginia commercial landings limit in Chapter 4VAC20-540-10, et seq., "Pertaining to Spanish Mackerel and King Mackerel" was not a daily limit, but only a trip limit. The ASMFC Omnibus amendment specifies that the commercial landings limit shall be a daily landings limit and was to be effective by July 1, 2012.

Mr. Grist said that staff recommended amendments to Chapter 4VAC20-540-50, page 2 of 3, were as follows:

"It shall be unlawful for any person to land, in Virginia, any amount of Spanish mackerel in excess of 3,500 pounds, from any vessel, in any one day.

Mr. Grist stated this proposal had been advertised, in accordance with Code Section 28.2-209, for public hearing. Staff had not received any public comments to date.

Commissioner Travelstead stated that this was a public hearing. There were no comments. He stated the matter was before the Commission.

**Associate Member Tankard moved to accept the staff recommendation. Associate Member Fox seconded the motion. The motion carried, 5-0.**

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**14. PUBLIC HEARING:** Proposed amendments to Regulation 4VAC20-960-10 et seq., "Pertaining to Tautog," to establish the 2012 recreational and commercial management measures.

**Commission Meeting**

Joe Cimino, Biological Sampling Program Mgr., gave the presentation. His comments are a part of the verbatim record.

Mr. Cimino explained the need for a new target fishing mortality rate arose from the 2011 update to the stock assessment for tautog. The assessment suggested that the stock is overfished and overfishing is occurring. The assessment model indicated that the stock is overfished because the estimated coastwide spawning stock biomass fell below the target set in Addendum IV to the FMP. Additionally, the estimated fishing mortality rate exceeds the previous target, indicating overfishing is occurring, as well.

The table below explains the current recreational regulations and the proposed amendments.

<b>Current regulation, est. Dec 6, 2011</b>				
<b>Size</b>	<b>Bag</b>	<b>Closed Season</b>	<b>Closed Days</b>	<b>% Reduction</b>
16	3	April 16- September 23	161	50.5
<b>2012 Proposed option</b>				
<b>Size</b>	<b>Bag</b>	<b>Closed Season</b>	<b>Closed Days</b>	<b>% Reduction</b>
16	4	April 16- July 31	107	42.0

The table below explains the current commercial regulations and the proposed amendments.

<b>Current regulation, est. Dec 6, 2011</b>			
<b>Size</b>	<b>Closed Season</b>	<b>Closed Days</b>	<b>% Reduction</b>
15	Jan 18- Mar 15; May 1- Nov 12	253	50.5
<b>2012 Proposed option</b>			
<b>Size</b>	<b>Closed Season</b>	<b>Closed Days</b>	<b>% Reduction</b>
15	Jan 18- Mar 15; May 1- Aug 31	180	41.21

Mr. Cimino said that staff provided the proposed options to the FMAC on April 16<sup>th</sup>. FMAC unanimously passed a motion recommending to the Commission options to adjust the closed season for the recreational fisheries and adjust the closed season and bag limit for the commercial fishery.

Mr. Cimino the amendments for the recreational fishery measures were shown on page 2 and the commercial fishery measures for 2012 were shown on page 3.

Mr. Cimino said the proposal had been advertised in accordance with Code Section 28.2-201 for a public hearing. Staff had not received any public comments to date.

Mr. Cimino reiterated that staff recommended amending Regulation 4VAC20-960-10, "Pertaining to Tautog", to establish the 2012 recreational and commercial management measures.

Commissioner Travelstead opened the public hearing. There were no public comments.

Mr. Cimino said that the measures for 2012 may have to be revisited for 2013.

Commissioner Travelstead asked for a motion.

**Associate Member Palmer moved to approve the staff recommendation. Associate Member Schick seconded the motion. The motion carried, 5-0.**

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**17. REQUEST FOR PUBLIC HEARING:** Establish the 2012 commercial bluefish quota, as part of Chapter 4VAC20-450-10 et seq., "Pertaining to the Taking of Bluefish".

Rob O'Reilly, Acting Chief, Fisheries Management, gave the presentation. His comments are a part of the verbatim record.

Mr. O'Reilly said that staff was recommending the advertisement for the establishment of a higher commercial quota for the bluefish for 2012. He noted this was a higher quota than what was allocated in 2011.

Commissioner Travelstead noted that the Board agreed to advertise the public hearing.

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**18. FAILURE TO REPORT:** Cases involving failure to report commercial harvests, in accordance with Chapter 4VAC20-610-10 et seq., "Pertaining to Commercial Fishing and Mandatory Harvest Reporting".

Stephanie Iverson, Fisheries Management Manager, gave the presentation. Her comments are a part of the verbatim record. Ms. Iverson explained that there were three cases to be presented and one individual could not be present because of transportation issues.

Ms. Iverson explained that the first case was for James R. Marshall and she noted that all notifications had been done.

James R. Marshall, waterman, was sworn in and his comments are a part of the verbatim record. Mr. Marshall explained that he worked with someone else and he assumed they were reporting for him. He said he thought the captain of the boat did the reporting for all on board.

Ms. Iverson stated that the staff recommendation was for 2 year probation.

Commissioner Travelstead asked for questions.

Associate Member Palmer asked how long did it take Mr. Marshall to get his records up to date. Ms. Iverson stated until today. Associate Member Palmer asked if Mr. Marshall had been cooperative. Ms. Iverson stated that there were no problems at all.

Commissioner Travelstead stated the matter was before the Commission.

**Associate Member Schick moved to accept the staff recommendation. Associate Member Tankard seconded the motion. The motion carried, 5-0.**

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Ms. Iverson stated that the second case was for Tracy Bonnville. She noted that all notifications were sent and the certified letter was signed for on the 8<sup>th</sup>. She said staff got all the information needed except for 2010. She added 2011 and 2012 were resolved. She said he still needed to turn in 2010 and was told that the Commission would suspend all licenses until he did.

Commissioner Travelstead asked what staff was recommending. Ms. Iverson said it was for a 2 year probation provided the Commission gets the last of the information needed until then his license would be suspended.

Tracy Bonnville, waterman, was sworn in and his comments are a part of the verbatim record. Mr. Bonnville said he thought he had turned in 2010 information as he did mail it. He said he had to check at home for these records.

Associate Member Schick stated this reporting issue had gone on for a long time. He said there had been two issues with crabs where fines were paid. He asked how many chances did you have to give someone.

Commissioner Travelstead explained that from a staff analysis, it was estimated that it cost between \$6,000 to \$7,000 to investigate and bring these matters to the Commission.

**Commission Meeting**

Tracy Bonnville apologized and promised to keep his harvest information up to date. Commissioner Travelstead informed him that if he came back there would be serious repercussions.

Associate Member Palmer asked if Mr. Bonnville had cooperated. Ms. Iverson responded yes.

**Associate Member Palmer told Mr. Bonnville that now was the time to change as the numbers were very important. He moved to accept the staff recommendation if all information was turned in within a week, 7 days, Thursday week, 31<sup>st</sup>. Associate member Schick seconded the motion. The motion carried, 5-0.**

\* \* \*

Ms. Iverson said the third case was for John Edward Brady. She said all data issues had been resolved.

Rob O'Reilly, Acting Chief, Fisheries Management, stated that Mr. Brady was the first to comply and staff recommendation was for probation, which staff will contact Mr. Brady to explain him about the 2 year probation.

**Associate Member Schick moved to accept the staff recommendation for the 2 year probation. Associate Member Fox seconded the motion. Associate Member Palmer stated he needs to come before the Commission. The motion carried, 4-1. Associate Member Palmer voted no.**

Commissioner Travelstead instructed staff to let Mr. Brady know about the Commission's concerns and that any violation brings him back before the Board.

\* \* \* \* \*

Commissioner Travelstead informed the Commission that the regular meeting date for the October meeting was the same week of the ASMFC meeting and he felt the Commission should delayed the meeting one week. He also discussed the possibility of combining the November and December meetings as was done last year into one meeting to be on December 4, 2012.

No action was taken at this time.

\* \* \* \* \*

**Commission Meeting**

**16785  
May 22, 2012**

There being no further business, the meeting was adjourned at approximately 6:02 p.m.  
The next regular meeting will be held Tuesday, June 26, 2012.

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Jack G. Travelstead, Commissioner

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Katherine Leonard, Recording Secretary