

MINUTES

February 24, 2004
Newport News, VA

Commission Meeting

The meeting of the Marine Resources Commission was held with the following present:

William A. Pruitt)	Commissioner
Chad Ballard)	
Gordon M. Birkett)	
Ernest N. Bowden, Jr.)	
S. Lake Cowart)	Associate Members
Russell Garrison)	
J. T. Holland)	
Cynthia Jones)	
F. Wayne McLeskey)	
Carl Josephson	Assistant Attorney General
Colonel Steve Bowman	Acting Deputy Commissioner
Wilford Kale	Senior Staff Advisor
Katherine Leonard	Recording Secretary
Andy McNeil	Programmer Analyst Sr.
Jane McCroskey	Chief, Admin/Finance Div.
Jack Travelstead	Chief, Fisheries Mgt. Division
Jim Wesson	Head, Conservation/Replenishment
Roy Insley	Head, Plans/Statistics Dept.
Chad Boyce	Fisheries Management Specialist, Sr.
Ellen Cosby	Fisheries Management Specialist
Lewis Gillingham	Fisheries Management Specialist
Kelly Lancaster	MR Compliance Coordinator
Stephanie Iverson	Head-Statistician
Lt. Col. Lewis Jones	Deputy Chief, Law Enforcement
MPO Andy Dunton	Marine Police Officer
MPO Richard Haynie	Marine Police Officer
Bob Grabb	Chief, Habitat Management Div.
Chip Neikirk	Environmental Engineer, Sr.
Kevin Curling	Environmental Engineer, Sr.
Jeff Madden	Environmental Engineer, Sr.
Jay Woodward	Environmental Engineer, Sr.

Benny Stagg
Tracy West
Hank Badger
Justin Worrell
Randy Owen
Paul Rogers

Environmental Engineer, Sr.
Surveyor

Virginia Institute of Marine Science (VIMS)

Lyle Varnell
Tom Barnard

Other present included:

Robert Foley
Ronald A. Martin
Lee M. Anderson
Fred Whitley
Ann Jennings
Tom Szelest
Cynthia A. Sale
Tom Langley
Frank Eseg
Paul Copeland
George Kushner
Marvin Milton
Jim Bauzier
Chuck Eastman
Michele Cleland
Fred Carrol
Freddie Linton
Douglas F. Jenkins
Jim Haydon
Keith Like
Mark Heflin

Otis Asal
Peter Glubiak
Richard Witton
Dimitri Hionis
Betty G. Waring
Sara Lavica
E. A. Sale
Tyla Matteson
Garnett Copeland
Rebecca Frances
Margaret Ballard
Al Houghton
Pat Milton
Craig Seltzer
Tom Lochen
P R. McDowry
Jan Marshall
Roger Parks
Russell Gaskins
Kenneth Heath
Rick Robins

Robert Scott
Willie F. Shiflette
R. Gary Allen
Josee Hionis
Michelle Newman
B. J. Jewel
Joe Smith
Gordon Page
Karla S. Havens
Sirec Mouchanzaz
Steven Fisher
Ray Otton
Claudette Jenkins
Doug Stamper
Joseph F. McCauley
Phil Rohrs
Steve Pruitt
Kelly Place
Edward A. Bender
Tom Powers

and others

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Commissioner Pruitt called the meeting to order at 9:38 a.m. with all Associate Members present.

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Tracy West, Environmental Engineer Sr., gave the invocation and Commissioner Pruitt led the pledge of allegiance to the flag.

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

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Approval of Agenda: Commissioner Pruitt asked if there were any changes to the agenda. Associate Member Ballard, after his conversation with staff, requested that in order to expedite the hearing, Items 9 through 12 be heard before the City of Hampton.

Associate Member Holland moved to approve the agenda with the change requested by Associate Member Ballard. Associate Member Birkett seconded the motion. The motion carried, 8-0.

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- 1. MINUTES: January 27, 2004 regular meeting and February 10, 2004 special meeting.**

Associate Member Holland moved to approve the minutes for the January 27th and February 10th meetings. Associate Member Garrison seconded the motion. The motion carried for the January meeting, 7-0. Associate Member McLeskey abstained from voting since he was not present for the January meeting. The motion carried for the February special meeting, 8-0.

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- 2. PERMITS:** Bob Grabb, Chief-Habitat Management, gave the presentation on Page Two items, A through H, and his comments are part of the verbatim record. Page Two items are projects that cost more than \$50,000, are unprotested, and staff is recommending approval.

Commissioner Pruitt asked if there was anyone to address the Commission on any of these projects, either pro or con. There was no one present to comment.

Associate Member Garrison moved to approve Page Two items, A through H. Associate Member Holland seconded the motion. The motion carried, 8-0.

2A. CITY OF HARRISONBURG, #03-2438, requests authorization to install a raw water intake, including a buried intake pipe and submerged intake screens, approximately 140 feet into the South Fork of the Shenandoah River in Rockingham County, and to remove the remnants of the McGaheysville Dam, located approximately 1,500 feet upstream. Both the intake installation and dam removal will require the construction of temporary causeways for access into the river.

Permit Fee.....\$100.00

2B. PRINCE WILLIAM FOREST PARK, #03-1149, requests authorization to install, by open-trench method, a 12-inch diameter ductile iron waterline under the South Fork of Quantico Creek in two locations, 50 linear feet at Scenic Drive and 62 feet at Mawavi Road, and to stabilize the stream banks at the construction impact locations with a maximum of 24 linear feet of riprap per location, within Prince William Forest Park in Prince William County. Staff recommends standard instream construction conditions.

Permit Fee.....\$100.00

2C. U. S. ARMY CORPS OF ENGINEERS, #03-1365, requests authorization to maintenance dredge up to 3 million cubic yards of State-owned subaqueous bottom per year from shoaled areas between Milepost 69 to Milepost 27 within the James River in the Counties of James City, Isle of Wight, Surry and Charles City. The dredged material will be placed in overboard disposal sites adjacent to the dredge areas. Recommend approval with the following conditions:

1. A time of year restriction prohibiting overboard disposal between February 15 through June 30 to protect anadromous fish species;
2. No dredged material may be placed within 750 feet of an active eagle nest between November 15 and October 1;
3. Condition surveys to be provided of the dredged material placement sites both before and after each dredge cycle;
4. Submittal of an Environmental Assessment documenting the fate of any dredged material placed overboard at the sites, as well as a benthic impact assessment of the cumulative overall activities prior to permit expiration.

Permit Fee.....\$100.00

2D. LYON'S SHIPYARD, #99-1789, requests, as a modification to a previously issued permit, 59,900 cubic yards of additional dredging to create a 332-foot long by 108-foot long basin to provide maximum depths of -42 feet below mean low water to accommodate the a new drydock and install three (3) new mooring dolphins adjacent to their property situated along the Eastern Branch of the Elizabeth River in Norfolk. Dredged materials will be transported to the Craney Island Disposal Facility. Staff recommends a royalty of \$0.45 per cubic yard for dredging of new material.

Dredging Royalty (31,000 cu. yds. @\$0.45/cu. yd.....\$13,950.00

2E. U. S. DEPARTMENT OF TRANSPORTATION, #98-1326, requests authorization to modify their existing permit to construct a 10-foot by 20-foot floating pier adjacent to a previously authorized concrete pier at the James River Reserve Fleet Facility within Skiffes Creek at Fort Eustis in the City of Newport News.

Permit fee not applicable.

2F. CITY OF CHESAPEAKE, #98-1015, requests authorization to construct a 450-foot long by 80-foot wide pile supported roadway bridge with 60 linear feet of associated riprap scour protection over New Mill Creek, and install a stormwater culvert with wingwalls and riprap scour protection aprons, associated with the construction of the expansion of Cedar Road in the City of Chesapeake.

Permit Fee.....\$100.00

2G. CSX TRANSPORTATION, #03-1647, requests authorization to dredge a 1,496-foot long by 210-foot wide construction access channel with maximum depths of up to minus seven (-7) below MLW, install channel fenders, build a temporary construction access pier and construct a 1,750 feet long by 50.5 feet wide open-pile railroad bridge parallel to an existing span crossing Quantico Creek in Prince William County. Staff recommends approval with the condition that the applicant compensate for SAV impacts by planting two (2) acres of SAV as mitigation for the loss of 1.7 acres of SAV. In the event of mitigation failure, the applicant has agreed to make a donation to the Commission's Marine Habitat and Waterways Improvement Fund in the amount of \$100,000 should two successive test plots fail or \$50,000 should the two-acre site fail after planting. Staff also recommends that no dredging occur between March 15 and June 30 to protect anadromous fish during spawning.

Permit Fee.....\$100.00

2H. HIDDEN HILL FARM, LLC, #03-1756, requests authorization to construct a 36-foot wide by 90-foot long concrete, clear-span road crossing of a portion of Beaver Dam Run, a nontidal tributary to the Rivanna River, adjacent to their property in Albemarle County. Staff recommends a one-time royalty of \$1,620.00 for the encroachment over 3,240 square feet of State-owned submerged land at a rate of \$0.50 per square foot.

Royalty for Subaqueous Encroachment (3,240 sq. ft. \$0.50/sq. ft.).....	\$1,620.00
Permit Fee.....	\$ 100.00
Total Fees.....	\$1,720.00

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3. CLOSED SESSION. Two closed session were held later in the meeting (see pages: 12676 and 12684).

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Items 9 through 12 were heard in accordance with amended agenda.

9. ED CALL, et al, #03-2456, requests authorization to install 495 linear feet of bulkhead on the beach across nine (9) properties situated along the Chesapeake Bay in Hampton. A Coastal Primary Sand Dune and Beaches permit is required.

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

Ms. West explained that the nine parcels were located along the Chesapeake Bay, in the Malo Beach section of Hampton, on a former dredge material disposal site situated between the Salt Ponds and the Chesapeake Bay. Despite the protection offered by a man-made dune/geotube that was constructed by the City of Hampton on the adjacent public beach, the properties experienced severe erosion during Hurricane Isabel. The applicants now propose to install a continuous bulkhead on their properties on portions of the beach in a jurisdictional area behind the remains of the geotube barrier.

Ms. West stated that the City of Hampton had not yet adopted the Model Coastal Primary Sand Dune/Beaches Ordinance. As a result, the Commission was charged with serving as the Board and for reviewing the impacts to the beach/dune areas as a result of this project.

Ms. West said that staff conducted a public hearing on this proposal, in downtown Hampton, on Thursday, February 12, 2004. In attendance were Mr. Ed Call, agent and contractor for the applicants, and Mr. and Mrs. Lett, two of the applicants. Mr. and Mrs. Lett spoke in support of the project for themselves and their neighbors.

Ms. West explained that the Virginia Institute of Marine Science stated that the presence of the geotube sand barrier should protect the beach from any potential adverse effects typically associated with the placement of bulkheads in beach and dune systems.

Ms. West said that Mr. Call's proposal minimized encroachment onto the jurisdictional beach area while providing some protection from further erosion for the nine upland property owners. As such, staff recommended approval of the project as proposed.

Ed Call, applicant, was present but did not comment.

No one was present in opposition to the project.

Associate Member Ballard moved to approve the request in accordance with staff recommendations and pursuant to the criteria set forth in Section 28.2-1403. Associate Member Holland seconded the motion. The motion carried, 8-0.

Permit Fees not applicable.

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10. **SUE ROMAN, #03-2377**, requests authorization to install 55 linear feet of bulkhead on the beach at her property situated along the Chesapeake Bay in Hampton. A Coastal Primary Sand Dune and Beaches permit is required.

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

Ms. West explained that the Roman property was located along the Chesapeake Bay, in the Malo Beach section of Hampton on a former dredged material disposal site situated between the Salt Ponds and the Chesapeake Bay. Despite the protection offered by a man-made dune/geotube that was constructed by the City of Hampton on the adjacent public beach, the property experienced severe erosion during Hurricane Isabel. The applicant now proposed to install a bulkhead on her property on the beach in a jurisdictional area behind the remains of the geotube barrier.

Ms. West said that the City of Hampton had not yet adopted the Model Coastal Primary Sand Dune/Beaches Ordinance. As a result, the Commission was charged with serving as the Board and reviewing the impacts to the beach/dune areas as a result of this project.

Ms. West stated that staff conducted a public hearing on this proposal, downtown Hampton, on Thursday, February 12, 2004. Only Mr. Steven Fisher, agent for the applicant, was in attendance.

Ms. West explained that the Virginia Institute of Marine Science stated that the presence of the geotube sand barrier should protect the beach from any potential adverse effects typically associated with the placement of bulkheads in beach and dune systems.

Ms. West said that Ms. Roman’s proposal minimized encroachment onto the jurisdictional beach area while providing some protection from further erosion. As such, staff recommended approval of the project as proposed.

Sue Roman, applicant, was present but did not have any comments.

No one was present in opposition to the project.

Associate Member Ballard moved to approve the request in accordance with staff recommendation and pursuant to the criteria set forth in Section 28.2-1403. Associate Member Holland seconded the motion. The motion carried, 8-0.

Permit Fees not applicable.

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Ms. West explained that Mr. Mark Heflin, applicant for Item 11, had not arrived for the meeting yet and requested that the Commission proceed with Item 12, Lee Anderson.

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12. LEE ANDERSON, #04-0104, requests authorization to expand an existing elevated deck on the beach at his property situated along the Chesapeake Bay in Hampton. A Coastal Primary Sand Dune and Beaches permit is required.

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

Ms. West explained that the property was located along the Chesapeake Bay, in the Malo Beach section of Hampton. The Anderson home was built on piles on the beach with an elevated deck on the seaward side. The applicants proposed to expand their existing elevated deck a maximum of 5 feet seaward in order to reach an alignment equal to their adjacent property owners.

Ms. West said that the City of Hampton had not yet adopted the Model Coastal Primary Sand Dune/Beaches Ordinance. As a result, the Commission was charged with acting as the Board and reviewing the impacts to beach areas associated with this project.

Ms. West stated that staff conducted a public hearing for this proposal, in downtown Hampton, on Thursday, February 12, 2004. Only the applicant was in attendance.

Ms. West said that the Virginia Institute of Marine Science had stated that the expansion should have minimal individual and cumulative adverse impacts on the beaches and dunes at the site.

Ms. West stated that the Anderson's were proposing to expand their deck only enough to equal the encroachment afforded their adjacent neighbors. Since VIMS had determined the addition to the existing deck would not pose a detriment, staff recommended approval of the project as proposed.

Lee Anderson, applicant was present, but did not have any comments.

No one was present in opposition to the project.

Associate Member Ballard moved to approve the request in accordance with staff recommendations and pursuant to the criteria set forth in Section 28.2-1403. Associate Member Holland seconded the motion. The motion carried, 8-0.

Permit Fees not applicable.

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11. MARK HEFLIN, #03-2404, requests authorization to install and backfill 60 linear feet of bulkhead on the beach at his property situated along the Chesapeake Bay in Hampton. A Coastal Primary Sand Dune and Beaches permit is required.

Tracy West, Environmental Engineer, Sr., gave the presentation with slides.

Ms. West explained that the Heflin property was located along the Chesapeake Bay, in the Malo Beach section of Hampton. The house and bulkheaded parking area at 830 N. First Street were initially authorized by the Commission on August 28, 2001. The bulkheaded parking area was permitted to encroach no further than 20 feet from the street. The limits of encroachment were determined by evaluating other parking areas authorized by the Commission on nearby properties.

Ms. West said that Hurricane Isabel destroyed the bulkheaded parking area in September 2003. Soon afterwards, Mr. Heflin submitted an application to relocate the bulkhead 15 feet seaward of the originally authorized location, increasing the encroachment to 35 feet from the street. He believed that the previous alignment did not provide an adequate parking area and he wished to increase the available parking at his property.

Ms. West said that the City of Hampton had not yet adopted the Model Coastal Primary Sand Dune/Beaches Ordinance. As a result, the Commission was charged with acting as the Board and reviewing the impacts to the beach and dune areas as a result of this project.

Ms. West stated that staff conducted a public hearing for the proposal, in downtown Hampton, on Thursday, February 12, 2004. No one was in attendance for this public hearing.

Ms. West said that the Virginia Institute of Marine Science stated that the bulkhead should be limited to the minimum necessary to provide vehicle parking. VIMS suggested that a maximum of 24 feet seaward from the street would be consistent with the dimensions of a parking stall, while allowing enough space to accommodate the City of Hampton right-of-way located on Mr. Heflin's property adjacent to the street.

Ms. West said that Mr. Heflin's request to encroach 35 feet seaward was inconsistent with previous permits issued by the Commission for the same purpose to other property owners along this portion of North 1st Street. As a result, staff recommended denial of the project as proposed.

Ms. West said that in light of the VIMS assessment and suggestion that four additional feet of encroachment may be reasonable, staff could recommend approval of a new bulkhead aligned a maximum of 24 feet from the street.

Mark Heflin, applicant, was not present at this time.

Associate Member Ballard asked if a 24' dimension was discussed with Mr. Heflin. Ms. West responded that Mr. Heflin was requesting the maximum that could be approved in order to get away from the traffic. Associate Member Ballard asked if he was agreeable with less. Ms. West responded, yes.

Associate Member Ballard moved to grant the additional 4 feet to make the total 24' and approve the project pursuant to the criteria set forth in Section 28.2-1403. Associate Member Birkett seconded the motion. The motion carried, 8-0.

Permit Fees not applicable.

(Note: During the Public Comment Period, Mr. Heflin requested that the decision for his project be reconsidered by the Commission. The Commission agreed to reopen his case to hear his testimony and at that time amended their decision.)

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1st CLOSED SESSION:

Associate Member Ballard moved that the meeting be recessed and the Commission immediately reconvene in closed meeting for the purpose of consultation with legal counsel and briefings by staff members pertaining to actual or probable litigation, or other specific legal matters requiring legal advice by counsel as permitted by Subsection (A), Paragraph (7) of § 2.2-3711 of the Code of Virginia, pertaining to:

The City of Newport News versus VMRC

The motion was seconded by Associate Member Cowart. The motion carried, 8-0.

Associate Member Ballard moved for the following:

**CERTIFICATION OF CLOSED MEETING
OF THE VIRGINIA MARINE RESOURCES COMMISSION**

WHEREAS, the Commission has convened a closed meeting on this date pursuant to an affirmative recorded vote and in accordance with the provisions of The Virginia Freedom of Information Act; and

WHEREAS, § 2.2-3712.D of the Code of Virginia requires a certification by this Commission that such closed meeting was conducted in conformity with Virginia law;

NOW, THEREFORE, the Commission hereby certifies that, to the best of each member's knowledge,

- (i) only public business matters lawfully exempted from open meeting requirements under Virginia law, and
- (ii) only such public business matters as were identified in the motion by which the closed meeting was convened were heard, discussed or considered in the closed meeting by the Commission.

Associate Member Birkett seconded the motion. Commissioner Pruitt held a Roll Call vote:

AYES: Ballard, Birkett, Bowden, Cowart, Garrison, Holland, Jones, McLeskey, and Pruitt

NAYS: None

ABSENT DURING VOTE: None

**ABSENT DURING ALL OR PART OF CLOSED MEETING: None
The motion carried, 9-0.**

**Recording Secretary
Virginia Marine Resources Commission**

Commissioner Pruitt explained that the Assistant Attorney General, legal counsel for VMRC, was meeting with City representatives, and upon his return the Commission would recess into another Closed Session, after which they would return to announce their decision.

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- 4. **VIRGINIA BEACH DEPARTMENT OF PUBLIC WORKS, #03-0641.** Commission update by City representatives regarding the status of their permit to undertake improvements to the Rudee Inlet infrastructure to reduce shoaling in the inlet, improve navigation and increase the efficiency of maintenance dredging operations.

Phil Roehrs, representing the City of Virginia Beach, gave the update presentation for the Rudee Inlet project. Mr. Roehrs explained that on November 24, 2003 the Dept. of Environmental Quality waiver was received. He further explained that the US Army Corps of Engineers permit was received January 30, 2004.

After Mr. Roehrs answered some questions from the Associate Members, Associate Member McLeskey thanked him for coming and presenting the project update to the Commission.

Project Status Report, Permit Fees not applicable.

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- 5. **CHARLES W. DAVIS, #03-1147.** Commission review on appeal by 25 or more freeholders of the January 22, 2004 decision by the Essex County Wetlands Board to approve a permit to construct a community fishing pier, a launch ramp for personal watercraft and canoes, and a vinyl bulkhead at community property situated along Piscataway Creek in Essex County.

Commissioner Pruitt explained that the Commission was only hearing testimony on the 2nd hearing and any additional information would need a motion. He further explained that the hearing was on the Wetland Board's compliance with the Code and the subaqueous application would be heard separate from the appeal.

Kevin Curling, Environmental Engineer, Sr., gave the presentation with a review of slides from the past record. Mr. Curling suggested that the comments from the Essex County Sheriff concerning the deputy's testimony be allowed. **Associate Member McLeskey moved to open the record. Associate Member Holland seconded the motion. The motion carried, 7-0, with Associate Member Cowart voting no.** Mr. Curling then distributed the sheriff's letter to the board.

Mr. Curling explained that the project was located along the upper Piscataway Creek, 7 miles from the Rappahannock River and approximately 2 miles above the Route 17 bridge. The project was located on a community parcel in a 25-lot development, 4 of which were riparian waterfront lots. The applicant sought authorization to construct 80 feet of bulkhead, a 12-foot wide by 40-foot long timber boat ramp, and a community pier.

Mr. Curling explained that the Commission reviewed this project in response to an appeal by 25 or more freeholders at its regularly scheduled meeting on October 28, 2003. At that time, the Commission remanded the matter to the Wetlands Board for further consideration, with directions to consider the “necessity” of the proposed boatramp, in light of an existing launching facility down creek.

Mr. Curling said that the Wetlands Board reheard this application at their January 22, 2004 meeting. On January 30, 2004, Commission staff received a letter and a petition with 40 signatures from Mr. Peter Glubiak, representing the freeholders, noting their appeal of the Essex County Wetlands Board’s decision. As such, the appeal was considered timely under the provisions of Section 28.2-1311(B) of the Code of Virginia. The appeal alleged that the Essex County Wetlands Board failed to take into account (1) the balancing of public and private benefit and detriment, (2) the potential destruction of wetlands of primary ecological significance, (3) the impacts to the adjacent wetlands and the ecologically critical upland areas surrounding the project, and (4) the economic necessity of the project.

Mr. Curling said that the hearing began with Mr. Gary Allen, the County Administrator, giving an overview and background on the existing public access point located on Route 664 at Route 17. The County did not consider this location to be a public boat ramp, but rather an historic VDOT steamboat landing.

Mr. Curling explained that Mr. Ronald Martin, representing the applicants, presented information documenting the increased tax revenues for the county of an improved common area. He, also, submitted evidence concerning the unsuitability of increasing the use of the existing public access point. He concluded his remarks by stating that there was no evidence that this project would be detrimental to Essex County in any manner.

Mr. Curling further explained that Mr. Peter Glubiak, representing the protestors, responded by stating that there was no economic necessity, that the public detriment of the impacts to the wetlands system outweighed the private benefit, and that the existing public access point was and will continue to be used. Five other speakers spoke in opposition to the project. They reiterated their concerns of impacts to the wetlands in the area and safety issues of navigating the creek. Several related their use of the existing public access point.

Mr. Curling said that during Mr. Martin's rebuttal, Mr. Allen restated the County's characterization of the existing public access point. There was also some discussion concerning the Sheriff's department's involvement with the area.

Mr. Curling stated that following the public testimony, the board discussed the project. The members attempted to determine the amount of increased boat traffic that this proposal would introduce and its impacts on the area. They also discussed the safety issues of navigating the creek and what alternatives were available to control traffic. They noted the conditions of the existing public access point and the direct wetlands impacts associated with using an unimproved ramp. A motion to approve the bulkhead and boat ramp was made and passed by a vote of 4 to 1. The board made no decision on the pier, but did discuss making a recommendation to the Commission.

Mr. Curling stated that the Essex County Wetlands Board was a five-member board. The transcript/minutes, however, reflected a recorded vote of 5 to 1. Six individuals were present on the dais and voted. According to the County, one of the members (Bayton) had asked to be replaced at the end of his term. Staff is presently unsure of that date. Apparently both the new replacement (Davis) and the old member (Bayton) were present and voted. Staff had been unable to determine which of the two members was the legal, proper voting member.

Mr. Curling explained that while this reflected a definite procedural error, staff did not believe that the decision, or rather outcome, of the Board would have been any different. The Board's decision was based on a thorough discussion of the necessity of the proposed boat ramp, its impact on the surrounding area, and the condition of the existing public access.

Therefore, Mr. Curling stated that staff was recommending that the decision of the Essex County Wetlands Board be upheld.

Ronald N. Martin, attorney for the applicant, was present and his comments are a part of the verbatim record. Mr. Martin explained that community access to water was needed. He stated that if the problem was not taken care of, there would continue to be damage to the wetlands. He explained that the boat ramp was for light boats and watercraft. He said the Rt. 17 boat ramp does not exist and was not a recognized public ramp. He again said that the Old Ferry Point Landing was not a public ramp and not recognized, as such, by other state agencies or the local governing body. He said this project was necessary to the county as a tax benefit. He said it would be no larger than 12 feet X 40 feet with skid cleats for safety purposes. He said the project was targeting the Piscataway residents.

Peter Glubiak, representing the protestors, was present and his comments are a part of the verbatim record. He said the Commission needed to review the minutes to see the procedural irregularities and to notice the questions. He said there was no economic necessity. He further explained that there was tremendous detriment to the public and

tremendous benefit to only one individual. He said that there were other alternatives. He said that he was not opposed to the pier for light watercraft but was opposed to the boat ramp. He stated it was an inappropriate use of riparian rights, which the wetlands board did not choose to consider in their review. He said the wetlands board needed guidance and needed to take the blinders off and come back with a denial. He said the Commission should accept the letter of Mr. McCauley in his official capacity.

Commissioner Pruitt explained that since Mr. McCauley did not originally testify in an official capacity it was not appropriate to do so now. Associate Member Ballard stated that the Commission only needed to consider the actions of the board and not the merits of the project.

Ronald N. Martin, in his rebuttal, stated that the county does not have access now and he did not understand what the protestors wanted. He acknowledged that a procedural error did occur. He stated that this was not an individual project but a community project. He asked that the Commission uphold the Wetlands Board's decision, as recommended by staff.

Associate Member McLeskey moved to uphold the Wetlands Board's decision as recommended by staff. Associate Member Holland seconded the motion. Associate Member McLeskey asked that the motion reference C. W. Davis, Permit Application #03-1147. Associate Member Birkett explained that he was not against public access to the water, but the Code put the Commission in the position of deciding whether the Wetlands Board erred and the board had not erred. Associate Member Ballard stated that in accordance with Section 28.2-1313 there was no evidence of the Wetlands Board failing in its duty. **The motion carried, 8-0.**

Permit Fees not applicable.

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6. **CITY OF HAMPTON, et al, #03-0740**, requests authorization to dredge, by hydraulic method, and to a maximum depth of -35 feet below MLW, 522,000 cubic yards of beach-quality sand from a 38-acre area of Horseshoe Shoals. 281,000 cubic yards of the material will be pumped and deposited along 3,785 linear feet of shoreline at Buckroe Beach, and 241,000 cubic yards of the material will be placed on 2,050 linear feet of public beach located near Salt Ponds.

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

Ms. West explained that the City of Hampton, in partnership with the U. S. Army Corps of Engineers, planned to nourish the public beaches at Buckroe Beach and the Salt Ponds. The project was being undertaken, as a hurricane and storm damage protection effort.

The nourishment at Buckroe Beach would begin adjacent to the former Buckroe Fishing Pier and extend north to Pilot Avenue. Mean low water would be relocated as much as 80 feet seaward in the most severely eroded portions of the beach. At the Salt Ponds, the nourishment would extend the length of the public beach from the intersection of N. First Street and Bay Front Place to the jetty at the Salt Ponds' entrance channel, with mean low water being relocated seaward as much as 150 feet.

Ms. West said that the proposed “ borrow” area was a 370-acre site at Horseshoe Shoals. Within this area, the applicant proposed to mine sand from a 38 acre borrow area. The 370-acre site included two previous borrow areas authorized by the Commission in 1990 and 1996 for beach nourishment efforts undertaken by the City of Hampton. The applicant had requested a large borrow area, in order to allow for the flexibility to relocate the dredge, if unexploded ordinance or areas of poor quality material were encountered.

Ms. West said that staff had no concerns regarding beach nourishment as a storm and hurricane protection strategy. Staff was, however, concerned that the dredging within the 370-acre borrow area would have adverse impacts to blue crabs.

Ms. West said that to minimize the potential for adverse impacts, VIMS recommended a time-of-year restriction from July 1 through September 15 to protect spawning crabs in the borrow area. If the applicant elected to enlarge the existing borrow sites, VIMS further recommended that an additional time-of-year restriction of December 1 through February 28 be imposed to protect buried and over wintering crabs. This second winter time-of-year restriction would not be necessary, if the applicant dredged a new 38-acre area within the 370-acre site.

Ms. West explained that studies following the earlier borrow efforts showed that the borrow areas provided and enhanced habitat for blue crabs. The existing borrow areas were heavily utilized by crabbers during the crab dredge season, December 1 through March 31.

Ms. West said that staff had no concerns regarding the proposed hurricane and storm protection effort and recommended approval of the beach nourishment as proposed.

Ms. West stated that to minimize impacts to the blue crab fishery and resource, however, staff recommended that the time-of-year restrictions recommended by VIMS be adopted. A summer time-of-year restriction from July 1 through September 15 to protect migrating and spawning blue crabs in the borrow area should be imposed regardless of the location of the new borrow pit. If dredging of the side slopes surrounding the existing borrow pit areas are contemplated, an additional time-of year restriction of December 1 through March 31 should also be imposed to protect both the winter buried crabs and to allow unimpeded access to the existing borrow pit areas by crab dredgers during the crab dredge season.

Fred Whitley, City of Hampton Engineer, was sworn in and his comments are a part of the verbatim record. Mr. Whitley urged the Commission to approve the beach nourishment at Buckroe Beach and the Salts Pond beach as there was much damage from Hurricane Isabel. He said it is imperative that the project be done before the end of the federal fiscal year, so that funding for this project would not be lost. He further stated that he concurred with the staff recommendations. He said there were some concerns that the Corps would address.

Associate Member Garrison expressed concern that the word, borrow, could be misconstrued and suggested that the word, excavation, be used instead.

Michele Cleland with the U. S. Army Corps of Engineers, was sworn in and her comments are part of the verbatim record. Ms. Cleland stated they had been working with the staff on this project for five years, and that only two months before this hearing a time of year restriction to protect the crab fishery and resource was brought up. She said that they would abide by this restriction but that it did not have the science to support it. She said, however, that this project was of the utmost importance to the applicant as expressed by Mr. Whitley and they did not want to cause a further delay. She further explained that the project description provided was incorrect by saying the maximum cubic yards was 522,000. She said the application should include a 100,000 cubic yards amount for contingency purposes which would bring the total to 622,000 cubic yards. Ms. Cleland explained that the application was set up, this way, similar to what was done for DEQ, so that a permit modification would not be necessary. She said they would accept the 522,000 but that they were requesting the 622,000 on an emergency contingency, as they needed the ability to act quickly.

Ms. West stated that the Commission books had the correct project description.

Bob Grabb, Chief, Habitat Management Division, explained that the staff did not recommend approval of the 100,000 cubic yards at this time. Because the Commission meets monthly, there is ample time to look at this again, if it becomes necessary. He said that the staff did not know where the material would be coming from, whether from a different area or an expanded area. He explained that the staff would support a modification should it become necessary.

No one else was present to address this matter, either pro or con.

Associate Member Ballard moved that the Commission approve the staff recommendation, granting this permit, including the additional time of year restriction and the additional permit conditions that were displayed on the screen. Associate Member Cowart seconded the motion. The motion carried, 8-0.

Permit Fee.....\$100.00

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Commissioner Pruitt announced at this point that the Commission would return to Closed Session since the Attorney had returned.

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2nd CLOSED SESSION:

Associate Member Ballard moved that the meeting be recessed and the Commission immediately reconvene in closed meeting for the purpose of consultation with legal counsel and briefings by staff members pertaining to actual or probable litigation, or other specific legal matters requiring legal advice by counsel as permitted by Subsection (A), Paragraph (7) of § 2.2-3711 of the Code of Virginia, pertaining to:

The City of Newport News versus VMRC

The motion was seconded by Associate Member McLeskey. The motion carried, 8-0.

Associate Member Ballard moved for the following:

**CERTIFICATION OF CLOSED MEETING
OF THE VIRGINIA MARINE RESOURCES COMMISSION**

WHEREAS, the Commission has convened a closed meeting on this date pursuant to an affirmative recorded vote and in accordance with the provisions of The Virginia Freedom of Information Act; and

WHEREAS, § 2.2-3712.D of the Code of Virginia requires a certification by this Commission that such closed meeting was conducted in conformity with Virginia law;

NOW, THEREFORE, the Commission hereby certifies that, to the best of each member's knowledge,

- (i) only public business matters lawfully exempted from open meeting requirements under Virginia law, and
- (ii) only such public business matters as were identified in the motion by which the closed meeting was convened were heard, discussed or considered in the closed meeting by the Commission.

Associate Member McLeskey seconded the motion. Commissioner Pruitt held a Roll Call vote:

AYES: Ballard, Birkett, Bowden, Cowart, Garrison, Holland, Jones, McLeskey, and Pruitt

NAYS: None

ABSENT DURING VOTE: None

ABSENT DURING ALL OR PART OF CLOSED MEETING: None

The motion carried, 9-0.

**Recording Secretary
Virginia Marine Resources Commission**

Commissioner Pruitt announced that the Commission would announce its decision on this matter after the lunch break.

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The Commission broke for lunch at approximately 12:54 p.m. and returned from lunch at approximately 1:45 p.m.

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Commissioner Pruitt reconvened the public meeting.

Associate Member Ballard moved that the Commission authorize the Commissioner to execute the agreement, which had been distributed, by and between the Commission and the City of Newport News, providing for a supplemental, informal hearing in settlement of existing litigation between the City and VMRC; provided, that no further changes are made to this agreement and the City continues to be willing to execute this agreement, following the briefing of City Council Members by City Officials. Associate Member McLeskey seconded the motion. The motion carried, 8-0.

Commissioner Pruitt explained that what the Commission had agreed to was to have this informal hearing on the Newport News/King William reservoir project. (A copy of what was adopted was passed out to the public present.) He said this was no indication of how the Commission was going to vote after that hearing. He further stated that the vote to do this had no bearing on how the vote will be concerning the project. He stated that will be after the informal hearing had taken place.

Associate Member McLeskey stated that he believed that the Commission was in a better position to weigh the facts. He said that the Commission had heard 18 to 20 hours of testimony from both sides. He also said that he believed they were in a better position to

analyze and to decipher any additional information to make a fair and just decision rather than to have it go to a court where a single judge will just read a transcript.

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7. **MOBJACK MARINA, INC., #03-1221**, requests authorization to construct one (1) 90-foot long timber bulkhead, one (1) 90-foot long timber jetty, six (6) 3-foot wide by 45-foot long finger piers, six (6) 3-foot wide by 30-foot long finger piers, install one (1) mooring buoy, creating a total of 11 mooring spaces, dredging 7,647 cubic yards of subaqueous material creating a 50-foot wide by 1,000-foot long channel with a depth of minus eight (-8) feet at mean low water adjacent to their property situated along the East River in the village of Mobjack in Mathews County. The project is protested by nearby property owners and an oyster ground leaseholder.

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

Mr. Curling explained that the town of Mobjack was located at the mouth of the East River in Mathews County. The proposed work was located at a marina facility that operated from the early 1960's to the mid 1990's. A channel was dredged in 1964. Presently, the existing depths in the boat basin were between -4 and -5 feet MLW. The entrance was also marked with 2 USCG maintained daymarkers.

Mr. Curling said that the original proposal also included beach nourishment and a second bulkhead around a small marsh island.

Mr. Curling stated that the Virginia Institute of Marine Science noted concerns over the proposed beach nourishment and construction of the second bulkhead. VIMS recommended that appropriate time-of-year restrictions, based on the presence of oysters in the vicinity of the dredging, be imposed. The Commission's East River Oyster Reef was located approximately 700 feet away. While there was no submerged aquatic vegetation in the area of the channel, it was present, however, in the immediate vicinity.

Mr. Curling said that the Department of Health (Division of Wastewater Engineering) had noted that the project was acceptable based on the applicant's willingness to build a pump-out facility, dump station and rest room facilities. The applicant did not propose any fuel facilities. The Department of Health (Division of Shellfish Sanitation) noted that there was a previously established seasonal closure at this site, and that it needed to be revised based on the new proposal. The new seasonal closure appeared to have minimal impacts on the existing oyster leases.

Mr. Curling said that the Mathews County Wetlands Board held its public hearing on July 2, 2003, and considered those items that were within their jurisdiction. They approved

the 90-feet of bulkhead and denied the beach nourishment and second bulkhead. Since the Board essentially denied the beach nourishment as the placement site for the dredge material, the applicant had identified an upland placement site located at an existing borrow pit within the County.

Mr. Curling said that Mr. Wilson Davis, the oyster ground leaseholder, had expressed concerns over the proposed channel and its effect on his adjacent upland shoreline. He gave the original owners the right to dredge through his oyster lease in 1964. Other nearby residents had raised concerns over the reestablishment of an operating marina and the disposal of the dredge spoils.

Mr. Curling said that this facility appeared to meet most of the requirements of the Commission's *Criteria for the Siting of Marinas or Community Facilities for Boat Mooring*. Item 2 of the Specific Siting Guidelines recommended that the channel be limited to the minimum dimensions necessary for navigation and should avoid sensitive areas such as wetlands, shellfish grounds and seagrass beds. According to Section 28.2-630 of the Code of Virginia, the Commission can grant a permit if "the Commissioner finds that the proposed bulkhead, wharf or channel will not adversely impact commercially productive oyster or clam grounds." Commercially productive oyster grounds are further defined as "those areas which can be demonstrated to have (i) suitable substrate for oyster or clam production and (ii) evidence of commercial oyster or clam production within the past three years." The section further states "Any person constructing a channel...shall compensate the lessee of any oyster or clam grounds of all losses or damages including the value of the ground taken for the construction of the channel."

Mr. Curling said that while the East River Oyster Reef was productive and it would appear that Mr. Davis' lease was suitable for oyster production, he had not been using his lease for commercial oyster production. Also, since the area had been dredged in the past, the new dredging should not have any more impact on the lease than what it had been subjected to for the past 40 years.

Mr. Curling said that in this case, the proposed depth of -8 feet appeared to be excessive for a facility of this size. Other marinas in Mathews County, that had privately dredged channels, had a maximum depth of -6 feet.

Mr. Curling stated that to reduce the impacts to the oyster lease and nearby resources, and yet provide the minimum dimensions necessary for navigation, staff recommended that the channel be reduced to -6 feet and that no dredging occur between July 1 and September 30, or between December 1 and March 15.

Mr. Curling said that if approved, staff further recommended that royalties in the amount of \$675 for the encroachment of 1,350 square feet of pier at \$0.50/square foot, \$54 for the encroachment of 180 square feet of bulkhead/jetty at 0.30/square foot, \$250 for a

commercial mooring buoy, and a dredging royalty of \$1,800 for the removal of 4,000 cubic yards of subaqueous material at \$0.45 per cubic yard be assessed.

Associate Member McLeskey asked if the commercial mooring buoy was owned by the marina. Mr. Curling responded, yes.

Karla Haven, applicant's representative, was sworn in and her comments are a part of the verbatim record. Ms. Haven explained that Mr. Curling had been very helpful and available to provide information. She said this project was being done to refurbish an existing marina. She stated that they would like to put in 11 slips for larger sailboats. She explained that they needed 8-foot depth also for the larger sailboats. She said the area was now 7 feet, but historically it had been 8 feet. Commissioner Pruitt asked her if the applicant agreed with the conditions recommended by staff? She responded, no, that they wanted the 8-foot depth. She said that VIMS said that the impacts would be short term, DEQ said the impacts would be minimal in nature, the time-of-year restriction was okay, and the Corps required that they stake the proposed channel cut.

No one in opposition to the project was present.

Associate Member McLeskey moved to approve the project with an 8-foot draft cut and all other conditions. Associate Member Birkett seconded the motion. The motion carried, 8-0.

Permit Fee.....	\$ 100.00
Dredge Royalty (7,647 cu. yds. @\$0.45/cu. yd.).....	\$3,441.15
Pier Encroachment (1,350 sq. ft. @\$0.50/sq. ft.).....	\$ 675.00
Bulkhead/jetty Encroachment (180 sq. ft. @\$0.30/sq. ft.)..	\$ 54.00
One Commercial Mooring Buoy.....	\$ 250.00
Total Fees.....	\$4,420.15

- 8. **BUBBA'S MARINA, #01-1979**, requests authorization to construct 2,087 square feet of open-pile commercial wharf to accommodate a commercial, open-pile building for a proposed wholesale/retail fish market and commercial seafood unloading dock, at their existing restaurant and marina facility situated adjacent to the Lynnhaven River in Virginia Beach.

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

Mr. Owen explained that the project was located at property situated along the Lynnhaven River, approximately 0.2 miles upstream from Lynnhaven Inlet, in Virginia Beach. The

marina abutted an existing federal project channel that was heavily utilized by recreational and commercial boating traffic.

Mr. Owen said that existing facilities on-site included, a restaurant, bait & tackle shop, parking lot, and a nine-slip marina with fuel dock and boat ramp. Due in large part to a lack of adequate parking spaces on-site, the applicant now sought authorization to demolish the existing bait & tackle shop and construct a new facility that would encroach over approximately 2,827 square feet of State-owned subaqueous land. This would provide additional parking spaces on the existing upland. The new two-story building would purportedly serve as a wholesale/retail fish market and commercial seafood unloading facility.

Mr. Owen stated that the original application, which was received on November 7, 2001, sought authorization for a bait and tackle shop, only for the stated purpose of providing additional upland parking for the marina and restaurant patrons. At that time, staff questioned the water-dependency of the original proposal and requested that the applicant provide additional justification for his request.

Mr. Owen said that the applicant later modified his proposal to include its use as a commercial seafood unloading facility and fish market. This facility had been approved by the City of Virginia Beach Chesapeake Bay Board and had preliminary Site Plan approval from the City's Developmental Services Center. The project did not involve any tidal wetlands.

Mr. Owen said that the Virginia Institute of Marine Science advised that it had no objection to the project provided that the building's use was restricted to a water-dependent use.

Mr. Owen stated that the applicant had received approval from the Department of Health. No objections had been received from any remaining State agencies.

Mr. Owen said that when reviewing proposals to build over State-owned submerged lands, the Commission's Subaqueous Guidelines directed staff to consider, among other things, the water-dependency and the necessity for the proposed structure. Furthermore, §28.2-1205 of the Code of Virginia stipulated that "In addition to other factors, the Commission shall also consider the public and private benefits of the proposed project and shall exercise its authority under this section consistent with the public trust doctrine as defined by the common law of the Commonwealth adopted pursuant to §1-10, 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. Owen explained that while staff acknowledged the water-dependency of a commercial seafood unloading facility, staff did question the need to site the proposed

retail fish market over State-owned subaqueous land. This use of the proposed facility was viewed as a non-water dependent use by staff with no inherent need to be sited over water. As such, staff believed it would be more appropriate to construct the fish market on the existing upland. Staff had no objection to the construction of a reasonably sized marginal wharf to facilitate seafood unloading if that was deemed necessary.

Mr. Owen said that accordingly, staff recommended denial of the project as proposed. Should the Commission elect to approve the project, however, staff recommended that the facility's encroachment over subaqueous land be restricted to that minimally necessary for unloading commercial seafood and that an annual royalty be assessed at \$1.00 per square foot for any authorized encroachment.

Tom Langley with the Langley and McDonald Engineering Firm, representing the applicants, was present and his comments are a part of the verbatim record. He presented slides of other operations in the area and a map of the project. He said that the slides showed the space needed by the marina when looking at similar operations in the area. He said the marina employed 130 to 155 people. He said that they were only asking for what other operations already had. Associate Member McLeskey asked if the pier on the west was modified or reduced? Mr. Langley responded, yes, because of navigational problems.

Richard Welton was sworn in and his comments in support of the project are a part of the verbatim record. Mr. Welton explained that in his view, the proposed project was water-dependent as the facility needed to be close to the ebb and flow of the tide. He further explained, if it were not close to the water, then the work boats could not get close in; and, also space was needed so that a tractor trailer could turn around. He explained that the increased value of waterfront property was pushing the watermen out.

No one in opposition to the project was present.

Associate Member McLeskey moved to approve the project, as presented, provided, that the proffer that this would be a commercial seafood landing facility was properly recorded and the annual royalty fees were eliminated. Associate Member Bowden seconded the motion. The motion carried, 8-0.

Permit Fee.....\$100.00

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(Note: Items 9 through 12 were heard earlier in the meeting.)

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- 13. OTIS P. ASAL AND ROBERT A. SCOTT, #03-027S**, request authorization to lease approximately Five (5) acres of Oyster Planting Ground in the Chesapeake Bay near the mouth of Old Plantation Creek. The project is protested by nearby property owners.

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

Mr. Badger explained that the lease was located adjacent to and southwest of the mouth of Old Plantation Creek, and about two and one half (2.5) miles south of Cape Charles Harbor. The water depths vary from minus one tenth (-0.1) of a foot on the sand bars, to minus three (-3) feet (mlw) in the small channel. The bottom is mostly sand with some areas of submerged aquatic vegetation (SAV) nearby. Old Plantation Creek is the site of a large amount of clam aquaculture activity.

Mr. Badger said that Mr. Asal and Mr. Scott first applied for a lease in 1999 (#99-085). Their application was for an area that had SAV on the southern portion and was protested by nearby homeowners in the Arlington Plantation subdivision. The protest was based on the potential adverse impacts to the shallow channel leading into Plantation Creek. The two parties agreed to a line approximately 25 feet northwest of the existing channel and the protest was withdrawn. A survey was made bounded on the north by the Nottingham Plat File 17494, east by the agreed to line 25 feet of the channel, south by SAV beds, and west by SAV. A lease (Plat file 17690, encompassing 8.69 acres) was assigned to Mr. Asal and Mr. Scott in 2000.

Mr. Badger explained that on October 16, 2001 staff received an application for oyster planting ground from Otis P. Asal and Robert A. Scott for 10 acres (#1-091). That application was bounded on the north by an oyster ground lease in the name of W. T. Nottingham (Plat file #17494); east by vacant bottom; south by vacant bottom and on the west by their oyster ground lease (Plat file #17690). This is the same area that was protested by the Arlington Plantation homeowners in the original application. The channel had meandered to the southeast and the applicant felt there was room for clam aquaculture. The Arlington Plantation homeowners again protested the project. The application was administratively denied and subsequently withdrawn on January 24, 2002.

Mr. Badger said that staff received another application from Mr. Asal and Mr. Scott on April 14, 2003 (#03-027). This oyster ground application was for 5 acres in the same area that had been denied on January 24, 2002, (#01-091). Mr. Asal and Mr. Scott have asked that their oyster ground application be heard by the full Commission.

Mr. Badger stated that staff had received letters from the Arlington Plantation Homeowner's Association and nearby homeowners on the south side of Plantation Creek protesting the oyster ground assignment. They had concerns the proposed lease would

adversely impact the shallow channel leading into Plantation Creek. The channel was very narrow and is almost non-existent as it crosses the sand bars into the bay. They also indicated that clamming activity in this area would limit the use of their beachfront property.

Mr. Badger explained that the movement of sand along this shoreline and the shoaling of Old Plantation Creek were historical problems. At present, it was difficult for small boats to enter the creek at low tide. With the addition of more oyster leases, navigating the restrictive channel could become even more of a challenge. The channel was not fixed and typically migrated in response to storm events and littoral processes.

Mr. Badger stated that based on the above, staff recommended that the Oyster Ground Application be denied. Furthermore, staff recommended that the area shown on the oyster ground map be set aside for ten (10) years to prevent further applications during that period.

Glen Crenshaw, representing the applicant, was present and his comments are a part of the verbatim record. Mr. Crenshaw said that staff said there was very little SAV in this area. He said that the applicant was willing to agree to cleaning the beds only on the ebb tides, if this would help in getting his request approved.

Marvin Milton, Arlington Homeowners Associate President, was present and his comments in protest are a part of the verbatim record. Mr. Milton referred the Commission to his handout that listed the Association's objections.

Commissioner Pruitt left the meeting at approximately 2:56 p.m. and Associate Member Birkett assumed his role as chair at this point. Associate Member Birkett stated that he did not object to allowing clam aquaculture, but not in an area that would affect others. He said that he agreed with staff recommendation to deny.

Glen Crenshaw in his rebuttal stated that the applicant would agree to a reduction with only 2.73 acres being approved.

Associate Member Holland asked if staff and the applicant could meet and try to come to some agreement with regards to cleaning on ebb tide. Mr. Badger stated that there was no place provided on the form for this kind of stipulation. Associate Member Cowart stated that in the northern area, net removal had been done before. Carl Josephson, Assistant Attorney General, stated that this could be added even though the form didn't allow a place on it by typing it separately and making it an attachment.

Associate Member Birkett asked for a motion from the Commission. Associate Member Holland moved to approve the lease for 2.73 acres with the applicant agreeing to clean the area on ebb tide only and to the removal of the nets once the clams had been harvested. Associate Member Bowden seconded the motion. The

motion carried, 5-1-1. Associate Member Jones voted no and Associate Member Ballard abstained from voting because of business interest conflicts.

Commissioner Pruitt returned to the meeting at approximately 3:05 p.m.

14. PUBLIC COMMENTS: (Heard after Item 15)

15. DISCUSSION: Request by Staff to set aside an area at the mouth of Plantation Creek for at least ten (10) years.

Hank Badger, Environmental Engineer, Sr., gave the presentation. His comments are a part of the verbatim record.

Mr. Badger explained that the proposed set aside area is located adjacent to and southwest of the mouth of Old Plantation Creek. The water depths vary from minus one tenth (-0.1) of a foot near the beach and sand bars, to minus three (-3) feet (mlw) in the small channel. The bottom is mostly sand with large areas of submerged aquatic vegetation (SAV). Old Plantation Creek has a large amount of clam aquaculture activity.

Mr. Badger further explained that sand movement along this shoreline, and, the shoaling of Old Plantation Creek had been an historical problem. At present, it was difficult for small boats to enter the creek at low water. With the addition of more oyster ground leases, navigating in the restrictive channel could become even more of a challenge.

Mr. Badger stated that VIMS had documented the presence of SAV throughout the area. VMRC, Regulation 4VAC 20-335-30-F, "Pertaining to On-Bottom Shellfish Aquaculture Activities" required that no new structure be placed on existing stands of submerged aquatic vegetation (SAV). This included clam nets.

Mr. Badger said that based on the above, staff requested that the area be set aside for ten (10) years as shown on the oyster ground map to prevent further applications during that period.

Mr. Badger explained that in general the set aside area would be bounded on the north by Griffith (PF #17617), Asal/Scott (PF #17690), Asal/Scott (new lease approved by Commission action), and Nottingham Enterprises (PF #7494); east by vacant bottom, Parson (PF #12055) and mean low water along the Arlington Plantation subdivision; south by Hand (PF #18079); and west by vacant bottom.

Commissioner Pruitt asked counsel if this action could be taken without a public hearing.

Carl Josephson, Assistant Attorney General, stated that since this was being done in the public's interest, to protect the SAV in this area and for other reasons discussed; and, this being stated-owned property, action could be taken by the Commission to set this area aside.

Associate Member Holland made the motion to set the area aside, as described by staff , in the public's interest. Associate Member Cowart seconded the motion. The motion carried, 8-0.

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14. PUBLIC COMMENTS:

Edward Bender

Mr. Bender addressed the Commission on behalf of pound netters and regarding his suit now in the federal courts over unfair restrictions established by NMFS. His comments are a part of the verbatim record.

Commissioner Pruitt asked him if he was here to discuss the federal decisions on turtles and their impact on the pound net fishery? Mr. Bender responded, yes. He said that he wanted to request two things. The first being that the Attorney General's office join him in his suit in the Federal Courts, and second, for the Commission to apply for an incidental take permit. This would allow turtles caught in pound nets to not be counted and then NMFS cannot close the fishery. He said that only the State was allowed to make this application. Commissioner Pruitt asked if this application must be made for the Endangered Species, to which Mr. Bender responded, yes. Mr. Bender further explained that when the regulation was being proposed in 2001, the Governor was asked to comment and he did not respond. Commissioner Pruitt explained that at that time he, Jack and Secretary Murphy met regarding this matter and the Governor did respond, which was sent to Dr. Hogarth. Commissioner Pruitt told Mr. Bender that the industry would have to take the legal matters to the Attorney General's office. He also explained that a meeting was scheduled for Friday with the Secretary of Natural Resources regarding the permit matter.

Commissioner Pruitt explained that the Commission was going to take some action today regarding this matter. At the Commissioner's request, Associate Member Holland read the following resolution:

**Resolution
of the
Marine Resources Commission**

I move the adoption of a resolution pertaining to the proposed rule of the National Marine Fisheries Service (NMFS) affecting Virginia's Pound Net Fishery and expressing the sentiment of this Commission as follows:

Whereas, the Virginia Institute of Marine Science has documented that the proposed rule is not supported by the evidence, and

Whereas, the pound net fishery has declined by more than 50 percent since the 1980's, and the use of large mesh nets have declined by 90 percent, while sea turtle strandings have increased 200-300 percent, and

Whereas, the NMFS assertion that most turtles "impinged" on nets will die is unsubstantiated and available evidence suggest otherwise, and

Whereas, the NMFS has failed to advertise their proposed rule in a timely fashion and long after pound net fishermen have ordered their nets and cut poles for the fishing season,

Now, therefore, be it resolved, the Commission opposes the imposition of the proposed rule and requests the NMFS continue with the status quo until such time as proposed experimental designs of pound net leaders can be evaluated.

Further, that the staff of the VMRC continue their discussions with the NMFS on the preparation of a Section 10 permit authorizing incidental takes of sea turtles under the Endangered Species Act.

Further, that a copy of this Resolution be provided to Dr. Bill Hogarth, Assistant Administrator, National Fisheries Service, and Secretary of Natural Resources, W. Tayloe Murphy, Jr.

Associate Member Ballard seconded the motion. Associate Member Jones stated that it was clearly important to diminish mortality on adult stage, endangered turtles. She said that it has been proven scientifically that preserving adults turtles is important to the species continuance. She explained that she was personally committed to the preservation of the turtles, but there was no scientific evidence to support the NMFS actions in closing the pound net fishery. She said that she agreed with the resolution. **The motion carried, 8-0.**

Jan Marshall

Mr. Marshall explained that the Tangier watermen wanted to request an extension of the dredge season in the Pocomoke-Tangier Management Area. He explained that they had

not been able to work all possible workdays because of bad weather. He said that the catch is running 1 bushel below limit. He said that the catch had been good on the public oyster rocks, such as, Johnson, California, Thoroughfare and Hurley's. Commissioner Pruitt asked, how many days were lost? Mr. Marshall responded that 32 days were lost. Mr. Marshall's comments are a part of the verbatim record.

Marvin Milton

Mr. Milton requested help and increased policing of debris resulting from aquaculture activity. Commissioner Pruitt explained that the legislative budget proposal included a request for 10 more Marine Police Officers to help with this problem and with their increased "Homeland Security" responsibilities. Mr. Milton's comments are a part of the verbatim record.

Mark Heflin, Applicant (Item 11)

Mr. Heflin requested that he be allowed to address the Commission since he was absent from the hearing when his request was heard earlier. He further explained that staff told him when he called earlier, that the Commission could reconsider their decision if he could make his case during the public comment period. Commissioner Pruitt agreed to his request to be heard.

Mr. Heflin stated that he was requesting a 30-foot encroachment. He said he needed this additional amount to allow for a parking crib for his vehicle. His comments are a part of the verbatim record.

Associate Member Garrison asked what was the staff's recommendation. Mr. Grabb responded that the staff recommendation had not changed and they still recommended the 24 feet.

After further discussion, Commissioner Pruitt asked for a motion from the Commission to reconsider the matter. **Associate Member Ballard moved to reconsider the matter. Associate Member McLeskey seconded the motion. The motion carried, 8-0.**

Associate Member Ballard asked if it was advertised for 35 feet and no protests were received? Ms. West responded, yes.

Associate Member Ballard moved to adopt staff recommendation with the exception that the new bulkhead be a maximum of 30 feet from the street. Associate Member Birkett seconded the motion. The motion carried, 8-0.

Fred Linton, Waterman, of Saxis

Mr. Linton told the Commission that he had a petition that asked the Commission to allow for the baiting of peeler pots to keep their Jimmies alive. Mr. Travelstead explained that the Crab Committee would be meeting on March 2nd and would discuss the matter at that time. Commissioner Pruitt invited Mr. Linton to make his comments known to the committee at that time.

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- 16. **Public Hearing:** Proposed amendments to regulation 4VAC20-920-10 et seq., "Pertaining to Landing Licenses" modifying requirements for the transfer of summer flounder endorsement licenses.

Jack Travelstead, Chief, Fisheries Management Division, gave the presentation and his comments are a part of the verbatim record. Mr. Travelstead explained that the transferring of permits from vessel to vessel for the offshore fishery needed to conform and be made similar to National Marine Fisheries Service requirements. He referred the Commission to the proposed draft regulation in their books and explained that page 3, Section 40, paragraph G, set forth the vessel transfer criteria as proposed by staff.

It reads as follows:

"Effective February 24, 2004, any vessel eligible for a Summer Flounder Endorsement License shall be considered a baseline vessel and that vessel's total length and gross tonnage shall be used to determine eligibility for all future transfers of that Summer Flounder Endorsement License. A Summer Flounder Endorsement License may be transferred from one vessel to another vessel that is entering the summer flounder fishery, provided, the vessel receiving the Summer Flounder Endorsement License does not exceed, by more than ten percent, the total length and gross tonnage of the baseline vessel which held the Summer Flounder Endorsement License on February 24, 2004."

Associate Member Ballard moved to adopt staff recommendations. Associate Member Birkett seconded the motion. The motion carried, 8-0.

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- 17. **Public Hearing:** Proposed amendments to Regulation 4VAC20-720-10 et seq., "Pertaining to Restrictions on Oyster Harvest" to open an oyster hand scrape area in Pocomoke Sound and to extend the oyster dredge season in the Pocomoke-Tangier Sound Management Area.

Dr. James Wesson, Dept. Head, Conservation and Replenishment Department, gave the presentation and his comments are a part of the verbatim record. Mr. Wesson said that at the last meeting watermen had requested that an area in Pocomoke Sound northeast of the management area be opened to the harvest of oysters; and, at that same time, the Commission decided to consider the request for an extension of the season for the Pocomoke-Tangier Management Area.

Commissioner Pruitt reminded the Commission that they had already heard Jan Marshall's comments, in the public comment period, regarding this matter.

Doug Jenkins, President of the Twin Rivers Watermen's Association, was present and his comments are a part of the verbatim record. Mr. Jenkins said that along with the extension in the Pocomoke-Tangier Management area, the James River Hand Scrape Area season should be extended because of loss of workdays due to bad weather

Fred Linton, waterman, was present and his comments are a part of the verbatim record. Mr. Linton said that they were requesting that the Commission open the public oyster rocks in Pocomoke Sound in the Saxis area to oyster harvest and to extend the Pocomoke-Tangier Management area harvest season.

Commissioner Pruitt closed the public hearing.

Associate Member Cowart moved to approve the extension of the season for the Pocomoke-Tangier Management Area through March 31st ; and, to open the area requested in Pocomoke Sound near Saxis to hand scraping for the month of March. Associate Member Bowden seconded the motion. The motion carried, 8-0.

Commissioner Pruitt asked staff, how could the Commission handle the James River Hand Scrape Area season extension request? Dr. Wesson responded that it would have to be done as an emergency action.

Associate Member Cowart moved to extend the James River Hand Scrape season through the month of March. Associate Member Birkett seconded the motion. The motion carried, 8-0.

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- 18. Scup and Black Sea Bass:** Request for public hearing to establish 2004 fishing requirements.

Chad Boyce, Fisheries Management Specialist, Sr., gave the presentation and his comments are a part of the verbatim record. Mr. Boyce explained these were compliance

issues and involved two separate regulations. He explained that staff was requesting a public hearing to be held at the March 2004 meeting.

Associate Member Birkett moved to approve the request for a public hearing for the March meeting. Associate Member Holland seconded the motion. The motion carried, 8-0.

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19. Summer Flounder: Request for public hearing to establish 2004 recreational fishing requirements.

Jack Travelstead, Chief, Fisheries Management, gave the presentation and his comments are a part of the verbatim record. Mr. Travelstead explained that Rob O'Reilly, who was in Rhode Island attending the ASMFC Technical Committee meeting, had called him and informed him that all the options given to the Technical Committee by the Commission staff had been approved. He explained that this would mean some difficult decisions for the Commission next month because of the wide range of options to be presented and considered. He said staff was requesting a public hearing for the March 2004 meeting.

Associate Member Garrison moved that the matter go to public hearing in March. Associate Member Cowart seconded the motion. The motion carried, 8-0.

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Commissioner Pruitt said that since Dr. Wesson was not in the meeting at the present time, the Commission would proceed with Item 21, Violations of Mandatory Report Requirements, and hear Item 20 when he returned to the meeting.

21. Violations of Mandatory Reporting Requirements.

Stephanie Iverson, Head-Statistician, stated that since Jonathan A. Holdgrafter was absent, staff wanted to wait until Law Enforcement could serve notice to Mr. Holdgrafter and then bring the matter back to the March meeting. She explained that he had been sent notification of this hearing, but they did not know whether he had received it.

She introduced Kelly Lancaster who had been promoted to the Compliance Coordinator position. Commissioner Pruitt congratulated Ms. Lancaster on her promotion.

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22. REPEAT OFFENDER.

Lt. Col. Lewis Jones, Deputy Chief, Law Enforcement Division, presented the case to the Commission.

Willie F. Shiflette, Jr., DOB 11/24/47, June 25, 2003-setting crab pots in marked navigational channels; July 1, 2003-setting crab pots in marked navigational channels; and August 8, 2003-possession of unculled crabs. First time before the Commission and all fines paid.

Mr. Shiflet was sworn in. Commissioner Pruitt asked him if he had been to court regarding these charges? Mr. Shiflet responded, yes. Associate Member Garrison, asked him why he was in the channel for a second time? Mr. Shiflet explained that other people had moved his pot. Commissioner Pruitt asked where? Mr. Shiflet responded in the Poquoson Channel. Commissioner Pruitt asked Mr. Shiflet if he understood the consequences should he come back before the Commission again and explained that he could lose his license. Mr. Shiflet responded, yes.

Associate Member Ballard moved that in accordance with the Commission's policy, Mr. Shiflet be put on 12 months probation. Associate Member Birkett seconded the motion. The motion carried, 7-0. Associate Member McLeskey abstained from voting as he was absent from the room during the testimony.

At the request of Commissioner Pruitt, Wilford Kale, Senior Staff Advisor, gave a briefing on the status of legislation in the 2004 General Assembly. His comments are a part of the verbatim record.

20. Consideration of the 2004 Oyster Restoration Program and approval of the procurement procedures.

Dr. James Wesson, Dept. Head, Conservation and Replenishment Department, gave the presentation and his comments are a part of the verbatim record. Dr. Wesson explained that the department needed the Commission's approval of procurement procedures for the 2004 Oyster Replenishment Program. He explained that there was less program activity planned. He explained that there were no general funds for program activities this year. He said that the program had used federal funding from NOAA for the last two years to carry on the program and it was unclear how this funding was going to happen for this year. He said that funds were needed to utilize house shells that are available for the program. He said that small pots of federal and non-federal funds would be used to continue functioning until the larger funding was available. He said that delays in federal

funding will cause the program to use up these small amounts of funds affecting the operation of the next year's program and will result in missing optimal success biologically. He said the proposed activities would utilize house shells in locations close to the shucking houses to keep cost down.

Associate Member Holland moved to approve the proposed 2004 Oyster Replenishment Program and Procurement Procedures as requested. Associate Member Birkett seconded the motion. The motion carried, 8-0.

2004 OYSTER REPLENISHMENT PROGRAM:

DESCRIPTION-FUNDING SOURCES	MATCH	AMOUNT
NON-FEDERAL		
General Funds (GF) State		\$ 0
Indirect Cost Recoveries (ICR) State		\$120,000
Special Oyster Rock Fund (SF) State		\$ 0
Waterway Improvement Fund (WIF) State		\$321,310
Chesapeake Bay License Plate Fund (CBLF)		\$ 20,000
Governor's State Income CB Fund (from 1999)		\$108,000
Virginia Oyster Reef Heritage Foundation		\$20,000
Norshipco Mitigation		\$25,000
TOTAL NON-FEDERAL		\$614,310
FEDERAL		
NOAA 2003 - Virginia Oyster Reef Heritage Foundation		\$243,000
CZM Seaside Oyster Heritage		\$50,000
National Fish and Wildlife Foundation (NFWF)	\$50,000	\$50,000
Westmoreland County - NFWF	\$30,000	\$30,000
Elizabeth River Project Grants	\$20,000	\$60,000

TOTAL FEDERAL	\$100,000	\$433,000
*NOAA-2004 - Oyster Restoration		\$950,000
*U. S. Army Corps of Engineers		\$1,500,000

* The status of two funding sources is currently unclear, both in approval of the funding and in the timing that the funds will be available for oyster restoration projects.

SEED TRANSFER:

There was almost no spatset in the Bay in 2003. Salinities are extremely low, disease impacts have been reduced somewhat, and spatsets may be limited in 2004. There are some seed oysters in the upper James River from previous spatsets. If we can find watermen to harvest the seed, we will move 6,000 bushels of seed oysters to the Nomini River. This would cost \$5.00 per bushel and would serve as the match requirement for the Westmoreland County Heritage Program grant.

6,000 bushels @\$5.00/bushel	\$30,000
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SHELLPLANTING Reef Sanctuary and Harvest Areas:

More than 1,000,000 bushels of house shells are available to plant on the western shore and 40,000 bushels on the Eastern Shore. If the NOAA-2004 funds are available, we will have enough money to use all of these shells. If it does not become available, we will only be able to buy a portion of these shells. We are actively searching for other shell buyers to reduce the uncertainty, but if sufficient funds are not available, we will buy a proportional amount from all shucking houses that would like to sell to the state.

Westmoreland County Oyster Heritage Program:

Westmoreland County continues to work with our Department to pursue funding to restore oysters within their county. We completed one and a half reefs there last year. We have funding for a new reef in the Yeocomico River this year.

Yeocomico River		
Barns Point Reef - 30,000 bushels of shells @\$1.100/bushel		\$30,000

Virginia Oyster Heritage Program, Phase II, Year 3:

Virginia's Oyster Restoration Plan follows the model that was endorsed by the Oyster Heritage Program, the Chesapeake Bay Program, and the scientific community. We have surveyed sites throughout the Bay and its tributaries, and have identified about 12,000 acres of good, public oyster bottom that needs consistent replenishment with shell

cultch. Approximately 10 percent of that area is to be set aside as sanctuaries, and the remainder replenished for harvest. To minimize costs this year, areas will be planted within reasonable proximity to the shell sources. The two primary areas of emphasis this year will be the shell replenishment of harvest areas in Tangier Sound near California Rock, and the maintenance of the productive harvest areas in the Lower Rappahannock River. Maps are included for these areas.

Reedville - Zapata Stockpile to California Rock, Tangier Sound

5,000 bushels/acre (approximately \$1.40/bushel) = 44 acres

200,000 bushels @\$1.40/bushel = \$308,000

Reedville - Zapata Stockpile to Elizabeth River - Paradise Creek
And other small reef projects @ approximately \$2.00/bushel

42,500 bu. @\$2.00/bushel = \$85,000

Other shucking houses on Western Shore to the Rappahannock
And Lower Bay, Deep Rock for maintenance of shell bottom

280,000 bu. @ 1,000-5,000/acre
@ \$0.95 - \$1.50/bushel = \$310,000

Seaside, Eastern Shore:

Several grants are available for Seaside.

NFWF Oyster, Scallop and SAV
Restoration with the Nature Conservancy

70,000 bushels of shells for oyster restoration
and other funds for bay scallop restoration
and eelgrass restoration \$50,000 NFWF
\$50,000 Non-Federal

Seaside Oyster Heritage Program
Oyster restoration on various rocks in Accomack and
Northampton Counties

30,000 bushels of shells \$50,000

PROCUREMENT ACTIVITY FOR THE 2004 OYSTER REPLENISHMENT PROGRAM:

General:

Certain aspects of the procurement of seed, shell, and replenishment services differ from the Commonwealth's standard procurement procedures and therefore must be documented and approved by the Commission. The Commission will be exercising this option under Section 28.2-550 of the Code of Virginia.

This section of the Code states that:

The Commission, when it makes a determination in writing that competitive bidding or competitive negotiation is not feasible or fiscally advantageous to the Commonwealth, may authorize other methods of purchasing and contracting for seed oysters, house shells, reef shells, shell bed turning, and other goods and services for oyster ground replenishment which are in the best interest of the Commonwealth and which are fair and impartial to suppliers. It may establish pricing for its award and purchases; use selection methods by lot; and open, close, and revise its purchases according to changing conditions of the natural resources, markets, and sources of supply.

For the harvest and movement of wild seed oysters and excavated shells, the Commission will set the per bushel price to be paid. For the turning and cleaning and dredging of public oyster bottoms, the Commission will set a per hour or per day rate to be paid. Public notices will be posted, and all interested parties may apply. Selection of contractors will be done using the lottery method.

The Commission will also set the price for the purchase of house shells. The prices will be \$0.30 per bushel for conch shells, \$0.35 per bushel for clam shells, and \$0.50 per bushel of oyster shells at the shucking house. Loading, transporting and planting costs will be set by the Commission based on handling costs, the type of activity, and the distance for transporting to the activity sites. Letters were sent to all licensed shucking houses inquiring as to the availability of shell. All houses that responded positively will provide shells to the 2004 program until the total dollar limit for this activity is met. If funds are sufficient, all available house shells in the State will be purchased by the Oyster Replenishment Program. If funding sources do not allow the purchase of the entire shell market, house shell contracts and/or contract amounts will be based on geographical location, mobilization cost, and shell planting locations which provide the greatest benefit to the oyster industry and to the Commonwealth.

The agency anticipates that all other 2004 oyster replenishment activities will be done using the Invitation for Bid or Request for Proposal process in accordance with the Virginia Public Procurement Act.

If the conditions of the oyster resources changes, or if the Conservation and Replenishment Department Head encounters unanticipated/unscheduled situations with the Oyster Replenishment Program, planned procurement activities may be changed, and one or more of the alternative methods of procurement listed above may be utilized to facilitate the completion of the 2004 Replenishment Program.

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In response to a question from the Commission about the blue crab issue being heard, Jack Travelstead, Chief, Fisheries Management Division, announced that the Blue Crab issue had been removed from the agenda and will be heard at the March 2004 meeting.

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There was no further business, the meeting adjourned at approximately 3:55 p.m. The next meeting will be held Tuesday, March 23, 2004.

William A. Pruitt, Commissioner

Katherine Leonard, Recording Secretary