

## MINUTES

**Commission Meeting****June 28, 2005**

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:

William A. Pruitt )	Commissioner
Ernest L. Bowden, Jr. )	
S. Lake Cowart, Jr. )	
Russell Garrison )	
J. T. Holland )	Associate Members
F. Wayne McLeskey )	
Richard B. Robins, Jr. )	
Kyle J. Schick )	
Carl Josephson	Sr. Assistant Attorney General
Col. Steven Bowman	Deputy Commissioner
Katherine Leonard	Recording Secretary
Wilford Kale	Senior Staff Advisor
Jane McCroskey	Chief, Admin./Finance Div.
Terri Short	Business Manager, Sr.
Bill Bowen	Accountant, Sr.
Debbie Sparks	Business Manager
Dorine Richard	Fiscal Technician
Enes Morgan	Fiscal Technician
Jeanne Baaklini	Fiscal Technician, Sr.
Sylvia Jackson	Fiscal Technician
Andy McNeil	Programmer Analyst, Sr.
Rob O'Reilly	Deputy Chief, Fisheries Mgt. Div.
Roy Insley	Head, Plans and Statistics
Adam Crockett	Fisheries Management Specialist
Lewis Gillingham	Fisheries Management Specialist
Stephanie Iverson	Fisheries Management Specialist, Sr.
Ron Owens	Fisheries Management Specialist, Sr.

**Commission Meeting**

**13257  
June 28, 2005**

Lt. Col. Lewis Jones

Deputy Chief, Law Enforcement

Bob Grabb

Chief, Habitat Management

Tony Watkinson

Deputy Chief, Habitat Mgt. Div.

Chip Neikirk

Environmental Engineer, Sr.

Jeff Madden

Environmental Engineer, Sr.

Jay Woodward

Environmental Engineer, Sr.

Tracy West

Environmental Engineer, Sr.

Ben Stagg

Environmental Engineer, Sr.

Justin Worrell

Environmental Engineer, Sr.

Randy Owen

Environmental Engineer, Sr.

Hank Badger

Environmental Engineer, Sr.

Benjamin McGinnis

Environmental Engineer, Sr.

Virginia Institute of Marine Science (VIMS)

David O'Brien

Carl Hershner

Other present included:

Glenn Croshaw

John B. Lapetina, Jr.

John C. Smith

Steven Cohen

Ellis W. James

David Long

J. Carter Luck

John Deleeum

B. C. Williamson

Phil Roehrs

Stephen Van Essendert

Shirley Williamson

Derek A. Mungo

Alan Voorhees

Patsy Kerr

Dan Wagoner

Chris Frye

Francis A. Burton

Clem Carlisle

Chris Corrada

Larry Kidd

Robert Woollard

Page Ayres

Jim Janata

Kevin DuBois

Paul Malcolm

Hugh Cosner

Tusie Cosner

Edwin Rosenberg

Susan Malcolm

Charles Bedford

Craig Palubinski

Robert Weagley

John Wyatt

Tom Powers

Chris Moore

Susan Gaston

and others

\* \* \* \* \*

Associate Member Cowart, Acting Chairman, called the meeting to order at approximately 9:37 a.m. Associate Member Jones was absent. Commissioner Pruitt was expected to arrive later in the morning.

\* \* \* \* \*

Associate Member Garrison gave the invocation and Associate Member Cowart led the pledge of allegiance to the flag.

\* \* \* \* \*

Associate Member Cowart swore in all VMRC and VIMS staff that would be speaking or presenting testimony during the meeting.

\* \* \* \* \*

Rob O'Reilly, Deputy Chief, Fisheries Management, introduced a new employee, Adam Crockett. He explained that Mr. Crockett was working in the Conservation and Replenishment Department of the Fisheries Management Division and had started with the Commission in late March of 2005.

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**Approval of Agenda:** Associate Member Cowart asked for any changes to the agenda or a motion. Associate Member Garrison requested time at the end of the agenda to discuss wetlands issues and the City of Virginia Beach's Rudee Inlet project and about what was being done to provide protection for surfers. Bob Grabb, Chief, Habitat Management told the Commission that Item 2 N, Tazewell Public Service Authority had been added to the page two items. He also requested that the City of Virginia Beach be allowed to give an update on the Rudee Inlet Project prior to hearing Item 5. **Associate Member Robins moved to approve the agenda, as amended. Associate Member Schick seconded the motion. The motion carried, 6-0-1. Associate Member McLeskey stated he was abstaining.**

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**MINUTES:** Associate Member Cowart asked for a motion to approve the May 24, 2005 meeting minutes. **Associate Member Holland moved to approve the minutes as circulated. Associate Member Schick seconded the motion. The motion carried, 6-0-1. Associate McLeskey stated he was abstaining because he was not present at the previous meeting.**

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- 2. **PERMITS** (Projects over \$50,000 with no objections and with staff recommendation for approval). Bob Grabb, Chief, Habitat Management made the presentation for the page two items, A through N, and his comments are a part of the verbatim record.

Associate Member Robins stated that he recalled that this case had come before the Commission before and he asked if all the issues regarding 2K, J. Carter Luck, et al. had been resolved. Randy Owen, Environmental Engineer, Sr., stated that Tom Langley was present and could better answer the question. Tom Langley, Langley and McDonald Engineering, was sworn in and his comments are a part of the verbatim record. Mr. Langley said that the pier was not being extended and there would be no dredging which were the issues of concern in the earlier application.

Associate Member Garrison asked for item 2I, Northrop Grumman Newport News Shipbuilding, where the dredged material was being taken. Bob Grabb responded that the materials would be going to the Craney Island disposal site.

Associate Member Cowart asked if anyone wished to address any of these issues. No one from the public was present to comment, pro or con.

**Associate Member Holland moved to approve items A-N as presented by staff. Associate Member Schick seconded the motion. The motion carried, 7-0.**

- 2A. **NORFOLK SOUTHERN RAILWAY COMPANY, #05-1008**, requests authorization to replace an existing timber open deck railway trestle with a concrete ballast deck trestle over the Nottoway River approximately 0.2 miles west of State Route 35 in Southampton County.

Permit fee.....\$100.00

- 2B. **DOMINION TERMINAL ASSOCIATES, #04-2850**, requests a permit modification to lengthen by 38 feet a previously authorized 610-foot long by 65-foot wide concrete pier addition and to construct two (2) concrete platforms, measuring 43-foot long by 64-foot wide and 53.5-foot long by 15-foot wide, to facilitate installation of a new conveyor belt and traveling hoppers necessary to accommodate self-unloading vessels and bulk carriers at their existing facility on the James River in Newport News.

No fees - permit modification.

**2C. DEPARTMENT OF THE NAVY, #04-2704**, requests authorization to install 12,000 linear feet of a floating barrier supported by plate anchors, lighted marker buoys, and warning signs, to serve as a protective waterfront barrier system and line of demarcation for the western boundary of the Naval Station Norfolk (NAVSTA) restricted waters situated along Hampton Roads in Norfolk. On January 23, 2001 the Commission approved VMRC #01-0001, which was similar project.

Permit fee.....\$100.00

**2D. LAMBERT'S POINT DOCKS, INC., #05-0025**, requests authorization to remove, by hydraulic dredging, 3,700 cubic yards of maintenance material and 266,000 cubic yards of new material to deepen a previously authorized mooring basin to reach maximum depths of -42 feet below mean low water in two slips and the associated access channel located at Pier P at their facility situated along the Elizabeth River in Norfolk. Staff recommends a royalty of \$119,700.00 for the new dredging.

Royalty Fee (dredging 266,000 cu. yds. @ \$0.45/cu. yd.)...\$119,700.00  
Permit Fee.....\$ 100.00  
Total fees.....\$119,800.00

**2E. COUNTY OF AUGUSTA, #04-2450**, requests authorization to install 205 linear feet of riprap and to excavate river rock deposited during Hurricane Isabel from a channel and reroute the river to the original waterway channel in order to restore normal flow conditions and adjacent to property situated along the St. Mary's River in Augusta County.

Permit fee.....\$100.00

**2F. COUNTY OF YORK, #02-0220**, requests a modification to their previously issued permit to install 9 mooring buoys at the Yorktown waterfront for use by transient boaters adjacent to their property situated along the York River in York County.

No fees – permit modification

**2G. TOLL ROAD INVESTORS PARTNERSHIP, II, #05-0929**, requests authorization to widen both existing Sycolin Creek Bridge crossings by 18 feet each, into the median of the existing Dulles Greenway toll road, crossing approximately 40 linear feet of Sycolin Creek in Loudoun County.

Permit fee.....\$100.00

**2H. VIRGINIA DEPARTMENT OF TRANSPORTATION, #03-1612**, requests a permit modification to revert to the original authorized location of the construction access trestle over the Pamunkey River on the New Kent County side to include a perpendicular turnout between Piers 28 and 29 and an additional 150 linear feet of trestle with 75 feet of perpendicular turnout on the West Point side to facilitate construction of four-lane bridges over Thorofare Creek, the Pamunkey River, West Point Creek and the Mattaponi River adjacent to the existing Route 33 Bridges in the Counties of New Kent, King William, King and Queen and the Town of West Point.

No fees – permit modification

**2I. NORTHROP GRUMMAN NEWPORT NEWS SHIPBUILDING, #00-0583**, requests a five-year extension of their existing maintenance dredge permit which authorizes the mechanical dredging, on an as needed basis, of 300,000 cubic yards of State-owned bottom material from the James River to create and maintain maximum depths ranging from -25 feet to -70 feet at mean low water adjacent to their facility in Newport News. Additionally, a modification is sought to add the dredge footprint previously authorized by VMRC Permit #03-0913 around Pier #3 and to deepen by a maximum of six feet project depths at four (4) depositional areas adjacent to Dry Docks 1, 2, 4, and 11 to allow for unimpeded dry dock gate operations. All dredged material will be transported directly to Craney Island for disposal. Recommend a royalty of \$2,396.25 for the new dredging of 5,325 cubic yards of State-owned subaqueous bottom material at a rate of \$0.45 per cubic yard.

Royalty fee (dredging 5,325 cu. yds. @ \$0.45/cu. yd)..\$2,396.25

**2J. BERTHA A. BURKE, ET ALS. , #05-0686**, requests authorization to install four (4) 150-foot long by 26-foot wide, quarry stone breakwaters, located approximately 100-foot channelward of mean low water and spaced 160-foot apart, with 10,000 cubic yard of associated beach nourishment along 1,300 linear feet of shoreline on Chesapeake Bay on Fleets Island near North Point in Lancaster County.

Permit fee.....\$100.00

**2K. J. CARTER LUCK, ET AL, #04-1745**, requests authorization to mechanically dredge approximately 5,225 cubic yards of bottom material, of which 4,425 is new dredging, to provide navigable channels and boat basins possessing maximum project depths of minus four and one-half feet (-4.5') feet at mean low water with a six-inch overdredge tolerance to facilitate navigational access to the Western Branch of the Lynnhaven River in Virginia Beach. Recommend approval with a dredging royalty of \$1,991.25 for the dredging of 4,425 cubic

yards of State-owned subaqueous bottom material at a rate of \$0.45 per cubic yard and a time-of-year dredging restriction which precludes dredging during the period of March 1 through September 30 to protect shellfish spawning periods and juvenile summer flounder recruitment.

Royalty fee (dredging 4,425 cu. yds. @ \$0.45/cu. yd.)...\$1,991.25  
Permit fee.....\$ 100.00  
Total fees.....\$2,091.25

**2L. HENRICO COUNTY DEPARTMENT OF PUBLIC WORKS, #04-2899,** requests a modification to their existing permit to allow for an additional 88 linear feet of riprap scour protection for their proposed replacement of the Hungary Road Bridge over the North Run in Henrico County.

No fees – permit modification

**2M. CITY OF SALEM, ET AL, #04-2003,** requests a modification to their previously issued permit to construct a 141-foot long by 24-foot wide crib-supported temporary construction access bridge in association with the replacement of the Colorado Street Bridge over the Roanoke River in the City of Salem, pending expiration of the public notice on July 5, 2005. The previously approved time-of-year restriction from March 15 to June 30 to protect fish spawning habitat and our standard instream construction conditions remain conditions of the permit.

No fees – permit modification

**2N. TAZEWELL COUNTY PUBLIC SERVICE AUTHORITY, #04-2798,** requests authorization to install a submerged sewer line beneath approximately 440 linear feet of the Bluestone River at 14 locations to provide sewer service to area residents in Tazewell County. Recommend approval with our standard instream permit conditions and the following time-of-year restrictions: (1) for Crossings 3, 4, and 22, a time-of-year restriction (TOYR) of Nov. 1 - May 15 to minimize potential adverse impacts upon trout; (2) for Crossings 11, 16, 17, and 18, a TOYR of April 15 - June 15, August 15 - Sept. 30, and Nov. 1 - May 15 to minimize impacts upon State Endangered Tennessee heelsplitters and trout; and (3) for crossings 12-15 and 19-21, a TOYR of April 15 - June 15, August 15 - Sept. 15, and Nov. 1 - May 15 to minimize impacts upon Tennessee heelsplitters and trout. Additionally, an updated mussel survey and relocation is required at Crossings 16-18 no more than 30 days prior to construction.

Permit fee.....\$100.00

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**3. CLOSED SESSION:**

**Associate Member Robins moved that the meeting be recessed and the Commission immediately reconvene in closed meeting for the purposes 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:**

1) Palmer versus VMRC; 2) Jewett versus VMRC; 3) Evelyn versus VMRC; and, 4) Dockominiums

**The motion was seconded by Associate Member Holland. The motion carried, 7-0.**

**Associate Member Robins moved for the following:**

**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 Holland seconded the motion. Associate Member Cowart, Acting Chairman, held a Roll Call vote:**

**AYES: Bowden, Cowart, Garrison, Holland, McLeskey, Robins, and Schick**

**NAYS: None**

**ABSENT DURING VOTE: Commissioner Pruitt and Associate Member Jones**

**ABSENT DURING ALL OR PART OF CLOSED MEETING: Commissioner Pruitt and Associate Member Jones.**

**The motion carried, 7-0.**

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**Katherine Leonard, Recording Secretary  
Virginia Marine Resources Commission**

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4. **JOHN LAPETINA, #05-0663.** Commission review of the Norfolk Wetland Board's April 13, 2005, decision to approve a permit to install a swimming pool within a coastal primary sand dune situated along the Chesapeake Bay in Norfolk.

Tracy West, Environmental Engineer, Sr., gave the presentation with slides. Her comments are a part of the verbatim record. Ms. West handed the board a large plan view that had been too large to make a copy.

Ms. West explained that Mr. Lapetina's property was located along the Chesapeake Bay in the Oceanview area of Norfolk. The project called for the construction of a 38-foot by 28-foot garage/carriage house with a second story deck and a swimming pool of unstated dimensions. A portion of the carriage house and all of the deck and pool would be constructed within a jurisdictional coastal primary sand dune.

Ms. West said that during the April 13, 2005, public hearing, Mr. Kevin DuBois, staff to the Norfolk Wetlands Board, presented the proposed project to the Board. During his presentation, Mr. DuBois cited the Coastal Primary Sand Dune and Beaches Guidelines, which emphasize that no permanent alterations upon coastal primary sand dunes shall take place which would impair the natural function of the dune, physically alter the contour of the dune, or destroy vegetation growing thereon. Activities contrary to those guidelines may be permitted only if the Wetlands Board found that there would be no significant ecological impact from the proposal or that granting a permit for the proposal was clearly necessary and consistent with the public interest (i.e. constitutes necessary economic development). Alterations to coastal primary sand dunes are ordinarily not justified for purposes or activities, which could be accommodated without encroachment into the dune area.

Ms. West said that Mr. DuBois read the VIMS report into the record. VIMS stated that the project impacts warranted careful consideration. In their opinion, the entire proposal should be relocated landward of the jurisdictional dune. In the alternative, VIMS suggested that the pool and deck be relocated to the southern side of the garage/carriage house.

Ms. West stated that in Mr. DuBois' opinion, the landward extent of the dune had been artificially enhanced due to the homes adjacent to this undeveloped parcel because wind blown sand tended to be directed between structures and deposited deeper on undeveloped lots.

Ms. West further stated that Mr. DuBois then recommended approval of the project as proposed with special conditions requiring the placement of sand fencing and a construction limits fence, replanting impacted vegetated areas with beach grasses, and restrictions on the placement of construction debris within the dune area.

Ms. West said that the applicant addressed the Board and submitted new plan view and cross section drawings of the proposed structures. Those drawings contained some details about the proposed garage/carriage house that were not previously contained in the application plan view drawing. These included the fact that the seaward 10 feet of the garage/carriage house consisted of only a second story and that the deck was to be pile supported. There were still no dimensions given for the proposed pool.

Ms. West said that Mr. Ellis James, a Norfolk resident, addressed the Board and expressed his concerns regarding the project. However, since the Board had chosen to provide only an "Excerpt of Proceedings", rather than a verbatim transcript of the hearing, those concerns could not be specified. Mr. James' testimony was conspicuously absent in the excerpt of proceedings provided. Staff received no explanation from the Board why the record did not include a transcript, as was their normal procedure.

Ms. West then explained that the Board considered the information presented during the hearing and discussed whether the applicant should consider moving the entire project landward of the jurisdictional dune. Without providing any specifics, the applicant stated he would endeavor to reduce the impacts as much as possible. The Board then voted to approve the application as proposed, without any binding directives on the applicant to reduce the proposed impacts to the jurisdictional dune area.

Ms. West said that upon review of the record provided, which did not include a verbatim transcript, staff did not believe that the decision to approve the project was consistent with the Guidelines, that the record supported a determination that the placement of a garage and second story deck with a swimming pool within a jurisdiction dune area constituted necessary economic development, or that there would be no significant ecological impact from the proposal.

Ms. West stated that while the Wetlands Board staff expressed an opinion that the dune location on the undeveloped lot was an artifact of the adjacent structures, a critical evaluation of proposed impacts to the jurisdictional dune areas, regardless of their source, remains a requirement of Section 28.2-1403(9) and cannot be diminished. Jurisdiction per se, was not an issue.

Ms. West said that the record did not include any information to indicate that the applicant actively explored alternatives to avoid and minimize impacts to the dune, two of which were noted in the VIMS report, through either modification of the proposed plan or by attempting to obtain zoning variances or other such actions. The applicant's property appeared to have sufficient non-jurisdictional area within which to accommodate the

placement of the desired structures without impacting the jurisdictional dune at all. The Guidelines state that alterations to the coastal primary sand dune are ordinarily not justified for activities that have no inherent need to be immediately adjacent to the shore and for which there is sufficient room landward of the coastal primary sand dune.

Ms. West explained that in addition, staff believed the application should have been considered incomplete by Wetlands Board staff and not brought before the Board at the April 13<sup>th</sup> hearing. A cross-sectional drawing was not included as a part of the original application until the applicant presented drawings (containing little information about the project's impacts on the jurisdictional dune area) during the April 13, 2005, hearing. The dimensions of the proposed pool do not appear to be stated in the application or contained on the revised drawings, which left the Wetlands Board staff in a position where they were required to estimate the dimensions of a hand-drawn pool structure placed on a scaled plat of the property. Further, there was no information contained in the application regarding the type of foundation proposed for the garage/carriage house. Without this information, it was unclear whether the structure was consistent with the Guidelines that recommend any construction on the dune backface should utilize an open-pile foundation to permit dune migration.

Ms. West said that given all of the above, staff recommended that the Commission reverse the decision of the Norfolk Wetlands Board and deny the application based on a finding that the decision to approve the project as proposed was contrary to the Guidelines and was arrived at based on an incomplete application.

Ms. West further stated, however, should the testimony of the applicant or representatives of the Norfolk Wetland Board persuade the Commission otherwise, staff would support a remand with the following directives.

Before the Board scheduled a rehearing for the application, the applicant must pursue all options for avoiding and minimizing impacts to the dune, specifically the two options recommended in the VIMS report. In addition, the Board should require the submission of a complete set of accurate, scaled, engineering drawings containing all the information necessary for the Norfolk Wetlands Board staff and Board members to perform an informed analysis of the project proposal prior to any scheduled rehearing of this application. These should include, at a minimum, scaled plan view and cross sectional drawings with topography from MHW to the landward limit of the property in 2-foot contour intervals on both the plan view and cross section drawings so the location of the dune and any structures proposed thereon can be clearly identified.

Ms. West said that after all avoidance and minimization efforts had been exhausted, the Board should specifically address whether the placement of a garage and swimming pool had an inherent need to be within a jurisdictional dune and clearly evaluate whether such structures constituted a necessary economic development.

In conclusion Ms. West indicated that staff would be able to support a reversal of the location of the garage/carriage house and the pool, provided, any portion of the garage/carriage house placed within the jurisdictional dune area was elevated on piles, and the seaward encroachment was in basic alignment with Mr. Lapetina's adjacent home to the west and the adjoining structure to the east.

Derek A. Mungo, Assistant City Attorney, representing the City of Norfolk in Cindy Hall's absence, was present and his comments are a part of the verbatim record. Mr. Mungo reminded the Commission that VMRC can only modify, reverse or remand in accordance with the provisions of Section 28.2-1413 and that is when the Wetlands Board failed to fulfill its responsibilities in accordance with the requirements set forth in Virginia Code regarding the sand dunes. He said the Board considered all of the testimony provided as well as the Virginia Institute of Marine Science recommendations. He said the Wetlands Board's decision should not be supplanted by this Commission's nor should this case be remanded back to the Wetlands Board or reversed. He said they were asking the Commission to uphold the Wetlands Board decision.

Kevin DuBois, representing the Norfolk Wetlands Board, was sworn in and his comments are a part of the verbatim record. Mr. DuBois said he was providing a summary of what had been addressed by the Wetlands Board. He said that a verbatim transcript was only provided for court cases as they do not have staff for this and must contract the job out. He said the Board sign in sheet did not indicate that Mr. Ellis James was present nor was there a record that he spoke. He said he might have been present, but nothing showed he actually spoke at the Wetlands Board meeting. He said the swimming pool dimensions were known to the board and VIMS said the pool impacted 875 square feet. He said that the staff and Wetlands Board were aware of the other alternatives, but allowed direct connection of the carriage house to the main house for easier access for the elderly residents. He said the impacts were quantified by VIMS and considered by the board. He said that staff did present information regarding guidelines for the board. He said under normal conditions the lot would not have been under their jurisdiction. The tongue of sand between the two homes had been artificially made by wind conditions and the tunnel effect. He said that the Board did adequately address all issues in making their decision. He said that they considered all of the testimony, that staff presented all of the detailed, pertinent information, such as the guidelines, and the board considered the recommendations of VIMS. He said the judgment of the Wetlands Board should not be substituted by VMRC's.

Associate Member Cowart asked for questions.

Associate Member Robins stated that in the staff summary there was no mention of ecological impact. Mr. DuBois said that it was a part of the Wetlands Board staff presentation and the staff's presentation was that there would be no significant impact. He said this was not in the Wetlands Board motion, but the board agreed with the staff recommendation.

Associate Member Garrison asked what proof there was that this was an artificial dune and if there were any historic pictures. Mr. DuBois said that the conditions in this area are similar to other areas where this does occur. Mr. Garrison asked how many feet from the edge of the water the house was. He said it was 153 linear feet. Mr. DuBois responded, yes. He asked if they were just trying to protect the beachfront. Mr. DuBois said it was similar to other dunes that staff had looked at over the years. He said this was a judgment call.

Associate Member McLeskey asked if anyone in opposition was present at the Wetlands Board meeting. Mr. DuBois said no, there was no record of any opposition. He asked if it would be appropriate to give the board the attendance record. Carl Josephson, Senior Assistant Attorney General and VMRC counsel, responded yes, and it would have to be kept in the VMRC file for 30 days in case an appeal should result from the Commission's decision.

Associate Member Cowart asked if Mr. Lapetina or a representative was present to speak to the Commission on this issue.

Glenn Croshaw, of the Wilcox and Savage law firm, representing the applicant was present and his comments are a part of the verbatim record. Mr. Croshaw explained that the Wetlands Board made every effort to look at all sides. He said the focus by this Commission was on the pool and not on the law. He said that the Wetlands Board did require that the pool be moved 5' landward. He said there was an analysis made of the impacts, the detriments, and the economic balance. He said the board supported their motion unanimously. He said they were asking that the Commission uphold the Wetlands Board's decision. Associate Member Schick asked what was the reason was for not moving the pool. Mr. Croshaw explained that to move it landward would limit access and made it structurally difficult. He said he was not present at the hearing, but the board did consider it.

Associate Member Schick asked for further elaboration to his question. Mr. DuBois explained that in the last photo of the swimming pool you could see that it was done this way to allow for a breezeway between the main residence and carriage house for easy access by the elderly residents.

When the questions were concluded, Associate Member Cowart asked if others were present to speak. There were none so he closed the hearing and he asked for a motion.

**Associate Member Holland moved to uphold the Wetlands Board decision. Associate Member McLeskey seconded the motion.** Mr. Grabb spoke up at this point and told the Board that Mr. Ellis James was present and contrary to Mr. DuBois's statement had spoken at the Wetlands Board meeting. Carl Josephson, Senior Assistant Attorney General and VMRC counsel, said that a motion would be necessary to open the record. Associate Member Cowart responded that there was no record of Mr. James'

presence at the Wetlands Board hearing. Mr. Grabb said that Mr. James was present and spoke at the Wetlands Board meeting and was prepared to testify to that effect. As a result, staff did not think it was opening the record if he discussed the comments he made which the Board omitted in its summary.

**Associate Member Cowart asked if the current motion could be withdrawn. Associate Members Holland and McLeskey agreed to withdraw the motion.**

**Associate Member Cowart asked for a motion to open the record. Associate Member Schick moved to allow the record to be opened only as it pertains to the testimony provided at the hearing. Associate Member Robins seconded the motion. The motion carried, 6-1. Associate Member Garrison voted No.**

Ellis W. James, Norfolk Resident, was sworn in and his comments are a part of the verbatim record. Mr. James said that the staff did a good job presenting the case. He said this was a mistake in judgment by the Wetlands Board. He made several references to the Code and the Guidelines. He said in Section 5 of the Guidelines it says that the construction of a large structure, such as the pool, which was in the ground, should be discouraged. He stated he had nothing personal against the Lapetinas and did not know any of them. He said every dune and its backside were needed. He explained that if the dune was retained it would protect these families and their homes so they do not get wiped out when a severe storm such as a hurricane comes to the area.

Commissioner Pruitt arrived to the meeting at approximately 11:04 a.m. Associate Member Cowart continued as the Acting Chairman.

Associate Member Cowart asked staff for further comments. Mr. Grabb referred the Commission to page 173 of the Code book, specifically, Section 28.2-1403(9), which basically outlines the responsibilities of the Board. He further explained Section 10B lists the criteria that must all be satisfied by the Wetlands Board when making a decision to approve a project.

Associate Member Cowart then asked for another motion. **Associate Member Holland moved to uphold the Wetlands Board's decision. Associate Member McLeskey seconded the motion. Associate Member Robins stated that he could not support the motion, as he was not satisfied with the finding that there was no impact or that full consideration was given to the VIMS recommendations. Associate Member Garrison said that he was confused about the location of the dune and he could not support the motion.**

Roll Call:

Bowden, Aye  
Garrison, No

Holland, Aye  
Jones, Absent  
Robins, No  
McLeskey, Aye  
Schick, No  
Pruitt, abstained, not present for the discussion.  
Cowart, No

**The motion failed, 3-4-1.**

Associate Member Cowart called for a new motion. **Associate Member Robins moved to remand it back to the Wetlands Board and instruct them, as recommended by VMRC staff, to speak to the full VIMS options and in addition require that a complete application and a drawing to scale be submitted. He said also that they needed to consider the location and placement of structures as recommended by VIMS. Associate Member Garrison seconded the motion. Associate Member Schick stated that there was room for structure movement and it was better to err on the side of nature to do the job.**

Vote Count:

Robins, Aye  
Garrison, Aye  
Schick, Aye  
Cowart, Aye  
Holland, No  
Bowden, No  
McLeskey, No  
Jones, Absent  
Pruitt, abstained, not present for the discussion.

**The motion carried, 4-3-1.**

No fees – wetlands appeal

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**BRIEFING** from the City of Virginia Beach representative on the status of the Rudee Inlet Infrastructure Improvements project (#03-0641).

Phil Roehrs, representative for the City of Virginia Beach, was present and his comments are a part of the verbatim record. Mr. Roehrs presented a powerpoint presentation, and discussed the chronological list of what had occurred along with some photographs.

Associate Member Garrison asked what was being done to protect the surfers in the area. Mr. Roehrs said that no requirements had been placed on them in the permit by VMRC. He said historically there have always been surfers in the area. He said that there was no need to make new rules.

When asked to comment, Bob Grabb, Chief, Habitat Management, said he had no recollection of any such discussion regarding the surfers, other than the need to replace the weir to protect surfers given its deteriorated condition. There were no conditions in the permit for anything else.

Associate Member McLeskey asked about the light on the north side of the jetty. Mr. Roehrs explained that it was just for illumination. Mr. McLeskey said that there needed to be a light on the south jetty. Mr. Roehrs explained that the Coast Guard had offered to put one on the north jetty but declined to put one on the southern jetty because of its inaccessibility and problems of maintenance. Mr. McLeskey asked if signs were to be on the weir. Mr. Roehrs explained that there were warning signs every 100 feet along the weir.

No action was taken.

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5. **CITY OF VIRGINIA BEACH, #96-0083**, requests authorization to modify their existing permit to remove the time-of-year restriction of March 1 through September 30 imposed on maintenance dredging of the Lynnhaven Boat Ramp and Launch Facility municipal channel situated along Crab Creek in Virginia Beach.

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

Mr. Worrell explained that the Lynnhaven Boat Ramp and Launch Facility provided public access into Crab Creek, which was located near the mouth of the Lynnhaven River system, just southwest of the Lesner Bridge in Virginia Beach. The ramp provided immediate boating access to both the Eastern and Western Branches of the Lynnhaven River and the Chesapeake Bay.

Mr. Worrell further explained that the Commission authorized the construction of the ramp, tending piers, and a connecting navigational channel in May 1996. The authorized channel extended from the head of Crab Creek in a southerly direction down to the mouth, and then made a turn back to the north, paralleling the shoreline until it ended just south of the bridge over Lynnhaven Inlet. The channel, as permitted, was approximately 2,600 feet long, 50 feet wide, and can be maintained to depths of -6 feet mean low water.

Mr. Worrell said that the Lynnhaven River, for the most part, was a shallow water estuary system. The ramp and channel at Crab Creek, near the mouth of the Lynnhaven River as it empties into the Chesapeake Bay, existed in a very dynamic area. During high tides and particularly storm events, this area was subjected to fast moving currents and sand shoaling, particularly near the sand flats near the permitted channel. At low water the sand flats were very obvious and carefully avoided by boaters.

Mr. Worrell said that to help combat shoaling that occurred in the channel, the existing permit allowed for necessary maintenance dredging to maximum depths of -6 feet mean low water during the five month period of October 1 through February 28. The time-of-year restriction of March 1 through September 30 precluded dredging in the channel to protect juvenile summer flounder recruitment and shellfish spawning periods.

Mr. Worrell stated that since 1996, the original permit had been modified several times and extended until May 31, 2006. Modifications had included adding a turning basin to the channel as it turns to enter the Lynnhaven, and temporary one-time extensions of the dredging window with the concurrence of the Virginia Institute of Marine Science.

Mr. Worrell said that the City of Virginia Beach had now requested that the entire time-of-year restriction be lifted. The City felt that hazardous shoaling in the channel increased the risk to public safety, and they would like the opportunity to maintenance dredge, whenever necessary, to maintain appropriate depths, particularly during the summer when the channel was heavily used.

Mr. Worrell explained that in its review of the City's request, VIMS pointed out the fact that the Lynnhaven River was a very significant resource because of "its ability to provide valuable shellfish spawning and finfish larvae and nursery habitat." Furthermore, Crab Creek was included as "an integral part of the Lynnhaven River ecosystem, which supported numerous commercially important finfish species, including and in particular, summer flounder. Overall declines in summer flounder stocks had been attributed to habitat loss." VIMS further concluded that the current time-of-year restrictions helped to reduce adverse impacts to larval and juvenile stages of the flounder, and that the City should make every effort to dredge during the existing five month window when necessary.

Mr. Worrell said that in staff's initial response to the City's request, Bob Grabb advised that a pre-emptive removal of the time-of-year restriction was not justified, and that the City should take every advantage to dredge during the five-month window provided. Furthermore, if a storm event or unforeseen shoaling situation were to occur, the City could seek Commission relaxation of the restriction on a case-by-case basis. Any such specific request, however, would be reviewed by VIMS before being presented to the full Commission, as it had in the past.

Mr. Worrell said that while staff recognized the problems that shoaling can create in the Lynnhaven, particularly near Crab Creek and in the City's permitted channel, staff also recognized the importance of a vital marine habitat. Given VIMS' recommendation that the current time-of-year restrictions were critical in preventing adverse impacts to larval and juvenile life stages of important species, such as flounder, staff could not support the City's request to permanently lift the time-of-year restrictions. Staff recommended that the Commission deny the request, and further advise the City to make every effort to maintenance dredge the channel during the existing five-month window, annually or biannually, if necessary. Staff was not convinced that the City had made every effort during the dredging window to address potential shoaling before the restriction took effect. Staff felt in this case that the costs of potentially damaging important marine habitat outweighed the benefits of enhancing the navigability of the channel. It would be counterproductive for the welfare of the marine habitat and species in and around Crab Creek to be sacrificed to allow for citizens to access this area, many of who were seeking the very species that could be harmed.

Associate Member Schick questioned that since staff did not recommend lifting the time of year restriction, how could the Commission respond in a timely manner to an emergency. Mr. Grabb responded that it would probably be a 30-day minimum response given the fact that the Commission meets monthly. It could be less with a special meeting being called. Associate Member Garrison asked if a telephone vote would be appropriate. Carl Josephson responded that the Commission would have to hold a meeting because telephone votes were prohibited. Associate Member Schick asked if the Board could empower the Commissioner to handle such emergency requests. Carl Josephson responded, yes. Associate Member Garrison then suggested adding that the Commissioner would consult with staff. Carl Josephson suggested giving the authorization provided notice was given in a certain time period. He said if the Commissioner and staff did not agree with the request, then it could be brought back for the full Commission to decide.

Commissioner Pruitt said he was concerned because there were other species besides the summer flounder in this area. He asked Mr. O'Brien to respond. David O'Brien, VIMS representative, explained that the flounder was the primary species of concern as well as the shellfish in the warmer months.

Phil Roehrs, City of Virginia Beach Public Works representative, was present and his comments are a part of the verbatim record. Mr. Roehrs explained that he did not think the quick response would work as he had experienced delays of as much as 4 months to get a response from VIMS. He said he could not see a quick turnaround happening. He said they were asking for removal of the restriction but not without certain methods to handle it. He said they would be satisfied with the time restriction being lifted for a specific area. He provided a slide and indicated the specific area they sought and needed to dredge. He went on to state that there were a couple of items not mentioned. He said the boat ramp in the area, which was funded by the Commonwealth, was constantly

shoaling. He said that the Corps' maintenance dredge project did not have a time of year restriction for 2003-2004. He told the Commission that the public boat ramp was very popular as statistics show that 22,000 vessels were launched and that many cars utilize the parking provided. He said this was a highly used area. He said if the Commission limits the dredging to 6 feet, within 2 months time it would shoal in again, which they had observed happening after the restricted time period ended. He suggested that a notice could be done and to set a certain depth limit before dredging would be allowed. He stated they were asking for the time restriction to be lifted and were willing to stay within a smaller area.

Commissioner Pruitt asked for public comments and there were none.

**Associate Member Schick moved to allow the City to dredge after a 30-day notice to the Commission and provision of a survey of the depths in the channel were less than 4 feet. He also included a one-time option to enable the City to join with the Corps in dredging at the entrance on the downstream channel side. Associate Member Holland seconded. Associate Member Schick said the City had suggested the 30-day notice and asked what was the minimum time staff would require. Mr. Grabb said staff would contact VIMS upon receipt of the notice but it would be at least a couple of weeks before the Commission could render a decision. Associate Member McLeskey said that staff would be making the decision. Mr. Grabb responded that staff must rely on VIMS and it was not as simple as a phone call.**

Mr. Roehrs explained that there would be a 30-day standby period for them since they needed to advertise and get bids. He said to reduce the VMRC 30-day notice requirement would be better.

**Associate Member Schick asked that the motion be changed to 14 days. Dr. O'Brien of VIMS said that they could accommodate the Commission request within the 14 days. Associate Member Schick then moved to grant the request to lift the time-of-year restriction on the south channel, requiring a 14-day notice with a survey depicting depths of less than 4' depths, plus, allow a one-time option by the City to dredge with the Corps' dredger for the entire channel this cycle. Associate Member Holland seconded. The motion carried, 7-0.**

No fees – permit modification

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Commissioner Pruitt announced that the Commission had once again done very well in being audited and congratulated the Administration and Finance personnel present on a good job. Jane McCroskey, Chief, Administration and Finance, provided each board member with a copy of the audit report.

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6. **MIKE B. MAYS, ET AL, #04-2780**, requests after-the-fact authorization for a joint-use pier and boathouse and two (2) riprap groins at property situated along the James River in Surry County. An adjoining property owner had protested the project.

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

Mr. Stagg explained that the project was located just upstream of the Scotland Wharf Ferry landing in Surry County. The shoreline along this reach consists of a narrow sand beach and shoreline embankments that vary in height from a few feet to over 20 feet in elevation above mean low water.

Mr. Stagg said that in 2003, Mr. Mayes applied for a permit to install a riprap revetment and grade the eroded bank along his shoreline. The project was entirely landward of mean high water and did not require either a wetlands or subaqueous permit. During construction of the riprap revetment, however, staff received a call from an adjoining property owner with concerns that the remnants of two stone groins at Mr. Mayes and Mr. Woollard's properties were being enhanced with additional stone. Staff contacted Mr. Woollard, who was the contractor on the Mayes job, and reminded him that no permit had been issued for any work within the intertidal or subtidal area and that any stone placed in those areas should be removed.

Mr. Stagg said that staff subsequently visited the site and noted that while some stone had been removed, the riprap groins were still larger than when Mayes had applied for his revetment permit. During this site visit, staff also discovered that the pier at this location, which had been previously constructed by Mr. Woollard (VMRC#92-1074), as a private riparian pier, actually straddled the common property line of Woollard and Mayes. Since the pier was incorrectly depicted as a single user riparian private pier, no permit was issued for the pier, however the boathouse did receive a permit in September of 1992.

Mr. Stagg stated that since Mr. Woollard wished to repair the pier and boathouse, as a result of Hurricane Isabel damage, staff advised him that a permit would be required since the pier was in fact a joint use pier. Mr. Woollard then agreed to submit an application, to include Mr. Mayes, as co-applicant, for after-the-fact authorization for both the pier and the two groins.

Mr. Stagg explained that shortly after receiving the Joint Permit Application seeking after-the-fact authorization, a letter of objection from Mr. John Smith, the adjoining property owner of Mr. Mayes was received. Mr. Smith indicated that he objected to the groin structures because he believed they were causing shoaling at his pier and boathouse.

He also indicated concerns about the proposed handrail along both sides of the pier and questioned whether the boathouse would have enclosed sides.

Mr. Stagg said that staff had visited the site on numerous occasions since 2003, and found the littoral drift at this location to be dynamic. While the groins may act to retain some sand, it appeared they would have a minimal effect given the location of Mr. Smith's boathouse. Staff noted that Mr. Smith's boathouse was very close to the shoreline and likely had never been easily accessible except during high tide.

Mr. Stagg said that the VIMS shoreline situation report noted that groins in this location could starve downdrift shorelines of sand and thus accelerate erosion in those areas. Additionally, VIMS recommended that the groins be reconfigured in a "low profile" design. This meant that the top elevation of the groin is gradually reduced beginning at approximately half its length so that groin slopes downward and its top elevation is not higher than that of mean low water at the channelward end. This design helps reduce adverse impacts to the downdrift shoreline.

Mr. Stagg explained that staff recommended after-the fact-approval to retain the two stone groins provided they were reconfigured to a low-profile design as noted in the VIMS report, with their total length not to exceed 48 feet channelward of mean low water. Staff further recommended after-the-fact approval of the pier within its current footprint. The applicants had indicated that the proposed handrails would be deleted and they did not propose to enclose the boathouse. If approved staff also suggested that the Commission may want to consider an appropriate civil charge for the groins since one of the applicants, who was also the contractor, was well aware of the permit requirements for this type of work.

Commissioner Pruitt asked if the applicants were present to comment.

Robert Woollard, applicant, was sworn in and his comments are a part of the verbatim record. Mr. Woollard explained that originally this project was applied for in 1992 and was approved in 1993. He said the jetty was in existence in 1979 when he purchased the property. He stated that in 2003 Hurricane Isabel wiped out the entire Scotland Wharf area. He said he replaced the pilings and refurbished the jetty. He said the other applicant did the construction with a contractor and when he went too far out he asked that they correct it to meet the permit in 2004. He stated that Mr. Smith, the protestant, originally was for the project, but he now had changed to objecting to it. He referred to Tom Barnard of VIMS letter regarding the low profile jetty. He explained that with a low-profile jetty the sand could pass over it and cause shoaling downstream. He said he did not intend to harm the environment. He said he was a builder of piers, bulkheads, etc. as a general contractor for 20 years. Commissioner Pruitt asked Mr. Woollard if he was representing Mr. Mayes in this matter. Mr. Woollard responded, yes.

Commissioner Pruitt asked if anyone was present in opposition to address the Commission.

John C. Smith, Jr., protestant and upriver property owner, was sworn in and his comments are a part of the verbatim record. Mr. Smith said the staff's photographs only spoke to the groin. He said they make his boatlift unusable. He stated that this issue was about fairness rather than the environment. He said he had spoken with Mr. Mayes and he had not been given all the information because he did not even know about the groin. He provided pictures for the Commission's review. He said he had contacted the Commission with his objections. He said there needed to be a compromise for this project proposal. He said he himself had gotten a permit from VMRC in 1985 to install rock groins. He asked that the Commission require Mr. Woollard and Mr. Mayes to restore the length and height to what it was prior to Isabel so that the beach could restore itself. He said that the groins were too efficient with the collection of sand, which have buried the gabions and increased the sand by 2 to 2 1/2 feet.

Mr. Woollard in his rebuttal comments said that the beach had been beaten back for the last 25 years. He said he was trying to stop the aggressiveness of nature. He said he was losing land because it was going back into the river.

**Associate Member Garrison moved to accept staff recommendation without the civil charge. Associate Member Holland seconded the motion.** Associate Member Schick commented that they were always hearing these after-the-fact cases and it was not fair to those who did it the right way. He further stated that there was need to do something to make sure the contractors had a price to pay for non-compliance. He said it seemed it was easier to ask for forgiveness than to ask for permission. Commissioner Pruitt said that he agreed with Mr. Schick, but the problem here was that all the parties were not present and the applicant was at fault. He said the contractor was not present nor was it known who it was. He said he agreed with Mr. Garrison that it was just a matter of trying to save their property, but they also need to follow the rules. Associate Member Garrison said he agreed also and had fussed in the past about this same thing. He further said that when the height of the groin was questioned or the length of the pier, it was a matter of trying to protect our rights. He said there were too many of these violation issues. **The motion carried, 5-1-1. Associate Member Schick voted, No, because he felt a civil charge was in order. Associate Member McLeskey abstained, as he was absent during some of the presentation.**

Permit fee.....\$100.00

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7. **CHARLES S. BEDFORD JR., #03-0717**, requests after-the-fact authorization to retain a 10-foot long by 14-foot open-sided gazebo at his property situated along Willoughby Bay in Norfolk.

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

Ms. West explained that Mr. Bedford's property was situated along Willoughby Bay, near Interstate 64, in the City of Norfolk.

Ms. West said that in 2003, Mr. Bedford sought authorization to construct a 230-foot long by 6-foot wide private, non-commercial, open-pile pier with a 10-foot by 8-foot "L" head and a 10-foot by 14-foot gazebo under application number #03-0717. The pier met the requirements for statutory authorization contained in State Code at that time. As a result, a "no permit necessary letter" was issued on March 25, 2003. Mr. Bedford was pointedly advised in that same letter, however, that a permit from this agency was required for the roofed structure. Mr. Bedford was advised that staff was withholding further processing of his application pending the outcome of several court cases involving gazebos (Bryant v. MRC in Suffolk, Evelyn v. MRC in New Kent, Palmer v. MRC in Middlesex). Staff did, however, conduct the required public interest review at that time. No opposition was received.

Ms. West stated that in October 2004, staff was traveling west on Interstate 64 and observed Mr. Bedford constructing the gazebo at the end of his pier. Staff contacted Mr. Bedford soon afterwards and scheduled a site inspection for October 15, 2004. Staff discussed the covered structure with Mr. Bedford at that time and a Sworn Complaint and a Notice to Comply were issued on December 23, 2004, directing removal of the roofed structure within 60 days of his receipt of the notice. In lieu of removal, however, Mr. Bedford was given the option of submitting a letter requesting authorization to retain the structure and as-built drawings that accurately reflected the dimensions of the covered structure. Additionally, the Notice to Comply requested statements explaining who performed the work and why the work was conducted without the necessary authorization and permit.

Ms. West also said that Mr. Bedford submitted a letter requesting authorization to retain the structure along with a copy of his Army Corps of Engineers permit and document from the City of Norfolk Department of Planning, Division of Building Construction Services. He did not indicate the party responsible for the construction of the gazebo; however, given staff's direct observation of Mr. Bedford's construction activities, we believe it is clear that Mr. Bedford is the responsible party.

Ms. West explained that Mr. Bedford noted in his letter that there were several other gazebo structures along the waterway in his vicinity. Following a file search, staff was unable to obtain any evidence that any of the other gazebo structures along Willoughby

Bay had been properly authorized by this agency. Staff planned to continue their investigation of the other gazebo structures and would initiate enforcement actions as necessary and appropriate. Their existence, however, should not be used as evidence of prior authorization.

Ms. West said that the applicant was well aware that authorization for encroachment over State-owned subaqueous lands from this agency was required. He was also well aware that the processing of his request for the gazebo was being withheld pending the outcome of legal proceedings that could directly shape this agency's policies over these types of structures. The Commission has been upheld in all three cases.

Ms. West stated that when reviewing 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. 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 §1-10 in order to protect and safeguard the public's 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."

Ms. West stated that as such, staff recommended denial of the roof structure and that the applicant be directed to remove it entirely within 60 days. In the event that the Commission elected to grant after-the-fact approval for the roof structure in this case, staff recommended an appropriate civil charge be considered based upon minimal environmental impact and a significant degree of deviation or non-compliance.

Mr. Bedford knowingly and willingly chose to violate the law. If he is allowed to retain the illegal structure, the civil charge should be sufficiently high to offset any economic incentive to proceed without the necessary permit, and given the fact that he had enjoyed the use of the gazebo for a year and a half. Counsel had previously stated that the civil charge could be up to \$10,000 per violation regardless of the staff matrix since it required the concurrence of the violator.

Charles Bedford, applicant, was present and his comments are a part of the verbatim record. Mr. Bedford acknowledged that he was responsible for the entire project. He said that the two walkways were constructed at the same time as the pier, and that they did not hurt the adjoining property owners. He said everything except for the rafters and shingles were installed in 2003. He said he had been in contact with VMRC and could not get anyone to talk with him. He said there were other pier structures in the area being constructed, so he assumed that it was okay. He said he was appealing to the Commission to approve his project as the pier with the roof was utilized a lot, especially by his elderly relatives. He said he was asking permission to retain these structures.

No one spoke in opposition to the project.

**Associate Member Holland asked that the matter be tabled until after the lunch break. Commissioner Pruitt agreed with his request.**

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The Commission broke for lunch at approximately 1:04 p.m. The Commissioner reconvened the meeting at approximately 1:52 p.m.

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Associate Member Cowart presented Mr. Gordon Birkett with a distinguished service certificate. He said he had served with Mr. Birkett for almost 8 years and thanked him for his fine service on the Commission. He read the certificate into the record.

Mr. Birkett said that he did miss being on the Commission. He said that it was a different outlook from the opposite side of the microphone. He congratulated Mr. Schick and Mr. Robins on their appointments to the Commission. He said that he had made friends here during his years of service and he felt that only with the staff's fine efforts was the Commission able to make their decisions.

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Associate Member Cowart announced that Roy Insley was retiring from the Commission effective July 1. Commissioner Pruitt presented Mr. Insley with his distinguished service certificate. He further spoke about Mr. Insley's time on the Board as well as his time as part of the staff here at VMRC. He said that what Mr. Insley had done on behalf of the Commonwealth was appreciated and he then read from the certificate.

Roy Insley expressed his appreciation for Mr. Pruitt's leadership and said he owed much of his success to Mr. Pruitt. He said at the present time everything was more complex and there was more federal involvement making it more complicated. He said he intended to enjoy his retirement by hunting and fishing and doing other things he has always wanted to do.

Associate Member Garrison said that Mr. Insley had been both an inspiration and help to the VMRC and the Board.

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**Commissioner Pruitt asked that the Commission return its attention to the matter of Item 7, Charles Bedford, which was tabled until after lunch. He asked for a motion.**

**Associate Member Robins explained that allowing unnecessary structures that were not water dependent and not authorized by statute did not agree with the public trust doctrine.** Mr. Robins moved to deny the request and stipulated that the structure be removed within 60 days. Associate Member Cowart seconded the motion. The motion carried, 7-0.

No fees, request denied.

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8. **EAST WEST PARTNERS OF VIRGINIA, #03-1904**, request authorization to construct a 6-foot wide community-use pier with eight (8) wetslips extending 250 linear feet channelward of mean high water to serve the residents of the Riverwatch Development situated along the Piankatank River off Hell Neck Road in Gloucester County. A local community league had protested the project.

Chip Neikirk, Environmental Engineer, Sr., gave the presentation with slides. His comments are a part of the verbatim record. Mr. Neikirk informed the Commission that two additional letters had been put in the notebooks at the back of this item. There was a letter of support from Mr. Fuller and another letter in opposition from the Piankatank Community League.

Mr. Neikirk explained that Riverwatch Development encompassed 374 acres situated along the Piankatank River and French Creek near the Harcum area of northern Gloucester County. The development included 11 private waterfront lots and a community lot along 3,175 linear feet of Piankatank River shoreline. There were also four lots along French Creek and approximately 80 inland parcels. Development along this portion of the river is primarily residential. The Piankatank River is about 3,700 feet wide at the project site and an 8-foot deep channel lies approximately 2,000 feet offshore.

Mr. Neikirk said that the applicants were seeking authorization to construct a 6-foot wide by 250-foot long pier with a 10-foot by 40-foot T-head and eight (8) wetslips to serve the residents of the development. A 12-foot by 60-foot boatramp was also proposed but since the ramp was proposed to stop at mean low water, a VMRC permit was not required. The application stated the pier would reach a depth of minus three (-3) feet at mean high water. Adjusting for the 1.3-foot tide range in this portion of the Piankatank River, the corresponding mean low water depth appeared to be less than two feet.

Mr. Neikirk stated that there were no deed restrictions associated with the Piankatank River lots that would prohibit or limit the construction of private piers. Accordingly, those lot owners retained the statutory right to construct a private pier extending from their property.

Mr. Neikirk said that Mr. Phil Olekszyk on behalf of the Piankatank Community League, had protested the project. They were concerned that the pier and associated boat traffic would pose a navigation and safety hazard and adversely affect the environment. They stated that water skiers and jet skiers frequently used the area and that the proposed pier would be the longest on the river for miles. Finally, they were concerned that boats attempting to use the shallow boat ramp would cause additional environmental damage.

Mr. Neikirk explained that the pier would encroach over oyster planting ground leased by Mr. John Hatch. Mr. Hatch, however, was notified of the project but had not commented on the proposal.

Mr. Neikirk stated that VIMS stated that the use of the boat slips would result in some degradation of water quality and suggested the use of trash receptacles and signage to encourage proper stewardship of the waters.

Mr. Neikirk said that the Health Department found the project acceptable and had approved an exemption from the requirement to install pump-out facilities. The exemption was based on an agreement that no boats with installed toilets or sewage holding tanks could use the facility, only residents and bonafide guests could use the pier, there would be no overnight mooring of boats at the pier, and a sign would be posted to advise the pier users that no discharge of sewage or other waste material overboard was allowed.

Mr. Neikirk said that the Department of Environmental Quality determined that a water quality certificate would not be required since the water quality impacts should be minimal and since the project qualified for a general permit from the U.S. Army Corps of Engineers. The Department of Conservation and Recreation determined that the project should not adversely affect their programs.

Mr. Neikirk explained that the siting criteria checklist in the Commission's "Criteria for the Siting of Marinas or Community Facilities for Boat Mooring" (VR 450-01-0047) identifies seven criteria associated with this facility as being undesirable. Specifically, the mean low water depth is less than three (3) feet, the salinity is suitable for shellfish growth, the water quality is high as evidenced by the approved designation for shellfish harvesting, the maximum wave height exceeds one (1) foot, it is more than 50 feet to navigable water depths, and the creek is presently used for other potentially conflicting uses such as skiing and fishing. Staff believes that some of these concerns would be mitigated by the stated use of the pier for temporary purposes rather than permanent mooring. Community piers associated with waterfront developments often raise difficult resource allocation questions. In this case, all the residents of the development would commonly own a 3.2-acre lot with 215 linear feet of shoreline. While staff agrees that these owners have some rights associated with the commonly owned shoreline, these rights probably only include some limited common right to access the water. Staff does not believe that this common interest in the waterfront lot automatically included a right

to construct a pier or moor a vessel thereto. This opinion is clearly expressed in the Commission's Marina Siting Criteria. As a result, staff is often left with trying to determine what constitutes "reasonable" access for the owners of such developments.

Mr. Neikirk further explained that the developers proposed to provide water access through the construction of a boat ramp and had stated that the proposed pier and slips were for temporary use and would be available on a first-come-first-serve basis. They did not intend to assign the slips to individual homeowners.

Mr. Neikirk said that for high density condominium developments, staff often recommends that the number of slips be limited to the number which could have been constructed had the property been developed as single family lots. Although this was not a condominium development, staff believed this rationale could also be utilized for this development. Under their current zoning it was likely that four additional lots could have been created along their Piankatank River shoreline. This would likely have resulted in the potential for four (4) additional statutorily authorized private piers.

Mr. Neikirk said that accordingly, staff recommended approval of the project with a condition that the number of slips be limited to four (4).

Associate Member Garrison asked where the protestants live. Mr. Neikirk said that he did not know as they belong to the Community League.

Associate Member Cowart asked about the possibility of 4 additional private piers. Mr. Neikirk stated that the County does not have any limits and the lots could have been made smaller to allow more piers.

Commissioner Pruitt asked if the applicant or a representative was present to comment.

Clem Carlisle, representative for the Developer and Home Owners Association, was sworn in and his comments are a part of the verbatim record. Mr. Carlisle explained that the area was originally zoned for 180 homes, but only 89 homes were planned with a winery. He said they had asked the County to rezone 100 homes without the winery. He further said that rights to develop 25 acres were given to the Land Trust. He said there would be no assigned slips or commercial slips, but it will be a community facility controlled by the Homeowners' Association. He said the pier was for the use of the residents only. He provided photos for the Board of other piers in the area. He said they had done a survey of the depths at the project site. He said Sutton and James had done the study just the past Friday to verify what depths they had found. He said they had tried to lessen use and impact on the surrounding area, had met criteria with the depths study, and had awarded development rights to some acreage to the Land Trust and they were checking into giving them more.

Paul Malcolm, representative for the Piankatank Community League, was sworn in and his comments are a part of the verbatim record. Mr. Malcolm explained that he was happy to see that the developer did what they wanted with the pier. He said the data they have come up with for the depths was fine with him. He said the County approved the revised drawing of the boat ramp. He said the design change was made to eliminate the dredging, which was fine with them, but a ramp at MLW was useless. He said he thought they would be back to the Commission to correct this once the Homeowner Association had accepted responsibility. He said they asked that the Commission ask them to follow the criteria for the ramp.

Clem Carlisle, in his rebuttal, said they had applied to the Wetlands Board for a longer ramp and deeper ramp but they had deleted it. He said all they were talking about here was the pier.

Paul Malcolm stated that the boat ramp still existed and suggested that the county should look at it again since the dredging had been eliminated.

Associate Member Robins asked what the actual dimensions of the ramp were? Mr. Neikirk responded 12 by 60 and from the plan view it looks like it stops at the MLW. Mr. Robins asked if the width of the ramp conformed to VIMS' recommendation. Mr. Neikirk said he thought it did.

Associate Member Schick asked if donated land was ever used as a mitigating effort? Mr. Grabb stated that there was no precedent for it.

Commissioner Pruitt asked for a motion. **Associate Member Holland stated that since they had reduced the number of lots and donated acreage to the Land Trust, he moved to accept staff recommendation for approval of the project, but to allow 8 slips. Associate Member Garrison seconded the motion. The motion carried, 6-1. Associate Member Cowart voted, No.**

Permit fee.....\$100.00

Associate Member Bowden left the meeting for the rest of the day.

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- 9. **DAVID LONG, #05-0423**, requests authorization to construct a 200-foot long private, non-commercial open-pile pier and a 1,200 square foot open-sided three-slip boathouse at his property situated along the Warwick River in the City of Newport News. The project is protested by an oyster ground leaseholder.

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

Mr. Owen explained that Mr. Long's property was located at the mouth of the Warwick River in the City of Newport News. The Warwick River, at this location, was approximately 0.7 miles wide. The minus three foot (-3') mean low water contour was located approximately 800 feet offshore.

Mr. Owen said that on February 28, 2005, staff received Mr. Long's application requesting authorization to construct a 200-foot long private, open-pile pier with a 16-foot wide by 25-foot long L-head, two (2) five-foot wide by 19-foot long finger piers, a 5-foot wide by 56-foot long timber catwalk and a 1,200 square foot non-commercial open-sided three-slip boathouse. The stated purpose of the project was to provide access to the water and mooring for a 25-foot long powerboat, an 18-foot long skiff and two jet skis. Similar length piers and boathouses have been constructed by nearby property owners.

Mr. Owen stated that the pier, as proposed, encroached approximately 65 feet into the leased oyster planting ground of Mr. John M. DeMaria Jr. Several neighboring piers also encroached into the subject lease.

Mr. Owen explained that in his letter, dated March 11, 2005, Mr. DeMaria noted his objection yet stated that the ground had not been productive for the past six years due to Hurricane Floyd and more recent freshets. Although his letter suggested that he was discussing possible arrangements to alleviate his objections, Mr. DeMaria recently advised staff that his objections to the project remained.

Mr. Owen further explained that Section 28.2-1203(A)(5) of the Code of Virginia conferred authority for the construction of private, non-commercial piers by owners of riparian lands in the waters opposite those lands, provided the pier did not exceed six feet in width and any L- or T-head construction platforms or protrusions did not exceed 250 total square feet. As originally submitted, the L-head, finger piers and catwalks resulted in 720 square feet of encroachment over State-owned subaqueous land. As such, the proposed pier was not statutorily authorized by Code and did not conform to the Commission criteria that would permit staff to administratively approve it even were it unprotested. The three-slip boathouse also was not statutorily authorized and required a permit from the Commission.

Mr. Owen stated that by letter, dated March 9, 2005, staff asked Mr. Long to provide additional justification for a structure of this size. In that letter, staff further explained that his pier could qualify for the statutory exemption should he agree to reduce the proposed finger piers and catwalk width to four feet. By letter dated March 27, 2005, Mr. Long informed staff that he was unwilling to reduce the widths of those structures. In his opinion, a 4-foot wide catwalk and finger pier would not allow for the safety of his children and family members.

Mr. Owen said that when reviewing proposals to build over State-owned submerged land, staff considered, among other things, the water dependency and the necessity of the

**Commission Meeting**

proposed structures. The intended goal of this review was to limit the encroachment of structures to the minimum amount necessary to reasonably achieve the intended use. Staff continued to question the applicant's need for a structure that exceeded the statutory authorization for private piers.

Mr. Owen stated that staff also could not support the applicant's request to cover his personal watercraft in a third slip. It was noted that the two large boathouses located immediately downstream were permitted as dual-slip boathouses for the storage of boats, not personal watercraft.

Mr. Owen stated that the pier itself should not adversely affect navigation or productive oyster ground. While staff was sympathetic to Mr. DeMaria's concerns, Section 28.2-630 clearly stated that the rights of the lessee or holder of so much of the oyster grounds as were reasonably needed for the building of the pier would cease if the Commissioner subsequently found, in writing, that the pier did not adversely impact commercially productive oyster or clam grounds. Commercially productive was further defined as being within the past three years. In light of Mr. DeMaria's own statement that the ground had not been productive for at least six years, staff recommended that the Commission find that the proposed pier would not adversely impact commercially productive oyster grounds.

Mr. Owen then stated that accordingly, staff recommended approval of the pier and boathouse contingent on the elimination of the inshore finger pier, the reduction in width of the second finger pier to four feet and reduction in length of the proposed roof to accommodate a maximum of two slips. This recommendation closely mirrored the approval of the large boathouse located immediately downstream. Staff could not support the applicant's request for the inshore finger pier.

David Long, applicant, was sworn in and his comments are a part of the verbatim record. Mr. Long said that he was concerned with a narrower catwalk because children in his family have cerebral palsy, his elderly great grandparents were still alive and his parents also had health concerns. He said both of the adjoining property owners had indicated that the project was okay. He said he spoke with Mr. DeMaria who suggested he purchase the leased acreage, but he could not see himself holding a lease. He said he was asking for only 11 linear feet of roof, that the one finger pier could be 5 feet versus the 4 feet suggested by staff; and that he be allowed the additional pier that the staff was recommending be deleted. He said he had respect for the environment and he believed what he proposed was right for keeping the users safe.

Commissioner Pruitt said that if he had to vote on the matter, he would agree to give Mr. Long what he was requesting.

**Associate Member Garrison moved to accept Mr. Long's proposal for this property as outlined, keeping the pier as staff proposed to five feet wide, but leaving the last**

**slip at four feet that staff had suggested eliminating, and shorten the covered slips for the first two as recommended by staff. Associate Member Schick asked if he was shortening the boathouse to cover just the first two slips. Associate Member Garrison responded, yes and Associate Member Schick seconded the motion.** Associate Member Cowart then commented that out of the million acres of subaqueous bottom in the State of Virginia there was probably less than 2 percent that was highly productive shellfish grounds. He reminded the Commission that in this particular case the oyster ground had not been worked nor shown to be productive for the last three years as required by Code. But, if there came a time when this was not true he hoped the Commission would try to protect those productive shellfish beds. He said that someone could do with a dock fifty feet less, for example, to protect an individual's right to harvest off these bottoms. He said he felt this would be in the best economic interest of the State of Virginia. **The motion carried, 5-0-1. Associate Member Cowart abstained.**

Permit fee.....\$100.00

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- 10. **BOSWELL WILLIAMSON, #05-0153**, requests after-the-fact authorization to retain a 12-foot long by 16-foot open-sided gazebo at his property situated along the Poquoson River in York County.

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

Ms. West explained that Mr. Williamson's property was situated along the Poquoson River, near the mouth of Quarter March Creek in York County.

Ms. West said that while conducting application site inspections in the area in September 2004, staff noted the presence of an open-sided gazebo on a nearby pier. Staff was unable to find any proof of authorization for the structure in our files. In addition, the structure did not appear to be present in the 2002 aerial photographs.

Ms. West stated that staff subsequently met with Mr. Williamson on November 29, 2004, and inspected the structure and discussed the gazebo. A Sworn Complaint and a Notice to Comply were issued on January 7, 2005, directing removal of the roofed structure within 60 days of receipt of the notice. In lieu of removal, however, Mr. Williamson was given the option of submitting an after-the-fact application with drawings that accurately reflected the dimensions of the covered structure. Additionally, the Notice to Comply requested statements explaining who performed the work and why the work was conducted without the necessary authorization and permit.

Ms. West said that on January 25, 2005, VMRC received a letter of explanation and a joint permit application from Mr. Williamson in which he requested authorization to retain the roof structure. The applicant's after-the-fact request was subjected to a public interest review. No other parties or agencies had expressed any opposition to the structure.

Ms. West explained that Mr. Williamson stated in his letter that he constructed the shelter while conducting repairs to his pier after Hurricane Isabel. The stated purpose of the gazebo was to provide shelter from the sun to address potential health concerns.

Ms. West said that when reviewing 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. 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 §1-10 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."

Ms. West explained that furthermore, Governor Warner's Executive Order 58, which was issued following Hurricane Isabel, specifically authorized the citizens of the Commonwealth to replace previously authorized and previously existing structures in the same or smaller footprint. The Order was not intended to exempt new construction or additions to existing structures from the regulatory process.

Ms. West stated that as such, staff recommended denial of the covered roof/deck structure and that the applicant be directed to remove it within 60 days.

Ms. West said in the event that the Commission elected to grant after-the-fact approval for the roof structure, staff recommended an appropriate civil charge be considered based upon minimal environmental impact and significant degree of deviation or non-compliance.

Boswell Williamson, applicant was sworn in and his comments are a part of the verbatim record. Mr. Williamson explained that the shelter proposed was for his wife who suffered from skin cancer. He further explained that it is only partially covered where they fished. He said they were requesting that the project be approved.

No one in support or opposition was present to comment.

**Associate Member Robins said he recommended temporary measures versus a permanent structure, which was not water dependent. Mr. Robins moved to deny the request and stipulated that the structure be removed within 60 days. Associate Member Schick seconded the motion. The motion carried 6-0.**

No fees, request denied.

\* \* \* \* \*

11. **HUGH COSNER, ET AL, #04-2861**, requests authorization to construct a private, non-commercial pier, extending approximately 130 feet channelward of mean low water, with a 248 square foot L-head platform, and a 6-foot wide walkway extending 54 feet around a single boat slip with lift; to install six (6) mooring dolphins; and to construct a 16-foot wide, concrete boat ramp, extending approximately 50 feet channelward of mean low water, adjacent to their property situated along the Rappahannock River in Westmoreland County. A nearby property owner had protested the project.

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

Mr. McGinnis explained that the proposed project was located along the eastern shoreline of the Rappahannock River in Westmoreland County, immediately south of Troy Creek. The applicant sought authorization to construct a 6-foot wide, private, non-commercial pier that would extend 130 feet channelward of mean low water. The proposed pier would include a 248 square foot L-head platform and a 6-foot wide walkway that would extend a total of 54 feet around a 14-foot wide by 34-foot long boat slip that would include a single boatlift. The proposed project also included the installation of six (6) mooring dolphins adjacent to the pier, and the construction of a 16-foot wide boat ramp that would extend approximately 50 feet channelward of mean low water to depths of around minus three feet.

Mr. McGinnis further explained that the applicants' original application was received on December 23, 2004, and included an 18-foot wide by 38-foot long open-sided boathouse, along with a larger pier footprint. The pier design has since been reduced in size in an apparent effort to more closely meet the requirements for statutory authorization provided in Section 28.2-1203 of the Code of Virginia. In addition, the boathouse portion of the request was deleted, following the denial of a special exception permit by the Westmoreland County Board of Supervisors on February 14, 2005.

Mr. McGinnis said that the Cosner's agent, Bayshore Design, informed the adjacent property owners of the proposed project around the same time the application for the project was submitted to VMRC. Staff subsequently received a phone call from Mr. Alan M. Voorhees objecting to the project, as well as a call from Ms. Linda Crowe of The

Nature Conservancy, who called for information on the proposed project at Mr. Voorhees request. The Nature Conservancy did not intend then, and has not since, protested this project. VMRC staff informed both Mr. Voorhees and The Nature Conservancy, that Mr. Voorhees should send a letter with his objections.

Mr. McGinnis said that by letter, dated February 8, 2005, Mr. Voorhees informed staff of his objections to the Cosner's proposed project. Specifically, Mr. Voorhees was concerned about water depths around the pier and the impact the project might have on eagles nesting near Troy Creek. He also objected to the proposed boathouse that had since been deleted. Mr. Voorhees' letter also included several attachments, including a copy of the design drawings, a signed Adjacent Property Owners Acknowledgment Form indicating his protest, and a copy of a letter sent to Bayshore Design dated January 4, 2005, stating his objections to the project. In that letter, Mr. Voorhees stated that he believed the design and placement of the pier were inappropriate, and that the Cosner's should use the boat ramp at Wilmont Wharf rather than construct their own private ramp through the buffer.

Mr. McGinnis stated that Mr. Voorhees revised his comments by letter dated April 8, 2005. In that letter he stated that a 250 square foot L-head platform was not appropriate for the area where the proposed pier was to be located. He also reiterated his previous concerns over water depths, eagles, and disturbance to the buffer.

Mr. McGinnis said that Bayshore Design later determined that Mr. Voorhees was no longer an adjacent property owner since the Cosner's had previously sold a large portion of their property to Troy Creek Associates, LLC of Arlington, Virginia. Staff received an Adjacent Property Owner's Acknowledgment Form on February 03, 2005, signed by Troy Creek Associates, LLC, indicating that they did not object to the project as proposed. Although Mr. Voorhees was no longer considered to be an adjacent property owner, his objections to the proposed project remained valid.

Mr. McGinnis said that in response to a verbal request by staff, Bayshore Design, by letter dated March 8, 2005, attempted to provide justification for the need of a 6-foot wide walkway around the boat slip rather than a 4-foot wide walkway, and for a 16-foot wide boat ramp rather than a typical 12-foot wide ramp. The Cosners and Bayshore Design felt that because of Mr. Cosner's medical conditions and the handicapped designation his doctors had given him, the increased dimensions of the walkway and boat ramp were required to accommodate the use of a golf cart to access the walkways around the boat slip, and to facilitate safe maneuvering of his vehicle and trailer while using the boat ramp.

Mr. McGinnis stated that the Virginia Institute of Marine Science (VIMS) Shoreline Application Report, dated February 18, 2004, indicated that the typical private boat ramp was 12 feet wide, and generally represented minimal individual and cumulative adverse impacts to the marine environment. In their opinion, however, a 16-foot wide boat ramp,

if justified, would not result in any additional, quantifiable long-term adverse impacts. The VIMS comments did not address impacts associated with the construction of the pier or mooring dolphins.

Mr. McGinnis said that the Westmoreland County Wetlands Board approved the intertidal portion of the proposed 16-foot wide boat ramp following a public hearing held on February 28, 2005.

Mr. McGinnis said that the Department of Game and Inland Fisheries, in comments provided by e-mail to VMRC staff on April 25, 2005, indicated that the proposed project was located within an area of the Rappahannock River that had been designated as an eagle concentration area. They stated that they generally do not support the construction of piers and boat ramps within these areas. DGIF has recommended a time-of-year restriction to minimize impacts to eagle populations as well as anadromous fish species. The United States Fish and Wildlife Service echoed DGIF's concerns over the eagle concentration area in a brief e-mail to VMRC staff on April 25, 2005. VMRC staff, however, felt that given the scope of this project, no time-of-year restrictions should be necessary.

Mr. McGinnis stated that the Department of Conservation and Recreation, in a memo forwarded to VMRC staff dated April 20, 2005, indicated that due to the scope of the activity and the distance from natural heritage resources, that they did not anticipate that this project would adversely impact these resources.

Mr. McGinnis said that no other State agencies had raised concerns or objections to the project.

Mr. McGinnis explained that while staff was sensitive to the concerns of the protestant, the Cosners were riparian property owners exercising their rights to access the water. While their request was somewhat excessive, staff did not feel that it was completely out of line. Staff was also sensitive to Mr. Cosner's medical conditions, but felt that portions of the Cosner's proposed project were excessive, non-water dependent, and unjustified, even when considering the needs of a handicapped individual.

Mr. McGinnis stated that a golf cart could certainly be maneuvered on a straight segment of a 6-foot wide pier, but staff had a hard time believing that a golf cart can safely make 90-degree turns on a 6-foot wide walkway. It was not clear why Mr. Cosner would need to access his boat using a golf cart from three separate sides. Staff felt that Mr. Cosner would be afforded ample access to his boat from the side of the slip adjacent to the L-head platform, and that the proposed walkway could be reduced to four feet in width. In addition, staff believed that a 12-foot wide boat ramp was more appropriate than the proposed 16-foot wide ramp, since it was unlikely that Mr. Cosner would be able to safely maneuver a wheelchair or walker on the sloped ramp. While increased dimensions

might be beneficial to those with handicapped designations, those dimensions in excess of the standard or typical design were not water dependent.

Mr. McGinnis said that as adopted by the Commission at its July 2003 meeting, water dependent means those structures and activities that must be located in, on or over State-owned subaqueous lands. Furthermore, in order to be water dependent, the Commission must determine (1) that it was necessary that the structure be located over water, and, (2) that it was necessary that the activity associated with the structure be over the water (emphasis added). The Commission was careful to caveat the definition with an acknowledgement that this did not prevent the Commission from issuing a permit for non-water dependent structures, provided that the Commission determined that the use was a reasonable one and they were able to set forth a rationale for such a finding on a case-by-case basis.

Mr. McGinnis said that accordingly, staff recommended that the proposed project be approved with the following conditions:

- (1) Denial of the 6-foot wide walkway extending around the boat slip.
- (2) Reduction of the boat ramp from 16 feet wide to 12 feet wide.

Mr. McGinnis further explained that staff's recommendation allowed the applicants to modify their proposed pier to include a 4-foot wide walkway around the boat slip, which would then qualify the pier for the statutory authorization provided in Section 28.2-1203 of the Code of Virginia, for the construction of private piers. This recommendation also reduced the overall scope of the project, thereby further limiting any impacts to eagles located within the designated eagle concentration area, which was a concern of the protestant, the Department of Game and Inland Fisheries, and the U.S. Fish and Wildlife Service.

Craig Palubinski of Bayshore Design represented the applicant. He was sworn in and his comments are a part of the verbatim record. Mr. Palubinski explained that the applicant had a letter from his doctor regarding his health issues. He said the increased size was for his safety. He explained that VDOT says that 16 feet provides for a safe launching of vessels at their public boat ramps. He said they had asked for 1 foot extra on both sides and that sides were proposed for the golf cart. He explained that on the side of the pier there was 1 to 2 feet of water depth. He said they had depth soundings taken at the property and in Troy Creek. He presented the depth sounding results on the overhead for the Commission. He said that based on the soundings they felt the project was in the best location. He said that there had been some reductions made on the original proposal. He said they were only asking for the same as others have already received recently.

Hugh Cosner, applicant, was sworn in and his comment are a part of the verbatim record. Mr. Cosner said that he had originally planned to divide up his property into lots for

houses to be constructed. He showed his original plan to develop, but he said that he did not do that for the good of the community. He said he had served on the Board of Supervisors and other boards for 27 years. He said he had been diagnosed with a rare blood disease, spinal meningitis and cancer. He said he had contributed a lot to the community and to the environment. He provided photographs of his property and Mr. Voorhees. He said there was a need to realize that more people have handicaps and sometimes you need to bend the rules. He said this was the last chance for him.

Commissioner Pruitt asked if anyone was in opposition.

Alan Voorhees, protestant was sworn in and his comments are a part of the verbatim record. Mr. Voorhees said that he was an expert in engineering and land development. He said he was not concerned with the pier itself. He said that Westmoreland County did not have any ordinances for pier development. He said the total project was not appropriate as it was just for Cosner's entertainment. He said that Wilmont Dock had easy access and he used it. He displayed a map on the overhead showing the water depths in the area. He said he was concerned if a large vessel was allowed in there.

Mr. Cosner in his rebuttal explained that he had a pontoon boat and to do what Mr. Voorhees wanted he would have to travel 9 miles from his house.

The Commissioner closed the hearing and asked the Commission for their decision.

Associate Member Robins said he felt the applicant had made an effort to bring the project down to a reasonable size and use. **Associate Member Robins then moved to approve the project, as proposed. Associate Member Cowart seconded the motion. The motion carried, 6-0.**

Permit fee.....\$100.00

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**WETLANDS ISSUE:**

Associate Member Garrison said that he agreed with a comment made by Dr. Jones in the past. He said she had said to move extra carefully and slowly when making decisions. He said that was what needed to be done for protecting the wetlands. He said to mitigate would make the matter less severe, though it was difficult to mitigate. He said at the present time there are 19,000,000 people on the waterfront and that was double from what it was in 1950. He said the Commonwealth should not wait until 2010 to take action and let the Federal government take over protecting the wetlands.

**4VAC 20-270-10, ET. SEQ., PERTAINING TO CRABBING:**

Associate Member Holland explained that the Commission had taken action to allow an exception for handicapped persons to work hours other than the 8-hour workday set by regulation. He said a case of a mate being a licensed crabber himself working with a licensed fisherman who qualified for an exception had been brought to his attention. The current Regulation 4VAC 20-270-10, Et seq. did not authorize this; he said this was causing a hardship and an allowance for this needed to be added to the regulation. He requested emergency action be taken by the Commission and Chapter 4VAC 20-270-30 (B) of the regulation be amended as follows:

“Nothing in this regulation shall prohibit any licensed crab pot or peeler pot fisherman, who has been granted an exception to the 8-hour work schedule, on a medical basis, from using another licensed crab pot or peeler pot fisherman as a mate, provided, however, during the designated alternate work hours, only the crab pots or peeler pots of the fisherman receiving the exception may be fished. Further, it shall be unlawful for the licensed crab fisherman, who has been granted an exception, or his mate, who is a licensed crab pot or peeler pot fisherman to fish, set, retrieve, or bait, during the alternate work hours, any crab pot or peeler pot, that is not owned and licensed by the fisherman granted the exception.”

Associate Member Holland stated that the staff endorsed this action.

Associate Member Cowart stated that the handicapped licensee must be present to work outside the established 8-hour workday and to allow someone to work with them.

**After some further discussion, Associate Member Holland moved to approve the emergency action and to advertise for public hearing to make this emergency action permanent. Associate Member Garrison seconded the motion. Commissioner Pruitt instructed staff to advertise for a hearing next month. The motion carried, 6-0.**

Associate Member McLeskey left for the day.

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**12. PUBLIC COMMENTS:**

**Tom Powers**, member of the FMAC was present and his comments are a part of the verbatim record.

Commissioner Pruitt left and Associate Member Cowart acted as the Chairman in his absence.

**Commission Meeting**

Mr. Powers explained that a legislative bill had become effective July 1, 2005 and he had some suggestions for amending the regulations, which were as follows:

4VAC 20-670-30 Gear Restrictions:

“D. It shall be unlawful for any person to use any recreational gill net, fish cast net, or fish dip net to catch and possess any species of fish whose commercial fishery is regulated by an annual harvest quota.” He asked that “fish cast net or fish dip net” be deleted, as an amendment to the regulation.

4VAC 20-670-50 Reporting Requirements:

“Any person using recreational gear described in 4VAC 20-670-20 of this chapter shall report annually, on forms provided by the Commission, the weight and species harvested, location of harvest, days fished, and amount of gear used.” He asked that “described in” be changed to “licensed as per”.

4VAC 20-80-40 Fish Pots:

“It shall be unlawful for any person to set, place, or fish a fish pot of any type in an area extending 250 yards from either span of the Chesapeake Bay Bridge-Tunnel. For purposes of this section, the distance shall be measured from the outer edges of each span and shall extend from the low water mark on Fisherman’s Island to the mean low water mark at the City of Virginia Beach.” This would be a new section of the regulation and he asked that 4VAC 20-80-40, penalty section, be changed to 4VAC 20-80-50.

Mr. Powers requested that public hearings be advertised and held for these recommendations.

Rob O’Reilly, Deputy Chief, Fisheries Management, said that these amendments could be advertised for a hearing next month.

**Associate Member Garrison moved for the public hearing to be advertised for Mr. Powers’ recommended regulation changes. Associate Member Holland seconded the motion. The motion carried, 5-0.**

Commissioner Pruitt returned to the meeting.

**John Wyatt**, representing the Upriver Waterman Association, was present and his comments are a part of the verbatim record. Mr. Wyatt said that at the January meeting there had been discussion on smaller nets being allowed for upriver fisherman so that they could target smaller fish. He said they were asking for relief or removal of this requirement. He said also staff was supposed to check with the ASMFC regarding the allowance of a shad bycatch fishery.

Commissioner Pruitt said that Mr. Travelstead had spoken with them. He said that the Potomac River was approved last year, but that Virginia was denied. He said since Mr. Travelstead was not at the meeting, but he would ask him about this on his return. He further stated that when this was brought to the ASMFC there was no support present from individuals at the ASMFC. He said that the watermen could not easily attend these meeting as the meetings were held in different areas on a rotating basis. Mr. Wyatt stated he could get people to go, but that staff was not providing any updates to the watermen, and the watermen were not sure their wishes were being taken to heart.

Associate Member Garrison suggested that the waterman speak to Cathy Davenport who was the Governor selected representative for the State. He said that Representative Chichester was also the State's representative. He said they should speak with him or his alternate. He also suggested they speak with their State delegates.

Mr. Wyatt said the Commission should take these matters to the representatives, as the watermen felt the Commission was their representative.

No action was taken.

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Associate Member Cowart informed the Commission that this was supposed to be his last meeting as his term expired June 30, 2005. He said he had enjoyed his time with the Commission and it had been a pleasure to work with the other members. He said he hoped the Commission would continue to help the oyster industry to get ahead.

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There was no further business, the meeting adjourned at approximately 4:20 p.m. The next meeting will be Tuesday, July 26, 2005.

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William A. Pruitt, Commissioner

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Katherine Leonard, Recording Secretary