

**MINUTES****Commission Meeting****July 25, 2006**

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:

Steven G. Bowman	Commissioner
Ernest L. Bowden, Jr. )	
J. Carter Fox )	
J. T. Holland )	Associate Members
Wayne McLeskey )	
Richard B. Robins, Jr. )	
Kyle Schick )	
Carl Josephson	Sr. Assistant Attorney General
Jack Travelstead	Deputy Commissioner-Chief Fisheries Mgmt Div.
Wilford Kale	Senior Staff Advisor
Katherine Leonard	Recording Secretary
Jane McCroskey	Chief, Admin./Finance Div.
Andy McNeil	Programmer Analyst, Sr.
Rob O'Reilly	Deputy Chief, Fisheries Mgmt. Div.
Joe Cimino	Fisheries Mgmt. Specialist
Sonya Davis	Fisheries Mgmt. Specialist, Sr.
Kelly Lancaster	Fisheries Mgmt. Specialist
Warner Rhodes	Acting Deputy Chief, Law Enforcement Div.
Carl Dize	Marine Police Officer

## Commission Meeting

13856  
July 25, 2006

Arthur Walden

Bob Grabb  
Tony Watkinson  
Chip Neikirk  
Jeff Madden  
Traycie West  
Ben Stagg  
Justin Worrell  
Randy Owen  
Benjamin McGinnis  
Hank Badger  
Elizabeth Gallup  
Sean Briggs

Marine Police Officer

Chief, Habitat Management Div.  
Deputy Chief, Habitat Mgt. Div.  
Environmental Engineer, Sr.  
Project Compliance Technician

Virginia Institute of Marine Science (VIMS)  
Lyle Varnell  
David O'Brien

Other present included:

Steve Pugh  
Trip Bugg  
Chuck Lawrence  
Joe Anson  
Robert E. Wright  
Bruce R. Lee  
Ellis W. James  
Mary Hill  
Helen Fridenstine  
Don M. Miles, II  
Rhoda Robberecht  
Dean Parham

Wayne Webster  
Kevin Curling  
Mike Ware  
Fred Carroll  
Jerry Ferguson  
Craig Palubinski  
Rob Boswell  
Marie Hill  
S. Lake Cowart, Jr.  
E. J. Harrison  
David Bradshaw

Dave Bugg  
Bill Riddle  
Robert Holloway  
Linda Wright  
William Bannon  
Dean Vincent  
Scott Harper  
Francis Chester  
Lori Blair Miles  
Paul W. Robberecht  
Andrew Bunce

and others

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**Commission Meeting**

Commissioner Bowman called the meeting to order at approximately 9:35 a.m. Associate Members Garrison and Jones were both not present.

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Tracye West, Environmental Engineer, Sr. gave the invocation and Mr. Carl Josephson, Senior Assistant Attorney General and VMRC Counsel led the pledge of allegiance to the flag.

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

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**APPROVAL OF AGENDA:** Commissioner Bowman asked if there were any changes to the agenda. Bob Grabb, Chief, Habitat Management, explained that a page two item had been added, 2G, Spectrum at Willoughby Harbor, #04-0345.

Commissioner Bowman asked for a motion to approve the agenda as amended. Associate Member Holland moved to approve the agenda as amended. Associate Member McLeskey seconded the motion. The motion carried, 6-0.

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**MINUTES:** Commissioner Bowman asked for a motion to approve the June 27, 2006 meeting minutes.

**Associate Member Holland moved to approve the minutes as presented. Associate Member Robins seconded the motion. The motion carried, 6-0-1. The Chair abstained from voting on the motion, as he was not on the board as yet nor was he present at the last meeting.**

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

Bob Grabb, Chief, Habitat Management Division, gave the presentation for the page two items, A through G. Mr. Grabb reviewed all the items for the board. His comments are a part of the verbatim record. Commissioner Bowman asked if anyone was present pro or con on these items to address the Commission.

Commission Meeting

Tom Langley, of Langley and McDonald Engineering, was sworn and his comments are a part of the verbatim record. Mr. Langley said that he wished to make a correction in the description of the Item 2G, Spectrum. He said that it should say 15 boat slips rather than the 14 as stated in the evaluation. He further said that the applicant reluctantly agreed to accept the royalty fees assessed in this case.

**Associate Member Holland moved to approve Page Two items, A through G, as amended. Associate Member Schick seconded the motion. The motion carried, 6-0.**

**2A. MID-ATLANTIC BROADBAND COOPERATIVE, ET AL, #05-1060,** requests authorization to modify a previously issued permit to add one (1) additional aerial crossing, of a fiber optic line, across the Meherrin River, in the town of Emporia in Greensville County. Recommend a royalty of \$390.00 for the encroachment over 130 linear feet of State-owned subaqueous land at a rate of \$3.00 per linear foot.

Royalty Fees (crossing 130 lin. ft. @ \$3.00/lin. ft.).....	\$390.00
Permit Fee.....	\$100.00
Total Fees.....	\$490.00

**2B. FLUVANNA COUNTY BOARD OF SUPERVISORS, # 04-0805,** requests authorization to construct a dual water intake structure comprised of two (2) 18-inch diameter raw water intake pipes which will extend 120 feet channelward of ordinary high water located 2000 feet downstream of the John H. Cooke Memorial Bridge crossing of the James River in the vicinity of the Bremo Bluffs power plant in Fluvanna County. Staff recommends approval of the project with our standard instream conditions and further that the Permittee is authorized a maximum daily withdrawal rate of 5.7 mgd with an intake velocity not to exceed 0.25 feet per second and an intake screen size no greater than one (1) millimeter.

Permit Fee.....	\$100.00
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**2C. NOKESVILLE DESIGN, PLC, #06-1126,** requests authorization to construct a 21-foot wide, concrete, arch span bridge, crossing over 25 linear feet of Slate Run with a minimum 9-foot clearance above ordinary high water, adjacent to the proposed Cowne residence off Parkgate Drive in Prince William County. Staff recommends a royalty in the amount of \$787.50 for the encroachment over 525 square feet of State-owned subaqueous land at a rate of \$1.50 per square foot.

Royalty Fees (crossing 525 sq. ft. @ \$1.50/sq. ft.).....	\$787.50
Permit Fee.....	\$100.00
Total Fees.....	\$878.50

**2D. COLONIAL PIPELINE COMPANY, #06-1301**, requests authorization to conduct routine inspections and maintenance activities of an existing 8-inch diameter petroleum pipeline (Line 25) at 16 jurisdictional stream crossings to include the North Fork of Goose Creek, Big Otter River, North Otter Creek, Elk Creek, and Ivy Creek in Bedford County, the James River in the City of Lynchburg, the James River and Harris Creek in Amherst County, Bent Creek and David Creek in Appomattox County, and Austin Creek, the North River (3 locations), Slate River, and Troublesome Creek in Buckingham County. Anomalies detected within any section of the pipeline may require excavation and replacement or in-stream repairs. Depending on the size of the stream and nature of the repair, temporary dams, cofferdams, and flume pipes may be installed to provide dry working conditions. Staff recommends standard in-stream construction conditions and a time-of-year restriction from March 15 to July 15 for work at crossings #1, 2, 3, 6, and 7 and from March 15 until June 30 for work at crossings #8, 9, 15, and 16 for protection of fish spawning areas.

Royalty Fees.....	(to be determined)
Permit Fee.....	\$100.00

**2E. CITY OF NORFOLK, #06-0518**, requests authorization to reconstruct the Haven Creek Public boat ramp facility with the construction of a 58-foot long by 30-foot wide concrete boat ramp with 115 linear feet of riprap scour protection and two (2) 114-foot long by 8-foot wide tending piers, a 55-foot long by 5-foot wide aluminum ramp to a 40-foot by 14-foot floating small vessel launching platform, 363 linear feet of bulkhead no greater than 2 feet in front of an existing deteriorated bulkhead, 60 linear feet of riprap, and a 325-foot long by 6-foot wide open-pile marginal wharf adjacent to property situated along Haven Creek in Norfolk.

Permit Fee.....	\$100.00
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**2F. ROBERT BUCHANAN, #06-0540**, requests authorization to install one (1) 125-foot long by 18-foot wide stone breakwater and one (1) 150-foot by 18-foot stone breakwater with 250 cubic yards of associated beach nourishment adjacent to his property situated along the Chesapeake Bay in York County.

Permit Fee.....	\$100.00
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**2G. SPECTRUM AT WILLOUGHBY HARBOR, #04-0345**, requests authorization to modify their permit to expand an existing fishing pier to include a 29-foot by 30-foot T-head, add a 22-foot long by 15-foot wide open-pile pier and a 35-foot long by 6-foot wide gangway to access a 455-foot by 15-foot floating breakwater/pier with eight finger piers (three 63-foot long by 6-foot wide, three 83-foot long by 6-foot wide, and one 103-foot long by 15-foot wide) to

accommodate 14 slips\*, and 350 linear of riprap adjacent to property situated along Willoughby Bay in Norfolk. Staff recommends a royalty of \$55,590.00 for 37,060 square feet of encroachment at \$1.50 per square foot for the pier and \$480.00 for 480 square feet of encroachment at \$1.00 per square foot for the expansion of the fishing pier.

Royalty Fees (encroachment 37,060 sq. ft. @ \$.150/sq. ft.)...	\$55,590.00
Royalty Fees (encroachment 480 sq. ft. @ \$1.00/sq. ft.).....	\$ 480.00
Total Fees.....	\$56,070.00

\*Approved as amended to reflect 15 slips vice 14 in the description.

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**3. CLOSED MEETING FOR CONSULTATION WITH OR BRIEFING BY COUNSEL. No closed session was held.**

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(Item 4. Staff Report on the Mary Hill situation was heard upon the arrival of Ms. Hill later in the meeting.)

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**5. ROBERT HOLLOWAY, #02-0012.** Clarification of the Commission's June 27, 2006, decision regarding Mr. Holloway's unauthorized construction at his property situated along the Poquoson River in York County.

Bob Grabb, Chief, Habitat Management, gave the presentation and his comments are a part of the verbatim record. Mr. Grabb explained that staff was asking for a clarification of the motion made at last month's meeting in the case of Mr. Holloway. He referred the board to the summary of the meeting minutes, page 26, which had just been approved. He explained further that there had been some discussion between himself and Associate Member Jones regarding charging triple fees, which was not included in the motion. He said that Mr. Ware, Mr. Holloway's attorney, was raising objections on behalf of his client to charging triple fees. He stated that the board needed to determine whether this was a new permit with after-the-fact revised drawings, or a reactivation and modification of the pre-existing permit.

Commissioner Bowman asked if new drawings would be required either way. Mr. Grabb responded, yes.

Associate Member Holland stated that he felt that action could not be taken until the revised drawings were submitted.

Mike Ware, Attorney for Mr. Holloway, was present and his comments are a part of the verbatim record. Mr. Ware stated that the motion did not include the triple fees and they were surprised when the staff sent a letter stating that triple fees were required. He said they only had a problem with the triple fees, not the assessment of a civil charge or the revised drawings requirement.

**Associate Member Robins said that he had listened to the meeting recording and the issue was discussed and was an open subject not stated as a part of the motion. He moved to approve the reactivation and modification of the pre-existing permit. Associate Member Bowden seconded the motion. Commissioner Bowman stated that he concurred that it was not specified in the motion at last month's meeting. The motion carried, 6-0-1. The Chair abstained from voting on the motion, as he was not on the board as yet nor was he present at the last meeting.**

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- 6. HARBOUR VIEW LIMITED PARTNERSHIP, #00-0476.** Formal Restoration Hearing concerning the construction of a 30.5-foot by 30.5-foot gazebo structure (approximately 730 square feet) channelward of mean low water adjacent to a riverfront park at the confluence of Knotts Creek and the Nansemond River in the City of Suffolk. Deferred from the June meeting.

Associate Member Robins recused himself from participating in this issue.

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 at the confluence of Knotts Creek and the Nansemond River in the Riverfront subdivision in the City of Suffolk. The adjoining highland parcel was a small riverfront park for the subdivision and provided water access for small craft, beach access and recreational fishing and sightseeing.

Mr. Stagg also explained that a Joint Permit Application was initially received on March 20, 2000, requesting authorization to construct a 6-foot by 240-foot long open-pile pier extending up to 110 feet channelward of mean low water. The original proposal included a 30-foot by 30-foot open-sided gazebo structure with a 5-foot wrap-around pier; one (1) 3-foot by 10-foot finger pier; two (2) 3-foot by 20-foot finger piers; a 15-foot by 26-foot open-sided boathouse roof and 7 mooring piles to create up to five wetslips. All structures were proposed adjacent to a riverfront park designated as an amenity to an upland residential development with the additional note that the boathouse would be used as a place to store a boat the developer would use during sales promotions to prospective property buyers.

Mr. Stagg said that upon receipt of the Joint Permit Application, staff requested additional information. The applicant was also advised that in considering their request "...we consider, among other things, the water dependency and the necessity of the proposed structures. The intended goal of this review is to limit the encroachment of the structures to the minimum amount necessary to reasonably achieve the intended use.... Generally, gazebos and covered storage areas are not normally considered water dependent structures, especially when they can be constructed on the upland property."

Mr. Stagg stated that subsequently, on September 15, 2000, staff received revised drawings, which depicted a considerable change in the proposal. These drawings indicated a request to construct an 8-foot by 210-foot long open-pile pier structure with a 10-foot by 20-foot T-head, with the channelward terminus being only 46 feet beyond mean low water. The modification also included a 30-foot by 30-foot open-sided gazebo that was clearly repositioned landward of mean low water. The proposed boathouse and wetslips were deleted from the request.

Mr. Stagg said that the modified proposal was then subjected to our normal public interest review process. Staff received no objections related to this proposal from other agencies or the public-at-large. The Suffolk Wetlands Board did not take jurisdiction over the project given its open-pile nature, and the exemption provided by Section 28.2-1302 (3)(1) of the Code of Virginia, and issued a letter to that effect on April 12, 2000. Since the gazebo was to be landward of mean low water, it was outside VMRC jurisdiction and did not require a permit. The VMRC permit for the pier portion of the project was issued on December 15, 2000.

Mr. Stagg explained that during a routine project compliance assessment by Commission staff in March of 2004, staff noted discrepancies between the permit drawings and the actual structures at the site. Those discrepancies included the existence of an 8-foot by 10-foot floating dock section at the channelward end of the pier, construction of a 30.5-foot by 30.5-foot gazebo structure much farther channelward than the permit drawings depicted, and that the actual location of mean low water was considerably different from that which was depicted in the permit drawings. Since low tide on that date was slightly above normal, staff determined that another site visit was warranted. Staff again visited the site in June, 2004 and again during 2005 and found the conditions to be the same during each visit. Subsequently, the applicant was notified and a joint onsite visit was conducted in early 2006.

Mr. Stagg stated that at the time of this meeting the floating dock had been removed. The applicant and his agent both attended this meeting and indicated that they did not believe the structure was out of compliance. Staff offered to allow the applicant to provide additional documentation in an attempt to resolve the matter. The applicant forwarded pictures that were taken during an extremely low tide in an attempt to show that there was no water under the gazebo. However, staff determined that due to several days of westerly winds that the tide level on the day of the photos was extremely low and not

representative of a normal low tide. The applicant was informed of this fact. Staff again visited the site on March 30, 2006 at low tide, and again found the gazebo structure to be channelward of mean low water.

Mr. Stagg said that a sworn complaint was then issued and the applicant was notified that if they were able to provide a certified survey depicting a properly documented mean low water elevation with the structure clearly positioned landward of mean low water, that the project would be found in compliance and no further action would be required. No such information was provided and the applicant was then notified to appear before the Commission at this restoration hearing. The applicant had provided additional photographs and a new drawing with the original alignment and the as-built location, but to date had not provided a certified survey depicting a properly documented mean low water elevation as requested.

Mr. Stagg said that given the fact that the applicant was fully aware of the Commission's water dependency policy and the fact that the original application was specifically modified to depict a gazebo structure that had been moved landward of mean low water, staff recommended that the permittee be required to remove and relocate the structure to a location landward of mean low water, and that this location be verified by a certified field survey depicting mean low water with the revised gazebo location clearly depicted thereupon. Staff further recommended that the permittee be given sixty days to accomplish this relocation and come into compliance with their permit. Given this staff recommendation, no civil charge was recommended.

Associate Member Holland asked for an engineer's definition of mean low water. Hank Badger, Environmental Engineer, Sr., explained that the MLW was based on a 19 year cycle. Associate Member Holland stated that an engineer plat had been provided. Mr. Badger explained that the plat did not depict the MLW, but 4 days of tides, and the soundings that were not based on the mean sea level. He stated there was nothing on the drawings showing MLW, only tides. He assumed that showing MLW defeated the client's purposes. Associate Member Holland asked if staff had done a survey. Mr. Badger said that there was no survey by VMRC only an assumption by staff that the MLW was in the middle of the gazebo. Mr. Badger said that the Corps of Engineers uses the same method.

After further discussion regarding the methods for determining MLW, Commissioner Bowman asked the applicant or his representative, if they wished to speak.

Dean G. Vincent, applicant and licensed Engineer in Virginia, was present and his comments are a part of the verbatim record. Mr. Vincent provided handouts to assist in his presentation, including a June letter with an attachment, a copy of the survey, and seven pages of pictures. He explained that in 2000, he went through a long process with numerous revisions. He said he had staked the location of the gazebo at that time and the permit was issued and the gazebo built. He said he met with VMRC staff in February 2006 to discuss the discrepancies. He stated that he had copies of numerous revised

drawings in his file, even though VMRC did not have any. He was told by VMRC at that time that the issues were the floating pier, pilings at the end of the pier, and the gazebo. He said the pilings had been removed. He said the Engineering Firm who surveyed for him had worked with him for many years. He said a physical survey was done and he was found to be 3' to 4' closer to the channel than the earlier drawings. He said assumptions were being made by the staff to determine the MLW. He said changes had occurred because of natural causes. He said in the survey performed for him they had looked at different locations on 4 different dates. He said he had always tried to meet and exceed standards set by this community. He said he was not informed of this problem until 2005 by VMRC. He said the staff seemed to be hasty in presenting this matter to the board and he felt that he had done nothing wrong. He said he felt this was one opinion versus another and the engineer was not told to show a line on the plat. He said he felt he was doing something beneficial for both the association and the community, by providing people who cannot access a boat to enjoy the waterfront. He asked that he be allowed to keep the structure, as it exists.

Commissioner Bowman asked for anyone from the public who wished to speak, pro or con. When Mr. Ellis rose to speak, Mr. Josephson reminded the board that this was a restoration hearing; therefore, additional public comments could not be accepted.

Commissioner Bowman asked the VIMS representative to give their assessment of the impact. Lyle Varnell, VIMS representative, explained that there was insignificant impact.

Associate Member Holland stated that he could not support making a decision to require moving the structure. He further stated that for future use a determination of the MLW line should be established.

Associate Member McLeskey explained that he was familiar with Harbour View and he felt there was no intentional wrong done in this case. He said he also knew the applicant to be a honorable person and that the structure would be well maintained. **He moved to let the structure remain for permit number 00-0476. Associate Member Holland seconded the motion.**

Commissioner Bowman stated that the staff was correct in being concerned with the discrepancies and to bring this matter to the attention of the board. Associate Member Fox explained that the VIMS comments state that there was not much damage in the current location and he supported the motion to allow the gazebo to remain. Associate Member Schick said he had a problem with allowing the gazebo, as it did not belong there but on the highland. He further said that it was not a water dependent use, but the General Assembly had allowed it and there was minimal impact, therefore, he agreed to the motion.

Bob Grabb, Chief, Habitat Management, asked the board to clarify the motion. He said staff needed to know if they were approving an after-the-fact authorization or if they were

reactivating and modifying an existing permit (#00-0476), thereby, not incurring triple fees and a civil charge. **Associate Member McLeskey said they were reactivating and modifying with no fees and civil charges.** Associate Member Holland agreed with Associate Member McLeskey statement. The motion carried, 6-0-1. Associate Member Robins abstained. The Chair voted yes.

No applicable fees – reactivation and modification.

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7. **C. W. LAWRENCE, JR., #03-1086**, requests authorization to retain a previously installed boat-lift along a permitted 8-foot by 36-foot open-pile pier, and to modify his existing permit to construct an 8-foot by 20-foot pier extension; install a 6-foot by 80-foot floating pier; and to install a 4-foot by 55-foot floating pier adjacent to his commercial property along Jones Creek, a tributary to the Pagan River in Isle of Wight County.

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 site was located in the Town of Rescue just downstream of the Route 704 Bridge over Jones Creek in Isle of Wight County. The applicant's adjoining upland includes a restaurant and boat refurbishing/sales businesses. The site also includes an existing boat ramp that was currently used only by the applicant. Mr. Lawrence wishes to extend a previously authorized pier and to reconfigure other piers from the original authorization. Additionally, the applicant wishes to retain a boatlift that had been installed without previous authorization.

Mr. Stagg said that this property had been the subject of numerous applications, from Mr. Lawrence, since 2001. In 2001, a small restaurant existed along the shoreline and actually encroached over State-owned subaqueous lands. In 2001 Mr. Lawrence requested a pier with T-head at this location (#01-0095). This application was eventually inactivated due to concerns from the Virginia Department of Transportation related to the replacement of the nearby Jones Creek highway bridge. Mr. Lawrence applied again in 2003 for authorization to construct a bulkhead and three piers along the proposed bulkhead (#03-0640). At this time the restaurant had been removed after being extensively damaged by fire, and the bridge construction was complete. This application was protested by an adjoining property owner during the Isle of Wight County wetlands review process and was ultimately denied by the wetlands board. The most recent application (#03-1086) was also submitted in 2003, and requested authorization to construct a bulkhead and three piers of varying width and length, each extending from the bulkhead. Mr. Lawrence was concurrently seeking authorization from the county to reconstruct the restaurant on the upland at the same time this application was submitted.

The Wetlands Board approved this project and subsequently a VMRC permit was issued on August 14, 2003.

Mr. Stagg explained that Mr. Lawrence submitted the current request to modify his permit on April 12, 2006. The length of the proposed piers at this site had been cause for concern in the past. The currently requested pier modification will extend up to fifty-five (55) feet channelward of the existing bulkhead. This will allow from 55 to 65 feet of clearance from the pier to the center of the existing channel. The existing and currently unauthorized boat-lift will be used by Mr. Lawrence for his personal boat and/or to display boats for sale from his boat refurbishing business. Mr. Lawrence has noted that the reason for the alignment of the current proposed structures was to allow safe access to the site by water, considering the strong tidal currents along this reach of the creek.

Mr. Stagg stated that the Virginia Institute of Marine Science had previously stated that the individual and cumulative adverse impacts resulting from this proposal would be minimal and had confirmed this finding based on the modification drawings and a recent site visit.

Mr. Stagg said that the Isle of Wight Wetlands Board approved the modification, as proposed, at their hearing on July 17, 2006. The Department of Conservation and Recreation found the proposal acceptable. Since the applicant did not propose any overnight mooring at the pier (other than the boats for sale) and since the restaurant had approved restroom facilities, no additional Health Department approval was required. No other agencies had commented on the project.

Mr. Stagg said that while the current request would likely result in boat traffic traversing a portion of the adjoining property owners riparian area, the adjoining owner had indicated that he did not object to the proposed alignment and use. Therefore, after evaluating the merits of the project, considering past Commission's action on similar projects, and all the factors contained in Section 28.2-1205(A) of the Code of Virginia, staff recommended after-the-fact approval of the previously installed boatlift, conditioned on the applicant's agreement to pay a civil charge, based on minimal environmental damage and a moderate degree of non-compliance. Staff also recommended approval of the proposed additions with the condition that there be no overnight mooring of boats along the channelward side of the offshore floating pier. Staff further recommended a royalty of \$1,040.00 be assessed for a 16-foot by 65-foot area (1,040 square feet at a rate of \$1.00 per square foot) to include the inshore fixed pier and attached floating pier along with a mooring area to be used for restaurant patrons arriving by boat, as this area did not satisfy the criteria for royalty exemption. The remaining area will be associated with the applicants boat sales business, also located at this site, and was exempt, by Code, from a royalty assessment.

After some questions and discussion, Commissioner Bowman asked if the applicant or his representative wished to address the Commission.

Commission Meeting

Chuck Lawrence, Jones Creek Association representative, was present and his comments are a part of the verbatim record. Mr. Lawrence explained that he had contacted various agencies regarding this project and felt they had done everything asked of him. He apologized for the boatlift, but he thought when the slip was allowed so was the lift. He said he had talked with everyone and revised the project, so it was the safest and most practical. He said he would appreciate the board's approval.

Associate Member Holland asked if he agreed with the staff recommendation. Mr. Lawrence responded yes.

Associate Member Robins asked him to explain about the boatlift. Mr. Lawrence said that he had gotten approval for everything else and the boatlift was for personal use. He explained that there was a strong current in the slip and the boatlift would make it easier to maneuver the boat when he backs into the slip.

Commissioner Bowman asked if there was anyone present who wished to address the Commission, pro or con. There was no one.

**Associate Member Holland moved to accept the staff recommendation. Commissioner Bowman asked if fees were to be assessed. Associate Member Holland stated since there was minimal impact, he felt a minimum assessment of \$600.00 for a civil charge was appropriate. Associate Member Schick seconded the motion. The motion carried, 7-0. The chair voted yes.**

Royalty Fees (encroachment 1,040 sq. ft. @ \$1.00 sq. ft.)	\$1,040.00
Civil Charge.....	\$ 600.00
Total Fees.....	\$1,640.00

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8. **WILLIAM J. MEAGHER, #06-0204**, requests authorization to construct a 15-foot by 20-foot riprap breakwater and a 15-foot by 40-foot riprap breakwater, 75 linear feet of riprap marsh toe sill, and to place 50 cubic yards of sand landward of the breakwaters, as beach nourishment, adjacent to his property situated along Stutts Creek in Mathews County. An adjoining property owner protested the project.

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

Mr. Neikirk explained that Mr. Meagher's property was situated along Stutts Creek and Callis Creek, a tributary to Stutts Creek in the Redart area of Mathews County. Development along this portion of the shoreline was primarily residential. Callis Creek was small, but it possessed relatively deep waters and there were numerous waterfront

lots along its shoreline. There were narrow, sandy spits of land on both sides of the mouth of Callis Creek that appeared to be migrating into the creek. The narrow channel leading into Callis Creek was adjacent to the project site. Mr. Meagher proposed to construct 75 linear feet of riprap marsh toe sill, a 40-foot by 15-foot riprap breakwater and a 20-foot by 15-foot riprap breakwater in an attempt to protect a vegetated spit of land located along the southwest side of the mouth of Callis Creek. He also proposed to place 50 cubic yards of sandy material landward of the breakwaters, as beach nourishment.

Mr. Neikirk said that staff had not received any written letters of objection to the project but staff had received several calls from concerned residents along Callis Creek. They noted that the entrance to the creek was shallow and narrow now and they were concerned that the project could further adversely affect the channel. Some were especially concerned with the placement and potential migration of the beach nourishment material.

Mr. Neikirk explained Mr. Meagher's house was located over 400 feet landward of the project and it was not clearly threatened by erosion. In fact, a tidal pond lies between the spit and Mr. Meagher's backyard. Mr. Meagher provided a composite drawing of two surveys to illustrate that the channelward face of the spit had experienced some erosion over the past 18 years. Although the drawing did indicate some change in the shoreline, staff believed it also illustrated that the spit was migrating landward. It was unclear whether or not the property had experienced any appreciable loss of sediment.

Mr. Neikirk noted that in their report, dated February 8, 2006, VIMS stated that they believed the current proposal was an improvement over a previous application. They also stated that while there was some change occurring along the shoreline, it was unexpectedly slow given the exposed nature of the shoreline. They also noted that the spit appeared to be moving into the creek. While VIMS was of the opinion that the beach nourishment sand would probably not adversely affect the channel, they recommended that the nourished areas be sprigged with saltmarsh cordgrass and salt meadow hay rather than the proposed American beach grass.

Mr. Neikirk stated that the Department of Game and Inland Fisheries noted the presence of Bald Eagles and Tiger Beetles within two miles of the project site. They also noted the presence of certain waterbird species listed by the state as species of special concern. They also recommended compensating for any nonvegetated wetland losses. The Department of Conservation and Recreation noted the presence of several natural heritage resources in the vicinity but stated that they did not believe the project would adversely affect those resources.

Mr. Neikirk said that the project had been revised several times in an attempt to address the concerns expressed by both VIMS and staff, and the sill and breakwaters appeared to be appropriately designed to protect Mr. Meagher's spit of land. Although the

effectiveness of breakwaters was related to their ability to hold a beach landward of the structures, and most breakwaters were proposed with beach nourishment, staff was concerned with the intentional placement of additional sand so close to the narrow Callis Creek entrance channel. This was especially true since Mr. Meagher did not have any structures currently threatened by erosion and the rate of erosion was relatively low at the site.

Mr. Neikirk stated that accordingly, staff recommended approval of the sill and breakwaters but recommended denial of the placement of sand for beach nourishment. Staff acknowledged that contractors often use the sand nourishment as a causeway for construction access when building breakwaters. In this instance, however, staff recommended that the contractor use mats to access the site. If it was not practical to utilize mats, staff would recommend allowing the contractor to use a maximum of 50 cubic yards of sand to create a construction causeway, provided that sand was removed and the intertidal and subtidal lands impacted were restored to their original pre-construction contours and conditions. Staff also recommended the applicant be required to install and maintain a piling mounted sign at the corner of the breakwater closest to the channel to warn boaters of the submerged hazard.

If approved per staff recommendation, Mr. Neikirk said staff would not recommend the assessment of a royalty since the breakwaters were constructed of riprap and because any sand fill would be required to be removed upon completion of the breakwaters. Should the Commission decide to authorize the beach nourishment, staff recommended the assessment of a royalty in the amount of \$0.05 per square foot for any submerged lands filled by the beach nourishment material.

Kevin Curling, Curling Environmental Consultant, LLC, representing the applicant was present and his comments are a part of the verbatim record. Mr. Curling explained that there were no protests, when it was first put on the agenda. He said there were 30 properties inside the creek and ten individuals signed the protest. He had some overhead pictures as a part of his presentation. He said the marsh was protecting the applicant's property and there had been changes at the point because of nature, and the sand spit was protecting the inward area. He said this project was necessary and appropriate. He said they had modified the project four times. He said in VIMS' comments they recommended beach fill and VMRC modified the project by recommending the fill for supporting construction be removed. He said that once the sand was compacted, six inches of fill would make it worse to remove and they wanted to just plant it after the construction was completed. He said the breakwater trapped sand from getting back into the channel

Commissioner Bowman asked if anyone, pro or con, wished to address the Commission. There was no one.

Associate Member Fox asked VIMS to comment on the removal of the sand used for the construction roadway. David O'Brien, VIMS representative, explained that if the sand was placed on filter cloth it would be removed without significant impact. He stated that in regards to the protestants' concerns, the use of beach nourishment should be avoided.

Associate Member Schick asked if the system would collect sand. Mr. O'Brien explained that was difficult to say with an offshore structure, but it was his opinion that it would. He said the spit rolling inward was a natural occurrence and left less sand in the system. Associate Member Schick asked if it would not be a problem and fill in the channel. Mr. O'Brien explained that it could go either way.

**Associate Member Fox moved to approve the sill/breakwater, deny permanent placement of sand as beach nourishment, allowing sand fill with mats put down for construction purposes, but if they do use sand to fill, that filter cloth would be put in first. Associate Member Robins seconded the motion. The motion carried, 7-0. The Chair voted yes.**

Permit Fee..... \$100.00

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**4. STAFF REPORT** regarding Ms. Mary Hill's Oyster Planting Ground situation.

Commissioner Bowman asked staff to provide a comprehensive report of Ms. Mary Hill's situation, starting from the beginning. He explained that Ben Stagg would report on the chronological history of the oyster ground application process and Jane McCroskey on what resolutions were attempted in response to Ms. Hill's concerns.

Ben Stagg, Environmental Engineer, Sr., gave a chronological report. His comments are a part of the verbatim record. Mr. Stagg explained the sequence of events in Ms. Hill's case. He provided the board with a timeline handout.

Commissioner Bowman asked if a list was established for newspapers having a "general circulation". Mr. Stagg responded there was such a list. Mr. Stagg explained that staff thought the Suffolk Herald was no longer operating and therefore changed to the Virginian Pilot several years ago. He said staff agreed that the cost of advertising in the Virginian Pilot was significantly higher. He said he called the Pilot inquiring about their costs and also checked about the circulation of the Suffolk Herald. He said the Virginian Pilot informed him that an increase went into effect last fall and that the cost for online publication was required. He said even when staff told them it was not necessary or required for our ads to be online, they insisted there was no choice. He said when he spoke with the Suffolk Herald he was informed they had issues 3 or 4 times a week. He said in his opinion, this frequency qualified them as a general circulation newspaper and staff had added them to the list.

Commissioner Bowman asked if a change had been made for Ms. Hill. Mr. Stagg responded yes. He explained that the Virginian Pilot will run an ad in advance of payment, but most will not, or the applicant must sign an agreement to pay for the advertising first. He explained that staff had called Ms. Hill to inform her that the Suffolk Herald qualified for general circulation, and the costs were less. He said he checked into how many applications submitted were in the James River area for 2005. He said that there had been 29 in all, 14 being for the James River, 11 of these were in the City of Suffolk and Isle of Wight County. He said there were none for the City of Newport News and the Daily Press was usually as expensive as the Virginian Pilot, until the Pilot increased their rates in the fall.

Jane McCroskey, Chief, Administrative and Finance, was present. Her comments are a part of the verbatim record. Mrs. McCroskey explained that she had spoken with Ms. Hill several times in an attempt to assist her, and explain the Tort Claim process to her.

Carl Josephson, Senior Assistant Attorney General and VMRC Counsel explained that with a Tort Claim there was a waiver of sovereign immunity and that applied in this case if a legal error occurred. He stated this was the logical place to start, but VMRC could not assist in the claim process since the claim was against them. He explained that the complainant or their attorney needed to pursue the claim. He said that Mrs. McCroskey had explained the process correctly.

Mary Hill, complainant, was present and her comments are a part of the verbatim record. Ms. Hill explained that since her application was with VMRC, that's where she came for help. She said harvesting oysters was the historical livelihood of her family. She said they wanted to get that back. She said this situation for her village was the same as if the Shipyard were to shut down. It would affect the local economy. She said she did not have an attorney. She said she was not given the opportunity to choose what newspaper was to advertise her application notice.

Commissioner Bowman explained that staff was following an established procedure for advertising notices when the applications were received. He said staff tried to assist and investigate alternatives and in the end implemented her suggestion. He said VMRC had no control over the Virginian Pilot, but in the future applicants would get to use a newspaper that was less expensive and satisfied the general circulation requirement. He said this had helped others. He said both Mrs. McCroskey and Mr. Josephson had explained that the Tort Claim process was available for this purpose. He said there was no way to address it further at the agency level. He stated watermen used the Tort Claim process all the time and it was not difficult. He said he felt VMRC had satisfied its responsibilities in this case, and for the report requested by Commissioner Pruitt at the June meeting.

Ms. Hill said that she felt she had a right to due process and equal protection in accordance with the Constitution's 14<sup>th</sup> amendment. Commissioner Bowman stated in response to the 14<sup>th</sup> amendment, there was the Tort Claim Act.

Mr. Josephson explained there had been no discrimination, as everyone was treated the same until this all came up.

Ms. Hill explained that she spoke with staff and they told her to wait for today's hearing. She said she also contacted Risk Management and was told they could not assist her, only refer her to their website. She said her mother was very elderly and ill and she was suffering from stress over the whole situation. She explained that she had been served with papers for the Virginian Pilot suit by the sheriff's department.

Commissioner Bowman responded that VMRC could not help with that part.

Carl Josephson, Senior Assistant Attorney General and VMRC Counsel explained that VMRC did not have authority to make a determination and give her back any money. He further explained that if she felt that she had been wronged she must go to the Division of Risk Management to make a Tort Claim and that there was a one-year time limit. He said that if she continued to wait to make her Tort Claim, she would not be able to get any resolution.

No further action was taken.

\* \* \* \* \*

12. **FRANCIS CHESTER, #05-0057**, request for review of the royalty assessment of \$1,140.75 for the encroachment over 760.5 square feet of State-owned submerged lands at a rate of \$1.50 per square foot for the permit issued to Mr. Chester to construct a 13-foot wide by 66-foot long bridge that spans 58.5 feet of Jennings Branch in Augusta County.

Tony Watkinson, Deputy Chief, Habitat Management gave the presentation. His comments are a part of the verbatim record. Mr. Watkinson explained that during the Public Comment period at the Commission's May 2006 meeting Mr. Chester asked that the Commission review the royalty assessment for the bridge permit he had received from Commission staff for execution. The permit had been sent to Mr. Chester for signature and payment of fees and royalties upon receipt of the final revised drawings for the bridge project which resolved the protest of the downstream property owner, and receipt of his agreement to restore a section of the waterway following certain unauthorized grading activities. The Commission agreed to consider Mr. Chester's request at its June meeting. Following the May meeting, Mr. Chester executed his permit and paid the royalty with the understanding that the Commission would consider the royalty question and he could ask for a refund if the Commission determined that a royalty was not required in this case.

Due to a personal conflict, however, Mr. Chester later submitted a letter requesting that the Commission consideration of this matter be deferred until July. Commissioner Pruitt granted that deferral. In addition to the royalty issue, Mr. Chester had also expressed concern over the length of time required for the review of his project. To address this latter concern, a little history was warranted.

Mr. Watkinson then went on to explain that Mr. Chester submitted his original application in early 2005. As submitted, Augusta County had objections to it and an adjoining property owner also protested it. The County eventually approved the project and the protest was ultimately resolved in response to revised engineering drawings that Mr. Chester had prepared. Mr. Chester did not, however, provide VMRC with the last revision, which staff had requested, until Tony Watkinson of the Commission's Habitat Management Division, met with him on-site on March 3, 2006, to inspect the site in response to a report of illegal stream grading Mr. Chester had undertaken without a permit. Because of the violation that resulted in unauthorized grading in the waterway staff withheld issuance of the permit until Mr. Chester agreed to a restoration plan proposed by the Department of Game and Inland Fisheries.

Mr. Watkinson stated that Mr. Chester's primary objection at this point seemed to be the royalty that was assessed for his bridge crossing. He maintains that Commission staff, did not inform him of this fee when he first applied in early 2005. That is true. The Commission was not authorized to resume collection of rents and royalties for the use of state-owned bottom until July 1, 2005. The revised rent and royalty schedule was adopted by the Commission on November 22, 2005, with an effective date of December 1, 2005. Mr. Chester maintains that he should not have to pay a rent and royalty since he applied prior to the effective date and is somehow "grandfathered".

Mr. Watkinson said that the royalty is not an application fee or processing fee. It is only effective upon permit approval and issuance. The same argument was made by Tom Langley at the January 2006 Commission meeting on behalf of Tanner's Landing Associates which was approved by the Commission at its December 2005 meeting. The Commission was not willing to agree with Mr. Langley's request either.

Mr. Watkinson explained that as the board could see from the chronological list in their packets, this had been a very controversial project, which was further complicated by Mr. Chester's unauthorized grading in the waterway. As such, until staff received all of the necessary information and revised drawings and Mr. Chester had agreed to undertake the proposed restoration plan, Commission staff was unable and unwilling to issue the permit for the proposed bridge.

Mr. Watkinson stated that in the absence of evidence to the contrary, staff assumed Commission jurisdiction over the bed of the Jennings Branch based on the Commonwealth's ownership as stipulated by §28.2-1200 of the Code of Virginia.

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Mr. Chester's bridge structure had a total encroachment over state-owned bottom of 733 square feet. As part of the permit document, staff assessed a royalty at the rate of \$1.50 per square foot, which was in keeping with the Commission's revised royalty schedule. This permit was issued administratively because it was under \$50,000 and no longer protested. Because the bridge was designed to provide access to two lots that Mr. Chester was selling, staff considered it to be commercial in nature as opposed to a private bridge a farmer might build to access his property for his own personal use. As such, staff recommended that the royalty fee and assessment not be changed.

Francis Chester, the permittee, was sworn in and his comments are a part of the verbatim record. Mr. Chester explained that in this matter he felt mind-boggled and that it was just unfair and unjust. He said he made application in January 2005. He said he could not finance his mill until he sold off some of his property. He explained that when he sold the property he put certain conditions on the side so that he could continue his operation. He said when he first applied staff indicated there would be a \$50 to \$100 permit fee and a short process. He said when he was notified of a protest and staff said he needed to make a modification, he did. He said when he called, staff said that the plans were lost and he sent another set. He said the revised project was protested and he was told to again to modify the project and he submitted new revised drawings. He said staff told him again that the plans were lost. He said he finally decided to come before the Commission because the costs were more than he was told originally. He said VDOT had told him he would have to install a commercial entrance. He said he received a bill from VMRC for over \$1,200.00 for his permit and it was unfair and unjust. He said the fees were only changed on December 1, 2005. He felt this was against the Constitution's 14<sup>th</sup> amendment. He said small businesses were getting hurt and everyone should work together. He said his business was growing and he was providing employment for the locality. He said he was asking the Commission to consider his request for the refund of the fees he had paid.

Associate Member Holland asked if it was a commercial entrance? Mr. Chester responded yes.

Carl Josephson, Senior Assistant Attorney General and VMRC Counsel, explained that under the Code these were state-owned subaqueous lands unless proven to the contrary with a Kings Grant or a Colonial Pact. He said it was not private property unless it was established as such.

Mr. Watkinson explained that if the project had not been protested it would have been processed in 60 to 90 days, which is typical and when staff told him the expected cost in January 2005, they had no authority to charge royalties, as the revised fee schedule was not in place.

Commissioner Bowman asked him about the number of impediments in processing this application. Mr. Watkinson explained that protests were received in March 2005, August

2005 and January 2006. At the time the last protest was resolved, staff expected to receive two revised drawings and they only received one. He said that in March 2006 when the site meeting occurred, staff received the appropriate drawing and it was made a part of the permit.

Mr. Chester in his rebuttal testimony explained that when he was asked he sent it in 3 times, and when the site meeting was held he was told then that the 2<sup>nd</sup> drawing was not in the package. Mr. Watkinson said there was some confusion on Mr. Chester's part, as he kept sending the wrong drawing.

Associate Member Robins asked the VMRC Counsel if there was a mechanism for applications received prior to the fee increase to be "grandfathered". Mr. Josephson said this was not a processing fee, but a royalty fee and the revised fee schedule was adopted for all future issuances of permits.

**Associate Member Holland stated that since this was established as a commercial entrance this was a commercial project, therefore, he moved to accept the staff recommendation. The motion carried, 7-0. The Chair voted yes.**

\* \* \* \* \*

The Commission broke for lunch at approximately 12:23 p.m. and asked to return at approximately 1:00 p.m. The meeting reconvened at approximately 1:10 p.m.

\* \* \* \* \*

9. **PORT ROYAL FISH HOUSE, L.L.C., #05-2547**, requests authorization to extend an existing commercial pier to approximately 245 feet to create a 14-slip commercial marina. The project also includes the installation of 108 linear feet of riprap revetment and the dredging of 380 cubic yards of State-owned subaqueous material, to create maximum depths of minus two and one half (-2.5) feet at mean low water. The Port Royal Fish House is situated along the Rappahannock River immediately northwest of the James Madison (Route 301) Memorial Bridge in Caroline County. Both Wetlands and Subaqueous permits are required. An adjoining property owner 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 project was located along the Rappahannock River in Caroline County, immediately upstream of the Route 301 – James Madison Memorial Bridge in the Town of Port Royal. As proposed, the project consists of three separate aspects; stabilization of the shoreline through the installation of 108 linear feet of riprap revetment; expansion of an existing open-pile, commercial pier; and dredging to improve

access for larger vessels. An existing 8-foot wide pier extends approximately 95 feet channelward of mean low water. The applicant proposes to extend it an additional 150 feet. The proposed pier expansion will also include a 10-foot wide by 75-foot long T-head platform, fourteen (14) wet slips, six (6) 3-foot wide by 16-foot long finger piers, twenty-two (22) mooring piles, fuel pumps, a sanitary pump-out, and a 6-foot wide by 50-foot long floating pier platform. The applicant also proposed to dredge 380 cubic yards of State-owned subaqueous material, to create maximum depths of minus two and one half (-2.5) feet at mean low water, to accommodate portions of three of the proposed wet slips, and to provide access to an existing boat ramp and the proposed floating platform. The dredged material would be de-watered on the upland property, and then transported to and disposed of at the applicant's property in Essex County, near the intersection of Route 17 and Route 641.

Mr. McGinnis stated that in June of 1994, the Commission approved a project proposed by a previous owner. That authorization (VMRC #91-1524) included the construction of an 8-foot wide by 250-foot long open-pile, commercial pier, with a 10-foot wide by 75-foot long T-head platform, the installation of 171 linear feet of timber bulkhead, and the construction of a 24-foot wide by 100-foot long concrete boat ramp. Only the boat ramp, and portions of the previously authorized pier and bulkhead were constructed. The previous project did not include any dredging and did not, include any slips defined by finger piers and mooring piles, although the Commissions authorization did allow the overnight mooring of up to 16 pontoon boats adjacent to the pier.

Mr. McGinnis explained that since Caroline County had not yet adopted the model Wetlands Zoning Ordinance, the Marine Resources Commission was responsible for administering the provisions of Chapter 13 (Wetlands) of Title 28.2 of the Code of Virginia in that locality. As a result, the Commission would be acting as the Wetlands Board for those portions of the project involving tidal wetlands, as well as for the encroachments over State-owned submerged land.

Mr. McGinnis stated that by letter dated November 2, 2005, Ms. Phyllis Carpenter, Vice President and Secretary of Gouldman Farms, Inc., an adjacent property owner, voiced their objection to the proposed project. It appeared that they were concerned over the potential impacts to the marine environment, although their letter did not provide details as to their specific concerns or objections to the project.

Mr. McGinnis said that the Virginia Institute of Marine Science (VIMS) Shoreline Permit Application Report, dated July 18, 2006, stated that the proposed pier structure was expected to have minimal adverse environmental impacts, although indirectly it had the potential to introduce pollutants, such as petroleum products, sewage, paint leachate, and solid waste into the marine environment. The report stated that it would be preferable to align the riprap revetment landward of existing wetlands. They further stated that the proposed dredging would directly impact benthic organisms, would be expected to adversely affect water quality by increasing suspended sediments, and was anticipated to

require long-term maintenance dredging. They questioned the need for the dredging on the downstream side of the pier and recommended that the proposed dredging be restricted to that necessary to utilize the existing boat ramp. Additionally, their report recommended a dredging time-of-year restriction from mid-March through June to lessen adverse impacts of suspended sediments on anadromous fish.

Mr. McGinnis explained that the Virginia Department of Health (VDH), in a letter dated March 23, 2006, stated that the proposed project was in compliance with their Sanitary Regulations for Marinas and Boat Moorings. The Virginia Department of Game and Inland Fisheries (DGIF), in an e-mail dated April 21, 2006, stated that this project was within a reach of the Rappahannock River, which had been designated as an Eagle Concentration Area, as well as an area designated as a Confirmed Anadromous Fish Use Area. Therefore, DGIF recommended a time-of-year restriction, which precluded any construction activities between February 15 and June 30, to minimize potential adverse impacts upon anadromous fish. In addition, in order to address potential adverse impacts upon eagles they had recommended that the applicant coordinate with their office and the U.S. Fish and Wildlife Service (USFWS) prior to construction. DGIF also recommended that an alternative to the riprap revetment design be considered, such as a "living shoreline" treatment, as well as the implementation of erosion and sediment control measures, including the use of turbidity curtains to isolate the construction area. Furthermore, DGIF questioned the necessity of the proposed dredging and was concerned that any new dredging could hinder current efforts to improve water quality in the Chesapeake Bay. The Virginia Department of Conservation and Recreation (DCR), in a memorandum dated April 24, 2006, stated that the proposed project should not affect any State Natural Area Preserves under their jurisdiction, but had information documenting a Bald Eagle nest site in the project vicinity. No other agencies had raised concerns or objections to the project.

Mr. McGinnis said that it appeared that the applicants' proposed project was designed with the Commission's previous authorization (VMRC #91-1524) in mind. The length and width of the proposed pier and T-head platform mirrored those of the previously permitted, but unfinished pier. Although the proposed riprap revetment would impact some vegetated and non-vegetated wetlands, staff believed that the impacts were largely unavoidable and minor in their extent. Furthermore, the substitution of a revetment over the previously authorized bulkhead was more environmentally acceptable and should provide habitat value in the interstitial voids of the riprap, thereby offsetting somewhat the loss of wetlands habitat. As a result, the project would not require compensation or mitigation under the Commission's Wetlands Mitigation-Compensation Policy.

Mr. McGinnis said that staff questioned the need for the dredging on the southeast or bridge side of the pier, since a majority of the proposed dredging on this side appeared to provide access to the proposed floating platform. In their application the applicant stated that the floating platform was intended for use by personal watercraft, such as jet-skis, canoes, and kayaks. Although the use of the floating platform seemed reasonable to staff,

it would not appear that such small watercraft would draft enough water to require two and half foot depths below mean low water. Therefore, staff could not support approval of the proposed dredging on the southeast side of the pier. If the applicant felt that without dredging, the proposed location of the floating platform could not support personal watercraft and kayaks, staff suggested that the floating platform be realigned further channelward to take advantage of the existing, greater depths. That should prove sufficient for small watercraft usage.

Mr. McGinnis stated that accordingly, after evaluating the merits of the project against the concerns expressed by those in opposition to the project, since the impacts resulting from the use of tidal wetlands and State-owned submerged land should be minimal, and after considering all of the factors contained in Sections 28.2-1205 (A) and 28.2-1302 of the Code of Virginia, staff recommended that the proposed dredging on the southeast side of the pier be denied, but that the remaining portions of the project be approved as proposed. Staff further recommended a time-of-year restriction, which precluded any dredging activities between February 15 and June 30, to minimize potential adverse impacts upon anadromous fish. In addition, staff recommended a royalty in the amount of \$9,674.00 be assessed for the encroachment of the main pier extension and its associated T-head platform, finger piers, pilings, and floating platform over 9,674 square feet of State-owned subaqueous land at a rate of \$1.00 per square foot. Staff further recommended the assessment of a royalty for the dredging of State-owned subaqueous bottom at a rate of \$0.45 per cubic yard, based upon revised drawings and dredge volume calculations reflecting the Commission's authorization.

Associate Member Robins asked what the water depth was for the floating pier. Mr. McGinnis responded 1 ½ to 2 feet at low water without dredging. He went on to say that VIMS preferred the riprap landward to the extent practical over any dredging.

Craig Palubinski, of Bayshore Design and agent for the applicant was sworn in and his comments are a part of the verbatim record. Mr. Palubinski explained that the purpose of the dredging was to provide deeper water for the existing pier.

Associate Member Schick asked if the floating dock was relocated to 2 feet would the line interfere with the boatslip. Mr. Palubinski responded no, as it would be used by transit boats.

Commissioner Bowman asked if the floating pier was a staging pier. Mr. Palubinski responded that it was to be used for kayaks and jet skis. He asked if anyone was present pro or con who wished to address the Commission.

Ellis W. James, Norfolk Resident and Sierra Club Member, was present and his comments in opposition to the project are a part of the verbatim record. Mr. James stated that there was a potential for problems, which should be paid close attention to, as the Commission needed to protect the resources.

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Bruce Lee, Applicant, was sworn in and his comments are a part of the verbatim record. Mr. Lee stated that Mr. James had not been to the site so he could see what was actually being done. Commissioner Bowman explained that Mr. James was making a general observation.

**Associate Member Schick stated that he had visited the site. He said there were not a lot of commercial facilities in the area where boats could fuel up. He said it was a good project. He moved to approve the project as applied for. Associate Member Holland seconded the motion.**

**Associate Member Robins stated that it was a worthwhile project, but the Commission needed to consider the VIMS comments and if the floating dock was moved out to the first piling for transit boats it would eliminate the need to dredge on the southeast side. In a substitute motion, he moved to accept the staff recommendation. Associate Member Fox seconded the motion. The motion carried, 4-3. Associate Members Schick, Holland and McLeskey all voted no. Commissioner Bowman stated that because of the VIMS comments and Associate Member Robins' rationale, he voted yes.**

Royalty Fees (encroachment 9,674 sq. ft. @ \$1.00/sq. ft.)....\$9,674.00
Royalty Fees (dredging @ \$0.45 cu. yds.).....(to be determined)*
Permit Fee.....\$ 100.00
Wetlands Permit Fee.....\$ 10.00

\*Pending revised drawings.

\* \* \* \* \*

**10. MR. & MRS. ROB BOSWELL, #04-2357**, request authorization to construct a 70-foot long by 6-foot wide extension to their existing 91-foot long, private, noncommercial timber pier at their property situated along Kingscote Creek in Northumberland County. The project is protested by the affected oyster ground leaseholder.

Jeff Madden, Environmental Engineer, Sr., gave the presentation with slides. His comments are a part of the verbatim record. Mr. Madden explained that in the evaluation he had indicated that a boatlift was being requested but there was no boatlift requested.

Jeff Madden explained that Mr. and Mrs. Boswell owned a weekend home in a residential subdivision at the end of Cherry Point Neck, along Kingscote Creek approximately six (6) miles northeast of the town of Callao in Northumberland County. The couple had an existing, six-foot wide, private, noncommercial timber pier with an overall length of 112 feet. That pier extended 82 feet from mean low water and included a 100 square foot L-head and two mooring piles to accommodate their 32-foot Grady White "300 Marlin."

According to the applicant, the mean low water depth of the water at the end of the current pier was minus two feet eight inches (-2'8").

Mr. Madden said that the Boswells would like to construct a 70-foot long extension, a second L-head measuring 140 square feet and install six additional mooring piles. Upon construction, the proposed pier would extend 152 feet from mean low water. The mean low water depth at the end of the extended pier would be minus four feet two inches (-4'2").

Mr. Madden stated that the current pier appeared to have been constructed by the previous property owner, Mr. Robert Abbate. That original pier request (VMRC #96-069) was for a 100-foot long (MHW) by 6-foot wide private, noncommercial, timber pier with a 140 square foot L-head and two mooring piles. The pier was not protested, and the 1996 request was authorized by statute. Mr. Abbate received a Zoning permit from Northumberland County on June 5, 1996, for the above-referenced pier. As near as can be determined by County and Commission staff, the pier originally built by Mr. Abbate appeared to be the same length from mean high water as the pier currently owned by Mr. and Mrs. Boswell. The L-head, however, was oriented toward the north, the pier had an uncovered boatlift on it, and it was 31.5 feet offset from the property line.

Mr. Madden said that Ms. Helen Fridenstine, the applicant's neighbor and oyster leaseholder, protested the current project. The existing pier and the proposed extension was wholly within Ms. Fridenstine's oyster lease. Since the pier and the new extension would be longer than 100 feet and over leased oyster ground, Section 28.2-1205(D) required the leaseholders concurrence. On January 3, 2005, staff received a protest letter from Ms. Fridenstine, which significantly altered the circumstances under which a permit could be granted. Ms. Fridenstine indicated that the area in the vicinity of the pier was productive oyster bottom and further that she felt the scope of the project was excessive. The oysterground leaseholder indicated that she would agree to a 100-foot long pier. In a subsequent letter, staff requested that the protestant support her protest by supplying documentation verifying that the area around the prospective pier extension was productive ground. Section 28.2-630 defines productive oyster ground as "those areas which can be demonstrated to have (i) suitable substrate for oyster or clam production and (ii) evidence of commercial oyster or clam production within the past three years." In her letter dated February 1, 2005, Ms. Fridenstine claimed that Mr. Lake Cowart Jr., planted 2,672 bushels of oyster in 2000 and 2002 and harvested 115.5 bushels of oyster from the ground in 2002.

Mr. Madden explained that on March 4, 2005, Commission staff agreed, at the applicant's request, to postpone the public hearing on the matter in order to allow Mr. and Mrs. Boswell to seek legal counsel. On June 15, 2006, staff received a letter from Mr. A. Davis Bugg Jr. on behalf of the applicants, indicating that he would be available to provide oral arguments for his clients on July 25, 2006. This started the 90-day clock specified in § 28.2-1205 within which the Commission is required to act.

Mr. Madden noted that staff had recently received a letter from Delegate Robert J. Wittman who believed that the proposed pier extension would have a significant impact upon the leased oysterground held by Ms. Fridenstine.

Mr. Madden stated that no other State agency or individual had objected to this project.

Mr. Madden explained that Section 28.2-1205 (D) of the Code states that while a permit was required, it shall be issued to the applicant. The Commission, however, was permitted to reasonably prescribe the size, dimension and location of the pier extension for the purpose of minimizing adverse impacts on such oyster grounds. While there was no other location along the Boswell's shoreline that would necessarily be better, staff believed that there was insufficient evidence on the record to indicate that Mr. and Mrs. Boswell even needed a 70-foot pier extension, or an additional 140 square foot L- head and associated mooring piles, let alone access to mean low water depths of minus four feet, two inches (-4' 2").

Mr. Madden further explained that although the applicant had expressed a need for a 50" depth, the Boswell's Grady White had a draft of 17 inches and was already moored at the existing pier. Should the Commission feel some extension was warranted, staff could support the construction of a 19-foot long, by 6-foot wide extension. This 19-foot extension would get the pier to a 101-foot (MLW) length and reach a mean low water depth of between 2'11" and 3'3". Because the length exceeded 100' it would require a permit and its issuance would seem to satisfy the Code requirements. In addition, the encroachment over the Fridenstine oyster lease could be further reduced by stipulating that no additional lift or protrusion of any kind would be allowed on the extension and further that only two mooring piles could be driven outboard of the new pier extension. Staff also believed that if approved, §28.2-630 of the Code of Virginia should be invoked which would grant the oysterground leaseholder one year to remove any shellfish resources from beneath the footprint of the approved pier extension.

Associate Member Schick stated that a boatlift was better than mooring and painting it. He said a lift would put more sunlight underneath the boat.

Associate Member Robins asked if no other site was better rather than minimizing the length and reorienting the structure to protect the oyster ground. Mr. Madden stated that Mr. Lake Cowart could better answer that question. He said Mr. Johnson, a neighbor, had his pier pulled back so as to stay off the oyster ground. He said Mr. Cowart stated that this was hard bottom.

Commissioner Bowman asked if the applicant or his representative wished to address the Commission.

Davis Bugg, Attorney for the applicant, was present and his comments are a part of the verbatim record. Mr. Bugg stated that to his knowledge, this was the first case under the

new law, which was effective in 2000 to be reviewed by the Commission. He said this was a test case. He referenced Section 28.2-1205(D) of the Code of Virginia, which states "a permit is required and shall be issued by the Commission for placement of any private pier measuring 100 or more feet in length from the mean low water mark, which is used for noncommercial purposes...that traverses commercially productive leased oyster or clam grounds....". He explained that further on it says it allows the VMRC to minimize impacts on oyster leases. He said there was 2'8" of water at MLW at low tide and the boat must be pushed out to get to deeper water. He said the extension put the pier in 3'11" at MLW. He said the VMRC could only change the design and location to minimize the impacts. He reiterated that the statute says the Commission must issue the permit and when looking at the structure it must traverse productive shellfish grounds as defined in 28.2-630. He said the Commission must look at the potential and current production for the last 3 years. He stated that in a letter sent to VMRC in January 2005, Mr. Cowart said the area was productive and sent documentation to show that it was productive. Mr. Cowart said in 2000 to 2002 shells had been planted and 115.5 bushels of oysters were harvested from this ground in 2002, not within 3 years. He stated this was an area that had been closed to harvest by the Health Department although it will be reopened shortly. He said the opponents must demonstrate commercial oyster production and there was no evidence of this within the 3-year requirement. He said the question was not whether or not it was going to be productive, only that it had been within the last 3 years. He said the applicant wanted an amicable resolution and would agree to some reduction to get his permit.

Commissioner Bowman asked if anyone, pro or con, wished to address the Commission.

S. Lake Cowart, Jr., protestant, was sworn in and his comments are a part of the verbatim record. Mr. Cowart stated that Cowart Seafood had worked the lease until 1999. He said in 2000 legislation was introduced (House Bill 667), which was now Section 28.2-630. He said in the past the shoreline property owners and the leaseholders had worked together. He said that in 2005 the Health Department condemned the area. He said that since that time he had spoken with the Health Department, Division of Shellfish Sanitation and they had 40 testing stations plotted on a chart. He said in 2003 and 2004 there was heavy rainfall causing the closure to be continued. He was told in July that this area could be reopened and could again be productive, as native oysters do exist on this bottom. He said on most leases only a portion of the area was actually productive and had the best bottom with shells on it. He said the area from the dock to the area where they wanted to build there were not a lot of shells, as you cannot shell right up to a dock.

Mr. Cowart said the Code says the Commission can issue or modify the permit. He said the staff recommendation qualified as a modification. He asked what does productive mean? He said it takes 3 years for the oysters to mature and not necessarily harvesting. He explained that of the 240,000 acres of public oyster ground and 110,000 acres of leases not a great percentage were good for shellfish. He said the Commission needed to

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protect the good bottom for oyster production and that a 100 feet pier was long enough. He stated he supported the staff recommendation and did not want to compromise.

Helen Fridenstein, protestant and leaseholder, was sworn in and her comments are a part of the verbatim record. Mr. Fridenstein explained that her pier was 60 feet long and her son owned the same kind of boat as the Boswells and he could get it in and out. She said she too could have gone out 100 feet, but did not have the finances to do so. She said that Cowart Seafood had used her ground since 1984 and she had sold oysters to him. She said in July 2005 shells were planted on the lease. She stated she was concerned that if this was allowed the other neighbors would want to do the same thing and further impact her lease.

Mr. Bugg in his rebuttal said this was a case of private rights versus commercial rights. He said the Commission could only decide on the design and location, not the length. He said there must be commercial production within 3 years and planting shells was not production. He said production means that it is commercially viable. He said his clients should be granted their request.

Commissioner Bowman stated that design could be construed to mean length and size. Carl Josephson, Senior Assistant Attorney General and VMRC Counsel concurred that it was within the VMRC's authority to interpret the Code and decide that design included the pier dimensions.

Commissioner Bowman explained that production takes time and it does not just get there suddenly. He said words and arguments are open to interpretation.

Associate Member Robins explained that production was more of a process. Production was not simply an end product. He said that shellplanting was for the future and seed transplanting had happened on this lease. Shellplanting had been done in 2005. He said the evidence also showed this was a suitable substrate and when you look at the production in last three years you have to look at it in a broad manner and consider the process of shelling and seeding and realize that oysters maturing to market size takes 3 years.

Associate Member Bowden said he agreed with Commissioner Bowman that length is part of the design. He said on the Seaside of the Eastern Shore it took 2 years for oysters to grow out, but on the bayside it took 3 to 5 years. He stated the lease ground was productive and producing now.

Associate Member Holland agreed with the comments once made by Commissioner Pruitt that this was a "grey" area. He suggested that staff meet with all parties and attempt to develop a compromise.

Mr. Cowart stated that Ms. Fridenstein did not want to compromise.

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Commissioner Bowman asked about the length resulting from the compromise. Mr. Bugg explained that it was an additional 40 feet, which was 30 feet less than was originally proposed. He said the L-head would be turned so it would be parallel to the dock.

Bob Boswell, applicant, was sworn in and his comments are a part of the verbatim record. Mr. Boswell explained that they had shortened the pier extension by 30 feet, the L-head was to be 12 feet, and they moved the platform along the side of the pier with mooring on the right side for a 22-foot boat, for which he needed a 40 foot boat slip.

Associate Member Robins asked if a boatlift was included. Mr. Boswell responded that they had never requested a boatlift.

**After further discussion, Associate Member Holland moved to accept the changes proposed by the applicant. Associate Member Schick seconded the motion.**

**Associate Member Robins explained that he appreciated the applicants' efforts, but when looking at the staff recommendation to limit the extension at the productive oyster ground, it was a good recommendation. He moved to compromise and approve a total length of the pier at 110 feet. Associate Member Bowden seconded the motion.**

Associate Member Schick stated that there were two rights to consider, the right to wharf out and the right to grow oysters. He said the right to wharf out had a longer history. He said the interest of the legislature was that wharfing out be allowed. He explained that the applicant was willing to compromise and both sides should be rewarded by a compromise. Associate Member Holland stated that he agreed.

Associate Member Fox asked Associate Member Robins if the L was allowed on the right or left side? He said on the right side there were no oysters as the oysters were all on the left side. He said it would be more helpful to the oystermen if it was on the right side as it would not conflict with mooring the boat. Associate Member Robins said that the watermen would not oyster up to the dock, so left or right did not apply.

**Associate Member Robins moved to approve a 110-foot pier with a reoriented T-head. Associate Member Bowden seconded the motion. The motion failed, 2-4. Associate Members Holland, Fox, Schick and McLeskey all voted no.**

**Associate Member Schick then moved to approve the applicant's compromise proposal for a 122-foot long pier, which would allow a 40-foot extension and the L-head to be turned as proposed by the applicant. That motion carried, 4-2. Associate Members Bowden and Robins both voted no.**

Permit Fee.....	\$25.00
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11. **JERRY W. FERGUSON.** Commission consideration of the appropriate terms and conditions to accompany the conveyance of a causeway and island located on approximately 1.2 acres of State-owned submerged land in the Rappahannock River adjacent to an easement from State Route 600 in Middlesex County as authorized by Chapter 201, Acts of Assembly 2006.

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

Mr. McLeskey recused himself from participating on this issue.

\* \* \* \* \*

Associate Member Holland announced a 5-minute break at approximately 2:52 p.m. and Commissioner Bowman reconvened the meeting at approximately 2:57 p.m. and the Commission continued the hearing for Item 11, Jerry W. Ferguson.

\* \* \* \* \*

Mr. Neikirk explained that the 2006 General Assembly approved House Bill 940, patroned by Delegate Harvey Morgan on behalf of Mr. Jerry Ferguson, which authorized the conveyance of a 1.2-acre manmade oyster shell causeway and island located in the Rappahannock River in Middlesex County. The causeway and island are referred to as Butylo Wharf and the area is located along the Rappahannock River near the end of State Route 600 in Middlesex County. It is immediately downstream of the Middlesex/Essex County line.

Mr. Neikirk stated that according to a 1955 letter from Mr. J.W. Ferguson (Jerry Ferguson's father) to the Corps of Engineers, a timber wharf was originally constructed by Mr. John H. Grinnels in 1925. The wharf was used for oyster processing and shells were typically piled along the sides of the wharf and the shucking facilities were located at the channelward end of the wharf. Mr. J.W. Ferguson purchased the wharf in 1952 and Hurricane Hazel completely destroyed the facility in 1954. Although the hurricane destroyed all of the structures, apparently most of the oyster shells remained where they had been piled alongside the timber wharf. In 1955, Mr. J.W. Ferguson received a permit from the Corps of Engineers to construct and maintain a solid fill causeway and pier measuring 984 feet long and 30 feet wide with a 100-foot long L-head.

Mr. Neikirk explained that it was unclear whether the State ever granted any comparable authorization for the original pier or the subsequent causeway and island to encroach on State-owned submerged land. The area surrounding the structures had been continuously leased since at least 1938. The original wharf was located on a 2.58-acre lease that was

transferred to Messrs. Abbott and Evans in 1938. It was increased to an 11.26-acre lease surrounding the causeway and island in 1956. The name of the leaseholder had changed several times and it was currently leased by Jerry Ferguson. It should be noted that the oyster planting ground lease specifically excluded the area physically occupied by the causeway and island. The island and causeway currently appear to be similar in length, width and configuration as they did in aerial photographs dating back to 1960.

Mr. Neikirk said that the legislation authorized the Marine Resources Commission to convey the property on behalf of the Commonwealth to Mr. Jerry W. Ferguson, and his successors and assigns, upon such terms and conditions as the Commission, with the approval of the Governor, shall deem proper. The Commission's royalty schedule recommended an assessment of between \$0.25 and \$5.25 per square foot for the filling of State-owned submerged land for the purpose of upland creation. The type of upland being created further categorized the recommended assessments. The recommended assessment for fill placed strictly for private purposes was \$1.00 per square foot. This was the rate that would typically be assessed for the filling of submerged lands associated with projects like a bulkhead replacement two feet channelward of an old bulkhead along private property. An assessment of \$3.00 per square foot was recommended for the filling of submerged land for the purpose of upland creation for commercial purposes. The commercial rate would typically be assessed for projects including community property, marinas, and seafood processing facilities. Finally, an assessment of \$5.00 per square foot was recommended for the placement of fill for upland creation for industrial properties.

Mr. Neikirk stated that Middlesex County did not currently assess the property, nor had they ever collected taxes on the land associated with the causeway and island. They did, however, collect taxes on the improvements located on the causeway and island. Although the Commonwealth owned the underlying property, the causeway and island were included in Middlesex County's zoning plan. The area was currently zoned as Low Density Rural, which was the County's primary rural and agricultural zoning district. Since the area had historically been used for seafood processing and continued to support those activities, the County informed staff that such use was permitted to continue as an existing nonconforming use. Staff was unaware if the property was currently listed for sale, but noted that it was listed as recently as two years ago for \$950,000.

Mr. Neikirk said that given the historic and continued use of the island and causeway to support seafood harvesting and processing activities, staff recommended that the Commission agree with the conveyance at the commercial rate of \$3.00 per square foot. At this rate, the assessment for 1.2 acres (52,272 square feet) would equate to \$156,816.

Jerry W. Ferguson, petitioner, was sworn in and his comments are a part of the verbatim record. Mr. Ferguson explained that he had been working to clear up this matter for the past nine years of what the state owned and what his family owned. He stated that Hurricane Isabel had put him out of the seafood business. He said that the County had

approved it for residential, as he would be shedding crabs on the first floor. He asked the Commission to consider a better price than the \$3.00 per square foot recommended by the staff.

**Associate Member Robins moved to accept the staff recommendation. Associate Member Fox seconded the motion.**

**Associate Member Schick offered a substitute motion to assess the property at \$1.50 per square foot. Associate Member Bowden seconded the motion. Associate Member Holland stated that the property would be residential with a small crab shedding operation. Carl Josephson stated that he saw no problem pursuant to the bill and the Governor would have to approve it, as well. He said the problem he saw was he did not think the Commission could restrict future use. The motion failed, 2-3-1. Associate Members Fox, Holland and Robins all voted no. Associate Member McLeskey abstained.**

**Commissioner Bowman asked for a vote on Associate Member Robins motion. The motion failed, 2-3-1. Associate Member Bowden, Holland, and Schick all voted no. Associate Member McLeskey abstained.**

**Associate Member Holland suggested tabling the matter until the next meeting. After some discussion, Associate Member Robins moved to approve an assessment of the property at \$2.75 per square foot. Associate Member Fox seconded the motion. That motion carried, 4-1-1. Associate Member Schick voted no and Associate Member McLeskey abstained.**

Carl Josephson explained that the deed would need to be prepared by the Attorney General's office. The Commission would then be asked to review and decide whether to approve it; and then the Governor would have to approve the final document.

Commissioner Bowman asked Mr. Josephson if Mr. Ferguson could appeal the Commission's decision. Mr. Josephson stated that an appeal was not allowed.

Conveyance of 1.2 acres (52,272 sq. ft. @ \$2.75/sq. ft.).....\$143,748.00

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**13. DISCUSSION:** Request for supplemental Commission guidance concerning royalty assessment procedures.

Bob Grabb, Chief, Habitat Management, gave the presentation. His comments are a part of the verbatim record. Mr. Grabb provided slides to assist in his discussion.

Mr. Grabb explained that Chapters 899 and 1018, Acts of Assembly 2004, provided that the Commission shall not assess and collect any rents or royalties, except dredging royalties, until July 1, 2005. At your August 23, 2005, meeting, you endorsed a resumption of the Commission's royalty assessment program.

Mr. Grabb stated that since the Commission's original rent and royalty schedule was initially adopted on June 26, 1979 and last revised in March 1986, the Commission referred the matter to the Habitat Management Advisory Committee (HMAC) with a request that they examine and update the rent and royalty schedule.

Mr. Grabb said that HMAC met to discuss this issue on two separate occasions, on September 8 and October 6, 2005. As a result of those meetings, HMAC reached consensus on a proposed rent and royalty schedule with ranges updated to reflect the changes in the CPI-U since the charges were last revised or first implemented. HMAC also endorsed a specific royalty figure for various project types within those ranges. In addition, HMAC made several other policy level recommendations, and suggested that the Commission pursue several legislative initiatives in an effort to update the fees contained in §§28.2-1206 and 28.2-1207 of the Code, and to streamline the regulatory approval process.

Mr. Grabb further said that one of the key HMAC policy recommendations, and a change that the Commission endorsed and adopted, was that all royalties should be assessed based on the bold outline of the total area encumbered, not the actual shadow of the permitted encroachment as was the case previously, since this more closely represented the area of public bottom, or public trust lands, that were being encumbered or essentially converted to a private use.

Mr. Grabb reminded the Commission that at their meeting on November 22, 2005, the Commission adopted the new royalty schedule recommended by HMAC and set an effective date of December 1, 2005. All permits issued after that date were to be assessed a royalty, unless they met one of the statutory exemptions provided in Code, since royalties for the private use of state-owned submerged lands are assessed and due at the time of permit issuance. In other words, permit issuance date was the determining factor, not application date.

Mr. Grabb explained that in the last seven months, the Commission had considered a number of projects and approved various royalty assessments as recommended by staff. Those staff recommendations were based on the revised royalty schedule and the Commission's express endorsement of the HMAC recommended policy change to assess royalties based on the bold outline of the area encumbered.

Mr. Grabb added that no rents or royalties were ever assessed, collected or proposed for private non-commercial piers or boathouses. The 2004 Acts of Assembly (codified as §28.2-1206.B of the Code of Virginia), also provided certain exemptions for riparian

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commercial facilities engaged in the business of ship construction or repair, services related to the shipping of domestic or foreign cargo, and those engaged in the selling or servicing of watercraft. In addition, VDOT, as well as all counties, cities and towns of the Commonwealth are also exempt from royalty assessments. It was truly the private individual or corporation that was seeking to privatize public trust lands that was being subjected to a royalty payment.

Mr. Grabb explained that when the Commission had been dealing with new facilities, this policy change had not posed a significant problem. The permittees seem to regard it as the cost of doing business. Given the ever rising price of waterfront property, the increase in value or marketability that resulted from structures or amenities that were built on the public's land more than offset any possible royalty assessment. The problems and confusion had largely arisen when the Commission had been issuing permits for new work or expansions at existing facilities.

Mr. Grabb stated that depending on the clarification and guidance the Commission provided, staff would anticipate adjusting the royalty assessment and collection procedures accordingly, including refunding monies that may have already been paid, if that were necessary.

Commissioner Bowman then explained that a request from the Norfolk Yacht and Country Club came in before Commissioner Pruitt left. He said he felt the Warwick Yacht and Country Club slips were "grandfathered" since boatlifts were being added to existing slips. He said he thought there was a problem assessing royalties for projects that benefit the environment. He explained that the staff had been asked to bring this presentation to the Commission.

Associate Member Schick stated that there should not be a charge for boatlifts installed in marinas. He said the Commission should encourage appropriate boatlift uses, as most people do not think a permit was required where there was a lawfully created boatslip. He said there should not be a charge if only putting in a boatlift, but for any other changes there should be a charge.

**After much discussion, Associate Member Robins moved to exempt cradle and rail boatlifts from royalty fees when they were to be installed in pre-existing slips. Associate Member Schick stated this would be boatlifts and associated structural amenities. Associate Member Holland seconded the motion. After some further discussion, the motion carried, 6-0.**

Commissioner Bowman asked about the cases of Norfolk, West Bay and Warwick Yacht Clubs. Mr. Grabb responded they could all be refunded the royalties they paid for boatlifts.

**Associate Member Fox moved to make the refunds. Associate Member Holland seconded the motion. The motion carried, 6-0.**

Mr. Grabb asked about other permits to be sent out. Should staff wait for HMAC to again review the matter? What should be done in the interim?

Commissioner Bowman said to go ahead and apply the boatlift exemption to those permits that were pending to reflect what was decided by the Commission at today's hearing.

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**14. DISCUSSION:** Repeal of the Commission's "Private Pier Guidance Criteria" given recent Code changes.

Bob Grabb, Chief, Habitat Management gave the presentation and his comments are a part of the verbatim record. Mr. Grabb explained that the staff was asking the Commission to repeal the Private Pier Guidance Criteria adopted by the Commission in 2003 to avoid confusion since recent Code of Virginia changes adopted by the General Assembly and effective July 1, 2006, eliminated the need for these criteria.

Commissioner Bowman asked for a motion on this matter.

**Associate Member Schick moved to accept the staff recommendation and repeal the guidelines. Associate Member Robins seconded the motion. The motion carried, 6-0.**

\* \* \* \* \*

**15. PUBLIC COMMENTS**

Ellis W. James, Norfolk Resident and member of the Sierra Club, was present and his comments are a part of the verbatim record. Mr. James suggested that a pamphlet called Rivers and Coves included good information and he encouraged the board to use it. He also suggested that they send copies to all the Wetlands Boards.

Mr. James expressed his concerns for the oyster resources in the Nansemond River that have been impacted by the demolition of the bridge. He said there were problems with the contractor and the slip shod work. He stated the board needed to take steps to protect the native species in that area.

No action was taken.

**William H. Bannon**, resident of Doe Creek, was present and his comments are a part of the verbatim record. Mr. Bannon said he was greatly concerned over the abandoned crab pots in his area. He said he had sought assistance from Law Enforcement, but was told there was no law on the books to require their removal. They told him also that the peeler pots were not supposed to be there, as they were on his lease. He was requesting some action be taken by the Commission.

Commissioner Bowman explained that zinc was so expensive that it was economically advantageous to trash the pots. He stated that the Commission would look at this problem before the next season. He said there would be a Symposium in Yorktown to discuss maritime debris.

Mr. Bannon explained that the watermen in the past did take them out to dry and recover them. He said he had looked at some of the pots and there was much deterioration.

No action was taken.

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**16. FAILURE TO REPORT HARVEST**, as required by Regulation 4 VAC 20-610-10 et seq., "Pertaining to Commercial Fishing and Mandatory Harvest Reporting".

Associate Member Robins excused himself from participating in this item.

Kelly Lancaster, Fisheries Management Specialist, gave the presentation and her comments are a part of the verbatim record. Mrs. Lancaster explained that Regulation 4VAC 20-610-10, Pertaining to Commercial Fishing and Mandatory Harvest Reporting required that watermen report their conch and horseshoe crab catch. She further explained that staff had found a number of individuals when the buyer audits were done that had not reported. She said that staff had contacted all these individuals to allow them time to correct the situation. She said Mr. Miles, Mr. Robberecht and Mr. Harrison had contacted staff all along and there were five of the individuals present at the hearing.

Mrs. Lancaster stated that staff recommended that those individuals who were not present have their license suspended until they do come before the Commission. She explained that means that they cannot work or act as an agent. She said for those that were present, staff recommended that they be given 12 months probation as long as their reports were timely and accurate.

Ms. Lancaster explained that during the 2006 session of the General Assembly, legislation was introduced that could have resulted in the elimination of the horseshoe crab and conch fisheries. She said the proposed measure was defeated, but that process was made more difficult because VMRC records describing the size and value of these fisheries were grossly understated.

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Alton Pruitt Jr. (0389) and Brian Pruitt (7236) were not present at the hearing. Ms. Lancaster said that this was a father and son and when she called she spoke with the son and told him he and his father needed to come to this meeting. She said they also sent a certified letter of notification for this meeting and both individuals had signed for the letter. Both individuals were placed on suspension until appearance at the next month's meeting.

**Associate Member Schick moved to accept staff recommendation and suspend the license for those individuals who had not contacted staff to correct the problem until such time as they do appear before the Commission. Associate Member Holland seconded the motion. The motion carried, 6-0-1. Associate Member Robins abstained. The Chair voted yes.**

Commissioner Bowman called the individuals present to the front of the room and swore them all in at once.

Don Miles II (0045) was present and his comments are a part of the verbatim record. Mr. Miles stated that he sent in reports in for conch potting since 1997. He said in 2004 he did not conch pot, but in 2005 he did and he sent the forms, as he had done in the past.

Earl Harrison (0249) was present and his comments are a part of the verbatim record. Mr. Harrison explained that he was now up to date. Staff verified that he had sent in the specialized conch reports but had not previously submitted his conch harvest on his mandatory reporting forms. Both forms must be submitted to be complete.

David Bradshaw (0810) was present.

David Robberecht (0922) was present and his comments are a part of the verbatim record. Mr. Robberecht said that he was conch potting in Federal waters and when he called he was told that he did not have to report and he did not realize it was different if he was selling to a Virginia buyer.

Ms. Lancaster then explained that on March 23, 2005 and again in Spring 2006, she had spoken with Mr. Robberecht's wife and explained he had to report federally harvested catches when selling to a non-federally permitted buyer.

Andrew Bunce (1047) was present.

Commissioner Bowman explained that this was valuable information, and at the interstate meetings staff had to fight to keep the quotas. He said the lack of data hurts staff efforts and that reporting was necessary to justify a sustained stock. He told them they were hurting themselves by not reporting.

**Associate Member Holland moved to accept staff recommendation and put the individuals present on 12 months probation. Associate Member Schick seconded the motion. The motion carried, 6-0-1. Associate Member Robins abstained. The Chair voted yes.**

\* \* \* \* \*

- 17. PUBLIC HEARING:** Proposed amendments to Regulation 4 VAC 20-566-10 et seq., "Pertaining to the Hampton Roads Shellfish Relay Area" to permanently extend the relay season to September 30th of each year.

Joe Cimino, Fisheries Management Specialist, gave the presentation and his comments are a part of the verbatim record. Mr. Cimino explained that this season had been extended in the past years and last year it had been requested that the date for the end of the Hampton Roads Shellfish Relay area be extended permanently through the month of September. He said that this year staff had advertised for the season to end September 30 without a year stipulated so the season extension would be permanent. He explained that it had been advertised for public hearing at this meeting and staff was recommending that this extension be made permanent.

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

**Associate Member Robins moved to accept the staff recommendation. Associate Member Holland seconded the motion. The motion carried, 7-0. The Chair voted yes.**

\* \* \* \* \*

There was no further business and the meeting was adjourned at approximately 4:30 p.m. The next meeting will be Tuesday, August 22, 2006.

(Note: After the July 25, 2006 meeting, the next meeting date was changed to August 29, 2006.)

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Steven G. Bowman, Commissioner

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Katherine Leonard, Recording Secretary