

MINUTES

Commission Meeting

September 27, 2005

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

William A. Pruitt)	Commissioner
Ernest L. Bowden, Jr.)	
Carter Fox)	
Russell Garrison)	
J. T. Holland)	Associate Members
Cynthia Jones)	
Richard B. Robins, Jr.)	
Carl Josephson	Sr. Assistant Attorney General
Katherine Leonard	Recording Secretary
Wilford Kale	Senior Staff Advisor
Jane McCroskey	Chief, Admin./Finance Div.
Andy McNeil	Programmer Analyst, Sr.
Jack Travelstead	Chief, Fisheries Mgt. Div.
Rob O'Reilly	Deputy Chief, Fisheries Mgt. Div.
Jim Wesson	Head, Conservation/Replenishment
Eric Robillard	Head, Plans and Statistics
Sonya Davis	Fisheries Management Specialist, Sr.
Lewis Gillingham	Fisheries Management Specialist
Ellen Cosby	Fisheries Management Specialist
Joe Cimino	Fisheries Management Specialist
Tara Bushnoe	Fisheries Management Specialist
Lt. Col. Lewis Jones	Deputy Chief, Law Enforcement
MPO Chris Beuchelt	Marine Police Officer
MPO Mike Stalling	Marine Police Officer
MPO Harold Springfield	Marine Police Officer
Bob Grabb	Chief, Habitat Management
Tony Watkinson	Deputy Chief, Habitat Mgt. Div.
Chip Neikirk	Environmental Engineer, Sr.
Jeff Madden	Environmental Engineer, Sr.
Jay Woodward	Environmental Engineer, Sr.
Tracy West	Environmental Engineer, Sr.
Ben Stagg	Environmental Engineer, Sr.

Justin Worrell
Randy Owen
Hank Badger
Benjamin McGinnis

Environmental Engineer, Sr.
Environmental Engineer, Sr.
Environmental Engineer, Sr.
Environmental Engineer, Sr.

Virginia Institute of Marine Science (VIMS)

David O'Brien
Lyle Varnell
Roger Mann
Wolfgang Vogelbein

Other present included:

Sidney Armsworthy
Ellen Richardson
Willis Slaughter
Judy Knick
Peggy Martin
Catherine Whitaker
Mildred W. Cooper
Myles Pocta
Stanley Oliff
Jay Lester
Melanie Mathewes
Tom Szelest
Al Cook
Michael Dzaman
Sandra W. MacDowell
Roger Parks
T. T. Turner, III
Mark Hodges
Susan Gaston
Lawrence Latne

B. K. Wilson
Chris Moore
Keith D. Jones
Helen Whaley
Bobby Martin
Rev. James A. Wilson
Yvonne Jones
Joseph Landrum
Harry Scott
Doug Canody
Yolima Carr
Penny Potons
Craig Read
Jon Natelson
Sue Lindsey
Frances W. Porter
Tommy Leggett
Bob Versaill
Jan Marshall
John McBull

Terry Howard
Pam Slaughter
Richard C. Knick, Jr.
Dorothy Weaver
Leon Coker, Jr.
Katie Madary
Margaret Quinn
Cathy Scott
Ed Bowdon
Michelle Newman
Harrison Bresee
Wade Walker
F. L. MacDowell
Douglas F. Jenkins, Sr.
Russell W. Gaskins
John C. Ludford
Chris G. Braun
Dan Dise
Kelly Place

and others

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Associate Member Garrison, Acting Chairman, called the meeting to order at approximately 9:37 a.m. Associate Members McLeskey and Schick were both absent from the meeting. Commissioner Pruitt was expected to arrive approximately 11:30 a.m.

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Associate Member Garrison gave the invocation and Carl Josephson, Senior Assistant Attorney General and VMRC Counsel led the pledge of allegiance to the flag.

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

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Approval of Agenda: Associate Member Garrison asked for any changes to the agenda. Bob Grabb, Chief, Habitat Management told the Commission that there was an additional page two Item, **2I. VIRGINIA JACOBS, #04-2794. Associate Member Robins moved to approve the agenda, as amended. Associate Member Holland seconded the motion. The motion carried 6-0.**

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MINUTES: Associate Member Garrison asked for a motion to approve the August 23, 2005 meeting minutes. **Associate Member Holland moved to approve the minutes as presented. Associate Member Jones seconded the motion. The motion carried, 5-0-1. Associate Member Fox explained that he was abstaining, as he was not in attendance at the August 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 I. His comments are a part of the verbatim record.

There were no public comments.

Associate Member Robins moved to approve the page two items A through I, as presented by staff. Associate Member Holland seconded the motion. The motion carried, 6-0.

2A. TOWN OF MARION, #05-0490, requests authorization to replace the Lee Street Bridge, and all associated utility lines (buried water, natural gas, and electric and overhead telephone) crossings of Staley Creek in the Town of Marion in Smyth County. The new bridge will be a pre-cast, clear-span structure providing a minimum clearance of four (4) feet above ordinary high water. Recommend approval with the inclusion of our standard in-stream construction conditions.

Permit Fee.....\$100.00

2B. HENRICO COUNTY DEPARTMENT OF PUBLIC UTILITIES, #05-1903, requests authorization to install a submerged water line beneath 90 linear feet of Upham Brook at two locations to provide potable water to area residents in the Wilkinson Road area of Henrico County.

Permit Fee.....\$100.00

2C. WASHINGTON COUNTY SERVICE AUTHORITY, #02-1007, requests authorization to construct a 12 MGD raw water intake, previously authorized by VMRC Permit #91-0420, on the South Fork Holston River Reservoir near its confluence with the Middle Fork Holston River in Washington County. The intake structure will be equipped with a coarse bar and 1-mm mesh screens and operated with a 0.25 fps maximum approach velocity. Recommend approval contingent on the inclusion of our standard instream permit conditions and that the structure be marked in accordance with the TVA regulations to minimize navigation impacts.

Permit Fee.....\$100.00

2D. MOBJACK MARINE SERVICES, LLC, #03-1221, requests authorization to modify their existing permit to allow the construction of 167 linear feet of floating pier with 14 wetslips, a transient slip and a pump out slip in lieu of the previously authorized open-pile marginal wharf with 10 slips and a single mooring buoy adjacent to their facility situated along a cove of the East River near the community of Mobjack in Mathews County.

No applicable fees - permit modification

2E. WATERMAN'S MUSEUM, #02-0503, requests reactivation, extension, and a modification to their permit authorizing the replacement of a previously existing pier with a 114-foot long by 8-foot wide open-pile commercial pier with a

132-foot long by 14-foot floating dock and a 60-foot by 6-foot access ramp adjacent to their property situated along the York River in York County. The project is being relocated 35 feet downstream of the previously authorized location to accommodate recently constructed breakwaters along the Yorktown waterfront.

No applicable fees - permit modification

2F. LANCE GARVER, #04-0345, requests authorization to reconfigure an existing marina with the replacement of all open-pile piers with floating piers and the addition of one floating pier resulting in an expansion of the number of wet slips to 84; install a 120-foot long stone groin beneath an existing fishing pier; dredge 1,300 cubic yards of State-owned submerged lands from a sandy spit area; the placement of the same 1,300 cubic yards of sandy dredge material as beach nourishment updrift of the proposed groin, and change the currently authorized use from a marina to a dockminium facility adjacent to property situated along Willoughby Bay in Norfolk.

Royalty Fees (Dredging approx. 1,300 cu. yds. @ \$0.45/cu. yd.)...\$585.00
Permit Fee.....\$100.00
Total Fees.....\$685.00

2G. ARMY CORPS OF ENGINEERS, #05-0338, requests authorization to maintenance dredge the James River Federal Project Channel at Tribell Shoal on as as-needed basis for a five-year period to maintain project depths of -28 feet at mean lower low water including advanced maintenance and allowable overdepth dredging. Approximately 500,000 cubic yards of dredged material, per dredging cycle, may be hydraulically placed in a previously utilized open-water disposal area at the upstream end of the Tribell Shoal in the James River. Recommend approval contingent on the prohibition of any overboard disposal between March 15 and September 30 to protect anadromous fish populations and shellfish.

Permit Fee.....\$100.00

2H. CAMP PEARY, #05-1109, requests authorization to install 72 linear feet of riprap adjacent to the Carter Creek bridge, 130 linear feet of riprap adjacent to the Ferry Point Bridge and 20 linear feet of riprap adjacent to the Souix Road bridge adjacent to government property situated along Carter and Skimino Creeks in York County.

Permit Fee.....\$100.00

- 2I. **VIRGINIA JACOBS, #04-2794**, requests authorization to dredge 2,000 cubic yards of material within a 200-foot by 250-foot basin to obtain maximum depths of -6 feet below mean low water and to install a 200-foot by 8-foot wide floating pier, a 168-foot long by 8-foot wide floating pier, and an 81-foot long by 8-foot wide 8-foot wide floating pier with associated finger piers to accommodate 48 wet slips for the construction of Pelican Nest Marina located adjacent to her property situated along Little Creek in Norfolk.

Royalty Fee (dredging approx. 2,000 cu. yds. @\$0.45/cu. yd.)...	\$900.00
Permit Fee.....	\$100.00
Total Fees.....	\$1,000.00

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3. CLOSED MEETING FOR CONSULTATION WITH OR BRIEFING BY COUNSEL.

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

- 1) Item 14, Michael Jewett; 2) Evelyn versus VMRC; and, 3) Mitchell versus VMRC

The motion was seconded by Associate Member Garrison. The motion carried, 6-0.

Associate Member Robins moved for the following:

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

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

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

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

Associate Member Holland seconded the motion. Associate Member Garrison held a Roll Call vote:

AYES: Bowden, Fox, Garrison, Holland, Jones, and Robins

NAYS: None

ABSENT DURING VOTE: Commissioner Pruitt, Associate Members McLeskey and Schick

ABSENT DURING ALL OR PART OF CLOSED MEETING: Commissioner Pruitt, Associate Members McLeskey and Schick

The motion carried, 6-0.

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

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- 4. MARIA NGUYEN, #04-1709.** Commission review, on appeal by the applicant, of the August 15, 2005, decision by the City of Virginia Beach Wetlands Board to deny a proposal to construct a residence on her property along the Atlantic Ocean in the Sandbridge section of Virginia Beach.

Justin Worrell, Environmental Engineer, Sr., gave the presentation with slides. His comments are a part of the verbatim record. Mr. Worrell explained that he had three aerial shots that were not a part of the Wetlands Board record, but that staff felt could be viewed by the Commission without requiring the opening of the record.

Mr. Worrell explained that the applicant's property is located at 3556 Sandfiddler Road contiguous to the Atlantic Ocean in the Sandbridge Beach section of Virginia Beach. The proposal was for the construction of a single-family residence with timber decks, pool, and paved parking area on a vacant lot. In the past seven months, the project was

scheduled for hearing and subsequently deferred on three different occasions at the request of the applicant.

Mr. Worrell stated that at its August 15, 2005 public hearing, the Wetlands Board received a staff briefing, including photographic slides of the property and copies of the plan view drawings. Recommendations from the Virginia Institute of Marine Science (VIMS) and the City's Planning Department were read into the record.

Mr. Worrell said that the VIMS recommendation stated that "construction as proposed will prevent the continued development of the dune and cause the deflation of the existing dune due to wind scour under and around the dwelling." The project was undesirable because construction would directly impact the existing dune (approximately 5,250 square feet) and secondary impacts would occur to the remaining dune.

Mr. Worrell said that the Virginia Beach Planning Department's recommendation for denial was taken directly from Chapter 14 of Title 28.2 of the Code of Virginia and the Coastal Primary Sand Dunes/Beaches Guidelines promulgated by this Commission. The recommendation cited concerns with permanently altering the dune and impairing its natural functions such as serving as a protective barrier from flooding and providing a source of natural sand replenishment.

Mr. Worrell stated that Mr. Brian Hietpas of Hietpas Construction then addressed the Board as Ms. Nguyen's building contractor. He testified that he had just recently built a similar residence in the Sandbridge section along the oceanfront. Ms. Nguyen briefly testified before the Board stating that she was anxious to begin construction and was willing to comply with any City requirements.

Mr. Worrell explained that following the applicant's testimony, Dr. Steven Vinson, a board member, commented that proposals at Sandbridge were difficult for the Board based on the recommendations provided by VIMS and the City's Planning Department when weighed against a property owner's rights. He then made a motion, seconded by Board member Ms. Nancy Lowe, to deny the project based on a finding that the public and private detriments of the proposed activity exceeded its anticipated public and private benefits. He further noted that the proposal did not conform with, and violated the purpose and intent of the City's Coastal Primary Sand Dune Zoning Ordinance and the Coastal Primary Sand Dunes/Beach Guidelines promulgated by the Virginia Marine Resources Commission, pursuant to § 28.2-1401 of the Code of Virginia. Dr. Vinson further commented that if applicants would do more to limit their project's impacts and help build up the dune system, maybe the Board would look more favorably on these types of proposals. There was no other discussion concerning the motion. The motion to deny then passed by a vote of three (3) ayes to two (2) nays.

Mr. Worrell said that staff received a letter of appeal on August 23, 2005, from R. Edward Bourdon, Jr. on behalf of his client Ms. Maria Nguyen. That letter was considered timely under the provisions of § 28.2-1411(B) of the Code of Virginia.

Although the letter stated that “by local rule,” a motion must receive four (4) votes, § 28.2-1403(7)(A) of the Code of Virginia specifically states that “Approval of a permit application shall require the affirmative vote of three members of a five-member board or four members of a seven-member board.” The City of Virginia Beach has a seven-member board. The Code was amended in 2004 to require a locality to appoint one to three alternate members. Virginia Beach had thus far appointed only one alternate. Although there were only five (5) members present on August 15 (with no alternates), that constituted a quorum, and the board was capable of holding the hearing and conducting a vote on the proposal.

Mr. Worrell said Mr. Bourdon in his letter went on to mention that he was unaware of any Sandbridge oceanfront lot owner that had been denied the right to construct a residence subsequent to the Beach Nourishment Easements being established and the City imposing a special sand tax to pay for nourishment at Sandbridge.

Mr. Worrell explained that Mr. Bourdon’s letter of appeal stated “...given the gravity and potential constitutional considerations of denying Ms. Nguyen the right to construct a home on her lot, this case necessitates a remand for a re-hearing by the full seven (7) member board.”

Mr. Worrell stated that in Section 28.2-1413 of the Code it states, “that the Commission shall modify, remand or reverse the Board’s decision if the Board in reaching its decision, failed to fulfill its responsibilities under the coastal primary sand dune zoning ordinance; or the substantial rights of the applicant have been prejudiced because the findings, conclusions, or decisions of the Board are in violation of constitutional provisions, in excess of statutory authority or jurisdiction of the Board, made upon unlawful procedure, affected by other error of law, unsupported by the evidence on the record considered as a whole, or arbitrary, capricious, or an abuse of discretion”.

Mr. Worrell said that based on staff review of the record, staff could not find that the Board erred procedurally in their review of this matter, nor that the substantial rights of the applicant had been prejudiced by that decision. It appeared that the Board’s decision to deny the proposal was based on the comments provided by VIMS and the City’s Planning Department. Both comments cited the proposal’s overall impacts as having a deleterious effect upon the developing dune and beach resource. In such cases the guidelines promulgated by this Commission do not support project approval. As such, staff concurred with the Board’s decision and recommended that the August 15, 2005 decision of the Virginia Beach Wetlands Board be upheld.

Mr. Worrell went on to say that, clearly, the Code permits the applicant to reapply in modified form if the application was denied. Should the applicant elect to do so, staff would encourage her to consider relocating the proposed structure landward such that the most seaward encroachment was in alignment with the adjacent structures to the north and south, and to further minimize any impacts to the beach and dune system.

Associate Member Garrison asked if the appellant or his representative was present.

Eddie Bourdon, the appellant's attorney, was present and his comments are a part of the verbatim record. Mr. Bourdon stated that the Wetlands Board staff in their report said that there was a dune on the property. He said that the appellant was not aware of any easement agreement that the City had. He further said that the Commission should remand the matter back to the Wetlands Board and impress on the board the need for all members to be present. He said it was justified that the matter be remanded back. He said his client's house should be in line with others in the area. He said the pool could be eliminated. He said the process had not served his clients well and that there was not a dune there as stated by the Wetlands Board staff.

Kate Wilson, Associate City Attorney for Virginia Beach, was present and her comments are a part of the verbatim record. Ms. Wilson said she was asking that the Commission uphold the Wetlands Board decision. She said that just like today the Commission was missing members of its board, enough Wetlands Board members were present to have the required quorum. She further said that as long as there was a quorum the board could conduct its meeting. She said it was announced at the beginning of the Wetlands Board meeting that only 4 members being present was necessary to make a decision. She said that the appellant was represented not by an attorney but by an agent at the board meeting. She stated the board's denial of the project was within their right and the board acted correctly. She referred the Commission to Section 28.2-1413 of the Code and read it into the record. She explained that the board had not erred and the matter should not be remanded, but the Commission should uphold the board's decision.

Mr. Bourdon in his rebuttal comments stated that the statement in the transcript was for political purposes and to cover the board's backside. He said the appellant's agent was not a representative and an equitable process was not followed.

Associate Member Robins said he felt disappointment with the case as the applicant was not given any guidance from the Wetlands Board staff, but did not agree there were grounds for remanding the matter back to the Wetlands Board on procedural grounds and the Commission should uphold their decision.

Associate Member Robins moved to uphold the Wetlands Board decision. Associate Member Holland seconded the motion. Associate Member Fox explained that if they were voting to remand the matter it would be remanded as is with the pool but if the Commission upheld the decision the applicant can modify the proposal and reapply. Carl Josephson stated that upholding the decision of the Wetlands Board does not prevent the applicant from reapplying. Associate Member Robins, in order to clarify the motion, stated the motion was to uphold the Wetlands Board's decision. Associate Member Jones said there were two competing issues to be considered by the board and the applicant was not given the attention she needed to

get him through the process. She stated she agreed with Associate Member Robins. The motion carried, 6-0.

No applicable fees, wetlands appeal

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5. **THE HERMITAGE FOUNDATION, #05-0630**, requests authorization to install three (3) breakwaters and fill 3,300 square feet of state-owned submerged land to create a tidal wetland area adjacent to their property situated along the Lafayette River in Norfolk. Several residents in the vicinity protested the project.

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

Ms. West explained that the Hermitage Foundation is an organization responsible for maintaining the Hermitage Museum, which was located on the Lafayette River, near the Norfolk Yacht and Country Club, in Norfolk. The museum grounds, which are bordered on three sides by the waters of the Lafayette River, consisted of an early 20th century residence surrounded by twelve acres of formal gardens and natural woodlands. The property had suffered continued erosion on the southeast corner of the property to the point where a portion of a brick garden wall was in jeopardy.

Ms. West said that several residents in the vicinity protested the proposed project. Their opposition focused on the alteration of the existing shoreline and concerns that the breakwaters would result in siltation of the channel and further navigation restrictions, as well as concerns over increased construction traffic on the local roadways. Two of the protestants did not indicate a reason for their objection and they did not respond to staff's request for additional information on the nature of their objection.

Ms. West said that the Army Corps of Engineers investigated whether the breakwaters would represent a navigational hazard and concluded that they would not encroach into the existing natural channel.

Ms. West said that the Virginia Institute of Marine Science reviewed the project, and stated that the impacts, although significant, would be partially offset by the restoration efforts, which should result in an overall gain in habitat quality.

Ms. West stated that the Norfolk Wetlands Board had already considered and approved the project at their public hearing on April 13, 2005. The Departments of Health, Historic Resources, Game and Inland Fisheries, and Conservation and Recreation had not offered any comment on the project.

Ms. West said that according to VIMS, the proposed breakwaters should not result in additional siltation within the adjacent waterway. In fact, stabilizing the shoreline should eliminate some of the siltation that was currently entering the waterway from the eroding point and that the structures would not interfere with navigation.

Ms. West stated that the Commission staff rarely supported the filling of State-owned submerged lands for the purpose of creating uplands. Not only does it result in a net loss of the near shore shallow water subtidal habitat, but also the displacement of the mean low water line, leads to the conversion of public property to private use. In this case, however, VIMS had carefully analyzed the benefits and detriments of this proposal and concluded that the benefits of this proposal outweighed the loss of the submerged aquatic habitat. Given the assertion by the scientific advisors that the overall quality of the adjacent aquatic environment would be improved through the conversion of 3,300 square feet of submerged lands to wetlands, staff recommended approval of the project as proposed.

Associate Member Robins asked staff if the area was actively eroding. Ms. West responded yes. Associate Member Robins stated that this was what VIMS considered a living shoreline. Ms. West stated that was a VIMS term. Associate Member Garrison stated he liked the statement made by staff that in this proposal it would be “making wetlands”.

Melanie Mathewes, Executive Director for the Hermitage Foundation, was sworn in and her comments are a part of the verbatim record. Ms. Mathewes stated that staff had presented the situation clearly. She had a couple of aerials for the Commission, which she presented, taken earlier showing the sandspit and one taken later showing the demise of the sandspit.

Associate Member Garrison asked if anyone was present to address this matter, either pro or con. There was none.

Associate Member Robins said the Commission gets other proposals for stopping erosion by rip rapping and such, but the breakwater was a good solution because as stated by staff and VIMS this was a “living shoreline”.

Associate Member Robins moved for approval. Associate Member Fox seconded the motion. The motion carried, 6-0.

Permit Fee.....\$100.00

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6. **ROBERT QUINN, #05-0283**, requests authorization to remove an existing 5-foot wide by 75-foot long pier; and to construct a new, 5-foot wide commercial/community pier, extending approximately 115 feet channelward of mean low water, with a 10-foot wide by 30-foot long T-head platform, eight (8) wet slips, two (2) three-foot wide by 12-foot long tapered finger piers, and 10 freestanding mooring piles; with approximately 48 linear feet of the landward end of the main pier section constructed eight feet wide to accommodate crab-shedding tanks, adjacent to an existing crab-shedding house on his property situated along Nomini Creek in Westmoreland County. Several nearby property owners protested the project.

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

Mr. McGinnis explained that the proposed project is located in Westmoreland County, along the eastern shoreline of Nomini Creek, immediately north of the Route 202 – Nomini Creek Bridge. Mr. Quinn recently purchased the property, which included a house, two rental apartments/homes, and a crab-shedding house leased to a local waterman, among other structures. An existing pier adjacent to the crab-shedding house would be removed in conjunction with the construction of the proposed pier.

Mr. McGinnis said that the applicant was seeking authorization to construct a mixed-use (community/commercial) pier, extending 115 feet channelward of mean low water. The pier was to be constructed at eight-foot wide for the first 48 feet, and then continue channelward at a width of five feet. It would include a 10-foot wide by 30-foot long T-head platform, and eight wet slips delineated by two finger piers and 10 freestanding mooring piles. Mr. Quinn had stated that the proposed use of the pier would be for the commercial operation of the crab shedding facility (two slips); and, to provide mooring for his personal boats (two slips), the boats of his upland tenants (two slips), and for any transient guests (two slips).

Mr. McGinnis stated that staff had received a letter of protest from a nearby property owner, Mr. Greg Camalier, on July 27, 2005. Similar letters were also received from Ms. Anne Davis Camalier, and Ms. Lori Camalier, on August 3, 2005. Collectively, they questioned the commercial classification of the pier, as well as Mr. Quinn's need for the number of proposed slips and the length of the pier. They also requested that restrictions be placed on the pier to limit its use and any further expansion, a prohibition against the rental of slips, and that the same overnight restrictions be imposed on this structure as were on the Mt. Holly Steamboat Inn's pier (#02-0668), which was adjacent to Mr. Quinn's property.

Mr. McGinnis explained that in an attempt to resolve the issue, staff drafted several potential conditions/restrictions for possible inclusion in the permit. These were provided to Mr. Quinn and Mr. Camalier for consideration. These conditions would have allowed

Commission Meeting

Mr. Quinn to keep the current pier design as-is, but would restrict its use to satisfy the protestants concerns. Mr. Quinn agreed to all of the proposed conditions, except one, which required the removal of two slips if the crab-shedding operation ceased. Mr. Quinn told staff that he reserved the right to find a new waterman to use the crab-shedding facility, or that those slips may be needed for tenants if they decide to lease further apartments/homes on the upland property.

Mr. McGinnis further explained that Mr. Camalier agreed to all four conditions staff proposed, and was willing to drop his protest if Mr. Quinn would also agree. When staff informed Mr. Camalier that Mr. Quinn would not agree to the third condition, Mr. Camalier elected to maintain his protest. Staff had not been able to contact Ms. Anne Davis Camalier or Ms. Lori Camalier to gather their thoughts on the proposed conditions.

Mr. McGinnis stated that the Westmoreland County Wetlands Board approved Mr. Quinn's proposed pier at its hearing on July 18, 2005.

Mr. McGinnis stated that the Virginia Institute of Marine Science Shoreline Permit Application Report, dated July 13, 2005, stated that impacts resulting directly from the pier structure would be minimal. The Department of Health stated in a letter dated April 20, 2005, that Mr. Quinn's proposed pier was in compliance with the Sanitary Regulations for Marinas and Boat Moorings, and had therefore been approved. The Department of Game and Inland Fisheries in an e-mail dated June 10, 2005, indicated that there were multiple bald eagle nests within 1-2 miles of the project, but that they did not anticipate any significant adverse impacts upon the eagle population. They also recommended erosion and sediment control measures be utilized during construction. No other State agencies have raised any concerns or objections to this project.

Mr. McGinnis said that although the protestants were not initially supportive of the pier design and its intended use, Mr. Camalier, as one of the main protestants, informed staff by telephone that he was willing to agree to Mr. Quinn's proposed pier, if the permit included all of the special permit conditions offered by staff. Mr. Quinn had informed staff that he would not want the expense of removing two slips (which could easily be accomplished by pulling two mooring piles) if the commercial operations ceased at the crab-shedding facility. Staff offered the special conditions as a way of possibly reaching some middle ground, which would allow the applicant to construct his pier as proposed, yet provide the protestants with the satisfaction of knowing that permit conditions precluded the unrestricted use of the pier's commercial status.

Mr. McGinnis stated that in general, staff did not feel that Mr. Quinn's proposed pier was excessive, and he appeared to have provided sufficient justification for the number of slips he was requesting, based upon the current circumstances. That being said, staff felt that if the justification provided for any number of slips were no longer valid at some point in the future, such as a halt in commercial crab-shedding operations on the property, then those slips would be unnecessary encroachment over State-owned submerged land,

and should therefore be removed. Since it is a commercial/community pier, staff was also willing to accept the two transient slips.

Mr. McGinnis said that accordingly, staff recommended the project be approved as proposed, with the inclusion of the following special conditions, which were similar to those previously offered by staff:

1. Permittee agrees to limit the use of this pier to the commercial operations of the adjacent crab-shedding facility, and as a community pier for the use of the permittee (or successive riparian property owner) and tenants occupying dwellings on the permittee's adjacent upland property, and to provide short-term, overnight moorage for transient guests staying with the permittee,
2. Permittee may not rent slips or provide overnight mooring for fee, or free, to members of the general public,
3. Permittee agrees to eliminate two slips from the pier should commercial operations cease at the adjacent crab shedding facility, and
4. The terms and conditions of this permit will remain in effect indefinitely, and will transfer with ownership of the adjacent upland property and pier.

Robert Quinn, applicant, was sworn in and his comments are a part of the verbatim record. Mr. Quinn stated he was asking for approval of the permit as commercial. He said he had problems with having to remove the slips. He stated he had plans to build a new home on his property and to rent out the old home. He said he would like to have one large pier rather than several small ones and he needed to get to deeper water. He said he was asking for unrestricted permission. He explained that the protestant would have power to exert over this project if the conditions stated were made a part of the permit.

Stanley Oliff, Crab Shed operator, was sworn in and his comments are a part of the verbatim record. He explained that the structure in the water was part of an old steamboat wharf. He said this had been commercial since the 1800's when there was a steamboat in operation. He said he had been operating as a crab shedder for 22 years. He further said that the pier was in bad shape and needed to be replaced.

Harry Scott, neighbor to Mr. Quinn, was sworn in and his comments are a part of the verbatim record. Mr. Scott asked that the Commission approve the pier without the conditions. He said Mr. Quinn was a good, upstanding person and did not want to hurt the creek.

No one else was present to comment on the proposed project.

Associate Member Robins said that from the testimony and staff discussion it would be right to recommend the pier with restrictions on use. He said the 3rd restriction he did not support.

Associate Member Robins moved to approve the project with staff conditions 1, 2, and 4. Associate Member Holland seconded the motion. Associate Member Garrison said he could support that motion. The motion carried, 6-0.

Permit Fee.....\$100.00

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7. **CHESAPEAKE REALTY VENTURES, LLC, #04-2516**, requests authorization to construct one (1) community pier adjacent to their property along Monroe Bay to serve the proposed development of Monroe Point in the Town of Colonial Beach. The pier will extend a maximum of 217 feet channelward of mean low water and provide a total of 94 boat slips with lifts. In addition to the pier, authorization is requested for the construction of a 6-foot wide timber walkway that will extend over a 10-foot section of Monroe Bay to be used as an access walkway and observation trail. An adjacent property owner and a nearby resident protested the project.

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

Mr. Worrell explained that the proposed community pier is part of a larger upland development along Highway 205 (James Monroe Highway) in the Town of Colonial Beach. The approximate 50-acre undeveloped riparian property fronts on both Monroe Creek on the southwest side and Monroe Bay on the southeast side. This property was one of the last large undeveloped parcels within the Town limits.

Mr. Worrell stated that the “Monroe Point Development” was intended to create a private community of medium-density residential units within the Town of Colonial Beach, including approximately 220 town homes, condominiums, and senior apartments. None of the individual unit owners would own property that extended to the low water line. The riparian rights to the property would be held in common and belong either to the developer or a future homeowners association. The proposed pier and boat slips were, however, intended for the exclusive use of the residents of the private community.

Mr. Worrell said that both the Westmoreland County Board of Supervisors and the Town Council of Colonial Beach initially approved the concept of the “Monroe Point Development” in 2003. The Town of Colonial Beach had subsequently reviewed and approved all land use plans for the development and had voiced their support for the pier facility as submitted in the application. There had been several community pier designs,

and with each one, the applicants had agreed to further reduce the pier's size and the total number of slips.

Mr. Worrell stated that the initial application was to construct two (2) community piers, one on the Monroe Creek side and one on the Monroe Bay side. This was modified by the Westmoreland County Wetlands Board to include one pier on the Bay side. There were several protestants to the original proposal. After the Board's decision, the applicants submitted a new application seeking approval for a 94-slip community pier on the Bay side. Only two (2) of the original groups of protestants continued with their objections.

Mr. Worrell said that Mr. Garnet Jett, one of the protestants, was an adjoining property owner who felt that the impact of the pier facility would increase the amount of wastewater and pollution currently flowing into the waterway. Mr. and Mrs. William Slaughter were nearby residents who contended that the impacts as a whole would damage the overall health of Monroe Bay, adversely affecting shellfish, shorelines, and existing wildlife.

Mr. Worrell also said that the Virginia Institute of Marine Science (VIMS) commented that there would be both direct and secondary impacts related to the installation of the pier and its use after it was constructed. However, common ownership of the waterfront was encouraged to preclude private pier construction in these situations. VIMS recommended that the applicants create and implement a marina management plan that included education of both staffers and residents, plans to handle waste and contaminant spills, and the inclusion of "no wake" provisions.

Mr. Worrell said that the U.S. Army Corps of Engineers had approved the proposal. The Department of Environmental Quality had determined that no permit was necessary, and the Department of Conservation and Recreation had no objections. The Virginia Department of Health (VDH) – Wastewater Engineering had also approved the proposal. The Division of Shellfish Sanitation had determined that although the area was currently condemned to shellfish harvesting, no extensions of the condemned area would be necessary. In addition, they recommended that no overnight occupancy aboard moored boats should be allowed.

Mr. Worrell said that while staff understood and was sympathetic to the protestants' concerns, they felt that the community pier proposal conformed to the Criteria for the Siting of Marinas or Community Facilities for Boat Mooring included in the Commission's Subaqueous Guidelines. A facility that would provide water access for the entire community at one specific point along the shoreline was the preferred alternative to the potential development of numerous smaller lots with individual private piers.

Mr. Worrell said staff felt that only 92 slips (in lieu of the proposed 94 slips) were warranted based on the approximately 2,300 linear feet of shoreline. The Town of

Colonial Beach had verified that within the Town limits, there were private riparian properties, measuring 50 feet in width or less, that had piers or possessed the right to pier out. If this entire property was subdivided into 50-foot lots along the water, and each owner applied to install a private pier with two boat slips within their riparian area, they would qualify for the pier exemption criteria contained in §28.2-1203(5) of the Code of Virginia. Fifty-foot wide lots along the approximate 2,300 linear feet of shoreline would result in 46 individual properties with an estimated two slips per pier that would result in 92 total slips.

Mr. Worrell stated that if approved, staff believed the development of a Homeowners Association covenant detailing specific conditions and uses of the facility must be submitted and approved by the Commission. Staff recommended that the following language be included in the covenant and as conditions in any Commission permit:

- Individual unit owners will be prohibited from constructing private piers and other subaqueous structures.
- None of the slips may be sold or rented to parties outside of the development.
- No additions may be constructed onto the pier structure without first submitting an application to the Commission.
- Governing documents related to the community pier facility may not be amended without first seeking Commission review.
- The regulatory authority over the facility as it exists above State-owned bottom does not end once the permit expires.

Mr. Worrell explained that ultimately, the covenant and any such governing documents must be consistent with the permit conditions. As such, staff recommended approval of a community pier possessing 92 slips, and including the aforementioned special conditions, along with the timber walkway over the smaller tidal creek, provided the applicants created a marina management plan as VIMS suggested, comply with the recommendations of VDH regarding no overnight occupancy, and continue to provide VDH all the pertinent information necessary to establish pump-out and waste disposal facilities.

Mr. Worrell stated that Mr. Jett's relatives called staff on his behalf to state he was still protesting the project and they also wanted to express their opposition to the project.

Jonathan Natelson, Applicant, was sworn in and his comments are a part of the verbatim record. He stated that the staff presentation was thorough and showed their proposal well with the slide presentation. He said there was no protest for the slip on the Bayside only for the creek-side slip. He said the proposal was redesigned to eliminate the creek-side slips, which resolved most objections. He said he had minimized the wetlands crossing by pulling back from them as much as possible. He said on the end of the 2nd finger pier the pumpout would be attached for the sewage system. He said he wanted to have 94 slips, but would accept the 92 slips as recommended by staff.

Commission Meeting

Wilbur W. Slaughter, Jr., resident across the creek from the project, was sworn in and his comments are a part of the verbatim record. He said that he and his wife Pam were residents on the creek. He said there were other protestants, Mrs. Ransome, Dale Sandery, direct neighbors, and Alice and George Stevens who submitted letters as well. He said the Town did not have any problems with the project, but it was full of wetlands and there was eagle habitat on the point. He said there was numerous other wildlife, such as, swans, herrings, and kingfishers in the area. He said that both crabbers and other watermen utilize the area. He said they were concerned about how 92 slips and the resulting powerboats would affect the channel. He said the Commission must consider the environment and protect it.

Mr. Natelson in his rebuttal stated that Mr. Slaughter was objecting more to the upland project than the pier. He said they were trying to lessen the impact on the wetlands, the channel and any environmental impacts. He said they had received approval from other agencies and had accepted the recommendations made by VIMS.

Associate Member Holland moved to approve the staff recommendation. Associate Member Robins seconded the motion. He said he suggested amending the motion to include a recommendation to the Game and Inland Fisheries Commission for a “No wake” plan and as recommended by VIMS that a Marina Management Plan be required. Associate Member Holland accepted the amendment for the Marina Management Plan requirement, but stated the “no wake” was not within VMRC jurisdiction. After further discussion, the motion carried, 6-0.

Permit Fee.....\$100.00

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- 8. **SIDNEY G. ARMSWORTHY #05-0633**, requests authorization to construct and backfill 209 linear feet of replacement bulkhead aligned a maximum of 2 feet channelward of his existing, deteriorating timber bulkhead at his property adjacent to Cockrell Creek in Northumberland County. An upstream neighbor protested the project.

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

Mr. Madden explained that the project is located at the applicant’s residence in the town of Reedville, along a tributary to Cockrell Creek in Northumberland County. At present, Mr. Armsworthy had a deteriorating 209-foot long timber bulkhead. While the bulkhead had not yet been breeched, there were numerous voids behind the aging timber structure. Mr. Madden stated that Mr. Armsworthy intended to construct and backfill the replacement bulkhead on an alignment two feet channelward of his existing timber bulkhead.

Mr. Madden said that Mr. Richard C. Knick, who is the owner of the parcel of land immediately north and upstream of Mr. Armsworthy, protested the project. In his letter, Mr. Knick expressed his concern that the project drawings made no reference to the depth the sheet piles would be driven into the substrate. The protestant was also concerned that bottom material would be dredged from Cockrell Creek and used as backfill for the bulkhead. Mr. Knick also mentioned his concerns over potential modifications to an existing boathouse since the initial application contained a request by Mr. Armsworthy to raise the height of his enclosed boathouse. That request was no longer under consideration, because the Northumberland County Board of Supervisors had denied it. The Northumberland County Wetlands Board did not assert jurisdiction over the project since no wetlands were involved.

Mr. Madden stated that the Virginia Institute of Marine Science commented that the environmental impacts associated with this project would be minor if the new bulkhead was aligned as proposed. VIMS further recommended that filter cloth and clean sandy soil be used as backfill. No other agency had protested the project.

Mr. Madden explained that the applicant was requesting authorization to stabilize his property utilizing a well-established construction practice. The bulkhead extends approximately three feet above the substrate. According to the revised drawings dated received July 15, 2005, the sheet piles would be driven into the substrate to a depth of three feet. In addition, the application stated that the composition of the backfill would be, 80% sand 15% clay and 5% organics.

Mr. Madden said that staff recommended approval of the permit as revised with the requirement that filter cloth be installed behind the replacement bulkhead.

Sidney Armsworthy, applicant was sworn in and his comments are a part of the verbatim record. Mr. Armsworthy explained that the purpose of the proposal was to stabilize the land and to curb the erosion of the land.

Associate Member Garrison asked if there was any one else, pro or con, to address the matter.

Richard C. Knicks, Jr. protestant, was sworn in and his comments are a part of the verbatim record. Mr. Knick explained that he was protesting any further encroachment and asked that the bulkhead be left where it was now located. He said his view would be obstructed if the bulkhead were placed where it was proposed.

Associate Member Garrison said the adopted practice was to put the replacement bulkhead 2 feet out from the old bulkhead. He said with the old bulkhead there would be more erosion but the new bulkhead would stop the erosion. He said the vinyl bulkhead was even better. Associate Member Fox said adding the filter cloth would retard siltation and improve the situation.

Associate Member Holland moved to approve the staff recommendation. Associate Member Robins seconded the motion. The motion carried, 6-0.

Permit Fee.....\$25.00

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- 9. **F. CRAIG READ, #04-2365**, requests authorization to construct a 12.5-foot by 36-foot private, non-commercial open-sided boathouse adjacent to a previously authorized pier adjacent to his property situated along Lamb's Creek in York County. An adjacent property owner protested the project.

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

Ms. West explained that Mr. Read's property is located on Lamb's Creek in York County. Mr. Read intended to remove the existing deteriorated pier and had requested authorization to construct a 170-foot long by 6-foot wide private, non-commercial, open-pile, pier with a 16-foot by 10-foot L-head, a 10-foot by 8-foot floating dock, and a 36-foot by 12.5-foot open-sided boathouse with associated 4-foot wide finger piers. The creek is approximately 500 feet wide at the project site.

Ms. West said that although there were no other boathouses within site of Mr. Read's property, a search of our permit-tracking database indicated that twenty boathouses had been authorized within the Lamb's Creek watershed since 1991. Staff did not know how many of those had been built, fallen into disrepair or were destroyed by Hurricane Isabel in the intervening years.

Ms. West said that staff had determined that the pier was authorized by statute (§28.2-1203 of the Code of Virginia). Since the boathouse was the subject of a protest letter from the adjacent property owner, however, that portion of the project was not statutorily authorized and must be considered by the Commission.

Ms. West said that an adjacent property owner, Ms. Peggy Martin, protested the project. She considered the proposal obtrusive and incompatible with the aesthetics of the shoreline. Ms. Martin submitted two additional letters, both of which stated that, while she felt she had no alternative but to give her consent, she remained opposed to the structure. Given the ambiguity of Ms. Martin's statements, staff believed that the matter should be brought to public hearing for the Commission's consideration.

Ms. West said that there were no oyster ground leases affected by the proposal.

Ms. West said that the subject boathouse appeared to be reasonably sized. In fact, if the adjacent property owner had not objected to the project, it would have qualified for the

authorization contained in § 28.2-1203 (A)(5) of the Virginia Code. The open-sided design should also minimize the visual impacts associated with the structure. In this instance, however, staff noted that while Mr. Read owned approximately 450 linear feet of shoreline, the pier was located on the peninsula closest to Ms. Martin's property. Since Mr. Read's plans already included the demolition of the existing pier and construction of a new pier, staff recommended that the Commission direct that the new pier and boathouse be relocated to the adjacent peninsula to the north. Relocation should significantly reduce the affect to Ms. Martin's viewshed while still providing Mr. Read with the access and the protection he desired.

Commissioner Pruitt arrived at the meeting at approximately 12:04 p.m. Associate Member Garrison continued to chair the meeting.

F. Craig Read, applicant, was sworn in and his comments are a part of the verbatim record. Mr. Read provided the Commission with a handout. He explained that there were 40 boathouses on Lambs Creek, most being built prior to 1991. He said he was working with York County and other agencies. He said he was told the pier was built in 1942 and he thought that it was "grandfathered". He said before Hurricane Isabel, he did not have any plans to do anything. He said after the hurricane he planned to rebuild and to have a boathouse like the ones in the rest of the area.

Peggy Martin and Bobby C. Martin were sworn in. Mr. Martin did not make any comments. Mrs. Martin's comments are a part of the verbatim record. Mrs. Martin stated they were not opposed to the pier and boatlift, only the boathouse. She said the boathouse would block their view to the water. She asked that the Commission either not approve the boathouse or require it to be relocated so that it would not be in their view. At the request of Associate Member Garrison, Mrs. Martin located her house on the slides provided by staff.

Mr. Read in his rebuttal explained that the aesthetics of the boathouse would be better than none. He said the boathouse compliments the upland structures and it would be industrial looking without the boathouse. He said that there were boats and trees in the area that prevented the protestant from having a view. He said that the protestant will only see the back of the boathouse, which would be 12 feet wide and it would be the same as having a duck blind. He said he had tried to keep up with the York County development plan approved in 1994. He said he had enough property that he could subdivide. He said he needed easy access for elderly, handicapped persons to get to the pier by golf cart.

Associate Member Jones suggested to resolve the protest, that the design could be flipped and the boathouse placed so as to give them more view. Mr. Read said the 16 X 16 platform was on the back and there was nothing on the other end. He said to move it would be more expensive. Associate Member Robins suggested rotating it 15 degrees

Commission Meeting

would get the boathouse out of the viewshed. Mr. Read said he was trying to get to 3 feet of water depth and he thought he had a good compromise.

Bob Grabb, Chief, Habitat Management Division, stated that the Corps would require a revised application. He said Mr. Read already qualified for a RP17 and would have to submit revised drawings, which should not be much of a problem.

Commissioner Pruitt asked if consideration of aesthetics was under the authority of VMRC? Carl Josephson said that based on the General Assembly authorization for boathouses, the protestant's aesthetics was a logical consideration.

Associate Member Holland moved to grant a permit as requested. Associate Member Robins seconded the motion. The motion carried, 6-0.

Permit Fee.....\$25.00

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The Commission broke for lunch at approximately 12:34 p.m. and returned at approximately 1:20 p.m.

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Commissioner Pruitt chaired after the Commission returned from lunch.

- 10. **ELEANOR BRAUN, ET AL, #05-1296**, requests after-the-fact authorization to widen a shared-use pier from its 4-foot width to a 6-foot width, and authorization to increase the size of a pierhead to 20 feet by 22 feet and construct a new 4-foot by 36-foot finger pier that will extend a total of 226 feet channelward of mean high water at their easement situated along Robinson Creek in Middlesex County. The adjoining property owners 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 the applicants' easement is situated along a small cove along the north side of Robinson Creek in the Remlik Hall subdivision in Middlesex County. The creek was approximately 1100 feet wide at the project site and the pier extended approximately 80 feet channelward of the mouth of the small cove. The mean low water depth was approximately four (4) feet at the channelward end of the pier. Development along Robinson Creek included a mixture of residential and commercial properties, however, the north side of the creek in the vicinity of the project was primarily residential.

Mr. Neikirk said that the subdivision was developed prior to 1950 and the properties involved had a long history with the Commission that included multiple permanent easements for fill on state-owned bottomlands and permit applications dating back to 1980. According to the Commission's historical permit application files, a pier was constructed at this location prior to 1950 when the Remlik Hall Subdivision was first being developed. At that time a 20-foot wide easement was granted to the owners of three non-waterfront lots to provide the owners with access to the pier. The pier was apparently rebuilt and extended in 1965 and again in 1977.

Mr. Neikirk stated that in 1980, the Commission issued a permit for after-the-fact authorization for the placement of four (4) pilings on the east side of the pier, and authorization to construct a 3-foot by 24-foot finger pier on the west side of the pier. According to the application at that time, the pier extended 191 feet channelward of a timber bulkhead and included a 17.5-foot by 11-foot pierhead. Additionally, four (4) pilings each were located to the east, west and landward sides of the pierhead creating three (3) wet slips. The main pier was four (4) feet wide and the authorized 24-foot by 3-foot finger pier extended the total length of the pier to 215 feet channelward of the bulkhead. A survey dated November 27, 2000, prepared by James Gray for a riparian apportionment case, depicted the pier as described above with the exception being that the pierhead depicted measures 19 feet long by 12 feet wide.

Mr. Neikirk said that the pier was apparently severely damaged during Hurricane Isabel and the owners applied for authorization to replace the pier in accordance with the Governor Warner's Executive Orders numbered 58 and 66. A letter, dated November 9, 2004, was sent to the owners advising them that the Executive Orders authorized the reconstruction of the pier, provided, it was rebuilt in the same location in identical or smaller dimensions.

Mr. Neikirk said that subsequent to their request to reconstruct the pier under the Governor's Executive Orders, the applicants submitted their current application seeking after-the-fact authorization to construct the pier 1-foot wider than had previously existed. The application also requested authorization to increase the size of the pierhead from an 18-foot by 12-foot platform to a 20-foot by 22-foot platform, to construct a 4-foot by 36-foot finger pier and to add and relocate several mooring piles.

Mr. Neikirk stated that while conducting a site visit on July 19, 2005, staff noted that although the applicants had requested after-the-fact authorization to increase the width of the pier from 4-foot wide to 5-foot wide, the pier had in fact been constructed at a width of six (6) feet, two feet wider than that which previously existed. Additionally, staff noted that a 12-foot by 20-foot pierhead had been constructed instead of the 12-foot by 18-foot pierhead that previously existed. The previously authorized 3-foot by 20-foot finger pier begins as four (4) feet in width and narrows to three (3) feet in width near the channelward end. Without a survey, it was impossible to determine if the pier had been constructed along the exact same alignment as the previous pier, but in addition to the

pierhead being larger than that previously authorized, approximately two (2) feet of the 18-foot long pierhead was previously located on the east side of the pier. Staff measured the overall length of the pier to be 214 feet, which was consistent with the previously existing structure. Subsequent to noting the discrepancies during our site visit, staff directed Mr. Chris Braun to cease all construction on the pier. Staff also advised him that staff would consider those portions of the project not built in accordance with the Governors Executive Orders to be after-the-fact.

Mr. Neikirk said that both adjoining property owners protested the project. They believed the proposed expansions would increase the congestion within an already crowded area and they are concerned that the applicants were attempting to circumvent the permit process by seeking after-the-fact authorization for a portion of the project. Finally, they were concerned that the pier may not be structurally sound, noting that no bolts had been installed in the pier. They requested that the pier be reconstructed as it previously existed and in a structurally sound manner.

Mr. Neikirk explained that to complicate matters further, the properties along this small cove were previously involved in a riparian apportionment dispute. The riparian areas associated with the adjoining lots, the subject easement and a portion of the subdivision road have been apportioned by the Middlesex County Circuit Court (Chancery No. 97-04). The applicants' pier was located within the riparian areas associated with the easement and a portion of the riparian area apportioned for the subdivision road that once bordered the cove. Although the previous pier encroached outside of the riparian area apportioned for the applicants' easement, the Court apparently allowed those portions of the pier located within the apportionment for the subdivision road to remain. The new replacement pier, however, extended further into the area apportioned for the subdivision road.

Mr. Neikirk said that the Health Department stated the project was in compliance with their "Sanitary Regulations for Boat Moorings." No other State agencies had commented on the proposal.

Mr. Neikirk said that the pier encroached on a riparian oyster lease assigned to Wilbon Jones and might encroach on a portion of a riparian oyster lease assigned to Richard D. Marsh. The highland property associated with both of these assignments was transferred more than 18 months ago and no request was made to transfer the lease to the current owners. Accordingly the previous assignments were no longer valid and the ground would revert back to the State.

Mr. Neikirk stated that staff did not believe that the pier or the proposed additions would interfere with navigation within Robinson Creek.

Mr. Neikirk said that had the applicants requested authorization to increase the width of the pier from four (4) to six (6) feet prior to conducting the work, that request would

likely have been approved. Additionally, the proposed 4-foot by 36-foot finger pier extension appeared to be reasonable. Staff was concerned with the unauthorized increase in the size of the pierhead, especially since the unauthorized expansion might result in additional encroachment outside of the riparian area assigned to the applicants' easement and because the cove was already congested. Furthermore, there was no water dependent justification provided for the larger pierhead or the proposed expansion of the pierhead.

Mr. Neikirk explained that when the Court apportioned the riparian area for the easement, subdivision road and adjoining parcels, it was apparent that a portion of the applicants' existing pier was located outside the riparian area apportioned for the easement. Although those portions of the pier located outside the applicants' riparian area were allowed to remain, staff did not believe it was appropriate to authorize any additional encroachment into an area apportioned to another party.

Mr. Neikirk said that staff recommended after-the-fact approval of the wider pier and approval of the requested 4-foot by 36-foot finger pier. Staff recommended denial, however, of the after-the-fact pierhead expansion and the proposed additional pierhead expansion. Furthermore, staff recommended that the pierhead and the 24-foot finger pier be reconstructed to be no larger than that which previously existed and in the same configuration. Staff had no objection to the placement of two mooring poles on either side of the pierhead provided the poles on the western side were located within 12 feet of the relocated pierhead and provided the poles on the eastern side were located within the applicants' riparian area. Staff also recommended the applicants be required to provide a revised scaled drawing on a new survey that depicted the location of the existing pier and the authorized revisions in relation to their riparian area. Finally, staff recommended the applicant be required to use ½-inch diameter or larger galvanized bolts to secure the framework of the pier. Should the Commission determine that a civil charge was appropriate, staff recommended an assessment based on minimal environmental impact and a moderate degree of deviation.

Christopher G. Braun, applicant, was sworn in and his comments are a part of the verbatim record. Mr. Braun explained that he had made some adjustments in this proposal to resolve some of the protests. He said the riparian was purchased in 1957 and the deed said all other riparian rights remained unchanged. He said he was not taking any more space than allowed. He said 3 families shared the area and the expansion was needed because of the number of people. He said he was filling back in order to increase the space. He said the bolts to strengthen the construction of the pier would be added.

Tom Perugio was sworn in and his comments are a part of the verbatim record. Mr. Perugio said that he was requesting approval of the pier and expansion of the deck as he also uses the dock area.

Commissioner Pruitt asked if there was anyone in opposition to the project.

Winiver Peters, protestant, was sworn and her comments are a part of the verbatim record. Ms. Peters said she went to court to establish her riparian rights and had survey poles installed. She said the piles were channelward in her riparian area and she wanted them to be removed. She said she was concerned with the quality of the construction of the pier as well. She did not object to the pier, but the last storm put the pier onto her property.

Mr. Braun in his rebuttal said that he did not intend to circumvent the permit requirements. He said he used Mrs. Peters stakes to locate the pilings and the pilings were not in her riparian area.

Associate Member Robins asked Mr. Josephson if it would be legal to allow further encroachment in the riparian area. Carl Josephson, Senior Assistant Attorney General and VMRC Counsel explained that if it was allowed in other riparian areas then Mrs. Peters could take the matter to court and have it removed.

Associate Member Garrison moved to accept the staff recommendation and to encourage the use of larger bolts and improve the construction of the pier by putting the pilings a foot closer together. Associate Member Holland seconded the motion. Associate Member Robins stated that he supported the motion in principal, but it was not appropriate to approve it with the requirements being that the pilings be made a foot closer together. He said he supported the staff recommendation. Associate Member Garrison agreed to take out that portion of the motion regarding the pilings. Associate Member Holland agreed to the change. The motion carried, 6-0.

Permit Fee.....\$25.00

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- 11. MORAN TOWING, #05-0399**, requests authorization to install two commercial mooring buoys adjacent to their property situated along the Eastern Branch of the Elizabeth River in Norfolk. Several residents in the vicinity protested the project.

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

Ms. West explained that Moran Towing of Virginia wanted to install two commercial mooring buoys within the Eastern Branch of the Elizabeth River on the north side of the channel upstream of the Campostella Bridge. The buoys would be used to secure barges during staging activities. Moran Towing typically transported barges that were either empty or full of coal, coke, or scrap steel. Moran Towing’s representative, Mr. Al Cook, indicated that only in unusual circumstances would a barge be moored in staging area for a period of time longer than the routine stay of 5 to 7 days.

Ms. West said that an adjacent property owner, Ms. Mildred Cooper, protested the project. In addition, approximately 25 local residents had signed a petition in support of Ms. Cooper's concerns. She and the other petitioners were concerned about active detrimental erosion that was occurring along this portion of the shoreline of the Eastern Branch of the Elizabeth River and believed that wakes from increased tugboat activity would result in additional erosion along the shoreline.

Ms. West said that there were no oyster ground leases affected by the proposal. The project was not expected to have any impact on a Commission oyster reef located across the channel from the proposed project.

Ms. West said that the mooring buoys did not appear to represent a hazard to navigation. While staff was sympathetic to the concerns of the local residents, staff would anticipate that tugs accessing the barge staging area would likely be operated at a reduced speed in order to properly maneuver. Therefore, the installation of these moorings and the establishment of a commercial staging area should not result in appreciably larger wakes. Therefore, staff recommended approval of the project provided the applicant agreed to install and mark the buoys in accordance with the Uniform State Waterway Marking System as approved by the U.S. Coast Guard. In addition, staff recommended that the buoys be marked with the VMRC permit number, which authorizes their installation.

Albert Cook, Operations Management for Moran Towing, was sworn in and his comments are a part of the verbatim record. He explained that Moran Towing were good stewards of the environment and good neighbors. He said the barges carried coal and steel products. He explained also that management shared the same policy of operation in a safe manner for the environment. He said all personnel are held to this policy when making any operational decisions. He said the tugs used slow mooring approaches by operating at a "no wake" speed. He said all their crews were professionals.

Commissioner Pruitt asked if there was anyone present in opposition to the proposed project.

Mildred Wescott Cooper, representing the Chesapeake Heights Civic League, was sworn in and her comments are a part of the verbatim record. Ms. Cooper explained that they strongly objected to the project. She went on to explain that since Moran Towing had been in that location erosion problems had increased. She said the tugboats go through the area at a fast speed. She said the area utilized by residents along the riverbank for recreational activities is eroding away and shrubbery is actually down in the water. She said the beach has eroded away. She said the tugs go fast through the area and there needs to be a "no wake" area established.

Yvonne Jones, a resident of the Chesapeake Heights area, was sworn in and her comments are a part of the verbatim record. Ms. Jones explained that the area along the water is private property used by the community. She said there had not been a meeting

held with them to discuss the project. She said the meeting today was short notice. She said they had been working with the city to beautify the community and to improve the wetlands. She said they were surrounded by commercial activities and cannot have their own pier and bulkheads. She said the city wants it to be made into a park. She said their lifestyle is being taken away and they seem to have been forgotten. She also said the tugs are brought very close to the shore.

Mr. Cook in his rebuttal explained that they can control their tugs and would even give them a 24-hour number where they can contact him to report improper operation of their tugs. He said they did meet with Mrs. Cooper when all this started. He said the project was posted in the newspaper when the application process was begun. He said their use of tugs was removing a lot of tractor-trailers from the highways.

Associate Member Fox asked Mr. Cook of Moran Towing if he would to get with the residents and assist them in obtaining a “no wake” status for the area. Mr. Cook agreed to do that.

Associate Member Garrison moved to accept the staff recommendation. Associate Member Holland seconded the motion. The motion carried, 6-0.

Permit Fee.....\$25.00

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- 12. **J.C. WALKER BROS. INC., #04-1874**, requests authorization to modify their existing permit for shellfish aquaculture, to increase the number of shellfish cages in an already permitted area in Occohannock Creek from 100 cages to 1,000 cages and to increase the size of the cages from two-feet wide by two-feet long to 5.3-feet wide by 3-feet long. The height will remain two feet. A nearby property owner protested the project.

Commissioner Pruitt left the meeting at approximately 2:27 p.m. Associate Member Garrison chaired the meeting at this point.

Hank Badger, Environmental Engineer, Sr., gave the presentation with slides. His comments are a part of the verbatim record. Mr. Badger explained that the permitted aquaculture sites are located in Occohannock Creek. One site was west of Tawes Creek and the other site was east of Morleys Wharf. The water depths vary from minus three (-3) feet near the shore to minus eight (-8) feet at mean low water (MLW) near the main channel in Occohannock Creek. The bottom was a mix of sand and mud.

Mr. Badger stated that J.C. Walker Brothers, Inc. leased over 830 acres of oyster planting ground on both the seaside and bayside of the Eastern Shore. The company had planted and raised aquaculture clams since the mid 1980’s following the construction of a clam

hatchery on their property in Willis Wharf. For the past five years the hatchery had also been used to propagate oysters. The Walkers were seeking authorization to increase the size and number of cages above one of their oyster ground leases and above another area that J.C. Walker Brothers had under application for oyster planting ground.

Mr. Badger said that the proposed racks would be used for the grow-out of oysters and were to be constructed of re-bar and wire mesh. Each rack was designed to hold 9 bags containing 300 oysters each, or a total of 2,700 oysters. The total capacity of the 1,000 racks was therefore nearly 3 million oysters. The racks would be deployed in rows with access channels between the rows. These channels would allow boats to access the racks for maintenance and harvesting. Each rack would be marked with a small float similar to a gillnet float.

Mr. Badger further said that the Virginia shellfish aquaculture industry continued to grow, and the majority of the aquaculture activity was located on the Eastern Shore. Many acres of leased oyster ground were currently being used for clam grow-out under nets (as authorized by regulation), and the Commission had issued several permits for the commercial grow-out of oysters in floats.

Mr. Badger explained that this permit modification would increase the number of cages (racks and bags) from 100 to 1,000 total. Although the racks would not reach the surface, they were proposed to extend more than one (1) foot off the substrate, and therefore do not qualify for authorization under our on-bottom aquaculture regulation (4VAC 20-335-10 et seq.).

Mr. Badger said the existing permit authorized 100 cages over three locations in Occohannock Creek with the purpose of determining the feasibility of a large scale off bottom "rack and bag" grow-out system. Mr. Walker now had nearly 100,000 aquaculture oysters nearing market size and believed the potential for a large-scale operation was now feasible.

Mr. Badger stated that a VMRC subaqueous permit only authorized an encroachment over the bottom; however, this permit modification would essentially grant nearly exclusive use of the water column above the bottom. The presence of the structures would effectively exclude or inhibit most other public uses. If available, this type of activity would more appropriately have been regulated through a water column lease. Unfortunately, §28.2-1600 et seq. of the code of Virginia "Water Column for Aquaculture Purposes" failed to take effect in July 2005.

Mr. Badger said that all property owners within 500 feet of the sites were notified. As a result, staff received two (2) letters in opposition. One was from Mr. Jason Pruitt, a commercial waterman. Mr. Pruitt was concerned that the modification would reduce the area in which he now crabs. After a site visit with the applicant, however, Mr. Pruitt withdrew his protest. The other letter was from Mr. Edwin O'Malley, a nearby property

owner. Mr. O'Malley asked that the cages continue to be a minimum of 400 feet offshore and in five feet of water as stated in the original permit. Mr. O'Malley's main concern, however, was the prospect of up to 1,000 small buoys in the creek to mark the location of the cages. He believed the buoys would have a visual impact from his shoreline and a navigation issue for boats in or near the project site.

Mr. Badger explained that the economic benefits associated with an aquaculture operation of this size were significant. Additionally, cultured oysters provided many of the same environmental benefits as wild stocks. They filtered large volumes of water, which might remove excessive nutrients, improve local water clarity, and possibly enhance nearby SAV beds.

Mr. Badger said that the Virginia Institute of Marine Science (VIMS) reviewed the proposal and stated that the individual and cumulative environmental impacts associated with the project would be minimal provided the cages were not placed in areas containing SAV. The Health Department, the Department of Conservation and Recreation, the Department of Game and Inland Fisheries and the United States Coast Guard all found the project acceptable. No State agency had expressed any concerns over the project.

Mr. Badger stated that it was unfortunate that there was not a mechanism to address the leasing of the water column. Staff believed such a lease would benefit both the public and the applicant. In the absence of a water column lease, the only mechanism to review and authorize this aquaculture activity remained our existing subaqueous permit process.

Mr. Badger said that although the project would certainly interfere with the public's use of the area, staff recognized the numerous potential economic and environmental benefits associated with the commercial production of nearly 3 million oysters. While certain types of fishing and recreational activities would be excluded due to the presence of the cages and floats, fishing and navigation in the access channels would still be possible and any interference from the structures did not appear to be overwhelming. In fact, it was possible that the structures would enhance recreational fishing in the area.

Mr. Badger stated that nevertheless, this was a relatively new activity and unforeseen impacts and conflicts may arise. Accordingly, staff recommended approval of the project with the following conditions:

- The permit and authorization to retain the structures shall be valid for a maximum period of three (3) years. After three (3) years, the Permittee may request that the Commission re-evaluate the project and authorize the activity for an additional period of time.

- Permittee agrees to place all oyster cages in a minimum of four (4) feet of water at mean low water. This is a change from the original permit. The original permit was for a minimum of five (5) feet of water at mean low water at the Tawes Creek site. To be consistent with the other two sites staff recommends a change from 5 feet to 4 feet.
- Permittee agrees to mark the location of each cage with a small float similar to a gillnet buoy.
- The Permittee shall submit an annual report of production and utilization.
- Should a water column leasing procedure be enacted, the project shall be re-evaluated and if deemed acceptable, converted to a lease upon termination of the initial three (3) year permit.
- The public shall not be excluded from any areas not physically occupied by the authorized structures.
- The Permittee shall maintain all structures and markers and shall remove any upon their falling into a state of disrepair or upon cessation of their use for aquaculture activities.
- Permittee agrees to mark the structures in accordance with all applicable U. S. Coast Guard requirements.
- Permittee agrees the overall area will be marked in accordance with §28.2-607 of the Code of Virginia and any subsequent regulations (4-VAC20-290-10-et seq.) and (4VAC 20-335-10 – et seq.)

Associate Member Garrison asked if the applicant wished to address the Commission.

William Wade Walker, applicant, was sworn in and his comments are a part of the verbatim record. Mr. Walker explained that he was a co-owner of J. C. Walker Brothers and they were involved in clam aquaculture for a long time and now have gotten into oyster aquaculture. He said they were willing to go along with the staff recommendations and conditions. He had brought a sample of the buoy they proposed to use for the Commission to see. He said they were set up for the buoy and ring system, but it was possible they would try other methods for marking the cages in the future. He said they were not sure that they would be able to use 1,000 cages in this size area.

Associate Member Garrison asked if there were others to comment, pro or con. There were none so he asked the Commission for a motion.

Associate Member Robin explained that the marking issue needed to be further considered and he wanted to see the results of this project. He said he did have some concerns with user group conflicts that might result. Associate Member Robins moved to approve the project. Associate Member Holland seconded the motion. Associate Member Bowden said that he had not heard anything from any watermen as to any concerns they might have in regards to the project. Associate Member Garrison said it was very encouraging to see this oyster restoration project. He said Hurricane Katrina was affecting the oyster resource supply and aquaculture was new and needed to be supported. The motion carried, 6-0.

Permit Fee.....\$100.00

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13. **ARBUCKLE SHELLFISH COMPANY, #04-031S**, requests authorization to lease approximately ten (10) acres of oyster planting ground along Assateague Channel near Little Beach in the Town of Chincoteague, Accomack County. The Town of Chincoteague and nearby property owners protested the project.

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

Mr. Badger explained that the proposed lease is located adjacent to the U.S. Fish & Wildlife Service, Chincoteague National Wildlife Refuge on Assateague Island and across Assateague Channel from the Town of Chincoteague. The water depths over the lease vary from minus one tenth (-0.1) of a foot near the shoreline to minus ten (-10) feet at mean low water offshore. The bottom was mostly sand with some mud mixed in offshore. A large amount of clam aquaculture activity borders the proposed lease in Toms Cove and Assateague Channel.

Mr. Badger said that Mrs. Jennifer Young, T/A Arbuckle Shellfish Company, applied for an oyster planting ground lease in August 2004. The application was for ten (10) acres of unassigned ground and included most of the area channelward of mean low water in the Little Beach area of Assateague Channel.

Mr. Badger said that staff had received letters from Mr. and Mrs. Forrest MacDowell and the Town of Chincoteague in opposition to the leasing of the Little Beach area. Both letters indicated that the residents and visitors were using the area for recreational activities.

Mr. Badger stated that in fact, the residents and visitors to the Town of Chincoteague had used the Little Beach area for recreational activities for generations. On holiday weekends there might be 75 people or more in the area.

Mr. Badger explained that in addition to denying the lease, the Town of Chincoteague was requesting that the Commission set-aside this area to provide recreational opportunities for the residents and visitors of Chincoteague. A set-aside would effectively prohibit the leasing of the Little Beach area during that period of time.

Mr. Badger said that a meeting was held on July 13, 2005, in the Chincoteague Town Office, with the applicant and the protestants. Mrs. Young (who also uses the area for recreation) indicated her oyster ground application was to help keep Little Beach from being leased by someone who might not respect the existing recreational use in the area. She did agree that setting aside the area would also accomplish that goal. Mrs. Young was not willing to withdraw her application, however, without some assurances that the area would not be leased in the future.

Mr. Badger indicated that although Mrs. Young might have good intentions, the residents and visitors to the Town of Chincoteague had used the Little Beach area for recreational activities for more than fifty years. Therefore, staff recommended the Arbuckle Shellfish Company application (VMRC #04-031S) be denied.

Furthermore, Mr. Badger said that staff recommended that the Commission agree to set-aside the area depicted on the oyster ground map for a period of ten (10) years. In general, the set-aside area would be bounded on the north by vacant bottom and Merritt (P.F. #17430); east and south by mean low water along the U.S. Fish & Wildlife Service, Chincoteague National Wildlife Refuge property on Assateague Island; and west by the Public Claming Ground Area #1, vacant bottom and McGee (P.F. #16970).

Mr. Badger further said that after the end of the ten (10) year period, the Town of Chincoteague could request that the Commission re-evaluate its decision to set-aside this area and agree to an additional period of time for the set-aside area.

Associate Member Garrison asked if the applicant was present. Mr. Badger explained that he had spoke with Mrs. Young and she did not want to pull her application nor did she have a problem with setting the area aside.

Associate Member Garrison asked if there was anyone present in opposition to the application.

Forest McDowell, protestant, was sworn in and his comments are a part of the verbatim record. He said there was a petition with 100 names/signatures that he took to the Town Manager asking that they preserve the beach for public use. He said there was a meeting held with all parties. He said he agreed with the staff, but the time period to set this area aside should be longer than 10 years.

Commissioner Pruitt returned to the meeting at approximately 2:53 p.m.

Terry Howard and Ellen Richardson, representing the Chincoteague Town Council, were sworn in and their comments are a part of the verbatim record.

Terry Howard, represented Chincoteague in their protest of the application. He read a letter from the Town Manager. He said they had the same concerns as Mr. McDowell and others in the community. He said they were asking that the area be set aside.

Ellen Richardson, Councilwoman, explained that she agreed with Mr. Howard that the area should be set-aside for a lifetime for the Town of Chincoteague.

Associate Member Garrison asked for a motion.

Associate Member Bowden said that he had had lots of calls regarding this issue and he himself had enjoyed the area with his son. He said that aquaculture is in the future, just not for every area. He said for all his life people have used this area for recreational purposes. He asked if two motions were needed. Carl Josephson, Senior Assistant Attorney General and VMRC Counsel responded yes, that it would make it clearer.

After some discussion about the length of time to set the area aside, the motions were made as follows:

Associate Member Bowden moved to deny the application for a lease. Associate Member Holland seconded the motion. The motion carried, 6-0.

Associate Member Bowden moved to set aside the area for 10 years or pending action to reopen the area, whichever was longer. Associate Member Holland seconded the motion. The motion carried, 6-0.

No applicable fees.

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Commissioner Pruitt chaired the meeting at this point.

14. DISCUSSION regarding Michael Jewett's compliance with the Commission's January 25, 2005, restoration order.

Michael Jewett was not present at the hearing. Associate Member Holland moved to proceed with the hearing of this case. Associate Member Garrison seconded the motion. The motion carried, 6-0.

Tracy West, Environmental Engineer, Sr., gave the presentation (no slides were presented). Her comments are a part of the verbatim record.

Ms. West explained that as the Commission was aware, the January 26, 2005, decision regarding the formal restoration hearing concerning Mr. Jewett's unauthorized construction activities at a former seafood offloading facility located at the terminus of Lawson Road on Bennett's Creek in Poquoson was upheld by the Circuit Court of York County.

Ms. West further explained that following the Circuit Court decision, Mr. Jewett submitted a letter from Mr. George Cornwell, dated July 22, 2005. In this letter, Mr. Cornwell provided his opinion with regards to the facility and offered general guidance for improving its structural integrity. Staff did not believe that letter or the time frame recommended, i.e. three years, satisfied the Commission's directive. Nevertheless, the letter was provided for consideration. Should the Commission determine that the letter was consistent with the intent of your January 25, 2005, directive, staff was concerned that Mr. Cornwell's suggestion that it would be acceptable to continue to allow public use of the facility during a three-year repair effort was unreasonable.

Ms. West said that at last month's meeting, the Commission directed staff to arrange an inspection of the facility in order to determine Mr. Jewett's compliance with the January 26, 2005, order. In accordance with those instructions, staff contacted Mr. Jewett by certified letter dated August 25, 2005. Mr. Jewett acknowledged receipt of that letter on August 29, 2005. In the letter, staff requested that Mr. Jewett contact them within two weeks with a convenient date and time wherein staff could schedule a compliance inspection. As the two-week response period drew to a close, and without a response from Mr. Jewett, Habitat Division staff and Marine Police Officers conducted inspections from the air and water in an attempt to ascertain compliance with the Commission's directive. Agency staff found that most of the vessels moored at the facility were not registered to the Jewett's and that the finger piers and walkway which were ordered to be removed remained in place. In addition, staff believed that a new finger pier had been installed since the January 25, 2005, Commission meeting. At this time, staff was unable to evaluate whether Mr. and Mrs. Jewett were residing within the building. In truth, staff had no idea what use Mr. Jewett was making of the two buildings.

Ms. West stated that on September 12, 2005, Mr. Jewett responded to staff's correspondence by hand-delivered letter. In that letter, he unequivocally stated that a site inspection was not necessary because he had chosen not to comply with most of the Commission's directives. He stated that he did not reside within the building, as directed by the Commission, but acknowledged that he was living aboard the vessel or barge moored thereto. He also stated that he had continued to allow vessels other than those owned by he or Mrs. Jewett to moor at the facility and that he had no intention of denying that use. Finally, he acknowledged that he had not removed the unauthorized new construction.

Ms. West said that the Commission's January 25, 2005 decision provided clear directives and deadlines for Mr. Jewett to meet. These directives were further reinforced when they

were considered, evaluated and upheld by the Circuit Court of York County. While staff, with some effort, had been able to determine Mr. Jewett's lack of compliance with most of the Commission's directives, staff remained uncertain as to what uses were being made of the facility itself. In addition, it was staff's understanding that numerous unresolved issues remained outstanding with other regulatory and governmental authorities, such as the Department of Health and the City of Poquoson.

Ms. West explained that Mr. Jewett had continued to make use of this facility for his own purposes for eight months in flagrant disregard of the Commission's directives and the Circuit Court's affirmation of those directives. As such, staff believed that there might be no other alternative than for the Commission to pursue whatever enforcement options were available in order to compel compliance.

Associate Member Robins said that the applicant has been given every opportunity to comply and a timetable had been provided. He said there had not been any good faith effort by the Jewetts to comply and this was the worst case of non-compliance they had ever had. He said the courts had upheld the Commission's Order. He said the letter received by the Commission was not a plan and non-compliant to the VMRC order. He said Mr. Jewett in his statement said he did not intend to comply.

Associate Member Robins moved to turn the case over to the Attorney General's office for further action to be taken against the Jewetts. Associate Member Bowden seconded the motion. The motion carried, 6-0.

No applicable fees.

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15. DISCUSSION: A request for public hearing to consider changes to the Commission's Subaqueous Guidelines.

Tony Watkinson, Deputy Chief, Habitat Management Division, gave the presentation. Mr. Watkinson said that staff is requesting approval to advertise for a public hearing in October.

Associate Member Robins moved for approval for a public hearing to be held in October. Associate Member Holland seconded the motion. The motion carried, 6-0.

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Jack Travelstead introduced new employees in the Fisheries Management Division, Department of Plans and Statistics. He explained that Tara Bushnoe was working in the Plans and Statistics Department for the Stock Assessment Program and Eric Robillard had replaced Roy Insley and would head up the Plans and Statistics Department.

Lt. Col. Lewis Jones introduced a new Marine Police Officer in the Southern Area, MPO Harold Springfield, who came to the Commission from the Newport News Police Department.

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16. PUBLIC COMMENTS:

Doug Jenkins, President of the Twin River Waterman's Association, was present and his comments are a part of the verbatim record. Mr. Jenkins explained that in the past watermen in the James River were allowed to keep both seed oysters and clean cull oysters in separate piles. He said that the old policy needed to be brought back. He said the James River area produced seed for other areas that need seed and do not have natural strike. He said he had spoken with staff and they did not agree with going back to the old policy. He said it cost the watermen money to have to throw the seed back overboard and seed needed for other areas was lost.

Associate Member Bowden said that he agreed with Doug Jenkins. He asked Jim Wesson to comment.

Jim Wesson, Head, Conservation and Replenishment, explained that this was a suggestion of the 1992 Blue Ribbon Panel so that in 1993 it was started that the waterman harvest either seed or clean cull in order to keep smaller oysters, 2 ½ inches or less from going to market. He said this is not just applied to the James River, but also to the Seaside where no seed oyster harvest is allowed. Associate Member Bowden said this policy should be changed for the western shore as it was needed.

Commissioner Pruitt said this would be referred to the Committee. He said it was agreed before that issues were to be taken to the Committee before the Commission made any decision. No further action was taken.

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17. PUBLIC HEARING: Proposed amendments to Regulation 4 VAC 20-720-10 et seq., "Pertaining to Restrictions on Oyster Harvest," to establish the public oyster harvest seasons for 2005-2006.

James Wesson, Department Head, Conservation and Replenishment, gave the presentation and his comments are a part of the verbatim record.

Dr. Wesson explained that each year the Commission has a public hearing in September to set the public oyster harvest seasons. Attached is a draft of Regulation 4VAC 20-720-10 with the suggested oyster seasons for 2005-2006.

Dr. Wesson further explained that the impact of Hurricane Katrina on the beleaguered Virginia oyster industry is the largest driving force in the seasons this year, as will be evident in the public comments. Our shucking industry depends on oysters from the Gulf region for approximately 90% of its product. The area of Mississippi, Alabama, and Louisiana east of New Orleans that had the most devastating impacts from Katrina were the heart of the Gulf's oyster production. No oysters have come from this area since the hurricane, and it will be unlikely that any oysters are available for this year's season. There are some oysters in western Louisiana and Texas, but these seasons do not open until November 1. It is unlikely that there will be enough oysters from those areas to support the needs in the Gulf, and the export market to the South and Mid-Atlantic. From the industry's point of view, opening the oyster season as early as possible in as many areas as possible was their main request. In recent years we have delayed the harvest, and had different areas of the State opening at different times, to spread the limited resource over a longer time period throughout the entire season.

Dr. Wesson stated that staff was just beginning the fall stock assessment and would not have that completed until late November or December. The results from 2004 are attached. There was no significant spatset (recruitment) in most areas of the Bay during the wet years of 2003 and 2004. Based on the shellstring data from VIMS, it appears unlikely that there is a significant spatset this year. We had the best harvest in 12 years last year. This harvest resulted from the relatively good spatsets in the drought years or 2001 and 2002, and the wet years (low salinity, low disease impacts, lower mortality) of 2003 and 2004. Salinities are more normal, or slightly elevated this year, and more disease mortality has been observed than in 2004. We would expect that the harvest in 2005 would be less than 2004, but better than most recent years. Unfortunately, since there has been no recruitment in 2003, 2004, and 2005, there will be very few market oysters available next year. In the areas that we have had an increase in harvest last year (Lower James, Middle Rappahannock, and Tangier and Pocomoke Sounds) and probably to a lesser degree this year, disease is the dominant, controlling factor on oyster survival, and it appears most prudent to actually harvest these oysters before they succumb to disease. If we maintain the significant sanctuary areas that are intermixed with all of these harvest areas, adequate broodstock should be protected. All of the seasons have been recommended to end on January 31, 2006, except for the James River Hand Tong Area, which continues until April 30. The fact that all of these areas are opening at the same time, should distribute the effort, but it was still unlikely, that there is enough stock of oysters to last the entire season at the established limits per boat.

Dr. Wesson said that there was a Shellfish Management Advisory Committee meeting on September 8, 2005, which was well attended. That group agreed with opening all of the areas simultaneously on October 1. They also recommended because of the increase in fuel cost, that the limits per commercial cardholder be increased from 8 to 12 bushels for all areas except the Seaside Eastern Shore and the James River Hand Tong Areas. Staff has included this change in the draft regulation. The 2 p.m. time limit, and the available

stock will limit the harvest within each area. A larger limit will likely shorten the season for the harvesters, but should not impact stocks.

Dr. Wesson explained that the Committee also wanted a change in the boundary of the sanctuary area in the James River to open a portion of Wreck Shoals to hand tonging. This sanctuary called "Wreck Shoals Management Area" is included in Regulation 4VAC 20-650-10, which is also attached. Staff has gone out with Law Enforcement and reset boundaries for this area that are clearer and opens the new area that the Committee requested. Since the Commission has not advertised this regulation, the Commission would have to either make this change as an emergency regulation or advertise for a public hearing at the next meeting and have the new boundaries become effective November 1.

Dr. Wesson stated that the only point of significant disagreement at the committee meeting involved the opening of the sanctuary area in the Lower Rappahannock River, east of the Route 3 Bridge. The lower and middle Rappahannock River have received millions of dollars of Federal, State, and private money for oyster restoration since 1999 as a part of the Oyster Heritage program with the Department of Environmental Quality. Most of the Oyster Heritage area has been opened to harvest. We have maintained the Lower Rappahannock as a sanctuary. Staff has continued to do simultaneous restoration on both the harvested and sanctuary area. All of these areas have been quantitatively monitored each year since 1999, and we have developed a unique and irreplaceable data set that characterizes the impact of harvest on oyster standing stocks. The 5 years of accumulated data is not enough to completely determine the impact of harvest because of differences in the environment and salinity between years. The data suggests that harvesting, when there are adequate sanctuaries, probably has minimal impacts on oyster populations in our portion of the bay. In higher salinity areas, disease is so much more of a dominant impact. Staff does not believe that this area should be opened until this dataset is completed, and that the Commission owes all the partners in the restoration efforts the completion of that dataset. Staff believes that this dataset will also be critical if the suggested listing of the eastern oyster as an endangered species moves further in the political process. The committee agreed to have another meeting after the full stock assessment is completed before they make a decision to ask for the area to be opened. Staff has agreed to the meeting to discuss this issue again at that time.

Dr. Wesson said that, finally, one area that was discussed at the meeting was the Deep Rock area. For the past 2 seasons, this area had been set-aside as a patent tong area. There has been very little harvest activity reported for this area. Staff had contacted several patent tongers, and there appears to be little interest in the area for the coming years. Staff recommended that this area be changed to a dredge area, and that it be opened on October 1, with the other areas.

Dr. Wesson stated that staff recommended that the Commission adopt the Regulation 4VAC 20-720-10, as amended with:

- 1) All areas opening simultaneously on October 1 with seasons from October 1 to January 31, 2006 except for the James River Hand Tong Area.
- 2) Increase the bushel limit from 8 to 12 bushels per cardholder, except for the Seaside Eastern Shore and the James River Hand Tong Area.
- 3) Changing the Deep Rock Patent Tong Area to the Deep Rock Dredge Area.
- 4) Changing the boundary for the "Wreck Shoal Management Area" in Regulation 4VAC 20-650-10 as described, either by emergency regulation or by public hearing next month.

After some discussion of the effects of the hurricanes in the Gulf States and some of the staff recommendations, the public hearing was opened.

Doug Jenkins, President of the Twin River Waterman Association, was present and his comments are a part of the verbatim record. Mr. Jenkins said that he had attended the committee meeting. He said that at that meeting they had decided to open all areas at the same time and that with increased fuel costs the watermen needed somewhere to work in their backyard. He said this would spread out the watermen and make the oyster stocks last longer. He said he had suggested 10 bushels, but at the meeting the Committee agreed to 12 bushels. He said they recommended changing Regulation 650 and opening up some of the Wreck Shoals area. He said it was agreed that the Deep Rock area be opened to dredging. He said a hurricane could happen here as it did in the Gulf and if the oysters are left they may be lost. He said that this year there had been a dry summer and fall. He said he would rather the oysters be used for the industry then lost to Mother Nature and when oysters reach 2 ½ to 3 inches they die from disease. He said this is a good plan other than the 10-bushel limit, which would make the oysters last longer.

Dan Dise, Tangier Waterman Association, was present and his comments are a part of the verbatim record. Mr. Dise said they would rather have the Pocomoke-Tangier Sounds open December 1 as the watermen were still crabbing. He said this would avoid crab potter and oyster dredger conflict. He said they wanted to keep the 8-bushel limit and that 12 bushels would end the season sooner.

The public hearing was closed.

Associate Member Robins said that the impacts of the hurricanes in the gulf were far reaching and the staff and industry had worked hard to come up with this proposal. He said that staff had made a good case for keeping the Lower Rappahannock River closed and for approval of the emergency action to change Regulation 650.

Associate Member Fox said he agreed with the Tangier watermen. Mr. Wesson said that December 1st was okay, but a 4 months season was kind of long. He also said 8 bushels

would be better for them to make the season last for 4 months. He stated that staff would be comfortable with 3 months and 8 bushels until after staff had done the oyster stock surveys.

Commissioner Pruitt said that the Tangier watermen needed to be represented at the committee meeting and gotten this approved. He said Mr. Dise had made a good argument for his request.

Associate Member Bowden said that he had spoken with individuals that want to keep the 8-bushel limit.

Associate Member Robins asked if Tangier was to be open December 1st for a 3-month season and if there were an 8-bushel limit would this be equitable for all. Mr. Wesson said this was what they wanted and what they had.

Dr. Roger Mann, representing VIMS, was present and his comments are a part of the verbatim record. Dr. Mann said that so far the "no net loss" had been hard to deal with. He said that Mr. Wesson was correct that the disease was widespread and had treated the resource badly. He said the wet years provided the product. He said that he understood the plight of the industry and either way there would be someone to suffer. He said normally he would argue to close all areas. He said he did agree that the Lower Rappahannock River should remain closed for a good dataset. He said there was talk of putting the *Virginica* oyster species on the "endangered species" list and no discussion would be needed next year if this did happen. He said what was discussed was a reasonable attempt in a difficult situation and there was reasonable balance with the proposal.

Associate Member Jones asked if the 12-bushel limit would be a red flag to the Federal government. Dr. Mann said 12 bushels was reasonable and could be explained.

Associate Member Robins moved to approve the staff recommendations with Pocomoke-Tangier Sound opening December 1 through February 28 and a 8-bushel catch limit per cardholder; amending Regulation 650 to open a portion of the Wreck Shoal Sanctuary area to the harvest of oysters by hand tong; keeping Deep Rock a dredge area; and keeping the Lower Rappahannock River as a sanctuary. Associate Member Fox seconded the motion. The motion carried, 6-0.

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18. **PUBLIC HEARING:** Proposed amendments to Regulation 4 VAC 20-310-10 et seq., "Pertaining to the Relaying of Shellfish," to exempt shellfish seed stock from certain condemned shellfish relay provisions.

James Wesson, Department Head, Conservation and Replenishment, gave the presentation and his comments are a part of the verbatim record.

Dr. Wesson explained that many of the shellfish hatcheries in Virginia were located in waters that were condemned by the Virginia Department of Health, Division of Shellfish Sanitation. By Code, it was unlawful to handle, harvest, or conduct the general husbandry of the shellfish seed in these hatcheries within the condemned waters. The Code Sections were written for protecting public health and the Commission had established a regulation procedure for handling marketable shellfish. Section 28.2-820 of the Code of Virginia was changed in 2003 and gave authority to the Commission to promulgate regulations for the harvesting, transporting, and handling of seed-stock shellfish. Staff had added to Regulation 4VAC 20-310-10, Et. Seq., a definition of seed-stock shellfish and a provision to exempt from the regulation the harvesting, transporting, and handling of wild and cultured seed-stock shellfish within condemned waters. Staff had consulted with the Department of Health, Division of Shellfish Sanitation and they are comfortable with these amendments to the regulation.

Dr. Wesson said that staff recommended approval of this amendment to Regulation 4VAC 20-310-10, Et. Seq.

The public hearing was opened. There were no public comments. The public hearing was closed.

Associate Member Garrison left the meeting.

Associate Member Fox moved to accept the staff recommendation. Associate member Holland seconded the motion. The motion carried, 5-0. Associate Member Garrison was not present at the point.

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Associate Member Garrison returned to the meeting.

- 19. STRIPED BASS:** Request for emergency amendment to Regulation 4 VAC 20-252-10 et seq., "Pertaining to Striped Bass," to allow possession of fish tagged for research purposes by the Virginia Institute of Marine Science.

Jack Travelstead, Chief, Fisheries Management, gave the presentation and his comments are a part of the verbatim record.

Mr. Travelstead explained that the latest VIMS work, which is now underway, involves the tagging of infected striped bass. Future recovery of those tagged fish will assist scientists in understanding the longer term effects of the disease and, in particular,

whether fish recover from the disease over time, so it is important to have fishermen return whole fish to VIMS for examination to determine the progression of the disease.

Mr. Travelstead said that to improve the recovery of tagged fish VIMS is offering a \$20.00 reward for each tagged fish. However, since many fishermen will be reluctant to retain possession of a diseased fish, particularly, if it counts against their ITQ or possession limit, VIMS requests that fishermen be allowed to possess tagged fish even if it is harvested out of season, outside of the legal size limits, or beyond the possession limit. He added that there was a \$5.00 reward for just the tag.

Mr. Travelstead said that the proposed changes recommended by staff could be found in the draft regulation in Chapter 4VAC 20-252-30(L).

Mr. Travelstead explained that staff recommended adoption of emergency amendments to Regulation 252 to provide that there not be any prohibition or restrictions on possession of striped bass bearing a green VIMS tag even if the possession causes the fisherman to exceed a bag limit, possess fish of a prohibited size or out of season or causes a commercial fisherman to possess a fish without applying a VMRC jaw tag.

Mr. Travelstead said there was a handout from VIMS and Dr. Wolfgang Vogelbein, a world known expert on this disease, was present for VIMS.

Dr. Wolfgang Vogelbein was present and his comments are a part of the verbatim record.

Associate Member Robins asked if it was known yet what caused this disease. Dr. Vogelbein said that they did know that it was bacterial and was the same bacteria that cause tuberculosis in humans.

Associate Member Fox said that the draft regulation does not have a number limit for tagged fish. Mr. Travelstead explained that any number of tagged fish was allowed to be kept and turned into VIMS. Associate Member Fox asked Dr. Vogelbein how the fish were to be obtained from the fishermen. Dr. Vogelbein said it was outlined in the brochure and they plan on educational programs as well as distribution of the brochures. He said that they ask that the fish be put on ice and they be contacted to pick up these fish.

Associate Member Garrison asked if the diet of the fish causes the disease. Dr. Vogelbein said they did not know and were still trying to find out. He said that more than one organism was identified (over 10) but they haven't been able to identify the bad guys. Associate Member Garrison said the striped bass being caught last year seemed to be rather skinny and in poor condition.

Associate Member Fox asked if the poor condition is not attributed to the lack of food. Dr. Vogelbein said that the poor condition was indicated, but multifactors or other factors could also play a role.

Associate Member Holland moved to accept the staff recommendations. Associate Member Garrison seconded the motion. Associate Member Bowden said this information should be sent to the ITQ holders by VIMS or VMRC. He explained that the monetary reward would probably encourage assistance by watermen. The motion carried, 6-0.

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20. BLACK SEA BASS: Review of industry requests for amendments to Regulation 4 VAC 20-950-10 et seq., "Pertaining to Black Sea Bass."

Joe Cimino, Fisheries Management Specialist, gave the presentation and his comments are a part of the verbatim record.

Mr. Cimino explained that the Atlantic States Marine Fisheries Commission (ASMFC) and the Mid-Atlantic Fishery Management Council (MAFMC), which jointly manage this species, adopted The Black Sea Bass FMP in 1996. This current program divides an annual quota between the recreational fishery (51 percent) and the commercial fishery (49 percent). Amendment 13, in an attempt to mitigate lengthy seasonal closures, and significant quota overages to the commercial black sea bass fishery, established a state-by-state allocation system in 2002. By allocating state shares, the management does not discriminate between residents of different states. This system allocates the annual quota on a coastwide basis each year. This system was extended through the fishing years 2005-2007 by Addendum XII, which was approved last year.

Mr. Cimino said that in 2003, the first year the state-by-state quota was in place, the Commission established a limited entry fishery for the Commonwealth that split Virginia's black sea bass commercial quota between a Directed and Bycatch fishery. The Directed fishery was initially set up as an Individual Fishery Quota (IFQ) System, which allocated shares of the commercial quota to individuals who could show (based upon National Marine Fishery Service records) past participation in the fishery at a level indicative of full time black sea bass fishing. In 2005 the Commission allowed the Directed Fishery to go to an Individual Transferable Quota (ITQ) system. This system enabled participants in the Directed Fishery to transfer shares of their quota on a temporary (annual) or permanent basis. In addition to this, Directed permit holders were allowed to land sea bass in Virginia on any vessel as long as the permit holder was on board that vessel. This was done to allow greater flexibility for Directed permit holders, so that they may fulfill their individual quotas. Specifically this allowance was to enable those permit holders who harvest black sea bass using fish pots and traps, hook and line or hand line gear to fulfill their quota.

Mr. Cimino stated that to date VMRC has received several requests to change this regulation so that a permit holder need not be on board another vessel when sea bass are landed. Staff met with industry on September 15th to further discuss this issue at the annual industry meeting.

Mr. Cimino said that on top of the dynamic management strategy that has taken place over the last decade, fishermen have had to adjust to the fluctuations in availability of the fish themselves. Industry is seeking the ability to utilize the quota allotted, while adapting to frequently changing regulations and management measures. Since Virginia has enacted the two-fishery system, the Bycatch fishery (which holds 16% of the commercial quota) has largely under utilized its quota, and overall the entire quota allocated to the Directed fishery has not been caught. It is probable that other states will point to the unused Virginia quota (which along with New Jersey holds the largest share of the coast wide quota) as a reason to reallocate the percentages that each state receives.

Mr. Cimino stated that staff recommends an emergency amendment to 4 VAC 20-950-10 ET. SEQ., "Pertaining to Black Sea Bass." to allow for Directed permit holders to authorize an alternate vessel to land black sea bass on their quota with out them being on board the vessel.

Commissioner Pruitt asked Mr. Cimino what made it necessary to take emergency action. Mr. Cimino explained that it needed to be done by October to allow fisherman to take action to do this and it still allowed time for a public hearing at the October meeting.

Associate Member Robins asked what mechanism would be used to transfer the quota. Mr. Cimino explained that a form had been developed by staff to be used by the permit holder, approved by the Commissioner, and a copy provided to the alternate vessel.

Associate Member Robins stated then this would be prearranged, not a spur of the moment process. Mr. Cimino said this would be prearranged and the letter would only be effective for 30 days.

Associate Member Robins moved to approve the emergency regulation. Associate Member Bowden seconded the motion. The motion carried, 6-0.

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21. STRIPED BASS: Review of recommendations of the Striped Bass Management Ad hoc Committee and the Finfish Management Advisory Committee.

Jack Travelstead, Chief, Fisheries Management, gave the presentation and his comments are a part of the verbatim record. Mr. Travelstead said he could be brief in this presentation if the Commission wished. Commissioner Pruitt agreed to the brief presentation.

Mr. Travelstead said that staff met with both the FMAC and Striped Bass Ad Hoc Committee as instructed by the Commission at the August meeting to explore other options. The ad hoc committee met on September 13 and FMAC met on September 20th. The one additional recommendation that resulted was that a ban be put on all temporary transfers of striped bass tags.

Mr. Travelstead said that staff was recommending that a public hearing be advertised for the October meeting and the Commission should consider all new and old recommendations.

Associate Member Jones moved to approve staff recommendation for an October hearing. Associate Member Robins seconded the motion. The motion carried, 6-0.

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SHEEPSHEAD DISCUSSION:

Jack Travelstead, Chief, Fisheries Management, made some comments on this species at the Commissioner's request to provide the board with some information. Mr. Travelstead explained that they were still trying to learn more about this species. He said Dr. Jones presently had a proposal for consideration by RFAB to study the species. He stated that some groups felt that action was needed to prevent the uncontrolled development of a fishery for this species. He explained there was a lot of support by the recreational sector to implement a regulation and to regulate the commercial community.

After further discussion, no action was taken by the Commission.

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CLOSED MEETING FOR CONSULTATION WITH OR BRIEFING BY COUNSEL.

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

Channing Mitchell versus VMRC

The motion was seconded by Associate Member Holland. The motion carried, 6-0.

Associate Member Robins moved for the following:

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

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

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

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

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

AYES: Bowden, Fox, Garrison, Holland, Jones, Robins, and Pruitt

NAYS: None

ABSENT DURING VOTE: Associate Members McLeskey and Schick

ABSENT DURING ALL OR PART OF CLOSED MEETING: Associate Members McLeskey and Schick

The motion carried, 7-0.

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

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There was no further business, the meeting adjourned at approximately 4:57 p.m. The next meeting will be Tuesday, October 25, 2005.

Commission Meeting

13433
September 27, 2005

William A. Pruitt, Commissioner

Katherine Leonard, Recording Secretary