

MINUTES

Commission Meeting

November 23, 2004
Newport News, VA

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 N. Bowden, Jr.)	
S. Lake Cowart, Jr.)	
Russell Garrison)	Associate Members
J. T. Holland)	
Dr. Cynthia Jones)	
F. Wayne McLeskey)	
Kyle Schick)	
Carl Josephson		Senior Assistant Attorney General
Wilford Kale		Senior Staff Advisor
Kathy Leonard		Recording Secretary
Andy McNeil		Programmer Analyst Sr.
Jane McCroskey		Chief, Admin/Finance Div.
Jack Travelstead		Chief, Fisheries Mgt. Div.
Rob O'Reilly		Deputy Chief, Fisheries Mgt. Div.
Roy Insley		Head, Plan/Statistics Dept.
James Wesson		Head-Conservation/Replenishment
Chad Boyce		Fisheries Management Specialist
Lewis Gillingham		Fisheries Management Specialist
Ellen Cosby		Fisheries Management Specialist
Lt. Col. Lewis Jones		Deputy Chief, Law Enforcement
MPO		Marine Police Officer
MPO		Marine Police Officer
Bob Grabb		Chief, Habitat Management Div.
Tony Watkinson		Deputy Chief, Habitat Mgt. Div.
Chip Neikirk		Environmental Engineer, Sr.
Randy Owen		Environmental Engineer, Sr.
Jeff Madden		Environmental Engineer, Sr.

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Tracy West
Jay Woodward
Benny Stagg
Justin Worrell
Benjamin McGinnis
Hank Badger

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

Virginia Institute of Marine Science (VIMS)
Lyle Varnell and Tom Bernard

And others.

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Commissioner William A. Pruitt called the meeting to order at 9:33 a.m. with six members present (Coward, Garrison, Dr. Jones, McLeskey, Schick and Pruitt). Associate Members Holland and Bowden arrived during the meeting. There was one vacancy on the Commission with the death on Oct. 25, 2004 of C. Chadwick Ballard, Jr.

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

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

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Approval of Agenda: Mr. Josephson added to end of the agenda consideration of a resolution regarding navigational hazards. Associate Member Garrison moved and Associate Member Cowart seconded the motion to approve the agenda. The motion carried, 5-0.

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1. APPROVAL OF MINUTES: Associate Member Garrison moved to approve the minutes for the September 28, 2004 and October 26, 2004 Commission meetings. Associate Member Cowart seconded the motion. The motion carried, 5-0.

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2. PERMITS:

Bob Grabb, Chief-Habitat Management, gave the presentation on Page Two items A through H and his comments are part of the verbatim record. Page Two items are projects that cost more than \$50,000, were not protested, and have a staff recommendation for approval.

Associate Member Garrison asked about 2D if the permit would require floating piers parallel to shore? Staff said the alignment is similar to older piers.

Commissioner Pruitt asked about time frame for Gloucester Point project? Staff said they were unsure. He also asked about 2G regarding Department of Game and Inland Fisheries Comments. Mr. Grabb said there was a time of year restriction and DGIF had no problems as long as the project gets underway prior to March 1.

He also asked if there was any controversy on 2B? Commissioner Pruitt asked if anyone in the audience had any comments. Hearing none he put the Page Two items before the Commission. Associate Member Garrison moved and Associate Member Dr. Jones seconded the motion to approve the permits. The motion passed, 6-0.

2A. BLUE RIDGE SOIL AND WATER CONSERVATION DISTRICT, #04-1581, requests authorization to install a concrete spillway and 130 linear feet of riprap scour protection at the location of the dam’s outflow pipe which will extend one and a half (1.5) feet channelward of ordinary high water adjacent to Marrowbone Creek in Henry County.

Permit Fee.....\$100.00

2B. TOWN OF CHINCOTEAGUE, #04-2134, requests authorization to directional drill a 16-inch water main, (approximately 2,550 linear feet) from the Town boat ramp on Chincoteague Island under Chincoteague Channel, Marsh Island and Black Narrows to a point west of the Black Narrows Bridge tying into the existing water mains on each side of the crossing.

Permit Fee.....\$100.00

2C. HANOVER COUNTY DEPARTMENT OF PUBLIC UTILITIES, #00-0106, requests reauthorization to install, by the directional drill method, 75 linear feet of a 30" sanitary sewer force main under the Chickahominy River between Hanover and Henrico Counties.

Reactivation project and permit fee is not applicable.

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2D. REGATTA POINT YACHT CLUB, #02-2375, requests authorization to modify their permit to allow the construction of 680 linear feet of 9-foot wide floating pier in lieu of a similar length of 8-foot wide open-pile fixed pier adjacent to their facility situated along Broad Creek in Middlesex County.

Modification of a project and permit fee is not applicable.

2E. DEPARTMENT OF GAME AND INLAND FISHERIES, #04-2191, requests authorization to remove an existing boat ramp and tending piers and to construct a new 32-foot by 105-foot concrete boat ramp, two 6-foot by 105-foot open-pile tending piers with 40-foot by 6-foot L-heads, two 105-foot long timber jetties, and 242 linear feet of riprap revetment at the Gloucester Point public landing along the York River in Gloucester County.

Permit Fee.....\$100.00

2F. CITY OF NORFOLK, #04-2262, requests authorization to extend 12 pile-supported stormwater outfall pipes a total of 752 linear feet and to install 12 sand causeways totaling 40,180 square feet to be utilized for construction access adjacent to property situated along the Chesapeake Bay in the Oceanview section of Norfolk. The sand will be removed and the causeway areas will be regraded to pre-existing contours.

2G. CITY OF FREDERICKSBURG and U.S. ARMY CORPS OF ENGINEERS, #02-0353, requests authorization for modification of their existing permit, to now construct a temporary causeway immediately upstream of the Embrey Dam, which will include twelve (12), six-foot diameter culverts in alignment with the dam's existing breach, for access to the dam during its removal, and in lieu of the previously authorized causeway and bridge at the upstream crib dam. All work will be performed in and along the Rappahannock River in Stafford County and the City of Fredericksburg.

Modification of a project and permit fee is not applicable.

2H. U.S. NAVY, #04-1841, requests authorization to reconfigure an existing marina and construct a 6-foot wide by 165-foot long pier extension, bringing the proposed pier length to approximately 555 linear feet channelward of mean low water. The proposed marina configuration will include a relocated 15-foot by 35-foot T-head platform; seven additional wet slips for 62 total wet slips; 32 finger piers between 10 feet and 16 feet, 8 inches in length; and 124 associated mooring piles, adjacent to Dahlgren Navy Base property situated along Upper Machocdoc Creek in King George County.

Permit Fee.....\$100.00

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4. **KENT EARLY, #02-2344**, requests a modification to his permit to construct an 8-foot by 460-foot private pier with a 24-foot by 54-foot open-sided boathouse and a 15-foot by 18-foot fabric personal watercraft cover adjacent to his property situated along the York River in Gloucester County. The requested modification would modify the point of origin and alignment of the pier. The project is protested by nearby property owners.

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

Mr. Neikirk said the site is located along the northern shore of the York River, approximately midway between Sarah Creek and the Perrin River in Gloucester County.

In the August 26, 2003, staff briefing the staff stated that the project was not protested by either neighbor and that they felt a pier extending 460 feet channelward of mean high water in this area of the York River should not adversely affect navigation. The staff also said the open-sided boathouse appeared to be reasonably sized for the boat Mr. Early indicated he was planning to purchase. Staff, however, did express concern regarding the proposed 8-foot width of the pier and stated that the 1,480 square feet of decking and finger piers proposed at the channelward end of the pier were excessive and that the personal watercraft cover was unnecessary. Finally, the staff conveyed a concern expressed by Dr. Bob Orth (Virginia Institute of Marine Science), that a dense bed of submerged aquatic vegetation (SAV) would be adversely affected by the shading of the pier and associated structures. Dr. Orth suggested the impacts could be reduced by reducing the size of the structures or by increasing their height to reduce shading. Photographs of the SAV are part of the record.

The Commission voted to approve the project with a condition that the 8-foot wide pier be constructed at a minimum height of five (5) feet above mean high water.

In May of this year staff received calls and letters from the neighbors and several nearby property owners expressing concern that they had not been notified of the project and noting their opposition to the pier. Some of those in opposition to the project addressed the Commission during the public comment period at our July 27, 2004, Commission meeting. The protestants were informed that a public notice had been placed in the local newspaper and that signed "adjoining property owner forms" indicating no objection to the project had been received by the Commission. Accordingly they were told the project had been properly authorized and that the time period for appeal had expired.

In early August staff received a call from Mr. Tony Dorsey, an adjoining property owner, who said he believed the pier was not being installed in the proper location and that he believed there were inaccuracies in the distances used to benchmark the location of the

pier on Mr. Early's permit drawings. That same day the staff also received a call from Mr. Early's contractor, Mr. T.J. Egan, who was concerned that if the pier was built as depicted in the permit, it would extend over Mr. Early's extended eastern property line.

Staff met with Mr. Egan on August 5, 2004, and concluded that Mr. Early's property was approximately 15 feet narrower than that depicted in his plan view drawing and therefore, the pier could not be built in the proposed location. Since the location of the pier had been benchmarked in relation to both adjoining property lines, we concluded that the pier could not be located in accordance with the permit drawings. It would have to be located closer to one or both adjoining properties. Accordingly, we informed Mr. Early that he would have to submit a request to modify his permit.

Mr. Early met with staff and explained that the location of the eastern property line was unclear when he made application and that the benchmark distance was actually measured to the adjoining property owner's timber groin. Staff explained that the dimension seemed to clearly be referenced to a property line and that given the discrepancies he would have to seek a permit modification. Accordingly, Mr. Early submitted a revised drawing seeking to correct the location of the pier and to realign the channelward end of the pier to the west to avoid an encroachment over the extended eastern property line.

The revised scale drawings show new benchmark distances and the pier was changed to 47.5 feet from eastern property line instead of 63 feet and 87.8 feet from the western property line.

The revised project continued to be protested by the adjoining property owners and some nearby residents. They believed that the proposed pier is excessively long, the pier-head and boathouse are too large, and the structure will adversely affect navigation and aesthetics.

Mr. Neikirk said the staff remained of the opinion that the 460-foot long pier should not adversely affect navigation and that the open-sided boathouse was reasonably sized to provide protective mooring for Mr. Early's 46-foot boat. Although staff continued to question the need to construct an 8-foot wide pier to provide golf cart access to the end of the pier, if the Commission remained convinced that golf cart access is necessary, staff would concede that an 8-foot width was probably necessary for safe operation and that the required minimum height of five (5) feet above mean high water should reduce the shading impacts on SAV. Given the size and seasonal use associated with personal watercrafts, however, staff still does not believe any additional cover for the PWCs was justified. The staff continued to recommend that the PWCs either be stored on davits or the adjacent upland property with a tight fitting fabric cover if necessary.

Finally, staff still believed the pier-head is excessive and represents an unnecessary encroachment over State-owned submerged land. Even if the use of a golf cart was deemed to be reasonable, staff continued to believe that a 400 square foot pierhead should

be more than adequate to accommodate a golf cart, boating access, swimming and fishing activities. The staff also recommend the step-down pier surrounding the boathouse and short finger pier be eliminated or reduced to a width of no more than four (4) feet.

Commissioner Pruitt asked for questions. Associate Member Garrison asked if any construction was begun. Mr. Neikirk responded in the affirmative.

Mr. William Kent Early and wife, Mandy Early appeared to support their application. Mr. Early explained the process of seeking the initial application and then the process involving the construction. His comments are part of the verbatim record. He said there are difficult times now between his family and neighbors. After having set five pilings, he said he realized that the alignment of the pier could be wrong. Work was stopped and new drawings made. There were no changes made, he said, only revisions to clear up any discrepancy.

Mr. Early spoke about the design of his pier and his remarks are part of the verbatim record. Then, Mr. Early noted that the staff does not object to his pier, or the size of the boathouse. The step-down pier was needed, he added, to get around the boat because at low tide the step-down would be necessary to access the boat.

The width of the pier is designated by safety concerns and Mr. Early's explanation is part of the verbatim record.

Associate Member Garrison said staff had suggested that the pier around the boathouse be reduced to four feet. Mr. Early said he had no objection.

Richard Sterns, who with his wife, lived about 400 feet downriver from the project. He said he submitted a letter. The eight-foot wide is excessive. Mr. Sterns said his own family pier is only four feet wide. He said neighbors were concerned about the pier becoming a mini-marina. He said he objected to the total size of the structure.

Christine A. Smith, also a neighbor, distributed some materials to the Commission. She said the pier is truly a big pier—from piling to piling it is 80 feet with a 145-foot wide lot. She suggested that the SAV in the area would be impacted. Not only will area under the eight-foot wide pier be impacted, but also broader areas that will be shaded. Her remarks in opposition are part of the verbatim record. By her calculation, the total project will cover 7,748 square feet. Her primary concern for SAV is that the underwater grasses in the bay are too little to support the sea life and believed Virginia is committed, through the Chesapeake Bay Act, to aggressive restoration not destruction of SAV. She said, if the Commission approves this project, or any project of this size, then it knowingly sets back Virginia's agreement to reach its goal to aggressively restore its grasses by 2010.

Commissioner Pruitt interrupted and asked if the property owner needed a permit from the county regarding an ordinance governing the Chesapeake Bay Act? Ms. Smith said

she did not believe he did. Staff also said there were no wetlands involved and no permitting mechanism at the county level regarding the Act.

Ms. Smith said there should be reasonable balance between public use and protection of the bay. The pier should be smaller and not so intrusive and the roof over the boathouse should be eliminated.

Laura Jane Tobin, another nearby property owner, wanted to ask a previous question. She said there was no earlier opposition because the Tobins knew nothing about the pier and other aspects of the project. She said she only knew about the groins, nothing about a pier. Her comments are part of the verbatim record.

William West, the adjoining property owner, said he was a commercial waterman and uses his dock for his work. Mr. West said he had no objections to the Early project because we did not know about a pier. The support, he said, was only for the groins that were proposed along the shoreline. He said his objections were because of the size of the pier, and in fact, will not be usable for 50 percent of the time due to weather conditions. Mr. West's remarks are part of the verbatim record.

Andy Dorsey, another property owner, said he did not oppose the pier, just the size of the project—eight foot wide and five feet high—and a boathouse and personal watercraft shelter. A project this size is a luxury not a necessity. His remarks are part of the verbatim record.

Commissioner Pruitt gave Mr. Early an opportunity to respond.

Mr. Early said there were two persons—Jerome Carmine and Clarence Eagan—who wanted to speak in support of the project. Mr. Carmine said he had 500-foot dock, 8-feet wide and 5-feet above the water and located not far from Mr. Early's site. His remarks are part of the verbatim record.

Mr. Eagan said Mr. Early's project is similar to other piers that he has built. His remarks are part of the verbatim record.

Mr. Early told the Commission that he only had one boat, which would be the main boat docked at his pier. He said at low tide there is no water under a 100-foot pier. He said his neighbors were told what he wanted to do with this property including a pier.

He said he was willing to withdraw a cover over the jet ski area.

Associate Member Cowart asked if neighbors knew about his intentions? Mr. Early said he felt everyone knew about the pier.

Associate Member McLeskey asked if the golf cart illustrated was the one he would purchase. Mr. Early responded in the affirmative. Mr. McLeskey also asked if the large number of pilings around the boathouse were needed. Mr. Early said he would reduce the number. Mr. Early also said the step-down pier was necessary for the boathouse and other boats.

Associate Member Shick asked if his house had handicapped accessibility? Mr. Early responded in the negative. Mr. Shick asked if another finger pier could be eliminated. Mr. Early said he felt it was needed.

Commissioner Pruitt put the case before the Commission. **Associate Member Garrison moved that the staff's recommendation be approved with a 460-foot long pier, eight-foot wide, 5-feet above mean high tide to reduce impact on SAV. The PWC's should not be covered. The short finger pier also should be reduced, he said, to a width of not more than four feet, plus the pier around the boathouse. Associate Member Holland seconded the motion.**

Associate Member Schick offered a friendly amendment: that the two pilings on the right hand side be eliminated and reduce the finger pier for the PWC's to 18 feet as was on the first plan and there would be no electrical hookup available for the two guest piers. The motion was adopted, 7-0

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3. CLOSED SESSION

Associate Member Garrison 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: Agenda items 6 and 13 and legal issues pertaining to the interpretation § 28.2-1203 A-5(iv) and delegation of authority.

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

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

AYES: Bowden, Cowart, Garrison, Holland, Jones, McLeskey, Schick and Pruitt

NAYS: None

ABSENT DURING VOTE: None

ABSENT DURING ALL OR PART OF CLOSED MEETING: None

The motion carried, 8-0

**Wilford Kale, Acting Recording Secretary
Virginia Marine Resources Commission**

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- 5. CHARLES DAVIS, #03-1147**, requests authorization to construct a community fishing pier, a launch ramp for personal watercraft, canoes and small boats and a vinyl bulkhead at community property situated along Piscataway Creek in Essex County.

Randy Owen, Environmental Engineer, Sr., gave the power point presentation. His comments are part of the verbatim record.

The project was located on a 1.05-acre community parcel in a 25-lot subdivision situated along the upper Piscataway Creek, 7 miles upstream from the Rappahannock River and approximately 2 miles above the Route 17 bridge. Of the 25 lots in the development, four are waterfront parcels with riparian rights on Piscataway Creek.

The stated purpose of the application is to provide access to recreational waters and erosion control. Specifically, the applicant seeks authorization to construct a 12-foot wide by 40-foot long timber boat ramp that will extend approximately 26 feet beyond

mean low water (MLW) and a 29-foot long by 6-foot wide pier with a 185-foot long by 6-foot wide “T-head” platform adjacent to the community parcel. The application also includes a request for 80 linear feet of bulkhead that was approved by the local wetlands board. The channelward would be used for fishing and crabbing, while the inside would be used for docking of small boats.

The Commission originally reviewed the wetlands component of this project in response to an appeal by 25 or more freeholders at its regularly scheduled meeting on October 28, 2003. The Commission remanded the matter to the Wetlands Board for further consideration with direction to consider the “necessity” of the proposed boat ramp in light of an existing downstream facility.

The Wetlands Board reheard the application at their January 22, 2004 meeting. The County Administrator told the Board that the “existing” facility was really an old steamboat dock that was in disrepair and not suitable for use. The Wetlands Board approved the project and the Commission reconsidered the matter on February 24, 2004 in response to a second appeal by freeholders. After careful consideration of the record transmitted by the Board and the oral arguments offered by Mr. Ronald Martin on behalf of the applicant and Mr. Peter Glubiak on behalf of the protestants, the Commission voted unanimously to uphold the decision of the Wetlands Board finding that the Board had fulfilled its responsibilities under the Model Wetlands Zoning Ordinance.

On March 24, 2004, the Commission was served with Mr. Glubiak’s Notice of Appeal. A copy of the Petition for Appeal was received on April 23, 2004. On May 12, 2004, the Attorney Generals Office filed a “Demurrer and Motion to Dismiss” with the court.

The matter was considered by the Essex County Circuit Court on August 20, 2004. By order dated October 4, 2004, the Court dismissed the matter with prejudice, finding that the Petition lacked allegations, which, if true, would confer standing upon Petitioners to bring this action as required by Sections 2.2-4026 and 28.2-1315 of the Code of Virginia (1950). The Court further ruled that because more than thirty (30) days had elapsed since the filing of the Petitioner’s Notice of Appeal, the Court lacked jurisdiction to permit the Petitioners to amend their Petition to add allegations of standing not alleged in their original Petition.

Accordingly, the Wetlands Board’s permit for the boat ramp and bulkhead, issued on January 22, 2004, remains in effect. The commission now considered the subaqueous aspects of the project since portions of the project that encroach over State-owned submerged land were also protested by numerous nearby property owners. Commission staff has received 17 letters in opposition. Additionally, a total of 50 property owners signed the freeholder appeal petitions. The protestant’s concerns, as outlined in their letters, primarily focus on the project’s potential impacts on existing wetlands in the area, safety issues of navigating the creek and overall adverse ecological impacts to Piscataway Creek. Numerous photographs were submitted by opponents and are part of the record.

(Although the applicant is not seeking mooring piles and wet slips per se, staff has been informed that the inside of the T-head will be utilized as a daytime mooring area for boats and personal watercraft. No overnight mooring is proposed. The channelward face of the T-head is purportedly reserved for fishing and crabbing.)

The Virginia Institute of Marine Science Shoreline Application Report, dated July 21, 2003, indicated that the project would result in the individual and cumulative adverse impacts to 590 square feet of Arrow Arrum/Pickrel Weed community and the pier would shade 1,432 square feet of subaqueous lands. Most of the impacts, they say, are associated with shading from the community pier.

The Virginia Department of Health advised that the applicant has submitted an approved plan for sanitary facilities. Their Division of Shellfish Sanitation advised that the project will affect condemned shellfish growing areas and would not cause an increase in the size of the closure. No other State agencies have raised objections to the project.

In summary, the pier as proposed, encroached to the minus 8-foot mean low water (MLW) contour, or approximately 26% of Piscataway Creek's MLW width. Controlling depths immediately adjacent to the proposed pier average minus 10 feet. Inasmuch as the boat ramp was primarily proposed for personal watercraft, canoes and boats with shallow draft requirements, staff questioned the need to pier out to minus 8-feet. In fact, staff was uncertain that any vessel larger than approximately 18-feet in length could be safely launched from the proposed boat ramp given the steep terrain.

As previously indicated, the riparian rights for the 4 waterfront lots have not been severed. As such, these lots are permitted navigable access by individual private pier construction pursuant to the statutory exemption provided for in Section 28.2-1203.A.5 of the Code.

Consistent with past Commission actions and policy, staff could not support the proposed wet slip mooring of vessels for non-riparian lot owners. Staff could support a small tending pier and marginal wharf designed to accommodate fishing, crabbing and the launch and retrieval of small watercraft and boats. Accordingly, staff recommended approval of the boat ramp but denial of the community pier as proposed. Staff would support a 6-foot wide tending pier with an 8-foot wide by 50-foot long "L-Head," aligned on the upstream side of the proposed ramp, with a channelward encroachment terminating at the minus 3-foot MLW contour. Should the Commission elect to approve the community pier as originally proposed or in modified form, however, staff would ask that the permit be conditioned to preclude the overnight mooring of vessels.

Associate Member Cowart asked if the staff recommendation had been shared with the applicant. Mr. Cross said the applicant was told of it, but was not willing to accept them.

Ronald A. Martin, who represented Mr. Davis, said the project could be accessed from either Rt. 17 or Rt. 360. Essex has no public water access and this site meets the needs of the county, but, he said later in the hearing, that the public would not be allowed use of it. The project only will be available to the property owners at the site. The project is the pier and boat ramp beyond the wetlands. He said everything done has been done after approval by local authorities. His comments are part of the verbatim record.

Associate Member Garrison asked how far channelward would the four foot contour be located? Mr. Cross said it would be 15-20 feet. Mr. Martin said he was not sure 15 feet would be an accurate measurement. It would be more like 10-12 feet.

Commissioner Pruitt asked those persons in opposition to come forward. Paul Copeland, who owns property directly across the creek, said the creek is narrow and has a sharp bend. The section is only about 130 feet wide. He said much of the creek area is marsh and cannot be used and there is marsh directly opposite the proposed location of the pier. He said he was not opposed to the pier, but rather was worried about access to the channel. His comments are part of the verbatim record.

Cynthia Ann Sail said her parents own property just upstream. She opposed the project as proposed. She said the project does not promote navigational safety and would be a hazard. She asked the Commission to safeguard the rights of the citizens who are already there living near the site. Her comments are part of the verbatim record.

Commissioner Pruitt asked if there was a pier on her property. She answered in the affirmative, but did not know the length.

Garnett Copeland said her main opposition to the project was the size and scale putting a 185-foot pier across nearly their whole waterfront. Additionally, the channel seems to be much wider than it really is. Almost on a daily basis during the summer time people find themselves grounded in the creek. Her comments are part of the verbatim record.

Lee Stevens, a Richmond attorney, who represented Mr. Pollard and Mr. Bagby who own about 75 acres across the creek from the site. Everything owned by Pollard and Bagby is marshland. There are several important focal points including navigation concerns. He said the staff's recommendation seems more appropriate. If developers can create a shoreline, problems will arise for everyone in the future. His comments are part of the verbatim record.

Commissioner Pruitt gave Mr. Martin several minutes to respond. Mr. Martin said that with the types of boats involved, three feet of water is adequate. He said the pier would be situated so that boats would come inside and fishermen would be on the channelward side of the pier. He said staff's proposal does not work; it creates problems. It does not allow for use of the inside of the pier. His comments are part of the verbatim record.

Commissioner Pruitt asked about a subdivision elsewhere on the creek that has a much smaller operation. Mr. Martin said he heard the project was larger than the one proposed. Commissioner Pruitt asked what would be the minimum? Mr. Martin said the developer could live with something smaller—130 to 150 feet—with an L-head rather than the T-head.

Associate Member Schick asked how the boat or jet ski would get it to the dock, because it is not adjacent to the planned pier? Mr. Martin said the boat would be launched—then—tied up to pier, if you need to use it.

Commissioner Pruitt put the matter before the Commission. Associate Member McLeskey asked if a floating dock were more invasive than fixed one. Mr. Cross said they were probably equal? He said the floating dock probably would do more damage inside because it would rest on the bottom. Mr. Cross said the 185-foot pier, six-foot wide would be parallel to the shoreline.

Associate Member Cowart said he felt that in a non-riparian community dock would not restrict rights to other riparian owners. He made a motion to approve the project with the staff recommendations. Associate Member Dr. Jones seconded the motion. Associate Member Holland offered a friendly amendment: to bring the pier out 22-feet so that the inside and outside of the pier could be used. Cowart and Dr. Jones accepted the amendment and the motion was approved, 7-0.

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The Commission took a 45-minute recess for lunch

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- 6. **MAURICE LEVIS, ET AL, #04-0725**, request authorization to construct a 90-foot by 5-foot private pier with a 10-foot by 20-foot pier-head adjacent to their property situated along Back Creek in Mathews County. The project is protested by several residents along the creek.

Chip Neikirk, Environmental Engineer Sr. gave the power point presentation. His comments are part of the verbatim record. The property was located along the northern shore of Back Creek, a small tributary of the Piankatank River, located near Burton Point in Mathews County.

The proposed pier included a 10-foot by 20-foot pier-head that extends approximately five (5) feet channelward of the marsh vegetation. The applicants proposed to use the pier to gain access to the river for their canoes and kayaks. The mean low water depth immediately adjacent to the pier-head was approximately 11 inches. Although deeper water was available adjacent to their property further inside the creek, the applicants had

expressed a desire to locate the pier at the proposed site because the firm sandy bottom would provide safer entry and exit from their canoes and kayaks.

The applicants originally requested authorization to construct a pier along a slightly different alignment with a 16-foot by 20-foot pier-head, including a canoe rack and step-down platform extending 15 feet channelward of the marsh vegetation. The current proposal, which was modified at the suggestion of staff, was for a reoriented 10-foot by 20-foot pier-head that has been moved approximately ten (10) feet further east and ten (10) feet landward. A canoe rack also has been deleted from the proposal.

As currently designed, staff believes the pier satisfied the criteria for statutory authorization contained in §28.2-1203(A)(5) of the Virginia Code. As such the staff was prepared to issue a “no permit necessary” letter to Mr. Levis and Ms. Wheeler. During the public comment portion of the October 26, 2004, Commission Meeting, however, several residents along the creek raised an objection to staff’s opinion that the pier qualified for statutory authorization. Specifically, they believe the pier would adversely affect navigation and therefore does not satisfy §28.-1203(A)(5)(iv) which states that “the piers are determined not to be a navigational hazard by the Commission.”

At the Commission’s direction, staff met with Senior Assistant Attorney General, Mr. Carl Josephson and several of the protestants during the October 26, 2004, meeting to discuss the matter. Based on Mr. Josephson’s advice, this matter is being brought before the full Commission for consideration of whether or not the proposed pier constitutes a navigational hazard.

The protestants contend that the pier will block a naturally meandering channel that presently exists near the northern shoreline of Back Creek. As such, they believe the pier will block ingress and egress to the creek.

Staff visited the site on three separate occasions and personally conducted soundings on September 24, 2004. The staff also has reviewed a survey prepared by Mr. Charles Kerns, on behalf of the protestants, and a detailed series of 150 soundings conducted by Mr. Rick Henderson of the U.S. Army Corps of Engineers. Mr. Henderson’s soundings, taken during high water, range between 28 and 41 inches. He concluded that the deeper water is located 18 to 35 feet channelward of the proposed pier. The Corps did issue a permit.

Mr. Cross said the pier will not encroach on any public or privately leased oyster ground and no state agencies have commented on the proposal.

In conclusion, the staff carefully reviewed this project’s potential impact on navigation. Back Creek was a relatively small tributary of the Piankatank River with a narrow and shallow mouth that opens into a wider embayment prior to reaching its confluence with the Piankatank River. The narrow channel was less than 20 feet wide at some points and the deeper water within the narrow channel presently resides along the northern side of

the channel, adjacent to Mr. Levis and Ms. Wheeler's property. In the wider embayment, where the pier is proposed to be located, however, the water becomes even shallower with the slightly deeper water located 20 to 40 feet channelward (south) of Mr. Levis and Ms. Wheeler's shoreline. Accordingly, staff remained convinced that the pier would not adversely affect navigation into and out of the creek and that the pier satisfies the criteria for the statutory authorization found in §28.2-1203(A)(5) of the Virginia Code. Should the Commission concur, a permit from the Marine Resources Commission would not be required.

Should the protestants still believe the pier obstructs navigation, staff believed they may still seek judicial review under §62.1-164 of the Virginia Code.

Commissioner Pruitt asked the applicant if he wanted to address the Commission. Maurice Levis, the applicant, came forward and said he was mystified by the claims that the pier would impede navigation. The pier is proposed a spot where there is no channel and it will not harm anyone. He said there was a large area where people can navigate.

Commissioner Pruitt called upon the protestants. Charles Kerns Jr., who represented 10 landowners on Back Creek. He said he was a licensed land surveyor. He explained that information has changed and the shoreline has changed over the past several months. He presented depth soundings from the Corps as well as those obtained by the protestants.

Mr. Kerns said the mouth of the creek is the most critical spot on the creek and during the life of this application, the channel has changed. He said a 2002 photograph clearly shows the channel near the dock. The opposition is concerned more about future owners who could have larger boats and the footprint of the dock becomes more and more critical as usage and ownership change.

He said the largest boat is 25-foot barker and a 25-foot Carolina skiff both with 18-inch draft. He said the bar at the mouth of the creek has changed. There have been two months of high tide and no flushing of the creek. The channel changes with the tide, especially as it hugs the northern shore.

The Army Corps of Engineers said the pier is a non-navigational problem because you can see it is a navigational problem because the natural channel changes with the tide. The applicant has other areas to put a dock that would be preferable and more environmentally sound, Mr. Kerns said. His remarks are part of the verbatim record.

Donna Ann Hunt, who lives on the creek, said the channel hugs the edge of the marsh and she opposes the new pier. There are currently five existing piers and nine boats that operate out of the creek. Ms. Hunt also said she put in an application for a 34-foot pier that was approved without opposition. Our major objection is to navigation and the opportunity to maintain our rights. Her remarks are part of the verbatim record.

J. D. Wilton, the principal property owner on the upriver side of Back Creek. The issue is not the issue; the issue is the location of the pier and its potential effect on navigation. The channel does, in fact, moves, rather extensively. His remarks are part of the verbatim record.

Bernet Kerns, who has lived on creek for 15 years, said the channel always shifts at times of bad weather. His remarks are part of the verbatim record.

Commissioner Pruitt asked if there were any questions, then being none he offered the landowner the opportunity for summation. Mr. Levis said he has not known of a channel near his pier site. He said the navigation problem is because the depth at medium tide is 1 ½ or two feet, but is relatively flat. The pier does not cause navigation problems. His remarks are part of the verbatim record.

Commissioner Pruitt asked why he did not locate the pier elsewhere. Mr. Levis said when the tide recedes the whole area becomes a mud flat.

Commissioner Pruitt placed the matter before the Commission. Associate Member Cowart asked where the opposition comes from? Mr. Kerns said the growing footprints enlarges in competition with the meandering channel.

Associate Member Holland moved to acceptance of the staff's recommendation. Associate Member Garrison seconded the motion, which passed, 7-0

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Commissioner Pruitt recognized Associate Member Cowart who wished to make a statement. After last month's meeting we were shocked to learn of the death of Chad Ballard on October 27, 2004 of a massive heart attack.

IN MEMORY OF C. CHADWICK BALLARD, JR., NOVEMBER 23, 2004

ON AUGUST 7, 1996, Chad Ballard was one of six persons appointed to VMRC by Governor George Allen.

It was a privilege to serve with Chad for the last 8 years and 3 months. Chad was an unselfish leader who did not push his views on other people.

He led the board into Executive Session the entire time he served on the board.

Chad was able to analyze complex issues and propose logical motions.

Chad would start his analysis with "It appears to me..." and in most cases his rationale would appear the same to the other Commissioners.

Chad was interested in and referred often to the “Public Trust Doctrine” as it held to the subaqueous bottomlands of Virginia in trust for the citizens of the Commonwealth. He read extensively on this doctrine to better understand it.

In 1999, HB 2269, patroned by Tayloe Murphy, better defined VMRC’s role in relation to the Public Trust Doctrine. After trying to understand this bill, and seeking other legislators who might understand it, Chad’s analysis was that there was only one person in Richmond who understood this—Tayloe Murphy. I believe there were two people at the end of the session and Chad was one of those.

Chad served as the Legislative Chairman of the Virginia Seafood Council for at least 10 years. He spent many days in Richmond, at his own expense, working on seafood issues that would better the Industry and the State of Virginia.

At no time during this period were Chad’s actions self-serving.

Chad Ballard was generous with his time and financial means, was honest, sincere, intelligent, and was loved and respected by all. Chad will be greatly missed but will be remembered for all that he did and the principles he stood for.

He was truly a “Virginia Gentleman”.

S. Lake Cowart, Jr., spoke on behalf of the entire Commission

Associate Member Garrison then offered a prayer:

OUR FATHER, we thank you for the opportunity to meet today and to dedicate this meeting to the memory of our dear, departed friend and fellow Commissioner, Chad Ballard.

It was an honor and privilege for the members of this Commission and staff to serve with Chad.

We come to you to celebrate the life of Chad and the fellowship you gave us in knowing him, in working with him, and admiring his love of Virginia.

For almost eight years, Chad served the people of the Commonwealth in a very admirable way. He tried to help every person with a permit application and helped mold regulations that will make the species of fish in the Bay and its tributaries be plentiful for generations to come.

We thank you for providing Chad the stamina and will power to lobby our legislature for the Seafood Council and to work to propagate aquaculture.

Chad was always innovative in his ideas. We depended on him for his expertise in the laws of Virginia relating to marine resources.

We ask you Dear God to be with his wife, his children, his parents, and all who grieve for our loss.

We know that by turning to you and asking for your grace, this grief in our hearts will be bearable.

We ask for your guidance and leadership that we may emulate Chad's efforts to make the Commonwealth a better place to live, work, and play.

In Jesus' name we pray, AMEN.

On the behalf of the Commission, Russell Garrison said the prayer.

Commissioner Pruitt thanked Associate Members Cowart and Garrison for those appropriate words. This meeting is dedicated to Chad's memory and a copy of the statement and prayer would be made available to Chad's family.

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Commissioner Pruitt swore in a court reporter.

7. **MICHAEL JEWETT, #03-0849.** Formal restoration hearing concerning ongoing unauthorized activities at a former seafood offloading facility located at the terminus of North Lawson Road on Bennett's Creek in Poquoson.

Associate Member Cowart assumed the chair as the Commissioner left the room.

Tracy West, Environmental Engineer, Sr. said this is a continuation of the restoration hearing and she distributed all the materials received during the past month related to the case.

Associate Member Garrison asked when the case would be resolved? Ms. West said that would fall in the Commission's jurisdiction. The staff recommendation was not changed. She read the staff recommendation into the record:

The issues surrounding this application continue to be numerous and complex. The upland property dispute is replete with conflicting deed information, contrary accounts of

local history, and personal discord between the parties. Local approvals (CBPA, zoning, utility hook-ups, etc.) for a commercial repair facility, which is Mr. Jewett's stated intended use of the facility, have not been obtained. In the opinion of the City Engineer, the structural integrity of the facility is suspect. It has long been a policy of this agency that local approvals and any upland property issues must be addressed and any conflicts resolved before the Commission will consider any associated application for activities over State-owned submerged lands.

It is unknown whether the initial construction of the facility was ever truly properly authorized and the status of the facility as a previous public landing or private enterprise is unclear. It is questionable whether all of the proposed uses for the facility stated in the application are water dependent. Some of the uses, like the stained glass studio, are clearly not water dependent. Necessary accompanying state approvals from the Department of Health have not been obtained. In accordance with §28.2-1205(C) of the Virginia Code, the Commission cannot issue a permit for this work until Mr. Jewett presents to the Commission a plan for sewage treatment or disposal facilities that have been approved by the Health Department.

Our Notice to Comply letter, dated June 17, 2004, directed Mr. Jewett to remove the illegal walkway, discontinue all construction activities at the facility, and the submittal of a written account of the circumstances surrounding all construction activities that had taken place thus far. These actions were to be completed within 30 days of his receipt of the notice. Mr. Jewett received the notice on June 21, 2004. To date, none of the information requested has been submitted and the walkway is still in place.

Given Mr. Jewett's failure to comply with staff's directives during the extended time since the Notice to Comply and Stop Work Order were issued, staff is compelled to recommend that the Commission direct Mr. Jewett to **IMMEDIATELY CEASE ALL ACTIVITIES AT THE FACILITY** until the following issues are resolved –

1. The ownership of the upland property has been decided.
2. Proof that the facility was properly authorized under the Code of Virginia has been provided to VMRC staff.
3. The information requested in the Notice to Comply dated June 17, 2004, has been provided to VMRC staff.
4. All required local permits and authorizations have been obtained.
5. All required state permits and authorizations have been obtained, including those from this agency and Department of Health.

Should Mr. Jewett not resolve these issues in a period of time deemed appropriate by the Commission, and given the opinion of the City Engineer for the City of Poquoson that the structure represents a hazard to public safety, staff recommends the Commission consider ordering the removal of the entire structure in conformance with the provisions of Section 28.2-1210 of the Code of Virginia. Further, in conformance with Section 28.2-1212 of the

Code, the Commission may wish to consider requiring a reasonable bond or letter of credit in an amount and with surety and conditions satisfactory to it securing the Commonwealth compliance with the conditions set forth in any Commission restoration order.

Should Mr. Jewett continue activities at the facility in contradiction to Commission directives or orders, staff recommends that the matter be immediately referred to the Attorney General's Office for initiation of appropriate enforcement action.

Associate Member Garrison said Mr. Jewett was given 30 days last month to comply. Associate Member Cowart said he understood that construction was begun and that he would obtain legal counsel. Ms. West said she did not believe legal counsel was obtained.

Mr. Jewett said he wanted to begin by trying to satisfy some of the outstanding items. He presented a Department of Health permit. He said he supplied staff with a 1944 York County Board of Supervisors finding that the building was property authorized on March 16, 1944. June and Susan Firth withdrawal form was presented so that they are no longer a part of this application.

Mr. Jewett said his intended uses of the building are: providing watermen with dockage and wharfage, saving an historic landmark and resuming a crab shedding operation, moorage of Jewett's personal watercraft and do not represent a change in use of the building. Stained glass is a hobby and not a vocation.

Mr. Jewett said he could not find a copy of letter of January 20, 2004 to Traycie West, citing that he did not know what part of his building would require a permit and what would not. He replaced rotting timbers and performed routine repair and maintenance. The City of Poquoson is denying permits. Therefore, I need your permit before I can get one from the City, he said.

He offered a statement on the various violations and reasons for the hearing. The statement is a part of the verbatim record. He said he was told initially that no permit would be required, but later a permit would be required for rebuilding the runway to the dock. He said that he replaced the 80-foot runway without a permit and in violation. It was not a violation of VMRC mission and harmed no one. The new runway is now eight feet wide instead of 16 feet and the footprint was reduced by 520 feet.

A staging area for maintenance and repair is called a violation, but it does not touch the water. I need it to continue repair work, Mr. Jewett said. Portions of the building are still badly in need of repair and asked that the stop work order be lifted so he could continue repairing the building.

Commissioner Pruitt returned and asked if the City of Poquoson had issued a stop work order prior to the hurricane. Mr. Jewett answered in the affirmative. He said the permit

was issued because he did not have a VMRC permit. Most of your testimony, Commissioner Pruitt said, was a result of the hurricane's activity. But it seems you were doing something that was not in an emergency situation in July 2004. The dock was built below the high tide line and it was held down by cables, spikes, etc. Mr. Jewett said the dock was falling in the water when he purchased the building.

He said he worked on the dock without VMRC permission and it was wrong.

Matthew Scott Bloxom, a commercial fisherman, said he had a history at the building since 1986 and sold crabs there for many years. The operation was then owned by Mr. Firth. From 1993 until this year, he said he used the dock several months a year when he was peeler potting in the York River. The dock's runway was in bad shape and on high tide the timbers were floating away. During Isabelle he said his boats were in Roberts Creek and that he used the dock in 03. Work did go on at the site prior to Isabelle.

Laurie Baker Jewett, wife of Michael Jewett, said the building was cleaned out and cleaned up. All our work is done under the supervision of a qualified contractor. Habitat Management staff failed to reject the building after the requests from the City. She said she and her husband are puzzled as to way they had not gotten support. She said she believed the work at the dock was good and always felt that a permit would be obtained. The habitat division has nothing to do with building codes and allows for repairs. Corps of Engineers approved our permits. A VMRC regulation said replacement can be made to structures already on state-owned land. She said there are also regulations governing what can be done over state-owned bottomland and their project does not compromise any state-owned property.

Firth's Dock does not belong to us along—it belongs to the watermen who have used it for years. We are here to help and preserve this asset. She called upon the Commission to support the project.

Michael M. McGuire, lives in Poquoson, just above the dock and own the land on the west side of the roadway and to which the dock is connected. He went through the packet of material that he presented to the Commission, explaining how and why the property on the western side is his. His comments are part of the verbatim record. When he purchased the property in 1993 all the area on the west was considered his, but that ownership problems did existed from the 1940s.

In 1969 previous owners sold dock to James W. Firth, Sr. and later to James W. Firth Jr. Turnarounds were placed at the end of many dirt streets in this area. The land was always intended to be filled in and a turnaround constructed. In the 1970s there was talk of the city buying these turnarounds, but nothing was done. People thought the area on the turnaround was city property.

In early 2001 the building was definitely in disrepair. Mr. McGuire said that he talked to city; the building either had to be fixed or torn down. All pilings had to be replaced. He said he met with the Jewett's who wanted to buy the land. In Poquoson you need 18,000 square feet of uplands to operate on the water. Mr. Jewett said he understood the problem. Mr. McGuire offered Mr. Jewett a long-term lease, but was turned down. Another proposal also was rejected. His comments are part of the verbatim record.

This problem is not yours, Mr. McGuire said. It belongs in the circuit court.

Commissioner Pruitt asked if there were any questions of Mr. McGuire. Hearing none, he asked Mr. Jewett for a response.

Mr. Jewett asked if he is entitled to a transcript from the court reporter? Carl Josephson, Senior Assistant Attorney General said it was a private effort being paid for by Mr. McGuire.

Mr. Jewett asked the Commission to reject Mr. McGuire's statements because no upland situation has any bearing on a restoration hearing. The VMRC does not have the legal authority to either grant me or deny me access across his property or to decide whether it is his property. Mr. McGuire has failed to show proof of the property legal authority that has the right to deny me access to my property. No Poquoson official has accepted Mr. McGuire's plate as the terminus of North Lawson Road.

Commissioner Pruitt asked if Mr. Jewett bought the dock. He said yes for \$10 and now has put in at least \$70,000.

Associate Member Schick asked whether an attorney had been obtained. Mr. Jewett said he had very limited finances.

Mrs. Jewett said why the application was not acted upon more immediately. She said staff took more than 1 ½ years to handle the case.

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Commissioner Pruitt then recognized Associate Member Garrison who 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: Agenda item 7.

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

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

AYES: Bowden, Cowart, Garrison, Holland, Jones, McLeskey, Schick and Pruitt

NAYS: None

ABSENT DURING VOTE: None

ABSENT DURING ALL OR PART OF CLOSED MEETING: None

The motion carried, 8-0

**Wilford Kale, Acting Recording Secretary
Virginia Marine Resources Commission**

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Associate Member Holland moved that the Commission extend its stop work order until the Commission's January meeting and that a Commissioner appoint a committee to consist of two Commission members, staff members and persons from the City of Poquoson will meet and bring back a recommendation. Associate Member Garrison seconded the motion, which was approved, 7-0.

Commissioner Pruitt said Mr. Jewett is not to do any more work at the site and when the matter returns in January we want cooperation or this matter is going to the Attorney General's Office.

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8. **PUBLIC COMMENT.** There were none.

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9. **REQUEST FROM INDUSTRY** to increase the vessel possession limits in quarters 1 and 2 of the 2005 offshore (EEZ) commercial summer flounder fishery and modify the start date of the quarter 1, 2005 fishery. A December public hearing is requested.

Lewis Gillingham, Fisheries Management Specialist asked for a public hearing on December 21st. **Associate Member Garrison made a motion to hold the public hearing at the Commission's December meeting. Associate Member Dr. Jones seconded the motion, which was approved, 7-0.**

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10. **PUBLIC HEARING:** Consideration of an amendment to Regulation 4 VAC 20-910-10 et seq. that would increase allowable landings of scup (porgy), from 2000 to 3500 pounds, during the Winter II period.

Joe Cimino, Fisheries Management Specialist, recommends adopted changes to regulation. Commissioner Pruitt asked for comments from the audience. There being none, he put the matter before the Commission. **Associate Member Garrison moved to approve the amendment. Associate Member Dr. Jones second the motion, which was approved, 7-0.**

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11. **PUBLIC HEARING:** Consideration for allowing hardship exception requests to obtain a Summer Flounder Endorsement License.

Rob O'Reilly, Deputy-Chief-Fisheries Management, said the Commission's charge was to look at hardship exceptions for the 11 limited entry fisheries. The staff and advisory committees found that there were opportunities to allow for entry, he said. There are transfers in the other fisheries, except for summer flounder. A draft regulation on page 3-4 portrays what the exception would be—landed a minimum of 500 pounds from 1990-1992 and in addition, there has to be some type of hardship that prevented the waterman from gaining the license initially.

Commissioner Pruitt opened the public hearing. Mr. William Culpepper said he favored the amendment. **Associate Member Garrison said damaged vessels could also be counted as a hardship. Associate Member Garrison moved to approve the amendment. Associate Member Bowden seconded the motion which was approved, 7-0.**

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12. **PUBLIC HEARING:** The Commission proposes to establish procedures associated with a public interest review, for the licensing of pound nets at new locations.

Jack Travelstead, Chief-Fisheries Management, said the proposal has been reviewed before the Commission the last two meetings. Mr. Travelstead pointed out the changes in the final draft and noted that the staff has received no public comments. Carl Josephson, Senior Assistant Attorney General, said an e-mail to the staff seeking questions about the proposed regulation and suggested some adjustments. Mr. Travelstead said those changes have been incorporated. Among the changes is to put the proposed location in laymen's terms. Landowners within 500 feet of the location will be notified and the pound net owner will identify the property owners. The 500-foot measurement will begin at the point closest to the shore. Language also has been added so that residents and tenants also will be notified along with property owner. A single protest would require a public hearing.

In response to a question from Associate Member Garrison, Mr. Travelstead said the staff would make contacts to property owners identified by the pound netter.

Keith Like, a fish trapper, said if this passes, it would be a death sentence for low water fish trappers. He said he has four traps, all along the shore. He tried to work with the landowners, but is afraid this public interest review will force watermen to use old site forever, even though they would be losing money. It also would drive all of our traps into the deeper water. His comments and responses are part of the verbatim record.

Mr. Like read a statement from Edward Bender. The statement is part of the verbatim record.

Doug Jenkins, representing Twin Rivers Watermen's Association, asked the Commission not to discourage pound netters from setting their nets. Please do not pass something that will limit or restrict them. He said he felt any more restrictions would be hardship on them. His comments are part of the verbatim record.

Associate Member Cowart asked Mr. Jenkins if he was part of the Committee. Jenkins responded that he did not remember anything about 500-foot off shore. Associate Member Cowart said he thought it was notifying people who are within 500-feet from the end of the proposed net.

Commissioner Pruitt put the matter before the Commission. **Associate Member Garrison said there was a sub-committee that studied the matter and made a report. He then moved that the regulation 4-VAC 20-25-10 et seq. as proposed be adopted.**

Associate Member Holland seconded the motion. Associate Member Bowden said he thought Mr. Jenkins was somewhat confused. The new regulation will give citizens of Virginia a way to voice their concerns and this, in no way, diminishes the rights of watermen. The motion was approved, 7-0.

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- 13. PUBLIC HEARING:** Any reissue of a pound net license, for 2005, to Mr. Ernest L. George of White Stone, for a pound net currently located in the Rappahannock River (approximately 1/4 mile east of Windmill Point Marina Channel). Protested by adjacent property owners.

Jack Travelstead, Chief-Fisheries Management, said this is one of the first hearings the Commission has held on a contested pound net in more than a decade. It is an issue that has been ongoing for the better part of this year. Earlier this year, shortly after Mr. George set his pound net in the Rappahannock River, staff started getting complaints from residents from the Beach Cove Villas. Since the license had been issued we felt we had no legal right to ask him to move. Since no license has been issued for 2005, the staff felt a public hearing would be appropriate and for the Commission to determine if a license should be granted.

Thomas Eubank, president of the Villas, who raises a number of concerns, and recently Commission members also received a letter from Bonnie Lee Jones regarding the net. Mr. Eubank asked that Mr. George's pound net not be licensed and that no other pound net be licensed within 1,500 feet of the Villas. He cites recreational impacts, safety and aesthetic reasons to support his request. Should the owner of the net, Mr. George, flag his net, no fishing could occur within 125-yards on either side of the net. Mr. George has not flagged his net and there are no prohibitions at this time. His comments are part of the verbatim record.

Mr. Travelstead offered a series of power point photographs that show that the pound net runs almost to the shoreline, and in doing so, would be a barrier to near shore canoeing and kayaking. However, the shoreline where the net runs ashore is heavily ripped making it an unlikely spot for beaching or swimming. There appears to be a more suitable swimming beach just upstream and in front of two of the three condominiums. There also is little doubt that the pound net is the source of the dead birds and fish that occasionally litter the beach. This is a normal occurrence with these nets and its proximity to shore makes the situation worse.

Mr. George's pound net is a shallow water net. The head of the net sits in about eight (8) feet of water. Moving the net offshore 1,500 feet may seriously affect its effectiveness and add costs to its construction since longer poles and deeper netting would be required. Depending on how the currents run in the area, moving the net offshore may not solve the beach-littering problem.

Mr. Travelstead said it is hard to understand how swimming, fishing and crabbing would be diminished because of the net. It does leave two concerns that may be real: the problems of kayaking and canoeing. He recommended that some poles be taken up at the shoreward end to allow for access.

David Bugg, an attorney, represented Mr. George. He said Mr. George had a trap further up the Bay and the spot was not good. His father had this site and it is a good one. He fishes the pound net all by himself. He cannot work or afford a deep-water trap. He needs his shallow-water trap near the beach. He did not go all the way to mean-low water with his net. Mr. Bugg said his client did not have a problem of removing three poles or two sections of net for access. The opponents want the net pushed 1,500 feet off shore. Simply taking the next "X" feet off shore will probably force Mr. George to go from a "good spot" to a "bad spot."

You are, defacto, recreating an annual review of existing traps, by holding this public hearing. The property owners, who spend a lot of money building a house, do not want it in front of their property. If you approve this, you allow the property owner to kill a shallow-water trap. His comments are part of the verbatim record.

Mr. Eubank and several other residents made presentations strongly in opposition to the existing pound net and asking that it be moved. Mr. Eubank said this is the first year (of the last 15 years) that a pound net has been placed in front of the properties. His detailed comments are part of the verbatim record.

Bonnie Lee Jones, another Villas resident, who wrote several letters to the Commission. She wanted to thank the Commission for holding this public hearing. All persons at the Villas take this very seriously; it is not personal thing with Mr. George. Her comments are part of the verbatim record.

Keith Like, a waterman, said there is now going to be a problem between property owners and pound netters. A way out for property owners is to lease the bottomland in front of the property and that will prevent traps or oyster grounds. His comments are part of the verbatim record.

Bill Jones, another Villas resident, said the photographs sent show about 200-feet of sandy beach at the ripraps. If he flags the net, my beach would be only about 45 feet wide. His comments are part of the verbatim record.

Tom Wilson, condo owner, said he had fished the beach for 20 years and does not think it is fair for a netter to come in and put his nets up. Activities of property owners have stopped there because of his nets. The property owners need a buffer zone, he said. His comments are part of the verbatim record.

Associate Member Garrison said the problem has been ongoing for several months. He asked how far offshore could Mr. George come to set his traps. Mr. George said he needed to come to shoreline. Associate Member Garrison said he felt it was unfair to Mr. George that he could come to the site and in the future we would find a balance. But correcting the situation we have

Associate Member Schick said the question is difficult because it is new territory, but the rights of the citizens and pound netters need to be protected. Each person has a right for their rights to be protected. Just because there are sheer numbers and a large concentration of people on the shoreline has created this issue. We have to protect the way of life of the Bay—its rural agriculture and fishing ways. People do not move here for an urban setting.

Associate Member Dr. Jones said she felt the tenor of the debate has been highly civilized. She also noted that former member Chad Ballard reminded her that fishing in the Chesapeake Bay is not a right, but a privilege and the VMRC regulates it.

Mr. George, responding to Commissioner Pruitt, said he would not remove net from shore, but would drop the net off shore and allow access.

Associate Member Garrison said the net would be marked, showing the access route. Associate Member Bowden said 1,500 feet is asking for exclusive rights to a beach that is not a public beach. Mr. George has a legal right; he has done everything that he was supposed to do.

Commissioner Pruitt put the matter before the Commission. **Associate Member Cowart moved that the net be placed in its current spot next year and that Mr. George give access by dropping the net two feet from the surface at low tide for 60 feet and that the net not be flagged so people can swim and fish close to the net. The area for access would begin 100 feet off shore. Associate Member Garrison seconded the motion, which was approved, 7-0.**

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14. RECOMMENDATIONS of the Recreational Fishing Advisory Board (RFAB).

Associate Member Dr. Jones said she was going to excuse herself from this matter because she has a proposal before the Board. She stressed that she has never and will never discussed the RFAB funding with fellow commission members in private or in public.

Chad Boyce, Recreational Fishing Specialist who is attending his last Commission meeting prior to moving to a new job with the Department of Game and Inland Fisheries, explained that the RFAB has completed its second funding cycle for this calendar year

and has recommended to the Commission a list of projects for approval and on the second page is a separate list of projects that were not recommended for funding

The Staff indicated it would support the recommendations of the RFAB, but would like to add item E to the list of projects for approval. The project is from Dr. Jones of Old Dominion University. The RFAB did not approve the project for three reasons, primarily because of the perception that the project was received late. We found that there was some misinformation on our web page that could have led someone to believe the deadline was July 1. If the commission approves the recommendations of RFAB it will leave only \$49,000 left. Dr. Jones' project is \$70,000. It may be an issue that needs to be discussed to fully fund her project.

Associate Member Holland asked how much money was left in the fund. Mr. said there is about a \$20,000 shortage, but funds could be available later in 2005. He said additional transfer of funds would be available early in 2005.

Commissioner Pruitt asked if there were any public comments on the proposals. No one spoke.

The following projects were recommended for approval by the RFAB:

- A) 2005 Virginia Game Fishing Tagging Program (Year 11). John Lucy and Claude Bain, VIMS and VMRC. \$57,408.
- B) 2005 Hampton Roads (Tidwater) Yourth Fishing Day (Year 8). Richard Welton, Coastal Conservation Association of Virginia, \$6,000.
- D) 2005 Children's Fishing Clinic (Year 8) Rob Cowling, Newport News Rotary Club and Coastal Conservation Association of Virginia, \$6,000.
- F) Coastal Conservation Association of Virginia Cape Charles Youth Fishing Day 2005. Richard Welton and Jennie Rogers Moore, Coastal Conservation Association of Virginia, \$595.
- H) Smith Landing Waterfront Improvement. Cheryl Sonderman, York County, \$215,767.
- I) Impact of Mycobacteriosis on the Striped Bass Recreational Fishery in the Chesapeake Bay. John Hoenig and Wolfgang Vogelbein, VIMS, \$84,800.

- J) The Value of Seagrass Habitats to the Ecosystem in the Chesapeake Bay. Rob Latour and Jacques van Montfrans, VIMS, \$58,221.

The following projects were not recommended for approval by the RFAB:

- C) Challenger Little League Tournament Marine Science Educational Booths. (Year 3) Richard Welton, Coastal Conservation Association of Virginia, \$800.

- E) How Seagrass Beds Support Healthy Fish Growth: a study of tropic structure in Chesapeake Bay using stable isotopes (Final year) Synthia Jones, Old Dominion University, \$70,169.

- G) St. Judge "Fishing for a Cure" Portion of the Little Creek Regatta. Di Ricks, St. Judge Little Creek Regatta. \$600.

- K) Additional Funding Support for Messick Point Boat Ramps & Parking. John Gill, City of Poquoson, \$200,310.

Associate Member Holland moved to approve the staff report regarding the RFAB recommendations, including Item E and that the money be forwarded for Item E when it becomes available. Associate Member Garrison seconded the motion, which was approved, 6-0.

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- 15. PUBLIC HEARING:** Consideration given to open additional areas to oyster harvest in the James River, York River and Chesapeake Bay for the 2004-2005

Dr. James Wesson, head, Conservation and Replenishment Department, asked the Commission to open three new hand scrape areas (the Blackberry Hangs area, an area on the north side of the York River in Public Ground No. 30, between the Coleman Bridge and Aberdeen Creek, and an area just above the James River Bridge up to White Shoals) and one patent tong area (in the Deep Rock region of the Chesapeake Bay).

Commissioner Pruitt asked if there were any comments from the public on this proposal. There were none.

Associate Member Garrison moved to open the areas. Associate Member Holland seconded the motion, which was approved, 6-0.

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16. REPEAT OFFENDERS

Lt. Col. Lewis Jones, Deputy-Chief, Law Enforcement, explained to the Commission the rules governing repeat offenders. He said a repeat offender is an individual who has been convicted or paid his/her fine for three violations within a 36-month period. The individual is written and told to bring all licenses with them when they appear before the Commission. The Commission has the authority to revoke all the licenses for a two-year period. Using the matrix, a first time repeat offender would receive a 12-month probation, the second offender, would receive a 90-day revocation and a third offender would receive a 180-days. A person can be brought before the Commission for abusive behavior or the nature of the offense is so server as to warrant Commission action.

The first individual was Willie F. Shiflette, Jr., who was already on probation for three crab violations when he received a summons on 7/12/04 for possession of over the limit of dark sponge crabs, Lt. Col. Jones explained. Mr. Shiflette did not appear before the Commission. The matrix requires that all of his licenses be revoked until Mr. Shiflette appears before the Commission. **Associate Member Holland moved and Associate Member second a motion to revoke all of Mr. Shiflette's licenses until he appears before the Commission. The motion was approved, 7-0**

The second individual was Andrews Parks, Sr. who did not accept his registered mail. He will be contacted in person and a new date to appear before the Commission will be set.

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17. Resolution

A resolution was brought by Carl Josephson, Senior Assistant Attorney General to the Commission for consideration.

Associate Member Holland moved that the Commission adopt the following resolution setting forth its interpretation of the word "Commission" in Code section 28.2-1203.A.5(iv) and, in any event, delegating authority to the Commissioner, and authorizing him to further subdelegate, the task of determining whether a pier, otherwise subject to Code section 28.2-1203.A.5, is, or is not, a navigational hazard. Associate Member Garrison seconded the motion, which was approved, 8-0.

**RESOLUTION BY THE VIRGINIA MARINE RESOURCES COMMISSION
CITIZEN BOARD INTERPRETING CODE § 28.2-1203.A.5(iv) and
DELEGATING AUTHORITY TO MAKE THE DETERMINATION CALLED
FOR BY CODE § 28.2-1203.A.5.(iv).**

WHEREAS, by 2003 Act of Assembly Chapter 973 ("Chapter 973"), Code § 28.2-1203.A.5 was amended to add several qualifications concerning when the owners of

riparian lands may, without the need for a permit from the Virginia Marine Resources Commission pursuant to Code §§ 28.2-1204 and 1207, place private piers for noncommercial purposes in the waters opposite those riparian lands; and

WHEREAS, among the qualifications added by Chapter 973 is that, pursuant to Code § 28.2-1203.A.5(iv), said “piers are determined not to be a navigational hazard by the Commission”; and

WHEREAS, Title 28.2 of the Code of Virginia does not consistently use the word “Commission” to refer solely to the Citizen Board (“Citizen Board”) authorized and described in Code § 28.2-102(A), but frequently uses the word “Commission” to refer to the full time staff of the Commission (“staff”), appointed and supervised by the Commissioner as chief executive officer as provided by Code § 28.2-104; and

WHEREAS, the Commission is aware that literally hundreds of applications by riparian owners to place private piers for noncommercial purposes in the waters opposite their riparian lands are annually reviewed by the staff; and

WHEREAS, considering the existing responsibilities of the Citizen Board set out in Code of Virginia Title 28.2, it is unreasonable, both from the perspective of the time available to the Citizen Board and the impact of additional delay on citizens, to expect that the General Assembly intended, by the use of the word “Commission” in Code § 28.2-1203.A(iv), to require the Citizen Board to review the hundreds of applications for private piers in order to determine that each is not a navigational hazard; and

WHEREAS, Virginia law recognizes the authority of an agency of the Commonwealth to interpret the statutes under which it operates and that such interpretations, when reasonable, are accorded judicial deference;

NOW BE IT RESOLVED that the Virginia Marine Resources Commission Citizen Board hereby interprets the word “Commission” in Code § 28.2-1203.A.5.(iv) to authorize the Commissioner and staff appointed by him to determine whether piers, otherwise authorized to be placed without a Commission permit pursuant to Code § 28.2-1203.A.5, are navigational hazards, and

Notwithstanding, but in addition to, the foregoing, the Virginia Marine Resources Commission Citizen Board hereby delegates to the Commissioner, and authorizes him to further sub-delegate to staff appointed by him, the task of determining whether piers, otherwise authorized to be placed without permit pursuant to Code § 28.2-1203.A.5, are navigational hazards, and

In so interpreting and delegating the aforesaid authority, the Virginia Marine Resources Commission Citizen Board is mindful that Code § 62.1-164 sets out a private judicial remedy for citizens who nevertheless may believe that a private pier or landing

obstructs the navigation of a watercourse, and that Code § 2.2-4025.A(v) exempts from judicial review under the Administrative Process Act (“APA”), Code § 2.2-4000, *et seq.*, those “matters subject by law to a trial de novo in any Court.”

In so interpreting and delegating the aforesaid authority, the Virginia Marine Resources Commission Citizen Board recognizes that, through necessity and customary practice over time, the Commissioner and the staff appointed by him, perform, and have performed, some other tasks addressed to the “Commission” in Code Title 28. Nothing herein is intended to disapprove such actions, retroactively or prospectively, which has customarily developed over time as a matter of necessity or practicality. Rather, this Resolution is intended to clarify a current matter, arising from the enactment of Chapter 973, for the further guidance of the Commissioner and staff appointed by him and for the information of citizens.

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There being no further business, the meeting was adjourned at approximately 6:10 p.m.

William A. Pruitt, Commissioner

Wilford Kale, Acting Recording Secretary