

MINUTES

Commission Meeting**June 26, 2007**

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

Steven G. Bowman	Commissioner
Ernest L. Bowden, Jr.)	
J. Carter Fox)	
J. T. Holland)	
John R. McConaugha)	Associate Members
Wayne McLeskey)	
Richard B. Robins, Jr.)	
Kyle J. Schick	
J. Edmund Tankard, III)	
Carl Josephson	Sr. Assistant Attorney General
David C. Grandis	Assistant Attorney General
Jack Travelstead	Chief Deputy Commissioner
John M. R. Bull	Director-Public Relations
Katherine Leonard	Recording Secretary
Jane McCroskey	Chief, Admin/Finance
Sunita Hines	Bs. Applications Specialist
Rob O'Reilly	Deputy Chief, Fisheries Mgmt.
Joe Grist	Head, Plans and Statistics
Stephanie Iverson	Fisheries Mgmt. Specialist, Sr.
Sonya Davis	Fisheries Mgmt. Specialist, Sr.
Joe Cimino	Fisheries Mgmt. Specialist, Sr.
Lewis Gillingham	Fisheries Mgmt. Specialist
Mike Johnson	Fisheries Mgmt. Specialist
Alicia Middleton	Fisheries Mgmt. Specialist
Warner Rhodes	Deputy Chief, Law Enforcement
Thomas Fitchett	Marine Police Officer
David Drummond	Marine Police Officer

Commission Meeting

**14322
June 26, 2007**

David Deemer
Amy Dodson
Steve Head
Jared Parks
Zachery Widgeon
Javier Arce

Marine Police Officer
Marine Police Officer
Marine Police Officer
Marine Police Officer
Marine Police Officer
Marine Police Officer

Bob Grabb
Tony Watkinson
Chip Neikirk
Jeff Madden
Randy Owen
Hank Badger
Ben Stagg
Jay Woodward
Benjamin McGinnis
Justin Worrell
Elizabeth Gallup
Danny Bacon
Bradley Reams

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

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

Other present included:

R. Keating
Joe Littleton
Rebecca Francese
Emmett Carawan
Emily Batchelet
Ellis W. James
Michael Jewett

P. Lynch
Ann Littleton
Bert Parolari
Richard Ayer
Richard Cantwell
Marina Phillips

Carey Keaney
Steve Stewart
Maria Nold
Robert H. Meyer
Jeff Watkins
Michelle Manners

Kevin Keaney
Dennis H. Dietrich
Randy Pack
Richard Batchelet
Stuart Mackler
Thad McDonald

and others

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Commissioner Bowman called the meeting to order at approximately 9:35 a.m. All members were present.

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Associate Member Holland gave the invocation and Carl Josephson, Senior Assistant Attorney General led the pledge of allegiance.

SPECIAL INTRODUCTIONS:

Joe Grist of the Fisheries Management Division introduced Alicia Middleton, who replaced Joe Cimino as a Fisheries Management Planner.

Lt. Col. Warner Rhodes of the Law Enforcement Division introduced six (6) new Marine Police Officers: David Deemer, Amy Dodson, Steve Head, Jared Parks, Zachery Widgeon, and Javier Arce.

Jane McCroskey of the Administration and Finance Division introduced Sunita Hines who replaced Andy McNeil in the Business Applications Department, as the Business Applications Specialist.

Commissioner Bowman introduced the new Director for Public Relations, Mr. John M. R. Bull.

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APPROVAL OF AGENDA: Commissioner Bowman asked if there were any changes to the agenda. Bob Grabb, Chief, Habitat Management said that staff was requesting that Item 5, H & H Enterprises, Inc., #06-1910 be removed from the agenda, at the request of the applicant. The matter was deferred until the July 24, 2007 meeting. There were no other changes.

Commissioner Bowman asked for a motion to approve the agenda. Associate Member Tankard moved to approve the agenda, as amended. Associate Member Holland seconded the motion. The motion carried, 9-0. The Chair voted yes.

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MINUTES: Commissioner Bowman asked, if there were no corrections or changes, for a motion to approve the May 22, 2007 meeting minutes. **Associate Member Robins**

moved to approve the minutes, as circulated. Associate Member Holland seconded the motion. The motion carried, 9-0. The Chair voted yes.

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

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

Bob Grabb, Chief, Habitat Management Division, reviewed items 2A through 2L for the Commission. He said that staff was recommending approval of these items.

Commissioner Bowman opened the public hearing and asked if anyone was present, pro or con to address these items.

Randy Pack, representative for Item 2L. Pack Family Limited Partnership, #04-2454, was sworn in and his comments are a part of the verbatim record. Mr. Pack said they just wanted to make sure that they met all requirements and the Commission was satisfied with everything as proposed. He said he would answer any questions. There were no questions.

No one else asked to address the Commission on these items. The public hearing was closed.

Commissioner Bowman asked for a motion for Items 2A through 2L. **Associate Member Schick moved to approve these items. Associate Member Robins seconded the motion. The motion carried, 9-0. The Chair voted yes.**

- 2A. **FAIRFAX COUNTY DEPARTMENT OF PUBLIC WORKS AND ENVIRONMENTAL SERVICES, #07-0368**, requests authorization to install 175 linear feet of gabion baskets to provide stream bank stabilization to Pimmit Run in Falls Church in Fairfax County.

Permit Fee.....\$100.00

- 2B. **SCENIC RIVER GOLF, LLC, #07-0613**, requests authorization to construct a 48-foot long by 36-foot wide temporary road crossing consisting of four culvert pipes impacting 1,728 square feet of Tuscarora Creek adjacent to the Goose Creek Golf Course in Loudoun County. Staff recommends a royalty of \$1,728.00 for the

encroachment over State-owned submerged bottom at a rate of \$1.00 per square foot.

Royalty (encroachment 1,728 sq. ft. @ \$1.00/sq. ft.).....	\$1,728.00
Permit Fee.....	\$ 100.00
Total Fees.....	\$1,828.00

2C. DEPARTMENT OF THE NAVY, #03-1659, requests authorization to modify their previously authorized permit to include the installation of a 300-foot long by 3-foot wide steel sheetpile breakwater located at the entrance to the cove area at Pier 5 adjacent to property situated along the Elizabeth River in Norfolk.

No applicable fees – Permit Modification

2D. HAMPTON ROADS TRANSIT, #06-0441, requests authorization for impacts to 8,354 square feet of Smith Creek, Holt Channel, Ohio Creek, Moseley Creek, Broad Creek, and Mill Creek consisting of installation of bridge piers, bridge crossings, timber fender expansion, installation of 30-inch utility pipe, fill and culverts for the Vehicle Storage and Maintenance Facility, temporary work platforms, and storm drain outlets as a result of the construction of the Norfolk Light Rail in Norfolk.

Permit Fee.....	\$100.00
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2E. HIGGERSON-BUCHANAN, INC., #06-2845, requests authorization to dredge 13,700 cubic yards of State-owned subaqueous bottom to create a 550-foot long by 130 foot wide (maximum) barge unloading berth with maximum depths of minus 14 (-14) feet at mean low water, and install one (1) seven-pile cluster dolphin at the confluence of Mains Creek and the Southern Branch of the Elizabeth River, located adjacent to their commercial property at 5300 Bainbridge Boulevard in Chesapeake. The dredged material will be removed mechanically and disposed of in their adjacent upland property. Recommend approval with a royalty in the amount of \$6,165.00 for the new dredging 13,800 cubic yards of State bottom at a rate of \$0.45 per cubic yard and \$200.00 for the encroachment of the dolphin over 100 square feet of State bottom at a rate of \$2.00 per square foot.

Royalty Fees (dredging 13,700 cu. yds. @\$0.45 cu.yd.).....	\$ 6,165.00
Royalty Fees (encroachment 100 sq. ft. @ \$2.00/sq. ft.).....	\$ 200.00
Permit Fee.....	\$ 100.00
Total Fees.....	\$ 6,465.00

2F. LINDA ABSALOM, #07-0182, requests authorization to install approximately 586 linear feet of riprap, the toe of which may extend a maximum of 10 feet channelward of the existing bulkhead and mean low water, for shoreline

protection adjacent to 1501 Quail Point Road in the Linkhorn Point subdivision situated along Linkhorn Bay in Virginia Beach.

Permit Fee.....\$100.00

2G. ROB QUARTEL, #06-2606, requests authorization to construct two (2) 25-foot by 100-foot riprap breakwaters and one (1) 25-foot by 150-foot breakwater with 800 cubic yards of sandy material placed landward of the breakwaters, as beach nourishment, and to install two osprey nesting platforms on existing pilings adjacent to his property situated along Milford Haven at 1071 Gum Thicket Road in Mathews County. Staff recommends approval with the assessment of a royalty in the amount of \$550.00 for the encroachment of the beach nourishment fill on 11,000 square feet of State-owned submerged land at a rate of \$0.05 per square foot.

Royalty Fees (nourishment 11,000 sq. ft. @ \$0.05/sq. ft.)....\$550.00
Permit Fee..... \$100.00
Total Fees.....\$650.00

2H. CITY OF BUENA VISTA, #07-0337, requests authorization to replace an existing bridge with a 48-foot wide by 34-foot long clear span bridge, crossing over 16 linear feet of Chalk Mine Run, and to install approximately 100 linear feet of riprap stream bank stabilization on the upstream side of the bridge, along Rockbridge Avenue in the City of Buena Vista.

Permit Fee.....\$100.00

2I. MEADWESTVACO CORPORATION, #07-0395, requests authorization to install approximately 285 linear feet of riprap scour protection along the upstream and downstream toe of an existing low-water bridge, along the Jackson River at their facility in Allegheny County.

Permit Fee..... \$100.00

2J. TIMOTHY McCULLOCH, ET AL, #04-1598, requests a permit modification to extend a 120-foot long timber jetty an additional 30 linear feet at his property situated along The Thorofare in York County. Recommend approval and an encroachment royalty of \$30.00 for the encroachment of the jetty over an additional 60 square feet of State-owned subaqueous land at a rate of \$0.50 per square foot.

Royalties Fees (encroachment 60 sq. ft. @ \$0.50/sq. ft.).....\$ 30.00

2K. HENRICO COUNTY DEPARTMENT OF UTILITIES, #07-0854, requests authorization to install a submerged water line and sewer force main, by directional bore method, beneath 25 linear feet of White Oak Swamp Creek to provide increased public utility service to eastern Henrico County.

Permit Fee.....\$100.00

2L. PACK FAMILY LIMITED PARTNERSHIP, #04-2454, requests authorization to modify their existing permit to install a 6-foot by 20-foot aluminum gangway to connect two (2) existing boardwalks at the applicant's marina/restaurant/hotel/retail shops complex along the Pagan River in the Town of Smithfield in Isle of Wight County.

No applicable fees – Permit Modification

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3. CLOSED MEETING FOR CONSULTATION WITH OR BRIEFING BY COUNSEL

Commissioner Bowman asked for a motion to convene a closed meeting.

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 items:

Item 4. Virginia Timberline, LLC, #06-017

VMRC versus Michael Jewett

The motion was seconded by Associate Member Tankard. The motion carried, 9-0.

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 Tankard seconded the motion. Commissioner Bowman held a Roll Call vote:

AYES: Bowden, Bowman, Fox, Holland, McConaugha, McLeskey, Robins, Schick, and Tankard.

NAYS: NONE

ABSENT DURING VOTE: NONE

ABSENT DURING ALL OR PART OF CLOSED MEETING: NONE

The motion carried, 9-0.

Katherine Leonard, Recording Secretary

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- 4. **VIRGINIA TIMBERLINE, LLC**, continuation of the hearing concerning violation of the Code of Virginia §28.2-1203, more specifically, the disturbance and alteration to subaqueous lands of the State of Virginia within several tidal tributaries of Lawnes Creek in Isle of Wight County without prior authorization. Notice of Violation #06-17, continued from the May 22, 2007 meeting.

Ben Stagg, Environmental Engineer, Sr., gave the presentation with slide. His comments are a part of the verbatim record. Mr. Stagg stated that he would not be making the full presentation since it was done at the last meeting and the attorneys representing Virginia Timberline had been able to listen to the recording of that meeting. He explained that the map on the slide showed the area destroyed, which was approximately 282 acres.

Commissioner Bowman explained that the matter had been tabled until Virginia Timberline's legal counsel could be present at the Commission meeting. He asked if their representative was present and wished to address the Commission.

Marina Phillips, attorney with Kauffman and Canoles, representing Virginia Timberline, LLC, was present and her comments are a part of the verbatim record.

Michelle Manners, Corporate Attorney for the Headquarters office in Massachusetts, was sworn in at this time.

Ms. Phillips explained that they were not present to dispute the violation. She said they just wanted to discuss the motion and civil charge proposed for this violation. She said they had listened to the May recording and the civil charge was not commensurate with the action taken. She referenced the Code of Virginia, Section 28.2-1213 (B), which she felt did not give the Commission the authority to assess these charges on a per day basis. She explained that she had worked with DEQ and they could do it as the statute gave them that explicit authority. She further explained that the \$370,000.00 civil charge proposed was inconsistent with other assessments, historically, both in the amount and number of days. She referred the Commission to a Virginian Pilot article written in May 2006 when a Norfolk dredging project occurred and the Commission penalized both the applicant and the contractor for illegal filling. She said the contractor was penalized \$15,000.00 and the applicant was penalized \$14,621.00, for a total of a little under \$30,000.00 for the violation. She said the Norfolk Dredging project violation impacted a much larger area and it was determined to be permanent. She said in comparison Virginia Timberline, LLC, involved a much smaller area, which was not permanent, as it would recover over a period of time.

Commissioner Bowman stated that the length of time the area will be impacted is still a question.

Ms. Phillips stated that most of the violation was on wetlands. She said that staff had stated that there were 282 acres, but that only 2 acres were subaqueous bottomland.

Commissioner Bowman said that Virginia Timberline personnel had given a figure of 142,000 linear feet of tracks and he asked if their counsel agreed with that figure.

Ms. Phillips responded yes, but the discussion was about the level of civil charges and the degree of violation. She said in her research, as a biologist, she had tracked the history of the land back to the 1800's. She said in the records from 1933 – 1955, the property line included marsh, and if this were part of a King's Grant then it would not be under the jurisdiction of the VMRC. She said the Commission should consider this as well. She stated that they wanted to resolve this matter today and were requesting that the Commission reconsider the civil charge of \$370,000.00. She stated that the applicant would not agree with it, but they were agreeable to a lesser penalty.

Commissioner Bowman explained that the original motion was never voted on and he asked Mr. Josephson whether they needed to withdraw the original motion from last month's meeting. Carl Josephson, Senior Assistant Attorney General, explained that it

was not necessary to do that, as the Commission could discuss the matter and make a substitute motion. Commissioner Bowman noted that the Isle of Wight County Wetlands Board indicated 37 days and personnel with Virginia Timberline indicated 142,000 linear feet and these benchmarks were on record.

Associate Member Fox explained that the board was representing the Commonwealth who owned the land and they were looking at the number of trespasses imposed on land owned by the Commonwealth and Virginia's citizens.

Commissioner Bowman stated that this was an egregious violation and there was no comparison to the other case. The cases were just not equal.

Ms. Phillips explained that she was not saying the cases were equal and from a scientific aspect the Salmon's filling violation was worse, and, also was viewed by the court as worse. She noted that VIMS in their comments stated that this was not a permanent situation, as the area would recover.

Commissioner Bowman asked what did the defendant suggest the Commission do? Ms. Phillips stated that they suggested a civil charge of \$20,000.00 to \$50,000.00.

After further discussion about the amount and the agency's authority, Associate Member Holland made a substitute motion and moved to assess a civil charge of \$100,000.00. Associate Member Robins seconded the motion. The motion carried, 9-0. The Chair voted yes.

Commissioner Bowman then stated that if Virginia Timberline did not accept this amount, the matter would be turned over to the Attorney General's office for further enforcement action.

Ms. Manners asked to speak. She explained that they were concerned with the harm the subcontractor had done to their reputation. She said they wanted to be good partners with the Commonwealth and to make sure this did not occur again. She then indicated that Virginia Timberline agreed with the \$100,000.00 civil charge.

CIVIL CHARGE.....\$100,000.00

5. **H & H ENTERPRISES, INC., #06-1910**, requests Commission reconsideration of the royalty assessment associated with the December 8, 2006, approval of a permit for dredging and commercial pier construction adjacent to their property situated along the Western Branch of the Elizabeth River in Portsmouth. A royalty in the amount of \$39,450.00 was assessed for the encroachment of the pier and vessel mooring plan over 19,725 square feet of State-owned subaqueous land,

at a rate of \$2.00 per square foot, based on input from the permit holder. The dredging royalty was waived since the former property owner, Virginia Boat and Yacht, obtained a permit to dredge this same area (VMRC #98-0776), paid the royalty, but never performed the dredging. The applicant is requesting Commission reconsideration and a waiver of the assessed royalty, claiming an exemption pursuant to Section 28.2-1206(B) of the Code of Virginia.

Pulled off the agenda -- Deferred until the July Commission Meeting, at the applicant's request.

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6. **H. ALEXANDER WILSON, III, #07-0384**, requests authorization to construct an 18-foot by 36-foot open-sided boathouse near the channelward end of a 125-foot long private noncommercial pier adjacent to his property situated along Billups Creek off Fitchets Wharf Road in Mathews County. An adjoining property owner protested the project.

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

Mr. Neikirk explained that Mr. Wilson's property is located along Billups Creek, a tributary of Stutts Creek in the Moon region of Mathews County. Billups Creek is approximately 500 feet wide at the project site. The shoreline was generally low and the development along the creek is primarily residential. Mr. Wilson's proposal was to construct an 18-foot by 36-foot open-sided boathouse at the channelward end a private pier extending 125 feet channelward of mean high water. According to the application, the channelward end of the pier would reach a mean low water depth of approximately minus three (-3) feet. The pier as designed would originate approximately 65 feet from the southern (upstream) property line and would angle toward the center of the property.

Mr. Neikirk stated that Kevin Keany the upriver adjoining property owner protested the project. He believed the pier and boathouse would interfere with access to his existing pier and would adversely affect his view, property value, and enjoyment of Billups Creek. The proposed boathouse would not encroach over any public or privately leased oyster planting ground, and no State agencies had provided comments on the project. Staff does not believe the proposed pier and boathouse would adversely affect navigation within the creek nor does it appear that the structures would impede access to Mr. Keany's pier.

Mr. Neikirk said that since Mathews County did not restrict the construction of private boathouses, had the adjacent property owner not objected to the project, the proposed structure would have qualified for the exemption provided by §28.2-1203 (A)(5) of the Code of Virginia. The proposed open-sided design should minimize the visual impacts associated with the structure. Accordingly after evaluating the merits of the project

against the concerns expressed by those in opposition to the project, and after considering all of the factors contained in §28.2-1205(A) of the Code of Virginia, staff recommended approval of the project, as proposed.

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

Mr. Jeff Watkins, agent for the applicant, was sworn in and his comments are a part of the verbatim record. Mr. Watkins stated that they appreciated the staff’s work. He said that they were limited in options to get to deeper water and there was no way of avoiding impacting the neighbors no matter how it was done. He said they felt the open-sided boathouse would be the least impacting.

Alexander Wilson, applicant was sworn in and his comments are a part of the verbatim record. Mr. Wilson said he appreciated the Commission’s desire to protect the bay, but they had taken everyone into consideration when they put this proposal together.

Kevin Keany, adjoining property owner and protestant was sworn in and his comments are a part of the verbatim record. Mr. Keany said that the site of the project was in front of their property and they were concerned with the adverse impact on the value of their property. He said that putting it on the south side of Mr. Wilson’s property impacted them. He said they want the project to be moved to the north side of the applicant’s property.

Karen Keany, adjoining property owner and protestant was sworn in and her comments are a part of the verbatim record. Ms. Keany provided pictures showing that the structure was directly in front of their property. She said that the project should be downsized and moved to the north side of the property.

Associate Member Fox noted that moving it to the north side of the applicant’s property would require the project to cross an even greater marsh area.

Mr. Watkins in his rebuttal agreed that it would cross over marsh, if it were on the north side. He said if it were to be relocated, the pier would also have to be extended out into the creek more and even without a boathouse it would still impact the adjoining property owners.

After the discussion was concluded, Associate Member Tankard said that Section 28.2-1205(A) of the Code of Virginia needed to be considered here in this matter. He made a motion to accept the staff recommendation. Associate Member Schick seconded the motion. The motion carried, 9-0. The Chair voted yes.

Permit Fee.....\$25.00

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7. **MR. & MRS. JOSEPH LITTLETON, III, #06-2204**, request authorization to construct a 20-foot wide by 35-foot long, single-slip, open-sided boathouse onto an existing, private, non-commercial pier, adjacent to their property situated along the Potomac River in Stafford County. An adjoining property owner protested the project.

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

Mr. McGinnis explained that the proposed project was located along the Potomac River in Stafford County, immediately downstream of the mouth of Aquia Creek. The applicants had an existing pier, which extended approximately 290 feet channelward of mean low water. Staff had previously determined that this structure qualified for statutory authorization, pursuant to Section 28.2-1203 (A)(5) of the Code of Virginia. The applicants were now seeking authorization to construct a 20-foot wide by 35-foot long, open-sided boathouse, onto their existing private, non-commercial pier. As proposed, the boathouse would cover a single slip with an existing boatlift.

Mr. McGinnis stated that Ron Woltz, an adjacent property owner to the applicants, contacted staff by telephone on September 11, 2006 and discussed his objections to the proposed project. At that time staff had not yet received the application. Following receipt and review of the applicants' Joint Permit Application, staff formally notified Mr. and Mrs. Woltz of the applicant's proposed project. Staff then received a formal letter of protest, dated October 19, 2006, from Mr. and Mrs. Woltz. The Woltzs' letter indicated they were opposed to the proposed project for several reasons including navigation, the public's right to fish and hunt, and impacts to submerged aquatic vegetation (SAV) and habitat resources. They were also concerned with their own riparian access, use and enjoyment of the water, including their stated "right to enjoy an unimpeded view of the river." In addition, the protestants argued that the applicants' proposed boathouse was not necessary for the use of the pier or for access to the river. They said that the pier's length was excessive and that the proposed boathouse was simply a convenience that did not benefit the Commonwealth, the public, or the adjacent property owners.

Mr. McGinnis explained that were it not for the objections, the proposed boathouse would otherwise have qualified for the statutory authorization provided in Section 28.2-1203 (A)(5)(iv) of the Code of Virginia, since the proposed 700 square foot roof structure met but did not exceed, the 700 square foot threshold allowed for private, non-commercial boathouses.

Mr. McGinnis stated that the Virginia Institute of Marine Science's *Preliminary 2006 Distribution of Submerged Aquatic Vegetation (SAV) in the Chesapeake Bay and*

Tributaries and the Coastal Bays distribution maps indicated that the project site was located in an area with SAV densities ranging between 70 and 100 percent. The published data from VIMS' 2005 SAV distribution report and staff's own observations at this site and within nearby Aquia Creek indicate that hydrilla (*Hydrilla verticillata*), a non-native invasive species, dominated SAV beds along the tidal freshwater reaches of the Potomac River and its tributaries.

Mr. McGinnis said that the U.S. Army Corps of Engineers, Norfolk District, had determined that the proposed project was not contrary to the public interest and issued a Regional Permit 17. The Department of Game and Inland Fisheries, by e-mail dated December 21, 2006, stated that the project was located in an area recognized as a Bald Eagle Concentration Area and a Confirmed Anadromous Fish Use Area. However, they went on to state that due to the amount of existing residential development around the site and since the pier had already been constructed, they did not anticipate any adverse impacts upon bald eagles or anadromous fish. DGIF also recommended strict erosion and sediment control measures be used during construction of the proposed boathouse. No other State agencies had raised concerns or objections to the proposed project.

Mr. McGinnis explained that while staff was sensitive to the concerns of the protestant, staff did not feel that the proposed boathouse was excessive since it met the 700 square foot threshold provided in the statutory authorization in Section 28.2-1203 of the Code of Virginia. When considering that the protestants owned nearly 350 feet of waterfront and that their home was approximately 600 feet from the proposed boathouse, staff also did not believe that the applicants' proposed boathouse would significantly obstruct the protestants' view or access to the Potomac River. In addition, while the proposed boathouse would be located within an identified SAV bed, staff did not believe that impacts would significantly increase over that already caused by the existing pier.

Accordingly, Mr. McGinnis said that after evaluating the merits of the project against the concerns expressed by those in opposition to the project, since impacts resulting from the use of State-owned submerged lands should be minimal, and after considering all of the factors contained in Section 28.2-1205 (A) of the Code of Virginia, staff recommended the project be approved, as proposed.

Commissioner Bowman asked if the applicant was present.

Joseph Littleton, applicant, was sworn in and his comments are a part of the verbatim record. Mr. Littleton thanked the Commission for the positive interaction he had with VMRC during the application process.

Commissioner Bowman asked if anyone was present in opposition. There were none. He asked for further discussion or a motion.

Associate Member Holland moved to accept the staff recommendation. Associate Member Robins seconded the motion. The motion carried, 9-0. The Chair voted yes.

Permit Fee.....\$100.00

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8. RICHARD J. CANTWELL, #06-2892, requests authorization to change the use of his existing 156-foot long by 5-foot wide pier from private to commercial to accommodate his shellfish business. Mr. Cantwell also requests authorization to install two (2) 4-foot by 10-foot upwellers with intake and outfall pipes; one (1) 2-foot by 10-foot oyster grader and to moor two (2) workboats to the open-pile pier situated adjacent to his property along Warehouse Creek at 7264 Otter Road in the Bayford area of Northampton County. Several nearby property owner 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 project was located on the south side of Warehouse Creek and was one mile from the Town of Bayford. Warehouse Creek is approximately 1,100 linear feet wide at the project location with a narrow channel running down the middle of the creek. The controlling depth in the immediate area is approximately five to six feet. Most of the development along the creek is residential. Mr. Cantwell’s parcel, however, was zoned A-1 agriculture.

Mr. Badger stated that Mr. Cantwell also leased a total of 33.94 acres of oyster-planting ground adjacent to and near his highland property. The three leases were used to propagate oysters for his small wholesale business under the name of “Oysters on Line.”

Mr. Badger said that Mr. Cantwell initially submitted an application for a 380-foot long private pier in 2001(VMRC #01-0137). That proposed pier was 90 feet off the property line he shared with Mr. Steve Stewart. In February 2002, Mr. Cantwell requested a modification to the above application. The modification was to move the proposed pier to within 20 feet of Mr. Stewart’s property line. At the time, Mr. Cantwell and Mr. Stewart were considering the possibility of a joint-use pier to cut down on the cost of building two piers and thereby eliminating the need for a second pier. In 2002, Mr. Cantwell elected to build a 156-foot long by 5-foot wide private pier since he and Mr. Stewart could not come to an agreement on a joint-use pier. Mr. Stewart then applied for a 200-foot long private pier (VMRC #05-2868) that was authorized by statute. His pier should be completed in the fall.

Mr. Badger further said that Mr. Cantwell's oyster business had now grown to the point that staff believed the pier no longer qualified for the private pier exemption. The pier was now used to load and unload his oysters, which were then taken to market by trucks from his property. The applicant had also requested authorization to install two upwellers and a small oyster grader on the existing pier.

Mr. Badger stated that the adjacent property owners protested the project. They expressed concerns that the project would have a negative impact on their property values in this mostly residential community, as well as the noise from the upweller pump. Mr. Stewart also had concerns that Mr. Cantwell would move his oyster operation off the upland onto his workboat and that the boat would become a permanent extension of his pier.

Mr. Badger said that the Health Department had informed staff that the project was in compliance with the Sanitary Regulations for Marinas and Boat Moorings and that it had been approved.

Mr. Badger further said that the Virginia Institute of Marine Science (VIMS) indicated that the individual and cumulative adverse environmental impacts resulting from this activity should be minimal.

Mr. Badger noted for the Commission that the Northampton County Wetlands Board had approved their portion of this project, as submitted, at their February 21, 2007, meeting. No other State agencies had raised any objections to the project.

Mr. Badger said that in granting or denying any permit for use of State-owned bottomlands, the Commission was guided in its deliberations by the provisions of §1 of the Constitution of Virginia; and, shall consider the effects of the proposed project upon other reasonable and permissible uses of State waters and State-owned bottomlands, the marine and fisheries resources of the Commonwealth, the wetlands of the Commonwealth, and the adjacent or nearby properties as well as the anticipated public and private benefits. The Commission had generally regarded its authority as extending only to the physical and ecological effects on adjacent properties, when such effects were the direct result of the subaqueous encroachment. Generally, VMRC did not consider the broader questions of local land use policies and planning. Although the property surrounding the applicant's property was considered residential, the Northampton County Zoning Board had established Mr. Cantwell's property as A-1 for agriculture. This zoning classification allowed for aquaculture uses by right.

Mr. Badger stated that after evaluating the merits of the entire project against the concerns expressed by those in opposition to the project, and after considering all of the factors contained in §28.2-1205(A) of the Code of Virginia, staff recommended approval of the project as proposed, with a royalty assessed at a rate of \$1.50 per square foot for the bold outline of the pier and two slips.

Commissioner Bowman asked if the applicant wished to address the Commission.

Richard Cantwell, applicant was sworn in and his comments are a part of the verbatim record. Mr. Cantwell stated that staff had provided an accurate description of the project. He said that both protestants were aware of his business when they moved into the area.

Associate Member Holland asked if staff had asked him to remove the upweller structures. Mr. Cantwell stated that he did remove them and everyone was aware that he had put the structures back. He said that the upweller was brought back out as it was needed and the grader was located on his vessel. Associate Member Holland asked Mr. Badger if he had asked Mr. Cantwell to remove them. Mr. Badger responded yes, but he had not told him he could not put them back.

Associate Member Tankard asked Mr. Cantwell how his operation worked. Mr. Cantwell explained that he obtained the seed when it was 1-2 mm from VIMS and would grow them out to marketable size. He explained it took about 1½ years to get the oysters to market size. He said the oysters filtering water were both a benefit and contributing factor to the improved health of the water and plants.

Commissioner Bowman asked if anyone in opposition wished to address the Commission.

Richard Batchelet, adjoining property owner and protestant was sworn in and his comments are a part of the verbatim record. Mr. Batchelet said that he was aware of the operation being there when he moved into the area and he was not opposed to aquaculture and its benefits. He said this operation duplicates the Bayford operation just one mile away and here was one individual expanding his operation. He said everyone should be living in harmony and he had concerns with the infrastructure at this site. He said there needed to be a balance for all and some relief given to others. He said the applicant did not have permission to use this area for commercial purposes. He provided overhead maps for the Commission to assist in his presentation.

Steve Stewart, adjoining property owner and protestant was sworn in and his comments are a part of the verbatim record. Mr. Stewart stated that he planned to retire at this location. He said he had lived in Virginia all his life and was aware of the nature of the area and the importance of aquaculture. He said he was not totally opposed to the project, but was concerned with the practices of the operation. He said that staff had asked Mr. Cantwell to remove equipment. He said this was not a situation that had just come up. It had been going on for years and staff had just started taking action. He said that he felt that the VMRC staff was biased. He said there should be a compromise in the middle. He said that he was requesting that Mr. Cantwell be required to keep all of his activity to the west side of his pier because his property was only 80' from the other side and the activity would impact him and his family.

Stewart Macklin, adjoining property owner and protestant, was sworn in and his comments are a part of the verbatim record. Mr. Macklin was concerned that Mr. Cantwell had applied for a private pier and this was now to be a commercial pier. He said he was also concerned with the noise and visual pollution and the impact this might have on his property values.

Richard Ayer, representative of a group called Shorekeepers, was sworn in and his comments are a part of the verbatim record. Mr. Ayer stated that he was in support of the project, as this area was zoned commercial and it was consistent with other land uses. He said Mr. Cantwell's oyster grounds were right there at the site. He said he wanted this to be approved wherever necessary. He said that Mr. Cantwell had approximately 1,000,000 oysters on his grounds.

Robert Meyer, downstream neighbor, was sworn in and his comments are a part of the verbatim record. Mr. Meyer explained that this was close to an outfall and would be best for the health of the waters. He said he encouraged the Commission to approve it so the water quality would improve.

Mr. Cantwell in his rebuttal stated he hoped to be taken seriously and have his request approved.

Associate Member Robins asked about the suggestion to limit mooring to the west side of the pier. Mr. Cantwell said that he needed the option of using both sides for tying up his larger boats when the weather made it necessary. He suggested that the protestant could move his pier, as he had 135 feet of waterfront.

Associate Member Holland stated that the operation of a commercial pier was not in keeping with this area, as the operation could be done on the upland. He said he moved to deny the permit. Associate Member Bowden seconded the motion for discussion purposes. He said it was a murky issue, private pier versus commercial pier. He said it was to be used by one individual, but concessions were needed, as suggested. He said also that a limit for tying up the boats could be set for long-term or overnight mooring. He said this was an ongoing business and he could not support the motion. **Associate Member Robins stated he agreed with Associate Member Bowden in that it was gray area and he appreciated the neighbor's willingness to compromise. He said that aquaculture was an important part of the shellfish industry. He offered a substitute motion to approve the permit and limit overnight mooring on the west side of the pier. Associate Member Bowden asked about the equipment. Associate Member Robins agree to add an amendment to limit the use of the equipment to when it was needed. Associate Member Holland stated that limited overnight mooring did not address daytime activity and that was not fair to other individuals.**

Commissioner Bowman asked for a second on the substitute motion and there was none. He explained since there was no second, the substitute motion failed and the original motion would need to be considered.

Associate Member Tankard explained that the County had approved it and it was a case of upland users versus aquaculture. He said the creek had historical background for the fishery being in this area and there were a large number of oysters being produced. He made another substitute motion to support the staff recommendation. Associate Member Robins seconded the motion. The motion carried, 5-4. Associate Member Bowden, Holland, and Schick and the Chair all voted no.

Roll Call

Bowden	No	Tankard	Aye	Chair	No
Fox	Aye	McConaugha	Aye		
Holland	No	McLeskey	Aye		
Schick	No	Robins	Aye		

Royalty Fees (encroachment 2,620 sq. ft. @ \$1.50/sq. ft.)....	\$3,930.00
Permit Fee.....	\$ 25.00
Total Fee.....	\$3,955.00

The Commission broke for lunch at approximately 12:20 p.m. The meeting was reconvened at approximately 1:15 p.m.

Commissioner Bowman read a news release from NOAA on the appointment of Associate Member Rick Robins to the Mid-Atlantic Fisheries Management Council. He congratulated Mr. Robins on his appointment.

- 9. **RICHARD KEATING, #05-2587**, requests authorization to increase the height of his 222-foot long, low-profile bulkhead an additional two (2) feet at his property situated along Chincoteague Bay adjacent to lots 1456 and 1457 in the Captains Cove subdivision of Accomack County.

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 project was located along Chincoteague Bay near the mouth of Swans Gut in the Captains Cove subdivision. The Captains Cove subdivision contained 4,800 lots, of which only about 25 % had been developed. The subdivision also consisted of a nine (9)-hole golf course, tennis courts, swimming pool and a yacht club with a marina. Mr. Keating originally applied for a permit (VMRC #01-1116) to construct and backfill 222 linear feet of vinyl bulkhead approximately two (2) to three (3) feet above marsh level, with weep holes, for marsh toe stabilization (with a minimal amount of marsh level backfill) to protect the existing marsh from eroding.

Mr. Badger stated that VIMS stated in their July 17, 2001, shoreline report that the bulkhead would effectively isolate the marsh from the marine environment. They recommended that riprap be placed on filter cloth and that the riprap be no higher in elevation than the adjacent marsh surface. A second option was to install the proposed bulkhead, but limit the height to that of the marsh surface and fill the washed out area landward of the proposed bulkhead to marsh level and sprig with smooth cordgrass. A third option was to raise the elevation of the existing gabion basket breakwater. The preferred approach was to raise the existing stone breakwater elevation and install the riprap marsh toe protection.

Mr. Badger said that In 2001, the Accomack County Wetlands Board modified and approved a bulkhead, but limited the height to that of the marsh surface and required that the washed out areas landward of the proposed bulkhead be filled to marsh level and sprigged with smooth cordgrass. VMRC also approved the subaqueous portion of the project, as modified by the Wetlands Board in 2001. The project was completed in the summer of 2002.

Mr. Badger explained that Mr. Keating's new application originally called for plans to raise the height of the previously permitted low-profile bulkhead an additional two (2) feet and to backfill 805 square feet of jurisdictional wetlands and approximately 5,200 square feet of non-jurisdictional wetlands. The latter were located at an elevation above the wetland board's jurisdiction, i.e. at an elevation greater than 1.5, the mean tidal range in Chincoteague Bay. Mr. Keating intended to fill both of his lots to the full height of the proposed bulkhead and build another home on lot #1457.

Mr. Badger said that the Accomack County Wetlands Board held their public hearing on June 22, 2006. The Board denied Mr. Keating's request to place two feet of fill over jurisdictional wetlands, but approved, as modified, the filling of the washed out areas landward of the bulkhead to the existing grade of the adjacent vegetated wetlands, and the sprigging with smooth cordgrass of all non-vegetated areas. This was the same decision that was originally granted by the Board back in 2001.

Mr. Badger further said that after the Wetland Board's decision, Mr. Keating modified his application. The modification was to leave a one-inch (1") gap between the existing low-profile bulkhead and the two-foot high wooden breakwater to allow water access to the

marsh. Mr. Keating had stated this would help reduce the washed out areas behind the low-profile bulkhead.

Mr. Badger stated that the Virginia Institute of Marine Science (VIMS) indicated that the proposed modification to the existing bulkhead warranted concern. They were of the opinion that the 1" gap proposed was meaningless and recommended that no additional structure be installed. While the additional structure would result in no additional direct impacts, they were concerned with the secondary impacts associated with a further restriction of tidal circulation. These secondary impacts included the trapping of debris and aging plant material from the adjacent marsh as well as further restriction of the movement of marine life between the marsh and open water. It was their opinion that there was no appropriate gap size and that raising the height of the structure was undesirable from a marine environmental perspective. They would, however, recommend as an alternative, consideration be focused on efforts to protect the upland/wetland interface to help protect the residential structure.

Mr. Badger stated that the U. S. Army Corp of Engineers (ACOE) and Department of Environmental Quality (DEQ) had both inactivated the application pending the receipt of additional information concerning the area. Mr. Keating wished to fill above the Wetlands Board's jurisdiction.

The project was not protested.

Mr. Badger said that as stated by VIMS, there appeared to be no appropriate gap size, between the existing low-profile bulkhead and the proposed two-foot high breakwater, to ensure that the breakwater would not effectively isolate the marsh behind the bulkhead from the marine environment. VIMS also had stated that raising the height of the existing low-profile bulkhead was undesirable.

Mr. Badger said that after evaluating the merits of the entire project, and after considering all of the factors contained in §28.2-1205(A) of the Code of Virginia, staff recommended denial of the proposed 2-foot high breakwater.

Mr. Badger stated that staff suggested that the applicant consider raising the existing gabion basket breakwater elevation, and installing a riprap toe in front of the existing low-profile bulkhead to help protect the existing marsh, one of the recommendations made by VIMS in their report dated July 17, 2001

Commissioner Bowman asked VIMS staff to comment. David O'Brien, representing the Virginia institute of Marine Science, explained that the alternatives suggested by them would serve the applicant better.

Commissioner Bowman asked if the applicant or representative were present and wished to comment.

Richard Keating, applicant, was sworn in and his comments are a part of the verbatim record. Mr. Keating explained that for the most part he agreed with what was said. He provided pictures for the Commission.

Mr. Keating said that the extent of the erosion could not be seen and the scouring that was occurring to the highland. He said the representative he had hired suggested low profile, but he needed high profile, which were all the same at the ends. He said the land was eroding and moving back because of the large amount of wave action occurring at the point. He said the bulkhead that cost him \$100,000.00 was failing. He said that he did not agree with VMRC or VIMS in the amount of erosion that had occurred and that since 2000 when he came to the area 25% of the land had eroded.

Associate Member Schick asked Mr. Keating about the VIMS recommendation to improve the gabions. Mr. Keating stated it was a large area and would be too expensive. He said gabions tend to fail.

Commissioner Bowman asked if anyone was present in opposition. There were none. He asked for further discussion or a motion.

Associate Member Robins explained that he appreciated the applicant's concerns and his desire to protect his property, but the Commission needed to rely on VIMS' expertise and they had given him a number of options. He moved to support the staff recommendation to deny the application for permit, as proposed. Associate Member Schick seconded the motion. He said that he understood the applicant's concerns. He said that the gabions were not the best way, but it would improve the outer defenses. He said that boards would not get the desired affect and would impact the wetlands. The motion carried, 9-0. The Chair voted yes.

No Applicable Fee -- Permit Denied.

10. PRESENTATION by staff on how mean low water is calculated and surveyed. Hank Badger, Environmental Engineer, Sr., discussed this subject with the board and utilized a powerpoint presentation to assist him. His comments are a part of the verbatim record.

11. COMMENTS:

Michael Jewett – VMRC versus Jewett (Compliance Issue)

Mr. Jewett discussed the background of his case and eventual court decision for him to comply with a VMRC Order. He stated he was asking for relief from this Order. His comments are a part of the verbatim record.

Commissioner Bowman explained that the Board in a closed meeting earlier had discussed the case with their counsel. He said they wanted Mr. Jewett to meet with their attorney to see if he could be persuaded to comply with the VMRC Order, which was upheld by the circuit court when it was appealed. His comments are a part of the verbatim record.

No action was taken.

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- 12. PUBLIC HEARING:** Proposed technical amendments to regulation 4VAC20-1120, "Pertaining to Tilefish and Groupers" to correct the scientific names of species listed in the regulation.

Joe Grist, Head, Plans and Statistics gave the presentation. Mr. Grist explained that the Commission at the last meeting had approved the emergency regulation and to hold a hearing this month to make this change in the regulation permanent. He said that no public comments had been received and staff recommended approval.

Commissioner Bowman opened the public hearing and there were no public comments, therefore, he closed the public hearing. He asked for a motion.

Associate Member Robins moved to accept the staff recommendation. Associate Member McConaugha seconded the motion. The motion carried, 9-0. The Chair voted yes.

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- 13. REPORT OF THE FINFISH MANAGEMENT ADVISORY COMMITTEE,** regarding restrictions on the use of gill nets within the Hampton Roads Management Area and the Black Drum Special Management Area.

Rob O'Reilly, Deputy Chief, Fisheries Management, gave the presentation. His comments are a part of the verbatim record.

Mr. O'Reilly said that staff was directed by the Commission at the last meeting to hold a meeting with FMAC on the issues relating to the Hampton Roads Management Area and the Black Drum Special Management Area.

Mr. O'Reilly explained that Gerald Parks, at the public comment period during last month's meeting, had asked for emergency action to be taken by the Commission to allow him to work a certain area in the Hampton Roads Management Area with his gill net in the summer months. Mr. O'Reilly said in Section 20 of the regulation there was the established boundaries for this area and in Section 30 the restriction for gillnet use in the HRMA during the summer months. He stated that more effort would be needed by FMAC, as it had been a long time since they had discussed this matter and there was a lot of information for them to review. He explained that a large workshop was held 15 years ago with a wide variety of members, after conflicts began between the head boat operators and gill-netters in the late 80's. He utilized a PowerPoint presentation to assist in his presentation.

Mr. O' Reilly explained that for the Black Drum Special Management Area issue, Dr. John Olney from VIMS may provide information that would benefit the Commission. He said Dr. Olney was contacted to make this presentation at the meeting in August.

Mr. O'Reilly stated that staff recommended no action be taken and to come back in August to hear these matters.

Associate Member Bowden stated that it had been a good FMAC meeting, but this was not a one meeting affair. He said he had suggested to the committee that they discuss this issue with others, to avoid any public uproar. He suggested that VIMS be represented at the meeting.

Associate Member Robins suggested that since there was a lot of sailing in the Hampton Roads area, it might be good to make contacts with representatives of that group.

No action was taken.

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There was no further business and the meeting was adjourned at approximately 2:10 p.m. The next meeting will be Tuesday, July 24, 2007.

Steven G. Bowman, Commissioner

Katherine Leonard, Recording Secretary