

MINUTES

Commission Meeting

April 27, 2004
Newport News, VA

The meeting of the Marine Resources Commission was held with the following present:

William A. Pruitt)	Commissioner
Chad Ballard)	
Gordon M. Birkett)	
Ernest N. Bowden, Jr.)	
S. Lake Cowart)	Associate Members
Russell Garrison)	
J. T. Holland)	
Cynthia Jones)	
F. Wayne McLeskey)	
Carl Josephson	Assistant Attorney General
Colonel Steve Bowman	Acting Deputy Commissioner
Wilford Kale	Senior Staff Advisor
Katherine Leonard	Recording Secretary
Andy McNeil	Programmer Analyst Sr.
Jane McCroskey	Chief, Admin/Finance Div.
Jack Travelstead	Chief, Fisheries Mgt. Division
Rob O'Reilly	Deputy Chief, Fisheries Mgt. Div.
Jim Wesson	Head, Conservation/Replenishment
Roy Insley	Head, Plans/Statistics Dept.
Chad Boyce	Fisheries Management Specialist, Sr.
Lewis Gillingham	Fisheries Management Specialist
Mike Meier	Head, Artificial Reef Program
Lt. Col. Lewis Jones	Deputy Chief, Law Enforcement
MPO Lisa Gruber	Marine Police Officer
MPO Trevor Johnson	Marine Police Officer
Bob Grabb	Chief, Habitat Management Div.
Tony Watkinson	Deputy Chief, Habitat Mgt. Div.
Chip Neikirk	Environmental Engineer, Sr.
Kevin Curling	Environmental Engineer, Sr.

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Jeff Madden	Environmental Engineer, Sr.
Jay Woodward	Environmental Engineer, Sr.
Benny Stagg	Environmental Engineer, Sr.
Tracy West	Environmental Engineer, Sr.
Justin Worrell	Environmental Engineer, Sr.
Randy Owen	Environmental Engineer, Sr.
Hank Badger	Environmental Engineer, Sr.

Virginia Institute of Marine Science (VIMS)

Lyle Varnell
Tom Barnard

Other present included:

John W. Ridley	Robert Jensen	David Thornes
Robert Koch	Don W. Hiams	Kevin W. Powell
Joe Gubeli	Gwen Gubeli	Bob Simon
David Cascell	H. Rudolph Kempe	Jim White
Ira Brutman	Robert Pruhs	Cabell Wallace
Stuart Owen	Chris Turner	Walter Beck
John Brooks	David Bailey	George Washington
Catherine Jenkins	Jerry R. Ward	Douglas Jenkins, Sr.
Roger Parks	Keith Like	Walter Burroughs
Russell Gaskins	John B. Gordon, Sr.	Tom Powers
Frances Porter		

and others

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Commissioner Pruitt called the meeting to order at 9:30 a.m. with Associate Members Bowden, Holland, Cowart and Jones arriving after the meeting started at later times.

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Associate Member Garrison gave the invocation and Commissioner Pruitt 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: Commissioner Pruitt asked if there were any changes to the agenda. Bob Grabb asked that Item 9 be moved forward because the agent for the case needed to leave for another commitment. **Associate Member Birkett moved to approve the agenda with the change. Associate Member Garrison seconded the motion. The motion carried, 4-0.**

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1. **MINUTES:** Commissioner Pruitt asked for a motion regarding the minutes. There were no changes.

Associate Member Garrison moved to approve the minutes for the March 23, 2004 Commission meeting. Associate Member Birkett seconded the motion. The motion carried, 4-0.

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2. **PERMITS:** Bob Grabb, Chief-Habitat Management, gave the presentation on Page Two items, A through M, and his comments are part of the verbatim record. Page Two items are projects that cost more than \$50,000, are unprotected, and staff is recommending approval.

Associate Member Holland arrived to the meeting at approximately 9:35 a.m. and Associate Member Bowden arrived to the meeting at approximately 9:40 a.m.

Commissioner Pruitt asked if there was anyone to address the Commission on any of these projects, either pro or con. There was no one present to comment.

Associate Member Garrison moved to approve Page Two items, A through M, as presented by staff. Associate Member Ballard seconded the motion. The motion carried, 6-0.

2A. HONEYWELL INTERNATIONAL, INC., #04-0314, requests authorization to install and backfill up to 140 linear feet of steel sheet-pile bulkhead aligned up to two (2) feet channelward of an existing deteriorated bulkhead at the Honeywell Plant pump house intake along the James River in the City of Hopewell. Recommend a royalty of \$560.00 for the encroachment over 280 square feet of State-owned subaqueous bottomland at a rate of \$2.00 per square foot.

Royalty Fees for Filling (approximately 280 sq. ft. @ \$2.00/sq. ft.).....	\$560.00
Permit Fee.....	\$100.00
Total Fees.....	\$660.00

2B. DEPARTMENT OF THE ARMY, #04-0071, requests authorization to install, on an annual basis, and up to 12 times per year, temporary floating causeways that will extend approximately 1,200 feet into the James River, which will necessitate the excavation of both intertidal and subaqueous lands (up to 592 cubic yards per exercise) to facilitate the causeway installation as part of military training along the Anzio Beach area of the U. S. Army Transportation Center, Fort Eustis in the City of Newport News. The excavated area would be restored to the original contours after each exercise.

Permit Fee.....	\$100.00
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2C. ROUTE 28 CORRIDOR IMPROVEMENTS, INC., #04-0021, requests authorization to remove the existing bridge over Beaverdam Run, a tributary of Broad Run, and construct a new four lane bridge in its place in Loudoun County. The new bridge will be 141 feet wide and span a maximum length of 60 feet of State-owned subaqueous bottom. An overhead electrical line will cross a minimum of 15 feet above ordinary high water and two underground utilities, a fiber optic line and a gas line, will be installed by directional drilling a minimum of 5 feet below the streambed. Access into the stream may be necessary to remove the sections of the existing bridge. Recommend a royalty in the amount of \$135.00 for the utility crossings' encroachment of 135 linear feet of State-owned subaqueous bottom at a rate of \$1.00 per linear foot.

Royalty Fee for Encroachment (approx. 135 lin. Ft. @ \$1.00/lf).....	\$135.00
Permit Fee.....	\$100.00
Total Fees.....	\$235.00

2D. BLUE RIDGE PASSAGE RESORT, #01-2171, requests authorization to reconstruct the Cockram Mill Dam to be 20 feet high by 150-feet long to create a 7.02-acre impoundment known as Cockram Millpond located on the Dan River at Meadows of Dan in Patrick County. Recommend approval with standard instream conditions and time-of-year restrictions from October 31 - May 15 to protect Brown and Rainbow Trout spawning. Recommend a royalty of \$2,000.00 for the filling of 1,000 square feet of State-owned bottom at a rate of \$2.00 per square foot.

Royalty Fee for Filling (approx. 1,000 sq. ft. @\$2.00/sq. ft.).....	\$2,000.00
Permit Fee.....	\$ 100.00
Total Fees.....	\$2,100.00

2E. GLOUCESTER BANKS ASSOC., #03-2548, requests authorization to rebuild their 600-foot community pier with the addition of a 165-foot by 5-foot lower platform and to construct two (2) 100-foot by 16-foot riprap breakwaters with 1500 cubic yards of sand, placed landward of the breakwaters, as beach nourishment adjacent to their property situated along the York River in Gloucester County. Staff recommends approval with a condition that the material for the beach nourishment must be comprised of at least 90 percent sand and with the assessment of a royalty of \$750.00 for the encroachment of the beach nourishment on 15,000 square feet of state-owned submerged land at a rate of \$0.05 per square foot.

Royalty Fee for Beach	
Nourishment (approx. 15,000 sq. ft. @\$0.05/sq. ft.).....	\$750.00
Permit Fee.....	\$100.00
Total Fees.....	\$850.00

2F. MARINE RESOURCES COMMISSION, #03-2585. The Fisheries Management Division requests authorization to construct an intertidal oyster reef (E-11) measuring 400 feet long by 40 feet wide with maximum heights of approximately 6 feet off the bottom, constructed of oyster and clam shell, with endpoints at 36° 47' 55" N Latitude 76° 17' 54" W Longitude and 37° 47' 54" N Latitude and 76° 17' 57" W Longitude located in Paradise Creek in Portsmouth. The proposed reef would to be marked in accordance with U.S. Coast Guard requirements.

No Fees applicable.

2G. MARINE RESOURCES COMMISSION, #03-2586. The Fisheries Management Division requests authorization to construct an intertidal oyster reef (E-12) measuring 150 feet long by 40 feet wide with maximum heights of

approximately 6 feet off the bottom, constructed of oyster and clam shell, with endpoints at 36° 48' 36" N Latitude 76° 17' 16" W Longitude and 36° 48' 37" N Latitude 76° 17' 16" W Longitude located in Southern Branch of the Elizabeth River in Chesapeake. The proposed reef would to be marked in accordance with U.S. Coast Guard requirements.

No Fees applicable.

2H. MARINE RESOURCES COMMISSION, #03-2587. The Fisheries Management Division requests authorization to construct an intertidal oyster reef (E-13) measuring 400 feet long by 60 feet wide with maximum heights of approximately 6 feet off the bottom, constructed of oyster and clam shell, with endpoints at 36° 44' 43" N Latitude 76° 17' 54" W Longitude and 36° 44' 45" N Latitude and 76° 17' 54" W Longitude located in Southern Branch of the Elizabeth River in Chesapeake. The proposed reef would to be marked in accordance with U.S. Coast Guard requirements.

No Fees applicable.

2I. DEPARTMENT OF THE NAVY, #03-1659, requests authorization to install 16 mooring piles and construct a dual-slip boathouse, boat ramp, new bulkhead, and dredge to -22 feet below mean low water adjacent to property situated along the Elizabeth River in Norfolk.

Permit Fee.....\$100.00

2J. CITY OF NORFOLK, #04-0356, requests authorization to nourish 1300 linear feet of shoreline from 14th Street to Ocean View Park. The beach would extend a maximum of 150 feet channelward of mean low water adjacent to the property situated along the Chesapeake Bay.

Permit Fee.....\$100.00

2K. MARINE RESOURCES COMMISSION, #97-1807. The Fisheries Management Division requests reactivation and extension of a previously issued and modified permit to construct, a circular, artificial reef that maintains a 12-foot clearance between the reef structures and mean low water in conjunction with a 72-acre hard clam broodstock sanctuary site within a 1,000-foot radius around Newport News Middle Ground Light in Hampton Roads.

No Fees applicable.

2L. MARINE RESOURCES COMMISSION, #00-1837. The Fisheries Management Division requests reactivation and extension of a previously issued permit to construct a square artificial fishing reef centered at 37° 14'24" N Latitude and 76° 13' 45" W Longitude, that maintains a 15-foot clearance between the reef structures and mean low water, approximately 7.35 miles ENE of Tue Point.

No Fees applicable.

2M. PILOT HOUSE MARINA, INC., #04-0354, requests authorization to construct a 47-foot by 157-foot enclosed commercial boathouse to create ten additional boat slips, including lifts and 5-foot wide tending piers, along their property adjacent to Neabsco Creek in Prince William County. Recommend a royalty in the amount of \$3,689.50 for the encroachment over 7,379 square feet of State-owned subaqueous bottom at a rate of \$0.50 per square foot.

Royalty Fees for Encroachment	
(approx. 7,379 sq. ft. @\$0.50/sq. ft.).....	\$3,689.50
Permit Fee.....	\$ 100.00
Total Fees.....	\$3,789.50

3. CLOSED SESSION.

Associate Member Ballard moved that the meeting be recessed and the Commission immediately reconvene in closed meeting for the purpose 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:

The procedures to be followed for the King Williams Reservoir Project hearing.

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

Associate Member Cowart arrived to the meeting when the Commission was in the closed session.

Associate Member Ballard moved for the following:

**CERTIFICATION OF CLOSED MEETING
OF THE VIRGINIA MARINE RESOURCES COMMISSION**

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

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

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

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

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

AYES: Ballard, Birkett, Bowden, Cowart, Garrison, Holland, McLeskey, and Pruitt

NAYS: None

ABSENT DURING VOTE: Associate Member Jones

ABSENT DURING ALL OR PART OF CLOSED MEETING: Associate Member Jones

The motion carried, 8-0.

**Recording Secretary
Virginia Marine Resources Commission**

Commissioner Pruitt explained that the closed session had been held due to a question that had been raised by Mr. David Bailey, who was a representative for the Mattaponi Indians.

Commissioner Pruitt asked Mr. Josephson to address this matter. **Carl Josephson explained that the Commission was not prepared to answer Mr. Bailey's question at the present time and the earliest that they could answer would be at the next Commission meeting.**

9. **JULES A. FREEMAN REVOCABLE TRUST, #04-0545**, requests after-the-fact authorization to retain 76 linear feet of timber bulkhead and to install an additional 82 linear feet of bulkhead adjacent to their property situated along Willoughby Bay in Norfolk.

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

Ms. West said that staff received a telephone call in January 2004 from the staff person to the Norfolk Wetlands Board reporting the installation of a bulkhead in front of an existing deteriorated bulkhead without a permit at the Harbormar Apartments on Willoughby Bay in Norfolk. Staff met with Mr. Tony Coley, manager of the apartment complex, on January 23, 2004, and found that installation of a bulkhead seaward of the existing bulkhead was in progress at the property. Approximately half of the structure was in place. The new bulkhead appeared to be aligned as close to the deteriorated bulkhead as possible. Staff advised Mr. Coley that the structure did require a permit from the Marine Resources Commission and that the contractor should not continue the installation until all required permits had been obtained.

Ms. West explained that staff issued a sworn complaint and notice to comply on January 29, 2004, advising Mr. Coley to either remove the illegal bulkhead or submit a Joint Permit Application for retention of the structure and completion of the project. A Joint Permit Application was received on March 5, 2004.

Ms. West said that the staff discussed the bulkhead installation with the contractor, Mr. David Cassell. Mr. Cassell stated he had called the Army Corps of Engineers regarding the project and was informed that he did not require a permit if he placed the bulkhead in the same footprint as the existing structure. Mr. Cassell stated he attempted to do so and found that he could not comply with his original proposal. He then began to drive sheeting in front of the deteriorated bulkhead without recontacting the Army Corps of Engineers or any other regulatory agency.

Ms. West explained that the installation of a portion of the bulkhead without submission of a Joint Permit Application and prior to the issuance of the required permits did not allow staff the opportunity to evaluate the project for compliance with shoreline stabilization best management practices. Staff notes that the drawings provided with the Joint Permit Application did not indicate that the applicant intended to use filter cloth behind the new bulkhead structure. In review of the cross sectional drawings, the applicant indicated fill behind the deteriorated structure and fill in between the old and new structure would be necessary to complete the project. As such, filter cloth was necessary to retain the fill behind the structure.

Ms. West stated that the Virginia Institute of Marine Science stated that the impacts associated with the project should be minimal.

Ms. West stated that no other State agencies had commented on the project.

Ms. West explained that the new bulkhead alignment was approximately one foot in front of the deteriorated bulkhead. As such, staff would have found the proposed alignment acceptable and most likely would have administratively issued a permit for the installation of the bulkhead provided the proposal was consistent with VMRC's Subaqueous Guidelines and Shoreline Development BMPs.

Ms. West further explained that staff recommended that the Commission approve both the after-the-fact and proposed portions of the project with the addition of installation of filter cloth behind the new bulkhead. In addition, staff recommended that the Commission consider an appropriate civil charge in lieu of further enforcement action.

Associate Member Birkett chaired the meeting in the Commissioner's absence.

Robert Simon of Waterfront Consultant was sworn in and spoke on behalf of the applicant. Mr. Simon said that staff did a very good job in their write-up regarding the matter. He explained that when the applicant contacted the Corps he was told to replace the bulkhead as close as possible to the old bulkhead. No contact was made to the other agencies. He further explained that he was not contacted until after the construction had been started. His comments are a part of the verbatim record.

Associate Member Birkett asked for questions and there were none. Associate Member Garrison asked if the contractor was present to comment.

David Cassell, building contractor for the applicant, was present and his comments are a part of the verbatim record. Mr. Cassell said that he had always worked for someone else until 2 years earlier when he started his own business and became self-employed.

Associate Member Birkett asked if anyone was present in opposition to the project. There were none. He then asked for a motion. He reminded the Commission that the Corps had said to go ahead with the project and then along comes VMRC and says he needed a permit. He said that sometimes the public's side needs to be considered.

Associate Member Holland moved to accept the staff's recommendation. Associate Member Garrison seconded the motion, but added to the motion that no civil charges be imposed. The motion carried, 7-0.

Royalty Fee for Filling approx. 158 sq. ft. @\$2.00/sq. ft.).....	\$316.00
Permit Fee.....	\$ 25.00
Total Fees.....	\$341.00

- 4. RAPPAHANNOCK PRESERVATION SOCIETY, #03-1649,** requests authorization to install a 2,800-foot long by 1,000-foot wide concrete debris oyster reef in the James River near the Monitor-Merrimac Memorial Bridge Tunnel in Newport News.

Tracy West, Environmental Engineer, Sr., gave the presentation with slides. Ms. West distributed to the Commission two letters with petitions in which the petitioners stated that they were protesting the project. Her comments are a part of the verbatim record.

Ms. West explained that the Rappahannock Preservation Society proposed to construct an artificial oyster reef to the west of the Monitor-Merrimac Memorial Bridge Tunnel. The reef would initially be constructed of concrete pier deck and pile cap segments obtained from the demolition of Pier 7A at Norfolk Naval Station. In addition, in the future, Mr. Jensen would like to add precast concrete harvestable reef modules to the reef structure.

Ms. West said that the proposed reef would be placed in approximately 18 feet of water and would consist of three circular areas 900 feet in diameter each. Each area would be approximately ten feet high and the reef as envisioned would allow for six to ten feet of navigational clearance above the structure. Given the composition of the proposed reef, the structure would represent a permanent feature on State-owned submerged lands.

Ms. West stated that the United States Coast Guard had indicated that warning day boards and lighting requirements would have to be incorporated into the reef structures if permitted. The applicant had agreed to adhere to those conditions. The USCG also stated that a 10-foot minimum navigational clearance from mean low water must be maintained.

Ms. West explained that the Commission's Plans and Statistics Department recommended against the proposed reef structure because the proposed location was within the Newport News Clam Management Area. The Department expressed concerns regarding the placement of construction debris on prime clamming ground, citing the loss of habitat and the potential for damage to clam harvesting equipment.

Ms. West further explained that the Virginia Institute of Marine Science echoed the concerns of the Plans and Statistics Department regarding placement of the reef within the Newport News Clam Management Area. They further expressed concerns regarding the long-term viability of the reef considering the ambient salinity conditions and the associated prevalence of MSX and Dermo at the proposed location.

Ms. West stated that the Virginia Department of Historic Resources had indicated that the proposal would have no impact on historical artifacts, and the Department of Conservation and Recreation had expressed no concerns. No other State agencies had commented on the project.

Ms. West explained that given that the proposed location of the reef within the Newport News Clam Management Area, and in light of the objections expressed by the Fisheries Management Division, staff could not support the placement of a reef at this location. This area already supported valuable clam habitat that, in turn, provided a harvest area for local watermen. While a hard substrate reef may provide suitable habitat for oysters, it represented the replacement of one aquatic resource with another; a trade or change that staff did not believe was necessary or appropriate in this case.

Ms. West went on to explain that should the Commission choose to approve the reef, staff recommended that approval be conditioned to require navigational clearance requirements similar to those typically imposed on our own artificial fishing reef structures. For most artificial fishing reef structures, a minimum of 15 feet of navigational clearance between the top of the structure and mean low water was required. One exception was allowed at Middle Ground Light, where the clearance requirement was 12 feet of navigational clearance at mean low water. Staff also recommended that the applicant be required to submit a bathymetric survey each time concrete debris or precast concrete harvestable reef modules were deposited on the site in order to verify that the navigational clearance requirements imposed by the Commission had been met.

Ms. West stated that there was a fisheries survey done in the project area. **Associate Member Ballard made a motion to hear a brief presentation by staff. Associate Member Cowart seconded the motion. The motion carried, 6-0.**

Roy Insley, Head, Plans and Statistics, was present and his comments are a part of the verbatim record. Mr. Insley said that a survey was made with Mr. Jensen at his request. He said that two individuals from Plans/Statistics went out. He explained that there were clams present and in different year classes. He said the average number of clams taken were significant with the total of 23 of various sizes taken in the grabs made. He explained that no density study was done in this brief survey. He stated this area was good clam habitat because in the middle was mud, and on both ends there was clay mixed with shell. He said the proposed reef would present a problem for watermen, because they would not be able to use their gear to harvest the shellfish because of possible damage.

Associate Member Birkett asked the Commission if they had questions. There were none.

Robert Jensen, applicant, was sworn in and his comments are a part of the verbatim record. Mr. Jensen explained that staff did not use recent, valid information with regards to this area. He said that was why he had asked the staff to accompany him in surveying the area. He said that in 44 licks 21 clams was not much. He said he could offer enhancement for clams by providing broodstock. He said the proposed configuration would trap sand and that clams like sandy bottom. He said the reef would only help the industry, not hurt it. He explained that the materials he proposed to use actually have

oyster strike on it. He said that live animals thrive on high salinity. He said that oysters were an important missing component in this area and oysters and clams could live together. He pointed out that the Rappahannock River reefs were producing and enhancing the river by providing spawn. He said that this reef could provide commercial value and pay for itself.

Carl Josephson, Assistant Attorney General and counsel for VMRC, asked if the proposed reefs were to be harvestable solely by Mr. Jensen. Mr. Jensen explained that he is in the process of obtaining a bank loan of \$1.5 million and if the Commission would allow it, the profits could be put back into the river. Mr. Josephson asked if this area was in Baylor? Mr. Jensen responded, no. Mr. Josephson asked if a lease was required when only harvested by one individual. Bob Grabb, Chief, Habitat Management, responded that the Commission could allow for it to be leased, but since it is in the middle of the Newport News Management Area the regulation establishing it would have to be modified.

Mr. Josephson said that the clam management area could be changed to allow for different or compatible use by modifying the regulation to exclude this area.

Roy Insley, Head, Plans/Statistics, explained that a sanctuary was already established at Middle Ground Light for clam broodstock. He explained that this had been funded mostly with mitigation monies. He further explained that VIMS had done a larval study at the Middle Ground areas and had shown that the areas established by VMRC for clam broodstock was appropriate. He explained that the Commission and staff had done some considerable planning for the Newport News Clam Management area with a broodstock area established at both Middle Ground Light and at Brown Shoals. His comments are a part of the verbatim record.

Associate Member Birkett asked Mr. Jensen if there was anyone else to speak. Mr. Jensen said his technical advisor, Mr. Ridley, was present and wanted to comment on the project. John Ridley, technical advisor for the applicant, was sworn in and his comments are a part of the verbatim record. Mr. Ridley said that the area had been overharvested and was located in an intense urban area. He said Mr. Jensen had been successful with his prior work in the Rappahannock River. He said that the Rappahannock Preservation Society was a non-profit organization and had the personal financial backing of Mr. Jensen. He said the Commission should forget about the commercial interests and 23 clams in 3 or 4, or a dozen licks did not establish this as a management area. He said it was being handled as a put-and-take fishery. He said that no oysters presently live there, but there are oysters around the navy piers and there was need to get the oysters out to where they can better survive. He said the VMRC project at Middle Ground took more area away from the watermen than his project would. He said 20% of the area would be a breeding sanctuary and would improve the oyster and clam resources. He said it would also provide a fishing reef for the locals.

Commissioner Pruitt returned to the meeting at approximately 11:04 a.m.

Commissioner Pruitt asked if there was anyone in opposition or any watermen present who wished to address the Commission? Mr. Insley stated that no one was present to speak from the public. He reminded the Commission that there were two letters with petitions in opposition that had been presented by Habitat Management. Ms. West stated that she had talked with several watermen who told her they were opposed to the project. She said she had referred them to Mr. Vigliotta and when reviewing one of the petitions, she noted that their names were present.

Commissioner Pruitt asked Mr. Jensen, if he had any rebuttal comments to make to the Commission. Mr. Jensen in his rebuttal explained that the \$1.5 million project was totally dedicated to improving oyster stocks as well as for enhancement of the clam resource. He stated that the project would work.

After reviewing the petitions presented by staff, Associate Member Cowart abstained from participating in this matter because he had done business with one of the protestants.

Commissioner Pruitt asked for a motion from the Commission. Associate Member Ballard explained that he admired the work done by the Rappahannock Preservation Society in the Rappahannock for the oyster resource. He further explained that he could not agree with substituting one shellfish resource for another and he felt that staff's objections were well founded. He stated that staff had used the VIMS' study to determine where it was best to establish the management area.

Associate Member Ballard moved to adopt the staff's recommendation and deny the application for permit. Associate Member Holland seconded the motion. Associate Member Garrison stated that he agreed with staff and appreciated Associate Member Ballard's motion. The motion carried, 6-0-1. Associate Member Cowart abstained from voting. Commissioner Pruitt reminded Mr. Jensen that the Commission's decision could be appealed to the Circuit Court.

No fees applicable.

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5. **JOSEPH GUBELI, III, #02-2155**, requests authorization to construct a private, noncommercial pier extending 300 feet channelward of mean high water with an 18-foot by 32-foot open-sided boathouse adjacent to his property situated along the Piankatank River in Gloucester County. Adjoining property owners protested the project.

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

Mr. Neikirk explained that Mr. Gubeli's property was located on the southern shore of the Piankatank River in the Hell Neck area of Gloucester County. The Piankatank River was

approximately 3,000 feet wide at the project site. Development along this portion of the shoreline was primarily residential.

Mr. Neikirk further explained that Mr. Gubeli stated in his application that the water depths at the channelward end of his proposed 300-foot pier were minus three and three-quarter feet (-3 3/4') at mean low water. Mr. Gubeli currently owns a 19-foot boat and had stated that he planned to purchase a larger vessel in the near future.

Mr. Neikirk said that the adjoining property owners, Mr. and Mrs. H. R. Kempe and Mr. and Mrs. Patrick Barbery, protested the project. They expressed concern over the length and alignment of the pier and the adverse aesthetic impacts of the boathouse.

Mr. Neikirk said that when the application was first submitted in 2002, Mr. and Mrs. Kempe expressed a concern that the pier and boathouse would encroach on their riparian area. Because Mr. Gubeli owned a limited length of shoreline and since the adjoining property owner questioned the riparian area, staff informed Mr. Gubeli that he would have to petition the local Court of Chancery to apportion the riparian area associated with his lot before we could continue to process his application.

Mr. Neikirk said that the riparian apportionment had been completed and Mr. Gubeli had slightly revised his application so that the pier and boathouse would not encroach on either of his neighbors' riparian areas. Although the pier and boathouse would extend approximately 50 feet beyond the line of navigability used by the court for the riparian apportionment, staff did not believe the structures would adversely affect navigation. In addition to the open-sided boathouse, a permit was required for that portion of the pier that extended beyond the apportioned area.

Mr. Neikirk said that the project would not encroach on any public or privately leased oyster ground and no state agencies had commented on the project.

Mr. Neikirk explained that staff was originally concerned with the possible encroachment of the pier into the neighbors' riparian areas. Mr. Gubeli had the court assign the riparian area associated with his lot and he had revised his application to center the pier within that riparian area. The proposed open-sided design should minimize the visual impacts associated with the boathouse. Accordingly, staff recommended approval of the project as proposed.

Joe Gubeli, applicant, was present and his comments are a part of the verbatim record. Mr. Gubeli provided slides with his presentation. He explained that the depth of water at the end of the pier, as proposed, would be 4-1/2 to 3-1/4 feet. He said that the Corps had approved his project. He stated that his project did not cause a navigational problem. He said he was proposing a 576 square foot covered boatlift. He explained there already were two boatlifts in the area owned by his neighbors. He said that there was a closed boathouse 3 piers over from his property. He said what he was proposing was a common

sight on the river. He said the protestor, Mr. Kempe, felt the proposed construction would block his view. He explained that Mr. Kempe's property was on a bluff and he had a high view of the area. He showed slides and superimposed his proposed pier and boathouse on one of the slides to show that there would not be much blockage. He said his project conformed to the guidelines, was not a problem for navigation, and was similar to other structures in the area.

Herman R. Kempe, protestant was sworn in and his comments are a part of the verbatim record. Mr. Kempe stated that his opposition letter was well covered by the staff. He further explained that originally Mr. Gubeli's shoreline was 35 feet wide and he was proposing a 65' pier. He said that when this matter was taken to court the County Attorney asked other neighbors about the dimensions of Mr. Gubeli's property. He explained that the applicant made an adjustment to the stream, which changed his shoreline width. He said the neighbors saw this and the county attorney agreed. Carl Josephson, Assistant Attorney General and counsel for VMRC, asked Mr. Kempe if he had appealed the court's decision. Mr. Kempe said he did not.

Mr. Gubeli in rebuttal stated that he had taken the matter to court to settle the protestants' questions about the riparian area as suggested by VMRC staff. Associate Member Cowart asked the applicant if the pier was now to be constructed in the middle of his riparian. Mr. Gubeli responded that it was slightly off from the middle, within 1 foot of the riparian line.

Associate Member Garrison stated that the court decision had satisfied staff's concerns over encroachment onto the neighbor's riparian area and he, therefore, moved to accept the staff's recommendation. Associate Member Holland seconded the motion. The motion carried, 7-0.

Permit Fee.....\$100.00

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Commissioner Pruitt decided to hear the rest of Habitat items after lunch and announced the lunch break at approximately 11:44 a.m. He asked that everyone return from lunch at approximately 12:30 p.m.

Associate Member Jones arrived to the meeting during the lunch break at approximately 11:50 a.m.

Associate Member Birkett reconvened the meeting in the Commissioner's absence.

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6. **VULCAN CONSTRUCTION MATERIALS, LP, #03-2110**, requests authorization to construct and backfill a 30-foot by 40-foot pre-cast piling bulkhead to replace an existing truck body hopper; replace 12 mooring dolphins; and to add 634 linear feet of riprap revetment along the James River shoreline at their Richmond Quarry and Lower Dock facilities in the City of Richmond. Both subaqueous and wetlands permits are required. The project is protested by the City of Richmond.

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

Mr. Stagg said the proposed project was located along both sides of the James River in the City of Richmond.

Mr. Stagg explained that the Richmond Quarry site was located along the western side of the James River and consisted of a quarry site and loading facility while the facility along the eastern side of the James River, known as the Lower Dock facility, served as a distribution yard for material barged across the river.

Mr. Stagg further explained that the existing Richmond Quarry site was issued a permit in 1995, which authorized the construction of a 40-foot by 40-foot loading platform extending up to 50 feet channelward of mean high water. This structure was never built. A modified truck bed, supported by pilings, however was placed in the same area, although covering a smaller footprint than the previously authorized loading platform. Since it was not feasible for loaded trucks to dump directly into the truck bed system that was currently in place, material was dumped on the upland and placed by front-end loader into the truck bed. The material was then loaded from the truck bed by a barge loaded clamshell crane into river barges for transport either to market or to the Lower Dock distribution facility.

Mr. Stagg said that the applicant proposed to remove the truck bed body and construct a permanent bulkhead enclosure holding facility to be backfilled with surge stone. This structure would be 40 feet in width and extend up to six (6) feet channelward of mean low water. The bulkhead would be constructed with a 3-foot high retaining wall above the loading surface to contain material. Trucks would dump directly into the holding facility where the material would then be loaded by clamshell crane into river barges. This method would eliminate the double handling of the material. The bulkhead enclosure would slope landward and be equipped with check dams along both edges to catch sheet flow and channel it into a basin for treatment before being released.

Mr. Stagg said in addition, the applicant proposed to stabilize the eroding shoreline with 634 linear feet of riprap revetment and to install up to 12 mooring dolphins to

accommodate river barge management. The riprap would include an elevated berm top to restrict direct surface water flow from entering the river.

Mr. Stagg stated that since the City of Richmond had not adopted the Model Wetlands Ordinance, the Commission was charged with reviewing the wetlands impacts associated with this project. Staff conducted a public hearing at City Hall in Richmond, on April 19, 2004. Two representatives from Vulcan Materials Company and a representative of Resource International, LTD, agent for the project, attended the hearing.

Mr. Stagg said the Public Works Department for the City of Richmond protested the project. They had concerns related to the Chesapeake Bay Protection Area, which required a 100-foot buffer to remain in a vegetated state or if one did not exist to encourage replacement of this buffer along the James River.

Mr. Stagg said the Department of Environmental Quality had determined that the project did not require an individual Water Protection Permit. The Department of Conservation and Recreation noted that this section of the James River *qualified for* designation as a State Scenic River. Additionally, they noted significant recreational boating usage in the area and encouraged maintaining the natural shoreline to the greatest extent possible. Finally, given the high usage of the area by water vehicles, they had expressed concerns about boating safety and barge traffic. The Virginia Department of Health found the project acceptable.

Mr. Stagg explained that the Virginia Institute of Marine Science (VIMS) indicated that the individual and cumulative impacts from the proposal appeared unavoidable given the existing land use. Additionally, they agreed with the applicant's proposal to mitigate for the tidal wetland impacts, but preferred that any compensation be tidal in nature. No other agencies commented on the project.

Mr. Stagg said that any Chesapeake Bay Act issues involving replanting on the upland must be resolved with the City of Richmond and should not impact approval of the subaqueous and tidal wetlands portions of this proposal. Staff did not receive any concerns from the Army Corps of Engineers related to navigation and the applicant did not propose to change its current mode of barge traffic in this area. It did not appear that the applicant had a suitable area, onsite, to provide in-kind wetland mitigation. Although the applicant had agreed to provide 1:1 mitigation through the Virginia Wetland Restoration Trust Fund, at this time there were no tidal wetland banks included in the Trust Fund nor was there a commercial tidal wetland mitigation bank in the watershed.

Mr. Stagg stated that the applicant previously received a permit to construct a larger open-pile structure at the site of the proposed bulkhead. The proposed bulkhead loading site should result in less material spillage into the river and improve water quality. Ongoing erosion was taking place at the current shoreline location of the proposed riprap

stabilization. The additional dolphins would allow for more efficient and safe mooring of barges.

Mr. Stagg said that staff, therefore, recommended approval of the project as submitted. Staff further recommended a royalty in the amount of \$480.00 be assessed for the fill over 240 square feet of State-owned subaqueous lands for the bulkhead loading structure at a rate of \$2.00 per square foot. Although the applicant had also agreed to pay \$402.96 to the Army Corps (Virginia Wetland Restoration Trust Fund) for impacts to 0.073 acres of tidal emergent wetlands at a ratio of 1:1 there was no guarantee at this time that these funds would be used for wetlands compensation in the James River watershed. As such, staff recommended the applicant be required to submit a plan for actual compensation of 318 square feet of tidal wetlands, at a ratio of 1:1, in the James River watershed and that the compensation be completed within one year of permit issuance.

Associate Member Ballard asked if the mitigation ratio was 1:1. Mr. Stagg responded that the mitigation was handled in two different ways, one which was tidal wetlands mitigation.

Walter Beck, Environmental Engineer for Vulcan Construction Materials, was sworn in and his comments are a part of the verbatim record. Mr. Beck explained that the property originally belonged to Tarmac and this was the reason for the plan proposed. He further explained that what was proposed would make things more efficient, more environmentally friendly, would stabilize the bank from further erosion and was aesthetically compatible to the surrounding area. He said that they were concerned with the mitigation as there was not a good location for the wetlands mitigation. He said that was why they had agreed to make a contribution to the Virginia Wetlands Restoration Trust Fund. He said that staff in their presentation had expressed the number in tenths and it was in hundredths of an acre. Mr. Stagg responded that the correct amount of acreage was 0.07.

No one was present in opposition.

Associate Member Garrison stated that he had worked with the company for years and they were very environmentally conscious and had much improved their other property. He asked if a fine could be assessed rather than the wetlands mitigation? Carl Josephson, Assistant Attorney General and counsel for VMRC, stated that he was not aware of any other case where this had been done. Bob Grabb, Chief, Habitat Management stated that there was no mechanism in place for such action. He further explained that the "no net loss" goal could not be realized, if wetlands were not replaced.

Associate Member Garrison moved to accept the permit and allow one year to find 7/100 of an acre of wetlands area to be in compliance. Associate Member Holland seconded the motion. Associate Member Ballard asked if this meant that the project could be done? Associate Member Garrison responded, yes. Carl Josephson

explained that if they did not comply with the wetlands mitigation then they would be in violation and charged a civil penalty. Ben Stagg asked if an area in the Appomattox would be acceptable. Associate Member Garrison responded, yes. The motion carried, 8-0.

Royalty Fee for Filling (approx. 240 sq. ft. @ \$2.00/sq. ft.).....	\$480.00
Permit Fee.....	\$100.00
Total Fees.....	\$580.00

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- 7. **ARMY CORPS OF ENGINEERS, #04-0269**, requests authorization to hydraulically place up to 100,000 cubic yards of dredged material, per dredge cycle, from the Swash Bay Federal Navigation Channel in Accomack County, on a previously used 23-acre site in Swash Bay involving State-owned non-vegetated wetlands and submerged lands. Both wetlands and subaqueous permits were required.

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

Mr. Badger explained that the Swash Bay Federal Project Channel was part of the Waterway on the Coast of Virginia (WCV) and required maintenance dredging approximately every four to five years. This particular area was set aside by the Commission in 1992 for use as an overboard placement site. Eventually this site would be used for the creation of oyster reefs as outlined in the "Swash Bay/White Trout Creek Dredged Material Placement Plan and Management Strategy." As a result of past overboard disposal, a portion of the placement site had become intertidal.

Mr. Badger stated that in 2005, the Corps desired to place approximately 100,000 cubic yards of maintenance dredged material within the site. The elevation of the spoil area would never be raised any higher than two feet above mean low water.

Mr. Badger said that although the disposal site was located within a potential state oyster planting area, there did not appear to be any viable public shellfish beds in the immediate vicinity at this time. There were, however, private oyster or clam ground leases adjacent to the channel.

Mr. Badger said that while the actual dredging of the federal project channel was authorized by statute, specifically §28.2-1293(A)(3) of the Code of Virginia, the placement of the dredged material overboard in the proposed site was not exempt and, therefore, required a permit. The Commission had issued a permit for this project in 1992. In keeping with the Commission's ten-year policy, the permit expired in 2002.

Mr. Badger explained that since a portion of the non-vegetated wetlands involved were State-owned, the Commission, rather than the Accomack County Wetlands Board, must issue a permit for their use pursuant to the provisions of Section 28.2-1306 of the Code of Virginia.

Mr. Badger said that the Commission staff had held a public hearing in the Accomack County Administration Building, Board of Supervisors Chambers, on Tuesday, April 6, 2004, to accept public comments on the project. In attendance were three ACOE representatives and one oyster ground leaseholder. No public opposition had been received to date. The oyster or clam ground leaseholders were notified of the public hearing.

Mr. Badger explained that the Virginia Institute of Marine Science indicated that the individual and cumulative adverse environmental impacts resulting from this activity would be significant on a local basis but should be limited to the duration of the dredging activity. The dredging would result in the loss of the benthic community but recovery should be rapid and the long-term plan was for the development of oyster grounds on the disposal sites. Furthermore, the dredging and the disposal area were in close proximity to both public and private oyster grounds. If any concerns regarding the existing oyster resource surfaced, VIMS recommended that the dredging be conducted only during the periods of mid-March through June or October through November in order to minimize the adverse effects of turbidity and silting on the oysters.

Mr. Badger stated that no other State agency had expressed any opposition to the project.

Mr. Badger said that since the proposed site had been used in the past and since it did not appear that continued use of the site would result in any significant long-term adverse impacts, staff recommended approval of the project with the stipulation that the overboard placement of the dredged material be confined to the periods of March 15 through June or October through November in order to minimize the adverse effects to oysters that may be present on nearby leases.

Mr. Badger said that staff further recommended that the applicant be required to submit post-dredging bathymetric and cross-sectional surveys within thirty days of completion of the dredging and that the elevation of the dredged material not be allowed to exceed two feet above mean low water.

Mr. Badger said that staff also recommended that once the south placement area had realized a gain of suitable intertidal area from the dredged material, the Corps of Engineers should make every effort to obtain funding for the placement of oyster shell and/or seed oysters on the intertidal area for the purpose of creating a productive oyster rock as envisioned in the "Swash Bay/White Trout Creek Dredged Material Placement Plan and Management Strategy."

Christopher Turner, representative for the U. S. Army Corps of Engineers, was sworn in and his comments are a part of the verbatim record. He stated that he did not have any comments to make to the Commission.

No one else present made any comments, pro or con, regarding the project.

Associate Member Holland moved to approve the permit as recommended by staff. Associate Member Birkett seconded the motion. The motion carried, 8-0.

Permit Fee.....\$100.00

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- 8. DON WILLIAMS, #03-2368**, requests after-the-fact authorization to retain a 48-foot long by 3-foot wide storage shed and an 8-foot by 8-foot rooftop cupola at his property situated along Willoughby Bay in Norfolk.

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

Ms. West explained that Mr. Williams' property was located on Willoughby Bay, adjacent to Interstate 64, in Norfolk. Mr. Williams submitted a Joint Permit Application (#00-1538) on August 23, 2000, requesting authorization to construct a 83-foot long private pier with a 48-foot long T-head, plus a ramp and a 30-foot long floating dock and a 48-foot wide by 30-foot long open-sided boathouse adjacent to his property.

Ms. West stated that the staff determined that the pier portion of the project was authorized under §28.2-1203 of the Code of Virginia. A "No Permit Necessary" letter was issued on September 12, 2000. The permit for the boathouse portion of the project was issued on October 3, 2000.

Ms. West said that in August 2003, staff began receiving inquiries regarding the construction of a large boathouse topped with a gazebo in Willoughby Bay. Staff met with Mr. Williams on August 20, 2003, to discuss the inquiries and conduct a compliance check of the structure. Staff found that the boathouse roof dimensions were consistent with the permit. The inspection, however, revealed that Mr. Williams had constructed an 8-foot square cupola atop the boathouse roof and a large storage shed on the T-head portion of the pier. Neither of these structures were depicted on the application Mr. Williams submitted in 2000.

Ms. West stated that in addition, the cover letter transmitting the permit contained the following capitalized wording:

“YOU ARE REMINDED THAT ANY DEVIATION FROM THE PERMIT OR ATTACHED DRAWINGS REQUIRES PRIOR AUTHORIZATION FROM THE MARINE RESOURCES COMMISSION. FAILURE TO OBTAIN THE NECESSARY MODIFICATION WILL BE CONSIDERED A VIOLATION AND COULD SUBJECT YOU TO CIVIL CHARGES IN AMOUNTS NOT TO EXCEED \$10,000 PER VIOLATION”.

Ms. West said that as a result of the inspection, staff issued a Sworn Complaint and Notice to Comply on August 29, 2003, requesting that Mr. Williams submit a Joint Permit Application and additional information regarding the source and nature of the shed and cupola within 30 days. Mr. Williams requested an extension on October 7th due to personal obligations resulting from Hurricane Isabel. He subsequently submitted the Joint Permit Application on November 18, 2003 requesting authorization to retain both a 48-foot long by 3-foot wide storage shed and the 8-foot by 8-foot cupola.

Ms. West said that in discussing the two structures in question with Mr. Williams, he stated that the shed was initially constructed in 2001 shortly after the construction of the pier as a security feature following the theft of electronics from his boat. Further, he stated that he “believed” the shed was authorized under his RP-17 permit issued by the Army Corps of Engineers. He offered no explanation why he did not seek additional authorization from the Commission.

Ms. West explained that Mr. Williams also stated that the addition of the cupola was an after-thought and was designed to vent heat from under the boathouse roof. Mr. Williams did not believe the cupola was a significant deviation from his issued permit and the drawings attached thereto since he had lowered the pitch of the boathouse roof.

Ms. West explained that while the cupola apparently served a function, it represented a deviation from the permit that was issued to Mr. Williams. A flat roof vent could have satisfied the same heat-venting function. As such, had staff been afforded the opportunity to review the cupola prior to its construction, it was likely that staff would have recommended the less obtrusive roof venting system.

Ms. West said that staff recognized Mr. Williams’ desire to protect his property, however, a fence with a gate could have provided the same function. The storage shed was not a water-dependent structure given the Commission’s definition. That definition states that water dependent means those structures and activities that must be located in, on, or over State-owned submerged lands. Again, had staff been given the opportunity to review the storage shed proposal prior to its construction, it was unlikely that staff could not have recommended approval of the shed as it currently exists.

Ms. West said that of the two illegal structures, however, the cupola was clearly the least objectionable. Accordingly, staff recommended approval of the cupola but removal of the storage shed within 60 days.

Ms. West went on to say that should the Commission choose to authorize the retention of the after-the-fact structures, staff recommended that the Commission consider an appropriate civil charge in lieu of further enforcement action.

Don Williams, applicant, was sworn in and his comments are a part of the verbatim record. Mr. Williams explained that what he did was for security purposes against vandalism. Commissioner Pruitt asked if it was all done for security purposes? Associate Member Ballard asked if the vandalism had been extensive? Mr. Williams said the last time all of the electronics were stolen from his boat and a smaller boat motor was torn off with the console. He explained that sometimes vandalism occurs that he attributed to adolescent involvement.

No one in opposition was present to comment.

Associate Member McLeskey stated that he had been out to visit the project site and he moved to approve the after-the-fact permit with the conditions that the shed and doorway structure be removed and that there be no civil charges imposed by the Commission. Associate Member Garrison seconded the motion. The motion carried, 8-0.

No Fees applicable.

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(Note: Item 9 was heard earlier in the meeting at the request of the applicant's agent.)

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Associate Member Ballard requested a 10-12 minute recess at this time to await individuals for the crab issue to arrive. Commissioner Pruitt agreed to the recess request.

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At this point Jack Travelstead informed the Commission that Stephanie Iverson, who heads up the Statistical Section of Plans and Statistics, had lost her husband to a stroke the previous week. **Associate Member Holland moved to express the Commission's sympathy for her loss. Associate Member Birkett seconded that motion. The motion carried, 8-0.**

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10. PUBLIC COMMENTS:

David Thornes

CRL#442503-5147

Cape Charles, VA

Mr. Thornes explained that he had been denied an exception at last month's meeting and now he was requesting approval of a crab license transfer based on the criteria requirement for one in and one out.

Associate Member Ballard moved to approve the license transfer as long as all documentation could be found. Associate Member Bowden seconded the motion. The motion carried, 8-0.

Catherine Jenkins

Ms. Jenkins explained that as a Commercial Registered Fisherman License holder she was requesting an increase in the number of crab licenses issued. Jack Travelstead, Chief, Fisheries Management, said that there was no provision for that. Ms. Jenkins further explained that she already had 4 boats and did not need another. She said that the current regulation required an individual to purchase the boat and gear in order to transfer a crab license.

Commissioner Pruitt explained that current regulations were made because of the Bi-State Blue Crab Plan requirement to reduce harvesting effort by Virginia's watermen and be in compliance. He said that Virginia had adopted these restrictions in order to comply. He explained that since Virginia was now within the reduction requirements they would be able to consider relaxing these restrictions, which would be done at a later date. He said until then they could not help her.

Mr. Cowart stated that the crab regulations required the transfer of peeler pots with gear and boat and this was not being considered as a problem. He said there needed to be one in and one out for the watermen, thus, relaxing the transfer requirements. Commissioner Pruitt asked if amending the regulation was being considered? Jack Travelstead said that was currently being debated by the Crab Management Advisory Committee (CMAC) and would be coming before the Commission at a later time.

Walter Coles Burroughs, Pound Net Fisherman

Mr. Burroughs explained that the poundnetters need help from the Commission, because they are just about out of business. He said they could only catch a few striped bass that were over the limit and had to throw them back. He explained that the fishermen want to keep the shad bycatch, but they have to throw them back as well. He said that the fish were dead and it did not make any sense to have to throw them back. He said there needed to be a bycatch limit established, there was one already in Maryland. He said that the moratorium was supposed to be over once the stocks recovered and that had not

happened. Once the marine resources are gone he further explained that there would no longer be a need for VMRC and authority would be passed onto the Game and Inland Fisheries Commission. He stressed that the State needed to tell ASMFC to go away because the fisherman were not being treated fairly.

Commissioner Pruitt stated that he agreed with Mr. Burroughs and he had made some good points. He further explained that Bill Hogarth was looking into the turtle issue. He said even though Mr. Burroughs was right, the process was set and could not be changed overnight.

Roger Parks, Gloucester County Crab Shedding operator

Mr. Parks explained that he was concerned about a proposed project in the creek where his crab shedding operation was located. He said that marina slips are taking over the creek and it was proposed that 38 boatslips be constructed for a marina in a small cove of the creek.

Commissioner Pruitt asked Bob Grabb if there was a project proposed and, if so, when would it come up. Bob Grabb, Chief, Habitat Management, responded that the project referred to would be heard in the next month or two. Commissioner Pruitt explained to Mr. Parks that he would need to bring his concerns up at the time the project was heard by the Commission.

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- 11. PUBLIC HEARING:** Pertaining to crab regulations 4VAC20-270, 370, 670, 750, and 1040 to establish 2004 crab harvest rules.

Jack Travelstead, Chief, Fisheries Management, gave the presentation and his comments are a part of the verbatim record. Mr. Travelstead discussed the information provided in the evaluation package separately and motions were made for each regulation.

Mr. Travelstead explained that staff had advertised the proposed amendments to the five crab regulations listed below as requested by the Commission and endorsed by the Crab Management Advisory Committee.

- Regulation 4 VAC 20-750-10 et seq., "Pertaining to Crab Dredge License Sales"
- Regulation 4 VAC 20-1040-10 et seq., "Pertaining to Crabbing Licenses"
- Regulation 4 VAC 20-270-10 et seq., "Pertaining to Crabbing"
- Regulation 4 VAC 20-370-10 et seq., "Pertaining to the Culling of Crabs"
- Regulation 4 VAC 20-670-10 et seq., "Pertaining to Recreational Gear Licenses"

Staff recommended that the regulations, if approved, be made effective May 1, 2004.

Regulation 4 VAC 20-750-10:

"This regulation had achieved its objective of reducing the number of vessels licensed for the crab dredge fishery from 375 (1994) to less than 220 (2003). Provisions for a lottery among registered commercial fishermen who made application to the Commission were necessary to bring the number of crab dredge licensees up to the 225-license cap. All persons who were now eligible for a crab dredge license and those added by the lottery would continue to be eligible for the license in future years unless they failed to register as a commercial fisherman or they transferred their dredge license to another person."

"Since the regulation had met its objective, it was now possible to eliminate many of its provisions:

- 1) The special crab dredge permit can be eliminated, although the sale of the licenses will continue to be limited.
- 2) The requirement that a dredge license holder purchase the license annually and actively engage in the fishery can be eliminated.
- 3) Transfer of dredge licenses to any registered watermen can be allowed, and the special conditions for the transfers can be eliminated, and
- 4) There is no longer a need for the exception process and review committee."

Commissioner Pruitt opened the public hearing. No one was present, pro or con, to comment.

Associate Member Bowden moved to accept staff recommendations. Associate Member McLeskey seconded the motion. The motion carried, 8-0.

Regulation 4 VAC 20-1040-10:

"The moratorium on the sale of all new crabbing licenses would end on May 26, 2004. The CMAC recommended that the moratorium be extended until May, 2005, if that did not jeopardize the 15% reduction requirement. Staff proposed that the moratorium be extended until May 26, 2007 to ensure that additional active effort was limited in the crab fisheries. Failure to extend the moratorium would seriously jeopardize Virginia's commitment to maintain the Bi-State Blue Crab Committee's crab management plan, which included the 15 percent harvest reduction objective."

"Under the proposed amendments, any person eligible for a crabbing license in 2004 would continue to be eligible for that license through the 2007 crabbing season, unless the fisherman failed to register as a commercial fisherman or transferred the crabbing license to another person."

Commissioner Pruitt opened the public hearing.

Gerry Ward, Poquoson Commercial Waterman, was present and his comments are a part of the verbatim record. Mr. Ward explained that he currently can not work in Poquoson. He said he was requesting a license to peeler pot based on a medical hardship.

Steward Owen, Poquoson Commercial Waterman, was present and his comments are a part of the verbatim record. He said he wanted to request a crab pot license. He further said that the regulation was causing hardships for the crabbers.

Associate Member Ballard explained that this was the consequence of limited entry.

Associate Member Cowart moved to adopt the regulation as recommended by staff. Associate Member Jones seconded the motion. The motion carried, 8-0.

Regulation 4 VAC 20-270-10:

"Commercial crabbing was prohibited on Sunday except that peeler crabs could be taken from crab traps or peeler pots on Sunday. It was a common practice for some peeler pot fishermen to remove hard crabs from their peeler pots and to use them to rebait their peeler pots. A strict interpretation of the current regulation made this practice unlawful on Sundays since the harvest of peeler crabs only was permitted on that day. The price of male crabs can exceed \$100 per bushel during the early season making it expensive and difficult for peeler pot fishermen to obtain sufficient male crabs for bait in their peeler pots. To accommodate this need, it was proposed that the regulation be amended to allow for the harvest of up to 1 bushel of male crabs from peeler pots on Sunday to be used only to bait peeler pots and not to be sold."

"The Crab Management Advisory Committee (CMAC) also endorsed an extension of the 8-hour workday to 9-hours during the months of April and May. And, to offset the increased harvest that would occur, the Committee recommended a shortening of the crabbing season by one week in November. Support for this recommendation appeared to be limited. Additionally, staff's analyses indicated that a closure of 13 days in November was necessary to account for the increased harvest that would occur in April and May. Consequently, staff did not support this proposal."

"Finally, additional language was needed to describe the lawful activities during the crabbing day to ensure that the 8-hour workday was a successful harvest reduction measure. Our Law Enforcement personnel had noted some activity outside of the 8-hour period that should be curtailed. The language clarified that the moving, baiting or setting of pots at a time outside of the 8-hour period was unlawful."

Commissioner Pruitt opened the public hearing.

Douglas F. Jenkins, Sr., Twin Rivers Watermen Association, was present and his comments are a part of the verbatim record. Mr. Jenkins explained that there are two types of peeler pots, walking and sex pot. He said that the Northern Neck area had lots of problems with the red tide causing the waterman to lose a lot of crabs with the sex pot. He said that the sex pot was the best for catching hard crabs. He further said that the male crabs would not go into the sex pot because the funnel was too small. He said that the Commission should allow the use of hard crabs for baiting peeler pots. He said he did not agree with staff's calculation of the 13 day closure and he figured it was more like 3 days.

Tom Powers, CMAC Member, was present and his comments are a part of the verbatim record. He said he supported the regulation amendment. He suggested that the Commission needed to add to the sentence... "from peeler pots".

Roger Parks, waterman, was present and his comments are a part of the verbatim record. He said he used all walking pots, no sex pots.

Lewis Jones, Deputy Chief, Law Enforcement, explained that the restriction on the harvest of hard crabs was in another regulation.

Commissioner Pruitt stated that he did not understand the issue regarding Sunday, when the watermen were not allowed to harvest them on that day. Associate Member Cowart explained that it was illegal to take hard crabs on Sunday.

Steve Bowman, Acting Deputy Commissioner and Chief, Law Enforcement, explained that this action was taken originally because of a problem with watermen setting crab pots 5 days early of the start of the season and calling them fish pots. He said the current verbiage in the regulation says the crabs can be taken back to the dock if not to be sold. He said he agreed with Mr. Powers' new verbiage.

Associate Member Ballard moved to accept staff recommendations for Regulation 270, not extend the 8-hour day, and add language...that on Sunday can be taken only from peeler pots. Associate Member Holland seconded the motion. The motion carried, 8-0.

Regulation 4 VAC 20-370-10.

"The CMAC also had recommended replacement of the season-long ban on possession of dark colored sponge crabs with a one-week ban on the possession of all sponge crabs. Some evidence suggested that the harvesting and culling of sponge crabs resulted in their mortality or at least the mortality of the larvae carried in the sponge. On that theory, the advisory committee supported the one-week ban on all sponge crabs, and suggested that crab fishermen could use this time period to work on their vessels and gear."

"Dr. Rom Lipcius suggests in his attached letter that the one-week ban is not guaranteed to be any more effective than the current regulation. He believes the current ban is at least partially effective where crabbers have stopped potting due to the high incidence of dark sponge crabs. Staff agrees with that assessment. We are also concerned because of a developing market for crab eggs, which will place an additional harvest effort on female crabs, particularly if the dark sponge ban is lifted."

"Finally, staff's analyses revealed that more than 4 times as many dark sponge crabs contributed to spawning under the current management measure, compared to the contribution from a one-week ban on all sponge crabs. Clearly, the current measure would be more beneficial to the stock unless the total ban were significantly longer than one week. Based upon this information, staff could not support this recommendation."

VMRC had also received a letter from the Lynnhaven Fishing Pier opposing lifting the current ban. Other e-mails had been received.

Commissioner Pruitt opened the public hearing.

Johnny Graham, Graham and Rollins-crab picking establishment, was present and his comments are a part of the verbatim record. Mr. Graham stated that this regulation had affected the lower Chesapeake Bay crab fishery adversely. He said he was opposed to it in 1999 and still opposed today. He explained that since the adoption of the regulation some watermen had left the business. He said the crab sanctuary, which was originally 200 square miles, was now over 900 square miles. He went on to say that it was the internal eggs that were valuable, not the outside eggs as stated earlier. He suggested that sanctuaries and curfews be used. He said that could not tell anyone where all the crabs came from after the hurricane, but already there was no market for the crabs.

Commissioner Pruitt asked when Maryland had made a change, what was the effect of that? Jack Travelstead said that a market had developed in Virginia. He said that the Maryland measure was not part of the 15% reduction as they claim they were already beyond that requirement.

Tom Powers, CMAC member, was present and his comments are a part of the verbatim record. He said he agreed with Pete Nixon who said that the black sponge caused the defacto closed area. He stated that he did not agree with the one-week ban on all sponge crabs. He said it was a struggle trying to get the female biomass up.

Commissioner Pruitt closed the public hearing to allow for further discussion by the Commission members.

Associate Member Cowart asked if there were options that could be discussed by the CMAC so that the Commission could hold off on a decision for another month. Jack

Travelstead stated that Rom Lipcius had 3 options proposed, such as time frames and expanding the area.

Associate Member Ballard asked if the black sponge ban counted in the reduction. Jack Travelstead answered that it was not a part of the 15% reduction, but that it did promote conservation of stocks, if the harvest was not increased by other means. Associate Member Ballard asked when the calculations for the reduction started. Rob O'Reilly responded, 2001.

Associate Member Jones explained that a certain amount of mortality occurs due to the female crabs as they migrate, not just the sponge crabs. She explained that the dark sponge crabs were nearest the stage of producing. She agreed that there was discrimination in the Lower Bay area.

Associate Member Ballard stated that geographic discrimination as a window dressing was wrong and that everyone should be sharing the burden. He said the Commission needed to look at this issue more.

Associate Member Cowart moved to refer the matter to the CMAC and have it brought back by staff to the Commission for a decision. Associate Member Garrison seconded the motion. The motion carried, 8-0.

Regulation 4 VAC 20-670-10:

"At your last meeting, Tom Powers requested advertisement of an amendment to this regulation to allow those persons licensed to use up to 5 recreational crab pots to crab on Sunday. In recent years, between 500 and 600 of these 5-pot licenses have been sold. The crabs taken under this license cannot be sold."

"Inasmuch as the recreational harvest of crabs was less than five percent of the total harvest, staff did not object to this proposal. We have also received several e-mails in support of this proposed measure. The advisory committee objected to this proposal on the grounds that it might lead to more theft of crabs and pots on Sunday. The Law Enforcement Division did not support that contention."

Commissioner Pruitt asked for questions of staff. Associate Member Garrison asked why the staff was supporting the increased harvest when the regulation was just getting started. Jack Travelstead agreed that it will increase harvest but he further said that it would not increase much. He further explained that there was a new stock assessment on Blue Crabs coming out later.

Commissioner Pruitt opened the public hearing.

Tom Powers, CMAC Member, was present and his comments are a part of the verbatim record. Mr. Powers said that he had requested this amendment be made to the regulation. He said this fishery was a small fraction of the commercial fishery. He stated that this was not being enforced by VMRC. He further stated that he would appreciate the Commission's endorsement of this amendment.

Colonel Steve Bowman, Acting Deputy Commissioner and Chief, Law Enforcement, stated that statistical information regarding summons were listed as crab violations and not broken down further. He said he would have to go back through the records to get more information. His comments are a part of the verbatim record.

Robert Koch, Recreational Crabber, was present and his comments are a part of the verbatim record. Mr. Koch said that he was a recreational crab potter and he checked his pots every three days. He said his weekly catch might be about a 1/2 bushel or maybe as much as 1 bushel in a month's time. He said that sometimes in some years he might only catch 10 bushels. He said that he had had pots stolen in the area of the James River near Huntington Park. He said that if someone wanted to steal the crabs, they can do it any day of the week, not just on Sunday.

George Washington, representative for the Virginia Watermen's Association, was present and his comments are a part of the verbatim record. Mr. Washington stated that those he spoke with were opposed to the proposed amendments. He said there are 500 licenses now, but the change might result in 5,000 licenses being issued. He said that some of the commercial watermen were considering obtaining a recreational license. He said the change will be opening Pandora' box. He asked who would enforce this, because he does not usually see any MPO's on Sunday patrolling the river.

Douglas F. Jenkins, Sr., Twin Rivers Watermen's Association, was present and his comments are a part of the verbatim record. Mr. Jenkins stated that he was opposed to changing the regulation, because it only gave someone another day to steal. He said that the recreational crabbers set their pots up all over the river not just in one area.

Commissioner Pruitt closed the public hearing.

Associate Member Garrison stated that he agreed with Mr. Washington and Mr. Jenkins, therefore, he moved to not change the regulation. Associate Member Bowden seconded the motion. Associate Member Ballard asked if the motion was to leave the regulation as is? Associate Member Garrison responded, yes. Commissioner Pruitt stated that not all recreational crabbers were stealing. Associate Member Bowden stated that his second of the motion was not because of the stealing issue, but because of increased harvest effort that would result. Associate Member Jones stated the Commission needed to wait for the new assessment that was being done before making any changes. The motion carried, 8-0.

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12. SPINY DOGFISH: Request for emergency regulation to adjust 2004 trip limits.

Lewis Gillingham, Fisheries Management Specialist, gave the presentation. His comments are a part of the verbatim record. Mr. Gillingham explained emergency action was needed on this matter for Virginia to remain in compliance with federal requirements. Staff also recommended the Commission advertise for a public hearing in May and make the changes permanent. He said the season starts on May 1. The following amendments were discussed:

- 1) Reduce the possession limit of spiny dogfish from 4,000 pounds to 600 pounds, from May 1 through October 30 and to 300 pounds, from November 1 through April 30.
- 2) Eliminate the 500,000 pound harvest and landing quota for the commercial spiny dogfish fishery.
- 3) Eliminate daily reporting of harvests and landings of spiny dogfish by seafood buyers.

Commissioner Pruitt asked if every state was doing the same thing. Jack Travelstead responded that other states had already done so or were in process of doing so. He said that no other state was out of compliance.

Commissioner Pruitt opened the public hearing. There was no one present, pro or con, to comment on this matter.

Associate Member Birkett moved to accept staff's amendments in emergency action and to advertise for a May public hearing. Associate Member Holland seconded the motion. Associate Member Bowden explained that every State north of New York except Maine would not comply and had never been told that they were out of compliance. He said that he could not support the motion. The motion carried, 7-1. Associate Member Bowden voted no.

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MEDICAL HARDSHIPS

Associate Member Holland brought to the attention of the Commission his concern that there were no provisions for hardships in the regulation.

Jack Travelstead, Chief, Fisheries Management, explained that it was being discussed by the advisory committee as to whether a special committee should be established to screen

applications for hardship exemptions and to establish conditions for allowing watermen to apply.

Associate Member Holland asked whether medical conditions were being considered. Mr. Travelstead explained that was different from what the advisory committee was discussing.

Associate Member Cowart mentioned that the advisory committee might need to discuss the part-time crabber and allowing another time of day fishery.

Associate Member Holland stated that there was a need to consider special conditions for the physically disabled.

Carl Josephson, Assistant Attorney General and Counsel for VMRC, said that it could be done by regulation, but needed to be consistent or provide for a conflict variance. He said that there should be a requirement for documentation from a doctor as well.

Associate Member Garrison stated that the Dept. of Game and Inland Fisheries allowed a disabled person to hunt from their car.

Associate Member Ballard agreed there was a need to develop general hardship exemptions for handicapped persons.

Commissioner Pruitt said the Commission would refer the matter to the CMAC. He stated that Law Enforcement personnel should attend the meeting.

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There was no further business, the meeting adjourned at approximately 3:47 p.m.

William A. Pruitt, Commissioner

Katherine Leonard, Recording Secretary