

MINUTES

June 22, 2004
Newport News, VA

Commission Meeting

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.)	
Russell Garrison)	Associate Members
J. T. Holland)	
F. Wayne McLeskey)	
Carl Josephson	Assistant Attorney General
Col. 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.
Rob O'Reilly	Deputy Chief, Fisheries Mgt. Div.
Chad Boyce	Fisheries Management Specialist, Sr.
Lewis Gillingham	Fisheries Management Specialist
Jim Wesson	Head, Conservation/Replenishment
MPO Grady Ellis	Marine Police Officer
MPO Allen Marshall	Marine Police Officer
Bob Grabb	Chief, Habitat Management Div.
Tony Watkinson	Deputy Chief, Habitat Mgt. Div.
Chip Neikirk	Environmental Engineer, Sr.

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June 22, 2004**

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.
Royce Bridger	Engineering Tech, IV

Virginia Institute of Marine Science (VIMS)

Lyle Varnell
Tom Barnard

Other present included:

David L. Reswick	John S. Martin	Charles Brown
Bob Reid	Bill Cooper	Eileen Cooper
Craig Palubinski	James Dunn	Henry Miller
Heather Stevenson	Anne Belanger	Phill Roehrs
Mike Kay	Robert Sutton	Edward Alleyne
Bill Judy	Jeff Gordon	Kathy Perkins
Susanne Bowden	Bill McDonough	Susan Gaston
Douglas F. Jenkins, Sr.	Francis Brooke	Helen Brooke
Bill Culpepper	Johnathan Kirk	Willis Kirk
Kelly Place	Donald Starke	Tom Powers

and others

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Commissioner Pruitt called the meeting to order at approximately 9:32 a.m. with Associate Members Cowart and Jones absent.

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

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

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Approval of Agenda: Commissioner Pruitt asked if there were any changes to the agenda. There were no changes. **Associate Member Ballard moved to approve the agenda. Associate Member McLeskey seconded the motion. The motion carried, 6-0.**

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1. **MINUTES:** Commissioner Pruitt asked for a motion regarding the minutes. **Associate Member Birkett said if there are no changes, he moved to approve the minutes for the May 25, 2004 Commission meeting as circulated. Associate Member Holland seconded the motion. The motion carried, 5-0-1. Associate Member Ballard abstained from voting, as he was absent from the May meeting.**

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2. **PERMITS:** Bob Grabb, Chief-Habitat Management, gave the presentation on Page Two items, A through E, 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.

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

2A. RIVER’S REST MOTEL & MARINA L.C., #04-0189: Requests authorization to install floating piers to create a total of 60 wetslips at their existing facility situated along the Chickahominy River in Charles City County. Recommend a royalty of \$5,771.00 for the encroachment over 11,542 square feet of State-owned subaqueous land.

Royalty Fees (Encroachment on 11,542 sq. feet @ \$0.50/sq. ft.).....	\$5,771.00
Permit Fee.....	\$ 100.00
Total Fees.....	\$5,871.00

2B. RICHMOND DEPARTMENT OF PUBLIC UTILITIES, #02-1288: Requests to modify their existing permit to include the option for an alternative installation method. This option would include the installation of an aggregate causeway up to 55 percent across the river with 15-foot wide openings on 150 –foot intervals and the installation of parallel downstream cofferdams to create contained workspace zones impacting a 100-foot wide area to facilitate installation of a 30-inch water main, during high water levels, within the James River in the City of Richmond and Henrico County.

No fees applicable, permit modification/government activity.

2C. YORK RIVER YACHT HAVEN, #04-0693: Requests authorization to renovate their existing ships store and re-align an open-pile pier located along the north side of the store and restaurant at their marina situated along Sarah Creek in Gloucester County. With the exception of the redesigned open-pile walkway, the work was previously authorized under VMRC #94-1293, which has expired. The re-designed walkway will not result in any additional encroachment beyond that which had previously been authorized.

Permit Fee.....	\$100.00
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2D. DANIEL A. HOFFLER, #03-2223: Requests authorization to install seven (7) 200-foot long offshore stone breakwaters along the Chesapeake Bay adjacent his property at “Point Farm” in Northampton County.

Permit Fee.....	\$100.00
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2E. NAVY PUBLIC WORKS CENTER, #04-0827: Requests authorization to construct a 150-foot long by 35-foot wide two-lane bridge and to install, by directional drill method, two (2) 180-foot long 4-inch conduits for power and communications lines adjacent to the bridge situated on Felgates Creek at the Yorktown Naval Weapons Station in York County. Staff recommends a time-of-year restriction from February 15 to June 30 to protect spawning of anadromous fish.

Permit Fee.....\$100.00

3. **CLOSED SESSION:** No closed session was held.

4. **WILLIAM McDONOUGH, #02-1839.** Restoration hearing to consider the unauthorized construction of 83 linear feet of replacement vinyl bulkhead aligned up to five and one-half (5.5) feet channelward of an existing bulkhead and three and one-half (3.5) feet farther than that permitted at his property situated along Chincoteague Channel. The VMRC permit authorized the construction of a 64-foot long vinyl replacement bulkhead, aligned a maximum of two (2) feet channelward of the deteriorating bulkhead. Continued from the May 25th meeting.

Commissioner Pruitt asked the staff to give the presentation for Mr. Ballard’s benefit as he was not present at the May Commission meeting.

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

Mr. Badger explained that the Commission voted to continue the hearing until their June 22, 2004, meeting to ensure that Mr. McDonough’s neighbor, Ms. Griffith, was fully aware of the nature of his request. The Commission also invited Ms. Griffith to attend the June 22, 2004, Commission meeting if the matter could not be resolved.

Mr. Badger said that staff had contacted Ms. Griffith on June 7, 2004, to find out if the matter had been resolved. Ms. Griffith stated that Mr. McDonough had contacted her over the Memorial Day weekend while she was in Chincoteague. They discussed the location of the bulkhead on site and Mr. McDonough asked if she would agree to the unauthorized alignment.

Mr. Badger stated that Ms. Griffith had since contacted her attorney and remained in opposition to the bulkhead at its present location. She still believed the bulkhead encroached into her riparian area and if allowed to remain could become her liability. Ms. Griffith does not oppose the original permitted bulkhead location.

Mr. Badger explained that in certain situations, when a violation is discovered, the property owner is given the option of applying for an after-the-fact permit or voluntarily restoring the area to pre-construction conditions. In this case, however, it was unlikely that staff could have recommended approval of a bulkhead alignment greater than the two

feet permitted, since the adjacent property owner had questioned the structure's encroachment into her riparian area. Ms. Griffith still maintains her opposition to the illegal bulkhead alignment. In light of her objection, restoration still appears to be the only acceptable alternative. While there may be some impacts associated with removal and reconstruction of the structure, staff believes the impacts would be relatively short-term.

Mr. Badger said that staff recommended the Commission order removal of that portion of the bulkhead that was not in compliance with Mr. McDonough's permit and that he be required to restore the area to pre-existing conditions. If Mr. McDonough wishes to reconstruct the bulkhead, it should be aligned a maximum of two feet channelward of the deteriorating bulkhead as originally permitted. If Mr. McDonough is concerned about the stability of the existing bulkhead and upland, he is certainly able to construct the replacement bulkhead landward of the failing structure. Upon completion of the new structure, the old bulkhead and slabs of concrete could then be removed from the upland by excavator.

William Charles McDonough was sworn in and his comments are a part of the verbatim record. Mr. McDonough explained that there was 20 feet of dry land behind Ms. Griffith's her house. He said that Barry Fisher, his neighbor, suggested he knock the concrete over and move the bulkhead back so that it can be excavated. He explained that the shallow depths did not allow for access by water. He said that the larger pieces of concrete are impossible to remove by hand and would require the use of heavy equipment.

Associate Member Garrison stated he was still not clear on the footage, the applicant said 20' and the staff said 4 or 5 feet. Mr. McDonough said that the survey would show it better. Mr. Badger explained that the first 20 feet were wetlands and not under VMRC jurisdiction.

Commissioner Pruitt asked what Ms. Griffith's biggest complaint was? Mr. Badger said that it was the encroachment into her riparian area and her feeling that it was causing her personal liability.

Associate Member McLeskey asked to see the survey. Mr. Badger put the survey up on the overhead and explained that the bulkhead, as built, was encroaching on Ms. Griffith's fee simple area.

Associate Member Holland said that he favored the staff recommendation to the letter. He said that this was a second offense and a minimum fine could not be assessed.

Mr. McDonough explained that on the survey, the property line was where the tall pole was shown. He said the stake used for the survey was put in the wrong location and he

had used it to determine where he was building. He said he was willing to comply with the permit, remove the bulkhead and relocate it back 20 feet.

Commissioner Pruitt said that the testimony today had changed his thinking and he did not see the actions by Mr. McDonough as deliberate.

Bob Grabb, Chief, Habitat Management, explained that the Commission does not have a matrix like law enforcement. He said the level of impact determined the civil charge. He explained that normally the policy allowed for replacement, but as it was done, it would not have been approved administratively. He further explained that the Court Chancery would have to determine the property line.

Commissioner Pruitt asked if anyone else was present to comment. No one else was present.

Associate Member Ballard stated that because the applicant was willing to comply and remove the bulkhead and to rebuild it to be in compliance, **he moved to adopt the staff recommendation requiring compliance and to allow him 90 days for removal of the bulkhead. Associate Member Bowden seconded the motion. The motion carried, 6-0.**

No fees applicable, 90-day compliance ordered requiring removal of the structure.

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5. **DEEP WATER MARINA, LLC, #03-0636.** Requests authorization to construct a commercial marina with 29 wetslips requiring the construction of three (3) piers, a launch platform and a connecting boardwalk adjacent to their property situated along the Great Wicomico River at Glebe Point in Northumberland County. Adjacent and nearby property owners protested the project.

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

Mr. Madden explained that the proposed marina facility and resort would be located at the southern tip of Glebe Point along the north shore of the Great Wicomico River in Northumberland County approximately nine miles north of the town of Kilmarnock, adjacent to the Route 200 Bridge. The new facility would be on the site of a former oyster house and wharf.

Mr. Madden said that the overall plan for the project site called for the construction of a 21-unit lodge and restaurant and the development of a marina facility with 29 wetslips. The piers would be constructed of concrete floating sections, portions of which would be connected by a timber boardwalk. The pier closest to the Route 200 bridge would be

offset 100 feet from the bridge, would be 126 feet long by 8 feet wide, and accommodate eight (8) wetslips intended for transient boaters. The main T-head pier would be 16 feet wide and extend 189 feet channelward of mean high water. The outboard length of the T-head would be 136 feet long by 10 feet wide. The pier would include tending piers and mooring piles to accommodate 17 large vessels, as well as fuel and pump-out services. The slips on the T-head pier would be used for long-term rentals. These two piers would be linked to the upland by a 16-foot wide, timber boardwalk.

Mr. Madden stated that the remaining elements of the marina include a kayak platform, and a third pier with 4 transient slips located in a man-made cove on the upstream side of the property. The kayak platform would be 576 square feet and would allow the resort patrons direct access to the water.

Mr. Madden explained that the Commission staff received protest letters from an adjacent property owner and three (3) residents of nearby Balls Creek. Mr. and Mrs. Thomas Bevan who own a parcel immediately adjacent to the proposed road access for the resort, were concerned about the use of the upland road, loss of privacy, impacts to their view and increased noise associated with restaurant/ marina operations. Their concerns, which were related to upland use and development issues, were beyond the Commission's jurisdiction.

Mr. Madden further explained that the remaining issues raised by the protestants included: navigational impacts, impact to oyster resources in the area, competing uses for this section of the river and pollution from the marina and the upland development.

Mr. Madden said that the Great Wicomico River's bank-to-bank width was approximately 1,100 feet. The T-head, which represented the greatest channelward encroachment beyond mean low water, was 186 feet. The north side of the marked pass-thru channel under the Route 200 Bridge was 551 feet beyond the end of the T head.

Mr. Madden stated that in an attempt to assess the impact the marina might have on oyster resources, the Commission staff notified all of the oyster ground leaseholders within a quarter mile radius of the T-head pier. Thus far, staff had not received any protests from them. Public Grounds number 6, 7, and 9 will be unaffected by the marina construction.

Mr. Madden said that the Department of Health (Division of Shellfish Sanitation) commented that since the project would involve approved shellfish waters, they would establish a 2.35-acre seasonal closure area in the vicinity of the marina. This enclosure essentially lies within the footprint of the marina itself.

Mr. Madden said that the Virginia Institute of Marine Science (VIMS) noted that pollution discharge was directly related to marina operations. The marina would not

provide any boat maintenance services and the applicant had provided a satisfactory fuel spill contingency plan.

Mr. Madden explained that in their original report, VIMS also questioned whether there would be a need for future dredging to maintain controlling depths within the marina. The applicant had addressed this issue by redesigning the piers to allow for sufficient depths throughout the marina, thereby, eliminating the need for any dredging.

Mr. Madden said that no other agency had protested the project, and the applicant had received all the County approvals for the upland development and marina construction.

Mr. Madden stated that with the exception of the required seasonal closure the project appeared to meet the requirements of the Commission's *Criteria for the Siting of Marinas or Community Facilities for Boat Mooring*. The closed area, however, only affected potential harvest during summer months within the footprint of the marina. This would not appear to represent a significant impact. Staff believes that the width of the main run of the T-head pier exceeds that necessary for marina operations, and that the pier should be no more than 8 to 10 feet wide. In rebuttal, the applicant's agent, in his May 28, 2004 letter, indicated that his client needed the width to accommodate pedestrians, dock boxes and golf carts that would be used to carry provisions and equipment to the vessels moored thereto. In addition, since a ramp already existed on the site in the man-made cove, staff questioned the need for the kayak platform.

Mr. Madden explained that staff recommended approval of the project, provided the width of the main T-head pier was reduced, the kayak platform was eliminated, and a royalty assessment at the rate of \$.050 per square foot for all authorized encroachments over State-owned submerged lands was assessed.

Mr. James Dunn, Manager for Deep Water Marina, and Craig Palubinski of Bayshore Design were present and sworn in to testify.

Mr. James Dunn explained that the VMRC approval was the last one needed. He said that the width of the pier was necessary because it was a multipurpose pier, not just to service the boat owners. He said that there was a restaurant and a 26-room hotel on site and it was proposed so as to ensure the safety of those using it also. He said they had already made adjustments to resolve the problem with the county.

Commissioner Pruitt asked for anyone in opposition and swore in Mr. Cockrell.

Mr. Otis B. Cockrell an area property owner was present and his comments are a part of the verbatim record. He said he was not a protestant of the project per se, only a concerned citizen. He said it was a good marina site and the County had required some cutbacks in the project, which were good. He suggested the pier be more like 10 to 12 feet rather than the proposed 16-foot width. He said he had an oyster lease on each side

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of the applicant and was concerned with the right-of-ways required for the sewage lines, which were not in yet. He explained he was an active oyster grower and would like to know where the sewage is going. The closest sewage facility was in Reedville. He said the Commission should put conditions the permit in order to protect his oyster ground. He said that there was a proposed floating pier, which he was not aware of, and he was concerned about that also.

Mr. Dunn responded to Mr. Cockrell’s concerns. He said that there are no sewage plants on this site. He stated that it was all being pumped up to where he had 12 acres in three parcels. He said that had been approved by the county and he had secured the right-of-ways from VDOT for any lines going up to that facility, so that nothing will be down at the project site. He said he had Health Department approval on the preliminary ones, but with the larger tanks they still had to do a perk check for the main large area. He said that he had enough now for this project’s approval.

Commissioner Pruitt explained that the Federal government was putting a lot of money into the river and there were a lot of private leases in that area, so this is something that the Commission had to have firm.

Associate Member Garrison asked questions about the water table in the area, such as quality of water and depth. Mr. Dunn said the water was good and that there was approximately 700 feet.

Associate Member McLeskey asked about the criteria for the width of the pier. Mr. Grabb responded that it was based on necessity. Associate Member Holland asked if staff recommended 10 feet. Mr. Madden responded yes.

Associate Member Garrison moved to approve the project with the kayak lift included and limiting the width of the pier to 12 feet. Associate Member Birkett seconded the motion. The motion carried, 6-0.

Royalty Fee (Encroachment on 7,976 sq. ft. @ \$0.05/sq. ft.).....	\$399.00 (Annual)
Permit Fee.....	\$100.00
Total Fees.....	\$499.00

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Associate Member Birkett assumed the chair duties in Commissioner Pruitt’s absence.

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6. **HENRY MILLER, IV, #04-0186.** Requests authorization to construct a private, non-commercial pier extending 200 feet channelward of mean high water with 642 square feet of open-pile deck area located at the channelward end of the pier; and, to install a single piling 100 feet channelward of the pier adjacent to his property situated along the Rappahannock River in Middlesex 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. Miller's property was located on the southern shore of the Rappahannock River in the Waterview area of Middlesex County. The Rappahannock River is approximately two miles wide at the project site and development along this portion of the shoreline is primarily residential.

Mr. Neikirk said that Mr. Miller had a 6-foot wide pier that extended approximately 165 feet channelward of mean high water with a 16-foot by 36-foot T-head and two smaller separate deck areas measuring 6-foot by 12-foot and 5-foot by 18-foot, respectively. The existing pier angled upriver toward the extended property line of his neighbors, Bryan and Linda Bowles. The pier had been severely damaged during Hurricane Isabel and required reconstruction.

Mr. Neikirk stated that Mr. Miller proposed to remove the existing pier and construct a new pier angled away from the Bowles' property and roughly parallel with his extended property lines. He also proposed to extend the pier 35 feet to a total length of 200 feet channelward of mean high water and to relocate the smaller decks near the channelward end of the pier. In his application, Mr. Miller stated the water was approximately 1.5 feet deep at mean low water near the channelward end of the proposed pier. Although the 35-foot extension would only provide a few additional inches of water depth, Mr. Miller believed the additional depth would allow his boats to remain floating during most low tides. A single mooring pile was also proposed to be located 100 feet channelward and approximately 50 feet downriver of the pier.

Mr. Neikirk said that Mr. Miller received authorization to rebuild the existing pier under Governor Warner's Executive Order 58 pertaining to the repair of previously authorized structures damaged during Hurricane Isabel. Executive Order 66, which was recently issued, extended the expiration of Executive Order 58. Since Mr. Miller preferred to extend and straighten the pier, a regular application is required. Additionally, since the pierhead exceeded 500 square feet, the pier did not meet the requirements of the statutory authorization for private piers provided in §28.2-1203(5) of the Code.

Mr. Neikirk explained that the adjoining property owners, Mr. and Mrs. John Fultz, objected to the project. They were concerned with any enlargement of the structure or any relocation of the pier closer to their property line.

Mr. Neikirk said that Mr. Miller originally proposed to construct a 5 to 10 foot wide lower level deck around the perimeter of the pierhead. The bi-level deck would have measured nearly 1,400 square feet. Both of the adjoining property owners objected to the original proposal and staff informed Mr. Miller that VMRC could not support the construction of such a large pierhead. He agreed to revise his project plans to the current proposal.

Mr. Neikirk said that staff did not believe the pier extension would adversely affect navigation, but were concerned that the isolated piling located 100 feet channelward of the pier might pose a potential hazard to boaters. Additionally, as proposed, the single piling might encroach into the riparian area of Mr. and Mrs. Fultz.

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

Mr. Neikirk said that since the 642 square feet of pierhead exceeded the 250 square foot maximum allowed by statutory exemption under §28.2-1203(5) of the Code, a VMRC permit was required. As revised, however, the square footage of the deck area was the same as that of his existing pier. The proposed extension should not adversely affect navigation and the proposed re-alignment of the pier was an attempt to center the pier on Mr. Miller’s property. Accordingly, staff recommended approval of the proposed pier extension. Since the single piling could pose a hazard to small boats and personal watercraft, staff recommended the single piling be deleted or changed to a mooring buoy and relocated to the center of Mr. Miller’s extended property lines.

Mr. Henry R. Miller, IV, applicant was sworn in and his testimony is a part of the verbatim record. Mr. Miller explained that the existing boatlift on the dock was omitted from the application, which he would like to maintain. He said that he also had a dock box used to store chairs and clean fish, which he would like to keep. He stated that he would be happy to rebuild as it was, but since he was doing the reconstruction he wanted to improve it and be able to get to deeper water for easier access by boat.

Mr. Neikirk said that staff had no problem with the boatlift. Associate Member Birkett said the dock box would be left to the staff’s discretion.

No one in opposition was present to comment on the project.

Associate Member Birkett asked for a motion from the Commission. **Associate Member Garrison moved to approve the project as recommended by staff. Associate Member Holland seconded the motion. The motion carried, 5-0.**

Permit Fee.....\$25.00

Commissioner Pruitt returned to the meeting and resumed his duties as chair.

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7. **MR. & MRS. ROBERT SUTTON, #02-2076.** Restoration hearing for an unauthorized bridge and marsh walkway that extends from the Sutton upland over State-owned subaqueous bottom of two tidal channels and onto land belonging to others on an unnamed cove off of the Rappahannock River near Weems in Lancaster County.

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

Mr. Woodward explained that on October 25, 2002, staff received an application from Robert and Rebecca Sutton for a 400-foot long by 4-foot wide open-pile walkway and pier that was to extend over their marsh and 32 feet channelward of mean low water into Rappahannock River at their property in Weems. The application was reviewed and, based on the information presented by the agent, found to meet the private, riparian pier exemption provided in Section 28.2-1203 of the Code of Virginia. As a result, staff sent a letter to the Suttons on November 1, 2002, indicating that a permit would not be required from the Commission. That standard “no permit necessary” (NPN) letter contained language that the determination “grants no authority for an individual to encroach upon the property rights, including riparian rights of others.”

Mr. Woodward said that on or about November 6, 2003, staff inspected the project at the request of an adjacent property owner, Ms. Suzanne Bowden, representing Wharton Grove. Ms. Bowden provided a boundary survey of the Wharton Grove property. This survey was used to determine, along with field measurements, that the uncompleted marsh walkway actually crossed over State-owned subaqueous bottom within two 20-foot wide tidal channels that lead into the tidal pond off of the Rappahannock River. It also showed an encroachment on approximately 200 feet of marsh, which was claimed by Ms. Bowden.

Mr. Woodward said that on November 14, 2003, staff sent the Suttons a letter rescinding the earlier NPN letter. In the letter staff requested that the applicant provide, within 60 days, a survey or any other information, which would refute the Wharton Grove survey findings. While the Suttons attempted to resolve the matter with Ms. Bowden, staff had not received any information that would refute the finding of violation. Accordingly, staff sent a Notice to Comply (No. 04-02) on March 16, 2004, directing removal of 210 feet of the terminal portion of the structure within 30 days of receipt of the Notice. On May 11, 2004, staff sent a letter to the Suttons directing them to appear before the Commission at the June 22, 2004 meeting for a formal Restoration Hearing, in accordance with the provisions of Section 28.2-1212 of the Code of Virginia.

Mr. Woodward explained that subsequent to the notice of the restoration hearing, Mr. Charles Chase, representing Coastal Land Development, LLC, informed staff that he represented the property owners of the parcel adjacent to, and north of the Sutton property on the tidal cove. Mr. Chase produced a recorded survey that disputed the unrecorded Wharton Grove boundary survey, and contended that the marsh walkway was actually built on their land. Mr. Chase indicated by letter, dated June 1, 2004, their willingness to cooperate in discussions to resolve the matter.

Mr. Woodward said that the Virginia Institute of Marine Science indicated that the impacts of an open-pile, four-foot wide walkway elevated above the marsh and channels would likely be minimal. VIMS further indicated that, while removal of the structure may result in impacts to environment, the marsh should recover over time, provided care is used in removing the piles and that all building material is completely removed from the cove.

Mr. Woodward said that the U. S. Coast Guard agreed with staff's direction to the Suttons to remove the structure across the cove. They noted in their comments that it was their intent to ensure that their office reviewed, for permitting determinations, proposed bridge crossings over navigable waterways of the United States.

Mr. Woodward said that the Lancaster County Wetlands Board did not have a hearing on this project, since it was represented as a private pier and open-pile walkway, which are exempt pursuant to Section 28.2-1302 of the Code.

Mr. Woodward said that while there was currently disagreement between two surveys of the area, staff generally supported waterfront surveys, which use the mean low water line as the boundary between upland property and Commonwealth property. Therefore, staff believed the Wharton Grove survey, while unrecorded more accurately reflected the boundaries of the properties in question. However, staff and the Commission clearly do not have the authority to determine which survey was legally accurate.

Mr. Woodward said that the application, as prepared by the applicant's agent and signed by the applicant, contained inaccurate information regarding the true location of the Sutton property, the true boundaries of the property, and the true nature of marsh and the adjacent State-owned subaqueous bottom of the tidal cove and channels there. Had the application been accurate, staff would have processed it for a bridge and non-riparian pier permit, requiring a public review, as neither of these structures was exempt by Code. Unfortunately, staff does not routinely field-review private pier applications unless the application information indicates the project will not meet the exemptions or an objection was brought to staff's attention during the review, therefore, these inaccuracies did not come to light. Were a public interest review initiated, Ms. Bowden and the prior owners of the Chase property would have been alerted. Given the concerns raised by the residents of Wharton Grove, staff would likely have recommended denial of the entire

project, even though some of the walkway was to be built upon non-jurisdictional areas of tidal marsh.

Mr. Woodward stated that staff concurred with VIMS that removal of the structure would likely not result in long-term damage to the marsh or tidal channels, and that the environment would likely recover on its own.

Mr. Woodward said that accordingly, staff recommended removal of all structures channelward (west) of the Sutton property within 90 days and that the marsh be restored to pre-construction conditions, as determined by staff and VIMS.

Mr. Robert Sutton, applicant was present and sworn in to testify.

Ms. Heather Stevenson, attorney for Mr. and Mrs. Sutton, was present and her comments are a part of the verbatim record. Ms. Stevenson explained that the Suttons tried to do the right thing when they hired a contractor to construct the pier and acquire all the necessary permits. She said it was clear that they got some very bad advice from that contractor. She said they were sorry for the confusion and the frustration that this had caused. She reiterated that it was an expensive pier and said the Suttons would like to keep it, if possible. She said that Mr. Chase, an adjoining property owner to the north, was interested in some sort of shared use of the pier and he too was concerned that the pier removal could cause harm to the cove. She said that the applicants would be happy if it was determined they could retain the pier, but they are ready to abide by the staff's recommendation.

Commissioner Pruitt asked if anyone else wished to comment.

Mr. John Martin, attorney representing Coastal Land Development, LLC, Charles Chase's company spoke. Mr. Martin explained that Coastal Land Development, LLC, was a Virginia Limited Liability Company. He said Charles Chase was the managing partner and a principal in the company. They owned the property north of the Sutton's property. He asked for a slide of the Keyser plat for him to refer to in his presentation. He corrected Mr. Woodward by stating that the tide line highlighted was not the boundary line. He delineated the correct boundary line on the plat. He said that there were two conflicting surveys done and the original survey showed that Coastal Land Development owned it. He said that unlike Ms. Bowden who wanted it removed, they wanted to work something out so as to leave it. He said that even a kayak would not be able to access water in this area at low tide. He said that there needed to be a determination of ownership before it was removed because if it was proved in court to belong to Coastal Land Development then they wanted to compromise with the Suttons.

Mr. Francis J. Brook, III, owner of property at Warten Grove, was present and his comments are a part of the verbatim record. He said that he and his wife, Helen Morgan Brook, were opposed to the pier. He said that the pier and walkway disrupted the area's

aesthetics. He said they wanted the pier/walkway construction stopped and removed from the cove, named Oyster Cove. He said they were not arguing the ownership issue. He said he had a declaration document that clearly establishes the boundary lines. He said that Charles Pruitt's survey established ownership back to the 1800's. He said there were ten cottage owners and he said that all ten are vigorously opposed to the project. He said they had no notification of the project.

Mrs. Helen Brook, property owner at Warten Grove, was present and her comments are a part of the verbatim record. She said she was opposed to the pier and said that it was an obstruction to navigable access by canoes and kayaks. She said she had always enjoyed the natural beauty in the area and had shared this with her children over the years. She said she was opposed to Mr. Chase's attorney's statement of shared use.

Mrs. Susanne Bowden, property owner on the cove, was sworn in and her comments are a part of the verbatim record. Ms. Bowden said that she shared the concerns expressed by the other protestants.

Ms. Heather Stevenson, attorney for the applicant in her rebuttal stated that the pilings were spaced so that a small boat could go in and through there.

Mr. Robert Sutton, applicant, said that the pier was under construction for about 4 months before there was any complaint registered. He further said that if this were such an eyesore with such an impact, that somebody in that 4 months period should have registered a complaint. He explained that the permit application was advertised in the local paper and posted at the property. He said that on advice of the county permission needed from the upriver landowner was secured. He said the County had not made a recommendation or given him direction to get permission from the downstream landowner because it was in his mind the pier bordered closer on the other property. He said he had gotten bad advice from the contractor and did not know the property at the spit belonged to anybody but the State. Commissioner Pruitt asked Mr. Sutton how he felt about Mr. Chase's attorney's suggestion about shared use if the court ruled the property was owned by Mr. Chase. Mr. Sutton said it would be very reasonable to have shared use. He said further that in the notification he got from VMRC it said that everything channelward of the initial portion of the pier had to be removed.

After further discussion, Associate Member Holland moved to table the matter until the dispute over ownership was settled. Associate Member Birkett seconded the motion. Carl Josephson, Assistant Attorney General and counsel for VMRC, asked if the construction was prohibited? Commissioner Pruitt responded, yes. Associate Member Holland asked that it be made a part of the motion. The motion carried, 6-0.

No fees applicable, deferred for dispute resolution.

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Commissioner Pruitt adjourned the meeting for a lunch break at approximately 12 noon. He asked that everyone return at approximately 12:45 to reconvene the meeting.

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Associate Member Birkett reconvened the meeting at approximately 12:52 and assumed the duties of chair in Commissioner Pruitt's absence.

8. **WILLIAM COOPER, #04-0470**, requests authorization to install an uncovered boat lift at the channelward end of an existing private, open-pile pier at property situated along Rainey Gut in Virginia Beach.

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

Mr. Owen said that the project site was located approximately 800 feet upstream of the confluence of Rainey Gut and Linkhorn Bay. Rainey Gut is a narrow tidal waterway that connects Linkhorn Bay with Crystal Lake. Crystal Lake, and the southern shoreline of Rainey Gut, are developed as residential property. Vessels trafficking this area range from small runabouts to large pleasure yachts. The northern shoreline of Rainey Gut is undeveloped since it is part of First Landing State Park.

Mr. Owen said that the applicant proposed to install an uncovered lift at the channelward end of a 158-foot long, open-pile pier. Mr. Cooper previously applied for the pier and lift in December 2000. Staff concluded, at that time, that the pier and lift were statutorily authorized by §28.2-1203(A)(5) of the Code of Virginia, provided that the most channelward feature of the structure remained landward of an existing obstruction (i.e., cypress stump), located approximately 30 feet northwest of the project. The U. S. Army Corps of Engineers also approved the project. Mr. Cooper constructed the pier sometime thereafter, but chose not to install the lift. On February 27, 2004, staff received a new request to install the lift and a 3-foot by 22-foot finger pier. Mr. Cooper later withdrew his request for the finger pier in partial response to staff's concerns.

Mr. Owen said that staff visited the site in March 2004, after reviewing the original project drawings, dated January 21, 2004. The site visit confirmed that the drawings inaccurately depicted the existing channel location relative to the subject pier. Staff met again in late March with Mr. and Mrs. Cooper and Mr. Rick Henderson with the Corps. At that meeting the Coopers agreed to provide a bathymetric survey that would accurately locate the channel position.

Mr. Owen said that a review of that survey revealed that the requested lift would encroach between the minus five and minus six-foot contours at mean low water. In staff's opinion, the lift now encroached channelward of a line drawn between the stump situated northwest of the pier and a similar obstruction located immediately upstream (southeast) and constituted a hazard to navigation.

Mr. Owen said that the Coopers maintain that the boat traffic in Rainey Gut steers well north of the stumps and that their proposed lift poses no hazard.

Mr. Owen explained that should the lift be approved as proposed, the distance between the channelwardmost lift piles and the opposing minus five-foot contour (mlw) was 50 feet and 48 feet, respectively. Currently, Mr. Cooper moors an 8-foot beam vessel at the dock with mooring whips. That boat sits approximately 3-foot off the pier for a total distance of 11 feet. The proposed lift would encroach 14 feet channelward of the pier, resulting in a further 3-foot reduction in the available channel width.

Mr. Owen further explained that in staff's opinion, the existing pier and mooring whip configuration represented the maximum encroachment that should be statutorily authorized by §28.2-1203(A)(5) of the Code. While it was true that mooring a larger vessel at the dock could create a similar encroachment as that of the proposed lift, staff could not support the structure approval given the waterway's narrow width and natural ability to accommodate deep draft vessel traffic, especially in a passing situation.

Mr. Bill Cooper, applicant, was sworn in and his comments are part of the verbatim record. Mr. Cooper explained the project. He said he moved the pier because of the stump and he thought he was required by the permit to do this. He said the lift was for his boat's protection from boat traffic and the weather. He explained that the Corps and VMRC permits both say to keep clear of the navigable channel. He said that removing the stump would be a service to all. He referred the Commission to the letters of support in their package. He said there was not a lot of traffic in the area like in areas such as Lesner Bridge and the Narrows.

Associate Member Birkett asked if anyone else was present to comment. There was no one.

Associate Member McLeskey moved to approve the permit application. Associate Member Garrison seconded the motion. The motion carried, 5-0.

No fees applicable.

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- 9. PUBLIC COMMENTS:** Associate Member Birkett called for any public comments.

DOUGLAS JENKINS, SR.:

Douglas Jenkins, Sr., Virginia Waterman's Association and Twin River Waterman Association representative, was present and his comments are a part of the verbatim record. Mr. Douglas explained that this was not new for him to bring this issue to the Commission. He explained that he was still very concerned with the striped bass system of double standards by the VMRC. He said that the Commission needed a more accurate and fair system to regulate the quota limits. He said that the 1,000,000 pounds was worth a million dollars to the commercial fishery. He said that so far VMRC was not doing an accurate job and he requested a letter setting forth management plans from staff.

Associate Member Garrison said that he had concerns when he first came on board, but he found out that it would take \$500,000 to do what's needed. He explained that this year VMRC could not get the license fees raised or funding for enforcement manpower.

Associate Member Bowden said that Mr. Garrison said the study would cost \$500,000, which was equal to the cost of mandatory reporting and more than this was collected in the Recreational Fishing License fund. He said in Rob's briefing to FMAC he reported that the recreational fishery was 500,000 pounds over quota. He further said the commercial fishery had been closed. He stated that he agreed with Mr. Jenkins when he said it was a double standard. He said that Rob needed to explain why they had not heard anymore back.

Rob O'Reilly, Deputy Chief, Fisheries Management, said that the NMFS survey methods were being looked at and that New York was very concerned because they went out of compliance on summer flounder. He said the survey is the standard. He said that since 1994 there has been \$60,000 on funding for harvest data by the Recreational Fisheries Board. He said there was a problem with Mr. Jenkins' data in that it included both the coastal and bay fisheries, but only the Bay had a quota. He also said that when just looking at the Bay overage, it was 500,000 - 600,000 pounds. He said that now that the slot method had been established this should compensate for the overage. He explained that in 2003 the quota was higher and the regulation had been changed to the slot method, so only the 2004 data can be used to determine restrictions for the 2005 season. He said this would cause any action to be last minute. He further explained that there were overages in all three years, 2001, 2002 and 2003. He said that in 2003, it was 500,000 pounds and that 2002 was 100,000 over 2001. He said the modified slot limit method was to compensate for the 2002 overage. He said that FMAC would need to review the matter before it is brought to the Commission.

Associate Member Bowden said they were told that the slot method would make up for the reduction in quota. He asked if the overage would be paid back. He said a payback needed to be required. Mr. O'Reilly said that there would be no payback and that the current regulation was to keep to the quota.

No action was taken by the Commission.

WILLIS KIRK:

Mr. Bill Culpepper requested that the Commission reconsider giving Mr. Kirk his summer flounder endorsement license. He explained that Mr. Kirk did not meet the criteria established by VMRC regulation, which was because of personal problems beyond his control, and it was hurting Mr. Kirk that he could not make a livelihood.

Rob O'Reilly, Deputy Chief, Fisheries Management, was present and his comments are a part of the verbatim record. He explained that next month a public hearing would be held on the medical hardship exemption from the 8-hour day. He further explained that, in the fall, a broader request process would be brought to the Commission. He said the FMAC suggested a review board be established with one Associate Member and members from the industry who would review all cases on merit. He also said that when limited entry fisheries started in 1993 there were no exceptions at all. Mr. Culpepper said this was all too late for Mr. Kirk and he would miss another season. Mr. O'Reilly told Mr. Culpepper they would need to keep in contact with VMRC to find out the results.

Commissioner Pruitt returned to the meeting at this point.

No action was taken by the Commission.

TOM POWERS:

Mr. Powers announced that the license fee increase had been approved by the General Assembly and set up to go to the Recreational Fisheries Advisory Board for their administration. He further explained that the VMRC could now raise the fees as of July 1st. He said he recommended that a group be set up to establish this increase in fees, which needed to be done by November.

No action was taken by the Commission.

Commissioner Pruitt ended the public comment period.

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- 10. VIRGINIA BEACH DEPARTMENT OF PUBLIC WORKS, #03-0641.**
Commission update by City representatives regarding the status of their permit to undertake improvements to the Rudee Inlet infrastructure to reduce shoaling in the inlet, improve navigation and increase the efficiency of maintenance dredging operations.

Phill Roehrs, representing the City of Virginia Beach, was present and gave a presentation on the status of the project. His comments are a part of the verbatim record. Mr. Roehrs gave the Commission a chronological list of actions in a handout. He explained that the last update to Commission was in February 2004.

Jeff Gordon, adjoining property owner to the project, expressed concerns of impacts from the dredging project and how it was affecting the private property owners. He asked the Commission for any help they could give the property owners. He showed some photos on the overhead to support the concerns he expressed to the Commission.

Commissioner Pruitt left the meeting and Associate Member Birkett assumed chair duties at this point. Associate Member Birkett asked for questions.

Associate Member McLeskey asked if VMRC could do anything. Bob Grabb, Chief, Habitat Management, explained that this was a Federal project and the City was the contractor for the Corps and that the Commission could not do anything legally, except to possibly pass a resolution. He further explained that this was a civil matter between the Federal and local government and the private property owners.

Associate Member McLeskey asked if that the City could dredge the dune away even if this were not a federal project. Mr. Grabb concurred. He further explained that when the General Assembly established the dune ordinance they exempted government authorities and activities.

Carl Josephson, Assistant Attorney General and legal counsel for VMRC, explained that the City was attempting to comply.

No action was taken by the Commission.

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- 11. REQUEST FOR PUBLIC HEARING:** Review the recommendations of FMAC for Regulation 4VAC 20-320-10, Et. Seq., "Pertaining to Black Drum".

Rob O'Reilly, Deputy Chief, Fisheries Management, gave the presentation. His comments are a part of the verbatim record. Mr. O'Reilly explained that this was a request for a public hearing to be held at the July Commission meeting.

Commissioner Pruitt asked Mr. O'Reilly to keep the presentation for next month and just tell the Commission what was wanted.

Mr. O'Reilly explained that the FMAC recommended keeping the existing management plan with two exceptions: 1) allow any registered commercial fisherman to catch and keep one black drum per day and count this catch against the 120,000 pound quota, and 2) eliminate the weekly reporting of commercial harvesting and continue the regular monthly reporting. He further explained that the Coastal Conservation Association of Virginia had written to express its opposition to the possible loosening of restrictions on the commercial fishery. He said that staff recommended advertising the FMAC recommendations for public hearing.

Associate Member Birkett moved to advertise for the public hearing. Associate Member Holland seconded the motion. The motion carried, 6-0.

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12. UPDATE: Experiments and Events Related to C. ariakensis.

Jim Wesson, Department Head, Conservation and Replenishment, was present to give the update for the Commission. His comments are a part of the verbatim record. Mr. Wesson explained that the start of the VSC project was delayed and 2 participants were out of the project due to the hurricane. He explained that the Corps permit had a June 30, 2004 expiration date and negotiations were underway for an extension. He said the federal agencies did not want to extend it beyond the 30th. He said the restrictions were preventing them from finding out the economic value this species had on the market. He said that marketing a new product was difficult. He said the participants were having a hard time marketing 20,000 oysters by June 30, as they had not reached market size, but the federal authorities were standing firm on the date for removal from the waters.

Mr. Wesson explained that they were about midway in finishing with the Environmental Impact Statement initiated in December by the Corps of Engineers. He said they are evaluating several alternatives not just the introduction of C. ariakensis. He said Maryland and Virginia were asking for a one year completion date for the EIS but the Corps of Engineers say 3 years, while the scientists say as long as 5 to 10 years to complete the EIS.

Commissioner Pruitt asked if there were any questions. There were no questions. **No action was taken by the Commission.**

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- 13. REVIEW:** Recommendations of the Recreational Fishing Advisory Board: Project T. "Sunshine Program Fishing Challenge Children's Day", \$3,954.00, Portsmouth Anglers Club.

Chad Boyce, Fisheries Management Specialist, Sr., was present and gave the presentation to the Commission. His comments are a part of the verbatim record. Mr. Boyce explained that staff was requesting the approval of Item T, because at their last meeting the Commission added Items R & S to the list of approved projects. He explained that this item was also a children's fishing project that the application had been received after the application deadline date, and this was identical to the other items added and approved by the Commission at their previous meeting.

Associate Member Holland moved to approve the project as requested by staff. Associate Member Birkett seconded the motion. The motion carried, 4-0. Both Associate Members Garrison and McLeskey were absent during the vote.

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PRESENTATION: Status of the VMRC mapping system, history and current progress in updating.

Ben Stagg, Acting Chief Engineer, gave the presentation with a power point presentation prepared by Royce Bridger, Engineering Tech IV for the Engineering and Surveying Department of Habitat Management Division. His comments are a part of the verbatim record.

Associate Member Ballard said he was very impressed with the presentation and with the progress.

No action was taken by the Commission.

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There was no further business, the meeting adjourned at approximately 2:40 p.m.

William A. Pruitt, Commissioner

Katherine Leonard, Recording Secretary