

MINUTES

Commission Meeting**July 24, 2007**

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

Steven G. Bowman	Commissioner
Ernest L. Bowden, Jr.)	
J. Carter Fox)	
J. T. Holland)	Associate Members
Wayne McLeskey)	
Richard B. Robins, Jr.)	
Kyle J. Schick)	
Carl Josephson	Sr. Assistant Attorney General
David C. Grandis	Assistant Attorney General
Jack Travelstead	Chief Deputy Commissioner
John M. R. Bull	Director-Public Relations
Katherine Leonard	Recording Secretary
Jane McCroskey	Chief, Admin/Finance
Sunita Hines	Bus. Applications Specialist
Joe Grist	Head, Plans and Statistics
Stephanie Iverson	Fisheries Mgmt. Specialist, Sr.
Sonya Davis	Fisheries Mgmt. Specialist, Sr.
Joe Cimino	Fisheries Mgmt. Specialist, Sr.
Alicia Middleton	Fisheries Mgmt. Specialist
Warner Rhodes	Deputy Chief, Law Enforcement
Tom Moore	Marine Police Officer
Ronnie Daniel	Marine Police Officer

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Bob Grabb	Chief, Habitat Management Div.
Tony Watkinson	Deputy Chief, Habitat Mgt. Div.
Chip Neikirk	Environmental Engineer, Sr.
Jeff Madden	Environmental Engineer, Sr.
Randy Owen	Environmental Engineer, Sr.
Hank Badger	Environmental Engineer, Sr.
Ben Stagg	Environmental Engineer, Sr.
Jay Woodward	Environmental Engineer, Sr.
Benjamin McGinnis	Environmental Engineer, Sr.
Justin Worrell	Environmental Engineer, Sr.
Elizabeth Gallup	Environmental Engineer, Sr.
Danny Bacon	Environmental Engineer, Sr.
Bradley Reams	Project Compliance Technician

Virginia Institute of Marine Science (VIMS)

Lyle Varnell
David O'Brien

Other present included:

Julie Bradshaw	Mike Jewett	Gary Caricofe
Duane Heitkemper	Vera Heitkemper	George Janek
Beth Hedgepeth	Walter Hodges	Mary Paphides
Edwin Snyder	John M. VanGuank	Charles Harvey
James S. Georgo	Butch Palmer	Julie C. Steele
Megan Brown	Terry Malarkey	Judy Malarkey
John Byrum	Brian Chromsy	John Critchfield
Azam Bejou	Robert Holloway	Paul Peterson
David Bejou	Chuck Roadley	Scott R. Bergman
Barbara Bergman	Ellis W. James	Roy Insley
Neal Insley	Douglas F. Jenkins, Sr.	
Roger Park	Pat Hurst	Lacey England
Patrick Lynch	Robert W. Jensen	

and others

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Commissioner Bowman called the meeting to order at approximately 9:35 a.m. Associate Members McConaugha and Tankard were both absent.

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

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APPROVAL OF AGENDA: Commissioner Bowman asked if there were any changes to the agenda. Bob Grabb, Chief, Habitat Management said that staff was requesting that they be allowed some time at the end of Habitat Management’s items for a discussion on streamlining Commission review for after-the-fact items.

Commissioner Bowman asked for a motion to approve the agenda. Associate Member Robins moved to approve the agenda, as amended. Associate Member Fox seconded the motion. The motion carried, 7-0. The Chair voted yes.

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MINUTES: Commissioner Bowman asked, if there were no corrections or changes, for a motion to approve the June 26, 2007 meeting minutes. **Associate Member Fox moved to approve the minutes, as circulated. Associate Member Robins seconded the motion. The motion carried, 7-0. The Chair voted yes.**

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

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

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

Associate Member Fox asked why there was a request for an extension of the report deadline for Newport News Waterworks, as spawning occurs in the spring.

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Paul Peterson, Project Manager with Malcolm-Pirnie, representing the Permittee for Item 2E, was sworn in and his comments are a part of the verbatim record. Mr. Peterson said that he was representing the Permittee for this item and could answer Mr. Fox’s question. He said there was more to the monitoring than they had thought as it goes beyond just spring, as spawning goes until August and then the lab analysis takes some more time. Associate Member Fox stated that he did not understand why this was not anticipated when the application was made.

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

No one asked to address the Commission on any of the other items. The public hearing was closed.

Commissioner Bowman asked for a motion for Items 2A through 2G. **Associate Member Holland moved to approve these items. Associate Member Schick seconded the motion. The motion carried, 7-0. The Chair voted yes.**

2A. TWO RIVERS COUNTRY CLUB, #07-0842, requests authorization to maintenance dredge 9,800 cubic yards of sediment from the Governor’s Land marina entrance channel to restore maximum depths of minus eight (-8) feet below mean low water adjacent to their property situated along the James River in James City County.

Permit Fee.....\$100.00

2B. EQUITABLE PRODUCTION COMPANY, #07-0919, requests authorization to install a 12” diameter natural gas pipeline (BF-203), by directional bore method, beneath 85 linear feet of the McClure River approximately 200’ downstream of the Short Branch Tunnel in Dickenson County. Recommend a royalty assessment of \$255.00 for the encroachment of the line beneath 85 linear feet of State-owned subaqueous land at a rate of \$3.00 per linear foot.

Royalty Fees (encroachment 85 L. Ft. @ \$2.00/L.Ft.)...\$255.00
Permit Fee.....\$100.00
Total Fees..... \$355.00

2C. CITY OF SUFFOLK DEPARTMENT OF PUBLIC UTILITIES, #07-0104, requests authorization to install a 30-foot extension to an existing 8-inch concentrate discharge pipeline outfall, to include the addition of three diffuser ports requiring the excavation of approximately 60 cubic yards of State-owned

subaqueous material within the Nansemond River, near the old Kings Highway Bridge.

Permit Fee.....\$100.00

2D. VIRGINIA DEPARTMENT OF TRANSPORTATION, #02-0950, requests a permit modification to allow for the temporary installation, on the south side and adjacent to the Queens Sound Bridge, of a 70-foot long by 40-foot wide open-pile work trestle. The trestle will be used to offload construction materials in conjunction with the previously authorized construction of the new Chincoteague Channel and Black Narrows Channel Bridges. Recommend approval with all previous permit conditions to remain in effect, including a prohibition of dredging for construction access for all portions of the project. In addition, recommend complete removal of the work trestle structure upon completion of the new bridge construction and existing bridge removal.

No applicable fees – Permit Modification

2E. CITY OF NEWPORT NEWS, #93-0902, requests an administrative modification to their existing permit which requires them to file the results of their ongoing eight-year long Pre-Operational Icthyoplankton Monitoring Programs efforts by September 30th, in conjunction with their permit for the intake structure associated with the King William Reservoir Project. Recommend approval of a December 1st annual deadline for the submittal date. Special permit condition #23 would then be amended to read as follows:

By December 1 of each year, Permittee shall compile and file a report with the Commission on its pre-operational monitoring efforts during that year. Each such report shall contain: (i) the data collected during that year's spawning season and (ii) a summary of all data collected in the pre-operational monitoring program in prior years.

At the end of the eighth year the Permittee shall provide an analysis of all such data with recommendations for Mattaponi River water temperature triggers to signal the commencement and end of the Springtime pumping hiatus.

No applicable fees – Permit Modification

2F. LOUDOUN COUNTY WETLANDS AND STREAM RESTORATION, LC, #07-1370, requests authorization to restore 1,423 linear feet of Sycolin Creek using the Natural Channel Design Process which includes creating riffles and pools and

installing rock vanes as part of the Loudoun County Wetlands and Stream Bank Project in Loudoun County.

Permit Fee.....\$100.00

2G. CITY OF HARRISONBURG, #07-0757, requests authorization to install 20 linear feet of 24-inch waterline a minimum of three feet below Blacks Run and construct a 20-foot by 80-foot bridge above Blacks Run as part of the Erickson Avenue/Stone Spring Road Connection Project in the City of Harrisonburg in Rockingham County.

Permit Fee.....\$100.00

3. CLOSED MEETING FOR CONSULTATION WITH OR BRIEFING BY COUNSEL

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

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

Associate Member Bowden seconded the motion. The motion carried, 7-0.

Associate Member Robins moved for the following:

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

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

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

- (i) only public business matters lawfully exempted from open meeting requirements under Virginia law, and

- (ii) only such public business matters as were identified in the motion by which the closed meeting was convened were heard, discussed or considered in the closed meeting by the Commission.

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

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

NAYS: NONE

ABSENT DURING VOTE: McConaugha and Tankard

ABSENT DURING ALL OR PART OF CLOSED MEETING: McConaugha and Tankard

The motion carried, 7-0.

Katherine Leonard, Recording Secretary

- 4. **H & H ENTERPRISES, INC., #06-1910**, requests reconsideration of the royalty assessment associated with the Commission's December 8, 2006, approval of a permit for dredging and commercial pier construction adjacent to their property situated along the Western Branch of the Elizabeth River in Portsmouth.

Bob Grabb, Chief, Habitat Management, gave the presentation with slides. His comments are a part of the verbatim record.

Mr. Grabb explained that the dredging royalty was waived since the former property owner, Virginia Boat and Yacht, obtained a permit to dredge this same area (VMRC #98-0776), paid the royalty, but never performed the dredging. The applicant was requesting Commission reconsideration and a waiver of the assessed royalty, claiming an exemption pursuant to Section 28.2-1206(B) of the Code of Virginia.

Mr. Grabb further explained that on December 19, 2006, the Commission considered H & H Enterprises, Inc.'s request to dredge 7,500 cubic yards of State-owned subaqueous bottom material from a 376-foot by 220-foot basin to achieve maximum depths of minus eight (-8) feet below mean low water, and to construct a 300-foot long by 20-foot wide industrial pier with an 8-foot by 20-foot L-head and two (2) 40-foot by 5-foot finger piers adjacent to their property situated along the Western Branch of the Elizabeth River in

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Portsmouth. The project was approved as a "Page 2" item (project cost was over \$50,000 with no objections and staff recommendation for approval). The royalty recommended by staff was based on the vessel-mooring plan provided by the applicant's agent, James S. Georgo, President of J.S.G. Development Consultants, P.C., dated October 1, 2006, as a result of discussions with staff. The square footage was calculated for the fixed portions of the pier and the areas over State-bottom which would be used to moor the four tugs and five barges currently owned and used by H & H in their marine construction business, based on the site plan provided by the applicant's agent. The square footage of encroachment of the pier and moored vessels was calculated to be 19,725 square feet. The resulting royalty, calculated at \$2.00 per square foot for commercial activities, as approved by the Commission on December 19, 2006, was \$39,450. Neither the agent nor the applicant contested the royalty, and there was no other public comment for or against the project provided at the time of the hearing.

Mr. Grabb said that on March 26, 2007, staff received a letter from Mr. Georgo requesting a waiver of the royalty fee assessed by the Commission. His letter stated that the proposed pier and dredging was "for the purpose of enhancing the existing operation and will not directly generate any revenue" and that the "construction of marine related structures certainly can be construed to be providing 'services that support the shipping of domestic of foreign cargo'." Accordingly, he believed that the nature of H & H Enterprises, Inc.'s business satisfied the requirements for exemption provided by Section 28.2-1206(B) of the Code of Virginia. Mr. Georgo asked the Habitat Management Division to waive the royalty administratively, or if that was not possible, to place the matter before the full Commission for consideration.

Mr. Grabb stated that since the full Commission approved the project, staff felt the request would have to be addressed by the full Commission. Staff informed Mr. Georgo of this in their response letter, dated April 24, 2007, and further informed him that staff disagreed with his contention that the types of activities associated with H & H Enterprises' use of State-owned subaqueous lands met the exemption criteria provided in Section 28.2-1206 of the Code. Staff also questioned why Mr. Georgo did not bring this issue to light during the December 2006 hearing. It should be noted that rather than calculate the encroachment royalty using the "bold outline" of the pier and slips, staff restricted the encroachment of the project to only those areas of the fixed pier itself and the individual slip areas as shown in the agent's mooring plan. Had staff drawn a bold outline around the pier and included all of the potential slip areas around the pier over State-owned submerged land, which would be for the private use of the Permittee, that square footage would have been 45,000 square feet, resulting in a recommended royalty of \$90,000, at the rate of \$2.00 per square foot.

Mr. Grabb explained that in this case staff could not see how H & H Enterprises, Inc., a company their agent stated was "engaged in dredging and the construction of waterfront related structures, including piers, bulkheads, revetments, etc.", met the criteria of Section

28.2-106(B) which was amended specifically to address commercial shipping and ship repair, sales and service.

Mr. Grabb stated that staff also believed that at that time, staff was exceedingly generous in their initial recommendation of the "bold outline" used for assessing the royalties, especially as it was based on the Permittee's specific input. Therefore, staff recommended the royalty assessment be upheld and that no work associated with this request be commenced until the assessed permit and royalty fees were received and the VMRC permit was finalized. This included all of the permit conditions as previously specified and approved by the Commission.

Commissioner Bowman asked what area would be eliminated by the Permittee's request. Mr. Grabb stated it would be the shadow encroachment of the pier only, not including the boats. He said that staff used an approximate area.

Associate Member Schick asked why they want it to be different now. Mr. Grabb explained that initially they said the dredging around the pier was exempt under Section 28.2-1206 of the Code of Virginia.

Associate Member Holland referring to the slide showing a schematic asked if the areas in blue and purple were the areas used. Mr. Grabb responded, yes.

Associate Member Fox asked if the assessed royalty was for the area converted to private use. Mr. Grabb responded, yes.

After some discussion about the area, Associate Member Robins asked if the bold outline used was established by Regulation or policy. Mr. Grabb stated that it was by regulation, which was adopted in December 2005. Associate Member Robins asked if there had been any deviations approved previously. Mr. Grabb responded there had been by the Commission.

Associate Member McLeskey asked if they were using the waterway, were they federal waters. Mr. Grabb explained that these were not federal waters. He further explained that for a marina the assessment would be for the entire area to be used, not based on the vessel. Carl Josephson, Senior Assistant Attorney General and VMRC Counsel explained that federal waters were not federally owned, but federally regulated and were the property of the Commonwealth of Virginia.

Commissioner Bowman asked if the applicant or their representative was present.

James Georgo, agent for H & H Enterprises, was sworn in and his comments are a part of the verbatim record. Mr. Georgo stated that they were asking for relief or abatement of the royalties based on the use of the barges. He said they were not there all the time and this was not a marina. He said the vessels were only there during times of maintenance or to

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load equipment and supplies for projects and were not there permanently. He said the vessels would be off on a job site, except for 10-15% of the year, when they would be tied up at the facility. He said they were requesting an exemption pursuant to Code.

Commissioner Bowman asked about the square footage of the vessels. Mr. Grabb said the barges were 65' by 30' and 120' by 45' for a total of approximately 7,300 square feet.

Associate Members Schick and Fox both stated that the Commission had been generous with the applicant in the assessment, which would normally be more. Associate Member Fox said he would actually want to go more, if it were not for the staff's recommendation.

After some further discussion, Associate Member Schick moved to not change the current assessment. Associate Member Fox seconded the motion. The motion carried, 7-0.

No change in the fees previously assessed -- Request was denied.

- 5. **BARBARA BERGMAN, #07-0651**, requests authorization to maintenance dredge 225 cubic yards of subaqueous bottom material to provide maximum mean low water depths of minus four and one-half (-4.5) feet within a 320 foot long channel within Spirit Branch, a tributary of Edwards Creek and Milford Haven in Mathews County. A nearby 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 the Bergman's property is situated along Spirit Branch, a tributary of Edwards Creek on Gwynn's Island in Mathews County. Development along the creek is primarily residential. A cemetery borders the creek along the west side of the project. The creek is only between 80 and 100 feet wide along most of the proposed area to be dredged and it becomes narrower at the head of the creek. VMRC records indicated that dredging of the creek was first permitted by VMRC in 1973 and that a permit for maintenance dredging was issued in 1988.

Mr. Neikirk stated that in his research on the history of this area's development he found the 1973 permit authorized a 40-foot wide channel with a mean low water depth of minus three and one-half (-3.5) feet. The 1988 permit authorized maintenance dredging the channel to a mean low water depth of minus three (-3) feet. Based on the soundings provided in the application, the channel only appeared to have silted in significantly near the head of the creek. The soundings indicated that most of the channel remained approximately 3.5 feet deep at mean low water.

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Mr. Neikirk said that Ms. Bergman sought authorization to maintenance dredge the area near the head of the creek to a depth of minus two (-2) feet at mean low water and tapering to minus three (-3) feet at mean low water for the northernmost 60 feet of the channel along the marginal wharf. Most of this area at the head of the creek was also proposed to be 30 feet wide. For the remainder of the channel, dredging was proposed to minus four and one-half (-4.5) feet deep at mean low water with a width of 15 feet. The 30-foot channel width near the head of the creek was necessary to allow boats to pass other boats moored along the marginal wharf. Since dredging of the channel was previously authorized only to a mean low water depth of minus three and one-half (-3.5) feet, any amount in excess of -3.5 feet was actually new dredging.

Mr. Neikirk stated that Mr. Harry Morris and Ms. Robin Powell both protested the project. They own property immediately downstream of the channelward end of the proposed dredging. They were concerned with the width of the dredging at the head of the creek, the location of the spoil site and they questioned the justification for dredging the small creek to provide access for large boats moored at the shallow head of the creek.

Mr. Neikirk said, in their report dated April 26, 2007, VIMS noted that the method to retain the spoil in the proposed spoil site was not specified. They also stated that dredging can cause significant disruption to the marine environment and often needed to be repeated to maintain water depths. Since the bottom material in this creek was fine-grained they stated there was a higher potential for material to remain in suspension for an extended period, adversely affecting water quality. They reiterated that dredging adversely affects bottom dwelling organisms and that the timeline for recovery was not well known. Finally, they stated that not all waterfront property was conducive to navigation or appropriate for deep draft boat traffic. They said that the dredging of shallow water habitat should be avoided.

Mr. Neikirk stated that the Department of Conservation and Recreation did not anticipate that the project would adversely affect any natural heritage resources or any documented State-listed threatened plant or insect species. No other State agencies commented on the proposal.

Mr. Neikirk said that the dredging would not directly involve any public or privately leased oyster planting ground.

Mr. Neikirk said that the Mathews County Wetlands Board approved those portions of the project involving tidal wetlands during their public hearing held May 2, 2007.

Mr. Neikirk stated that if the creek had not been previously dredged, staff would likely be reluctant to recommend approval for dredging the upper reaches of this narrow and shallow waterway. Authorization was granted for the creek to be dredged, however, twice in the past 25 years because larger vessels had historically used the creek. Therefore, staff believed it was appropriate to allow the requested maintenance dredging, but was reluctant

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to recommend approval of the increased depth. With the exception of the uppermost reaches of the creek, the channel did not appear to have experienced significant shoaling. In fact, the soundings provided in the application indicated that the portion of the channel south of the marginal wharf was still at the originally authorized depth of 3.5 feet below mean low water. The larger boats that would be using the channel would regularly be moored near the head of the creek in the area proposed to be dredged to a mean low water depth of minus three (-3) feet or less. Accordingly, dredging the southern portion of the channel to a depth of minus four and one-half (-4.5) feet at mean low water did not appear to be justified, especially since the channel had apparently not experienced significant shoaling since the last time it was dredged in the late 1980s.

Accordingly, Mr. Neikirk explained that staff recommended approval of the dredging of the area near the head of the creek adjacent to the marginal wharf. Staff did not recommend approval for the requested increased dredge depth to minus four and one-half (-4.5) feet, thereby, eliminating most of the dredging south of the marginal wharf. If any areas within the channel south of the marginal wharf were shallower than minus three and one-half (-3.5) feet at mean low water, staff would have recommended allowing those areas to be maintenance dredged in order to restore the original channel depth of minus three and one-half (-3.5) feet at mean low water. Should the Commission decide to approve any dredging deeper than minus three and one-half (-3.5) feet at mean low water, staff would recommend a royalty of \$0.45 per cubic yard for the new dredging.

Scott Bergman, speaking on behalf of the applicant, was sworn and his comments are a part of the verbatim record. Mr. Bergman explained that one difference in information that he had from what staff had, was the area at the head of the creek was historically a deep area according to the long-time residents. He said Hurricane Isabel had impacted this area. He explained that the objections were not correct. He and another individual had been tying up their boats for 5 years and 10 years, respectively. He said this area had filled in significantly. He said the other objection was incorrect in that they had not asked to dredge bank to bank.

Commissioner Bowman stated that staff had recommended 3 to 3 and one-half feet and asked Mr. Bergman, if this would work for him. Mr. Bergman answered that his boat draws 4 feet of water, so he would need at least 4 feet. He had pictures, which he provided the Commission that showed the area before and after the 1988 maintenance dredging.

There were no further questions of Mr. Bergman. Commissioner Bowman asked for anyone else present who wished to speak, pro or con for this project. There were none. He asked for discussion or a motion.

Associate Member Holland moved to accept the staff recommendation. Associate Member Robins seconded the motion. The motion carried, 7-0.

Permit fee.....\$100.00

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6. **PALMER AND PALMER, LLC, #06-1722**, requests authorization to install an 80-foot long by 20-foot wide rock groin adjacent to their property situated along the James River in James City County. The adjacent property owners protested the project.

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

Ms. Gallop explained that the proposed groin was designed to protect the beach along a currently undeveloped parcel of residential property at 3 West Circle in Williamsburg. This property is located on the James River in James City County off of The Maine in the First Colony subdivision. This section of the shoreline along the James River is primarily residential.

Ms. Gallop stated that the applicant proposed to install approximately 681 linear feet of riprap above mean low water and an 80-foot groin to be used as shoreline protection, remove riprap rubble and debris, and fill a man-made pond on the property. With the exception of the groin, all other portions of the applicant's project did not require authorization from the Marine Resources Commission.

Ms. Gallop said that staff began receiving letters of protest from the Palmers' neighbors in July 2006. Staff received a letter from Mr. Darrell Rickmond, dated August 3, 2006, and three letters from Mr. Noel Hume, dated July 31, 2006, November 9, 2006 and November 16, 2006. They both had concerns over the proposed groin and its impact on navigation and their shorelines.

Ms. Gallop noted that the applicant, their agent, the protestants, Sandy Loving representing the First Colony Marina, and staff met on site on September 20, 2006 to discuss the protestants concerns. As a result of the meeting, the applicant revised the application to include a reflected day board marker.

Ms. Gallop said that the James City County Wetlands Board approved this project at their public hearing held on November 8, 2006. By letter dated August 22, 2006 the Virginia Department of Health indicated that they did not have concerns with the project. The Department of Conservation and Recreation, by letter dated August 17, 2006, stated that they did not anticipate adverse impacts to natural heritage resources. The Department of Environmental Quality, by letter dated November 1, 2006 indicated that they anticipated water quality impacts should be minimal and temporary in nature.

Ms. Gallop explained that the VIMS Shoreline Stabilization Report questioned the need for the groin due to the existing beach, which offered natural protection to the shoreline. Staff

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was in agreement with the report from VIMS and also questioned the need for a groin. Groins were generally installed to widen an existing beach. In this instance, the stated intent of the applicant was to protect his existing shoreline. The existing beach along the property offered natural protection to the adjacent uplands. Accordingly, after evaluating the merits of the project against the concerns expressed by those in opposition to the project, and after considering all of the factors contained in §28.2-1205(A) of the Code of Virginia, staff recommended that the application be denied. Should the applicant still wish to pursue installing some sort of structure for shoreline protection, staff would be in support of a properly designed offshore breakwater.

Associate Member Robins asked if the riprap had hardened the shoreline. Ms. Gallop stated that they were above the mean high water for protection of the shoreline. Commissioner Bowman asked if there was noted erosion. Ms. Gallop stated that there had been some and VIMS had indicated moderate erosion.

Associate Member Holland noted that one of the staff's pictures showed there had been erosion as a tree was no longer on land but in the water, which he felt was definite proof of erosion.

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

Chuck Roadley with Williamsburg Environmental Group and representing the applicant was sworn in and his comments are a part of the verbatim record. Mr. Roadley provided the Commission with a photograph that showed the highland erosion. He also provided a brief history. He said the application was submitted to VMRC a year prior, but other local and state application processing had delayed any action by VMRC. He said there was riprap on portions of the property, but they had been washed out, as they were not put in properly. He said the intent of this project was to connect with the existing riprap. He said that they somewhat agreed with the staff recommendation and felt that eventually installation of a breakwater would be necessary. He said they were requesting the matter be tabled, so they could work with staff regarding their concerns.

Associated Member Robins moved to table the matter as requested by the applicant's agent. Associate Member Holland seconded the motion. The motion carried. 7-0. Commissioner Bowman asked staff if there should be a date set for the hearing. Mr. Grabb stated that it would be best to leave it open-ended.

No action taken at this time -- tabled until further notice.

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7. **JOHN M. VAUGHAN, JR., EDWARD R. HOLDSWORTH, AND MICHAEL A. AND CHERYL G. JOHNSON, #06-1354**, request authorization to construct a 6-foot by 100-foot fixed open-pile multi-user pier to include a 6-foot by 53-foot floating L-head with two (2) 4-foot by 24-foot finger piers, and two (2) 3-foot by 24-foot finger piers to create three wet-slips, within Jones Creek, to be accessed by an easement through the upland property of Mr. Vaughan, at 13300 Doggett Lane, Carrollton, VA, in Isle of Wight County.

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

Mr. Stagg explained that the proposed multi-use pier was located near the end of a private right-of-way, and immediately offshore of a 10-foot wide easement through Mr. John M. Vaughan, Jr.'s property situated along Jones Creek, a tributary to the Pagan River in Isle of Wight County. The waterway at this location is approximately 350 feet wide. Development along this reach of shoreline is residential in nature.

Mr. Stagg said that a Joint Permit Application was originally submitted on June 7, 2006, in the name of Mr. John M. Vaughan, Jr. Staff subsequently wrote to Mr. Vaughan in a letter dated June 19, 2006, requesting additional information, to include dimensions of the proposed pier along with additional information related to an easement depicted on the drawings. Staff noted that the proposed pier appeared to represent a second pier on the same parcel. The applicant submitted additional information that was received in this office on July 20, 2006, which clarified that the application was to be in the name of the parties as noted above. Additional correspondence was exchanged related to the location of the pier in relation to the property line and the easement lines, related to conditions required by the county for setbacks of ancillary structures. On March 21, 2007, staff received a revised drawing depicting a five foot wide fixed pier, offset 5 feet from the property line at its landward terminus. The applicant continued to request a 53-foot floating L-head with four finger piers (two, 3 feet wide and two, 4 feet wide) to create three slips. The L-head would extend upstream and appears to be within the riparian area of Mr. Vaughan's property.

Mr. Stagg stated that when staff reviews an application for community use pier structures, staff typically determines the number of private piers that could be accommodated along the shoreline of the entire parcel to determine the appropriate number of slips. This parcel was not part of a larger residential development and the current owner already had a private pier for his personal use. Additionally, the easement agreement for the two nearby property owners only granted access over the upland to Jones Creek and did not specifically grant any additional rights to construct a pier within the riparian area of Mr. Vaughan.

Mr. Stagg said that there had been no objections to the pier. The Isle of Wight County Wetlands approved the project on October 30, 2006. The Department of Health had

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recommended denial of the project, until a plan for sanitary facilities was approved or a variance had been granted. The applicant was currently seeking such approval and/or variance.

Mr. Stagg explained that while the nearby property owners did apparently have a right to access Jones Creek through a 10-foot wide deeded easement, no additional rights appeared to have been granted by the property owner related to the construction of a second pier within his riparian area. Mr. Vaughan already had a private pier adjacent to his property along this same shoreline. Staff believed that the granting of a multi-user pier, with multiple slips, through a narrow upland easement at this location would set a dangerous precedent.

In light of these concerns, Mr. Stagg said that staff recommended approval of a 5-foot by 100-foot open-pile pier, without finger piers and slips. This arrangement would allow water access to the nearby property owners who had easement rights to the creek. The pier would also be “self-regulating” allowing only two boats to be temporarily moored along either side of the pier at the same time discouraging the permanent moorings of more than two boats. Given Mr. Vaughan’s current pier, staff saw no reason for more than two berths to serve two-non-riparian property owners. In keeping with the VMRC’s normal procedures, any approval should also be conditioned upon the receipt of an approved sewage treatment plan or variance from the Department of Health.

Commissioner Bowman asked if the applicant was present. John M. Vaughan, Jr., co-applicant, was sworn in and his comments are a part of the verbatim record. Mr. Vaughan stated that his existing pier was built in a poor location. He said all three residents own boats and if they can only get 2 slips that will be okay. Associate Member Fox asked if the existing pier would be removed if the total project were approved. Mr. Vaughan responded no and explained that the pier does still get used by both adults and children for fishing and the easement said only that they were allowed access to water.

Associate Member Robins asked VMRC Counsel to comment on the easement. Carl Josephson, Senior Assistant Attorney and VMRC Counsel explained that a court would have to look at an easement like this one and it cannot be assumed that it includes the right to a pier.

There was no one else present from the public to address this issue, either pro or con.

Associate Member Schick moved to accept the staff recommendation. Associate Member Robins seconded the motion. Associate Member Fox asked if this was approval for the straight pier. Associate Member Schick responded, yes, and the additional requirements were included. The motion carried, 7-0.

Permit Fee.....\$25.00

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8. **RODNEY ELLIS, #07-1012**, requests authorization to construct three (3) low-profile, timber groins extending 48 feet channelward of mean high water artificially nourished with approximately 230 cubic yards of clean sand, adjacent to his property situated along Portobago Bay in Caroline County. Both Wetlands and Subaqueous permits were required.

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

Mr. McGinnis explained that the project was located along Portobago Bay, just off the Rappahannock River in Caroline County, near its border with Essex County.

Mr. McGinnis said that a gently sloping sand beach, as much as 30 feet in width, and a steep bank of up to 25 feet in height, characterize the applicant's property. Several nearby property owners had previously chosen to install timber bulkheads and groins similar to those requested by the applicant. In fact, during its March 27, 2007, meeting, the Commission unanimously approved a similar project immediately upstream of the applicant, at the property of his neighbor, Mrs. Margaret Blevins (VMRC #07-0139).

Mr. McGinnis stated that the applicant was proposing to install 200 linear feet of timber bulkhead and three (3) low-profile, timber groins that would extend a maximum of 48 feet channelward of mean high water. The groins would be artificially nourished with 230 cubic yards of clean sand. The proposed bulkhead was to be aligned landward of mean high water, and would not require a permit from the Commission. The proposed project would result in impacts to both subaqueous bottom and non-vegetated tidal wetlands under the Commission's jurisdiction.

Mr. McGinnis explained that since Caroline County had not yet adopted the model Wetlands Zoning Ordinance, the Marine Resources Commission was responsible for administering the provisions of Chapter 13 (Wetlands) of Title 28.2 of the Code of Virginia in that locality. As a result, the Commission would be acting as the Wetlands Board for those portions of the project involving tidal wetlands, as well as the encroachments over State-owned submerged land.

Mr. McGinnis said that the Virginia Institute of Marine Science (VIMS) Shoreline Permit Application Report, dated July 11, 2007, suggested the use of a riprap revetment rather than the proposed bulkhead, but acknowledged in their impact summary that the bulkhead would not have any impacts within jurisdictional wetlands. Their report goes on to state that the proposed nourishment was expected to minimize adverse impacts on downdrift shorelines as a result of the proposed groins.

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Mr. McGinnis stated that the Department of Game and Inland Fisheries, in an e-mail dated July 18, 2007, stated that the proposed project was in a designated bald eagle concentration area, and recommended a time-of-year restriction, which precluded construction activities during the periods of May 1st to July 31st and December 1st to February 28th. In addition they had recommended that strict erosion and sediment control measures be utilized, the use of a low-water sill and coir logs rather than the proposed bulkhead, and compensation for lost wetland resources at a ratio of at least 1:1.

Mr. McGinnis said the Department of Conservation and Recreation, in a memorandum dated July 11, 2007, stated that the proposed project would not impact any documented state-listed plants or insects, or State Natural Area Preserves. They also noted that the project was located within a Bald Eagle Concentration area and that the Parker's pipewort, a rare plant, had been historically documented within the area. In addition, they went on to state that the proposed project must comply with the Chesapeake Bay Preservation Area Designation and Management Regulations, as enforced through locally adopted ordinances.

Mr. McGinnis noted that no other state agencies provided comments, and no individuals had voiced opposition to the proposal.

Mr. McGinnis said that in this case, staff would prefer to see the use of a riprap revetment rather than a vertical bulkhead, as was recommended by VIMS. However, since the applicant had aligned the bulkhead landward of mean high water, a permit was not required for this portion of the proposed project.

Accordingly, Mr. McGinnis said that since impacts resulting from the use of tidal wetlands and State-owned submerged land should be minimal, and after considering all of the factors contained in Sections 28.2-1205 (A) and 28.2-1302 of the Code of Virginia, staff recommended that the project be approved, as proposed. Staff also recommended the assessment of a royalty in the amount of \$169.20 for the encroachment of the proposed nourishment over 3,384 square feet of State-owned submerged land at a rate of \$0.05 per square foot. Staff would typically recommend a royalty for the encroachment of timber groins over State-owned subaqueous land at a rate of \$0.50 per square foot. However, since the proposed groins had been designed to meet the requirements of the Commission's General Permit VGP #2 for groins, and since royalties were not assessed for groins permitted under this general permit, staff did not recommend the assessment of royalties for the encroachment of the three proposed groins.

Commissioner Bowman asked if the applicant or the applicant's representative wished to address the matter.

Mary Paphides, agent for the applicant, was sworn in and her comments are a part of the verbatim record. Ms. Paphides explained that the bulkhead was to be tied to the neighbor's.

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No one else asked to comment on the matter.

Associate Member Robins moved to accept the staff recommendation. Associate Member Holland seconded the motion. The motion carried, 7-0.

Royalty Fees (nourishment of 3,384 sq. ft. @ \$0.05/sq. ft.)...	\$169.20
Subaqueous Permit Fee.....	\$100.00
Wetlands Permit Fee.....	\$ 10.00
Total Fees.....	\$279.20

- 9. **DUANE HEITKEMPER, #07-1300**, requests after-the-fact authorization to retain a 567 square foot flat roof boathouse with 6’ tall side walls and plywood siding at his property situated along The Thorofare in York County. An adjoining property owner and nearby waterfront lot residents protested the project.

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

Mr. Owen explained that Mr. Heitkemper’s property is located at 1206 Dandy Loop Road on The Thorofare, approximately 0.3 mile south of its confluence with the York River, in York County. The shoreline along this section of The Thorofare is comprised mostly of residential properties.

Mr. Owen also explained that in 1994, prior to the Heitkemper’s purchasing the property, the previous owner applied for and constructed, under VMRC Permit #94-0656, a 195’ long private non-commercial open-pile pier with a 588 ft² open-sided A-frame roof boathouse. Apparently, at some point, the previous owner also constructed an unauthorized lower level enclosure in violation of the VMRC permit. This unauthorized addition went undiscovered until recently. The Heitkempers purchased the property on August 31, 2004. On September 1, 2006, Tropical Storm Ernesto hit the Virginia coastline and damaged the Heitkemper’s boathouse and boat, when the vessel floated out of its lift and into the existing roof.

Mr. Owen stated that repairs to the structure were initiated after obtaining a York County building permit on April 2, 2007. That building permit authorized repairs to the existing A-frame roof only and specified that it “must be replaced with the exact structure.” After removing the damaged A-frame roof, however, the contractor, Gary Caricofe with Caricofe General Construction, approached York County and questioned what additional authorization was required to replace the A-frame roof with a flat-roof design and elevated deck. Although advised by the County that revised drawings and a permit modification were necessary, Mr. Caricofe and the Heitkemper’s proceeded with the modified design without obtaining the necessary authorization from either York County or VMRC.

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Mr. Owen said that on April 26, 2007, staff received a telephone call from York County advising of the unauthorized construction activity at 1206 Dandy Loop Road. Staff met onsite with the Heitkempers and their contractor on that day and advised them that they did not have VMRC authorization for the work completed to date. They agreed to stop work on-site until the violation could be resolved. A Sworn Complaint and Notice To Comply, dated May 2, 2007, were subsequently served on the Heitkempers.

Mr. Owen explained that the boathouse, as constructed, constituted a violation of Chapter 12, Article 2 of the Code of Virginia. Our Notice to Comply directed Mr. Heitkemper to either remove the unauthorized structure or submit an after-the-fact application seeking approval for its retention. An application for permit was received on May 31, 2007. In his application, Mr. Heitkemper stated that the sides were added to provide additional clearance between his boat and the new roof. He maintains that a former VMRC employee advised him that he could repair the storm-damaged A-frame roof without a Commission permit. Staff continued to stand by that statement. Maintenance and repair, however, does not include an expansion or enlargement of the pre-existing structure or a completely different design.

Mr. Owen stated that the downstream adjacent property owner and five additional waterfront lot owners protested the project. Letters in opposition were also received from Mr. Robert Holloway, a local marine contractor, and from Mr. G. L. Brundage, a recreational fisherman from the City of Hampton. The protestants characterized the existing structure as an obtrusive eyesore ('large vinyl box') that was not consistent with the piers and other boathouses in the immediate area. The neighboring lot owners and Mr. Holloway also questioned the structural integrity of the repair and believed that the boathouse would shear off during the next storm event and cause damage to their respective properties.

Mr. Owen said that the project, as constructed, did not qualify under Governor Kaine's Executive Order No. 34. That Order only authorized repairs to the original footprint and design, of previously authorized and serviceable structures. VMRC Permit #94-0656 authorized a 588-ft² open-sided A-frame roof boathouse only at 1206 Dandy Loop Road. Even if it did, the Heitkemper's also failed to submit the abbreviated VMRC application, as required by the Executive Order, to obtain written Commission authorization to undertake repairs to structures situated over State-owned subaqueous land damaged by Tropical Storm Ernesto. Their contractor further advised staff that he had limited experience as a marine contractor and that he failed to provide York County with the revised project drawings necessary to obtain a modified building permit for the flat-roof design.

Mr. Owen stated that staff also questioned the structural integrity of the structure. Staff would not have recommended approval of a framed wall, banded to the top of the existing boathouse support piles, for the purpose of increasing roof clearance. Additionally, staff would not have supported a request for the partially sided design or an elevated deck on

top. In light of the foregoing, staff could not support the request for after-the-fact authorization and recommended denial and Commission direction that the Heitkemper's remove the unauthorized framed walls, plywood siding, lower level enclosure and flat-roof no later than August 30, 2007. Staff, however, would support reconstruction of the A-frame roof to its originally permitted length and width dimensions and would not object to the installation of longer support pilings to elevate the roof to provide the additional clearance necessary for the Heitkemper's existing boat.

Commissioner Bowman asked if the applicant was present or his representative.

Duane Heitkemper, applicant was sworn in and his comments are a part of the verbatim record. Mr. Heitkemper explained that tropical storm Ernesto had a big impact on the structure and with what he was constructing he was just trying to make it safer. He said his insurance company questioned the original structure and said that increased premiums would be added if the structure was not of sounder construction. He provided a picture for the Commission's review. He said he wanted to raise his boat out of the water. He said he called VMRC staff and was told that repairs do not require a permit.

Gary Caricofe, marine contractor for the applicant, was sworn in and his comments are a part of the verbatim record. Mr. Caricofe explained that he does insurance work only and he met the applicant through the State Farm Insurance Company. He said his business operated out of New Kent. He said there was concern that if the structure failed it would cause it to be a high risk for insuring. He said when he contacted County personnel they told him that they had called VMRC and was told VMRC did not have any authority over this project. He said he took their word for it and gave the plans to the County. He said when they made changes to the proposal, the County said no problem they just needed revised drawings. He said when he did turn in the plans VMRC contacted the County and said the work had to stop. He said he had always done the right thing in the past in his business.

Commissioner Bowman asked if anyone was present in support or opposition.

Robert Holloway said he was representing Mr. Perkinson, was sworn in and his comments are a part of the verbatim record. Mr. Holloway stated that a letter was submitted and provided some pictures. He had no further comment, but answered questions.

Commissioner Bowman asked Mr. Holloway to comment on the project in regards to how safely it was constructed. Mr. Holloway said the picture provided shows it and it's still in the same location. He said a hurricane would destroy it and this would impact the properties of the neighbors above the pier. He said it was not structurally sound.

Commissioner Bowman asked for a motion.

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Associate Member Schick moved to accept the staff recommendation for the Commission to consider a bigger boathouse with new pilings. Associate Member Robins seconded the motion. He asked that the motion include that a plan view drawing be submitted prior to construction. He said the staff recommendation was reasonable, but there needed to be an A-frame roof. He also said that the structure was a non-water dependent structure, as it was, and could be damaged in bad weather. Associate Member Schick agreed to the amendment but added they be required to remove the lower portion. Associate Member Fox stated that no roof would solve the problem of the boat rising. The motion carried, 7-0.

No applicable fees – Permit Denied

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- 10. DR. DAVID BEJOU, #03-2108, requests after-the-fact authorization to retain a 4-foot by 20-foot section of concrete retaining wall, and a portion of riprap that extends approximately 2 feet channelward of ordinary high water, for a length of 18 feet, and to extend an existing concrete boat ramp up to 29 linear feet channelward of ordinary high water at the his property situated along the James River in Chesterfield County.

Ben Stagg, Environmental Engineer, Sr., gave the presentation with slides. His comments are a part of the verbatim record. Mr. Stagg had an additional comment letter which he provided copies for the board.

Mr. Stagg explained that the project was located along the James River, above the fall line and the VMRC’s jurisdiction extended only to the ordinary high water mark. On September 30, 2003, Mr. Bejou submitted a Joint Permit Application, requesting authorization to install up to 97 linear feet of riprap revetment and construct a concrete boatramp, both landward of ordinary high water, and to construct an open-pile private pier at his property situated along the James River in Chesterfield County. Staff issued an “NPN” letter indicating that provided the proposed riprap and boatramp did not extend channelward of ordinary high water, no authorization was required from VMRC. The pier was also exempt as a private non-commercial pier.

Mr. Stagg said that on March 13, 2007, Mr. Bejou submitted a modification requesting to extend his boatramp an additional 29 feet channelward of its original terminus. Since the proposed project now extended over State-owned subaqueous lands a permit was required from VMRC. As part of our normal public interest review, both adjoining property owners were notified of the proposed modification request.

Mr. Stagg stated that staff received a letter of concern from Mr. Guy C. Crowgey, attorney for the upstream adjoining property owners, Mr. and Mrs. Downing. That letter indicated that while his clients had no objection to the ramp extension, they did have concerns about

the currently installed ramp, riprap and grading that had occurred in conjunction with the shoreline work. Mr. Crowgey further requested that staff conduct a site visit to determine if the completed work was in conformance with Mr. Bejou's original request.

Mr. Stagg said that staff conducted a site visit on June 13, 2007, at which Mr. Bejou was present. During this visit staff noted that the original boat ramp appeared to be constructed as requested and that the private pier had not been constructed. The riprap had been installed along the shoreline but staff noted the construction of a two-tiered concrete retaining wall along the channelward side of the riprap. This structure was not depicted in the original application submitted in 2003, and a portion of the wall extended channelward of ordinary high water for a length of approximately 18 feet. Mr. Bejou was informed that the wall was beyond the scope of the original application and that it required a permit from VMRC. Staff recommended he request after-the-fact approval, if he wished to retain the structure.

Mr. Stagg stated that staff informed Mr. Bejou of the public interest process that would be required, and that a full hearing before the Commission would also be required. At that time he would be afforded an opportunity to explain to the Commission why work was done beyond the scope of the original proposal.

Mr. Stagg explained that Mr. Bejou also stated that he was confused concerning the rules related to the alignment requirements of shoreline erosion structures. Staff noted that Mr. Bejou had also installed a drop inlet with drainpipe, and had graded his property to drain towards his boat ramp, as directed by the County of Chesterfield, in an attempt to address the concerns of the Downings.

Mr. Stagg noted that as a follow up to the letter from the neighbors' attorney, staff wrote to Mr. Crowgey, noting that this work appeared to have been completed in consultation with the County. Although this work was done in upland areas outside the jurisdiction of VMRC, those actions did appear to address the concerns raised in his previous letter to the Commission. The letter further indicated that staff did discover a portion of the project that exceeded the original submission, and that a permit would be required from VMRC for Mr. Bejou to retain the concrete retaining wall, as constructed. Staff requested that Mr. Crowgey, provide this information to his clients, the Downings, and that he inform our office within 15 days of his receipt of the letter if they still had any concerns with either the after-the-fact request for the retaining wall or the boat ramp extension.

Mr. Stagg said that staff received a phone message from Mr. Crowgey, followed by a facsimile transmission of a letter dated July 9, 2007, in which Mr. Crowgey requested additional information concerning the retaining wall structure, including a drawing of the structure. Staff responded, by e-mail, indicating that a drawing had been requested and would be forwarded upon receipt. Staff also clarified that the retaining wall was already constructed and had been in place for some time, and noted that the Downings could

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readily observe its presence and impact from their property. Staff also forwarded a digital photograph of the shoreline of Bejou showing the riprap and retaining wall.

In response to staff's request, Mr. Stagg said that Mr. Bejou provided a revised drawing of the existing structures and a copy of this drawing was forwarded to Mr. Crowgey. Additionally, Mr. Bejou further stated in an e-mail correspondence dated July 17, 2007, that the retaining wall was used to assist in boat launching and mooring and with a future small floating dock. He further stated that the pier that was previously requested would not be built.

Mr. Stagg explained that staff believed the original objections by the Downings were outside the jurisdiction of VMRC. It did not appear that the retaining wall, as currently constructed, was adversely impacting the Downing property. However, to properly stabilize the wall, additional riprap may be required along both the channelward toe and adjacent to the boat ramp. Therefore, staff recommended the removal of the entire structure, to be replaced with riprap, terminating at ordinary high water.

Mr. Stagg said that since the applicant had indicated an intention to use the structure in conjunction with boat launching at the ramp and for boat mooring, and to forego construction of the previously proposed larger pier structure, and should the Commission deem after-the-fact approval of the structure to be warranted, staff recommended a triple permit fee and triple royalty of \$108.00 for the filling of 36 square feet of subaqueous lands at the triple rate of 3.00 per square foot as provided by Section 28.2-1206(D) of the Code of Virginia. Staff also recommended approval of the boat ramp extension, as requested.

After some discussion about the integrity of the structure and the applicant's decision to not build a private pier, the Commissioner asked if the applicant wished to comment.

David Bejou, applicant, was sworn in and his comments are a part of the verbatim record. Mr. Bejou explained that there had been some delay in the construction because of health problems. He said he wished to keep the boat ramp and retaining wall as the structure would be too difficult to move. He reiterated his intention not to construct the private pier in the future.

Associate Member Holland moved to accept the staff recommendation and put riprap on both sides. Associate Member Fox asked if there was to be a triple fee assessment. Associate Member Schick responded yes. The motion carried, 7-0.

Permit Fee (After-the-fact-triple fees).....	\$ 75.00
Royalty Fees (After-the-fact-triple fees--filling 36 sq. ft. @ \$3.00/sq. ft.).....	\$108.00
Total Fees.....	\$183.00

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The Commission recessed for lunch at approximately 12:14 p.m. The meeting was reconvened at approximately 1:09 p.m.

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11. **TERRY MALARKEY, #07-0043**, requests after-the-fact authorization to retain three (3) uncovered boatlifts, two (2) 10-foot by 4-foot fingers piers and one (1) 20-foot by 3-foot finger pier. Mr. Malarkey also requests authorization to install seven (7) uncovered boatlifts with lift poles and enlarge the remaining three finger piers to 20-foot by 3-foot, at his existing permitted ten-slip community pier along Chesconessex Creek, near Crystal Beach, in the Wise's Point subdivision of Accomack County.

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

Mr. Badger explained that Wise's Point was a nine (9) lot subdivision on the southwest side of Chesconessex Creek located less than a mile northwest of the small town of South Chesconessex. While the existing 10-slip community pier is owned by the applicant at the present time, Mr. Malarkey plans to transfer the ownership of the community pier to the Wise's Point Association sometime this year, as provided for in their covenants.

Mr. Badger said that Mr. Malarkey received a permit from the Commission in 1990 (#89-1977), for the construction of an open-pile community mooring facility consisting of a 260-foot long by 5-foot wide access pier, expanding to 10-foot wide for an additional 70 feet. The community pier included a 30-foot by 10-foot T-head, four (4) small fingers piers and eighteen (18) associated mooring piles to provide ten (10) slips for use by the residents of the Wise's Point subdivision. The pier was built, as permitted, in the early 1990's.

Mr. Badger stated that prior to submitting the current Joint Permit Application, Mr. Malarkey contacted staff to inquire whether a permit would be required for the installation of uncovered boatlifts on his community pier. Staff informed him that since the pier was a community pier and not a private pier, a permit would be required from VMRC. Mr. Malarkey then informed staff that three (3) of the ten (10) boatlifts and three (3) of the six (6) finger piers had already been constructed.

Mr. Badger said that on January 5, 2007, staff received the after-the fact, Joint Permit Application submitted by Mr. Terry Malarkey. That application requested authorization to install ten (10) uncovered boatlifts, construct two (2) new 10-foot by 4-foot finger piers and enlarge four (4) finger piers from 25 square feet to 60 square feet each. The proposed

boatlifts and finger piers continue to fall within the existing community pier's bold outline. This application was then subjected to our standard public interest review.

Mr. Badger stated that the Virginia Institute of Marine Science has indicated that they do not anticipate any significant adverse environmental impacts resulting from the additional boatlifts or finger piers, provided the community pier is operated in an environmentally responsible manner.

Mr. Badger said that the Virginia Health Department advised that the project was in compliance with their Sanitary Regulations for Marinas and Boat Moorings, and had been approved. Their Division of Shellfish Sanitation informed staff that although the project involved shellfish growing waters it would not require a seasonal closure, as the number of slips did not exceed ten (10). The project was not protested by any other individuals and no other State agencies had commented on the project.

Mr. Badger explained that although the Accomack County Wetlands Board approved the original permit, they did not require a permit for this proposal since the current proposed boatlifts and finger piers lay channelward of mean low water and were therefore outside their jurisdiction.

Mr. Badger stated that had the applicant not constructed the three boatlifts and three finger piers prior to receiving authorization from VMRC, staff could have approved the project as submitted and issued a permit administratively. Therefore, after evaluating the merits of the entire project and after considering all of the factors contained in §28.2-1205(A) of the Code of Virginia, staff recommended approval of the project as proposed, with triple fees and a civil charge based on minimal environmental impact and a minimal degree of deviation given the after-the fact nature of the project. Since the community pier and slips were constructed prior to the resumption of the royalty collections in December 2005, staff did not recommend a royalty be assessed on the existing bold outline. Staff did, however, recommend a royalty of \$330.00 for the additional encroachment of the finger piers over 220 square feet of State-owned subaqueous bottom at a rate of \$1.50 per square foot.

Terry Malarkey, the applicant, was sworn in and his comments are a part of the verbatim record. Mr. Malarkey apologized for his actions and stated that no one thought a permit would be required.

Associate Member Holland asked if he had contacted a contractor. Mr. Malarkey responded yes, but the contractor did not think a permit was necessary. He stated now he does.

After a little more discussion, Associate Member Holland stated that the applicant had contacted a contractor and it appeared there was a misunderstanding between all parties. He moved to approve the project and assess a triple permit fee with no civil charge. Associate Member Robins seconded the motion. The motion carried, 7-0.

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Commissioner Bowman stated he appreciated the applicant’s candor, as not many would come forward, and he appreciated the integrity of the individual.

Royalty Fees (encroachment 220 sq. ft. @\$1.50/sq.ft.)..	\$330.00
Permit Fee (After-the-fact, triple fees).....	\$300.00
Total Fees.....	\$630.00

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Bob Grabb, Chief, Habitat Management, suggested that the Commission proceed with the next two items, as staff had received a letter from Spotsylvania County.

- 12. **SPOTSYLVANIA COUNTY UTILITIES, #07-0712**, requests after-the-fact authorization to retain unauthorized portions of, and to complete the installation of, 120 linear feet of riprap to stabilize an exposed section of the Massaponax Sewer Interceptor and the adjacent stream bank, as part of an emergency stabilization project within Massaponax Creek in Spotsylvania County.

Ben McGinnis, Environmental Engineer, Sr., gave the presentation with slides. His comments are a part of the verbatim record. Mr. McGinnis, following the presentation, read a letter from the applicant into the record at their request. He said that staff had not met with the applicant at the site, but the Corps did meet with them.

Mr. McGinnis explained that the project was located along Massaponax Creek, immediately adjacent to Route 208 in Spotsylvania County. The applicant was seeking after-the-fact authorization to retain riprap stream bank and erosion scour protection emplaced over an exposed section of the Massaponax Sewer Interceptor, which crosses Massaponax Creek at the project location. Spotsylvania County Utilities was also requesting authorization to install remaining portions of the planned 120 linear foot stream bank and stream bank stabilization, immediately adjacent to the exposed sewer line and manhole.

Mr. McGinnis said that on February 28, 2007, Mr. Delma Armstrong, Deputy Superintendent for the Spotsylvania County Department of Utilities, contacted staff to inquire about the necessity of a permit for the proposed project. Mr. Armstrong explained that the County considered the proposed project to be an emergency and that they needed to take steps to prevent the exposed sewer line and manhole from being compromised during the next high flow event along Massaponax Creek.

Shortly after being notified of the proposed project, Mr. McGinnis stated that staff visited the site to observe the eroding stream bank and exposed sewer line. Based upon field observations and a review of a project drawing, staff sent a letter, dated March 1, 2007, to the applicant stating that staff agreed that the exposed sewer line and manhole could represent an emergency situation, but that staff could not agree that the proposed stream

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bank stabilization constituted an emergency that could not wait for proper authorization prior to the commencement of installation. In the letter staff encouraged the submission of a Joint Permit Application (JPA) to receive a permit prior to the start of any work, and further stated that any unauthorized construction would constitute a violation of Chapter 12 of Title 28.2 of the Code of Virginia.

Mr. McGinnis said that the Department of Game and Inland Fisheries, in an e-mail to staff dated June 18, 2007, stated that they did not anticipate any significant adverse impacts upon Threatened or Endangered wildlife resources, and would recommend the applicant consider the implementation of a stream restoration project to address long-term degradation of the creek. The Department of Conservation and Recreation, in a memo to staff dated June 20, 2007, stated that they did not anticipate any adverse impacts to natural heritage resources or State Natural Area Preserves. In addition, they stated that the proposed project must comply with the Chesapeake Bay Preservation Area Designation and Management Regulations as enforced through locally adopted ordinances. No other State agencies had raised concerns or objections to the project.

Mr. McGinnis stated that based upon their past history of applying for and receiving permits, Spotsylvania County Utilities was well aware of the need to obtain VMRC permits before conducting work encroaching upon State-owned submerged lands. However, the potential for further stream bank erosion not only threatened the exposed sewer line and manhole, but also could have posed a public health hazard had the sewer line or manhole been compromised. In this case, it appeared that the applicant acted quickly to protect the exposed sewer infrastructure to prevent a more serious problem and was not in a position to wait for Commission authorization before beginning the work.

Accordingly, Mr. McGinnis said that since impacts resulting from the use of State-owned submerged land were minimal, and after considering all of the factors contained in Sections 28.2-1205 (A) and 28.2-1302 of the Code of Virginia, staff recommended that the project be approved as proposed. Furthermore, since staff would have recommended approval of the project had it been submitted prior to installation, because the applicant notified and worked with staff prior to the start of work, and because of the emergency nature of this municipal project, staff did not recommend the assessment of a civil charge or triple permit fees.

Associate Member Robins moved to approve the request due to the emergency of the situation. Associate Member Holland seconded the motion. The motion carried, 7-0.

Permit Fee.....\$ 25.00

- 13. TOUCHSTONE DEVELOPMENT, LLC, #06-2610**, requests after-the-fact authorization to retain approximately 27 square feet of stone rip rap scour protection, channelward of ordinary high water, within Second Branch, at the applicant's residential development in Chesterfield County. The applicant has a pending permit for a pipeline utility crossing at the same location.

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

Mr. Stagg explained that the project was located at a residential development known as Highlands Development in Chesterfield County. The applicant submitted a Joint Permit Application on January 22, 2004, requesting authorization to install a 16-inch water line beneath Second Branch, a tributary to Swift Creek, by the directional drill method. A permit was issued in August of 2004. On November 1, 2006, the applicant submitted a new Joint Permit Application seeking authorization to install the water line by open trench method noting that the directional drill method was no longer feasible due to the presence of bedrock at this location.

Mr. Stagg said that staff had conducted a routine site inspection on February 21, 2007, at which time it was noted that a small portion of the bank of Second Run had been graded and armored with riprap along with the installation of a storm sewer drain pipe upon the nearby upland area. The applicant and agent for the project, Townes Site Engineering, were notified by letter dated March 22, 2007 of the site visit; and, potential violation of the Code of Virginia, Chapter 12, 28.2-1203. Staff received a letter of response, dated March 30, 2007, from Mr. Thomas Houston of Townes Site Engineering, acknowledging the violation. Staff responded by letter dated April 17, 2007, requesting that the rip rap channelward of ordinary high water be removed and the stream bank restored to pre-disturbed conditions, or inform VMRC if the applicant would like to seek after-the-fact authorization to retain the work as completed. Staff further noted that issuance of a permit for the water line would not be issued until the violation was resolved.

Mr. Stagg stated that staff received a letter from Ms. Lacey England of Townes Site Engineering, dated May 30, 2007 requesting after-the-fact authorization to retain the riprap and shoreline grading. Additionally, the letter clarified that the proposed water line would not impact the area already graded. A public notice was published for both the water line crossing and the bank grading and rip rap placement.

Mr. Stagg said that the Department of Game and Inland Fisheries recommended that the water line installation be done during low or no-flow conditions and within cofferdams blocking no more that 50% of the stream. The also recommended that any material removed from the stream be properly stockpiled to prevent it from returning into the stream, and that the streambed and bank be restored to their original contours. No other agencies commented on this project or the after-the-fact request.

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Mr. Stagg stated that the agent acknowledged that the bank grading and riprap placement constituted a violation of the Code of Virginia. They noted, however, that the proposed work, while apparently on construction plans for the site, was not included in the Joint Permit Application documentation or drawings. Staff would likely have approved the bank grading and riprap installation, had the applicant sought approval through the Joint Permit Application process. Therefore, staff recommended after-the-fact approval of the riprap and approval of the installation of the water pipeline, by open trench method, provided the applicant followed the normal instream work permit conditions. Staff additionally recommended a triple permit fee, as provided by Section 28.2-1206(D) of the Code of Virginia, along with a royalty of \$90.00 for the waterline encroachment of 30 linear feet of Second Run at rate of \$3.00 per linear foot.

Commissioner Bowman asked about a civil charge. Mr. Stagg stated that it was up to the Commission whether there should be a civil charge.

Lacey England, representing Touchstone Development, was sworn in and her comments are a part of the verbatim record. Ms. England explained the riprap was supposed to be above where VMRC's jurisdiction was.

Commissioner Bowman asked if the location of the riprap caused the problem. Ms. England said that she could not answer that, as it was designed by an engineer and the County had approved it.

Commissioner Bowman stated he was perplexed by the mistake being made and the applicant not knowing a permit was required. He asked if there was anyone in opposition present. There were none.

Associate Member Robins moved to accept the staff recommendation, adding an assessment for a \$1,200.00 civil charge for a minimal environmental impact and a minimal degree of deviation. Associate Member Fox seconded the motion. The motion carried, 7-0.

Royalty Fees (encroachment 30 linear ft. @ \$3.00 per linear ft.)..	\$ 90.00
Permit Fee (After-the-fact tripled).....	\$ 300.00
Civil Charge.....	\$1,200.00
Total Fees.....	\$1,590.00

DISCUSSION: Streamlining review by the Commission of the after-the-fact Habitat items.

Bob Grabb, Chief, Habitat Management, gave the presentation. His comments are a part of the verbatim record. Mr. Grabb explained some of the history of past attempts to handle

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consent items the same as Page Two Items. He stated that back when Tim Hayes was on the Board this was done by giving the staff authorization to negotiate and appropriate civil charge with the Commission, as the final reviewer. He said this worked okay for a time, from 1993 to 1999. He said it was when new Board members were appointed that this process was challenged. He explained that staff was asking for a reinstatement of this procedure in order to expedite the review and Commission hearing process.

Associate Member Holland asked if an agreement was made between the staff and the applicant, could a Board member or protestant request that this issue be heard separately. He also asked if it could be modified. Mr. Grabb responded yes, that if there was a concern then a full briefing could be done, but at a subsequent meeting.

Associate Member Fox asked if the staff would provide a more detailed description than what is done for Page Two Items. Mr. Grabb responded yes, it would be a page or so that would be included within the Commission’s mailout packet.

Associate Member Schick stated that it was good to expedite these issues, but this would not be saying the Commission condones violations of the law. He said he suggested that the Page Three Item people be required to attend the meeting. He said he still had concerns about violations involving a contractor being at fault.

Commissioner Bowman asked if staff negotiations would take into consideration the Commission’s past actions. Mr. Grabb responded yes. Commissioner Bowman stated that this procedure could be tried to see how it works. He asked what if the Board did not agree with the negotiation. Mr. Grabb stated the negotiation would not be binding, unless the Board approved it.

Associate Member Holland suggested a trial period of 90 days. When asked if a motion was needed, Commissioner Bowman stated that no motion was necessary and the consensus of the Board members would be sufficient.

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14. PUBLIC COMMENTS:

Douglas F. Jenkins, Sr.

Doug Jenkins, President of the Twin Rivers Watermen’s Association, commented that he disapproved of some aspects of the pending recommendations of the Blue Ribbon Oyster Panel Plan. His comments are a part of the verbatim record.

Mr. Jenkins stated that he was concerned that public funds and the Baylor grounds were benefiting the private sector and not the public in general. He also said that he did not agree that James River seed must stay in the river because of oyster

disease. He explained that the seed areas in the Great Wicomico and Piankatank were closed to public use while providing spawn for private grounds. He said with the seed were not being used for other areas but being purchased from the private sector.

Commissioner Bowman requested that staff provide some comments. Jack Travelstead, Chief Deputy Commissioner, explained that there would be a detailed presentation of the Blue Ribbon Oyster Panel Report at the next meeting. He said in 10 days the final report would be mailed to the Board members. He stated that it was not a unanimous consensus by the panel, as there were varying opinions. He said there was a lot of details in the report and it was close to a consensus by the panel, which was very good considering there were members of the industry, scientific sector and environmental groups as members of the panel. He said everyone got something, but not everything they wanted.

Commissioner Bowman stated that the final draft had been revised 3 times and staff confirmed this. He went on to say that this had been a dynamic process, as well as a learning process.

No action was taken.

Robert W. Jensen

Captain Bob Jensen of the Rappahannock River Preservation Society said the U. S. Navy was giving up its Ammunition Mooring Facility in the James River and suggested the concrete be utilized for oyster replenishment efforts. His comments are a part of the verbatim record.

No action was taken.

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- 15. JOHN BECKWITH:** Request for a license to locate a pound net in the Chesapeake Bay, West of Parkers Island. The proposed site is protested.

Jack Travelstead, Chief Deputy Commissioner, gave the presentation with slides. His comments are a part of the verbatim record.

Mr. Travelstead explained that Mr. John E. Beckwith of Painter, Virginia had filed an application to locate a new pound net in the Chesapeake Bay approximately 150 feet west of Parkers Island. The net is proposed to be 675 feet long. He said the staff projects the location to be 440 feet from shore. Mr. Beckwith's description puts it in the SAV, but if the latitude and longitude numbers are used, the net location is acceptable.

Mr. Travelstead said that the main concerns expressed in the public comments against the application were commercial gear impact on the recreational fishermen, the impact on SAV, and the net presenting a hazard to navigation, especially at night for small boats. He stated it is difficult to believe that a single net of this nature would result in the significant demise of the recreational fishery. He said that Parker's Island is almost 4 miles long. He said that Mr. Angle fished the net at that location for one year, but later moved it because of the travel distance between this net and his other nets.

Mr. Travelstead explained that staff's main concern with the location was the impact on SAV beds. He said that VIMS maps indicated the presence of SAV in 2005, but in 2006 showed an absence of the SAV. He said Mr. Beckwith was not impacting SAV as the location was beyond the SAV line and staff would not allow a net to be placed in SAV beds.

Mr. Travelstead stated that staff recommended approval of the application for Mr. Beckwith.

Associate Member Bowden stated that he was familiar with the area. He said that offshore was 4 feet of water depth, below Onancock Creek and off of the Onancock buoy line, so it should not affect boat traffic from Onancock Creek.

Mr. Neil Insley, the attorney representing Mr. Beckwith, was present and his comments are a part of the verbatim record. Mr. Insley explained that because his father was ill, Mr. Beckwith had not been able to attend the meeting. He said he could be reached by telephone if necessary.

Mr. Insley stated that Mr. Beckwith had been a waterman for 40 years in other states as well as Virginia. He said he obtained his pound net by transferring a license from someone else to him, and it would be a shame if he did not get to use the license. He explained that the applicant had made a mistake in his description and after he spoke with Mr. Travelstead decided to use the latitude and longitude.

Mr. Insley said that the location that was proposed was not in the SAV beds. He said there had been SAV in that location at one time, but not now. He said the navigational safety concerns for small boats could be avoided by simply following the rules of navigation. He said it was required that speed be reduced and lookout kept during poor visibility or at night. He said the conservation impacts that the protestors were concerned about did not exist. He said this was a passive gear, as the bycatch can be released alive, most of the time, and Mr. Beckwith intended to cull the fish on site to lessen the kill of the bycatch. He said that other gears have more impact and if this gear did then the VMRC would address it. He said it was a misconception that the watermen were not concerned with conservation. He stated Mr. Beckwith had never had a violation in all the years he had worked as a waterman, and he did not want to impact the fishery or himself.

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Commissioner Bowman asked if anyone wished to speak in opposition.

Pat Hurst, protestant, was sworn in and his comments are a part of the verbatim record. Mr. Hurst stated he had worked as a waterman on the Eastern Shore for 20 years off Onancock Creek. He said this was not a commercial versus recreational issue, but a conservation issue only. He said the creek did not support a commercial gear fishery in the past and the area certainly cannot support a pound net. He stated Mr. Beckwith was new to the Eastern Shore and not familiar with the area. He said he disputed the staff's comments on the water depth and he agreed with Mr. Bowden. He said this was a spawning area for various species.

Mr. Insley in his rebuttal stated that the Commission needed to take action on all harvest needs so that Mr. Beckwith can be allowed to use his legal gear license. He said that it was not true that only one person benefited with a gear license, but all Virginians who wanted fresh seafood to eat would benefit.

Associate Member Bowden said this was a dilemma on the Eastern Shore and users of one gear should not be stopped by others with another gear. He said this was not a conservation issue, but a user conflict and it had been blown up out of proportion. He said he would make a motion to accept the staff recommendation when the time was right.

Associate Member Robins said the staff had indicated there were no navigational concerns and he would support the applicant.

Associate Member Bowden moved to accept the staff recommendation. Associate Member Holland seconded the motion. The motion carried, 7-0.

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16. DISCUSSION: Recommendations of the Recreational Fishing Advisory Board.

Associate Member Bowden left the meeting and did not return.

Sonya Davis, Fisheries Management Specialist, Sr., gave the presentation. Her comments are a part of the verbatim record.

Ms. Davis stated that there was only one proposal for \$400,000 to be considered by the Board and that was for the Artificial Reef Program. She said they had the opportunity to acquire a very large amount of donated materials to be used to refurbish a wide variety of the reef sites in the Bay.

Jack Travelstead, Chief Deputy Commissioner explained that the priority site would be the Northern Neck Reef, which had been heavily used and which has had sedimentation problems. He said there were two new reefs approved by the Board this past year, which

do not have much material on them and could use a lot of the material. He said also that with the amount of materials available all the other reef sites would benefit as well. He said the cost to the State would be millions of dollars if they had to pay for it. His comments are a part of the verbatim record.

Associate Member Fox moved to accept the staff recommendation. Associate Member Schick seconded the motion. The motion carried, 6-0. Commissioner Bowman noted that Associate Member Bowden was absent for the vote.

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- 17. **DISCUSSION:** Amendments to Regulation 4 VAC 20-755-10 et seq., "Pertaining to Artificial Reefs", to incorporate other established artificial reef sites into this regulation that reserves reef sites for recreational fishing. This is a request for a public hearing to be held in August.

Jack Travelstead, Chief Deputy Commissioner, gave the presentation. His comments are a part of the verbatim record. Mr. Travelstead explained that there were a number of artificial fishing reefs that had been established for a while and they needed to be added to the regulation. He said staff was requesting approval to advertise for a public hearing next month.

Associate Member Fox moved to approve the request for a public hearing in August. Associate Member Holland seconded the motion. The motion carried, 6-0. Associate Member Bowden was absent for the vote.

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There was no further business and the meeting was adjourned at approximately 2:45 p.m. A Special Commission meeting was scheduled for Wednesday, July 25, 2007 and the next regular Commission meeting would be August 28, 2007.

Steven G. Bowman, Commissioner

Katherine Leonard, Recording Secretary