

MINUTES

JUNE 26, 2001
NEWPORT NEWS, VIRGINIA 23607

The regular Monthly meeting of the Marine Resources Commission was held on June 26, 2001 with the following present:

William A. Pruitt)	Commissioner
C. Chadwick Ballard)	
Gordon M. Birkett)	
Lake Cowart, Jr.)	
Henry Lane Hull)	Members of the Commission
F. Wayne McLeskey)	
John W. White)	
Kenneth W. Williams)	
Carl Josephson		Assistant Attorney General
Wilford Kale		Sr. Staff Adviser
Erik Barth		Head - MIS
Andy McNeil		Programmer Analyst Sr.
LaVerne Lewis		Commission Secretary
Bob Craft		Chief-Finance & Administration
Jane McCroskey		Deputy Chief-Finance & Administration
Debbie Brooks		Executive Secretary
Steve Bowman		Chief-Law Enforcement
Lewis Jones		Deputy Chief-Law Enforcement
Warner Rhodes		Middle Area Supervisor
Randy Widgeon		Eastern Shore Supervisor
Jim Majors		First Sergeant - Southern Area
Grady Ellis		Marine Patrol Officer
Lawrence Ayers		Marine Patrol Officer

Virginia Institute of Marine Science

Dr. Eugene Bureson
 Lyle Varnell
 Tom Barnard

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Walter Priest

Jack Travelstead	Chief-Fisheries Management
Rob O'Reilly	Deputy Chief-Fisheries Management
Roy Insley	Head-Plans and Statistics
Lewis Gillingham	Fisheries Management Specialist
Ellen Cosby	Fisheries Management Specialist
Chad Boyce	Fisheries Management Specialist
Cory Ruth	Fisheries Management Specialist
Tina Hutchinson	Fisheries Management Specialist

Bob Grabb	Chief-Habitat Management
Tony Watkinson	Deputy Chief-Habitat Management
Chip Niekirk	Environmental Engineer
Randy Owen	Environmental Engineer
Traycie West	Environmental Engineer
Hank Badger	Environmental Engineer
Jeff Madden	Environmental Engineer
Mark Eversole	Environmental Engineer
Jay Woodward	Environmental Engineer
Kevin Curling	Environmental Engineer

Gerry Showalter	Head-Engineering & Surveying
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others present:

Aruthur C. Miles	Robert Smiley
David S. Bailey	Robert E. Simon
Massie Burger	Edward Winds
James Walden	Lewis Gregory
Judy Gregory	Dan caulhoun
Shirley Caulhoun	J. W. Waldrop
P. L. Johnson	J. A. Oxley
Hollis Kenyan	Devin Dubois
Timothy S. Taylor	Preston R. Smith
Jeff Watkins	David H. Teagle
Dan Locey	Jessica Fleming
Lee Rosenberg	Lewis J. Taylor
Lynn Ruth Taylor	Harry B. Taylor
John Blandin	Robert D. Tupper

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Charles K. Olson
Stern Hurzog
Gen Sweeney
Betty Clark
John Tazewell
Steve Bulleigh
Ellen R. Grimes
Jeannie Butler
Breck Ingler
Ed Nealon

Rick Thomas
John Sweeney
Ellen & Troy Lane
Ken Stolle
Page Ayres
Pete & Suzanne Swart
Kathleen Redfem
Martha Connolly
Tom Owens

Commissioner Pruitt opened the May meeting at 9:30 a.m. Members present were Associate Members Ballard, Birkett, Cowart, Hull, McLeskey, White and Williams. Associate Member

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Gordy was absent. Commissioner Pruitt established that there was a quorum. Mr. Gerry Showalter gave the invocation and Mr. Carl Josephson led the Pledge of Allegiance to the Flag.

1. MINUTES of previous meeting.

Associate Member White moved to approve the Minutes as distributed. Motion was seconded by Associate Member Hull. Motion carried unanimously.

**** APPROVAL OF AGENDA**

Associate Member Birkett requested that item 11 be move to 3a because Dr. Olsen had scheduled surgery for later. Motion was seconded by Associate Member White. Motion carried unanimously.

Associate Member Hull moved to accept the Agenda, with the change as presented. Motion seconded by Associate Member White. Motion carried unanimously.

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

Bob Grabb, Chief-Habitat Management, briefed the Commission on the following eleven "page two" items for projects that were over \$50,000 and not contested.

2A. U.S. ARMY CORPS OF ENGINEERS, #92-0616, requests reactivation and extension of their previously issued permit to place up to 175,000 cubic yards of material dredged from Swash Bay/White Trout Creek along the Waterway on the Coast of Virginia (WCV) in a 92-acre overboard site as part of the Corps' Dredged Material Placement Plan and Management Strategy, which includes the eventual development of the area as an oyster reef.

Permit fee not applicable

2B. HANOVER COUNTY DEPARTMENT OF PUBLIC UTILITIES, #00-1332, requests authorization to install a gravity sewer interceptor line under Totopotomoy Creek in five (5) locations as part of the Totopotomoy Sewer Interceptor project extending from an existing pump station adjacent to Totopotomoy Creek approximately 6,000 feet west of Route 301 and ending at the proposed Totopotomoy Wastewater treatment Plant approximately 4,000 feet east of Route 643 in Hanover County.

Permit fee.....\$ 100.00

2C. KIRKPATRICK, L.C., #01-0161, requests authorization to cross multiple tributaries to Broad Run and Bull Run, to construct a sanitary sewer line associated with commercial and residential development in Loudoun County. Recommend approval with standard instream conditions and a royalty in the amount of \$2,180.00 for the encroachment over 2,180 linear feet at rate of \$1.00 per linear foot.

Encroachment over 2,180 ln. ft. @ \$1.00 per ln. ft. of subaqueous bottom.....	\$	2,180.00	
Permit fee.....			<u>100.00</u>
	Total		\$ 2,280.00

2D. WASHINGTON COUNTY SERVICE AUTHORITY, #01-0783, requests authorization to install a waterline beneath Brumley Creek, Greendale Creek and the North Fork Holston River, at one location each, to provide potable water service to residents of the Brumley Gap Road area in Washington County. Recommend approval with our standard instream permit conditions for Brumley Creek and Greendale Creek, an October 1 to March 31 time-of-year restriction for Brumley Creek to protect reproducing brown trout and a requirement that the line beneath the North Fork Holston River be installed by directional bore method.

Permit Fee.....	\$	100.00
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2E. DAVID GATLING, #00-1928, requests authorization to mechanically dredge 1,682 cubic yards of State-owned subaqueous bottom material to provide 1,175 linear feet of navigable channel with a maximum allowable project depth of minus four (-4') feet at mean low water with a tolerance of plus/minus six (± 6) inches at property situated along Lynnhaven Bay in Virginia Beach. All dredged material shall be transported to and disposed of within an approved upland site. Recommend approval with our standard dredge conditions and a royalty in the amount of \$351.90 for the dredging of 782 cubic yards of new material at a rate of \$0.45 per cubic yard. Additionally, no dredging shall be permitted during the months of March through November to protect shellfish spawning periods and juvenile summer flounder recruitment.

Dredging of 782 cu. yds. @ \$0.45 per cu. yd.....		\$351.90
Permit fee.....		100.00
	Total	\$ 451.90

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F. DEPARTMENT OF THE NAVY, #01-0626, requests authorization to set four (4) concrete pilings and install a 12-foot wide by 42-foot long floating dock adjacent to Pier 60 in Little Creek Cove at the Little Creek Amphibious Base in Virginia Beach.

Permit fee..... \$ 100.00

2G. NORFOLK SHIPBUILDING AND DRYDOCK CORPORATION, #01-0793, requests authorization to replace Pier 3 with a new pier 712 feet long by 53 feet wide in the same location adjacent to their property situated along the Southern Branch of the Elizabeth River in the City of Norfolk. Recommend a royalty for all new encroachment at a rate of \$1.00 per square foot.

Fill of 6,404.99 sq. ft. @
\$1.00 per sq. ft..... \$
6,404.99
Permit fee..... 100.00
Total \$ 6,504.99

2H. CITY OF HAMPTON, #00-0783, requests authorization to maintenance dredge, on an as-needed basis, up to 12,000 cubic yards of State-owned submerged lands to maximum depths of minus eight (-8) feet below mean low water within the Salt Ponds entrance channel. All sand is to be placed along the public beach situated along the Chesapeake Bay in the City of Hampton.

Permit fee..... \$ 100.00

2I. NEWPORT NEWS SHIPBUILDING AND DRYDOCK CO., #00-0583, requests authorization to modify their existing permit to dredge an additional 3,200 cubic yards of State-owned bottom material from the James River to create and maintain maximum depths of -45 feet at mean low water adjacent to their facility in Newport News. Recommend a royalty of \$1,440.00 at \$0.45 per cubic yard.

Dredge additional 3,200 cu. yds.
of State-owned bottom material
@ \$0.45 per cu. yd..... \$ 1,440.00

2J. CITY OF NEWPORT NEWS, #01-0270, requests authorization to maintenance dredge, by clamshell method, 11,500 cubic yards of State-owned subaqueous bottom material from the James River in order to achieve maximum depths of minus eleven feet and six inches (-11.5) below mean low water adjacent to Huntington Park in Newport News.

Permit Fee..... \$100.00

2K. CITY OF NEWPORT NEWS, #01-0269, requests authorization to maintenance dredge, by clamshell method, 9,700 cubic yards of State-owned subaqueous bottom material from Salter's Creek in order to achieve maximum depths of minus six feet (-6) below mean low water adjacent to Peterson's Yacht Basin in Newport News.

Permit fee..... \$100.00

There being no comments from the public, Commissioner Pruitt placed the page two items before the Commission. Associate Member Ballard moved to adopt the recommendations from staff on the page two items. Motion was seconded by Associate Member Williams. Motion carried unanimously.

3. EXECUTIVE SESSION

Associate Member Ballard moved that this meeting be recessed and that the Commission immediately reconvene in executive closed meeting for the purpose of consultation with legal counsel and briefing by staff pertaining to actual or probable litigation, or other specific legal matters requiring legal advice by counsel as permitted by Subsection (A), Paragraph (7) of Section 2.1-344 of the Code of Virginia, pertaining to agenda item 4. Motion was seconded by Associate Member Williams. Motion carried unanimously.

The commission returned from Executive session and Associate Member Ballard moved that

WHEREAS, the Marine Resources Commission has convened an executive 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, § 2.1-344.1 of the Code of Virginia requires a certification by this Commission that such executive meeting was conducted in conformity with Virginia law;

NOW, THEREFORE, BE IT RESOLVED that the Marine Resources Commission hereby certifies that , to the best of each member's knowledge, (i) only public business matters lawfully exempted from opening meeting requirements by Virginia law were discussed in the executive meeting to which this certification resolution applies, and (ii) only such public business matters as were identified in the motion convening the executive meeting were heard, discussed or considered by the Marine Resources Commission. Motion was seconded by

Associate Member Birkett. Motion carried unanimously.

4. **CRAB CREEK IMPROVEMENTS, L.L.C., #00-2197.** Commission review on appeal by 43 freeholders of property within the City of Norfolk of the December 13, 2000, decision of the Norfolk Wetlands Board to approve, in modified form, an application to dredge navigation channels within Crab Creek, a tributary of the Lafayette River.

Commissioner Pruitt commented that Mr. Ballard would be abstaining on this case.

Chip Neikirk, Environmental Engineer, briefed the Commission on the appeal. He showed the Commission a slide that was not part of the record to orient them to the project area. He then summarized the record of the case. He noted that the proposed dredging project involved 21,200 square feet of subaqueous area and 15,000 feet of channels. He said the project had originally been denied by the Norfolk Wetlands Board in 1999 when it failed to get a majority vote. He indicated that Mr. Dashiell, the Board Chairman did not participate in the 1999 vote on the project because he lived on the creek that would be impacted by the proposed work. Mr. Neikirk said a revised application for the project was received on November 13, 2000 and that in the renewed application process Mr. Dashiell participated in the deliberations after consulting the city attorney on potential conflict of interest.

Mr. Neikirk reviewed the slides viewed by the Board during their hearing on the new application. He stated that one of the recommendations to the Board from VIMS was to not allow any channel dredging work that violated the "4x" buffer rule. He said VIMS also did not recommend dredging 1300 feet of channel in the upper portion of the northeast channel or in channels less than 15 feet in width. He showed a graphic depicting residents for, against, and neutral to the project and noted the areas of concern to those opposed to the project. He said mitigation was discussed by the Board, including a recent case on Tanner Creek where the Corps of Engineers required mitigation after the Board had made its ruling. Mr. Neikirk said the Norfolk Wetlands Board voted 4-3 to approve the revised application. He reported that the Commission received a petition for appeal from 43 freeholders on December 27, 2000 stating their position that the Board's decision was arbitrary and capricious and had failed to fulfill their responsibilities under the wetlands zoning ordinance. Mr. Neikirk noted that there was some controversy over Mr. Dashiell's participation in the vote since he benefited from the proposed work, but that while there was an air of impropriety, legal advice to the Board on this issue indicated that his participation was not prohibited by conflict of interest laws. Mr. Neikirk stated that staff did not think the Wetlands Board had considered all alternatives, particularly there being no compensation for wetlands losses. He said staff recommended the case be remanded back to the Norfolk Wetlands Board. Comments are part of the verbatim

record.

Associate Member Cowart asked when Crabb Creek was last dredged. Mr. Neikirk said it had been dredged in the past, but was not sure when. Associate Member McLeskey confirmed that the Creek had been dredged and indicated that a company he had some ownership in had helped do the work. He said he felt the project should qualify for maintenance dredging. Commissioner Pruitt commented that he thought the Wetland Board's staff presentation to their Board was good. Mr. Neikirk responded that staff thought that alternatives were not fully explored by the Board. Mr. Pruitt reminded the Associate Commissioners that they were there to review the Norfolk Board's decision, not the merits of the case. Comments are part of the verbatim record.

David Bailey, counsel for the freeholders, spoke in opposition to the Board's decision on the project. He said they had no generic opposition to the project and did not want denial, but that they wanted the wetlands guidelines applied to the project. He said portions of the proposed work dramatically exceeded the guidelines. He described what he thought were the main areas of dispute and noted that although guidelines were not rules, significant departure from them were an abandonment of the guidelines. He continued with comments on a second area of contention regarding Mr. Dashiell's participation in the case, noting how he recused himself from the original application and then became a proponent of the project and cast a deciding vote on the revised application. Comments are part of the verbatim record.

Cindy Hall, Deputy City Attorney for Norfolk, spoke on behalf of the Norfolk Wetlands Board. She handed out a copy of a power point presentation she planned to make. Commissioner Pruitt verified that her remarks would not include anything not already in the record. Ms. Hall noted that while the Board made its decision on December 13, 2000, one month after receiving the revised application, the process represented 13 months of project discussions, public hearings and forums. She stated that the project had no direct impacts on vegetated wetlands and non-vegetated areas impacted were only about 15% of the total project area; she said this percentage was significantly less than similar projects approved by the Board. On the issue of Mr. Dashiell's alleged conflict of interest, she said the Commonwealth Attorney had opined on the matter and enforcement of the conflict of interest resided with that office. On the issue of the Board's decision, she reviewed the standards they should follow for their decision and explained how they had met those standards, including how the Board had addressed the recommendations from VIMS. She said compensation was discussed and considered by the Board and noted the guidelines do not require compensation. Comments are part of the verbatim record.

Ken Stolle, attorney representing Crab Creek Improvements, explained the conflict of interest statutes to the Commission and testified that Mr. Dashiell had fully complied with the law. He asked that the Commission approve the actions of the Norfolk Wetlands Board. Comments are

part of the verbatim record.

Commissioner Pruitt indicated that the Assistant Attorney General had been consulted on the conflict of interest issue and they had concurred that it was not within the Commission's jurisdiction. He requested a motion on the matter. Associate Member Cowart made a motion to not consider the conflict of interest issue since the Code of Virginia clearly stated the requirements. Associate Member White seconded the motion and it was adopted unanimously.

Associate Member Cowart said he intended to support the Wetlands Board decision. He said he thought they acted in a timely manner, and had discussed mitigation (he referred to pages in the record). He suggested that in the future the Board should consider including a clause in their permits allowing them to require mitigation after the fact if the Corps did not act regarding mitigation. He noted that the Board tried to accommodate some recommendations to them by limiting the size of the equipment used in some areas and had considered alternatives for the channel area near Mr. Dashiell's property, but the best alternative was not available to them. Associate Member Cowart then made a motion to uphold the Norfolk Wetlands Board decision. He said he felt the Board had fulfilled their responsibility under the wetlands zoning ordinance. The motion was seconded by Mr. McLeskey and adopted unanimously.

Wetlands Board's Decision Upheld

11. **CHARLES OLSON, #01-0852**, requests after-the-fact authorization to retain a 30' x 30' open-sided elevated deck adjacent to his property situated along the Western Branch of the Elizabeth River in the City of Chesapeake.

Traycie West, Environmental Engineer, briefed the Commission and gave a power point presentation on the location and description of the project. Ms. West explained that Dr. Olson had submitted an application for a permit to put riprap along his property. Staff, along with representatives from the Wetlands Board, and VIMS visited the site on April 27, 2001 and noticed the elevated deck and boathouse that was under construction. Ms. West asked Dr. Olson if he had obtained a permit from the Marine Resources Commission to construct the deck and boathouse. Dr. Olson informed staff that he was not aware that a permit was required. Ms. West suggested that Dr. Olson file an after-the-fact application. Dr. Olson submitted an after-the-fact application. Staff reviewed the application and because there were no objections from the adjacent property owners, staff concluded that the boathouse portion qualified for the statutory authorization provided in Section 28.2-1203 (5) of the Code of Virginia. However, the elevated deck portion was not statutorily exempted.

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Ms. West further stated that the 900 square-foot covered elevated deck structure did not appear to be water-dependent, nor did it appear to be the minimum structure necessary to achieve Mr. Olson's intended use for providing shelter to people and personal belongings during storm events. Therefore, Ms. West said staff recommended that the Commission direct Mr. Olson to remove the structure and relocate it to the adjacent upland within a reasonable period of time. However, should the Commission wish to grant approval of the elevated deck, the Commission may wish to consider an appropriate civil charge in lieu of further enforcement actions.

Charles K. Olson, applicant, indicated that staff had summarized the situation very accurately. He said that his entire riverbank had been moved and reconstructed improperly as a result of a project that the City of Norfolk had done. Mr. Olson said for several years erosion had been occurring and the City did not want to do anything about it. He then decided to do something himself. He said his children had built the structure. Mr. Olson presented pictures he had taken of other structures up and down the river, and he felt some of them were more extensive than the one he proposed.

Commissioner Pruitt asked how long had his private pier been there. Mr. Olson responded that he thought the pier had been there since the early 1900s. He said the pier was a remnant of an old railroad trestle and it was there when he purchased the property. He said he had constantly upgraded the pier since he bought the property. A brief discussion followed regarding the persons he reviewed the project with. Comments are a part of the verbatim record.

Associate Member Hull asked Mr. Olson what year did he acquire title to the property. Mr. Olson responded that it was in 1988.

Associate Member Ballard commented that he was concerned about the shape of the pier and wanted to know if the footprint of the pier had changed. Mr. Olson responded indicated it had not.

Carl Josephson, Assistant Attorney General, said he did not think there was any problem with the boathouse, but the issue was the elevated deck. He wanted to know if there was going to be something else done to the deck. Mr. Olson said they had been trying to complete the structure, but his son broke his leg and it was difficult for him to get the project completed. In addition, they wanted to comply with any other building codes to make it safe. Mr. Olson said the project originally started out with the stairs being a support and brace for the roof.

Cynthia Burns, Dr. Olson's neighbor, said she had lived in the neighbor for 23 years, along with the existing neighbors that have been life long residents, gave comments in support of the project. Comments are a part of the verbatim record.

There being no further comments, pro or con, Commissioner Pruitt placed the matter before the

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Commission.

Associate Member Ballard commented that there were two things that were conflicting. He said it appeared from Dr. Olson's testimony, that the encroachment over the subaqueous bottoms were always there in terms of a single story pier, and what had been added was a second story to that pier, which did not appear to increase the encroachment over the State-owned subaqueous bottom. On the hand, he did not think the Commission would have approved the project in the first place in that configuration. He also commented that if the Commission approve the project, he felt it would give comfort to people to go ahead and build, and then come to the Commission. However, he did not think that was the situation with Dr. Olson.

Commissioner Pruitt commented that he agreed with Mr. Ballard's comments. He said he felt that if a contractor was involved in the construction of the project, that would be a different situation because there were so many laws and regulations, which made it difficult for a private citizen to keep up with all the regulations.

Associate Member Hull commented that he also agreed with Mr. Ballard's comments and he was convinced that there was no duplicity. He said he could not see how the Commission could go along with approving the deck, but could approve the boathouse. He also felt citizens needed to know the law and what the regulations were.

Associate Member Birkett said that according to the pictures Dr. Olson presented, the structures in the surrounding areas were very massive in some cases and he wanted to know if all those structures were permitted. Commissioner Pruitt responded that some could have predated the law. Mr. Birkett then said he did not think Dr. Olson should be penalized in this particular instance because the proposed structure was not water dependent and it was not infringing on any additional subaqueous bottom. Mr. Birkett then moved to approve the application as submitted. Motion seconded by Associate Member White. Motion carried 4 to 3.

Permit fee..... \$ 25.00

- 5. **CAPTAIN BOB'S MARINA, #00-2163**, requests authorization to dredge by clamshell and dragline methods, on an as-needed basis, approximately 4,170 cubic yards of subaqueous material from the entrance channel leading to Captain Bob's Marina, to provide maximum dredge depths of minus six (-6) feet at mean low water, along Chincoteague Channel in the Town of Chincoteague.

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Hank Badger, Environmental Engineer, briefed the Commission and gave a power point presentation on the location and description of the project. Comments are a part of the verbatim record. Mr. Badger said that approximately half of the slips in the marina were seasonal rentals and the remaining slips were for the applicant's 16-foot long rental boats. Mr. Badger explained that during the staff site visit on April 14, 2000, staff determined that an area approximately 70 feet long by 35 feet wide had been dredged to the entrance of the channel to the marina. He indicated that a prop dredge was used creating depths 1 to 1.5 feet deeper than the surrounding subaqueous bottom. Mr. Badger also mentioned that Ms. Roeske, owner of the marina, acknowledged that the area had been prop dredged without a permit.

Mr. Badger said a Notice to Comply was issued to Ms. Roeske on May 12, 2000. Ms. Roeske then submitted an after-the-fact application for the dredged work and a proposal to dredge the remainder of the entire entrance channel.

Mr. Badger stated that the Virginia Institute of Marine Science (VIMS) indicated that the proposed dredging would have temporary impacts to water quality and the benthic community, but the cumulative adverse impacts resulting from the dredging should be minimal. However, VIMS did not endorse "prop" dredging as an acceptable dredge technique. The Virginia Health Department stated that the channel dredging, as proposed by the revised drawings, would have no impact on the Department's programs. The Corps of Engineers issued a Nationwide Permit (35) for the project, and the Department of Environmental Quality stated that they would not require a Virginia Water Protection Permit. The U. S. Coast Guard stated that the project was acceptable. The project was not protested and no other State agencies had made comments on the proposal.

Donna Rae Roeske, owner of the Marina, apologized to the Commission. She said when her stepfather died seven years ago, she took over the marina, but she knew nothing about the business and had learned a lot of things the hard way. However, before she renovated or made upgrades on the property, she would contact the government agencies. Therefore, when persons came to her and said, "you need to blow out the mud so people could get in and out of your harbor, and this is the boat that Captain Bob used to do it," she said okay. Ms. Roeske also explained how the increase of commercial boats had created a "breakers affect" washing in mud and sledge.

Commissioner Pruitt asked Ms. Roeske how she planned to dredge the entrance in the future. Ms. Roeske responded that she would do it by the law. There being no other comments, pro or con, Commissioner Pruitt placed the matter before the Commission.

Associate Member White moved to accept the staff recommendation. Motion was seconded by

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Associate Member Cowart. Motion carried unanimously.

Dredge 4,170 sq. yds. @ \$0.45			
per sq. yd.....		\$1,876.50	
Permit fee.....			<u>300.00</u>
Total	\$	2,176.50	

6. HUDGINS POINT ESTATES CONDOMINIUM OWNERS ASSOCIATION, #01-0343, requests authorization to expand an existing three-pier, 15-slip community pier facility to 22 slips by adding two (2) sections of pier totalling 135 feet long by 5 feet wide; four (4) 10-foot long by 4-foot wide finger piers and 11 additional mooring piles to existing Pier C adjacent to their property situated along Cobbs Creek in Mathews County. The project is protested by numerous adjoining property owners.

Kevin Curling, Environmental Engineer, briefed the Commission and gave a power point presentation describing the project. He gave a brief history on the applications filed on behalf of the Hudgins Point Estates condominiums. Comments are a part of the verbatim record.

Mr. Curling then explained that the current application had been submitted in April 1999 and in October 1999. He said staff returned both of the applications based on their conclusion that the applications were not significantly modified from the previously denied proposals. On January 23, 2001, at the Commission hearing during the public comment period, representatives from the condo association requested that the Commission reconsider the current application. The Commission voted 8 to 0 to accept the application and staff was directed to subject the application to all public interest reviews. Mr. Curling explained that the entire creek has been closed for shellfish harvest since March 9, 2001. He said that the project was again protested by several residents in the vicinity. The protestants were concerned about the potential adverse impacts due to concentrated boating activity on the environment and navigation within the creek.

Mr. Curling stated that the Virginia Institute of Marine Science (VIMS) continues to recommend that the total number of slips along the property should be limited to the number of slips which could have been constructed had the property been developed as single-family one-acre lots. VIMS's recommendation was based on the potential for increased shoreline erosion, impacts to fringe marsh vegetation and adverse impact to water quality. The Health Department indicated that the condo association was in compliance with the Sanitary Regulation for Marinas and Boat Moorings because of the agreement with the nearby Ginny Point Marina to use their pumpout facilities. The Health Department further stated that they may impose a seasonal closure in the vicinity of the piers if the area was reopened. The

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Department of Environmental Quality issued a no permit required letter on March 22, 2001, stating that the water quality impacts due to the construction activities would be minimal and temporary in nature.

Mr. Curling said that according to the Commission's *Criteria for the Siting of Marinas or Community Facilities for Boat Moorings*, several issues should be carefully considered: The General Siting Criteria states, "projects by their cumulative impact that will result in dense concentrations of boats in one area would be critically evaluated as to their impacts on natural resources." The Specific Siting Criteria states, that "for community piers...which are appurtenances to residential developments, the number of slips will not necessarily be predicated by the number of units on the property." The Siting Criteria Check List contains 18 conditions to be considered by the Commission. Of those, six seemed to be of particular concern in this case: 1) water quality, 2) shellfish grounds, 3) existing public water uses, 4) finfish habitat usage, 5) salinity, and 6) flushing rate.

Mr. Curling also pointed out that a study to determine the hydrodynamics within the creek had not been performed and therefore the actual extent and magnitude of the impacts and the carrying capacity of the creek were virtually impossible to determine. He said a water quality sampling collected on July 28, 1995 showed low dissolved oxygen value which could indicate a system that was not necessarily well flushed.

Mr. Curling gave further comments regarding the Marina Siting Criteria and the issue of the limited shoreline that must be shared by a group of owners. He explained staff's recommendation regarding "reasonable" access for the owners of such developments. He also mentioned that Code Section 28.2-1205 directs that the Commission consider the public and private benefits on the proposed project and the affects on the following: 1) other reasonable and permissible uses of state waters and state-owned bottomlands; 2) marine and fisheries resources of the Commonwealth; 3) tidal wetlands; 4) adjacent or nearby properties; 5) water quality and 6) submerged aquatic vegetation.

Mr. Curling summarized the project and stated that the proposed pier expansion would occur on a small arm of Cobb's Creek that was about 160 feet wide, and not within the main channel. He said previous pier development had been limited in this area to eliminate the navigation and encroachment concerns of the protestants to ensure that the area could be used as a common and not interfere with the rights of other users. He said that given the nature of this area of the creek and its impacts on adjacent and nearby properties, it appears this may not be an appropriate area to allow further encroachment onto State-owned submerged land for additional boat slips. Accordingly, since there was a potential for adverse environmental impacts and potential unresolvable conflicts with other waterway uses, staff was compelled to recommend denial of the proposed expansion. However, if the Commission elects to approve a permit, staff recommends the assessment of a royalty in the amount of \$0.30 per square foot for

all additional encroachment over State-owned submerged land.

Massey Burger appearing on behalf of his neighbors and the 22 homeowners of Hudgins Point Estate addressed the Commission. He gave supporting comments regarding adding seven new wet slips to an existing pier, which would provide one boatslip for each homeowner. Mr. Burger provided input regarding how the condo community related its concerns to the environment. Other comments are a part of the verbatim record.

Robert O'Smiley, professional wetlands scientist with Resource International and a consultant to the Hudgins Point condominium Association, provided comments regarding the 18 items list from the Marina Criteria for the Siting of Marinas or Community Facilities for Boat Mooring. Comments are a part of the verbatim record. Mr. O'Smiley said that out of the 18 items from the criteria, 16 of the 18 suitability criteria were met. Mr. O'Smiley also submitted information regarding long-term affects of the present facilities. He felt that it would soon be exceeded and the extra boat owners would anchor offshore using bottom anchors which could adversely impact the substrate and increase turbidity. He also provided information on the potential lot lines that could be reconfigured to extend the shore, thereby affording the opportunity for each land owner to put up his own mooring. Mr. O'Smiley said the slips in a long-term would be an aesthetic and environmental improvement.

Geraldine Sweeney, representing all the protestants, addressed the Commission. Ms. Sweeney indicated that Mathews County's Zoning Department had said, that the shore could not build docks onto land. She said that if the Commission voted yes on this project, the Commission would be ignoring their own technical staff's advice and ignoring the protests of all that were on this arm and across the creek. Ms. Sweeney also indicated that this was a small area that was already crowded. She said the condo owners each wanted a slip of their own just to increase their property value. Comments are a part of the verbatim record.

Mr. Burger addressed the Commission in rebuttal. He said they had discussed with Mathews County and with a condominium attorney the possibility of reconfiguring the condominium documents so that each unit owns, between parallel lines, a strip of land out to the waterline. This would give each unit owner riparian rights. Other comments are a part of the verbatim record.

Commissioner Pruitt placed the matter before the Commission.

Associate Member Williams commented that he visited the project site yesterday and he did not think that the seven additional slips would be a safety issue. Mr. Williams then moved to approve staff's recommendation. Motion seconded by Associate Member McLeskey.

Associate Member Ballard indicated that he did not plan on supporting the motion, because he heard some very disturbing things today. Mainly, the one made by the engineer that this would

be a high density development, and everybody had a right to a boat slip. He said the 18 points enumerated were merely a part of the guidelines for citing a marina. However, the broader standards were those embraced in Section 28.2-1205 of the Code regarding impacts to adjacent or nearby property owners from increased erosion, and the VIMS report clearly stated that fact. Also of concern was the water quality and whether the area could support shellfish, since there was data which indicated the salinity was well within the range for the growth of shellfish. He said the condemnation line had a habit of moving back and forth, which indicated two things to him: 1) that the condemnation line could move again, and 2) this area had marginal water quality that could come back and might, in fact, go deeper into the negative side of the pollution. He felt that adding seven more boats to the creek would affect the things he just indicated. For those reasons he did plan on supporting the motion.

Commissioner Pruitt asked who made the statement that erosion would occur if additional slips were added. Mr. Ballard said it was in the VIMS report. Mr. Pruitt requested clarification regarding the boats already being used in the area versus having them tied up to a slip.

Mr. Barnard pointed out that if the boats were moored in that cove, then their activities were concentrated in that area. With the increase in the number of boats, the assumption was that the activities would increase and that would put more stress on the shoreline. He said the seven slips would concentrate additional activity in that particular cove.

Associate Member Cowart commented that he would not support the motion because of the shellfish resource that the State of Virginia had in the Piankatank, which was downriver from this particular area. Mr. Cowart said according to DEQ's information, they experienced low oxygen in that area. He said this could lead to degradation of the water quality in that area, and he felt the shellfish resource in the area should be considered. Mr. Cowart said this particular application had been reviewed by the Commission three times since he had been serving on the Commission. The application was denied because this area was just too small to support the amount of boats that this particular development wanted to put in. He said had it been on a larger body of water, perhaps it would be more appropriate to grant that number of slips.

Associate Member Hull commented that he could not support the motion because he did not think it had merit. He felt staff had made a strong case against not approving the project, and Mr. Ballard and Mr. Cowart had echoed that in their comments. Mr. Hull said he felt Mr. Burger's comments were offensive during his rebuttal, when he passed out a slip of paper that indicated if the Commission did not support approval, the condo association would do this. He said each member had taken the oath that they would uphold the law of the Commonwealth of Virginia and they took their responsibilities very seriously and he took personal offense at his comment.

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Associate Member Birkett commented that he had visited the site and he was overwhelmingly impressed with the site being a model environmental community. He said the community had gone above and beyond the call of duty to protect the environment. He said they had engineered the parking lot and drainage system. A buffer zone was all around the condominium property that was naturally vegetated and there was a great deal of plantlife in the buffer zone. He said the runoff from the lawns, before it entered the creek, would go through the buffer zone. He said the parking lot was a gravel parking lot that drained into the French drains. Mr. Birkett said the boat traffic infringement would not keep the seven condominium owners that had boats from coming into the cove, and anchor day after day. He said the area that the pier would be constructed on was within the bounds of the current pier, and the area that the boats would be moored in were within the bounds of the pier that was already there.

Associate Member Williams commented that he was also concerned about the shellfish and what was happening to the oysters in the area, but he felt that whether the boats were at the slips or at ramps on the river, the seven additional boats would get in the river one way or the other.

Commissioner Pruitt then called for the vote. The motion carried 4 to 3.

Encroachment over 835 sq. ft	
@ \$0.30 per sq. ft.....	\$ 250.50
Permit fee.....	<u>25.00</u>
Total	\$ 275.50

- 7. **RICHARD VESELY, #01-0510**, requests authorization to construct and backfill 138 linear feet of vinyl bulkheading, situated up to 11 feet channelward of mean low water, adjacent to his property along Lewis Creek in the Town of Chincoteague. The project is protested by a nearby property owner.

Hank Badger, Environmental Engineer, gave a power point presentation on the location and description of the project. Comments are a part of the verbatim record. Mr. Badger said Mr. Vesely stated in his application that the placement of the bulkhead and the fill at the proposed alignment would create the square footage necessary for him to be able to build a third condominium unit on the property.

Mr. Badger stated that Ms. Margaret Worrall, a nearby property owner, and protestant was concerned that she thought Mr. Vesely intended to build three townhouses on his property, but he only had enough highland property to build two units. Therefore, he needed to create the

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additional land in order to build the third townhome. Mr. Badger said Ms. Worrall also felt that Mr. Vesely's application to create land for financial gain was outside the objective of the Marine Resources which was to protect the natural resources of Lewis Creek and Chincoteague Bay.

Mr. Badger said on April 26, 2001, the Accomack County Wetlands Board held a Public Hearing and approved their portion of bulkhead and backfill lying above mean low water which fell within their jurisdiction. The Virginia Institute of Marine Science indicated that the individual and cumulative adverse environmental impacts resulting from this activity would be minimal, although the proposed bulkhead alignment would result in the loss of some intertidal and subaqueous rubble habitat, it was of questionable value. The Department of Environmental Quality requested that the applicant consider relocating the proposed bulkhead landward of the mean low water mark. The Health Department and Coast Guard had expressed no opposition to the project.

Mr. Badger stated that the project, as proposed, would create approximately 1,039 feet of upland enabling Mr. Vesely to build a third townhome, instead of two authorized under Chincoteague's zoning regulation on the existing lot. Mr. Badger said since the applicant's shoreline was showing signs of erosion, staff agreed that some form of stabilization was necessary. However, staff believes that the creation of upland in his case, was unwarranted. As such, staff recommended alignment at or above the mean low water line as depicted on the survey date October 11, 2000.

Ellen Grimes, from Coastal Resource Management, spoke representing Mr. Vesely's interest. She said Mr. Badger had described the project very well. Ms. Grimes stated it was true that in order to construct a three-unit townhome, opposed to a two-unit townhouse, Mr. Vesely would need a total 16,500 square feet. At this point, he had 15,500 square feet and was seeking an additional 1,000 square feet in order to accommodate the efficient use of the property. Ms. Grimes indicated that she had a discussion with Sherri Coton of DEQ on Friday afternoon. DEQ's second proposal was to compensate for the proposed impacts in the form of monetary contribution to the Virginia Wetlands Restoration Fund. Ms. Grimes said she discussed this option with the applicant and requested that he only ask for what he absolutely needed for the bulkheading of his lot. Ms. Grimes said this was probably the only piece of property that was not bulkheaded along that creek. Ms. Grimes read a rebuttal letter from Mr. Richard J. Vesely into the record regarding Ms. Margaret Worrall's concerns. Comments are a part of the verbatim record.

Ms. Grimes also informed the Commission that the old mill property with the building on it would be moved across the street for preservation purposes and at the expense of Mr. Vesely.

Associate Member Ballard asked if she had sought other alternatives for the third townhouse.

Ms. Grimes said she didn't believe Mr. Vesely had gone that route. Ms. Grimes said Mr. Vesely liked the idea of mitigation, but he did not want to contribute monetarily to a fund. He just wanted to create something on the island, but there was no room on site for mitigation.

Associate Member White asked if Mr. Vesely had made any statement on the record about the mitigation issue. Ms. Grimes responded no, it was not a matter of record, it was discussed only with her to the Commission. Associate Member Cowart asked if the Corps of Engineers had issued a permit. Ms. Grimes responded no, but they had done a site visit.

There being no one present in opposition, Mr. White placed the matter before the Commission.

Associated Member Ballard commented that this project required that 1300 square feet of public trust land be granted to a private individual for the purpose of gaining an additional condominium. Mr. Ballard said there were other ways to do that besides taking the public trust land, and he did not think all the options had been fully explored. He said it seemed that before the Commission would consider giving up State-owned land for one individual's consideration, benefit should be given to all of the people of the Commonwealth and not for the private use of one individual. The Commission should ensure that all other options have been exhausted. He then moved that the application be denied. Associate Member Hull seconded the motion and echoed Mr. Ballard's comment. Motion carried unanimously.

8. **TROY LANE, #00-1871**, requests after-the-fact authorization to retain a 48-foot long, by 18-foot wide, open-sided, timber boathouse and construct a second 35-foot long, by 16-foot wide, open-sided private, noncommercial timber boathouse adjacent to his property situated along Mill Creek in Northumberland County. The project is protested by Mr. Leonard Pittman, the oyster ground leaseholder.

Jeff Madden, Environmental Engineer, gave a power point presentation on the location and description of the project. Comments are a part of the verbatim record. Mr. Madden said Mr. and Mrs. Lane were requesting authorization to retain a structure that was on their property when they purchased it in 1990. The Lanes also would like to demolish the other 28 foot wide by 28 foot long structure and reconstruct a smaller boathouse. Mr. Madden said the project was protested by Mr. Leonard Pittman, the oyster ground leaseholder. Mr. Madden said Mill Creek was currently open for direct marketing of shellfish. He also stated that Mr. Pittman's lease ground was the benchmark for the condemnation line in the area.

Mr. Madden summarized the project. He said Mr. and Mrs. Lane were trying to legalize an illegal structure. He said had staff been afforded the opportunity to review the project prior to any boathouse construction, they would have been reluctant to recommend approval of the

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boathouse over the objection of an oyster ground leaseholder, especially in an area open for the direct marketing of shellfish. According, staff recommended denial of the new boathouse 35-foot by 16-foot wide. However, acknowledging that the boathouse had been there since 1990, staff recommended that the Lanes be authorized to retain the existing 48 foot long by 18-foot structure.

Associate Member Ballard asked what was staff's recommendation on the smaller boathouse. Mr. Grabb responded that it was built prior to the Commission's jurisdiction. A discussion between Commission members following regarding retaining the two boathouses. Comments are a part of the verbatim record.

Ed Nealon, representing Nealon Marine Consulting, said he completed the application for Mr. and Mrs. Lane. He had been working for the past nine months with staff, the Pittmans and Mr. McKinley. Mr. Nealon pointed out that Mr. and Mrs. Lane were trying to get legal and to get legal permits for the two boathouses they had. They would like to tear one of the boathouses down and put up a new open-sided boathouse (replacing the one that they would like torn down). Mr. Nealon said they tried to obtain the small portion of the oyster lease that the shed was over under Section 28.2-625. Mr. Nealon then requested approval for the permit as originally submitted and later revised.

After a discussion between staff and commission members regarding approval of the proposal from Northumberland County, Mr. Grabb suggested that the item be tabled until it went before Northumberland County Board.

Associate Member Hull then moved to table the action on this proposal until it went before the Northumberland County Board of Supervisors. Motion was seconded by Associate Member Birkett. Motion carried unanimously.

9. **R. PETER SWART, #01-0659**, requests authorization to move and relocate a 20-foot by 30-foot cottage onto a 42-foot by 28-foot elevated open-pile platform on his property along Chesconessex Creek in the Crystal Beach area of Accomack County. A Coastal Primary Sand Dune and Beach permit is required.

Hank Badger, Environmental Engineer, gave a power point presentation on the location and description of the proposal. Comments are a part of the verbatim record. Mr. Badger said the Swarts were requesting authorization to relocate and elevate on pilings an existing beach cottage, which has been in their family for 32 years. However, two years ago Hurricane Floyd substantially damaged the cottage and moved the dune landward and the mean high water line to within five feet of the existing cinder block foundation.

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Mr. Badger said the Accomack County had not yet adopted the model Coastal Primary Sand Dune and Beach ordinance. Therefore, the Commission was responsible for administering the provisions of the ordinance. He said a public hearing was held in Accomack County Administration Building, on June 7, 2001 to accept public comments. No one attended the hearing, and no public opposition had been received on this project to date.

Mr. Badger stated that the Virginia Institute of Marine Science had reviewed the project and stated from a marine habitat perspective, the individual and cumulative adverse impacts would be minimal provided the sand dune was restored to its original condition. VIMS further stated that once the house was relocated, construction completed, and all debris removed, the restored dune should be revegetated with new saltmeadow hay plants at a density similar to that which now exists. The Department of Health, along with the Accomack County Health Department, recommended that the application be denied until a viable plan for the existing sewage system was proposed and approved. The Department of Conservation and Recreation has documented the Northeastern beach tiger beetle in the vicinity, but stated the current activity would not affect any documented state listed plants or insects. The Corps of Engineers stated that a permit was not required.

Mr. Badger stated that Mr. Swart's plan should lessen the impact of the structure on the dune by elevating the cottage on an open-pile foundation, provided the sand dune is restored to its original condition. He said staff, however, could not support the proposed project without the Department of Health's approval. Therefore, staff recommended denial without prejudice until a viable plan for a sewage system has been submitted and approved by the Department of Health.

Robert Peter Swart, applicant, addressed the Commission. He said he had done everything starting at the County level and up. He said the application was verbally approved on the County level, but he was later told that Mr. Badger had to come out and check the project and to make sure they were not on the dune. Mr. Swart said their purpose for the request was to get away from the beach and to get off the sand. He said this would impact the environment less. Mr. Swart also indicated that the current septic systems works, and the system has worked well for the past 32 years and it was only used one month of the year. The septic system get pumped every year and it was maintained correctly. Mr. Swart said he had an approval from the Health Department in December and presented a copy to the Commission. However, a letter from the Health Department in June indicated that the project would probably damage the existing septic system. He said that was the reason he was moving the cottage 10 feet back and 5 feet over. The 5 feet over would take it away from the septic system. He said he contacted Mr. Murant, his adjacent property owner, who had several lots that could be used for an off site septic system. Mr. Swart said they would like to keep the property they way it was, and it would be expensive to pump to that site, but he would do that to continue the use of his property, and he had done what he was told to do to make this a

viable project.

There being no opposition, Commissioner Pruitt placed the matter before the Commission.

Commissioner Pruitt commented that if there were no other problems with the project, the recommendation could be to approve the project pending the Health Department's approving the septic system so that Mr. Swart would not have to come back to the Commission.

Arthur C. Miles, Environmental Health Supervisor from the Accomac and Northampton Health Department, said they were in the process of talking at this point, and there was the possibility of firming up an alternative location to pump to in the event the current system would fail. Mr. Miles said once that was worked out, they had no problem with the project.

Carl Josephson asked if the house was not relocated and the septic system failed, would the situation would be the same, whether it was relocated or remain in the same location. Mr. Miles said in either case if the system fails there would have to be a plan. Mr. Josephson asked if there were any other problems. Mr. Miles said if the house was moved, a permit was required. After a discussion., Mr. Pruitt asked Mr. Miles if he had any problem with his suggestion. Mr. Miles responded no.

Commissioner Pruitt placed the matter before the Commission.

Associate Member Ballard said after reviewing the material sent to him, staff's recommendation, the testimony heard today, and along with Mr. Pruitt suggestion, moved to grant the permit with the special condition that no activities were to take place unless they were authorized by the Commission and appropriate approvals have been received from the Accomack County Health Department. Associate Member Williams seconded the motion. Motion carried unanimously.

10. Tim Taylor, #01-0415, requests authorization to construct a 17-foot by 34-foot elevated deck area with an enclosed 20-foot by 17-foot screened gazebo atop a proposed boathouse at the channelward end of a 100-foot private pier adjacent to his property along the Poropotank River in Gloucester County.

Chip Neikirk, Environmental Engineer, briefed the Commission and gave a power point presentation on the location and description of the property. Comments are a part of the verbatim record. Mr. Neikirk indicated that the waterway was between 2,000 to 4,000 feet wide at the project site. He said there was a wide shoal area adjacent to the project site and the channel was located near the opposite side of the creek. Mr. Neikirk said Mr. Taylor's

shoreline is low with extensive marsh areas and the surrounding area is sparsely developed. In addition, his property consisted of approximately 130 acres with 4,000 feet of shoreline.

Mr. Neikirk stated that the pier and open-sided boathouse met the statutory authorization under Section 28.2-1205 of the Virginia Code. The steps leading to the deck, deck railing and the gazebo located at the top of boathouse are not covered by the exemption and require Commission authorization. He said the Taylors stated that the deck and gazebo were designed to provide views of the river while avoiding mosquitoes on their upland property. The Taylors also noted that the Chesapeake Bay Act prohibited the construction of such structures within 100 feet of the shoreline and wetland areas. They also have a large tract of land along a wide portion of the river and that neither of their neighbors have objected to the proposal.

Mr. Neikirk said the project was not protested and no State-agencies have commented on the proposal. The project did not encroach over any public or privately leased oyster-planting ground. Mr. Neikirk said that the boathouse and the pier were water dependent and were statutorily authorized. Although the elevated deck and gazebo were unprotested, and the environmental impacts associate may be minimum, the structures were not considered to be water dependent. However, staff believes that a similar screen structure could provide comparable views of water and shield against mosquitoes could be constructed on the applicant's upland property. Also, locating the structure on the upland would minimize the potential for the building materials to enter the waterway during storm events or when the structures fall into a state of disrepair. Accordingly, staff was unable to recommend approval for the construction of the gazebo or the elevated deck with its associate railing and stairs over State-owned submerged land.

Timothy S. Taylor, property owner, addressed the Commission, along with Jeff Watkins, Riverworks agent and contractor, on the project. Mr. Taylor commented that he wasn't building a gazebo, but a boathouse and extending the roof up, with a sitting area under the roof.

Mr. Watkins said from a construction point of view, the height of the structure was not excessive from the other boathouses they built. Mr. Watkins said the structure would have shading of 578 square feet whether the boathouse had additional coverage or not there was no additional shading.

David H. Teagle, resident of Gloucester County for 66 years, said he had known Mr. Taylor for quite awhile. He also gave other supporting comments for the project. Comments are a part of the verbatim record.

There being no other comments, pro or con, Commissioner Pruitt placed the matter before the Commission.

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Associate Member Birkett moved to approved the project. Motion was seconded by Associate Member McLeskey. Motion carried 6 to 1, with Mr. Ballard voting no.

12. PUBLIC HEARING: Proposed amendment to Regulation 4VAC 20-890-10 et. seq., prohibiting the setting of conch pots within 250 yards of the Chesapeake Bay Bridge-Tunnel.

Lewis Gillingham, Fisheries Management Specialist, briefed the Commission on the background on the proposed amendment to Regulation 4 VAC 20-890-10 et. seq., prohibiting the setting of conch pots within 250 yards of the Chesapeake Bay Bridge Tunnel. Mr. Gillingham said that the Commission had approved a limited number of conch pot fishermen to fish in Virginia waters since 1991. Comments are a part of the verbatim record. He said the Virginia waters were a supplemental area, and the bulk of the catch was made outside Virginia waters. In January 2000, the Commission established a limited entry fishery for channeled whelk in Virginia waters. He said in the past, the conch pot fishery had been an experimental fishery. The number of licensed conch pot fishermen increased from 43 permit holders in 1999 to 85 licensed holders in 2001.

Mr. Gillingham said that last month a letter was received from Richard Welton, the Executive Director of the Coastal Conservation Association of Virginia. Mr. Welton was requesting an emergency action to ban conch pots within 250 yards of either span of the Chesapeake Bay Bridge Tunnel (CBBT). Mr. Welton's letter indicated that the unlit conch pot buoys set in the vicinity of the heavily trafficked CBBT span were a potential tragedy. The boats might become disabled by conch pot buoy lines and be swept into the crossing's pilings or onto the rock islands. Mr. Gillingham also said that the proposed amendment was not unprecedented because a similar ban had existed for gill nets since the late 1980s.

Mr. Gillingham said that after the request for an emergency regulation was made last month, the Commission appointed an ad hoc emergency committee to discuss the situation. A meeting was held with five members in the VMRC library. After discussing the situation and making some phone calls to other industry members, the Committee concurred with Mr. Welton's views regarding the boating safety issue. The Commission then adopted the emergency regulation.

Mr. Gillingham also mentioned that conch pots could be set anywhere, except the marked channels, and this includes bridges, like the CBBT. Gillingham said that the conch potters may argue that restricting them from the CBBT area was unfair, while allowing the recreational or pleasure boaters complete access to the same waters. In addition, other mobile gears, such as, conch dredges and crab dredges that targeted the conch, would be allowed to fish the area. He said the recreational anglers will argue strongly that a large number of buoy lines do restrict, and in most cases, precluded their use of certain areas. Mr. Gillingham said there were

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boating safety concerns because of the tidal currents and wave heights being amplified in this area. He said the boats faced the threat of ramming into the CBBT cement pilings or the rock islands by the strong currents. The channels also supported the heavy use by commercial and naval vessels. Restricting conch pots from this area was expected to have little or no impact on the conch industry. Mr. Gillingham said he had received 16 e-mails from the recreational fishery strongly supporting this closure. He said the crab pot and fish pot issues had been remanded by to the Blue crab and Finfish Committee.

Mr. Gillingham said staff recommended adopting the provisions in the emergency regulation, 4 VAC 20-890-10 et. seq., Pertaining to Channeled Whelk, prohibiting the setting of conch pots 250 yards of the CBBT.

There being no comments, pro or con, Commissioner Pruitt placed the matter before the Commission.

Associate Member White said he had received three phone calls from members of the Chesapeake Bay Bridge Tunnel Commission, as well from Captain Pruitt, from the CBBT, requesting approval of the proposed amendment.

Associate Member Hull moved to adopt provisions of emergency regulation, 4 VAC 20-890-10 et. seq. Pertaining to Channel Whelk, as part of permanent regulation 4 VAC 20-890-10 et. seq. This would prohibit the setting of conch pots within 250 yards of either span of the Chesapeake Bay Bridge Tunnel. Associate Member White seconded the motion. Motion carried 6 to 1.

13. PUBLIC HEARING: Proposed amendment to Regulation 4 VAC 20-610-10 et. seq., prohibiting any person whose license has been revoked by the Commission from serving as an agent for another fisherman.

Jack Travelstead, Chief-Fisheries Management, briefed the Commission on the proposed amendment that would prohibit any person whose license had been revoked by the Commission from serving as an agent for another fisherman. Mr. Travelstead said this issue was discussed on two occasions by the Finfish Management Advisory Committee and the committee unanimously supported the amendment to the regulation. He said that he had received 10 e-mails supporting the proposed change. In addition, Mr. Pete Freeman, former member of the Commission, called in support of the proposal.

Commissioner Pruitt commented that the proposed change would still allow someone that was sick or had various emergencies to have someone else to work their boat. Mr. Travelstead further commented that any legitimate watermen whose license had not been revoked could

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continue to use others as his agent.

Commissioner opened the public hearing.

Carlene Shores from Tangier addressed the Commission. She said she felt this was a harsh law. However, she did not support people breaking the law three times. Ms. Shores said she felt this proposal would take away the livelihood of some watermen.

Michael Mayler, a recreational fishermen, addressed the Commission. He gave comments regarding suspension of a watermen's license.

A brief discussion followed for clarification of the interpretation of the Code regarding the revocation of licenses. Comments are a part of the verbatim record.

Tom Powers, from the Coastal Conservation Association, commented that in the two years he had been attending the Commission meetings, the Commission had suspended very few licenses. Mr. Powers further indicated that the revocation of a license would not prevent individuals from working, they just could not work independently.

Carl Josephson, Assistant Attorney General, asked if this only applied to revocation, and if there was a difference for suspensions. Mr. Travelstead explained that he did not think the Code made a distinction between suspension and revocation.

Commissioner Pruitt placed the matter before the Commission.

Associate Member Ballard moved to adopt the provisions of 4 VAC-20-16-10 et. seq., providing for the amendments that would prohibit those persons whose licenses had been revoked from serving as an agent for another fisherman. Associate Member Hull seconded the motion.

Mr. Ballard said if three violations were committed within a 12-month period, the waterman was generally given probation. Commissioner Pruitt further commented that this regulatory authority was given to the Commission by the General Assembly and not one that the Commission had instituted. Mr. Pruitt pointed out that it was not a pleasant task for the Commission, but once it was given to them, they had the responsibility to administer the regulation. However, the Commission tried to be as fair as possible.

Commissioner Pruitt then called for the vote. Motion carried unanimously.

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PUBLIC HEARING: Proposed amendment to Regulation 4 VAC 20-380-10 et. seq. clarifying application of the 150 pound bycatch limit on grey trout.

Rob O'Reilly, Deputy Chief-Fisheries Management, indicated that the Commission discussed this issue last month. He pointed out that this issue was to clarify what constituted a bycatch for the 150 pound grey trout allotment for the commercial fisherman during the time of year when the fishery was closed. Mr. O'Reilly said the bycatch allowance with the current regulation was not specific as to who it was intended for. Therefore, the VMRC Finfish Management Advisory Committee (FMAC) recommended amending the regulation to specify, that any fisherman must be a "registered commercial fisherman" to be eligible for the bycatch allowance. He said FMAC had recommended a cap of 450 pounds of grey trout on board when the number of fishermen exceeded three (or two in the case where one fisherman on board held a seafood landing license).

Mr. O'Reilly indicated that he checked with ASMFC regarding the schedule for the amendment regarding recovery of the grey trout fishery, and ASMFC indicated that it would be around October 2002 before it was available.

Mr. O'Reilly then gave background information on the gill net fishery landings. He said the gill net fishery had rebounded back to the landings of the early 1990s. The pound net fishery had increased. He said the average grey trout landings in Virginia was 1.34 million pounds, and the grey trout landings were 1.36 million pounds for 2000.

A discussion followed regarding language in the regulation.

Commissioner Pruitt opened the public hearing.

Tom Powers, from the Coastal Conservation Association, gave comments regarding supporting the bycatch fishery. Mr. Powers provided information regarding landings by different gear types. He said the CCA supported the per person landing bycatch limit, and they were interested in ASMFC making a per boat or person regulation. He said the CCA was also concerned about the seafood landing license and double dipping.

There being no further comments Commissioner Pruitt closed the public hearing, and placed the matter before the Commission.

Associate Member Ballard and Assistant Attorney General Josephson indicated that there may be a loophole, concerning the draft regulation's treatment of bycatch per Seafood Landing Licensee. Staff was directed to improve the clarity of that section of the regulation, and the Commission moved, temporarily, to another matter.

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Commissioner Pruitt commented that at various times he attended watermen association meetings that had discussed the number of regulations on the books. However, after reviewing the regulations, the majority of the regulations came from ASMFC in order to keep a fishery open in Virginia. However, some of the regulations came from the Committees and others came from all segments of the industry. A few regulations came from staff. Mr. Pruitt said he felt they had reached a point where they needed to look at the regulations and see if the regulations were working and necessary. He then appointed a Committee consisting of Associate Members McLeskey, Ballard and White, the appropriate staff members, one waterman, and one recreational fisherman.

Mr. O'Reilly approached the Commission with the changes to the 150 pounds bycatch proposed regulation as follows, "the boat or vessel possession limit for grey trout shall be the lesser of 450 pounds or an amount equal to the number of registered commercial fisherman or seafood landing licensees on board multiplied by 150 pounds, except that only one license of per person, either the commercial fisherman's registration landing license or seafood landing license, shall be used to calculate the boat or vessel possession limit."

Commissioner Pruitt placed the matter before the Commission.

Associate Member Ballard moved to adopt the provisions 4 VAC 20-380-10 et. seq. revised as amended, clarifying application of the 150 pound bycatch limit on the grey trout. Motion seconded by Associate Member Cowart. Motion carried unanimously.

15. REPEAT OFFENDERS.

Lewis Jones, Deputy Chief-Law Enforcement, briefed the Commission on the following repeat offenders:

Arthur A. Kellum, 226-46-4010 - Present with Attorney Breckinridge Ingles. Mr. Jones said this was Mr. Kellum's first time before the Commission as a repeat offender.

Violations: October 19, 1999 - set crab pots without cull rings, guilty, fined \$70.

October 19, 1999 - fail to maintain ID. numbers on crab pot, guilty, fined \$50.

June 4, 2000 - commercially crabbed on Sunday, guilty, fined \$110.

June 29, 2000- crab pot with obstructed cull rings, guilty, fined \$250.

Commissioner Pruitt asked Mr. Ingles if Mr. Kellum went to court on any of the violations. Mr. Ingles responded that Mr. Kellum went to court on September 18, 2000, regarding obstructed cull rings.

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Breckingridge Ingles, attorney for Mr. Kellum, apologized for the mixup at the last Commission meeting. Mr. Ingles further indicated that he had spoke with Mr. Kellum about the seriousness of these violations. Mr. Ingles then requested that the Commission take into consideration Mr. Kellum had worked on the water all his life and he was a full time watermen.

Commissioner Pruitt placed the matter before the Commission.

Associate Member Ballard moved that in accordance with the guidelines, Mr. Kellum be placed on probation for a year. Associate Member Hull seconded the motion. Motion carried unanimously.

Dennis P. Dalheim, 226-33-6363 - Present.

Lewis Jones, Deputy Chief-Law Enforcement, briefed the Commission on Mr. Dalheim's violations and indicated that this was Mr. Dalheim first time before the Commission as a repeat offender.

Violations: June 3, 2000 - possession of dark sponge crabs, guilty, fine \$150.
July 18, 2000 - possession of dark sponge crabs, guilty, fined \$100.
August 2, 2000 - possession of dark sponge crabs, guilty, fined \$150.
August 2, 2000 - possession of dark sponge crabs, guilty, fined \$150.

Commissioner Pruitt asked Mr. Dalheim if he went to court. Mr. Dalheim responded yes. Mr. Dalheim said he understood the coloring matter now, but he was just the driver.

Associate Member Ballard moved that in accordance with the guidelines, Mr. Dalheim be placed on probation for one year. Associate Member Birkett seconded the motion. Motion carried unanimously.

James W. Eskridge, 228-45-7868 - Present.

Lewis Jones, Deputy Chief-Law Enforcement, briefed the Commission on Mr. Dalheim's violations and indicated that this was Mr. Eskridge's first time before the Commission as a repeat offender.

Violations: May 15, 2000 - baited peeler pot, guilty, fined \$50.
August 15, 2000 - possession of undersized crabs, guilty, \$100.
February 2, 2001 - taking clams without license, guilty, \$50.

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Commissioner Pruitt asked Mr. Eskridge if he went to court. Mr. Eskridge responded no. Mr. Pruitt requested an explanation on the clamming license issue. Mr. Eskridge explained that the evening before he went clamming, he went to purchase his license from Cindy Park, the agent, but she had gone with her husband to the hospital. The next day his wife purchased his license, he went out clamming, but the inspector gave him a summons because he did not have his license with him.

Mr. Jones explained to Mr. Eskridge the regulation regarding unculled crabs. After a discussion, it was determined that Mr. Eskridge's wife did purchase his clamming license the same day he received the summons.

Commissioner Pruitt placed the matter before the Commission.

Associate Member Ballard read from the guidelines the following: "In appropriate cases, the first time a three-time offender appears, the Commission, as a minimum, will impose a 12-month probation period." However, Mr. Ballard said there were some extenuating circumstances regarding the clamming licenses, therefore, he moved for six-month's probation for Mr. Eskridge. Motion seconded by Associate Member Birkett. Motion carried unanimously.

16. PUBLIC COMMENTS.

Tom Powers, from the CCA, indicated that legislation had been enacted regarding enabling eel pots for recreational fishermen, effective July 1, 2001. Mr. Powers requested a public hearing. Commissioner Pruitt indicated that issue was already on the July agenda.

There being no further business before the Commission, the meeting was adjourned.

William A. Pruitt, Commissioner

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LaVerne Lewis, Commission Secretary