

MINUTES

**JULY 24, 2001
NEWPORT NEWS, VA 23607**

The regular Monthly meeting of the Marine Resources Commission was held on July 24, 2001 with the following present:

- | | | |
|---------------------|---|--------------------------------|
| William A. Pruitt |) | Commissioner |
| C. Chadwick Ballard |) | |
| Gordon M. Birkett |) | |
| Lake Cowart, Jr. |) | |
| Laura Belle Gordy |) | Members of the Commission |
| Henry Hull Lane |) | |
| 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 |
| 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 |
| Dan Eskridge | | First Sergeant |
| Kenny Oliver | | Southern Area Supervisor |
| Thomas Moore, Jr. | | Marine Patrol Officer |
| Dennis Knuteson | | Marine Patrol Officer |

Virginia Institute of Marine Science
Lyle Varnell
Walter Priest

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Jack Travelstead
Rob O'Reilly
Roy Insley
Lewis Gillingham
Ellen Cosby
Chad Boyce
Cory Routh

Chief-Fisheries Management
Deputy Chief-Fisheries Management
Head-Plans and Statistics
Fisheries Management Specialist
Fisheries Management Specialist
Fisheries Management Specialist
Fisheries Management Specialist

Bob Grabb
Tony Watkinson
Randy Owen
Tracy West
Hank Badger
Jeff Madden
Mark Eversole
Kevin Curling
Ben Stagg

Chief-Habitat Management
Deputy Chief-Fisheries Management
Environmental Engineer
Environmental Engineer
Environmental Engineer
Environmental Engineer
Environmental Engineer
Environmental Engineer
Environmental Engineer

others present:

Wayne Couch
Paul Kidd
Bruce B. Mills
George Washington
Tom Powers

B. Kay Wilson
Andrew Gurkin
Michele Culand
Kelly Place

and others.

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Commissioner Pruitt opened the July meeting at 9:30 a.m. Members present were Associate Members Ballard, Birkett, Cowart, Gordy, Hull, White and Williams. Associate Member McLeskey was absent. Commissioner Pruitt established that there was a quorum. Associate Member Hull gave the invocation and Associate Member White led the Pledge of Allegiance.

1. MINUTES of previous meeting.

Associate Member White moved to accept the Minutes as distributed. Associate Member Hull seconded the motion which carried 6 to 0. Mrs. Gordy abstained because she was not present for the June meeting.

**** APPROVAL OF AGENDA**

The agenda item, Special Presentation, was deferred until the August meeting. Mr. Owen said that a letter was received this morning regarding the Jean Siebert, #01-0729-10 appeal requesting a withdrawal of the appeal. There being no other changes to the agenda, Associate Member Hull moved to approve the agenda with the changes. Motion was seconded by Associate Member Cowart and carried unanimously.

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

Tony Watkinson, Deputy Chief-Habitat Management, briefed the Commission on the following six Page Two items for projects over \$50,000 and not contested.

2A. TRANSCONTINENTAL GAS PIPELINE CORP., #01-0434-20, requests authorization to perform routine maintenance activities (smart pig - internal pipeline inspection) at 26 jurisdictional stream crossings and make necessary in-stream pipeline repairs along an expanse of an existing gas pipeline in Fauquier, Prince William and Fairfax Counties. Recommend approval with standard instream conditions.

PERMIT FEE.....\$ 100.00

2B. U. S. DEPARTMENT OF TRANSPORTATION (Maritime Administration, MARAD), #01-1130-19, requests authorization

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to install 68 mooring legs consisting of buried plate anchors and associated chain and shackle appurtenances to secure up to 100 ships within the MARAD James River Fleet in the James River west of Fort Eustis in Isle of Wight County and the City of Newport News.

PERMIT FEE..... \$ 100.00

2C. NAVAL FACILITIES ENGINEERING COMMAND, #01-0596-15, requests authorization to replace Pier A at the Elizabeth River Deperming Station with a 632.5 linear foot open-pile pier, one new mooring dolphin, a cable reel platform, small boat ramp and 7-pile timber corner dolphin in the City of Norfolk.

PERMIT FEE..... \$ 100.00

2D. CITY OF HAMPTON, #01-0871-15, requests authorization to install two (2) breakwaters and associated beach nourishment adjacent to City property at Buckroe Beach.

PERMIT FEE..... \$ 100.00

2E. TOWN OF BIG STONE GAP, #01-0688-10, requests authorization to construct a concrete monitoring weir approximately 150' downstream of the Big Cherry Reservoir Water Treatment Plant and a new concrete dam across the South Fork of the Powell River approximately 165' downstream of the existing Big Cherry Dam to provide for a regional water supply facility for the Towns of Big Stone Gap, Norton, Wise, Appalachia and Pennington Gap in Wise County. Recommend approval with our standard instream permit conditions.

PERMIT FEE..... \$ 100.00

2F. CITY OF VIRGINIA BEACH, ET AL, #01-0951-10, requests authorization to nourish approximately five miles of Sandbridge Beach on a bi-annual basis by placing a total of approximately 3.5 million cubic yards of beach quality sand obtained from a borrow source located outside of Virginia's Territorial Sea. Recommend approval of an initial volume of 1.5 million cubic yards scheduled for the summer of 2002, with an additional two million cubic yards required for two (2) additional maintenance cycles tentatively planned for 2004 and 2006.

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PERMIT FEE..... \$ 100.00

There being no public comments, pro or con, Commissioner Pruitt placed the permit requests before the Commission. Associate Member Gordy moved to approve the Page Two items. Motion was seconded by Associate Member Ballard. Motion carried unanimously.

- 3. **GEORGE WILKIE, #01-0693-10.** Commission review, on appeal by the City of Virginia Beach and 44 freeholders of property within the City, of the June 18, 2001, decision of the Virginia Beach Wetlands Board to approve, in modified form, a permit to construct two duplexes with decks, paved parking areas and utilities installation at property identified as lots 13 & 14, Block 36, adjacent to the Chesapeake Bay in the Ocean Park section of Virginia Beach. Applicant has requested a continuance until the Commission's August 28, 2001, meeting.
- 4. **ELTON W. TURPIN, JR., #01-0153-10.** Commission review, on appeal by the City of Virginia Beach and 44 freeholders of property within the City, of the June 18, 2001, decision of the Virginia Beach Wetlands Board to approve, in modified form, a permit to construct one duplex with deck, paved parking area and utilities installation at property identified as lot 12, Block 36, adjacent to the Chesapeake Bay in the Ocean Park section of Virginia Beach. Applicant has requested a continuance until the Commission's August 28, 2001, meeting.

Randy Owen said that he received a request from counsel representing the appellants asking for a continuance of items, 3 and 4 until the August meeting. Mr. Owen said the freeholders were aware of the continuance request. Representatives from the City of Virginia Beach were present, and did not oppose the continuance.

Commissioner Pruitt placed the matter before the Commission.

Associate Member Hull moved to grant the continuance until next month. Motion was seconded by Associate Member Cowart. Motion carried unanimously.

- 5. **BRUCE B. MILLS, #00-1488-10.** Commission review on appeal of the June 18, 2001, decision by the Virginia Beach Wetlands Board to deny a permit to construct a single

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family residence with a timber bridge, utilities, paved parking and 340 feet of asphalt road involving a coastal primary sand dune in Virginia Beach.

6. **MAGGIE G. RABEY, #00-1489-10.** Commission review on appeal of the June 18, 2001, decision by the Virginia Beach Wetlands Board to deny a permit to construct a single family residence with a timber bridge, utilities, paved parking and 340 feet of asphalt road involving a coastal primary sand dune in Virginia Beach.

Randy Owen, Environmental Engineer, said because of the similarity of the Mills and Rabey cases and the fact that the Virginia Beach Wetlands Board heard the cases simultaneously he was prepared to brief the Commission similarly with their concurrence. The Commission agreed. Mr. Owen then reminded the Commission that it would be asked to make separate motions on the appeals once the review had been concluded.

Mr. Owen said the Commission's choice was to review the June 18, 2001, decision by the Virginia Beach Wetlands Board to deny permits to both Bruce Mills and the estate of Maggie G. Rabey to construct two, single family residences, one each, on the respective properties, along with timber bridges, paved parking and approximately 340 linear feet of asphalt road involving a coastal primary sand dune in Virginia Beach

Mr. Owen briefed the Commission and provided a power point presentation on the location and description of the project. He said the Wetlands Board had seen everything he was presenting except the vicinity map. He provided the map for the Commission's orientation. Mr. Owen said this was actually a resubmittal of an application that was denied by the Board in May 2000. He said Mr. Mills submitted a second application that was considered by the Board in October 2000. The Commission remanded that application to the Board in November 2000 with specific instructions for the Board to consider a modified proposal to be prepared by Mr. Mills and the Rabeys.

Mr. Owen stated that, according to VIMS, the dune was a well-vegetated structure that was performing all of the natural functions attributed to the coastal primary sand dunes. VIMS concluded that the project remained undesirable because of its potential adverse impact on the frontal face of the dune that could lead to adverse impacts on the dune's overall structure form and function. The Virginia Beach Planning Department provided written comments. It reminded the Board that the proposal lacked final site plan review and approval by the City which could lead to additional changes in the project. They concluded that the proposed hardening of the dune, the loss of the vegetation, would adversely impact the dune's ability to function as a coastal barrier to flooding for the existing homes and developments.

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Mr. Owen said there were four speakers who appeared and spoke opposing the project. They were concerned that the project would damage the beach and the dune. One speaker, representing the Chesapeake Beach Civic League, submitted a petition in opposition bearing 96 signatures. The speaker said that they had maintained their same objections from the original submittal and that they had submitted previously in the original record a petition in opposition of 146 signatures. Mr. Owen said Mr. Mills presented additional written comments from Dr. George Oertel, of Old Dominion University, who commented on the environmental impacts of the project on the beach and dunes. Mr. Mills also presented two poster boards depicting a 40-foot seaward relocation of the dwelling and a four-piling support foundation instead of a single concrete pedestal. Mr. Owen said according to Dr. Oertel's comments, they felt this new configuration would further reduce the project's impact on the dune.

Mr. Owen indicated that following the public testimony, the Wetlands Board offered a motion to deny the application, finding that the anticipated public and private detriments exceeded its anticipated public and private benefits. Additionally, the project did not conform with the standards and guidelines promulgated by the Virginia Marine Resources Commission (VMRC) concerning the Coastal Primary Sand Dune Act and its guidelines. The motion to deny passed unanimously. Mr. Owen said the agency received Mr. Mills' and the Rabey's letter of appeal on behalf of their applications within the 10 days required by Code. As a result, staff considered both appeals to be timely.

Mr. Mills based his appeal on the grounds set forth in Section 28.2-1413 (2) of the Code of Virginia, specifically that his substantial rights were prejudiced because the findings, conclusions, and decisions of the board were in violation of constitutional provisions in excess of the statutory authority or jurisdiction, based upon unlawful procedure, affected by other areas of law, were unsupported by the evidence on the record considered as a whole, and were arbitrary, capricious and an abuse of discretion.

Mr. Owen said, after conducting a review of the record, staff was unable to conclude that the Board erred procedurally in its review of the matter, or that the substantial rights of the applicant were prejudiced by their decision. He said that staff disagreed with Mr. Mills' statement that the Commission remanded this matter solely for a reevaluation of the decision as far as it was an infringement of the constitutionally guaranteed rights of private property owners. In reference, he cited staff's November 16, 2000, letter of notification of the Commission's decision wherein the Wetlands Board was instructed to consider a modified proposal. The revised proposal replaced an elevated timber walkway with an asphalt road and paved parking. Contrary to Mr. Mills' position, the Board, its staff and VIMS clearly understood that the project, as modified, proposed additional impacts to the dune that were not

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previously considered. Furthermore, the Board believed that the project failed to meet the three criteria set forth in Section 28.2-1408 (Code of Virginia), was inconsistent with the policy, standards and guidelines of the Coastal Primary Sand Dune Act, and would result in significant adverse impacts on the dune/beach system.

Mr. Owen stated that it appeared that the project was denied based on the comments provided by VIMS, the Planning Department, the four individuals who spoke in opposition, and ultimately a finding that the public and private detriments associated with the project exceeded the public and private benefits. Staff concurred with these findings and recommended that the June 18, 2001, decision of the Virginia Beach Wetlands Board be upheld in both cases.

Mr. Owen then apologized for the fact that he failed to summarize the comments made by Mr. Mills and requested the time to do so. Mr. Owen then said that Mr. Mills felt strongly that his proposal met all three criteria set forth in the Act. Specifically, that the design preserved the dune vegetation, did not physically alter the dune contour, or impair its natural function.

Bruce Benson Mills, the applicant, then addressed the Commission. Mr. Mills pointed out that Mr. Owen said that the Board did not remand the case because it did not have anything to do with private property rights. He then read into the record the verbatim motion that the Commission gave as follows: "Associate Member Birkett said needless to say, I am very perplexed about all the different arguments and about this particular application and I, like you stated, am very much for individual property rights. But I see in some cases here, where Mr. Mills and the other parties rights are being limited to a great degree and further . . . on down, it talks about property rights . . . the people behind the property using those dunes now for their front yard so to speak. And also furthermore, (Associate Member) Hull said I am also very leery about infringing on people's property rights . . ." Mr. Mills said he did not understand why Mr. Owen felt this was not fundamental to the motion, but it appeared that way to him. Mr. Mills then provided supporting comments regarding private property rights: i. e. that the Fifth Amendment to the U. S. Constitution forbids the taking of private property without compensation; the Fourteenth Amendment of the Constitution applies it to the states; the Bill of Rights of the Virginia Constitution, Article One, Section One, has an even more stringent prohibition against the taking of private rights and states, "that the General Assembly shall pass no law whereby private property can be taken for public purposes without compensation."

Mr. Mills further said that while the Virginia Beach Wetlands Board lacked the authority to take his property, it could severely restrict his use of that property. He said he had no objection to restrictions because he had bent over backwards to conform with the criteria set forth in the act. Mr. Mills said the reason for his appeal was that it was impossible and futile to receive a

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fair, impartial, and reasonable decision from the Virginia Beach Wetlands Board. He also felt that the Wetlands Board and the City had made it abundantly clear, by their words and actions, that they would approve no development on the lots under any circumstances, no matter what type of proposal he made. He said that he hoped that the Commission would afford him the opportunity to have a fair and impartial hearing on all of the facts. Mr. Mills said that after the Commission had remanded this case to the Virginia Beach Wetlands Board, he followed the Commission's direction and met with the Director of Planning for the City, Mr. Bob Scott. He said he met with Mr. Scott twice, (he and Mr. Rabey met with him on one occasion, and he met with him once by himself). He said he offered a variety of solutions and was willing to do whatever was agreeable between the two of them. He said Mr. Scott said that he agreed with him that the full right-of-way improvements that the City was requiring would actually destroy the dunes. He said Mr. Scott indicated that if he received his permit, he would work with him to develop a plan to access his property that would be acceptable. Mr. Mills then said that he had taken two parts of his application from two other applications, that had been previously approved by the Commission, the Wetlands Board, and the City of Virginia Beach. Mr. Mills then presented many slides depicting surrounding structures that he felt were located on the dune. He said the Planning Department approved them because there was minimal direct impact on the estuarine dune. Mr. Mills then briefed the Commission on his new proposal. He said his coastal engineer and coastal geologist, Dr. Oretel, came up with a plan that reduced the pilings to four and elevated the proposed structure 6 feet above the dune. The related walkway would also be elevated. To prevent shading, Dr. Oretel suggested moving the structure seaward 40 feet. Given the sun's orientation and inclination, Mr. Mills felt that would cast the structure's shadow on his other pieces of property. However, he preferred to keep the structure as originally proposed because it was more logical in that location. Mr. Mills then presented slides that demonstrated how the shading would fall. Comments are a part of the verbatim record.

Carl Josephson, Assistant Attorney General, asked if the original plan called for one single piling and that then Mr. Mills showed up at the Wetlands Board meeting with a proposal for four pilings as an amendment to his application? Mr. Mills responded that his geologist told him it would be better with four pilings.

Associate Member Cowart then asked if the Duck Inn's gazebo (show on an earlier slide) was initially constructed below the low water mark? Mr. Mills responded that he was not sure where it was now, but acknowledged that it was originally below the low water mark.

Mr. Owen clarified the situation and stated that a gazebo was permitted on state-owned subaqueous land. The Wetlands Board only approved a part of the walkway necessary to

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access the gazebo. A brief discussion followed.

Associate Member Hull asked Mr. Mills what year he and the Rabey's acquired the property. Mr. Mills said that he had his property for approximately 25 years and Mr. Rabey had his property about 35 years, both before enactment of the Coastal Primary Sand Dune Ordinance in 1980.

Kay Wilson, Assistant City Attorney for the City of Virginia Beach, representing the City and the Wetlands Board, addressed the Commission. She said the case remanded to the Wetlands Board by the Commission was to construct a single family home on the beach and frontal face of coastal primary sand dune and to construct an approximately 250-foot long, six-foot wide elevated walkway along the dune's crest. Ms. Wilson indicated that the Virginia Beach Wetlands Board unanimously voted to deny this third application because the public and private detriments outweighed the public and private benefits and because the project did not comply with the standards of the coastal primary sand dune ordinance and the other promulgated guidelines. She said the project also clearly violated the purpose and intent of the Coastal Primary Sand Dune Ordinance. Ms. Wilson said the Board found that the more recent applications (of Mr. Mills and the Rabey's) were more detrimental than the previous applications. She said this proposal involved an asphalt road along the dune, whereas, the previous application involved a timber walkway along the crest of the sand dune. She said there were no provisions in the application for bringing the pedestal to the beach or an explanation how it would be installed.

Ms. Wilson then addressed Mr. Mills' contention that the Board would deny anything he brought before the Board. She said that while Mr. Mills modified the application, this application was even more detrimental. Therefore, the Board denied the application. She stated that the Commission's responsibility (in the appeal review process) was to examine the record transmitted by the Board to determine if the Board fulfilled its responsibilities under the Wetlands Act, or if the substantial rights of the applicant had been prejudiced because the decision of the Board was in violation of the Constitution, in excess of statutory authority, unlawful or affected by other areas of law, unsupported by the record, or arbitrary, capricious, or an abuse of discretion.

Ms. Wilson said the only issue within the jurisdiction of the Wetlands Board regarding the Duck Inn proposal was the access walkway. Mr. Mills proposal included an asphalt road across the dune and a home on the beach. This was not about a walkway. She said the other homes on the beach he cited were constructed more than 20 years ago, before the Act.

Ms. Wilson said the Board examined many issues, such as, the economics, the aesthetics, the

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practicalities, the recommendations of staff, and the arguments of the applicant. She further said that the current proposal required that the Board apply its knowledge to the "what ifs" and the practicalities of this application. For example, how would you drive the single pile, how do you get it to the beach, what is going to happen when you drive it in, what is going to happen to the dune when the asphalt road is installed and the asphalt trucks travel directly on the crest of the dune.

Ms. Wilson further indicated that the recommendations from VIMS and the City's Planning Department saw this project as a clear, and substantial detriment to the natural function of the coastal primary sand dune system as it now exists. She said the dune system in this area now provided all the attributes one would expect from a well-vegetated dune system--sand nourishment, habitat protection and aesthetics. Ms. Wilson said that under Code Section 28.2-1408, no permanent alteration or construction upon any coastal primary sand dune shall take place that would impair the natural function of the dune as described by the Act, or physically alter the contour of the dune or destroy the vegetation growing on the dune. She said Mr. Mills' application violated all three statutes under the Code and that Mr. Mills has never submitted a plan that met the requirements of the ordinance. She then stated that the Wetlands Board examined the issues the application was remanded for, and applied the proper procedure in denying this project for a third time. The Wetlands Board also followed the dictates of the Coastal Primary Sand Dune Ordinance as they saw them and as they are set forth in Virginia Code and the Guidelines. The Wetland Board balanced all of the equities and the law charged to it and fulfilled its obligations under the Coastal Primary Sand Dune Ordinance. The substantial rights of the applicant had not been prejudiced and the decision was not in violation of the Constitutional provisions, nor was the decision in violation of statutory authority or jurisdiction. The decision was not made upon unlawful procedure or affected by other area of law, and it was supported by the record, and was not arbitrary or capricious. Therefore, Ms. Wilson requested that the Commission uphold the Wetlands Board's carefully thought out and reasonable decision because it adhered to the law and guidelines.

Bruce Mills addressed the Commission in rebuttal. He provided summary comments regarding the plans he had submitted and stressed the inability for him to be able to use his property. Comments are a part of the verbatim record.

Commissioner Pruitt placed the matter before the Commission.

Associate Member Cowart moved to uphold the Virginia Beach Wetlands Board's decision and said that he felt the Board did fulfill their responsibility. He did not think the Board had failed in anyway according to Section 28.2-1413 of the Code. Mr. Cowart referred to comments given

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by Mr. Davenport (page 28 of the Wetlands Board's verbatim transcripts) that "everything was not buildable and I'm the strongest believer of property rights in the room..."

Mr. Cowart said he certainly would not feel comfortable reversing the decision of that Board because he felt they had done the right thing and followed the guidelines. Associate Member Hull seconded the motion. Motion was carried unanimously, upholding the Virginia Beach Wetlands Board's decision in the Mills case.

The Commission agreed that no further briefing was necessary on item 7, regarding the estate of Maggie Rabey. Associate Member Cowart offered the same motion, as previous stated (in item 6) to apply to the Rabey property. Associate Member Ballard seconded the motion. Motion carried unanimously.

The Commission recessed for 10 minutes.

7. **JEAN SIEBERT, ET AL, #01-0729-10.** Commission review on appeal of the June 18, 2001, decision by the Virginia Beach Wetlands Board to deny a permit to construct and backfill 205 linear feet of steel, sheet-pile bulkheading, a single family residence, deck, paved parking and utilities involving a coastal primary sand dune in Virginia Beach.

As previously explained, the appeal was withdrawn and agreed to by the Commission.

8. **DISCUSSION:** Report on Habitat Management Advisory Committee (HMAC).

Tony Watkinson, Deputy Chief-Habitat Management, briefed the Commission on the recent discussions and recommendations by the Agency's Habitat Management Advisory Committee (HMAC). Mr. Watkinson said that there were three issues that he would like to address: 1) contractors and violations; 2) Submerged aquatic vegetation (SAV) transplant guidance previously approved by the Commission, and 3) wetlands mitigation compensation policy. He said the Commission had expressed concern whether it could deal with contractors when a permit violation was committed. Mr. Watkinson said that in certain situations the Commission could deal with contractors in terms of accessing a civil charge or civil penalties, or turn it over for prosecution as a criminal case. He said committee member, Mr. Ballard, felt this might be confusing and requested that Mr. Carl Josephson, the Assistant Attorney General, explain this process.

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Mr. Josephson said the Commission needed to discount its authority to be able to regulate contractors and to preclude them from engaging in business with the property owner. He said it was questionable and advised against (the agency) recommending particular contractors to applicants or property owners. The Commission does have authority to deal with or sanction contractors who have done things inconsistent with the terms of a permit, or done things without a permit. He said he thought the Commission could do that under Chapter 12, subaqueous; Chapter 13, wetlands; Chapter 14, sand dunes and beaches. He said each statute says, it is unlawful for any person to violate the provisions of this chapter and the chapters called for a permit, unless there were statutory exceptions. If the contractor did something that was inconsistent with the provisions of a permit, and there was no permit, the Commission had the authority to request a consensus civil charge from the contractor in lieu of other legal action. The Commission also had the authority to refer a situation like that to the Office the Attorney General to pursue civil penalties through the court process. The Commission also had the authority to refer the matter for consideration by a local Commonwealth Attorney for prosecution (Class One Misdemeanor). Mr. Josephson asked Colonel Steve Bowman if law enforcement had the authority to initiate prosecution for class one misdemeanors without the okay of the Commonwealth's Attorney. Colonel Bowman said yes. Mr. Josephson also mentioned that possibly an administrative mechanism could be developed whereby the property owner is notified or put on notice through a permit condition that states that the law provides for sanctions if the project is not performed consistent with the approved permits and that possibly a contractor could be required to sign an acknowledgement regarding the conditions of the permit. In such a case, there would be no doubt that the contractor would have any question about what the terms and provisions of the permit were.

Mr. Watkinson stated that the last comment made by Mr. Josephson was an issue that the HMAC discussed and recommended that they pursue the development of some type of permit condition and an acknowledgment form in the permit that the applicant and contractor would sign and return to the Commission. This would complete the process and allow the applicant to proceed with the construction under that permit. Such a dual signature also could be a requirement of the permit conditions. This would put the contractor on notice to make sure the permit is performed correctly as opposed to just the property owner and the contractor would be aware of exactly what the permit required.

There being no further comments on the statement, Commissioner Pruitt said that they would pursue the recommendation.

Mr. Watkinson then addressed the HMAC's discussion of the SAV transplant guidance, developed last fall regarding recommending how SAV should be transplanted for restoration

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projects and what permit format would be used. He said the HMAC also discussed the issue of general permits and the Commission's policy regarding preservation of SAV versus mitigation of potential impacts. Mr. Watkinson said only five permits were handled by the agency in the last year and one was pending for this activity. He said given the issues here, the potential conflicts that might occur, and the need to get the public reaction to this type of project, the Committee felt it necessary to retain the current public interest review and not abbreviate the process. The committee also felt it was better to let the permit process remain the same and not go any further with an expedited general permit at this time. The Commission's policy regarding impacts to SAV's, stresses that impacts should be avoided in all situations. As part of the guidance for transplantation, there was some discussion whether it would apply to mitigation as well. Mr. Watkinson said the Committee concluded we should not change the policy and it should be the Commission's primary responsibility to preserve SAV resources and avoid impacts in all situations. However, there may be times when it is in the public interest to permit some impacts and at such time it would be up to the applicant, the staff and the Commission to consider any mitigation requirements. At that time, we also would consider the techniques recommended in the transplantation guidance for implementing any restoration or compensation for unavoidable impacts from a permitted project. He said he did not believe those discussions required any action from the Commission at this time.

Regarding the final issue of mitigation compensation policy, Mr. Watkinson said that they have found over the last several years of monitoring and assessments by the Virginia Institute of Marine Science field work that each year a few acres of wetlands impacts are permitted that are not compensated for. As such, the no net loss policy in the state included in the Chesapeake Bay Agreement is not being met. Currently, the wetlands guidelines suggest that if a project's scope is under 1,000 feet of impacts, wetlands loss should be avoided to the greatest extent possible and not require any mitigation. However, in many cases 200 or 300 square feet of impacts associated with an acceptable shoreline stabilization project are approved and over a year's period the total adds up. He indicated there is a need to look at the guidance considering this issue and previous legislation changes that allow for mitigation banks and see if the guidance and policy regarding wetlands mitigation could be updated or amended. He stated Mr. Ballard felt that staff should brief the Commission on that need to see if you concurred with the Committee going forward and reviewing that issue and possibly coming back to you with recommended changes.

Commissioner Pruitt asked the members if they had any problems with the Committee's suggestion. There were none.

9. PUBLIC COMMENTS: Commissioner Pruitt called for anyone to address the commission. There were none.

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10. DISCUSSION: Establishment of a recreational eel pot license costing \$10.00 and limiting the licensee to two eel pots, pursuant to HB 1572 adopted by the 2001 General Assembly. Request for public hearing.

Mr. Jack Travelstead, Chief-Fisheries Management, said it was a request for a public hearing to consider an amendment creating a recreational license for eel pots. Staff recommends a public hearing next month. There are many rules already in place that regulate the harvest of eels. There is a description of what the pots should look like and another regulation provides for an escape panel in the pots to allow small eels to escape. We also have a six inch minimum size limit already in place and a 50-eel limit for recreational fishermen. All of those measures would apply to the holder of an eel pot license should you decide to create one.

Commissioner Pruitt asked if this amendment had been taken to the Finfish Management Advisory Committee. Mr. Travelstead said yes, but that there had been no quorum. There were a number of people in the audience and a few members present and no one objected to the license. Mr. Pruitt put the measure before the Commission.

Associate Member Hull moved to hold the public hearing. It was seconded by Associated Member Williams and carried unanimously.

11. RECOMMENDATION of the Recreational Fishing Advisory Board to purchase a Sport Fishing Simulator--\$28,000. Mr. Routh distributed to the members photographs of the simulator unit at the Virginia Marine Science Museum. You may recall in May that the Recreational Fishing Advisory Board (RFAB) tabled the issue pending a decision on how the program could be administered, how it would be stored and transported. In July, the RFAB recommended the funding of the project on a 5-2 vote. Currently, the Fisheries Management Division recommends the project for your approval.

Commissioner Pruitt asked if there were any questions. Associated Member Ballard said he did not understand what this is or what it does. Mr. Routh said it was a device with a winch plugged into a VCR which shows tape of a fish fighting. Currently, there are only three saltwater species available--marlin, sailfish and tarpon. An individual stands in front of the VCR with a line from the rod to the unit and you see the fish fight and the machine reacts to signal and simulates you fighting the fish. There is a score on how you manage the tension in the line. It is a virtual reality type thing. Associated Member Ballard then asked why the agency wanted one of these.

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Mr. Routh said the project is being pushed by the CCA chapter on the Eastern Shore. It will be mobile and will be carried around to various shows and the State Fair. It will be implemented into our educational program of the Virginia Marine Patrol. Associated Member Ballard said it was basically promotional material/strategy for recreational fishermen.

Associated Member Hull said, from what he could tell, that this was an excellent project and he would strongly endorse it for Kings Dominion, Busch Gardens or Coney Island, at their expense, but thinks it is a misuse of the money from this fund for us to be supporting this. He said he could not approve it. Commissioner Pruitt asked if there was anyone in the public who wished to address the issue. There were no comments.

Associated Member Hull made a motion to deny the request and it was seconded by Associate Member Cowart. Associated Member Gordy said she did not feel she had enough information to vote on it. She said she was glad when Associate Member Ballard asked his question. Mr. Routh said he had a video that would show how the machine operates.

Commissioner Pruitt said there was a motion and second on the floor, but he would indulge the Commission for a moment while the video was set up. He noted that the biennial audit from the Auditor of Public Accounts had been received and it was a perfect audit. He said when you are dealing with the public's fund, it is an important item of business. But when you are dealing with somebody's money--in this case the taxpayer's money--there is no gray area. It is either handled right or handled wrong.

And we consistently handle it right. He showed the report of just three or four pages. Commissioner Pruitt said he wanted to give credit to the people who do that. He recognized all of the employees from the Administration and Finance Division and congratulated them for the fine work.

Returning to the agenda, Associated Member Ballard asked Mr. Travelstead for the section of the Code that defined the licensing fund and how the money could be spent. The Commission then viewed the video presentation. An audio of the video tape is part of the verbatim record.

Following the video presentation, Associate Member Hull said if the Commission did approve it, every time it is shown staff would have to be present to operate it. He strongly urged the Commission not to support it. Commissioner Pruitt asked if there was any more discussion. Associate Member Ballard said he would support the motion because he did not think the Commission could approve it. He said he did not see where the project falls under the provisions set by the legislature. Referring to the Recreational Fishing Development Fund, the Code says the funds shall be administered by the Commission and used solely for the purposes

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of conserving and enhancing finfish species taking by recreational anglers, enforcing the provisions of several Code sections cited, improving recreational fishing opportunities, administering the Virginia Saltwater Sport Fishing Tournament certificates program, obtaining the necessary data and conducting research for fisheries management, and creating or restoring habitat for species taken by recreational fishermen. Associate Member Ballard said he did not see where it fit any of these categories and did not see any choice but to reject the project.

Commissioner Pruitt asked for other comments. The motion was passed unanimously.

12. REPEAT OFFENDERS.

Steven Bowman, Chief-Law Enforcement, briefed the Commission on the following repeat offenders:

Ronald K. Cantrell, 225-945-642. Mr. Bowman said this was Mr. Cantrell's first time before the Commission as a repeat offender.

Violations: April 22, 2000 - set gill net within 300 yards of pier, guilty, fined \$75.
February 21, 2001 - possessed untagged striped bass, guilty, fined \$75.
April 6, 2001 - set improperly marked gill net, guilty, fined \$100.

Commissioner Pruitt asked Mr. Cantrell if he went to court on any of the violations. Mr. Cantrell said no. He said on the pier situation that Mr. Abbott owns the pier and he always calls the day before the pier opens so the nets could be moved. He said this has been going on for a dozen years and there have never been previous problems. He said he had the gill net flags, but did not have the numbers on it. On the rock fish tags, he said he had been keeping the fish in the refrigerator and the tags in a box. Mr. Cantrell said when he sold the fish, he would throw the tags away. He said the tags for the fish in the freezer must be put into the bags because a Marine Patrol Officer told him. He said he did not want to go to court and make anyone angry.

Kenny Oliver, Southern Area Captain, said he was present when one of the summons was issued. Mr. Cantrell was told that the fish and the tag must be together. Mr. Oliver said he had used tags just laying around and that was wrong. Commissioner Pruitt reiterated that it is the same policy being used by all Marine Patrol Officers.

Mr. Bowman said the tags must be fixed to the fish from point of capture to the point of sale. It also must follow the filet with a tag. You do not get to take one tag and use it over. Mr. Cantrell said he asked what to do with a 30-pound rock fish filleted into eight ounce sections. Where does the tag go? Mr. Bowman said it was simple, the time the fish is sold, filet by filet,

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it is all right for the filet to go out of the business after it has been sold and the exchange has been made. The tag remains there until the last filet is sold in the box assigned to the fish and the commercial fisherman is then relieved of the responsibility of maintaining custody of the tag assigned to the fish. When there is a fish there being sold by a commercial fishermen there must be a tag assigned to that fish.

Commissioner Pruitt said the tag is for the fish not for a filet. Mr. Bowman said that is correct. Commissioner Pruitt asked for additional questions. With no questions, he placed the matter before the Commission. Associate Member Ballard said he believed it was Mr. Cantrell's first appearance. Mr. Bowman agreed, but the provision of the rock fish law said if there is one violation he could have his rock fish tags revoked. Commissioner Pruitt said he understood that Mr. Cantrell was a commercial fisherman and a seafood dealer. Commissioner Pruitt asked Mr. Cantrell if he knew how to handle the situation correctly.

Commissioner Pruitt placed the matter before the Commission.

Associated Member Ballard said there was sufficient confusion in his mind as to the striped bass issue. He said he was not convinced Mr. Cantrell was intentionally violating the striped bass portion and would go with the regular policy of 12-month probation. The motion was seconded by Associate Member White and passed by a 6-0 vote with Associate Member Williams abstaining.

Wilson H. Hatter, 227-703-551, was the next individual on the agenda, but Mr. Bowman said he did not accept his mail and now would be personally served to appear before the Commission. Commissioner Pruitt said the individual was sent a registered letter and did not accept his mail. So, there was no response. Mr. Bowman said the agency has not complied with the requirements of the law. The individual will be personally served by a Marine Patrol Officer. We are taking no action now, Mr. Bowman stressed, because he has not been properly served.

Kenneth T. Heath, 228-085-835, sent to the law enforcement office a request for a continuance to obtain legal counsel. Mr. Bowman said he agreed to the request and the case will be continued until the Commission's August meeting. Mr. Bowman said Mr. Heath had been convicted in six cases of untagged striped bass.

Stephen C. Frucci, with the law firm of Brydges, O'Brien and Frucci, the counsel for Costas Kambouropoulos, 212-969-625, came to Mr. Bowman prior to the Commission meeting and said he had not had sufficient time to prepare for Mr. Kambouropoulos' case. He requested a

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continuance and Mr. Bowman granted it until the Commission's August meeting.

James C. Keeling, 228-865-658. Mr. Bowman said this was Mr. Keeling's first time before the Commission as a repeat offender and there was nothing aggravating about the cases involved.

Violations: August 17, 2000, possessing undersize crabs, guilty, fined \$25.
March 17, 2001, set over-length gill net, guilty, fined \$25.
March 28, 2001, set improperly marked gill net, guilty, fined \$100.

Commissioner Pruitt asked Mr. Keeling if he had gone to court. He said he went on at least one. He questioned the actions of a Marine Patrol Officer. Regarding the overlength, he said he had plenty of 600-foot licenses, but the length was 900-feet. Mr. Bowman said Mr. Keeling had two 600-foot nets tied together, over the 600-foot allotment. His rationale was that since he had plenty of 600-foot licenses it was all right to tie them together. Mr. Bowman said that is why there are 100, 600 and 1,200-foot licenses, you cannot add them together. Mr. Keeling also said his net had been cut and Commissioner Pruitt said Mr. Keeling had the right to file for the net and regarding a complaint against an officer he should go to Mr. Bowman and if he is not satisfied then go to the Commissioner. Commissioner Pruitt said then if he did not like the answer he could go to court.

Commissioner Pruitt placed the matter before the Commission.

Associate Member Ballard said it was Mr. Keeling's first time and the guidelines call for 12-months probation and he so moved. Associated Member Gordy seconded the motion and it passed by a 6-0 vote with Associate Member Williams abstaining.

Sang Tran, 227-219-702, is represented by Mr. Eugene Jordan, counsel, who requested a continuance, which was granted until the Commission's August meeting.

Brian G. White, 231-258-724. Mr. Bowman said it was Mr. White's first appearance before the Commission as a repeat offender.

Violations: September 30, 2000, set unmarked gill net, guilty, fined \$75.
January 19, 2001, set/leave crab pots in water, guilty, fined \$200.
March 12, 2001, set/leave crab pots in water, guilty, fined \$200.

Commissioner Pruitt asked Mr. White if he went to court on the cases. He said yes. Mr. White said in the crab pots out of season cases, his skiff had broken down and he was not able to get

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them up in December. He was able to get to some of them in his larger clam boat, but could not reach those closer to shore. Commissioner Pruitt said there is a grace period if there are boat problems. He said he could understand the January situation, but not the March one. Mr. White said those were the ones near shore.

Commissioner Pruitt placed the matter before the Commission.

Associate Member Gordy moved that Mr. White be placed on 12-months probation. Associate Member White seconded it and the motion was approved by a 6-0 vote with Associate Member Williams abstaining.

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

William A. Pruitt, Commissioner

Wilford Kale, Acting Commission Secretary