

**CHESAPEAKE BAY LOCAL ASSISTANCE BOARD'S
POLICY COMMITTEE MEETING - AUGUST 26, 2003
JAMES MONROE BLDG.
101 N. 14TH STREET, CONFERENCE ROOM C, MAIN LEVEL
RICHMOND, VIRGINIA 23219
MINUTES**

MEMBERS PRESENT:

Donald W. Davis
Colin D. Cowling
Stuart Mendelsohn

STAFF PRESENT:

C. Scott Crafton, Executive Director
Carolyn Elliott, Administrative Assistant
Martha Little, Chief Environmental Planning
Shawn Smith, Principal Planner
Ali Baird, Special Projects Planner

Mr. Davis called the meeting to order at 10:10 a.m. He recognized Mr. Scott Crafton, Director of the Department, and Assistant Secretary of Natural Resources, Mr. Russ Baxter.

Mr. Davis asked Mr. Crafton if he would like to make opening comments. Mr. Crafton stated that he expected a long meeting and asked those who would like to provide comments to please speak up, since it is often hard to hear in this meeting. He said the meeting was the culmination of a lot of work that had been accomplished over the last several months, and noted several guidance documents would be presented to the committee with the hope that these documents would be brought to the full Board for final approval at the September 15, 2003 meeting. He went on to say there were a number of things going on parallel with the guidance development, such as strategic planning and budget development, that are driven by the Administration and take a lot of staff time. He said at the same time, local governments are working on amendments to their local ordinances and staff is interacting with them. He said with all the deadlines, getting consensus on the guidance documents and bringing them to successful conclusion would be very helpful.

Mr. Davis thanked Mr. Crafton for his comments and explained that each issue would be taken separately, after which public comment would be invited before continuing to the next point.

Mr. Davis called for Mr. Russ Baxter's presentation regarding Determinations of Water Bodies with Perennial Flow. Mr. Baxter thanked staff and members of the committee and commented that the Ad Hoc Committee presentation to the Board on July 16, 2003 revealed that the issue of particular concern was how ditches were going to be addressed in the guidance document. He advised that CBLAD staff had developed additional language to address the issues of farm drainage ditches, local flood control and ditches along roadways. He said he and Scott Crafton had met with representatives of the Virginia Farm Bureau, providing an explanation of how the ad hoc process worked and what issues had been addressed. He asked Mr. Crafton to continue the discussion regarding how ditches are being addressed. He said that all the issues have not been resolved and some questions still remain. He also said that there are some new proposals that might still be considered.

Mr. Crafton advised that drafts had been sent to the Committee, the Board members, and the information had been posted on the website. He said earlier interpretations had been resurrected, either from the old Local Assistance Manual or other guidance dealing with ditches, and an additional section is included in both the perennial stream documents that talks about the mapping and regulation of ditches as RPAs. He said three interpretations were added and the same language was inserted into the mapping document because it is pertinent to that document as well. He said that on Page 3, second paragraph in the section "Mapping & Regulation of Ditches as RPAs" it states that Section 9 VAC 10-20-150.B.1 talks about the exemption from the Regulations of the installation, operation, and maintenance of public roads and their appurtenant structures as long as they comply with state Stormwater Management and Erosion Control Regulations. He said the point is made that a roadside ditch that is designed to deal with the drainage from the road is considered an appurtenant structure. The second paragraph addressed agricultural drainage ditches and said that as long as at least one best management practice that addresses the most important water quality issue is in place, the ditch would not have to be buffered. He said this interpretation has been long standing. The third issue dealt with flood control ditches and the need to maintain these, and the desire not to have to buffer them. The third paragraph noted that under the new Regulation amendments, flood control structures are allowed within RPAs, and the guidance allows for their maintenance and requires no buffers for such ditches.

Mr. Davis thanked Mr. Crafton for his report and called for public comments.

Mr. Davis recognized Mr. Pat O'Hare, representing the Home Builders Association of Virginia, who commented that with respect to the ditching issue, he suggested that, at the end of each paragraph regarding road and agricultural ditches, and flood control best management practices, a sentence be added that says there is no requirement to add a buffer adjacent to these types of ditches. He said that most people would know that is the case, based on the language, but those who do not know how the program works may not. He also suggested that the very last paragraph in the section has nothing to do with the ditches and suggested that it be deleted.

Mr. Davis recognized Mr. Joe Lerch, Chesapeake Bay Foundation, who commented that the ditching issue was not dealt with fully by the Ad Hoc Committee and suggested that that this issue be taken out of the document at this time and have the Ad Hoc Committee look at it again in order to come to some resolution.

Mr. Davis asked Mr. Lerch if he was referring to man made ditches. Mr. Lerch responded that he was referring to the section on ditches and specifically the added language. He said he concurred with Mr. O'Hare regarding taking the last paragraph completely out.

Mr. Mendelsohn asked if Mr. Lerch was saying to send the issue back to the Ad Hoc Committee, and have the guidance be silent about these ditches.

Mr. Lerch responded that the Ad Hoc Committee could come up with Regulatory guidance that specifically addressed the issue or possibly, the issue could be looked at during the 2004 Regulations update.

Mr. Mendelsohn asked how they would address the issue that the ditches had not been addressed at all.

Mr. Lerch responded that when you look at the definition of water bodies with perennial flow it does say that it may include ditches. It does not say that it requires it. He also said that this may not be the most optimum solution at this time, but because of the controversy it might be better to have the Ad Hoc Committee look at it separately.

Mr. Cowling asked if attention had been paid to Section 150 that says self-imposed situations are not exempt. He asked if Stormwater ditches dug in high water table areas are in fact self imposed, and therefore not exempt in the Regulations.

Mr. Baxter commented that was one of the issues that had been brought up but had not been resolved. He said at this time, he would like to see the document go through as is so that localities can go ahead and update their ordinances to comply with the Regulations.

Mr. Davis recognized Mr. Bill Britton, Charles City County. Mr. Britton asked the Committee if the new guidance would hinder the restoration of areas that have been determined perennial. He noted that the U.S. Fish & Wildlife Service has a program called the Private Lands Act, and Ducks Unlimited contributes money into the program. He said that these two entities have been working to try to bring wetlands back. He asked again if the guidance would stop these projects.

Mr. Crafton advised that it was not intended to stop restoration of wetlands or stream channels. He said that he knew of nothing in the Regulations that would create any problems for these projects. He went on to say that guidance had been issued in the past, and asked if Ms. Little was aware of anything that would hinder either stream or wetland restoration.

Ms. Little responded that she was unaware of anything. Mr. Britton stated that in Charles City County individuals were creating wetland mitigation banks via the soil and water regulations and asked if the guidance would impact the creation of such banks.

Mr. Crafton advised that the guidance would not and noted that banks have been created in other areas of Tidewater Virginia and are overseen by other agencies.

Mr. Britton asked about using USGS maps as an indication of a perennial streams. Mr. Davis responded that there is a provision in the Guidance and in current Regulations as proposed to use that for general purposes, however, the guidance as proposed would go further to use a more scientific definition and protocol to determine perenniality.

Discussion ensued regarding a dam that Mr. Britton was aware of in Charles City County. It was decided that without more information it would be difficult to answer any questions about how the guidance would affect this dam. Mr. Crafton offered to have staff discuss the issue with him personally. Mr. Britton thanked Mr. Crafton for the offer.

Mr. Davis thanked everyone for their comments and closed the public comment period for this issue.

Mr. Cowling questioned why the term that wetlands connected by surface flow and contiguous was not included. Mr. Davis suggested to Mr. Crafton that extra words could be inserted wherever wetlands are discussed that it would be noted that perennial wetlands are under the jurisdiction of the Chesapeake Bay Regulations. Mr. Cowling suggested that the language should read from the Regulations...connected by surface flow and contiguous. Mr. Crafton asked Mr. Cowling to identify where this sentence needed to be added. Mr. Cowling stated that the sentence should be added in the paragraph on Page 2 that says "...determination would not necessarily show nontidal wetlands..." Mr. Crafton thanked Mr. Cowling for the clarification.

Mr. Cowling commented that on July 16, 2003, he suggested that he was uncomfortable with the inference regarding biological indicators that would infer perennial flow. These may, in fact, infer only a wetland that may or may not be perennial.

Mr. Davis asked if he was referring to the bulleted items on Page 3. Mr. Cowling responded yes and he would like to see the second and third bulleted items taken out. He also suggested that this information be deleted on Page 5 as well.

Mr. Mendelsohn asked if it was Mr. Cowling intention to delete all references to biological indicators. Mr. Cowling responded that the biological species definitely indicate a wetland but not necessarily one that the Board has jurisdiction over. He said it could be impounded water or even poultry and hog containment areas that also have a lot of the same bugs. He said, for instance, mayflies seemed to love hogs, and clearly

including this information could lead to designation of areas over which the Board does not have jurisdiction.

Mr. Davis commented that the last sentence says that perennial flow can be inferred by satisfying any of the following criteria, but does not say will be inferred by satisfying any of the following criteria. He went on say that he had read this section a number of times and found this to be a useful tool to determine perennality, but not the only tool.

Mr. Crafton noted that this was discussed thoroughly by the Advisory Committee and clearly they did not have the kinds of situations in mind to which Mr. Cowling referred. He noted that Wilmer Stoneman of the Farm Bureau raised the question about he macroinvertebrates, noting that he had a lot of mayflies around his horse lot, where there is no stream. Mr. Crafton went on to say that the intention was to have a basic definition, but to say that if you are looking at a stream and you find fish in it or you find macroinvertebrates that need free flowing water in order to survive, there is a pretty good chance that the stream is perennial.

Mr. Cowling went on to say that this same language is repeated later in the guidelines for methods that you might use to determine perennial flow, but to include the language in the definition is misleading and inaccurate. Mr. Cowling expressed concern that localities would pick the language up verbatim.

Mr. Baxter offered to provide history of the discussion noting that providing an opportunity for localities to use this type of identification was attractive because there was little cost in applying it. He said that he thought it might be appropriate to move the indicators into a protocol, and remove them from the definition, but keep them as a part of the methods for determining perennial flow. He went on to say that it was meant to be a much less cumbersome process for determination, not a definition.

Mr. Cowling commented that he believed a body of impounded water, be it a mountain lake or a large farm pond without an overflow, may be large enough to become an ecosystem of its own and might support fish without any perennial flow to anywhere. He went on to say that as a determining factor as a protocol or indicator, it may be included, but not as part of the definition.

Mr. Davis suggested that the information be moved, not changed, and placed under Field Indicator Protocols. Mr. Cowling agreed. It was noted that the language was already included in the text.

Mr. Davis asked if Mr. Crafton agreed with the suggestion. Mr. Crafton commented that he understood the concern and believed that you could have a situation where a pond was large enough to support fish without an outflow, however, the guidance clearly indicated the need to have perennial flow coming both into and out of it in order for it to be declared perennial.

Mr. Crafton asked Mr. Matt Meyers if they had included these bullets in the Fairfax County ordinances definition. Mr. Meyers responded that they had not included the bulleted items under discussion. Mr. Davis commented that he did not believe there was a problem with the verbiage of the bulleted items; the question was whether it belonged in the Definition.

Mr. Davis asked if anyone else would like to make a comment about these items. Mr. O'Hare commented that if you take out the first two bullets, consideration of those factors is already included in the third bullet when coming up with the score.

Mr. Mendelsohn suggested that the first two bullets be taken out and the last sentence of the paragraph changed to read ...Alternatively, perennial flow can be inferred by satisfying a numeric value.

Mr. Meyers said that it is not just a numeric value, it is the application of a protocol, and the protocol uses a biological and numeric application.

Mr. Baxter asked Mr. Meyers if the bulleted criteria are not in the definition but only in the protocol, would that affect a determination in any way. Mr. Meyers responded that changing the sentence to indicate that the determination would be made only by numbers and not by other indicators, would indeed change the protocol.

Mr. Mendelsohn commented that he was looking at whether the criteria needs to be in the definition if it is going to be described in the protocol anyway. Mr. Meyers agreed that it did not need to be in the definition. Mr. Mendelsohn commented that what they were trying to say is that this is a protocol rather than a definition, and the language should be stricken from the definition.

Mr. Davis commented that they were not changing anything, rather moving something that might be confusing to a locality.

Mr. Davis asked if there were any other issues. Mr. Friedman, Fairfax County Public Works, commented that on Page 7, there are references to drainage area sampling being a definitive method for determining the precise beginning of perennial flow and that statement is not consistent with the Regulations. The Regulations require a site specific field evaluation of perenniality, and it seems confusing to indicate that a threshold watershed area for definitively determining the upstream extent of the stream is an acceptable method and then saying later that this is supplemented later by a field determination. He said that he did not believe this statement is entirely consistent with the Regulations.

Mr. Davis asked Mr. Crafton for comments. Mr. Crafton commented that the thrust behind the discussion was that this method provides an extra layer of precision beyond the USGS map, because it involves going out in the field and narrowing the margin of error. Mr. Crafton commented that consideration was given to whether this method of providing sampling to determine a threshold drainage area that would

represent perennial streams could, from an administrative point of view, provide sufficient precision to allow avoidance for having to go out every time someone submitted a site plan.

Mr. Davis commented that there had been discussion in the Ad Hoc Committee meetings about smaller localities not having the resources and that this would be a very quick way to come up with a basis in the various watersheds for perenniality. He noted that the guidance did not say that you have to use this method; it says it is one of the available tools and he did not have a problem with leaving it in.

Mr. Crafton also said that given that there was a chance that some streams would be lost, some would also be gained, and it would provide for some localities the avoidance of having to go out and do further work. He said there had been consensus on this among the Ad Hoc group.

Mr. O'Hare commented that the last paragraph of the section says that such a map is assumed to be accurate, however it is recommended that localities require a site specific survey be performed as part of the site development process.

Mr. Keith White, Henrico County, commented that during the Regulatory process, the concept of a threshold drainage was proposed and rejected. It was not included in the new Regulations.

Mr. Mendelsohn noted in the last paragraph ...However, it is recommended that localities require a site-specific survey be performed as part of the site development process...”He asked doesn't that mean that it is not required, only recommended. Mr. Crafton commented that was the intent, but they do have to perform a site specific survey for a plan of development- the Regulations do require that a confirmation be made.

Mr. Mendelsohn asked again if he was correct about the language. Mr. Crafton responded that under this protocol language the site specific confirmation was not required. Mr. Crafton said that they were saying this method would satisfy Section 105 and narrow the margin of error to acceptable.

There was discussion between Mr. Cowling, Mr. Baxter and Committee Members regarding the issue of what happens when a homeowner agrees that there is a perennial stream running through the property. If, on the other hand, a homeowner disagrees that there is a perennial stream, then it would be up to the homeowner to prove that.

Ms. Little commented that even though this section refers to a definitive map, the proposed mapping guidance says that any changes to the definitive map are considered major modifications and are required to come before the Board for approval. There would be further consideration to the items that needed to be either added, deleted or otherwise modified before approval by the full board.

Ms. Salvati suggested that the second paragraph on Page 8 needed to be changed, but certainly not stricken. However she proposed no specific changes.

Mr. Davis suggested that the areas that have been identified were still in need of work to be correct. He asked that they be revised and sent to the Policy Committee for agreement before the next Board meeting. He said that he did believe that it was very clear where the issues were.

Mr. Davis said the outstanding issue appeared to be ditches. He recommended that the proposed changes be kept on Page 3 and that the Ad Hoc Committee should discuss the issue further. Another issue is ditches that were dug prior to the Bay Act that might be grandfathered from various regulations.

Mr. Crafton commented that he had received a letter regarding language that North Carolina used that might be useful. He said he would provide this to the Ad Hoc Committee as well. Mr. Crafton asked Mr. O'Hare to further comment on the Mapping and Regulation of Ditches as RPAs. Mr. O'Hare suggested that the proposed clarifications be kept, reflecting his earlier suggestions, and the last paragraph should be deleted. Mr. Crafton confirmed this to include taking this information back to the Ad Hoc Committee. Mr. Crafton agreed to this suggestion. Mr. Davis reminded everyone that these are guidance documents only, and there is nothing in these documents that cannot be changed.

Mr. Crafton commented that there appeared to be consensus to delete the three bulleted items on Page 3 and the last sentence in the previous paragraph from the definition, and, and on Page 8, massage the last paragraph so that the sampling would not satisfy the requirements for a site specific confirmation. Mr. Davis suggested that thought be given to the wording in all the paragraphs that contain terms such as "definitive", "determine" and so forth.

Mr. Cowling asked if there was agreement about inserting the words on page 2 regarding "contiguous and connected by surface flow" that he suggested earlier. Mr. Crafton responded that he agreed with that.

Mr. White made it clear that information in the past has been given more weight than just guidance, and he wanted to be clear that this is just guidance. Mr. Crafton commented that when a review is done in Henrico County, it would be done based on the Regulations, not the guidance.

Ms. Little asked Mr. Crafton to summarize what was going to be done. He said that on Page 2 in the second paragraph, language is going to be added regarding the wetlands, making it clear that the document is referring to those that are contiguous and connected, therefore, subject to the Bay Act Regulations.

On Page 3, the last sentence of the first paragraph of the definition and the three bulleted items will be stricken from the definition. In the section on "Mapping &

Regulation of Ditches in RPAs”, a sentence will be added in each of the interpretative paragraphs to make it clear that buffers are not required for those types of ditches. On Page 4, last paragraph in the section on ditches will be stricken, and on Pages 7 and 8 in the section that deals with drainage areas based on sampling, staff will massage the language to say that this method is acceptable for initial general mapping but not to satisfy the site-specific confirmation that is required under Section 105 of the Regulations.

Mr. Crafton said a draft of these changes would be provided to the Board members and posted to the web site prior to the September Board meeting. He said this is with the understanding that the document would also be sent back to the Ad Hoc Committee for further review and discussion of additional issues related to ditches.

Mr. Davis asked Mr. Cowling if he agreed with the changes. Mr. Cowling agreed. Mr. Davis called for a motion to send this document to the full Board for approval, as revised and subject to further review. Mr. Mendelsohn motioned, Mr. Cowling seconded. Mr. Davis called for the vote. All members voted aye. Mr. Davis noted that the motion passed.

Mr. Davis called for the presentation of the document entitled “Administrative Procedures for the Designation and Refinement of Chesapeake Bay Preservation Area Boundaries”, referred to as the Mapping document.

Mr. Crafton opened comments stating that at the last meeting there had been general acceptance of this document, with the understanding that whatever changes were made to the Perennial Flow document regarding ditches would relate to this document as well. The only change that was made was the addition of identical language on Page 5 dealing with the mapping and regulation of ditches as RPAs. Mr. Crafton proposed to change this language to be identical to changes made in the Perennial Flow document.

Mr. Davis asked if there were other suggested changes by Committee members. Mr. Cowling referred to the language on Page 2 regarding wetlands connected by surface flow and contiguous and requested that this language be corrected to match the same language in the Perennial Flow document. On Page 3, Mr. Cowling referred to paragraph 4 where it says “.....Therefore, any enlargement or addition of a ‘general’ CBPA map, Mr. Cowling suggested that the word reduction be added so that it would readTherefore, any enlargement, or reduction of a ‘general’.

Mr. Crafton explained the thinking behind this statement and did not remember why the word was not included in the beginning. Mr. Mendelsohn pointed out that using the word pursuant negated all previous words. Mr. Mendelsohn suggested that it say instead “....any modification of a ‘general’ CBPA map pursuant to a site-specific determination....”and in that way it could be anything. Mr. Cowling agreed to Mr. Mendelsohn’s wording. Mr. Crafton agreed to make the change.

Mr. Davis called for public comment. Mr. O'Hare commented that he supported Mr. Crafton's comments regarding this section.

Mr. Davis closed public comment. Mr. Crafton summarized the changes noting that on Page 2, the last full paragraph the language would change to be the same as in the Perennial stream guidance to make it clear that wetlands are contiguous and connected by surface flow and are subject to the jurisdiction of the Bay Act Regulations; on Page 3 in the paragraph before Site-Specific CBPA Maps, the sentence before will read "...Therefore, any modification of a 'general' CBPA map pursuant to a site-specific determination...", and on page 5, the language in the same section of the Perennial Flow document.

Mr. Davis called for a motion. Mr. Mendelsohn motioned to approve the changes that Mr. Crafton outlined and submit the guidance document to the full Board for approval in September. Mr. Cowling seconded the motion. Mr. Davis called for a vote. All members voted aye.

Mr. Davis recognized Mr. Crafton for presentation of the document entitled "Resource Protection Areas: Permitted Development Activities". Mr. Crafton noted that this document was brought before the Policy Committee earlier, thinking there was a consensus on its contents. However, at the meeting Mr. John Matthews, representing several marina owners, raised a concern about the language limiting the non-water dependent components of water dependent activities that the agency believed needed to be moved out of the buffer. He said that Mr. Matthews made a compelling case about the problems that created for the owners, particularly at existing marinas where there is limited land.

Mr. Crafton explained that because Mr. Matthews presented his concerns at the last minute, staff did not have the opportunity to do any homework on the issues and were not prepared to fully discuss his concerns. Since then staff has revised the document that essentially adds a regulatory reference that clarifies why staff had originally said what was said. Mr. Crafton noted that in the third bullet on the first page Section 9VAC10-20-130.1.b sets out the criteria in the Regulations that must be met for new or expanded water dependent facilities to be allowed in the RPA. These criteria include the following: that it does not conflict with the local comprehensive plan; that it complies with all performance criteria; that any non-water dependent component be located outside the RPA; and that access is provided with the minimum disturbance necessary. He said the requirement for the non-water dependent component to be located outside the RPA is actually in the Regulations and that is why the previous document had said that, although this reference to the Regulatory language was not included in the original document.

Mr. Crafton explained that he wanted to make it clear that someone who has limited property, as Mr. Matthews pointed out, could certainly go through the exceptions process if they felt they had a compelling case. Mr. Crafton said that Mr. Matthews' preference was that they did not have to. However, the Regulations do require that

individuals take this action. Mr. Crafton also said that he had spoken with Mr. Matthews, who suggested several things that could provide relief for these owners when the Regulations are reviewed in 2004.

Mr. Crafton noted that Bullet 2 was the only addition to the guidance and asked that consideration be given by the Committee to forward this guidance on to the full Board for approval in September.

Mr. Davis commented that Mr. Matthews had referred to a dictionary definition of “marina” that included accessory uses, such as parking areas and boat storage. He submitted that these activities should be allowed within RPAs. Mr. Davis stated that he wondered if it was clear that accessory uses must be located outside the RPA. Mr. Crafton commented that at Mr. Matthews’ suggestion, he visited a marina in Maryland that was considered state-of-art. In this particular case, there was a lot of property and accessory uses were largely behind the buffer. However, he said the owner also owned several older marinas where there is not a lot of land and additional property cannot be purchased. In those locations, complying with State and local regulations has presented difficulties.

Mr. Crafton suggested that during the next Regulation process this matter be given more consideration in order to provide reasonable relief at least for owners of existing marinas.

Mr. Davis asked if there were any further comments. Ms. Little noted that on Page 4 there was a reference to IDA guidance that staff had thought would be approved but has not been approved yet. She suggested that the last sentence in the first paragraph be deleted. The sentence now says “Please refer to the Intensely Developed Area guidance document for specific information on how development activity within IDAs is managed.”

Mr. Davis thanked Ms. Little for bringing that to the Committee’s attention and called for a motion to forward the document entitled “Resource Protection Areas: Permitted Development Activities” to the full Board for approval in September.

On a motion by Mr. Cowling, seconded by Mr. Mendelsohn, the Committee recommended that this guidance be presented to the full Board in September with the one modification noted by Ms. Little. Mr. Davis called for the vote. All members voted aye.

Mr. Davis called for a motion to recess the meeting. On a motion by Mr. Cowling, seconded by Mr. Mendelsohn the meeting was recessed at 11:25 a.m.

Mr. Davis called the meeting to order at 11:45 a.m. and recognized Mr. Crafton to provide opening comments regarding the “Riparian Buffers Guidance Manual”. Mr. Crafton explained that local governments had requested guidance regarding the Regulations about how to deal with people who wanted to modify their buffers, as allowed in the Regulations or those who were randomly cutting down their buffers.

Local governments were unclear about how to deal with buffer violations. He said other questions had also arisen over the years regarding appropriate penalties, mitigation, vegetation establishment ratios when replanting buffers, and plant survival, to name a few.

Mr. Crafton went on to explain that in 2001, the Department received a grant from the Chesapeake Bay Program's Forestry Work Group to fund the Riparian Buffer Manual. At that time, Alli Baird was hired to work under the direction of Doug Wetmore to create this manual. A work group of technical and scientific experts was created. Another advisory committee of local government staff was also created to advise CBLAD staff.

Mr. Crafton stated that Department staff had discussed the manual with him back in the spring. They had indicated that the document was not aimed at the development process, but instead at homeowners who have buffers and local government staff who must oversee management of these buffers. Staff indicated that there was strong support, from both advisory committees, for the concepts being presented in the document, and no opposition. Mr. Crafton noted that, at that time, he was dealing with many other pressing commitments and did not have the time to review the document. He admitted making the assumption that if there was unanimous support and no opposition from the targeted stakeholders, the document must be okay.

Mr. Crafton said that he presented the manual to the Board at their June meeting, without their prior review, based on this assumption proved to be wrong. Upon review by the Board and himself, a number of major issues were identified that needed to be corrected, especially where the guidance appeared to exceed the Regulations. He said that since that time, significant changes had been made to the buffer guidance and the revised document had been posted on the Department's web site. He also made it clear that the document was to be used as guidance, only and localities were free to use other methods.

Mr. Davis asked if there any questions for Mr. Crafton. There being none, Mr. Davis called for Public Comment.

Mr. Pat O'Hare commented that he and Mr. Toalson had reviewed the buffer manual and were pleased that, except for one item, all comments made by the Home Builders Association of Virginia had been accepted. He said the only one not accepted was on Page 63, first paragraph "...In reviewing shoreline erosion control projects, the locality must confirm that the applicant has made *every* effort to avoid..." He said the use of the word "every" was too strong and required more than was reasonable. Mr. O'Hare suggested that the term "good faith" or "reasonable" be substituted for "every" because it was impractical to expect someone to make "every" effort.

Mr. Davis stated that he had no problem changing the word "every" to "reasonable". Mr. Crafton commented that this must have been an oversight and agreed to the change. Mr. Baxter also agreed.

Mr. Davis thanked Mr. O'Hare for his comments and recognized Ms. Joan Salvati who stated that she represented one of the localities that asked staff to provide guidance for her to use when violations occur. She said that it was not the builders or developers who were in violation, but the homeowner. She shared her experiences with homeowners who been given a notices of violation and negative outcomes for the County in court. She noted that judges will dismiss a case when localities cannot provide written guidance.

Mr. Davis thanked Ms. Salvati for her comments and asked her if she thought the manual would be difficult to enforce. Ms. Salvati stated that she did not believe it would be and on the contrary it would make enforcement easier because she will no longer have to pull documents from everywhere to teach people how to be compliant.

Mr. Davis recognized Mr. Darryl Cook. Mr. Cook stated that he believes local governments need this type of guidance and consider the manual to be a good learning tool. He went on to say that it was a great asset and answered questions. He went on to say that he echoed Ms. Salvati's comments. He said the only change he recommended was in the Preface on Page iii in the last paragraph in the sentence "...However, the Board and the Department staff acknowledge that achieving this model may not always be appropriate." He suggested changing this to read "...this model may not always be achievable.

Mr. Mendelsohn commented that the change was reasonable.

Mr. Davis recognized Mr. John Friedman, Fairfax County, Ms. Beverly Harper, Northampton County. All supported the buffer guidance document. Ms. Catherine Mull, Fairfax County, spoke of her personal experience where homeowners had cleared steep slopes that had generated a lot of concern from the public. She said that she had found different individuals do not have equal expertise, and this Manual was definitely needed to be able to explain the specifics of a buffer. She went on to say that the sections about sight lines and the functions of buffers are very useful for her Northern Virginia area, and the single most important thing people can do to help water quality is to protect a buffer. Mr. Leon Hughes, Prince George County, also expressed his support of the document, saying that he echoed Ms. Salvati's comments and also believed the document answered a lot of questions and would save considerable staff time. He also reminded everyone that staff had to routinely provide answers over and over again that the Manual covered. Dr. Judy O'Kay, Department of Forestry, commented that her review indicated that staff was correct in what they had written regarding replacement values. Mr. Trent Funkhouser, Westmoreland County, supported the buffer manual because he believes that individuals do not want to learn from a lot of talk but would prefer to see the requirements in writing. He said that the Manual will not only save time and dollars for local staff, but he believes this guidance will result in few problems for the Board of Supervisors.

Mr. Davis asked Mr. Funkhouser what he intended to do with the Manual when it was completed. Mr. Funkhouser stated that he intended to duplicate it and hand it out

like candy. Mr. Davis thanked Mr. Funkhouser for his comments and closed the Public Comment period.

Mr. Davis called for comments from Committee members. Mr. Mendelsohn commented that except for a couple of single word changes, he believed the pictures were excellent and agreed with the suggested changes. He said that he believed it important for localities to have the Manual and commended staff and all those who worked on it. He also commented that he appreciated all of those who had provided comments.

Mr. Davis recognized Mr. Cowling who stated that, to be quite honest, he had a lot of problems with the extensiveness of the manual. He said to follow up on a conversation that he had with a nurseryman and then with Mr. Davis regarding replanting rates, he believes the replantings are likely to be so dense that the plants cannot survive. He said the Manual encourages the counties to require bonding or a surety to assure the plants are going to survive but then requires vegetation to be planted so dense it cannot survive. He said this puts people in a catch-22 and this needs to be corrected. He said forestry standard for replacement should not be used that may or may not relate to erosion. He said it was wrong to use cubic centimeters of stump instead of active root zone. He said his personal opinion is that replacement should be based on tree circumference of removed vegetation on a one-to-one ratio, rather than counting dormant areas of a tree stump, because only the area under the bark, the xylem or phloam, is what the roots are depending upon. He said this correlates to the circumference and size of the tree, as opposed to using square centimeters of stump.

Mr. Cowling stated there was nothing in the Regulations regarding bonding, and he would prefer to delete all mention of it in the Manual, since it is not in the Regulations. The localities that have this legal option have the option whether the Board mentions it to them or not. He went on to say that he did not believe the Board should be encouraging something that is not in the Regulations.

Mr. Cowling went on to reference the picture on Page 22, bottom of the page, noting that the sight line from this house would likely be closed up within 30 days. He said the picture should not be used.

Mr. Cowling referred to Chapter 3.1, Page 25, where it says "...All vegetation on and at the top of a stable bank or slope should be retained". He noted this statement could be contrary to the statement in the manual about sight lines. He said that certainly concern should be shown, but the statement should not use the word "all".

Mr. Cowling referred to Page 26, where it states "...In multi-family, apartment, condominium or townhouse developments, each individual unit should not expect to have vistas of the water created through removal of vegetation....A vista to the water may be provided from a common area, rather than creating multiple individual views." He said that what he saw here was individual having fee simple deeds to their property, the same as single family homes, and did not believe the Board should discriminate against this

ownership by telling one town house they could have a vista and another that they cannot. He said he believed this statement should be changed.

Mr. Cowling referred to Page 26, under Properties with Impacted Buffers, where it states "...Landowners with structures encroaching upon the buffer should limit removal of any additional vegetation to achieve sightlines. Pruning may be sufficient." Mr. Cowling stated that the Board cannot say that the individuals cannot have a sightline when the homeowner has already been told that he has to replant whatever he has destroyed. He said this is double jeopardy.

Mr. Cowling referred to Page 27, under Replacement Planting, where a performance guarantee is being encouraged and noted this is not in the Regulations. Also on Page 27, noting the next to the last bullet where it says "...No vegetation should be removed, nor should sightlines be chosen, until construction on the site is finished". He said this would severely limit marketing and is a gross infringement on property rights. He said this could limit the value for someone who wanted to sell their lot. He said he did not believe the Board could legally do that and the Board would be in affect seizing, value which he believed to be illegal. He said the statement should be deleted.

Mr. Cowling referred to Page 28, Item 1 (a), where it states "...The plans should indicate the onsite location of existing trees and shrubs, and indicate the species and size of trees proposed for removal in the area of the proposed sight line" and b)".....The plan should identify the location, size, and species of proposed replacement plantings." Mr. Cowling stated that this wording appeared all through the document. He said to ask homeowners to identify species is asking too much. He said that certainly the size of the tree should be asked, but it is not reasonable to ask the average homeowner to identify what kind of cottonwood that is, and the homeowner probably would not know whether the tree is an evergreen or a hardwood. He said any references for the homeowner to identify the species should be removed all through the manual.

Referring to homeowners having to select a sightline, on Page 28, he said the third bullet under "Plan Elements for a Sightline Request" should be stricken. He said the Board should allow a property owner the ability to enhance their property values within the limits of the Regulations.

Mr. Cowling referred to Page 30, under review criteria for sightline and vista clearing projects, where another reference to bonding that should be stricken.

Mr. Cowling referred to Chapter 3.2, Page 35, 4th bullet, under Conclusions, that states "...Plantings along the side of paths should be used to mitigate the effects of runoff and prevent soil erosion." He said this is not required in the Regulations for a path. A path could be as simple as a footpath and there is no requirement in the Regulations to line that path with vegetation.

Mr. Cowling referred to Page 35 under "Recommend Procedure for Local Governments", Item 2 c, the reference to "...The location, name, and size of replacement

plantings for vegetation removed....”that appears again under Item 3 c on Page 36, “...Location of replacement plantings should be identified at this time, to encourage even coverage of vegetation within the buffer”; and Item 5 ii) “...If the plants have not survived, replacement plants must be installed and a new performance agreement could be issued to cover the new plantings.” Mr. Cowling stated all of these references needed to be deleted because the Board has no authority to make individuals do this.

Mr. Mendelsohn asked if paths were defined as either foot paths, paved, etc. in the Regulations. Mr. Davis stated he thought the Regulations only referenced access paths. Mr. Cowling noted that this issue and ditches needed to be revisited during the Regulatory review in 2004.

Mr. Cowling referred to Chapter 3.3, “General Woodlot Management” and noted that it was misnumbered and should read 3.3, not 3.2. He also referred to the first sentence under the Purpose “:local governments to help property owners who are *trying* to maintain a health, functioning buffer”. He said there is an expectation that homeowners are doing it, not trying to do it. He said the term “trying to” should be deleted.

Mr. Cowling referred to Page 41, second line: “...Removal of any material in the 25 feet closest to a stream...” He said there is no delineation of a 25 foot limit anywhere in the Regulations, other than for Agriculture. He said this statement goes where the Regulations do not authorize the Board to go. He said there were exceptions for Agriculture and Silviculture but not for general woodlot management. Therefore, this statement should be taken out.

Mr. Mendelsohn asked if the statement would be correct if it were 100 feet.

Mr. Cowling responded that if you make the number 100 feet then you cannot limit removal of any material, because that would impact the ability to have a sightline.

Mr. Crafton suggested that this could be semantics and was not saying that local government may not shall not could not allow any vegetation in that 25 foot area to be removed. He said a part of the purpose of the manual went back to Chapter 2, where the benefits of the buffer is discussed. He said that a part of this is to provide education to those who do not understand these things. In this particular case there is scientific evidence that the 25 feet next to the stream is scientifically and biologically important, so changes within that area should be avoided. Mr. Crafton restated that the guidance says you should avoid and does not say you must avoid or you shall avoid. Mr. Crafton commented that he had tried to be very careful about how things were said to make it clear that it is not required; we are simply saying that it is a good idea. Mr. Crafton said he considered a number of items Mr. Cowling had pointed out fall to fall into this category. Mr. Crafton went on to explain that staff had spoken with the localities, and some already have these types of provisions in their codes and other ordinances, such as tree preservation or landscaping ordinances.

Mr. Cowling made the point that this is supposed to be a guidance manual for the Board's Regulations, and if something is not in the Regulations, then it does not belong in the manual. He said there should be recognition that there are other related laws in the Code of Virginia such as having a certain population per mile in order to have a tree regulation. He said in this instance, it could be that this section of the code is being pushed. He said he was not saying that the information was not scientifically valid, or that it is an area they should not be looking at when the Regulations are reviewed, but is saying the information is not in the Regulations, and to discuss things that are not in the Regulations is going beyond the Regulations.

Ms. Little commented that it might be useful to compare some of these issues to the perennialty guidance, which establishes a whole series of protocols, none of which are mentioned in the Regulations. She said the information is there for guidance.

Mr. Cowling responded that there are references in the Regulations to scientifically valid means of determining perennial flow, and this authorized the Board to identify some. He said there is no scientifically valid reference to 25 versus 26 feet in the Regulations.

Mr. Davis commented that the document is a guidance manual. It does not necessarily mean that localities must take it exactly verbatim, but there is some flexibility. The intent was to come up with a buffer manual that is a buffer manual.

He went on to say that he had discussed with Mr. Crafton scientific data that should be added as an to the manual that deals with the effectiveness of the 100-foot buffer and why it serves the purpose, so that this supports the requirement in the Regulations for the 100-foot width. He said he believes it should be very clear to localities that they do have flexibility and that they would be able to make adjustments. He went on to say that he believes there were changes that need to be made, but there still needs to be some flexibility. He pointed out the differences between Mathews County and the City of Petersburg as an example. He also said that he did not believe there would ever be a Manual where everyone agreed on every single word. He asked Mr. Cowling to continue.

Mr. Cowling referred Page 43 , second paragraph regarding "...a certified arborist, degreed horticulturalist.." He said this requirement should be taken out because there is no requirement in the Regulations for this. He said that, for a small landowner this is an imposition. He also noted that the statement "...all tree removal is subject to approval by the local government is okay, but he objected to the statement "...is limited to those trees that are dead, dying or diseased..." Mr. Cowling commented that here is no such statement in the Regulations.

Mr. Cowling referred to Page 48, where it says, under "Woodlot Evaluation" "...consultation with a professional arborist..." He said this is not in the Regulations.

Mr. Davis commented that there are many times when having a professional arborist or forester to come out to make recommendations is beneficial to the home

owner. He said there are times when thinning is necessary for the removal not only for site-lines but for the growth of the trees.

Mr. Cowling referred to Page 51, where the guidance says under bullet 5 that "...Thinning should only be done according to an approved plan based on recommendations of a professional arborist or forester, or as part of a ...". Mr. Cowling noted that these two statements are tied together, and very simply, the Regulations do not require it. Mr. Cowling pointed to statements on Page 52 regarding bullet 1, and bullet 3, stating that references to this are not in the Regulations. He also pointed out that on Page 53, Item 3a references a performance guarantee again.

Mr. Cowling pointed out that there are situations where individuals were forced to purchase 5 acres when originally purchasing their property, even though they may not have wanted or needed 5 acres. He said it was simply that it had been zoned that way, and to require homeowners on waterfront property to meet this guidance is unreasonable. He said this kind of zoning was adopted to discourage development in agriculture zones.

Mr. Cowling referred to Page 61, "Shoreline Erosion Control", where it references the VIMS Regulations and others are being quoted. He questioned whether these should be referenced, since they may change in the immediate future.

Mr. Davis commented that when Regulations are amended by a locality a reference is included that says as "amended". Mr. Cowling pointed out that there were a number of references made to these publications that may be fine today but not tomorrow, and it could be a problem when someone else's sources are being used. Mr. Davis commented that he saw the guidance as a living document that could change next week, month or year. Parts could be taken out or put in or changed in some way.

Mr. Cowling asked about the picture on Page 64 that shows no shoreline. Ms. Baird explained that both pictures on this page are of the same site. Mr. Davis asked Ms. Baird if she could do a little cut and past and slide them together. Ms. Baird noted that this would be difficult because of the difference in scale.

Mr. Cowling referred to Page 66, first sentence of the last paragraph, where the word "all" was used more than once unnecessarily, and Page 66 was his final reference.

Mr. Davis said that he also had comments and stated that he had spoken with a number of localities and Planning District Commissions about the Manual. He said that across the board he was told that for restoration pertaining to encroachments into the buffers, the replanting ratios were higher than the planting ratio for establishing a new buffer. He said that this is typically reflective of what is being recommended in this document. Mr. Mendelsohn commented that he agreed the ratio, as presented in the manual, was correct.

Dr. Judy Okay, Department of Forestry commented that when you are talking about reestablishment or restoration, generally there is consideration given to allowing

for regeneration to take place; but when you have someone who has a violation and is asked to restore the damage, they are not likely to quit mowing but rather will mow around the trees, and there will be no regeneration.

Mr. Cowling responded that the Board cannot ask a landowner to replant a population that cannot survive at grow-out, and he believes some of the replanting rates are too dense. Also, regarding restoration, the Manual is saying on one acre or more you can just let it grow back, but on less than one acre you have to replant. He stated he did not believe the Board has the authority to discriminate in this way. He said he believes everyone should have the same rights, and allowing mother nature to take her course, as long as the erosion and sediment controls are met under other laws, is probably a preferable outcome in the long run of a twenty year grown out. He also commented that this is a relatively new science and mother nature knows more than the Board does; and most people are still trying to figure it out. He reminded members that the Bay Model, that millions of dollars has been spent on and has been worked on by the best minds, has a tendency to break down when you apply it to a small area. He said the Board needs to be careful. Individual mistakes are fixable. However, look at Eastern Europe where when you make a systemic mistake in a central control situation, you have ecological disasters of vast proportions. He said the Board has to be very careful where there are so many unknowns.

Mr. Davis thanked Mr. Cowling for his comments and noted that he had a few comments. He said on Page #43, under “Noxious Weeds”, the Regulations allow you to remove noxious weeds and requested that this section be expanded to further explain what is noxious, and what is invasive can be different between individuals. He said poison ivy is maybe an invasive weed but may not be considered “noxious”, and thought the Board needs to be very careful what is being talked about in this section. He thought it best to rewrite this section.

Ms. Baird pointed out that the terms are defined in a break-out box, so that should provide clarification. Mr. Crafton stated that he had spoken with several commenters about poison oak and poison ivy needing to be removed because of severe allergic reactions among family members. He noted that the guidance does not intend to limit such reasonable actions.

Mr. Davis went on to comment about performance guarantees. He agreed that the Regulations do not talk about performance guarantees, but he found in discussing this issue with localities that, in order for the Regulations to have any teeth to them regarding buffer restorations, the localities believed they need to require some type of surety to guarantee that someone who has violated the buffer replants it and assures that the vegetation will survive.

Mr. Cowling asked if Mr. Davis meant that a surety was appropriate for violators only, and not the typical homeowner who just wants to create a sightline. Mr. Cowling commented that if someone wants to just clean up a sight line that has become overgrown, he should not be required to provide a surety.

Mr. Crafton commented that he understood the only time this is used is when you have violators with restoration projects. Mr. Davis commented that another time a surety might be used is for mitigation vegetation at a time of the year, such as winter, when vegetation cannot be planted and expected to grow.

Mr. Cowling commented that he had no problem with a surety being used for the purposes stated by Messrs. Crafton and Davis, but when an average homeowner wants to work on his sight line, he could not agree that the person should have to up a surety.

Mr. Davis referred to Page 52 and read the first bullet that stated "...On first and second order streams, no dead tree, log, or other large woody debris should be removed from within the 25 foot area closest to the stream." Mr. Davis suggested that this bullet be deleted.

Mr. Mendelsohn asked staff what they were thinking when they wrote that. Ms. Baird responded that the main study was what would be most beneficial for first and second ...where there are streams that have fish that are juvenile. Large logs and leaf litter and twigs that fall into the water are a source of food for many of the organisms ...insects, flies, bugs that are eaten by the fish. She said if you have situations where this undergrowth is removed you will have as complete ecology of those kinds of organisms that support the larger fishes. She said that talking about it came from the many documents that say large organic debris is very significant source for food and shelter for aquatic species.

Mr. Cowling commented that he did not question the science at all, but this simply is not in the Regulations, and whoever reviews the Regulations in 2004 could add this to their list of issues to be considered.

Dr. Okay stated that there are two very good graphics that illustrate the varying functions for different zones within buffers and for buffers of different widths.

Mr. Davis stated that from a safety standpoint, you could have a tree that falls over and based on this, the suggestion would be in the guidance that you cannot remove that tree. Ms. Baird commented that the statement is not saying that you cannot remove the tree. It is saying that if you want to have a full ecological system, you might want to leave it in place. She went on to say that it is not mandatory and is not a part of the Regulations. She stated that she was just trying to say that it is an important feature of a healthy stream. Mr. Davis suggested that Ms. Baird rewrite the sentence to say what she just said.

Mr. Davis asked that scientific data be added in the appendices. He noted that he had discussed this with Mr. Crafton and the information was available regarding the effectiveness of a 100-foot buffer. Mr. Mendelsohn suggested putting in Dr. Okay's graphic as well.

Mr. Davis asked that the Preface be strengthened to indicate that the buffer manual is guidance and should be used as guidance, not a Regulation, but is based in part on the Regulation itself.

Mr. Davis stated that as he interpreted the guidance, it does not preclude the reasonable pruning of trees for sight lines. Mr. Crafton commented that it was not intended to. He said he was referring to Page 21, where it says“(1)Trees may be pruned or removed as necessary to provide for sight lines and vistas, provided that where removed they shall be replaced...”

Ms. Little commented that the statement was a quote from the Regulations and could not be changed.

Ms. Little further commented that the reference for diseased or dying trees is directly from Section 9 VAC 109-20-130.5.a(3) of the Regulations.

She pointed out that in that same section all of the references are based on sound horticultural practices.

Ms. Little asked Mr. Davis if he was suggesting that the definition of noxious weeds be revised or deleted. Mr. Davis said he did not believe that the Regulations have information about noxious weeds and believed the Board needed to be clear about exactly what is meant. Mr. Davis referenced Page 43 and asked where the definition came from. Ms. Baird responded that it came from the dictionary. Mr. Davis commented that he was confused about what Ms. Baird was saying and asked that the guidance be expanded further, and change the definition.

Mr. Mendelsohn suggested that for the purpose of the section, noxious weeds encompasses any invasive species that have gotten out of control and have become harmful to the health and survival of the woody vegetation in buffers.

Mr. Crafton commented that staff had discussed the same types of concerns as were being discussed now, and it would be impractical to try to list all of the possible noxious and obnoxious weeds.

Mr. Davis stated that ended his comments.

Mr. Mendelsohn commented that he had not expected to go through the document is this kind of detail. He said the public comment that they heard was very supportative, and frankly with all due respect for Mr. Cowling, he did not agree with most of what he said. He went on to say that the Board should not be in the position of rewriting a document to the degree Mr. Cowling suggested. He said that he agreed with a few of comments that were made regarding cleanup, he agreed, but said he could find only five changes plus the added appendices that are really needed. Mr. Mendelsohn also noted that it is important to recognize that the guidance can be changed, if needed, and that it is not a Regulation. He said it is a valuable document to be used in the field.

Mr. Davis commented that he based his comments on issues that were discussed during the meeting. Mr. Davis asked for any comments. Mr. Crafton stated that he would very much like to move the guidance along because of the time constraints. He noted the extension of the grant deadline, but pointed out that staff needs the Board's approval of this in order to print and distribute it and provide training before the end of December. Mr. Davis commented that he did not want to hurry the process but would like to meet the deadlines to help localities meet their deadlines.

Mr. Crafton commented that he echoed Mr. Mendelsohn's comments and that he understood Mr. Cowling's concerns. He said that he believed that it can be made clear enough in the Preface that the document constitutes guidance not the Regulations. He said the document will help people understand the value of buffers, and why they need to be protected and there are effective ways to do this.

Mr. Mendelsohn motioned to recommend this Manual to the full Board for approval at the September meeting with the following suggested changes: (1) the added ; (2) the strengthening of the Preface, the clarifying that this is a guidance document; (3) Page iii, at the bottom, changing "appropriate" to "achievable"; (4) Page 26, adding "removal of" under the picture; (5) Page 39, correcting the Chapter Number from 3.2 to 3.3 and clean up the sentence that says "trying to maintain". (Mr. Mendelsohn stated he was not going to offer any recommended language except to say that people should be doing more than trying); (6) the modification that was discussed on Page 52 regarding first and second order streams; and (7) on Page 63, changing "every" to "reasonable". He said he feels these are the only changes that are really necessary.

Mr. Davis asked Mr. Cowling for final comments. Mr. Cowling commented that he had done a lot of work and it was all marked in his buffer manual, comparison, and the bottom line is that he believes a lot of this language is going to translated into local ordinances without administrative codes to back it up. Thus localities will have a hard time making a legal case of a violation. He said, for instance, if he were taken to court because he owns a townhouse and has a sight-line and the locality says he is not supposed to have a sight-line, and the county official puts the guidance manual up, if he puts the Regulations up, the Regulations take rule – case dismissed. He said he does not want to set localities up for this to happen by having too much stuff in the manual that is not in the Regulations. Mr. Cowling said his main thrust has been that even though it may be good science or areas that the Board needs to go, maybe directions for the future but the Regulations are the Regulations, and if you are arguing from the Regulations when the gavel goes down vs something copied out of a guidance manual you are going to get the decision that was handed down in Richmond that you went too far. He said not only do you have to look at the science and what the Board would like to do or even what might be best, you have to go with the Regulations you already have.

Mr. Crafton commented that staff had been working with local governments who are writing their ordinance amendments, including meetings, telephone calls and exchanging drafts and so forth. He said that as staff reviews what they are submitting to us, we will catch things that they propose to put in their ordinances that do not relate to

the Regulations. He also said that staff has a history of doing that, including the original local ordinances in the early 1990s, when localities wanted to put things in their ordinances and CBLAD said they either could not do that or you have to cite another authority from the Code of Virginia that allowed them and reference that the source. Mr. Crafton said he appreciated Mr. Cowling's concerns, but he does not believe any locality in Tidewater will put anything in their ordinance from the manual that is not supported by the Regulations, because staff will catch it. He said he didn't believe the fear would come a reality.

Mr. Cowling commented that it begged the point that if it is necessary to tell them it is not in the Regulations, then why did the Board lead them down that path to start with.

Mr. Crafton proposed that the information was useful to build a bigger picture of what is involved in managing buffers.

Mr. Davis commented that the members had heard from localities during the meeting, indicating that guidance is necessary. He said this is not a perfect document, but it is much better than the document that came before the Board in June. He said he was ready to move on and would like to see the changes that had been talked about and did not believe they were substantial changes, and he wanted to move the document on to the full Board.

Mr. Crafton said that there was a motion on the table and there needed to be a second. Mr. Mendelsohn commented that he had already motioned and that he would move it again. Mr. Cowling seconded with the condition that staff review and consider his comments. Mr. Crafton agreed.

Mr. Davis asked that this be made part of the record. Mr. Mendelsohn said that he motioned to move this as a recommendation for the Board's adoption at the September meeting, with the changes that he had previously identified. Mr. Davis asked again for a second. Mr. Cowling stated that he would second only providing that staff would consider the items that he had marked and passed along to Mr. Crafton. Mr. Mendelsohn asked that staff please review the other comments. Mr. Davis called for a second then seconded the motion. Mr. Davis called for the vote. All members voted aye. Mr. Davis noted that the motion passed.

Mr. Davis commented that he looked forward to getting the revised document so that it could be passed along to the full Board prior to the September meeting.

Mr. Davis called to recess the meeting at 1:30 p.m. Mr. Davis called the meeting to order again at 2:00 p.m. and asked Mr. Crafton to present the Discussion of Intensely Developed Areas.

Mr. Crafton advised that conversations with Hampton Roads localities and the Hampton Roads Planning District Commission (HRPDC) indicated they were in the

process of developing proposals for designating Intensely Developed Areas (IDAs). He said that during this process, a question arose over a statement in Section B of 9 VAC 10-20-100 that they believed needed an interpretation: the statement regarding “little of the natural environment” remaining. Mr. Crafton turned the discussion over to John Carlock, of the Hampton Roads Planning District Commission staff. Mr. Carlock thanked Mr. Crafton for the opportunity to present the issues on behalf of the Hampton Roads localities.

Mr. Carlock advised that the IDA issue had been discussed with the Policy Committee in 2002, and that questions about IDAs had been around for a long time, and the use of an IDA, depending on the location, warranted different solutions

Mr. Carlock explained that in the Hampton Roads Area, infrastructure was already in place, the development pattern had been set, and this development pattern was dense. He said that pre-Bay Act homeowners became severely restricted in their use of their property, and there is a need to grow with smart development.

Mr. Carlock said that the use of IDAs is one way the legal process could be addressed in a less cumbersome manner. Mr. Carlock went on to explain the issue of the IDA expansion demonstrating the difference between a shoreline with multi-tier vegetative buffer versus a shoreline devoid of a multi-tier vegetative buffer, noting that in much of the area the three tiers of understory, leaf litter and canopy do not exist. He then provided several aerial views that showed densely populated areas on the water. His presentation also identified the resource protection area (RPA) boundary, noting that most homes were already located well within its boundaries. Mr. Carlock also provided an example of a home that was situated within the RPA, where the homeowner requested an accessory structure that, under normal circumstances, would have required the formal exception process to be used.

Mr. Carlock explained that in view of the buildout in the Hampton Roads area, the use of a designation of an intensely developed area was the best possible solution. However, interpretation of the phrase “a little of the natural environment remains” needs to be made in order for them to continue with their plans to expand their IDAs.

Mr. Mendelsohn commented that there is an issue regarding residential rights. However, he believes the definition of what “little of the natural environment remaining” means requires more thought, and he did not believe it possible to provide a definition at this meeting. He asked for more time to consider the interpretation.

Mr. Carlock thanked the committee for the opportunity to present their issue. Mr. Davis asked Ms. Little to present staff’s presentation regarding IDAs.

Ms. Little commented that even though the presentation was a bit long, she would try to go through it as quickly as possible. She said that the presentation would set the stage for discussion on this issue.

Ms. Little said that the IDA requirements were covered under Section 9VAC 10-20-100, which permits local governments to designate IDAs as overlays to both the RPAs, and the RMAs. She said that IDAs are intended to serve as redevelopment areas in which development is concentrated as of the local program's adoption date. She said that in the 2001 regulation amendments, the only major change was the clarification that the IDA must be based on conditions that were in effect as of the original local program adoption date.

Ms. Little explained that Section 9VAC 10-20-100.B outlined the criteria for designating IDAs and that, under this subsection, IDAs are to be areas of existing development and infill sites where little of the natural environment remains. She said that traditionally "little of the natural environment remains" suggests highly impervious, highly urban.

Ms. Little said that in addition to the criteria "little of the natural environment remains", an IDA must have at least one of the following conditions, also at the time of the local program adoption; there should be either 50 percent or more impervious coverage, public water and sewer or constructed storm drainage system, or housing density equal to or exceeding 4 units per acre. She explained that the Regulations acknowledge development activities, i.e. expansion of impervious coverage and additional encroachment into the buffer area, may occur in IDAs due to the lack of buffer vegetation and the concentration of development already in existence.

Ms. Little explained the Regulations require that local comprehensive plans must to evaluate and address potential water quality improvements for redevelopment areas, including any IDAs. Therefore, any proposed IDA should also be identified in the local comprehensive plan as a redevelopment area. She stated that within an IDA, both development and redevelopment are permitted, but other water quality requirements must be met and a water quality impact assessment (WQIA) is also required.

Ms. Little said that one of the concerns during the development of the Regulations regarding IDAs was that the IDA designation be added as an overlay to an RMA or RPA, allowing that the RPA designation remains within an IDA. She said that even though revegetation of the buffer may not be required, buffer vegetation, that remains should be protected and the locality should consider how to establish a vegetated buffer over time.

Ms. Little explained that 1989 a document entitled "Explanation of Substantial Changes," pertaining to the original regulations, noted that an IDA would be an area of little natural environment and would be indicative of urban development. In 1992 a study group recognized the importance of an IDA and noted that the focus was encouraging development in areas where development is already concentrated and addressing water quality issues associated with heavily urbanized areas.

Ms. Little said that the Local Assistance Manual addressed this same issue. In the early 1990s when local governments developed their Phase I programs, only 17 chose to designate IDAs. She reviewed these and showed photographs of them. Staff found that these were primarily industrial or commercial lands and highly impervious. Ms. Little

said that one of the unusual approved IDAs is in Prince William County. Review by staff indicated that IDAs appeared not to be associated with mapped RPAs; rather they were associated with interior land areas. Staff found that “the real and only benefit to IDA designation was the ability to waive buffer requirements without the imposition of additional best management practices or an exception process.

Ms. Little advised that Fairfax County is proposing an IDA in the Tyson’s Corner Urban center, and has prepared a position paper. She said this project has the same historical precedent, and the County is assessing costs and benefits. She said some HRPDC localities have indicated their desire to designate IDAs in areas dominated by residential development.

Ms. Little explained that even though the HRPDC localities want to develop a regional approach to IDAs, each has different development and stormwater scenarios. Ms. Little briefly explained the differences between the Cities of Virginia Beach, Hampton, Norfolk, Newport News, and Chesapeake.

Ms. Little’s summary of the presentation noted that the Hampton Roads localities are interested in designating primarily IDAs in residential areas. Since the Regulations allow new principal structures can be permitted on existing lots provided certain conditions are met, and existing principal nonconforming structures may be expanded, both through an administrative process, the only activity of concern is the construction of accessory structures within the RPA. She said that when the Regulations were first developed it was the Board’s intent that IDAs be designated so that accessory structures could be permitted by right in existing residential areas with RPAs. She said the IDA concept seeks to reduce the level of nonpoint source pollutants, and property owners will probably not install or retrofit onsite BMPs to achieve pollutant reductions for accessory structures.

Ms. Little advised that staff had worked with the HRPDC workgroup, and had met with them several times last year. At the October 29, 2002 Policy Committee meeting, the IDA workgroup agreed to provide information from their local attorney regarding the “general permit” concept. However no information relating to this issue was ever submitted to the Department. Recently, Mr. Crafton was contacted to resume IDA discussions. She indicated that the HRPDC is asking the Board to interpret the term to mean the existing buffer area is not sufficient to provide for a full range of buffer functions and benchmark pollution removal established in the Regulations. They desire this interpretation now because of the December 31, 2003 deadline for revising local programs to bring them into compliance with the Regulations.

Ms. Little advised that the Board is now being asked to consider approving IDAs to be designated for less intensely developed residential areas, primarily for the purpose of more easily permitting accessory structures, rather than supporting redevelopment activities or infill development on previously undeveloped parcels. Given the timeframe and the concern that a Board interpretation needs to be carefully considered to avoid unforeseen consequences, she suggested that staff work with individual localities on the

IDA issue, and that they have IDA language inserted into their Bay ordinances as a “placeholder” until the issue can be resolved. She also suggested that localities continue to investigate the “general permit” concept for accessory structures in RPAs, where necessary.

Mr. Crafton suggested that placeholder verbiage be crafted, and there was still the idea of a general permit. Messrs. Mendelsohn, Cowling and Davis discussed the presentation and agreed that hearing from Mr. Carlock and Ms. Little, many questions needed to be answered. Mr. Mendelsohn suggested that more information be gathered from other localities and that this issue be added to a future Board meeting agenda. They agreed that this could not be resolved at the September Board meeting, and the issue should be referred to the Ad Hoc Advisory Committee for resolution by the end of the year.

Mr. Carlock commented that he appreciated the time that staff had already provided in identifying the issues surrounding the idea of an IDA expansion, and they would provide additional information regarding the general permit as soon as possible.

Mr. Davis suggested that staff get this information out to all of the localities. He recognized Mr. Crafton for staff’s presentation regarding the Shorelands project.

Mr. Crafton described the Shorelands project noting it is a way to assist localities, with their comprehensive plans, providing a means of in identifying shorelands that are most suitable for development and recommendations for mitigating the impact of development on less suitable lands. He said this is not standard guidance and that localities will not be required to use the information. He asked if the members believed comments should be obtained from the public. Messrs. Davis and Mendelsohn commented that because the information is informal in nature, public comment was not needed. However, they agreed the information should be placed on the web page.

Mr. Cowling noted that the document is for informational purposes only. Mr. Mendelsohn agreed and motioned that to be correct, and there is no need for public comment. Mr. Cowling seconded the motion. All members voted aye.

Mr. Davis called for Other Business. There being none, Mr. Davis called for a motion to adjourn the meeting. Mr. Cowling motioned, Mr. Mendelsohn seconded. The meeting was adjourned at 3:15 p.m.