Title 10.1 - Chapter 21 - Chesapeake Bay Preservation Act

§ 10.1-2100. Cooperative state-local program.

A. Healthy state and local economies and a healthy Chesapeake Bay are integrally related; balanced economic development and water quality protection are not mutually exclusive. The protection of the public interest in the Chesapeake Bay, its tributaries, and other state waters and the promotion of the general welfare of the people of the Commonwealth require that: (i) the counties, cities, and towns of Tidewater Virginia incorporate general water quality protection measures into their comprehensive plans, zoning ordinances, and subdivision ordinances; (ii) the counties, cities, and towns of Tidewater Virginia establish programs, in accordance with criteria established by the Commonwealth, that define and protect certain lands, hereinafter called Chesapeake Bay Preservation Areas, which if improperly developed may result in substantial damage to the water quality of the Chesapeake Bay and its tributaries; (iii) the Commonwealth make its resources available to local governing bodies by providing financial and technical assistance, policy guidance, and oversight when requested or otherwise required to carry out and enforce the provisions of this chapter; and (iv) all agencies of the Commonwealth exercise their delegated authority in a manner consistent with water quality protection provisions of local comprehensive plans, zoning ordinances, and subdivision ordinances when it has been determined that they comply with the provisions of this chapter.

B. Local governments have the initiative for planning and for implementing the provisions of this chapter, and the Commonwealth shall act primarily in a supportive role by providing oversight for local governmental programs, by establishing criteria as required by this chapter, and by providing those resources necessary to carry out and enforce the provisions of this chapter.

(1988, cc. 608, 891.)

§ 10.1-2101. Definitions.

For the purposes of this chapter, the following words shall have the meanings respectively ascribed to them:

"Board" means Virginia Soil and Water Conservation Board.

"Chesapeake Bay Preservation Area" means an area delineated by a local government in accordance with criteria established pursuant to § 10.1-2107.

"Criteria" means criteria developed by the Board pursuant to § 10.1-2107 for the purpose of determining the ecological and geographic extent of Chesapeake Bay Preservation Areas and for use by local governments in permitting, denying, or modifying requests to rezone, subdivide, or to use and develop land in Chesapeake Bay Preservation Areas.

"Department" means the Department of Conservation and Recreation.

"Director" means the Director of the Department of Conservation and Recreation.

"Person" means any corporation, association, or partnership, one or more individuals, or any unit of government or agency thereof.

"Secretary" means the Secretary of Natural Resources.

"State waters" means all waters, on the surface or under the ground, wholly or partially within or bordering the Commonwealth or within its jurisdiction.

"Tidewater Virginia" means the following jurisdictions:

The Counties of Accomack, Arlington, Caroline, Charles City, Chesterfield, Essex, Fairfax, Gloucester, Hanover, Henrico, Isle of Wight, James City, King George, King and

Queen, King William, Lancaster, Mathews, Middlesex, New Kent, Northampton, Northumberland, Prince George, Prince William, Richmond, Spotsylvania, Stafford, Surry, Westmoreland, and York, and the Cities of Alexandria, Chesapeake, Colonial Heights, Fairfax, Falls Church, Fredericksburg, Hampton, Hopewell, Newport News, Norfolk, Petersburg, Poquoson, Portsmouth, Richmond, Suffolk, Virginia Beach, and Williamsburg.
(1988, cc. 608, 891; 2005, c. 41; 2012, cc. 785, 819.)

§ 10.1-2102.
Repealed by Acts 2012, cc. 785 and 819, cl. 2.

§ 10.1-2103. Powers and duties of the Board.

The Board is responsible for carrying out the purposes and provisions of this chapter and is authorized to:

1. Provide land use and development and water quality protection information and assistance to the various levels of local, regional and state government within the Commonwealth.

2. Consult, advise, and coordinate with the Governor, the Secretary, the General Assembly, other state agencies, regional agencies, local governments and federal agencies for the purpose of implementing this chapter.

3. Provide financial and technical assistance and advice to local governments and to regional and state agencies concerning aspects of land use and development and water quality protection pursuant to this chapter.

4. Promulgate regulations pursuant to the Administrative Process Act (§ 2.2-4000 et seq.).

5. Develop, promulgate and keep current the criteria required by § 10.1-2107.

6. Provide technical assistance and advice or other aid for the development, adoption and implementation of local comprehensive plans, zoning ordinances, subdivision ordinances, and other land use and development and water quality protection measures utilizing criteria established by the Board to carry out the provisions of this chapter.

7. Develop procedures for use by local governments to designate Chesapeake Bay Preservation Areas in accordance with the criteria developed pursuant to § 10.1-2107.

8. Ensure that local government comprehensive plans, zoning ordinances and subdivision ordinances are in accordance with the provisions of this chapter. Determination of compliance shall be in accordance with the provisions of the Administrative Process Act (§ 2.2-4000 et seq.).

9. Make application for federal funds that may become available under federal acts and to transmit such funds when applicable to any appropriate person.

10. Take administrative and legal actions to ensure compliance by counties, cities and towns with the provisions of this chapter including the proper enforcement and implementation of, and continual compliance with, this chapter.

11. Perform such other duties and responsibilities related to the use and development of land and the protection of water quality as the Secretary may assign.

12. Enter into contracts necessary and convenient to carry out the provisions of this chapter.
(1988, cc. 608, 891; 1997, c. 266.)

§ 10.1-2104. Exclusive authority of Board to institute legal actions.

The Board shall have the exclusive authority to institute or intervene in legal and administrative actions to ensure compliance by local governing bodies with this chapter and with any criteria or regulations adopted hereunder.
(1988, cc. 608, 891; 1997, c. 266.)

§ 10.1-2104.1. Program compliance.

Program compliance reviews conducted in accordance with § 10.1-2103 and the regulations associated with this article shall be coordinated where applicable with those being implemented in accordance with the Erosion and Sediment Control Law (§ 10.1-560 et seq.) and associated regulations and the Stormwater Management Control Act (§ 10.1-603.2 et seq.) and associated regulations. The Department may also conduct a comprehensive or partial program compliance review and evaluation of a local government program more frequently than the standard schedule.

Following completion of a compliance review of a local government program, the Department shall provide results and compliance recommendations to the Board in the form of a corrective action agreement should deficiencies be found; otherwise, the Board may find the program compliant. When deficiencies are found, the Board will establish a schedule for the local government to come into compliance. The Board shall provide a copy of its decision to the local government that specifies the deficiencies, actions needed to be taken, and the approved compliance schedule. If the local government has not implemented the necessary compliance actions identified by the Board within 30 days following receipt of the corrective action agreement, or such additional period as is granted to complete the implementation of the compliance actions, then the Board shall have the authority to issue a special order to any local government imposing a civil penalty not to exceed $5,000 per day with the maximum amount not to exceed $20,000 per violation for noncompliance with the state program, to be paid into the state treasury and deposited in the Virginia Stormwater Management Fund established by § 10.1-603.4:1.

The Administrative Process Act (§ 2.2-4000 et seq.) shall govern the activities and proceedings of the Board under this article and the judicial review thereof.
In lieu of issuing a special order, the Board is also authorized to take legal action against a local government to ensure compliance.
(2012, cc. 785, 819.)

§ 10.1-2105.

Repealed by Acts 2005, c. 41, c. 2.

§ 10.1-2106. Powers and duties of Director.

A. In addition to the other responsibilities set forth herein, the Director shall carry out management and supervisory responsibilities in accordance with the regulations and policies of the Board. In no event shall the Director have the authority to adopt regulations.

B. The Director shall be vested with all the authority of the Board related to this article, including the authority granted by § 10.1-2104, when it is not in session, subject to such regulations as may be prescribed by the Board.
(1988, cc. 608, 891; 1997, c. 266; 2005, c. 41; 2012, cc. 785, 819.)

§ 10.1-2107. Board to develop criteria.

A. In order to implement the provisions of this chapter and to assist counties, cities and towns in regulating the use and development of land and in protecting the quality of state waters, the Board shall promulgate regulations which establish criteria for use by local governments to determine the ecological and geographic extent of Chesapeake Bay Preservation Areas. The Board shall also promulgate regulations which establish criteria for use by local governments in granting, denying, or modifying requests to rezone, subdivide, or to use and develop land in these areas.

B. In developing and amending the criteria, the Board shall consider all factors relevant to the protection of water quality from significant degradation as a result of the use and development of land. The criteria shall incorporate measures such as performance standards, best management practices, and various planning and zoning concepts to protect the quality of state waters while allowing use and development of land consistent with the provisions of this chapter. The criteria adopted by the Board, operating in conjunction with other state water quality programs, shall encourage and promote: (i) protection of existing high quality state waters and restoration of all other state waters to a condition or quality that will permit all reasonable public uses and will support the propagation and growth of all aquatic life, including game fish, which might reasonably be expected to inhabit them; (ii) safeguarding the clean waters of the Commonwealth from pollution; (iii) prevention of any increase in pollution; (iv) reduction of existing pollution; and (v) promotion of water resource conservation in order to provide for the health, safety and welfare of the present and future citizens of the Commonwealth.

C. Prior to the development or amendment of criteria, the Board shall give due consideration to, among other things, the economic and social costs and benefits which can reasonably be expected to obtain as a result of the adoption or amendment of the criteria.

D. In developing such criteria the Board may consult with and obtain the comments of any federal, state, regional, or local agency that has jurisdiction by law or special expertise with respect to the use and development of land or the protection of water. The Board shall give due consideration to the comments submitted by such federal, state, regional, or local agencies.

E. Effective July 1, 2014, requirements promulgated under this article directly related to compliance with the Erosion and Sediment Control Law (§ 10.1-560 et seq.) and the Stormwater Management Act (§ 10.1-603.2 et seq.) and regulated under the authority of those laws shall cease to have effect.

(1988, cc. 608, 891; 2012, cc. 785, 819.)

§ 10.1-2108. Local government authority.

Counties, cities, and towns are authorized to exercise their police and zoning powers to protect the quality of state waters consistent with the provisions of this chapter.

(1988, cc. 608, 891.)

§ 10.1-2109. Local governments to designate Chesapeake Bay Preservation Areas; incorporate into local plans and ordinances; impose civil penalties.

A. Counties, cities and towns in Tidewater Virginia shall use the criteria developed by the Board to determine the extent of the Chesapeake Bay Preservation Area within their jurisdictions. Designation of Chesapeake Bay Preservation Areas shall be accomplished by every county, city and town in Tidewater Virginia not later than twelve months after adoption of criteria by the Board.

B. Counties, cities, and towns in Tidewater Virginia shall incorporate protection of the quality of state waters into each locality's comprehensive plan consistent with the provisions of this chapter.

C. All counties, cities and towns in Tidewater Virginia shall have zoning ordinances which incorporate measures to protect the quality of state waters in the Chesapeake Bay Preservation Areas consistent with the provisions of this chapter. Zoning in Chesapeake Bay Preservation Areas shall comply with all criteria set forth in or established pursuant to § 10.1-2107.

D. Counties, cities and towns in Tidewater Virginia shall incorporate protection of the quality of state waters in Chesapeake Bay Preservation Areas into their subdivision ordinances consistent with the provisions of this chapter. Counties, cities and towns in Tidewater Virginia shall ensure that all subdivisions developed pursuant to their subdivision ordinances comply with all criteria developed by the Board.

E. In addition to any other remedies which may be obtained under any local ordinance enacted to protect the quality of state waters in Chesapeake Bay Preservation Areas, counties, cities and towns in Tidewater Virginia may incorporate the following penalties into their zoning, subdivision or other ordinances:

1. Any person who: (i) violates any provision of any such ordinance or (ii) violates or fails, neglects, or refuses to obey any local governmental body's or official's final notice, order, rule, regulation, or variance or permit condition authorized under such ordinance shall, upon such finding by an appropriate circuit court, be assessed a civil penalty not to exceed $5,000 for each day of violation. Such civil penalties may, at the discretion of the court assessing them, be directed to be paid into the treasury of the county, city or town in which the violation occurred for the purpose of abating environmental damage to or restoring Chesapeake Bay Preservation Areas therein, in such a manner as the court may direct by order, except that where the violator is the county, city or town itself or its agent, the court shall direct the penalty to be paid into the state treasury.

2. With the consent of any person who: (i) violates any provision of any local ordinance related to the protection of water quality in Chesapeake Bay Preservation Areas or (ii) violates or fails, neglects, or refuses to obey any local governmental body's or official's notice, order, rule, regulation, or variance or permit condition authorized under such ordinance, the local government may provide for the issuance of an order against such person for the one-time payment of civil charges for each violation in specific sums, not to exceed $10,000 for each violation. Such civil charges shall be paid into the treasury of the county, city or town in which the violation occurred for the purpose of abating environmental damage to or restoring Chesapeake Bay Preservation Areas therein, except that where the violator is the county, city or town itself or its agent, the civil charges shall be paid into the state treasury. Civil charges shall be in lieu of any appropriate civil penalty that could be imposed under subdivision 1 of this subsection. Civil charges may be in addition to the cost of any restoration required or ordered by the local governmental body or official.

F. Localities that are subject to the provisions of this chapter may by ordinance adopt an appeal period for any person aggrieved by a decision of a board that has been established by the locality to hear cases regarding ordinances adopted pursuant to this chapter. The ordinance shall allow the aggrieved party a minimum of 30 days from the date of such decision to appeal the decision to the circuit court.

(1988, cc. 608, 891; 1998, cc. 700, 714; 2008, c. 15.)

§ 10.1-2110. Local governments outside of Tidewater Virginia may adopt provisions.

Any local government, although not a part of Tidewater Virginia may employ the criteria developed pursuant to § 10.1-2107 and may incorporate protection of the quality of state waters into their comprehensive plans, zoning ordinances and subdivision ordinances consistent with the provisions of this chapter.
(1988, cc. 608, 891.)

§ 10.1-2111. Local government requirements for water quality protection.

Local governments shall employ the criteria promulgated by the Board to ensure that the use and development of land in Chesapeake Bay Preservation Areas shall be accomplished in a manner that protects the quality of state waters consistent with the provisions of this chapter.
(1988, cc. 608, 891.)

§ 10.1-2112.

Repealed by Acts 2012, cc. 785 and 819, cl. 2.

§ 10.1-2113. Effect on other governmental authority.

The authorities granted herein are supplemental to other state, regional and local governmental authority. No authority granted to a local government by this chapter shall affect in any way the authority of the State Water Control Board to regulate industrial or sewage discharges under Articles 3 (§ 62.1-44.16 et seq.) and 4 (§ 62.1-44.18 et seq.) of the State Water Control Law (§ 62.1-44.2 et seq.). No authority granted to a local government by this chapter shall limit in any way any other planning, zoning, or subdivision authority of that local government.
(1988, cc. 608, 891.)

§ 10.1-2114. State agency consistency.

All agencies of the Commonwealth shall exercise their authorities under the Constitution and laws of Virginia in a manner consistent with the provisions of comprehensive plans, zoning ordinances and subdivision ordinances that comply with §§ 10.1-2109 and 10.1-2110.
(1988, cc. 608, 891.)

§ 10.1-2115. Vested rights protected.

The provisions of this chapter shall not affect vested rights of any landowner under existing law.
(1988, cc. 608, 891.)

§ 10.1-2116.

Repealed by Acts 2004, c. 1000.

Virginia Administrative Code
Database updated through January 17, 2013

CHAPTER 90
CHESAPEAKE BAY PRESERVATION AREA DESIGNATION AND MANAGEMENT REGULATIONS

Part I
Introduction

4VAC50-90-10. Application.

The board is charged with the development of regulations which establish criteria that will provide for the protection of water quality, and that also will accommodate economic development. All counties, cities and towns in Tidewater Virginia shall comply with this chapter. Other local governments not in Tidewater Virginia may use the criteria and conform their ordinances as provided in this chapter to protect the quality of state waters in accordance with § 10.1-2110 of the Code of Virginia.

4VAC50-90-20. Authority for chapter.

This chapter is issued under the authority of § 10.1-2107 of the Code of Virginia (the Chesapeake Bay Preservation Act, hereinafter "the Act").

4VAC50-90-30. Purpose of chapter.

A. The purpose of this chapter is to protect and improve the water quality of the Chesapeake Bay, its tributaries, and other state waters by minimizing the effects of human activity upon these waters and implementing the Act, which provides for the definition and protection of certain lands called Chesapeake Bay Preservation Areas, which if improperly used or developed may result in substantial damage to the water quality of the Chesapeake Bay and its tributaries.

B. This chapter establishes the criteria that counties, cities and towns (hereinafter "local governments") shall use to determine the extent of the Chesapeake Bay Preservation Areas within their jurisdictions. This chapter establishes criteria for use by local governments in granting, denying or modifying requests to rezone, subdivide, or to use and develop land in Chesapeake Bay Preservation Areas. This chapter identifies the requirements for changes which local governments shall incorporate into their comprehensive plans, zoning ordinances and subdivision ordinances and employ to ensure that the use and development of land in Chesapeake Bay Preservation Areas shall be accomplished in a manner that protects the quality of state waters pursuant to §§ 10.1-2109 and 10.1-2111 of the Act.

4VAC50-90-40. Definitions.

The following words and terms used in this chapter have the following meanings, unless the context clearly indicates otherwise. In addition, some terms not defined herein are defined in § 10.1-2101 of the Act.

"Act" means the Chesapeake Bay Preservation Act found in Chapter 21 (§ 10.1-2100 et seq.) of Title 10.1 of the Code of Virginia.

"Best management practice" means a practice, or combination of practices, that is determined by a state or designated area-wide planning agency to be the most effective, practicable means of preventing or reducing the amount of pollution generated by nonpoint sources to a level compatible with water quality goals.

"Board" means the Virginia Soil and Water Conservation Board.

"Buffer area" means an area of natural or established vegetation managed to protect other components of a Resource Protection Area and state waters from significant degradation due to land disturbances.

"Chesapeake Bay Preservation Area" means any land designated by a local government pursuant to Part III (4VAC50-90-70 et seq.) of this chapter and § 10.1-2107 of the Act. A Chesapeake Bay Preservation Area shall consist of a Resource Protection Area and a Resource Management Area.

"Department" means the Department of Conservation and Recreation.

"Development" means the construction or substantial alteration of residential, commercial, industrial, institutional, recreation, transportation or utility facilities or structures.

"Director" means the Director of the Department of Conservation and Recreation.

"Floodplain" means all lands that would be inundated by flood water as a result of a storm event of a 100-year return interval.

"Highly erodible soils" means soils (excluding vegetation) with an erodibility index (EI) from sheet and rill erosion equal to or greater than eight. The erodibility index for any soil is defined as the product of the formula RKLS/T, where K is the soil susceptibility to water erosion in the surface layer; R is the rainfall and runoff; LS is the combined effects of slope length and steepness; and T is the soil loss tolerance.

"Highly permeable soils" means soils with a given potential to transmit water through the soil profile. Highly permeable soils are identified as any soil having a permeability equal to or greater than six inches of water movement per hour in any part of the soil profile to a depth of 72 inches (permeability groups "rapid" and "very rapid") as found in the "National Soil Survey Handbook" of November 1996 in the "Field Office Technical Guide" of the U.S. Department of Agriculture Natural Resources Conservation Service.

"Impervious cover" means a surface composed of any material that significantly impedes or prevents natural infiltration of water into the soil. Impervious surfaces include, but are not limited to, roofs, buildings, streets, parking areas, and any concrete, asphalt or compacted gravel surface.

"Infill" means utilization of vacant land in previously developed areas.

"Intensely Developed Areas" means those areas designated by the local government pursuant to 4VAC50-90-100.

"Local governments" means counties, cities and towns. This chapter applies to local governments in Tidewater Virginia, as defined in § 10.1-2101 of the Act, but the provisions of this chapter may be used by other local governments.

"Local program" means the measures by which a local government complies with the Act and this chapter.

"Local program adoption date" means the date a local government meets the requirements of subdivisions 1 and 2 of 4VAC50-90-60.

"Nontidal wetlands" means those wetlands other than tidal wetlands that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in

saturated soil conditions, as defined by the U.S. Environmental Protection Agency pursuant to § 404 of the federal Clean Water Act, in 33 CFR § 328.3b.

"Plan of development" means any process for site plan review in local zoning and land development regulations designed to ensure compliance with § 10.1-2109 of the Act and this chapter, prior to issuance of a building permit.

"Public road" means a publicly owned road designed and constructed in accordance with water quality protection criteria at least as stringent as requirements applicable to the Virginia Department of Transportation, including regulations promulgated pursuant to (i) the Erosion and Sediment Control Law (§ 10.1-560 et seq. of the Code of Virginia) and (ii) the Virginia Stormwater Management Act (§ 10.1-603.1 et seq. of the Code of Virginia). This definition includes those roads where the Virginia Department of Transportation exercises direct supervision over the design or construction activities, or both, and cases where secondary roads are constructed or maintained, or both, by a local government in accordance with the standards of that local government.

"Redevelopment" means the process of developing land that is or has been previously developed.

"Resource Management Area" means that component of the Chesapeake Bay Preservation Area that is not classified as the Resource Protection Area.

"Resource Protection Area" means that component of the Chesapeake Bay Preservation Area comprised of lands adjacent to water bodies with perennial flow that have an intrinsic water quality value due to the ecological and biological processes they perform or are sensitive to impacts which may result in significant degradation to the quality of state waters.

"Silvicultural activities" means forest management activities, including but not limited to the harvesting of timber, the construction of roads and trails for forest management purposes, and the preparation of property for reforestation that are conducted in accordance with the silvicultural best management practices developed and enforced by the State Forester pursuant to § 10.1-1105 of the Code of Virginia and are located on property defined as real estate devoted to forest use under § 58.1-3230 of the Code of Virginia.

"Substantial alteration" means expansion or modification of a building or development that would result in a disturbance of land exceeding an area of 2,500 square feet in the Resource Management Area only.

"Tidal shore" or "shore" means land contiguous to a tidal body of water between the mean low water level and the mean high water level.

"Tidal wetlands" means vegetated and nonvegetated wetlands as defined in § 28.2-1300 of the Code of Virginia.

"Tidewater Virginia" means those jurisdictions named in § 10.1-2101 of the Act.

"Use" means an activity on the land other than development including, but not limited to, agriculture, horticulture and silviculture.

"Water-dependent facility" means a development of land that cannot exist outside of the Resource Protection Area and must be located on the shoreline by reason of the intrinsic nature of its operation. These facilities include, but are not limited to (i) ports; (ii) the intake and outfall structures of power plants, water treatment plants, sewage treatment plants and storm sewers; (iii) marinas and other boat docking structures; (iv) beaches and other public water-oriented recreation areas; and (v) fisheries or other marine resources facilities.

Part II

Local Government Programs

4VAC50-90-50. Local program development.

Local governments shall develop measures (hereinafter called "local programs") necessary to comply with the Act and this chapter. Counties and towns are encouraged to cooperate in the development of their local programs. In conjunction with other state water quality programs, local programs shall encourage and promote: (i) protection of existing high quality state waters and restoration of all other state waters to a condition or quality that will permit all reasonable public uses and will support the propagation and growth of all aquatic life, including game fish, which might reasonably be expected to inhabit them; (ii) safeguarding the clean waters of the Commonwealth from pollution; (iii) prevention of any increase in pollution; (iv) reduction of existing pollution; and (v) promotion of water resource conservation in order to provide for the health, safety and welfare of the present and future citizens of the Commonwealth.

4VAC50-90-60. Elements of program.

Local programs shall contain the elements listed below.

1. A map delineating Chesapeake Bay Preservation Areas.

2. Performance criteria applying in Chesapeake Bay Preservation Areas that employ the requirements in Part IV (4VAC50-90-120 et seq.) of this chapter.

3. A comprehensive plan or revision that incorporates the protection of Chesapeake Bay Preservation Areas and of the quality of state waters, in accordance with criteria set forth in Part V (4VAC50-90-160 et seq.) of this chapter.

4. A zoning ordinance or revision that (i) incorporates measures to protect the quality of state waters in Chesapeake Bay Preservation Areas, as set forth in Part VI (4VAC50-90-180 et seq.) of this chapter, and (ii) requires compliance with all criteria set forth in Part IV (4VAC50-90-120 et seq.) of this chapter.

5. A subdivision ordinance or revision that (i) incorporates measures to protect the quality of state waters in Chesapeake Bay Preservation Areas, as set forth in Part VI (4VAC50-90-180 et seq.) of this chapter, and (ii) assures that all subdivisions in Chesapeake Bay Preservation Areas comply with the criteria set forth in Part IV (4VAC50-90-120 et seq.) of this chapter.

6. A plan of development process prior to the issuance of a building permit to assure that use and development of land in Chesapeake Bay Preservation Areas is accomplished in a manner that protects the quality of state waters.

Part III
Chesapeake Bay Preservation Area Designation Criteria

4VAC50-90-70. Purpose.

The criteria in this part provide direction for local government designation of the ecological and geographic extent of Chesapeake Bay Preservation Areas. Chesapeake Bay Preservation Areas are divided into Resource Protection Areas and Resource Management Areas that are subject to the criteria in Part IV (4VAC50-90-120 et seq.) and the requirements in Part V (4VAC50-90-160 et seq.) of this chapter. In addition, the criteria in this part provide guidance for local government identification of areas suitable for redevelopment that are subject to the redevelopment criteria in Part IV (4VAC50-90-120 et seq.) of this chapter.

4VAC50-90-80. Resource Protection Areas.

A. At a minimum, Resource Protection Areas shall consist of lands adjacent to water bodies with perennial flow that have an intrinsic water quality value due to the ecological and biological processes they perform or are sensitive to impacts which may cause significant degradation to the quality of state waters. In their natural condition, these lands provide for the removal, reduction or assimilation of sediments, nutrients and potentially harmful or toxic substances in runoff entering the bay and its tributaries, and minimize the adverse effects of human activities on state waters and aquatic resources

B. The Resource Protection Area shall include:

1. Tidal wetlands;

2. Nontidal wetlands connected by surface flow and contiguous to tidal wetlands or water bodies with perennial flow;

3. Tidal shores;

4. Such other lands considered by the local government to meet the provisions of subsection A of this section and to be necessary to protect the quality of state waters; and

5. A buffer area not less than 100 feet in width located adjacent to and landward of the components listed in subdivisions 1 through 4 above, and along both sides of any water body with perennial flow. The full buffer area shall be designated as the landward component of the Resource Protection Area notwithstanding the presence of permitted uses, encroachments, and permitted vegetation clearing in compliance with Part IV (4VAC50-90-120 et seq.) of this chapter.

C. Designation of the components listed in subdivisions 1-4 of subsection B of this section shall not be subject to modification unless based on reliable, site-specific information as provided for in 4VAC50-90-110 and subdivision 6 of 4VAC50-90-140.

D. For the purpose of generally determining whether water bodies have perennial flow, local governments may use one of the following methods as long as the methodology is adopted into the local program and applied consistently: (i) designation of water bodies depicted as perennial on the most recent U.S. Geological Survey 7½ minute topographic quadrangle map (scale 1:24,000) or (ii) use of a scientifically valid system of in-field indicators of perennial flow. However, site-specific determinations shall be made or confirmed by the local government pursuant to 4VAC50-90-110.

4VAC50-90-90. Resource Management Areas.

A. Resource Management Areas shall include land types that, if improperly used or developed, have a potential for causing significant water quality degradation or for diminishing the functional value of the Resource Protection Area.

B. A Resource Management Area shall be provided contiguous to the entire inland boundary of the Resource Protection Area. The following land categories shall be considered for inclusion in the Resource Management Area and, where mapping resources indicate the presence of these land types contiguous to the Resource Protection Area, should be included in designations of Resource Management Areas:

1. Floodplains;

2. Highly erodible soils, including steep slopes;

3. Highly permeable soils;

4. Nontidal wetlands not included in the Resource Protection Area;

5. Such other lands considered by the local government to meet the provisions of subsection A of this section and to be necessary to protect the quality of state waters.

C. Resource Management Areas shall encompass a land area large enough to provide significant water quality protection through the employment of the criteria in Part IV (4VAC50-90-120 et seq.) and the requirements in Parts II (4VAC50-90-50 et seq.) and V (4VAC50-90-160 et seq.) of this chapter.

1. Local governments with few or no Resource Management Area land types evident from available mapping resources should evaluate the relationships of the following land categories to water quality protection in making their Resource Management Area designations. The board will consider the degree to which these land categories are included when evaluating the consistency of a locality's Resource Management Area designation for achievement of significant water quality protection:

a. Known Resource Management Area land types;

b. Developable land within the jurisdiction;

c. Areas targeted for redevelopment; and

d. Areas served by piped or channelized stormwater drainage systems which provide no treatment of stormwater discharges.

2. Localities with no mapping resources or with mapping resources for only portions of their jurisdiction should evaluate the relationships of the following land categories to water quality protection in making their Resource Management Area designations. The board will consider the degree to which these land categories are included when evaluating the consistency of a local government's Resource Management Area designation for achievement of significant water quality protection. Furthermore, such designations may be considered an interim designation until such time as appropriate mapping resources become available if such resources are considered by the board to be useful in determining the Resource Management Area boundaries, in which case the board will reevaluate the interim Resource Management Area designations at a later date:

a. Known Resource Management Area land types;

b. Developable land within the jurisdiction;

c. Areas targeted for redevelopment; and

d. Areas served by piped or channelized stormwater drainage systems which provide no treatment of stormwater discharges.

3. Local governments should consider extending the Resource Management Area boundary to the remainder of the lot, parcel, or development project upon which Resource Management Area-type features are present.

4. Local governments shall demonstrate how significant water quality protection will be achieved within designated Resource Management Areas, as well as by each local program as a whole, and to explain the rationale for excluding eligible Resource Management Area components that are not designated.

5. It is not the intent of the board, nor is it the intent of the Act or this chapter, to require that local governments designate all lands within their jurisdiction as Chesapeake Bay Preservation Areas. It is also not the intent of the board to discourage or preclude jurisdiction-wide designations of Resource Management Areas when the local government considers such designations appropriate, recognizing that greater water quality protection will result from more expansive implementation of the performance criteria. The extent of the Resource Management

Area designation should always be based on the prevalence and relation of Resource Management Area land types and other appropriate land areas to water quality protection.

4VAC50-90-100. Intensely Developed Areas.

A. At their option, local governments may designate Intensely Developed Areas as an overlay of Chesapeake Bay Preservation Areas within their jurisdictions. For the purposes of this chapter, Intensely Developed Areas shall serve as redevelopment areas in which development is concentrated as of the local program adoption date. Areas so designated shall comply with the performance criteria for redevelopment in Part IV (4VAC50-90-120 et seq.) of this chapter.

B. Local governments exercising this option shall examine the pattern of residential, commercial, industrial and institutional development within Chesapeake Bay Preservation Areas. Areas of existing development and infill sites where little of the natural environment remains may be designated as Intensely Developed Areas provided at least one of the following conditions existed at the time the local program was originally adopted:

1. Development has severely altered the natural state of the area such that it has more than 50% impervious surface;

2. Public sewer and water systems, or a constructed stormwater drainage system, or both, have been constructed and served the area by the original local program adoption date. This condition does not include areas planned for public sewer and water or constructed stormwater drainage systems;

3. Housing density is equal to or greater than four dwelling units per acre.

4VAC50-90-110. Site-specific refinement of Chesapeake Bay Preservation Area boundaries.

Local governments shall, as part of their plan-of-development review process pursuant to subdivision 1 e of 4VAC50-90-240 or during their review of a water quality impact assessment pursuant to subdivision 6 of 4VAC50-90-140, ensure or confirm that (i) a reliable, site-specific evaluation is conducted to determine whether water bodies on or adjacent to the development site have perennial flow and (ii) Resource Protection Area boundaries are adjusted, as necessary, on the site, based on this evaluation of the site. Local governments may accomplish this by either conducting the site evaluations themselves or requiring the person applying to use or develop the site to conduct the evaluation and submit the required information for review.

Part IV
Land Use and Development Performance Criteria

4VAC50-90-120. Purpose.

A. The purpose of this part is to achieve the goals of the Act and 4VAC50-90-50 by establishing criteria to implement the following objectives: prevent a net increase in nonpoint source pollution from new development and development on previously developed land where the runoff was treated by a water quality protection best management practice, achieve a 10% reduction in nonpoint source pollution from development on previously developed land where the runoff was not treated by one or more water quality best management practices, and achieve a 40% reduction in nonpoint source pollution from agricultural and silvicultural uses.

B. In order to achieve these goals and objectives, the criteria in this part establish performance standards to minimize erosion and sedimentation potential, reduce land application of nutrients and toxics, maximize rainwater infiltration, and ensure the long-term performance of the measures employed.

C. The criteria in this part become mandatory upon the local program adoption date. They are supplemental to the various planning and zoning concepts employed by local governments in granting, denying, or modifying requests to rezone, subdivide, or to use and develop land in Chesapeake Bay Preservation Areas.

D. Local governments shall incorporate the criteria in this part into their comprehensive plans, zoning ordinances and subdivision ordinances, and may incorporate the criteria in this part into such other ordinances and regulations as may be appropriate, in accordance with §§ 10.1-2108 and 10.1-2111 of the Act and Parts V (4VAC50-90-160 et seq.), VI (4VAC50-90-180 et seq.), and VII (4VAC50-90-200 et seq.) of this chapter. The criteria may be employed in conjunction with other planning and zoning concepts to protect the quality of state waters.

4VAC50-90-130. General performance criteria.

Through their applicable land use ordinances, regulations and enforcement mechanisms, local governments shall require that any use, development or redevelopment of land in Chesapeake Bay Preservation Areas meets the following performance criteria:

1. No more land shall be disturbed than is necessary to provide for the proposed use or development.

2. Indigenous vegetation shall be preserved to the maximum extent practicable, consistent with the use or development proposed.

3. All development exceeding 2,500 square feet of land disturbance shall be accomplished through a plan of development review process consistent with § 15.2-2286 A 8 of the Code of Virginia and subdivision 1 e of 4VAC50-90-240.

4. Land development shall minimize impervious cover consistent with the proposed use or development.

5. Any land disturbing activity that exceeds an area of 2,500 square feet (including construction of all single family houses, septic tanks and drainfields, but otherwise as defined in § 10.1-560 of the Code of Virginia) shall comply with the requirements of the local erosion and sediment control ordinance. Enforcement for noncompliance with the erosion and sediment control requirements referenced in this criterion shall be conducted under the provisions of the Erosion and Sediment Control Act (§ 10.1-560 et seq. of the Code of Virginia) and attendant regulations.

6. On-site sewage treatment systems not requiring a Virginia Pollutant Discharge Elimination System (VPDES) permit shall:

a. Have pump-out accomplished for all such systems at least once every five years.

(1) If deemed appropriate by the local health department and subject to conditions the local health department may set, local governments may offer to the owners of such systems, as an alternative to the mandatory pump-out, the option of having a plastic filter installed and maintained in the outflow pipe from the septic tank to filter solid material from the effluent while sustaining adequate flow to the drainfield to permit normal use of the septic system. Such a filter should satisfy standards established in the Sewage Handling and Disposal Regulations (12VAC5-610) administered by the Virginia Department of Health.

(2) Furthermore, in lieu of requiring proof of septic tank pump-out every five years, local governments may allow owners of on-site sewage treatment systems to submit documentation every five years, certified by a sewage handler permitted by the Virginia Department of Health, that the septic system has been inspected, is functioning properly, and the tank does not need to have the effluent pumped out of it.

b. For new construction, provide a reserve sewage disposal site with a capacity at least equal to that of the primary sewage disposal site. This reserve sewage disposal site requirement shall not apply to any lot or parcel recorded prior to October 1, 1989, if the lot or parcel is not sufficient in capacity to accommodate a reserve sewage disposal site, as determined by the local health department. Building shall be prohibited on the area of all sewage disposal sites until the structure is served by public sewer or an on-site sewage treatment system which operates under a permit issued by the State Water Control Board. All sewage disposal site records shall be administered to provide adequate notice and enforcement. As an alternative to the 100% reserve sewage disposal site, local governments may offer the owners of such systems the option of installing an alternating drainfield system meeting the following conditions:

(1) Each of the two alternating drainfields in the system shall have, at a minimum, an area not less than 50% of the area that would otherwise be required if a single primary drainfield were constructed.

(2) An area equaling 50% of the area that would otherwise be required for the primary drainfield site must be reserved for subsurface absorption systems that utilize a flow diversion device, in order to provide for future replacement or repair to meet the requirements for a sewage disposal system. Expansion of the primary system will require an expansion of this reserve area.

(3) The two alternating drainfields shall be connected by a diversion valve, approved by the local health department, located in the pipe between the septic (aerobic) tank and the distribution boxes. The diversion valve shall be used to alternate the direction of effluent flow to one drainfield or the other at a time. However, diversion valves shall not be used for the following types of treatment systems:

(a) Sand mounds;

(b) Low-pressure distribution systems;

(c) Repair situations when installation of a valve is not feasible; and

(d) Any other approved system for which the use of a valve would adversely affect the design of the system, as determined by the local health department.

(4) The diversion valve shall be a three-port, two-way valve of approved materials (i.e., resistant to sewage and leakproof and designed so that the effluent from the tank can be directed to flow into either one of the two distribution boxes).

(5) There shall be a conduit from the top of the valve to the ground surface with an appropriate cover to be level with or above the ground surface.

(6) The valve shall not be located in driveways, recreational courts, parking lots, or beneath sheds or other structures.

(7) In lieu of the aforementioned diversion valve, any device that can be designed and constructed to conveniently direct the flow of effluent from the tank into either one of the two distribution boxes may be approved if plans are submitted to the local health department and found to be satisfactory.

(8) The local government shall require that the owner(s) alternate the drainfields every 12 months to permit the yearly resting of half of the absorption system.

(9) The local government shall ensure that the owner(s) are notified annually of the requirement to switch the valve to the opposite drainfield.

7. Land upon which agricultural activities are being conducted, including but not limited to crop production, pasture, and dairy and feedlot operations, or lands otherwise defined as agricultural land by the local government, shall have a soil and water quality conservation assessment conducted that evaluates the effectiveness of existing practices pertaining to soil erosion and sediment control, nutrient management, and management of pesticides, and, where necessary, results in a plan that outlines additional practices needed to ensure that water quality protection is being accomplished consistent with the Act and this chapter.

a. Recommendations for additional conservation practices need address only those conservation issues applicable to the tract or field being assessed. Any soil and water quality conservation practices that are recommended as a result of such an assessment and are subsequently implemented with financial assistance from federal or state cost-share programs must be designed, consistent with cost-share practice standards effective in January 1999 in the "Field Office Technical Guide" of the U.S. Department of Agriculture Natural Resource Conservation Service or the June 2000 edition of the "Virginia Agricultural BMP Manual" of the Virginia Department of Conservation and Recreation, respectively. Unless otherwise specified in this section, general standards pertaining to the various agricultural conservation practices being assessed shall be as follows:

(1) For erosion and sediment control recommendations, the goal shall be, where feasible, to prevent erosion from exceeding the soil loss tolerance level, referred to as "T," as defined in the "National Soil Survey Handbook" of November 1996 in the "Field Office Technical Guide" of the U.S. Department of Agriculture Natural Resource Conservation Service. However, in no case shall erosion exceed the soil loss consistent with an Alternative Conservation System, referred to as an "ACS", as defined in the "Field Office Technical Guide" of the U.S. Department of Agriculture Natural Resource Conservation Service.

(2) For nutrient management, whenever nutrient management plans are developed, the operator or landowner must provide soil test information, consistent with the Virginia Nutrient Management Training and Certification Regulations (4VAC5-15).

(3) For pest chemical control, referrals shall be made to the local cooperative extension agent or an Integrated Pest Management Specialist of the Virginia Cooperative Extension Service. Recommendations shall include copies of applicable information from the "Virginia Pest Management Guide" or other Extension materials related to pest control.

b. A higher priority shall be placed on conducting assessments of agricultural fields and tracts adjacent to Resource Protection Areas. However, if the landowner or operator of such a tract also has Resource Management Area fields or tracts in his operation, the assessment for that landowner or operator may be conducted for all fields or tracts in the operation. When such an expanded assessment is completed, priority must return to Resource Protection Area fields and tracts.

c. The findings and recommendations of such assessments and any resulting soil and water quality conservation plans will be submitted to the local Soil and Water Conservation District Board, which will be the plan-approving authority.

8. Silvicultural activities in Chesapeake Bay Preservation Areas are exempt from this chapter provided that silvicultural operations adhere to water quality protection procedures prescribed by the Virginia Department of Forestry in the January 1997 edition of "Forestry Best Management Practices for Water Quality in Virginia Technical Guide." The Virginia Department

of Forestry will oversee and document installation of best management practices and will monitor in-stream impacts of forestry operations in Chesapeake Bay Preservation Areas.

9. Local governments shall require evidence of all wetlands permits required by law prior to authorizing grading or other on-site activities to begin.

4VAC50-90-140. Development criteria for Resource Protection Areas.

In addition to the general performance criteria set forth in 4VAC50-90-130, the criteria in this section are applicable in Resource Protection Areas.

1. Land development may be allowed in the Resource Protection Area, subject to approval by the local government, only if it (i) is water dependent; (ii) constitutes redevelopment; (iii) constitutes development or redevelopment within a designated Intensely Developed Area; (iv) is a new use established pursuant to subdivision 4 a of this section; (v) is a road or driveway crossing satisfying the conditions set forth in subdivision 1 d of this section; or (vi) is a flood control or stormwater management facility satisfying the conditions set forth in subdivision 1 e of this section.

a. A water quality impact assessment in accordance with subdivision 6 of this section shall be required for any proposed land disturbance.

b. A new or expanded water-dependent facility may be allowed provided that the following criteria are met:

(1) It does not conflict with the comprehensive plan;

(2) It complies with the performance criteria set forth in 4VAC50-90-130;

(3) Any nonwater-dependent component is located outside of Resource Protection Areas; and

(4) Access to the water-dependent facility will be provided with the minimum disturbance necessary. Where practicable, a single point of access will be provided.

c. Redevelopment outside locally designated Intensely Developed Areas shall be permitted in the Resource Protection Area only if there is no increase in the amount of imperious cover and no further encroachment within the Resource Protection Area, and it shall conform to applicable erosion and sediment control and stormwater management criteria set forth in the Erosion and Sediment Control Law (§ 10.1-560 et seq. of the Code of Virginia) and the Stormwater Management Act (§ 10.1-603.2 et seq. of the Code of Virginia) and their attendant regulations, as well as all applicable stormwater management requirements of other state and federal agencies.

d. Roads and driveways not exempt under subdivision B 1 of 4VAC50-90-150 and which, therefore, must comply with the provisions of this chapter, may be constructed in or across Resource Protection Areas if each of the following conditions is met:

(1) The local government makes a finding that there are no reasonable alternatives to aligning the road or driveway in or across the Resource Protection Area;

(2) The alignment and design of the road or driveway are optimized, consistent with other applicable requirements, to minimize (i) encroachment in the Resource Protection Area and (ii) adverse effects on water quality;

(3) The design and construction of the road or driveway satisfy all applicable criteria of this chapter, including submission of a water quality impact assessment; and

(4) The local government reviews the plan for the road or driveway proposed in or across the Resource Protection Area in coordination with local government site plan, subdivision and plan of development approvals.

e. Flood control and stormwater management facilities that drain or treat water from multiple development projects or from a significant portion of a watershed may be allowed in Resource Protection Areas provided such facilities are allowed and constructed in accordance with the Stormwater Management Act (§ 10.1-603.2 et seq. of the Code of Virginia) and its attendant regulations, and provided that (i) the local government has conclusively established that location of the facility within the Resource Protection Area is the optimum location; (ii) the size of the facility is the minimum necessary to provide necessary flood control or stormwater treatment, or both; (iii) the facility must be consistent with a comprehensive stormwater management plan developed and approved in accordance with 4VAC50-60-92 of the Virginia Stormwater Management Program (VSMP) Permit regulations; (iv) all applicable permits for construction in state or federal waters must be obtained from the appropriate state and federal agencies, such as the U.S. Army Corps of Engineers, the Virginia Department of Conservation and Recreation, the Virginia Department of Environmental Quality, and the Virginia Marine Resources Commission; (v) approval must be received from the local government prior to construction; and (vi) routine maintenance is allowed to be performed on such facilities to assure that they continue to function as designed. It is not the intent of this subdivision to allow a best management practice that collects and treats runoff from only an individual lot or some portion of the lot to be located within a Resource Protection Area.

2. Exemptions in Resource Protection Areas. The following land disturbances in Resource Protection Areas may be exempt from the criteria of this part provided that they comply with subdivisions a and b of this subdivision 2: (i) water wells; (ii) passive recreation facilities such as boardwalks, trails and pathways; and (iii) historic preservation and archaeological activities:

a. Local governments shall establish administrative procedures to review such exemptions.

b. Any land disturbance exceeding an area of 2,500 square feet shall comply with the erosion and sediment control criteria in subdivision 5 of 4VAC50-90-130.

3. Buffer area requirements. The 100-foot wide buffer area shall be the landward component of the Resource Protection Area as set forth in subdivision B 5 of 4VAC50-90-80. Notwithstanding permitted uses, encroachments, and vegetation clearing, as set forth in this section, the 100-foot wide buffer area is not reduced in width. To minimize the adverse effects of human activities on the other components of the Resource Protection Area, state waters, and aquatic life, a 100-foot wide buffer area of vegetation that is effective in retarding runoff, preventing erosion, and filtering nonpoint source pollution from shall be retained if present and established where it does not exist.

a. The 100-foot wide buffer area shall be deemed to achieve a 75% reduction of sediments and a 40% reduction of nutrients.

b. Where land uses such as agriculture or silviculture within the area of the buffer cease and the lands are proposed to be converted to other uses, the full 100-foot wide buffer shall be reestablished. In reestablishing the buffer, management measures shall be undertaken to provide woody vegetation that assures the buffer functions set forth in this chapter.

4. Permitted encroachments into the buffer area.

a. When the application of the buffer area would result in the loss of a buildable area on a lot or parcel recorded prior to October 1, 1989, encroachments into the buffer area may be allowed through an administrative process in accordance with the following criteria:

(1) Encroachments into the buffer area shall be the minimum necessary to achieve a reasonable buildable area for a principal structure and necessary utilities.

(2) Where practicable, a vegetated area that will maximize water quality protection, mitigate the effects of the buffer encroachment, and is equal to the area of encroachment into the buffer area shall be established elsewhere on the lot or parcel.

(3) The encroachment may not extend into the seaward 50 feet of the buffer area.

b. When the application of the buffer area would result in the loss of a buildable area on a lot or parcel recorded between October 1, 1989 and March 1, 2002, encroachments into the buffer area may be allowed through an administrative process in accordance with the following criteria:

(1) The lot or parcel was created as a result of a legal process conducted in conformity with the local government's subdivision regulations;

(2) Conditions or mitigation measures imposed through a previously approved exception shall be met;

(3) If the use of a best management practice (BMP) was previously required, the BMP shall be evaluated to determine if it continues to function effectively and, if necessary, the BMP shall be reestablished or repaired and maintained as required; and

(4) The criteria in subdivision 4 a of this section shall be met.

5. Permitted modifications of the buffer area.

a. In order to maintain the functional value of the buffer area, existing vegetation may be removed, subject to approval by the local government, only to provide for reasonable sight lines, access paths, general woodlot management, and best management practices, including those that prevent upland erosion and concentrated flows of stormwater, as follows:

(1) Trees may be pruned or removed as necessary to provide for sight lines and vistas, provided that where removed, they shall be replaced with other vegetation that is equally effective in retarding runoff, preventing erosion, and filtering nonpoint source pollution from runoff.

(2) Any path shall be constructed and surfaced so as to effectively control erosion.

(3) Dead, diseased, or dying trees or shrubbery and noxious weeds (such as Johnson grass, kudzu, and multiflora rose) may be removed and thinning of trees may be allowed pursuant to sound horticultural practice incorporated into locally-adopted standards.

(4) For shoreline erosion control projects, trees and woody vegetation may be removed, necessary control techniques employed, and appropriate vegetation established to protect or stabilize the shoreline in accordance with the best available technical advice and applicable permit conditions or requirements.

b. On agricultural lands the agricultural buffer area shall be managed to prevent concentrated flows of surface water from breaching the buffer area and appropriate measures may be taken to prevent noxious weeds (such as Johnson grass, kudzu, and multiflora rose) from invading the buffer area. Agricultural activities may encroach into the buffer area as follows:

(1) Agricultural activities may encroach into the landward 50 feet of the 100-foot wide buffer area when at least one agricultural best management practice which, in the opinion of the local soil and water conservation district board, addresses the more predominant water quality issue on the adjacent land—erosion control or nutrient management—is being implemented on the adjacent land, provided that the combination of the undisturbed buffer area and the best management practice achieves water quality protection, pollutant removal, and water resource conservation at least the equivalent of the 100-foot wide buffer area. If nutrient management is

identified as the predominant water quality issue, a nutrient management plan, including soil tests, must be developed consistent with the Virginia Nutrient Management Training and Certification Regulations (4VAC5-15) administered by the Virginia Department of Conservation and Recreation.

(2) Agricultural activities may encroach within the landward 75 feet of the 100-foot wide buffer area when agricultural best management practices which address erosion control, nutrient management, and pest chemical control, are being implemented on the adjacent land. The erosion control practices must prevent erosion from exceeding the soil loss tolerance level, referred to as "T," as defined in the "National Soil Survey Handbook" of November 1996 in the "Field Office Technical Guide" of the U.S. Department of Agriculture Natural Resource Conservation Service. A nutrient management plan, including soil tests, must be developed, consistent with the Virginia Nutrient Management Training and Certification Regulations (4VAC5-15) administered by the Virginia Department of Conservation and Recreation. In conjunction with the remaining buffer area, this collection of best management practices shall be presumed to achieve water quality protection at least the equivalent of that provided by the 100-foot wide buffer area.

(3) The buffer area is not required to be designated adjacent to agricultural drainage ditches if at least one best management practice which, in the opinion of the local soil and water conservation district board, addresses the more predominant water quality issue on the adjacent land—either erosion control or nutrient management—is being implemented on the adjacent land.

(4) If specific problems are identified pertaining to agricultural activities that are causing pollution of the nearby water body with perennial flow or violate performance standards pertaining to the vegetated buffer area, the local government, in cooperation with soil and water conservation district, shall recommend a compliance schedule to the landowner and require the problems to be corrected consistent with that schedule. This schedule shall expedite environmental protection while taking into account the seasons and other temporal considerations so that the probability for successfully implementing the corrective measures is greatest.

(5) In cases where the landowner or his agent or operator has refused assistance from the local soil and water conservation district in complying with or documenting compliance with the agricultural requirements of this chapter, the district shall report the noncompliance to the local government. The local government shall require the landowner to correct the problems within a specified period of time not to exceed 18 months from their initial notification of the deficiencies to the landowner. The local government, in cooperation with the district, shall recommend a compliance schedule to the landowner. This schedule shall expedite environmental protection while taking into account the seasons and other temporal considerations so that the probability for successfully implementing the corrective measures is greatest.

6. Water quality impact assessment. A water quality impact assessment shall be required for any proposed development within the Resource Protection Area consistent with this part and for any other development in Chesapeake Bay Preservation Areas that may warrant such assessment because of the unique characteristics of the site or intensity of the proposed use or development.

a. The purpose of the water quality impact assessment is to identify the impacts of proposed development on water quality and lands in the Resource Protection Areas consistent with the goals and objectives of the Act, this chapter, and local programs, and to determine

specific measures for mitigation of those impacts. The specific content and procedures for the water quality impact assessment shall be established by each local government. Local governments should notify the board of all development requiring such an assessment. Upon request, the board will provide review and comment regarding any water quality impact assessment in accordance with the advisory state review requirements of § 10.1-2112 of the Act.

b. The water quality impact assessment shall be of sufficient specificity to demonstrate compliance with the criteria of the local program.

7. Buffer area requirements for Intensely Developed Areas. In Intensely Developed Areas the local government may exercise discretion regarding whether to require establishment of vegetation in the 100-foot wide buffer area. However, while the immediate establishment of vegetation in the buffer area may be impractical, local governments shall give consideration to implementing measures that would establish vegetation in the buffer in these areas over time in order to maximize water quality protection, pollutant removal, and water resource conservation.

4VAC50-90-150. Nonconformities, exemptions, and exceptions.

A. Nonconforming uses and noncomplying structures.

1. Local governments may permit the continued use, but not necessarily the expansion, of any structure in existence on the date of local program adoption. Local governments may establish an administrative review procedure to waive or modify the criteria of this part for structures on legal nonconforming lots or parcels provided that:

a. There will be no net increase in nonpoint source pollutant load; and

b. Any development or land disturbance exceeding an area of 2,500 square feet complies with all erosion and sediment control requirements of this part.

2. This chapter shall not be construed to prevent the reconstruction of pre-existing structures within Chesapeake Bay Preservation Areas from occurring as a result of casualty loss unless otherwise restricted by local government ordinances.

B. Public utilities, railroads, public roads, and facilities exemptions.

1. Construction, installation, operation, and maintenance of electric, natural gas, fiber-optic, and telephone transmission lines, railroads, and public roads and their appurtenant structures in accordance with (i) regulations promulgated pursuant to the Erosion and Sediment Control Law (§ 10.1-560 et seq. of the Code of Virginia) and the Stormwater Management Act (§ 10.1-603.2 et seq. of the Code of Virginia), (ii) an erosion and sediment control plan and a stormwater management plan approved by the Virginia Department of Conservation and Recreation, or (iii) local water quality protection criteria at least as stringent as the above state requirements will be deemed to constitute compliance with this chapter. The exemption of public roads is further conditioned on the following:

a. Optimization of the road alignment and design, consistent with other applicable requirements, to prevent or otherwise minimize (i) encroachment in the Resource Protection Area and (ii) adverse effects on water quality; and

b. Local governments may choose to exempt (i) all public roads as defined in 4VAC50-90-40, or (ii) only those public roads constructed by the Virginia Department of Transportation.

2. Construction, installation and maintenance of water, sewer, natural gas, and underground telecommunications and cable television lines owned, permitted, or both, by a local government or regional service authority shall be exempt from the criteria in this part provided that:

a. To the degree possible, the location of such utilities and facilities should be outside Resource Protection Areas;

b. No more land shall be disturbed than is necessary to provide for the proposed utility installation;

c. All such construction, installation and maintenance of such utilities and facilities shall be in compliance with all applicable state and federal permits and designed and conducted in a manner that protects water quality; and

d. Any land disturbance exceeding an area of 2,500 square feet complies with all erosion and sediment control requirements of this part.

C. Exceptions.

1. Exceptions to the requirements of 4VAC50-90-130 and 4VAC50-90-140 may be granted, provided that a finding is made that:

a. The requested exception to the criteria is the minimum necessary to afford relief;

b. Granting the exception will not confer upon the applicant any special privileges that are denied by this part to other property owners who are subject to its provisions and who are similarly situated;

c. The exception is in harmony with the purpose and intent of this part and is not of substantial detriment to water quality;

d. The exception request is not based upon conditions or circumstances that are self-created or self-imposed;

e. Reasonable and appropriate conditions are imposed, as warranted, that will prevent the allowed activity from causing a degradation of water quality; and

f. Other findings, as appropriate and required by the local government, are met.

2. Each local government shall design and implement an appropriate process or processes for the administration of exceptions. The process to be used for exceptions to 4VAC50-90-140 shall include, but not be limited to, the following provisions:

a. An exception may be considered and acted upon only by the local legislative body; the local planning commission; or a special committee, board or commission established or designated by the local government to implement the provisions of the Act and this chapter.

b. Local governments implementing this chapter through the local zoning code may provide for specific provisions that allow for consideration of exceptions that comply with subdivision 2 of this subsection.

c. The provision of subdivision 2 b of this subsection notwithstanding, no exception shall be authorized except after notice and a hearing, as required by § 15.2-2204 of the Code of Virginia, except that only one hearing shall be required. However, when giving any required notice to the owners, their agents or the occupants of abutting property and property immediately across the street or road from the property affected, the notice may be given by first-class mail rather than by registered or certified mail.

3. Exceptions to other provisions of this part may be granted, provided that:

a. Exceptions to the criteria shall be the minimum necessary to afford relief; and

b. Reasonable and appropriate conditions upon any exception granted shall be imposed, as necessary, so that the purpose and intent of the Act is preserved.

4. Notwithstanding the provisions of subdivisions 2 a through 2 c of this subsection, additions and modifications to existing legal principal structures may be processed through an administrative review process, as allowed by subsection A of this section, subject to the findings

required by subdivision 1 of this subsection but without a requirement for a public hearing. This provision shall not apply to accessory structures.

Part V
Comprehensive Plan Criteria

4VAC50-90-160. Purpose.

The purpose of this part is to assist local governments in the development of a comprehensive plan or plan component that is consistent with the Act, and to establish guidelines for determining the consistency of the local comprehensive plan or plan component with the Act.

4VAC50-90-170. Comprehensive plans.

Local governments shall review and revise their comprehensive plans, as necessary, for compliance with § 10.1-2109 of the Act and this chapter. As a minimum, the comprehensive plan or plan component shall consist of the following basic elements: (i) a summary of data collection; (ii) analysis and policy discussion(s); (iii) land use plan map(s); and (iv) implementing measures, including specific objectives and a time frame for accomplishment.

1. Local governments shall establish and maintain, as appropriate, an information base from which policy choices are made about future land use and development that will protect the quality of state waters. This element of the plan should be based upon the following, as applicable to the locality:

a. The location and extent of Chesapeake Bay Preservation Areas;

b. Physical constraints to development, including soil limitations;

c. The character and location of commercial and recreational fisheries and other aquatic resources;

d. Shoreline and streambank erosion problems;

e. Existing and proposed land uses;

f. Catalog of existing and potential water pollution sources;

g. Public and private waterfront access areas, including the general locations of or information about docks, piers, marinas, boat ramps, and similar water access facilities;

h. A map or map series accurately representing the above information.

2. As part of the comprehensive plan, local governments shall clearly indicate local policy on land use issues relative to water quality protection based on an analysis of the data referred to in subdivision 1 of this section. Local governments shall ensure consistency among the policies developed.

a. Local governments shall discuss each component of Chesapeake Bay Preservation Areas in relation to the types of land uses considered appropriate and consistent with the goals and objectives of the Act, this chapter, and their local programs.

b. As a minimum, local governments shall prepare policy statements for inclusion in the plan on the following issues, as applicable to the locality:

(1) Physical constraints to development, including a discussion of the relationship between soil limitations and existing and proposed land use, with an explicit discussion of soil suitability for septic tank use;

(2) Protection of potable water supply, including groundwater resources and threats to the water supply or groundwater resources from existing and potential pollution sources;

(3) Relationship of land use to commercial and recreational fisheries and other aquatic resources;

(4) Siting of docks and piers;

(5) Public and private access to waterfront areas and effect on water quality;

(6) Mitigation of the impacts of land use and its associated pollution upon water quality;

(7) Shoreline and streambank erosion problems; and

(8) Potential water quality improvement through reduction of existing pollution sources and the redevelopment of Intensely Developed Areas and other areas targeted for redevelopment.

c. For each of the policy issues listed above, the plan shall contain a discussion of the scope and importance of the issue, the policy adopted by the local government for that issue, and a description of how the local policy will be implemented.

d. Within the policy discussion, local governments shall address the relationship between the plan, existing and proposed land use, public services, and capital improvement plans and budgets to ensure a consistent local policy.

Part VI
Land Development Ordinances

4VAC50-90-180. Purpose.

The purpose of this part is to assist local governments in the preparation of land use and development ordinances and regulations adopted pursuant to § 10.1-2109 and Articles 1 (§ 2.2-2200 et seq.), 2 (§ 2.2-2210 et seq.), 4 (§ 2.2-2233 et seq.), 5 (§ 1.1-2239), 6 (§ 2.2-2240 et seq.), and 7 (§ 2.2-2280 et seq.) of Chapter 22 of Title 15.2 of the Code of Virginia that are consistent with the Act and this chapter, and to establish guidelines for determining the consistency of such ordinances and regulations with the Act and this chapter. Such ordinances and regulations include, but are not limited to, subdivision ordinances and zoning ordinances.

4VAC50-90-190. Land development ordinances regulations and procedures.

A. Local governments shall review and revise their land development regulations, as necessary, to comply with § 10.1-2109 of the Act. To achieve this:

1. Local zoning ordinances shall ensure that the uses permitted by the local zoning regulations are consistent with the Act and this chapter;

2. Local land development ordinances and regulations shall incorporate either explicitly or by direct reference the performance criteria in Part IV (4VAC50-90-120 et seq.) of this chapter. Specific development standards that implement the performance criteria from subdivisions 1, 2 and 4 of 4VAC50-90-130 (minimizing land disturbance and impervious cover and preserving existing vegetation) shall be included;

3. Local land development ordinances and regulations shall protect the integrity of Chesapeake Bay Preservation Areas by incorporating standards to ensure (i) the protection of water quality; (ii) the preservation of Resource Protection Area land categories, as set forth in 4VAC50-90-80, including the 100-foot wide buffer area; and (iii) the compatibility of development with Resource Management Area land categories, as set forth in 4VAC50-90-90;

4. Local land development ordinances and regulations shall provide for (i) depiction of Resource Protection Area and Resource Management Area boundaries on plats and site plans, including a notation on plats of the requirement to retain an undisturbed and vegetated 100-foot wide buffer area, as specified in subdivision 3 of 4VAC50-90-140 (ii) a plat notation of the

requirement for pump-out and 100% reserve drainfield sites for onsite sewage treatment systems, when applicable; and (iii) a plat notation of the permissibility of only water dependent facilities or redevelopment in Resource Protection Areas, including the 100-foot wide buffer area; and

5. Local governments shall require, during the plan of development review process, the delineation of the buildable areas that are allowed on each lot. The delineation of buildable areas shall be based on the performance criteria specified in Part IV (4VAC50-90-120 et seq.) of this chapter, local front and side yard setback requirements, and any other relevant easements or limitations regarding lot coverage.

B. Local governments shall undertake the following as necessary, to comply with § 10.1-2109 of the Act:

1. Local governments shall evaluate the relationship between the submission requirements, performance standards, and permitted uses in local land development ordinances and regulations to identify any obstacles to achieving the water quality goals of the Act and this chapter as set forth in § 10.1-2107 B of the Act, 4VAC50-90-50 and 4VAC50-90-120. Local governments shall revise these ordinances and regulations, as necessary, to eliminate any obstacles identified in the submission requirements or development standards.

2. Local governments shall review and revise their land development ordinances and regulations adopted pursuant to § 10.1-2109 and Article 1 (§ 2.2-2200 et seq.), 2 (§ 2.2-2210 et seq.), 4 (§ 2.2-2233 et seq.), 5 (§ 2.2-2239), 6 (§ 2.2-2240 et seq.), and 7 (§ 2.2-2280 et seq.) of Chapter 22 of Title 15.2 of the Code of Virginia to assure that their subdivision ordinances, zoning ordinances, and all other components of their local Chesapeake Bay Preservation Act programs are consistent in promoting and achieving the protection of state waters. In addition, local governments shall identify and resolve any conflicts among the components of the local programs and with other local ordinances, regulations and administrative policies, to assure that the intent of the Act and this chapter is fulfilled.

3. Local governments shall review and revise their land development ordinances and regulations to ensure consistency with the water quality protection goals, objectives, policies, and implementation strategies identified in the local comprehensive plan.

Part VII
Local Assistance and Local Program Consistency Review Process

4VAC50-90-200. Purpose.

The purpose of this part is to assist local governments in the timely preparation of local programs to implement the Act and to establish an administrative procedure for determining local program consistency with the Act.

4VAC50-90-210. Local assistance manual.

A. The department will prepare a manual to provide guidance to assist local governments in the preparation of local programs in order to implement the Act and this chapter. The manual will be updated periodically to reflect the most current planning and zoning techniques and effective best management practices. The manual will be made available to the public.

B. The manual will recommend a schedule for the completion of local program elements and their submission to the board for its information to ensure timely achievement of the requirements of the Act and timely receipt of assistance. The board will consider compliance with the schedule in allocating financial and technical assistance.

C. The manual is for the purpose of guidance only.

4VAC50-90-220. Board to establish liaison.

The board will establish liaison with each local government to assist the local government in developing and implementing its local program, in obtaining technical and financial assistance, and in complying with the Act and this chapter.

4VAC50-90-230. Planning district comments.

Local governments are encouraged to enlist the assistance and comments of regional planning district agencies early in the development of their local programs.

4VAC50-90-240. Preparation and submission of management program.

Local governments must adopt the full management program, which will consist of Phases I-III as defined in this section and including any revisions to comprehensive plans, zoning ordinances, subdivision ordinances, and other local authorities necessary to implement the Act. Prior to adoption, local governments may submit any proposed revisions to the board for comments. Criteria are provided below for local government use in preparing local programs and the board's use in determining local program consistency.

1. Phase I shall consist of the designation of Chesapeake Bay Preservation Areas and adoption of the performance criteria. This phase of designating Chesapeake Bay Preservation Areas as an element of the local program should include:

a. Utilizing existing data and mapping resources to identify and describe tidal wetlands, nontidal wetlands, tidal shores, water bodies with perennial flow, flood plains, highly erodible soils including steep slopes, highly permeable areas, and other sensitive environmental resources as necessary to comply with Part III (4VAC50-90-70 et seq.) of this chapter;

b. Determining, based upon the identification and description, the extent of Chesapeake Bay Preservation Areas within the local jurisdiction;

c. Preparing an appropriate map or maps delineating Chesapeake Bay Preservation Areas;

d. Preparing amendments to local ordinances that incorporate the performance criteria of Part IV (4VAC50-90-120 et seq.) of this chapter or the model ordinance prepared by the board;

e. Establishing, if necessary, and incorporating a plan of development review process. Local governments shall make provisions as necessary to ensure that any development of land within Chesapeake Bay Preservation Areas shall be accomplished through a plan of development procedure pursuant to § 15.2-2286 A 8 of the Code of Virginia to ensure compliance with the Act and this chapter. Any exemptions from those review requirements shall be established and administered in a manner that ensures compliance with this chapter.

f. Conducting a public hearing. Prior to adopting Chesapeake Bay Preservation Areas and the performance criteria, each local government shall hold a public hearing to solicit public comment regarding these local program components.

g. Providing copies of the adopted program documents and subsequent changes thereto to the board for consistency review, as set forth in subdivision 5 of this section.

2. Phase II shall consist of local governments reviewing and revising their comprehensive plans, as necessary, for compliance with § 10.1-2109 of the Act, in accordance with the provisions set forth in Part V (4VAC50-90-160 et seq.) of this chapter.

3. Phase III shall consist of local governments reviewing and revising their land development regulations and processes, which include but are not limited to zoning ordinances,

subdivision ordinances, and the plan of development review process, as necessary, to comply with § 10.1-2109 of the Act and to be consistent with the provisions set forth in Part VI (4VAC50-90-180 et seq.) of this chapter.

4. Consistent with §§ 10.1-2108, 10.1-2109, and 10.1-2113 of the Act local governments may use civil penalties to enforce compliance with the requirements of local programs.

5. Review by the board.

a. The board will review proposed elements of a program phase within 60 days according to review policies adopted by the board. If the proposed program phase is consistent with the Act, the board will schedule a conference with the local government to determine what additional technical and financial assistance may be needed and available to accomplish the proposed program phase. If the proposed program phase or any part thereof is not consistent, the board will notify the local government in writing, stating the reasons for a determination of inconsistency and specifying needed changes. Copies of the adopted program documents and subsequent changes thereto shall be provided to the board.

b. The board will review locally adopted elements of a program phase according to review policies adopted by the board and as set forth in 4VAC50-90-260.

Part VIII
Implementation and Enforcement

4VAC50-90-250. Applicability.

The Act requires that the board ensure that local governments comply with the Act and regulations and that their comprehensive plans, zoning ordinances and subdivision ordinances are in accordance with the Act. To satisfy these requirements, the board has adopted this chapter and will monitor each local government's compliance with the Act and this chapter.

4VAC50-90-260. Administrative proceedings.

Subdivision 8 of § 10.1-2103 and § 10.1-2104.1 of the Act provide that the board shall ensure that local government comprehensive plans, subdivision ordinances and zoning ordinances are in accordance with the provisions of the Act, and that it shall determine such compliance in accordance with the provisions of the Administrative Process Act. When the board determines to decide such compliance, it will give the subject local government at least 15 days notice of its right to appear before the board at a time and place specified for the presentation of factual data, argument and proof as provided by § 2.2-4019 of the Code of Virginia. The board will provide a copy of its decision to the local government. If any deficiencies are found, the board will establish a schedule for the local government to come into compliance.

1. In order to carry out its mandated responsibilities under subdivision 10 of § 10.1-2103 and § 10.1-2104.1 of the Act, the board will:

a. Require that each Tidewater local government submit an annual implementation report outlining the implementation of the local program. The board will develop reporting criteria which outline the information to be included in the reports and the time frame for their submission. The board will use the information in these reports to assess local patterns of compliance with the Act and this chapter and to evaluate the need for an administrative proceeding to more closely review any individual local government's compliance. All proceedings of this nature will be developed and conducted in accordance with this section.

b. Develop a compliance review process. Reviews will occur on a five-year cycle, and, when feasible, will be conducted as part of the local government's comprehensive plan review and update process. The department may also conduct a comprehensive or partial program compliance review and evaluation of a local government program more frequently than the standard schedule. The review process shall consist of a self-evaluation by each local government of local program implementation and enforcement as well as an evaluation by department staff. Based on these evaluations, the department shall provide the results and compliance recommendations to the board in the form of a corrective action agreement should deficiencies be found; otherwise, the board may find the program compliant. When deficiencies are found, the board will establish a schedule for the local government to come into compliance. The board shall provide a copy of its decision to the local government that specifies the deficiencies, actions needed to be taken, and the approved compliance schedule. If the local government has not implemented the necessary compliance actions identified by the board within 30 days following receipt of the corrective action agreement, or such additional period as is granted to complete the implementation of the compliance actions, then the board shall have the authority to issue a special order to any local government imposing a civil penalty not to exceed $5,000 per day with the maximum amount not to exceed $20,000 per day per violation for noncompliance with the state program, to be paid into the state treasury and deposited into the Virginia Stormwater Management Fund established by § 10.1-603.4:1 of the Code of Virginia.

(1) The self-evaluation shall be conducted by each local government according to procedures developed by the board.

(2) At a minimum, the department staff's evaluation will include a review of previous annual reports and site visits.

2. Certification of a local program. Upon a satisfactory finding resulting from the compliance review process, the board will certify that the local program is being implemented and enforced by the local government consistent with the Act and this chapter and is, therefore, in compliance. Such a certification shall be valid for a period of five years until the local government's next scheduled review, unless the board finds a pattern of noncompliance during the interim period of time, pursuant to subdivision 1 of this section.

4VAC50-90-270. Legal proceedings.

Subdivision 10 of § 10.1-2103 and § 10.1-2104.1 of the Act provide that the board shall take administrative and legal actions to ensure compliance by local governments with the provisions of the Act. Before taking legal action against a local government to ensure compliance, the board shall, unless it finds extraordinary circumstances, initiate an administrative proceeding under the Act and 4VAC50-90-260 to obtain such compliance and give the local government at least 15 days notice of the time and place at which it will decide whether or not to take legal action. If it finds extraordinary circumstances, the board may proceed directly to request the Attorney General to enforce compliance with the Act and this chapter. Administrative actions will be taken pursuant to 4VAC50-90-260.