

Martin O'Malley
Governor

Anthony G. Brown
Lt. Governor



Margaret G. McHale
Chair

Ren Serey
Executive Director

STATE OF MARYLAND
CRITICAL AREA COMMISSION
CHESAPEAKE AND ATLANTIC COASTAL BAYS

1804 West Street, Suite 100, Annapolis, Maryland 21401
(410) 260-3460 Fax: (410) 974-5338
www.dnr.state.md.us/criticalarea/

August 27, 2008

Deborah A. Renshaw
Zoning Inspector
Town of St. Michaels
300 Mill Street
P.O. Box 206
St. Michaels, MD 21663

Re: Miles Point Marsh Creation

Dear Ms. Renshaw:

Thank you for providing information on the above-referenced marsh creation at Miles Point in the Town of St. Michaels. You requested expert advice from this office on the effects of the marsh creation on environmental matters in the waterway, including marine life, wildlife, conservation, water pollution, water quality, and erosion.

For a marsh creation project, such as the one proposed at Miles Point, this office relies on, and abides by, the findings, certifications, permits, licenses, and conditions of the regulatory agencies charged with reviewing and approving these projects, including the State of Maryland Board of Public Works, Maryland Department of Natural Resources, Maryland Department of the Environment, and United States Army Corps of Engineers. Consequently, this office strongly advises the Town to consult the documentation supplied by each regulatory agency to evaluate the potential impacts this project will have on the appropriate environmental features considered by each of the regulatory agencies listed above.

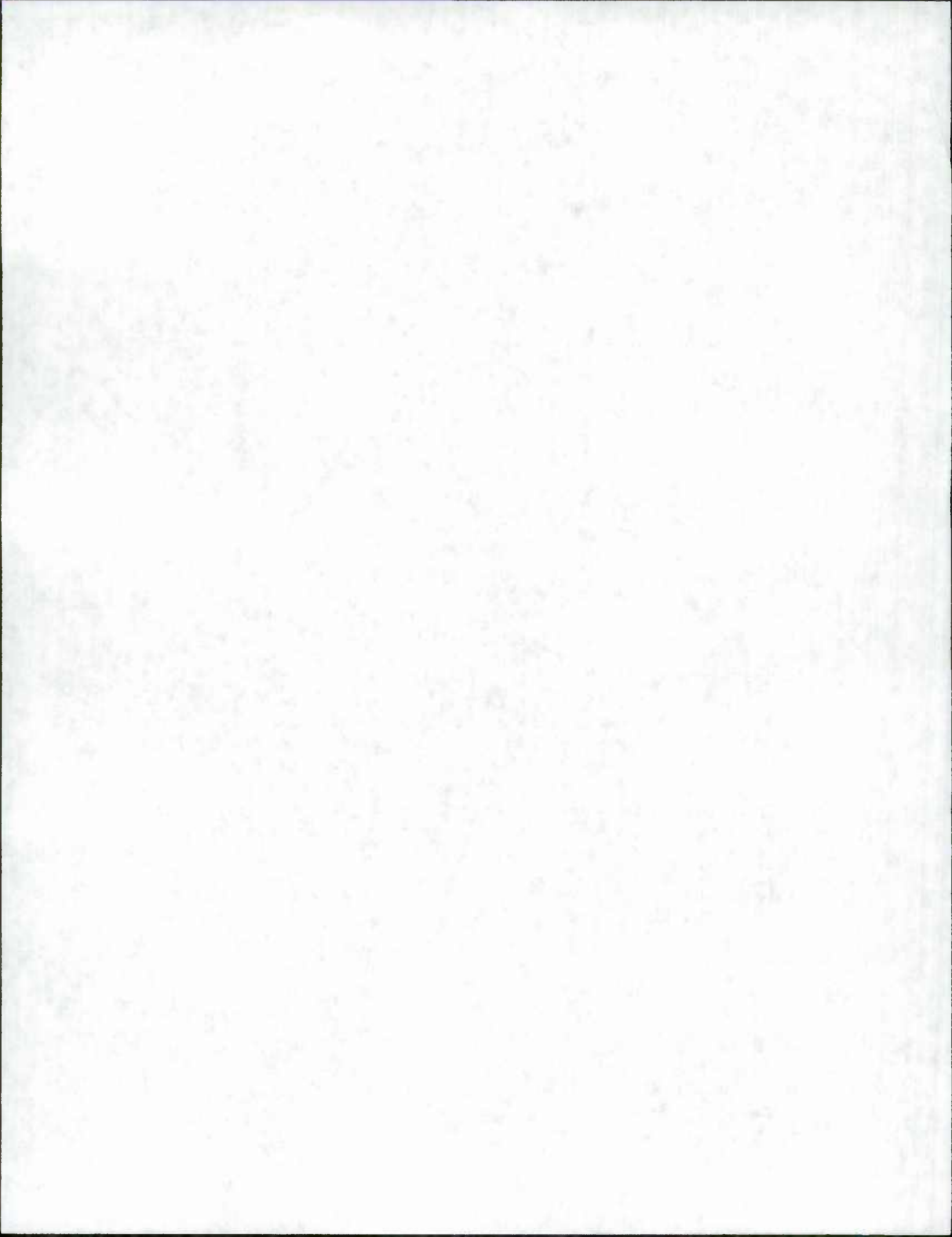
Thank you again for providing information on this marsh creation project. If you have any questions, please feel free to call me at (410) 260-3483.

Sincerely,

A handwritten signature in cursive script that reads "Nick Kelly".

Nick Kelly
Natural Resource Planner

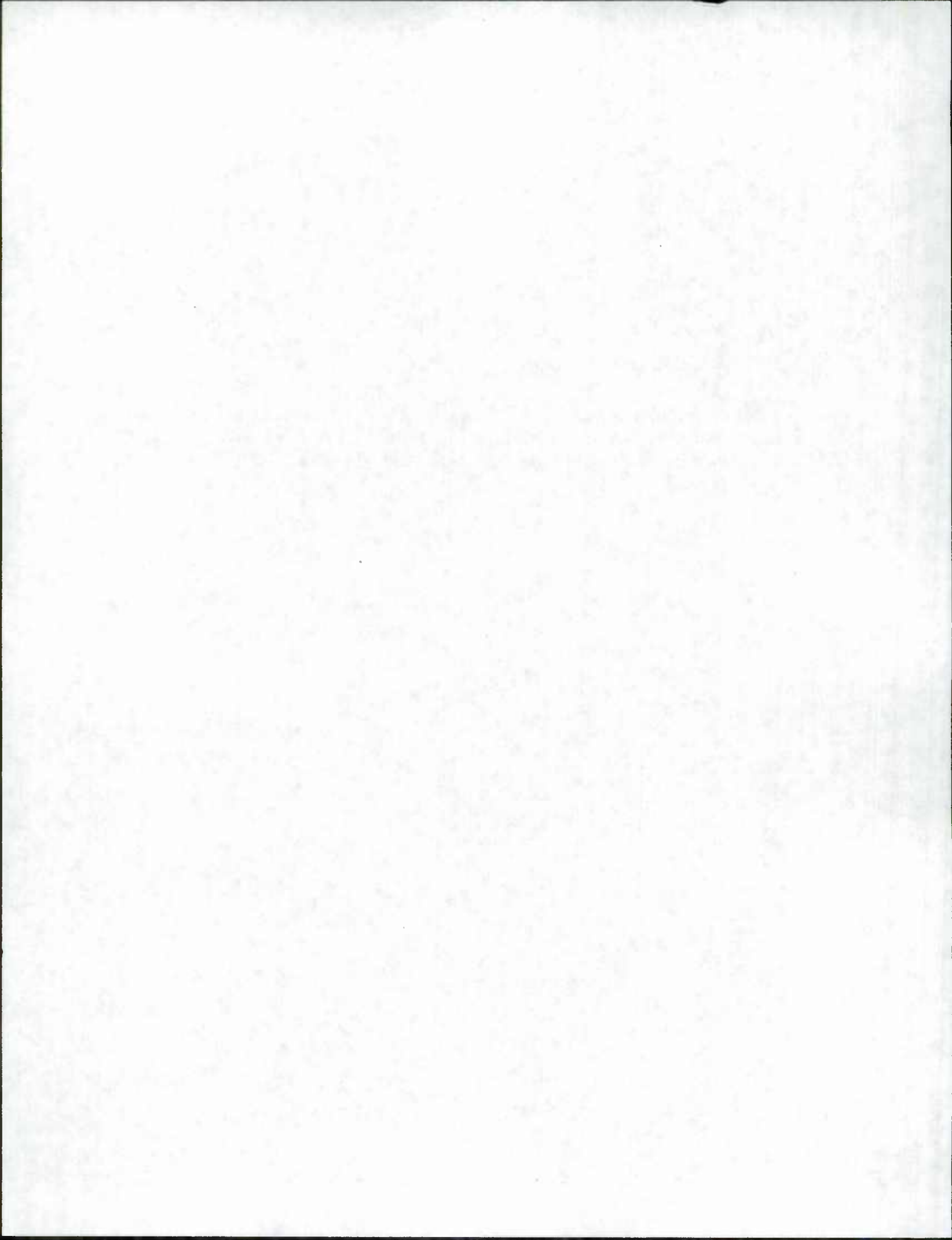
cc: TC 320-08
Marianne Dise, CAC
Lisa Hoerger, CAC



MEMO TO FILE

To: File
From: Kerrie Gallo
Date: June 10, 2008
Subject: Comments on Appeal #1498

Based on the Commission's litigious history with the Miles Point property, Counsel has advised against staff participation in this appeal before the Board. Therefore, no comments were sent and the County was notified via phone that comments would not be provided.





Hearing Date 07/14/08

Appeal No. 1498

Filing Date 05/15/08

Amount Paid \$700.00

Neighbors Notified 06/12/08

Petitioners Notified 06/25/08

OFFICIAL USE ONLY

To the Honorable, the Talbot County Board of Appeals,

Pursuant to the provisions of the most current Talbot County Zoning Ordinance for Talbot County, Maryland, or as amended, request is hereby made for:

XXX Variation from strict application of said Ordinance
Administrative Appeal
Special Exception

Statement of Case: A statement of the facts in full detail, including documentary evidence to be attached as deemed appropriate, and reference to any statute or law pertaining to the matter resulting in the denial of relief or direction for compliance. You may type on a separate sheet if additional space is needed and label as Attachment A.

SEE ATTACHMENT A

Location of Property: 24679 YACHT CLUB RD, ST. MICHAELS

Tax Map 23 Grid 15 Parcel 98/60 Lot 1 Size 6.368 Zone RC
acres

Property Owner: MILES POINT PROPERTY, LLC

Address of Owner: 1228 31st ST, N.W., WASHINGTON, D.C. 20007

Telephone Number: () Election District

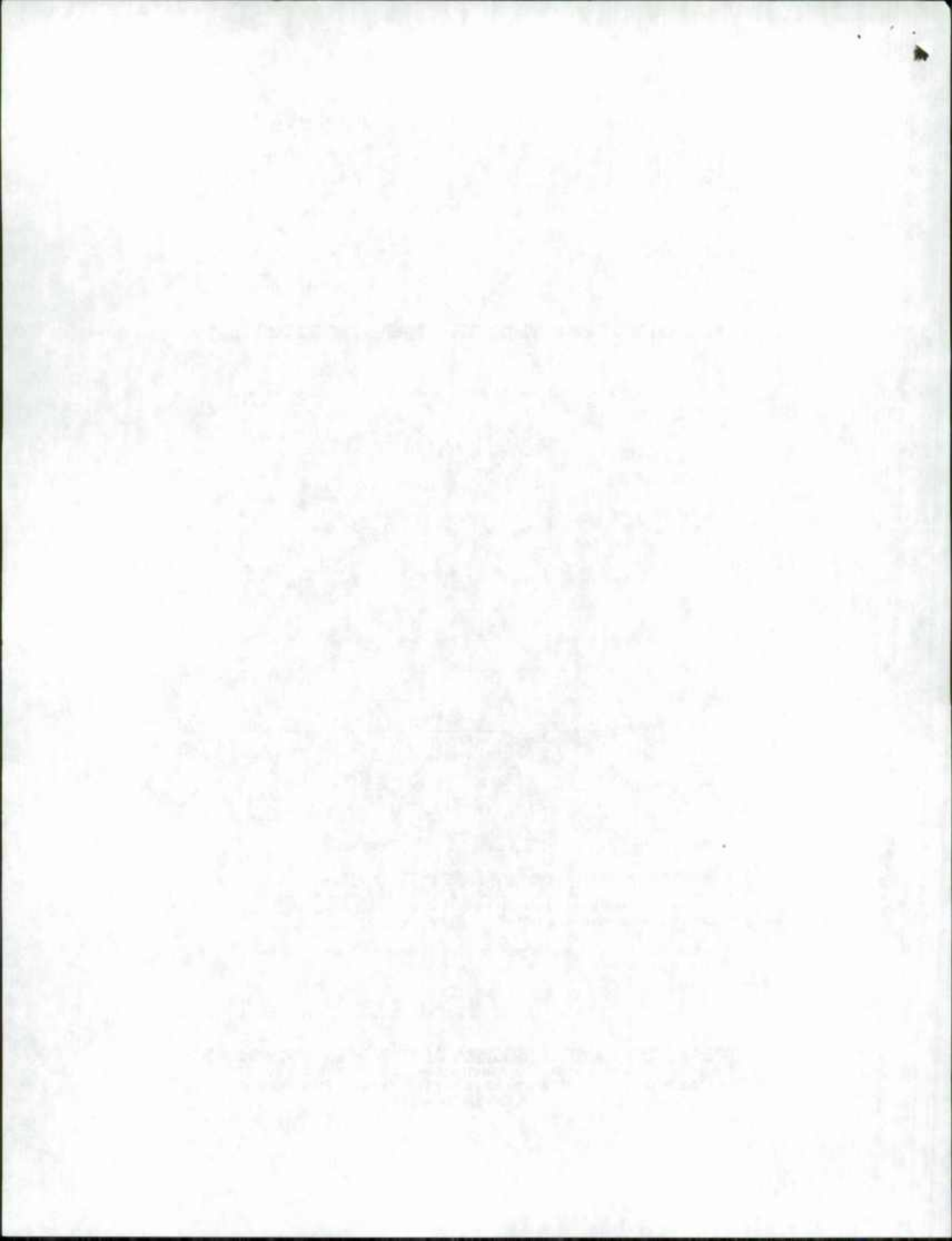
Applicant's name, address & telephone number if different from owner:
SEE ATTACHMENT B

Has above property ever been subject of previous Appeal(s)?
If so, give Appeal number(s) and date(s)

I (we) hereby certify, under penalty of perjury, that the matters and facts set forth in the foregoing Appeal are true to the best of my (our) knowledge and belief.

Thomas A. Deming
Applicant's/Agent's Signature
CO COUNSEL FOR APPELLANTS

IMPORTANT: APPLICATIONS ON WHICH ALL REQUIRED INFORMATION IS NOT FURNISHED WILL BE RETURNED FOR COMPLETION BEFORE PROCESSING, AND SHALL NOT BE CONSIDERED FILED WITH THIS DEPARTMENT.



BEFORE THE TALBOT COUNTY
BOARD OF APPEALS

Administrative Appeal of Zoning Certificate,
Permit Number 07-950

ATTACHMENT A

Statement of the Case

This is an administrative appeal of the issuance, by the Talbot County Department of Permits & Inspections on April 15, 2008, of a Zoning Certificate, Permit No. 07-950 ("the permit"), to Environmental Concern, Inc., contractor for property owner Miles Point Property, LLC, concerning a marsh creation project along the shore of the owner's property. A copy of the permit is attached hereto as Appellants' Exhibit 1. Appellants, listed on Attachment B, all are aggrieved by issuance of the permit.

Authority of the Board of Appeals

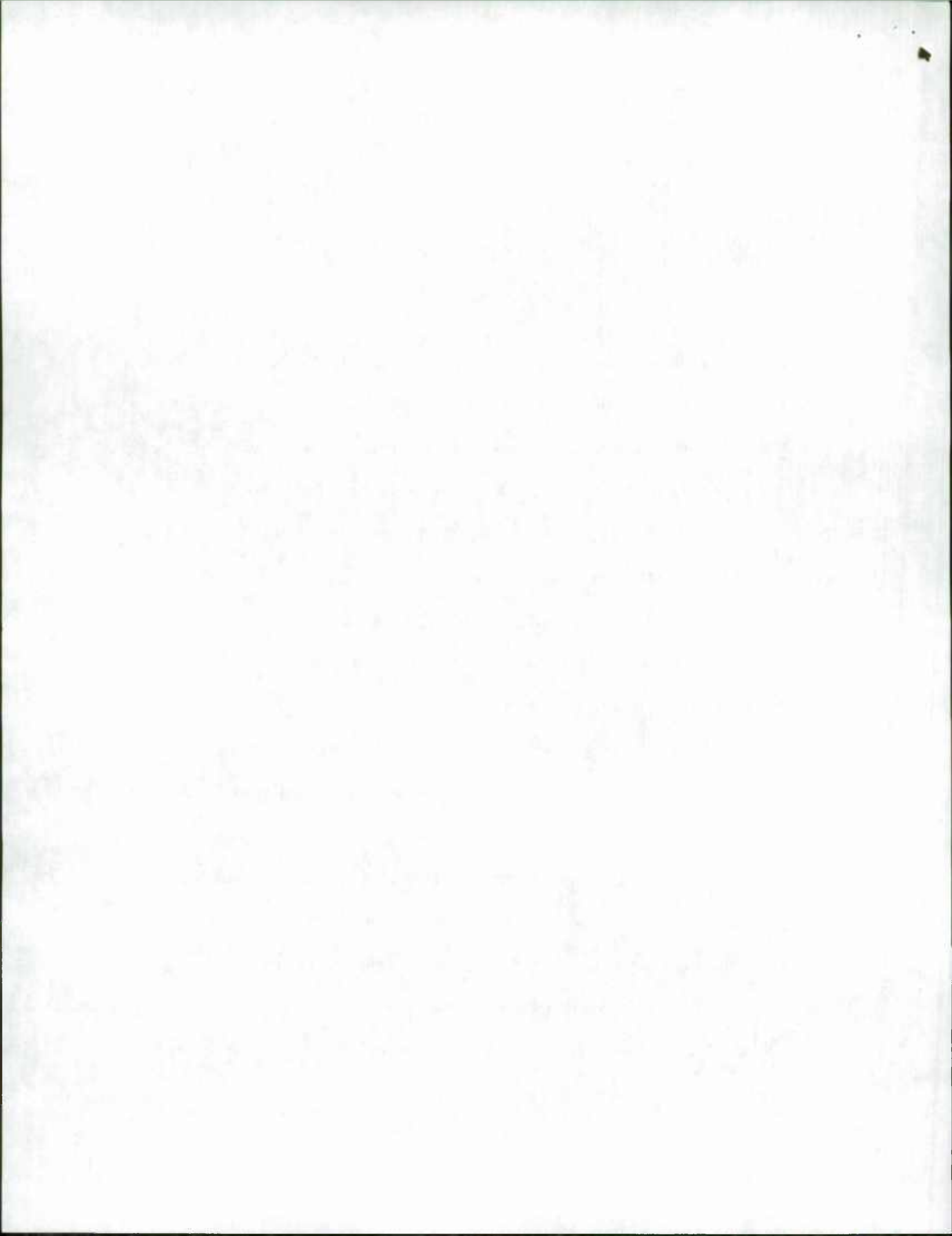
The Board of Appeals is authorized to hear and decide this appeal under Section 20-3 A(3)(a) of the Talbot County Code.

Appellants' Reservation Re Issues, Witnesses and Exhibits

As contemplated by Section 20-7 C(4) of the County Code, Appellants will submit no later than 30 days prior to the public hearing any further clarification of issues, all documents, and all witnesses to be called. Appellants reserve the right to further clarify issues and to supplement materials submitted with this application for administrative appeal with further clarifications of issues, additional documents and names of additional witnesses.

Initial Statement of Issues for Appeal

Section 190-7 of the County Code states in pertinent part:



No building, structure, land or part thereof shall hereafter be used, occupied, altered, erected, constructed or reconstructed, unless in conformity with this chapter. Activities not in compliance with this chapter shall be expressly prohibited.

With respect to zoning certificates and building permits, Section 190-101 states in pertinent part:

No building permit shall be issued unless all applicable County regulations are complied with.

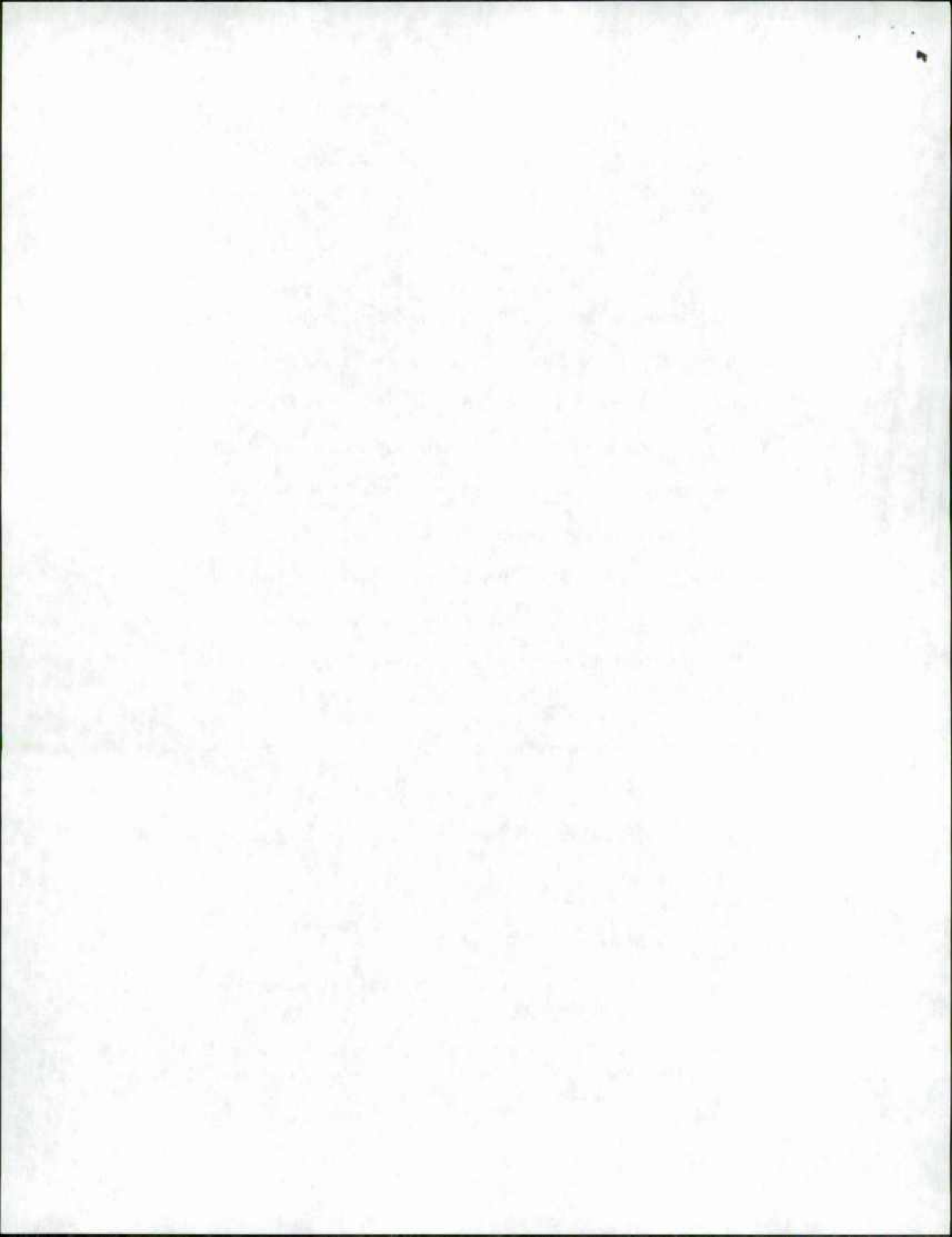
Appellants will contend in this appeal that the above-quoted provisions impose a duty upon an applicant for a building permit or zoning certificate to demonstrate his compliance with all applicable provisions of Chapter 190, Zoning, and with other applicable provisions of the County Code. With respect to Permit No. 07-950, the materials submitted in support of the application were inaccurate in some instances and incomplete in others, such that it was error for the Department of Permits and Inspections to issue this permit.

Among the provisions of Chapter 190 with which an application must be shown to be in compliance are the purpose provisions of Section 190-2. For activities throughout the County, subsection 190-2 A provides that it is the purpose of the zoning chapter, among other purposes, to:

- (2) Promote the conservation of natural resources.
- (6) Preserve the existing rural character and quality of life of the county.

For activities within the critical area in the County, purposes of the zoning chapter stated in subsection 190-2 B include:

- (2) The conservation of fish, wildlife and plant habitats.
- (4) The promotion of the most environmentally sensitive plans and practices where development is allowed in shoreline areas.
- (5) The conservation of all types of wetlands within the Critical Area so that they can continue to function in their natural capacities as marine nurseries, filters, and absorbers of flood and erosive impacts; and

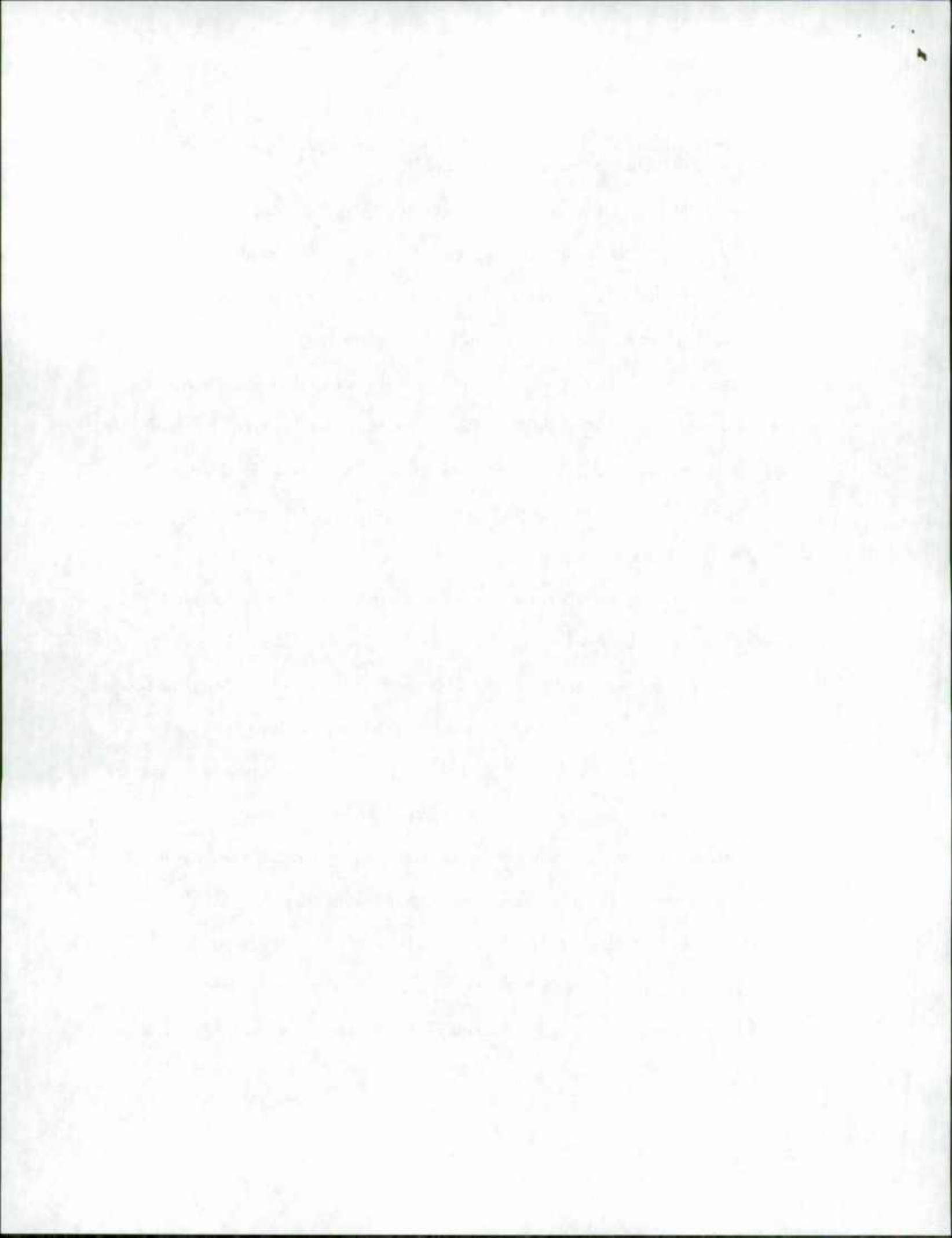


(6) The restoration of both shellfish and fin fish productivity through protection and cultivation of submerged aquatic vegetative beds.

In light of the foregoing purposes for which the zoning code has been enacted, it was incumbent upon the applicant for this permit to depict accurately the natural features and habitats of the site. One example of the applicant's failure to do so concerns the location of shellfish habitat adjacent to the project site. On this point, applicant submitted to the Department of Permits and Inspections an exhibit depicting "Miles Point Historic Oyster Bars. See Appellants' Exhibit 2, attached hereto. This exhibit depicts the "Ash Craft" oyster bar as being well offshore from the project site. The note on this exhibit states that it is based upon a 1997 Maryland DNR report entitled "Maryland's Historic Oyster Bottom; A Geographic Representation of the Traditional Named Oyster Bars." However, this 1997 DNR report is prefaced with an express Notice that states, "the charts and depictions shown within should not be construed as the boundaries of the current legal oyster bars." See Appellants' Exhibit 3, attached. In fact the current legal oyster bar adjacent to the project site is shown as "N.O.B. 9-6" on Maryland DNR Natural Oyster Bar Chart 9. The pertinent portion of Chart 9 is attached hereto as Appellants' Exhibit 4. The boundaries of N.O.B. 9-6, highlighted in yellow, actually come all the way to the shoreline at Miles Point, at the exact location of the proposed marsh creation project.

As witnesses for Appellants will attest, protection of this oyster habitat not only is important for the oysters, but as importantly for the watermen who still work N.O.B. 9-06 and whose livelihood is a crucial part of "rural character and quality of life" of Talbot County.

Beyond the requirements of Chapter 190, and among other provisions of the County Code, the proposed marsh creation project also must meet the requirements of the County's



Floodplain Management code, Chapter 70. Section 70-1 states, among other purposes for the County's regulation of activities in the floodplain, that:

- B. Floodplains are an important asset to the community. They perform vital natural functions such as temporary storage of floodwaters, moderation of peak flood flows, maintenance of water quality, groundwater recharge, prevention of erosion, habitat for diverse natural wildlife populations, recreational opportunities, and aesthetic quality. These functions are best served if floodplains are kept in their natural state. Wherever possible, the natural characteristics of floodplains and their associated wetlands and water bodies should be preserved and enhanced.

Among other provisions, Section 70-9, requires that plans and elevations for projects in the floodplain must be prepared by professional engineers.

While this project may be subject to separate application under Chapter 70, it nevertheless remains a responsibility of the Department of Permits and Inspections to ascertain that all requirements of the County Code will be complied with. Where, as here, the application materials on their face evidence no involvement of a licensed, professional engineer in the preparation of the project design, this application should have been denied by the Department of Permits and Inspections.

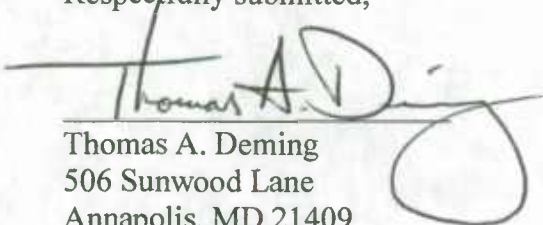
Conclusion

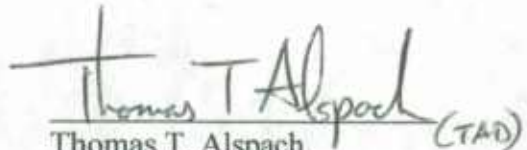
For the foregoing reasons, and further based upon such other documentation and testimony as to these and related issues that Appellants may include in their Section 20-7 C(4) submission and present at the hearing before the Board of Appeals, the Board should find that

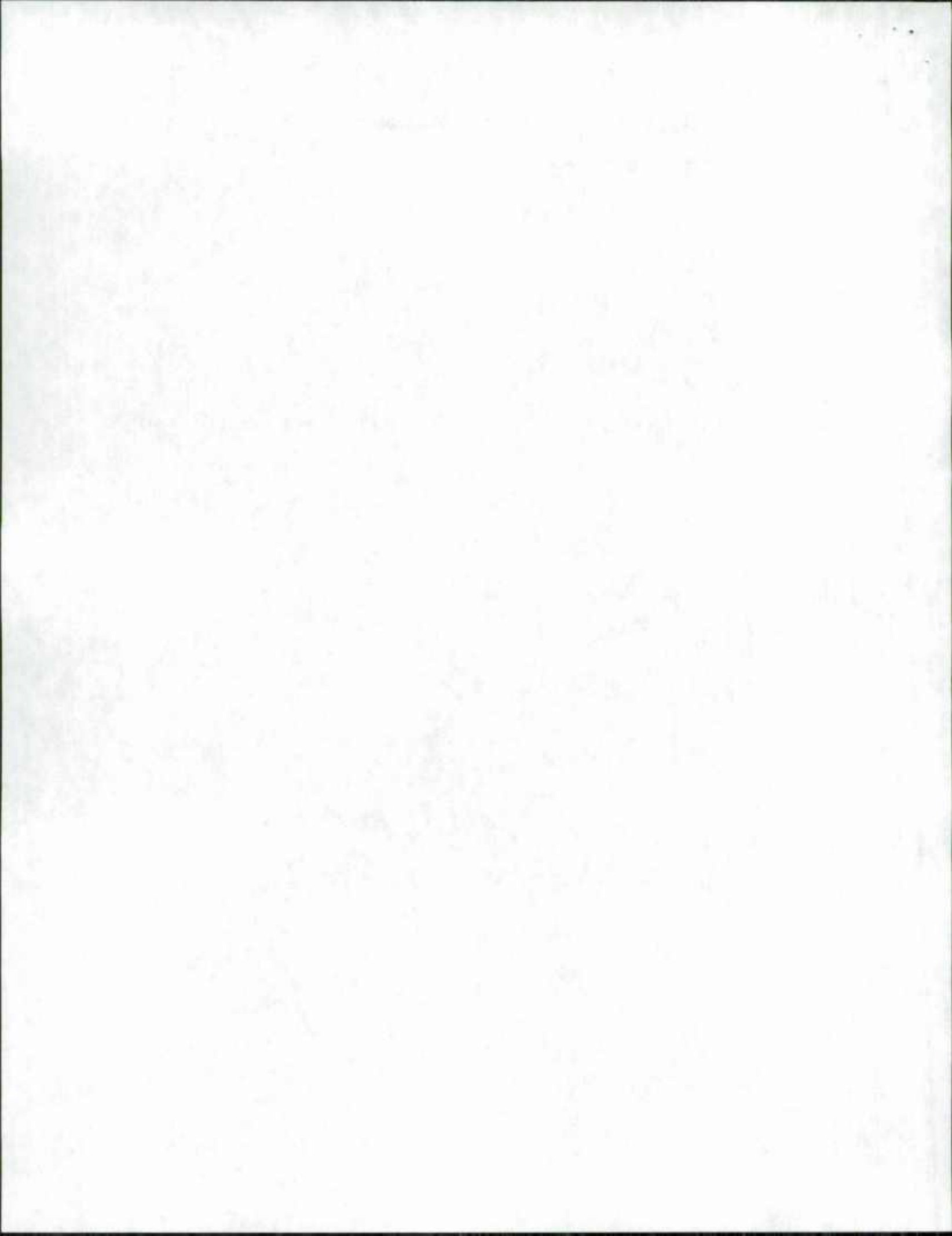


the Department of Permits and Inspections erred in the issuance of Permit Number 07-950 and should order that the permit be denied.

Respectfully submitted,


Thomas A. Deming
506 Sunwood Lane
Annapolis, MD 21409
(410) 757-0100
CO-COUNSEL FOR APPELLANTS


Thomas T. Alspach (TAD)
295 Bay Street, Suite One
Easton, MD 21601
(410) 822-9100
CO-COUNSEL FOR APPELLANTS



ATTACHMENT B – LIST OF APPELLANTS AND THEIR ATTORNEYS

Appellants

Bruce and Ann Bedford
300 Perry Cabin Drive
St. Michaels, MD 21663
(410) 745-3262

Helen Jeffereys
350 Perry Cabin Drive
St. Michaels, MD 21663
(410) 745-3716

Dennis B. Kastel
23650 Mt. Pleasant Landing
St. Michaels, MD 21663
(410) 745-5571

Jesse Jump
P.O. Box 1267
319 Dodson Avenue
St. Michaels, MD 21663
(410) 770-5124

Russell Dize
P.O. Box 164
5423 Rude Avenue
Tilghman, MD 21671
(410) 886-2249

John C. North, II
Broadview Manor
Yacht Club Road
St. Michaels, MD 21663
(410) 822 - 43721

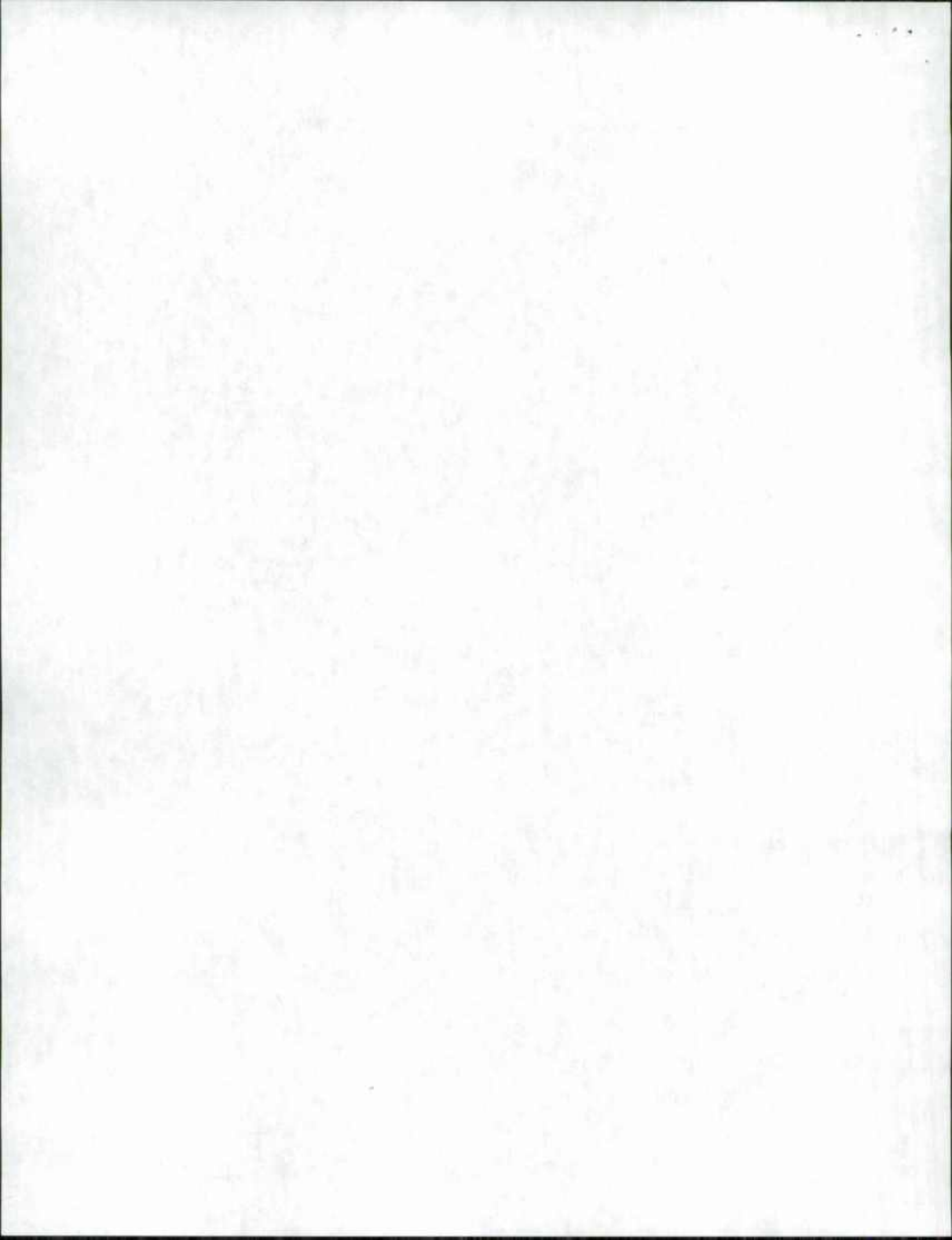
FOR HIMSELF AND, IN HIS
CAPACITY AS FIRST VICE PRESIDENT,
FOR THE MARYLAND WATERMEN'S ASSOCIATION

Attorneys for Appellants

Thomas T. Alspach
295 Bay Street, Suite One
P.O. Box 1358
Easton, MD 21601
(410) 822-9100

Thomas A. Deming
506 Sunwood Lane
Annapolis, MD 21409
(410) 757-0100

Carolyn H. Williams
WILLIAMS & CONNOLLY, LLP
725 Twelfth Street, N.W.
Washington, D.C. 20005
(202) 434-5530





**CODES ENFORCEMENT OFFICER
ZONING INSPECTOR**

300 Mill Street
P. O. Box 206
St. Michaels, MD 21663

Settled 1670-1680
Telephone 410.745.9535

Incorporated 1804
Facsimile 410.745.3463

August 13, 2008

Mr. Nick Kelly
Critical Area Commission
1804 West Street, Suite 100
Annapolis, MD 21401

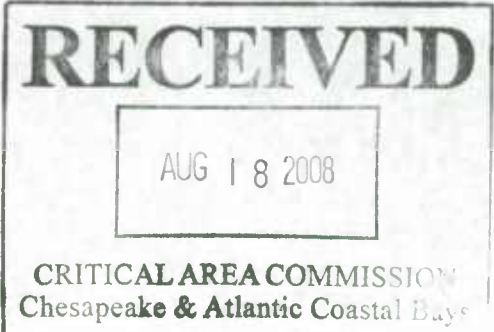
RE: Miles Pt. – Marsh Creation

Dear Nick:

I am forwarding an application which we have received for the establishment of a marsh at the above referenced property located adjacent to the Miles River. In accordance with §340-9 B(3), I as Zoning Inspector am required to make specific findings relative to those items contained with §333-6A(2). In order to make such findings I am seeking expert advice on certain environmental criterion. Specifically what are the effects of the marsh reclamation project set forth in the application upon environmental matters in the waterway including (1) Marine life; (2) Wildlife; (3) Conservation; (4) Water Pollution; (5) Water Quality; and (6) Erosion.

In addition, does the project, particularly in light of the settlement agreement between the CAC and Applicant, (1) enhance the public waterway; (2) unreasonably extend private dominion into the public waterway and (3) preserve, restore and/or increase tidal wetlands.

To assist in your review, I am enclosing documentation which the client has submitted in support of the issuance of the requested permit. I should point out that there is opposition to the creation of the marsh with adjacent property owners and some watermen stating that the marsh creation will impact a historic oyster bar. There are letters contained in this packet that contradict that allegation,



The applicants are anxious to begin work on this marsh and as such if you could respond within the next 10 working days, it would be greatly appreciated. Should you need additional information, please do not hesitate to contact me. Thanking you in advance for your attention to this matter.

Sincerely,

A handwritten signature in cursive script, appearing to read "Deborah A. Renshaw".

Deborah A. Renshaw
Codes Enforcement Officer

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ENVIRONMENTAL CONCERN

Celebrating our 35th year of wetland stewardship

Ms. Deborah A. Renshaw,
Zoning Inspector/Codes Enforcement Officer
Town of St. Michaels
300 Mill Street
St. Michaels, MD 21663

Re: Supplemental Information- Zoning Certificate
Marsh Creation – Miles Point

Dear Ms. Renshaw:

The Town of St. Michaels Waterways Management Ordinance Ch. 333-9-B(3), states in part that the Zoning Inspector may approve an application to permit "...within the developable waterway ...only upon evidence and finding of fact, relating to the factors set forth in section 333-6A(2) of this chapter, that the waterway improvement being applied for is in the public interest and will not otherwise violate this chapter."

By way of background:

- The Miles Point application for a State license and a Federal permit to construct the marsh was reviewed at four Town meetings convened by the Commissioners of St. Michaels and at two public hearings conducted by MDE.
- In addition to the public hearings, the application process included a thorough review of the permit application by State and Federal officials, including the EPA, USACE, MDE, DNR, USFWS, NMFS, MHT and CAC. The application was reviewed independently and at a joint meeting of these agencies.
- In October 2006, the MDE submitted a favorable Report and Recommendation (R&R) to the Wetland Administrator, Board of Public Works. This R&R was made available to all interested parties. The Board of Public Works received the favorable recommendation of its Wetland Administrator and MDE at its December 2006 meeting. The Board continued the hearing to January the 3rd and requested that the staff compile additional information for the Board's consideration. On Jan 3, 2007, the Board voted unanimously to approve Wetland License #04-0194 for marsh creation at Miles Point. At that time, MDE issued the Water Quality Certification associated with this License. Both the Wetland License and the Water Quality Certification state that the proposed marsh creation is consistent with Maryland's Coastal Zone Management Program.
- The USACE (Corps) completed its evaluation of the marsh application in July 2007, and on 2 August 2007 issued individual authorization (permit) # CENAB-OP-RMS 05-65320-13.

In summary, the EPA, USACE, MDE, DNR, USFWS, NMFS, MHT and CAC thoroughly reviewed the application and supporting documentation. The end product of this review was the Wetland License #04-0194 and Corp individual authorization # CENAB-OP-RMS 05-65320-13.

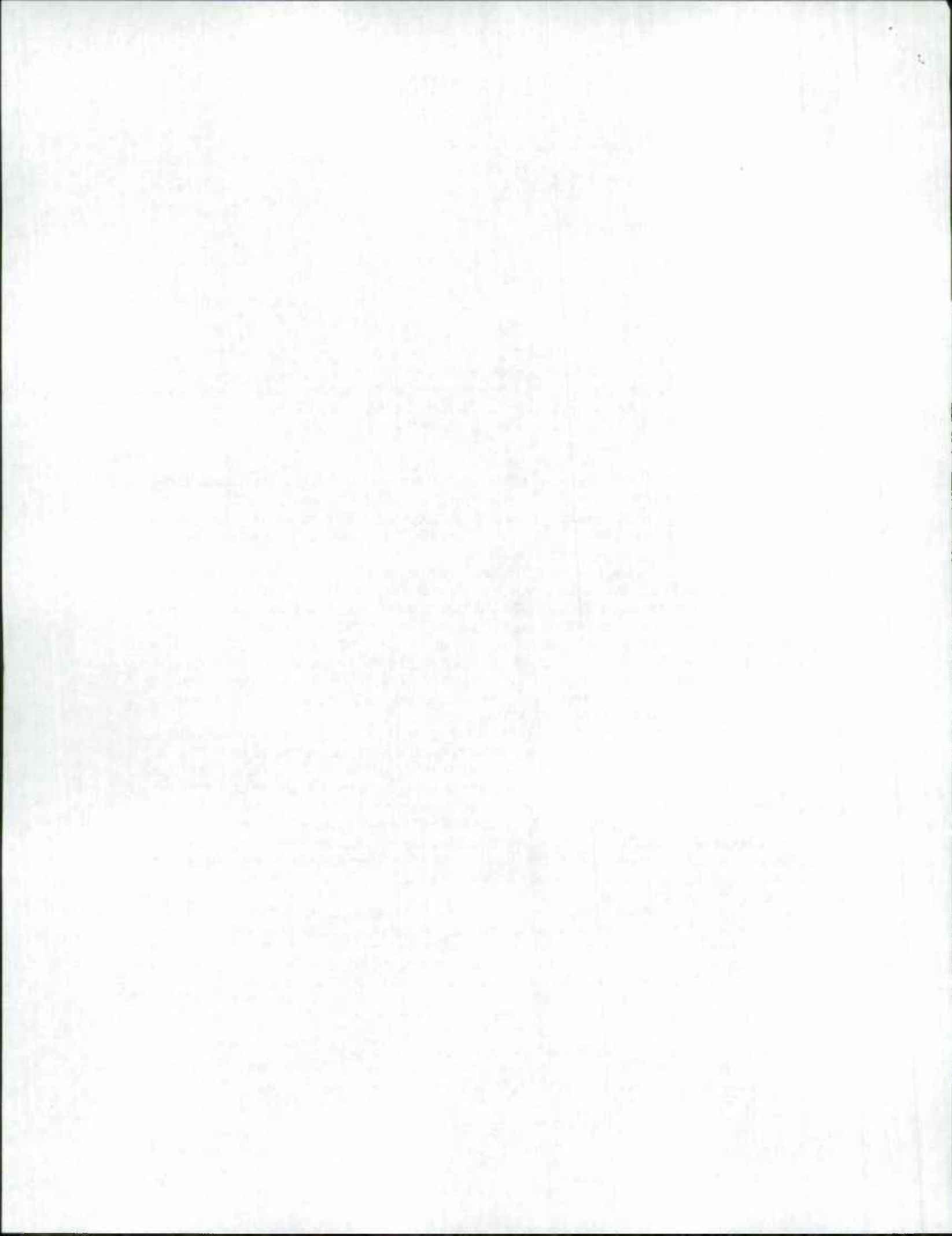
Each of the criteria listed in Section 333-6A(2) was addressed in the technical reviews and the approvals issued by the MDE and the Army Corps which preempt any inconsistent determinations that the Town of St. Michaels might otherwise render. I included copies of both permits with this application filing.

For our mutual convenience, I have included with this letter, separate copies of pertinent pages of these permits as well as copies of relevant staff documents prepared in the course of the permit review process. These copies are listed here in the order that they are referenced:

- Plate 6- Bathymetry rev 4: 12/08/06 (Plate 6)
- Letter dated July 11, 2007 from MDE to Elizabeth D. Jones, President Bay Hundred Foundation (MDE-BHF)
- Letter dated Aug 02, 2007 from the Corp to Ms. Bettejewski of the Talbot River Protection Association (Corp-TRPA)
- Department of the Army Permit Evaluation and Decision Document (Corp E&D)
- MDE Report and Recommendation to the Board of Public Works dated 29 Nov. 2006 (MDE-R&R)
- Letter dated 2 April 2008 from MD DNR to Corp re: Natural Oyster Bar 9-6 (DNR-Corp)
- NOB 9-6 Plates 2 & 3 dated 4/14/2008 (Aerial NOB 9-6)
- Site Plan for Proposed Tidal Marsh at Miles Point -by McCrone, sealed 7-14-08 (Site Plan);
- 1847 U.S. Coastal Survey Chart T-223 Overlaid on 2006 Aerial: 05/29/2007 (HistMap)
- EC PPP describing the Functions & Values of the Marsh at Miles Point (Salt Marsh-Functions&Values) – (previously submitted)
- Findings, Decision & Conditions By the COSM - Application for Growth Allocation Miles Point 3-150 Plan (Facts MP 3-150)
- Critical Area Commission Staff Report September 7, 2005 REVISED – Miles Point Buffer Management Plan (CAC-Staff)

P.O. Box P, St. Michaels, Maryland 21663
<http://www.wetland.org>

410-745-9620
410-745-3517 Fax



With respect to the policy statements contained in Section 333-2, as incorporated into 333-6(2)(a), the Commissioners have already rendered affirmative findings with respect to each of these criteria in their Growth Allocation Facts MP3-150' Plan (which is included herewith). Likewise, in that Decision the Commissioners also determined that: (1) construction of the marsh satisfies the purposes contained in Section 333-3, (2) complies with the Zoning Ordinance, (3) furthers the goals of the Comprehensive Plan and, in particular, the environmental sensitivities discussed therein, (4) was predicated upon a favorable recommendation of the Zoning Inspector, and (5) does not in any way deviate from the purposes contained in the Harbor Management Plan. This latter point is further illustrated by the site plan submitted by McCrone, dated July 14, 2008.

In the interest of clarity, I have reformatted this application, addressing criteria (g) through (r) below, as listed in Section 333-6A(2). The balance of this letter addresses these 12 criteria.

Section 333-6A(2):

(g,h) The effects upon the scenic view and the effects upon visual access to a waterway from land:

The marsh elevation at top of sill will be approximately +2.0 MLW. The top of bank will be approximately +3.0 MLW. The marsh will be fully vegetated. The marsh and the proposed buffer will enhance the scenic view of the landscape and the waterway. The gently sloping marsh plane will present a gracious visual access to the water.

(i) The effects upon vessel traffic:

The water depth at the channelward limits of the marsh is approximately -1.0MLW (Plate 6). "The project will not impact navigation." (MDE-BHF-pg.5). "The proposed marsh creation and pier should not adversely impact navigation in the area as the water depths within the project area are less than one foot at mean low water" (Corp-TRPA).

"The proposed pier and marsh creation would not adversely impact navigation. The portion of the river to be filled is in the intertidal zone, which is not used by boaters. ... Thus, neither the marsh or the pier would impact general navigation because this part of the river is too shallow for boat traffic. The proposed recreational pier would not provide any new boat slips, therefore the authorized work would not result in increased boat traffic on the Miles River" (Corp E&D pg.17).

(j) The location of existing lawfully placed waterway improvements:

None, other than those proposed in connection with this permit.

(k) The needs of commercial waterman:

The Limits of Disturbance associated with the proposed marsh will not adversely impact the needs of commercial waterman. "USFWS stated their support of the proposal during the 27 Sept 2006 JE meeting" (Corp E&D-pg.5).

There will be a positive indirect impact which MDE explained to the Board of Public Works as follows:

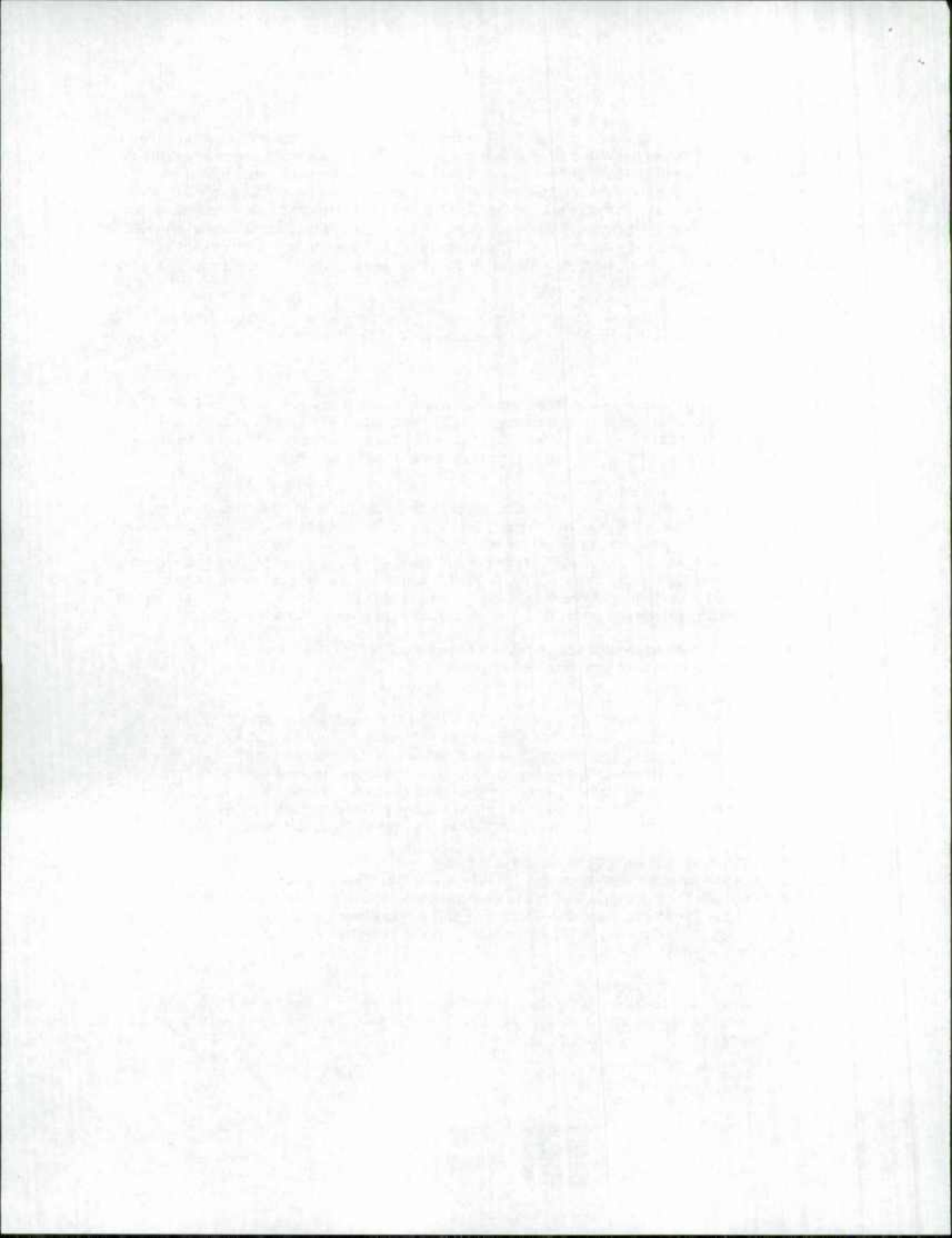
"The project shoreline is undergoing severe erosion and as a result, significant amounts of nutrients and sediments are being eroded into the waterway every day, degrading water quality and indirectly impacting all aquatic living resources including any oysters or submerged aquatic vegetation (SAV) in the area. The proposed Marsh will enhance water quality and therefore improve offshore resources, including the oyster bar..."

Federal and State agencies confirmed that the area within NOB 9-6 is not Oyster habitat. "the area of the NOB that would be impacted by the proposed marsh construction at Miles Point is not oyster habitat" (DNR-Corp-pg.1). "The additional information provided by Mr. Pashayan does not alter our earlier review conclusion that the proposed marsh construction will not impact oyster resources within NOB 9-6" (DNR-Corp-pg.2). The footprint of the proposed marsh relative to the NOB 9-6 and the Ash Craft Bar is depicted on Aerial 2 and Aerial 3. Note that the limits of NOB 9-6 are channelward of the proposed sill (Aerial NOB 9-6).

(l) The configuration of the shoreline:

The existing and proposed shoreline, as permitted, is presented on the Site Plan by McCrone dated July 2008 (Site Plan). The historic survey map provides additional perspective. Note the location of the proposed sill relative to the marsh (HistMap).





(m) The depth of the water at Mean Low Tide (MLW):

"The proposed marsh creation and pier should not adversely impact navigation in the area as the water depths within the project area are less than one foot at mean low water" (Corp-TRPA). The bathymetry in the area of the proposed Miles Point shoreline is included in the McCrone site Plan (Site Plan) and the permit application (Plate 6).

(n) The patterns and intensity of vessel traffic:

"The project will not impact navigation" (MDE-BHF-pg.5). "The proposed marsh creation and pier should not adversely impact navigation in the area as the water depths within the project area are less than one foot at mean low water" (Corp-TRPA).

(o) The necessary and available anchorage space in the water:

Not applicable. The water depth in the project area is not suitable for anchorage.

(p) The effects upon environmental matters in the waterway, including: [1] Marine Life; [2] Wildlife; [3] Conservation; [4] Water Pollution; [5] Water quality, and [6] Erosion:

EC presented the Functions and Values of the proposed salt marsh at four Municipal public hearings over a two year period. These values were presented for the record in 2004, and again at the public hearings convened by the Commissioners of St. Michaels in December 2005 and January 2006 (Salt Marsh-Functions&Values).

"Conservation: The project would provide shoreline stabilization to the actively-eroding shoreline, thus greatly reducing the amount of sediment entering the river. The marsh creation should improve water quality by both reducing the amount of sediment entering the river, and by providing some filtration of nutrients in the water column." (Corp E&D-pg.13)

"The marsh would improve water quality both in terms of nutrient reduction and sedimentation, thereby improving conditions for SAV establishment channelward of the marsh" (Corp E&D-pg.14).

"The improvement in water quality resulting from the marsh creation would improve offshore resources rather than degrade them" (Corp E&D-pg.14).

"Wetlands: The proposed work would not impact any existing wetlands. In fact, the proposal would create 4.4 acres of tidal wetlands. These wetlands would provide habitat for birds, small mammals, crustaceans, and benthic organisms; would protect the shoreline from erosion; would remove nitrogen and phosphorous from the water; and would provide nutrients and detritus to support the food chain of aquatic species, a function known as nutrient export" (Corp E&D-pg.15).

"The proposed marsh creation would prevent further shoreline erosion, thereby improving water quality" (Corp E&D-pg.17).

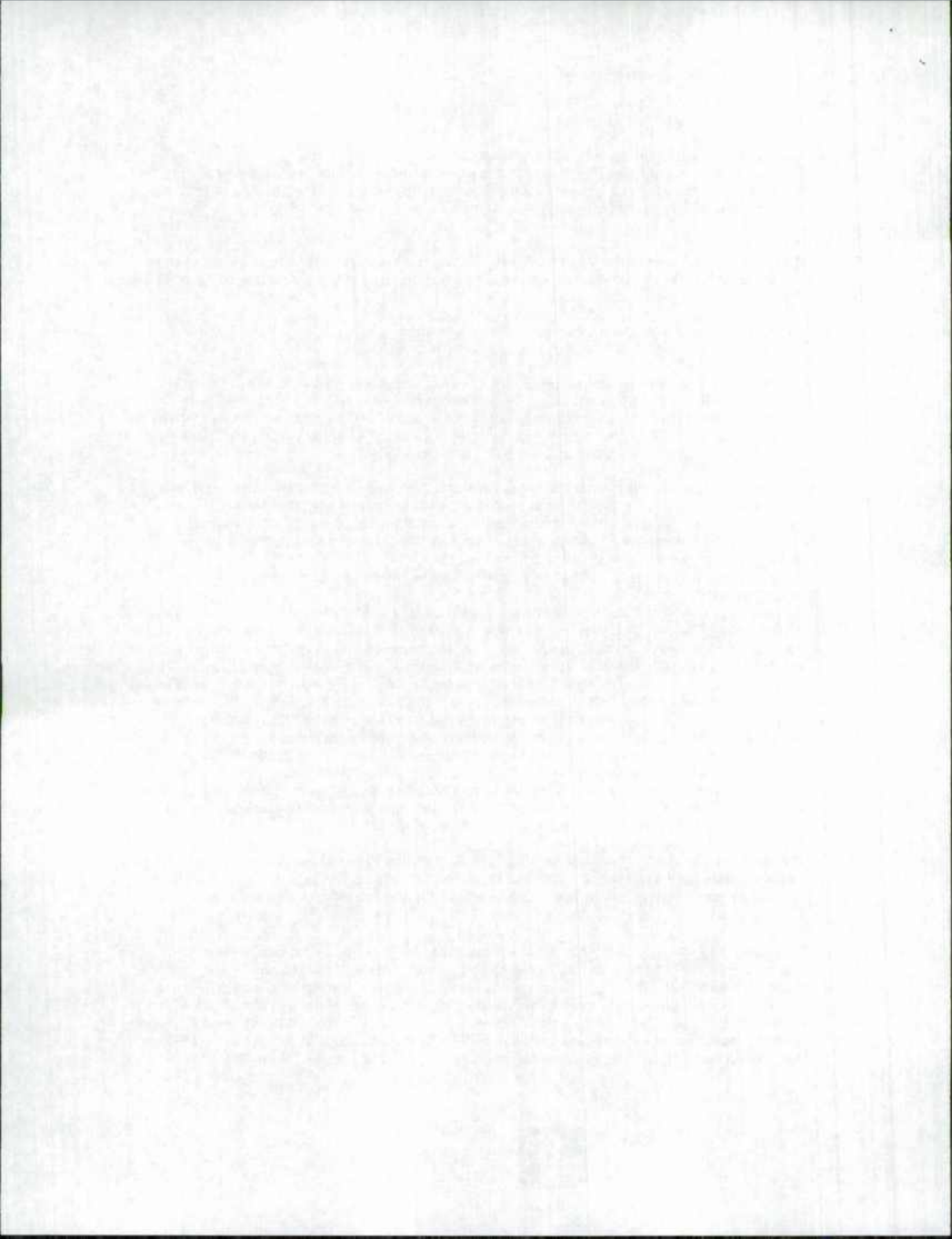
"The stabilization of the actively eroding shoreline would improve local water quality by reducing the sediment in the local water column. The marsh would remove nitrogen and phosphorous from the water column" (Corp E&D-pg.18).

"The proposed marsh creation and stone sill would provide much needed stabilization of the shoreline, thus benefitting the private owner by protecting his existing uplands. The general public would benefit from the shoreline stabilization by the improved water quality and increased wildlife habitat in the Miles River. In terms of the biomass produced, a salt marsh is one of the most productive ecosystems on earth. The spartina forms the base of a complex food web supporting insects, detritivores (snails, bacteria, fungi, worms), scavengers (shrimp, fiddler crabs, blue crabs), filter feeders (clams, oysters, worms), predators (egrets, herons, gulls, osprey, eagles), and fish" (Corp E&D-pg.19).

"Shoreline erosion is evidenced by bank undercutting, bank slumping, near shore sedimentation, and upland property loss. Expansive shallow water flats are situated offshore of the site. No submerged aquatic vegetation or significant living resources are located in the immediate project vicinity or within a distance close enough to be impacted by the project" (MDE-R&R).

The *Findings, Decisions and Conditions* by the COSM states in part that "the MP3-150 Plan includes the Shoreline Stabilization, of which the Marsh is the most important part. The constructed shoreline marsh has been described and discussed previously in this Decision .⁵⁰⁷ The marsh provides the following environmental benefits that have already been touched on; the importance of which cannot be overstated: (a) improves the water quality of the Miles River with each rising tide that flushes into the marsh, through filtration of the river water and uptake of nutrients in the river water; (b) provides habitat and food for marine life and waterfowl; and (c) provides additional vegetated setback, physically and effectively making impervious surface and human activity more distant from the shoreline" (Facts MP 3-150-pg.107).





"...the original intended purpose of the Marsh is to stabilize the eroding shoreline of the Subject Property. The eroding banks will be re-contoured to create gentle slopes that will support vegetation. The banks will be disturbed to the extent necessary to stabilize them, after which they will be planted with natural vegetation and remain undisturbed as part of the shoreline buffer. The marsh is a natural way to stabilize the shoreline" (Facts MP 3-150-pg.107).

"The developer's Plan regarding the buffer and the additional setback, together with the proposed creation of a tidal marsh, adequately addresses, in staff's view, the habitat protection and wildlife corridor issues contemplated in the criteria and the conditions placed upon the project during the Commission's initial review" (CAC-Staff-pg.3).

(q) The rights of riparian property owners:

The applicant owns all of the riparian rights in the area of the proposed marsh.

"The proposed pier and marsh creation would not adversely affect (adjacent) property ownership. At this time, the permit applicant owns the entire property. Corps regulations presume that a property owner has a right to protect his property from erosion. Therefore, the project would protect the owner's interest" (Corp E&D-pg.18).

(r) Such other factors as the Zoning Inspector and/or the Commissioners may deem appropriate under the circumstances:

[1] Flood plain. Based on past practice, careful review of the Town regulations, and consultation with FEMA and MDE officials, Environmental Concern Inc. (EC), on behalf of the Applicant, certifies that creation of the proposed wetland will not alter a watercourse and will not have an adverse impact on aquatic resources.

The proposed marsh creation is located in tidal waters at the confluence of Fog Cove and the Miles River; it is not located in the channel, and therefore, will not impede the flow of water. The project will restore and stabilize an eroding shoreline, protecting it from further damage. This marsh creation will also create/improve aquatic habitat.

The following is a definition taken from the Code of Federal Regulations for a 'regulatory floodway' (44CFR59.1):

Regulatory floodway means the channel of a river or other watercourse and the adjacent land areas that must be reserved in order to discharge the base flood without cumulatively increasing the water surface elevation more than a designated height.

This section does not apply to marsh creation projects since the marsh creation is in tidal waters.

This marsh creation will not impound floodwaters and it will not increase flood heights.

"The proposed marsh creation would provide buffering between the subdivision and the river. Marshes, including man-made wetlands, provide flood storage and would act to break-up waves and would spread storm surges across the surface of the marsh, thus reducing the potential flood hazard" (Corp E&D-pg.16).

"The proposed marsh creation would result in the discharge of fill within a portion of the Miles River. However, this fill would have a negligible effect on flood storage, and the marsh would attenuate wave energy during flood events. The riparian habitat would be enhanced by the creation of the marsh and by the stabilization of the eroding shoreline" (Corp E&D-pg.16).

[2] Buffer Impact: A Buffer Management Plan, approved by the Critical Area Commission and the COSM has been submitted on behalf of the applicant.

[3] Erosion and Sediment Control Plan (E&SC): An E&SC Plan, approved by the Talbot County Soil Conservation Service and a Notice of Intent (NOI), issued by the MDE, have been submitted with this application.

I trust the above and attached additional information will assist you in your review and approval of our application. Please advise if you require any additional information.

Respectfully submitted:

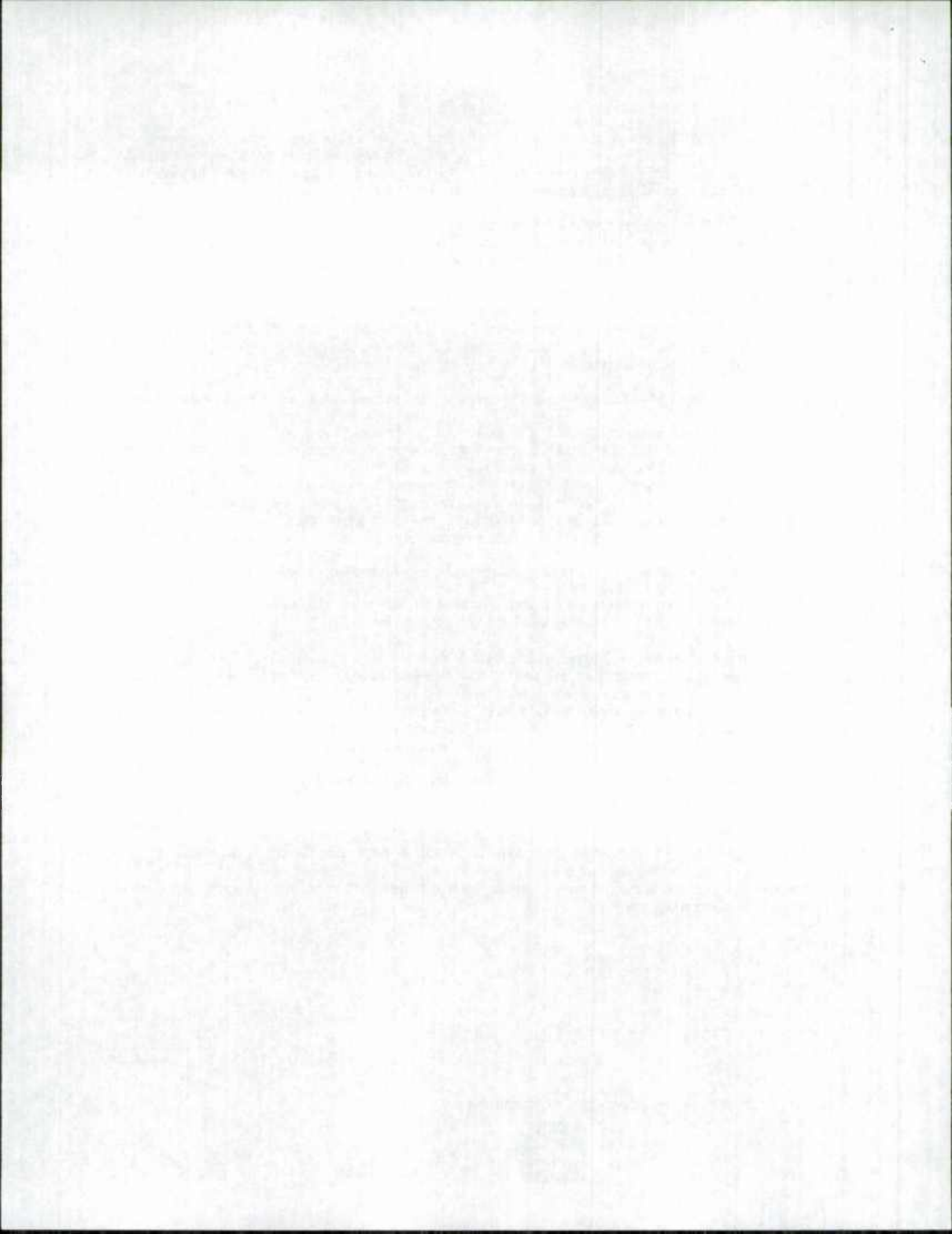


Gene Slear
Vice President
Environmental Concern Inc.
31 July 2008

cc: George Valanos- Miles Point Property, LLC, w/o attachments



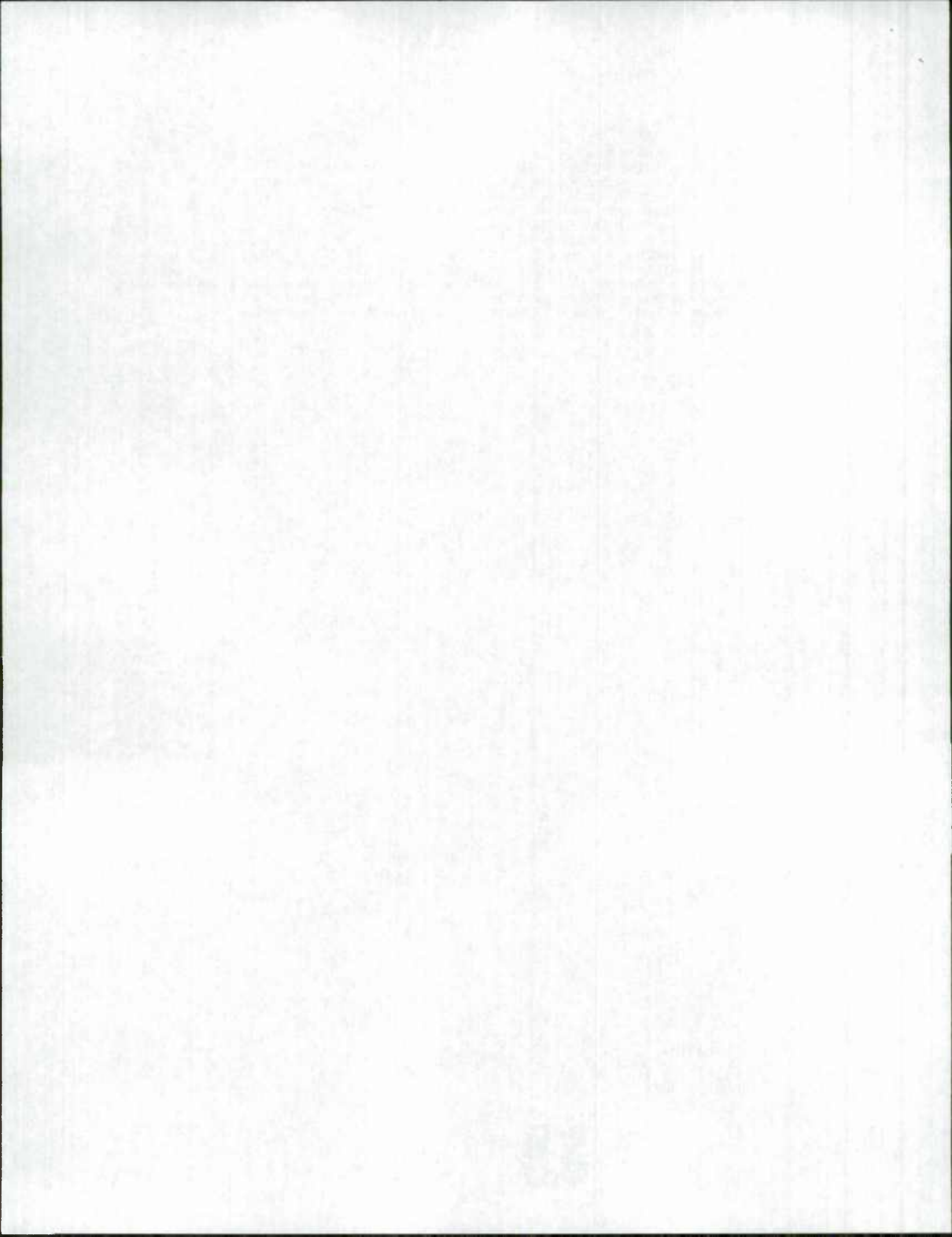
ENVIRONMENTAL
CONCERN



Attachments:

Plate 6- Bathymetry rev 4: 12/08/06 (Plate 6)
Letter dated July 11, 2007 from MDE to Elizabeth D. Jones, President Bay Hundred Foundation (MDE-BHF)
Letter dated Aug 02, 2007 from the Corp to Ms. Betlejewski of the Talbot River Protection Association (Corp-TRPA)
Department of the Army Permit Evaluation and Decision Document (Corp E&D)
MDE Report and Recommendation to the Board of Public Works dated 29 Nov. 2006 (MDE-R&R)
Letter dated 2 April 2008 from MD DNR to Corp re: Natural Oyster Bar 9-6 (DNR-Corp)
NOB 9-6 Plate 2 and Plate 3 dated 4/14/2008 (Aerial NOB 9-6)
Site Plan for Proposed Tidal Marsh -by McCrone, sealed 7-14-08 (Site Plan)
1847 U.S. Coastal Survey Chart T-223 Overlaid on 2006 Aerial: 05/29/2007 (HistMap)
EC Power Point Presentation describing the Functions & Values of the Marsh at Miles Point (Salt Marsh-Functions&Values) – (previously submitted)
Findings, Decision & Conditions by COSM - Application for Growth Allocation Miles Point 3-150 Plan (Facts MP 3-150)
Critical Area Commission Staff Report September 7, 2005 REVISED – Miles Point Buffer Management Plan (CAC-Staff)







Martin O'Malley, Governor
Anthony G. Brown, Lt. Governor
John R. Griffin, Secretary
Eric Schwaab, Deputy Secretary

2 April 2008

Rod Schwarm
U.S. Army Corps of Engineers
Regulatory Field Office
Talbottown Shopping Center
Easton, MD 21601

Subject: MDE Tracking No. 200565320; Miles Point Property LLC; Miles River; Chester River Area;
Talbot County

Dear Mr. Schwarm:

This letter is in response to your request to review information that your office received from a Mr. Pashayan regarding the above referenced project and the adjacent Natural Oyster Bar (NOB 9-6). The project proposes to protect 2,050 linear feet of eroding shoreline by constructing a 2.6 acre tidal marsh at Miles Point. The proposed marsh would extend a maximum of 110 feet channelward of the existing mean high water line and the stone sills at the channelward extent of the project would be in water indicated to be 1.7 feet deep at mean high water.

The Department reviewed the wetland application for this project in August 2005 and as part of our review we noted that the proposed project was located within a portion of NOB 9-6 where the NOB boundary line comes to the mean high water line along the shoreline. For its review of projects the Department uses the legally defined boundaries that form the Natural Oyster Bar, in this case NOB 9-6. The Ash Craft [Ashcroft] oyster bar identified by Mr. Pashayan is a historic oyster bar, the boundaries of which have been included within the boundaries of NOB 9-6. The legal boundaries of NOB 9-6 also contains other historic oyster bars and also areas of bottom that are not oyster habitat but which by being incorporated into the NOB boundaries provide for efficient enforcement of those boundaries.

While the proposed marsh construction is located within the boundaries of NOB 9-6, the Department's policy on activities within Natural Oyster Bars does allow shoreline erosion control projects provided oyster resources will not be impacted. Shoreline erosion control projects sited along eroding shorelines are usually in the intertidal zone and do not occur in water deep enough to be oyster habitat. In general, the Department views shoreline erosion control projects within NOBs, especially vegetated shorelines, as reducing sediment inputs to the adjacent NOB and providing water quality improvements.

The area of the NOB that would be impacted by the proposed marsh construction at Miles Point is not oyster habitat. The closest area of NOB bottom that has actual oyster habitat and populations is located further offshore in deeper water and not near or at the shoreline or within the inter-tidal zone. The additional

information provided by Mr. Pashayan does not alter our earlier review conclusion that the proposed marsh construction will not impact oyster resources within NOB 9-6.

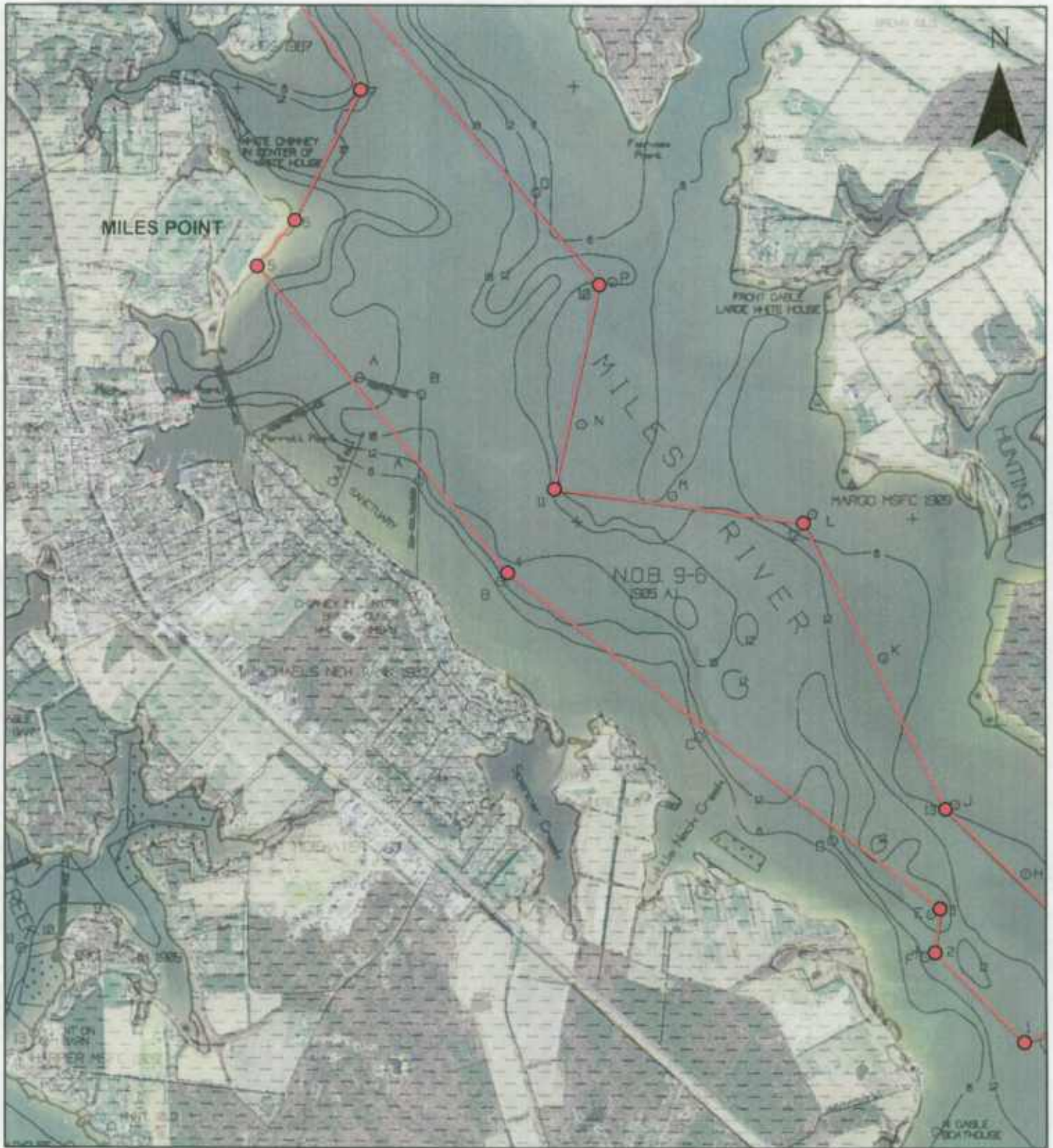
If you have any questions concerning these comments or if any of the above listed recommendations cannot be implemented, please contact me at 410-260-8333.

Sincerely yours,

A handwritten signature in cursive script, appearing to read "Roland J. Limpert".

Roland J. Limpert
Environmental Review Unit

cc: Frank Dawson, OOS
Harley Speir, FS
Tom O'Connell, FS
Chris Judy, FS
Marty Gary, FS



Sources: Aerial: "Talbot County - 2006 Natural Color High Resolution Orthophotography", Talbot County Dept. of Public Works, 2006.
 Natural Oyster Bars: "Chart 9: Natural Oyster Bar Chart", Maryland Department of Natural Resources, 1961.

2

Miles Point

Chart 9 - DNR Natural Oyster Bar Chart
 Overlaid on 2006 Aerial

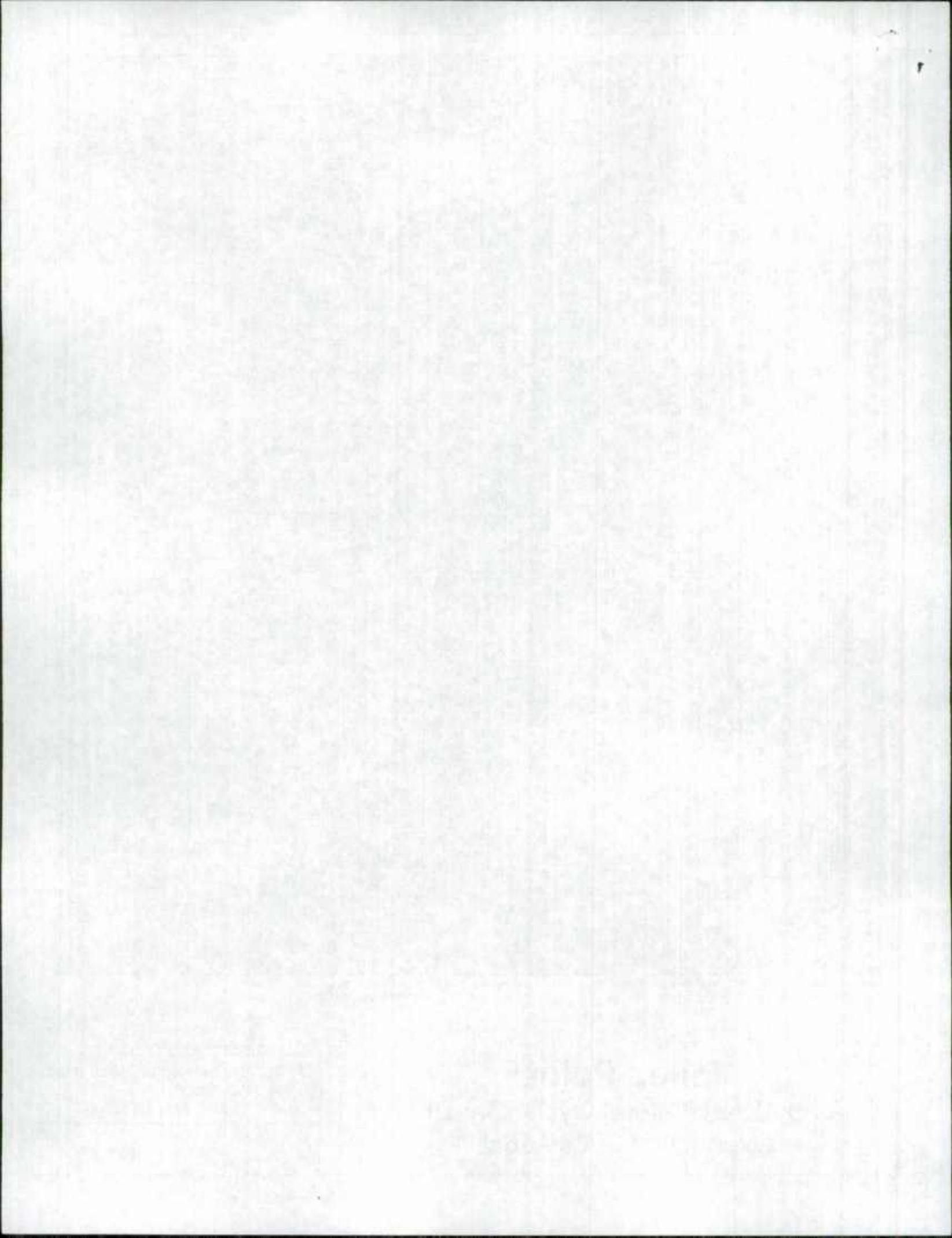
0 750 1,500 3,000 Feet



Environmental Concern Inc.
 P.O. Box P
 St. Michaels, MD 21663

Miles Point
 Talbot County, MD

04/14/2008





Sources: Aerial: "Talbot County - 2006 Natural Color High Resolution Orthophotography", Talbot County Dept. of Public Works, 2006.
 Natural Oyster Bars: "Chart 9: Natural Oyster Bar Chart", Maryland Department of Natural Resources, 1961.
 Feature Overlays: Environmental Concern Inc, 2008.

0 125 250 500 Feet

3

Miles Point

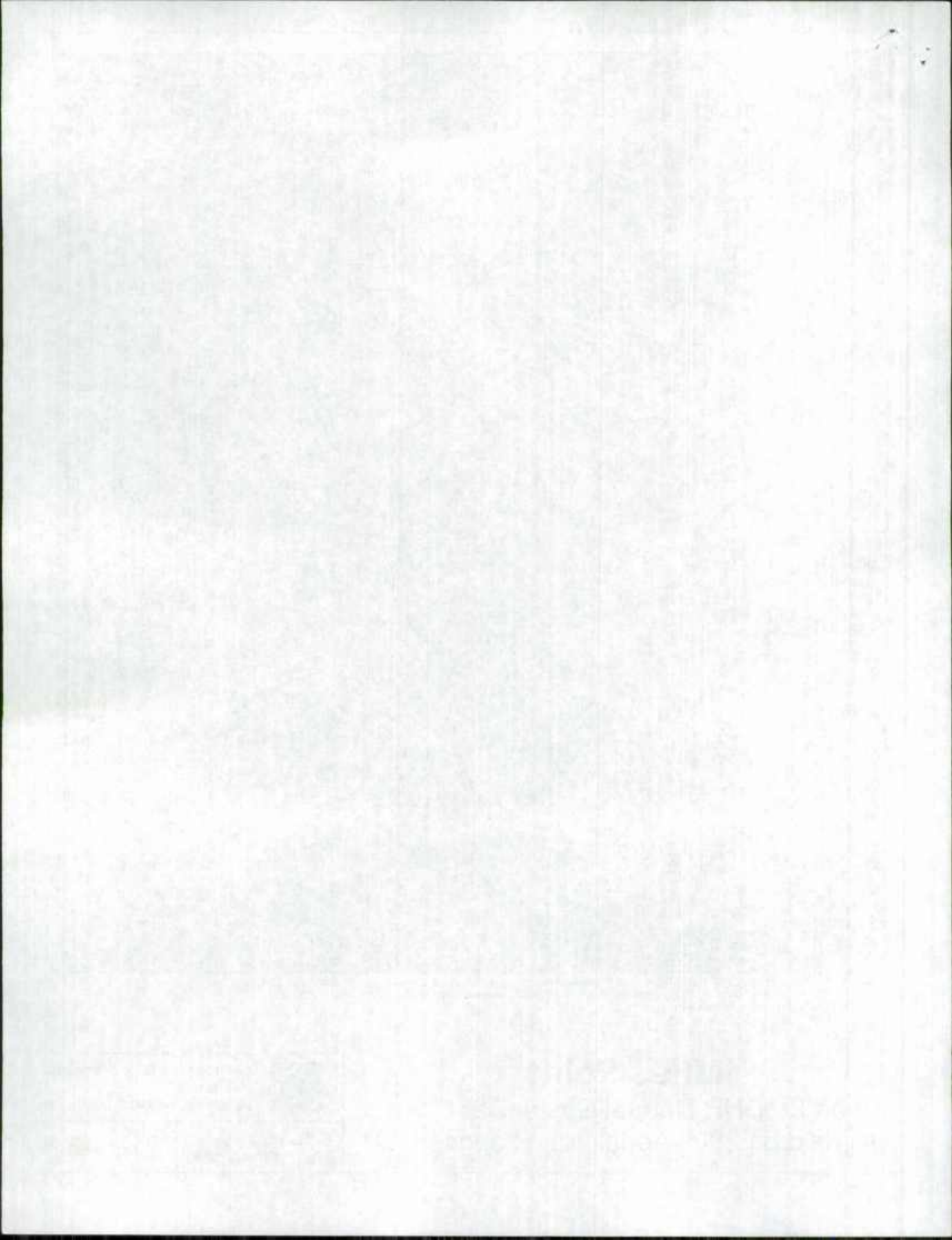
Chart 9 - DNR Natural Oyster Bar Chart
 Overlaid on 2006 Aerial with Proposed Sill



Environmental Concern Inc.
 P.O. Box P
 St. Michaels, MD 21663

Miles Point
 Talbot County, MD

04/14/2008





MARYLAND DEPARTMENT OF THE ENVIRONMENT
1800 Washington Boulevard • Baltimore MD 21230
410-537-3000 • 1-800-633-6101

Martin O'Malley
Governor

Anthony G. Brown
Lieutenant Governor

Shari T. Wilson
Secretary

Robert M. Summers, Ph.D.
Deputy Secretary

July 11, 2007

Elizabeth D. Jones, President
Bay Hundred Foundation, Inc.
P.O. Box 811
St. Michaels MD 21663

Dear Ms. Jones:

Thank you for your letter to Governor Martin O'Malley regarding the regulatory and legal issues with respect to constructed tidal wetlands. The Governor received your letter and asked that I respond on his behalf.

The Maryland Department of the Environment (MDE) has been a pioneer in the science of marsh creation. The Department's experience dates back to the early 1980's, when development of this practice was in its infancy. While there have been many significant advances over the past 25 years, one important change has been the construction of projects channelward of the Mean High Water (MHW) line. The reason for this change is two-fold. First, the passage of the Chesapeake Bay Critical Area Act in 1984 established habitat protection areas, including a 100-foot buffer to tidal waters and wetlands. As a result, grading banks to create tidal wetlands is no longer a viable option for the majority of property owners, particularly if the 100-foot buffer is forested. Second, construction logistics can be simplified and adverse environmental impacts associated with excavating significant amounts of material from the shoreline can be reduced if the projects are constructed channelward of the MHW line. It is important to note that, regardless of the channelward encroachment of a project, the issuance of a Tidal Wetlands License does not transfer a property interest of the State unless expressly stated by the Board of Public Works (BPW).

Constructed wetlands are usually a mixture of low and high marsh. In general, these vegetative zones are created by differences in tidal flooding regimes. Low marsh is flooded twice a day by the tides, while high marsh is flooded less often than daily. The vegetation within each zone is different due to the frequency and duration of tidal flooding. Low marsh is dominated by smooth cordgrass (*Spartina alterniflora*). In addition, the drastic change between high and low tide makes the low marsh a difficult environment for many animals to live. High marsh, on the other hand, is a mosaic of vegetation, with plant diversity increasing with elevation, and a high animal diversity. In addition to imitating natural conditions, the combination of low marsh and high marsh in constructed wetland projects is necessary to protect the shoreline from erosion -- erosive wave energy is dissipated as waves move across and up the gentle incline of the low marsh to high marsh. This dynamic tidal system should not be confused with uplands, which is land situated at a higher elevation that is not flooded by the ebb and flow of the tide.

Elizabeth Jones, President
Page Two

Depending on the location of a constructed marsh, it may be necessary to provide additional protection in the form of a low profile stone structure, known as a sill emplaced immediately channelward of the marsh. Unlike the elaborate root system of a natural marsh that has evolved over time and can withstand the forces of wind and wave activity, newly created marsh lacks this natural protection. As a result, to insure that tidal flooding and access to aquatic organisms is maintained, MDE requires that these measures be incorporated into the structural portion of a project.

The Department closely coordinates its activities with the Critical Area Commission (CAC) to insure that licenses and permits do not conflict with critical area criteria. In fact, MDE and CAC meet bi-monthly to discuss projects and policies to insure that these programs work in concert. In those few instances where MDE may authorize an activity that is contrary to the critical area criteria, CAC contacts MDE to resolve the issue. If necessary, MDE can either suspend or revoke the authorization until the issue is resolved. With regard to shore erosion control projects, both agencies use the same priority -- giving preference to nonstructural, rather than structural techniques, such as bulkheads and revetments. More importantly, to my knowledge, the CAC has never suggested that MDE's actions have ever "undercut Maryland's Critical Area laws and policies." The Department has not issued any authorization that does not comply with its regulations governing shore erosion control projects.

The enclosed document responds to the issues presented in your letter. The document also provides the basis for MDE's response to your recommendations, which are addressed below in the order in which they were presented in your letter.

- The Board of Public Works should impose a temporary moratorium on approvals of hybrid wetland applications in order to allow a thorough and unbiased scientific investigation of the associated risks, benefits, and best practices.

The Maryland Departments of Environment and Natural Resources have over 25 years of experience with marsh establishment projects. Both agencies believe that there is strong evidence that constructed wetlands, even when anchored by stone sills, provide important water quality and habitat benefits. Through long-term education from the regulatory agencies and the scientific community, the general public now accepts that marsh creation is preferred over other methods of shore erosion control. A moratorium on these types of projects is not warranted and would encourage structural and more ecologically damaging structures such as revetments and bulkheads.

- The Maryland Department of the Environment should initiate a comprehensive review of whether, in issuing licenses for hybrid marshes in the past administration, MDE paid adequate heed to existing COMAR regulations.

Authorizations issued by MDE for constructed marshes are consistent with existing regulations. According to Code of Maryland Regulation (COMAR) 26.24.04.01C.(5), nonstructural erosion control measures, such as marsh creation, are the preferred method of shoreline stabilization. If MDE determines that marsh creation is appropriate at a particular location, it would be contrary to its regulations to approve an alternative method of protection.



- The Critical Area Commission and Maryland Department of the Environment should draft language that includes a hybrid constructed-wetland classification, reflects the scientific findings, and ranks its viability and desirability.

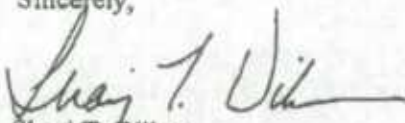
As previously mentioned, the Critical Area Commission and Maryland Department of the Environment believe that there is strong evidence that constructed wetlands, even when anchored by stone sills, provide important water quality and habitat benefits. (Please refer to the attachment for a discussion on work recently performed by The University of Maryland.) Additionally, MDE believes that the term "hybrid" is a misnomer. The use of stone sills is a critical design feature that is occasionally needed to protect newly created marsh from wind and wave activity. This feature, which facilitates the establishment of constructed marshes, is not only a legitimate practice, but also one that has been embraced throughout the Chesapeake Bay watershed. More importantly, when properly designed, the marsh behind the stone sill functions similarly to a natural marsh. Finally, the use of constructed wetlands is driven by site characteristics, which determines whether any particular site is desirable and whether the constructed marsh will be viable.

- The Attorney General's office should analyze whether recent approvals are or can be appropriately certified as consistent with the Coastal Zone Management Program by state or federal permitting agencies.

The Federal Coastal Zone Management Act of 1972 requires that proposed federal activities affecting a State's coastal zone be consistent, to the maximum extent practicable, with a State's federally approved Coastal Zone Management Program (CZMP). Activities covered include direct federal activities; federal licenses and permits; and federal assistance to State and local governments. Maryland's CZMP is referred to as a "networked" program. The term "networked" means that the program is based on existing authorities. Therefore, the State's consistency review of the federal activities identified in your letter is based on its compliance with applicable State statutes, regulations and policies. Issuance of authorizations or approval by both MDE and CAC demonstrate compliance with the respective regulatory programs, leading to the State's favorable Coastal Zone Consistency determination.

Thank you again for your letter. The Governor appreciates hearing from you, and on his behalf, I thank you for your interest in this very important issue. If I may be of further assistance, please contact me or Ms. Virginia Kearney, Acting Director of Water Management Administration at 410-537-3567, toll-free at 800-633-6101, by mail at 1800 Washington Boulevard, Baltimore, Maryland 21230 or by e-mail at vkearney@mde.state.md.us.

Sincerely,



Shari T. Wilson
Secretary

Enclosure

cc: Mr. Doldon W. Moore, Jr., Wetlands Administrator, Board of Public Works ✓
Ms. Virginia Kearney, Acting Director, Water Management Administration

ELIZABETH D. JONES
PRESIDENT, BAY HUNDRED FOUNDATION, INC.
MAY 2, 2007 CORRESPONDENCE
MDE'S RESPONSE TO SPECIFIC ISSUES

Coordination with State and Federal Agencies

The Department's coordination efforts not only include the CAC, but also a myriad of other State and federal resource agencies, including the U.S. Army Corps of Engineers, the U.S. Environmental Protection Agency, the U.S. Fish and Wildlife Service, the National Marine Fisheries Service (NMFS), Maryland Department of Natural Resources (DNR) and the Maryland Historical Trust. Interestingly, you express concern that constructed wetlands are replacing productive inter-tidal and shallow water estuarine habitats. This is an unlikely scenario because, when entertaining applications for marsh creation channelward of the MHW line, MDE relies heavily on the recommendation of NMFS's Habitat Conservation Division (HCD). This Division reviews and comments on projects affecting coastal wetlands and waterways under the authorities of the Magnuson-Stevens Fishery Conservation and Management Act, and Fish and Wildlife Coordination Act. It is HCD's responsibility to ensure that such projects are minimal in their impacts on NMFS trust fish resources, and aquatic habitats important to those resources. In general, HCD only supports projects that limit channelward encroachment while diversifying habitat.

Tidal Wetlands Application Number 04-WL-0194

On January 3, 2007, the Maryland Board of Public Works (BPW) approved Tidal Wetlands Application Number 04-WL-0194. The application submitted by Miles Point Property LLC proposed the construction of a shoreline protection and marsh creation project on the Miles River in St. Michaels, Talbot County, Maryland. The role of MDE for this particular project was to evaluate the license application and submit a Report and Recommendation (Report) to BPW. After a nearly 17-month application review process, including two public informational hearings, MDE submitted a favorable Report to BPW on November 29, 2006. The Report recognized that the project site experiences significant wave action, but stated that, as designed, the proposed shoreline protection and marsh creation project would be successful. MDE's position was supported by numerous State and federal resource agencies participating in the application review process, including the Maryland Department of Natural Resources, the U.S. Army Corps of Engineers, the U.S. Environmental Protection Agency, the U.S. Fish and Wildlife Service, and the National Marine Fisheries Service.

Miles Point is an appropriate location for marsh creation. The project design takes into account the long fetches associated with the site. Shallow waters extend a considerable distance off shore of the project. Because incoming wave heights are proportional to water depths, large waves will break in the shallow offshore area prior to reaching the shoreline. The wide marsh width provides ample area for wave energy to be dissipated as small waves cross the marsh. BPW has approved several marsh creation projects in high-energy areas throughout the Bay that have been very successful.

According to Code of Maryland Regulation (COMAR) 26.24.04.01C.(5), nonstructural erosion control measures, such as marsh creation, are the preferred method of shoreline stabilization. Since MDE has determined that marsh creation is appropriate at this particular location, it would be contrary to its regulations to approve an alternative method of protection. Furthermore, this project is not only providing shoreline protection, but also creating additional marsh. As a result, the project provides additional habitat and habitat diversity by extending the marsh channelward. MDE has contributed to

similar marsh creation projects through its Tidal Wetlands Compensation Fund, which is supported by the compensation payments required by many Tidal Wetland Licenses issued by BPW.

In addition to its regulatory authority over tidal wetlands, the State has a proprietary interest in the lands beneath the ebb and flow of the tide. The State, as an independent sovereign, owns the submerged lands beneath navigable waters and holds them in trust for all of its citizens. It is also important to note, however, that people who own waterfront land have certain property rights, including the right to reasonable access to navigable water and the right to protect their property from erosion. It is the responsibility of MDE to insure that a landowner exercises those rights in an environmentally sensitive manner. MDE remains convinced that the proposed project will not only protect the shoreline of Miles Point, but also improve water quality and provide additional habitat diversity.

Several other issues regarding the Miles point property are addressed below:

- The establishment of high marsh did not change the MHW line, the location of State ownership, or the setback required by the Critical Area Commission. The existing mean high water line was established on-site by MDE prior to project approval and, then, surveyed and depicted on the project plans.
- It is generally understood by the scientific community, the general public, and State and federal resource agencies reviewing the Miles Point project that impacts to fish and wildlife were not only minimized, but also enhanced by the creation of a habitat that is in scarcity in this part of the watershed.
- The project will not impact navigation.
- The project will not impact any rare, threatened, endangered species, or any species in need of conservation including submerged aquatic vegetation or oyster bars.

Federal Consistency

Maryland's Coastal Zone Management Program (CZMP) is based on existing state laws and regulations, and that the Federal Consistency review and determination is based on the enforceable policies of the CZMP that are applicable to the project. In the case of the Miles Point project, the applicable State authorities are the Chesapeake and Atlantic Coastal Bays Critical Area Protection Program and the Wetlands and Riparian Rights Act.

The approval of growth allocation by the State's Critical Area Commission and the issuance of the Tidal Wetlands license by the Board of Public Works for the Miles Point project are the official decisions that the project complies with the State's enforceable policies that apply to the proposal. Accordingly, based on these approvals, the project is consistent with the CZMP. The records or basis for MDE's determination of consistency with the CZMP are the file/records supporting the granting of growth allocation and the file/records supporting the issuance of the Tidal Wetlands license constitute the basis/record for the Federal Consistency determination. It is important to note that the Federal Consistency Coordinator does not conduct an "independent" review of the project when State permits/approvals are required. The decision(s) of the Program's responsible for these approval(s) are the basis of the consistency decision.

Recent Studies

Financial assistance for shoreline protection projects has been provided by the State since 1967. Funding for structural controls was discontinued in the 1990's in favor of vegetative, non-structural approaches. Vegetative stabilization has become increasingly more favored since the 1980's. However, the nature of vegetative stabilization practices has changed. For a number of years, projects were designed and implemented by a small number of specialized contractors and experts in highly suitable areas. More contractors today with primary expertise in hard structural practices are incorporating vegetative elements in areas where the practice is less suitable, or may require a combination of vegetative and hard controls. In some of these cases, there was some question as to whether or not the created marsh is providing the functions typically associated with tidal wetlands: shoreline stabilization, water quality, and habitat. The Tidal Wetlands Division, Wetlands and Waterways Program recognized the need to evaluate shoreline stabilization and marsh creation projects, with special emphasis on projects with sills, for effectiveness for both erosion control and wetland function. The Program received a U.S. Environmental Protection Agency grant to study the projects and develop new design guidance and ample drawings.

The University of Maryland conducted the study (completed in 2006) for MDE. The study placed special emphasis on projects with sills to determine if they were necessary for erosion control, if they allowed for wildlife access, and what designs were most suitable. Eighty sites were evaluated across the Chesapeake Bay, including 6 in Talbot County. The results showed that 82% of the sites were moderately to very successful, in terms of supporting vegetation, erosion control and providing wildlife habitat. The conclusion was that marsh creation projects could be successful along most shorelines, even with fetch distances greater than .5 miles. Projects were successful with or without sills. MDE has developed new guidance and sample drawings that reflect the results and recommendations of the University study. If a sill is to be used, it should have a low profile, be offset from the marsh, and contain vents (openings) to allow for passage of aquatic life. Guidance and sample drawings may be viewed and downloaded from: www.mde.state.md.us/Programs/WaterPrograms/Wetlands_Waterways/documents_information/technicaldocuments.

MDE's findings are supported by other research. Dr. Bhaskaran Subramanian presented a study on marsh creation/hybrid projects at the April 14, 2007 course, "Living Shorelines in Maryland's Bays," in Ocean City. Projects included marsh creation with an adjacent structure, and were sponsored by the Eastern Shore Resource Conservation and Development Council. The study evaluated projects completed over a 20-year period. A pilot project inspecting 35 sites in Talbot County was completed. Bank condition in found to be stable in 83% of sites. Marsh erosion was absent or minimal in 74% of sites. The condition of the adjacent structure was deemed excellent in over 70% of the sites. The conclusion of the study was that non-structural shore erosion projects were largely successful.

While both studies indicate that marsh, can successfully be established at more sites than originally believed, MDE concurs that marsh creation may not be the best design in all instances. Extensive marsh, as the writer noted, does not occur along all shorelines. Natural shorelines other than marshes, that are similar to other stable undisturbed reaches, may be a more suitable model in areas where marsh typically was limited in distribution and extent.

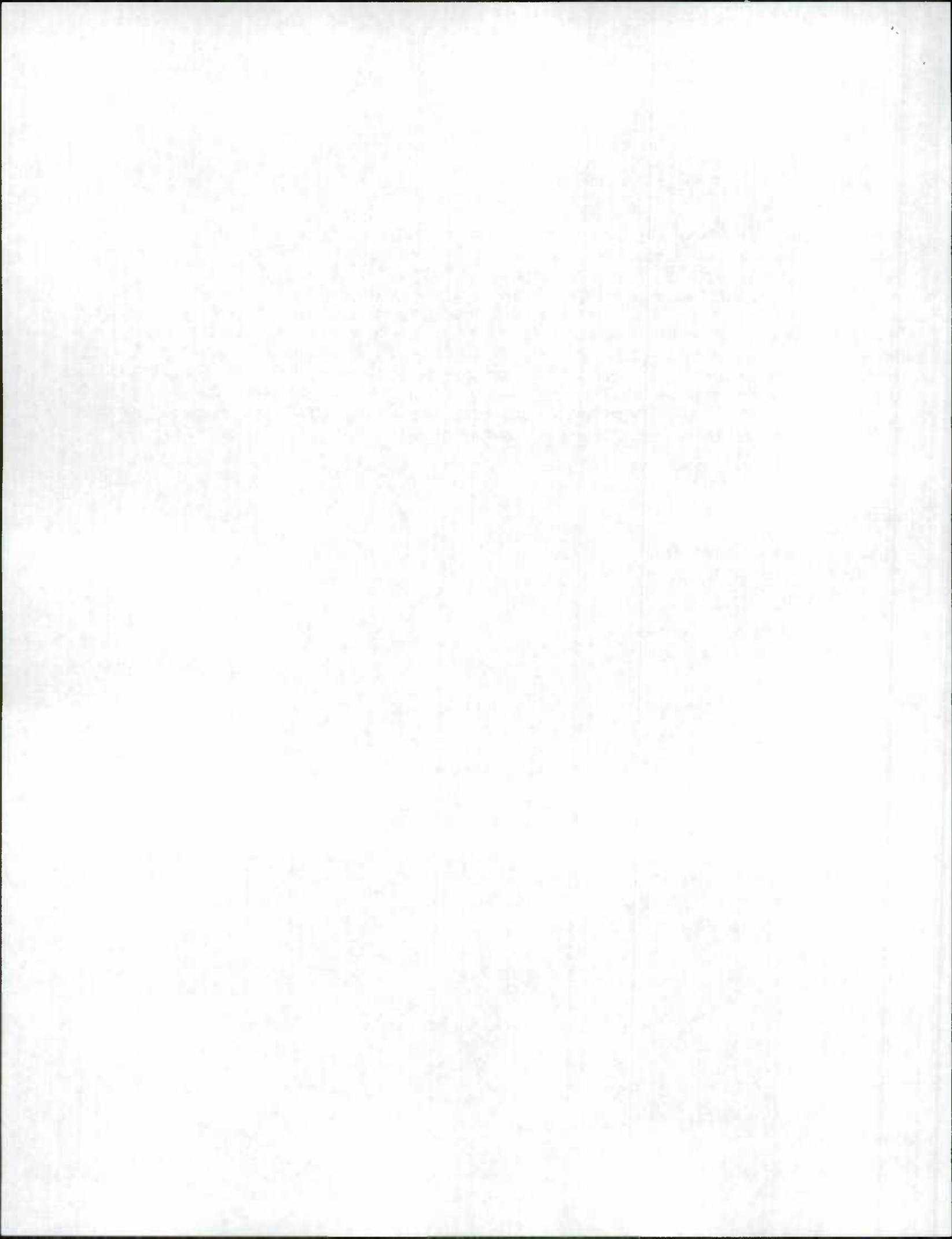
The document Shore Erosion Control Guidelines for Waterfront Property Owners is out of date and is currently being revised to reflect the results of University of Maryland study and other recent recommendations by MDE. Factors such as fetch, as noted previously, have been found to be less influential in the success of a project.

From: D Henry [DHenry@mdp.state.md.us]
Sent: Monday, March 31, 2008 3:34 PM
To: construction@wetland.org
Subject: MHT Review of Miles Point Project

Gene -- Thank you for your inquiry on Friday, March 28th regarding the status of our review of the above-referenced project. As noted in our letter dated April 13, 2007, we concur with the Corps of Engineers' determination that the proposed shoreline stabilization work will have NO ADVERSE EFFECT on historic properties, as the project has been redesigned to avoid impacting site 18TA365 - a potentially significant prehistoric archeological site. This determination was largely based on our review of the draft Phase I report, "Phase I Archaeological Investigations at Miles Point in Talbot County, Maryland" (Lowery 2007). Please note that we recommended a number of revisions to this draft report, and we have not yet received a final, revised copy of the document. However, our receipt of the final report is NOT a condition of the issuance of the Corps permit or of our concurrence with the Corps' determination. As stated in the Corps' April 27, 2007 letter, the Section 106 coordination for this particular undertaking has been concluded. Please feel free to contact me if you have any questions or require further information.

- Dixie Henry

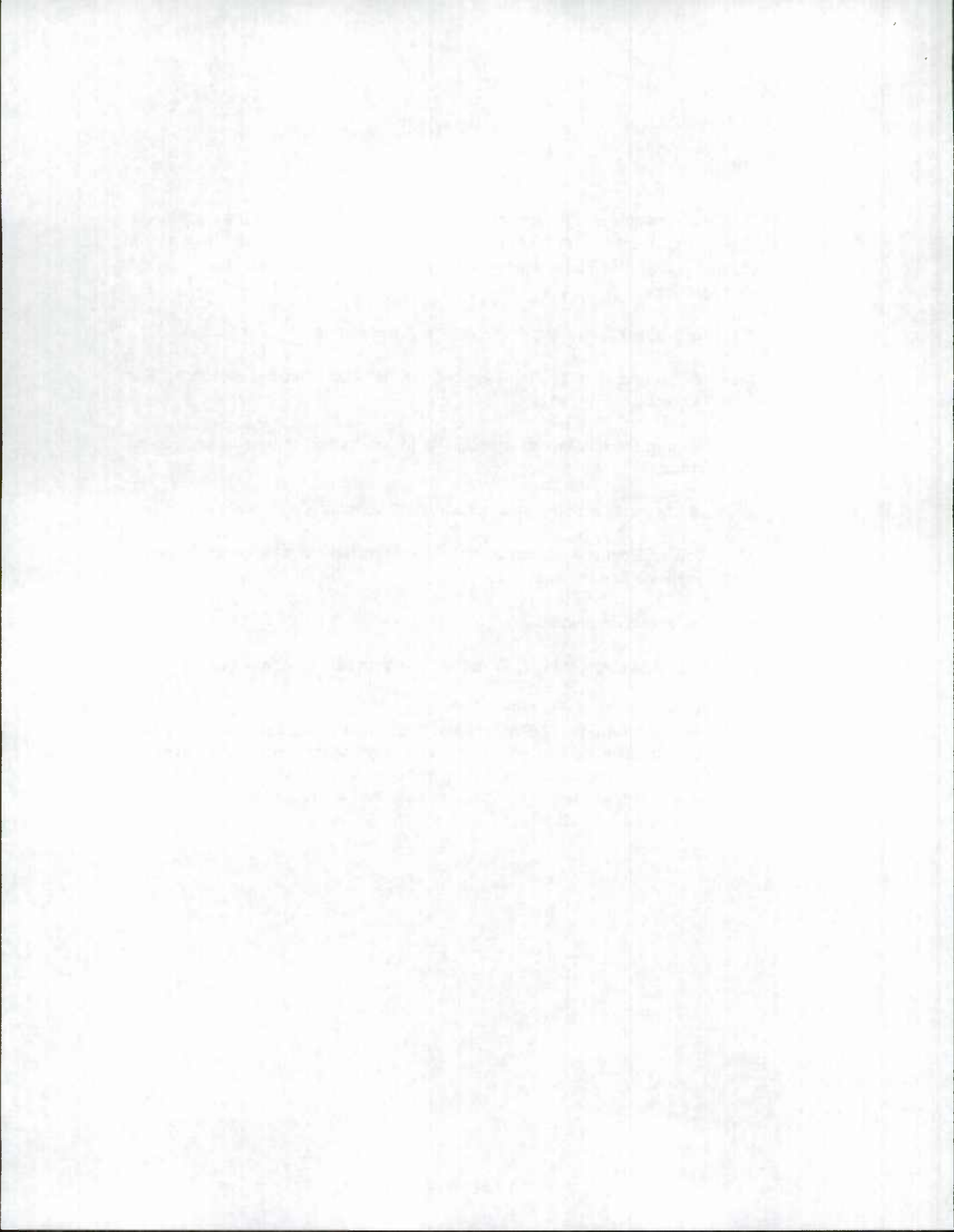
Dixie L. Henry, Ph.D.
Preservation Officer
Project Review and Compliance
Maryland Historical Trust
100 Community Place
Crownsville, MD 21032
Phone: 410-514-7638/Fax: 410-987-4071
dhenry@mdp.state.md.us



Appendix
Miles Point Property LLC
Wetlands Application

Per Board members' instructions, Board staff posed the following questions to MDE, the Critical Areas Commission, and the Town of St. Michael's. All responded. In addition, the Board's Wetlands Administrator answered the questions. Each agency's response is attached.

- (1) Is this marsh an appropriate vehicle in this setting
- (2) Allegation: that the State agencies did not work together concerning this project
- (3) Role of the breakwater, specifically in the context of hurricanes/tropical storms
- (4) Is this marsh simply due to settlement of litigation and is that pertinent
- (5) Talbot County's statement that its approval should occur before a wetlands license issues
- (6) Impact on the oyster bar
- (7) Peter Bergstrom of NOAA's comments about sub-aquatic vegetation
- (8) Is the Board's choice "either/or": either 270 houses and 300' setback (no wetlands license) or 279 houses and marsh and public amenities (wetlands license) OR would denying the permit have other consequences such as having to renegotiate the zoning permissions. If the Board denied the permit, would the project automatically be able to go forward with 270 houses and 300' setback.



**Comments of Critical Area Commission (Serey) regarding
Miles Point Property LLC questions from the Board of Public Works
At its December 20, 2006 meeting
Submitted: December 27, 2006**

(1) Is this marsh an appropriate vehicle in this setting

No answer

(2) Allegation: that the State agencies did not work together concerning this project

The Secretaries of seven State agencies are represented on the Critical Area Commission including the Department of the Environment and the Department of Natural Resources. The agencies and their staff members participated fully in Commission discussions and review of the Miles Point project, which has always included a marsh. The Commission and the Town of St. Michaels sought guidance from the professional staff at MDE concerning the viability of the marsh and the proper location of Mean High Water. The Commission's approval of the project followed a public hearing attended by more than 100 people; public comments filled two large binders. The Commission voted in public three times to approve the project. The final approval included the marsh and a minimum 150-foot buffer and setback area planted in native vegetation and a public walkway, as well as the proposed pier.

(3) Role of the breakwater, specifically in the context of hurricanes/tropical storms

No answer

(4) Is this marsh simply due to settlement of litigation and is that pertinent

The marsh project is not the result of settlement of litigation involving the Critical Area Commission. The Commission is still defending its approval in Circuit Court of the final project plan which includes the marsh and the 150-foot setback from Mean High Water. The Town of St. Michaels is similarly defending its decision to approve the project. Suits concerning two earlier versions of the project, one with a 300-foot setback and one with a 100-foot setback, were dismissed as moot in November, 2006.

(5) Talbot County's statement that its approval should occur before a wetlands license issues

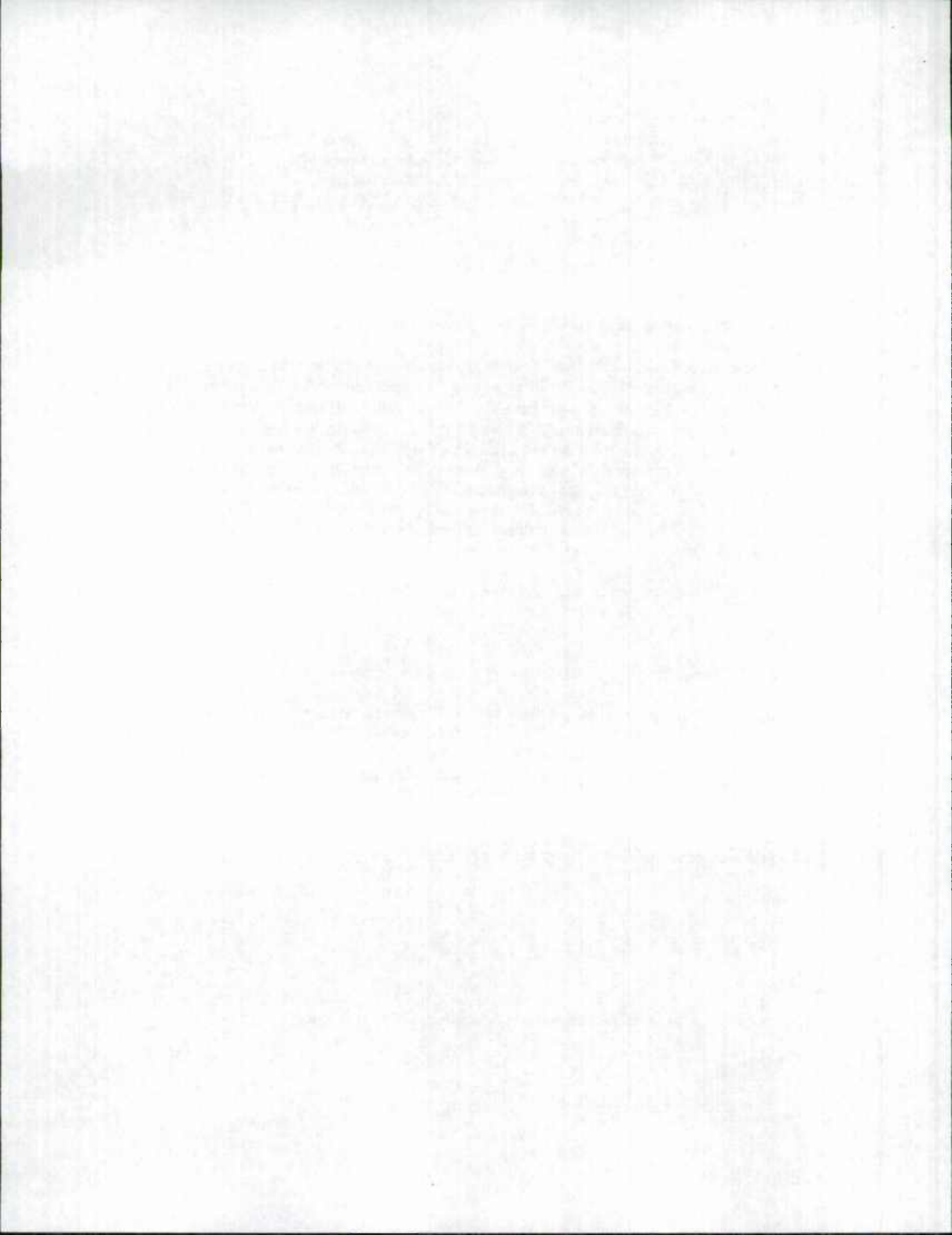
No answer

(6) Impact on the oyster bar

No answer

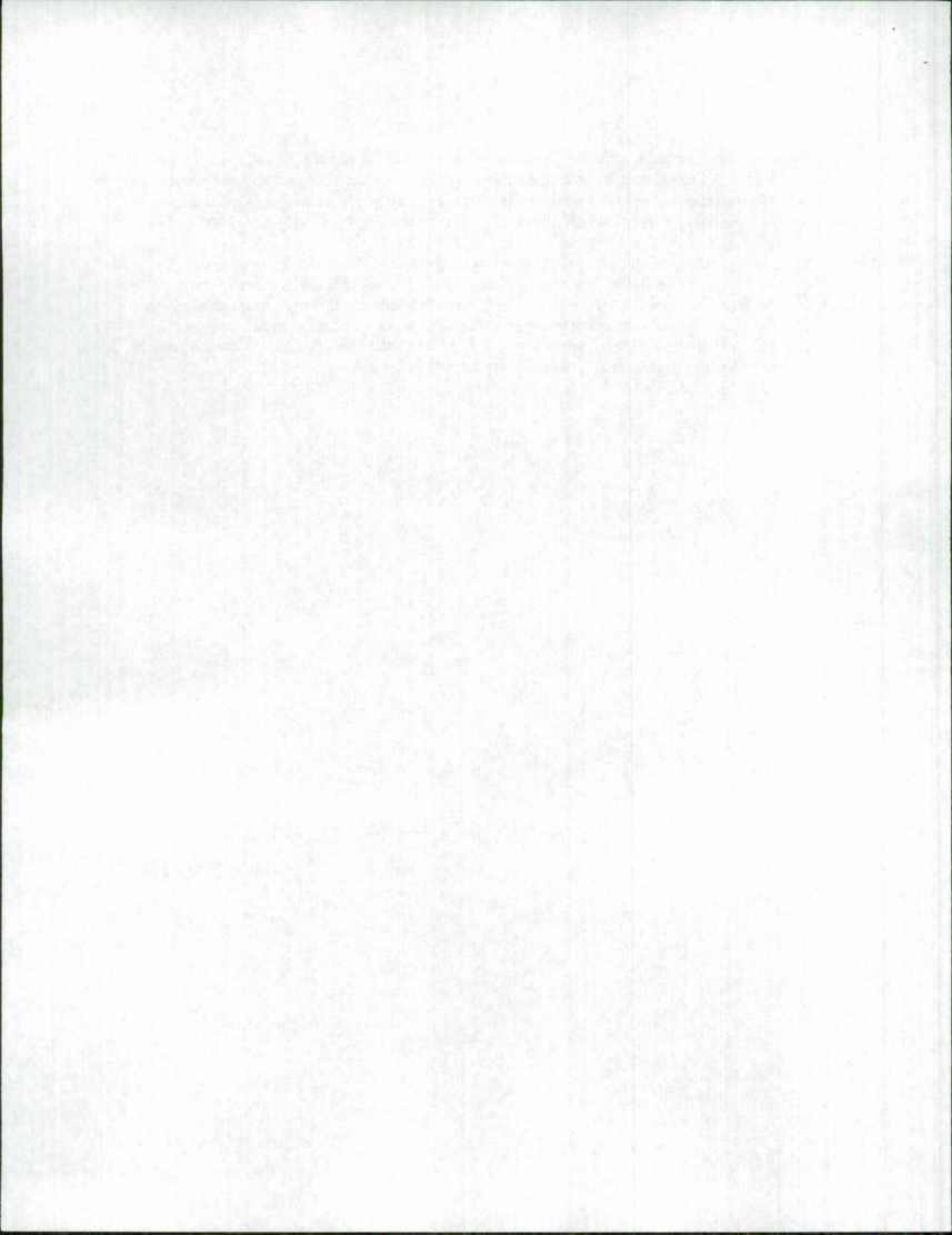
(7) Peter Bergstrom of NOAA's comments about sub-aquatic vegetation

No answer



(8) Is the Board's choice "either/or": either 270 houses and 300' setback (no wetlands license) or 279 houses and marsh and public amenities (wetlands license) OR would denying the permit have other consequences such as having to renegotiate the zoning permissions. If the Board denied the permit, would the project automatically be able to go forward with 270 houses and 300' setback.

The 300-foot setback (with 270, or 279, or some other number of houses) is not automatically approved by the Town or the Critical Area Commission if the Board does not issue a wetlands license. If no license is issued, the Town would have to decide whether to approve an alternative project, which it would subsequently submit to the Critical Area Commission as a proposed amendment to the local Critical Area Program. The Commission would then process the Town's request under the procedures in Natural Resources Article 8-1809.



Comments of Maryland Department of the Environment (Setzer/Ayella) regarding
Miles Point Property LLC questions from the Board of Public Works
At its December 20, 2006 meeting
Submitted: December 27, 2006

(1) *Is this marsh an appropriate vehicle in this setting*

Yes, marsh is appropriate. The project design takes into account the long fetches associated with the site. Shallow waters extend a considerable distance off shore of the project. Because incoming wave heights are proportional to water depths, large waves will break in the shallow offshore area prior to reaching the shoreline. The wide marsh width provides an ample area for wave energy to be dissipated as small waves cross the marsh. The Board has approved several marsh creation projects in high-energy areas through out the Bay that have been very successful.

(2) *Allegation: that the State agencies did not work together concerning this project*

This project was coordinated at all levels of government. The project was presented to a joint evaluation meeting with all State and federal environmental review agencies. The project received support from the U.S Fish and Wildlife Service, the U.S. Environmental Protection Agency, the National Marine Fisheries Service (NOAA), the U.S. Army Corps of Engineers, the Maryland Department of Natural Resources, and the Maryland Historical Trust.

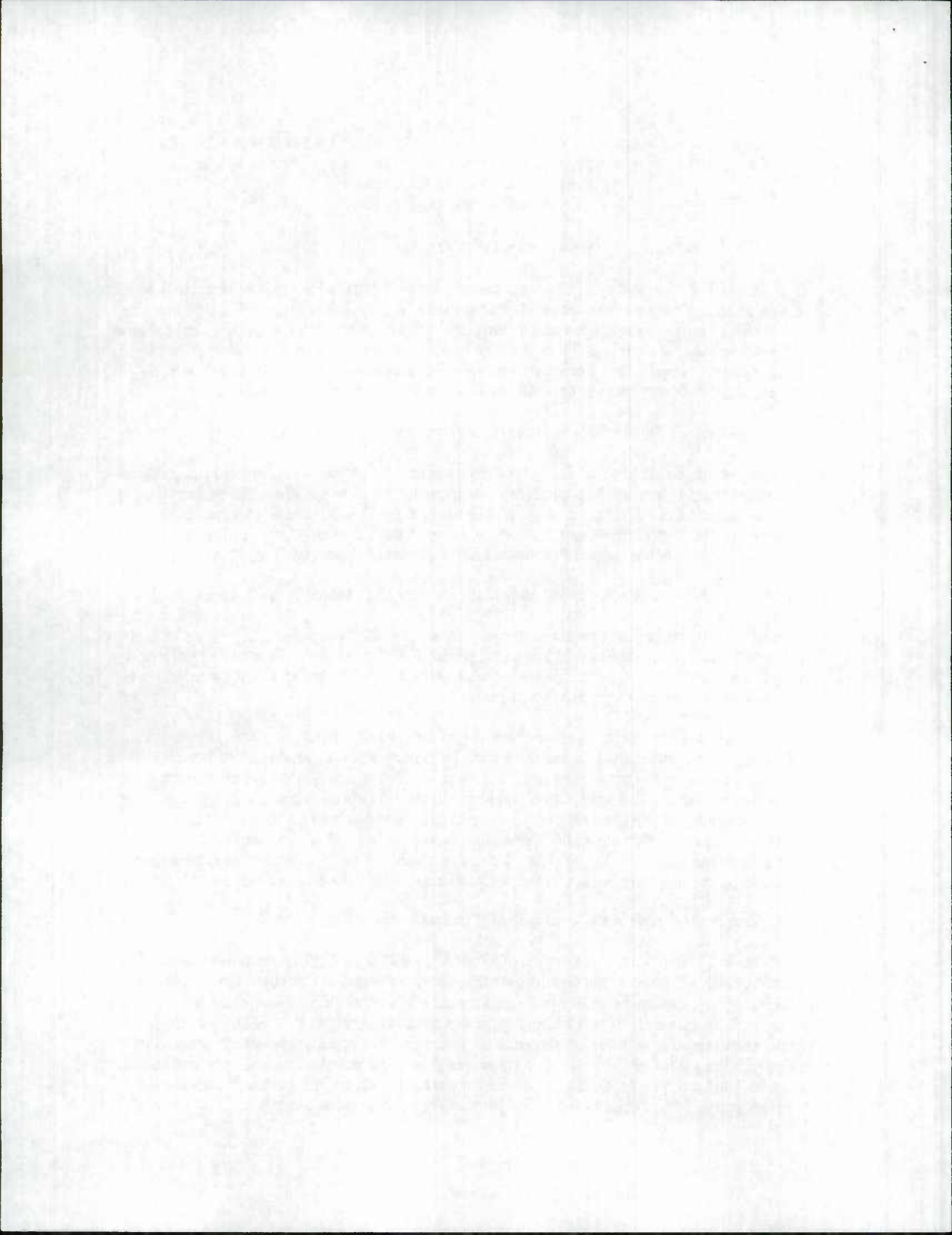
(3) *Role of the breakwater, specifically in the context of hurricanes/tropical storms*

There is no breakwater associated with this project. A stone sill is proposed along the waterward edge of the marsh and is an integral part of the project design. The stone sill is a low profile (low height) structure placed along the waterward edge of the marsh. The purpose of the stone sill is to provide continuous protection to the entire marsh.

The sill is a two-sided structure and can be envisioned as two right triangles placed back to back with sloping sides facing the land and the water. The structure is very stable and resistant to overtopping by waves. On the other hand, a stone revetment, which is also used to protect the shoreline from erosion and wave action, can be envisioned as only one right triangle placed against an eroding bank. If waves overtop a revetment, the soil behind the structure will erode and the structure will ultimately fail. During the last several tropical storms, empirical information collected by MDE suggested that marsh creation projects were surviving the storms, while more rigid structures, such as revetments and bulkheads, were more vulnerable.

(4) *Is this marsh simply due to settlement of litigation and is that pertinent*

According to Code of Maryland Regulation (COMAR) 26.24.04.01C.(5), nonstructural erosion control measures, such as marsh creation, are the preferred method of shoreline stabilization. Similar language appears in the Critical Area Commission's regulations. Since MDE has determined that marsh creation is appropriate at this particular location, it would be contrary to its regulations to approve an alternative method of protection. It is important to note, however, that this project is a hybrid, not only providing shoreline protection, but also creating additional marsh. As a result, the project provides additional habitat and habitat diversity by extending the marsh channelward. MDE has contributed to similar marsh creation projects through its Tidal Wetlands



Compensation Fund, which is supported by the compensation required by many Tidal Wetland Licenses approved and issued by the Board.

(5) *Talbot County's statement that its approval should occur before a wetlands license issues*

MDE's experience with Talbot County and many other local jurisdictions is that a State License and Federal permit are required to be obtained prior to a person submitting an application for the local permit.

(6) *Impact on the oyster bar*

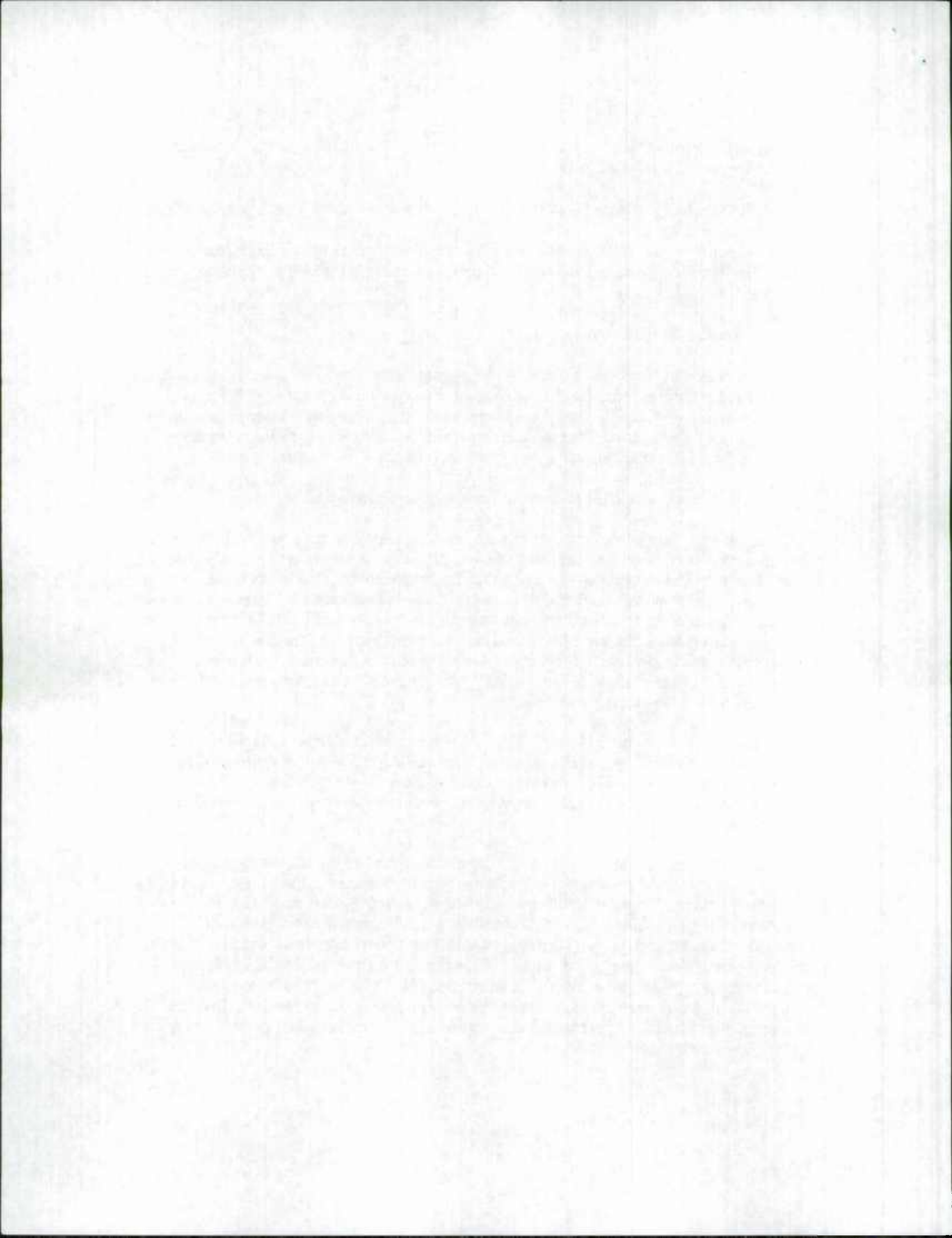
The project shoreline is undergoing severe erosion and as a result significant amounts of nutrients and sediment are being eroded into the waterway every day, degrading water quality and indirectly impacting all aquatic living resources including any oysters or submerged aquatic vegetation (SAV) in the area. The proposed marsh will enhance water quality and therefore improve offshore resources, including the oyster bar, rather than impact them.

(7) *Peter Bergstrom of NOAA's comments about sub-aquatic vegetation*

MDE agrees with Peter Bergstrom that protecting existing SAV beds and restoring beds where they once grew are important restoration strategies. However, due to water depths (shallowness), tide fluctuations, and wave action, the area within the immediate project vicinity is not a priority site for SAV establishment. MDE is not aware of any SAV in the immediate project vicinity nor has Peter Bergstrom documented any in that area. He has only documented SAV 'nearby'. There is no scientific evidence that any SAV will be directly impacted by the proposed project. The project will improve water quality both in terms of nutrient reduction and sedimentation, improving conditions for SAV. In fact, Dr. Bergstrom suggests that the "first priority" [to reverse a decline in SAV] is to improve water quality.

(8) *Is the Board's choice "either/or": either 270 houses and 300' setback (no wetlands license) or 279 houses and marsh and public amenities (wetlands license) OR would denying the permit have other consequences such as having to renegotiate the zoning permissions. If the Board denied the permit, would the project automatically be able to go forward with 270 houses and 300' setback.*

The orderly development and use of land is regulated through planning and zoning controls implemented by the local government. Once the appropriate land use has been determined by the local jurisdiction, it is the responsibility of the Board, supported by the report and recommendation of MDE, to review the proposal for potential impacts to tidal wetlands. Opponents of the proposed project have suggested that the upland development and shoreline protection/marsh creation project are linked. While this may be true, MDE suggests that any linkage is the prerogative of the Town of St. Michaels. MDE's review focused solely on the merits of the proposed shoreline protection/marsh creation project and remains convinced that the proposed project will not only protect the shoreline of Miles Point, but also improve water quality and provide additional habitat diversity.





REPLY TO
ATTENTION OF

Operations Division

DEPARTMENT OF THE ARMY
BALTIMORE DISTRICT, U.S. ARMY CORPS OF ENGINEERS
P.O. BOX 1715
BALTIMORE, MD 21203-1715

AUG 02 2007

Ms. Patricia Betlejewski
The Talbot River Protection Association
P.O. Box 2234
Easton, Maryland 21601

Dear Ms. Betlejewski:

I am replying to your letter regarding Department of the Army (DA) permit application, CENAB-OP-RMS (Miles Point Property LLC/Marsh Creation) 2005-65320-13.

Thank you for your letter. We acknowledge the concerns you raised. You and others have expressed various concerns about the proposed project, such as:

- 1) Potential impacts to submerged aquatic vegetation (SAV) and to the mudflat
- 2) The suitability and design of the marsh creation
- 3) Water quality
- 4) Potential impacts on general navigation
- 5) Cultural resources
- 6) Development density
- 7) Traffic impacts on the St. Michaels Historic District
- 8) Need for an Environmental Impact Statement
- 9) Request for a public hearing

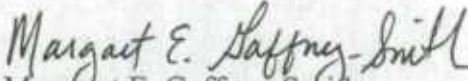
Following is a synopsis of our response to the issues identified above. The proposed marsh creation would occur in the inter-tidal zone, where submerged aquatic vegetation does not exist. While we recognize the importance of the inter-tidal mud flat to waterfowl, it is in the public interest to protect eroding shorelines, and the proposed marsh creation with rock sill is the most environmentally-sustainable method of shoreline stabilization. The ecological productivity of the marsh will exceed that of the mud flat. The marsh creation will be constructed in accordance with current U.S. Army Corps of Engineers design publications and was reviewed by an outside consultant to ensure it can withstand wave energy. The Maryland Department of the Environment issued the required Water Quality Certification on December 20, 2006. The proposed marsh creation and pier should not adversely impact general navigation in the area as the water depths within the project area are less than one foot at mean low water. Cultural resource impact review was coordinated with the Maryland Historical Trust and the Advisory Council on Historic Preservation, in accordance with Section 106 of the Historic Preservation Act of 1966. The Trust concurred that the Federal undertaking will result in no effect on the St. Michaels Historic District and has No Adverse Effect on significant

archeological resources. The impacts associated with the upland development and land uses, including traffic impacts on the St. Michaels Historic District, are not within our purview under Section 10 of the Rivers and Harbors Act of 1899 or Section 404 of the Clean Water Act, and should more appropriately be addressed by local government.

I have reviewed and evaluated the requests for a public hearing. There is sufficient information available to evaluate the proposed project, and numerous opportunities for public involvement have already been provided at the state and local level. Therefore, the requests for a public hearing are being denied. Having reviewed the information provided by the applicant and all interested parties, and our assessment of the environmental impacts of the proposed marsh and pier, including secondary and cumulative effects of the project, I find that this permit would not have a significant impact on the quality of the human environment. Therefore, an Environmental Impact Statement is not required.

We appreciate your taking time to express your concerns. We value the public's input in our permit review process, and we want to assure you that the comments we received were carefully weighed in making our decision on the marsh creation and pier.

Sincerely,


Margaret E. Gaffney-Smith
Chief, Regulatory Branch

Department of the Army Permit Evaluation
And Decision Document

Case Number: CENAB-OP-RMS (MILES POINT PROPERTY LLC / MARSH
CREATION) 2005-65320-13

This document constitutes my Environmental Assessment, Statement of Findings, and review and compliance determination according to the 404(b)(1) Guidelines, prepared in evaluation of an application of an individual permit for the proposed work described below.

MEMORANDUM FOR RECORD

SUBJECT: Department of the Army Environmental Assessment and Finding for the Above-Numbered Permit application

1. Applicant: Miles Point Property LLC
Mr. George Valanos
1228 31st Street, NW
Washington, DC 20007

Agent: Environmental Concern
P.O. Box P
St. Michaels, MD 21663

2. Location, Existing Site Conditions, Project Description, Changes to the Project:

- a. Location: The project site is the eroded shoreline in the Miles River, at Miles Point, St. Michaels, Talbot County, Maryland, latitude: 38 47' 45.9999", longitude: -76 13' 6.9999".
- b. Existing Site Conditions: The project site is the eroding shoreline of an approximately 89 acre upland farm field. The eroding shoreline is an un-vegetated clay bank ranging from three feet high at the southern end to 6 feet high at the northern end of the riverfront shoreline.
- c. Project Description: To stabilize approximately 2,100 linear feet of eroding shoreline by constructing 4.4 acres of tidal marsh. The marsh will be created by emplacing 11,900 cubic yards of clean sandy fill material a maximum of 100 feet channelward of the mean high water line, and is to be planted with high and low marsh vegetation. The marsh creation is to be protected by a low profile stone revetment (sill) consisting of 1,950 cubic yards of stone, extending no more than 110 feet channelward of the existing eroded shoreline. The project includes construction of a six-foot wide pier with a six-foot wide by 24-foot long floating kayak/canoe launching platform and a 12-foot by 25-

foot fixed platform, extending no more than 140 feet channelward of the rock sill, in the Miles River, at Miles Point, Talbot County, Maryland.

- d. Changes to the Project: The plans of the shoreline stabilization were changed to provide breaks in the stone sill to promote tidal flushing. The public access pier was added to the plans after the first public notice (PN), therefore a second PN was advertised. The proposed pier was shortened from 240 feet in length to 128 feet. In response to the discovery of an archeological site in the shoreline, riprap will be constructed in the vicinity of the archeological site to ensure that it is not impacted by erosion. The riprap will be covered with soil and vegetation so that it will be similar in appearance to the remainder of the shoreline stabilization.

3. Project Purpose and Need: The marsh creation is to protect and stabilize the eroding shoreline. The proposed pier is to provide public access to the Miles River from the proposed 150-foot wide shoreline buffer that will serve as a Town park.

4. Scope of Analysis: The Corps' jurisdiction is limited to the proposed work in the water and a narrow band of upland immediately adjacent to the shoreline which would require re-grading pursuant to creation of the marsh. A development on the 89-acre farm consisting of 251 single-family houses, 20 townhouses, 8 live/work units, an inn, and a public waterfront park proposed in the uplands, would have no impact to waters of the U.S., including jurisdictional wetlands. Corps regulations at 33 CFR 325 Appendix B discuss the circumstances under which the Corps' responsibility to assess impacts under NEPA would be extended to include the portions of a project beyond the Corps' jurisdiction. The NEPA review would extend to the entire project when sufficient Federal control and responsibility over the entire project is determined to exist. In the case of the Miles Point project, the Corps is not aware of any Federal agency having control or responsibility over the upland development. Therefore, there is insufficient Federal control over the project to warrant extending Federal responsibilities under NEPA to the entire project.

Corps regulations at 33 CFR Part 325, Appendix C instruct this agency on consideration of Section 106 of the National Historic Preservation Act (NHPA) in the Corps regulatory program. The Corps has also considered the 25 April 2005, "Revised Interim Guidance for Implementing Appendix C of 33 CFR Part 325 with the Revised Advisory Council on Historic Preservation Regulations at 36 CFR Part 800." Under Appendix C, the Corps uses a three pronged test to consider the relationship between the proposed undertaking in waters of the U.S. to other proposed work in uplands. The Corps "permit area" for purposes of NHPA compliance is usually limited to those areas comprising the waters of the United States that will be directly affected by the proposed work or structures, and uplands directly affected as a result of authorizing the work or structures. To have a sufficient nexus to extend the Corps' permit area to include the proposed work in the uplands, the Corps must determine that work meets all three of the following:

- (i) Such activity would not occur but for the authorization of the work or structures within the waters of the United States;
- (ii) Such activity must be integrally related to the work or structures to be authorized within waters of the United States. Or, conversely, the work or structures to be authorized must be essential to the completeness of the overall project or program; and
- (iii) Such activity must be directly associated (first order impact) with the work or structures to be authorized.

In the case of the Miles Point project, the construction of the marsh creation and pier is not dependent upon the housing. The shoreline is eroding at the rate of 3 to 5 feet per year and could continue to erode for several decades without threatening to erode the homes sites which would be located 150 feet further inland. In addition, it is not necessary for a permit applicant to propose development activities on the upland portion of a property in order to receive authorization to stabilize an eroding shoreline. The two activities are not dependent upon one another to satisfy their purpose. Therefore, the Federal undertaking is limited to the proposed shoreline stabilization and the community pier.

Several organizations (including some historic groups) suggested that the Corps take federal jurisdiction over the upland portion of the project for purposes of complying with the NHPA. They contend that the "but for" test in 33 CFR 325 Appendix C, which establishes the criteria under which the Corps' permit area can be extended to include areas outside waters of the U.S., has been satisfied on this project. Their contention is based on a condition of a Settlement Agreement between the developer and the state Critical Areas Commission (CAC) which requires the marsh creation as a prerequisite to receiving higher growth allocation from the CAC. For the reasons stated above, the Corps finds this argument advocating expanding the permit area unpersuasive.

5. Statutory Authority: Section 10 of the River and Harbor Act of 1899, and Section 404 of the Clean Water Act.

6. Section 106 of the NHPA: The Corps conducted extensive coordination with the Maryland State Historic Preservation Officer (which, in Maryland, is represented by the office of the Maryland Historical Trust (MHT), the Advisory Council on Historic Preservation (ACHP), and several organizations that requested status as consulting parties.

- a. The Corps conducted coordination with MHT via two Corps public notices issued on 21 February 2006 and 11 October 2006. The public notices described the federal undertaking, and MHT responded to both notices stating that no historic properties are affected by the undertaking.

- b. Three organizations requested participation as consulting parties: the Bay Hundred Foundation, the Center for Environment and Society at Washington College, and the National Trust for Historic Preservation. Their concerns focused on their desire for the Corps to expand its scope of review to include the entire subdivision, and assess the effect of the project on the St. Michaels Historic District. The Corps consulted with all three organizations. The Corps considers "consultation" to require, as a minimum, an exchange of information concerning historic properties and the proposed undertaking's effect on those properties, as such information is developed. However, the extent to which the Corps consults with such parties normally varies according to the significance of the historic resource, the severity of the effect, and the interest shown by the parties. The Corps provided written responses to these organizations to advise them concerning the Corps' limited scope of review, the Corps' effect determinations, and the findings of the MHT. None of the organizations responded to this information or expressed any further interest in continuing consultation.
- c. As a result of a Phase I archeological survey voluntarily performed by the permit applicant, a significant archeological resource was discovered within the limits of the Federal undertaking. This site was determined to be avoidable. In addition, to ensure that the site would not be lost to erosion from a future storm event, the applicant agreed to cover the site with riprap, as requested by MHT. This action to preserve the site in place resulted in a No Adverse Effect determination.
- d. The ACHP objected to the Corps' scope of review for historic resources. The Corps considered their comments, provided two responses, and made a copy of this decision document available to the ACHP.

7. Other Federal, State, and Local Authorizations obtained or required and pending.

- a. State Water Quality Certification (WQC): the Maryland Department of the Environment (MDE) issued the required WQC on 20 December 2006 (Encl 1).
- b. Coastal Zone Management (CZM) consistency determination: The issued WQC contained a statement that MDE has determined that the proposed activity (marsh creation and pier) complies with, and will be conducted in a manner consistent with, the State's Coastal Zone Management Program, as required by Section 307 of the Federal Coastal Zone Management Act of 1972, as amended.
- c. The applicant entered into a Settlement Agreement with the Maryland Critical Area Commission on 7 September 2005.
- d. Tidal Wetlands License: The Maryland Board of Public Works issued a Tidal Wetlands License on 3 January 2007.

8. Date of Public Notices, Summary of Comments, and Disposition of Comments:

- a. The application was received on 29 July 2005. The application was reviewed and additional information and justification for the encroachment was requested by telephone. Upon receipt of the information, the project proposal and plans for the shoreline stabilization (i.e., marsh creation) were advertised by PN on 21 February 2006 (Encl 2). After the pier was added to the proposal, the entire project was re-advertised by a PN dated 11 October 2006 (Encl 3). All comments received on this application have been reviewed and are summarized below:

- (1) US Environmental Protection Agency (EPA): No written comments were received, however a representative of EPA stated during the 27 September 2006 Joint Evaluation (JE) meeting that EPA was in support of the proposed marsh creation and had no objection to the proposed pier.
- (2) US Fish & Wildlife Service (USFWS): No written comments were received. USFWS also stated their support of the proposal during the 27 September 2006 JE meeting.
- (3) National Marine Fisheries Service (NMFS): Stated their support of the marsh creation during the 27 September 2006 JE meeting. NMFS followed up their verbal comments by a memo dated 18 October 2006, which recommended that the pier decking be four feet above the marsh creation surface, and that an additional flushing break be added to the northern end of the proposed stone sill. The pier height over the marsh has been made a condition of the permit, and the plans have been revised to depict the additional flushing break.
- (4) US Coast Guard (USCG): USCG provided a comment form dated 13 November 2006 stating that USCG has no comment on the proposal.
- (5) State Historic Preservation Officer (SHPO): The Maryland Historical Trust (MHT) responded to both PNs. By a stamped and signed statement dated 17 March 2005, MHT stated "The Maryland Historical Trust has determined that there are no historic properties affected by this undertaking." MHT responded to the second PN with a comment form dated 26 October 2006, which reiterated the stamped and signed statement, as well as a hand written note that the "Permit only applies to marsh creation, not entire subdivision. Unlikely to impact sig. resources."

Late in 2006, the permit applicant voluntarily conducted a Phase I

archeological survey of the permit area and the upland property. A single archeological site was discovered along the shoreline, and is considered to be potentially eligible for the National Register. [Note: This site is considered to be within the Corps' permit area because this area immediately adjacent to the shoreline would require re-grading in order to construct the marsh creation. Upon advice of MHT who wanted to avoid further disturbance to the site, the Corps agreed to forego Phase II archeological testing, which is ordinarily undertaken to verify that a site is eligible for the National Register, and will treat the site as though it is eligible.] Upon discovery of the archeological site, the Corps coordinated further with MHT by letter dated 4 April 2007 (Encl 4). The Corps requested MHT's concurrence in our No Adverse Effect determination for the archeological site and our No Effect determination for the St. Michaels Historic District. The Corps concluded the Federal undertaking would have no effect on the St. Michaels Historic District because the construction of a pier and marsh would not destroy, alter, or remove any portion of the District, affect its character, alter its setting, introduce visual, atmospheric, or audible elements that would diminish its integrity, cause neglect, or result in the transfer, lease, or sale of any portion of the District. [Note: Although the St. Michaels Historic District is outside the Corps' permit area, the proposed marsh creation and pier would be visible from the St. Michaels Historic District (specifically, from the Maritime Museum). Therefore, the Corps made an effect determination to document our conclusion that the Federal undertaking would not have any effect, direct or indirect, on the St. Michaels Historic District.]

The MHT replied by letter dated 13 April 2007 (Encl 5), concurring with "the Corps' delineation of its permit area and associated area of potential effect for the undertaking," concurring that the Federal undertaking would "not affect the St. Michaels Historic District," and concurring that, with the addition of riprap to protect the archeological site, the proposed marsh creation and pier would have "No Adverse Effect on historic properties, including archeological sites and the historic built environment." The MHT also provided a recommendation that the archeological site be fenced during construction. This recommendation has been incorporated as a special condition of the Corps' permit.

- (6) The Advisory Council on Historic Preservation (ACHP) stated in a letter dated 20 December 2006 (Encl 6) that they believe the entire subdivision parcel should be considered within the Area of Potential Effect for the Section 106 review. In a letter dated 27 April 2007 (Encl 7) to Dr. Eddins, ACHP, the Corps explained why the Settlement Agreement between the CAC and the developer has no bearing on the Corps' determination of the permit area under Section 106. The Corps

explained that the Federal undertaking is limited to the marsh creation and pier, and that these would have no effect on the St. Michaels Historic District. The Corps also provided information on the recent discovery of the archeological site in the shoreline, and the MHT's concurrence with our determination of "No Adverse Effect."

By letter dated 20 June 2007 (Encl 8), the ACHP advised that they remain concerned with the Corps' position that limits the scope of the undertaking to exclude the proposed upland development. The ACHP acknowledged that, "as a matter of engineering," the upland development may proceed without the construction of the tidal marsh, stone sill, and timber pier. However, the ACHP concluded that "the fact remains, that without the Corps' permitted work on the tidal marsh and stone sill, the upland development (as proposed) cannot be legally built."

In a letter dated 1 August 2007 (Encl 9), the Corps informed the ACHP that their comments were fully considered, and provided a copy of the Corps' decision document.

- (7) Maryland Department of Natural Resources (DNR): DNR stated on a JE form and an e-mail dated 30 October 2006 that DNR recommended a time-of-year restriction for resting waterfowl, and states DNR's support for the marsh creation. The time-of-year restriction was not made a part of the permit as resting waterfowl impacts do not come under Corps jurisdiction.
- (8) Maryland Critical Areas Commission (CAC): Following litigation in the State Court system, the applicant and CAC entered into a Settlement Agreement on 7 September 2005. One of the conditions of the Settlement Agreement requires the marsh creation.
- (9) The Maryland Department of the Environment submitted their Report and Recommendation (R&R) to the Maryland Board of Public Works on 29 November 2006. The R&R recommended approval of the project. The Board approved the Tidal Wetland License on 3 January 2007.
- (10) Individuals: Forty eight letters were received from the general public along with nineteen e-mails. These comments were in opposition to the proposal. The letters generally questioned the design of the proposed marsh creation and stone sill, they questioned the potential navigation impacts, and they also raised general issues with the applicant's subdivision on the upland portion of the site. The letters objected to the density of the proposed houses in the subdivision, the storm water design, and traffic through the town of St. Michaels

Historic District. Many letters contained a request for a public hearing and the preparation of a Draft Environmental Impact Statement. The applicant's agent addressed the design comments during the JE meeting and during the two MDE public informational hearings. The Corps does not consider the project to have negative impacts on navigation. The issues regarding the subdivision pertain to local land use and are not subject to Corps jurisdiction. This decision document concludes that the Federal undertaking will not result in significant impacts, and that an Environmental Impact Statement is not needed.

(11) Organizations: Letters in opposition to the project were received from four organizations. Three of the four requested participation as a consulting party under ACHP regulations (36 CFR Part 800). According to those regulations, and the Corps' internal guidance, consultation is required with certain individuals and organizations having a demonstrated interest in the undertaking due to the nature of their legal or economic relation to the undertaking or affected historic properties, or their concern with the undertaking's effects on historic properties. To those who requested participation as a consulting party, the Corps provided documentation of the Federal undertaking's effects on historic properties (per 36 CFR 800.5(c) and 36 CFR 800.11(e) for determinations of No Adverse Effect). The Corps did not receive any subsequent comments from those parties.

(i) The Talbot River Protection Association stated their opposition to the project, and recommended that the comment period be extended, that the Corps hold a Public Hearing, and that a full EIS be prepared. The comment period was extended by the issuance of a second Corps PN. MDE held two meetings that were open to the public, and the Corps determined that a Corps public hearing would not likely yield new information to be considered in the Corps' evaluation of the permit application. The impacts of the Federal action, as documented in this decision document, would not warrant preparation of an EIS (see conclusion in Section 13 below).

(ii) The Bay Hundred Foundation stated in their letters of 31 October 2006 and 19 January 2007 that they oppose the project, questioned the need for the marsh creation, questioned the design of the marsh creation and stone sill, as well as raising concerns about the density of the proposed subdivision and the potential impacts of the subdivision on the historic resources on site and on the St. Michaels Historic District. They also recommended a comprehensive Section

106 review, and requested that they be allowed to participate as a "consulting party." They recommended the preparation of an EIS on the project. In a 14 December 2006 letter, they requested that the Corps convene a meeting with those organizations that have requested to be "consulting parties."

By letter dated 4 May 2007 to Ms. Elizabeth Jones of the Bay Hundred Foundation, the Corps provided information to advise that an archeological site was discovered along the shoreline, in the area of the proposed marsh creation, and that coordination with MHT resulted in their concurrence in our determination of "No Adverse Effect." The Corps also explained why the Corps' jurisdiction is limited to the work in the water, and advised that the marsh creation and pier would have no effect on the St. Michaels Historic District. The Corps also responded to the concerns about the stability of the marsh by stating that the design was based on design manuals developed by the Corps, and that the design had been verified by an outside firm.

- (iii) The Center for the Environment and Society at Washington College stated that the development site contained a high probability for unknown archaeological sites. They presented a number of GIS maps to support their claim, however most of the potential resources they identified were on land that has been eroded away. They also stated the subdivision location might impact historic resources and the potential increase in traffic through the St. Michaels Historic District might cause an adverse impact. They also recommended a complete Section 106 review and requested to participate as a "consulting party".

By letter dated 4 May 2007 to Dr. Seidel, Center for the Environment and Society at Washington College, the Corps responded to these concerns, explaining that a complete Phase I archeology report of the entire property was voluntarily prepared by the permit applicant, and a single archeological resource, considered to be potentially eligible for the National Register, was identified. The Corps' letter advised that the archeological site will be protected from the possibility of further shoreline erosion by placing riprap, and that the MHT concurred with our determination of "No Adverse Effect." The Corps also advised that MHT concurred with our determination that the Federal undertaking is limited to the work in the water, and

that this work will have no effect on the St. Michaels Historic District.

- (iv) The National Trust for Historic Preservation emphasized the importance of the Town of St. Michaels as a historic resource in a letter dated 27 October 2006 from Mr. Richard Moe. The Trust expressed concerns that the proposed development could potentially have an adverse impact on the St. Michaels Historic District. The Trust also recommended a complete Section 106 review and requested to participate as a "consulting party." This was followed with an e-mail from Mr. Rob Nieweg of the Trust to the Corps and to Congressman Gilchrest on 5 December 2006, to which the Corps responded through Congressman Gilchrest by letter dated 21 December 2006. On 6 December 2006, the Corps also responded by e-mail to Mr. Nieweg, outlining the Corps' coordination with MHT and advising of the MHT position that "there are no historic properties affected by the undertaking" and MHT's concurrence that the permit area is limited to the proposed shoreline stabilization, not the entire subdivision.

By letter dated 4 May 2007 to Mr. Richard Moe, National Trust for Historic Preservation, the Corps advised that an archeological site was discovered in the shoreline, that it will be protected from the possibility of further erosion by placing riprap, and that MHT concurred with the Corps' determination that the marsh creation and pier would result in "No Adverse Effect" to the archeological site, and would not effect the St. Michaels Historic District. The 4 May 2007 letter also explained why the Corps did not extend its jurisdiction to include the upland development.

(12) Congressional interest

This office received letters dated 23, 25, and 27 October 2006 from Senator Mikulski forwarding comment and opposition letters from numerous constituents. This office responded to the Senator by explaining the limits of our jurisdiction over the proposed work.

Letters of 19 October, 13 and 22 December 2006, 12 January 2007, and 20 April 2007 were received from Congressman Gilchrest forwarding concerns from his constituents. The Corps responded to the Congressman, addressing each of the issues raised.

9. Alternatives:

- a. Avoidance: Avoidance would not meet the project goal of shoreline stabilization. Department of the Army regulations state that a landowner has the general right to protect property from shoreline erosion, and that such applications will usually receive favorable consideration [33 CFR 320.4 (g) (2)].
- b. Minimization: The shoreline stabilization could be accomplished with the construction of a stone revetment, which would reduce the amount of mud flat to be impacted by the marsh creation. However, the marsh creation with stone sill would provide shoreline stabilization while also creating marshland that would provide valuable habitat for a diverse assemblage of fauna, trap nutrients, and provide an enriched benthic community.

10. Evaluation of the 404 (b) (1) guidelines:

a. Restriction on discharges:

(1) Alternatives (See paragraph 8):

- (i) The activity is located in a special aquatic site (mudflat)

Yes X No

The project is located on a mudflat, which is classified as a special aquatic site. However, the "mudflat" actually consists of a hard clay pan, consequently, it is not as ecologically productive as many mudflats. Submerged aquatic vegetation is also a special aquatic site. No submerged aquatic vegetation would be impacted. Surveys of submerged aquatic vegetation indicate that the grasses are further channelward of the proposed marsh and sill.

- (ii) The activity needs to be located in a special aquatic site to fulfill its basic purpose.

Yes X No

It is not possible to totally avoid impacts to the mud flat. Although the acreage of impact to the mud flat could be reduced by constructing a stone revetment, the marsh creation would enhance the ecological value of the shoreline by adding to the diversity of habitat along the river. In recognition of the gain in marsh habitat, which is expected to increase the Benthic Index of Biological Integrity from the existing score of 2.1 to a score of 4.5-5.0, the conversion of 4.4 acres of hard clay substrate to marsh is not considered detrimental.

- (iii) All practicable alternatives have been reviewed in paragraph 8

above. It has been demonstrated that the alternative that impacts the least acreage of the aquatic ecosystem (the stone revetment), has been identified.

Yes X No

While the stone revetment would impact the least acreage of river bottom, it has not been selected because shoreline stabilization using the marsh creation method is considered to be the environmentally-preferred technique of shoreline stabilization.

- (iv) The least damaging alternative (stone revetment) has no other significant environment effects, and would meet the project need.

Yes X No

However, the marsh creation would result in greater habitat diversity and would be inhabited by a diverse assemblage of fauna.

(2) Other program requirements:

- (i) The proposed activity violates applicable State water quality standards or Section 307 prohibitions or effluent.

Yes No X

- (ii) The proposed activity jeopardizes the continued existence of federally listed threatened or endangered species or affects their critical habitat.

Yes No X

- (iii) The proposed activity violates the requirements of a federally designated marine sanctuary.

Yes No X

- (3) The activity will cause or contribute to significant degradation of water of the United States, including adverse effects on human health; life stages of aquatic organisms; ecosystem diversity, productivity, and stability; and recreational, esthetic, and economic values.

Yes No X

(4) Minimization of adverse effects:

- (i) Appropriate and practicable steps have been taken to minimize potential adverse impacts of the discharge on the aquatic ecosystem.

Yes X No

The proposed discharge will result in creation of a marsh that will enhance the value of the shoreline in terms of habitat, water quality, nutrient export, and attenuation of wave energy.

- (ii) Compensatory Mitigation: No mitigation is necessary to supplement the proposed creation of tidal wetlands for shoreline stabilization.

11. Public Interest Review:

- a. Corps analysis of comments and responses: The permit applicant has responded to all the concerns that were raised by the public at the two MDE public meetings. Concerns about the design of the marsh were addressed by the applicant. The applicant utilized U.S. Army Corps of Engineers publications [*Coastal Engineering Manual*, EM1110-2-1100(2002) and *Shore Protection Manual*, 1984 (4th Edition)] to design the marsh, and then contracted with another consultant, Offshore and Coastal Technologies, Inc, to verify the design assumptions and calculations. In accordance with 33 CFR 325 Appendix C, the concerns about the impact of the upland development on the St. Michaels Historic District are beyond the purview of the Corps. In accordance with 33 CFR 325 Appendix B, the Corps is not required to extend the scope of its NEPA review to include impacts that result from development of the upland areas.
- b. All public interest factors have been reviewed. The following public interest factors are considered relevant to this proposal. The cumulative and secondary impacts of the Federal action on the public interest have been considered.
- (1) Conservation: The project would provide shoreline stabilization to the actively-eroding shoreline, thus greatly reducing the amount of sediment entering the river. The marsh creation should improve water quality both by reducing the amount of sediment entering the river, and by providing some filtration of nutrients in the water column. The pier could accommodate only kayaks and canoes, not power boats, due to the shallow water depth. There would be no detrimental impact to water quality generated by kayaks and canoes.
 - (2) Economics: The project would have a positive short-term impact on local economics during construction due to the labor and material costs.
 - (3) Aesthetics: The proposed pier would provide the public an opportunity to observe waterfowl, since the pier and a 150-foot wide shoreline buffer area would become parkland, and the pier would extend past the marsh to open water.

- (4) General environmental concerns: General environmental concerns relating to the loss of mudflat habitat, impacts to submerged aquatic vegetation, impacts on a natural oyster bar, and the possibility of erosion of the created marsh are discussed below.

The "mudflat" area which would be impacted by the marsh creation is actually a hard clay pan resulting from the erosion of the upland over an extended period of time. It currently has a Benthic Index of Biological Integrity (which is DNR's rating of benthic diversity and abundance) score of 2.1, which the marsh creation is expected to improve to a score of 4.5 - 5.0 (see 10 Sep 2006 response from Environmental Concerns to Mr. Doldon Moore, Board of Public Works).

The existing submerged aquatic vegetation (SAV) beds are more than 150 feet channelward of the shoreline, which is beyond the limits of the marsh creation. The project area would not be expected to be suitable for establishment of SAV due to water depths, tides, wave action, and dessication due to exposure at low tide. The marsh would improve water quality both in terms of nutrient reduction and sedimentation, thereby improving conditions for SAV establishment channelward of the marsh.

The Ash Craft oyster bar is approximately 1000 feet east of the proposed sill. The improvement in water quality resulting from the marsh creation would improve offshore resources rather than degrade them.

The marsh creation has been designed in accordance with U.S. Army Corps of Engineers design manuals, and includes a stone sill to protect the channelward edge of the created marsh. The consultant for the marsh creation made a presentation at MDE's office which addressed the issues raised by the public concerning the ability of the proposed marsh to withstand wave energy. The design considered the wave energy generated by storm winds, the fetch (measurement of the distance wind blows over open water) from three different directions, and the expanse of shallow water channelward of the shoreline. Also, an additional review to verify the design of the marsh was completed by Offshore and Coastal Technologies, Inc. The applicant's consultant, Environmental Concern, Inc., reports that all of their marsh creation projects constructed with a stone sill are stable, and have survived storms such as Hurricane Isabel. Manmade and natural marshes can withstand the effects of such storms mainly because the wetlands and stone sills are flooded over, and are well below the wave trough's

damaging attack. Stone revetments built against the shoreline are in the direct line of attack and fail once they are overtopped.

- (5) Wetlands: The proposed work would not impact any existing wetlands. In fact, the proposal would create 4.4 acres of tidal wetlands. These wetlands would provide habitat for birds, small mammals, crustaceans, and benthic organisms; would protect the shoreline from erosion; would remove nitrogen and phosphorus from the water; and would provide nutrients and detritus to support the food chain of aquatic species, a function known as "nutrient export."
- (6) Historic and cultural resources: The proposal was the subject of letters from three historical organizations, raising the issue of the Corps' scope of analysis and potential effects on historic properties. These letters recommended that the entire subdivision parcel be considered by the Corps due to the fact that, in approving the growth allocation for the development, the Settlement Agreement between the CAC and the developer made reference to the marsh creation, which these groups alleged would provide a sufficient nexus to subject the area to Corps jurisdiction. However, the MHT concurred with the Corps' determination that the Corps is not obligated to consider the effect of the upland development on historic resources outside the Corps-defined permit area because the requisite nexus between the work in the uplands and the jurisdictional resources does not exist.

The Federal undertaking (i.e., the marsh creation and pier) would have no effect, under Section 106, on the St. Michaels Historic District since the construction of a pier and marsh would not destroy, alter, or remove any portion of the District, affect its character, alter its setting, introduce visual, atmospheric, or audible elements that would diminish its integrity, cause neglect, or result in the transfer, lease, or sale of any portion of the District. MHT concurred in this determination of "No Effect."

An archeological site was discovered in the shoreline as a result of a Phase I archeological survey voluntarily performed by the applicant. This resource is considered eligible for the National Register, and falls within the Corps' permit area. This was coordinated with MHT who concurred that, with the placement of riprap to protect the site, the project would result in "No Adverse Effect" on the archeological resource.

- (7) Fish and wildlife values: The proposed project would not impact any listed threatened or endangered species or their critical habitat.

While potential impacts from the loss of the hard clay pan and/or

the possible erosion of the created marsh have been raised as potential impacts on fish and wildlife values, neither of these issues is considered to be valid, for the following reasons. The marsh creation and stone sill would create tidal wetlands which would increase the diversity of habitat along the river, providing habitat for small finfish, shellfish, waterfowl, and benthic organisms. The created marsh vegetation would export nutrients with every high tide that would provide food for numerous species of filter feeders (clams, mussels, worms), and these in turn provide food for fish and waterfowl. The created marsh is expected to have a greater diversity and abundance of benthic organisms than currently exists in the hard clay pan. Research on benthic habitats has determined that the benthic communities found near disturbed shorelines are less productive and of lower quality than those benthic habitats adjacent to undisturbed tidal marshes (Bilkovic, 2006).

The construction of the marsh could temporarily increase turbidity, depending upon the method of construction employed, the equipment used, and the wind and current conditions during construction. However, the marsh is designed to withstand wind, wave, and storm effects, and is expected to remain stable.

- (8) Flood hazards: The issue of flood hazard was raised in one of the letters received on the project. The proposed upland subdivision is not subject to the Corps' jurisdiction, and any issues related to potential flooding of the subdivision would have to be addressed through the local zoning laws and regulations. Nevertheless, the proposed marsh creation would provide buffering between the subdivision and the river. Marshes, including man-made wetlands, provide flood storage and would act to break-up waves and would spread storm surges across the surface of the marsh, thus reducing the potential flood hazard.
- (9) Floodplain values: The proposed marsh creation would result in the discharge of fill within a portion of the Miles River. However, this fill would have a negligible effect on flood storage, and the marsh would attenuate wave energy during flood events. The riparian habitat would be enhanced by the creation of the marsh, and by the stabilization of the eroding shoreline.
- (10) Land use: The Federal undertaking is limited to the proposed pier and marsh creation. In consideration of 33 CFR 325 Appendix B, the Corps finds that it has no obligation, or ability, to federalize the entire project and extend its assessment of impacts under NEPA to include the upland development. Furthermore, at the time of the Corps' decision, the CAC's decision to increase the growth allocation had

already been made. The Town's decision to allow development of the farm field did not result as a consequence of the Federal action, and there are no federally-regulated aquatic resources affected by the upland development. The Corps understands that the CAC and Town Commissioners relied on certain environmental commitments by the developer (including marsh creation) in agreeing to grant higher growth allocation to the developer. The impact of this decision on the Town, and on the St. Michaels Historic District in particular, should more appropriately be assessed in the CAC's decision document, since the decision to increase the growth allocation was made by the CAC, not the Corps, and the Corps has no input into, or control over, land use decisions.

The entire shoreline buffer is to be turned over to the Town of St. Michaels to be used as a public park. Therefore, the pier would also be accessible by the public for canoe/kayak launches and for observing waterfowl.

- (11) Navigation: The proposed pier and marsh creation would not adversely impact navigation. The portion of the river to be filled for the marsh creation and stone sill is in the inter-tidal zone, which is not used by boaters. Furthermore, the proposed stone sill would extend approximately two feet above the mean high water elevation, so it would be visible to boaters. The proposed pier would extend 128 feet channelward of the proposed stone sill, but would terminate in water depths of approximately 0.75 feet at mean low water. Thus neither the marsh or the pier would impact general navigation because this portion of the river is too shallow for boat traffic. The proposed recreational pier would not provide any new boat slips, therefore the authorized work would not result in increased boat traffic on the Miles River.
- (12) Shore erosion and accretion: The project site has evidence of active erosion, a lack of established wetlands, exposed vertical eroded bank, and exposed clay pan flats, and is in need of stabilization. The proposed marsh creation would prevent further shoreline erosion, thereby improving water quality. By stopping the erosion that currently occurs, the proposed marsh creation and stone sill may decrease down-drift accretion. This would benefit the St. Michaels harbor by reducing the frequency of dredging. While down-drift accretion can also be beneficial for shoreline protection where it results in the accretion of sand beaches, most of the properties along the river, in vicinity of this project, are protected from erosion through bulkheading or riprap.
- (13) Recreation: The proposed marsh creation and pier would not

adversely impact recreation in the area. The project should have a positive impact on recreation by supporting habitat for recreational fin fish and shellfish in the general project area. The pier would also have a canoe/kayak launching platform which would be open to the public, and the pier would afford opportunities for viewing the waterfront.

(14) Water supply: Not applicable.

(15) Water quality: The proposed marsh creation and pier construction would not adversely impact water quality. MDE issued the required Water Quality Certification (WQC) on 20 December 2006. Since 1990, shoreline erosion at Miles Point has contributed more than 35,200 tons of sediment to the Miles River (see 10 Sep 2006 letter from Environmental Concern, Inc. to Mr. Dolden Moore, Board of Public Works). The stabilization of the actively-eroding shoreline would improve local water quality by reducing the sediment in the local water column. The marsh would remove nitrogen and phosphorus from the water column. The project would provide no new boat slips.

(16) Energy conservation and development: Not applicable.

(17) Safety: The proposed marsh creation, with its stone sill, and the proposed pier would not adversely impact general safety. The stone sill would be visible to boaters at high and low tide. The stone sill and marsh would dissipate wave energy during storms.

(18) Food and fiber production: Not applicable.

(19) Mineral needs: Not applicable.

(20) Considerations of property ownership: The proposed pier and marsh creation would not adversely affect local property ownership. At this time, the permit applicant owns the entire property. Corps regulations presume that a property owner has a right to protect his property from erosion. Therefore, the project would protect the owner's interest.

(21) Noise impacts: There would be some construction equipment noise impacts associated with the construction of the pier and marsh. These are expected to have a short duration.

c. The relative extent of the public and private need for the proposed structures: The proposed marsh creation and stone sill would provide much needed stabilization of the shoreline, thus benefiting the private owner by protecting

his existing uplands. The general public would benefit from the shoreline stabilization by the improved water quality and increased wildlife habitat in the Miles River. In terms of the biomass produced, a salt marsh is one of the most productive ecosystems on earth (Encl 10). The spartina forms the base of a complex food web supporting insects, detritivores (snails, bacteria, fungi, worms), scavengers (shrimp, fiddler crabs, blue crabs), filter feeders (clams, oysters, worms), predators (egrets, herons, gulls, osprey, eagles), and fish. The pier would benefit the general public as an access point to the river, since the entire shoreline buffer is to be turned over to the Town of St. Michaels for a public park.

- d. The only practicable or reasonable alternative method for shoreline stabilization would be the construction of a stone revetment. However, the marsh creation is considered the more desirable method as it creates a soft shoreline that is better suited as wildlife habitat. The State and Federal resource agencies have expressed their support of the marsh creation method of stabilization. There is no other location or technique that would meet the project goal of shoreline stabilization of this property with greater net environmental benefit.
- e. The beneficial effects of the proposed marsh creation and pier on the public and private uses to which the area is suited, should be long lasting. The shoreline stabilization by marsh creation with stone sills has been shown to be an effective method, and the benefits of the reduced sediment load in the local water column would benefit the local population by improving water quality and habitat. There would be some loss of benthic habitat, but the ecological value of the tidal marsh would create highly productive habitat and would more than offset the loss of the hard clay pan.
- f. Threatened or Endangered Species: The proposed project would not jeopardize the continued existence or critical habitat of any threatened or endangered species.
- g. Corps wetland policy: There would be no impacts on existing wetlands. The project would result in the creation of 4.4 acres of tidal wetlands. The beneficial effects of the project on water quality, improved riparian habitat, stabilization of the shoreline, and public recreation are considered to outweigh any negative effects. Therefore, the project would be consistent with Corps policy.
- h. Secondary and Cumulative Impacts: Council on Environmental Quality regulations (40 CFR 1508.7) define cumulative impacts as "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency or person undertakes such other actions." The development of 251 single family homes, 20 townhouses, 8 live/work

units, an inn, and a waterfront park on an existing farm are considered reasonably foreseeable future actions.

The development of the upland farm field is not subject to the Corps' jurisdiction and does not result as a consequence of the Federal action. The development is not dependent on the Corps permit in order to proceed. Nevertheless, the Corps evaluated the cumulative effects of this development as a reasonably foreseeable action of others.

Though concerns have been expressed by some with respect to population growth, visual, and traffic impacts, a number of efforts have been undertaken by the project developer and local government to minimize or mitigate those effects. In an effort to ensure the proposed upland development is not inconsistent with the character and setting of the Town of St. Michaels, the Town Commissioners have imposed certain requirements. The zoning of the proposed development was changed to Traditional Neighborhood Development (TND), and the developer hired an expert in the design of neo-traditional communities, Mr. Andres Duany, an architect recognized by the American Institute of Architects for his work at Kentlands in Gaithersburg, MD. The number of home sites was scaled back from 400 to 279, and the Commissioners required that the site be surrounded by three rows of evergreen trees, not less than 8 feet in height, which would shield the adjacent properties and the Historic District from the proposed development.

In a 28 Dec 2006 email to the Board of Public Works, Mr. Barry Gillman, President of the Town Commissioners of St. Michaels, explained that the Town is confronted with economic and infrastructure issues that require some degree of growth in order to preserve their way of living. The Town's population is in decline and is aging. A recent sewage treatment plant upgrade is expected to double the user fees passed on to Town residents. Other infrastructure improvements are needed as well. Twenty percent of the Town residents are in subsidized housing and cannot afford higher taxes and user fees. The Town needs more residents to distribute the costs of the needed infrastructure improvements over a greater number of households. Miles Point is the only undeveloped site of any size in the Town. The Corps was advised by Ms. Debbie Renshaw, Planning Director for the Town of St. Michaels, in a 25 May 2007 phone conversation, that there are only two other proposed subdivisions within the Town limits, amounting to 18 lots total, and approximately 20 additional infill lots scattered throughout Town, that are available for construction of houses.

Having previously entertained a permit application by the MD State Highway Administration for a highway bypass of St. Michaels, the Corps is aware of the significance of the St. Michaels Historic District, not only in terms of its historic integrity, but also as the engine that supports the local economy. The Town has many antique shops which add to the historic

ambiance. This historic attraction, combined with the beauty of the waterfront, draws tourists by the busload to special events during the summer season, supporting the numerous antique shops, bed-and-breakfasts, and inns that make the local economy flourish. The Corps is also aware of the traffic concerns that are generated by summer events. There is only one main east-west road (MD 33) on the peninsula, and no significant shopping centers west of St. Michaels. The residents of Tilghman Island and Bay Hundred must pass through St. Michaels enroute to shopping destinations in Easton. Traffic through town is heavy during the summer tourist season and is exacerbated by the fact that traffic comes to a halt when motorists try to parallel park in front of the shops. Furthermore, there are no traffic signals to regulate the flow of turning vehicles. The Town has constructed a satellite parking lot to help relieve congestion through Town during special events, but each successive residential development adds to travel delays for residents west of town. The proposed project would have an incremental impact on traffic circulation through the Town of St. Michaels. However, the Town has alternatives available to it for managing traffic, and does not wish to address traffic issues by limiting future growth.

Pursuant to issuing an access permit for the proposed development, the Maryland State Highway Administration (SHA) evaluated the traffic impact of the proposed development on MD 33. The Corps was advised by Ms. Debbie Renshaw, Planning Director for the Town of St. Michaels, that SHA concluded the entrance to the proposed development would operate at level-of-service C (which is considered acceptable to SHA). Acceleration and deceleration lanes would be required on MD 33 to facilitate entering and exiting the development, but SHA concluded there is not a sufficient amount of new traffic to warrant installation of a traffic signal at the entrance.

To limit the effects of runoff from additional impervious surfaces, the Town Commissioners are requiring a state-of-the-art stormwater management system that includes infiltration/bioretenction practices. In addition, each residential property owner is required (1) to maintain vegetative ground cover on all pervious surfaces, and (2) to have privately-maintained stormwater management practices (e.g., rain gardens, bioretention ponds, rain barrels, pervious pavement, dry swales, etc) occupying 5% of the area of each lot.

The proposed development would result in the need to treat additional sewage, but the recent sewer upgrade can accommodate this increase.

The impact of the Miles Point development on the Town and on the St. Michaels Historic District has been minimized. Although the Miles Point development would not be within the boundaries of the St. Michaels Historic District, it would introduce modern structures that would be out of character with the buildings in the Historic District. However, the structures would be further from the District than other modern intrusions already in existence at

the Inn at Perry Cabin. As can be seen on the attached aerial photo (Encl 11), the proposed Miles Point development is approximately 2000 feet from the Historic District, and would be screened from view by the Inn at Perry Cabin and the townhouses that currently exist on that property, as well as by three rows of evergreen trees that the Town Commissioners are requiring to be planted to buffer the townhouses from the development. While the sewer assessment has added to the tax burden of the town's residents, the addition of new residents to the town would keep sewer assessments lower for existing residents than they otherwise would have been, absent the development.

Secondary (or indirect) effects are those which are caused by the action and are later in time or further removed in distance, but reasonably foreseeable. A potential secondary effect is the transport of sediment from the marsh, following construction, due to storm damage.

The latest design manuals for marsh creation are contained in the *Coastal Engineering Manual* and the *Shore Protection Manual* developed under the auspices of the U.S. Army Corps of Engineers, Coastal and Hydraulic Laboratory, in Vicksburg, MS. These guidelines were employed in the design of this project by Environmental Concern, from St. Michaels, MD, and the design was verified by another consultant having expertise in coastal engineering, Offshore and Coastal Technologies, Inc. The rock sill is designed to withstand a 25-year return period wave, generated by sustained winds over open water. The designer accounted for a fetch of 4.3 miles from the northeast, 1.0 miles from the east, and 3.4 miles from the southeast, resulting in a projection of wave heights at the toe of the sill ranging from 2.5 feet at the southerly segment to 3.5 feet at the northerly segment. The analysis shows that the waves will undergo a reduction in height as they pass over the sill structure. Furthermore, while standards have not been established for calculating wave attenuation over a vegetated marsh, studies by Knutson (1982) and Moller and Spencer (2002) show that there will be further attenuation of wave height and energy as the wave traverses the marsh. The design also established the size of the stone that will be needed to withstand the wave energy. The project designer has completed similar type projects with even greater fetch on the Miles River, Choptank River, and Chesapeake Bay, and both the marsh and sill at these sites continue to be stable, and have even withstood Hurricane Isabel. In addition, by special condition of the Corps permit, the designer will be required to monitor the project and make any necessary repairs for a period of ten years.

12. Public Hearing Evaluation: A Corps Public Hearing was not held. However, MDE held two informational meetings on the proposal, 21 February and 26 October 2006. Corps staff attended both MDE meetings. The issues raised at these meetings were the same issues contained in the letters received by this office in response to the Corps public notices. The issues have been addressed in responses, and through subsequent analyses provided by the permit applicant. In addition, hearings were held by the St. Michaels

Planning Commission on 3, 4, and 17 November 2005, and by the Town Commissioners on 15 and 20 December 2005 and 5, 9, and 10 January 2006. To those citizens who requested a public hearing, the Corps is replying to advise that there has been sufficient information generated for the Corps to evaluate the proposed project, and a public hearing will not be conducted.

13. Essential Fish Habitat (EFH): Both Corps PNs included coordination on EFH. NMFS made two EFH recommendations. Their recommendation to create breaks in the sill for tidal flushing of the low marsh was incorporated into the plans. Their recommendation to keep the pier 4 feet above the marsh has been incorporated as a special condition of the Corps permit.

14. Determinations:

a. Findings of No significant Impact (FONSI): Having reviewed the information provided by the applicant and all interested parties, and an assessment of the environmental impacts, I find that this permit action will not have a significant impact on the quality of the human environment. Therefore, an Environmental Impact Statement will not be required.

b. Compliance with 404 (b)(1) guidelines: Having completed the evaluation in paragraph 9. above, I have determined that the proposed discharge complies with the 404 (b)(1) guidelines.

c. Section 176(c) of the Clean Air Act General Conformity Rule Review: The proposed permit action has been analyzed for conformity applicability pursuant to regulations implementing Section 176(c) of the Clean Air Act. It has been determined that the activities proposed under this permit will not exceed de minimis levels of direct emissions of a criteria pollutant or its precursors and are exempted by 40 CFR Part 93.153. Any later indirect emissions are generally not within the Corps' continuing program responsibility and generally cannot be practicably controlled by the Corps. For these reasons a conformity determination is not required for this permit action.

d. In accordance with Title III of the Civil Rights Act of 1964 and Executive Order 12898, each Federal agency must ensure that all programs that affect human health or the environment do not directly or through contractual or other arrangements, use criteria, methods, or practices that discriminate on the basis of race, color, or national origin. Each Federal agency must analyze the environmental effects, human health effects, economic effects, and social effects of Federal actions, including effects on minority communities and low-income communities. The proposed marsh creation would improve local water quality in the Miles River, and the proposed pier would provide access to the river for all segments of the population.

e. Public Hearing Request: I have reviewed and evaluated the requests for a public hearing. State public hearings were held on 21 February 2006 and 26 October 2006, and were attended by the Corps. There is sufficient information available to

evaluate the proposed project; therefore, the requests for a public hearing were denied by authority of the Branch Chief of the Baltimore District Regulatory Branch. Those who requested a public hearing were notified, by letter, of this decision.

f. Public Interest Determination: I find that issuance of a Department of the Army permit is not contrary to the public interest.

PREPARED BY: _____
Rod D. Schwarm
Biologist, Maryland Section Southern

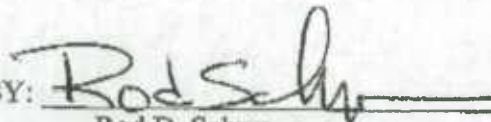
REVIEWED BY: Paul R. Wettlaufer
Paul R. Wettlaufer
Acting Chief, Maryland Section-Southern

APPROVED BY: Margaret E. Gaffney-Smith
Margaret E. Gaffney-Smith
Chief, Regulatory Branch

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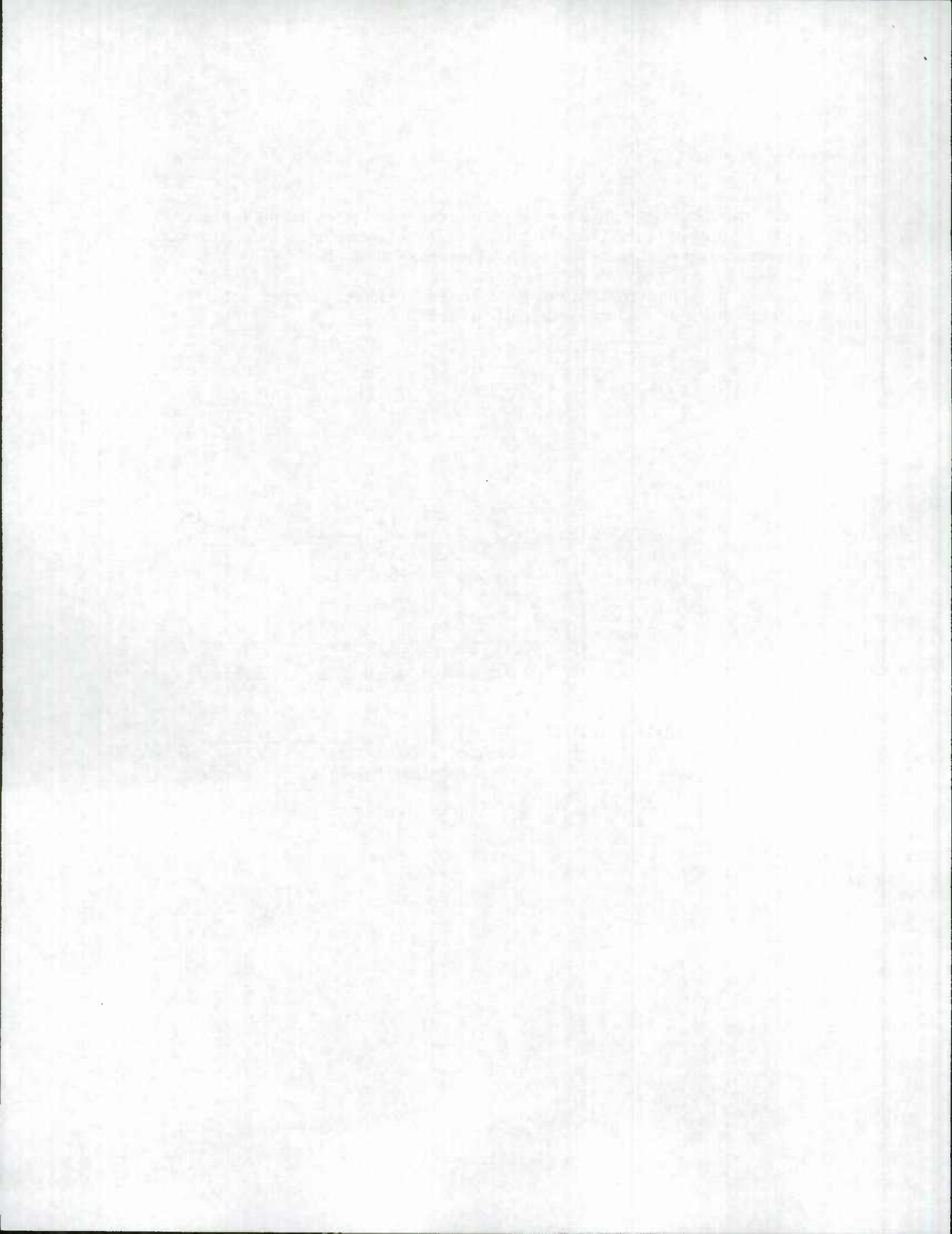
Rod D. Schwarn
Biologist, Maryland Section Southern

REVIEWED BY: _____

Paul R. Wettlaufer
Acting Chief, Maryland Section-Southern

APPROVED BY: _____

Margaret E. Gaffney-Smith
Chief, Regulatory Branch



SETTLEMENT AGREEMENT

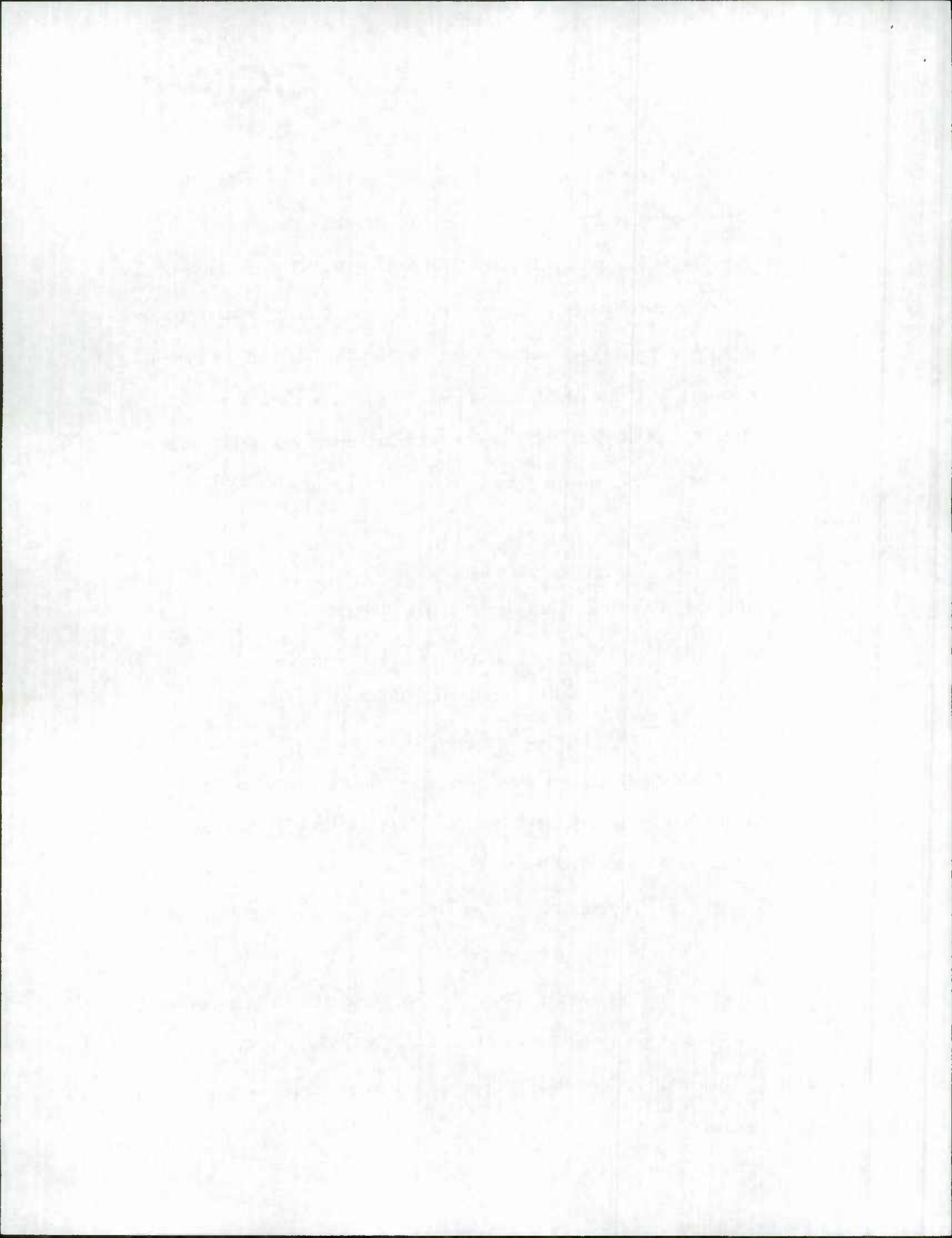
This Settlement Agreement (also referred to as the "Agreement") is made and entered into this 7th day of September, 2005, by and between: (i) The Midland Companies, Inc., and Miles Point Property, LLC, (collectively, the "MIDLAND PARTIES"), and each of the MIDLAND PARTIES' successors and assigns, divisions, units, officers, agents, servants, representatives, employees and independent contractors; and (ii) The Maryland Department of Natural Resources and its Critical Area Commission for the Chesapeake and Atlantic Coastal Bays (the "CRITICAL AREA COMMISSION"), and their successors and assigns, agencies, departments, divisions, units, officers, agents, servants, representatives, employees and contractors.

Definitions

A. The term "PARTIES" shall mean, collectively, the MIDLAND PARTIES and the CRITICAL AREA COMMISSION.

B. The term "CIVIL ACTION" shall mean the lawsuit captioned *The Midland Companies, Inc., et al. v. Maryland Department of Natural Resources, Critical Area Commission for the Chesapeake and Atlantic Coastal Bays, et al.*, Case No. 2-C-04-005088 AA, Circuit Court of Maryland for Talbot County, presently on appeal to the Court of Special Appeals of Maryland, where the case is captioned *Maryland Department of Natural Resources, Critical Area Commission for the Chesapeake and Atlantic Coastal Bays, et al. v. The Midland Companies, Inc., et al.*, Case No. 308, September Term, 2005.

C. The term "FIRST COMMISSION ACTION" shall mean the action, as referenced in the CIVIL ACTION, taken by the CRITICAL AREA COMMISSION on May 5, 2004, wherein the CRITICAL AREA COMMISSION approved with certain conditions an application



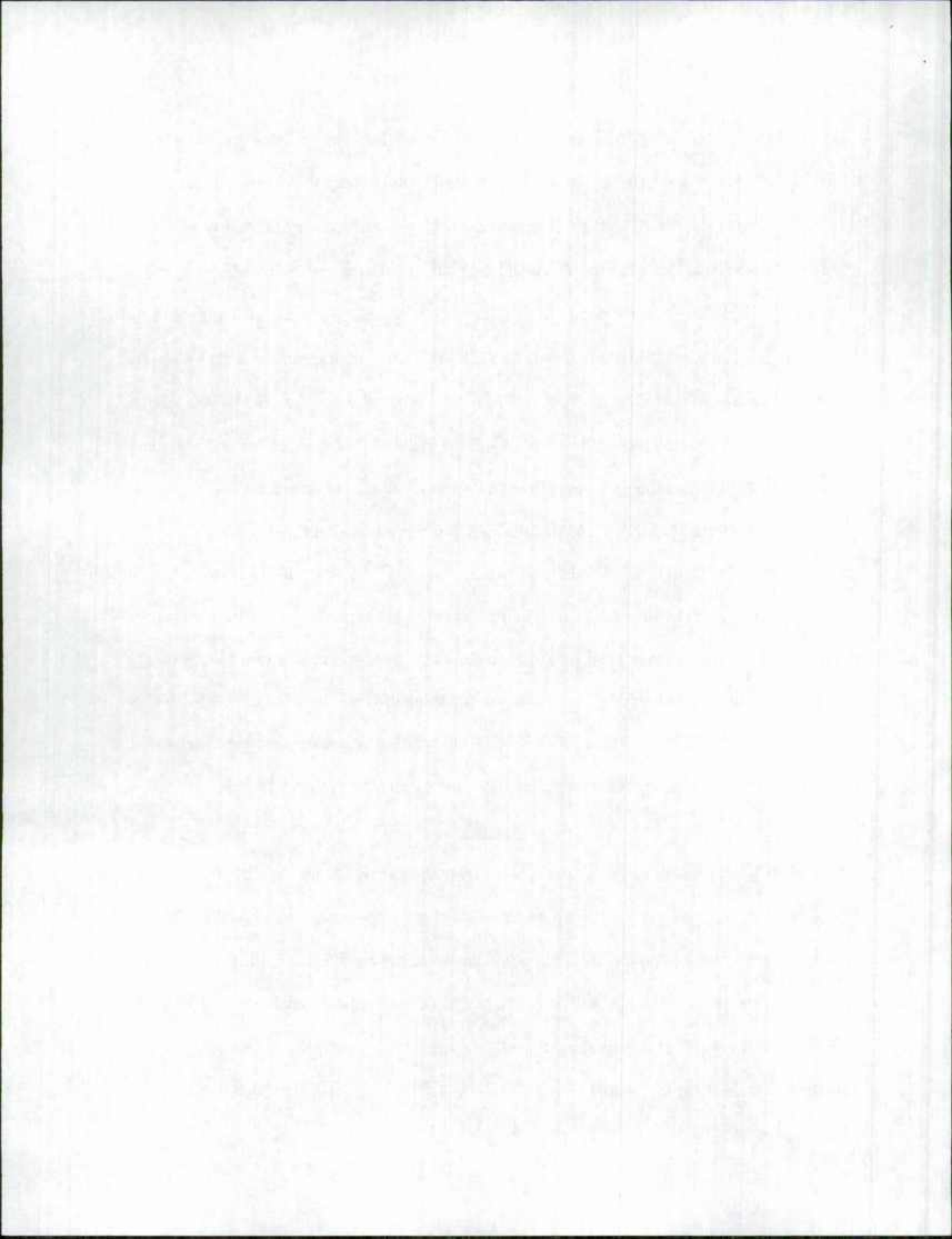
submitted to the CRITICAL AREA COMMISSION by the Commissioners of the Town of St. Michaels, Maryland (the "Town"), to award growth allocation under the Town's Critical Area Program enabling the MIDLAND PARTIES to develop a 72-acre parcel of property known as the Perry Cabin Farm located in the Town and the Critical Area (as defined by Md. Code Ann., Nat. Res. § 8-1807(a)). A copy of the FIRST COMMISSION ACTION is attached as Exhibit A.

D. The term "SECOND COMMISSION ACTION" shall mean the action taken by the CRITICAL AREA COMMISSION on May 4, 2005, wherein the CRITICAL AREA COMMISSION, in compliance with an April 11, 2005 Order of Circuit Court for Talbot County in the CIVIL ACTION, approved the application for growth allocation referenced in paragraph C above. A copy of the SECOND COMMISSION ACTION is attached as Exhibit B.

E. The term "RELEASED CLAIMS" includes any and all claims, demands, damages, actions, causes of action, obligations, debts of whatsoever kind or nature, known or unknown, which arise or may arise, or which arose or may have arisen, as a result of, or in any way growing out of, injuries or damages incurred as a result of either the FIRST COMMISSION ACTION or the SECOND COMMISSION ACTION, whether or not they are contemplated at the present time and whether or not they arise following execution of this Agreement.

Recitals

WHEREAS, on or about February 18, 2004, the Commissioners of the Town of St. Michaels, Maryland (the "Town") approved an award of growth allocation to reclassify a 72-acre parcel of property located on the Miles River and known as the Perry Cabin Farm from Resource Conservation Area to Intense Development Area ("IDA") and also to enable the MIDLAND PARTIES to develop the property pursuant to a specific development plan. In accordance with State of Maryland's Critical Area Law, Md. Code Ann., Nat. Res. ("NR") § 8-1801 *et seq.*, and



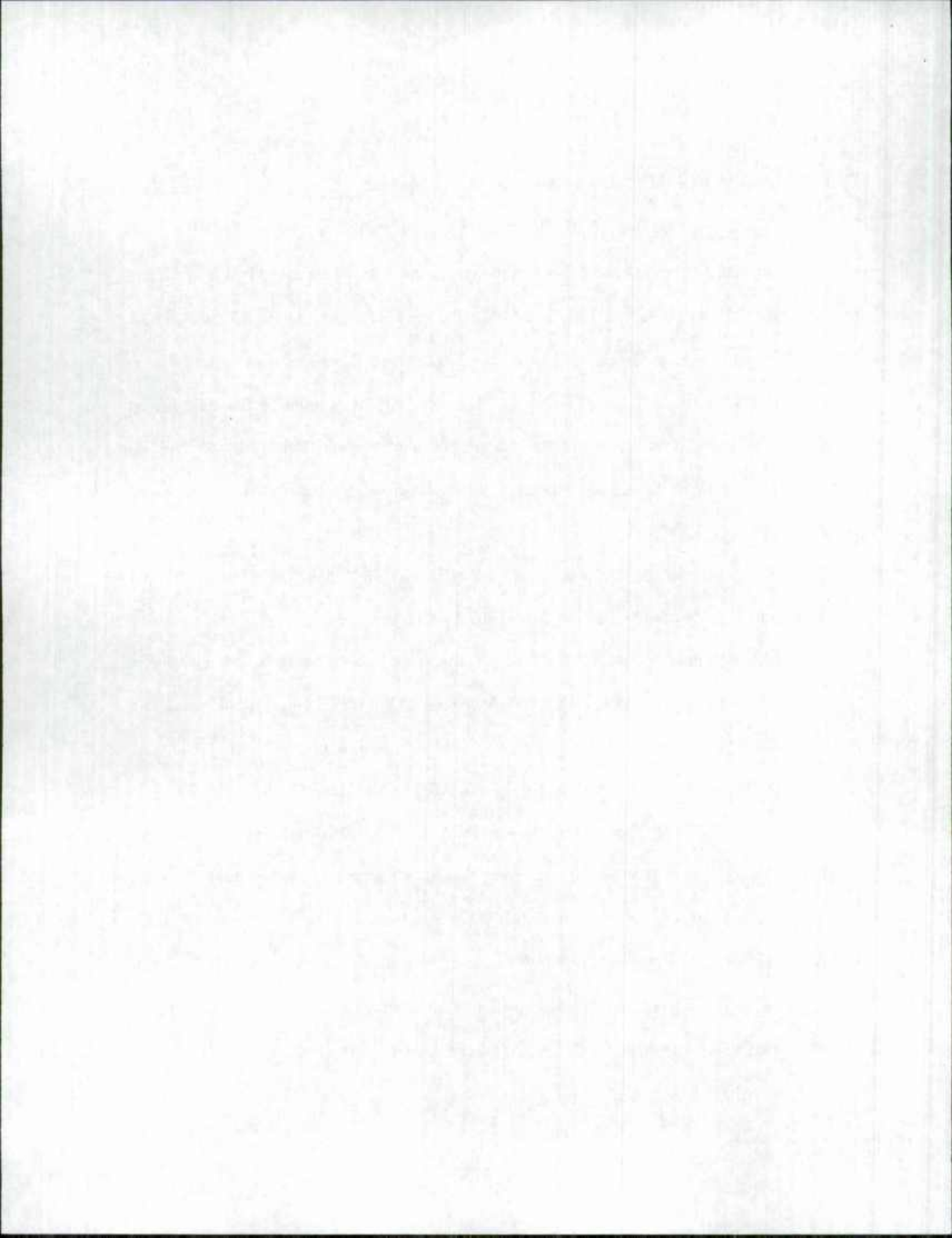
the Town's zoning ordinance, the Town forwarded the growth allocation approval to the CRITICAL AREA COMMISSION for final review and approval;

WHEREAS, on May 5, 2004, following a comprehensive review of the MIDLAND PARTIES' growth allocation application for the Perry Cabin Farm as approved by the Town and forwarded to the CRITICAL AREA COMMISSION, the CRITICAL AREA COMMISSION voted to award the request for growth allocation subject to certain conditions as set forth in the FIRST COMMISSION ACTION (Exhibit A). The COMMISSION imposed these conditions because it determined that the request for growth allocation as proposed by the MIDLAND PARTIES and the Town did not meet certain Critical Area Standards and Criteria as referenced at NR § 8-1809(j);

WHEREAS, on June 4, 2004, the MIDLAND PARTIES filed the CIVIL ACTION challenging the legality of the FIRST COMMISSION ACTION;

WHEREAS, on April 11, 2005, the Circuit Court for Talbot County issued an Order in the CIVIL ACTION declaring that the CRITICAL AREA COMMISSION had acted beyond the scope of its authority when it took the FIRST COMMISSION ACTION;

WHEREAS, on May 4, 2005, the CRITICAL AREA COMMISSION took the SECOND COMMISSION ACTION. In so doing, the CRITICAL AREA COMMISSION reiterated that under its interpretation of the Critical Area Law, the Town's growth allocation request for the Perry Cabin Farm did not meet certain Critical Area Standards and Criteria. The CRITICAL AREA COMMISSION, however, explained that, as constrained by the April 11, 2005 Order in the CIVIL ACTION, it was compelled to grant the award of growth allocation. The CRITICAL AREA COMMISSION noted that it disagreed with the April 11, 2005 Order, and that it had filed an appeal thereof;

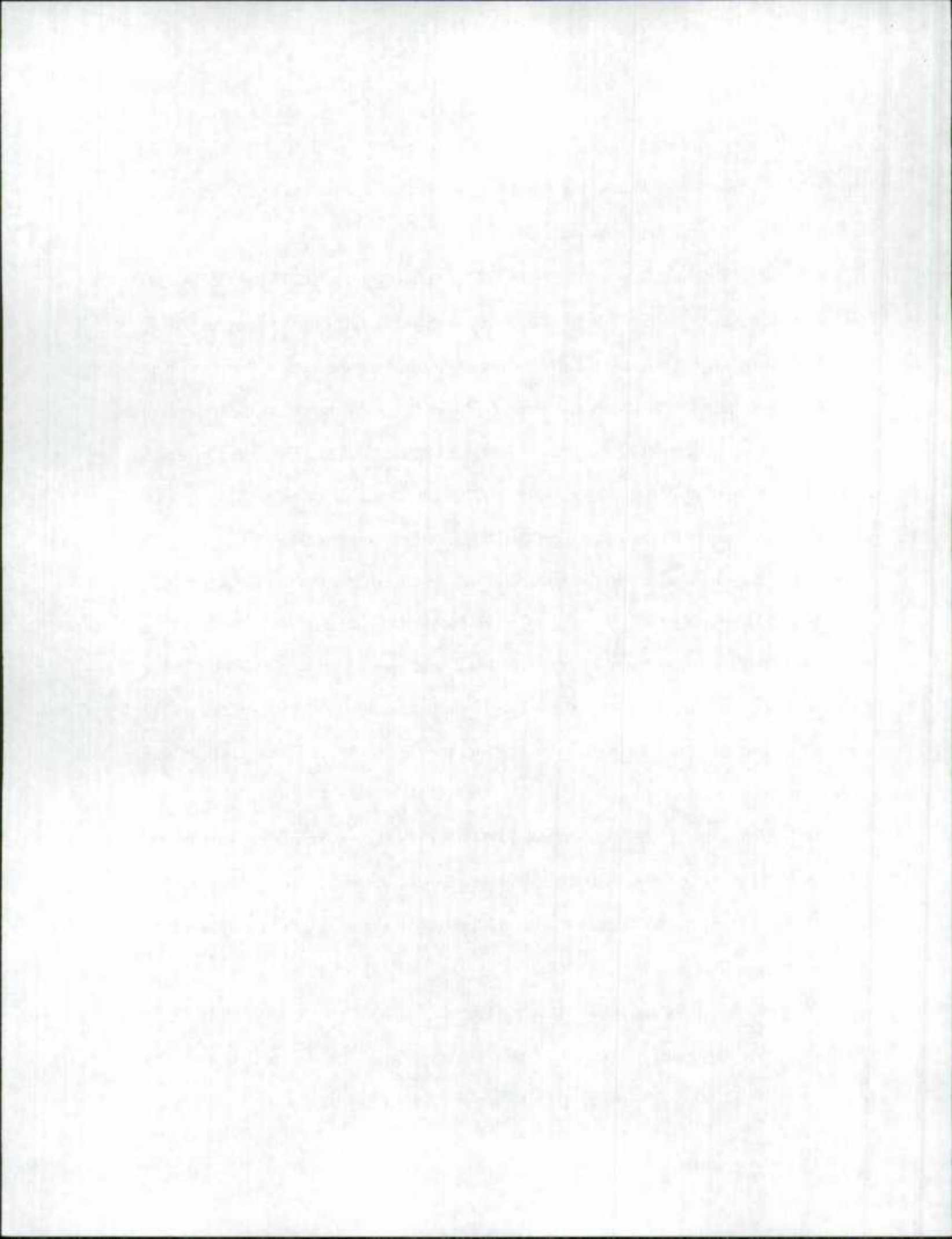


WHEREAS, on June 6, 2005, the Court of Special Appeals issued an Order enjoining the MIDLAND PARTIES from undertaking any impervious surface construction on the Perry Cabin Farm, pending outcome of the appeal in the CIVIL ACTION;

WHEREAS, during the pendency of the CIVIL ACTION the MIDLAND PARTIES and staff for the CRITICAL AREA COMMISSION have engaged in detailed discussions regarding site development and landscape and buffer management plans for the Perry Cabin Farm with respect to the property's 100-foot buffer along the Miles River and an extended development setback therefrom. As a result of these discussions, the MIDLAND PARTIES have proposed a revised development plan (the "Approvable Plan"). The staff of the CRITICAL AREA COMMISSION has recommended to the COMMISSION that the Approvable Plan meets the Critical Area Standards and Criteria referenced at NR § 8-1809(j). A copy of the Approvable Plan is attached hereto as Exhibit C; a copy of an illustrated cross-section of the Approvable Plan is attached hereto as Exhibit D; and a copy of an agreed upon planting list for the 100-foot buffer and additional setback within the Approvable Plan is attached hereto as Exhibit E. Exhibits C, D and E are each incorporated herein by reference, and each are made a substantive part of this Agreement;

WHEREAS, the CRITICAL AREA COMMISSION has exercised its independent judgment by applying the Critical Area Standards and Criteria to the Approvable Plan, and has entered this Agreement only after, and as a result of, its determination that this Plan meets with said Standards and Criteria;

WHEREAS, because the MIDLAND PARTIES are willing to pursue development of the Approvable Plan which the CRITICAL AREA COMMISSION has determined meets the Critical Area Standards and Criteria, it is the desire of the PARTIES to end the litigation



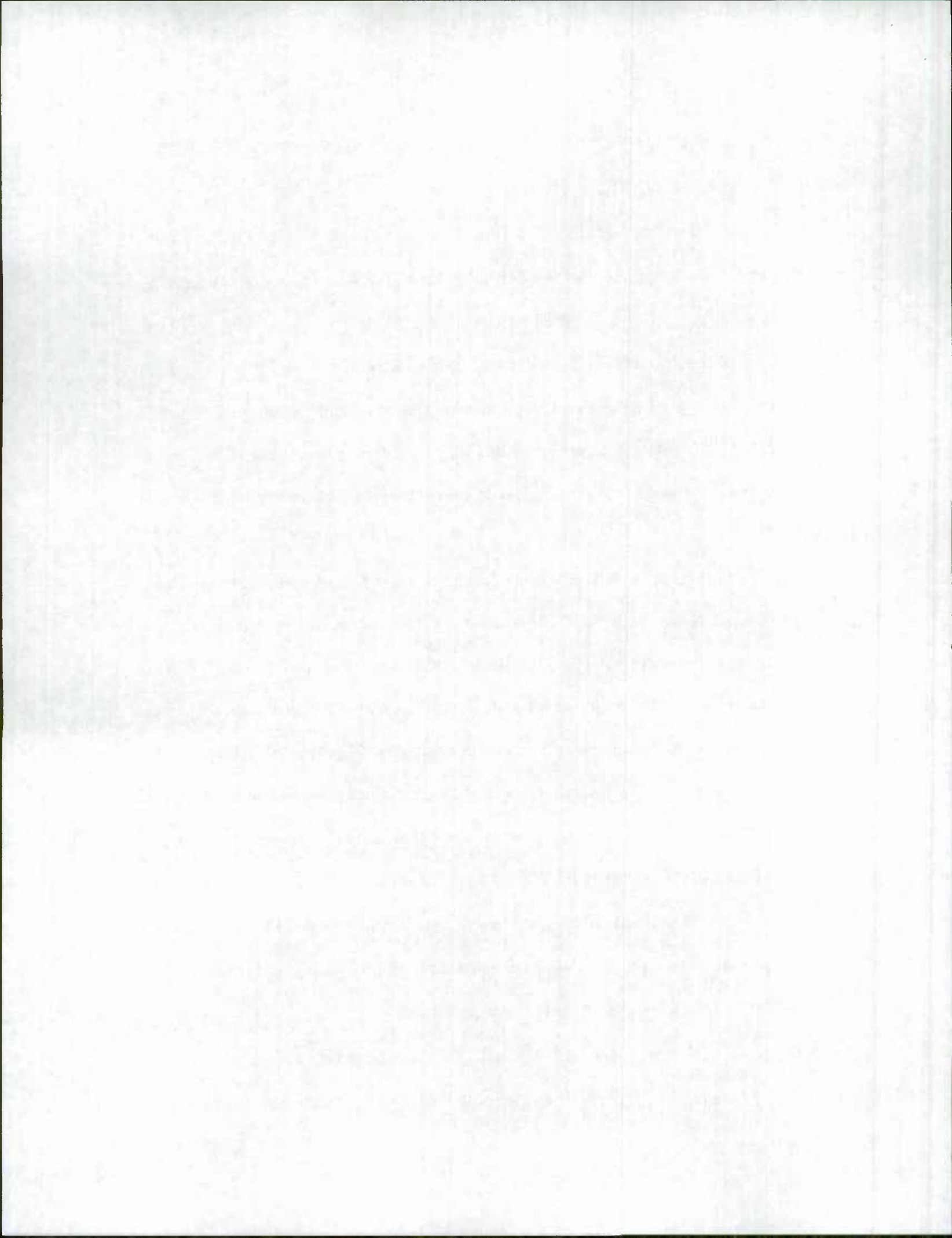
involving the FIRST COMMISSION ACTION and the SECOND COMMISSION ACTION which form the basis of the CIVIL ACTION;

WHEREAS, although the MIDLAND PARTIES are willing to develop the Perry Cabin Farm pursuant to the Approvable Plan, the MIDLAND PARTIES are unwilling to dismiss the CIVIL ACTION involving the FIRST COMMISSION ACTION and the SECOND COMMISSION ACTION unless and until the Commissioners of St. Michaels (the "Town Commissioners") also approve the specific form of development set forth in the Approvable Plan so that the MIDLAND PARTIES are certain that they have the requisite approvals from the relevant state and local governmental agencies to proceed with development based upon the Approvable Plan;

WHEREAS, in order to allow adequate time for the Town Commissioners to consider the Approvable Plan before the CIVIL ACTION progresses to the point when it is heard and decided by the Court of Special Appeals, the PARTIES shall file a motion to stay the CIVIL ACTION;

WHEREAS, if the motion to stay is granted by the Court of Special Appeals and the Town Commissioners consider and take action on the Approvable Plan, the PARTIES intend for the following to occur: (a) in the event that the Town Commissioners approve the Approvable Plan, the PARTIES shall file a motion to dismiss the CIVIL ACTION on the basis that the subject matter of the CIVIL ACTION is moot; or (b) in the event that the Town Commissioners reject the Approvable Plan or fail to either approve or reject the Approvable Plan by December 31, 2005, this Settlement Agreement shall automatically terminate and the PARTIES shall resume the CIVIL ACTION through a final judgment;

WHEREAS, Intervenors in the CIVIL ACTION, Fogg Cove Homeowners Association, Inc, et al. ("Fogg Cove"), have declined to join in this Agreement, and intend to pursue their



appeal in the CIVIL ACTION notwithstanding this Agreement. Fogg Cove has represented to the PARTIES that it will not join in a motion to dismiss or in a notice of dismissal of the CIVIL ACTION; and

WHEREAS, the PARTIES agree to move forward with this Agreement notwithstanding Fogg Cove's decision not to join in this Agreement.

NOW THEREFORE, in consideration of the mutual promises and premises hereunder, and other good and valuable consideration, the PARTIES agree as follows:

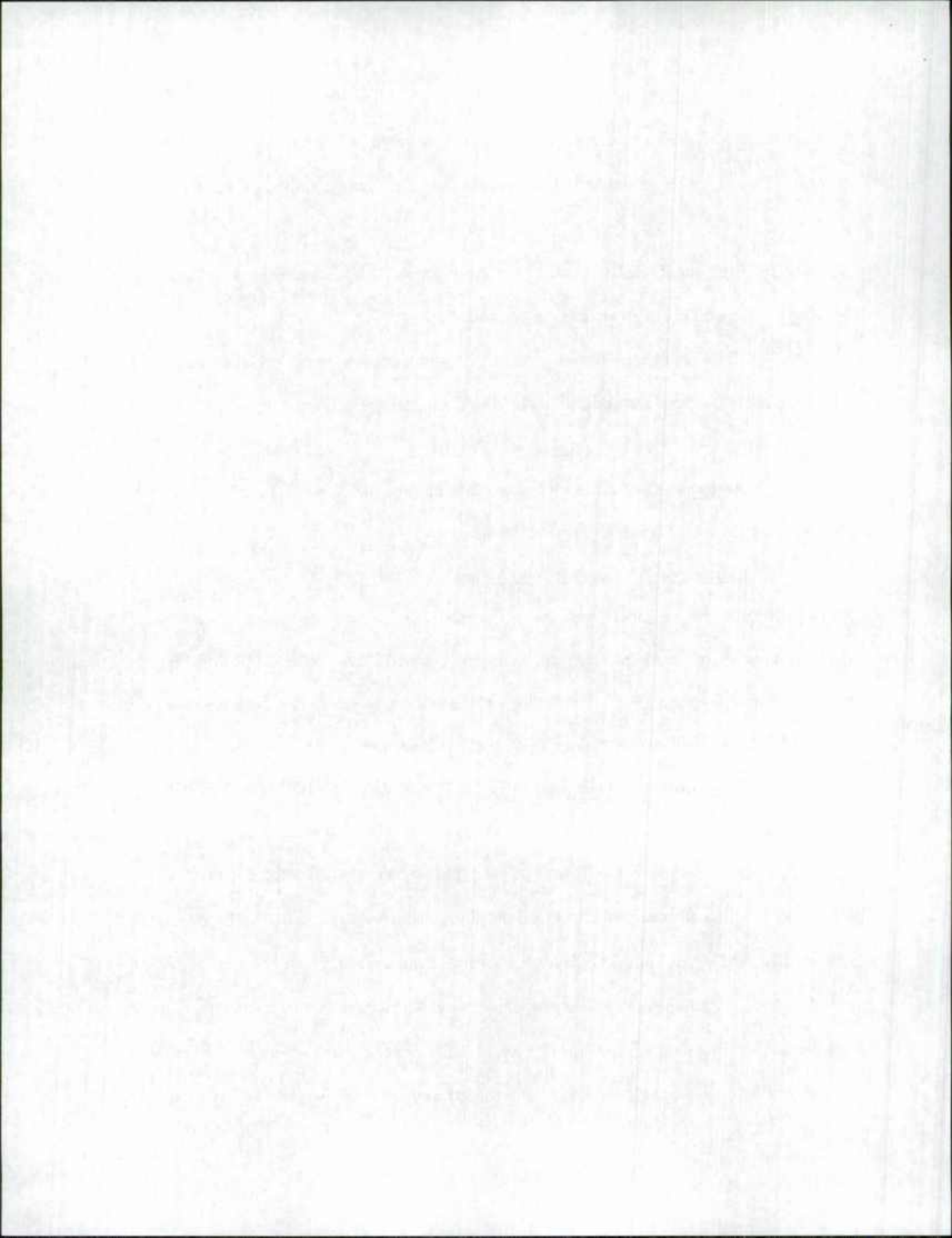
Agreement Provisions

1. **Recitals.** The Recitals above are incorporated into these Agreement Provisions by reference, and made a substantive part of them.

2. **Critical Area Commission Action.** Based upon the CRITICAL AREA COMMISSION'S determination that the Approvable Plan meets applicable Critical Area Standards and Criteria, and expressly recognizing that the CRITICAL AREA COMMISSION is under no obligation pursuant to this Settlement Agreement to reach this determination, the CRITICAL AREA COMMISSION does, this 7th day of September, 2005:

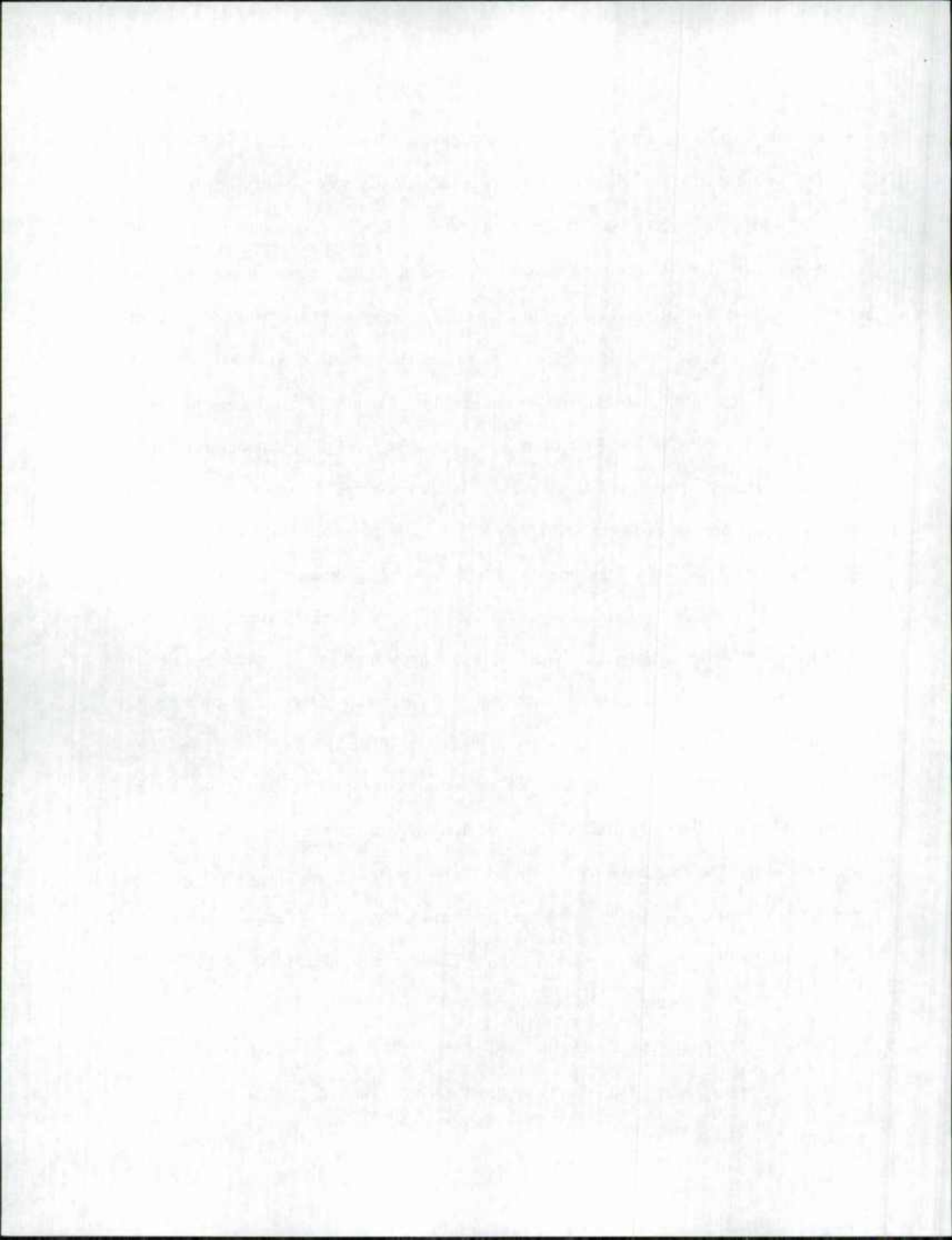
(A) withdraw both the FIRST COMMISSION ACTION and the SECOND COMMISSION ACTION, subject to the Town's consent to said withdrawals; and

(B) approve the Town's request for growth allocation for the Perry Cabin Farm, conditioned upon the requirement, consented to in advance by the MIDLAND PARTIES, that the MIDLAND PARTIES shall develop, establish and manage the Perry Cabin Farm based upon the buffer, additional setback, buffer plantings and other requirements contained in the Approvable Plan as detailed in Exhibits C, D and E hereto. For purposes of clarity, Exhibit C is intended to illustrate, among other details specified thereon, the following: (1) that vegetative



enhancements within the setback area from mean high tide will have an average width of at least 150' as measured as of the date of commencement of construction of impervious surface in the areas adjacent to the setback; and (2) an absolute minimum setback of impervious surface from mean high tide of 150', also measured as of the date of commencement of construction of impervious surface in the areas adjacent to the setback, with the exception that the CRITICAL AREA COMMISSION approves the location of storm water management ponds within the 150' setback but outside of the 100' Buffer. For further clarity, Exhibit C does not depict the entire 150' setback on the Perry Cabin Farm but is illustrative of the PARTIES' intentions with respect to all of the setback on the Perry Cabin Farm. The tables on the right side of Exhibit C recite the planting requirements agreed to between the PARTIES under this Agreement. The tables on the left side of Exhibit C recite the prior conditions imposed in connection with the FIRST COMMISSION ACTION and the general CRITICAL AREA COMMISSION planting guidelines, both of which are modified under this Agreement for the development on the Perry Cabin Farm. The PARTIES agree that, subsequent to the execution of this Agreement and prior to implementation of a stormwater management plan by the MIDLAND PARTIES on the Perry Cabin Farm, the MIDLAND PARTIES shall present a stormwater management plan for the property to staff of the CRITICAL AREA COMMISSION and that the MIDLAND PARTIES and staff of the CRITICAL AREA COMMISSION will make a good faith effort to develop therefrom a mutually agreeable stormwater management plan. Any changes made by the MIDLAND PARTIES in implementing the Approvable Plan as detailed at Exhibits C, D and E must be approved, in advance, by the Chairman of the CRITICAL AREA COMMISSION.

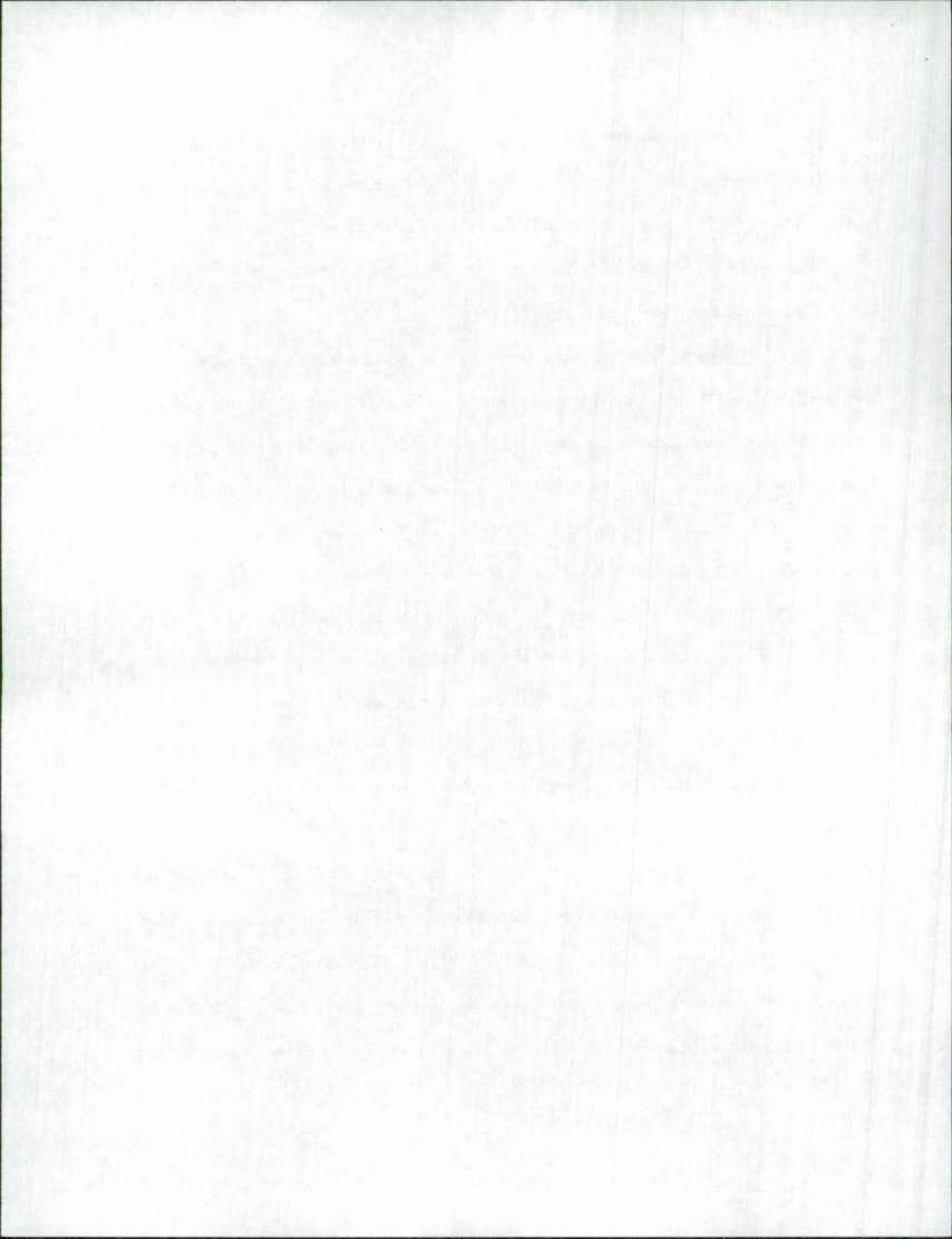
3. **Midland Action.** The MIDLAND PARTIES shall submit the Approvable Plan to the Town Commissioners in sufficient time that the Town Commissioners may act to either



approve or reject the Approvable Plan by December 31, 2005. If not so expressed by the Town, the Town's approval of the Approvable Plan shall also constitute, for purposes of this Agreement, the Town's consent to the CRITICAL AREA COMMISSION's withdrawals of both the FIRST COMMISSION ACTION and the SECOND COMMISSION ACTION CONSISTENT consistent with paragraph 2.(A) above.

4. **Motion for Stay.** Within seven (7) days of the actions taken by the CRITICAL AREA COMMISSION pursuant to paragraph 2 above, the PARTIES shall file with the Court of Special Appeals a joint motion for a stay (the "Motion for Stay") requesting that the Court of Special Appeals stay the CIVIL ACTION until such time that the Town Commissioners have either approved or disapproved the Approvable Plan, and further until the Court of Special Appeals rules upon a joint motion to dismiss, if filed by the PARTIES pursuant to paragraph 5, below. If the Motion for Stay is denied by the Court of Special Appeals, or if the Court of Special Appeals fails to take action on the Motion for Stay prior to ruling upon the merits of the appeal of the CIVIL ACTION, or if the Motion for Stay is granted by the Court of Special Appeals and later vacated or reversed by the Court of Appeals, the actions taken by the CRITICAL AREA COMMISSION pursuant to paragraph 2 above, and this Agreement, shall be null and void.

5. **Motion To Dismiss.** In the event that the Town Commissioners approve the Approvable Plan, then within ten (10) days of that action the PARTIES shall file with the Court of Special Appeals a joint motion to dismiss the CIVIL ACTION as moot (the "Motion to Dismiss"); however, if the Town Commissioners deny the Approvable Plan, or if the Town Commissioners fail to either approve or reject the Approvable Plan by December 31, 2005, then

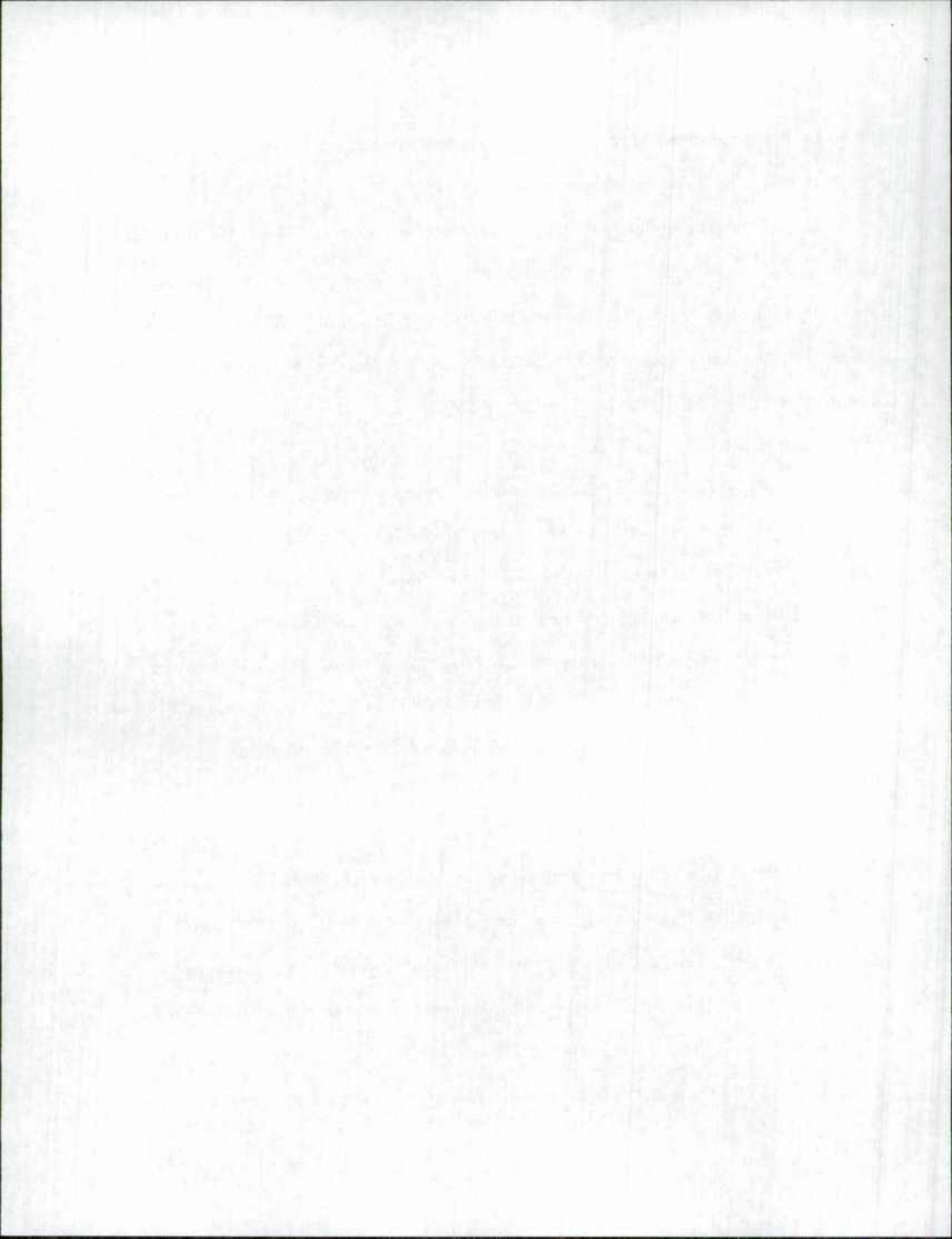


the terms of this Settlement Agreement shall automatically terminate and the PARTIES shall resume litigating the CIVIL ACTION.

6. **Denial of Motion to Dismiss.** If the Motion to Dismiss is denied by the Court of Special Appeals, or if the Court of Special Appeals fails to take action on the Motion to Dismiss prior to ruling upon the merits of the appeal of the CIVIL ACTION, or if the Motion to Dismiss is granted by the Court of Special Appeals and later vacated or reversed by the Court of Appeals, the actions taken by the CRITICAL AREA COMMISSION pursuant to paragraph 2 above, and this Agreement, shall be null and void.

7. **Release.** So long as this Agreement does not terminate by operation of paragraph 5 above, and is not rendered null and void by operation of either paragraphs 4 or 6 above, the MIDLAND PARTIES do release, acquit and forever discharge the CRITICAL AREA COMMISSION, and any and all other persons, associations and corporations, whether herein named or referred to or not, who together with the CRITICAL AREA COMMISSION may be jointly or severally liable to either the MIDLAND PARTIES of and from all RELEASED CLAIMS, including any and all claims that were or could have been raised in the CIVIL ACTION.

8. **Indemnification.** So long as this Agreement does not terminate by operation of paragraph 5 above, and is not rendered null and void by operation of either paragraphs 4 or 6 above, the MIDLAND PARTIES will indemnify and hold harmless the CRITICAL AREA COMMISSION against any and all costs and losses, including counsel fees, in any suit or proceeding arising out of the RELEASED CLAIMS brought by or on behalf of any one or more of the MIDLAND PARTIES in which the CRITICAL AREA COMMISSION is named as a party and is brought subsequent to the date of this Agreement. In the event any third party who



is not directed or controlled by the MIDLAND PARTIES initiates any suit or proceedings arising out of or relating to the RELEASED CLAIMS, naming either or both of the MIDLAND PARTIES or the CRITICAL AREA COMMISSION, the named PARTY or PARTIES in any such litigation shall each defend their position at each PARTY's own cost, including, but not limited to, the cost of attorneys' fees.

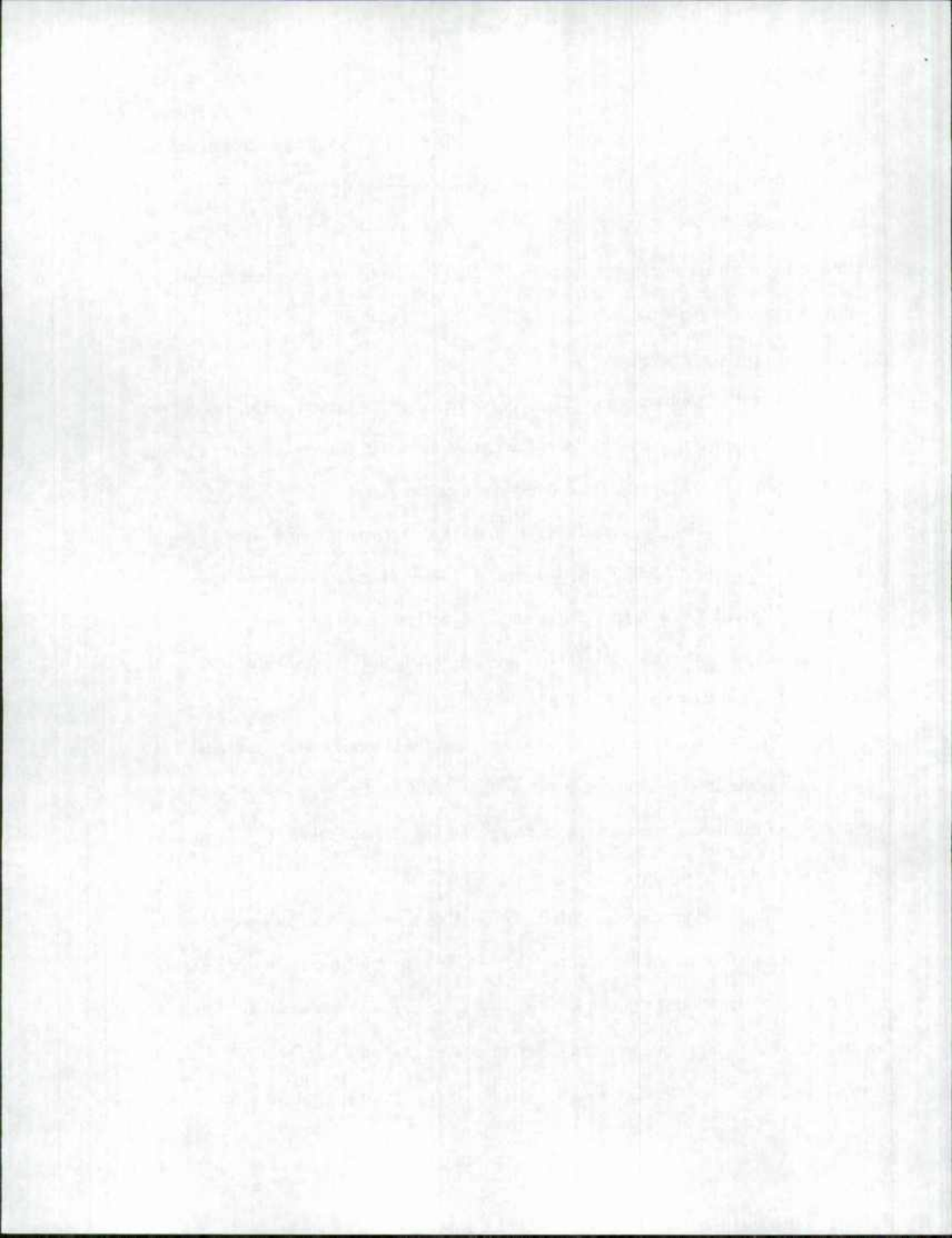
9. **General Provisions.**

a. **Construction.** Unless the context requires otherwise, singular nouns and pronouns in this Agreement shall be deemed to include the plural, and pronouns of one gender shall be deemed to include the equivalent pronoun of the other gender.

b. **Merger and Integration.** This Agreement constitutes the entire agreement between the PARTIES and supersedes all other prior oral or written agreements between the PARTIES. It is expressly understood that no amendment, deletion, addition, modification, or waiver of any provision of this Agreement shall be binding or enforceable unless in writing and signed by all PARTIES.

c. **Severability.** Each and every provision of this Agreement is severable. If any term or provision is held to be invalid, void or unenforceable by a court of competent jurisdiction for any reason whatsoever, such ruling shall not affect the validity of the remainder of the Agreement.

d. **Meaning and Effect.** This Agreement has been negotiated by the PARTIES through their respective counsel. The PARTIES attest, by their respective signatures below, that they understand the meaning of this document and the consequences of signing it and acknowledge that each has entered into this Agreement freely and after the opportunity to consult with counsel. The PARTIES accept this Agreement as their free and voluntary act, without



duress, and intend to be legally bound by it. This Agreement is made without any reliance upon any statements or representations by the PARTIES or their representative not contained herein.

e. **Costs.** The PARTIES shall bear all of their own costs and shall be responsible for all or their own attorneys' fees in connection with the CIVIL ACTION and in connection with the negotiation, execution and performance of this Agreement.

f. **Applicable Law.** The performance, construction and enforcement of this Agreement and any documents executed in connection with this Agreement shall be governed by the laws of the State of Maryland, without regard to conflicts of law.

g. **Counterparts.** This Agreement may be executed in any number of counterparts, each of which shall be deemed an original, but all of which shall constitute one and the same agreement.

IN WITNESS WHEREOF, the parties have knowingly and voluntarily signed and sealed this Settlement Agreement.

CRITICAL AREA COMMISSION:

By: Martin G. Madden (SEAL)

Martin G. Madden
Chairman

[Signature]
Witness

9/7/2005
Date

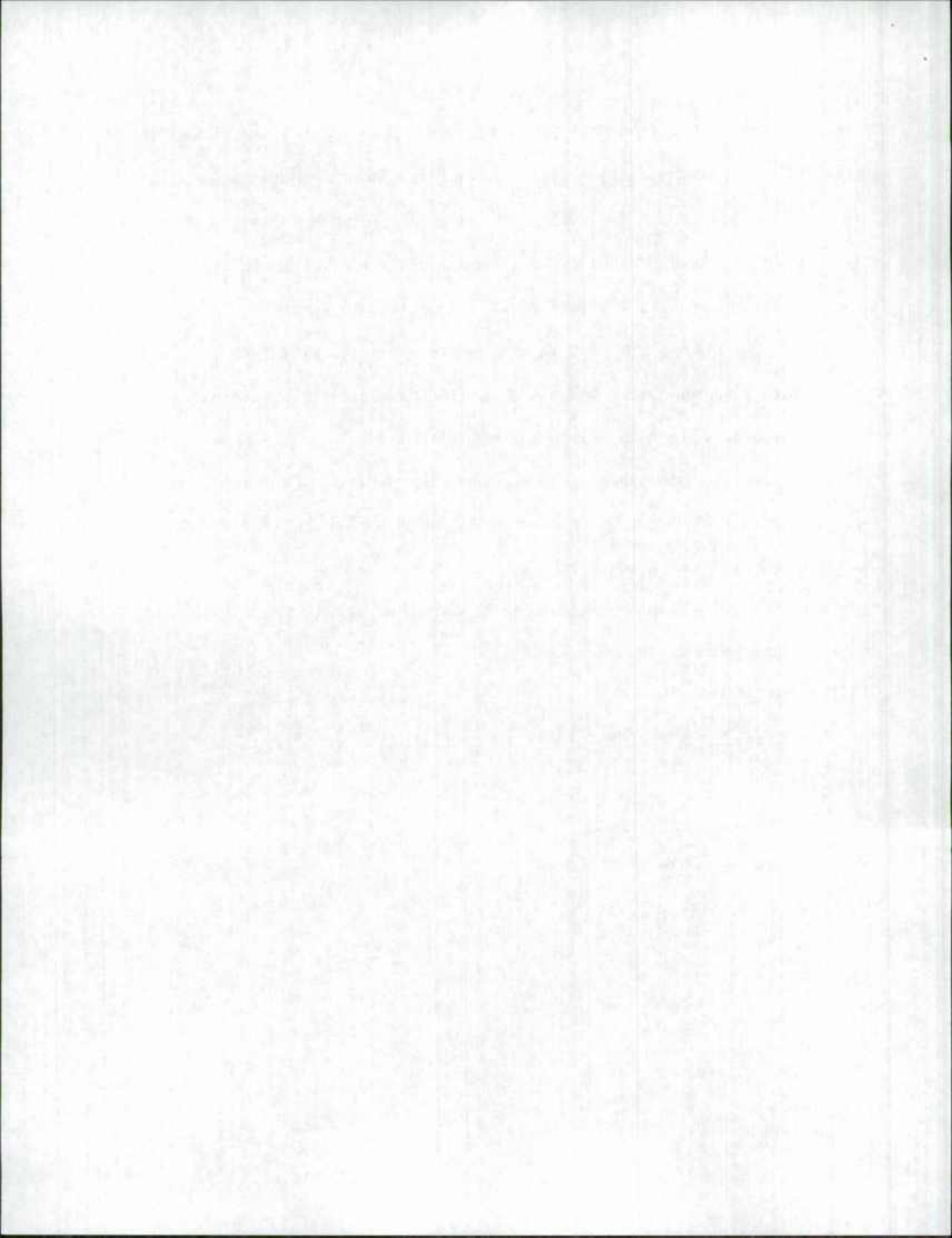
THE MIDLAND COMPANIES, INC.:

By: George A. Valanos (SEAL)

George A. Valanos
President


[Signature]
Witness

9-7-05
Date



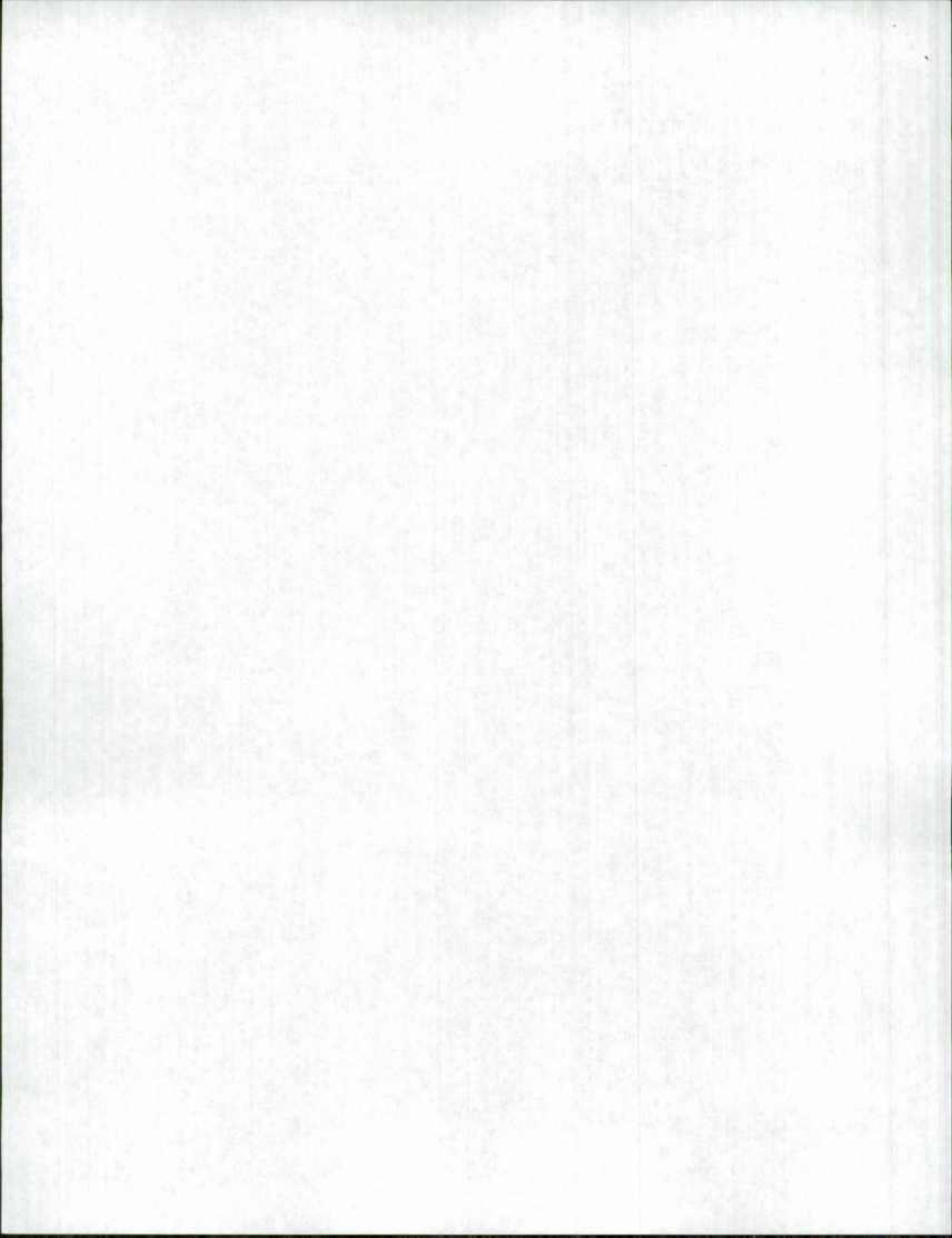
MILES POINT PROPERTY, INC.:

By:

 (SEAL)
George A. Valanos
Managing Member

9-7-05
Date




Witness



P1 B 500 yds West



Key

-  Low Marsh = 2.4 acres
-  High Marsh = 2.0 acres

Total = 4.4 acres

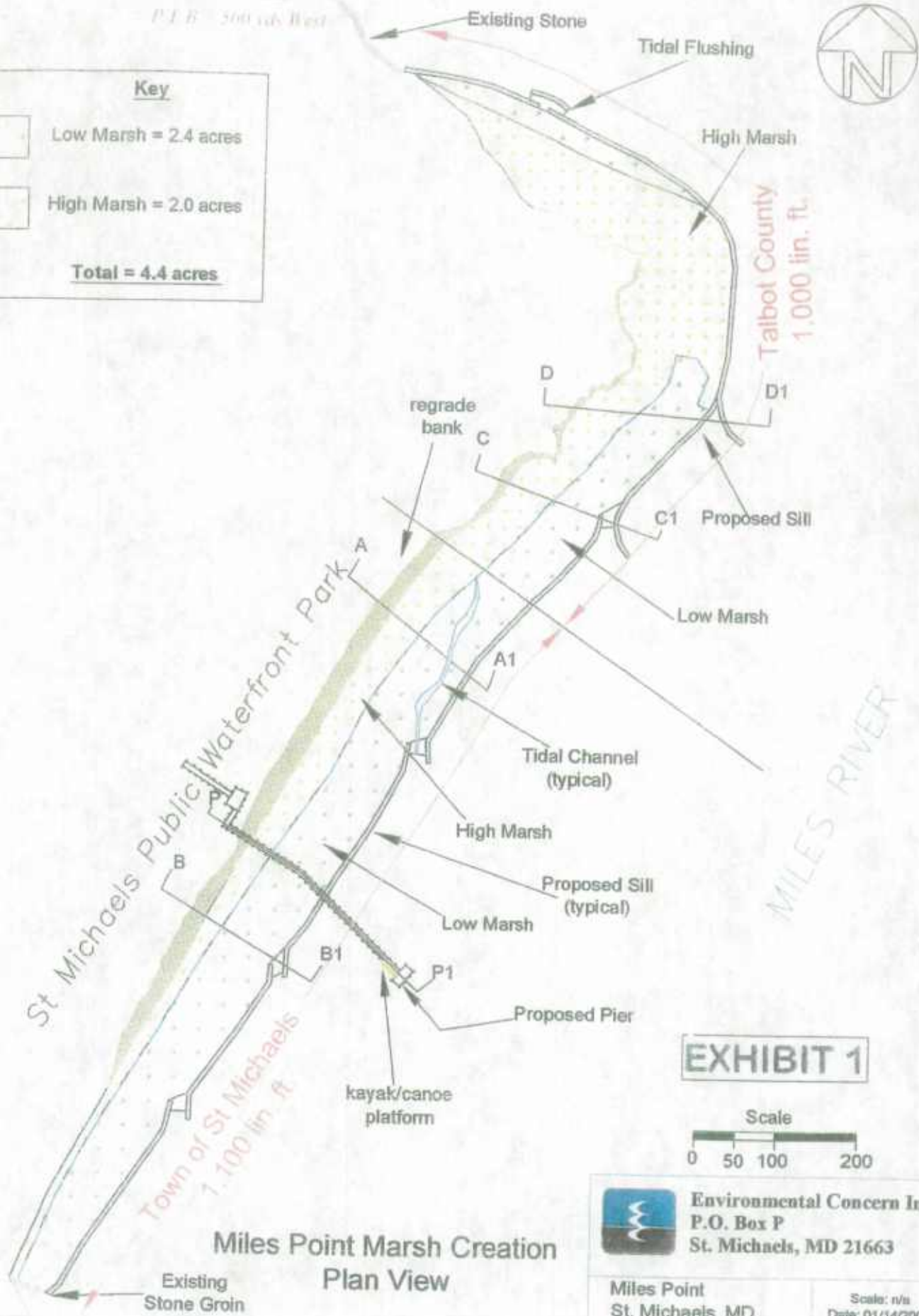
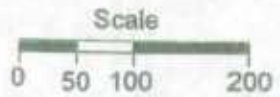


EXHIBIT 1



Environmental Concern Inc.
 P.O. Box P
 St. Michaels, MD 21663

Miles Point
 St. Michaels, MD

Scale: n/a
 Date: 01/14/2008

**Miles Point Marsh Creation
 Plan View**

SITE PLAN



P/L B > 500 yds West

Existing Stone

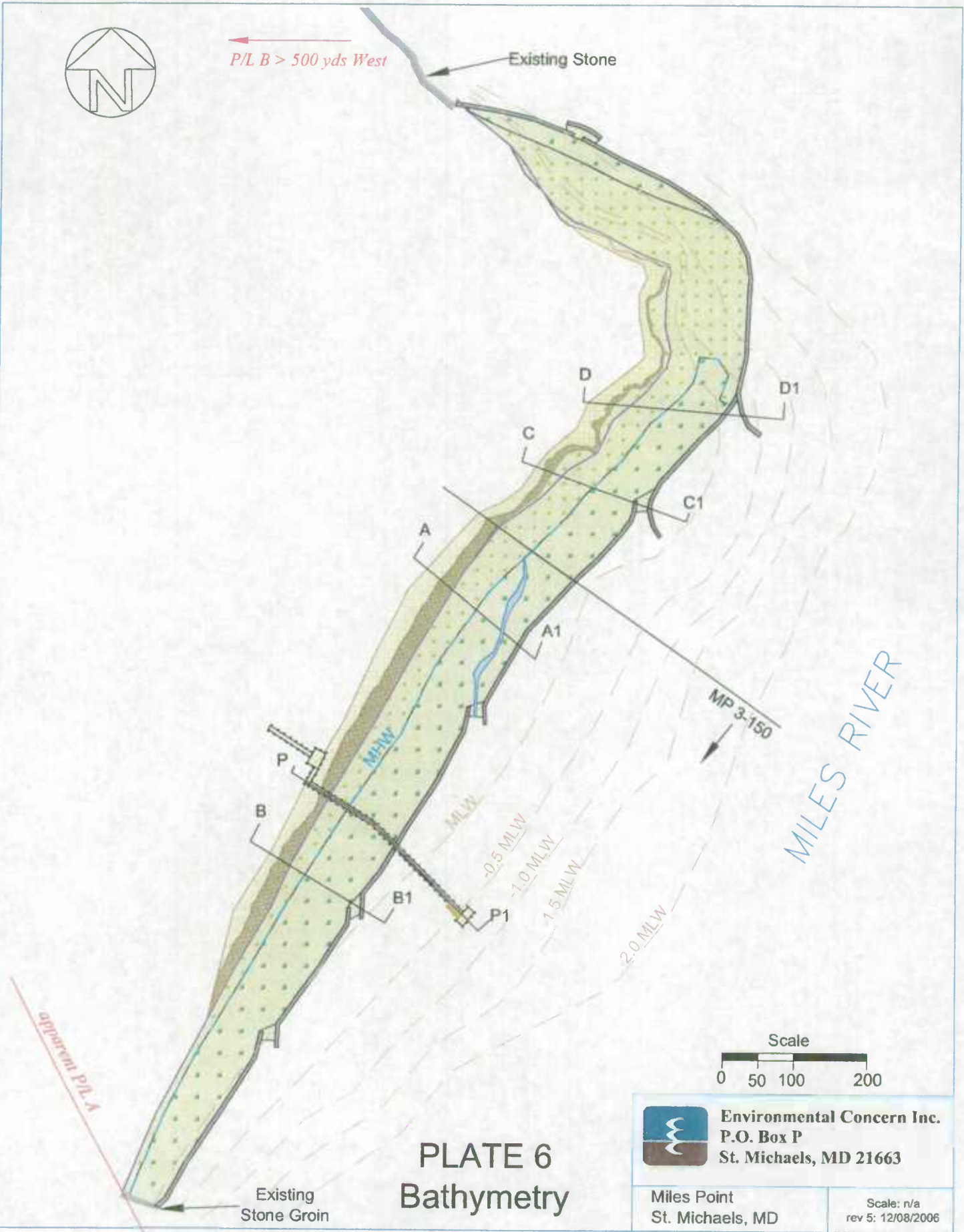


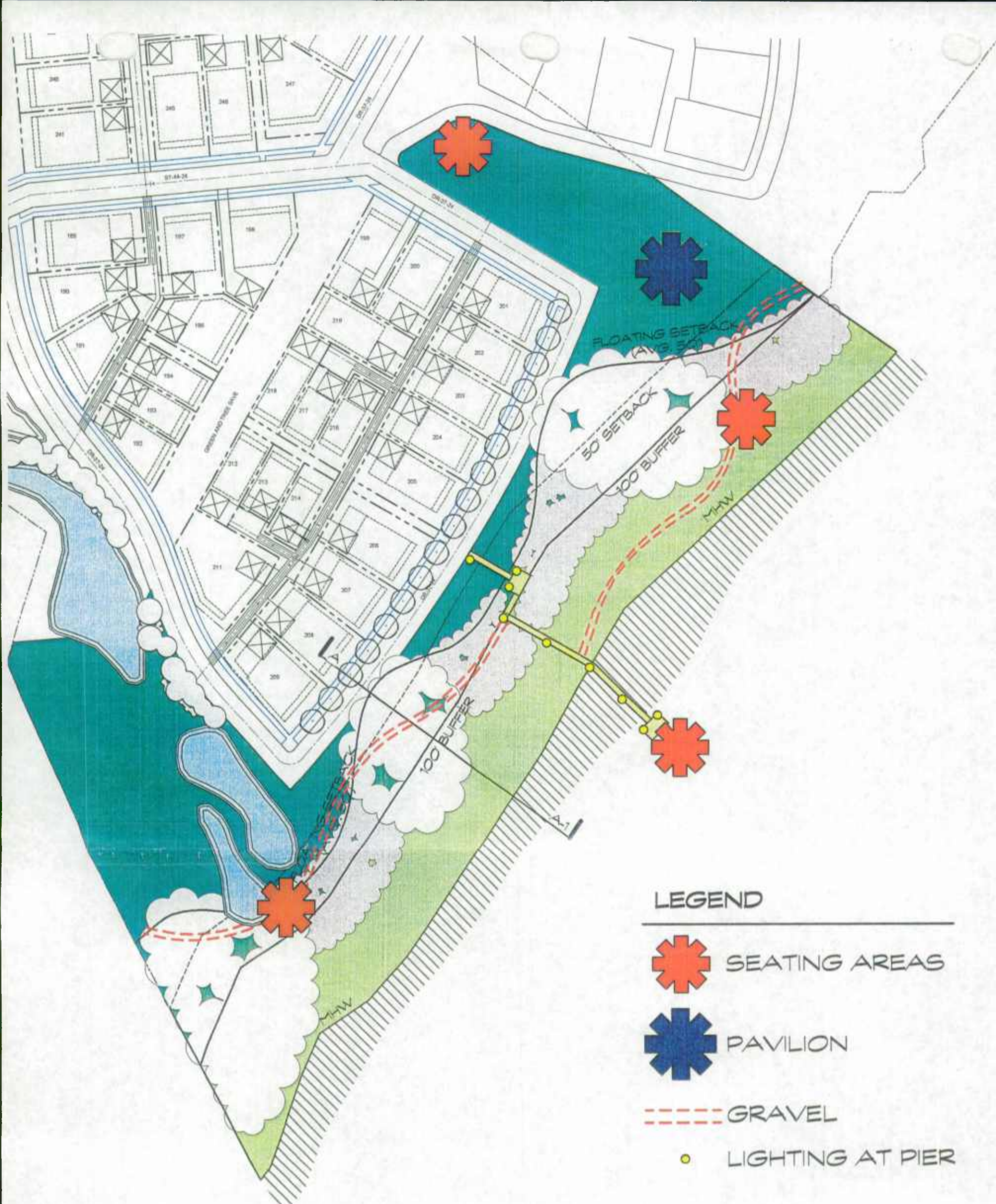
PLATE 6 Bathymetry



Environmental Concern Inc.
P.O. Box P
St. Michaels, MD 21663



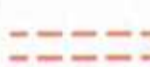

Miles Point
St. Michaels, MD

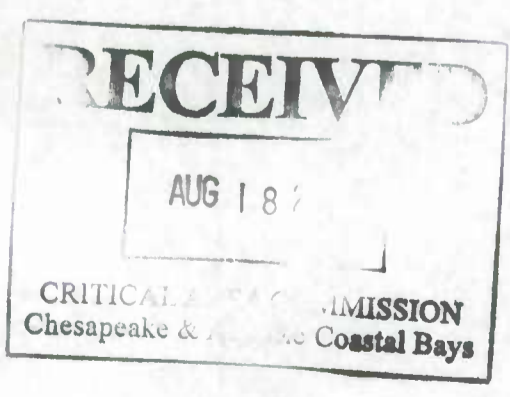
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rev 5: 12/08/2006



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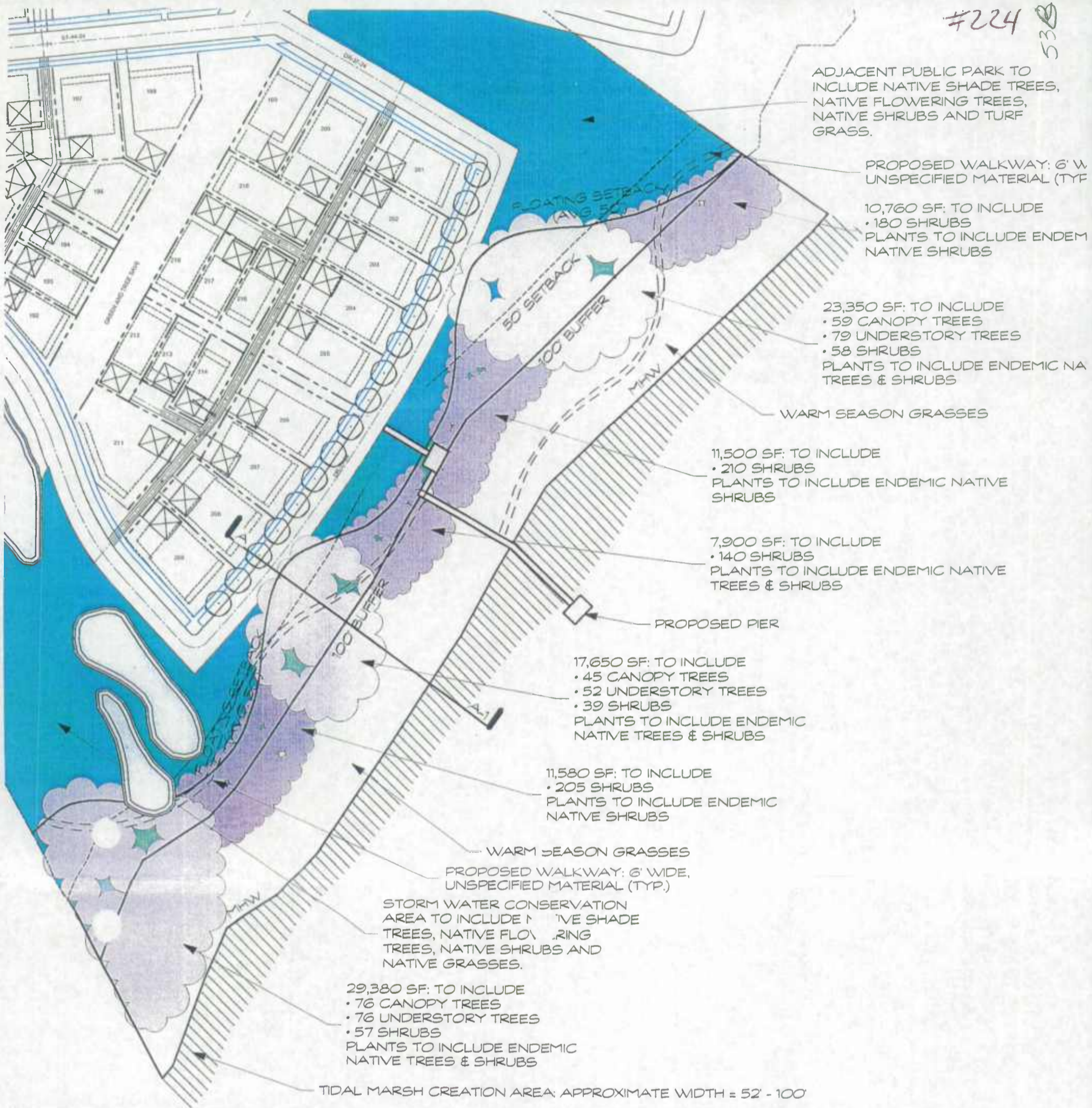
LEGEND

-  SEATING AREAS
-  PAVILION
-  GRAVEL
-  LIGHTING AT PIER



MILES POINT
Conceptual Lighting & Seating Plan

Scale 1" = 100'-0"
Graham Landscape Architecture



Planting Area	C.A.C. Growth Allocation Condition	
100' Buffer	103,530 sf	Trees, Shrubs
200' Setback	188,672 sf	Turf Grass
Tidal Marsh	0 sf	
Total	292,202 sf	

Planting Area	Miles Point Agreement in Principle, Sept. 2005		
	Trees & Shrubs	112,120 sf	Canopy Trees, Understory Trees, Shrubs
	Warm Season Grasses	55,800 sf	Warm Season Grasses
	Storm Water Conservation Area	46,160 sf	Trees, Shrubs, Native Grasses
	Public Park	66,894 sf	Trees, Shrubs, Turf Grass
	Tidal Marsh	76,000 sf	Native Grasses
Total		356,974 sf	

100' Buffer Plantings	C.A.C. Planting Guidelines*
*C.A.C. Planting Guidelines	1 Canopy Tree plus 2 Understory Trees or 1 Canopy Tree plus 3 shrubs per each 400 sf within 100' Buffer
Total 100' Buffer Plantings	259 Trees 259 Understory Trees 388 Shrubs
Total Plantings	1,036 Trees & Shrubs

100' Buffer Plantings	Miles Point Proposed Planting, Sept. 2005 Agreement	
Total 100' Buffer Plantings	180 Canopy Trees	1" Caliper
	207 Understory Trees	1" Caliper
	889 Shrubs	min. 5 gallon container grown
Total Plantings	1,276 Trees & Shrubs	

Notes:

- Planting stock size = 1" caliper (avg.)
- Planting rates for seed mix = 35 lb/AC (avg.)

Key:

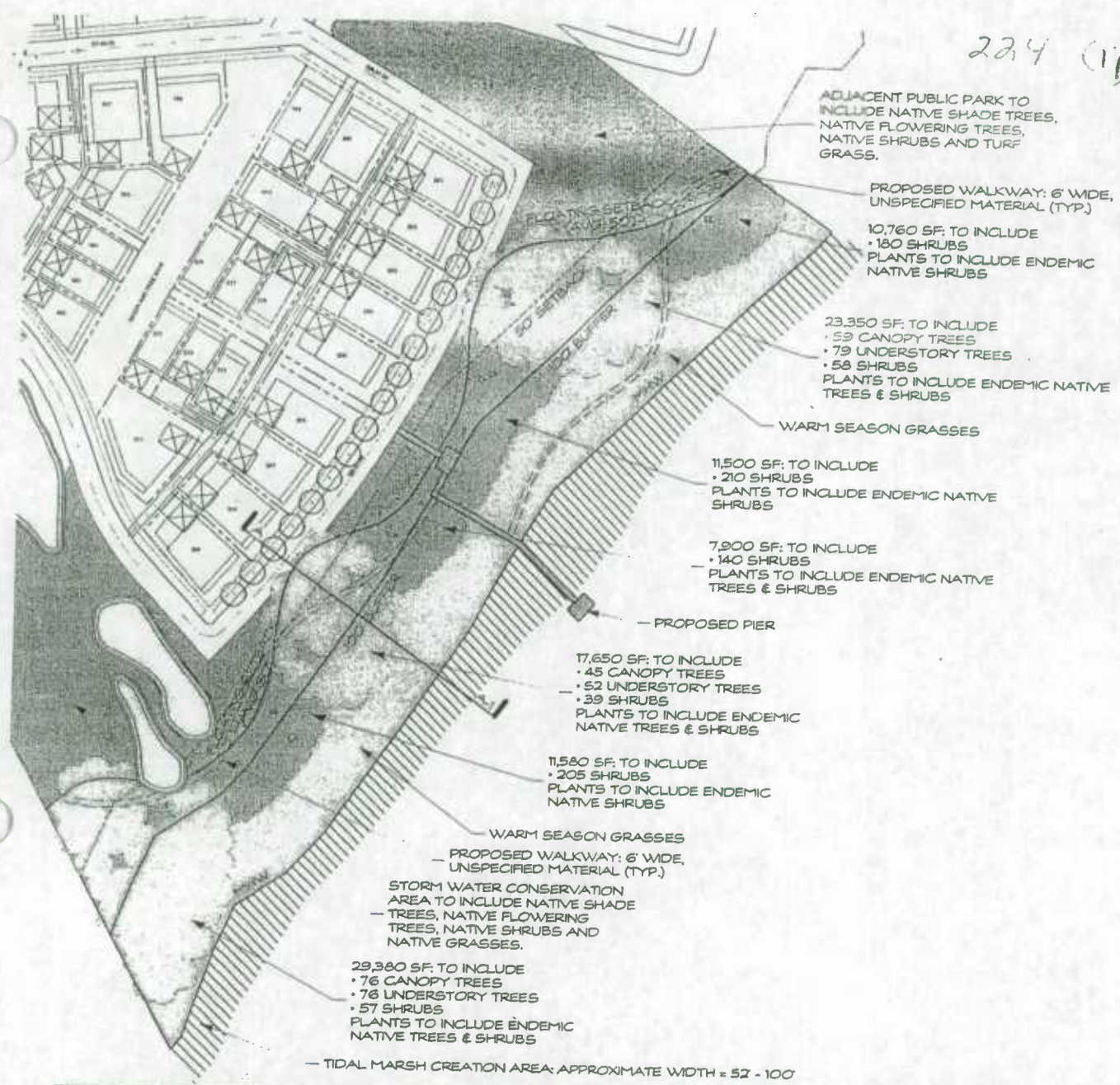
- 100' Buffer
- 200' Setback/Adjacent Open Spaces & Canopy Trees, Understory Trees, Shrubs
- Shrubs
- Warm Season Grasses
- Tidal Marsh Creation Area

MILES POINT
CONCEPTUAL SHORELINE BUFFER PLAN

SCALE: 1" = 100'

02 SEPTEMBER 2005
RAHAM LANDSCAPE ARCHITECTURE

224 (10)



Planting Area	C.A.C. Growth Allocation Conditions
100' Buffer	103,530 sf Trees, Shrubs
200' Setback	188,672 sf Turf Grass
Total Marsh	0 sf
Total	292,202 sf

Planting Area	Miles Point Agreement in Principles, Sept. 2005
Trees & Shrubs	112,120 sf Canopy Trees, Understory Trees, Shrubs
Warm Season Grasses	55,800 sf Warm Season Grasses
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Total 100' Buffer Plantings	180 Canopy Trees 1" Caliper 207 Understory Trees 1" Caliper 889 Shrubs min. 5 gallon container grown
Total Plantings	1,276 Trees & Shrubs

Notes:
 • Planting stock size = 1" caliper (avg.)
 • Planting rates for seed mix = 35 lb/AC (avg.)

Key:
 • 100' Buffer
 • 200' Setback/Adjacent Open Spaces &
 • Canopy Trees, Understory Trees, Shrubs
 • Shrubs
 • Warm Season Grasses

MILES POINT
 CONCEPTUAL SHORELINE BUFFER PLAN

SCALE: 1" = 100'
 02 SEPTEMBER 2005
 GRAHAM LANDSCAPE ARCHITECTURE

