

# Next Steps for the Critical Area Law

By Charles R. Schaller, Jr.,  
and Benjamin Starbuck  
Wechsler

During the 2008 legislative session, the Maryland General Assembly passed sweeping changes to the Chesapeake and Atlantic Coastal Bays Critical Area Law (the "Critical Area Act"). These legislative changes to Maryland's shoreline protection program erect new hurdles for property owners located within 1,000 feet of mean high tide line of the Chesapeake Bay and the Atlantic Coastal Bays (the "Critical Area"). The very mention of the term "Critical Area" incites strong reactions – to some these words are confusing, to others these words mean protection and conservation of coastal resources, and to many property owners and the development community they mean endless time, expense and aggravation.

The Critical Area Act was passed by the Maryland General Assembly in 1984 to prevent further deterioration of the Chesapeake Bay's water quality and resources, and to guide development within the Critical Area. The Act's stated purposes are (1) to foster more sensitive development activity in shoreline areas, and (2) to implement the law on a cooperative basis between the State and local governments. Under the Act, local jurisdictions (counties and municipalities) adopt local Critical Area Programs with the oversight and guidance of the state Critical Area Commission. The Commission consists of 29 members, appointed by the Governor. In 2002, the Critical Area Act was expanded to regulate land surrounding the Atlantic Coastal Bays.

During the 2008 legislative session, in response to a perception that law was ineffective, the General Assembly attempted an ambitious rewrite of portions of the law, resulting in the passage of House Bill 1253. HB 1253 gives the Commission greater authority over the growth allocation process, grants rule-making authority to the Commission, further restricts impervious surface limitations, expands the critical area's "no build" buffer in agricultural areas and drastically

increases the Commission's enforcement powers and the penalties for violating the law. The legislation also promotes the use of "living shorelines" and directs the Department of Natural Resources to undertake a comprehensive remapping of the entirety of Maryland's Chesapeake and Coastal Bays shorelines in light of changed physical conditions since the law's inception 24 years ago.

While the ultimate impacts of HB 1253 will not be known for some time, several issues seem settled. In the immediate term, any type of waterfront development will become more complicated and expensive, and both state and the local governments will more aggressively pursue violations. In the longer term, it appears that the Commission will take a more active role in regulating waterfront development statewide, impinging upon the traditional autonomy of local governments in Maryland over land-use issues.

As noted during the public hearings concerning HB 1253, the Commission stressed that it supported the legislation because local governments were either not enforcing the existing law stringently enough or were not adhering to their own local Critical Area programs. The Commission and other supporters further noted that the legislation would bring consistency, efficiency and predictability to the overall management of the Critical Area program.

Part and parcel of the Commission's quest for consistency, and thus ability to control overall development within the Critical Area, is the Commission's ability to adopt and promulgate regulations. Until the passage of HB 1253, the Commission did not have authority to develop regulations, and instead developed a series of "policies" to further the goals of the Critical Area Act. These policies or guidelines

have served as the Commission's tools in approving, modifying and, on occasion, rejecting development projects or local program amendments. The new legislation now allows the Commission to adopt regulations in accordance with the Maryland Administrative Procedure Act in the areas of buffers, community piers, public access to water, mapping the Critical Area, water dependent facilities, conservation and protection of resources, development activities and growth allocation, to name some of them.

It is anticipated that the proposed regulations will begin to be circulated for public review during the next six months, and will be finalized and codified in COMAR within 12 to 18 months. This newfound regulatory authority will allow the Commission to take a more formal and likely active role in local land-use decisions. It may also allow greater transparency in what to date has been an extremely confusing and frustrating process for some individuals and entities with a development projects in the Critical Area.

One thing is for sure, the Commission is here to stay and be heard. With the passage of HB 1253, the Commission will have most of the necessary tools to control local land-use decisions. As the Commission begins to exercise its newly-granted rulemaking authority, perhaps it is not too soon to speculate that in future legislative sessions the Commission will be granted status of a full-fledged independent administrative agency directly exercising land-use controls in coastal areas.

*Charles R. Schaller, Jr., is a Partner in the Annapolis office of Linowes & Blocher LLP, and Benjamin Starbuck Wechsler is an Associate in that office. Each practices in environmental and land-use law with an emphasis on waterfront development issues.*



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# A Platform to Fines

By Zhen Zhang

In a small town on the Chesapeake Bay, the mailman is delivering letters. He delivers 10 letters from an agency to 10 property owners on the same street. As if on schedule, the owners go to the mailbox in unison, pick up the letters and discover that all of their pier platforms are in violation of Maryland laws and regulations and the violations may result in lawsuits and fines. It just happens that their platforms were constructed by the same contractor.

Away from the waterfront, imagine another street where a modest home sits quietly. The mailman drops a large thick envelope into the mailbox. The marine contractor who lives there had already left for work to develop his small family business of building piers and platforms. In the evening, he gets home and opens the envelope. He looks in disbelief at the 10 separate lawsuits spread out before him involving properties on the street where the owners just received the letters.

Although such a scenario did not unfold this way in real life, the result is the same. A contractor is faced with a wave of lawsuits, with the potential for more liability from any other jobs not prohibited by the statute of limitations. The property owners are faced with the task of bringing their pier platforms into compliance. Both face legal troubles, associated legal fees and, the worst part, fines. Maryland is serious about enforcement on the Chesapeake Bay. To avoid these types of situations, both property owners and contractors must be conscientious of the legal limits of construction on the Bay.

Maryland regulations restrict a private noncommercial pier to 200 square feet. The 200 square feet calculation includes the main pier section to which the platform is attached and multi-levels. Although one will not be slapped with a lawsuit for

going a few feet over, anything substantially exceeding 200 square feet has the potential for an enforcement action. In addition to a violation of the size restriction, the State will allege illegal filling of wetlands. Filling of wetlands is the displacement of tidal water and depositing into the tidal water materials such as soil, sand, pilings and any artificial alteration by a physical structure. This broad definition specifically includes filling by pilings and will apply to pilings from platforms.

While the property owner is responsible for what is done on his/her property, the contractor faces more liability. Despite the fact that the contractor does not own the property, the contractor is expected to provide additional services to the property owner and bring the platform in compliance with the 200 square feet restriction. Furthermore, the law allows a \$10,000 fine for each tidal wetlands violation. Depending on whether the platform violation is part of other violations, a fine against the property owner may be waived in exchange for reducing the size of the platform to the legal size. Unlike the private property owners who are involved usually in only one pier platform, contractors are viewed as potential repeat violators because they are in the business of building piers and/or platforms. Contractors are also believed to be in the best position to prevent the number of violations. Hence, a marine contractor involved in 10 alleged violations at 10 different properties faces up to \$100,000 in fines. While a court generally will not order the maximum fines, and there is always room to negotiate with the State, contractors will have to pay something even if the platforms are reduced.

In the past, a complaint for a civil penalty had to be filed within one year after the offense was committed. Beginning on October 1, 2008, the

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their review of an earlier draft.

According to the ANPR, regulating greenhouse gas emissions under the CAA would be extremely challenging. As Administrator Johnson describes it, the CAA is "an outdated law originally enacted to control regional pollutants that cause direct health effects" and, therefore, is "ill-suited" to regulate greenhouse gas emissions. The CAA was designed to improve and maintain air quality in the United States by controlling specific sources of air pollution within a particular State or local area. Emissions requirements under the CAA are generally premised on a health-based or public welfare-based air-quality standard. Greenhouse gases, on the other hand, are emitted all over the world by a variety of human and natural sources, mix freely in the atmosphere and remain in the atmosphere for long periods of time. It is unclear whether limiting greenhouse gas emissions from particular sources in the United States would effectively address global climate change, particularly if other countries do not also limit emissions.

Much of the ANPR is devoted to a detailed examination of the various provisions of the CAA, how they may be used to regulate greenhouse gas emissions and the implications of such regulation. For example, because similar endangerment language is found in numerous sections of the CAA, a finding of endangerment under one provision could significantly impact EPA's decisions on endangerment under other provisions. Another issue is whether EPA should define greenhouse gases as "air pollutants", either individually or collectively, which could impact EPA's flexibility to define greenhouse gases as pollutants in

other sections of the CAA.

Regulation of greenhouse gas emissions from motor vehicles could also lead to the regulation of numerous other sources. Since the Supreme Court's decision, EPA has received several petitions to set emissions standards for other types of mobile sources, such as construction and farm equipment, ships and aircraft. Regulation under the CAA could also trigger the regulation of smaller stationary sources that also emit greenhouse gases, such as apartment buildings, hospitals, schools and large homes.

### Conclusion

Given the complexities inherent in regulating greenhouse gases under the CAA, it will likely take the EPA a long time to develop and propose regulations. As the ANPR

suggests, federal legislation may be a more appropriate way to address the nation's greenhouse gas emissions. New legislation could be tailored to provide more flexibility to deal with issues unique to greenhouse gases than that which is available under the CAA. To date, however, Congress has been unable to enact comprehensive climate change legislation. Unless and until such legislation is enacted, EPA will be required to proceed with promulgating greenhouse gas regulations under the CAA.

*Margaret Witherup Tindall is a member of the Environmental & Energy and Litigation Departments of Gordon, Feinblatt, Rothman, Hoffberger & Hollander, LLC. She concentrates her practice in environmental law and complex commercial litigation.*

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State will have three years from the date it knew or reasonably should have known of the violation to file a complaint for civil penalty. This change in the law not only allows the State to seek fines for work done within the three-year period but it also allows legal actions for work older than three years, as long as a complaint is filed within three years after receiving notice of a violation. For a small contractor who does 25 jobs a year, if all the platforms are larger than 200 square feet, a heart-stopping \$750,000 fine is possible after three years. Even if the time for the State to seek fines has passed, the State may still file suit against the property owner and contractor to force the reduction of the platform size.

To avoid a situation like the one facing our friends in the small town on the Chesapeake Bay and

the hard-working marine contractor, one must evaluate the size of the project, when the project was completed and whether steps can be taken to comply before any involvement by the State. In addition, property owners and contractors should consider alternatives such as community piers, commercial piers and additional finger piers. Let's face it, 200 square feet is not large. Gone are the quiet days on the Bay when individuals and small businesses had a good chance of avoiding enforcement actions. If you don't want to help the State fill its coffers with fines, then arm yourself against litigation by making smart choices.

*Zhen Zhang is an associate at Rich & Henderson, P.C., in Annapolis. She focuses her practice on environmental law, land use and zoning.*

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cases reach an agreement with the lenders. "One of things we learned at the MICPEL training concerned FHA loans," Gordon notes. "FHA loans provide for mandatory loss mitigation before the case can be docketed, so we were able to take advantage of this."

Civil Justice Executive Director Phillip Robinson, Esq., said his agency has been at the forefront of this problem since it began manifesting itself. He maintains that the most efficient way to cope with foreclosure is not after the process starts but before it begins. "The real push of this program is to get the clients seeking advice beforehand,"

Robinson says. "That is when the most effective work is done."

Mary Goulet, Esq., of counsel to Whitman, Curtis, Christofferson & Cook, PC, a Virginia patent law firm, couldn't agree more. "The pro bono cases we are currently working with came to us before the foreclosure process began," Goulet says. "For instance, one elderly couple had been talked into a very complex adjustable-rate mortgage that was entirely inappropriate for them. We were able to stabilize the situation and prevent foreclosure, but this should never have happened. People need to have attorneys look over their mortgage paperwork before

they sign, not after."

If you are interested in helping out with the Foreclosure Prevention Pro Bono Project, please call the Pro Bono Resource Center (PBRC). Support the legal service agencies in your community. Add your resources to the fight. For more information on volunteer opportunities in Maryland, contact Jon Moseley at PBRC at (410) 837-9379 or (800) 396-1274, or e-mail [jmoseley@probonomd.org](mailto:jmoseley@probonomd.org).

*Jon Moseley is Director of Volunteer Services & Community Outreach for the Pro Bono Resource Center of Maryland.*

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Nominations are being accepted through Friday, August 22, 2008. The Awards will be presented at the Legal Excellence Awards Reception on September 23, 2008. Nomination forms and ticket information can be found online at [www.msba.org](http://www.msba.org). For more information, contact Nicole Earl, MSBA Director of Administration, at (410) 685-7878, ext. 3019, or e-mail [nearl@msba.org](mailto:nearl@msba.org).

