

## CHESAPEAKE BAY PRESERVATION ACT

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### INTRODUCTION

When the Virginia General Assembly enacted the Chesapeake Bay Preservation Act during the 1988 session,<sup>1</sup> environmentalists praised the state's first comprehensive attempt to reduce pollution in the Chesapeake Bay watershed resulting from the general activities of agriculture, development, and urban life. The purpose of the legislation is to protect and improve the water quality of the Chesapeake Bay and its tributaries and to ensure balanced economic development in fragile waterfront areas.<sup>2</sup> The Act created the Chesapeake Bay Local Assistance Board to establish land-use guidelines in light of these objectives.<sup>3</sup> However, striking the proper balance between growth and environmental protection has not been an easy task. In September 1989, following over a year of deliberation, public comment, and revision, the Board approved the final regulations establishing criteria that provide for both the protection of water quality and the accommodation of economic development.<sup>4</sup>

The following material will provide a brief background of the Chesapeake Bay Preservation Act and the initial regulations approved by the Board in June 1989. The article will then outline the final regulations that the Board adopted on September 20, 1989.

### THE CHESAPEAKE BAY PRESERVATION ACT

The Chesapeake Bay Preservation Act<sup>5</sup> provides for local planning and implementation of state standards for the use and development of designated lands in "Tidewater Virginia."<sup>6</sup> The Act

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<sup>1</sup> Act of Apr. 9, 1988, ch. 608, 1988 Va. Acts 738, (codified as amended at VA. CODE ANN. §§ 10.1-2100 to -2115 (1989)).

<sup>2</sup> VA. CODE ANN. § 10.1-2100 (1989).

<sup>3</sup> *Id.* §§ 10.1-2102, -2103.

<sup>4</sup> Chesapeake Bay Preservation Designation and Management Regulations, 6 Va. Regs. Reg. §§ 1.1-6.5 (Sept. 20, 1989).

<sup>5</sup> Hereinafter referred to as "the Act."

<sup>6</sup> "Tidewater Virginia" includes the "Counties of Accomack, Arlington, Caroline, Charles City, Chesterfield, Essex, Fairfax, Gloucester, Hanover, Henrico, Isle of Wright, James City, King George, King and Queen, King William, Lancaster, Mathews, Middlesex, New Kent, Northampton,

creates a new administrative agency, the Chesapeake Bay Local Assistance Department.<sup>7</sup> The Department is to provide technical and administrative assistance to the Chesapeake Bay Local Assistance Board ("the Board"), the state policy board responsible for promulgating regulations and overseeing local program administration.<sup>8</sup>

The Board's regulations are to serve two purposes. The first is to develop procedures and establish criteria to aid local governments in determining the ecological and geographic extent of the "Chesapeake Bay Preservation Areas" within their jurisdictions.<sup>9</sup> The second is to establish criteria for use by local governments in granting, denying, or modifying requests to rezone, subdivide, or use and develop land in these areas.<sup>10</sup> The guiding principle behind the regulations is the protection of water quality from significant degradation as a result of the use and development of land.<sup>11</sup>

Local governments must employ the Board's criteria to ensure that the use and development of land within Chesapeake Bay Preservation Areas is done in a manner that protects the quality of state waters consistent with the provisions of the Act.<sup>12</sup> Specifically, local governments must incorporate water quality protection measures into their comprehensive plans, zoning ordinances, and subdivision ordinances.<sup>13</sup> Localities are responsible for enforcing these criteria in all land use decisions through the exercise of their police and zoning powers.<sup>14</sup> The Board is authorized to provide financial and technical assistance and advice to local governments concerning land use and development and water quality protection.<sup>15</sup> In addition, the Board is authorized to consult

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Northumberland, Prince George, Prince William, Richmond, Spotsylvania, Stafford, Surry, Westmoreland, and York, and the Cities of Alexandria, Chesapeake, Colonial Heights, Fairfax, Falls Church, Fredericksburg, Hampton, Hopewell, Newport News, Norfolk, Petersburg, Poquoson, Portsmouth, Richmond, Suffolk, Virginia Beach, and Williamsburg." *VA. CODE ANN.* § 10.1-2101.

<sup>7</sup> *Id.* § 10.1-2105.

<sup>8</sup> *Id.* §§ 10.1-2102, -2103, -2104, -2107 (promulgation of all regulations and determination of compliance must be in accordance with the Virginia Administrative Process Act (*VA. CODE ANN.* § 9-6.14:1 *et seq.*); *see id.* § 10.1-2103(4),(8)).

<sup>9</sup> *Id.* §§ 10.1-2103(5), (7), -2107(A).

<sup>10</sup> *Id.* §§ 10.1-2103(5), -2107(A).

<sup>11</sup> *Id.* § 10.1-2107(B).

<sup>12</sup> *Id.* § 10.1-2111.

<sup>13</sup> *Id.* § 10.1-2109(B)-(D).

<sup>14</sup> *Id.* § 10.1-2108.

<sup>15</sup> *Id.* § 10.1-2103(3).

with local governments regarding all phases of developing and implementing local comprehensive plans, zoning ordinances, and subdivision ordinances to ensure compliance with the objectives of the Act.<sup>16</sup> Localities may submit any application for the use or development of land within their jurisdiction to the Board for review.<sup>17</sup> In the exercise of its oversight and enforcement authority, the Board may institute legal actions to ensure that counties, cities, and towns comply with the provisions of the Act.<sup>18</sup>

#### JULY 1, 1989 REGULATIONS

On July 1, 1989, the Board adopted and promulgated regulations as mandated in the Act.<sup>19</sup> Criticism of the regulations, mostly from environmentalists and farmers, prompted Governor Baliles to order the Board to suspend its enactment of the rules and re-open public comment on the two most contentious issues: septic tank requirements and agricultural buffer zones.

Environmental advocates complained that the regulations as adopted were significantly weaker and less effective than the draft criteria originally proposed. Their main concern was the Board's failure to include tough new septic tank requirements in the final regulations, leaving responsibility for developing these criteria with the State Health Department. Wastewater discharge from septic tanks is considered to be a significant contributor to pollution of the Bay's waters.

Farmers and other agricultural groups objected to the reduction of acreage resulting from the Board's adoption of a 100-foot buffer zone for all agricultural lands bordering on the Bay or its tributaries. This buffer area of vegetation along the shoreline is meant to retard erosion and filter chemical runoff, another major pollutant of the Bay.

#### SEPTEMBER 20, 1989 REGULATIONS

On September 20, 1989, the Board adopted and promulgated the final regulations.<sup>20</sup> The

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<sup>16</sup> *Id.* § 10.1-2103(2),(8).

<sup>17</sup> *Id.* § 10.1-2112.

<sup>18</sup> *Id.* § 10.1-2104.

<sup>19</sup> *VA. CODE ANN.* § 10.1-2107(E).

<sup>20</sup> Chesapeake Bay Preservation Designation and Management Regulations, 6 Va. Regs. Reg. §§ 1.1-6.5 (Sept. 20, 1989) [hereinafter "Final Regulations"].

following is a summary of selected provisions and not a comprehensive coverage of the regulations.

### *Introduction*

The purpose of the regulations is to minimize the polluting effects of human activity upon the Chesapeake Bay, its tributaries, and other state waters.<sup>21</sup> The regulations establish the criteria by which local governments must determine the Chesapeake Bay Preservation Areas and set land use and development guidelines within their jurisdictions.<sup>22</sup>

### *Local Government Programs*

Localities must develop measures, called local programs, necessary to comply with the Act and regulations.<sup>23</sup> Local governments have twelve months from the adoption of the regulations in which to map the Chesapeake Bay Preservation Areas within their jurisdictions and adopt the relevant performance criteria in these areas.<sup>24</sup> They have two years to incorporate measures that comply with these criteria into their comprehensive plans, zoning ordinances, subdivision ordinances, and other water quality protection plans.<sup>25</sup>

### *Chesapeake Bay Preservation Area Designation Criteria*

Chesapeake Bay Preservation Areas are to be divided into Resource Protection Areas and Resource Management Areas.<sup>26</sup> Resource Protection Areas are lands near the shoreline that either have an intrinsic water quality value due to the ecological and biological processes they perform or are sensitive to impacts which may cause significant degradation to the quality of state waters.<sup>27</sup> They include tidal wetlands, some contiguous nontidal wetlands, tidal shores, and a 100-foot buffer area subject to certain exemptions.<sup>28</sup> Resource Management Areas are lands which, if improperly used or developed, may substantially damage water quality or diminish the functional value of the

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<sup>21</sup> *Id.* § 1.3.

<sup>22</sup> *Id.* § 1.1, 1.3.

<sup>23</sup> Final Regulations, § 2.1.

<sup>24</sup> *Id.* § 2.2(A)-(B).

<sup>25</sup> *Id.* § 2.2(C)-(G).

<sup>26</sup> Final Regulations, § 3.1.

<sup>27</sup> *Id.* § 3.2(A).

<sup>28</sup> *Id.* § 3.2(B).

Resource Protection Area.<sup>29</sup> These areas must be contiguous to the entire inland boundary of the Resource Protection Areas and may include floodplains, highly erodible or permeable soils, and other nontidal wetlands.<sup>30</sup>

Localities within Chesapeake Bay Preservation Areas where existing development is concentrated may be designated as Intensely Developed Areas at the option of local governments and are subject to separate redevelopment criteria.<sup>31</sup>

#### *Land Use and Development Performance Criteria*

The criteria in this section establish performance standards for incorporation into local programs and are meant to achieve the goals and objectives of the Act.<sup>32</sup> The criteria may be employed in conjunction with other planning and zoning concepts to protect the quality of state waters.<sup>33</sup>

#### *General Performance Criteria*

Any use, development, or redevelopment of land in designated Preservation Areas must meet the general performance criteria. These criteria include provisions on best management practices, development exceeding 2500 square feet, septic systems, stormwater management, and agricultural and silvicultural activities.<sup>34</sup> The criteria incorporate tougher septic tank requirements in response to complaints by environmentalists. The regulations require septic systems to be pumped out once every five years and new systems to be built with a reserve sewage disposal site to reduce the threat of overflow.<sup>35</sup>

#### *Performance Criteria for Resource Protection Areas*

This criteria is supplemental to the general performance criteria and applies specifically

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<sup>29</sup> *Id.* § 3.3(A).

<sup>30</sup> *Id.* § 3.3(B).

<sup>31</sup> *Id.* § 3.4.

<sup>32</sup> Final Regulations, § 4.1.

<sup>33</sup> *Id.* § 4.4.

<sup>34</sup> Final Regulations, § 4.2.

<sup>35</sup> *Id.* § 4.2(7).

within Resource Protection Areas.<sup>36</sup> It allows land development in the Resource Protection Areas only if it is "water dependent" or constitutes "redevelopment."<sup>37</sup> The regulations require a 100-foot buffer of vegetation to be preserved or established to act as a pollutant filter to halt chemical runoff.<sup>38</sup> In certain instances the buffer can be reduced to fifty feet if a combination of the reduced buffer and suitable best management practices would collectively achieve water quality protection equivalent to the 100-foot buffer.<sup>39</sup>

In response to complaints by farmers and agricultural groups, the criteria adopt more lenient agricultural buffer restrictions. The agricultural buffer area may be reduced to a minimum of twenty-five feet when an approved soil and water conservation plan has been implemented on adjacent land.<sup>40</sup> The regional Soil and Water Conservation District must approve the plan and ensure that it achieves water quality protection at least the equivalent of the 100-foot buffer.<sup>41</sup>

#### *Administrative Waivers and Exemptions*

Local governments may permit the continued nonconforming use or reconstruction, but not necessarily the expansion, of any pre-existing structure within Chesapeake Bay Preservation Areas.<sup>42</sup> Public utilities, railroads, and facilities are generally excepted from the criteria subject to certain requirements.<sup>43</sup> Any exceptions granted under this section must be the minimum necessary to afford relief and must preserve the purpose and intent of the Act.<sup>44</sup>

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<sup>36</sup> Final Regulations, § 4.3.

<sup>37</sup> *Id.* § 4.3(A); *see id.* § 3.4(A)-(C).

A "water-dependent facility" is "a development of land that cannot exist outside of the Resource Protection Area and must be located on the shoreline by reason of the intrinsic nature of its operation. These facilities include, but are not limited to (i) ports; (ii) the intake and outfall structures of power plants, (iii) marinas and other boat docking structures; (iv) beaches and other public water-oriented recreation areas, and (v) fisheries or other marine resources facilities." *Id.* § 1.4. "Redevelopment" means "the process of developing land that is or has been previously developed." *Id.* § 1.4.

<sup>38</sup> *Id.* § 4.3(B).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* § 4.3(B)(4).

<sup>41</sup> *Id.*

<sup>42</sup> Final Regulations, §4.5(A).

<sup>43</sup> *Id.* § 4.5(B).

<sup>44</sup> *Id.* § 4.6.

### *Implementation, Assistance, and Determination of Consistency*

One of the Board's functions is to assist in the preparation and implementation of local programs.<sup>45</sup> For this purpose, the Board must provide a local assistance manual, establish a liaison with each local government, and review proposed programs.<sup>46</sup> The regulations establish guidelines both for local government use in preparing local programs and for the Board's use in determining local program consistency.<sup>47</sup>

### *Enforcement*

The Board has the right to take administrative and legal action to ensure that local governments comply with the provisions of the Act and the regulations.<sup>48</sup>

## CONCLUSION

The Chesapeake Bay Preservation Act will have wide ranging effects on real estate use and development in Tidewater Virginia. Tougher standards for the use and development of land in designated Protection Areas will make the activities of builders, land owners, and farmers more costly. Local governments are also concerned with the costs of implementing the regulations. Most localities do not have the technical and financial resources necessary to implement the regulations without state assistance. Finally, environmental groups will still need to pressure local authorities to adopt a firm stance on the incorporation of the Board's criteria into their local programs. In the end, the Act's final impact will depend to a large extent upon the strength of local governments' implementation of the Board's regulations.

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<sup>45</sup> Final Regulations, § 5.1.

<sup>46</sup> *Id.* §§ 5.2, 5.3, 5.5(B).

<sup>47</sup> *Id.* § 5.6.

<sup>48</sup> Final Regulations, §§ 6.1, 6.2, 6.3.