Adrift Without a Paddle: The Present and Future of the Chesapeake Bay Preservation Act

Robert E. Baute Jr.
ADRIFT WITHOUT A PADDLE: THE PRESENT AND FUTURE OF THE CHESAPEAKE BAY PRESERVATION ACT

ROBERT E. BAUTE, JR.*

I. INTRODUCTION

Covering over 64,000 square miles from New York to Virginia, the Chesapeake Bay ("Bay") is the country's largest and most biologically diverse estuary. In addition, the Bay is one of Virginia's most valuable natural resources. It has played a major role in the development of Virginia's culture and traditions as well as some of the state's major industries, including tourism, trade, shipbuilding, and fishing. Unfortunately, as the population in the Bay region has risen, so too has the level of pollution and the demands on the Bay's finite resources. As a result, excess sediment and nutrients are finding their way into the Bay and are endangering its water quality.

Virginia has attempted to address the Bay's ecological deterioration in numerous ways. On the interstate level, Virginia works in

---

* Mr. Baute received his B.A. from Dickinson College in Carlisle, Pennsylvania, in 1994, and expects to receive his M.P.P. from the College of William and Mary and his J.D. from William and Mary School of Law in May 2002.


4 See CBA 2000, supra note 2.

5 Harry R. Hughes & Thomas W. Burke, Jr., The Cleanup of the Chesapeake Bay: A Test of Political Will, 11 NAT. RESOURCES & ENV’T 30 (1996).

6 BAY FAQ, supra note 1.

cooperation with Maryland, Pennsylvania, the District of Columbia, the Chesapeake Bay Commission, and the Environmental Protection Agency ("EPA"), as a member of the Chesapeake Bay Program ("Program"). This program helps to coordinate the individual efforts of the respective members and sets goals for the restoration and protection of the Bay. The Program came about as a result of historic agreements signed in 1983 and 1987. In order to meet the goals set by the 1987 Chesapeake Bay Agreement ("CBA"), in 1988 Virginia enacted the Chesapeake Bay Preservation Act ("CBPA"). The CBPA is the centerpiece of Virginia's Bay policy. Its goal is to improve water quality in the Bay and its tributaries through the use of wise resource management practices. It is based on the idea that the use and development of land can continue as long as appropriate steps are taken to mitigate the impact on water quality.

The philosophy behind the CBPA is that local governments are in a better position to effectively and pragmatically reduce pollution of the Bay from adjacent lands. Instead of creating a large regulatory agency and empowering it to create and enforce regulations protecting the Bay, the Virginia General Assembly created a small agency (Chesapeake Bay Local Assistance Department ("CBLAD")) and Board; and empowered localities to implement pollution reductions measures in accordance with standards and criteria provided by CBLAD. The CBPA created a unique partnership between the state government and the localities, in which the localities are expected to take the lead not only in making land use decisions but also in the enforcement of those decisions.

Today, twelve years after the CBPA was originally enacted, a number of flaws have become apparent. Chief among them is that the Board and CBLAD do not have the necessary funding, tools, or authority to ensure that localities are fully and effectively implementing the law. This Note analyzes the law itself, discusses the important issues

---

8 CBA 2000, supra note 2.
9 Id.
10 Id.
13 Id.
14 See id.
15 See id.
16 See id.
surrounding its implementation, and makes recommendations for how the Act could be improved.

II. THE CHESAPEAKE BAY

A. A Natural Resource

There is little debate about the fact that the Bay is a tremendous natural resource. In 1997 alone it was estimated that the dockside value of the Bay’s commercial shellfish and finfish harvests was close to $196 million. The Bay is also a major commercial waterway, with two key North American ports. The Hampton Roads Complex (i.e., Portsmouth, Norfolk, Hampton, and Newport News) at the mouth of the bay is second nationally in metric tons of exports. Further north, the port of Baltimore is ranked eleventh in volume of exports in foreign trade. In total, Baltimore and Hampton Roads handled seventy million tons of both imports and exports in 1997. Another key Bay-related industry is shipbuilding, with one of the nation’s largest remaining builders of commercial and naval vessels located in Newport News.

B. An Ecosystem

As a large estuary, the Bay is also a tremendously important ecosystem. Estuaries contain nature’s most productive habitats. Many important species of fish, including white and yellow perch, striped bass, herring, and shad, use the Bay’s tidal freshwater tributaries as spawning grounds and nurseries. Others, such as the bluefish, weakfish, Atlantic Croaker, menhaden, summer flounder, and spot, use the Bay as a feeding ground during the warmer months. Also, many migratory birds and

---

17 CBA 2000, supra note 2.
19 Id.
20 Id.
21 Id.
22 Id.
23 Id.
24 See Groom, supra note 1, at 217.
25 BAY ECOSYSTEM, supra note 7.
26 Id.
waterfowl use the Bay as a stopover. These species include tundra swans, Canadian geese, canvasback ducks, pintail ducks, scoter ducks, eider ducks, and ruddy ducks. Important permanent residents of the Bay include the Bald Eagle and the Osprey. In total, the Bay is a host to over 3,600 species of plants, fish, and animals.

III. THE HEALTH OF THE BAY

With the Bay playing such an important role in the histories, cultures, and economies of Virginia and the other states in the Chesapeake Bay watershed, it is impossible to overstate the importance of keeping it healthy and vibrant. However, the most recent State of the Bay report from the Chesapeake Bay Foundation ("CBF") scored the Bay's health at 28 out of a possible 100. This represented no change from the previous year. CBF acknowledges that a 100—a pristine bay—is unattainable because of the permanent development of the watershed, but believes the Bay could eventually reach about 70.

The CBF estimates the Bay's score bottomed out in the early 1980s when it would have likely been about a 23. It was around that

\[27\text{ Id.}\]
\[28\text{ Id.}\]
\[29\text{ Id.}\]
\[30\text{ BAY FAQ, supra note 1.}\]
\[31\text{ Watersheds are defined as follows:}\]
\[\text{A watershed is a region of land that is crisscrossed by smaller waterways that drain into a larger body of water. For example, thousands of creeks, streams and rivers in Pennsylvania ultimately drain into the Susquehanna River. The land these streams and rivers drain is considered Susquehanna River watershed or basin. On a larger scale, the 64,000 square miles of land drained by hundreds of thousands of rivers, creeks and streams crisscrossing the Bay region comprises the Chesapeake Bay watershed or basin.}\]
\[\text{Id.}\]

\[32\text{ The CBF is a private sector organization dedicated to defending and restoring the Chesapeake Bay. CHESAPEAKE BAY FOUNDATION, ABOUT CBF, at http://www.savethebaycbf.org/about_cbf/what_we_do.htm (last visited Dec. 1, 2001).}\]
\[33\text{ Alliance for the Chesapeake Bay, Declines Offset Gains; CBF Index Same as 1999, BAY J. (Oct. 2000), available at http://www.bayjournal.com/00-10/cbf.htm (last visited Dec. 1, 2001).}\]
\[34\text{ See id.}\]
\[35\text{ Id.}\]
\[36\text{ Id.}\]
time that people really started to focus attention on the Bay’s deteriorating health. In 1983, the EPA completed a 7-year study, which found:

1. Increased occurrence of algae blooms;
2. Significant decrease in submerged aquatic vegetation;
3. Significant decrease in the supply and reproduction of various varieties of shellfish;
4. Startlingly high levels of nitrogen and phosphorus in the Bay;
5. Dissolved oxygen levels had decreased substantially in certain areas; and
6. High levels of toxic compounds on the Bay’s bottom near the ports of Baltimore and Norfolk.

Increased algae growth in the water represents a major problem striking at the heart of the Bay’s ecological structure. It suffocates other marine life by using up precious oxygen in the water. It also blocks sunlight that is necessary for the growth of bottom grasses—grasses that provide food for waterfowl and a habitat for spawning fish and shellfish.

The major cause of increased algae growth is excess nutrients in the water in which the algae feed. These nutrients are emitted by “nonpoint” source pollution. Nonpoint source pollution is pollution that cannot be traced to a pipe or any single identifiable point but is instead contained in natural drainage that comes from farms, lawns, parking lots, sewage treatment plants, etc. More than half the pollution in the Bay comes from nonpoint sources.

Due in part to the increased pollution, production of many types of fish and shellfish has greatly decreased. A startling example of this is the oyster harvest. From the 1950s through 1970s the average annual

---

38 See Groom, supra note 1, at 218.
39 Id.
40 Id.
41 Id.
42 Id.
43 Id.
44 See Groom, supra note 1, at 218
45 See BAY ECOSYSTEM, supra note 7.
oyster catch was about twenty five million pounds per year.\textsuperscript{46} Since then, however, the catch has declined dramatically.\textsuperscript{47}

IV. CHESAPEAKE BAY AGREEMENT

The first real step in addressing these problems came in 1983 when Virginia, Maryland, Pennsylvania, the District of Columbia, and the EPA signed the first CBA, a short agreement to coordinate efforts to address the problems outlined in the EPA study.\textsuperscript{48} In 1987, a more expansive agreement was signed, setting concrete goals and addressing the Bay's problems from a number of perspectives, including water quality, animal and plant life, the impact of growth and development around the Bay, public access to the Bay, and the public's education on issues relating to the Bay.\textsuperscript{49} A key goal of this agreement was to "reduce and control point and nonpoint sources of pollution to attain the water quality condition necessary to support the living resources of the Bay."\textsuperscript{50}

V. THE CHESAPEAKE BAY PRESERVATION ACT

While the CBA provided broad outline for addressing the Bay's specific problems, each of the states was left with the responsibility of devising their own detailed strategies and structures for the implementation of the agreement. In 1988, Virginia stepped up to the plate by enacting the CBPA.\textsuperscript{51} The CBPA centers upon improving land use management and reducing nonpoint source pollution through a

\textsuperscript{46} See id.
\textsuperscript{47} Id.
\textsuperscript{48} See Barker, supra note 37, at 745.
\textsuperscript{49} Id. at 747-48.
\textsuperscript{50} Id. at 748 (quoting Chesapeake Bay Agreement of the Chesapeake Exec. Council (Dec. 15, 1987) (available from the Council on the Environment, Richmond, Virginia)). The 1987 Agreement set specific goals for the year 2000. Id. With regard to nutrients, the Agreement called for reducing levels in the Bay by 40%. Id. This required reducing annual phosphorus emissions by 10 million lbs. and reducing annual nitrogen emissions by 74 million lbs. Id. Recent studies indicate that the Bay partners have fallen short of their phosphorus and nitrogen goals by 1.5 million lbs. and 24 million lbs. respectively. See Karl Blankenship, Bay Program Falling Short of 40% Goal to Cut Nutrients, BAY J. (Oct. 2000), at http://www.bayjournal.com/00-10/goal.htm (last visited Dec. 1, 2001). However, the Program members signed a new Chesapeake Bay Agreement in 2000, revising their goals and strategies for the protection and restoration of the Bay. See CBA 2000, supra note 2.
\textsuperscript{51} Groom, supra note 1, at 218.
partnership program between the state and the eighty-nine localities in the Tidewater area (essentially everything east of Interstate 95).\textsuperscript{52}

A. \textit{State Level Structure}

At the state level, the CBLAD administers the CBPA.\textsuperscript{53} The Board is made up of nine citizens, appointed by the Governor, representing different parts of the Tidewater, as well as various interests including business, agriculture, land development, local government, and environmental management.\textsuperscript{54} The Board’s responsibilities include:

1. Promulgating and updating regulations that establish criteria for local programs;
2. Providing technical and financial assistance to local governments;
3. Providing technical assistance and advice to regional and state agencies on land use and water quality protection; and
4. Ensuring that local comprehensive plans and zoning and subdivision ordinances are in compliance with the regulations.\textsuperscript{55}

The Board is staffed and supported by CBLAD, which consists of an Executive Director and three divisions (i.e., Administration, Engineering, and Planning).\textsuperscript{56} CBLAD also has a number of liaisons available to assist localities with implementation issues.\textsuperscript{57}

B. \textit{Philosophy Behind the Act: Empower Local Governments}

The CBPA was written with the goal of putting decision-making power into the hands of local level officials. The language of the statute states that:

\textsuperscript{52} \textit{Id.} at 219.  
\textsuperscript{53} \textit{Id.}  
\textsuperscript{54} Chesapeake Bay Local Assistance Dep’t Website, \textit{at} http://www.cblad.state.va.us/pres/cbpaover/cbpaover_files/frame.htm (last visited Dec. 1, 2001) [hereinafter CBLAD Website].  
\textsuperscript{55} \textit{Id.}  
\textsuperscript{56} \textit{Id.}  
\textsuperscript{57} \textit{Id.}
Local governments have the initiative for planning and for implementing the provisions of this chapter, and the commonwealth shall act primarily in a supportive role by providing oversight for local governmental programs, by establishing criteria as required by this chapter, and by providing those resources necessary to carry out and enforce the provisions of this chapter.\(^{58}\)

Legislators envisioned localities using their zoning and permit powers to effectively protect sensitive areas and reduce nonpoint source pollution while retaining the flexibility to tailor the initiative to the specific circumstances and needs that exist in their community. Also, legislators understood that a large state level body regulating land-use, much of which occurs on private property, would likely engender a great deal of resentment and hostility.\(^{59}\) Placing enforcement at the local level allows citizens to gain a better understanding of the issue and the stakes, helping to alleviate some fears and doubts. This philosophy is actually supported, at least in principal, by environmental groups such as the CBF. In a CBF fact sheet entitled “Debunking Sprawl Myths: What We Really Want in Our Communities,” a subsection entitled “Myth 7: Managing Growth Means That the State Will Take Over Local Powers” states that “[l]ocal governments must retain primary authority for local land-use decisions. They know their communities and are most closely connected to the people whose lives they impact . . . . State growth objectives and requirements should serve as a guide for local plans.”\(^{60}\)

C. CBPA: A Three-Phase Plan

1. Phase One

The first phase of the CBPA was the delineation of Chesapeake Bay Preservation Areas and the adoption of performance criteria for the


\(^{59}\) Michael Clower, Executive Director of the Chesapeake Bay Local Assistance Department, recently encapsulated his Agency’s position this way, “We’re a land-use program. And in Virginia, that’s just not a popular thing.” Scott Harper, Portsmouth Ignores Rules on Environmental Studies, Virginian-Pilot & Ledger Star, Sept. 11, 2000, at B1, available at 2000 WL 23683684.

\(^{60}\) Chesapeake Bay Found., Debunking Sprawl Myths: What We Really Want in Our Communities, at http://www.savethebay.cbf.org/resources/facts/debunking_sprawl.htm (last visited Dec. 1, 2001).
lands within the preservation areas. CBPAs are lands "which, if improperly developed, may result in substantial damage to water quality of the Chesapeake Bay and its tributaries." They can be divided into two categories: Resource Protection Areas ("RPAs") and Resource Management Areas ("RMAs").

RPAs are made up of "tidal wetlands, non-tidal wetlands connected by surface flow and contiguous to tidal wetlands or tributary streams, tidal shores, other lands, [and] a buffer of not less than 100 feet in width landward of these features and along both sides of any tributary stream." The purpose of the buffer is to mitigate the effects of human activities and runoff on sensitive areas in the watershed. Within RPAs there are strict regulations on land-use practices. CBLAD believes that these buffers achieve a 75% reduction in the sediments that enter the Bay from a particular protected area as well as 40% reduction in nutrients. The regulations allow for the development within the buffer if it is re-development or if it is for a water dependent use. There are also a number of exemptions from RPA regulations, including water wells; boardwalks, trails, and pathways used for passive recreation; and historic preservation or archaeological activities, as well as public roads, utilities, and railroads. Finally, the regulations allow for modifications to the requirements on pre-1989 lots where enforcing the buffer would mean a loss of buildable land. Modifications can also be sought for agricultural land to come within fifty feet if a best management practice ("BMP") is complete or even within twenty-five feet on agricultural land that is implementing a Conservation Plan. These modifications must be in the

---

61 See Groom, supra note 1, at 220.
63 CBLAD Website, supra note 54.
64 See id.
65 See id.
66 See id.
67 See id. Water dependent uses include ports, intake and outtake structures for power plants and other plants, marinas and other boat docking structures, beaches, and fisheries. See id.
68 See id.
69 See CBLAD Website, supra note 54. BMPs are practices, or combinations of practices, that are determined by the state or area wide planning agency to be the most effective, practicable means of preventing or producing the amount of pollution generated by nonpoint sources to a level compatible with water quality goals. Id.
form of the minimum necessary to provide relief.\textsuperscript{70} RMAs are made up of “floodplains, highly erodible soils (including steep slopes), highly permeable soils, non-tidal wetlands not included in RPAs, [and] other lands.”\textsuperscript{71}

The performance criteria set out by the Board in the regulations were:

1. No more land shall be disturbed than is necessary to provide for the desired use or development.
2. Indigenous vegetation shall be preserved to the maximum extent possible.
3. Localities must ensure Best Management Practice (BMP) maintenance through agreements with the owner or developer.
4. All development exceeding 2,500 square feet shall be accomplished through a plan of development process.
5. Land development shall minimize impervious cover.
6. Any land disturbing activity that exceeds 2,500 square feet (including construction of single-family homes & septic tanks and drainfields) shall comply with the local erosion and sediment control ordinance.
7. On-site sewage treatment systems not requiring a VPDES permit shall: a) be pumped out at least once every 5 years and b) provide a reserve sewage disposal site.
8. Stormwater Management:
   a. For development and re-development currently served by BMPs, post-development nonpoint source pollution runoff load shall not exceed pre-development load.
   b. For redevelopment, pre-developed loads must be reduced by 10%.
9. Agricultural lands shall have a soil and water quality conservation plan.
10. Silvicultural activities are exempt provided they adhere to the water quality protection procedures prescribed by the Department of Forestry.

\textsuperscript{70} See id.
\textsuperscript{71} See id. CBLAD describes these lands as “[l]ands that if improperly used or developed have potential for causing water quality degradation or for diminishing the functional value of the RPA.” Id.
11. Local governments shall require evidence of all wetlands permits required by law prior to authorizing grading or other on-site activity.  

2. Phase Two

The second phase of the CBPA plan required local governments to construct or revise a comprehensive plan incorporating protection of CBPAs and water quality in general. These plans had to address five particular policy areas:

1. Physical constraints to development;
2. Protection of potable water supply;
3. Shoreline and streambank erosion;
4. Public and private access to waterfront areas; and
5. Redevelopment.

Upon the completion of Phase Two, the Board reviewed the localities' plans to ensure that it properly addressed the Board's performance criteria and policy recommendations.

3. Phase Three

The third and final phase requires the localities to incorporate specific water quality protection measures into their comprehensive plan and into their zoning and subdivision ordinances. This serves the purpose of ensuring that CBPA considerations are an essential and unavoidable part of every zoning or development decision. In summary, at the end of the third phase each local program must include seven elements: (1) a map delineating preservation act areas; (2) performance criteria for land use and development in preservation areas; (3) a comprehensive plan incorporating protection of preservation areas and water quality; (4) a zoning ordinance that includes measures to protect water quality; (5) a subdivision ordinance that includes measures to protect water quality; (6) an erosion and sediment control ordinance

---

72 Id.
73 See Groom, supra note 1, at 222.
74 See CBLAD Website, supra note 54.
75 See Groom, supra note 1, at 223.
consistent with provisions in the regulations; and (7) a plan of development review processes that protects water quality.\(^7\)

D. \textit{State Plays Limited Role}

With almost all of the localities now having completed phase two and the tools of implementation now in the hands of the localities, the role of the Boards and of CBLAD as envisioned in the CBPA is essentially to provide oversight and guidance to the localities so that their programs can continually become more modern, effective, and efficient. CBLAD accomplishes this task in three different ways. First, it is continually updating the regulations that establish the criteria for the Bay Act programs. This constant updating process allows CBLAD to incorporate new information gained through scientific investigation as lessons learned from its experiences, those of localities in the Commonwealth, and those of other members of the Chesapeake Bay Program. Second, CBLAD provides technical and financial assistance to the local governments.\(^7\) This assistance varies from CBLAD personnel that assist local governments in the process of creating and updating comprehensive plans to grants that go to localities or planning districts to help with implementation.\(^7\) Third, CBLAD ensures that local government comprehensive plans, zoning ordinances, and subdivision ordinances remain in compliance with the CBPA regulations.

CBLAD’s most important oversight authority pertains to enforcement. It is CBLAD’s responsibility to make sure that the localities are acting in “continual” accordance with their approved comprehensive plans and enforcing the related ordinances.\(^7\) This is a very serious task. If the locality refuses to comply, CBLAD can ask the Attorney General to sue the locality.\(^8\) This authority has proven more useful as a threat than as an actual weapon. It has been very effective in persuading localities to amend their ordinances or comprehensive plans in order to bring them into compliance with the Board’s regulations.\(^8\)

\(^7\) See id.
\(^7\) See Groom, \textit{supra} note 1, at 224.
\(^7\) See Michael Clower, Address at the Save the Bay Breakfast (Nov. 19, 2000). CBLAD’s budget for such assistance at one time was as high as $1.5 million annually but is now at $500,000. See id.
\(^8\) See id. § 10.1-2104.
\(^8\) Telephone Interview with Shawn Smith, Chesapeake Bay Local Assistance Department (Oct. 5, 2000).
E. **CBLAD v. Board of Supervisors of Charles City County**

Only once has the Board actually gone to court in order to force a locality to comply with the Act. In 1992, the Board of Supervisors of Charles City County adopted a program that the Board found to be inconsistent with the Act and regulations. After subsequent amendments failed to bring the County into compliance, on June 10, 1993, the Attorney General filed a complaint on behalf of the Board seeking to compel compliance. In particular, the Board wanted the County to change a twenty-five foot resource management area that it believed did not provide sufficient water quality protection. The Circuit Court of the County of Charles City granted the Board's motion for a preliminary injunction on June 18, 1993 and ordered the County to comply. The County adopted a new ordinance on October 26, 1993, only to again have it found to be inconsistent with the Act and regulations. The Board then amended its original Bill of Complaint seeking to have the Court enjoin the County to adopt a program in compliance with the Act and regulations. The County subsequently agreed to adopt a program of compliance with the Act and regulations. The court then issued a consent decree ordering the County to submit its program, including the agreed upon amendments, to the Board for review and approval. The County complied with this order and the case was stricken.

VI. **BREAKDOWNS IN THE SYSTEM**

A. **Portsmouth: A Wake-Up Call**

---

82 Letter from Michael D. Clower, Executive Director, Chesapeake Bay Local Assistance Department, to Dennis H. Treacy, Director, Virginia Department of Environmental Quality (June 14, 1999) (on file with author) [hereinafter Clower Letter].

83 See id.


85 See Clower Letter, supra note 82.

86 Id.

87 Id.

88 Id.

89 Id.

90 Id.
It was recently discovered that for years Portsmouth has been neither enforcing the buffer requirement, nor requiring environment and water quality assessments mandated by the CBPA.\textsuperscript{91} This only came to light when a citizen advocacy group called "Save Our Buffers," which formed to fight the proposed building of 102 condominiums within fifty feet of the Elizabeth River, requested to see environmental impact studies through the Freedom of Information Act, and were told that the documents did not exist.\textsuperscript{92} The lapses allowed at least four waterfront subdivisions to be built without proper review.\textsuperscript{93}

On September 18, 2000, the Board voted to sue Portsmouth for violating the CBPA.\textsuperscript{94} However, as of yet, the Attorney General has not filed a suit.\textsuperscript{95} The likely reason for that is the threat of suit helped to motivate Portsmouth to take the legislation more seriously, and the day after the suit was filed Portsmouth's Deputy City Attorney said that they would be sending out a revised plan for CBLAD's review as soon as possible.\textsuperscript{96} Since that date CBLAD has conducted an audit of Portsmouth's files and is currently in negotiations to bring about compliance.\textsuperscript{97}

This unfortunate series of events highlights many of the important problems facing the CBPA. The city's complete (and seemingly intentional) failure to implement the rules and CBLAD's total lack of awareness both hint at major problems which may be undermining the CBPA and could slow Virginia's progress toward the day when the Bay reaches the 70 health rating the CBF thinks is achievable.

B. \textit{Localities Oppose the CBPA}

\textsuperscript{92} See id.
\textsuperscript{93} See id.
\textsuperscript{94} See id.
\textsuperscript{95} See id.
\textsuperscript{97} Telephone Interview with Michael Clower, Executive Director, Chesapeake Bay Local Assistance Department (Mar. 27, 2001) [hereinafter Clower Interview].
When the Act passed it generated a great deal of confusion and fear in the effected communities. There was an outcry from many that it would kill development and leave countless landowners with land that could not be built on, causing serious financial losses. While some of the more dire predictions have not been realized, there is still a great deal of bitterness towards the Act, some of it coming from the local enforcement officials. These officials feel that the CBPA is more of a hindrance than a tool. A common complaint is that the CBPA limits the options they have in dealing with environmental issues in their communities, leaving little room for allowing or encouraging creative mitigation measures that might.

For example, when existing property developed years ago becomes vacant due to competitive issues, site, etc., localities have difficulty finding new tenants or buyers because any required changes to the site making it viable are often prohibitive. Henrico County has addressed this problem in some situations with a program that grants certain exemptions to developers in exchange for payment into a fund used for environmental rehabilitation of local rivers and streams. Planners in Henrico claim that this has been extremely successful because it allows them to concentrate funds towards effective river cleanup in the most polluted waterways in the county. However, this option is not available in many situations because of the Board’s regulations. Allowing equally beneficial, alternative means of compliance might be more efficient.

There is a downside to granting this kind of flexibility to the localities. In general, localities have little expertise or no environmental mitigation and planning, and few resources with which to obtain help. CBLAD would have to be extremely vigilant in its oversight of the localities to make sure that proper steps were being taken to mitigate damages. Under such a system CBLAD would have to oversee eighty-

---


99 See id.

100 Telephone Interview with Harvey Hinson, City Planner, Henrico County, Virginia (Oct. 5, 2000) [hereinafter Hinson Interview].

101 See id.

102 See id.

103 See id.

104 See id.

105 See id.
four different standards attempting to ensure that no localities were allowing persons or businesses to build within the 100-foot buffer without obtaining proper compensation (whether it be money, mitigation, or a BMP). Such a task would likely overtax CBLAD already stretched resources, at least as it is currently constituted.

C. What's Truly Good for the Environment?

Like Portsmouth, Norfolk has an ordinance allowing development within fifty feet of the water if certain mitigation steps are taken. Lee Rosenberg, Norfolk's Environmental Services Director, said this type of flexible policy is useful in urban areas because it can be used to encourage cluster development, thereby reducing sprawl. "We think we’re helping the environment by encouraging tighter development in our urban watersheds.” He believes the original Act rightly included flexibility for urban localities and is concerned that regulators are growing more insistent that localities keep a 100-foot buffer.

Supporters of the 100-foot buffer point out that the distance did not come about by accident but was arrived at by intensive scientific research in the matter. CBLAD contends that the amount of pollutants filtered out using a 100-foot buffer far exceeds the amount filtered by a 50-foot buffer and this difference cannot be effectively remedied through the use of BMPs and other mitigation measures, especially when those exceptions are being granted on a broad scale. CBLAD claims that the 100-foot buffer requirement is not arbitrary, but was chosen based on the results of intensive scientific research in the matter. However, many local planners and commissioners believe that other mitigation methods such as BMPs or river rehabilitation programs can be equally effective in combating runoff.

This disagreement highlights a very basic and difficult problem. Though there may be broad agreement that runoff is polluting the bay, there seems to be no consensus among scientists or planners on how best to address the problem. Although all of the relevant players point to scientific evidence studies to support their positions, one must ask whether they arrived at these positions because of the scientific evidence, or if they simply looked for evidence to support positions they were already tied to

106 Harper, supra note 91.
107 Id.
108 Id.
109 Id.
110 See Clower, supra note 78.
for unrelated reasons. It is certainly an interesting coincidence that state
level regulators point to studies supporting the easily enforceable buffer
solution, while local level administrators point to studies supporting the
use of more flexible methods such as BMPs.

D. Exceptions Becoming the Rule

The Portsmouth case was shocking insofar as the City’s actions
evidenced a complete and utter disregard for the laws and regulations of
the CBPA. While this type of willful negligence may be rare, it is
becoming abundantly clear that the wholesale granting of buffer
exceptions is becoming a standard practice in some localities.

VII. CBLAs Not Equipped to Enforce Compliance with Its
Regulations

The CBPA and regulations were recently incorporated into the
Virginia Coastal Resources Management Program as one of the Program’s
enforceable policies. This incorporation required that the Program meet
five federal consistency provisions pursuant to the Coastal Zone
Management Act. The fifth and last of these provisions requires that
the “state has the ability to assure local compliance with its program once
approved.” In a letter to the Director of the Virginia Department of
Environmental Quality (“DEQ”), Dennis H. Treacy, CBLAD Executive
Director Michael Clower described a number of methods it uses such as
tips from citizens, reviews of plans, and quarterly reviews required under
grand contracts. However, the most striking information came from
what went unsaid. The letter made it clear that at this point CBLAD does
not have a long term strategy in place for assuring continued compliance
by the localities it oversees. With this in mind, recent discoveries about
the compliance practices in Portsmouth or elsewhere should come as no
surprise. Clower has described his own agency as “a paper tiger.”

111 See VA. DEPT OF ENVTL. QUALITY, CHESAPEAKE BAY ACT INCORPORATED INTO
VIRGINIA’S COASTAL PROGRAM, available at http://www.deq.state.va.us/coastal (last
112 See Clower Letter, supra note 82.
113 Id.
114 Id.
115 Revised regulations containing a requirement that each locality file an annual
implementation report are currently under consideration. See id.
116 Harper, supra note 91.
lacks the authority to fine offenders, lacks the staff to study compliance trends and must rely on citizen complaints to investigate problems,” Clower added.\footnote{117}

A. \textit{CBLAD: Under Funded and Under Resourced}

When CBLAD was created it had a staff of twenty-eight people.\footnote{118} During the 1990s the staff numbered as few as fifteen people and presently includes twenty-one members.\footnote{119} Of the fifteen, only eight were field compliance personnel.\footnote{120} They were responsible for monitoring the entire eighty-four Tidewater localities that are covered by CBPA.\footnote{121} This lack of staffing is one reason why Portsmouth was able get by without requiring water quality assessments for so long.\footnote{122}

Another key budgetary problem is funding for financial and technical assistance to localities. With an annual budget of $500,000, CBLAD does not have enough funding to maintain a positive and proactive presence in the localities. This has been mentioned by local level policy-makers as one reason CBLAD has lost credibility with the localities.\footnote{123} No longer able to assist localities on compliance issues, CBLAD is simply thought of as another enforcement agency to be dealt with, and not an effective one at that.

In his letter to Treacy, Clower wrote that the “continued compliance of local governments once their program has been approved occurs through the Program’s: review of local program amendments; review of program implementation; and ability to initiate administrative and legal proceedings and to seek the imposition of civil penalties or charges.”\footnote{124} However, at a November 18, 2000 “Save the Bay Breakfast” sponsored by the CBF, Clower said that the lack of staff and funds has meant that the Department is not able to take proactive measures to assure compliance and instead can only react to problems that are brought to its attention.\footnote{125} In order to be effective, Clower has stated that “[w]e need

\footnote{117}{Id.}
\footnote{118}{See Clower, supra note 78.}
\footnote{119}{See id.}
\footnote{120}{See id.}
\footnote{121}{See id.}
\footnote{122}{See id.}
\footnote{123}{See Hinson Interview, supra note 100.}
\footnote{124}{See Clower Letter, supra note 82.}
\footnote{125}{See Clower, supra note 78.}
about 50% more people and almost double our budget . . . . But let’s face it . . . we’re not exactly the most politically popular agency out there. We’re a land-use program. And in Virginia, that’s just not a popular thing.”

B. **CBLAD Has Few Enforcement Options**

CBLAD’s hands are tied to a certain extent because it must deal with the localities. It cannot deal directly with people found to be in violation of the regulations, either through fines or injunctions. The reason for this is because granting CBLAD the authority to issue fines and seek injunctions would create an overlapping enforcement system in which developers and land owners would have to comply with the law as it is interpreted and enforced by their local government and as it is interpreted and enforced by CBLAD. This could put a tremendous burden on citizens attempting to comply with the law in good faith. The only thing CBLAD can do in the face of obvious and ongoing violations of the CBPA is to convince the localities to actively enforce the rules.

The Board’s most persuasive tool is the threat of suit. The CBPA authorizes the Board to sue localities in order to ensure future cooperation and compliance. The Attorney General acts as the Board’s lawyer in these instances and is responsible for filing the suit. By its own accounts, CBLAD has used the threat of suit as an effective tool in the past, however, recent events seem to indicate that this threat is no longer considered credible. As described earlier, the Board has only sued once, and while that court battle was generally successful, it was not the kind of victory that would instill fear in the hearts of localities. The localities understand that the Board is in a difficult spot. The standard it must meet in court is a high one. The remedy for a verdict against a locality is court ordered enforcement of the CBPA. For the Board to win, it must prove not only that the locality has failed to enforce the Act in the past, but also that the locality is refusing to comply in the future.

---

128 See *id.* § 2108.
129 See *id.* § 2105.
131 See Clower, *supra* note 78.
132 See *id.*
This very difficult standard has made CBLAD and the Attorney General very weary of suing localities.\textsuperscript{133}

Generally, when CBLAD has voted to sue a locality and informed the Attorney General, the localities have taken a very conciliatory tone and promised to enforce the act in the future, avoiding legal action.\textsuperscript{134} If the Attorney General were to press the suit, the locality could argue that it is now working with CBLAD in good faith and there is no reason for the suit.\textsuperscript{135} While renewed promises to enforce the CBPA may be considered a victory for CBLAD, recent evidence of negligent enforcement, some of which has been willful, indicates that localities do not believe the Board is willing or able to follow through.

Finally, even if the Board were unfettered in its ability to sue non-compliant localities, the budget and staff requirements for mounting suits would be prohibitive.\textsuperscript{136} Lawsuits are very time consuming and staff consuming. The preparation of a case takes staff away from other roles such as enforcement. CBLAD must think very carefully before it commits its finite resources to such a venture.

VIII. ROLE OF CITIZENS IN ENFORCEMENT

Perhaps the only saving grace the Board and CBLAD have is the role citizens have played in enforcing the CBPA. In 1997, CBLAD adopted a Standard Operating Procedure for handling citizens complaints about the implementation of local programs.\textsuperscript{137} From August 1997 through June 1999, CBLAD responded to twenty-eight citizen complaints.\textsuperscript{138} In fact, it was a citizen complaint that alerted CBLAD to Portsmouth's unwillingness to enforce the regulations.\textsuperscript{139} Considering CBLAD's small staff and meager resources, vigilant individuals and groups like Save Our Buffers and the CBF play an extremely important role in enforcement. Unfortunately, reporting incidents of non-compliance by individuals or localities is as far as the citizen can go. The legislation

\textsuperscript{133} See id.
\textsuperscript{134} See id.
\textsuperscript{135} See id.
\textsuperscript{136} See id.
\textsuperscript{137} See Clower, supra note 78.
\textsuperscript{138} See id.
\textsuperscript{139} See Harper, supra note 91.
provides no avenue by which proactive citizens can seek to punish violations of the CBPA that the Board fails to address.  

Citizens can play a role in enforcement through their legal standing to contest zoning decisions that are in violation of the CBPA. However, in practice this has little value because standing to contest these decisions is limited to neighboring landowners (landowners adjacent to a parcel). Few have the knowledge, financial resources, and motivation to follow through with litigation on such an issue.

IX. AMENDMENTS

Over the past six years, the Board has attempted to amend the regulations to close some of the loopholes that have come to light. Two of these amendments are particularly controversial. First, the Board would like to restrict the ability of localities to grant exceptions allowing development within the 100-foot buffer. While the Board claims that these amendments are simply clearing up confusion about the intent of its prior regulations, they are in fact quite plainly aimed at localities that, in the opinions of the Board, CBLAD, and environmental groups, have purposefully exploited the exception provisions in order to encourage development. This has caused quite a stir among some property owners, real estate interests, developers, and local government officials who believe these new regulations will erode property rights, deprive localities of much needed flexibility in implementation, and make development unnecessarily cumbersome and expensive.

There has also been significant resistance to amendments adding criteria regarding the Board and CBLAD’s process for reviewing local program implementation for consistency with the regulations. Under one of the proposed amendments, each Tidewater locality would have to

---

141 See VA. CODE ANN. § 15.1-496.1 (Michie Cum. Supp. 2000). Zoning appeals may be taken by “aggrieved” parties. In Cupp. v. Board of Supervisors, 318 S.E.2d 407, 411-12 (Va. 1984), the court stated that “aggrieved” parties in zoning disputes must have a “personal stake” in the outcome of the case and that the owner of affected property always has “personal stake.”
144 See id.
submit an annual implementation report to the Board outlining the implementation of the local program.\textsuperscript{145} This is opposed by many localities that claim it will require the needless expenditure of local funds and staff time for preparation.\textsuperscript{146}

X. **Recommendations**

A. *Adopt the Proposed Regulatory Revisions*

While the localities make a compelling argument for retaining flexibility with regard to the 100-foot buffer, the evidence suggesting that this flexibility will be abused is simply too strong. The proposed regulations make a small but important step forward. For too long, CBLAD has not had an avenue by which to effectively monitor local implementation. It is vitally important that CBLAD learn from the errors uncovered in Portsmouth and reasserts at least a minimal level of control over the localities. The proposed regulatory changes will give it the tools it needs to do just that.

B. *Be Guided by Science*

Although CBLAD used scientific data to formulate its 100 foot buffer policy,\textsuperscript{147} there is still a great deal of confusion and disagreement about which methods are the most effective at reducing aggregate runoff of nutrients into the Bay. To address this problem, the DEQ should conduct an in-depth study of the effectiveness of various pollution mitigation measures. Localities argue that mitigation measures such as BMPs or river rehabilitation projects are just as beneficial as the buffers. In truth there appears to be little hard evidence to turn to in comparing and contrasting these methods with the buffer program. A comprehensive study would allow CBLAD and the localities to set regulations secure in the knowledge that the method or blend of methods they choose will have the results they expect.

C. *Provide CBLAD with the Funding It Needs to Do the Job*


\textsuperscript{146} See Kathy James Webb, Remarks at Public Hearing on Regulatory Revisions (Nov. 17, 2000) (transcript available from CBLAD).

\textsuperscript{147} See Telephone Interview with Laura McKay, Virginia Coastal Program, Virginia Dep’t of Env’tl. Quality (Oct. 5, 2000).
The reductions in CBLAD’s funding have made it more difficult for CBLAD to act as a partner to localities. In the early years of the program, CBLAD grants gave localities much needed help with planning and implementation, making them more amenable to stick to enforcement of the regulations. As CBLAD has been forced to become more of a strict regulatory enforcement agency an atmosphere of skepticism and distrust has filled the void. Until the Board and CBLAD can offer some sort of carrot to go with the stick, this relationship will not be the kind of cooperative partnership envisioned by the legislation. Furthermore, a more capable CBLAD would be able to grant localities more flexibility, secure in the knowledge that abuses would be detected.

D. Expand Board’s Authority to Enforce the CBPA Through Legal Action

As currently constituted, the Board’s authority to institute legal and administrative actions to ensure compliance by local governing bodies is little more than a hollow threat. Localities have little or no fear that they may be held accountable in court. This only makes them bolder in their defiance of the regulations. Another option is granting CBLAD the right to institute legal or administrative action directly against developers or property owners whose actions are flagrantly in violation of their local ordinances. This would be a drastic measure and in order to minimize the conflicts with local authorities it would be important that the standard of review be heightened as in a criminal case.

XI. A NEW DIRECTION FOR ENFORCEMENT

The recommendations above, if implemented, would help make the CBPA a more effective statute. However, the problems that plague the statute are rooted in its very core. Placing essentially unfettered enforcement authority into the hands a large number of localities that vary greatly from one another in terms of structure and resources almost guarantees the types of problems that have been encountered. If Virginia is truly committed to preserving the Bay for future generations to enjoy, it must act decisively to centralize power and achieve some measure of uniformity in the implementation of the CBPA. Though many in the Commonwealth would loathe admitting it, the federal government might have just the plan for doing this.

A. The Federal Model

The cooperative partnership scheme employed by the CBPA is not dissimilar in structure from many federal environmental statutes. One of the most common elements of the statutory scheme for federal environmental statutes is the delegation of enforcement authority. These federal statutes, which include, among others, the Clean Air Act ("CAA"), the Clean Water Act ("CWA"), the Safe Drinking Water Act, and the federal Resource Conservation and Recovery Act ("RCRA"), allow the EPA to delegate enforcement authority to the states on the condition that the state programs meet certain minimum standards. The state then operates its program in lieu of the federal program. This is meant to utilize the state's increased understanding of local conditions (as well as the state's resources) and the state's flexibility to adopt creative approaches and solutions to environmental problems.

This does not mean that the EPA has no role in enforcement. The EPA supervises the states to ensure that their programs remain consistent with federal standards, thereby creating some measure of national consistency. Furthermore, if for some reason a state fails to take action in response to a violation of the law, or the state's reaction is inadequate, the EPA retains the authority to institute its own enforcement actions against the violator. When the EPA exercises this authority it is called "overfiling."

As a matter of policy, the EPA does not overfile when a state has taken timely and appropriate action. Its policy calls for overfiling if any fines levied by the state are deemed inadequate, settlement conditions are

153 Id. § 6921.
154 See Dittman, supra note 149.
155 See id. at 377.
156 See id.
157 See id.
158 See id.
insufficient to alleviate "imminent and substantial endangerment to health or the environment," the state failed to act after having been notified of the problem, or simply that the EPA believes there are issues which still must be corrected. While this type of discretion could open the door to numerous interventions, this is somewhat misleading. In reality, overfilings are "very rare for comity and resource reasons." A state-by-state survey conducted by the Environmental Council of the States for 1992 showed the number of cases declining from a high of three-tenths of a percent in the early 1990s to less than one-tenth of one percent between 1995 and 1996. According to Tom Sitz, an attorney with EPA's Office of Enforcement, Compliance, and Environmental Justice for Region 8, the downward trend continues today.

B. The Legal Landscape

Over the last twenty-one years, a series of cases have addressed the legal issues surrounding the practice of overfiling, providing significant food for thought for policy makers and legislators considering the usefulness of the federal model. Out of these cases have risen two questions that must be answered before any discussion on the topic can continue. The first question is what does the statute authorize? As one of the cases in the line demonstrates, the EPA should ensure the legislation actually authorizes overfiling before filing. The second question is whether the practice of overfiling might be barred by the principle of res judicata.

1. What Does the Statue Authorize?

For many years, nobody questioned the source of the EPA's authority to overfile, but that changed with the case of Harmon Industries, Inc. v Browner. In analyzing whether the RCRA truly authorized

---

161 See Dittman, supra note 149, at 380.
162 See id. (quoting e-mail from Josh Secunda, Senior Enforcement Counsel, Office of Environmental Stewardship, EPA's New England Region, to author (Nov. 8, 1999) (on file with author)).
164 See id.
165 See Harmon Indus., Inc. v. Browner, 191 F.3d 894, 902-04 (8th Cir. 1999).
166 See id. at 899-900.
overfiling, the court focused on language in the statute stating that a state's program operates "in lieu of" the federal government's hazardous waste program,167 and "[a]ny action taken by a State under a hazardous waste program authorized under [the RCRA] [has] the same force and effect as action taken by the [EPA] under this subchapter."168 The court interpreted this language as a clear indication that once the EPA certified a state program as meeting its standards, Congress intended for the EPA to cede all enforcement authority growing out of the Act to the state, until such time that the EPA rescinded that authority based upon a finding that:

1. The state program is not equivalent to the federal program;
2. The state program is not consistent with federal or state programs in other states; or
3. The state program is failing to provide adequate enforcement of compliance in accordance with the requirements of federal law.169

This strict reading of the language only allows the EPA to file against individual violators in states in which the state government does not have enforcement authority. The EPA's response to this interpretation was that its overfiling authority was clearly laid out in section 6928 of the RCRA, which states:

(1) Except as provided in paragraph (2), whenever on the basis of any information the [EPA] determines that any person has violated or is in violation of any requirement of this subchapter, the [EPA] may issue an order assessing a civil penalty for any past or current violation, requiring compliance immediately or within a specified time period, or both, or the [EPA] may commence a civil action in the United States district court in the district in which the violation occurred for appropriate relief, including a temporary or permanent injunction.
(2) In the case of a violation of any requirement of [the RCRA] where such violation occurs in a State which is authorized to carry out a hazardous waste program under

168 Id. § 6926(d).
169 See id. § 6926(b).
section 6926 of this title, the [EPA] shall give notice to the State in which such violation has occurred prior to issuing an order or commencing a civil action under this section. 170

The EPA interpreted this language as allowing it to initiate action against an alleged violator within an authorized state as long as it first notified the state in writing. 171 The court dismissed this interpretation, stating that it undermined the primary enforcement role of the state. 172 Instead, the court said that sections 6928(a)(1) and (2) should be read within the framework of the entire Act, and when interpreted within this context the language manifests Congress’ intent to give the EPA a secondary enforcement right, to be exercised if the state had failed to initiate any enforcement action. 173

The lesson for the prospective drafters of the new enforcement provisions is quite simple: be specific. The ambiguous language of the RCRA allowed the court the find an interpretation that was consistent with its stance that overfiling is not good policy. Any legislation drafted to authorize overfiling must be clear on where the authorities of the state and the localities begin and end, respectively. This means specifically defining the circumstances under which the CBPA might overfile a locality.

2. Is Overfiling Barred by Res Judicata?

The common law doctrine of res judicata dictates that a “final judgment on the merits of a claim precludes the parties from further litigation based on that claim. The doctrine protects litigants from multiple law suits, conserves judicial resources, and fosters certainty and reliance in legal relationships.” 174 As currently written, the CBPA allows localities to use fines and other penalties to penalize violations of ordinances relating to the Act. 175 If a scheme following the federal model were to be adopted, violators would undoubtedly have occasion to raise res judicata as a defense, claiming that CBLAD’s claims have been

170 Id. §§ 6928(a)(1)-(2)
171 See Harmon, 191 F.3d at 899.
172 See id.
173 See id.
precluded by local enforcement actions. The following cases help flesh out when this defense might be successful.

a. **United States v. ITT Rayonier, Inc.**

The question of whether overfiling might be in conflict with the principle of res judicata was first explored by the Ninth Circuit in *United States v. ITT Rayonier, Inc.* In its deliberations, the court noted that res judicata may not be applicable when there are countervailing statutory policies that would be thwarted. However, the court rejected this argument in the context of overfiling, stating it could “not perceive how the need for uniformity under [the CWA] is best promoted by conflicting judicial constructions and repeated agency prosecutions.” While this direct condemnation of the practice has not been widely repeated, there does seem to be a consensus supporting the court’s finding that overfiling does not abrogate res judicata on policy grounds.

In its holding, the court declared that while the CWA expressly authorized the EPA to overfile, the principle of res judicata precluded the EPA from beginning any enforcement action after the state enforcement action had reached a final judgment. Prior to a final judgment on a state action, the EPA could still bring its own enforcement action in federal

---

176 627 F.2d 996 (9th Cir. 1980) (deciding whether a judgment by the Washington Supreme Court in a state enforcement action precluded an EPA enforcement action that was still on going).

177 Id. at 1001-02. Regarding abrogation, the court stated:

> In employment discrimination suits under Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e et seq., several circuits have refused to give collateral estoppel effect to prior decisions by state agencies under state law. See, e.g., Batiste v. Fumco Constr. Corp., 503 F.2d 447, 450 (7th Cir. 1974), *cert. denied*, 420 U.S. 928, 95 S.Ct. 1127, 43 L.Ed.2d 399 (1975); Cooper v. Philip Morris, Inc., 464 F.2d 9 (6th Cir. 1972); Voutsis v. Union Carbide Corp., 452 F.2d 889, 894 (2nd Cir. 1971), *cert. denied*, 406 U.S. 918, 92 S.Ct. 1768, 32 L.Ed.2d 117 (1972). See also, Gunther v. Iowa State Men's Reformatory, 612 F.2d 1079 (8th Cir. 1980) (refusing to accord collateral estoppel effect to prior state court determination). *But see*, Sinicropi v. Nassau County, 601 F.2d 60 (2d Cir.), *cert. denied*, 444 U.S. 983, 100 S.Ct. 488, 62 L.Ed.2d 411 (1979) (Title VII suit barred when issues decided adversely to plaintiff in prior state proceeding). These courts have found a countervailing public policy that a plaintiff is not to be deprived of a federal forum to adjudicate employment discrimination claims. Unlike Title VII, FWPCA does not provide a mandatory period of deference to state proceedings.

Id. at 1002.
court, but once a final judgment had been reached, the EPA's only option was to withdraw the state's enforcement authority.\textsuperscript{178} Of course, the preclusive effect of res judicata cuts both ways. In \textit{ITT Rayonier}, if the EPA had pressed its case and arrived at final judgment before the state, the state case would have been barred under the same principles.

b. \textit{Harmon Industries, Inc. v Browner}

In \textit{Harmon}, the Eighth Circuit considered whether a state court consent decree barred an EPA enforcement action under the principles of res judicata.\textsuperscript{179} The \textit{Harmon} court's analysis began with the Full Faith and Credit Clause found in the United States Constitution, which "require[s] federal courts to give preclusive effect to the judgments of state courts whenever the state court from which the judgment emerged would give such an effect."\textsuperscript{180} This required that the court analyze whether Missouri law would extend protections of res judicata to a consent decree.\textsuperscript{181} This holding sent a signal that the war over whether res judicata precludes overfiling would be fought in small battles, with different remedies being tested against different states' concepts of res judicata.

c. \textit{CLEAN v. PSF}

In \textit{Citizens Legal Environmental Action Network, Inc. (CLEAN) v. Premium Standard Farms, Inc. (PSF)},\textsuperscript{182} the court considered, in part, whether claims brought in a citizen suit filed by CLEAN under the authority of the CWA and the CAA were precluded by a state enforcement action on the grounds that the claims were the same. The \textit{CLEAN} court analyzed this issue by comparing the counts of the claims side-by-side to see if they were truly identical.\textsuperscript{183} This case is important because it highlights a very plausible scenario. Under many environmental protection laws each day of violation is considered a separate offense.\textsuperscript{184}

\textsuperscript{178} See \textit{id.} at 1002.

\textsuperscript{179} Harmon Indus., Inc. v. Browner, 191 F.3d 894, 902 (8th Cir. 1999).

\textsuperscript{180} \textit{id.}

\textsuperscript{181} See \textit{id.}

\textsuperscript{182} No. 97-6073-CV-SJ-6, 2000 WL 220464 (W.D. Mo. Feb. 23, 2000).

\textsuperscript{183} 2000 WL 220464 at *5-7.

\textsuperscript{184} See Jerry Organ, \textit{Environmental Federalism Part II: The Impact of Harmon, Smithfield, and CLEAN on Overfiling under RCRA, the CWA, and the CAA}, 30 E.L.R. 10732, 10752 (2000).
Consequently it is possible if not likely that a state’s complaint will not cover every conceivable violation, leaving the door open for others to assert claims that would not be barred by res judicata because they are different claims.  

**d. State Water Control Board v. Smithfield Foods**

In *State Water Control Board v. Smithfield Foods* the Virginia Supreme Court considered Smithfield’s contention that an enforcement action brought by the State Water Control Board was barred by the doctrine of res judicata because Smithfield had already been found liable for violations of its permit in an action brought by the EPA. In Virginia, to establish a defense of res judicata the proponent must demonstrate the “identity of the remedies sought, identity of the cause of action, identity of parties, and identity of the quality of the persons for or against whom the claim is made.”

By an agreement between the parties made before the trial court, the only question at issue in this case was the identity of the parties. Though the Board was not a party to the prior action, the Virginia Supreme Court has held that the doctrine of privity extends the preclusive effect of a prior judgment to any potential party that was in privity with a party in the prior proceeding. While there is no fixed definition of privity with regard to res judicata, the key to the concept for purposes of res judicata is that the interests of the parties are so identical in terms of the legal right being represented. In the case at hand, the court considered whether the interests of the EPA and those of the Board were so identical that the legal right represented by the EPA in its prior action was the same as the Board sought to assert in the present action.

The Smithfield court recognized that the Board and the EPA drew their enforcement authority from different sources (the Board from Virginia statutes, the EPA from the CWA). The salient fact in the eyes of

---

185 See id.
186 542 S.E.2d 766 (Va. 2001).
187 See id.
188 See id. at 769.
189 See id. The court made a point of noting that it distinguishes between the identity of the legal interests advanced and the identity of the cause of action. It is only because the parties agreed to limit the issues that the court did not address this issue in its opinion. See id.
190 Smith v. Ware, 421 S.E.2d 444 (Va. 1992).
191 Smithfield Foods, 542 S.E.2d at 769.
the court, however, was that the permit issued to Smithfield represented
the interests of both authorities.192 This permit indicated that they
"share[d] more than an abstract interest in enforcement."193 With this in
mind, the court held that the state and the EPA were indeed in privity and
the Board’s case was therefore precluded by res judicata.194

e. Lessons Learned

The cases discussed above highlight some important aspects of the
legal landscape surrounding res judicata and the practice of overfiling. It
is clear that if the Virginia legislature where to adopt the federal model of
enforcement for the CBPA, CBLAD’s ability to overfile would have some
limitations. Yet, it also seems clear that these limitations are manageable.
As long as CBLAD diligently assessed the facts of each individual
situation before filing it ought to be able to identify problems of privity
and identity of claims and predict when claims are likely to be precluded.
There does not appear to be a legal barrier proscribing the federal model
as a viable alternative to the current system.

4. Problems With Overfiling

The process is not without its flaws or its critics. The EPA’s
exercise of its overfiling authority usually indicates a rift between the EPA
and the state over some technical or philosophical issue relating to the
enforcement, and if there was not one before the EPA overfiles, it is bound
to create one. The fallout from this type of rift lands squarely on the
regulated community, which can be caught in the middle of this regulatory
tug-of-war not knowing with whom to deal with. In Harmon,195 the Eight
Circuit commented that it is unreasonable to subject an alleged violator to
two separate enforcement actions that might reach contradictory results.
“Such a potential schism runs afoul of the principals of comity and
federalism so clearly embedded in the text and history of the RCRA.”196 It
might also run afoul of the cooperative enforcement partnership created by
the CBPA. Overly aggressive use of overfiling authority by CBLAD

192 See id. at 770.
193 See id. (quoting United States v. ITT Rayonier, Inc., 627 F.2d 996, 1003 (9th Cir.
1980)).
194 See id. at 771.
195 191 F.3d 894 (8th Cir. 1999).
196 Id. at 902.
could create a great deal of tension in its relationships with localities, making it less likely that localities would take advantage of other services provided by CBLAD under the authority of the CBPA, such as technical advice.

The Harmon court also stated its belief that the overlapping enforcement powers of an overfiling scheme “would predictably result in confusion, inefficiency, duplicative agency expenditures and would thwart the public policy of early and non-judicial dispute resolution.”197 If this prediction were correct, amending the CBPA to follow the federal model could create problems which might offset the benefits of innovative thinking and local knowledge that the cooperative partnership was designed to tap.

Finally, the lessons found in the case history on this topic could create some troubling incentives on both sides of the equation. The final judgment standard outlined in ITT Rayonier creates a race to final judgment that could be very destructive. Concern over the possibility of losing the option of suit could cause the EPA to pursue claims without much forethought in order to avoid preclusion. On the other side, counsel attempting to forestall EPA overfilings may be best served by encouraging local enforcement officers to “throw the book at them” and charge them with everything possible so that there are no new claims available. This type of illogical incentive only limits the willingness and ability of local officials to utilize their flexibility in finding innovative methods of solving problems.

5. The Benefits of Overfiling

It is important to remember that the CBPA places enforcement mechanisms in the hands of the localities to take advantage of their local knowledge and flexibility and to make compliance easier for effected landowners. However, the legislature did not intend for the localities to develop their own Bay protection schemes independent of the Act. It is certainly reasonable that CBLAB and CBLAD expect the localities to administer and enforce CBPA related ordinances in a manner consistent with other localities and with the law itself. Overfiling would allow it to enforce this consistency. It would also benefit the regulated population by limiting confusion caused by dissimilarities between the individual programs administered by eighty-four different localities. This type of consistency would be especially beneficial to businesspersons such as

197 See id.
developers, contractors, and homebuilders whose businesses span several different localities, necessitating the spending of time and money to learn the ins and outs of multiple administrative mechanisms.

An additional benefit of overfiling is that it provides a mechanism by which localities and regulated persons or entities can be effectively educated as to how the law is properly interpreted and applied. One of the major complaints of CBLAD and people in the environmental community is that the language of the CBPA is very gray, allowing localities to adopt interpretations very much at odds with CBLAD’s interpretation and the original intent of the legislature. Although the pending amendments to the CBPA attempt to eliminate some of this gray language, it would seem unlikely that CBLAD and the localities in question would agree to changes in the enforcement scheme as long as there is a financial incentive for localities to find justifications for lax enforcement. Examples like Portsmouth indicate that competition for development dollars may be spurring a race to the bottom among localities as they try to promote themselves as development friendly. The specter of having CBLAD overfile would provide localities with a real incentive make sure their programs reflect the goals and policies of the CBPA and to make sure those goals and policies are the foremost consideration when administering related ordinances.  

The localities themselves might also benefit from a revised enforcement scheme. Under the current scheme, when serious violators are uncovered, it’s the locality that must face the music. CBLAD cannot address the situation directly with the violator so they must go after the locality. These problems almost never make it to court but they do require significant time and effort on the part of their staffs, which translates into money wasted on infighting. The federal model allows CBLAD to bypass the locality and deal directly with the violator, which in some instances may save the locality a tremendous amount of money. Also, the localities can use the threat of CBLAD intervention, and even the race to judgment created by ITT Rayonier, as sources of leverage in their negotiations with violators.

Finally, the complaints of those who oppose overfiling are the same complaints that have been voiced since the inception of the concept, and there is little evidence to suggest that any of these dire predictions have come to pass. As was mentioned above, very few overfilings actually take place and those that do, occur only after the EPA has given

---

198 This is not to say that all or most of the localities do not attempt to enforce the CBPA in good faith. It is quite clear that many if not most of the effected localities have worked hard to meet or surpass CBLAD’s expectations.
significant warning to all parties that action is on the horizon if their conduct is not altered. Given CBLAD’s unwillingness to pull the trigger on suits against localities, it is unlikely that it would exercise its overfiling authority unless it was the only viable option. The fact the CBLAD has only once taken a locality to court indicates that it has consistently erred on the side of caution and accommodation in its dealings with the localities. CBLAD can be counted on to act responsible in the use of this authority. If only those regulated by the CBPA were as reasonable, there would be no need for this discussion.

6. Citizen Suits

Besides allowing overfiling, the federal model differs from the scheme laid out in the CBPA in that it makes provision for citizen suits. This is a concept that has generated a great deal of discussion and controversy on the federal level. Over the last twenty years the Supreme Court has gradually moved to limit the citizen suit by making it more difficult to gain standing.\(^{199}\) Today, in federal court the plaintiff has the burden of providing evidence to prove standing.\(^{200}\) This evidence is evaluated using a three-part test for Article III standing. The evidence must show the plaintiff has standing because there is “injury in fact, adequate causation, and a likelihood of redressability.”\(^{201}\) However, gaining standing within Virginia is a different matter. If the legislature chose to adopt a citizen suit provision it would be within its power to abrogate normal limitations on standing and create an entirely new structure.

A well thought out citizen suit provision could be an excellent enforcement provision in this situation. It is important that citizen suits be considered in the proper context. They are meant to be a tool for enforcement, not a penalty. The EPA, CBLAD, and the localities are in similar positions. They are charged with enforcing environmental provisions across areas far too large to effectively patrol no matter how many local officials are co-opted into enforcement. The incident in Portsmouth is the perfect example. Until Save Our Buffers invited CBLAD to inspect certain pieces of property, CBLAD was completely unaware that Portsmouth had ceased requiring developers to comply with


\(^{200}\) See id. at 105.

\(^{201}\) See id.
the 100-foot buffers. Since that notification CBLAD and Portsmouth have entered into negotiations to bring the city into compliance.

Many property rights advocates and government officials have expressed concern that citizen suit provisions would flood the courts with frivolous suits, forcing individuals and localities to bankrupt themselves with legal bills. However, there is little evidence to suggest that legalizing such suits would open the floodgates.

There are several steps that could be taken in order to limit the number and kinds of citizen suits filed. First, the legislature could adopt very specific restrictions on standing, limiting it to persons who own adjacent property or those living nearby who can prove damages. Second, the legislature could craft a restrictive notice requirement to ensure that the locality had ample opportunity to investigate the situation and preempt the suit with its own enforcement action if it so chooses. Third, the legislature could strictly limit the remedies available to ensure that people are not motivated by greed. These restrictions, in combination with existing barriers such as the high cost of litigation, would eliminate many of the suits that worry opponents without nullifying the value of the citizen suits as an enforcement tool.

XI. CONCLUSION

In a January 9, 2000 article, the Virginian-Pilot & Ledger-Star described the CBPA as having "revolutionized land-use management in eastern Virginia by putting it under state oversight more than 10 years ago." While this may be so, it would appear that since then the revolution has stagnated. The momentum begun by the signing of the Chesapeake Bay Agreement and sustained by the passage of the CBPA has now faded and the difficulties of reversing years of careless exploitation of the Bay are now coming into focus. This has left the Chesapeake Bay Preservation Act at a crossroads. If all of the interested parties can work together to correct the enumerated deficiencies the CBPA can become the dynamic, proactive, and cooperative program it was envisioned to be. If, however, the legislature does not act soon to change

---

202 See Harper, supra note 91.
203 See Clower Interview, supra note 97.
204 See McCrory, supra note 199, at 90-92. The CWA requires sixty days notice before filing. See id.
205 See id.
the Act's enforcement scheme and provide the Board and CBLAD with the proper support, over time the CBPA will become increasingly hollow and insignificant.