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THE CHESAPEAKE BAY PRESERVATION ACT: THE PROBLEM WITH STATE LAND REGULATION OF INTERSTATE RESOURCES

The Chesapeake Bay is one of America's most beautiful environments and is the largest estuarine system in North America.¹ In its immense natural productive capacity, the Bay is unparalleled among the world's estuaries.² Each year the Bay produces half the blue crabs and soft shell clams consumed in the United States and accounts for more than one billion dollars in economic activity.³ The Bay area is also a major habitat for numerous species of wildlife and serves as a winter home for various species of birds that migrate annually from Canada.⁴ In the past few decades, however, the Bay has experienced significant environmental decline, illustrated by an eighty-five percent decrease in aquatic plants since 1950 and ever decreasing catches of rockfish, oysters and crabs.⁵

In April 1988, the Virginia General Assembly passed the Chesapeake Bay Preservation Act,⁶ fulfilling part of its obligation under the 1987 Chesapeake Bay Agreement entered into with Maryland, Pennsylvania, the District of Columbia and the United States Environmental Protection Agency.⁷ The first part of this Note traces

1. Eichbaum, *The Chesapeake Bay: Major Research Program Leads to Innovative Implementation*, 14 ENVTL. L. REP. 10,237, 10,237-38 (1984).

2. Winegrad, *The Critical Areas Legislation: A Necessary Step to Restore the Chesapeake Bay*, 17.1 U. BALT. L.F. 3 (1986). In fact, only the Atlantic and Pacific Oceans exceed the Bay's productivity. *Id.*

3. *Id.*; Eichbaum, *supra* note 1, at 10,238.

4. Eichbaum, *supra* note 1, at 10,238; Warner & Kindt, *Land-Based Pollution and the Chesapeake Bay*, 42 WASH. & LEE L. REV. 1099, 1100 (1985). Warner and Kindt state, "The success or failure of Chesapeake initiatives will have profound impacts upon the future of environmental efforts in the United States to curb nonpoint source pollution and to protect the ecologically sensitive coastal areas." *Id.* at 1130. Nonpoint source pollution is water pollution, primarily runoff from land development and agricultural activities, that is not emitted from a point source, such as a factory pipe or sewer.

5. Winegrad, *supra* note 2, at 3; see Warner & Kindt, *supra* note 4, at 1110-12.

6. VA. CODE ANN. §§ 10.1-2100 to -2115 (1989).

7. 1987 Chesapeake Bay Agreement of the Chesapeake Executive Council (Dec. 15, 1987) (available from the Council on the Environment, Richmond, Va.) [hereinafter 1987 Agreement]. The Agreement calls for the State of Maryland, the Commonwealths of Virginia and Pennsylvania, the District of Columbia and the United States Environmental Protection

the history of environmental protection initiatives in the United States, the development of regional land use protection measures and the development of the strategy toward the Chesapeake Bay that has produced the present Bay protection schemes. The second part examines the Chesapeake Bay Preservation Act as a system of regional environmental land use regulation, comparing it with Maryland's Chesapeake Bay Critical Area Protection Program.⁸ This analysis illustrates the inadequacy of the Preservation Act as a means of regional environmental control. Finally, part three of the Note addresses special problems of environmental protection for interstate resources and recommends an alternative approach to environmental regulation of land use to protect the Bay that may serve as a model for the protection of other environmental resources.

HISTORICAL PERSPECTIVES

Concern about the environment is not new. President Theodore Roosevelt recognized the importance of nature conservation and held a White House conference for the states on the subject in 1908.⁹ After the Industrial Revolution and its alteration of the environment and use of natural resources as fuel, people began to recognize the need to preserve the environment from haphazard and ill-considered use.¹⁰ Legislative response to this awareness, however, was slow. During the first half of this century, the federal and state governments made few substantive advances in environmental protection.¹¹

Agency to begin comprehensive environmental protection measures to improve the water quality and protect the wildlife habitats of the Chesapeake Bay. The Agreement states, "Recognizing that the Chesapeake Bay's importance transcends regional boundaries, we commit to managing the Chesapeake Bay as an integrated ecosystem and pledge our best efforts to achieve the goals in this Agreement." *Id.* at 1.

8. MD. NAT. RES. CODE ANN. § 8-1801 to -1816 (Supp. 1988).

9. See MODEL LAND DEV. CODE art. 8 commentary at 291 (1975). President Roosevelt's conservation conference prompted many states to create conservation programs. *Id.*

10. W. RODGERS, HANDBOOK ON ENVIRONMENTAL LAW § 2.1 (1977) [hereinafter W. RODGERS, HANDBOOK]. Professor Rodgers says that "[f]rom nuisance cases alone, [o]ne could easily write an informative account of the development of the Industrial Revolution." *Id.* He adds that "[n]uisance actions have challenged virtually every major industrial and municipal activity that today is the subject of comprehensive environmental regulation." W. RODGERS, ENVIRONMENTAL LAW: AIR AND WATER § 1.1A (1986).

11. W. RODGERS, HANDBOOK, *supra* note 10, § 1.1.

Congress' first major step toward environmental protection produced the National Environmental Policy Act of 1969 (NEPA).¹² This legislation requires all federal agencies to consider the environmental impact of their proposed actions and, in some instances, to prepare a detailed statement describing the impact and possible alternative measures.¹³ Many states passed laws similar to NEPA, and, as a result, the requirement of environmental impact statements became widespread.¹⁴ The primary goal of NEPA was to bring environmental factors into the decisionmaking process.¹⁵ Although the Supreme Court has not ruled definitively on whether a court may engage in substantive review of an environmental impact statement under NEPA, language in *Strycker's Bay Neighborhood Council, Inc. v. Karlen*¹⁶ indicates that the Court would find substantive review unavailable under NEPA.¹⁷ Although

12. 42 U.S.C. §§ 4321-4370 (1982 & Supp. V 1987); see W. RODGERS, HANDBOOK, *supra* note 10, § 7.1.

13. 42 U.S.C. § 4332 (1982 & Supp. V 1987). Specifically, NEPA states:

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act, and (2) all agencies of the Federal Government shall . . .

. . . .

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official

Id.

14. Palmer, *Environmentally Based Land Use Planning and Regulation*, 2 PACE ENVTL. L. REV. 25, 30-33 (1984).

15. *Id.* at 29. NEPA met strong resistance from many federal agencies, and the resulting court cases interpreting the statute are numerous. See generally W. RODGERS, HANDBOOK, *supra* note 10, § 7.6-.10 (a complete discussion of recurrent issues in NEPA litigation). Palmer criticizes some NEPA-type statutes that allow a contractor working on the action that triggers the impact statement to prepare the environmental impact statement rather than the government agency sponsoring the project. Because the contractor has an interest in the impact statement's acceptance and the project's proceeding, Palmer argues that a conflict of interest exists. Criticism of NEPA at the federal level points to the lack of a supervising agency that could approve or disapprove an environmental impact statement leaving only the federal courts to supervise the process. Palmer, *supra* note 14, at 29-31.

16. 444 U.S. 223 (1980).

17. *Id.* at 227. The Court stated that "once an agency has made a decision subject to NEPA's procedural requirements, the only role for a court is to insure that the agency has considered the environmental consequences." *Id.* (emphasis added). The Court's language indicates that NEPA provides a process by which environmental concerns are brought administratively into the decisionmaking process, but judicial review under NEPA is not avail-

NEPA requires consideration of environmental factors, it does not require that action be taken to minimize adverse environmental impact. Congress only began to compel broad environmental protection measures on a national level with the passage of the Clean Air Act¹⁸ in 1970 and the Federal Water Pollution Control Act of 1972.¹⁹

State and local governments have the power to implement environmental protection measures as well, and in some cases these measures have proven innovative and successful.²⁰ Local governments, however, often face problems overcoming traditional notions of property rights and balancing the financial benefits of development with environmental considerations.²¹ In some instances, the question arises whether local governments in a given state have the power to zone or regulate for environmental purposes.²² Furthermore, localities often cannot adequately address the most serious environmental problems because such problems stretch beyond their jurisdictional boundaries.²³ Some of the same problems that have plagued local governments have burdened states. At the state level, however, the question of the power to regulate is an issue

able to establish that a policy choice made in spite of adverse environmental consequences was wrong. *See id.*

18. 42 U.S.C. §§ 7401-7642 (1982 & Supp. V 1987). The Clean Air Act established regional air quality standards throughout the nation in order to regulate and control air pollution. *Id.* § 7401.

19. 33 U.S.C. §§ 1251-1387 (1982 & Supp. V 1987). The Clean Water Act sets technology forcing standards for effluent discharge into the nation's waters. The Act uses a system of permits to insure that polluters use a required level of technology and that they update that technology to reduce by a predetermined date the pollution emitted. *Id.* §§ 1311-1317, 1342.

20. *See* MODEL LAND DEV. CODE art. 7 commentary at 249-52 (1975) (discussing actions by various states to regulate land use at the state level). *See generally* Palmer, *supra* note 14, at 34-63 (discussing innovative environmental planning at the local level).

21. *See* MODEL LAND DEV. CODE art. 7 commentary at 249 (1975).

22. *See* VA. CODE ANN. § 10.1-2108 (1989) (expressly granting authority to "[c]ounties, cities, and towns . . . to exercise their police and zoning powers to protect the quality of state waters consistent with . . . this chapter"); *see also* *Land Use Initiatives For Tidewater Virginia: The Next Step in Protecting the Bay* 11, The Findings and Recommendations of the Chesapeake Bay Land Use Roundtable (Nov. 1987) [hereinafter *Land Use Initiatives*] (available from the Council on the Environment, Richmond, Va.) (recognizing the need to grant additional powers to local government to zone for environmental purposes).

23. MODEL LAND DEV. CODE art. 7 commentary at 248 (citing *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926)).

only to the extent that the constitutionality of a regulatory taking is involved.²⁴

As recognition of the scope of environmental problems has increased, state and local governments have developed more responsive solutions.²⁵ One such innovation is the development of regional plans and regional land use regulation to respond to the pressures of development and population expansions that threaten to destroy natural resources and environmental quality within a large area.²⁶ The advantage of a regionally based land use regulation plan is that it removes enough power over land use decisions from local control to protect the region, but leaves much of the plan's actual implementation in the hands of local government.²⁷

Regional Land Use Control

The history of land use control in the United States demonstrates a tendency to leave such control in the hands of local jurisdictions that do not necessarily act using well-developed principles of land use planning.²⁸ This distribution of control gave little consideration to local land use's impact on regional resources shared

24. See generally Penn Cent. Trans. Co. v. New York City, 438 U.S. 104 (1978). For an exception to the general rule that states do have the power to zone and regulate land use, see Note, *Constitutional Barriers to Statewide Land Use Regulation in Georgia: Do They Still Exist?*, 3 GA. ST. U.L. REV. 249 (1987) [hereinafter Note, *Constitutional Barriers*]. A complete discussion of the takings issue in conjunction with the Chesapeake Bay Preservation Act is beyond the scope of this Note. However, in *Commonwealth ex rel. State Water Control Bd. v. County Util. Corp.*, 223 Va. 534, 290 S.E.2d 867 (1982), the Virginia Supreme Court cited with approval the United States Supreme Court ruling in *Penn Central* that no governmental taking may occur without interference "with all reasonable beneficial uses of the property." *Id.* at 542, 290 S.E.2d at 872. For a complete discussion of the takings issue with respect to Chesapeake regulation, see Liss & Epstein, *The Chesapeake Bay Critical Area Commission Regulations: Process of Enactment and Effect on Private Property Interests*, 16 U. BALT. L. REV. 54, 66-80 (1986), and Note, *The Fifth Amendment's Taking Clause: New Twists to an Evolving Doctrine*, 18.2 U. BALT. L.F. 22 (1988) (concluding that the Maryland legislation does not violate constitutional prohibitions against governmental takings without just compensation). Given that the Maryland Chesapeake Bay Critical Area Protection Program is more restrictive than Virginia's Chesapeake Bay Preservation Act, Virginia's legislation is probably also constitutional.

25. See *supra* note 20 and accompanying text.

26. See MODEL LAND DEV. CODE art. 7 commentary at 249-52; see also N. ROBINSON, ENVIRONMENTAL REGULATION OF REAL PROPERTY § 18.02 (1988) (a review of several major state efforts to regulate land use for environmental purposes).

27. See MODEL LAND DEV. CODE art. 7 commentary at 252-53.

28. See *id.* at 248.

by several jurisdictions.²⁹ In the past several decades, states have begun to recognize the need to take back some of this local land planning power in order to protect their citizens and the regional resources that were suffering.³⁰

Several states have combined a regional land use planning mechanism with environmental protection concerns in order to preserve regional environmental resources.³¹ Such schemes may be developed for large regions within a state, for statewide environmental preservation and for environmental resources shared by several states.³²

In 1978, Congress set aside the Pinelands National Reserve³³ and required New Jersey to develop a resource analysis of the region and a comprehensive plan for the region "to protect, preserve and enhance its land and water resources as a 'primary responsibility of the State of New Jersey and various local units of government.'"³⁴ The state legislature established the Pinelands Commission, which had responsibility for developing zoning and land use regulations for the region, and temporarily transferred all local zoning powers to the Commission.³⁵ Localities regained their powers of local control over land use when they conformed their comprehensive plans, zoning ordinances and development restrictions to the regulations that the Commission established.³⁶

The Adirondacks in New York provide another example of intra-state regional environmental control.³⁷ In response to developmental pressure caused by new roads and second home buyers in the area, Governor Rockefeller established the Temporary State Commission on the Future of the Adirondacks in 1968.³⁸ After two

29. N. ROBINSON, *supra* note 26, § 18.01.

30. See Note, *Constitutional Barriers*, *supra* note 24, at 251 (citing MODEL LAND DEV. CODE art. 7 commentary at 249-52).

31. See MODEL LAND DEV. CODE art. 7 commentary at 249-52; N. ROBINSON, *supra* note 26, § 18.02; Palmer, *supra* note 14, at 48.

32. See N. ROBINSON, *supra* note 26, § 18.01.

33. 16 U.S.C. § 471i(c) (1982).

34. Palmer, *supra* note 14, at 49 (quoting 16 U.S.C. § 471i(c)); see N. ROBINSON, *supra* note 26, § 18.04 (additional discussion of the Pinelands).

35. Palmer, *supra* note 14, at 49; see N. ROBINSON, *supra* note 26, § 18.04.

36. Palmer, *supra* note 14, at 49.

37. See N. ROBINSON, *supra* note 26, § 18.03.

38. *Id.*

years of study, including public hearings, the Commission recommended the establishment of a state agency to control development planning for private lands within the six million acre park.³⁹ The state created the Adirondack Park Agency and developed a master plan for the area that restricted population growth, but allowed for environmentally suitable development.⁴⁰ The New York legislature ratified the plan and Governor Rockefeller signed it into law, saying that regional land use planning was " 'a Number One environmental priority facing our nation and, with the signing of this bill, the Adirondack Park becomes the largest area in the country to come under comprehensive land use control.' " ⁴¹

Wisconsin, Florida and California have also instituted regional land use regulation. Wisconsin initiated state regulation to protect its water resources.⁴² Under the Wisconsin statute, the state now exercises control over land within 1000 feet of lakes and ponds, and within 300 feet of rivers and streams.⁴³ Florida began a major environmental land use control scheme with the Environmental Land and Water Management Act of 1972.⁴⁴ Based primarily on Tentative Draft 3 of article 7 of the Model Land Development Code, the land management system gave Florida control over areas of critical state concern and development projects of regional impact.⁴⁵ Voters in California chose regional environmental land use regulation by passing the Coastal Zone Initiative,⁴⁶ which granted control over land within 1000 yards of water to regional agencies.⁴⁷

A final example of regional environmental planning is the Tahoe Regional Planning Agency, which has control over the Lake Tahoe

39. *Id.*

40. *Id.*

41. *Id.* (quoting Farber, *Governor Signs Bill to Curb Adirondack Development*, N.Y. Times, May 23, 1973, at 22, col. 3).

42. WIS. STAT. ANN. § 144.26 (West 1989).

43. *Id.* § 59.971 (West 1988).

44. FLA. STAT. ANN. § 380.012-12 (West 1988).

45. Finnell, *Saving Paradise: The Florida Environmental Land and Water Management Act of 1972*, 1973 URB. L. ANN. 103, 114, 117.

46. See California Coastal Act of 1976, CAL. PUB. RES. CODE §§ 30000-30900 (West 1986 & Supp. 1989) (originally enacted as Coastal Zone Conservation Act of 1972, CAL. PUB. RES. CODE §§ 27000-27650).

47. *Id.* § 30103(a).

area.⁴⁸ In this interstate region,⁴⁹ the Agency has authority to identify environmental resources and problems, and to establish standards for land use to protect these resources.⁵⁰ The Agency also has the power to create regulations necessary to implement the standards it creates.⁵¹

These examples of regional, state and interstate land use regulation suggest that effective environmental regulation requires that the regulating governmental body have jurisdiction over the entire area affected by the natural resource. Yet opponents of regional land use control schemes argue that regional regulation removes decisionmaking authority from local governments and, in so doing, removes land use control farther from the individual landowner.⁵² If one accepts the proposition that local government provides the greatest *quantity* of democratic decisionmaking control to the local voter,⁵³ and that regional, state and federal control incrementally diminish that quantitative democratic control, then one might view regional land use control as essentially anti-democratic. With an issue of regional, state or interstate concern, however, the *quality* of democratic decisionmaking increases with each level of government.⁵⁴ For example, with a regional environmental resource such

48. N. ROBINSON, *supra* note 26, § 18.02. For a more complete discussion of the Lake Tahoe experience and other interstate environmental proposals, see *infra* notes 202-22 and accompanying text.

49. N. ROBINSON, *supra* note 26, § 18.02.

50. *Id.*

51. *Id.*

52. For ease of discussion, the term "regional regulation" is used to indicate any regulation exercised by government at levels above local government (*e.g.*, regional, state or interstate governing bodies).

53. The *quantity* of decisionmaking authority pertains to the value of a vote cast by a voter in the local jurisdiction. At the local level, a landowner's vote may be one of thousands. Quantitatively, however, that person's vote carries more weight on a given local issue than the same person's vote would carry at the state level.

54. When an issue is of regional, state or interstate concern, the scope of the issue by definition extends beyond local jurisdictions. Therefore, voters from the entire affected area should have an equal voice in the issue's debate and outcome. Consequently, when a regional issue is decided solely by one local jurisdiction, as has happened in the past with environmental resources, the *quality* of the decisionmaking is low because some affected voters, and the resources and expertise available to their representatives, have been excluded from participation in the outcome. Therefore, as the group of decisionmakers more accurately reflects all those affected by the issue, the *quality* of the decisionmaking increases.

as the Chesapeake Bay, local land use control may give local landowners great influence over land use policies and therefore significant quantitative decisionmaking control because their numbers as voters may be greater than their opposition. But the lack of relevant land use, scientific, or environmental information or expertise at the local level and the difficulty of balancing immediate land use concerns against long term environmental interests may severely impair the quality of the decisionmaking process at the local level.⁵⁵ On the other hand, if one accepts the proposition that the Bay is a resource of state or interstate value, then voters from the whole concerned region should have a voice in Bay policy. The opposition to the parochial interests of affected local landowners will thereby increase substantially, diminishing the landowners' control over their land; however, because the resource is of regional importance, any decrease in quantitative democracy should be offset by a corresponding increase in the quality of the decisionmaking.

Two additional benefits arise when the governmental regulatory body has jurisdiction over the whole resource: uniformity of approach and result for the preservation of the resource, and fairness to affected landowners. Under local land use control, even if one locality implements stringent environmental control, the value of that locality's efforts are diminished if other local jurisdictions do not implement equally stringent controls. Consequently, regional control provides a way to correct this disparity in effort and result for the benefit of the protected resource and all residents of the region.

Fairness to affected landowners also requires that the regulated region encompass the entire natural resource. No one doubts that to effect significant improvements in environmental quality, land use must be controlled to some extent. Clearly, therefore, some individual landowners will be restricted in the use of their land. Without regional control, local governments may implement whatever level of control they deem appropriate. A landowner in a jurisdiction with strict environmental regulation could suffer significant restrictions upon the use of his land, while his neighbor,

55. See generally Delogu, *Local Land Use Controls: An Idea Whose Time Has Passed*, 36 ME. L. REV. 261 (1984)(discussing the desirability of withdrawing land use control entirely from local governments).

whose land sits in a neighboring jurisdiction, may have only weak restrictions that do not limit her uses at all. Both landowners border the same regional resource, but one must sacrifice severely while the other barely at all. Basic concepts of fairness suggest that when a regional resource is involved, the regulated region should be large enough that all landowners who must sacrifice for the preservation of the resource share the burden of use restrictions as equitably as possible.

The Chesapeake Bay

The Chesapeake Bay is an environmental resource bounded by Virginia and Maryland, with Pennsylvania and the District of Columbia situated on the Susquehanna and Potomac Rivers respectively, both major tributaries that feed into the Bay. Concern about the Bay has developed over many years.⁵⁶ In the mid-1970s, United States Senator Charles Mathias of Maryland proposed funding for a comprehensive environmental study of the Bay.⁵⁷ The resulting Environmental Protection Agency (EPA) study took seven years to complete and produced a valuable body of new information regarding the water quality problems in the Bay and their causes.⁵⁸ During this period Virginia and Maryland recognized that preservation of the Bay required a cooperative approach. The two states established the Chesapeake Bay Commission in 1980.⁵⁹ The primary function of the Commission was to make recommendations to the state legislatures and promote uniformity of legislative activity.⁶⁰ When completed, the EPA study

56. See Eichbaum, *supra* note 1, at 10,237.

57. *Id.* at 10,239. See generally Warner & Kindt, *supra* note 4, at 1119-27 (a complete review of federal action with respect to the Chesapeake Bay).

58. See Eichbaum, *supra* note 1, at 10,237.

59. MD. NAT. RES. CODE ANN. § 8-302 (1983 & Supp. 1989); VA. CODE ANN. §§ 62.1-69.5 (1987). The statutes were amended in 1985 to include Pennsylvania in the Chesapeake Bay Commission. PA. STAT. ANN. tit. 32, § 820.11 (Purdon Supp. 1988).

60. See sources listed *supra* note 59.

produced five reports,⁶¹ the conclusions of which were discussed at a Chesapeake Bay Conference held in December 1983.⁶²

The EPA study confirmed earlier research conducted on the Bay environment.⁶³ These findings included an increased occurrence of algae blooms, significant decreases in submerged aquatic vegetation and significant decreases in the supply and reproduction of various varieties of shellfish.⁶⁴ The study found increases in the levels of nitrogen and phosphorus in the Bay.⁶⁵ Dissolved oxygen in the Bay had decreased substantially in certain areas, and high levels of toxic compounds were found at the Bay's bottom near Baltimore and Norfolk, the two main industrial centers on the Bay.⁶⁶ Perhaps the EPA study's most startling and enlightening finding was that a substantial amount of the high levels of nitrogen and phosphorus present in the Bay came from agricultural activities.⁶⁷ This discovery, perhaps more than any other single fact, forced the leaders of the responsible states to recognize the need for land use control in the Chesapeake Bay region to effect significant long term improvement.

At the close of the three-day conference, executives from the sponsoring jurisdictions and the EPA signed the 1983 Chesapeake Bay Agreement.⁶⁸ The Agreement, although quite brief, recognized the decline of the Bay's natural resources, pledged coordinated efforts to improve the Bay's condition and established the Chesapeake Executive Council.⁶⁹

61. The five reports were: EPA, CHESAPEAKE BAY: A FRAMEWORK FOR ACTION (1983); EPA, CHESAPEAKE BAY: A PROFILE OF ENVIRONMENTAL CHANGE (1983); EPA, CHESAPEAKE BAY: INTRODUCTION TO AN ECOSYSTEM (1982); EPA, CHESAPEAKE BAY PROGRAM: TECHNICAL PROJECT SUMMARIES (1982); EPA, CHESAPEAKE BAY PROGRAM TECHNICAL STUDIES: A SYNTHESIS (1982); Eichbaum, *supra* note 1, at 10,239.

62. Eichbaum, *supra* note 1, at 10,240. The 1983 Bay Conference was sponsored by Virginia, Maryland, Pennsylvania, the District of Columbia and the U.S. Environmental Protection Agency. *Id.*

63. *Id.* at 10,240 n.8.

64. *Id.* at 10,240; see Warner & Kindt, *supra* note 4, at 1109-13 (full listing and discussion of the Chesapeake Bay's environmental problems).

65. Eichbaum, *supra* note 1, at 10,240.

66. *Id.*

67. *Id.*

68. *Id.* at 10,244.

69. The 1983 Chesapeake Bay Agreement of the Chesapeake Executive Council, *reprinted* in Eichbaum, *supra* note 1, at 10,244 n.15 [hereinafter 1983 Agreement]. The Agreement says:

Pursuant to the 1983 Agreement, the Maryland General Assembly passed a series of laws in 1984 aimed at protecting and improving the environmental quality of the Chesapeake Bay region.⁷⁰ The most comprehensive of these laws was the Chesapeake Bay Critical Area Protection Program,⁷¹ which required major changes in local land use decisions in the area surrounding the Bay.⁷² The Critical Area Protection Program generated substantial controversy when it was proposed.⁷³ With considerable local input and a few amendments, however, the Maryland General Assembly passed the legislation.⁷⁴

In March 1986, the Virginia General Assembly, encouraged by Virginia's representatives on the Chesapeake Bay Commission, established the Chesapeake Bay Land Use Roundtable, a discussion

We recognize the findings of the Chesapeake Bay Program have shown a historical decline in the living resources of the Chesapeake Bay and that a cooperative approach is needed among the Environmental Protection Agency (EPA), the State of Maryland, the Commonwealths of Pennsylvania and Virginia, and the District of Columbia (the States) to fully address the extent, complexity, and sources of pollutants entering the Bay. We further recognize that EPA and the States share the responsibility for management decisions and resources regarding the high priority issues of the Chesapeake Bay.

Accordingly, the States and EPA agree to the following actions:

1. A Chesapeake Executive Council will be established which will meet at least twice yearly to assess and oversee the implementation of coordinated plans to improve and protect the water quality and living resources of the Chesapeake Bay estuarine system. The Council will consist of the appropriate cabinet designees of the Governors, the Mayor of the District of Columbia, and the Regional Administrator of EPA. The Council will initially be chaired by EPA and will report annually to the signatories of this agreement.

2. The Executive Council will establish an implementation committee of agency representatives who will meet as needed to coordinate technical matters and to coordinate the development and evaluation of management plans. The Council may appoint such *ex officio* non-voting members as deemed appropriate.

3. A liaison office for Chesapeake Bay activities will be established at EPA's Central Regional Laboratory in Annapolis, Maryland to advise and support the Council and the Committee.

Id.

70. Winegrad, *supra* note 2, at 3.

71. MD. NAT. RES. CODE ANN. §§ 8-1801 to -1816 (Supp. 1989).

72. *See infra* notes 124-46 and accompanying text.

73. *See generally* Winegrad, *supra* note 2 (addressing the areas of controversy in the statute and its criteria).

74. MD. NAT. RES. CODE ANN. §§ 8-1801 to -1816 (Supp. 1989). *See generally* Liss & Epstein, *supra* note 24, at 62-65 (discussing the public hearings and legislative debate).

group that was to "focus on land use issues and the Bay."⁷⁵ The roundtable consisted of legislators, farmers, environmentalists, developers and others who shared an interest in land use initiatives.⁷⁶ The group made several important findings: Nonpoint source pollution had to be controlled to improve the water quality in the Chesapeake Bay and its tributaries,⁷⁷ and strong state leadership was needed to develop a new land use management system.⁷⁸ To effectuate this new land use system, the roundtable agreed that the primary responsibility for the system would rest with local governments, although the state should provide strong leadership.⁷⁹ Further, the roundtable proposed a series of changes that would require localities to exercise zoning powers for the protection of natural resources.⁸⁰ The state would establish standards and review procedures to insure compliance and consistency among local jurisdictions.⁸¹

At approximately the same time that the roundtable published the results of its eighteen months of discussion and debate, the Chesapeake Executive Council (Council) published the 1987 Chesapeake Bay Agreement,⁸² a document that greatly expanded upon the goals of the 1983 Agreement. Organized as a set of "goals and

75. *Land Use Initiatives*, *supra* note 22, at 1.

76. *Id.*

77. *See id.* at 3. For the definition of nonpoint source pollution, see *supra* note 4.

78. *Id.* at 4-5. The roundtable made special note of the Virginia Constitution, which says in part:

To the end that the people have clean air, pure water, and the use and enjoyment for recreation of adequate public lands, waters, and other natural resources, it shall be the policy of the Commonwealth to conserve, develop, and utilize its natural resources, its public lands, and its historical sites and buildings. Further, it shall be the Commonwealth's policy to protect its atmosphere, lands, and waters from pollution, impairment, or destruction, for the benefit, enjoyment, and general welfare of the people of the Commonwealth.

VA. CONST. art. XI, § 1 (1971).

79. *Land Use Initiatives for Tidewater Virginia: The Next Step in Protecting the Bay*, *supra* note 22, at 7.

80. *Id.* at 9-13.

81. *Id.* at 9-10, 13. The roundtable also proposed the creation of a citizen's board to oversee implementation of the new land use controls and the strengthening of existing state programs in wetland and sand dune protection, erosion and sediment control, stormwater management, and management of agricultural and forest lands. *Id.* at 14-15, 17-21.

82. 1987 Agreement, *supra* note 7.

priority commitments,"⁸³ the 1987 Agreement addresses the problems with the Bay from a variety of perspectives. It covers water quality in the Bay as well as its animal and plant life, and the impact of population growth and development.⁸⁴ The document also addresses issues of public access and education with respect to the Bay.⁸⁵

The water quality goal of the 1987 Agreement is to "reduce and control point and non-point sources of pollution to attain the water quality condition necessary to support the living resources of the Bay."⁸⁶ To accomplish this goal, the Council agreed to implement a strategy to reduce the amount of nitrogen and phosphorus entering the Bay by forty percent by the year 2000.⁸⁷ The Council also recognized the need for reducing toxic discharges into the Bay as well as conventional pollutants.⁸⁸

The Council's goal for living resources was to "provide for the restoration and protection of the living resources, their habitats and ecological relationships."⁸⁹ Recognizing that the Bay was a primary habitat for countless species that had been declining in numbers due to environmental decay, the Agreement set as a commitment the implementation of water quality and habitat protection programs, and the implementation of coordinated strategies to preserve and protect ecologically and commercially significant species.⁹⁰

The 1987 Agreement placed new focus on land use and control of development as major methods of improving conditions in the Bay. Specifically, the Council's goal was to "plan for and manage the adverse environmental effects of human population growth and land development in the Chesapeake Bay Watershed."⁹¹ The new recognition of the impact of land use on the Bay undoubtedly stems from the information discovered during the EPA study. To

83. *Id.* at 1.

84. *See generally id.*

85. *See generally id.*

86. *Id.* at 3.

87. *Id.*

88. *Id.*

89. *Id.* at 2.

90. *Id.*

91. *Id.* at 4.

achieve the stated goals, the Council committed itself to promote the use of "best management practices for development and to cooperatively assist local governments in evaluating land-use and development decisions,"⁹² and "to evaluate state and federal development projects in light of their potential impacts [on the environment]."⁹³ Perhaps most significantly, however, the Council commissioned a study "on anticipated population growth and land development patterns in the Bay region through the year 2020."⁹⁴ In light of this history of study, discussion and activity, the Virginia General Assembly passed the Chesapeake Bay Preservation Act in April 1988; the statute and its criteria can be analyzed adequately only with reference to this history.

THE STATUTES

The Chesapeake Bay Preservation Act⁹⁵ is Virginia's response to the continuing decline of the water quality and environment in the Chesapeake Bay and its tributaries. The Act attempts to create a comprehensive land use management system for Tidewater Virginia,⁹⁶ thereby minimizing the adverse impact of land use decisions on water quality. The statute calls for a cooperative approach between state and local government, with most of the responsibility for implementation falling to local governing bodies.⁹⁷

92. *Id.*

93. *Id.*

94. *Id.*; see *Population Growth and Development in the Chesapeake Bay Watershed to the Year 2020*, The Report of the Year 2020 Panel to the Chesapeake Executive Council (Dec. 1988) [hereinafter *2020 Report*] (available from the Council on the Environment, Richmond, Va.).

95. VA. CODE ANN. §§ 10.1-2100 to -2115 (1989).

96. *Id.* § 10.1-2100. According to the statute, Tidewater Virginia includes:

[t]he Counties of Accomack, Arlington, Caroline, Charles City, Chesterfield, Essex, Fairfax, Gloucester, Hanover, Henrico, Isle of Wight, James City, King George, King and Queen, King William, Lancaster, Mathews, Middlesex, New Kent, Northampton, Northumberland, Prince George, Prince William, Richmond, Spotsylvania, Stafford, Surry, Westmoreland and York, and the Cities of Alexandria, Chesapeake, Colonial Heights, Fairfax, Falls Church, Fredericksburg, Hampton, Hopewell, Newport News, Norfolk, Petersburg, Poquoson, Portsmouth, Richmond, Suffolk, Virginia Beach, and Williamsburg.

Id. § 10.1-2101.

97. *Id.* § 10.1-2100(B). This section says:

Local governments have the initiative for planning and for implementing the provisions of this chapter, and the Commonwealth shall act primarily in a sup-

The state agency responsible for overseeing the new program is the Chesapeake Bay Local Assistance Board (Board),⁹⁸ made up of nine residents of Tidewater Virginia appointed by the governor.⁹⁹ An initial responsibility of the Board was to develop criteria by which local governing bodies would establish the Chesapeake Bay Preservation Area within their jurisdiction.¹⁰⁰ The Board's criteria require each jurisdiction to delineate within its boundaries a Resource Protection Area (RPA) and a Resource Management Area (RMA).¹⁰¹ The RPA consists of land most essential to reducing nonpoint source pollution and must include all areas within a jurisdiction that are tidal wetlands, nontidal wetlands connected to tidal wetlands or tributary streams, tidal shores and other areas "necessary to protect the quality of state waters."¹⁰² In addition, the RPA includes "a buffer area not less than 100 feet wide located adjacent to and landward of [the above environmental components], and along both sides of any tributary stream."¹⁰³ Although the buffer zone generally must be 100 feet wide, it may be reduced under some circumstances.¹⁰⁴

portive 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.

Id.

98. *Id.* §§ 10.1-2102 to -2103.

99. *Id.* § 10.1-2102. The statute requires that "[m]embers of the Board shall be representative of, but not limited to, citizens with an interest in and experience with local government, business, the use and development of land, agriculture, forestry and the protection of water quality." *Id.*

100. *Id.* §§ 10.1-2107 to -2109.

101. Chesapeake Bay Preservation Area Designation and Management Regulations, 6:1 Va. Regs. Reg. 11-24 § 3.1 (1989) [hereinafter *Criteria*].

102. *Id.* § 3.2(A), (B). For definitions of each area required to be included in the Resource Protection Area, see *id.* § 1.4.

103. *Id.* § 3.2(B)(5). The buffer zone must be vegetated, subject to certain limited exceptions for development. *Id.* § 4.3(B).

104. *Id.* § 4.3(B). The criteria state:

Except as noted in this subsection, a combination of a buffer area not less than 50 feet in width and appropriate best management practices located landward of the buffer area which collectively achieve water quality protection, pollutant removal, and water resource conservation at least the equivalent of the 100 foot buffer area may be employed in lieu of the 100 foot buffer.

Id. For other exceptions and exemptions, see *id.* §§ 4.3(B)(2)-(4), 4.5, 4.6.

The RMA may encompass areas that are of secondary importance to runoff reduction and water quality improvement.¹⁰⁵ In defining the RMA, the criteria mandate that such an area be established "contiguous to the entire inland boundary of the Resource Protection Area."¹⁰⁶ The following land areas must be considered when designating the RMA: flood plains, highly erodible soils, highly permeable soils, nontidal wetlands not included in the RPA and other land subject to water-quality degradation.¹⁰⁷

The criteria also provide for the optional designation of an Intensely Developed Area (IDA).¹⁰⁸ An IDA is an area that development has already altered or that may serve as a redevelopment area where future building may be concentrated.¹⁰⁹ If a jurisdiction designates such an area, further development within that area is subject to regulations for redevelopment areas requiring a ten percent improvement in nonpoint source pollution.¹¹⁰ An IDA is not subject to the stricter requirements of the RPA.¹¹¹

After the local government designates the Chesapeake Bay Preservation Area, the area is subject to land use regulations, called general performance requirements, which are instituted to minimize erosion and nonpoint source pollution.¹¹² The regulations include¹¹³ criteria that new development should disturb "no more

105. *See id.* § 3.3(A).

106. *Id.* § 3.3(B).

107. *Id.*

108. *Id.* § 3.4.

109. *Id.* The criteria define IDAs as areas in which:

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

B. Public sewer and water is constructed and currently serves the area by the effective date [of these regulations]. This condition does not include areas planned for public sewer and water; [or]

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

Id. § 3.4.

110. *Id.* § 4.2(8).

111. *See id.* §§ 3.4, 4.3(A)(2).

112. *Id.* § 4.2. Although the regulations are not clear on the point, § 3.4, which introduces the concept of the IDA, indicates that IDAs are subject only to performance criteria for redevelopment. By negative implication, therefore, IDAs are not subject to other general performance criteria.

113. The criteria listed here are selected as examples of the general performance criteria and are not exhaustive. For a complete listing of the general performance criteria, see *id.* § 4.2.

land . . . than is necessary to provide for the desired use," that "vegetation shall be preserved to the maximum extent possible," and that development "shall minimize impervious cover."¹¹⁴ The regulations further provide that any development in the designated area that exceeds "2500 square feet of land disturbance" must undergo a development plan review.¹¹⁵ The general performance criteria are the only land use regulations applicable to the RMA under the Chesapeake Bay Preservation Act.

Further restrictions are placed on an area designated as an RPA. Specifically, in the RPA development will be allowed only if it is "water-dependent,"¹¹⁶ or a valid "redevelopment" under the regulations.¹¹⁷ Even the permitted uses in RPAs must conform to more restrictive land use regulations.¹¹⁸

After local governments have designated the extent of the preservation area within their jurisdiction, the Board must assist each locality in shaping its comprehensive land use program, using that locality's zoning laws, subdivision ordinances and comprehensive plan to protect the quality of state waters in the preservation areas.¹¹⁹ The Board may tell the local government whether its designations are consistent with the Board's criteria, but it has no ex-

114. *Id.* "Impervious cover" refers to a surface that "significantly impedes or prevents natural infiltration of water into the soil," such as concrete or asphalt. *Id.* § 1.4.

115. *See id.* § 4.2(4). The development plan review procedure is the method by which local governments will review development projects to insure compliance with the Chesapeake Bay Preservation Act and its criteria. Under the criteria, the Board leaves approval or rejection of the development plan to the local government. *See id.* § 5.6(C).

116. *Id.* § 4.3(A)(1). The regulation defines a water-dependent facility as development of land that cannot exist outside of the Resource Protection Area and must be located on the shoreline by reason of the intrinsic nature of its operation. These facilities include, but are not limited to (i) ports; (ii) the intake and outfall structures of power plants, water treatment plants, sewage treatment plants, and storm sewers; (iii) marinas and other boat docking structures; (iv) beaches and other public water-oriented recreation areas, and (v) fisheries or other marine resources facilities.

Id. § 1.4. For further restrictions on water-dependent facilities, see *id.* § 4.3(A)(1).

117. *Id.* § 4.3(A)(1). This criterion refers to the Intensely Developed Areas regulations. If a government chooses to designate Intensely Developed Areas, those areas "serve as redevelopment areas in which development is concentrated while improving the water quality." *See id.* § 3.4.

118. *Id.* §§ 4.2, 4.3(B).

119. VA. CODE ANN. §§ 10.1-2103 to -2109 (1989).

PLICIT authority to approve or reject a local governments' program proposal.¹²⁰

Finally, the Preservation Act grants to "[c]ounties, cities, and towns" the express authority to exercise police and zoning powers to protect water quality,¹²¹ and gives to the Local Assistance Board the exclusive authority to bring suit to insure local governments' compliance with the Act or the criteria.¹²²

Maryland's Chesapeake Bay Critical Area Protection Program¹²³ is similar in many ways to Virginia's Chesapeake Bay Preservation Act. Like the Preservation Act, the Critical Area Protection Program operates on a cooperative basis between state and local governments.¹²⁴ Further, the Program establishes the Chesapeake Bay Critical Area Commission, which is composed of twenty-six voting members from the jurisdictions affected by the Program.¹²⁵ The Commission is charged with developing the criteria by which each local governing body may develop its program.¹²⁶

Significant differences in the two statutes do exist. The focus of the Critical Area Protection Program includes not only the improvement of water quality through reduction of nonpoint source pollution, but also the preservation of the entire Chesapeake Bay ecosystem.¹²⁷ Furthermore, Maryland's program calls for land use controls over most land within 1000 feet of the Bay or its tributaries,¹²⁸ a much larger area than that regulated by the Preservation Act. Finally, the Critical Area Commission has more control over the implementation and operation of the Program than the Chesapeake Bay Local Assistance Board does in Virginia.¹²⁹

In Maryland's program, the "initial planning area" of the Critical Area is established by statute, but the local governments may exclude certain areas that would not be improved materially by

120. See Criteria, *supra* note 101, § 5.5(B).

121. VA. CODE ANN. § 10.1-2108.

122. *Id.* § 10.1-2014.

123. MD. NAT. RES. CODE ANN. §§ 8-1801 to -1816 (Supp. 1989).

124. *Id.* § 8-1801(b)(2).

125. *Id.* §§ 8-1803(a) to -1804(a).

126. *Id.* § 8-1806(1).

127. See generally MD. REGS. CODE tit. 14, § 15.01-.11 (1988).

128. MD. NAT. RES. CODE ANN. § 8-1807.

129. See *infra* notes 172-76 and accompanying text.

participating in the local program.¹³⁰ The Commission is charged with approving proposed exclusions¹³¹ and with developing a local implementation plan for any local governing body that is unable or unwilling to do so for itself.¹³²

Each locality covered by the Program must identify within its critical area a Resource Conservation Area (RCA), a Limited Development Area (LDA), and an Intensely Developed Area (IDA).¹³³ The local government must also identify Habitat Protection Areas lying within its jurisdiction.¹³⁴ Within the RCA, little new development is permitted, and what is allowed is subject to strict water quality and habitat protection controls.¹³⁵ New development is permitted in the LDA provided such development will not change the area's "prevailing character as identified by density and land use . . . in the area,"¹³⁶ and conforms to water quality and habitat protection criteria.¹³⁷ Restrictions on development within the LDA are designed to preserve the area environmentally, protect water qual-

130. MD. NAT. RES. CODE ANN. § 8-1807.

131. *Id.* § 8-1807(b)(3). The Commission must approve any proposed exclusion "unless the Commission finds, based on stated reasons, that the decision of the local jurisdiction was: (i) Not supported by competent and material evidence; or (ii) Arbitrary or capricious." *Id.*

132. *Id.* § 8-1809(b).

133. MD. REGS. CODE tit. 14, § 15.02.02 (1988). Virginia's legislation also provides for Intensely Developed Areas. See *supra* notes 107-110 and accompanying text. The Maryland regulations define Intensely Developed Areas as follows:

(A) Intensely Developed Areas are those areas where residential, commercial, institutional, and/or industrial developed land uses predominate, and where relatively little natural habitat occurs. These areas shall have at least one of the following features:

(1) Housing density equal to or greater than four dwelling units per acre;

(2) Industrial, institutional, or commercial uses are concentrated in the area; or

(3) Public sewer and water collection and distribution systems are currently serving the area and housing density is greater than three dwelling units per acre.

(B) In addition, these features shall be concentrated in an area of at least 20 adjacent acres, or that entire upland portion of the Critical Area within the boundary of a municipality, whichever is less.

MD. REGS. CODE tit. 14, § 15.02.03(A)-(B).

134. *Id.* §§ 15.09, 15.10.01(E).

135. *Id.* § 15.02.05(B),(C).

136. *Id.* § 15.02.04(B)(3)(b).

137. *Id.* § 15.02.04(B)(3)(a), (C).

ity and wildlife, and if possible, increase the total area within the jurisdiction covered by forests.¹³⁸ The IDA is the least regulated area, and the kinds of new development allowed within this area have no specific limitations.¹³⁹ The regulations require local jurisdictions to develop programs to reduce urban runoff, and require new development or redevelopment to use technology to reduce stormwater runoff, limit cutting and clearing of trees, and enhance developed woodlands.¹⁴⁰

In addition to these provisions, the Critical Areas Program presents an exhaustive list of elements that each local program must address.¹⁴¹ The statute contains a detailed system of program adoption procedures that includes deadlines for each step of each procedure.¹⁴² It also addresses the method for project approval once the local critical area program is in place,¹⁴³ and the enforcement mechanisms available to the local jurisdictions, the Commission and the state's attorney general.¹⁴⁴

Statutory Analysis

The foregoing discussion of the legislative and environmental events that led up to enactment of the Chesapeake Bay Preservation Act indicates that an awareness of the serious decline in the Bay's resources and the need for a regional plan motivated the Virginia General Assembly and the governor to pass the Act. A thorough analysis of the Chesapeake Bay Preservation Act and its regulations from an environmental perspective demonstrates that, despite the creation of a regional plan, the Act leaves too much control in the hands of local governing bodies to achieve the uniformity of result that is its purpose. Furthermore, because the Act does not give state government enough power to insure a uniformity of result for the whole Bay in coordination with Maryland's ef-

138. See *id.* § 15.02.04(C).

139. *Id.* § 15.02.03(C).

140. *Id.* § 15.02.03(D).

141. MD. NAT. RES. CODE ANN. § 8-1808 (Supp. 1989).

142. *Id.* § 8-1809.

143. *Id.* § 8-1811. This section requires that notice of certain projects be given to the Commission before the local government may approve the project. *Id.* § 8-1811(b). State and local agency projects require Commission approval. *Id.* § 8-1814(a).

144. *Id.* § 8-1815.

forts, the Act is illusory as a regional environmental land use mechanism.¹⁴⁵

Distribution of power

The Chesapeake Bay Preservation Act is a cooperative effort by state and local governments.¹⁴⁶ The state establishes criteria to which local governments adhere when establishing their local programs.¹⁴⁷ The goal of this program is to improve water quality in the Bay, as has been discussed.¹⁴⁸ However, the statute leaves to local governing bodies the power to define the preservation area within their jurisdiction.¹⁴⁹ Clearly, the definition of the preservation area will affect the uses to which land may be put, and by leaving this designation to the locality, the General Assembly has invited land developers and others to resist strongly classification of land as a preservation area.¹⁵⁰ Following the criteria developed by the Chesapeake Bay Local Assistance Board, each jurisdiction must designate, within its preservation area, a Resource Protection Area (RPA) and a Resource Management Area (RMA).¹⁵¹ In addition to strong resistance from developers to limit the breadth of the preservation area, local officials also will face additional resistance to the classification of lands as an RPA, the Act's most re-

145. L. MALONE, ENVIRONMENTAL REGULATION OF LAND USE § 14.03(2) (1990).

146. See *supra* notes 95-97 and accompanying text.

147. VA. CODE ANN. § 10.1-2107(A) (1989).

148. See *supra* notes 95-96 and accompanying text.

149. VA. CODE ANN. § 10.1-2109(A).

150. The author does not suggest that local government officials do not favor environmental regulation generally, but merely that development interests possess a powerful lobby at the local level, where officials are closest to constituents. See generally Winters, *Environmentally Sensitive Land Use Regulation in California*, 10 SAN DIEGO L. REV. 693, 698-700 (1973) (discussing decisionmaking at the local level). For evidence of local discontent with the Chesapeake Bay Preservation Act, see Axtell, *Taxpayers to foot new rules on Bay: 'The buck definitely stops here'*, Va. Gazette, Sept. 20, 1989, at 5A, col. 1; O'Donovan, *New rules on Bay have wider sweep: July 1 laws awash in criticism*, Va. Gazette, June 28, 1989, at 6A, col. 3; Stevens, *Bay rules are too fuzzy: 'It's impossible to know what's prohibited'*, Va. Gazette, May 20, 1989, at 3A, col. 1. Shortly after the regulations became final on Oct. 1, 1989, a citizens group filed suit seeking an injunction against enforcement of the regulations on the grounds that their passage violated the Virginia Administrative Process Act and the takings and equal protection clauses of the United States and Virginia Constitutions. Concerned Citizens For Property Rights v. Chesapeake Bay Local Assistance Bd., Chancery No. 8219 (Cir. Ct. for York County, Va., filed Nov. 3, 1989).

151. Criteria, *supra* note 101, § 3.1.

strictive classification.¹⁵² The regulations specifically allow the local jurisdiction to "exercise judgment in determining site-specific boundaries of Chesapeake Bay Preservation Area components and in making determinations of the application of these regulations, based on more reliable or specific information gathered from actual field evaluations of the parcel."¹⁵³ The weakness in the designation criteria is that if a local jurisdiction should succumb to the pressure of development interests, only limited areas will be designated as RPAs.¹⁵⁴

The designation of the RMA provides an even greater potential battleground for development and environmental interests. The minimum required by the criteria is that a "Resource Management Area shall be provided contiguous to the entire inland boundary of the Resource Protection Area."¹⁵⁵ The criteria do require each jurisdiction to consider including various environmental components within the RMA; however, the inclusion of those components in the RMA is not required.¹⁵⁶ The criteria do not establish a minimum width for the RMA.

Restrictions placed on development within the RMA allow for significant growth and development, but the criteria establish procedures for such development that would increase costs for developers.¹⁵⁷ The restriction of the RMA to the smallest required area is therefore to the advantage of developers. Given that local officials have discretion in designating such areas, development interests will certainly lobby rigorously for a minimal RMA.

The regulations as currently written put local officials in the unwelcome position of trying to designate their Chesapeake Bay Preservation Area under the pressure of powerful resistance. Because each locality will have to go through the process of designating preservation areas, the extent of the preservation areas will probably vary greatly with differing degrees of protection for water quality. The possibility of such wide-ranging results means that

152. See *supra* notes 102-04, 116-17 and accompanying text.

153. Criteria, *supra* note 101, § 4.1(B).

154. *Id.* § 3.2(B).

155. *Id.* § 3.3(B).

156. *Id.* Section 3.3(B) of the criteria lists land categories that localities "shall . . . [consider] for inclusion" in the RMA.

157. *Id.* § 4.2.

the current allocation of power creates a situation that is not much better than it would have been without state regulation.

Another weak provision of the criteria, applicable to both the RPA and RMA, is in the development plan review procedure.¹⁵⁸ Each local program is required to contain a development plan review procedure if one is not already in place.¹⁵⁹ However, under such a system, after the review, the local government has the authority to approve or reject all plans submitted.¹⁶⁰ No regulation requires that the Local Assistance Board approve a plan, or even be notified of the development plan submissions. Additionally, the local government may exempt any use of development of land from the review procedure without the Board's approval.¹⁶¹ The criteria provide no opportunity for judicial review of the locality's approval or rejection of a development plan submission.

The regulations as currently written give the local government complete control over the approval of development projects. Yet the local government officials are also those most susceptible to powerful lobbying efforts by developers. Furthermore, the local government does not have to notify the Board of any plans of development that have been submitted. In light of these requirements, the Board may have difficulty remaining aware of all pertinent development occurring in the fifty-four affected jurisdictions and in lending necessary assistance and support to local officials. Moreover, without notification, the Board cannot adequately carry out its enforcement duties under the Preservation Act.

The exemption provision within the development plan review criteria provides that "any exemptions from [the development plan] review requirements shall be established and administered in a manner that ensures compliance with these regulations."¹⁶² This provision provides an escape clause for the local jurisdiction. Although the Board may review the local government's exemptions during the local program's approval phase, the Board does not have explicit power to approve or reject the program. The exemption provision will give land interests an additional opportunity to

158. *Id.* § 4.2(4).

159. *Id.* § 5.6(C).

160. VA. CODE ANN. § 15.1-491(h) (1989).

161. Criteria, *supra* note 101, § 5.6(C).

162. *Id.*

lobby local government officials to take notice of their circumstances and grant them an exemption from the development plan review procedure. The Board may dislike a particular exemption, but it does not have the power to reject the local government's management proposal on that or any other basis. This is particularly troublesome given that the development plan review is one of the major statutory mechanisms by which the Act's goals are to be achieved.

Perhaps the greatest weaknesses of the Board's criteria are the numerous exemptions within the criteria themselves and the exceptions that local governments may grant to landowners without the Board's approval. To begin with, the establishment of a Chesapeake Bay Preservation Area is entirely within the judgment of the local government.¹⁶³ Second, redevelopment areas and silviculture activities are exempt from most of the general performance criteria and the land use regulations for RPAs.¹⁶⁴ Also, the buffer area regulations and stormwater management regulations have equivalency options whereby the landowner may satisfy the criteria in one of several ways, apparently without supervision or prior approval by the Board or local government.¹⁶⁵ An equivalency option for compliance with the buffer area requirement is available to agricultural lands as well, with the buffer width reduced to as little as twenty-five feet.¹⁶⁶

In addition to the exemptions and equivalency options, the regulations grant local governments the power to

establish an administrative review procedure to waive or modify the [land use restrictions] for structures on legal nonconforming lots or parcels provided that:

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

b. Any development or land disturbance exceeding an area of 2500 square feet complies with all erosion and sediment control requirements of this part.¹⁶⁷

163. *Id.* § 4.1(B).

164. *Id.* §§ 3.4, 4.2(10), 4.3(B)(3). "Silviculture" refers to forestry activities.

165. *Id.* §§ 4.2(8), 4.3(B).

166. *Id.* § 4.3(B)(4).

167. *Id.* § 4.5(A)(1).

The regulations also permit local jurisdictions to grant exceptions from the regulations, provided only that "exceptions . . . shall be the minimum necessary to afford relief, and . . . reasonable and appropriate conditions . . . shall be imposed as necessary so that the purpose and intent of the Act is preserved."¹⁶⁸ These loopholes in the regulations are so broad and flexible in the hands of local officials that they provide an open invitation to land interests to lobby vigorously for an administrative waiver or exception. Because the Board has no power to reject a local government's area designations or management program proposal, the Board and its staff will have to spend much of their time and energy attempting to bring the fifty-four local jurisdictions into nominal compliance with the regulations. The Board will have little opportunity to determine whether local governments have achieved substantial compliance—that is, whether the regulations actually produce the water quality improvements sought.

In summary, the Chesapeake Bay Preservation Act and its criteria provide land development interests with a number of opportunities to delay and weaken a local program. If one local government implements the minimum program required by the statute, other surrounding local governments will be pressured to follow suit in order to compete for future development. Given the likely variations in the designation of a preservation area, RPA and RMA in the affected jurisdictions, and strong local control over the development plan review process, the statute contains no mechanism short of legal action¹⁶⁹ to insure that all programs provide equal levels of water quality protection. As a result, some jurisdictions may shirk their responsibilities under the Act while others diligently follow its spirit and prescriptions.

Maryland's Critical Area Protection Program¹⁷⁰ takes a much different approach. The statute defines an "initial planning

168. *Id.* § 4.6.

169. VA. CODE ANN. § 10.1-2104 (1989). The statute does grant exclusive authority to the Board "to institute legal actions to ensure compliance by local governing bodies" with the statute and the accompanying regulations and criteria. *Id.* This section provides some enforcement capabilities, but the enforcement process is likely to be time-consuming and costly. The section also takes away a private citizen's right to institute legal action to gain compliance.

170. MD. NAT. RES. CODE ANN. §§ 8-1801 to -1816 (Supp. 1989).

area"¹⁷¹ and allows the local government to exclude areas that fall within a narrow range of criteria.¹⁷² By using this approach, the state has control over the area that is of critical importance to the Program's success. The Maryland statute grants to the Critical Areas Commission the power to approve or reject each local jurisdiction's critical area program;¹⁷³ and if a local government is unable or unwilling to adopt a program, the statute empowers the Commission to prepare and adopt a program for that jurisdiction's critical area.¹⁷⁴ Under Maryland's Program, the Commission must be notified of the submission of plans for significant projects before they are approved by a locality.¹⁷⁵

These enforcement mechanisms may seem harsh, but in fact they serve to empower local officials. By designating statutorily the initial planning area for the Critical Area Program, local officials are not faced with the difficult battle over designating critical areas. The RCA, LDA and IDA that local officials must designate¹⁷⁶ are defined clearly by density, topography and current use,¹⁷⁷ thereby reducing opportunity for quibbling. By relieving local officials of this burden, the statute allows them to focus on developing and implementing a local program. The land use and development permitted under the program will have the greatest impact on water quality and development interests, and therefore should be the aspect of the program most open to local debate.

The fact that the Commission will develop a program for any locality that does not develop its own¹⁷⁸ also enhances rather than detracts from the authority of local officials. Local officials want to encourage economic growth and stability within their jurisdictions; however, they must also address environmental concerns, not only for the sake of natural resources, but also to maintain economic stability.¹⁷⁹ The threat that the state might step in to impose a

171. *Id.* § 8-1807(a).

172. *Id.* § 8-1807(b); *see supra* note 131 and accompanying text.

173. MD. NAT. RES. CODE ANN. § 8-1809(d).

174. *Id.* § 8-1809(b).

175. *See supra* note 143.

176. *See supra* notes 133-40 and accompanying text.

177. For an example, *see supra* note 133.

178. *See supra* note 132.

179. The Chesapeake Bay Land Use Roundtable agreed that "[h]ealthy state and local economies and a healthy Chesapeake Bay are integrally related; economic development and

program on the locality should decrease the pressure that development interests place upon local officials and allow the officials to create a local program that supports economic growth and the needs of the jurisdiction while protecting environmental values and the Chesapeake Bay's ecosystem. The Maryland statute ultimately requires local jurisdictions to give up only that power necessary to make effective a regional land use control mechanism.

Virginia's Chesapeake Bay Preservation Act has many of the components of a regional environmental land use control mechanism. Because the Act leaves most land use control power in the hands of local jurisdictions, however, its efficacy for regional land use regulation is slight. The primary advantage of regional land use controls is that legislators can use them to coordinate planning in an area that is beyond the reach of a local jurisdiction or even a state. With one regional policy rather than conflicting local policies, the goal of protecting the resource or area is more efficiently and fully realized.

The value of a regional plan is evident in Maryland's Critical Areas Protection Program.¹⁸⁰ The state recognized the value of the Bay as a state and national resource.¹⁸¹ Rather than forcing local jurisdictions to try to combat the environmental problem on their own, a task obviously beyond their capability, the state adopted the project and allowed local jurisdictions to administer it. In this scheme, power is shared between state and local government, with each playing the part it is best equipped to handle.¹⁸²

The Chesapeake Bay Preservation Act, on the other hand, does not grant enough power to the state to enable it to coordinate the local programs with one policy and thus promote uniformity. Virtually all of the decisionmaking that is crucial to the process is left to the local governments. This scheme not only puts local officials in a difficult situation, but it thwarts the purpose of initiating a regional land regulation scheme. It suggests that some other ap-

resource protection are not and cannot afford to be seen as mutually exclusive." *Land Use Initiatives*, *supra* note 22, at 8.

180. See Eichbaum, *supra* note 1, at 10,241, 10243-45; Winegrad, *supra* note 2, at 3-5.

181. Eichbaum, *supra* note 1, at 10,243.

182. State commitment to the Critical Area Program has weakened, however, as evidenced by recent cuts in funding. Wash. Post, Mar. 6, 1989, at B10, col. 1.

proach is required to effectuate a truly coordinated and comprehensive solution to the environmental problems in the Bay.

ALTERNATIVES

The problems inherent in the Chesapeake Bay Preservation Act discussed so far demonstrate the need for an alternative approach to land use regulation in the Chesapeake Bay area. Beyond the cooperative approaches taken by Maryland, Virginia and other jurisdictions lie the possibilities of a bi-state or multi-state compact and stricter direct federal regulation. An exploration of the strengths and weaknesses of each approach will determine whether a hybrid approach may be necessary to resolve the Bay's unique problems.

The next most restrictive strategy for regional or interstate land use planning and control requires a formal compact between two or more states. The final compact would require approval by the United States Congress.¹⁸³ Articles 7 and 8 of the Model Land Development Code offer one approach for initiating land use controls in a multi-state area that states could accomplish by entering a formal compact.¹⁸⁴ Article 8 proposes primarily state land use regulation and planning, but interstate regulation is also possible under this model.¹⁸⁵

183. U.S. CONST. art. I, § 10. The compact might not require congressional approval if it does not affect federal governmental powers or the federal political balance. *Virginia v. Tennessee*, 148 U.S. 503, 517-20 (1893). Furthermore, Congress has granted broad authorization for compacts targeted "for cooperative effort and mutual assistance in support of community development planning and programs . . . as they pertain to interstate areas and to localities within such States . . ." 42 U.S.C. § 5316 (1982).

184. See MODEL LAND DEV. CODE arts. 7-8 (1975). The Model Land Development Code is model legislation prepared by the American Law Institute to assist state and local governments in the planning and regulation of development. Article 8 of the Model Code, which deals with state land development planning, is designed to work in conjunction with article 7 on State Land Development Regulation. See *id.* commentary at 291. Several of the current state land use regulation schemes, including Maryland's Chesapeake Bay Critical Areas Protection Program, follow closely the suggested provisions of article 7. Emphasis is placed on the planning provisions of article 8 for the purposes of this discussion on alternative approaches for protection of interstate natural resources because article 8 suggests that regional planning is integral to the long term protection of interstate resources. This contrasts with the other approaches discussed that focus primarily on the structure of land use regulation schemes.

185. *Id.* § 8-207.

Prominent among the provisions of article 8 of the Model Code is establishment of the State Land Planning Agency (Agency).¹⁸⁶ Designed like other administrative agencies, the Agency would have the power to make rules and issue orders pursuant to a state's administrative procedure legislation¹⁸⁷ and could intervene in judicial or administrative proceedings within its purview.¹⁸⁸ The Agency also would have the power to establish regional divisions within its jurisdiction¹⁸⁹ and to appoint local land development agencies when local governments have not taken action in this area.¹⁹⁰ Article 8 also recommends that governors appoint state and regional advisory committees.¹⁹¹ In addition to advising the Agency on issues of state or regional concern, such committees would comment on any development proposal within their jurisdiction before the Agency submitted the proposal to the governors for approval.¹⁹²

Under article 8, the plan developed by the Agency is quite comprehensive. Prior to developing the plan, the Agency would conduct extensive studies¹⁹³ and consider the plans of local govern-

186. *Id.* § 8-101.

187. *Id.* § 8-201.

188. *Id.* § 8-203.

189. *Id.* § 8-102.

190. *Id.* § 8-206.

191. *Id.* § 8-103.

192. *Id.* § 8-103(3).

193. *Id.* § 8-402. The Model Code says:

(1) The State Land Planning Agency shall undertake studies as comprehensive as feasible concerning matters found by the Agency to be important to future development including:

(a) population and population distribution, which may include analysis by age, education level, income, employment, race, or other appropriate characteristics;

(b) amount, type and general location of commerce and industry;

(c) amount, type, quality and general location of housing;

(d) general location and extent of existing or currently planned major transportation, utility, recreational and other community facilities;

(e) amount, general location and interrelationship of different categories of land use;

(f) geological, ecological and other physical factors that would affect or be affected by development;

(g) areas, sites or structures of historical, archeological, architectural, recreational, scenic or environmental significance;

ments and other state government agencies.¹⁹⁴ The plan must include a short term program.¹⁹⁵ The purpose of the short term program is to encourage use of the plan to institute intermediate goals that will effectuate the plan's overall long term goals.¹⁹⁶ In this way, the plan is continually updated and reviewed.¹⁹⁷ The plan itself is defined as "[a] statement . . . prepared and adopted . . . setting forth objectives, policies, and standards to guide public and private development of land within the [regulated area], and including a short-term program of public actions"¹⁹⁸ The plan may apply to an interstate region, a state, or a defined region within a state.¹⁹⁹

Land use planning, the primary focus of article 8, is important for a number of reasons. A regional plan provides a framework for future development that already incorporates a balancing of diverse interests, thus increasing the efficiency of the development process and reducing delay due to opposition from competing interests.²⁰⁰ The plan may be the only way to insure protection of environmentally and commercially valuable resources that have been damaged by development in the past. By preparing and periodically updating the plan, the state gains closer contact with the status of its infrastructure and the adequacy of local and state government services. Consequently, the state will have better knowledge about the needs of individual communities and the effectiveness of its current programs. The deficiency in the Model Code approach is that questions of decisionmaking authority and en-

(h) extent and general location of blighted, depressed or deteriorated areas and factors related thereto; and

(i) natural resources, including air, water, open spaces, forests, soils, rivers and other waters, shorelines, fisheries, wildlife and minerals.

Id. § 8-402(1).

194. *Id.* § 8-404.

195. *Id.* § 8-405.

196. *Id.* § 8-405 note.

197. *Id.*

198. *Id.* § 8-401(1).

199. *Id.*

200. *Id.* art. 7 commentary at 252-53.

forcement, two major problems in the regulation of a multi-state resource, are left largely unresolved.²⁰¹

An illustration of a bi-state compact is the Tahoe Regional Planning Agency (TRPA). California and Nevada initiated the TRPA in 1969 to preserve the beauty and environmental health of the Lake Tahoe area, which was threatened by overdevelopment.²⁰² The TRPA governing board consisted of five representatives from each state, three of whom were local officials or residents, and two of whom were appointed by each state's governor.²⁰³ In addition to the board, the Agency had an advisory committee made up of state and local health and planning officials, and a planning staff.

The TRPA had responsibility for regional planning to control growth in the Lake Tahoe area.²⁰⁴ Several problems inherent in the TRPA contributed to its inefficacy. The compact granted the agency little enforcement capability.²⁰⁵ The governing board had responsibility to approve or deny development plans proposed for the regulated area,²⁰⁶ but for a development project to be denied, a majority of each states' representatives had to vote for denial.²⁰⁷ If no dual majority emerged after sixty days, the development proposal was approved by default.²⁰⁸ This administrative mechanism²⁰⁹ contributed significantly to the failure of the TRPA in its initial form.

Other major problems were that the federal and state governments gave the TRPA no funding in the compact itself, and that the compact required the TRPA to deal with only regional concerns and avoid interference with local authority.²¹⁰ The TRPA possessed no control over state public works projects.²¹¹ Finally,

201. Because articles 7 and 8 of the Model Code are designed primarily as models for state regulation, they do not provide answers to some of the thornier political questions involved with regulating interstate resources.

202. Act of Dec. 18, 1969, Pub. L. No. 91-148, 83 Stat. 360.

203. See Comment, *Nationalizing Lake Tahoe*, 19 SANTA CLARA L. REV. 681, 682 n.13 (1979).

204. *Id.* at 682.

205. *Id.* at 683.

206. *Id.* at 682-83.

207. *Id.* at 683.

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.* at 684.

the board and advisory committee had a majority of local officials whose interests were tied inextricably with the Tahoe region.²¹²

The problems that plagued the TRPA were so acute that the states amended the compact in 1980.²¹³ The amended compact provided for fewer local officials on the board and planning committee, and eliminated the sixty-day default approval mechanism.²¹⁴

The Columbia River Gorge bordering Washington and Oregon has also been the subject of regulatory debate in recent years.²¹⁵ Two proposals were put forward to control land development and use in that area.²¹⁶ The governors of the two states proposed a bi-state compact and administrative procedures similar to the original Lake Tahoe agreement.²¹⁷ United States Senator Robert Packwood of Oregon put forward legislation that created a National Scenic Area of the Columbia River Gorge, modeled after National Recreation Areas established elsewhere by Congress.²¹⁸

Under the Packwood initiative, the United States Secretary of Agriculture administers the National Scenic Area in accordance with the legislation creating the area and laws applicable to national forest areas.²¹⁹ In addition, the initiative calls for a regional commission made up of local, state and federal representatives who would advise the Secretary.²²⁰ The plan gives the Secretary eminent domain power over critical lands,²²¹ as established by Congress, and allows the Secretary to acquire a less than fee simple interest in such lands.²²² The legislation requires the Secretary to

212. *Id.*

213. Act of Dec. 19, 1980, Pub. L. No. 96-551, 94 Stat. 3233.

214. See Meyers, *Proposed Federal Land Use Management of the Columbia River Gorge*, 15 ENVTL. L. 71, 91 (1984).

215. *Id.* at 71-92.

216. *Id.* at 73.

217. *Id.* at 75.

218. *Id.* at 73. The Packwood plan, which Congress enacted in 1986, is codified at 16 U.S.C. § 544-544p (Supp. V 1987). See Packwood, *The Columbia River Gorge Needs Federal Protection*, 15 ENVTL. L. 67 (1984) (discussing the development problem in the Columbia River Gorge and the legislation); see also Bozung, *Recent Developments in Environmental Preservation and the Rights of Property Owners*, 20 URB. LAW. 969, 990 (1988).

219. Meyers, *supra* note 215, at 73-74.

220. *Id.* at 78.

221. *Id.* at 79.

222. *Id.*

adopt interim procedures, to monitor all land use activity in the regulated area and to take action when necessary to carry out the purposes of the proposed Act.²²³ Any person aggrieved by decisions of the Secretary or his administrator may appeal those decisions to the federal district court.²²⁴ Finally, the plan would allow local governments to implement the plan voluntarily if they could demonstrate that they had the ability to carry out the purposes of the proposal consistent with the overall management plan, had provided penalties for violation and had adequate resources to carry out the plan.²²⁵

The proposals and ultimate strategies used by land use planners for Lake Tahoe and the Columbia River Gorge provide a framework from which a more effective interstate approach emerges for the Chesapeake Bay and other interstate resources.

RECOMMENDATION

The environmental problems facing the Chesapeake Bay may surpass those faced by the Lake Tahoe Region and the Columbia River Gorge. In addition to questions of aesthetic quality and overdevelopment, the Bay faces potentially irreparable environmental decay, and loss of marine life and aquatic habitats.²²⁶ Furthermore, these environmental problems have led to reductions in the economic productivity of the area for fishermen and related industries.²²⁷

On the other hand, Virginia and Maryland have recognized the crisis facing the Bay and have pledged coordinated efforts to reverse the devastating trends.²²⁸ The only question remaining is how best to accomplish this goal. Based on the history of cooperation between the two states and a presumed distaste for committing regional problems to federal control, the best approach for the Bay is a hybrid bi-state or multi-state compact borrowing from ar-

223. *Id.* at 80-81.

224. *Id.* at 81.

225. *Id.* at 83-84.

226. *See supra* notes 5, 63-67 and accompanying text.

227. *See supra* note 5 and accompanying text.

228. *See supra* notes 59-69 and accompanying text.

ticle 8 of the Code and the experiences of Lake Tahoe and the Columbia River Gorge.

The hybrid compact approach would require a board of directors, a planning committee and administrative staff. The compact would grant to the board all regulatory and land use decisionmaking authority over the regulated area, which would be determined in the compact itself. The board would consist of four members from each participating state and three members from the federal Environmental Protection Agency (EPA). Of the four members from each state, no more than two could be from the State's regulated regions. The board's chair would sit for a two-year term, and the position would rotate between or among the states. The chairperson would act as administrator of the daily functions of the agency.

Any proposal for development in the regulated area that would have regional impact would require approval by the full board. Any proposal that the agency determines has no regional impact could be left to the discretion of the local jurisdictions. For development proposals of regional impact, if the board takes no action within ninety days, the project would be deemed denied. The board would have to produce a full, detailed explanation of its reasons for denial. Any person aggrieved by a board decision could apply for rehearing. An appeals committee made up of one member from each state and one EPA member would decide whether to grant a rehearing. Upon exhaustion of administrative remedies, any person could appeal to the United States District Court closest to the site of the proposed development. This hybrid structure borrows from prior multi-state compacts, but attempts to remove some of the political problems evident in those efforts and provide for a more smoothly functioning regulatory program.

The board's composition would ensure that local interests are represented, as well as state and national interests. The balancing of all three is a primary goal of the hybrid approach. The rotation of the board's chair would provide a continuing check on overzealousness by a state delegation, and encourage negotiation and compromise among board members and their respective interests. The administrative appeal process would ensure that the board reviews close questions under the regulations before expensive litigation ensues. This process would also provide a check on

frivolous development proposals and ensure that those persons with serious proposals had the opportunity to explain fully their plans. Right of appeal to federal district court would protect against arbitrary and capricious board decisions.

In addition to the board, the agency would have a planning committee and sufficient administrative staff to carry out its functions. The planning committee's responsibility would include advising the board on all development proposals and maintaining current data on land use patterns, population projections, environmental status and technological advances.

The best parts of the Chesapeake Bay Preservation Act and the Chesapeake Bay Critical Area Protection Program could thus be combined to serve as the compact between or among the participating states.²²⁹ Another alternative is to use the 1987 Chesapeake Bay Agreement²³⁰ as a framework from which the participating states could develop a compact.

The creation of an interstate agency to handle land use regulation for a multi-state area has several advantages. By combining the efforts of two or more states and the EPA, the interstate agency may draw on the technological and creative resources of these several governmental bodies. Such a variety of resources helps insure that the agency has available to it the most current information and planning techniques. The interstate agency, representing local, regional, state and national interests, is more likely to balance effectively state and regional environmental and quality of life interests with local development interests. The agency would thereby remove the burden of balancing such interests from local officials ill-equipped to handle it. It also would provide local officials with a political scapegoat when they sacrifice local development interests to compelling state or regional environmental interests. Finally, the interstate agency would provide a framework by which the participating states might launch multi-state efforts on other projects. All these advantages recommend the use of the hy-

229. The strong state control embodied in Maryland's Critical Area Protection Program might be combined with the extraordinary sensitivity to farmers and individual home owners embodied in Virginia's Chesapeake Bay Preservation Act to arrive at a compact agreeable to both states.

230. See *supra* notes 82-94 and accompanying text.

brid interstate compact approach for the regulation of multi-state environmental resources.

CONCLUSION

The awareness of and the legislative responses to the environmental decay occurring in the Chesapeake Bay are part of a continuing and growing awareness in the United States of the fragility of natural resources and their inability to absorb relentless mistreatment. As this awareness and our scientific knowledge of the problems' causes have expanded, the search for solutions has become more creative. Some states developed the regional environmental land use regulation mechanism to control and reverse the adverse impact on large land areas and natural resources that were beyond the scope of any single local jurisdiction. These regional control schemes have been successful.

Virginia and Maryland have struggled with the Bay's decline for many years now, but only in the last decade have the two states begun to make real progress toward developing a coordinated land use control system that could stem detrimental nonpoint source pollution flowing into the Bay. While on the verge of what might have been a major victory for regional environmental regulation, the enactment of parallel statutes that would bring about a uniform result, the process broke down. Virginia's Chesapeake Bay Preservation Act as currently written does not provide enough state control over preservation areas or local programs to insure compliance and uniformity of result in an effective and efficient manner. One hopes that the Act is just a first step in the process.

A better approach to the problems in the Chesapeake region would be for Maryland and Virginia, and perhaps other jurisdictions, to enter into a compact granting regulatory authority over the Bay area to an interstate agency. The compact would grant sufficient authority to the agency to effectuate fairly and uniformly the purpose of environmental preservation, while balancing the legitimate development interests of all jurisdictions.

Other states confronted with environmental decay of a major natural resource may learn a valuable lesson from the experiences of the Chesapeake Bay states. Governments should not wait to enact environmental regulation until natural resources begin to show signs of serious damage and decline. The process of developing

consensus and cooperation on acceptable levels of regulation may take years or perhaps decades to complete. In addition, regional land use regulation for interstate environmental resources requires regulation by a governmental body that has jurisdiction over the whole resource. Only then can legislators and the people develop the proper balance between environmental preservation, uniform regulation and fairness to property owners that is the formula for long term environmental protection.

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