



**CHESAPEAKE**  
LEGAL ALLIANCE

# Bay Brief Quarterly



FALL 2017

## Sewage System Improvements Secured for Baltimore

With the assistance of CLA volunteer attorneys from the D.C. office of Covington & Burling, Blue Water Baltimore achieved a significant milestone in its efforts to fix Baltimore’s dilapidated sewage system. On October 12, 2017, U.S. District Judge J. Frederick Motz approved the \$1.6 billion plan to rehabilitate Baltimore’s sewer system and stop illegal discharges of sewage from flowing into the Baltimore Inner Harbor by 2030.



Baltimore’s sewage system has been plagued for years by a lack of capacity and broken sewer pipes. Each year, the system releases millions of gallons of water contaminated with sewage into Baltimore Harbor and nearby waterways that then flow into the Chesapeake Bay. These overflows also back up into city homes, leaving behind unhealthy conditions and costly cleanups. Last September, a federal judge granted Blue Water Baltimore a seat at the table to discuss revising the terms of a 2002 consent decree between Baltimore City, the U.S. Environmental Protection Agency (EPA), and the Maryland Department of the Environment (MDE) requiring the city to fix its sewer systems and prevent illegal sewage discharges after

years of missing deadlines to make the needed upgrades and repairs.

The proposed modified consent decree was submitted to the reviewing court on September 6, 2017. On September 20, 2017, Blue Water Baltimore asked the court to remove a proposed provision that would prohibit EPA or MDE from using data collected

under the agreement to require Baltimore “to perform additional work under the terms of the Consent Decree or to create any other obligations under the terms of the Consent Decree.” In response to Blue Water Baltimore’s opposition to this provision, MDE and EPA assured the court that in-stream water quality data collected in conjunction with the sewage upgrade project could be used to enforce the terms of the consent decree. This is an important acknowledgement and one that will ensure that “all useful data,” including water-quality monitoring, should be considered when determining whether the city’s sewer repairs have succeeded in improving water quality.

Blue Water Baltimore’s work to negotiate the terms of the consent decree ensured that key public accountability

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and cleanup measures important to residents were included in the final agreement. Angela Haren, Blue Water Baltimore's Director of Advocacy and Baltimore Harbor Waterkeeper said that the organization is "proud that their advocacy efforts helped achieve worthwhile improvements to the sewage consent decree, including a building backup reimbursement program, and the public accountability and transparency it now guarantees." Haren stated the organization is, "encouraged that state and federal regulators agree that all useful data should be considered when evaluating the success of work to fix our sewer system" and that Blue Water Baltimore "looks forward to working cooperatively with the city and all stakeholders to ensure the consent decree is effective in securing the clean water future we all deserve."

*The law firm of Covington & Burling, including CLA volunteer attorneys Ted Garrett, Thomas Brugato, and Patrick Phelan, has supported Blue Water Baltimore since 2013 in its advocacy, enforcement, intervention,*

*and negotiations concerning the 2002 sewage consent decree.*

**For more information see:** [http://www.bayjournal.com/article/judge\\_approves\\_disputed\\_plan\\_to\\_fix\\_baltimores\\_sewage\\_overflows](http://www.bayjournal.com/article/judge_approves_disputed_plan_to_fix_baltimores_sewage_overflows)

## WE'RE ALMOST THERE!

CLA set a goal to grow its volunteer attorney network by 100 attorneys/law firms in 2017.

**WE JUST NEED 13 MORE ATTORNEYS TO MEET THIS GOAL!** An expanded network allows us to meet the needs of the Chesapeake Bay efficiently and adds greater legal expertise. Law firms of all sizes, government attorneys, retired and new attorneys, and law students all have a role to play. All types of legal experience is welcomed. **Join us now!**

To learn more contact us at: 410-216-9441 or [info@chesapeakelegal.org](mailto:info@chesapeakelegal.org).

## Pennsylvania's Environmental Rights Amendment is Even Stronger!

Recently, the Pennsylvania Supreme Court, in [Pennsylvania Environmental Defense Foundation v. Pa.](#), strengthened greatly the Commonwealth's Environmental Rights Amendment to its Constitution by broadly interpreting the Commonwealth's role as trustee for public natural resources. The decision will provide environmental groups and citizens additional tools to challenge permits that are granted by the Pennsylvania Department of Environmental Protection (PADEP). There is now clear support for claims that granting of a permit that impacts negatively the environment demonstrates that the Commonwealth has violated its fiduciary duty as trustee for public natural resources.



meetings with environmental attorneys associated with a variety of interest groups to solicit recommendations on how PADEP should react to the Supreme Court's mandate. CLA Board member Martin Siegel of the York, PA office of Stock & Leader recently attended one of these meetings along with other attorneys representing the environmental community.

Representatives of the environmental groups made suggestions to PADEP on measures that it could implement to satisfy the spirit and intent of Article 1, Section 27 of the Pennsylvania Constitution, and the mandates of the Supreme Court. Time will tell whether the Court's action will result in greater efforts to meet legal requirements related to the water quality of Chesapeake Bay and local waterways.

PADEP's Chief Counsel has convened a series of informal



## CLA Tracking Bay Clean Up Implementation (Phase III WIP Development)

An important part of successful implementation of the Chesapeake Bay Total Maximum Daily Load (TMDL), or “Bay Clean Up Plan”, is the development and execution of “roadmaps” to success, developed by each Bay jurisdiction (New York, Pennsylvania, Delaware, Maryland, Washington, D.C., West Virginia, and Virginia). These roadmaps are called Watershed Implementation Plans, or WIPs, and each jurisdiction is responsible for developing and implementing three WIP phases. Phase I and Phase II WIPs were submitted to EPA in 2010 and then 2012, both outlining how each jurisdiction planned to achieve water quality goals set for 2017.

Phase III WIPs are due to EPA at the beginning of 2019. In their Phase III WIPs, each Bay jurisdiction is expected to provide a plan of action that will enable it to reach its goals between 2018 and 2025. WIP development is complicated and time consuming, as each jurisdiction is evaluating past plans, current successes and failures, public comment, and suggested guidance from EPA. The broader roadmap is filled in with local plans, developed at the county and/or city level.

*Chesapeake Legal Alliance staff and Board members are monitoring Phase III WIP in each jurisdiction to identify areas in which CLA and our partner organizations can assist each jurisdiction create and implement activities to achieve clean up goals.*

**To learn more about the Phase III WIP process, click [HERE](https://www.epa.gov/chesapeake-bay-tmdl/chesapeake-bay-watershed-implementation-plans-wips).** <https://www.epa.gov/chesapeake-bay-tmdl/chesapeake-bay-watershed-implementation-plans-wips>

### Representative Goodlatte Aims to Block Enforcement of the Chesapeake Bay Cleanup Plan

U. S. House Representative Bob Goodlatte and other U.S. House Representatives are working to weaken the Chesapeake Bay cleanup plan. Rep. Goodlatte, a Republican representing western Virginia, introduced a bill amendment that was approved by the House on September 8, 2017 that would prohibit the U.S. Environmental Protection Agency (EPA) from using agency funds to enforce the Chesapeake Bay cleanup plan. The amendment, H.R. 3354, was made to the Department of the Interior, Environment, and Related Agencies Appropriations Act 2018. The appropriations bill would fund EPA and the Department of the Interior for most of fiscal year 2018. If this amendment survives Senate approval, it will remove state accountability for pollution reductions previously agreed to under the cooperative federal-state Chesapeake Bay Cleanup plan.

**For more information on the Goodlatte amendment, visit:** <http://www.baltimoresun.com/news/maryland/environment/bs-md-bay-enforcement-20170908-story.html>

got subpoenas?

**Have you or your organization received a subpoena to appear at a deposition or**

**produce documents in lieu of appearing in person?** If so, do not ignore it! The word “subpoena” comes from a Latin term meaning “under penalty.” If you do not respond to it, you may be subject to civil or criminal penalties. **But don’t worry – CLA can help!** CLA volunteer attorneys have advised clients regarding how and when to respond to a subpoena, as well as regarding what documents should be turned over in response to discovery requests.





## Conowingo Dam 101

By Hannah Brubach, CLA Legal Fellow

Located 9.9 miles away from where the Lower Susquehanna River joins the Chesapeake Bay, the Conowingo Dam provides a barrier to nutrients and sediments traveling down the river that would otherwise enter the Bay. At its peak trapping capacity, the 9,000-acre reservoir behind the dam caught 2% of Nitrogen, 40% of Phosphorus, and 70% of sediment. However, the dam is now at maximum trapping capacity, and excess pollutants and silt are now travelling freely downriver from New York and Pennsylvania, straight into the Bay.

The influx of pollution makes it more difficult for Pennsylvania and Maryland to meet their pollution reduction goals under the Chesapeake Bay TMDL or "Bay Clean Up Plan." This winter, Maryland plans to test dredging the reservoir behind the dam, with the hope of creating space for more nutrient filled sediment to settle. Although dredging will increase the trapping capacity, a 2016 report by the Army Corps of Engineers found that stopping pollution at its source is the best and most cost-effective way to restore the Bay's health. Maryland and Pennsylvania will therefore have to step up their work on reducing pollution and sediment in other ways.

The dam is currently up for relicensing by the Federal Energy Regulatory Commission (FERC). The dam's owner, Exelon Corporation, is requesting a 46-year operating license. FERC has completed its Final Environmental Impact Statement and Maryland is in the process of creating its Water Quality Certification for the dam. Maryland Department of the Environment has scheduled a public hearing to discuss the Certification for **December 5, 2017** at 6 pm in Harford County, MD. During this time, the public comment period will also be reopened.

*CLA will continue to follow the relicensing process and options to address dam capacity to assist our partners in their efforts to stem pollution at its source and prevent pollution from reaching the Bay.*

**Read the full-length article on CLA's website:** <http://www.chesapeakelegal.org/index.php?/articles/entry/conowingo-dam-101>

## Meet Our Fall Interns and Legal Fellow

*This fall, CLA welcomes a Law and Policy Fellow and 3 legal interns to our team!*



**Hannah Brubach**, CLA's Law and Policy Fellow, is a recent Vermont Law School graduate. Hannah is researching and evaluating laws and regulations that protect the Bay, its lands, and waterways, helping track Phase III WIP developments and impaired waters listings, and performing research on Maryland's Living Shoreline Act.



**Mariel Yarbrough** is a graduate of the University of Denver Sturm College of Law. She is a volunteer board member for Chesapeake Bay String of Pearls Project and was previously the Easement Coordinator with Scenic Rivers Land Trust. Mariel is developing content for CLA's new website.



**Caroline Barker** is in her final year at George Washington Law School, where she is also working towards a master's degree in public health. Caroline will focus her work at CLA on the potential environmental health impacts and resulting legal implications of the construction of the D.C. United Soccer Stadium.



**Stephen Milak** is a second-year student at Georgetown Law School where he is a member of the Environmental Law Review. Stephen will be comparing the Maryland, Virginia, and Pennsylvania National Pollutant Discharge Elimination System permit programs under the federal Clean Water Act.



## New CLA Matters

**Caroline Gaudet, Steptoe & Johnson LLP** (Washington, DC) is assisting the **Lower Shore Land Trust** in the review and analysis of conservation easements and title reviews to support the conservation of biologically significant lands in Maryland.

**Phillip Chalker, Law Office of Phillip Chalker** (Baltimore, MD) is assisting a **regional environmental group** with research and analysis of changes to processing procedures under the newly implemented USDA inspection regulations of blue catfish, an invasive species of fish abundant in the rivers of the Bay Watershed.

**Ridgway Hall** (Washington, DC) is assisting the **Maryland Clean Agriculture Coalition (MCAC)** in evaluating the progress of Maryland's Accounting for Growth committee, charged with developing a plan for including population and pollution growth in the state's Phase III Watershed Implementation Plan.

**Bill Pedersen, Bill Pedersen Law** (Washington, DC) assisted **Dorchester Citizens for Planned Growth** analyze water quality concerns related to the level of pollutants going into the Transquaking River. This information will help support the groups review of a forthcoming water quality permit to be issued by the Maryland Department of the Environment. Attorney Pedersen will assist DCPG review and comment on the draft permit.

**William Bierbower** (Annapolis, MD) assisted **Interfaith Partners for the Chesapeake** with drafting a general non-disclosure agreement for use in contracting with outside vendors.

**Bill Pedersen, Bill Pedersen Law** (Washington, DC) will provide the **Chesapeake Bay Enforcement Network** with support and guidance regarding suggested language for consent decrees entered into by the Maryland Department of Environment.

**Ridgway Hall** (Washington, DC) and **CLA Staff** provided legal research and analysis to the **Potomac Conservancy** regarding the definition of "fishable and swimmable" under the Clean Water Act and how that definition is developed within each Bay jurisdiction.

**Alex English, GreenSpring Legal, LLC** (Silver Spring, Maryland), assisted **Dorchester Citizens for Planned Growth** review recently requested Maryland Public Information Act Requests to determine whether the state failed to produce documents that fell within the scope of the organization's request for documents related to a pending water pollution permit application.

**Russ Stevenson** (Severna Park, MD) assisted the **Magothy River Association** with a review of organizational structure and advice on future growth.

**Martin Siegel, Stock & Leader** (York, PA) assisted the **Choose Clean Water Coalition** with analysis of whether the Pennsylvania Department of Environmental Protections is meeting all state Sunshine Act requirements for public engagement in its Phase III WIP development process.

**Ridgway Hall** (Washington, DC) assisted **Blue Water Baltimore and the Baltimore Harbor Waterkeeper** in drafting comments on the cleanup at Tin Mill Canal, a water feature located within the Tradepoint Atlantic property at Sparrows Point.

**Alex English, GreenSpring Legal, LLC** (Silver Spring, Maryland), assisted **Neighbors of the Mayo Peninsula** with advice on a Maryland Public Information Act request to Anne Arundel County regarding water quality samples and related data.

**Mike Pretl, Law Offices of Mike Pretl** (Riverton, MD), advised **Blue Water Baltimore and the Baltimore Harbor Waterkeeper** regarding labor laws regulating employees volunteering for employers.

CLA provided **Socially Responsible Agriculture Project (SRAP)** with peer review comments on its Combined Animal Feeding Operations (CAFO) guides for citizens in both Virginia and Maryland. These guides will help citizens understand how to engage in local CAFO permitting processes.

CLA Intern **Amy Stevens** assisted a **citizen of Accomack County, VA** with research and analysis regarding the Virginia Freedom of Information Act (VFOIA) to help determine what personal and proprietary information from CAFO Resource Management Plans is excluded from VFOIA requests.

CLA Intern **Katie McKerall** assisted the **Severn River Association** with research and analysis regarding when local planning and zoning laws implemented to protect the environment are considered a regulatory taking.

CLA Legal Fellow **Hannah Brubach** assisted the **Lower Susquehanna Riverkeeper** with research and analysis of procedural requirements for challenging EPA's review of the Pennsylvania Department of Environmental Protection decision to not include the Lower Susquehanna River on the impaired waterway list.



## New Matters continued...

**CLA Legal Fellow Hannah Brubach** assisted **South River Federation** research procedural requirements of the 2008 Living Shoreline Act to assess waivers if a property owner does not want to comply with living shoreline requirements.



**CLA Legal Fellow Hannah Brubach** assisted **CLA** research and analyze which Maryland counties developed Phase II local watershed plans indicating how these municipalities planned to comply with the pollution reduction limits required under the Chesapeake Bay TMDL Cleanup Plan. This information will support ongoing efforts to review county and state plans under the third and final phase of watershed implementation plans to be developed in early 2018.

**CLA Intern Mariel Yarbrough** assisted **Mehoopany Creek Watershed Association (MCWA)** research

the status of the U.S. Fish and Wildlife Service's NEPA review for a proposed 50-year incidental take permit of five (5) endangered bat species that would be harmed by proposed natural gas pipeline construction in the northeast.

**CLA Intern Caroline Barker** is assisting a **D.C. community group** research and analyze what environmental laws may apply to the construction of the D.C. United Soccer Stadium and whether any requirements were not met by stadium developers.

**CLA Intern Stephen Milak** is assisting **CLA** research and analyze Virginia and Pennsylvania water quality permitting programs. This information will help **CLA** determine whether citizen guides may be needed to help Virginia and Pennsylvania communities understand how to participate in the public participation process for Clean Water Act point

## New Legal Developments

By **Mariel Yarbrough, CLA Fall Intern**

### Maryland and Environmental Organizations Sue EPA to Enforce CAA Provisions for Interstate Air Pollution

In a case filed on September 27, 2017, Maryland sued EPA demanding the agency require appropriate air pollution controls on power plants in Indiana, Kentucky, Ohio, Pennsylvania, and West Virginia. This case was filed in the Southern District Court for the District of Maryland. The state claims that this action is needed to address the air pollution that crosses interstate borders and contributes to smog in Maryland. Out-of-state pollution is hindering Maryland's ability to meet federal air quality standards. MDE estimates 70 percent of the ozone pollution in Maryland comes from outside of the state. Maryland currently requires its power plants to install scrubbers and air-cleaning technology. In the lawsuit filed by Maryland, the state asks EPA to require the 19 power plants in the



upwind states to install the same pollution reduction technology.

On October 4, 2017, the Chesapeake Bay Foundation, joined by six partner groups (Sierra Club, Environmental Defense Fund, Chesapeake Physicians for Social Responsibility, Environmental Integrity Project, Chesapeake

Climate Action Network, and Adirondack Council), filed a related suit claiming that these same 19 power plants are harming the Chesapeake Bay through deposition of nitrogen to water. Reducing nitrogen oxides from these power plants would reduce the amount of NOx in Maryland by an estimated 39,000 tons.

**You can read more here:** <http://www.baltimoresun.com/news/maryland/environment/bs-md-smog-lawsuit-20170927-story.html>; <http://chestertownspy.org/2017/10/05/chesapeake-bay-foundation-join-other-groups-in-suit-against-epa/>

**You can read Maryland's complaint here:** <http://src.bna.com/sUG>



## New Legal Developments continued...

### D.C. Circuit Reinstates CAFO Air Emissions Reporting Rule



A 2008 EPA rule exempted Concentrated Animal Feeding Operations (CAFOs) from hazardous air pollution reporting requirements. In April, the D.C. Circuit struck down this illegal

exemption and reinstated the reporting requirements, requiring CAFOs to report hazardous air pollutants, including ammonia and hydrogen sulfide. Now, EPA is asking the court to delay implementation of this decision until January 2018 so the agency can develop compliance guidance for CAFOs. CAFOs emit nearly three-quarters of the nation's ammonia air pollution, which adds to water quality impairments in the Chesapeake Bay and poses a threat to public health and animal welfare.

**You can read the D.C. Circuit decision here:** <https://www.cadc.uscourts.gov/internet/opinions>.

**For more information see:** <http://waterkeeper.org/cafos-ordered-to-report-hazardous-pollution/>

### EPA Postponed Compliance Dates for Effluent Limitations and Revising Standards for Steam Electric Power Generating Facilities

In 2015, EPA set a new standard for the best available technology achievable ("BAT") for effluent limitations and pretreatment standards that would reduce the level of toxic metals that steam electric power plants could discharge into waterways. The power plants were to comply with this new standard beginning in 2018. In September, EPA announced it will postpone compliance dates by two years for bottom ash transport water and flue gas desulfurization wastewater facilities because the agency intends to conduct a rulemaking to potentially revise the BAT required for these types of facilities. Compliance dates for the other types of waste streams were not changed.

**You can read the prepublication version of this Final Rule here:** [http://www.epa.gov/sites/production/files/2017-09/documents/steam-electric-elg\\_final\\_postpone-compliance-dates\\_fr-prepub\\_09-12-2017.pdf](http://www.epa.gov/sites/production/files/2017-09/documents/steam-electric-elg_final_postpone-compliance-dates_fr-prepub_09-12-2017.pdf)

**For more information see:** <https://enablon.com/blog/2017/09/29/epa-power-plant-discharge-rule-compliance-dates-weekly-compliance-digest>

**AND ~**

<http://www.powermag.com/epa-finalizes-steam-electric-power-plant-effluent-guidelines/>

### Streamlining Environmental Analyses due to Trump Executive Order

A new Executive Order (E. O.13807) issued in August set new goals for federal reviews of major infrastructure projects. In line with the Trump Administration's efforts to hold agencies accountable for conducting efficient reviews and reduce paperwork, the Department of Interior (DOI) is streamlining Environmental Impact Statements (EIS) prepared under the National Environmental Policy Act (NEPA). DOI issued a memo limiting each EIS to no more than 150 pages, or no more than 300 pages if the project is unusually complex. DOI has also set a one-year completion goal for an EIS. DOI may produce additional guidance to direct field staff on the new procedures.

The Council on Environmental Quality (CEQ) released an initial list of actions to implement a more efficient review of projects under NEPA. Some of the items on the list include developing a framework to implement "One Federal Decision" for each major infrastructure project, designating projects as high-priority, revising existing guidance, and issuing additional guidance to simplify and accelerate the NEPA process. The streamlining actions may result in an increase in NEPA-related litigation if they cause stakeholders to find individual reviews inadequate.

**You can read Executive Order 13807 here:** <https://www.whitehouse.gov/the-press-office/2017/08/15/presidential-executive-order-establishing-discipline-and-accountability>



## New Legal Developments continued...

### California Proposes Regulation to Continue Protections to its Wetlands

The Clean Water Act (CWA) applies to “waters of the United States” (WOTUS). The definition of WOTUS and the scope of the jurisdiction of federal agencies under the CWA is in flux as the Trump administration plans to rescind the existing proposed Clean Water Rule and promulgate a new regulation that would



direct agencies to use more restrictive principals. This means that seasonal and isolated wetlands, which were included in the definition of WOTUS by the Obama Administration’s Clean Water Rule, would likely not be protected by the CWA. In response to this narrowing of the definition of WOTUS, states are beginning to react with new laws to protect water resources.

California has a “no-net-loss” Wetlands Policy, which ensures a long-term net gain of wetland acreage in California. In July, the California State Water Resources Control Board published wetland procedures, defining wetlands under the state’s no-net-loss Wetland Policy for the first time and includes waters that may not be included in a revised version of the Clean Water Rule, including state oversight of western vernal pools. The procedures also created Water Quality Certifications and Waste Discharge Requirements for applicable dredging or fill activities in California. California has also defined “waters of the state” broadly. The Water Board intends to finalize the rulemaking process by this winter.

**The proposed changes to California’s rules on wetlands can be found here:** [https://www.waterboards.ca.gov/water\\_issues/programs/cwa401/wrapp.shtml](https://www.waterboards.ca.gov/water_issues/programs/cwa401/wrapp.shtml)

**For more information see:** <http://www.sacbee.com/news/local/article164240607.html>

### NEPA Review Must Consider Downstream Greenhouse Gas Emissions from Natural Gas Transported in Pipelines

In August, the D.C. Circuit of the U.S. Court of Appeals ruled that Federal Energy Regulatory Commission’s (FERC) National Environmental Policy Act (NEPA) review process could not ignore greenhouse gas (GHG) emissions from burning natural gas that is transported in the Sabal Trail Pipeline. The pipeline would deliver natural gas to Florida power plants. The court held that the NEPA Environmental Impact Statement (EIS) was required to quantify the impact of GHG resulting from the end user burning the gas or explain why FERC failed to quantify this amount. This decision overturned FERC’s approval of the project, and the agency was required to conduct the downstream GHG analysis which found likely net increases in downstream greenhouse gas emissions in Florida.



This decision means that agencies performing NEPA reviews must analyze reasonably foreseeable direct or indirect effects associated with downstream GHG emissions. This case puts legal limitations on the Trump Administration’s recent attempts to deemphasize climate change in NEPA analyses.

**You can read the court decision here:** <https://www.sierraclub.org/sites/www.sierraclub.org/files/blog/FINAL%20ORDER%208-22-17.pdf>

**For more information see:** <http://thehill.com/policy/energy-environment/347469-court-rejects-pipeline-project-on-climate-concerns>; <https://oilprice.com/Energy/Natural-Gas/Landmark-Court-Ruling-Could-Jeopardize-This-Major-Pipeline.html>



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