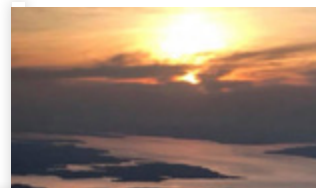
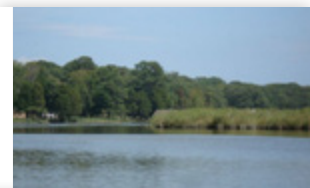




**CHESAPEAKE**  
LEGAL ALLIANCE

# Bay Brief Quarterly



SPRING 2018

## VICTORY! Local Groups Win at Turtle Run When Critical Area Law Enforced

Local citizens, along with environmental and community groups, have spent more than 12 years fighting for the environmental integrity and preservation of one of the last pristine, tidal waterfront areas in Anne Arundel County. The battle over the hotly disputed planned development -Turtle Run at Deep Cove – in Churchton, Maryland was finally won when the Anne Arundel County Board of Appeals closed an appeal, effectively stopping Snyder Development from moving forward. 11 single family homes were planned on land designated as a Resource Conservation Area (RCA) within the Critical Area (land within 1,000 feet of the Bay or its tidal tributaries).



attempting to skirt this important state-wide environmental protection by arguing that it could reconfigure development rights between non-adjacent parcels of land that the developer owned within the RCA, and therefore could build 11 homes on a lot composed of fewer than 40 acres. To argue its case, Snyder Development relied on a definition of “site” located in a completely unrelated section of the Code of Maryland Regulations (COMAR) concerning stormwater management, that defined “site” as parcels of property owned by the same person or entity. In 2016, Snyder convinced Anne Arundel County to accept this definition of “site”

According to Maryland state law, only one home can be built on every 20 acres of land within a RCA. This regulation makes development within the RCA the most restrictive on land found within Maryland’s Critical Area, protecting natural habitat and water quality. Snyder Development was

and approve its development plans for Turtle Run.

Assisted by Chesapeake Legal Alliance volunteer attorney John Wyss of Wiley, Rein (Washington, D.C.) and volunteer attorney Jonathan Guy of Orrick (Washington, D.C), South Arundel Citizens for Responsible Development (SACReD) and the West/Rhode Riverkeeper, along with the Chesapeake Bay Foundation and local citizens, appealed

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the County's approval of Snyder's development plan. After two years and 25 hearings, the Anne Arundel County Board of Appeals administratively dismissed the appeal, finding that the County's 2016 approval of the development plan was null and void, and therefore there was nothing pending before the Board to decide. This dismissal was the result of a finding by Maryland's Critical Area Commission (CAC), the commission responsible for review and approval of local and state-wide implementation of the Critical Area Act, that Anne Arundel County was not meeting state Critical Area law requirements. The CAC gave the County 90 days to amend its local Critical Area Program to address its deficiencies and determined that any local project approval based on the stormwater-related definition of

"site" was null and void, including Snyder's proposal.

This tremendous victory is not only a testament to the hard work and unwavering will of community advocates to stand up for their local water quality and against illegal development, but it is also an example of how the correct application of existing state statutes protects the health and future of the Chesapeake Bay and its lands and waterways. Thanks to the thoughtful and thorough analyses of both the CAC and Anne Arundel County Board of Appeals this land will be protected and Anne Arundel County will be forced to establish a more thorough, more effective, and more accurate local plan to implement the Critical Area Law in the future throughout the county.

## State Environmental Rights Amendments to Protect the Chesapeake Bay

By: Caty Scharnagle (CLA Intern)

Many state constitutions include provisions that grant fundamental human rights, such as the right to enjoy and defend life and liberty, the right to free speech, and the right to own property. Thirty-three state constitutions also make some mention of the right to a healthy environment, but only a few of these provisions have been interpreted to rise to the same level of legal protection as fundamental human provisions and the scope of the rights vary greatly.

Within the Chesapeake Bay watershed, New York, Pennsylvania, and Virginia provide constitutional environmental provisions. Of these, only the Pennsylvania provision has been found to provide citizens a broad actionable right to a clean and esthetic environment. A recent Pennsylvania court decision case has expanded significantly the scope of Pennsylvania's Environmental Rights Amendment.

Article I, Sec. 27 recognizes that Pennsylvania's citizens have a right to, "clean air, pure water, and to the preservation of the natural, scenic, historic, and esthetic values of the environment." In 2017, the decision in *Pennsylvania Environmental Defense Foundation v. Commonwealth* affirmed the government's role as a

trustee of Pennsylvania's natural resources. 161 A.3d 911 (Pa. 2017). As a trustee, the state has the "duty to prohibit the degradation, diminution, and depletion of our natural resources, whether these harms might result from direct state action or from the actions of private parties." This newly expanded duty of the state government may provide a new mechanism for

### CLA Hosts Law Students for Alternative Spring Break

Two students from Roger Williams University School of Law – Kathy Kulaga and Caty Scharnagle, both first year students – joined us in March as part of their Alternative Spring Break. That program allows students to spend a week contributing to the work of non-profit organizations of their choice. Kathy and Caty performed research to support a stormwater enforcement project CLA and ShoreRivers is developing and a training webinar CLA presented on environmental rights amendments in Chesapeake Bay jurisdictions.





environmental advocates to challenge government actions for failure to uphold these duties. It is likely that the Pennsylvania Environmental Rights Amendment can be used to challenge governmental decisions, including those made by local governments, and will impose new responsibilities on government and polluters. The case law around this newly expanded right will help guide clean water advocates on how best to implement this

tool to protect water quality in Pennsylvania.

The Pennsylvania state provision may also serve as a model for other Chesapeake

Bay states interested in adopting a meaningful environmental rights provision. New York has adopted the "Forever Wild" Clause in its constitution to protect specific forested lands - the Adirondack and Catskill Parks. (Article XIV, Sec. 3-4). The New York amendment does not go as far as Pennsylvania because it does not define environmental rights as fundamental to citizens. In 2017 and 2018, a broader environmental amendment was proposed in the state legislature but did not pass. In 2018, Maryland tried to pass an environmental rights amendment similar to Pennsylvania and interest remains to pursue a bill in 2019.

*CLA will continue to follow emerging case law and legislative efforts to use environmental rights amendments as a tool to protect water quality in the Chesapeake Bay watershed. Please contact CLA if you or your organization would like to learn more about how to put these provisions to work in your community.*

**To learn more, please view CLA's recent legal education presentation on Bay Environmental Rights Amendments:**  
[http://www.chesapeakelegal.org/documents/Choose\\_Clean\\_Water\\_Coalition\\_Enviro\\_Rights\\_Amendments\\_CLE\\_3.27.18.pdf](http://www.chesapeakelegal.org/documents/Choose_Clean_Water_Coalition_Enviro_Rights_Amendments_CLE_3.27.18.pdf)

## CLA's ED Will Continue to Collaborate in New Position



Jackie Guild

Executive Director, Jackie Guild, is resigning in mid-May to take on the position of Director of the Office of Environmental Policy of the City of Annapolis. Russ Stevenson, President and Chairman

of CLA said, "Jackie was the first Executive Director of the Chesapeake Legal Alliance, and she has been with us since early 2011. Her talent, energy, and creativity have been indispensable to the significant role we continue to play in restoring the health of the Chesapeake Bay. We are going to miss her; but she is leaving behind a strong, stable organization with a great staff and an active and growing program. We look forward to working with her as she takes on a new challenge." Jackie is looking forward to working with CLA and the other Bay non-profits in her new role.

Eliza Smith Steinmeier, a CLA Board member and the founder of and first Baltimore Harbor Waterkeeper, will step in as interim Executive Director until a replacement for Jackie is brought on board. Sheila Jones, another Board member, Georgetown Law School professor, and retired partner of Holland & Hart, LLP, will also support CLA staff during this period.



Eliza Smith Steinmeier



## MDE Backs Away from Enforcement of Existing Water Laws

As reported in our Spring 2017 newsletter, the Maryland Department of Environment (MDE) has pursued fewer enforcement actions for water quality violations and this trend continues in 2018. MDE's water and science agency—the agency responsible for water pollution enforcement—reported taking 771 enforcement actions in 2017. This is a 46 percent decrease in the number of actions taken in 2016 and is the fewest since 2008. In 2017, the agency wide enforcement rate is no better. The Bay Journal reports that MDE's overall enforcement activity in 2017, excluding lead paint violations, was the lowest in a decade.

This significant reduction in enforcement is attributed



to a shift in enforcement policy under Governor Larry Hogan and years of declining funding and resources that has resulted in understaffing of inspection and enforcement positions. MDE is currently the most understaffed agency within the state government. In a study looking at the staffing adequacy in the Maryland Executive Branch, the Maryland Department of Legislative Services found MDE has the need for 295 additional positions to meet required agency functions and comply with workload mandates. This staffing shortfall mirrors a national trend in reduced state government executive branch staff that began during recent economic recessions and have not been addressed as state economies have recovered.

## CLA Returns to Capitol Hill to Fight for Bay Program Funding



On March 21st, CLA braved the late season snow storm to join the Choose Clean Water Coalition (CCWC) in educating members of the House and Senate about the importance of providing full funding to the Chesapeake Bay Program. Thanks to the efforts of coalition members, and the support of our Bay Senators and Representatives, the Bay Program will be funded at \$73 million, with no cuts to Farm Bill conservation programs through Fiscal Year 2018! *Special thanks to CLA volunteer attorney Patty Zweibel of Skadden, Arps (Washington, D.C.), who, in preparation for "Lobby Day," provided coalition members with a training webinar on IRS rules regarding non-profit lobbying.*



In partnership with the Center for Progressive Reform, the Maryland League of Conservation Voters, and the Maryland Choose Clean Agriculture Committee, CLA worked again this year to advocate for money to be set-aside to fund inspection positions at MDE and MDA. For the second year in a row, the Maryland General Assembly designated \$400,000 of the state's FY2019 budget to fill vacant enforcement and compliance positions within the agencies. Last year, neither agency made use of these funds. It is unclear why the agencies did not use these funds to add critically important inspection capacity. According to the Bay Journal, MDE has pivoted from prioritizing enforcement actions and instead is counseling violators in an approach Secretary of MDE Ben Grumbles dubbed "compliance assurance." The result is MDE providing compliance assistance approximately twice as often as pursuing an enforcement action, according to the Bay Journal.

CLA will continue to follow whether the agencies use the money set-aside for inspector positions this year and provide information to the Maryland General Assembly regarding the gaps in legal enforcement associated with a "compliance assurance" approach. The state approach is particularly troubling due to reduced enforcement and deregulation at the national level.

**You can read the full Bay Journal article discussing enforcement rate declines here:** [https://www.bayjournal.com/article/mde\\_taking\\_fewer\\_enforcement\\_actions\\_against\\_water\\_pollution](https://www.bayjournal.com/article/mde_taking_fewer_enforcement_actions_against_water_pollution)

**You can read the Maryland Executive Branch Staffing Adequacy Study here:** <http://dls.maryland.gov/pubs/prod/TaxFiscalPlan/Executive-Branch-Staffing-Adequacy-Study.pdf>

## CLA Awarded Contract Through Chesapeake Bay Program and Chesapeake Bay Trust



The Chesapeake Legal Alliance was recently awarded a contract to review and evaluate Bay-wide statutes and regulations currently in place to protect Submerged Aquatic Vegetation (SAV), or underwater grasses, in the Chesapeake Bay. SAV adds to the health of the Bay by

adding oxygen to the water. They improve clarity and make up an important part of the Bay's ecosystem and natural habitat for other fish and wildlife. They also help to prevent and reduce shoreline erosion.

The Chesapeake Bay Program has a goal to achieve and sustain 185,000 acres of SAV, necessary for Bay health and sustainability. The CLA report will also suggest changes to help the Bay Program reach its SAV-related goals.





## New CLA Matters

**Ryan Kennedy** (Annapolis, M.D.) is assisting a **local conservation association** to track and review stormwater management violations on a development site, along with any related enforcement actions taken by the Maryland Department of Environment (MDE).



**Ridgway Hall** (Washington, D.C.) and **CLA staff attorneys Mary Clemmensen and Molly Brown**, in partnership with **Chesapeake Bay Foundation**, are providing Choose Clean Water Coalition with support drafting recommendations to Maryland Department of the Environment regarding local participation in Phase III Watershed Implementation Plan development.

**Ridgway Hall (Washington, D.C.) is advising ShoreRivers** regarding the extent to which Maryland Department of Environment is required to consider previous National Pollutant Discharge Elimination System (NPDES) permit violations when reviewing new permit applications by the same applicant.

**Eliza Smith Steinmeier** (Baltimore, M.D.) is assisting the **Langley Park Civic Association**, located in Prince Georges County, M.D. with strategic advice and assistance drafting and filing 501(c)(3) formation documents.

**Dan McGannon of Stock and Leader** (York, P.A.) is assisting the **Middle Susquehanna Riverkeeper** with review and advice regarding the terms of employment of the organization's summer internship program.

**CLA Intern Caty Scharnagle (Roger Williams University School of Law, Providence, R.I.)** provided CLA with research and analysis of existing Environmental Rights Amendments in each of the Chesapeake Bay jurisdictions.

**Stephen Kurzman** (Washington, D.C.) is providing **EcoLatinos** with strategic advice regarding organizational direction.

**CLA Intern Kathy Kulaga (Roger Williams University School of Law, Providence, R.I.)** provided CLA and **ShoreRivers** with review and analysis of existing legal frameworks for stormwater management in several Eastern Shore counties and local municipalities.

**CLA Intern David Moskowitz (Georgetown Law, Washington, D.C.)** assisted CLA with a review of existing educational materials for citizens regarding Municipal Separate Storm Sewer System (MS4) permits.

**CLA Intern David Moskowitz (Georgetown Law, Washington, D.C.)** is assisting CLA with a review of local, state, and federal requirements for standing in administrative and judicial environmental issues.

**Bill Pedersen** (Washington, D.C.) is assisting a **regional environmental group** with advice and strategy regarding its strategy regarding actions taken by the Atlantic States Marine Fisheries Commission concerning its Menhaden Fisheries Management Plan.

**Ryan Kennedy** (Annapolis, M.D.) is assisting a **local home owners association** in opposition to an appeal by a developer concerning the rejection of a rezoning application by the Anne Arundel County Office of Planning and Zoning.

**Catherine Woolley** (Baltimore, M.D.) provided strategic analysis to the **Orangeville Community Association** regarding public participation opportunities in the redevelopment plans of the Baltimore Brownfields by the University of Baltimore.

**CLA Intern Aaron Aber (George Washington School of Law, Washington, D.C.)** assisted **Maryland Clean Agriculture Coalition (MCAC)** with review and analysis of concentrated animal feeding operation (CAFO) related air quality laws adopted and implemented in states other than Maryland.

**Martin Seigel of Stock and Leader** (York, P.A.) is assisting **Lancaster Clean Water Partners** in a review of its internal corporate policies and documents.

**Patty Zweibel of Skadden, Arps** (Washington, D.C.) provided the **Choose Clean Water Coalition** with a training webinar designed to educate coalition members about IRS rules for non-profit lobbying restrictions in preparation for participation in Chesapeake Bay Federal Lobby Day on Capitol Hill.

**Marty Seigel of Stock and Leader** (York, P.A.), along with **CLA Staff Attorney Mary Clemmensen**, provided the **Choose Clean Water Coalition** with an educational training webinar focused on Pennsylvania's Environmental Rights Amendment.



## New Legal Developments

### Virginia Approves Draft Plan to Begin Cap-and-Trade of Air Pollutants



In late 2017, the **Virginia State Air Pollution Control Board approved draft regulations that if implemented would decrease carbon emissions by 3% each year and 30% overall by 2030.** The plan would require

power plants to reduce emissions and link the state plan to the Regional Greenhouse Gas Initiative (RGGI) - a carbon cap-and-trade program with nine state participants, including the Chesapeake Bay states of New York, Delaware, and Maryland.

Several previously unsuccessful RGGI bills have been proposed in the Virginia legislature to establish Virginia participation in RGGI. The current proposed plan would be implemented through regulations the Virginia Department of Environmental Quality (VDEQ) would draft pursuant to its authority under the State Air Pollution Control law. Because VDEQ does not have authority to generate revenue through direct participation in RGGI market auctions, the Virginia plan would function differently than other RGGI states by raising funds from auctioned credits regulated by the State Corporation Commission. The Commission would ensure that funds are used to offset expected increases in energy rates.

VDEQ held six public comment periods on the proposed carbon trading plan and is expected to provide responses to comments and publish a final proposed rule this summer.

**For more information, please visit VDEQ's website:**  
<http://www.deq.virginia.gov/Programs/Air/GreenhouseGasPlan.aspx>

### Congress Gives Large Agricultural Facilities A Pass on Reporting Air Emissions

On March 23, 2018, Congress passed the Consolidated Appropriations Act of 2018 - an Omnibus Bill. **Title XI of the bill exempts large agricultural production facilities from reporting "air emissions from animal waste at a farm" under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).** This bill overrides a recent decision by the D.C. Circuit Court of Appeals that would have invalidated an exemption EPA had provided farm operations from reporting air emissions under CERCLA.

As we reported in our Fall 2017 newsletter, the D.C. Circuit's decision required CAFOs to report hazardous air pollutants, including ammonia and hydrogen sulfide under the federal Emergency Planning and Community Right-to-Know Act (EPCRA). These rules require reporting of releases of a hazardous substance that exceeds a reportable quantity within a 24-hour period. 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. Due to the exemption language included in the Omnibus Bill, farms will remain exempt from CERCLA reporting requirements.

**To read more about this CERCLA exemption click here:**  
<https://cen.acs.org/environment/pollution/Livestock-emissions-still-air/96/i14>





## New Legal Developments continued...

### PA Superior Court Recognizes Claim for Trespass from Fracking



The Superior Court of Pennsylvania decided last month claims of trespass by hydraulic fracturing operations “may constitute an actionable trespass where subsurface fractures, fracturing fluid and proppant cross boundary lines and

extend into the subsurface estate of an adjoining property for which the operator does not have a mineral lease.” Briggs v. Southwestern Energy Production Company, 2018 PA Super 79 (Apr. 2, 2018). This decision will allow property owners to bring claims for liability if hydraulic fractures and fluid extend into subsurface on their property. Successful trespass claims could limit oil and gas operations, although proving the elements of trespass in these types of cases can be difficult.

You can read the Superior Court of Pennsylvania case here: <http://www.pacourts.us/assets/opinions/Superior/Out/Opinion%20%20ReversedRemanded%20%2010348768634826102.pdf?cb=1>

### Fourth Circuit Finds Some Groundwater Subject to Clean Water Act

In April, the Fourth Circuit joined the Ninth Circuit in finding that some discharges of pollutants to groundwater can be subject to permitting requirements under the Clean Water Act.

In *Upstate Forever v. Kinder Morgan Energy Partners*, the court found that the Clean Water Act applies to discharges of groundwater that have “direct hydrological connection” to surface waters that traditionally fall within the scope of CWA jurisdiction. *Upstate Forever et al. v. Kinder Morgan Energy Partners LP, et al.*, Case No. 17-1640 (4th Circuit, April 12, 2018). The “conduit” theory recognized by the court expands the type of discharges that would require a CWA permit and expand citizen suit enforcement for these types of discharges.



The CWA regulates point sources of pollution discharged into navigable surface waters but does not regulate pollution discharges to groundwater. This case considered whether a discharge to groundwater that is connected to a CWA surface water could trigger CWA liability. The Fourth Circuit found that pollutants discharged into groundwater with a “direct hydrological connection” between a point source and navigable waters are subject to regulation under the CWA. This finding follows a similar Ninth Circuit case that found that point sources of pollution discharged into CWA surface waters, such as rivers and lakes, through a groundwater connection can be regulated under the CWA. *Hawaii Wildlife Fund et al. v. County of Maui*, Case No. 15-17447 (9th Circuit, Feb. 1, 2018). These two cases continue a trend of courts expanding CWA jurisdiction to groundwater that serves as a conduit to surface water.

You can read the Fourth Circuit decision here: <http://www.ca4.uscourts.gov/opinions/171640.P.pdf>

You can read the Ninth Circuit decision here: <http://cdn.ca9.uscourts.gov/datastore/opinions/2018/02/01/15-17447.pdf>



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