



CHESAPEAKE
LEGAL ALLIANCE

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A Victory for Water Quality in Virginia - a CLA Volunteer Attorney's Perspective

By: *Guest Author Emily Russell, CLA volunteer attorney*

Emily is an Assistant County Attorney for Chesterfield County, Virginia and a graduate of Tulane University Law School where she concentrated in environmental law.

Standing on Morrison Avenue, under the towering magnolias, pine trees, and dogwoods, surrounded by the sound of birds chirping, it is difficult to imagine such a lush area could be clear-cut and replaced with nearly 40 townhomes. That was, however, the proposal of a developer in Henrico County, Virginia until the Friends of Bryan Park, a local volunteer group dedicated to the preservation and improvement of historic Bryan Park, decided to focus its efforts on preserving this natural buffer just beyond the park's boundaries. In 2014, John Zeugner, a board member of Friends, contacted me and asked if I could provide legal assistance to help him acquire the 6.5-acre property from the developer. His attempts to negotiate with the developer on his own had reached an impasse.

John invited me on a tour of the site so I could see for myself



why it was a special piece of property. As we walked through the site, John explained that it contained wetlands and a groundwater recharge area. It also provided important habitat and stormwater filtration in an otherwise developed area bounded by Bryan Park on one side and Interstate 95 on the other. The property itself drains to two creeks that flow through the park and

ultimately to the Chickahominy River and the Chesapeake Bay.

After the tour, I was convinced that I wanted to help John and the Friends in their quest to preserve the property, but I faced a dilemma. I was working as a lobbyist for a small non-profit and was not associated with a law firm that could provide support and professional insurance for the work John and Friends of Bryan Park needed. Enter Chesapeake Legal Alliance, a win-win solution for both my client and me. As a volunteer attorney with CLA, I qualify for its insurance coverage and was therefore able to provide contract development and negotiations on John's behalf. Moreover, since the work would promote

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the goals of a non-profit, John received “low bono” legal services at a fraction of the rate charged by a private firm.

Providing legal assistance through CLA was a creative solution with a happy result. After a few months of negotiating, the developer agreed to sell the property and John closed on the deal. My work was complete. The sale, however, was just the first step in a two-year effort to achieve the Friends’ goal of preserving the site forever. In April 2017,

with the assistance of the Capital Region Land Conservancy and Henricopolis Soil and Water Conservation District, John recorded a perpetual conservation easement for the property. Pursuant to the easement, the property will never be developed even if the land is sold. It will remain an urban oasis, and if John and Friends of Bryan Park have their way, it may even become part of Bryan Park one day.

Yellow Perch Habitat Preserved through Cattail Commons Settlement

9.4 acres of Anne Arundel County land on the Broadneck Peninsula will be placed into permanent conservation thanks to the efforts of CLA volunteer attorney Russ Stevenson, the Magothy River Association (MRA) and the Greater Severna Park Council!

The conservation easement is the result of years of advocacy and negotiations between local conservation groups, concerned citizens, CLA volunteer attorneys, and Koch-Riva Properties Group LLC. Koch had originally planned to build 32 townhomes on an over 11-acre parcel of land situation in Severna Park between Ritchie Highway and the Baltimore & Annapolis trail. The townhomes were to be constructed on delicate wetlands bordering Cattail Creek, a historic spawning area for yellow perch. Today, Cattail Creek has the poorest water quality of any creek feeding into the Magothy River, and this new construction would have only caused further harm to the already heavily impaired creek, the Magothy River, and ultimately the Bay.



Pursuant to the settlement, negotiated in large part by Attorney Stevenson, Koch has agreed to limit development to 2 acres, situated directly along Ritchie Highway. The newly proposed

development will be commercial in nature, instead of residential, and will necessitate a zoning reclassification of that site. The property owner will donate the remaining 9.4 acres to Anne Arundel County under permanent conservation easement. In exchange, MRA agreed to withdraw its pending appeal

of Anne Arundel County’s decision to grant Koch a rezoning of property in Pasadena, Maryland from one home per acre to 15 homes per acre, allowing the developer to move forward with its plans to build 184 townhomes on that site. This concession will free up MRA resources to focus on other battles in the fight for the health of the Magothy River.

For more information on this important conservation outcome, see: <http://www.capitalgazette.com/news/environment/ph-ac-cn-cattail-commons-0701-20170630-story.html>.



Zoning Ordinances Used to Protect Public from Poultry Operations

By: Amy Stevens, CLA Summer Intern

Local zoning ordinances can be an effective way for communities to take more control over the location of new and expanding Concentrated Animal Feeding Operations (“CAFOs”) in their counties. While there is still much room for improvement, some Delmarva counties are passing ordinances that increase setback requirements, reduce the number of chicken houses allowed in a defined area, and/or require best management practices for controlling dust and stormwater runoff.

Due to citizen pressure, Accomack County, Virginia recently updated its ordinance that now bans commercial poultry operations in general business or residential areas, increases minimum property line setbacks, sets density requirements of only one poultry house per five acres with a maximum of 12 houses per parcel, and requires vegetative buffers near poultry houses. Somerset, Wicomico, and Worcester counties in Maryland also recently updated their ordinances, increasing property line setbacks and expanding vegetative buffer requirements. Somerset County now requires a 1,000-foot setback on tunnel fans, which emit ammonia, dust, feathers, and other pollutants from poultry houses which are linked to adverse effects on public health.

In contrast, Cecil County, Maryland, which is experiencing a surge in commercial poultry operations, has not updated its ordinance since 2011 and requires only a 100-foot setback, unless there is an existing residence adjoining the operation which then triggers a 300-foot setback. These lenient requirements may attract more poultry operations as other counties tighten restrictions on the location of chicken house operations.

CLA summer intern Amy Stevens is assisting

Chesapeake Legal Alliance research and analyze gaps in the Virginia and Maryland permitting programs for CAFOs. This information will further support collaborative projects of local groups, such as the Assateague Coastal Trust and the Socially Responsible Agriculture Project, to develop legal strategies aimed at reducing water and air pollutants from CAFOs.

Meet Our Summer Interns

This summer, CLA’s work is being supported by the efforts of a fantastic group of summer interns.

Katherine McKerall is a rising second year student at George Mason University, Antonin Scalia Law School. **Amy Stevens** is a rising second year student at Vermont Law School. **John Rott** is a rising Senior at Hofstra University. The interns are performing research and analyses related to reducing pollution associated with poultry operations, use of drones to collect conservation and enforcement data, and educating citizens on shoreline stewardship; as well as tracking the Chesapeake Bay TMDL Phase III Watershed Implementation Plans.





Natural Gas Pipeline Route Planned to Go Under the C&O Canal

By Katherine McKerral, CLA Summer Intern

Columbia Pipeline Group, Inc. has plans to construct and operate a gas pipeline under the Potomac River and C&O Canal National Park in Maryland using horizontal hydraulic drilling. The Eastern Panhandle Expansion Project would consist of 3.4 miles of pipe carrying approximately 47,500 cubic feet of fracked natural gas per day through Washington County, Maryland. The pipeline will begin in Pennsylvania where the gas will be fracked, cross Maryland, and connect with a pipeline in West Virginia, serving West Virginia customers.

Such a project has significant implications for the Chesapeake Bay watershed. Washington County contains Maryland's largest area of Karst geology, which consists of easily dissolvable limestone and is prone to sinkholes, caves, and underground streams. The addition of a fracked gas pipeline to this fragile topography could increase the already elevated risk of groundwater contamination. During construction, any accident that releases hydraulic mud could cause significant damage to the Potomac River, other streams that will be crossed, and the C&O canal. If the proposed pipeline is damaged during operations, leaking methane gas could contaminate groundwater, wells, and the Potomac River which is the source of drinking water for millions of people.

In September 2016, Columbia Gas (which was recently purchased by TransCanada, the company behind the Keystone XL pipeline) applied to the National Parks Service (NPS) for a Special Use Permit, seeking a right of way through the C&O Canal National Park. Columbia would traverse the park by drilling horizontally under the canal, a popular spot for boating, fishing, camping, and cycling. Such a project will trigger a NEPA (National Environmental Policy Act) review to be conducted by the Federal Energy Regulatory Commission (FERC), which has the authority to grant, deny or condition the grant of a certificate of public necessity and convenience. In March 2017, Columbia filed its application with FERC, and hopes to start construction by January 2018.

Chesapeake Legal Alliance volunteer attorney Virginia Strasser (Washington, D.C.) has been working closely with the Potomac Riverkeeper Network (PRKN) to keep PRKN up-to-date and involved in the permitting process of this pipeline expansion to help ensure that FERC, the Army Corps of Engineers, the National Park Service, the State of Maryland, and others perform appropriate and thorough environmental assessments, and consider either denying the project or imposing conditions that would mitigate significantly any likely environmental harms. To learn more about the work that attorney Strasser and the Potomac Riverkeeper are doing on this issue, visit: <http://www.potomacriverkeepernetwork.org>.

Water Conservation District Established in Charles County, Maryland

Charles County, Maryland, recently established a Water Conservation District as part of the comprehensive land use plan it adopted last year. The Water Conservation District, which implements a one dwelling per twenty acre density limit on residential development and places limits on impervious surface coverage, is a huge win for groups and individuals within Charles County who have been working to limit sprawl development within the county and help limit damaging stormwater runoff into Mattawoman Creek and the headwaters of the Port Tobacco River, both tributaries of the Potomac River.

The Water Conservation District will cover approximately 36,769 acres, about 12% of the western part of Charles

County, and will prevent development of over 17,000 new housing units. This proactive action will help protect sensitive wildlife habitat and the health of local waterways, as well as help maintain the recreational and economic value of county land.

Congratulations to both 1000 Friends of Maryland and the Smarter Growth Alliance for Charles County for successfully advocating for this important change to Charles County zoning law!





New CLA Matters

Katherine Meyer, Meyer, Glitzenstein & Eubanks LLP (Washington, DC), assisted a **group of law professor members** of the **Center for Progressive Reform** to file amicus curiae brief in a challenge to President Trump's Executive Order 13771 on "Reducing Regulation and Controlling Regulatory Costs."

Ben Clapp, Skadden, Arps, Slate, Meagher & Flom LLP (Washington, DC), is assisting the **Assateague Coastal Trust** in reviewing Worcester County's implementation of Maryland's Critical Area Law and identifying and analyzing areas in which the County is falling short of its statutory duties under the law.



Roy Mason, Smouse & Mason, LLC (Annapolis, MD), is assisting the **Severn River Association** with advice and strategy regarding how to publicize private property owner violations of local, state, and federal water-related rules

and regulations along the Severn River without running afoul of defamation standards.

Scott Gluck, Duane Morris LLP (Washington, DC), is assisting a **Maryland environmental organization** with drafting merger documents as it moves forward with a merger with other organizations.

Sarah Nural, Steptoe & Johnson LLP (Washington, DC), is assisting the **Back Creek Conservancy** with research, analysis, and drafting of a comprehensive guidance document related to buffer zone stewardship.

James R. Dolphin, Kirkland & Ellis LLP (Houston, TX) is assisting the **Middle Susquehanna Riverkeeper** organization draft a vehicle and canoe lease for property the organization rents from an organization staff member.

Allison Wright, EichlerWright PLC (Alexandria, VA) is assisting the **Magothy River Association** with research and strategy analysis regarding enforcement of the Habitat Protection Area requirements of Maryland's Critical Area Law.

William Bierbower (Annapolis, MD) assisted **Interfaith Partners for the Chesapeake** with a review and analysis of potential copyright infringements concerning educational materials that IPC has assembled for dissemination to groups and individuals interested in starting faith-based youth summer camp programs focused on natural resource protection.

Virginia Strasser (Washington, DC) is assisting the **Potomac Riverkeeper Network** with research and

analysis of Columbia Gas Pipeline's proposal to route a natural gas pipeline from Pennsylvania to West Virginia under the C&O Canal in Washington County, Maryland.

Russ Stevenson (Severna Park, MD) assisted the **Magothy River Association** in reaching a settlement with a developer over a contested plan to develop townhomes that would add to the impairment of Cattail Creek.

Ridgway Hall (Washington, D.C.) assisted the **Maryland Clean Agriculture Coalition** draft a comment letter to the Water Quality Trading Advisory Committee (Maryland Department of the Environment) on ways to improve Subtitle 08 Chapter 11 Maryland Water Quality Nutrient and Sediment Trading and Offset Program Draft Regulations.

CLA Intern Hannah Brubach drafted a white paper focused on the current state of management of the Lower Susquehanna River under the Chesapeake Bay TMDL and needed improvements.

CLA Intern Katie McKerral assisted **Back Creek Conservancy** with research and drafting of an overview of best management practices and permitting processes for shoreline property owners.

CLA Intern Katie McKerral is assisting **Blue Water Baltimore** with research and analysis of federal, state, and local statutes and regulations regarding use of drones in Baltimore County, as well as analysis of the admissibility of images collected by drones in an enforcement action, including any relevant constitutional or privacy issues. She is also researching for CLA the restrictions on drone use in all Bay states and Washington, D.C.



CLA Intern Amy Stevens assisted **CLA** research and draft a memorandum providing an overview of current requirements to establish standing before various courts and administrative bodies in Maryland. She also assisted **CLA** research, analyze, and draft a related memorandum regarding zoning ordinances of all Eastern Shore counties that regulate setbacks, density, buffer, and other zoning requirements for poultry feeding operations.

CLA Intern Amy Stevens is assisting **CLA** research and analyze Virginia and Maryland CAFO regulations to identify the gaps in these programs under required Clean Water Act standards.



New Legal Developments

EPA and Army Propose to Repeal and Replace the 2015 Clean Water Rule

In June, EPA and the Army Corps of Engineers released a pre-publication proposed rule to repeal the 2015 Clean Water Rule regulation. This action came after President Trump signed an Executive Order in February 2017 ordering the agencies to review the regulation and consider interpreting the scope of jurisdiction the agencies have over waterways in the country consistent with the opinion of Justice Antonin Scalia in *Rapanos v. United States*, 547 U.S. 715 (2006). The 2015 Clean Water Rule was written to clarify the definition of "waters of the United States," which are those waterways regulated under the Clean Water Act.

EPA and the Army Corps have proposed a two-step repeal and replace process. First, recodify the regulation that was in place prior to issuance of the Clean Water Rule. Second, propose a new definition that would replace the approach in the 2015 Clean Water Rule with a new jurisdictional approach that will take into consideration the more restrictive principles that Justice Scalia outlined in the *Rapanos* opinion. These actions would reduce the scope of authority the agencies have over waterways throughout the country.



The repeal and replace process may take several years to complete. In the meantime, the agencies will go back to enforcing a guidance document from 2008 when deciding whether a waterway is subject

to federal oversight for pollution control purposes.

You can read the pre-publication proposed rule here: https://www.epa.gov/sites/production/files/2017-06/documents/wotus_prepublication_version.pdf

DC Circuit Rules EPA Must Require Ammonia Reporting from CAFOs

The District Court of Appeals for the D.C. Circuit vacated an exemption EPA had provided livestock feeding operations from reporting ammonia air emission under the Comprehensive Environmental

Response, Compensation, and Liability Act (CERCLA) and the Emergency Planning and Community Right-to-Know Act (EPCRA). Large Confined Animal Feeding Operations (CAFOs) produce ammonia and hydrogen sulfide emissions. Both substances are considered "hazardous" and "extremely hazardous" under CERCLA and EPCRA respectively. This new court ruling will require CAFOs to report these substances if produced at more than 100 lbs./day, and will require notification of releases over this quantity to state and local agencies.



You can read the court decision here:

<https://www.cadc.uscourts.gov/internet/opinions>

<http://www.pacourts.us/assets/opinions/Supreme/out/J-35-2016mo%20-%2010314240919600966.pdf?cb=1>

You can also read Martin Siegel's analysis of the case here: <http://www.stockandleader.com/business-law/environmental-rights-strengthened>

FERC Conditional Authorizations Found Not in Conflict with Clean Water Act Sec. 401

The District Court of Appeals for the D.C. Circuit recently found that the Federal Energy Regulatory Commission (FERC) did not violate the Clean Water Act when it issued the Transcontinental Gas Pipe Line Company, LLC (Transco) a conditional agency authorization to move forward with a pipeline project prior to the company receiving a Clean Water Act (CWA), Section 401, water quality certification from the state of Pennsylvania.

The Delaware Riverkeeper Network and the Delaware Riverkeeper challenged FERC's authority to issue a conditional approval prior to a pipeline company obtaining a state water quality certification. Section 401 of the CWA requires an applicant for a federal permit provide a certification that any pollution discharges from the project or facility will comply with CWA and state-established water quality standards. Ultimately, the Court determined that FERC can issue conditional authorizations so long as the



New Legal Developments continued...



conditional authorization does not allow for activity that may result in a discharge into waters that would trigger the CWA requirements.

The Court did not reach, for procedural reasons, the Delaware Riverkeeper's allegation that FERC

violated the CWA when it issued a letter allowing the company to begin pre-construction tree-felling and other activities. Based on the Court's decision on the other question in this case, this type of claim may arise again in future FERC actions.

You can read the court decision here: <https://www.ferc.gov/legal/court-cases/opinions/2017/16-1092.pdf>

Alabama Groups Sue EPA for Not Responding to De-delegation Petition

Seven Alabama environmental groups filed an appeal to the 11th Circuit asking the Court to review an EPA Agency Order issued in response to petitions to de-delegate the state's water quality permit authority. Under the Clean Water Act (CWA), states can ask EPA for authorization to implement the CWA National Pollutant

Discharge Elimination System (NPDES) program in their state. Alabama has been granted this authority.

The environmental organizations argued that the Alabama NPDES program was not meeting CWA requirements. In EPA's final response to the petitioners, it affirmed issues existed in Alabama's program, including adequacy of penalty assessment and insufficient resources to implement the NPDES program. However, EPA found in its final determination that those issues did not warrant withdrawing Alabama's NPDES program authority.

If the appeal of EPA's final determination being heard in the 11th Circuit leads to the agency withdrawing Alabama's authority to administer its NPDES program, then EPA would take over the state program. Such an outcome could provide a roadmap for how similar challenges could be brought in comparable situations in other states.



Maryland Water Quality Permit Training & Guide Now Available

In July, CLA, in partnership with the Midshore Riverkeeper Conservancy (MRC), released our *Citizen Guide to Public Participation in Maryland's NPDES Permitting Program*. The guide is designed to help citizens and organizations contend with water pollution within their communities. The Clean Water Act requires point sources that discharge pollutants to waters of the United States through discrete conveyances to obtain permits that specify the types and quantities of pollutants that they can discharge legally. The guide walks the reader through each step in the Maryland National Pollutant Discharge Elimination System (NPDES) permitting process and explains points for public input, including permit reviews, public comments, and requesting public hearings. While the guide is designed for residents of Maryland, much of the information it contains applies to the public comment process for Clean Water Act discharge permits generally, so it is useful to residents of other states as well.

The guide and live training are produced by CLA and Midshore Riverkeeper Conservancy (MRC) with assistance from the guide's primary author CLA volunteer Attorney Jill Grant (Jill Grant & Associates). We thank the peer review team for dedicating their time and expertise to this project: William Anderson, Dorchester Citizens for Planned Growth, Jennifer Chavez, Khushi Desai, Ridgway Hall, Matthew Henjum, Evan Isaacson, Shelia Jones, Phillip Musegaas, and Zachary Szczukowski.

Get a copy of the **Citizen Guide to Public Participation in Maryland's NPDES Permitting Program** here: http://www.chesapeakelegal.org/documents/Citizen_Guide_NPDES.pdf

To request live training for your group, contact: Mclemensen@chesapeakelegal.org

Citizen Guide

Public Participation in Maryland's NPDES Permitting Program



Midshore RIVERKEEPER Conservancy (MRC)
Chesapeake Legal Alliance (CLA)
July 2017



Pennsylvania Supreme Court Broadly Interprets Environmental Rights Amendment



Pennsylvania Environmental Defense Foundation v.

Pa., challenged the State's practice of allocating royalties from the lease of state lands for gas drilling

to the State's General Fund. The Court held that Pennsylvania, as trustee of the Commonwealth's natural resources, must use these funds to enhance and protect these resources. Thus, the State action violated the Environmental Rights Amendment (ERA) of the Pennsylvania constitution.

This case holding is far reaching because the Court rejected a previous ruling that employed a narrower interpretation of the ERA. In this broader interpretation of the ERA, the Court found that the ERA creates an environmental trust that imposes two duties on the state. First, the state "has a duty to prohibit the degradation, diminution, and depletion of our public natural resources, whether these harms might result from direct state action or from the actions of private parties." Second, the state "must act affirmatively via legislative action to protect the environment."

CLA volunteer attorney Martin Siegel stated that this case decision "sets aside more than 40 years of judicial practice, and overturned precedent that more narrowly interpreted the

CLA Staff Attorney Presents on Clean Water Act



On July 6, CLA Staff Attorney Mary Clemmensen was a panelist on the *Basics of the Clean Water Act* presented by the Environmental Law Institute 2017 summer school series. Mary was joined by Nizanna Bathersfield, Attorney Advisor, EPA. The discussion examined the history of the Clean Water Act and the progress yet to be made to end water pollution. It included the regulatory and permitting framework for limiting water pollution, the important distinction between point sources and nonpoint sources, and recent litigation and agency actions impacting the definition of "waters of the United States."

You can view the PowerPoint presentation and recorded webinar here: <https://www.eli.org/events/basics-clean-water-act-eli-summer-school-2017>

ERA." Mr. Siegel is a Pennsylvania attorney at Stock and Leader, where his practice focuses on environmental law. Mr. Siegel added that this case, "will require the Commonwealth, particularly the Department of Environmental Protection ("DEP"), to give increased scrutiny to projects that affect the environment, such as excavation, manufacturing, and farming."



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