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MARYLAND DEPARTMENT OF THE ENVIRONMENT
JANUARY 17, 1996

My name is Gary Setzer and I am the Program Administrator for the Wetlands and Waterways Program in the Maryland Department of the Environment (MDE). Thank you for the opportunity to present Maryland's Nontidal Wetlands Protection Program.

Introduction

The 1987 Chesapeake Bay Agreement included a commitment to increase the protection of nontidal wetlands. To honor its commitment, Maryland created a special task force to develop a comprehensive wetland protection policy. Due to continued wetland losses and an existing inefficient regulatory framework, the task force recommended a new State law. In 1989, the Maryland General Assembly endorsed the task force recommendation by enacting the Nontidal Wetlands Protection Act.

The law was one of the first state laws to declare a goal of "no net loss" of wetland acreage and function and to strive for a net gain in wetlands over time. Additional legislative goals included:

- protection of waters of the State;
- prevention of further degradation and losses of nontidal wetlands due to human activity by regulating all activities that may impact a nontidal wetland;
- mitigation or compensation for authorized nontidal wetland losses; and
- an expedient project review by instituting a coordinated application review process and imposing strict application review deadlines.

Program Highlights

Customer service is an important component of the legislation enacted by the Maryland General Assembly. As a result, an important step in the development of Maryland's nontidal wetlands protection program was permit coordination between the State and federal agencies involved with the regulatory process. To enhance coordination, the following actions were undertaken:

- adoption of the 1987 U.S. Army Corps of Engineers (Corps) Wetland Delineation Manual in statute to ensure consistency with federal regulatory jurisdiction;

- development of standard operating procedures to clarify respective State and federal roles in the permit application review process and reduce duplication;
- installation of the Regulatory Analysis and Management System, a permit tracking system used by the Corps to insure a common database and facilitate efficient and effective communication;
- creation of a Permit Service Center, which receives, logs, and distributes all wetland and waterway applications for both State and federal agencies; and
- issuance of the Maryland General Permit by the Corps on January 31, 1991 to facilitate the review and authorization of minor activities with minimal nontidal wetland impacts.

Additional actions taken to assist the individual permit applicant included the establishment of a toll-free permit tracking number (1-800-876-0200) and the establishment of regional offices in Salisbury (Eastern Shore) and Frostburg (Western Maryland).

Finally, the Nontidal Wetlands Protection Act allows for delegation of all or part of the State program to local governments and provides for the development of watershed management plans. Watershed management plans, developed in accordance with the Nontidal Wetlands Protection Act and Code of Maryland Regulations, can be used as the basis for regulatory decisions. The plans are developed in cooperation with local governments and specifically protect wetlands by incorporating them into a jurisdiction's land use decisions. To date, watershed plans have been adopted for the Big Annessex River watershed in Somerset County and initiated in Baltimore, Calvert and Montgomery Counties.

Regulatory Program

From its inception, Maryland's nontidal wetlands protection program was designed to parallel many aspects of Section 404 of the Clean Water Act. Activities regulated by Maryland's program include:

- Removal, excavation, or dredging of soil or materials of any kind;
- Changing existing drainage or flood retention characteristics;
- Disturbance of the water level or water table by drainage, impoundment, or other means;
- Filling, dumping, discharging of material, driving piles, or placing obstructions;
- Grading or removal of material that would alter existing topography; and
- Destruction or removal of plant life.

Two aspects of Maryland law differ from federal regulation: the alteration of vegetation and hydrology and regulation of a 25-foot buffer. In addition, buffer requirements are expanded to 100 feet for "nontidal wetlands of special State concern". These wetland areas are designated by regulation and mapped as having exceptional ecological or educational value of Statewide significance. These regulatory differences recognize that the benefits provided by a wetland depends on its hydrology and vegetation and that activities immediately adjacent to a wetland may have as much effect on its function as activities in the wetland.

There are three types of project approvals including exemption, letter of authorization, and permit. Exempted activities do not require MDE authorization. Examples include agricultural and forestry activities. A letter of authorization may be issued for activities impacting less than 5,000 square feet of nontidal wetlands or less than one acre of isolated nontidal wetland. These activities do not require an alternative site analysis, public notice, or mitigation by the applicant. MDE is responsible for mitigation. Examples include repair activities, utility projects, and construction of a private residence on a single lot. A permit is required for activities that do not qualify for an exemption or a letter of authorization. An alternative site analysis, public notice, and mitigation by the applicant, are required. The State statute and regulations provide strict application review time frames.

Through the regulatory program, which began in 1991, the Nontidal Wetlands Protection Act has achieved many of its goals. The program continues to achieve its "no net loss" objective and continuous efforts are undertaken to enhance the efficiency of the regulatory process. Successful streamlining actions have included the merger of the Nontidal Wetlands, Floodplain Management, and Water Quality Certification Divisions to form the Nontidal Wetland and Waterways Division, resulting in a consolidated application review process and issuance of a single permit for activities in floodplains, waters of the State and nontidal wetlands.

Mitigation Program

Maryland's law and regulations stress the development of a program to obtain a "no net loss" of nontidal wetland acreage and function, and to strive for an overall net gain. This objective is achieved through a variety of mechanisms including voluntary efforts of private landowners, State initiatives, and the regulatory program.

Implementing this objective requires consideration of wetland types and values. In the regulatory process, wetland types and values can dictate the extent of avoidance and minimization prior to consideration of compensatory mitigation. Also, as previously

mentioned, Maryland's law required the identification of significantly valuable nontidal wetland areas and their designation as Nontidal Wetlands of Special State Concern.

The regulatory program achieves "no net loss" through two types of mitigation efforts designed to replace lost wetland acreage and function: permittee mitigation and programmatic mitigation. Permittee mitigation represents 60% of regulatory mitigation efforts and is required for larger wetland losses, generally those exceeding 5,000 square feet. Nontidal wetland creation, restoration, or enhancement is required or, in some instances, the permittee may be eligible to pay a specified amount into the State Nontidal Wetland Compensation Fund. Programmatic mitigation, representing 40% of regulatory mitigation efforts, is performed by the State for nontidal wetland losses generally less than 5,000 square feet or for permittees who have paid into the Nontidal Wetland Compensation Fund. Since its beginning on January 1, 1991, Maryland's regulatory program has achieved a net gain of nontidal wetlands.

The State is constantly striving to improve its mitigation program. Prior to implementation of Maryland's program, failure of mitigation projects was largely due to insufficient monitoring for hydrology, poor design, and the lack of follow-up by regulatory agencies. The State has analyzed these factors to ensure enhanced success of mitigation projects. To address these issues, the State requires the following:

- Monitoring hydrology to determine suitability of site;
- Design review;
- Five (5) years of post-construction monitoring;
- 85% success rate on vegetative cover; and
- Long-term protection mechanisms for the site.

Another mechanism that must be developed as a mitigation tool is banking, the restoration, creation, or enhancement of wetlands undertaken expressly for the purpose of providing compensation credits for wetland losses from future activities. In 1993, the General Assembly enacted legislation to develop standards and adopt regulations for the establishment and operation of nontidal wetlands mitigation banks. In addition, MDE adopted mitigation banking regulations in October, 1994. To date, mitigation banking remains an untapped resource in Maryland's wetland protection program.

Future Direction

Today, with the direction of the federal program uncertain, Maryland is focussing on new opportunities to streamline the regulatory process and continuing to identify and eliminate redundancies between local, State, and federal permit programs. More importantly, we are expending our efforts to take advantage of programs and expertise at all levels of government.

At the federal level, we are negotiating a new Maryland State Programmatic General Permit (SPGP), which will include:

- Activities conducted in tidal and nontidal wetlands;
- Alternative analysis, and avoidance, minimization and mitigation requirements reviewed by the State;
- Non-reporting thresholds; and
- Suspension of Nationwide Permits.

The new SPGP, as currently drafted, will rely on the State regulatory process to provide wetlands protection for nearly 85% of permit applications. In addition to eliminating State/federal regulatory duplication, the new SPGP will free resources and enable the Corps to devote staff to currently neglected areas of wetland protection: advanced wetland identification, aerial photography groundtruthing, watershed planning and functional assessments, mitigation site selection, mitigation monitoring and enforcement.

At the State level, we are developing new State general permits for certain single family home construction; utility line installation; repair and maintenance of road crossings; activities conducted in incidentally created wetlands; and certain agricultural activities.

At the local level, we are working on a pilot project with the Montgomery County Department of Transportation, Maryland National Capital Park and Planning Commission, and the Corps to determine ways to use information generated during the development of the comprehensive master plan in the permit process.

THE ANNOTATED CODE OF THE PUBLIC GENERAL LAWS OF MARYLAND

1995 Supplement

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Environment

1993 REPLACEMENT

Place in Pocket of Corresponding Volume of Main Set.
This Supersedes Previous Supplement, Which
May Be Retained for Reference Purposes.

Effective Date of Statutes

See Md. Const., Article XVI, § 2

Annotated through 656 A.2d 996. For complete
scope of annotations and legislation, see
preface in supplement to Volume 1.

MICHIE BUTTERWORTH

Law Publishers

CHARLOTTESVILLE, VIRGINIA

1995

Subtitle 9. Nontidal Wetlands.

§ 5-901. Definitions.

(a) *In general.* — In this subtitle the following words have the meanings indicated.

(b) *Agricultural activity.* — (1) "Agricultural activity" means aquaculture and farming activities.

(2) "Agricultural activity" includes:

(i) Plowing, tillage, cropping, seeding, cultivating, and harvesting for the production of food and fiber products; and

(ii) The grazing of livestock.

(c) *Best management practices.* — "Best management practices" means conservation practices or systems of practices and management measures that:

(1) Control soil loss and reduce water quality degradation caused by nutrients, animal waste, toxics, and sediment; and

(2) Minimize adverse impacts to the surface water and groundwater flow and circulation patterns, and to the chemical, physical, and biological characteristics of a nontidal wetland.

(d) *Department.* — "Department" means the Department of the Environment.

(e) *Forestry activity.* — "Forestry activity" means planting, cultivating, thinning, harvesting, or any other activity undertaken to use forest resources or to improve their quality or productivity.

(f) *Isolated nontidal wetland.* — "Isolated nontidal wetland" means a nontidal wetland that is not hydrologically connected, through surface or subsurface flow, to streams, tidal or nontidal wetlands, or tidal waters.

(g) *Mitigation banking.* — "Mitigation banking" means wetland restoration, creation, or enhancement undertaken expressly for the purpose of providing compensation credits for wetland losses from future activities.

(h) *Nontidal wetland.* — (1) "Nontidal wetland" means an area that is inundated or saturated by surface water or groundwater at a frequency and duration sufficient to support, and that under normal circumstances does support, a prevalence of vegetation typically adapted for life in saturated soil conditions, commonly known as hydrophytic vegetation.

(2) The determination of whether an area is a nontidal wetland shall be made in accordance with the publication known as the "Federal Manual for Identifying and Delineating Jurisdictional Wetlands", published in 1989 and as may be amended.

(3) "Nontidal wetlands" do not include tidal wetlands regulated under Title 16 of this article.

(i) *Regulated activity.* — (1) "Regulated activity" means any of the following activities in a nontidal wetland or within a 25 foot buffer of the nontidal wetland:

(i) The removal, excavation, or dredging of soil, sand, gravel, minerals, organic matter, or materials of any kind;

(ii) The changing of existing drainage characteristics, sedimentation patterns, flow patterns, or flood retention characteristics;

(iii) The disturbance of the water level or water table by drainage, impoundment, or other means;

(iv) The dumping, discharging of material, or filling with material, including the driving of piles and placing of obstructions;

(v) The grading or removal of material that would alter existing topography; and

(vi) The destruction or removal of plant life that would alter the character of a nontidal wetland.

(2) "Regulated activity" does not include an agricultural activity or forestry activity as defined in this section.

(j) *Soil conservation and water quality plan.* — "Soil conservation and water quality plan" means a land use plan for a farm that shows a farmer how to make best possible use of soil and water resources while protecting and conserving those resources for the future.

(k) *Compensation ratio.* — "Compensation ratio" means the ratio of the area of wetland restored, created, or enhanced to the area of wetland for which mitigation is required. (1989, ch. 536; 1990, ch. 6, § 2; 1993, ch. 347, §§ 1, 2; 1995, ch. 488, §§ 1, 8, 16.)

Effect of amendments. — The 1990 amendment, approved Feb. 16, 1990, and effective from date of passage, substituted "subtitle the" for "subtitle, the" in (a); divided the provisions of (b) into (b) (1) and (b) (2); rewrote the introductory language of (b) (2); and substituted "section" for "subtitle" in (h) (2).

The 1993 amendment, effective July 1, 1993, inserted (g) and (k) and redesignated former (g) through (i) as (h) through (j).

Section 8, ch. 488, Acts 1995, effective July 1, 1995, substituted "Department of the Environment" for "Department of Natural Resources" in (d).

Editor's note. — Chapter 306, Acts 1987, effective July 1, 1987, transferred former §§ 8-1201 through 8-1214 of this article to be present §§ 4-301 through 4-314 of the Environment Article.

Additionally, ch. 306 transferred the subtitle heading for Title 8, Subtitle 12 of the Natural Resources Article, "Subtitle 12. Watershed Sediment and Waste Control," to be the subtitle heading for Title 4, Subtitle 3 of the Environment Article.

Section 2, ch. 536, Acts 1989, provides that "to reduce unnecessary delays and paperwork in the permitting process, the Department of Natural Resources shall work in cooperation with the U.S. Army Corps of Engineers to develop a joint nontidal wetlands permit application and process similar to the joint process already developed for tidal wetland permits. The Department shall report its progress on the development of a joint nontidal wetlands permit application and process to the General Assembly on the first day of the 1990 Session."

Section 3 of ch. 536 provides that "it is the intent of the General Assembly that the Department of Natural Resources shall issue a

nontidal wetlands permit for the harvesting of peat bogs where this activity is water dependent and there is no practicable alternative for the conduct of this activity except in or within a certain distance from a nontidal wetland. The Department may require, as a condition of the permit, that the permit holder take certain actions during and following the harvesting of peat bogs in accordance with the requirements for regulated activities set forth in this Act."

Section 4 of ch. 536 provides that "between July 1, 1989 and December 31, 1990, the Department of Natural Resources shall apply the standards in § 8-1207 of this Act when issuing waterway construction permits."

Section 5 of ch. 536 provides that "the regulations adopted and the guidance maps prepared by the Department of Natural Resources under this Act shall be presented to the General Assembly on the first day of the 1990 Session. Notwithstanding § 10-117 of the State Government Article, the regulations may not take effect until March 15, 1990."

Section 6 of ch. 536 provides that "a person who has applied to the Army Corps of Engineers by December 31, 1990 for a permit under § 404 of the federal Clean Water Act and is ultimately issued a permit may not be required to obtain a permit under the provisions of this Act provided the applicant does not alter the scope of the regulated activity originally applied for in the application."

Section 7 of ch. 536 provides that the act shall take effect July 1, 1989.

Section 1, ch. 488, Acts 1995, effective July 1, 1995, transferred former §§ 8-1201 through 8-1209, 8-1209.1 and 8-1210 of the Natural Resources Article to be §§ 5-901 through 5-911 of this article.

Additionally, § 1 of ch. 488 transferred the

subtitle heading from former Title 8, Subtitle 12 of the Natural Resources Article to be the subtitle heading for Title 5, Subtitle 9 of this article.

Section 16, ch. 488, Acts 1995, provides that "the publishers of the Annotated Code of Maryland are directed to propose a plan for the correction of numerical and similar nonnumerical

cross-references throughout the Annotated Code that refer to provisions found in the Environment Article." Pursuant to § 16 of ch. 488, appropriate changes have been made in (h) (3).

Maryland Law Review. — For article, "Nontidal Wetlands Protection in Maryland and Virginia," see 51 Md. L. Rev. 105 (1992).

§ 5-902. Legislative findings and intent; goal of statewide program.

(a) *Legislative findings.* — The General Assembly finds that nontidal wetlands play important roles in the preservation and protection of the Chesapeake Bay and other waters of the State. Nontidal wetlands serve important roles through the reduction of pollutant loadings, including excess nutrients, sediment, and toxics, the attenuation of floodwaters and stormwaters, shoreline stabilization and erosion control, waterfowl breeding and habitat for many species of fish, game and nongame birds, and mammals, including rare and endangered species, food chain support, and timber production. Many nontidal wetlands have already been lost or degraded due to the combined effects of population growth and land use. Further degradation and losses of nontidal wetlands will contribute to the decline of the Chesapeake Bay and other waters of the State.

(b) *Statewide program for protection, etc.; goals.* — It is the intent of the General Assembly to protect the waters of the State through a comprehensive, statewide nontidal wetland program in cooperation with federal agencies, other states, and local government. The goal of the program shall be to attain no net overall loss in nontidal wetland acreage and function and to strive for a net resource gain in nontidal wetlands over present conditions.

(c) *Prevention, restoration, etc., of loss or degradation.* — It is the intent of the General Assembly that:

- (1) Waters of the State be protected;
- (2) Further degradation and losses of nontidal wetlands due to human activity be prevented wherever possible; and
- (3) Where unavoidable losses or degradations occur as a result of permitted human activity, these losses or degradations be offset wherever practicable and feasible through the deliberate restoration or creation of nontidal wetlands. (1989, ch. 536; 1990, ch. 6, § 2; 1995, ch. 488, § 1.)

Effect of amendments. — The 1990 amendment, approved Feb. 16, 1990, and effective from date of passage, in (a), substituted "loadings, including" for "loadings including" and "mammals, including" for "mammals including" in the first sentence; substituted "waters of the State" for "State's waters" in the first sentence of (b); divided (c) into introduc-

tory language and (c) (1) through (c) (3); deleted "that" at the beginning of (c) (2); and substituted "activity, these" for "activity, that these" in (c) (3).

Maryland Law Review. — For article, "Nontidal Wetlands Protection in Maryland and Virginia," see 51 Md. L. Rev. 105 (1992).

§ 5-903. Statewide program established; application of subtitle; Department's duties; regulations.

(a) *Statewide program established; application of subtitle.* — There is a statewide program within the Department for the conservation, regulation, enhancement, creation, monitoring, and wise use of nontidal wetlands.

(b) *Department's duties.* — The Department shall:

(1) Coordinate with other State agencies, federal agencies, other states, local governments, and interested persons in the regulation of nontidal wetlands;

(2) Assist local governments in undertaking nontidal wetland management planning, including mapping, technical assistance, and expediting the permit process;

(3) Develop certification programs to ensure uniform and professional standards for the identification, delineation, functional assessment, and mitigation of nontidal wetlands;

(4) Evaluate proposed activities on nontidal wetlands and grant or deny permits or other approvals of proposed activities;

(5) Conduct watershed studies and educational programs and disseminate information concerning the nontidal wetlands program;

(6) Prepare, adopt, and periodically revise guidance maps of nontidal wetlands;

(7) Adopt standards for planning, regulating, restoring, creating, and enhancing nontidal wetlands;

(8) Purchase, restore, and create nontidal wetlands; and

(9) Conduct periodic monitoring, cumulative impact assessment, and evaluation of activities authorized under this subtitle.

(c) *Regulations.* — By December 31, 1989 the Department shall adopt final regulations necessary to administer this subtitle, in accordance with § 10-111 (a) of the State Government Article. (1989, ch. 536; 1990, ch. 6, § 2; 1993, ch. 141; 1995, ch. 488, § 1.)

Effect of amendments. — The 1990 amendment, approved Feb. 16, 1990, and effective from date of passage, substituted "forestry, or" for "forestry or" in (a) (2); substituted "planning, including" for "planning including" in (b) (2); and substituted "1989 the" for "1989, the" in (c).

The 1993 amendment, effective Oct. 1, 1993, deleted (a) (2) and redesignated former (a) (1) as present (a).

Editor's note. — Section 2, ch. 141, Acts 1993, provides that "the Chesapeake Bay Critical Area Commission shall repeal its nontidal wetland criteria codified as COMAR 27.01.09.02 and 27.02.05.10, in accordance with § 8-1806 of the Natural Resources Article, and in any event, those criteria shall be abrogated and of no further effect after September 30, 1993, with no further action required by the General Assembly."

§ 5-904. Delegation of Department's authority; regulated activity by unit of State government.

(a) *Delegation of Department's authority.* — (1) The Department may delegate all or part of its authority under this subtitle to any county that enacts a nontidal wetland protection program by December 31, 1994 that meets at least the minimum standards adopted by the Department.

(2) (i) After December 31, 1994, the Department may delegate all or part of its authority under this subtitle to a county that applies to the Department to initiate a nontidal wetland protection program and meets at least the minimum standards adopted by the Department.

(ii) The Department shall establish a schedule for acceptance of applications from counties to initiate programs under this paragraph that provides a limited period of time once every 2 years for counties to submit their applications to the Department.

(3) A delegation in accordance with this subsection:

(i) May not be effective for more than 2 years; and

(ii) May be renewed by the Department for additional 2-year periods.

(4) After an opportunity for a hearing and upon a finding that the county program is not being administered in a manner consistent with the standards adopted by the Department, the Department may withdraw program delegation.

(b) *Regulated activity by unit of State government.* — Any regulated activity undertaken by a unit of State government shall comply with the provisions of this subtitle, including the provisions of this subtitle requiring the issuance of a nontidal wetland permit by the Department. The unit is not required to have local government approval. (1989, ch. 536; 1990, ch. 6, § 2; 1991, ch. 198; 1995, ch. 488, § 1.)

Effect of amendments. — The 1990 amendment, approved Feb. 16, 1990, and effective from date of passage, divided the provisions of (a) (2) into introductory language, (a) (2) (i) and (a) (2) (ii).

The 1991 amendment, effective July 1, 1991,

in (a), inserted present (2) and redesignated the following paragraphs accordingly, and substituted "1994" for "1990" in (1).

Maryland Law Review. — For article, "Nontidal Wetlands Protection in Maryland and Virginia," see 51 Md. L. Rev. 105 (1992).

§ 5-905. Approvals and mitigation of loss requirements; delineation of affected wetlands.

(a) *Exempt activities.* — The following agricultural and forestry activities are exempt from the approval and mitigation requirements of this section:

(1) Agricultural activities undertaken in accordance with public drainage regulations;

(2) Agricultural and forestry activities, including the repair and maintenance of farm ponds, drainage ditches, channels, subsurface drains, causeways, bridges, or water control structures, provided that they do not drain, dredge, fill, or convert nontidal wetlands on which agricultural and forestry activities are not presently conducted;

(3) Agricultural and forestry activities on areas that have laid fallow as part of a conventional rotational cycle or due to a civil action involving ownership of the property;

(4) Agricultural and forestry activities on areas that had been set aside or taken out of production under a formal State or federal program;

(5) Forestry activities not requiring an erosion and sediment control plan;

(6) Construction or maintenance of forest roads and skid trails in accordance with best management practices; and

(7) Other activities exempted by the Department by regulation to maintain consistency with federal law.

(b) *Required approvals.* — (1) After December 31, 1990 agricultural activities conducted in nontidal wetlands that are not exempted under subsection (a) of this section require the soil conservation district to approve a soil conservation and water quality plan that contains best management practices to protect nontidal wetlands in compliance with regulations adopted by the Department in consultation with the Department of Agriculture.

(2) After December 31, 1990 forestry activities required to have an erosion and sediment control plan that are not exempted under subsection (a) of this section shall incorporate nontidal wetlands best management practices in compliance with regulations under this subtitle.

(c) *Mitigation for losses.* — After December 31, 1990 if an agricultural activity that is not exempted under subsection (a) of this section results in a loss of nontidal wetlands, the Department shall require that a soil conservation and water quality plan include mitigation for the loss within 3 years. Mitigation may include creation or restoration of nontidal wetlands or monetary compensation. In determining the extent of mitigation, the Department shall consider the benefits provided by best management practices. If the State Department of Agriculture determines in writing that mitigation will create an economic hardship which would jeopardize the continued operation of the farm, mitigation may be deferred until:

(1) The economic hardship no longer exists;

(2) The current owner or operator transfers the farm to a new owner or operator, however, the current owner or operator is responsible for mitigation; or

(3) Agricultural activities no longer take place on the nontidal wetland.

(d) *Delineation of extent of affected wetlands.* — The soil conservation district shall be responsible for delineating the extent of nontidal wetlands affected by agricultural or forestry activities. (1989, ch. 536; 1990, ch. 6, § 2; 1995, ch. 488, § 1.)

Effect of amendments. — The 1990 amendment, approved Feb. 16, 1990, and effective from date of passage, deleted the comma following "1990" in (b) (1) and (2) and in the first sentence of (c); and substituted "State" for

"Maryland" near the end of the introductory language of (c).

Maryland Law Review. — For article, "Nontidal Wetlands Protection in Maryland and Virginia," see 51 Md. L. Rev. 105 (1992).

§ 5-906. Permits generally; compliance with regulations; buffers.

(a) *Exemptions from permit requirement.* — The following types of activities shall be exempt from the permit requirements of this section if notice is given to the Department and best management practices are implemented:

(1) Activities which normally occur in nontidal wetlands with minimal impact on nontidal wetlands, including the repair and maintenance of existing structures, utilities, including underground utilities, rights-of-way, and railroad beds; or

(2) Activities in isolated nontidal wetlands of less than 1 acre and having no significant plant or wildlife value.

(b) *Permit and compliance with regulations required.* — (1) After December 31, 1990 a person may not conduct a regulated activity without first obtaining a permit from the Department.

(2) In addition to obtaining a permit, a person shall comply with all other pollution control, flood hazard reduction, sediment control, stormwater management, local zoning, and other applicable federal, State, and local regulations.

(c) *Application for permit.* — To apply for a permit, the applicant shall submit a delineation of the affected nontidal wetlands and all other information as required by the Department.

(d) *Notice to applicant for permit; additional information.* — Within 45 days from receipt of the application, the Department shall notify the applicant whether the application is complete and the delineation is correct. If the Department fails to notify the applicant about the application or delineation within 45 days, the delineation shall be treated by the Department as correct and the application shall be treated as complete. The Department may request further information or provide for an extension of this deadline when extenuating circumstances prevent consideration of the application.

(e) *Public notice and hearings regarding permit applications.* — After receipt of a complete application, under the procedures of § 5-204 (b) through (e) of this title the Department shall issue public notice of an opportunity to submit written comments or to request a hearing. A hearing shall be held within 45 days if requested, unless extenuating circumstances justify an extension of time. The hearing is not a contested case under the State Government Article.

(f) *Conditions, limitations imposed upon grant of permit.* — In granting a permit, the Department may impose conditions or limitations required to carry out the provisions of this subtitle.

(g) *Security for permits.* — The Department may require a bond or other instrument to secure compliance with the conditions in the permit.

(h) *Temporary emergency permits.* — The Department may issue a temporary emergency permit for a regulated activity if:

(1) An unacceptable threat to life or severe loss of property will occur if an emergency permit is not granted; and

(2) The anticipated threat or loss may occur before a permit can be issued or modified as provided under this subtitle.

(i) *Buffers.* — (1) By December 31, 1989 the Department shall designate by regulation nontidal wetlands for which the buffer is to be expanded beyond 25 feet, but the total buffer may not exceed 100 feet, to assure adequate protections from adjacent activities or conditions which may adversely affect the nontidal wetland and associated aquatic ecosystem.

(2) Activities or conditions where the buffer may be expanded beyond 25 feet include the presence of slopes, highly erodible soils or other soils with development constraints, or the presence of nontidal wetlands of special State concern.

(j) *Time for grant, denial, etc. of permits.* — The Department shall grant, deny, or condition a permit within 45 days of a public hearing or within 60 days of the receipt of a completed application if no hearing is held. After notifying the applicant, the Department may extend its action beyond these

time periods for an additional 30 days for extenuating circumstances. (1989, ch. 536; 1990, ch. 6, § 2; 1994, ch. 739, § 2; 1995, ch. 488, §§ 1, 16.)

Effect of amendments. — The 1990 amendment, approved Feb. 16, 1990, and effective from date of passage, deleted the comma following "1990" in (b) (1) and "1989" in (i) (1); and deleted "of Natural Resources" following "Department" in the first sentence of (j).

The 1994 amendment, effective Oct. 1, 1994, inserted "under the procedures of § 8-206 (b) through (e) of this title" in (e).

Editor's note. — Section 16, ch. 488, Acts 1995, provides that "the publishers of the An-

notated Code of Maryland are directed to propose a plan for the correction of numerical and similar nonnumerical cross-references throughout the Annotated Code that refer to provisions found in the Environment Article." Pursuant to § 16 of ch. 488, appropriate changes have been made in the first sentence of (e).

Maryland Law Review. — For article, "Nontidal Wetlands Protection in Maryland and Virginia," see 51 Md. L. Rev. 105 (1992).

§ 5-907. Preconditions to grant of permits.

(a) *In general.* — The Department may not issue a nontidal wetland permit for a regulated activity unless the Department finds that the applicant has demonstrated that the regulated activity:

(1) (i) Is water dependent and requires access to the nontidal wetland as a central element of its basic function; or

(ii) Is not water dependent and has no practicable alternative;

(2) Will minimize alteration or impairment of the nontidal wetland, including existing topography, vegetation, fish and wildlife resources, and hydrological conditions;

(3) Will not cause or contribute to a degradation of groundwaters or surface waters; and

(4) Is consistent with any comprehensive management plan that may be developed in accordance with § 5-908 of this subtitle.

(b) *Practicable alternatives.* — The applicant shall demonstrate to the satisfaction of the Department that practicable alternatives have been analyzed and that the regulated activity has no practicable alternative. In evaluating whether the proposed regulated activity has a practicable alternative, the Department shall consider:

(1) Whether the basic project purpose cannot be reasonably accomplished utilizing 1 or more other sites in the same general area that would avoid or result in less adverse impact on nontidal wetlands;

(2) Whether a reduction in the size, scope, configuration, or density of the project as proposed and all alternative designs that would result in less adverse impact on the nontidal wetland would not accomplish the basic purpose of the project;

(3) In cases where the applicant has rejected alternatives to the project as proposed due to constraints such as inadequate zoning, infrastructure, or parcel size, whether the applicant has made reasonable attempts to remove or accommodate these constraints; and

(4) The economic value of the proposed regulated activity in meeting a demonstrated public need in the area and the ecological and economic value associated with the nontidal wetland. (1989, ch. 536; 1990, ch. 6, § 2; 1995, ch. 488, §§ 1, 16.)

Effect of amendments. — The 1990 amendment, approved Feb. 16, 1990, and effective from date of passage, substituted "wetland, including" for "wetland including" in (a) (2).

Editor's note. — Section 16, ch. 488, Acts 1995, provides that "the publishers of the An-

notated Code of Maryland are directed to propose a plan for the correction of numerical and similar nonnumerical cross-references throughout the Annotated Code that refer to provisions found in the Environment Article." Pursuant to § 16 of ch. 488, appropriate changes have been made in (a) (4).

§ 5-908. Watershed management plans.

In cooperation with other State, local, and federal agencies, the Department may prepare comprehensive watershed management plans which address nontidal wetland protection, creation, and restoration, cumulative impacts, flood protection, and water supply concerns. Completed watershed management plans will be used as the basis for consistent permitting decisions and creating and restoring nontidal wetlands. (1989, ch. 536; 1995, ch. 488, § 1.)

§ 5-909. Mitigation of losses; Nontidal Wetland Compensation Fund.

(a) *Mitigation of losses — In general.* — An applicant shall take all necessary steps to first avoid significant impairment and then minimize losses of nontidal wetlands. If the applicant demonstrates to the Department's satisfaction that all necessary steps were taken and losses or significant impairment of nontidal wetlands are unavoidable, the Department shall require the applicant to adopt mitigation practices.

(b) *Same — Standards and procedures.* — (1) By December 31, 1989 the Department shall consistent with the goals established in § 5-902 of this subtitle adopt by regulation standards and procedures for the mitigation of nontidal wetlands losses, including practices for nontidal wetland creation, restoration, enhancement, or monetary compensation.

(2) The Department may accept monetary compensation only if it is determined that creation, restoration, or enhancement of nontidal wetlands are not feasible alternatives. Monetary compensation may not be a substitute for the requirement to avoid and minimize nontidal wetland losses.

(c) *Fund.* — (1) There is a Nontidal Wetland Compensation Fund in the Department.

(2) The following money shall be deposited in the Fund:

(i) Any monetary compensation paid by an applicant instead of engaging in the creation, restoration, or enhancement of a nontidal wetland; and

(ii) Any civil or criminal penalty imposed by a court in accordance with § 5-911 of this subtitle.

(3) Funds in the Nontidal Wetland Compensation Fund may be used only for the creation, restoration, or enhancement of nontidal wetlands, including:

(i) Acquisition of land;

(ii) Acquisition of easements;

(iii) Maintenance of mitigation sites;

(iv) Purchase of credits in mitigation banks; and

(v) Contractual services necessary to accomplish the intent of this paragraph.

(4) Funds credited and any interest accrued to the Fund:

- (i) Shall remain available until expended; and
- (ii) May not be reverted to the General Fund under any other provision of law.

(5) At the end of the fiscal year, the Department shall prepare an annual report on the Nontidal Wetland Compensation Fund that includes an accounting of all financial receipts and expenditures to and from the Fund and shall provide a copy of the report to the General Assembly, as provided under § 2-1312 of the State Government Article. (1989, ch. 536; 1990, ch. 6, § 2; 1991, ch. 55, § 1; 1993, ch. 347, § 2; 1995, ch. 488, §§ 1, 16.)

Effect of amendments. — The 1990 amendment, approved Feb. 16, 1990, and effective from date of passage, substituted "1989 the Department shall consistent with the goals established in § 8-1202 of this title adopt" for "1989, the Department shall, consistent with the goals established in § 8-1202 of this subtitle, adopt" and inserted "the" preceding "mitigation" in (b) (1); and divided the provisions of (c) (4) into introductory language, (c) (4) (i) and (c) (4) (ii).

The 1991 amendment, approved Apr. 9, 1991, and effective from date of enactment, substituted "subtitle" for "title" in (b) (1).

The 1993 amendment, effective July 1, 1993, rewrote (c) (3).

Editor's note. — Section 16, ch. 488, Acts 1995, provides that "the publishers of the Annotated Code of Maryland are directed to propose a plan for the correction of numerical and similar nonnumerical cross-references throughout the Annotated Code that refer to provisions found in the Environment Article." Pursuant to § 16 of ch. 488, appropriate changes have been made in (b) (1) and (c) (2) (ii).

§ 5-910. Mitigation banking.

(a) *Legislative findings.* — The General Assembly declares that:

(1) In the application review process, one of the primary mitigation issues is locating the most beneficial area to conduct wetland restoration, creation, or enhancement;

(2) Where unavoidable losses or degradations occur as a result of permitted human activity, there exists a sequential process for mitigation site location which includes consideration of on-site alternatives;

(3) Mitigation banking, which allows a person to restore, enhance, or create a functional wetland ecosystem, may offer a sound mitigation alternative and may provide an opportunity to contribute to the goal of no net loss in wetlands acreage and function; and

(4) Mitigation banking may not alter the regulatory requirements of § 5-907 of this subtitle.

(b) *Regulations — Development; contents.* — The Department shall develop standards and adopt regulations for the creation of wetland mitigation banks, including:

(1) The types and locations of wetlands to be restored, created, or enhanced and the types and locations of wetlands to be filled for which a person may obtain credit through a mitigation bank;

(2) The types and number of credits available through the bank to offset losses by acreage and by function of a wetland to be filled;

(3) The method of wetland construction, supervision, and maintenance to be required of a bank owner seeking to obtain credit for use of the bank;

(4) Maintenance requirements;

(5) Monitoring requirements;

(6) Bonding requirements, to include assurance of wetland function;

- (7) Reporting requirements to the Department;
- (8) Consistency with developed watershed plans, forest conservation, local growth management policies, and local comprehensive plans;
- (9) Requirements for the protection in perpetuity of mitigation banks, through methods that include easements, covenants, or similar mechanisms, that shall be in place at the time credits are withdrawn;
- (10) Compensation ratios for mitigation through mitigation banks that shall equal or exceed 1.5 to 1; and
- (11) Public notice and comment requirements, including opportunity for public review and comment on any specific wetland bank that is greater than 5 acres in size.

(c) *Same — Compliance with other provisions; examinations; preferences.* — The standards and regulations adopted by the Department under this section shall ensure that:

(1) The provisions of § 5-907 of this subtitle, including the avoidance, alternative analysis, and minimization of disturbance of nontidal wetlands, are fully adhered to;

(2) The goals of § 5-902 of this subtitle to attain no net overall loss in nontidal wetland acreage and function and to strive for a net resource gain are achieved;

(3) Onsite mitigation is examined before conducting mitigation off site; and

(4) Mitigation through wetland banking should be accomplished in and with preference to the same watershed and county as the wetland for which mitigation is required.

(d) *Construction of section; cooperation with private sector; use of State lands.* — (1) This section may not be construed to require the Department to:

(i) Establish or fund State mitigation banks;

(ii) Fund the establishment of mitigation banking by the private sector; or

(iii) Use State lands for mitigation banking.

(2) The Department may establish mitigation banking through and with the cooperation of the private sector and may use State lands for mitigation banking sites. (1993, ch. 347, § 2; 1995, ch. 488, §§ 1, 16.)

Editor's note. — Section 3, ch. 347, Acts 1993, provides that the act shall take effect July 1, 1993.

Section 16, ch. 488, Acts 1995, provides that "the publishers of the Annotated Code of Maryland are directed to propose a plan for the cor-

rection of numerical and similar nonnumerical cross-references throughout the Annotated Code that refer to provisions found in the Environment Article." Pursuant to § 16 of ch. 488, appropriate changes have been made in (a) (4), (c) (1) and (c) (2).

§ 5-911. Enforcement.

(a) *Provisions additional; authority of counties.* — (1) The enforcement provisions in this section are in addition to any other applicable provisions in this title.

(2) In addition to the enforcement authority granted the Department, the enforcement provisions of this section may be exercised by any county that has program delegation authority.

(b) *Revocation of permits.* — The Department may revoke a permit for cause, including violation of permit conditions, obtaining a permit by misrepresentation, failing to disclose a relevant or material fact, or change in conditions. The Department shall notify the violator in writing and provide an opportunity for a hearing.

(c) *Stop work orders.* — The Department may issue a stop work order against any person who violates any provision of this subtitle or any regulation, order, or permit under this subtitle related to a regulated activity.

(d) *Civil penalties and remedies.* — (1) A person who violates any provision of this subtitle or any regulation, order, or permit under this subtitle is liable for a penalty not exceeding \$10,000, which may be recovered in a civil action brought by the Department. Each day a violation continues is a separate violation under this subsection.

(2) The court may issue an injunction requiring the person to cease the violation and restore the area unlawfully disturbed.

(e) *Criminal penalties; restoration of area.* — (1) A person who violates any provision of or fails to perform any duty imposed by this subtitle or by a regulation, order, or permit under this subtitle is guilty of a misdemeanor and on conviction is subject to:

(i) For a first offense, a fine not exceeding \$10,000; or

(ii) For a second or subsequent offense, a fine not exceeding \$25,000.

(2) The court may order the person to restore the area unlawfully disturbed. (1989, ch. 536; 1990, ch. 6, § 2; 1995, ch. 488, § 1.)

Cross references. — See Editor's note to § 5-901 of this article.

Effect of amendments. — The 1990 amendment, approved Feb. 16, 1990, and effective from date of passage, substituted "cause, including" for "cause including" in the first

sentence of (b); substituted "any regulation" for "any rule, regulation" in the first sentence of (d) (1); and substituted "subtitle or by a regulation" for "subtitle, or by a rule, regulation" and "subtitle is" for "subtitle, is" in the introductory language of (e) (1).