



Maryland

Department of the Environment

Larry Hogan, Governor
Boyd K. Rutherford, Lt. Governor

Ben Grumbles, Secretary
Horacio Tablada, Deputy Secretary

January 19, 2022

The Honorable Kumar P. Barve
House Environment and Transportation Committee
House Office Building, Room 251
Annapolis, Maryland 21401

Re: House Bill 149 – Wetlands and Waterways – Riparian Rights - Voluntary Registry and Notice

Dear Chairman Barve and Members of the Committee:

The Maryland Department of the Environment (MDE) has reviewed House Bill 149, Wetlands and Waterways – Riparian Rights – Voluntary Registry and Notice and would like to share some information/concerns regarding this legislation as drafted. MDE would also like to mention that we are working with the Sponsor to amend the language of the bill to lessen the burden on the Department and provide a similar outcome for her constituents.

The State of Maryland, like all other states, owns the submerged lands beneath the navigable waters within its borders. In Maryland, riparian landowners, whose privately owned land extends to the mean high water line, generally have a common-law right of reasonable access to navigable water and, by statute, the right to build structures out over State-owned submerged lands to provide such access or to protect their fast land. Those riparian rights, however, have always been subject to the State's obligation under the public trust doctrine to hold State-owned property for the use of all citizens. Many court cases have supported that the area between mean high water and mean low water, title to which is vested in the State of Maryland, is held for the benefit of the inhabitants of the State.

House Bill 149 (Bill) is an amended version of HB 160/SB 21, which were proposed during the 2021 legislative session. The Bill adds a new Section 16-201.1 to the Tidal Wetlands Act of the Environment Article, requiring the Department to establish and maintain a registry of riparian right claims on its website (the "Registry"). The Bill would also require State and local governments to notify owners of riparian right covenants—whose interests are in the "immediate area" of proposed projects—at the outset of the permitting/approval process(es).

It is unclear whether or not the Department would be required to verify a riparian rights claim submitted to the Registry. However, the Department is charged with determining what a property owner is required to provide in order for one to submit information to the public Registry. This suggests that the Department is required at some measure to ascertain the legally sufficient information necessary for claim submission, to verify the information submitted is accurate and determine if claims are contradictory. The Registry, being on the Department's website, could lend

the State's imprimatur to such claims regardless of their validity, thereby confusing the public. The Registry could also embroil the Department in private litigation as third parties dispute the ownership of riparian rights in specific areas—for example, calling the Department as a witness to bolster a contested claim—and expose the Department to litigation risk if an application for inclusion of a claim in the Registry is denied. The Department should not be the adjudicator of riparian rights claims throughout the estimated 7,000 miles of shoreline in the state of Maryland.

The Bill may also raise future legal issues regarding the degree to which a claim in the Registry is sufficient to vest a riparian right to the exclusion of the State's presumption of ownership over submerged lands as water levels change throughout the State. Similar issues could arise if the Department receives claims to areas that are already submerged.

MDE currently lacks existing staff to oversee the work of creating a Registry on the Department's website to keep records of property owners that claim riparian rights. Creating a web-based repository and verifying all registered property owners that claim riparian rights throughout Maryland will be an extensive undertaking requiring outside solicitation of proposals for the web design and implementation. While the Bill has funds to be appropriated to cover the cost of establishing and maintaining the registry, the Bill does not appear to include additional staff resources. Existing staff lack the expertise to research and perform this work solely to determine full legal interpretations of legal documents pertaining to riparian rights within documents and private agreements, therefore, existing staff cannot absorb the additional work. Once established, the Registry would need to be updated as property ownership changes or deeds/bylaws/covenants are updated and verified regularly to ensure the information is current and require ongoing maintenance and staff costs.

The Bill also requires the holder of a "covenant" for riparian rights to be provided notice of a project in the "immediate area" of a proposed project. This Bill does not require the holder of a covenant to register or notify the Department of such a private agreement or terms, so it is unclear how the Department is to know that there is a holder of a covenant in the "immediate area." The term "immediate area" is overly broad and undefined and in conflict with the regulations that require adjoining riparian property owners' notification of proposed projects. The term "other approval process" is also un-defined and may be subject to multiple, conflicting interpretations given the number of State and local agencies involved.

The costs of "immediate area" notifications may fall onto the state as it is unclear in the legislation who bears the burden of the notifications and in what form that needs to be taken. As the boundaries of the type of project or type of notice required are not defined, it is unclear what these costs may be. However, they could be multiplied by the number of approvals necessary for the property at the state, local and "other approval" authorities. It is also unclear whether a covenant owner must receive notice for each approval process or once for an entire project. The Bill also requires notice to covenant owners whether they have registered a claim of riparian rights. The Department could require applicants to notify covenant owners, but it is unclear what would transpire if a covenant owner was not notified. Failure to notify a covenant owner could slow down or reverse approvals, creating additional barriers for applicants and litigation risk for State and local governments.

In order to comply with the proposed notification requirement, the Department would need to allocate staff to research this information for every project the Department receives (which is on average of 1,500 applications annually) and then further research the legal validity of the private agreement (covenant). Currently, State regulations such as COMAR 26.24.01.02, 26.24.02.03, & 26.24.04.02 specifically define riparian owners and identify the criteria for evaluating tidal wetlands licenses or permit applications. An applicant for a permit is already required to provide all property information pertaining to their parcel that may restrict their use, this includes any deeded restrictions. This legislation appears to shift that burden to the State. Existing staff lack the expertise to perform this work solely to determine full legal interpretations of legal documents pertaining to riparian rights within community association documents, therefore, existing staff cannot absorb the additional work.

MDE will be unable to divert resources to address this without neglecting other existing statutory mandates, including process permit applications in a timely manner for projects statewide if resources are tasked with this additional research. Furthermore, existing staff have full-time roles and responsibilities to complete, as mandated under statute and regulation. Staff in the Wetlands and Waterways Program are responsible for providing guidance to the regulated community during pre-application visits, and for reviewing permit applications, technical reports and documents that provide detailed analysis of impacts to regulated resources. Additionally, this Program already assists in the development and implementation of policy relating to the regulation, management, and restoration of wetlands.

Thank you for considering the Department's information regarding this legislation. We will continue to monitor House Bill 149 during the Committee's deliberations, and I am available to answer any questions you may have. Please feel free to contact me at 410-260-6301 or by e-mail at tyler.abbott@maryland.gov.

Sincerely,

A handwritten signature in black ink, appearing to read "Tyler Abbott", written over a horizontal line.

Tyler Abbott

cc: The Honorable Heather Bagnall
Lee Currey, Director, Water and Science Administration