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**To:** Education, Energy, and the Environment Committee (Senate)

**From:** Legislative Committee of the Real Property Section Counsel

**Date:** February 19, 2024 [Hearing Date February 20, 2024]

**Subject:** **SB 1048 – Environment - Tidal Wetland Permit - Ownership of Land**

**Position:** **Opposed**

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The Real Property Section Counsel of the Maryland State Bar Association (MSBA) **opposes Senate Bill 1048 – Environment - Tidal Wetland Permit - Ownership of Land.**

Currently, the Maryland Department of the Environment ('DOE') issues tidal wetland licenses to private landowners to authorize certain activities affecting tidal wetlands including but not limited to shoreline erosion control projects, construction of piers and associated structures, dredging, filling, and shoreline alteration. The law governing wetland use is found in the Environment Article of the Maryland Code § 16-101, et. Seq. and is regulated by the Department of Environment pursuant to COMAR 26.24.

The process of obtaining a license includes a detailed application filed with DOE which includes a drawn plan showing the extent of the proposed activity. The licenses have a three-year duration and do not transfer title in any manner or respect to any filled or submerged land affected by the activities undertaken by the private landowner.

The proposed legislation seeks to require that DOE transfer title in fee to any landowner who obtains a wetland permit for the purpose of shore stabilization. The extent of the proposed conveyance is the 'land that is landward of the mean high tide up to the portion of the land that is stabilized under the permit'.

We oppose this bill for several reasons. First, Maryland law already provides for recovery of land lost by private landowners due to the processes of erosion and avulsion. The Environment Article of the Maryland Code § 16-201(a) provides that a "person who is the owner of land bounding on navigable water is entitled to reclaim fast land lost by erosion or avulsion during the person's ownership of the land to the extent of provable existing boundaries." Therefore, to whatever extent a shoreline stabilization project works to reclaim a certain riparian owner's land lost to erosion or avulsion, the law currently provides that title remains vested in the landowner. To the extent that the proposed legislation seeks to ensure private landowners are not affected by the effects of erosion, avulsion, or other natural processes, the proposed

legislation is unnecessarily duplicative.

Second, a significant part of the impetus for passing the Wetlands Act, Section 16 of the Environment Article, was the legislative history with respect to granting of patent title to submerged lands to riparian owners and the unregulated filling of submerged land. In 1862, the General Assembly passed Chapter 129 of the Acts of 1862 “in order to resolve any doubts about the rights of owners bounding on navigable waters.” Chapter 129 ended the State’s prior practice of patenting lands covered by navigable waters and instead entitled riparian owners to all accretions and relictions both natural and otherwise, and therefore implicitly allowed for artificial filling of navigable waters and wetlands. It also allowed the riparian owner the exclusive right of making improvements into the waters in front of his land, which improvements passed automatically with the title to the fast land.

In short, the law granted riparian owners the right to “wharf-out” from their lands provided such action did not interfere with navigation. The provisions in Chapter 129 were later codified in the now defunct Sections 45 and 46 of Article 54 the Maryland Annotated Code. As filling submerged land became increasingly lucrative and more feasible for riparian owners, the affect on the state’s wetlands became significant and was a large impetus for the passage of the Wetlands Act. To pass the proposed legislation would again open the door for riparian owners to personally benefit from the filling of wetlands and unwind 50 years of positive effects of the Wetlands Act.

Third, the proposed legislation as it currently reads seems to be a veiled process to transfer a significant amount of state land to private, riparian owners with little oversight and/or discretion on the part of the state. In Maryland, the law provides that title to private property binding on tidal or navigable waters extends only to the mean high-water mark. *Owen v. Hubbard*, 260 Md. 146, 153 (1970). Conversely, the State of Maryland holds title to all submerged land under the navigable waters of the state. *See Bd. of Pub. Works v. Larmar Corp.*, 262 Md. 24, 35 (1971). To whatever extent a shore stabilization project by a private landowner purposefully or inadvertently fills previously submerged land, the proposed legislation will necessarily require that the state transfer said land to the private owner. This would have a deleterious effect on the rights of the public to fishing and navigation under the public trust doctrine. Public policy demands that the transfer of public land to private parties be met with higher scrutiny and a greater public benefit.

Finally, the proposed legislation is opaque with respect to the process for transferring title to the land. The tidal wetland permits are not currently recorded in the circuit court. Though there is a searchable repository of wetlands permits on the DOE website, the information is limited. More than a few questions will require clear answers:

1. Does DOE even have authority to transfer state land to private landowners?
2. Will DOE require that tidal wetland permits be recorded with the circuit court?
3. When will title transfer – will DOE execute a deed to a private owner upon approval of the permit or completion of a project? Who will be responsible for recording such a deed?
4. In order to obtain an insurable interest, the private owners will need to obtain ALTA boundary surveys of the newly acquired land – will an ALTA survey be part of the permit process?

5. Will the State Department of Assessments and Taxes records be updated?

For private landowners to benefit from the proposed legislation, the land transferred in fee will need to be insurable by title insurers. For title insurers to properly vet these transfers will at minimum require satisfactory evidence of authority of the transferor(s), recordable instruments conveying title which includes information regarding the approval of the wetland permit, and a boundary survey clearly delineating the boundaries of the property to be transferred. The legislation as proposed does not sufficiently address these title issues regarding how title will transfer and, therefore, the insurability of these transfers.

For these reasons, the Real Property Section Counsel of the MSBA **opposes SB 1048** and asks for an **unfavorable report**. Thank you for your consideration.