

**Maryland General Assembly  
Department of Legislative Services**

**Proposed Regulations  
Critical Area Commission for the Chesapeake and Atlantic Coastal Bays**  
(DLS Control No. 14-258)

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**Overview and Legal and Fiscal Impact**

These regulations streamline provisions pertaining to State agency actions resulting in development on State-owned lands and add climate change provisions in order to implement Executive Order .01.01.2012.29.

The regulations present no legal issues of concern.

State agency costs of development on State-owned land in the Critical Area may increase in certain cases.

**Regulations of COMAR Affected**

**Critical Area Commission for the Chesapeake and Atlantic Coastal Bays:**

Criteria for Local Critical Area Program Development: General Provisions:

COMAR 27.01.01.01

Development in the Critical Area Resulting From State and Local Agency Programs:

General Provisions: COMAR 27.02.01.01

State Agency Actions Resulting in Development on State-Owned Lands:

COMAR 27.02.05.01-.03

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**Legal Analysis**

**Background**

The Critical Area Commission was created in 1984 in order to preserve and restore water quality in the State, maintain valued wildlife habitat, and accommodate inevitable growth. Due to an Opinion of the Attorney General issued in 1987 (72 Md. Op. Atty. Gen. 14, 1987 WL 339797 (Md.A.G.)), the commission's authority to adopt regulations became unclear, and therefore the commission was unable to update regulations to correspond with changes in science and updates to other State regulations. Chapter 119 of 2008 addressed this issue by clarifying the commission's authority to adopt regulations to implement Critical Area programs and requiring the commission to update the 1,000 foot-Critical Area boundary. Under this purview, the commission has reviewed several subtitles of its regulations relating to State Agency development on State-owned land. During this review, the commission identified necessary updates to these regulations to (1) reflect changes in other State regulations over the past 30 years that have rendered certain provisions in these regulations obsolete; (2) streamline the provisions pertaining to State agency actions resulting in development on State-owned lands; and (3) update the drafting style of the regulations according to current drafting standards.

On December 28, 2012, Executive Order .01.01.2012.29 was signed by the Governor in order to address climate change and “coast smart” construction. The Executive Order requires State agencies that propose capital projects for new State structures, or the reconstruction or rehabilitation of substantially damaged structures, for inclusion in the State capital budget on or after July 1, 2013 to consider the risk of coastal flooding and sea level rise to the project, and to site and design State structures in a manner that avoids or minimizes associated impacts.

## **Summary of Regulations**

The regulations amend, repeal, and add new regulations to COMAR 27.01.01.01, 27.02.01.01, and 27.02.05.01-.03. Specifically, the regulations:

- update and add definitions under 27.01.01.01, 27.02.01.01, and 27.02.05.01;
- clarify that State-owned land cannot be used to generate additional growth allocation acreage for a local jurisdiction’s growth allocation reserve and clarify that State-owned lands cannot be used by a private developer to satisfy the adjacency requirement for the award of growth allocation under 27.02.05.01E(1) and F;
- add new requirements and considerations to address climate change concerns under 27.02.05.02A(2), .03B(3)(b), .03B(9), .03C, .03D, .03E(1)(b)(ii);
- broaden the application of the requirements under 27.02.05.03B(3)(c), .03B(8), and .03F, to apply to all development on State-owned land in the Critical Area;
- require under 27.02.05.03B(10)(a) that a State agency replant a cleared forest or developed woodland at a ratio of at least 3:1 if the agency clears the area before obtaining commission approval;
- add the option for development by a State agency that will cross or impact a stream to accommodate an increase in flood frequency, rather than prevent an increase in flood frequency, under 27.02.05.03E(1)(b)(i);
- broaden the application of the requirements under 27.02.05.03B(3)(a), .03B(3)(d), .03B(3)(e), .03B(4), and .03B(10) to apply to development in an intensely developed area;
- require the commission to review a linear project in accordance with 27.02.05.03-1 if the project crosses an area designated as a limited development area under 27.02.05.03-2B or crosses an area designated as a resource conservation area under 27.02.05.03-3C;
- require a State agency, to the maximum extent practicable, to plant native vegetation if the agency proposes development in an intensely developed area under 27.02.05.03-1C(1);
- alter the type of permanent sludge handling, storage, or disposal facility that may be located in an intensely developed area of the Critical Area from a facility that is not

associated with a wastewater treatment facility to a facility that is associated with a wastewater treatment facility under 27.02.05.03-1E(2)(b);

- add requirements for development in a resource conservation area under 27.02.05.03-3;
- repeal the exception allowing a solid or hazardous waste acceptance facility on State-owned lands within the Critical Area if there is no environmentally acceptable alternative outside of the Critical Area;
- repeal the authorization of certain transportation facilities and utility transmission facilities to be located on State-owned lands within the Critical Area in areas of intense development; and
- repeal the provision authorizing a State agency to allow for modifications in road standards to reduce potential impacts to the site and Critical Area resources in areas outside of areas of intense development.

### **Legal Issue**

The regulations present no legal issues of concern.

### **Statutory Authority and Legislative Intent**

The commission cites §§ 8-1806, 8-1808, 8-1811, and 8-1814 of the Natural Resources Article as authority for the regulations. More specifically, § 8-1806(b)(1)(x) requires the commission to adopt regulations to establish comprehensive standards and procedures for development in the critical area. Section 8-1814(a) requires any State agency that proposes development that has not been subject to project approval by the local jurisdiction under an approved program in the critical area to receive approval from the commission before the State agency begins the development.

This authority is correct and complete. The regulations comply with the legislative intent of the law.

### **Technical Corrections and Special Notes**

The Department of Legislative Services has notified the commission regarding several technical corrections. The commission has submitted the following technical corrections:

- adding § 8-1811 as statutory authority;
- fixing a grammatical error under 27.02.01.01B(7-2);
- clarifying the definition for “sea level rise” under 27.02.01.01B(46-2);
- fixing an incorrect internal cross-reference under 27.02.01.01B(64)(b); and

- adding “agency” as included in the definition of “State agency” under 27.02.05.01(6).

## **Fiscal Analysis**

State agency costs of development on State-owned land in the Critical Area may increase in certain cases.

### **Agency Estimate of Projected Fiscal Impact**

The Critical Area Commission advises that the regulations have no impact on State or local governments. The Department of Legislative Services concurs that the regulations have no fiscal impact on local governments but disagrees that the regulations have no fiscal impact on State government. The regulations have the potential to increase State agency costs of development on State-owned land in certain cases in the Critical Area. The regulations make a stormwater requirement which currently only applies to State agency development on State-owned land in intensely developed areas more broadly applicable to development on State-owned land under any area classification, potentially increasing costs for certain projects in non-intensely developed areas. The regulations also implement Executive Order 01.01.2012.29 by including requirements related to climate change impacts in the Critical Area regulations dealing with State agency development on State-owned land. The commission indicates that the executive order separately requires State agencies to have in place policies and guidelines addressing climate change impacts from development activities and that the regulations simply ensure that climate change impacts are uniformly addressed by State agencies in the Critical Area. However, due to a broader definition of “development” in the regulations, these regulations may require additional actions to be undertaken related to climate change impacts for certain projects.

### **Broader Application of Stormwater Requirement**

The stormwater requirement that is made more broadly applicable to State agency development on State-owned land in all area classifications, rather than just intensely developed areas, is a requirement that post-development/redevelopment pollutant loadings from the site be reduced by 10% from pre-development/redevelopment levels, or that offsets be provided. The Maryland Department of the Environment also implements stormwater requirements that apply to development in general (including development in non-intensely developed areas in the Critical Area) that disturbs over 5,000 sq. ft. of land. However, pursuant to these Critical Area regulations, State agency development on State-owned land in the Critical Area, in areas that are not intensely developed, may require additional stormwater management measures to meet the 10% requirement than would currently be required to meet Maryland Department of the Environment requirements. State agency development on State-owned land in the Critical Area in non-intensely developed areas that does not disturb more than 5,000 sq. ft. of land would also be newly subject to the 10% requirement. Whether, and by how much, a State agency’s costs could increase, would vary by project. Based on information provided by the commission’s staff, most increases should only be in the tens of thousands of dollars (less than \$100,000).

## **Requirements Related to Climate Change Impacts**

The definition of “development” under these regulations is “a human activity that materially affects the condition or use of dry land, land under water, or a structure” and it includes redevelopment. These regulations, pursuant to a directive in Executive Order 01.01.2012.29, incorporate requirements related to climate change impacts under the Critical Area regulations applicable to State agency development on State-owned land. The executive order separately requires that State agencies site and design new State structures or the reconstruction or rehabilitation of substantially damaged State structures to avoid or minimize impacts associated with coastal flooding and sea level rise. Because the definition of “development” in these regulations is broader than the applicability of the executive order’s directive to State agencies regarding “new State structures or the reconstruction or rehabilitation of substantially damaged State structures,” the Critical Area regulations may require actions to be taken to mitigate climate change impacts for State agency development on State-owned land in certain cases where actions would not otherwise be required pursuant to the executive order. The extent of any resulting additional costs, however, cannot be reliably determined at this time because it is uncertain how many projects would be affected and the cost that might be incurred for each project.

## **Impact on Budget**

As mentioned above, the regulations have the potential to increase State agency costs of development on State-owned land in certain cases in the Critical Area, which would affect the budgeted amounts allocated for the development. The extent of any overall increase in costs, however, cannot be reliably determined.

## **Agency Estimate of Projected Small Business Impact**

The Critical Area Commission advises that the regulations have minimal or no economic impact on small businesses in the State, noting that the regulations may have a minimal, positive impact on small business consulting firms that assist State agencies with development activities in the Critical Area. The Department of Legislative Services disagrees. With there being the potential for these regulations to require additional stormwater or climate change impact mitigation on certain projects, it appears there is at least a possibility of small business consulting firms to benefit meaningfully as a result of the regulations.

## **Contact Information**

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