



January 28, 2021

The Honorable Paul G. Pinsky, Chair
Education, Health, and Environmental Affairs Committee
2 West, Miller Senate Office Building
Annapolis, Maryland 21401

Re: SB0021 Senate Bill 21 – Wetlands and Waterways – Riparian Rights – Prohibition on Termination or Impairment

Dear Chairman Pinsky and Members of the Committee:

The Maryland Department of the Environment (MDE) has reviewed Senate Bill 21, Wetlands and Waterways – Riparian Rights – Prohibition on Termination or Impairment and would like to share some information regarding this legislation.

The State of Maryland—like all other states in the Union—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 a pier out over State-owned submerged lands to provide such access. 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.

The intent of this legislation is not clear, however as drafted the bill significantly conflicts with current State statute and regulations. Specifically, the legislation states MDE or Board of Public Works (BPW) cannot terminate or impair the riparian rights to install a pier. 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. Furthermore, Env’t §16-103 already does what this legislation is proposing, “Except as specifically provided in this title, a riparian owner may not be *deprived* of any right, privilege, or enjoyment of riparian ownership that the riparian owner had prior to July 1, 1970.” In addition, COMAR 26.24.04.02, identifies pier criteria that all piers must conform to and that all pier activities should conform to State, federal, or local land use requirements. MDE considers these items in its application review to make a determination. If this statute prohibits the state from conditioning a pier permit in accordance with other applicable laws and regulations, or prohibits the State from denying a permit application, then MDE and BPW are unable to carry out their mission to protect the waters of the State for all of Maryland’s citizens. The denial of an application for a pier does not terminate a person's riparian rights or interests. A pier permit may be denied for various other reasons supported by existing statute or regulation, but that denial does not terminate a person's riparian rights. This

may increase litigation costs associated with appeals of permit decisions or MDE's inability to act on a permit application due to conflicting statute and regulations.

The broad and ambiguous language would suggest that any criteria used to review piers, which allow riparian access while also minimizing adverse effects to other natural resources, water quality, and navigation, may not be used. MDE permit decisions support many goals for maintaining tidal wetlands and their numerous benefits for recreation, including recreation fishing, commercial fish and shellfish harvesting, aesthetics, and natural shoreline protection. If MDE lacked the ability to consider these other factors in permit decisions, the benefits of tidal waters and wetlands may be greatly diminished.

The bill proposes to add provisions which would require MDE to devote considerable resources to investigating community associations and their riparian rights and access. MDE currently has limited staffing and 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. 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.

MDE processes approximately 600 sole pier applications on average annually and over 1,000 permits in total, any number of which can include a pier component of work. The additional review with current staffing will increase plan reviewers' review time impairing the Department's ability to meet the statutory and regulatory obligation. An applicant for a permit is required to provide all property information pertaining to their parcel that may restrict their use, this includes any deeded restrictions. However, 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. Furthermore, existing staff have full-time roles and responsibilities to complete, as mandated under statute and regulation.

Thank you for considering the Department's information regarding this legislation. We will continue to monitor Senate Bill 0021 during the Committee's deliberations, and I am available to answer any questions you may have. Please feel free to contact me by e-mail at tyler.abbott@maryland.gov.

Sincerely,

A handwritten signature in black ink, appearing to read "Tyler Abbott", written in a cursive style.

Tyler Abbott