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Finding the Pearl in the Oyster: Strategies for a More Effective Implementation of Virginia's Chesapeake Bay Preservation Act

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FINDING THE PEARL IN THE OYSTER: STRATEGIES FOR A MORE EFFECTIVE IMPLEMENTATION OF VIRGINIA'S CHESAPEAKE BAY PRESERVATION ACT

Cradle and grave of the sun;
Looking-glass of night's celestial ornaments;
Cartographer of our fates;
Keeper of secrets,
never to be revealed
by your myriad tongues.¹

I. INTRODUCTION

Since our nation's infancy, the Chesapeake Bay ("Bay") has been one of Virginia's natural treasures.² The Bay is America's largest and historically most productive estuary, valued today as an economic resource, a wilderness sanctuary, and an aesthetic asset.³ Every year, commercial fishermen harvest blue crabs, oysters, and a multitude of fish species in mass quantities to satiate our desire for seafood.⁴ Nature aficionados can observe ospreys, laughing gulls, and other shorebirds taking their share of the Bay's bounty.⁵ From the shoreline, quiet

³. See John W. Warner & John W. Kindt, Land-Based Pollution and the Chesapeake Bay, 42 WASH. & LEE L. REV. 1099, 1100 (1985).
⁴. See BUTLER & LIVINGSTON, supra note 2, at 74-76.
⁵. The author has had the good fortune of being able to spend a few lovely
vacation homes overlook the waters across coves and inlets. Despite these idyllic images, the Bay has been facing rather serious problems, most notably declining water quality and an accompanying drop in productivity.6

The Chesapeake Bay is host to a staggering number of contaminants which emanate from equally numerous sources.7 Airborne pollutants, recreational and commercial watercraft, and the cumulative effects of individual landowners' actions have all contributed to a decline in the Bay's well-being.8 Nevertheless, the Bay's flagging health has not, by any means, gone unnoticed.9

Recognizing the economic and aesthetic benefits of preserving the natural resources of our waters, both the federal government and the states have taken steps to restore, and prevent further deterioration of, our aquatic ecosystems.10 Virginia, itself, has enacted measures designed to protect state waters, such as the Virginia Pollution Discharge Elimination System,11 which regulates the discharge of pollutants into state waters by requiring permits for pollution discharges. While these initial efforts have made some headway into reducing the flow of pollutants into the Bay,12 none of this legislation addresses non-point source pollution, which has a markedly deleterious effect on water quality.13

Non-point source pollution consists primarily of wastes and chemical residues that enter the hydrologic cycle as runoff from

6. See, e.g., Lawrence Latane III, Harvest Outlook is Blue; Crab Catch Expected to be Worst In 36 Years, VMRC to be Told, RICH. TIMES-DISPATCH, Oct. 23, 1995, at A1. See generally Warner & Kindt, supra note 3.
7. See Warner & Kindt, supra note 3, at 1110-11.
8. See id.
developed and cultivated lands. Such pollutants wash off, or seep through, agricultural lands, septic tanks, streets and highways, harvested forestland and suburban yards. Due to the widespread occurrence of non-point pollution sources, the identification, monitoring, and mitigation of non-point source pollution is challenging, if not maddening.

Although there have been some preliminary attempts by the Federal government to control non-point source pollution, such measures are by no means comprehensive, often meet with resistance from landowners, and are unlikely to be developed much further in the near future. Nevertheless, with the passage of the Chesapeake Bay Preservation Act, Virginia has created a potentially powerful tool for controlling non-point source pollution.

The Chesapeake Bay Preservation Act ("Act") was enacted in 1988 as a means of reducing the flow of non-point source pollutants into the Bay. One of the most notable aspects of the Act is the method by which the program is administered. Instead of following the traditional method of delegating power to a central agency that makes and enforces regulations, the Act relies on a cooperative effort between the state and the various localities of Tidewater Virginia.


15. See generally id.


22. See VA. CODE ANN. § 10.1-2100 (Michie 1993). The political entities that constitute Tidewater Virginia are "the Counties of Accomack, Arlington, Caroline, Charles City, Chesterfield, Essex, Fairfax, Gloucester, Hanover, Henrico, Isle of Wight, James City, King George, King and Queen, King William, Lancaster, Mathews, Middlesex, New Kent, Northampton, Northumberland, Prince George, Prince William, Richmond, Spotsylvania, Stafford, Surry, Westmoreland, and York, and the Cities of
The portion of the Act pertaining to the state establishes the Chesapeake Bay Local Assistance Board23 ("Board"). The Board’s duties entail promulgating regulations, establishing water quality criteria to be used by local governments, acting as an advisory board to localities, and enforcing the Act.24 The local governments, in turn, are charged with designating Chesapeake Bay Preservation Areas25 and incorporating the Board’s criteria into their comprehensive plans and zoning ordinances.26

Part II of this paper describes the Chesapeake Bay Preservation Act and the mechanics of its implementation. Part III addresses the efficacy of the Act to date and the potential shortcomings of land-use based pollution controls. Part IV proposes potential solutions for improving the effectiveness of the Act.

II. THE CHESAPEAKE BAY PRESERVATION ACT: A PERFECT WORLD ON PAPER

A. The State’s Helping Hand

As its name suggests, the Chesapeake Bay Local Assistance Board was established to assist the various Tidewater local governments in protecting state waters. The Board’s main function has been to promulgate regulations.27 Included in the regulatory scheme are criteria governing the environmental protection activities of the localities.28 The foundational regulations

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23. See id. § 10.1-2102.
24. See id. § 10.1-2103. But see infra notes 149-54 (discussing questionable enforcement power of Board).
25. See infra notes 27-38.
28. See id.
are those that establish criteria for the designation of Chesapeake Bay Preservation Areas ("CBPAs").

According to the Board’s criteria, local governments are charged with designating CBPAs, which are divided into Resource Protection Areas ("RPAs"), Resource Management Areas ("RMAs"), and Intensely Developed Areas ("IDAs"). RPAs include those lands which are at or near the shoreline of any type of wetland, and must provide for a 100-foot vegetated buffer area located adjacent to, and landward of, the particular wetland. The purpose of the RPAs is to mitigate and eliminate the flow of pollutants into state waters by preventing, or at least slowing, runoff from areas lying in close proximity to wetlands. Such mitigation measures are accomplished through the imposition of strict and specific regulations upon land-use practices within RPAs.

RMAs, in turn, include land types that are not designated as RPAs, but that also have a propensity for causing water quality degradation. Among the lands included in RMAs are floodplains, highly erodible and permeable soils, and non-tidal wetlands not encompassed by RPAs. While the rationale behind RPAs and RMAs is similar, RMAs are subject only to Best Management Practices, as opposed to the specific regulations that apply to RPAs. IDAs may be designated at the option of the local governments, and include lands that have more than fifty percent impervious surface, are served by public water and

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29. See id. §§ 10-20-70 to -100.
30. See id.
31. See id. § 10-20-80.
32. See id.
33. See id. §§ 10-20-110 to -160.
34. See id. § 10-20-90(A).
35. See id. § 10-20-90(B).
36. See id. §§ 10-20-90, -120(3), -120(8)(a)(1). "Best management practice" means a practice, or combination of practices, that is determined by a state or designated area wide planning agency to be the most effective, practicable means of preventing or reducing the amount of pollution generated by nonpoint sources to a level compatible with water quality goals." Id. § 10-20-40; see also Eisen, supra note 13, at 25-29 (discussing Best Management Practices in Federal stormwater pollution control context).
sewer systems, or have at least four or more dwelling units per acre. 38

Following the designation of CBPAs, Tidewater localities are to adopt the Board's criteria for the regulation of land-use practices within such areas. 39 Some of the mandatory general practices for CBPAs include limiting unnecessary land disturbances, minimizing impervious cover, requiring maintenance of land, preserving indigenous vegetation, and providing for reserve drainfields for septic systems. 40 The more specific criteria for RPAs deal primarily with the 100-foot buffer area, and include limitations on vegetation removal and path construction in order to achieve a seventy-five percent reduction in sediments, and a forty percent reduction of nutrients. 41

Beyond its regulatory function, the Board plays a significant advisory role to the participating local governments. 42 Under the Board's regulations, each individual locality is given the responsibility of initiating management programs and revising its comprehensive plan. 43 To promote a degree of uniformity between the individual programs, and to ensure compliance with the Act, the Board may, for the purposes of determining the plan's consistency with the Act, review any local management program voluntarily submitted by a local government. 44

The review of local plans also facilitates a determination of whether additional technical or financial assistance is needed to carry out the goals of the local program. 45 In keeping with the idea that the Board is meant to assist local governments, the Board has the authority to provide grants to localities. 46 In its

38. See id. § 10-20-100.
39. See id.: §§ 10-20-110 to -160.
40. See id. § 10-20-120.
41. See id. § 10-20-120(B).
44. See VA. CODE ANN. § 10.1-2112 (Michie 1993); 9 VA. ADMIN. CODE § 10-20-220(F) (1996).
46. See An Update on the Implementation of the Chesapeake Bay Preservation Act, BAY ACT STATUS REPORT (Chesapeake Bay Local Assistance Department, Richmond, VA), Jan. 1995, at 1-2, 8 (on file with the University of Richmond Law Review) (discussing grant funding programs) [hereinafter BAY ACT STATUS REPORT].
initial stages, the Board provided funding for the purposes of establishing mapping, information technology, and ordinance preparation programs.⁴⁷ Currently, funds are targeted for enforcement personnel and local comprehensive planning activities.⁴⁸ In the future, grant proceeds will be aimed at projects dealing with public education, non-point source pollution control, and new land-use management techniques.⁴⁹

The final, and arguably most important, attribute of the Board is its authority to enforce its own regulations and the relevant provisions of the Act.⁵⁰ This power simply allows the Board to bring administrative and legal proceedings against localities that have either not adopted plans or ordinances, or have adopted plans or ordinances which do not accord with the Act or the Board's regulations.⁵¹

B. The Local Government Role

One of the more significant provisions of the Act is section 10.1-2108, which gives counties, cities, and towns the authority to exercise their police and zoning powers to protect state waters.⁵² The importance of this grant of power lies in the fact that Virginia still adheres to Dillon's Rule in determining the scope of municipal authority.⁵³

According to Dillon's Rule, a municipality only has those powers specifically granted to it by the state.⁵⁴ Prior to the Act, therefore, even if a locality had wanted to implement land-use measures for the purposes of preserving water quality or preserving the environment, the locality ran the very probable risk of being sued successfully by a disgruntled landowner on

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⁴⁷ See id. at 1.
⁴⁸ See id.
⁴⁹ See id.
⁵² VA. CODE ANN. § 10.1-2108 (Michie 1993).
⁵³ See Benson & Garland, supra note 21, at 5 n.26; Butler, supra note 12, at 876 n.195.
⁵⁴ See Benson & Garland, supra note 21, at 5 n.26; Butler, supra note 12, at 876.
the ground that the measures were an *ultra vires* exercise of power.\(^5\) The passage of the Act alleviated at least some of these barriers to locally based environmental protection measures.\(^6\)

Given this explicit grant of power, localities are to exercise their authority to implement pollution reduction measures in accordance with the regulations and criteria issued by the Board.\(^7\) The Board envisions such measures progressing through three general phases.\(^8\) In Phase I, local governments are to designate CBPAs\(^9\) within their borders and adopt performance criteria for lands within those areas.\(^10\) In Phase II, localities are to integrate water quality improvement measures into their comprehensive plans.\(^11\) In Phase III, local governments are to incorporate more specific water-quality improvement measures into their zoning and subdivision ordinances and other land-use management regulations.\(^12\)

Zoning in accordance with a comprehensive plan is one of local government's greatest powers,\(^13\) and it is central to the Act's non-point source reduction scheme.\(^14\) The flow of non-point source pollution over and through developed and farmed land can be effectively controlled in a number of ways.\(^15\) By way of traditional Euclidean zoning,\(^16\) various land uses can be segregated and clustered in order to buffer or disperse pollution runoff.\(^17\)

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5. See Benson & Garland, *supra* note 21, at 8.
7. See id.
9. See supra notes 27-38 and accompanying text.
10. See BAY ACT STATUS REPORT, *supra* note 46, at 3.
11. See id.
12. See id.
14. See VA. CODE ANN. § 10.1-2109 (Michie 1993) (“Local governments to designate Chesapeake Bay Preservation Areas; incorporate into local plans and ordinances”).
Land uses that involve a significant amount of impervious cover, or that are prone to stormwater discharges, such as agricultural lands, may be intermingled with residential or forested tracts.\(^68\) By preventing a concentration of non-point sources in any one area, non-point source pollutants will be dispersed and will be buffered by the more highly vegetated lands.\(^69\) Another mitigation technique that can be effected through zoning entails regulating the density of land development.\(^70\)

Beyond regulating uses themselves, local governments can control to what degree the uses themselves may be conducted.\(^71\) For example, by requiring larger lot sizes and limiting the number of dwellings on any given parcel,\(^72\) a locality can not only preserve a greater expanse of vegetated land, but can reduce the amount of effluents from septic tanks, lawns, and the impervious cover which accompanies development.\(^73\) In addition, local governments can simply restrict the number of particularly harmful uses by limiting the number of parcels zoned for such uses.\(^74\) Finally, a locality could require environmentally sound building practices, such as the utilization of permeable asphalt for driveways, parking lots, and sidewalks.\(^75\)

\(^{68}\) See id.
\(^{69}\) See id.
\(^{70}\) See id.
\(^{71}\) See, e.g., Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (approving zoning restriction on use of property).
\(^{72}\) Requiring large lot sizes, however, could raise the spectre of exclusionary zoning. See, e.g., CHARLES M. HAAR, SUBURBS UNDER SIEGE: RACE, SPACE, AND AUDACIOUS JUDGES (1996) (providing history of Mount Laurel line of cases outlawing exclusionary zoning practices); HAAR & WOLF, supra note 63, at 371-504 (discussing exclusionary zoning). See also Patrick J. Skelley II, Note, Defending the Frontier (Again): Rural Communities, Leap-Frog Development, and Reverse Exclusionary Zoning, 16 VA. ENVTL. L.J. 273 (1997) (discussing methods by which local governments can zone to prevent displacement of low-income residents by uncontrolled development).
\(^{73}\) See 9 VA. ADMIN. CODE §§ 10-20-110 to -160 (1996) (citing these ends as goals of the program).
\(^{74}\) See Euclid, 272 U.S. at 397 (validating zoning ordinances prohibiting industrial uses in particular areas).
\(^{75}\) See 9 VA. ADMIN. CODE § 10-20-120(5) (1996) (requiring minimization of impervious cover); see also Chester L. Arnold, Jr. & C. James Gibbons, Impervious Surface Coverage: The Emergence of a Key Environmental Indicator, PLANNING, Mar. 22, 1996, at 243 (discussing importance of controlling impervious surfaces in water resource protection). The parking lots surrounding Walden Pond, Henry David Thoreau's source of inspiration in Massachusetts, are made of permeable asphalt, reducing the amount of impervious cover, thus preventing stormwater runoff.
In order to promote stability, and reduce piecemeal or haphazard zoning, land-use decisions must be made in accordance with a comprehensive plan.\textsuperscript{76} A comprehensive plan delineates patterns of growth for a locality and is essentially a future-oriented, long-range blueprint that ostensibly governs land-use practices.\textsuperscript{77}

A further benefit of comprehensive planning is the predictability that it lends to zoning decisions.\textsuperscript{78} Such predictability makes it easier for developers to propose construction projects, since they can target areas that, in theory, the public has approved for development.\textsuperscript{79} In addition, the planning process helps define the reasonable expectations of landowners, who can determine in advance the uses for which their property is suitable.\textsuperscript{80} By setting out in advance a scheme for land development and use in a comprehensive plan, a local government can avoid, to some extent, the potential for court challenges to zoning decisions.\textsuperscript{81}

Recognizing the vital role of comprehensive planning, the Act focuses, to a great extent, on the planning process.\textsuperscript{82} As mentioned above, many of the water quality criteria and protection measures are to be incorporated into the comprehensive plans of Tidewater localities.\textsuperscript{83} In addition, under a separate section

\textsuperscript{76} For the seminal discussion of zoning in accordance with a comprehensive plan, see Charles M. Haar, \textit{In Accordance With a Comprehensive Plan}, 68 HARV. L. REV. 1154 (1955).

\textsuperscript{77} "The plan serves as an overall set of goals, objectives, and policies to guide land-use decisionmaking by the local legislative body." DONALD G. HAGMAN & JULIAN CONRAD JUERGENSMIEYER, \textit{URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW} § 2.9 (2d ed. 1986). \textit{See generally} Haar, supra note 76.

\textsuperscript{78} \textit{See} HAGMAN & JUERGENSMIEYER, supra note 77, § 2.10.

\textsuperscript{79} \textit{See} id.

\textsuperscript{80} \textit{See} id.

\textsuperscript{81} \textit{See} Butler, supra note 12, at 926 n.393.

\textsuperscript{82} \textit{See}, e.g., 9 VA. ADMIN. CODE § 10-20.220 (1996) (providing for land-use-based implementation of the Act).

\textsuperscript{83} \textit{See} VA. CODE ANN. § 10.1-2109 (Michie 1993).
of the Virginia Code, localities are authorized to establish a separate planning commission, the main concern of which is to consider matters arising under the Act. 84

The emphasis on planning is readily understandable. By making the protection of state waters part of the long-range planning process, local governments can satisfy two pressing concerns. First, local governments must comply with the Act or face potential legal action by the state. 85 Comprehensive planning facilitates compliance by making feasible the above-mentioned techniques of use segregation and clustering. 86 Second, localities need to maintain and enhance their tax bases by attracting new businesses. 87 By regulating the time, sequence, and tempo of development within its boundaries, a locality can accomplish both. 88

C. Land-Use and Non-Point Source Pollution

Non-point source pollution is, by its very nature, diverse, omnipresent, and ever-changing. 89 Therefore, any regulatory scheme aimed at reducing the flow of this contamination must in some manner have these characteristics designed into it.

Federal efforts to control non-point source pollution have been ineffective 90 and are fundamentally unwise. 91 First, controlling non-point sources is very different from the regulation of point sources. 92 While point sources can, at least to some degree, be easily monitored, non-point sources are much more numerous and invidious. 93 The human resources needed to locate non-point sources, and identify the pollutants therefrom, would strain the capabilities of any current federal agency; 94

86. See supra notes 63-75 and accompanying text.
87. See Hagman & Juergensmeyer, supra note 77, § 3.21.
88. See Haar & Wolf, supra note 63, at 599-700 ("Regulating the Tempo and Sequence of Growth").
89. See Eisen, supra note 13, at 12-21.
90. See Plater, supra note 17, at 287; see also Eisen, supra note 13, at 36-64 (noting failure of Federal efforts to mitigate urban stormwater runoff).
91. See, e.g., Angry Threats, supra note 19, at A16.
92. See Plater, supra note 17, at 287.
93. See Eisen, supra note 13, at 15-17 nn.74-81.
increased funding for a federal agency would be highly unlikely in light of the present political climate.\textsuperscript{95}

Next, correlated to the problem of non-point source identification from a central governmental perspective is the problem of enforcement.\textsuperscript{96} Even if non-point sources could be catalogued by a central agency, an equally or more challenging task would be the enforcement of federal non-point source pollution laws.\textsuperscript{97} Enforcement would require constant monitoring of water quality by federal agents, and constant oversight of individual land-use practices.\textsuperscript{98}

Finally, even if logistically feasible, a federally based program would most likely be politically unpopular.\textsuperscript{99} The federal regulatory process is far removed from the average citizen, and for this reason, federal laws governing land-use practices would likely meet strong opposition from landowners and property-rights advocates.\textsuperscript{100} Such efforts would be regarded as an unwarranted regulatory imposition on liberty, especially where access to law-making is not readily accessible.\textsuperscript{101} Furthermore, enforcement practices would likely meet even greater resistance, since effective implementation of non-point source pollution control could entail entering private property for monitoring water quality and land-management measures.\textsuperscript{102} Enforcement of this type would surely be seen as an unwelcome governmental intrusion.\textsuperscript{103}

A state- or multi-state-based system, while not as detached from the average citizen, is not likely to fare any better.\textsuperscript{104}

\textsuperscript{95} Battle Over Curbing EPA: House Moderates Try Again to Preserve Its Power, RICH. TIMES-DISPATCH, Nov. 1, 1995, at A12.
\textsuperscript{96} See PLATER, supra note 17, at 286-87.
\textsuperscript{97} See generally; Eisen, supra note 13.
\textsuperscript{98} Cf. RODGERS, supra note 94, § 8.1, at 687 (noting that 90-95% of hazardous waste releases are not reported).
\textsuperscript{99} See Butler, supra note 12, at 841-42.
\textsuperscript{100} See Angry Threats, supra note 19, at A16; see also, e.g., Omnibus Property Rights Act of 1995, S. 605, 104th Cong. (1995) (compelling compensation to property owners for regulations causing deprivation of 33% or more).
\textsuperscript{101} See Angry Threats, supra note 19, at A16.
\textsuperscript{102} See, e.g., id.
\textsuperscript{103} See, e.g., id.
\textsuperscript{104} See Benson & Garland, supra note 21, at 15-23. But see Paul D. Barker, Jr., Note, The Chesapeake Bay Preservation Act: The Problem With State Land Regulation
with a federal program, a multi-state or state approach to controlling non-point source pollution would also require a central agency, or a number of regional agencies, for effective implementation.\textsuperscript{105} The inherent problems of such a system again include funding and staffing shortages,\textsuperscript{106} as well as unpopularity among the public.\textsuperscript{107}

Given the flaws inherent in a non-point source program that is administered from a higher level of government, a land-use-based system for protecting water quality, such as the Act, seems to be particularly suited to non-point source pollution control.

First, the existence of local governments themselves alleviates the need for a large regulatory agency to identify non-point source pollution and implement measures designed to reduce such pollution.\textsuperscript{108} As stated earlier, local governments are responsible for designating CBPAs and incorporating water quality criteria into their zoning ordinances and comprehensive plans.\textsuperscript{109} Since localities have existing planning and zoning resources, it is unnecessary to duplicate these resources in the form of an agency.\textsuperscript{110} In addition, local governments have more ready access to information concerning land-use practices within their boundaries, since land-use issues are a fundamental part of local government.\textsuperscript{111} It is therefore easier for local governments to identify areas that are particularly problematic in terms of non-point source pollution.\textsuperscript{112}

Naturally, local governments cannot be expected to have the staff, funding, or experience necessary to determine particular water quality standards or land management systems.\textsuperscript{113} In
order to augment the local governments' efforts to implement the Act's various provisions, the Act established the Board.\(^\text{114}\) Although the Board is a state agency imbued with the authority to promulgate regulations, the Board has never been envisioned as a particularly powerful governmental unit.\(^\text{115}\)

Another advantage to local authority over state water quality protection is the average citizen's putative familiarity with local government action.\(^\text{116}\) Since citizens have ready access to, and an active voice in, the local political process, land-use regulations aimed at environmental protection may be viewed with less apprehension than those imposed by a higher level of government.\(^\text{117}\) Furthermore, many people feel that local government officials are more answerable for their actions than higher-level politicians.\(^\text{118}\)

The greater degree of citizen participation in local decision-making also minimizes enforcement problems. From the standpoint of effective implementation of the Act, citizens, rather than government agencies alone, are able to play at least a limited role in enforcing the Act. First, since the Act is based upon the zoning power, neighboring landowners have standing to sue for zoning decisions that do not comply with the Act.\(^\text{119}\) Second, since citizens are more likely to know about the Act's restrictions as they are embodied in local laws, particularly if the Board implements community outreach programs,\(^\text{120}\) they may be more likely to report violations to the Board. Furthermore, enforcement actions may seem less intrusive when taken by a local government, or viewed as being protective of a particular community.\(^\text{121}\)

\(^{114}\) See VA. CODE ANN. § 10.1-2102 (Michie 1993).
\(^{115}\) See Benson & Garland, supra note 21, at 17-19.
\(^{116}\) See HAAR & WOLF, supra note 63, at 67-85 (discussing advantages and disadvantages of “advocacy planning”).
\(^{117}\) See id.
\(^{118}\) See id.
\(^{120}\) See BAY ACT STATUS REPORT, supra note 46, at 1 (discussing planned community education programs).
\(^{121}\) Although on the whole Virginians favor the protection of private property
III. THE CHESAPEAKE BAY PRESERVATION ACT IN PRACTICE: A STEP SHORT

Nine years have passed since the Chesapeake Bay Preservation Act was signed into law.\textsuperscript{122} As of January, 1995, six of the eighty-four Tidewater localities covered by the Act had still not yet completed their Phase I programs,\textsuperscript{123} despite the fact that such programs were supposed to be completed by November, 1991.\textsuperscript{124} Of the seventy-seven Phase I programs reviewed by the Board, ten were found to be only provisionally consistent with the Act.\textsuperscript{125} Thirty-six localities were at that time in the process of revising their comprehensive plans,\textsuperscript{126} and the Board had completed just six consistency reviews for those plans.\textsuperscript{127} Phase III programs remained solely in the development stage.\textsuperscript{128}

Despite the ambitious nature of the Act as it is written, progress in preserving Virginia's waters has been slow at best.\textsuperscript{129} The Act as a whole is correctly focused upon a land-use based approach to controlling non-point source pollution. Nevertheless, obstacles to the effective implementation of the Act are manifold.

A. The Localities In and Out of Control

One of the advantages to utilizing the zoning power as a means of controlling environmental hazards is the accessibility of local officials.\textsuperscript{130} Pollution control measures enacted at the

\textsuperscript{123} See BAY ACT STATUS REPORT, supra note 46, at 3.
\textsuperscript{124} See 9 VA. ADMIN. CODE § 10-20-60 (1996).
\textsuperscript{125} See BAY ACT STATUS REPORT, supra note 46, at 3.
\textsuperscript{126} See id.
\textsuperscript{127} See id.
\textsuperscript{128} See id.
\textsuperscript{129} See, e.g., Latane, supra note 6.
\textsuperscript{130} See Butler, supra note 12, at 929 (noting that local governments tend to be more susceptible to political pressures from property owners than are state agencies).
local level seem less alien than those from a higher level of
government. 131 This heightened accessibility, or accountability,
however, also accounts for one of the main problems of the Act,
since local officials may be more concerned with reelection than
remediation. 132 Local officials could be hesitant to fully
implement the Act in order to avoid creating a group of dis-
gruntled landowners. 133 In addition, local governments may
not want to appear to be capitulating to the demands of state
bureaucracy. 134

In addition to political pressures, local governments face
economic pressures as well. Because economic needs and goals
differ from locality to locality, many local governments end up
running in the "race of laxity." 135 The "race" exists because
regions that are not direct beneficiaries of the Bay's economic
productivity will be less likely to restrict development or polluting
land uses where such uses are perceived as being necessary
for economic growth. 136 Areas with less stringent regulations
are naturally more attractive to developers and industry, and
hence areas trying to improve their economies by attracting
potentially polluting businesses in this manner will work to be
as non-restrictive as possible.

A further economic pressure is the system by which develop-
ers offer to construct public improvements in exchange for the
re zoning of a particular tract of land. 137 Some of this infra-
structure building is meant solely to alleviate the burden im-
oposed by the new development. 138 Nevertheless, offers that go
beyond the localities' current needs, such as new schools, utility
lines, or roadways, are particularly attractive to local officials
and are hard to turn down. 139 Compounding this problem is

131. See supra notes 116-18 and accompanying text.
132. See Butler, supra note 12, at 932.
133. See id.
134. See Rex Springston, Allen Files Challenge to Air Laws; Federal Lawsuit
Against EPA Cites High Cost of Rules to Virginia, RICH. TIMES-DISPATCH, Jan. 10,
135. See PLATER, supra note 16, at 776-79.
136. See Butler, supra note 12, at 923-24.
137. See HAAR & WOLF, supra note 63, at 256-69 (discussing the process of "incentive
zoning").
138. See id.
139. See Barker, supra note 104, at 757.
the fact that the Act exempts vested property rights from its scope. The race of laxity is hence joined by the "race to vest," as landowners and developers attempt to vest their property rights in order to avoid the Act's environmental restrictions.

Dillon's Rule is another barrier to effective implementation of the Act. Despite the broad grant of powers provided to localities by the Act, local governments will often err on the side of avoiding a lawsuit, rather than taking conservationist measures in accordance with the Act. Dillon's Rule also becomes a factor in avoiding a takings claim by a landowner. While total regulatory takings are rare, Dillon's Rule precludes many of the innovative land-use techniques that could avert such cases. For instance, transferable development rights are one

141. See Benson & Garland, supra note 21, at 50-62 (discussing the race to vest).
142. See supra notes 52-56 and accompanying text; Butler, supra note 12, at 875-81.
143. See Butler, supra note 12, at 875-76.
144. Restricting the use of private property inevitably raises the question of "regulatory takings." While it is unlikely that Act-related zoning actions would invoke a takings suit, local governments should, nonetheless, be aware of the possibility. Under current takings jurisprudence, a landowner must be compensated if, as a result of governmental regulatory action: (1) she has suffered a total deprivation of the value of her property, see Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992); (2) a regulation results in a less-than-total deprivation that is not substantially related to a legitimate state interest or the regulation interferes with reasonable investment-backed expectations, see Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978); (3) an unconstitutional condition has been imposed upon a landowner, see Dolan v. City of Tigard, 512 U.S. 374 (1994); Nollan v. California Coastal Commission, 483 U.S. 825 (1987); or (4) there is a compelled physical occupation of the landowner's property, see Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1992). For a comprehensive treatment of takings law, see Michael Allan Wolf, Takings Term II: New Tools for Attacking and Defending Environmental and Land-Use Regulation, 13 N. Ill. U. L. Rev. 469 (1993).

The Virginia Attorney General has determined that the buffer area requirements of the Chesapeake Bay Preservation Area do not create an unconstitutional taking. See 1991 Op. Va. Atty Gen. 77 (1991). The Chesapeake Bay Local Assistance Board has kept detailed records and findings of fact in the form of a "regulatory support document" to avert Nolan and Dolan challenges to the Act, although some of the vegetation standards may in fact exceed the Board's authority. Telephone Interview with Jeter Watson, Of Counsel, Hirschler, Fleischer, Weinberg, Cox & Allen, P.C. (Nov. 13, 1995). Watson suggests that the Act could be improved by giving localities more flexibility in choosing their means of meeting water quality standards. Id.

145. See Butler, supra note 12, at 875-81; see also Board of Supervisors v. Omni Homes, Inc., Nos. 960508, 960471, 1997 WL 31141 (Va. Jan. 10, 1997) (holding that actions taken by county in implementing Act are not takings under United States or
way in which a taking could be avoided.\textsuperscript{146} If a landowner is not permitted to develop a certain piece of land, a taking can be averted by giving the landowner development rights that she may transfer to another piece of property or sell to another landowner.\textsuperscript{147} Despite the efficacy of these non-traditional zoning schemes, they are beyond the ken of the Tidewater localities, since no explicit grant of power has been given to authorize such actions.\textsuperscript{148}

B. All Bark, No Bite

At first glance, the problem of local government recalcitrance seems somewhat harmless in light of the fact that the Board is imbued with the authority to bring suit against non-complying localities.\textsuperscript{149} There are, however, a number of problems with the Board’s role as an enforcing body.

One of the main concerns with the Board’s enforcement powers is the vagueness in terms of the scope of its authority.\textsuperscript{150} The Board’s actual power to effect legal action for non-compliance is often delimited by the idea that the Board was created for the primary purpose of assisting local governments.\textsuperscript{151}

Virginia Constitutions).

\textsuperscript{146} See HAAR & WOLF, supra note 63, at 269-76 (discussing transferable development rights).

\textsuperscript{147} See id.

\textsuperscript{148} See VA. CODE ANN. § 10.1-2108, -2110 (Michie 1993); Butler, supra note 12, at 877 n.201.

\textsuperscript{149} See VA. CODE ANN. § 10.1-2103(10), -2104 (Michie 1993); 9 VA. ADMIN. CODE §§ 10-20-240 to -280 (1996).

\textsuperscript{150} See Benson & Garland, supra note 21, at 15-23.

\textsuperscript{151} See id. The Virginia General Assembly has in March 1997 amended § 10.1-2103(10) to give the Board authority to take legal and administrative actions to ensure “the proper enforcement and implementation of, and continual compliance with, this chapter.” 1997 Va. Acts ch. 266, sec. 1, § 10.1-2103(10).

This change indeed may give the Board the needed authorization to take a more aggressive approach in implementing and enforcing the Act. Nevertheless, given the fact that § 10.1-2112, permitting only advisory review of local plans, remains unchanged, the Board is probably still limited in some respects to taking a reactive, rather than a proactive, approach to enforcing compliance with the Act. Furthermore, aside from evidencing some legislative intent to augment the Board’s powers, it is difficult to see how the new language in any way changes the Board’s original mandate. The Board already had the power to “ensure compliance with the Act,” which seems to logically entail taking actions to enforce, and compel implementation of, the Act.
It is generally thought that the Board has no power to reject locally implemented programs that are not consistent with the Act.\textsuperscript{152} Since the Board cannot take proactive measures to promote consistency, a substantial amount of the Board's resources will be expended in the attempt to ensure compliance by the various localities.\textsuperscript{153} This retroactive enforcement diverts energy and funds which could be used for more productive purposes, such as developing new land-use management techniques or providing educational services to the public.\textsuperscript{154}

The Board, however, is not the only entity which has the power to control the implementation of the Act.\textsuperscript{155} Since the Act relies on the zoning power, a local government's actions are subject to public approval at two levels. First, citizens concerned about protecting the Bay and other state waters can voice their opinions at council meetings and zoning hearings.\textsuperscript{156} Second, members of the public who feel that their locality has erred in making a particular zoning decision can bring legal action against these non-complying localities.\textsuperscript{157}

Nevertheless, the public citizens' role is limited by two significant factors. First, at the level of local decision-making, effective public participation requires that individuals possess sufficient knowledge of environmental issues and the motivation to take part in community affairs.\textsuperscript{158} Next, in order to challenge a particular zoning decision, a person must have legal standing.\textsuperscript{159} Currently, in Virginia, standing to challenge a zoning decision is only afforded to landowners adjacent to the parcel for which the zoning change was made.\textsuperscript{160} This severely limits

\textsuperscript{152} See id.
\textsuperscript{153} See Barker, supra note 104, at 758.
\textsuperscript{154} See \textit{Bay Act Status Report}, supra note 46, at 1 (noting plan to devote funds to assisting localities in devising remediation schemes and educating public).
\textsuperscript{156} See \textit{id.} § 15.1-431 (requiring hearings on zoning decisions).
\textsuperscript{157} See \textit{id.} § 15.1-496.1 (giving "aggrieved" parties standing to sue in zoning actions).
\textsuperscript{158} See Butler, supra note 12, at 844.
\textsuperscript{159} See Rodgers, supra note 94, § 1.9 (discussing standing to sue under federal environmental laws).
\textsuperscript{160} See \textit{Va. Code Ann.} § 15.1-496.1 (Michie Cum. Supp. 1996); Cupp v. Board of Supervisors, 318 S.E.2d 407, 411-12 (Va. 1984) ("aggrieved" parties in zoning disputes must have "personal stake" in outcome of case; owner of affected property always has
the number of eligible plaintiffs who could bring a legal claim on the ground that the zoning decision was contrary to the purposes of the Act.161

A further difficulty in bringing suit for zoning violations is the standard by which local government decisions are reviewed. A zoning decision will be upheld so long as the rationale behind the decision is "fairly debatable".162 So long as the decision shows some indicia of reasonableness, it will stand. Localities are thus afforded great deference to their decision-making. This problem is compounded by the strong property-rights tradition in Virginia.163 While local government actions to permit more intensive uses of property will withstand judicial scrutiny, efforts to downzone, or require less intensive uses, are less favored.164

In Virginia, downzoning of property falls under the "change or mistake" rule.165 According to this rule, downzoning of property is proper only where a mistake in the original zoning or a change in circumstances dictates that the original zoning must be altered.166 A landowner, dissatisfied with a downzoning of his property, may thus assert that the local government's action is unreasonable and hence illegal.167 Since environmental concerns are relatively new, new knowledge of environmental dangers will not likely be viewed by the court as a "change" for the purposes of justifying the downzoning of property, and as a result, the local government's efforts will be nullified.168

161. See RODGERS, supra note 94, § 1.9 (discussing standing to sue under federal environmental laws).
162. See Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926). "If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control." Id.
163. See Butler, supra note 12, at 827.
164. See, e.g., Board of Supervisors v. Snell Const. Co., 202 S.E.2d 889 (Va. 1974) (invalidating downzoning of property due to lack of "change or mistake").
165. See, e.g, id. at 892-94.
166. See HAGMAN & JUERGENSMEYER, supra note 77, § 6.2.
167. See, e.g., Snell, 202 S.E.2d at 892-94.
168. See id.; see also Butler, supra note 12, at 893 (noting Virginia judiciary's restrictive approach to environmental regulation).
IV. TOWARDS A MORE PERFECT ACT-THE CITIZEN ATTORNEY GENERAL

A. The Role of Education

In light of the aforementioned difficulties, it is obvious that the Chesapeake Bay Preservation Act, while indubitably well intentioned, is not as powerful a tool for controlling non-point source pollution as it could be. The Act's shortcomings stem from an inherent uncertainty as to the scope of the Act itself, and the nature of local government land-use practices as they exist in Virginia. Nevertheless, the Act could be made much more effective through some modifications to both the Act and land-use planning law in Virginia.

Because the Act is centered around land-use decisions made at the local level, education about environmental issues is key to effective implementation of the Act. In order to ensure well-reasoned decision-making, local officials need to know both the ultimate effects of their actions and the importance of preserving the water quality of the Bay for the sake of their communities. From the citizen's standpoint, an understanding of the Bay, and the effects of land-use planning upon it, is necessary for adequate input into the local political process. Furthermore, such knowledge allows citizens to bring violations to the attention of the Board.

The Board has already taken preliminary steps to institute public education programs, and further measures should be developed. Such efforts, however, divert resources from other important Board activities such as comprehensive planning and training of enforcement personnel. Therefore, as an adjunct to the Board's activities, public interest groups should consider creating a consolidated program for the purpose of educating

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169. See Butler, supra note 12, at 844, 926 (noting importance of education in implementing environmental laws).
170. See id.
171. See id.
172. See BAY ACT STATUS REPORT, supra note 46, at 1 (noting plans to implement public education programs).
173. See id. (comprehensive planning and enforcement activities are “focus” of grant funding).
the public about the Bay and its importance to the average citizen.

This consolidated approach should include more than just the traditional "environmental advocacy" groups. Persons who engage in outdoor activities such as fishing or hunting need to be made aware of the fact that a decline in water quality can dramatically affect those pursuits and that environmentalism, in a general sense, is germane to their interests. There are many groups that share the overarching goal of protecting water quality and the Bay's viability. Keeping this goal in mind, groups such as the Chesapeake Bay Foundation, Ducks Unlimited, B.A.S.S., and the Audubon Society should seriously consider pooling their efforts to foster public awareness. This approach would aid in both building a consensus over environmental issues and stimulating interest in the Act.

B. A Preemptive Strike

Besides educating the public, steps must be taken to enhance the Board's enforcement capabilities. In a sense, the Act, with its focus on comprehensive planning, takes a proactive approach to controlling land-based pollution. In its current form, however, the Board's power to ensure the consistency of such plans is remedial in nature. Submission of a plan, or any proposal affecting land use, is dependent solely upon a locality's discretion. Moreover, even if a local government decides to have a plan reviewed, the Board is only supposed to act in an advisory capacity. Thus, the Board will not insti-

175. The National Wildlife Federation, for example, takes a "hook-and-bullet" approach to conservation, advocating environmental protection for the purposes of promoting sportspersons' interests. See id.
176. See Barker, supra note 104, at 758 (noting Board's difficulties in carrying out enforcement duties).
178. See Barker, supra note 104, at 758 (Board has no power to reject local government's area designations).
180. See id. ("Advisory state review of local government decisions") (emphasis added).
tute legal actions unless the effects of the plan are not in accord with the goal of protecting state waters.\textsuperscript{181} Even if noncompliance is discovered, however, the Board may be powerless to remedy the situation, since vested rights are protected by the Act.\textsuperscript{182}

To ameliorate this problem of remedial enforcement, the Act should be revised to require local governments to inform the Board about their land-use decisions. For example, section 10.1-2112 of the Act could be amended to read:

\begin{quote}
In addition to any other review requirements of this chapter, any application for the use or development of land in any county, city, or town shall be reviewed by the Board. Such review shall determine whether the application is consistent with the provisions of this chapter. Any such review shall be completed, and a report submitted to such county, city or town, and made available to the public, within ninety days of the submission of the application.\textsuperscript{183}
\end{quote}

This approach would reduce the costly and time-consuming process of determining compliance following a local government's adoption of what could be a patently flawed program.

Even if the Board is hesitant to take legal action against localities, enforcement of the Act could be effected by granting citizens legal standing to sue for violations of the Act.\textsuperscript{184} Citizens could easily be made a more significant part of the Act's implementation by coupling public education with the insertion of a citizen suit provision in the Act similar to that in the fed-

\begin{itemize}
\item \textsuperscript{181} See Barker, supra note 104, at 758-59 (Board cannot reject local government decisions, but must subsequently enforce compliance with regulations).
\item \textsuperscript{182} See VA. CODE ANN. § 10.1-2115 (Michie 1993) ("Vested rights protected").
\item \textsuperscript{183} Compare section 10.1-2112 of the Code of Virginia, which currently provides that
\begin{quote}
[i]n addition to any other review requirements of this chapter, the Board shall, upon request by any county, city or town, review any application for the use or development of land in that county, city or town for consistency with the provisions of this chapter. Any such review shall be completed and a report submitted to such county, city or town within ninety days of such request.
\end{quote}
\item \textsuperscript{184} See Butler, supra note 12, at 928 (recommending granting standing to localities themselves).
\end{itemize}
eral Clean Water Act\textsuperscript{185} or Clean Air Act\textsuperscript{186} This provision could read:

Va. Code section 10.1-2117
A. Any citizen may commence a civil action on his or her own behalf against
1. any person or governmental instrumentality of any type who is allegedly not in compliance with the provisions of this chapter, or
2. the Board, where there is alleged a failure of the Board to perform any act or duty under this chapter.

B. Nothing in this section shall restrict any right which any person, or class of persons, may have under any statute or common law to seek enforcement of the provisions of this chapter, or to seek any other relief, including relief against the Board or a state agency.

C. For the purposes of this section,
1. the term “citizen” means a person or persons having an interest which is or may be adversely affected;
2. the term “interest” means a citizen’s right to have pure water, and the use and enjoyment for recreation and economic benefit of non-despoiled public lands, waters, and other natural resources.
3. the term “adverse” means any detrimental effect on a citizen’s interests.

For this section to be effective, it will be necessary to repeal section 10.1-2104 of the Act, which gives the Board exclusive authority to institute legal actions.\textsuperscript{187}

Citizen participation in enforcement efforts could be enhanced further by including language in the Act requiring the Board to take legal and administrative actions to ensure compliance with the Act. The effect of this mandate would be threefold. First, if

\begin{itemize}
\item \textsuperscript{185} 33 U.S.C. § 1365 (1994) ("Citizen suits").
\item \textsuperscript{186} 42 U.S.C. § 7604 (1994) ("Citizen suits").
\item \textsuperscript{187} See VA. CODE ANN. § 10.1-2104 (Michie 1993). In March of 1997, the Virginia General Assembly amended § 10.1-2104 to give the Board exclusive authority to initiate administrative actions, and to intervene in both administrative and legal actions. This amendment could possibly erect further barriers to suits by citizens or other localities.
\end{itemize}
the Board currently has any affirmative duty to enforce the Act (and this is unclear), the duty would be made explicit. Second, such a duty would facilitate a citizen suit under proposed section 10.1-2117 for Board inaction. Finally, even without proposed section 10.1-2117, a citizen could bring suit against the Board for violation of the Virginia Administrative Process Act.

C. Changing the Tides in the Courts

Giving citizens access to the courts, alone, may not be sufficient. An individual bringing suit under proposed section 10.1-2117 will most likely be challenging a land-use decision made by a local government. Judicial deference to local government decision-making, and the probable reluctance to recognize environmental hazards as a "change" to warrant downzoning, would be barriers to successfully challenging violations of the Act.

The judicial deference difficulty could be handled in one of two ways. First, a provision could be inserted into the Virginia Constitution to give citizens a right to be protected from environmental degradation. Article XI, § 1, could be amended to read:

The people have a right to clean air, pure water, and the use and enjoyment for recreation and economic benefit of adequate public lands, waters, and other natural resources. Therefore, it shall be the policy of the Commonwealth to conserve, develop, and utilize its natural resources, its public lands, and its historical sites and buildings in a manner that minimizes the interference with this right. Further, it shall be the Commonwealth's policy to protect its atmosphere, lands, and waters from pollution, impairment, or

188. See supra note 151 (discussing legislative amendments to the Board's powers and duties).
190. See supra notes 162-68 and accompanying text.
191. See supra notes 162-68 and accompanying text.
192. See Butler, supra note 12, at 844-60 (discussing environmental provisions in state constitutions).
destruction, for the benefit, enjoyment, prosperity, and general welfare of the people of the Commonwealth.193

Making protection of the environment a citizen's right would serve to heighten the standard of review for environmentally based zoning decisions. While the "fairly debatable" standard194 would most likely still apply, individuals could assert infringement of their constitutional right as an indication of unreasonable behavior on the part of local decision-makers.195 As a result, the balance would shift in favor of a person who challenges a zoning decision on the ground of failing to adequately protect state waters.196 Furthermore, such an amendment to the Virginia Constitution would have the incidental benefit of requiring other state agencies to act in an environmentally sensitive manner.197

The other approach to overcoming the problem of judicial deference to local zoning decisions could be a legislatively defined standard of review for suits alleging non-compliance with the Act. Such legislation could look like the following:

Va. Code § 10.1-2118

For any legal action arising out of this chapter, the defendant shall have the burden of showing that

A. the defendant's actions or omissions furthered the purposes of this chapter; and,

B. the defendant adequately considered all reasonable alternatives to the action.

193. See id.
194. See supra note 162 and accompanying text.
195. It would be quite interesting to see how a Virginia court would balance property rights with constitutional rights.
196. A zoning ordinance that conflicted with a citizen's constitutional right would be almost per se unreasonable. See Board of Supervisors v. Degroff Enters., 198 S.E.2d 600 (Va. 1973) (striking down an "inclusionary zoning" scheme under state constitution's takings clause).
197. See Butler, supra note 12, at 855-56 ("[C]ourts could construe [environmentally oriented constitutional] provisions as imposing a general duty on regulators to consider the policies embodied in the provisions in carrying out the regulators' administrative responsibilities."); see also National Environmental Policy Act, 42 U.S.C. §§ 4321-4370d (1994) (requiring federal agencies to consider environmental effects of their actions).
By putting the burden on local governments to show that their actions are in conformity with the Act, the number of environmentally unsound variances, exceptions, and rezonings made by local governments should be minimized, since a locality will be constrained to take such actions unless truly warranted.

Legislative action could also reverse the judiciary's reluctance to approve downzoning for purposes of environmental protection. For example, the Act could simply include the following provision:

Va. Code § 10.1-2119

Any knowledge regarding the importance of protecting the environment shall constitute a change of circumstances justifying rezoning property from a more intensive use to a less intensive use.

If a provision such as this is enacted, a landowner whose property has been downzoned for the purposes of implementing the Act will no longer be favored in a legal proceeding challenging the zoning decision. Nevertheless, a landowner whose rights have vested will in many circumstances still enjoy protection from the reach of the Act.

D. The Dillon's Rule Dilemma

The final change concerning the Act's implementation involves the scope of Dillon's Rule. Dillon's Rule hampers local governments by making the extent of their powers unclear. The result is the reluctance of local officials to take any innovative land-use actions, for fear of being sued. This problem can be resolved in one of two ways.

198. See Butler, supra note 12, at 860-69 (discussing state environmental protection legislation).
200. See Butler, supra note 12, at 875-81 (discussing Dillon's Rule and its restrictive effect on localities).
201. See id.
202. See supra notes 142-47 and accompanying text.
First, Virginia could completely abandon Dillon's Rule and join other states which operate under the home rule system.²⁰³ According to the home rule doctrine, and in contrast to Dillon's Rule, a municipality's powers are delimited by express prohibitions against municipal actions, as opposed to being defined by an express grant of powers.²⁰⁴ On the other hand, in lieu of a wholesale abolition of Dillon's Rule, the General Assembly could easily authorize non-Euclidean zoning practices through simple legislation, thus allowing the use of such tools as transferable development rights, incentive zoning, and conditional rezoning.²⁰⁵

Either of these grants of power would aid implementation of the Act. By reducing the possibility of takings claims,²⁰⁶ or other property-rights-based challenges to local government action, local governments will be less fearful of being taken to court.²⁰⁷ Localities, therefore, should be more willing to take measures to protect state waters and the Bay, and landowners should be more willing to support those measures.

V. CONCLUSION

With every passing year, protection of the Chesapeake Bay becomes more crucial. Virginia's economy, its citizens, and the many forms of wildlife that call the Bay home, all depend upon the maintenance of state water quality for their continued viability. The passage of time also makes preservation more difficult as Tidewater Virginia continues to develop and non-point pollution sources continue to multiply.

The Chesapeake Bay Preservation Act was a positive step toward redressing the problems faced by the Bay. The Act's focus upon local land use and comprehensive planning makes it a potentially effective tool for controlling pollution, while balancing the continued pressures on undeveloped land. Neverthe-

²⁰³. See Butler, supra note 12, at 878-79.
²⁰⁴. See id.
²⁰⁵. See supra notes 142-47 and accompanying text.
²⁰⁶. See supra note 144 (discussing takings issues).
²⁰⁷. See supra note 144.
less, the Act as it stands today is a step short, as it leaves open too many possibilities of governmental inaction.

While the measures proposed in this paper may seem like strong medicine, one must keep in mind that environmental degradation is hard to reverse, and that there is no cure for death. Moreover, waterfront property has far less value when the water has nothing left to give. By increasing public awareness of the Act, and public participation in the Act's implementation, the flow of non-point source pollutants into the Bay can be significantly slowed, while still giving due consideration to the concerns of the private landowner.

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