Land Use Issues in Maryland

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From 30,000 feet ….

And, why are attorneys here?

- **Engineers and attorneys compliment each other via their differing skill sets.**
  - ✓ **Obviously there are technical components involved in the compliance with various environmental regulations, but there are also areas for *interpretation*.**
  - ✓ **Attorneys can effectively interface with regulators and the community.**

- **The Goal – get your project permitted and built!**
  - ✓ **Avoid litigation.**
  - ✓ **Avoid negative PR.**

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A Land Use Primer

The Three Legged Stool

- **Planning, Zoning and Development.**
  - ✓ **Planning is the broadest of the three.**
    - **It looks at the elements that make communities desirable.**
      - ➢ **APFOs are considered here.**
  - ✓ **Zoning looks at the use of the land and its intensity.**
  - ✓ **Development is concerned with community design and aesthetics.**
    - **The goal is to make sure the uses on the land don't overtax the community.**

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The Process

Getting built means getting permitted.

- **There are typically two separate stages in the development process.**
  - ✓ **Phase 1 – the entitlement process**
  - ✓ **Phase 2 – the detailed engineering process**
- **The State regulates much of the environmental field and has authorized local jurisdictions to act on its behalf in some areas.**
- **Some areas dealt with in Phase 1:**
  - ✓ **Wetlands**
  - ✓ **Stream Protection**
  - ✓ **Forest Conservation**
  - ✓ **Sewerage (if in a rural area)**

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Lessons Learned

Forming your team:

- **The merger of the technical and the vague is where time and money are often wasted and lost.**
  - ✓ **Sometimes vague definitions provide flexibility.**
  - ✓ **Finding the “touch points”.**
  - ✓ **Getting to a compromise.**

- **Time = $, and it pays to invest in quality.**
  - ✓ **Hiring experienced consultants is key.**
  - ✓ **Local knowledge and connections are important.**

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Lessons Learned, continued

The Power of the Community:

- **Get in touch with the community before they get in touch with you!**
  - ✓ **Communities are expecting to have input.**
  - ✓ **Make them your advocate, not your adversary.**
  - ✓ **Communication is key – early and often.**
  - ✓ **But, don't let anyone else but you control/design/drive your project!**

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Lessons Learned, continued

The Value of EARLY and Intensive Site Analysis:

- **Where environmental impact is required:**
  - ✓ **Study the alternatives early in the process.**
  - ✓ **The reviewing agencies will need justification for approving whatever relief you require – help them to help you!**

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Environmental Drivers in Maryland's Land Use Policies & Programs

Infrastructure-driven to Environmental-driven:

- **Environmental drivers are becoming more and more critical in planning, zoning and development.**
- **What used to be infrastructure-driven (are roads, schools and utilities in place to serve the new development) is now often environmental-driven (what's the carrying capacity of our environment to handle that new development).**
- **Primary considerations are impacts to waters, with forest cover and air impacts also being considered to a lesser extent.**
- **This trend is only likely to continue (and not only in Maryland….)**

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Why?
The big picture…

The Clean Water Act ("CWA")

- **Prohibits the discharge of pollutants to waters of the U.S. unless otherwise permitted.**
- **Enables states to issue these discharge permits, commonly known as NPDES permits.**
- **Requires states to designate "impaired waters" that don't meet water quality standards.**

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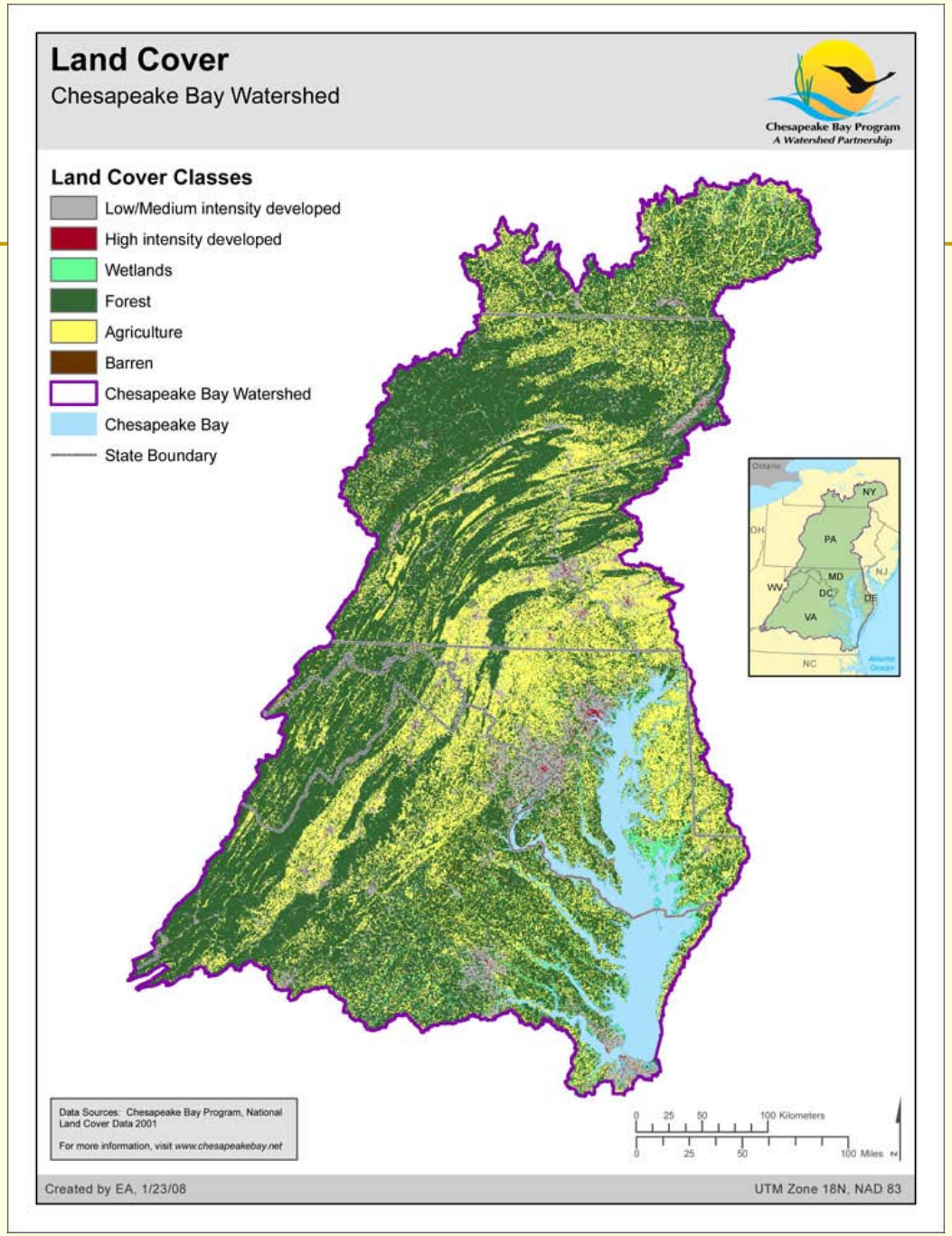

The Chesapeake Bay TMDL

- **Issued in December 2010 by the U.S. EPA.**
- **64,000 square mile watershed.**
- **Six states (New York, Pennsylvania, Delaware, Maryland, West Virginia, Virginia) and the District of Columbia.**
- **TMDL establishes a "pollution diet" for nitrogen, phosphorus and sediment in the Bay and its tributaries that must be met by 2025.**

Ok, so what does this mean for us & our utilities?

- **The Bay states & DC have each drafted plans that address localized Total Maximum Daily Loads (“TMDLs”) and account for how that jurisdiction will account for its share of the nutrient diet (Watershed Implementation Plans - “WIPs”).**
- **These plans provide for reductions in wastewater treatment plant and industrial discharges, septic tank discharges, agricultural run off and urban stormwater run off.**
- **Each state and local jurisdiction has a different approach and differing priorities.**
- **If Maryland and the other Bay states don’t comply with the TMDL, the EPA can impose fines, withhold grant funding for expanding infrastructure and tighten permitting requirements themselves.**

How is this impacting us in Maryland?

- **Because of the TMDLs and WIPs, Maryland's land use, development, and construction-related policies are now being evaluated with new laws and regulations implemented to reduce future environmental impacts.**
- **Comparatively, Maryland's laws aspire to be generally progressive and reaching, targeting pollution goals far ahead in the future.**
- **While certain utility projects may be exempted by other regulatory programs and processes, these new programs and policies can influence other utility projects, public and governmental perceptions, expectations, and long-term regional growth patterns.**

Example 1

Integrated Erosion & Sediment Control Regulations

- **Impacts projects under construction.**
- **These regulations are arguably authorized by the Stormwater Management Act of 2007, issued in August 2011.**
- **Limits land clearing to no more than 20 acres at a time, possibly even more restrictive in the future through general permits.**
- **Brings the concept of Environmental Site Design ("ESD") into the construction phase of a project.**
- **General Permit for Stormwater Associated with Construction Activity will also implement restrictions.**

Example 2

General NPDES Industrial Stormwater Permits

- **Impacts existing sites and operations.**
- **Draft of new permit has been issued, expected to be finalized by end of 2013.**
- **Will require the restoration of 20% of the facility's impervious area that is not already restored to the maximum extent practicable.**
- **Qualitative monitoring requirements for all permittees to confirm compliance over a period of one year.**
- **Elimination of the opportunity for otherwise regulated facilities to provide a "No Exposure Certification" if that facility discharges stormwater to a watershed impaired by nitrogen, phosphorus or sediment.**

Example 3

Senate Bill 236 (2012)/ Development & Growth Tiers

- **Impacts long-term land use planning and immediate development opportunities.**
- **Restricts the development of major residential subdivisions served by septic systems to those areas which have been adopted by the counties as being included in the appropriate "growth tier".**
- **Counties that have lower overall development densities in their rural areas will be allowed greater freedom to approve major subdivisions in areas generally zoned for land, agricultural, resource protection or similar conservation uses.**
- **Minimal to no direct impact on utilities, but will influence long-term growth patterns and potential infrastructure**

Example 4

Watershed Management & Restoration Program (i.e., the "Rain Tax"

- **Required ten major jurisdictions to implement a watershed protection & restoration program and to implement a stormwater remediation fee to fund it by July 1, 2013.**
- **The bill exempted property owned by the State, a county, a municipality or a volunteer fire department from the fees.**
- **Disparate implementation of the requirement is causing great concern in political and business circles.**
- **Differing impact on utilities because of varying interpretations and programs, such as how gravel is treated….**

Example 5

“Accounting for Growth” & Nutrient Trading

- **Impacts new and potentially, existing sites.**
- **Intended to address future growth in nutrient loading not addressed by the TMDL.**
- **Will require all new development (utilities included) to “offset” any nutrient loading generated over a certain baseline by purchasing credits generated elsewhere and sold on the open market.**
- **Highly controversial, proposed regulations to be issued by MDE in mid-October.**
- **There may be an opportunity for utilities to generate credits on little-used or under-developed properties.**

So what's next?

- **General NPDES permits may include Effluent Limitation Guidelines and even active treatment requirements - environmental advocates want this but currently it has been deemed too difficult to address by EPA and MDE.**
- **Possible general NPDES permits may be required for impervious areas used for parking and commercial storage (beyond the industrial general permits).**
- **Greater sensitivity to forest fragmentation and increasing cover.**
- **Consideration of "Vehicle Miles Traveled" by the occupants of a new development in their nutrient loading calculations.**
- **Potential cross-sector and -program nutrient trading.**

Practice Pointers

- **Time = $**
- **Invest in your team of consultants – you can only get 2 out of 3 from the good/fast/cheap triangle.**
- **Fully examine alternative sites early on in the process.**
- **Consider the community early and often.**
- **Be conscientious of impervious surfaces as they are becoming a greater regulatory and financial burden - can they be eliminated or reduced?**
- **Even though regulatory and permitting processes may exempt utilities, the public and policy makers may not see a difference.**

Questions?

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