

## MARYLAND<sup>1</sup>

### *State Authority for Marine Protection*

#### Summary of State Authorities

Various Maryland agencies have statutory authority to protect marine areas, mainly through species-specific regulations. The Department of Natural Resources has authority to create fish refuges to protect the state’s fisheries, submerged aquatic vegetation (“SAV”) protection zones to conserve flora, and restricted areas to protect endangered species. The Department of the Environment also has authority to protect tidal wetlands through a permitting scheme and links to local government natural resource management. Finally, both state agencies have cooperated with the U.S. Environmental Protection Agency to create No Discharge Zones in two areas off Maryland’s coast.

	Fish Refuges	SAV Protection Zones	No Discharge Zones	Nongame and Endangered Species Conservation Act	Tidal Wetlands Act
Legal requirement	Allows designation of fish refuges	Allows designation of submerged aquatic vegetation protection zones	Allows designation of No Discharge Zones	Allows designation of restricted areas	Permitting for activities in tidal wetlands
Citation <sup>2</sup>	MD. CODE ANN., NAT. RES. § 4-401 (1957)	MD. CODE ANN., NAT. RES. § 4-1006.1(a)(3) (1998)	67 Fed. Reg. 1352 (Jan. 10, 2002)	MD. CODE ANN., NAT. RES. § 10-2A-01 <i>et seq.</i> (1975)	MD. CODE ANN., ENVIR. § 16-101 <i>et seq.</i> (1957)
Designation authority	Maryland Department of Natural Resources (MDNR)	MDNR	U.S. Environmental Protection Agency (after petition by MDNR & Maryland Department of the Environment)	MDNR	Tidal wetlands defined by statute
Management & enforcement authority	MDNR	MDNR	MDNR & Maryland Department of the Environment	MDNR	Maryland Department of the Environment
Jurisdiction & boundaries	All state waters	All state waters	All state waters	Lands between the mean high and mean low water lines	Estuaries, coastal lands, beaches, and dunes
Prohibited uses	Taking of aquatic life	Dredging	Discharge of boat sewage	No entry	Determined through permitting
Permitted uses	None specified	None specified	None specified	None specified	None specified

<sup>1</sup> This state chapter is part of a 23-state assessment of state and local authority for marine protection. It should be read in conjunction with the Executive Summary, Introduction and Methodology Chapters in order to fully understand the scope and approach. Other chapters are available at [www.eli-ocean.org/mpa](http://www.eli-ocean.org/mpa).

<sup>2</sup> The citation date provided is the earliest date of enactment and does not reflect subsequent amendments unless otherwise noted. The enactment date is meant to inform the reader of how long the protection authority has existed.

The state of Maryland’s jurisdiction over its coastal waters extends three nautical miles seaward.<sup>3</sup> Maryland defines “Waters of the State” to include: (1) both surface and underground waters within the boundaries of the state; (2) the portion of the Atlantic Ocean within the boundaries of the state; and (3) portions of the Chesapeake Bay and its tributaries.<sup>4</sup>

### Fish Refuges

The Secretary of the Maryland Department of Natural Resources (“MDNR”) has broad authority over the state’s fisheries and “is responsible for conservation management of the fish, fisheries, fish resources and aquatic life within the State.”<sup>5</sup> In addition to seasonal closures that protect fish spawning areas, the Secretary uses this authority to designate fish refuges “to protect and propagate fish throughout the State.”<sup>6</sup> MDNR may “acquire, by purchase, lease, condemnation, or gift, title or control of any area of water or land in the State suitable to protect, propagate, or manage fish.”<sup>7</sup> The Department also has rulemaking authority over the refuges.<sup>8</sup>

MDNR has designated two refuges, both in Charles County on the Potomac River. Both refuges are no-take zones that offer seasonal protection to the fish populations; the refuge period runs from March 1 to June 15.<sup>9</sup>

### SAV Protection Zones

MDNR has authority to establish and update submerged aquatic vegetation (“SAV”) protection zones, which are defined as “area[s] delineated by the Department for the Protection from Uprooting and the Restoration of Submerged Aquatic Vegetation.”<sup>10</sup> SAV beds provide important habitat for many fish and shellfish, such as spotted sea trout and blue crabs. The zones protect marine habitat through gear restrictions that prohibit bottom dredging.<sup>11</sup>

MDNR completed the first delineation of SAV protection zones in 2001; the agency must update the protected zones every three years thereafter.<sup>12</sup> In addition to the protection provided by the zones, projects in tidal waters that involve harvesting, cutting, eradicating, or removing submerged aquatic vegetation must first obtain approval from MDNR.<sup>13</sup>

### No Discharge Zones

MDNR and the Maryland Department of the Environment (“MDE”) collaborated with the U.S. Environmental Protection Agency (“EPA”) to designate No Discharge Zones (“NDZs”) in two areas:

<sup>3</sup> See Submerged Lands Act of 1953, 43 U.S.C. §§ 1301–1315.

<sup>4</sup> MD. CODE ANN., NAT. RES. § 8-101(g).

<sup>5</sup> *Id.* § 4-202.

<sup>6</sup> *Id.* § 4-405.

<sup>7</sup> MD. CODE ANN., NAT. RES. § 4-401 (1957).

<sup>8</sup> *Id.* § 4-407.

<sup>9</sup> MD. CODE REGS. 08.02.17.01 to .02.

<sup>10</sup> MD. CODE ANN., NAT. RES. §4-1006.1(a)(3) (1998).

<sup>11</sup> *Id.* § 4-1006.1(f).

<sup>12</sup> *Id.* § 4-1006.1(b)(1).

<sup>13</sup> *Id.* § 4-213.

Herring Bay and the Northern Coastal Bays.<sup>14</sup> The Clean Water Act allows states to prohibit all boat sewage discharges by creating NDZs if the state provides evidence to EPA that its coastal waters require greater protection than current legal protections afford. The discharge of all boat sewage is prohibited in these areas, including raw sewage and sewage treated by an approved marine sanitation device. NDZs do not restrict the discharge of gray water.

### Nongame and Endangered Species Conservation Act

Maryland's state law counterpart to the federal Endangered Species Act is the Nongame and Endangered Species Conservation Act, which governs state listing of endangered species.<sup>15</sup> The Act is supported by MDNR regulations that contain the official State Threatened and Endangered Species list.<sup>16</sup>

The Act provides for the designation of "restricted areas" in order to protect state-listed endangered or threatened species of wildlife or plants, or species identified as in need of conservation in MDNR's regulations.<sup>17</sup> "Without written permission from the Secretary, a person may not trespass, enter, or release an animal on lands owned or controlled by the State which are located between the mean high and mean low water lines of waters of the State and which are posted in a conspicuous manner as a restricted area."<sup>18</sup>

Maryland has designated three restricted areas: the state-owned coastal areas adjacent to the Assateague Island National Seashore, Skimmer Island in Isle of Wight Bay, and Flag Ponds Nature Park.

### Tidal Wetlands Act

MDE is responsible for protecting and restoring the quality of Maryland's air, land, and water resources. The agency seeks to achieve this goal mainly through permitting activities. Maryland's Tidal Wetlands Act specifically provides the Department with regulatory authority over Maryland's submerged lands.<sup>19</sup> The Act is chiefly a license/permit scheme covering a defined set of activities in state tidal wetlands; for example, it does not regulate fishing.

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<sup>14</sup> Maryland State Prohibition on Discharges of Vessel Sewage; Final Affirmative Determination, 67 Fed. Reg. 1,352 (Jan. 10, 2002). EPA's website additionally states:

- Vessel sewage discharge is regulated under Section 312 of the Clean Water Act. States can have all or portions of their waters designated as a no discharge zone for vessel sewage to:
- (1) protect aquatic habitats where adequate and reasonably available pumpout or dump station facilities are available for the safe and sanitary removal and treatment of sewage;
  - (2) protect special aquatic habitats or species [the state does not have to show that there are reasonably available pump-out or dump stations]; and
  - (3) safeguard human health by protecting drinking water intake zones.

Envtl. Prot. Agency, Mid-Atlantic Water: No Discharge Zones, <http://www.epa.gov/reg3wapd/nodischarge/> (last visited Feb. 25, 2013). See also No-discharge zones by EPA prohibition, 40 C.F.R. § 1700.10 (2011).

<sup>15</sup> MD. CODE ANN., NAT. RES. § 10-2A-01 *et seq.* (1975).

<sup>16</sup> MD. CODE REGS. 08.03.08.00 *et seq.*

<sup>17</sup> *Id.* 08.03.08.11.

<sup>18</sup> *Id.*

<sup>19</sup> MD. CODE ANN., ENVIR. §16-101 *et seq.* (1957).

Maryland defines “state tidal wetlands” as the lands under the navigable waters of the state below the mean high-tide line that are affected by the regular rise and fall of the tide.<sup>20</sup> Board of Public Works (“BPW”) regulations state: “the landward boundary of State tidal wetlands is coterminous with the mean high water line. The seaward boundary is 3 miles from the low water mark of the Atlantic coast.”<sup>21</sup> In contrast, private tidal wetlands are defined as “any land not considered ‘State wetland’ bordering on or lying beneath tidal waters, which is subject to regular or periodic tidal action and supports aquatic growth,” which includes former state wetlands conveyed to private ownership before 1862.<sup>22</sup>

Before beginning any work in tidal wetlands, a person who intends to construct or reconstruct structures, or to dredge or fill the wetland must obtain a license from the BPW or a license, general license, general permit, or permit from MDE.<sup>23</sup> Without a license or permit, a person may not dredge, fill, construct a structure in, on, over or under tidal wetlands, or use the wetlands in a way that would destroy the natural vegetation or tidal flow, or alter the wetland’s beneficial character.<sup>24</sup> MDE reviews applications for both licenses and permits.<sup>25</sup>

Some of the license and permit conditions set forth in MDE regulations have explicit spatial elements. For example, MDE is expressly empowered to limit dredging within 500 yards of certain submerged lands for certain periods of time to protect shellfish areas, finfish spawning and nursery areas, and to protect submerged aquatic vegetation.<sup>26</sup>

More importantly, in evaluating an application for a license or permit the MDE must consider “the degree to which . . . the proposed activity is consistent with State, federal, and local land use plans and laws, including Critical Area laws.”<sup>27</sup> The Critical Area Program is operated through local and municipal plans and ordinances, as illustrated in the Local Authorities section below.<sup>28</sup>

## Other Authorities

### *Shellfish Regulation*

MDNR has designated oyster sanctuary areas, where oysters may not be harvested, throughout the Chesapeake Bay.<sup>29</sup> The sanctuaries range in size from 5 acres to over 5,800 acres and include the entire Severn and Magothy Rivers.

<sup>20</sup> *Id.* §16-101(o); MD. CODE REGS. 26.24.01.02(B)(52).

<sup>21</sup> MD. CODE REGS. 23.02.04.02B.

<sup>22</sup> MD. CODE ANN., ENVIR. §16-101(k).

<sup>23</sup> *Id.* § 16-202. The Public Service Commission has jurisdiction over wetlands permitting/licensing for projects requiring a Certificate of Public Convenience and Necessity.

<sup>24</sup> MD. CODE REGS. 26.24.02.01(B).

<sup>25</sup> In general, a “permit” is issued by the MDE for activities in private wetlands; while a “license” is issued by the BPW for state wetlands after receipt of MDE’s recommendation. MD. CODE ANN., ENVIR. §16-202(b); MD. CODE REGS. 26.24.01.01(C). However, if a project qualifies for a general wetlands license and does not require mitigation, the MDE may issue the license directly. MD. CODE REGS. 26.24.02.04(A).

<sup>26</sup> *Id.* 26.24.02.06.

<sup>27</sup> *Id.* 26.24.02.03(B)(8).

<sup>28</sup> Apart from regulatory requirements, Maryland has engaged in planning for the conservation of tidal wetlands. Maryland’s *State Wetland Conservation Plan* lists five goals: (1) Develop a wetland baseline; (2) Assess current and potential wetland threats and trends; (3) Increase the efficiency and effectiveness of wetlands regulation and management in Maryland; (4) Identify wetlands for priority protection and restoration; (5) Increase participation in wetlands preservation, restoration, enhancement and stewardship. MD. DEP’T OF THE ENV’T, MD. STATE WETLAND CONSERVATION PLAN (2002), [http://www.mde.state.md.us/programs/Water/WetlandsandWaterways/MDWetlandConservationPlan/Pages/Programs/WaterPrograms/Wetlands\\_Waterways/wetland\\_conservation/index.aspx](http://www.mde.state.md.us/programs/Water/WetlandsandWaterways/MDWetlandConservationPlan/Pages/Programs/WaterPrograms/Wetlands_Waterways/wetland_conservation/index.aspx). Maryland has also identified priority restoration areas.

<sup>29</sup> MD. CODE ANN., NAT. RES. §§ 4-1006.2, 4-1014 to -1014.3 (1997).

MDNR also designates oyster harvest reserve areas, which are subject to periodic closures and harvest limitations.<sup>30</sup> MDNR may also establish oyster “seed areas” in state waters, which are closed to harvest.<sup>31</sup> Moreover, the statute governing MDNR’s activities provides natural oyster bars in the Chesapeake Bay and establishes broad protections against unregulated activities.<sup>32</sup>

The Governor’s 2010 Oyster Restoration and Aquaculture Development Plan increased the number of oyster sanctuaries to encompass more oyster recovery areas. In 2011, the General Assembly authorized some shellfish aquaculture within sanctuaries.<sup>33</sup>

MDE may also establish restricted shellfish areas that prohibit harvest.<sup>34</sup> If the Department determines that pollution has caused the “shellfish produced or stored in the area [to be] a hazard to public health, it shall restrict the area for the catching or storing of shellfish.”<sup>35</sup>

MDNR administers 20-year leases of Maryland’s submerged lands for the production of shellfish.<sup>36</sup> The state legislature substantially augmented and reformed this process in 2009, resulting in further spatial planning for leases aimed at the cultivation and harvest of shellfish. The legislation directed MDNR to establish by regulation, in consultation with the Oyster Advisory Commission, public shellfish fishery areas within the Chesapeake Bay where leasing will be prohibited.

#### *State Development Plan*

The Maryland Department of Planning (“MDP”) is statutorily mandated to prepare a State Development Plan.<sup>37</sup> In December 2012, the Department released *PlanMaryland*, an integrative document for sustainable growth and development.<sup>38</sup> The planning document is aimed chiefly at development patterns and decision-making preferences on Maryland’s lands; it does not contain submerged lands as a planning element. However, it does address conservation objectives and incorporates Maryland’s Greenprint, which “identifies areas that have a heightened relative value for preservation and restoration based on environmental and ecological factors.”<sup>39</sup> These areas include wetlands and marine areas supporting high-quality tidal waterbodies, fisheries, bay, and coastal ecosystems.

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<sup>30</sup> *Id.* § 4-1009.1.

<sup>31</sup> MD. CODE ANN., NAT. RES. §§ 4-1103, 4-1103.1, 4-1105.

<sup>32</sup> The relevant provision states:

Except for normal harvesting activities, the dredging and transplanting of oyster shell or seed oysters as part of the Department’s Oyster Propagation Program, or as authorized in a State wetlands license, a person may not destroy, damage, or injure any oyster bar, reef, rock, or other area located on a natural oyster bar in the Chesapeake Bay that is not a leased oyster bottom.

MD. CODE ANN., NAT. RES. § 4-1118.1(a).

<sup>33</sup> Md. Dep’t of Natural Res., DNR Announces Aquaculture Opportunities in Sanctuaries, [www.dnr.state.md.us/fisheries/news/story.asp?story\\_id=171](http://www.dnr.state.md.us/fisheries/news/story.asp?story_id=171) (last visited Dec. 16, 2013). Leasing is not allowed on or within 150 feet of historic oyster bars as defined by the Yates survey.

<sup>34</sup> *Id.* § 4-742; 4-1006.

<sup>35</sup> *Id.* § 4-742(a)(1) (1957).

<sup>36</sup> *Id.* §§ 4-1102 to -1103, 4-11A-01 to 4-11A-11 (2005 Replacement Volume and 2008 Supplement).

<sup>37</sup> MD. CODE ANN., STATE FIN. & PROC. §5-602 (1957).

<sup>38</sup> MD. DEP’T OF PLANNING, PLANMARYLAND: A SUSTAINABLE GROWTH PLAN FOR THE 21ST CENTURY (Dec. 2011), [http://www.plan.maryland.gov/PDF/plan/PlanMaryland\\_Final.pdf](http://www.plan.maryland.gov/PDF/plan/PlanMaryland_Final.pdf).

<sup>39</sup> *Id.* at 2-31.

A Memorandum of Understanding between MDP and MDNR explicitly provides that MDP “will assure that State and local plans are compatible with the State’s policies for management of coastal resources,” and that MDNR will provide the Department with information and technical analyses sufficient to make this determination concerning plans and permits in the coastal zone.<sup>40</sup> Maryland law directs the MDP to maintain “inventory lists” of “the natural resources of the State,” a function that also belongs to MDNR.<sup>41</sup>

*Living Shoreline Protection Act*

The Living Shoreline Protection Act of 2008 requires that shore erosion control projects must consist of “nonstructural shoreline stabilization measures that preserve the natural environment, such as marsh creation,” except in areas specified by the Maryland Department of Environment or in individual cases where the property owner can demonstrate that structural or “hard” measures are required.<sup>42</sup> Waiver requests are administered under MDE regulations.<sup>43</sup>

*Evaluation of State Authorities<sup>44</sup>*

FACTORS	Fish Refuges	SAV Protection Zones	No Discharge Areas	Nongame and Endangered Species Conservation Act	Tidal Wetlands Act
<b>Legal Regime</b>	★★★★★ Regulatory	★★★★★ Regulatory	★★★★★ Regulatory	★★★★★ Regulatory	★★★ Planning
<b>Ocean Jurisdiction</b>	★★★★★ All marine waters	★★★★★ All marine waters	★★★★★ All marine waters	★ Beach, tidal only	★★ Estuarine
<b>Durability</b>	★★ Indeterminate	★★★★★ MDNR updates every 3 years	★★ Indeterminate	★★ Indeterminate	★★ Indeterminate
<b>Consistency</b>	★★★ Authorizes year-round protection	★★★★★ Mandates year-round protection	★★★★★ Mandates year-round protection	★★★★★ Mandates year-round protection	★★★★★ Authorizes year-round protection
<b>Habitat</b>	★★★ Habitat protection goal	★★★★★ Habitat protection goal	★★ Byproduct is habitat protection	★★★★★ Habitat protection goal	★★★★★ Habitat protection goal
<b>Sector</b>	★ Authorizes single-sector protection	★★★★★ Mandates multi-sector protection	★★★★★ Mandates multi-sector protection	★★★★★ Mandates multi-sector protection	★★★ Authorizes multi-sector protection
<b>Enforcement</b>	★★★★★ Grants MDNR authority to enforce chapter & arrest offenders or issue citations	★★★★★ Grants MDNR authority to enforce chapter & arrest offenders or issue citations	★★ Some MPA-specific enforcement	★★★★★ Grants MDNR authority to enforce chapter & arrest offenders or issue citations	★★★★★ Grants MDE authority to enforce chapter & arrest offenders or issue citations
<b>Extent (Scope)</b>	★★★★★ Multi-site,	★★★★★ Multi-site,	★★★★★ Multi-site,	★★★★★ Multi-site,	★★★ Permitting






<sup>40</sup> Md. Dept’t of Planning & Md. Dep’t Natural Res., Memorandum of Understanding on Coastal Zone Management (2004).

<sup>41</sup> Md. CODE ANN., STATE FIN. & PROC. §5-505.

<sup>42</sup> Md. CODE ANN., ENVIR. §16-201(c).

<sup>43</sup> See Md. CODE REGS. 26.24.04.01.

<sup>44</sup> For an explanation of the evaluation matrix and criteria, please see the Introduction and Methodology Chapters.

FACTORS	Fish Refuges	SAV Protection Zones	No Discharge Areas	Nongame and Endangered Species Conservation Act	Tidal Wetlands Act
	potential expansion	potential expansion	potential expansion	potential expansion	authority, local designation through the Critical Areas Program (see below)
Process for designation or expansion	No MPA-specific public process 	No MPA-specific public process 	No MPA-specific public process 	No MPA-specific public process 	No MPA-specific public process 

### Local Authority for Marine Protection

#### Summary of Local Authorities

Local governments in Maryland have limited authority to protect the marine environment. The state requires local governments to adopt plans and programs to regulate shoreline and upland activities. If a local government fails to adopt a critical area program, the state Critical Area Commission is authorized to adopt one.

	Critical Area Act
Legal requirement	Local governments must adopt plans and programs to regulate coastal lands and tidal wetlands
Citation <sup>45</sup>	Md. CODE ANN., NAT. RES. § 8-1801 <i>et seq.</i> (1984)
Designation authority	Local governments
Management & enforcement authority	Local governments
Jurisdiction & boundaries	Estuaries, tidal wetlands, coastal lands, beaches and dunes
Prohibited uses	None specified
Permitted uses	None specified

#### Critical Area Act

Maryland’s Critical Area Program is overseen by the state’s Critical Area Commission, which sets standards and identifies particular sensitive areas, but carried out primarily by local governments. The purpose of the law is to “establish a Resource Protection Program for the Chesapeake and the Atlantic Coastal Bays and their tributaries by fostering more sensitive development activity for certain shoreline areas so as to minimize damage to water quality and natural habitats.”<sup>46</sup>

Critical areas include all land within 1,000 feet of the mean high-water line of tidal waters or the landward edge of tidal wetlands, and all waters of and lands under the Chesapeake Bay and the state’s coastal bays.<sup>47</sup> However, a local government may exclude areas if it finds that particular lands are in an

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<sup>46</sup> MD. CODE ANN., NAT. RES. § 8-1801(b)(1) (1984).

<sup>47</sup> *Id.* §§ 8-1807(a)–(b).

urban area and “the imposition of a program would not substantially improve protection of tidal water quality or conservation of fish, wildlife, or plant habitats.”<sup>48</sup> Local governments may also propose to include areas that fall outside the statutory default zone.<sup>49</sup>

Under the law, local governments adopt plans and programs to regulate shoreline and upland activities, subject to the criteria adopted by the state Critical Area Commission.<sup>50</sup> If a local government fails to adopt a critical area program, the law authorizes the Commission to adopt one.<sup>51</sup>

### Evaluation of Local Authorities

FACTORS	Critical Area Act
Legal Regime	Planning ★★
Ocean Jurisdiction	Estuarine ★★
Durability	Indeterminate ★★
Consistency	Indeterminate ★★
Habitat	Habitat protection goal ★★
Sector	Mandates multi-sector protection ★★
Enforcement	Some MPA-specific enforcement ★★
Extent (scope)	Local government plans ★
Process for expansion	No MPA-specific public process ★★

<sup>48</sup> *Id.* § 8-1801(c)(1)(i).

<sup>49</sup> *Id.* §§ 8-1801(d)–(e).

<sup>50</sup> *Id.* § 8-1806. And the criteria categories specified by statute and adopted by regulation are not particularly suited to submerged lands and activities in the waters.

<sup>51</sup> *Id.* § 8-1810.