



June 26, 2012

Jay Prager
Deputy Program Administrator
MDE/Water Management Administration
1800 Washington Boulevard
Baltimore, MD 21230

Dear Mr. Prager:

The Maryland Association of REALTORS® (MAR) opposes the proposed regulation 26.04.02 affecting on-site sewage disposal systems (OSDS) published in the June 1 Maryland Register. This regulation will require Best Available Technology (BAT) systems for new residential construction in the Chesapeake Bay and Atlantic Coastal Bays watersheds. MAR believes the changes recommended in 26.04.02 can only be implemented by the Maryland General Assembly.

No Statutory Authority for Expanded BAT Requirement

Section 9-1108 of the Environment Article states the specific circumstances under which “nitrogen removal technology” (BAT systems) may be required. That section requires BAT systems only for residential and commercial properties located in the Chesapeake and Atlantic Coastal Bays Critical Areas. Despite this specific statutory authority limiting BAT systems to the Critical Areas, 26.04.02 would expand the BAT requirement well beyond the Critical Areas.

The regulatory authority exercised by MDE or any other state agency is a function of the authority granted to it by the Legislature. If the Legislature has acted in a particular area, such as requiring BAT systems for the Critical Areas, MDE cannot arbitrarily expand its BAT authority beyond that granted in the statute. To the contrary, MDE’s rulemaking authority extends only to implementing the statutory requirements of the law.

That the Legislature did not intend the broad grant of authority that the proposed regulation would assert is clear. When the current BAT requirement in Section 9-1108 (through the Chesapeake Bay Nitrogen Reduction Act of 2009) was passed, the Legislature considered requiring BAT systems for the entire State of Maryland. However, as the Act moved through the legislative process, the General Assembly specifically rejected a broad requirement for BAT systems throughout the State, and amended the Act’s BAT requirement to apply only to the Critical Areas. The proposed regulation 26.04.02 would usurp the decision making authority of the General Assembly by expanding BAT systems to areas that the General Assembly rejected only 3 years ago.

Moreover, the Chesapeake Bay Nitrogen Reduction Act was one of at least 6 bills that the Legislature has considered in the last 11 years that would have regulated or limited septic systems in some way. The most recent bill was the Sustainable Growth and Agricultural Preservation Act of 2012. Clearly, the Legislature has carefully considered what authority it

is willing to grant state agencies to control pollution from OSDS, and what authority it is unwilling to grant those agencies.

Need for Better Data

While OSDS are a source of nitrogen loading, the policy interest in OSDS greatly exceeds the OSDS impact on the environment. It is stated that OSDS accounts for 8% of the nitrogen loading from Maryland sources. However, because Maryland accounts for only 20% of the total nitrogen load to the Bay from all sources from all states, Maryland's OSDS load to the entire Bay is only about 1.4% of total nitrogen. That 1.4% is the load from the more than 420,000 OSDS statewide.

Because this regulation affects only new OSDS, it would not reduce the 1.4% measurably, but would impose a \$60 million annual cost (not including maintenance and operation) on Maryland residents according to the regulation's own economic impact analysis. In comparison, the much debated Bay Restoration Fee increase passed this year will cost Maryland residents about \$53 million per year. Moreover, the Bay Restoration Fee increase was implemented in large part to address wastewater treatment plants, which contribute more than 4 times the nitrogen to the Bay than OSDS.

Impact on Affordability

As detailed in the regulation, the BAT system requirement will add approximately \$12,000 to the cost of a new home. This is in addition to the \$6,000 cost that the Legislature recently mandated on new homes by requiring fire sprinklers. If this regulation is adopted, over \$18,000 in additional cost will have been added just this year to many new homes constructed in Maryland. In a normal market environment, such a large increase in the cost of a new home would be difficult to overcome. In the difficult market that still exists today, such additional costs have an even more detrimental effect on the market.

MAR believes this regulation exceeds MDE's statutory authority, imposes a costly requirement that is not commensurate with the environmental benefit it will bestow, and will diminish housing affordability. For those reasons, we urge MDE to withdraw 26.04.02.

Sincerely,



Pat Terrill
President

CC The Honorable Martin O'Malley
The Honorable Mike Miller
The Honorable Mike Busch
The Honorable E. J. Pipkin
The Honorable Anthony O'Donnell
The Honorable Paul Pinsky
The Honorable Anne Healey