SB 407

Department of Legislative Services

Maryland General Assembly
2011 Session

FISCAL AND POLICY NOTE

Senate Bill 407 (Senator Pipkin)
Education, Health, and Environmental Affairs

Sewage Sludge Utilization Permits - Chesapeake and Atlantic Coastal Bays Critical Area - Judicial Review

This bill specifies that a sewage sludge utilization permit to be issued by the Maryland Department of the Environment (MDE) for land within the Chesapeake and Atlantic Coastal Bays Critical Area (Critical Area) must comply with certain notice, judicial review, and other public participation requirements specified in Title 1, Subtitle 6 of the Environment Article.

The bill takes effect July 1, 2011.

Fiscal Summary

State Effect: Potential increase in workload for MDE to implement the additional public participation and judicial review requirements for specified sewage sludge utilization permit applications. Without any actual experience under the bill, it is assumed this additional workload could be absorbed with existing budgeted resources. Revenues are not materially affected.

Local Effect: Potential increase in workload for the circuit courts as a result of the bill's changes; it is assumed that any such increase could be handled with existing resources. To the extent the bill's changes lead to any permit delays or denials that otherwise would not occur, local expenditures to dispose of sewage sludge from wastewater treatment plants could increase.

Small Business Effect: Potential meaningful.

Analysis

Current Law:

Public Participation Requirements for Permits Identified in Title 1, Subtitle 6 of the Environment Article

The following permits are subject to the requirements specified under Title 1, Subtitle 6:

- specified air quality control permits to construct;
- specified permits to install, materially alter, or materially extend landfill systems and incinerators;
- specified water discharge permits;
- specified sewage sludge storage and distribution structure permits;
- specified controlled hazardous substance facility permits;
- specified hazardous material facility permits; and
- specified low-level nuclear waste facility permits.

For these permits, a contested case hearing may not occur, and final determination by MDE on the issuance, denial, renewal, or revision of a permit is subject to judicial review only at the request of a person that meets the threshold standing requirements under federal law and is either the applicant or a participant who submitted comments in the public participation process (unless an opportunity for public participation was not provided).

Judicial review must be on the administrative record before MDE and limited to objections raised during the public comment period, except under specified conditions. Unless otherwise required, a petition for judicial review must be filed with the circuit court for the county where the proposed activity will occur. The petition for judicial review must be filed (1) within 30 days after publication of a notice of final determination; and (2) in accordance with the Maryland Rules. An action for judicial review must be conducted in accordance with the Maryland Rules.

These environmental permits are also required to be accompanied by the following standard notice provisions, among others:

- notice has to be published at least once a week for two consecutive weeks in a daily or weekly newspaper of general circulation in the geographical area in which the proposed facility is located;

- MDE may require notice of an informational meeting or a public hearing by mail to each person requesting the meeting or hearing or to their authorized representatives;

- MDE may provide additional notice by requiring the notice to be posted at the proposed facility or at public facilities in the geographical area of the proposed facility; and

- the applicant bears all costs incurred by MDE in providing notice.

Upon written request or its own discretion, MDE must provide an opportunity for an informal meeting with respect to an application.

Once MDE receives an application for one of these permits, it must prepare a tentative determination, including whether it proposes to issue the permit, and any proposed permit limitations and conditions, as well as a brief explanation of the tentative determination and any proposed schedule of compliance. If the tentative determination is to issue a permit, a draft permit, among other things, must be made available to the public for inspection and copying.

MDE must publish a notice of the tentative determination and allow 30 calendar days for public comment before the issuance of the final determination. Upon request, MDE must extend the public comment period by 60 days. MDE must hold a public hearing on the tentative determination when a written request is made within 20 days of publication of a notice of the tentative determination. MDE is required to prepare a final determination if certain adverse comments are received following publication of notice of the hearing or at the hearing, or under other circumstances. If MDE is not required to prepare a final determination, then the tentative determination becomes final when the permit is issued or denied.

Sewage Sludge Utilization Permit Regulation and Public Participation

MDE is the primary State agency that regulates sewage sludge utilization. Use and disposal of sewage sludge is also regulated by the federal government under 40 CFR 503. Under State law, a sewage sludge utilization permit is required for any person that collects, incinerates, stores, treats, applies to land, transports, or disposes of sewage sludge or septage in Maryland. A separate permit is required for each utilization site. Permit fees, which range from $25 to $750 depending on the way the sewage sludge is used, are paid into the Maryland Clean Water Fund.

When MDE receives an application for such a permit, MDE must mail a copy of the application to the appropriate county's executive and legislative body, the executive of

any municipal corporation where the sewage sludge utilization site is to be located, and the executive and legislative body of any county within one mile of the site. Other entities must also receive notice depending on the type of permit. Within 15 days of receiving a copy of the permit application, the county or municipality may request that MDE hold a public hearing or public informational meeting, depending on the type of permit.

Any county or municipality that receives a copy of an application must also be given the opportunity to consult with MDE about the decision to issue, deny, or place restrictions on a sewage sludge utilization permit. In addition, Chapters 192 and 193 of 2009 require that whenever MDE must publish notice of an application for these permits, it must also post notice on its website and allow interested persons to electronically request any additional notice related to the permits.

MDE may not issue a permit to install, materially alter, or materially extend a sewage sludge composting facility or a sewage sludge storage facility until the facility meets all zoning and land use requirements of the county where the facility is to be located. Also, MDE must hold a public hearing before the Secretary issues, amends, or renews such permit.

A local jurisdiction or adjoining landowner affected by the issuance of a sewage sludge application permit, or the submission of an application for such a permit, has standing to sue to force compliance with specified sewage sludge laws or to intervene in any civil or contested case administrative action.

Sewage sludge is subject to both State and federal regulations. At the State level, agricultural use of federally defined Class B sewage sludge (which meets standards for metal concentrations and has been treated by a federally approved Procedure to Significantly Reduce Pathogens) is subject to both MDE permit requirements and the nutrient management regulations of the Maryland Department of Agriculture. MDE regulates the application of Class B sewage sludge through an individual permit required for those sites where sewage sludge is applied. Under State and federal regulations, Class A sewage sludge (which meets more stringent requirements for chemical content, pathogen reduction, and vector attraction) is allowed to be distributed to the public as fertilizer. MDE issues a permit to the distributor of Class A sewage sludge products but does not regulate sites where it is used.

Agricultural or horticultural use of sludge under appropriate approvals when applied by an approved method at approved application rates may be permitted in the Critical Area, except in the 100-foot buffer. However, Critical Area Commission regulations state that permanent sludge handling, storage, and disposal facilities (except associated with wastewater treatment facilities), because of their intrinsic nature, or because of their

potential for adversely affecting habitats or water quality, may not be permitted in the Critical Area except in "intensely developed areas," and only after the activity or facility has demonstrated to all appropriate local and State permitting agencies that there will be a net improvement in water quality to the adjacent body of water.

Other regulations require a buffer of at least 100 feet between areas where sewage sludge is applied and the mean high water line of tidal waters or the landward side of tidal wetlands. MDE advises that it is currently in the process of promulgating new sewage sludge utilization regulations to increase the buffer zone between tidal waters and areas in which sewage sludge is applied, from 100 to 200 feet. In addition, the regulations will require any area between 200 and 1,000 feet from tidal waters to allow only subsurface injection of sewage sludge. These regulations are anticipated to become effective during calendar 2011.

Background:

Judicial Review and Environmental Standing

Generally, a party to a civil action must be authorized to participate in the action, either by statute or by having "standing." Standing means that a party has a sufficient stake in a controversy to be able to obtain judicial resolution of that controversy.

Under federal law, a party has standing if its use and enjoyment of the area is affected by the challenged action/decision or if the party has a particular interest in the property affected. Federal law also makes little distinction between individual and group standing.

Under federal case law, in order to have standing, "a plaintiff must show (1) that it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision."

Federal case law requires an association to satisfy an additional three-part test in order to have "associational standing." Under the test, an association has standing if (1) one or more members of the association have standing as individuals; (2) the interests that the association seeks to protect in the case are germane to the association's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of the member with individual standing in the lawsuit.

Chapters 650 and 651 of 2009 expanded standing for individuals and associations and organizations in bringing challenges related to specified permits and licenses issued by

MDE; repealed the ability to contest cases; and instead provided for judicial review as outlined above under Current Law.

Sewage Sludge Utilization

Sewage sludge is one of the final products of the treatment of sewage at a wastewater treatment plant, after treatment has broken down the organic matter and killed disease-causing organisms. According to MDE, more than 700,000 wet tons of sewage sludge are generated in Maryland each year. MDE indicates that the application of sewage sludge to agricultural land recycles nutrients, saves landfill space and money, and helps reduce nutrient pollution to the Chesapeake Bay.

In 2008, about 620,000 tons of sewage sludge were utilized; 30% of the utilized sewage sludge was applied to agricultural land, 47% was hauled out of state, and the remainder went to other uses, including 6% to landfill utilization/disposal. At the end of 2008, there were 701 active sewage sludge permits. Of those permits, 316 were for land application, the vast majority of which appear to have been for agricultural land application.

Chesapeake and Atlantic Coastal Bays Critical Area

Chapter 794 of 1984 established the Chesapeake Bay Critical Area Protection Program in order to minimize damage to water quality and wildlife habitat by fostering more sensitive development activity along the shoreline of the Chesapeake Bay and its tributaries. The law identified the Critical Area as 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 its tributaries. The 1,000-foot area was delineated on Maryland's 1972 State Wetlands Maps. Local governments then transferred the Critical Area boundary line to their own maps.

The 1984 legislation also created a statewide Chesapeake Bay Critical Area Commission (now called the Critical Area Commission for the Chesapeake and Atlantic Coastal Bays) that oversees the development and implementation of local land use programs dealing with the Critical Area. Each local jurisdiction is charged with the primary responsibility for development and implementation of its own local program; that local authority, however, is subject to commission review and approval.

In 2002, the law was expanded to include the State's coastal bays. As of 2008, the 1,000-foot wide Critical Area encompassed approximately 680,000 acres (or roughly 11% of the land area in the State) and spanned 64 local jurisdictions (16 counties, Baltimore City, and 47 other municipalities). Chapter 119 of 2008 made several changes to the Critical Area law; among other things, it provided greater authority to the Critical

Area Commission, updated the basic components of the program, enhanced buffer and water quality protection, and strengthened enforcement and variance provisions.

State Expenditures: According to MDE, about 200 sewage sludge utilization permits are issued each year, and MDE estimates that about 30 of these are located in the Critical Area. MDE further advises that, typically, sewage sludge utilization permits evoke little public interest, with a far greater number of informational meetings being held than there are actual requests for such meetings. MDE expects that, if judicial review were accorded for each of these permits in the Critical Area, an estimated five of these cases may be challenged in circuit court.

The required appearance of MDE personnel at these additional permit cases afforded judicial review by the bill results in an additional operational burden for MDE. Further, although the cost to provide additional notice of the issuance of sewage sludge utilization permits must be borne by permit applicants, the provision of notice may still be undertaken by MDE. Thus, while unlikely, the cumulative effect of these various new duties may slow down the sewage sludge permit review process such that MDE has to hire an additional regulatory and compliance engineer. Thus, it is assumed that MDE can likely implement the bill with existing budgeted resources. If existing resources prove insufficient, MDE may request additional staff through the annual budget process.

Local Expenditures: To the extent the bill's changes lead to any permit delays or denials that otherwise would not occur, local expenditures increase in several jurisdictions as costs for sewage sludge disposal increase for locally owned wastewater treatment facilities. According to MDE, the cost to dispose of sewage sludge through land application is around $40 per ton, including transportation costs. Hauling sewage sludge out of state or disposing of it in a landfill are more expensive. For example, disposal in a landfill typically averages $52 per ton, not including transportation costs. *For illustrative purposes*, if 10% of the 200,000 tons of sewage sludge applied annually to agricultural land in Maryland were required to be disposed of through other means due to a successful permit challenge in court, or due to a temporary injunction granted by a circuit court, then, assuming an additional disposal cost of $12 per ton, the statewide increase in local government expenditures for alternative methods of sewage sludge disposal could increase by about $240,000. It is unknown which jurisdictions would bear the greatest burden from this cost, but it would likely be for more populous jurisdictions near the Critical Area, especially those in Central Maryland.

The Judiciary advises that circuit court cases involving sewage sludge application tend to be technically and scientifically complex. Nevertheless, due to the small number of cases expected, it is likely that the additional operational burden can be handled with existing budgeted resources.

Small Business Effect: Small businesses that apply for sewage sludge utilization permits, such as farmers, incur additional costs to comply with the bill's notice requirements. Any small businesses wishing to challenge the issuance of such permits could benefit to the extent the bill's changes provide them with standing for judicial review. To the extent the bill's changes lead to any permit delays or denials that otherwise would not occur, small businesses involved in the generation or use of sewage sludge (such as wastewater treatment systems, applicators, and farmers) could be negatively affected.

Additional Information

Prior Introductions: SB 803 of 2010 received a hearing in the Senate Education, Health, and Environmental Affairs Committee, but no further action was taken on the bill.

Cross File: None.

Information Source(s): Anne Arundel, Cecil, Charles, Frederick, Montgomery, and Queen Anne's counties; City of Frederick; Board of Public Works; Department of Natural Resources; Maryland Department of the Environment; Maryland Environmental Service; Judiciary (Administrative Office of the Courts); U.S. Environmental Protection Agency; Department of Legislative Services

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