

Department of Legislative Services
 Maryland General Assembly
 2021 Session

FISCAL AND POLICY NOTE
First Reader

House Bill 160 (Delegate Bagnall)
 Environment and Transportation

Environment – Wetlands and Waterways – Riparian Rights

This bill establishes that the riparian rights of a community association or entity may not be terminated or impaired as a result of (1) erosion or sea level rise or (2) the issuance of an approval by a county, the Maryland Department of the Environment (MDE), or the Board of Public Works (BPW) to a waterfront property owner, including by the issuance of a wetlands and waterways or a building permit, license, or other approval. This provision applies to a community association that possesses riparian rights, including through an express reservation of riparian rights to control access to the water in a deed or other recorded instrument. The bill also requires MDE to establish and maintain a publicly accessible repository on its website to keep a record of community associations and other entities that possess riparian rights.

Fiscal Summary

State Effect: General fund expenditures increase by \$465,400 in FY 2022; future year expenditures reflect annualization and ongoing costs. It is assumed that State revenues are not materially affected, as discussed below.

(in dollars)	FY 2022	FY 2023	FY 2024	FY 2025	FY 2026
Revenues	\$0	\$0	\$0	\$0	\$0
GF Expenditure	465,400	328,300	337,400	348,600	360,200
Net Effect	(\$465,400)	(\$328,300)	(\$337,400)	(\$348,600)	(\$360,200)

Note: () = decrease; GF = general funds; FF = federal funds; SF = special funds; - = indeterminate increase; (-) = indeterminate decrease

Local Effect: Local finances and operations are not anticipated to be materially affected.

Small Business Effect: Minimal.

Analysis

Current Law:

Relevant Definitions

“State tidal wetlands” means any land under the navigable waters of the State below the mean high tide, affected by the regular rise and fall of the tide and not otherwise transferred by the State. “Private tidal wetlands” means 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; tidal wetlands transferred by the State by a valid lease, patent, or grant confirmed by Article 5 of the Maryland Declaration of Rights, to the extent of the interest transferred; and tidal water created by the excavation of upland unless conveyed to the State. Regulations define a “riparian landowner” to mean a property owner whose land borders on tidal wetlands or waters of the State and “riparian rights” to mean the rights of an owner of land bordering on tidal wetlands or waters of the State as recognized by Title 16 of the Environment Article.

Approvals Generally Required for Projects in Wetlands

Wetlands in the State are protected, and the Wetlands and Waterways Program within MDE administers a statewide program for the management, conservation, and protection of Maryland’s tidal wetlands and nontidal wetlands and waterways. Generally, a person must obtain a permit or license before working in wetlands in the State. BPW has the authority to determine whether to issue a license to dredge, fill, or alter State wetlands; MDE must assist BPW in making such a determination and, in some cases, BPW delegates the authority to issue such a license to MDE. Authorizations granted to work in privately owned wetlands are issued by MDE.

Riparian Owner’s Rights

In general, except as specifically provided, a riparian owner may not be deprived of any right, privilege, or enjoyment of riparian ownership that the riparian owner had prior to July 1, 1970. Further, provisions of Title 16 of the Environment Article, which address wetlands and riparian rights, do not transfer the title or ownership of any land or interest in land. According to BPW, the Court of Special Appeals has noted “The term ‘riparian rights’ indicates a bundle of rights that turn on the physical relationship of a body of water to the land abutting it. These rights are significantly different from each other in many respects, and yet they share a common name just as riparian landowners attempt to share the common benefits that arise from adjacency to defined bodies of water.” *Gunby v. Old Severna Park Improvement Ass’n*, 174 Md.App. 189, 239 (2007).

A person who is the owner of land bounding on navigable water is entitled to any natural accretion to the person's land, to reclaim fast land lost by erosion or avulsion during the person's ownership of the land to the extent of provable existing boundaries. The person may make improvements into the water in front of the land to preserve that person's access to the navigable water or protect the shore of that person against erosion, as specified. After an improvement has been constructed, the improvement is the property of the owner of the land to which the improvement is attached. A right covered in Subtitle 2 of Title 16 of the Environment Article (which addresses State wetlands) does not preclude the owner from developing any other use approved by BPW. The right to reclaim lost fast land relates only to fast land lost after January 1, 1972, and the burden of proof that the loss occurred after this date is on the owner of the land.

MDE and BPW consider all of these factors and rights when reviewing applications and making determinations on whether to issue licenses or permits and whether to impose any conditions on such approvals.

State Fiscal Effect: General fund expenditures for MDE increase by \$465,403 in fiscal 2022, which accounts for the bill's October 1, 2021 effective date. This estimate reflects the cost of hiring two natural resource planners, one administrative aide, and one assistant Attorney General to (1) establish and maintain a publicly accessible repository on MDE's website to keep a record of community associations and other entities that possess riparian rights; (2) update MDE regulations related to reviewing affected permit applications; and (3) conduct additional analysis for affected permit applications within required timeframes. It includes salaries, fringe benefits, one-time start-up costs (including contractual costs to create the required database), and ongoing operating expenses. The information and assumptions used in calculating the estimate are stated below:

- MDE does not currently have any data or records on community associations or other entities that possess riparian rights;
- according to MDE, there are an estimated 7,719 miles of shoreline in the State, which means the task of identifying, recording, and maintaining a database of all shoreline property owned by community associations and other entities requires significant research and staff time;
- MDE processes, on average, more than 1,000 wetlands permits annually;
- MDE is required to issue permit decisions within 45 days, pursuant to current law and regulations;
- additional legal analysis and research must be conducted to review affected permit applications; and
- existing MDE staff are fully subscribed and do not have sufficient expertise to handle the additional responsibilities stemming from the bill's changes.

Positions	4
Salaries and Fringe Benefits	\$236,553
Contractual Costs for Database	200,000
Other Operating Expenses	28,850
Total MDE FY 2022 Expenditures	\$465,403

Future year expenditures reflect full salaries with annual increases and employee turnover and ongoing operating expenses, including ongoing contractual costs to maintain the database.

BPW advises that current BPW staff can implement the bill’s changes with existing resources. However, both BPW and MDE note that the bill likely alters how license and permit applications are evaluated. Without actual experience under the bill, it is unclear how the bill may affect the issuance of such approvals. However, the bill likely shifts the current approach from one that views riparian rights as key to sharing access to water among adjacent property owners to one that views riparian rights as an exclusive contest of rights with an explicit preferred right for community associations or other entities. Further, since the riparian rights of a community association (or other entity) may not be terminated or impaired under the bill, MDE and BPW’s ability to deny an application, or to conditionally approve an application, may be limited, although this is unclear.

Despite the potential implications on the decision-making process used by BPW and MDE when evaluating affected applications, this analysis assumes that the bill does not materially affect fee revenue resulting from such applications.

Additional Information

Prior Introductions: None.

Designated Cross File: None.

Information Source(s): Baltimore City; Anne Arundel, St. Mary’s, and Talbot counties; Maryland Department of the Environment; Board of Public Works; Department of Legislative Services

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