

Department of Legislative Services  
Maryland General Assembly  
2023 Session

FISCAL AND POLICY NOTE  
First Reader

House Bill 635 (Delegates Wivell and Valentine)  
Environment and Transportation

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Water Pollution Control - Discharges From Construction Sites - Limits on  
Liability

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This bill limits the liability for civil and administrative penalties for a person who holds an individual discharge permit for stormwater associated with construction activity or is covered under a general discharge permit for stormwater associated with construction activity. For such a person, the bill also decreases the maximum civil or administrative penalty that may be imposed for discharges from a construction site.

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Fiscal Summary

**State Effect:** General fund expenditures may increase, potentially significantly, beginning in FY 2024 for additional enforcement. Special fund revenues from penalties decrease, potentially significantly, beginning as early as FY 2024. Federal fund revenues may also be affected, as discussed below. Other potential effects on State agencies, as permit holders, are discussed below.

**Local Effect:** Potential increase in local expenditures for enforcement beginning in FY 2024. Local revenues are not directly affected. Other potential effects on local governments, as permit holders, are discussed below.

**Small Business Effect:** Potential meaningful.

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Analysis

**Bill Summary:** The bill limits the applicability of existing civil and administrative penalty provisions under § 9-342 of the Environment Article for a person who holds an individual discharge permit for stormwater associated with construction activity or is covered under

a general discharge permit for stormwater associated with construction activity. More specifically, such a person is not liable under § 9-342 of the Environment Article and no civil or administrative penalty may be imposed for a discharge from a construction site unless (1) the Maryland Department of the Environment (MDE) previously provided written notice to the person of the condition that gave rise to the discharge and (2) the person willfully caused or failed to prevent the discharge of pollutants from the site into waters of the State. Similarly, such a person is not liable if the discharge was due to an act of God, including any weather event in which two or more inches of rain fell within 24 hours.

The bill also decreases the maximum civil or administrative penalty that may be imposed on such a person under § 9-342 of the Environment Article for a discharge from a construction site. *Under current law*, the maximum civil penalty that may be imposed is \$10,000 per day and the maximum administrative penalty is \$10,000 for each violation, not exceeding \$100,000 total. *Under the bill*, the maximum civil or administrative penalty may not exceed \$5,000 for each violation or \$25,000 total.

### **Current Law:**

#### *Federal Clean Water Act and the National Pollutant Discharge Elimination System*

The federal Clean Water Act (CWA) establishes the basic structure for regulating discharges of pollutants into the waters of the United States. The National Pollutant Discharge Elimination System (NPDES), a component of CWA, is a permit program that addresses water pollution by regulating point sources that discharge pollutants to U.S. waters. In Maryland, the federal Environmental Protection Agency (EPA) delegates authority to issue NPDES permits to MDE. MDE's Water and Science Administration and Land and Materials Administration issue discharge permits to protect Maryland's water resources by controlling industrial and municipal wastewater discharges. Surface water discharges are regulated through combined State and federal permits under NPDES. Groundwater discharges are regulated through State-issued groundwater discharge permits.

#### *Discharge Permits for Construction Activities*

Any construction project that disturbs one or more acres of earth must apply for either a general or individual permit for stormwater discharge associated with construction activity and obtain coverage under the permit before beginning earth disturbance or any part of the project. These discharge permits are types of NPDES permits. A notice of intent (NOI) is one of the first steps in acquiring a construction general permit for stormwater discharge. However, prior to submitting a NOI, a final erosion and sediment control plan must be submitted to the appropriate approval authority (such as the Soil Conservation District).

Applications fees are required for certain projects and are calculated based on the total disturbed acreage. A permitting authority may require any construction site to apply for an individual permit rather than using the general permit, but according to MDE, individual projects are rarely used. When they are, they are most often used for very large projects or projects located in sensitive watersheds.

### *Relevant Penalties*

Under § 9-342 of the Environment Article, in addition to being subject to an injunctive action, a person who violates the State's water pollution control laws (under Title 9, Subtitle 3 of the Environment Article), or any regulation, order, or permit issued under these laws is subject to a maximum penalty of \$10,000 to be collected in a civil action brought by MDE. Each day a violation occurs is a separate violation. MDE may also impose a maximum administrative penalty of \$10,000 per violation, not exceeding \$100,000 total, for a violation of any water pollution control law, regulation, order, or permit. Each day a violation occurs is a separate violation. Administrative penalties must be assessed with consideration given to specified factors.

### **State Fiscal Effect:**

#### *Maryland Department of the Environment Administrative Costs*

MDE advises that by limiting liability and reducing the maximum penalties that may be assessed for affected violations, the bill removes the deterrent effect for permittees, resulting in the need for MDE to seek additional injunctions to address noncompliant construction stormwater discharges. Accordingly, MDE estimates that its general fund expenditures increase by \$1.3 million in fiscal 2024 and by at least \$1.4 million annually thereafter to hire 15 full-time employees (4 natural resource planners, 5 assistant Attorney Generals, and 6 regulatory and compliance engineers) to conduct additional site inspections, increase permit oversight, and handle a significant increase in actions for injunctive relief. The information and assumptions MDE used to develop this estimate are stated below:

- MDE assumes that the bill's changes result in an increase in noncompliance, requiring MDE to ramp up enforcement activity, including site inspections;
- there are more than 6,000 active construction sites and 1,000 industrial stormwater sites in the State;
- during calendar 2022, MDE's Water and Science Administration performed approximately 1,800 construction stormwater inspections and found approximately 600 sites in noncompliance; and
- an additional 240 injunctive actions are taken per year under the bill.

The Department of Legislative Services concurs that the bill has the potential to affect noncompliance by reducing the deterrent effect that currently exists. However, without actual experience under the bill, changes in the behavior of permittees cannot be predicted. Accordingly, while the bill has the potential to result in the need for MDE to increase its enforcement activity, it is impossible to estimate the need for additional staff beforehand. Accordingly, general fund expenditures may increase for MDE to hire staff, but any such increase cannot be estimated at this time.

#### *Penalty Revenues and Potential Impact on Federal Fund Revenues*

Special fund revenues from penalties decrease beginning as early as fiscal 2024 due to the bill's changes to existing provisions regarding liability and the maximum civil and administrative penalties that may be imposed for violations. Although an estimate of the decrease in penalties collected under the bill cannot be made, given the substantial decrease in the maximum penalties that may be imposed, in addition to the decrease in liability for affected permittees, the decrease in special fund revenues is potentially significant. Penalties imposed under the provisions affected by the bill are paid into the Maryland Clean Water Fund.

Additionally, MDE advises that the bill's changes make State law less restrictive than CWA and, as a result, the bill places EPA's delegation of NPDES permitting authority to MDE in jeopardy. EPA's delegation to Maryland allows State law to be more, but not less, restrictive than CWA. According to MDE, loss of delegated authority could result in a reduction in federal fund revenues.

#### *Impact on State Agencies as Permit Holders*

The potential impact on State agencies, as permit holders, is discussed in the Additional Comments section below.

**Local Fiscal Effect:** To the extent the bill requires additional enforcement at the local level due to an increase in noncompliance, local government expenditures increase. The potential impact on local government agencies, as permit holders, is discussed in the Additional Comments section below.

**Small Business Effect:** The potential impact on small businesses, as permit holders, is discussed in the Additional Comments section below.

**Additional Comments:** By limiting liability and reducing the maximum civil and administrative penalties that may be imposed on affected permittees, any such permittees, which could include State agencies, local governments, and small businesses, benefit to the

extent they violate the law and would otherwise be subject to penalties (or higher penalties) for noncompliance.

In addition, as mentioned above, MDE advises that the bill puts the State's delegated NPDES permitting authority in jeopardy by making State law less restrictive than federal law. Ultimately, this conflict could result in MDE losing part or all of its delegated authority under CWA, which could add uncertainty and delays to the permitting process. If this occurs, permit applicants and permittees, which include State agencies, local governments, and small businesses, are likely affected.

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### **Additional Information**

**Prior Introductions:** Similar legislation has not been introduced within the last three years.

**Designated Cross File:** SB 936 (Senator Folden) - Rules.

**Information Source(s):** Maryland Association of Counties; Maryland Municipal League; Judiciary (Administrative Office of the Courts); Public School Construction Program; Maryland Department of the Environment; Department of General Services; Maryland Department of Transportation; Department of Legislative Services

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