

Department of Legislative Services
Maryland General Assembly
2024 Session

FISCAL AND POLICY NOTE
First Reader

Senate Bill 798 (Senator Hester)
Education, Energy, and the Environment

Stream Restoration Contractors Licensing Board, Stream Restoration Contractors, and Stream Restoration Project Requirements

This bill establishes the Stream Restoration Contractors Licensing Board in the Maryland Department of the Environment (MDE) and requires a person to be licensed by the board as a stream restoration contractor or be employed by an individual or entity that is licensed as such before the person may perform or solicit to perform stream restoration contractor services in the State. The bill also requires MDE to adopt regulations for the management of stream restoration projects by December 1, 2025, subject to specified requirements, including public notice and comment and submission of a forest conservation plan to the Department of Natural Resources (DNR) for certain projects. MDE, in consultation with the Chesapeake Bay Trust (CBT), must develop a related project assessment. A stream restoration project may not be constructed unless MDE (1) adopts the regulations or (2) determines compliance with the requirements of the bill and the project makes all monitoring reports public. **The bill takes effect July 1, 2024.**

Fiscal Summary

State Effect: General/special fund expenditures for MDE increase significantly, likely by at least \$1.3 million annually, beginning in FY 2025. Special fund revenues for MDE increase beginning in FY 2025 from stream restoration contractor fees. State expenditures (all funds) increase significantly for State agencies that undertake stream restoration projects beginning in FY 2025. Other potential effects are discussed below. The bill's penalty provisions are not anticipated to materially affect special fund revenues.

Local Effect: Local government expenditures increase significantly beginning in FY 2025, as discussed below. Revenues are not affected. **This bill imposes a mandate on a unit of local government.**

Small Business Effect: Meaningful.

Analysis

Bill Summary:

Stream Restoration Contractors Licensing Board

The Stream Restoration Contractors Licensing Board is established in MDE. Subject to the specified provisions in the bill, the board is responsible for the licensing and regulation of individuals and entities that provide stream restoration contractor services in the State. “Stream restoration contractor services” means construction, demolition, installation, alteration, repair, or salvage activities located in, on, or under State or private streams or nontidal wetlands. It includes in-stream structure installation, stream channel relocation, stream bank stabilization, infrastructure protection, habitat creation, floor protection, and stream channel filling. It does not include the routine maintenance and repair of an existing stream restoration erosion control structure if the maintenance and repair does not involve the use of heavy machinery.

The bill specifies the membership, terms, powers, and duties of the board. Board members are entitled to reimbursement for travel expenses. The board may employ a staff in accordance with the State budget. The board must set reasonable fees for licensure and other services the board provides; the fees must be set so as to produce funds to approximate the costs of maintaining the board. All funds collected by the board must be paid into the Wetlands and Waterways Program Fund (an existing special fund).

Licensure

The bill specifies qualifications for licensure, including work experience, passing a written test, and liability insurance, and establishes an application process with associated requirements, including the payment of an application fee set by the board. Local government employees who perform stream restoration contractor services while in the performance of their duties are not required to pay a fee for licensure or testing (but are responsible for the costs of continuing education). Licenses are valid for two years. The bill establishes related license renewal requirements, which include a minimum of 12 hours of continuing education. The board may establish different license categories for different stream restoration contractor services.

Generally, a person must be licensed by the board as a stream restoration contractor or be employed by an individual or entity that is licensed as such before the person may perform or offer to perform stream restoration contractor services in the State. An individual, an entity, or a unit of local government may qualify for a license. There are three general exceptions to the licensure requirement to perform stream restoration contractor services:

- federal or State government employees while in the performance of the duties of their employment;
- residential or commercial property owners on their own property; and
- local government employees, if performing stream restoration contractor services that (1) would present a *de minimis* risk to human health or the environment; (2) do not require a federal or State permit; and (3) if the services involve an existing structure, do not increase the structure's footprint.

However, local government employees must be licensed as stream restoration contractors if they are performing stream restoration contractor services for the routine maintenance or repair of an existing man-made structure that is within the footprint of an existing or proposed stream channel.

While a license to an entity is in effect, it authorizes the entity to (1) employ individuals who are not licensed stream restoration contractors to provide stream restoration contractor services to the public on behalf of the licensee and (2) represent itself to the public as a licensed stream restoration contractor entity. Licensees must also meet specified ongoing standards, such as those related to advertising.

Licensees and applicants are subject to specified administrative enforcement actions by the board (subject to specified procedures). All persons are subject to specified criminal and civil penalties for violations of the bill's provisions or resulting regulations. More specifically, a violation of the bill or resulting regulations is a misdemeanor and subject to a maximum penalty of a \$10,000 fine and/or one year imprisonment. Each day that a person conducts stream restoration contractor services without a license constitutes a separate offense. A person may also be liable for a civil penalty of up to \$10,000 for each violation in a civil action brought against the person. Any penalties collected are paid into the Wetlands and Waterways Program Fund, to be used for the administration of the board.

Subject to the evaluation and reestablishment procedures of the Maryland Program Evaluation Act (MPEA), the above provisions and all regulations adopted under them terminate July 1, 2028.

Initial Registration

By December 31, 2024, all persons performing or soliciting to perform stream restoration contractor services in the State must register with MDE and pay a \$300 registration fee. A person that fails to do so may not perform stream restoration contractor services and is subject to the administrative penalties described above. The registrations expire on December 31, 2025, unless extended by an action of the board.

Exemption from Other Licensing

Licensed stream restoration contractors are exempt from Maryland Home Improvement Commission (MHIC) contractor licensing requirements.

Stream Restoration Projects and Assessments

By December 1, 2025, MDE must adopt regulations for the management of stream restoration projects in the State. The regulations must:

- incorporate the content from MDE’s “MS4/Chesapeake Bay/TMDL/Trust Fund Restoration Project Wetlands & Waterways Permit Package Checklist”;
- require that a stream restoration project in the State include (1) a public comment period of at least 60 days; (2) at least two public meetings that allow for in-person and virtual participation and comment; and (3) public notice of the project to residents of the entire county in which the stream restoration project is to occur and communities directly adjacent to the proposed project site;
- for projects that are not covered under the Forest Conservation Act (FCA): (1) require that the stream restoration contractor for the project submit a forest conservation plan to DNR that includes applicable best practices, as specified; and (2) alter the index of biotic integrity requirement for restoration to apply only to streams that are poor or very poor;
- if the proposed stream restoration project is intended to create credits under MDE’s Water Quality Trading Program to meet a National Pollutant Discharge Elimination System (NPDES) permit or Total Maximum Daily Load (TMDL) requirement, require the stream restoration contractor for a project to submit a statement to MDE on how the project will target and mitigate pollutants in the stream; and
- require MDE to ensure that the permits are allocated equitably by performing an analysis of the Municipal Separate Storm Sewer System (MS4) permit scoring allocation used by the department.

By December 30, 2025, MDE, in consultation with CBT, must develop an assessment to determine whether a stream restoration project meets the requirements of the regulations described above. The assessment must (1) address stormwater management, regrowth of vegetation, and effects on local biodiversity populations in the stream channel or riparian area and (2) allow for public input on whether the stream restoration project meets the requirements of the regulations.

MDE must perform the assessment three years after completion of each stream restoration project and, based on that assessment, if the department determines that a stream restoration project does not meet the requirements of the regulations, the contractor responsible for the

project must be liable for the cost of bringing the stream restoration project into compliance.

Notwithstanding an existing wetlands and waterways authorization for a stream restoration project, a stream restoration contractor may not construct a stream restoration project in the State unless (1) MDE adopts regulations in accordance with the above requirements or (2) to the satisfaction of MDE's Wetlands and Waterways Program Division, the application for the stream restoration project demonstrates compliance with the above requirements and the stream restoration contractor makes all stream restoration monitoring reports available for public inspection.

Current Law:

Licensing of Contractors Who Perform Stream Restoration Work

State law does not require a person to hold a license specific to stream restoration contractor services. However, contractors performing such services may be required to obtain other licenses, depending on the range of work performed by a particular contractor.

The Marine Contractors Licensing Board within MDE is responsible for the licensing and regulation of individuals and entities that provide "marine contractor services" in the State. "Marine contractor services" means construction, demolition, installation, alteration, repair, or salvage activities located in, on, over, or under State or private tidal wetlands. It includes (1) dredging and filling; (2) the construction, demolition, installation, alteration, repair, or salvage of structures, including boathouses, boat or other personal watercraft lifts or ramps, slips, docks, floating platforms, moorings, piers, pier access structures, pilings, wetland observation platforms, wetland walkways, and wharfs; and (3) the construction, demolition, installation, alteration, repair, or salvage of stabilization and erosion control measures, including revetments, breakwaters, bulkheads, groins, jetties, stone sills, marsh establishments, and beach nourishment or other similar projects.

In addition, unless exempt, a person must obtain a contractor license from MHIC whenever the person acts as a "home improvement" contractor in the State. "Home improvement" includes a shore erosion control project for a residential property. Licensed marine contractors are exempt from MHIC licensing.

Wetlands and Waterways Program

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. Regulations define

the criteria for evaluating tidal wetlands licenses and permits, as well as the property information that permit and license applicants must provide as part of the application process. The Board of Public Works (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. Application fees for wetlands and waterways authorizations are paid into the Wetlands and Waterways Program Fund.

Total Maximum Daily Load and Municipal Separate Storm Sewer System Permit

TMDLs are a requirement under the federal Clean Water Act (CWA). A TMDL (1) establishes the maximum amount of an impairing substance or stressor that a water body can assimilate and still meet water quality standards and (2) allocates that load among pollution contributors.

Surface water discharges in the State are regulated through combined State and federal permits under NPDES, which is a component of CWA. Among other things, NPDES regulates stormwater discharges from MS4s. There are 10 jurisdictions in Maryland that hold NPDES Phase I MS4 permits (Anne Arundel, Baltimore, Carroll, Charles, Frederick, Harford, Howard, Montgomery, and Prince George's counties and Baltimore City). Additionally, the State Highway Administration (SHA) holds a Phase I MS4 permit.

Forest Conservation Act

The Forest Service within the DNR administers FCA, but it is primarily implemented on the local level. FCA establishes minimum forest conservation requirements for land development, and local governments with planning and zoning authority (with the exception of Allegany and Garrett counties and their municipalities) are required to develop local forest conservation programs that meet or are more stringent than the requirements of FCA. FCA applies to any public or private subdivision plan or application for a grading or sediment control permit by any person, including a unit of State or local government, on areas 40,000 square feet (0.9 acres) or greater, subject to certain exceptions. The exceptions include any stream restoration project for which the applicant for a grading or sediment control permit has executed a binding maintenance agreement of at least five years with the affected property owner.

A proposed construction activity goes through a process of evaluation of existing vegetation on a site and development of a forest conservation plan for the site defining how forest area will be retained and/or afforestation (establishment of tree cover in open areas) or reforestation (creation of specified forest area) will be undertaken. If afforestation or reforestation requirements cannot be reasonably accomplished on site or off site (which

can include use of off-site forest mitigation banks), payment may be made into the applicable forest conservation fund (fee-in-lieu payments) to be spent by the State or the local government on reforestation and afforestation, maintenance of existing forest, and achieving urban canopy goals.

Chapters 541 and 542 of 2023 made various changes to FCA, including changes to the reforestation requirements under the Act, which take effect July 1, 2024. Under the new requirements, if forest is removed, reforestation must be undertaken at a ratio of one acre planted for every one acre removed, unless the forest removed is in a priority funding area and not identified as a priority for retention, in which case the area of forest removed must be reforested at a ratio of one-half acre planted for every one acre removed. The changes also establish that, in addition to other requirements, all unforested riparian buffers on a site must be afforested and reforested, except under specified circumstances.

Chapters 541 and 542 also allow local jurisdictions to establish specified alternative afforestation, reforestation, and preservation requirements.

State Fiscal Effect: The effects of establishing the Stream Restoration Contractors Licensing Board and establishing new requirements for stream restoration projects are discussed separately below.

Stream Restoration Contractors Licensing Board

The number of stream restoration contractor registrations and licenses issued under the bill is unknown. Other than a one-time \$300 initial registration fee, other fee amounts are also unknown, as they must be set by the Stream Restoration Contractor Licensing Board to approximate the board's costs. All funds collected by the board must be paid into the Wetlands and Waterways Program Fund. Accordingly, special fund revenues for MDE increase by an indeterminate amount beginning in fiscal 2025, initially from registration fees and subsequently from license fees and any penalties imposed for violations.

The Department of Legislative Services (DLS) notes that all persons performing or soliciting to perform stream restoration contractor services in the State must register and pay the one-time \$300 fee, including the State and local governments. Going forward, State employees do not need to be licensed.

MDE advises that it requires additional staff for the board. Without actual experience under the bill, including the number of licensees and the level of ongoing enforcement activities, total administrative costs for MDE cannot be determined at this time. Based on information provided by MDE, the department's administrative costs total approximately \$250,000 to \$300,000 annually beginning in fiscal 2025, which does not include any information technology costs associated with establishing a licensing system.

The Wetlands and Waterways Program Fund is not altered to specifically allow for the funding of the board's expenses, so it is unclear whether the board can be funded, initially or otherwise, from the fund. Accordingly, general/special fund expenditures for MDE increase beginning in fiscal 2025, likely by at least the amounts described above.

Subjecting the board to MPEA has no effect on State expenditures beyond the potential for future termination – most entities are reauthorized. Under MPEA, entities may be subject to an evaluation by the Office of Program Evaluation and Government Accountability (OPEGA) within DLS prior to their termination. However, OPEGA may conduct an evaluation only if directed by specified entities or by legislation.

Any increase in workload for the Office of Administrative Hearings resulting from enforcement of the stream restoration contractor licensing provisions is anticipated to be handled with existing budgeted resources.

DNR advises that there may be an operational effect of the licensure requirement on its ability to hire stream restoration contractors for projects but did not indicate any additional costs associated with the requirement.

This estimate does not reflect any decrease in State revenues associated with fewer licenses issued by MHIC under the bill.

New Requirements for Stream Restoration Projects

Maryland Department of the Environment

MDE advises that general fund expenditures increase by approximately \$1.4 million to \$1.5 million annually beginning fiscal 2025 to hire 14 employees, primarily to increase its capacity to review, permit, and assess stream restoration projects under the enhanced and more complex processes and evaluations required by the bill, but also for staff to ensure that comprehensive stream restoration project regulations are adopted by December 1, 2025. For fiscal 2025, MDE's estimate also includes costs to purchase vehicles and supplies.

DLS concurs that the bill establishes substantial new responsibilities for MDE and that general fund expenditures increase significantly for MDE to hire staff and to purchase vehicles and supplies. However, without actual experience under the bill, a reliable estimate of the increase in costs – primarily costs to hire staff – cannot be made at this time. Nevertheless, DLS anticipates that general fund expenditures increase significantly, likely by at least \$1.0 million annually, beginning in fiscal 2025.

Regarding the bill's requirement that MDE regulations require the department to ensure that stream restoration permits are allocated equitably by performing an analysis of the MS4 permit scoring allocation used by the department, MDE advises that it does not have the authority to modify those calculations unilaterally, as they are determined and set by the Chesapeake Bay Program (CBP). MDE notes that major modifications to MS4 permits also need to be approved by the U.S. Environmental Protection Agency. Thus, MDE may not be able to implement this requirement.

Stream Restoration Project Costs

Costs related to stream restoration projects undertaken by affected State agencies increase significantly beginning in fiscal 2025 due to (1) a likely increase in wetlands and waterways project application review times for MDE; (2) the need to conduct additional planning and analysis for project applications and to increase public participation in the project application process (including hosting additional public meetings); (3) costs and potential project approval delays associated with submitting a forest conservation plan to DNR for certain projects not covered by FCA; and (4) any additional projects that may be required for entities implementing stream restoration projects to meet TMDL goals and MS4 permit targets (to the extent CBP modifies the pollution reduction credits that are awarded to stream restoration projects, as discussed in the preceding section). Costs also increase in fiscal 2025 due to the payment of one-time registration fees to MDE for stream restoration contractors.

Certain entities that are permitted by MDE utilize stream restoration projects to meet permit requirements (including for MS4 permits) and to meet other environmental and restoration goals (including TMDL goals). Thus, increased stream restoration project costs result in increased compliance costs for affected permit holders and entities working to achieve various environmental goals.

Affected agencies include the Maryland Department of Transportation and the Maryland Transportation Authority (MDTA). For context, MDTA estimates additional costs of \$250,000 per stream restoration project, while the Maryland Transit Administration estimates a similar cost increase (\$278,000) for one of its upcoming stream restoration projects. SHA also indicates that it incurs significant costs but did not provide a per-project estimate.

DNR advises that it can implement the bill's provision related to forest conservation plans with existing budgeted resources.

The potential for a *de-facto* moratorium on stream restoration projects is discussed in the Additional Comments Section below.

Local Fiscal Effect: Local governments experience significant cost increases and operational delays for stream restoration projects as described above for State agencies. In addition to those effects, including the registration fee in fiscal 2025, local government employees must, unless exempt under the bill in limited circumstances, be licensed as stream restoration contractors if they are performing stream restoration contractor services, although there are no fees for licensure or testing of local government employees.

Additionally, if stream restoration accounting methodologies are impacted through the requirement for equitable credit distribution, local governments required to meet MS4 NPDES permit impervious surface restoration requirements may be negatively impacted, especially if they have planned for or designed stream restoration projects to meet their MS4 permit requirements. Additional costs associated with stream contractor licensing may also be passed on to local governments sponsoring stream restoration projects. The effect on any particular local government is unknown, but likely significant for many local governments.

The potential for a *de-facto* moratorium on stream restoration projects is discussed in the Additional Comments Section below.

Small Business Effect: Generally, small businesses that perform stream restoration work as defined in the bill must be either licensed by (as a sole proprietor), or employ at least one individual licensed by, the Stream Restoration Contractors Licensing Board. Licensure involves meeting specified experience requirements, passing a written test, maintain insurance coverage, and ongoing continuing education. There is an initial registration period, which this analysis assumes is designed to provide time for licensure processes to be adopted by the new board. By December 31, 2024, and through December 31, 2025, all persons performing or soliciting to perform stream restoration contractor work must be registered with the board.

Small businesses engaged in stream restoration projects also experience significant cost increases and operational delays as described above. The potential for a *de-facto* moratorium on stream restoration projects is discussed in the Additional Comments Section below.

Additional Comments: MDE raised multiple concerns with implementation and funding to DLS in its response to a request for information for this fiscal and policy note. For example:

- Of perhaps the most immediate concern, MDE advised that the bill creates a moratorium on all stream restoration projects until MDE adopts required regulations by December 1, 2025 (which is itself too early of a deadline). DLS notes that the bill does allow MDE to determine that a project demonstrates compliance with the

bill's requirements prior to regulations being adopted – although that would likely have significant operational effects on MDE.

- Many stream restoration projects are conducted by State and local governments, which do not pay license fees to support the new Stream Restoration Contractor Licensing Board.
- Required post-project assessments in the bill are inconsistent with existing post-construction monitoring requirements intended to ensure consistency with waterway construction, floodplain, and nontidal wetland permitting goals.
- The bill affects the applicability of any conclusions from an existing comprehensive study, analysis, and evaluation of ecological restoration projects required by Chapter 465 of 2022, which is due June 1, 2024.

Additional Information

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

Designated Cross File: None.

Information Source(s): Maryland Department of the Environment; Department of Natural Resources; Maryland Department of Transportation; Maryland Department of Labor; Office of Administrative Hearings; Anne Arundel, Baltimore, Carroll, Harford, Prince George's and St. Mary's counties; towns of Bel Air and Leonardtown; Maryland Association of Counties; Maryland Municipal League; Department of Legislative Services.

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