

February 22, 2023

The Honorable Brian J. Feldman, Chair
Education, Energy, and the Environment Committee
Miller Senate Office Building, 2 West
Annapolis, MD 21401

Unfavorable: SB 471 – Water Pollution Control – Discharge Permits – Stormwater Associated with Construction

Dear, Chair Feldman and Committee Members:

The NAIOP Maryland Chapters representing more than 700 companies involved in all aspects of commercial, industrial, and mixed-use real estate, recommend your unfavorable report on Senate Bill 471.

Rationale for NAIOP's Unfavorable Position

Senate Bill 471 proposes major changes to the technical and procedural requirements for stormwater permits that apply during temporary construction activities such as clearing, grading and excavation. There are several problematic provisions in the bill:

- Page 3, lines 1-8 limit eligibility for coverage under the General Discharge Permit for Stormwater Associated with Construction Activity (Construction General Permit) expanding the instances when MDE is required to develop site-specific stormwater controls through an Individual Permit. This change will increase administrative burdens on MDE and the applicant with little or no environmental benefit. *(For discussion of differences between an Individual Permit and the General Permit, please see the next page)*
- MDE has existing authority to incrementally add requirements or convert a Construction General Permit application into an Individual Permit. The bill overrides this departmental discretion and requires Individual Permits without regard for the professional judgement of the staff.
- The recently approved Construction General Permit increases water quality protections for all projects including elevated requirements for projects in the high-quality watersheds called out in the bill. The new requirements include:
 - a site-specific Stormwater Pollution Prevention Plan (SWPPP),
 - specific measures for stream protection zones,
 - an expanded anti-degradation checklist for projects near high-quality waters, and
 - more rigorous requirements and time deadlines to take corrective action after storm events.
 - [MDE's Fact Sheet on the new Construction General Permit is linked here.](#)
- Page 3, line 26 – page 4, line 3 says a permit holder may not *cause* or *allow* runoff from a construction site. We do not see how a permit holder could comply as written. These provisions fundamentally change the meaning of discharge and run contrary to the purpose of the Construction Stormwater Permit which is to establish the conditions under which a permittee is authorized to discharge from the site. This language applies to sites covered by both the Construction General Permit and Individual Permits.
- Buildings are not located in floodplains but, on occasion, utilities or a stream crossing necessitate disturbances in the floodplain. We do not believe this should trigger an Individual Permit. Also, the bill does not specify which floodplain designation requires an Individual Permit. (e.g., 100yr)
- There is little private development in Tier II Watersheds, but page 3, lines 4-6 contain connective language that trigger the requirements of the bill if the project is in a watershed or catchment that drains to a high-quality receiving water. We do not understand the extent of this geographic area.

- There are broad rights of appeal and judicial review applied to the final approval of Individual Permits. This exposes those projects to political and legal risks. The General Permit can be appealed when its provisions are reauthorized, but not each time coverage is granted to individual projects.
- Construction General Permit coverage can be obtained in 45 days compared to an average of 6 months to develop an Individual Permit. *(Please see the Individual Permit flow chart below)*

Discussion of Individual vs. General Permit

The Federal Clean Water Act prohibits discharge of any pollutant from construction sites that disturb one acre or more of land, unless the discharge is authorized by obtaining coverage under an NPDES permit (National Pollutant Discharge Elimination System). There are two options for obtaining authorization to discharge, coverage under the Construction General Permit and under an Individual Permit.

Most discharges associated with construction activities are covered under the Construction General Permit. General Permits are utilized by the U.S. EPA and MDE to reduce the administrative workload for applicants and the department by predetermining the permit requirements. Projects eligible for coverage under the Construction General Permit have similar characteristics and the permit applies a common set of mitigation practices and regulations to these projects. The Maryland Construction General Permit is revised every five years and has just been reissued with significant protective changes summarized above.

If MDE determines that the provisions of the General Permit will not be sufficiently protective, the staff has the authority to add requirements beyond what is in the General Permit and/or make changes to the Erosion and Sediment Control Plan. If MDE determines the General Permit Conditions cannot be sufficiently modified to address environmental impacts of an application, the department will require that an Individual Permit be written for the project.

The Individual Permit process is show in the text box to the right. This process takes an average of 6 months vs. 45 days (or less) for coverage under the General Permit. Additionally, there are broad rights of appeal and judicial review applied to the final approval of Individual Permits. This exposes projects in that category to political and legal risks. The General Permit can be appealed when its provisions are reauthorized, but not each time coverage is granted to individual projects.

For these reasons, NAIOP respectfully recommends your unfavorable report on Senate Bill 471.

Sincerely,



Tom Ballentine, Vice President for Policy
NAIOP Maryland Chapters -The Association for Commercial Real Estate

cc: Education, Energy and Environment Committee Members
Nick Manis – Manis, Canning Assoc.

Permitting Process

