

Department of Legislative Services  
Maryland General Assembly  
2024 Session

FISCAL AND POLICY NOTE  
Third Reader - Revised

Senate Bill 837

(Senator McKay)

Education, Energy, and the Environment

Environment and Transportation

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Deep Creek Lake - Lower Lake Levels - Requirement and Impact Study

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This bill requires the Water and Science Administration in the Maryland Department of the Environment (MDE) to require Brookfield Power Piney & Deep Creek, LLC (Brookfield), by September 30 each year from 2024 through 2028, to lower the lake level of Deep Creek Lake as specified for at least four weeks. While the lake level is lowered each year, the Department of Natural Resources (DNR), or a contractor hired by DNR, must conduct a specified impact study. DNR must compile a report of the findings of each study and submit an annual report on the findings to MDE and the Deep Creek Lake Policy and Review Board. Each unit of the State must consider the most recent report when issuing, reviewing, or modifying a permit regarding Deep Creek Lake. Funding for the impact studies must be provided by the (1) State Lakes Protection and Restoration Fund; (2) the Deep Creek Lake Recreation Maintenance and Management Fund; or (3) any other appropriate source. DNR is authorized to waive the bill's requirements under extraordinary circumstances. **The bill takes effect July 1, 2024.**

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Fiscal Summary

**State Effect:** DNR can likely complete the required studies by redirecting staff from other duties, as discussed below. The bill has an operational effect on MDE, as discussed below. Revenues are not directly affected.

**Local Effect:** The bill is not anticipated to have a direct, material effect on local government operations or finances.

**Small Business Effect:** Minimal overall, but potential meaningful impact in Garrett County, as discussed below.

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## Analysis

**Bill Summary:** By September 30 each year from 2024 through 2028, the Water and Science Administration in MDE must require Brookfield to lower the lake level of Deep Creek Lake to a specified level for a period of at least four weeks between October 31 and January 1, both inclusive; however, the bill may not be construed to authorize Brookfield to lower the lake level below the levels authorized in its permit. However, Brookfield may begin to lower the lake level before October 31 each year.

While the lake level is lowered, DNR, or a contractor hired by DNR, must conduct a study to determine the impact of lower lake levels on (1) the spread and growth of aquatic invasive plant species and aquatic nuisance plant species in the lake; (2) accumulated sediment deposition in the lake; and (3) the whitewater industry.

After each study is completed, DNR must compile a report of the findings of the study and, by June 30 each year that the lake level is lowered, from 2025 through 2029, submit the report to MDE and the Deep Creek Lake Policy and Review Board. The report must include:

- a list of the aquatic invasive plant species and aquatic nuisance plant species found in Deep Creek Lake;
- the status and variation of aquatic invasive plant species and aquatic nuisance plant species in Deep Creek Lake;
- an analysis of the impact of lower lake levels on aquatic invasive plant species and aquatic nuisance plant species in Deep Creek Lake;
- recommendations for an aquatic vegetation management plan to control the growth and spread of aquatic invasive plant species and aquatic nuisance plant species in Deep Creek Lake;
- the extent of shallow water sediment erosion and deposition in Deep Creek Lake; and
- an analysis of the impact of lower lake levels on the whitewater industry.

Beginning on the submission of the initial report, each unit of the State must consider the most recent report when issuing, reviewing, or modifying a permit regarding Deep Creek Lake.

DNR may waive the bill's requirements under extraordinary circumstances, as determined in the discretion of the department.

## **Current Law:**

### *Water Appropriation and Use Permits*

Except for specified uses, a permit must be obtained from MDE to appropriate or use or begin to construct any plant, building, or structure that may appropriate or use any waters of the State, including Deep Creek Lake. A permit applicant must provide MDE with satisfactory proof that the proposed withdrawal of water will not jeopardize the State's natural resources.

Before acting on any permit application, MDE must weigh all respective public advantages and disadvantages and make all appropriate investigations. If MDE believes that the applicant's plans provide greatest feasible utilization of the waters of the State, adequately preserve public safety, and promote the general public welfare, MDE must grant the permit. If MDE believes that the proposed appropriation or use of State waters or proposed construction is inadequate, wasteful, dangerous, impracticable or detrimental to the best public interest, MDE may reject the application or suggest modifications to the proposed plans to protect the public welfare and safety.

In addition to being subject to an injunctive action, a person who violates any provision of law relating to water appropriation and use or any related rule, regulation, order, or permit adopted or issued under any such provision is liable for a civil penalty of up to \$5,000 per violation to be collected in a civil action brought by MDE. Each day a violation occurs or continues is a separate violation. A person who violates these provisions is also subject to specified criminal penalties. All penalties collected by MDE under these provisions are paid into the Maryland Clean Water Fund.

### *State Lakes Protection and Restoration Fund*

Chapters 404 and 405 of 2017 first established the State Lakes Protection and Restoration Fund, administered by the Secretary of Natural Resources, to protect and restore State-owned lakes. Under Chapters 404 and 405, the fund consisted of money appropriated in the State budget to the fund and any other money from any other source accepted for the benefit of the fund. Chapter 698 of 2018, however, required the Governor to include in the annual budget bill an appropriation of \$1.0 million to the fund for fiscal 2020 and each fiscal year thereafter and expanded the authorized uses of the fund in the manner discussed in the following paragraph. Originally, Chapter 698 was subject to a June 30, 2022, termination date; however, Chapter 39 of 2022 extended the termination date of Chapter 698 to June 30, 2025.

Chapters 698 and 39 explicitly authorize the fund to be used to protect or restore State-owned and State-managed lakes by (1) removing sediment; (2) treating contaminated

sediment; (3) preventing the spread of invasive species; (4) improving ecological and recreational value; and (5) taking any other action DNR determines necessary.

Effective July 1, 2025, the mandated appropriation required by Chapters 698 and 39 terminates and the fund may only be used for the protection or restoration of State-owned lakes.

#### *Deep Creek Lake Recreation Maintenance and Management Fund*

The Deep Creek Lake Recreation Maintenance and Management Fund was established within DNR for the maintenance and management of the land, recreational facilities, and services that are related to Deep Creek Lake in Garrett County. The fund consists of all fees collected for boat launching at Deep Creek Lake State Park, all funds collected from lake and buffer use permits, contracts, grants, and gifts as a result of the Deep Creek Lake management program, and investment earnings of the fund. At the end of each quarter of the fiscal year, DNR must pay 25% of the total revenue collected during the quarter to the Board of County Commissioners of Garrett County. Money in the fund may be used for administrative costs, as specified.

#### *Deep Creek Lake Policy and Review Board*

The Deep Creek Lake Policy and Review Board is responsible for reviewing and advising the Secretary of Natural Resources on matters that relate to the Deep Creek Lake Recreation Maintenance and Management Fund and the Deep Creek Lake management program.

The board must also review and advise the Secretary of the Environment on matters that relate to Deep Creek Lake and are within the jurisdiction of the Secretary of the Environment. The board may review and make recommendations on the budgetary matters that concern the management and maintenance of the lake and buffer area.

#### *Deep Creek Lake Recreation and Land Use Plan*

The Secretary of Natural Resources and the Deep Creek Lake Policy and Review Board must prepare a plan that provides for the wise use, protection, and management of the natural and recreational resources of Deep Creek Lake. The plan must (1) evaluate the lake, shoreline, and buffer area as a recreational, water, natural, and scenic resource, considering land use, carrying capacity, zoning, visitor access, recreation areas, commercial and private use, and related activities and (2) reflect activities such as fishing, boating, docking, hiking, water sports, scenic appreciation, natural interpretation, and other programs, which provide the public with opportunities to appreciate and enjoy the value of the lake and buffer area.

DNR may consult with MDE and the Department of Commerce in preparing the Deep Creek Lake recreation and land use plan and on any other matter relating to Deep Creek Lake. Following specified procedures, the Secretary may adopt regulations relating to Deep Creek Lake that are necessary to (1) protect the public health and safety, natural resources, and the environment or (2) implement the Deep Creek Lake recreation and land use plan.

Pursuant to current regulations, the Deep Creek Lake manager issues various permits relating to Deep Creek Lake, including (1) buffer strip permits that allow the use of State property, including land adjacent to the lake and existing docking facilities; (2) special permits that are necessary for a permittee to alter, modify, or improve the lake or buffer strip in a manner that is not authorized under a standard buffer strip permit; and (3) development permits that are necessary to construct specified buildings or install or expand a common dock facility on the lake or a buffer strip.

### **State Fiscal Effect:**

#### *Department of Natural Resources*

DNR advises that the bill's required studies can likely be completed by redirecting existing staff from other duties. However, if DNR staff are otherwise fully subscribed and cannot complete the required studies, the bill explicitly authorizes DNR to hire a contractor to do so. Should contractual support be required, DNR estimates study costs averaging approximately \$126,800 annually over the five-year study period required by the bill. It is assumed that the costs of any contractual services would be funded by redirecting special funds from other authorized uses of the State Lakes Protection and Restoration Fund in fiscal 2025 and 2026 and the Deep Creek Lake Recreation Maintenance and Management Fund in fiscal 2027 through 2029 (because the State Lakes Protection and Restoration Fund terminates at the end of fiscal 2026). Alternatively, general funds would be needed.

#### *Maryland Department of the Environment*

MDE advises that the water appropriation and use permit in effect for the dam at Deep Creek Lake (which is held by Brookfield) is one of its most technically complicated permits, in large part due to the number of stakeholders involved. MDE further advises that, in order to enforce the bill's requirements, it needs to modify this permit to incorporate the bill's requirements. MDE anticipates a substantial increase in its workload to modify the permit as it solicits and responds to public comments during the permit modification process and works to balance the competing interests of stakeholders.

Alternatively, under the authority provided by the bill, MDE could direct Brookfield to lower the lake levels without modifying its permit; however, MDE advises that if it takes that approach, it would not be able to enforce the bill's requirement.

MDE also advises that the lake level specified in the bill (2,457 feet, based on the North American Vertical Datum of 1988) – while within the band limit of Brookfield’s water appropriation and use permit – is extremely close to the lower band limit of the permit (0.2 feet, or 2.5 inches) and would put Brookfield at risk of noncompliance when the lake level is lowered in accordance with the bill’s requirements.

**Small Business Effect:** MDE advises that holding the Deep Creek Lake water low during the winter reduces the likelihood that the water levels will be high enough during the spring for whitewater rafting and cold-water fishing releases from the dam. Although MDE advises that the likelihood of this occurring is low, to the extent that it occurs, the tourism industry in the area around the lake could be negatively affected.

**Additional Comments:** As noted above, the bill requires each unit of the State to consider the most recent report submitted by DNR under the bill when issuing, reviewing, or modifying a permit regarding Deep Creek Lake. Other than the operational effects on MDE described above, this analysis does not address any resulting impacts on the issuance, review, or modification of State-issued permits relating to the lake, as any impact cannot be predicted in advance.

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### Additional Information

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

**Designated Cross File:** HB 910 (Delegate Hinebaugh) - Environment and Transportation.

**Information Source(s):** Garrett County; Maryland Department of the Environment; Department of Natural Resources; Department of Legislative Services

**Fiscal Note History:** First Reader - February 16, 2024  
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