

Department of Legislative Services
Maryland General Assembly
2009 Session

FISCAL AND POLICY NOTE

Senate Bill 120 (Senator Stone)
Education, Health, and Environmental Affairs

Environment - Permit Process - Modifications

This bill makes various changes in the environmental permitting process to increase public participation. First, the bill establishes an Environmental Leadership Group within the Maryland Department of the Environment (MDE) to consider and act on environmental matters, including activities that require permit approval from local, State, and federal agencies. Second, the bill requires MDE to provide an opportunity for a contested case hearing with respect to all permits MDE issues for any aggrieved party, rather than just for the permit applicant. Third, the bill specifies that the public hearings, informational meetings, and published notice that MDE is required to provide are to be located in the zip code of the proposed project. Finally, the bill requires the preparation and submission of an environmental impact statement (EIS) by applicants for an air quality permit to construct.

Fiscal Summary

State Effect: Significant increase in general fund expenditures for MDE and the Office of Administrative Hearings to handle the increase in workload anticipated as a result of the bill's changes. Additional increase in State expenditures for State agencies (as permittees) to the extent the bill results in a delay in the issuance of permits or an increase in costs associated with the permit process. No direct effect on revenues.

Local Effect: Potential significant increase in local expenditures to handle the anticipated increase in workload for delegated permits. Potential significant impact on local governments (as permittees) to the extent the bill results in a delay in the issuance of permits or in an increase in costs associated with the permit process.

Small Business Effect: Meaningful.

Analysis

Current Law: For certain types of permits, MDE is required to provide the public with an opportunity to review and comment on the department's decision to issue or deny a permit. The following is a brief summary of major elements of the law:

- The initial stage of the required review process provides for a public comment period when written comments are accepted. Next, MDE creates an opportunity for an open informational meeting about the proposed activity or project. No decisions about issuing or denying the permit are made at that point. A notice announcing the meeting is placed in a newspaper, and a copy of the permit application is available for review in the local library.
- Later, MDE makes a tentative (preliminary) decision to issue or deny the permit and holds a public hearing. A notice announcing the hearing and the period of time that the hearing record is open for written comment (usually at least a week beyond the actual hearing date) is also placed in a newspaper. Technical information used by MDE in developing its tentative determination and a copy of a draft permit (if the tentative decision is to issue a permit) is available for review in the local library.
- After the hearing, MDE responds to all comments received and makes a final decision on issuing or denying the permit, and a notice to this effect is published in the newspaper.

Not all permits require public participation or notification. Generally, public comment is solicited when required by law for specific permits. These permits involve air, water, and waste management activities that have the potential for significant harm to the environment or public health. The following permits are subject to the public participation requirements specified under Title 1, Subtitle 6 of the Environment Article:

- specified air quality control permits to construct;
- specified permits to install, materially alter, or materially extend landfill systems and incinerators;
- specified water discharge permits;
- specified sewage sludge permits;
- specified controlled hazardous substance facility permits;
- specified hazardous material facility permits; and
- specified low-level nuclear waste facility permits.

MDE is *not* required to provide an opportunity for a contested case hearing to any party *other than the applicant* in connection with any permit issued under the Environment Article, except for the permits listed above. A person may request a contested case hearing to appeal a final determination if the person makes factual allegations with sufficient particularity to demonstrate that the person is aggrieved by the final determination and that the final determination is legally inconsistent with applicable provisions of law or based upon an incorrect determination of a relevant and material fact.

MDE's *Public Participation Guide Citizen Handbook* (which can be found at <http://www.mde.state.md.us/assets/document/MDEPublicParticipationGuide2006.pdf>) provides an overview of MDE's permitting and public participation process. A flow chart that summarizes the process can be found on page 23 of that document.

Applicants for an air quality permit to construct are required to prepare an ambient air quality impact analysis regarding the proposed construction. State law does not automatically require those permit applicants to prepare and submit an EIS. However, regulations relating to water supply, sewerage, solid waste, and air pollution authorize MDE to require a draft EIS if the department determines, after the environmental review, that significant environmental impacts may occur and cannot be adequately mitigated or that specified conditions set forth in federal regulations exist.

Background: MDE issued 10,455 permits and licenses in 2007. MDE advises that, going beyond legal requirements, it encourages permit applicants for major projects or activities to communicate with the public outside of the formal public review process required by law. MDE encourages permit applicants to seek out known community groups and local elected officials and meet with them prior to submitting a permit application. This allows citizens a chance to make any concerns known early in the process and provides the applicant an opportunity to begin to address issues before the formal review process begins.

State Expenditures:

Maryland Department of the Environment

General fund expenditures increase significantly, primarily as a result of the bill's provision that expands the opportunity for contested case hearings to any specified party, not just the applicant. Although a reliable estimate of the number of additional requests for contested case hearings as a result of the bill cannot be made, the following information is helpful in understanding the potential impact of the bill:

- in 2008, MDE's Mining Program issued 16 permits that may be affected by the bill's changes;
- in 2008, MDE's Air and Radiation Management Administration issued 776 permits to construct, of which 44 permits to construct were subject to expanded public participation including the opportunity for a contested case hearing;
- even in a simple case, an appeal takes three to five workdays of staff time; and
- while many of the permits MDE issues are of no particular interest to the public, others are certain to generate many additional requests for contested case hearings.

For illustrative purposes, if 75% of the permits identified above, or an additional 560 permits annually, were involved in contested case hearings, MDE's costs would increase significantly by more than \$640,000 in fiscal 2010, which accounts for the bill's October 1, 2009 effective date. This estimate, which assumes that an average of four additional days of staff time would be required for each permit, reflects the cost of hiring three assistant Attorneys General, four public health engineers, one geologist, and one office secretary to track appeals and defend permit decisions. It includes salaries, fringe benefits, one-time start-up costs, and ongoing operating expenses. It does not include additional costs borne by MDE with respect to the Office of Administrative Hearings (OAH) (described below). Future year expenditures would reflect annualization and inflation.

Even if MDE hires additional staff to handle the anticipated increase in workload, MDE advises that permit turnaround times are likely to increase as a result of the bill.

MDE can handle the bill's requirement to establish an Environmental Leadership Group with existing resources.

Office of Administrative Hearings

The bill also results in a significant increase in workload for OAH to hold additional hearings delegated by MDE. OAH advises, that on average, MDE hearings take three days to complete, and for each hour devoted to hearings, an administrative law judge devotes two hours to writing a decision.

Although a reliable estimate of the number of additional hearings that will be delegated to OAH cannot be made at this time, *for illustrative purposes*, if, as described above, 560 additional contested cases are processed due to appeals, and if 10% of those cases are delegated to OAH, costs increase by almost \$200,000 in fiscal 2010, which accounts for the bill's October 1, 2009 effective date. This estimate reflects the cost of hiring two administrative law judges to handle the additional cases. It includes salaries, fringe benefits, one-time start-up costs (including digital recording equipment), and ongoing operating expenses. Future year expenditures would reflect annualization and inflation.

OAH advises that its expenditures are typically funded with reimbursable funds by the agency that delegates the hearings. Accordingly, it is assumed that any increase in expenditures for OAH is ultimately borne by MDE and *in addition to* MDE's other costs described above. For informational purposes, the Governor's proposed fiscal 2010 budget for MDE includes \$184,896 in general funds for OAH.

State Expenditures:

Other State Agencies

General fund, Transportation Trust Fund, and special fund expenditures may increase for other State agencies seeking to obtain environmental permits. For example, the Maryland Department of Transportation alone applies for hundreds of environmental permits each year and therefore faces additional costs to comply with the bill. Moreover, State agencies may be adversely impacted by any delay in the issuance of permits that results from the bill.

Local Expenditures: Local governments are subject to various permits issued by MDE. Accordingly, local governments may be adversely impacted by any delay in the issuance of permits that results from the bill. In addition, local governments may incur additional costs to participate as witnesses in contested case hearings, prepare environmental impact statements for air quality permits to construct as required by the bill, and handle the anticipated permit review workload with respect to the issuance of permits delegated to local governments by MDE. The overall impact to local governments cannot be estimated at this time; however, MDE and several local governments have advised that costs just to prepare an environmental impact statement may total tens of thousands of dollars per project.

Small Business Effect: The number of small businesses affected by the bill is unknown; however, it may be significant. According to 2001 data from the U.S. Census Bureau's *Survey of U.S. Businesses*, 92.6% of Maryland firms employ fewer than 50 people. Because many businesses are subject to various permits issued by MDE, any delay in the issuance of permits that results from the bill may have a significant impact on affected entities. In addition, any businesses required to prepare an environmental impact statement (for air quality permits to construct) will incur significant costs; MDE advises that such costs may total tens of thousands of dollars. Although many businesses subject to that requirement are likely to be large, MDE advises that some of them (for example, a crematory) may be small businesses.

Additional Information

Prior Introductions: A nearly identical bill was introduced in the 2008 session as SB 508 and received an unfavorable report from the Senate Education, Health, and Environmental Affairs Committee.

Cross File: None.

Information Source(s): Montgomery, Washington, and Worcester counties; Maryland Department of the Environment; Department of Legislative Services

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mcp/ljm

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