Department of Legislative Services

Maryland General Assembly
2010 Session

FISCAL AND POLICY NOTE

Senate Bill 420 (Senator Colburn, *et al.*)
Education, Health, and Environmental Affairs

Environment - Stormwater Management - New Development and Redevelopment Projects

This emergency bill delays the applicability of stormwater regulations recently adopted by the Maryland Department of the Environment (MDE) by 10 years, from May 4, 2010 to May 4, 2020.

Fiscal Summary

State Effect: The bill may result in an additional operational burden for the Water Management Administration at MDE to revise regulations and alter long-term planning activities. In addition, State capital expenditures for construction projects could be affected to the extent that costs under the recently adopted stormwater regulations vary from costs under the older regulatory regime.

Local Effect: Local government expenditures decrease for some jurisdictions that would have been required to obtain additional personnel and resources to implement the new MDE stormwater regulations that are delayed under this bill. However, local government expenditures may also increase significantly for certain jurisdictions that can no longer rely on the recently adopted MDE regulations to lower pollutant loading from stormwater discharges as currently planned and as required by federal law; new and potentially more expensive means of satisfying these requirements may be required. Local capital expenditures may also be affected to the extent that costs under the recently adopted stormwater regulations vary from costs under the older regulatory regime.

Small Business Effect: Meaningful.

Analysis

Current Law: State law requires each county and municipality to adopt ordinances necessary to implement a stormwater management program and to restrict the development of any land unless the landowner has submitted a stormwater management plan consistent with the local ordinance. The county or municipality has the authority to approve or disapprove stormwater management plans.

In general, a person may not develop any land for residential, commercial, industrial, or institutional use without submitting, and getting approval of, a stormwater management plan from the county or municipality that has jurisdiction. The developer must certify that all land development will be done according to the approved plan. A State or federal agency may not undertake any construction activity unless the agency has submitted and obtained approval of a stormwater management plan from MDE.

Criminal, civil, and administrative penalties apply to violations of the State's stormwater management provisions. Every three years, MDE is required to review the stormwater management programs in the counties and municipalities and monitor their implementation. MDE is also required to provide technical assistance, training, research, and coordination services to local governments in the preparation and implementation of their stormwater management programs.

Chapters 121 and 122 of 2007, among other things, required MDE to establish regulatory requirements regarding the use of environmental site design in stormwater management practices. In October 2008, MDE proposed regulations to implement the Stormwater Management Act of 2007. The regulations, which were adopted on May 4, 2009, require the use of "environmental site design" (ESD) to the maximum extent practicable in stormwater management practices. "Environmental site design" means using small-scale stormwater management practices, nonstructural techniques, and better site planning to mimic natural hydrologic runoff characteristics and minimize the impact of impervious surfaces from land development. "Maximum extent practical" means designing stormwater management systems so that all reasonable opportunities for using ESD planning techniques and treatment practices are exhausted and, only where absolutely necessary, a structural measure is implemented. The goal of the regulations is to maintain after development as nearly as possible the predevelopment runoff characteristics.

The new stormwater regulations apply to new projects that do not have approved erosion and sediment control and stormwater management plans by May 4, 2010 (one year from the date of the final adoption of the regulations).

Background:

Stormwater an Increasing Problem for the Chesapeake Bay

According to MDE, while nitrogen loading to the Chesapeake Bay from agricultural and wastewater sources in Maryland has been decreasing since 1985, loading from developed areas during that same timeframe has been increasing. MDE's new stormwater regulations are expected to slow down the loading increase.

MDE's Recently Revised Stormwater Regulations

During the regulatory development process and since the adoption of MDE's new stormwater regulations, numerous concerns have been raised by local jurisdictions, developers, and others. In general, those concerns relate to the applicability of the regulations and the associated grandfathering date; the cost and feasibility of ESD in particular situations; potential conflicts of the regulations regarding redevelopment with the State's Smart Growth efforts; and enforcement and long-term maintenance of ESD practices.

MDE advises that, in implementing the regulations, there will be flexibility for case-by-case review that will take local priorities and plans into account. In addition, MDE announced that it is developing additional local guidance regarding the use of variances for exceptional circumstances. This guidance is expected to be published soon.

Many of the comments MDE received during the public comment period on the proposed regulations related to grandfathering. The majority of commenters, including local approval authorities, noted that it would be unfair to impose new criteria on projects already approved and that development already under construction would need to be redesigned if no grandfathering were allowed. Based on the comments received and on MDE's past experience, MDE determined that a May 4, 2010 deadline (one year after the adoption of the regulations) was reasonable. This coincides with the time localities have to adopt revised stormwater management ordinances, although it is expected that many local governments will not meet this deadline. Some local representatives and other entities have suggested that the grandfathering provision be extended so as to allow for some projects already in the pipeline to go forward without being subject to the new requirements.

Cost Comparison of Traditional Stormwater Facilities and New ESD Practices

According to the National Research Council (NRC), there is limited data and literature available from which to compare the costs of nonstructural stormwater practices with the costs of traditional stormwater facilities. Costs of both traditional facilities and newer

forms of stormwater management practices may also vary greatly based on location and specific characteristics of the project involved. In addition, the two types of stormwater management involve very different types of costs. While traditional, structural facilities may involve lower initial costs for construction and land acquisition, ESD practices generally have lower long-term operation and maintenance costs and may require less future investment in the municipal stormwater system. Overall, NRC concluded that individual controls on stormwater discharges are currently inadequate, and recommended that stormwater control must be designed systematically, including the use of both traditional best management practice facilities and modern, nonstructural ESD practices.

State Expenditures: State agencies, like regulated entities, must comply with stormwater management regulations. Thus, deferring implementation of MDE's new stormwater regulations could have an impact on State capital expenditures. However, it is unclear whether and to what extent State capital expenditures are affected, as the costs of traditional stormwater practices versus the costs of ESD vary considerably depending on the project. While ESD may require more investment up front for construction and land acquisition, ESD practices generally have lower long-term operation and maintenance costs.

Local Expenditures: Similar to the impact on State agencies, it is unclear whether and to what extent local capital expenditures for construction projects are affected by deferring implementation of the new stormwater regulations as the costs of traditional stormwater practices versus the costs of ESD vary considerably depending on the product.

However, there is at least some administrative savings likely for some local governments, since local governments are responsible for administering stormwater management provisions. At least one jurisdiction reports that it has not yet hired additional personnel that it plans to hire in the absence of the bill. Another jurisdiction indicates that its current backlog of stormwater permitting activities will likely decrease under the bill if it is able to revert to permitting under the older stormwater regulations. For these jurisdictions, there is a direct decrease in administrative expenditures and a potential indirect increase in future tax revenue from additional or expedited development and associated economic activity.

On the other hand, several jurisdictions caution that the bill will cause an additional operational burden to revise documents and otherwise revert to the older stormwater regulatory regime. For jurisdictions that have already implemented the changes required under MDE's new stormwater regulations, the administrative burden and expenditures already incurred represent a sunk cost.

In addition, expenditures may also increase significantly for a jurisdiction to meet the requirements of federal stormwater permits, to the extent that its stormwater planning efforts under the new regulations requiring ESD are disrupted by the bill. If the jurisdiction is required to revert to the prior stormwater regulations until May 4, 2020, it may no longer be able to incorporate the expected reductions in pollutant loading associated with the new ESD regulations. In this case, a jurisdiction may need to revise its plans to require greater reductions from other sources of water pollution, whether from publicly owned facilities, new or existing industries, or through the implementation of other, potentially more expensive, efforts.

Small Business Effect: The bill has a meaningful positive impact on developers and others to the extent that (1) the deferral of MDE's new stormwater regulations enables some projects to go forward without being redesigned; or (2) the bill reduces stormwater-related costs that might otherwise be incurred. As noted above, although the initial costs to implement ESD may be higher than traditional stormwater methods, over time, MDE's new regulations are anticipated to be cost-neutral or possibly even less costly, particularly from lower maintenance costs. By delaying the implementation of MDE's regulations, the bill also has a meaningful negative impact on small businesses engaged in the design and construction of ESD practices; according to MDE, many of the engineering firms that provide ESD services are small businesses.

Additional Comments: Legislative Services advises that the U.S. Environmental Protection Agency (EPA) is in the process of developing new stormwater regulations. Although the new regulations are to apply nationwide, EPA has specified stormwater practices affecting the Chesapeake Bay as one of five primary concerns. In addition, EPA guidance documents focus extensively on the use of nontraditional, nonstructural stormwater practices, components of which are currently set forth in the new MDE stormwater management regulations. Currently, EPA projects final action on the stormwater management regulations in late 2012. Further, pursuant to a federal court order, EPA has begun the process of establishing a comprehensive nutrient budget for the Chesapeake Bay watershed, known as Total Maximum Daily Load. In order to complete this, MDE is required to submit a watershed implementation plan to EPA by June 1, 2010. Thus, federal regulatory efforts may require MDE to readopt the new ESD regulations, or another more stringent framework of stormwater regulation, before May 4, 2020.

Additional Information

Prior Introductions: None.

Cross File: HB 964 (Delegate Haddaway, *et al.*) - Environmental Matters.

Information Source(s): Anne Arundel, Kent, Washington, and Worcester counties; City of Laurel; Maryland-National Capital Park and Planning Commission; Board of Public Works; Department of Natural Resources; Maryland Department of Planning; Maryland Department of the Environment; Maryland Association of Counties; Maryland Municipal League; U.S. Environmental Protection Agency; National Research Council; Department of Legislative Services

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