

Department of Legislative Services
Maryland General Assembly
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FISCAL AND POLICY NOTE

Revised

Senate Bill 1128

(Senator Colburn)

Education, Health, and Environmental Affairs

Environmental Matters

**Board of Public Works - Licenses to Dredge and Fill on State Wetlands - Working
Marinas**

This emergency bill authorizes the Board of Public Works (BPW) to issue a tidal wetlands license for a specified development project to expand a marina located in an area where the water depth is less than 4.5 feet at mean low water and on a waterway without strong flushing if the project: (1) enhances aquaculture activities or seafood operations; (2) is located in a marina or seafood operation at a marina operated by a nonprofit organization to promote aquaculture activities or oyster restoration; (3) does not adversely impact submerged aquatic vegetation (SAV); and (4) will further the policies of the State related to aquaculture. The license may authorize dredging to improve navigational access to the marina or marina facility operations. BPW may only issue licenses under the bill if the license applicant has obtained specified local, State, and federal authorizations.

Fiscal Summary

State Effect: Since it is assumed that this bill will apply in a limited number of cases, State finances are not materially affected.

Local Effect: The bill does not directly affect local government operations or finances.

Small Business Effect: Minimal overall impact on small businesses. However, at least one nonprofit organization could benefit significantly to the extent the bill results in the issuance of a tidal wetlands license necessary for it to move forward with its proposed project.

Analysis

Bill Summary: The bill applies to a development project to expand a marina that historically operated as a working marina for the sole purpose of supporting aquaculture or seafood operations. It does not apply to a development project to expand a marina if the existing or expanded marina is used to allow a person to moor, dock, or store recreational or pleasure vessels.

BPW is prohibited from issuing a tidal wetlands license under the bill unless the license applicant has obtained the following authorizations: (1) local planning or zoning authorization; (2) an aquaculture lease; (3) a water column lease issued by BPW or a submerged land lease issued by the Department of Natural Resources (DNR); and (4) specified permits issued by the U.S. Army Corps of Engineers (USACE).

Current Law:

The Maryland Department of the Environment's Wetlands and Waterways Program

The Wetlands and Waterways Program within the Maryland Department of the Environment (MDE) administers a statewide program for the management, conservation, and protection of Maryland's tidal wetlands and nontidal wetlands and waterways, including the 100-year floodplain. Permits granted for work in privately owned wetlands are issued by MDE; licenses granted for work in State-owned wetlands are issued by BPW.

In general, a person may not dredge; fill; construct, reconstruct, or repair structures; conduct certain other activities over, on, in, or under State tidal wetlands; or alter State tidal wetlands without a license issued by BPW. MDE is required to forward a report of its recommendations to BPW on each tidal wetlands license application; the report must state whether a license should be granted and any terms or conditions that should be attached to a license. Current MDE regulations describe numerous criteria MDE must use in evaluating tidal wetlands license applications.

With respect to the construction or expansion of marinas in tidal wetlands, current MDE regulations establish marina siting guidelines. In general, new marina development and the expansion of existing marinas must be located: (1) to avoid and minimize impacts to tidal wetlands and other aquatic resources; and (2) on waterways with strong flushing characterized by specified factors. In addition, new marina development and the expansion of existing marinas may not be located in areas where: (1) the natural depth is 4.5 feet or less at mean low water unless the marina basin is excavated from upland; and (2) their presence would adversely impact SAV; productive macroinvertebrate communities; shellfish beds; spawning or nursery areas; rare, threatened, or endangered species or

species in need of conservation; or historic waterfowl staging areas. Expansion of existing marinas is favored over development of new marinas.

Current BPW regulations state that, whenever possible, a license applicant must obtain approvals in the following order: (1) obtain local approvals up to the building permit stage; (2) apply concurrently to USACE and MDE using a joint federal and State wetlands application form; (3) obtain the general tidal wetlands license from MDE or the State wetlands license from BPW; (4) obtain the USACE permit; and (5) obtain the local building permit.

Under current BPW regulations, a nonrecurring, nonrefundable license fee of \$1,000 applies for any individual license authorizing a riparian commercial structure or activity when the structure or activity aids the expansion or operation and is intended to increase the revenue of the commercial enterprise or is an improvement to navigation. License fees are paid into the Wetlands and Waterways Program Fund within MDE.

With specified exceptions, tidal wetlands license applicants are also generally subject to MDE's Wetlands and Waterway Program application fees. All MDE wetlands permit applications must be accompanied by a \$750 application fee; however, certain major projects are charged an application fee that ranges from \$1,500 to an amount equal to the impact area in acres multiplied by \$7,500 when the proposed permanent impact is one acre or more. Some activities are exempt from the fees, including stream restoration, vegetative shoreline stabilization, wetlands creation, or other projects in which the primary effect is to enhance the State's wetlands or water resources. Application fees, which may be adjusted annually for inflation, are paid into MDE's Wetlands and Waterways Program Fund. On February 5, 2010, MDE eliminated permit application and impact fees for commercial aquaculture. Because oysters serve a vital ecological role by filtering sediment and other particles from the water column and provide a unique bottom habitat for numerous aquatic species, MDE determined that aquaculture activities fall under the existing statutory exemption for projects that enhance the State's wetlands or water resources.

Aquaculture and Submerged Land Leases

In an effort to encourage the expansion of the aquaculture industry in the State, Chapters 173 and 174 of 2009 require DNR to establish Aquaculture Enterprise Zones (AEZs) in the Chesapeake Bay by regulation. AEZs are areas of the bay approved for the leasing of submerged land or the water column. DNR is authorized to issue aquaculture leases only in AEZs. Aquaculture leases are leases of any submerged land and occasionally the water column, in an AEZ, for cultivating oysters or other shellfish for commercial purposes. Aquaculture leaseholders are limited to engaging in specified shellfish cultivation practices. Aquaculture activities within AEZs are exempt from the

requirement to obtain a tidal wetlands license from BPW. However, a person who wishes to obtain a water column lease outside of an AEZ must apply for a tidal wetlands license.

DNR is also authorized to issue submerged land leases in the Atlantic Coastal Bays and in nonAEZ areas of the Chesapeake Bay. A “submerged land lease” is any land lying beneath the waters of the State leased by the State to any person for cultivating oysters and other shellfish for commercial purposes. These leases are subject to water quality requirements approved by MDE. In the Atlantic Coastal Bays, DNR is authorized to establish submerged land areas that are preapproved, not approved, or may be approved for leasing, with consideration being given to potential conflicts with other uses.

In order to obtain an aquaculture or submerged land lease, individuals must submit specified application information and a nonrefundable application fee to DNR. Such leases are limited to a term of 20 years and assessed an annual rental rate and an aquaculture development surcharge determined by DNR. Proceeds from the rental rates are credited to DNR’s Fisheries Research and Development Fund, and proceeds from the aquaculture development surcharge are credited to the Maryland Department of Agriculture for development of, and training and grants for, aquaculture. DNR advises that the development surcharge is being waived for an unspecified period of time.

Background: In December 2009, Governor Martin O’Malley proposed a new management and restoration plan for oysters and the Maryland oyster industry. The proposal seeks to increase Maryland’s network of oyster sanctuaries, expand oyster aquaculture leasing opportunities, and maintain 167,720 acres of natural oyster habitat for a public oyster fishery. During January 2010, DNR held a series of open houses to solicit public comments on the oyster plan’s proposed implementation regulations. Comments and suggestions were collected and are currently being reviewed.

Aquaculture operations sometimes require improved access to navigable waters and the development of working marinas. To develop a marina on State wetlands, however, a person must obtain a tidal wetlands license from BPW. In some cases, proposed aquaculture projects involving marinas may not meet the marina-siting guidelines established by MDE and thus may not qualify for a tidal wetlands license. This bill provides a limited exemption from the marina-siting requirements for specified projects.

The Waterman’s Trust is a 501(c)3 nonprofit organization that applied to MDE for a tidal wetlands license to expand an existing marina located on Tedious Creek in Dorchester County. The goals of the organization include oyster restoration, economic stimulus and recovery, and wetland creation and preservation. According to MDE, the proposed 38-slip marina expansion was designed to complement an upland oyster culture operation and a proposed 1,000-acre aquaculture lease in Fishing Bay. To date, MDE has not submitted a favorable report and recommendation to BPW regarding the license

application because the proposed project does not meet the minimum water depth requirements of 4.5 feet at mean low water or the requirement that the waterway have strong flushing. Under the bill's changes, however, a favorable recommendation could be made.

BPW is not aware of any other proposed projects to which this bill would apply, and MDE concurs that the bill would likely apply only in a few unique situations.

Additional Information

Prior Introductions: None.

Cross File: HB 1568 (Delegates Conway and Mathias) - Environmental Matters.

Information Source(s): Maryland Department of the Environment; Board of Public Works; Department of Natural Resources; Maryland Department of Agriculture; Department of Health and Mental Hygiene; Maryland Department of Transportation; Charles, Frederick, and Montgomery counties; City of Frederick; Department of Legislative Services

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