

HB 800

Department of Legislative Services

Maryland General Assembly

2013 Session

FISCAL AND POLICY NOTE

House Bill 800 (Delegate Frush)
Environmental Matters

Wetlands and Riparian Rights - Licenses and Permits for Nonwater-Dependent Projects on State or Private Wetlands

This bill generally alters the conditions for issuance of a license or permit by the Board of Public Works (BPW), the Maryland Department of the Environment (MDE), or a local government for a “nonwater-dependent project” to be located on a pier in State or private wetlands. The bill establishes separate standards for projects involving small-scale renewable energy systems and a process for approving projects through an “after-the-fact” license.

The bill takes effect July 1, 2013.

Fiscal Summary

State Effect: Special fund revenues to MDE's Wetlands and Waterways Program Fund increase beginning in FY 2014 to the extent that the bill results in an increase in license or permit applications submitted for nonwater-dependent projects on piers over State or private wetlands, as applicants pay any required application fees, license fees, and compensation. Assuming the bill does not result in a significant increase in applications, the bill's changes can likely be handled by MDE, BPW, and the Critical Area Commission with existing budgeted resources.

Local Effect: Local government expenditures may increase minimally for any jurisdiction that amends its local critical area program pursuant to the bill's changes.

Small Business Effect: Potential meaningful.

Analysis

Bill Summary: The bill defines a “nonwater-dependent project” as a temporary or permanent structure that, by reason of its intrinsic nature, use, or operation, does not require location in, on, or over State or private tidal wetlands. A “nonwater-dependent project” includes: (1) a dwelling unit on a pier; (2) a restaurant, shop, office, or other commercial building on a pier; (3) a temporary or permanent roof or covering on a pier; (4) a pier used to support a nonwater-dependent use; and (5) a small-scale renewable energy system on a pier, including a solar, geothermal, and wind energy system.

Repeal of Current BPW and MDE Conditional Authority to Issue Wetlands Licenses and Permits

The bill repeals the conditional authorization for BPW and MDE to issue a license or permit for a project involving the construction of a nonwater-dependent structure on a pier located on State or private wetlands. Under this current authorization, BPW and MDE may issue a license or permit if the project (1) is located in a marina owned by specified public entities; (2) enhances maritime transportation, the preservation of an historic lighthouse, or the construction of specified replicas; (3) is approved by local planning and zoning authorities; and (4) is located in a priority funding area or an area that has been excluded from a local critical area program.

The bill also repeals another conditional authorization for the issuance of a license or permit for a project involving the construction of either a dwelling unit or another nonwater-dependent project on a pier located on State or private wetlands. Under this current authorization, BPW and MDE, or a local government for a project in the Chesapeake and Atlantic Coastal Bays Critical Area, may issue a license or permit if several conditions are satisfied, including that: (1) the pier is verified as in existence as of December 1, 1985; (2) the project does not expand the pier by more than specified amounts; (3) the project is approved by local planning and zoning authorities; (4) the project is located in an Intensely Developed Area of the Critical Area; and (5) the project allows public access to tidal waters, if appropriate.

The bill also repeals other specified conditions that must be met for projects involving the construction of a dwelling unit or other nonwater-dependent facility on a pier located on State or private wetlands within the Critical Area to be licensed or permitted. Currently, for such projects, the applicant must (1) demonstrate that the project will not have a long-term adverse effect on the adjacent body of water; (2) improve the water quality of existing stormwater runoff from the project site into adjacent waters; and (3) demonstrate that any sewer or utility lines extended for the pier will not adversely affect the water quality of adjacent waters.

Modified Conditions for License and Permit Issuance of Nonwater-dependent Projects

The bill authorizes BPW to issue a license, the Secretary of the Environment to issue a permit, and a local government to issue a building permit or other approval that allows a nonwater-dependent project to be located on State or private wetlands under specified conditions. The project must:

- involve a commercial activity that is permitted as a secondary or accessory use to a permitted primary commercial use;
- not be located on a pier that is attached to residentially, institutionally, or industrially used property;
- be approved by the local planning and zoning authorities after the local jurisdiction's program amendment, if applicable, has been approved;
- allow or enhance public access to State wetlands, if applicable;
- not expand beyond the length, width, or channelward encroachment of the pier on which the project is constructed;
- have a height of no more than 18 feet unless the project is located at a marina; and
- not be more than 1,000 square feet in total area.

In addition, the project must either be located in (1) an Intensely Developed Area and authorized under a program amendment to a local jurisdiction's critical area program approved on or after July 1, 2013, if the approved program amendment includes necessary changes to the local jurisdiction's zoning, subdivision, and other ordinances so as to be consistent with, or more restrictive than, these conditions or (2) an area that has been excluded from a local critical area program if the exclusion has been adopted or approved by the Critical Area Commission.

The bill establishes slightly different conditions between projects in State and private wetlands for which a BPW license or MDE permit is required and for projects in State or private wetlands in the Critical Area for which a local building permit or other approval is required. For a BPW license or MDE permit, the following conditions must also be satisfied: (1) the project must avoid and minimize impacts to State wetlands and other aquatic resources; (2) MDE must recommend the additional height of a project, if the project is not located at a marina; (3) the project must not be located in, on, or over vegetated tidal wetlands, submerged aquatic vegetation, a natural oyster bar, a public shellfish fishery area, a Yates bar, or an area with rare, threatened, or endangered species, or species in need of conservation; and (4) the project must not adversely impact a fish spawning or nursery area or an historic waterfowl staging area.

For a project that is located on a pier that was in existence by December 31, 2013, a license or permit may be issued if the project has a temporary or permanent roof or

covering that is no more than 1,000 square feet in total area (if applicable) and satisfies all of the conditions discussed above, except for the requirements to (1) be no more than 1,000 square feet in total area; (2) not be located in, on, or over vegetated tidal wetlands, submerged aquatic vegetation, a natural oyster bar, a public shellfish fishery area, a Yates bar, or an area with rare, threatened, or endangered species, or species in need of conservation; and (3) not adversely impact a fish spawning or nursery area or an historic waterfowl staging area.

MDE may issue a permit to authorize a nonwater-dependent project located on private wetlands without meeting the requirement related to public access.

Licenses and Permits for Small-scale Renewable Energy System Projects

The bill also authorizes BPW to issue a license, MDE to issue a permit, and a local government to issue a building permit or other approval, that allows a nonwater-dependent project for a small-scale renewable energy system to be located on State or private wetlands under specified conditions.

The small-scale renewable energy system project must (1) involve the installation or placement of a system that is permitted as a secondary or accessory use on a pier; (2) be located in either the critical area and authorized under a program amendment to a local jurisdiction's critical area program approved on or after July 1, 2013, if the approved program amendment includes necessary changes to the local jurisdiction's zoning, subdivision, and other ordinances so as to be consistent with or more restrictive than the requirements of this bill, or be located in an area that has been excluded from a local critical area program if the exclusion has been adopted or approved by the Critical Area Commission; and (3) be approved by the local planning and zoning authorities after the jurisdiction's program amendment has been approved, if applicable.

The bill establishes slightly different conditions between small-scale renewable energy system projects in State wetlands for which a BPW license or MDE permit is required and for projects in State or private wetlands in the Critical Area for which a local building permit or other approval is required. For a BPW license or MDE permit, the project must also (1) avoid and minimize impacts to State wetlands and other aquatic resources; (2) not be located in, on, or over vegetated tidal wetlands, submerged aquatic vegetation, a natural oyster bar, a public shellfish fishery area, a Yates bar, or an area with rare, threatened, or endangered species or species in need of conservation; and (3) not adversely impact a fish spawning or nursery area or an historic waterfowl staging area.

A license for a small-scale renewable energy system may include the installation or placement of one of five types of renewable energy systems:

- a solar energy system attached to a pier if the system does not extend more than four feet above or 18 inches below the deck of the pier, or one foot beyond the edge of the pier;
- a solar energy system attached to a piling if there is only one solar panel per boat slip;
- a solar energy system attached to a boathouse roof if the system does not extend beyond the length, width, or height of the roof;
- a closed-loop geothermal heat exchanger under a pier if the equipment does not (1) extend beyond the length, width, or channelward encroachment of the pier; (2) deleteriously alter long shore drift; and (3) cause significant individual or cumulative thermal impacts to aquatic resources; or
- one wind energy system attached to a pier of up to 12 feet in height (and a rotor diameter of up to 4 feet) with setbacks from the nearest property line and from the channelward edge of the pier of at least 1.5 times the height of the system.

Annual Compensation Rates

The bill requires BPW to establish an annual compensation rate for nonwater-dependent projects located on State wetlands (except for small-scale renewable energy systems). BPW must assess a minimum annual compensation rate that is based on the most recent data provided by the State Department of Assessments and Taxation (SDAT) in the assessment record for the real property to which the nonwater-dependent project is attached. The rate must be computed by multiplying the total square footage of the project by a fraction, the denominator of which is the total square footage of the property, and the numerator of which is the assessed land value of the property. BPW may periodically recalculate the minimum annual compensation rate to reflect any change to the data provided by SDAT. BPW may assess an annual compensation rate for a nonwater-dependent project that is more than the minimum rate calculated in the formula described above.

After-the-fact Wetlands Licenses and Permits

The bill specifies that for a nonwater-dependent project in existence on December 31, 2012, for which a State tidal wetlands license or a private tidal wetlands permit has not been issued, a person may apply to MDE for an after-the-fact tidal wetlands license or permit by July 1, 2014 (unless extended by MDE), which must be evaluated under specified criteria and all other applicable State and local laws in effect on the date that the application is filed. If BPW issues an after-the-fact State tidal wetlands license, compensation must be in accordance with the rate established by the bill and any regulations adopted under the bill.

If a person does not apply for a license or permit by July 1, 2014 (unless extended), or if MDE denies an after-the-fact license or permit and that denial is upheld on final appeal, then the person must remove the unauthorized nonwater-dependent project.

Prospective Application

Finally, the bill is to be construed prospectively with respect to State tidal wetlands licenses or private wetlands permits and the payment of compensation for a State tidal wetlands license. BPW may only require the payment of additional compensation for a State tidal wetlands license in effect as of July 1, 2013, if the licensee applies for a new license for a project that materially alters the nature or expands the magnitude of an already existing, licensed nonwater-dependent project.

Current Law/Background:

Wetlands Regulation in Maryland

Licenses for projects in State tidal wetlands are issued by BPW. Permits for projects in private tidal wetlands are issued by MDE.

In general, BPW and MDE may not issue a tidal wetlands license or a wetlands permit for any project involving the construction of a dwelling unit or other nonwater-dependent structure on a pier located on State or private wetlands, except under specified conditions, as described above. As noted above, projects on State or private wetlands within the Critical Area must also meet other specified requirements.

State law also generally prohibits a local jurisdiction from issuing a building permit for any project involving the construction of a dwelling unit or other nonwater-dependent structure on a pier located on State or private wetlands in the Critical Area, with specified exceptions, as generally described above.

MDE regulations define a “nonwater-dependent structure or activity” as a temporary or permanent structure or activity, which by reason of its intrinsic nature or operation does not require location in or over State or private tidal wetlands.

Chapter 142 of 2008 (HB 1056) established the Wetlands and Waterways Program within MDE as a statewide program for the management, conservation, and protection of Maryland’s tidal wetlands and nontidal wetlands and waterways, including the 100-year floodplain. The goal of the program is to avoid and minimize impacts associated with development and to mitigate impacts that are determined to be necessary and unavoidable. The program is supported by a Wetlands and Waterways Program Fund comprised of application fees for various wetlands and waterways permits and licenses and specified compensation rates for installation of a cable, pipeline, or other structure laid on, in, or under a State wetland. MDE’s application fees are shown in **Exhibit 1**. Some activities are exempt from the fees.

Exhibit 1
Current Wetlands and Waterways Program Application Fees

<u>Minor Project Application Fees</u>		
<u>Type of Application</u>	<u>Permanent Impact Area</u>	<u>Fee</u>
Applications for Minor Projects or General Permits	< 5,000 square feet	\$750
Applications for Minor Modifications	< 5,000 square feet	\$250
<u>Major Modification Application Fees</u>		
<u>Type of Application</u>	<u>Permanent Impact Area</u>	<u>Fee</u>
Applications for Major Modification	\geq 5,000 square feet	\$1,500
Applications for Major Projects	< $\frac{1}{4}$ acre	\$1,500
	$\leq \frac{1}{4}$ acre to < $\frac{1}{2}$ acre	\$3,000
	$\leq \frac{1}{2}$ acre to < $\frac{3}{4}$ acre	\$4,500
	$\leq \frac{3}{4}$ acre to < 1 acre	\$6,000
	\geq 1 acre	\$7,500 per acre

Fees for Certain Minor Projects

<u>Permit Type</u>	<u>Project Description</u>	<u>Fee</u>
Tidal Wetlands	Installation of an individual boatlift with two pilings	\$300
	Installation of a maximum of six pilings	\$300
	In-kind repair and replacement of structures	\$300
	Installation of a fixed or floating platform, where the total platform area (fixed and floating) does not exceed 200 square feet	\$300
	Replacement of an existing bulkhead where the replacement bulkhead does not exceed more than 18 inches channelward of the existing structure	\$500
	Construction of a nonhabitable structure that permanently impacts less than 1,000 square feet, such as a driveway, deck, pool, shed, or fence	\$300
Nontidal Wetlands and Waterways	In-kind repair and replacement of existing infrastructure	\$500

Source: Maryland Department of the Environment

BPW charges a nonrecurring, nonrefundable license fee for State tidal wetlands licenses. Current license fees range from \$50 (for certain residential spur dredging projects) to \$1,000 (for any individual license authorizing a riparian commercial structure or activity that aids the expansion or operation and is intended to increase the revenue of the riparian commercial enterprise or is an improvement to navigation). License fees are paid into MDE's Wetlands and Waterways Program Fund.

Chesapeake and Atlantic Coastal Bays Critical Area

The Chesapeake Bay Critical Area Protection Program was established by Chapter 794 of 1984 in order to minimize damage to water quality and wildlife habitat by fostering more sensitive development activity along the shoreline of the Chesapeake Bay and its tributaries. The law identified the Critical Area as all land within 1,000 feet of the mean high water line of tidal waters or the landward edge of tidal wetlands and all waters of and lands under the Chesapeake Bay and its tributaries. In 2002, the program was expanded to include the Atlantic Coastal Bays.

Maryland's Renewable Energy Portfolio Standard

Maryland's Renewable Energy Portfolio Standard requires that renewable sources generate specified percentages of Maryland's electricity supply each year, increasing to 20%, including 2% from solar power, by 2022.

State Revenues: The bill has the potential to increase the number of commercial, nonwater-dependent projects on piers that could be authorized by BPW or MDE. A reliable estimate of the increase in special fund revenues for the Wetlands and Waterways Program Fund cannot be made due to significant uncertainty regarding the effect that the bill may have on the number of applications for nonwater-dependent projects submitted, as well as the types of projects that are proposed to be constructed. Even if the bill's changes result in an increase in the demand for the construction of nonwater-dependent projects on piers over tidal wetlands, some local jurisdictions may opt to not update local critical area program laws to conform to the bill's changes.

The bill makes several changes that may result in an increase in special fund revenues for the Wetlands and Waterways Program Fund. First, MDE advises that the current evaluation criteria is outdated and may be confusing to prospective project applicants. Therefore, to the extent that the bill modernizes the conditional authorization to issue a wetlands license or permit or a local building permit for nonwater-dependent projects, the bill may attract additional project applicants.

Second, the bill authorizes small-scale renewable energy systems, a new type of project not previously authorized. Presumably, at least a few renewable energy projects will be permitted or licensed.

Third, the bill establishes a new compensation rate structure applicable to nonwater-dependent projects on piers over State's wetlands (except for small-scale renewable energy systems) that is defined in statute. Currently, except for cables, pipes, and similar structures, compensation rates are not specified in statute, but are instead set at the discretion of BPW. The bill establishes a formula based on property values that may provide additional clarity and certainty to prospective project developers and are sensitive to the relative land values throughout various jurisdictions in the State, which may also attract additional project applications.

Finally, the bill creates after-the-fact licenses and permits for nonwater-dependent projects and a grace period within which an unpermitted or unlicensed project owner may apply. Applicants for after-the-fact licenses or permits must pay relevant application fees, license fees, and compensation, depending on the project. Therefore, special fund revenues increase to the extent that the owner of existing unauthorized projects avail themselves of the opportunity to achieve compliance with State law through the use of after-the-fact licenses and permits.

Any additional applications for permits or licenses submitted to MDE or BPW as a result of the bill generates additional special fund revenue for the Wetlands and Waterways Program Fund, as program applicants pay relevant application fees, license fees, and required BPW compensation. MDE advises that, considering the bill's limits on the size of projects, it is reasonable to assume that most nonwater-dependent projects would be subject to an application fee of \$750 (for both private tidal wetlands permits and State tidal wetlands licenses) and a \$1,000 license fee plus the additional compensation rate required by BPW (for State tidal wetlands licenses). Although the amount of compensation will vary depending on the project and its location, MDE provided the following examples of potential annual compensation required by the bill for a 1,000 square foot project on a pier over State tidal wetlands in various locations:

- For a project at a restaurant in Wicomico County with a land value per square foot of \$2.73, the annual compensation required totals \$2,726.
- For a project at a hotel in Chesapeake Beach (Calvert County) with a land value per square foot of \$33.21, the annual compensation required totals \$33,207.
- For a project at restaurant in Riva (Anne Arundel County) with a land value per square foot of \$52.47, the annual compensation required totals \$52,475.
- For a project at an office building/restaurant in the Inner Harbor (Baltimore City) with a land value per square foot of \$100, the annual compensation required totals \$100,000.

MDE advises that additional uncertainty as to the impact of the bill results from the fact that local governments are not required to amend their local critical area programs to

conform with the bill's provisions. Unless a local program is amended, a nonwater-dependent project or small-scale renewable energy project cannot be approved. Some jurisdictions may opt not to update the local critical area program either because it does not perceive that sufficient demand for such nonwater-dependent projects exists, or because it does not want to authorize such projects over tidal wetlands.

Small Business Effect: The bill has the potential to have a meaningful positive impact on small businesses that are able to obtain permits or licenses for additional nonwater-dependent projects over State or private tidal wetlands as a result of the bill's changes. Any small businesses involved in the construction, engineering, or installation of any additional nonwater-dependent projects also benefit. Finally, small businesses involved in the sale and installation of small-scale renewable energy systems may also benefit. However, the number of small businesses impacted by the bill, and the magnitude of any impact, is unknown.

Additional Information

Prior Introductions: None.

Cross File: SB 524 (Senator Colburn) - Education, Health, and Environmental Affairs.

Information Source(s): Anne Arundel, Carroll, Cecil, Harford, Montgomery, and Queen Anne's counties; the towns of Bel Air and Leonardtown; State Department of Assessments and Taxation; Department of Natural Resources; Maryland Department of Planning; Maryland Department of the Environment; Public Service Commission; Department of Legislative Services

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