

Department of Legislative Services
Maryland General Assembly
2016 Session

FISCAL AND POLICY NOTE
First Reader

Senate Bill 963 (Senators Eckardt and Hershey)
Education, Health, and Environmental Affairs

Harris Creek Oyster Restoration - Vessel Damage - Compensation

This bill authorizes a vessel owner to file a claim with the Department of Natural Resources (DNR) for payment of damages if DNR or its employee makes an error or omission in the course of employment that is related to the required depth of navigable waters in the Harris Creek Oyster Restoration Project and, as a result of that error or omission, the vessel sustains damages.

Fiscal Summary

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

Local Effect: The bill is not expected to materially impact the Talbot County Circuit Court.

Small Business Effect: Minimal.

Analysis

Bill Summary: Under the bill, a claim must include a request for a hearing on the matter, be made in the manner that DNR requires, and be filed within one year of the cause of action. A claim payment is capped at \$400,000 and is made from DNR funds or the State Insurance Trust Fund (SITF).

After providing notice to interested parties and holding a hearing on the claim, DNR may either approve the claim and order payment of damages to the vessel owner or deny the

claim. DNR must order that a claim be denied if it finds that damages were the result of a reckless or negligent act on the part of the vessel owner.

If a claim is denied, the vessel owner of the denied claim may appeal the decision to the Talbot County Circuit Court, which has jurisdiction to examine the facts of the case and determine if the owner is entitled to any damages.

Current Law/Background:

Harris Creek Oyster Restoration

DNR's oyster restoration activities include the construction of restored oyster reefs, oyster production, and the promotion of oyster aquaculture. The restoration activities are funded largely with capital general obligation bond funding, federal funding from the National Oceanic and Atmospheric Administration, and smaller amounts of general and reimbursable funds. There are 51 sanctuaries in the Maryland sanctuary network, with varying quality of oyster habitat. DNR's restoration efforts are currently focused on the Harris Creek and Little Choptank River sanctuaries, chosen based on oyster population assessment, water quality, substrate conditions, and other factors. Pursuant to a project cooperation agreement with DNR, the U.S. Army Corps of Engineers (USACE) has contributed to oyster restoration efforts in the Harris Creek sanctuary and is undertaking restoration efforts in the Tred Avon River sanctuary. The Tred Avon River sanctuary restoration efforts are conducted in partnership with DNR, but substrate construction is being undertaken by USACE.

Harris Creek is a tributary of the Choptank River on Maryland's Eastern Shore. According to the Oyster Recovery Partnership, it was the first tributary selected for restoration as part of an effort to restore native oyster habitat and populations in 10 Chesapeake Bay tributaries by 2025. This goal was supported by a 2009 White House Executive Order and subsequent action plan (Executive Order: 13508 – Chesapeake Bay Protection and Restoration) and finalized in the 2014 *Chesapeake Bay Agreement* signed by Chesapeake Bay Program Partners, including the State of Maryland. Between 2011 and 2015, more than two billion oysters were planted over 350 acres, making it one of the largest oyster restoration projects worldwide.

DNR advises that it is already liable for damages related to the required depth of navigable waters in the Harris Creek Restoration Project. DNR further advises that the Harris Creek oyster reefs were constructed by DNR and USACE and that by permit, all reefs must have at least five vertical feet of clearance. There have been reports of boats running aground on oyster reefs that were restored in Harris Creek, but no claims have been filed with USACE. However, DNR advises that three claims have been filed with USACE's

subcontractor. DNR advises that its boating services division marked the area with a shoal buoy.

Maryland Tort Claims Act

Under current law, a claim must be filed in accordance with the Maryland Tort Claims Act (MTCA), processed by the State Treasurer or the Treasurer's designee, and paid from SITF.

In general, the State is immune from tort liability for the acts of its employees and cannot be sued in tort without its consent. Under MTCA, the State statutorily waives its own common law (sovereign) immunity on a limited basis. MTCA applies to tortious acts or omissions, including State constitutional torts, by "State personnel" performed in the course of their official duties, so long as the acts or omissions are made without malice or gross negligence.

MTCA limits State liability to \$400,000 to a single claimant for injuries arising from a single incident. (Chapter 132 of 2015 increased the liability limit under MTCA from \$200,000 to \$400,000 for causes of action arising on or after October 1, 2015.) The liability for an MTCA tort claim may not exceed the insurance coverage granted to units of State government under the State Insurance Program/SITF. In actions involving malice or gross negligence or actions outside of the scope of the public duties of the State employee, the State employee is not shielded by the State's color of authority or sovereign immunity and may be held personally liable.

MTCA also contains specific notice and procedural requirements. A claimant is prohibited from instituting an action under MTCA unless (1) the claimant submits a written claim to the State Treasurer or the Treasurer's designee within one year after the injury to person or property that is the basis of the claim; (2) the State Treasurer/designee denies the claim finally; and (3) the action is filed within three years after the cause of action arises.

Additional Information

Prior Introductions: None.

Cross File: HB 1169 (Delegate Mautz, *et al.*) - Environment and Transportation.

Information Source(s): Judiciary (Administrative Office of the Courts), Department of Natural Resources, Oyster Recovery Partnership, Chesapeake Bay Program, Department of Legislative Services

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