

Department of Legislative Services
Maryland General Assembly
2017 Session

FISCAL AND POLICY NOTE
First Reader

House Bill 281 (Delegate Lafferty, *et al.*)
Environment and Transportation

Environment - On-Site Sewage Disposal Systems - Best Available Technology for
Nitrogen Removal - Prohibition

This bill prohibits a person from newly installing an on-site sewage disposal system (septic system) to service property in the State that is within the Chesapeake Bay watershed, the Atlantic Coastal Bays watershed, or the watershed of a nitrogen-impaired body of water unless it utilizes the best available technology (BAT) for nitrogen removal. The bill also (1) repeals obsolete provisions related to financial assistance that was authorized for homeowners from the Bay Restoration Fund (BRF) from calendar 2010 through 2012 and (2) requires the Maryland Department of the Environment (MDE), subject to existing statutory provisions, to use BRF to assist homeowners with the cost difference between a conventional septic system and one that uses BAT, if sufficient funds are available.

Fiscal Summary

State Effect: Overall finances of the BRF Septics Account are not affected, and MDE can handle any increase in workload with existing resources, as discussed below. General fund income tax revenues may decrease minimally beginning in FY 2018 due to the application of an existing subtraction modification. The application of existing penalties to the bill's prohibition is not anticipated to materially affect State finances.

Local Effect: Local governments can absorb the bill's requirements using existing resources, as discussed below. To the extent that State income tax revenues decrease, local income tax revenues also decrease minimally.

Small Business Effect: Meaningful.

Analysis

Current Law/Background:

Legislative and Regulatory History of the Requirement to Utilize BAT vs. Conventional Technology for Septic Systems

Chapter 280 of 2009 required the installation of septic systems that utilize BAT for new construction or replacement systems in the Chesapeake and Atlantic Coastal Bays Critical Area (Critical Area). Further, Chapter 280 required MDE to assist homeowners to upgrade a conventional septic system to a system that utilizes BAT with money authorized for this purpose within BRF, if sufficient funds are available. Chapter 280 also created a subtraction modification against the personal income tax for the cost of upgrading a septic system, less any BRF assistance provided. Finally, Chapter 280 applied existing civil and administrative penalties to violations of the Act, but limited the total penalties that could be assessed to \$8,000.

In 2012, MDE adopted regulations that expanded the Chapter 280 requirements beyond the Critical Area, requiring septic systems that utilize BAT for new construction in the Chesapeake Bay watershed, the Atlantic Coastal Bay watershed, and the watershed of any nitrogen-impaired water body. The regulations also required BAT for any replacement system on property located in the Critical Area, which is consistent with the provisions of Chapter 280. Additionally, the regulations required the operation and maintenance (O&M) of a septic system utilizing BAT by the property owner for the life of the system. Finally, the regulations defined “new construction” to include the renovation or repair of a residence or other building where the approving authority determines the existing septic system is inadequate to serve the proposed alteration or altered building.

In 2016, MDE adopted new regulations that retracted the expansions established by the 2012 regulations, among other changes. The 2016 regulations established that septic systems that utilize BAT are only required for new construction in the Critical Area, unless (1) the system has a design flow of 5,000 gallons per day or greater or (2) the local jurisdiction has required septic systems utilizing BAT outside of the Critical Area in order to protect public health or the waters of the State. The regulations also redefined “new construction” to exclude the renovation, repair, or change of use of an existing residence or other building, unless the residence or building is located in the Critical Area and the approving authority finds that the residence or building’s existing septic system is inadequate to serve the proposed changes. Finally, the regulations require all systems utilizing BAT that are sold in the State to include a two-year O&M contract and a two-year warranty. The notice of final action for the 2016 regulations was published in Volume 43, Issue 23 of the *Maryland Register* on November 14, 2016, and the regulations took effect November 24, 2016.

Bay Restoration Fund

Chapter 428 of 2004 established BRF, which is administered by the Water Quality Financing Administration within MDE. The main goal of BRF is to provide grants to owners of wastewater treatment plants (WWTPs) to reduce nutrient pollution to the Chesapeake Bay by upgrading the systems with enhanced nutrient removal (ENR) technology. The fund is also used to support septic system upgrades and the planting of cover crops.

As a revenue source for the fund, Chapter 428 established a bay restoration fee on users of wastewater facilities, septic systems, and sewage holding tanks, and Chapter 150 of 2012 doubled the fee for most users. The BRF statute enumerates several uses of fee revenues, including for ENR upgrades of WWTPs, upgrades of septic systems to BAT for nitrogen removal, and funding for Maryland Department of Agriculture (MDA) cover crop activities. Between fiscal 2005 and 2009, the BRF statute authorized grants of up to \$5 million annually for a portion of the costs of projects relating to combined sewer overflows abatement, rehabilitation of existing sewers, and upgrading conveyance systems, including pumping stations. MDE advises that 28 such projects were funded with grants of \$20 million under that authority.

BRF – Septic System Upgrades

Of the BRF revenue collected from users of septic systems and sewage holding tanks, 60% must be deposited into a separate account, commonly referred to as the Septics Account, to provide grants and loans to septic system owners for the upgrade of their septic systems and to implement an education and outreach program. The remaining funds collected from users of septic systems and sewage holding tanks (40%) must be transferred to the Maryland Agricultural Water Quality Cost Share Program within MDA to provide financial assistance to farmers for planting cover crops.

As noted above, Chapter 280 of 2009 prohibits a person from newly installing or replacing a septic system on property in the Critical Area unless the installed system utilizes BAT. MDE is required to assist homeowners in upgrading a septic system with money authorized for this purpose from the Septics Account if sufficient funds are available.

Priority for funding from the Septics Account is as follows: (1) failing systems in the Critical Area and (2) other failing systems that MDE determines are a threat to public health or water quality. Septics funds can be used to cover up to 100% of (1) the cost of upgrading a septic system to BAT; (2) the cost difference between a conventional septic system and one that uses BAT; (3) the cost of repairing or replacing a failing septic system with a system that uses BAT; (4) the cost of replacing multiple septic systems in the same community with a new community sewerage system that meets ENR standards and other

specified conditions; or (5) the cost of connecting a property served by a septic system to a wastewater facility meeting specified levels of treatment. The Septics Account may also be used for specified administrative costs and, for qualifying low-income homeowners, up to 50% of the cost of an O&M contract of up to five years for a BAT septic system. MDE advises that five years of O&M is included in the initial grant amount provided for all residential BAT systems.

BRF Funding and Progress

According to the Comptroller's Office, through December 31, 2016, a total of \$895.4 million in bay restoration fees collected from wastewater facility users had been deposited in MDE's Wastewater Account. In addition, of the fee revenues collected from users of septic systems and sewage holding tanks, \$127.1 million had been deposited in MDE's Septics Account, and \$93.5 million had been provided to MDA to support the planting of cover crops. As of August 2016, BRF has supported the installation of nearly 8,127 BAT systems, of which 4,842 upgrades were completed within Maryland's Critical Areas. Further, 214 homes were connected to public sewerage using BRF. BRF has also supported ENR upgrades to 49 major wastewater facilities, with 14 other facilities under construction and 4 in the planning or design stages.

State Revenues: General fund revenues may decrease minimally beginning in fiscal 2018 to the extent that additional taxpayers claim a subtraction on their personal income tax for the difference between the cost of a BAT system and a conventional septic system, less any BRF assistance provided. Any such decrease is anticipated to be minimal.

State Expenditures:

MDE Administration

MDE advises that two regular full-time positions are needed to implement the bill's requirements, which MDE estimates would increase special fund expenditures by \$114,828 in fiscal 2018, increasing to \$164,935 by fiscal 2022. MDE notes that the expanded geography covered under the bill, and MDE's increased responsibilities for tracking and maintaining BAT systems, necessitate additional staff. The Department of Legislative Services (DLS) disagrees.

Although DLS concurs that the bill expands MDE's duties, until November 24, 2016, when the most recent regulations went into effect, MDE was implementing the bill's requirements, as discussed above. The regulations, promulgated by MDE, repealed the geographic requirements related to installation of septic systems that utilize BAT that this bill reinstates. During the rulemaking process, MDE estimated that although the number of BAT systems installed annually was expected to decline due to the regulations, the

overall fiscal impact on State agencies, including MDE, was minimal. Further, there was no indication that the department would be able to abolish any positions as a result of the regulations. Thus, DLS assumes that MDE can simply shift existing staff to resume the implementation of the bill's requirements. Accordingly, the need for new staff is not justified at this time. To the extent that existing staff prove insufficient, MDE can seek additional positions through the annual budget process.

BRF Septics Account

Overall finances of the BRF Septics Account are not affected. It is assumed that any grants provided to assist additional homeowners with BAT upgrades as a result of the bill would have been used for other allowable uses of the Septics Account in the absence of the bill.

Local Expenditures: MDE indicates that local governments must handle an estimated 703 additional applications for BAT system installations annually and that local governments must dedicate resources to process required testing and applications. DLS disagrees that the bill alone has a significant impact on local governments. As mentioned above, the bill is merely reinstating requirements that were repealed through regulation on November 24, 2016. At that time, MDE estimated that there was minimal fiscal effect on local governments. Thus, DLS anticipates that local governments can implement the bill's requirements with existing resources.

Small Business Effect: Small businesses in the State that manufacture, install, and provide operation and maintenance services on BAT nitrogen-removal systems are meaningfully affected. There is likely an increase in business as a result of the expected increase in the number of BAT systems installed. Similarly, there is a potential decrease in sales for conventional septic system vendors in cases where new systems must utilize BAT nitrogen removal instead of conventional technology.

MDE estimates that approximately 703 additional BAT systems may be installed annually in the State as a result of the bill. According to MDE, the average cost difference between a conventional septic system and a BAT system is \$7,500. Thus, the estimated annual economic impact could approximate \$5.3 million in increased revenue relating to the sales of BAT systems. According to a recent estimate provided by MDE, there are 15 manufacturers, approximately 1,350 certified BAT installers, and 200 certified BAT O&M providers in the State.

Because BAT systems are more expensive than conventional systems, affected property owners, some of which may be small businesses, are affected from increased costs related to the purchase, installation, and maintenance of BAT nitrogen removal septic systems as a result of the bill. The bill likely increases the cost of new construction outside the Critical

Area, which may affect levels of new construction and have a negative impact on small businesses engaged in that construction.

Additional Information

Prior Introductions: None.

Cross File: SB 266 (Senator Conway, *et al.*) - Education, Health, and Environmental Affairs.

Information Source(s): Comptroller's Office; Maryland Department of the Environment; Department of Legislative Services

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