

Department of Legislative Services
Maryland General Assembly
2018 Session

FISCAL AND POLICY NOTE
Enrolled - Revised

House Bill 1456

(Delegate Barve, *et al.*)

Judiciary and Environment and
Transportation

Judicial Proceedings

Offshore Drilling Liability Act

This bill establishes that an “offshore drilling activity” is an ultrahazardous and abnormally dangerous activity and that a person that causes a spill of “oil” or “gas” (as those terms are defined in the bill) while engaged in an offshore drilling activity is strictly liable for damages for any injury, death, or loss to person or property that is caused by the spill. “Offshore drilling activity” means (1) the exploration, development, or production of oil or gas in, on, or under the federal outer continental shelf (OCS) waters and (2) transporting oil or gas by pipeline, ship, or otherwise from a specific site of exploration, development, or production of oil or gas on the federal OCS. The bill has prospective application and does not apply to any cause of action arising before the bill’s October 1, 2018 effective date.

Fiscal Summary

State Effect: Potential significant increase in general fund revenues, beginning in FY 2024 at the earliest, if the State recovers damages it would be unable to recover absent the bill. The bill can be implemented with existing budgeted resources.

Local Effect: Potential significant increase in future local revenues from recovered damages, beginning in FY 2024 at the earliest. The bill is not expected to materially affect local expenditures.

Small Business Effect: Potential meaningful.

Analysis

Bill Summary: A provision in any contract or agreement that attempts or purports to waive the right to bring an action under the bill or reduce any liability for injury, death, or loss to person or property that is caused by a spill of oil or gas as a result of an offshore drilling activity is void against public policy. “Oil” means oil of any kind or in any form, including specified substances and products. “Gas” means any natural gas or other fluid hydrocarbons that are produced from a natural reservoir, including carbon dioxide and hydrogen sulfide.

The bill also exempts a judgment in an action for damages brought under the bill’s provisions from the limits on the amount of a supersedeas bond required to stay enforcement of a judgment during the appellate or discretionary review process under § 12-301.1 of the Courts and Judicial Proceedings Article.

Current Law:

Strict Liability – Abnormally Dangerous Activities

Strict liability is liability imposed on an individual based on the commission of a particular act, regardless of the individual’s negligence or intent to do harm. Abnormally dangerous activity and ultrahazardous activity, which are interchangeable terms, are types of activities to which strict liability applies. Abnormally dangerous activities are uncommon acts that carry a significant risk of serious harm to persons or property, even if the actor used reasonable care.

According to the *Restatement (Second) of Torts*, determining whether an activity is abnormally dangerous involves the following analysis: (1) whether the activity involves a high degree of risk of harm; (2) whether the harm associated with the activity is substantial; (3) the ability of the exercise of reasonable care to eliminate the risk of harm; (4) whether the activity is a common one; (5) whether the activity is appropriate to the location in which it occurs; and (6) whether the value of the activity to society outweighs the danger it presents. Dynamiting/blasting is an often-cited example of an abnormally dangerous activity.

Strict Liability – Leasing of Oil and Gas Resources on State Lands or Waters

Under § 5-1703 of the Natural Resources Article, which applies to State lands and waters, any person who drills for oil or gas on the lands or in the waters of the State is strictly liable for any damages that occur in exploration, drilling, or producing operations or in the plugging of the person’s oil or gas wells, including liability to the State for any environmental damage.

Supersedeas Bonds

In general, an appellant may stay the enforcement of a civil judgment from which an appeal is taken by filing a supersedeas bond or alternative security with the clerk of the court. The bond or security may be filed at any time before satisfaction of the judgment, but the enforcement is stayed from the time the security is filed.

Supersedeas bonds are typically filed with and approved by the clerk of the court and must contain a surety, unless otherwise expressly provided. If a clerk refuses to approve a bond, or an adverse party objects in writing to the bond, the court may approve the bond after notice and a hearing, if necessary. Under Rule 1-402(d), a court may require an increase or decrease in the face amount of a bond for good cause shown. This rule reserves to the trial court the discretion to increase or decrease the face amount of the bond in an extraordinary case. *O'Donnell v. McGann*, 310 Md. 342 (1987).

However, pursuant to § 12-301.1 of the Courts and Judicial Proceedings Article (Chapter 225 of 2015), in a civil action filed on or after October 1, 2015, the amount of a supersedeas bond that must be posted in a civil action to stay enforcement of a judgment granting any type of relief during the entire course of all appeals or discretionary reviews may not exceed the lesser of \$100 million or the amount of the judgment for each appellant, regardless of the amount of the judgment appealed. These limits on the amount of a supersedeas bond apply notwithstanding any other law or court rule, except for situations involving dissipation or diversion of assets, as described below.

In a civil action, a party seeking a stay of execution of a judgment of any amount pending review may file a motion to reduce the amount of a supersedeas bond required to obtain the stay. Upon this motion or on its own motion, a court may reduce the amount of the supersedeas bond or may set other conditions to obtain the stay, with or without a bond, in the interest of justice or for good cause shown. If an appellant posts a supersedeas bond in an amount that is less than the amount that would be required under Maryland Rule 8-423(b), the appellee may engage in discovery for the limited purpose of determining whether the appellant dissipated or diverted assets outside the course of its ordinary business or is in the process of doing so. The circuit court must retain jurisdiction over the action for the limited purpose of ruling on motions relating to this discovery and to make determinations regarding the dissipation or diversion of assets.

If a court determines that an appellant dissipated or diverted assets outside the course of its ordinary business or is in the process of doing so, the court may (1) enter orders necessary to protect the appellee; (2) require the appellant to post a bond in an amount not to exceed the full amount that would be required under Maryland Rule 8-423(b); and (3) impose other remedies and sanctions that the court considers appropriate.

Under Maryland Rule 8-423(b), subject to § 12-301.1 of the Courts and Judicial Proceedings Article, the amount of a bond for a judgment of money not otherwise secured must be the amount that will cover the whole amount of the unsatisfied portion of the money judgment, plus interest and costs. However, the court may reduce the amount of the bond after making specific findings justifying the amount following consideration of all relevant factors. When the judgment determines the disposition of the property in controversy or when the property, or the proceeds of its sale, is in the custody of the lower court or the sheriff, the amount of the bond must be the sum that will secure the amount recovered for the use and detention of the property, interest, costs, and damages for delay. In any other case, the amount of the bond must be fixed by the lower court. Despite these parameters, the parties in a case may agree to an alternative amount for the bond.

Background: In January 2018, the Trump administration announced plans to significantly expand offshore oil and gas drilling. By opening approximately 90% of the nation's OCS to oil and gas leases, the five-year plan reverses the Obama administration's ban on offshore drilling in approximately 94% of the nation's OCS acreage. The plan marks the first time since the 1980s that oil companies have an opportunity to purchase new leases in the Atlantic and Pacific oceans.

The plan is part of the OCS Lands Act. The Act requires the U.S. Secretary of the Interior to develop a five-year plan to sell oil and gas leases as part of the 2019-2024 National OCS Oil and Gas Leasing Program. The areas available for leasing are narrowed down through the three stages of the program – the Draft Proposed Program, the Proposed Program, and the Proposed Final Program. The Draft Proposed Program authorizes 47 potential lease sales in 25 of 26 planning areas. Nine of the leases are located in the Atlantic Ocean, with three of those leases located in the Mid-Atlantic.

According to the federal Bureau of Ocean Energy Management within the U.S. Department of the Interior, the Secretary of the Interior must consider the following factors when determining the size, timing, and location of potential oil and gas lease sales:

- geographical, geological, and ecological characteristics;
- equitable sharing of developmental benefits and environmental risks;
- location with respect to regional and national energy markets and needs;
- other uses of the sea and seabed;
- laws, goals, and policies of affected states identified by governors;
- interest of potential oil and gas producers;
- environmental sensitivity and marine productivity; and
- environmental and predictive information.

The announcement sparked concerns and protests among environmental groups and met with criticism from officials in the affected states, including Maryland. In a letter dated January 4, 2018, Governor Lawrence J. Hogan, Jr. instructed Maryland Attorney General Brian E. Frosh to investigate whether the plan applies to Maryland's coastal waters and, if it does, to "commence and prosecute any viable legal claims, actions, or suits against the U.S. government to prevent it."

Shortly after the announcement, Florida was granted an exemption from the plan by U.S. Secretary of the Interior Ryan Zinke. On January 17, 2018, Governor Hogan, along with the governors of Connecticut, Delaware, Massachusetts, North Carolina, Rhode Island, and Virginia, sent a letter to Secretary Zinke requesting exemptions from the plan for their respective states and the Atlantic Coast. The governors noted that their states, like Florida, have unique natural resources and economies that rely on tourism and cited the potential risks of offshore drilling to the environment, the economy, and the public health of Atlantic Coast communities as reasons for the exemptions.

State Revenues: General fund revenues may increase significantly, beginning as early as fiscal 2024, if the bill allows the State to recover damages it would not be able to recover absent the bill. The bill imposes a strict liability standard in civil lawsuits for damages from oil or gas spills in federal OCS waters. However, the extent to which this occurs cannot be reliably determined at this time and depends on whether (1) offshore drilling activity eventually occurs in federal OCS waters near Maryland; (2) an oil or gas spill caused by any such activity occurs; (3) the State accrues damages as a result of the spill; and (4) the State successfully litigates for damages under the bill's provisions. Given that the federal plan is not expected to be finalized until 2024, any increase in general fund revenues does not occur until fiscal 2024 at the earliest.

Local Revenues: For the reasons stated above, local revenues may increase significantly for damages recovered as a result of the bill beginning as early as fiscal 2024.

Small Business Effect: The bill has a meaningful impact on small businesses that are able to recover damages from oil or gas spills as a result of the bill.

Additional Information

Prior Introductions: None.

Cross File: SB 1128 (Senator Mathias, *et al.*) - Judicial Proceedings.

Information Source(s): Judiciary (Administrative Office of the Courts); *Black's Law Dictionary*; *The Baltimore Sun*; WTOP; *U.S. News and World Report*; National Public
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Radio; CNN; *The Washington Post*; Delaware.gov; *Restatement (Second) of Torts*;
U.S. Department of the Interior; Department of Legislative Services

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