

Department of Legislative Services
Maryland General Assembly
2019 Session

FISCAL AND POLICY NOTE
Third Reader - Revised

House Bill 28

(Delegate Clark)

Environment and Transportation

Education, Health, and Environmental Affairs

Natural Resources - Shellfish Nursery Operations - Wetlands License
Requirements

This bill establishes that a pump, a pipe, or any other equipment attached to a pier that is associated with a permitted shellfish nursery operation is *not* a “nonwater-dependent project” for the purpose of wetlands license and permit requirements. The bill specifies that, as long as installing such equipment (for the purpose of cultivating shellfish seed in a permitted shellfish nursery) does not require increasing the length, width, or channelward encroachment of the pier, (1) a person does not need to first obtain a tidal wetlands license or permit from the Board of Public Works (BPW) or the Maryland Department of the Environment (MDE) and (2) such activity is a lawful use of private wetlands. If such a project does require increasing the length, width, or channelward encroachment of the pier, a license or permit must be obtained, but the project is not subject to the more stringent requirements related to a nonwater-dependent project.

Fiscal Summary

State Effect: The bill is not expected to materially affect State operations or finances, as discussed below.

Local Effect: Local government expenditures may increase minimally to update regulations and ordinances, as necessary, to reflect changes to the definition of a nonwater-dependent project. Revenues are not affected.

Small Business Effect: Minimal overall, but potential meaningful impact on some small businesses, as discussed below.

Analysis

Current Law:

Shellfish Nursery Permits

A person must obtain a shellfish nursery permit from the Department of Natural Resources (DNR) to commercially rear shellfish seed in areas that are not leased in accordance with aquaculture provisions of the Natural Resources Article. For a shellfish nursery located in State waters outside a DNR aquaculture lease area, DNR may issue a permit only (1) to the owner of a wharf or other structure constructed on or about the water and approved by the U.S. Army Corps of Engineers, or to a person with the owner's permission and (2) for the cultivation of shellfish seed within 20 feet of the wharf or other structure, in an area of water that does not exceed 200 square feet. Under current regulations, the application fee for a shellfish nursery permit is \$100, and a permit is valid for five years.

A permitted shellfish nursery operation located in State waters is not required to obtain a water column or submerged land lease. Shellfish nursery products are not subject to National Shellfish Sanitation Program water quality classifications and restrictions.

State and Private Wetlands Licenses and Permits

Relevant Definitions: A “nonwater-dependent project” is 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 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. A nonwater-dependent project does not include (1) a fuel pump or other fuel-dispensing equipment on a pier; (2) a sanitary sewage pump or other wastewater removal equipment on a pier; or (3) an office on a pier for managing specified marina operations.

“State wetlands” means any land under the navigable waters of the State below the mean high tide, affected by the regular rise and fall of the tide and not otherwise transferred by the State. “Private wetlands” means any land not considered “State wetland” bordering on or lying beneath tidal waters, which is subject to regular or periodic tidal action and supports aquatic growth.

Licenses for Dredging or Filling State Wetlands: BPW has the authority to determine whether to issue a license to dredge or fill State wetlands, but MDE must assist BPW in making such a determination. In some cases, BPW delegates the authority to issue such licenses to MDE. Generally, a person is prohibited from dredging or filling State wetlands without a license except for:

- dredging and filling being conducted as of July 1, 1970, as authorized under the terms of an appropriate permit or license;
- dredging of seafood products by any licensed operator, harvesting of seaweed, or mosquito control and abatement as approved by the Maryland Department of Agriculture;
- improvement of wildlife habitat or agricultural drainage ditches approved by an appropriate unit;
- routine maintenance or repair of existing bulkheads with no addition or channelward encroachment; or
- aquaculture activities occurring under a lease issued by DNR under Title 4, Subtitle 11A of the Natural Resources Article.

Conditions for License and Permit Issuance of Nonwater-dependent Projects: Statute generally prohibits BPW and MDE from issuing a license or permit to authorize a nonwater-dependent project located on State or private wetlands. However, statute authorizes BPW (for State wetlands) and the Secretary of the Environment (for private wetlands) to issue such a license or permit under specified conditions. Specifically, 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;
- avoid and minimize impacts to State or private wetlands and other aquatic resources;
- 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 MDE recommends additional height;
- not be more than 1,000 square feet in total area;
- 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
- not adversely impact a fish spawning or nursery area or an historic waterfowl staging 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.

For a project that is located on a pier that was in existence by December 31, 2012, 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.

License and Permit Fees: BPW charges a license fee for State wetlands licenses. Current license fees range from \$50 to \$1,000 depending on the type of project. All applicants for wetlands and waterways authorizations issued by MDE and BPW must pay an application fee. Application fees range from \$250 to \$7,500 depending on the size of the project and the level of impact. However, aquaculture activities permitted by DNR under Title 4, Subtitle 11A of the Natural Resources Article are exempt from the application fees.

Lawful Uses of Private Wetlands

Notwithstanding any regulation adopted by the Secretary of the Environment to protect private wetlands, the following uses are lawful on private wetlands: (1) conservation of soil, vegetation, water, fish, shellfish, and wildlife; (2) trapping, hunting, fishing, and catching shellfish if otherwise legally permitted; (3) exercise of riparian rights to improve land bounding on navigable water to preserve access to the navigable water, or to protect the shore against erosion; (4) reclamation of fast land owned by a natural person and lost during the person's ownership of the land after January 1, 1972, as specified; and (5) routine maintenance and repair of existing bulkheads, provided that there is no addition or channelward encroachment.

State Fiscal Effect: Because shellfish nursery permit operations are already exempt from wetlands application fees, and because it is anticipated that the bill applies to a limited number of projects, the bill is not expected to have a material fiscal or operational impact on BPW or MDE.

Small Business Effect: Although permitted shellfish nursery operations do not need to pay application fees for wetlands permits or licenses, DNR advises that obtaining a license or permit for a nonwater-dependent project can be costly and time consuming. Thus, any small business seeking to install a pump, a pipe, or any other equipment to a pier that is associated with a permitted shellfish nursery operation benefits from the bill's exemption from the more stringent licensing and permitting requirements associated with nonwater-dependent projects.

DNR advises that currently, it processes approximately 18 nursery permit renewals, modifications, and applications each year.

Additional Information

Prior Introductions: None.

Cross File: SB 939 (Senator Klausmeier) - Education, Health, and Environmental Affairs.

Information Source(s): Maryland Department of Agriculture; Maryland Department of the Environment; Department of Natural Resources; Board of Public Works; Department of Legislative Services

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