



January 15, 2021

The Honorable Kumar P. Barve, Chair
Environment and Transportation Committee
House Office Building
Annapolis, Maryland 21401

Re: House Bill 302 – Environment – On-Site Wastewater Services -Regulation

Dear Chairman Barve and Members of the Committee:

The Maryland Department of the Environment (MDE) has reviewed House Bill 302, entitled Environment- On-Site Wastewater Services - Regulation and would like to offer a letter of information and share our concerns regarding this legislation.

This bill is similar to House Bill 136 that was introduced during the 2020 Legislative Session. Unfortunately, HB 302 as introduced does not address the concerns raised last year and has additional concerning issues. This bill proposes to establish a State Board of On-Site Wastewater Professionals and requires certain individuals to be licensed by the Board prior to performing on-site wastewater services in Maryland. The bill seeks to establish the Board members and the authority of the Board to recommend to the Department standards for the licensing requirements and the regulations pertaining to the septic industry. The bill further requires any business performing specific on-site services to have the owner or employee licensed by the Board.

Before we lay out our concerns with the bill, we must point out that at present, the On-Site Systems Division at MDE only has four (4) PINs to cover the entire State of Maryland, and one of those PINs is vacant. Given the scope of this legislation, the Department would need at minimum four additional PINs. While the bill attempts to give the Department the necessary resources to implement the proposed Board, given the current economic climate there is no guaranty if or when the PINs would be created or funded for the Department's use. If this legislation were to pass, the three employees currently in the On-Site Division would have to cease their current statutorily mandated work in order to create and implement the new licensing process in the allotted time period. Although the legislation as proposed provides for a \$150 licensing fee, it is not clear how quickly or how many licensees would submit the fee. It is likely the Department would have to implement the legislation for an indeterminate period of time without sufficient staff or funding.

With regard to the bill, the Department believes there is merit in having licensing for on-site wastewater professionals, including some type of Board oversight. However, HB 302 presents most of the same legal concerns as last year's bill, with several additional concerns. Taken together and summarized, the Department has concerns with: 1) the potential overlap and conflicts with two other State boards, existing provisions of COMAR, and local laws; 2) the structure and composition of the new Board; 3) the bill's enforcement; and 4) scope of the Board's jurisdiction.

Potential Overlap and Conflicts with other State Boards, COMAR, and Local Laws

First, the definitions in HB 302 pertaining to the Board and its jurisdiction are broad enough to intersect with both the existing State Board of Environmental Health Specialists and the State Board of Waterworks and Waste Systems Operators. Section 9-11A-01 defines “on-site wastewater services” as “*any activity* associated with the design, installation, operation and maintenance, pumping, repair, or property transfer inspection of an on-site wastewater system” (emphasis added). Although inspections of on-site systems are not explicitly mentioned, the broad scope of “any activity” would almost certainly include inspections of such systems. Inspectors of on-site systems are already regulated by the State Board of Environmental Health Specialists, as specified by § 21-101(i) and (i)(3) of the Health Occupations Article (defining “practice as an environmental health specialist,” over which that board has jurisdiction, as “a major component of employment...[of] the inspections and investigations necessary to collect and analyze data and to make decisions necessary to secure compliance with federal, State, and local health and environmental laws and regulations specifically relating to control of the public health aspects of the environment,” including wastewater treatment and disposal). Furthermore, HB 302’s proposed § 9-11A-01 broadly defines an on-site wastewater system as that which is “designed to treat and dispose of effluent on the same property that produces the wastewater.” This definition fails to distinguish between residential and industrial systems; thus, it would include operators of industrial on-site wastewater systems, which are already regulated by the State Board of Waterworks and Waste Systems Operators. *See* Env. §§ 12-102 and 12-101(l).

Second, § 9-11A-09(A)(1)(II) requires the Board to establish certification procedures and qualifications for an “advanced treatment installer,” “mound installer,” “advanced treatment operation and maintenance provider,” and “advanced treatment unit pumper,” although the Department already certifies sand mound and at-grade septic system installers as specified in COMAR 26.04.02.05, and best available technology (BAT) service providers in 26.04.02.07. These sections would have to be amended to be consistent with HB 302 and any new associated regulations.

Also, § 9-11A-02 allows local governments to impose requirements or standards that are more stringent than those established under the subtitle. The bill, however, does not specify which “requirements or standards” may be more stringent, such as professional certification requirements. A local government may therefore adopt professional certification requirements stricter than those of the Board, creating additional certification requirements. These additional requirements may differ among local jurisdictions, creating the possibility of confusion given that on-site wastewater professionals often operate in multiple local jurisdictions.

Concerns Regarding the Structure and Composition of the Board

Additionally, the Board’s structure and composition established by HB 302 are of concern. First, the bill contains an inherent logical conflict: although § 9-11A-06(A)(3)(I) requires that the Board be comprised of certain professionals (at least one “licensed master installer,” “licensed master pumper,” “licensed master operations and maintenance provider,” a “certified designer,” and a “licensed master property transfer inspector), none of these professional titles currently exist and will not exist until established by the bill and then licensed and certified by the Board.

Also, while § 9-11A-07 provides for the designation of the Board’s chairperson and specifies that the Board will elect its other officers, the provision fails to identify the positions and duties of those other officers, such as a vice-chair, treasurer, or secretary. A treasurer is particularly important since the bill also establishes the On-Site Wastewater Professionals Fund to be administered by the Board – money in the Fund, such as fees and penalties collected under this new subtitle, will maintain and subsidize the Board’s operation.

Notably, the Board may not enjoy the State’s immunity defense in tort lawsuits. While entities of the State, such as State boards, usually enjoy the State’s antitrust immunity to tort actions against them, the U.S. Supreme Court has held that there is no such protection against tort liability unless the State actively

supervises the board. *See generally North Carolina State Board of Dental Examiners v. Federal Trade Commission*, 13 S.Ct. 1101 (2015). In order for the State to be able to actively supervise the Board, the bill should: 1) include a provision stating that the Board is a unit of the Department; 2) amend § 1-406 of the Environment Article to include the Board as unit of the Department; and 3) state that any final action of the Board is subject to review by the Secretary or its designee. Similarly, the bill does not include the Board among the list of government units subject to the General Assembly's oversight according to the Maryland Program Evaluation Act, § 8-401 *et seq.* of the State Government Article. If the Board is to be treated consistently as other boards of the Department, HB 302 should amend § 8-403 of State Government Article to include the Board among the list of government activities subject to periodic review.

This is particularly important given that the bill specifically requires the Board to include, as a member, an individual designated by the Maryland Onsite Wastewater Professionals Association (MOWPA). This company currently offers training, charging \$125 - \$400 per class and \$65 for a training manual. There are other non-profit training companies in the State, those companies are not considered in the legislation. MOWPA will financially benefit from the passage of this legislation and as a named member of the Board, will be in a unique position to influence regulations, policies, and other decisions by the Board, possibly to their financial benefit and to the detriment of other equally as qualified competitors.

Enforcement

The bill presents legal concerns about its enforcement. First, there is a concern about the enforcement of licensing in the period of time between the bill's effective date and the date when the Board recommended licensing and certification procedures to the Department. HB 302 attempts to address this concern through the proposed § 9-11A-15(A)(2), which would allow individuals with any license, certification, or registration in Maryland issued as of January 1, 2021, to continue to perform on-site wastewater services until MDE established its licensing requirements, by paying a biannual fee. However, there is still an enforcement gap, as an individual may lose a license, certification, or registration after January 1, 2021, but before the bill's effective date of July 1, 2021.

Furthermore, § 9-11A-15(D) requires a business performing on-site wastewater services to have a licensed employee or owner. This section does not, however, actually require that employee or owner to perform the work, or even to supervise other employees who perform the work. Thus, this provision fails to effectively regulate the performance of on-site wastewater services or the businesses that provide them.

Next, § 9-11A-16(4) allows the Board to deny, suspend, or revoke a license, including the issuance of a reprimand, for "gross negligence, incompetence, or misconduct while performing on-site wastewater services." These are very different standards normally used in other legal contexts (e.g., "gross negligence" is commonly used in nuisance law, while incompetence and misconduct may be found in employment law) and are not defined by the bill.

Scope of the Board's Jurisdiction

The proposed definition of "on-site wastewater system" is overly narrow. The definition limits the system to treating wastewater on the same property where the wastewater is produced, while in practice, wastewater systems may sometimes be located on a different property where the wastewater is produced through an easement. On the other hand, the Board's defined purpose (to establish minimum standards for systems "not required to be permitted under § 9-323") is so expansive as to include, but not be limited to, residences, commercial facilities, shared facilities, and experimental designs.

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Last legislative session, the Department suggested that a taskforce lead by the Department be formed with comprehensive input stakeholders in order to develop the framework for a board that is both protective of public health and the environment, and can be feasibly implemented. The Department would be willing to work with the sponsor and other stakeholders to form the taskforce and resolve these issues.

Thank you for your consideration. We will continue to monitor House Bill 302 during the Committee's deliberations, and I am available to answer any questions you may have. Please feel free to contact me at 410-260-6301 or by e-mail at tyler.abbott@maryland.gov.

Sincerely,

A handwritten signature in black ink, appearing to read "Tyler Abbott", with a long horizontal line extending to the left.

Tyler Abbott

cc: The Honorable Dana Stein