

MEMORANDUM

April 19, 2012

To: Stormwater Management Committee, National Association of Clean Water Agencies

From: Lawrence R. Liebesman, (lawrence.liebesman@hklaw.com)
Barbara Wilkins, (barbara.wilkins@hklaw.com)

Re: Summary and Analysis of HB 987, The Maryland Stormwater Management
Watershed Protection and Restoration Act of 2012

Summary and Analysis of Maryland House Bill 987 Stormwater Management - Watershed Protection and Restoration Program

Summary On April 9, 2012, the Maryland General Assembly passed HB 987 requiring each county and municipality¹ subject to NPDES Phase 1 municipal separate storm sewer permit (Phase I MS4 permit) to establish an annual stormwater remediation fee and local watershed protection and restoration fund. The purpose of the bill is to require Maryland's most populous jurisdictions to impose a new dedicated fee as a funding source for implementing local stormwater management plans. Reducing stormwater impacts will help meet the Chesapeake Bay Total Maximum Daily Load (TMDL) requirements established by EPA in December 2010. The Bay TMDL (1) sets the maximum amount of pollution the Bay can receive and still attain water quality standards and (2) identifies specific pollution reduction requirements for nitrogen, phosphorus and sediment that must be met by 2025 with at least 60% of the actions completed by 2017.

HB 987 Requirements for Phase I Jurisdictions

- Adopt and implement local laws and ordinances by July 1, 2013 to establish a stormwater remediation fee and local watershed protection and restoration fund including a hardship exemption program.
- The stormwater fee shall be set in an amount based on the share of SW services related to the property. A County or Municipality may base the fee on either a (1) flat rate, (2) graduated amount based on impervious surface on each property or (3) another method of calculation selected by the local government.

¹ Phase I jurisdictions are Anne Arundel, Baltimore, Charles, Carroll, Frederick, Harford, Howard, Montgomery, and Prince George's Counties and Baltimore City. No Maryland municipalities, except Baltimore City, currently have a population sufficient to qualify, at least in the near future, as a Phase I MS4 permittee.

- Establish policies and procedures approved by Maryland Department of the Environment (MDE) to reduce any portion of the established stormwater fee to account for on- site and off-site systems, facilities, services or activities that reduce the quantity or improve the quality of stormwater discharged from the property.
- Establish policies and procedures, including guidelines for: (1) determining which on - site systems, facilities, services or activities may be the basis for a fee reduction; (2) a method for calculating the amount of fee reduction; and (3) procedures for monitoring and verifying the effectiveness of such systems in reducing the quantity or improving the quality of stormwater discharged from the property.
- The fund moneys may be used for the following purposes only: (1) capital improvements for stormwater management; (2) operation and maintenance of stormwater management systems/facilities; (3) public education and outreach related to stormwater management , stream or wetland restoration; (4) stormwater management planning; (5) grants to nonprofit organizations for up to 100% of the projects costs for watershed restoration and rehabilitation projects; and (5) reasonable costs to administer the fund.
- Beginning on July 1, 2014 to be updated every 2 years, prepare a publicly available report on the number of properties subject to the fee, the amount of money deposited into the Fund and the percentage of funds spent on each of the purposes required by the bill.

HB 987 Limitations and Exclusions

- Property owned by the State, a unit of State government, a county, municipality or regularly organized fire department that is used for public purposes may not be charged a stormwater remediation fee.
- HB 987 requirements do not apply to a county or municipality that has enacted and implemented a system of charges under Section 4-204 of the Environment Article on or before July 1, 2012 for the purpose of funding watershed protection and restoration program or similar program consistent with the requirements of HB 987.
- A property may not be assessed a stormwater remediation fee by both a county and a municipality.
- Before a county may impose a stormwater fee on a property within a municipality, the county must notify a municipality of the county's intent to impose a stormwater fee on the municipality and provide the municipality a reasonable time to pass an ordinance authorizing the imposition of a municipal stormwater fee instead of a county stormwater fee.
- If a county currently imposes a stormwater remediation fee on property located within a municipality and the municipality decides to implement its own fee, the municipality shall notify the county of its intent and provide the county a reasonable time to discontinue the collection of the county stormwater remediation fee before the municipality's fee becomes effective.
- A county or municipality must establish a program to exempt property based on a showing of substantial financial hardship. A county may use the fund as an environmental fund and deposit and expend additional money from other sources dedicated to environmental uses provided that the funds received from the stormwater remediation fee are expended only for purposes authorized under HB 987. Monies in the fund may not revert to the general fund to be expended for other public purposes.

Analysis

HB 987 responds to the tremendous costs that will be incurred in meeting the interim and final targets under the Bay TMDL. Maryland currently estimates that the costs of meeting the 2025 goals will be \$14.7 billion, out of which \$7.7 billion will be devoted to stormwater remediation. Existing funding sources for stormwater management projects are insufficient to address the anticipated costs of stormwater treatment. While Section 4-204 of the Environment Article grants discretionary authority to counties and municipalities to "adopt a system of charges to fund the implementation of stormwater programs," (which does not exclude publicly owned properties), only a few jurisdictions have instituted such fee programs.² In contrast, this bill creates a state mandate for the ten most populous jurisdictions to implement such a program with very specific requirements for assessing the fees and for the use of fee revenue to implement stormwater programs. Mandated fee programs under this bill also incentivize residents and businesses to lower their stormwater fees by reducing the extent of impervious surfaces, thereby, lessening the flow and improving the quality of stormwater. These measures may also include environmental site design, such as installing pervious pavement, green roofs, tree plantings and rain gardens.

The exclusion of State, county and municipal properties from the stormwater fee program raises several issues. First, the exclusion will increase the costs to residential, commercial and non-profit rate payers to cover the costs of stormwater treatment from public properties. The State alone is a substantial property owner in Maryland (Department of General Services is responsible for the statewide operation and maintenance of 56 buildings with 6.3 million square feet of space, the University Systems of Maryland encompasses another 1000 buildings in 100 locations, and the Maryland Department of Transportation is likewise a significant property holder). The exclusion removes any requirement for the State or other public properties to pay for local costs of treating stormwater discharged by publicly-owned properties into the municipal MS4 system. Those costs will likely be borne by residential, commercial and non-profit property owners.³

Second, the exclusion raises fairness issues. Local governments may feel that it is fundamentally unfair to exempt state-owned properties that are contributing to the local costs of meeting the stormwater reductions required under the Chesapeake Bay TMDL program. This exclusion could impact the state and local partnership needed to meet the TMDL goals. It could also make it politically difficult for local governments to convince their residents to shoulder the necessarily higher stormwater fee when neighboring state-owned facilities do not have to pay for stormwater treatment costs discharging into the very same municipal system. However, the bill does allow municipalities, that are either subject to an existing county stormwater fee program or a proposed county fee program under this bill, a reasonable opportunity to adopt their own fee program. Municipalities that have not yet adopted a fee program may do so under the discretionary authority of Section 4-204 which includes no specific exemption for public property owners. The

² The fiscal note on HB 987 notes that Charles, Montgomery and Prince Georges Counties and the cities of Annapolis, Frederick, Rockville and Tacoma Park have developed programs to raise revenues dedicated for stormwater management (Fiscal Note on HB 987 at p. 8)

³ Local revenues may increase statewide by \$86.7 million annually assuming an average residential stormwater remediation fee of \$60 annually. Fiscal Note at p. 9

discrepancy created in HB 987 by exempting public properties is likely to create legal uncertainty and claims of "unfair" treatment by local residents and businesses.

Finally, this exclusion for public property could very well impact the ability of local governments to assess federal facilities for the costs to stormwater discharging from federal properties. Public Law 111- 378 , the " Cardin⁴ amendment" to the Clean Water Act, signed into law on January 4, 2011, clarifies the duty of federal agencies to pay "reasonable service charges" for treating stormwater runoff from federal properties, provided the fee is "nondiscriminatory," based on "some fair approximation of the proportionate contribution of the property or the facility to stormwater pollution," and the fee is "used to pay or reimburse the costs associated with any stormwater management program." Federal facilities may very well resist paying stormwater fees assessed by local jurisdictions under HB 987, asserting the exclusion of State, county and municipal-owned properties contained in HB 987 amounts to a "discriminatory" fee under P.L. 111-378. Federal facilities may, therefore, argue that the newly mandated fee program in Maryland is not applicable to federal properties.

#11160923_v1

⁴U.S. Senator Ben Cardin (D-MD), sponsor of PL 111-378