



## Senate Bill 863

### *Watershed Protection and Restoration Programs - Revisions*

MACo Position: **SUPPORT**  
**WITH AMENDMENTS**

To: Environment and Transportation Committee

Date: April 1, 2015

From: Leslie Knapp, Jr.

The Maryland Association of Counties (MACo) **SUPPORTS** SB 863 **WITH AMENDMENTS**. While the bill could further MACo's broad position on the stormwater remediation fee, several amendments are needed to address provisions of the bill relating to the annual financial assurance plans and municipal tax setoffs.

SB 863, as amended by the Senate, would repeal the 2012 mandate (HB 987) that required the 10 Maryland county jurisdictions subject to a federal National Pollutant Discharge Elimination System (NPDES) Phase I Municipal Separate Storm Sewer System (MS4) permit to adopt a stormwater remediation fee (also called the "rain tax" by the fee's opponents). The 10 jurisdictions include: Baltimore City and Anne Arundel, Baltimore, Carroll, Charles, Frederick, Harford, Howard, Montgomery, and Prince George's Counties. The bill also contains numerous other changes to how counties may charge fees and State oversight of the permit.

#### **MACo's Broad Position on the Stormwater Remediation Fee**

MACo's position on all stormwater fee legislation introduced this Session has been consistent: provide counties with maximum flexibility to meet their diverse MS4 permit requirements while still maintaining a reasonable system of accountability and oversight. While this position was approved by all 24 counties, deference was given to issues raised by the 10 Phase I counties.

However, while counties should strongly strive to meet their permit requirements, MACo does not believe that counties should be unfairly punished for failing to meet goals that may be impractical or even impossible to meet. Several of the provisions in SB 863 raise such issues and must be amended before MACo can support passage of the bill. MACo is proposing three amendments to the bill:

- (1) Amendment #1 would alter the frequency of when a county must submit a financial assurance plan and undergo a public hearing, clarify the standard of review by the Maryland Department of the Environment (MDE), and create a more graduated and logically related penalty system;

- (2) Amendment #2 would address added language (not in the original bill) relating to a municipal tax setoff which introduces a much broader local government issue not properly within the scope of this bill; and
- (3) Amendment #3 would grandfather Carroll County from the bill's financial assurance plan requirements for the life of their current MS4 permit as Carroll has already been deemed by MDE and the Office of the Attorney General to be complying with their permit requirements.

### **MDE Review of Financial Assurance Plan**

SB 863 requires each of the 10 counties, whether they have adopted a fee or not, to annually submit a "financial assurance plan" to the MDE (3rd reader bill, starting page 10, line 13). The plan must contain a variety of fiscal and performance information. MDE must hold a public hearing on the plan and determine whether or not each county has demonstrated sufficient yearly funding to meet the requirements of its MS4 permit. If MDE deems a county to be lacking, the county is ineligible to receive State funding from a variety of specified sources, including the Bay Restoration Fund, the Water Pollution Control Fund, and the Water Quality Revolving Loan Fund.

MACo has no issue with a reasonably strengthened reporting requirement, nor the public hearing requirement. However, MACo is offering amendments to address the standard by which MDE should review counties, the frequency of the public hearing/report, and penalties associated with failure to meet the requirements.

#### *Frequency of the Financial Assurance Plan and Public Hearing*

All Phase I MS4 jurisdictions are subject to annual reporting and oversight, both by MDE and if necessary the United States Environmental Protection Agency (EPA). Stormwater remediation projects can take significant time to complete and MACo does not believe that a single-year view always provides the most accurate picture of a county's progress in meeting its MS4 goals. Projects can be temporarily delayed or take longer than anticipated to finish (this is especially true for the remediation of existing impervious areas, where many unanticipated factors can arise).

Additionally, it would be administratively challenging for MDE to hold a public hearing every year for all 10 jurisdictions (with that number likely increasing in the future). Instead, MACo believes that requiring the financial assurance plan and public hearing every two years (during the second and fourth year of the permit) would provide a more accurate assessment of a county's progress and be more practical administratively.

#### *Standard of Review by MDE*

The MS4 permit compliance standard for local governments is to the "maximum extent practicable." This means that MDE and EPA will consider both cost and practicality when determining whether or not a local government is meeting its permit requirements. However, the bill appears to impose a "strict compliance" standard of review that would ignore the longstanding issues of cost and practicality. In order to more closely maintain the federal maximum extent practicable standard, MACo believes that MDE should use a "good faith" standard of review when determining whether or not a jurisdiction is achieving its permit goals.

Furthermore, MACo's amendments provide for criteria for MDE to consider based on standards previously adopted by the General Assembly when considering county waivers for public school funding maintenance of effort. This balanced consideration would provide both MDE and the counties with more clarity on how to judge their progress in meeting their permit requirements.

### *Penalties*

The bill's broad-based and punitive funding restriction for wastewater treatment plant upgrades, septic system upgrades, and other water pollution treatment projects has no logical nexus to whether a county is meeting its MS4 stormwater permit requirements. In fact, the arbitrary restricting of such funding could undermine a county's efforts to comply with its water pollution reduction goals under the Chesapeake Bay Total Maximum Daily Load.

Furthermore, the mandatory funding restriction under the bill could eliminate anticipated State funding for a project where a county has already issued bonds, creating a long-term and unexpected budgetary shortfall for the county and potentially stopping a project in mid-construction. Bond rating agencies will also view such funding sources as highly uncertain and potentially negatively adjust a county's bond rating if a county seeks to issue bonds in reliance of State funding assistance.

To address the numerous issues with the penalty, MACo's amendments would authorize MDE to consider a warning for a first offense, mediation for a second offense, and restricting any State funding for new stormwater projects for a third or subsequent offense. This graduated scale of punishments creates a more logical nexus to the permit's stormwater goals, avoids jeopardizing State funds anticipated for existing bonded projects, and gives counties a chance to correct unintentional deficiencies in their MS4 program before being subject to a significant penalty.

### **Tax Setoff Language**

A second troubling element of the amended bill is its apparent reference to municipal tax setoffs (3rd reader bill, page 4, lines 17-26). While the actual language added by the Senate is somewhat unclear, the apparent intent is to compel a county that uses county-wide general revenue to support stormwater functions (rather than a dedicated fee) to provide a dollar-for-dollar offset for municipal residents as a reduction in the property tax rate. This represents a substantial and unreasonable intrusion into long standing state laws - generally the province of committees overseeing tax policy.

For decades, state law has enabled municipal tax setoffs as a tool to address duplicative local services within municipal bounds. These laws, generally in the Tax-Property Article §§6-305 and 6-306, guide the local exchange, negotiations, and adoption of tax setoffs for municipal residents, which are used widely in the state. The language currently in SB 863 overrides this decades-long body of law, resulting from countless local agreements and extensive legislative deliberation. To the extent the Committee seeks to address stormwater services as part of this county/municipal dynamic, MACo urges revised language to simply place this issue on a par with other services funded through county property taxes. This proposal is included within the amendments attached to this testimony.

## Conclusion

MACo believes that SB 863 can further MACo's position of granting counties maximum flexibility to meet their MS4 permit requirements while still maintaining reasonable accountability and oversight. However, MACo's position can only be achieved if the amendments contained in MACo's testimony are adopted by the Committee. Accordingly, MACo urges the Committee to adopt a report of **FAVORABLE WITH AMENDMENTS** for SB 863.

# MACo Proposed Amendments to SB 863

## AMENDMENT NUMBER 1

4-202.1

(j) (1) BEGINNING JULY 1, 2016, ~~AND EVERY YEAR THEREAFTER FOR EVERY SECOND AND FOURTH YEAR OF A NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM PHASE I MUNICIPAL SEPARATE STORM SYSTEM PERMIT~~, A COUNTY, ~~INCLUDING MONTGOMERY COUNTY~~, OR MUNICIPALITY SHALL FILE WITH THE DEPARTMENT A FINANCIAL ASSURANCE PLAN THAT CLEARLY IDENTIFIES:

(i) ACTIONS THAT WILL BE REQUIRED OF THE COUNTY OR MUNICIPALITY TO MEET THE REQUIREMENTS OF ITS NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM PHASE I MUNICIPAL SEPARATE STORM SEWER SYSTEM PERMIT;

(ii) PROJECTED ANNUAL AND 5-YEAR COSTS FOR THE COUNTY OR MUNICIPALITY TO MEET THE IMPERVIOUS SURFACE RESTORATION PLAN REQUIREMENTS OF ITS NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM PHASE I MUNICIPAL SEPARATE STORM SEWER SYSTEM PERMIT;

(iii) PROJECTED ANNUAL AND 5-YEAR REVENUES OR OTHER FUNDS THAT WILL BE USED TO MEET THE COSTS FOR THE COUNTY OR MUNICIPALITY TO MEET THE IMPERVIOUS SURFACE RESTORATION PLAN REQUIREMENTS OF ITS NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM PHASE I MUNICIPAL SEPARATE STORM SEWER SYSTEM PERMIT;

(iv) ANY SOURCES OF FUNDS THAT WILL BE UTILIZED BY THE COUNTY OR MUNICIPALITY TO MEET THE REQUIREMENTS OF ITS NATIONAL POLLUTANT ELIMINATION SYSTEM PHASE I MUNICIPAL SEPARATE STORM SEWER SYSTEM PERMIT; AND

~~(iii)~~ (v) ~~SPECIFIC PLANS~~ ACTIONS AND EXPENDITURES THAT THE COUNTY OR MUNICIPALITY WILL IMPLEMENT IMPLEMENTED IN THE TWO PREVIOUS FISCAL YEAR YEARS TO MEET ITS IMPERVIOUS SURFACE RESTORATION PLAN REQUIREMENTS UNDER ITS NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM PHASE I MUNICIPAL SEPARATE STORM SEWER SYSTEM PERMIT.

(2) ~~A FINANCIAL ASSURANCE PLAN SHALL DEMONSTRATE THAT THE COUNTY OR MUNICIPALITY HAS SUFFICIENT FUNDING IN THE CURRENT FISCAL YEAR BUDGET TO MEET ITS ESTIMATED ANNUAL COSTS.~~

~~(3) THE DEPARTMENT SHALL HOLD A PUBLIC HEARING WITHIN 30 DAYS AFTER THE COUNTY OR MUNICIPALITY FILED THE FINANCIAL ASSURANCE PLAN WITH THE DEPARTMENT.~~

~~(4) (3) (I) THE DEPARTMENT SHALL MAKE A DECISION WHETHER REVIEW THE FINANCIAL ASSURANCE PLAN DEMONSTRATES SUFFICIENT FUNDING AND DETERMINE WHETHER THE COUNTY OR MUNICIPALITY IS MAKING A GOOD FAITH EFFORT TO MEET THE REQUIREMENTS OF ITS NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM PHASE I MUNICIPAL SEPARATE STORM SEWER SYSTEM PERMIT WITHIN 90 DAYS AFTER THE COUNTY OR MUNICIPALITY FILED THE FINANCIAL ASSURANCE PLAN WITH THE DEPARTMENT.~~

~~(II) WHEN MAKING A DETERMINATION OF GOOD FAITH, THE DEPARTMENT SHALL CONSIDER:~~

~~1. WHETHER THE COUNTY OR MUNICIPALITY HAS MADE GOOD FAITH EFFORTS IN THE PAST TO MEET THE REQUIREMENTS OF ITS NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM PHASE I MUNICIPAL SEPARATE STORM SEWER SYSTEM PERMIT;~~

~~2. WHETHER THE COUNTY OR MUNICIPALITY HAS HAD TO MAKE SIGNIFICANT EXPENDITURES IN RESPONSE TO AN EMERGENCY, NATURAL DISASTER, OR SIMILAR SITUATION DURING THE 2-YEAR TIME PERIOD COVERED BY THE FINANCIAL ASSURANCE PLAN;~~

~~3. WHETHER THE COUNTY OR MUNICIPALITY HAS BEEN SUBJECT TO A BROAD ECONOMIC DOWNTURN AFFECTING MORE THAN ONE COUNTY DURING THE 2-YEAR TIME PERIOD COVERED BY THE FINANCIAL ASSURANCE PLAN; AND~~

~~4. WHETHER THE COUNTY OR MUNICIPALITY HAS BEEN SUBJECT TO A SIGNIFICANT REDUCTION IN STATE AID DURING THE 2-YEAR TIME PERIOD COVERED BY THE FINANCIAL ASSURANCE PLAN.~~

~~(5) IF THE DEPARTMENT DETERMINES THAT THE FUNDING IN THE FINANCIAL ASSURANCE PLAN IS INSUFFICIENT TO MEET THE PROJECTED ANNUAL COSTS OF COMPLIANCE WITH A COUNTY OR MUNICIPALITY IS NOT MAKING A GOOD FAITH EFFORT TO MEET THE REQUIREMENTS OF THE COUNTY'S OR MUNICIPALITY'S NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM PHASE I MUNICIPAL SEPARATE STORM SEWER SYSTEM PERMIT, THE COUNTY OR MUNICIPALITY MAY NOT RECEIVE STATE FUNDING, ASSURANCES,~~

~~GUARANTEES, GRANT PAYMENTS, CREDITS, TAX CREDITS, OR OTHER ASSISTANCE FOR ANY PROJECT FROM: THE DEPARTMENT MAY:~~

~~(i) THE WATER POLLUTION CONTROL FUND, ESTABLISHED UNDER § 9-345 OF THIS ARTICLE;~~

~~(ii) THE WATER SUPPLY FINANCIAL ASSISTANCE PROGRAM, ESTABLISHED UNDER § 9-420 OF THIS ARTICLE;~~

~~(iii) THE WATER QUALITY REVOLVING LOAN FUND, ESTABLISHED UNDER § 9-1605 OF THIS ARTICLE;~~

~~(iv) THE BAY RESTORATION FUND, ESTABLISHED UNDER § 9-1605.2 OF THIS ARTICLE;~~

~~(v) THE CHESAPEAKE AND ATLANTIC COASTAL BAYS NONPOINT SOURCE FUND, ESTABLISHED UNDER § 9-1605.3 OF THIS ARTICLE; OR~~

~~(vi) THE CHESAPEAKE AND ATLANTIC COASTAL BAYS 2010 TRUST FUND, ESTABLISHED UNDER § 8-2A-02 OF THE NATURAL RESOURCES ARTICLE.~~

~~(i) FOR A FIRST OFFENSE, ISSUE A WARNING TO A COUNTY OR MUNICIPALITY;~~

~~(ii) FOR A SECOND OR SUBSEQUENT OFFENSE, ENGAGE IN MEDIATION WITH THE COUNTY OR MUNICIPALITY TO MODIFY THE COUNTY OR MUNICIPALITY'S FINANCIAL ASSURANCE PLAN AND ACTIONS SO THAT THE COUNTY OR MUNICIPALITY CAN BE DEEMED TO BE MAKING A GOOD FAITH EFFORT TO MEET THE REQUIREMENTS OF THE COUNTY'S OR MUNICIPALITY'S PERMIT; OR~~

~~(iii) FOR A THIRD OR SUBSEQUENT OFFENSE, DENY STATE FUNDING OR ASSISTANCE FOR NEW STORMWATER-RELATED PROJECTS UNTIL THE COUNTY OR MUNICIPALITY IS DEEMED TO BE MAKING A GOOD FAITH EFFORT TO MEET THE REQUIREMENTS OF THE COUNTY'S OR MUNICIPALITY'S PERMIT.~~

~~(6) A FINANCIAL ASSURANCE PLAN REQUIRED UNDER THIS SUBSECTION SHALL BE MADE PUBLICLY AVAILABLE ON THE DEPARTMENT'S WEB SITE.~~

~~(7) BEGINNING SEPTEMBER 1, 2016, AND EVERY YEAR THEREAFTER, THE DEPARTMENT SHALL SUBMIT A REPORT EVALUATING THE COMPLIANCE OF COUNTIES AND MUNICIPALITIES WITH THE REQUIREMENTS OF THIS SECTION TO THE GOVERNOR AND, IN ACCORDANCE WITH § 2-1246 OF THE STATE GOVERNMENT ARTICLE, THE SENATE~~

EDUCATION, HEALTH, AND ENVIRONMENTAL AFFAIRS COMMITTEE AND THE HOUSE ENVIRONMENT AND TRANSPORTATION COMMITTEE.

AMENDMENT NUMBER 2

4-202.1.

(e) (1) (I) Except as provided in paragraph (2) of this subsection and subsection (f) of this section, a county or municipality [shall] MAY establish and annually collect a stormwater remediation fee from owners of property located within the county or municipality in accordance with this section.

~~(II) IF A COUNTY INCLUDES THE COST OF STORMWATER REMEDIATION IN THE COUNTY'S CAPITAL BUDGET OR OPERATING BUDGET, THE COUNTY SHALL MEET WITH EACH MUNICIPALITY WITHIN ITS JURISDICTION TO MUTUALLY AGREE THAT THE COUNTY WILL:~~

~~—————(1) ASSUME RESPONSIBILITY FOR THE MUNICIPALITY'S STORMWATER REMEDIATION OBLIGATIONS; OR~~

~~—————(2) FOR A MUNICIPALITY THAT HAS ESTABLISHED A STORMWATER REMEDIATION FEE UNDER THIS SECTION, ADJUST THE COUNTY TAX RATE WITHIN THE MUNICIPALITY TO OFFSET THE STORMWATER REMEDIATION FEE CHARGED BY THE MUNICIPALITY.~~

~~IN A COUNTY USING GENERAL REVENUES TO SUPPORT ALL OR PART OF THE FUNCTIONS SPECIFIED IN THIS SECTION, THOSE REVENUES AND SERVICES SHALL BE CONSIDERED AS PART OF ANY ANNUAL MEETINGS AND CONSIDERATIONS REGARDING MUNICIPAL TAX SETOFFS HELD BETWEEN THE COUNTY AND ITS MUNICIPALITIES UNDER SECTIONS 6-305 OR 6-306 OF THE TAX-PROPERTY ARTICLE.~~

AMENDMENT NUMBER 3

~~SECTION 4. AND BE IT FURTHER ENACTED, That a county that was found by the Maryland Department of the Environment to have an alternative funding source in lieu of any stormwater remediation fee prior to January 1, 2015 shall be exempt from submitting a financial assurance plan under Section 1 of the Act for the duration of the county's current National Pollutant Discharge Elimination System Phase I Municipal Separate Storm Sewer System permit.~~

SECTION 4. 5. AND BE IT FURTHER ENACTED, That Section 3 of this Act shall take effect on the taking effect of the termination provision specified in Section 2 of Chapter 150 of the Acts of the General Assembly of 2012. If that termination provision

takes effect, Section 2 of this Act shall be abrogated and of no further force and effect. This Act may not be interpreted to have any effect on that termination provision.

SECTION ~~5~~.6. AND BE IT FURTHER ENACTED, That, subject to the provisions of Section ~~4~~5 of this Act, this Act shall take effect July 1, 2015.