SB 589

Department of Legislative Services

Maryland General Assembly
2006 Session

FISCAL AND POLICY NOTE
Revised

Senate Bill 589 (Senator Frosh, *et al.*)

Education, Health, and Environmental Affairs Environmental Matters

Environment - Judicial Review of Permits - Standing

This bill repeals specified provisions relating to contested case hearings and establishes new provisions regarding judicial review of final decisions by the Maryland Department of the Environment (MDE) with respect to the issuance, renewal, or revision of the following permits: water appropriation and use, waterway construction, nontidal wetlands, certain tidal wetlands, mining, and gas and oil drilling.

The bill takes effect October 1, 2007.

Fiscal Summary

State Effect: General fund expenditure increase of $257,500 in FY 2008 for MDE to hire additional staff to handle the increase in workload anticipated to result from the bill's changes. Future year expenditures are annualized, adjusted for inflation, and reflect ongoing operating costs. Revenues would not be directly affected.

(in dollars)	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012
Revenues	$0	$0	$0	$0	$0
GF Expenditure	257,500	329,000	348,100	368,600	390,600
Net Effect	($257,500)	($329,000)	($348,100)	($368,600)	($390,600)

Note:() = decrease; GF = general funds; FF = federal funds; SF = special funds; - = indeterminate effect

Local Effect: By expanding standing for judicial review, eliminating contested case hearings, and providing for judicial review of certain decisions that may not currently be subject to that review, the bill could result in an increase in workload for the circuit courts. Any such increase cannot be reliably estimated at this time, but could be significant.

Small Business Effect: Potential meaningful.

Analysis

Bill Summary: Except for specified permit applications, a final decision by MDE on the issuance, renewal, or revision of the permits specified above is subject to judicial review at the request of any person who: (1) meets the threshold standing requirements under federal Constitutional Law; and (2) participated in a public participation process through the submission of written or oral comments, unless an opportunity for public participation was not required. This expands standing for judicial review. If a person is entitled to judicial review under these provisions, judicial review must be available immediately, and a contested case hearing may not occur. The above provisions do not apply to a permit application for a proposed activity concerning a pier, rip-rap, or bulkhead.

Judicial review must be on the administrative record before MDE and limited to objections raised during the public comment period unless the petitioner demonstrates that the objections were not reasonably ascertainable during the comment period or that grounds for the objections arose after the comment period. Unless otherwise required by statute, a petition for judicial review under the bill must be filed with the circuit court for the county where the application for the permit states that the proposed activity will occur.

Current Law: MDE must mail notice of a decision to issue, modify, or deny a permit or license to the applicant and to persons on the interested persons list. When opportunity for a contested case hearing on MDE's decision is provided by law, MDE must provide all persons on the interested persons list and the applicant an opportunity to request a contested case hearing within 14 calendar days of the mailing date of the notice of decision.

Upon written request, MDE must grant a contested case hearing if it determines that three conditions are met: (1) the requestor has a specific right, duty, privilege, or interest which is or may be adversely affected by the permit determination or license decision and which is different from that held by the general public; (2) the requestor raises adjudicable issues which are within the scope of the permit authority; and (3) the request is timely. Upon motion by a party to a contested case hearing, MDE may grant a temporary stay of the issuance of the permit pending a final decision in the contested case under specified conditions.

The opportunity for a contested case hearing for most of the permits affected by the bill is provided by the substantive statutes or regulations governing those permits. For certain

wetlands permits, there is not an opportunity for a contested case hearing but statute provides for appeals to the circuit court.

Maryland law currently limits standing to those who are "aggrieved" by the agency decision. "Aggrievement" has been defined by numerous court decisions to mean the ownership of property either adjacent to, or within "'sight or sound' range of the property that is the subject of [the plaintiff's] complaint." Accordingly, property ownership is central to establishing standing under Maryland law. As a result, citizen groups, be they homeowners' associations, environmental groups, or other entities, do not have standing under Maryland law unless they (and not their members) own property adjacent to, or near, the property at issue. The current language of § 5-204 of the Environment Article limiting standing to those with a "specific right, duty, privilege, or interest which is or may be adversely affected by the permit determination or license decision and which is different from that held by the general public" is simply a more detailed statement of the more general common law "aggrievement" standard.

Pursuant to the Administrative Procedure Act, a party who is aggrieved by the final decision in a contested case is entitled to judicial review of the decision.

Federal law is broader than State law in that it does not require property ownership as prerequisite for standing. Rather, it is sufficient under federal law that the party opposing the permit *uses* the area affected by the permit decision or otherwise has a particular *interest* in the property. Federal law also makes no distinction between individual and group standing.

Under federal case law, in order to have standing, "a plaintiff must show: (1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." Citizen groups can establish standing "when [their] members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." Thus, as long as the group's members would be able to establish standing through their recreational or aesthetic enjoyment of the area at issue, the group itself would likely have standing under federal law.

U.S. Supreme Court decisions during the 1990s required plaintiffs alleging environmental injury in federal courts to meet stringent standing requirements. In a series of decisions, the court held that: (1) averments by plaintiffs that a federal agency action affecting specified tracts of land adversely affected their recreation on unspecified portions of

public land lacked geographic specificity for standing; (2) an environmental group's allegations that, as a result of a federal action, the group's members would not be able to observe endangered species at a location the members intended to visit at an unspecified time in the future lacked temporal specificity for standing; and (3) a plaintiff failed to meet the redressability component of federal standing when a defendant came into compliance during the 60-day notice period prior to a citizen action suit being filed, since the civil penalties requested by the plaintiff were payable to the federal government, not the plaintiff, and thus could not redress any injury plaintiffs continued to suffer as a result of the former violation.

However, in a 2000 decision, the court held that sworn statements by plaintiffs that waste discharged from a corporate hazardous waste incinerator into a local river interfered with their recreational use of the river downstream met the "injury in fact" component of federal standing since "environmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity." The court also held that the civil penalties requested by the plaintiff met the redressability component because the violations were ongoing at the time the suit was filed and the penalties served as a deterrent against future harmful activity.

Background: According to MDE, only a handful of contested cases for water-related permits are requested each year. MDE advises that approximately five cases were referred to the Office of Administrative Hearings (OAH) in 2005, with only one case scheduled to go to trial.

State Expenditures: General fund expenditures could increase by an estimated $257,497 in fiscal 2008, which accounts for the bill's October 1, 2007 effective date. This estimate reflects the cost of hiring five public health engineers within MDE to handle the increase in workload anticipated under the bill's provisions. It includes salaries, fringe benefits, one-time start-up costs, and ongoing operating expenses. The information and assumptions used in calculating the estimate are stated below:

- Due to the elimination of contested case hearings and the fact that permit revisions would now be appealable, MDE would need to devote additional staff time to fully document permit decisions to ensure that, if a decision is appealed, the record is complete. Currently, MDE makes a simple summary of a decision, knowing that, if the decision is appealed, it will have the opportunity to elaborate on the record developed during the contested case hearing. In addition, MDE advises that, currently, minor permit modifications are generally not subject to contested case hearings or judicial review.

- The bill's changes would require an additional two days of staff time for permit applications relating to nontidal wetlands, waterway construction, and mining, and an additional five days of staff time for permit applications relating to water appropriations.

- Based on permit data for 2005, MDE would need to devote additional staff time with respect to 92 nontidal wetlands permit applications, 61 waterway construction permit applications, 78 mining permit applications, and 120 water appropriations permit applications. This assumes that most permit applications received by MDE would not require any additional documentation.

- No additional staff time would be needed to document most tidal wetlands permit applications as a result of the bill; current law already provides that decisions regarding State tidal wetlands permits may be appealed to the circuit court. In addition, the bill specifically exempts permit applications for piers, rip-rap, or bulkheads.

- Each person works 233 days per year.

Salaries and Fringe Benefits	$237,451
Equipment	17,050
Operating Expenses	2,996
Total FY 2008 State Expenditures	**$257,497**

Future year expenditures reflect: (1) full salaries with 4.6% annual increases and 3% employee turnover; and (2) 1% annual increases in ongoing operating expenses.

To the extent that the actual increase in workload for MDE varies from the above estimates, the need for staff would vary accordingly.

Because only a handful of contested case hearings are requested each year, the bill's changes would not materially affect OAH.

Small Business Effect: The 2001 Survey of U.S. Business by the U.S. Census Bureau indicated that 92.6% of all firms in Maryland had fewer than 50 employees. Small businesses permitted by MDE could be subject to additional court challenges with respect to permit decisions. This could result in an increase in expenditures for affected businesses. Other small businesses, however, might benefit from the bill's changes.

Additional Comments: The Administrative Office of the Courts and OAH both advise that, by eliminating the contested case hearing provisions with respect to these permits, the bill eliminates the winnowing process that occurs by having contested case hearings that are reviewed under the Administrative Procedure Act. OAH believes that, because the circuit courts already have heavy administrative review dockets, OAH would likely be able to schedule the cases covered under this bill more quickly. OAH opines that the bill's changes might not reduce the overall time involved with contesting a permit decision. In addition, the Administrative Office of the Courts advises that findings of fact by administrative agencies are entitled to great judicial deference in contested cases and, moreover, contested case adjudicators often organize the evidence and exhibits to provide a clearer record to review. Under the bill, the record may become more difficult to review, resulting in lengthier court processes and, perhaps, more remands.

Additional Information

Prior Introductions: None.

Cross File: HB 1429 (Delegate Stern, *et al.*) – Environmental Matters.

Information Source(s): Maryland Department of the Environment, Judiciary (Administrative Office of the Courts), Office of Administrative Hearings, Office of the Attorney General, University of Maryland School of Law, Congressional Research Service, U.S. Census Bureau, Department of Legislative Services

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