# Department of Legislative Services

Maryland General Assembly
2009 Session

## FISCAL AND POLICY NOTE

Senate Bill 824 (Senator Frosh, *et al.*)
Education, Health, and Environmental Affairs

**Community Environmental Protection Act of 2009**

This bill makes extensive changes to standing requirements in environmental cases, authorizes private citizens to bring legal action under specified circumstances in response to violations of environmental laws, and expands the availability of judicial review of certain decisions by governmental entities.

## Fiscal Summary

**State Effect:** Potential significant increase in expenditures for the Maryland Department of the Environment (MDE) and the Department of Natural Resources (DNR) to employ additional staff and handle administration related to the increase in cases and legal proceedings generated by the bill.

**Local Effect:** Potential significant increase in local expenditures for administrative costs incurred as a result of the increase in cases and legal proceedings generated by the bill.

**Small Business Effect:** Potential meaningful impact on small businesses whose permits are delayed by legal challenges to permits authorized by the bill.

## Analysis

**Bill Summary:** The bill applies to claims pertaining to administrative decisions and provisions under the Environment Article, the Maryland Environmental Policy Act, the Forest Conservation Act, and the Chesapeake and Atlantic Coastal Bays Critical Area Protection Program. The bill defines an "administrative decision" as any permit, license, renewal, or other form of authorization, or any standard, ordinance, rule, regulation, or order that is issued by a State or local governmental unit or agency, including a county board of appeals.

*Standing:* Under the bill, a person has standing for the purposes of claims arising under the applicable statutes if the person suffered an "injury in fact" that is fairly traceable to the challenged action of the defendant and is likely to be redressed by the requested relief. However, any interest or injury asserted must fall within the zone of interests sought to be protected by the relevant statute.

An association has standing for these claims if (1) one or more members of the association have standing as individuals; (2) the interests that the association seeks to protect are germane to the association's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of the member.

An "injury in fact" means an invasion of a legally protected interest that is concrete and particularized, actual or imminent, and not conjectural or hypothetical. An injury in fact includes (1) a property right or personal interest that is distinct from or affected in a way that is different from a property right or personal interest of the general public; and (2) a negative impact or the threat of a negative impact to the public health or the use and enjoyment of a natural resource.

*Participation in Administrative Appeal Proceeding:* The bill authorizes a person to participate in an administrative appeal proceeding if the person participated in a public participation process through the submission of comments or suffers an injury in fact from the administrative decision.

*Judicial Review of Final Administrative Decisions:* A person may request judicial review of a final administrative decision if the person has standing and engaged in the public participation process, if participation was required by statute. However, an association may still request judicial review if the association was involved in the public participation process and the individual member of the association who has standing was not personally involved in the process.

*Challenges to Final Administrative Decisions*: The bill authorizes a person who has standing to bring a civil action on the person's behalf to challenge a final administrative decision of a departmental Secretary or any other presiding officer or unit of government. The bill also provides additional options for courts in judicial reviews of final decisions in contested cases under the Administrative Procedure Act. A court may award the costs of litigation to the prevailing party, including reasonable attorney's fees, court costs, and expert witness fees. However, if a party to the action acts in bad faith or without substantial justification in maintaining or defending the action, the court may award litigation costs to the adverse party.

Judicial review of the final decision must be confined to the administrative record supplemented by additional evidence taken in accordance with specified requirements.

The final administrative decision maker may modify the findings or decision in light of the new evidence and must file the additional evidence and modifications with the court.

*Citizen Suits:* The bill authorizes a person with standing to bring a civil action on his/her own behalf (1) against any person or governmental entity alleged to have violated or be in violation of any standard or limitation under the applicable statutes or an order or permit issued by a departmental Secretary, an officer or agency of the State, local government, or political subdivision; or (2) against a Secretary or any other officer or agency of the State, local government, or political subdivision where there is an alleged failure of the official or agency to perform any nondiscretionary act or duty required by the applicable statutes. A citizen suit may be brought at least 60 days after the plaintiff has given notice of the alleged violation to the appropriate Secretary, the Attorney General, the local jurisdiction in which the alleged violation occurred, and the alleged violator. The bill creates exceptions to this general timing requirement when a department Secretary has commenced and is diligently prosecuting an action in State court to require compliance with the applicable provision that is the basis for the alleged violation or if the opposed activity presents an imminent and significant risk to the public health, natural resources, or environment of the State. Though a citizen suit may not be brought if there is a relevant concurrent State action, a private citizen with standing may intervene in the State action.

The bill specifies the types of relief that a court may provide in these citizen suits. If the court awards a civil penalty authorized by the applicable statute that is the basis for the claim, the penalty must be deposited in the manner specified in statute. If the enforcement of a statutory duty has been delegated to a local government, up to 10% of the collected civil penalty may be awarded to the local government. A court may award litigation costs to a prevailing party or to an adverse party if a party acts in bad faith or without substantial justification.

*Intervention in Litigation:* With the exception of concurrent State litigation as it relates to citizen suits, a person with standing may intervene as a matter of right in an action arising out of the applicable statutes unless a defendant demonstrates that the person's interest is adequately represented by existing parties. The State may intervene as a matter of right in a proceeding brought under the bill.

*Chesapeake and Atlantic Coastal Bays Critical Areas Program:* A person meeting the standing provisions in the bill has the standing, the right to intervene, the right to judicial review, and the right to participate in a proceeding arising under the statutes governing the program or a regulation adopted pursuant to and approved under these statutory provisions.

*Severability/Intent:* The bill contains uncodified language specifying that its provisions are severable, and should one of the provisions be held invalid, the other provisions still apply. The bill also contains language expressing the intent of the General Assembly that (1) the bill provide certain remedies to abate harm to the public health, environment, or natural resources of the State; (2) the bill may not be construed to alter or abridge any existing legal rights or remedies; and (3) may not be construed as stopping or limiting the State or any person in the exercise of the right to protect the State's natural resources, suppress nuisances, or abate pollution.

**Current Law:**

*Standing:* Generally, a party to a civil action must be authorized to participate in the action, either by statute or by having common law "standing." Standing means that a party has a sufficient stake in a controversy to be able to obtain judicial resolution of that controversy. Maryland law currently limits standing to those who are "aggrieved" by the agency decision. "Aggrievement" has been defined by court decisions to mean that the plaintiff has a specific interest or property right that has been affected by the disputed action or decision in a way that is different from the effect on the general public. With respect to cases involving challenges to specific types of permits and zoning/planning decisions, Maryland courts have defined "aggrievement" 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."

The Court of Appeals has held that an association lacks standing to sue where it has no property interest of its own, distinct from that of its individual members. *Citizens Planning & Housing Ass'n. v. County Executive, 273 Md. 333 (1974).* In *Medical Waste Ass'n. v. Maryland Waste Coalition, 327 Md. 596 (1992),* the Court of Appeals stated that if an individual or organization is seeking to redress a public wrong, the individual or organization has no standing unless the wrong suffered is different in character and kind from that suffered by the general public.

Federal law is broader than State law in its determination of standing. Under federal law, a party has standing if its use and enjoyment of the area is affected by the challenged action/decision or if the party has a particular interest in the property affected. Federal law also makes little 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."

However, federal cases have at times limited the application of these broad standing requirements. 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.

*Contested Case Hearing/Judicial Appeal:* 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.

Not every permit issued by MDE is eligible for a contested case hearing. In general, only the major permits issued by MDE are eligible for contested case hearings. The opportunity for a contested case hearing for permits is provided by the substantive statutes or regulations governing those permits. 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. For certain permits, there is not an opportunity for a contested case hearing, but statute provides for appeals to the circuit court.

*Citizen Suits:* In general, State environmental laws do not authorize citizen suits. Under the Maryland Environmental Standing Act, a private citizen may pursue legal action in an appropriate circuit court for mandamus or equitable relief against the State or an agency for its failure to perform a nondiscretionary duty; however, it does not authorize a citizen to pursue legal action against a violator of environmental laws.

Several federal environmental statutes, including the Clean Air Act and the Clean Water Act, do permit citizen suits. In addition to authorizing legal action by private citizens against governmental units for failure to perform a nondiscretionary duty, these statutory provisions also permit citizens to pursue legal action against violators of environmental laws and against governmental units to challenge the validity of a standard, rule, regulation, ordinance, order, or issued permit.

*Intervention in Litigation:* Under Rule 2-214, upon a timely motion, a party has a right to intervene in an action if a person has an unconditional right to intervene as a matter of law or claims that he/she has an interest – the protection of which requires intervention in the litigation in order to be adequately protected. Pursuant to case law, the State has a right to intervene when its representation in the action may be inadequate.

Upon the making of a timely motion, a person may be permitted to intervene in an action when the person's claim or defense has a question of law or fact in common with the action. After making a timely motion, a governmental entity and officer of a governmental entity may intervene in an action when the validity of a legal provision, ordinance, regulation, executive order, requirement, or agreement affecting the moving party is drawn in question in the action or when a party to the action relies on the applicable provision in his/her grounds of claim or defense. Courts typically consider whether the person seeking intervention has an interest that demands intervention in order to be protected and if the interests of the current parties adequately represent the potential intervenor's interest.

**Background:** Forty-four states allow for associational standing in a manner similar to the provisions of this bill. Three states (Mississippi, South Dakota, and Virginia) permit this type of associational standing for specified actions, and three states (Kentucky, Maryland, and Nevada) do not have expanded associational standing. However, it is unclear how many of these states have an administrative process comparable to the one currently in place in Maryland.

*Chesapeake Bay Critical Area Protection Program*

The Chesapeake Bay Critical Area Protection Program is within DNR and was established by Chapter 794 of 1984 in order to minimize damage to water quality and wildlife habitat by fostering more sensitive development activity along the shoreline of

the Chesapeake Bay and its tributaries. The law identified the Critical Area as all land within 1,000 feet of the mean high water line of tidal waters or the landward edge of tidal wetlands and all waters of and lands under the Chesapeake Bay and its tributaries. The 1,000-foot area was delineated on Maryland's 1972 State Wetlands Maps. Local governments then transferred the Critical Area boundary line to their own maps.

The 1984 legislation also created a statewide Chesapeake Bay Critical Area Commission (now called the Critical Area Commission for the Chesapeake and Atlantic Coastal Bays) that oversees the development and implementation of local land use programs dealing with the Critical Area. Each local jurisdiction is charged with the primary responsibility for development and implementation of its own local program; that local authority, however, is subject to commission review and approval.

In 2002, the law was expanded to include the State's coastal bays. Under current law, the 1,000-foot wide Critical Area encompasses approximately 680,000 acres (or roughly 11% of the land area in the State) and spans 64 local jurisdictions (16 counties, Baltimore City, and 47 other municipalities). Chapter 119 of 2008 sought to address program concerns by providing greater authority to the Critical Area Commission, updating the basic components of the program, enhancing buffer and water quality protection, coordinating new development more closely with growth management policies and other environmental protection and planning processes, and strengthening enforcement and variance provisions.

*Forest Conservation Act*

Enacted in 1991, the Forest Conservation Act provides a set of minimum standards that developers must follow when designing a new project that affects forest land. Local governments are responsible for making sure these standards are met but may choose to implement even more stringent criteria. If there is no local agency in place to review development plans, DNR does so. In general, the Act calls for a minimum amount of forest cover on development sites based upon the site's zoning.

*Maryland Environmental Policy Act*

The Maryland Environmental Policy Act (MEPA), Chapter 702 of 1973, requires State agencies to prepare environmental effects reports for each proposed State action that significantly affects the quality of the environment. A "State action" is a request for legislative appropriations or other legislative actions that will alter the quality of the air, land, or water resources. MEPA is similar to the National Environmental Policy Act of 1969, which requires federal agencies to consider the environment in all major federal actions and involves studying alternatives and evaluating various environmental impacts and mitigation measures.

**State Fiscal Effect:** The bill will result in a significant increase in State expenditures for additional staff at DNR and MDE to handle the anticipated increase in cases/legal proceedings created by the bill's expansion of the number of persons with standing in legal challenges to final agency decisions and the availability of judicial review of final agency decisions.

*Department of Natural Resources:* DNR advises that the bill will affect the following decisions each year:

- Chesapeake and Atlantic Coastal Bays Critical Area Program: Local governments approve more that 2,000 development projects on private lands in the Critical Area each year, each of which is reviewed by the Critical Area Commission for consistency with the State's Critical Area law and the 64 local Critical Area programs implemented by Maryland's counties and municipalities. Currently, the commission appeals 10 to 15 of these projects annually to courts. However, under the bill all 2,000 of the commission's decisions concerning locally approved development projects are subject to appeal by any person or association who disagrees with the commission's decision.

  Each year, the commission has direct approval authority over at least 50 State and local development projects and approves more than 25 amendments to local Critical Area programs; each of these actions will also be prone to appeal by a larger population.

  Pursuant to legislation enacted in 2008, the commission is authorized to develop regulations to more efficiently and effectively implement the Critical Area law. DNR advises that the commission expects to adopt 5 to 10 sets of regulations annually. The 2008 legislation also established requirements and procedures for the commission to adopt new maps for the Critical Area; the new maps will incorporate an undetermined amount of land not previously under State jurisdiction. While any affected landowner has the right to appeal the commission's decision under current law, the bill expands the persons who can appeal the decisions to include other individuals and associations. DNR advises that the number of mapping decisions will be in the thousands.

  DNR further advises that the commission is typically involved in 10 to 15 new legal proceedings per year, each typically running for more than one year and generating $5,000 to $10,000 in printing costs. The department currently has three assistant Attorneys General to supplement regularly assigned legal staff with the more complex cases currently in progress. Due to the number of decisions susceptible to appeal by a larger pool of persons and associations, the number of additional legal and/or administrative staff needed cannot be reliably determined at

this time, but is expected to be significant. Additionally, DNR will need to spend more time preparing testimony, coordinating expert witnesses, and attending court proceedings for the additional cases. Additional expenditures will be incurred for the department to compensate expert witnesses.

- *Forest Service:* It is unlikely that the bill will result in additional expenditures for DNR's Forest Service. However, if administrative appeals increase significantly, the Forest Service may need one additional full-time staff person to assist in following up on reported violations or administrative decision appeals.

*Maryland Department of the Environment:* MDE advises that it issues thousands of permits, licenses, authorizations, and corrective orders each year. Under current law, only certain major permits issued by MDE are subject to judicial review by third parties who meet the State standing requirements. The bill expands the population of potential third-party appellants and the number of agency decisions susceptible to judicial review. The bill also authorizes a person to participate in an administrative appeal proceeding if the person suffers an injury in fact from the administrative decision, even if the person did not engage in the public participation process. The administrative process as it relates to permits provides numerous opportunities for public comment and participation so that an agency may consider those concerns and address them prior to making a final decision. However, under the bill, it is possible that the first time MDE will hear about a person's concern with an agency decision is during the appeals process. The increase in the number of additional administrative appeals and petitions for MDE as a result of the bill cannot be reliably determined at this time. However, it is likely that MDE will need an additional 1.5 assistant Attorney General positions to accommodate the additional workload, at an average cost of $120,000 per year. This estimate is based on MDE's assessment that the bill will result in a 10% increase in appeals/proceedings. MDE will also incur additional administrative and operating expenses to handle the increased caseload.

*Other Agencies:* The Office of the Attorney General (OAG) and the Judiciary cannot reliably determine the fiscal impact of this bill on their agencies at this time. However, OAG advises that any impact on its office will be personnel related.

**Local Fiscal Effect:** As previously stated, the bill affects a large number of county and municipality decisions, all of which are appealable by a larger group of third parties. The increase in the number of appeals for counties and municipalities cannot be reliably determined at this time but is expected to be significant, due to the breadth and scope of the bill's application. Baltimore City and Allegany and Harford counties anticipate a significant increase in expenditures as a result of the bill. Montgomery County advises that the bill does not have a direct impact on county finances. The bill may also result in an increase in circuit court proceedings from judicial appeals.

## Additional Information

**Prior Introductions:** None.

**Cross File:** HB 1053 (Delegate McIntosh, *et al.*) - Environmental Matters.

**Information Source(s):** Department of Natural Resources; Maryland Department of the Environment; Baltimore City; Allegany, Caroline, Harford, and Montgomery counties; Office of the Attorney General; Judiciary (Administrative Office of the Courts); University of Maryland Environmental Law Clinic; Department of Legislative Services

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