HB 1569

Department of Legislative Services

Maryland General Assembly
2009 Session

FISCAL AND POLICY NOTE
Revised

House Bill 1569 (Delegate McIntosh, *et al.*)
Environmental Matters Education, Health, and Environmental Affairs

Standing - Miscellaneous Environmental Protection Proceedings and Judicial Review

This bill repeals specified provisions relating to contested case hearings and establishes new provisions regarding judicial review of certain permit determinations by the Maryland Department of the Environment (MDE) with respect to the issuance, denial, renewal, or revision of specified permits and by the Board of Public Works (BPW) with respect to a license to dredge or fill on State wetlands.

The bill takes effect January 1, 2010.

Fiscal Summary

State Effect: Potential significant increase in general fund expenditures for MDE to implement the bill's requirements. Potential minimal decrease in expenditures for the Office of Administrative Hearings (OAH).

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 may result in an increase in workload for the circuit courts. Any such increase cannot be reliably estimated at this time, but may be significant. Potential minimal increase in local government expenditures to handle challenges to variance requests in the Critical Area buffer.

Small Business Effect: Potential significant impact on businesses whose permits are expedited due to the elimination of contested case hearings or whose permits are delayed due to the inclusion of more parties in the judicial review process as a result of the bill's expansion of standing in these cases.

Analysis

Bill Summary: The bill prohibits contested case hearings with respect to MDE's issuance, denial, renewal, or revision of the following permits: (1) ambient air quality control; (2) landfills/incinerators; (3) discharge pollutants; (4) sewage sludge; (5) controlled hazardous substance facilities; (6) hazardous materials facilities; (7) low-level nuclear waste facilities; (8) water appropriation and use; (9) nontidal wetlands; (10) gas and oil drilling; (11) surface mining; and (12) private wetlands. The bill also applies to decisions by BPW to issue or deny a license to dredge or fill on State wetlands.

Instead, a person or an association may request judicial review of these decisions if he/she meets the requirements for standing under federal law and is the applicant or participated in an applicable public participation process through the submission of written or oral comments. The petition for judicial review must be filed (1) within 30 days after publication of a notice of final determination; and (2) in accordance with the Maryland Rules. An action for judicial review must be conducted in accordance with the Maryland Rules.

The bill specifies where petitions for judicial review must be filed and that review is limited to an administrative record and objections raised during the public comment period, with limited exceptions. If the case involves objections raised outside of the public comment period that are permissible under the limited exceptions, the court is required to remand the matter to MDE for consideration of those objections. The bill specifies what materials constitute an administrative record for purposes of judicial review. MDE and BPW are required to make certain materials from the administrative record available within a specified time period when the department or board issues a draft permit, license, or tentative determination, with the exception of certain privileged materials exempted from inclusion in the administrative record. MDE and BPW must grant a one-time 60-day extension of the public comment period upon request. The bill contains uncodified language requiring a court to examine the following factors when considering a motion for a stay in an action brought for judicial review under the bill: (1) the likelihood that the plaintiff will succeed on the merits; (2) whether greater injury would be done to the defendant by the court's granting of the stay than would result from the court's refusal; (3) whether the plaintiff will suffer irreparable injury unless its stay is granted; and (4) the public interest in granting the stay.

For a proceeding involving a variance for a development activity in the Chesapeake and Atlantic Coastal Bays Critical Area buffer, a person who meets federal standing requirements may participate as a party in a local administrative proceeding involving the variance. A person who meets this requirement may also (1) participate as a party in an administrative proceeding at a board of appeals even if the person was not a party to the original administrative proceeding; and (2) petition for judicial review and participate as

a party even if the person was not a party to the action which is the subject of the petition. These provisions only apply to a variance application filed with a local Critical Area program on or after the bill's January 1, 2010 effective date.

Severability: The bill also contains uncodified language specifying that its provisions are severable, and should one of the provisions be held invalid, the others still apply.

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." Federal case law requires an association to meet a three-part test in order to have standing. Under the test, an association has standing if: (1) one or more members of the association have standing as individuals; (2) the interests that the association seeks to protect in the case are germane to the association's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of the member with individual standing 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.

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.

On March 3, 2009, the U.S. Supreme Court held that an association lacked standing to challenge regulations of the U.S. Forest Service exempting small fire-rehabilitation and timber-salvage projects from specified notice, comment, and appeals processes applicable to more significant land management decisions. The court determined that the group had standing with respect to the imminent and concrete harm threatened to its members by a specific project; however, since the group had voluntarily settled that portion of the dispute, it could no longer use the threat imposed by that project on its members to meet the standing requirements of Article III of the federal constitution. Furthermore, the court determined that the remaining affidavit submitted in support of the group's standing stating that one of its members: (1) had suffered past injury from development on Forest Service land; and (2) wants to visit the National Forests in the future was insufficient to prove that the application of the regulations posed an actual or imminent injury to any of the association's members. See *Summers et al. v. Earth Island Institute et al.*, __ U.S. __ (No. 07-463, March 3, 2009).

Contested Case Hearing/Judicial Appeal: 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.

In general, 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.

Slightly different procedures apply to permits listed in § 1-601 of the Environment Article (permits (1) through (7) on page 2). For these permits, a person may request a contested case hearing if the person makes factual allegations with sufficient particularity to demonstrate that: (1) the person is aggrieved by the final determination; and (2) the final determination of the department is legally inconsistent with any provisions of law applicable to the final determination being challenged or is based on an incorrect determination of a relevant and material fact. A party requesting a contested case hearing for these permits must submit a written request within 15 days after publication of a notice of final determination.

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 or licenses, such as a license to dredge or fill on State wetlands, there is not an opportunity for a contested case hearing, but statute provides for appeals to the circuit court. BPW, with assistance from the Secretary of the Environment, issues licenses to dredge or fill on State wetlands. Any party aggrieved by a decision of BPW can petition the circuit court where the land is located for an appeal on the record compiled by the board. The petition must be filed within 30 days after the petitioner received BPW's decision. In general, the Maryland Rules require a petition for judicial review of an administrative agency decision to be filed within 30 days of the date of the order or action to be reviewed or the date the administrative agency sent a statutorily required notice of the order or action to the petitioner, whichever is later.

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 the Department of Natural Resources (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.

State Fiscal Effect:

Maryland Department of the Environment: MDE advises that staffing needs would increase, requiring general fund expenditures for one assistant Attorney General position. However, Legislative Services advises that this estimate may understate staffing needs for MDE. *For illustrative purposes only,* based on an analysis of information provided to the Department of Legislative Services by MDE in 2006 in reference to a similar bill that affected fewer permits, MDE expenditures were anticipated to increase by more than $300,000 per year on an annualized basis to handle that bill's requirements.

That estimate reflected the cost of hiring five public health engineers within MDE to handle the increase in workload anticipated under the bill's provisions. The information and assumptions used in calculating the estimate for the 2006 legislation are stated below:

- Due to the elimination of contested case hearings and the fact that permit revisions would have been appealable, MDE would have needed to devote additional staff time to fully document permit decisions to ensure that, if a decision were appealed, the record would have been 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. Also, in 2006 MDE advised that minor permit modifications were generally not subject to contested case hearings or judicial review.

- The 2006 bill's changes would have required an additional two days staff time for permit applications relating to nontidal wetlands, waterway construction, and mining, and an additional five days for permit applications relating to water appropriations.

- Based on permit data for 2005, MDE would have needed 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 estimate assumed that most permit applications received by MDE would not require any additional documentation.

- No additional staff time would have been needed to document most tidal wetlands permit applications as a result of the bill; current law already provided that decisions regarding State tidal wetlands permits could be appealed to the circuit court. In addition, the 2006 bill specifically exempted permit applications for piers, rip-rap, or bulkheads.

- Each person would have worked 233 days per year.

Thus, it is likely that staffing needs under this bill would be similar or even greater. Furthermore, the 2006 estimate did not factor in additional legal needs. Legislative Services concurs that MDE will need to hire additional legal staff or request assistance from the central office of the Office of the Attorney General.

Board of Public Works: The bill alters standing requirements regarding BPW decisions pertaining to licenses to dredge or fill on State wetlands, requires the board to make certain materials available, and requires BPW to extend the public comments period upon request. While these changes may have an operational impact on BPW, it is assumed that they can be handled with existing resources.

Department of Natural Resources: The bill's alteration of standing requirements for proceedings involving variance requests for development activity in the Critical Area buffer is limited to local administrative proceedings. Thus, the bill will not affect decisions by the department's Critical Area Commission, which reviews local decisions. DNR will be able to handle any increased duties under the bill's provisions with existing budgeted resources.

The Critical Area Commission advises that approximately 300 variance applications are filed each year. Between 70% and 75% of these applications relate to development activity in the buffer, which is the area located within 100 feet of the mean high water line. The commission further advises that a maximum of 10 cases per year make it to the circuit court level.

Office of Administrative Hearings: OAH handles very few contested case hearings for MDE permits. OAH advises that it handled 20 contested cases for MDE permits between July 2007 and March 2009, five of which occurred during fiscal 2008. Thus, it is assumed that the bill's changes do not materially affect OAH.

Local Fiscal Effect: Local expenditures will increase to accommodate judicial review of permit decisions in the circuit courts. The extent of the increase will depend on the number of legal challenges to permit decisions. According to the Critical Area Commission, it is rare for a county to participate in a variance case at the circuit court level. To the extent that local governments participate in challenges to variance requests in the Critical Area buffer, local government expenditures will increase to handle these cases.

Small Business Effect: The elimination of contested case hearings for specified environmental permits and the expansion of standing in judicial review of these permit decisions are the two components of the bill that could impact small businesses. However, the extent to which these two factors will counteract each other cannot be reliably determined at this time.

The length of a contested case hearing for a permit varies depending on the nature of the permit, the issues involved, and the number of parties. MDE advises that some of the contested case hearings for its permits take a few days, while others last for three weeks. Because MDE has not delegated its final decision making authority to OAH for permit cases, OAH's decisions in these cases are *proposed* decisions, not final decisions. OAH typically disposes of MDE permit cases within six months of receipt of a request for a contested case hearing, and is required to do so within this time period for contested case hearings for permits listed in § 1-601 of the Environment Article (permits (1) through (7) on page 2). Once OAH issues its proposed decision to MDE and the parties involved, MDE and the parties have an opportunity to file exceptions to OAH's decision. A final decision maker for MDE reviews the exceptions and issues a final decision. A final decision may be appealed to a circuit court. Because a person seeking judicial review of

a permit decision must exhaust all available administrative remedies, he/she must go through this entire process before seeking judicial review. MDE advises that this process can take longer than one year. Thus, for permits that are inevitably going to judicial review, the elimination of a contested case hearing in favor of judicial review on the administrative record has the potential to significantly reduce expenditures and delays for small businesses seeking expedited decisions on permits.

However, under the bill, the only avenue to challenge a decision by MDE on these permits is through judicial review on the administrative record. The bill's alteration of the standing requirements would also allow more persons or groups to challenge the permits. It is unclear at this time if the process proposed in the bill would delay the issuance of permits or resolution of issues related to permits that are currently resolved without judicial review.

Additional Information

Prior Introductions: None.

Cross File: SB 1065 is designated as a cross file; however, the bills are not identical.

Information Source(s): Office of the Attorney General, Department of Natural Resources, Maryland Department of the Environment, Judiciary (Administrative Office of the Courts), Office of Administrative Hearings, Maryland Chamber of Commerce, Department of Legislative Services

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