



March 25, 2024

The Honorable Brian J. Feldman, Chair  
Education, Energy, and the Environment Committee  
Miller Senate Office Building, 2 West  
Annapolis, MD 21401

**Oppose: HB 1101 – Standing - Environment and Natural Resources Actions**

Dear, Chair Feldman and Committee Members:

On behalf of the NAIOP Maryland Chapters representing seven hundred companies involved in all aspects of commercial, industrial, and mixed-use real estate I am writing in opposition to HB 1101.

This bill grants a new cause of action to allow any individual or association to independently sue any person, business, a county, municipality, the City of Baltimore, or multicounty government entities. Because the bill adopts the federal standing standard, a claim of a past or potential future negative impact to aesthetic, recreational, conservational, health or economic interests of the individual will be enough to qualify for judicial review. The plaintiff may seek injunctive relief and civil penalties, be awarded the costs of litigation, and participate in alternative mitigation requirements imposed by the court.

Although narrower than the bill as introduced, NAIOP still has significant concerns about the causes of action authorized by HB 1101 and their implications. The bill provides an additional method for determined opponents to initiate tactical litigation in state courts to delay or alter new housing and commercial projects after their permits have been approved.

The rationale for NAIOP's opposition includes the following:

- Because HB 1101 authorizes an independent cause of action, it would allow private interests to bring enforcement action against permit holders in state court for the first time. Individuals who meet the federal definition of standing could independently initiate enforcement action based on their own assessment of how permitted activities harm their environmental or aesthetic interests and what remedies or penalties they believe to be appropriate.
- Regulated entities would be subject to litigation from private parties who only need to show there is a threat of negative impacts to their use and enjoyment of the environment or aesthetic interests – no actual environmental harm need be shown to show standing. Deleting references to *enjoyment of a natural resource* and *negative impact to aesthetic interests* on page 2 line 28 - page 3 line 2 does not change how these concepts will be used to determine who has standing to initiate the state court litigation authorized by the bill.
- The change to *Waters of the U.S.* in the Sackett case did not change the definition of *Waters of the State* or diminish their level of regulatory protection in Maryland. Today, enforcement authority over state and local permits is vested with state and local agencies who operate in the public interest, use their own discretion in enforcement decisions, and are subject to oversight by the General Assembly and local elected bodies. HB 1101 would allow litigation against permit holders without the agency that issued the permit being a party. In fact, the bill bars MDE from being sued or being assessed civil penalties even if the plaintiff alleges that MDE issued an incorrect permit.

- Under current law, individuals who meet the federal definition of standing have several existing avenues to address concerns related to environmental permits. ENV 1-601 (attached) allows individuals who meet the federal standing requirements to seek judicial review of final decisions on the issuance or renewal of state air quality and water quality permits. Under NR 1-503 (attached) anyone who meets federal standing requirements can sue state or local officials to carry out their enforcement duties. ENV 9-433.1 (attached) allows individuals who meet the federal standing requirements to intervene in an enforcement action initiated by MDE in state courts. In fact, NAIOP worked with the University of Maryland Environmental Law Clinic and other stakeholders to authorize the right to intervene established in ENV 9-433.1. Despite supporting the right to intervene in MDE enforcement actions we believe HB 1101 goes too far because it would allow individuals to independently initiate their own enforcement actions against permit holders in state court.
- The Federal Clean Water Act allows attorney's fees and the costs of expert witnesses to be awarded to *any prevailing or substantially prevailing party*. This bill allows a *prevailing plaintiff or a substantially prevailing plaintiff* to be awarded attorney's fees and the costs of expert witnesses but a *substantially prevailing defendant* can only be awarded litigation costs *if the plaintiff's claim was frivolous, unreasonable, or groundless*. The bill sets a higher bar for permit holders who are forced to defend themselves and prevail to be awarded costs than is set out in the Clean Water Act. This creates a monetary incentive for the plaintiff to initiate or prolong court action.
- The notice provisions in the bill are not specific enough to allow the permit holder to understand the alleged violation and to have an opportunity to correct prior to court action by the plaintiff.
- Striking *OR GOVERNMENTAL ENTITY* on page 5 line 4 does not appear to exclude state or local government agencies or officials from suit. The change still allows enforcement action against any *person*. Person is defined in Env 1-101(k) "Person" means an individual, receiver, trustee, guardian, personal representative, fiduciary, or representative of any kind and any partnership, firm, association, corporation, or other entity."

The scope of the new right to sue raises serious concerns that determined opponents will be able to use authority in the bill to initiate tactical litigation to delay or alter permitted activities after they have been approved. Because the bill adopts the very permissive federal definition of standing, a plaintiff could get into court based on subjective claims of aesthetic impacts or personal concerns about their ability to recreate on the Chesapeake Bay. The person does not have to live near the alleged violation to trigger a civil enforcement proceeding and the agency that issued the permit does not have to be a party to the proceeding.

**For these reasons NAIOP respectfully requests your unfavorable report on HB 1101**

Sincerely,



Tom Ballentine, Vice President for Policy

NAIOP Maryland Chapters -*The Association for Commercial Real Estate*

cc: Senate Energy, Environment and Education Committee Members  
Nick Manis – Manis, Canning Assoc.