

Department of Legislative Services
 Maryland General Assembly
 2024 Session

FISCAL AND POLICY NOTE
Third Reader - Revised

Senate Bill 653

(Senator Augustine, *et al.*)

Education, Energy, and the Environment

Environment and Transportation

Standing - Environmental and Natural Resources Protection Proceedings (Clean Water Justice Act of 2024)

This bill establishes standing, for a person that meets the threshold standing requirements under federal law, in civil claims arising under specified standards relating to (1) nontidal wetlands that do not have a continuous surface connection to surface water and (2) discharges of pollutants affecting ephemeral streams or intermittent streams. The bill authorizes a person that has standing pursuant to the bill to bring a civil action against any person or political subdivision that is alleged to be in violation of those standards. The bill also authorizes a person that meets the threshold standing requirements under federal law to intervene in a civil action brought by the Secretary of the Environment relating to nontidal wetlands (similar authority already exists, and is reestablished under the bill, with respect to a civil action relating to the discharge of pollutants to waters of the State).

Fiscal Summary

State Effect: General fund expenditures for the Maryland Department of the Environment (MDE) increase by \$86,400 in FY 2025; future years reflect annualization and inflation. General fund expenditures may also increase for the Judiciary beginning in FY 2025 (not reflected below). Special fund revenues may increase, as discussed below.

(in dollars)	FY 2025	FY 2026	FY 2027	FY 2028	FY 2029
SF Revenue	-	-	-	-	-
GF Expenditure	\$86,400	\$103,600	\$108,200	\$112,900	\$117,900
Net Effect	(-)/-	(-)/-	(-)/-	(-)/-	(-)/-

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

Local Effect: Local government expenditures may increase, as discussed below. Revenues are not materially affected.

Small Business Effect: Potential meaningful.

Analysis

Bill Summary: The bill makes changes to State law to provide standing and certain remedies to a person with respect to civil claims arising under any “standard.”

“Person” means an individual, receiver, trustee, guardian, personal representative, fiduciary, or representative of any kind and any partnership, firm, association, corporation, or other nongovernmental entity.

“Standard” means any requirement, prohibition, limitation, or condition established by statute, regulation, permit, order, or license issued by the Secretary of the Environment in accordance with (1) Title 5, Subtitle 9 (“Nontidal Wetlands”) of the Environment Article, if the requirement, prohibition, limitation, or condition is related to nontidal wetlands that do not have a continuous surface connection to surface water or (2) Title 9, Subtitle 3 (“Water Pollution Control”) of the Environment Article, if the requirement, prohibition, limitation, or condition is related to an ephemeral stream or an intermittent stream.

“Ephemeral stream” means a body of water with (1) a stream bed located above the water table year-round; (2) a stream flow primarily sourced from rainfall runoff; and (3) flowing water only during, and for a short duration after, precipitation events in a typical year.

“Intermittent stream” means a body of water with (1) flowing water during certain times of year, when groundwater provides water for stream flow and (2) a stream flow supplemented by runoff from rainfall.

The bill makes the following changes:

- **Standing** – The bill establishes that a person that meets the threshold standing requirements under federal law has standing in civil claims arising under any “standard” (as defined above).
- **Authorization to Bring a Civil Action** – The bill establishes that a person that has standing may bring a civil action on the person’s own behalf against any person or political subdivision that is alleged to be in violation of any “standard.” However, an action may not be brought unless the plaintiff first gives 60 days’ notice of the alleged violation to the Secretary of the Environment, the Attorney General, any local jurisdiction in which the violation is alleged to occur, and an alleged violator of the standard. A person may not bring an action if the secretary has commenced and is diligently prosecuting a civil action, or a consent order is entered, to require compliance. An action must be brought in any circuit court of a county where the condition, activity, or failure is alleged to be a violation of a standard.
- **Consent Judgment or Settlement Agreement** – A plaintiff must give notice of and provide a complete and unredacted copy of a proposed consent judgment to which

MDE is not a party, or a settlement agreement, to MDE and the Attorney General at least 45 days before the date that the proposed consent judgment or settlement agreement is filed with the court. The bill authorizes a court to approve a consent judgment or settlement agreement between the parties that includes a supplemental environmental project.

- ***Authorized Relief*** – The bill authorizes a court to (1) order the enforcement of a standard and (2) grant temporary or permanent equitable relief or, except as otherwise provided under the bill, any other relief provided under a standard.
- ***Civil Penalties*** – The bill authorizes a court to impose a civil penalty authorized under the applicable statute (and deposited in accordance with existing statute); however, the State may not be held liable for civil penalties in any action under the bill.
- ***Costs of Litigation*** – The bill authorizes the court, in an action pursuant to the bill, to award costs of litigation to (1) a prevailing plaintiff; (2) a substantially prevailing plaintiff; or (3) a substantially prevailing defendant if the plaintiff’s claim was frivolous, unreasonable, or groundless.
- ***Authorization to Intervene in a Civil Action Brought by the Secretary*** – The bill gives a person that meets the threshold standing requirements under federal law the unconditional right and authority to intervene in a civil action brought by the Secretary of the Environment under Title 5, Subtitle 9 or Title 9, Subtitle 3 (not limited only to civil actions relating to nontidal wetlands that do not have a continuous surface connection to surface water and discharges of pollutants that affect ephemeral streams or intermittent streams). In the case of a civil action brought by the secretary under Title 9, Subtitle 3, however, this new provision replaces/reestablishes a similar existing provision, enacted under Chapters 618 and 619 of 2021 (described below, under Current Law), that is repealed by the bill. A person that has standing to intervene has the same rights as an interested person or aggrieved party under the federal Clean Water Act (CWA) and must exercise the right to intervene in accordance with the applicable practices, procedures, and laws in the State.
- ***Authorization for the State to Intervene in a Civil Action Brought by a Person*** – The State may intervene in any proceeding brought pursuant to the bill at any time.

“Political subdivision” means (1) a county; (2) Baltimore City; (3) a multicounty agency; (4) a municipality; (5) a single-purpose district; or (6) a sanitary district.

The bill establishes the General Assembly’s intent that the bill:

- provide certain remedies to abate the pollution, destruction, or substantial or unreasonable impairment to the public health, water quality, or any other natural resources of the State;

- may not abridge or alter any right of action or remedies that exist under law; and
- may not be construed as stopping or limiting the State or any person in the exercise of the right to (1) protect the natural resources of the State; (2) suppress nuisances; or (3) abate pollution.

Finally, the bill includes a severability provision.

Current Law:

Enforcement under the Environment Article

The Secretary of the Environment is required to carry out and enforce the provisions of the Environment Article and rules and regulations adopted under the article.

Title 5, Subtitle 9

Title 5, Subtitle 9 has the purpose of preserving nontidal wetlands in the State and, among other things, requires a person to obtain a permit for activities affecting nontidal wetlands.

A person who violates the provisions of the subtitle or any regulation, order, or permit under the subtitle is subject to a civil penalty of up to \$10,000. Each day a violation occurs is a separate violation and a court may issue an injunction requiring the person to cease the violation and restore the area unlawfully disturbed. A person who violates any provision of or fails to perform any duty imposed by the subtitle or a regulation, order, or permit under the subtitle is guilty of a misdemeanor and subject to a maximum fine of \$10,000 for a first offense or \$25,000 for a second or subsequent offense (and the court may order the person to restore the area unlawfully disturbed). MDE is also authorized to revoke a permit and/or issue a stop work order. Civil and criminal penalties are deposited in the Nontidal Wetland Compensation Fund and used for the creation, restoration, or enhancement of nontidal wetlands.

Title 9, Subtitle 3

Title 9, Subtitle 3 has the purpose of preventing, abating, and controlling water pollution in the State and, among other things, requires a person to hold a permit for specified activities that could cause or increase the discharge of pollutants into the waters of the State.

Sections 9-334 through 9-344 establish the enforcement provisions of Title 9, Subtitle 3. The provisions of §§ 9-334 through 9-341 govern (1) the ability of MDE to issue specified complaints, notices, and corrective orders, and to seek an injunction against any person who violates the subtitle or any rule, regulation, order, or permit adopted or issued under the subtitle and (2) a person's ability to seek judicial review of final decisions of the

department in connection with an order or permit issued under the subtitle if the person is aggrieved by a final decision.

In addition to being subject to an injunctive order, under § 9-342 a person who violates any provision of the subtitle or any rule, regulation, order, or permit adopted or issued under the subtitle is subject to a civil penalty of up to \$10,000. Each day a violation occurs is a separate violation. In addition, MDE may impose an administrative penalty of up to \$10,000 for each violation, but not exceeding \$100,000 total. Each day a violation occurs is a separate violation. An administrative penalty must be assessed with consideration given to several specified factors.

Under § 9-343, a person who violates any provision of or fails to perform any duty imposed by the subtitle, or who violates any provision of or fails to perform any duty imposed by a rule, regulation, order, or permit adopted or issued under the subtitle, is guilty of a misdemeanor and on conviction is subject to a maximum fine of \$25,000 and/or imprisonment for up to one year for a first offense and a maximum fine of \$50,000 and/or imprisonment for up to two years for a subsequent offense. The person may also be enjoined from continuing the violation. Each day on which a violation occurs is a separate violation. In addition, a person is guilty of a misdemeanor and on conviction is subject to a maximum fine of \$50,000 and/or imprisonment for up to two years if the person (1) knowingly makes any false statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained or (2) falsifies, tampers with, or knowingly renders inaccurate any monitoring device or method required to be maintained. Pursuant to § 9-344, the Attorney General is in charge of prosecuting and defending, on behalf of the State, cases that arise under provisions of the subtitle.

There are also additional administrative penalty provisions under § 9-328.1 applicable to certain permit holders that remain in significant noncompliance with discharge permits. These administrative penalties range from \$250 to \$10,000 depending on specified factors.

Civil and administrative penalties, and fines, imposed under the subtitle are deposited in the Maryland Clean Water Fund and used for various activities specified in statute.

Title 9, Subtitle 3 – Right to Intervene in a Civil Action

Pursuant to Chapters 618 and 619, under § 9-344.1, a person who meets the threshold standing requirements under CWA has an unconditional right and the authority to intervene in a civil action that the State initiates in State court to require compliance with Title 9, Subtitle 3, regulations adopted in accordance with the subtitle, or any discharge permit, effluent limitation, or order issued in accordance with the subtitle.

A person must exercise the right to intervene in accordance with the applicable practices, procedures, and laws in the State. A person who meets the (standing) requirements to intervene has the same rights as an interested person or aggrieved party under CWA, including the right to apply for judicial appeal.

Certain Authorizations/Standing Related to Environment/Natural Resources Enforcement

Environmental Standing Act

The Environmental Standing Act, under the Natural Resources Article, includes a finding by the General Assembly that the State's courts are an appropriate forum for seeking the protection of the environment and that an unreasonably strict procedural definition of "standing to sue" in environmental matters is not in the public interest.

The Act authorizes the Attorney General, a political subdivision of the State, and any other person – regardless of whether the person possesses a special interest different from that possessed generally by the residents of the State, or whether the person is under threat of substantial personal or property damage – to bring and maintain an action for *mandamus* or equitable relief against any officer or agency of the State or a political subdivision for (1) failure to perform a nondiscretionary ministerial duty or (2) failure to enforce an applicable environmental quality standard for the protection of the air, water, or other natural resources of the State.

The Act's authorization is subject to specified limitations, including that in order for an individual to bring an action the individual must either reside in the county or Baltimore City where the action is brought or must demonstrate that the alleged condition, activity, or failure complained of affects the environment where the individual resides.

Specified Environmental Permits/Licenses and Critical Area Variances

Chapters 650 and 651 of 2009 establish the following authorizations for a person to request judicial review of specified permits/licenses under the Environment Article or to participate in an administrative proceeding regarding a specified variance for development activity (and petition for judicial review) under the Chesapeake and Atlantic Coastal Bays Critical Area Protection Program under the Natural Resources Article:

- *Specified Permits/Licenses under the Environment Article* – A final determination/decision on the issuance, denial, renewal, or revision of specified permits/licenses (including a permit under Title 5, Subtitle 9 and a permit to discharge pollutants to waters of the State under Title 9, Subtitle 3) is subject to judicial review at the request of any person that meets the threshold standing requirements under federal law and (1) is the applicant or (2) participated in a public

participation process through the submission of written or oral comments, unless an opportunity for public participation was not provided.

- *Variances under the Chesapeake and Atlantic Coastal Bays Critical Area Protection Program* – A person who meets the threshold standing requirements under federal law is authorized to participate as a party in specified administrative proceedings involving a specified variance for development activity and to petition for judicial review.

Chapters 650 and 651 establish the General Assembly’s intent, in uncodified language, that the references to “threshold standing requirements under federal law” be construed, among other things (1) in the context of the entire body of federal case law regarding standing, as that case law existed when Chapters 650 and 651 took effect and as it evolved/evolves in subsequent rulings and (2) in accordance with the ruling in *Hunt v Washington State Apple Advertising Commission*, 432 U.S. 333 (1977).

Under federal law, the constitutional minimum of standing requires that (1) the plaintiff suffered an injury in fact (an actual or imminent concrete and particularized invasion of a legally protected interest); (2) the injury must be fairly traceable to the challenged action of the defendant; and (3) it must be likely that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992).

In *Hunt v. Washington State Apple Advertising Commission*, the U.S. Supreme Court stated that “an association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization’s purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.” *Hunt* at 343.

Federal Clean Water Act

In General

Congress established CWA (33 U.S.C. § 1251 *et seq.*) to restore and protect the quality of the nation’s surface waters. CWA protects “navigable waters,” defined in the statute as “waters of the United States, including the territorial seas,” but does not clearly define “waters of the United States.”

Citizen Suits

In addition to enforcement authority of the Administrator of the U.S. Environmental Protection Agency (EPA), and states, under the Act, CWA authorizes any citizen (a person or persons having an interest which is or may be adversely affected) to commence a civil action on the person’s own behalf against any person (including government entities) who

is alleged to be in violation of specified effluent standards or limitations under CWA or an order issued by the EPA Administrator, or a state, with respect to such a standard or limitation. Similar to the bill, CWA requires 60 days' notice to be provided to the EPA Administrator, the state in which the alleged violation occurs, and the alleged violator, and prohibits commencement of an action if the EPA Administrator or state has commenced and is diligently prosecuting an action.

Sackett v. Environmental Protection Agency

Under [Sackett v. EPA](#) (decided in May 2023), the U.S. Supreme Court concluded that the term “waters” used in the definition of “navigable waters” under CWA encompasses only those relatively permanent, standing or continuously flowing bodies of water forming geographical features that are described in ordinary parlance as streams, oceans, rivers, and lakes (also described by the Court as “relatively permanent bod[ies] of water connected to traditional interstate navigable waters”). The case focused on the extent to which CWA applies to wetlands and the Court held that CWA extends only to wetlands that are, as a practical matter, indistinguishable from waters of the United States, requiring a party asserting jurisdiction over adjacent wetlands to establish (1) that the adjacent body of water constitutes “waters of the United States” and (2) that the wetland has a continuous surface connection with that water, making it difficult to determine where the “water” ends and the “wetland” begins.

State Revenues: Special fund revenues may increase as a result of any increased civil penalties collected as a result of civil actions brought pursuant to the bill. Civil penalties collected under Title 5, Subtitle 9 and Title 9, Subtitle 3 are deposited in the Nontidal Wetland Compensation Fund and the Maryland Clean Water Fund, respectively. Any increase in State revenues from court filing fees resulting from the bill is not expected to be material.

State Expenditures:

Maryland Department of the Environment

General fund expenditures increase by \$86,397 in fiscal 2025, which accounts for the bill’s October 1, 2024, effective date. This estimate reflects the cost of hiring one assistant Attorney General to (1) manage the department’s actions in response to 60-day notices received from persons intending to bring civil actions under the bill (including reviewing the proposed civil actions and associated MDE records and advising the department); (2) manage the department’s initiation of, monitoring of, and/or intervention in, any resulting legal actions; (3) address any discovery-related requests submitted to MDE as a part of an action; and (4) review, and provide advice to MDE with respect to, any consent judgments or settlement agreements submitted to the department prior to being filed with

the court. The estimate includes a salary, fringe benefits, one-time start-up costs, and ongoing operating expenses.

Position	1.0
Salary and Fringe Benefits	\$79,141
Operating Expenses	<u>7,256</u>
Total FY 2025 MDE Expenditures	\$86,397

Future year expenditures reflect a full salary with annual increases and employee turnover as well as annual increases in ongoing operating expenses.

Judiciary

The Judiciary indicates that costs may be incurred for training for circuit court judges relating to providing equitable relief in the environmental actions brought pursuant to the bill. These costs have not been quantified, however.

Local Expenditures: Local governments *may* incur increased costs associated with litigation resulting from the bill as regulated entities (potential defendants in an action), including costs of litigation (potentially including the opposing party’s costs) and any costs associated with relief granted by the court or the terms of a consent judgment or settlement agreement. MDE indicates, however, that the extent of any potential litigation is likely to be relatively limited, due to the scope of the bill (*e.g.*, the limited definition of “standard”) and existing MDE enforcement of Title 5, Subtitle 9 and Title 9, Subtitle 3.

Small Business Effect: Small businesses that are regulated entities under Title 5, Subtitle 9 and Title 9, Subtitle 3 of the Environment Article may be meaningfully affected by litigation costs and any penalties, costs associated with consent judgments or settlement agreements, or costs associated with relief granted, under a civil action brought pursuant to the bill.

Additional Information

Recent Prior Introductions: Similar legislation has not been introduced within the last three years.

Designated Cross File: HB 1101 (Delegate Love, *et al.*) - Environment and Transportation.

Information Source(s): Maryland Environmental Service; Harford County; Maryland Association of Counties; Maryland-National Capital Park and Planning Commission;

City of Frostburg; Maryland Municipal League; Office of the Attorney General; Judiciary (Administrative Office of the Courts); Maryland Department of Agriculture; Maryland Department of the Environment; Department of Natural Resources; Maryland Department of Transportation; *Standing Last in Line: The Hurdles to Bringing Environmental Accountability Lawsuits in Maryland*, Isaacson, Evan, Chesapeake Legal Alliance, Nicholas, Betsy, Waterkeepers Chesapeake, Schmitt, Katlyn, Center for Progressive Reform (December 2022); Department of Legislative Services

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