



January 22, 2020

The Honorable William C. Smith, Jr., Chair
Senate Judicial Proceedings Committee
Miller Senate Office Building, 2 East
Annapolis, MD 21401

Oppose: SB 151 – Constitutional Amendment – Environmental Rights

Dear Chair Smith and Committee Members:

The NAIOP Maryland Chapters representing more than 700 companies involved in all aspects of commercial, industrial and mixed-use real estate oppose Senate Bill 151.

The bill would create broad new rights to litigate government actions based, not on scientific standards adopted through laws and regulations, but on the plaintiff's personal tastes; their personal definition of the new, constitutionally guaranteed air, and water rights. A personal view of what constitutes, "*scenic, and historic values of the environment*" would become the basis for litigation that would paralyze activities conducted under government permits. The courts would be faced with adjudicating matters of taste and how the subjective values of the plaintiffs should be achieved with no objective standard of review on which to rely.

The bill is very different than current state and federal rights to citizen suits and would mark the end of carefully balanced approaches to rights of appeal land use and environmental permits. It would also allow private parties to intervene in agency enforcement actions and sue government entities for perceived inaction.

The bill should raise serious concerns that routine functions of state and local governments would become chaotic and some ungovernable. Activities performed under state and local permits would never really be vested and reliably carried out because virtually any opponent could use the broad language of this bill to initiate tactical litigation to oppose legitimate work under government permits. Our specific concerns follow:

1. The bill would guarantee conditions that are beyond the control of the state to provide. For example, the bill would cause the state to guarantee Marylanders undefined, "pure water" and "clean air." The state is in attainment for three of four of the primary Federal air quality standards and is near attainment in the fourth. Sophisticated, long-term, enforceable measures are in place through the Greenhouse Gas Reduction Act (GGRA) to improve air quality. HB 82 would allow virtually anyone to initiate litigation against any number of government agencies, entities and individuals arguing that this status does not qualify as constitutionally guaranteed, "clean air" and that the GGRA, standards of review for permits and other measures are inadequate management strategies. Given that one of the most influential remaining factors is air pollution from downwind states that Maryland has no jurisdiction to regulate, how could a court judgement, administrative enforcement action or settlement agreement provide a remedy?
2. Maryland's well-developed case law and closely negotiated legislative provisions that define appeals to environmental permits and land use decisions, would both be abrogated. In Maryland standing to appeal environmental permits is broadly granted, and similar to federal rules appeals are reviewed based on the

administrative record. The proposed amendment does not limit review to the record and would allow challengers to “surprise” defendants with new allegations at the last minute. The content of comprehensive land use plans is the product of a wide-open public consensus building process. Once adopted, standing to appeal the planning and zoning decisions made to implement the community vision embodied in those plans is limited to those who can show they are harmed by the decision in a way that is different than the general public. SB 151 would allow determined opponents to block implementation of local land use plans and activities performed under state environmental permits.

3. The bill would conflict with federal rules in many respects because it does not bring over any of the structure, and limitations present in the United State Code. Differing versions of citizen suits and standing to intervene in enforcement actions are found in the Clean Water Act, the Clear Air Act, code sections dedicated to management of solid waste and CERCLA or Superfund. One of the fundamental differences between those provisions and SB 151 is that federal rights relate back to enforcing specific regulations and defined standards and tolerances whereas SB 151 has at its foundation subjective qualities and values that are not defined. The structure used to implement federal standing provides rights to citizens but also protects the interests of regulatory agencies and those who are defendants through limitations on how those rights are carried out. That structure is completely missing from HB 82.
4. Federal provisions permitting citizen suits to enforce environmental laws are designed to permit private parties to sue only when the government fails to diligently enforce the law. The federal statutes provide that the private party must give the agencies notice of an intent to sue 60 days before bringing an action and, if the agency then diligently enforces the law, the private party cannot initiate the action. HB82 ignores that requirement allowing the private party to displace the agency charged with responsibility for enforcement.

Proponents point to Pennsylvania as precedent. Pennsylvania does not have the private cause of action contained in SB 151 and the courts have gone back and forth on how the basket of rights may be enforced. The most celebrated case related to this type of constitutional provision was a case in Pennsylvania that reinstated local land use decision making authority, reversing a state law that had compelled local fracking for natural gas. Ironically, because the language in SB 151 is so broad that it can serve the purpose of any skilled litigator, there is little doubt that SB 151 would be used to dismantle Maryland’s system of local land use decision making rather than preserve it.

For these reasons, NAIOP respectfully requests your unfavorable report on Senate Bill 151.

Sincerely;



Tom Ballentine, Vice President for Policy
NAIOP Maryland Chapters -*The Association for Commercial Real Estate*

cc: Senate Judicial Proceedings Committee Members
Nick Manis – Manis, Canning Assoc.