In The

COURT OF APPEALS OF MARYLAND

September Term, 2010

No. 139

PATUXENT RIVERKEEPER

Petitioner,

v.

MARYLAND DEPARTMENT
OF THE ENVIRONMENT, *et al*.,

Respondents.

On Writ of Certiorari to the Court of Special Appeals of Maryland

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JOINT BRIEF OF *AMICI CURIAE* THE CHESAPEAKE BAY FOUNDATION, INC. AND WATERKEEPER ALLIANCE, INC.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

QUESTION PRESENTED BY AMICUS CURIAE 3

STATEMENT OF FACTS 3

CONCLUSION 26

STATEMENT OF FONT TYPE USED AND TYPE SIZE 28

CERTIFICATE OF SERVICE 29

TABLE OF AUTHORITIES

Cases

Babbit v. United Farm Workers Nat'l Union, 442 U.S. 289 (1979) 15

Bryniarski v. Montgomery Co., 247 Md. 137 (1967) 12, 13

CBF, Inc. and Citizens for Stumpy Lake v. Commonwealth of Virginia, et al., 46 Va. App. 104 (Va. App. 2005) 24

Cent. Delta Water Agency v. U.S., 306 F.3d 938 (9th Cir. 2002) 15

Chesapeake Bay Foundation, Inc. v. Clickner, 192 Md.App. 172 (2010) 13

Concerned Taxpayers of Brunswick County v. Department of Environmental Quality, 31 Va. App. 788 (Va. App. 2000) 24, 25

Friends of the Earth, Inc. v. Gaston Copper Recycling Corp., 204 F.3d 149 (4th Cir. 2000) .... passim

Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc., 528 U.S. 167 (2000) .... passim

Hunt v. Wash. St. Apple Advertising Comm'n, 432 U.S. 333 (1977) 10

Los Angeles v. Lyons, 461 U.S. 95 (1983) 20

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) 10

Massachusetts v. EPA, 549 U.S. 497 (2007) 19

Mattaponi Indian Tribe et al. v. Commonwealth of Virginia, et al., 261 Va. 366 (2001) 24

Mountain States Legal Found. v. Glickman, 320 U.S. App. D.C. 87 (D.C. Cir. 1996) 22

Ohio Forestry Assn., Inc. v. Sierra Club, 523 U.S. 726 (1998) 22

Philip Morris v. Chesapeake Bay Foundation, 273 Va. 564 (2007) 24

Residents Involved in Saving the Environment, Inc. et al. v. Commonwealth of Virginia, et al., 2000 Va. App. LEXIS 547 (2000) 25

Scheer v. Commonwealth, 46 Va. Cir. 335 (1998) 23

Sierra Club v. Cedar Point Oil Co., 73 F.3d 546 (5th Cir. 1996) 22

Sierra Club v. Morton, 405 U.S. 727, 734-736 (1972) 9, 17

State Water Control Board, et al. v. Crutchfield et al., 265 Va. 416 (2003) 24

Sugarloaf v. Dept. of Environment, 344 Md. 271 (1996) 12, 21

Summers v. Earth Island Inst., 129 S.Ct. 1142 (2009) 9, 17, 18

U.S. v. S.C.R.A.P., 412 U.S. 669 (1973) 19

Valley Forge Christian College v. Americans United For Separation of Church & State, Inc., 454 U.S. 464 (1982) 15

Village of Elk Grove v. Evans, 997 F.2d 329 (7th Cir. 1993) 22

Virginia v. Browner, 80 F.3d 869 (4th Cir. 1996) 23

Whitmore v. AR, 495 U.S. 149 (1990) 20

Winter v. NRDC, 555 U.S. 7 (2008) 20

Statutes

MD. CODE ANN., ENVIR. § 5-204(f) (2010) .... passim

MD. CODE ANN., ENVIR. § 5-902(a) (2010) 6

Va. Code § 10.1-1318 23

Va. Code § 10.1-1457 .... 23, 25

Va. Code § 62.1-44.29 .... 23, 25

Rules

Maryland Rule 8-511(b) 1

INTRODUCTION

Amici curiae, Chesapeake Bay Foundation, Inc. ("CBF") and Waterkeeper Alliance, Inc. hereby submit the following brief pursuant to Maryland Rule 8-511(b).

STATEMENT OF THE CASE

This case presents a question of first impression in Maryland. House Bill 1569 and Senate Bill 1065, known as the "Maryland Standing Act", effective January 1, 2010 and codified at MD. CODE ANN., ENVIR. § 5-204(f) (2010), repealed certain contested case hearing provisions and authorized judicial review of environmental permits to individuals and organizations that satisfied the test for Article III standing under federal case law. The purpose of this Act was to expand standing to the public by incorporating federal standing, but would restrict review to judicial examination on the administrative record before the Department of the Environment.[1] Prior to this Act, Maryland courts applied a "person aggrieved" standard for standing to challenge the merits of permitting environmental harm. The Act removed the "person aggrieved" standard and specified the relevant test to be considered by a reviewing court – a test based upon federal case law.

Petitioner is the Patuxent Riverkeeper ("Riverkeeper"). Respondent Petrie/ELG Inglewood, LLC, is the developer of the Woodmore Towne Center, an approximately 245

[1] Delegate McIntosh, Chair of the House Environmental Matters Committee stated shortly before the bill was passed: "For decades Maryland had virtually locked the court doors when the public tried to protest state environmental decisions, but this new law gives increased access."
http://www.cbf.org/Page.aspx?pid=1222

acre residential and commercial private development situated in the northeast section of Maryland Route 202 and I-495. On April 20, 2007, Respondent applied to MDE and to the United States Army Corps of Engineers for a nontidal wetlands and waterways permit to develop the Towne Center. On March 19, 2010, MDE issued permit number 07-NT-0153/20076219 to the Respondent, granting authorization to build the Towne Center. On April 16, 2010, the Riverkeeper sought judicial review of MDE's issued permit in the Circuit Court for Prince George's County. The Riverkeeper moved to stay implementation of the Permit but was denied. Because the requested injunction was denied, the development was completed before May 27, 2010- the date Respondent received notice of the circuit court appeal.

Respondent and MDE moved to dismiss the case for lack of standing. Standing to appeal wetland destruction permits issued by MDE is governed by MD. CODE ANN., ENVIR. § 5-204(f) (2010)which directs courts to apply the federal test for Article III standing allowing judicial review of certain environmental disputes.

In response to the motion, Riverkeeper submitted the affidavits of Fred Tutman, the Patuxent Riverkeeper, and David Linthicum, a member of the Riverkeeper organization. After reviewing the affidavit and testimony of Mr. Linthicum, the circuit court granted the motion holding that Mr. Linthicum's allegations of injury were insufficient to support standing and the case was dismissed. This appeal followed.

Implicit in the power of government agencies to issue permits that allow harm to our air, land, and water, is the obligation to allow meaningful public notice and comment. A necessary adjunct to that public right to comment is the right to judicially challenge

decisions that are factually or legally incorrect. *See* 61 Fed. Reg. 20972 at 20972 (May 8, 1996). The denial of standing to individuals and organizations based upon an expansive view of what constitutes "speculative harm" severely restricts judicial review of environmental disputes.

Environment Article, Section § 5-204(f) was enacted to conform Maryland standing law to federal law and to ensure citizen standing was expanded, not restricted, subject to a limited set of requirements. This Court's resolution of this case will set the course for the future and determine whether Maryland environmental permitting complies with federal requirements or not. To ensure compliance, rejection of the circuit court's decision and a correct interpretation of the recent legislation granting broad federal standing to individuals and organization are necessary.

QUESTION PRESENTED BY AMICUS CURIAE

I. Whether the circuit court erred when it held that the Patuxent Riverkeeper failed to meet the federal standard for associational standing to represent its members under MD. CODE ANN., ENVIR. § 5-204(f), to challenge the issuance of a state nontidal wetlands permit that authorized permanent impacts to wetlands in the Western Branch of the Patuxent River watershed?

STATEMENT OF FACTS

Impacts to Wetlands Allowed by The Permit

The Permit for the Towne Center authorizes temporary and permanent impacts to over 35,000 square feet of wetlands. The majority of the impacts occur in the Patuxent

River Western Branch Watershed in Prince George's County. The Patuxent River drainage area covers 930 square miles. The Western Branch flows into the Patuxent River which ultimately flows into the Chesapeake Bay.

The Permit authorized the construction of a bridge, which required a major stream crossing and caused a majority of the wetlands impacts. A large cement box culvert was constructed to channel the flow of stormwater into a tributary of the Western Branch. It was alleged by Riverkeeper that the increased stormwater flow will significantly impact the Western Branch and ultimately the Patuxent River.

As stated in Mr. Linthicum's affidavit: "Channelization of flow is perhaps the single greatest impact to surface water inflows in urban areas….Increased flow rates through culverts can be a major impediment to wetland functioning as well as fish migration." E. 272, ¶ 12.[2]

"[T]he natural dendritic properties of stream networks play an intrinsic role in the delivery of nitrogen and other pollutants to downstream receiving waters from headwater locations throughout watersheds."[3] In the context of streams and wetlands, the term "dendritic" refers to the branch-like characteristics of upstream headwaters, which then funnel into a single stream or river downstream, as is the case with the Western Branch watershed and tributary.

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[2] *See* Ronald M. Thom and Amy B. Borde, *Influence of Urbanization on Ecological Processes in Wetlands, in* Land Use and Watersheds: Human Influence on Hydrology and Geomorphology in Urban and Forest Areas - Water Science and Application Volume 2 at 14 (American Geophysical Union 2001).
[3] *See* Richard B. Alexander, Elizabeth W. Boyer, Richard A. Smith, Gregory E. Schwartz & Richard B. Moore, *The Role of Headwater Streams in Downstream Water Quality*, Journal of the American Water Resources Association, Vol. 43, No. 1, Feb. 2007, at 57.

Wetlands provide recharge and storage of surplus water during storm events, which can lessen the impacts of flooding and property damage to downstream neighbors. Wetlands serve as natural "sponges" to absorb manmade toxins and poisons that leach from surrounding contaminated runoff caused by paved surfaces, trash, and chemicals applied to urbanized lands. The loss of natural wetlands in a river system eventually leads to the death and desertification of a river's tributaries and takes an equivalent toll on the waters of the main channel. E. 272, ¶ 10.

Due to changes in land use, including urbanization like the construction of the Towne Center, the Patuxent River tributaries of the Chesapeake Bay have become eutrophic (nutrient enriched) and subject to algal blooms that deplete the water of oxygen necessary for aquatic life, due to changes in land use, including urbanization. T.R. Fisher, J.D. Hagy III, W.R. Boynton & M.R. Williams, *Cultural Eutrophication in the Choptank and Patuxent Estuaries of Chesapeake Bay*, Limnol. Oceanogr., 51(1, part 2), 2006, 435–447.[4] These changes have resulted in increased volumes of wastewater that have led to higher loads of nutrients (nitrogen and phosphorous) in the waterways, thereby reducing water quality and submerged aquatic vegetation. *Id*. at 445. "Local communities have never paid the full price for living in this region - depending on free ecosystem services to handle waste flows - and a degrading series of estuarine systems is the result." *Id*. at 446.

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[4] See also MDE's "Eyes on the Bay" dissolved oxygen water quality monitoring for the Patuxent River and the Western Branch. http://mddnr.chesapeakebay.net/eyesonthebay/index.cfm

These scientific references and others cited by Mr. Linthicum in his affidavit establish the importance of wetlands to the Patuxent River system and the Chesapeake Bay. Indeed, the Maryland General Assembly has recognized the values of nontidal wetlands. MD. CODE ANN., ENVIR. § 5-902(a) (2010).

Harms Caused by the Permit to Riverkeeper's Members

The Patuxent Riverkeeper is a nonprofit environmental organization with its offices in Upper Marlboro. The purpose of the Riverkeeper is to protect, restore and advocate for clean water in the Patuxent River and its ecosystem – including the Western Branch.

To satisfy representational standing requirements, the Riverkeeper presented affidavits from Frederick Tutman, CEO of the Riverkeeper, and David Linthicum, an active member of the organization. Mr. Tutman explained the negative effects the Permit will have on the ecology of the Western Branch and the Riverkeeper's interests at stake. Mr. Linthicum provided an affidavit and testimony discussing the impacts of the Permit on wetlands and waterways including the Patuxent River, and explained his recreational, aesthetic, and economic interests in the Western Branch tributary and watershed. *See* E. 272. On December 1, 2010, the circuit court dismissed the case, holding that Mr. Linthicum failed to meet the federal test for standing because his interests were "conjectural" and "hypothetical."

CBF sought leave to file an *amicus curiae* brief because preservation and restoration of the Chesapeake Bay is its primary mission and an overarching concern of its members, which includes 94,300 Maryland residents. CBF has been involved in such

work since its inception in 1967. Much of that work has focused on the adverse impacts of development like the Towne Center on the Chesapeake Bay. For example, CBF has and continues to fund and operate environmental and volunteer programs specifically designed to improve the water quality of the Bay and its tributaries. In addition, CBF has spent considerable effort to insure proper consideration of citizen standing in judicial appeals and was actively involved in the passage of the Maryland Standing Act. MD. CODE ANN., ENVIR. § 5-204(f) (2010).

Waterkeeper Alliance is a nonprofit organization that represents the interests of its nearly 200 member watershed groups who are dedicated to the preservation and protection of water bodies and their neighboring communities. Fourteen of Waterkeeper Alliance's member programs are on-the-water advocates for their local watersheds in Maryland and work extensively to protect their watersheds from the impacts of pollution sources. Furthermore, Waterkeeper Alliance and its member programs, represented by the University of Maryland Environmental Law Clinic, were heavily involved in the drafting and passage of the Maryland Standing Act, MD. CODE ANN., ENVIR. § 5-204(f), and seek to ensure that it is interpreted consistent with the Maryland General Assembly's intent and in line with federal Article III standing law.

ARGUMENT

Because the Maryland statutory standard is "the threshold standing requirements under federal law" federal decisions should guide this Court's resolution of this dispute. *See* MD. CODE ANN., ENVIR. § 5-204(f). Unfortunately, the circuit court incorrectly applied those decisions in denying standing to the Patuxent Riverkeeper and circumvents

decades of Supreme Court jurisprudence establishing the requirements of associational standing and should be overturned.

For an organization to satisfy federal standing, it must show that one of "its members would otherwise have standing to sue in [his] 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." *Friends of the Earth, Inc. v. Laidlaw Environmental Services(TOC), Inc.*, 528 U.S. 167 (2000). To meet those requirements, the Riverkeeper organization relied on the affidavits and testimony of Fred Tutman, the Patuxent Riverkeeper, and David Linthicum, a long-standing member of the organization. After considering only the affidavit and testimony of Mr. Linthicum, the court incorrectly ruled that the Riverkeeper did not satisfy the federal test for associational standing because Mr. Linthicum lacked individual standing to bring the suit.

Citizen participation in the permitting process, including judicial challenges, is a fundamental precept to federal environmental law. *See* 61 Fed. Reg. 20972 (May 8, 1996)(preamble to federal rule of citizen participation in permitting challenges). While the Supreme Court has developed prudential standards for determining standing sufficient to meet Article III of the U.S. Constitution, those standards are not overly stringent. For example, the Supreme Court has long held that "[w]hile generalized harm to the forest or environment will not alone support standing, if that harm affects the recreational, or even the mere aesthetic interests of the plaintiff, that will suffice." *Summers v. Earth Island Inst.*, 129 S.Ct. 1142, 1149 (2009) (*quoting Sierra Club v. Morton*, 405 U.S. 727, 734-736 (1972)). Because organizations cannot challenge environmental permits based

solely on a general harm to the environment, organizations typically rely on the individual standing of their affected members to bring environmental actions. Here, the Riverkeeper has standing to challenge the issued permit because Mr. Linthicum has alleged sufficient injury, caused by the permit, to his aesthetic, recreational, and economic interest in the Western Branch watershed and the Patuxent River downstream of the wetlands destroyed by the permit issued by MDE.

To satisfy federal standing: (1) a plaintiff must have suffered an injury in fact which is concrete and particularized and actual or imminent, not conjectural or hypothetical; (2) there must be a causal connection between the injury and the conduct in question; 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 environmental cases, Article III requires allegations of injury to the plaintiff, not just injury to the environment. *Laidlaw,* 528 U.S. at 181 (*Laidlaw*). However, the injury need not be significant, immediate, or proven. *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 160 (4th Cir. 2000)(*Gaston Copper*)(" If the plaintiff can show that his claim to relief is free from excessive abstraction, undue attenuation, and unbridled speculation, the Constitution places no further barriers between the plaintiff and an adjudication of his rights.").

Federal law allows an organization to represent the interests of its members based upon the standing of its individual members. *Laidlaw,* 528 U.S. at 180-181. The test established over three decades ago provides such standing when; a member of the

organization would have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted or the relief requested requires the participation of individual members in the lawsuit. *Hunt v. Wash. St. Apple Advertising Comm'n*, 432 U.S. 333, 342-343 (1977). This form of standing is often referred to as "associational" or "representational" standing.

I. THE CIRCUIT COURT ERRED WHEN IT HELD THAT THE RIVERKEEPER FAILED TO ESTABLISH STANDING UNDER FEDERAL LAW AND MARYLAND CODE ENVIRONMENT ARTICLE, SECTION 5-204.

Standing in this case is governed by Maryland Code, Section 5-204(f) of the Environment Article:

> (f) Judicial review of final determination by Department. A final determination by the Department on the issuance, denial, renewal, or revision of any permit issued under Title 5, Subtitle 5 or Subtitle 9, § 14-105, § 14-508, § 15-808, or § 16-307 of this article is subject to judicial review at the request of any person that:
>
> (i) Meets the threshold standing requirements under federal law; and
>
> (ii) 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.[5]

The legislative versions of this section, House Bill 1569 and Senate Bill 1065, were passed in 2009, and went into effect January 1, 2010. MD. CODE ANN., ENVIR. § 5-204(f) (2010), This section repeals certain provisions regarding contested case hearings and establishes new provisions related to judicial review of specified permit determinations by the Maryland Department of the Environment (MDE) with respect to environmental permits.

[5] The circuit court did not challenge Riverkeeper's compliance with subsection (ii).

Prior to enactment, forty-four states allowed for representational standing in a similar manner. *See* CBF's Comments regarding House Bill 1569 and Senate Bill 1065 submitted during the 2009 Legislative Session of the Maryland General Assembly. The purpose of the section was to expand standing for judicial review, including review of wetland permits issued by the MDE, and to allow an organization to challenge a permit if one of its members satisfied the federal test for standing.

The General Assembly's decision was supported, in part, by federal regulations. Section 123.30 of Title 40 of the Code of Federal Regulations provides:

> All States that administer or seek to administer a program under this part shall provide an opportunity for judicial review in State Court of the final approval or denial of permits by the State that is sufficient to provide for, encourage, and assist public participation in the permitting process. A State will meet this standard if State law allows an opportunity for judicial review that is the same as that available to obtain judicial review in federal court of a federally-issued NPDES permit (see § 509 of the Clean Water Act). A State will not meet this standard if it narrowly restricts the class of persons who may challenge the approval or denial of permits (for example, if only the permittee can obtain judicial review, if persons must demonstrate injury to a pecuniary interest in order to obtain judicial review, or if persons must have a property interest in close proximity to a discharge or surface waters in order to obtain judicial review.) This requirement does not apply to Indian Tribes.

40 C.F.R. § 123.30. The federal rule was:

> intended to ensure effective and meaningful public participation in the permit issuance process by establishing a minimum level of public participation among State water pollution control programs. When citizens have the opportunity to challenge executive agency decisions in court, their ability to influence permitting decisions through other required elements of public participation, such as public comments and public hearings on proposed permits, is enhanced. This rule will promote effective and meaningful public participation and will minimize the possibility of unfair and inconsistent treatment of similarly situated people potentially affected by State permit decisions.

61 Fed. Reg 20972 (May 8, 1996).

Prior to enactment of this section, Maryland common law and the procedures for contested cases liberally allowed individuals and organizations to become parties to administrative hearings. *Sugarloaf v. Dept. of Environment*, 344 Md. 271, 286-287 (1996). In *Sugarloaf*, the Court held that standing to bring a judicial action depends on whether an individual is "aggrieved," meaning whether an individual is personally affected by the challenged action in a way different from the public generally. *Id*. at 288. However, "[t]he status of a person to [obtain judicial review] as a 'person aggrieved' is to be distinguished from the result on the merits of the case itself." *Id*. at 295, citing *Bryniarski v. Montgomery Co.,* 247 Md. 137 at 146 (1967).

Now, without contested cases, an individual must bring action in circuit court to challenge the actions of MDE. Accordingly, the Maryland legislature amended its standing laws to extend federal standing to individuals and citizen groups, thus, overriding the narrow "person aggrieved" standard. *See Bryniarski, supra*, 247 Md. at 143 (two conditions must be met before an individual has standing to appeal to the circuit court from a decision of the Board: "(1) he must have been a *party to the proceeding before the Board*, and (2) he must be *aggrieved by the decision of the* Board). *See also Chesapeake Bay Foundation, Inc. v. Clickner*, 192 Md.App. 172 (2010), granting standing to CBF to challenge decisions of the Anne Arundel County Board of Appeals.

Thus, the circuit court's ruling to limit federal standing is contrary to the overall intent of the Maryland legislature and severely limits the ability of interested parties to

seek redress for MDE's failure to comply with state and federal law allowing the destruction of wetlands.

A. The Circuit Court Incorrectly Interpreted the Article III Test for Representational Standing When it Held That Mr. Linthicum Failed to Meet the Threshold Requirements for Standing.

The Riverkeeper sought standing through its member, David Linthicum, and Frederick Tutman, the CEO and "Riverkeeper" of the Patuxent Riverkeeper organization. Mr. Linthicum and Mr. Tutman offered testimony and sworn affidavits to the trial court, describing deleterious effects that the issued permit would have on the watershed and to the Patuxent River watershed. Mr. Tutman noted that "[i]mpacts to wetlands and streams on the Subject Property will have a negative effect on the ecology of the Western Branch sub-watershed and the water quality and flow of the streams and tributaries that lead into the Patuxent River. For this reason, the environmental interests at stake on the Subject Property are germane to the Patuxent Riverkeeper's purpose." E. 278, ¶ 7.

However, the trial court failed to consider the testimony of Mr. Tutman and focused only on whether Mr. Linthicum had standing in his own right to bring suit. This failure implies that the circuit court was only concerned with whether Mr. Linthicum would suffer a personal injury from MDE's decision and not whether the decision to challenge the permit was germane to Riverkeeper's purposes.

The circuit court held that Mr. Linthicum's averments did not establish an injury in fact sufficient for Article III standing. In reaching that conclusion, the court focused on three facts: Mr. Linthicum had not visited the construction site, had not paddled on the tributary near the construction site, and had not seen actual impacts to the tributary post-

construction. Cir. Ct. Op at pg. 3. These are not proper considerations for a standing analysis.

First, there is no requirement that a plaintiff have visited the actual site being permitted to establish an injury in fact. For example, in *Gaston Copper*, there was no requirement that the plaintiffs actually had visited the recycling facility that allegedly discharged harmful chemicals in to a river. All they needed to establish was their use and enjoyment of the river that could potentially have been harmed by the discharges from the facility. *Gaston Copper, supra,* 204 F.3d at 159-60 (Landowners downstream from recycling company that discharged waste water into a river could establish citizen group standing). The damage may only be to aesthetic or recreational interests. *Id.* at 154. Moreover, Mr. Linthicum owns land adjoining the Patuxent River and does enjoy and recreate on waters downstream from the permitted area. E. 272, ¶ 4. His affidavit makes clear that he believes the permitted construction will harm his interests due to increased polluted runoff. *Id.* at ¶¶ 7-10, 13-14. These are not conjectural or hypothetical injuries.

Second, the Supreme Court has repeatedly held that threatened, rather than actual harm satisfies the Article III test for standing. *Gaston Copper, supra,* 204 F.3d at 160; *Valley Forge Christian College v. Americans United For Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982). In *Laidlaw*, the Court held that sworn citizen statements attesting to reduced water usage because of a reasonable pollution concern constituted threat of "injury in fact" sufficient to confer standing. *Laidlaw,* 528 U.S. at 182-183. The Ninth Circuit has recognized the particular importance of conferring standing in cases where threat to the environment exists because "[t]he extinction of a species, the

destruction of a wilderness habitat, or the fouling of air and water are harms that are frequently difficult or impossible to remedy." *Cent. Delta Water Agency v. U.S.*, 306 F.3d 938, 950 (9th Cir. 2002). "One does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending that is enough." *Babbit v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979).

In this case, Mr. Linthicum evidenced imminent and future threats due to the permit through testimony and sworn affidavits that the health of the Western Branch "will suffer as a direct result of the impacts to the connected streams and tributaries just a few miles upstream at the Woodmore Towne Center site." E. 272, ¶ 8. Mr. Linthicum cited several recent, scientific articles supporting his claim of future and imminent threat to the river and its tributaries. One such article discusses the connection between urbanization, impacts to streams and deleterious effects on watersheds and downstream rivers:

> Headwater systems are important sources of sediments, water, nutrients, and organic matter for downstream reaches. Despite the significant roles of headwater systems within the channel network, the ecological values of headwater systems are underestimated, and their processes have been extensively modified by land use.

Id. ¶ 13 (quoting Takashi Gomi, Roy C. Sidle & John S. Richardson, *Understanding Processes and Downstream Linkages of Headwater Systems*, BioScience, Vol. 52, No. 10, Oct. 2002, at 914). Mr. Linthicum further testified regarding the impact of a large box culvert on the property:

> Urbanization affects surface water flows into and out of wetlands systems through alteration of drainage, rates and location of water flowing into the system, holding capacity, and outflow rates. Channelization of flow is

perhaps the single greatest impact to surface water inflows in urban areas….Increased flow rates through culverts can be a major impediment to wetland functioning as well as fish migration.

Id. ¶ 12.[6] Although the circuit court found that Mr. Linthicum has "an aesthetic interest in the beauty of the river and the cleanliness of its water," Opinion and Order at 3., it ignored that legitimate interest when it held that Mr. Linthicum's "good-faith belief" that urbanization will one day destroy the "wetlands and waterways that he loves" was not sufficient injury in fact to establish federal standing. *Id.*

Courts have consistently granted federal standing in environmental cases where the injury in fact "affects the recreational, or even the mere aesthetic interests of the plaintiff." *Summers*, 129 S. Ct. at 1149 (2009); *Sierra Club*, 405 U.S. at 734-736. Moreover, The United States Supreme Court has "held that environmental plaintiff's 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." *Sierra Club.* 405 U.S. at 735; *Laidlaw,* 528 U.S. at 183.

Mr. Linthicum explained how these injuries to the watershed will directly affect him. Mr. Linthicum visits the Patuxent River almost every day, and has visited and will continue to visit the Western Branch every few months. E. 272, ¶ 5. Additionally, Mr. Linthicum has been "paddling, wading and clearing branches and other blockages in the Western Branch for nearly ten years." *Id.* Because the Western Branch is much healthier

[6] *See* Ronald M. Thom and Amy B. Boarde, *Influence of Urbanization on Ecological Processes in Wetlands, in* Land Use and Watersheds: Human influence on Hydrology and Geomorphology in Urban and Forest Areas- Water Science and Application Volume 2 at 14 (American Geophysical Union 2001).

than its surrounding watersheds, Mr. Linthicum has a particular aesthetic and environmental interest in this area. *Id*. Mr Linthicum testified that he most often visits the area of the Western Branch just downstream from the Woodmore Towne Center Project, sometimes paddling as far north as Upper Marlboro, approximately 8.5 miles from the impacted streams. *Id*. at ¶ 6. Also, Mr. Linthicum lives on the Patuxent River itself, about one mile to the east of the Western Branch tributary. *Id*. at ¶ 4. Mr. Linthicum stated that diverting streams can affect the flow rate and ecology on the Patuxent River and drainage of stormwater from the Woodmore development into the watershed will further degrade the water quality of the Western Branch. *Id*. at ¶ 9. These activities will have negative effects on Mr. Linthicum's recreational and aesthetic enjoyment of the Western Branch. Id. at ¶ 10. Specifically, the loss of wetlands in a river system "eventually leads to the death and desertification of a river's tributaries and takes an equivalent toll on the waters of the main channel." *Id*. These same interests were found by the Fourth Circuit to be sufficient to satisfy standing in *Gaston Copper*. 204 F.3d at 159 (Plaintiff "is a property owner in the path of a toxic discharge whose injury is ongoing.").

Mr. Linthicum also has an economic interest in the Western Branch watershed. Beyond his work as a professional geographer, Mr. Linthicum spent hundreds of hours surveying the Western Branch and the Patuxent River watershed in order to develop a map and guide of the watershed, which he has sold, and does sell online and at several locations. *Id*. at ¶ 14. Thus, while a pecuniary interest is not necessary to establish an injury in fact, issuance of the permit and construction of the bridge and box culvert will

“lessen” Mr. Linthicum's long-standing aesthetic, recreational and economic enjoyment of the river and the court should grant Mr. Linthicum standing under federal law. *See Laidlaw*, 528 U.S. at 183.

The circuit court dubbed Mr. Linthicum's averments to be a “good-faith” belief that urbanization will eventually erode the wetlands he loves and classified his claim that the development will “ultimately” impact his economic, aesthetic and recreational interests as “precisely the conjectural or hypothetical injury forbidden by *Summers*.” Opinion and Order at 3. However, the court in *Summers* denied standing because the individual did not have a firm intention to visit the area in the future. *Summers*, 129 S.Ct. at 1142. Here, Mr. Linthicum has visited the affected area and will continue to visit the affected area. E. 272, ¶ 5. There is nothing conjectural or hypothetical about his belief that the permit and the subsequent destruction of wetlands will harm his interests.

Contrary to the circuit court's holding that Mr. Linthicum did not have standing because he failed to meet an “imminence requirement,” federal courts have rejected a strict interpretation of standing requirements and have allowed plaintiffs to broadly vindicate their claims, even in cases where the plaintiff could not specify exact dates, times and coordinates relating to the threat of future harm. For example, in *Massachusetts v. EPA*, 549 U.S. 497, 522-523 (2007), the Court held that Massachusetts had standing to challenge EPA's failure to regulate certain greenhouse gases associated with global warming, even though EPA's failure might not harm Massachusetts for several decades. Furthermore, the Court in *S.C.R.A.P.* held that an environmental group had sufficiently met federal standing requirements when it challenged the Interstate

Commerce Commission's approval of a surcharge on railroad freights, specifically freights transporting goods to be recycled. *U.S. v. S.C.R.A.P.*, 412 U.S. 669, 689 (1973). The group alleged that the rate increase would cause them to suffer "economic, recreational and aesthetic harm" because the rates would increase the use of non-recyclable goods, "thus resulting in the need to use more natural resources to produce such goods…and resulting in more refuse that might be discarded in national parks in the Washington area." *Id*. at 688.

The circuit court found that Mr. Linthicum had a good-faith belief that the wetlands would one day be impacted by the development of upstream property. Thus, the court erred in holding that Mr. Linthicum failed to meet the federal test for standing.

Assuming, *arguendo*, that the circuit court was correct in holding that federal standing demands satisfaction of a strict "imminence requirement," the Court in *Lujan* explained that imminence is an elastic concept that "cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes.[7]" The Court specifically distinguished "imminence" to be "stretched beyond

[7] In Lujan, the Secretary of the Interior promulgated a new interpretation of the Endangered Species Act of 1973. The Act originally protected foreign and domestic animals, but was amended by the Secretary to exclude animals abroad. Respondents, wildlife conservation organizations, filed suit seeking declaratory judgment and injunctive relief to restore the original interpretation. The district court granted petitioner's motion to dismiss for lack of standing, but the circuit court reversed. The United States Supreme Court reversed the circuit court's decision and remanded because respondents lacked standing under Article III of the Constitution to bring an action. The court ruled that the respondent's alleged intent to return to the areas abroad that they had visited before, where they would now be deprived of the opportunity to observe the endangered species, was not enough. "Such 'someday' intentions -- without any description of concrete plans, or indeed even any specification of *when* the someday will

the breaking point" when, as in *Lujan*, the "plaintiff alleges only an injury at some indefinite future time, and the acts necessary to make the injury happen are at least partly within the plaintiff's own control." *Lujan,* 504 U.S. at 564. The Court explained that in these specific cases, the injury must "proceed with a high degree of immediacy, so as to reduce the possibility of deciding a case in which no injury would have occurred at all." *Id*. *See, Whitmore v. AR*, 495 U.S. 149, 156-160 (1990); *Los Angeles v. Lyons*, 461 U.S. 95, 102-106 (1983). Furthermore, the Court in *Ohio Forestry Assn., Inc. v. Sierra Club*, 523 U.S. 726, 734 (1998), held imminence to be a requirement apposite to cases determining ripeness or injunctive relief. Accordingly, imminence is frequently evaluated "where irreparable injury is *likely* in the absence of an injunction." *Winter v. NRDC*, 555 U.S. 7, 27 (2008)(emphasis in the original); *Lyons,* 461 U.S. at 103 (holding that the plaintiff who had been subject to past unlawful chokeholds would have had standing if he had shown a 'realistic threat' that reoccurrence of the chokehold would cause him harm 'in the reasonably near future'). Those are not our facts and imminent injury is not of paramount concern in this standing analysis.

The Court in *Sugarloaf* held that the degree of harm goes to the merits of a case, and a person seeking standing does not have to prove "imminence" of harm in order to acquire standing. *Sugarloaf*, 344 Md. at 296-297. The Court recognized that if an individual's standing in court to challenge the issuance of a permit were "dependent upon the plaintiff's establishing that he or she would suffer legally cognizable harm, the result

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be" is not enough to support the required finding of an actual or imminent injury. *Lujan,* 504 U.S. at 564.

would be that numerous permits, issued after adjudicatory hearings, would be immune from judicial review" and plaintiffs would necessarily "be faced with an unreasonable hurdle." *Id*. at 296. In Maryland, the rule of *Sugarloaf* and incorporated federal standing need not be deemed mutually exclusive, and there is nothing in the legislative history of the 2009 Act that would in any way support a *sub silentio* modification of the *Sugarloaf* rule.

In this case, Mr. Linthicum has no control over the development of the Towne Center or the impacts to the watershed that may flow from its construction and, as the circuit court acknowledged, Mr. Linthicum has a good-faith belief that irreparable harm to the impacted waterways and wetlands will likely occur in the future. Order and Opinion at 3.

Several circuits have followed the Supreme Court and recognized that a credible threat of harm is sufficient to confer standing under federal law, whether or not there has been a statutory violation and despite the nature of the proposed harm. The Seventh Circuit held that "even a small probability of injury is sufficient to create a case or controversy- to take a suit out of the category of the hypothetical- provided of course that the relief sought would, if granted, reduce the probability." *Village of Elk Grove v. Evans*, 997 F.2d 329 (7th Cir. 1993) (holding that the plaintiff town situated on a flood plain, suffered sufficient threatened injury to confer standing in the case against the construction of a radio tower that would have increased the chance of flooding in the town).

The District of Columbia Circuit found injury in fact from a logging plan that increased the risk of wildfire. *Mountain States Legal Found. v. Glickman*, 320 U.S. App. D.C. 87 (D.C. Cir. 1996). The Fifth Circuit held that evidence of actual harm to the waterway was not required in order to confer standing to the plaintiffs. *Sierra Club v. Cedar Point Oil Co.*, 73 F.3d 546, 566 (5th Cir. 1996)(court rejected the defendant's argument that a mere concern about environmental threats was not enough to confer standing under federal law.).

Mr. Linthicum has proven sufficient threats of harm to satisfy federal standing and should not have to wait until the watershed he enjoys becomes polluted and barren in order to satisfy standing under Article III. Thus, controlling federal law contradicts the circuit court's holding that Mr. Linthicum lacked standing.

B. The Circuit Court's Holding That Mr. Linthicum Lacked Standing is Contrary to The Holdings in Other States.

Various other state courts, including those in Virginia, recognize that federal standing requirements are broader than those traditionally imposed by states. Previous to 1996, Virginia narrowly restricted the class of persons who could challenge the approval or denial of permits. *See* 61 Fed. Reg. 20972 (May, 8, 1996). Only persons who had been denied a permit could, in essence, challenge a permitting decision. In *Browner*, Virginia challenged the EPA's refusal to approve the state's proposed program for issuing air pollution permits because of the state’s cramped view of standing to challenge permits issued under federally delegated programs. *Virginia v. Browner*, 80 F.3d 869, 873-875

(4th Cir. 1996).[8] Specifically, Virginia challenged EPA's finding that the state had failed to comply with Title V of the Clean Air Act (CAA) because the proposal lacked adequate provisions for citizens to seek judicial review under Va. Code § 10.1-1318. *Id*. at 875. The Fourth Circuit agreed with EPA's interpretation that the provision was too restrictive, limiting availability of review to individuals with "pecuniary and substantial" interests, and that Virginia's proposed judicial review provisions were in violation of CAA §502(b)(6). *Id*. at 876.

Despite repeated challenges to the amended statutes, Virginia courts have faithfully effectuated the Virginia General Assembly's intention to broaden the scope of standing. In *Scheer v. Commonwealth*, 46 Va. Cir. 335, 337 (1998), the state circuit court held that the legislature did not intend to preclude the right of judicial review where a water protection permit was issued in connection with the Clean Water Act and the class of persons entitled to seek judicial review was extended to those persons entitled to review under Article III. *See also Philip Morris v. Chesapeake Bay Foundation*, 273 Va. 564 (2007) (holding that the organization established both representational and individual standing to seek review); *State Water Control Board, et al. v. Crutchfield et al.*, 265 Va. 416, 420 (2003) (holding that the landowners did have standing under Va. Code §62.1-44.29 and Article III); *CBF, Inc. and Citizens for Stumpy Lake v. Commonwealth of*

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[8] In 1996, the federal government voiced concerns that Virginia, and several other states, had judicial review standing requirements that were too restrictive. *See* 61 Fed. Reg. 20972 (May, 8, 1996). In response to the federal government, and *Browner*, the Virginia General Assembly amended several statutes to include provisions allowing any person aggrieved of a permitting authority's decision to seek judicial review under an expansive interpretation of Article III standing. Va. Code 10.1-1318, Va. Code 62.1-44.29 and Va. Code 10.1-1457.

Virginia, et al., 46 Va. App. 104 (Va. App. 2005) (holding that although the appellants lacked standing to bring the suit, Virginia recognized representational standing if the appellants satisfied the requirements under Article III); *Concerned Taxpayers of Brunswick County v. Department of Environmental Quality*, 31 Va. App. 788 (Va. App. 2000) (holding that the appellants had suffered injury and had representational standing to sue the DEQ).

In *Mattaponi Indian Tribe et al. v. Commonwealth of Virginia, et al.*, 261 Va. 366 (2001), the state water board issued a permit for the City of Newport News's proposed King William Reservoir public water supply project. *Id*. at 369. Among other things, the project involved a 78-foot-high and 1700-foot long dam on a tributary that would result in the loss of 437 acres of wetlands, 21 miles of streams, 875 acres of wildlife habitat, and an alteration of 105 acres of downstream wetlands- allegedly harmful to fish and wildlife. *Id*. at 371. Appellants, organizations and individual riparian landowners, and appellant Indian tribe challenged the permit, contending that the permit was contrary to law and would cause injury to the environment, loss of land, loss of recreational use, injury to way of life and culture. *Id*. at 370-374. In response, the Commonwealth filed demurrers, claiming that because appellants failed to meet the federal standing requirements (i) actual or imminent injury and (ii) causation, appellants lacked standing to sue. *Id*. at 369. The Supreme Court of Virginia disagreed with the Commonwealth and held that appellants did have standing under Va. Code §62.1-44.29 because the injuries were fairly traceable to the Board's decision to issue the permit. *Id*. at 374.

Here, because the issued permit impacts over 35,000 square feet of wetlands and waterways and causes future and threatened harm to Mr. Linthicum's aesthetic, recreational and economic interests in the Western Branch and its tributary, Mr. Linthicum has standing to challenge the permit, thus, so does the Patuxent Riverkeeper.

In *Residents Involved in Saving the Environment, Inc. et al. v. Commonwealth of Virginia, et al.*, 2000 Va. App. LEXIS 547 (2000), appellants appealed a decision by the Department of Environmental Quality to issue a solid waste permit to construct and operate a landfill in King and Queen county. The Commonwealth alleged that the appellants lacked standing because Va. Code § 10.1-1457 did not expressly provide for representational standing, the appellants did not suffer an "actual or imminent injury," and appellants were not "persons aggrieved" under Va. Code §10.1-1457(A). *Id*. at 15. The court held that the appellants did have standing, pursuant to *Concerned Taxpayers*, and were "persons aggrieved" as property owners whose lands could be harmed by a final decision of the Board in issuing a permit. *Id*. at 16. The court also found that appellants participated in the public comment process, were subject to "imminent injury" which was "concrete and particularized," and that the injury would likely be redressed in a favorable action by the court. *Id*.

Like Virginia's decision to amend its standing law for environmental permit challenges, the Maryland legislature amended Maryland law to conform to federal standing requirements. MD. CODE ANN., ENVIR. § 5-204(f) (2010). The Court should consider the decisions of the Supreme Court of Virginia and, in doing so, should find that the Riverkeeper has established standing through its member Mr. Linthicum.

CONCLUSION

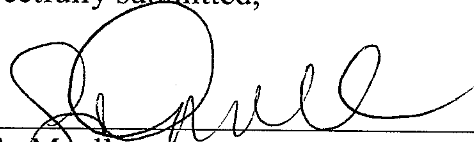
The Maryland General Assembly has unequivocally determined that state standing law in environmental permitting matters should conform to federal law. As a case of first impression, the Court's decision in this matter will determine whether the General Assembly's decision will be upheld. Due to the General Assembly's decision and well established federal law, the correct decision is reversal of the circuit court and a finding that standing exists.

There is no dispute that Mr. Linthicum, a Riverkeeper member, has important current and future aesthetic, economic, and recreational interests in the vitality of the Western Branch and the Patuxent River. The permit impacts wetlands and waterways that will harm the watershed and Mr. Linthicum's interests. Numerous federal and state courts evaluating similar facts have found standing to exist.

Thus, the circuit court incorrectly applied federal law when it held that the Riverkeeper lacked standing to challenge the wetlands and waterways permit. *Amici curiae*, Chesapeake Bay Foundation, Inc. and Waterkeeper Alliance, Inc, respectfully requests that this Court reverse the decision of the Maryland circuit court and grant Riverkeeper the right to judicially challenge this permit.

Dated: March 31st, 2011

Respectfully submitted,



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STATEMENT OF FONT TYPE USED AND TYPE SIZE

Pursuant to Maryland Rules 8-112 and 8-504(a)(8), this brief has been prepared using Times New Roman, 13 pt. type.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on March 31st, 2011 two (2) copies of the foregoing Amicus Brief of Chesapeake Bay Foundation, Inc. and Waterkeeper Alliance, Inc. were sent by U.S. mail, postage prepaid, and electronic mail to:

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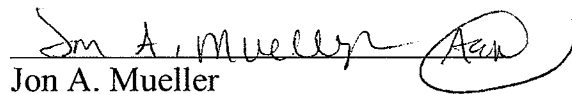

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CITATIONS AND TEXT OF PERTINENT STATUTES AND REGULATIONS

[SEE FOLLOWING PAGES]

1 of 1 DOCUMENT

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*** ANNOTATIONS CURRENT THROUGH January 19, 2011. ***

TITLE 10.1. CONSERVATION
SUBTITLE II. ACTIVITIES ADMINISTERED BY OTHER ENTITIES
CHAPTER 13. AIR POLLUTION CONTROL BOARD
ARTICLE 1. GENERAL PROVISIONS

GO TO CODE OF VIRGINIA ARCHIVE DIRECTORY

Va. Code Ann. § 10.1-1318 (2011)

§ 10.1-1318. Appeal from decision of Board

A. Any owner aggrieved by a final decision of the Board under *§ 10.1-1309*, *§ 10.1-1322* or subsection D of *§ 10.1-1307* is entitled to judicial review thereof in accordance with the provisions of the Administrative Process Act (*§ 2.2-4000* et seq.).

B. Any person who has participated, in person or by submittal of written comments, in the public comment process related to a final decision of the Board under *§ 10.1-1322* and who has exhausted all available administrative remedies for review of the Board's decision, shall be entitled to judicial review of the Board's decision in accordance with the provisions of the Administrative Process Act (*§ 2.2-4000* et seq.) if such person meets the standard for obtaining judicial review of a case or controversy pursuant to Article III of the United States Constitution. A person shall be deemed to meet such standard if (i) such person has suffered an actual or imminent injury which is an invasion of a legally protected interest and which is concrete and particularized; (ii) such injury is fairly traceable to the decision of the Board and not the result of the independent action of some third party not before the court; and (iii) such injury will likely be redressed by a favorable decision by the court.

HISTORY: 1971, Ex. Sess., c. 91, § 10-17.23:2; 1986, c. 615; 1988, c. 891; 1993, c. 997; 1996, c. 1032.

NOTES: EDITOR'S NOTE. --Acts 1996, c. 1032, cl. 3 provides: "[t]hat the second enactment of this act shall not be effective unless and until a final and unappealable decision of a court of competent jurisdiction has declared that subsection B of *§ 10.1-1318* as it is currently effective does not meet the requirements for state program approval under Title V of the federal Clean Air Act or regulations promulgated thereunder with respect to standing to seek judicial review of state permitting decisions."

Acts 1996, c. 1032, cl. 5, as added by Acts 1997, c. 520, cl. 1, provides: "That the 'final and unappealable decision of

a court of competent jurisdiction' referred to in enactment clauses 3 and 4 was rendered by the United States Supreme Court in the case of Commonwealth vs. Browner on January 21, 1997."

THE 1996 AMENDMENT rewrote subsection B which formerly read: "Any person who is aggrieved by a final decision of the Board under *§ 10.1-1322*, who participated, in person or by submittal of written comments, in the public comment process related to the Board's decision and who has exhausted all available administrative remedies for review of the Board's decision, shall be entitled to judicial review of the Board's decision in accordance with the provisions of the Administrative Process Act (§ 9-6.14:1 et seq.). The person invoking jurisdiction under this subsection bears the burden of establishing that (i) such person has suffered an actual, threatened or imminent injury; (ii) such injury is an invasion of an immediate, legally protected, pecuniary and substantial interest which is concrete and particularized; (iii) such injury is fairly traceable to the decision of the Board and not the result of the action of some third party not before the court; and (iv) such injury will likely be redressed by a favorable decision by the court." For effective date, see Editor's note.

LAW REVIEW. --For an article reviewing key environmental developments at the federal and state levels during the period from June 1996 to June 1998, see *32 U. Rich. L. Rev. 1217 (1998).* For 2007 annual survey article, "Environmental Law," see *42 U. Rich. L. Rev. 383 (2007).*

LexisNexis 50 State Surveys, Legislation & Regulations

Air Quality Standards

DENIAL OF FORMAL PETITION FOR HEARING ENTITLES "OWNER AGGRIEVED" TO JUDICIAL REVIEW. --A final decision on the part of the State Air Pollution Control Board to deny a formal petition for a hearing would, under this section, entitle any "owner aggrieved" by that decision a right to judicial review. *Citizens for Clean Air v. Commonwealth ex rel. State Air Pollution Control Bd., 13 Va. App. 430, 412 S.E.2d 715 (1991).*

WHERE THE TERM "OWNER" APPEARS ELSEWHERE THAN IN THIS SECTION in the State Air Pollution Control Law, the context clearly indicates that the word is meant to indicate the owner of a source or a potential source of air pollution. *Citizens for Clean Air v. Commonwealth ex rel. State Air Pollution Control Bd., 13 Va. App. 430, 412 S.E.2d 715 (1991).*

UNINCORPORATED ASSOCIATION COMPOSED OF OWNERS OF REAL PROPERTY adversely affected by poultry processing facility did not have standing to appeal the State Air Pollution Control Board's denial of the association's petition for a formal hearing regarding issuance of an air permit to the poultry processing facility, because the association was not an "owner" under *§ 10.1-1318*, and the association was not a "party aggrieved" under § 9-6.14:16. *Citizens for Clean Air v. Commonwealth ex rel. State Air Pollution Control Bd., 13 Va. App. 430, 412 S.E.2d 715 (1991).*

APPLIED in *Virginia v. United States, 926 F. Supp. 537 (E.D. Va. 1995); Philip Morris USA, Inc. v. Chesapeake Bay Found., Inc., 273 Va. 564, 643 S.E.2d 219, 2007 Va. LEXIS 67 (2007).*

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TITLE 10.1. CONSERVATION
SUBTITLE II. ACTIVITIES ADMINISTERED BY OTHER ENTITIES
CHAPTER 14. VIRGINIA WASTE MANAGEMENT ACT
ARTICLE 8. PENALTIES, ENFORCEMENT AND JUDICIAL REVIEW

GO TO CODE OF VIRGINIA ARCHIVE DIRECTORY

Va. Code Ann. § 10.1-1457 (2011)

§ 10.1-1457. Judicial review

A. Except as provided in subsection B, any person aggrieved by a final decision of the Board or Director under this chapter shall be entitled to judicial review thereof in accordance with the Administrative Process Act (*§ 2.2-4000* et seq.).

B. Any person who has participated, in person or by the submittal of written comments, in the public comment process related to a final decision of the Board or Director under *§ 10.1-1408.1* or *§ 10.1-1426* and who has exhausted all available administrative remedies for review of the Board's or Director's decision, shall be entitled to judicial review thereof in accordance with the Administrative Process Act (*§ 2.2-4000* et seq.) if such person meets the standard for obtaining judicial review of a case or controversy pursuant to Article III of the United States Constitution. A person shall be deemed to meet such standard if (i) such person has suffered an actual or imminent injury which is an invasion of a legally protected interest and which is concrete and particularized; (ii) such injury is fairly traceable to the decision of the Board and not the result of the independent action of some third party not before the court; and (iii) such injury will likely be redressed by a favorable decision by the court.

HISTORY: 1986, c. 492, § 10-312; 1988, c. 891; 1996, c. 1032.

NOTES: EDITOR'S NOTE. --Acts 1996, c. 1032, cl. 3 provides: "[t]hat the second enactment of this act shall not be effective unless and until a final and unappealable decision of a court of competent jurisdiction has declared that subsection B of *§ 10.1-1318* as it is currently effective does not meet the requirements for state program approval under Title V of the federal Clean Air Act or regulations promulgated thereunder with respect to standing to seek judicial review of state permitting decisions."

Acts 1996, c. 1032, cl. 5, as added by Acts 1997, c. 520, cl. 1, provides: "That the 'final and unappealable decision of

a court of competent jurisdiction' referred to in enactment clauses 3 and 4 was rendered by the United States Supreme Court in the case of Commonwealth vs. Browner on January 21, 1997."

THE 1996 AMENDMENT added the subsection A designation, inserted "Except as provided in subsection B" at the beginning of subsection A and added subsection B. For effective date, see Editor's note.

LAW REVIEW. --For 2007 annual survey article, "Environmental Law," see *42 U. Rich. L. Rev. 383 (2007).*

LexisNexis 50 State Surveys, Legislation & Regulations

Solid Waste Management

STANDING TO CHALLENGE PERMIT. --A church and a corporation of residents were "aggrieved persons" and had standing to challange the issuance of a landfill permit where he church, a legal entity owning property adjacent to the landfill, alleged that its water well and cemetery would be affected by the landfill operations and the residents corporation's members, many of whom were adjacent landowners, alleged injury to their water supplies and property values as a result of the operation of the landfill. Residents Involved in *Saving Env't, Inc. v. Commonwealth ex rel. Dep't of Waste Mgt., No. 3103-99-2, 2000 Va. App. LEXIS 547* (Ct. of Appeals July 25, 2000).

While the trial court erred in holding that the plain language of *§ 62.1-44.29* did not confer representational standing on two citizen groups in their challenge against the issuance of a water protection permit to a developer, and they did not have standing to sue in their own right, said holding failed to address whether the citizens alleged sufficient injury to confer standing on a member of either of their groups in a personal and individual manner; thus, the matter was remanded for a determination as to whether the citizens alleged sufficient facts to grant them representational standing. *Chesapeake Bay Found., Inc. v. Commonwealth ex rel. State Water Control Bd., 46 Va. App. 104, 616 S.E.2d 39, 2005 Va. App. LEXIS 286 (2005).*

MATERIALS RECOVERY FACILITY CLASSIFICATION. --Department's classification of a facility as a materials recovery facility was proper; the department found the recyclable materials which were to come to the facility did not become exempt or excluded from regulation until after they were separated from all of the incoming solid waste, and the record supported the department's finding that approximately 30 percent of the materials coming to the facility would have been non-recyclable. The department did not act in an arbitrary or capricious manner when it determined more than a de minimis amount of solid waste would come to the facility. *Frederick County Bus. Park, LLC v. Va. Dep't of Envtl. Quality, 52 Va. App. 40, 660 S.E.2d 698, 2008 Va. App. LEXIS 244 (2008),* aff'd, *278 Va. 207, 677 S.E.2d 42, 2009 Va. LEXIS 64 (2009).*

APPLIED in *Philip Morris USA, Inc. v. Chesapeake Bay Found., Inc., 273 Va. 564, 643 S.E.2d 219, 2007 Va. LEXIS 67 (2007).*

CIRCUIT COURT OPINIONS

STANDING TO CHALLENGE AGENCY DECISION. --River association did not have standing to challenge, in its representative capacity, Virginia Waste Management Board's decision to charge a fee to transport waste on Virginia's waters because the plain language of Virginia's Administrative Process Act, *§ 2.2-4000*, et seq., clearly provided that standing to seek judicial review of a decision of the board was not conferred on persons in a representative capacity; however, the association stated sufficient facts to show that it was a "person aggrieved" under *§ 10.1-1457*; thus it did have standing to appeal the Board's decision. *James River Ass'n v. Commonwealth ex rel. Waste Mgmt. Bd., 63 Va. Cir.*

602, 2004 Va. Cir. LEXIS 88 (Richmond 2004).

LEXSTAT VA. CODE § 62.1-44.29

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TITLE 62.1. WATERS OF THE STATE, PORTS AND HARBORS
CHAPTER 3.1. STATE WATER CONTROL LAW
ARTICLE 5. ENFORCEMENT AND APPEAL PROCEDURE

GO TO CODE OF VIRGINIA ARCHIVE DIRECTORY

Va. Code Ann. § 62.1-44.29 (2011)

§ 62.1-44.29. Judicial review

Any owner aggrieved by or any person who has participated, in person or by submittal of written comments, in the public comment process related to a final decision of the Board under *§ 62.1-44.15 (5)*, *62.1-44.15 (8a)*, (8b), and (8c), 62.1-44.15:20, 62.1-44.15:21, 62.1-44.15:22, 62.1-44.15:23, 62.1-44.16, 62.1-44.17, 62.1-44.19, or 62.1-44.25, whether such decision is affirmative or negative, is entitled to judicial review thereof in accordance with the provisions of the Administrative Process Act (*§ 2.2-4000* et seq.) if such person meets the standard for obtaining judicial review of a case or controversy pursuant to Article III of the United States Constitution. A person shall be deemed to meet such standard if (i) such person has suffered an actual or imminent injury which is an invasion of a legally protected interest and which is concrete and particularized; (ii) such injury is fairly traceable to the decision of the Board and not the result of the independent action of some third party not before the court; and (iii) such injury will likely be redressed by a favorable decision by the court.

HISTORY: 1970, c. 638; 1986, c. 615; 1996, c. 1032; 2000, cc. 1032, 1054; 2007, c. 659.

NOTES: EDITOR'S NOTE. --Acts 1996, c. 1032, cl. 4, provides: "[t]hat the second enactment of this act [which amended this section] shall not be effective unless and until a final and unappealable decision of a court of competent jurisdiction declaring that subsection B of *§ 10.1-1318* as it is currently effective does not meet the requirements for state program approval under Title V of the federal Clean Air Act or regulations promulgated thereunder with respect to standing to seek judicial review of state permitting decisions." The 1996 amendment became effective January 21, 1997, the date of the final and unappealable decision referred to throughout the act.

Acts 1996, c. 1032, cl. 5, as amended by Acts 1997, c. 520, cl. 1, provides: "That the "final and unappealable decision of a court of competent jurisdiction" referred to in enactment clauses 3 and 4 was rendered by the United States Supreme Court in the case of Commonwealth vs. Browner on January 21, 1997."

Acts 2000, cc. 1032 and 1045, cl. 4 provides: "That nothing in this act shall be construed to restrict the State Water Control Board's authority to issue Virginia Water Protection Permits for activities requiring certification under § 401 of the Clean Water Act."

THE 2000 AMENDMENTS. --The 2000 amendments by cc. 1032 and 1054 are identical, and inserted "62.1-44.15:5" in the first sentence.

THE 2007 AMENDMENTS. --The 2007 amendment by c. 659 substituted "62.1-44.15:20, 62.1-44.15:21, 62.1-44.15:22, 62.1-44.15:23" for "62.1-44.15:5."

LAW REVIEW. --For article discussing decisions of Virginia courts dealing with state administrative procedures between June 1, 2002 and June 1, 2003, see *38 U. Rich. L. Rev. 39 (2003).* For article, "Why Does the Chesapeake Bay Need Litigators?," see *40 U. Rich. L. Rev. 1113 (2006).* For 2007 annual survey article, "Environmental Law," see *42 U. Rich. L. Rev. 383 (2007).*

MICHIE'S JURISPRUDENCE REFERENCES. --For related discussion, see *1A M.J. Administrative Law, § 16*; *20 M.J. Waters and Watercourses, § 19*.

LexisNexis 50 State Surveys, Legislation & Regulations

Water Quality

WAIVER OF SOVEREIGN IMMUNITY. --This section, by reference to the State Water Control Board's authority under subdivision (5) of *§ 62.1-44.15*, expressly waives the board's sovereign immunity as to the board's grant of a Virginia Water Protection Permit for the alteration of state waters. *Alliance to Save Mattaponi v. Commonwealth ex rel. State Water Control Bd., 30 Va. App. 690, 519 S.E.2d 413 (1999).*

Doctrine of sovereign immunity did not bar appeal of board's modification of water protection permit, since permit was "a certificate for the alteration of state waters" pursuant to subdivision (5) of *§ 62.1-44.15* and, by referring to board's authority under that provision, this section expressly waived board's sovereign immunity as to grant of that permit. Riverview Farm Assocs. v. Department of Envtl. Quality, No. 2337-98-2 (Ct. of Appeals Dec. 7, 1999).

REVIEW OF PERMIT FOR ALTERATION OF STATE WATERS. --This section explicitly provides for judicial review of the State Water Control Board's decision to issue a permit for the alteration of state waters. *Alliance to Save Mattaponi v. Commonwealth ex rel. State Water Control Bd., 30 Va. App. 690, 519 S.E.2d 413 (1999).*

No error attached by the Court of Appeals' act in endorsing the State Water Control Board's issuance of the permit to the city to build a reservoir, as the Board fulfilled its statutory mandates, did not abuse its discretion in approving certain scientific methodology or in determining to proceed with the permit decision, and reached a decision supported by substantial evidence; but, while the Court of Appeals lacked jurisdiction, the circuit court had jurisdiction to consider an Indian tribe's separate treaty claims asserted against the city under *Treaty at Middle Plantation With Tributary Indians After Bacon's Rebellion, May 29, 1677, art. V. Alliance to Save the Mattaponi v. Commonwealth Dep't of Envtl. Quality ex rel. State Water Control Bd., 270 Va. 423, 621 S.E.2d 78, 2005 Va. LEXIS 100 (2005),* cert. denied, -- *U.S. --, 126 S. Ct. 2862, 165 L. Ed. 2d 895 (2006).*

STANDING REQUIREMENTS. --The wording of this section tracks the language by the United States Supreme Court about standing requirements imposed by the "case" or "controversy" provisions of Article III of the United States Constitution. The standing doctrine requires (1) that the plaintiff has suffered an "injury in fact," an invasion of a judicially cognizable interest that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) that there be a causal connection between the injury and the conduct complained of, that is, the injury

must be fairly traceable to the challenged action of the defendant, and not the result of independent action of some third party not before the court; and (3) that it be likely, not merely speculative, the injury will be redressed by the court's favorable decision. *Mattaponi Indian Tribe v. Commonwealth ex rel. State Water Control Bd., 261 Va. 366, 541 S.E.2d 920, 2001 Va. LEXIS 26 (2001); State Water Control Bd. v. Crutchfield, 265 Va. 416, 578 S.E.2d 762, 2003 Va. LEXIS 42 (2003).*

As riparian owners had sufficiently alleged damage to their recreational interests in their petition for review of actions of the State Water Control Board (SWCB), the trial court erred in ruling they lacked standing to contest the SWCB's issuance of a permit to allow the county to discharge pollutants into a river adjoining the owners' land. *Crutchfield v. State Water Control Bd., No. 1095-01-2, 2002 Va. App. LEXIS 206* (Ct. of Appeals Apr. 2, 2002), aff'd, *265 Va. 416, 578 S.E.2d 762 (2003).*

Standing provisions of *§ 62.1-44.29* require persons challenging a final decision by the Virginia State Water Control Board to establish that they meet all three enumerated requirements of the statute before a court will consider the merits of their challenge to a governmental action; these components of U.S. Const. art. III standing are not merely requirements of pleading, but must be supported by adequate evidence. *State Water Control Bd. v. Crutchfield, 265 Va. 416, 578 S.E.2d 762, 2003 Va. LEXIS 42 (2003).*

While the trial court erred in holding that the plain language of *§ 62.1-44.29* did not confer representational standing on two citizen groups in their challenge against the issuance of a water protection permit to a developer, and they did not have standing to sue in their own right, said holding failed to address whether the citizens alleged sufficient injury to confer standing on a member of either of their groups in a personal and individual manner; thus, the matter was remanded for a determination as to whether the citizens alleged sufficient facts to grant them representational standing. *Chesapeake Bay Found., Inc. v. Commonwealth ex rel. State Water Control Bd., 46 Va. App. 104, 616 S.E.2d 39, 2005 Va. App. LEXIS 286 (2005).*

Environmental organization alleged a permit issued by the Virginia State Water Control Board failed to comply with federal and state pollution regulations for state waterways. Its allegations that the discharge of chemicals under the permit violated discharge restrictions set at the level necessary to protect the designated uses of the receiving waterways was a sufficient injury in fact to confer standing on the organization itself, as it used the river for educational, recreational, and restorative purposes. *Chesapeake Bay Found., Inc. v. Va. ex rel. State Water Control Bd., 48 Va. App. 35, 628 S.E.2d 63, 2006 Va. App. LEXIS 122 (2006),* aff'd, *273 Va. 564, 643 S.E.2d 219, 2007 Va. LEXIS 67 (Va. 2007).*

Environmental organization alleged a permit issued by the Virginia State Water Control Board failed to comply with federal and state pollution regulations for state waterways. As *§ 62.1-44.29* confers representational standing in cases meeting its requirements, and the organization sufficiently pled injury in fact, causation, and redressability as to at least one of its members, it alleged sufficient facts to establish standing to sue in a representative capacity. *Chesapeake Bay Found., Inc. v. Va. ex rel. State Water Control Bd., 48 Va. App. 35, 628 S.E.2d 63, 2006 Va. App. LEXIS 122 (2006),* aff'd, *273 Va. 564, 643 S.E.2d 219, 2007 Va. LEXIS 67 (Va. 2007).*

Court of Appeals of Virginia properly determined that an environmental conservation organization had standing to appeal the approval of a wastewater discharge permit affecting the James River issued by the State Water Control Board, reversing the judgment of the circuit court, as it presented sufficient allegations of an injury in fact, a link between the injury and the grant of a wastewater discharge permit, and an available civil remedy. *Philip Morris USA, Inc. v. Chesapeake Bay Found., Inc., 273 Va. 564, 643 S.E.2d 219, 2007 Va. LEXIS 67 (2007).*

Environmental group asserted in a petition to appeal a decision of the Commonwealth agency, the State Water Control Board, that extension of the city's permit to build and operate a county reservoir would impair natural river resources or impair the aesthetic value of rivers. Thus, its factual allegations sufficiently showed: (1) an injury in fact; (2) a causal connection; and (3) the injury could be redressed such that it had individual standing to seek judicial review of the decision under the State Water Control Law. It showed that that its individual members had standing to sue in their own rights, the interests involved were germane to its purpose, and that individual members did not have to be involved such that it showed it had representational standing. *Chesapeake Bay Found., Inc. v. Commonwealth ex rel. Va. State Water Control Bd., 52 Va. App. 807, 667 S.E.2d 844, 2008 Va. App. LEXIS 493 (2008).*

PARTICIPATION IN PUBLIC COMMENT PROCESS. --Nonprofit organization's appeal under *§ 62.1-44.29* of the Virginia State Water Control Board issuance of a water protection permit should not have been dismissed where the

trial court erroneously grafted a new prong onto the U.S. Const., Art. III representational standing requirements. Individual member participation in the public comment process was not an Article III, *Lujan* requirement. Standing was satisfied if the Article III, Lujan criteria were met and the organization itself participated in the public comment process. *Chesapeake Bay Found., Inc. v. Commonwealth ex rel. State Water Control Bd., 56 Va. App. 546, 695 S.E.2d 549, 2010 Va. App. LEXIS 282 (2010).*

THE "FAIRLY TRACEABLE" PRONG OF THE STANDING ANALYSIS does not mean that the defendant's actions are the very last step in the chain of causation; while there is no standing if the injury complained of is the result of "independent" action of some third party not before the court, that prong does not exclude injury produced by the effect of action of someone else. *Mattaponi Indian Tribe v. Commonwealth ex rel. State Water Control Bd., 261 Va. 366, 541 S.E.2d 920, 2001 Va. LEXIS 26 (2001).*

STANDING TO CHALLENGE WATER SUPPLY PROJECT. --Alliance of organizations and individuals and an Indian tribe had standing to challenge the issuance of a permit by a state water control board for a public water supply project as the alleged injuries were traceable to the board's permit award and were not solely the result of the independent action of the United States Army Corps of Engineers, a third party not before the trial court. *Mattaponi Indian Tribe v. Commonwealth ex rel. State Water Control Bd., 261 Va. 366, 541 S.E.2d 920, 2001 Va. LEXIS 26 (2001).*

CIRCUIT COURT OPINIONS

STANDING REQUIREMENTS. --Citizens groups asserted that they had standing simply because their members used the lake and surrounding area at issue, but the court held that use was not sufficient for standing; the groups needed to own real or personal property that would be adversely affected by the Virginia Water Control Board's decision in dispute. *Chesapeake Bay Found., Inc. v. Commonwealth ex rel. Va. Water Control Bd., 65 Va. Cir. 440, 2004 Va. Cir. LEXIS 279 (Richmond 2004).*

1 of 1 DOCUMENT

Annotated Code of Maryland
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*** Current through all Chapters of the 2010 Regular Session ***
*** with updates for sections effective through March 1, 2011 ***
*** Annotations through February 17, 2010 ***

ENVIRONMENT
TITLE 5. WATER RESOURCES
SUBTITLE 9. NONTIDAL WETLANDS

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Md. ENVIRONMENT Code Ann. § 5-902 (2011)

§ 5-902. Legislative findings and intent; goal of statewide program

(a) Legislative findings. -- The General Assembly finds that nontidal wetlands play important roles in the preservation and protection of the Chesapeake Bay and other waters of the State. Nontidal wetlands serve important roles through the reduction of pollutant loadings, including excess nutrients, sediment, and toxics, the attenuation of floodwaters and stormwaters, shoreline stabilization and erosion control, waterfowl breeding and habitat for many species of fish, game and nongame birds, and mammals, including rare and endangered species, food chain support, and timber production. Many nontidal wetlands have already been lost or degraded due to the combined effects of population growth and land use. Further degradation and losses of nontidal wetlands will contribute to the decline of the Chesapeake Bay and other waters of the State.

(b) Statewide program for protection, etc.; goals. -- It is the intent of the General Assembly to protect the waters of the State through a comprehensive, statewide nontidal wetland program in cooperation with federal agencies, other states, and local government. The goal of the program shall be to attain no net overall loss in nontidal wetland acreage and function and to strive for a net resource gain in nontidal wetlands over present conditions.

(c) Prevention, restoration, etc., of loss or degradation. -- It is the intent of the General Assembly that:

(1) Waters of the State be protected;

(2) Further degradation and losses of nontidal wetlands due to human activity be prevented wherever possible; and

(3) Where unavoidable losses or degradations occur as a result of permitted human activity, these losses or degradations be offset wherever practicable and feasible through the deliberate restoration or creation of nontidal wetlands.

HISTORY: 1989, ch. 536; 1990, ch. 6, § 2; 1995, ch. 488, § 1.

MARYLAND LAW REVIEW. --For article, "Nontidal Wetlands Protection in Maryland and Virginia," see *51 Md. L. Rev. 105 (1992).*

USER NOTE: For more generally applicable notes, see notes under the first section of this part, subtitle, title, division or article.