Maryland Standing Guide

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Prepared for the use of Chesapeake Legal Alliance and its partners.

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OVERVIEW

The first step to protecting the environment through the courts is proving to the court that you are allowed to be there, *i.e.*, establishing standing. Unfortunately, the requirements for standing are complex and often difficult to establish. This is especially so in Maryland, where, in most situations, the courts limit the field of permissible plaintiffs to an extremely narrow subset of the population. The purpose of this memo is to explain the existing standing requirements in Maryland in order to facilitate actions brought by environmental groups.

This memo provides a general understanding of federal and Maryland standing doctrines and serves as a quick-reference guide for organizations seeking to bring environmental claims within the State of Maryland. Part I begins with a review of federal standing requirements for individuals and organizations and illustrates these requirements through a discussion of relevant challenges to environmental decisions. It then provides an overview of Maryland's standing doctrine. Part II presents environmental organizations with a guide to bringing claims within the state of Maryland. This section delineates the applicable standing rules for various types of action that environmental groups may bring, discusses applicable case law, and provides a brief recommendation for what groups need to show in order to have standing in each situation.

This guide is not exhaustive and law concerning standing may change from the time of writing. As such, readers should conduct independent research as part of their standing analysis.

I. GENERAL STANDING REQUIREMENTS

Plaintiffs must demonstrate standing to bring a claim in both federal and states courts. Federal and state standing requirements can differ substantially, but reviewing both is important because environmental claims may arise under federal law (*i.e.* the Endangered Species Act or the Clean Water Act) or state law (*i.e.* state tort law or zoning issues). This section will cover the

general requirements of federal and Maryland state standing and explain what the practical impact of the differences are.

A. Federal Standing Requirements

Federal standing requirements are much more relaxed than those in Maryland courts, but still provide significant obstacles to environmental groups seeking to sue the government or private entities. Only by understanding the federal standing requirements is it possible to grasp just how exclusionary Maryland standing doctrine is and forge a path forward.

There are two overarching components to standing in federal courts: the constitutional requirements of Article III and related prudential considerations.[1] In order to meet the constitutional requirements, the plaintiff must show: (1) injury in fact, (2) causation, and (3) redressability.[2] The term "injury in fact" does not require a physical injury. Rather, it means that the injury must be "concrete and particularized,"[3] and "actual or imminent," as opposed to "conjectural or hypothetical."[4] The injury in fact requirement is often the most difficult for plaintiffs launching environmental claims to satisfy. In order to meet the causation requirement, the injury must be fairly traceable to the alleged wrong, and "not the result of the independent action of some third party not before the court."[5] Finally, it must be likely—not merely speculative—that a favorable court decision will redress the harm.[6]

In addition to these three Article III requirements, certain related prudential considerations may prohibit a court from hearing a case. Even if the plaintiff satisfies Article III

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1 *Warth v. Seldin*, 422 U.S. 490, 498, 501 (1975).
2 *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992).
3 *Id. See also See Allen v. Wright*, 468 U.S. 737, 751 (1984); *Warth v. Seldin*, 422 U.S. 490, 508 (1975); *Sierra Club v. Morton*, 405 U.S. 727, 740–741, n. 16 (1972).
4 *Lujan*, 504 U.S. at 560 (1992). *See also Whitmore*, *supra*, 495 U.S., at 155, 110 S.Ct., at 1723 (quoting *Los Angeles v. Lyons*, 461 U.S. 95, 102, 103 S.Ct. 1660, 1665, 75 L.Ed.2d 675 (1983)).
5 *Lujan*, 504 U.S. at 560 (quoting *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 41–42 (1976)).
6 *Lujan*, 504 U.S. at 561 (1992).

requirements, federal courts may not allow the case to proceed if: (1) the plaintiff's injury does not fall within the "zone of interest" protected by the constitutional or statutory provision in question; (2) the plaintiff is airing "generalized grievances"; and (3) the plaintiff is asserting the rights of third parties not before the court.[7] While Congress can loosen and alleviate these prudential requirements through legislation, the Article III requirements still must be met.[8]

1. *Federal Associational Standing*

An important aspect of federal standing law for environmental groups is the specific law that exists for associational standing. While groups and organizations can claim standing on their own behalf in limited circumstances (diversion of resources or frustration of mission),[9] groups commonly claim standing on behalf of their members in what is often referred to as associational or representational standing.

The federal standing rules for associations are fairly straightforward. An association may bring a suit on behalf of its members when: (1) at least one member of the organization would have standing to sue in his or her own right; (2) the interest it seeks to protect is "germane" to the organization's purpose; and (3) the claim asserted and the relief requested does not require the participation of the individual members.[10] Given that environmental litigation is often brought by environmental groups themselves on behalf of their members, these requirements mean groups will have to demonstrate the standing of individual members as well as the relevance of the purported interest to the group's purpose.

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7 *See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 127 (2014); *Warth v. Seldin*, 422 U.S. 490, 499 (1975); *Allen v. Wright*, 468 U.S. 737, 758, 767 (1984).

8 *Seldin*, 422 U.S. at 501.

9 *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378-79 (1982).

10 *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 342-43 (1977).

2. *Standing in Environmental Challenges in Federal Courts*

Although environmental groups do not always prevail in establishing standing to sue, the case law in this area illustrates what groups must show in order to have standing. In most cases, claims fail because the group cannot show they suffered, or will suffer, an injury in fact, not because they are unable to bring the claim on behalf of their members.

One of the seminal decisions in this area is *Lujan v. Defenders of Wildlife*.[11] In that case, the Supreme Court found that the environmental group lacked standing to challenge a rule promulgated by the Department of the Interior under the Endangered Species Act.[12] The plaintiff environmental group argued that the agency had incorrectly interpreted the Act and, in doing so, threatened the existence of endangered species. The group argued that its members would personally be harmed because they would not be able to observe the species once they went extinct.[13] The Court first noted, "[o]f course, the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purpose of standing."[14] Still, to show that they met the standing requirements, "the respondents had to submit affidavits or other evidence showing, through specific facts, not only that listed species were in fact being threatened by funded activities abroad, but also that one or more of respondents' members would thereby be 'directly' affected apart from their 'special interest' in th[e] subject."[15] In holding that the plaintiffs had not met that standard here, the Court emphasized that "when the plaintiff is not himself the object of the government action or inaction

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11 *Lujan v. Defs. of Wildlife*, 504 U.S. 555 (1992).
12 *Lujan* at 558-59.
13 *Lujan* at 562-63.
14 *Id*. *See also Sierra Club v. Morton*, 405 U.S., at 734, 92 S.Ct., at 1366.
15 *Lujan* at 563 (quoting *Sierra Club*, 405 U.S. at 735.).

he challenges, standing is not precluded, but it is ordinarily "substantially more difficult" to establish.[16]

While *Lujan* limited standing for plaintiffs that were not the object of government action or inaction, it also provided a framework for establishing standing. Working within that framework, in *Friends of the Earth v. Laidlaw*, the Court found that the environmental groups had standing to bring suit under the Clean Water Act (CWA).[17] There, environmental groups challenged the South Carolina Department of Health and Environmental Control's decision to grant the defendant a National Pollutant Discharge Elimination System permit under the CWA.[18] "The relevant showing for purposes of Article III standing," the Court stated, "is not injury to the environment but injury to the plaintiff."[19] The environmental groups satisfied the Article III standing requirements because their members presented evidence that they suffered injuries from the pollution resulting from the permit issuance.[20] For example, one member averred that he "lived a half-mile from the defendant's facility; that he occasionally drove over the North Tyger River, and that it looked and smelled polluted; and that he would like to fish, camp, and picnic in and near the river. . . but would not do so because he was concerned that the water was polluted by Laidlaw's discharges."[21] Other members' affidavits presented similar evidence: one member attested that she lived near the defendants' facility and previously engaged in activities near the river such as picnicking, walking, and wading, but no longer engaged in these activities because of the pollution.[22] Another member attested that her home, which was near the defendant's facility, had a lower value than similar homes located farther from the facility, and that she

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16 *Lujan* at 562 (citations omitted).
17 *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc*., 528 U.S. 167 (2000).
18 *Id.* at 174-76.
19 *Id.* at 181.
20 *Id*. at 182-82.
21 *Id*. at 182.
22 *Id.*

believed the pollution was to blame for the discrepancy.[23] Effectively, plaintiffs established they were the object of government action and the Court found these injuries sufficient to meet the "injury in fact" requirement.[24]

This showing still requires something more than an abstract possibility of future injury to a member or plaintiff. More recently, in *Summers v. Earth Island Institute*, the Supreme Court determined that the plaintiff association did not have standing in an action to enjoin the U.S. Forest Service from applying its regulation to exempt salvage sale of timber.[25] The Court initially noted that "[w]hile generalized harm to the forest or the environment will not alone support standing, if that harm in fact affects the recreational or even the mere esthetic interests of the plaintiff that will suffice."[26] To show injury, the plaintiffs submitted a member's affidavit, which asserted that he had suffered injury in the past from development on Forest Service land, that he had visited many national forests and planned to visit several unnamed national forests in the future.[27] "We are asked to assume," the Court declared, "not only that [the member] will stumble across a project tract unlawfully subject to the regulations, but also that the tract is about to be developed by the Forest Service in a way that harms his recreational interests, and that he would have commented on the project but for the regulation."[28] Therefore, the Court found these assertions insufficient to meet the concrete harm requirement and further remarked, "[a]ccepting an intention to visit the national forests as adequate to confer standing to challenge any Government action affecting any portion of those forests would be tantamount to eliminating

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23 *Id.* at 182-83.
24 *Id.* at 183-84.
25 555 U.S. 488 (2009).
26 *Id.* at 494 (citing *Sierra Club v. Morton*, 405 U.S. 727, 734-36 (1972)).
27 *Id.* at 495.
28 *Id.* at 496.

the requirement of concrete, particularized injury in fact."[29] The plaintiffs also argued that they had standing because they suffered a procedural injury, in that they were denied the ability to file comments on some Forest Service actions. The Court outright rejected that argument: "deprivation of a procedural right without some concrete interest that is affected by the deprivation. . . is insufficient to create Article III standing."[30] The reasoning extended the *Lujan* framework by again holding that injuries must be specific, not conjectural. In both cases, plaintiffs that failed to detail specific plans to observe or visit specifically affected land or specifies did not have standing.

3. *Standing to Challenge Consent Decrees Against the Maryland Department of the Environment That Were Issued Under the CWA.*

The above discussion of federal standing law mainly serves as background for understanding Maryland standing law. But it is obviously applicable directly to potential environmental challenges under federal law, such as under the Clean Water Act (CWA). Environmental groups often have an interest in the consent decrees issued to remedy causes of action under the CWA.[31] Standing to challenge or intervene in those consent decrees has the same requirements as Article III associational standing generally.[32] Similar cases have turned on the standing of members to sue in their own right, and in particular, the injury-in-fact requirement.[33] The analysis tends to be fairly fact intensive depending on the terms of the particular consent decree being challenged. As such, groups will need to demonstrate exactly how a particular consent decree has injured their members. In *Defs. of Wildlife v. Perciasepe*,

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29 *Id*.
30 *Id*.
31 *See, e.g., Karr v. Hefner*, 475 F.3d 1192, 1195 (10th Cir. 2007); *United States v. Metro. St. Louis Sewer Dist. (MSD)*, 952 F.2d 1040, 1044 (8th Cir. 1992).
32 *See Defs. of Wildlife v. Perciasepe*, 714 F.3d 1317, 1323-26 (D.C. Cir. 2013).
33 *See, e.g., United States v. City of Miami, Fla.*, 115 F.3d 870, 872 (11th Cir. 1997); *Defs. of Wildlife v. Perciasepe*, 714 F.3d 1317, 1323-26 (D.C. Cir. 2013); *Minor I Doe ex rel. Parent I Doe v. Sch. Bd. for Santa Rosa Cty., Fla.*, 264 F.R.D. 670, 679 (N.D. Fla. 2010).

the court upheld the rejection of plaintiff's attempt to intervene in a consent decree issued based on a claim under the CWA on the basis of standing.[34] There, the consent decree obligated the EPA to "establish[] a schedule for EPA to initiate notice-and-comment rulemaking and make a formal decision whether to promulgate a new rule revising certain effluent limitations and effluent limitations guidelines."[35] The plaintiff organization claimed injury based on a number of grounds including anticipated rulemaking results, harm caused by too short of a notice-and-comment schedule, and violation of its member's right to only have the EPA promulgate rules under statutory direction.[36] The court found that the group lacked standing, rejecting the first argument as conjectural and the second and third as without legal precedent.[37]

B. Maryland Standing Requirements

Unlike federal courts, Maryland State courts do not impose constitutionally based standing requirements. Instead, standing is determined through a backdrop of common law requirements, but this backdrop has been supplanted by specific statutory frameworks in many cases. This subsection B first explains the common law standing requirements and when they apply, including application to associations. Then, Section II outlines specific statutory frameworks that have replaced or supplemented the common law backdrop in the environmental context.

1. *Maryland Common Law Standing*

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34 714 F.3d 1317, 1323-26 (D.C. Cir. 2013).
35 *Id.* at 1319.
36 *Id.* at 1323-26.
37 *Id.*

In challenging a "public wrong" under the common law (*i.e.* traditional tort claims), a complainant can assert standing through two traditional standing doctrines: property owner standing and taxpayer standing.[38]

a. Property Owner Standing

The basis of property owner standing is "special aggrievement."[39] To show special aggrievement, plaintiffs must essentially allege that the harm they are suffering is unique. Thus, "[a]n adjoining, confronting or nearby property owner is deemed, prima facie, to be specially damaged and, therefore, a person aggrieved."[40] On the other hand, "[a] person whose property is far removed from the subject property ordinarily will not be considered a person aggrieved ... [unless] he meets the burden of alleging and proving ... that his personal or property rights are specially and adversely affected."[41]

The special aggrievement requirement is the core obstacle to obtaining standing under Maryland law where the primary harm is that to the environment, because environmental harms are often born by the public in general. The implication of this requirement is that plaintiffs such as those in *Friends of the Earth v. Laidlaw*, who had standing in federal courts, would not have standing in Maryland courts because the harm they suffered (not being able to fish, kayak, etc.) was borne by the public in general. In these situations, unless the complainant can assert a special aggrievement, then the plaintiff has no standing, because he is merely "generally aggrieved," just as any other member of the public.[42]

b. Taxpayer Standing

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38 *State Ctr., LLC v. Lexington Charles Ltd. P'ship*, 438 Md. 451, 518-19, 92 A.3d 400, 440 (2014).
39 *Id.*
40 *Bryniarski*, 247 Md. at 145, 230 A.2d at 294.
41 *Id.*
42 *State Ctr., LLC v. Lexington Charles Ltd. P'ship*, 438 Md. 451, 521 (2014).

Another avenue to assert standing in addressing a public wrong is taxpayer standing. "Under the taxpayer standing doctrine, a complainant's standing rests upon the theoretical concept that the action is brought not as an individual action, but rather as a class action by a taxpayer on behalf of other similarly situated taxpayers."[43] To establish eligibility to bring a suit under the taxpayer standing doctrine, the case law establishes that the complainant must allege three things: (1) that the complainant is a taxpayer, (2) that the suit is brought, either expressly or implicitly, on behalf of all other taxpayers, and (3) the action by the public official is illegal or ultra vires.[44] A Maryland court noted that the *ultra vires* requirement "has been applied leniently and seems rather easy to meet."[45] The court went on to explain that "So long as the plaintiffs allege, in good faith, an *ultra vires* or illegal act by the State or one of its officers. . . .such allegations are sufficient to confer taxpayer standing doctrine."[46]

While taxpayer standing might seem to be an attractive alternative to property owner standing for environmental groups, Maryland courts in fact do not allow litigants to use taxpayer standing as a work around to the stringent requirements of property owner standing: "th[e] Court has not undertaken to declare that every abuse of a legal authority by a municipal corporation, to the prejudice of a tax-payer, is a ground for equitable interference to prevent injury."[47] It is well-settled that, to obtain standing, the taxpayer must allege also a special interest distinct from the general public.[48] Reflecting this stringency, this requirement "has been interpreted repeatedly to

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43 *Id*. at 547.
44 *See, e.g., Holt v. Moxley*, 157 Md. 619, 622–26, 147 A. 596, 597–99 (1929); *State Ctr., LLC v. Lexington Charles Ltd. P'ship*, 438 Md. 451, 540, 547, 555-56 (2014).
45 *State Ctr., LLC v. Lexington Charles Ltd. P'ship*, 438 Md. 451, 556 (2014).
46 *Id.*
47 *Kelly v. City of Baltimore*, 53 Md. 134, 140 (1880).
48 *State Ctr., LLC*, 438 Md. at 463 (citations omitted).

require a showing that the action being challenged results in a pecuniary loss or an increase in taxes."[49] As the inaugural case explained:

> [P]ublic wrongs cannot be redressed at the suit of individuals, who have no other interest in the matter than the rest of the public. Thus an individual cannot maintain a bill of injunction to prevent a public nuisance, unless he suffers thereby some special damage; and the principle governing cases of that kind has been supposed to be applicable to the present case. But it appears from the averments of the bill, that these complainants, as taxpayers of the city, and others similarly situated, in whose behalf as well as their own the bill is filed, constitute a class specially damaged by the alleged unlawful act of the corporation, in the alleged increase of the burden of taxation upon their property situated within the city. The complainants have therefore a special interest in the subject-matter of the suit, distinct from that of the general public. . . .In other words, the special interest that is distinct from the general public is ***the increased burden of taxation.***[50]

This requirement for injury can be a poor fit for environmental groups because, in many cases, plaintiffs in environmental litigation suffer harms related to experience and enjoyment as opposed to financial harm. There is not always a clear pecuniary harm, particularly where a plaintiff does not own land. Because taxpayer standing requires an allegation of financial harm (through increased taxes or other pecuniary losses), it is not an available avenue for many citizens seeking to challenge the government's actions affecting the environment.

2. *Maryland Association Standing*

Maryland also takes a strict approach to associational standing. Unlike federal associational standing, in which associations can allege a claim so long as one of its members has standing in their own right, Maryland courts require the association to have "an affected

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[49] *Citizens Planning & Housing Ass'n v. Cnty. Exec. of Baltimore Cnty.*, 273 Md. 333, 339 (1974) (citations omitted).

[50] *State Ctr., LLC*, 438 Md. at 57 (citations omitted) (emphasis added).

property interest separate and distinct from its members."[51] This can create substantial barriers to environmental groups bringing litigation because it typically requires associations to actually own land or otherwise have a distinct interest of its own. In some cases statute has removed this common law requirement.[52] But unless otherwise overridden by statute, associational standing in Maryland requires a separate and distinct interest. As detailed in various portions of Section II below, this means that associations will need interests themselves (*i.e.* own property, commented on regulatory change, etc).

II. SPECIAL CASES IN MARYLAND STANDING

As discussed in Section I, Maryland has a general common law backdrop for standing. That backdrop, however, is altered in a variety of contexts. This section discusses certain Maryland statutes that expand upon or alter Maryland's common law standing requirements. As a general note, where a plaintiff maintains that his or her protected interest arises from a statute, that plaintiff must also satisfy the court that "the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."[53]

The discussion here starts with the Maryland APA, which provides the framework for standing applied in many instances for environmental challenges. That framework, however, can be overridden by other statutes. The section goes on to discuss such situations as special cases,

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[51] *Medical Waste Associates, Inc. v. Medical Waste Coalition, Inc.*, 612 A.2d 241 (Md. 1992), *rev'd on other grounds, Patuxent Riverkeeper v. Maryland Dep't of Env't*, 422 Md. 294 (2011). *See also Citizens Planning & Housing Ass'n v. County Executive*, 273 Md. 333,329 A.2d 681 (1974).

[52] *See, e.g.*, Md. Code Ann., Envir. § 1-601(c) (West).

[53] *Kendall v. Howard Cty.*, 431 Md. 590, 604, 66 A.3d 684, 692 (2013)(quoting *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970); and citing *120 West Fayette St., LLLP v. Mayor of Baltimore*, 407 Md. 253 (2009)); *Sherrill v. CBAC Gaming*, LLC, No. 2028 SEPT.TERM 2013, 2016 WL 617313, at *13 (Md. Ct. Spec. App. Feb. 16, 2016).

along with providing a more general discussion of common special case standing situations that arise.

A. Maryland Administrative Procedure Act

The Maryland Administrative Procedure Act (Maryland APA) establishes the procedures for challenging certain agency hearing decisions in Maryland state courts.[54] Functionally, it creates a default framework for standing in the context of contested case hearings for Maryland administrative agencies that mirrors the common law requirements for standing. A wide range of environmental laws explicitly incorporate this structure as well. Other statutes and regulations, however, will supplement or supplant this scheme.

The Maryland APA determines those who are eligible to seek review of an agency decision by Maryland courts through the following language: "a party who is aggrieved by the final decision in a contested case is entitled to judicial review of the decision as provided in this section."[55] Contested cases are those where the constitution requires an opportunity for a hearing with respect to a right, duty, statutory entitlement privilege, or the grant, denial, renewal, revocation, suspension, or amendment of a license.[56] The definition of an aggrieved party is determined by Maryland common law, as discussed in section I.B. As noted above, in order for an individual to have standing, they must have a personal interest or property right that is "specifically" affected in a different way from the public in general.[57] Consistent with that, in *Sugarloaf Citizens' Association v. Department of Environment*, the Maryland Court of Appeals recognized standing to challenge a construction permit only for owners of land directly adjacent

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54 Md. Code Ann., State Gov't § 10-101 (West).
55 Md. Code Ann., State Gov't § 10-222(a)(1) (West).
56 Md. Code Ann., State Gov't § 10-202(d)(1) (West).
57 *Sugarloaf Citizens' Ass'n v. Dep't of Env't*, 686 A.2d 605, 614 (1996) (citations omitted), *rev'd on other grounds*, *Chesapeake Bay Found., Inc. v. DCW Dutchship Island, LLC*, 439 Md. 588, 595, 97 A.3d 135, 139 (2014).

to a challenged incinerator as opposed to those who were further from the incinerator.[58] As explained earlier, in order for an organization or association to have standing in Maryland, it must have a "property interest of its own - separate and distinct from that of its individual members."[59] Therefore, the Maryland APA makes it very difficult for associations to challenge administrative decisions in Maryland by requiring associations to have property interests distinct from their members.

The Environmental Article of the Maryland Code requires that contested environmental cases be determined under Maryland APA's rules.[60] This requirement affects most sections of the code through a provision of the Environmental Article–section 5-204(a) of the Water Resources Title.[61] Section 5-204 directs a huge swath of titles and subtitles of the Environmental Article to the Maryland APA by reference to the "contested case" procedures.[62] Additionally, several provisions of the Environmental Article refer to the Maryland APA directly, including Sediment Control,[63] Stormwater Management,[64] and Water Pollution[65] provisions. That means effectively the Maryland APA in most cases provides the framework for standing for agency contested case challenges, the exception being instances where the statutory language for specific environmental provisions includes its own requirements for standing.

B. Standing to Intervene in Civil Action Filed by Maryland Department of the Environment

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58 *Id.* at 620.

59 *Med. Waste*, 612 A.2d at 249 (quoting *Citizens Planning and Hous. Ass'n v. County Executive of Bait.*, 329 A.2d 681, 687 (Md. 1974)).

60 Md. Code Ann., Envir. § 1-101(b) (West).

61 The pertinent language of section 5-204 reads as follows: "It is the intent of the General Assembly to establish consolidated procedures and notice and hearing requirements for Title 5, Subtitles 5 and 9 and Titles 14, 15, and 16 of this article in order to ensure efficient review and consistent decision making." Md. Code Ann., Envir. § 5-204 (West).

62 These titles and subtitles include, through cross-reference: waters, Reservoirs, and Dams; Non-Tidal Wetlands; Gas and Oil; Mines and Mining; and Wetlands and Riparian Rights. Md. Code Ann., Envir. § 5-204 (a)(l).

63 Md. Code Ann., Envir. § 4-115 (West).

64 Md. Code Ann., Envir. § 4-214 (West).

65 Md. Code Ann., Envir. § 9-340 (West).

Under Md. Rules 2-214(2), Maryland grants statutory standing to intervene in civil actions filed by the Maryland Department of the Environment ("MDE") in two circumstances: "(1) when the person has an unconditional right to intervene as a matter of law; or (2) when the person claims an interest relating to the property or transaction that is the subject of the action, and the person is so situated that the disposition of the action may as a practical matter impair or impede the ability to protect that interest unless it is adequately represented by existing parties."[66] Maryland courts have held that for intervention in the latter case, "the applicant's interest must be such that the applicant has standing to be a party ... [which] ordinarily requires that the outcome of the lawsuit might cause the person to 'suffer [ ] some kind of special damage ... differing in character and kind from that suffered by the general public.'"[67] In other words, standing under Md. Rules 2-214(2) effectively has the same requirements as common law standing. Therefore, an organization must show that it is "specially aggrieved," meaning it either owns land adjoining the land that is affected by the litigation or its personal property would be harmed in a way distinct from the general public.

In *Envtl. Integrity Project v. Mirant Ash Mgmt., LLC* nonprofit organizations sought to intervene in a MDE action against power plant operators for alleged violations of the Clean Water Act.[68] The court held that the nonprofit did not have standing because the interests claimed by organizations were not "different than and distinct from the interests of the general public in protecting the environment in protecting the environment, restoring and safeguarding the natural habitats of the Wicomico and Potomac Rivers, and enforcing state environmental laws."[69] Conversely, as mentioned earlier, the court in *Sugarloaf Citizens' Ass'n* held that parcels

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66 Md. Rules 2-214(a).
67 *Duckworth v. Deane*, 393 Md. 524, 540 (Md. 2006).
68 197 Md. App. 179, 194 (2010).
69 *Id.* at 189.

directly adjoining land creating disturbances is prima facie aggrieved.[70] The *Sugarloaf* court clarified that property owners who could demonstrate that much higher levels of the toxic substances at issue would fall on their properties as opposed to further properties were also prima facie aggrieved.[71] In both cases, the court required the intervening party to demonstrate how its claimed injury was different from those of the general public in the same manner as the common law standing analysis requires.

[70] *Sugarloaf Citizens' Ass'n v. MDE*, 686 A.2d 605, 619-20 (1996) (abrogated on other grounds).
[71] *Id.* at 620.

C. Challenge to Permitting and Licensing Decisions Made by the Maryland Department of the Environment

Standing to challenge final determinations on permitting and licensing decisions made by the MDE is controlled by statute. Two similar statutory requirements address various permitting and licensing decisions. One set of cases falls under § 1-601 of the Maryland environmental code, under which certain MDE permitting decisions regarding air quality, landfill systems, and water pollution (amongst others)[72] are subject to judicial review at the request of any person that meets federal standing requirements and either (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.[73] In another set of cases, including certain oil and gas wells, mining, and wetland activity,[74] standing to challenge final determinations on permitting is controlled by a near identical regime contained in § 5-204(f) of the Maryland Environmental Code. To challenge permitting decisions under these parallel statutory structures, an environmental group generally needs to (1) enter a written comment on the permitting decision during the notice and comment period; and (2) show that one of its members: (a) suffered or will suffer an injury in fact (including an aesthetic injury); (b) that is caused by the permitting decision, and (c) is redressable by a favorable court decision.

Patuxent Riverkeeper v. Maryland Dep't of Env't was the first major case under the new laws. The appellate court applied the law as written, and through a federal standing analysis, found that the environmental group had standing to sue the Maryland Department of Environment for permitting decisions.[75] The circuit court had held there was not standing, but the Court of Appeals overturned noting that, in enacting the new standing laws, the "General

[72] Md. Code Ann., Envir. § 1-601(a) (West).
[73] Md. Code Ann., Envir. § 1-601(c) (West).
[74] Md. Code Ann., Envir. § 5-204(f)(1) (West).
[75] *Patuxent Riverkeeper v. Maryland Dep't of Env't*, 29 A.3d 584 (Md. 2011).

Assembly embraced the 'broader' notion of standing applied in federal courts, to enable both individuals and organizations to challenge environmental permits in judicial review actions."[76] Patuxent Riverkeeper argued that its member, an avid paddler and mapmaker, suffered an injury in fact, because his aesthetic, recreational, and economic interests in the Patuxent River were jeopardized by the road extension and stream crossing allowed by the permit. The member stated with particularity that the "upstream impacts caused by the crossing will cause 'nitrogen and other pollutants' to leach into waters downstream."[77] The Court of Appeals of Maryland reversed the lower court and found that the harm was imminent and was sufficiently related to the permit.[78]

Since *Patuxent Riverkeeper* was decided, courts in Maryland have handily applied the new law, finding environmental groups had standing to sue permitting decisions. In *Maryland Dep't of Env't v. Anacostia Riverkeeper*, for example, any possible issue with standing was dismissed in a footnote.[79] By mirroring federal standing requirements, § 5-204(f) and § 1-601 of the Maryland environmental code have substantially relaxed requirements for standing as compared to Maryland common law.

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76 *Id*. at 586.
77 *Id.* at 590.
78 *Id.* at 594.
79 134 A.3d 892, 908 n. 36 (Md. 2016) ("The statutory requirements for judicial review, which include standing, are not in dispute. *See* EN § 1–601. The Court of Special Appeals determined that Anacostia Riverkeeper and other environmental groups had standing to challenge the Montgomery County Permit in Case No. 42. We reach the same conclusion with respect to all parties in the four other challenges in the circuit courts.").

D. Challenges to Maryland Agricultural Land Preservation Foundation Decisions

Challenges against the Maryland Agricultural Land Preservation Foundation (MALPF) have the same standing requirements as challenges to other administrative agency decisions: they must be specially aggrieved. In practice, this means an organization must either have property adjacent to affected land or suffer a harm that is unique from the harm to the general public. In *Long Green Valley Ass'n v. Bellevale Farms, Inc.*, a preservation association and its member brought a suit against a farm owner and the MALPF challenging owner's proposed construction and operation of a creamery in violation of an agricultural preservation easement held by the MALPF.[80] The court repeated the long held principle that "[u]nder Maryland common law principles 'if an individual ... is seeking to redress a public wrong ... [that individual] has no standing in court unless [he or she] has also suffered some kind of special damage from such wrong differing in character and kind from that suffered by the general public."[81] However, the court also held that the adjacent property owners had prima facie standing to sue and were therefore relieved of the burden of alleging specific harm.[82] The court further noted the general principle that Maryland associational standing requires associations have a property interest of their own, separate and distinct from its members.[83]

This framework likely creates similar burdens for organization standing to the *Sugarloaf* decision because it makes the standing dependent on land ownership itself. As detailed earlier, in *Sugarloaf*, the court recognized standing only for owners of land directly adjacent to a challenged incinerator as opposed to those who were further from the incinerator.[84] Here, the

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80 *Long Green Valley Ass'n v. Bellevale Farms, Inc.*, 205 Md. App. 636 (2012), aff'd, 432 Md. 292 (2013)
81 *Id.* at 684.
82 *Id*. at 688-89.
83 *Id*. at 658.
84 *Sugarloaf Citizens' Ass'n*, 686 A.2d at 620.

Long Green Valley Ass'n court held that prima facie standing exists for those directly next to affected land. Whether there are alternative methods of demonstrating special aggrievement is unclear, but what is clear is that having directly adjacent land ownership appears to be the most likely route to demonstrate standing.

E. Challenges to the Maryland Public Service Commission (PSC)

Standing for challenges to orders of the Maryland Public Service Commission (PSC) are controlled by statute. "Except for the staff of the Commission, a party or person in interest, including the People's Counsel, that is dissatisfied by a final decision or order of the Commission may seek judicial review of the decision or order as provided in this subtitle."[85] The court in *Mid–Atlantic Power Supply Ass'n v. Pub. Serv. Comm'n of Maryland* held that the test is fulfilled "if the petitioner is either a party to the proceedings before the Commission or, if not a party, a 'person in interest.'"[86] There, the court held that a trade association that had intervened in the proceedings before the PSC had standing to challenge the order. The court held that a "person in interest" is a party who intervenes in the proceedings before the PSC under Maryland Code (1998) § 3-106, which allows a party to intervene where the commission determines that it has "an interest in the proceeding that is not being adequately represented and that interest, in turn, has been determined not to be frivolous or of no consequence to the proceeding."[87] The dissatisfaction requirement is fulfilled when "the party or person in interest seeks judicial review, proffering reasons for the court to reverse the order or decision."[88] The definition of person is broad and includes an "individual, receiver, trustee, guardian, personal representative, fiduciary, or representative of any kind and any partnership, firm, association, corporation, or other

85 Md. Code Ann., Pub. Util. § 3-202(a) (West).
86 361 Md. 196, 205 (2000).
87 *Id*. at 205.
88 *Id*. at 206.

entity."[89] Thus, in a case where an environmental advocacy organization intervened in PSC proceedings and then challenged the order, a Maryland court held they had standing to do so.[90]

F. Mandamus Actions to Require the State to Perform Non-Discretionary Tasks

The Maryland Environmental Standing Act (MESA) establishes that "[a]ny ... person, regardless of whether he possesses a special interest different from that possessed generally by the residents of Maryland, or whether substantial personal or property damage to him is threatened [,] ... may bring and maintain an action for mandamus or equitable relief, including declaratory relief against any officer or agency of the State ... for failure ... to perform a nondiscretionary ministerial duty imposed upon them under an environmental statute, ordinance, rule, regulation, or order[.]"[91] In practice, in the very narrow cases where the environmental group is seeking injunctive, declaratory, or mandamus relief for a ***nondiscretionary*** MDE action, the MESA means the group does not need to show any special harm. But where the environmental group is challenging a ***discretionary*** MDE action, the MESA does not provide relief from stringent standing requirements and the environmental group will still need to show (1) that it has a property interest (2) separate and distinct from its members, that is (3) "specifically" affected by the agency's actions in a way that is (4) different from the public in general.

Passed in 1973, MESA is codified in sections 1-501 through 1-508 in the Natural Resources section of the Maryland Code. MESA was created with the specific intention of loosening the common law requirements for standing. The Maryland General Assembly included a declaration of legislative policy and intent in the Act itself, which states:

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89 Md. Code Ann., Pub. Util. § 1-101(t) (West).

90 *Accokeek, Mattawoman, Piscataway Creeks Cmty. Council, Inc. v. Pub. Serv. Comm'n of Maryland*, 451 Md. 1, 14 (2016).

91 Md. Code Ann., Nat. Res. § 1-503 (West).

> The General Assembly finds and declares that the natural resources and the scenic beauty of the State of Maryland are in danger of irreparable harm occasioned by the use and exploitation of the physical environment. It further finds that improper use and exploitation constitute an invasion of the right of every resident of Maryland to an environment free from pollution to the extent possible. It further finds that the courts of the State of Maryland 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.[92]

The legislature did not, however, create a right of judicial review.[93] In *Medical Waste Associates*, the Maryland Court of Appeals considered for the first time whether the Maryland Environmental Standing Act applied to an action for judicial review of an administrative action.[94] The court held that the MESA does not "expressly include judicial review of an administrative proceeding." [95] In reaching this conclusion, the court restricted standing under MESA to include only mandamus or declaratory actions against an agency or its members for failure to perform a non-discretionary act.[96] In *Medical Waste Associates*, an environmental organization challenged the decisions of the Maryland Department of the Environment to issue to permits which allowed Medical Waste Associates to construct a medical waste incinerator in Baltimore.[97] The Court acknowledged that MESA expands standing for organizations to sue "in certain cases without regard to whether the harm suffered" by the organization is different from "the harm suffered by the general public,"[98] thereby relaxing standing requirements as compared to Maryland common law. But it found that those relaxed standing requirements only apply to the standing provided for in the act itself. That is, actions that "request mandamus or equitable

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92 Md. Code Ann., Nat. Res. § 1-502 (West).
93 Md. Code Ann., Nat. Res. § 1-503 (West).
94 *Med. Waste Assocs., Inc. v. Maryland Waste Coal., Inc.*, 327 Md. 596, 614, 612 A.2d 241, 250 (1992), *rev'd on other grounds*, *Patuxent Riverkeeper v. Maryland Dep't of Env't*, 422 Md. 294 (2011).
95 612 A.2d 241.
96 *Id.* at 251.
97 *Id.* at 242.
98 *Id.* at 252.

relief, including a declaratory judgment" against any officer or agency for failure to perform a nondiscretionary ministerial duty.[99]

Unfortunately, this severely limited MESA's utility because most MDE decisions are discretionary. For example, in *Friends of Mount Aventine, Inc. v. Carroll*, the court found that the environmental group did not have standing to enjoin MDE's approval of two amendments to the county's water and sewerage plan.[100] Even though the group sought equitable relief, the court found where "an agency is free to reject, approve, modify, or take any 'appropriate action' with respect to proposed amendments to a county waste and sewerage plan, that agency is making a discretionary administrative decision." Therefore, MESA did not apply, and the plaintiffs would have to meet Maryland common law standing requirements, which they did not.[101] Thus, for the limited range of non-discretionary decisions, MESA relaxes standing requirements as compared to Maryland common law and the Maryland APA, but because many MDE decisions are discretionary, the impact of MESA is limited.

G. Challenges to City and County Zoning Ordinances

1. *Comprehensive Zoning*

Comprehensive zonings "are not adjudicative determinations affecting one property owned by one person, but instead are classically legislative determinations designed to affect local and regional needs and all property owners within the planning area."[102] In *Anne Arundel*, the Court of Appeals of Maryland held that "challenges to comprehensive zoning ordinances" must "satisfy the requirements of taxpayer standing . . . rather than property owner standing."[103] In that case, county property owners and community associations challenged the county

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99 *Id.* at 251.
100 103 Md. App. 204, 209, 652 A.2d 1197, 1199 (Md. App. 1995).
101 *Id.* at 1199.
102 *Anne Arundel Cty. v. Bell*, 113 A.3d 639, 647-48 (Md. 2015)(citations omitted).
103 *Id.* at 661.

council's adoption of a comprehensive zoning ordinance.[104] Taxpayer standing, rather than property owner standing, was appropriate for challenges to zoning ordinances because taxpayer standing is generally required in Maryland for challenges to "comprehensive legislative enactments."[105]

To establish common law standing under this doctrine, the plaintiff must first allege that (1) they are a taxpayer and (2) that the suit is brought, either expressly or implicitly on behalf of all other taxpayers."[106] Once those elements are met, the plaintiff must further allege (1) that the governmental action is illegal or ultra vires and (2) injures their property.[107] The injury requirement merely requires a showing that the challenged action results in a "pecuniary loss or an increase in taxes."[108] Courts further requires a nexus between the challenged action and the injury.[109]

The plaintiffs' claim failed in this case because they did not allege that their taxes would be increased or any pecuniary loss.[110] Rather, the harms they asserted were increased traffic and noise, and violation of the alleged right to participate in zoning ordinances.[111] The court did not discuss whether the association plaintiffs had to make any showings unique from the property owner plaintiffs.

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104 *Id.*
105 *Id.* at 664.
106 *Id.* at 662 (citations omitted).
107 *Id.*
108 *Id.*
109 *Id.* at 663.
110 *Id.* at 666.
111 *Id.* at 667.

2. *Zoning Actions*

"[W]hen a legislative body changes the zoning classification of a particular property, it is 'zoning action' subject to administrative appeal."[112] Challenges to zoning actions are controlled under § 10–501 and § 4-401 of the Maryland Code of Land Use. § 4-401 allows (1) a person aggrieved by the decision or action, (2) a taxpayer, or (3) an officer or unit of the local jurisdiction to challenge zoning actions by legislative bodies or a decision by a board of appeals. Similarly, § 10–501 allows any person, taxpayer, or officer or unit of Baltimore City aggrieved by a decision of the Board or a zoning action by the Baltimore City Council to file a request for judicial review by the Circuit Court for Baltimore City. A taxpayer is any "person" or "entity" that "pays real property taxes to the local jurisdiction whose zoning action is being challenged on appeal."[113]

In *Ray v. Mayor & City Council of Baltimore*, plaintiffs, who lived half a mile away from a proposed development, filed a petition in the Baltimore City Circuit Court for judicial review of a Baltimore City Council action approving of the mixed use development.[114] The issue before the court was whether plaintiffs had standing to sue under § 10–501. For the purposes of that section of the Maryland Code, a "person aggrieved" is "one whose personal or property rights are adversely affected by the decision of the board. The decision must not only affect a matter in which the protestant has a specific interest or property right but his interest therein must be such that he is personally and specially affected in a way different from that suffered by the public generally."[115] The court went on to provide further clarity as to what aggrievement means.

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112 *MBC Realty, LLC v. Mayor & City Council of Baltimore*, 160 Md. App. 376, 387, 864 A.2d 218, 224 (2004), *rev'd on other grounds*, 395 Md. 16 (2006).

113 *A Guy Named Moe, LLC v. Chipotle Mexican Grill of Colorado, LLC*, 223 Md. App. 240, 245, 115 A.3d 733, 736 (2015), aff'd but criticized, 447 Md. 425, 135 A.3d 492 (2016).

114 430 Md. 74, 78, 81, (2013).

115 *Id.* at 81 (citations omitted).

First, "[a]n adjoining, confronting or nearby property owner is deemed, prima facie, to be specially damaged and, therefore, a person aggrieved."[116] Second, "[a] person whose property is far removed from the subject property ordinarily will not be considered a person aggrieved ... [unless] he meets the burden of alleging and proving ... that his personal or property rights are specially and adversely affected."[117]

Plaintiffs argued that the aggrieved class should be defined as the entire neighborhood and based their claim for special aggrievement on (1) proximity to the proposed development (2) the change in character of the neighborhood, (3) increased traffic, and (4) visibility of the proposed development from their homes.[118] The court rejected this argument. First, the court found that the neighborhood could not constitute an aggrieved class because "the creation of a class of aggrieved persons is done on an individual scale and not based on delineations of city neighborhoods."[119]

The court also rejected the individual plaintiff's argument that they were specially aggrieved, holding: (1) they are not proximate to the affected land, (2) "claims of change in the characters of the neighborhood by protestants who lack proximity are insufficient to prove special aggrievement," because the harm does not directly affect their properties, (3) increased traffic is not a sufficient harm unless the plaintiff's property is proximate to the affected property, and (4) "mere visibility is not enough to give the requisite standing."[120]

In summary, the standing schemes for both comprehensive zoning schemes and for zoning actions have different requirements, but both are more difficult than federal standing requirements. Both require taxpayer status. Comprehensive zoning schemes also require (1) that

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116 *Id.*
117 *Id.*
118 *Id.* at 86-88.
119 *Id.* at 88.
120 *Id.* at 90-98.

the governmental action is illegal or ultra vires, (2) injures their property, and (3) the suit is brought either expressly or implicitly on behalf of all other taxpayers. It is not clear whether there are any additional requirements for associational standing. Standing to challenge zoning actions also requires the plaintiff's personal or property rights are adversely affected by the decision of the board in a way different from the general public.

H. Standing to Sue the State for Nuisance

A public nuisance is a "nuisance[ ] which ha[s] a common effect and produce[s] a common damage."[121] Property owner standing doctrine applies to public nuisance suits, meaning plaintiffs must show that they are "specially aggrieved" by the challenged activity. A tort claim against the state also is severely limited by sovereign immunity.[122]

In *Ray v. Mayor & City Council of Baltimore*, to determine whether the plaintiffs were "specially affected" in a way that gave them standing to sue the city based on its zoning ordinance, the court reviewed the law of public nuisance for "enlightenment" – in particular, the Second Restatement of Torts.[123] Under the Restatement, for a private individual to recover in tort for a public nuisance, he must have suffered harm of a different kind from that suffered by other persons exercising the same public right."[124] Moreover, "[i]t is not enough that he has suffered the same kind of harm or interference but to a greater extent or degree."[125]

Thus, the court in *Ray* held that in order to sue the state for nuisance, the plaintiff must be specially aggrieved: "Inasmuch as a public nuisance was an offense against the state and, accordingly, was subject to abatement on motion of the proper governmental agency, an individual could not maintain an action for a public nuisance unless he suffered some special

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121 *Burley v. Annapolis*, 34 A.2d 603, 605 (1943).
122 *See, e.g., Litz v. Maryland Dep't of Env't*, 434 Md. 623, 634, 76 A.3d 1076, 1082 (2013).
123 430 Md. at 81-82.
124 Restatement (Second) of Torts § 821C cmt. b (1979).
125 *Id.*

damage from the public nuisance."[126] "Without the special damage, 'a private citizen has no standing to champion the right of the public in abating a public nuisance.'"[127] Again, it is important to note that tort claims against the state itself are severely limited by sovereign immunity.[128]

[126] 430 Md. at 82 (citations omitted).
[127] *Id.*
[128] *See, e.g., Litz v. Maryland Dep't of Env't*, 434 Md. 623, 634, 76 A.3d 1076, 1082 (2013).