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IMPEDIMENTS TO ENVIRONMENTAL JUSTICE: THE INEQUITIES OF THE MARYLAND STANDING DOCTRINE

DANIEL W. INGERSOLL IV*

I. INTRODUCTION: THE MARYLAND STANDING DILEMMA

The doctrine of standing is the gatekeeper to any citizen suit against a regulatory agency. In order to seek judicial review of an agency decision, like a permit grant, an individual must show an injury that can be redressed by the court. Standing, as a doctrine, is a basic safeguard for the separation of powers, ensuring that courts do not decide cases that should be addressed by the legislative branch or through political processes.

In Maryland, antiquated and overly strict standing requirements ensure that the gates to the courthouse remain locked to many individuals who would have standing in a federal or another state's court. In particular, Maryland's associational standing requirements limit standing to potential plaintiffs with the economic or political means and inclination to file suit, thus creating an inequitable distribution of procedural benefits. This inequitable distribution is the source of serious environmental injustice among economically disadvantaged classes.

This article surveys and compares Maryland's standing laws to federal requirements and the requirements of other states. Section II gives a brief history of the standing doctrine and its purpose, followed by Section III, which describes federal standing requirements as well as the requirements of several other states. Section IV outlines the statutory landscape of the Environmental Title of the Maryland Code and also its common law interpretation, showing the complexity and inchoate nature of Maryland's standing doctrine. The analysis section examines these disparate standing requirements in light of the theory of environmental justice, and discusses legislation that is currently underway to remedy the inequities.

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II. A BRIEF HISTORY OF THE STANDING DOCTRINE

The Standing Doctrine derives from the simple principle that only those individuals with active complaints should have their cases heard and decided by the courts. In the United States, the organic language for standing comes from the “Cases and Controversies” clause of Article III of the Constitution.¹ From this simple declaration, the United States Supreme Court has expounded a complex and self-imposed set of requirements for when a case or controversy is justiciable.²

Compared to the English common law, the American notion of standing is both fairly recent and unique.³ Historically, the English courts were open to almost all litigants, regardless of the nature or temporality of their injury.⁴ This tradition continued into the colonial period of the United States, with most courts open to issuing purely advisory opinions.⁵ However, the framers of the United States Constitution recognized a need to circumscribe the judiciary’s power through the new Federal Constitution.⁶ Today’s standing doctrine under federal law, which stems entirely from the Constitution, is seen as an important mechanism by which the federal courts’ non-majoritarian views are held to certain specific instances.⁷

1. U.S. CONST. art. III, § 2. “The Judicial Power shall extend to all cases, in law and equity, arising under the Constitution, the laws of the United States, and . . . to controversies to which the United States shall be a party; — to controversies between two or more states”
Id.

2. *See Allen v. Wright*, 468 U.S. 737, 750-51 (1984).

Standing doctrine embraces several judicially self-imposed limits on the exercise of federal jurisdiction, such as the general prohibition on a litigant’s raising another person’s legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff’s complaint fall within the zone of interests protected by the law invoked.

Id.

3. *See generally* Philip Weinberg, *Unbarring the Bar of Justice: Standing in Environmental Suits and the Constitution*, 21 PACE ENVTL. L. REV. 27 (2003) (discussing the evolution of the standing doctrine).

4. *Id.* at 28-29.

5. *Id.* For a discussion about the prohibition on advisory opinions, *see generally* *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995). Here, the United States Supreme Court overturned a law that allowed the rehearing of previously adjudicated cases as violating the rule against advisory opinions. *Id.* at 227 (“Having achieved finality, however, a judicial decision becomes the last word of the judicial department with regard to a particular case or controversy, and Congress may not declare by retroactive legislation that the law applicable to that very case was something other than what the courts said it was.” (emphasis in original)).

6. *Id.*

7. *Allen*, 468 U.S. at 750.

Additionally, standing in its articulated constitutional form is a recent, Twentieth Century creation. Previously, courts looked to whether a plaintiff had a cause of action under the common law or under a statute rather than applying a constitutional standing analysis.⁸ The United States Supreme Court did not dismiss a case for lack of standing until 1923 in *Massachusetts v. Mellon*,⁹ in which the Court found that the plaintiffs lacked standing because of their taxpayer status.¹⁰ The standing doctrine took further shape under the New Deal as a way to “digest” the surfeit of cases arising under new administrative regulations.¹¹ The essence of the standing principle was codified under the Administrative Procedure Act of 1946¹² (APA), which reads, “[A] person suffering legal wrong because of an agency action, or adversely affected or *aggrieved* by agency action within the meaning of the relevant statute, is entitled to judicial review thereof.”¹³ While some form of the APA has been adopted by most states, including Maryland,¹⁴ the definition of an “aggrieved” person is subject to the standing principles of state and federal courts, which are discussed more thoroughly in subsequent sections.

All of the Doctrines that cluster about Article III — not only standing but mootness, ripeness, political question, and the like — relate in part, and in different though overlapping ways, to an idea, which is more than an intuition but less than a rigorous and explicit theory, about the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government.

Id. (quoting *Vander Jagt v. O’Neill*, 699 F.2d 1166, 1178-79 (D.C. Cir. 1983)). See also *supra* note 2 and accompanying text.

8. See Robert V. Percival & Joanna B. Goger, *Escaping the Common Law’s Shadow: Standing in the Light of Laidlaw*, 12 DUKE ENVTL. L. & POL’Y F. 119, 121 (2001).

9. 262 U.S. 447 (1923).

10. Weinberg, *supra* note 3, at 30.

11. Percival & Goger, *supra* note 8, at 122 (“Standing first emerged as a distinct legal concept during the New Deal period as courts struggled to digest a flood of new regulatory legislation.”).

12. Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

13. Administrative Procedure Act, 5 U.S.C. § 7 (1994) (emphasis added). See also Percival & Goger, *supra* note 8, at 123.

14. See generally Administrative Procedure Act, MD. CODE ANN., STATE GOV’T §§ 10-101 to -305 (1999).

III. FEDERAL AND CROSS-STATE COMPARISON OF STANDING REQUIREMENTS

Before discussing the minutiae of Maryland's "associational standing" law, this section outlines the basic concepts adopted by the Supreme Court regarding standing in general, standing under environmental statutes, and associational standing. Though the Supreme Court has vacillated between lenient and strict standing requirements, associational standing has never been as restrictive at the federal level as it is in Maryland.¹⁵ Additionally, this section examines the practice of Maryland's neighboring states of adopting the federal requirements for individual and group standing. It is only in light of the federal requirements for standing that the inadequacies of Maryland law stand in stark relief.

A. *The Federal Standard*

The issue of environmental standing combines areas of administrative law, individual standing, and organizational standing. The following sections describe these elements at the federal level, beginning with the general, constitutional requirements of standing, proceeding to standing requirements that are specific to environmental cases, and concluding with standing requirements that apply to environmental groups and groups in general.

1. *General Requirements*

In general, there are two components of standing — constitutional and prudential. As stated above, constitutional standing derives from Article III of the Constitution.¹⁶ In order to meet the Court's constitutional requirement, a plaintiff must demonstrate the following: 1) Injury in fact — the plaintiff must claim a personal injury; 2) Causation — the injury must be fairly traceable to the allegedly wrongful conduct of the defendant; and 3) Redressability — the court must be able to redress the injury.¹⁷ The second component of standing is the prudential requirement, which includes the rarely

15. See *infra* Part V.A.

16. See *supra* note 1 and accompanying text.

17. *Allen v. Wright*, 468 U.S. 737, 751 (1984) (plaintiffs, parents of African-American students bringing a class action against the Internal Revenue Service for failing to deny tax benefits to private schools practicing discrimination, were unable to show injury in fact).

used “zone of interest” standard, a prohibition against filing suits for generalized grievances, or bringing a claim on behalf of a third party.¹⁸

An injury under Article III is a shifting and incorporeal standard that greatly depends on the case law in a particular jurisdiction.¹⁹ For example, an injury recognized by the Supreme Court varies depending on the type of injury incurred, as well as the type of relief sought (i.e., past harms to plaintiffs may not satisfy standing for a suit seeking *future* relief unless future injury is very likely).²⁰ This becomes particularly important in environmental cases where often the only injury involved is aesthetic and difficult to locate in a particular person.²¹ Though courts have attempted to isolate concrete criteria for standing in environmental cases,²² a successful approach is often elusive because, as Justice O’Connor wrote in her majority opinion in *Allen v. Wright*, “[t]he constitutional component of standing doctrine incorporates concepts concededly not susceptible of precise definition. . . . [T]he terms [‘distinct and palpable’ injury] cannot be defined so as to make application of the constitutional standing requirement a mechanical exercise.”²³ Justice O’Connor concluded that an injury can only be established by reviewing relevant case law.²⁴

2. *Environmental Standing*

Standing under environmental statutes emerged from the New Deal and the APA.²⁵ In order to encourage citizen enforcement of new

18. *Singleton v. Wulff*, 428 U.S. 106, 113-14 (1976) (holding that because a sufficient connection existed between two physicians and their patients, the physicians could sue on behalf of the patients). *See also* *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004) (citing *Allen*, 468 U.S. at 751).

19. *See infra* notes 23-24 and accompanying text.

20. *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1982). This case involved a man who was injured by a police chokehold during an arrest. *Id.* at 98. The Court held that there was an actual injury, but no present case or controversy for the injunctive relief sought because of the plaintiff’s inability to demonstrate a likelihood of future injury. *Id.* at 105-06.

21. *See, e.g., Sierra Club v. Morton*, 405 U.S. 727 (1972). In this case, the Court recognized the impracticability of the traditional standing test requiring “legal interest” and “legal wrong” in holding that “injury in fact,” i.e., aesthetic wellbeing, was sufficient for standing under the Administrative Procedure Act. *Id.* at 733.

22. *See, e.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). Here, plaintiffs were unable to show that their plans to study endangered animals in the future were “concrete and particularized” or “actual or imminent.” *Id.* at 564.

23. *Allen*, 468 U.S. at 751.

24. *Id.* (“In many cases the standing question can be answered chiefly by comparing the allegations of the particular complaint to those made in prior standing cases.”).

25. *Percival & Goger*, *supra* note 8, at 126-29.

environmental laws, the Clean Air Act of 1970,²⁶ and most subsequent environmental acts all included citizen-friendly judicial review requirements.²⁷ This encouragement of citizen suits recognized “the difficulty of getting government bureaucracies to respond to environmental concerns.”²⁸

The pendulum of case law defining standing under environmental statutes has swung back and forth over the past three decades. Justice Scalia’s majority opinion in *Lujan v. Defenders of Wildlife*²⁹ in 1991 reined in those seeking standing to bring claims under federal environmental statutes. There, environmental organizations challenged a decision by the Secretary of the Interior to implement a regulation alleged to be outside the “geographic scope” of the Endangered Species Act. Having identified the “injury” prong as the pertinent issue in environmental standing cases, the Court determined that the alleged injury must be “concrete and particularized,” and “actual or imminent — not ‘conjectural’ or ‘hypothetical.’”³⁰ In doing so, the Court created a high bar for standing under the Act, holding that the plaintiffs must have “concrete” plans to study or benefit from the endangered species in the future in order to show an injury in fact.³¹ While the Court continued to recognize that its previous holdings allowed “purely aesthetic purposes” as cognizable interests for the purpose of standing,³² it clarified that a plaintiff with standing must also show concrete future plans to enjoy those aesthetic benefits.³³

This holding produced a line of cases with negative results for environmental groups. One important example, *Public Interest Research Group New Jersey v. Magnesium Elektron*,³⁴ involved a chemical company that admitted to violating its Clean Water Act permit 123 times by discharging zirconium carbonate into the Delaware River.³⁵ The Third Circuit held that the plaintiffs did not

26. 42 U.S.C. § 7604(a)(1) (2007).

27. Percival & Goger, *supra* note 8, at 129 (“Congress added citizen-suit provisions to virtually all the major federal environmental laws to ensure that they were implemented and enforced.”).

28. *Id.*

29. 504 U.S. 555 (1991).

30. *Id.* at 560 (citing *Warth v. Seldin*, 422 U.S. 490, 508 (1975); *Sierra Club v. Morton*, 405 U.S. 727, 740-41 (1972); and *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)).

31. *Id.* at 564.

32. *Id.* at 562-63 (citing *Sierra Club*, 405 U.S. at 734).

33. *Id.*

34. 123 F.3d 111 (3d Cir. 1997).

35. *Id.* at 115.

have standing under *Lujan* because they did not show injury to the environment,³⁶ and because “knowledge of pollution,” which caused several plaintiffs to cease water activities, was insufficient to show injury to the plaintiffs.³⁷

The standard set by *Lujan* was relaxed, however, by the Court’s decision in *Friends of the Earth v. Laidlaw, Inc.*³⁸ Similar to the chemical company in *Magnesium Elektron*, the defendant in this case — a hazardous waste incinerator in South Carolina — was accused of violating its Clean Water Act permit by dumping mercury into the North Tyger River.³⁹ In allowing a citizen suit claim brought under the Clean Water Act, the Court held that the plaintiff need only show an injury to the plaintiff, not an injury to the environment,⁴⁰ and that evidence of reduced use of the affected environment by the plaintiffs was enough to establish standing.⁴¹ The Court thus returned to a requirement for federal environmental standing similar to that established by the 1972 case, *Sierra Club v. Morton*.⁴²

Currently, plaintiffs alleging injuries from polluters under federal law can invoke the standards of *Friends of the Earth v. Laidlaw, Inc.*; however, recent appointments to the Supreme Court raise many questions about the future of environmental standing. Justice Alito, who heard oral argument for the first time on February 21, 2006, took part in the decision in *Magnesium Elektron*,⁴³ and could potentially steer the Court back towards decisions akin to *Lujan v. Defenders of Wildlife*.

3. Associational Standing

Associational standing at the federal level is well established and parallels individual standing requirements. One early interpretation by the Supreme Court regarding associational standing is *Hunt v. Washington State Apple Advertising Commission*.⁴⁴ Here, the

36. *Id.* at 121 (“[Plaintiff] PIRG’s members do not allege in their complaint or affidavits any injury to the Delaware River.”).

37. *Id.* at 120 (“PIRG’s knowledge that MEI exceeded the effluent limits set by its NPDES permit does not, by itself, demonstrate injury or threat of injury.”).

38. 528 U.S. 167 (2000).

39. *Id.* at 175-76.

40. *Id.* Here the Court overturned the deleterious standard that was used in *Magnesium Elektron*: “[t]he relevant showing for purposes of Article III standing, however, is not injury to the environment but injury to the plaintiff.” *Id.* at 180.

41. *Id.* at 183.

42. *See id.* *See also* 405 U.S. 727 (1972).

43. *See, e.g., supra* notes 34-37 and accompanying text.

44. 432 U.S. 333 (1977).

Washington State apple industry, through the Advertising Commission, challenged an administrative rule by the North Carolina Board of Agriculture.⁴⁵ The Court held that the Association had standing,⁴⁶ finding that an association may bring 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.⁴⁷

The Fourth Circuit Court of Appeals has applied the requirements for associational standing espoused in *Hunt* in actions arising under the APA. For example, in *Friends of the Earth v. Gaston Copper*,⁴⁸ a case involving judicial review of a permit violation of the Clean Water Act, the Fourth Circuit adopted the criteria used in *Hunt* to determine if the plaintiff had standing under the Act’s citizen suit provision.⁴⁹ Furthermore, in *1000 Friends of Maryland v. Browner*,⁵⁰ a case involving a challenge to an administrative determination under the Clean Air Act, the Fourth Circuit again applied the *Hunt* criteria and determined that members of the plaintiff organization had injuries that satisfied the requirements of *Friends of the Earth, Inc. v. Laidlaw*.⁵¹

B. Cross-State Comparison

Many states have adopted the federal Article III standing requirements in one way or another. Some state courts have integrated the *Hunt* requirements into their common law, while others (usually states with comprehensive environmental codes) have made this change statutorily.⁵² Although the Maryland General Assembly attempted to adopt similar changes through the Maryland Environmental Standing Act (MESA)⁵³ in order to circumvent the harsh common law discussed *infra*, those efforts have been fruitless

45. *Id.* at 335.

46. *Id.* at 343.

47. *Id.* (citing *Warth v. Seldin*, 422 U.S. 490, 511 (1975)).

48. 204 F.3d 149 (4th Cir. 2000).

49. *Id.* at 155.

50. 256 F.3d 216 (4th Cir. 2001).

51. *Id.* at 225-26.

52. *See, e.g., Med. Waste Assocs., Inc. v. Md. Waste Coal., Inc.*, 612 A.2d 241, 252-53 (Md. 1992).

53. MD. CODE ANN., NAT. RES. §§ 1-501 to -508 (2000).

because MESA does not afford a right of judicial review.⁵⁴ This section discusses the various changes that some of Maryland's neighbors have made over the years to supplement traditional environmental standing for associations.

Several states have acts similar to MESA; however, in almost every such state other than Maryland, state legislatures have taken care to include judicial review of agency decisions under their provisions. These states include Michigan,⁵⁵ Florida,⁵⁶ Connecticut,⁵⁷ Minnesota,⁵⁸ and South Dakota.⁵⁹ The General Assembly of Maryland, in promulgating MESA, aspired to relieve Maryland citizens of the hardships associated with overly-strict environmental standing.⁶⁰ However, the poor drafting and contradictory language of the Act prevent Marylanders from enjoying the same rights as the states listed above because they have no right to judicial review of alleged violations of the Act.

While other states have not taken specific steps to codify environmental standing, many states, including New York and Pennsylvania, have adopted the federal Article III standing requirements into their common law and have applied them to regulatory decisions that affect the environment. In *Society of the Plastics Industry v. County of Suffolk*,⁶¹ the plastics industry challenged a county government's decision to ban the use of plastic grocery bags in stores, and the Court of Appeals of New York applied federal associational standing requirements.⁶² Similarly, in *National*

54. See *infra* note 87 and accompanying text.

55. Michigan was the first state to adopt such an Act in 1970. See *Med. Waste*, 612 A.2d at 252; Michigan Environmental Protection Act, MICH. COMP. LAWS ANN. § 691.1205 (1979), repealed by MICH. COMP. LAWS ANN. § 324.1701 (West 1995). See also Kimberly C. Strasser, *Environmental Law*, 52 MD. L. REV. 673, 677-78 (1993) (noting that Michigan was the seminal state in providing for increased citizen protection in environmental suits).

56. See FLA. STAT. ANN. § 403.412 (West 2002) ("No demonstration of special injury different in kind from the general public at large is required.").

57. See CONN. GEN. STAT. ANN. § 22a-19 (West Supp. 2006).

58. See MINN. STAT. ANN. § 116B.09 (West 2005).

59. See S.D. CODIFIED LAWS § 34A-10-2 (1999).

60. The Court of Appeals in *Medical Waste* determined that the legislative history of MESA "sheds little light on the intent of the General Assembly," despite the language of section 1-502 of MESA, which includes the following legislative finding: "the courts of the State of Maryland are an appropriate forum for seeking the protection of the environment and an unreasonably strict procedural definition of 'standing to sue' in environmental matters is not in the public interest." See *Med. Waste*, 612 A.2d. at 250 (citing MD. CODE ANN., NAT. RES. § 1-502 (1989)).

61. 573 N.E.2d 1034 (N.Y. 1991).

62. *Id.* at 1041 (citing *Allen v. Wright*, 468 U.S. 737, 751 (1984)).

Solid Wastes Management Association v. Casey,⁶³ the Commonwealth Court of Pennsylvania found that an association may have standing “solely as the representative of its members.”⁶⁴

Virginia, who shares the Chesapeake Bay with Maryland, has not created an environmental standing act and has common law standing rules that, in their strictness, are similar to Maryland’s standing rules.⁶⁵ However, Virginia has supplemented the state environmental titles to include Article III standing on an ad hoc basis.⁶⁶ While Maryland has a similar provision under its Ambient Air Quality Control title,⁶⁷ this is an isolated section that has generated no significant case law in its short tenure. Virginia’s environmental provisions, on the other hand, cover a vast array of subtitles, thus having a significant effect on standing.⁶⁸

IV. MARYLAND STANDING REQUIREMENTS

This section outlines standing barriers facing the environmental advocate in Maryland who wishes to seek judicial review of an administrative decision, such as permit or zoning decisions that allegedly violate the organic statutes. The first part provides a description of the statutory landscape that defines the standing issue, including the Administrative Procedure Act,⁶⁹ the Maryland Environmental Standing Act,⁷⁰ Title 66B for zoning,⁷¹ and the Ambient Air Quality standard.⁷² The second part describes how these

63. 580 A.2d 893 (Pa. Commw. Ct. 1990).

64. *Id.* at 899.

65. *See, e.g.,* Health Sys. Agency of N. Va. v. Stroube, 623 S.E.2d 444, 449-50 (Va. Ct. App. 2005).

66. *See* VA. CODE ANN. § 10.1-1457 (West 2006); VA. CODE ANN. § 62.1-44.29 (West 2001).

67. MD. CODE ANN., ENVIR. § 2-404.1 (1993). *See also infra* note 98 and accompanying text.

68. The Virginia Code has two sections that adopt Article III standing specifically. Comparatively, whereas Maryland’s Ambient Air Quality title is exclusive to ambient air, MD. CODE ANN., ENVIR. § 2-404.1, the two sections of the Virginia code cover all matters of waste management, such as solid waste, landfills, hazardous waste, and radioactive waste (VA. CODE ANN. § 10.1-1457) and almost all water pollution provisions under “Waters of the State, Ports and Harbors” (VA. CODE ANN. § 62.1-44.29). *See, e.g.,* State Water Control Bd. v. Crutchfield, 578 S.E.2d 762, 767 (Va. 2003); Chesapeake Bay Found. v. Commonwealth, 616 S.E.2d 39, 43 (Va. Ct. App. 2005).

69. MD. CODE ANN., STATE GOV’T § 10-101 (1999).

70. MD. CODE ANN., NAT. RES. §§ 1-501 to -508 (2000).

71. MD. CODE ANN., Art. 66B § 1.02(a) (1988).

72. MD. CODE ANN., ENVIR. § 2-404.1.

already narrow rules have been given a very narrow reading by the Court of Appeals.

A. *The Statutory Landscape*

The Environmental Article of the Maryland Code establishes the Department of the Environment,⁷³ which is headed by the Secretary of the Environment.⁷⁴ The Secretary is under the ultimate authority of the Governor of Maryland, who in turn defines the state's environmental policies.⁷⁵ The Environmental Article establishes the legal requirements for air quality, water quality, coal mining, wetlands regulation, sanitation, and much more.

1. *The Administrative Procedure Act*

Many standing issues under the Environmental Article refer to the Administrative Procedure Act (APA), which is codified in the State Government Article of the Maryland Code.⁷⁶ The "Definitions" section of the Environmental Article requires that contested cases be determined under the rules of the APA.⁷⁷ This requirement affects most sections of the code through a provision of the Environmental Article — section 5-204(a) of the Water Resources Title.⁷⁸ Section 5-204 directs a huge swath of titles and subtitles of the Environmental Article to the APA by reference to the "contested case" procedures.⁷⁹ Additionally, several provisions of the Environmental Article refer to the APA directly, including Sediment Control,⁸⁰ Stormwater Management,⁸¹ and Water Pollution.⁸²

73. MD. CODE ANN., ENVIR § 1-401 (1993).

74. MD. CODE ANN., ENVIR § 1-402 (1993).

75. *Id.*

76. MD. CODE ANN., STATE GOV'T § 10-101 (1999).

77. This section of the code defines a contested case as "an adjudicatory hearing in accordance with the contested case procedures of Subtitle 2 of the Maryland Administrative Procedure Act." MD. CODE ANN., ENVIR. § 1-101(b) (1993).

78. 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(a) (1993).

79. 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)(1).

80. MD. CODE ANN., ENVIR. § 4-115 (1993).

81. MD. CODE ANN., ENVIR. § 4-214 (1993).

82. MD. CODE ANN., ENVIR. § 9-340 (1993).

As stated before, all of these portions of the Environmental Article are subject to the procedures of the APA. The 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.”⁸³ The definition of an aggrieved party is determined by Maryland common law, which is discussed *infra* in Section B. It is this determination that has such a profound effect on standing.

2. *Maryland Environmental Standing Act*

The Maryland Environmental Standing Act (MESA)⁸⁴ was created in 1973 with the specific intention of loosening the common law requirements for standing.⁸⁵ Unlike the APA, which limits standing to aggrieved parties, MESA expands standing to “[a]ny . . . person, regardless of whether he possesses a special interest different from that possessed generally by the residents of Maryland.”⁸⁶ However, MESA’s broad standing requirements apply to an incredibly limited field of remedies that does not include judicial review of an agency action.⁸⁷ As a consequence, the Maryland Court of Appeals has made MESA a dead letter in the Maryland Code.⁸⁸ This consequence runs counter to the General Assembly’s intention at the time of MESA’s creation that strict standing laws were (and still are) against the public interest when it comes to environmental cases.⁸⁹

3. *Article 66B (Zoning)*

Standing is also difficult to attain under the general zoning provisions of the State of Maryland. Article 66B of the Maryland Code grants authority to local governments in the State to establish local

83. MD. CODE ANN., STATE GOV’T § 10-222(a)(1) (1999).

84. Maryland Environmental Standing Act, MD. CODE ANN., NAT. RES. §§ 1-501 to -508 (2000).

85. The General Assembly found 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.” MD. CODE ANN., NAT. RES. § 1-502.

86. MD. CODE ANN., NAT. RES. § 1-503(a)(3).

87. *See generally* MD. CODE ANN., NAT. RES. §§ 1-501 to -508. While MESA establishes several forms of relief, such as a writ of mandamus and equitable relief, MD. CODE ANN., NAT. RES. § 1-503(b), the Court of Appeals in *Medical Waste Associates, Inc. v. Medical Waste Coalition, Inc.* was quick to point out that judicial review was not one of the actions created by the statute. 612 A.2d 241, 252 (Md. 1992).

88. *Id.*

89. *See supra* note 85 and accompanying text.

zoning plans.⁹⁰ Because local governments may determine the use and classification of public and private lands,⁹¹ their decisions have an immense impact on the environment.

Standing under Article 66B encompasses aggrieved parties and “any taxpayer”;⁹² however, Maryland courts have interpreted the language of this code provision narrowly. The Court of Special Appeals, for example, held in *Committee for Responsible Development on 25th Street v. Mayor and City Council of Baltimore*⁹³ that in order to qualify as an aggrieved party in an action challenging a zoning decision, the challenger must be within sight or sound range of the property that is subject to complaint.⁹⁴

However, the limited implications of Article 66B for environmental standing — given that 66B only applies to the five non-charter counties in Maryland⁹⁵ — may not justify the significantly greater effort that would be needed in order to change its standards. All other counties are allowed to adopt their own zoning principles with their own corresponding standing provisions.⁹⁶ Thus, an amendment to Article 66B would only affect a few of the smallest counties in the state,⁹⁷ and yet would likely bring every developer in the state, an industry averse to environmental protection, out of the woodwork to oppose it.

4. Ambient Air Quality

The Ambient Air Quality Control Title⁹⁸ requires special attention because it is the *only* provision of Maryland’s Environmental Code that specifically adopts federal Article III “case and controversy”

90. MD. CODE ANN., Art. 66B § 3.01(a) (1988).

91. MD. CODE ANN., Art. 66B § 3.05(a)(4)(ii)(1) (1988).

92. MD. CODE ANN., Art. 66B § 4.08(a)(1)(iii) (1988).

93. 767 A.2d 906 (Md. Ct. Spec. App. 2001).

94. *See id.* at 912.

95. *See* MD. CODE ANN., Art. 66B § 1.02(a) (1988).

96. The difference between a charter and a non-charter county in the state of Maryland is defined in the Maryland Constitution. MD. CONST. art. XI-A, XI-F. These sections describe the process by which counties either elect to form a charter, or adopt “home rule” in the case of “code counties.” *Id.* A code county has no charter, and is therefore subject to general provisions of the Maryland Code, such as Article 66B. *Id.* *See* MD. CODE ANN., Art. 66B § 1.02(a). Because of the various forms of government available to Maryland counties, in depth analysis of their esoteric zoning requirements would be laborious and beyond the scope of this article.

97. Out of Maryland’s twenty-three counties, only five of them are still code counties: Allegany, Caroline, Kent, Queen Anne’s, and Worcester. *See* Allegany County Board of County Commissioners, http://www.gov.allconet.org/bcc/quick_look.htm (last visited October 28, 2006).

98. MD. CODE ANN., ENVIR. §§ 2-101 to -901 (1993).

standing requirements. The standing provision of the Ambient Air Quality Title⁹⁹ was adopted by the 2002 Acts and designed to emulate the federal standing requirements. Here the language permits judicial review for any person who meets federal constitutional law standing requirements.¹⁰⁰

This section needs special attention for two reasons. First, the new standing provision indicates the dissatisfaction of the federal government over the Act's originally proposed standing requirements, since the Maryland Department of the Environment lost federal approval of its Ambient Air Quality standing requirements and was forced to adopt federal requirements.¹⁰¹ Second, at the time of this writing, the language of this Title was the focus of discussion by the General Assembly over amendments to the entire Environmental Article.¹⁰²

B. Case Law Interpretation

The Maryland Court of Appeals' decision in *Medical Waste Associates, Inc. v. Medical Waste Coalition, Inc.*¹⁰³ is its most in-depth interpretation of the statutory layout described above. The plaintiff in *Medical Waste* challenged a permit issued by the Department of the Environment to Medical Waste Associates for the building of a medical waste incinerator.¹⁰⁴ The Court of Appeals held that the plaintiff environmental group, Medical Waste Coalition, did not have standing to challenge the issuance of the permit because it did not have an affected property interest separate and distinct from its members.¹⁰⁵

The court made several important determinations in regard to standing. First, the court dismissed the claim under MESA, holding that the Act does not "expressly include judicial review of an administrative proceeding."¹⁰⁶ In doing so, the Court of Appeals

99. See MD. CODE ANN., ENVIR. § 2-404.1 (limiting standing to those who "(1) [m]eet the threshold standing requirements under federal constitutional law; and (2) Participated in a public participation process through the submission of written or oral comments, unless an opportunity for public participation was not required by statute or regulation.").

100. See *id.*

101. Act of May 16, 2002 Md. Laws ch. 437 (S.B. 248) (codified as amended MD. CODE ANN., ENVIR. § 2-404.1), available at <http://mlis.state.md.us>.

102. See, e.g., S.B. 589, 2006 Leg., 421st Sess. (Md. 2006).

103. 612 A.2d 241 (Md. 1992).

104. *Id.* at 242.

105. *Id.* at 249-50.

106. To support this holding, the Court of Appeals looked to similar environmental standing acts from other states that do include judicial review in their language. Some of these states include Michigan, Connecticut, Florida and South Dakota. *Id.* at 252-53.

restricted the expanded standing of MESA to include only mandamus or declaratory actions against an agency or its members for failure to perform a non-discretionary act.¹⁰⁷ Second, the court held that the claim of the environmental group fell under the standing requirements of the APA,¹⁰⁸ and that the definition of “aggrieved” under the APA is determined by Maryland common law.¹⁰⁹

In comparison to federal common law, the Court of Appeals has more narrowly interpreted the definition of an “aggrieved” party under Maryland common law. Maryland common law for standing, like federal law, has separate requirements for individuals and organizations. In Maryland, however, in order for an individual to have standing, they must have a personal interest or property right that is “specifically” affected in a way that is different from the public in general.¹¹⁰ Thus, in *Sugarloaf Citizens’ Association v. Department of Environment*,¹¹¹ the Maryland Court of Appeals recognized standing only for owners of land directly adjacent to a challenged solely because their land was closer to the incinerator than the plaintiffs found not to have standing.¹¹² 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.*”¹¹³ Maryland common law therefore makes it very difficult for associations to challenge administrative decisions in Maryland by diverting attention away from the actual injury and instead focusing on the differences between potential victims.

V. ANALYSIS

The standing doctrine is supposed to separate true controversies under the law from generalized complaints that should

107. *Id.* at 251-52.

108. *Id.* at 248 (“We have determined that the administrative proceedings held in this case were contested cases under the APA.”).

109. *Id.* (“We have held that the statutory requirement that a party be ‘aggrieved’ mirrors general common law standing principles”) (citing *Bryniarski v. Montgomery County Court of Appeals*, 247 Md. 137, 143-46 (1966)).

110. *Id.*

111. 686 A.2d 605 (Md. 1996).

112. *Id.* at 620.

113. *Med. Waste*, 612 A.2d at 249 (quoting *Citizens Planning and Hous. Ass’n v. County Executive of Balt.*, 329 A.2d 681, 687 (Md. 1974)) (emphasis added).

be remedied through the political process.¹¹⁴ However, the standing doctrine as it is applied in Maryland has created inequitable results. Not only does Maryland require a higher threshold to establish a judicially recognized “injury” than the federal government,¹¹⁵ it also stands out among its neighboring states for its unreasonable standing requirements.¹¹⁶ The puzzling requirement that Maryland places on associations for standing almost guarantees that individuals in lower economic neighborhoods, where polluting entities often choose to locate their sites, cannot enjoy the advocacy of organizations with the resources and time to represent their claims. Thus, Maryland’s associational standing creates a significant barrier to environmental justice. Though the true problem is in Maryland’s common law, attempts to remedy the standing problem statutorily have recently been made by the General Assembly. While critics claim that expanded judicial review will overburden the court system, these views are not supported by evidence at the federal level. This analysis describes and assesses those efforts, concluding that they are an appropriate step in the right direction.

A. Maryland Group Standing Fails to Maintain Parity with Federal Standards and Multi-state Trends

The most compelling rationale for amending Maryland’s standing law is that it is contrary to national trends at the federal and state level. As stated above, significant differences exist for associational standing under Maryland and Supreme Court analysis.¹¹⁷ Most importantly, Maryland law denies standing to an important sector of interested parties — associations that would pass under the Federal standard, simply because an association must have a property interest separate and apart from its members.¹¹⁸ The Supreme Court, on the other hand, only requires that one member of the association have standing to sue in his or her own right.¹¹⁹ Furthermore, while the injury prong of individual standing has vacillated over the years in the

114. See, e.g., *Allen v. Wright*, 468 U.S. 737, 750 (1984) (noting that the case or controversy requirement, along with ripeness, mootness, and political question, “defines” the separation of powers doctrine in regards to the Judicial Branch) (citing *Valley Forge Christian Coll. v. Ams. United for the Separation of Church & State*, 454 U.S. 464, 471-76 (1982)).

115. See *infra* Part V.A.

116. *Id.*

117. See *supra* Parts III.A.2-3, IV.B.

118. See *supra* note 113 and accompanying text.

119. See *supra* notes 47-49 and accompanying text.

Supreme Court,¹²⁰ associational standing has been consistently recognized.¹²¹

Notwithstanding federal law, the trends of neighboring states, and the direct assertion by the Maryland General Assembly that looser standing requirements are in the public interest,¹²² Maryland courts have retained an overly-narrow view on standing. The environmental titles of the Maryland Code, therefore, should be changed to relieve Maryland citizens of a pernicious impediment to environmental justice.

B. Maryland Group Standing Unnecessarily Restricts the Availability of Procedural Remedies, and Stands as a Bar to Environmental Justice

Environmental justice is the theory that the burdens of environmental harm should be distributed evenly across all aspects of society, and should not affect certain classes, races, ethnicities, or other groups disproportionately.¹²³ This idea was articulated in 1994 in an executive order by President Clinton.¹²⁴ Additionally, the Environmental Protection Agency (EPA) in 1998 defined environmental justice as “[t]he fair treatment of people of all races, cultures, incomes, and educational levels with respect to the development and enforcement of environmental laws, regulations, and policies.”¹²⁵ President Clinton’s executive order and the EPA’s

120. See *supra* Part III.A.2.

121. The Supreme Court has not revisited the law regarding group standing since *Hunt v. Wash. State Apple Adver. Comm’n*, 432 U.S. 333 (1977).

122. See *supra* note 85 and accompanying text.

123. Robert R. Kuehn, *A Taxonomy of Environmental Justice*, in ENVIRONMENTAL JUSTICE: LAW, POLICY & REGULATION 6, 7 (Clifford Rechtschaffen & Eileen Guana eds., 2003).

124. Exec. Order No. 12,898, 59 Fed. Reg. 7,629 (Feb. 11, 1994), *amended by* Amendment to Exec. Order No. 12,898, 60 FR 6381 (Jan. 30, 1995). President Clinton’s Executive Order states, in pertinent part, the following:

To the greatest extent practicable . . . each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing . . . disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations in the United States

Id. See also Kuehn, *supra* note 123, at 7.

125. Kuehn, *supra* note 123, at 7. The EPA’s most recent definition of environmental just, though slightly different, conveys the same message: “Environmental Justice is the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.” U.S. Environmental Protection Agency, Environmental Justice, <http://www.epa.gov/compliance/environmentaljustice/index.html> (last visited Apr. 3, 2007).

definition took environmental justice beyond theory, and into a cognizable public policy at the federal level.

As many scholars point out, there are many aspects and dimensions of environmental justice depending on one's definition of the terms "environment" and "justice."¹²⁶ Some common categories include distributive justice and procedural justice.¹²⁷ The former refers to the equitable distribution of environmental harms, while the latter refers to the equal availability of procedural remedies. It is procedural justice that frames the argument under which one must examine environmental standing in Maryland.

1. Politics, Externalities, and the Importance of Procedural Remedies to Environmental Justice

The danger of rigorous group standing requirements is particularly relevant because the political activity of a community is a factor when deciding the location of hazardous waste sites (i.e. "siting"). A study performed by James Hamilton, for instance, found that between 1987 and 1992, commercial hazardous waste firms, when deciding where to increase hazardous waste capacity, were likely to take into consideration a community's propensity for collective action.¹²⁸ Under the Coase Theorem — the principle that firms will locate where the cost to society is the least¹²⁹ — firms that produce externalities should locate where the social costs are minimized. Hamilton notes, however, that "in a world where collective action is variable," a firm may end up locating its facility where social costs are high, but the firm's costs are low due to lack of community opposition.¹³⁰ Such siting decisions *could* be a measure of social cost in that the non-litigious nature of a community may be due to a lack of

126. Kuehn, *supra* note 123, at 6.

127. *See id.* at 8. *See also* Vicki Been, *What's Fairness Got to Do With It? Environmental Justice and the Siting of Locally Undesirable Land Uses*, in ENVIRONMENTAL JUSTICE: LAW, POLICY, & REGULATION, *supra* note 123, at 12.

128. James T. Hamilton, *Politics and Social Costs: Estimating the Impact of Collective Action on Hazardous Waste Facilities*, 24 RAND J. ECON. 101, 121 (1993).

129. In other words, in an ideal world where property rights are perfectly defined, there are no transaction costs, and people enjoy the right to be free of pollution, a firm "realizes that it will have to pay its neighbors for the 'right' to pollute." *Id.* at 103. In making a decision as to where to locate, a company will take into consideration the social costs on a certain community, and locate where this cost is the least. *Id.*

130. *Id.* at 122.

interest in the environment.¹³¹ However, the lack of community opposition may also be explained by an *inability* to be litigious.¹³²

One obvious solution to the market's failure to internalize the hidden social costs of the politically and legally inactive is representation in the political process.¹³³ Theoretically, politically-interested groups battle to have their voices heard and ultimately produce public policies that "help correct market failures."¹³⁴ Resolution through the political process, moreover, is also one of the main constitutional arguments behind the standing doctrine.¹³⁵ But what happens when the political mechanism for enforcement becomes complacent despite the adoption of sound environmental principles?

Maryland's group standing doctrine must be changed to mirror federal standards so that environmental groups can assume the burden of representing the politically and legally underrepresented, especially given the reduced government enforcement of environmental regulations. While it is no secret that enforcement of environmental regulations at the national level has declined in recent years,¹³⁶ enforcement actions by the Maryland Department of the Environment (MDE) have also decreased.¹³⁷ Between 2003 and 2005, enforcement actions by the MDE decreased from approximately 2027 actions to

131. *Id.* at 102. After all, critics of environmental justice claim that inequitable siting decisions are based on typical market forces. Robin Saha & Paul Mohai, *Explaining Racial and Socioeconomic Disparities in the Location of Locally Unwanted Land Uses: A Conceptual Framework*, in ENVIRONMENTAL JUSTICE: LAW, POLICY, & REGULATION, *supra* note 123, at 34. One such argument states that "[d]isproportionate siting . . . occur[s] because cost-effective industrial areas with low property values are also likely to be nearby areas with low residential property values." *Id.* Thus, critics attempt to distance the environmental justice argument from sensitive notions of race and class by using the sterile market-force theory as an explanation for the disparities.

132. Hamilton, *supra* note 128, at 102. Hamilton states that "[i]f areas vary in their potential for collective action and thus their potential to organize politically to express their demands, then a community's *expressed* opposition to a facility may be low, even though residents strongly oppose it." *Id.* (emphasis in original). See also Saha & Mohai, *supra* note 131, at 34 ("[o]ne way of avoiding the high costs of citing delays or defeats is to select communities where the likelihood of public opposition is reduced Evidence exists to support the claim that middle-income, affluent, and better educated communities are better equipped to wage effective opposition campaigns.").

133. Hamilton, *supra* note 128, at 104.

134. *Id.* (citing Gary S. Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q. J. ECON. 371 (1983)).

135. See, e.g., *supra* note 114 and accompanying text.

136. James R. May, *Now More than Ever: Trends in Environmental Citizen Suits* at 30, 10 WIDENER L. REV. 1, 4-5 (2003).

137. See generally MARYLAND DEPARTMENT OF THE ENVIRONMENT, 2005 ANN. ENFORCEMENT & COMPLIANCE REP. (n.d.) 1, available at <http://www.mde.state.md.us/AboutMDE/Reports/enforcementComp.asp>.

1221.¹³⁸ Furthermore, MDE's total budget was reduced by three percent, fewer penalties were collected, and inspections and audits were reduced by more than 3000.¹³⁹ During the same period, the amount of pollution from coal-fired plants increased by three percent, which translates to about 32,000 tons of pollution in one year.¹⁴⁰

Worries that a relaxed standing requirement will inundate the court system are unfounded. Critics of relaxed standing requirements argue that the decision of *Laidlaw* has led to the over-representation of self-interested environmental groups and the subsequent over-burdening of the court system with "frivolous" lawsuits.¹⁴¹ However, statistics from a United States Department of Justice study show that the level of citizen suits filed under the Clean Water Act has remained unchanged in light of the Court's decision in *Laidlaw*.¹⁴² Specifically, the citizen enforcement cases arising under the Clean Water Act between 1995 and 1999, as logged by the Department of Justice, averaged about forty-seven cases a year.¹⁴³ After the decision in *Laidlaw* in 2000, citizen enforcement cases have averaged about thirty a year, showing a slight decrease (possibly due to uncertainty as to how the courts would determine standing under newer case law).¹⁴⁴ Furthermore, there is a general recognition that environmental statutes, especially at the federal level, include citizen suit provisions because the relevant agencies "lack the ability to enforce all environmental laws to the maximum extent possible."¹⁴⁵ While the General Assembly of Maryland recognized this in the adoption of MESA,¹⁴⁶ the common law retains a distinct barrier to citizen suits.

138. *Id.* Enforcement actions were compiled using the Maryland Department of the Environment's *Annual Enforcement and Compliance Reports* from 2000 to 2005. *See id.* Calculations are approximate, and do not include "Air Quality Complaints." *Id.* at 50.

139. *Id.* at 1-2.

140. *See* Editorial, *Air Conditions*, BALT. SUN, May 31, 2006, at 14A.

141. *See, e.g.*, A.H. Barnett & Timothy D. Terrell, *Economic Observation on Citizen-Suit Provisions of Environmental Legislation*, 12 DUKE ENVTL. L. & POL'Y F. 1, 18-19 (2001). *See also* Jonathan H. Adler, *Stand or Deliver: Citizen Suits, Standing, and Environmental Protection*, 12 DUKE ENVTL. L. & POL'Y F. 39, 58-59 (2001).

142. Edward Lloyd, *Citizen Suits and Defenses against Them*, SJ101 A.L.I.-A.B.A. 885, 889 (2004). *See also* May, *supra* note 136, at 14-16.

143. Lloyd, *supra* note 142, at 889.

144. *Id.*

145. Eileen Guana, *Federal Environmental Citizen Provisions: Obstacles and Incentives on the Road to Environmental Justice*, in ENVIRONMENTAL JUSTICE: LAW, POLICY, & REGULATION, *supra* note 123, at 289.

146. *See supra* note 85 and accompanying text.

2. *The State of Environmental Justice in Maryland*

Environmental Justice in Maryland is slowly pulling itself into existence after the issuance of President Clinton's Executive Order.¹⁴⁷ In 2003 the Commission on Environmental Justice and Sustainable Communities (CEJSC) was statutorily created for the purpose of advising state agencies about environmental justice issues, and for developing criteria to assess the state of environmental justice in Maryland.¹⁴⁸ Since that time, the CEJSC has issued several annual reports, the most recent of which is its 2004 Annual Report.¹⁴⁹ Unfortunately, the 2004 Annual Report only identifies certain quantitative measures of environmental justice, such as asthma rates and community demographics, and only a few sample statistics are available.¹⁵⁰

The dearth of local, quantitative information pertaining to environmental justice makes meaningful illustration of environmental justice difficult — beyond the case law examples cited above.¹⁵¹ However, anecdotal evidence shows the difficulty that environmental groups have had in raising claims on behalf of concerned citizens.

One such environmental crusader is Andrew McCown, director of Echo Hill Outdoor School, President of the Chester River Association, and Board Member of the Eastern Shore Land Conservancy for the past fifteen years.¹⁵² McCown knows all too well the uphill battle involved in protecting the environment of Maryland's Eastern Shore.¹⁵³ McCown explains, for example, the impact that mercury contaminated fish (Maryland has issued statewide mercury advisories for rivers and lakes¹⁵⁴) have had on him and the community. First, mercury advisories forced Echo Hill Outdoor School to curtail the portions of its experiential learning curriculum that include catching and eating fish, while concerned parents have also removed

147. See *supra* note 124 and accompanying text.

148. MD. CODE ANN., ENVIR. § 1-701(h) (1993).

149. MARYLAND STATE COMMISSION ON ENVIRONMENTAL JUSTICE AND SUSTAINABLE COMMUNITIES, 2004 ANN. REP. 1 (n.d.), available at http://www.mde.state.md.us/Programs/MultimediaPrograms/Environmental_Justice.

150. See *generally id.*

151. See *supra* Part IV.B.

152. Interview with Andrew and Betsy McCown, Directors Echo Hill Outdoor School, in Betterson, MD (Feb. 26, 2006) (on file with author).

153. *Id.*

154. See, e.g., U.S. ENVTL. PROTECTION AGENCY, 2004 NATIONAL LISTING OF FISH ADVISORIES 3 (2005), available at <http://epa.gov/waterscience/fish/advisories/fs2004.pdf>.

their children from the program.¹⁵⁵ Second, mercury from Maryland fish may bio-accumulate in consumers outside the state because fish that are caught in the Chesapeake Bay are often shipped out of state (as far as Chicago and Boston), and usually contain no mercury advisories in the commercial marketplace.¹⁵⁶ Finally, most of the types of fish caught in the Chester River for commercial sale (i.e., white perch, yellow perch, and catfish), and which are increasingly contaminated with mercury, are inexpensive fish that are commonly consumed by the economically-disadvantaged.¹⁵⁷

Under Maryland's standing laws, it is difficult for an individual to establish a "direct injury" in such situations. Even for a local consumer of fish from Eastern Shore markets, it is hard to create the nexus between mercury ingestion and a questionable permit originally issued to a point-source polluter in another part of the state. Moreover, the hurdles that an association must overcome in order to bring suit in an environmental claim often leave community groups powerless to address such problems. In an interview, for instance, McCown stated the following: "often people come to the Chester River Association with a complaint about something that is being done and ask us what we can do. All I can say is, legally, nothing."¹⁵⁸ Other environmental leaders have attempted litigation only to be faced with disappointment. Drew Koslow, of the South River Association, testified before the General Assembly Senatorial Committee on Education, Health, and Environmental Affairs that his organization spent over \$14,000 in legal fees trying to seek judicial review of a decision that would affect two linear miles of the South River.¹⁵⁹ At the end of the day, the organization was found to lack standing to seek judicial review and was out \$14,000.¹⁶⁰

At the time of this writing, the General Assembly had several bills before the floor that would amend the Environmental Title of the Maryland Code.¹⁶¹ Chief among these is Senate Bill 589, which would

155. Interview with Andrew and Betsy McGown, *supra* note 152.

156. *Id.*

157. *Id.*

158. *Id.*

159. *Judicial Review of Permits: Hearing on S.B. 589 Before the S. Comm. on Education, Health, and Environmental Affairs*, 2006 Leg., 421st Gen. Assem. (Md. 2006) (statement of Drew Koslow).

160. *Id.*

161. See *infra* note 162 and accompanying text. Other bills that address standing in the 421st General Assembly of Maryland are Board of Appeals or Zoning Action — Appeals to Courts, H.B. 88, 2006 Leg., 421st Gen. Assem. (Md. 2006) (Sponsored by Delegate Smigiel), and Local Government—Zoning Regulations and Building Permits—Appeals—Neighboring

apply the Article III language found in the Ambient Air Quality Control title to section 5-204 of the Environmental Title.¹⁶² Section 5-204 covers a broad array of environmental provisions, as discussed above.¹⁶³ Adopting the Article III standing requirements to this section would be a positive start in the right direction that would make Maryland's standing law roughly analogous to Virginia's. However, more should be done.

For example, with the recent addition of Justice Alito to the Supreme Court, the General Assembly should consider codifying the federal standard as it exists today to prevent the new language (which simply adopts "federal constitutional law" requirements) from changing with future Supreme Court decisions. Alternatively, to placate the Maryland Court of Appeals, the General Assembly should consider amending the faulty language of MESA to explicitly provide for "judicial review." Furthermore, while amending section 5-204 of the Environmental Title would canvas a broad range of agency actions, there are still many areas of the Environmental Code that would remain unchanged. Therefore, these other sections need to be excavated, examined, and possibly amended as well.

VI. CONCLUSION

Increased standing is the necessary next step in environmental litigation in Maryland. By setting the bar higher than the federal level and the level of other states, Maryland courts deny its citizens an important tool to ensure that agencies properly enforce the statutes under which they operate. Furthermore, lack of effective associational standing creates a barrier to many citizens who have no choice but to let unwanted and harmful development encroach upon their neighborhoods. Though the needs of modern life require the existence of certain polluting entities, a fair requirement for standing would ensure for a citizen of an economically depressed area the same legal voice as a citizen of a more affluent neighborhood.

Associations, H.B. 155, 2006 Leg., 421st Gen. Assem. (Md. 2006) (Sponsored by Deiegare Costa).

162. Environment–Judicial Review of Permit–Standing, S.B. 589, 421st Gen. Assem. (Md. 2006) (Sponsored by Senators Frosh, Britt, Conway, Green, Grosfeld, Pinsky and Ruben).

163. See *supra* Part IV.A.1.

