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Legislation: The 1978 Maryland Environmental Standing Act

Kim R. Siegert
University of Baltimore School of Law

THE 1978 MARYLAND ENVIRONMENTAL STANDING ACT

> "[*A*]*ccess to the court of the United States is the most effective means for citizens to participate directly in environmental decisions and may be the only way to assure that democratic processes are brought to bear on environmental problems.*"[1]

In 1978, the Maryland General Assembly enacted the Environmental Standing Act[2] (ESA), which significantly expands the scope of standing to sue in environmental matters. In establishing a new, procedural process by which private parties, as well as public officials, may participate in the important task of environmental protection, the General Assembly followed precedent established in at least ten other states[3] — notably Michigan, which enacted the first legislation of this type.[4] Although the effect of the ESA is to liberalize the federal standing requirements enumerated by the United States Supreme Court in *Sierra Club v. Morton*,[5] it is, nevertheless, significantly more limited in scope than comparable statutory provisions in other states.[6]

This article will briefly discuss the concept of standing and will then analyze the provisions of the ESA, discuss how it changes previous Maryland law, and compare its provisions with comparable federal and Michigan law.

I. DEVELOPMENT OF THE STANDING CONCEPT

A. Federal

Standing has been referred to as one of the most amorphous[7] concepts in law. Despite the many complexities and uncertainties[8]

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1. McGovern, *Forward* to J. SAX, DEFENDING THE ENVIRONMENT at xii (1970).
2. Law of May 29, 1978, ch. 838, 1978 Md. Laws 2434 (codified at MD. NAT. RES. CODE ANN. §§ 1-501 to-508 (Supp. 1978)). The Act took effect July 1, 1978.
3. *See* CAL. GOV'T. CODE §§ 12600-12612 (West Supp. 1978) (the attorney general must maintain the action in the name of the people of the State of California); CONN. GEN. STAT. ANN. §§ 22a-14 to-20 (West 1975); FLA. STAT. ANN. § 403.412 (West 1973); IND. CODE ANN. §§ 13-6-1-1 to 13-6-1-6 (Burns 1973); MASS. GEN. LAWS ANN. ch. 214, § 7A (West Supp. 1979); MICH. COMP. LAWS ANN. §§ 691.1201 to-.1207 (Supp. 1978); MINN. STAT. ANN. §§ 116B.01 to-.13 (West 1977); NEV. REV. STAT. §§ 41.540 to-.570 (1973); N.J. STAT. ANN. §§ 2A:35A-1 to-14 (West Supp. 1978-79); S.D. COMPILED LAWS ANN. §§ 34A-10-1 to-15 (1977).
4. Michigan's Environmental Protection Act has served as a model for other states in the enactment of environmental legislation. See Ray v. Mason County Drain Comm'r, 393 Mich. 294, 298, 224 N.W.2d 883, 887 (1975).
5. 405 U.S. 727 (1972). See text accompanying notes 22-32 *infra*.
6. *E.g.*, CONN. GEN. STAT. ANN. §§ 22a-14 to-20 (West 1975); MICH. COMP. LAWS ANN. §§ 691.1201 to-.1207 (Supp. 1978); N.J. STAT. ANN. §§ 2A:35A-1 to-14 (West Supp. 1978-79).
7. Flast v. Cohen, 392 U.S. 83, 99 (1968).
8. *See* Association of Data Processing Serv. Organizations, Inc. v. Camp, 397 U.S. 150, 151 (1970). ("Generalizations about standing to sue are largely worthless as such.").

attendant to the issue of standing, certain criteria have been established by the United States Supreme Court.[9] Although a complete analysis of the federal rules of standing is beyond the scope of this article, several basic concepts will be briefly discussed.

The concept of standing to sue emanates from the "case" or "controversy" requirement of Article III of the United States Constitution.[10] The basic consideration is whether the plaintiff is "a proper party to request an adjudication of a particular issue and not whether the issue itself is justiciable."[11] In short, a party must allege "a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution" of the controversy.[12] The purpose of the standing requirement is to ensure that courts will not have to decide cases of a "hypothetical," "abstract,"[13] or "ill-defined"[14] nature.

Federal standing requirements were established in *Association of Data Processing Service Organization, Inc. v. Camp,*[15] in which

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9. The Supreme Court demonstrated an inclination towards increasing liberalization of standing criteria between the years 1968-1973. *See, e.g.,* United States v. SCRAP, 412 U.S. 669 (1973); Barlow v. Collins, 397 U.S. 159 (1970); Association of Data Processing Serv. Organizations, Inc. v. Camp, 397 U.S. 150 (1970); Flast v. Cohen, 392 U.S. 83 (1968). Recent Supreme Court decisions have deviated from this trend, however. *See, e.g.,* Warth v. Seldin, 422 U.S. 490 (1975); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974); United States v. Richardson, 418 U.S. 166 (1974). For a discussion of the expansion and contraction of the standing concept, *see generally* Broderick, *The Warth Optional Standing Doctrine: Return to Judicial Supremacy?,* 25 CATH. U.L. REV. 467 (1976); Note, *Federal Standing: 1976,* 4 HOFSTRA L. REV. 383 (1976); Note, *Recent Standing Cases and a Possible Alternative Approach,* 27 HASTINGS L.J. 213 (1975); Davis, *The Liberalized Law of Standing,* 37 U. CHI. L. REV. 450 (1970); *see also* CONGRESSIONAL RESEARCH SERVICE, CONSTITUTION OF THE UNITED STATES OF AMERICA 645-48 (1973).
10. U.S. CONST. art. III, § 2.
11. Flast v. Cohen, 392 U.S. 83, 100 (1968).
12. Sierra Club v. Morton, 405 U.S. 727, 731 (1972).
13. Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240 (1937).
14. United States Pub. Workers of America v. Mitchell, 330 U.S. 75, 90 (1947).
15. 397 U.S. 150 (1970). Although *Data Processing* serves as a basis for current federal standing requirements, a brief discussion of several classic cases is important in order to illustrate the development of the standing concept.

In Frothingham v. Mellon, 262 U.S. 447 (1923), one of the plaintiffs, a private citizen, challenged the constitutionality of the Maternity Act of 1921 as a taking of property without due process. The plaintiff alleged that she was a taxpayer and that the Act's appropriations would increase the burden of future taxation. The Supreme Court held that the plaintiff's mere status as a federal taxpayer was insufficient to establish standing to challenge the constitutionality of the federal statute. The Court held that the plaintiff must "[have] sustained or [be] in immediate danger of sustaining some direct injury as a result of [the statute's] enforcement, and not merely that he suffers in some indefinite way in common with people generally." *Id.* at 488.

Nearly forty years later, the Court held in Baker v. Carr, 369 U.S. 186 (1962), that the plaintiff voters had sufficient standing to challenge the constitutionality of the Tennessee Apportionment Act of 1901. The standard announced by the Court is that a party who brings the action must allege "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which

the plaintiffs successfully challenged a ruling by the Comptroller of the Currency that enabled national banks to provide data processing services.[16] In *Data Processing,* the Supreme Court, speaking through Justice Douglas, formulated a two-pronged test.[17] In order to establish standing, a litigant must allege (1) that the challenged action has caused him "injury in fact"[18] and (2) that "the interest sought to be protected . . . is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."[19] Although the plaintiffs in *Data Processing* sought protection of economic interests, the Court emphasized that standing may be based upon noneconomic values as well, including aesthetic, conservational, and recreational interests.[20] Although Justice Douglas's emphasis on these noneconomic values was dicta, a foundation was nevertheless established upon which to base standing to contest environmental issues.[21]

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sharpens the presentation of issues upon which the Court . . . depends for illumination of difficult constitutional questions." *Id.* at 204.

Finally, in Flast v. Cohen, 392 U.S. 83 (1968), plaintiff taxpayers attacked the expenditure of funds under the Federal Elementary and Secondary Education Act of 1965 on the ground that it violated the Establishment and Free Exercise Clause of the First Amendment. The Supreme Court departed from the restrictive *Frothingham* rule and held that there is no absolute bar to suits by federal taxpayers to challenge the constitutionality of federal taxing and spending programs. The Court established a more liberal standard whereby the substantive issues in a case are to be examined in order to determine whether "a logical nexus" exists between the status asserted by the plaintiff and the claim sought to be adjudicated. *Id.* at 102.

16. In *Data Processing,* the plaintiffs sold data processing services to businesses in the general marketplace. The suit challenged a ruling by the Comptroller of the Currency that enabled national banks to make data processing services available to other banks and to bank customers.
17. In a recent case, Duke Power Co. v. Carolina Environmental Study Group, Inc., 98 S. Ct. 2620 (1978), the Supreme Court further "refined" the criteria for standing to require that the plaintiff establish "a distinct and palpable injury" to himself and a "'fairly traceable' causal connection between the claimed injury and the challenged conduct." *Id.* at 2630. In addition there must be a substantial likelihood that the exercise of the Court's remedial powers will redress the claimed injuries. *Id.* at 2631. *See also* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 260–62 (1977); Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 37–42 (1976); Warth v. Seldin, 422 U.S. 490, 498–501 (1975).
18. 397 U.S. at 152. The Court found that the plaintiffs satisfied the injury in fact test by alleging that competition by national banks in the business of providing data processing services might adversely affect their future profits and that certain customers were being solicited away from them. *Id.*
19. *Id.* at 153. As competitors, the Court found that the plaintiffs were within the zone of interests protected by the Bank Service Corporation Act, 12 U.S.C. § 1864 (1976), which prohibits bank service corporations from engaging in any activities other than performance of bank services for banks. 397 U.S. at 155–56.
20. *Id.* at 154.
21. In addition to judicially created standing requirements enumerated in *Data Processing,* the Federal Administrative Procedure Act, 5 U.S.C. §§ 701–706 (1976), affords a statutory basis upon which a person who has been harmed by federal agency action may rely in seeking judicial review. 5 U.S.C. § 702 (1976) states the following: "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a

The *Data Processing* injury in fact requirement was applied to an environmental controversy in *Sierra Club v. Morton,*[22] and it remains an important consideration in federal environmental litigation.[23] *Sierra Club* is indicative of the current view of the Supreme Court, and has been cited frequently in subsequent environmental cases in which the issue of standing was raised.[24]

In *Sierra Club,* the plaintiff environmentalist group sought to prevent the development of a ski resort and other commercial projects in the Mineral King Valley, located in the Sierra Nevada Mountains. The plaintiff sued as a membership corporation with a "special interest in the conservation and sound maintenance of the national parks, game refuges, and forests of the country."[25] While the Supreme Court recognized that the alleged aesthetic and ecological injuries were sufficiently important to warrant judicial protection, the Court found that the plaintiff did not meet the "injury in fact" test because it made no allegation in its complaint[26] of individualized harm to itself or its members.[27] In addition, the Court stressed that Sierra Club failed to allege that it or its members would be affected directly by the proposed development, or that its members actually used the Mineral King Valley for any purpose.[28]

The Court rejected the plaintiff's argument that it was maintaining a public action and that standing should be afforded through its capacity as a representative of the public interest.[29] Although the Court recognized the trend to broaden the categories of injury that may be alleged in support of standing, it nevertheless emphasized that the party seeking review must himself have

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relevant statute, is entitled to judicial review thereof." The National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4361 (1976), for example, is a relevant statute within the "standing" section of 5 U.S.C. § 702 (1976). *See* United States v. SCRAP, 412 U.S. 669, 685-686 (1973).

22. 405 U.S. 727 (1972).
23. See CCTW & M v. United States Environmental Protection Agency, 452 F. Supp. 69, 74-75 (D.N.J. 1978). *See also* V. YANNACONE, B. COHEN, & S. DAVISON, 1 ENVIRONMENTAL RIGHTS AND REMEDIES 447-55 (Supp. 1978). [hereinafter cited as YANNACONE, COHEN, & DAVISON].
24. *E.g.,* Duke Power Co. v. Carolina Environmental Study Group, Inc., 98 S. Ct. 2620, 2631 (1978); United States v. SCRAP, 412 U.S. 669, 684-90 (1973); Clinton Community Hosp. Corp. v. Southern Maryland Medical Center, 374 F. Supp. 450, 454-56 (D. Md. 1974), *aff'd per curiam,* 510 F.2d 1037 (4th Cir.), *cert. denied,* 422 U.S. 1048 (1975).
25. 405 U.S. at 730.
26. The Court did note that the plaintiff could amend its complaint under Rule 15 of the Federal Rules of Civil Procedure. 405 U.S. at 736 n.8.
27. *Id.* at 734-35.
28. *Id.* at 735.
29. *Id.* at 736. In so holding, the Court reversed the liberal trend of the lower federal courts that afforded standing to certain groups as responsible representatives of the public, even though there was no allegation of direct personal or economic harm to the groups or their members. *See* Environmental Defense Fund, Inc. v. Hardin, 428 F.2d 1093 (D.C. Cir. 1970); Citizens' Comm. For Hudson Valley v. Volpe, 425 F.2d 97 (2d Cir.), *cert. denied,* 400 U.S. 949 (1970).

suffered injury.[30] The Court stated that the "mere 'interest in a problem,' no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization 'adversely affected' or 'aggrieved' within the meaning of the APA."[31] The Court concluded that the purpose of judicial review is not to assist those who seek to vindicate their own value preferences by use of the judicial process.[32]

In summary, in order to seek successfully judicial review of an environmental controversy in federal courts, the plaintiff must satisfy a two-pronged test. He must first allege an injury in fact and demonstrate a connection between the defendant's acts and the environmental interest that he is seeking to protect.[33] To accomplish this, the plaintiff should allege that he uses, or members of the plaintiff's organization use, the area of the environment threatened by the defendant's actions. Second, the plaintiff must allege that he is within the zone of interests to be protected or regulated. In order to satisfy this requirement, the plaintiff should allege that the environmental interest that he is seeking to protect is within the interests to be protected by an applicable environmental statute or regulation and that the defendant is not complying with the applicable law.[34]

B. Maryland

Prior to the enactment of the Environmental Standing Act, Maryland courts were in general accord with the Supreme Court guidelines for standing enumerated in *Data Processing* and *Sierra Club*. In *Thomas v. Howard County*,[35] the Court of Appeals of Maryland considered whether the plaintiff plumbers had standing as taxpayers to sue Howard County and other defendants for willful failure to enforce the Howard County Plumbing Code, thereby causing health hazards and loss of revenue to the county. In addition to their financial interest as taxpayers and their interest as residents to be free of health hazards, the plaintiffs alleged that their employment opportunities as plumbers were adversely affected.[36] Citing with approval *Data Processing* and *Flast v. Cohen*,[37]

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30. 405 U.S. at 738.
31. *Id.* at 739.
32. *Id.* at 740.
33. *See* Duke Power Co. v. Carolina Environmental Study Group, Inc., 98 S. Ct. 2620, 2630 (1978). *See also* YANNACONE, COHEN, & DAVISON, note 23 *supra*, at 447–55 (Supp. 1978).
34. *See* United States v. SCRAP, 412 U.S. 669, 686 n.13 (1973). *See also* YANNACONE, COHEN, & DAVISON, note 23 *supra*, at 455–61 (Supp. 1978).
35. 261 Md. 422, 276 A.2d 49 (1971).
36. *Id.* at 424–25; 276 A.2d at 50–51.
37. See note 15 *supra*.

the court of appeals held that the plaintiffs, having alleged a direct and real interest in the matter in controversy, had standing to maintain the suit.

In *Kerpelman v. Board of Public Works*,[38] the plaintiff, a Baltimore City resident, brought suit on behalf of herself and others similarly situated against the Board of Public Works of Maryland and others seeking an injunction to require reconveyance of certain lands located in Worcester County. The suit was brought in an attempt to prevent probable adverse ecological effects that would result from sale of the land by the county to two private corporations.[39] The court of appeals first held that the plaintiff did not have standing merely because of her taxpayer status.[40] It then discussed the plaintiff's concern over the preservation of marshlands and wetlands. It noted that the plaintiff's interest in the matter was not alleged to be different from that generally of other citizens in the state. The court found that in order for a person to challenge a statute or the action of a public official acting under a statute, there must be an allegation of a special interest rather than the mere general interest of a member of the public.[41]

II. THE MARYLAND ENVIRONMENTAL STANDING ACT

In 1973, the Maryland General Assembly declared environmental protection to be a policy of the state. The Maryland Environmental Policy Act[42] declares that "[e]ach person has a fundamental and inalienable right to a healthful environment, and each person has a responsibility to contribute to the protection, preservation, and enhancement of the environment."[43] The General Assembly did not, however, intend for this declaration to confer standing upon a

38. 261 Md. 436, 276 A.2d 56, *cert. denied*, 404 U.S. 858 (1971).
39. The plaintiff alleged that the sale of two tracts of land to private corporations was for an inadequate consideration considering the adverse ecological consequences that would result from filling the wetlands, marshes, and shallows. She further alleged that she and others similarly situated would be deprived of the use of the land and that real estate taxes derived from the sale would not be adequate compensation. *Id.* at 438-40, 276 A.2d at 57-59.
40. The court of appeals held that the plaintiff did not meet the standard enumerated in Stovall v. Secretary of State, 252 Md. 258, 263, 250 A.2d 107, 110 (1969). "In Maryland taxpayers have standing to challenge the constitutionality of a statute when the statute as applied increases their taxes, but if they cannot show a pecuniary loss or that the statute results in increased taxes to them, they have no standing to make such a challenge." *Id.* The court stated that the effect of the sale of the land would be to increase the tax base of the state so that the plaintiff's taxes would be *reduced*. This case differs from *Thomas* where the allegations on the face of the complaint indicated an *increase* of taxes payable by the plaintiffs. 261 Md. at 444, 276 A.2d at 60-61.
41. 261 Md. at 443, 276 A.2d at 60. This requirement differs from the federal rule enumerated in United States v. SCRAP, 412 U.S. 669, 687 (1973) ("Standing is not to be denied simply because many people suffer the same injury.").
42. MD. NAT. RES. CODE ANN. §§ 1-301 to -305 (1974).
43. *Id.* § 1-302(d).

Maryland resident in order that he might fulfill this responsibility through the judicial process. Rather, the General Assembly intended state agencies to accomplish the goals and purposes of the Environmental Policy Act.[44]

With the enactment of the 1978 Environmental Standing Act, state agencies are no longer solely responsible for the "protection, preservation, and enhancement" of the state's environment. Maryland has now entered a new era of direct private citizen and group involvement in environmental protection. The General Assembly has declared 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."[45] In broadening the concept of standing to sue, the General Assembly has extended the right of access to state courts to private individuals and entities in order to ensure the enforcement of environmental laws and regulations.

The Environmental Standing Act basically provides that the State of Maryland,[46] any political subdivision,[47] and any other person[48] may bring an action for equitable relief against any officer or agency of the state or political subdivision for failure to perform a nondiscretionary ministerial duty imposed by pertinent environmental law[49] or for neglect in enforcing an applicable environmental quality standard.[50] The essential change from previous law is that any person, regardless of whether he possesses a special interest different from that possessed generally by Maryland residents or whether substantial personal or property damage to him is

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44. *See* Leatherbury v. Gaylord Fuel Corp., 276 Md. 367, 380-81, 347 A.2d 826, 834 (1975). The plaintiffs sought to have the prospective use of a quarry operation on adjacent property declared a nuisance and to have its owners enjoined from using the property for quarry purposes. They alleged that the Maryland Environmental Policy Act, MD. NAT. RES. CODE ANN. § 1-302(d) (1974), conferred special standing upon them to sue. The court disagreed, and held that the General Assembly did not intend to create new or enlarged actionable rights under the statute and that the goals and purposes enumerated in the Act were to be accomplished by state agencies only.
45. MD. NAT. RES. CODE ANN. § 1-502 (Supp. 1978).
46. *Id.* § 1-503(a)(1). This section includes any agency or officer of the state, acting through the Attorney General.
47. *Id.* § 1-503(a)(2). This section includes any agency or officer acting on behalf of the political subdivision.
48. *Id.* § 1-503(a)(3). "Person," as defined in the Act, means "any resident of the State of Maryland, any corporation incorporated under the laws of the State of Maryland, or any partnership, organization, association, or legal entity doing business in the State." *Id.* § 1-501(b).
49. *Id.* § 1-503(b). The duty may be imposed by an environmental statute, ordinance, rule, regulation, or order.
50. *Id.* The standard may be expressed in a statute, ordinance, rule, regulation, or order of the state or any political subdivision.

threatened,[51] now has standing to bring an equitable action in order to safeguard the environment. Although a number of limitations have been incorporated into the legislation, it is, nevertheless, a positive step forward in environmental protection.

The Maryland General Assembly had unsuccessfully attempted to enact legislation of this type in the past.[52] Business interests traditionally have strongly opposed the liberalization of standing concepts, and actively lobbied in an attempt to defeat this legislation.[53] A primary objection to broad standing requirements is that such provisions discourage business and thereby prohibit economic growth and development. In addition, it has also been argued that such a law would result in an influx of frivolous suits, cause inevitable long-term delays in industrial and economic projects, impair the powers and effectiveness of administrative boards and agencies, and weaken the authority of the state political subdivisions to issue building permits.[54]

As a result of the strong opposition to a broad definition of standing to sue, the final version of the Environmental Standing Act contains several limitations that may severely limit its ultimate effectiveness. For example, while the ESA broadens the standing concept by easing prior requirements, the General Assembly has limited the class of persons against whom an action may be brought. The original Senate Bill No. 942 contained a provision that authorized a direct cause of action against any person presently or prospectively engaged in a condition or activity that fails to meet applicable environmental quality standards.[55] This provision was

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51. The effect of § 1-503(a)(3) is to delete the injury in fact requirement enumerated in Sierra Club v. Morton, 405 U.S. 727 (1972). See text accompanying notes 22-32 *supra*. Likewise, the special interest in the subject matter requirement as expounded in *Kerpelman* has also been removed. See text accompanying notes 38-41 *supra*.
52. S. 179 (1975); S. 487 (1973); H.D. 1965 (1976).
53. Some of the opponents of the original Senate Bill 942 included the Maryland Chamber of Commerce, the Maryland Farms Bureau, the State of Maryland Institute of Home Builders, Inc., the Maryland Industrial Development Association, and Anne Arundel Trade Counsel, Inc.
54. *See, e.g.*, Statement by William F. Holin, representing the Maryland Chamber of Commerce, to Senate Judicial Proceedings Committee (March 8, 1978) (unpublished-photocopy on file University of Baltimore Law Review office); Letter from John N. Bowers, on behalf of State of Maryland Institute of Home Builders, Inc. to Senate Judicial Proceedings Committee (March 1, 1978) (unpublished-photocopy on file University of Baltimore Law Review office).
55. The original S. 942 (1978) § 1-503(B) provided that,

> Any person given standing by [the Act] . . . may bring and maintain an action against any other person who is causing, engaging in, or maintaining, or is about to cause, engage in, or maintain, a condition or activity which involves failure to meet an applicable environmental quality standard for the protection of the air, water, or other natural resources of the state, as expressed in a statute, ordinance, rule, regulation, or order of the state, of any political subdivision, or of any officer or agency of the state or political subdivision.

1978 Md. Laws 2436.

deleted and the ESA now authorizes an action for mandamus or equitable relief only against an officer or agency of the state or political subdivision for failure to perform a nondiscretionary ministerial duty or to enforce an applicable environmental quality standard. The Act further provides that upon request of the defendant officer or agency of the state or political subdivision, the court may, in its discretion, join as a party defendant any person against whom the plaintiff is requesting that action be taken, following notice to that person.[56]

One possible explanation for the limitation upon the class of possible defendants in environmental suits is that the General Assembly did not intend for the ESA to create any new substantive cause of action not presently recognized by the courts of the state; it merely sought to extend existing rights to new persons.[57] Although the concept of standing is generally a procedural question relating to who may assert a recognized legal right, the deleted provision may have been interpreted as having conferred new substantive legal rights to sue in connection with an alleged violation of any environmental standard, where no such right previously existed.[58] In any event, a plaintiff under the Act only has a cause of action against an officer or agency of the state or any political subdivision. The effect of this provision will be to place a greater burden on state agencies and officials to fulfill adequately their nondiscretionary duties and responsibilities or face the possibility of court action.

The Environmental Standing Act includes several other limitations upon the plaintiff's statutory authority to maintain environmental actions in court. The original bill required only that an individual citizen reside in the State of Maryland.[59] This requirement was amended to provide that "an individual citizen either shall reside in the county or Baltimore City where the action is brought, or shall demonstrate that the alleged condition, activity, or failure complained of affects the environment where he resides."[60] When read in accordance with the venue requirement that the action is to be brought in the circuit court where the alleged violation has, or is likely to occur,[61] it becomes evident that a major limitation has been placed upon when and where a private citizen may initiate an action. It is possible that although the General Assembly sought to

56. MD. NAT. RES. CODE ANN. § 1-503(b) (Supp. 1978).
57. MD. NAT. RES. CODE ANN. § 1-504(a) (Supp. 1978).
58. The State of Maryland Institute of Home Builders, Inc., for example, argued that the original S. 942, which contained the provision referred to in note 55 *supra*, conferred substantive rights that had previously not existed. *See* Letter from John N. Bowers, State of Maryland Institute of Home Builders, Inc. to Senate Judicial Proceedings Committee (March 1, 1978) (unpublished photocopy on file University of Baltimore Law Review office).
59. S. 942 (1978) §§ 1-501(B) & 1-503(A)(3), 1978 Md. Laws 2435-36.
60. MD. NAT. RES. CODE ANN. § 1-503(a)(3) (Supp. 1978).
61. *Id.* § 1-505(a).

enable a resident of a particular subdivision to protect his local environment, it did not intend to confer the unrestricted authority to protect the environment of the entire state by use of the state courts.

Another limitation of the ESA is that a plaintiff may not recover monetary damages but rather is limited to obtaining an injunction or other equitable relief to halt environmental damage.[62] Therefore, there is no direct monetary incentive for a plaintiff to sue. Additionally, the ESA does not abrogate the existing requirement of exhaustion of administrative remedies;[63] a plaintiff may use the courts only after all other channels of statutory or regulatory relief have been explored.[64] Finally, the ESA provides that if a party is determined to have brought the action "in bad faith or solely for the purposes of harassment or delay," the defendant may recover court costs, attorneys fees, witness fees, and damages[65] incurred as a

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62. *Id.* § 1-504(c). This subsection, however, does not preclude an award of monetary damages in any action in which a judgment is appropriate to a plaintiff who has standing to sue other than by virtue of the provision of the ESA.
63. *Id.* § 1-504(d). This provision adheres to the general rule that where an administrative remedy is provided by statute, that remedy must be pursued and exhausted before the party may proceed in court. *See* Leatherbury v. Gaylord Fuel Corp., 276 Md. 367, 373, 347 A.2d 826, 830 (1975). The judicial review section of Maryland's Administrative Procedure Act, MD. ANN. CODE art. 41, § 255(a) (1978), provides that "[a]ny party aggrieved by a final decision in a contested case, whether such decision is affirmative or negative in form, is entitled to judicial review thereof under this subtitle." The authority of the Board of Review of the Department of Natural Resources, for example, is established by MD. NAT. RES. CODE ANN. § 1-106 (Supp. 1978). Any person aggrieved by action or inaction on the part of the Secretary of Natural Resources or any unit within that department is entitled to appeal to the Board of Review. Prior to the commencement of the appeal, the person must set forth the basis of his complaint to the individual responsible for the improper conduct and make a request for review. If satisfactory resolution has not occurred within thirty days, an appeal may be taken. The decision of the Board shall be the final decision for purposes of judicial review under the Administrative Procedure Act. *Id.* § 1-107. Similar procedures have been established for appeals to the Department of Health and Mental Hygiene in MD. ANN. CODE art. 41, §§ 206A-206B (Supp. 1978).
64. Another procedural requirement of the ESA is that if the plaintiff is a person other than the state, written notice of the alleged condition, activity, or failure must be delivered to the appropriate agency and to the Attorney General at least thirty days prior to the commencement of the action. *Id.* § 1-505(b). The purpose of this provision may be to permit the defendant to cure his violation, thus precluding the necessity for litigation.
65. *Id.* § 1-507(a). The provision allowing damages to the defendant is an amendment to the original S. 942. The provision may have been added to appease business opponents of the bill. For example, William F. Holin, representing the Maryland Chamber of Commerce wrote:

> While the bill provides for possible reimbursement of legal expenses to a defendant if it can be clearly shown an action is brought solely in bad faith or for harassment or delay no provision is made for making up the tremendous losses that would occur by delay of the project. Time is

result of the action.[66] These provisions were incorporated primarily to ensure that only persons with legitimate complaints can maintain an action in court.

In addition to the limitations imposed upon a plaintiff, the ESA also includes several defenses that may be raised by a defendant. No relief may be granted if the defendant can prove that the condition, activity, or failure complained of is pursuant to and in compliance with a valid permit issued by an agency of the United States, the State of Maryland or a political subdivision thereof. Likewise, the defendant may successfully defend upon proving that he is acting in compliance with an order or other adjudication of a court of competent jurisdiction.[67]

III. COMPARISON TO FEDERAL LAW

There is no comparable environmental standing legislation on the federal level. In 1970, Senators George McGovern and Philip Hart introduced the Environmental Protection Act.[68] This proposed legislation embodied the principles of increased citizen participation in environmental protection as enumerated in the Michigan Environmental Protection Act.[69] The Act would have given any person the right to maintain an action on his own behalf or on behalf of those similarly situated for the protection of the environment "from unreasonable pollution, impairment, or destruction which results from or reasonably may result from any activity which affects interstate commerce."[70]

Although the proposed bill, which sought to establish broad standing requirements for environmental actions, was not enacted, several federal statutes do provide specific, automatic standing provisions. The Federal Water Pollution Control Act,[71] for instance, contains limited provisions for environmental standing. Section 1365 establishes citizen participation in the enforcement of control

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money in these cases and losses can amount to millions of dollars a day on major private or public projects.

Statement by William F. Holin to Senate Judicial Proceedings Committee (March 8, 1978) (unpublished-photocopy on file University of Baltimore Law Review office).

66. The General Assembly made no provision in the ESA for recovery of court costs, attorneys fees, witness fees, and damages by the plaintiff.
67. MD. NAT. RES. CODE ANN. § 1-504(f)(1) (Supp. 1978).
68. S. 3575, 91st Cong., 2d Sess., 116 CONG. REC. 6578-82 (1970). Similar legislation was introduced in the House of Representatives by Morris Udall. H.R. 16,436, 91st Cong., 2d Sess., 116 CONG. REC. 6876 (1970).
69. McGovern, *Foreword* to J. SAX, DEFENDING THE ENVIRONMENT at xiii (1970). See text accompanying notes 78-87 *infra*.
70. S. 3575 § 3(a), 91st Cong., 2d Sess., 116 CONG. REC. 6580 (1970).
71. 33 U.S.C. §§ 1251-1376 (1976). *See also* Clean Air Act and Air Quality Act of 1967, 42 U.S.C. §§ 1857-1858(a) (1976) *as amended by* Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685, Pub. L. No. 95-190, 91 Stat. 139. 42 U.S.C. § 1857h-2 (1976) includes provisions for citizen suits.

requirements and regulations created in the Act.[72] It should be noted that in drafting the legislation, Congress specifically examined the possibility of overturning the *Sierra Club v. Morton*[73] standing requirements, but declined to do so.[74] In the 1972 Amendments, Congress adhered to the *Sierra Club* holding by defining "citizen" as "a person or persons having an interest which is or may be affected."[75] Hence, the broad provisions in the Senate Bill that would have permitted anyone to initiate a civil action against a violator were rejected.[76]

IV. COMPARISON TO MICHIGAN LAW

As a result of the Environmental Standing Act, Maryland is more liberal than the federal government in terms of environmental standing requirements. The ESA is, however, substantially more restrictive in scope than environmental standing statutes enacted in other states.[77]

Michigan was the first state to break down traditional standing barriers and give private citizens the opportunity to take the initiative in environmental law enforcement.[78] Previously, this responsibility had been left exclusively to state regulatory agencies.[79] According to Michigan's governor at the time the Environmental Protection Act of 1970[80] (EPA) was enacted, the purpose of the legislation is to permit direct citizen involvement and to increase consciousness concerning the protection and preservation of the

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72. Unlike Maryland's ESA, 33 U.S.C. § 1365 (1976) provides for a cause of action against the actual wrongdoer, as well as against the Administrator of the Environmental Protection Agency for the failure to perform a nondiscretionary act or duty under the Water Pollution Control Act. See text accompanying notes 55-58 *supra*.
73. See text accompanying notes 22-32 *supra*.
74. S. REP. No. 92-414, 92d Cong., 2d Sess. § 505, *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 3668, 3744-47; S. CON. REP. No. 92-1236, 92d Cong., 2d Sess., *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 3776, 3822-23 ("It is the understanding of the conferees that the conference substitute relating to the definition of the term 'citizen' reflects the decision of the U.S. Supreme Court in the case of Sierra Club v. Morton.").
75. 33 U.S.C. § 1365(g) (1976).
76. Note, however, that the citizen suits section of the Clean Air Act, 42 U.S.C. § 1857h-2 (1970) does not separately define the term "citizen." This section does not require compliance with federal standing requirements such as the injury in fact test enumerated in *Sierra Club*. Friends of the Earth v. Carey, 535 F.2d 165, 172-73 (2d Cir. 1976), *cert. denied*, 434 U.S. 902 (1977); Metropolitan Washington Coalition for Clean Air v. District of Columbia, 511 F.2d 809, 814 (D.C. Cir. 1975).
77. *See, e.g.*, CONN. GEN. STAT. ANN. § 22a-16 (West 1975); FLA. STAT. ANN. § 403.412(2) (West 1973); N.J. STAT. ANN. § 2A:35A-4 (West Supp. 1978).
78. See note 4 *supra*.
79. *See* Sax & Conner, *Michigan's Environmental Protection Act of 1970: A Progress Report*, 70 MICH. L. REV. 1004 (1972) [hereinafter cited as SAX & CONNER].
80. MICH. COMP. LAWS ANN. §§ 691.1201 to -.1207 (Supp. 1978).

environment.[81] The Michigan Act authorizes any person[82] to bring an action for declaratory and equitable relief against *either* a public agency or a private person or entity[83] "for the protection of the air, water, and other natural resources and the public trust therein from pollution, impairment or destruction."[84]

Upon the plaintiff's prima facie showing that "the defendant has, or is likely to pollute, impair or destroy the air, water or other natural resources or the public trust therein,"[85] the defendant may show, by way of an affirmative defense, that there is no viable alternative to his conduct and that such conduct is consistent with the state's paramount concern for the protection of its environment. The EPA also provides that if regulatory proceedings are available to determine the legality of the defendant's conduct, the court may, but is not compelled to, remit the parties to such proceedings.[86] In any event, the court may grant temporary equitable relief when necessary.[87]

Maryland's ESA is too recent to have been extensively analyzed and interpreted. Michigan's EPA, however, has been in existence for nine years and, consequently, its provisions have been analyzed and its effect upon the state has been studied.

The Environmental Protection Act was cited with approval by the Supreme Court of Michigan in *Eyde v. State*.[88] In that case the court stated that "[t]he EPA is significant legislation which gives the private citizen a sizeable share of the initiative for environmental law enforcement. The Act creates an independent cause of action,

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81. Press release, Governor William G. Milliken (March 31, 1970), *reprinted in* Thibodeau, *Michigan's Environmental Protection Act of 1970: Panacea or Pandora's Box?*, 48 J. URBAN L. 579, 598 (1971).
82. MICH. COMP. LAWS ANN. § 691.1202(1) (Supp. 1978) provides that "[t]he attorney general, any political subdivision of the state, any instrumentality or agency of the state or of a political subdivision thereof, any person, partnership, corporation, association, organization or other legal entity may maintain an action . . . ." Unlike the Maryland ESA § 1-501(b), Michigan's EPA has no requirement that a corporation must be incorporated under the laws of the state in order to maintain an action.
83. MICH. COMP. LAWS ANN. § 691.1202(1) (Supp. 1978) provides that an action may be brought "against the state, any political subdivision thereof, any instrumentality or agency of the state or of a political subdivision thereof, any person, partnership, corporation, association, organization or other legal entity . . . ." In short, any person or entity that is empowered to bring an action under the statute can also be a defendant.
84. *Id.*
85. *Id.* § 691.1203(1). The phraseology of the statute enables the courts to develop a common law of environmental quality. This result was specifically intended by the Michigan Legislature. Ray v. Mason County Drain Comm'r, 393 Mich. 294, 304, 224 N.W.2d 883, 888 (1975).
86. MICH. COMP. LAWS ANN. § 691.1204(2).
87. *Id.* § 691.1204(1).
88. 393 Mich. 453, 225 N.W.2d 1 (1975).

granting standing to private individuals to maintain actions . . . against anyone for the protection of Michigan's environment."[89]

In addition to judicial discussion and approval, comprehensive follow-up studies on the effect of the Michigan EPA have been conducted.[90] These studies provide insight into the possible effect that Maryland's more restrictive statute might have on the state.[91]

Since the enactment of the statute, several studies have shown that there has been no resulting flood of environmental litigation in Michigan.[92] Suits have varied widely in character[93] with state and local officials, citizens' groups, established environmental organizations, and property owners with standing under conventional riparian or nuisance actions being the most active users of the EPA.[94] As in Maryland, business and industrial opponents argued that the ESA would cause a decrease in investor confidence in Michigan industry, resulting in industrial curtailment and loss of jobs. In response to this contention, the Michigan House of Representatives declared that "[o]ther investors have not neglected Michigan industry because of the threats of lawsuits under the EPA. . . . There is no evidence that the EPA has cost jobs in Michigan, and in no case has an industrial plant closed down or moved from Michigan as a result of an EPA lawsuit."[95]

In an analysis of the EPA in its sixth year, it was emphasized that the success of the Act was due in large part to direct citizen involvement.[96] Citizens have contributed to the growth of environmental protection without harassing industry or clogging the courts.[97] Due to the high level of citizen concern, public officials have

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89. *Id.* at 454, 225 N.W.2d at 2. *See also* Ray v. Mason County Drain Comm'r, 393 Mich. 294, 303, 224 N.W.2d 883, 887 (1975); Michigan State Highway Comm'n v. Vanderkloot, 392 Mich. 159, 184, 220 N.W.2d 416, 427 (1974); Wayne County Dept. of Health v. Olsonite Corp., 79 Mich. App. 668, 690, 263 N.W.2d 778, 790 (1978).
90. See SAX & CONNER, note 79 *supra;* Sax & DiMento, *Environmental Citizen Suits: Three Years Experience Under the Michigan Environmental Protection Act*, 4 ECOLOGY L.Q. 1 (1974) [hereinafter cited as SAX & DIMENTO]; Haynes, *Michigan's Environmental Protection Act in Its Sixth Year: Substantive Law From Citizen Suits*, 53 J. URBAN L. 589 (1976) [hereinafter cited as HAYNES].
91. Similar studies have been made on the effect of environmental standing legislation in other states. *See* DiMento, *Citizen Environmental Legislation in the States: An Overview*, 53 J. URBAN L. 413 (1976), which indicates that the conclusions of the Michigan studies are not unique.
92. In the first sixteen months following the enactment of the Michigan EPA, one study indicated that only thirty-six cases were filed pursuant to the EPA, and those were distributed evenly at a rate of two to three per month. SAX & CONNER, note 79 *supra*, at 1007. By 1976, only 119 cases or administrative proceedings had relied on the EPA (approximately 600,000 civil cases were initiated in Michigan Circuit Courts during the period). HAYNES, note 90 *supra*, at 593.
93. SAX & CONNER, note 79 *supra*, at 1008.
94. HAYNES, note 90 *supra*, at 645.
95. Michigan House of Representatives, Analysis of S.B. 1003, at 2 (Aug. 4, 1975), *reprinted in* HAYNES, note 90 *supra*, at 669.
96. HAYNES, note 90 *supra*, at 673.
97. *Id.* at 672.

made great use of the Act, and agency awareness has increased.[98] Finally, it should be noted that as a result of the EPA, defendants have rarely contested the plaintiff's standing[99] and courts have been very liberal in allowing intervention and joinder in these actions.[100]

As previously indicated, Michigan's EPA is much broader than the comparable Maryland Environmental Standing Act. The most significant difference between the statutes is the class of persons who may be cited as defendants in environmental litigation. The provision in Maryland's ESA that permits the plaintiff to bring suit only against an officer or agency of the state or political subdivision[101] is much more restrictive than Michigan's EPA, which allows the plaintiff to bring suit against the state *or* directly against the actual wrongdoer.[102] The Maryland Act further restricts a plaintiff by requiring (1) that the plaintiff live in the county where the alleged violation is occurring or demonstrate that the alleged violation is damaging the environment where he resides, and (2) that the plaintiff bring the action in the county where the alleged violation occurred or is likely to occur.[103] The Michigan statute merely requires that the action be brought where the violation occurred or is likely to occur.[104] Similarly, if the plaintiff in Maryland is a corporation, it must be incorporated within the state.[105] No such limitation is explicitly stated in the Michigan law.[106] It should also be noted that the Maryland ESA requires that the complainant must have exhausted all administrative remedies before an action may be brought in court.[107] Again, the Michigan EPA is more liberal in that it permits a party to initiate court action on matters cognizable before administrative agencies without having first exhausted the administrative remedy.[108] The EPA provision is flexible in that a judge before whom the suit is brought may decide whether to hear the case immediately or return it for administrative action.[109]

The two acts also differ in the approach taken to protect the defendant's interest. The Michigan EPA provides that the court may order the plaintiff to post a surety bond or cash not to exceed $500.00.[110] While no such provision exists in the ESA, Maryland's Act does contain a safeguard provision against suits brought in bad

98. *Id.* at 673.
99. *Id.* at 644.
100. SAX & DIMENTO, note 90 *supra*, at 36.
101. MD. NAT. RES. CODE ANN. § 1-503(b) (Supp. 1978).
102. See note 83 *supra*.
103. See text accompanying notes 60-61 *supra*.
104. MICH. COMP. LAWS ANN. § 691.1202(1) (Supp. 1978).
105. MD. NAT. RES. CODE ANN. § 1-501(b) (Supp. 1978).
106. MICH. COMP. LAWS ANN. § 691.1202(1) (Supp. 1978).
107. See note 63 *supra*.
108. MICH. COMP. LAWS ANN. § 691.1204(2) (Supp. 1978).
109. SAX & CONNER, note 79 *supra*, at 1020.
110. MICH. COMP. LAWS ANN. § 691.1202(a) (Supp. 1978).

faith under which a defendant may recover court costs, attorneys fees, witness fees, and damages.[111]

A Maryland defendant is afforded greater latitude in his actions than one similarly situated in Michigan. Under the Maryland ESA, a defendant is protected as long as he acts pursuant to a valid legislative permit or court order.[112] The EPA, however, also requires that a defendant prove that there is no feasible and prudent alternative to the conduct in question and that he has acted consistently with the promotion of the public health, safety, and welfare.[113] The Michigan statute is, therefore, much more stringent.

Finally, the ESA specifically provides that the statute creates no new substantive cause of action or theory of recovery.[114] The Act is specifically intended as a procedural expansion of the standing concept in environmental litigation. Michigan's EPA, on the other hand, is not specifically limited to procedural considerations. The EPA itself has been interpreted as a source of substantive law[115] making it unlawful "to pollute, impair or destroy the air, water and other natural resources or the public trust therein"[116] unless no acceptable alternatives exist that are consistent with public environmental policy. This consideration becomes important when the defendant contends that in light of the challenged activities he has no obligation to take environmental considerations into account.[117]

V. CONCLUSION

The Maryland Environmental Standing Act is a watered-down version of the Michigan Environmental Protection Act and similar statutes enacted in other states. Although the ESA changes the narrow interpretation of standing previously existing in Maryland, it nevertheless limits a person's ability to protect environmental

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111. MD. NAT. RES. CODE ANN. § 1-507(a) (Supp. 1978).
112. *Id.* § 1-504(f)(1).
113. MICH. COMP. LAWS ANN. § 691.1203(1) (Supp. 1978).
114. MD. NAT. RES. CODE ANN. § 1-504(a) (Supp. 1978).
115. In Michigan State Highway Comm'n v. Vanderkloot, 392 Mich. 159, 184, 220 N.W.2d 416, 428 (1974), the Supreme Court of Michigan stated that
> EPA is designed to accomplish two distinct results:
> (a) to provide a *procedural* cause of action for protection of Michigan's natural resources; and
> (b) to prescribe the *substantive* environmental rights, duties, and functions of subject entities.

(emphasis in original). *See also* HAYNES, note 90 *supra*, at 597 & 644.
116. See note 85 *supra*. In addition, the EPA specifically supplements existing administrative and regulatory procedures provided by law. MICH. COMP. LAWS ANN. § 691.1206 (Supp. 1978). The statute, therefore, provides a cause of action for a party who faces an environmental problem that does not fall within the established jurisdiction of an administrative agency. *See* HAYNES, note 90 *supra*, at 602.
117. SAX & CONNER, note 79 *supra*, at 1055.

interests. It is evident that the intent of the General Assembly was not to give ordinary citizens a free hand in initiating environmental law enforcement. It merely determined that an unreasonably strict procedural definition of standing to sue is not in the public's best interest.

The ESA appears to have been drafted in response to specific fears and criticisms expounded by opponents to a broad interpretation of environmental standing. As stated earlier, the limitations that have been incorporated into the Environmental Standing Act serve to ensure that only persons with valid environmental complaints will be able to maintain a court action. Strict compliance by persons who utilize the statute will almost certainly be required. Based upon the results of reliable studies that have been conducted in jurisdictions with broader statutes, it would appear that restrictions such as citizen residency requirements and limitations upon the proper party to sue have been unnecessarily incorporated into the Act.

As enacted, the Environmental Standing Act may be viewed as a compromise. While it certainly does not contain the broad provisions recommended by environmentalists, it does provide a cause of action for certain parties who might otherwise be excluded from the judicial system. It is difficult to determine exactly how useful the Environmental Standing Act will be in protecting Maryland's environment. The courts will make that ultimate determination.

Kim R. Siegert