

IN THE CIRCUIT COURT FOR GARRETT COUNTY

YOUGH FARMS, LLC *et al.* *

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Petitioners *

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IN THE CASE OF SWALLOW FALLS *

Civil Action No.: C-11-CV-23-000132

BRIDGE REPLACEMENT - SCENIC *

AND WILD RIVERS EXCEPTION *

APPLICATION 2018DNR139

* * * * *

OPPOSITION TO THE MOTION TO DISMISS

Petitioners, by and through counsel J. Dirk Schwenk, hereby oppose the Motion to Dismiss filed by Respondent Department of Natural Resources (and joined by the County Commissioners of Garrett County, Maryland), and for their reasons state:

1. Introduction

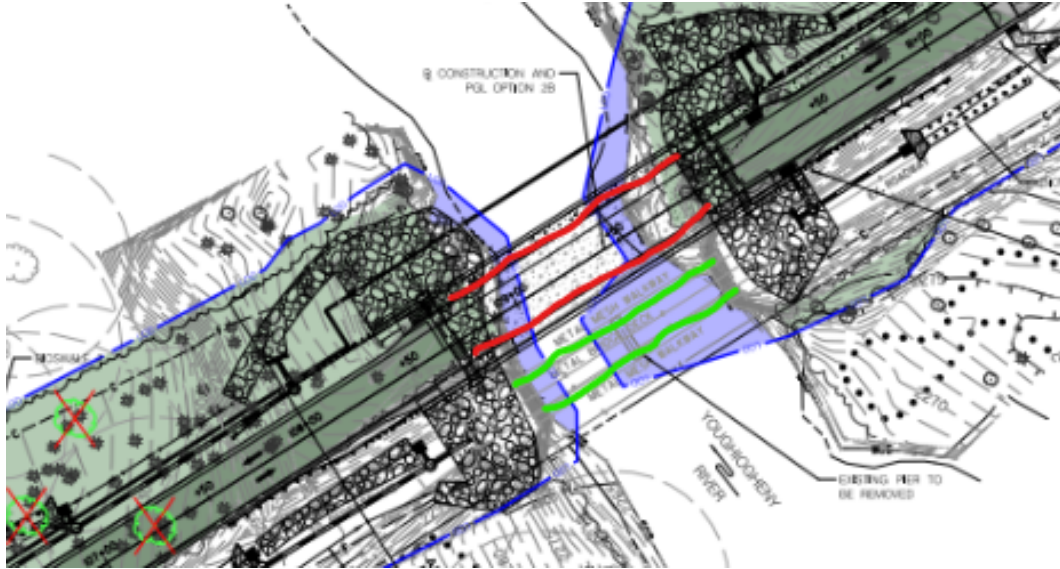
This matter is seeks judicial review of the decision of the Josh Kurtz, Secretary of the Maryland Department of Natural Resources (“DNR”), to issue an exception to the Youghiogheny Scenic and Wild River Corridor (“Yough Corridor”) protections to allow for a new bridge, new road and new grading and stormwater easements with the river basin. The Wild River portion of the Youghiogheny River is among the most protected areas in Maryland and is the subject of both a Management Plan and regulations concerning the use and development that would affect the primitive qualities and characteristics of the wild river and the adjacent scenic corridor along its banks. Md. Code Ann., Nat. Res. § 8-409. The purpose of the Wild and Scenic Rivers Act “is to preserve and protect the natural values of these rivers, enhance their water quality, and fulfill vital conservation purposes by wise use of resources within their surrounding environment.” Md. Code Ann., Nat. Res. § 8-401. The regulations prohibit new roads, new

bridges and any clearing except for uses and developments that are approved under the regulations.

- a. “Roads are not permitted except those necessary to reach developments permitted in these regulations. Setback lines established elsewhere in these regulations may not be crossed except where topographic conditions prevent any other access.” COMAR 08.15.02.13.
- b. “Damming, dredging, filling, channelization, or other alteration of the river or its banks is prohibited except that involving the repair of existing bridges.” COMAR 08.15.02.11 (emphasis added).
- c. “Any clearing of natural vegetation other than for logging is limited to that necessary for uses and developments permitted by these regulations. B. The Department, in evaluating a plan for the clearing of natural vegetation, shall: (1) Take into account the effects of the proposed clearing on the scenic and wild character of the river; (2) Insure that natural vegetation on or near the shoreline remains undisturbed to screen the cleared area from the river and its contiguous shore; and (3) Consider the effect the clearing operations may have on the fish, aquatic, and riverine resources by: (a) Altering the temperature of the water; (b) Causing siltation; (c) Pesticide or fertilizer contamination; or (d) Any other deleterious effect.” COMAR 08.15.02.12.

Despite these prohibitions (and many other restrictions and requirements) the Secretary issued a letter on August 18, 2023 which allowed “the construction of a new bridge in an offset alignment in the area of the existing [Swallow Falls] bridge.”¹ only contained one location for a “new bridge in an offset alignment”. That bridge was described as “Option 2” and was a new bridge and roadway North of the existing bridge, and thus closer to the Swallow Falls State Park. That location is shown in this excerpt - the existing bridge highlighted in green, and the proposed new bridge in red.

¹The Application, supporting exhibits, video recording of the hearing, and the public comments are all published by the DNR on its Swallow Falls Bridge page: <https://dnr.maryland.gov/publiclands/Pages/western/SwallowFalls/Swallow-Falls-Bridge-Replacement-Project.aspx>. This Court is empowered to take notice of these publications. Md. Rule 5-201.



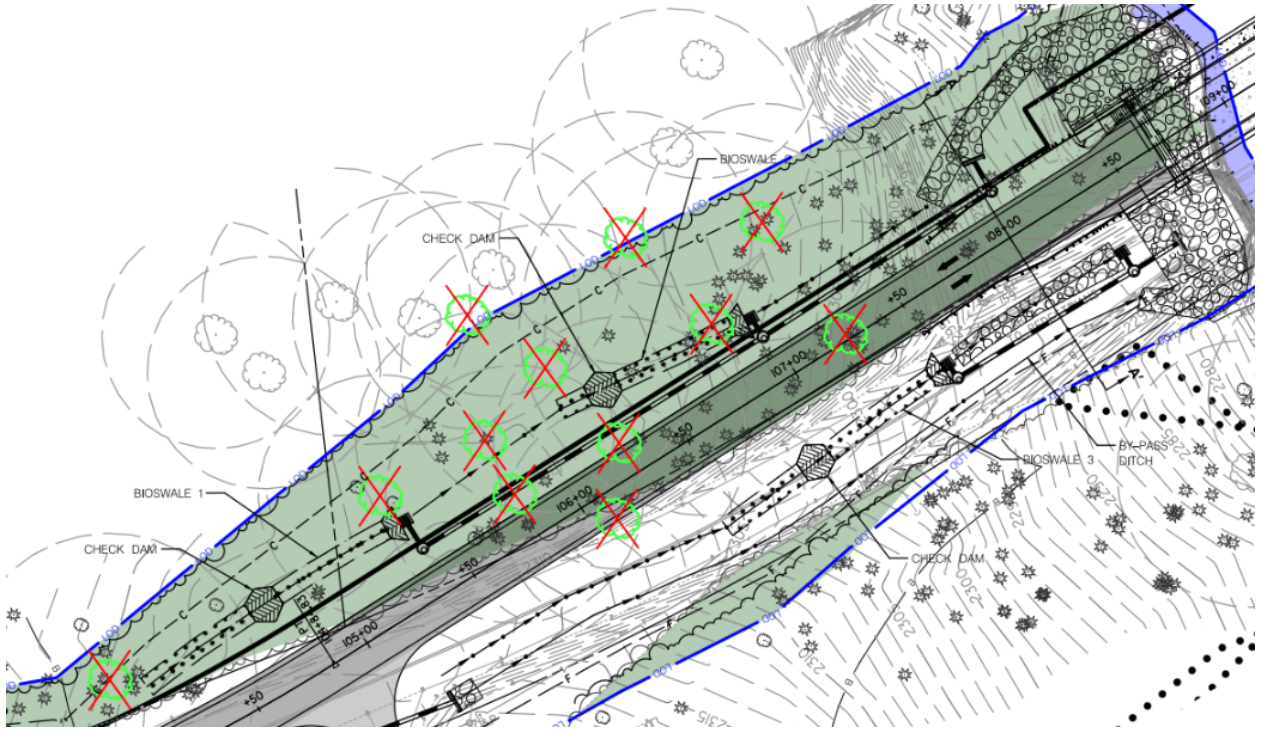
The impact on the Yough Corridor, however, is much greater than just the bridge. Every option presented in the application involves the removal of numerous old growth trees, hundreds of mature trees between 12 and 29.9 inches and between .96 and 1.70 acres of forest clearing.

Table 1 – Design Alternative Environmental Impacts

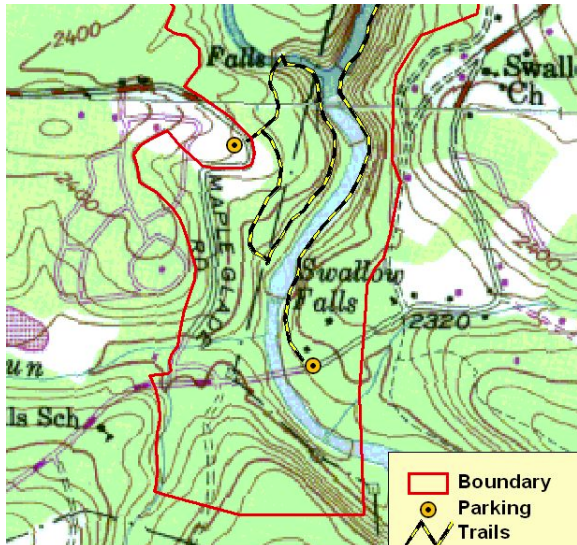
	Forest Clearing (acres)	Specimen Tree Removal	Specimen Trees with CRZ impact to be Preserved	Tree Removal 12"-29.9"	Wetland Impacts (SF)	Wetland Buffer Impacts (SF)	Temporary WUS Impacts (SF)	Permanent WUS Impacts (SF)
Option 1	0.96	7	7	163	1,378	6,588	4,686	58
Option 1C	0.68	4	6	110	1,373	6,585	4,378	0
Option 2	1.27	11	8	227	921	4,069	4,689	58
Option 2B	1.70	13	9	269	1,675	5,724	4,698	58
Option 2C	1.00	7	7	183	922	4,052	4,696	58
Option 2D	1.21	11	6	222	921	4,067	4,689	58

(Supporting Exhibits - titled “Environmental Assessment”, except, p. 21). On the West side, adjacent to Swallow Falls State Park as many as a dozen old growth original hemlocks would be destroyed along with many other mature trees. This is the same stand of old growth hemlocks which caused the founding of the Swallow Falls State Park, and the cleared area is contiguous with or within the Swallow Falls State Park. It is the last

stand of old growth hemlocks in Maryland.



Every inch of the impacted land is a part of the Swallow Falls Natural Heritage Resource Area.²

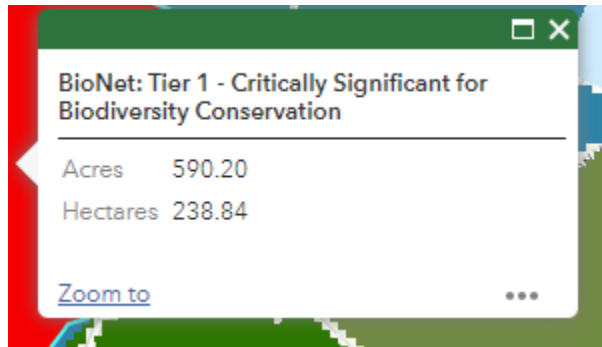


² (map and description: <https://dnr.maryland.gov/wildlife/Pages/NaturalAreas/Western/Swallow-Falls.asp>, accessed and screenshots November 13, 2023).

The DNR's own GIS mapping system, known as MERLIN

(<https://dnr.maryland.gov/pages/Merlin.aspx>) designates the entire area as BioNet: Tier 1

- Critically Significant for Biodiversity Conservation - the most protected tier.



(screenshot of data as of November 13, 2023).

The Secretary's letter also notes that these hemlocks have been designated as part of the "Irreplaceable Natural Area" but nevertheless reaches the conclusion that their loss can be mitigated by conditions such as replanting and executing a management plan.

¹ The old growth hemlock forest of Swallow Falls State Park is proposed to be designated as an Irreplaceable Natural Area. Although the designation has not yet been finalized, the Department has nevertheless determined that this bridge replacement project is the continuation of an existing use and will not have a detrimental impact on the habitats or natural resources for which this area is to be designated as an Irreplaceable Natural Area.

Secretary's Letter, Exh _____, Footnote 1.³ The idea that the destruction of old growth forest can be mitigated by replanting is belied by the words on the DNR's own Swallow Falls page - which show that it would be 300 years before replanting might work:

³ Maryland's Irreplaceable Natural Areas program is designed to protect publicly owned land that contains "habitat necessary to support ... [a] unique natural community [that has] an assemblage of native plants or animals that is rare or declining in the State." It was passed into law by the legislature in 2022, and directs the DNR to promulgate regulations to protect such areas. The DNR did promulgate regulations for publication on June 30, 2023 which designate the "Youghiogheny River and Tributaries" (available on the DNR website <https://mgaleg.maryland.gov/pubs/committee/AELR/23-123P-Regulation.pdf>). The designation is not limited to Swallow Falls State Park or the old growth hemlocks in the park - it is the entirety of the river corridor, including all of the areas scheduled for destruction. The designation was done by Secretary Josh Kurtz on May 23, 2023, less than three months before the waiver in this case was granted.

Forests are generally considered "old growth" if they have not been logged or significantly disturbed by people since the 1700s. Of the 2.7 million acres of forest in Maryland, 2,000 acres are officially designated as old growth and 1.8% of that is hemlock forest. This park shelters the same precious 37 acres of hemlocks and white pines so loved as a camping spot by the Vagabonds.⁴ Not many old growth forests remain in the eastern U.S. and fewer still are as easily accessible to hikers.

(<https://dnr.maryland.gov/wildlife/Pages/NaturalAreas/Western/Swallow-Falls.aspx>, accessed November 13, 2023).

As described further below, the Petitioners challenge the Secretary's decision to allow a new road, new easements and a new bridge through an old growth hemlock and white pine forest which the Maryland legislature has repeatedly tasked the DNR with preserving.

2. The legal basis for the petition.

Petitioners filed pursuant to Maryland Rule 7-401, which provides for judicial review in circumstances where, as here, no review is expressly provided for in the law. "The rules in this Chapter govern actions for judicial review of a quasi-judicial order or action of an administrative agency where review is not expressly authorized by law." Maryland rules 7-401(a). The DNR is an administrative agency under the rules. "As used in this Chapter, "administrative agency" means any agency, board, department, district, commission, authority, Commissioner, official, or other unit of the State or of a political subdivision of the State." Maryland rules 7-401(b). The Committee Note stated in the Rule says: "A writ of mandamus is an appropriate remedy for review of a quasi-judicial order or action of an administrative agency only when no other right of appeal is

⁴ As noted above the Swallow Falls Natural Areas designation extends beyond the boundaries of the Swallow Falls State Park, and includes the entire area in question. The "Vagabonds" refers to the story of the original impetus for the preservation of the area: "In the summer of 1921, three men who changed our nation camped here beside Muddy Creek Falls. Calling themselves "the Vagabonds", Thomas Edison, Henry Ford, and Harvey Firestone found peace and solace in this natural sanctuary."

provided by state or local law. See *Heaps v. Cobb*, 185 Md. 372 (1945).” Heaps v. Cobbs held “Courts have the inherent power, through the writ of mandamus, by injunction, or otherwise, to correct abuses of discretion and arbitrary, illegal, capricious or unreasonable acts; but in exercising that power care must be taken not to interfere with the legislative prerogative, or with the exercise of sound administrative discretion, where discretion is clearly conferred. Heaps v. Cobb, 185 Md. 372, 379, 45 A.2d 73, 76 (1945).⁵

Rule 7-402 requires petitions such as this one to comply with the provisions of Rules 7-202 and 7-203. “An action for a writ of administrative mandamus is commenced by the filing of a petition, the form, contents, and timing of which shall comply with Rules 7-202 and 7-203.” Rule 7-402. Rule 7-203 requires that a petition be filed within 30 days of “the date of the order or action for which review was sought.” Rule 7-202 provides a form for obtaining review. The form is required to be filed in the Circuit Court; it specifies a heading which designated the decision to be reviewed; and substantively requires that the petition include: (A) request judicial review; (B) identify the order or action of which review is sought; (C) state whether the petitioner was a party to the agency proceeding, and if the petitioner was not a party to the agency proceeding, state the basis of the petitioner's standing to seek judicial review.” No other substance is required by Rule: all of this was complied with by Petitioners.

⁵ The rules are drafted in accordance with the Heaps decision and allow this Court to enter the following relief: “The court may issue an order denying the writ of mandamus, or may issue the writ (1) remanding the case for further proceedings, or (2) reversing or modifying the decision if any substantial right of the plaintiff may have been prejudiced because a finding, conclusion, or decision of the agency:(A) is unconstitutional,(B) exceeds the statutory authority or jurisdiction of the agency,(C) results from an unlawful procedure,(D) is affected by any error of law,(E) is unsupported by competent, material, and substantial evidence in light of the entire record as submitted,(F) is arbitrary or capricious, or (G) is an abuse of its discretion.” Rule 7-403.

3. The DNR's Procedural arguments are based on the entirely incorrect idea that its Motion is equivalent to a Motion to Dismiss a Complaint pursuant to Maryland Rule 2-322.

As noted above, this Petition was filed under Rule 7-402, which requires the Petitioners to follow the form described in Rule 7-202. Rule 7-202 requires only three statements to initiate review: (A) request judicial review; (B) identify the order or action of which review is sought; (C) state whether the petitioner was a party to the agency proceeding, and if the petitioner was not a party to the agency proceeding, state the basis of the petitioner's standing to seek judicial review. *Id.* The DNR, however, cites to completely irrelevant standards applicable to Complaints (not Petitions for Judicial Review) and cites Rule 2-322(b). *See, Motion to Dismiss*, p. 1, 2 “the alleged facts and permissible inferences, so viewed, would, if proven, nonetheless fail to afford relief to the plaintiff.” This argument entirely misses the context in which the Petition was filed, and thereby also misunderstands the burden of proof applicable to its Motion.

4. The Petition meets the requirements of Rule 7-401, et seq; the cases concerning dismissal for failure to state a claim are entirely irrelevant.

The DNR's Motion to Dismiss is actually filed under Rule 7-204(b): “A person may file with the response a preliminary motion addressed to standing, venue, timeliness of filing, or any other matter that would defeat a petitioner's right to judicial review. Except for venue, failure to file a preliminary motion does not constitute waiver of an issue.” The Department did not challenge venue, so that issue is waived. The Motion does not assert any failure to comply with Rules 7-202 and 7-203, nor has it asserted that it is not an “administrative agency” for the purposes of Rule 7-401. The Motion challenges Petitioner's standing, and makes a number of incorrect arguments about the scope of this Court's review. The DNR bears the burden of proof to demonstrate that the Petitioners lack standing, but has not presented any evidence to support

such a claim. “An adjoining, confronting or nearby property owner is deemed, prima facie, to be specially damaged and, therefore, a person aggrieved. The person challenging the fact of aggrievement has the burden of denying such damage.” Bryniarski v. Montgomery Cty. Bd. of Appeals, 247 Md. 137, 144–45, 230 A.2d 289, 294 (1967).

5. The DNR bears the burden of demonstrating that Petitioners do not have standing, but offer no such evidence. The Petition on its face shows that Petitioners have standing.

The Rules only require Petitioners to make the following statements related to standing: “state whether the petitioner was a party to the agency proceeding, and if the petitioner was not a party to the agency proceeding, state the basis of the petitioner's standing to seek judicial review.” Maryland Rule 7-202. Petitioners met the requirement of the Rule and provided additional information demonstrating their standing:

14. Petitioner Storck is a resident of Garrett County and a Member of Yough Farms, LLC. He submitted a public comment and participated in the July 10, 2023 hearing in Garrett County, which was the only public hearing involved in the decision. His comments appear at 46:50 of the public hearing which appears on Youtube at <https://youtu.be/OzsK2Gq8T5o?si=VmB0fKUMad0Dy5wQ>.

15. Through Yough Farms, LLC, Petitioner Storck owns the closest parcel of privately owned land to the proposed project which abuts the river. His parcel is bounded to the North and South by lands owned by the Department of Natural Resources, and, as is the bank across the river from his parcel.

16. Petitioner Storck has a special interest as an adjoining land owner and additionally meets the standing criteria set forth in Md. Code, Nat. Res. § 1-503. “Any other person, regardless of whether he possesses a special interest different from that possessed generally by the residents of Maryland, or whether substantial personal or property damage to him is threatened. However, 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.”

17. Yough Farms, LLC is an adjoining land owner to the proposed project, and is additionally the owner of the only privately held parcel of riverfront land near the proposed site. The value of the property is directly tied to its direct ties to a Maryland Wild River, and would be diminished by the detrimental impact of the proposed project.

18. OLD GROWTH FOREST NETWORK is a Maryland non-stock company whose members are devoted to protecting undisturbed woodlands like the kind that are present in the Wild River corridor and at the proposed bridge site. Its Members participated in

the public comments held in relation to this project.

(Petition). From these facts, it can be seen that the Petitioners include the only private person (Yough Farms, LLC) that is contiguous to the lands owned by the Department of Natural Resources which will be used for this project, as well as the closest privately owned lands which are subject to the Yough River development restrictions - which person also participated via a Member in the public hearing and comments; 2) Mr. Storck participated in the comments and hearing and is a Member of Yough Farms, LLC, the nearest and contiguous private land owner; and 3) the Old Growth Forest Network, which is an environmental group devoted to preserving this kind of ancient forest, and whose members participated in the comments and hearing.

Maryland law provides that where - as here - there is no statute setting higher standards, standing requirements are lenient: “[T]he requirements for administrative standing under Maryland law are not very strict.” Chesapeake Bay Found., Inc. v. DCW Dutchship Island, LLC, 439 Md. 588, 599, 97 A.3d 135, 141 (2014). As the Maryland Court of Appeals explained in the Sugarloaf case those requirements are, by design, relaxed and informal. Sugarloaf v. Dept of Environment, 344 Md. 271, 286-87 (1996). The Petitioners participated in the comments and hearing below, and therefore are persons that met the criteria for administrative standing.

Judicial standing also requires that at least one petitioner be “aggrieved” by the decision. “If any appellant is a person aggrieved, the court will entertain the appeal even if other appellants are not persons aggrieved.” Chesapeake Bay Found., Inc. v. Clickner, 192 Md. App. 172, 186, 993 A.2d 1163, 1172 (2010). In this case, all the Petitioners are aggrieved. The cases specifically identify at least two factors which indicate the kind of particularized injury sufficient to grant standing -- both are alleged in this appeal. The case Bryniarski v. Montgomery Cty. Bd. of Appeals, 247 Md. 137, 144–45, 230 A.2d 289, 294 (1967), states the following:

An adjoining, confronting or nearby property owner is deemed, prima facie, to be specially damaged and, therefore, a person aggrieved. The person challenging the fact of aggrievement has the burden of denying such damage in his answer to the petition for appeal and of coming forward with evidence to establish that the petitioner is not, in fact, aggrieved.

Id. (Emphasis added). Yough Farms, LLC is an adjoining and nearby property owner, and the only nearby private owner with land in the wild river corridor. It is therefore prima facie specially damaged and aggrieved for the purposes of appeal.⁶

The Old Growth Forest Network also easily satisfies the Bryniarski test. There is no requirement that it own property in order to have standing. “[P]roperty ownership is not a prerequisite to aggrievement.” Chesapeake Bay Found., Inc. v. Clickner, 192 Md. App. 172, 189, 993 A.2d 1163, 1173 (2010). Old Growth Forest Network is identified in the Petition as “is a Maryland non-stock company whose members are devoted to protecting undisturbed woodlands like the kind that are present in the Wild River corridor and at the proposed bridge site. Its Members participated in the public comments held in relation to this project.” The DNR would bear the burden of showing that this was insufficient aggrievement, but it has offered no evidence to that effect. “The person challenging the fact of aggrievement has the burden of denying such damage in his answer to the petition for appeal and of coming forward with evidence to establish that the petitioner is not, in fact, aggrieved.” Bryniarski, 247 Md. 137, 144–45.

Petitioner Storck is a Member of Yough Farms, LLC and therefore directly connected to the controversy via the ownership of the farm. Additionally, Mr. Storck and Yough Farms, LLC qualify for standing under the Environmental Standing Act, which sets forth:

⁶ Maryland also recognizes “almost prima facie standing” and taxpayer standing, although there is no need to invoke those doctrines here. *See, e.g., State Ctr., LLC v. Lexington Charles Ltd. P'ship*, 438 Md. 451, 534, 92 A.3d 400, 449 (2014).

The following persons have standing to bring and maintain an action provided for in this section in the courts of equity of this State:...(3) Any other person, regardless of whether he possesses a special interest different from that possessed generally by the residents of Maryland, or whether substantial personal or property damage to him is threatened. However, 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.

Md. Code Ann., Nat. Res. § 1-503. The Petition states that they are residents of Garrett County and that the proposed act affects the environment in which they reside. The DNR offers no evidence to the contrary.⁷

In sum, Petitioners include all possible potential complainants: the closest private landowner, which is also contiguous to both the Yough Corridor and the DNR's property; an individual citizen who has an ownership interest in the farm, and who is a resident of the County and for whom the DNR's action affects the environment where he resides; and an environmental organization devoted to the specific cause of preserving old growth forests. All of whom additionally participated as individuals or through their members in the hearings and comments below. The DNR has offered no evidence to show that the parties do not have standing - despite its clear burden to make such a case if it could. Lastly, it is worthy of note that if the three petitioners in this case did not have standing, then there is no one else that possibly could. The land is owned by the DNR; the decision was made by the DNR; there is no closer landowner on the Yough Corridor; and there is no other environmental group with a greater interest in the outcome. An Agency should not be able to avoid all judicial review - even for actions that are flat out illegal - simply because its actions take place in isolated locations on property it owns.

⁷ The DNR complains that a notice of "the alleged condition, activity, or failure" was not delivered "at least 30 days prior to the commencement of the action" to the Attorney General. The language does not apply to a petition such as this one seeking review of the final decision of the Agency, which is not a "condition, activity, or failure." It is not possible to provide 30 days notice prior to filing a petition for judicial review, because the petition must be filed "within 30 days" after "the date of the order or action of which review is sought." Rule 7-203(a).

6. The DNR's Substantive Position: "It's Good To Be King."⁸

In a nutshell, the DNR's substantive position is this: no person can challenge the DNR's omnipotent and unreviewable authority and no Court has the power to review its decision, no matter how illegal, arbitrary or capricious. According to the DNR, the Secretary is a mini King who can ignore the legislature's requirement that he protect the Yough Corridor; can ignore the designation of this as an Irreplaceable Natural Area; and can ignore his Department's own regulations that prohibit roads, new bridges and clearing of trees. The Secretary can do what he wants, when he wants and however he wants, no matter how improper or arbitrary. Citizens and Circuit Court judges have no place asking impertinent questions. We should sit down and be quiet.

This position is a wild overreach and the motion should be denied. Circuit Courts have the inherent power to review administrative decisions. "Courts have the inherent power, through the writ of mandamus, by injunction, or otherwise, to correct abuses of discretion and arbitrary, illegal, capricious or unreasonable acts..... Heaps v. Cobb, 185 Md. 372, 379, 45 A.2d 73, 76 (1945). The rules for seeking such relief are set out in Maryland Rule 7-402, *et seq.* Maryland Rule 7-403 specifically says that this Court can review and take the following actions:

The court ... may issue the writ (1) remanding the case for further proceedings, or (2) reversing or modifying the decision if any substantial right of the plaintiff may have been prejudiced because a finding, conclusion, or decision of the agency: (A) is unconstitutional, (B) exceeds the statutory authority or jurisdiction of the agency, (C) results from an unlawful procedure, (D) is affected by any error of law, (E) is unsupported by competent, material, and substantial evidence in light of the entire record as submitted, (F) is arbitrary or capricious, or (G) is an abuse of its discretion.

⁸ The phrase "It's good to be king" is credited to Mel Brooks in History of the World Part I, wherein he played the King of France and generally was able to benefit from his office by avoiding consequences for inappropriate conduct. In Tom Petty's later song of the same name he sings "It's good to be king and have your own way, Get a feeling of peace at the end of the day." As a cultural reference, it indicates being insulated from consequence by being in power.

It is the authority in Heaps v. Cobb and Rule 7-403 on which Petitioners rely in seeking injunctive or declaratory relief - and it is clear that the Court has those powers.

- 7. The DNR's argument that the decision "was not reached on individual grounds, did not scrutinize a single property, and the decision-making process did not involve a deliberative fact-finding process with testimony and the weighing of evidence" is either misrepresentation to the Court or it is a confession that it failed in the duties imposed by the legislature.**

The DNR's final argument is that a writ of mandamus is not available because the "Decision is not quasi-judicial as required by Md. Rule 7-401(a)." Brief, p. 4. Rule 7-401(a) governs "actions for judicial review of a quasi-judicial order or action of an administrative agency where review is not expressly authorized by law." The Committee Note in the rule cites to Heaps v. Cobb, 185 Md. 372, 380 (1945)("Where the statute or ordinance makes no provision for judicial review, an implied limitation upon an administrative board's authority is that its decisions be supported by facts and that they be not arbitrary, capricious or unreasonable.").

The DNR relies on Overpak v. Baltimore to argue that its decision is not quasi-judicial and specific, and is therefore not reviewable under Rule 7-401. "The outcome of the analysis of whether a given act is quasi-judicial in nature is guided by two criteria: (1) the act or decision is reached on individual, as opposed to general, grounds, and scrutinizes a single property, and (2) there is a deliberative fact-finding process with testimony and the weighing of evidence."

Maryland Overpak Corp. v. Mayor And City Council Of Baltimore, 395 Md. 16, 33, 909 A.2d 235, 245 (2006)(citations omitted). In order to try to place itself within this more limited category of judicial review,⁹ the DNR represents that "the Department's Decision was not

⁹ Although the DNR is using this distinction in support of a Motion to Dismiss, even if it were correct that this were a legislative act - which it was not - legislative acts are still subject to judicial review. "A legislative or quasi-legislative decision, as distinguished from a quasi-judicial or administrative decision, is also subject to court review, by invoking the court's original jurisdiction. Unlike ordinary statutory and nonstatutory judicial review of administrative decisions, legislative actions are subject to much more limited review." Armstrong v. Mayor & City Council of Baltimore, 169 Md. App. 655, 668, 906 A.2d 415, 422 (2006).

reached on individual grounds, did not scrutinize a single property, and the decision-making process did not involve a deliberative fact-finding process with testimony and the weighing of evidence.” The argument is either a misrepresentation or a confession. Or perhaps both.

The Overpak analysis is based on the more extended evaluation in Armstrong v. Mayor & City Council of Baltimore, 169 Md. App. 655, 669, 906 A.2d 415, 423 (2006), which cites in turn to Dep't of Nat. Res. v. Linchester Sand & Gravel Corp., 274 Md. 211 (1975). In DNR v. Linchester, the DNR had been recently tasked with protecting the state’s wetlands.

Maryland's recently enacted ‘wetlands statute,’ marshalled by the General Assembly to protect those vast acres of ecologically, economically, aesthetically and recreationally valuable terraqueous areas having completely, partially or periodically submerged bottoms, which are the habitats of innumerable variations of aquatic life, is the legal quagmire through which was must wade in order to resolve this dispute.

Id., 274 Md. 211, 212. The case involved the appeal of the denial of a permit by the DNR for dredging and construction of a wetland.

The Supreme Court (then Court of Appeals) viewed the process of reviewing permits under the wetlands act one where the DNR was to acquire the facts of the specific cases and apply the law as directed by the legislature. “[A]dministrative agencies [] after being provided with general rules and standards to guide them, are given ‘the task of acquiring information, working out the details, and applying these rules and standards to specific cases.’” DNR v. Linchester, 274 Md. 211, 218–19, 334 A.2d 514, 520 (1975)(emphasis added). After sifting through a number of issues not found in the instant case, the Supreme Court held that the DNR’s function in granting or denying permits was a quasi-judicial fact-finding role, subject “arbitrary and capricious” scrutiny.

The agency now before us, the Department of Natural Resources, does not present a twilight situation such as does the Workmen's Compensation Commission. It is

clear that whether, under Title 9 of the Natural Resources Article, a particular parcel of land comes within the statutory wetlands designation and, if so, whether it must remain in its then existing natural state for ecological, aesthetic, environmental and recreational reasons are decisions to be made pursuant to the State's police power. Consequently, departmental activities must be exercised within the guidelines and standards prescribed by the Legislature; thus circumscribed, when granting or denying a permit in a specific case, the Secretary and the board of review gather and sift evidence which is directed both at present and future repercussions so as to take into account the needs of the public in general. In this regard the decisions and the activities of this agency are not dissimilar from those of zoning councils, the tax court, or the Public Service Commission, all of whose actions we determined can be reviewed by the judiciary only under an 'arbitrary and capricious' type of scrutiny.

DNR v. Linchester, 274 Md. 227–28 (emphasis added).

The DNR's functions in the instant matter are effectively identical to the review of wetlands permits considered in Linchester. The language of the wetlands act at the time is mirrored in the language of the instant regulation.

<p>Wetlands Act, per <u>Dep't of Nat. Res. v. Linchester Sand & Gravel Corp.</u>, 274 Md. 211, 215–16, 334 A.2d 514, 518–19 (1975).</p>	<p>COMAR Youghiogeny Wild River 08.15.02.01 et. seq.</p>
<p>'In granting, denying, or limiting any permit, the secretary,' ...may limit or impose conditions or limitations designed to carry out the public policy set forth in this subtitle....</p>	<p>The Department shall deny the use or development permit or issue it with or without conditions and restrictions</p>
<p>shall consider the effect of the proposed work with reference to the public health and welfare, marine fisheries, shellfisheries, wildlife, economic benefits, the protection of life and property from flood, hurricane and other natural disasters, and the public policy set forth in this subtitle.</p>	<p>after consideration of: (1) Impacts the proposed use or development will have on the aquatic resources of the wild river; (2) Impacts the proposed use or development will have on the riverine resources of the wild river; (3) Concerns of the private landowners in the scenic corridor who may be affected by the proposed use or development; (4) Any effect the proposed use or development may have on the wild character of the wild river and the scenic corridor; and (5) Any effect the proposed use or development may have on</p>

	visitor experience on the wild river or within the scenic corridor.
Upon receipt of an application for a permit pursuant to this section, the secretary or his designee, '... shall hold a public hearing on the matter within 60 days after receipt of the application. A decision shall be made by the secretary within 30 days after the hearing.	The Department shall respond to the request [for an exception] within 60 days of receipt by either granting, conditionally granting, or denying the request. The Department shall hold a public hearing in Garrett County on the application before rendering its final decision. Md. Code Regs. 08.15.03.03

In the instant case, the DNR received an application for an exception related to the replacement of the Swallow Falls Bridge. The application is published on the DNR's website at this location:

<https://dnr.maryland.gov/publiclands/Documents/Swallow-Falls/Scenic-and-Wild-Rivers-Development-Application-signed.pdf>. The required attachments which lay out the facts related to the application are here.

<https://dnr.maryland.gov/publiclands/Documents/Swallow-Falls/Swallow-Falls-Scenic-and-Wild-River-Environmental-Assessment-Final-06-16-23.pdf>. The public hearing held by the DNR was published to youtube and is linked on the DNR's website along with the documents above and the public comments received concerning the proposal.

<https://dnr.maryland.gov/publiclands/Pages/western/SwallowFalls/Swallow-Falls-Bridge-Replacement-Project.aspx>. The application identifies the specific location for which the exception is sought.

LOCATION OF PROPOSED DEVELOPMENT

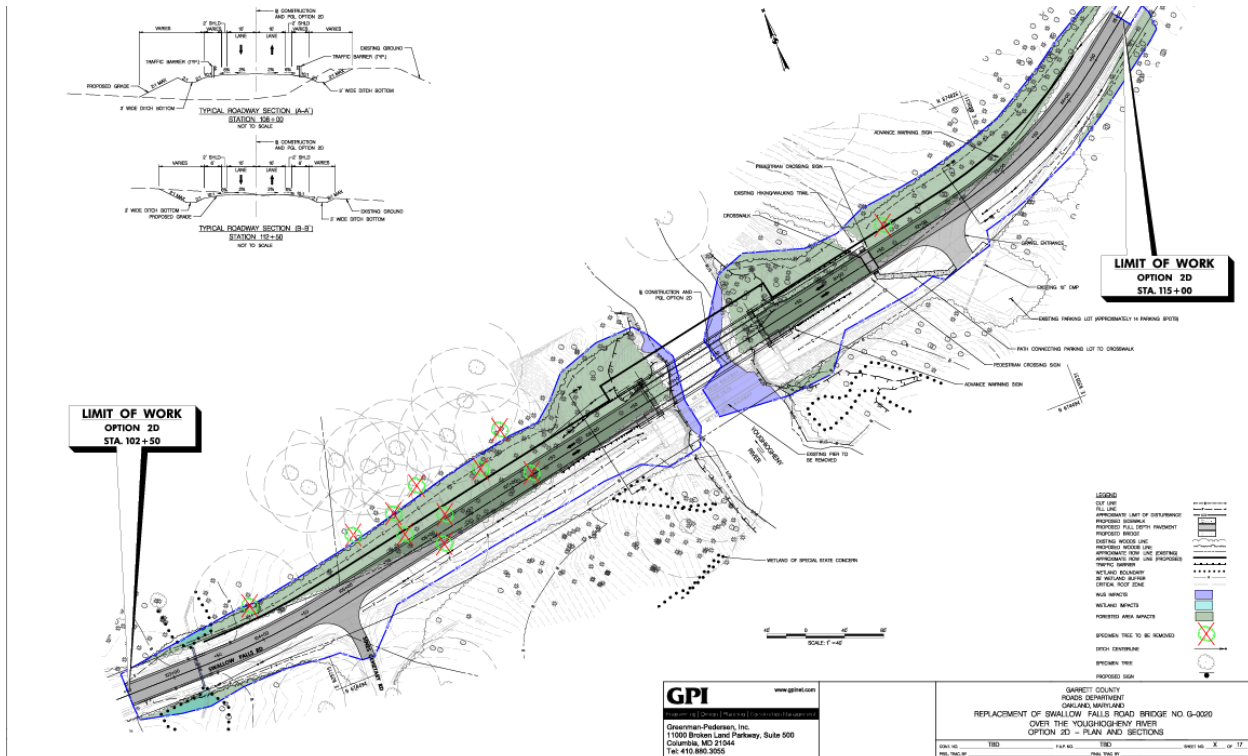
River Name	Youghiogheny River
General Location	Swallow Falls Road over the Youghiogheny River in Swallow Falls State Park
Latitude/Longitude	39.49, -79.41

(Excerpt, Development Application). The supporting documentation shows that the proposed location is not general, it is specific - sufficiently specific that the applicant was able to exactly measure the forest to be cleared and exactly count the hundreds of trees to be cut.

Table 1 – Design Alternative Environmental Impacts

	Forest Clearing (acres)	Specimen Tree Removal	Specimen Trees with CRZ Impact to be Preserved	Tree Removal 12"-29.9"	Wetland Impacts (SF)	Wetland Buffer Impacts (SF)	Temporary WUS Impacts (SF)	Permanent WUS Impacts (SF)
Option 1	0.96	7	7	163	1,378	6,588	4,686	58
Option 1C	0.68	4	6	110	1,373	6,585	4,378	0
Option 2	1.27	11	8	227	921	4,069	4,689	58
Option 2B	1.70	13	9	269	1,675	5,724	4,698	58
Option 2C	1.00	7	7	183	922	4,052	4,696	58
Option 2D	1.21	11	6	222	921	4,067	4,689	58

(Excerpt, Supporting Documentation, p. 21). The location is sufficiently specific that it has been surveyed and completed engineering site plans have been prepared, including limits of disturbance, trees to be removed, new easements to be created - everything necessary to begin work.



(Excerpt, Supporting Documentation, p. 85). We can be certain that the Secretary approved the location depicted in Option 2 because that was the “offset location” and the approval states: “As described in the County’s application, this project involves the construction of a new bridge on an offset alignment in the area of the existing bridge.” (Approval letter, p. 1, <https://dnr.maryland.gov/publiclands/Documents/Swallow-Falls/Swallow-Falls-Bridge-Replacement-DNR-Decision-Letter.pdf>).

All of this is unquestionably within the Youghiogheny Scenic and Wild River Corridor, which the DNR is unquestionably charged with protecting from development.

YOUGHIOGHENY SCENIC AND WILD RIVER APPLICATION FOR USE AND DEVELOPMENT

The Maryland Department of Natural Resources Youghiohony Scenic and Wild Rivers Program is authorized by §8-401 through §8-411 of Title 8 of the Natural Resources Article of the Annotated Code of Maryland, and is implemented through the regulatory provisions of COMAR 08.15.01 through 08.15.04. The regulations require approval of land use and development activities in, near or affecting rivers that have been designated by the Maryland General Assembly as Scenic and Wild. Information provided on this form will be used in evaluating the request for approval. Information in this application is a matter of public record and will be included in public notice of the proposed activity. If necessary and sufficient information is not provided, the application may not be approved.

(Except, Application p.1). The application form which the DNR drafted and published admits the location and describes itself as having to provide approval. As such, this is the precise situation considered in DNR v. Linchester - an application to the DNR for permission to disturb lands the DNR is charged to protect. The DNR's review of the application required finding facts and applying the law.

If the DNR's assertion that "the Department's Decision was not reached on a individual grounds, did not scrutinize a single property, and the decision-making process did not involve a deliberative fact-finding process with testimony and the weighing of evidence" then that is a confession that the DNR did not do the job it was required to do, and this case might as well be immediately remanded with instructions that the DNR fulfill its obligations. If that statement is not true, then the Attorney General's office should be admonished to limit its advocacy to the bounds of the truth.

8. Conclusion

This matter was properly filed within 30 days of the DNR's decision pursuant to Maryland Rule 7-401. It included all of the contents imposed by Maryland Rules 7-202 and 7-203. The DNR challenged Petitioner's standing, but bears the burden of proof in such a challenge, and did not present any evidence. The DNR's failure to offer evidence stems from its confusion about the Rule on which there motion must necessarily be based - citing Maryland

Rule 2-322 (where a plaintiff has an obligation to state facts and make a claim), with Maryland Rule 7-204(b) (where the DNR has the burden of proving that the appeal is without grounds). The DNR's arguments about injunctions and declaratory relief can be rejected, as the kinds of relief available are specifically laid out in Heaps v. Cobb and Rule 7-403. Its argument that it did not engage in a deliberative process in granting a permit to destroy old growth forest under its protection - is at best silly and at worst false. It is definitely an admission that the DNR did not do its job - which is exactly the position of the Petitioner's herein.

The Motion should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing Opposition to the Motion to Dismiss was served via the Electronic Filing System of Garrett County on all counsel of record on this 14th day of November, 2023.

Respectfully submitted,

J. Dirk Schwenk /s/ _____

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