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May 6, 2010

The Honorable Martin O'Malley
Governor of Maryland
State House
Annapolis, Maryland 21401-1991

RE: House Bill 68

Dear Governor O'Malley:

We have reviewed, and hereby approve for constitutionality and legal sufficiency, House Bill 68, entitled "Department of the Environment – Grants – Small Business and Certified Minority Business Enterprises."

House Bill 68 amends portions of the Environment Article relating to the Chesapeake and Atlantic Coastal Bays Nonpoint Source Fund to add a requirement that grantees take steps outlined in the bill to include small businesses, certified minority business enterprises, and certified minority business enterprises classified as women-owned businesses. These steps are:

- (i) Placing qualified small business enterprises, minority business enterprises, and women's business enterprises on solicitation lists;
- (ii) Assuring that small business enterprises, minority business enterprises, and women's business enterprises are solicited whenever they are potential sources;
- (iii) Dividing total requirements, when economically feasible, into small tasks or quantities to permit maximum participation of small business enterprises, minority business enterprises, and women's business enterprises;

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- (iv) Establishing delivery schedules, where the requirement permits, that encourage participation by small business enterprises, minority business enterprises, and women's business enterprises; and
- (v) Using the services and assistance of the Maryland Department of Transportation and the Governor's Office of Minority Affairs in identifying and soliciting small business enterprises, minority business enterprises, and women's business enterprises.

If these steps are not demonstrated to the satisfaction of the Maryland Department of the Environment (the "Department" or "MDE"), the Department may withhold financial assistance for the project. The required steps are consistent with other grant programs administered by the Department. *See, e.g.*, EN § 9-345 (Water Pollution Control Fund) and EN § 9-421 (general provisions for water supply facilities). House Bill 68, however, contains an additional provision, not found elsewhere in Maryland law. The new section states that when determining whether the grantee took the required steps,

the Department shall consider the availability to the grantee of small businesses, certified minority business enterprises, and certified minority business enterprises classified as women-owned businesses that are capable of completing all or part of the project.

House Bill 68, page 4, lines 30 – 35.

According to materials in the bill file, the foregoing language was amended into the bill at the request of the Maryland Association of Counties, Inc. ("MACo"). After listing the required steps in House Bill 68, MACo stated that it was "concerned about the potentially subjective interpretation that can be taken by MDE in determining whether a grantee has complied with these steps." *See* MACo Statement in Support With Amendments, House Bill 68, submitted to Environmental Matters Committee, Feb. 3, 2010. MACo argued that "the proximity and availability of small businesses, MBEs, and WBEs to the grantee capable of completing all or part of a project should be considered by MDE. It is sometimes difficult, especially in rural areas, to find qualifying businesses that possess the knowledge and means necessary to bid or work on the project." *Id.*

For House Bill 68 to be constitutional in its application, it is our view that MDE must judge compliance with its requirements based simply on whether the steps were

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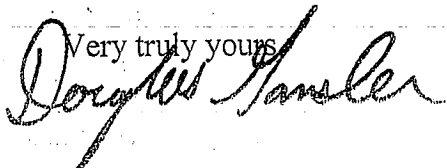
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taken, not whether some specified level of participation by certified minority business enterprises and certified minority business enterprises classified as women-owned businesses was achieved. A government program that uses race and gender classifications is constitutional only if it is narrowly tailored to support a compelling government interest. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995). As we have previously advised: "Because a race or gender-conscious program is constitutionally suspect, the Supreme Court has essentially put the burden on a government entity with such a program to justify the program with findings based on evidence." 91 *Op. Att'y Gen.* 181, 183 (2006). An agency must show that the program is a necessary remedial measure to address a past discriminatory practice, which can be shown by evidence such as a disparity study. The Supreme Court, however, made clear that a "generalized assertion that there has been past discrimination in an entire industry provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy." *Croson*, 488 U.S. at 498. Therefore, without specific evidence to support a remedial measure to address past discrimination, it is our view that MDE should not implement House Bill 68 in a way that requires a specific level of participation by minority business enterprises and women's business enterprises.

Nevertheless, while House Bill 68 is aimed at providing equal opportunities to small, minority, and women's business enterprises, the required actions are, in our view, race and gender neutral. The required actions are legitimate outreach activities that will likely expand the pool of qualified applicants. *See, e.g., Peightal v. Metropolitan Dade Co.*, 26 F.3d 1545, 1557-1558 (11th Cir. 1994) (presentations at job fairs and other events created to apprise minorities of government career opportunities are race-neutral). Moreover, MDE could track participation by minority business enterprises and women's business enterprises with grantees. So long as grant decisions are not made on the basis of race or gender, House Bill 68 is constitutional.

Very truly yours



Douglas F. Gansler
Attorney General

cc: The Honorable John P. McDonough
Joseph Bryce
Karl Aro