



THE SENATE OF MARYLAND
ANNAPOLIS, MARYLAND 21401

**Testimony of Senator Jill P. Carter
In Favor of SB0334 - Water Pollution Control - Intervention in Civil
Actions - Rights and Authority
Before the Judicial Proceedings Committee
on January 26, 2021**

Mr. Chairman, Vice chair, and Members of the Committee:

Intervention is an important function for allowing interested parties to engage in legal matters that concern them. Intervention is all the more important when it comes to enforcement of our environmental laws, given the role of Citizen Suit provisions, allowing citizens to take the role “private attorneys general” that Congress established for citizens and the partnership of the state, the public, and environmental organizations in protecting our natural resources. Unfortunately, while Maryland law gives citizens the right to intervene, the Maryland Court of Special Appeals has refused to recognize that right in state Clean Water Act proceedings, even when both Maryland Department of the Environment and the Maryland Attorney General have expressly supported such intervention. Accordingly, we ask for your help enacting legislation to establish a statutory right to intervene for plaintiffs who already demonstrate the kind of standing needed to sustain a citizen suit for violations of the Clean Water Act.

A. Background: “Intervention as of Right” in Maryland

- **The federal Clean Water Act (“CWA”) provides several mechanisms for citizen participation, including the right to bring**

citizen suits against violations and the right to intervene in an enforcement action. 33 U.S.C. §§ 1365(a)(1), 1365(b)(1)(B). The importance of citizen enforcement to the CWA's regulatory scheme is reflected in the requirements for state-administered programs, such as Maryland's, which stipulate that a state *must allow* intervention as of right—where a citizen has an interest that is or may be adversely affected—or, alternatively, allow for and respond to public comments on proposed settlements. 40 C.F.R. § 123.27(d).

- **Maryland chose the first option, which is to provide intervention as of right to adversely affected citizens. See *Maryland Rule 2-214(a)*. Both the federal CWA and the regulations governing state-administered programs establish intervention as a key component of citizen participation in the enforcement process.**

- **The Maryland rules allow citizens to intervene as of right in two instances. First, when that intervention is timely and there is a statute that provides an *unconditional* right under Md. Rule 2-214(a)(1). If there is no statutory right, then citizens have to seek a *conditional* right to intervene under Md. Rule 2-214(a)(2). In order to secure a *conditional* right to intervene, that citizen's intervention must still be timely but must also meet additional conditions, for example, having an interest in the lawsuit.**

- **A decision by the Court of Special Appeals, however, has made it functionally impossible for environmental groups and most citizens to intervene as of right in these proceedings. In *Environmental Integrity Project v. Mirant Ash Management, LLC*, 197 Md. App. 179 (2010), the Maryland Court of Special Appeals found that environmental groups and citizens did not meet the**

test for intervention as of right in Maryland, as they lacked interests different than those of the general public, and with the presumption that Maryland Department of the Environment (“MDE”) would adequately represent their interests. In this case, toxic coal ash was being released into the Potomac River and local streams.

- The Maryland Attorney General supported the intervention of environmental organizations in that case.

- While the court’s analysis was premised on the facts of a specific case, it is difficult to see how *any* environmental group or most interested citizens could overcome this exceptionally high hurdle. The groups’ have specifically articulated interests: Environmental Integrity Project (“EIP”) is concerned with the enforcement of state environmental laws to prevent improper dumping of coal ash, one of the largest types of industrial waste generated in the United States, and Potomac Riverkeeper Network (“PRKN”) is also concerned with protecting and preventing pollution of their local waterways at issue in the case. Still, the court found these interests to be no different than the general public and therefore insufficient.

- In spite of the fact that groups presented evidence that five individual citizens lived five to fifteen miles downstream of the facility, recreated on and around the rivers, and expressed concerns regarding the pollution’s impact on their property values, the court found their interests to be no different than those of the general public. Under the court’s stringent view, the only proper intervening party appears to be an adjoining property owner who can demonstrate higher levels of pollution on his or her property. Thus, the Maryland Court of Special Appeals has effectively ruled that environmental groups and citizens without property adjoining the facility in question do not have the right to intervene in state Clean Water Act enforcement actions, even when intervention is supported by the state.

- A review of case law prior to and after *Mirant* bears this out: there have not been any instances of environmental groups or citizens intervening in state Clean Water Act enforcement actions since.
- The State supported the parties' motion to intervene in the *Mirant* case. However, it must also be acknowledged that the Maryland Department of the Environment and Office of the Attorney General's support was *not enough* to overcome The Court of Special Appeal's interpretation of the State's intervention as of right laws.

Quote from *Mirant* briefing:

"The Department and the Office of the Attorney General strongly support citizen engagement in matters concerning the quality of waters of this State and actions that threaten them. Citizens are often, through sampling streams and rivers, walking their shores and fishing their waters, the first to observe a problem. As such, the Department not only welcomes, but actively solicits citizens to come forward with complaints. In addition, the State is undergoing a period of budgetary constraints and hiring freezes. The convergence of this resources crisis with growing concern about the future of the Chesapeake and Coastal Bays makes citizen participation particularly welcome."

- This "growing concern" rings even truer today in the current financial crisis due to the COVID-19 pandemic, especially as the U.S. Environmental Protection Agency ("EPA") has stated that it will not seek enforcement of pollution violations during this pandemic.
- The COVID-19 pandemic has also shown that frontline communities suffering existing health problems from pollution in their communities are far more likely to contract and potentially die from COVID-19. Additionally, state and federal

enforcement budgets have been slashed, reducing government oversight and increasing the likelihood that more violations of law go unpunished. Moreover, political considerations—including interstate competition and pressure from industry to minimize regulation—threaten to further compromise states’ ability to enforce the laws. As government enforcement becomes increasingly less reliable, citizen enforcement of environmental law is more necessary than ever.

- We view SB334 as the *only* opportunity to ensure that citizens are provided the public participation that is required under the Clean Water Act for Maryland’s program.

Maryland Attorney General Agrees with this Legislation and its Purpose

- Based on some points raised by the opposition of cities and counties through their legislative representatives MACo and MML, we sought clarification from the Maryland Attorney General’s office. We have provided a copy of this letter to committee members. The letter states: *“House Bill 76 [and Senate Bill 334] does not expand standing or create a new cause of action; rather, it adopts the specific intervention provision outlined in the CWA for states to provide the required public participation.”*

Intervention is in the state’s interest:

- Citizen intervention allows individual citizens, organizations, cities and counties to help supplement the State’s resources and assist them in collecting penalties from polluters.
 - All penalties collected go into Maryland’s Clean Water Fund, making these resources available for a wide array of environmental and natural resource protection and restoration programs in the state.

- Penalties will *never* go to “intervenor”; they only go to the state.
- And the amount of penalties the state is allowed to collect does not increase when another party intervenes.
- Additionally, intervention does not apply to any other state programs, such as those administered by Maryland Department of Agriculture, Maryland Natural Resources Department, or even other programs administered by Maryland Department of the Environment. It only applies to Clean Water Act enforcement cases.
- MDE’s enforcement has been on a steep decline. Clean water act enforcement actions by Maryland Department of the Environment have dropped to record lows in Maryland in 4 of the last 5 years, and FY 20’s number was 85% below the long term average before 2015, when the steep decline in enforcement began. This drop is *not* due to a reduction in violations, as the percentage of facilities having violations has actually increased slightly over this same time period, according to MDE’s data.
- Eight other states (Alabama, Arkansas, Florida, Indiana, Kansas, Oklahoma, Tennessee and Wyoming) have used legislation to allow for unconditional citizen intervention as a right, ensuring that that public participation is provided for in the courts. However, most states already provided for intervention as a right through direct incorporation of the federal standard or incorporation by reference.
- Clean water is not just about health and safety. It is an economic necessity. About 40 million anglers spend \$45B annually to fish in U.S. waters; the beverage industry uses more than 12B gallons of water annually to produce products valued at \$58B; manufacturing companies use nine trillion gallons of

freshwater every year; 31 percent of all water withdrawals in the U.S. are for irrigation, highlighting the extent to which the nation's farmers depend on clean water. All of these uses become restricted when our waters are polluted. This means that there are strong economic reasons to ensure that enforcement of the CWA is stringent and sufficient penalties are assessed to remediate the damage from unlawful discharges of pollutants.

What this bill *does* and *does not* do:

- It **DOES NOT** create another cause of action. If the government has already begun—or is diligently pursuing legal action in court in order to require compliance with the Clean Water Act—a citizen cannot sue independently. The citizen may, however, still be able to file a motion to intervene in that case.
- It **DOES NOT** increase the costs of burden on the state. There will be no increase in lawsuits or burden on state courts or the attorney general's office. In fact, intervention helps relieve these burdens by supplementing state enforcement authority. For instance, citizen groups often hire their own experts from money out of their own pocket to help the State's staff (and polluter) reach the most efficient solution to bring the facility back into compliance with clean water laws (and avoid racking up more penalties, which are assessed per violation per day).
- Intervention **DOES NOT** provide any independent right to bring a lawsuit. It is not "standing" and, in fact, standing must be met by any party seeking to intervene. The State must already have brought a case in state court. This bill allows affected citizens to intervene in those cases.
- It **DOES NOT** expand standing. It **DOES** allow Maryland to provide intervention to citizens. It **DOES** bring Maryland into compliance with the Federal Clean Water Act. Maryland is

explicitly required to provide intervention in state clean water cases. Otherwise, its clean water program is out of compliance and could be de-authorized. This bill is not asking Maryland to provide more than what is owed to its citizens, it is asking to provide what it is legally required to do.

- Intervention only applies to a very narrow set of circumstances.
 - Citizen intervention under SB334 *only* applies to Clean Water Act enforcement cases, where the state files the enforcement action in state court. If Maryland were to file the enforcement action in federal court, citizens would already be provided the right of unconditional intervention, where standing is met.

As such, I urge this committee to give a favorable report on SB0334. Thank you.

Respectfully,



Jill P. Carter