



## Testimony in Support of Senate Bill 334 (Senator Carter) Water Pollution Control – Intervention in Civil Actions – Rights and Authority

January 26, 2021

Dear Chairman Smith and Members of the Committee:

Thank you for this opportunity to submit testimony in support of Senate Bill 334 on behalf of Waterkeepers Chesapeake, a coalition of seventeen Waterkeepers, Riverkeepers, and Coastkeepers working to make the waters of the Chesapeake and Coastal Bays swimmable and fishable. If enacted, SB 334 will be an important tool for Waterkeepers, citizen organizations, political subdivisions, and community groups working to protect their communities, rivers, and streams from pollution.

Senate Bill 334 **aligns Maryland law with federal law** by allowing citizen intervention in civil enforcement actions in state court, only when brought by the state of Maryland against alleged polluters. While the right to intervention is provided in federal court under the Federal Clean Water Act, when the same action is brought **in state court, intervention is functionally prohibited. This is in conflict with the requirements under the federal Clean Water Act for delegated state programs such as Maryland's.** This bar to intervention negatively impacts Waterkeepers, citizens, and communities seeking full and fair enforcement of our laws.

To be clear, **this bill is narrowly drafted, and does not impact standing, or offer citizens any additional causes of action.** (See Counsel to the General Assembly Memo, *attached*.)

**MDE's enforcement, in terms of both penalties and cases, has been on a steep decline.**<sup>1</sup>

Clean Water Act enforcement actions by Maryland Department of the Environment have

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<sup>1</sup> See Len Lazarik, Md. Environment Department Taking Fewer Enforcement Actions Against Water Pollution, MarylandReporter.com (April 22, 2018) <https://marylandreporter.com/2018/04/22/md-environment-department-taking-fewer-enforcement-actions-against-water-pollution/#:~:text=In%20a%20report%20submitted%20earlier,fewest%20since%20fiscal%20year%202008>



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.<sup>2</sup> 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.

A decline in penalties sought is, unequivocally, an environmental justice issue. A lack of fair enforcement is a clear signal to polluters—that they are welcome to pollute Maryland's communities. When these polluters engage in violations, they disproportionately do so in low-income communities and communities of color.<sup>3</sup> Fair penalties are an important way that Maryland can address this disparity. It is in this spirit of participation and fair citizen involvement that the Clean Water Act ensures access to intervention in both state and federal court. **SB 334 addresses disparities and decline by ensuring that Maryland citizens have full access to intervention and participation—in the manner consistent with what the Clean Water Act prescribes** for states with delegated Clean Water Act permitting authority.

**Maryland's low income communities and communities of color are most susceptible to being polluted, while possessing less tools (such as access to intervention) to address water pollution.** A report from the Environmental Law Clinic at The University of Maryland stated that the lack of investment of Clean Water Act resources in Maryland's overburdened communities is highly problematic, and disrupts efforts to make these communities healthier and more sustainable.<sup>4</sup> The report also concluded that in terms of a number of health risks in communities of color, that "...environmental factors, such as pollution and the lack of health promoting infrastructure in many communities, most likely contribute to the health disparities in Maryland."<sup>5</sup>

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<sup>2</sup> See Md. Dept. of Environment, *Annual Enforcement & Compliance Report: Fiscal Year 2020* (2020) [https://mde.maryland.gov/Documents/AECR\\_FY20.pdf](https://mde.maryland.gov/Documents/AECR_FY20.pdf).

<sup>3</sup> See Elizabeth Shwe, *Md. Needs an Environmental Justice Plan, Advocates Say*, (August 24, 2020) <https://www.marylandmatters.org/2020/08/24/md-needs-an-environmental-justice-plan-advocates-say/>.

<sup>4</sup> See Maryland Environmental Law Clinic, *Environmental Justice in Maryland*, (September, 2015) <https://www.bdlaw.com/content/uploads/2019/04/fulltext.pdf>.

<sup>5</sup> *Id.*



**This bill provides an essential tool for both citizens and the state, and an opportunity to make sure polluters are held to account through full and fair enforcement actions and penalties, which are strong deterrents to future pollution.** Intervention allows community members across the state—particularly in overburdened communities on the frontlines of pollution, to seek stronger penalties through intervention and other appropriate court remedies for their communities. Ensuring that Marylanders have the right to intervene in Clean Water Act cases brought by the state in state court (which is comports with what the Federal Clean Water Act already requires) is a short bridge to cross towards a more just, healthy and equitable Maryland.

**For all of these reasons, we urge a favorable report on Senate Bill 334.**

Respectfully submitted,

A handwritten signature in black ink, appearing to read "M.A. Johnson".

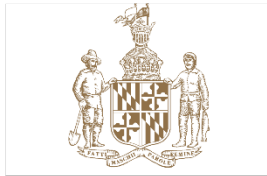
Morgan Johnson  
Staff Attorney  
Waterkeepers Chesapeake

Attachment: AG - Counsel to The General Assembly Memo

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January 20, 2021

The Honorable Sara Love  
Maryland General Assembly  
210 House Office Bldg.  
Annapolis, Maryland 21401  
*Via email*

**Re: *House Bill 76 - Water Pollution Control – Intervention in Civil Actions – Rights and Authority***

Dear Delegate Love:

You asked whether House Bill 76 expands standing in cases addressing compliance with specified environmental laws and regulations, or creates new causes of action. I do not read the bill that way. Rather, in my view, the bill would align State law consistent with the federal Clean Water Act (“CWA”).

Congress considers citizen suits as a key part of the CWA enforcement program. “The CWA prohibits independent citizen suits where a state ‘has commenced and is diligently pursuing a civil or criminal action ... to require compliance,’ but also provides that ‘in any such action in a court of the United States any citizen may intervene as a matter of right.’” *Environmental Integrity Project v. Mirant Ash Management, LLC*, 197 Md. App. 179, 187 n.8 (2010) (quoting 33 U.S.C. § 1365(b)(1)(B)). *See also Kentucky v. Shepherd*, 366 S.W.3d 1, 5 (Ky. 2012) (“[c]learly the regulations contemplate citizen intervention in an agency’s state-court enforcement action”).

It is important to note that intervention as a matter of right in this context is limited to a party who has an interest which is or may be adversely affected. *See* 40 C.F.R. 123.27(d)(1) (specifying as an option for states to meet the mandated public participation requirement in the CWA the provision in state law of “intervention as of right in any civil or administrative action to obtain remedies ... by any citizen having an interest which is or may be adversely affected”); *U.S. v. Hooker Chemicals & Plastics Corp.*, 101 F.R.D. 451 (W.D.N.Y. 1984) (holding that “[t]he right to intervene applies to actions which citizens could have commenced in their own right if the government had

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not acted first”). Therefore, in my view, House Bill 76 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.

Sincerely,

A handwritten signature in black ink, appearing to read "Sandra Benson Brantley". The signature is fluid and cursive, with the first name being the most prominent.

Sandra Benson Brantley  
Counsel to the General Assembly