

BRIAN E. FROSH  
ATTORNEY GENERAL

ELIZABETH F. HARRIS  
CHIEF DEPUTY ATTORNEY GENERAL

CAROLYN A. QUATTROCKI  
DEPUTY ATTORNEY GENERAL



THE ATTORNEY GENERAL OF MARYLAND  
OFFICE OF COUNSEL TO THE GENERAL ASSEMBLY

SANDRA BENSON BRANTLEY  
COUNSEL TO THE GENERAL ASSEMBLY

KATHRYN M. ROWE  
DEPUTY COUNSEL

JEREMY M. MCCOY  
ASSISTANT ATTORNEY GENERAL

DAVID W. STAMPER  
ASSISTANT ATTORNEY GENERAL

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 "Sandra" being the most prominent.

Sandra Benson Brantley  
Counsel to the General Assembly