



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 as they protect their communities, rivers, and streams from pollution. These comments are also submitted on behalf of Chesapeake Bay Foundation, Chesapeake Legal Alliance, Assateague Coastal Trust, Center for Progressive Reform, Food and Water Watch, Potomac Riverkeeper Network, Safe Skies Maryland, Maryland Campaign for Environmental Human Rights, ShoreRivers, Maryland Sierra Club, and Blue Water Baltimore.

Senate Bill 334 would align Maryland law with federal law by allowing citizen intervention in civil enforcement actions brought by the state of Maryland against alleged polluters. While this right 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 – which Maryland has.

The Federal Clean Water Act and Maryland’s State Delegated Program

While Congress intended federal and state agencies to be primarily responsible for enforcement of the Clean Water Act, legislators recognized that enforcing these provisions could be beyond the resources of the federal government and/or expensive and politically difficult. Therefore, Congress included provisions in the Clean Water Act to allow private citizens the ability to enforce the laws when the government was unwilling or unable to do so. These so-called “citizen lawsuit” (or “citizen suit”) provisions, included in every major federal environmental law on the books, allow citizens to sue alleged violators in federal court.

Congress intended citizen suits to supplement government action, when underfunded or overworked agencies could not ensure that all laws are complied with. If the government brings an enforcement action under the Clean Water Act—a citizen cannot bring their own action. In other words, state enforcement precludes any citizen



enforcement. When a private citizen, a community organization, or other party seeks to bring an enforcement action under the Clean Water Act, they have to provide notice of their intent 60-days before they are allowed to file. The specific purpose is to allow the government to take action, if they choose to do so, even though it will prevent that citizen action from going forward. But Congress had no intent of cutting citizens out of the process, that's why they provided for an unconditional right for citizens to intervene in that state action. This allows the state to be the enforcer while also allowing impacted people, groups and municipalities to have a voice in the process and ensure a just result for their communities.

The Clean Water Act is a federal law, but it also allows for “delegation” of the authority to administer this law, along with permitting and enforcement authority, to qualified states. When a state like Maryland is qualified to administer the Clean Water Act, they adopt state laws and regulations for administering this program. As such, this creates a somewhat parallel system of federal and state laws and also allows for enforcement actions to be brought in either federal or state court. One of the criteria for a state to be approved as a delegated program is that the state, here Maryland, must provide at least as much access to courts under the state program as would be allowed under the federal program. That's where the problem lies and what this bill will fix.

The federal clean water act requires that citizens have an unconditional right to intervene in enforcement actions. Maryland is currently not providing citizens with this right for intervention. Under current Maryland law, if the state were to bring an enforcement action in federal court for Clean Water Act violations, “citizens”—which includes cities, counties and community groups—would be provided an unconditional opportunity to participate in the case. However, if that same enforcement action were brought in Maryland courts, citizen groups, cities and counties would not be allowed to intervene (i.e. participate) in the case, even if the violations were originally investigated and documented by one of these parties. SB 334 would remedy this problem.

Back in 2009, Waterkeepers Chesapeake and our member Riverkeepers filed a petition to the U.S. EPA to de-delegate, i.e., withdraw Maryland's authority to administer the Clean Water Act due to a series of inspection and enforcement problems as well as a legal issue. The legal issue was Maryland's failure to provide an unconditional right to intervene in state clean water enforcement cases. The Clean Water Act requires states to provide one of two types of citizen intervention in enforcement cases—permissive intervention or intervention as of right. While this petition was sitting before the EPA, Potomac Riverkeeper and the Environmental Integrity project (EIP) investigated and documented permit violations from a coal ash landfill owned by Mirant. The state of



Maryland brought an enforcement action in state court, Potomac Riverkeeper and five citizens living near the landfill sought to intervene, and the court barred their intervention, applying a more stringent standard for intervention after finding that state clean water laws did not provide an unconditional right to intervention like the Clean Water Act. Without an unconditional right to intervention, the Maryland Court of Special Appeals' 2010 court decision ([EIP v. Mirant](#)) interpreted Maryland's general intervention rules that makes it virtually impossible for Maryland citizens and political subdivisions to successfully intervene. Since 2010, there have been no cases of successful intervention in any state-based lawsuits targeting polluters. This bill will fix this problem by clarifying in Maryland law that the state allows unconditional intervention, when standing has been met, for Clean Water Act enforcement cases.

1. No Additional Lawsuits or Burden on Courts

Providing for intervention will not increase the number of lawsuits filed and may reduce them. Intervention only deals with who can participate in the court proceedings already brought forward by the state. In order to intervene, citizens must show "standing," meaning a compelling interest in the matter and a specific harm to them. When intervention is granted, it provides no rights or authorization related to bringing a matter to court.

This bill also only relates to a very narrow class of lawsuits -- state enforcement of the Clean Water Act. This bill will not impact any other laws or actions and has no effect on zoning, agriculture, or other matters governed outside the Clean Water Act.

2. Other States Already Provide These Rights

Many states have referred to the federal law in their state laws regarding intervention, or they have explicitly stated that they provide the same unconditional right of intervention. However, where states have not provided for unconditional intervention, or where their state court limited intervention, states have changed their laws. Eight other states (Alabama, Arkansas, Florida, Indiana, Kansas, Oklahoma, Tennessee and Wyoming) have enacted legislation to allow for citizen intervention as a right, thereby ensuring that public participation is provided for in the courts.

Kansas changed their intervention law following a 1989 petition to the U.S. Environmental Protection Agency, requesting that the state's authority to administer the Clean Water Act be revoked since they were not allowing unconditional intervention. Following this petition, the Kansas legislature took the same action we are asking of the Maryland General Assembly -- to explicitly allow for unconditional intervention in these



state enforcement actions under the Clean Water Act.

3. It is Critical That the General Assembly Act This Year

Waterkeepers Chesapeake has a lawsuit pending in the 4th Circuit Court of Appeals regarding this issue. We have asked the court to stay (hold) this lawsuit and allow the Maryland General Assembly an opportunity to amend state law to provide for unconditional intervention. If the Maryland General Assembly does not make this change, the court action will resume and this matter will be decided by a federal court, rather than Maryland lawmakers. Additionally, the “question” before the court is whether they should direct the U.S. EPA to withdraw Maryland’s entire permitting program for the failure to provide this required citizen intervention. We would prefer that this not be the outcome and that the Maryland General Assembly fix this problem. The 4th Circuit has asked for us to report an update on our efforts by the end of March.

4. Intervention is a critical element of community involvement and public participation

Many of the communities hit hardest by the COVID-19 pandemic are also dealing with health effects of disproportionate environmental burdens. These communities deserve a right to participate in state actions against violators to ensure their experiences and concerns are heard.

The Clean Water Act is considered one of the most successful environmental laws in the United States. It has provided tremendous improvements to water quality and public health. But as state and federal enforcement budgets have been slashed, government oversight has been reduced, and this has increased the likelihood that more violations of law will go unpunished. Moreover, political considerations, including interstate competition, pressure from industry to minimize regulation, and competing governmental priorities threaten to further compromise states’ ability to enforce the laws.

States are confronting massive budget shortfalls due the COVID-19 pandemic and corresponding economic decline. As you know, Maryland government is facing hiring restrictions and staff reductions. This will result in fewer inspection and enforcement personnel, making the role of “citizens” to assist the state in prosecuting cases even more important. Senate Bill 334 ensures that Maryland citizens, cities and counties have a right to intervene and the chance to fight for full and fair enforcement of laws that affect their local waterways and their health.

4. What This Bill Is and Is Not



- This bill is about intervention, not standing. In order to intervene you *must* already show standing prior to requesting intervention. In fact, the bill directly states that federal standing is required for any citizen intervention. It is “federal” instead of “state” standing since state law does not provide a “citizen suit provision” under the Maryland Water Pollution Control Act, so there is no “state standing” that could be reference for this type of action.
- This bill needs to pass this session, as there is a case pending before the 4th Circuit -- the FEDERAL appeals court -- that will otherwise decide this issue. However, the federal court cannot decide issues of state law, and thus the question before that court is whether EPA should revoke Maryland's permitting program under the Clean Water Act, because Maryland does not have a required element -- unconditional intervention in Clean Water Act cases. For "delegated" state program -- states that administer the Clean Water Act at the state level, they must provide at least as much public participation, including things like intervention, as the federal law provides. Thus, Maryland's permitting authority could be withdrawn. This is not what the groups involved in this case would like to see happen. MDE, EPA and the appellants -- WKC and EIP, all requested that the court put a "stay" i.e., hold on the case to resolve this at the Maryland General Assembly. There are eight other states that have had to do this exact same thing -- seek a legislative amendment of their program to allow for unconditional intervention, so as to avoid possible federal withdrawal and take over of their permitting program.
- The Maryland Attorney General and MDE are both supportive of Citizen Intervention for the enforcement of Clean Water Act cases. Their quote for the Mirant case, where the Court of Special Appeals misconstrued intervention was:

"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."
- Maryland Department of the Environment, in the fiscal note for this bill, noted that there would be minimal financial impact at the state *and* local level.



- The Maryland Attorney General's office has provided a letter of clarification on this bill, which clearly states their opinion that: this bill will not expand standing in any way, and does not add a new cause of action. Specifically, “**[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.**”
- Citizens already have full authority to bring enforcement actions against polluters for violations of the Clean Water Act in federal court. But, there is no citizen enforcement provision under state law. Thus, it is simply "impossible" to expand standing at the state level because there is no possible cause of action under the Maryland Water Pollution Control Act.

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

Thank you,

Betsy Nicholas Waterkeepers Chesapeake

Mark Southerland, Safe Skies Maryland

Kathy Phillips, Assateague Coastal Trust

Robin Eilenberg, Chesapeake Bay Foundation

Nina Beth Cardin, Maryland Campaign for Environmental Human Rights

Mark Frondork, Shenandoah Riverkeeper

Jenn Aiosa, Blue Water Baltimore

Katlyn Schmitt, Center for Progressive Reform

Michele Merkel, Food and Water Watch

Matt Pluta, ShoreRivers

Mark Posner, Maryland Sierra Club

Phillip Musegaas, Potomac Riverkeeper Network

Hannah Brubach, Chesapeake Legal Alliance