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Support for Senate Bill 653

Dear Chairman Feldman and Members of the Committee:

The Chesapeake Legal Alliance strongly supports SB 653. The Maryland General Assembly has long established itself as a leader among states in creating protections for water quality that go beyond the federal minimum. ***This leadership is needed now more than ever*** as the U.S. Supreme Court has just struck a generational blow to the viability of the federal Clean Water Act, one of our bedrock environmental laws. States around the country are now scrambling to understand what to do next.

More than fifty years ago, the Congressional leaders that created the Clean Water Act knew that one of the critical ingredients necessary to establish an effective water quality law would be a new right for all Americans to enforce violations of the law. Thus, the public enforcement right written into the law became one of the quintessential features defining the Clean Water Act and distinguishing it from its ineffectual statutory predecessors. Generations of federal water pollution control laws had proven to be ineffective in restoring the deplorable condition of our nation's waters in large part because the enforcement features of those older statutes were weak. Congress knew that state and federal regulators would be the primary enforcers of the new law, but also knew that the public would, for the first time, need to be able to serve as a crucial backstop prodding the regulators along and using their enforcement right where regulators could not or would not act.

This Congressional intent has indeed borne fruit. Today, the vast majority of all enforcement actions are undertaken by state and federal agencies. Over the last 25 years, there has been an average of nearly 200 enforcement actions for violations of Maryland's water pollution and wetlands laws, though that number has plummeted in recent years, and has still not recovered. By comparison, the number of Clean Water Act enforcement actions proposed by the public, as reported to federal databases, averaged less than a handful per year in Maryland.

However, while the public enforcement right is used only rarely, it serves an outsized role in importance in the compliance process and the overall implementation of the Clean Water Act. For one thing, it should be noted that the Clean Water Act gives regulators, as the primary enforcement authority, the right to take over any proposed enforcement action from the public. So, just because few public enforcement actions make their way to federal court, the initiation of such actions via the mandatory notice letter still have the important effect of coaxing regulators to resolve the identified violations.

Secondly, the more engaged the public becomes in the enforcement process the more active regulatory agencies become; this participation is something Congress emphasized it wanted right in the very first section of the Clean Water Act. Finally, even though state and federal agencies were intended to be the primary enforcers, Congress knew that the public would be an essential backstop, stepping up to enforce the Act where regulatory agencies could not act. This is why some of the highest profile actions come from the public; indeed the current Bay restoration effort itself was the result of public enforcement

action authorized under the Act.

Unfortunately, this crucial public right to act as "private attorneys general" is in peril today. To be clear, the Supreme Court in the case of *Sackett v. EPA* did not directly affect the provision of the Clean Water Act that conferred public enforcement rights. Instead, what the Supreme Court did was substantially shrink the scope of federal jurisdiction, leaving by most estimates a majority of our nation's streams and wetlands unprotected by the Clean Water Act and its public right to enforce violations.

In essence, the Court handed to Maryland and our sister states the job of protecting these waterways with whatever state laws are on the books. Thus, as we speak, state legislatures across the country are taking a fresh look at their water pollution and wetland laws. Here in Maryland, we are blessed with a long history of legislative acts to protect our own waters. Compared with some states, Maryland protects many more types of waterways from many more sources of pollution. But where Maryland law lags far behind federal law is in the ability of the public to participate in the implementation and enforcement of our water pollution control and wetlands laws. All that this bill would do is put Maryland's public enforcement rights on par with the analogous federal provisions and create the same rights that Pennsylvanians have.

The effect of this change will be twofold. First, a portion of the handful or so of public enforcement actions that previously were brought in federal court would instead be brought in state court; not a net increase, but merely a change in venue. This restorative aspect of the bill would ensure that our state courts are a backstop where federal public rights no longer exist. Second, for a fraction of permitted facilities that are governed under state water pollution control laws only, and not subject to the federal Clean Water Act, there would be a new right to enforce violations that did not previously exist. This would close a loophole that has long existed, albeit for only a fraction of permitted facilities.

Finally, it is important to point out what this bill does *not* do. The bill does not change any environmental standards, establish any new requirements, or tilt the playfield in either direction. The bill also does not alter the legal doctrine of standing in any way outside of the narrow scope of these public enforcement rights included in the bill. And where standing is affected it merely adopts federal law and arguably, gives effect to a prior enactment from this body: Decades ago, the General Assembly declared that "the courts of the State of Maryland are an appropriate forum for seeking the protection of the environment and that *an unreasonably strict procedural definition of 'standing to sue' in environmental matters is not in the public interest*."

Maryland Courts, like judicial systems throughout the United States, are acutely aware of the Access to Justice issues plaguing Americans. This bill would help to ensure that environmental injustices are not exacerbated by needless obstacles standing in the way of communities seeking to vindicate their rights to a healthy environment. As Chief Justice John Marshall wrote in one of the most famous cases in American history "it is a settled and invariable principle, that every right, when withheld, must have a remedy, and every injury, its proper redress." As Americans lost a critical environmental right last year, we must act now to ensure that this right is restored for all Marylanders and that no one is left with a right without recourse.

For these and many other reasons we support Senate Bill 653. For more information, you may reach Evan Isaacson at evan@chesapeakelegal.org.

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