



January 20, 2021

**Support for HB 76:
Water Pollution Control – Intervention in Civil Actions – Rights and Authority**

Dear Chairman Barve and Members of the Committee:

Thank you for this opportunity to submit testimony in support of House Bill 76 on behalf of Chesapeake Legal Alliance, a nonprofit organization that provides pro bono legal services to individuals and groups working to protect and restore the Chesapeake Bay. If enacted, HB 76 will be an important tool for individuals and groups as they protect their communities, rivers, and streams from pollution.

House Bill 76 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 broadly 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. For the reasons set forth below, we strongly urge you to support this important bill.

I. 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. 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. Prior to filing, a community member or organization must give the government 60 days’ notice of their intent to file, and provide the government the opportunity to take action. If the government takes action, it will prevent the community member or organizations action from going forward. However, Congress had no intent of cutting “citizens” out of the process completely, that’s why they provided for an **unconditional right** for citizens to intervene in a federal action by a state. This allows the state to be the enforcer while also allowing the impacted community to have a voice in the process to ensure a just result.

Maryland has delegated authority from the U.S. Environmental Protection Agency to administer the Clean Water Act in Maryland. Therefore, Maryland has adopted 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 state law be at least as stringent as federal law. (*McAbee v. Payne*, 318 F.3d 1248, 1253, 16 Fla. L. Weekly Fed. C 238 (11th Cir. 2003)). In addition, each state, here Maryland, must provide **at least as much access to courts under the state program as would be allowed under the federal program**. HB 76 would fill in the missing gap and ensure that “citizens” have at least as much access to courts under the state program as the federal program.

The federal Clean Water Act requires that citizens have an unconditional right to intervene in enforcement actions. Maryland is currently not providing citizens with a unconditional right of 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 was 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. HB 76 would remedy this problem.

Due to state water pollution control laws not protecting the unconditional right to intervene, many community groups, watershed organizations, and members of the public are unable to participate in enforcement actions that impact their community, the rivers where they recreate and the water they drink. 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, only to participate in an ongoing proceeding brought by the state.

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. 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. The communities have standing to be apart of the enforcement actions and deserve a right to participate in state actions against violators to ensure their experiences and concerns are heard. The legislature must act to allow overburdened communities intervene in enforcement actions that impact their local waterways.

II. Conclusion

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. Many agency actions are triggered by the information or complaints of community members, local groups or advocacy organizations. As resources remain strained, it will be a critical role of the citizenry to ensure that enforcement is diligently prosecuted. This includes assessment of penalties where polluters have benefited from violating the law and granting reasonable timelines for remediation. House Bill 76 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.

For all of these reasons, we urge a favorable report on House Bill 76.

Thank you,



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