



THE MARYLAND HOUSE OF DELEGATES  
ANNAPOLIS, MARYLAND 21401

**HB 76, Citizen Intervention Under the Clean Water Act in Maryland**

HB 76/SB 334 would authorize citizens (which includes cities, counties and citizen groups) to intervene in Clean Water Act enforcement actions brought by the State in state court.

Intervention is an important function for allowing interested parties to engage in legal matters that concern them. Intervention is all the more important when it comes to enforcement of our environmental laws, given the role of “private attorneys general” that Congress established for citizens and the partnership of the state, the public, and environmental organizations in protecting our natural resources. Unfortunately, while Maryland law gives citizens the right to intervene, the Maryland Court of Special Appeals has refused to recognize that right in state Clean Water Act proceedings. Accordingly, we need to enact legislation to establish a statutory right to intervene for plaintiffs who already demonstrate the kind of standing needed to sustain a citizen suit for violations of the Clean Water Act (CWA).

A. Background: “Intervention as of Right” in Maryland

- The federal Clean Water Act provides several mechanisms for citizen participation, including the right to bring citizen suits against violations and the right to intervene in an enforcement action. 33 U.S.C. §§ 1365(a)(1), 1365(b)(1)(B). The importance of citizen enforcement to the CWA’s regulatory scheme is reflected in the requirements for state-administered programs, such as Maryland’s, which stipulate that a state *must allow* intervention as of right—where a citizen has an interest that is or may be adversely affected—or, alternatively, allow for and respond to public comments on proposed settlements. 40 C.F.R. § 123.27(d).
- The Court of Special Appeals, however, has made it functionally impossible for environmental groups and most citizens to intervene as of right in these proceedings. In *Environmental Integrity Project v. Mirant Ash Management, LLC*, 197 Md. App. 179 (2010), the Court held that

environmental groups and citizens did not meet the test for intervention as of right in Maryland, as they lacked interests different than those of the general public, presuming that MDE would adequately represent their interests.

- The Maryland Department of the Environment and the Maryland Attorney General supported the intervention of environmental organizations in that case.

*"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." Mirant*

In light of Mirant, HB 76/SB 334 is needed to ensure that citizens are provided the public participation that is required under the Clean Water Act for Maryland's program.

#### B. Intervention is in the State's interest

MDE's enforcement has been on a steep decline. Clean Water Act enforcement actions by Maryland Department of the Environment have 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. 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, according to MDE's data.

Citizen intervention allows individual citizens, organizations, cities and counties to lessen some of the burden on the State by sharing the responsibility of prosecuting these enforcement actions. It can also supplement the State's resources and assist them in collecting penalties from polluters. (Note: All penalties collected go into Maryland's Clean Water Fund, making these resources

available for a wide array of environmental and natural resource protection and restoration programs in the state.)

### C. Other important points

Eight other states (Alabama, Arkansas, Florida, Indiana, Kansas, Oklahoma, Tennessee and Wyoming) have enacted laws to allow for citizen intervention as a right, ensuring that that public participation is provided for in the courts. However, most states already provided for intervention as a right through direct incorporation of the federal standard or incorporation by reference.

To be clear, this will not cause an increase in lawsuits or burden on state courts or the attorney general's office. Intervention does not provide any independent right to bring a lawsuit. It is not "standing" and, in fact, standing must be met by any party seeking to intervene.

Clean water is not just about health and safety. It is an economic necessity. About 40 million anglers spend \$45 billion annually to fish in U.S. waters; the beverage industry uses more than 12 billion gallons of water annually to produce products valued at \$58 billion; manufacturing companies use nine trillion gallons of freshwater every year; and 31 percent of all water withdrawals in the U.S. are for irrigation, highlighting the extent to which the nation's farmers depend on clean water. All of these uses become restricted when our waters are polluted. This means that there are strong economic reasons to ensure that enforcement of the CWA is strong and sufficient penalties are assessed to remediate the damage from unlawful discharges of pollutants.

For the foregoing reasons, I respectfully request a favorable report on HB 76