

May 5, 2016

BY ELECTRONIC AND FIRST CLASS MAIL

The Honorable Benjamin Grumbles  
Secretary  
Maryland Department of the Environment  
1800 Washington Boulevard  
Baltimore, MD 21230

The Honorable Brian Frosh  
Attorney General  
200 St. Paul Place  
Baltimore, MD 21202

Re: Decreases in Environmental Enforcement

Dear Secretary Grumbles and Attorney General Frosh,

We are writing to express concern over sharp downward trends in environmental enforcement and to make several recommendations regarding how you might reverse these troubling developments. Over the last year (from March 2015 through February 2016), the Maryland Department of the Environment's (MDE) referrals of enforcement cases to the Office of the Attorney General has declined by 18 percent compared with the prior year period. To be sure, enforcement trends were headed in the wrong direction in the final years of Governor O'Malley's administration. In fact, case referrals are down a startling 35 percent from two years prior – a period spanning at least one year during both administrations. During this three year period, core air pollution case referrals have decreased by more than 50 percent; lead poisoning prevention referrals have declined by 46 percent; and Water Management Administration compliance case referrals are down 27 percent.

As enforcement case referrals continue to decrease, the long-term trend for cases resulting in "compliance assistance" is heading even more significantly in the opposite direction. Over the last six fiscal years, the ratio of cases resulting in compliance assistance versus traditional enforcement actions is more than twice as great compared with the previous six years. We recognize that compliance assistance has a role to play in vigorous environmental enforcement, but a strategic shift that neglects to enforce violations of the law with penalties and other deterrent actions has two important drawbacks. First, counseling does not work with regulated entities that want to save money by ignoring the law. Second, and closely related, compliance counseling alone tilts the playing field in favor of businesses that break the law, giving them a competitive advantage over law-abiding companies that invest in pollution control devices and practices. This outcome provides strong disincentives to prevent pollution that could undermine progress toward restoring Maryland's environment.

We are especially concerned about trends we have observed in many aspects of MDE's enforcement track record:

1. **Penalties.** Despite the General Assembly's decision to double the maximum administrative penalties for Water Pollution Control violations in 2014, the amounts collected for surface water discharges in violation of Clean Water Act permits has actually decreased – both in absolute terms and as an amount per violation. The General Assembly clearly expressed, in a strikingly bipartisan vote, an intent to increase the deterrent value of penalties for violations of state and federal water pollution control laws. MDE and the Office of the Attorney General must carry out the goals of the new law by levying penalties with a significant deterrent influence on future behavior.
2. **Recovery of economic benefits.** The foundation of an effective enforcement program is the recovery of the economic benefit achieved by the violator as a consequence of breaking the law. If owners and operators of permitted facilities delay installing pollution control equipment beyond deadlines set in regulations or consent agreements, the savings achieved by such delays, many of which extend over several years, should be the baseline amount recovered in penalties plus additional amounts that punish such violators. EPA Region 3 has repeatedly found in its assessment of MDE's Clean Water Act enforcement program that the department has failed to properly collect the economic benefit gained by a polluter. Maryland must address this incentive to break the law and harm the health of the state's citizens and environment by establishing an effective policy carried out in a consistent fashion.
3. **Treatment of Recidivists.** Tolerance of delays in installing control equipment and imposing penalties without sufficient deterrent effect obviously results in additional pollution. Another issue that EPA Region 3 has raised with MDE's administration of its Clean Water Act authority is the failure to return facilities to compliance after an enforcement action. In its latest assessment, EPA found that one-third of the major facilities it examined had essentially ignored MDE's enforcement response and remained in noncompliance. EPA specifically recommended that MDE revise its standard operating procedures to increase penalties substantially when dealing with recidivists.
4. **Inadequate Inspections.** Compounding the problem of lenient enforcement policy is the long-term decline in budgetary resources for inspection and enforcement personnel within MDE. The number of inspector positions in the Water Management Administration has been cut by about one-third since 2000, even as the state general fund budget has increased by more than 80 percent. We hope that you will ask Governor Hogan and the General Assembly to restore these positions. As the state

continues to spend billions of dollars to restore the Chesapeake Bay, it is crucial to recognize that the most cost-effective pollution control strategy is the proper inspection of existing pollution controls and enforcement of the laws already on the books in a manner that deters and prevents ongoing or new sources of pollution. The cost to restore these positions is negligible compared with the overall environmental budget and compared with the benefits produced by the inspectors.

Obviously, you each play a distinct role in fulfilling MDE's mission. Agency personnel under Secretary Grumbles' supervision are responsible for writing permits, inspecting facilities, identifying violations, and determining appropriate courses of action. Then attorneys representing MDE under the supervision of Attorney General Frosh have the responsibility of pursuing the enforcement action in court. MDE can also bring administrative proceedings against violators, although these types of cases generally involve modest penalties and should be reserved for relatively minor cases. The Attorney General is responsible for criminal enforcement, although he must rely on MDE inspections to build such cases. In contrast to consistently strong environmental criminal enforcement at the national level, Maryland's program is quiescent.

Recognizing the inter-dependency of your constitutionally and statutorily required roles, we hope that by working together more closely, you can achieve badly needed improvements in state enforcement programs. Specifically, we urge you to consider the following initiatives:

- \* Develop a policy for the full recovery of economic benefits in all cases and escalating penalties to deter ongoing noncompliance and return facilities in violation back to compliance;
- \* Advocate for a budget that restores the positions needed to adequately inspect facilities and enforce violations, write protective permits, and verify the proper functioning and maintenance of pollution control devices and other best management practices; and
- \* Convene a taskforce of state and local enforcement officials to discuss methods for identifying and bringing to justice chronic violations of the law.

In conclusion, we are pleased to note that Maryland continues to be among the leaders in efforts to restore the Chesapeake Bay and local waters throughout the region and is roughly on pace to meet its overall 2017 midpoint assessment goals under the regional Chesapeake Bay pollution diet. But this achievement largely depends on longstanding commitments of taxpayer investments to install cutting edge technology on our fleet of wastewater treatment plants. To fully meet the state's commitment to its neighbors with regard to the Chesapeake Bay, as well as its commitments to the citizens of Maryland to ensure that our air, water, and lands are clean and healthy, we need a full commitment to enforcing the law.

We urge you to consider whether existing enforcement policies and resources are sufficient to protect our citizens and environment and to take appropriate actions to correct any deficiencies.

Sincerely,

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Blue Water Baltimore

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