



**Secretary Ben Grumbles
Maryland Department of the Environment
1800 Washington Blvd
Baltimore, MD 21230**

August 26, 2020

Re: Follow-up letter on transparency during the COVID pandemic

Secretary Grumbles,

We are writing to follow-up with you on our letter dated May 21, 2020 (attached) regarding our concerns related to the agency's response to the pandemic, including environmental compliance waivers and claims of force majeure. While we appreciate that you and your staff are working hard during this unprecedented time, reviewing waiver requests and force majeure claims on a case-by-case basis, we still have not received a response to our original letter and would like to reiterate the agency's vital role in limiting our vulnerability to the COVID-19 virus.

We repeat our recommendations: (a) MDE must make public any permit or consent decree waiver requests it has received since March 1, 2020; (b) MDE must make public any decisions it has made upon those requests and; (c) MDE must provide notice to permittees of their respective permit requirements related to claims of force majeure. We also ask that MDE provide a statement on how the agency will handle any new waiver requests or claims of force majeure after August 31st when EPA's enforcement-discretion memorandum is set to end. Additionally, MDE should release relevant related documentation for each of the above, such as the request from the permittee and MDE's reasoning for its decision. These actions will ensure that the public is better protected from unsanctioned pollution from state-permitted facilities and informed about local air and water emissions levels that may be atypical. Complete transparency and aggressive public information-sharing are imperative during this crisis and your agency has the best tools for creating a trustworthy and centralized source of information about environmental threats.

1. Current Status of our May 21 Recommendations

Through a Public Information Act (PIA) request and a review of MDE's website, we found the following deficiencies with regards to our previous recommendations:

- MDE has not attempted to make any pollution permit related documentation concerning the pandemic, mentioned above, publicly available nor has MDE come up with a clear public policy on how it is handling or deciding upon the waiver and force majeure requests.
- MDE's webpage does not explicitly require permit holders to provide immediate notice (or any form of notice) to MDE of non-compliance related to the COVID-19 pandemic. While MDE notified construction stormwater general permittees with a compliance framework, mandating that permittees inform MDE of non-compliance, this was not extended to other permittees across the state. We urge you to send a clear message to all permit holders that—consistent with existing notification requirements in their permits—they are required to proactively notify your agency of any pandemic-related noncompliance event or suspected noncompliance event immediately.
- MDE has not made any public statements regarding worker anonymity for those who desire to report suspected or ongoing violations. Likewise, it's not clear that MDE has consulted with its counterparts in the Maryland Department of Labor to ensure all workers across the state are informed of state and federal worker protections from retaliation for such reporting. During this unprecedented time of reduced agency-initiated inspections, we will be especially dependent upon whistleblowers to call attention to environmental hazards created by facilities in the region.
- To our knowledge, MDE has not suspended or taken an official position on non-emergency proceedings; comment periods have followed normal time limits and have not remained open, as requested. Likewise, MDE has seemingly shifted to virtual hearings. We'd like to reiterate that any consideration of equity and fairness would likely show that the public cannot reasonably and adequately participate in virtual meetings and hearings under the current circumstances. This is especially true in environmental justice communities which often lack access to internet service or lack devices that would allow them to participate in virtual hearings.

2. Specific COVID19-Related Waivers & Claims of Force Majeure

Through our PIA request, we learned that a number of facilities across Maryland have requested waivers and/or notified MDE of force majeure claims for various reasons that were not overtly pandemic-related. This calls into question whether certain entities, specifically Baltimore City Department of Public Works, Baltimore County, and Washington Suburban Sanitary Commission (WSSC), may be using the pandemic as an excuse to subvert or delay important deadlines. In EPA's ECHO database, the facilities claiming force majeure have had a number of enforcement actions taken against them in the last few years for failure to comply with permit terms. The waiver requests related to water quality sampling, drinking water sampling, inspections, and project deadlines are particularly problematic and could have dire impacts on public health during a public health crisis. We urge MDE to do everything in its power to prevent such an outcome including on-site inspections. We also encourage MDE to make any relevant information related to requested water permitting waivers and/or

claims of force majeure publicly available--without the need for an additional formal PIA request.

We also learned that a number of facilities across Maryland have requested extensions to complete certain testing and submit certain emissions reports as required by Title V/Part 70 Clean Air Act permits, which protect the air quality of vulnerable communities. Among the facilities requesting extensions are some of Maryland's largest sources of harmful air pollution. MDE has granted the requested extensions, often citing EPA's Enforcement Policy, which expires on August 31, 2020. We plan to submit a follow-up PIA request to understand the extent to which these extension requests have continued since June and how/whether MDE's approach to reviewing and/or granting these requests has evolved. However, we encourage MDE to make information publicly available--without the need for a formal PIA request--regarding any granted or denied extensions of air permitting requirements.

To the extent that the COVID-19 pandemic persists and requests for extensions become more common or routine, it is imperative that MDE be transparent about its approach to these requests and clarify exactly what authority it is relying upon in granting any request (e.g., EPA's Enforcement Policy, statutory provision(s), regulation(s), etc.). Monitoring, recordkeeping, and reporting requirements are bedrock components of Title V air permits and are designed to ensure compliance with the emission limits and standards in the permit--any deviation from these requirements is a matter of public interest and health. See 42 U.S.C. § 7604(a), (f)(4) (authorizing citizen suits under the Clean Air Act to enforce "any permit term or condition"); 40 C.F.R. § 70.6(a)(3) (monitoring, recordkeeping, and reporting requirements).

These examples highlight the need for better clarity and transparency in how the agency is handling waiver and force majeure requests during this time. We urge you to prioritize the activities that will keep us safe and reduce unnecessary risks, including meaningful air and water quality monitoring efforts.

Thank you for your attention to these recommendations. We welcome the opportunity to meet with you or your staff either by phone or virtually to further discuss these issues. If you have any questions or would like to schedule a meeting, please contact Emily Harris, coordinator for the Chesapeake Accountability Project (HarrisE@nwf.org).

Sincerely,

Matthew Shultz, Executive Director
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Eliza Smith Steinmeier and David Reed, Co-Directors
Chesapeake Legal Alliance

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