

# BACK TO BASICS:

**An Agenda for the Maryland General Assembly to Protect the Environment**

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### Restoring Maryland's Environmental Leadership

In 2012, the United States will celebrate the 40th anniversary of the Clean Water Act. This landmark law has protected many of the most precious natural resources that are vital to the health and well-being of Marylanders. More than 7,000 miles of coastline and thousands of stream and river miles and lake acres are unquestionably cleaner than they were just decades ago. Despite the progress, however, much remains to be done, and water pollution is not the only problem in Maryland. Air pollution, poor air quality, and exposure to mercury, lead, asbestos, and other chemicals persist.

Working with the states, the Environmental Protection Agency (EPA) is determined to make significant improvements in the water quality of the Chesapeake Bay, a crown jewel of the country's natural resource heritage. **By getting back to the basics of the Clean Water Act and other environmental laws, the General Assembly can give the Maryland Department of the Environment (MDE) the tools it needs to achieve its statutory mandate to protect and restore the state's natural resources.**

Those tools are needed. Maryland has a long-held reputation as a regional and national leader in environmental protection. But in some areas, especially enforcement, that reputation warrants scrutiny. For example, Maryland charges less than Pennsylvania and Virginia for some pollutant discharge permits, and the state does not assess permit fees for municipalities despite the resources required to administer those permits. The penalties for violating the Clean Water Act have remained chronically below the level allowed under federal law. Maryland law does not require MDE to penalize polluters for the the full amount of the economic benefit they gain by flouting the law, unlike laws in Pennsylvania and Virginia.<sup>1</sup> Together, these shortcomings may effectively dilute the deterrent effect of environmental laws across the state.

To affirm Maryland's reputation as a regional and national leader in protecting the environment, this legislative brief recommends that the 2012 Maryland General Assembly:

- **Increase permit fees to accurately reflect the cost of developing permits, monitoring and regulating facilities with permits, and managing pollutant discharges.<sup>2</sup>**
- **Ensure that the statutory penalty maximum for a violation of the Clean Water Act keeps pace with inflation and the federal maximum.**
- **Restore the full deterrent effect of a penalty by adopting a statutory mandate to recover any economic benefit from noncompliance that a violator receives.**
- **Establish a clear, mandatory minimum penalty requirement for violations of the environmental laws that protect the land, water, air, and other natural resources of Maryland.**

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### **MDE's Shrinking Resources: Doing More with Less**

Over the past four decades, the number and types of pollutants and pollution sources have proliferated. State environmental agencies around the country administer increasingly complex regulatory programs that are necessary both to protect human communities that are exposed to environmental hazards and to protect frail ecosystems that support tourism and economic development. Maryland is no exception. The high quality of life and economic opportunities in Maryland have driven steady population growth over the past decade, meaning that more people are exposed to environmental health hazards at the same time that they have come to appreciate the rivers, coastal inlets, and green spaces across the state.

By failing to authorize MDE to charge fees for municipal permits, the Maryland General Assembly deprives MDE of a significant resources needed to administer the water pollution prevention program. Taking Virginia's fee schedule for municipalities, for example, the lack of permit fees for the 98 MS4 permits in Maryland translates into a potential loss of roughly \$580,000 to \$860,000 each year and a potential one-time permit application fee loss of \$780,000 to \$1.5 million. Similarly, the lack of permit fees for the 288 individual municipal discharge permits in FY2011 means a potential loss of roughly \$1.8 million to \$2 million each year and a potential one-time permit application fee loss of roughly \$2.16 million to nearly \$6 million. Considering that the FY2010 enforcement budget for MDE's Water Management Administration was just over \$3.7 million, these "ghost revenues" would drastically enhance the agency's ability to protect the water resources in Maryland.

**To protect the environment for current and future generations, the General Assembly must provide MDE with the tools and resources for a strong environmental enforcement program.** One key resource is adequate funding to hire the staff necessary to oversee permit holders and bring enforcement actions against those who break the law. In 2010, the Center for Progressive Reform analyzed the effectiveness of the MDE's Clean Water Act enforcement program and concluded, consistent with MDE's analyses, that the agency is drastically underfunded to fulfill its basic mission.<sup>3</sup> Between 2000 and 2009, overall funding for the enforcement workforce of the Water Management Administration (WMA) declined from \$3.39 million to \$3.16 million. Adjusted for inflation, that decline was nearly 25 percent and coincided with a doubling of pollutant-discharge permits in effect. During the same period, the number of active, full-time inspectors in the WMA also decreased by 25 percent. Although these statistics improved during fiscal year 2010, the funding shortage has a crippling effect on MDE's resources needed to protect the air, land, and water in Maryland.

### **Deterrence-Based Enforcement: Motivating Rational Compliance**

**One crucial reason that MDE has fallen behind is the lack of parity between Maryland's enforcement authority and the standards applicable to federal**

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**enforcement actions.** To strengthen MDE's enforcement program, the General Assembly must close these gaps, bolstering the program's deterrent effect. Deterrence-based enforcement is the traditional model used across the country to enforce laws. It is based on the common sense notion that a penalty exists to dissuade violators from breaking the law so that no environmental harm occurs. When violations are discovered, meaningful penalties must be imposed, sending a strong message to the violator and to similarly situated facilities that they must redouble their compliance efforts or risk similarly severe consequences.

This model assumes that a regulated company operates to maximize its profit. **Rationally enough, a company will comply with environmental laws and regulations if the cost of noncompliance outweighs the benefit of noncompliance.** If a company will save \$10,000 by avoiding compliance and illegally discharging waste into the Chesapeake Bay but also knows that it will face stiff penalties that far exceed \$10,000 for this discharge, the company will be dissuaded from violating environmental laws under the deterrence-based enforcement model. This example illustrates the key elements of an effective deterrence-based enforcement program. MDE must:

- (1) Conduct sufficient compliance monitoring to identify a violator;
- (2) Initiate enforcement actions against violators in a timely and appropriate way;
- (3) Require the violator to achieve compliance; and
- (4) Impose a monetary sanction that penalizes the violator by requiring it to pay a fine that exceeds its economic gain from the violation.

**Penalties play a central role in motivating regulated companies to comply with environmental laws and regulations.** Uniform, nationwide penalties help establish a level playing field for companies to ensure that a potential violator does not take advantage of more lenient penalties in certain states or gain an economic advantage over a competitor that complies with the law and regulations. The threat of a severe penalty also motivates a company to take proactive and preventative measures to minimize pollutant discharge and reduce the potential for liability.<sup>4</sup>

The current economic and financial constraints on Maryland's budget force tough choices on nearly every state program, and MDE is not immune. However, Maryland law authorizes MDE to charge permit fees that are based on the anticipated cost of administering Clean Water Act programs. By ensuring that the fees truly reflect this cost and account for inflation, the General Assembly can ensure that basic water protection and other environmental programs generate their own funds that do not require additional allocations from the state's general funds. The General Assembly can also preserve our natural resources for future generations by inducing greater compliance with environmental laws.

### **Action Item 1: The Maryland General Assembly should ensure that permit fees are updated to reflect the true cost of permit monitoring and program operations.**

MDE plays a crucial role in protecting the air, water, and land across the state, but the downward funding trend over the past decade threatens to undermine its ability to ensure

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clean air and safe drinking water for Marylanders. The General Assembly should ensure that permit fees reflect the anticipated cost of program operations, as mandated by Maryland law.

Unlike a penalty, a permit fee accounts for the additional work that a regulated facility generates for MDE by discharging pollution into the environment. These permit fees allow MDE to develop permits and permit standards and to monitor a facility for potential harm to the environment. Ultimately permit fees ensure that the regulated entity that releases pollution into Maryland's water or air shoulders the full cost of its operations, rather than the public.

Since 2007, MDE has conducted an annual fiscal analysis of its revenues and expenditures, and the most recent analysis emphasizes the shortcomings in funding its basic operations.<sup>5</sup> Each year since the analyses were first conducted, MDE has reached the same conclusion about its operations: a significant revenue gap exists, one that makes it impossible for the state to hire the more than 350 full-time employees needed to protect the health and environment of Marylanders. Despite implementing cost-savings measures, MDE is faced with the same budget restrictions as other agencies across the state and is increasingly relying on special funds to operate its clean water and other environmental programs.

One source of special funds comes from fees associated with the various permits issued by MDE. Maryland law requires permit fees to be based on the *anticipated cost* of monitoring and regulating the permitted facility and programmatic needs related to prevention pollution discharge into the waters of Maryland. Thus, a permit fee should cover the cost of developing the permit and also much of the agency's operating costs for administering the water program.

As noted in MDE's 2010 fiscal analysis, however, only the General Assembly has the authority to raise certain fees, including fees charged to municipalities. **Maryland does not charge fees for either general or individual municipal permits, in contrast with neighboring Pennsylvania and Virginia.** During the 2012 session, the General Assembly should amend section 9-325 of the Maryland Environment Code to include factors such as an inflation multiplier to keep pace with the increased number of statutory mandates and general inflation and cost-of-living standards. Municipal facilities such as sewage treatment plants, or publicly owned treatment works (POTWs), must be included in these changes because they contribute an estimated nearly 28 percent of the nitrogen<sup>6</sup> and more than 20 percent of the phosphorus discharged into the Bay.

Tables 1-5 compare selected permit fees with the fees in Pennsylvania and Virginia. **Although the fee amounts vary, Maryland is on the low end of the maximum fee amounts for some of the regulated entities that MDE oversees.** Tables 1 and 2 show that Maryland does not charge for municipal permits, unlike Virginia and Pennsylvania. Interestingly, Virginia also includes an inflation adjustment factor to calculate annual permit fees. Maryland does charge for concentrated animal feeding operations permits, although during the initial stage of the program it did not charge fees.

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**Table 1. Municipal Wastewater Fees for Maryland, Pennsylvania, and Virginia.**

State	General Permit		Individual Permit		
	Application Fee	Annual	Application Fee	Annual Fee	Other Fees
Maryland	\$0	\$0	\$0	\$0	n/a
Pennsylvania	\$0	n/a	\$100 to \$10,000 <sup>7</sup>	\$250 to \$5,000	\$100 to \$5,000 for renewal
Virginia	n/a <sup>8</sup>	n/a	\$21,300 (major) \$7,500 or less (minor)	\$7,172, \$6,346, or less <sup>9</sup>	\$10,650 (major) or \$3,750 (minor) for modifications

**Table 2. Municipal Stormwater (MS4) for Maryland, Pennsylvania, and Virginia.**

State	General Permit		Individual Permit		
	Application Fee	Annual	Application Fee	Annual Fee	Other Fees
Maryland	\$0	\$0	\$0	\$0	n/a
Pennsylvania	\$0	n/a	\$5,000	\$500	\$2,500 for renewal
Virginia	\$4,000 (small)	\$3,000 (small)	\$16,000 (large and medium) or \$8,000 (small)	\$8,800 (large and medium) or \$6,000 (small)	\$5,000 (large and medium) and \$2,500 (small) for modifications

**Table 3. Industrial Wastewater Fees in Maryland, Pennsylvania, and Virginia.**

State	General Permit		Individual Permit		
	Application Fee	Annual	Application Fee	Annual Fee	Other Fees
Maryland	\$0 to \$5,000 <sup>10</sup>	\$0 to \$5,000	\$50 to \$20,000	\$100 to \$5,000	n/a
Pennsylvania	\$0	\$0	\$1,000 to \$50,000	\$500 to \$25,000	\$500 to \$25,000 for renewal
Virginia	\$600	\$0	\$24,000 (major) or \$10,200 or less (minor)	\$7,914 (major) or \$1,978 or \$3,363 <sup>11</sup> (minor)	\$12,000 (major) or \$5,150 or less (minor) for modifications <sup>12</sup>

**Table 4. Industrial Stormwater Fees for Maryland, Pennsylvania, and Virginia.**

State	General Permit		Individual Permit		
	Application Fee	Annual	Application Fee	Annual Fee	Other Fees
Maryland <sup>13</sup>	\$0 to \$5,000	\$0 to \$5,000	\$50 to \$20,000	\$100 to \$5,000	n/a
Pennsylvania	\$750	n/a	\$2,000	\$1,000	\$1,000 for renewal
Virginia	\$500	\$0	\$7,200	\$2,374	\$3,600 for modifications <sup>14</sup>

**Table 5. CAFO Fees in Maryland, Pennsylvania, and Virginia.**

State	General Permit		Individual Permit		
	Application Fee	Annual	Application Fee	Annual Fee	Renewal Fee
Maryland	\$120, \$600, or \$1,200	\$120, \$600, or \$1,200	n/a <sup>15</sup>	n/a	n/a
Pennsylvania	\$0	\$0	\$1,500	\$0	\$750
Virginia	\$0	\$0	\$0	\$0	\$0

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### **Action Item 2: The Maryland General Assembly should ensure that the statutory penalty maximum for a violation of the Clean Water Act keeps pace with inflation and the federal maximum.**

In Maryland, the penalties for violating the Clean Water Act have remained chronically below the maximum permitted under federal law, initially set at \$1,000 per violation per day but later amended in 2009 to \$5,000 per violation per day.<sup>16</sup> In contrast, at the federal level, EPA is obligated by the Debt Collection Improvement Act (DCIA) of 1996 to increase statutory maximums for penalties to account for inflation since the passage of the modern Clean Water Act in 1972. The main purpose of the DCIA is to restore the deterrent effect of civil penalties over time.<sup>17</sup> The DCIA requires periodic review and at least a quadrennial adjustment of the civil penalties. Table 6 shows the current penalty fees states may assess under federal law for violation of the Clean Water Act.

During the 2012 legislative session, the General Assembly should restore the deterrent effect of penalties by adjusting the penalty minimums and maximums to keep apace with inflation. EPA has already established an existing framework. The General Assembly could easily adopt this federal framework. If an entity can write off a violation as a marginal loss compared to the cost of complying with the law, environmental laws will lose their effect and become nothing more than words on a page.

**Table 6. Federal Administrative Penalties under the Clean Water Act.**

	Statutory Penalty, as enacted in 1972	For violations occurring between January 30, 1997, and March 15, 2004	For violations occurring between March 15, 2004, and January 12, 2009	For violations occurring after January 12, 2009
Maximum Penalty Per Violation, Per Day	\$10,000	\$11,000	\$11,000	\$16,000
Statutory Maximum, Total Penalty	\$25,000	\$27,500	\$32,500	\$37,500

### **Action Item 3: The Maryland General Assembly should ensure that a penalty fully deters any violations by including a statutory mandate to recover any economic benefit from noncompliance that a violator receives.**

In the environmental context, one of the primary goals of assessing a penalty is to recover the revenue a company gains by breaking the law, such as failing to install monitoring and pollution control equipment. Not only is such windfall illegal, but it also gives the violator an unfair advantage over its competitors. Enforcement officials know that recouping revenue achieved through violations is the minimum requirement for an effective program. **If such illegal benefits are not recovered, polluters actually end up with a positive incentive to break the law.** The General Assembly should amend the list of



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penalty considerations to explicitly include recovery of any benefit from noncompliance, so that Maryland's penalty policy is consistent with EPA's and its neighboring Bay states.

Under Maryland law, MDE may impose an administrative penalty for violations of laws that protect the land, water, air, and other natural resources. Administrative penalties are often used to settle common violations through the agency, as opposed to egregious violations, which are often taken to civil court. To calculate this penalty, the Department is required to consider a variety of statutory factors, such as the willfulness of the violation, the actual harm caused by the violation and potential to cause harm, the degree of hazard posed by the pollutants, and the extent to which the violation has occurred in the past or is part of a pattern of violations.<sup>18</sup> These considerations overlap markedly with EPA's penalty considerations, with one notable exception: **MDE is not required to consider the economic benefit associated with noncompliance, unlike the penalty statute in Virginia<sup>19</sup> and the penalty policy in Pennsylvania.<sup>20</sup>**

During the 2012 session, the General Assembly should amend the list of factors for penalty considerations to include recovering the economic benefit of noncompliance to ensure that MDE's enforcement program has the strongest possible deterrent effect.

### **Action Item 4: The Maryland General Assembly should establish a clear, mandatory minimum penalty requirement for violations of laws designed to protect the land, water, air, and other natural resources of the state.**

A mandatory minimum penalty automates part of the enforcement process by identifying certain violations that result in a predetermined penalty assessment, saving agency resources and time. They also provide clarity to the regulated community and provide consistent penalties that are immune to interference.

New Jersey and California have both enacted a mandatory minimum penalty for certain violations committed by companies that have a history of years of noncompliance with the law. Empirical and anecdotal evidence suggest that these penalties have led to increased compliance. New Jersey enacted its minimum penalty statute in 1990 and saw a dramatic decline in violations. Between 1992 and 2000, effluent violations decreased by 87 percent during the first decade, including a 95 percent decrease in effluent violations of permits for hazardous pollutants and a 92 percent decrease for non-hazardous pollutants.<sup>21</sup>

Similarly, California's penalty statute requires a minimum \$3,000 penalty for a serious violation, which depends on the type of pollutant discharged. Minimum penalties also apply to the failure to file required reporting documents or chronic violations. EPA has attributed part of the reduction in the percentage of facilities in the state that would otherwise be in non-compliance to the presence of mandatory minimum penalties. In addition, EPA noted that the "ongoing and nondiscretionary nature of the MMPs provides both a motivation to resolve violations and a strong deterrent against violation."<sup>22</sup>



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What are the lessons from these states? First, mandatory minimum penalties must clearly identify the violations to which they apply and any affirmative defenses. The penalties should apply to basic effluent discharge violations and reporting violations. Second, the penalty amount should have a deterrent effect for the wealthiest polluters but also be fair to small businesses or operations, and the amount should adjust with inflation. For example, in New Jersey, the level of reporting violations has improved but is still fairly high, suggesting that the \$100 per day per omitted effluent parameter does not sufficiently deter violations. Third, state agencies should assess the penalties in a timely and prompt manner to provide the maximum deterrent effect. Finally, publicly owned treatment works facilities should be authorized to assess penalties against dischargers to those facilities.<sup>23</sup>

**The Maryland General Assembly should demonstrate clear regional environmental leadership by establishing mandatory minimum penalties.** These penalties will help ensure that MDE's enforcement program has maximum deterrent effect, thus contributing to the clean-up and protection of the precious natural resource that is the Chesapeake Bay.

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### Endnotes

- <sup>1</sup> Md. Env't. Code § 9-342 (2011).M
- <sup>2</sup> Md. Env't. Code § 9-325 (2011).
- <sup>3</sup> Robert L. Glicksman and Yee Huang, *Failing the Bay: Clean Water Act Enforcement in Maryland Falling Short*, CPR White Paper No. 1004 (April 2010).
- <sup>4</sup> A handful of empirical studies as well as anecdotal evidence has shown that increased levels of deterrence-based enforcement actions such as an increase in the number of inspections, the threat of inspections, and timely and appropriate enforcement actions lead to greater rates of compliance. Conversely, studies have shown that the lack of deterrence-based enforcement—namely the lack of meaningful penalties or sanctions—often results in greater rates of noncompliance.
- <sup>5</sup> Maryland Department of the Environment, “MDE 2007 Fiscal Analysis Project,” available at <http://www.mde.state.md.us/fiscalanalysisproject/pages/aboutmde/mde2007fap.aspx> (last visited Oct. 7, 2011).
- <sup>6</sup> BayStat, <http://www.baystat.maryland.gov/sources2.html>.
- <sup>7</sup> The fee amount depends on the size.
- <sup>8</sup> Virginia does not have a general permit for municipal wastewater discharge.<sup>1</sup>
- <sup>9</sup> The fee amount depends on the size of the MS4.
- <sup>10</sup> The statutory factors for Maryland’s discharge permit fees are the volume of discharge, the type of industry, and how water is used.
- <sup>11</sup> The fee amount depends on certain permit conditions.
- <sup>12</sup> Virginia also charges a permit modification fee for any modifications that occur during the validity period of the permit.
- <sup>13</sup> See supra note 7.
- <sup>14</sup> See supra note 9.
- <sup>15</sup> To date, all CAFOs in Maryland fall under a general permit, and MDE is not planning to issue individual permits.
- <sup>16</sup> Md. Env't. Code § 9-342(b)(2).
- <sup>17</sup> Memorandum from Steven A. Herman, EPA Assistant Administrator, to EPA Regional Administrators regarding Modifications to EPA Penalty Policies to Implement the Civil Monetary Penalty Inflation Rule (Pursuant to the Debt Collection Improvement Act of 1996) (May 9, 1997).
- <sup>18</sup> Md. Env't. Code § 9-342 (2011).
- <sup>19</sup> Va. Code Ann. § 62.1-44.15(8b) (2011).
- <sup>20</sup> Pa. Dep’t of Env’tl Protection, Bureau of Water Standards and Facility Regulation, “[Guidance for Civil Penalty Calculations for Effluent Violations](#),” No. 362-4180-001 (June 20, 2009).
- <sup>21</sup> William Coyne & Luke Metzger, Mandatory Minimum Penalties: An Effective Tool for Enforcement of Clean Water Laws, TexPIRG Education fund (May 2004) at 13. .
- <sup>22</sup> U.S. EPA Region 9, [2007 State Review Framework Report for the State of California Clean Water Act Compliance and Enforcement Activities](#) (Jan. 28, 2008) at 15.
- <sup>23</sup> Coyne & Metzger, supra note 21.

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### About the Center for Progressive Reform

Founded in 2002, the Center for Progressive Reform is a 501(c)(3) nonprofit research and educational organization comprising a network of scholars across the nation dedicated to protecting health, safety, and the environment through analysis and commentary. CPR believes sensible safeguards in these areas serve important shared values, including doing the best we can to prevent harm to people and the environment, distributing environmental harms and benefits fairly, and protecting the earth for future generations. CPR rejects the view that the economic efficiency of private markets should be the only value used to guide government action. Rather, CPR supports thoughtful government action and reform to advance the well-being of human life and the environment. Additionally, CPR believes people play a crucial role in ensuring both private and public sector decisions that result in improved protection of consumers, public health and safety, and the environment. Accordingly, CPR supports ready public access to the courts, enhanced public participation, and improved public access to information.

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This white paper is a collaborative effort of the following individuals: **Rena Steinzor**, Professor of Law at the University of Maryland Francis King Carey School of Law and President of CPR, and **Yee Huang**, Policy Analyst at CPR. The authors gratefully acknowledge the assistance of Shana Jones, Executive Director of CPR; Andrew Gosden, Maryland Department of Environment; Jennifer Orr and Dave Roote, Pennsylvania Department of Environmental Protection; and Burton Tuxford, Virginia Department of Environmental Quality. The authors bear responsibility for any factual errors and for the views and recommendations expressed in this paper.

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