Senate Bill 221

Department of the Environment – Enforcement Authority

MACo Position: **SUPPORT WITH AMENDMENTS**

To: Education, Health, & Environmental Affairs Committee

Date: February 2, 2022

From: Dominic J. Butchko

The Maryland Association of Counties (MACo) **SUPPORTS** SB 221 **WITH AMENDMENTS.** The bill sets forth a wide array of clearer and stronger tools for the Maryland Department of the Environment to use to enforce violations of departmental permits. **MACo urges that any such framework recognizes the specific contours applicable to public sector actors, with an eye toward the presumably desired outcomes of remediation and prevention, rather than punishment.**

SB 221 is clearly introduced with the goal of improving compliance with environmental regulations and policies. Counties both recognize and support their proper role in a productive regime to hold all players properly accountable for misdeeds and failures in this essential task. As joint custodians of our precious resources, we share these objectives.

At the same time, counties recognize that parts of the bill, as introduced, appear to present either untenable or deeply impractical burdens on locally-owned facilities, and in some cases, their individual employees. MACo urges the Committee to commit to the work needed to balance out the language in the actual bill with the best means of achieving its goals, particularly as regards publicly operated facilities.

To that end, MACo offers three principles to guide bill amendments:

Recognize "Willfullness" as a Principal Tenet Before Applying Punitive Measures.

Under current law, the Department is charged with focusing on "willfull" violations occurring with water suppliers (see Title 9, Subtitle 4, beginning on page 9 of the first reader bill). Here, the framing clearly reflects a deliberate threshold for applying the fines envisioned:

> "a person who willfully violates [specific provisions] of this subtitle is subject to a civil penalty of up to $5,000 for each day…" *(emphasis added)*

SB 221 would rewrite that standard to eliminate both its specificity and breadth, to read:

> "a person who violates [any provisions at all] of this subtitle is subject to a civil penalty of up to $10,000 for each day …" *(emphasis added)*

Were SB 221 to pass in this posture, the willfullness of the violation is relegated to a secondary matter in assessing the fines – phrased merely as "consideration given to." Willfullness should remain a central component of the administration and severity of any fines assessed through these laws. Examples of unwilful violations arising from *force majeure* circumstances are plentiful, and should appropriately be treated with a different posture than a deliberately poor practice.

Preserve and Encourage Practical Solutions, Before Applying Punitive Measures.

Currently, the Department routinely opens communications with a water treatment facility, or comparable public sector operation, when a suspected or known violation has occurred. The goal of such interactions is compliance – recognizing that public facilities are not driven by profits or shareholders, but by public service. A county or municipal water facility may indeed suffer a failing, through any number of reasons – but a collaborative approach to focus its local resources on repair and remediation, rather than payments to a State fund, is the surest means to effect that primary end.

Public sector operators, relevant under a number of the subtitles amended in SB 221, simply lack the direct resources to respond to punitive financial penalties. A water system overrun by flood waters well beyond its control could be found to be in extended violation of multiple requirements – and SB 221's regimented approach may obligate the system to levy special assessments on water users across the community. This yields a deeply regressive and unsound outcome from a natural disaster, and places accountability at the wrong level.

Across public sector actors, a collaborative and informal effort to seek mutual outcomes is ideal. To the extent SB 221 removes this flexibility and accelerates the application of fines and penalties, it misses the mark for our best policy outcomes.

Prevent Individual Employee Liability, Unless High Standard Reached.

SB 221 and the many components of the Environment article it amends make reference to a "person" as the subject of the various fines and penalties it creates and strengthens. The Environment article already broadly defines this term, but SB 221 deliberately details a rather extended definition of "person" under Title 12, governing

"waterworks," to clearly include individual people in their professional roles as operators, testers, collectors, and the like.

Opening the door, so clearly, to individual liability of public employees is unwise and not merited by the goals of the legislation, particularly given the reduction of the "willfullness" standard and the diminution of informal remedies under the bill as a whole. SB 221's combined effect could catapult these professional roles into unwanted positions fraught with unreasonable personal downside.

As a standard for comparison, Maryland's Local Government Tort Claims Act governs the circumstances when an employee action is properly excluded from the employer's indemnification and charge, for general tort liability purposes. That law, under Title 5, Subtitle 3 of the Courts and Judicial Proceedings article, specifies that an employee forfeits the employer coverage under those laws if he or she is found to have "acted with actual malice," a decidedly high judicial standard *(Courts and Judicial Proceedings, §5-302(b)(2)).* No similar standard is envisioned in SB 221, leaving an unclear but seemingly wide-open route to target fines on individual operators or other employees.

Malicious acts by rogue employees may merit proper attention through either fines or civil penalties. SB 221 does not adequately frame this avenue to enforcement and should be addressed with a balanced approach.

The policy choices posed by SB 221 are substantial. Counties recognize that the concerns noted above may apply, to varying degrees, on other permit holders, whose circumstances are likely beyond the expertise of local officials.

SB 221 advances scrutiny and accountability for environmental permit holders to advance goals shared by all stakeholders. Bill amendments could help to reframe the specific interaction of these laws with local government facilities and employees, and promote intergovernmental collaboration where it appears productive. Accordingly, MACo urges the Committee to give SB 221 a **FAVORABLE WITH AMENDMENTS** report, preserving a reasonable framework for Departmental interactions with public sector providers.