



State of West Virginia
Office of the Attorney General

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November 2, 2016

The Honorable Brian E. Frosh
Attorney General
State of Maryland
200 St. Paul Pl.
Baltimore, MD 21202

The Honorable Benjamin H. Grumbles
Secretary of the Environment
State of Maryland Department of the Environment
Montgomery Park Business Center
1800 Washington Blvd.
Baltimore, MD 21230

Dear General Frosh and Secretary Grumbles:

As the chief legal officer for the State of West Virginia, I am writing concerning an urgent matter that affects the sovereign interests of our State and the economic and personal well-being of its citizens. Specifically, I write to vindicate the State's legal right to withdraw water from the Potomac River free from interference from regulatory authorities in the State of Maryland.

As you may be aware, the Maryland Department of the Environment ("MDE") asserts the authority to issue permits to regulate new construction on West Virginia's side of the Potomac and limit the amount of water that the State's water treatment facilities can withdraw from the River. For example, MDE has purported to limit a Berkeley County water treatment facility's intake to four million gallons per day, when the facility requested and has an urgent need to operate at six million gallons per day.

Maryland has no authority to impose these limits on West Virginia or regulate its water supply. Nor can West Virginia abide by these restrictions and continue to meet the needs of its citizens.

Commercial development and population grown in West Virginia's Eastern Panhandle is expanding rapidly. Of particular note, Proctor and Gamble is constructing a new plant in Berkeley County that is projected to require up to 1.3 million gallons of water per day to maintain operations. That facility will also likely generate additional industrial and residential demand for water in the area. Within the next two years, the Berkeley facility will need to make improvements and operate at six million gallons per day to meet area needs.

Moreover, West Virginia has an important interest in fostering a regulatory environment that will allow the State to compete for new development. West Virginia routinely competes with neighbor counties in Maryland and Virginia for large industrial, commercial, and technological projects. Proctor and Gamble's success in the Eastern Panhandle would doubtless spur other companies to settle in our State, creating additional jobs and increasing our residents' demand for water. It is fundamentally unfair for Maryland to claim regulatory authority to tilt the competitive balance in its favor by limiting West Virginia's access to basic utilities like water.

It is also unlawful. The United States Supreme Court has already concluded that Maryland has no authority to regulate or limit the State of Virginia's sovereign right to enjoy the Potomac River below the low-water mark of the River's southern border. *Virginia v. Maryland*, 540 U.S. 56, 73-74 (2003).

Because West Virginia and Virginia share a common history with respect to their use of the Potomac, the Supreme Court's decision applies with equal force to West Virginia. In 1785, George Washington invited representatives from Maryland and Virginia to Mount Vernon to address the States' respective rights to the Potomac. That conference produced a binding compact between the States, which provided the citizens of each state with "full property in the shores of [the] Potowmack river adjoining their lands," including "the privilege of making and carrying out wharves and other improvements" on the River. *Virginia*, 540 U.S. at 62 (quoting Va. Code Ann. Compacts App., pp. 342-343 (Lexis 2001)).

Over the next century, Virginia's continued use of the Potomac confirmed its sovereign right to "full dominion over the soil to low-water mark" and "such use of the river . . . as may be necessary to the full enjoyment of her riparian ownership . . ." ¹ *Id.* at 62-63 (citing Act of Mar.

¹ A "riparian right" refers to "[t]he right of a landowner whose property borders on a body of water or watercourse . . . to make reasonable use of the water." Black's Law Dictionary 1352 (8th ed. 2004). When more than one landowner abuts the same waterway, each "ha[s] equal rights to use the water passing through or by their property." *Id.*

3, 1879, ch. 196, 20 Stat. 482). These sovereign rights were further memorialized in a second compact between Virginia and Maryland in 1877 known as the Black-Jenkins Award. *See id.*

West Virginia has the same sovereign right as Virginia to make use of the Potomac. When West Virginia became a State in 1863, it “succeeded to the rights and title of Virginia.” *Maryland v. West Virginia*, 217 U.S. 1, 24 (1910); *see also Maryland v. West Virginia*, 217 U.S. 577, 578 (1910) (“*Maryland II*”). Accordingly, the Supreme Court has recognized that West Virginia’s border (like Virginia’s) extends to the low-water mark on the south side of the River and that the 1785 compact “indicate[s] the intention of each state to maintain the riparian rights and privileges to its citizens on their own side of the river.” *Maryland II*, 217 U.S. at 580-81.

West Virginia has a vital interest in establishing its definitive right to use the Potomac River free from interference from Maryland regulators. It is not practical for the State to apply for additional permits from MDE. While the Berkeley facility has applied for permits in the past, the State has not conceded Maryland’s authority to operate its permitting system.² Experience has also shown that the permit process is unacceptably cost- and time-intensive—taking as long as two years and imposing hundreds of thousands of dollars in expenses for environmental studies and legal fees. West Virginia cannot initiate this process each time its water needs increase.

Therefore, West Virginia is prepared to seek a declaration of its rights in an original action filed in the United States Supreme Court. A judicial resolution may be unnecessary, however, if Maryland would be willing to enter into a binding compact with West Virginia making unequivocally clear that West Virginia enjoys the same rights and privileges as Virginia to use the Potomac, on the terms set forth in *Virginia v. Maryland*, 540 U.S. 56 (2003). I am prepared to work with the state legislature in West Virginia to draft such a compact.

Due to the immediate needs of the Eastern Panhandle’s residents, time is of the essence. Please respond in writing no later than **November 23, 2016** that Maryland (a) agrees that it lacks authority to regulate West Virginia’s use of the Potomac beyond the low-water mark on the south side of the River and (b) agrees to work with West Virginia in entering into an interstate compact for submission to the United States Congress for approval under the Compact Clause of the U.S. Constitution, U.S. Const. art. I, § 10, cl. 3. If Maryland is unable to agree to these terms, or if I do not hear from you by November 21, West Virginia will proceed to litigation.

² To the contrary, West Virginia’s Constitution and statutes assert the State’s sovereign right to make use of the Potomac River. *See* W. Va. Const. art. II, § 1 (1872) (“all territorial rights and property in, and jurisdiction over, the same, heretofore reserved by, and vested in, the commonwealth of Virginia, are vested in and shall hereafter be exercised by, the State of West Virginia”); W. Va. Code § 1-1-2 (2002) (“The jurisdiction of this state also extends over all the rivers which are boundary lines between this and any other state, to the opposite shore, where there is no statute or compact to the contrary.”).

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I am, of course, happy to discuss these matters further at your convenience.

Sincerely,

A handwritten signature in blue ink that reads "Patrick Morrissey". The signature is written in a cursive, flowing style.

Patrick Morrissey
Attorney General

cc: The Honorable Larry Hogan
Governor to the State of Maryland

The Honorable Earl Ray Tomblin
Governor to the State of West Virginia