**DATE:** August 8, 2018

**SUBJECT:** The Patuxent River Commission's authority to comment on development projects that may threaten the health of the Patuxent River

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## I. INTRODUCTION

The Patuxent River Commission was established by the Maryland General Assembly to address the health of the Patuxent River and its watershed. At the time of the Commission's creation, in 1980, the River was dying. The Commission brought together people from diverse backgrounds and tasked them with reviewing and commenting on proposals that may affect the River. Over the last three decades, the Commission has worked together with Maryland state agencies, including the Maryland Department of Planning, to protect the River and to fulfill their respective statutory obligations.

Recently, however, the Department of Planning has taken unprecedented action to restrict the operations of the Commission, jeopardizing its mission and the health of the Patuxent River. Relying in part on a memorandum from Secretary of Planning Robert McCord, the Department has attempted to restrain the Commission from reviewing and commenting on projects and approvals that may threaten the health of the river; has restricted the Commission's access to its own email list-serve; and has attempted to force the Commission to use the Department's attorney, creating an ethical conflict of interest. As explained in this memorandum, each of these actions by the Department is contrary to law. The Commission: 1) has clear authority from the plain text of the statute to comment on

projects and approvals that may affect the health of the River; 2) should have access to its own email list-serve; and 3) is entitled to representation by an attorney without conflicts of interest.

## II. AUTHORITY OF THE PATUXENT RIVER COMMISSION TO REVIEW AND COMMENT ON PROJECTS AND APPROVALS THAT THREATEN THE HEALTH OF THE RIVER

Contrary to the position recently adopted by the Department, the Commission has clear statutory authority to comment on projects and approvals that may threaten the health of the River. First, the Patuxent River Watershed Act mandates that the Commission shall "review and comment on plans and reports related to the Patuxent River and its watershed." MD. CODE ANN., STATE FIN. & PROC. § 5-816(3) (West 2017). The statute thus grants the Commission broad authority to review and comment on "plans" of any type, without limitation, so long as they are "related to the Patuxent River and its watershed."

*Id.*[1] This authority encompasses government approvals of planned private developments—plans which the Department is improperly attempting to prevent the Commission from commenting on. Such developments can pose a serious threat to the River, and thus are uncontrovertibly "related to the Patuxent River and its watershed."

Additionally, and contrary to the Department's assertions in its recent memorandum, the Commission finds clear authority to comment on proposed land developments that may affect the health of the River under its duty to "review the operation of units of State and local government." § 5-816(1). Common usage and common sense dictate that the various government approvals and decisions involved in the authorization of a private development project—including, here, a swap for public land—constitute "operations" of State and local government. Officials at each level of government are or will

[1] It is important to note here that this section refers to "plans" with a lower-case "p." While "Plan" is a defined term in the statute, and refers to the Patuxent River Policy Plan, the phrase "plans and reports" should be given its ordinary plain meaning. *See FDIC v. Meyer*, 510 U.S. 471, 476 (1994) ("In the absence of [a statutory] definition, 'we construe a statutory term in accordance with its ordinary or natural meaning.'"). Since the legislature frequently used "Plan" throughout this subtitle, and they did not here, they are presumed to have made an intentional and purposeful decision to broaden this provision well beyond the Policy Plan. *See Gardner v. State*, 20 A.3d 801, 807 (Md. 2011) (quoting *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993)) ("'[W]here Congress includes particular language in one section of a statute but omits it in another, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."). Additionally, this provision of the statute cannot logically be read to refer to the Policy Plan, as the Commission's duty to comment on that plan is established in a prior section, while this provision appears in a separate section prefaced with, "In addition to its other powers and duties." § 5-816. The context thus confirms that "plans or reports" should be given its ordinary plain meaning. Not only is such an interpretation in keeping with common usage of the word, the frequent usage of these words in Maryland statutes clearly demonstrates that such a broad interpretation is correct. *See, e.g.*, statutes referring to capital plans (MD. CODE ANN., STATE FIN. & PROC. § 3-601 (West 2017)), strategic plans (§ 3-1003), and project plans (§ 3A-303).

be carrying out the daily actions (or "operations") of government when they make these decisions.

The Department attempts to argue that "operation" somehow excludes anything pertaining to private parties by offering a definition of its own,[2] but even using that definition leads to the conclusion that the Commission has authority to comment on development projects. The Department claims "operation" means only the "discharge of a function." But review of a private development by the State or the County *is* a "discharge of a function," as is the approval of such a development. In reviewing and approving a planned private development, the Howard County Planning Board has *discharged* government functions. Likewise, if Howard County approves the land swap, the County itself will have *discharged* its duty to approve or disapprove the deal, thereby performing another *function* of government. If the Department is called on to certify this land swap to the federal government, it will also be discharging a function—the government will be taking an affirmative step to fulfill a governmental duty. Government actions frequently affect private rights, but that does not make those actions any less of a government function.

The Department's newly articulated position would curtail the Commission's ability to perform one of its core functions—to comment on projects and activities that threaten the River. The Department claims that the Commission has no authority to comment on issues related to "specific private development projects," but nothing about the word "operation" or the plain text of the statute supports such a proposition. Under both § 5-816(1) and (3),

[2] Despite putting the definition in quotes, the Department is unable to cite to any support for this definition.

the statute's plain language directs the Commission to comment on a local (or State) government's approval of development projects that could threaten the health of the River.

The Department's novel position is also at odds with the broader framework of the statute and its history. The legislature itself has expressed concern about private development in the River watershed, and acknowledged the role the Commission played in bringing these issues to their attention. S.J. Res. 7, 2001 Leg., 415th Sess. (Md. 2001). The Commission itself was established after lawsuits from Southern Maryland alleged that the State's plans were inadequate to protect the health of the river, and one of the main purposes of the statute is to ensure that the Commission can comment on approvals of plans that could harm the River. *See* Gary Hodge, History of the Patuxent at 8. Indeed, why would the Maryland legislature go to great pains to ensure farming, business, and development interests were all represented on the Commission, *see* § 5-814(a)(6), if the Commission were prohibited from addressing issues involving private activity?

The Department's recent actions to prevent the Commission from commenting on these issues are not only unprecedented but defy the language and purpose of the Commission's statutory authorization. The Commission is well within its authority to comment on various plans and government actions (such as the approval of land swaps or other approvals) that affect the Patuxent River, even if those actions were initiated by a private party.

## III. THE COMMISSION SHOULD HAVE ACCESS TO ITS OWN EMAIL LIST-SERVE

The Commission has the right to access its own email list-serve. Nothing in the Open Meetings Act requires the Department of Planning to control the list-serve or be an

intermediary for all emails that Commission members wish to send.

The Open Meetings Act does not prohibit e-mail communication between committee members outside of official meetings. Maryland Open Meetings Act Manual at 1-10 (noting "sequential e-mail communications … are not subject to the Act" (citing 81 Op. Att'y Gen. 140, 142 (1996)). If it did, the operations of Maryland's government would grind to a halt. While certain uses of the list-serve—such as voting or conducting virtual meetings in real time—could raise issues under the Open Meetings Act, the Commission needs to be able to use the list-serve for many other purposes that are consistent with the Act. Chairs and members of the Commission are certainly entitled, at the least, to share meeting agendas, meeting minutes, and other information with one another using the list-serve or to have discussions not involving a quorum of members. The Commission is fully capable of complying with the law without the Department of Planning serving as an intermediary for all messages.

It is our understanding that members of the Commission would be happy to work with the Department to develop guidelines for their use of email to ensure no violations occur. There is no legal (or rational) justification for restricting the Commission's access to its own list-serve.

## IV. THE COMMISSION HAS THE RIGHT TO REQUEST COMMENT ON LEGAL ISSUES AND HAS THE RIGHT TO AN UN-CONFLICTED ATTORNEY

The Commission also has the right to solicit comments and opinions on a variety of matters, including those of a legal nature. One of the Commission's duties is to serve as a "clearinghouse for information." § 5-816(2). It is well within its role as a collector of information and a commenter to solicit legal opinions on issues of public import, as well as

to take those opinions into account when carrying out its other duties. Further, as acknowledged by the Department in its own memo, Commission members retain their ability to consult legal counsel in their capacity as private individuals.

In addition, as a unit of government, the Commission has the right to be represented by an attorney from the Office of the Attorney General free from conflicts of interest. The Department's insistence that the Commission must use the attorney assigned to the Department, when the two government units have taken adverse legal positions, is contrary to the rules of ethics. Even if the two units of government have compatible interests at certain times and on certain issues, separate legal representation is required to the extent that their interests are or become adverse. Any attorney representing both the Commission and the Department on such an issues must recuse herself from joint representation and take appropriate steps to preserve the confidences of her former clients.

Maryland Courts have repeatedly emphasized the critical importance that an attorney be free from conflicts: "A lawyer cannot represent conflicting interests, because he owes to every client the duty of undivided loyalty." *Sinclair v. State*, 363 A.2d 468, 477 (Md. 1976). Serving the public as an Attorney General instead of serving private clients does not change this: "A lawyer who enters public life does not leave behind the canons of legal ethics." *Id.* at 477.

Nor are Maryland's Rules of Professional Conduct at all ambiguous on this issue. "[A]n attorney shall not represent a client if…the representation of one client will be directly adverse to another client." 19 Md. Code and Court Rules § 301.7 (2017) ("Rule 1.7"). Rule 1.11 expressly applies this Rule to attorneys serving as public officers. *Id.* at 301.11. Here,

the Commission is attempting to fulfill its statutory obligations, and the Department is attempting to restrict the Commission's ability to do so. It is difficult to envision a scenario where their interests would be more adverse.

The Patuxent River Watershed Act makes clear that the Commission is an independent unit of government whose interests may at times conflict with the Department: the Department has no control over Commission membership (voting members are appointed by the Governor for set terms); the Commission elects its own leadership and has the ability to appoint non-voting members without any oversight or control by the Department; finally, the Commission is frequently instructed by the statute to work *with* the Department on the Patuxent River Policy Plan, not for it. §§ 5-814(a), 5-815, 5-805(a)(2), (b)(1), 5-809(c). While the history between the Department and the Commission has been remarkably cooperative, the structure of the statute, by its very nature, creates the potential for adversity. Whenever one unit of government is tasked with reviewing and commenting on the actions and plans of another unit, there is the potential for conflict—and just such a conflict has arisen here.

Two attorneys from the same AG office are capable of representing and counseling the Commission and the Department if screens are put in place to ensure confidentiality and protect the two parties' interests. It would be a severe ethics violation, however, to allow the single attorney currently representing the Department to also represent the Commission when their interests have become adverse.

## V. CONCLUSION

The Commission has clear statutory authority to comment on a wide range of

actions and activities that pertain to the Patuxent River and its watershed, including the consideration, review, and approval of planned land swaps and other private development projects by units of state and local government. The Department's requirement that it draft all Commission emails for the list-serve is unduly burdensome and unnecessary, and serves only to hamper the Commission in its work and waste State resources. Finally, the Commission has the right to solicit information from a wide range of sources, including legal sources, in exercising its statutory functions, and the Commission has a right to counsel from the Attorney General's Office that is free from conflicts of interest.

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