

The Abell Report

What we think about, and what we'd like you to think about

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ABELL SALUTES:

“Community Greens”;

When alleys become walkways,
neighbors become friends.

The scene, in the late afternoon of a summer's day, is of a patio party: neighbors in convivial conversation, children playing about, barbecue grill in full production. The setting could be taken as suburban, but it is not. It is deep in the city, one of many neighborhood gatherings held often these days in the rear of the row houses on both sides of what was once an alley running between the unit blocks of North Glover St., and Luzerne Avenue, a stone's throw from Patterson Park in East Baltimore.

But that alley is an alley no more. It is gated and locked at both ends and converted into a pleasantly accommodating extension of the block's back yards and patios. Along it are benches and potted plants that together have turned the once harsh concrete alley into an inviting and winding and picturesque walkway. It is an urban planner's fantasy, the amenities of suburbia flourishing in the city: where backyards and patios are meeting the former alley, the neighbors are meeting each other. Meet the Heslin's who live on Glover St.

Middle class and in their early forties, college educated, married, with three young daughters; they are living out a dream in this inner city row home. When they made the decision to leave Manhattan in 2003, they knew that they

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Maryland Clean Water Enforcement Falling Short: At Stake, Continued Deterioration of the Bay and Health of Local Economy

New Study Calls for Redesigning State's Enforcement, Increased Funding

By Robert Glicksman, Yee Huang, and Shana Jones

Robert Glicksman is a professor at George Washington University Law School and a Member Scholar of the Center for Progressive Reform (CPR). Yee Huang is a CPR Policy Analyst. Shana Jones is the Executive Director of CPR.

Nearly 40 years after Congress passed the Clean Water Act (CWA), the Chesapeake Bay—the crown jewel of Maryland's natural resource heritage—remains degraded. Chemical contaminants, sediment, and nutrients—specifically, phosphorus and nitrogen—impair the Bay's water quality.

The impacts of this pollution are clear and present: The Bay's oyster population has been devastated, down to 2 percent of its average levels in the 1950s, and its famous blue crab harvest dropped by more than half between 1990 and 2006. “Dead zones” in the Bay simply contain too little oxygen to support aquatic life.

The Bay is not only a home for aquatic life, but for recreation, and it is an economic driver for the region. In one study, economists pegged the value of recreational boating activity on the Bay at \$2 billion a year. A University of Maryland study two decades ago estimated the total value of the Bay at \$678 billion—more

than a trillion in today's dollars.

The *need* to restore the Bay is clear; the *how* is harder—but it can be done. New laws, greener development practices, more resources for restoration, increased personal commitment—the list goes on and on. But much could be done right now under the Clean Water Act, if it were aggressively enforced. Currently, it is not.

In late 2009, The Abell Foundation commissioned the Center for Progressive Reform (CPR), a network of legal scholars focusing on regulatory and environmental law, to examine CWA enforcement in Maryland today and recommend fixes. (The full report, on which this article is based, and a response from the Maryland Department of the Environment (MDE) are available at www.progressivereform.org.)

Our research looked at how MDE, the agency with primary responsibility, actually enforces the law. We examined MDE's Annual Enforcement and Compliance Reports, reviewed scholarly research on

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effective enforcement program design, and conducted a series of interviews with stakeholders across the state.

The picture that emerged from our research was clear, and not encouraging. We found the following: MDE is unable to effectively accomplish its mission of enforcing the law because it is starved for resources, conducts in-person inspections of only a small portion of water pollution sites, and fails to take advantage of citizen-enforcement suits to supplement its limited resources. Meanwhile, nearly all the stakeholders we interviewed—from industry representatives to environmentalists—lamented that MDE is asked to do more with less money. One industry representative put it starkly and well: Maryland “can’t keep diverting resources and adding more statutory requirements and expect things to improve.”

We concluded, ultimately, that the MDE needs more inspectors, and therefore more funding, to monitor polluters. But even in the absence of increased resources, the agency needs to redesign parts of its enforcement efforts. Specifically, it should impose much tougher penalties on those who break the law, so as to deter them from doing it again. We also believe the agency needs to embrace citizen suits as a helping force, not a distraction.

The numbers tell the story: For MDE’s Water Management Administration (WMA) alone, between 2000 and 2009, the number of permits to pollute has doubled, yet the overall budget during this time declined from \$3.39 million to \$3.16 million. When adjusted for inflation, that represents a decline of almost 25 percent. During this period,

the total number of WMA inspector positions, including both filled and vacant positions, has decreased by 12 percent, while the number of active, full-time inspectors has decreased by 25 percent. As a result, each inspector in the WMA is now responsible, on average, for roughly 1,180 permits as of 2009, triple the number of permits per inspector in 2000. It’s no wonder, then, that MDE relies on paper inspections of self-monitoring reports from polluters instead of actual on-site visits.

Similarly troubling is that the fees for surface water discharge permits—fees that support the WMA—have not been raised since 1993. Meanwhile, the average penalty obtained per enforcement action in the WMA over the past ten years is approximately \$1,260. Not all of these actions fall under the CWA, of course—yet it is startling to consider that if we use the CWA penalty structure as a yardstick, this average is roughly 5 percent of the maximum penalty authorized for a *single day of violation* under the CWA, as enacted, and roughly 12.6 percent of the penalty amount authorized per day for CWA violations under Maryland law. Put simply, if polluting is cheaper than not polluting, many polluters will violate the law if there is little chance of it being enforced, chalking up the meager fines imposed whenever caught to the “cost of doing business.” Raising fees and penalties would also support the agency’s strained budget.

Less understandable is MDE’s institutional hostility to citizen suits, a tool intended by Congress to supplement agency enforcement efforts. MDE is in the habit of “over-filing” suits brought by citizens against polluters, invoking a provision in the law that allows it to reclaim control of enforcement. Unfortunately, it

also has the effect of moving suits from federal courts back to state courts, where weaker penalties for polluters are likely to be far less of a deterrent.

The resource crunch continues beyond MDE. Funding shortages also dramatically curtail the ability of MDE’s legal counsel to pursue and effectively litigate enforcement actions. Nearly 40 percent of MDE’s referrals for legal action from 2009—325 of 816 cases—are still awaiting action by the Office of the Maryland Attorney General (OAG).

In this article, we first provide an overview of the scope of Maryland’s water pollution and explain how the Clean Water Act serves—ideally—to remedy many of the problems. We then analyze how Maryland has actually been enforcing the law, relying on our examination of Maryland’s annual enforcement reports. We conclude with a series of findings and recommendations, steps the MDE can take, as well as areas where the state legislature needs to act to provide adequate funding. We also include a summary of MDE’s response to the report.

Maryland’s Waters Today

Maryland has more than 7,000 miles of coastline and thousands of stream and river miles and lake acres. Nearly the entire state lies within the Chesapeake Bay’s watershed, and Maryland contributes about 20 percent of the pollution to the Bay. The health of the Bay is tenuous—improved from its condition in the 1980s, but still far short of what scientists consider healthy. High concentrations of nitrogen, phosphorous, and sediment are the biggest culprits; they accumulate in the Bay and contribute to algal blooms and dead zones during the summer months.

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Chesapeake 2000, the most recent agreement among Bay states, sets as a goal the removal of the Bay from the Clean Water Act's impaired-waters list by 2010. We won't meet this goal—and, in fact, we aren't even close: the most recent EPA assessment finds that the Bay was only 21 percent of the way toward meeting its water-quality goals.

The state has passed a series of laws intended to strengthen restoration efforts, including the Chesapeake Bay Restoration Act and the Maryland Healthy Air Act. Despite these efforts, and the expenditure of billions of dollars in federal aid over the past 20 years, water quality and the health of precious ecosystems, including fishing resources, within the Bay have not improved during this period.

The Chesapeake Bay today is not the natural resource—and economic provider—that it was just ten years ago. In 2007, the crab harvest in Maryland and Virginia was down to \$41 million, nearly 40 percent lower than it was a decade earlier, according to a report by Environment Maryland. Once-robust harvests of oysters and clams are now all but history. Jobs that were once reliable are now part-time or gone altogether.

The Role of State Government in Enforcing the Clean Water Act

In 1972, Congress adopted the then-bold CWA, establishing federal, uniform standards for protecting the nation's waterways. The law established a process for limiting polluting emissions, under which state and federal environmental agencies grant permits to polluters based on local waterways' uses and pollution loads. Just as important, the law created a mechanism for federal and state enforcement of those permits.

The heart of the CWA's implementation and enforcement strategy is the

National Pollution Discharge Elimination System (NPDES) program. All point sources—specific, identifiable sources of pollution—must obtain an NPDES permit and comply with the limits on discharges (called effluent limits) that it sets.

By law, the EPA may delegate to states the authority to administer the NPDES permit program if the state establishes a program that satisfies the minimal requirements of the CWA. The EPA may also withdraw that delegation of authority and administer the permitting program itself, if a state fails to administer the program in compliance with CWA requirements.

The adoption of environmental quality laws, of course, does not by itself protect the nation's waters. Achievement of statutory environmental-protection goals depends on rigorous enforcement. The CWA establishes two primary enforcement mechanisms: civil and criminal enforcement actions *by the government*, either the EPA or a state with delegated authority; and civil enforcement actions *by citizens* acting as private attorneys general to supplement governmental enforcement initiatives.

The CWA vests concurrent jurisdiction in both the federal and state governments to enforce discharge limits and related permit responsibilities. The CWA delegates to EPA fundamental oversight responsibilities but gives a state the first opportunity to address alleged violations of the permits it issues.

Deterrence-Based Enforcement: How It Can Work

Deterrence-based enforcement is based on the theory that those subject to legal obligations weigh the costs and benefits of complying with them. If the costs of complying with the law are lower than the costs of violating it, a rational regulated entity will comply with the law, goes the theory. If, howev-

er, the size of the penalties for violation, discounted by the probability that the government will pursue them, makes it cheaper to violate than to comply, a rational profit-maximizer will choose noncompliance.

Deterrence-based enforcement works, therefore, only if the threat of enforcement is credible. Part of the calculus involves assessing the likelihood that the government will detect a violation and decide to take enforcement action. In assessing whether compliance or noncompliance makes more sense, regulated entities will discount the amount of the penalties that may result from enforcement by the probability that enforcement will occur. In other words, credible enforcement and the possibility of significant fines drive the cost of polluting up, making compliance with the law a better business decision than violating it.

Citizen-Suit Enforcement

Like most federal environmental statutes, the CWA contains a citizen-suit provision that empowers citizens and public-interest organizations to bring enforcement actions against dischargers for violating their permits. Congress recognized that even the best-designed and most well-intentioned enforcement programs could not and would not catch all violations. Resource limitations preclude federal and state officials from identifying and pursuing all instances of regulatory violations. Aware of these limitations, and intent on providing a safeguard against excessive alignment by regulators with the interests of those they regulate, Congress included citizen-suit enforcement provisions to supplement government enforcement initiatives. The CWA's citizen-suit provision serves as a safety net to catch violations that elude detection or enforcement by federal and state regulators.

Citizen suits also serve other broader

purposes. In creating this second track of enforcement by “private attorneys general,” Congress reasoned that the ability to bring such lawsuits would strengthen democratic values by allowing citizens to redress grievances and ensure that citizens, as well as well-financed regulated entities, have access to the federal courts in matters relating to implementation and enforcement of the CWA.

The CWA’s citizen-suit provision provides that any citizen may bring a civil action against any person who is alleged to be in violation of an effluent standard or limitation or of an administrative compliance order.¹ Before proceeding, however, the citizen must give the administrator of the EPA, the state, and the alleged violator notice of the suit, and must allow a 60-day period for the violation to be corrected. To help finance citizen suits, the court may award attorney’s fees to the prevailing party.

During the 60-day notice period, a state may initiate its own action against the violator. In several instances, states have “over-filed” enforcement actions within this time frame in state court. These cases are often pursued at the request of the violator, which solicits state enforcement to shield itself from a citizen suit. If a state action commences and continues to diligently pursue enforcement action, the only remaining option for the citizen is to intervene in the suit at the state court level. The availability of opportunities for intervention depends on state law.

Citizen suits have made a significant mark as an environmental enforcement tool. One report found that between 1973 and 2002, citizens initiated actions that resulted in more than 1,500 reported federal decisions.² In the decade between 1993 and 2002, federal courts averaged 110 civil environmental cases per year, approximately 75 percent of which were citizen suits.³

Maryland’s Clean Water Act Enforcement Program

In 2009, MDE’s Water Management Administration had 46.4 full-time inspectors, who were responsible for 54,942 permits under a variety of federal and state water programs. Of these, approximately 14,000 permits were issued under the Clean Water Act.

MDE assigns priority for its sharply limited inspection resources to (1) sites that are subject to complaints from citizens; (2) oversight of owners and operators that have violated self-monitoring and self-reporting requirements in the past; and (3) oversight of owners and operators in violation of the permitted effluent limits. MDE routinely conducts paper-only reviews of permitted polluters’ Discharge Monitoring Reports (DMRs) and, less frequently, site inspections to determine whether or not the facility or site meets the criteria for significant noncompliance. These reviews assess whether a facility has exceeded the federal threshold for significant noncompliance; whether illegal discharges have caused or could cause an adverse impact to public health or the environment; and whether the violation represents willful, chronic, or recalcitrant behavior.

When MDE finds violations it deems minor, such as record-keeping or reporting errors, it has the discretion to allow the facility to correct a documented problem, either past or ongoing, without taking formal action. Significant violations or repeated minor violations warrant more serious legal action, which can include a combination of penalties, corrective orders, stop-work orders or injunctions, and criminal sanctions.

Maryland law provides the statutory minimums for civil and criminal penalties, as well as factors to determine the penalty amount. The penalties are determined based on criteria including the willfulness of the violation and pattern

of violation by facility, the harm to the environment or human health, and the cost of clean-up or restoration.

Like most other federal and state enforcement agencies, MDE reduces penalties on the basis of good-faith behavior by the violator, including prompt self-disclosure of the violation; prompt and voluntary corrective action; the development of plans to prevent future recurrence of the violation; and full cooperation with MDE to investigate the violation.

Noticeably missing from the list of factors used to determine the penalty amount is any effort to recover the violator’s economic benefit from noncompliance—a step that would be consistent with the theory of deterrence-based enforcement. The federal EPA, by contrast, includes a penalty component to recover the polluter’s economic benefit from breaking the law. The EPA has also taken another step that Maryland has not: It adjusted its statutory maximum penalty to correspond with inflation and can now issue penalties up to \$37,500.

MDE’s Enforcement Record

MDE is required by state law to publish an annual report on its enforcement activities during the previous year. To Maryland’s credit, it requires such a report—most states do not. The following analysis is based on data from fiscal years 2000 to 2009, contained in MDE’s Annual Enforcement and Compliance Reports and posted on MDE’s website.

One of the most striking aspects of these reports, when examined cumulatively, is that while overall resources have declined, the number of permits and scope of enforcement responsibilities have increased. The overall budget for MDE’s WMA enforcement workforce has decreased by almost 25 percent since 2000, adjusted for 2009 values. While the FY 2009 budget represents an increase from the lowest budget in FY 2007, the overall decrease

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coincides with a doubling of permits in effect during the same period.

Not surprisingly, the budget has a significant impact on the number of inspectors. The total number of inspector positions allocated, including both filled and vacant positions, has decreased overall by 12 percent from a high of 63.3 positions in 2000 to a low of around 47.5 positions in 2007 and 2008. In 2009, the number of allocated positions increased to 55.9. Even more dramatic, however, is the overall decrease in the number of filled, full-time inspector positions, from 62 inspectors in 2000 to 46.4 inspectors in 2009—a 25-percent decrease in active inspectors. With the doubling of the number of permits in effect, the decrease in full-time inspectors means that roughly 1,180 permits are in effect for each inspector, three times the number of permits in 2000.

In a press release on the FY 2009 Enforcement and Compliance Report, MDE heralded a 7-percent increase in enforcement actions and a 17-percent rise in sites inspected, attributing these increases to an initiative to improve enforcement launched in 2007. The increase in enforcement actions came primarily in sectors unrelated to the CWA, such as drinking water and radiological health.

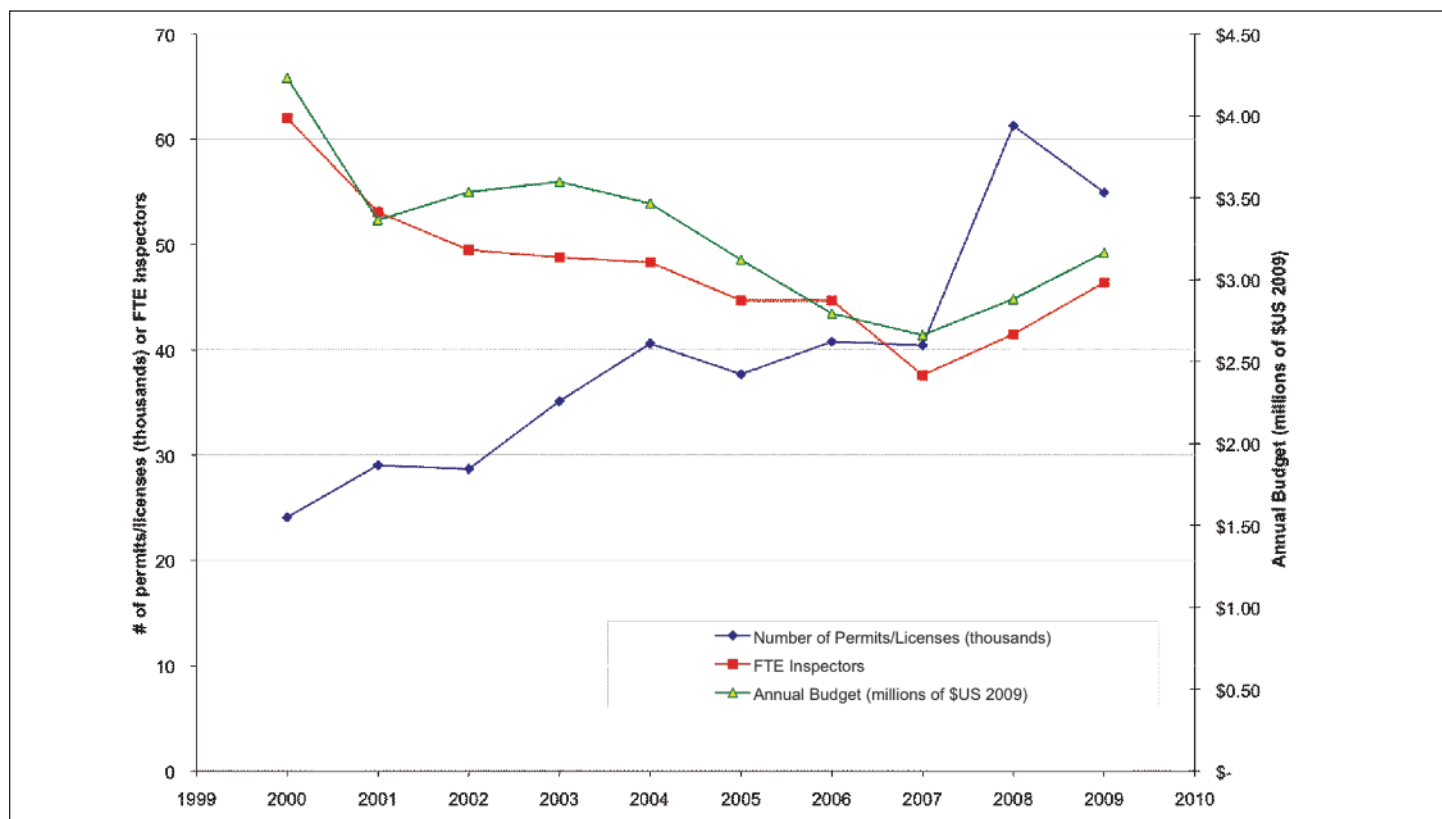
The 2009 report notes that, despite this overall increase, many enforcement actions are in queue at the Attorney General’s Office. The report acknowledges that “legal staffing has not kept pace,” and as a result, nearly 40 percent of MDE’s referrals—325 cases of 816 cases referred—are still awaiting assignment to or active attention from MDE’s legal counsel.

Moreover, MDE is settling for strikingly low penalties. As we noted, the average penalty obtained per enforcement action in the WMA over the past

ten years is approximately \$1,260. From 2000 to 2009, average penalties were higher for municipal and industrial dischargers with NPDES permits, averaging \$8,265 per enforcement action. We emphasize, however, that these are averages for enforcement actions—and not for how much was recovered per day of violation. The penalty structure under both Maryland law and the CWA provide for maximum *daily* penalties—enforcement actions often involve violations that happen more than once. Under Maryland law, CWA violations are subject to a maximum civil penalty of \$10,000 *per violation per day*. Under the Clean Water Act and subsequent adjustments for inflation, the current civil penalty maximum is \$37,500 *per violation per day*.

So, for example, if a polluter violates its permit for three days, it would be subject to either a \$30,000 maximum penalty amount under Maryland law or a \$112,500 maximum under federal

Figure 1. Trends in WMA Permits, Inspectors, and Budget, FYs 2000-2009.



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law, depending on the court in which the case was filed. While the number of penalties issued in any given year does not necessarily reflect the effectiveness of MDE's enforcement program—a variety of factors can explain a high or low collection rate—the average penalty obtained per enforcement action in Maryland is notably less than the maximum penalties provided by law for a single day of violation.

More Permits Mean Greater Workload: Municipal and Industrial Surface Water Discharges

Under the federal CWA and Maryland law, all industrial, commercial, or

institutional facilities that discharge wastewater directly into the waters of Maryland require an NPDES permit. Additionally, concentrated animal feeding operations (CAFOs) must obtain NPDES permits. According to MDE, this program is a high priority.

Between FY 2000 and FY 2009, the number of permits in effect increased sharply, primarily due to dramatic increases in 2008 and 2009. In FY 2008, MDE began including all general permits for stormwater associated with construction activity in its calculation of permits in effect. General permits cover an entire category of polluter. Permit holders need not apply for an individual NPDES permit, but must comply with the conditions attached to the general

permit for the industrial category involved. The program shows a gradual increase in the number of site inspections, particularly between 2000 and 2007, but with significant drops in 2008 and 2009. The inspection coverage rate dropped sharply in 2008 and 2009, as a result of the dramatic increase in the numbers of permits in effect.

Monitoring Pretreatment Industrial Discharges

MDE's responsibility for regulating the discharge of wastewaters extends to regulating wastewaters from industrial and other nondomestic sources discharged to publicly owned treatment works. This oversight helps to ensure that these dischargers do not introduce to municipal treatment works wastewater that could harm the works' critical water infrastructure.

As of FY 2009, MDE had delegated responsibility for enforcement actions to 20 local pretreatment programs responsible for 198 industrial sources. These local pretreatment programs assume the enforcement duties and authorities of MDE, according to MDE's delegation agreement with the EPA. The enforcement actions taken by these programs are not included in MDE's enforcement statistics, however. Instead, MDE compliance and enforcement efforts in the pretreatment sector focus on monitoring delegated local pretreatment programs and industrial dischargers that discharge to nondelegated local programs.

This supervision requires a significant commitment of resources and, given Maryland's shortfalls in other areas and the importance of controlling this type of discharge to the preservation of environmental quality, this arrangement raises serious concerns about the effectiveness of locally delegated programs in implementing CWA requirements.

Between FY 2000 and 2009,

Figure 2. Municipal and Industrial Surface Water Discharge Permits and Inspections, FYs 2000-2009.

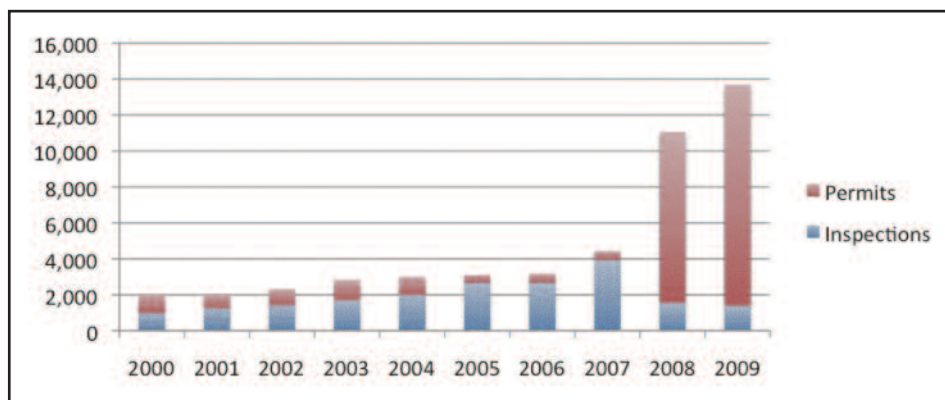
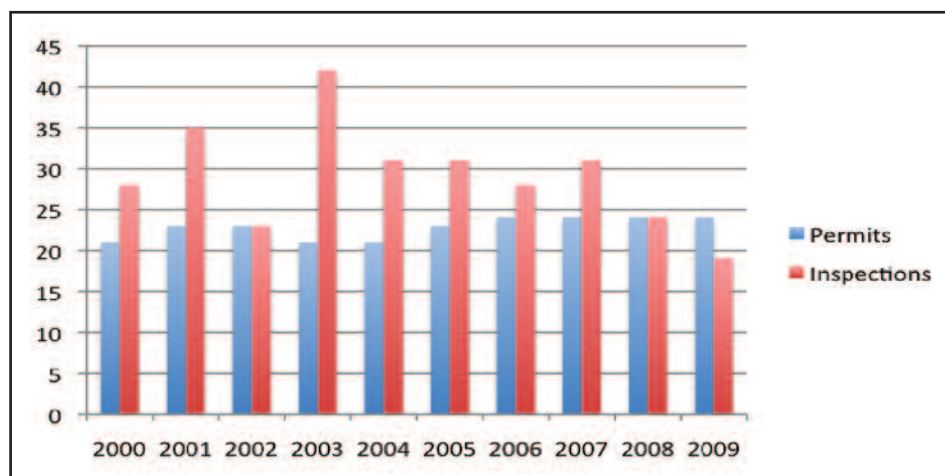


Figure 3. Pretreatment Industrial Discharge Permits and Inspections, FYs 2000-2009.⁴



enforcement activity by MDE remained relatively steady, with a nearly 100-percent inspection rate for the delegated authorities and industrial discharges that receive permits directly from MDE. Compared to other programs, MDE oversees relatively few facilities under this program. The number of enforcement actions is low. When enforcement actions do occur, they are primarily compliance-assistance activities.

From 2000 to 2009, this program took only 13 penalty and other enforcement actions, not including compliance assistance. The average penalty per action was \$22,935. Again, MDE's annual reports do not include information on enforcement activities by locally delegated pretreatment programs, a crucial information gap.

Stormwater Management and Erosion & Sediment Control for Construction Activity

MDE's stormwater program works to reduce the amount of sediment and other pollution that flows into state waters from construction or land-use activities associated with urbanization. In Maryland, construction activity that disturbs more than 5,000 square feet or more of land or results in 100 cubic yards or more of earth movement is required to have stormwater management plans and erosion and sediment controls in place before construction activities begin. MDE has delegated inspection and enforcement authority for erosion and sediment control to 14 counties and 10 municipalities. The enforcement activities conducted by these delegated authorities are not included in MDE's enforcement statistics.

Under Maryland law, construction sites with approved erosion and sediment control plans must be inspected once every two weeks on average. The

enforcement reports freely concede inadequate inspections and state that "[t]his requirement is not being met due to workload."

Between FY 2000 and FY 2009, the number of stormwater and erosion and sediment permits in effect has steadily increased overall. However, the number of sites inspected has slowly decreased. More telling, however, is the sharp decline in the inspection coverage rate, which is calculated as the number of sites inspected divided by the number of permits in effect. The average penalty per enforcement action in this program from 2000 to 2009 was \$4,786.

Concentrated Animal Feeding Operations

In 2009, a new permitting program became effective for large animal feeding operations that qualify as either a concentrated animal feeding operation (CAFO) under federal law or a newly established Maryland animal feeding operation (MAFO). The CAFO program authorizes on-farm inspections and enforcement of water quality problems by MDE. Whether or not a farm facility falls under this new permitting program hinges, in part, on whether it "proposes to discharge," or is designed with a conveyance system to remove contaminated runoff or wastewater from the production area to the surface waters of Maryland. If a farm qualifies as a CAFO, it is required to obtain a Comprehensive Nutrient Management Plan (CNMP) from the USDA Natural Resources Conservation Service. If a farm qualifies as a MAFO, it must obtain either a CNMP or both a nutrient management plan (NMP) and a state conservation plan. All other farms are still required to have NMPs under a separate program enforceable by the Maryland Department of Agriculture.

Because the CAFO/MAFO program is new, statistics regarding enforcement

efforts are limited. As of March 2010, some 506 Maryland farms have submitted applications for CAFO status.⁵

Missing Enforcement Data

The available enforcement data show that resources have decreased at the same time that the number of permitted facilities has increased dramatically. Fewer inspectors are responsible for assessing compliance with more and more permits, and inspection coverage rates are down, meaning more facilities slide by each year without physical inspections.

Yet the statistics in MDE's annual enforcement reports do not present a complete picture because, although MDE offers explanations for variations from year to year, those explanations do not fully or thoroughly detail MDE's enforcement actions. Instead, the reports use different definitions of site categories from year to year, making it difficult to track trends. They also have crucial information gaps and reporting inconsistencies.

Significantly, the enforcement statistics in MDE's reports do not include enforcement activities conducted by other local delegated jurisdictions and vary depending on how certain enforcement activities are counted. In Maryland, 20 publicly owned treatment works have delegated enforcement authority over indirect industrial dischargers to their facilities. However, MDE does not include this information in its annual reports. Both MDE and the public would benefit from having this information available to determine whether these delegated authorities are conducting appropriate enforcement actions.

The Compliance Program freely acknowledges—and the enforcement statistics clearly demonstrate—that the vast majority of inspection and monitoring activities are not physical on-site

inspections.⁶ Instead MDE relies on self-reporting by the regulated community. While these reports are an important part of environmental enforcement, they can never substitute for physical inspections. The reports may be fraudulent or fail to include important information; they do not account for unpermitted activities; and DMRs represent only the extent to which sources complied with their discharge limits, but not other important obligations, such as compliance with schedules for construction of new pollution-control techniques.

Finally, the annual enforcement reports from 2006 to 2009 contain considerably less information, self-evaluation, and explanations of the statistics than in previous years. The inclusion of such information would help make the data more understandable and benefit both MDE, by providing the opportunity to explain any discrepancies, and the public, by enhancing the transparency of agency enforcement activity.

Interviewees Describe Special Areas of Concern

As noted, CPR conducted a series of stakeholder interviews as part of our research. Interviewees highlighted several areas of concern:

Maryland's Enforcement Compared with Other States. One environmental interviewee described MDE's enforcement program as "middle of the pack—slightly under par," while an official evaluated the program more positively, noting the "considerably higher" number of violations flagged for formal enforcement actions. One official noted that the Chesapeake Bay is a driver for enforcement because it gives MDE and Maryland a higher profile than other regions with less famous

or less historically important waterways. Yet another environmental interviewee said that the long history of Bay restoration was an obstacle to an active and vigorous enforcement program. "The Bay restoration effort has been going on for so long now, and there's a mentality that there's nothing that will help all that much, so just plug away and be satisfied."

Impartiality of State Courts. At least five officials and environmental interviewees said that state courts were not the ideal venue to hear civil or criminal environmental enforcement actions. Some officials preferred administrative hearings, and some environmental interviewees expressed a preference for citizen suits because they are heard in federal court. One environmentalist said: "Some cases you can't get anywhere in state court. You need to be in federal court." Another alleged that state court judges are "unbelievably predisposed to defendants" and "hostile to MDE."

The Office of the Attorney General. At least two interviewees emphasized the need for the Office of the Attorney General to review permits for legal issues before they are issued. According to one environmental interviewee, "the OAG seems surprised when issues of legality are raised." Another environmental interviewee commented that if the OAG is "going to have to defend state decisions, they need to have a more active role in reviewing the legality of permits." This interviewee acknowledged that the OAG cannot review every permit but that "some are getting through that are clearly illegal." This perspective was refuted by one official, who explained that some groups may feel that "MDE's permits aren't as environmentally protective as they could be, but the permits are legally sustainable. It's not the OAG's role

to say to MDE, 'Be tougher.'"

Report Recommendations

The CPR report focuses on three areas:

Funding. MDE is drastically underfunded. For the Water Management Administration alone, the overall budget between 2000 and 2009 declined by almost 25 percent, coinciding with a doubling of permits-in-effect. As a result, the agency does not have enough resources to effectively fulfill the core mission of the CWA and state water-quality laws. The funding shortages are especially pronounced with respect to the enforcement workforce and the number of inspections.

In interviews, nearly all of the stakeholders expressed dismay at the lack of inspectors and the lack of inspections in MDE's enforcement program and cited a need to increase both. An industry representative said that a fully staffed enforcement workforce would "paradoxically" benefit the regulated community because more inspectors would allow MDE to distinguish more easily between the "good guys" and the "bad guys" instead of the "tendency to overreach in the first go-round."

An industry interviewee said, "That is the single biggest change they need—more people out in the field going from place to place." Recognizing that the "work of agency staff is complicated and technically challenging," one environmental interviewee suggested that MDE needs resources to "retain capable staff." Although there "are definitely some," MDE must have the financial ability to retain inspectors so that they "hang in there."

Mindful of these concerns, the Maryland legislature should:

- Provide **additional funding** to ensure a vigorous enforcement program and should index increased

- funding levels to the rate of inflation;
- Authorize an **increase in permitting fees** to ensure that the fees cover the basic cost of program administration; and
- Authorize **increased penalties for violations** and should establish mandatory minimum penalties that are not subject to MDE discretion.

Program Design. Regardless of funding shortfalls, MDE has not designed its enforcement program to effectively deter dischargers from violating the CWA and state water-quality laws. MDE relies primarily on paper reviews of Discharge Monitoring Reports to assess compliance, overlooking the importance of physical, on-site inspections that may reveal violations or problems not disclosed in such reports.

MDE has settled for strikingly low penalties, and its penalty policy fails to recover the violator's economic benefit from noncompliance. MDE also fails to fully disclose the range of enforcement actions taken by local programs with delegated enforcement authority, resulting in an incomplete picture of enforcement activities across the state.

The stakeholders interviewed expressed the perception that MDE sets penalties at levels that are not sufficient to create an effective deterrent to non-compliance, causing the regulated community to view those penalties as the necessary "cost of doing business," to be regarded no differently than payroll, equipment purchase, and other ongoing costs. In response, one industry interviewee said that this mentality operates on a case-by-case basis. "There will always be a few that would rather pay the fine than pay for the upgrades." Another industry interviewee categorically denied that regulated companies calculate MDE enforcement penalties

as the cost of doing business. Considering the legal fees and the public relations impact, regulated entities "clearly never make money" from a deliberate violation.

Therefore, we make the following recommendations:

- MDE should revise its penalty structure, seeking to **recoup the economic benefit achieved by noncompliance** from all defendants in enforcement actions.
- The General Assembly should **authorize a maximum civil penalty that is comparable to the federal maximum.** Currently, the Clean Water Act authorizes a maximum civil penalty of \$37,500 for NPDES violations, whereas Maryland law authorizes a maximum civil penalty of \$10,000 for the same violations.
- MDE should also **stop relying solely or primarily on paper reviews** of permit-holders' Discharge Monitoring Reports to set enforcement priorities, and should increase the frequency of physical, on-site inspections.
- MDE should also **re-evaluate the balance of judicial enforcement actions and administrative enforcement actions**, and carefully consider which route is better, based on factors such as the difference in maximum available penalties or past experience with similar cases or in similar venues.
- The department should **conduct an analysis of the most significant causes of Bay pollution and select and inspect on an annual basis the largest dischargers or a random sample of discharges in sectors with multiple small dischargers.**

Citizen Suits. Fundamentally, MDE seems to give inadequate weight to Congress's decision when it enacted the CWA to establish the citizen-suit provision to protect against the risk that government entities would not have the resources,

energy, or will to pursue effective enforcement actions in the full range of cases in which noncompliance occurs—precisely the circumstance that many stakeholders feel is in evidence at MDE.

Citizen suits are an integral and established part of most federal environmental laws and enforcement programs. They represent an explicit congressional recognition that citizens have a role to play in enforcement because they and their organizations are able and have information and resources to monitor local dischargers that MDE may not.

In interviews, we heard dramatically differing views on the role and value of citizen suits depending on the stakeholder's background: "Citizen suits are overrated as a tool for significant change." Another industry interviewee commented that citizen suits "affect the timing [of an enforcement action] but seldom change the outcome." This interviewee explained that a citizen-suit notice may force MDE to act faster than it would without the notice, but ultimately MDE is "not likely to take any action that it wouldn't have taken anyway." However, environmental interviewees and some officials were more favorable: Those who favored the use of citizen suits, described them as "a critical piece of the enforcement tool set," a "check and balance," and a "helpful [way to] to drive action and policy."

The unavoidable conclusion is that MDE fails to take advantage of citizen suits to supplement its own enforcement actions and to maximize its limited resources. The department's institutional mentality precludes citizen suits from proceeding by preempting these lawsuits and denying citizens the opportunity to participate or to represent their own interests once MDE takes over the case.

An environmentalist interviewee recounted conversations where MDE

staff “said that they can’t let citizens bring lawsuits because it gives the perception that they are not doing their job.... They don’t want that message out there to lose public support.”

This attitude toward citizen suits has provoked an atmosphere of tension and controversy among MDE staff and the regulated community, as they question the validity of this supplementary enforcement tool provided by Congress to give citizens access to the courts and to assist state enforcement programs.

On a case-by-case basis, MDE should permit citizen suits to proceed in federal court to supplement its own enforcement. Allowing enforcement actions to proceed in federal courts would facilitate maximum penalty recovery and thus create maximum deterrent effect.

Conclusion

In order to achieve the goal of a restored Chesapeake Bay, the Maryland Department of the Environment must forcefully and publicly rededicate its commitment to enforcement.

Because MDE is starved for resources and has persisted in carrying out an inadequately designed program, its CWA enforcement program is ineffective in deterring noncompliance across the spectrum of regulated sectors. Funding gaps have persisted for so long that, according to many interviewees, MDE’s staff has internalized an unacceptably low level of expectations for the agency’s performance in enforcement. A primary example is MDE’s primary reliance on paper inspections of self-monitoring reports to determine compliance. Few, if any, credible experts in the operation of a deterrence-based enforcement program, whether in the government, the private sector, or among publicly fund-

ed organizations, would agree that paper inspections provide the foundation for an effective enforcement program. As troubling, a backlog of 325 referred cases awaiting assignment in the Office of the Attorney General indicates that even MDE’s unacceptably weak efforts to verify compliance and implement an effective deterrence-based enforcement program are crippled by lack of legal representation.

While Maryland has many tough environmental laws, MDE lacks the funding and does not currently have an adequate enforcement program to achieve the goals set under the CWA and its own state laws. Even without additional funding, it could redesign its existing program and reallocate its limited resources to improve enforcement of water-quality laws. Maryland prides itself on being an environmentally progressive state. That may have been true once. With aggressive enforcement, it could be a reality again.

MDE’s Response to the Report

After compiling our report, we sent it to MDE for its review and comment and met with several senior staff members as well. Their feedback was helpful, thoughtful, and measured. In its official letter of response to our report, which is included in full in the report’s appendix, MDE “generally agreed” with our analysis of its funding shortfall and agreed that our report “accurately reflects the large number of cases awaiting administrative or civil action in the Attorney General’s Office.” The agency disagreed, however, with our overall assessment of its enforcement program, noting that many internal improvements had been made over the last three years and providing the following efforts as support:

- In 2007, MDE conducted a review of its fiscal health and, in response

to this review, “implemented several recommendations from the study, including prioritizing activities and functions, eliminating low-priority functions, realigning fund sources, and three fee increases.”

- MDE increased the number of enforcement actions taken after establishing a Standard Enforcement Procedure in 2007 that “requires the enforcement activity to significant violations begin within 90 days of the violation date.” MDE states that enforcement actions taken annually have increased 44 percent from FY07 to FY09.
- MDE established the MDEStat accountability program. “Each MDE administration is reviewed monthly at MDEStat meetings, and any enforcement cases overdue for processing are identified and discussed.” As a consequence of this effort, “the backlog of CWA enforcement actions to be referred for legal action has been eliminated.”
- In January 2009, “MDE implemented a consistent enforcement approach for sanitary sewer overflows (SSOs) by assessing a penalty for each and every event (unless the responsible party can demonstrate to MDE’s satisfaction that the SSO was beyond its control or is already paying stipulated penalties for SSOs under a consent order).”

MDE also disagreed with our criticism of their program design, asserting it has confidence in DMR reviews and disagreeing that their approach to CWA compliance is based largely on “paper reviews.” The agency writes:

The draft report assert that MDE’s approach to CWA compliance is based largely on “paper reviews,” referring to reviews of facility-supplied Discharge Monitoring Reports, or DMRs, to determine compliance. The draft report further notes that the apparently-high percentage of MDE compliance reviews are

“paper reviews.” In fact, the number of facilities audited by DMR reviews only is smaller than the number evaluated by on-site inspections. In FY08 there were 2,311 total sites evaluated; of those, 1,544 sites were inspected (67%). In FY09 1,711 sites were evaluated, of those 1,385 sites were inspected (81%). This illustrates that the majority of evaluations involve on-site inspections.

We would only observe that, according to MDE’s 2009 enforcement report, 13,677 permits were in effect for municipal and industrial dischargers, and that the 1,711 sites “evaluated” is a subset of this total number. MDE’s point is well taken, however, that, when it conducts an evaluation, this evaluation more often than not also includes an on-site visit. We note that 1,385 on-site inspections in 2009 is a “coverage” rate of 10 percent of the 13,677 permitted dischargers (a fact indeed noted in MDE’s 2009 enforcement report as well).

Moreover, the 2008 and 2009 reports distinguish between unique sites evaluated for compliance and the overall number of compliance activities. With respect to the overall number of compliance activities, these reports support our assessment that MDE relies largely on paper audits rather than on-site inspections. In 2008, under the Surface Water State and NPDES permits, the total number of inspections and spot checks was 3,120, and the total number of audits was 5,929. The report defines an audit as “a review of records, self-monitoring reports performed off site at MDE offices.” Thus, in 2008 there were nearly twice as many paper reviews as on-site reviews, consistent with our assessment. The 2008 report even explicitly states, on page 18, that “much of compliance is determined by record reviews rather than physical inspections.” The num-

bers for 2009 are comparable.

Finally, with respect to citizen suits, MDE stated the following:

- MDE considers the facts presented in each citizen-suit notice and decides the best course of action in light of priority based on protection of public health and the environment.
- MDE does not “block” citizen suits but does file enforcement actions when appropriate. “Contrary to the report’s claim that MDE ‘denies citizens the opportunity to participate’ in enforcement actions when MDE ‘takes over the case,’ over the past two years, MDE has filed an enforcement action and preempted a citizen suit only once in response to a Notice of Intent. The last time citizens sought to intervene in a State enforcement action, MDE actively supported their effort by filing a motion with the court in support of intervention.”
- MDE “encourages citizen participation in a grant-funded MDE Enforcement Volunteer Corps that is helping review required records under the General Permit for Construction Activity, enabling enforcement actions to be taken for identified violations.”

We note that MDE asserts that it has been more cooperative with citizen suits *in the last two years*. This report covers a broader period, of course, and given the department’s long track record on the issue, we’re hopeful that it has, in fact, turned a corner on this issue. If it has, however, we note that our interviewees were unaware of such an intention by the Department. Additionally, while the point may be technically correct, there are other ways of preempting citizen-suit actions. For example, MDE could enter into a consent decree with the polluter prior to

the 60-day “overfiling” deadline, thus effectively ending the citizen suit.

ENDNOTES

- ¹ 33 U.C.S. § 1365 (2010).
- ² James R. May, *Now More Than Ever: Trends in Environmental Citizen Suits at 30*, 10 *Widener L. Rev.* 1, 30 (2003).
- ³ *Id.*
- ⁴ In Figure 3, the “permits” include both the local pretreatment programs and the industrial users over which MDE has direct responsibility and issues delegation agreements or permits. For example, in 2009, MDE delegated enforcement authority to 20 local programs and issued four permits to industrial users, for a total of 24 permits. MDE’s inspection rate for the pretreatment program is high, often exceeding the number of permits. However, it is important to remember that approximately 200 facilities discharge to the local programs, so the overall rate of inspection by MDE is still fairly low.
- ⁵ Maryland Department of the Environment, *Status of Concentrated Animal Feeding Operations (CAFOs) Applications*, http://www.mde.state.md.us/Programs/LandPrograms/Solid_Waste/cafo_search/ (last visited Mar. 7, 2010).
- ⁶ Maryland Department of Environment, FY 2008 Annual Enforcement and Compliance Report 18 (2009), http://www.mde.state.md.us/assets/document/AboutMDE/enf_comp_08.pdf.

ABELL SALUTES

continued from page 1

were not ready to give up the excitement of city living. They used the internet to research numerous eastcoast cities, ultimately deciding on Baltimore because of its central location, job opportunities and proximity to water. Months of house hunting later, a small classified ad in the newspaper led them to the Patterson Park Community Development Corporation (PPCDC), and finally to their new home on North Glover Street. In fact, it was this series of choices that eventually led them to become active in Baltimore City's first successful alley gating and greening project, now a city-wide program brought into being in April 2007 by city ordinance.

The pioneering program, the origins of which go back to Copenhagen in Denmark and Melbourne in Australia, encourages residents to gate their alleys and turn the once-gritty and even dangerous space into user-friendly, park-like settings.

Known as "Community Greens," the converted alleyways become shared parks, tucked away inside residential blocks. They are collectively owned and managed by neighbors whose homes and backyards, decks, patios, and balconies enclose the green. In Baltimore, Streuver Bros. Eccles & Rouse created Grindall's Yard in Federal Hill in the early 1980's; and in Patterson Park, the Luzerne/Glover neighbors (including the Heslins') have transformed their alley into a community green.

Community Greens, an initiative of Ashoka, a national organization which bills itself as working to improve quality of life ("Innovators for the Public"), has been working for the past four years in Baltimore to launch the initiative. In 2007, a \$47,000 grant from The

Abell Foundation supported Community Green's efforts to complete the city's ordinance regulations, raise the visibility of the program city wide, work with groups of residents interested in creating their own community green, and evaluating the program's effectiveness.

Many of Baltimore's neighborhood alleys are blighted spaces, where crime and garbage dumping keep whole neighborhoods in decline and discourage potential residents from living in the city. The passage of the resident-led Alley Gating and Greening Ordinance gives Baltimoreans an unprecedented opportunity to reclaim their alleyways, engage in civic life, and improve their communities. Residents are able to convene together without fear; children can play safely and get the exercise they need; and residents can create a serene, environmentally sustainable area.

Residents interested in greening have a number of steps to implement. The complexities of the ordinance requirements mean that residents will need assistance navigating the process. The challenges range from block organizing to working with the city's Department of Public Works.

They must first decide whether to gate their alleys and leave the concrete intact, or gate and green the alleys, and whether they want traffic obstructed; secondly, they must assemble 80 percent of landowners to support a petition for gating and/or greening, including absentee landowners who must be located and their approval secured. Once an 80 percent majority approval is received, residents submit an application to the Department of Public Works that includes "green design" specifics; obtain approvals from police, fire, sanitation, and private utility companies; and provide stipulated public notifications of public hearings and alley closures. They are expected to

raise funds to pay for gates, application fees, public notices in newspapers, locks and access methods for emergency personnel and utility companies, planters, soil, and shrubs.

Community Greens is working in 24 neighborhoods throughout the city. Nine projects have been completed to date and 74 are in the approval process with the Dep't. of Public Works.

Researchers from University of Maryland and College of William and Mary are evaluating each initiative and attempting to determine the impact of green spaces on residents and communities. In the proof: crime statistics, calls to 311, property values, and environmental-impact measures, perception of quality of life..

Abell Salutes the Community Greens initiative, and Baltimore's resident leadership for reclaiming formerly ignored and sometimes unsightly alleyways, and so improving the quality of life in their neighborhoods.

But back to our patio party in the walkway in the rear of the houses between Glover Street and Luzerne Avenue: Guests are not thinking about the data being gathered to assess the Community Greens program. They don't need any proof. The newly-found and invigorated neighborly camaraderie made possible by the gating of the alley that runs behind their houses is proof enough.
