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## State trying to cope with backlog of pollution violation cases

### Nearly 300 awaiting enforcement

By Timothy B. Wheeler, The Baltimore Sun

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FEDERALSBURG — Charles S. Long was upset to discover that a bulldozer had cleared the land next to his, knocking down trees and uprooting day lilies on his property in the process.

A state inspector also found problems with the clearing project: It lacked a plan for controlling sediment pollution, and nothing had been done to keep mud from washing off the land into a nearby creek when it rains. What's more, the landowner, William L. Tarbutton, who lives in Preston, has run afoul of state regulations before — as a contractor, he worked on developments in Queen Anne's and Caroline counties that were cited in 2007 and 2008 for sediment control violations.

Until The Baltimore Sun inquired recently, those two earlier cases were still awaiting action by the state attorney general's office, along with nearly 300 other environmental enforcement cases, many of them years old and most involving water pollution violations.

"I really think the ball has been dropped," said Long, 63, who showed a reporter recently where his trees and flowers stood before the late August incident. The cleared land has since been planted, though around the perimeter there's still a swath of bare soil.

Long isn't the only one bothered by the backlog. Rena Steinzor, a University of Maryland law professor and president of a pro-regulation think tank called the Center for Progressive Reform, says the state is missing a chance to help clean up the Chesapeake Bay through stricter enforcement of environmental laws and rules.

"A backlog is a very bad sign," she said. "There've been problems for many years. Maryland has been insufficiently vigorous."

State officials say the backlog has resulted from a shortage of lawyers who can pursue violations, but Steinzor contends a lack of resources is no excuse — especially since Attorney General Douglas F. Gansler said he would make environmental issues a focus of his office.

"Gansler came into office promising a very aggressive profile," Steinzor said, "and it's discouraging that he and the governor haven't been able to get together on this. ... It's a political problem, not only a resource problem."

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The state Department of the Environment has struggled for years with a reduced staff to cope with an increasing number of sites to inspect and regulations to enforce. The department checked on just 17 percent of all construction sites last year, according to its most recent enforcement report. Even so, it's increased the number of enforcement actions initiated, levying 79 penalties and cleanup orders last year for storm-water and sediment violations.

Steven R. Johnson, an assistant attorney general who serves as MDE's principal counsel, said the backlog actually is a byproduct of more aggressive enforcement — but a shortage of lawyers to deal with it.

Until a few years ago, state regulators had tried a gentler approach, Johnson explained, negotiating with violators to fix problems without hitting them with fines. But O'Malley administration officials concluded that "compliance assistance," as it was known, wasn't working in many cases, so they decided to start referring all significant violations to the attorney general's office for legal action.

As a result of that policy shift, the attorney general's staff got 459 water pollution cases of all types referred for legal action in 2009 alone, Johnson said. According to MDE's most recent annual enforcement report, regulators asked for legal help on 816 cases that year — more than double the number sent over two years before.

"If you're going to do full, rigorous enforcement you need a whole lot more attorneys," Johnson said.

All but two or three of the 24 lawyers assigned to the Department of the Environment work on enforcement, he explained. Just five deal primarily with water cases, though, while the rest focus on air pollution, lead poisoning and other regulatory cases.

And with the state's budget crunch, MDE has been unable to get funds for more positions, so the attorney general's office could not hire more lawyers to handle the jump in cases, Johnson said.

The state may lack the inspectors to check as frequently as it should on all potential polluters, Steinzor said, but penalizing violators sends a message to others to tow the line. Failing to act promptly doesn't deter violations, she said.

"In an era where there are such chronic shortfalls in every area, enforcement brings the biggest bang for the buck," she said.

Johnson said his office has dealt with the backlog by prioritizing cases — tackling first those where people's health or the environment actually have been harmed, for instance.

Some water cases also have been assigned to other lawyers in the office, and the backlog has been whittled down from 348 a year ago to 282 recently. Now, Johnson said he's recently been able to hire three lawyers on contract, two of them to focus on water cases.

"We're not dropping cases," Johnson said, adding that "we're careful that those cases on backlog never run past the statute of limitations."

But Johnson later acknowledged that the three-year limit has passed on taking legal action against Tarbutton for his 2007 and 2008 violations.

An MDE inspector first cited Tarbutton for sediment pollution violations in March 2007 at the construction site for a housing development in Church Hill known as the Preserve at Southeast Creek. The Chester River Association, a local environmental watchdog group, had called in a complaint about inadequate erosion controls there.

The inspector found "unacceptable" installation of silt fence to prevent sediment pollution and other problems. In four

follow-up visits over the next four months, Tarbutton, the excavation contractor on the project, and the developer were repeatedly written up for failing to follow their own plan for controlling erosion and putting soil where it would likely be washed into the creek.

In July 2008, another MDE inspector cited Tarbutton for failing to follow his sediment control plan at a commercial site in Bethlehem in western Caroline County. Silt fencing again was not properly installed, the inspector found. It took a month and repeat inspections to fix those problems.

Sediment pollution is a serious problem for the Chesapeake Bay and its tributaries. Soil particles can cloud the water, stunting or killing underwater vegetation, and can smother bottom-dwelling plants and animals, such as oysters and clams. Sediment also typically carries phosphorus with it, one of the plant nutrients blamed for feeding the massive algae blooms in the bay and ultimately creating the vast "dead zone" that forms every summer.

Sediment control violations deserve prompt enforcement attention, Johnson said.

"We'd rather get at that when there's a potential for sediment pollution, rather than get to it a year or two later," he said. But the 2007 and 2008 cases were part of that "enormous slug" of referrals from MDE, he explained, that overwhelmed the staff.

Now, if MDE refers the recent Federalsburg case to the attorney general's office, Johnson said his office would treat it as a repeat violation and make it a high priority.

In that case, the MDE inspector found in late August that Tarbutton had cleared a little less than half an acre of grass and trees without doing anything to keep mud from washing off the land into the creek when it rains. Nor apparently had he filed a plan for controlling sediment pollution, which is required in order to get a permit to clear land. A follow-up inspection a few weeks later found the site still lacked adequate measures to keep soil from washing off.

Asked if earlier enforcement action by the state might have deterred Tarbutton from running afoul of the law again in Federalsburg, Johnson said, "We have plenty of people who are repeat violators even when they are penalized — especially, unfortunately, with sediment and erosion control violations. There's a general sense out there that it's not a big deal."

Though the statute of limitations has passed for taking Tarbutton to court, Johnson said the state still can impose stiff administrative penalties. On Nov. 17, after The Sun had inquired about the state's delay in acting, the attorney general's office wrote Tarbutton telling him the state intends to file complaints against him over the two old problems and seeking \$240,000 in penalties, the maximum allowed under the law. Acknowledging the time that has passed since the violations, the letter offered to settle if Tarbutton paid \$200,000.

When reached by phone, Tarbutton, 43, dismissed the state's move to fine him for the old cases as "a big joke, to be honest with you.

"It was five years ago, and those issues were settled," he said. "Everything was corrected." Asked about the more recent Federalsburg incident, Tarbutton said he'd fixed that as well, then declined to talk any more.

Walking the stream that runs by the cleared Federalsburg property with Ronald Fluharty, the neighboring property owner who alerted him to the illegal clearing, Long pointed out its badly eroded banks. That's often a telltale sign that development along its banks could be altering the flow. It's an unnamed tributary of the Marshyhope Creek, which suffers algae blooms, according to a state report.

"This poor stream is out of control when it rains because of all the runoff," Long said.

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