



The Maryland Department of the Environment
Secretary Serena McIlwain

HB0635

Water Pollution Control - Discharges From Construction Sites - Limits on Liability

Position: Oppose

Committee: Environment & Transportation

Date: February 22, 2023

From: Gabrielle Leach

The Maryland Department of the Environment (MDE or the Department) **OPPOSES** House Bill 635. The bill proposes to limit liability and penalties for stormwater discharges from construction without coverage under a discharge permit, including the General Permit for Stormwater Discharges Associated with Construction Activity.

Specifically, HB 635 would allow the following:

- A person to not be liable and penalties may not be imposed unless: (1) the Department first notifies the person in writing of the need for permit coverage; and (2) the person willfully caused or failed to prevent the discharge;
- Excludes a person from liability for discharges due to an “Act of God,” including storm events of 2 inches or more within 24 hours; and
- Limits liability for prohibited stormwater discharges associated with construction activity at \$5,000 per violation, with a maximum civil or administrative penalty of \$25,000.

The bill presents three legal concerns:

First, the bill’s purpose and language is contrary to the federal Clean Water Act (CWA) and conflicts with the U.S. Environmental Protection Agency’s (EPA) delegation of the NPDES permitting authority to the State. House Bill 635 significantly restricts the liability for stormwater discharges associated with construction activity by requiring both that the Department notify a person in advance of the need for permit coverage and that any illegal discharge be willful. Under these circumstances the bill essentially allows stormwater pollution without a discharge permit contrary to the CWA. EPA’s delegation to Maryland allows State law to be more, but not less, restrictive than the CWA.

Second, the bill does not define the term “willfully,” generally speaking a willful act is one taken intentionally or deliberately. By placing this limitation on intent, the bill would severely restrict the Department’s ability to enforce stormwater violations associated with construction activity by adding an unnecessary, and difficult, element of proof in any enforcement action.

Third, HB 635 treats an uncommon but not unexpected rain event as an “Act of God.” An “Act of God” is generally used as a defense from liability as it refers to an event extraordinary or sudden enough to be outside of normal control, such as a tornado or earthquake. However, the bill pairs the strict “Act of God” standard with rain events of 2 inches or more within 24 hours, which are a little less common than a 1-year storm event. This type of rain event is not unexpected and would be inconsistent with an “Act of God.” Coupled with the bill’s limitation on penalties, this liability exemption would certainly result in less stormwater control and more stormwater pollution from construction sites.

For the reasons detailed above, MDE urges a **UNFAVORABLE** report for HB 635.

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