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February 17, 2021

TO: The Honorable Kumar P. Barve
Chair, Environment and Transportation Committee

FROM: Brian E. Frosh
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RE: HB 739 – Environment – Multidefendant Oil and Hazardous Substance Pollution Cases – Effect of Settlement – **Support with Sponsor Amendments**

Chairman Barve, Vice Chair Stein, and distinguished Members of the Environment and Transportation Committee, please accept the following testimony in support of HB 739.

House Bill 739 is designed to bring accountability and fairness to Maryland's law that allocates responsibility for environmental damage when suits against multiple polluters are settled.

Under existing law, when multiple polluters damage resources in Maryland, liability is apportioned among the polluters for settlement purposes pro rata. That means that all polluters are responsible for "equal shares that are determined by dividing the common liability by the number of joint tort-feasors"[1] Thus, in a suit against 10 polluters for causing oil pollution, a settlement with one party will reduce the responsibility of the remaining polluters by 10%. This is true whether the settling polluter's contribution to the damage was 90% or 1%.

House Bill 739 would create a standard that is fairer and more reasonable. The standard set in HB 739 would hold polluters accountable for their fair share of the damage that they caused or contributed to. The allocation formula established by HB 739 is consistent with the principle that the polluter pays. Larger polluters will not receive a benefit when smaller polluters settle. That contrasts with existing law, under which the total liability of a polluter who is responsible for 80% of the damage would be reduced to 10% in a case with 10 polluters if the other 9 settled. Under HB 739, the liability of the large polluter would be reduced only by the

[1] *Mercy Med. Ctr. v. Julian*, 429 Md. 348, 357 (2012)

amount of the settling polluter's fair share of the pollution. Thus, the large polluter's share would remain at 80%.

This legislation will make the Environment Article more consistent with federal law[2] and the laws of other states by ensuring that polluter-defendants are responsible for their fair share of the harm they cause.

The legislation will also facilitate early settlements. Early settlements are critical to the management of these large-scale cases because they simplify the case and create momentum toward resolving it. Under the bill, a defendant that settles with the State is protected from contribution claims without the State having to give up more than that settling-defendant's fair share of the overall judgment. The bill thus removes an obstacle to settlement that made it difficult for small defendants to resolve their liability and get out of these cases early on.

The bill is also narrowly drawn. It would not amend Maryland Uniform Contribution Among Joint Tort-Feasors Act (UCATA), which appears in the Courts Article. Instead, it creates a way to fairly apportion responsibility in the largest and most complex environmental pollution cases that we handle—hazardous substances (Title 7) and oil pollution (Title 4). The bill accomplishes that by removing the UCATA reference from Title 7 and applying the same fair apportionment language equally in Titles 7 and 4. The legislation thus is focused on the industry-wide pollution claims that the State brings in its *parens patriae* capacity on behalf of all Marylanders. It does not alter UCATA, which will continue to apply to all other tort suits.

We believe that HB 739 is a fairer way to allocate liability in large-scale pollution cases and that it serves judicial economy by letting less culpable defendants settle and resolve their liabilities while keeping more culpable defendants on the hook. However, some potentially interested parties have prevailed upon us to propose, and urge the Committee to adopt, certain perfecting amendments. They are as follows:

The first amendment alters the contribution provisions of the bill by prohibiting settling defendants from seeking contribution from other responsible parties. As drafted, the bill allowed for such contribution actions, which is consistent with federal law. *See* § 4-421(e) and § 7-221(f)(3) (as originally proposed). But several groups representing small gas station owners raised the concern that this provision would allow big petroleum companies to settle their liability with the State and turn around and sue small retailers for contribution. The amendment addresses those concerns by simply adding the word "not" in the two relevant provisions. As a result, any party that settles with the State will not be able to obtain contribution from other entities.

The second amendment clarifies that the bill does not alter the fact that defendants in these cases are jointly and severally liable for the pollution that they cause or contribute to. As drafted, the bill expressly required the factfinder to determine and assign each defendant a share of the overall liability, which could be read as eliminating joint and several liability and making

[2] 42 U.S.C. § 9601 *et seq.*

each defendant only severally liable. *See* § 4-421(b) and § 7-221(f)(2) (as originally proposed). Deleting those provisions will remove any suggestion that the bill would have that effect, as will adding the term "joint and several" throughout the bill.

The third amendment clarifies that the liability allocation approach adopted in this bill does not apply to any statutory penalties that the Department of the Environment might be able to impose with respect to each defendant's pollution-causing actions. *See* § 4-421(c)(2)(ii); § 7-221(f)(2)(ii)2 (as amended).

The fourth and final amendment alters Section 2 of the bill to clarify that the bill's provisions will not apply retroactively to prior settlements, but instead will apply to all settlements executed after the bill's effective date.

For all the foregoing reasons, I urge the Environment and Transportation Committee to favorably report House bill 739 with amendments.

cc: Members of the Committee