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TESTIMONY IN SUPPORT OF SENATE BILL 334 (SENATOR CARTER)

January 26, 2021

Dear Chairman Smith and Members of the Committee,

Thank you for the opportunity to submit testimony in support of Senate Bill 334. I am submitting this testimony on behalf of the Environmental Integrity Project, an environmental nonprofit organization that advocates for the effective enforcement of environmental laws.

If enacted, SB 334 will give individuals, communities, and other groups in Maryland the opportunity to participate in state clean water enforcement actions against alleged polluters. While individuals are afforded an unconditional right to intervene in federal court under the Federal Clean Water Act, intervention is functionally prohibited when the same action is brought in state court. My testimony explains why intervention in state court is practically impossible, and how this bill would align Maryland law with federal law.

Intervention is an important function for allowing interested members of the public to engage in legal matters that concern them. Understanding that the environment and clean water is a matter of great public concern, the Federal Clean Water Act provides several avenues for citizen participation, including the right to intervene in an enforcement action.¹ Recognizing the importance of intervention, states are legally required to provide either intervention as of right or permissive intervention in order to carry out their own Clean Water Act programs.² Maryland chose the first option, relying on its general rules for intervention as of right.³

For background, Maryland Rules authorize intervention as of right in two instances. *First*, intervention as of right is allowed under Md. Rule 2-214(a)(1) when a statute provides an *unconditional* right to intervene. *Second*, if there is no unconditional right provided, parties must seek a *conditional* right to intervene, which requires parties to meet additional requirements. This *conditional* right to intervene under Md. Rule 2-214(a)(2) requires, for instance, that (1) a party has an interest in the subject of the lawsuit, and that (2) this interest is inadequately represented by the existing parties to the lawsuit. Because there is no unconditional right to intervene in state lawsuits under the Maryland Water Pollution Control Act, members of the public have to apply for a conditional right to intervene and meet these additional criteria.

A 2010 decision by the Court of Special Appeals, however, interpreted these additional criteria for the conditional right to intervene under Md. Rule 2-214(a)(2) in an extremely prohibitive

¹ 33 U.S.C. §1365(b)(1)(B).

² 40 C.F.R. § 123.27(d).

³ See Maryland Rule 2-214(a).

manner.⁴ In doing so, the court has made it functionally impossible to intervene as of right in these state clean water cases. In this particular case, five individuals who lived within five to fifteen miles downstream of a coal ash facility, the Environmental Integrity Project, and the Potomac Riverkeeper tried to intervene in a state clean water enforcement action against the facility, which was unlawfully dumping toxic pollution into the Potomac River and its tributaries. The court denied their attempt to intervene. And although the individuals and groups appealed, the Court of Special Appeals upheld the lower court’s denial, finding that they were unable to meet these two additional requirements under the conditional right to intervene.

First, for the requirement that intervenors have an interest in the enforcement action, the individuals and groups attested that they lived downstream from, fished in, sailed in, and were dedicated to the protection of the rivers and streams receiving pollution from the facility. The Court of Special Appeals prohibitively concluded that these interests were shared by the general public and therefore insufficient. For example, the court ruled that the five individuals did not show “that they [were] personally affected in some way that is different from any other residents living within a ten to fifteen mile radius” of the facility.⁵ Likewise, the court ruled that the environmental groups’ interests “do not appear to be different than and distinct from the interests of the general public in protecting the environment, restoring and safeguarding the natural habitats of the Wicomico and Potomac Rivers, and enforcing state environmental laws.”⁶

Second, the court also found that the individuals and environmental groups could not join the lawsuit because the State of Maryland adequately represented their interests. According to the court, Maryland and these private citizens and environmental groups all shared the goals of “generally protecting the environment.”⁷ This is despite the fact that Maryland asserted to the court that their interests were “potentially inconsistent” and “not necessarily the same.”⁸

While the court’s analysis was premised on the facts of a specific case, it is difficult to see how any environmental group or most interested citizen could pass this impossible test. In spite of the fact that the five individual citizens lived downstream of the facility, recreated on and around the rivers, and expressed concerns regarding the pollution’s impact on their property values, the court found their interests to be no different than other local residents’. And in spite of the groups’ specifically articulated interests—for instance, Potomac Riverkeeper’s with respect to protecting and preventing pollution of the very waterways at issue in the case—the court found these interests to be shared by the general public and the State of Maryland. So while Maryland law does lay out the rules for citizens if they want to seek the right to intervene, the Maryland Court of Special Appeals has refused to recognize that right in state clean water enforcement cases, which Maryland is legally required to provide. In contrast, under these same set of facts in

⁴ *Environmental Integrity Project v. Mirant Ash Management, LLC*, 197 Md. App. 179 (2010), available at <https://law.justia.com/cases/maryland/court-of-special-appeals/2010/1779s09-1.html> (last accessed Jan. 18, 2021).

⁵ *Id.* at 189.

⁶ *Id.*

⁷ *Id.* at 192.

⁸ *Id.* at 190–191.

federal court, intervention would have been granted because the Federal Clean Water Act provides an unconditional right to intervene.

SB 334 brings Maryland into compliance with its legal obligations under the Clean Water Act. If enacted, individuals, communities, and other groups in Maryland will have a right to intervene, to have their voices heard, and to have a chance to advocate for their interests in attaining cleaner waterways and a healthier Maryland.

For the foregoing reasons, we respectfully request a FAVORABLE report on SB 334.

Respectfully submitted,

A handwritten signature in black ink, appearing to be 'SL' or similar initials, written in a cursive style.

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