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TO: The Honorable William C. Smith, Jr.
Chair, Senate Judicial Proceedings Committee

FROM: Brian E. Frosh
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RE: SB 524 – Environment – Multidefendant Oil and Hazardous Substance Pollution Cases
– Effect of Settlement – **Support with Sponsor Amendments**

Chair Smith, Vice Chair Waldstreicher, and distinguished Members of the Judicial Proceedings Committee, please accept the following testimony in support of SB 524.

Senate Bill 524 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%.

Senate Bill 524 would create a standard that is fairer and more reasonable. The standard set in SB 524 would hold polluters accountable for their fair share of the damage that they caused or contributed to. The allocation formula established by SB 524 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 SB 524, the liability of the large polluter would be reduced only by the

¹*Mercy Med. Ctr. v. Julian*, 429 Md. 348, 357 (2012) (internal citations omitted).

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 law² 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 SB 524 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.³ 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 See generally 42 U.S.C. § 9601 *et seq.*

³ See S.B. 524 §§ 4–421(e), 7–221(f)(3), 2021 Leg., 422d Sess. (Md. 2021).

each defendant only severally liable.⁴ 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.⁵

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 Judicial Proceedings Committee to favorably report Senate Bill 524 with these sponsor amendments.

cc: Members of the Committee

⁴ See S.B. 524 §§ 4–421(b), 7–221(f)(2).

⁵ See Attached Amendments on S.B. 524 §§ 4–421(c)(2)(ii), 7–221(f)(2)(ii)2.

A BILL ENTITLED

AN ACT concerning

**Environment – Multidefendant Oil and Hazardous Substance Pollution
Cases – Effect of Settlement**

FOR the purpose of exempting certain types of pollution cases from the Maryland Uniform Contribution Among Joint Tort–Feasors Act; requiring the factfinder in certain legal actions to ~~make a determination of the total liability and~~ assign comparative responsibility to certain parties; authorizing the State to continue to pursue certain legal actions or bring new legal actions if the State has obtained less than complete relief from a certain person who has resolved the person’s liability with the State in a settlement; providing that a certain person is not liable for certain claims under certain circumstances; providing for the effect of a settlement that resolves the liability of a particular person with the State; preserving joint and several liability among non-settling parties; authorizing a certain person to seek contribution from certain other persons pursuant to certain provisions of law; and generally relating to legal actions involving oil or hazardous substance pollution.

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4-421.

(A) IN THIS SECTION, “PROPORTIONATE SHARE OF LIABILITY” MEANS THE PERCENTAGE OF COMPARATIVE RESPONSIBILITY ASSIGNED BY THE FACTFINDER TO A SETTLING PARTY. IN ACCORDANCE WITH SUBSECTION (B) OF THIS SECTION.

~~— (B) IN AN ACTION ARISING FROM A VIOLATION OF ANY PROVISION OF THIS SUBTITLE OR ANY RULE, REGULATION, ORDER, OR PERMIT ISSUED IN ACCORDANCE WITH THIS SUBTITLE, THE FACTFINDER SHALL:~~

~~(1) MAKE A DETERMINATION OF THE TOTAL LIABILITY IN THE LEGAL ACTION, INCLUDING DAMAGES, REMOVAL COSTS, CLEANUP COSTS, AND ALL OTHER AVAILABLE RELIEF; AND~~

~~(2) ASSIGN COMPARATIVE RESPONSIBILITY TO ALL PARTIES JOINED IN THE LEGAL ACTION, INCLUDING ALL PLAINTIFFS,~~

~~DEFENDANTS, THIRD PARTY—DEFENDANTS, INTERVENORS, AND OTHER NAMED PARTIES.~~

(~~BE~~) IF THE STATE HAS OBTAINED LESS THAN COMPLETE RELIEF FROM A PERSON RESPONSIBLE FOR THE DISCHARGE WHO HAS RESOLVED THE PERSON'S LIABILITY TO THE STATE IN A SETTLEMENT, THE STATE MAY:

(1) CONTINUE TO PURSUE AN ONGOING LEGAL ACTION AGAINST ANY OTHER PERSON RESPONSIBLE FOR THE DISCHARGE WHO HAS NOT RESOLVED THE PERSON'S LIABILITY; OR

(2) BRING A NEW ACTION AGAINST ANY OTHER PERSON RESPONSIBLE FOR THE DISCHARGE WHO HAS NOT RESOLVED THE PERSON'S LIABILITY.

(~~CD~~) (1) IF A PERSON RESPONSIBLE FOR THE DISCHARGE RESOLVES THE PERSON'S LIABILITY TO THE STATE IN A SETTLEMENT, THE PERSON SHALL NOT BE LIABLE FOR CLAIMS FOR NONCONTRACTUAL CONTRIBUTION OR INDEMNITY REGARDING ANY MATTER OR CLAIM ADDRESSED IN THE SETTLEMENT, INCLUDING ANY STATUTORY OR COMMON LAW CLAIM.

(2) EXCEPT AS PROVIDED IN PARAGRAPH (3) OF THIS SUBSECTION, A SETTLEMENT THAT RESOLVES THE LIABILITY OF A PARTICULAR PERSON RESPONSIBLE FOR THE DISCHARGE:

(I) SHALLDOES NOT RELEASE FROM JOINT AND SEVERAL LIABILITY ANY OTHER PERSON RESPONSIBLE FOR THE DISCHARGE EXCEPT AS SPECIFICALLY PROVIDED BY THE TERMS OF THE SETTLEMENT; AND

(II) SHALLDOES NOT RELEASE ANY OTHER PERSON RESPONSIBLE FOR THE DISCHARGE FROM ITS RESPONSIBILITY TO PAY PENALTIES; BUT

(3HI) A SETTLEMENT THAT RESOLVES THE LIABILITY OF A PARTICULAR PERSON RESPONSIBLE FOR THE DISCHARGE SHALLDOES REDUCES THE POTENTIAL JOINT AND SEVERAL LIABILITY OF OTHER PERSONS RESPONSIBLE FOR THE DISCHARGE BY THE SETTLING PERSON'S PROPORTIONATE SHARE OF LIABILITY FOR ALL SETTLED CLAIMS, INCLUDING ALL STATUTORY AND COMMON LAW CLAIMS.

(DE) A PERSON RESPONSIBLE FOR THE DISCHARGE WHO HAS RESOLVED THE PERSON'S LIABILITY TO THE STATE IN A SETTLEMENT OR THROUGH THE SATISFACTION OF A JUDGMENT MAY NOT SEEK CONTRIBUTION FROM ANY OTHER PERSON RESPONSIBLE FOR THE DISCHARGE WHO HAS NOT SETTLED THE OTHER PERSON'S LIABILITY TO THE STATE IN ACCORDANCE WITH THIS SECTION OR § 7-221 OF THIS ARTICLE.

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7-221

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(F) (1) IN THIS SUBSECTION, "PROPORTIONATE SHARE OF THE LIABILITY" MEANS THE PERCENTAGE OF COMPARATIVE RESPONSIBILITY ASSIGNED BY THE FACTFINDER TO A SETTLING PARTY, ~~IN ACCORDANCE WITH PARAGRAPH (2) OF THIS SUBSECTION.~~

~~(2) IN AN ACTION UNDER SUBSECTION (B) OF THIS SECTION, THE FACTFINDER SHALL:~~

~~(I) MAKE A DETERMINATION OF THE TOTAL LIABILITY IN THE LEGAL ACTION, INCLUDING COSTS, EXPENDITURES, AND INTEREST AVAILABLE UNDER THIS SUBTITLE AND ALL OTHER AVAILABLE RELIEF; AND~~

~~(II) ASSIGN COMPARATIVE RESPONSIBILITY TO ALL PARTIES JOINED IN THE LEGAL ACTION, INCLUDING ALL PLAINTIFFS, DEFENDANTS, THIRD PARTY DEFENDANTS, INTERVENORS, AND OTHER NAMED PARTIES.~~

(32) (I) IF A RESPONSIBLE PERSON RESOLVES THE PERSON'S LIABILITY FOR A VIOLATION OF THIS SUBTITLE TO THE STATE IN A SETTLEMENT, THE PERSON SHALL NOT BE LIABLE FOR CLAIMS FOR NONCONTRACTUAL CONTRIBUTION OR INDEMNITY REGARDING ANY MATTER OR CLAIM ADDRESSED IN THE SETTLEMENT, INCLUDING ANY STATUTORY OR COMMON LAW CLAIM.

(II) EXCEPT AS PROVIDED IN SUBPARAGRAPH 3. OF THIS PARAGRAPH, A SETTLEMENT THAT RESOLVES THE LIABILITY OF A PARTICULAR RESPONSIBLE PERSON:

1. SHALL~~DOES~~ NOT RELEASE FROM JOINT AND SEVERAL LIABILITY ANY OTHER RESPONSIBLE PERSON EXCEPT AS SPECIFICALLY PROVIDED BY THE TERMS OF THE SETTLEMENT; AND

2. SHALL~~DOES~~ NOT RELEASE ANY OTHER RESPONSIBLE PERSON FROM ITS RESPONSIBILITY TO PAY PENALTIES; ~~BUT~~

23. A SETTLEMENT THAT RESOLVES THE LIABILITY OF A PARTICULAR PERSON~~RESPONSIBLE PERSON FOR THE DISCHARGE SHALL~~DOES REDUCES THE POTENTIAL JOINT AND SEVERAL LIABILITY OF OTHER RESPONSIBLE PERSONS BY THE SETTLING PERSON'S PROPORTIONATE SHARE OF THE LIABILITY FOR ALL SETTLED CLAIMS, INCLUDING ALL STATUTORY AND COMMON LAW CLAIMS.

(43) A RESPONSIBLE PERSON WHO HAS RESOLVED THE PERSON'S LIABILITY TO THE STATE IN A SETTLEMENT OR THROUGH THE SATISFACTION OF A JUDGMENT MAY NOT SEEK CONTRIBUTION FROM ANY OTHER RESPONSIBLE PERSON WHO HAS NOT SETTLED THE OTHER PERSON'S LIABILITY TO THE STATE IN ACCORDANCE WITH THIS SECTION OR § 4-421 OF THIS ARTICLE.

SECTION 2. AND BE IT FURTHER ENACTED, That this Act shall be construed to apply retroactively to all settlements executed after ~~legal actions pending on~~ the effective date of this Act.

SECTION 3. AND BE IT FURTHER ENACTED, That this Act shall take effect July 1, 2021.