American Petroleum Institute
Northeast Region

March 7, 2023

Senate Education, Energy and the Environment Committee
Miller Senate Building
2 West
Annapolis, Maryland 21401

IN RE: SB 843 "An Act Concerning Climate Change Adaptation and Mitigation Payment Program and Climate Impact …"

Dear Chair Feldman, Vice Chair Kagan, and Members of the Committee:

Thank you for this opportunity to provide comments related to the above-referenced legislation. The American Petroleum Institute (API)[1] **opposes SB 843**. While API appreciates the goal of funding environmental programs, this legislation is not the way to effectuate this objective. API believes it is bad public policy and may be unconstitutional. Among other things, as discussed below, API is extremely concerned that the bill: retroactively imposes costs and liability on prior activities that were legal, violates equal protection and due process rights by holding companies responsible for the actions of society at large; and is preempted by federal law.

Retroactive Law Making

Generally speaking, legislation should apply prospectively to ensure notice to the regulated community and protect due process rights and interests. SB 843 imposes strict liability on actions that occurred almost a quarter century ago. While retroactive *ex post facto* laws may be justifiable under certain circumstances, there is reason to believe that a court would view this legislation as unconstitutional given the harsh and oppressive nature of the bill.[2] Stated another way, there is a persuasive argument that the bill's extreme retroactivity (reaching back 23 years to 2000) and amount of potential liability (up to $9 billion) makes the law "harsh and oppressive" considering that the targeted companies' actions were lawful during the relevant period and the emissions were actually produced by others farther down the supply chain.

Law May Be Contrary to Excessive Fines and Takings Clauses

The U.S. Constitution includes both an "Excessive Fines" Clause, which prohibits disproportionate fines like those proposed in SB 843, and a "Takings" Clause, which prevents the government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole. The legislation at issue may effectively result in a taking, as it will impose a considerable financial burden for conduct that legally occurred decades earlier in a way that singles out the refining industry for others' use of fossil fuels. Singling out energy production for exorbitant and disproportionate penalties while ignoring the economy-sustaining use of that energy is misguided.

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[1] The American Petroleum Institute represents all segments of America's natural gas and oil industry, which supports more than 11 million U.S. jobs. Our nearly 600 members produce, process, and distribute the majority of the nation's energy. API members participate in API Energy Excellence, through which they commit to a systematic approach to safeguard our employees, environment and the communities in which they operate. Formed in 1919 as a standards-setting organization, API has developed more than 700 standards to enhance operational and environmental safety, efficiency, and sustainability.

[2] McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco, 496 U.S. 18, 41 n.23 (1990) (internal quotation marks omitted); see, *e.g.*, E. Enters. v. Apfel, 524 U.S. 498, 549-550 (Kennedy, J., concurring in the judgment) (opining that a law that "create[ed] liability for events which occurred 35 years ago" violated due process); James Square Assocs. LP v. Mullen, 21 N.Y.3d 233, 249 (N.Y. 2013) (holding that a tax law with a 16-month retroactivity period was unconstitutional because the sole state purpose offered—"raising money for the state budget"—was "insufficient to warrant [such] retroactivity").

11 Beacon Street, Suite 1230, Boston, Massachusetts 02108 | 617.227.4227 | api.org

Arbitrary Penalties and Estimated Fines Create Due Process and Fairness Issues
The bill incorrectly suggests that emissions by companies over the past 70 years can be determined with great accuracy. That is simply not true. At best the state can only estimate emissions; and these estimates are imprecise and not accurate enough to base a prorated share of a $9 billion dollar penalty. Additionally, this bill mirrors legislation introduced this year in Massachusetts and New York. In none of these bills is the total penalty justified or explained; rather in all three jurisdictions the total penalty is arbitrary.

No Nexus Between Fine and Actual Responsibility
The bill as introduced imposes liability without regard to the extent of a particular business's actual responsibility. Given the magnitude of the fines at play, API believes that the state must offer more than an asserted causal connection between a company's greenhouse gas emissions and negative impacts or injuries to the environment or public health and welfare. Liability should not attach simply because a company extracted or refined fossil fuels that were placed into commerce and combusted by a third party.

Improper Use of Strict Liability Standard
The goal of the bill is to effectively impose strict liability for purported present and future damages caused by alleged past emissions from extracted or refined fuels no matter where in the world those emissions were released, or who released them. It is patently unfair to charge a group of large companies that did not combust fossil fuels but simply extracted or refined them in order to meet the needs and demands of the people. The bill is arguably discriminatory because it singles out certain companies. With respect to impact attribution from source emissions, it seems obvious that those who drafted this legislation are aware of the difficulties of establishing a conclusive link between anthropogenic climate change and alleged injuries to Maryland. The legislation also neglects to even consider that companies responded with a supply of product to meet the demand for them in the marketplace. Through their use of the strict liability standard, proponents of this legislation concluded that only one segment of the economy should pay the state for excessive costs.

Disproportionate Penalties
The bill as written places an unfair burden on domestic companies. The bill envisions the total liability will be proportionately divided by so-called "responsible parties." As written, "responsible party" excludes "any person who lacks sufficient connection with the state to satisfy the nexus requirements of the United States Constitution." There will be situations where certain companies, including foreign companies, can suggest they have an insufficient connection with Maryland, which would mean that other domestic companies may shoulder greater financial responsibility than their true applicable share.

Preemption
The payments required by the bill may be preempted by federal law. Greenhouse gas emissions are global in nature and subject to numerous federal statutory regimes, including the Clean Air Act. They are also a matter of federal and international law, not state law. The U.S. Court of Appeals for the Second Circuit recently noted this fact in *City of New York v. Chevron Corp.*,[3] where the court rejected state-law nuisance claims based on global emissions because "a federal rule of decision is necessary to protect uniquely federal interests." As this bill seeks compensation for alleged harms to the environment based on global emissions, it is preempted by federal law.

Conclusion
For all the reasons articulated above, API strongly opposes this bill and recommends an unfavorable report.

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[3] *See* 993 F.3d 81, 90 (2d Cir. 2021).