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TESTIMONY IN SUPPORT OF HOUSE BILL 76 (DELEGATE LOVE)

January 20, 2021

Dear Chairman Barve and Members of the Committee,

Thank you for the opportunity to submit testimony in support of House Bill 76. 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, HB 76 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 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 when a statute provides an unconditional right to intervene. *Second*, if there is no unconditional right provided, parties must rely on Maryland's general rules for intervention as right. These general rules, under Md. Rule 2-214(a)(2), require intervenors to demonstrate, for instance, that (1) they have 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 rely on these general rules.

¹ 33 U.S.C. §1365(b)(1)(B).

² 40 C.F.R. § 123.27(d).

³ See Maryland Rule 2-214(a).

A 2010 decision by the Court of Special Appeals, however, has made it functionally impossible to intervene as of right in these proceedings.⁴ Five individuals who lived within five to fifteen miles downstream of a coal ash landfill, the Environmental Integrity Project, and the Potomac Riverkeeper tried to intervene in a state clean water enforcement action against a coal ash landfill that was unlawfully dumping toxic pollution into nearby waterways. 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 general rules for intervention.

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 landfill. The Court of Special Appeals rejected these interests and interpreted the general rules to require that for a party to intervene, their interest cannot be one that is shared by the general public. 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 landfill.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.” This is despite the fact that Maryland asserted to the court that their interests were “potentially inconsistent” and “not necessarily the same.”⁷

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 overcome this exceptionally high hurdle. 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 although it is true that Maryland offers general rules for intervention as of right, intervention is practically prohibited in state clean water enforcement cases. In contrast, under these same set of facts in federal court, intervention would have been granted because the Federal Clean Water Act provides an unconditional right to intervene.

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 190–191.

HB 76 ensures that individuals, communities, and other groups in Maryland 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 HB 76.

Respectfully submitted,

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

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