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HB 76

January 20, 2021

TO: Members of the Environment and Transportation Committee

FROM: Natasha Mehu, Director of Government Relations

RE: HOUSE BILL 76 – Water Pollution Control – Intervention in Civil Actions – Rights and Authority

POSITION: OPPOSE

Chair Barve, Vice Chair Stein, and Members of the Committee, please be advised that the Baltimore City Administration (BCA) **opposes** House Bill (HB) 76.

HB 76 is intended to amend procedures to make it easier for individuals to participate in civil suits and court proceedings related to the State's water pollution laws. First, the bill gives any person who meets the threshold standing requirements under the Clean Water Act, a right to intervene in civil actions brought by the Attorney General's Office on behalf of Maryland Department of the Environment ("MDE"). In short, a motion to intervene would fall under Maryland Rule 2-214(a)(1), but arguably, the intervenor(s) would need to demonstrate in a motion, that federal standing has been met.

Second, the bill grants a person, who meets the threshold standing requirements under the Clean Water Act, the right to apply for judicial review and appeal an administrative decision related to the State's water pollution laws, *as if the person was an aggrieved party or interested person in the federal administrative process*. There is significant history here. Environmental standing was expanded under Maryland Code, Title 1, subtitle 6 of the Environment Article, for specified permits in 2009. Traditionally, these matters were subject to an administrative hearing before the Office of Administrative Hearings, however, as part of a compromise under the 2009 legislation, these matters were now subject to direct judicial review on the administrative record. Pursuant to Section 1-601(c), judicial review was available to any person who: 1) meets the threshold standing requirements under federal law; 2) is the applicant for the subject permit; or 3) participated in the public participation process through the submission of written or oral comments.

In practice, environmental advocacy groups would seek judicial review of permits issued by MDE by filing a short notice identifying the permit. Nonetheless, Maryland Rule 7-202(c)(1) outlines the necessary content of a petition and provides in pertinent part:

(C) state whether the petitioner was a party to the agency proceeding, and if the petitioner was not a party to the agency proceeding, state the basis of the petitioner's standing to seek judicial review;

Under the new law, there was no administrative quasi-judicial proceeding that would allow the parties to flesh out concepts of standing. Consequently, I have argued that individuals seeking judicial review must set forth the basis for standing in the petition. This is important because it allows the litigants to address jurisdictional issues prior to filing memoranda arguing the merits of the case. Not surprisingly, environmental advocacy groups argue that they should be able petition for judicial review and establish standing in their opening memorandum, as they would be entitled under federal law. Essentially, this logic gives advocacy groups time to manufacture standing after the fact. The law, however, is plain. Only a person who meets the federal standing requirements can seek judicial review. In other words, you must meet this threshold when filing the petition, not thirty days later when filing a memorandum.

This bill seems to be an attempt to adopt federal procedures, without addressing the language of Maryland Rule 7-202(c)(1)(C). The bill inappropriately references the "the same rights as an interested person or aggrieved party under the federal Clean Water Act," as a means to amend Maryland's court rules. Oddly, it also seeks to amend these rules for water pollution laws instead of creating a holistic change under Article 1.

This bill will have a limited impact on Baltimore City, however, it is likely a first step in an expansion of environmental standing. The City holds numerous permits issued by MDE and may be forced to defend these permits when re-issued. As a matter of practice, it makes sense to be able to address jurisdictional issues related to standing in a motion to dismiss, prior to defending the merits of these complicated permits.

We respectfully request an **unfavorable** report on House Bill 76.