

# ASSOCIATED INDUSTRIES OF VERMONT

REPRESENTING THE VERMONT INDUSTRIAL AND BUSINESS COMMUNITY SINCE 1920

## **Comments on S.37**

### **House Committee on Judiciary**

#### **William Driscoll, Vice President**

**March 21, 2019**

Madam Chair and Committee Members:

Thank you for the opportunity to provide comments on S.37. S.37 would make sweeping changes to the potential liabilities that companies could face for any alleged personal injury, property damage, and medical monitoring costs that individuals might associate with releases of chemicals. We are concerned that the legislation is seriously flawed in that it is not consistent with what courts in other states have held regarding the application of strict liability and for medical monitoring claims. It could significantly increase operational risks and costs for a wide range of Vermont employers and make Vermont an outlier compared to states that have recognized when medical monitoring is a remedy for plaintiffs.

Some of the key problems with the bill include:

- Companies could be held financially liable for any claim of personal injury or property damage associated with any release at any level, regardless of compliance with state or federal permits and regulations or other environmental or health standards for acceptable releases.
- For medical monitoring costs, liability could be associated with releases that are below levels set by state or federal permits and regulations and below state or federal environmental or health thresholds.
- The bill does not set clear or reasonable exposure thresholds that are linked to any established state or federal environmental or health thresholds for a plaintiff to make a claim.
- Companies could be held liable for medical monitoring costs even if an alleged exposure is not considered likely to result in any disease actually developing -- any increase in risk is sufficient.
- The legislation does not provide many of the exemptions or defenses against financial liability that are included in the statutes that allow the state to hold companies liable for chemical releases.
- The bill could make liability insurance unaffordable or unavailable to many businesses in Vermont, compounding the increased risks and costs of doing business in the state.
- No other state has adopted similar strict liability legislation. The bill would create potentially significant risks and disincentives to continued investment and business operations in Vermont compared to other states.

## **Recommendations**

Although these do not entirely resolve concerns with S.37, we would offer the following recommendations as potential steps toward that end:

- Delete the strict liability provisions of the bill.

- Exclude permitted releases that are in compliance with statutory and regulatory requirements.
- Delete from definitions of a toxic substance that exposure to the substance can be shown by expert testimony to increase the risk of developing a latent disease.
- Require negligence, recklessness, or willful misconduct for liability for medical monitoring claims.
- Require exposure to exceed background levels and, where applicable, state and federal health guidelines.
- Require that as a proximate result of the exposure, the person has a significantly increased risk of contracting a serious latent disease.
- Require that a prescribed monitoring regime is different from that normally recommended in the absence of exposure and that the prescribed monitoring regime is reasonably necessary according to contemporary scientific principles.
- Make explicit that the legislation does not apply retroactively.

## **Conclusion**

There are a number of legal and regulatory options for citizens and for the state to seek appropriate compensation and remediation from companies responsible for chemical releases that cause true harm. As drafted, S.37 would lower thresholds and criteria and remove defenses to such an extent as to fundamentally undermine due process and reasonable or sustainable risks and costs. The negative economic consequences would only be compounded by the extent to which Vermont would be out of line with other states. If the objective is to codify the right for Vermont citizens to bring medical monitoring claims before the Vermont courts, then the focus should be to codify what the majority of state courts have used as a valid test for those claims. S.37 does not do that as presently drafted.