

January 18, 2021

Senator William C. Smith, Jr., Chair
Senator Jeffrey D. Waldstreicher, Vice-Chair
Senate Judicial Proceedings Committee

Senator Paul G. Pinsky, Chair
Senator Cheryl Kagan, Vice-Chair
Senate Education, Health and Environmental Affairs Committee

Delegate Kumar P. Barve, Chair
Delegate Dana Stein, Vice-Chair
House Environment and Transportation Committee

Re: HB 82 Constitutional Amendment: Environmental Rights;
Written Testimony of Martin R. Siegel, Esquire
FAVORABLE

Sen. Smith, Sen. Waldstreicher, Sen. Pinsky, Sen. Kagan, Del. Barve, and Del. Stein:

My name is Martin Siegel. Thank you for the opportunity to present my views in support of HB 82 and SB 151, which would add an environmental rights amendment to Maryland's Constitution. By way of background, I am a relatively recent transplant to Maryland, having moved to Baltimore City approximately five years ago. I am a Pennsylvania environmental attorney and have been in private practice, based in York, PA, since 2016. My clients include energy companies, developers, individuals, and municipalities. Prior to moving to private practice, I worked for approximately 22 years as an environmental litigator for the Pennsylvania Department of Environmental Protection. I also served as a senior attorney for the Centers for Disease Control and Prevention in Atlanta and as a senior research scientist for the U.S. Department of Energy's Pacific Northwest National Laboratory in Hanford, WA. Over the past five years, I have written and presented extensively on legal developments related to Pennsylvania's Environmental Rights Amendment ("ERA").

Pennsylvania's ERA, (Article I, Section 27 of the Pennsylvania Constitution), states:

“The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania’s public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.”

My goal is to provide some insights regarding the impacts of Pennsylvania’s recently revitalized Environmental Rights Amendment. In short, I believe that the ERA has led to better informed environmental decision-making by state and local governments in Pennsylvania, as well as by developers and businesses. While the ERA has not lived up to the wildest hopes of the environmental community or the fears of the business community, it has provided a valuable foundation for protecting the environmental rights of Pennsylvania residents.

The ERA was added to Pennsylvania’s Constitution in 1971, after the unanimous approval in two sessions of the General Assembly and by a 4-1 margin by voters. The amendment declared that the people had a right to clean air and water and established the Commonwealth as the trustee of Pennsylvania’s public natural resources. It is noteworthy that the Environmental Rights Amendment was placed in Article I of Pennsylvania’s Constitution, enshrining it alongside other basic rights, such as freedom of speech and religion and the right to bear arms.

Despite much fanfare, ERA had little or no practical effect from 1971 to 2013. Pennsylvania’s courts established a standard of review that essentially held that compliance with Pennsylvania’s existing environmental statutes satisfied the ERA. *See Payne v. Kassab*, 312 A.2d 86 (Pa. Cmwlth. 1973). In light of this restrictive standard, few, if any governmental actions were reversed based upon the ERA.

Things began to change in 2013, with the Pennsylvania’s Supreme Court’s decision in *Robinson Township v. Commonwealth*, 83 A.3d 901 (Pa. 2013). This case involved a challenge

to various aspects of Act 13, which amended Pennsylvania's Oil and Gas Act. The challenged provisions included significant restrictions on local municipalities' ability to regulate fracking activity. Expressing a more expansive view of the ERA, a plurality of the Court struck down several provisions of Act 13.

The real game changer for the ERA came in 2017 with the PA Supreme Court's decision in *Pennsylvania Environmental Defense Foundation ("PEDF") v. Commonwealth*, 161 A.3d 911 (Pa. 2017). With this decision, the Court overturned 40 years of jurisprudence on the ERA. In *PEDF*, a majority of the Court accepted the reasoning of the *Robinson Township* plurality. This case involved a challenge to Pennsylvania's practice of funneling money obtained from leasing state forest and park land from fracking to the State's General Fund. The Court explicitly rejected the existing *Payne* test, stating that the ERA acknowledged the people's common ownership of Pennsylvania's natural resources and the Commonwealth's role as trustee of those resources. The Court held that as the trustee, the Commonwealth has a "duty to prohibit the degradation, diminution, and depletion of natural resources, whether those harms result from direct state action or from the actions of private parties." In addition, the Court held that Pennsylvania "must act affirmatively via legislative action to protect the environment." Finally, the Court noted that "all agencies and entities of the commonwealth government, both statewide and local, have a fiduciary duty" as trustee to protect the corpus of the environmental trust. The Court also endorsed language from *Robinson Township* that the ERA "does not call for a stagnant landscape; nor . . . for the derailment of economic or social development."

Subsequent litigation before courts and Pennsylvania's Environmental Hearing Board, which hears appeal from final actions by the Department of Environmental Protection, continues to define the parameters of state and local governments' responsibilities and the protections

afforded by Pennsylvania's ERA. While the ERA is now a frequent and valuable tool in environmentalists' arsenal to challenge legislation and projects, it has not come close suffocating developments or overwhelming municipal and state government. Land development has continued. Municipalities have not been required to hire staff to do environmental assessments, and fracking and mining have not been halted. That said, even though the case law under the ERA continues to develop, I believe the revitalized ERA has had positive environmental impacts without imposing significant burdens of government and businesses.

To appreciate the impact of the ERA in recent years, it is first necessary to understand the context in which the ERA is been used. In general, the ERA has been utilized to challenge 1) legislative actions by the General Assembly; 2) programmatic actions by state agencies; or 3) specific permitting actions or approvals by DEP or local municipalities, such as zoning decisions. The principles enunciated by the Pennsylvania Supreme Court in *Robinson Township* and *PEDF*, which addressed challenges to legislation, do not easily translate to evaluating specific actions taken on an almost daily basis by local and state governmental entities.

We can, however, glean some insights on how the ERA has impacted environmental actions in Pennsylvania. First, it is safe to say that DEP and many local municipalities now must incorporate more in-depth assessment and analysis of environmental impacts in decision-making regarding major projects. For example, there have been cases where the Environmental Hearing Board has remanded approvals to DEP because of lack of appropriate consideration of environmental impacts. In addition, it is now routine for parties challenging DEP approval of permits or other DEP actions before the Environmental Hearing Board to allege that DEP has failed to comply with the ERA. These imperatives have led DEP to adopt policies to incorporate consideration of its ERA responsibilities into its review processes.

Second, despite fears from the business community, it is apparent that projects will not be rejected simply because they may have temporary or limited impacts on the environment. For a project to run afoul of the ERA, it must have a significant impairment of the environment over time.

My impression is that the recent revitalization of the ERA has not led to an onslaught of litigation. What generally appears to be the case is that the ERA is used as an additional basis for challenging projects that would already have been challenged. In addition, DEP has not hired additional attorneys in order to address ERA litigation since the ERA was revitalized by the Pennsylvania Supreme Court. I believe the same is true for Pennsylvania local governments.

Perhaps most significantly, it is likely that the ERA has led many developers and businesses to submit better project proposals to municipalities and the DEP by incorporating heightened consideration of environmental impacts into their design of projects. Doing so reduces the potential that projects will be delayed by challenges and the need for developers to go back to the drawing board. While it is difficult to objectively assess the magnitude of the ERA's impact in this regard, I know that I, as well as many of my colleagues, routinely advise our clients to do such analysis to help streamline approvals and avoid appeals.

The ERA has also provided a tool for local governments to use if they wish to encourage more environmentally friendly development within their boundaries. It does not, however, compel them to ban potentially environmentally unfriendly land uses, such as fracking. Municipalities, at a minimum, must assess the potential environmental impacts of actions such as changes in zoning ordinances to ensure that they do not infringe on fundamental rights protected under the ERA.

Based upon my experience with the implementation of Pennsylvania's ERA, I firmly believe that amending Maryland's Constitution to include a similar provision is essential to protecting fundamental environmental rights and to clearly establishing the obligations and ability of state and local government to protect these rights. The experience in Pennsylvania demonstrates that this can be done in harmony with the needs of the business community and local government by ensuring that all development is done in a way that respects the environmental rights of Maryland's residents.

Martin R. Siegel
6204 Mossway
Baltimore, MD 21212
msiegel@barley.com