

BILLS: SB0151 AND HB0082 – CONSTITUTIONAL AMENDMENT - ENVIRONMENTAL RIGHTS

SUBMITTER: RACHEL M. HOPP, ESQ., GAITHERSBURG, MD

POSITION: FAVORABLE

Thursday, January 7, 2021

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

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

The Honorable Kumar P. Barve, Chair, and
Dana M. Stein, Vice-Chair
House Environment and Transportation Committee

Maryland General Assembly Legislative Services Building
90 State Circle
Annapolis, MD 221401

RE: Support SB0151 AND HB0082 – CONSTITUTIONAL AMENDMENT - ENVIRONMENTAL RIGHTS

Dear Chairs, Vice-Chairs and Honorable Members of the Committees:

I write to urge your full support during this 2021 General Assembly's Legislative Session for SB0151 AND HB0082 – CONSTITUTIONAL AMENDMENT - ENVIRONMENTAL RIGHTS. I do so not only as a near life-long resident of our beautiful state, but as an attorney with more than 40 years of experience in environmental law.

My career has focused on some of our most challenging ecological issues, including air and water pollution, climate change, natural resource damage, sustainable development, and environmental justice. I served as a U.S. Environmental Protection Agency enforcement attorney and program manager and was a lead architect of the 1990 Clean Air Act Amendments, and Acid Rain and Stratospheric Ozone Protection programs. I was principal of the Law Offices of Hopp and Associates, PLLC, where I advised and represented international organizations, public service agencies, private sector clients, public interest groups, and disadvantaged communities, on air and water pollution, climate change, hazardous waste, sustainable development, and many other complex administrative, judicial, legislative, treaty,

and regulatory environmental matters. Lastly, before I retired in 2017, I was Legislative and Regulatory Counsel at the Coast Guard's National Pollution Funds Center and was centrally involved in major environmental disasters including Deepwater Horizon, Athos I, and Katrina. I have also taught and authored numerous articles on environmental law topics.

I have remained involved in environment and conservation initiatives in retirement and am on the Advisory Circle of the Maryland Campaign for Human Environmental Rights (MDEHR.org), a coalition of individuals and organizations advocating for this legislation. I also belong to the D.C. Bar Environment, Energy and Natural Resources Committee, the Environmental Law Institute (a national think tank), and I volunteer for and support other environmental organizations, including the Maryland Sierra Club (Zero Waste Committee, Montgomery County), Maryland League of Conservation Voters, Interfaith Power and Light for MD-DC-NoVA, Muddy Branch Alliance, and Izaak Walton League.

My support for SB0151 and HB0082 is informed by my experience working with states, localities, communities and businesses throughout our great Nation, my work on international treaties and sustainable development, and the informative research and consultations I have had with some of the foremost legal experts on environmental constitutionalism and environmental justice. They include Professors Erin Daly and James May at the Widener University Delaware Law School,¹ Professor Barry Hill, Adjunct Professor of Law at Vermont Law School and author of numerous books and articles on Environmental Justice,² Professor Russell B. Stevenson Jr., Visiting Professor of Law at Georgetown University Law Center and author of a well-informed article on the Maryland Environmental Policy Act,³ Professor Robert V. Percival at the University of Maryland School of Law,⁴ Professor David R. Boyd, Associate Professor of Law, Policy, and Sustainability at the University of British Columbia,⁵ and Maya K. Van Rossum author of *The Green Amendment: Securing Our Right to a Healthy Environment*. I urge you to become

¹ See, e.g., *Environmental Rights in State Constitutions: PRINCIPLES OF CONSTITUTIONAL ENVIRONMENTAL LAW*, p. 305, James R. May, ed., American Bar Association, 2011, Widener Law School Legal Studies Research Paper No. 11-47, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1932753 (last viewed 1/5/2021).

² See, e.g., Barry E. Hill *Environmental Justice: Legal Theory and Practice*, 4th Edition, Environmental Law Institute (2018); *Environmental Justice for All Must Be a Human Right Enforceable in U.S. State Constitutions* Barry E. Hill; *Bending the Arc Toward Justice*, Barry E. Hill - Vermont Law School, ELI Environmental Forum, Vol. 37, Issue 4 (July-August 2020).

³ Russell B. Stevenson Jr., *The Maryland Environmental Policy Act: Resurrecting a Tool for Environmental Protection*, 45 ELR 10074 (1-2015).

⁴ Robert V. Percival, "Greening" the Constitution - Harmonizing Environmental and Constitutional Values (2002) available at https://digitalcommons.law.umaryland.edu/fac_pubs/439.

⁵ David R. Boyd, *The Constitutional Right to a Healthy Environment* (February 28, 2013), last viewed on 1/5/2021 at <https://www.lawnow.org/right-to-healthy-environment>.

familiar with the contributions of these experts to better understand the importance of this legislation for all Marylanders, now and in future generations.

COMMENTS

SB0151 and HB0082 (hereafter the MARYLAND ENVIRONMENTAL HUMAN RIGHTS AMENDMENT), is sponsored by Senator Obie Patterson and Delegates Wanika B. Fisher, Ereik L. Barron, and Vaughn M. Stewart III. It puts to the voters of our beautiful state whether to amend the Maryland Constitution by adding a new Article 48 to our Declaration of Rights. This important Article fills significant gaps in Maryland's environmental law by recognizing in our State Constitution:

1. The fundamental right of all Marylanders to a healthful environment and stable climate, and
2. The State's authority and responsibility to serve as trustee of Maryland's natural resources.

Hearings on this important legislation are currently scheduled for 1/20/2021 at 1:30 p.m., before the House of Delegates Environment and Transportation Committee, and 1/26/2021 at 1:00 p.m., before the Senate Judicial Proceedings Committee.

Certainly, there will be many excellent questions about the specific wording used in SB0151 and HB0082. But I am convinced of the wisdom of, and need for, this legislation.

Moreover, given the threats posed to all Marylanders by the ongoing and potential future pandemics and the civil society crisis we now find ourselves in, there can be no question that the time has come to submit this legislation to the voters of our State. It is the right and just thing for you to do.

Maryland has many laws on the books. But this important legislation protects Maryland's environment in our State Constitution for the first time in our history. It also complements and strengthens existing Maryland law and preserves long-established principles of separation of powers.

Above all it gives all Marylanders similar protections to those now enjoyed by the residents of many other states and over 100 nations. Those protections include the Pennsylvania "Environmental Rights Amendment" (ERA), a 1971 amendment to Pennsylvania's Constitution

that very recently helped protect local drinking water supplies from pollution due to fracking.⁶ Other states that expressly protect environmental rights in their constitutions include Hawaii, Illinois, Massachusetts, Montana, and Rhode Island.⁷

The MARYLAND ENVIRONMENTAL HUMAN RIGHTS AMENDMENT works in concert with, strengthens, and fills significant gaps in Maryland’s existing statutory and regulatory environmental laws. Here are just a few examples:

- *Filling Gaps in Federal Law and Balancing the State-Federal Relationship*. Although the U.S. Constitution provides the Federal Government with power to regulate on behalf of environmental quality and affords some protections to address “conscience-shocking” conduct such as the Flint, Michigan, water crisis,⁸ it also limits federal power and does not expressly recognize a constitutional right to a clean environment. As a result, although our modern federal environmental laws set a floor of protection, our federal system of government defers to the traditional responsibility of each state to protect its natural resources and the public health and welfare of its residents.⁹ It is, therefore, entirely proper for states to elevate clean air, clean water, and a healthy environment to the level of a state-protected constitutional right.¹⁰ Defining environmental rights as fundamental in our

⁶ *Robinson Township v. Commonwealth of Pennsylvania*, 623 Pa. 564 (2013) [interpreting Article I, section 27 of the Pennsylvania Constitution and concluding at 79 that “economic development cannot take place at the expense of an unreasonable degradation of the environment” and the Commonwealth’s police power must be exercised to promote *sustainable* property use and economic development]. Reaffirmed *Pennsylvania Environmental Defense Foundation v. Commonwealth*, No. 10 MAP 2015 (Pa. June 20, 2017).

⁷ In addition, many other states are well on their way toward recognizing environmental rights in their state constitutions. For example, New York’s Legislators passed S 2072/A 2064 on April 30, 2019, the inalienable and self-executing right of all New Yorkers to clean air and water, and a healthful environment. After a second successful passage in 2021, that amendment will be submitted to New York’s voting public, possibly as early as November 2, 2021. See, also, <https://forthe generations.org>.

For additional discussion of state constitutions addressing environmental issues see: *The Green Amendment: Securing Our Right to a Healthy Environment* by Maya K. Van Rossum (2017); Art English and John J. Carroll *State Constitutions and Environmental Bills of Rights* (2015), viewed on January 5, 2021 at <http://knowledgecenter.csg.org/kc/system/files/English%20Carroll%202015.pdf>; Matthew Thor Kirsch *Upholding the Public Trust in State Constitutions*, Duke L. Journal Vol. 46, No. 5, pp. 1169-1210 (Mar., 1997), viewed on January 5, 2021 at <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1003&context=dlj>.

⁸ *Guertin v. Michigan*, 912 F.3d 907 (6th Cir. 2019), *cert. denied*, 140 S. Ct. 933 (2020), *reaffirmed*, 20a0244 p.06 (6th Cir., Aug. 5, 2020) [“conscience-shocking” conduct sustains a substantive due process claim].

⁹ For a comprehensive look at federal constitutional questions see, *Principles of Constitutional Environmental Law*, by James May, American Bar Association (February 26, 2013); Robert V. Percival, *Greening the Constitution - Harmonizing Environmental and Constitutional Values*, 32 *Envtl. L.* 809 (2002).

¹⁰ See U.S. Const. amend. IX and X.

State Constitution and recognizing preservation of our natural resources as a sovereign responsibility of the State also helps delineate the parameters of the State-Federal relationship.

- *Achieving MEPA's Aspirational Goals.* In 1973, the Maryland General Assembly passed the MARYLAND ENVIRONMENTAL POLICY ACT (MEPA), recognizing that every Marylander has the “fundamental and inalienable right to a healthful environment”.¹¹ The State, however, has yet to promulgate overarching implementing regulations in COMAR to preserve this important right. MEPA applicability has, moreover, been so narrowly tailored and construed as to render it effectively dormant.^{12, 13}

That void has, among other things, allowed Maryland to neglect the environmental impacts of government actions and contributed to the concentration of polluting activities, particularly in historically disadvantaged communities. For example:

- According to research conducted by students at the Johns Hopkins Bloomberg School of Public Health, 200 pollution emitting facilities are concentrated in a 2.5 mile radius in South Baltimore. This concentration of pollution has led to serious health disparities in South Baltimore, including asthma hospitalization rates that are four times the Maryland average.¹⁴
- On the Eastern Shore, concentrated animal feeding operations (CAFOs) are contaminating drinking water,¹⁵ runoff from growing development is causing water,

¹¹ MD. CODE ANN., NAT. RES. §§1-301 to 1-305, at §1-302(d) (Westlaw 2021).

¹² Russell B. Stevenson Jr., *The Maryland Environmental Policy Act: Resurrecting a Tool for Environmental Protection*, 45 ELR 10074 (1-2015). Three Maryland agencies, Dept of Planning, Transportation and Labor, promulgated regulations shortly after MEPA was enacted. Those regulations, however, have not been updated in 40 years, and no regulations have been promulgated by the Department of Natural Resources, the Maryland Department of the Environment or any other Maryland agency with responsibilities impacting the environment.

¹³ *Cf.*, 40 CFR Parts 1500-1508 [regulations applicable to *all* Federal agencies implementing the NATIONAL ENVIRONMENTAL POLICY ACT OF 1969, as amended (Pub. L. 91-190, 42 U.S.C. 4321 et seq.)]

¹⁴ A Short Report on the Cumulative Health Impacts of Air Pollution in South Baltimore, by Toby Harris, Christian Jenkins, Zain Kazi, Breanne Kincaid & Alina McIntyre, Johns Hopkins Bloomberg School of Public Health Dep. of Environmental Health & Engineering, Principles of Environmental Health II (Fall 2019). See also <https://www.jhsph.edu/news/news-releases/2015/researchers-find-link-between-air-pollution-and-heart-disease.html> and <https://pubmed.ncbi.nlm.nih.gov/25872223>.

¹⁵ Report: Eastern Shore Has Unhealthy Levels of Nitrate in Drinking Water Due to CAFOs, By Elizabeth Shwe, Maryland Matters (October 21, 2020) <https://www.marylandmatters.org/2020/10/21/report-eastern-shore-has-unhealthy-levels-of-nitrate-in-drinking-water-due-to-cafos>.

air and land pollution and, when combined with sea level rise, threaten the livelihoods and very existence of our beloved Chesapeake Bay communities.

- In St. Mary's County and Montgomery County per-and polyfluoroalkyl substances (PFAS) are contaminating seafood and drinking water.
- There, and elsewhere, sewage overflows, single-use plastic pollution, ever more frequent historic flooding, power plant and incinerator emissions, road expansions and transportation emissions, and other insults are choking our ecosystems.¹⁶

We all want a robust economy that benefits all Marylanders. But the sad truth is that, as our population and economy continue to grow,¹⁷ we too often prioritize often short-term economic interests over the livelihoods, health, and well-being of *all* Marylanders. So, we continue to live what I often refer to as the legacy of *laissez faire*, one that perpetuates unsustainable patterns, burdens communities, and ignores the important truth that our economy and our ability thrive are totally beholding to the environment.

In the words of the late Sen. Gaylord Nelson, the father of Earth Day, some 50 years ago:

"The wealth of the nation is its air, water, soil, forests, minerals, rivers, lakes, oceans, scenic beauty, wildlife habitats and biodiversity . . . that's all there is. That's the whole economy. That's where all the economic activity and jobs come from. These biological systems are the sustaining wealth of the world."

"The environment involves the whole broad spectrum of man's relationship to all other living creatures, including other human beings. . . It involves the environment of the ghetto which . . . [has] the worst pollution, the worst noise, the worst housing, the worst situation in this country . . ."

¹⁶ See, e.g., <http://mdehr.org/stories/>, <https://www.cbf.org/about-cbf/locations/maryland/issues/index.html>, <https://www.sierraclub.org/maryland>, <https://www.mdclv.org/issues>.

¹⁷ Since the beginning of the modern environmental movement in the early 1970s Maryland has grown from 4 to more than 6 million people (approx. 33% increase). Meanwhile Maryland vehicle miles traveled have more than doubled, land use under development has increased by approximately 160% and trade has grown exponentially. See, e.g.:

- <https://www.macrotrends.net/states/maryland/population>,
- https://www.roads.maryland.gov/OPPEN/Vehicle_Miles_Traveled.pdf,
- <https://planning.maryland.gov/Pages/OurWork/LandUse.aspx>, and
- <https://msa.maryland.gov/msa/mdmanual/01glance/economy/html/economy.html>.

Clearly, we are falling behind and need stronger legal authority to attain a truly protected, sustainable environment. As compared to MEPA and other statutes and regulations, the constitutional environmental rights created by this Amendment provide that. They elevate a healthful environment, one that protects the well-being of *all* Marylanders, from a mere aspirational goal to an overarching organizing priority of our State.

- *Establishing the State's Trustee Authority and Responsibilities.* Maryland has certified to the Federal Government that the State is "trustee" of its natural resources for purposes of the Federal Clean Water Act, Oil Pollution Act and Comprehensive Environmental Response, Compensation and Liability Act. As compared to other states, however, that authority is not found in Maryland's Constitution. The State's authority to protect Maryland's natural resources now and for future generations, therefore, lacks an organic basis. Our Constitution is also silent on the fundamental notion that the State's responsibility to carry out its trustee duties is as a fiduciary for the benefit of *all* Marylanders. Compare these gaping omissions with the constitutions of Pennsylvania and Montana, among others. The MARYLAND ENVIRONMENTAL HUMAN RIGHTS AMENDMENT fills this gap in our organic law, establishing a clear fiduciary standard for its implementation.
- *Establishing Overarching Protection.* Statutes and regulations do not, and cannot, foresee and timely remedy, all environmental harms. Legislating takes enormous effort, requires difficult compromises, and can often come at great political and economic cost with the outcomes less than certain. Legislators, therefore, frequently are not able to reach a consensus over how to deal with environmental issues, especially systemic ones, until well after the damage is done and they are faced with an outcome that shocks the conscience, the type that gives rise to widespread societal outcries for protection.

In many respects, Maryland is in better shape than some other parts of our country. That includes our recent bans on fracking and polystyrene. But Maryland is uniquely vulnerable to climate change¹⁸ and suffers from other major environmental and health risks.¹⁹

But Maryland is no exception to the weaknesses of the legislative and regulatory process. We know this and we know why. The problems we have are complex, embedded in how we have historically organized ourselves, and not easily resolved. Our state environmental laws, moreover, are for the most part media-specific, require regulatory implementation, and are

¹⁸ See, <https://climatechange.maryland.gov/science>.

¹⁹ See, websites linked at foot note

more-often-than-not a reaction to the changing, often politicized and contradictory, mandates of the Federal Government. The result is a siloed, ineffective, piecemeal assortment of often contradictory requirements, rather than an integrated system responsive to Maryland-specific priorities.

By comparison, because our Constitution is the highest law of the State, it provides the most enduring statement of legal principles and protections that preserve our ability to not only address crises when they arise, but often prevent them from unfolding in the first instance. The MARYLAND ENVIRONMENTAL HUMAN RIGHTS AMENDMENT does just that. It not only allows for a remedy when none is provided for in our statutes and regulations but establishes overarching guiding principles to put our wonderful state on a solid course toward improving and preserving a more healthful environment for *everyone* including our most disadvantaged communities and future generations.

In conclusion, I want to say a few words about the need for you to support the MARYLAND ENVIRONMENTAL HUMAN RIGHTS AMENDMENT and put it to the voters at this time in our history, a time like no other in living memory. The past year of struggle, including the sad events we witnessed in Washington, D.C. over the past 24 hours, has underscored the tremendous dangers we face: a failure of civil society during a global pandemic that has already killed almost 2 million people, including 6,132 souls in our state alone.

Our scientists tell us that this pandemic is due to our increased exposure to zoonotic illnesses (diseases transmitted from animals to humans) and are the direct result of our global mobility, climate change and the unsustainable use of natural resource. These patterns of how we have organized our lives have put us in ever closer contact with animals and other organisms that humans had little prior exposure to. Because of Maryland's unique geography, our heavy involvement in maritime commerce and other trade, and our high levels of mobility and urbanization, we are even more vulnerable.

This pandemic has also underscored the tremendous living and healthcare inequities that exist in our state. One cannot socially distance, stay healthy, grow, and prosper, in a densely-packed urban area with inadequate services and a diminishing environment. In that respect Maryland sadly is not unique.

These circumstances demand that we take better care of our own. That starts with your leadership. It starts with your willingness to allow us to build a legal system that puts Maryland on a stronger footing, one that can effectively address the challenges we now face and protect every Marylander's right to live in a healthy environment.

So, I urge you to support this legislation, and let the voters decide whether to include the MARYLAND ENVIRONMENTAL HUMAN RIGHTS AMENDMENT in our Declaration of Rights.

Thank you for your consideration, and please let me know if you have any questions or need further information.

Sincerely,

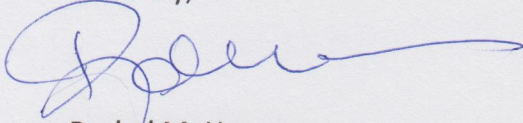
Rachel M. Hopp

Cc: Rabbi Nina Beth Cardin, Executive Director
Maryland Campaign for Human Environmental Rights

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