

**Testimony in Support of House Bill 596 – Constitutional Amendment – Environmental Rights (‘Maryland Environmental Human Rights Amendment’)**

February 23, 2021

Dear Chairman Barve and Members the Committee:

Thank you for this opportunity to submit testimony in support House Bill 596, which establishes a constitutional right to a healthy and healthful environment, on behalf of the Center for Progressive Reform.

House Bill 596 would simply give Marylanders the ability to amend our Declaration of Rights, as we’ve done before, to establish environmental health as a fundamental and foundational value of Marylanders now and for future generations. If successful on the ballot, this amendment would give the General Assembly and the courts in our state the clear authority to take strong action to protect the environment for the health of all Marylanders. The omission of environmental health protections in our constitution—at the core of the air we breathe and the water we drink—is a fundamental flaw that Marylanders should have the ability to address.

A constitutional amendment would ensure that the state and local government has a legal obligation to treat all individuals and communities equitably when it comes to protecting their rights to a clean and healthy environment. This amendment would establish the fundamental human right that no person should suffer disproportionate environmental, health and quality of life burdens because of their skin color, their income, or where they live.

Every day, local, state, and federal governments are granting permission to industries to pollute, deforest, denigrate, and despoil our environment, which is having serious effects on the health of our state and our bodies. A constitutional amendment would ensure that all state officials in all government branches would have an affirmative duty to protect the environment (i.e. adequate enforcement, permitting and compliance) and a prohibitory duty to refrain from direct government action that would permit or otherwise encourage the degradation, diminution, or depletion of public natural resources (i.e. permitting a industrial polluter in an overburdened community).

House Bill 596 acknowledges that existing laws and regulatory frameworks in Maryland do not adequately protect Marylanders. A constitutional amendment would serve as a stopgap to this imperfect system, especially in addressing new, emerging, and more generalized threats that are not exactly captured by existing law or implementation of that law.

- ◇ Wherever there are disproportionate environmental burdens to underserved and overburdened communities, this constitutional amendment would provide a way for communities to push back against further degradation as well as focus efforts on needed restoration. (i.e. Brandywine, Curtis Bay, Eagle Harbor, Lothian, etc.)
  - This amendment would likely cover practices such as zoning focused on repeatedly locating polluting operations in the same communities and institutional racism that has resulted in minority and/or low-income communities being situated in highly-polluted areas -- with decaying infrastructure and toxic sites, such as landfills, superfund sites, industrial operations and major roadways. No one should have to suffer health problems due to their income, their skin color, or their zip code.
- ◇ Enforcement within the Maryland Department of the Environment (MDE) is lagging and the agency is under-resourced. MDE's Water & Science Administration (WSA) only took 627 enforcement actions in FY 2021. This is the lowest amount of annual enforcement actions taken since FY 2002 and roughly a 30 percent decrease from the average number of enforcement actions taken annually over the last 20 years. The record low annual number of inspections conducted by WSA occurred in FY 2020, with 2,929 inspections. This number only grew to 3,078 inspections in FY 2021, which is still a 60 percent decrease from the average number of inspections conducted by the WSA annually.
- ◇ Noncompliance with Maryland's environmental laws is rampant.
  - MDE inspected a 4.38-acre waste management and recycling facility in Pasadena eight times, owned by Ecology Services, beginning in January 2020, and found violations during every single visit before it finally filed a lawsuit in the late spring of 2020. This facility has been operating without its required coverage under the state's industrial stormwater permit, despite discharging sediment and other unknown pollutants into the Magothy River for years. This runoff prevented yellow perch from spawning in nearby parts of the Magothy this year. The Magothy River is currently impaired by sediment, bacteria, ions, metals, nutrients, and PCBs. While this is independently a great win on the enforcement front, the state tolerated an endless number of stormwater violations prior to bringing this lawsuit.
  - There's been rampant noncompliance under the states industrial stormwater permit that has largely gone unaddressed by MDE. For instance, **only 24 percent (475 of 1,979) of MDE's inspections between 2017 and 2020 found that industrial stormwater permittees were in compliance with their permit**

**terms.** The Department found direct noncompliance in almost two-thirds (1,305) of its inspections between 2017 and 2020. Despite finding some form of noncompliance in 76 percent (1,504 of 1,979) of its inspections, the Department only took formal enforcement actions against 0.3 percent (6 of 1,979) of the sites found in noncompliance during the same time period. Lastly, inspection data show that numerous facilities were in noncompliance repeatedly, and many times consecutively. Of the 1,305 inspections that resulted in direct findings of noncompliance, 617 of the inspected facilities were repeat offenders. The widespread noncompliance and lack of adequate enforcement measures over the last few years looks glaringly similar to what the Center for Progressive Reform and the Environmental Integrity Project found in their [report](#) on industrial stormwater regulation in Maryland between 2014 and 2017.

- The Environmental Integrity Project recently released [a report](#) on widespread noncompliance among CAFOs on Maryland's Eastern Shore. The industry produces more than 600 million pounds of manure every year from roughly 300 million chickens. The report found that 51 percent of the CAFOs (with public records available in 2019) overapplied manure (above nutrient management plan limits), yet none were fined by the Maryland Department of Agriculture. Despite the fact that the Maryland Department of the Environment inspects fewer CAFOs every year (inspections have fallen by 40 percent since 2013), 84 percent of the CAFOs inspected between 2017 and 2019 by MDE failed to meet the required water pollution controls; 46 percent failed the second inspection. Only 4 percent were fined by MDE, and half of those fines were collected. The report notes that "despite the industry's large footprint on the Eastern Shore, state oversight is minimal and ineffective at protecting water quality." You can read more [here](#).
- ◇ Permitted facilities in Maryland have lapsed permits with outdated permit terms and it's taken too long for the Department to bring these facilities into compliance with important environmental protections. For example, Valley Proteins has been operating a chicken rendering plant with a discharge permit that has been administratively extended since 2006. Over two decades ago, the facility was identified as the single [largest contributor of nitrogen](#) to the Transquaking River. Since then, the facility's discharge monitoring reports and water quality tests have demonstrated alarming levels of pollution. Valley Proteins owns many animal waste processing facilities along the East Coast and in some parts of the Midwest, where it turns animal processing byproducts into pet food. Ironically, Valley Proteins' slogan is "Making a sustainable difference for a healthier environment." Despite the alarming amount of violations from this rendering plant on Maryland's lower eastern shore, MDE has only taken one enforcement action, a [\\$5,000 fine](#) in April 2019, against the facility until more recently filing a lawsuit against the facility.
- ◇ Pollution violations at the Back River and Patapsco wastewater treatment plants are well-documented, but MDE has failed to pursue any meaningful enforcement actions

to hold these facilities accountable. Coupled together, these plants continue to discharge millions of gallons of wastewater pollution into local waterways.

These are just a few of the many examples where this amendment could provide additional pathways for communities to ensure they are protected. A constitutional right, as opposed to a regular law, would ensure that environmental protection is the highest obligation of the government, and not just an aspirational goal that could be amended at any point in time. As a constitutional guardian of our natural resources, Maryland state officials would be: (a) constitutionally obligated to protect the environment and its impact on the health of Marylanders, and (b) legally prevented from permitting egregious harm to public natural resources that would violate the constitutional right. Under the provision, the government is not the proprietor of the environment, but is the trustee of public natural resources and must conserve/maintain those resources for the benefit of both present and future generations. Under such a trust obligation, government must comply with fiduciary duties, which include the duties of prudence, loyalty, and impartiality. This duty simply cannot be brushed aside in decision-making. For instance, in 2016 Pennsylvania's environmental rights amendment was utilized by the state Supreme Court (*Robinson Township v. Commonwealth*) to strike down provisions in a 2012 state law (Act 13) that allowed industry to drill and frack shale gas in every municipality across the state, regardless of the local zoning laws and prohibitions on construction near schools, residents, wildlife sanctuaries, and public parks. It also gave industry the unilateral power to seize land through eminent domain for underground gas storage. The Court found that the state was not acting as the true trustee of the environment.

Constitutional rights cannot be waived or displaced by acts of the legislature; when there is a defensible claim of infringement on a constitutional right there is a constitutional right to seek redress in the courts by those who are impacted. What that means is that when a government action is going to pollute the water or air, or harm the environment in ways that could be deemed unconstitutional, impacted people can go to court to challenge that government action, even if there is no specific law or regulation that otherwise allows a challenge to the permit issued or decision made. More specifically, the individual environmental rights protections provided by the amendment in Maryland is written in a way that will direct the courts to conduct a strict scrutiny review, which means that: (1) any intrusion on an individual's right to a healthy environment must serve a compelling government interest; (2) the proposed action uses the least restrictive means (i.e. inflicts the least detrimental impact on the environment); and (3) the compelling government interest is deemed consistent with the purposes of our constitutional amendment (i.e. non-degradation and equity in terms of impact on communities).

Passing this amendment is not a panacea for fixing all of today's environmental challenges, but it would represent an enforceable promise to future generations that their health and the health of our planet is a priority worth articulating in our state's most sacred political document.

We urge a favorable report on HB596.

Sincerely,

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