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Testimony in Support of House Bill 517 – Constitutional Amendment – Environmental Rights (‘Maryland Constitutional Amendment for Environmental Health & Justice’)

February 19, 2020

Dear Chairman Barve and Members the Committee:

Thank you for this opportunity to submit testimony in support House Bill 517, which establishes a constitutional right to a healthy environment, on behalf of Waterkeepers Chesapeake and the undersigned organizations. All of these organizations are committed to ensuring a healthy Chesapeake Bay watershed, which includes the rivers and streams that feed into the Bay.

Maryland Waterkeepers have an interest ensuring clean waterways and across the state and believe that an amendment to the Maryland Constitution would give the General Assembly and the courts in our state the clear authority to take strong action to protect the environment and our waterways.

1. The right to a healthy place to live is just as fundamental as our other state constitutional rights.

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 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.

Our Declaration of Rights in Maryland’s Constitution, just like the Bill of Rights in our U.S. Constitution, is the supreme law of the land that establishes the baseline rules and restraints on government power. The UN Special Rapporteur on human rights and the environment, David R. Boyd, says that a “[a] constitution also reflects and reinforces a society’s deepest and most cherished values, acting as a mirror of a country’s soul.” 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.

The Declaration of Rights provision under Maryland's Constitution, is made up of forty-seven articles, with varying rights -- from the right to religious liberty, free speech, a free press, and a free election, to finding remedy from injury in the court system, and to not be deprived of life, liberty and property, among others. The Declaration of Rights even establishes Marylanders fundamental right to petition the Legislature for redress of problems and establishes the legislature as the Trustee of the Public.

While all of our rights are written broadly in the Declaration of Rights as an affirmation of our liberties; as with all laws, these rights have been interpreted and given practical meaning by our court system. House Bill 517 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. Without a healthy place to live, all of our other rights tend to lose some of their meaning.

2. A Constitutional Amendment to Environmental Health and Justice would ensure remedies for Maryland communities that suffer from public health disparities due to disproportionate pollution burdens.

A constitutional amendment would ensure that the state 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.

Polluting industries often target minority and low-income communities under the guise of jobs, attempting to get residents to rationalize detrimental impacts to their health and their community for short-term economic payoffs. Such practices have led to wide-spread, disproportionate environmental inequities, resulting in some communities being seen as expendable so that others may live in clean and healthy environments.

Wherever there are disproportionate environmental burdens to low-income communities and communities of color, the Constitutional Amendment for Environmental Health and Justice provides a way to push back against further degradation as well as focus efforts on needed restoration. It would focus government decision-makers directly on the immense health and environmental burdens that many communities face and to hold governmental officials accountable when they continue actions, activities, and decisions that increase that burden. An amendment would also greatly enhance the tools available to communities to remedy current degradation and push back against further devastation. 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.

3. Constitutional rights are the strongest protection a state can provide.

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.

4. Our current state environmental standing laws are inadequate.

Maryland has a patchwork of environmental standing laws that only provide standing to Marylanders in limited situations, most notably standing is often limited to people who are directly impacted by government decisions and actions and when there are specific impacts to property rights, economic harms, or for recipients who have sought but been denied a permit. But standing is often difficult, if not outright prohibited, for those that don't live adjacent to the impacted area or operation to bring a challenge even if there is going to be a profound and meaningful impact on their water, air or environment. More specifically, standing has been limited in a number of ways:

- (1) The Miscellaneous Environmental Protection Proceedings and Judicial Review Act provides standing to challenge state permitting decisions, but does not apply to local decisions;
- (2) The Maryland Administrative Procedure Act allows standing to challenge agency decisions, but is insufficient because individuals have to show personal interest or property rights affected by the decision and organizations have to show an interest different from that

of its individual members, making it difficult for those that don't live adjacent to the impacted area to show standing. This also applies in Clean Water Act state enforcement cases;

(3) The Maryland Court of Appeals has found that the Maryland Environmental Standing Act does not "expressly include judicial review of an administrative proceeding." So the public has no judicial recourse for a state or local permitting decision that harms water quality or public health.

Standing rights enumerated through legislation, unlike fundamental constitutional rights, can be altered or taken away by the legislature at any time. Creating a constitutional right to healthy environments will support standing when there is a claim that the government has acted in a way that will infringe on constitutional environmental rights – e.g. have contaminated the water or air in dangerous ways that harm human health for surrounding communities -- even if there is no specific regulation or law that would otherwise allow impacted individuals or communities to bring a legal challenge to the specific government action taken. Likewise, constitutional rights, allow affected Marylanders to find recourse in the highest court of the State, whereas rights conferred through legislation generally can only be remedied through lower courts.

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).

5. The bill language has changed from prior years.

In 2019, there was a concerted effort among multiple environmental, legal and public health stakeholders to change the bill language from years past. The language in House Bill 517 reflects the work of these stakeholders to address some of the concerns that have been raised in the past -- mainly the concern that this amendment would prohibit the development of renewable energy projects across the state. The intent of this bill is not to target projects that are necessary for the sustainability of our planet -- like renewable energy projects -- but major projects or laws that are significantly detrimental

to both the environment and human health (i.e. Maryland repeals the fracking ban and passes similar law to PA's partially overturned Act 13). More specifically, House Bill 517 differs in the following ways:

1. The protections for the “aesthetic” rights were removed from the bill. While the term “aesthetic” often arises under Maryland land use law under many local ordinances to promote the health, morals, or safety of the public welfare,¹ the term “aesthetic” is too subjective and has been used in zoning ordinances in other states to prevent renewable energy projects from moving forward;² Maryland courts have repeatedly found that zoning ordinances with the sole purpose of achieving aesthetically pleasing results are unconstitutional.³ For these reasons, protections of the “aesthetic” value of the environment were removed.
2. The bill language retained protections for the “scenic” value of the environment because, in Maryland, the term “scenic” is well defined and often involves the Scenic and Wild Rivers Program, establishing scenic corridors, scenic byways, or open space areas.⁴ The areas designated as “scenic” often trigger additional state protections to help retain the area’s natural qualities. Given the well-defined context for “scenic,” the stakeholders felt comfortable leaving this language in the bill.
3. The bill language retained protections for the “historic” value of the environment, because unlike “aesthetic” it is well-defined⁵ and the historic importance of a region may be used as the sole legitimate consideration in a zoning process.⁶ If an area has historic importance, local zoning authorities are able to regulate that area as well as the land adjacent to it. Given the well-defined nature of “historic,” the stakeholders felt comfortable leaving this language in the bill.
4. Lastly, language in the bill was removed that would allow Marylanders to directly sue private parties under the amendment. The Declaration of Rights in Maryland’s Constitution, just like the Bill of Rights in our U.S. Constitution, is the supreme law of the land and establishes the baseline rules and restraints on *government power*. As such, the stakeholders felt it would be inappropriate to place a right against private parties in the state’s Declaration of Rights.

6. Conclusion

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. Waterkeepers

¹ *Baltimore v. Mano Swartz, Inc.*, 268 Md. 79, 88 (1973)

² *Zimmerman v. Board of County Com'rs*, 289 Kan. 926 (2009)

³ *Id.*; *Coscan Wash., Inc. v. Md.-National Capital Park & Planning Com.*, 87 Md. App. 602 (1991).

⁴ Md. Natural Resources Code Ann. §8-401.

⁵ Md. Code Ann., State Fin. & Proc. § 5A-301.

⁶ *Coscan Wash., Inc. v. Md.-National Capital Park & Planning Com.*, 87 Md. App. 602, 623 (1991)

Chesapeake hopes that you will favorably report this bill and support sending this amendment to the voters of Maryland for their approval.

Sincerely,

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