February 10, 2020

Chairman Kumar Barve

House Environment and Transportation Committee

Maryland House of Delegates

Dear Chairman Barve and Members of the Committee;

I write this letter in support of HB 517 not only as a Maryland resident for decades but also as an environmental attorney with 40 years of experience in the public and private sectors. Currently, I am an Adjunct Professor of Law at Vermont Law School, and a Visiting Scholar at the Environmental Law Institute, a Washington, DC think tank in environmental law and policy. I also served as the Director of the Office of Environmental Justice at the U.S. Environmental Protection Agency from 1998-2007.

My comments in support of HB 517 are based in part on my essay, "Environmental Justice For All Must Be A Human Right Enforceable in U.S. and State Constitutions," in the book, A BETTER PLANET: 40 Big Ideas for a Sustainable Planet, recently published by Yale University Press.

Let me state that, based upon my experience as an environmental lawyer and policy maker, I am an unabashed and unapologetic advocate for environmental justice for all communities; an advocate for a human right to a clean and healthy environment; and an advocate for environmental rights amendments.

With that being said, I would like to bring to your attention that, on January 21, 2020, the U.S. Supreme Court denied the petition of former state and local government officials in the ***City of Flint v. Guerin*** matter. With that denial, the Court determined that the Flint, Michigan residents' civil suit against those former state and local government officials could proceed. The residents argued that they had a constitutional "right to bodily integrity." They argued that the government officials acted with deliberate indifference and thus violated their constitutional right to bodily integrity by knowingly contaminating their drinking water with lead and harmful bacteria, and then repeatedly lied about evidence of the contamination, causing the residents to unknowingly and involuntarily ingest poisonous substances over a period of months. The Court's denial of the petition is an enormous victory for the Flint residents, who were exposed to high levels of lead after the government officials changed the city's drinking water source in 2014.

Flint, unfortunately, has become the current poster child for environmental injustice in this country. While the Supreme Court's ruling should be applauded, it's worth noting that if Michigan had an environmental rights amendment (ERA) – which provides a constitutional right to environmental protection – the Flint water crisis likely would never have happened in the first place.

An ERA, placed in the bill of rights section of a state constitution, creates a constitutional mandate that each person, regardless of race, color, national origin, or income has an inalienable right to clean water, clean air, and clean land. These "green amendments" provide a mechanism to imbed environmental justice for all communities as a substantive obligation of government: not merely as an aspirational goal.

As you know, environmental justice is an urgent problem in America. For example, a recent U.S. National Institutes of Health study entitled, "Race, Income, and Environmental Inequality in the United States,"

concluded that black families are more likely to live in environmentally hazardous neighborhoods than white families, despite having equal or higher incomes. According to the researchers, blacks are so overburdened with toxic concentrations of pollution, tne findings explain some of the significant health disparities that exist between blacks, whites, and Hispanics. The Trump administration, moreover, acknowledged this reality when the *American Journal of Public Health* published a study by EPA 's National Center for Public Health of the Office of Research and Development concluding that "disparities in pollution exposure from PM [particulate matter] emissions were more pronounced for Black populations (regardless of wealth) than those living in poverty...Emission disparities resulting from structural racism exist on a national level and at the state and county levels in most instances."

Green amendments, as constitutional provisions, are the primary statements of environmental public policy in the states, and a fundamental pillar in the battle for environmental justice. The good news is that ERAs are not a novel or radical idea. They are already found in a number of state constitutions, and those provisions serve as models for environmental constitutionalism across the U.S.

Consider the ERA of the Commonwealth of Pennsylvania that was approved in 1971 by Pennsylvania voters in a referendum. According to Article I, section 27, of the Declaration of Rights in the Constitution of the Commonwealth of Pennsylvania, "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." This language protects the right of all Pennsylvanians to clean air and pure water, just like the other rights set forth in the Declaration of Rights (e.g., the right to life, liberty, property, and the pursuit of happiness; freedom of speech; freedom of religion; the right to trial by jury; and the right to bear arms).

The Pennsylvania Supreme Court's 2013 ruling in ***Robinson Township v. Commonwealth of Pennsylvania*** stated that the people's right to clean air and pure water was to be treated not just as a statement of environmental policy but, more importantly, as a binding rule of constitutional law. In that lawsuit, which was filed by nine towns from across the state, the Plaintiffs challenged the constitutionality of Act 13 of 2012, which updated the state's oil and gas laws to encourage more hydraulic fracturing (fracking) in the Marcellus Shale Formation. The Plaintiffs argued, and the Pennsylvania Supreme Court agreed, that Act 13 not only violated the Commonwealth's ERA but also detrimentally impacted the duty of the nine towns to protect the environment and public health of the state's residents.

The Flint water crisis offers an example of how a green amendment could have prevented this public health disaster. If Michigan had an ERA that explicitly protected citizens' rights to clean water like the Pennsylvania ERA, it is likely that the state officials, in their policy decisions, would have been obligated to more carefully consider the right of the Flint residents to clean water, and would not have switched the water supply in 2014. Flint is, in many respects, a wake-up call to the legislative, executive, and judicial branches of the entire Nation regarding citizens' access to clean drinking water.

Pennsylvania is ***not*** alone. Rhode Island (1987), Montana (1972), Hawaii (1978), Illinois (1970), and Massachusetts (1972) all have green amendments in their state constitutions, and New York and New Jersey are in the process of amending theirs. None of the states that have an ERA has gone bankrupt, and neither have any businesses that have had to comply with the ERA.

I understand that you were concerned with the effect that an ERA would have on the "harms/benefit" test in the government's environmental decision-making process. Please be advised that a harms/benefit test would continue to guide environmental decisions consistent with Maryland's environmental laws and

their implementing regulations. In fact, the Pennsylvania Supreme Court's 2005 ruling in ***Eagle Environmental II Ltd. Partnership v. Commonwealth of Pennsylvania*** stated that the Environmental Quality Board's regulations adopting a harms/benefit test as part of the permitting process for waste disposal facilities was constitutional and authorized by the Commonwealth's Solid Waste Management Act, the Municipal Waste Management Planning, Recycling and Waste Reduction Act, etc. In short, the Commonwealth's environmental regulators continue to be required to conduct environmental assessments of a proposed project and the benefits of the project.

In conclusion, if environmental justice is to be secured for all communities, there must be a concerted effort to amend state constitutions to include ERAs. Otherwise, environmentally overburdened communities like Flint will continue to be exposed disproportionately to environmental harms and risks. As Pennsylvania, Rhode Island, Montana, Hawaii, Illinois, and Massachusetts have already demonstrated, environmental constitutionalism works.

Very truly yours,

Barry E. Hill