

February 16, 2020

The Honorable Kumar P. Barve, Chair  
and Members of the House Environment and Transportation Committee  
Maryland General Assembly  
Room 251, House office Building  
Annapolis, MD 21401

**RE: Support for House Bill 517 – Constitution Amendment – Environmental Rights**

Dear Chairman Barve and Members of the Committee:

I write today – both as an experienced environmental attorney and a resident of the beautiful State of Maryland in Montgomery County (D-17) – in support of HB 517, a bill proposing the Maryland Environmental Rights Amendment (MD ERA) to our Declaration of Rights. This important legislation recognizes that all Marylanders, including future generations, have a fundamental right to a quality environment, and enshrines into our Constitution the important role of the State and its political subdivisions to serve as trustees of our natural resources. It deserves your full support!

My comments today are informed by my work in environmental law, including as a legislative, regulatory, and enforcement counsel, program manager and international treaty negotiator, for the U.S. Environmental Protection Agency and U.S. Coast Guard’s National Pollution Funds Center; and representing private and quasi-public clients, public interest conservation organizations, individuals and communities on environment and conservation matters.<sup>1</sup> I also served for many years on the City of Gaithersburg’s Environmental Affairs Committee. So, I am sensitive to how conservation and environmental considerations affect individuals, the private sector and all levels of government.

I am fully aware that, for many if not most environmental issues, there are no easy answers, no silver bullets. But I hope that my comments will spark a serious conversation about why we need to recognize conservation of our natural resources and a quality environment as fundamental tenets of how we govern ourselves in Maryland.

**I. WHAT DOES THE MARYLAND ENVIRONMENTAL RIGHTS AMENDMENT DO?**

House Bill 517 adds Article 48 to the Maryland Declaration of Rights. Its provisions enshrine the aspirational goals of our existing environmental laws and regulations in our Constitution by proclaiming the right of every person to a quality environment and establishing that right as fundamental. The MD

---

<sup>1</sup> The substantive focus of my work has included federal and state domestic environmental laws, including Clean Air Act, Clean Water Act, TSCA, RCRA and Oil Pollution Act, natural resource damage, state implementation plan and NPDES programs; treaties including the Framework Convention on Climate Change and other transboundary pollution regimes; constitutional law, including questions of preemption, spending, takings, and public trust; fiscal law; and the cross section of environmental law with related economic, business, energy, common law, property law and individual and tribal rights matters.

ERA also asserts the primary role of the State and its political subdivisions in environmental management and recognizes that Maryland's natural resources are the common property of all Marylanders and that the State and each political subdivision of the State serve as its trustees. Finally, MD ERA prohibits unreasonable diminution of those resources and authorizes enforcement of the rights so created.

We can debate the specific wording of this proposal. For example, some provisions are more appropriate for statutory laws. But the wisdom of its intentions cannot be challenged. These are benchmark principles implicit in the concept of an orderly society and the traditional function of state government in our Federal system; and importantly recognize a quality environment as fundamental to preserving life, liberty and property.

HB 517 will not just ensure that our State's environment is protected and preserved for all Marylanders, including future generations. It will help Maryland fill the void and prevent backsliding in this era of reduced Federal leadership. The MD ERA will also help achieve important cost savings by ensuring that environmental externalities are considered at the earliest stages of government decision-making and will provide Maryland with an economically viable mechanism for addressing environmental concerns when they arise. Finally, it will underpin both State sovereignty and individual protections under the U.S. Constitution. These important objectives deserve your full consideration and support.

## II. THE MD ERA IS NOT A NEW OR RADICAL IDEA

Nearly one-half of U.S. states, including Pennsylvania, Montana, Hawaii, Illinois, and Massachusetts, explicitly recognize a quality environment as either a basic civil right or a central concern.<sup>2</sup> In addition, more than three quarters of the world's national constitutions (149 out of 193) include explicit references to environmental rights and/or environmental responsibilities.<sup>3, 4</sup>

These constitutional provisions are important. For example, in 2013 the Pennsylvania Supreme Court relied on the Pennsylvania Declaration of Rights environmental provision to protect local governments and individuals from injury caused by fracking.<sup>5</sup> HB 517 is based on that Pennsylvania provision.

---

<sup>2</sup> Jack R. Tuoholske, *U.S. State Constitutions and Environmental Protection: Diamonds in the Rough*, 21 *Widener Law Review* 21, 239 (2015), citing James May & William Romanowicz, *Environmental Rights in State Constitutions*, in *PRINCIPLES OF CONSTITUTIONAL ENVIRONMENTAL LAW* 306 (James May ed., 2011); Art English and John J. Carroll *State Constitutions and Environmental Bills of Rights*, *The Book of The States* 2015 (The Council of State Governments).

<sup>3</sup> See, e.g., David R. Boyd *David Suzuki Foundation Paper #4: The Status of Constitutional Protection for the Environment in Other Nations – Executive Summary*, <https://david Suzuki.org/wp-content/uploads/2013/11/status-constitutional-protection-environment-other-nations-SUMMARY.pdf>. See also, Jim May, *Widener University Constitutional Environmental Law*, <http://blogs.law.widener.edu/envirolawcenter/environmental-law/constitutional-environmental-law/>.

<sup>4</sup> Clean water and sanitation have also been recognized as a fundamental "human right" by the United Nations. (UN Resolution 64/292 adopted July 18, 2010, <https://www.un.org/press/en/2010/ga10967.doc.htm>). This is further international recognition of what any reasonable person would consider a fundamental right of mankind.

<sup>5</sup> *Robinson TP., Washington County v. Com.*, 83 A.3d 901 (Pa. 2013) [Pennsylvania Supreme Court held unconstitutional major parts of Pennsylvania's "Act 13"—a 2012 oil and gas law designed to facilitate the development of natural gas from Marcellus Shale]

### III. WE NEED EVERY TOOL AVAILABLE TO PROTECT AND PRESERVE OUR ENVIRONMENT

#### ***A. We are making progress, but still have huge environmental challenges ahead***

Maryland has a lot going for it. But, among the 50 states, Maryland ranks only 41 for renewable energy usage and 40 for air quality.<sup>6</sup> These are shocking statistics given Maryland's small industrial footprint. We are also home to many endangered and threatened species,<sup>7</sup> and our tree canopy continues to decline each year leading to both economic and environmental harm.<sup>8</sup>

The challenges we face are growing and complex. For example, although we and neighboring states have made enormous strides protecting the Chesapeake Bay, we are also challenged by crippling Federal spending cuts and a lack of Federal leadership in critical areas.<sup>9</sup>

Similarly, as noted on the State's website "The effects of climate change in Maryland are already apparent in rising seas, summer heat waves, and more frequent and violent thunderstorms. All of these changes affect Maryland's citizens, their livelihoods, and the state's economy."<sup>10</sup> Who can forget the heart-breaking images of flooded cemeteries on Smith Island, drivers stranded on the tops of their cars on River Road in Potomac, and the repeated torrential flooding of Ellicott City.<sup>11</sup> Our residents, local governments and the business community are all being affected. No one is immune!

So, what do we do? I believe it starts by ensuring that Maryland has every possible tool at its disposal to address these and other serious challenges. That includes the authority to expeditiously fill gaps in our laws and retrenchments in Federal regulation.

Maryland can start that process by embedding environmental rights into its foundational legal document. The ERA will strengthen state authority and be a force multiplier by empowering citizen boots on the ground.

#### ***B. Statutes and regulations are not enough***

The emergence of any new and pressing environmental problem is usually followed by calls for new legislation. But, although statutes and regulations are essential, they can take years to develop, are costly to implement, and require a level of political attention and will that can be difficult to muster. Nor are they readily adaptable to changing circumstances. Furthermore, once enacted, statutes and their

---

<sup>6</sup> See, <https://www.usnews.com/news/best-states/rankings/natural-environment/air-water-quality>;  
<https://www.usnews.com/news/best-states/rankings/infrastructure/energy>.

<sup>7</sup> See, <https://www.fws.gov/endangered/map/md-info.html>

<sup>8</sup> See, [https://dnr.maryland.gov/forests/Documents/sfc/SFC\\_NNL\\_110811.pdf](https://dnr.maryland.gov/forests/Documents/sfc/SFC_NNL_110811.pdf)

<sup>9</sup> See, e.g., *Trump plan again guts funding for Chesapeake*, Washington Post, p. B1 (February 14, 2020).

<sup>10</sup> <https://climatechange.maryland.gov/science/>.

<sup>11</sup> See, e.g., <https://weather.com/safety/floods/news/2019-07-08-washington-maryland-virginia-flooding-leads-to-water-rescues>; and <https://www.npr.org/2019/10/09/768697825/how-a-proposal-to-reduce-flood-risk-in-ellicott-city-nearly-destroyed-the-commun>.

implementing regulations can prove ineffective and be eroded by loopholes and a lack of adequate enforcement resources. Simply put, though we have made great strides, our statutes and regulations are often too little, too late.

Constitutional environmental protections, by comparison, are immediately available to address pressing environmental problems. Moreover, as a higher, more permanent, statement of our society's environmental values, they guarantee the full and consistent implementation of the purposes embedded in our existing laws and regulations.

**C. *We do not have the fundamental rights to a quality environment many Marylanders think we have***

We all recognize that environmental quality is critical to our ability to lead healthy, productive lives, and most people understand that stable and productive economies are reliant on a healthy environment. Many Marylanders may also believe that access to the basic necessities that sustain life on this planet – breathable air, potable water and land on which to grow healthful foods – are fundamental human rights; and they might believe that those rights are protected by Federal and State Law. But they would be wrong, at least currently here in Maryland.

Our modern environmental laws include broad aspirational goals. But those statements do not establish protection of the environment as a central foundational principle defining how we govern ourselves as a society. That can only happen by elevating those goals to the status of fundamental rights protected by our Constitution.

The U.S. and Maryland Constitutions do not, however, clearly confer such rights. For example, the 6<sup>th</sup> U.S. Circuit Court of Appeals recently recognized in *Guertin, et al. v. State of Mich., et al.*, that individuals have a 14<sup>th</sup> Amendment Due Process right to be free from bodily injury caused by pollution.<sup>12</sup> But the Court also noted that there is no due process right under the U.S. Constitution to a contaminant-free environment.<sup>13</sup>

*Guertin* provides an important opening to further exploration of the bounds of environmental rights that may be protected under the U.S. Constitution. But to date only one preliminary district court ruling in the climate change case *Juliana v. U.S.* has given the 14<sup>th</sup> Amendment a more expansive reading, and that case was just dismissed.<sup>14</sup>

Nor does the Maryland Constitution include a provision such as we find in Article 1, Section 27 of the Pennsylvania Declaration of Rights. That provision states:

---

<sup>12</sup> *Guertin, et al. v. State of Mich., et al.*, CA Nos. 17-1698 /1699 /1745/1752 /1769, pp. 6, 12 (6<sup>th</sup> Cir., January 4, 2019), *cert. denied* (January 21, 2020) [hereafter *Guertin*].

<sup>13</sup> *Id.*, at p. 12, and concurring opinion at p. 59.

<sup>14</sup> *Juliana v. US*, 6:2015cv01517 (D. Or, 2015), dismissed (9<sup>th</sup> Cir. January 17, 2020) [On November 2016, in a suit by 21 young plaintiffs asserting the U.S. has failed to protect their U.S. 14<sup>th</sup> Amendment, Section 1, rights to life, liberty and property, J. Aiken preliminarily ruled that the right to "a climate system capable of sustaining human life" was a fundamental right. The case was dismissed in January based on standing. A petition *en banc* is expected.]

*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.*

HB 517 is based on that Pennsylvania provision and would remedy this critical gap in Maryland law.

**D. Our system of “cooperative federalism” is not enough to fully protect our environment**

Traditionally, land use, water rights and nuisance regulation fell under the police powers of the states. Over the course of the industrial age, however, the environment increasingly degraded, in some instances to the point of becoming uninhabitable. Our rivers and bays became so toxic that fish kills became routine, many of our rivers caught on fire,<sup>15</sup> and in industrial towns like Pittsburgh, air pollution from steel mills blocked the sun at mid-day. *Some of you may remember those days!*

In response – during what Professor Barry Hill refers to as “the age of enlightenment for environmental law and policy”<sup>16</sup> – the United States developed a complex Federal-State structure of environmental laws under the direction from the Federal Government. The driving reason for this hierarchy, often referred to as “cooperative federalism”,<sup>17</sup> was the “race to the bottom” proposition. Congress determined, and the courts agreed, that without the backstop of overarching national standards, the states would continue to compete with one another for industrial development by lowering environmental requirements.

That proposition was true enough. But, one of the results of this federally led scheme is that the states have consigned much of their traditional police powers, relying instead on the Federal Government to define issues and set the benchmarks of environmental quality. Consequently, now and for the most part, the Federal Government defines what is clean and the states and municipalities implement programs to achieve those standards. For example, the Federal Government establishes National Ambient Air Quality Standards and water quality criteria, and the states seek to achieve those standards through state implementation plans and permitting requirements.

For sure most of our Federal laws preserve the states’ authorities to implement more stringent requirements. But those authorities are rarely used and often curtailed, including in some instances by state prohibitions on more stringent state and local regulatory requirements. Much more troubling are the often politically driven Federal Government challenges to more stringent state regulations. *It's one*

---

<sup>15</sup> See, e.g., <https://www.worldatlas.com/articles/is-the-cuyahoga-river-the-only-river-to-ever-catch-on-fire.html>.

<sup>16</sup> Barry E. Hill *Time for a New Age of Enlightenment for U.S. Environmental Law and Policy: Where Do We Go From Here?* 49 ELR 10362 (April 2019).

<sup>17</sup> See generally, Testimony of University of Maryland law Professor Rena Steinzor, before the U.S. House Committee on Energy and Commerce, Subcommittee on Environment and Economics, hearing on “Constitutional Considerations: States vs. Federal Environmental Policy Implementation” (July 11, 2014), available at <https://docs.house.gov/Committee/Calendar/ByEvent.aspx?EventID=102452>.

*thing when Federal Government standards set a floor. It is quite another when they create a cap or, worse, a bar to state laws seeking to be more protective of the environment.*

The Federal Government's current abandonment of efforts to address climate change is, of course, well publicized. But there are many other areas where the system is failing us. Take for example toxic chemicals. As explained in an April 17, 2014 letter from attorneys general in Maryland and 12 other states during congressional debate on a proposal to amend the Toxic Substances Control Act (TSCA) to preempt state regulation, states have historically been leaders in reducing risks to citizens' health and the environment from toxic chemicals, often acting before the Federal Government. Moreover, they noted "only a small handful of the approximately 84,000 registered industrial chemicals are currently subject to any federal regulation".<sup>18</sup> Despite that abysmal record, some preemptive provisions were enacted.

The Flint Michigan Water Crisis should be another wake-up call to all levels of government that the current system is not protecting our communities and businesses from egregious environmental harm. Yet, despite the well-publicized dangers of lead in our drinking water, the Federal Government has just proposed a rollback to the lead pipe replacement standards.<sup>19</sup> These and other Federal Government deregulatory assaults are undermining the foundations of our state environment and natural resource programs.

Many of our national laws are, moreover, structurally insufficient. For example, they focus less on pollution prevention and more on costly pollution permitting, thereby often proving to be only band-aids and not cures. The "single media" focus of our federally driven system (i.e., laws dealing only with one element such as air or water) ignores the important cumulative impacts of the broad mix of contaminants that can overly burden states and localities. The scheme, moreover, creates inconsistencies that confound everyone: state lawmakers and regulators, businesses, communities and individual citizens alike. These problems and the resulting uneven implementation and enforcement of our laws cause us to miss their intended objectives.

The clear and obvious lesson we must take from this experience is that states will be increasingly at the mercy of national environmental politics, and less and less able to serve the local needs of their citizens, if they rely only on cooperative federalism. The MD ERA is an important step to address these problems. It provides a backstop by establishing the primacy of environmental protection in our State's government decision making and a flexible mechanism for filling gaps.

***E. Recognizing environmental law as a traditional exercise of state sovereignty will help protect Maryland from assertions of preemptive Federal Government regulation.***

Much of the concern expressed over efforts to add an ERA to the Maryland Constitution has focused on two issues: the potential for increased litigation and the impact on cost-benefit analysis. I address those two issues further below. But little attention is being given to the important function state ERAs can play in the increasingly polarized debate over Federal preemption and state sovereignty.

---

<sup>18</sup> Id.

<sup>19</sup> See, [www.eenews.net/greenwire/2019/10/11/stories/1061252277](http://www.eenews.net/greenwire/2019/10/11/stories/1061252277).

Without delving too deeply into this complex subject, I want to briefly address that issue in the hopes of stimulating a more thoughtful exploration into how the MD ERA may help clarify the scope of Maryland's traditional police powers (e.g., health, education, and welfare) and the constitutional bounds of the Federal Government's authority to limit state powers under the U.S. Constitution.

A few basic concepts bear mentioning. Our constitutional system of dual sovereignty limits Federal law to enumerated (and related implied powers) and preserves the separate and independent autonomy of the states under the Tenth Amendment.<sup>20</sup> The Constitution, however, does not define the scope of those reserved state authorities.<sup>21</sup> It also constrains what states may do through both express and implied exercises of federal power and the Supremacy Clause.<sup>22</sup>

The debate over the proper delineation of state and federal power is, therefore, a matter of constant inquiry; and is even more animated in the area of environmental protection. This is in large part because Federal environmental regulation, which relies principally on the Commerce Clause, has penetrated ever deeper into areas once occupied by the states. One result is that conflicting state environmental laws are susceptible to attack as invalid under the Supremacy Clause.

But, the present era of regulatory retrenchment begs the question whether the Federal Government is abandoning (or failing to occupy) areas of environmental regulation to such an extent that preemption does not apply.

*It is in that juncture that this Committee should consider how the MD ERA can help define not only the substantive environmental rights of our communities, but also define the parameters of the State's Tenth Amendment authorities to uphold those rights.*

Specifically, when a state constitution defines rights as fundamental and preservation of those rights as a sovereign responsibility of the state, and the Federal Government does not fully occupy the space, the Federal Government's enumerated and implied authorities might be deemed not preemptive. The MD ERA would, therefore, help re-establish Maryland's traditional authority to protect public health and welfare.<sup>23, 24</sup>

---

<sup>20</sup> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

<sup>21</sup> See, <https://www.law.cornell.edu/constitution-conan/amendment-10/reserved-powers#fn2amd10>

<sup>22</sup> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Article VI, Clause 2.

<sup>23</sup> For a fuller overview of preemption see, <https://www.law.cornell.edu/constitution-conan/article-1/section-8/clause-3/concurrent-federal-and-state-jurisdiction#fn1160art1>.

<sup>24</sup> Similar issues bear exploration in respect to the impact of ERAs on Ninth Amendment analysis. The Ninth Amendment states "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." For more on the Ninth Amendment see: <https://www.law.cornell.edu/constitution-conan/amendment-9>.

#### IV. CONCERNS

##### ***A. Cost-Benefit Analysis***

As with any law, this Committee must consider the practical impacts and established principles of good environmental regulation. One concern that has been raised is whether HB 517 would impact cost-benefit analysis in the balancing of environmental regulatory requirements. I believe this concern is unwarranted and that the MD ERA is entirely consistent with, and bolsters, effective cost-benefit analysis.

First off, as noted previously, the MD ERA enshrines existing statutory law. Surely our economy has already adapted to the direct regulatory costs of those requirements.

Moreover, the purposes clause of HB 517 explains that the intent of the legislation is to address “unreasonable” diminution of or degradation to Maryland natural resources. The “unreasonable” qualifier appears again in Art. 48, §(D)(1). This qualifier ensures that decisions respecting application of the MD ERA will be measured.

The Committee should also consider that the MD ERA will have significant economic benefits. Recognizing protection of the environment as a fundamental right ensures governance decisions are informed by a deliberate balancing of environmental impacts with other compelling government interests. The MD ERA thus ensures that environmental externalities are considered at all levels of government early in the decision-making process. Internalizing environmental externalities at an early stage gives government the tools needed to address not only the cost of regulations but the adverse economic impacts of environmental harm in the absence of regulations, such as damage to fisheries, real estate, and the medical costs of poor air quality. In addition, it prevents environmental backsliding and, in turn, protects those businesses and communities that have grown under more protective environmental requirements from anti-competitive impacts.

It is worth noting that the ERAs adopted under the constitutions of other states have *not* been shown to have negative impacts on government budgets or economic development. By comparison, and in retrospect, consider the very high costs Michigan and the City of Flint, as well as its residents and businesses, now face because of their short-sighted penny-wise and pound-foolish decision to cut corners.<sup>25</sup> I agree entirely with the comment on this legislation submitted on February 10, 2020 by Professor Hill that Michigan and Flint likely would not now be in that position if Michigan had an ERA. Instead an ERA would have ensured the deliberative process needed to shield the City from a decision that, as found by the 6<sup>th</sup> Circuit in *Guertin*, shocked the conscience.

##### ***B. There is no evidence that the MD ERA will increase litigation***

There is no evidence that the MD ERA will increase litigation or cause the courts to assume legislative powers. As the Maryland Environmental Health Network noted in their February 2019 testimony on HB 472, similar ERAs have not lead to more litigation or over-reaching court decisions.<sup>26</sup> A litigation survey

---

<sup>25</sup> See *Guertin*, *supra*.

<sup>26</sup> Testimony of the Maryland Environmental Health Network, presented by Student Attorney Nathaniel Gajasa, University of Maryland Environmental Law Clinic, February 20, 2019, House Bill 472, Committee: Environment and Transportation.



conducted by the University of Maryland Environmental Law Clinic of five states with ERAs – Pennsylvania, Hawaii, Illinois, Montana, and Rhode Island – found that, over the course of 40 years the ERAs were mentioned in only 174 cases. Furthermore, the courts relied on the ERAs as part of their determinations in only 55 of those cases. This was because the cases relied on existing statutory law and would have been brought regardless of the existence of an ERA under those provisions.

This finding is not surprising because, as noted, environmental rights amendments enshrine existing statutory laws, particularly the powerful purpose statements of those laws. Those statements may not be enough to fill statutory gaps, but they have already provided the foundation for four plus decades of environmental compliance efforts.<sup>27</sup>

Moreover, there can be no question but that the courts will impose necessary constraints on frivolous suits. They include the showings plaintiffs must make to overcome qualified immunity. Such requirements will surely keep run-of-the-mill tort claims from being elevated to violations of constitutional guarantees.<sup>28</sup>

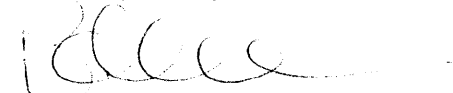
## **VI. CONCLUSION – LET THE VOTERS DECIDE!**

All Marylanders, individuals and businesses alike, depend on a clean and healthy environment to thrive. By adopting the MD ERA, Maryland will join many other jurisdictions that have long recognized that need as a fundamental human right. The MD ERA enshrines the right to a quality environment that is now embedded in statute and regulation in the highest law of the land. It establishes the responsibility of the State and its political subdivisions to protect those rights and serve as trustees of Maryland's natural resources. It ensures that all government decisions are made with deliberation fully understanding the impacts of their actions on these important rights; and it empowers our communities and citizens.

HB 517 deserves your full backing to ensure it goes before the voters for ratification. Let this 441st session of the General Assembly be the body that took up the mantle of leadership to enshrine into our State Constitution the right of all Marylanders to a quality environment, today and into the future.

Thank you for your consideration.

Yours respectfully,



Rachel M. Hopp  
Gaithersburg, MD

---

<sup>27</sup> See, e.g., Jonathan Z. Cannon, *Environment in the Balance* 29 (2015), cited in Kyle Burns, *Constitutions & the Environment: Comparative Approaches to Environmental Protection and Struggle to Translate Rights into Enforcement*, available at <https://harvardelr.com/2016/11/14/constitutions-the-environment-comparative-approaches-to-environmental-protection-and-the-struggle-to-translate-rights-into-enforcement>.

<sup>28</sup> See, *supra*, Guertin, et al.