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Re: Whitepaper on FAQs to Maryland’s Proposed Environmental Human Rights Constitutional Amendment
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Background and Purpose

Multiple non-profit and community organizations have worked in recent years to advocate for an amendment to the Maryland Constitution providing a substantive right to a healthful environment. A proposed amendment, in various iterations, has been in front of the Maryland legislature in 2018, 2019, and 2020. It will soon be in front of the legislature again in 2021. The Maryland Campaign for Environmental Rights has partnered with the Environmental Law Clinic at the University of Maryland Francis King Carey School of Law to create this whitepaper answering frequently asked questions regarding this proposed amendment. This whitepaper is for educational and informational purposes only. No part of this whitepaper is intended to provide legal advice.

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Maryland’s Proposed Environmental Human Rights Constitutional Amendment 2021 (EHR)

1. Each person has a fundamental and inalienable right to a healthful environment, including clean air, water and land, a stable climate, and to the preservation, protection, and enhancement of the ecological, scenic, and historic values of the environment.
2. The State has a duty as trustee to protect, preserve and enhance the air, land, water, living and historic resources for the benefit of the people of this State including future generations.

FAQ 1: Is the EHR a new idea and if not, do other states have a right similar to Maryland’s proposed EHR amendment?

Answer:

As of 2020, more than twenty states have varying forms of environmental rights located within their constitutions. The majority of those are policy declarations: “the protection of the state’s beautiful and healthful environment is hereby declared to be of fundamental importance to the public interest, health, safety and the general welfare”¹; “it shall be the policy of this State to conserve and protect its lands and waters for the benefit of all its citizenry”²; or “it shall be the policy of the Commonwealth to conserve, develop, and utilize its natural resources, its public lands, and its historical sites and buildings.”³ Amendments containing policy declarations can

¹ N.M. CONST. art XX, § 21.

² N.C. CONST. art. XIV, § 5.

³ VA. CONST. art. XI, § 1.

also designate funds and order the legislature to enact laws to the requested end. Six states have Environmental Rights Amendments that confer to the people a substantive right, that may look like: “each person has the right to a healthful environment.”⁴

Other states use their amendment to help confer standing⁵, bolster existing environmental legislation⁶, and produce environmental wins⁷. The concept of an EHR evolved from the substantive environmental rights enacted in the 1970s.⁸ Both have similar goals of environmental protection, recognizing the intrinsic benefits of a healthy and clean environment, but the EHR puts more emphasis on environmental effects as they relate to humans. Depending on its intended use, legislative comments and history, and judicial interpretation, an EHR may be a better tool for fighting certain environmental issues.

Environmental justice issues have not been the predominant focus of litigation in Pennsylvania, Illinois, or Hawaii in cases utilizing their Environmental Rights Amendments. However, scholars believe that the language of the amendments could be very effective at tackling environmental justice problems.⁹ An amendment focusing more on environmental problems as they relate to humans could be more effective as a way to garner support from groups other than environmentalists, such as economists and other human-focused factions. Further, since most environmental problems can be framed by how they affect humans, an EHR could be an effective method of solving environmental problems.

FAQ 2: What will the EHR do and how will it benefit the public?

Answer:

The EHR, first and foremost, will clarify the state’s environmental priorities, guide subsequent legislation, and declare the state’s public trust obligations. If the EHR acts like the Environmental Rights Amendments of the 1970s¹⁰, it could help confer legal standing in

⁴ IL. CONST. art. XI, § 2.

⁵ Historically helpful in Illinois, like in *Glisson v. Marion*, 720 N.E.2d 1034 (Il. 1999).

⁶ This occurred in Pennsylvania in *Commonwealth v. Parker White Metal Co.*, 515 A.2d 1358 (Pa. 1986).

⁷ Environmentalists in Hawai’i used the amendment to require the government body deciding new power sources to consider the effects of Green House Gases. *In re Hawai’i Elec. Light Co.*, 445 P.3d 673 (Haw. 2019).

⁸ See PA. CONST. art. I, §27; ILL. CONST. art. XI, §§ 1,2.

⁹ Neil A.F. Popovic, *Pursuing Environmental Justice with International Human Rights and State Constitutions*, 15 STAN. ENVTL. L.J. 338, 360-61 (1996).

¹⁰ The substantive Environmental Rights Amendments that are seen today were promulgated in the 1970s, this includes Illinois, Pennsylvania, Hawaii, and others.

environmental lawsuits.¹¹ Legal standing is a prerequisite to any case; it requires injury, traceability, redressability, and sometimes contains harsher common law requirements for environmental lawsuits. An example of an Environmental Rights Amendment helping citizens with standing occurred in Illinois. In Illinois, the Supreme Court of Illinois held that their Environmental Rights Amendment

declares that individuals have 'standing' to assert violations of this right. . . [i]t was the intent of the committee to broaden the law of standing by eliminating the traditional special injury prerequisite for standing to bring an environmental action. As such, section 2 gives standing to an individual for a grievance common to members of the public. The committee comments also indicate that section 2 is limited to granting standing and does not create any new causes of action.¹²

One of the largest objections to the Environmental Amendment proposed in Maryland in 2018 was “the substantial and unnecessary expansion of the standing standard in Maryland . . . and this bill would widen the scope drastically of those who would be able to bring suit against local governments . . . and all levels of government as lawsuits increase as well as the costs associated with them.”¹³ This same argument was brought up in 2020 in committee hearing.¹⁴ Based on what occurred in other states after passage of their Environmental Rights Amendments, Maryland has no reason to expect significantly expanded litigation. One way to ensure this is to say in the committee hearing that the EHR does not create an independent cause of action, as Illinois did. Thus, supplemental legislation, which Maryland has and will continue to build, would be required in order to bring an environmental lawsuit. Hawai’i did not stipulate such limitations to their amendment and their courts inferred their amendment created a private cause of action to enforce certain legislation.¹⁵ Enen then, the Hawai’ian legislature saw so little

¹¹ See *Kahana Sunset Owner's Association v. Maui County Council*, 948 P.2d 122, 124 (Haw. 1997) (“The legislature finds that article XI, section 9, of the Constitution of the State of [Hawai’i] has given the public standing to use the courts to enforce laws intended to protect the environment.”).

¹² *Glisson v. Marion*, 720 N.E.2d 1034 (Il. 1999).

¹³ *Constitutional Amendment - Right to a Healthy Environment and Communities: Hearing on SB0872 Before the S. Comm. on Education, Health, and Environmental Affairs*, 2018 Leg., 438th Sess. (Md. 2018) <http://mgahouse.maryland.gov/mga/play/730997f9-bcad-4e8a-9b84-b51f172b7ea6/?catalog/03e481c7-8a42-4438-a7da-93ff74bdaa4c&playfrom=10331000> (at 3:12:47).

¹⁴ *Constitutional Amendment - Environmental Rights: Hearing on HB0517 Before the H. Comm. on Environment and Transportation*, 2020 Leg., 441st Sess. (Md. 2020) http://mgaleg.maryland.gov/mgawebsite/Committees/Media/false?cmte=ent&ys=2020RS&clip=ENV_2_19_2020_meeting_1&url=http%3A%2F%2Fmgahouse.maryland.gov%2Fmga%2Fplay%2F19a12ac2-5dec-4667-a8e0-3d5cbb99bba3%2F%3Fcatalog%2F03e481c7-8a42-4438-a7da-93ff74bdaa4c%26playfrom%3D689700 (at 00:30:15).

¹⁵ *County of Hawai’i v. Ala Loop Homeowners*, 235 P.3d 1103, 1127 (Haw. 2010) (For the reasons set forth below, article XI, section 9 creates a private right of action to enforce chapter 205 in the circumstances of this case, and the legislature confirmed the existence of that right of action by enacting HRS § 607-25, which allows recovery of attorneys' fees in such actions).

increase in litigation that they chose to promulgate an act that facilitated more lawsuits by obtaining attorneys' fees against private parties in certain circumstances.¹⁶

It is unclear exactly how the EHR would interact with the Maryland Environmental Standing Act and the common law of Maryland. However, if the EHR does help facilitate standing, an influx of litigation is not expected, as evidenced by Hawai'i and Illinois.

FAQ 3: How would the EHR be used to ensure environmental justice?

Answer:

Since the EHR clarifies that clean air, land, and water is an inherent right of all citizens, actions with disproportionate environmental impacts should come under stricter scrutiny.¹⁷ For example, Pennsylvania's Environmental Rights Amendment's trusteeship provision, which is similar to Maryland's proposed EHR's trusteeship provision, states "as trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people." In theory, these types of negative rights give all people protection from environmental harms and allow them to assert that right against the government. The language of the Pennsylvania provision "implies that a government failure to protect environmental rights for some people to the same extent it protects those rights for other people would violate the Pennsylvania constitution."¹⁸ The language of the EHR should provide similar protections. Further, the EHR would create legally enforceable obligations for the state, as trustee, and would entitle citizens to hold the state accountable if it fails to act in accordance with those obligations. Citizens will have an easier

¹⁶ *Kahana Sunset Owner's Association v. Maui County Council*, 948 P.2d 122, 124 (Haw. 1997) ("The legislature finds that article XI, section 9, of the Constitution of the State of [Hawai'i] has given the public standing to use the courts to enforce laws intended to protect the environment. However, the legislature finds that the public has rarely used this right and that there have been increasing numbers of after-the-fact permits for illegal private development. Although the legislature notes that some government agencies are having difficulty with the full and timely enforcement of permit requirements against private parties, after-the-fact permits are not a desirable form of permit streamlining. For these reasons, the legislature concludes that to improve the implementation of laws to protect health, environmental quality, and natural resources, the impediment of high legal costs must be reduced for public interest groups by allowing the award of attorneys' fees, in cases involving illegal development by private parties."); *County of Hawai'i v. Ala Loop Homeowners*, 235 P.3d 1103, 1127 (Haw. 2010) (citations omitted) (expressed concern that the broad, liberalized standing-to-sue provision in the subject amendment will encourage a flood of lawsuits. The report noted that the experience to date in Hawai'i with the provision, as well as that in other states (such as Illinois) with similar provisions, did not justify those concerns).

¹⁷ Barry E. Hill, *Time for a New Age of Enlightenment for U.S. Environmental Law and Policy: Where do we go from Here?*, 49 ENVTL. L. REP. NEWS & ANALYSIS 10362, 10383 (2019) ("An environmental rights amendment is essentially an additional tool in the proverbial toolbox that can be utilized to ensure environmental justice for all by not only affected individuals and communities, but also by federal, state, and local environmental regulatory agencies in their decisionmaking processes").

¹⁸ Neil A.F. Popovic, *Pursuing Environmental Justice with International Human Rights and State Constitutions*, 15 STAN. ENVTL. L.J. 338, 360-61 (1996).

time holding the state accountable for disproportionate impacts that cause some people to have worse air, land, and water than the rest of the citizens.

The EHR would work best to promote environmental justice if it was coupled with supporting legislation. While the EHR establishes state trust obligations and a fundamental right to a healthful environment for the general public, an environmental justice bill would be focused on the most disadvantaged communities, and, therefore, most effective at tackling environmental injustice. For instance, an environmental justice bill could specifically target cumulative impacts or otherwise lawfully permitted emissions that, in the aggregate, build up and tend to disproportionately impact low income and minority communities.¹⁹ The proposed constitutional amendment is broad in scope and secures a general right; it is unlikely that it alone would cover specific issues such as cumulative impacts, which are environmental impacts produced incrementally by a collective of individual parties acting in compliance with permit obligations and the law. Therefore, while the constitutional amendment secures a right to a healthful environment for all persons, supporting legislation will likely be required to achieve specific environmental justice goals. To this end, an EHR would form a basis for complimentary environmental legislation, as it did in Pennsylvania.²⁰

FAQ 4: Would the EHR address the issue of climate change or cumulative impact?

Answer:

It depends upon how the Courts interpret the EHR. The first method of analysis a court uses with contested language is to look to the plain meaning. The EHR specifically includes a “stable climate” in the language of the EHR, which indicates that climate change is included under the protections of the EHR. Additionally, in the context of the EHR’s expansion of Maryland’s public trust obligations, the right to a stable climate emboldens the State to take further action on climate change adaptation and mitigation.²¹ This was seen very recently when Rhode Island utilized their Environmental Rights Amendment to take on twenty-one oil and gas companies and hold them liable for “causing climate change impacts that adversely affected the

¹⁹ Isaac Kort-Meade, *State Sponsored Environmental Justice: New Jersey’s Cumulative Impacts Act*, ARIZONA STATE UNIVERSITY LAW JOURNAL FOR SOCIAL JUSTICE, <https://lawjournalforsocialjustice.com/2020/10/18/state-sponsored-environmental-justice-new-jerseys-cumulative-impacts-act/> (last visited Jan. 8, 2021).

²⁰ *Commonwealth v. Parker White Metal Co.*, 515 A.2d 1358 (Pa. 1986).

²¹ See Robin Kundis Craig, *Adapting to Climate Change: The Potential Role of State Common-Law Public Trust Doctrines*, 34 VT. L. REV. 781 850–52 (2010).

state's natural resources, as well as the rights of its inhabitants' access to and use of those natural resources in violation of the state's Environmental Rights Amendment.”²²

Further, extending the right to a healthful environment “for future generations” recognizes the detrimental long-term, cumulative effects of numerous pollution sources.²³ By ensuring the state must consider future generations, the EHR would further emphasize the necessity of assessing the cumulative impacts of State actions over time.²⁴ Addressing cumulative impacts is imperative because MEPA only requires consideration of cumulative impacts for a narrow set of circumstances.²⁵ Most state actions (and all local actions) affecting the environment do not require a MEPA environmental analysis. Thus MEPA does not sufficiently address cumulative impact analysis.²⁶ Additionally, many current federal and state administered permitting schemes fail to fully consider pollution from a combination of different sources (non-point source pollution).²⁷ Even when a permitting scheme establishes a certain threshold of pollution for individual sources, it can fail to adequately account for multiple polluting sources in a small geographic area that all fall below the pollution threshold but nonetheless aggregate to create a high concentration of pollution. The EHR could force the state to consider the aggregate environmental effects of issuing certain permits in a way that no existing regulations or laws require. The EHR would promote and help facilitate the promulgation of cumulative impact and other environmental bills. The EHR is also meant to act as a backstop for when existing legislation fails to fully address adverse environmental effects. Therefore, if cumulative impacts are detrimentally affecting a community, and existing environmental legislation does not adequately solve the problem, the EHR can bolster existing legislative frameworks and provide a basis for future environmental legislation.

²² Barry E. Hill, *Environmental Rights, Public Trust, and Public Nuisance: Addressing Climate Injustices Through State Climate Liability Litigation*, 50 ELR 11022, fn 4 (2020).

²³ *Gardner v. N.J. Pinelands Comm'n*, 593 A.2d 251, 258 (N.J. 1991).

²⁴ See Michelle Bryan Mudd, *A Constant and Difficult Task: Making Local Land Use Decisions in States With a Constitutional Right to a Healthful Environment*, 38 ECOLOGY L.Q. 1, 42–43 (2011).

²⁵ 11 COMAR ch. 8, § 3 (A-B). MEPA applies only to “Proposed State Actions”, that significantly affect the environment. “Proposed State action” is defined in the Natural Resources Article, §1-301(c) as “requests for legislative appropriations or other legislative actions that will alter the quality of the air, land or water resources. It does not include a request for an appropriation or other action with respect to the rehabilitation or maintenance of existing secondary roads.” The Act requires environmental effects reports only in connection with requests for legislative appropriations or legislative actions that “significantly affecting the environment, natural as well as socioeconomic and historic.”

²⁶ See *Pitman v. Washington Suburban Sanitary Commission*, 368 A.2d 473 (Md. 1977); *Mayor & City Council of Baltimore v. State*, 281 Md. 217 (Md. 1977); *Leatherbury v. Peters*, 332 A.2d 41 (Md. 1975).

²⁷ See e.g. Steven P. Lipowski, *In Search of Further Regulation of Cattle Under the Clean Water Act: Cattle as Point Sources After Oregon Natural Desert Association*, 6 WIS. ENVTL. L.J. 167, 172 (1999) (The court stated that the CWA clearly does not pertain to non-point sources, and thus cattle grazing activities here are outside the purview of the CWA).

States with Environmental Rights Amendments have extended their citizens the most environmental protections by supplementing their general constitutional environmental rights with more targeted pieces of legislation. New Jersey recently passed a cumulative impacts bill that targets the cumulative effects of all permitted facilities on burdened communities (defined as those communities in the bottom 33% for state median annual household income).²⁸ New Jersey's Cumulative Impacts Statute is specifically geared towards preventing additional polluting facilities from moving into already burdened communities. It even touches those facilities that plan to comply with permit obligations because each polluting facility, though they may be complying with laws and permits, may contribute enough pollution, in the aggregate, to overburden the surrounding community. The level of sophistication, detail, and specificity required for an environmental justice bill like the one passed in New Jersey would be difficult to replicate without an EHR to rely on, like the one proposed in Maryland. It is imperative that supplemental legislation be passed to work with the EHR and fully address the effects of cumulative impacts.

FAQ 5: How do State and local governments benefit from the EHR?²⁹

Answer:

Environmental Rights Amendments often provide tangential support weighing in favor of protecting the environment and illustrating that the people have elevated environmental protection to a constitutional level. In other states with Environmental Rights Amendments, this proposition helped state and local governments prosecute air³⁰, waste³¹, and water³² pollution and

²⁸ See S.B. 232 (N.J. 2020).

²⁹ In 2020, committee members asked how this will affect local governments. *Constitutional Amendment - Right to a Healthy Environment and Communities: Hearing on HB0517 Before the H. Comm. on Environment and Transportation*, 2020 Leg., 441st Sess. (Md. 2020)

http://mgaleg.maryland.gov/mgaweb/Committees/Media/false?cmte=ent&ys=2020RS&clip=ENV_2_19_2020_meeting_1&url=http%3A%2F%2Fmgahouse.maryland.gov%2Fmga%2Fplay%2F19a12ac2-5dec-4667-a8e0-3d5cbb99bba3%2F%3Fcatalog%2F03e481c7-8a42-4438-a7da-93ff74bdaa4c%26playfrom%3D689700.

³⁰ *Commonwealth Dep't of Environmental Resources v. Locust Point Quarries*, 396 A.2d 1205 (Pa. 1979) (Defendant charged for violating the Air Pollution Control Act, however, while witnesses testified to fugitive emissions, the trial court held that DER had failed to prove that the emissions caused or contributed to a condition of air pollution, but the Supreme Court of Pennsylvania held that fugitive emissions are prohibited because the board concluded they cause air pollution and the act forbids them).

³¹ *Nat'l Wood Preservers v. Commonwealth Dep't of Envtl. Res.*, 414 A.2d 37 (Pa. 1980) (Pollution on property not caused by owner, DER ordered owner to clean up and the Court affirmed DER's order and that the police power of the state was authorized).

³² *Meadowlark Farms Inc. v. Illinois Pollution Control Board*, 308 N.E.2d 829 (Ill. App. Ct. 1974) (Pollution Control Board found Plaintiff guilty of violating environmental regulations under the EPA, specifically water pollution and contested PCB's power and constitutionality and Court affirmed the Board's decision and power).

win permitting cases³³. For example, early in Pennsylvania’s Environmental Rights Amendment’s existence, the state tried to condition a mining permit on a mine company treating the discharge of acid mine drainage from not only the owner’s mine but also from an adjacent mine not owned by the permittee.³⁴ The Court, utilizing the recently enacted amendment, recognized that the people had raised the environment to a constitutional level, and the Supreme Court of Pennsylvania approved the permit prerequisites.³⁵

These types of amendments have additional benefits for local governments. The EHR would encourage and facilitate better long term environmental and land use planning and could further embolden local government to incorporate sustainable development principles into city planning.³⁶ The EHR could also help local governments protect their citizens from disproportionate impacts and address environmental justice problems.³⁷

FAQ 6: What does the EHR mean when it says everyone has a right to a healthful environment, including clean air, water and land, a stable climate?

Answer:

The EHR’s plain text defines a “healthful environment” as clean air, water, land, and a stable climate. In the context of Illinois’ green amendment, courts have interpreted “healthful” to refer to the relationship between the environment and human health.³⁸ This reading is bolstered by the second paragraph of the EHR, which obligates the State to ensure this right “for the benefit of the people.” Thus, the EHR establishes clean air, water and land, and a stable climate

³³ *Commonwealth v. Harmar Coal Co.*, 306 A.2d 308 (Pa. 1973) (Coal mine owner requested a discharge permit from the Sanitary Water Board and the Board conditioned the permit on the mine company treating the discharge of acid mine drainage from an adjacent mine (due to worry that it could collapse into the mine in question and kill minors) and treat all the discharge from its own mine, which the court affirmed); *Tri-County Landfill Co. v. Illinois Pollution Control Board*, 353 N.E.2d 316 (Il. App. Ct. 1976) (Landfill found to be polluting into a water source within their property. Landfill contested the water body falling within “Waters of the State” since it was not public property nor factually navigable. Defendants also contended that the Board and IEPA were estopped from asserting and pursuing violations of the Act since the landfill was previously approved, however, the Court specifically prohibited estoppel because that would interfere with the people’s constitutional right to a healthful environment).

³⁴ *Commonwealth v. Harmar Coal Co.*, 306 A.2d 308 (Pa. 1973).

³⁵ *Id.*

³⁶ Michelle Bryan Mudd, *A “Constant and Difficult Task”: Making Local Land Use Decisions in States with a Constitutional Right to a Healthful Environment*, 38 ECGLQ 1, 38-40 (2011).

³⁷ Barry E. Hill, *Time for a New Age of Enlightenment for U.S. Environmental Law and Policy: Where do we go from Here?*, 49 ENVTL. L. REP. NEWS & ANALYSIS 10362, 10383 (2019) (“An environmental rights amendment is essentially an additional tool in the proverbial toolbox that can be utilized to ensure environmental justice for all by not only affected individuals and communities, but also by federal, state, and local environmental regulatory agencies in their decisionmaking processes”).

³⁸ See *Glisson v. Marion*, 720 N.E.2d 1034 (Il. 1999).

as the baseline standard of environmental quality in order to facilitate a minimum decency in standard of living to all current and future Marylanders.

Beyond its plain meaning, there is no specific definition for “clean”. The term “clean” will not set a numerical value on amounts any person or company can pollute. Legislators asked the same questions in 2018 and 2019, voicing worry that it would leave deciding the definitions up to the courts.³⁹ Yet, “it is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule.”⁴⁰ Constitutions usually do not proscribe definitions and strict language, rather constitutional text is often left intentionally broad. For example, what is cruel and unusual punishment? Due process of the law? In Maryland, Article 6 of the Declaration of Rights dictates the imperative right to establish a new government, but only “when the ends of government are perverted, and public liberty manifestly endangered, and all other means of redress are ineffectual.”⁴¹ What are the “ends” of government? When are they “perverted”? When is the public liberty “manifestly endangered”? Constitutional provisions are purposefully broad, so that the provision can stand the test of time and change, as necessary, with the times.⁴² “Clean” may very well need to be more strictly construed in the future as the effects of climate change worsen.

³⁹ *Constitutional Amendment - Right to a Healthy Environment and Communities: Hearing on SB0872 Before the S. Comm. on Education, Health, and Environmental Affairs*, 2018 Leg., 438th Sess. (Md. 2018) <http://mgahouse.maryland.gov/mga/play/730997f9-bcad-4e8a-9b84-b51f172b7ea6/?catalog/03e481c7-8a42-4438-a7da-93ff74bdaa4c&playfrom=10331000> (at 3:10:38); *Constitutional Amendment - Environmental Rights: Hearing on HB0472 Before the H. Comm. on Environment and Transportation*, 2019 Leg., 440th Sess. (Md. 2019) http://mgaleg.maryland.gov/mgawebsite/Committees/Media/false?cmte=ent&ys=2019RS&clip=ENV_2_20_2019_meeting_1&url=http%3A%2F%2Fmgahouse.maryland.gov%2Fmga%2Fplay%2Fd4bc37a6-49fb-420e-97b2-d1ab16360543%2F%3Fcatalog%2F03e481c7-8a42-4438-a7da-93ff74bdaa4c%26playfrom%3D10676000 (at 03:26:30).

⁴⁰ *Marbury v. Madison*, 5 U.S. (1 Cr.) 137, 177 (1803).

⁴¹ Md. Dec. of Rights art. 6.

⁴² See generally Jack M. Balkin, Symposium: *Jack Balkin's Constitutional Text and Principle: Nine Perspectives on Living Originalism*, 2012 U. ILL. L. REV. 815 (2012).

FAQ 7: Don't Marylanders have those rights anyway?⁴³

Answer:

Past committee members have questioned the need for a green amendment when courts already have the ability to provide injunctive relief to protect human health.⁴⁴ They further asserted that Maryland has already taken many environmental steps including promoting offshore wind, banning fracking and offshore oil drilling, all without a constitutional amendment. They also asserted that the EHR "is completely unnecessary," especially compared to Pennsylvania who has an amendment, yet has done none of the above.⁴⁵ Maryland does not confer to the people the right to a clean and healthful environment. Contrary to popular belief, environmental regulation typically does not demand a clean environment. Rather, pollution control regulations and permitting schemes are "permissions to pollute" and allows environmental pollution up to a certain point.⁴⁶ Although current environmental laws are intended to prevent the degradation or facilitate the restoration of natural resources, they do not set a basic minimum standard for achieving and maintaining a healthful environment. Nothing besides a constitutional amendment can actually guarantee a right to a healthful environment in such a powerful and longlasting way.

⁴³ In 2019, legislators asked if MDE already had the right/authority to protect the environment and asked again in 2020. *Constitutional Amendment - Environmental Rights: Hearing on HB0472 Before the H. Comm. on Environment and Transportation*, 2019 Leg., 440th Sess. (Md. 2019)

http://mgaleg.maryland.gov/mgawebsite/Committees/Media/false?cmte=ent&ys=2019RS&clip=ENV_2_20_2019_meeting_1&url=http%3A%2F%2Fmgahouse.maryland.gov%2Fmga%2Fplay%2Fd4bc37a6-49fb-420e-97b2-d1ab16360543%2F%3Fcatalog%2F03e481c7-8a42-4438-a7da-93ff74bdaa4c%26playfrom%3D10676000 (at 03:35:30); *Constitutional Amendment - Right to a Healthy Environment and Communities: Hearing on HB0517 Before the H. Comm. on Environment and Transportation*, 2020 Leg., 441st Sess. (Md. 2020)

http://mgaleg.maryland.gov/mgawebsite/Committees/Media/false?cmte=ent&ys=2020RS&clip=ENV_2_19_2020_meeting_1&url=http%3A%2F%2Fmgahouse.maryland.gov%2Fmga%2Fplay%2F19a12ac2-5dec-4667-a8e0-3d5cbb99bba3%2F%3Fcatalog%2F03e481c7-8a42-4438-a7da-93ff74bdaa4c%26playfrom%3D689700 (at 00:39:20).

⁴⁴ Injunctive Relief "is a remedy which restrains a party from doing certain acts or requires a party to act in a certain way." LEGAL INFORMATION INSTITUTE, *Injunctive Relief*, https://www.law.cornell.edu/wex/injunctive_relief (last visited Jan. 8, 2021).

⁴⁵ *Constitutional Amendment - Right to a Healthy Environment and Communities: Hearing on HB0517 Before the H. Comm. on Environment and Transportation*, 2020 Leg., 441st Sess. (Md. 2020)

http://mgaleg.maryland.gov/mgawebsite/Committees/Media/false?cmte=ent&ys=2020RS&clip=ENV_2_19_2020_meeting_1&url=http%3A%2F%2Fmgahouse.maryland.gov%2Fmga%2Fplay%2F19a12ac2-5dec-4667-a8e0-3d5cbb99bba3%2F%3Fcatalog%2F03e481c7-8a42-4438-a7da-93ff74bdaa4c%26playfrom%3D689700 (at 00:39:20).

⁴⁶ See Andrew P. Morriss & Roger E. Meiners, *Borders and the Environment*, 39 ENVTL. L. 141, 152 (2009) ("In some cases, the polluters may have obtained state permission to pollute, thereby blocking nuisance actions"); E. Donald Elliot, *EPA's Existing Authority to Impose a Carbon "Tax"*, 49 ELR 10919, 10922 (2019) (like governmental permission to broadcast over the public's air, governmental permission to pollute the public's air is a privilege granted by government).

FAQ 8: What is the public Trust Doctrine and how will it interact with the EHR?

Answer:

The Public Trust Doctrine is a legal doctrine providing that the state holds certain lands and resources in a trust for the benefit of the public. Essentially, this doctrine places certain limitations on private uses of public trust lands and prohibits the state from engaging in actions contrary to public interest in those lands. In Maryland, this doctrine applies to fish, navigable waterways, and the submerged land beneath navigable waterways.⁴⁷ This doctrine is more robust, however, in other states.

The common law Public Trust Doctrine and Maryland's EHR could reinforce each other in a variety of ways. First, it expands the doctrine to cover almost all natural resources. Second, by expanding the doctrine, it also clarifies the scope of Maryland's Trusteeship requirements beyond that of substantive caselaw. The next two paragraphs review how Environment Rights Amendments can interact with the Public Trust Doctrine.

The Public Trust Doctrine and a Constitutional Environmental Right interacted in *People ex. rel. Scott v. Chicago Park District* where, in 1963, the legislature conveyed 194 acres of land submerged under Lake Michigan. The Supreme Court of Illinois chose to rely predominantly on the Public Trust Doctrine and used the EHR supplementarily to show that the public has an interest in "conserving natural resources and in protecting and improving our physical environment" because "[t]he public has become increasingly concerned with dangers to health and life from environmental sources and more sensitive to the value and, frequently, the irreplaceability of natural resources."⁴⁸

In contrast to Illinois's Environmental Rights Amendment, Maryland's EHR will contain a trusteeship provision, which will likely be treated differently by the courts than the Illinois amendment. Pennsylvania's Environmental Right Amendment contains a trusteeship provision so the Pennsylvania court's treatment might provide some guidance on what to expect. The Pennsylvania Environmental Rights Amendment declares: "As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people." In the recent 2016 case *Pennsylvania Environmental Defense Foundation v. Commonwealth*, the Supreme Court of Pennsylvania analyzed the trusteeship provision and held it to mean:

⁴⁷ *Dept. of Natural Resources v. Mayor and Council of Ocean City*, 274 Md. 1, 5, 332 A.2d 630, 633 (Md. 1975). See Douglas F. Gansler, *Protecting Maryland's Environment: A Holistic Solution*, 40 U. BALT. L. F. 205, 226 (2010).

⁴⁸ *People ex. rel. Scott v. Chicago Park District*, 360 N.E.2d 773 (Il. 1976).

As trustee, the Commonwealth is a fiduciary obligated to comply with the terms of the trust and with standards governing a fiduciary's conduct. The explicit terms of the trust require the government to 'conserve and maintain' the corpus of the trust. See Pa. Const. art. I, § 27. The plain meaning of the terms conserve and maintain implicates a duty to prevent and remedy the degradation, diminution, or depletion of our public natural resources. As a fiduciary, the Commonwealth has a duty to act toward the corpus of the trust—the public natural resources—with prudence, loyalty, and impartiality.⁴⁹

In Pennsylvania and likely in Maryland, not only is the trusteeship provision self-executing,⁵⁰ but also the trustee responsibilities applied to all three branches of government.⁵¹

FAQ 9: Why does Maryland need a constitutional amendment, especially if the language is already in MEPA?

Answer:

Existing Maryland law recognizes a strong, substantive right to certain aspects of a healthful environment.⁵² An EHR, however, would provide a catchall for when there is a lapse or gap in coverage. For example, there is currently no existing Maryland state law that addresses environmental justice and cumulative impacts.⁵³ Further, an EHR would bolster existing Maryland laws that do not work well to protect the environment, like the Maryland

⁴⁹ *Pa. Env'tl. Def. Found. v. Commonwealth*, 161 A.3d 911 (Pa. 2017) (the trusteeship provision of Pennsylvania's environmental rights amendment requires consideration of 3 factors "the Commonwealth, as trustee under Section 27's public trust, should (1) exercise the duty of loyalty by administering the trust solely for the benefit of all the people, including future generations, (2) abide by the duty of impartiality by balancing the interests of all the beneficiaries, including balancing the interests of current versus future generations, and (3) act with prudence by managing the resources with ordinary skill and caution.").

⁵⁰ *Pa. Env'tl. Def. Found. v. Commonwealth*, 161 A.3d 911 (Pa. 2017).

⁵¹ *Commonwealth v. Parker White Metal Co.*, 515 A.2d 1358 (Pa. 1986).

⁵² Maryland's Statutory Code on Environmental and Natural Recourse Laws encompasses much legislation including water pollution, hazardous substances, sanitary facilities, gas and oil drilling, mining, renewable energy requirements, and much more. MD. CODE ANN., Env't & Nat. Res.

⁵³ See e.g. Elizabeth Shwe, *MD. LCV Scorecard Faults Lawmakers on Failure of Bills Addressing Climate Change, Transportation*, MARYLAND MATTERS (Oct. 15, 2020), <https://www.marylandmatters.org/2020/08/24/md-needs-an-environmental-justice-plan-advocates-say/> ("state legislators need to focus on environmental justice issues in the upcoming session, particularly on cumulative impact legislation that would require all environmental permits issued by the state to include an assessment of the potential impacts on surrounding communities. . . Maryland's Commission on Environmental Justice and Sustainable Communities, which has recently received criticism for its ineffectiveness, needs to be 'reimagined' have a stronger mandate and include real voices from impacted communities").

Environmental Policy Act (MEPA). MEPA contains language similar to the EHR.⁵⁴ Indeed, the Maryland Court of Appeals has endorsed that MEPA confers a “fundamental inalienable right” to a healthful environment and establishes the State as stewards of the environment.⁵⁵ However, Maryland courts have also found that MEPA does not establish any substantive or legally actionable obligations upon the state.⁵⁶ Further, since Maryland courts have interpreted MEPA’s applicability to only a specific set of circumstances,⁵⁷ MEPA’s judicially recognized⁵⁸ substantive requirements do not apply to most State legislative and executive actions. Given MEPA’s limited applicability, any rights or governmental obligations the statute recognizes are of limited import.⁵⁹ Simply put, MEPA’s declarations of policy itself do not impose any substantive or legally actionable obligations on the state.⁶⁰ By giving substantive legal weight to the “fundamental inalienable right” articulated in MEPA and enveloping that right in the Maryland Constitution, the EHR would clarify and expand the scope of the State’s environmental policy obligations.⁶¹

The EHR would also provide necessary guideposts for the adoption and implementation of future environmental law and policy. For example, the EHR could bolster arguments to promulgate more and stronger environmental protections, as it has done in states like Pennsylvania.⁶² In Pennsylvania, the Solid Waste Management Act was promulgated to help

⁵⁴ While MEPA provides that “each person has a fundamental and inalienable right to a healthful environment,” this right is undercut by its charging of “each person” rather than just the State government with the “responsibility to contribute to the protection, preservation, and enhancement of the environment.” MD. CODE ANN. Nat. Res. § 1–302(d).

⁵⁵ See *Bausch & Lomb, Inc. v. Utica Mutual Insurance Co.*, 625 A.2d 1021 (Md. 1993).

⁵⁶ See Russell B. Stevenson Jr., *The Maryland Environmental Policy Act: Resurrecting a Tool for Environmental Protection*, 45 ELR 10074, 10078–80 (2015).

⁵⁷ See *Pitman v. Washington Suburban Sanitary Commission*, 368 A.2d 473 (Md. 1977); *Mayor & City Council of Baltimore v. State*, 281 Md. 217 (Md. 1977); *Leatherbury v. Peters*, 332 A.2d 41 (Md. 1975).

⁵⁸ See *Bausch & Lomb, Inc. v. Utica Mutual Insurance Co.*, 625 A.2d 1021 (Md. 1993).

⁵⁹ See Russell B. Stevenson Jr., *The Maryland Environmental Policy Act: Resurrecting a Tool for Environmental Protection*, 45 ENVTL. L. REP. 10074, 10076 (2015) (noting how MEPA’s narrow applicability deprives it of “beneficial action-forcing effects”).

⁶⁰ See Russell B. Stevenson Jr., *The Maryland Environmental Policy Act: Resurrecting a Tool for Environmental Protection*, 45 ENVTL. L. REP. 10074, 10078–80 (2015).

⁶¹ Amending MEPA could fix many of MEPA’s insufficiencies, and the EHR could help facilitate MEPA through the legislature. See Russell B. Stevenson Jr., *The Maryland Environmental Policy Act: Resurrecting a Tool for Environmental Protection*, 45 ELR 10074, 10078–80 (2015). However, amending MEPA alone will not solve Maryland’s environmental problems and will not provide the people of Maryland a right to challenge government actions like the EHR will.

⁶² *Commonwealth v. Parker White Metal Co.*, 515 A.2d 1358 (Pa. 1986) (“In declaring sections 606(a) and 606(b) of the Solid Waste Management Act unconstitutional, the lower court has given little, if any, consideration to the strong and fundamental presumption of constitutionality that must attend judicial review of a legislative enactment. That presumption is further strengthened in this case by the explicit purpose of the Act to implement Article I, section 27 of the Pennsylvania Constitution, a remarkable document expressing our citizens’ entitlement and ‘right to clean air, pure water, and -- to the preservation of the natural, scenic, historic and esthetic values of the environment’”).

implement and further strengthen the purpose of Pennsylvania’s ERA.⁶³ Compared to laws and regulations, amendments are broader in scope and applicability and apply generally to all State actions. Considering the scope of environmental actions authorized by the legislature and undertaken by the executive branch, a constitutional amendment would provide the State greater flexibility in implementing law and policy, given the constant applicability of the EHR. While over time, narrowly crafted legislation could accomplish similar results, a constitutional amendment provides legislative and regulatory accountability without rewriting statutory law or the regulatory code.

Lastly, amendments are more capable of standing the test of time. Unlike a statute, which can be amended with a standard majority of the legislature, a constitutional amendment requires a supermajority in order to be amended. An amendment allows this generation of legislators to more permanently secure distinctly important rights for current and future Marylanders that can protect us for a longer period of time than a statute.

FAQ 10: Will the EHR open a “slippery slope of rights”? How is an environmental right different than the right to access to healthcare, or housing, or education?

Answer:

The EHR will not lead to a “slippery slope of rights.” Unlike rights concerning access to healthcare, housing, or education, this right would not establish or expand specific entitlements for individual citizens. This is because the right to healthcare, housing, or education is a positive right, a right that requires the government to provide something.⁶⁴ Comparatively, an environmental right is similar to the negative rights already existing in the Maryland Bill of Rights like the right to a speedy and fair trial⁶⁵ or the prohibition on poll taxes⁶⁶. Negative rights do not expand entitlements or require the government to provide anything, but rather puts limitations on government actions, and prohibit the government from doing certain things.⁶⁷ The proposed EHR is a negative right because it imposes substantive limitations on and basic minimum standards for State actions that equally affect the interests of all Marylanders.⁶⁸ The

⁶³ *Id.*

⁶⁴ Linda R. Monk, *Rights*, PBS, https://www.pbs.org/tpt/constitution-usa-peter-sagal/rights/#.X_nBCS2z3OQ (last visited Jan. 9, 2021).

⁶⁵ MD. DEC. OF RIGHTS art. 19.

⁶⁶ MD. DEC. OF RIGHTS art. 15.

⁶⁷ Linda R. Monk, *Rights*, PBS, https://www.pbs.org/tpt/constitution-usa-peter-sagal/rights/#.X_nBCS2z3OQ (last visited Jan. 9, 2021) (They say what government cannot do, not what it must do).

⁶⁸ *Id.* See Mary Ellen Cusack, *Judicial Interpretation of State Constitutional Rights to a Healthful Environment*, 20 B.C. ENVTL. AFFAIRS L. REV. 173, 200 (noting how courts “appear to agree universally that [environmental rights] provisions do place an obligation on state governments to consider the environmental effects of their decisions”) (1993).

EHR is framed to provide general policy guidance to the legislative, executive, and judicial branches. This approach simply recognizes the broad consensus on the importance of maintaining healthful environment rather than constitutionalizing specific policy outcomes, such as expanding healthcare or housing access.⁶⁹

FAQ 11: Who would decide between competing values (for example producing clean energy with wind or solar arrays that some believe would destroy the viewshed)?⁷⁰

Answer:

Courts make decisions between competing values all the time, that is the role of the judiciary.⁷¹ The EHR, however, does not seek to decide between competing environmental values; rather, it seeks to ensure, at a minimum, a basic standard of environmental health. By securing a fundamental right to a clean environment for the general public, the EHR does not seek to establish winners and losers, or even be the deciding factor in circumstances of competing values. The EHR seeks to place minimum obligations on state action, and establish the basic standard of environmental health to which the public is entitled.

⁶⁹ See Barton H. Thompson Jr., *Environmental Policy and State Constitutions: The Potential Role of Substantive Guidance*, 27 RUTGERS L.J. 863 (1996) (concluding that, by placing greater emphasis on general substantive values rather than detailed [policy] prescriptions, states would avoid constitutional provisions that would undermine public policy).

⁷⁰ A similar type of question was asked at the committee hearing for the Environmental Amendment in 2019 and 2020. In addition to the competing values argument, the questioner coupled the question with wouldn't people want the competing values to be decided by the legislature instead of the courts. *Constitutional Amendment - Environmental Rights: Hearing on HB0472 Before the H. Comm. on Environment and Transportation*, 2019 Leg., 440th Sess. (Md. 2019)

http://mgaleg.maryland.gov/mgaweb/Committees/Media/false?cmte=ent&ys=2019RS&clip=ENV_2_20_2019_meeting_1&url=http%3A%2F%2Fmgahouse.maryland.gov%2Fmga%2Fplay%2Fd4bc37a6-49fb-420e-97b2-d1ab16360543%2F%3Fcatalog%2F03e481c7-8a42-4438-a7da-93ff74bdaa4c%26playfrom%3D10676000 (at 03:20:00) (Delegate Barve followed this up by saying the courts should not decide these difficult questions because judges are not held accountable since they are not elected to office. However, judges can be held accountable, they can be removed and their decisions can be appealed. They also have enough information with the number of witnesses and amicus briefs get presented at trial and through discovery. Additionally, judges do not have to worry about pandering to the interests of interest groups who could hurt their chances next election if they do not hold a particular way. This is especially important because the strength of industry groups and other powerful entities can sway elections); *Constitutional Amendment - Environmental Rights: Hearing on HB0517 Before the H. Comm. on Environment and Transportation*, 2020 Leg., 441st Sess. (Md. 2020)

http://mgaleg.maryland.gov/mgaweb/Committees/Media/false?cmte=ent&ys=2020RS&clip=ENV_2_19_2020_meeting_1&url=http%3A%2F%2Fmgahouse.maryland.gov%2Fmga%2Fplay%2F19a12ac2-5dec-4667-a8e0-3d5cbb99bba3%2F%3Fcatalog%2F03e481c7-8a42-4438-a7da-93ff74bdaa4c%26playfrom%3D689700 (at 00:36:30).

⁷¹ Kathleen Sullivan, *Post-Liberal Judging: The Roles of Categorization and Balancing*, 63 U. COLO. L. REV. 293 (1992).

FAQ 12: How does a constitutional amendment get passed in Maryland?

Answer:

Under Article XIV of the Maryland Constitution, there are two ways to pass a constitutional amendment. The first requires a 3/5th vote from the representatives in both houses of the Maryland legislature. If the EHR receives the requisite 3/5th vote in both houses, it must be submitted to the citizens of Maryland for a vote, and must be approved by the majority of citizens who voted. The second method is by constitutional convention, wherein a ballot is sent to the people every twenty years, most recently 2010 and next 2030, to gauge if the citizens want to convene a constitutional convention. If the majority of the electorate votes to call a convention, the General Assembly, at their next session, must facilitate a convention and the delegates participating (equal to the number of representatives in both legislative houses, which represents the respective counties and Baltimore City). If adopted at the convention, the EHR must still be approved by a majority vote from the people of Maryland.

Find Article XIV here: <https://msa.maryland.gov/msa/mdmanual/43const/html/14art14.html>

Appendix

HB0082 – 2021

1. Each person has a fundamental and inalienable right to a healthful environment, including clean air, water and land, a stable climate, and to the preservation, protection, and enhancement of the ecological, scenic, and historic values of the environment.
2. The State has a duty as trustee to protect, preserve and enhance the air, land, water, living and historic resources for the benefit of the people of this State including future generations.⁷²

HB0517 - 2020

Every person has the right to a clean and healthy environment, including the right to clean air; pure water; ecosystems that sustain the State's natural resources, including the waters of the State, air, flora, fauna, climate, and public lands; and the preservation of the natural, healthful, scenic, and historic values of the environment. The bill authorizes the State, a political

⁷² This language is similar to the existing language in MEPA that states “[a]ll State agencies must conduct their affairs with an awareness that they are stewards of the air, land, water, living and historic resources, and that they have an obligation to protect the environment for the use and enjoyment of this and all future generations.” Maryland Environmental Policy Act (MEPA), MD. CODE ANN., Nat Res. §§1-301 to 1-305 (LEXIS 2020).

subdivision of the State, and any person to enforce these rights against any public party through appropriate legal proceedings. Every person also has the right to intervene in an action brought by the State or a political subdivision of the State to protect the rights established by the bill. The bill also (1) establishes that the State's natural resources are the common property of every person and (2) establishes standards of treatment for the State's natural resources.

HB0472 - 2019

Every "person" has the right to a clean and healthy environment, including the right to clean air; pure water; a healthful environment; ecosystems that sustain the State's "natural resources"; and the preservation of the natural, scenic, historic, and aesthetic values of the environment. The bill authorizes the State, a political subdivision of the State, and any person to enforce these rights against any public or private party through appropriate legal proceedings. Every person also has the right to intervene in an action brought by the State or a political subdivision of the State to protect the rights established by the bill. The bill also (1) establishes that the State's natural resources are the common property of every person and (2) establishes standards of treatment for the State's natural resources.

SB0873 - 2018

Every "person" has the right to clean air, pure water, healthy communities, an environment free of conditions that degrade public health or natural resources, and the preservation of the natural, scenic, historic, and aesthetic values of the environment. In addition, an agency or a political subdivision of the State, or any person that meets the threshold standing requirements under federal law, may enforce these rights against any public or private party through appropriate legal proceedings. Every person has the right to intervene in an action brought by the State to protect the rights established by the bill.