

COMMITTEE: JUDICIAL PROCEEDINGS and EDUCATION, HEALTH and ENVIRONMENTAL AFFAIRS COMMITTEES

TESTIMONY ON: SB 783 – CONSTITUTIONAL AMENDMENT – ENVIRONMENTAL RIGHTS

HEARING DATE: MARCH 9, 2022

SUBMITTER: RACHEL M. HOPP, ESQ., GAITHERSBURG, MD

POSITION: FAVORABLE

Tuesday, March 8, 2022

The Honorable William C. Smith, Jr., Chair, and
Jeffrey D. Waldstreicher, Vice-Chair,
Senate Judicial Proceedings Committee

The Honorable Paul G. Pinsky, Chair, and
Cheryl Kagan, Vice-Chair
Senate Education, Health and Environmental Affairs Committee

Dear Chairs, Vice-Chairs and Honorable Members of the Committees:

I write to urge you to vote favorably for SB 783 – CONSTITUTIONAL AMENDMENT - ENVIRONMENTAL RIGHTS. I do so both as a resident of our beautiful state and as an experienced environmental law practitioner.¹

If passed the session by both chambers of the Maryland General Assembly, and supported by the voters in November, this important bill will add Article 48 to the Maryland Declaration of Rights, elevating protections and State responsibilities that are already reflected in Maryland statutory and common law to the level of constitutional authority. Article 48 provides that:

(A) EVERY PERSON HAS THE FUNDAMENTAL AND INALIENABLE RIGHT
TO A HEALTHFUL AND SUSTAINABLE ENVIRONMENT.

(B) THE RIGHT ENUMERATED UNDER SUBSECTION (A) OF THIS
SECTION MAY NOT BE INFRINGED.

¹ I am also a member of the Advisory Circle for the Maryland Campaign for Environmental Human Rights, a coalition of civic leaders, elected officials, individuals, and organizations advocating for this legislation. See, MDEHR.org. The views expressed here, however, are my own.

(C) THE STATE SHALL:

(1) SERVE AS THE TRUSTEE OF THE STATE'S NATURAL RESOURCES, INCLUDING THE AIR, LAND, WATER, WILDLIFE, AND ECOSYSTEMS OF THE STATE; AND

(2) CONSERVE, PROTECT, AND ENHANCE THE STATE'S NATURAL RESOURCES FOR THE BENEFIT OF EVERY PERSON, INCLUDING PRESENT AND FUTURE GENERATIONS.

Importantly, Article 48 has been reviewed by many legal experts and civic leaders, it has been considered in the light of the nearly 50 years of experience with similar provisions in other state constitutions, and the implications are well understood and overwhelmingly beneficial. Above all, like other Maryland Declaration of Rights provisions, Article 48 will establish clear, enduring guardrails to ensure a healthful environment for all Marylanders now and in the future.

For those reasons, Article 48 is supported by the State of Maryland Office of the Attorney General,² and by a long list of other Maryland elected officials, civic leaders, and organizations.³

⁴ It also has the support of 76% of Maryland's voters.⁵

This legislation deserves your full support.

Informing Background and Research

² See, Hannibal G. Williams II Kemerer, Chief Counsel, Legislative Affairs, Office of the Attorney General, "HB 596 – Constitutional Amendment – Environmental Rights – Support," To the Honorable Kumar P. Barve Chair, Environment and Transportation Committee, February 23, 2022. [Opinion supporting HB 596, the cross-file to SB 783.]

³ See MDEHR.org

⁴ SB 783 has 15 co-sponsors. Its cross-filed bill HB596 has 29 co-sponsors.

⁵ Memorandum to Nina Beth Cardin, Director, Maryland Campaign for Environmental Human Rights from Steve Raabe, President, OpinionWorks LLC, dated January 18, 2022, Subject: *Maryland Poll Findings: Environmental Human Rights Amendment*, enclosed. For more information go to MDEHR.org.

My support and views for SB 783 are informed by my prior professional experience, informative research and consultations I have had with some of our foremost experts on environmental constitutionalism and environmental justice.

My background includes leadership positions working on some of our most challenging national, state, and global, environmental and health issues, including climate change, air, oil and water pollution, natural resources damage, sustainable development, and environmental justice. I was a lead architect of the 1990 Clean Air Act, and a U.S. EPA program manager, environmental treaty negotiator and enforcement counsel. I was also principal of the Law Offices of Hopp and Associates, PLLC, and advised and represented international organizations, public utilities, businesses, and disparately impacted communities. Before retiring in 2017, I was Legislative and Regulatory Counsel to the National Pollution Funds Center and was centrally involved in the U.S. responses to major environmental disasters including Deepwater Horizon, Athos I, and Katrina. I have taught and written on many environmental law topics and am admitted to practice in Maryland and the District of Columbia.

My research about this legislation has included reviews of Maryland environment and natural resources law, and the constitutional environmental provisions of other jurisdictions. I have also consulted with, and delved into, the thoughtful body of work of many leading experts including:

- former Pennsylvania Senator The Hon. Franklin L. Kury;⁶
- Professor John C. Dernbach, Widener University Commonwealth Law School;⁷
- Professor James May, Widener University Delaware Law School;⁸
- Professor Barry Hill, Adjunct Professor, Vermont Law School, and former Director of U.S. EPA's Office of Environmental Justice;⁹

⁶ Sen. Kury was the lead sponsor the legislation that elevated environmental rights to the Pennsylvania Constitution and is author of the recent very accessible book *The Constitutional Question to Save the Planet* (Environmental Law Institute, 2021).

⁷ See, e.g., John C. Dernbach and Edmund J. Sonnenberg, *A Legislative History of Article 1, Section 27 of the Constitution of the Commonwealth of Pennsylvania, Showing Source Documents*, Widener Law School Legal Studies Research Paper Series no. 14-18 . Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2474660 (last viewed Mar 8, 2022)

⁸ See, e.g., *Environmental Rights in State Constitutions: PRINCIPLES OF CONSTITUTIONAL ENVIRONMENTAL LAW*, p. 305, James R. May, ed., American Bar Association, 2011, Widener Law School Legal Studies Research Paper No. 11-47, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1932753 (last viewed 1/5/2021).

⁹ See, e.g., Barry E. Hill *Environmental Justice: Legal Theory and Practice*, 4th Edition, Environmental Law Institute (2018); *Environmental Justice for All Must Be a Human Right Enforceable in U.S. State Constitutions*

- Montana constitutional environmental law expert and landmark case litigator, Roger Sullivan, Senior Partner, McGarvey Law;
- Maya K. Van Rossum;¹⁰
- Professor Russell B. Stevenson Jr., Georgetown University Law Center and one of our foremost experts on the Maryland Environmental Policy Act;¹¹
- Professor David R. Boyd, Associate Professor of Law, Policy, and Sustainability at the University of British Columbia;¹² and
- Professor Robert V. Percival at the University of Maryland School of Law.¹³

I urge you to become familiar with the contributions of these experts to better understand the now well-understood beneficial impacts of constitutional-level environmental protections.

Article 48 Will Complement and Strengthen Our Environmental Laws

The Maryland Constitution is one of only a handful of state constitutions that do not address the environment or natural resources in any way.¹⁴ SB 783 will change that!

This important Article complements and strengthens existing Maryland law, filling gaps while preserving long-established principles of separation of powers. As noted by the Office of the Attorney General's recent letter of support,¹⁵ Article 48 focuses on individual rights and the State's responsibilities:

- Subsection (A) recognizes a right that was first recognized in the Maryland Environmental Policy Act passed in 1973: that every person has a fundamental and

Barry E. Hill; *Bending the Arc Toward Justice*, Barry E. Hill - Vermont Law School, ELI Environmental Forum, Vol. 37, Issue 4 (July-August 2020).

¹⁰ Maya K. Van Rossum, *The Green Amendment: Securing Our Right to a Healthy Environment*.

¹¹ Russell B. Stevenson Jr., *The Maryland Environmental Policy Act: Resurrecting a Tool for Environmental Protection*, 45 ELR 10074 (1-2015).

¹² David R. Boyd, *The Constitutional Right to a Healthy Environment* (February 28, 2013), last viewed on 1/5/2021 at <https://www.lawnow.org/right-to-healthy-environment>.

¹³ Robert V. Percival, *"Greening" the Constitution - Harmonizing Environmental and Constitutional Values* (2002) available at https://digitalcommons.law.umaryland.edu/fac_pubs/439.

¹⁴ Thirty-six (36) state constitutions include provisions concerning the environment or natural resources. Of those, seven recognize an individual right to a healthy environment. Others concern the public trust responsibilities of the state, and the public interest respecting the natural resources. The Maryland Constitution is entirely silent.

¹⁵ *Id.*, FN 2.

inalienable right to a healthful and sustainable environment. Subsection (B) ensures that right will be protected.

- Subsection (C) recognizes that Maryland’s natural resources are a public trust, and the State is responsible as trustee to conserve, protect, and enhance those natural resources for the benefit of not just present but also future generations.

If passed in November, Article 48 will afford all Marylanders similar environmental protections to those now enjoyed by the residents of many other states and over 100 nations. They include the constitutional protections adopted in the early 1970s by six states including Pennsylvania and Montana: Pennsylvania Constitution Article 1, Section 27, which has helped protect local drinking water supplies from pollution due to fracking,¹⁶ and Montana Constitution Article II, Section 3 and Article IX, Section 1, which protected the public from arsenic pollution.¹⁷

Other states that expressly protect environmental rights in their constitutions include Hawaii, Illinois, Massachusetts, and Rhode Island, all adopted in the 1970s, and beginning in 2022, New York.¹⁸

The Nation’s nearly 50 years of experience with constitutional environmental rights has demonstrated that these protections do not lead to a flood of litigation or produce counterproductive or inappropriate impacts. They do, however, work in concert with, strengthen, and fill gaps in existing statutory and regulatory environmental laws, and improve the ability of government to carry out its important public functions.

Below are just a few examples of how I would expect those same helpful outcomes to be seen in Maryland.

¹⁶ Robinson Township v. Commonwealth of Pennsylvania, 623 Pa. 564 (2013) [interpreting Article I, section 27 of the Pennsylvania Constitution and concluding at 79 that “economic development cannot take place at the expense of an unreasonable degradation of the environment” and the Commonwealth’s police power must be exercised to promote *sustainable* property use and economic development]. Reaffirmed Pennsylvania Environmental Defense Foundation v. Commonwealth, No. 10 MAP 2015 (Pa. June 20, 2017).

¹⁷ Montana Environmental Information Center v. Department of Environmental Quality. 296 Mont. 207 (Mont. 1999), 1999 MT 248, 988 P.2d 1236, <https://casetext.com/case/meic-v-dep-of-env-quality>.

¹⁸ For additional information about state and national constitutions addressing environmental issues see authorities cited in footnotes above, including Appendices III and V of Franklin L. Kury’s book *The Constitutional Question to Save the Planet* (Environmental Law Institute, 2021). See also, <https://forthe generations.org>; Art English and John J. Carroll *State Constitutions and Environmental Bills of Rights* (2015), viewed on January 5, 2021 at <http://knowledgecenter.csg.org/kc/system/files/English%20Carroll%202015.pdf>; Matthew Thor Kirsch *Upholding the Public Trust in State Constitutions*, Duke L. Journal Vol. 46, No. 5, pp. 1169-1210 (Mar., 1997), viewed on January 5, 2021 at <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1003&context=dlj>.

1. Article 48 Will Fill Gaps in Federal Law and Strengthen Maryland in the State-Federal Relationship

Although the Federal Government has constitutional authority to regulate on behalf of environmental quality and the U.S. Constitution affords some protections to address “conscience-shocking” conduct such as the Flint, Michigan, water crisis,¹⁹ Federal power is also limited. As a result, although modern Federal environmental laws set a floor of protection, our federal system of government defers to the traditional responsibility of each state to protect its natural resources and the public health and welfare of its residents.²⁰

Recent retrenchments in Federal environmental law underscore how important that state function is. They include the narrowing definitions of “waters of the United States”, the U.S. withdrawal from the Paris Climate Accord, and challenges to the Obama Era Clean Power Plan. These examples underscore that the Federal Government does not fully occupy the space, and that state governments have a critical responsibility to better define their responsibilities and fill that void.

It is entirely proper, helpful, and necessary for Maryland to elevate clean air, clean water, and a healthy environment to the level of a *state-protected* fundamental constitutional right, and to delineate the sovereign responsibility of the state in protecting that right through its natural resource trustee responsibilities.²¹ Article 48 does that.

2. Article 48 Will Give Overarching Substantive Authority to Help Achieve the Failed Objectives of the Maryland Environmental Policy Act

In 1973, the Maryland General Assembly passed the MARYLAND ENVIRONMENTAL POLICY ACT (MEPA). One of its most important provisions recognizes that every Marylander has a “fundamental and inalienable right to a healthful environment”.²² Unfortunately Maryland has not yet promulgated implementing regulations in COMAR applicable to all State agencies to preserve

¹⁹ *Guertin v. Michigan*, 912 F.3d 907 (6th Cir. 2019), *cert. denied*, 140 S. Ct. 933 (2020), *reaffirmed*, 20a0244 p.06 (6th Cir., Aug. 5, 2020) [“conscience-shocking” conduct sustains a substantive due process claim].

²⁰ For a comprehensive look at Federal constitutional questions see, *Principles of Constitutional Environmental Law*, by James May, American Bar Association (February 26, 2013); Robert V. Percival, *Greening the Constitution - Harmonizing Environmental and Constitutional Values*, 32 *Envtl. L.* 809 (2002).

²¹ See U.S. Const. amend. IX and X.

²² MD. CODE ANN., NAT. RES. §§1-301 to 1-305, at §1-302(d) (Westlaw 2021).

this important right. MEPA applicability has, moreover, been narrowly tailored and construed. The result is that MEPA is effectively dormant.^{23, 24}

That void has, among other things, resulted in Maryland neglecting the environmental impacts of many government actions and contributed to the concentration of polluting activities, particularly in historically disadvantaged communities. For example:

- a. According to research conducted by students at the Johns Hopkins Bloomberg School of Public Health, 200 pollution emitting facilities are concentrated in a 2.5 mile radius in South Baltimore. This concentration of pollution has led to serious health disparities in South Baltimore, including asthma hospitalization rates that are four times the Maryland average.²⁵
- b. On the Eastern Shore, concentrated animal feeding operations are contaminating drinking water, but continue operating under expired permits,²⁶ runoff from growing development is causing water, air and land pollution and, when combined with sea level rise that is already taking place, it is threatening the livelihoods and very existence of our beloved Chesapeake Bay communities.
- c. In St. Mary's County and Montgomery County per-and polyfluoroalkyl substances (PFAS) are contaminating seafood and drinking water.
- d. There, and elsewhere, sewage overflows, single-use plastic pollution, ever more frequent historic flooding, power plant and incinerator emissions, road expansions and their resulting

²³ Russell B. Stevenson Jr., *The Maryland Environmental Policy Act: Resurrecting a Tool for Environmental Protection*, 45 ELR 10074 (1-2015). Three Maryland agencies, Dept of Planning, Transportation and Labor, promulgated regulations shortly after MEPA was enacted. Those regulations, however, have not been updated in 40 years, and no regulations have been promulgated by the Department of Natural Resources, the Maryland Department of the Environment or any other Maryland agency with responsibilities impacting the environment.

²⁴ *Cf.*, 40 CFR Parts 1500-1508 [regulations applicable to *all* Federal agencies implementing the NATIONAL ENVIRONMENTAL POLICY ACT OF 1969, as amended (Pub. L. 91-190, 42 U.S.C. 4321 et seq.)]

²⁵ A Short Report on the Cumulative Health Impacts of Air Pollution in South Baltimore, by Toby Harris, Christian Jenkins, Zain Kazi, Breanne Kincaid & Alina McIntyre, Johns Hopkins Bloomberg School of Public Health Dep. of Environmental Health & Engineering, Principles of Environmental Health II (Fall 2019). See also <https://www.jhsph.edu/news/news-releases/2015/researchers-find-link-between-air-pollution-and-heart-disease.html> and <https://pubmed.ncbi.nlm.nih.gov/25872223>.

²⁶ Report: Eastern Shore Has Unhealthy Levels of Nitrate in Drinking Water Due to CAFOs, By Elizabeth Shwe, Maryland Matters (October 21, 2020) <https://www.marylandmatters.org/2020/10/21/report-eastern-shore-has-unhealthy-levels-of-nitrate-in-drinking-water-due-to-cafos>.

transportation emissions, the continued loss of forest cover and habitats, and other insults are choking our ecosystems.²⁷

We all want a robust economy that benefits all Marylanders. But the sad truth is that, as our population continues to grow and our economic activity continues to expand,²⁸ we too often prioritize short-term economic interests over long-term sustainability, health, and well-being. So, we continue to live the legacy of *laissez faire*, one that perpetuates unsustainable patterns, burdens communities, and ignores the important truth that our economy, health, and ability to thrive are totally beholden to the environment.

In the words of the late Sen. Gaylord Nelson, the father of Earth Day:

The wealth of the nation is its air, water, soil, forests, minerals, rivers, lakes, oceans, scenic beauty, wildlife habitats and biodiversity . . . that's all there is. That's the whole economy. That's where all the economic activity and jobs come from. These biological systems are the sustaining wealth of the world.

The environment involves the whole broad spectrum of man's relationship to all other living creatures, including other human beings. . . . It involves the environment of the ghetto which . . . [has] the worst pollution, the worst noise, the worst housing, the worst situation in this country . . .

Sadly, those words, spoken 50 years ago, continue to apply to Maryland today. Clearly, we are falling behind and need stronger legal authority to attain a truly protected, sustainable environment.

As compared to MEPA and other statutes and regulations, the overarching constitutional authority of Article 48 will do that. It will elevate a truth already recognized by this body from a mere aspirational goal to an overarching organizing priority of our State.

²⁷ See, e.g., <http://mdehr.org/stories/>, <https://www.cbf.org/about-cbf/locations/maryland/issues/index.html>, <https://www.sierraclub.org/maryland>, <https://www.mdrcv.org/issues>.

²⁸ Since the beginning of the modern environmental movement in the early 1970s Maryland has grown from 4 to more than 6 million people (approx. 33% increase). Meanwhile Maryland vehicle miles traveled have more than doubled, land use under development has increased by approximately 160% and trade has grown exponentially. See, e.g.:

- <https://www.macrotrends.net/states/maryland/population>,
- https://www.roads.maryland.gov/OPPEN/Vehicle_Miles_Traveled.pdf,
- <https://planning.maryland.gov/Pages/OurWork/LandUse.aspx>, and
- <https://msa.maryland.gov/msa/mdmanual/01glance/economy/html/economy.html>.

3. Article 48 Will Establish the State's Trustee Authority and Clarify its Fiduciary Responsibilities.

Maryland is required to designate natural resource trustees for purposes of the Federal Clean Water Act, Oil Pollution Act and the Comprehensive Environmental Response, Compensation and Liability Act.²⁹ As compared to other states, however, there is no provision of Maryland's Constitution recognizing the State as trustee of Maryland's natural resources or defining that authority. The legal authority of the State to protect Maryland's natural resources now and for future generations, therefore, lacks an organic basis.

Our State Constitution is also silent on the fundamental notion that the State is responsible to carry out its natural resource trustee duties as a fiduciary for the benefit of *all* Marylanders. Compare these gaping omissions with the constitutions of Pennsylvania and Montana, among others. Article 48 fills this legal gap, establishing a clear fiduciary standard for its implementation.

As noted by the Office of the Attorney General in its recent letter supporting enactment of the HB 596, the cross-file to SB 783:

As a trustee, the State would assume certain duties and obligations to act in the public's best interest consistent with Article 48. The rights and obligations arising under Article 48 would govern State action (laws, regulations, actions, policies, and decisions by the State of Maryland and its instrumentalities), not private action (activities of companies, individuals, and other third parties who are not affiliated with the State).

4. Article 48 Will Give Clear Direction to the State and Protect Individual Rights.

This body has an awesome responsibility and does tremendous work to protect Maryland's environment. That includes your recent bans on fracking and expanded polystyrene and your many years of effort to protect the Chesapeake Bay.

But statutes do not, and cannot, foresee and timely remedy, all environmental harms. Legislating takes enormous effort, requires difficult compromises, and can often bring their own unintended environmental consequences. Nor are environmental protections when passed always implemented as intended.

²⁹ See, 42 U.S. Code § 9607(f)(2)(B); 33 U.S. Code § 2706(b)(3)

You, therefore, are not always able to address environmental problems fully, especially systemic ones, until well after the damage is done and they are faced with an outcome that shocks the conscience such as the Flint Water Crisis.

In many respects, Maryland is in better shape than some other parts of our Nation. But as a maritime state Maryland is uniquely vulnerable to climate change³⁰ and struggles with other environmental problems.³¹ The impacts are felt daily in lives and property lost.

Maryland is no exception to the weaknesses of the legislative and regulatory process. We know this and we know why. The problems we have are complex, embedded in how we have historically organized ourselves, and they are not easily solved. Our environmental laws, moreover, are media-specific, require regulatory implementation, and at the state-level are more-often-than-not reactions to the changing mandates of the Federal Government. The result is a siloed, piecemeal assortment of often contradictory requirements, rather than an integrated system responsive to Maryland-specific priorities.

By comparison, as the highest law of the State, Article 48 will provide the most enduring form of legal protection:

- It will provide clear direction to guide this body and the other branches of our State Government in crafting legislation and will, thus, strengthen Maryland's ability to not only address environmental crises when they arise, but to prevent them from unfolding in the first instance.
- In addition, as a clear statement of values and responsibilities, it provides strong guardrails, ensuring immediately available remedies when none are provided for in our laws. Over time it will put Maryland on a solid course toward improving and preserving a more healthful environment for *everyone* including our most disadvantaged communities and future generations.

Conclusion

The past two years of struggle, including the global pandemic, have underscored the tremendous dangers we all face, and the many inequities that exist, including in our state. One cannot stay healthy, grow, and prosper, in a diminishing environment, and Maryland sadly is not immune.

³⁰ See, <https://climatechange.maryland.gov/science>.

³¹ See, footnotes 25 thru 28.

These circumstances demand that we take better care of our own. That starts with your leadership. It starts with your willingness to build a solid legal foundation for protecting Maryland's environment, one that places our environment on a stronger footing on par with other important interests, one that can effectively address the challenges we now face and those we will face in the years to come.

Constitutional environmental rights have proven useful to achieve those objectives in other jurisdictions, and they have not inhibited economic progress, intruded on the legislative prerogative, or led to a flood of litigation. I, therefore, urge these Committees to vote favorably for SB 783, so that the voters of Maryland will have the opportunity to add this amendment to the Maryland Constitution.

Thank you for the attention the Committees are giving this important bill, and please let me know if you have any questions or need further information.

Sincerely,

[s]

Rachel M. Hopp

Cc: Rabbi Nina Beth Cardin, Executive Director
Maryland Campaign for Human Environmental Rights