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Committee: Judicial Proceedings

Testimony on: SB 783 – “Constitutional Amendment – Environmental Rights”

Position: Favorable

Hearing Date: March 9, 2022

The Maryland Chapter of the Sierra Club strongly supports SB 783, which would add Article 48 to the Maryland Declaration of Rights, establishing the right of all Marylanders to a healthful and sustainable environment. The amendment would also fortify Maryland’s public trust doctrine by recognizing for the first time in our Constitution that the State is trustee of Maryland’s natural resources and is charged to conserve those resources for present and future generations. If approved by the voters in November, Maryland will be joining the majority of the states by addressing environmental quality and natural resources concerns in its state constitution.

Amending the Constitution is a serious matter, and we appreciate the attention that the Committee is providing it. In this testimony we would like to answer the following questions:

- Why does the State Constitution need an environmental rights amendment?
- Will the amendment open the floodgates of litigation, intrude on the legislative prerogative, or stifle growth?
- What has been the experience in the states that have enacted similar language?

Why does the State Constitution need an environmental rights amendment?

Article 48 is based on, and elevates to the level of constitutional authority, rights and responsibilities already recognized in Maryland statutory and common law, and similar provisions in other state constitutions. The amendment states 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.
- (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.

We believe the rights enunciated in Subsections (A) and (B) of Article 48 and the trustee responsibilities set forth in Subsection (C) are the type of important, widely agreed upon, protections and authorities that should be raised to the constitutional level.

Subsections (A) and (B) elevate a right that was first recognized in 1973 as a matter of Maryland statutory law to the Declaration of Rights: that every person has a fundamental and inalienable right to a healthful and sustainable environment. It is a right that must not be infringed if we hope to ensure a livable environment in our state.

Founded in 1892, the Sierra Club is America’s oldest and largest grassroots environmental organization. The Maryland Chapter has over 70,000 members and supporters, and the Sierra Club nationwide has over 800,000 members and nearly four million supporters.

Subsection (C) recognizes that Maryland's natural resources are a public trust and that it is the State's responsibility as trustee to conserve, protect, and enhance those natural resources for the benefit of not just present but also future generations. A constitutional requirement that the State act as trustee to conserve, protect, and enhance a healthful and sustainable environment will bolster the State's authority and responsibility to implement our existing laws and regulations. It will also encourage future legislatures and administrations to consider the objectives of a healthful and sustainable environment when developing statutes and regulations.

As Americans, our core constitutional rights – freedom of speech, freedom of the press, freedom of religion, the right to a fair trial, equal protection by the laws – are fundamental to who we are. In the more than two centuries since they were established, our constitutional rights have persisted. They are bedrock guardrails to our Nation and State, and they shape the way we as Americans and Marylanders interact with each other and govern. The same applies to our State Declaration of Rights.

We likewise believe that all Members of this Committee want to leave this generation and future generations a State that is healthful and sustainable. Unfortunately, we are on track to leave our children, our grandchildren, and future generations an environment that is seriously degraded. Most of our residents live in communities with harmful air quality¹ and many, if not most, of our water bodies are impaired.² Even with the Maryland Environmental Policy Act and dozens of other supporting significant pieces of legislation, we have not done nearly as good a job protecting the environment as we have done protecting our State Declaration of Rights and Federal Bill of Rights freedoms.

Article 48 is more than a statement of principles. It will be an important part of Maryland law. Above all, like our Bill of Rights and other provisions of Maryland's Declaration of Rights, it will serve as a guardrail to prevent egregious nonperformance or malperformance by the State. As an example, the amendment would provide heightened scrutiny in cases where the executive branch of the State declines to implement or enforce environmental laws and regulations that are on the books. We are not seeking the amendment as a backdoor approach to achieve specific environmental outcomes. However, we and respected state officials have observed situations where pollution violations have repeatedly occurred. This could happen in the future, as well, and the amendment would set a high bar for the executive branch to justify that its discretion outweighs the need to enforce the existing law.

In addition, the amendment would prevent bans and waivers of environmental analyses and regulations that are needed to provide Maryland residents a healthful and sustainable environment. This is how similar constitutional provisions have been used in other states. For example, in Montana, a state law preventing the state's Department of Environmental Quality from regulating arsenic discharges from a mine was found to be unconstitutional³. In Pennsylvania, a state law prohibiting local jurisdictions from regulating fracking to protect local water supplies, was found to be unconstitutional.⁴

¹ U.S. Environmental Protection Agency, Maryland Nonattainment/Maintenance Status for Each County by Year for All Criteria Pollutants, Feb. 28, 2022. https://www3.epa.gov/airquality/greenbook/anayo_md.html

² Maryland's Draft Combined 2020-2022 Integrated Report of Surface Water Quality, Dec. 6, 2021. Table 6, 15, 19, and 25. https://mde.maryland.gov/programs/water/TMDL/Integrated303dReports/Documents/Integrated_Report_Section_P_DFs/IR_2020_2022/2020_2022IR_Parts_A_E.pdf

³ 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>.

⁴ "Robinson Township. v. Commonwealth of Pennsylvania. 83 A. 3d 901 (2013), <https://casetext.com/case/robinson-twp-v-pa-pub-util-commn>

Finally, because minority and low-income communities are most likely to experience degraded and unhealthful environments, the amendment could help promote environmental justice and equity. While the State and Nation currently are currently sustaining and expanding environmental protections, we also recognize that leaders and political winds can change. Article 48 will put Maryland's environmental health on par with other essential rights. It will help protect Maryland from Federal relaxations and it will help prevent future State administrations from taking difficult- or impossible-to-reverse actions in Maryland.

Will the amendment open the floodgates of litigation, intrude on the legislative prerogative, or stifle growth?

This is an important question, and it deserves a serious, evidence-based answer. The answer, based on 50 years of experience in the other states with similar protections, is no. There is no evidence of irresponsible and frequent lawsuits across the other states with similar constitutional environmental rights.

First, 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, the amendment will be added to the Maryland Declaration of Rights which is focused on individual rights and the State's responsibilities, and not on disputes and remedies between private parties. The Office of the Attorney General noted that:

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).⁵

Second, courts generally base their decisions upon statutory authorities before deciding cases based on constitutional provisions. Because of that, across all the states with similar provisions, there have been few cases brought and decided based on the states' constitutional environmental provisions.

Third, cases where state laws were found unconstitutional under the amendment were compelling. As noted earlier, in one case, a Montana law prohibited the State government from considering arsenic pollution of a river near Yellowstone National Park. The law was found to be unconstitutional under that State's constitutional environmental provision. In Pennsylvania, a court found that localities should not be barred from considering the risks that fracking activities in their jurisdiction would have upon local water supplies. Neither of these cases involved trivial litigation or judicial overreach, and both resulted in meaningful protection of public health.

Article 48 would not be useful, in contrast, for parties seeking to overturn thoughtfully implemented policies such as transit oriented development that creates vibrant communities or zoning changes to permit installation of solar panels on agricultural land. Neither of these actions would create threats to a healthful environment or a sustainable environment.

Importantly, the legislative and executive branches of our State will retain their separate essential constitutional roles in bringing meaning to these provisions. Just as courts and legislatures have addressed abuses of other constitutional privileges (incitement to riot, libel, etc.), we believe Maryland's courts and the General Assembly will give meaning to the amendment. We are confident that Maryland's courts will not take on the role of expert agencies or overturn carefully considered legislation.

What has been the experience in the states that have enacted similar language?

Thirty-six state constitutions, not including Maryland, have some sort of environmental provision. Of

⁵ 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.

those, six state constitutions have been amended since the 1970s to confer a personal right to a healthy environment.⁶ As indicated above, the experience in those other states has been that constitutional environmental rights and authorities are highly beneficial from a policy perspective, providing a clear statement of the states' overarching values, and have been used only occasionally in litigation. In the five decades that those states have had their provisions in effect, few court cases were decided based upon them, and then only when the states' actions were egregious.

We recognize that some of the above states have environmental challenges that are at least as serious as Maryland's. We do not argue that their environmental amendments have been a panacea. But we do believe that, over time, they have proven to be a useful and an increasingly important and beneficial component of those states' environmental legal frameworks, and this amendment would similarly be useful in Maryland.

One other element of the other states' experiences is the broad support for this amendment. For example, in November 2021, nearly 69 percent of New York voters approved that state's similar amendment, which had previously received approval from the state's legislature in a process broadly similar to Maryland's. It is worth noting that while New York voters approved this amendment, they did not approve three of the other four amendment proposals on their ballot.

Conclusion

We believe that the merits of Article 48 are very well supported by legal analysis and practical experience. It would provide important, long-term protections that warrant elevation to our State's Constitution. Like other constitutional provisions, it will establish clear guardrails that have lasting value and reflect broadly shared principles. There is no evidence from decades of experience that Article 48 will produce counterproductive or inappropriate impacts.

Our views on the merits of Article 48 are widely shared. With our partners we have gained the endorsement of the State of Maryland Office of the Attorney General, elected officials, over 150 organizations, and thousands of individuals in Maryland. What is particularly impressive is the breadth of social justice, environmental, labor, and faith-based organizations represented; they look like Maryland. They include the NAACP Maryland State Conference, Maryland League of Women Voters, Maryland League of Conservation Voters, Chesapeake Bay Foundation, Izaak Walton League of America Sportsman's Chapter, Audubon Mid-Atlantic, Maryland Public Health Association, University of Maryland School of Nursing, and a very diverse set of faith-based groups.⁷ The breadth and thoughtful, public-spirited nature of the support for Article 48 is meaningful and noteworthy.

We urge the Committee to join us and this impressively representative group of officials, individuals, and entities and support passage of SB 783 so that the voters of Maryland will have the opportunity to add this amendment to the Maryland Constitution.

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⁶ Illinois Const. art. XI, § 2 (effective July 1, 1971), Pennsylvania Const. art. I, § 27 (effective May 18, 1971), Montana Const. art II, § 3 (effective July 1, 1973), Hawaii Const. art. XI, § 9 (effective Jan. 1, 1979), Massachusetts Const. article of amendment XLIX (effective Nov. 7, 1972), and New York (effective Jan. 1, 2022). The Rhode Island Bill of Rights (1987) includes related protections.

⁷ <https://mdehr.org/amendment/amendment-support/>