



March 6, 2018 before Senate Committee on Education, Health, and Environmental Affairs

Submitted Testimony regarding SB 873

from Maya K. van Rossum, the Delaware Riverkeeper,

leader of the Delaware Riverkeeper Network, and

author of The Green Amendment, Securing Our Right to a Healthy Environment.

(Verbal remarks highlighted in bold)

Good afternoon, My name is Maya van Rossum, I am the Delaware Riverkeeper and leader of the regional nonprofit organization the Delaware Riverkeeper Network. **I am also the author of a new book, The Green Amendment, Securing Our Right to a Healthy Environment, focused on the power and importance of constitutional recognition and protection of environmental rights in the Declaration of Rights sections of our state and federal constitutions.** And both I and my organization (the Delaware Riverkeeper Network) were the lead plaintiffs in the case that breathed legal life into Pennsylvania's long ignored environmental rights provision in the landmark case of *Robinson Township, Delaware Riverkeeper Network, et. al. v Commonwealth of Pennsylvania*, 83 A.3d 901 (Pa. 2013), decided December 18, 2013.

I am pleased to be here today to support what I hope will be a historic first step for the state of Maryland in recognizing and protecting the rights of the people to healthy environments essential to sustaining healthy lives and economies including,

- ✓ clean water,
- ✓ healthy air,
- ✓ healthy food grown in healthy soils,
- ✓ to be protected from exposure to dangerous toxins,
- ✓ to have the flood, drought, climate change, and quality of life protections as well as the economic benefits that come from healthy forests, wetlands, rivers, streams, and ecosystems.

I would like to thank Senator Zirkin for his vision in advancing this proposed amendment at such a critical time in history.

With the proposal of this amendment, Maryland is poised to become a national leader in recognizing and protecting environmental rights.

Clean water, healthy air, and healthy soils in which to grow healthy foods, are fundamental necessities to support our own healthy lives. Healthy forests, wetlands, streams, and rivers are essential to protecting us from flooding and the devastations of climate change; they provide critical and irreplaceable recreational opportunities that we can enjoy alone, or while bonding with family and friends. A diversity of healthy species and animal populations contribute to the quality of our lives, and, through activities such as pollination, they sustain human life while at the same time enjoying their own moral right to live free and healthy lives.

Given that we all depend upon clean water, clean air and healthy environments to support and sustain our very lives, this proposed amendment is not only appropriate, but necessary and long overdue.

As Franklin Kury recognized when he, as a state legislator, proposed the environmental rights amendment in Pennsylvania that came to be known as Article 1, Section 27:

"If we are to save our natural environment we must ... give it the same Constitutional protection we give to our political environment."

As written, SB 873 proposed by Senator Zirkin **properly places the environmental rights provision** -- including the right to clean air, pure water, 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 the Declaration of Rights section of the Maryland Constitution**, as article 48.

This placement, in the Declaration of Rights, is essential for **ensuring that the right to a healthy environment is given the proper recognition and protection as an inalienable human right, that rises to the same level of community and constitutional importance as other fundamental rights** enumerated in the State’s Declaration of Rights **such as the right to free speech, freedom of religion, and freedom of the press**—as well as the right to be free from unreasonable searches and seizures; the right of victims of crime to be treated with dignity, respect, and sensitivity; private property rights and more.

Enacting this amendment will ensure the people of Maryland have, among other things, the right to,

- ✓ **drink clean water from their faucets, breathe clean air in their neighborhoods, and have their children play and grow in a community with natural resources free of dangerous contaminants and degradation.**

As placed and written, **SB 873 provides an important opportunity to address environmental justice concerns** in the state. **SB 873 ensures that environmental rights are recognized as belonging to “every person”, thereby recognizing and protecting environmental rights equitably across the state and across communities, regardless of race, income, or past practices.** No longer will industrial operations and polluting entities be consolidated into targeted communities, creating environmental sacrifice zones. In practice, this concept of consciously consolidating polluting and degrading operations into targeted areas, as a means of preserving other communities and environments, targets communities of color and low income communities and should never be allowed.

The constitutional environmental right will encourage innovative development, industry and business growth, and provide a powerful incentive for government officials to render decisions and advance businesses in ways that accomplish economic and business objectives, while at the same time protecting water, air, soils, food, forests, wetlands and other natural resources critical to sustaining healthy lives and economies.

The assertion that the proposed provision does not have the requisite level of detail or guidance to render it enforceable is a false narrative. The proposed provision recognizing the right to a healthy environment is as detailed as all other statements of fundamental rights and the courts are well equipped to apply constitutional law principles to interpret and protect these rights.

How will a constitutional provision change things in the state?

- ⇒ It will ensure the importance of science-based decisionmaking.
- ⇒ It will ensure that government officials are considering individual and cumulative impacts of the decisions they are making.
- ⇒ It will require government officials, before passing a law, issuing a permit, or approving a new industrial operation, not only look to see if they are checking the boxes of existing regulations, but that they are taking the extra big-picture look to ensure that the actions they are proposing will not take from someone their access to healthy water, air or environments, and that environmental rights will be given consideration on par with other rights, like constitutional property rights.
- ⇒ It will make clear that environmental rights must be honored and protected by every government official at every level of government here in Maryland.
- ⇒ It will ensure communities are treated equitably in terms of environmental decisionmaking.

As a lead plaintiff in the case that restored constitutional standing to Pennsylvania's environmental rights amendment, and as the author of the book *The Green Amendment* which examines this issue on a state and national level, I am here to provide strong support for SB873.

That being said, I, my organization, and the constitutional legal counsel with whom we work, **would like to urge one critical modification** to section (D) **regarding standing**. While we understand the importance for being explicit about the right to standing, **it is essential that the environmental rights amendment be given the same respect with regards to its implementation, including standing, as the other Declaration of Rights provisions**. And so we urge that the standing language be reformed to track constitutional principles of standing that serve the other fundamental freedoms in the constitution's Declaration of Rights, **including that the provision be recognized as self-executing** so that injured parties do not need to find a legislative hook to vindicate their rights when they have been violated. To that end, **we recommend amending the language** in (D) to read:

This provision shall be self-executing. An agency or a political subdivision of the State or any person who meets the threshold standing requirements under either federal law or Maryland law for enforcement of fundamental constitutional rights may enforce the right enumerated under section (B) of this Article against any public or private party through appropriate legal proceedings.

In addition, if you want to enhance the current language to strengthen the clarity of the state's

obligation regarding protection and preservation of the natural resources of the state, we recommend adding language that brings to bear trust law, that recognizes all natural resources of the state as being the common property of all the people, with the state serving as trustee. To that end, we recommended adding the following language:

The state's natural resources, including its waters, air, flora, fauna and climate are the common property of all the people and the state shall serve as trustee of these resources, and shall take no action that would cause their unreasonable diminution or degradation.

A look at the news headlines make clear that our current system of environmental protection laws in Maryland, including applicable federal legislation, are not doing the job of ensuring healthy environments that protect and sustain healthy lives, good quality of life, and the strong economic benefits that healthy environments provide:

- ⇒ Maryland Deaths from Air Pollution Highest in U.S., Maryland Reporter, September 13, 2013
- ⇒ 11 Pollutants Found in Maryland Drinking Water, Study Shows, Columbia Patch, July 26, 2017
- ⇒ Report says toxic runoff in Maryland threatens drinking water, food, WBAL Baltimore-Nov 16, 2017
- ⇒ Lead Contamination Forces Water Shut off at Prince George Co. Elementary School, WUSA9, October 10, 2016
- ⇒ Tests Find Bacteria Levels In Maryland Bodies of Water Far Above Federal Safety Standards, Fox - Baltimore, August 24, 2016
- ⇒ 5.7 million gallons of sewage flows into *Baltimore's* waterways, Baltimore Sun, Feb 14, 2018
- ⇒ Baltimore's dirtiest air and asthma hot spots are in same neighborhoods, Baltimore Brew, December 18, 2017
- ⇒ Investigation: Baltimore Scrapyard Violations Raise Question about Md. Pollution Enforcement, Maryland Reporter, November 2, 2017
- ⇒ Baltimore Inner Harbor Water Quality Failing, Report Says, The Daily Record, May 9, 2016
- ⇒ Industrial Runoff Fouls Bay, Threatens Communities, Reports Says, Maryland Reporter, November 17, 2017
- ⇒ Chesapeake Bay Dead Zone this Summer Worst Since 2014, Baltimore Sun, October 9, 2017
- ⇒ Large Chicken Houses Spur Health Concerns, Maryland Reporter, February 28, 2017

- ⇒ Toxic Algae Bloom, Unusual for this Time of Year, Reported in Baltimore Harbor, Baltimore Sun, December 1, 2017
- ⇒ Acid cloud leaks from chemical plant in South *Baltimore*, prompting shelter in place alert., Baltimore Sun-Sep 18, 2017
- ⇒ Fairfield junkyard's pollution violations met with lax state response, Baltimore Brew-Nov 1, 2017
- ⇒ Industrial runoff fouls Chesapeake Bay, threatens health, report says, Baltimore Brew-Nov 17, 2017
- ⇒ In urban streams, pharmaceutical pollution is driving microbial resistance, Science Daily-Jan 9, 2018: “Researchers evaluated the presence of pharmaceuticals -- including painkillers, stimulants, antihistamines, and antibiotics -- in four streams in Baltimore, Maryland. “
- ⇒ Baltimore smog meets federal limit, but people still at risk from pollution, Baltimore Sun-Jun 4, 2015
- ⇒ Code Orange Air Quality Alert In Effect For Friday, CBS Baltimore / WJZ-Jun 29, 2017: “The Maryland Department of the Environment has issued a code orange air quality alert for the Baltimore metro area for Friday. This means air pollution around the area may become unhealthy for sensitive groups including children, people suffering from asthma, heart disease or other lung diseases and the elderly.”

Many of you may wonder, if Pennsylvania has had a Green Amendment for nearly 50 years, how come the environment isn't better protected in that state – isn't that proof that a Green Amendment does not work? The fact is, that almost as soon as Pennsylvania's Green Amendment was passed, there was overreach by the state itself in its use, and in response the Pennsylvania Supreme Court declared the provision merely a statement of public policy – as the Chief Justice of the court said at the time in a dissenting opinion, the court “emasculated” the provision. As a result, Article 1, Section 27 was not given the legal stature the provision was due given its placement in the Bill of Rights section of the constitution and the clear language provided regarding the environmental rights of the people of Pennsylvania and the obligations of government to protect those rights. It was not until December of 2013 when the Pennsylvania Supreme Court revisited the constitutional language in response to litigation my organization and 7 towns brought to challenge a piece of pro-fracking legislation— which included eminent domain language, stripped municipalities of their zoning powers over the industry, and included a gag rule on physicians seeking to treat impacted patients—that the provision

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was properly interpreted using standard constitutional law principles. And so, in truth, Pennsylvania's provision is relatively new, but it is already providing important benefits in protecting the rights of the people of that state to healthy water, air, soils, and environments in order to protect their health, their property rights, their quality of life, and local economies that would otherwise be damaged, even devastated, by environmental degradation.

While it has been suggested that a Green Amendment such as SB 873 will stymie development, the advancement of industry or other business operations in the state – this is simply not true. In practice this has not been the result of these important amendments in the two states where they currently exist, Pennsylvania and Montana.

Green Amendments allow for development, industry, and business growth. They simply require that these interests be pursued using standards and practices that best protect the environment and other constitutional rights, like the property rights of those that would be harmed by migrating pollution for example. And in those few instances when it may require that a new industrial operation be prevented or development project be re-sited, it will be only in those instances when there is critical and just cause – for example to avoid dangerous and unavoidable levels of contamination to drinking water supplies.

Green Amendments such as SB 873 are intended to protect environmental rights by preventing degradation, and ensuring actions and activities are undertaken using approaches that both accomplish the goal of the project, e.g. residential development, and protecting the environment at the same time. In short, in the context of development, it is not about no development, it is about sustainable and environmentally protective development. To this point, the Pennsylvania Supreme Court plurality in *Robinson Twp., Delaware Riverkeeper Network, et al v. Commonwealth*, 83 A.3d 901 (Pa. 2013) (*Robinson II*) emphasized that Section 27, Pennsylvania's Green Amendment, was never designed to stop all development. Rather, Section 27 constrains governmental entities to exercising authority "in a manner that promotes sustainable property use and economic development."¹

¹ *Robinson Township*, 83 A.3d at 954; see also *id.* at 958 ("Of course, the trust's express directions to conserve and maintain public natural resources do not require a freeze of the existing public natural resource stock; rather, as with the rights affirmed by the first clause of Section 27, the duties to conserve and maintain are tempered by legitimate development tending to improve upon the lot of Pennsylvania's citizenry, with the evident goal of promoting sustainable development").

There have been three appellate court decisions in zoning cases that have considered arguments invoking Pennsylvania's Environmental Rights Amendment since the Pennsylvania Supreme Court's decision in *Robinson Twp., Delaware Riverkeeper Network, et al v. Commonwealth*, 623 Pa. 564, 83 A.3d 901, 953 (2013). In each, the Pennsylvania Commonwealth Court has sided with the developer. See *Delaware Riverkeeper Network v. Middlesex Township Zoning Hearing Board*, Pa. Commw. Ct. No 1229 CD 2015, 2017 WL 2458278 (June 7, 2017); *Kretschmann Farm, LLC v. Township of New Sewickley*, 131 A.3d 1044 (Pa. Commw. Ct. 2016); and *Feudale v. Aqua Pennsylvania, Inc.*, 122 A.3d 462 (Pa. Commw. Ct. 2015).

As explained by the Commonwealth Court in *Feudale*:

The Environmental Rights Amendment was not intended to “deprive persons of the use of their property or to derail development leading to an increase in the general welfare, convenience, and prosperity of the people.” *Robinson Twp. v. Commonwealth*, 623 Pa. 564, 83 A.3d 901, 954 (2013). It does, however, require that economic development not take place at the expense of an “unreasonable degradation of the environment.” *Id.* (emphasis added). Furthermore, with respect to the environment, “the state’s plenary police power ... must be exercised in a manner that promotes sustainable property use and economic development.” *Id.* Thus, [t]he Environmental Rights Amendment does not call for a stagnant landscape; nor, as we explain [above], for the derailment of economic or social development; nor for a sacrifice of other fundamental values. But, when government acts, the action must, on balance, reasonably account for the environmental features of the affected locale, ... if it is to pass constitutional muster. *Id.* at 953. In sum, the Environmental Rights Amendment “do[es] not require a freeze of the existing public natural resource stock; rather, ... the duties to conserve and maintain are tempered by legitimate development tending to improve upon the lot of Pennsylvania’s citizenry, with the evident goal of promoting sustainable development.” *Id.* at 958.

It has also been suggested by opponents that Green Amendments become a driver of frivolous litigation. This too is simply not true. This has not been the experience in the two states that have Green Amendments (again, Pennsylvania and Montana). And to the extent some unscrupulous attorneys seek to use the provision in that way, they would quickly find themselves facing adverse

court decisions, unhappy plaintiffs with high legal bills, and potentially the attorneys themselves facing sanctions or fines for misusing the law to intimidate and harm. The result will be decisions and reactions that dissuade others from similarly misusing the law.

Given that we all depend upon clean water, clean air & a healthy environment to support and sustain our very lives, it is right and appropriate that they should be protected with the same legal vigor and strength that we protect the other political rights, civil rights and human rights we hold dear.

I hope the Committee will join Senator Zirkin in advancing SB 873, a Green Amendment for the people of Maryland.