



February 10, 2021

Dear Members of the House Energy and Environmental Protection Committee and the Water and Land Committee

***Re: HB551 – The Right to a Clean and Healthy Environment***

I would like to offer testimony regarding HB551, the proposal to add environmental rights to the Bill of Rights of the Hawaii Constitution.

My name is Maya van Rossum, I am an attorney, leader of the organization Green Amendments For The Generations, and author of the book titled *The Green Amendment, Securing Our Right to a Healthy Environment*, focused on the power and importance of Bill of Rights constitutional recognition and protection of environmental rights. I and my organization were instrumental in helping to interpret and apply Pennsylvania's Green Amendment.

***Adding Environmental Rights to the Hawaii Constitution's Bill of Rights will provide important and valuable additional protections for the natural resources and the people of Hawaii.***

The Environmental Rights Amendment proposed by HB551 is an important addition to the Hawaii Constitution, providing a new and important tool for protecting the natural resources of the state and the ensuring the environmental rights of Hawaii's people are given the same high level protect that is given to other fundamental rights like speech, religion, property, and civil rights.

While Hawaii has in place important environmental protections in its constitution as recognized and applied by the courts, HB551 will help fill an important gap that will strengthen the goal of enforceable environmental rights that belongs to all the people of Hawaii.

Article XI, Section 1 establishes the state of Hawaii as trustee of the natural resources of the state to be protected for present and future generations. The courts have effectively interpreted this trustee obligation as providing important substantive and procedural protections.

Article XI, Section 9 is significantly different. While the provision promises that "Each person has the right to a clean and healthful environment" that right is defined by the laws passed by state government. That dependence on legislation, and the failure to be self-executing by its terms provides significant limitations on the asserted right, can subject environmental

rights to the politics of the day, and can deny critical protections in those areas where the law is not strong enough or there is a gap in legislative protection. By contrast, HB551 will put in place a self-executing right to a healthy environment that belongs to all the people of Hawaii and will ensure that environmental rights are given the same strength and constitutional standing as other fundamental rights such as private property rights; and the additional substantive and procedural protections discussed below will provide a more assured and robust set of protections that apply when and where the people need them.

In addition to ensuring the right to pure water, clean air, healthy ecosystems and a stable climate, the proposed language gives specific voice to other important environmental values. Notably, the cultural environmental values of Hawaii's indigenous communities receive explicit protection. This will be a powerful complement to other constitutional language and state efforts focused on preserving and protecting customary and traditional Native Hawaiian rights. The human health values of the environment are also highlighted as critical for protection. And recognizing the natural and scenic values ensures that the natural beauty, the ecosystem support, the recreational and the quality-of-life values so important are also given a priority place in thoughtful decision-making.

***Article I protection of environmental rights will require and strengthen important procedural and substantive environmental rights protections.***

Article 1 placement requires each branch of state government to consider the environmental effects of any proposed action on the constitutionally protected rights in advance of proceeding. Informed decision-making is a constitutional pre-requisite to taking action that could infringe upon environmental rights— as explained by the Pennsylvania supreme court when assessing a similar Bill of Rights environmental rights provision: “The failure to obtain information regarding environmental effects does not excuse the constitutional obligation because the obligation exists *a priori*<sup>1</sup> to any statute purporting to create a cause of action.”

In addition, as happens with other fundamental rights, placement of this language in Article I and as self-executing will ensure that government prioritize environmental protection and work to avoid environmental pollution and degradation as part of the decision-making process; when there is the best opportunity for preventing harm including (but not limited to) when crafting and implementing legislation and regulations, when issuing permits, approving development, and considering how to address ongoing environmental concerns.

Placement in Article I ensures environmental rights are protected on par with other fundamental rights (e.g., speech, due process, property rights) and ensures fair balancing of rights when needed. For example, if both property and environmental rights might be affected by government action then both must be considered, balanced and protected by

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<sup>1</sup> “Latin, is concluded from what has happened previously and that certain affects must by necessity will follow.” <a href="https://thelawdictionary.org/a-priori/" title="A PRIORI">A PRIORI</a>

the final outcome. This on par balancing is not constitutionally assured by the current Article XI Section 9 language as it is not in the Bill of Rights.

Article I placement will help ensure that in those instances when government does knowingly infringe on environmental rights there is a compelling state interest and there has been a conscious effort to minimize the impacts on the right, i.e., minimize environmental harm.

The compliment of individual rights with the existing recognized role of government as trustee will strengthen environmental justice protections, ensuring all government officials at every level of government are constitutionally required to treat all people and communities equitably, regardless of race, ethnicity, wealth and geography, and ensure that government may not consistently/repeatedly sacrifice the rights of one person or community for the benefit of others.

While the amendment will be a tool to prevent environmental harm, it will also provide legislators & regulators constitutional grounding upon which to advance positive and strengthened environmental protections.

***The language in the proposed amendment is appropriately broad.***

As expressed by Senator Franklin Kury, the lead legislative sponsor for Pennsylvania's environmental rights amendment: "... amendments- like those in the U.S. Bill of Rights - should be

broadly drafted so their vitality would carry well into the future."

Broad language is characteristic of protected Article I rights. The terms 'pure water', 'clean air', 'healthy ecosystems', 'stable climate' are no less clear than the language in other Hawaii Bill of Rights provisions, e.g., the right to "peaceably to assemble", the "right of the people to privacy", the right to be free from "excessive bail"; these terms are all open to interpretation.

As with other language in the Bill of Rights, there is a well exercised and understood process for defining key terms as these:

- ⇒ definition will begin with the legislative and executive arms of government through passage of legislation, regulations, policies, and decision-making that respects and protects the rights.
- ⇒ It is then incumbent on the people and the courts to challenge and/or support such decisions through the judicial system, which will provide further refinement, guidance and understanding as to how these terms are to be applied and fulfilled.

Hawaii's government officials, courts and justices are well-equipped to define, interpret and apply constitutional environmental rights language using standard principles of

legislative interpretation, constitutional law and trust law – they have done so successfully with other Article 1 amendments; they are well equipped to do it for environmental rights as well.

***Article I protection of environmental rights will ensure environmentally sustainable and protective economic development.***

While it has been suggested that the proposed environmental rights amendment will stymie economic development in Hawaii, this is not the intent, and in practice this has not been the result of these important amendments in the two states where they currently exist, Pennsylvania and Montana.

First and foremost, advancing Bill of Rights recognition for environmental rights is about protecting the people and the natural resources they depend upon. Constitutional environmental rights are not intended to prevent development or economic growth; but instead to ensure that industry and business advance sustainably, 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.

In addition, constitutional environmental rights protection will enhance economic development by encouraging sustainable, environmentally protective, and innovative development, industry, and businesses that support jobs and economic growth but at the same time avoid the economic, health and safety harms that result from environmental pollution and degradation. The environmental rights amendment will provide a powerful incentive and mandate 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, climate and other natural resources critical to sustaining healthy, safe and successful lives and economies.

In Pennsylvania and Montana, the two states that have already enshrined environmental rights in their state constitution Bill of Rights, legislators, regulators, the state attorney general, the governor, town councils and the courts have successfully used the constitutional language to protect the environment while balancing multiple community interests including property rights and economic development.

In Hawaii, where environmental protection is so deeply honored and valued as part of the culture, beliefs, way of life and economy, HB551/SB502 becomes a powerful value-added tool for advancing economic development that also ensures environmental protection.

In Pennsylvania and Montana, the two states with Bill of Rights protection for environmental rights, the legal actions filed have not been to stymie economic development but rather to address serious issues of public concern – protecting drinking water, supporting government action to secure responsible party clean-up of toxic contamination, and protecting local zoning authority intended to protect local environments.

### ***Modifying HB551 to Mirror SB502***

SB502, the compliment to HB551, has removed the language intending to ensure that there is no confusion of interpretation and application by making clear that Article XI, Section 9 and its language limiting environmental rights to only the environmental protections articulated in legislation, cannot be used to transform the overarching and self-executing nature of the new Article 1 constitutional environmental rights language. While I think maintaining this language is of value, I do not think that your removing it in order to align with the revised SB502 raises significant legal concerns – the clarity on the self-executing nature of the rights, its placement in the Bill of Rights, and the fact that you are advancing this new Bill of Rights amendment in order to clearly raise up environmental rights constitutionally I think will ensure the proper interpretation by Hawaii government and the courts.

I hope you find this information helpful in understanding how HB551 is an important, meaningful and powerful step forward for advancing environmental protection and environmental justice in Hawaii.

With respect, regards and appreciation,

A handwritten signature in blue ink that reads "Maya K. van Rossum" followed by a horizontal flourish.

Maya K. van Rossum  
Founder/Leader/Attorney  
Green Amendments For The Generations