



February 21, 2021

Dear Members of the Senate Judiciary Committee and the Senate Ways and Means Committee

*Re: SB502 SD1 – The Right to a Clean and Healthy Environment*

I would like to offer this comment regarding SB502 SD1, 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.

***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 SB502 SD1 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, SB502 SD1 will help fill a significant gap that will strengthen the goal of recognizing enforceable environmental rights that belong 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, SB502 SD1 will put in place a self-executing right to a healthy environmental 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 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 recognition of individual environmental rights will strengthen environmental justice protections, ensuring all government officials at every level of government are constitutionally required to protect the environmental rights of 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.

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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 self-executing nature of the proposed amendment is part of its tremendous value.***

Allowing the right to a clean and healthy environment to only be defined by the laws on the books as is the case with Article XI, Section 9, seriously undermines, and can even deprive people of their environmental rights.

Environmental laws are often not strong, inclusive or comprehensive enough as evidenced by ongoing environmental harms in the state; are defined by the politics of the day; and are more focused on managing and permitting pollution at the end of the decisionmaking process rather than preventing environmental degradation, pollution and harm throughout the decisionmaking process. By raising up environmental rights to the Bill of Rights level – i.e rights the people reserve unto themselves to be protected from government infringement -- HB502 SD1 ensures that while environmental rights are to be informed by legislation the constitutional right is different than simply complying with the laws on the books.

Article 1, self-executing protection ensures that if science, cumulative impacts, existing conditions, or environmental justice concerns demonstrate that stronger environmental protections are needed, the constitution can ensure they are provided.

In addition, a self-executing provision will fill the gaps where there is not yet a law to address a serious environmental condition or threat, until legislative protections can catch up. This ability to rely upon the constitution for needed protections in the absence of existing law is irreplaceably important. For example, had there been a constitutional self-executing environmental right years ago, there could have been the tool in place necessary to avoid the harms of PFAS contamination or to ensure stronger and earlier action to address the threat and harm it was inflicting on the environment and human health in the state.

A self-executing provision will also ensure environmental rights are included in the fair balancing of fundamental rights when they will be impacted by government decisionmaking. For example, if both property and environmental rights might be affected by government action then both must be considered, balanced and protected in the final outcome. The requirement for protection and priority consideration in balancing cannot be simply legislated out of existence.

And a self-executing provision will ensure government prioritizes prevention of environmental harm as part of the decision-making process; when there is the best opportunity for avoiding harm.

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

***Article I recognition of environmental rights is a powerful tool for good government actors including legislators, municipal officials, the Attorney General's Office, and others.***

While the amendment will be a tool to prevent environmental harm, it will also provide legislators, regulators, the attorney general's office and others in government the constitutional grounding upon which to advance positive and strengthened environmental protections.

In Pennsylvania that is one of only 2 states that currently recognize self-executing environmental rights in their state constitution Bill of Rights, the obligation to protect the rights of the people to a clean and healthy environment has been used by legislators as a foundation for advancing environmentally protection legislation; by the governor to veto legislation that would undermine the ability of local communities to put in place stronger environmental protections they deem necessary; by the Attorney General to support important environmental enforcement actions; and local municipalities to support protective environmental decisions.

Given the Hawaii Attorney General's testimony on this matter, I include at the end of my comments a number of examples of how the PA Attorney General has benefitted from the existence of a Bill of Rights environmental right in that state.

***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 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. In PA and MT, 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, SB502 SD1 becomes a powerful value-added tool for advancing economic development that also ensures environmental protection.

I hope you find this information helpful in understanding how SB502 SD1 is an important, meaningful and powerful step forward for advancing environmental protection and environmental justice in Hawaii.

With respect, regards and appreciation,



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Green Amendments For The Generations

**Addendum: Attorney General Uses in Pennsylvania of Bill of Rights Environmental Rights**

March 30, 2017: [Attorney General Shapiro Announces \\$30.4 Million Settlement with Volkswagen for Environmental Damages](#)

“I’m fighting to ensure a healthy environment for Pennsylvanians and protect their right to clean air and pure water,” Attorney General Shapiro said in announcing the settlement. “In this settlement, our prosecutors have addressed the serious harms caused by Volkswagen’s emissions device and its conscious cheating that resulted in excessive, illegal amounts of pollutants fouling the air across our Commonwealth.”

June 5, 2017: [Attorney General Josh Shapiro joins with 19 Attorneys General in Coalition with Governors, Mayors, Business and Community Leaders Vowing to Support Principles of the Paris Climate Agreement](#)

“President Trump’s decision to pull out of the Paris Climate Agreement does not change Pennsylvanians’ constitutional right to clear air and pure water,” said Attorney General Shapiro. “I’m proud to stand with my colleagues in a national coalition opposing the administration’s decision to withdraw from the agreement and I vow to continue to protect this right for the people of our Commonwealth.”

June 14, 2017: [Attorney General Josh Shapiro and 10 Attorneys General Sue U.S. Energy Department over Stalled Energy-Efficiency Rules](#)

“I’m suing to make the Trump Administration follow the law and protect our environment,” said Attorney General Shapiro. “Pennsylvanians have a constitutional right to clean air and pure water, and I’m taking legal action to protect that right.”

August 1, 2017: [Pennsylvania Takes Legal Action against Trump Administration to Protect Pennsylvanians’ Health from Ozone and Smog](#)

“Pennsylvanians have a constitutional right to clean air and pure water, and I’ll stand up to defend those rights and protect Pennsylvania’s environment from anyone that threatens them,” Attorney General Shapiro said. “If the EPA and Administrator Pruitt won’t act to protect Pennsylvanians from the dangers of ozone and smog, I will.”

December 11, 2017: [Environmental Firm Executive Charged with Illegally Storing and Disposing Hazardous Waste](#)

“This defendant illegally stored and disposed of hazardous wastes for many years,” Attorney General Shapiro said. “Wastes were illegally poured down the drain on the company’s property. I won’t allow anyone to deliberately harm Pennsylvanians’ rights to clean air and pure water. Our Environmental Protection Section works every day to safeguard the environment in our Commonwealth.”

October 26, 2018: [PROTECTING CLEAN AIR: Attorney General Shapiro Demands Trump Administration’s EPA Withdraw Plan to Roll Back Rules on Clean Cars](#)

“The Trump Administration is reversing course on standards that are working economically and environmentally and I strongly oppose this rollback,” Attorney General Josh Shapiro said at a news conference yesterday in Pittsburgh, surrounded by Mayor Bill Peduto, Allegheny County Executive Rich Fitzgerald and Pittsburgh City Councilwoman Erika Strassburger. “Pennsylvanians have a constitutional right to clean air and pure water, and I’ll stand up to defend those rights and protect Pennsylvania’s environment from anyone who threatens them.”

Nov 1 2018: [Attorney General Shapiro Takes Action Against EPA’s Unlawful Proposed Replacement for Clean Power Plan](#)

“The EPA’s proposed rule change is in clear violation of the Clean Air Act, and I’m fighting to uphold the law and protect Pennsylvanians’ constitutional right to clean air and pure water,” said Attorney General Shapiro. “In Pennsylvania alone, more than 1.7 million adults and 235,000 children have asthma symptoms, and this will exacerbate the problem. The EPA’s rule is bad for public health and our environment.”

February 1, 2019: [Attorney General Josh Shapiro Files 161 Criminal Charges Against Pittsburgh Water & Sewer Authority](#)

“Pennsylvanians have a constitutional right to clean air and pure water – I’m here to defend that,” Attorney General Shapiro said, at a news conference at a recreation center in Pittsburgh’s Lawrenceville neighborhood – an area impacted by the Authority’s violations. “The Water & Sewer Authority knew it was required to notify residents of its plans to replace service lines, and it knew it was required to sample the lines for lead content – yet it failed to do so. That makes PWSA criminally liable under the Safe Drinking Water Act.”

March 26, 2019: [CASE UPDATE: Former Owner of Lackawanna County Business Sentenced to 11 ½ to 23 Months in Prison on Environmental Crimes Charges](#)

“Pennsylvanians have a right to clean air and water, and my Office will not tolerate anyone who acts with such disregard for the laws protecting our environment,” Attorney General Josh Shapiro said. “Illegally storing and disposing of hazardous waste creates serious danger for communities. Thank you to the local fire departments in Jessup for their fast response to the fire caused by this man’s reckless actions—their response prevented damage to nearby homes of families who were forced to evacuate.”

August 15, 2019: [AG Shapiro Urges Congressional Leadership to End Use of Harmful PFAS Chemicals](#)

“Pennsylvanians have a constitutional right to clean air and pure water, and as Attorney General, I am committed to defending that right,” said Attorney General Josh Shapiro. “PFAS chemicals are harming Pennsylvanians’ health and environment, yet the federal government has failed to act in a timely and appropriate manner to address this threat.

August 20, 2019: [CASE UPDATE: Berks County Construction Company Owner Pleads Guilty to Falsifying Drinking Water Reports](#)

“Pennsylvanians have a constitutional right to clean air and pure water and, as Attorney General, I am committed to defending that right against anyone who tries to impede on it,” said Attorney General Josh Shapiro. “The defendant put the health and wellbeing of the people of Berks and Lancaster Counties at risk by falsely reporting the absence of harmful bacteria in their drinking water. Thanks to the hard work of our Environmental Crimes Section, we put an end to his dangerous behavior.”

October 22, 2019: [AG Shapiro Opposes EPA’s Proposed Rule to Limit States’ Clean Water Act Oversight](#)

“The Clean Water Act unequivocally grants states the right to protect our waters, and the Environmental Protection Agency has recognized that right for three decades under both Republican and Democratic administrations,” said Attorney General Josh Shapiro. “Now, the EPA is attempting to undermine this authority. I’m proud to stand with my colleague Attorneys General in opposition to this attack on states’ rights and our environment. As Attorney General, I will do everything in my power to protect Pennsylvanians’ state constitutional right to clean air and pure water.”

April 16, 2020: [AG Shapiro to EPA: Enforce Environmental Protections, Defend Vulnerable Communities During COVID-19 Emergency](#)

Right now, government agencies and businesses need to band together to keep Pennsylvanians safe,” said Attorney General Shapiro. “This is not the time for cynical attempts to slash public health protections, whose removal only benefits corporate interests. My office takes seriously our job to

defend Pennsylvanians' constitutional right to clean air and pure water. I'm calling on the EPA to do the right thing and keep holding companies accountable that violate environmental standards."

May 1, 2020: [AG Shapiro: Inflection Energy to Pay \\$40K to Conservation Groups for Polluting Lycoming County Water](#)

Attorney General Josh Shapiro today announced that Inflection Energy, a natural gas company, has entered a plea for its role in the 2017 wastewater spill in Loyalsock Creek located in Lycoming County, and will pay \$40,000 to conservation groups in the area. "Pennsylvanians have a constitutional right to clean air and pure water," said Attorney General Shapiro. "Any company that endangers those rights will be thoroughly investigated, without fear or favor. This is just another example– there will be more– as we continue our efforts to protect public health and preserve our heritage and natural resources for the next generation."

May 19, 2020: [AG Shapiro Files Criminal Charges Against Carbon County Recycling Facility](#)

"Pennsylvanians have a right to clean air and pure water. Today, we charged Plastic World Recycling for dumping an outrageous amount of cleaning agents into a Carbon County creek that people rely on for trout fishing," said Attorney General Shapiro. "Any company, big or small, that endangers our environmental rights will be thoroughly investigated. This is just one example– there will be more– as we continue our efforts to protect public health and preserve our heritage and natural resources for the next generation."