



Date: March 8, 2021

To: Joint Standing Committee on Environment and Natural Resources

From: Maya K. van Rossum, Attorney/Founder, Green Amendments For The Generations; Author of The Green Amendment Securing Our Right to A Healthy Environment

Re: The Pine Tree Amendment, LD489

Dear Senator Brenner, Representative Tucker, and Honorable Members of the Joint Standing Committee on Environment and Natural Resources,

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* which is focused on the importance of Constitutional Bill of Rights protection for environmental rights in our state and federal constitutions. My book and founding of the Green Amendments organization is an outgrowth of my 26-years leading the four state advocacy organization the Delaware Riverkeeper Network, and being the lead environmental organization and petitioner that secured the precedent setting decision interpreting Pennsylvania's Environmental Rights Amendment in December 2013.

I submit these written comments in addition to my verbal testimony in support of LD 489.

My goal is to answer many of the questions you have about the proposed constitutional language in LD489 including its benefits and impacts, and why the language and placement is so important and beneficial for environmental and environmental justice protection.

Constitutional Environmental Rights are Nationally Recognized as Important.

While Maine is now considering adding environmental rights to the fundamental rights protected in its Article I Bill of Rights, currently there are already 2 states – Pennsylvania and Montana -- with environmental rights amendments of this kind that can provide helpful information on how to interpret and apply them. The language Maine is considering is most closely aligned with that of Pennsylvania. In addition, there are 10 other states considering similar amendments, among them New Mexico, Washington, Oregon, New Jersey, New York, Vermont, Maryland, Kentucky, West Virginia and Hawaii. Each state is at a different place in the process but all of them have proposals and support.

While Maine is certainly not standing alone in considering Bill of Rights protection for environmental rights, Maine is being recognized as a leader with other states choosing to mirror the language you are now considering in significant ways.

The Proposed Pine Tree Amendment Is Not a Grant of New Authority, It is a Limit on Power.

The Pine Tree Amendment – Maine's proposed environmental rights amendment -- will be a *limitation* on government authority, not a grant or expansion of authority. While much of the Constitution is a grant of power from the people to their government, Article I contains a limitation on

that power. Article I contains those rights that the people have reserved unto themselves, to be protected from government interference.

The proposed amendment will protect environmental rights by limiting/preventing government actions or activities that inflicts constitutional-level harm on protected environmental rights. When there is an infringement it will provide a mechanism for the people of Maine to secure judicial support in interpreting the law and ensuring environmental rights and natural resources are protected in a way that is in keeping with the constitutional obligation.

The Proposed Pine Tree Amendment Will Not Invite Legal Challenges Between Neighbors.

Because the constitution defines the relationship between the people of the state and their government, and given the clear language proposed with a clear focus on government action to benefit the people of Maine, the environmental rights amendment should not provide a basis for legal actions between private parties. Instead the amendment will focus on government actions and decisions that result in constitutional violations, and any remedies secured will be equitable remedies whereby the government will be required to bring its actions and decisions into accord with the constitution. For example, in Pennsylvania and Montana this has included:

- ✓ reforming regulatory permit requirements;
- ✓ rescinding unconstitutional statutory language before harm is created;
- ✓ undertaking additional scientific, factual and cumulative impact reviews to ensure constitutional obligations and rights will be met when permitting;
- ✓ preventing local or state government from having to act in ways that would result in constitutional violations (e.g. protecting the zoning authority and decisions of local government;
- ✓ protecting the state from having to enforce a contract that would result in an unconstitutional despoilment of the drinking water supply of an entire town); and
- ✓ ensuring funding constitutionally dedicated to natural resources protection was not misappropriated for other uses.

The Proposed Pine Tree Amendment Provides Clear Legal Guidance.

The proposed environmental rights amendment is not merely an aspirational goal – it will provide procedural and substantive mandates that will provide clear guidance to Maine government and meaningfully advance environmental protection and environmental justice, including to:

- ⇒ ***Ensure a focus on prevention of environmental degradation when there is the best opportunity for preventing harm.*** Just as is the case with other fundamental rights, the language and Article I placement of the proposed environmental rights amendment will ensure government include a conscious effort to avoid infringing on the constitutional right. In the environmental rights context this means considering environmental rights impacts and protections as part of their decisionmaking process and working to prevent infringement and harm. It is during decisionmaking when there is the best opportunity for preventing harm.
- ⇒ ***Ensure a compelling state interest and effort to minimize environmental harm when rights are infringed upon.*** Article I placement will ensure that when government does knowingly infringe on environmental rights there is a compelling state interest and is a demonstrated effort to minimize the impacts on the right, i.e., minimize environmental harm.

- ⇒ ***Provide clear guidance on how to fulfill the constitutional obligations.*** An essential component of the proposed amendment is the trust obligation it creates which, among other things, will instill fiduciary duties of prudence, loyalty and impartiality on government. Fulfilling these trustee duties:
- will ensure government officials engage in truly **informed decisionmaking**, including an analysis and consideration of relevant science, existing local conditions, potential impacts and cumulative impacts. For example, is the community already being impacted by industrial air pollution that will be compounded to a constitutional level by a proposed government action or decision?
 - will **strengthen environmental justice** protection by ensuring that natural resources and environmental rights are protected equitably across the state and across communities, regardless of race, ethnicity or socioeconomic status.
 - including future generations as beneficiaries of the trust will **ensure generational planning, protection and decisions**; will allow the cumulative impacts of actions that are known to worsen over long time spans to be constitutionally considered and addressed such as how to best address/avoid the growing climate crisis through smart decisionmaking today; and will ensure the rights and protections of future generations are not knowingly being sacrificed to near term goals that can better be served by long-term plans. As explained by the Pennsylvania Supreme Court: “The Environmental Rights Amendment offers protection equally against actions with immediate severe impact on public natural resources and against actions with minimal or insignificant present consequences that are actually or likely to have significant or irreversible effects in the short or long term.”
- ⇒ ***Ensure government action balances environmental protection with other goals, rights and obligations.*** Article I Placement will ensure that the fair balancing of rights in decision-making includes the environment; e.g., if both property and environmental rights might be affected by government action then both must be considered, balanced and protected by the final outcome.
- ⇒ ***Ensure recognition and protection of the indigenous, human health and other important values in government decisionmaking.*** It is noteworthy that the cultural environmental values of Maine’s Native American communities receive explicit protection in the proposed amendment; as do the human health benefits of a quality environment; and the tremendous benefits and values provided by the recreational benefits of the environment.
- ⇒ ***Ensure all arms of government understand they have a role in environmental rights protection.*** The amendment will make clear that environmental rights must be honored and protected by every government official at every level of government here in Maine, it is not just a responsibility of legislators. Ensuring that all government bodies are prioritizing environmental protection as part of decisionmaking will enhance the opportunity for environmental success.

The Trust Included in the Proposed Language Provides Clarity, Definition and Guidance Helpful to Government, the Judiciary & the People.

To the extent legislators and the people of Maine are seeking terms that are well understood and defined, using trust law and terminology is very beneficial.

The inclusion of trust language in the proposed Pine Tree Amendment, with the state serving as trustee of the natural resources of the state for the benefit of present and future generations, brings clearly identified responsibilities and duties that can help legislators, regulators and the courts understand the steps they must undertake to fulfill their constitutional obligations.

As touched on above, under trust law, trustees have clearly identified and understood fiduciary duties that guide their authority and discretion in order to protect beneficiaries' interests and ensure that the trustee abides by the terms of the trust. By including trust language, the amendment will help government officials understand what is expected of them in the first instance, and when necessary will guide the courts in determining whether government officials fulfilled their constitutional obligations in those instances when there is a legal challenge.

Among the guidance provided by the Pennsylvania Supreme Court with regards to the trustee duties of that state in a relatively similar amendment:

- “As a trustee, the [State] must deal ‘with its citizens as a fiduciary, measuring its successes by the benefits it bestows upon all its citizens in their utilization of natural resources under law.’” ... [The State] may not act as a mere proprietor, pursuant to which it ‘deals at arms['] length with its citizens, measuring its gains by the balance sheet profits and appreciation it realizes from its resources operations.’” Citing to See Pa. L. Journal, 154th General Assembly, No. 118, Reg. Sess., 2269, 2273 (1970)
- “As trustee, the Commonwealth is a fiduciary obligated to comply with the terms of the trust and with standards governing a fiduciary’s conduct. The explicit terms of the trust require the government to “conserve and maintain” the corpus of the trust. See PA. CONST. art. I, § 27. The plain meaning of the terms conserve and maintain implicates a duty to prevent and remedy the degradation, diminution, or depletion of our public natural resources. As a fiduciary, the [State] has a duty to act toward the corpus of the trust -- the public natural resources -- with prudence, loyalty, and impartiality.”
- “This environmental public trust was created by the people of [the State], as the common owners of the [State]’s public natural resources; The plain intent of the provision is to permit the checks and balances of government to operate in their usual fashion for the benefit of the people in order to accomplish the purposes of the trust.”

Quotations from:
Robinson Twp., Delaware Riverkeeper Network v. Commonwealth, 623 Pa. 564, 83 A.3d 901, 954 (2013)
PEDF v. Commonwealth of Pennsylvania, 161 A.3d 911 (2017).

The Language in the Proposed Amendment is Appropriately Broad and Includes Valuable Guidance Helpful in its Application and Interpretation.

Broad language is characteristic of protected Maine Article I rights. The terms ‘pure water’, ‘clean air’, ‘healthy environment’ are no less clear than the language in other Maine Bill of Rights provisions, e.g., the right to be free from “unreasonable searches and seizures”, the right to “freely speak”, that private property may not be taken for “public use” without “just compensation”, and that the right to bear arms “shall never be questioned”.

Rather than focus on individual words such as “pure”, “clean”, or “healthy” it is the process for securing the definition which should be the key focus. As with other Bill of Rights provisions, the process for definition will begin with the legislative and executive branches, including implementing agencies and local government, and will at times require the courts to further consider, refine and/or define when there is a clearly identified constitutional-level concern.

Maine government officials, courts and justices are well-equipped to define, interpret and apply other Article I fundamental rights, and they are similarly well equipped to interpret and apply constitutional environmental rights language using standard principles of legislative interpretation, constitutional law and trust law.

In addition, Maine government officials and courts have the advantage of the positive advancements in Pennsylvania and Montana who are also benefiting from constitutional environmental rights and a growing body of interpretation. Including with regards to the trustee obligations of the state, and on how to interpret and apply terms such as “pure” and “clean” which are part of the Pennsylvania Environmental Rights Amendment.

The Pine Tree Amendment Will Support Healthy Economic and Business Growth and Avoid the Economic, Health, Safety and Quality of Life Harms Environmental Degradation Invites.

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 industry, business, development or economic growth; but instead to ensure they advance sustainably, using practices that best protect the environment, avoid the costs of environmental degradation, and protect other constitutional rights, like the property rights of those that would be harmed by migrating pollution for example.

As explained by a conservative Pennsylvania Supreme Court Chief Justice:

The “Environmental Rights Amendment does not call for a stagnant landscape; nor ... for the derailment of economic or social development; nor for a sacrifice of other fundamental values.”

But it does *make clear that* “... to achieve recognition of the environmental rights enumerated ... as ‘inviolable’ necessarily implies that economic development cannot take place at the expense of an unreasonable degradation of the environment. As respects the environment, the state’s plenary police power, which serves to promote said welfare, convenience, and prosperity, must be exercised in a manner that promotes sustainable property use and economic development.”

Robinson Twp., Delaware Riverkeeper Network v. Commonwealth, 623 Pa. 564, 83 A.3d 901, 954 (2013).

From an economic and community perspective, the constitutional environmental right will encourage innovative development, industry and business growth, and provide a powerful mandate for government officials to advance industry, business, and development in ways that accomplish economic and business objectives, while at the same time protecting our environment, including water, air, soils, food, forests, climate, wildlife, plant life, wetlands and other natural resources critical to sustaining and nourishing healthy lives and economies.

And in those instances when the constitutional obligation may require that a new industrial operation be prevented or development project be re-sited, it will be in those instances when there is critical and just cause – for example to avoid dangerous and unavoidable levels of contamination to drinking water supplies.

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 both states economic development and energy creation continue to advance, even in this age of COVID, but are being increasingly expected to do so in a way that is sustainable and respectful of the environmental rights of the people of those states and the obligation of government officials to protect the state's natural resources in a way that benefits all people and generations.

Constitutional Environmental Rights Have Protected Communities in the 2 States That Have Them.

In Pennsylvania and Montana, the only two states that already have Bill of Rights environmental rights amendments on par with what is being considered in Maine, the constitutional amendments have been used by residents, township officials, administrative agencies, elected officials including the state attorney general and the governor, and organizations to:

- ⇒ protect state government from having to enforce well-testing that could contaminate an entire town's drinking water supply with cancer causing toxins, also poisonous to aquatic life,
- ⇒ prevent permitting for dangerous industrial gold mining operations that would decimate critical natural resources and contaminate highly prized river systems recreationally and economically important; and that in one instance would have had significant harmful ramifications for environments and natural resources important to Yellowstone National Park, vital to the environmental and economic health of the region,
- ⇒ ensure agency action to secure responsible industries cleanup a highly contaminated site with a spreading pollution plume,
- ⇒ prevent legislative overreach that mandated fracking operations be allowed in all zoning districts including agricultural districts and in residential communities as close as 300 feet from homes thereby infringing on the constitutional obligation and rights of town officials to zone, and infringing on property rights and expectations of those affected,
- ⇒ ensure agencies consider cumulative impacts, relevant scientific data and existing local conditions prior to final permitting.

Ensuring Constitutional Protection of Environmental Rights Will Not Encourage an Onslaught of Litigation Nor Unduly Burden the State Budget.

While environmental rights will support important legal claims essential to address environmental pollution and degradation harmful to the lives of the people of Maine, it is not expected to support a sudden rush of litigation and will certainly not support an onslaught of frivolous litigation.

The most important values of environmental rights amendments are about changing government decision-making in order to avoid, address, and remedy environmental harms advanced by government action which overreaches and results in constitutional environmental rights violations.

By its terms the proposed environmental rights amendment is not calling for outlays of government funds to address environmental issues. The focus of the proposed constitutional language is ensuring government decision-making that avoids environmental pollution and degradation that rises to the level of violating people's rights. Remedies for constitutional violations will be equitable, rather than money damages.

In those situations where government overreach is causing a constitutional violation, as with other fundamental rights, the remedy will be to modify or reverse the harmful decision, or demonstrate a

compelling state interest and appropriate measures to minimize the harm. For example, to remedy unconstitutional legislative/regulatory language before a law is final; remedy or rescind permitting or other actions to avoid rights violations and/or ensure appropriate advance review of relevant conditions, data and impacts to ensure constitutionally justified permit conditions; provide for environmental protections when there are gaps in the law that fail to protect environmental rights; support/protect local and state environmental protection authority; ensure government is fully and fairly implementing existing laws in order to ensure constitutional level protection, etc.

The amendment is about protecting environmental rights; the remedy will take many different forms; and in PA and MT those have not been about massive government expenditures.

Notably, avoiding or remedying environmental harm is beneficial for protecting jobs, economic development, property values and associated tax revenues and as a result protects government from unnecessary costs caused by environmental degradation, and generates valuable state and local revenues. For example, water contamination by a manmade family of chemicals known as Perfluorinated chemicals (PFC) is making affected people in Maine sick, harming dairy farmers, and dropping the resale value of impacted properties. A constitutional amendment that years ago could have empowered the government to prevent use of this dangerous chemical until it was proven safe, or using methods that would have ensured it did not escape into the environment, could have avoided the environmental, economic, job, health, property and safety harms now costing so many so much.

I thank you for the opportunity to submit this written comment. I hope you found it beneficial in our assessment of proposed LD489 and the important values of advancing the proposed constitutional Pine Tree Amendment.

Respectfully Submitted,



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