



To: NY State Senate and NY State Assembly

From: Maya K. van Rossum, the Delaware Riverkeeper, Delaware Riverkeeper Network

Date: 4/23/18

Re: Business Opposition to the Constitutional Right to a Healthful Environment

Dear New York Senators and Assembly members,

We reach out to urge you to support the passage of a Green Amendment that recognizes and protects the right to clean water, clean air and a healthful environment as an inalienable right deserving of the same level of recognition and protection as other fundamental freedoms we hold dear such as the right to free speech, freedom of religion, property rights and due process rights. Given that we all depend upon clean water, clean air and healthy environments to support and sustain our very lives, a constitutional amendment that recognizes and protects the right to clean water, clean air and a healthy environment is not only appropriate, but necessary and long overdue.

It is troubling that the NY Business Council would oppose protecting the right of New Yorkers to clean water, clean air and a healthful environment. Their stated reasons for opposition are unsupported by the facts.

Passage of a Green Amendment in New York would be as beneficial for the businesses of New York as it would be for the people. Forward-thinking business operators and developers recognize that they too benefit from clean water and air and a healthy environment. A clean and healthy environment saves businesses money, can increase the marketability and market value of their developments and products, enhances the ability to attract the best talent to their company, and ensures happier and healthier workers

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that reduce costs and enhance productivity. A Green Amendment does not pit people and the environment against business; it joins them together in a common cause that benefits everyone. A 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 Business Council is concerned that a Green Amendment would provide a direct right of action when environmental degradation is so great that an individual or community believes there has been a violation of the right to clean water, air and a healthful environment. It is stunning that the Business Counsel believes New Yorkers should be denied court access when there is a genuine claim of such a violation.

The Business Council asserts a concern that a constitutional right to a healthy environment does not include criminal penalties and as a result is wanting. But in making such an assertion the Business Council fails to recognize the goal of such a provision. The goal is to ensure good decisionmaking that results in meaningful environmental protection – criminal penalties, fines and jail time are not necessary to accomplish these important objectives. Criminal penalties are about punishment; a constitutional provision is about protection.

A look at the news headlines make clear that our current system of environmental protection laws are not truly recognizing and protecting the rights of people to a healthy environment. This is as much the case in New York as in other states across the nation. Just as with religious freedom and property rights, gun rights and speech rights – legislation and regulation are important in protecting those rights, but the constitutional recognition and protection of these inalienable rights is morally and legally appropriate. It is also essential for ensuring a higher standard of care is given to these fundamental freedoms that we all hold dear. A constitutional provision provides an essential back stop that not only ensures better decisionmaking, but also provides irreplaceable protection for those situations when decisionmakers, including legislators, fail to perform their obligation to protect the rights of each and every person to a healthy environment.

The public record and media headlines are filled with examples of how unprecedented levels of environmental degradation are devastating health and lives . These demonstrate that, contrary to what the Business Council argues, environmental protection laws are not ensuring healthy environments that protect and sustain healthy lives, good quality of life, and the strong economic benefits that healthy environments provide. Examples include:

- Failing Kids with Lead Poisoning, *Investigative Post* article speaking about NY communities
- Vast swaths of New York City have higher lead exposure than Flint, Michigan, *The Week*
- Can a 'perpetually toxic lake' in Upstate NY be made swimmable again?, *New York State Up*
- NY Waterways Polluted by Billions of Gallons of Raw Sewage Each Year, *The Associated Press*
- Hoosick Falls Residents shocked by High PFOA Test Results, *Times Union*
- NYC Has Some of the Worst Smog Pollution in the Country, *Time Out*
- This Is What New York's Sky Would Look Without All The Pollution, *IFLScience*
- Drinking *water* blamed in hundreds of illnesses, 13 deaths, CDC ..., *CNN*
- 63 million Americans exposed to unsafe drinking *water*, *USA TODAY*
- Air Pollution is Still Killing People in the United States, *Time*

A constitutional right would provide appropriate access to the courts in those situations when our governmental decisionmakers are not honoring the inalienable right of all people to a healthy environment, including when our current system of environmental laws are allowing damaging levels of pollution and degradation to pass unchallenged.

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.

The Business Counsel complains that the boundaries of a right to a healthy environment are not laid out in excruciating detail in the constitutional proposal – failing to recognize that the constitution is never the right place for that level of detail. Statutes and regulations can define supplementary environmental protection standards as long as they are crafted and implemented in accordance with the Amendment. It is ultimately through judicial interpretation that the constitutional right will be defined just as is the case with every other inalienable right honored in the Bill of Rights section of the New York Constitution.

To argue that an inalienable right should not be given due recognition and protection because the Business Council is worried it will result in litigation is disturbing, to say the least. All legal

protections result in some level of litigation, but that is never a good reason to deny legitimate and appropriate legal protections. Simply because we are talking about giving an appropriate level of constitutional recognition to environmental rights does not mean we are going to have a mass rush to litigation. Attorneys are bound by legal standards and ethical rules that will protect against unfounded legal challenges. 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 constitutional provision.

Among other things, a properly framed and placed Green Amendment 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. A constitutional provision helps address environmental injustices that allow minority and low income communities to be inappropriately targeted for pollution and environmental degradation.

Among other things, a properly framed and placed Green Amendment ensures that decisionmakers consider and take seriously the environmental implications of the decisions they make, the permits they issues, the regulations and/or legislation they passed, rather than simply looking to the four corners of a regulatory or legislative mandate. It will ensure the use of good science and consideration of individual, local and cumulative impacts during the decision-making process. A Green Amendment will in fact help avert environmental degradation and the need for litigation because it will ensure better, defensible decisions from the outset.

How will a constitutional Green Amendment 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, to not only look to see if they are checking the boxes of existing regulations, but also 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 New York.
- ⇒ It will ensure communities are treated equitably in terms of environmental decisionmaking.

The Business Counsel's assessment of the status of the Environmental Rights Amendment in Pennsylvania is woefully deficient and misleading. While the Business Counsel speaks about a 1973 legal case involving Pennsylvania's provision, they ignore the most recent legal decisions where the Pennsylvania Supreme Court is embracing, defining and very successfully implementing the right to a healthy environment in Pennsylvania. In Robinson Twp., Delaware Riverkeeper Network v. Com. ("Robinson II"), 83 A.3d 901 (Pa. 2013); and Pa. Env'tl Defense Found. v. Com. ("PEDF"), 161 A.3d 911 (Pa. 2017) the state is successfully using constitutional principles to interpret and apply Article 1, Section 27 of Pennsylvania's constitution for the benefit of all the people in the state. (For more discussion of the Business Counsel misrepresentation of the status of Pennsylvania's provision see attached memo to Maya van Rossum from Jordan B. Yeager and Lauren M. Williams with Curtin Heefner LLP, March 5, 2018).

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.

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."

MEMORANDUM

To: Maya van Rossum, the Delaware Riverkeeper

From: Jordan B. Yeager and Lauren M. Williams, Curtin & Heefner LLP

Date: March 5, 2018

RE: New York Proposed Amendment – Business Council Memorandum

We have reviewed the New York Business Council's ("NYBC," "Business Council") memorandum opposing Bill A06279, a bill that would enact an environmental rights amendment to the New York Constitution. NYBC apparently seeks to sow uncertainty and doubt where there is none. It relies on sources and interpretations of sources that are questionable, at best, and deliberately misleading at worst.

While the Business Council claims to offer a review of similar constitutional provisions in other states, including Pennsylvania, the Business Council completely ignores the Pennsylvania Supreme Court's recent landmark decisions interpreting the Environmental Rights Amendment to the Pennsylvania Constitution. Robinson Twp., Delaware Riverkeeper Network v. Com. ("Robinson II"), 83 A.3d 901 (Pa. 2013); Pa. Env'tl Defense Found. v. Com. ("PEDF"), 161 A.3d 911 (Pa. 2017). Both cases reinvigorated Pennsylvania's Environmental Rights Amendment and affirmed that the provision meaningfully protects Pennsylvanians' rights to a healthy local environment. Contrary to the Business Council's claims, Pennsylvania's highest court has ruled that residents can seek redress in the courts for governmental actions that threaten those rights. Likewise, contrary to the Business Council's claims, the Pennsylvania Courts have utilized long-established standards of constitutional interpretation to vindicate the constitutional right to a healthy environment, just like the courts regularly do to vindicate other fundamental constitutional rights.

One of the most egregious errors in the Business Council's memo is that the Business Council claims that the Environmental Rights Amendment to the Pennsylvania Constitution is not self-executing. (Page 3, NYBC Memo). It claims this based on a chart from a book that the Business Council does not even provide a full reference to, preventing anyone from identifying the year the chart was made. (Pages 3, 4, NYBC Memo).

In reality, the Pennsylvania Supreme Court has definitively ruled that Pennsylvania's Environmental Rights Amendment is self-executing. Robinson II, 83 A.3d at 951-54, 963, 964 n.52, 974-75 (plurality); PEDE, 161 A.3d at 936-37 & n.29; see also Com. v. Nat'l Gettysburg Battlefield Tower, Inc., 302 A.2d 886 (Pa. Commw. Ct. 1973); compare Friends of Lackawanna v. DEP, 2017 EHB 1123, 1162-63.

Not only does the Business Council ignore the two landmark Pennsylvania Supreme Court decisions from 2013 and 2017, but it even misconstrues the now-largely-outdated 1973 decision in Com. v. Nat'l Gettysburg Battlefield Tower, Inc. ("Gettysburg"), 302 A.2d 886 (Pa. Commw. Ct. 1973). In Gettysburg, the Commonwealth of Pennsylvania sought to enforce clause 1 of the Environmental Rights Amendment, *directly* against a private property owner where there had been no governmental approval for the action that the property owner was undertaking. First, the Business Council quotes language that it claims is from the Commonwealth Court opinion, but in fact, is from the Pennsylvania Supreme Court's plurality opinion. Second, contrary to NYBC's suggestion, the Commonwealth Court in that case found that Pennsylvania's Environmental Rights Amendment *is* self-executing. See also John C. Dernbach, Taking the Pa. Constitution Seriously When It Protects the Environment: Part II – Environmental Rights and Public Trust, 104 Dickinson L.Rev. 97, 103-04 (1999).

Indeed, the Pennsylvania Courts have repeatedly recognized the ability of residents to challenge state action – such as permit approvals, legislation, and other actions that would cause potential degradation of the environment. Robinson II, 83 A.3d 901; Pa. Env'tl Defense Found. v. Com. (“PEDF”), 161 A.3d 911; Friends of Lackawanna v. DEP, 2017 EHB 1123, 1162-63; Delaware Riverkeeper Network, et al. v. Middlesex Twp. Zoning Hearing Bd., 2017 WL 2458278 (Pa. Commw. Ct. 2017); Ctr. for Coalfield Justice v. DEP, 2017 EHB 799.

The Business Council even gets Montana’s constitutional provision wrong, again relying on an undated chart to claim that it is “uncertain” whether the provision is self-executing.¹ In fact, the Montana Supreme Court has explicitly recognized that the Montana Constitution’s environmental rights amendment is self-executing and can be used to challenge the legislation and executive action, Montana Env'tl Info. Ctr. v. Dept. of Env'tl Quality, 988 P.2d 1236 (Mt. 1999), just like residents can vindicate their other constitutional protections such as freedom of religion, freedom of speech, and the right to bear arms.

Another example of the Business Council’s attempts to create uncertainty involves its claim that the proposed amendment’s interpretation would be unclear. The terms being used in the amendment are similar to existing provisions in Montana and Pennsylvania. Thus, the New York courts will be able to look to the interpretations of their sister courts in Pennsylvania and Montana. Further, the New York courts will be able to apply the same standards of constitutional analysis that they apply when they consider other constitutional provisions. It is axiomatic that the government cannot abridge fundamental constitutional rights unless there is a

¹ The Business Council also claims, based on a citation to a law review article, that New York’s environmental provisions are self-executing. In reviewing the article, it cites to no New York case law making such a determination, and appears to rely on Section 5 of Article XIV. Mary Ellen Cusack, Judicial Interpretation of State Constitutional Rights to a Healthful Env't, Boston College Env'tl Affairs L.Rev, 182 & n.68. N.Y. Const. Article XIV, Section 4 repeatedly and expressly references legislative implementation of the protections in Section 4, cutting against a finding that the provision is self-executing.

compelling state interest and the degradation of rights being inflicted has been minimized. Likewise, as noted in Robinson II and in Montana Env'tl Info Ctr., science and the intent of those framing the constitutional provision provide guidance as to what level of protection residents should expect for their environmental rights. Robinson II, 83 A.3d at 953-54; Montana Env'tl Info. Ctr., 988 P.2d at 1244-49 (interpreting “clean and healthful environment”).

Lastly, the Business Council claims that the proposed amendment is not needed because the New York Legislature has taken other actions to protect the environment in New York. While the Legislature’s actions are laudable, the amendment provides a bedrock protection against any governmental entity’s potential infringement on the people’s fundamental rights to a healthy place to live and work. If Pennsylvania’s experience is any guide, that bedrock protection has been essential as a check on governmental action that would threaten our air, water, and other natural resources that we rely on for life, for commerce, and for recreational and spiritual enjoyment in our daily lives.