



NEW YORK'S ENVIRONMENTAL RIGHTS CONSTITUTIONAL AMENDMENT WILL REQUIRE SOUND JUDICIAL INTERPRETATION

by Victor E. Schwartz and Christopher E. Appel

On November 2, 2021, New York voters approved a ballot initiative to amend the New York Constitution's Bill of Rights to provide that "Each person shall have a right to clean air and water, and a healthful environment."¹ The amendment, commonly referred to as the Environmental Rights Amendment, proposes to make clear that the public's right to drink clean water, breathe clean air, and live and work in a healthy environment is as fundamental as other constitutionally protected rights, such as a person's right to free speech or assembly.² Less clear, however, is what this newfound right to "clean" water and air means as a practical matter, and the scope of a right to a "healthful environment."

The interpretation of New York's Environmental Rights Amendment is virtually certain to occupy the judiciary's time and attention in the coming months and years. On one hand, the amendment may be interpreted to bolster the state's commitment to environmental conservation and other issues, such as promoting investment in water infrastructure and new energy technologies. On the other hand, the amendment could be interpreted to usher in an era of unsound and unbounded environmental litigation over anything claimed to impede a "healthful environment."

It is not difficult to imagine environmental advocates and trial lawyers invoking the amendment's ambiguous language in lawsuits targeting almost any entity that engages in conduct with an alleged environmental impact. For instance, could a factory that lawfully emits greenhouse gases (GHGs) pursuant to state and federal permits nevertheless be subject to a lawsuit asserting that the emissions violate a constitutional right to "clean air" or otherwise impede a "healthful environment" by contributing to climate change? Could the producer of lawful energy products such as gasoline or the manufacturer or seller of a car that consumes the fuel also be targeted in a lawsuit? What about the operation of a cattle farm that releases GHGs or other agricultural enterprises? Could a farmer's mere consumption of water during drought conditions be said to infringe upon a New Yorker's constitutional right to clean water?

If courts interpret New York's Environmental Rights Amendment broadly, and endorse private enforcement lawsuits without meaningful safeguards, the liability implications would be almost limitless. As this LEGAL BACKGROUNDER explains, judges have the power to give appropriate meaning to the amendment without allowing it to become a predicate for unsound litigation.

¹ N.Y. Const. Art. 1, § 19 (2021).

² See *Report and Recommendations Concerning Environmental Aspects of the New York State Constitution*, New York State Bar Ass'n *Env'tl. and Energy Law Section*, 38 PACE L. REV. 182, 188 n.9 (2017) (recommending adoption of environmental rights amendment as part of New York Constitution Bill of Rights "because such a right is appropriately viewed as on par with the other important rights protected in Article 1").

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Contextualizing New York’s Environmental Rights Amendment

New York is one of a handful of states to adopt a constitutionally based environmental protection amendment, and the only state to have done so in the past several decades.³ During the 1970s, five states— Illinois, Pennsylvania, Montana, Massachusetts, and Hawaii—adopted constitutional amendments.⁴ Rhode Island adopted an amendment in 1987.⁵

Each state’s environmental rights amendment uses different language, but all express the same general right to a clean and healthful environment. For example, Montana’s amendment establishes an inalienable “right to a clean and healthful environment and the rights of pursuing life’s basic necessities.”⁶ Massachusetts’s amendment similarly provides that “The people shall have the right to clean air and water, freedom from excessive and unnecessary noise, and the natural, scenic, historic, and esthetic qualities of their environment.”⁷ Hawaii’s amendment says, “Each person has the right to a clean and healthful environment, as defined by laws relating to environmental quality....”⁸

Like New York’s Environmental Rights Amendment, these provisions are often included as part of the respective state constitution’s Bill of Rights or Declaration of Rights.⁹ Some of these state constitutional provisions also explicitly address enforcement, while others are silent. Massachusetts and Rhode Island’s amendments, for instance, empower the state legislature to protect the constitutional right. Illinois’s amendment, which provides that the “public policy of the State and the duty of each person is to provide and maintain a healthful environment for the benefit of this and future generations,” similarly charges the legislature with enforcement.¹⁰

Hawaii’s amendment, in comparison, states that *any person* may enforce the constitutional provision, “subject to reasonable limitations and regulation as provided by law.”¹¹ The Hawaii Supreme Court has interpreted the amendment as conferring a protected property interest, but also has maintained the legislature’s broad discretion to balance environmental interests in pollution control and other environmental conservation and protection laws.¹² As a result, the amendment’s application has been limited mainly to ensuring some consideration of environmental impacts of proposed state action.¹³ The constitutional provision has generated relatively few lawsuits in the 40 years since its adoption.

Pennsylvania’s amendment, which provides that the “people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment,” has been

³ See *The Precedents and Potential of State Green Amendments*, Rockefeller Inst. of Gov’t, Center for Law & Policy Solutions (July 2021), at 5, <https://rockinst.org/wp-content/uploads/2021/07/CLPS-green-amendments-report.pdf>; Art English & John J. Carroll, *State Constitutions and Environmental Bills of Rights* (2015), <http://knowledgecenter.csg.org/kc/system/files/English%20Carroll%202015.pdf>.

⁴ See Ill. Const. Art. XI (adopted in 1970); Pa. Const. Art. I, Sec. 27 (adopted in 1971); Mont. Const. Art. II, Sec. 3 (adopted in 1972); Mass. Const. Art. 97 (adopted in 1972); Haw. Const. Art. XI, Sec. 9 (adopted in 1978).

⁵ See R.I. Const. Art. I, Sec. 17 (adopted in 1987).

⁶ Mont. Const. Art. II, Sec. 3.

⁷ Mass. Const. Art. 97.

⁸ Haw. Const. Art. XI, Sec. 9.

⁹ See Mass. Const. Art. 97; Mont. Const. Art. II, Sec. 3; Pa. Const. Art. I, Sec. 27; R.I. Const. Art. I, Sec. 17.

¹⁰ Ill. Const. Art. XI.

¹¹ Haw. Const. Art. XI, Sec. 9.

¹² See *Protect and Preserve Kahoma Ahupua’a Ass’n v. Maui Planning Comm’n*, 489 P.3d 408, 413 (Haw. 2021); *In re Application of Maui Elec. Co., Ltd.*, 408 P.3d 1, 13 (Haw. 2017).

¹³ See *Matter of Hawai’i Electric Light Co., Inc.*, 445 P.3d 673, 688-89 (Haw. 2019) (finding environmental organization had right to be heard at proceeding to address environmental impacts of proposed biomass facility); *Stop H-3 Ass’n v. Dole*, 870 F.2d 1419, 1429-32 (9th Cir. 1989) (finding Hawaii’s environmental rights amendment did not preclude construction of interstate highway project); *Fiedler v. Clark*, 714 F.2d 77, 80 (9th Cir. 1983) (stating legislative history of amendment “suggests the legislature was attempting to remove barriers to standing to sue, not to enlarge the subject matter jurisdiction of the federal courts”).

the subject of mixed judicial interpretations.¹⁴ During the first four decades following the amendment's adoption in 1971, Pennsylvania courts limited the viability of constitutional claims to cases in which the General Assembly had acted to define the values the amendment seeks to protect.¹⁵ During the past decade, however, the Pennsylvania Supreme Court has reexamined this right, and other provisions of the amendment establishing the Commonwealth as trustee of Pennsylvania's natural resources, to provide greater oversight of state actions with alleged environmental impacts.¹⁶ Pennsylvania courts, though, have rejected attempts to invoke this constitutional right as a means of requiring government action on important environmental issues such as climate change.¹⁷

Finally, Montana's amendment likewise generated modest litigation during the first several decades following its adoption in 1972.¹⁸ Early decisions by the Montana Supreme Court found that the amendment did not forestall development projects based on allegedly insufficient environmental impact assessments where local governments signed off or other state laws were followed.¹⁹ The state high court later interpreted the amendment, in conjunction with other state constitutional provisions, as providing a fundamental right that could subject certain state actions to heightened scrutiny.²⁰ Even so, the court has recognized significant safeguards on the exercise of this right, including a bar on the recovery of money damages in constitutional tort actions between private parties.²¹

New York's Environmental Rights Amendment Provides More Questions Than Answers

As indicated, the entirety of New York's Environmental Rights Amendment reads: "Each person shall have a right to clean air and water, and a healthful environment."²² The amendment does not explain the scope of the right, define any of its terms, or address its intended enforcement. It is comparatively more "bare bones" than other state constitutional provisions.

The judiciary will likely need to address basic aspects of this amendment, beginning with its intended enforcement. For instance, there is no indication of who has standing to invoke the constitutional right or whether the provision applies solely to state action or to the conduct of private actors (based inside or outside of New York). Assuming the right is meant to be enforced in some manner, must an action be predicated on some underlying statute or rule that more clearly defines or governs the environmental interest at issue? Do statutes of limitation preclude actions based on past conduct (perhaps when certain environmental impacts were less studied or otherwise less apparent), and if so, what are they?

Even when such threshold issues are determined, courts will need to parse the vagaries of the amendment's language. What constitutes "clean" air or water or a "healthful environment," and who

¹⁴ Pa. Const. Art. I, Sec. 27.

¹⁵ See *Commonwealth by Shapp v. National Gettysburg Battlefield Tower, Inc.*, 311 A.2d 588 (Pa. 1973); *Payne v. Kassab*, 312 A.2d 86 (Pa. Commw. Ct. 1973); see also *Pennsylvania Environmental Defense Found. v. Commonwealth*, 255 A.3d 289, 295 (Pa. 2021) (stating that earlier jurisprudence "largely neutered the ERA's protections").

¹⁶ See *Robinson Township v. Commonwealth*, 83 A.3d 901 (Pa. 2013) (plurality decision); *Pennsylvania Environmental Defense Found. v. Commonwealth*, 161 A.3d 911 (Pa. 2017).

¹⁷ See *Funk v. Wolf*, 144 A.3d 228 (Pa. Commw. Ct. 2016), *aff'd*, 158 A.3d 642 (Pa. 2017).

¹⁸ See *The Precedents and Potential of State Green Amendments*, *supra* note 3, at 15.

¹⁹ See *Montana Wilderness Ass'n v. Board of Health & Env'tl. Sciences*, 559 P.2d 1157 (Mont. 1976); see *id.* at 1161 (Haswell, J., dissenting) (arguing the majority's ruling "reduced constitutional . . . protections to a heap of rubble"); *Kadillak v. Anaconda Co.*, 602 P.2d 147 (Mont. 1979), *superseded by statute as stated in Park County Environmental Council v. Montana Dep't of Env'tl. Quality*, 477 P.3d 288 (Mont. 2020).

²⁰ See *Mont. Env'tl. Info. Ctr. v. Mont. Dep't of Env'tl. Quality*, 988 P.2d 1236 (Mont. 1999); *Park Cty. Env'tl. Council v. Mont. Dep't of Env'tl. Quality*, 477 P.3d 288 (Mont. 2020); *Clark Fork Coal. v. Montana Dep't of Nat. Res. & Conservation*, 481 P.3d 198 (Mont. 2021).

²¹ See *Shammel v. Canyon Res. Corp.*, 167 P.3d 886 (Mont. 2007); *Sunburst School Dist. No. 2 v. Texaco, Inc.*, 165 P.3d 1079 (Mont. 2007).

²² N.Y. Const. Art. 1, § 19 (2021).

decides this? What happens when the state certifies conduct as sufficiently “clean” or “healthful,” or when state actors cannot reach consensus? Might the right to a “healthful environment” encompass interests beyond the natural environment, such as commercial activity that enables New Yorkers to obtain jobs and prosper or otherwise pursue “life’s basic necessities”?²³

Some New York lawmakers appeared to recognize these fundamental concerns about the Environmental Rights Amendment. As state Senator Dan Stec observed, “I’m all for clean air and clean water. Who isn’t? But in the face of ambiguity, you will have distrust, you will have lawsuits, you will have costs”²⁴ If courts fail to establish clear boundaries on the scope of this new right, these costs will likely become substantial and unpredictable, to the point where unchecked litigation could jeopardize many meaningful efforts to protect and improve the environment.

It Is Up to Judges to Identify a Sound Path Forward

New York’s Environmental Rights Amendment has the potential to provide an important safeguard that facilitates consideration of environmental impacts in a way that benefits all New Yorkers. It also has the potential to facilitate abusive litigation if interpreted too broadly. The judiciary will likely need to identify a sound path forward. There are several key principles that may help in doing so.

First, judges can and should learn from the law and experiences of other states with a constitutionally based environmental protection amendment. A common theme in judicial interpretation of amendments that do not expressly provide for enforcement by the state legislature is to proceed with caution. As discussed, state high courts have generally adopted restrictive initial interpretations that allow for gradual evolution over time (as with many other constitutional rights) instead of opening the proverbial “Pandora’s Box” at the outset and leaving few options for reining in overbroad interpretations. This consideration is particularly important in the case of New York’s amendment because it is shorter and less defined than other states.

Second, a core concept in the interpretation and application of all state environmental rights amendments is respect for the legislature’s prerogative in setting environmental policy. Indeed, this is why some state constitutional provisions make explicit that only the legislature may enforce the right. Allowing private persons to challenge any legislative decision with an alleged environmental impact in which that individual disagrees would undermine the basic functioning of representative government and potentially create chaos for any economic development initiatives. Lawsuits could end up impeding “green” initiatives, such as construction of a wind farm, based on individuals’ claims the project will not be carried out exactly as they prefer.

Third, any broad interpretation of the amendment will have ripple effects beyond a particular case, which raises significant potential for lawsuit abuse. For example, allowing private actors to sue one another in the context of a large project, such as a power plant, could open the door to constitutional tort actions in smaller, comparatively less important situations, such as a spat between two neighbors. New York voters probably did not envision the amendment generating constitutional tort claims over a something like a neighbor’s burning of leaves in the backyard, but the amendment’s application could give way to harassing or otherwise abusive lawsuits if not properly contained.

Judges should tread carefully when interpreting New York’s Environmental Rights Amendment. It proposes to facilitate more robust consideration of environmental impacts for many state initiatives, but also could create more problems than it solves.

²³ Mont. Const. Art. II, Sec. 3.

²⁴ Abby Carnviale, *What New York’s Environmental Rights Amendment Could Mean for Waterfront Communities*, Spectrum News 1, Oct. 27, 2021, <https://spectrumlocalnews.com/nys/hudson-valley/news/2021/10/27/ny-s-environmental-rights-amendment-goes-to-voters-tuesday> (quoting state Senator Dan Stec).