New York Becomes the Third State to Adopt a Constitutional Green Amendment

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On November 2, 2021, New York State voters passed a ballot measure enshrining in the State Constitution the right to a “healthful environment.” The new “green amendment” or “Environmental Rights Amendment” (ERA) places New York alongside six other states with similar provisions in their state constitutions, while several others have considered green amendments. These amendments may introduce new avenues for those aiming to enforce environmental laws in anticipation of harm and
may invite novel environmental protection litigation claims.

Key Takeaways

- New York joins Pennsylvania and Montana in adding an affirmative right to a clean environment in its state constitution. ERAs have been used to strike down conflicting state and local laws, which can impact related environmental permits. For example, in 2020, the Montana Supreme Court upheld a District Court decision finding that 2011 amendments to the governing Montana Environmental Protection Act unconstitutionally prevented equitable relief in violation of the ERA, making it possible to void the exploration license challenged in the case.

- As informed by implementation of the Pennsylvania and Montana ERAs, the regulated community and industry actors in New York should assess how those opposing their operations might use the new amendment to develop creative legal arguments and claims in conjunction with evolving environmental, climate, and environmental justice laws.

Background

The new green amendment, approved last month by New York voters, will become the 16th right enumerated in the New York Constitution’s Bill of Rights. In accordance with state law, voters approved the amendment following passage by wide margins in two concurrent legislative sessions. The Amendment provides, in its entirety, “Each person shall have a right to clean air and water, and a healthful environment.” N.Y. Const., Art. 1, Sec. 19.

The amendment arose out of support from legislators and state citizens alike, who voiced concerns that existing state environmental laws have allowed pollution to go unaddressed. State legislators argued that existing environmental laws did not sufficiently protect disadvantaged communities -- particularly those near pollutant “hotspots.”

Green Amendments in Other States

With the approval of this amendment, New York becomes the third state in the nation to adopt environmental rights in its Bill of Rights, following Pennsylvania and Montana (which did so in 1971 and 1972, respectively). Four other states – Hawaii, Illinois, Massachusetts and Rhode Island – have constitutional provisions regarding environmental protections, although not in their Bill of Rights. In addition, several state legislatures have proposed green amendments, including Iowa, Kentucky, Maine, Maryland, New Jersey, New Mexico, Oregon, Vermont, Washington, and West Virginia. The amendment in New York most closely resembles ERAs in Pennsylvania and Montana, which have been the subject of decades of case law that have helped define their scope.

For the first few decades following its enactment, Pennsylvania courts interpreted the ERA in ways that provided few, if any, rights or protections beyond those found in other Pennsylvania laws. More recently, the Pennsylvania Supreme Court has
interpreted the ERA to

[I]mpose[] two basic duties on the Commonwealth as the trustee. First, the Commonwealth has a duty to prohibit the degradation, diminution, and depletion of our public natural resources, whether these harms might result from direct state action or from the actions of private parties. Second, the Commonwealth must act affirmatively via legislative action to protect the environment.[1]

The PEDF court held that the public trust component of the ERA required, in general, application of principles of Pennsylvania trust law. As applied to the facts of that case, the court held that payments to the Commonwealth for oil and gas drilling on state lands must be used for environmental conservation purposes.

As in Pennsylvania, we can expect New York’s state courts to play a large role in interpreting the amendment’s scope and the extent to which it may be applied to affect state and local laws and permits, or to redress alleged or anticipated environmental impacts.

**ERA in Context of New York’s Growing Focus on Climate and Environmental Justice**

Passage of the ERA is one of several recent and significant climate and environmental law developments in New York State. These include the 2019 passage of the broad-reaching Climate Leadership and Community Protection Act (CLCPA), which mandates significant reductions in greenhouse gas emissions and requires that all electricity be derived from emissions-free sources by 2040. In 2020, New York also codified its environmental justice policy, building upon the U.S. Environmental Protection Agency’s definition and committing that “all people, regardless of race, color, religion, national origin or income, have a right to fair treatment and meaningful involvement in the development, implementation and enforcement of laws, regulations and policies that affect the quality of the environment.” As recently as last month, New York’s Department of Environmental Conservation applied the CLCPA to deny permits for two natural gas plants seeking to replace older power stations with newer ones. The New York State Department of Environmental Conservation found that the gas plant projects “could exacerbate and extend the use of fossil fuels to produce electricity, contrary to the requirements of [the CLCPA].”

New York’s new ERA may provide an energized and growing group of climate and environmental justice advocates with new grounds for bringing claims where they believe that the “right to clean air and water, and a healthful environment” is threatened. In Montana, for example, 16 youth plaintiffs filed a climate lawsuit last year, relying on the state’s green amendment to challenge the constitutionally of Montana’s state energy policy. Plaintiffs are seeking a declaration that their right to a clean and healthful environment includes a right to a stable climate system and demand that the state develop and implement a plan to reduce greenhouse gas emissions. The case remains pending at present, but any successes by the plaintiffs in that action may provide a roadmap for similarly situated plaintiffs in New York under the new ERA.
The full extent of the ERA’s impact in New York will be shaped, in large part, by the courts in coming years, but it is a safe bet that plaintiffs will take an expansive view and attempt to rely on it in support of broadening environmental claims.


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