

New York Environmental Rights Amendment: Historic Development and Practical Application

Air & Waste Management Association

Enrichment Seminar

April 28, 2022

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AGENDA

- ▶ The Environmental Rights Amendment
- ▶ Historic View of Rights to the Natural Environment
- ▶ Practical Application



New York Constitution

Article I §19

§ 19. Environmental rights

Each person shall have a right to clean air and water, and a healthful environment.

N.Y. Const. art. I, § 19



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All in Favor? : All Opposed?

▶ Advocates:

- ▶ NY League of Conservation Voters
- ▶ Delaware Riverkeeper Network
- ▶ Etc.

▶ Opponents

- ▶ NY Business Council
- ▶ NY Farm Bureau
- ▶ Etc.



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The Magna Carta & the Charter of the Forest

- ▶ Magna Carta introduced in 1215; Charter of the Forest first introduced in 1217 and revised in 1225
- ▶ Separate restatement of the rules governing “forests”
- ▶ Reduced royal claims, established rights of use and access, clarified restrictions and responsibilities, limited penalties, and created courts



The Public Trust Doctrine

- ▶ Rooted in Roman civil law: “by the law of nature these things are common to all mankind: the air, running water, the sea, and...the shores of the sea”
- ▶ In the US, traditionally applied to navigable waters, tidal areas, submerged lands, and wildlife
 - ▶ Prevailing theory has been that PTD is a state doctrine, not federal
- ▶ Recent attempts to invoke PTD to address climate change
 - ▶ *Juliana v. U.S.*, Dkt. 6:15-cv-01517 (D. Or)
 - ▶ *Chernaik v. Brown*, 367 Or. 143 (Or. 2020)



Pennsylvania

- ▶ Response to decades of significant industrial harm to the environment
- ▶ 1971 Amendment by voter referendum after legislative passage
- ▶ Early Cases
 - ▶ *Commonwealth v. National Gettysburg Battlefield Tower, Inc.*, 311 A.2d 588 (Pa. 1973)
 - ▶ *Payne v. Kassab*, 312 A.2d 86 (Pa. Commw. Ct. 1973)
- ▶ Modern Revival
 - ▶ *Robinson Township v. Commonwealth*, 623 Pa. 564 (Pa. 2013)
 - ▶ *PEDF v. Commonwealth*, 161 A.3d 911 (Pa. 2017)
 - ▶ *PEDF v. Commonwealth*, 609 M.D. 2019 (Pa. Commw. 2021)



Montana

- ▶ 1972 Constitutional Convention
 - ▶ Preamble and Inalienable Rights
 - ▶ Right to Know & Right to Participate
- ▶ *Montana Environmental Law Center v. Montana Dep't of Environmental Quality*, 296 Mont. 207 (Mont. 1999)
- ▶ *Lucky Minerals* and the 2011 MEPA Amendment
 - ▶ *Park County Environmental Council v. Montana Dep't of Environmental Quality*, 402 Mont. 168 (Mont. 2020)
- ▶ *Held v. State of Montana*, CDV-2020-307 (Mont. Dist. Ct.)



“Green Amendments” versus “Constitutional Provisions”

- ▶ The [National Caucus of Environmental Legislators](#) distinguishes “Green Amendments” in Bills of Rights from other constitutional provisions
- ▶ [Green Amendments for the Generations](#), an advocacy group, sets out four key features that advocates should seek to include:
 - ▶ Inclusion in the Bill of Rights
 - ▶ Secure individual rights to essential attributes (pure water, clean air, healthy ecosystems, stable climate, biodiversity, and cultural, esthetic, or scenic values)
 - ▶ Make the State the trustee
 - ▶ Rights should be inherent, inalienable, inalienable, and self-executing



States with Constitutional Provisions

- ▶ Hawaii
 - ▶ 1978 Amendment
 - ▶ 1988 Amendment
- ▶ Illinois
 - ▶ Dual provisions: “Public Policy” and “Individual Right”
- ▶ Massachusetts
 - ▶ 1972 ballot initiative
 - ▶ Established individual right and restrictions on conservation takings
- ▶ Rhode Island
 - ▶ Very limited, addressing seashore and fishing rights
- ▶ ...and more?
 - ▶ Arizona
 - ▶ New Mexico
 - ▶ Florida



NY: SEQRA and Forever Wild

- ▶ State Environmental Quality Review Act (“SEQRA” or “SEQR”)
 - ▶ Procedural, not prescriptive; requires consideration of environmental impacts
 - ▶ Applies to government action, and impacts private actions that require public involvement (permitting, zoning variances, funding, etc.)
- ▶ Article XIV “Conservation”
 - ▶ Addresses forests, wildlife, reservoirs, and agricultural lands
 - ▶ “Forever Wild” provision
 - ▶ Prohibits any use of the Adirondack & Catskill forest preserves other than as wild forest land, with specified exceptions
 - ▶ Provides for enforcement by the People or by citizens



The Green Amendment in New York Process to Ballot

Timeline of New York State Legislature Votes for a State Constitutional 'Green Amendment'



<https://rockinst.org/blog/new-yorks-potential-green-amendment-a-primer/>



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Ballot Proposal 2:

FORM OF SUBMISSION OF PROPOSAL NUMBER TWO, AN AMENDMENT Right to Clean Air, Clean Water, and a Healthful Environment

The proposed amendment to Article I of the New York Constitution would establish the right of each person to clean air and water and a healthful environment. Shall the proposed amendment be approved?

ABSTRACT OF PROPOSAL NUMBER TWO, AN AMENDMENT Right to Clean Air, Clean Water, and a Healthful Environment

The purpose of this proposal is to protect public health and the environment by adding the right of each person to clean air and water and a healthful environment to the Bill of Rights in Article I of the New York Constitution.

TEXT OF PROPOSAL NUMBER TWO, AN AMENDMENT CONCURRENT RESOLUTION OF THE SENATE AND ASSEMBLY

proposing an amendment to article I of the constitution, in relation to the right to clean air and water and a healthful environment

Section 1. Resolved (if the Assembly concur), That article I of the constitution be amended by adding a new section 19 to read as follows:

§ 19. Environmental rights. Each person shall have a right to clean air and water, and a healthful environment.

§ 2. Resolved (if the Assembly concur), That the foregoing amendment be submitted to the people for approval at the general election to be held in the year 2021 in accordance with the provisions of the election law.

Explanation – Matter underscored is new; matter in brackets [] is old law to be omitted.



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“Each Person” ...

- ▶ Differs from Pennsylvania and Montana



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“...shall have a right...”

“Remedy defines the right”

Cause of Action

“Constitutional Tort”



“Remedy

A remedy is a form of court enforcement of a legal right resulting from a successful civil lawsuit. Remedies fall into three general categories:

Damages - monetary compensation for the plaintiff's losses, injury, and/or pain or restitutionary measures designed to restore the plaintiff's status to what it was prior to the violation of his or her rights,

Coercive remedies - requiring a party to do or omit doing a specific act through injunctive relief or a court order of specific performance (a court mandates that the party fulfill contractual obligations. See Contracts).

Declaratory judgment - the court determines individual rights in a specific situation without awarding damages or ordering particular action.”

<https://www.law.cornell.edu/wex/remedy>



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"....to clean..."

Who determines what is "clean"

Department of Environmental Conservation?

Department of Health?

Battle of the experts?

"Courts regularly defer to the governmental agency charged with the responsibility for administration of [a] statute in those cases where interpretation or application involves knowledge and understanding of underlying operational practices or entails an evaluation of factual data and inferences to be drawn therefrom, and the agency's interpretation is not irrational or unreasonable"

New York State Superfund Coal., Inc. v. New York State Dep't of Env't Conservation,
18 N.Y.3d 289, 296, 961 N.E.2d 657, 662 (2011)

“...air and water....”

Ambient Air (i.e., natural environment)?

Indoor air?

Water

in Natural Environment?

Hoosick Falls

At the tap?

lead pipes

“...and a healthful...”

Differ from “clean” ?

“beneficial to health of body or mind” Merriam Webster

<https://www.merriam-webster.com/dictionary/healthful>

“helping to produce good health”

<https://dictionary.cambridge.org/us/dictionary/english/healthful>

“ ... environment ”

(I) **Environment** means the physical conditions that will be affected by a proposed action, including land, air, water, minerals, flora, fauna, noise, resources of agricultural, archeological, historic or aesthetic significance, existing patterns of population concentration, distribution or growth, existing community or neighborhood character, and human health.

N.Y. Comp. Codes R. & Regs. tit. 6, § 617.2

Process Issues

1. Cause of Action

- a. Article 78 Proceeding
- b. "Constitutional Tort" (money damages)

2. Jurisdiction

- a. Court of Claims
- b. Supreme Court Article 78

3. Standing

4. Defendants

Government

Private Parties ("Necessary and indispensable parties")

5. Defenses:

- a. Enforcement discretion

6. Remedy

7. Enforcement

Cases To Watch

Fresh Air for The East Side v New York

Monroe County by Knauf Shaw, LLP

INTRODUCTION

1. In this action, Plaintiff complains, *inter alia*, the constitutional rights of its members (the “Members”) to clean air and a healthy environment, guaranteed by Section 19 of Article I of the New York Constitution (the “Green Amendment”), are being violated as a result of the improper operation of the High Acres Landfill (“the Landfill”), located at 425 Perinton Parkway in the Town of Perinton, Monroe County, and in the Town of Macedon, Wayne County, in the State of New York, owned and operated by Defendant Waste Management of New York, L.L.C. (“WMNY”) in a manner that negatively affects air quality.

WHEREFORE, Plaintiff respectfully requests this Court award the following relief: (1) declare the Defendants are violating Plaintiff’s constitutional rights under the Green Amendment in Article I §19 of the New York State Constitution to clean air and a healthful environment by causing the Odors and Fugitive Emissions and the emissions of GHGs into the atmosphere, furthering the cumulative impact of climate change; and (2) ordering the immediate proper closure of the Landfill, or alternatively directing Defendants to immediately abate the Odors and Fugitive Emissions in the Community; and (3) granting such other further relief as this Court deems just and proper, including Plaintiff’s costs, reasonable attorney’s fees, and disbursements pursuant to CPLR Article 86.



Questions?

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