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Environmental Amendment to NYS Constitution Will Be on the Ballot in November

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By Christopher Rizzo and Karen E. Meara. Published in the *New York Law Journal*.

This November New York state voters will be asked to decide whether to amend the New York State Constitution to create an individual right to clean air, clean water and a healthy environment. The proposed environmental rights amendment (the Amendment) would add a new §19 to Article 1–the section titled "bill of rights." If history is any guide, voters are likely to approve it. New York voters have approved 19 of the 25 ballot amendments referred by the legislature since 1995. While the clear intent is to increase protections for individual New Yorkers from environmental hazards ranging from tainted drinking water to asthma-inducing air pollution, the Amendment is vaguely worded–the entire text reads "Each person shall have a right to clean air and water and a healthful environment"–and thus its full implications are unclear and subject to judicial interpretation. This article considers what the Amendment might mean for New Yorkers, lawyers and courts.

Amendment Process

Proposed amendments to the Constitution may only be sent to the voters for a referendum if they are approved by both houses of the New York state legislature in two consecutive legislative sessions. See NYS Const. Art. XIX §1. The Amendment was first introduced during the 2017-2018 legislative session and passed by the Assembly, but never made it out of committee in the Senate. It was reintroduced in the 2019-2020 legislative session and approved by both houses. Finally, as required under Article XIX, it was sent again to the legislature after the 2020 elections and approved by lopsided votes of both houses early in the 2021-2022 legislative session.

A Constitutional Right to A Clean Environment?

Environmental protection is a concept utterly lacking in the U.S. Constitution, although it is included in the constitutions of many other nations. In contrast, New York's constitution directly addresses environmental issues. It includes provisions requiring the conservation of certain public lands and requiring the legislature to "protect and conserve natural resources." Article XIV, §4 specifically requires the legislature to "include adequate provision for the abatement of air and water pollution and of excessive and unnecessary noise, the protection of agricultural lands, wetlands and shorelines, and the development and regulation of water resources," and §5 allows any citizen to bring suit to enforce violations of §4. However, the few New York courts that have interpreted these provisions have held that, while they impose an affirmative duty on the legislature and state agencies to act on conservation matters, those state actors retain substantial discretion in how to do so. In other words, New Yorkers do not, presently, have an affirmative right to a clean environment–at least according to courts.

So why now? As previously pointed out in these pages by Prof. Katrina Fischer Kuh, it may have a lot to do with the appalling tainted drinking water case from Hoosick Falls, N.Y. There, a resident concerned about high rates of cancer in the community six years ago tested the drinking water and found high levels of perfluorooctanoic acid (PFOA). Because the contaminant was not then regulated by federal or state drinking water regulations, residents had little recourse other than begging the legislature and government agencies to take action. Increasing

awareness of environmental justice issues and income-based disparities in water quality, air quality and respiratory health also serve as a motivating factor–the "justification" in the Senate's 2021 memo in support cited both "recent water contamination and ongoing concerns about air quality" as a basis for establishing a "fundamental right."

Experience From Other States

Federal courts have uniformly held that the U.S. Constitution contains no affirmative environmental rights. States courts have reached differing results, holding in a few instances that state constitutions do implicitly provide affirmative rights to a clean environment. The authors' survey of state court litigation indicates over 100 court decisions addressing explicit and implicit environmental rights in state constitutions. The decisions have varied wildly and not always in the way red state/blue state politics might indicate. For example, California has no express environmental protections in its constitution and courts have held that the document contains no implicit environmental right either. Alabama courts reached a different conclusion and have held that its state constitution does contain implicit environmental rights. Most of the litigation comes from the few states with explicit environmental rights in their state or territorial constitutions–including Hawaii, Illinois, Massachusetts, Montana, the Northern Mariana Islands, Pennsylvania and Rhode Island. Of those, courts have been most likely to enforce the environmental rights in Hawaii, Pennsylvania and Montana.

The presence of explicit environmental rights has proven to be very meaningful in those three states. The most instructive example is from Pennsylvania. Its Environmental Rights Amendment to the state constitution states: "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. Pennsylvania's public natural resources are the common property of all the people, including generations to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all people." In 2012, as interest in Pennsylvania's considerable Marcellus Shale gas reserves exploded, the State passed "Act 13", which in part banned local regulation of fracking, including through zoning. One provision declared that such activities must be permitted as-of-right in all zoning districts. Citizens and certain towns sued the state, claiming in part that the law violated the Environmental Rights Amendment. The state's top court agreed. It held that the state could not, in the name of advancing a certain industry, both usurp municipal authority to regulate that industry consistent with the Environmental Rights amendment and ignore its own affirmative obligations to comply with that amendment. It also held that citizens could litigate to enforce the rights guaranteed under Pennsylvania's Environmental Rights Amendment. *Robinson Twp. v. Commonwealth*, 83 A.D.3d 901 (Sup. Ct. Pa. 2013); see also *Montana Environmental Information Center v. Mt. Department of Environmental Quality*, 296 Mont. 207 (Sup. Ct. Mt. 1999) (statute authorizing environmental agency's issuance of a mineral exploration permit allowing discharges of pollutants to nearby waters without non-degradation review violated state's environmental amendment).

Colorado's top court reached the completely opposite result in 2016, in part because the state constitution contains no affirmative environmental rights or environmental amendments. The City of Longmont banned fracking and disposal of fracking wastes. The state's oil and gas trade group sought a declaratory judgment that state law preempted local regulation of oil and gas drilling. The court agreed, stating: "[t]he Colorado Constitution does not include a similar provision [to Pennsylvania], and the citizen intervenors have not cited, nor have we seen, any applicable Colorado case law adopting the public trust doctrine in this state. We therefore conclude that the inalienable rights provision of the Colorado Constitution [reserving unnamed rights to citizens] does not save" the local law. *City of Longmont v. Colorado Oil & Gas Ass'n*, 2016 Co. 29, 62 (Sup. Ct. Colorado 2016).

What Is the Amendment Likely To Mean for New Yorkers?

In the best-case scenario, the amendment will push the legislature to do more to ensure that all New Yorkers are protected from environmental harms (and give citizens an enforceable right if the state fails to act.) The vagueness of the provision, however, means courts will have a lot of interpreting to do and that may produce some unintended consequences. There is a very real possibility that municipalities will invoke the

constitutional right to a "healthful environment" to restrict some of the most controversial land-use initiatives in the state–affordable housing, high-density development, wind and solar facilities, electric transmission lines, etc. However, if government proponents of these initiatives include vigorous environmental protections and public review procedures, they will probably avoid the overreach that doomed the Pennsylvania fracking legislation in *Robinson Township*. We will see if courts agree.

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