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EXPLAINER

New York’s New Constitutional Environmental Bill of Rights: Impact and Implications

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Introduction

On November 2, 2021, New York voters approved an Amendment to the State Constitution’s Bill of Rights providing that: “Each person shall have the right to clean air and water, and to a healthful environment.”² In those sixteen words, the right to a healthy environment was, for the first time, cloaked in constitutional protection in New York and deemed the equivalent to the sixteen current constitutional guarantees in the state Bill of Rights. Those rights include freedom of speech, trial by jury, religious liberty, habeas corpus, compensation for taking of private property, equal protection of law, and security against unreasonable searches and seizure.

There has been considerable commentary on the potential impact of the new Amendment, commonly referred to as the “Green Amendment.” The question yet unresolved is whether the Green Amendment will be no more than an abstract statement of a societal desire or a meaningful mechanism for citizens to safeguard their environment. This explainer outlines several facets of that question.

Why Have a Green Amendment?

In many ways, the New York State Constitution offers greater protection than its federal counterpart. The New York State Constitution encompasses positive rights in addition to negative rights. Positive rights provide citizens with a right to certain governmental actions, including in

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² N.Y. CONST., Art 1, § 19.

New York: welfare, education, and now a healthful environment. In contrast, negative rights found in the Federal Bill of Rights only guarantee protection against government action. The distinction is significant, between what the government cannot do and what it must do.³

Why would New York, a state whose environmental safeguards encompass thousands of regulations enforced by numerous state and local entities, need a new statement of environmental protection? It may be that the Green Amendment will provide a mechanism for citizen enforcement, including compelling state involvement, to address unresolved environmental issues. New York's Environmental Conservation Law permits citizens to bring a suit themselves only when the Department of Environmental Conservation has failed to enforce the existing environmental laws and regulations.⁴ The Green Amendment, by contrast, appears to offer individuals the opportunity to go further than the existing law, but exactly how much further is unclear.

The arguments likely to be asserted by those who wish to narrow the impact of the Green Amendment and those who wish to broaden its reach, are numerous. Several of the most obvious are addressed in the sections that follow.

Is the Green Amendment Self-Executing?

State and private entities called to defend a lawsuit based on the Green Amendment will likely assert that the provision cannot be “self-executing.” In other words, they will argue that the Green Amendment does not do anything by itself, but will only be effective after more implementing legislation is passed. That argument, which has been raised in connection with other constitutional amendments, is that an amendment requiring expenditure of public funds untethered to implementing legislative or executive action fundamentally shifts the development of state policy to the judiciary and away from the legislative and executive branches, improperly allowing the judiciary to reset state priorities and impact the state treasury.

Courts have accepted arguments that constitutional provisions are not “self-executing” with respect to other constitutional guarantees. For example, Article I, Section XI of the New York State Constitution requires, “*That the legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated.*” (Emphasis added). The New York Court of Appeals has interpreted this to mean that “the state offers all children the opportunity for a sound basic education,” but courts must still “*defer to the Legislature in matters of policymaking particularly in a matter so vital as educational financing.*”⁵ Similarly, Article XVII, Section 1 of the New York State Constitution provides that “The aid, care and support of the needy are public concerns and shall be provided by the state and such of its subdivisions, and in such manner and *by such means as the legislature may from time to time determine.*” (Emphasis added).

³ Ava Ayers and Scott N. Fein, PROTECTIONS IN THE NEW YORK STATE CONSTITUTION BEYOND THE FEDERAL BILL OF RIGHTS (2017), <https://governmentlawcenter.omeka.net/items/show/308>.

⁴ See N.Y. ECL § 71-1311.

⁵ *Campaign for Fiscal Equity v. State of New York*, 100 N.Y.2d 893, 925 (2003) (emphasis added).

The contrary argument is that the general rule is that constitutional provisions are presumptively self-executing.⁶ In contrast to the constitutional provisions referenced above, which explicitly reference further action by the legislature, there is no mention in the text of the Green Amendment of involvement of the legislature or legislative process as a predicate to implementation. Consequently, based on the plain text, it would seem that the Green Amendment is enforceable without additional legislation.

What does “clean air and water, and a healthful environment” mean?

The breadth and lack of specificity in the text of the Green Amendment has prompted concern among some.⁷ What do the phrases “clean air and water” and “healthful environment” mean in concrete terms? What is its scope, and how will courts determine whether the environment has been impinged upon? What if the source of the pollution was operating lawfully under New York law before the Green Amendment was passed? In the absence of guidance in the text of the Green Amendment, courts may be tempted to look to existing state and federal environmental regulations to provide the standard in cases in which a violation of the Amendment’s provisions is alleged.

However, if the courts’ application of the Green Amendment to existing activity is guided by current environmental statutes and regulations, the impact of the Amendment may prove to be illusory or redundant. In other words, if existing standards are used to determine what activities are allowed by the Green Amendment, then the addition of the Amendment to the New York State Constitution will not have raised the standard in any practical sense.

These views may have some merit, but at least two tangible benefits of the Green Amendment would nonetheless exist even if current environmental law guides how courts interpret what “clean air and water, and a healthful environment” means: (i) the Green Amendment may strengthen a community’s ability to compel the state to mitigate environmental problems that the State has not yet addressed, by providing a new cause of action beyond what is in the Environmental Conservation Law, and (ii) the Amendment may require the State to pause and reflect before enacting legislation and regulations that potentially infringe on this new constitutional right. As Professor Nicholas Robinson of Pace University noted, it is conceivable that citizens impacted by an as-of-yet unregulated hazardous contaminant or circumstance could now sue to compel the State to intercede.⁸ Ultimately, if existing government regulations prove inadequate in the face of emerging harms, the Green Amendment may provide a remedy.

Is the Green Amendment actionable against private parties?

An additional question is whether the Green Amendment is actionable against private parties. In other words, who can be sued for violating someone’s right “to clean air and water, and a healthful environment”? The Amendment allows enforcement against the government, this much

⁶ *Brown v. State*, 89 N.Y.2d 172, 186 (1996) (citing *People v. Carroll*, 3 N.Y.2d 686 (1958)).

⁷ See, e.g., The Business Council, *The Business Council Opposes Proposition 2-Environmental Rights Amendment*, N.Y. Bus. Council. (Oct. 27, 2021), <https://www.bcnys.org/news/business-council-opposes-proposition-2-environmental-rights-amendment>.

⁸ Nicholas A. Robinson, *Environmental Human Rights in New York’s Constitution* at 12, N.Y. St. B.A. J. (Oct. 2017), <http://digitalcommons.pace.edu/lawfaculty/1079/>.

is unambiguous. It appears less likely that the courts will allow an action to prevent pollution to be brought directly against private entities under the Green Amendment.

A comparison with several other provisions of the New York State Constitution informs this view. Article I, Section 11 provides that “No person shall because of race, color, creed or religion be subjected to any discrimination in his or her civil rights *by any other person or any firm, corporation, or institution*, or by the state or any agency or subdivision of the state.” (Emphasis added). In contrast, Article I, section 3, pertaining to the free exercise of religion, and Article I, section 8, protecting freedom of the press, make no reference to private entities and, with certain limited exceptions, have been found to impose a restriction only on the government.⁹

The proposition that New York’s Green Amendment applies only to government actors will likely soon be tested. In what appears to be the first case seeking relief under the Amendment, the plaintiff included as party defendants the private entity that owns and operates the landfill whose permit is being challenged, in addition to governmental entities—New York State, the New York State Department of Environmental Conservation, and New York City.¹⁰ At the time of this writing, the case is in the early stages of litigation. It seems inevitable, however, that the private defendant will move to dismiss the claims against it on this basis and that the courts will begin to address the issue.

Who May Use the Green Amendment to Bring a Lawsuit?

Does the Green Amendment mean that anyone at all can bring a lawsuit to protect the environment? Probably not.

Typically, citizens seeking to bring a lawsuit based on an alleged constitutional violation need to demonstrate “standing,” a legal term of art roughly meaning that they are personally affected by the action and that prevailing in their suit would solve their problem. Standing to commence an action under the Green Amendment will likely comport with existing law on when plaintiffs may bring environmental lawsuits.

Ordinarily, a litigant must establish an “injury-in-fact,” i.e. that they are personally affected, through a showing of actual or imminent harm particular to themselves. The concept has been broadened in some measure in environmental cases to provide that “a person who can prove that he or she uses and enjoys a natural resource more than most other members of the public has standing . . . to challenge a governmental action.”¹¹ In certain instances, the concept has been broadened even further, with courts holding that standing limitations “should not be heavy handed” such that “a showing of special damage or actual injury is not always necessary to establish a party’s standing” and “in some instances, the party’s particular relationship to the subject of the action may give rise to a resumption of standing.”¹²

⁹ See 20 N.Y. JUR.2D CONSTITUTIONAL LAW § 263.

¹⁰ *Fresh Air Fund for Eastside Inc. v. The State of New York et al.*, Docket No. 2, Index No. E2022000699 (N.Y. Sup. Ct. Monroe County, Jan. 28, 2022).

¹¹ *Matter of Save the Pine Bush Inc. v. Common Council of the City of Albany*, 13 N.Y.3d 297, 301 (2009).

¹² *Har Enterprises v. Town of Brookhaven*, 74 N.Y.2d 524 (1989).

Similarly, the existing rule governing when a person or company can participate in ongoing litigation (referred to as “intervention”) presumably will apply. Intervention is typically allowed when a private party may be adversely impacted by a lawsuit.¹³ More specifically, New York’s Civil Practice Law and Rules provide that, “[A]ny person shall be permitted to intervene in any action when the representation of the person’s interest by the parties is or may be inadequate and the person is or may be bound by the judgment.”¹⁴

What Are the Implications of the Green Amendment on Environmental Justice?

The concept of environmental justice seeks to ensure that no single community, particularly low income and minority communities, will bear a disproportionate share of the adverse environmental consequences from property development and industry.¹⁵ The pursuit by communities of environmental justice has not been without its challenges. Impacted communities need to organize, locate funds to underwrite their effort, and oppose often well-funded project applicants who will maintain that their proposals satisfy existing environmental regulations. The Green Amendment may provide impacted communities an additional tool to advance their views. Not only will these communities have the opportunity to demonstrate in the regulatory process that the environmental footprint of a proposed project may have a disproportionate impact, but they now also may assert that the project would contravene the community’s constitutional right to a healthy environment.

Conversely, there is also a possibility that the Green Amendment may be used to block changes designed to help low-income New Yorkers. For example, higher-income communities opposed to the construction of new low-income housing in their area may argue that increased housing density that comes with new emissions from vehicles and buildings may impinge upon their fundamental right to a healthy environment.

Can Citizens Receive Monetary Compensation Based on Violations of the Green Amendment?

What if, despite the Green Amendment, New York State or its localities approve permits for environmentally destructive activities? What if, faced with an emerging environmental issue, New York State or its localities choose to do nothing? Under certain circumstances, New York courts recognize an implied cause of action, including one for compensatory damages (i.e. an award of money), based upon a violation of the New York State Constitution.¹⁶ However, the circumstances permitting a suit for money damages are limited. An action seeking recovery for a “constitutional tort,” in other words a constitutional violation for which someone can sue the government, can be brought only when there is no other remedy available or the claim is not duplicative of another statutory or common law cause of action.¹⁷

¹³ CPLR 1013.

¹⁴ CPLR 1012.

¹⁵ See generally, Ken Kimmell, Alaina Boyle, Yutong Si & Marisa Sotolongo, A USER’S GUIDE TO ENVIRONMENTAL JUSTICE: THEORY, POLICY, & PRACTICE, NORTHEASTERN UNIVERSITY SCHOOL OF PUBLIC POLICY AND URBAN AFFAIRS, <https://cssh.northeastern.edu/policyschool/wp-content/uploads/sites/2/2021/07/Users-Guide-to-Environmental-Justice-6.22.21-clean.pdf>

¹⁶ *Brown v. State of New York*, 89 N.Y.2d, 172, 176 (1996).

¹⁷ *Martinez v. City of Schenectady*, 97 N.Y.2d 78, 84 (2001).

What does that mean for suits for damages based on the Green Amendment? It's fair to suggest that, if a common law remedy embraced in statute is not readily available to address an environmental concern or the concern is ignored by the government, the Green Amendment may provide a cause of action giving rise to money damages from the State or locality. At the very least, the prospect that damages may be awarded to a plaintiff could serve as catalyst for state agencies and local governments to take the concerns about environmental harms more seriously at the outset.

Will the Green Amendment Impact Local Control Over Land Use?

Some New York localities have expressed concern that the Green Amendment could erode their land use oversight authority. At this early stage, the implications are unknown, but several observations bear note. First, New York's State Environmental Quality Review Act (SEQRA) is robust and requires state agencies and local governments to *consider* the environmental impact of any discretionary government action. SEQRA requires that discretionary actions mitigate such impacts to the extent practicable, and balance any unmitigated impacts against other "social, economic, and other essential considerations." It remains to be seen whether the Green Amendment is consistent with SEQRA's balancing test or elevates environmental protection above other considerations.

It also bears note that the Green Amendment may enhance local authority to limit land use. While the Green Amendment might give private parties an opportunity to challenge land use approvals, localities could theoretically use the Amendment to extend their land use power by relying upon the Amendment to deny approval of projects that might otherwise satisfy the provisions of SEQRA.

Conclusion

Environmental concerns have emerged as the central issue of our time. New York's addition of the Green Amendment to the New York State Constitution, following in the footsteps of other states like Pennsylvania and Montana, shows that New York intends to take those issues seriously. However, questions remain about whether the Green Amendment will not simply be an artifact but, rather, an important tool to allow communities to seek to safeguard their environment and compel state and local governments to act to prevent environmental harms.

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