



## What's trending: New York possible constitutional right to clean air and water

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### Introduction

Everyone wants clean water and clean air, but how far must the government go to protect these resources, and can citizens bring legal action if it believes that its “right” to clean water and air is being ignored? Even before New Yorkers vote on whether to hold a constitutional convention where “environmental rights” are rumored to be one of the topics deserving further constitutional protections, a proposed amendment to the New York State Constitution codifying one approach to expand New Yorker’s “environmental rights” has already passed the State Assembly. The Assembly approved a proposed constitutional amendment that would add the following to the Constitution’s Article 1 “Bill of Rights”: “Environmental rights. Each person shall have a right to clean air and water and a healthful environment.”<sup>1</sup>

This sounds great, but what would it actually mean? What happens if a citizen of New York feels her right to clean water or air has been violated? Can she sue an industry? Can she sue her neighbor? What standard of review will the courts use?

Further, how would this new “right” fit in with the existing New York Constitution provision in the Article XIV, which addresses “Conservation”? Among other things, Article XIV states:

### *Protection of natural resources; development of agricultural lands*

§4. The policy of the state shall be to conserve and protect its natural resources and scenic beauty and encourage the development and improvement of its agricultural lands for the production of food and other agricultural products. The legislature, in implementing this policy, shall include adequate provision for the abatement of air and water pollution and of excessive and unnecessary noise[;] the protection of agricultural lands, wetlands and

<sup>1</sup> State of New York proposed Amendment to Constitution, 2017 Bill A06279/S05287. The bill passed the Assembly in April 2017. The Judicial Committee of the Senate asked the state’s attorney general for an opinion on the proposal. That opinion simply states that the proposed amendment will “have no further effect on other provisions of the Constitution.”

shorelines[;] and the development and regulation of water resources. The legislature shall further provide for the acquisition of lands and waters, including improvements thereon and any interest therein, outside the forest preserve counties, and the dedication of properties so acquired or now owned, which because of their natural beauty, wilderness character[] or geological, ecological or historical significance, shall be preserved and administered for the use and enjoyment of the people. Properties so dedicated shall constitute the state nature and historical preserve and they shall not be taken or otherwise disposed of except by law enacted by two successive regular sessions of the legislature.<sup>2</sup>

### **[Violations of article; how restrained]**

§5. A violation of any of the provisions of this article may be restrained at the suit of the people or, with the consent of the supreme court in appellate division, on notice to the attorney-general at the suit of any citizen.<sup>3</sup>

Several other states, including Pennsylvania, Montana and Hawaii have similar provisions in their constitutions.<sup>4</sup> The purpose of this article is to briefly examine how those states have enforced the provision and, from those examinations, determine how a similar provision may be enforced in New York.

### **Enforcement in other states**

Enforcement in other states with similar environmental provisions in their constitutions seems to be limited to actions against the state, not against private individuals.

### **Pennsylvania**

The most recent and relevant activity, and therefore the focus of most of this Alert, are recent decisions in Pennsylvania. Article I Section 27 of the Pennsylvania constitution, referred to as the “Environmental Rights Amendment,” states:

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<sup>2</sup> Added by vote of the people November 4, 1969.

<sup>3</sup> Adopted by Constitutional Convention of 1938 and approved by vote of the people November 8, 1938. Renumbered §5 by vote of the people November 4, 1969.

<sup>4</sup> The Pennsylvania Constitution’s provision is quoted below. Hawaii’s Constitution states: “For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawaii’s natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State.” HAW. CONST. art. XI, § 1. Montana’s Constitution states: “The state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations. The legislature shall provide for the administration and enforcement of this duty. The legislature shall provide adequate remedies for the protection of the environmental life support system for degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources.” MONT. CONST. art. IX, § 1. The Massachusetts Constitution has a similar provision, but will not be discussed in this Article, as the majority of the case law is about takings, and not clean air and water. The Massachusetts Constitution states: “The people shall have the right to clean air and water[;] freedom from excessive and unnecessary noise, and the natural, historic, esthetic qualities of their environment; and protection of the people in their right to the conservation, development and utilization of the agricultural, mineral, forest, water, air[] and other natural resources is hereby declared to be a public purpose.” MASS. CONST. art. XLIX. Illinois and Rhode Island also have similar provisions. See ILL. CONST. art. XI, §§ 1-2; R.I. CONST. art I, § 17.

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 yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people ....

This language has triggered numerous court cases over the years, but a recent state law case and a permitting challenge have clarified both what this environmental rights statement means and how these rights are interpreted in a state permitting process.

On June 21, 2017, the Pennsylvania Supreme Court found that the state’s decades-old test, established in *Payne v. Kassab*, used to balance the environmental harm of challenged projects against their overall benefit, is insufficient to uphold the principles in the “Environmental Rights Amendment” (Article 1, Section 27 ) of the Pennsylvania Constitution.<sup>5</sup> In *Environmental Defense Fund v. Commonwealth of Pennsylvania*, the Supreme Court of Pennsylvania concluded that the language of the constitution itself provided the correct standard of judicial review,<sup>6</sup> upholding the plurality’s position in the court’s previous decision in *Robinson Township v. Commonwealth*, that the actual text of the constitution, “[t]he people have a right,” matters.<sup>7</sup>

The court in *Pa. Environmental Defense Fund* did not establish a clear test to replace the *Payne* test. However, the court stated that the State Constitution’s Environmental Rights Amendment puts a limit on the state’s power to act against the right to clean air, pure water and to the preservation of the values of the environment. The court found that although the subject of the right may be responsive to regulation, any laws that unreasonably debilitate the right are unconstitutional.<sup>8</sup> The language of the case, such as, “places a limitation on the state’s power to act contrary to this right,” indicates that only the state, and not private entities, owes this right to the citizens of Pennsylvania.<sup>9</sup> This is in line with the language of the amendment itself, which reads: “As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.”<sup>10</sup>

Attorneys involved with the case believe that there will be a lot of dispute around what the Environmental Rights Amendment means but are also confident that the court is well-equipped to employ its usual standards for assessing whether the government has violated a fundamental

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<sup>5</sup> *Pa. Environmental Defense Fund v. Commonwealth of Pennsylvania et al.*, 2017 WL 2645417 (Pa. 2017) (finding that the three-part balancing test established in *Payne v. Kassab*, 312 A.2d 86 (Pa. Commw. Ct. 1973), minimized the constitutional duties of the executive and judicial branches and overruled the balancing test). The balancing test established in *Payne* asked: (1) was there compliance with all applicable statutes and regulations relevant to the protection of the Commonwealth’s public natural resources? (2) Does the record demonstrate a reasonable effort to reduce the environmental incursion to a minimum? (3) Does the environmental harm, which will result from the challenged decision or action, so clearly outweigh the benefits to be derived therefrom that to proceed further would be an abuse of discretion? *Payne*, 312 A.2d at 94.

<sup>6</sup> *Id.*

<sup>7</sup> See *Robinson Twp. v. Commonwealth*, 147 A.3d 536 (Pa. 2016).

<sup>8</sup> *Pa. Environmental Defense Fund*, 2017 WL 2645417, at \* 13.

<sup>9</sup> *Id.*

<sup>10</sup> PA. CONST. art. I, § 27.

right.<sup>11</sup> Plaintiffs, however, will still need to demonstrate that they are experiencing harm, and, despite compliance with applicable statutes and regulations, the government could and should have done more to conserve a public resource.<sup>12</sup> Proponents of the Environmental Rights Amendment believe that the decision in *Pa. Environmental Defense Fund* will give the Pennsylvania Constitution language some teeth and plaintiff's a "real road" to recovery.<sup>13</sup>

Some of the desired clarification may have come in the form of a detailed decision handed down by the Pennsylvania Environmental Hearing Board (Board) on August 15, 2017.<sup>14</sup> This case involved the challenge brought by two environmental groups to the state's issuance of two different mining permit revisions issued to Consol Pennsylvania Coal Company, LLC for longwall mining in Consol's Bailey Mine Eastern Expansion Area, the largest underground coal mine in North America. While much of the decision focuses on state law and regulations, the Board also spent considerable time on whether these permit modifications violated the Pennsylvania Environmental Rights Amendment constitution provisions. After spending some time summarizing and interpreting the *Pa. Environmental Defense Fund* decision, the Board divides the State Constitution's Environmental Rights Amendment into three separate rights: (i) the right of citizens to clean air and pure water ... (ii) the common ownership by the people of the state of its "public" natural resources and (iii) the establishment of a public trust wherein the natural resources, such as streams, are the body of the trust and the Commonwealth is the trustee with the people of the state being the beneficiaries.<sup>15</sup>

While the Board's discussion of all three of these "rights" is interesting, because the proposed New York amendment only addresses the first one: the right to clean air, pure water and other desirable environmental attributes, this article only summarizes that discussion. In discussing the *Pa. Environmental Defense Fund* decision, the Board indicated that<sup>16</sup>

the benchmark for these decision[s] by courts is the express purpose of the Environmental Rights Amendment to be a bulwark against actual or likely degradation of our air and water quality. The plurality also notes that the Constitution protects the people from government action that "unreasonably causes actual or likely deterioration" of the natural, scenic, historic and esthetic values of the environment.

The Board went on to say that in evaluating whether the state meaningfully considered the environmental rights of its citizens,<sup>17</sup> "the Department considered the environmental effects of its

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<sup>11</sup> Matt Fair, *Pa. Justices Create Uncertain New Era For Enviro Reviews*, Law360 (June 21, 2017), <https://www.law360.com/articles/936871/pa-justices-create-uncertain-new-era-for-enviro-reviews>. The standards used for assessing a fundamental right usually involves whether there was a compelling state interest behind the challenged action and whether the least restrictive means were employed to achieve that interest. *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> Fair, *supra* note 9.

<sup>14</sup> *Center For Coalfield Justice And Sierra Club v. Commonwealth of Pennsylvania, Department of Environmental Protection and Consol Pennsylvania Coal Company, LLC, Permittee*, Pennsylvania Environmental Hearing Board, August 15, 2017, Issued Docket No. 2014-072-B (Consolidated with 2014-083-B and 2015-051-B), 2017 Pa. Environ. LEXIS 52

<sup>15</sup> *Center for Coalfield Justice*, 2017 Pa. Environ. LEXIS 52, 92-101.

<sup>16</sup> *Center for Coalfield Justice*, 2017 Pa. Environ. LEXIS 52, 94, citations omitted.

<sup>17</sup> *Id.* at 97

permitting action and whether that action is likely to cause, or in fact did cause, the unreasonable degradation or deterioration of the waters of the Commonwealth.”

With respect to the right to clean air and pure water, the Board ultimately found that limited and temporary degradation, and even destruction, of a stream could be acceptable, stating that:<sup>18</sup>

the destruction and degradation of the streams would need [to] be more significant than the limited and temporary impacts that result from Consol's longwall mining under [one of the challenged permit revisions] issued by the Department. Longwall mining has social utility and is a type of development leading to an increase in the general welfare, convenience[] and prosperity of the people. If it lacked that characteristic, it would be more likely to be judged unreasonable.

## Montana

Montana's constitution reads: “The state and each person shall maintain a clean and healthful environment.”<sup>19</sup> In a 2012 case, *Northern Plains Resource Council, Inc. v. Montana Bd. Of Land's Com'rs*, the Montana Supreme Court confirmed that the right to clean air and water is a fundamental right.<sup>20</sup> The court found that a statute that impacts the right to clean air and a healthful environment, to the extent that it interferes with the exercise of that right, is subject to strict scrutiny, requiring the state to provide a compelling interest for its existence and narrowly tailored means to achieve such interest.<sup>21</sup>

## Hawaii

Cases in Hawaii turn up similar results, implying that it is the state's duty to adhere to the environmental sections of the constitution.<sup>22</sup> In fact, the language of Hawaii's constitution is fairly clear that it is the state's duty to conserve Hawaii's natural resources: “The [s]tate and its political divisions shall conserve and protect Hawaii's natural beauty and all natural resources.”<sup>23</sup>

## Conclusion

While New York courts, like the state itself, does not always follow the lead of courts in other states, the recent Pennsylvania Supreme Court decision and the subsequent State Environmental Hearing Board's permit decision, as well as those in Montana and Hawaii seem to uniformly suggest that identifying clean water and clean air as a fundamental “right” embedded in the state constitution provides wide latitude, separate and distinct from anything established by state law or

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<sup>18</sup> *Id.* at 100.

<sup>19</sup> MONT. CONST. art. IX, § 1.

<sup>20</sup> 366 Mont. 399, P.3d 169 (2012).

<sup>21</sup> *Id.* (finding that the State of Montana's deferral of environmental impact statement (EIS), in accord with the state statute, from leasing stage to specific proposal stage did not interfere with the exercise of the fundamental right to a clean and healthful environment under the state constitution that would trigger strict scrutiny review, where there was a lease to a mineral mining company without performance of EIS because the leases themselves did not permit any degradation to the environment).

<sup>22</sup> *O Haleakala v. Board of Land*, 138 Hawai'i 383,411, 382 P.3d 195, 223 (2016) (“In this case, those duties include considering and applying the [s]tate's obligations under Article XI, section 1.”) (emphasis added).

<sup>23</sup> HAW. CONST. art. XI, § 1.

regulation, for citizens to bring actions against the state if they believe that the state has taken an action that will interfere with this constitutional right. Due to the absence of specific language allowing citizen suits against other entities than the state, at least the Pennsylvania and Hawaii constitutions seem to not provide a broader basis for a citizen to sue an industry or other entity that it believes is preventing it from having clean water or air. But these constitutions, as well as the Montana constitution, do appear to significantly broaden the available bases for citizens to challenge state actions (or alleged inaction). The same would appear to be true for the proposed New York Constitutional amendment.

However, given the existing New York Constitution language addressing conservation that, in part, says:

[t]he policy of the state shall be to conserve and protect its natural resources and scenic beauty ... The legislature, in implementing this policy, shall 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

it appears that New York's existing constitutional provisions may be sufficient to provide the rights purported to be protected by the proposed constitution amendment. Thus the question is, does New York need this Constitutional Amendment? Further, to avoid a conflict between this proposed new language and the existing protections given in Article XIV of the New York Constitution, it appears that the proposed constitutional amendment should be revised to cross reference Article XIV and/or to make it explicit that the rights conferred by this language are to be exercised by legislative enactments to incorporate the protection of those rights into existing or new statutes.

Unless the purpose of the proposed New York amendment is to allow any state citizen to sue any other citizen it believes is making the air or water unclean, which would likely bury the state's lower court systems under dubious cases where no statutory or regulatory violation can be substantiated, then the language probably needs to be further modified to clarify that the only entity that can be sued by a citizen for alleged failure to keep the state's air and water "clean" is the state itself.

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