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New York seeks constitutional right to clean air and water

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This November, New Yorkers will vote on a proposed environmental rights amendment to the New York State Constitution. The proposed “Green Amendment” passed both the NY Senate and Assembly and will now proceed to New York voters. This alert examines similar provisions in other state constitutions, as well as recent, relevant court decisions in other states to shed light on how the proposed New York constitutional amendment may be applied.

The proposed amendment

The proposed constitutional amendment adds the following language to the New York State Constitution’s Article I—Bill of Rights:

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

Bills proposing the amendment passed both houses of the state legislature in consecutive two-year sessions, fulfilling the New York Constitutional amendment process requirement.

The remaining hurdle for the proposed amendment is a statewide referendum, which is expected to be included on the November 2 ballot. If the amendment is approved by a majority of voters, the amendment will become part of the New York State Constitution.

Existing New York constitutional provisions on environment

New York made world history in 1894 when a Constitutional Convention adopted the first constitutional provisions mandating nature conservation.

Under Article XIV, Section 1 of the New York Constitution “[t]he lands of the state, now owned or hereafter acquired, constituting the forest preserve as now fixed by law, shall be forever kept as wild forest lands.” Known as the “Forever Wild” clause, this provision is celebrated for successfully protecting New York’s forests, especially the Adirondacks.

Moreover, Article XIV, Section 4, known as the “Conservation Bill of Rights” states, in part:

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 shorelines, and the development and regulation of water resources.

Notably, Article XIV, Section 4 explicitly allows private parties to bring citizen suits to enforce these constitutional provisions. Specifically, Article XIV, Section 5 states that: “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.”

Other state constitutions with environmental rights

Six other states have constitutionally guaranteed environmental rights, examined in turn below:

- Illinois
- Pennsylvania
- Hawaii
- Montana
- Massachusetts
- Rhode Island

Illinois

The Illinois Constitution, Article XI, Section 1, provides, “[t]he public policy of the State and the duty of each person is to provide and maintain a healthful environment for the benefit of this and future generations.” Article XI, Section 2 states: “Each person has the right to a healthful environment. Each person may enforce this right against any party, governmental or private, through appropriate legal proceedings subject to reasonable limitation and regulation as the General Assembly may provide by law.” Thus, the Illinois provision explicitly permits private parties to enforce the right to a “healthful environment” against governmental and private parties. However, the Illinois Supreme Court held that Section 2 only affords private parties the opportunity to seek relief, and it does not create or establish a new cause of action. “It merely declares that individuals have ‘standing’ to assert violations of [this] right.” *Glisson v. City of Marion*, 188 Ill. 2d 211 (1999).

Pennsylvania

Article 1, Section 27 of the Pennsylvania Constitution, referred to as the “Environmental Rights Amendment,” 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 yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

This language triggered numerous court cases over the years. In *Pennsylvania Environmental Defence Foundation v. Commonwealth*, the Supreme Court of Pennsylvania struck down legislation that allowed the government, which has a duty to act as the Trustee of the protected resources, to use royalties from oil and gas activities for non-environmental, general purposes. In doing so, the court stated that the Environmental Rights Amendment “places a limitation on the state’s power to act contrary to this right.” *Environmental Defence Foundation v. Commonwealth*, 640 Pa. 55 (2017). Pennsylvania courts expressly held that the Environmental Rights Amendment does not impose duties or obligations on private parties. The Court opined that the “plain language of the Environmental Rights Amendment charges the Commonwealth, as trustee, with the duty to conserve and maintain Pennsylvania’s public natural resources, and we are unaware of any case law applying this duty to non-Commonwealth entities.” *Clean Air Council v. Sunoco Pipeline L.P.*, 185 A.3d 478, 494 (Pa. Commw. Ct. 2018).

Montana

Under Montana’s Constitution, Article IX, Section 1, “[t]he state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations.” In addition, Montana’s Constitution reads: “[a]ll persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment” The Montana Supreme Court confirmed that the right to clean air and water is a fundamental right, and that any government action infringing upon this right is subject to strict scrutiny by the courts. *Clark Fork Coal. v. Montana Dep’t of Nat. Res. & Conservation*, 2021 MT 44 (2021). Under the “strict scrutiny” standard of review, the challenging party bears a burden of showing that the disputed government action substantially interferes with the fundamental right, whether facially or as applied. The burden then shifts to the defending party to show that the government’s action is narrowly tailored to further a compelling government interest.

Hawaii

Hawaii’s Constitution, Article XI, Section 9 states that “[e]ach person has the right to a clean and healthful environment, as defined by laws relating to environmental quality, including control of pollution and conservation, protection and enhancement of natural resources. Any person may enforce this right against any party, public or private, through appropriate legal proceedings, subject to reasonable limitations and regulation as provided by law.” Thus, the Hawaii Constitution explicitly gives any person the right to enforce this right against anyone, including the state government, and what constitutes a “clean and healthful environment” is explicitly shaped by environmental quality and pollution control laws.

The right to a clean and healthful environment was deemed by the Hawaii Supreme Court to be a substantive right guaranteed to each person, and courts have further classified this right as a property interest protected by due process. *Matter of Gas Co., LLC*, 147 Haw. 186 (2020).

Massachusetts

Article 97 of the Massachusetts Constitution provides that “[t]he people shall have the right to clean air and water . . . and the natural, scenic, historic, and esthetic qualities of their environment. . . . The general court shall have the power to enact legislation necessary or expedient to protect such rights.” The Massachusetts constitutional provision places the responsibility of protecting this right on the government.

Rhode Island

The Rhode Island Constitution, Article 1, Section 17, states that “it shall be the duty of the general assembly to provide for the conservation of the air, land, water, plant, animal, mineral and other natural resources of the state, and to adopt all means necessary and proper by law to protect the natural environment of the people of the state by providing adequate resource planning for the control and regulation of the use of the natural resources of the state and for the preservation, regeneration and restoration of the natural environment of the state.”

Conclusion

If passed by a referendum vote in November, the proposed “Green Amendment” adds another environmental provision to the New York State Constitution by adding to the State’s Bill of Rights the environmental rights that “[e]ach person shall have a right to clean air and water, and a healthful environment.” While six other states have similar environmental rights in their state constitutions, these states have used different language, including various levels of details regarding enforcement and definitions, and taking different approaches to assign duties or obligations related to environmental rights. In comparison, New York’s proposed amendment uses the most general wording feasible, giving great flexibility to the courts in New York to interpret and apply.

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