

NY APPROVES CONSTITUTIONAL RIGHT TO HEALTHY ENVIRONMENT

New York voters have approved the "Green" or "Environmental Rights" Amendment to the state's constitution, which provides that "[e]ach person shall have a right to clean air and water, and a healthful environment."

In a victory for ESG activists, New York voters approved the "Green Amendment," also known as the "Environmental Rights Amendment," to the state's constitution. New York thus joins the ranks of Pennsylvania, Montana, Illinois, Massachusetts, Hawaii, and Rhode Island, which provide some form of constitutional right to, or protection for, a healthy environment.

NEW YORK'S CONSTITUTIONAL RIGHT TO A HEALTHY ENVIRONMENT

Like those afforded by the constitutions of Pennsylvania, Montana, and Rhode Island, New York's right to a healthful environment sits in the state's Bill of Rights. As a result of this amendment, lawmakers will be obligated to "consider the impact on clean water, clean air, and the environment when making decisions."¹

In proposing the amendment, the New York state legislature referenced the constitutional provisions of Pennsylvania, Hawaii, Massachusetts, and Montana, noting that New York's amendment "would follow those models." Significantly, though, the text of the New York amendment provides little insight into how closely it will in fact follow other states' models. At just 15 words, New York's Green Amendment is silent on many points – including as to who can bring suits, against whom, and when. This differs from the constitutional provisions of other states, which – while still relying on the courts for interpretation – provide more detailed guidance. For example, Illinois and Hawaii both specify that the rights can be enforced against public or private parties "through appropriate legal proceedings, subject to reasonable limitations and regulation as provided by law"²; Pennsylvania charges the Commonwealth with the responsibility to conserve and maintain the natural resources to which Pennsylvanians have a constitutional right³; and Montana gives the legislature the responsibility to "provide for the administration and

Key issues

- New York voters approved a constitutional amendment providing a right to a healthy environment.
- The contours of the amendment will be defined by the courts.

¹ Question 2: *Right to Clean Air, Clean Water, and a Healthful Environment*, NYC VOTES, <https://www.voting.nyc/meet-the-candidates/2021-general-election/2021-ballot-proposals/question-2/> (last visited Jan 4, 2022).

² HAW. CONST. art. XI, § 9; see ILL. CONST. art. XI, § 2.

³ PA. CONST. art. I, § 27.

enforcement of th[e] duty" of "[t]he state and each person [to] maintain and improve a clean and healthful environment."⁴

APPLICATION OF NEW YORK'S AMENDMENT

The brevity of New York's Green Amendment means that the courts will have to define its contours. Some of the more significant questions to be answered include whether the provision will be self-executing, whether suits under the provision can be brought against both government and private parties, and the meaning of "clean air and water" and "a healthful environment."

The amendment seems likely to be self-executing, given New York's presumption in favor of self-executing constitutional rights,⁵ meaning that it will not require enabling legislation to take effect. The remedies available to plaintiffs under such suits are also to be determined. Though an amendment must be self-executing for the courts to imply civil damage remedies, not all violations of self-executing provisions support claims for damages.⁶

The failure to include language specifying that citizens can bring suits only against the state of New York – as suggested in a 2017 analysis by a New York State Bar Association Task Force – may be evidence that the amendment was intended to confer an enforceable right on citizens against private defendants, though some commentators do not consider this to be likely.

The meaning of "clean air and water" and "a healthful environment" is also difficult to predict.

Notably, there may be no further legislative guidance on these and other issues before plaintiffs begin filing lawsuits based on the 15-word amendment.

IMPLICATIONS OF NEW YORK'S AMENDMENT

The business sector opposed the Green Amendment as unnecessary, citing New York's already robust environmental legislation, and likely to bring about frivolous litigation. Even non-frivolous lawsuits are likely to be long and costly, though other states providing a constitutional right to or protection for a healthy environment have not been inundated with related litigation after implementing their constitutional provisions.

Other concerns regarding New York's Green Amendment arise from the broad role to be played by the courts. Some worry that leaving the contours of such a wide-reaching provision up to the courts means that implementation of climate change policies will be taken from the legislature and given to the judiciary. In its 2017 analysis, the New York State Bar Association Task Force did not find this likely, citing the experience of other states with similar provisions. The analysis notes, for example, that the public trust duties included in Hawaii's and Pennsylvania's constitutional provisions have played a significant role in key court decisions. The New York Green Amendment, at least on its face, does not impose such a duty.

Still, the judiciary's role in environmental policy is not an unreasonable concern, given recent developments in climate litigation around the world. In May 2021 (in a ruling now under appeal), a Dutch court considering an unwritten duty of care under Dutch tort law ordered Royal Dutch Shell to

⁴ MONT. CONST. art. IX, § 1.

⁵ *Brown v State*, 674 N.E.2d 1129, 1137 (N.Y. 1996).

⁶ *Brown v State*, 674 N.E.2d 1129, 1137–38 (N.Y. 1996).

reduce its CO2 emissions by 45% by 2030, as compared with 2019 levels. Courts in France, the Netherlands, and New Zealand have held that the governments of those countries did not do enough to implement climate change regulations and policies.

If recent climate developments in New York state are any indication, legislation arising under New York's Green Amendment has the potential to affect fossil fuel projects and investments. The New York State Department of Environmental Conservation, for example, recently denied permits to replace fossil fuel-powered turbines, citing inconsistency or interference with the 2019 Climate Leadership and Community Protection Act's greenhouse gas emissions limits. Lawsuits under the Green Amendment could similarly impact energy projects.

Though it may come with litigation risks for businesses, the focus on the right to a healthy environment is growing. As reported by the Special Rapporteur in December 2019, over two-thirds of UN member states have legally recognized the right to live in a healthy environment, and just last month the UN Human Rights Council passed a resolution recognizing the right to a healthy environment. The focus on environmental policy shows no sign of abating, and businesses should carefully consider the effects that developments in respect of climate, and environmental policy and regulation, will have on their activities.

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