

Green Amendments: A Fundamental Right to a Healthy Environment?

HUNTON
ANDREWS KURTH

Article By

[Samuel L. Brown](#)

[Hunton Andrews Kurth](#)
[The Nickel Report](#)

Related Practices & Jurisdictions

- [Environmental, Energy & Resources](#)
- [All Federal](#)
- [New York](#)

Tuesday, March 30, 2021

Environmental justice and equity issues have taken center stage as part of the national conversation on the environment, climate change and racial equality. As we have [explained](#), environmental justice will be a central focus of the Biden administration, as reflected in a recent [Executive Order](#) that declares federal agencies:

shall make achieving environmental justice part of their missions by developing programs, policies, and activities to address the disproportionately high and adverse human health, environmental, climate-related and other cumulative impacts on disadvantaged communities, as well as the accompanying economic challenges of such impacts.

We expect significant developments on environmental justice at the federal level, including in the context of permitting, rulemaking, enforcement, funding, and other actions. There will also be developments via state legislation that follows New

Jersey’s first-of-its-kind [environmental justice legislation enacted](#) last year. On March 26, for example, Massachusetts [enacted](#) comprehensive climate change legislation, [Senate Bill 9](#), which also expands the Massachusetts Environmental Policy Act to require environmental impact reports for all projects that impact air quality within one mile of newly defined environmental justice neighborhoods. Another example is California, where new legislation has been [proposed](#) to similarly incorporate environmental justice into state decision-making. States are also taking administrative actions to further environmental justice objectives (e.g., California’s [proposed](#) update to CalEnviroScreen). We also expect to see updates to corporate policies, including incorporating environmental justice-related concepts within [environmental, social and corporate governance \(ESG\)](#) and human rights policies.

A distinct, but interrelated development, are efforts to amend state constitutions to include provisions that enshrine environmental protections as fundamental rights. This “[Green Amendment](#)” movement seeks to elevate the right to clean air, water and a healthy environment to the same level as other constitutional rights (e.g., free speech, equal protection). Proponents of Green Amendments believe the provisions would be a tool for combating environmental racism and rebalancing inequities in communities of color and low-income communities.

This post surveys existing environmental-focused state constitutional provisions, proposals to expand environment rights in New York and other states, and the practical questions raised by the Green Amendment movement.

Existing State Constitutional Environmental Rights

Many states have provisions in their constitutions that touch on the environment and the role of state government to protect public health and natural resources. Fewer states have constitutional provisions that focus on environmental rights of its citizens. The table below identifies the states and the associated constitutional provisions that are most often cited in the context of the Green Amendment movement.

State	Environmental Constitutional Provision
Pennsylvania	<p>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.</p> <p>Pa. Const. Art. I § 27.</p> <p>The state and each person shall maintain and</p>

Montana

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 from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources.

Mont. Const. Art. IX § 1.

Illinois

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.

ILL. Const. Art. XI, § 2.

Massachusetts

The people shall have the right to clean air and water, freedom from excessive and unnecessary noise, and the natural, scenic, historic, and esthetic qualities of their environment; and the 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. The general court shall have the power to enact legislation necessary or expedient to protect such rights.

Mass. Const., Part the First, Art. XCVII.

Hawaii

Each 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.

Haw. Const. Art. XI § 9.

Most of these state constitutional provisions were enacted in the 1970s during the height of the original environmental movement. However, these provisions are being dusted off and used in new ways. The highest profile example is in Pennsylvania, where the Supreme Court struck down legislation focused on oil and gas operations that it found to violate the state's environment-focused constitutional provision. *Penn. Env'tl. Def. Found. v. Commonwealth*, 161 A.3d 911, 939 (Pa. 2017). In Hawai'i, the Supreme Court held its environment-focused constitutional provision allows for private enforcement of environmental laws, absent legislative or regulatory limitations. *County of Hawaii v. Ala Loop Homeowners*, 235 P.3d 1103, 1120-34 (Haw. 2010), *abrogated on other grounds by Tax Found. of Hawai'i v. State*, 439 P.3d 127, 141 (Haw. 2019). In Montana, the Supreme Court held that the right to a clean and healthful environment is a fundamental right and "any statute or rule which implicates that right must be strictly scrutinized," *Mont. Env'tl. Info. Ctr. v. Dep't of Env'tl. Quality*, 988 P.2d 1236, 1246 (Mont. 1999) (emphasis omitted), and later held the right applies to private actions. *Cape-France Enters. v. Estate of Peed*, 29 P.3d 1011, 1017 (Mont. 2001).

Examining the provisions in the table above, some would likely argue that one or more are not self-executing, or are subject to restrictions by state legislatures or administrative agencies, and therefore do not truly establish fundamental rights. The Green Amendment movement emphasizes establishing a broader fundamental right, which is reflected in recent developments in New York.

Proposed Amendments to State Constitutions to Expand Environmental Rights

In November 2021, New York voters will decide whether to add a new section to the New York Constitution guaranteeing a level of "environmental rights." Specifically, the action would amend the State Constitution's Bill of Rights (Section 19 to Article I) to ensure that: "[e]ach person shall have a right to clean air and water, and a healthful environment."

The legislature's [justification](#) for this amendment is that "[r]ecent water contamination and ongoing concerns about air quality have highlighted the importance of clean drinking water and air as well as the need for additional protections." As an additional justification, it is noted that "[s]everal other states including Pennsylvania, Hawaii, Massachusetts and Montana have constitutional protections in place to ensure access to clean air and water. This proposed constitutional amendment would follow those models and ensure that clean air and water are treated as fundamental rights for New Yorkers."

New York may be going first in the next phase of establishing environmental rights, but it is not alone. In Washington, there is a [proposal](#) to amend the state constitution to recognize the "right to a clean and healthy environment, including pure water, clean air, healthy ecosystems, and a stable climate, and to the preservation of the natural, cultural, scenic and healthful qualities of the environment." Washington's Green Amendment was modeled after the Pennsylvania Constitution, but note the explicit reference to climate. Efforts are being made in other states, including [New Jersey](#), [New Mexico](#), [Maryland](#), [Oregon](#), and [Vermont](#), among others, and the expectation is similar efforts will be made in the future.

Implications of the Green Amendment Movement

Each state constitution—and Green Amendment—will be different, and so it is difficult to clearly identify all of the potential practical implications. However, using New York as a representative example, there are clear questions in terms of what the Green Amendment would mean in the real world for the state, municipalities, companies, and others in New York. Assuming the proposal passes in November, below are some of the questions and considerations associated with New York’s proposal:

- New York’s proposal is simple, yet vague. What does “[e]ach person shall have a right to clean air and water, and a healthful environment” mean? Who has an obligation (or the ability) to secure this right? The text of the New York proposal is an outlier in terms of its brevity when compared to the other states in the table above.
- Unlike other states, the New York proposal—on purpose—does not rely on the New York legislature or state agencies to define or limit the right. Is the proposal self-executing? At least in New York, constitutional provisions are presumptively self-executing. *People v. Carroll*, 148 N.E.2d 875, 877-79 (N.Y. 1958). Given the text of the proposal and the law in New York, this Green Amendment may be found to be self-executing. Notably, the proposal aligns with similar text considered in 2017 when a New York State Bar Association task force recommended a self-executing Green Amendment. See Y. State Bar Ass’n Env’t & Energy L. Section, *Report and Recommendations Concerning Environmental Aspects of the New York State Constitution*, 38 Pace L. Rev. 182, 191 (2017). Practically, what does “self-executing” mean, and executed by and against whom? Unlike other states, New York’s proposal contains minimal guidance on where or how to direct enforcement.
- In New York, state and local government actions can be challenged under Article 78 of the Civil Practice Law and Rules. What are the implications of the proposal on Article 78 challenges to agency actions? Relatedly, what are the implications—procedurally or substantively—to agency compliance with the State Environmental Quality Review Act (SEQR), New York’s equivalent of the federal National Environmental Policy Act? What are the implications for infrastructure projects, existing facilities, and other activities that rely on environmental permits from state and local agencies subject to SEQR?
- There are robust environmental laws in New York, notably under the [Environmental Conservation Law \(ECL\)](#). However, unlike many federal environmental statutes the ECL does not contain citizen suit provisions that allow for private parties to enforce state environmental laws. The proposal does not address enforcement, but it is certain that private parties will attempt to use this new constitutional provision as a basis for a direct right of action to enforce state environmental laws against other private parties in state court. A proposal that is self-executing and that can be directly enforced would likely be used in situations where there is a perceived gap in regulation or where some believe the state was failing to take appropriate enforcement action (or not taking strong enough action). Ultimately, it will likely be up to state courts to

define the extent of any private right of action based on this proposal against other private parties.

- Related to enforcement is the question of the standing of those parties to bring an action in state court. Will the proposal expand the law of standing of private parties or organizations? In other states, environmental provisions have been interpreted to expand access to state courts. *for the Great Lakes v. Dep't of Nat. Res*, 161 N.E.3d 293, 304 (Ill. App. Ct. 2020) (“[A]rticle XI of the Illinois Constitution broadens the law of standing by eliminating the traditional special injury requirement in an environmental action.”). While not directly applicable to federal law, will federal judges find it persuasive that parties have fundamental environmental rights under state law? What are the implications of this, for example, on standing in climate change-related litigation in federal courts? *Juliana v. United States*, 947 F.3d 1159, 1175 (9th Cir. 2020) (Climate case dismissed for lack of standing).
- The 2017 task force noted above based its recommendation for a Green Amendment in New York, in part, on the “anticipated emergence of climate change-related environmental challenges unprecedented in their severity and complexity.” 38 Pace L. Rev. at 189. New York is taking action to address climate change. The [New York Climate Leadership and Community Protection Act](#), for example, requires steep declines in greenhouse gas (GHG) emissions, leading to an 85% reduction below 1990 levels by 2050. What does the New York proposal mean for climate-change related legislation, regulatory actions, the obligations of sources of GHGs in New York, and the obligations (and liabilities) of sources outside New York?

The voters in New York will have their say in November. If passed, there will likely be uncertainty and unanswered questions, ultimately leading to state courts deciding how to operationalize this new fundamental right in the real world. Beyond New York, the Green Amendment movement is here to stay, with efforts being made to spur additional states to take action. The focus on adding environmental rights to state constitutions should be viewed as a part of the larger national conversation on environmental and climate justice.

Copyright © 2022, Hunton Andrews Kurth LLP. All Rights Reserved.

National Law Review, Volume XI, Number 89

Source URL: <https://www.natlawreview.com/article/green-amendments-fundamental-right-to-healthy-environment>