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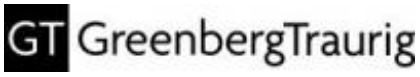
The New Environmental Rights Amendment to the New York Constitution



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On November 2, voters in New York approved “Proposal 2” and adopted a new section 19 to Article I of the state constitution that reads: “Each person shall have a right to clean air and water, and to a healthful environment.” It will take effect in January 2022.

While the new Environmental Rights Amendment is short and simple, we cannot know yet exactly what it means and what practical implications it will have for businesses and people in New York. We highlight here briefly some thoughts based in part upon the experience in Pennsylvania, which added an Environmental Rights Amendment to its constitution in 1971.

Section 19 sets out a new constitutionally protected right of “each person.” That right is part of Article I, the New York Bill of Rights. The Bill of Rights protects

rights of people against the government. In general, the Bill of Rights does not create private entitlements of one citizen against another. Thus, section 19 probably constrains government action or requires affirmative government action, but it does not create a right of your neighbor to have you maintain your trees or to stop polluting.

In the environmental context, a person might not have "clean air" for many reasons. One of those reasons might be that a neighboring facility pollutes the air. Unless this new section 19 is read by the New York courts in a way different from the way they have read the other 18 sections of the Bill of Rights, section 19 will not give the person whose air is dirty a right to sue the polluter directly. It may give the polluted-upon person a right to insist that the government consider the pollution before allowing the polluting facility to operate or before funding the polluting facility, and it may even create an obligation on the part of the government to regulate the existing polluting facility. But the Bill of Rights generally does not give one citizen the right to sue another.

The right each person holds is "to clean air and water, and to a healthful environment." What counts as "clean" air or water? How much of any pollutant makes the air or the water not "clean"? Does the source of the pollution matter? That is, if soot from a natural fire contaminates the air, is the air not "clean"? What if the soot is from a manmade source outside New York? What if it is from a manmade source in New York, operating lawfully under New York law?

Similarly, what counts as a less than "healthful" environment? Does each particular spot in the environment have to be "healthful" if one stayed there all the time? That is, does the environment in Times Square have to be "healthful" when traffic is stopped and the temperature is 95 degrees? Do indoor environments have to be "healthful"? How about in-between environments, like the Lincoln Tunnel? All these issues seem to cry out for legislative or regulatory elaboration on the constitutional text.

Elaboration may be on the way through the efforts of New York's environmental regulator, the Department of Environmental Conservation (NYSDEC). Will this new constitutional language impact NYSDEC permitting decisions? It is likely that NYSDEC will answer that question in the negative, arguing that the existing mandates in New York's Environmental Conservation Law already evince a state policy aimed to afford New Yorkers clean air, clean water, and a healthful environment. After all, New York's air permitting regime is based on health-based emissions standards derived from the federal Clean Air Act. The same goes for New York's clean water regulations, which in some ways go beyond the dictates of the federal Clean Water Act. And other schemes, such as the New York State hazardous waste cleanup laws, solid waste laws, and Brownfield Cleanup Program, surely are aimed at promoting a "healthful" environment. "It would not be at all surprising to see NYSDEC offer the view that these new provisions simply codify in the New York Constitution policy already adopted statutorily and reflected in the Environmental Conservation Law. Pennsylvania may provide some lessons on how New York's Environmental Rights Amendment will or will not impact environmental regulation in the state. The Pennsylvania Environmental Rights Amendment, adopted in 1971, has three sentences. The first sentence of the Pennsylvania amendment creates a right

similar to the New York provision: “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.” Pa. Const. Art. I, § 27.

In 1973, an intermediate appellate court in Pennsylvania set out a three-part test against which to test a government action to determine its constitutionality:

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 reflect a reasonable effort to reduce 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 v. Kassab, 312 A.2d 86, 94 (Pa. Commw. Ct. 1973), *aff’d*, 361 A.2d 263 (Pa. 1976). That test made constitutionality depend primarily on compliance with legislative or administrative standards, and therefore deprived the constitutional standard of any serious independent content.

In two relatively recent cases, however, the Pennsylvania Supreme Court disavowed the *Payne* test. *Pa. Envt’l Def. Found’n v. Commonwealth*, 161 A.3d 911 (Pa. 2017); *Robinson Twp. v. Pub. Util. Comm’n*, 83 A.3d 901 (Pa. 2013)(setting forth a history of the Article I, section 27, jurisprudence); *see also Pa. Envt’l Def. Found’n v. Commonwealth*, No. 64 MAP 2019 (Pa. July 21, 2021). The court held that neither the legislature nor an executive agency can define a constitutional right. The constitutional right exists independent of the implementing legislation or regulation, not the other way around.

In Pennsylvania, the right requires a consideration of the environmental harms of any activity undertaken or permitted by the government against its environmental and other benefits before the government may take any action. That obligation to evaluate environmental impacts exists at every level of government. *Robinson Township*, for example, invalidated a state law requiring uniform municipal zoning for oil and gas activities because that law precluded municipalities from exercising the required discretion over their own land use decisions under section 27. The cases have not yet made clear whether any government agency has the power to conduct this evaluation without legislative authority to do so, or whether one agency can rely on another to do this work. Nor are all the standards clear; we do not know how much adverse impact is unacceptable.

Unlike Pennsylvania, however, New York has a “little NEPA,” the State Environmental Quality Review Act, often referred to as SEQRA. That statute already requires state agencies and local governments to consider the environmental impacts of any discretionary government action, including permit issuance, funding, adoption of regulations and local laws. Therefore, except for laws enacted by the state legislature, New York’s Environmental Conservation Law already mandates that agencies consider the significant adverse environmental impacts of any discretionary actions, mitigate such impacts to the maximum extent practicable, and balance any unmitigated impacts against other “social, economic, and other essential considerations.” SEQRA, adopted in 1977, has an extensive body of case

law interpreting it. It remains to be seen if this added constitutional language will lead to courts exalting consideration of adverse environmental impacts over other valid governmental interests, thus rendering the balancing of interests that is at the heart of SEQRA moot. Given the exalted role that environmental interests already play due to New York's environmental review statute, it appears unlikely that New York courts will conclude that the codification of environmental rights in the state constitution transforms SEQRA into a substantive law that mandates the trumping of other legitimate governmental obligations in favor of environmental protection at all costs. There is a greater potential, however, that courts could nullify any attempt by the legislature to exempt specific projects or categories of governmental action from environmental review. SEQRA exempted state legislative acts from its purview, but there is no such exemption when it comes to a state constitutional right. The open-ended language in the provision creating this right makes anything possible.

While New York courts might read the constitutional right differently from Pennsylvania courts given the existence of SEQRA and the well-established environmental rights embedded through New York's Environmental Conservation Law, they are likely to agree that a constitutional right cannot be defined exclusively by legislation or regulation. Therefore, one cannot have clarity on what new section 19 will require the New York government to do until courts, potentially with the guidance of NYSDEC, explain what the right means in terms of assessing governmental actions. That is going to take some time. Imagine trying to figure out what "due process" meant before the first case had ever been decided. That is where we are right now. Stay tuned.

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