

New York's Green Amendment: (Not) Protecting Our Lakes

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Agenda

- What Does the Green Amendment Mean?

 - Text

 - Inspiration

 - Legislative History

 - Advocacy Groups

- Why Does It Matter?

 - Fictional Exercise

 - Benefits of a “Maximalist” Approach

- Where Is It Going?

 - Fresh Air for the Eastside v. New York*

The Green Amendment (N.Y. Const. Art. I Sec. 19)

“Environmental rights. Each person shall have a right to clean air and water, and a healthful environment. (Added by vote of the people November 2, 2021.)”

Unanswered Questions (Michael Gerrard)

Self-executing or need legislative action?

Apply to private parties as well as governments?

Is permit compliance a complete defense?

Applicable statute of limitations (4 months or 6 years)?

Exhaustion of administrative remedies required?

Scope of courts' remedial power?

How deal with environmental tradeoffs?

Inspiration

Pennsylvania – Environmental Rights Amendment (enacted 1971)

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.

Inspiration

Montana – Environmental Rights Amendment (enacted in 1972)

Section 1. Protection and improvement. (1) The *state and each person shall maintain and improve* a clean and healthful environment in Montana for *present and future generations* .

(2) The *legislature shall provide* for the administration and enforcement of this duty.

(3) 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.

Legislative History

Supporters:

Assemblymember Steve Englebright: the amendment created “no new rights of inappropriate expectation”

Assemblymember Richard Gottfried said that the whole point of the amendment was to add environmental protections to the public’s judicially enforceable “bundle of rights.”

Senator Robert Jackson noted that New York courts had stepped in to uphold constitutional rights before, and argued that the Judiciary should have the power to protect the public’s right to a clean and healthful environment

Legislative History

Opponents:

Assemblymember Daniel Stec said he opposed the Green Amendment in part because it would grant standing to everyone in New York State to sue over environmental harms

Assemblymember Andy Goodell said that he had been assured the Green Amendment would extend protections beyond New York's existing regulatory scheme and stated that if it did not there would be no need to pass it.

Assemblymember Philip Palmesano said the amendment would "certainly create a right of private action" for the public to file constitutional suits.

Advocacy Groups

Supporters

For The Generations, Environmental Advocates NY (EANY), the Delaware Riverkeeper, and the Adirondack Mountain Club—stated that the Green Amendment would provide New Yorkers with a “powerful and important tool” for combating environmental racism and rectifying environmental degradation.

In a separate memo, EANY asserted that the Green Amendment would grant the New York public environmental rights with “the same legal strength” as their “rights to free speech, freedom of religion, due process or property.”

Opponents

The Business Council, Empire State Forest Products Association, and New York Farm Bureau all opposed the Green Amendment because it would create judicially enforceable rights.

What would it mean to enforce environmental rights with
“the same legal strength” as the “rights to free speech,
freedom of religion, due process or property?”

Exercise – A “Maximalist” Approach

Consider the problem of nutrient pollution

Exercise – A “Maximalist” Approach

Facts:

Lake source of drinking water for 45,000 residents

Nutrient pollution from nearby CAFOs → toxic algal blooms

Scientists determine if CAFOs abate pollution, lake will heal

County health department about to issue “DO NOT DRINK” order

County petitions state DEC and DOH to issue tighter regulation

State declines, issues looser regulations, renews CAFOs permits

Sound familiar....?

Exercise – A “Maximalist” Approach

Remedies

Declaratory Judgement – establishes legal obligations, future State actions and regulations would need to abide by the judgment and prevent harmful nutrient pollution

Mandatory Injunction – court order → State revokes or conditions CAFOs permits

Structural Injunction – court-supervised plan for State to reduce/eliminate nutrient pollution, ensure residents have access to clean water, and clean up the lake

FAFE v. New York

FAFE v. New York

Plaintiffs: Green Amendment suit try and close landfill

State AG: Green Amendment created no new rights, limited selection of legislative history

Supreme Court (actually lowest court): focused on the text → broad interpretation of Green Amendment, State has no discretion to violate the constitution, two-part test

Appellate Division (middle court): reversed, very short opinion, said State has discretion to act within New York's environmental laws

Court of Appeals (high court): dismissed FAFE's appeal (no significant constitutional question!!!)

FAFE v. New York

The Green Amendment after *FAFE*

- Applies only to government, not to private entities (even if private entities' actions entwined with government actors)
- Does not apply if government merely exercising its discretion (i.e. not taking enforcement action against permit violators)
- Does not seem to create any significant additional protections
 - Subordinated to NYS statutory regime. May apply if government agency abandons statutory responsibilities.
 - Perhaps applies if NYS weakens its environmental laws or regulations (locks in regime at time of amendment's enactment?)

Thank you! Any questions?

Further Reading

Nathan Porceng, *New York's Green Amendment: Regulatory Gaps and Remedies*, 37 Env't Claims J. 171 (2025)

<https://nygreen.pace.edu/>