

## NEW YORK'S CONSTITUTIONAL RIGHT TO THE ENVIRONMENT

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On November 4<sup>th</sup>, by a 2:1 majority, New York voters amended the State's Constitution to provide a right to the environment for everyone in the State. The New York State Constitution's Bill of Rights now provides in Article 1 that:

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

Bills proposing this “Green Amendment” had passed both houses of the state legislature in consecutive two-year sessions, in accordance with New York's Constitutional amendment procedures. The rights it guarantees are effective from the date of its adoption. It now awaits implementation by all State agencies and local governments.

While the environmental bar and law school professors in New York State had sought recognition of such a self-executing right for two decades, there were objections from some lawyers. For example, several bar associations took no stand, complaining that the words in the Green Amendment are vague and too general, despite the fact that courts have been able to construe the general words “due process of law” to protect the liberties of individuals ever since the Magna Carta. The Farm Bureau, some local chambers of commerce, and associations of local governments also opposed its adoption, evidently worried that ongoing pollution practices might subject them to lawsuits, and a few editorials urged “NO” votes, fearing a glut of new litigation.

Perhaps because of diminished capacity during Covid-19 shut-downs, there were no major environmental campaigns favoring the amendment. The electorate's decision to add these rights was all the more remarkable because voters, on that same November ballot, declined to adopt proposed constitutional amendments on other topics. Evidently, this reflected voters' concern that New York was failing to protect human health.

New York City is still recovering from Hurricane Sandy that occurred in 2012, and New Yorkers have grown anxious about escalating climate change impacts. Moreover, while the State has been slow to implement the Legislature's 2019 “Climate Leadership and Protection Act”, voters are experiencing deteriorating ambient environmental conditions in the wake of localized flash floods and intense weather events, including measurable biodiversity losses that threaten New York agricultural production and threats to wild flora and fauna in New York's fabled Adirondack & Catskill Forest Preserve, and are concerned about groundwater contamination on Long Island where sole source aquifers supply all the water.

Even though former Governor Andrew Cuomo largely ignored the trends in environmental degradation, the Legislature has been more attuned to the public's growing environmental angst. Assembly Speaker Carl Heastie and Environmental Conservation Chair Steve Englebright, together since 2019 with Senator Andrea Stewart-Cousins, have been leading the legislative effort to rebuild depleted environmental agency budgets. Hailing from Long Island, Assemblyman Englebright led bipartisan support for twice enacting the laws to place the “Green Amendment” on the ballot.

New Yorkers have long supported nature conservation. The State Forest Preserve's "forever wild forest land" has been protected in the Constitution since 1894, and New York enacted the nation's first codified Conservation Law in 1911. Governor Theodore Roosevelt shared New York's conservation ethic across America, and subsequent governors, including Franklin Roosevelt, Nelson Rockefeller, Hugh Cary, Mario Cuomo and George Pataki, fostered stewardship of ecological and public health. However, since 2017, environmental degradation has accelerated across New York. On November 4<sup>th</sup> voters evidently sought to send their State government a message: no more back-sliding on environmental quality. Clean air and water are birthrights.

New York's amended Bill of Rights ushers in a new era of environmental jurisprudence, as there is no federal analogue and only scant case law from the handful of States, like Massachusetts, Montana and Pennsylvania, whose constitutions provide environment rights. Since air pollution accumulates from diverse sources, public health is maintained only by community-wide governmental action.

For several years, New York State has failed to strengthen its State Implementation Plan (SIP) to abate air pollution in compliance with the federal Clean Air Act. The SIP is designed to protect vulnerable persons afflicted by asthma or other respiratory diseases. Oversight by the US Environmental Protection Agency has been lax in requiring New York to attain mandated clean air standards.

The American Lung Association reports that asthma rates across New York are at alarming levels. The Department of Health statistics agree, and yet the Department of Environmental Conservation (DEC) has taken no effective action. Rather than adopting regulations to remediate harmful air quality, New York has defaulted on its duty under the Clean Air Act to attain "National primary ambient air quality standards ... [and] *allowing [for] an adequate margin of safety*" that are "*requisite to protect the public health.*" Section 109(b)(1), 42 USC 7409(b)(1). This is all the more important due to the administrative complexity of the Clean Air Act that effectively deters asthma sufferers, or others with respiratory illness, from invoking their "citizen suit" procedural rights under Section 304 of the Clean Air Act.

Indeed, since 1990, New York has failed to meet its duty to provide an adequate margin of safety for children, the elderly, or those with impaired lungs. This can be an Environmental Justice issue also, since asthma rates for people of color are markedly higher than for others. By invoking their Right to Clean Air, citizens could petition New York courts to order the Governor and DEC to mandate measures that restore healthy air quality.

What remedies might the Right to Clean Water provide? Consider, for example, the plight of those who received contaminated drinking water in their Hoosick Falls homes during 2014-16, having to cook with and bathe in water contaminated by local industry for two years before DEC and the US Environmental Protection Agency provided safe water. Judicial intervention could have provided remedies before then if they had a right to clean water. A constitutional right should accord individuals with a priority in securing relief from the courts due to threats to life and health.

New York's bar and bench can also draw upon judicial experiences from abroad. A majority of nations have recognized the right to a healthy environment, and the United Nations itself is poised to acknowledge such a right. On October 8, 2021, in [Resolution 48/13](#), the UN Human Rights Council in Geneva recognized that a clean, healthy and sustainable environment is a human right. It further called on nations around the world to work together, and with other partners, to implement this recognized right. Sponsored by Costa Rica, the Maldives, Morocco, Slovenia and Switzerland, the Resolution passed with 43 votes in favor and 4 abstentions (Russia, India, China and Japan). While the USA was not then a member of the Council, when the UN General Assembly votes next year in New York City on recognizing an international human right to the environment, the delegates will each be a beneficiary of New York States' constitutional right to a healthy environment.

What might a self-executing environmental right look like? The United Nations Environment Programme (UNEP) released the first [global report on The Environmental Rule of Law](#) in January of 2019. Prepared with research support from the Environmental Law Institute (ELI), this study finds that even rigorous environmental laws are ineffective without legal procedures for their implementation. Since the Magna Carta, a declaration of rights has provided a foundation for the rule of law. The right to clean air and water and to other basic environmental rights, is embedded within the umbrella right to a healthy environment.

Invoking the right to a healthy environment prods governments to take their environmental duties seriously. The [World Health Organization reports](#) that environmental risk factors are linked to 24% of all estimated global deaths, or roughly 13.7 million deaths a year. The contours of what is lacking due to the failure to ensure a "healthful" environment are well documented. For example, in February of 2021, the United Nations released a scientific synthesis report entitled "[Making Peace with Nature: A scientific blueprint to tackle the climate, biodiversity and pollution emergencies](#)".

Public health has entered a state of emergency in many nations, not unlike New York. With environmental security increasingly at risk, New York's new "Green Amendment" can offset that risk. New Yorkers can now petition state government or city hall to redress their environmental grievances. Individuals can go to court to re-secure the protections promised by state environmental statutes. Freedom entails preserving each individual's capacity to foster resilience and to protect life, livelihood and property. New York's enhanced Bill of Rights now provides the foundation for realizing the environmental rule of law.