

NYWEA Water-Related Questions and Answers on the Proposed NY Environmental Rights Constitution Amendment

I. Introduction

In November, New Yorkers will vote on whether to add an environmental rights amendment to the New York State Constitution Bill of Rights. In keeping with its mission of “educating its members and the general public about water resources and the water environment,” the New York Water Environment Association (NYWEA)¹ convened water leaders within the state and knowledgeable legal professionals to explore what this proposed amendment may mean to those on the frontline of protecting New York’s waters and the citizens that rely on these waters. NYWEA hosted two webinar-based legal panels to hear from amendment proponents as well as those questioning the amendment.² This question and answer document is based on those presentations and is intended to educate NYWEA members and others who strive to protect and enhance the state’s waters while leaving the decision on whether to vote for or against the proposed amendment up to each individual.

II. New York’s Proposed Environmental Rights Constitution Amendment

The proposed Amendment would add the following to the New York State Constitution’s Article I, Bill of Rights:

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

This amendment has gone through the legislative process and passed in two consecutive legislative sessions. The next step is for New York State voters to vote on whether it becomes part of the state’s Bill of Rights.

III. Questions and Answers

1. Can you speak to New York’s proposed amendment in comparison to similar constitutional amendments enacted in other states?

Environmental rights are in 150 national constitutions around the world and included in a growing number of state constitutions across the United States. While other states, including Hawaii, Illinois, Massachusetts, Montana, Pennsylvania, and Rhode Island, already have environmental rights provisions in their state constitutions, each state has used different language

¹ NYWEA, the [New York Water Environment Association](#) serves the public by promoting sustainable clean water quality management through science, education, and training.

² See Attachment A for a description of the panel presentations used to develop this paper.

and various levels of detail regarding implementation, definitions, and assignment of obligations.³ No two states have the same environmental rights amendment.

In comparison to other state amendments, New York’s proposed amendment is one of the briefest and broadest: “Environmental rights. Each person shall have a right to clean air and water, and a healthful environment.”⁴

Amendment proponents note that the brevity of the proposal is in keeping with the federal Bill of Rights, which are typically simple and broad, while questioners point to the other “Rights” in this section of the New York Constitution, which are much longer, with greater detail. According to proponents, the benefit of such a brief statement of rights is that it establishes a fundamental right that is protected from government infringement and yet is broad enough to be interpreted—by the New York State legislative, executive, and judicial branches as well as the people of New York—to cover a broad range of situations. A criticism of the amendment’s single sentence and broad language is that it has lots of room for interpretation, which could create a number of potential unforeseen consequences, a proliferation of litigation, and/or judicial overreach. That risk, however, may be tempered by the fact that New York courts typically show greater judicial deference to the legislature when faced with broad constitutional language. The real risk of broad language, according to amendment proponents, is that courts may be too timid in applying the rights because judges may not feel they have enough to go on based on the amendment wording.

Like only two other states, Pennsylvania and Montana, New York would have its constitutional environmental rights provision included in its Bill of Rights. Proponents state that this location is key: it acknowledges these rights as fundamental and likely self-executing, as explained further in Question 3 below.

Overall, proponents and those questioning the amendment agree that, over time, the scope of applicability of the broadly worded environmental rights amendment will likely be determined by the New York State courts.⁵ But examples of court precedent in other states may have limited predictive value for New York State; because the amendment texts are different, the judicial approaches may be different, and the placement of rights within the constitution varies.

2. Under this Amendment, how do you think “clean water” or “clean air” will be defined?

Like other broadly worded rights in the federal Bill of Rights (e.g., no “excessive” bails or fines, the right to “freedom of speech,” freedom from “unreasonable search and seizures”), the right to “clean” air and water is not defined in the amendment. Amendment proponents note that the

³ See, e.g., “New York Seeks Constitutional Right to Clean Air and Water,” *Rochester Business Journal*, Nixon Peabody LLP (April 15, 2021) (comparing wording of environmental rights amendments of several states).

⁴ Interestingly, the language of the New York proposal is very similar to the UN Human Rights Council’s October 5, 2021, statement that, among other things, “Recognizes the right to a clean, healthy[,] and sustainable environment as a human right that is important for the enjoyment of human rights.”

⁵ As pointed out by one of the amendment proponents upon review of the draft of this document, “In the first four years after the Pennsylvania Supreme Court breathed new life into its Environmental Rights Amendment, the Commonwealth Court issued opinions that produced a holding on the ERA in only five cases challenging actions by local governments and, in those cases, the local government actions were upheld. Moreover, the suits typically stated multiple claims suggesting that the suits would likely have been filed under other theories anyway. See John C. Dernbach, *Thinking Anew About the Environmental Rights Amendment: An Analysis of Recent Commonwealth Court Decisions*, 30 *Widener Commonwealth L. Rev.* 147, 151.”

judiciary is well equipped to apply standards of interpretation, as has been done for other rights, to understand what “clean” means. It will simply take time and process to arrive at the interpretations.

However, those questioning the proposed amendment are concerned about the current uncertainty of an undefined right to “clean” air and water, and a healthful environment. The greatest challenge in environmental review and permitting for businesses and municipalities is the uncertainty of the standards against which a project will be judged. This uncertainty can lead to difficulty in obtaining financing or create significant budgetary challenges. On its face, the amendment increases that uncertainty. Additionally, although there are various existing clean air and water standards that may be a baseline for defining “clean” air and water, means of enforcing those standards already exist. New constitutional claims would, therefore, likely seek to enforce new, more restrictive standards. This leads those questioning the amendment to speculate that even if a project complies with current regulations and permits, it potentially may not succeed or have to be altered in light of the currently uncertain, possibly more-restrictive, constitutional considerations.

3. How would you define the word “right” in the context of this proposed amendment? How would you distinguish this from the notion that clean water should be free to all?

The proposed environmental rights, like all rights protected by the Bill of Rights, are fundamental and self-executing. Fundamental rights cannot be infringed by the government unless there is a compelling state interest and courts deem it (i) necessary, (ii) narrowly tailored to achieve a compelling state interest, and (iii) the least restrictive means to achieve the purpose. Self-executing means the amendment has legal, enforceable strength on its own: it is a constitutional right that can be relied on even in the absence of another law.

Proponents of the amendment do not think that the proposed environmental right implies a right to free services, such as free potable water or free wastewater treatment. Some other constitutionally protected rights have costs for services, such as the right to marriage requires the purchase of a marriage license. Additionally, one proponent noted that according to the amendment’s legislative history, the amendment is “[t]o protect public health and the environment by ensuring clean air and water,” which seems to mean protection of ambient conditions rather than guaranteeing services that clean water. Finally, the Bill of Rights typically is about what the government cannot do (negative rights) rather than compelling the government to do something like requiring an entity to provide free clean water. Overall, to most presenters, it is unlikely that this amendment will eliminate the need to pay for water services. As one presenter said: the right to clean water is not the right to free water.⁶

4. Do you think there will be new ways for citizens to enforce the right to clean water or clean air?

The Environmental Rights Amendment will provide new ways for people to seek to force the protection of clean air and water. It provides people direct access to the courts to vindicate their right to clean air, water, and a healthful environment. New constitutional-based claims could be

⁶ As pointed out by one of the presenters questioning the amendment upon review of the draft of this document, the amendment could create a risk that someday a court could hold that the right to clean water is a basic human right regardless of cost, and if so, a court could find that a water rent fee for usage statute violates the amendment.

raised against government action if allegedly the government has gone too far or failed to fulfill its obligation to protect fundamental rights of the people. For example, people could newly raise a claim that an existing law or permit issuance fails to adequately protect the right to clean air or water. Additionally, where certain statutes, like the Clean Water Act, already include citizen suit provisions, new constitutional environmental rights claims could also be added onto those suits.

5. Do you think the right to clean water could be used to change the state’s established processes used to set Water Quality Standards or address emerging concerns (such as PFAS)?

Questioners of the amendment note that current rules and regulations are based on research and science and shaped by balancing overall economic and social well-being. For example, regulations promulgated under the state’s Public Health Law include drinking water standards that were created through scientific processes and which were judged to be currently achievable by a typical public water supply. One potential criticism is that the amendment would create potential for adopted standards to be preempted by a judge.

Amendment proponents note that the amendment could be used to help prevent the next emerging contaminants from having significant environmental impacts, and use the recent concern over PFAS as an example. They allege that corporate misconduct delayed regulation for years. Use of the amendment could have helped push regulators to move this problem to the top of the priority list, to undertake necessary studies, and to consider exposure prevention. They claim that the Environmental Rights Amendment could help people and regulators ensure that the next emerging contaminants do not stay unregulated for long periods of time.

However, some questioners of the amendment say that existing regulatory structures worked well in addressing the risk from PFAS. Questioners of the amendment added that the infrastructure needed to establish scientifically sound regulations have been developing for the past 50 years, and the existence of the amendment would not expedite those processes. For example, they question whether the amendment, if it had been adopted, would have had any impact on the way events played out in Hoosick Falls or other PFAS-impacted communities.

6. How else could the right to clean water change current practices?

In some ways, both amendment proponents and questioners indicated the amendment may be duplicative of existing legal tools and practices.

Those questioning the amendment consider New York’s environmental regulatory requirements to be “very, very comprehensive.” They question whether the proposed amendment would bring anything new beyond what is already provided by existing statutes like the State Superfund law addressing certain contamination, the State Environmental Quality Review Act requiring certain project developments to consider environmental impacts, or common law claims like nuisance protection against noise, bad air, etc. One amendment questioner added that environmental enforcement is currently handled by a “dedicated NYSDEC” and an “activist Attorney General’s office,” so the need for additional enforcement mechanisms, such as a “constitutional right” may not be necessary. If the new amendment is not offering anything beyond the many rules in existence, then some ask why the amendment is needed.

Amendment proponents acknowledge that pre-constitutional claims, like those famously advanced in the climate change case *Juliana v. US*, already seem to account for environmental rights through the Public Trust doctrine. Additionally, amendment proponents have the

impression that people in New York generally assume they already have a right to clean air and water and a healthful environment, so adding the amendment could formally codify that generally held perception.

Overall, however, both sides also see that the amendment could have the following real impacts that change current practices.

a. Amendment could fill gaps in environmental law

According to amendment proponents, the Environmental Rights Amendment is needed to fill gaps in the state's environmental protection rules. They believe that the current state of environmental contamination and environmental justice issues show that an additional path is needed to fill those gaps and address those inequities. For example, "asthma alley" is a gap seen in the Bronx where people have high rates of polluted air and asthma. Additionally, amendment proponents note that one of the biggest gaps is the need to address climate change. They state that for these type of gaps, we can no longer afford to have regulatory pathologies, wait for federal or other states to act, or allow blind spots in our laws. Amendment proponents see the Environmental Rights Amendment as offering a new pathway for environmental protection in New York State.

In contrast, those questioning the amendment indicate that these gaps are not real gaps, but rather intentional results of a comprehensive process. In other words, according to those questioning the amendment, the current laws are intended to strike a balance that is in the best overall interest of the public—there is no perfect solution or absolute standards that the legislature, NYSDEC, and other agencies have to allocate limited resources for inspection and enforcement. New York's current constitutional provisions and environmental laws require a balancing of outcomes. Those questioning the amendment question whether an action brought under the Environmental Rights Amendment may disrupt the allocation of resources or other such agency determinations.

b. Amendment could shift resource allocation decisions

Those questioning the new amendment explained that the amendment could shift who makes decisions on environment-related resource allocation. Currently, resource allocation is decided by the legislature making the laws and the agencies regulating and enforcing the laws. The concern is that the Environmental Right Amendment would make resource allocation a judicial decision in response to litigation. Those questioning the amendment provided three potential examples. First, currently, certain lakes and streams do not meet Water Quality Standards, which the state government acknowledges and addresses through a Total Maximum Daily Load ("TMDL") program to bring lakes and streams into compliance over time. The amendment could be used in a law suit to compel a stream's compliance with Water Quality Standards in a more immediate way than the TMDL program, perhaps by forcing some permitted dischargers to meet such low limits that there isn't available treatment technology. Second, where raw sewage discharges into combined sewer systems, a case may be brought under the amendment to require municipalities to develop a plan addressing the raw sewage issues more quickly than the currently required planning timeframe. Third, the amendment may arguably be raised to try to bypass or pre-empt state laws that currently allow for additional latitude to agriculture activities like water discharges. If the amendment is used to fill intentional gaps, then it may divert

resources to those areas to the detriment of other areas prioritized by current decision makers and the established decision-making processes.⁷

Amendment proponents, however, see this as a positive: it would be great if citizens could force the legislature to allocate funds needed to do a safety study or to prioritize a desired environmental protection action. Those questioning the new amendment assert that elections are the mechanism to make sure the legislature does its job.

Amendment proponents add that, as needed, the use of the amendment could help to achieve better and more informed decision making and to focus on prevention of environmental harm rather than waiting and having to implement remedies after the harm is done. Overall, the amendment could be a prod to help devote resources where they are needed.

c. Amendment could create or eliminate agency “capture”

Some questioning the amendment speak in support of agencies’ expertise in dealing with the difficult tasks of supporting clean water while being the steward of public money. They are concerned that if the amendment could be used to force a particular type of action or shift in resources, then the prioritization process would be taken out of the agencies’ hands. The real concern is that this shift in decision-making power and the establishment of new priorities could be driven by special interests. One presenter questioning the amendment further noted that it is not unusual for separate, moneyed, private interests to use environmental laws for their own goals rather than for the intended public benefit. Those questioning the amendment are concerned whether it is in the best interest of the community to delegate the setting of regulatory priorities to the courts.

Amendment proponents, on the other hand, view the amendment as a valuable tool to overcome agency “capture.” Amendment proponents say a key example of how this successfully worked in another state is in the case *Robinson Township v. Commonwealth of Pennsylvania*. In that fracking law case, despite the strength of statutory protection and the regulatory processes, the plaintiffs argued that there was “capture” of the legislative and regulatory process by strong special interests. In this Pennsylvania case, its Constitutional Environmental Rights provision provided a judicial backstop to pause and to correct that perceived regulatory failure.

IV. Conclusion

On Election Day this November 2021, New York State voters will decide whether the New York State Constitution Bill of Rights will include the Environmental Rights Amendment. NYWEA is not making a recommendation on how New Yorkers should vote on the amendment; instead, it has compiled this objective list of questions of interest of those who protect and provide water within the state and the answers provided by our two expert panels. NYWEA thanks all those who participated in the panels to share support for and questioning of the Environmental Rights Amendment.

⁷ Those questioning the amendment also added that public water supplier, wastewater treatment entities, or municipal governments could see amendment-related claims against other activities, such as the use of road salt, lead pipes within water systems, or chemicals to clear vegetation from roads; trace chemicals within the water supply; infrastructure decisions; lack of dilution in a surface discharge; materials storage; or water rent statutes and rates.

Attachment A

NYWEA has been tracking the New York Environmental Rights Constitutional Amendment (ER Amendment) since it was first introduced in the State Legislature. Once it passed both chambers in two different legislative sessions, NYWEA, knowing that some of its members had significant questions about the amendment and how it might affect their work protecting and enhancing New York's waters sought to objectively educate its members and embarked on the following multi-step process:

- It convened a panel of NYWEA leaders who developed a series of questions focused on how the proposed amendment could impact who work to protect and enhance the state's water resources.
- It provided those questions to two panels of experts who have spent time delving into not only the proposed New York ER Amendment, but also have tracked what has happened in other states that have adopted ER constitutional amendments. These experts agreed to discuss the proposed NY ER Amendments and provide their thoughts on the NYWEA questions during two separate webinars.
 - One featuring proponents of the ER Amendment. A recording of the webinar can be accessed [here](#). The panel included:
 - [Maya van Rossum](#), who has served as the Delaware Riverkeeper and leader of the Delaware Riverkeeper Network since 1994. Maya is the founder of the national Green Amendment Movement and author of "[The Green Amendment](#)."
 - [Katrina Fischer Kuh](#), who joined the Pace University Elisabeth Haub School of Law faculty as the Haub Distinguished Professor of Environmental Law in 2017. Professor Kuh's scholarship focuses on climate change and sustainability, and she has taught Environmental Law, International Environmental Law, Global Climate Change and U.S. Law, Administrative Law, and Torts. She is the co-editor of *The Law of Adaptation to Climate Change: United States and International Aspects*.
 - Other representatives of New York's legal community have been evaluating and raising questions about the propose ER Amendment. A recording of the webinar can be accessed [here](#). The panel included:
 - [Robert Stout](#), of Whiteman Osterman & Hanna LLP. He advises clients on all aspects of environmental law with particular experience counseling clients on environmental regulatory compliance and enforcement.
 - [Kevin M. Young](#) of Young Sommer LLC, who has been practicing environmental law for over 28 years. He assists clients in achieving their business and municipal objectives while complying with environmental and land use regulations.
 - [Kenneth J. Pokalsky](#) of the Business Council of New York State, Inc., is responsible for management of The Business Council's

government affairs staff and Council's overall legislative and regulatory advocacy efforts.

- From these webinars and a few published articles, the attached summary of the answer to the NYWEA questions was developed. Each webinar panelist was asked to review and comment on the draft summary and their responses were factored into the attached Q&A white paper.