

## How Green Amendments Protect Key Environmental Rights

By **Maya van Rossum** (November 23, 2021, 6:01 PM EST)

On Nov. 2, New York's citizens voted to add a green amendment to the state constitution. Some may ask: Why it is needed? Will it make a difference? Is New York's amendment unique? Are other states considering such amendments? Is a federal amendment being considered?

In short, New York's green amendment is part of a nationwide movement with roots in other states, that will help address fundamental deficiencies in the state and federal systems of environmental protection.



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### Why Green Amendments Are Needed

Clean water and air, a stable climate and healthy environments are essential for supporting healthy lives, healthy communities and healthy economies. Yet across our nation, these basic human rights are not given meaningful, constitutional recognition and protection.

Instead, their protection is entrusted to a political system with competing demands — where money, power and connections have primacy over justice and basic human needs; and where partisan gamesmanship is often more important than facts, science and problem-solving.

In most states, and under the U.S. Constitution, environmental rights are not recognized as inalienable rights reserved to the people that are to be protected from government infringement and overreach. At the same time, here in the U.S., there tends to be a presumption among government officials of a right or need for industry and business to pollute, even when it will inflict serious health and safety consequences on people and the environment.

Under our system of government, environmental impacts are too often relegated to the end of the governing process. The primary focus is on permitting and monitoring pollution and degradation, rather than prioritizing minimization of harm at the beginning of the process — when prevention and protection are most achievable.

At the same time, our current legal structure perpetuates environmental racism, often exposing Indigenous, Black and other people of color to pollution that threatens their lives, health and safety, and turns their neighborhoods into environmental sacrifice zones.

Environmental exposures for these communities are often further compounded by diminished access to

needed health care. While environmental justice is receiving renewed attention, the legislation, regulation, policies and programs being advanced do not provide the systemic solutions necessary to prevent ongoing environmental racism.

### **What Green Amendments Are, and How They Work**

Not every constitutional provision mentioning environmental rights meets the criteria for being a green amendment, as I defined the term in my 2017 book, "A Green Amendment: Securing Our Right to a Healthy Environment."

Green amendments are self-executing provisions that recognize and protect the inalienable rights of all people to clean water and air, a stable climate and healthy environments in the declaration of rights sections of our state and federal constitutions. In short, green amendments put environmental rights legally on par with other civil, human and political rights — like free speech, due process and property rights.

While over 40 states talk about the environment and/or environmental rights in their constitutions, only three states to date have the benefit of a constitutional green amendment: Pennsylvania, Montana and, most recently, New York. As with other declaration of rights protections, green amendments are a limitation on government authority — protecting environmental rights from government infringement or overreach, as opposed to being a new grant of government authority.

As discussed by Ronald Castille, then-chief justice of the Pennsylvania Supreme Court, in the court's 2013 decision in *Robinson Township v. Commonwealth of Pennsylvania*:

The Declaration of Rights assumes that the rights of the people ... are inherent in man's nature and preserved rather than created by the Pennsylvania Constitution. ... The Declaration of Rights is that general part of the ... Constitution which limits the power of state government.

This heightened constitutional standing helps to reorient government decision making so that pollution prevention and environmental protection are a prerequisite for, and presumption of, all government action — bringing environmental considerations to the beginning of the decision-making process when they are best able to be avoided, minimized and addressed.

The self-executing nature of a green amendment ensures that the amendment defines and guides the interpretation and application of laws and regulation, as opposed to the constitutional right being defined through legislation. The self-executing nature also allows the constitutional right to be relied upon when there is a gap in environmental protection laws, and when implementation of a law is causing disproportionate harm to environmental justice communities that otherwise cannot be addressed.

Green amendments explicitly recognize and protect environmental rights that are fundamental to human life, health and community. These include the right to clean water and air, a stable climate and healthy environments.

Recognizing and protecting the rights of people to the natural, human health, scenic, recreational and indigenous cultural values of the environment helps to ensure a green amendment respects and protects the environment in a well-rounded way, including benefits and values of the natural environment that may be of particular importance to a state and its diverse communities.

Notably, green amendments protect the rights of all people, regardless of race, ethnicity or socioeconomics. There can be no environmental sacrifice zones with a green amendment at work.

In addition, green amendments create a duty on all government entities and officials, subject to the constitution, to respect and protect enumerated environmental rights; this constitutional duty is not limited to the legislature.

While these are green amendment essentials, there are other elements that can strengthen environmental justice and generational protections offered by the amendment, and, at the same time, provide additional clarity on the constitutional obligations required of government decision makers.

In addition to recognizing the individual rights of all people to a clean and healthy environment, use of trust protection for natural resources provides tremendous added value. For example, Pennsylvania's green amendment identifies the natural resources of the state as trust resources that are to be conserved and maintained by government for the benefit of present and future generations of Pennsylvanians.

The constitutional trust created by a green amendment is not limited to the traditional common law public trust doctrine, which often only covers navigable waters and other specified aspects of the environment. A green amendment trust includes all natural resources of a state — or the U.S., if talking about a federal amendment — and embraces the full body of precedent, protection and guidance that trust law has to offer.

Among the benefits of using trust law is that it brings forth fiduciary obligations that guide constitutionally required government action. For example, the trustee duties of prudence, loyalty and impartiality in the environmental rights context require informed decision making that includes consideration of applicable science and individual and cumulative impacts, and ensures all beneficiaries are treated and protected equitably.

Fulfilling these basic fiduciary obligations will not only support better government decision making, but will help the courts determine when challenged government action is constitutionally infirm.

Ideally, green amendment language will specifically recognize that environmental rights and healthy natural resources belong to, and must be protected for, both present and future generations. This intergenerational protection ensures that government is focused on the long-term and cumulative impacts of its actions.

Having a generational component not only gives government a strong foothold and directive for taking action to address the climate crisis, but it can also allay fears that a green amendment would be used to avert environmentally justified and defensible clean energy projects.

In addition to protecting environmental rights from government overreach, green amendments provide powerful constitutional grounding for environmentally protective government action. For example, green amendments provide a foundation for strong environmental legislation or regulation; can strengthen permitting decisions, including allowing consideration of environmental justice protections; support state enforcement actions against environmental violators; and support local zoning ordinances and decision making designed to benefit local environmental concerns.

The benefits of green amendments do not begin or end with the law. As is the case with other constitutional rights, the grant of constitutional protection for environmental rights empowers people, emotionally and intellectually, to raise the expectations they have of their government officials, and to advocate more firmly, actively and confidently for environmental protection.

Green amendments change the focus of the conversation to environmental rights, as opposed to an environmental wish list. Ideally, green amendments allow advocates to secure stronger environmental protections through their activism, negating the need for litigation.

### **How the Green Amendment Movement Began, and Where It Stands**

The green amendment movement was inspired by a successful legal action secured in 2013, where a preexisting, but legally ignored, Pennsylvania constitutional environmental rights amendment was used to defeat a devastatingly piece of legislation that was slated to give the shale gas industry new powers and rights, unleashing a new wave of fracking and all its devastating harms.

The law, known as Act 13, gave the industry automatic waivers from environmental protection standards; undermined local zoning by mandating that fracking be allowed in residential, historic preservation, environmental protection and farming districts; relieved the fracking industry from notification requirements where there was potential drinking water contamination of private wells; and gave industry the power of eminent domain to force storage of their explosive gas on and under private property.

Once it passed, and with a very pro-fracking Legislature and governor in office, there was little hope of overturning the law, until a coalition — including local community leaders, seven municipalities and my organization, the Delaware Riverkeeper Network — brought the Robinson Township case to challenge the law as a violation of Pennsylvania's long-ignored environmental rights amendment.

Ultimately, a plurality of the very conservative Pennsylvania Supreme Court declared provisions of Act 13 to be unconstitutional because they violated the environmental rights of the people of Pennsylvania — not only defeating the law, but overturning 42 years of bad precedent, and breathing legal life into the state's green amendment.

Recognizing this transformative victory as the foundation for a powerful national model, I founded the Green Amendments For the Generations movement in 2014. I determined that the only other state with a Green Amendment at that time was Montana.

Since the founding of the Green Amendment movement, 13 states have been inspired to put forth green amendment proposals, and earlier this month, New York became the first state in the modern era to pass such an amendment. Other states where green amendments are under consideration include New Mexico, Hawaii, Maine, New Jersey, Delaware, West Virginia, Vermont, Maryland, Washington, Kentucky, Arizona and Iowa, with interest growing in many more states.

The goal: a green amendment passed in every state in the nation. Simultaneously, the movement is laying the foundation for securing a federal green amendment as well.

Green amendments in Pennsylvania and Montana have been used to address a variety of serious environmental issues of public concern, but have not resulted in a massive onslaught of new litigation, with, on average, less than 10 lawsuits a year advancing based on each state's amendment.

The Pennsylvania and Montana green amendments have been used by individuals, organizations, municipalities and state government to secure health, safety, environmental and economic benefits in the face of unconstitutional legislation, permitting, and government actions that would undermine local zoning authority, contaminate drinking water supplies and decimate critical natural areas.

They have also been used to inform how existing legislation and regulations should be interpreted; to advance positive government action, such as toxic site cleanups; to support local government decisions; and to underpin positive state government action.

### **The Transformational Power of Green Amendments**

Green amendments create a transformational shift in how we legally, politically and emotionally address and protect our environment. Given that we all depend upon clean water, clean air, a stable climate and a healthy environment to support every aspect of our lives, no rights are more appropriate for the highest constitutional protection than environmental rights protected by constitutional green amendments.

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***Disclosure: The author and her organization, the Delaware Riverkeeper Network, were plaintiffs in the 2013 litigation discussed in this article.***

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