

The Precedents and Potential of State Green Amendments

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July 2021

Rockefeller
SUNY
Institute of Government



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LAW & POLICY
SOLUTIONS



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Introduction

On November 2, 2021, New Yorkers are poised to vote on a ‘green amendment’ to the state constitution. The potential amendment, as required by law, has already passed both houses of the state legislature in two consecutive legislative sessions before being put to public referendum. If approved by voters, the amendment will add a new section (19) to the state constitution in the Bill of Rights (Article I) that reads:

§ 19. Environmental Rights. Each person shall have a right to clean air and water, and a healthful environment.

Previous state legislative debates, alongside business and environmental advocacy efforts, have already raised some potential advantages and concerns. Proponents in New York have generally framed the amendment in terms of expanding rights, establishing standing for communities to be able to bring legal cases forward when harm has or may be caused. They argue preventing such environmental health harms will increase long-term economic and human health benefits. Opponents, on the other hand, have framed the amendment with respect to concerns about lack of specification within the amendment’s language, significant increases in litigation, and increases to the costs of doing business.

That discussion will now shift to the broader public. As voters decide how to weigh in later this year, it is important to outline exactly what a green amendment is, how such amendments have fared in other states, and whether these potential advantages and concerns have actually played out in those cases. This report considers the two earlier examples of state green amendments passed in Pennsylvania and Montana in 1971 and 1972 respectively. We review the discourse and framing of each state amendment’s potential impacts ahead of its adoption, as well as the observed impacts after its adoption as seen through the judicial precedents that followed.

Timeline of New York State Legislature Votes for a State Constitutional 'Green Amendment'



The limited number of other states with green amendments makes it difficult to predict the potential impacts in New York. As with other rights protected under the constitution, the ultimate impact will be significantly influenced by case law. Our research finds the initial impacts in Pennsylvania and Montana were minimized as a result of early legal judgements. Consequently, for several decades the hopes of proponents for a more significant expansion of environmental rights, protections, and enforcement did not pan out. Neither did the concerns opponents have expressed about compliance costs and litigation. More recent judicial decisions have, however, begun to shift the degree to which the impacts of green amendments are fully felt in Pennsylvania and Montana. These shifts have been cited in further court cases as the basis for more environmentally protective decisions. The result is a more promising outlook for green amendments.

Background

The environmental movement of 1960s and 1970s in the United States emerged as public awareness and concerns grew about pollution from pesticides, industrial and energy production, transportation, mining, and toxic chemicals.¹ As is often noted, Rachel Carson's book, *Silent Spring* (1962), was a seminal work during this period, making the dangers of pesticide use part of the broader public and political discourse. Following grassroots campaigns against pollution and several environmental catastrophes—including the Santa Barbara oil spill and the Cuyahoga River fire—there was a bipartisan shift in the United States electorate towards environmental concerns.²

In the context of this shift and broader public attention, a handful of states began proposing amendments in the early 1970s to enshrine environmental provisions into their state constitutions. These state-level constitutional provisions generally granted residents an affirmative right—that explicitly asserts the existence of a right to something—with respect to clean air, clean water, and a healthy environment. Green amendments put the right to a healthy environment on par with other rights protected in bills of rights including free speech, religious liberty, trial by jury, and equal protection under the law.

The passage of a green amendment generally gives residents, and in some cases organizations, standing in a court of law to challenge activities with potential environmental impacts before execution. Without such standing, communities often need to wait and be able to prove harm after the fact. The language of green amendments thus shifts the burden of proof to those who would create pollution.³ This means, in theory, that rather than communities needing to prove harm after the fact, people or entities that might cause or have caused pollution have to prove that they are not in violation of the rights and responsibilities outlined in the constitutional amendment. A green amendment does not directly change environmental regulations or enforcement in a state. The effectiveness and implementation of the green amendment is largely determined by the legal cases brought by residents following its passage.

To date, only six states currently have constitutionally-based environmental protection provisions. Illinois, Massachusetts, and Hawaii introduced new articles in their constitutions detailing environmental rights, provisions, and protections.⁴ Only two state constitutions have introduced green amendments. We define green amendments as affirmative rights included in their bill of rights, rather than elsewhere in the state constitution.⁵ These state green amendments broadly address environmental rights.

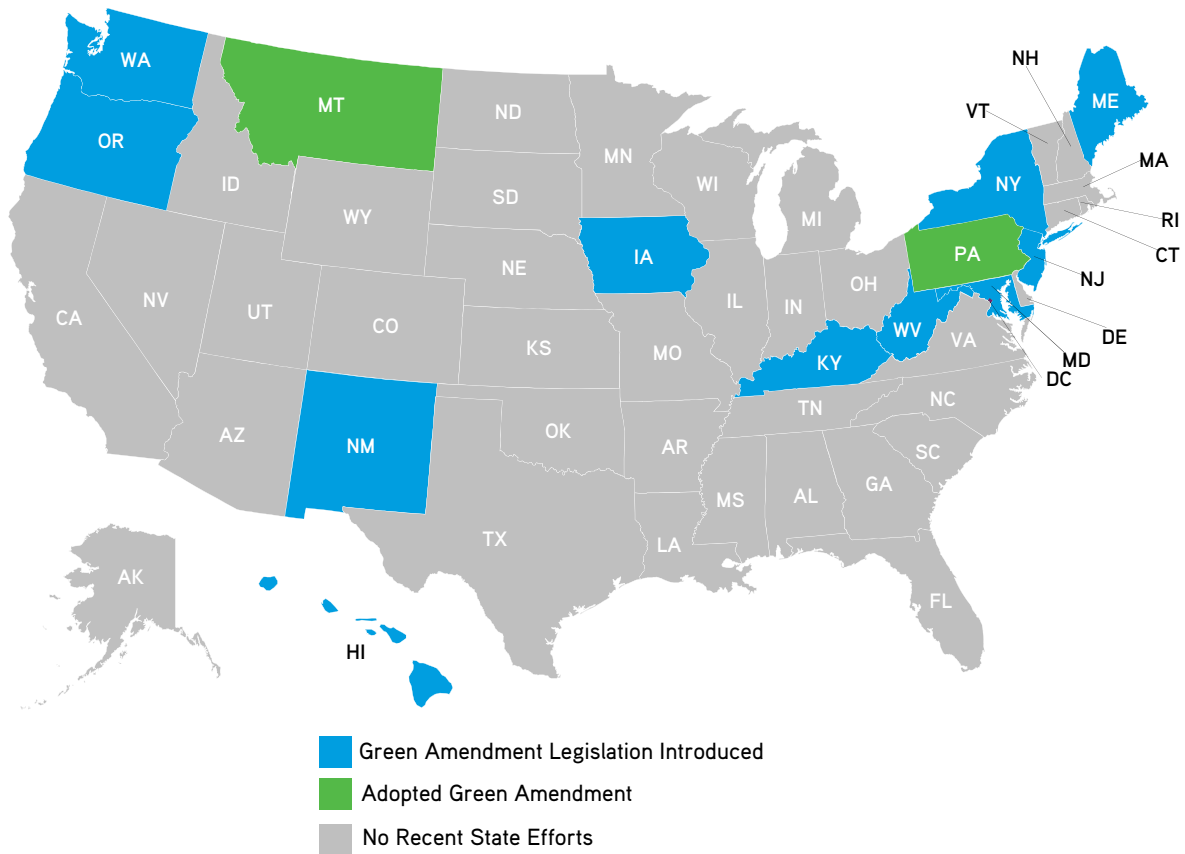
STATE GREEN AMENDMENTS ARE:

State-level constitutional provisions that: grant residents an affirmative right to certain environmental conditions; locate those rights under the state bill of rights, rather than elsewhere in the state constitution; and broadly include environmental rights like clean air, clean water, and a healthy environment.

By this definition, Pennsylvania (in 1971) and Montana (in 1972) were the first and only two states to adopt such green amendments into their constitutions.^{6,7} In the decades that followed, however, court precedents in Pennsylvania and Montana significantly impeded the potential impact of their respective amendments. As a result, few green amendments were proposed or seriously considered in the following decades.

More recently, court cases have overturned the original case law and created new precedents and reaffirmed the environmental rights offered by green amendments. Consequently, over the past decade or so, green amendment legislation has been introduced in 11 other states, including New York, New Jersey, Maryland, and Maine.

States That Have Introduced Green Amendment Legislation





Pennsylvania

As far back as the Civil War, Pennsylvania was one of the largest producers of steel and coal in the United States, as well as an epicenter for regional railroads. Although the industrial manufacturing and transportation sectors contributed substantially to the state's overall economy, they also contributed to a significant amount of pollution. As early as 1905, in a response to a typhoid fever outbreak, Pennsylvania passed The Purity of Waters Act that regulated what could be dumped in streams. Coal companies and tanneries producing leather, however, were excluded under the law.⁸ In addition, although mining legislation was enacted beginning in the 1940s, the resulting impacts were not generally effective. According to historian Richard Vietor, "this first generation of laws was crude and ineffective, and did little more than require some dirt be thrown back into the exhausted [mine] pits."⁹ However, beginning in the 1960s, as the broader environmental movement across the United States grew, Pennsylvania legislators introduced and passed more numerous and substantive environmental protection bills, including a green amendment.^{10, 11}

Originally introduced on April 21, 1969, by Representative Franklin Kury as House Bill 958, Pennsylvania's green amendment was officially referred to as The Environmental Rights Amendment. The bill was then unanimously passed during the 1969-70 session and the 1970-71 session of the state legislature.¹² As in New York, Pennsylvania requires that constitutional amendments be passed in two subsequent legislative sessions before being ratified by voters. Once it passed for the second time, the bill then became Joint Resolution 3 and was added to the ballot for residents to vote on. On May 18, 1971, the following language was ratified by voters by a margin of 4 to 1 as part of Article I, Section 27 of the state constitution.^{13, 14, 15}

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.¹⁶

The language of the Environmental Rights Amendment, and of green amendments in general, shifts the burden of proof to those who would create pollution.¹⁷ This means, in theory, that rather than communities needing to prove harm after the fact, people or entities that might cause or have caused pollution have to prove that they are not in violation of the rights and responsibilities outlined in the constitutional amendment.

Pennsylvania's amendment also makes the government of Pennsylvania the explicit trustee of the environment. The inclusion of such public trust language places the responsibility of preserving natural resources on the Pennsylvania government, including all its branches and agencies.¹⁸ The amendment's additional inclusion of the terms "scenic, historic, and esthetic values" further broadens the cases to which the amendment may be interpreted to apply. Thus, in Pennsylvania, the state and those operating within it may have to consider how actions impact not only the quality and health of the environment, but also the visual appearance of it and historic sites throughout the state.

Discourse on Pennsylvania's Green Amendment

Based on public records, and the unanimous vote in favor, there was no evident opposition to Pennsylvania's green amendment in the legislature. Supporters highlighted the intergenerational potential of the amendment, framing its importance with respect to protecting the environment for future generations and averting an existential threat.¹⁹ While there was little actual debate on the bill given the broad support for it, one Pennsylvania legislator, referenced as Mr. Wise in debate transcripts, called for the legislature to vote aye on the bill by simply asking that two articles be submitted into the record—"the first is an article from the *Philadelphia Bulletin* of May 25, 1969, by Gary Brooten, entitled, 'The Right to Freedom from Pollution.' The second article is from the *New York Times* of April 7, 1969, by Israel Shenker, entitled, 'Man's Extinction Held Real Peril.'"²⁰ This future focused framing of concerns is embedded in the amendment itself, as it states that "Pennsylvania's public natural resources are the common property of all the people, including generations yet to come."²¹

Proponents also stressed the more immediate urgency of the bill by highlighting the broader existing impacts of pollution on human and environmental health in Pennsylvania and the United States more broadly and, as is evident in Wise's submissions into the record, emphasized a rights-based framing of the amendment. Paralleling the importance of environmental rights with other intrinsic political rights such as freedom of speech and assembly, in legislative debate on April 21, 1969, Kury stated that he believed:

The protection of the air we breathe, the water we drink, the esthetic qualities of our environment, has now become as vital to the good life—indeed, to life itself—as the protection of those fundamental political rights, freedom of speech, freedom of the press, freedom of religion, of peaceful assembly and of privacy.²²

Later legislative discussions generally served to further explore the dangers of environmental issues and pollution to the ecosystem, humans, and the economy.²³

Outside of the legislature, the green amendment became part of broader political discourse and a noted electoral issue. On April 15, 1970, a column appeared in the *Valley Times-Star* newspaper by then-Democratic gubernatorial candidate Milton Shapp. Shapp made an appeal to Pennsylvanians and explained the importance of the amendment. He opened the article by writing about existing environmental degradation in the state, noting that Pennsylvanians had a “tremendous stake[...] in preserving our valuable resources of land, air, and water—and trying to salvage what has been damaged, if not destroyed, by pollution.” He also noted the importance of the health of Pennsylvanians writing that there “is convincing proof that polluted air can be fatal,” and made a broad appeal to residents that air pollution impacts not just urban areas, but rural areas as well.²⁴

Case Law Impacts After Passage

While Pennsylvania was the first state to pass a green amendment, the court precedents that immediately followed rendered the amendment largely unenforceable for over four decades. Only more recently, in cases in 2013 and 2017, have those early precedents been changed or reversed, representing a potential shift in how the state courts generally treat the Environmental Rights Amendment.

Payne v. Kassab (1973)

Shortly after the Environmental Rights Amendment’s passage, residents in the City of Wilkes-Barre, Pennsylvania, challenged a project by the Department of Transportation to widen a street because it would take land away from a public park called River Common. The residents asserted that the state violated the public trust language of the constitution, negatively impacting “the historical, scenic, recreational and environmental values” of the land.

The Pennsylvania Supreme Court, however, rejected the residents’ claim and the case’s ruling established a three-part test to decide whether the action violated the Environmental Rights Amendment. The test asked:

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 demonstrate a reasonable effort to reduce the 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?

This three-part test established criteria that subsequent judges could use when considering cases brought by residents. The test proved very difficult for agency or related private actions to fail; it was used for decades as *the* test to decide whether subsequent state actions violated the state's Environmental Rights Amendment. Consequently, 23 out of 24 cases found that the state's actions passed the *Payne* test, reflecting that it significantly limited the application of the amendment.²⁵ The court also stated in the majority opinion that it saw no purpose in exploring "the difficult terrain of whether the amendment does or does not require additional legislation before enforcement," whether the amendment was "self-executing" and did not require the passage of additional legislation to be effective. The opinion also noted that while executing the Environmental Rights Amendment is important, the state "is also required to perform other duties, such as the maintenance of an adequate public highway system, also for the benefit of all the people."²⁶

Commonwealth v. National Gettysburg Battlefield Tower, Inc. (1973)

In 1971, an agreement was reached between the National Park Service and National Gettysburg Battlefield Tower, Inc., in which the latter would convey certain land to the Park Service and forgo plans to build an observational tower for visitors. In return, the Park Service agreed to allow the building of the tower on other nearby property. While the two parties agreed to this plan, the state did not. The Commonwealth of Pennsylvania sought to prevent the construction of the tower, bringing a case that argued the tower would violate the Environmental Rights Amendment as its construction would depreciate the public's scenic, historic, and esthetic values of that environment.²⁷

This case was unusual in that it was brought by the state against a private entity in a matter in which the state had not been directly involved or responsible for the permitting thereof. The court ultimately found that the state did not provide enough evidence that the tower would harm those values outlined in the constitutional amendment. While the tower was ultimately built, the boundaries of the park were later extended and the tower, under eminent domain, was demolished by the National Park Service in 2000.²⁸

Robinson Township et al. v. Commonwealth (2013)

In 2012, the Pennsylvania legislature passed Act 13, an amendment to the Pennsylvania Oil and Gas Act. Act 13 included provisions that preempted local zoning, required localities to allow oil and gas development in all zones, and limited the amount of time officials had to rule on permit applications pertaining to such activities. Several parties challenged Act 13 on the basis that it violated parts of the state constitution, including the Environmental Rights Amendment.

In its decision, the Pennsylvania Supreme Court found certain sections of Act 13 to be unconstitutional, including those related to preempting local authority. The resulting plurality opinion held that the Environmental Rights Amendment requires all branches

of government to consider environmental impacts before proceeding, and outlined the government's responsibility to "refrain from unduly infringing upon or violating the right" guaranteed to each resident, including "anticipatory protection" of the environment.²⁹ Addressing issues of equity, the court further held in its decision that some "communities will carry much heavier environmental and habitability burdens than others" under Act 13, and that "this disparate impact is irreconcilable with the express command that the trustee will manage the corpus of the trust for the benefit of 'all the people.'"³⁰

This was the first time the Pennsylvania Supreme Court found a statute, or significant portions thereof, unconstitutional under the Environmental Rights Amendment, four decades after the 1973 *Payne v. Kassab* decision.³¹ While the plurality's opinion did not completely overturn the three-part test established by *Payne*, it did find that it was "inappropriate" for all but a narrow set of cases.

Pennsylvania Environmental Defense Foundation v. Commonwealth of Pennsylvania (2017)

Beginning in 2008, the Pennsylvania Department of Conservation and Natural Resources (DCNR) allowed state land to be leased for the extraction of natural gas. The lease of land for oil and gas extraction, particularly within the Marcellus Shale region, generated funds totaling in the hundreds of millions of dollars. In 2009-10, \$383 million from these funds were diverted from the DNCR to the state's general fund, with further funds from the leases being moved to the general fund in the years since.³²

The Pennsylvania Environmental Defense Foundation brought a case against the Commonwealth on the grounds that the diversion of funds violated the Environmental Rights Amendment in the reallocation of funds to other purposes. The state supreme court found that in consideration of the public trust language included in the amendment, "assets of the trust are to be used for conservation and maintenance purposes" and could therefore not be diverted if deemed part of that trust.³³

The court's decision saliently overturned the three-part test established in *Payne* and held that the amendment is instead self-executing. This signaled an important and precedent-setting turn in how the amendment might impact further executive, legislative, and judicial decisions and lent momentum to environmental advocates' efforts to expand green amendments to other states, like New York. Since that decision, however, the case has continued to play out in Pennsylvania's court system with respect to how certain portions of funds derived through oil and gas are allocated.³⁴

Overall, the potential impacts of Pennsylvania's green amendment have been mitigated for decades by early court decisions. The most recent 2017 decision in *PEDF v. Commonwealth of Pennsylvania* overturning those earlier precedents opened the door to further cases through which to finally enforce the amendment. But, given how recently it occurred and the cases filed since, the full impact of Pennsylvania's green amendment will only likely be seen in the wake of further case law.



Montana

In 1972, on the heels of Pennsylvania’s Environmental Rights Amendment, Montana also codified environmental rights into its state constitution. Unlike in Pennsylvania, where the underlying bill was first passed through the state legislature, the language of the amendment in Montana was determined through a constitutional convention composed of 100 elected delegates. In comparison to the state legislature at that time, the delegates were more bipartisan and diverse with respect to gender and age. Nineteen delegates were women, the oldest delegate was 74, and the youngest delegate was 24.³⁵ The partisan makeup was 58 Democrats, 36 Republicans, and six independent delegates.³⁶

Like Pennsylvania, the environmental rights provisions in Montana were reflective of the broader political contexts of the early 1970s. At the federal level, the Environmental Protection Agency (EPA) was established in 1970, with several further landmark pieces of environmental legislation to follow in the decade thereafter. At the state level, Montana established the Montana Department of Environmental Quality in March 1971 through the Montana Environmental Policy Act (MEPA). In that context, former convention delegate Mae Nan Ellingson recalled that both a deep sense of place and concern for environmental degradation underpinned the constitutional changes. As she noted, “it was a compelling time for us to want to protect our environment.”³⁷ Ellingson also highlighted those environmental impacts visible within the state—namely, the longer-term impacts of mining and the more recent and visible accelerated rate of degradation (in the 1970s) caused by large-scale strip mining of coal and the clear cutting of trees.

The convention’s proceedings reflect, however, that while there was broad consensus on adopting some kind of environmental provision in the constitution, there was little consensus on the wording of that provision. Much of the discussion and debate focused on how specific the provision should be, whether or not particular terms should be included, and what the implications of those choices were with respect to delegating authority to different branches of the government.

Discourse on Montana's Green Amendment

While the broader slate of amendments at the constitutional convention was passed unanimously, the discourse and support for the specific language of the environmental rights amendment was not so harmonious. Debate ensued both during the internal discussions of the Environment and Natural Resources Committee and in the convention's general forum after the committee presented its recommendations. The dominant framings of the proposed environmental amendments centered on: a sense of responsibility to future generations; the specific language of the bill in qualifying the state of the environment; and the question, with respect to that language and its placement, of whether the rights would be self-executing through judicial interpretation or need to be implemented through further legislative action.

The committee's initial proposal included an affirmative right to the environment, but the condition of that environment had not been described. The chair of the committee, Louise Cross, advocated for the terms "clean and healthful" to be included in the amendment, akin to Illinois' environmental amendment (similarly passed through a constitutional convention in 1970, but not included as part of the state's Bill of Rights) which gave every person "the right to a healthful environment." However, according to delegate Bob Campbell, the majority of the committee preferred not to include that language and to reserve all aspects of environmental regulation for the legislature. The committee's recommended article, brought forward by the second ranking committee member C.B. McNeil, initially stated "the State of Montana and each person must maintain and enhance the environment of the state for present and future generations."³⁸

Delegate Campbell noted his opposition to the initial proposal at the convention, framing it as too vague and leaving too much up to interpretation. "I feel that the present section, as presented by [Mr. McNeil's] committee...is absolutely worthless," he noted, "...there is no type of standard whatsoever to define this environment."³⁹ McNeil, on the other hand, was concerned that the potential addition of the words "clean and healthful" cast too much power to the courts.

Several iterations of further changes to the amendment were proposed in which the term "clean and healthful" was voted on multiple times and lost by increasing margins. However, late in the day on which the convention took up the environmental provision and after delegates had started getting ready to go home, the president of the convention, Leo Graybill, wrote a note to Campbell. According to Campbell, that note directed him to bring the question up one more time. In doing so, Campbell made a final impassioned argument in which he framed the choice of language instead with respect to future generations and what they would think of this decision and the responsibility of delegates given both the cost of the convention and the trust delegates had been given by their neighbors who elected them:

you go home and you're seeking to ratify this Constitution you're going to be walking down the street of your town that elected you to this Convention and some little kid is going to come up to me and—or you and say what did you do about my environment in the future? And you're going to have to say we

decided to have one. Okay, so the little kid is going to shake his head and he's going to say you spent a half a million dollars in writing a Constitution for me in the future to have an environment but you're not going to tell me whether it's going to be a good environment or a bad environment. And he's going to shake his head and walk away.⁴⁰

Campbell concluded, appealing to a sense of neighborly state rivalry, "there won't be any more North Dakota jokes. It will be one big Montana joke."⁴¹ On those comments and in the context of the late hour of the day, the vote flipped and the inclusion of the terms "clean and healthful" passed.

The enforcement of environmental rights and where they would be placed in the constitution continued to be hotly debated for another six days. According to Campbell and Ellingson, the convention's eventual decision to place environmental rights in Article II under the Inalienable Rights section of the state's Declaration of Rights established them as self-executing rights and qualified them for a higher level of judicial scrutiny, or a more rigorous test through which to determine an action's constitutionality.⁴² Article II: Section 3 read:

All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment and the rights of pursuing life's basic necessities, enjoying and defending their lives and liberties, acquiring, possessing and protecting property, and seeking their safety, health and happiness in all lawful ways. In enjoying these rights, all persons recognize corresponding responsibilities.⁴³

However, the convention further included environmental rights language in Article IX on Environment and Natural Resources. Under this section, they delegated authority to the legislature to carry out a duty of the state to "maintain and improve a clean and healthful environment in Montana for present and future generations."⁴⁴ The article outlines that:

The legislature shall provide for the administration and enforcement of this duty [and] 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.⁴⁵

In practice, and as determined through later court cases (including those in 1999 and 2020 discussed below), this provision has been used to challenge enacted legislation that did not adequately work to prevent or allowed for environmental harms or the loss of natural resources. The broader set of constitutional changes, including these provisions for environmental rights were then, as noted, unanimously ratified by the convention delegates in June of 1972. Six months later, the entire slate of constitutional convention changes were approved by 50.1 percent of voters in a public referendum, passing by a slim margin of 2,532 votes.⁴⁶ Because all amendments were voted on in a single referendum, no information is available on the final public support for the environmental provisions alone.

Case Law Impacts After Passage

The impact of Montana's green amendment, like Pennsylvania's, was significantly curtailed by court decisions in the first few decades following its adoption. The degree to which the environmental rights provisions passed by the convention are self-executing, the respective authority vested in different branches of state government, and the ways in which the different environmental provisions interact both with each other and with MEPA, has been a significant point of contention with respect to the legal cases that followed.

Montana Wilderness Association v. Board of Health & Environmental Sciences (1976)

In *Montana Wilderness Association*, the plaintiffs, a citizen conservation group, brought forth a case against the Montana Board of Health and Environmental Science seeking to prevent further action in the construction of a proposed subdivision development.⁴⁷ The plaintiffs argued that the department had not adequately completed its environmental impact statement under MEPA requirements and inappropriately allowed for the development to move forward. The state supreme court initially found that the plaintiffs had standing or the right to bring the case under Article II of the state constitution, while acknowledging that Article IX was not self-executing

While the court initially ruled three to two in July 1976 for the plaintiffs and granted injunctive relief, that ruling was short-lived. Upon rehearing the case in December of the same year, the court reversed its decision. The court found that regardless of the completeness of the state's environmental impact statement, the local government was able to approve the subdivision, even if and as the state's environmental impact statement might be insufficient.

In Justice Haswell's dissenting opinion, he stated that the ruling dealt "a mortal blow to environmental protection in Montana" in which he contended that "the majority has reduced constitutional and statutory protections to a heap of rubble, ignited by the false issue of local control."⁴⁸ No specific justification was provided by the two justices whose opinion had changed between the July and December decisions.

Kadillak v. Anaconda (1979)

In *Kadillak*, the court ruled on the relationship between the environmental rights in the state constitution and the MEPA. In this case, the property owners (Kadillak) challenged the Anaconda company's development of mining and waste operations near their property. They argued that the state's environmental impact statement process (EIS) under MEPA was inadequate given the environmental rights included in the 1972 constitution. However, the court ruled that because MEPA was passed before Montana's 1972 constitution "that the statutory requirement of an EIS is not given constitutional status by the subsequent enactment of this constitutional guarantee...It is not the function of this Court to insert into a statute 'what has been omitted.'"⁴⁹ In effect, the ruling determined that MEPA and Article II of the constitution are not linked and that the state's implementation of MEPA cannot be challenged on the basis that it failed

to uphold the environmental provisions of the constitution because those provisions chronologically followed, rather than acted as a basis for, the responsibilities of the state outlined under MEPA.⁵⁰

Following this ruling, as in Pennsylvania, the impact of the state constitution's environmental rights lay relatively dormant until 1999.⁵¹

Montana Environmental Information Center v. Department of Environmental Quality (1999)

After early precedents limited the impact of Montana's green amendment, new life was breathed into the statute during the late 1990s.

In 1999, the Montana Environmental Information Center (MEIC), an environmental advocacy organization, brought a case against a mining entity, known as Seven-Up Pete, related to the discharge of groundwater from wells containing arsenic that ultimately ran into the Blackfoot and Landers Fork Rivers. While state law typically required a review in such circumstances, the legislature had exempted certain "nonsignificant" practices including the well tests at issue in this case.

In *MEIC*, the court found that while the legislature's broader Nondegradation Policy's review process fell in line with its duties under Article IX of the constitution, the exempted activities in the Degradation Review Waiver process within it violated the plaintiff's constitutional rights in Articles II and IX, given that the exemption categories were determined irrespective of a contaminant's characteristics or the extent of contamination and its impact. Consequently, and saliently, this ruling determined that the two environmental articles in the constitution "must be read together."⁵²

The court also found that although the plaintiffs had not yet demonstrated the levels of arsenic in the rivers were "unsafe," as opposed to the lower bar of being impacted by increased levels of arsenic, they still had standing to bring the case as the environmental rights under the state constitution were "both anticipatory and preventive,"⁵³ with Justice Trieweiler stating that:

The delegates did not intend to merely prohibit that degree of environmental degradation which can be conclusively linked to ill health or physical endangerment. Our constitution does not require that dead fish float on the surface of our state's rivers and streams before its farsighted environmental protections can be invoked.⁵⁴

Since the decision in *MEIC*, more cases in Montana have been brought in ways that build on its precedent with increasing decisions that are favorable to enforcing the environmental rights enshrined in the state constitution.⁵⁵



Park County Environmental Council & Greater Yellowstone Coalition v. MT DEQ & Lucky Minerals Inc. (2020)

In 2015, Lucky Minerals Inc. proposed an exploration of land for the purposes of mining in the Emigrant Gulch area of the broader Yellowstone ecosystem, roughly 15 miles north of Yellowstone National Park. In doing so, it submitted a license application and, as required under MEPA, the state Department of Environmental Quality (DEQ) conducted an environmental assessment. Despite public comments concerning and acknowledgement of potential wildlife disturbance and displacement from the project, surface and ground water quality degradation, and other issues, the final assessment found no significant environmental impact.

A 2011 legislative amendment to the state constitution, however, prohibited the court from issuing an injunction to stop a project under MEPA. The plaintiffs, both environmental advocacy organizations, in this case therefore brought a challenge to both the DEQ's environmental assessment allowing for mining activities to take place and the 2011 amendment. The court not only found that DEQ had not taken the necessary "hard look" in conducting its assessment, but that the 2011 amendment was in violation of the state constitution.⁵⁶ This violation was outlined on the basis of not only the right to a "clean and healthful environment" as set out in Article II, but the duty delegated to the legislature (which had passed the amendment) under Article IX to ensure "adequate remedies to prevent unreasonable depletion and degradation of natural resources," as well as the way in which the amendment foreclosed the state's ability to ensure environmental rights in an anticipatory and preventative manner as found in *MEIC v. DEQ*.⁵⁷

As in Pennsylvania, early court decisions in Montana significantly impeded the impact of the state's green amendment for decades, while more recent decisions—particularly following *MEIC v. DEQ*—reflect a shift in how the amendment may be interpreted. This is not only visible in success of the case brought by the Park County Environmental Council and Greater Yellowstone Coalition in 2020, but in ongoing cases like *Held v. Montana*. That case was brought by a group of 16 youths against the State of

Montana for policies related to the production and use of fossil fuels under particular provisions of Montana’s State Energy Policy.⁵⁸ In it, the plaintiffs contend that the exclusion of climate change impacts from consideration under MEPA is in violation of the constitution, citing Articles II and IX of the state constitution. The outcome of that case is, however, still pending.

Conclusion

As the case studies presented here indicate, state green amendments have had limited, if more recently promising, success in improving residents’ environmental conditions. On the other hand, the concerns about costs and litigation have also generally not materialized.

Few cases brought before the courts have been successful since the Pennsylvania and Montana amendments were enacted in the early 1970s. State courts significantly impacted the strength and usage of state green amendments in the years immediately following their passage. The application of Pennsylvania and Montana’s amendments were both substantially restricted for decades after their passage due to the respective early case law.

If New York’s green amendment is passed by voters in November 2021, we are also not likely to be able to observe its full impact until further cases are brought within the state—and those early cases may have an outsized impact for years to come. While early precedents in Pennsylvania and Montana proved limiting with respect to the environmental health impacts that advocates had hoped for, recent shifts in judicial decisions in those states may indicate that that may be changing more broadly.

Although Pennsylvania and Montana’s green amendment experiences offer important information about the potential of New York’s green amendment, they cannot fully predict the exact outcomes of the proposal given the differences across states, their particular language, and the contexts in which they were enacted. Overall, however, the lessons from Pennsylvania and Montana point towards the conclusion that while New York’s amendment, if adopted, may not be quite as successful as proponents hope it will be in the immediate term, it is also not likely to be detrimental in ways that opponents have feared.

Endnotes

- 1 Samuel P. Hays, "The Environmental Movement," *Journal of Forest History* 25, 4 (1981): 219-21, <https://doi.org/10.2307/4004614>.
- 2 Matthew Green, "When Rivers Caught Fire: A Brief History of Earth Day (with Lesson Plan)," KQED, April 20, 2018, <https://www.kqed.org/lowdown/21839/when-rivers-caught-fire-a-brief-history-of-earth-day>.
- 3 John C. Dernbach and Edmund J. Sonnenberg, "A Legislative History of Article I, Section 27 of the Constitution of the Commonwealth of Pennsylvania," *Widener Law Journal* 24, 2 (2015): 181, <http://ssrn.com/abstract=2684030>.
- 4 Illinois, Pennsylvania, Montana, Massachusetts, Hawaii, and Rhode Island.
- 5 We have based this definition on environmental rights and green amendments made to state constitutions starting in the 1970s. The first literature discussing environmental rights amendments dates back to the 1970s (for a review of relevant literature see Daniel Kemmis, "Environmental Rights," *Montana Law Review* 39, 2 (1978), <https://core.ac.uk/download/pdf/232672397.pdf>). Freyfogle (1992) explored three forms of green amendments to the Bill of Rights: (1) The government should not degrade the natural environment. (2) All people have a right to live in a clean healthy environment, and (3) All people have a right to live in a clean, healthy environment, which the government is obligated to ensure. In his book *Constitutional Environmental Rights* (2000), Tim Hayward defined environmental rights as "All human beings have the fundamental right to an environment adequate for their health and well-being" and explored the constitutional provisions designed to guarantee them.

More recently, Maya K. van Rossum published *The Green Amendment: Securing Our Right to a Health Environment* (Austin, TX: Disruption Books, 2017) in which she defines green amendments as "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 state constitutions." Van Rossum's definition also calls for the creation of a duty for all government and entities to respect and protect enumerated environmental rights.

The definition and parameters developed for this analysis have been developed to represent the green amendments passed to date in Pennsylvania and Montana and the proposal under consideration in New York State.
- 6 Rhode Island later included environmental provisions in its bill of rights as well (1987), but is generally not included as having a green amendment. Its constitutional provisions were considerably narrower—specifically addressing fishery rights and shore privileges—than Pennsylvania and Montana.
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- 8 Michele Smith, "Pennsylvania's Clean Streams Law: The Liability Imposed," *Duquesne Law Review* 28, 4 (1990): 757, <https://dsc.duq.edu/cgi/viewcontent.cgi?article=2733&context=dlr>.
- 9 Richard H. K. Vietor, "Environmental Politics in Pennsylvania: The Regulation of Surface Mining, 1961-1973," *Pennsylvania History: A Journal of Mid-Atlantic Studies* 45, 1 (1978): 19-46, https://www.jstor.org/stable/27772495?seq=1#metadata_info_tab_contents.
- 10 These include: The Air Pollution Control Act (1960); The Coal Refuse Disposal Control Act (1968); The Land and Water Conservation and Reclamation Act (1968); Act 275 (1970) creating the Department of Environmental Resources; and The Pennsylvania Scenic Rivers Act (1972).
- 11 Franklin L. Kury, *Clean Politics, Clean Streams: A Legislative Autobiography and Reflections* (Bethlehem, PA: Lehigh University Press, 2011).

- 12 In the House, in June 1969, the bill received 190 yays and 0 nays, with 12 missing votes. The bill then moved to the Senate where it passed with 39 yays and 0 nays, after being amended before returning to the House where the Senate's amendments to the proposal again passed unanimously. In the 1970-71 legislative session, the bill was passed in the house with 199 yays, 0 nays, and 3 missing votes. During that session, the Senate voted for the amendment with 45 yays and 0 nays.
- 13 The final vote for the vote: Yes: 1,021,342 to No: 259,979.
- 14 John C. Dernbach, Kenneth T. Kristl, and James R. May, "Recognition of Environmental Rights for Pennsylvania Citizens: Pennsylvania Environmental Defense Foundation v. Commonwealth of Pennsylvania," *Rutgers Law Review* 803 (2018), <https://ssrn.com/abstract=3137074>.
- 15 Dernbach and Sonnenberg, "A Legislative History of Article I, Section 27 of the Constitution of the Commonwealth of Pennsylvania."
- 16 Penn. Const. art. I, § 27, "Natural resources and the public estate," <https://www.legis.state.pa.us/WU01/LI/LI/CT/HTM/00/00.HTM>.
- 17 Dernbach and Sonnenberg, "A Legislative History of Article I, Section 27 of the Constitution of the Commonwealth of Pennsylvania."
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- 19 Commonwealth of Pennsylvania Legislative *Journal of the House of Representatives* 1,39: 1969, <https://www.legis.state.pa.us/WU01/LI/HJ/1969/0/19690602.pdf>.
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ACKNOWLEDGMENTS

This report, completed by the Center for Law & Policy Solutions Spring 2021 intern class, was overseen by Center Director Laura Rabinow, with help from Graduate Assistant Erin Vallely.

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