

# ENVIRONMENTAL AND ENERGY INFORMATION MEMO

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## Explaining the New York Environmental Rights Amendment

The Environmental Rights Amendment (Green Amendment) was passed by the New York State Senate and Assembly in consecutive legislative sessions. Because this fulfills New York State's requirement for a constitutional amendment, the Green Amendment will appear on ballots for a referendum vote in November 2021. If passed, a new Section 19 would be added to the New York Constitution as follows:

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

The Legislature stated that “[r]ecent water contamination incidents and ongoing concerns about air quality have highlighted the importance of clean drinking water and air as well as the need for additional protections.” The Legislature’s rationale was certainly influenced by high-profile environmental issues such as the discovery of groundwater contamination by per- and polyfluorinated alkyl substances (PFOA and PFAS), as well as the potential for impacts of climate change.

In New York, a constitutional provision is presumed to be “self-executing,” which means it is effective without the need for legislation. The terms “clean air and water” and “healthful environment” are not defined in the Green Amendment, and the Legislature has provided no guidance or implementation language. As a result, no one knows (a) what those terms mean, (b) what the scope of the protected rights are or (c) how and when those rights have been infringed. Accordingly, if the Green Amendment is approved by the voters in November, it may lead to disputes and increased litigation, and New York courts will be tasked with interpreting and applying the Green Amendment.

A threshold issue for litigation is the meaning of the terms “clean air and water” and “healthful environment.” What criteria should be used in defining those terms? Does clean water mean something different in Albany County and Nassau County? Does clean air and clean water have to meet certain numeric standards (for example, will permissible limits in state regulations qualify as “clean”)? The courts will have to decide these issues, and at least initially, there is potential for disparity in the standards that courts find to constitute “clean air and water” across the state.

The Green Amendment could create an opportunity for a citizen (or an organization) to seek direct enforcement against an alleged violator of the citizen’s right to “clean air and water” and a “healthful environment.” This enforcement could potentially be directed against either a governmental agency or a private property owner. If passed, plaintiffs may view the Green Amendment as an opportunity to directly challenge activities that they consider to be harmful to the environment, to disproportionately impact disadvantaged communities and populations, or indeed, to simply be objectionable and undesirable. The Green Amendment could also be utilized by governments to expand their powers and regulation of land use. For example, municipalities could potentially invoke the Green Amendment to restrict land-use initiatives or projects that are controversial.

Plaintiffs might also invoke the Green Amendment to force a defendant to meet “extra-legal” compliance. Environmental permits authorize the emission or discharge of up to a specific quantity of contaminants – as long as permit levels are not exceeded, the permittee meets legal requirements. A business which meets its permit limits may still be subject to a lawsuit by a plaintiff alleging that compliance with permit limits is insufficient, and the emission or discharge of any contaminants violates the Green Amendment’s mandate. Another litigation concern is that a plaintiff could argue that individual circumstances, such as his/her individual sensitivity to odors, mean that their right to “clean air and water, and a healthful environment” has been violated.

The Green Amendment would also seem to facilitate litigation against the New York State Department of Environmental Conservation (NYSDEC) and other agencies in an effort to compel a response to perceived environmental issues. NYSDEC enforces the Environmental Conservation Law and its implementing regulations throughout the State, and it imposes financial penalties and, in many cases, injunctive relief through administrative procedures. Plaintiffs who believe that NYSDEC has not taken action against a violator, or has not taken sufficient enforcement action, will seek to use the Green Amendment to force agency action.

Will the Green Amendment be approved in November? No one can say for sure, but it clearly has numerous supporters, and likely appeals to many voters. Most people would generally agree that clean air, water and a healthy environment are issues that are important and deserve their support. Environmental and human rights organizations support the Green Amendment because they view it as providing a substantive legal basis to implement environmental justice considerations, and ensure that projects do not have a disparate environmental impact on disadvantaged persons and/or communities. Others view the Green Amendment as a means to close the gap on what they consider to be inadequate and/or ineffective existing environmental laws and regulations.

Only one thing is certain – if the Green Amendment is approved by the voters, its impact will take years to be settled.

If you are questions about this information memo, please contact [Robert Tyson](#), [Amelia McLean-Robertson](#), any [attorney](#) in the [Environmental and Energy practice](#) or the attorney at the firm with whom you are regularly in contact.

