New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
WWW. NYLJ.COM
ALM.
WEDNESDAY, MARCH 8, 2023

Environmental Law

Expert Analysis

New York's Green Amendment: The First Decisions

By **Michael B. Gerrard**

And **Edward McTiernan**

On Nov. 2, 2021, the voters of New York by a margin of more than 2-1 approved an environmental rights amendment to the Bill of Rights in the New York State Constitution. Article I Section 19 reads in its entirety: "Environmental Rights. Each person shall have a right to clean air and water, and a healthful environment."

In the little more than a year since then, one of the great questions in New York environmental law has been—what does this mean? It looks significant, but just how much? That is left to the courts to decide.

We now have two decisions, both of which are under appeal, and four pending cases that have not been decided. This column discusses the emerging jurisprudence under what has been called New York's Green Amendment.

In the little more than a year since then, one of the great questions in New York environmental law has been—what does this mean? It looks significant, but just how much? That is left to the courts to decide.

High Acres Landfill Decisions

The two decisions are both in suits brought by a group of the neighbors of the High Acres Landfill, which straddles Monroe and Wayne counties in the Finger Lakes region. It is the second-largest landfill in New York and the one with the largest remaining capacity for the disposal of municipal solid waste. The plaintiffs say the landfill causes horrible odors, fugitive emissions and other environmental problems, including greenhouse gas emissions. One case is *Fresh Air for the East Side v. State of New York, New York State Department of Environmental Conservation (DEC), the City of New York, and Waste Management of New York.* (That is a company that operates the landfill and ships waste there under contract with the city.) The other case is called *Fresh Air for the Eastside v. Town of Perinton, Town of Perinton Zoning Board of Appeals, and Waste Management of New York.*

All the defendants in both cases moved to dismiss. Defending DEC, the New York State Attorney General's office argued in its brief, "By its plain language, the Green Amendment does not impose any mandatory duty on the state to take enforcement action or otherwise withdraw DEC's discretion to take enforcement action. In con-

MICHAEL B. GERRARD *is professor and faculty director of the Sabin Center for Climate Change Law at Columbia Law School, and senior counsel to Arnold & Porter.* EDWARD MCTIERNAN *is a partner with the firm, and former general counsel of the New York State Department of Environmental Conservation.*

trast to the green amendments of other states on which it was modeled upon, the amendment mandates no particular action by the state."

In December 2022, Judge John J. Ark of New York Supreme Court, Monroe County, granted some of these motions and denied others. See *Fresh Air for the Eastside v. State,* 2022 N.Y. Misc. LEXIS 8394, 2022 NY Slip Op 34429(U) (Sup. Ct. Dec. 20, 2022) (amended decision and order); *Fresh Air for the Eastside v. Town of Perinton*, No. E2021008617 (Sup. Ct. Dec. 8, 2022).

Since these were the first decisions under the Green Amendment, Judge Ark had to issue several rulings of first impression. We do not know if other courts will come out the same way, but if they do, it means we already know a lot about significance of the Green Amendment.

First, Judge Ark found that the Green Amendment is self-executing. It does not require further action by the Legislature.

Second, in dismissing the claim against Waste Management, Judge Ark found that the Green Amendment is not enforceable against private companies—only against the state.

Third, in dismissing the claim against the city of New York, Judge Ark found that though it was the city's garbage that was causing the injury, the city was not liable because it was merely a customer of the landfill. This tends to limit the scope of the Green Amendment. In this way it is narrower than the federal Comprehensive Environmental Response, Compensation and Liability Act, which imposes liability on waste generators.

Fourth, in allowing the claims against the state and DEC to proceed, the court found that the plaintiffs did not need to exhaust their administrative remedies. They do not need to petition DEC or bring an Article 78 proceeding before using the Green Amendment.

> The Green Amendment could add to the force of Section 7.2 of the CLCPA, which requires all state agencies to consider whether their decisions are inconsistent with the attainment of the statewide greenhouse gas emissions limits.

Fifth, the court rejected arguments that the four-month Article 78 statute of limitations applies; rather, Judge Ark applied the six-year statute of limitations for constitutional claims.

Sixth, the fact that the landfill has the needed DEC and town permits does not shield it from the Green Amendment claims. Judge Ark stated, "In adjudicating and applying the Green Amendment, it may be necessary to have a two prong test: First, did the government action comply with the applicable statute? Second, did the government action violate a person's constitutional 'right to clean air and water, and a healthful environment'?'"

Seventh, the court found that the state has a nondiscretionary duty to comply with the Constitution, and therefore a mandamus action would be appropriate.

Eighth, the Green Amendment is not retroactive. It does not apply to decisions or events prior to its adoption.

And ninth, the court recognized that there are limits to what it can or should do under the Green Amendment. The plaintiffs demanded either the immediate closure of the landfill, or the installation of a permanent cover on the portions of the landfill not being actively landfilled. The court did not order either. Recognizing that New York City's garbage has to go somewhere, and that shutting down the landfill would cause many other problems, the court did not rule on the remedy. He said the Town of Perinton—its town board, its land use boards, and ultimately its voters—will have to decide the future of the landfill. The parties will be back before the court, but there will be a new judge; Judge Ark, having reached the mandatory retirement age, retired on Dec. 31.

Pending Cases

All nine of these findings are very significant. Both decisions are being appealed; we will see what happens there, and we will see whether other courts agree. There are now four other pending cases under the Green Amendment. The library of the Elizabeth Haub School of Law of Pace University has a website, called New York's Environmental Right Repository, that is compiling all the litigation under the Green Amendment.

Seneca Lake Guardian v. DEC is a challenge to DEC permits for a waste transfer facility in Tompkins County. The plaintiffs claim that the facility will generate leachate that will contain PFAS, a class of hazardous chemicals. The Green Amendment is the basis for one of the four causes of action.

Marte v. City of New York challenges the Two Bridges project, a large residential development in the Lower East Side of Manhattan. The suit claims that the City's review of the project under the State Environmental Quality Review Act (SEQRA) violated the Green Amendment.

People of the State of New York v. Norlite ensued from an enforcement action that the state had brought against the operator of a hazardous waste incineration facility in Cohoes, New York. Neighbors moved to intervene in the action, seeking a declaratory judgment claim against DEC that continued operation of the facility violates their rights to clean air and a healthful environment under the Green Amendment.

The most recent case, filed on Jan. 30, is *Abdullahi v. City of Buffalo*. It says the city has stopped fluoridating its drinking water supply. The suit claims that fluoridated water is critical for a healthful environment. The suit is brought as a class action and seeks an injunction, and compensatory and consequential damages.

Another case was decided on Feb. 14. *Renew 81 for All v. New York State Department of Transportation* challenged the State Department of Transportation's decision to demolish the I-81 viaduct in Syracuse and route the traffic through grade-level streets. The plaintiffs are citizens who say they would be hurt by this plan. They brought an Article 78 proceeding claiming violations of SEQRA, the Smart Growth Act, the Climate Leadership and Community Protection Act (CLCPA), and the Green Amendment. The court found that the environmental impact statement (EIS) for the project had certain deficiencies and ordered preparation of a supplemental EIS. The court acknowledged that a Green Amendment claim was included in the petition but did not otherwise discuss it.

Implications

So we are seeing Green Amendment claims included in lawsuits about a variety of projects and actions. Especially if the findings in the decisions about the High Acres Landfill gain traction, we will see a lot more of this. A rule that holding and complying with the necessary permits may not be enough, and that suits may be filed six years after the subject action, would lead to great opportunities for environmental plaintiffs and great uncertainties for the regulated community. The uncertainties may be especially great with projects that have both environmental positives and negatives, such as windfarms and transmission lines—both sides could claim that the Green Amendment supports their views, leaving much discretion with the judges.

The Green Amendment could add to the force of Section 7.2 of the CLCPA, which requires all state agencies to consider whether their decisions are inconsistent with the attainment of the statewide greenhouse gas emissions limits.