

### 2024 Environmental and Energy Law Forecast

#### NEW YORK

##### Interpreting New York's Green Amendment through Recent Decisions

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As previously reported in earlier forecasts, New York voters approved in 2021 an environmental rights amendment to the Bill of Rights of the New York State Constitution, known as the "Green Amendment." Article I §19, which came into force in January 2022, sets out that "Each person shall have a right to clean air and water, and a healthful environment."

The interpretation and applicability of the Green Amendment is now being shaped in New York courts. While the law in this area remains unsettled and is the subject of now-pending appeals, some themes have developed in the early case law.

First, according to current case law, the Green Amendment provides a cause of action against the State, but not private entities (see *Fresh Air for the Eastside, Inc. v. State of N.Y.*, 2022 NY Slip Op 34429(U) at 12-13 (Sup. Ct., Monroe Co., Dec. 20, 2022)). For now, courts have also determined that the Green Amendment is self-executing, as parties can challenge as unlawful government action or inaction without any additional grant of authority from a legislature or regulatory entity (see *Fresh Air for the Eastside v. State of N.Y.* at 12). The statute of limitations for a proceeding seeking relief under § 19 is six years (see *Fresh Air for the Eastside v. State of N.Y.* at 15). Even where a party previously did not have a legal basis to challenge a project under the Green Amendment, parties may challenge a project permitted to proceed, including by a state or local agency, given the constitutional nature of the rights conferred by the Green Amendment (see *Fresh Air for the Eastside, Inc. v. Town of Perinton*, Index No. E2021008617 (Sup.Ct. Monroe Co., Dec. 8, 2022), cited in *Fresh Air for the Eastside v. State of N.Y.*). However, the Green Amendment cannot be used to bring challenges that were already unsuccessful and where the challenge is time-barred (see *Marte v. City of New York*, 2023 WL 2971394 (NY Co. March 28, 2023), 2023 N.Y. Slip Op. 31198(U)).

What follows is a summary of recent decisions, as cited above:

- *Fresh Air for the Eastside v. State of New York* – this action involves a landfill in upstate New York which has been a source of odors and fugitive greenhouse gas emissions (i.e., methane) for years. The plaintiff sought closure of the landfill or more enforcement by the New York State Department of Environmental Conservation (DEC). The court denied the motions to dismiss by the State/DEC and, among other rulings, found that the plaintiff had a viable Green Amendment claim. The actions against the private defendant and New York City, which was sued as the major generator of the solid waste,

were dismissed. The court found that private citizens could bring a Green Amendment case based on alleged rights violations, which the court could compel the State to address. The decision is on appeal to the Fourth Department.

- *Fresh Air for the Eastside v. Town of Perinton* – this action involves a challenge by the same plaintiff as the case above under Article 78 of the Civil Practice Law and Rules to the issuance of a landfill permit by the Town of Perinton. The plaintiff amended its petition to also assert a claim that the Town Board’s decision would result in harmful conditions that would violate their members’ right to a healthful environment in violation of the Green Amendment. The constitutional claim based on the Green Amendment survived a motion to dismiss, with the court noting that even where an action was previously permitted by a state or local agency, it would not be immune from judicial scrutiny due to the constitutional nature of the rights conferred by the Green Amendment. This decision is under appeal.
- *Marte v. The City of New York* – plaintiffs in this action sought an order compelling defendants to take various actions in connection with a housing development project in their neighborhood. Plaintiffs argued that the project would negatively affect air quality, the amount of open space and result in the loss of light. They demanded, among other things, that vibration and crack monitors be installed to prevent damage to the buildings in which they reside. The court granted the defendants’ motion to dismiss, dismissing the action, holding that plaintiffs’ constitutional challenge was only the latest in a long line of unsuccessful challenges to the project that had been initiated years before. In the court’s view, plaintiffs were seeking yet another “bite at the apple” under circumstances where every previous request was unsuccessful and where nothing substantive has changed in the intervening years. The court held that the Green Amendment cannot be used to bring challenges that were already unsuccessful and where the challenge is time-barred.

Questions remain about the relation between the Green Amendment and existing environmental law. While environmental regulators generally retain discretion to decide whether to enforce particular regulatory standards, initial decisions interpreting the Green Amendment signal that agency discretion may be subject to challenge under the Green Amendment when conditions violate New Yorkers’ rights to clean air, clean water, or a healthful environment.

## **Local Law 97 Takes Effect in New York City**

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New York City’s Local Law 97 (LL97) compliance begins in 2024. LL97 is part of New York City’s climate legislation passed in 2019, which is comprised of a collection of laws aimed at mitigating the effects of greenhouse gas (GHG) emissions from buildings. LL97 sets a series of deadlines for buildings over 25,000 square feet to reduce emissions by certain amounts to 40 percent by 2030 with an ultimate goal of net zero carbon emissions by 2050. LL97 is enforced by the New York City Department of Buildings (DOB).

While most buildings have reportedly already met emissions guidelines for 2024, an estimated 10 percent of properties are struggling to decrease their emissions. Owners of these properties who show “good faith efforts” to reduce emissions can submit a decarbonization plan for bringing their building into compliance by 2026 – giving them an extra two years to comply. Businesses may also purchase renewable energy credits (RECs) to offset excess emissions and fund alternative energy projects, starting in 2026.

In *Glen Oaks v. City of NY*, Index No. 154327/2022 (Sup. Ct., NY Cnty.), plaintiffs sued the City of New York, the DOB, and the Commissioner of the DOB alleging that LL97 (i) is unconstitutional as it constitutes an unauthorized tax, (ii) is preempted by the New York State Climate Leadership and Community Protection Act of 2019 (CLCPA), and (iii) violates due process given its “excessive penalties” against property owners. On October 30, 2023, the New York Supreme Court dismissed the action by Court Order. The decision confirms that LL97 is valid, enforceable, and constitutional.

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