

2022 Environmental and Energy Law Forecast

NEW YORK

New York Environmental Rights Amendment Takes Effect

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In November 2021, New Yorkers voted to adopt a new environmental rights amendment (the “Amendment”) to the New York Constitution’s Bill of Rights. The Amendment was approved by voters in November after it had been approved in two successive legislative sessions in 2019 and 2021. The Amendment takes effect this month.

While several other states have environmental protections incorporated into their respective constitutions, New York joins only Montana and Pennsylvania to add environmental rights to their respective Bills of Rights. In a single sentence, the new Amendment in New York provides that, “Each person shall have a right to clean air and water, and a healthful environment.” N.Y. Const., Art. 1, § 19.

There is much uncertainty regarding what this Amendment affords New Yorkers. None of the Amendment’s words or phrases are defined, nor does the Amendment set out how it is to be implemented. Does the Amendment, for example, authorize a private cause of action by residents of New York against alleged polluters for infringing their rights? Does it create a private cause of action against the state or local government for failing to protect these new environmental rights? Does the Amendment expand the authority of executive agencies or local governments to regulate activities that might infringe environmental rights, or does the Amendment merely limit governmental action that would infringe on these environmental rights?

Potential answers to these questions may be found in neighboring Pennsylvania. As has been previously reported in our [2021 Forecast](#), courts there have been actively interpreting Pennsylvania’s version of an environmental rights amendment following the Pennsylvania Supreme Court’s 2017 decision in *Pa. Envtl. Defense Found. v. Commonwealth*, 161 A.3d 911 (Pa. 2017), which appeared to breathe life into an amendment that had until then been viewed as largely duplicative of state laws that protected the environment. Notably, however, although New York’s Amendment invokes similar rights of the people to “clean air and water,” New York’s version does not incorporate the “public trust” and “common property” principles that are found in the Pennsylvania amendment, which may limit reliance in New York on Pennsylvania decisions for interpretative assistance.

For now, only one thing remains clear: this new addition to the New York Constitution will be fodder for New York litigators and courts for the foreseeable future.

Opposition to Renewable Energy Projects in New York Continues to Present Challenges for Project Developers

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In 2019, New York State passed the Climate Leadership and Community Protection Act, committing the State to 100 percent zero-emission electricity by 2040. Since then, proposed solar and wind energy projects have sprung up across the State, particularly in Upstate and Western New York. Despite the State's ambitious agenda, however, many of these renewable energy projects have been bogged down or even stopped by local opposition.

Opponents of these types of projects have often borrowed from the playbook of environmental organizations and public interest groups that have used environmental and administrative laws, in particular the Federal National Environmental Policy Act (NEPA) and its New York equivalent, the New York State Environmental Quality Review Act (SEQRA), to slow and sometimes stop fossil fuel or other types of development projects. The opposition often takes many forms, including submission of public comments, participation in public hearings, running internet campaigns and petitions, and filing lawsuits against government decisionmakers and developers. Local and municipal governments have also banned, placed moratoria on, or significantly restricted wind and solar energy development in response to renewable energy project proposals.

While local opposition can be challenging to the siting of solar and wind farms, some of the largest fights concern the siting and development of transmission lines that are needed to move renewable energy from upstate to downstate, a crucial component of plans to transform New York's energy economy. Opposition to such major infrastructure projects is often broad and varied depending on the trajectory of the proposed line, and can include environmental groups, local municipalities, and Native American tribes, among others.

Some innovative approaches are being used by lawmakers and others to reduce the delays for renewable projects that have plagued the development of other types of infrastructure. In 2020, New York passed the Accelerated Renewable Energy Growth and Community Benefit Act, Executive Law § 94-c, which created the Office of Renewable Energy Siting to streamline the permitting process for large scale renewable projects. The Office must complete its review of most types of projects within one year of a complete application. Executive Law § 94-c also restricts the ability of local governments to regulate or prevent the siting of these projects. New York courts have so far rejected challenges to Executive Law § 94-c and its implementing regulations, see *Town of Copake v. NY State Office of Renewable Energy Siting*, No. 905502-21 (N.Y. Supr. Ct. Oct. 7, 2021).

Elsewhere, courts have turned to mediation as a tool to resolve litigation disputes regarding the proposed development of renewable energy projects. For example, in Hawaii this past year, a solar farm and neighboring residents reached an agreement through mediation that included a legally enforceable \$1.375 million community benefits package for local groups. This type of an agreement could serve as a model for future disputes over renewable energy projects.

If New York State is truly committed to transforming its energy economy by 2040, lawmakers and developers will have to continue to generate innovative ways to reconcile local concerns with large-scale infrastructure development.

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