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An Environmental Rights Amendment for NJ: Panacea or Portent?

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Currently pending before the New Jersey Legislature are concurrent resolutions, ACR85 and SCR134, which embody an environmental rights amendment to New Jersey's constitution. Modeled after Article 1, Section 27, of the Pennsylvania Constitution, the New Jersey Environmental Rights Amendment would read as follows:

> (a) Every person has a right to a clean and healthy environment, including pure water, clean air, and ecologically healthy habitats, and to the preservation of the natural, scenic, historic, and esthetic qualities of the environment. The State shall not infringe upon these rights, by action or inaction.
>
> (b) The State's public natural resources, among them its waters, air, flora, fauna, climate, and public lands, are the common property of all the people, including both present and future generations. The State shall serve as trustee of these resources, and shall conserve and maintain them for the benefit of all people.
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> (c) This paragraph and the rights stated herein are (1) self-executing, and (2) shall be in addition to any rights conferred by the public trust doctrine or common law.

New Jersey's process for adopting a constitutional amendment would require either a three-fifths majority in the Senate and Assembly, or a majority vote in each house in two consecutive years, prior to submission to the voters, who must then approve by a majority vote. Assuming that the three-fifths majority in each house could be met, the earliest the amendment could go before the voters would be the November 2019 ballot.

Although the text of the proposed amendment is short and seems fairly clear, below the surface lurk complexities that, if Pennsylvania is any precedent, threaten to throw the extensive statutory structure of environmental protection in New Jersey into chaos without discernable corresponding benefit.

Pennsylvania's Precedent: Outstanding Questions

After more than 40 years on the books in Pennsylvania, during which it played a relatively minor role, the meaning of Pennsylvania's Environmental Rights Amendment—and the breadth of its reach—has recently become the subject of numerous court challenges and great debate. Whether this debate will have a real and positive effect on Pennsylvania's

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environment remains to be seen, but the debate has undermined certainty in the existing statutory and regulatory structure of Pennsylvania's environmental programs.

Over many decades, Pennsylvania's General Assembly and agencies, including the Pennsylvania Department of Environmental Protection (PADEP) and the Department of Conservation and Natural Resources (DCNR), have steadily established, implemented and enforced standards for protection of Pennsylvania's environment and its natural resources through extensive legislation and regulations. These standards are expressly or implicitly intended to reflect the values set forth in Article 1, Section 27, and have had real and positive effects.

As to the implementation of the amendment itself, for over 40 years prior to 2017, Pennsylvania courts had applied a balancing test to determine compliance with the amendment, which essentially turned on whether there was compliance with all applicable laws and regulations. *See Payne v. Kassab*, 312 A.2d 86 (Pa. Cmwlth. 1973). But a 2017 decision by the Pennsylvania Supreme Court raised the possibility that the environmental rights amendment enables (and may even mandate) PADEP, DCNR and many other state and local governmental entities to require protections that differ from those established standards, or even to prohibit certain activities notwithstanding compliance with those standards. *See Pa. Envtl. Defense Found. v. Commonwealth*, 161 A.3d 911 (Pa. 2017).

The ensuing debate has generated a flood of litigation. There have been at least 14 significant legal decisions directly addressing the application of Pennsylvania's environmental rights amendment just in the past 18 months.

The Pennsylvania cases have raised many questions and, to date, have settled few. First and foremost, does the amendment impose substantive environmental standards beyond those already provided for by existing laws and regulations? So far, no Pennsylvania court has imposed such heightened standards, but the state Environmental Hearing Board, a quasi-judicial agency that hears appeals from decisions of the PADEP, has evaluated whether PADEP's adherence to established standards is adequate to prevent environmental incursion that would violate the amendment. Citizen challenges to state and local government actions strongly advocate for a heightened standard, presumably to be developed and applied by judicial or quasi-judicial decision-makers on a case-by-case basis. This could leave environmental policy-making in the hands of these decision-makers, a consequence not likely intended by the legislature.

Examples of the progressive role that New Jersey has played in developing statutes to protect its environmental resources are many.

Second, is the private right to a clean environment self-executing, or does it require affirmative legislation to take effect? New Jersey's proposed amendment, in contrast to Pennsylvania, explicitly makes the amendment self-executing, which could leave the state vulnerable to innumerable private causes of action of an uncertain nature, and could subject NJDEP, as the state's primary environmental actor, to additional second guessing.

Third, what is the scope of the "public natural resources" covered by the amendment? Unlike the Pennsylvania amendment, which does not further define the public natural resources subject to its terms, New Jersey's proposal defines those resources to include "waters, air, flora, fauna, climate, and public land," but the sponsors admit that this list is not exhaustive and that the term is "amenable to change over time." This open-ended approach will likely foster future litigation over public and private rights, as it has in Pennsylvania. *See*, *e.g.*, *Marcellus Shale Coal. v. Dep't of Envtl. Prot.*, 185 A.3d 985, 1010 (Pa. 2018) (Donohue, J., concurring and dissenting) (discussing potential scope of "public natural resources").

Fourth, does the amendment require the state to conduct a separate "pre-action analysis" to analyze the environmental effect of a proposed state action, similar to environmental review under the federal National Environmental Policy Act? In Pennsylvania, this approach is strongly advocated by environmental groups. The sponsors of the New Jersey proposal take the position that the proposed amendment indeed requires such a pre-action analysis, which would lead to a new layer of administrative review and delay.

Fifth, to what extent must municipalities in Pennsylvania consider the environmental rights amendment when approving ordinances and projects? *See e.g., Frederick v. Allegheny Twp. Zoning Hearing Bd.*, 2295 CD 2015 (Pa. Cmwlth. Oct. 26, 2018). Local opposition groups are attempting to use the amendment to halt projects at the local level, leaving townships vulnerable to lengthy and expensive litigation based on currently undefined standards.

Is a NJ Environmental Amendment Necessary?

As the debate unfolds in Pennsylvania, New Jersey should consider whether a similar amendment, and no doubt a similar debate, will add to or detract from New Jersey's already comprehensive set of legislative enactments and regulatory pronouncements—a structure that has made New Jersey a national leader in progressive environmental protection, and which already fully embodies the values inherent in the environmental amendment.

For example, when it comes to protection of its shoreline and tidally flowed lands, New Jersey is the leading state in embracing the public trust doctrine, a common law doctrine which has served the state as a means to protect and preserve the public's rights in both the waters and land resources associated with the shore. More recently, the State has asserted its trusteeship as protector of the public's rights in clean groundwater via the natural resource damage program—as recently as August 2018, the state announced a new natural resource damages enforcement initiative.

Examples of the progressive role that New Jersey has played in developing statutes to protect its environmental resources are many. New Jersey's Spill Compensation and Control Act, enacted in 1976, was one of the first laws in the nation establishing the statutory principle of strict liability for the remediation of contaminated sites, and served as the model upon which the federal Superfund law (and in turn other state superfund laws) was based.

Moreover, the legislature in 1982 enacted the Environmental Cleanup and Responsibility Act, now known as the Industrial Site Recovery Act, the first and still one of the few laws in the country that requires the remediation of industrial properties before they can be transferred or operations can cease. New Jersey is also a leader in the enactment of brownfields legislation, having established the most stringent cleanup standards in the country for the remediation of sites that are being redeveloped for productive reuse, and the innovative licensed site remediation professional program created to effectively and efficiently remediate those brownfield sites.

In addition to the rigorous triumvirate of laws governing water quality (the New Jersey Water Pollution Control Act), air quality (the Air Pollution Control Act), and solid waste (the Solid Waste Management Act), New Jersey has taken the lead in developing highly specialized statutes directed at comprehensively protecting its unique natural resources. For example, these statutes include the following:

(1) The Coastal Area Facilities Review Act and the Waterfront Development Act, which contain a comprehensive regulatory scheme for protecting the state's critical coastal resources.

(2) The Pinelands Protection Act, which provides for the management and protection of the sensitive natural resources contained in the unique 938,000-acre Pinelands Area.

(3) The Highlands Water Protection and Planning Act, which is targeted at protection of the drinking water for approximately half of the residents of the state through comprehensive land use management and open space protection.

(4) The Freshwater Wetlands Protection Act, pursuant to which New Jersey has developed a wetlands regulatory program that is so rigorous that New Jersey is only one of two states to secure program delegation by the Army Corps of Engineers.

(6) The Garden State Preservation Trust Act, the centerpiece of New Jersey's legislative open space preservation program—one of the most successful programs in the country.

Finally, New Jersey has a comprehensive citizen suit law, the Environmental Rights Act, which gives citizens the right to enforce the environmental laws against any person alleged to be in violation of those laws, whether they be in a statute or ordinance. N.J.S.A. 2A:35A-1 et seq.

All of these statutes, and more, represent a careful balance wrought by the legislature over nearly half a century about how best to protect the natural resources of the state, and who should have the authority to implement and enforce the laws protecting those resources. These choices have been carefully fine tuned by the NJDEP's development of rigorous regulatory programs—regulatory programs as to which the legislature, in turn, retains (and at times has exercised) the authority to overrule under the New Jersey Constitution should it decide that NJDEP has acted in a manner that is inconsistent with legislative intent. This backdrop should raise significant pause as to whether a separate environmental amendment to the state constitution will serve the best interests of the state, or will instead inject uncertainty and costly litigation into an already robust environmental protection program. ■

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