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NYS Bar Association Annual Meeting Lecture Outline: The New Environmental Rights in NY's Constitutional Bill of Rights

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NEW YORK STATE BAR ASSOCIATION

JANUARY 2022 ANNUAL MEETING

ENVIRONMENT AND ENERGY LAW SECTION

Tuesday, January 25, 2022

10:40 – 11:30 a.m.

The Impact of the Green Amendment

A New Era of Environmental Jurisprudence

Prof. Nicholas A. Robinson¹

Elisabeth Haub School of Law at Pace University

Foreword

Steve Englebright – *These rights are “elemental”
“Very clear and concise” – “Never too late to recognize”
“The rights to a healthy environment”*

René Dubos – *“Think Globally and Act Locally”*

Preface

It is too easy this winter to miss the signature Human Rights event in New York, the overwhelming vote last November 4th to recognizing the Human Right to the Environment. Competition for our attention is fierce: the Pandemic, political rivalries playing out in Washington, D.C., and angst about extreme weather events and other climate change impacts. So, I welcome this opportunity to illuminate the hope and promise of Article 1, Section 19 in New York’s Bill of Rights: “Each Person shall have a right to clean air and water, and a healthful environment.” Most New York lawyers have yet to explore the scope of the Human Right to the Environment. The more precise legal meaning of New York’s Environmental Rights is the province of our judiciary and Court of Appeals. But their effectiveness is the shared responsibility of the Governor, and every other official in New York. Rule 1.1 of the NY Rules of Professional Conduct obliges all lawyers to know, observe and apply the Bill of Rights when advising clients. Human Rights are universal norms, guiding all government officials. Ultimately, all persons hold these Rights to the Environment. This Outline offers a threshold briefing about the NY Bill of Rights’ newly minted Article 1, Section 19. Others doubtless will proffer different professional judgements on the issues raised herein, but all can agree that when NY voters amended the Bill of Rights, they decided that our birthrights to breathe and for potable water and to enjoy a healthful environment deserve the most powerful legal protection our State can afford. Like due process of law, these environmental rights are framed in elegant and plain English. New York’s Environmental Rights are expressed more forcefully and gracefully than in any other constitution. We lawyers have a solemn responsibility duty to breathe life into this legal bulwark for ensuring each person’s fundamental birth rights. Our obligation is to serve our Constitution’s Bill of Rights as if life itself depends on our actions. As biodiversity plummets and climate disruption grows, it just might.

¹ Member of the NYSBA Committee on the State Constitution; formerly Chair of the NYSBA Section on Environmental and Energy Law and of the Committees on Environmental Law and International Environmental law of the NYC BAR (Association of the Bar of the City of New York); Deputy Commissioner and General Counsel, NYS Department of Environmental Conservation (1983-85) and Chair of the Environmental Advisory Board to Governor Mario M. Cuomo (1985-94). Currently, Executive Governor of the International Council of Environmental Law.

A Thank You to EELS:

This Annual Meeting of the NY State Bar is arguably the first public gathering to explore the legal meaning of Bill of Rights Article 1, Section 19, New York State's Environmental Rights.

I. New York's Newly Amended Bill of Rights Inaugurates a New Foundation for the Environmental Rule of Law: This Outline Sketches Out the Jurisprudential Context for Beginning to Assess the "Impact" of New York's "Green Amendment," Recognizing a Human Right to the Environment

- A. Environmental degradation increases faster than prevention or remediation across much of the world, and the impacts of climate change become ever more apparent. See UN Environment Programme's scientific synthesis report, "Making Peace with Nature" at <https://www.unep.org/resources/making-peace-nature> (February 2021).
- B. Environmental Law has been implemented imperfectly in many countries, or not at all, leading to calls to strengthen the rule of law. The Environmental Law Institute (ELI) prepared a study for UNEP on the Environmental Rule of Law. See <https://www.unep.org/resources/assessment/environmental-rule-law-first-global-report> (2019).
- C. The World Conservation Congress of the International Union for the Conservation of Nature (IUCN) adopted a set of 13 principles that characterize the "environmental Rule of Law." For ecologically sustainable development. See the World Declaration on the Environmental Rule of Law at https://www.iucn.org/sites/dev/files/content/documents/english_world_declaration_on_the_environmental_rule_of_law_final.pdf (April 2016). Compare the American Bar Association's National Environmental Law Enforcement Conference (December 2021) at https://www.americanbar.org/content/dam/aba/events/environment_energy_resources/2021/enforcement-conference-brochure.pdf.
- D. The United Nations Human Rights Council (UNHCR) in October 8, 2021 adopted Resolution 48.13 recognizing a human right to a clean, healthy and sustainable environment. See <https://undocs.org/a/hrc/48/l.23/rev.1>. The Resolution's first clause state that the Council: "Recognizes the right to a safe, clean, healthy and sustainable environment as a human right that is important for the enjoyment of human rights." The UNHCR Resolution is now before the UN General Assembly for action in the next UNGA Session beginning at the end of August, 2022. See UN Press Release at <https://news.un.org/en/story/2021/10/1103082>.

- E. The UN recognized the Human Right to Water in 2010. See UNGA Resolution 64/292 at https://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/64/292 . The State of California recognized the human right to water on September 25, 2012, when Governor Edmund G. Brown Jr. signed legislation making California the first state in the nation to legislatively recognize the human right to water. See Assembly Bill 685: https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201120120AB685 The California Water Code, in Section 106.3, provides that that “every human being has the right to safe, clean, affordable, and accessible water adequate for human consumption, cooking, and sanitary purposes.”
- F. Constitutions in Montana and Pennsylvania, and in more rather more limited ways the constitutions of Illinois, Massachusetts and Hawaii, recognize rights to the environment. The “Environmental Rights” provided now in the New York State Constitution’s Bill of Rights are a stronger recognition of the Human Right to the environment than those adopted in these sister states. New York’s unconditional right is fundamental, harkening back to the recognition of “due process of law” itself first recognized in 1215 in Magna Carta (included in the NYS Constitution’s Bill of Rights Article 1, Section 6). It is worth noting that environmental rights are embedded in Magna Carta from its inception. See Nicholas A. Robinson, “The Charter of the Forest: Evolving Human Rights in Nature,” Chapter 12 in Daniel B. Magraw, Andrea Martinez, and Roy E. Brownell II, eds., Magna Carta and the Rule of Law (American Bar Association, 2014, published for the 800th anniversary of Magna Carta. Available at <https://digitalcommons.pace.edu/lawfaculty/990/> . Like due process of law, the right to the environment is enjoyed by everyone, and is self-executing.
- G. For a thorough exposition of the growing interest in other states – and eventually in the federal context – see the book by the Delaware Riverkeeper, Maya K. van Rossum, The Green Amendment – Securing Our Right to A Healthy Environment (2017). See also her recent article for LAW360 (Portfolio Media) entitled “How Green Amendments Protect Key Environmental Rights” (November 23, 2021), www.law360.com . Maya K. van Rossum is founder of the national Green Amendments for the Generations organization, see <https://forthegenerations.org>

II. **Amending NEW YORK STATE’S BILL OF RIGHTS Article 1, §19: “Environmental Rights”**

- A. **“Each Person shall have a right to clean air and water, and a healthful environment.”**
- B. ***Legislative History for NY Assembly Bill 6279 (Englebright)*** in the NYS Legislature’s 2017-18 Regular Sessions; A-6279 sponsored by Assemblyman Steve Englebright (Chair,

NHYS Assembly Committee on Environmental Conservation); Assembly Speaker *Pro Tempore* Jeffrion L. Aubey presiding; votes to approve A-6279 on April 24, 2017, were Yes 113; No 26. First adoption also in occurred in the Senate of companion bill S.5287 (Carlucci); the Legislature's second adoption as S. 2072 (Carlucci)/A2064(Englebright) occurred in 2019; the Assembly originated the bill in 2017, and key parts of the bill's legislative history are provided here:

1. The Purpose or general idea of the bill: "To protect public health and the environment by ensuring clean air and water."
2. Summary of Provisions: "Amends the State Constitution's Bill of Rights to include a right to clean air and water and a healthful environment."
3. provided a Justification as follows: "Recent water contamination and ongoing concerns about air quality have highlighted the importance of clean drinking water and air as well as the need for additional protections. Several other states including Pennsylvania, Hawaii, Massachusetts and Montana have constitutional protections in place to ensure access to clean air and water. This proposed constitutional amendment would follow those models and ensure that clean air and water are treated as fundamental rights for New Yorkers and to protect the overall health of the people and the environment."
4. Highlights of the Assembly Floor debate on Assembly No. 6279, Rule Report 62, April 24, 2017 pp. 29-63:
 - a. Englebright **"This is an elementary concept, the premise being that part of the fundamental rights of being a citizen of this great State should be that one of those rights...is a right to have a healthy environment. And it isn't in the Constitution, but it should be. And certainly, there have been events that have reminded us to the need for this, in places like Hoosick Falls and Newburgh, Long Island ...where there have been horrific insults to the environment and to community's well-being and to the health of individuals, ...it seems appropriate on this celebration of Earth Day to memorialize the right that all our citizens should have."** [Emphasis added in bold type]
 - b. In reply to inquiry by Goodell that legislation is sufficient to provide for these rights: Englebright: "...as you look to the trajectory of the interaction of communities with the environment ...there is a need to reassure citizens that they have basic rights in the constitution ..."
 - c. In reply to inquiry by Goodell, on conveying an individual cause of action: Englebright: "No, it doesn't add new powers..."
 - d. In reply to inquiry by Goodell on SEQRA, Englebright: "SEQRA is a sunshine law for procedures leading to a particular decision for a particular proposal. That's very different."
 - e. In reply to inquiry by Goodell about defining "clean," Englebright: "Well, we're talking about what is healthful. Healthful basically means that the environment is conducive to the well-being and the normal biological

activities of a human interacting with the environment is one that will allow for the well-being of our citizens, in this case it is predictable.”

- f. In reply inquiry by Goodell about affecting other rights, such as challenging MTAs use of diesel-powered buses, both the question and the response are inchoate, but Englebright replied: **“What is the very purposeful effort is to reassure the people of this State that they have an unalienable right to a clean environment, and that the environment itself deserves to have our reciprocal support to keep it healthy. All of the creatures that God bestowed upon this great State deserves our respect, and they too, are, in a sense, indicators of the well-being potential of the environment for our species.”** [emphasis added]
- g. In reply to an inquiry by Goodell about what tangible impact for air or water, Englebright replied: “It will begin in our schools. It will begin with the children of the State, who will be taught that it is their right to grow up in a healthful environment.”
- h. In reply to an inquiry by Goodell about the meaning of “healthful,” Englebright: **“I think there will be a certain amount of extrapolation, but the reality is that this is based upon the premise that the land, the air and the water deserve to be, and the creatures that live thereon and within, deserve to be essentially in a balanced state of equilibrium, and that we, as participants in the journey taken together into the future of our State, deserve to have a balance and predictably healthful environment as well.”** [Emphasis added]
- i. In reply to an inquiry by Goodell about whether New York courts will follow the precedents of Pennsylvania, Englebright: “I trust that our judicial leaders and the judicial system will protect our citizens within the context of our State’s Constitution. ... The National Conference of State Legislatures ...[advised] that in their experience this amendment has not resulted increased citizens lawsuits.”
- j. In reply to an inquiry by Goodell about whether healthful includes unnecessary noise, natural, scenic, historic, esthetic qualities, Englebright: **“Of course. The totality of these parts and pieces of our experience from our five senses is to give us a sense of well-bring. And biologically, ... if we take care of the environment, the environment will take care of us.** [emphasis added]
- k. In debate, Mr. Goodell: ... the question is whether we should do it through a constitutional amendment or whether we should continue the practice that we have of addressing these issues by statute. ... I am reminded of the words of Benjamin Cardozo...about the differences between statutes and constitutions, and he said, *Statues are designed to meet the fugitive exigencies of the hour. An amendment is easy as the exigencies change. In such cases, a meaning once construed tends to legitimately to stereotype itself in the form first cast.* [italics as in original transcript]. The point that Mr. Cardozo was making is that statutes, by their nature, are much more flexible

than the Constitution, and that's desirable in the environmental area, because we have seen that with previous legislation, we legislate about issues that didn't exist ten years ago...So with that as a background ... the problem is that this constitutional amendment has words that are completely undefined; words like "clean" air and water. What's "clean" mean? Does it mean pure? No contaminants? ... what happens when we pass a constitutional amendment with very, very broad terms like "clean" or "healthy"? Well, what happens is we transfer legislative authority from us – from the Senate, from the Assembly – we transfer it to the Judiciary. ... And while all of us in this room support clean air and clean water and a healthy environment, I respectfully suggest that ... We are more appropriate, as a Body, to judge the foists and benefits of those environmental decisions and make the decisions ourselves. ..."

- l. In reply to an inquiry by Murray, about how to measure what is "clean" or "healthful," Englebright: "The voters will make that determination. This will pass twice here. ... the missing part of the process that we just head about a moment ago is that the voters, in fact, will weigh in on this..."
- m. In reply to an inquiry by Murray about undefined words leading to lawsuits, Englebright: "**Look, the list of fundamental rights, each one in our Constitution is written in a very concise manner. One of them, for example, is freedom of speech.** We could have this same debate about whether or not you can say anything, anywhere, at any time. But the reality is, you really are not supposed to yell 'fire' in a crowded theater. ... And has been correctly pointed out, we do have a responsibility ...to pass laws that are very specific ... But that is not inconsistent with establishing a basic right and restating what too often has been assumed, but in fact, when you search through the Constitution, it is not there as a basic right. So, this is not mutually-exclusive of our other laws. It is supporting, and provides a vessel of context for all of the specificity that you so rightly point out we should be looking for.
[Emphasis added]
- n. In debate, Murray: "Thank you. ... I see what you're saying here. ... My concern, again, is the devil in the details as far as who is determining exactly what is the definition of "clean" in some situations or "healthful" ... if we go down this road, then I wonder ... are we now going to introduce an amendment telling everyone of their fundamental right to be fed...not to be homeless...something like this may be opening up a Pandora's Box ...I'm concerned about the end result, with possible lawsuits, etc."
- o. In debate, Barron: "... **When you have constitutional amendments, there's far more strength to that. There's far more involvement with the people. And believe me, they'll have no difficulties defining what clean water is. ... The people of the State will see that the government cares about these basic rights. ... And the definitions will evolve.** ...courts are set up so anything you pass can be challenged in court. That is not a basis for not having a constitutional amendment to the right to clean air, water, and a

healthy environment. ... This is a powerful piece of legislation, and other countries around the world, when they want to guarantee human rights and basic things for the people of these countries, they put it in the constitutions so that the constitution reflects that of the goodness, the good intentions of the government and protecting its people. And this is what this bill does..." [Emphasis added]

- p. On inquiry by Palmesano about who is ultimately to define "clean," Englebright: "... if someone is harmed because of a chemical or a substance or a disease that is environmentally-created by virtue of a contamination event or an irresponsible decision, then "'clean' becomes pretty clear as to what that ...meaning is, because somebody will have been injured. So, we also can see, in some cases, as preview of what can happen to us when we have creatures of the environment – fish, birds, mammals, reptiles, amphibians – that are also injured. Sometimes they are more sensitive to contamination or encounter it first. The so -called 'canary in a coal mine' analogy certainly is appropriate here. ... "
- q. In debate, Palmesano: "...how will this play into the regulatory framework we have in this country and in our State. ...the last couple of years there's been ... [determinations by federal EPA rule about the waters of the United States] ...that would really eliminate [farmers'] ...ability to farm on their land. It was really as concern for our farming community. Will this allow even more legal jeopardy? Because I know when you talked about clean, you talked about if there is damage or harm. ... But ... [the waters of the United States rules] something that was going to have a detrimental, devastating effect on our agricultural community. I know it's on hold right now ... but through a constitutional amendment ... would someone ...go around to a judge who might be sympathetic to than and then have a damaging ramification to our number-one [agricultural] industry in the State, ...Is that possible?
- r. In reply to Palmesano, Englebright: "I don't see that as something you should be apprehensive about at all. The experience in others states, which includes Illinois, the breads basket of our nation, there hasn't been any. ... I know from having walked in the shadow of my grandfather on his farm in Evansville...that the farm needed clean water, and that he sold vegetables which he was so proud were not contaminated. ...He would say *These have been raised with pure water* [italics in original transcript]. Now, he didn't mean distilled water. He meant water that was healthful, that did not create any cause for alarm if you consumed the fruit or the vegetables. And that's the context that I, as the sponsor of this, believe is inherent. ... **what we're trying to do here is ...reinforce what should have been many years ago already written down as part of our constitution, it's never too late, and we're going to have a chance to do that now. And we get a chance to reinforce the premise that all of our citizens have the right to grow up and reside in this State free from contamination, free from fear that their**

families will be injured by water that is not pure, air that is not clean enough to breathe.” {Emphasis added]

- s. On inquiry from Palmesano, about local voters turning down upgrades for sewage and water systems, and could a lawsuit overturn the local electorate if votes violated the clean water right, Englebright: “You’re asking me to speculate. All can do is point to the record of six other states... All I can say is I don’t believe that that is what has happened elsewhere and, based on that, I don’t think it would happen here.”
- t. On inquiry from Palmesano, on possible use of fracking to produce natural gas, if the fracking polluting drinking water, as has happened in Pennsylvania, Englebright: “Anything is possible. Certainly, there have been problems associated with the disposal of fracking fluid. Water, often taken from local streams and lake, purposefully contaminated for ... injecting into the ground under pressure. They have not always stayed in the ground, and sometimes when they are brought back up, they come back up radioactive and they are saline and they are not welcome at the local sewer treatment plant, and they are not welcome. I should point out, on any of our ocean outfall pipes, of which we have six on Long Island. No, the solution to pollution is not dilution, and we should be very careful about our industrial processes. ... New technologies ... [like horizontal drilling for fracking] have the potential to be harmful to our population. ... **The larger context is what this bill is about. It doesn’t pretend to add specifics. It doesn’t pretend to be a cause of action. But what it does is it states very clearly that it is the right of every citizen in this State to have a clean and healthful environment to turn to and rely upon.**” [Emphasis added]
- u. In debate, Palmesano, raising objections to the process of substances, of federal EPA lowering of TDMLs for nitrogen and phosphorous discharges into the Susquehanna River and Southern Tier watersheds, and again questioning whether energy needs might necessitate new natural gas sources, and unsure about the impacts on local community infrastructure for water and sewage treatment, and concerned for unknown impacts on farmers and agricultural communities, stating: “Again, each and every one of us are committed to clear water and clean air, but I just want to make sure as we move forward with this discussion and debate – I know it’s got to pass two concurrent Legislatures – I hope we take these things into consideration ... These are all things that we need consider as we consider any type of thing that broadens the authority and – and regulatory power, but anything that can also open up a litigious society for one judge to make and determine one way or another. ... please take these things into consideration ... So, on that note I will end my comments....”
- v. In explaining their votes, all in affirmative: Niou cited the Hoosick Falls case, noting for some issues the amendment comes too late, and quotes Kurt Vonnegut, “We could have saved the Earth but we were too damn cheap”; Lavine noted that the 10th amendment of the US Constitution reserved

powers to the States that are not delegated to the federal government, and that the amendment was not over-reach; Hyndman observed that New York needed to not rely on the federal government, but needs to ensure it can act to protect water and air, citing problems around JFK airport; Crick observed the “bizarre” situation that as society advances it adds to degradation of the environment, and that that “we cannot continue to have bad air and water”; Rivera stated that the defiling of Earth’s air and water and beauty was a sin and we all need to “wake up” and said “I hope we don’t come back next year and still debate whether we should have clean wafer or clean air; Walter explained that since Pennsylvania’s constitution allows fracking, his vote was a first step to allowing hydraulic fracturing in NY.

C. Legal Analysis Available to the Legislature during debate and adoption

1. Legal analysis of the issues of the proposed constitutional amendment was extensive, so the legislative staff and legislators had ample references to guide the preparation of the amendment. See, e.g.:
 - a. Proposal for a self-executing environmental rights provision in the NYS Constitution – Prof. Williams R. Ginsburg, “The Environment,” Chapter 15 in Gerald Benjamin (ed.), The New York Constitution: A Briefing Book. Pp. 221-229 (Nelson A. Rockefeller Institute of Government, 1994)
 - b. Comparative analyses of State Constitutions include (a) was published in National Conference of State Legislatures, “State Constitutional Right to Hunt and Fish,” (Nov., 9, 2015); 9b) A. English and J.J. Carroll, “State Constitutions and Environmental Bills of Rights”, in Council of State Governments, The Book of the States 1.8 (2015).
 - c. CLE Materials prepared for “Constitutional Convention Panel” the Fall Meeting of the NYSBA Environmental Law Section, Cooperstown, NY Oct. 14-16, 2016, by N.A. Robinson, K. Leisch, and T. Ulasewicz.
 - d. For November 7, 2017 NYS Election on whether to convene as Constitutional Convention, to revise the State Constitution (pursuant to Article XIX “Amendments”) the NYS Bar Association’s Committee on the NYS Constitution prepared and adopted a report and recommendations concerning THE CONSERVATION ARTICLE IN THE STATE CONSTITUTION (Article XIV), August 3, 2016, approved by the NYSBA House of Delegates on November 5, 2016, at <https://nysba.org/app/uploads/2020/02/Report-on-NYS-Constitution-Article-XIV-final.pdf><https://nysba.org/app/uploads/2020/02/Report-on-NYS-Constitution-Article-XIV-final.pdf> ; see pp. 28-30 on the pros and cons of a self-executing environmental right. When the voters declined to call a constitutional convention to consider a broad range of constitutional changes, the other procedure for the “Green Amendment” to be considered was passage of the proposed amendment in accordance with Article XIX, in

two successive legislative sessions, for submission to the NY State's voters in a state-wide election.

- e. Nicholas A. Robinson, "Updating New York's Constitutional Environmental Rights," 38 *Pace Law Review* 151 (Fall; 2017).
- f. NYSBA Environment and Energy Law Section (EELS), "Report and Recommendations Concerning Environmental Aspects of the NY Constitution, (Task Force chaired by Prof. Katrina Fischer Kuh), published in 38 *Pace Law Review* 182 (2017) available at: <https://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1962&context=plr>
- g. Books, including David R. Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights and the Environment* (2012), evaluating the some 80 nations that recognize constitutional rights to the environment; and law review articles, including, e.g., James R. May, "Constituting Environmental Rights Worldwide," 23 *Pace Environmental Law Review* 113 (2006), available at <https://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1075&context=pehr> ; and Jason J. Czarnezki, "Environmentalism and the Wisconsin Constitution," 90 *Marquette Law Review* 466 (2007); and John Tucker, "Constitutional Codification of an Environmental Ethic," 52 *Florida Law Review* 299 (2000)
- h. Commentary on NYS Constitution Article XIV, including its provisions for the self-implementing strictly enforced "forever wild:" provisions for the State Forest Preserve, and the policy directives of the non-binding not-self-implementing "Conservation Bill of Rights," e.g., David Sive, Nicholas A. Robinson, and Philip Weinberg, "Is The Forest Preserve 'Forever' or 'Wild'?", in Michael B. Gerard, Editor, *Environmental, Law In New York* (Parts 1 and 2, January and February 2013, LexisNexis).

D. Construing In construing the NY Bill of Rights Article 1, Section 19

There are ample authorities available for the study, interpretation, and application of these new fundamental rights. The Legislature had an ample legal foundation for its decision to recognize a fundamental right to clean air, clean water, and a healthful environment in plain and self-evident words, akin to other basic rights such as "due process." The ways in which New York Environmental Rights are applied will depend on the context. Here are comparative law examples, taken from the realm of land use law, to ponder:

1. Consider, by comparison, how the Minnesota Environmental Rights Act has been construed to embed Aldo Leopold's Land Ethic (*A Sand County Almanac*, 1949) into decision-making under that State's Environmental Rights legislation; see *County of Freeborn v. Bryson* (Bryson I), 297 Minn. 218, 210 N.W.2d 290 (1973), and *County of Freeborn v. Bryson* (Bryson II), 309 Minn. 178, 243 N.W.2d

- 316 (1976), appellants raised a successful defense of their action based on the Minnesota Environmental Rights Act, Minn..Stat. ch. 116B (1978). As Assemblyman Englebright makes clear in the legislative history cited above, the “Green Amendment” embeds this basic ethical norm in New York’s Constitution.
2. There is ample authority for New York applying the NYS Bill of Rights’ Environmental Article 19 wholly within New York, without being under any constraints from the federal Constitution. See Judith S. Kaye, “Dual Constitutionalism in Practice and Principle,” 61 *St. John’s Law Review* 399 (1987). In terms of conserving open spaced, for example, a local government might rely on the State’s Environmental Rights, without the federal Constitution’s “takings” clause constraining such action. See John A. Humbach, “Law and A New Land Ethic,” 74 *Minn. L. Rev.* 339 (1989), at <http://digitalcommons.pace.edu/lawfaculty/95/> .
 3. On broader ethical issues of land uses law and environment, see Robert Jay Goldstein, [Ecology And Environmental Ethics: Greenwood in the Bundle of Sticks](https://supergrow.info/Ecology-And-Environmental-Ethics:-Green-Wood-In-The-Bundle-Of-Sticks-(Applied-Legal-Philosophy)-(Applied-Legal-Philosophy)-Robert-Jay-Goldstein.cgi) at [https://supergrow.info/Ecology-And-Environmental-Ethics:-Green-Wood-In-The-Bundle-Of-Sticks-\(Applied-Legal-Philosophy\)-\(Applied-Legal-Philosophy\)-Robert-Jay-Goldstein.cgi](https://supergrow.info/Ecology-And-Environmental-Ethics:-Green-Wood-In-The-Bundle-Of-Sticks-(Applied-Legal-Philosophy)-(Applied-Legal-Philosophy)-Robert-Jay-Goldstein.cgi)
 4. Law Review articles available before the elections include: John C. Dernbach, “Thinking Anew About the Environmental Rights Amendment: An Analysis of Recent Commonwealth Court Decisions.” 30 *Widener Commonwealth Law Review*. 147 (2021). [Widener Law Commonwealth Research Paper No. 21-4], available at SSRN: <https://ssrn.com/abstract=3777547> .

III. Public Debate Prior to Voting on the Constitutional Environmental Rights Amendment and Following Adoption of the Amendment

- A. The news media paid scant attention to the pros and cons of the proposed amendment – exception, “Should clean air and water be added to the New York State Bull of Rights?” “Yes”, by Peter Iwanowicz, and “No” by Melvin Norris, *Adirondack Explorer*, pp. 66-67 (March/April 2021)
- B. **Con:** James B. Meigs, “Why NY’s Proposed ‘Green Amendment’ Could Devastate the State’s Economy,” (Oct. 20, 2021), at <https://nypost.com/2021/10/20/why-nys-proposed-green-amendment-could-devastate-states-economy/> , and James B. Meigs, “A Dangerously Seductive Idea,” *City-Journal* (November 2, 2020) at <https://www.city-journal.org/proposition-2-new-yorks-dangerous-green-amendment>
- C. **Pro:** Katrina Fischer Kuh, “Why do We Need a Green Amendment?” *New York Law Journal* (March 15, 2021), at <https://www.law.com/newyorklawjournal/2021/03/15/why-do-we-need-the-green-amendment/> ; and Katrina Fischer Kuh and Maya K. van Rossum, “For Business,

- Green Amendment is Double Green,” *Westchester and Fairfield County Business Journal* (April 20, 2021)
<https://www.newsbreak.com/news/2209943861535/westchester-and-fairfield-county-business-journal-featured-haub-law-professor-katrina-kuh-s-co-authored-op-ed-with-haub-law-graduate-maya-van-rossu-for-businesses-green-amendment-is-double-green>
- D. **Pro:** Nicholas A., Robinson and Maya K. Van Rossum, “New York’s November Ballot – A Right to the Environment: The third chance to establish the right to a clean and healthy environment for all New Yorkers is on the ballot for Nov. 2, 2021,” *New York Law Journal* (October 21, 2021), p. 1., at
<https://www.law.com/newyorklawjournal/2021/10/21/new-yorks-november-ballot-a-right-to-the-environment/?sreturn=20220005154821>
- E. **Pro:** Environmental Advocates of New York assembled more than 40 environmental organizations to endorse a Yes vote, but perhaps due to Covid-19 there was very little outreach to the general public outside of their memberships.
- F. **Con:** “The Business Council Opposes Proposition 2- Environmental Rights Amendment” (November 2, 2021), at <https://www.bcnys.org/news/business-council-opposes-proposition-2-environmental-rights-amendment> ; Greater Utica Chamber of Commerce opposes Green Amendment (June 11, 2019), at <https://greateruticachamber.org/opposing-a-proposed-green-amendment-to-the-nys-constitution/>
- G. The Rockefeller Institute of Government issued a study: Laurie Rabinow and Abigail Guisbond, “New York’s Potential Green Amendment: A Primer” (Oct. 27, 2021), focusing on experiences under other State Constitutions, at <https://rockinst.org/blog/new-yorks-potential-green-amendment-a-primer/>
- H. The New York Water Environment Association (NYWEA) issued “NYWEA Water-Related Questions and Answers on the Proposed NY Environmental Rights Constitutional Amendment,” with links to webinars raising pros and cons, October 15, 2021, at <https://www.nywea.org/Training%20%20Conferences%20Documents/Other/EnvironmentalRightsResponses1021.pdf> (see also press release at <https://www.nywea.org/Training%20%20Conferences%20Documents/Other/PressReleaseConstitutionalAmdmt1021.pdf>)
- I. Christine Weniger, “What Could New York State’s Proposed Environmental Rights Amendment Achieve?” (September 1, 2020), at <http://blogs.law.columbia.edu/climatechange/2020/09/01/what-could-new-york-states-proposed-environmental-rights-amendment-achieve/>

- J. The results of the November ballot, and relevant data, are collected by **BallotPedia**, at [https://ballotpedia.org/New_York_Proposal_2,_Environmental_Rights_Amendment_\(2021\)](https://ballotpedia.org/New_York_Proposal_2,_Environmental_Rights_Amendment_(2021)).
70.12% Yes (2,129,051)
29.88% No (907,159)
It is remarkable that the Environmental Rights Amendment passed 2:1 and only one other proposed amendment was adopted by a narrow majority, and three other proposed amendments were defeated. The votes clear made a conscious and discriminating decision about the “Green Amendment.”
- K. Commentaries following adoption of the “Green Amendment” have been relatively few. See, e.g. David G. Mandelbaum, and Steven C. Russo, “The New Environmental Rights Amendment to New York’s Constitution,” *National Law Journal*, vol XII, no. 6 (Nov. 8, 2021), at <https://www.natlawreview.com/article/new-environmental-rights-amendment-to-new-york-constitution> ; and Stacey Halliday, et al., “New York Becomes Third State To Adopt A Constitutional Green Amendment,” BDLaw.com (Dec. 10, 2021) at https://www.bdlaw.com/publications/new-york-becomes-the-third-state-to-adopt-a-constitutional-green-amendment/?utm_source=Mondaq&utm_medium=syndication&utm_campaign=LinkedIn-integration ; and Nicholas A. Robinson, “New York’s Constitutional Right to the Environment,” American College of Environmental Lawyers Blog (Nov. 24, 2021), at <https://acoel.org/wp-content/uploads/Robinson-blog-2021.11.24.pdf> ; Nicholas A. Robinson, “New York’s Constitutional Right to the Environment,” *Westchester Lawyer*, vol., 9, no 1, p. 10 (January, 2022, Westchester County Bar Association) at <https://www.pageturnpro.com/Westchester-County-Bar-Association/103105-Westchester-Lawyer-01-2022/flex.html#page/1>
- L. Rachael Carson in Silent Spring (1962) observed: “If the Bill of Rights contains no guarantees that a citizen shall be secure against lethal poisons distributed either by private individuals or by public officials, it is surely only because our forefathers despite their considerable wisdom and foresight, could conceive of no such problem.” Much the same words and ideas independently arose during the debates on the floor of the Assembly when it debated adopting the amendment to submit to the People for adoption.
- M. The pros and cons before the vote raised many issues, and included more than a few red herrings. It is time now to be clear as a matter of law about what the amendment does and does not do. Spurious arguments raised in opposing adoption of the amendment should not be repeated. Article 1, Section 19 does not, for

example, authorize any new cause of action or a new generation of toxic tort suits or usher in broad new claims for money damages that would spark contingency litigation. It does protect individual persons, and provides a substantive additional Constitutional foundation for the State's environmental legislation. The Bill of Rights now bars every governmental entity in New York from denying a person's environmental rights. Its reach is far beyond just the NYS Department of Environmental Conservation, to apply whenever state action impedes the right to clean air and water and as healthful environment.

IV. How does this new Bill of Rights Clause Ensure a Person's Right to the Environment: "Each Person shall have a right to clean air and water, and a healthful environment."

- A. **Self-Executing:** The New York State Bill of Rights aims to secure a person from governmental action that is expressly secured by the relevant Constitutional article. Each basic right is self-executing, for instance the guarantee of freedom of religion (Article 1, Section 3), the right to assemble and petition government (Article 1, Section 9) or the right to equal protection of laws (Article 1, Section 11). Case law recognizes the self-executing nature of these rights, e.g. the due process clause (Article 1, Section 6, *Remley v. State*, 665 N.Y.S.2s 1005, 1008 (Ct Cl. 1997) or the prohibition of cruel and unusual punishment (Article 1, Section 5, *Boggs v. State*, 25 N.Y.S. 3rd 545 (Ct. Cl. 2015). 1215). It is "presumed" that the Bill of Rights' constitutional provisions are self-executing. *People v Carroll*, 3 NY 2d 686, 690-91 (1958); *Brown v. State*, 89 N.Y. 2d 172, 182; 674 N.E. 2nd 1129, 137 (1996).
1. Fundamental Rights are self-executing since they clearly delineate a basic Human Rights that a person holds autonomously by virtual of their humanity and being, and not by grace of the State. The government may not deny that right.
 2. Here, each person (without discrimination) has the environmental rights and to clean air and clean water and to a healthful environment.
 3. As with all aspects of environmental law, the environmental sciences provide an empirical basis for describing the characteristics of air and water and healthfulness. The sciences of ecology, biology, chemistry, and medicine, and other disciplines, all provide scientific knowledge and data for the relevant aspects of air and water and human health impacts in the context of any given case where persons allege their environmental rights are denied.
 4. Environmental rights are several, and of necessity require holistic application, because all ecological systems invariably are interrelated.
 5. In the first instance, when environmental statutes provide for protection of clean air and water and ambient environmental health, it can be expected that a governmental entity turn will be in compliance with its duties and

obligations under environmental laws (see NYS Environmental Conservation Law).

- B. **A Constitutional Foundation for Courts to Evolve a Common Law for Environmental Rights in New York:** The NY Environmental Rights will be defined by NY's courts, ultimately the Court of Appeals. The new Article 1, Section 19 rights now address an issue that Prof. Joseph Sax, dean of environmental law professors in the USA, posed in 1970 in his seminal book Defending the Environment – A Strategy for Citizen Action (Knopf, 1970). Sax poses the challenge at p. 148: "Thus two tasks face the legal systems. This is to begin identifying the nature of public rights in matters pertaining to environmental quality; the second is to help courts see their way toward a liberation from the administrative-review syndrome of crabbed inquires... Public rights need to be viewed in a fashion similar to private rights – to be seen as capable of direct examination on their merits within the framework of the common-law system and freed from excessive deference to the decisions, and the records made, by administrative officials. In short, public rights must be removed from the stranglehold which bureaucrats now have upon them and returned to their true 'owners' – citizens *as* members of the public." (Italics in original).
1. Too much of administration of Environmental Law has become too bureaucratic and removed from securing the basic environmental rights that inspired enactment of these remedial statutes in the first place. The impact of adopting the NY Bill of Rights Article 1, Section 19, is to clearly state the public environmental rights, and to allow the courts to ensure that government decisions respect each person's environmental rights, as members of the public that government is to serve.
 2. New York's Environmental Rights can enable each person to act to safeguard the public's shared right to clean air and water and a healthful environment, through the courts when governmental agencies fail to respect those rights. As Prof. Sax put it, "Courts are powerful enough so long as they are enabled to build a common law for the environment, remand dubious proposals to the legislatures, and declare moratoria." *Id.* at 239. It will take many years for New York's governmental agencies to retool to become stewards of clean air and water, but courts can ensure that such a process advance.
 3. Article 1, Section 19, lays the constitutional basis to enable New York's courts to forge a new common law for the environment in New York State. The voters in November of 2021 have launched a new era of environmental decision-making in New York. It may take many years to make a pervasive difference, but like the Constitutional provisions for equal protection in matters of civil rights, for environmental rights there is now a way forward and a floor or bulwark against regression.
- C. **Auditing How Government Respects Environmental Rights:** These self-executing rights are to be observed and respected by all branches of New York State

government, including local governments, public authorities. Now that the amendment has become a fundamental right, it is incumbent on all government entities to determine if they are respecting this right. They should be proactive, and not ignore their obligations. Governmental entities should assess if their on-going programs or activities respect these rights, and where short-comings may be found, they can provide remedial measures to ensure that the environmental rights are not abridged.

1. Environmental law best practices provide the means for any government entity to review how it can ensure it observes and respect the environmental rights. Corporations already know how to perform environmental audits, and with the enactment of the Bill of Rights Section 19, these analytics and assessment techniques can be undertaken by any governmental entity. Environmental audits (e.g. ISO 14001, see e.g. <https://www.isostandardsguide.com/iso-14001/>) and environmental management systems (EMS, see e.g. <https://www.epa.gov/ems>), both provide well understood systems and well defined tools by which any governmental entity can learn if it ensures respect for each person's rights under Bull of Rights Article 1, Section 19.
2. The NYS Comptroller should invoke Article 1, Section 19, to prepare audit standards and practices whereby state and local agencies could demonstrate that they are in compliance with applicable environmental laws, and respecting the Bill of Rights.
3. For example, where a State agency, like the Department of Environmental Conservation, has failed to update the NY State Implementation Plan (SIP) required by the federal Clean Air Act, DEC arguably violates Article 1, Section 19, because DEC's implementation of the clean air laws fails to provide protection, with the Clean Air Act's statutorily mandated "adequate margin of safety," for persons who suffer lung ailments, or the elderly or very young. The Bill of Rights will provide rigor to DEC's duty to implement environmental protection laws.
4. The NYS Division of the Budget in the Executive Chamber will need to reassess its cut-backs in the State Budget for financing of the DEC implementation of laws for clean air and water and a healthful environment. DEC has been short-changed in the past decade, as the NYS Comptroller has found, to the detriment of environmental quality across NY State.
5. In like vein, there is a principle of Environmental Law that, as in Human Rights Law, prohibits regression or back-sliding lower than levels of environmental protection attained under relevant laws. State and federal water quality laws mandate prohibit non-degradation of water quality. Once a level or remediation or clean-up is attained, it is now allowed to revert to a lesser level of protection. Environmental protection is progressive, aiming to restore environmentally healthy conditions and sustain them. So, implicit in New York State's Environmental Rights is the obligation not to allow environmental quality conditions to deteriorate. Non-regression is

fundamental to human rights law generally, and specifically is a part of the human right to the environment. See Lynda Collins, “Principle of Non-Regression,” in Essential Concepts of Global Environmental Governance (Routledge, 2020).

D. Protecting Environmental Rights Now Guides All Governmental Environmental Duties

1. All State Agencies and local governments are obliged to respect Article 1, Section 19, and to interpret their duties in ways that ensure a person’s environmental rights will be respected. Interpretation of statutes and regulations will now apply these environmental norms. The fundamental rights serve as a guide to agencies in interpreting their duties.
2. Where a person’s rights to clean air and clean water and a healthful environment are compromised by action that had previously been permitted by a state agency or a local government, the fact that the conduct had been deemed “legal” will not insulate it from judicial scrutiny and appropriate remedial orders by a court to give the environmental rights effect and ensure that the individual’s rights are respected. There is no “grandfathering” of actions previously permitted by government.
3. Where ambient environmental conditions currently fail to provide clean air or clean water or a healthful environment, the Environmental Rights will require an off-set of any new impacts, so that new conduct will not exacerbate conditions. This is akin to the off-sets provisions in use in Los Angeles, which over-time have allowed new development while reducing air pollution levels. New development may not add cumulatively to a degrading of air or water quality for an affected person or persons. Persons living in polluted areas of the State may seek to invoke their Environmental Rights to secure equitable remedies that over time will secure the clean air and clean water that they are entitled to.
4. For example, School Districts will find that the Environmental Right to clean air needs to be secured for individual school children being transported by school buses, where lungs of school children are adversely affected by school bus emissions. See <https://www.epa.gov/dera/reducing-diesel-emissions-school-buses> and in NY <https://ag.ny.gov/press-release/2005/school-bus-companies-agree-reduce-diesel-air-pollution> . Governor Kathy Hochul has called for replacing all school buses with electric school buses by 2035, see <https://electrek.co/2022/01/06/new-york-state-governor-100-electric-school-buses-2035/> and this is the sort of remedy that State and local authorities will need to begin considering in order to respect the Environmental Rights of all persons. Where a school student could establish that a school bus emissions harm the student lungs, a remedy to vindicate the student’s clean air rights would be appropriate at once, not just in 2035, which is long after this student may have graduated.

5. Thus, the Bill of Rights Article 1, Section 19, in practical application provides a mandate to governments to work toward attaining the clean air and clean water with a due deliberate speed. Any reasonable equitable remedies can be proposed to a court to assure that a person's environmental rights will be honored as promptly as possible, and interim protections can be provided, e.g., the provision of safe drinking water in cases where public water supplies or well water is contaminated (cf. remedies provided in Flint, Michigan, <https://www.nrdc.org/stories/flint-water-crisis-everything-you-need-know> j).
6. Equitable remedies may be akin to those courts have used in civil rights or women's rights litigation. See Jeffery Omar Usman, "Good Enough for Government Work: The Interpretation of Positive Constitutional Rights in State Constitutions," *73 Albany Law Review* 1459 (2010).

V. Constitutional Litigation Issues to Secure NY Environmental Rights

A. Environmental Cases Are Complex – No "floodgates" will open

1. To sustain a claim for government denial of a person's right to clean air or water or a healthful environment, it will be necessary to assemble a substantial body of scientific evidence, and coherently gather it in a legal context. This is time-consuming and costly. The complexity of environmental statutes makes it challenging to delineate how a governmental officer is acting in ways that deny Article 1, Section 19 environmental rights.
2. Substantial scientific analysis of the ambient environment will be needed, and environmental consultants (such as those who cooperate with EELS) must be engaged. Law firms with environmental law departments will be capable of prosecuting or defending Article 1, Section 19 law suits, but it will not be easy to provide legal services. The Bar will need to study how public defenders and counsel in Environmental Justice cases, can be supported to provide the requisite legal services.
3. The remedies are mostly equitable, to enjoin harmful behavior or mandamus action to protect a right. Cases invoking the Environmental Rights are quintessential public interest litigation. Enforcement of the Bill of Rights is not a field for plaintiff contingency fee "plaintiffs" litigation, a fact that the chambers of commerce and others failed to understand in opposing adoption of the amendment. There will not be a flood of litigation.
4. The NYS Attorney General's Bureau of Environmental Protection may find use of Bill of Rights Article 1, Section 19, of value in its actions against local governments that are violating public environmental rights. Cases to vindicate environmental Human Rights are more compelling than bring public nuisance actions under Common Law, or even for breach of the Environmental Conservation Law.
5. By its express terms, the Right to the Environment addresses primarily the ambient environment, and is not a Right affecting most issues addressed by rules for food safety standards in restaurants, or health care in hospitals. The

Environmental Rights clause has limits to its application that courts will define over time.

6. Judicial criteria for Standing (*locus standi*) will need to be reassessed in light of this fundamental right now being provided in the State's Bill of Rights. While Article 1, Section 19 is not a citizen suit provision and does not create a new cause of action, it does guarantee a basic set of rights. In matters invoking the Bill of Rights, courts understand that it is essential keep the court house door open, and to hear those seeking to vindicate their constitutional environmental rights.

B. The Environmental Rights Constrain Government not to abridge a person's rights, and do not enable law suits against private parties

1. New York courts accept that "Constitutions do not generally restrict the actions of private parties." *Brown v. State*, 89 N.Y. 2d 172, 182 (1996).
2. Common law doctrines of nuisance and public nuisance, and remedies created in environmental statutes, can be invoked against private parties. Private action, solely by a company or an individual, is not focus of Article 1, Section 19 of the Bill of Rights. Compare the free speech clause: "That a Bill of Rights is designed to protect individual rights against the government is standard constitutional doctrine ... and while the drafters of the 1821 free speech clause may not have envisioned shopping malls, there can be no question that they intended the State Constitution to govern the rights of citizens with respect to their government and not the rights of private individuals against private individuals." *SHAD All. v. Smith Haven Mall*, 66 N.Y. 2d 496, 502-3 (1983).
3. While equitable remedies seem most likely, New York's Court of Appeals has allowed a claim for damages under the Equal Protection and Search and Seizure clauses of the NY Bill of Rights. *Brown v. State*, 89 N.Y. 172, 232-35 (1996). An award of damages depends on the plaintiff showing the unavailability of other remedies. *Martinez v. City of Schenectady*, 97 N.Y. 2d 78, 83 (2001).

C. Interstate Claims May be strengthened

1. Massachusetts and Pennsylvania share borders with New York, and both States have environmental constitutional rights that presently remain inchoate across these shared borders. It may be that cases developed invoking the right to the environment in the constitutions of two or more states could establish duties as a high priority for governments, whereas now they tend to be neglected because the environmental problems are beyond the jurisdiction of one or another States' courts. Trans-frontier pollution is a problem. Migratory species issues could be examined in this context.
2. Where New York is a party to inter-state compacts, like the Delaware River Basin Commission, the NYS Delegates will be obliged to vote to progressively implement the mandate of Article 1, Section 6, to enhance water quality.

Similarly for decision-making in the Port Authority and Metropolitan Transportation Authority. NY Governors will be constrained to respect and honor the Article 1, Section 19 rights. The Bill of Rights will constrain the sometimes regressive decision-making of NY Governors going forward. Compare the now discontinued LaGuardia transport disputes (<https://reinventalbany.org/2021/09/major-transit-enviro-anti-poverty-groups-call-for-halt-to-lga-airtrain/>).

3. State Decisions under federal laws such a §401 Water Quality Certification, will likely require the State officials to adhere to decision that protect a person's Environmental Rights.

D. Environmental Justice Claims are Strengthened – Basic Human Rights Are at Stake

1. Since 2003 the NYS Department of Environmental Conservation has had a policy on Environmental Justice, CP-29, expressly applied to air and water permitting, *inter alia*. See <https://www.dec.ny.gov/regulations/36951.html> and:
https://www.dec.ny.gov/docs/permits_ej_operations_pdf/cp29a.pdf#:~:text=It%20is%20the%20general%20policy%20of%20DEC%20to,regulations%20legislative%20proposals%20and%20activities%20related%20to
2. The NYS Department of Health cooperates with DEC on EJ:
https://www.health.ny.gov/environmental/investigations/environmental_justice/
https://www.health.ny.gov/environmental/investigations/environmental_justice/
3. Under Bill of Rights Article 1, Section 19, all agencies and local government will need to apply comparable EJ decision-making, to ensure that they do not violate the environmental rights of persons. This duty combines with the Bill of Rights provisions for equal protection of law and prohibiting discrimination, Article 1, Section 11.
4. Such EJ issues will arise in the context of prisoners' rights litigation. See ICRC at <https://www.icrc.org/en/doc/resources/documents/misc/59n8yx.htm> .
5. It may be more likely now that EJ claims brought under federal law, <https://www.usccr.gov/files/pubs/envjust/ch4.htm> , will have a parallel State Constitutional rights claim.

E. SEQRA Judicial Review

1. While Article 1, Section 19 does not directly address or change the New York State Environmental Quality Act (Article 8, ECL), when DEC engages in rule-making to clarify the generic SEQRA regulations, as it may soon do for mitigation and adaptation of climate change impacts, DEC will need to ensure that the new regs respect the Bill of Rights' Environmental Rights. In agency or local government SEQRA decision-making, the potential for adversely impacting clean air and water and a healthful ambient environment or individual personal environment, the Bill of Rights now

obliges the governmental decision-maker to assess more carefully the impact on air, water and a healthful environment. SEQRA, ELC Article 8-0103(8): “It is the intent of the legislature that all agencies conduct their affairs with an awareness that they are stewards of the air, water, land, and living resources, and that they have an obligation to protect the environment for the use and enjoyment of this and all future generations.”

2. In mitigating substantial environmental impacts, including cumulative impacts, in a SEQRA procedure, the governmental decision-maker will need to ensure it does not adversely impact rights guaranteed under Article 1, Section 19.
3. In judicial review of as SEQRA decision, NY caselaw will develop differently than it has in Pennsylvania, which does not have a “Little NEPA” process. It would be likely under the NY Bill of Rights; the DEC would regress from its finding to bar High-Volume Hydraulic Fracturing in NY. Fracking now banned by the SEQRA DEC proceeding. See <https://www.dec.ny.gov/energy/75370.html>

F. Courts will mediate how a person’s individual Environmental Rights are affected by government projects deemed to be environmentally appropriate

1. When pesticides are applied in ways that harm a person’s Environmental Rights, even though the pesticide application is lawful, courts may be asked to fashion remedies to ensure governments are complying with the Environmental Rights clause in the Bill of Rights.
2. Siting of wind farms and solar electricity generating facilities are subject to extensive environmental reviews under SEQRA, and the Environmental Rights and EJ issues can be addressed by the SEQRA procedures.
3. Where DEC’s water quality standards fail to protect a person’s right to clean water, or its State Implementation Plan (SIP) for the Clean Air Act fails to protect rights to clean air, it is likely DEC will be obliged to strengthen its standards and demonstrate how it will fulfill a person’s Environmental Rights under the State’s Bill of Rights.
4. Similarly, where DEC,, or another State agency, or a local governmental body denies a permit on environmental protection grounds, the Bill of Rights presumptively confirms the DEC’s decision, and raises the burden of proof on a permit applicant’s appeal from a denial.

G. The Aesthetic and Social Aspects of a Healthful environment

1. As Assemblyman Englebright observed in the Assembly’s debates, A HEALTHFUL ENVIRONMENT is a holistic and contextual right. In reply to an inquiry by Goodell about whether healthful includes unnecessary noise, natural, scenic, historic, esthetic qualities, Englebright replied: “Of course, The totality of these parts and pieces of our experience from our five senses

is to give us a sense of well-being. And biologically, ... if we take care of the environment, the environment will take care of us.”

2. It is likely that the Bill of Rights Article 1, Section 19 may come to subsume some or all of the provisions set forth in the “Conservation Bill of Rights” in Article XIV, Section 4, which treat beauty and culture and nature conservation as entitlements of the People of the State of New York. These “of course” are elements of a healthful environment. (See Legislative Debates at II.B.4.j *supra*).
3. The Assembly debate raised the prospects that clean air and water and a healthful environment also entail protection of species other than humans: On inquiry by Palmesano about who is ultimately to define “clean,” Englebright: “... if someone is harmed because of a chemical or a substance or a disease that is environmentally-created by virtue of a contamination event or an irresponsible decision, then “‘clean’ becomes pretty clear as to what that ...meaning is, because somebody will have been injured. So, we also can see, in some cases, as preview of what can happen to us when we have creatures of the environment – fish, birds, mammals, reptiles, amphibians – that are also injured. Sometimes they are more sensitive to contamination or encounter it first. The so -called ‘canary in a coal mine’ analogy certainly is appropriate here. ... “
4. Climate Change will change everything as the Public Hearing now underway by the NYS Climate Action Council makes clear. See <https://climate.ny.gov/Our-Climate-Act/Draft-Scoping-Plan> . The Bill of Rights provides a floor for protecting person’s rights in whatever actions a government takes – or fails to take - to respond to climate change. Protecting Human Rights is an essential element of coping with climate change globally, and all Human Rights invariably must be respected locally. New York is ready.
5. The Right to a healthful environment offers a legal basis in New York to recognize “One Health,” the integration of disciplines to manage zoonosis, or the sharing of diseases like Covid-19 between animals and people. See Nicholas A. Robinson and Christian Waltzer, “How Do Prevent the Next Outbreak,” *Scientific American* (March 25, 2020) at <https://blogs.scientificamerican.com/observations/how-do-we-prevent-the-next-outbreak/> and Nicholas A. Robinson, “The Next Pandemic Is Here,” *Environment Forum* (ELI, November/December 2020), available at <https://law.pace.edu/sites/default/files/Alumni/EnvForumZoonosisEssayAug2020.pdf>

VI. This New Era of Environmental Jurisprudence in NY

- A. In 1970-71 New York converted the State’s historic Conservation Law (dating from 1911) into the Environmental Conservation Law. The 1970s ushered in a new era of environmental stewardship. This Section on Environmental Law was

born then, in response. See Rosemary Nichols and Nicholas A. Robinson, "The Revolution in NY Environmental Law," *NYS Bar Journal* (1972-73).

- B.** Article 1, Section 19, now provides a Constitutional foundation for all New York's laws affecting the environment. The People have voted in a new era, as surely as they did in 1894 when approving the New York State Constitution's "forever wild" forest preserve guarantees.
- C.** If this Outline does nothing else, it establishes the urgent need for the Bar to launch an extensive set of Continuing Education Courses.
- D.** As this Outline illustrates, the NY Bill of Rights Article 1, Section 19, poses many issues that will require State agencies to interpret and apply. Many, if not most, can be answered sensibly, as this Outline indicates. The courts will resolve uncertainties as they are called upon to vindicate a person's Environmental Rights. Judicial procedure will allow for a careful vetting of how New York's Environmental Rights will be defined and applied. The next decade will be decisive.
- E.** New York's crisp and clear Rights to Clean Air and Water and a Healthful Environment are now the strongest set of environmental rights of any State in the USA. Courts around the world have given meaning to Environmental Rights in adjudicating specific controversies. The Bill of Rights is not about abstractions or the sort of social debates that were heard before the November 4th election. The People have given the Bar and Bench have an awesome responsibility:
"Each Person shall have a right to clean air and water, and a healthful environment."