



# Green Amendment Victories

## How Green Amendments Are Recognizing & Protecting Environmental Rights



GREEN AMENDMENTS  
FOR THE GENERATIONS  
Pure Water. Clean Air. Healthy Environment.

Pennsylvania, Montana, New York, are the only three states in the U.S. that currently promise, protect and respect constitutional environmental rights protected on par with other fundamental human, civil and political rights we hold as inviolate, inherent, inalienable and inalienable rights protected from government infringement and transgression. In this series we share the varied ways that constitutional recognition is providing meaningful and transformative protection in the states where they exist, thereby making the case for constitutional Green Amendments in states across our nation and ultimately at the federal level.

### ***Fresh Air for the Eastside, Inc. v. State of New York*** (*NY Sup. Ct. Monroe Cty. 2022*)

In 2021, New York voters passed a ballot measure to amend the Bill of Rights within the State Constitution to confer the right of each person to “clean air and water, and a healthful environment.”<sup>1</sup> *Fresh Air for the Eastside, Inc. v. State of New York*<sup>2</sup> is the first lawsuit asserting violations of these newly-established constitutional rights. On December 7, 2022, the Supreme Court of Monroe County—a trial-level court of general jurisdiction—issued a key decision and order on the Defendants’ Motions to Dismiss.

In *Fresh Air for the Eastside, Inc. v. State of New York*, Plaintiff, members of Fresh Air for the Eastside, Inc. (“FAFE”)—a not-for-profit organization formed, in part, to preserve and defend the environment for residents living near the High Acres Landfill in Monroe and Wayne counties, New York—filed suit against Defendants, the State of New York, New York State Department of Environmental Conservation (NYSDEC) (together “the State”), Waste Management of New York, LLC (“WMNY”), and New York

<sup>1</sup> N.Y. CONST. art. I, § 19.

<sup>2</sup> *Fresh Air for the Eastside, Inc. v. State of New York*, Index No. E2022000699 (Sup. Ct. Monroe Cty. 2022) (decision and order granting and denying Defendants’ motions to dismiss).

City, alleging violations of their Green Amendment rights as the result of the Defendants' actions and inactions regarding a mega-landfill located in Monroe and Wayne counties in New York.<sup>3</sup> FAFE is seeking both declaratory and injunctive relief.

At the center of this case is High Acres Landfill ("Landfill"), which WMNY owns and operates.<sup>4</sup> Importantly, New York City, a municipal corporation, has contracted WMNY to "collect, transport, and dispose" of New York City's garbage.<sup>5</sup> Ninety percent of the municipal solid waste at the Landfill is from New York City.<sup>6</sup> The State is tasked with the regulatory oversight and enforcement of the Landfill's multiple permits ("Landfill permits").<sup>7</sup>

FAFE argues that the Landfill causes fugitive greenhouse gas emissions (including greenhouse gas emissions laced with hazardous substances) and the release of persistent and noxious odors of garbage and landfill gas (collectively, "Odors and Fugitive Emissions"). Several factors, FAFE asserts, have precipitated this problem, including, in part, that the Landfill: does not with comply with cover requirements, constantly exceeds its emissions limits, contributes to climate change, and is contrary to the State's Solid Waste Hierarchy, which disfavors landfilling municipal solid waste."<sup>8</sup> Specifically, FAFE argued that WMNY "has acted jointly and/or in concert with the State and NYC, and with the approval of NYSDEC, to operate the Landfill in a manner that results in the Odors and Fugitive Emissions which may deprive the Members [of FAFE] of their [Green Amendment] rights."<sup>9</sup>

WMNY, joined by WNYC, filed a motion to dismiss, arguing that the Green Amendment is not self-executing and cannot be enforced against a private party.<sup>10</sup> The court granted WMNY's and NYC's motions to dismiss. In the course of rendering this determination, the court clarified that the Green Amendment does not confer the right to a direct action against a private party, but also affirmed that the Green Amendment is self-executing and permits enforcement against government.<sup>11</sup> Relying on analysis offered by an Albany Law School Government Law Center article, the court agreed that

[i]n contrast to the constitutional provisions . . . which explicitly reference further action by the legislature, there is no mention in the text of the Green Amendment of involvement of the legislature or legislative process as a predicate to implementation. Consequently, based on the plain text, it would seem that **the Green Amendment is enforceable without additional legislation . . . The Amendment allows enforcement against the government, this much is unambiguous.**

*Id.* (quoting Scott Fein & Tyler Otterbein, *New York's New Constitutional Environmental Bill of Rights: Impact and Implications*, ALBANY L. SCH. GOV. L CTR. EXPLAINER 3–4, <https://www.albanylaw.edu/government-law->

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<sup>3</sup> *Id.* at pgs. 2–3.

<sup>4</sup> *Id.* at pg. 3.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at pg. 7.

<sup>7</sup> *Id.* at pg. 6 (The Landfill is governed by several permits, including 6 N.Y.C.R.R. Part 360 Solid Waste Management Facility Permit and Title V Clean Air Act Permit (collectively, the "Permits")).

<sup>8</sup> *Id.* at pg. 5.

<sup>9</sup> *Id.* at pg. 3–4.

<sup>10</sup> *Id.* at pg. 10.

<sup>11</sup> *Id.* at pgs. 10–11.

center/new-yorks-new-constitutional-environmental-bill-rights-impact-and (last visited Dec. 9, 2022).

Determining both that the Green Amendment is self-executing and permits direct actions against the government, the court then turned to, and denied, the State’s motion to dismiss. In its motion to dismiss, the State argued that: 1) FAFE was required to pursue its action first through a CPRL Article 78 proceeding (*i.e.*, a special proceeding to challenge a final administrative agency action—here, the Landfill permitting decisions) rather than through an action for declaratory judgment; and 2) FAFE’s claims were time-barred and did not state a cause of action.<sup>12</sup> The court rejected the former argument, determining that FAFE did not challenge the issuance of the Landfill permits but rather sought redress for the State’s “actions, inactions, and/or results that violate the [Landfill] [p]ermits or which otherwise cause unclean air or an unhealthful environment, and thereby violate the Constitution.”<sup>13</sup> With precision, the court provided that “**a declaration of constitutional rights is most appropriate in a declaratory judgment action, not a CPLR Article 78 proceeding.**”<sup>14</sup>

The court plainly rejected the State’s latter argument that similarly relied on a mis-categorization of FAFE’s claims. Because FAFE alleged a constitutional violation and not the State’s issuance of the Landfill permits, FAFE’s claim was subject to “a six-year statute of limitations under [Civil Practice, Law and Rules] § 213.”<sup>15</sup> FAFE filed suit within two months of when the Green Amendment took effect and was thus timely filed.<sup>16</sup>

The State also proffered that FAFE did not exhaust its administrative remedies before bringing the instant action. The court did not accept the State’s suggestion that FAFE could have “petitioned NYSDEC to modify or revoke the Permits on the grounds they violate the Green Amendment, then seek [the requested] relief through NYSDEC’s administrative permit review process, and only then seek judicial review pursuant to Article 78 proceeding.”<sup>17</sup> Because “[t]he Green Amendment was placed into the New York’s Bill of Rights,” the court provided, the “matter is within this [c]ourt’s purview.” The court correctly articulated that, under New York law, constitutional questions do not necessitate administrative exhaustion.<sup>18</sup>

In the latter argument in support of its motion to dismiss, the State claimed that mandamus was inappropriate in the instant case. The court unmistakably rejected this argument, explaining

**the State must ensure that its citizens have the right to clean air and healthful environment.** Because the decision on whether or not to comply with the Constitution is nondiscretionary, the State’s argument that mandamus is available only to force a public official to perform a ministerial duty enjoined by law is without merit. **Complying with the Constitution is not optional for a state agency, and is thus nondiscretionary and ministerial.** [citations omitted]. The violation continues until it is corrected. Contrary to the State’s argument, it is unnecessary for the Green Amendment

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<sup>12</sup> *Id.* at pg. 12.

<sup>13</sup> *Id.* at pg. 13.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at pg. 14.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at pgs. 14–15.

<sup>18</sup> *Id.* at pg. 15.

to “impose any mandatory duty on the State” because of the State’s nondiscretionary obligation to comply with the Constitution. . . **The Green Amendment is clear.** The legislative history is interesting, but unnecessary to decide whether there has been a constitutional violation, since **there is no ambiguity in the plain language of the Green Amendment.** [citation omitted]. **Thus, this Court is fully entitled to compel the State to comply with the Constitution.**

*Id.* at pg. 15.

Ultimately, the court denied the State’s motion to dismiss.

In summary, in the course of rendering its decision refusing the State’s request that the action be dismissed, the court made a few critical legal determinations regarding New Yorker’s newly secured environmental rights. According to the Court’s decision:

- The New York Green Amendment is self-executing and requires no additional legislation to be enforceable.
- The New York Green Amendment is enforceable against governmental action and not intended to be used in direct actions against private parties.
- The New York Green Amendment is enforceable against governmental action and omissions/inaction when they result in a constitutional environmental rights violation.
- Filing with the court to make a claim of a constitutional violation of Article 1 Section 19 and the environmental rights it protects, is appropriate, and plaintiffs are not required to exhaust administrative remedies before invoking the court’s jurisdiction;
- It is appropriate for a court to grant declaratory relief (*i.e.*, a judgment that constitutional rights have been violated and must be remedied) in response to a claim that constitutional environmental rights recognized in Article 1 Section 19 (*i.e.*, the New York Green Amendment) have been violated.
- “Complying with the constitution is not optional for state agencies.”
- The state lacks discretion to violate the Constitution, thus the court has the ability to compel the state to comply with the New York Green Amendment when a violation has been found.

Notably, the Supreme Court of Monroe County, on December 8, 2022, issued additional determinations helpful in assessing the impacts of the New York Green Amendment in a companion case challenging, among other things, decisions and approvals by the Town of Perinton and the Town of Perinton Zoning Board of Appeals which approved and permitted landfill operations.<sup>19</sup>,

As with the case challenging State of New York actions and omissions with regards to the landfill and its operations, this companion case and determination also focused on motions to dismiss the community’s legal challenges on various grounds. Motions to dismiss were brought forth on several procedural and legal grounds. With regards to the claim that the town’s actions violated the environmental rights protected by Article 1, Section 19 (the New York Green Amendment), the court denied the requested Motion to Dismiss filed by the town and its zoning board of appeals. In the course of reaching its conclusion, the court made several key determinations regarding the state’s Green Amendment, including:

- ✓ “[W]hether a governmental action was arbitrary and capricious may not be the standard for adjudicating constitutional rights.” To do so, the court suggests, would put the burden of proof on

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<sup>19</sup> *Fresh Air for the Eastside, Inc. v. Town of Perinton*, Index No. E2021008617 (Sup. Ct. Monroe Cty. 2022).

the complainant (in this case the residents). “[C]onstitutional inquiries of governmental action are more rigorous.”<sup>20</sup>

- ✓ “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?’”<sup>21</sup> Notably, as found in Pennsylvania, simple compliance with laws and regulations does not automatically affirm compliance with a constitutional environmental rights obligation.
- ✓ Through reference to, and quotation of, robust legal analysis by law professor Nicholas A. Robinson and published by the New York State Bar Association, the court confirmed that the constitutional obligation falls to all branches of New York state government, including local governments and public authorities, and that governmental bodies must be proactive in fulfilling their constitutional obligation.<sup>22</sup>
- ✓ The court confirmed that the constitutional obligation, approved through a November 2021 ballot measure and officially added to the state constitution January 1, 2022, does not apply retroactively to government action; but does apply to new actions or omissions that cause or perpetuate constitutional violations.

**While these cases will continue on to the merit stage of litigation against the State and town, these judicial decisions were a hard-earned and laudable step in the right direction: for FAFE; for the environment; for all the present and future generations of residents neighboring the Landfill; and for the New York voters who made their voice heard at the ballot box, effectuating their constitutional environmental rights through passage of a New York Green Amendment.**

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<sup>20</sup> *Id.* at pg. 8.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at pg. 9.