

Steven Russo ([00:13](#)):

Hello, I'm Steven Russo and welcome to another episode of our 2022 evolving environmental law series here at Greenberg Traurig and I have with me my colleague from the GT Philadelphia office, David Mandelbaum. Hello, David.

David Mandelbaum ([00:28](#)):

How are you today?

Steven Russo ([00:29](#)):

I am well. I am well. We are going to be talking about New York environmental law with a Philadelphia lawyer, but we're going to get to why in a little bit. The topic is the recently enacted and to go into effect in January of 2022, constitutional amendment in New York dealing with environmental law. It is a very short provision, but has the potential, as we're going to discuss, to provide a fair amount of uncertainty and questions about what it exactly is going to mean for New Yorkers. The provision, which was approved as part of Proposal 2 in the recent election in New York reads, "each person shall have a right to clean air and water and to a healthful environment." That's it. That's the whole provision and it's in New York's Bill of Rights Section 19.

Steven Russo ([01:21](#)):

So, you might ask, why are we consulting with a Philadelphia lawyer about a New York law provision? Well, it turns out that Pennsylvania has had a similar provision for a lot longer than New York has. Matter of fact, I think it's coming on its 50th anniversary. David, tell us a little bit about the experience in Pennsylvania with that provision and whether it provides any instruction for what we might expect to see in New York.

David Mandelbaum ([01:47](#)):

Sure. Pennsylvania adopted Section 27 of its Bill of Rights, Article One, in 1971. That provision has three sentences. The second and third have to do with a public trust, which is not parallel to the New York provision, but the first sentence is very similar. It says "the people," notice it's collective rather than individual, "have a right to clean air, pure water and to the preservation of the natural scenic, historic and aesthetic values of the environment." It's the Pennsylvania provision. I think the experience that's important here is how it's been interpreted over the intervening 50 years.

David Mandelbaum ([02:32](#)):

For environmental lawyers, like you and me Steve, it's a little bit disconcerting to think of standards that are constitutionalized, because we are used to thinking about expert agencies and legislatures figuring out what legal requirements are. In this case, however, the Constitution tests the statute for the regulations. For the first, well until 2013, the Pennsylvania provision was effectively neutered by a decision that the way you would test its constitutionality of government action would be to see whether it complied with statutes and regulations, which is, of course, not what a constitution does. In 2013, the Pennsylvania Supreme Court decided that it is a constitutional provision and invalidated a statewide regulation of municipal zoning concerning oil and gas activities.

David Mandelbaum ([03:34](#)):

Subsequent decisions have affirmed that. What we now have is kind of a standard list, procedure list, requirement for some sort of environmental review in Pennsylvania, where it may have a substantive component. And that's the situation. There will be a parallel situation in New York, one assumes, which is that the New York statutes and regulations, which you and I would tend to look to, to decide what clean air and clean water are and what a healthful environment means and what a regulated entity has to do, they don't govern. The Constitution now governs and we don't know what the Constitution means until courts say what the Constitution means, which is expensive and time consuming and uncertain.

Steven Russo ([04:22](#)):

Yeah, but let's back up, David, for a second because in New York, when this provision was on the ballot, there was a lot of parade of horrors. This is going to open up the floodgates of litigation, dogs and cats living together, people who were opposing it were going crazy about it, but of course, voters, there weren't a lot of advertising on it. Voters saw the provision, they voted for it, it passed overwhelmingly. The one thing it's not, we feel pretty confident about though, is some kind of super and viral provision that private citizens can use to litigate as a crusading private attorney general with this provision. That's not something we're going to see.

David Mandelbaum ([05:05](#)):

Well, it's part of the Bill of Rights. The only right that a private citizen gets is against the government. It's a prohibition on government action or a mandate for government action. It's not a right that private parties have against each other. So if there's a polluting facility across the street that's polluting my air, I can't sue the facility. I may be able to sue New York, but I can't sue the facility.

Steven Russo ([05:30](#)):

Yeah. I think a lot of people didn't understand that and while this provision, as we'll get into, could potentially change things in New York, it's not going to do that. It's not a citizen suit provision. It's not a private right. Doesn't give people a private right of action to enforce it. What it's going to be is potentially impact how the government issues permits, how the government makes grants, how the government acts and at least that's what it sounds like. We've seen a little bit, at least recently, in Pennsylvania.

David Mandelbaum ([06:03](#)):

Yeah. I wouldn't be so confident, Steve, that there's no right of action by a private citizen against the state for violating the Constitution. I think it's pretty clear that you get a right to challenge state action. In Pennsylvania, it applies to every level of government, so it's also an opportunity to challenge municipal action.

Steven Russo ([06:30](#)):

Sure. You could do that under Article 78 of the CPLR in New York and that's not going to change, but I can't go to the Department of Environmental Conservation and say, under the Constitution, government, you must go enforce against my neighbor. I'm not going to be able to do that.

David Mandelbaum ([06:48](#)):

Unless the courts say that you can. Here's the question. Each individual person in New York, according to this text, if the text means what it says in plain English, has a personal right to clean air and clean water

and a healthful environment. Now take an example of clean water regulation. The Clean Water Act, which is adopted in New York through the New York statutes, through the environmental conservation law, basically regulates dischargers of pollutants to navigable waters through a technology-based regulatory scheme. Everybody in a certain industry has to achieve a certain percentage of pollutant reduction and proceed in that way. If a waterway to which there are discharges is still impaired, it doesn't meet the state water quality standards, you impose water quality based effluent limitations on that waterway, and that may or may not achieve the water quality standards in any reasonable amount of time. There are plenty of impaired waters that have been impaired for a long time.

David Mandelbaum (08:04):

Now I've got a personal right to clean water. How do you test how clean is clean? Is failing to meet the water quality standard indicate that it's not clean? I don't know whether it does or it doesn't, but let's suppose the waterway does not achieve that clean water standard. Do I have a right to force the state to regulate in such a way that I get my clean water that I'm entitled to?

Steven Russo (08:33):

Yeah. The DEC is going to be, I'm told, issuing some form of guidance about what does this provision mean for them? How are they going to absorb it and regulate pursuant to it? I suspect what they're going to say is something along the lines of, this just constitutionalizes what we've been doing anyway. Now it's in the constitution, which is a good thing because it's not easily changed, but our statutes, embodied in the environmental conservation law, already embed the right to clean air, clean water and a healthful environment. That's what the whole damn set of statutes is about. We're the clean air, clean water, healthful environment agency. I believe that is the position the DEC's going to take and of course it remains to be seen whether the courts think this very general provision adds something, in addition to the very specific rights and standards and provisions embodied in the New York environmental conservation law and the regulations issued pursuant to it.

David Mandelbaum (09:36):

That was the point I led with Steve because that sets that the expert agency ought to define what clean air and clean water in a healthful environment mean and how they're to be achieved. Is the natural conclusion that most people would come to because that's the way we've been not operating since the 1960s, but in fact by constitutionalizing it, you remove from DEC the ability to set what the standards are to achieve the constitutional standard. The courts have to decide whether what DEC did is enough.

David Mandelbaum (10:17):

To take a, sort of a reasonably familiar from law school example, there's the famous case of *Mathews and Eldridge* about the Due Process Clause and the Social Security administration decided that if we took away some of your social security disability benefits, you got your hearing, but you got a hearing afterwards. Now, if you allow the Social Security administration to determine what counted as due process, that would be the end of the story, but instead it litigates the Supreme Court of the United States, which ultimately agreed that if you have a prompt post-deprivation hearing, it's constitutional, but in each case, the courts have to decide whether the hearing is sufficiently prompt, post deprivation.

David Mandelbaum (11:00):

The other thing is, our experience in Pennsylvania is that the problem is not so much in challenges to actions of the DEP, the Department of Environmental Protection, the equivalent of your DEC. This

applies to every agency of the Commonwealth. How does it apply to the department of transportation? To the turnpike commission? To the public utility commission? To anyone who permits, funds, participates in a project that might affect the environmental rights of Pennsylvanians?

Steven Russo ([11:37](#)):

[crosstalk 00:11:37]. What have the Pennsylvania court said about that? I mean-

David Mandelbaum ([11:37](#)):

They have said that it applies individually to each agency, to each level of government and we have two big open problems. One is, can any agency rely on the analysis of another agency? You would think if you need environmental permits and the environmental permits require a sufficiently broad environmental review, you would not have the Department of Transportation redoing that work.

Steven Russo ([12:12](#)):

Yeah, that's fascinating because it's very different than New York. New York, of course, has what's known as a little NEPA, or its own environmental review statute, which Pennsylvania doesn't. It's a big distinction because in New York we already have built in the requirement to consider significant adverse environmental impacts for every discretionary governmental action, be it funding or permitting and the like. That's already embedded. That was adopted in 1977. We have 40-plus years of case law on it. We already have that, but what's in there is also a concept that the agency can balance environmental impacts with social, economic, and other essential considerations. In the end, courts look at, has the court identified and really considered all the impacts of its actions? Then the government is allowed to balance that against other competing interests. Does this new New York provision somehow alter that balancing so that they're not allowed to say, yeah, it's going to pollute, but there's all these other benefits and we're going to balance it. I don't think, in the end, that's the way it's going to go. I think it's going to be similar to what we've already seen in New York, which is as long as you actually really consider the environmental impacts and don't give lip service to them or miss them entirely, you'll probably be okay, but we don't know for sure.

David Mandelbaum ([13:37](#)):

Yeah. This is the recurring theme of what I'm talking about. My instincts, your instincts, the instincts of people in this field, have turned out to be not necessarily right. The case that made all the problems in Pennsylvania in 2013, case called Robinson Township against the Public Utility Commission, the issue was that the state legislature, in order to promote natural gas development, had struck a balance, which is that it created limits on local land use regulation of oil and gas activities and recognized that the legislature is the source of the authority of municipalities to enact local land use regulation at all. There were limits. You couldn't require a bigger setback than was set out by statute or things like that. The compensation for municipalities was an impact fee, which they would get a portion of, for the oil and gas activity that was going on in the municipality. The Supreme Court plurality decides that unconstitutionally removed from each municipality, the ability to make its own balance.

Steven Russo ([14:56](#)):

Interesting. When you talked about, could another agency make the findings for an action by another agency, in New York there's case law that says no. Absolutely not. That SEQRA, the way it's written, the concept is the lead agency, the agency charged with the decision must undertake, they cannot delegate the environmental review to a specialized environmental review agency or the environmental regulator

or anything like that. They're making the decision, they need to do the analysis, even if they don't necessarily have the expertise to do so. That's an embedded in New York's environmental review statute through a decision called Coca-Cola years ago.

David Mandelbaum ([15:38](#)):

Which also resolves, I would imagine, one of the other great ambiguities we've got, which is the fact that an executive agency, all these regulators are just executive agencies, can't, considering its decisions or use a procedure, things that are not authorized by the authorizing statute. If they need a regulation to implement the authorizing statute, they have to have a properly adopted regulation. You can't have free floating standard list undisciplined regulatory considerations. If the constitution requires you to consider things, which the implementing statute hasn't baked in, how do you go about doing that?

Steven Russo ([16:24](#)):

Yeah. We don't have that problem in New York because using that SEQRA statute, you can impose mitigation measures. An agency, the Department of Environmental Conservation can say, you need to mitigate the traffic impacts of your development project because you need a wetland permit. Even though the wetland statute doesn't talk about traffic mitigation, you can use SEQRA to condition your permit to do these other things. That's pretty well established in New York. I think we have a framework to incorporate that and I think what we'll see from the DEC is saying, in their guidance, SEQRA is, in the environmental conservation law, it is the way we're going to comply with the statute, the way the state's going to comply with the statute. Otherwise, if you comply with our regulations and you comply with the environmental conservation law, then you comply with this provision, but of course, as you said, they don't get to say that. The courts will have to say that works with the bill the rights constitutional provision, but the vague standard list stuff is definitely pretty terrifying. It's interesting that Pennsylvania's been wrestling with it for at least the last 10 years.

David Mandelbaum ([17:35](#)):

The additional wrinkle that New York has is the change in the language from, assuming that the New York provision was at least in part based on the Pennsylvania provision, Pennsylvania's right is phrased as a collective right, "the people." New York's right is "each person." One would assume that courts will view that "each person" language as intentional. What does that mean about the ability of the courts in deciding or the agency, in deciding case number one by Smith? How does Smith's case bind Jones? Presumably Jones experiences the water, the air and the healthful environment slightly differently than Smith. They don't live in exactly the same place. They don't do exactly the same things. They're not the same person. Does that mean that there's an endless opportunity for litigation over this on constitutional grounds? That would be crazy. There has to be some limiting principle. I don't know what it's going to be.

Steven Russo ([18:49](#)):

Yep. I guess we're going to have to see. This issue is discussed in blog post, a shameless blog for the Greenberg Traurig E2 blog in which David and I write about this, if you want to delve into it a little bit more and lots of other issues as well. David, any final thoughts on this before we conclude?

David Mandelbaum ([19:07](#)):

No, thank you.

This transcript was exported on Nov 30, 2021 - view latest version [here](#).

Steven Russo ([19:09](#)):

All right. Thanks a lot.