

Green Amendments: Lessons From Hawai'i, New York, and Montana

Green amendments are sprouting up in state constitutions around the country and are starting to be tested in court. These provisions generally guarantee a right to a clean and healthy environment and, if recent cases are any indication, they may have teeth.

In a case earlier this year, the Hawai'i Supreme Court relied on the state's constitutional right to a "clean and healthful environment" to reject a greenhouse-gas emitting project. In that case, Hawai'i Electric Light Company had asked the state Public Utilities Commission to approve a power purchase agreement with Hu Honua Bioenergy, LLC. Under the agreement, Hu Honua was planning to use an abandoned power plant to burn trees to create energy and sell the energy to Hawai'i Electric, thus creating an ostensibly renewable biomass power source.

A local community group challenged the agreement, and the commission held a hearing where it found that the new facility would generate significant greenhouse gas emissions through trucking and then burning the trees. The company claimed it would plant trees to offset the emissions, but the commission found those claims were based on speculative and doubtful evidence. The commission rejected the agreement, holding that the project was not in the public interest.

Hu Honua challenged this decision in an appeal to the state's Supreme Court. The court rejected all of the company's arguments—relying expressly on Hawai'i's constitutional guarantee of a "clean and healthful environment." The company had argued that the commission erred because it was required to compare the biomass project to emissions from a fossil-fueled plant, rather than look at the proj-

ect's greenhouse emissions compared to either another renewable project or a baseline without the project, as the commission did. Under state law, the commission is required to consider the need to reduce the state's reliance on fossil fuels. But the court found that this requirement did not translate into a rule that the biomass project be compared only against a fossil-fueled plant. As the court explained, that would have meant ignoring emissions from this fuel source—and ignoring such significant emissions just because a source was considered "renewable" would undermine the constitution's goal of preserving a "life-sustaining climate system."

In a concurring opinion, Justice Michael Wilson also cited the Hawai'i constitution's due process right to "life, liberty, [and] property" as a basis to uphold the commission's decision. As Wilson explained it, if the commission permits projects that increase emissions, "it will be contributing to the destruction of resources essential to public health and Hawai'ian culture, which in turn undermines all fundamental rights guaranteed by the Hawai'i Constitution."

There are several other states with "green" constitutional provisions that are similar to Hawai'i's. In those states, court cases are beginning to test the limits and scope of the provisions. In New York, for example, the state constitution was recently amended to provide that "each person shall have a right to clean air and water, and a healthful environment" and several lawsuits have been filed under the new amendment. In one of the recent cases, *Fresh Air for the Eastside, Inc. v. State of New York*, the plaintiffs have argued that the state's failure to control odors and fugitive emissions from the High Acres Landfill violated their rights under the constitu-

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tion. A trial court recently rejected all of the state's arguments for dismissing the case, holding that the amendment is self-executing, and allowing plaintiffs to proceed with their challenge. To track the many other cases pending in New York, Pace Law School has created an Environmental Right Repository with helpful updates.

In Montana, the state constitution has guaranteed a "clean and healthful environment . . . for present and future generations" since the 1970s. Now several young plaintiffs have sued the state, arguing that Montana is violating their rights by authorizing fossil fuel projects that contribute to increased greenhouse gas emissions. The case, *Held v. Montana*, recently went to trial and a decision is likely to come out later this summer.

The Hu Honua decision highlights another important legal frontier in environmental law at the state level. Utility regulators regularly make decisions like the one in the Hawai'i case that will have a significant impact on greenhouse gas emissions. Yet proceedings in front of these regulators are often not focused on environmental impacts, but rather on evidence about rates and other factors. With commissions like Hawai'i's now more focused on critically examining the environmental impact of new energy projects and the growing trend of constitutional rights bringing those impacts into focus, there is likely to be a lot more of this kind of state-level litigation to come.