The New York State Legislature failed to pass the Environmental Rights Constitutional Amendment during the 2017-2018 session. The Assembly, which has a large majority of Democrats, approved the bill, which is considered a “resolution,” but it failed to get released from committee in the Senate, the house with a bare Republican-voting majority of only one.

The single sentence comprising the amendment would create a new constitutional right parallel to the rights guaranteed in the New York State Constitution, such as trial by jury, freedom of religion, and compensation for taking private property.

The New York State bill was greatly simplified from the version originally discussed, but it still is an extremely dangerous threat to individual rights and freedoms, as well as centuries of historic law, and did make serious headway in the legislature.

The wording of what was to be an amendment to the New York State constitution was introduced in the Assembly on March 1, 2017 to be a “concurrent resolution”:

“That article 1 of the constitution be amended by adding a new section 19 to read as follows:

“Section 19. ENVIRONMENTAL RIGHTS. EACH PERSON SHALL HAVE A RIGHT TO CLEAN AIR AND WATER, AND A HEALTHFUL ENVIRONMENT.”

Since this resolution was passed by the Assembly in April 2017 but not sent to the floor for a vote in the Senate that year, the rules required that it had to be reintroduced to the Assembly again during 2018, which was also done. The bill passed again on April 24, 2018. But it never got out of the Senate Judiciary Committee, chaired by retiring Senator John H. Bonacic.

With the legislative session ending without passage of the bill, it would have to be introduced again in 2019, and pass both houses of the legislature during a single year of one session.

But the bill would still have to be passed by two houses of the legislature again during one year of the next two-year session, which begins in 2021.

Then, if the bill is signed by the governor, it would go to the voters of the State of New York, where a majority vote in favor is required.

The Public Trust Doctrine

The Public Trust Doctrine, applied to the public natural resources, which was also part of the Environmental Rights Amendment of the Commonwealth of Pennsylvania, was not included in the proposed amendment for New York State. This clause stated that, as trustee of these resources the state shall conserve and maintain them for the benefit of the people, including generations yet to come. In September 2016, Pennsylvania’s high court struck several core provisions of the oil and gas law because they “violate the Commonwealth’s duties as trustee of Pennsylvania’s public natural resources under the Environmental Rights Amendment,” which had passed forty years earlier. The plurality of judges who ruled together were joined by another judge to make a majority to strike these provisions.

Dangers of the Environmental Rights Amendment

New York’s proposed Environmental Rights Amendment, as simple and innocuous as it looks, could profoundly affect agriculture, for instance. Even where state laws may exempt agriculture from complaints about alleged nuisances and from some local and state laws, a constitutional provision would supersede local and state law. And this provision creates a fundamental right, which is self-executing, meaning that the aggrieved individual need not have to find a grievance reference in any particular law that already has been enacted and would not

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have to persuade a state agency such as the Department of Environmental Conservation to prosecute. It would be the individual’s fundamental right; he or she could go to court directly.

So, the individual would create law directly, with neither the legislature enacting the law nor a state agency encoding its enforcement rules according to state administrative law.

In fact, today a citizen cannot appear in state court to enforce environmental law, unless the environmental law that is being violated is personally affecting the citizen. As law stands, a citizen can go to court for personal redress if the citizen’s property is being damaged or the citizen is being directly injured by a particular person or business. This is the age-old concept of “nuisance.”

The concept of nuisance does not consider the idea of having undefined “clean” air or water or a “healthy” environment.

This result of the Environmental Rights Amendment would contrast with the well-defined current New York State law, which provides for what is referred to in some states as the “citizen attorney general,” where a private individual may go to court against the state if the state is making a specific illegal expenditure, as our pro se group of four litigants did in 1990 to stop the governor’s illegal expenditures distributing propaganda to influence the Election Day vote on the 1990 Environmental Quality Bond Act.

Even if both the state and the federal government have determined that damage does not exist, if this constitutional amendment passed, the possibility is that a citizen could litigate against an industrial facility to enforce compliance with the citizen’s demand, whether or not the citizen has credible data to allege that the measured level of a chemical in groundwater, or unmeasured vibrations from blasting for a mine, for instance, caused pollution or vibration damage to neighboring property.

It should be kept in mind that in recent years it has become possible to measure extraordinarily low levels of foreign matter in soil and water. Government agencies now routinely cite levels of parts per millionth of a million, or per trillion, and cause the levels of foreign matter to seem amazingly large to the unversed citizen by referring to, say, a formerly negligible level of pollution such as one or two parts per million as one or two million parts per trillion, which looks extraordinarily high to the ignorant eye, written as 1,000,000 or 2,000,000 parts per trillion.

This observation leads to the possibility that a litigant could go to court without any scientific information or competent technical analysis, or when misconstruing technical information that is out of his scope of expertise, or because he places his faith on incompetently executed local mortality studies.

Or, for instance, a citizen or environmental group could use the Environmental Rights Constitutional Amendment to go to court to stop a project in the vicinity of a healthful scenic spot, whether or not a public agency is required to hold hearings for the project.

The amendment would enable environmental groups or individuals to target selected businesses, industries, home builders, loggers, or even private citizens who are building a home, and drag them into court. Being forced to defend oneself in court from costly damage claims, even just to appear in court, under the Environmental Rights Constitutional Amendment is much more serious to the defendant than the situation where two parties have the right to appear at a public hearing before a government body in a zoning dispute, for instance.

Without this constitutional amendment, environmental groups and activist citizens do not have the automatic right to be in court solely because something offends their judgment about clean air or water or healthfulness of the environment. Generally speaking, the automatic right to have “standing” to appear before a judge only applies for constitutional rights, such as the right of freedom of speech and freedom of religion.

In summary, the Environmental Rights Constitutional Amendment would give an environmental group or citizen activist license to use the courts to repeal laws, impose laws, or make new laws pertaining to the environment and possibly “healthful” scenery, without going through the legislature. And even if the litigator fails in court, the cost to the defendant could be financially ruinous.

Looking ahead: The rights of property owners, especially in eminent domain, have found fine advocates from both parties in the New York State Legislature. Personal citizen participation is the key.