

**Environmental and Energy Law Section
Fall Meeting
Executive Committee Agenda
October 22, 2017**

1. Welcome and Introductions
2. Motion to Approve Minutes of May 3, 2017 (N. Ward-Willis)
3. Financial Report (H. Tollin)
4. Membership Report (F. Piccinni/R. Stout)
5. Future of Federal Environmental Policy Task Force (D. Freeman)
6. House of Delegates and Executive Committee Report (L. Shaw / S. Rivera)
7. Committee Reports
8. Committee Manual Update (K. Bernstein / V. Robbins)
9. Social Media Task Force
10. Annual Meeting (L. Bataille / K. Bernstein / Co-Chairs)
 - Potential Topics
 - Change in Format / Schedule
11. 2018 Fall Meeting (M. Wieder)
12. NYCELLI Funding (W. Mugdan)
13. Expense Reimbursement for Speakers
14. Young Lawyers Section – Trial Academy – Sponsorship
15. Report of the Task Force on Environmental Aspects of the New York State Constitution

**New York State Bar Association
Environmental & Energy Law Section
SUMMARY OF May 3, 2017 Executive Committee Meeting**



Notes By: Howard Tollin

In person: Bataille, Greenthal, Kogut, Schnapf, McTiernan, Lesser, Bogin, Ruzow, Putsavage, Guida, Schultz, Matthews, Moore, Piccininni, Russo, Colligan, Knauf, Braymer, Kasow, Quist, Reilly, Rivera, Parker; Phone: Dean, Cavaluzzi, Vollweiller, Bernstein, Wieder, Tollin, Wyner, Alexander, Krainin, Mona, Stolorow, Healy, Shaw, and Mussio.

1. Approval of Minutes from January Executive Committee Meeting
 - a. Approved, no changes
2. Budget Report:
 - a. Revenue in 2016 was 75k and expenses were 66k, adding 9k to surplus which is not 72k.
3. Membership
 - a. Recent drop went from 1,034 members to 897 members
 - b. Membership campaigns needed to reach out to drops, and target energy and environmental lawyers
4. House of Delegates Report
 - a. Committee on the New York State Convention completed its report dated 4/20/17 and available on NYSBA HOD reports and Communities libraries
 - b. There is a new NYSBA membership challenge to sections
 - c. Larry presented the 2017 Update Report on Climate Change at the April 1 NYSBA House of Delegates meeting in Albany.
5. Regulatory Comments on Title 12
 - a. Larry mentioned upcoming comment period regarding Title 12
6. Regulatory Comments on SEQRA
 - a. The drafters of SEQRA comments were “technocratic,” not favoring any faction
 - b. Some environmental advocate members still objected to comment that SEQRA is a Sisyphean task and stated that undue delays could be the result of applicant actions

- c. Other comments involved the scope of smart growth provisions being defined too broadly
 - d. The general consensus is to submit a comment letter, vote by 5/12, and meet current DEC deadline of 5/19
7. Federal Environmental Policy Task Force
- a. A draft letter to EPA Administrator Pruitt and OMB Director Mulvaney has been developed by the Task Force (headed by David, Gail and Kevin)
 - b. Comments by the EC will be due by 5/12 will go to Ron Kennedy and for NYSBA House of Delegates agenda for June
 - c. The tone of the letter is going to be “ we are here and stand ready to assist you”
 - d. Discussions about whether letter should come from our section or NYSBA
 - e. The letter addressed climate change, State and Tribal Assistance Grants (STAG), CERCLA enforcement, and the continued importance of the Federal enforcement of our nation’s environmental laws
 - f. Task force developing a list of contacts and resources to assist with a broader response (i.e., environmental non-profits and other bar associations).
8. Constitutional Convention Task Force
- a. A general discussion and opinions will be openly discussed on Environmental Communities for a couple of weeks
 - b. The EC will need to consider those comments and then cast their votes in an e mail to Lisa Bataille by 5/30
 - c. The HOD will accept feedback from the Sections by 6/9 to either support, disapprove or take no position.
 - d. There appear to be mixed sentiment about a recommendation for a Constitutional Convention as issues seem to include “Risk to ‘Forever Wild’ Provision”
9. Spring programs
- a. Barry did a great job with RCRA Program which was well attended
 - b. The Trump effect program had over 100 attendees
 - c. John Parker and Jillian Kasow hosted an excellent Legislative Forum prior to the EC meeting
10. Revisions to Part 375 Regulations
- a. Concerns have been raised about these DEC revisions to reflect legislative and policy changes to the Brownfields Cleanup Program (BCP)
 - b. The DEC (Andrew Guglielmi and Jennifer Dougherty) will host a webinar or webex for one and a half hours on May 12 in the morning to review and discuss.
11. Oil Spills Symposium
- a. Will take place on June 7 at NYSBA Bar Center in Albany hosted by the Petroleum Spills Committee
 - b. The program will also be webcasted
 - c. Panelists will include Gary Bowitch, Alan Knauf, Doug Zamelis, Seth Friedland, Linda Shaw, Patrick Holloway (Office of State Controller), and two speakers on use of forensics in petroleum spills cases
 - d. John Greenthal and Joan Leary Matthews circulated drafts of the Section’s Commitment to Diversity and updated Speaker Guidelines

- e. They should be sent to EC and ratified at next May 3 EC Meeting in Albany
12. Social Media Committee
- a. Meaghan presented a business plan to create a NYSBA EELS twitter handle
 - b. Some members expressed concern about the content of the tweets
 - c. Meaghan and others responded that the information will be factual and innocuous
 - d. The social media committee was approved for another year
13. Fall Meetings 2017 and 2018
- a. The Fall Meeting is in Saratoga Springs and Co-Chairs are Adam Scultz and Yvonne Hennessey who will focus on energy topics and panelists
 - b. Marla is going to visit the Emerson Resort in the Catskills as a possible location for the 2018 Fall Meeting
14. EJ Committee
- a. Two new EJ Co-Chairs should be consulted to provide input on diversity report and possibly put together a panel for either the Fall 2017 Meeting and/or January annual meeting
15. May 18 Cabinet Call
- a. Is being cancelled due to May 18 Section Leaders Conference that day

New York State Bar Association
Environmental Law Section
For the Eight Months Ending Thursday, August 31, 2017

	2017 Budget	2017 Year To Date	August	Percent	2016 Budget	2016 Year To Date	Percent	2015 Year To Date	2014 Year To Date	2013 Year To Date
Income										
Dues	\$30,000.00	\$28,761.25	\$175.00	95.87%	\$32,000.00	\$29,287.50	91.52%	\$31,247.92	\$32,283.75	\$33,727.92
Meetings	35,000.00	20,121.50	145.00	57.49%	33,000.00	19,405.00	58.80%	24,750.00	26,826.00	20,867.00
Sponsorship	8,000.00	19,000.00		237.50%	10,000.00	6,600.00	66.00%	6,300.00	5,700.00	6,700.00
Newsletters	200.00	370.00		185.00%	1,000.00	165.00	16.50%	555.00	720.00	720.00
Publications				0.00%			0.00%	25.00	30.00	
Prior Years Surplus Used	5,100.00			0.00%	3,500.00		0.00%			
Total Income	78,300.00	68,252.75	320.00	87.17%	79,500.00	55,457.50	69.76%	62,877.92	65,559.75	62,014.92
Expenses										
Postage & Shipping	2,000.00	665.99		34.30%	1,500.00	1,043.16	69.54%	698.27	889.14	817.35
Awards & Grants	3,500.00	692.26		19.78%	3,500.00	1,672.69	47.79%	1,550.13	7,529.90	4,553.17
Diversity	6,000.00			0.00%	6,000.00		0.00%	5,500.00		3,000.00
Membership Initiative	2,500.00			0.00%			0.00%			
Catering & Banquets	35,000.00	31,800.95		90.86%	40,000.00	15,871.15	39.68%	22,122.36	13,309.68	41,007.37
Beverage Service & Receptions	12,000.00	5,785.76		48.21%	10,000.00	2,637.20	26.37%	3,604.63	3,351.63	5,675.25
Speaker & Guest Expense	1,500.00	360.30		24.02%	1,500.00	840.99	56.07%		289.23	277.75
Audio/Visual Expense	5,000.00	3,506.76		70.14%	5,000.00	4,232.52	84.65%	1,857.93	2,083.32	2,076.95
Activities & Entertainment				0.00%	500.00		0.00%			
Gratuities	300.00			0.00%	300.00		0.00%			
Section Executive Committee Meetings	2,500.00	1,498.35		59.93%	1,500.00	829.42	55.29%	1,210.72	35.11	275.48
Officers Expense	500.00	161.23	2.44	32.25%	1,000.00	141.34	14.13%	53.38	118.75	697.50
Miscellaneous Meeting and Program Costs	2,000.00	8,669.04	185.69	433.45%	1,000.00	964.66	96.47%	1,241.77	400.00	1,064.90
Section Subcommittee Meetings	500.00	269.57	4.86	53.91%	1,000.00	74.18	7.42%	213.80	230.45	79.99
Newsletters	3,000.00	3,849.32		128.31%	5,500.00	4,546.28	82.66%	2,690.01	3,440.71	61.92
Graphic Department Allocations	2,000.00	588.90		29.45%	1,200.00	1,035.42	86.29%	819.83	735.04	894.37
Total Expenses	78,300.00	57,868.43	192.99	73.91%	79,500.00	33,889.01	42.63%	41,562.83	32,412.96	60,482.00
Net Income over Expense			127.01	0.00%		21,568.49	0.00%	21,315.09	33,146.79	1,532.92

Accumulated Surplus (Deficit) 80,974

NYSBA Section Profile Report for Environmental Law Section

Total Members: 944

		Valid	
	Count	Percent	Percent
A) Gender			
F	276	29.24%	31.12%
M	611	64.72%	68.88%
X (no data)	57	6.04%	
	944	100.00%	100.00%
B) Practice Setting			
Government	8	0.85%	1.09%
Government - Federal	15	1.59%	2.05%
Government - Municipal	21	2.22%	2.87%
Government - State	32	3.39%	4.37%
In-House Counsel	51	5.40%	6.97%
Judiciary	4	0.42%	0.55%
Law School - Faculty	11	1.17%	1.50%
Law School - Student	2	0.21%	0.27%
Legal Aid	3	0.32%	0.41%
Non-Law Related	13	1.38%	1.78%
Non-Profit	21	2.22%	2.87%
Other	16	1.69%	2.19%
Part-Time Attorney	5	0.53%	0.68%
Private Practice	499	52.86%	68.17%
Public Interest	4	0.42%	0.55%
Retired	12	1.27%	1.64%
Trade/Professional Association	6	0.64%	0.82%
Unemployed	9	0.95%	1.23%
X (no data)	212	22.46%	
	944	100.00%	100.00%
C) Office Size			
Fifty to 99	84	8.90%	11.95%
One Hundred and greater	183	19.39%	26.03%
Six to Nine	51	5.40%	7.25%
Solo Practitioner	108	11.44%	15.36%
Ten to Nineteen	76	8.05%	10.81%
Twenty to 49	97	10.28%	13.80%
Two to Five	104	11.02%	14.79%
X (no data)	241	25.53%	
	944	100.00%	100.00%
D) Position			
Academic	14	1.48%	2.16%
Administrative Law Judge/Hearing Officer	3	0.32%	0.46%
Associate	92	9.75%	14.22%
Court Personnel	1	0.11%	0.15%
E) Age			
24 and Under	21	2.22%	2.36%
25 to 35	143	15.15%	16.05%
36 to 45	117	12.39%	13.13%
46 to 55	167	17.69%	18.74%
56 to 65	253	26.80%	28.40%
66 and Over	190	20.13%	21.32%
X (no data)	53	5.61%	
	944	100.00%	100.00%
F) Race/Ethnic Group			
Asian/Pacific Islander	9	0.95%	1.58%
Black/African American	8	0.85%	1.41%
Decline to Answer	41	4.34%	7.21%
Hispanic	11	1.17%	1.93%
Multiple Race/Ethnic Group	1	0.11%	0.18%
Other	1	0.11%	0.18%
White/Caucasian	498	52.75%	87.52%
X (no data)	375	39.72%	
	944	100.00%	100.00%
G) Who Paid For Membership Dues			
Collectively by Firm and Member	24	2.54%	4.24%
Fully by Firm or School or Organization	300	31.78%	53.00%
Member	237	25.11%	41.87%
No Dues Paid	5	0.53%	0.88%
X (no data)	378	40.04%	
	944	100.00%	100.00%
H) Number of Years Admitted to Bar			
0 (Less than 1)	9	0.95%	0.95%
1 to 3	81	8.58%	8.58%
4 to 5	38	4.03%	4.03%

	Count	Percent	Valid Percent
6 to 7	35	3.71%	3.71%
8 to 14	97	10.28%	10.28%
15 to 19	70	7.42%	7.42%
20+	544	57.63%	57.63%
No Admit Date	70	7.42%	7.42%
X (no data)	70	7.42%	
	1,014	107.42%	100.00%

	Count	Percent	Valid Percent
J) Disability			
Decline to Answer	87	9.22%	15.45%
No	465	49.26%	82.59%
X (no data)	381	40.36%	
Yes	11	1.17%	1.95%
	944	100.00%	100.00%

	Count	Percent	Valid Percent
J) Sexual Orientation			
Decline to Answer	58	6.14%	14.11%
Heterosexual	344	36.44%	83.70%
Lesbian/Gay/Bisexual	1	0.11%	0.24%
Lesbian/Gay/Bisexual/Transgender	8	0.85%	1.95%
X (no data)	533	56.46%	
	944	100.00%	100.00%

	Count	Percent	Valid Percent
K) Dues Billing Category			
a) NY Admitted 8 Plus Years	565	59.85%	59.85%
b) NY Admitted 6-7 Years	29	3.07%	3.07%
c) NY Admitted 4-5 Years	26	2.75%	2.75%
d) NY Admitted 2-3 Years	46	4.87%	4.87%
e) NY Newly Admitted	20	2.12%	2.12%
f) NY Sustaining	16	1.69%	1.69%
g) OOS Admitted 8 Plus Years	96	10.17%	10.17%
h) OOS Admitted 6-7 Years	6	0.64%	0.64%
i) OOS Admitted 4-5 Years	9	0.95%	0.95%
j) OOS Admitted 2-3 Years	18	1.91%	1.91%
k) OOS Newly Admitted	8	0.85%	0.85%
l) OOS Sustaining	4	0.42%	0.42%
n) Complimentary	22	2.33%	2.33%
o) Law Student	63	6.67%	6.67%
p) Over 70, 25 yr Member	11	1.17%	1.17%
z) Mis-Marked	5	0.53%	0.53%
	944	100.00%	100.00%

	Count	Percent	Valid Percent
L) New Section Members (This Month)			
a) NY Admitted 8 Plus Years	1	0.11%	20.00%
g) OOS Admitted 8 Plus Years	1	0.11%	20.00%
k) OOS Newly Admitted	2	0.21%	40.00%
o) Law Student	1	0.11%	20.00%
	5	0.53%	100.00%

	Count	Percent	Valid Percent
M) Judicial District			
01	174	18.43%	18.43%
02	18	1.91%	1.91%
03	151	16.00%	16.00%
04	32	3.39%	3.39%
05	57	6.04%	6.04%
06	20	2.12%	2.12%
07	47	4.98%	4.98%
08	54	5.72%	5.72%
09	132	13.98%	13.98%
10	85	9.00%	9.00%
11	12	1.27%	1.27%
12	3	0.32%	0.32%
13	3	0.32%	0.32%
99	150	15.89%	15.89%
Unknown	6	0.64%	0.64%
	944	100.00%	100.00%

	Count	Percent	Valid Percent
N) Sections			
Antitrust Law Section	23	2.44%	0.93%
Business Law Section	80	8.47%	3.24%
Commercial & Federal Litigation Section	58	6.14%	2.35%
Corporate Counsel Section	44	4.66%	1.78%
Criminal Justice Section	32	3.39%	1.30%
Dispute Resolution Section	55	5.83%	2.23%
Elder Law and Special Needs Section	43	4.56%	1.74%
Entertainment, Arts and Sports Law Section	30	3.18%	1.21%
Environmental Law Section	944	100.00%	38.22%
Family Law Section	32	3.39%	1.30%
Food, Drug & Cosmetic Law Section	31	3.28%	1.26%
General Practice Section	47	4.98%	1.90%
Health Law Section	34	3.60%	1.38%
Intellectual Property Law Section	35	3.71%	1.42%
International Section	61	6.46%	2.47%
Judicial (Courts of Record) Section	26	2.75%	1.05%
Labor and Employment Law Section	45	4.77%	1.82%
Local and State Government Law Section	221	23.41%	8.95%
Real Property Law Section	185	19.60%	7.49%
Senior Lawyers Section	104	11.02%	4.21%
Tax Section	30	3.18%	1.21%
Torts, Insurance & Compensation Law Section	62	6.57%	2.51%
Trial Lawyers Section	52	5.51%	2.11%
Trusts and Estates Law Section	48	5.08%	1.94%
Young Lawyers Section	148	15.68%	5.99%
	2,470	261.65%	100.00%

O) Member/Non-Member

	Count	Percent	Valid Percent
Member	944	100.00%	100.00%
	944	100.00%	100.00%

P) State, City (Top 25)

	Count	Percent	Valid Percent
*Non-US	9	0.95%	1.54%
DC, Washington	18	1.91%	3.08%
NJ, Englewood Cliffs	5	0.53%	0.85%
NJ, Florham Park	4	0.42%	0.68%
NJ, Morristown	8	0.85%	1.37%
NJ, Newark	7	0.74%	1.20%
NY, Albany	109	11.55%	18.63%
NY, Binghamton	5	0.53%	0.85%
NY, Brooklyn	19	2.01%	3.25%
NY, Buffalo	39	4.13%	6.67%
NY, Garden City	5	0.53%	0.85%
NY, Glens Falls	7	0.74%	1.20%
NY, Ithaca	6	0.64%	1.03%
NY, Melville	5	0.53%	0.85%
NY, New City	5	0.53%	0.85%
NY, New York	174	18.43%	29.74%
NY, Poughkeepsie	9	0.95%	1.54%
NY, Rochester	38	4.03%	6.50%
NY, Rockville Centre	5	0.53%	0.85%
NY, Saratoga Springs	6	0.64%	1.03%
NY, Syracuse	43	4.56%	7.35%
NY, Tarrytown	7	0.74%	1.20%
NY, Troy	5	0.53%	0.85%
NY, Uniondale	9	0.95%	1.54%
NY, White Plains	38	4.03%	6.50%
	585	61.97%	100.00%

Q) New Members (based on Join Date)

	Count	Percent	Valid Percent
01-January	3	0.32%	12.50%
02-February	3	0.32%	12.50%
04-April	4	0.42%	16.67%
05-May	3	0.32%	12.50%
06-June	2	0.21%	8.33%
07-July	1	0.11%	4.17%
08-August	5	0.53%	20.83%
09-September	3	0.32%	12.50%
	24	2.54%	100.00%

R) NY Law Schools

	Count	Percent	Valid Percent
Albany Law School	87	9.22%	16.26%
Brooklyn Law School	25	2.65%	4.67%
Columbia University	31	3.28%	5.79%
Cornell University	24	2.54%	4.49%
CUNY - City University of New York	7	0.74%	1.31%

	Count	Percent	Valid Percent
Fordham University	27	2.86%	5.05%
Hofstra University	28	2.97%	5.23%
New York Law School	22	2.33%	4.11%
New York University	33	3.50%	6.17%
Pace University	100	10.59%	18.69%
St. Johns University	23	2.44%	4.30%
SUNY at Buffalo	57	6.04%	10.65%
Syracuse University	44	4.66%	8.22%
Touro College	11	1.17%	2.06%
Yeshiva University - Benjamin N. Cardozo S	16	1.69%	2.99%
	535	56.67%	100.00%

S) Non-NY Law Schools (Top 25)

	Count	Percent	Valid Percent
American University	2	0.21%	1.03%
Boston College	3	0.32%	1.54%
Boston University	5	0.53%	2.56%
California, University of - Los Angeles	2	0.21%	1.03%
Catholic University of America	5	0.53%	2.56%
Chicago, University of	3	0.32%	1.54%
Foreign (outside of United States)	4	0.42%	2.05%
Franklin Pierce Law Center	3	0.32%	1.54%
George Washington University	6	0.64%	3.08%
Georgetown University	10	1.06%	5.13%
Harvard University	20	2.12%	10.26%
Michigan, University of	4	0.42%	2.05%
Northeastern University	4	0.42%	2.05%
Out Of State	37	3.92%	18.97%
Pennsylvania, University of	6	0.64%	3.08%
Rutgers University - Camden	5	0.53%	2.56%
Rutgers University - Newark	10	1.06%	5.13%
Seton Hall University	5	0.53%	2.56%
Vermont Law School	36	3.81%	18.46%
Villanova University	3	0.32%	1.54%
Virginia, University of	9	0.95%	4.62%
Western New England	3	0.32%	1.54%
William and Mary School of Law	3	0.32%	1.54%
X (no data)	140	14.83%	
Yale University	7	0.74%	3.59%
	335	35.49%	100.00%

Z) Areas of Concentration

	Count	Percent	Valid Percent
Administrative Law	216	22.88%	
Agriculture	29	3.07%	
Antitrust and Trade	11	1.17%	
Appellate Law	89	9.43%	
Arbitration/Mediation	48	5.08%	
Banking	23	2.44%	
Bankruptcy/Insolvency	17	1.80%	

	Count	Percent	Valid Percent
Business Law	92	9.75%	
Civil Rights	38	4.03%	
Commercial Litigation	114	12.08%	
Communication	6	0.64%	
Computer Law	6	0.64%	
Construction	82	8.69%	
Contracts	93	9.85%	
Corporate Law	100	10.59%	
Creditors' Rights and Collections	6	0.64%	
Criminal Law	37	3.92%	
Derivatives and Structured Products	2	0.21%	
Elder Law	30	3.18%	
Employee Benefits	11	1.17%	
Entertainment, Arts and Sports	11	1.17%	
Environmental Law	587	62.18%	
Ethics	15	1.59%	
Family Law	31	3.28%	
Finance and Securities	23	2.44%	
Food, Drug & Cosmetics	22	2.33%	
Franchise Law	5	0.53%	
General Practice	89	9.43%	
Government	114	12.08%	
Health Law	28	2.97%	
Immigration Law	23	2.44%	
Insurance	65	6.89%	
Intellectual Property and Copyrights	33	3.50%	
International Law	33	3.50%	
Labor and Employment Law	44	4.66%	
Law Office Economics and Management	12	1.27%	
Leases And Leasing	47	4.98%	
Libel	6	0.64%	
Litigation - General Civil	197	20.87%	
Medical Malpractice	16	1.69%	
Municipal Law	200	21.19%	
Personal or Property Injury	62	6.57%	
Product Liability	63	6.67%	
Professional Liability	12	1.27%	
Public Contract	35	3.71%	
Public Utility	66	6.99%	
Real Property Law	241	25.53%	
Social Security Law	8	0.85%	
Tax - Corporate Business	17	1.80%	
Tax - Personal	11	1.17%	
Transportation	20	2.12%	
Trust and Estates Law	74	7.84%	
Workers Compensation	10	1.06%	
Zoning, Planning And Land Use	277	29.34%	

Count	Percent	Valid Percent
3,547	375.74%	100.00%

NYSBA Section Membership by JD

9/30/2017

	<u>JD01</u>	<u>JD02</u>	<u>JD03</u>	<u>JD04</u>	<u>JD05</u>	<u>JD06</u>	<u>JD07</u>	<u>JD08</u>	<u>JD09</u>	<u>JD10</u>	<u>JD11</u>	<u>JD12</u>	<u>JD13</u>	<u>OOS</u>	<u>No JD</u>	<u>Total</u>
ANTI	238	18	26	0	5	6	6	4	16	19	4	2	3	145	5	497
BUS	1,073	84	170	53	89	70	110	150	228	301	66	13	15	918	54	3,394
CORP	331	43	80	22	34	24	39	44	111	136	40	8	10	493	26	1,441
CRIM	266	110	140	51	49	40	53	97	160	174	74	30	20	162	27	1,453
DRS	539	52	87	21	50	23	44	70	154	180	40	11	5	335	7	1,618
EASL	488	97	29	2	8	9	14	16	91	112	39	11	10	357	24	1,307
ELD	326	117	193	106	148	87	146	152	387	586	120	34	54	146	2	2,604
ENVI	174	18	151	32	57	20	47	54	132	85	12	3	3	150	6	944
FAM	509	99	176	100	93	79	127	140	381	383	99	28	32	142	11	2,399
FED	844	44	98	9	56	14	67	106	130	221	33	5	4	304	4	1,939
FOOD	68	7	18	0	1	0	1	12	13	24	4	1	2	92	1	244
GEN	247	78	116	67	78	49	75	97	215	241	95	25	27	163	10	1,583
HLS	230	42	192	34	54	22	40	80	102	220	22	17	12	185	3	1,255
HLP	461	43	31	6	7	23	13	30	53	49	36	6	3	839	63	1,663
IPS	509	64	60	11	24	15	28	30	92	98	29	6	8	468	18	1,460
JUD	69	33	56	27	28	7	17	34	58	57	10	16	12	7	0	431
LABR	573	72	209	49	101	36	74	106	179	275	36	10	2	313	5	2,040
MUNI	101	22	172	59	84	59	76	88	180	142	15	5	4	52	7	1,066
REAL	1,031	197	252	138	149	97	215	202	546	687	191	35	60	393	6	4,199
SLS	954	85	237	77	138	67	125	173	463	525	78	30	37	653	0	3,642
TAX	911	52	61	15	31	12	31	68	141	169	40	4	14	602	2	2,153
TICL	403	65	186	53	115	54	76	208	257	384	61	22	21	193	2	2,100
TRIA	385	42	180	48	99	64	77	152	199	280	45	21	12	205	4	1,813
TRUS	1,052	146	232	130	176	116	192	202	534	776	146	32	54	563	1	4,352
YOUN	1,604	874	470	150	498	321	198	395	569	1,367	797	149	126	2,726	467	10,711

New York State Bar Association: Section Admission Year Comparison

9/30/2017

<u>Section</u>	<u>Admitted 10 years or more</u>		<u>Admitted less than 10 years</u>		<u>Students</u>	
	<u>Count</u>	<u>Percent</u>	<u>Count</u>	<u>Percent</u>	<u>Count</u>	<u>Percent</u>
Antitrust Law Section	328	66.00%	125	25.15%	44	8.85%
Business Law Section	2,513	74.04%	658	19.39%	223	6.57%
Corporate Counsel Section	929	64.47%	373	25.88%	139	9.65%
Criminal Justice Section	881	60.63%	241	16.59%	331	22.78%
Dispute Resolution Section	1,372	84.80%	171	10.57%	75	4.64%
Entertainment, Arts and Sports Law Section	713	54.55%	391	29.92%	203	15.53%
Elder Law Section	2,189	84.06%	380	14.59%	35	1.34%
Environmental Law Section	686	72.67%	190	20.13%	68	7.20%
Family Law Section	1,850	77.12%	434	18.09%	115	4.79%
Commercial & Federal Litigation Section	1,534	79.11%	342	17.64%	63	3.25%
Food, Drug & Cosmetic Law Section	175	71.72%	52	21.31%	17	6.97%
General Practice Section	1,147	72.46%	297	18.76%	139	8.78%
Health Law Section	923	73.55%	257	20.48%	75	5.98%
International Section	1,053	63.32%	409	24.59%	201	12.09%
Intellectual Property Law Section	938	64.25%	396	27.12%	126	8.63%
Judicial (Courts of Record) Section	422	97.91%	9	2.09%	0	0.00%
Labor and Employment Law Section	1,567	76.81%	418	20.49%	55	2.70%
Municipal Law Section	900	84.43%	144	13.51%	22	2.06%
Real Property Law Section	3,268	77.83%	778	18.53%	153	3.64%
Senior Lawyers Section	3,534	97.03%	103	2.83%	5	0.14%
Tax Section	1,607	74.64%	490	22.76%	56	2.60%
TICL Section	1,789	85.19%	277	13.19%	34	1.62%
Trial Lawyers Section	1,504	82.96%	253	13.95%	56	3.09%
Trusts and Estates Law Section	3,635	83.52%	671	15.42%	46	1.06%
Young Lawyers Section	155	1.45%	3,422	31.95%	7,134	66.60%
	35,612		11,281		9,415	

New Members of the Environmental Law Section for September 2017

<u>Name</u>	<u>Phone</u>	<u>Admit Date</u>	<u>Email</u>
<u>Judicial District: 01</u>			
Amy J. Allen 1954 First Ave 4 Q New York, NY 10029 <i>Dues Billing Category: Undetermined</i>			amy.joy.allen@gmail.com
<u>Judicial District: 05</u>			
Joshua Robert Stack, Esq. Northeast Natural Homes, Inc. 5110 Velasko Rd Syracuse, NY 13215-1943 <i>Dues Billing Category: NY Admitted 8 Plus Years</i>	(315) 478-6016	01/01/2004	jrstack@gmail.com
<u>Judicial District: 10</u>			
Brittany Adikes 18 W Scudder Place Northport, NY 11768 <i>Dues Billing Category: Law Student</i>			brittany.adikes11@stjohns.edu
<u>Judicial District: 99</u>			
Ryan Bravata 35 Jewel St. Apt. 3 Brooklyn, NY 11222 <i>Dues Billing Category: Undetermined</i>			ryan.bravata17@stjohns.edu
Charles Desmeules, Esq. Innergex Renewable Energy 1225 St-Charles West Street, 10th F Longueuil, PQ J4K0B9 CANADA <i>Dues Billing Category: OOS Admitted 8 Plus Years</i>	(450) 928-2550	01/01/2002	cdesmeules@innnergex.com
Douglas M. Halsey , Esq. 11325 Sw 70th Avenue Miami, FL 33156 <i>Dues Billing Category: OOS Newly Admitted</i>		05/03/2017	dhalsey@whitecase.com
Erika G. Johnson 48 Faneuil Place New Rochelle, NY 10801 <i>Dues Billing Category: Undetermined</i>			erika.johnson@brooklaw.edu
Brigid O'Hara Dannat Hall 411 78 N. Broadway White Plains, NY 10603 <i>Dues Billing Category: Undetermined</i>			bohara@law.pace.edu
David Albert Schwartz, Esq. 2616 Erwin Rd Apt 1307 Durham, NC 27705 <i>Dues Billing Category: OOS Newly Admitted</i>		04/24/2017	ds269@duke.edu

New Members of the Environmental Law Section for September 2017

<u>Name</u>	<u>Phone</u>	<u>Admit Date</u>	<u>Email</u>
Nicole Smith 147-24 Union Turnpike Flushing, NY 11367 <i>Dues Billing Category: Undetermined</i>			nsmith@skidmore.edu

Total New Members: 10

The Future of Federal Environmental Policy (FFEP) Task Force met on September 13 by conference call. Among the topics discussed were the following:

- Memorandum in Support of Environmental Programs, and accompanying letters to Pruitt and Mulvaney: The draft letters, with some further editorial and formatting modifications, were approved by NYSBA President Sharon Gerstman and transmitted, as Environmental and Energy Law Section Memorandum No. 4, to all members of the New York State Congressional Delegation, with copies to EPA Administrator Pruitt and OMB Director Mulvaney. Through Ron Kennedy, we will be following-up with key Congressional staffers to see what New York State-centric issues are of greatest interest to them, and on which of those issues we could be of most assistance. Ron identified Congressman Paul Tonko as a leader in the New York Congressional delegation on these issues. Rosemary is a constituent of his; she will call Ron and offer to be involved in any outreach to the Congressman or his staff.
- Letter regarding climate change: The draft letter has been forwarded to Sharon Gerstman, who has it under advisement. It is subject to her approval and, possibly, also the approval of the State Bar Executive Committee, which will not meet until later this fall. We will obtain further clarification of the process and timing for approval of this letter. If approved, it will be circulated as a communication of the State Bar rather than of the Section.
- Outreach to EPA Region II: John has circulated a draft letter to the (as yet unnamed) Region II Administrator, offering a dialogue on environmental issues of mutual interest. The draft was forwarded to representatives of the three other jurisdictions (New Jersey, Puerto Rico and the Virgin Islands) comprising Region II. John has heard back from the Puerto Rico representative that the letter is fine; he is awaiting feedback from the other two jurisdictions. The letter will not be sent until a Region II Administrator is confirmed. Participants on the call had not heard of any specific person having been proposed for the position.

Outreach to younger members: Sarah has been working with John and Joan Matthews, Co-Chairs of the Section's Diversity Committee, on how FFEP work can be coordinated with a broader outreach to younger members of the Section and the Bar. Among the initiatives being discussed are a "speed networking" session, small group mentorship programs, and CLE programs more clearly geared to younger members (e.g., offering "young lawyers" CLE credits).
- Next Call: Participants on the call felt it was preferable to wait to schedule the next call until we have specific action items to discuss. We will schedule a call at that time.

David, Gail and Kevin



TO: Environmental Committee

FROM: Linda Shaw

DATE: June 16-17, 2016

RE: **NEW YORK STATE BAR ASSOCIATION
CAUCUS MINUTES AND HOUSE
OF DELEGATES MINUTES**

MEMO

Section Delegates Caucus FRIDAY June 16, 2017

The first order of business at the Caucus Meeting was to discuss the letters certain sections have been drafting to the president and new administration. Apparently in the history of the Bar Association, no section has ever requested permission to send letters to the President. Sections have requested permission to write letters to the Governor, state legislature and Congress, but not the President.

Legislative Guidelines may need to be changed. Also Media guidelines may need to be reviewed and revised. The Executive Committee made a few revisions today.

There was a comment about Information reports and that the criminal justice committee had prepared one, which was rejected, because there were no recommendations. It was based on a brand new topic now, and they wanted the issue to be presented now, before recommendations were developed, in order to solicit ideas. The executive Committee chair expressed frustration about this topic, because the section did the work. However, the reason it may not have been put on the agenda might have been due to the lack of time on the House of Delegates agenda.

Seat on Nominating Committee topic – Rona and Sarah are now officially on the CLE committee on behalf of the caucus.

Membership campaign – “Five things to Know about the Section Communities” presentation. Since the Bar drops folks who do not pay dues in April, the membership drops. We are climbing back up. Interestingly, section numbers are not dropping even though the overall Bar members are dropping due to baby boomers’ retirement and fewer new attorneys graduating. Bar can help sections get active on the community pages. This is posted to section community page. Goal is to attract newer attorneys.

Elder Law complaint – they put \$5-10K to provide discounts for new members as part of their membership initiative. But this shows as a loss during their end of year budget. Pat from the Bar indicated that she would work with the Elder Law section to fix this issue.

Pitch to add \$125.00 to your annual due to become a Sustaining Member.

Dave Schaefer -Judiciary Law §470 (law office in the state for transaction of the law issue). A case just went to Supreme Court and certiorari was denied. The residency requirement was repealed a number of years ago, but the law office exception was not. Bar thinks the office issue should be amended. Committee on this issue is seeking input from section members that have out of state members to potentially develop a legislative proposal.

Finance – Environmental Law section revenue hit an eight year high in 2015 of \$93,785 but surprisingly only brought in \$74,990.00 last year. Data is available from between 2009-2016. The 2016 revenue is below all of the last eight years other than 2014 when we were slightly lower. This data is available for all of the sections. Our surplus in 2016 is only \$9,055.00 down from \$28,622.00 in 2015. We should try to figure out what happened since we did well on sponsor. It appears we had a significant membership rise in 2015 (from 1,058 members in 2014 to 2,534 in 2015) and in 2016 we were back down to 1,034. On a more positive note, we are doing better than in 2010-2012 when we did not have a surplus.

Best Practices – This committee has 7 more sections to survey before they can provide an update. They may need some help. The survey was developed to be only a 15-20 minute survey. However, they realized they might need more questions like “how do you use technology?“, “what form of CLE do you prefer?” The Bar office has capability of sending out surveys via email on behalf of the sections.

Section Caucus Morning Meeting
SATURDAY, JUNE 17, 2017 – 7:15-9:00

There was a recap of the events of yesterday caucus meeting and a review of the Executive Committee meeting. One of the hot topics was whether two new committees should be created – Transportation Law and Marijuana Law. The new Bar President said she would not be encouraging during her term and new committees that can be part of a pre-existing committee. Since Marijuana Law and fit within Health Law, this committee was debated. However, the issue overlapped too many sections so in the end, they did create a new committee for each of these topics. The taskforce on gun violence was disband but the Bar is looking for a home for that issue. The EC explored the limits of their power to require a section to take on a topic. Apparently, the EC cannot tell a section to house a particular topic as there was also a report that the Executive Committee has voted unanimously for a Constitutional Convention.

There was a unanimous vote for the new slate of officers.

Despite the fact that 4 delegates per section are now allowed to participate so that there is always representation, attendance did not seem to increase in the room. So it appeared (at least to me)

that attendance of only 1 or 2 delegates per section remained the status quo. Therefore, we will have to internally discuss if we want to add delegates or stick with two delegates. We voted on these amendments to the bylaws.

I did provide a brief summary of the Section's Report and Recommendation on the Constitution Convention, which was neutral, and our Section's recent "no" vote and explained that this will be debated at the House meeting today.

The Financial Committee reported that overall we lost 5000 members over the last two years (and at least based on our numbers 1,500 members were lost from our section) so their focus will be on the health of each section since the sections are still doing better. However, if a sections' surplus is expanding, the bar may need to look at the surplus policy to add members to the overall Bar and section.

House of Delegates Meeting
SATURDAY, JUNE 17, 2017 – 9:00-12:00

1. Call to order, Pledge of Allegiance and introduction of new members – Mr. Michael Miller 8:30 a.m.
2. Approval of minutes of April 1, 2017 meeting 8:35 a.m.
3. Report of Treasurer – Mr. Scott M. Karson 8:40 a.m. Overall budget is \$500,000 in the negative. The main costs have been associated with technology improvements. Revenue derived from CLE is up to \$1.3 million, but this income is slightly less than the two prior years. Membership dues income is down to less than \$10 million also down from the last two years. The Bar is trying to increase revenue by some new initiatives including:
 - a. contracting with network media partners to advertise the Bar,
 - b. setting up a For Profit Corp. so other organizations can pay rent and fees to host meetings at the Albany Bar Center,
 - c. plan to improve the job board listing on the web site, which results in a fee to the Bar; and
 - d. examining royalty agreements.

Expenses have gone up by \$200,000, mostly for salaries and benefits. However, the overall bottom line, including all of the Bar's investments, is up by \$700,000. Members as of 1-1-17 was 71,530. But in April, nonpaying members were dropped so the number dipped to 44,960. Of the members dropped are the 13,137 free student members so are asked to pay after the graduated and start working.

4. Memorial for Hon. Sheila Abdus-Salaam – Hon. Eugene M. Fahey 8:55 a.m. There was a memorial speech for this Court of Appeals judge who just passed away at 65. Then there was a moment of silence.
5. Presentation of Root/Stimson Award – Ms. Sharon Stern Gerstman 9:15 a.m. The winner was Lesley Rosenthal who has focused her pro bono practice on music and arts related clients. Ms. Rosenthal called all attorneys to look at not only their

careers but to their community service. Our country only ranks 18 on providing justice to its citizens. She asked all of us to support an organization today, including the NYS Bar Foundation.

6. Remarks by ABA President Linda A. Klein 9:25 a.m. – The number one issue between the ABA and NY Bar is the refunding of the Legal Services corp., which funds the Legal Aid Societies here in NY and around the country. Right now, the budget calls for complete elimination of the Legal Services Corp., which will shut down all Legal Aid Societies. Log onto www.DefendLegalAid.org to sign up to support legal aid. The ABA was able to deliver 20,000,000 names so far in support of legal aid. The NYSBA has been supporting this nationwide effort. The ABA has launched a center for innovation – the ABA has partnered with Microsoft for an on-line portal for legal aid tools and to translate Miranda warnings into every language. The ABA is also working on initiatives for veterans. The NY Bar has a clinic in Onondaga County for veterans at the VA hospital there. The ABA would like video clips on such programs to help veterans. The ABA is spreading the word on Twitter about all the things the Bar Associations are doing to help US citizens and promote diversity. There are programs that are packaged in ABA blueprint (abablueprint.com) to help small practitioners. This ABA annual meeting is a collaboration with 22 local bars, including NY. There will be a track at the U.N. There will also be a challenge – NY thin pizza vs. Chicago thick crust pizza.
7. Installation of Sharon Stern Gerstman as President – Oath to be administered by Hon. Eugene M. Fahey 9:40 a.m.
8. Report of President – Ms. Sharon Stern Gerstman 9:40 a.m. – The new president’s speech was short because the meeting was slightly behind but she mainly focused on the need to work on our criminal justice system.
9. Report and recommendations of Committee on the New York State Constitution – Mr. Henry M. Greenberg 10:00 a.m. – there have been 4 constitutions in NY. There are cherished rights in the Constitution, such as the “forever wild” clause, which guarantees that the Catskills and Adirondack parks be forever wild. There is a right to public education and many other rights. But it is unreadable. It is a 52,500 word document. It is need of an overhaul. It was not written to last for the ages like the federal Constitution. It was intended to be revised by each generation. Amendments can be made by the legislature. This has been done 200 times. The other method is by a Constitutional Convention. The Convention can propose any amendments but the Convention ONLY makes recommendations. The people then vote on the amendments. There have been 9 conventions, and the last one was in 1967. There has been convention phobia since then. New Yorkers seem to like the devils they know more than the devils they do not know. This Committee, which was extremely diverse, came to a unanimous decision that there should be another convention. Unanimity was achieved based on asking what is in the best interest of

the Bar The Committee looked at all the arguments pro and con and then put it up to a vote. The pro conclusions were:

- a. It should be streamlined and modernized
- b. Fix basic problems with state government (e.g. byzantine court system; home rule system needs to be improved; three men in a room system permitted by the Constitution)
- c. Provide opportunity to establish positive rights
- d. No practical alternatives.

The cons are:

- a. Process will be politically influenced
- b. Cherished constitutional rights would be at risk (e.g. forever wild)
- c. Double dipping threat by legislators
- d. A Conventioin is unnecessary and will be expensive

Hope v. Fear is what we face. The Committee sided with the Hope side. NY should not forfeit this rare, generational opportunity. There is a need to revise the judiciary system. This has been at the core of what we have advocated for 50 years. The system is byzantine and too complex; the most complex out of any system in the country. There has been zero effort to reform the system to date. There is also a need to enhance voter participation. We just edged out Nebraska but are behind Georgia on how many New Yorkers just voted for the President. Same day registration should be allowed. The Committee deeply respects the fears of those of us who are against the Convention. The aid to the needy clause is sacred and the potential loss of it is scary. The environmental law section also put in a letter that the forever wild is so sacred, they do not want a convention. However, history proves they should not be fearful. There is a 4 million democratic vote's lead in NY. Therefore, it is unlikely that in 2019, sacred rights will be stripped away. Whatever is ultimately proposed will be voted on by the public.

The Committee also asked why are will taking a position? The answer is also that it has been part of our history. For the last forty years, we have voted and the last two times we voted no. Defending a Constitution is part of a lawyers' DNA. If not us, then who? Nevertheless, the Legal Aid, Access to Justice and Environmental Law sections all voted against the convention. The litigation and judiciary related committees are for it.

Then there were over 20 or so speakers primarily in favor of the convention. The House voted 111 to 28 for the Constitutional Convention. Both Kevin Bernstein, Eileen Millett and an attorney who represents the Adirondack area expressed concerns against the convention. However, the need to fix the Judiciary and voting issues seemed to win the day.

10. Report and recommendations of Environmental Law Section – Mr. Kevin Bernstein 11:15 a.m. Kevin presented the new Climate Change report. The administration decided to withdraw from the Paris agreement. That same day, the Governor issued

an executive order that went through NY's efforts to combat greenhouse gas emissions. However, some of these should be codified in legislation along with the 2009 executive order. Clean energy jobs and businesses must be supported as a major "take away" message in our report recommendations. RGGI should also be supported in the report recommendations. This report also calls for support for the biofuels industry. SEQRA should continue to consider greenhouse gas emissions and the social cost of carbon. Sea level rise must be evaluated.

11. Report of The New York Bar Foundation – Mr. John H. Gross 11:45 a.m.

12. Administrative items – Mr. Michael Miller 11:55 a.m.

13. New business 12:00 p.m.

14. Date and place of next meeting Saturday, November 4, 2017
Bar Center, Albany, New York

ANNUAL MEETING | 2018

JANUARY 22 – 26



ANNUAL MEETING REGISTRATION LAUNCH INFORMATION DUE BY SEPTEMBER 21, 2017

1. Your first step: Please provide a program title and short blurb or general list of topics for your meeting that will grab members' attention and encourage them to register early. This information will be included on our Annual Meeting website.

We ask you to complete the form below and return it to us by **September 21, 2017** to ensure that information about your meeting will be displayed on our website at the time it is launched. Otherwise, we will simply list the date and time. This is your first opportunity to inform members about your Section or Committee program at Annual Meeting, so we hope you take advantage of it.

2. Your next step: Finalize your agenda by November 15, 2017 so we can create your Section or Committee Program Flyer. Our records show that **early mailing of the Program Flyer results in greater attendance**. If we receive your schedule, topics and speakers by the deadline, we will be able to guarantee hard-copy mailing, multiple eblasts and additional marketing for your meeting.

Please complete the following:

Section Committee Name: Environmental & Energy Law Section

Section or Committee Chair Name: Kevin M. Bernstein

E-Mail: kbernstein@bsk.com

Program Chair(s) Names and Email Addresses:

Kathleen M. Bennett : kbennett@bsk.com

Amy K. Kendall : akendall@nyenvlaw.com

Date Of Program: 1/26/18

Times Of Program: 8:30 a.m. to 12:30 p.m.

If Applicable, Will The Section/Committee Be Subsidizing The Cost Of The Lunch?

If Yes, By How Much?

(total lunch fee is \$110 per person)

NYSBA Section/Committee Liaison: Lisa Bataille

Title and Topic information You Would Like Listed:

BALANCING ACT: Federalism and Section 401 Water Quality Certifications

ENERGY INNOVATIONS

BEYOND STANDING ROCK: The Intersection of Indian and Environmental Law

ETHICS

COMPLETE AND RETURN TO ADRIANA FAVREAU AT AFAVREAU@NYSBA.ORG

Environmental & Energy Law Section Annual Meeting 2018 – Modified Structure

Thursday, January 25th, 2018, New York Hilton Mid-Town

- 1:00 – 3:00 Executive Committee Meeting and Buffet Lunch – *MURRAY HILL WEST HOLLOW SQUARE*
- 3:00 – 4:00 Agency Update – *MURRAY HILL EAST*
- 4:00 – 5:00 Committee Meetings at Hilton – *MURRAY HILL*
- 5:00 – 6:00 Business Meeting, Nominations, Section Announcements at Hilton *MURRAY HILL*
- 6:00 - 7:30 Networking Reception – *MURRAY HILL EAST AND WEST*

Friday, January 26, 2018

- 8:15 – 8:45 Registration and Breakfast *MURRAY HILL EAST AND WEST*
- 8:45 - 12:45 Program – *MURRAY HILL EAST AND WEST*
- 1:15 – 3pm Lunch, Awards and Networking - *Mastro's Steakhouse, 1285 Avenue of the Americas*

**NEW YORK STATE BAR ASSOCIATION
ENVIRONMENTAL AND ENERGY LAW
SECTION**

REPORT AND RECOMMENDATIONS

CONCERNING

**ENVIRONMENTAL ASPECTS OF THE NEW
YORK STATE CONSTITUTION**

ADOPTED BY

**THE TASK FORCE ON ENVIRONMENTAL
ASPECTS OF THE NEW YORK STATE
CONSTITUTION**

AUGUST 23, 2017

2017

TASK FORCE REPORT

183

Membership of the New York State Bar Association Task Force on the Environmental Aspects of the New York State Constitution**CHAIR:**

Katrina Fischer Kuh

MEMBERS:

Claudia K. Braymer

Meaghan Colligan

Timothy Cox

Michael Gerrard

Robert Glennon

Carl Howard

Alan J. Knauf

Robert Knoer

Jan S. Kublick

Mary Lyndon

Peter Lehner

Joan Leary Matthews

Rosemary Nichols

Peter S. Paine Jr.

Telisport W. Putsavage

Nicholas A. Robinson

Daniel Ruzow

Thomas Ulasewicz

Thomas J. Warth

Philip Weinberg

Neil Woodworth

Introduction and Executive Summary

The Executive Committee convened the Task Force on Environmental Aspects of the NY State Constitution in January of 2017 with the following purpose:

study and prepare a written report, to submit to the Section's Executive Committee, regarding (1) environmental issues appropriate for consideration in any amendment to the New York Constitution, beyond the issues which the NYSBA House of Delegate has already determined, and (2) constitutional issues relevant to climate change, and (3) appropriate provisions for an environmental right in the State Constitution, and (4) any other environmental issues that the Task Force considers important for submission to the Section Executive Committee¹

The Task Force has met, consulted, and prepared the Report and Recommendations that follow. As described in greater detail and for the reasons provided, the Task Force recommends:

- (I) That no changes be made to Article XIV; and
- (II) Article I be amended to set forth an environmental right.

The purpose of the Report is to inform and enrich understanding of environmental issues which may be considered at a Constitutional Convention (should one occur) or with respect to proposals to amend the Constitution through the legislative process.

The New York State Bar Association supports a Constitutional Convention. If a convention is held, the Task Force recommends as follows:

1. Memorandum from Nicholas A. Robinson to Lawrence P. Schnapf, Proposals for a Section Task Force on Environmental Aspects of the NY State Constitution (Jan. 27, 2017).

Recommendation I

No changes to Article XIV are needed or advisable.

Some analyses of Article XIV² have suggested tweaks designed to update and simplify the Article's text without altering its substantive content and protections. The Task Force examined two such suggestions for how the text of Article XIV could be improved (deletion of the "as now fixed by law" clause and repeal of Section 2, the Burd Amendment) and concluded in each case that no change is needed or advisable. The Task Force is also aware of proposals to amend Article XIV that might be raised at a Constitutional Convention and could have the effect of weakening the text. The Task Force does not believe that textual amendment is necessary to improve Article XIV and further recognizes that a Constitutional Convention creates the risk that Article XIV could be weakened.

(1) Evaluating the "as now fixed by law" clause

Article XIV provides in Section 1, "The lands of the state, now owned or hereafter acquired, constituting the forest preserve *as now fixed by law*, shall be forever kept as wild forest lands."³ The "as now fixed by law" clause is the key to preventing the Legislature from purporting to (re)define the Forest Preserve. The clause anchors the definition in time, in a way serving the "forever" part of the constitutional mandate.

The Constitutional Convention debates of September 7 and 8, 1894 make clear the purpose behind the phrase "as now fixed by law." The delegates knew they were "fixing" the definition of Forest Preserve in a statute not part of the Constitution and that the use of the phrase was intended to prevent the Legislature from changing the definition by changing the statute. On September 7, delegate David McClure, Chairman of the Special Committee on State Forest Preservation which had proposed the

2. Including the New York State Bar Association, Report and Recommendations Concerning the Conservation Article in the State Constitution (Article XIV) (approved by the House of Delegates November 5, 2016).

3. N.Y. CONST. art. XIV, §1 (emphasis added).

Forever Wild Clause explained that he inserted the words “as now fixed by law” in the original draft, saying he was doing so to prevent the Legislature from ever changing the statutory definition of the phrase in Laws of 1893, chapter 332:

The object of inserting “as now fixed by law” is to prevent the Legislature from at any time limiting the extent of the forest preserves by providing that in a certain county which by the laws of the state is now a part of the forest preserves there should not be included within it, or in any way excepting, any part of the lands within that county. It was thought by the committee desirable to fix it so that as the law now constitutes the forest preserves it shall be understood to be referred to in the Constitution.⁴

The “as now fixed by law” clause thus serves an important function and should be retained.

(2) Evaluating Section 2, the Burd Amendment

Section 2, the Burd Amendment, reserves up to three percent of the Forest Preserve “for the construction and maintenance of reservoirs for municipal water supply, and for the canals of the state.”⁵ The Burd Amendment is specifically limited to the construction and maintenance of reservoirs for municipal water supplies and for the supplying water to the canals of the State. It does not authorize the use of Forest Preserve for water wells, nor does it authorize the flooding of Forest Preserve for flood control reservoirs or to address river level fluctuations. It is very unlikely a municipality will propose a new water supply reservoir in the Forest Preserve because today’s New York State Health Department is very opposed to surface water reservoirs in the Forest Preserve as a source of

4. See, Robert C. Glennon, “Non-Forest Preserve: Inconsistent Use,” *in* GOVERNOR’S COMMISSION ON THE ADIRONDACK PARK IN THE TWENTY FIRST CENTURY, TECHNICAL REPORT, Vol 1, No. 5, at 76 n. 5.

5. N.Y. CONST., art. XIV, sec. 2.

drinking water and would be unlikely to issue a permit for same. It is even more unlikely that anyone would ever propose a new dam and reservoir for any canal system. Section 2 thus expressly limits any prospective dam and water impoundment project and does so in a manner that renders it extremely unlikely that such a project would be pursued. For those reasons, the Task Force concludes that Section 2 should not be amended or deleted.

The Task Force also recognizes the value of the Section 4 State Nature and Historical Preserve Trust which has been used by land conservationists to protect tens of thousands of acres of scenic and ecologically “unique” lands as part of the State Nature and Historical Preserve Trust created by Section 4.⁶ Section 4 provides for State acquisition of lands for a “state nature and historical preserve” located outside of the Forest Preserve.⁷ The statutory authority for Article 45 of the Environmental Conservation Law is expressly predicated on Section 4 of Article XIV⁸ and Environmental Conservation Law §§ 45-0117 and 51-0703 give effect to this provision by creating a State Nature and Historical Preserve Trust to protect unique natural resources and features of State forests and wildlife management areas designated as “unique areas” to be included in the Trust.

Therefore, the Task Force concludes that there is no need to update or amend the text of Article XIV. The Task Force is further concerned that the following contemporary Adirondack legal controversies might be addressed by the delegates of a Constitutional Convention to the detriment of the “forever wild” character of the Forest Preserve:

6. The Task Force further notes that Section 3 of Article XIV creates the legal basis for some 750,000 acres of state forest land and 250,000 acres of state wildlife management areas outside the bluelines of the Adirondack and Catskill Forest Preserve. While Section 3 notes that the strict limits of section 1 of Article XIV do not apply to these lands, section 3 concludes with this strong legal protection for these valuable lands, declaring “that such lands shall not be leased, sold or exchanged, or be taken by any corporation, public or private.” N.Y. CONST. art. XIV, § 3. Section 3 preserves these valuable lands all across the state from commercial exploitation or sale.

7. N.Y. CONST. art. XIV, § 4.

8. See ECL § 45-0101.

- A possible amendment approving an Adirondack Park network of road-like community connector snowmobile trails should the State lose the currently pending Protect the Adirondacks v. DEC case challenging the creation of such a snowmobile trail system;
- An amendment to allow all-terrain vehicle use of the great network of existing and future snowmobile trails if climate change threatens the practicality of snowmobile use and its contribution to the economy of communities in the Adirondack Park;
- a Closed Cabin Amendment redux, arising from current DEC proposals like the 5-acre “Unclassified” parcel to facilitate a dining and lodging hut-to-hut/yurt facility on the Forest Preserve lands of the Boreas Tract or other Forest Preserve lands on the 15 identified “hut to hut” trail routes in the Adirondack Park.

Article XIV presently provides robust protection to the Forest Preserve. Even small, well-intentioned changes to the text of Article XIV run the risk of occasioning unintended consequences and open the door to efforts to weaken Article XIV. The Task Force thus recommends that Article XIV should not be amended, changed or modified.

Recommendation II

Article I should articulate and provide for the protection of a right to clean and healthy environment.

The Task Force supports the adoption of a constitutional right to a clean and healthful environment. We propose that the right be embodied as a new Section 19 of Article I, which contains other bill of rights provisions such as free speech and equal protection.⁹ The beneficial operation of similar provisions

9. The Task Force recommends incorporation of an environmental right in Article I, as opposed to Article XIV, because such a right is appropriately viewed as on par with the other important rights protected in Article I. Additionally, any effort to amend Section 4 of Article XIV to include an environmental right might invite opponents to attempt to delete or weaken Section 5 of Article XIV, its vitally important citizens suit provision. Section 5

in other jurisdictions, the anticipated emergence of climate change-related environmental challenges unprecedented in their severity and complexity, and the limited scope of New York's existing Conservation Bill of Rights augur in favor of the adoption of such a right.

Several states and nations have already adopted constitutional environmental rights¹⁰ and efforts are underway to secure the recognition of environmental rights around the world.¹¹ In March 2017, the New York State Assembly passed Assembly Bill 6279 which would amend Article I of the Constitution by adding: "Each person shall have a right to clean air and water, and a healthful environment."¹² Most notably in the United States, three states—Pennsylvania, Montana and Hawaii—have enacted constitutional provisions to protect environmental values, which the courts of those states have ruled to be enforceable by citizens. In these jurisdictions, constitutional environmental rights provisions have proven to be environmentally protective, a useful means to require consideration of the interests of future generations, and have not unduly displaced legislative prerogative.

is critical, especially to give citizens and advocacy groups the right to sue to protect the "forever wild" character of the Forest Preserve. Existing Article XIV effectively protects the Forest Preserve in the Adirondack and Catskill State Parks. That provision, part of the State Constitution since 1894, is vital to the future of those areas of our State so important environmentally and for tourism and recreation. It should be maintained in its integrity.

10. See *Environment and Natural Resource Provisions in State Constitutions*, 22 J. LAND RESOURCES AND ENVTL. L. 73 (2002) (surveying state constitutional provisions); James R. May & Erin Daley, *Constitutional Environmental Rights Worldwide*, in PRINCIPLES OF CONSTITUTIONAL ENVIRONMENTAL LAW 329 (2011).

11. Delaware Riverkeeper, for example, has a new initiative, For the Generations, "to pursue and secure constitutional protection of environmental rights in states across the nations." Delaware Riverkeeper, For the Generations, available at <http://www.delawariverkeeper.org/ongoing-issues/generations> (last visited Aug. 8, 2017). Additionally, the draft Global Pact for the Environment provides in Article I, "Every person has the right to live in an ecologically sound environment adequate for their health, well-being, dignity, culture and fulfilment." Preliminary Draft Global Pact for the Environment (June 24, 2017), available at <https://www.iucn.org/sites/dev/files/content/documents/draft-project-of-the-global-pact-for-the-environment.pdf> (last visited Aug. 8, 2017).

12. While we also recommend adoption of a constitutional environmental right in Article 1, the text that we propose differs in some respects for the reasons described *infra*.

Additionally, emerging environmental threats present unprecedented societal challenges. Vexing environmental problems have emerged within the scope of traditional regulation of air and water quality, such as increased recognition of connections between pollution and asthma rates, awareness of local air pollution hot spots, and the detection of widespread contamination of drinking water with a range of pollutants (such as pharmaceuticals, PFOAs and 1,4 dioxane). More importantly, however, climate change presents challenges that have no historical analog in their scope and complexity and will require a long-term, proactive, and thoughtful governmental response.¹³

Finally, as presently interpreted, the existing Conservation Bill of Rights in Article XIV Section 4 does not function as a robust assertion of environmental right that can help New York meet these unprecedented challenges. The existing Conservation Bill of Rights in Article XIV, section 4, provides in relevant part:

The policy of the state shall be to conserve and protect its natural resources and scenic beauty and encourage the development and improvement of its agricultural lands for the production of food and other agricultural products. The legislature, in implementing this policy, shall include adequate provision for the abatement of air and water pollution and of excessive and unnecessary noise, the protection of agricultural lands, wetlands and shorelines, and the development and regulation of water resources.

The Conservation Bill of Rights was held in *Leland v. Moran* to afford no “constitutionally protected property right” enforceable in the courts and its substantive charge is both

13. For a discussion of how the public trust doctrine can guide adaptation to climate change in the context of water resources, see Robin Kundis Craig, *Adapting to Climate Change: The Potential Role of State Common-Law Public Trust Doctrines*, 34 VERMONT L. REV. 781 (2009) (describing how state public trust doctrines can support adaptive management for water resources in the context of climate change).

limited in scope and generally understood to be fulfilled by existing environmental statutes.¹⁴

The analysis that follows (1) undertakes a close examination of the most serious concern expressed about the adoption of a self-executing constitutional environmental right, namely that it will displace legislative and executive authority with in environmental policymaking; and (2) evaluates different constructions and orientations of a constitutional environmental right. This analysis concludes that it is unlikely that adoption of a self-executing environmental right in New York would override basic principles of judicial deference to legislative and executive actions. It also recommends that the right be oriented around the concept of a governmental trust duty enforceable directly by citizens in actions against the government and that it expressly reference the interests of future generations and incorporate ecological principles.

(1) Assessing the implications of a self-executing right

The potential to shift policymaking authority from the legislature to the judiciary is often identified as a chief reason not to constitutionalize environmental rights or duties. For a variety of reasons, legislatures may be more institutionally suited to develop environmental policy.¹⁵ Judicial intervention may, however, be warranted when the legislative process proves inadequate to protect core environmental values,¹⁶ which is particularly likely to occur when, for example, seeking to protect

14. *Leland v. Moran*, 235 F.Supp.2d 153, 169 (N.D.N.Y. 2002), *aff'd*, 80 Fed. Appx. 133, 2003 WL 22533185 (2d Cir. 2003).

15. *See generally* Barton H. Thompson, Jr., *Environmental Policy and State Constitutions: The Potential Role of Substantive Guidance*, 27 RUTGERS L.J. 863, 891-899 (1996) (explaining various reasons why legislatures are a preferred venue for developing environmental policy, including that judicial intervention can reduce incentives for legislative action, legislatures are in a better position to decide environmental tradeoffs which present largely political questions, legislatures are better equipped to engage in fact-finding).

16. *See generally* Jeffrey Omar Usman, *Good Enough for Government Work: The Interpretation of Positive Constitutional Rights in State Constitutions*, 73 ALB. L. REV. 1459, 1515-16 (2010) (describing the argument that even the expression of general constitutional principles should warrant judicial enforcement in certain circumstances).

the interests of future generations¹⁷; additionally, a shift of authority to the judiciary is arguably less troubling from the perspective of democratic representation at the state, as compared to the federal level.¹⁸ And many lament that it is difficult for public environmental rights and concerns to be redressed in New York's courts because New York State environmental statutes lack the citizen-suit provisions found in the major federal environmental statutes.¹⁹ We note the existence of long-running debate about the optimal role for the judiciary in environmental policy and that it undergirds concern about constitutionalizing environmental rights.

To inform assessment of the advisability of incorporating a more robust (self-executing) environmental right in the New York State Constitution, it is thus useful to consider whether and to what extent adopting such a right would, in fact or potential, shift environmental policymaking to the judiciary. The analysis that follows assesses the impact that robust, self-executing constitutional environmental rights have had on the distribution of judicial and legislative authority in those states where such a right or duty is recognized and seeks to envision how such a right might affect judicial authority in New York.

Ultimately, while a robust, self-executing constitutional environmental right would allow for increased judicial participation in significant environmental disputes, it is unlikely that such participation would unduly encroach on the core role of the legislature. States that recognize a robust, self-executing constitutional environmental right have not

17. Barton H. Thompson, Jr., *Constitutionalizing the Environment: The History and Future of Montana's Environmental Provisions*, 64 MONT. L. REV. 157, 198 (2003) (positing that the "normative argument for constitutional intervention is stronger" with respect to "[e]nvironmental issues that involve future generations, such as the depletion of exhaustible resources, the endangerment of species, global climate change, and the use of long-lived toxics.").

18. State court judges are, for example, more accountable to the electorate and closer to state culture and legal norms and state constitutions can be more easily amended (thereby providing a more feasible means for the citizenry to override judicial constitutional interpretations with which it disagrees). Usman, *supra* note 16, at 1524.

19. See *Friends of the Earth v. Carey*, 535 F2d 165 (2d Cir. 1976) (interpreting federal citizen suit provisions to allow citizens to be "welcomed participants in the vindication of environmental interests.").

experienced a radical or undesirable shift of environmental policymaking authority to the judiciary. In Montana, judicial intervention has been relatively limited and reserved for cases presenting unusual and compelling facts. In Hawai'i, judicial intervention to enforce constitutional environmental rights has been more common and involved, but is perhaps best characterized as requiring dialogue about and attentiveness to environmental values. And in Pennsylvania, while the judiciary has twice invoked constitutional environmental rights to strike down State statutes, both cases involve disputes about the appropriate development of the State's natural gas reserves through fracking, a factual situation that closely parallels the concerns about environmental damage associated with historical exploitation of Pennsylvania's natural resources that motivated the adoption of its Environmental Rights Amendment.

Additionally, in terms of predicting how New York courts might interpret and apply a similar right, it is useful to note that when New York courts have interpreted self-executing positive constitutional rights addressed to other subjects (such as poverty), they have done so in a manner that largely preserves legislative prerogative. Finally, the text of the environmental right that we recommend for New York is oriented and phrased so as to provide the citizens of New York with a judicial backstop—a means to challenge actions affecting integral environmental values while largely preserving existing mechanisms of environmental policymaking and protection.

***Positive constitutional environmental rights and
judicial authority***

Environmental constitutional rights²⁰ are typically articulated as positive (second-generation or substantive)

20. Environmental rights can be expressed in a variety of ways in state constitutions and typically involve the assertion of an affirmative, individual right to a clean and healthy environment (or similar). Many state constitutions also impose trust duties. Most notably, the Hawai'i and Pennsylvania constitutions house both affirmative grants of environmental rights provisions and declare public trust duties and in both states it is the public trust duties that have proved particularly important in key decisions.

rights.²¹ The enforcement of positive rights can require courts not only to prevent or stop government action (as would be demanded in the enforcement of negative rights), but further to compel legislative action and thus “immerse[] courts more deeply within the affairs of the executive and legislative branches” and raise separation of powers concerns.²² A review of state judicial interpretation of positive state constitutional rights reveals that courts often deploy doctrines or approaches (political question, finding that an affirmative right is not self-executing, recognizing that the right imposes an affirmative duty on the legislature but giving the legislature broad discretion in defining the scope of the duty, narrowly interpreting the scope of environmental rights provisions, declining to hear cases on procedural grounds (such as standing or ripeness)) that largely preserve the traditional distribution of authority between the judiciary and the legislature and avoid judicial policymaking.²³ These approaches can be seen in New York, where at least one court has held that Section 4, the existing Conservation Bill of Rights, affords no constitutionally-protected property right enforceable by courts (effectively treating it as non-self-executing)²⁴; and, in the context of interpreting Article XVIII, Section 1 (imposing an affirmative obligation to help the needy), courts have largely deferred to the

21. For a discussion of the distinction between positive and negative constitutional rights, see Usman, *supra* note 16, at 1462-1464.

22. *Id.* at 1495.

23. Usman, *supra* note 16, at 1497-1506; Barton H. Thompson, Jr., *Constitutionalizing the Environment: The History and Future of Montana's Environmental Provisions*, *supra* note 17, at 163-65 (2003); Thompson, *Environmental Policy*, *supra* note 15, at 896-97.

24. Leland v. Moran, 235 F.Supp.2d 153, 169 (N.D.N.Y. 2002), *aff'd*, 80 Fed. Appx. 133, 2003 WL 22533185 (2d Cir. 2003). Of note, it is also relatively difficult to demonstrate standing in New York in many environmental public interest cases. Albert K. Butzel; Ned Thimmayya, *The Tyranny of Plastics: How Society of Plastics, Inc. v. County of Suffolk Prevents New Yorkers from Protecting Their Environment and How They Could Be Liberated from Its Unreasonable Standing Requirements*, 32 PACE ENVTL. L. REV. 1, 2 (2015) (lamenting the stringency of standing requirements under SEQRA and documenting that “numerous other states have developed standing doctrines that more capably match the purposes of their environmental protection acts and address the ecological complexities of environmental harms yet also prevent frivolous complaints from disrupting judicial efficiency”).

legislature regarding the adequacy of benefits.²⁵

In some circumstances, however, courts have applied strict scrutiny to state constitutional affirmative rights (see discussion of application of Montana's environmental right, *supra*) or become deeply enmeshed in defining and overseeing the implementation of policy necessary to satisfy the state constitutional affirmative right (for example, the New Jersey Supreme Court's involvement in school finance litigation).²⁶ Both of these approaches to interpreting affirmative rights in state constitutions (strict scrutiny and active judicial management) can result in greater judicial policymaking at the expense of legislative prerogative.

To better understand the potential for a constitutional environmental right to give rise to increased policymaking on the environmental by the judiciary, a short review follows of the experience in the three states with positive constitutional environmental rights where those rights have been treated as self-executing and have not been otherwise unduly limited through court interpretation, Hawai'i, Montana and Pennsylvania.²⁷

25. Usman, *supra* note 16, at 1504-05; Sylvia Ewald, Note, *State Court Adjudication of Environmental Rights: Lessons from the Adjudication of the Right to Education and the Right to Welfare*, 36 COLUM. J. ENVTL. L. 413, 445-47 (2011) ("New York courts have taken a relatively conservative approach to welfare rights, and are highly deferential to the legislature in this area.").

26. Usman, *supra* note 16, at 1508-11.

27. Of note, six state constitutions articulate environmental rights, Sylvia Ewald, Note, *State Court Adjudication of Environmental Rights: Lessons from the Adjudication of the Right to Education and the Right to Welfare*, 36 COLUM. J. ENVTL. L. 413, 420 (2011), although many more address environmental matters in some fashion (including through the identification of government trust duties). Of the state constitutions articulating environmental rights, two environmental rights provisions are not self-executing as they textually require legislative action (Massachusetts, Rhode Island). *Id.* at 423. Another state environmental right provision (Illinois) is explicitly self-executing, but has been interpreted primarily as a means to demonstrate standing in claims based upon other state laws. *Id.* at 426-29. *See also* People v. Pollution Control Bd., 129 Ill. App. 3d 958, 964, 473 N.E.2d 452, 456 (1984) (holding that the intent of the Illinois constitutional environmental rights provision was merely "to remove the special injury requirement for standing" and thus functions only "to ensure standing, not to create substantive causes of action.").

Hawai'i

Article XI, Section 1 of the Hawai'i Constitution provides:

For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawai'i's natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State. All public natural resources are held in trust by the State for the benefit of the people.²⁸

Article XI, Section 9 of the Hawai'i Constitution provides:

Each person has the right to a clean and healthful environment, as defined by laws relating to environmental quality, including control of pollution and conservation, protection and enhancement of natural resources. Any person may enforce this right against any party, public or private, through appropriate legal proceedings, subject to reasonable limitations and regulation as provided by law.²⁹

The trust duty set forth in Article XI, Section 1 coexists with and is defined with reference to common law public trust principles. While it is difficult to discern precisely what the constitutional expression of the trust duty adds to underlying common law public trust doctrine, Hawai'ian courts have been clear that the constitutional expression strengthens the trust duty, observing that through the "constitutional affirmation of a trust duty the people of this state have elevated the public trust doctrine to the level of a constitutional mandate."³⁰ Courts

28. HRS Const. Art. XI, § 1.

29. HRS Const. Art. XI, § 9.

30. *In re Water Use Permit Applications*, 94 Haw. 97, 131, 9 P.3d 409,

invoking Section 1 have further suggested that judicial review is more searching when public trust duties are involved, noting that “while agency decisions affecting public trust resources carry a presumption of validity,” ultimately “[a]s with other state constitutional guarantees, the ultimate authority to interpret and defend the public trust in Hawai‘i rests with the courts of this state.”³¹ In the context of water resources (most closely aligned with traditional, common law understandings of the public trust doctrine), Hawai‘ian courts have actively defined³² and policed the scope of public trust duties, making clear that the public trust doctrine has “independent vitality,” to “inform the [State Water] Code’s interpretation, define its permissible ‘outer limits,’ and justify its existence.”³³

While the Section 1 public trust duty has been developed primarily with regard to water resources, it has also been held to encompass lands in the public domain.³⁴ In *Mauna Kea*, the Supreme Court of Hawai‘i held that the Board of Land and Natural Resources had violated, *inter alia*, Article XI, Section 1 of the Hawai‘i Constitution as a matter of law by deciding the merits of an application for a permit for a proposed astronomy observatory on Mauna Kea before conducting a contested case hearing in which the public trust doctrine, and the obligations it imposes on the State, could have been duly considered.³⁵ The court held that Mauna Kea was within the public trust and that “an agency of the State must perform its statutory function in a manner that fulfills the State’s affirmative constitutional obligations,” namely “fashion procedures that are commensurate to the constitutional stature of the rights involved.”³⁶ Notably, however, the court’s decision did not rest

443 (2000).

31. *In re Water Use Permit Applications*, 94 Haw. 97, 143, 9 P.3d 409, 455 (2000).

32. *In re Waiola O Molokai, Inc.*, 103 Haw. 401, 429, 83 P.3d 664, 692 (2004) (exploring the scope of public trust duties relating to water resources).

33. *In re Water Use Permit Applications*, 94 Haw. 97, 133, 9 P.3d 409, 445 (2000).

34. *Morimoto v. Bd. of Land & Natural Res.*, 113 P.3d 172 (Haw. 2005) (suggesting in dicta that the public trust could apply to biodiversity).

35. *Mauna Kea Anaina Hou v. Bd. of Land & Nat. Res.*, 136 Haw. 376, 409, 363 P.3d 224, 257 (2015).

36. *Mauna Kea Anaina Hou v. Bd. of Land & Nat. Res.*, 136 Haw. 376, 414, 363 P.3d 224, 262 (2015).

solely on the Section 1 trust duty; the court also held that issuance of the permit before a contested case hearing violated the due process rights of parties with standing to assert Native Hawaiian traditional and customary rights.

Hawai'i's constitution also sets forth the right to a clean and healthful environment in Article XI, Section 9. This constitutional right was long referenced by Hawaiian courts primarily to support liberalized standing. However, in *Ala Loop Homeowners*, the Hawaii Supreme Court held that article XI, Section 9 is self-executing and provides an implied private right of action to enforce State laws relating to environmental quality.³⁷ The court thus held that a neighborhood association had a private right of action to seek to enforce land use statutes against a charter school. In its decision, the court noted the intent of the framers at the 1978 Constitutional Convention to increase public involvement:

Your Committee believes that this important right deserves enforcement and has removed the standing to sue barriers, which often delay or frustrate resolutions on the merits of actions or proposals, and provides that individuals may directly sue public and private violators of statutes, ordinances and administrative rules relating to environmental quality. The proposal adds no new duties but does add potential enforcers.³⁸

Notably, although *Ala Loop Homeowners* would seem to invite suits to enforce state environmental laws, few environmental decisions have relied on *Ala Loop Homeowners* in the intervening seven years. Moreover, the court also signaled deference to the legislature in defining the scope of the constitutional environmental right, observing that Article XI, Section 9 “recognizes a substantive right ‘to a clean and

37. *Cty. of Hawaii v. Ala Loop Homeowners*, 123 Haw. 391, 417, 235 P.3d 1103, 1129, 1134 (2010).

38. *Cty. of Hawaii v. Ala Loop Homeowners*, 123 Haw. 391, 414, 235 P.3d 1103, 1125-26 (2010) (citing to Stand. Comm. Rep. No. 77, in 1 Proceedings of the Constitutional Convention of 1978, at 689–690 (1980)).

healthful environment,’ with the content of that right to be established not by judicial decisions but rather ‘as defined by laws relating to environmental quality.’”³⁹

In Hawai‘i, then, the constitutional assertion of a public trust duty appears to have resulted in significant judicial oversight, particularly with regard to the development of policy governing water resources (a subject matter with respect to which there is often some judicial involvement even absent a constitutional provision as a result of the “amphibious” scope of the common law public trust doctrine). Judicial oversight is both substantive (requiring, for example, that intergenerational interests be considered) and procedural (compelling procedures sufficient to assure consideration of public trust values). Judicial intervention does not, however, approach the level of judicial management sometimes seen in the context of other state constitutional positive rights, such as education or assistance to the needy. The judiciary appears to be adding its voice to a dialogue with agencies and the legislature about appropriate considerations and processes in environmental policy—a level of judicial involvement with which even many wary of undue judicial aggrandizement are likely comfortable. The constitutional enshrinement of an environmental right, while interpreted to be self-executing and to provide a right of action to enforce environmental laws, has not yet resulted in notable judicial oversight of environmental policy.

Montana

Montana’s constitution provides in relevant part:

All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment⁴⁰

* * *

39. *Cty. of Hawaii v. Ala Loop Homeowners*, 123 Haw. 391, 409, 235 P.3d 1103, 1121 (2010) (citing to *Stand. Comm. Rep. No. 77*, in 1 *Proceedings of the Constitutional Convention of Hawai‘i of 1978*, at 689).

40. *Mont. Const. art. II, § 3*.

- (1) The state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations.
- (2) The legislature shall provide for the administration and enforcement of this duty.
- (3) The legislature shall provide adequate remedies for the protection of the environmental life support system from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources.⁴¹

For many years, the Montana Supreme Court referenced the constitutional environmental provisions to uphold State action, but declined to rely on those provisions to “challenge actions harming the environment.”⁴² However, in 1999, the Montana Supreme Court held that an amendment to Montana’s Water Quality Act which excluded certain activities from review under the Act’s nondegradation policy, thereby allowing the discharge of arsenic-containing water without environmental review, implicated the right to a clean and healthful environment, and could survive only after the application of strict scrutiny on remand.⁴³ The Montana Supreme Court found that the right to a “clean and healthful” environment is a fundamental right and that “any statute or rule which implicates that right must be strictly scrutinized and can only survive strict scrutiny if the State establishes a compelling state interest and that its action is closely tailored to effectuate that interest and is the least onerous path that can be taken to achieve the State’s objective.”⁴⁴ Two years later, the Montana Supreme Court applied this holding to private actions, relying on the constitutional provisions to invalidate a private contractual provision that would have required drilling a well through a contaminated aquifer, potentially spreading the contamination.⁴⁵

41. Mont. Const. art. IX, § 1.

42. Thompson, *Constitutionalizing the Environment*, *supra* note 17, at 167.

43. *MEIC v. DEQ*, 296 Mont. 207, 231 (1999).

44. *MEID v. DEQ*, 296 Mont. 207, 225 (1999).

45. *Cape-France Enterprises v. Estate of Peed*, 305 Mont. 513 (2001).

By invoking strict scrutiny and extending the reach of the constitutional provisions to private actions, these cases would appear to have significant potential to increase judicial policymaking in the environmental realm. The cases, however, have not prompted a flood of litigation or a radical redistribution of policymaking to the judiciary. Few discovered cases have successfully relied on this precedent and, while it is too early to know how case law will evolve, to date the most enduring principle to have emerged is that legislative exemptions to environmental statutes will be subject to close scrutiny. Indeed, the Montana Supreme Court “has begun to demarcate the limits of the MEIC holding” in a manner that “suggests that the court will be deferential to state and local governments” and “will continue to give deference to the interpretations of administrative agencies.”⁴⁶ In 2012, for example, the Montana Supreme Court limited the scope of its holding that the environmental right is fundamental, subjecting a statute deferring environmental review for a coal strip mining operation until the permitting stage to only rational basis review. The Court’s reasoning was that

the leases themselves do not allow for any degradation of the environment, conferring only the exclusive right to apply for State permits, and because they specifically require full environmental review and full compliance with applicable State environmental laws, the act of issuing the leases did not impact or implicate the right to a clean and healthful environment in Article II, Section 3 of the Montana Constitution.⁴⁷

Nonetheless, in the words of one scholar, “[t]he Montana

46. Ewald, Note, *supra* note 27, at 432-33. See generally John D. Echeverria, *State Judicial Elections and Environmental Law: Case Studies of Montana, North Carolina, Washington, and Wisconsin*, 16 VT. J. ENVTL. L. 363, 376 (2015) (observing that “in the last several years, environmental advocates have suffered several important losses in the Supreme Court, suggesting a shift in attitudes on the Court toward environmental cases.”).

47. *N. Plains Res. Council, Inc. v. Montana Bd. of Land Comm’rs*, 2012 MT 234, ¶ 19, 366 Mont. 399, 406, 288 P.3d 169, 174 (2012).

court's powerful interpretation of the constitutional right to a clean and healthful environment . . . affects agency decisions, thwarts legislative efforts to give polluters and developers statutory breaks from environmental laws, and infuses public debate on environmental issues."⁴⁸

Pennsylvania

Article I, Section 27 of Pennsylvania's constitution, the Environmental Rights Amendment, provides:

The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.⁴⁹

Section 27 is located in Article I, the Pennsylvania's Declaration of Rights, which also provides for religious freedom, freedom of speech, and protection from unreasonable search and seizure.⁵⁰ Section 25 declares that rights set forth in Article I are "excepted out of the general powers of government and shall forever remain inviolate."⁵¹

Early Pennsylvania cases interpreted Section 27 as a grant of power to the government (as opposed to a limitation upon it) and required only that government decisions challenged as violating Section 27 satisfy a three-part balancing test largely divorced from the Section's text (the Payne test).⁵² Courts also

48. Jack R. Tuholske, U.S. State Constitutions and Environmental Protection: Diamonds in the Rough, 21 *Widener L. Rev.* 239, 245 (2015).

49. Pa. Const. art. I, § 27.

50. Pa. Const. art. I, §§ 3, 7, 8.

51. Pa. Const. art. I, § 25.

52. *Commonwealth v. Nat'l Gettysburg Battlefield Tower, Inc.*, 311 A.2d 588, 594 (Pa. 1973); *Payne v. Kassab*, 312 A.2d 86, 97 (Pa. Commw. Ct. 1973), *aff'd*, 361 A.2d 263 (Pa. 1976). *See also* Dernbach, *The Potential Meanings of a Constitutional Public Trust*, 45 *ENVTL. L.* 463, 473-78 (2015) (summarizing pre-

came to understand the section to not be self-executing.⁵³ So construed, Section 27 had little practical effect.

In 2013, in *Robinson Township*, a plurality of the Pennsylvania Supreme Court invoked Section 27, in particular its trust provisions, to strike down as unconstitutional a State statute (Act 13) that amended the 1969 Oil and Gas Act to impose a regulatory structure for unconventional gas development, including *inter alia*, by overriding local ordinances.⁵⁴ In deciding that Act 13 violated the Section 27 (primarily its trust clause), the plurality clarified that because Section 27 appears in Article I it imposes a limit on government power and that the right is self-executing.⁵⁵

In *Pennsylvania Environmental Defense Foundation v. Pennsylvania*, the Pennsylvania Supreme Court, this time in a majority decision, expanded on *Robinson Township*, striking down legislation that allowed royalties from oil and gas drilling to be used for non-environmental (general) purposes with consideration of trust duties.⁵⁶ *Pennsylvania Environmental Defense Foundation* built on *Robinsons Township* in several important ways, including by expressly overruling the deferential Payne test for assessing violations of the Environmental Rights Amendment and holding that private trust law principles are to be used to interpret the scope of the Commonwealth's trust duty. The majority invoked private trust law and reasoned that the proceeds from the sale of trust assets become part of the corpus of the trust and must be managed consistent with trust purposes; it thus held that the Commonwealth had violated its fiduciary duties in statutes directing the use of trust proceeds for general purposes without consideration of trust purposes.

It is too early to fully appreciate whether and how a reinvigorated Section 27 might shape Pennsylvania law. One expert scholar (writing before *Pennsylvania Environmental*

Robinson Township Pennsylvania cases interpreting Section 27).

53. Dernbach, *The Potential Meanings of a Constitutional Public Trust*, *supra* note 52, at 475 (describing the evolution of Pennsylvania caselaw regarding whether Section 27 is self-executing).

54. *Robinson Twp. v. Commonwealth*, 83 A.3d 901 (Pa. 2013).

55. *Id.* at 948, 964-65 & n. 52.

56. 161 A.3d 911 (June 20, 2017).

Defense Foundation was decided) concluded that most post-*Robinson Township* cases “are more about filling gaps and repairing inadequacies in the existing environmental regulatory system than they are about overturning that system and replacing it with something else. While public constitutional rights undergird the entire regulatory system, they are likely to be applied directly in only a relatively small percentage of cases.”⁵⁷

While at first blush *Pennsylvania Environmental Defense Foundation* may seem like use of a constitutionalized environmental right for precisely the type of judicial aggrandizement feared by many, two points bear noting that should temper this concern. First, both occasions on which the Pennsylvania Supreme Court has struck down legislation using the Environmental Rights Amendment have involved a factual situation (rapid, economically-motivated exploitation of a natural resource) that closely mirrors the concerns that animated adoption of the Environmental Rights Amendment (such as the environmental harms from timbering and coal mining).⁵⁸ Faced with the rapid scale up of fracking to exploit Pennsylvania’s natural gas resources, the Environmental Rights Amendment can thus be viewed as functioning as a judicial backstop, providing the Pennsylvania Supreme Court with a means to strike down State laws that in its view went too far in favoring the short-term economic needs of the present generation over conservation of the underlying natural resource for current and future Pennsylvanians. Additionally, *Pennsylvania Environmental Defense Foundation* turns on the majority’s decision to invoke and apply technical aspects of private trust law.

We are doubtful about the propriety of applying technical aspects of private trust law to a constitutionally-expressed environmental public trust right and recommend that the drafting and legislative history accompanying the adoption of an environmental right in New York should indicate that it is

57. Dernbach, *The Potential Meanings of a Constitutional Public Trust*, *supra* note 52, at 514.

58. *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 960-63 (Pa. 2013); *see also Penn. Env’tl. Def. Found. v. Commonwealth*, 161 A.3d 911 (June 20, 2017).

grounded in the traditional public trust doctrine.⁵⁹

Summary and conclusions

The more specific and detailed the constitutional right, the more readily we can rely upon strong and consistent judicial intervention in its defense without much risk of judicial aggrandizement.⁶⁰ The Forever Wild provision in the New York State Constitution presently functions in this fashion, with courts regularly enforcing its clear constitutional command.⁶¹ However, the defining environmental problems and goals of our generation and the next—including most notably climate change and sustainability—are so wide-ranging and complex in their causes, manifestation, and needed policy response (most of which are difficult to anticipate) that they cannot be captured in a neatly defined constitutional command the enforcement of which obviates the need for judicial interpretation and (possibly) more engaged judicial involvement. These issues are nonetheless of central—constitutional—import.

Scholars identify a number of potential benefits of constitutionalizing public rights. Because constitutional rights “trump inconsistent statutes and regulations” they “create a legal bulwark against incursion by the legislative or executive branches.”⁶² From a federalism perspective, some have

59. *Penn. Evtl. Def. Found. v. Commonwealth*, 161 A.3d 911, 943 (June 20, 2017) (Baer, J., dissenting) (arguing that the Environmental Rights Amendment should be interpreted using the principles of the public trust doctrine as opposed to “precepts of private trust law”).

60. Usman, *supra* note 16, at 1516-17 (describing such provisions as “highly specific detailed affirmative rights provisions” and noting that “[r]igorous [judicial] enforcement of highly specific affirmative rights provisions is warranted.”).

61. As stated *supra*, we do not recommend tinkering with the language of Article XIV. In light of the large body of case law interpreting the Forever Wild provision (and the extent to which it is indexed to the precise language of that provision), the great benefit it provides, and the potential for efforts to weaken to same (or simply cause inadvertent diminution), should a Constitutional Convention occur, we would recommend that delegates not touch or amend Article XIV in any respect.

62. John C. Dernbach, *The Potential Meanings of a Constitutional Public Trust*, *supra* note 52, at 471-72.

theorized that “the identification and enforcement of state constitutional rights can serve as a mechanism by which state governments can resist and, to a degree, counteract abusive exercises of national power.”⁶³ Constitutionalized public rights are also more permanent because it is harder to amend a constitution than to alter statutes or regulations.⁶⁴ And some posit that “because of their enduring nature and their higher legal status, public rights of the kind embodied in a bill of rights tend to more easily become part of the broader public discourse and public values over the long term than provisions in statutes or regulations,” thereby “foster[ing] the values they embody.”⁶⁵

While conceding that a robust, self-executing environmental right (and/or trust duty) carries with it the possibility of an expansion of judicial authority, experience gleaned from three other States and New York’s application of other affirmative constitutional rights suggests that there is little risk, in particular in New York, that this will unduly displace legislative prerogative. In the words of one scholar, “courts have seldom invoked substantive environmental provisions to constrain or dictate state policy except in ‘transition periods,’ when some or all of the political branches of state government have lagged behind public opinion on an important issue.”⁶⁶ And even where, as in Hawai’i, courts have interpreted constitutional environmental rights and duties in a more expansive fashion, the result has been judicial insistence upon consideration of and respect for core, constitutional environmental values, such as a recognition of the interests of future generations.

(2) Orientation and wording of a constitutional environmental right

There is great variation in the wording of constitutional

63. James A. Gardner, *State Constitutional Rights as Resistance to National Power: Toward a Functional Theory of State Constitutions*, 91 GEO. L. J. 1003, 1004 (2003).

64. Dernbach, *The Potential Meanings of a Constitutional Public Trust*, *supra* note 52, at 471-72.

65. *Id.*

66. Thompson, *Environmental Policy and State Constitutions*, *supra* note 15, at 865.

environmental rights provisions, with constitutional texts ranging from relatively bare assertions of a right to a healthy environment to detailed descriptions of the content of the environmental right.⁶⁷ Having reviewed many articulations of constitutional environmental rights, examined how they have functioned (in particular in state constitutions), and considered the specific needs of New York, the Task Force believes that the constitutional text that establishes a constitutional right to a healthy environment should explain that a healthy environment requires the conservation and protection of our natural resources, clarify that natural resources necessary to a healthy environment belong to the people in common, and make clear that the State has the duty to protect these natural resources. The constitutional text should provide guidance for understanding the meaning of the right to a healthy environment by (a) describing it with reference to ecosystems and the services that they provide; (b) making clear that the right is held by and associated duties owed to future generations; and (c) explaining that the natural resources that support a healthy environment constitute a public trust. It should also clarify the government's duty to conserve and protect the public natural resources held in trust for the public and provide a mechanism for New Yorkers (citizens, through application to the judiciary) to require that the government meet its duty.

Specifically, the Task Force recommends that a constitutional environmental right for New York should:

- define the right to a healthy environment to include *inter alia* resilient and diverse ecosystems;
- clarify that the public natural resources of New York

67. *E.g.*, CONSTITUTION OF THE REPUBLIC OF ECUADOR, Oct. 20, 2008, art. 413 (“The State shall promote energy efficiency, the development and use of environmentally clean and healthy practices and technologies, as well as diversified and low-impact renewable sources of energy that do not jeopardize food sovereignty, the ecological balance of the ecosystems or the right to water.”); art. 414 (“The State shall adopt adequate and cross-cutting measures for the mitigation of climate change, by limiting greenhouse gas emissions, deforestation, and air pollution; it shall take measures for the conservation of the forests and vegetation; and it shall protect the population at risk.”), *available* *from*
<http://pdba.georgetown.edu/Constitutions/Ecuador/english08.html>.

furnish the fundamentals of a healthy environment and are held in trust by the State for the benefit of the people, including future generations;

- assert the State's duty to conserve and protect New York's public natural resources to safeguard the people's right to a healthy environment; and
- provide for any person to enforce the right against the State and its subdivisions through appropriate legal proceedings.

Together, these principles, which are explained in further detail below, can be used to develop a constitutional environmental right that provides meaningful protection to citizens and direction to courts and legislators as New York navigates modern environmental challenges. A right incorporating these principles would invite a judicial oversight role and provide the judiciary with sufficient guidance to enable courts to meaningfully engage while defining and limiting the scope of judicial involvement so as to prevent undue encroachment on the legislature's policymaking role.

Ecosystem frame

Our recommendation to index a healthy environment to resilient and diverse ecosystems reflects a recognition of our embeddedness in and reliance on and impact upon natural systems. This recognition will be important as we seek to achieve sustainability and prepare for and navigate the impacts of climate change. It also reflects an understanding of the relationship between nature and man that accommodates both anthropocentric values (the services that ecosystems provide that advance human well-being) and inherent existence values, including the value of diverse species.

Since the 1970s "growth vs. conservation" has been a recurring dilemma. The goal should be to balance the market's appetite for "resources" within appropriate parameters. We can see that the law we have developed is not preventing the disintegration of many ecosystems. Climate change and low-level chemical exposures are two examples. There is a disjunction between our legal expectations and ecological

reality. The fate of our essential ecological infrastructure is uncertain and the legal response not yet adequate.⁶⁸

Meanwhile, ecology and its constituent sciences and tools are developing rapidly. One suggestion for the law that has emerged from ecological studies is that we supplement use of the term “environmental” with the more concrete term(s), “ecological” or “ecosystem.” While the “environment” is abstract, ecosystems are physical, local, and temporal. An ecosystem can be mapped and studied. Ecological terminology, frameworks and principles can assist the legal system in protecting the actual environment.⁶⁹

Professionals in ecology and related disciplines are considering how best to manage and preserve ecosystems so that their functional integrity is supported and maintained. The literature on ecosystem services, ecological integrity and sustainability presents new possibilities and reveals the sources of risks we are recognizing now. An important step to addressing these risks should be to acknowledge (or strengthen) the connection between ecosystems and those who live in them, to recognize a grounded legal basis for the inhabitants of ecosystems to participate in its protection.

Public trust

We recommend indexing the constitutional right to a healthy environment to a government trust obligation. The concept of environmental public trust is historical and familiar, but also dynamic and flexible.⁷⁰ In New York, the common law

68. Johan Rockström & Mattias Klum, BIG WORLD, SMALL PLANET: ABUNDANCE WITHIN PLANETARY BOUNDARIES 64-77 (2015) (identifying key planetary boundaries).

69. The term “ecosystem” refers to the manner or process of how nature constitutes itself, creating the infrastructure we rely upon. The Millennium Ecosystem Assessment defined ecosystem services broadly as “the benefits people obtain from ecosystems. These include provisioning services such as food, water, timber, and fiber; regulating services that affect climate, floods, disease, wastes, and water quality; cultural services that provide recreational, aesthetic, and spiritual benefits; and supporting services such as soil formation, photosynthesis, and nutrient cycling.” MILLENNIUM ECOSYSTEM ASSESSMENT, ECOSYSTEMS AND HUMAN WELL-BEING: A FRAMEWORK FOR ASSESSMENT 49, 54-55 (2003).

70. See Mary Christina Wood, NATURE’S TRUST – ENVIRONMENTAL LAW

public trust doctrine protects uses of navigable waters and has been extended to safeguard municipal and State parks from being alienated or converted to nonpublic use, to preserve forests, and to protect historic sites.⁷¹ The concept of treating environmental resources as a public trust is likewise reflected in New York statutes.⁷² Grounding a constitutional environmental right in traditional public trust concepts thus provides a grounding for judicial interpretation. We fear that judicial reluctance to elaborate on a bare assertion of a right to a healthy environment would result in such a provision laying fallow. Public trust principles can, moreover, guide government response to emerging environmental challenges, like climate change, that require grappling with aggregated harms, future impacts and questions about long term sustainability. The public trust doctrine articulates the existence of some outer limits on private use of natural resources and it reaffirms the democratic goal of broad access to meet the people's common and long term needs and opportunities.

One concern expressed about the creation of a constitutional environmental right is its potential to impact private property rights. We would recommend making an environmental right self-executing only as against the State with respect to satisfaction of its public trust duty. As such, it could not be relied upon to bring suit directly against the owner of private property. Of course, it is possible that in fulfilling its public trust duty to conserve and protect public natural resources to protect the constitutional environmental right the government may adopt laws and regulations that restrict private activity. It is

FOR A NEW ECOLOGICAL AGE (Cambridge 2014).

71. Friends of Van Cortlandt Park v. City of N.Y., 95 N.Y.2d 623 (2001) (stating that “our courts have time and again reaffirmed the principle that parkland is impressed with a public trust, requiring legislative approval before it can be alienated. . .for non-park purposes.”); Town of North Elba v. Grimditch, 98 A.D.2d 183, 188 (3d Dep’t 2012).

72. See N.Y. Parks Rec. & Hist Preserve Law § 3.0l (protecting State owned parkland throughout the State); N.Y. Parks Rec & Hist Preserve Law § 19.05 (safeguarding historic sites as parks to be protected); N.Y. Evtl. Conservation Law, §15-1601 (McKinney 2011) (declaring that “all the waters of the state are valuable public natural resources held in public trust. . .and this state has a duty as trustee to manage its waters effectively for the use and enjoyment of present and future residents and for the protection of the environment.”).

important to note, however, that these actions can just as well be expected to *enhance* private property rights by promoting environmental conditions that improve the enjoyment and value of property.

Concerns might be raised that constitutional affirmation that public natural resources are held as a public trust might prevent private property owners from obtaining just compensation through a regulatory takings claim. A vested property right is a precondition for a regulatory takings claim and for purposes of the Takings Clause, property is defined with respect to “the restrictions that background principles of the [s]tate’s law of property and nuisance already place upon land ownership.”⁷³ Thus, a property owner cannot obtain just compensation where background principles of state property or nuisance law (including, possibly, the public trust doctrine) already limit the scope of the property right in the manner of the challenged regulation.⁷⁴ Notably, “[g]overnment defendants have successfully raised the public trust doctrine as a defense in a number of takings cases across the country, particularly those involving submerged lands,” although whether and under what circumstances the public trust doctrine qualifies as a background principle that will defeat a takings claim remains unsettled.⁷⁵

We think it unlikely that constitutional assertion that public natural resources constitute a public trust will significantly impact private property owners’ opportunities to obtain just compensation. It is unclear whether a constitutional assertion of public trust would be deemed a relevant background principle. Moreover, in many cases, the public trust will overlap with other recognized background principles that limit the use of property, such as the exercise of police powers or the prerogative to intervene to prevent private property from being used in a manner that unreasonably interferes with the rights of others, which already forestall takings claims. And, as recently reiterated by the U.S. Supreme Court in *Murr v. Wisconsin*, whether a regulatory taking has occurred typically

73. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029 (1992).

74. *Id.*

75. John D. Echeverria, *The Public Trust Doctrine As A Background Principles Defense in Takings Litigation*, 45 U.C. DAVIS L. REV. 931, 934 (2012).

depends upon the particular facts.⁷⁶ We thus do not believe that there is significant risk that articulation of a constitutional public trust and associated duty relating to public natural resources would unduly affect the rights of private property owners.

Enforcement

To be effective, the environmental right should be self-executing by providing for any person to enforce the right against the State and its subdivisions through appropriate legal proceedings. As discussed at length above, absent such an enforcement mechanism, the right may lay fallow and provide little value. Additionally, allowing for citizen enforcement should not occasion undue judicial aggrandizement. One important question raised, however, in structuring a provision to allow for enforcement of the right by citizens against the State is which entities are subject to the duties and responsibilities created by the right and subject to suit. In short, how should the State and its subdivisions be defined and understood?⁷⁷

It would be inadequate to limit suits to actions directly against the New York State Legislature. Actions and decisions with significant impacts on the State's environment and natural resources are commonly undertaken by a multitude of government actors. Having looked to New York statutes which address obligations of government for guidance,⁷⁸ the Task Force

76. *Murr v. Wisconsin*, 137 S.Ct. 1933, (“A central dynamic of the Court’s regulatory takings jurisprudence, then, is its flexibility. . . . In adjudicating regulatory takings cases a proper balancing of these principles requires a careful inquiry informed by the specifics of the case.”).

77. Other states’ environmental right provisions vary as to who is covered and who can initiate enforcement. In Pennsylvania, for example, the constitutional text places the duty on the “Commonwealth,” which courts have interpreted to include “all levels of government in the Commonwealth.” *Franklin Twp. v. Com., Dep’t of Env’tl. Res.*, 500 Pa. 1, 8–9, 452 A.2d 718, 722 (1982). In Hawai’i, public natural resources are held in trust by “the State,” the “State and its political subdivisions shall conserve and protect Hawai’i’s natural beauty and all natural resources,” and the right to a clean and healthful environment is enforceable by “[a]ny person . . . against any party, public or private. . .” HRS Const. Art. XI, §§ 1, 9.

78. Specifically, the State Environmental Quality Review Act (SEQRA) the Freedom of Information Law (FOIL) as well as the State Administrative Procedures Act (SAPA) and some provisions of the criminal laws all in some

recommends that the right extend to and be enforceable against the sovereign State of New York, defined as the State, its counties, and chartered municipalities including with the broadest interpretation possible all administrative and legislative bodies, all municipal instrumentalities including without limitation public authorities chartered by the State together with individuals, boards, cooperatives or organization empowered with any authority through the sovereign power of the State.

Conclusion

For the reasons described above, the Task Force recommends that (I) no changes be made to Article XIV; and (II) Article I be amended to set forth an environmental right. Article XIV provides a great value to the citizens of New York and should be maintained in its integrity. Article XIV is not, however, adequate in scope to meet today's pressing and unprecedented environmental challenges. Indeed, the ecosystems within the Forest Preserve cannot be protected in the long term without decisive action to respond to climate change.

We also, therefore, recommend that the New York State Constitution clearly articulate and provide a means for citizens to insist upon respect for core environmental principles through the addition of an environmental right. In some respects, these principles are so fundamental that they can be understood to be a condition of sovereignty, part of our social compact. All too often, however, the continued existence of resilient ecosystems capable of supporting and enriching life is assumed and the threats to the same are invisible in their proliferation and diffusion. As we confront existential questions of sustainability and the human impact on life systems, there is value in stating a right understood to exist—that New Yorkers have a right to an environment capable of supporting and sustaining life—and

way mandate that government function in service to citizens. As such the statutes were crafted to encompass various subsets of government actors. None of the statutes is specifically broad or focused enough to provide language that can be co-opted in whole for use in an environmental right but the statutes' definitions are instructive.

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providing a means for citizens and the judiciary to protect it.