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ANALYSIS

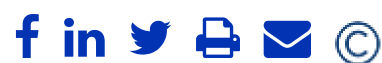
From Big Sky to the Big Apple: How Environmental Constitutionalism Could Shape New York Dockets

The challenges of guaranteeing the right to a clean and healthful environment will create many legal pariahs in trial courts and intermediate appellate courts, and in due time, New York's Court of Appeals will be confronted with the fresh face of this movement.

November 10, 2023 at 10:00 AM

Litigation

By Michael V. Caruso | November 10, 2023 at 10:00 AM



Hailed as the first major climate trial victory in the United States, the Montana First Judicial District Court in *Held v. State of Montana,* 2023 WL 5229257 (Mont. Dist., 2023), declared that Montana's energy policy unconstitutionally promotes the development and utilization of fossil fuels, and deemed unconstitutional the Montana Environmental Policy Act (MEPA) prohibiting the state from considering the impacts of climate change when making certain permitting decisions thereby preventing courts and agencies from considering a project's climate impacts.

The court found a clear causal link between authorizing the projects under agency review, their direct contributions to global greenhouse gas (GHG) emissions, and the harm to children already living with these impacts "because of their unique vulnerabilities, their stages of development as youth, and their average longevity on the on the planet in the future" creating "lifelong hardships resulting from climate change."

The Montana Attorney General's Office criticized the decision as "a week-long taxpayer publicity stunt" and quipped that "Montanans can't be blamed for changing the climate." Nonetheless, *Held* has broad standing and evidentiary implications for litigants in states like New York now benefiting from constitutionally ingrained environmental rights.

In *Held*, a group of 16 youth-plaintiffs challenged the constitutionality of fossil fuel-based provisions of MEPA preventing the state from considering the impacts of GHG emissions or climate change during environmental review, and the state's aggregate acts to implement and perpetuate a fossil fuel-based energy system.

At trial, the court heard live testimony from 27 witnesses. The plaintiffs called 23 and the state defendants called 4. In total, the court admitted 168 of the plaintiffs' trial exhibits and 4 from the defendants, creating an extensive and asymmetric scientific trial record.

After trial, the court found the plaintiffs had the requisite standing and had proven a fairly traceable connection between the MEPA limitation at issue and the state's allowance of resulting fossil fuel GHG emissions, which contribute to and exacerbate the plaintiffs' injuries.

The court's standing analysis is rooted in decades old constitutional protections afforded to Montana's children and future generations (Mont. Const. Art. II, Sec. 15) and the disproportionate harm to them posed by fossil fuel pollution and climate impacts. It classified this harm as "concrete, particularized and distinguishable from the public generally" in

citing evidence including acute and chronic impacts.

Addressing causation, the court in *Held* found a “fairly traceable connection between the state’s disregard of GHG emissions and climate change” because of MEPA’s statutory limitations on agency review of GHG emissions over which the state has control.

The court considered evidence and found that every additional ton of GHG emissions exacerbates the plaintiffs’ injuries and risks cementing irreversible climate injuries, and that the plaintiffs’ injuries will grow increasingly severe and irreversible without science-based actions to address climate change.

As to redressability, the court further discussed that, “Defendants can alleviate the harmful environmental effects of Montana’s fossil fuel activities through the lawful exercise of their authority if they are allowed to consider GHG emissions and climate change during MEPA review.” This, in turn, will enable the defendants “to conform their decision-making to the best science and their constitutional duties and constraints, and give them the necessary information to deny permits for fossil fuel activities when inconsistent with protecting plaintiffs’ constitutional rights.”

In other words, agencies can no longer turn a blind eye to GHG emissions or downplay their scientific foundation during agency review. The court found that because “Montana’s land contains a significant quantity of fossil fuels yet to be extracted,” it is possible to avoid “future degradation to Montana’s environment and natural resources and injuries to these plaintiffs” in relation to MEPA and GHG regulation.

Originally adopted in the spring of 1971 and modeled after the National Environmental Policy Act (NEPA), MEPA establishes and declares Montana’s environmental policy. It specifically acknowledges human activity’s potential for a profound impact on the environment and requires the state government to coordinate plans, functions, and resources to achieve its environmental, economic and social goals.

SEQRA, New York’s functional equivalent, advances similar policy objectives and frames the environmental impact assessment and review processes. Although *Held* has no New York companion cases yet, voters have set the stage for its emergence.

In 2021, New York voters answered the call to action for a constitutional “green amendment” to its bill of rights. Article I, Section 19 entitled “Environmental Rights” provides that “[e]ach person shall have a right to clean air and water, and a healthful environment.” These are distinctly individual rights, and New York courts are beginning to scrutinize them using the heavily litigated lens of standing.

For example, in *Fresh Air for the Eastside v. State*, 2022 N.Y. Slip Op. 34429 (Sup. Ct., Monroe Cty. 2022) (*FAFE*), the plaintiffs sued to enjoin “persistent, noxious and offensive odors of garbage and landfill gas and excess fugitive emissions of noxious chemicals and hazardous substances” being emitted into the surrounding community from waste in the High Acres Landfill, the second largest in New York state and having an estimated remaining life of nearly 29 years.

The court dismissed claims against Waste Management, the landfill’s operator, concluding that the Green Amendment’s plain text did not authorize claims against private entities (versus individuals). It also dismissed claims against New York City, which the court found to be “merely a customer” of the landfill.

The court, however, has allowed claims against NYSDEC and the state to proceed noting that “there is no ambiguity in the plain language of the Green Amendment,” allowing the court to compel the state to comply with the Constitution and provide clean air and a healthful environment to the FAFE plaintiffs. Despite this clear Constitutional affirmation, Judge John J. Ark emphasized the onus ultimately lies with the local elected officials, who are responsible for issuing permits to the landfill to accept New York City’s garbage, even alluding to a nonjudicial workaround: “no permit, then no landfill, then no pollution, then no more violations of the Green Amendment.”

In *Seneca Lake Guardian v. NYSDEC*, 2023 N.Y. Slip Op. 31812 (Sup. Ct., Thompkins Cty. 2023), relying on the 2021 Green Amendment, the plaintiffs sought to annul NYSDEC-issued permits for a private landfill alleging its leachate ("garbage juice") discharging per-and poly-fluoroalkyl substances (PFAS), which are known carcinogens, into nearby Cayuga Lake.

The court dismissed the plaintiffs' claims for lack of standing and because (i) no evidence showed the presence of PFAS in the facility's operational wastewater facility, and (ii) the mere use of Cayuga Lake, a public waterbody, "as a source of potable water and for recreational purposes will be impaired 'are merely generalized claims of harm no different in kind or degree from the public at large, which are insufficient for standing purposes.'"

In *Marte v. City of New York*, 2023 NY Slip Op 31198(U) (Sup. Ct., N.Y. Cty. 2022), the plaintiffs challenged a development project for three skyscrapers in Manhattan's Lower East Side next to "public housing buildings with substandard conditions and existing structural problems." The plaintiffs in *Marte* invoked the Green Amendment as applied to the city's CEQR review process, arguing the construction activity and fully built project would yield "deleterious impact upon the structural integrity, light, air and/or open space currently enjoyed by the plaintiffs in their homes."

In dismissing the complaint, the court cited *FAFE* in downplaying the Green Amendment's weight, noting "[t]he impact of passing this amendment and its influence on environmental jurisprudence in this state is only in its infancy" and that its impact was "unclear." at present.

Despite prior unsuccessful challenges to the project, the court in *Marte* drew a clear distinction between the impacts posed by odors in *FAFE*, which it described as "readily apparent" and justifying "the application of the Green Amendment" and the less palpable harms expressed by neighbors of the development project. The *Marte* court was keen to distinguish the alleged harms as being more pedestrian and the types "traditionally raised by those who oppose construction projects" in dismissing them.

Presently, New York courts seem apprehensive to accept that NIMBYism has a stronger and greener constitutional foundation. But the powerful gale of social, political and scientific validation arriving from the Great American West portends a richer, more complex brand of environmental justice on the rise.

The costs of compliance will not likely get cheaper. But can state agencies, business owners and developers afford to shoulder the bill for a clean and healthy environment? Can they afford not to? The challenges of guaranteeing the right to a clean and healthful environment will create many legal pariahs in trial courts and intermediate appellate courts, and in due time, New York's Court of Appeals will be confronted with the fresh face of this movement.

On Oct. 17, 2023, the Montana Supreme Court certified prior orders as final in *Held* such that an appeal can proceed. Regardless of the outcome on appeal, *Held* represents a growing, undeniable scientific consensus taking hold in our courts that climate science is not just real, but increasingly actionable.

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