

# Why Rights to Clean Water, Air, and Soil Need to be in the Georgia Constitution

## **Interim Report to Georgia Water Coalition**

### **by Right to Clean Water Committee**

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# Executive Summary

**To improve Georgians’ ability to enjoy a consistently healthy quality of life,** Citizen Rights to Clean Water, Air, and Soil (RTCW) need to be enshrined as basic rights in Article I of the Georgia Constitution alongside freedom of speech and rights to hunt and fish. Satilla Riverkeeper has written a five-page legal summary, included below as Legal Implications of a Right to Clean Water Amendment, of how RTCW would have helped failed cases in some states, to show how existing laws are not good enough, and how RTCW has helped other cases, especially ones related to the GWC Policy Criteria. The Committee has drafted a white paper including historical background, litigation, and current proposals, with accompanying presentation slides. Seven states have RTCW, of which two are well-written and useful, in Montana and Pennsylvania, plus possibly New York. At least sixteen states have RTCW proposals. New York State voters overwhelmingly approved RTCW on November 2, 2021,<sup>1</sup> while rejecting other proposed amendments. A statewide petition in Florida intends to get RTCW on the ballot for 2024. The Committee proposes modifying those Georgia hunting and fishing rights (23 states have these) to add RTCW, similarly to Montana’s amendments. The Committee is all ears for suggestions and invites additional Committee members or supporters of RTCW.

## Proposed GWC Policy

This Committee proposes the following policy for the GWC Biennial Report, Section 10, **Government enforcement, monitoring, funding, transparency, and public participation:**

*“Georgia should adopt a constitutional amendment to the state Bill of Rights establishing that each person has an inherent and inalienable constitutional right to clean and healthy air, land, and surface and underground water; to support substantial interests, including human health, safety and welfare, native fish and wildlife, conservation of natural resources, outdoor recreation, aesthetic values, business opportunities, property values, and economic interests throughout the State. The constitutional amendment should be self-executing, define standing and remedies, establish the state as trustee for present and future generations, and ensure local jurisdictions the ability to enact stricter laws or ordinances that the state cannot preempt.”*

For a draft amendment, see [What: Georgia RTCW Wording](#).

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<sup>1</sup> Dan Clark, WXXI News, November 3, 2021, Voters approve change to NY Constitution on ‘clean’ environment, reject proposals on elections, <https://www.wxxinews.org/post/voters-approve-change-ny-constitution-clean-environment-reject-proposals-elections>

# Why Rights to Clean Water (RTCW)?

Human health, quality of life, and opportunity depend on life support provided by a healthy natural environment. The constitution should provide human rights to **healthy ecosystems**, not just enable regulations for permits for access to **resources** at individual locations.

Imagine trying to argue for free speech without the First Amendment. The First Amendment is not perfect, and laws get passed all the time that violate it, such as criminalizing demonstrations against pipelines. But at least the First Amendment provides something to appeal to and a possibility of overturning such bad laws. RTCW is similar.

The return on the investment of years of time and resources to pass a RTCW constitutional amendment would be great.

Summary of legal brief:

- Fundamental Right. Any new or existing law that would violate it must pass a strict scrutiny standard, being narrowly tailored to a compelling state interest.
- Gap Filler. Courts can fill gaps in legal schemes that would otherwise violate the Right to Clean Water.
- Natural Resources Trust Fund. Money from environmental licenses and fees going to protect the environment for present and future generations: anticipatory and preventative.
- Standing. “[Montana’s] constitution does not require that dead fish float on the surface of our state’s rivers and streams before its farsighted environmental protections can be invoked.” –Justice Trieweiler, Montana Supreme Court, MEIC v. Montana DEQ 1999

Some examples of applications:

- In what situations would a RTCW be useful in protecting Georgia’s water resources? The short answer: All of them.
- Ogeechee River Milliken fishkill. RTCW would have made it easier to hold bad actors accountable, with faster process and better remedies.
- PFAS and other “emerging” contaminants. Give citizens standing to protect themselves from emerging contaminants that we know are toxic, but not yet regulated, such as estrogen and other hormones, pharmaceuticals, microplastics, and PFAS.
- Pipelines. RTCW would have provided standing and a case to stop the Sabal Trail pipeline’s Superior Court lawsuits to get river-drilling easements.
- Groundwater. In south Georgia below the fall line, everybody drinks from the Floridan Aquifer or other underground water, and surface water interchanges with groundwater through the porous limestone of the coastal plain. Even though the majority of the people of Georgia drink from surface water, the leading industry of Georgia, forestry, is mostly in the coastal plain, as are most of the rivers and, of course, the coast. Coal ash and land application sites complicate the situation. As recently as 2020, the U.S. Environmental

Protection Agency (EPA) tried to discard protection of underground water. Science should lead. RTCW will help.

Identify any other groups working on this issue, if applicable. The groups do not have to be GWC members.

- Center for a Sustainable Coast,
- Coosa River Basin Initiative,
- Delaware Riverkeeper Network,
- Georgia Wildlife Federation,
- Flint Riverkeeper,
- Ogeechee Riverkeeper,
- Satilla Riverkeeper,
- Savannah Riverkeeper,
- Suwannee Riverkeeper,
- Suzanne Welander, author of *Canoeing and Kayaking Georgia*,
- National Sierra Club,  
<https://www.sierraclub.org/sierra/green-life/when-rivers-are-granted-legal-status-persons>
- Need more groups

# Legal Implications of a Right to Clean Water Amendment

By Satilla Riverkeeper Chris Bertrand, November 1, 2021.

## I. **Question Presented:**

If Georgia amended its constitution to include a “right to clean water,” what would be the legal implications?

## II. **Brief Answer:**

Amending the constitution would create a fundamental right to clean water. If a statute, regulation, or city ordinance violates that fundamental right, the courts have the power to hold such law unconstitutional. A “right to clean water” would also give the courts the ability to fill in regulatory gaps in current environmental law to protect this fundamental right. If the “right to clean water” is worded correctly, it could require that the state dedicate money received from environmental permits and leases go to conservation rather than the general fund. Lastly, the right could enjoy less restrictive standing requirements.

## III. **Discussion**

This memo explores several of the major cases in Pennsylvania and Montana to give a concise overview of the primary legal implications of an environmental rights amendment. This memo does not include every possible legal tool that an environmental rights amendment could provide, but rather focuses on the main legal outcomes.

### **a. Fundamental Right**

A clean water amendment would create a fundamental right for the citizens of Georgia to enjoy clean water. Both the Pennsylvania and Montana Supreme Courts have interpreted their environmental rights amendments as fundamental rights.<sup>2</sup> A “right to clean water” would act as

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<sup>2</sup> *Robinson Twp. v. Commonwealth (Robinson Township)*, 83 A.3d 907 (Pa. 2013); *Mont. Env'tl. Info. Ctr. v. Mont. Dep't of Env'tl. Quality*, 988 P.2d 1236, 1250 (Mont. 1999).



an anti-backsliding provision preventing rollbacks of environmental laws.<sup>3</sup> Statutes, rules, and local ordinances will be held unconstitutional if they are violative of a “right to clean water.” Georgia’s state courts would interpret whether a law implicates the “right to clean water.” Any law infringing upon the “right to clean water” would need to be narrowly tailored to further a compelling state interest in order to pass a strict scrutiny analysis.

Courts in Pennsylvania and Montana have used their environmental rights amendments to strike down several sections of legislation. For example, in *Robinson Township*, a plurality of Pennsylvania’s Supreme Court pointed to their environmental rights amendment to find several provisions of the state’s fracking law unconstitutional.<sup>4</sup> Additionally, the court in *Robinson Township*, found that Pennsylvania’s environmental rights amendment prevented the legislature from preempting local government’s zoning regulation of oil and gas extraction.<sup>5</sup>

Montana has also used their environmental rights amendment to prevent rollbacks of environmental law. In *MEIC v. Dept of Environmental Quality*, the Montana Supreme Court found it unconstitutional for the legislature to exclude water discharges from environmental review without regard to the nature or volume of the discharge.<sup>6</sup>

If an environmental rights amendment is in place, its power to prevent rollbacks or preemptions goes beyond the court room. In Pennsylvania, the governor vetoed a law which preempted local government from prohibiting plastic bags, because the governor believed the law violated the environmental rights amendment.<sup>7</sup>

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<sup>3</sup> From conversations with John C. Dernbach, legal contributor to *Robinson Township* and preeminent scholar on environmental rights amendments.

<sup>4</sup> *Robinson Township*, 83 A.3d at 977

<sup>5</sup> *Id.*

<sup>6</sup> *Mont. Env'tl. Info. Ctr.* 988 P.2d at 1250

<sup>7</sup> From conversations with John C. Dernbach, legal contributor to *Robinson Township* and preeminent scholar on environmental rights amendments. See also: <https://stateimpact.npr.org/pennsylvania/2017/06/30/in-vetoing-plastic-bag-bill-wolf-cites-environmental-rights-amendment/>

Lastly, creating a fundamental right to “clean water” has the potential to affect agency decision makers. Constitutional limits on the government’s power tend to be taken serious by many government employees, because it is their job to implement the constitution.<sup>8</sup>

In conclusion, creating a fundamental right to clean water will act as an anti-backsliding tool for statutes, regulations, and city ordinances. Nonetheless, it is up to the state courts to interpret when the amendment is being violated. While this is an extremely potent tool, it took Pennsylvanian courts four decades from the passing of the amendment to use it to strike down provisions of a statute and fully activate the amendment’s power as a fundamental right.

### **b. Gap Filler**

An environmental amendment can act as a gap filler for environmental statutes and regulations. An environmental rights amendment gives courts the ability to proactively fill in holes within a state’s current legal schemes.

For example, in Pennsylvania, the court in *Robinson Township* used the environmental rights amendment to fill in a regulatory gap in a fracking statute. The law allowed Pennsylvania’s Department of Environmental Protection to waive buffer requirements for companies drilling near streams, wetlands, and other bodies. The court found this statutory waiver provision unconstitutional, because it did “not provide any ascertainable standards by which public natural resources are to be protected if an oil and gas operator seeks a waiver.”<sup>9</sup> To summarize, in *Robinson Township*, the court identified a gap in the statutory scheme and determined the statutory provision unconstitutional with the current gap.

*Robinson Township* case has a wide-reaching effect on the regulated community. After the case, project developers have been more likely to redesign their projects to avoid regulatory

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<sup>8</sup> *Id.*

<sup>9</sup> *Robinson Township*, 83 A.3d at 983.

gaps, because the developers do not want to tempt the courts to overturn a permit on the grounds that it violates the state's environmental rights amendment.<sup>10</sup>

In conclusion, a "right to clean water" amendment can function as an active gap filler in the court room and a passive gap filler by preventing the regulated community from exploiting holes in the law.

### **c. Natural Resources Trust Fund**

In addition to protecting a right to "clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment," the Pennsylvania environmental rights amendment instructs the state to conserve and maintain Pennsylvania's natural resources for all people and generations to come.<sup>11</sup> The courts in Pennsylvania have taken the state's role in trust management seriously. The court in *Pennsylvania Environmental Defense Foundation v. Commonwealth* found that any royalty proceeds from oil and gas lease sales on state forests must only be spent to maintain public natural resources and cannot be sent to the general fund.<sup>12</sup> If the "right to clean water" amendment is worded to recognize a public trust in water and other public natural resources, it could require money received from environmental permits and leases go to conservation rather than the general fund.

### **d. Standing**

An environmental rights amendment could make the requirements of standing could be more generous for plaintiffs. The court in *MEIC v. Dept of Environmental Quality* found that the right to a clean and healthy environment provides "protections which are both anticipatory and preventative."<sup>13</sup> To invoke standing for the environmental rights amendment, it is not necessary

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<sup>10</sup> From conversations with John C. Dernbach, legal contributor to *Robinson Township* and preeminent scholar on environmental rights amendments.

<sup>11</sup> PA. CONST. art. I, § 27.

<sup>12</sup> *PEDF II*, 161 A.3d 911, 916 (Pa. 2017).

<sup>13</sup> Mont. Env'tl. Info. Ctr. 988 P.2d at 1248

to prove that the public health is threatened or that there has already been a significant impact on current water quality standards.<sup>14</sup> The Montana court expands the harm requirement for standing when it says the legislature “did not intend to merely prohibit that degree of environmental degradation which can be conclusively linked to ill health or physical endangerment.

[Montana’s] constitution does not require that dead fish float on the surface of our state’s rivers and streams before its farsighted environmental protections can be invoked.”<sup>15</sup> In conclusion, in litigation invoking an environmental rights amendment, standing is likely to be interpreted more liberally.

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<sup>14</sup> *Id.* at 1249

<sup>15</sup> *Id.*

## What happens without RTCW

Existing laws and precedents are not strong enough to guarantee people rights to clean water.

### 2021-06-18: Iowa CCI & FWW v. State of Iowa

The Iowa Supreme Court on June 18, 2021, ruled 4:3 that "a favorable decision would not remedy the harm from pollution in the river and that the case raised political questions that the legislature, not the courts, should resolve. As a result, although the Court recognized that the case seeks to address 'a real environmental problem,' the lawsuit will not proceed and unabated agricultural water pollution will continue to pollute the Raccoon River."

Iowa Food & Water Watch says the suit, *Iowa Citizens for Community Improvement and Food & Water Watch v. State of Iowa*, "relied on the Iowa Constitution and the Public Trust Doctrine."<sup>16</sup>

--[Food & Water Watch](#)

Why did they not use federal Clean Water Act (CWA)? Does the CWA require a "special damage"? If yes, that could be an argument why it alone is insufficient.

Why did they bring the suit based on state laws?

Why not partner with private property owners?

### 2021-04-22: Iowa RTCW HJR 12

Iowa does have a proposed RTCW amendment: HJR 12, submitted on Earth Day 2021, still sitting in House Judiciary Committee as HJR 999 (**emphasis added**):<sup>17</sup>

*Every person has the right to a clean and healthy environment, including pure water, clean air, ecologically healthy habitats, and the preservation of the natural, scenic, historic, and aesthetic qualities of the environment. The state shall not infringe upon these rights by action or inaction. The state's public natural resources, including its soils, waters, air, flora, fauna, climate, and public lands, are the common property of the people, including both present and **future generations**. As **trustee** of these resources, the state shall conserve, maintain, and restore these resources for the health and benefit of all the people. This section and the rights stated herein are **self-executing and shall be in addition to any rights conferred by the public trust doctrine or common law.***

HJR 12 seems like the kind of legislative solution that the judge recommended. Maybe this court ruling will provide incentive to get it passed.

There seems no compelling reason to believe that a similar suit in Georgia would fare any better without RTCW.

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<sup>16</sup> Food & Water Watch, June 18, 2021, "Iowa Supreme Court Rules Against Iowa Citizens in Right to Clean Water Lawsuit," <https://www.foodandwaterwatch.org/2021/06/18/iowa-supreme-court-rules-against-iowa-citizens-in-right-to-clean-water-lawsuit>

<sup>17</sup> House Joint Resolution 12 (HJR12) introduced by ISENHART, STAED, BROWN-POWERS, STECKMAN, HUNTER, ANDERSON, and WINCKLER, April 22, 2021, <https://www.legis.iowa.gov/legislation/BillBook?ga=89&ba=HJR12>

# Deep Precedents: RTCW is not a new idea

## 530: Justinian's Code

Book II. Of Things:<sup>18</sup>

### *I. Divisions of Things.*

*In the preceding book we have treated of the law of persons. Let us now speak of things, which either are in our patrimony, or not in our patrimony. For some things by the law of nature are common to all; some are public; some belong to corporate bodies, and some belong to no one. Most things are the property of individuals who acquire them in different ways, as will appear hereafter.*

*1. By the law of nature these things are common to mankind--the air, running water, the sea, and consequently the shores of the sea. No one, therefore, is forbidden to approach the seashore, provided that he respects habitations, monuments, and buildings which are not, like the sea, subject only to the law of nations.*

*2. All rivers and ports are public; hence the right of fishing in a port, or in rivers, is common to all men.*

*3. The seashore extends as far as the greatest winter flood runs up.*

*4. The public use of the banks of a river is part of the law of nations, just as is that of the river itself. All persons, therefore, are as much at liberty to bring their vessels to the bank, to fasten ropes to the trees growing there, and to place any part of their cargo there, as to navigate the river itself. But the banks of a river are the property of those whose land they adjoin; and consequently the trees growing on them are also the property of the same persons.*

*5. The public use of the seashore, too, is part of the law of nations, as is that of the sea itself; and, therefore, any person is at liberty to place on it a cottage, to which he may retreat, or to dry his nets there, and haul them from the sea; for the shores may be said to be the property of no man, but are subject to the same law as the sea itself, and the sand or ground beneath it.*

Much of this has been modified in later laws, but underlying it all is that common to all mankind are the air, running water, and the sea, from which people derive certain rights.

This is the germ of the Public Trust Doctrine,<sup>19</sup> which the Iowa case shows is not sufficient.

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<sup>18</sup> The Institutes of Justinian, A.D. 535, <http://thelatinlibrary.com/law/institutes.html>

<sup>19</sup> Dotty E. LeMieux, On the Commons, December 19, 2005, The Public Trust Doctrine: Venerable and Besieged, <http://www.onthecommons.org/public-trust-doctrine-venerable-and-besieged#sthash.wiS92jEA.dpbs>

## 1797: Thomas Paine, Agrarian Justice

Emphasis in the original:<sup>20</sup>

*Firstly, **natural property**, or that which comes to us from the Creator of the universe--such as the earth, air, water....*

*It is a position not to be controverted that the earth, in its natural uncultivated state was, and ever would have continued to be, **the common property of the human race**. In that state every man would have been born to property. He would have been a joint life proprietor with the rest in the property of the soil, and in all its natural productions, vegetable and animal.*

The rest of Paine's essay is about the relations of private property to natural property.

### Federal Government Precedents

1948 Federal Water Pollution Control Act

1965 Solid Waste Disposal Act (SWDA)

1970 National Environmental Policy Act (NEPA)

1971 Environmental Protection Agency (EPA)

1972 Clean Water Act (CWA)

1976 Resource Conservation and Recovery Act (RCRA)<sup>21</sup> for hazardous waste updated SWDA

1980 Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) aka Superfund

1984 Hazardous and Solid Waste Amendments (HSWA) updated RCRA, with more updates later

Yet we still have huge problems about clean water, from coal ash, fertilizers, manure, pesticides pipelines, sewage, strip mines, overpumping, and more: see **Can we quantify or demonstrate how the priority/proposed priority impacts any of the following: the health, safety, quantity, quality of Georgia's water, public health, property rights?** All these federal laws attempted to deal with pieces of the problem, creating more rules and regulations that unfortunately are often gamed by the polluters. For example, the 2020 Navigable Waters

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<sup>20</sup> Thomas Paine, Agrarian Justice, 1797, <http://piketty.pse.ens.fr/files/Paine1795.pdf>

<sup>21</sup> EPA, Resource Conservation and Recovery Act (RCRA) Laws and Regulations, accessed October 28, 2021, <https://www.epa.gov/rcra>

Protection Rule (NWPR) promulgated by EPA and USACE severely contracted the Waters of the U.S. (WOTUS) related to the CWA. A District Court has now remanded and vacated that NWPR.<sup>22</sup>

We need something more basic: a Constitutional amendment for a right to clean water, air, and soil. That would make things like the NWPR more difficult to promulgate and easier to revoke. Even if NWPR stayed in force, a Georgia RTCW would at least partly fill that gap. Further, instead of arguing with U.S. EPA about subjects important to Georgia such as groundwater, a state RTCW could explicitly cover those.

A federal Constitutional amendment was attempted twice in 1968 and 1970, but those proposals failed. “In their wake, efforts to convince courts that there is already an implicit right to a clean environment in the U.S. Constitution also failed.”<sup>23</sup>

Nonetheless, several states did pass Environmental Rights Amendments back in the 1970s, and two of them are quite good. New York State joined them in November 2021, and other states are proposing such amendments now.

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<sup>22</sup> Sophia E. Amberson, Rachael L. Lipinski, Duncan M. Greene, and Jenna R. Mandell-Rice, National Law Review, September 2, 2021, “UPDATED: Rough Waters Ahead, Once Again: A District Court Vacates the 2020 Navigable Waters Protection Rule as the EPA and Corps WOTUS Definition Rulemaking Continues; Updated: On September 3, 2021, the EPA announced that the EPA and Corps have halted the implementation of Navigable Waters Protection Rule and will be applying the pre-2015 WOTUS definition.” <https://www.natlawreview.com/article/rough-waters-ahead-once-again-district-court-vacates-2020-navigable-waters>

<sup>23</sup> (name redacted), Legislative Attorney, American Law Division, CRS Report for Congress, Order Code RS20084, February 23, 1999, Right to a Clean Environment Provisions in State Constitutions, and Arguments as to A Federal Counterpart, [https://www.everycrsreport.com/files/19990223\\_RS20084\\_44ef72947246f9ace4bd5f3e64150cfbcde7ce1b.pdf](https://www.everycrsreport.com/files/19990223_RS20084_44ef72947246f9ace4bd5f3e64150cfbcde7ce1b.pdf) See, e.g., Ely v. Velde, 451 F.2d 1130, 1139 (4th Cir. 1971). See also David Sive, *Some Thoughts of an Environmental Lawyer in the Wilderness of Administrative Law*, 70 Colum. L. Rev. 612, 642-643 (1970).



# State Precedents: Right to Clean Water

Seven states have adopted some form of Right to Clean Water, two of them are quite good, and a third (New York) is considered by some advocates to also be good.

Date	State	Good?	In BoR?	Length	Trustee	Self executing	Future Generations	W <sup>24</sup>	A <sup>25</sup>	L <sup>26</sup>	E <sup>27</sup>
1970	Illinois	No	No	Medium	No	No	Yes	-	-	-	E
<b>1971</b>	<b>Pennsylvania</b>	Good	Yes	Short	Yes	No	Yes	W	A	?	E
1972	Massachusetts	No	No	Long	No	No	No	W	A	?	E
<b>1972</b>	<b>Montana</b>	Good	Yes	Longest	?	No	Yes	-	-	-	E
1978	Rhode Island	No	No	Longest?	No	No	No	W	A	L	E
1978	Hawaii	No <sup>28</sup>	No	Short	No	No	No	-	-	-	E
<b>2021</b>	<b>New York</b>	Good	Yes	Shortest	No	No	No	W	A	-	E

We consider the three good ones here (Montana, Pennsylvania, and New York). In the interests of getting on with the story, we push the four bad ones into a later section on [Existing constitutional amendments lacking bona fide environmental rights](#).

A Rockefeller Institute report has much more background on the Montana and Pennsylvania amendments, including debate leading up to their passage, and case law afterwards.<sup>29</sup>

A National Law Review article covers all these early initiatives.<sup>30</sup>

A Congressional Research Service Report contains some useful cautions: “Most court cases analyzing such state constitutional provisions, and most scholarly commentary, begin with whether the provision is self-executing — that is, whether it can be implemented in the absence of legislation. This issue, in turn, hinges on whether the state constitution speaks directly to the self-executing question. Where the constitution is silent, the decisions are mixed.”<sup>31</sup>

<sup>24</sup> Water

<sup>25</sup> Air

<sup>26</sup> Land or Soil: does habitat count? Scenic values?

<sup>27</sup> Environment or Ecology

<sup>28</sup> Further amendment proposed.

<sup>29</sup> Genevieve Bombard, Joshua Kapczynski, Azania Maitland, Catherine Reed, Imari Roque, and Hoshi Salcedo, Rockefeller Institute of Government, Center for Law & Policy Solutions, July 2021, The Precedents and Potential of State Green Amendments, <https://rockinst.org/wp-content/uploads/2021/07/CLPS-green-amendments-report.pdf>

<sup>30</sup> Samuel L. Brown, National Law Review, March 30, 2021, Green Amendments: A Fundamental Right to a Healthy Environment? <https://www.natlawreview.com/article/green-amendments-fundamental-right-to-healthy-environment>

<sup>31</sup> CRS Report, *op cit*.

## Pennsylvania 1971

This Environmental Rights Amendment (ERA) is one of the best ones.

*Article I, Section 27. Natural resources and the public estate.*

*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.*

It says clean water, air, and environment are rights of the people. It explicitly requires the state to enforce those rights. Note: “common property of all the people” and “including generations yet to come.”

<https://conservationadvocate.org/pennsylvanias-environmental-rights-amendment/>

There is an in-depth analysis of what is in the Pennsylvania ERA and how to craft a similar amendment for another state.<sup>32</sup> And an overview of the various court cases that eventually recognized the ERA as self-enforcing and used it.<sup>33</sup> Plus an in-depth examination of the history of the Penn. ERA.<sup>34</sup>

### **2013: PA Supreme Court used ERA to strike down fracking waivers and pre-emptions**

Including local government pre-emptions.

[https://ballotpedia.org/Pennsylvania\\_Question\\_3\\_Environmental\\_Rights\\_Amendment\\_\(May\\_1971\)](https://ballotpedia.org/Pennsylvania_Question_3_Environmental_Rights_Amendment_(May_1971))

### **2017: PA Supreme Court decided ERA needs no enabling legislation**

Struck down legislation diverting oil and gas royalties to general fund, must go to conservation trust fund.

<https://www.mankogold.com/publications-PA-Environmental-Rights-Amendment-PEDF-commonwealth.html>

### **2019: PA Commonwealth Court directed to conservation trust fund**

two thirds of rental payments and up-front bonuses received by the Commonwealth as proceeds from oil and gas leases on state forest and park lands (way better than zero).

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<sup>32</sup> Jordan B. Yeager & Lauren M. Williams, John Smith, and Jonathan Kamin, FTG, January 8, 2019, A GREEN AMENDMENT IS A RESTRAINT ON GOVERNMENTAL AUTHORITY,

<https://forthe generations.org/wp-content/uploads/2019/02/FTG-Resources-GreenAmendmentFunctions.pdf>

<sup>33</sup> George Jugovic, Jr., PennFuture Blog, August 22, 2017, How the Environmental Rights Amendment Strengthens Our Impact, <https://www.pennfuture.org/Blog-Item-How-the-Environmental-Rights-Amendment-Strengthens-Our-Impact>

<sup>34</sup> John C. Dernbach and Edmund J. Sonnenberg, “A Legislative History of Article I, Section 27 of the Constitution of the Commonwealth of Pennsylvania,” Widener Law Journal 24, 2 (2015): 181, <http://ssrn.com/abstract=2684030>.

## Montana 1972 Article II, Declaration of Rights

This one seems more straightforward.

*3. Inalienable Rights. All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment and the rights of pursuing life's basic necessities, enjoying and defending their lives and liberties, acquiring, possessing and protecting property, and seeking their safety, health and happiness in all lawful ways. In enjoying these rights, all persons recognize corresponding responsibilities.*

Article I says “the right to a clean and healthful environment.” It is also a personal responsibility law, “and each person.” But corporations are legal persons.

## Montana 1972 Article IX, Environment and Natural Resources

After the above passage in the Declaration of Rights, there's much more detail in Article IX.

*Article IX, Section 1. Protection and Improvement*

*(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. [1]*

It is also a personal responsibility law, “and each person.” But corporations are legal persons.

It says state regulation is not just possible but required.

Note: “environmental life support system”.

[https://ballotpedia.org/Article\\_IX,\\_Montana\\_Constitution](https://ballotpedia.org/Article_IX,_Montana_Constitution)

Spelling things out can be useful:

“Whether a right to a clean environment provision stands alone or is accompanied by related provisions may be pivotal. For example, Montana's constitution proclaims a right to clean environment, but also obligates the state and each person to maintain and improve that environment. Read together, these provisions suggest a right of action against those who do not “maintain and improve.””<sup>35</sup>

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<sup>35</sup> CRS Report, *op cit.*, page 5.

## **MEIC v. Montana DEQ 1999**

Montana Supreme Court decided unanimously: Montanans' constitutional right to a clean and healthful environment (Article IX, Section 1) **is a fundamental right and one that is intended to be preventative in nature.**

Montana Department of Environmental Quality had allowed Seven-Up Pete Joint Venture to pump millions of gallons of **untreated arsenic-tainted water into the Landers Fork and Blackfoot Rivers.** MEIC and WVE claimed the discharges violated Article IX, Section I, and that the exemption was unconstitutional.

Justice Trieweiler, Montana Supreme Court: *“Our constitution does not require that dead fish float on the surface of our state’s rivers and streams before its farsighted environmental protections can be invoked,”* and concluded that **“the delegates’ intention was to provide language and protections which are both anticipatory and preventative.”**

<https://meic.org/montanas-right-to-a-clean-healthful-environment/>

## **Held v. State of Montana, August 5, 2021**

State District Judge Seeley ruled that 16 Montana youth can proceed with their lawsuit against the State **for violating their constitutional right to a clean and healthful environment.**

Plaintiff’s attorneys say their evidence “will prove that by supporting a fossil fuel-driven energy system, the state of Montana causes and contributes to dangerous levels of greenhouse gas emissions, and therefore is responsible for the **climate-related injuries the youth suffer in violation of their rights under the Montana Constitution.**”

<https://ens-newswire.com/montana-judge-sides-with-youth-plaintiffs-in-climate-case/>

## New York 2021

The voters of New York State passed the first new state Environmental Rights Amendment in half a century, on November 3, 2021, by 68.9%.<sup>36</sup> Some other proposed amendments failed on the same ballot,<sup>37</sup> so voters considered this one worthwhile.

This is the entire text of the amendment:

Article 1, “§19 Each person shall have a right to clean air and water, and a healthful environment.”

Some advocates consider this an effective amendment, even though it does not include many of the features considered important for such an amendment.<sup>38</sup>

An analysis by the Environmental and Energy Law Section of the New York State Bar Association<sup>39</sup> recommended such an amendment, but advised<sup>40</sup> that it should include a governmental public trust duty, reference the interests of future generations, and be made self-executing against all state government bodies, but not against private parties.

New York constitutional provisions are presumptively self-executing: “In New York, there is a presumption in favor of the self-executing nature of constitutional provisions, especially if they confer a right to citizens. *Brown v. State of New York*, 674 N.E.2d 1129 (N.Y. 1996).”<sup>41</sup>

The ballot referendum was previously approved twice by the New York State Legislature.

Despite the amendment starting with “Each person,” some Legislators assured that “this Constitutional Amendment does not” provide “a private right of action for environmental damage”.<sup>42</sup>

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<sup>36</sup> Ballotpedia, accessed November 24, 2021, New York Proposal 2, Environmental Rights Amendment (2021), [https://ballotpedia.org/New\\_York\\_Proposal\\_2\\_Environmental\\_Rights\\_Amendment\\_\(2021\)](https://ballotpedia.org/New_York_Proposal_2_Environmental_Rights_Amendment_(2021))

<sup>37</sup> Dan Clark, WXXI News, November 3, 2021, Voters approve change to NY Constitution on ‘clean’ environment, reject proposals on elections, <https://www.wxixnews.org/post/voters-approve-change-ny-constitution-clean-environment-reject-proposals-elections>

<sup>38</sup> FTG, accessed October 24, 2021, GREEN AMENDMENT CHECKLIST: Essential Elements of an Effective Environmental Rights Amendment, [https://forthe generations.org/wp-content/uploads/FTG\\_Checklist2021.pdf](https://forthe generations.org/wp-content/uploads/FTG_Checklist2021.pdf)

<sup>39</sup> Katrina Fischer Kuh, Chair, New York State Bar Association Environmental and Energy Law Section, August 23, 2017, Report and Recommendations Concerning Environmental Aspects of the New York State Constitution, 38 Pace L. Rev. 182 (2017), <https://digitalcommons.pace.edu/plr/vol38/iss1/10/>

<sup>40</sup> Christine Weniger, Climate Blog, Sabin Center for Climate Change Law, September 1, 2020, WHAT COULD NEW YORK STATE’S PROPOSED ENVIRONMENTAL RIGHTS AMENDMENT ACHIEVE? <http://blogs.law.columbia.edu/climatechange/2020/09/01/what-could-new-york-states-proposed-environmental-rights-amendment-achieve/>

<sup>41</sup> *Ibid.*

<sup>42</sup> Sheila Birnbaum, Mark Cheffo, Allie Ozurovich, Rachel Passaretti-Wu, Marina Schwarz, and Lincoln Wilson, Dechert LLP, accessed November 24, 2021, New York’s Green Amendment: How Guidance from Other States Can Shape the Development of New York’s Newest Constitutional Right, <https://www.jdsupra.com/legalnews/new-york-s-green-amendment-how-guidance-2462721/>

One legal review finds even deeper problems:<sup>43</sup>

Even fundamental questions have yet to be answered, such as how to define “clean” and “health,” and whether there are penalties for violations. Nor does the Green Amendment provide any guidance as to whether compliance with current regulations will be a safe harbor defense in litigation—for example, by complying with current emissions standards under New York or federal law.

There is also uncertainty as to how this Amendment will affect state agencies’ and legislative bodies’ policymaking power. While both typically drive environmental policy, that power could now vest with private citizens—prosecuted through the courts—as they pursue litigation consistent with their own environmental ambitions and agendas. In the face of such litigation, courts may be tasked with evaluating the intricacies of environmental policy beyond constitutional boundaries. Such litigation could turn separation of powers on its head by devolving into a judicial evaluation of the merits of a particular economic and environmental policy, rather than just its legality.

The same review looks at precedents in Pennsylvania, Montana, Hawaii, Massachusetts, Illinois, and Rhode Island for guidance, and still concludes:

It will be up to the courts in the coming years to shape the impact of this Amendment on private citizens, state agencies, and companies alike.

It would be good for a Georgia RTCW amendment to spell things out to avoid decades of court cases.

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<sup>43</sup> *Ibid.*

## Pending state Right to Clean Water amendments

Pending	Status	Length	Trustee	Self executing	Future Generations	W <sup>44</sup>	A <sup>45</sup>	L <sup>46</sup>	E <sup>47</sup>
<b>Florida</b>	Petition start April 2022 for 2024 ballot	longest	Implicit	yes	no	W	-	-	E
<b>Hawaii</b>	SB 502 passed Senate 2021	short	no	yes	no	W	A	?	E
<b>Iowa</b>	HJR 12 introduced 2021 more sponsors 2022	medium	?	yes	yes	W	A	S	E
<b>Kentucky</b>	HB 107 in committee 2021	short	yes	?	no	-	-	?	E
<b>Maine</b>	LD 489 died 2021, back 2022	short	no	?	yes	W	A	L	E
<b>New Jersey</b>	ACR 72 & SCR 15 died in committee January 2022	long	yes	yes	yes	W	A	?	E
<b>New Mexico</b>	HJR 2 died in House, February 2022	long	yes	yes	yes	W	A	S	E
<b>Oregon</b>	SJR 5 died in committee 2021 but HB 4077 Environmental Justice Council passed, is law effective June 3, 2022	long	yes	yes	yes	W	A	?	E
<b>South Carolina</b>	H. 3382 died in committee February 2019	long	yes	yes	yes	W	A	?	E
<b>Vermont</b>	PR 9 died in committee February 2020	short	Implicit	?	no	W	A	?	E
<b>Washington</b>	HJR 4209 / SJR 8210 died in committee, February 2022	long	yes	yes	yes	W	A	S	E
<b>West Virginia</b>	HJR 25 died in committee, January 2020	short	yes	?	yes	W	A	?	E

Here we review proposals in three states: South Carolina, Hawaii, and Florida.

See the slightly out of date list by National Caucus of Environmental Legislators (NCEL), which is missing Florida, South Carolina, and Delaware.<sup>48</sup>

For what should be in any such amendment, there's a checklist.<sup>49</sup>

<sup>44</sup> Water

<sup>45</sup> Air

<sup>46</sup> Land or Soil: does habitat count? Scenic values?

<sup>47</sup> Environment or Ecology

<sup>48</sup> Kate Burgess, National Caucus of Environmental Legislators (NCEL), accessed September 30, 2021, Green Amendment, Legislation, <https://www.ncelenviro.org/issues/green-amendment/#map>

<sup>49</sup> For the Generations, accessed November 24, 2021, Green Amendment Checklist: Essential Elements of an Effective Environmental Rights Amendment. [https://forthegenerations.org/wp-content/uploads/FTG\\_Checklist2021.pdf](https://forthegenerations.org/wp-content/uploads/FTG_Checklist2021.pdf)

## South Carolina

South Carolina has had a pretty good amendment proposed that has gotten pretty close and has been useful even though not yet passed. It begins:

*Article I, Section 26. (A) The people of the State of South Carolina find and declare that South Carolina's environment is the common property of all South Carolinians. The conservation of South Carolina's environment, including its clean air, pure water, and natural and scenic values, is fundamental and it should be protected and preserved for all South Carolinians, including generations yet to come.*

*(B) The people of the State of South Carolina have a right to South Carolina's environment. The people of this State have the authority and legal standing to enforce this right. As trustees of this resource, the State and local governments shall conserve South Carolina's environment, including its clean air, pure water, and natural and scenic values for the benefit of all people. This section applies to the State of South Carolina and to every city, town, and county in the State.*

*(C) All provisions of this section are self-executing and severable. To facilitate the conservation of South Carolina's environment, local governments have the power to enact laws, regulations, ordinances, and charter provisions that are more restrictive and protective of the environment than laws or regulations enacted or adopted by the state government. If any local law or regulation enacted or adopted pursuant to this article conflicts with a state law or regulation, the more restrictive and protective law or regulation governs."*

It does not actually say the people have a right to clean air, pur water, etc. Maybe saying those things are the common property of all South Carolinians means much the same thing.

It does say for generations yet to come, it gives the people legal standing, and it makes state and local governments trustees. It says it is self-executing and local governments can enact more protective laws or regulations, which apparently the state cannot preempt.

For further details, see [South Carolina](#) in [Proposed constitutional amendments](#).

## Hawaii

Hawaii already has a constitutional amendment, but it has been found lacking; see [Hawaii 1978](#) in [Existing constitutional amendments lacking bona fide environmental rights](#). So an additional amendment is proposed, mostly to add self-executing and inherent and inalienable.

*Each person has a right to a clean and healthy environment, including pure water; clean air and healthy ecosystems, and to the preservation of the natural, cultural, scenic and*



*healthful qualities of the environment. This provision and the rights stated herein are self-executing. The reserved rights stated herein are equivalent to other protected inherent and inalienable rights.*

For further details, see [Hawaii](#) in [Proposed constitutional amendments](#).

## Florida

The first of five statewide petitions for Constitutional amendments by FL5.org in 2021:

Article I, Section 28 (a) *Every Floridian has a right to clean water.*

There is more, mostly not relevant to Georgia. See [Florida](#) in Proposed constitutional amendments.

That 2021 petition did not get enough signatures. However, its organizers are starting another petition for Rights to Clean Water in April 2022, this time greatly reworked. They will focus on that one petition for the 2024 ballot. The other petitions will follow in later years.

Florida has numerous Constitutional provisions about clean water, such as its **Outstanding Florida Water** (OFW) designation, which applies among others to the Apalachicola, Aucilla, Suwannee, and Ochlockonee Rivers,<sup>50</sup> all of which originate in Georgia. OFW is supposed to require developers to prove no harm. Actually, that does not happen; we could provide a long list of examples. Consider the Sabal Trail natural gas pipeline, which a representative of the Florida Department of Environmental Protection in 2015 testified under oath met all the OFW criteria. Yet a year later that pipeline caused one of the things that wasn't supposed to happen, in very similar geography under the Withlacoochee River in Georgia.<sup>51</sup> That Florida water protection failure contributed to Sabal Trail being in the 2016 GWC Dirty Dozen.

So an explicit Right to Clean Water is needed.

## Standing & Local Laws: 2021 Florida Right to Clean Water

*(c) Any resident, nongovernmental organization, or government entity of this state shall have standing to enforce and defend the rights secured by this section in any court possessing proper jurisdiction.*

*(f) Any Florida county, city, and town may enact local laws providing additional protections for clean water provided that those local laws do not establish standards and requirements that are lower or less stringent than those imposed by this Section or by*

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<sup>50</sup> Florida Department of Environmental Protection, accessed November 25, 2021, Outstanding Florida Waters, <https://floridadep.gov/dear/water-quality-standards/content/outstanding-florida-waters>

<sup>51</sup> WWALS, November 11, 2016, Drilling mud oozing up into the Withlacoochee River from Sabal Trail HDD, <https://wwals.net/?p=25475>

state law.

(g) Local laws adopted pursuant to subsection (f) of this section shall not be subject to preemption by state law

Standing: Are the Pennsylvania, Montana, maybe New York, and maybe soon Florida precedents enough for standing in Georgia?

Local laws: Pre-emption already happened in Florida, so it is necessary to revoke it. What about Georgia?

For the current Florida petition, see [Florida](#) in Proposed constitutional amendments.

## Waterkeeper Endorsements of FL5.org in 2021



# Georgia: How to Do It?

Get it into GWC Policies.

Then get it on the ballot.

- No Georgia statewide petition for constitutional amendment
- Must get  $\frac{2}{3}$  majority in each house of legislature, then majority of voters

Add as an amendment to Georgia Rights to Hunt and Fish?

What should it say?

## Georgia Rights to Hunt and Fish (2005)

Article I. **Bill of Rights.** Section 1. **Rights of Persons**

*Paragraph XXVIII. **Fishing and hunting.** The tradition of fishing and hunting and the taking of fish and wildlife shall be preserved for the people and shall be managed by law and regulation for the public good.*

<https://www.senate.ga.gov/Documents/gaconstitution.pdf>

Rights to hunt and fish need clean water, air, and land for the wildlife and fish, and for the people. What good are rights to speak or bear arms or even to live without clean water, air, and soil?

## 23 States have rights to hunt and fish

California and Rhode Island have rights to fish, but not to hunt.

[https://ballotpedia.org/Right\\_to\\_hunt\\_and\\_fish\\_constitutional\\_amendments](https://ballotpedia.org/Right_to_hunt_and_fish_constitutional_amendments)

- 1777: [Vermont](#)
- 1996: [Alabama](#)
- 1998: [Minnesota](#)
- 2000: [North Dakota](#)
- 2000: [Virginia](#)
- 2003: [Wisconsin](#)
- 2004: [Louisiana](#)
- 2004: [Montana](#)
- 2006: [Georgia](#)
- 2008: [Oklahoma](#)
- 2010: [Arkansas](#)
- 2010: [S. Carolina](#)
- 2010: [Tennessee](#)
- 2012: [Idaho](#)
- 2012: [Kentucky](#)
- 2012: [Nebraska](#)
- 2012: [Wyoming](#)
- 2014: [Mississippi](#)
- 2015: [Texas](#)
- 2016: [Indiana](#)
- 2016: [Kansas](#)
- 2018: [N. Carolina](#)
- 2020: [Utah](#)

## Frequent language in Rights to Hunt and Fish

“Heritage”: Idaho, Minnesota, Montana, NC, ND, SC, Utah, Wyoming

“Tradition” and “public good”: Georgia

“Traditional manners and means”: Tennessee

“Traditional methods”: Kansas, Idaho, NC, Texas, and Utah

“Shall be forever preserved”: North Carolina and Utah

“Preserve the future”: Idaho, Indiana, and Mississippi

“Preserve the freedom”: Louisiana, “Liberty”: Vermont

Popular words also include “conservation” and “public good.”

## Sponsor: Rights to Hunt and Fish

In at least several states, the sponsor was the National Rifle Association (NRA). Their model:

*The citizens of this State have the right to hunt, fish, and harvest wildlife, including the use of traditional methods, subject only to statutes enacted by the Legislature and regulations adopted by the designated agency [or “fish and game commission” or state-specific term] to promote wildlife conservation and management and to preserve the future of hunting and fishing. Public hunting and fishing shall be a preferred means of managing and controlling wildlife. This section shall not be construed to modify any provision of law relating to trespass or property rights.*

## 2015 Tennessee case, Davidson County Chancery Court

*“the language of this amendment does not appear to limit any right the state had to regulate commercial activity before the amendment passed nor does it indicate that it should be interposed to retroactively set aside previously adopted wildlife regulations.”*

[https://ballotpedia.org/Tennessee\\_Hunting\\_Rights\\_Amendment\\_\(2010\)](https://ballotpedia.org/Tennessee_Hunting_Rights_Amendment_(2010))

[Look for court cases on environmental grounds.]

## Vermont 1777, Rights to Hunt and Fish

### *Chapter 2, Section 67: Hunting; Fowling and Fishing*

*The inhabitants of this State shall have liberty in seasonable times, to hunt and fowl on the lands they hold, and on other lands not inclosed, and in like manner to fish in all boatable and other waters (not private property) under proper regulations, to be made and provided by the General Assembly.*

<https://legislature.vermont.gov/statutes/constitution-of-the-state-of-vermont/>

Earliest U.S. example of state constitutional provision related to Rights to Clean Water, etc.

Expressly says regulations should be made.

What good are hunting and fishing without clean water, air, and soil for the wildlife, fish, and people?

## Montana 2004, Rights to Hunt and Fish

Added to the same Article IX as Right to Clean Water:

*Article IX, Section 7. Preservation of Harvest Heritage*

*The opportunity to harvest wild fish and wild game animals is a heritage that shall forever be preserved to the individual citizens of the state and does not create a right to trespass on private property or diminution of other private rights.*

Note: “heritage”. Doesn’t say regulation is possible. But Article IX says that earlier.

## What: Georgia RTCW Wording

The time has come to protect the environmental support system of all life on behalf of the people.

- Conservation of what is left
- Stewardship to restore better

While the main purpose of this white paper is to motivate and propose [a policy for the Georgia Water Coalition Biennial Report](#), nonetheless members of the GWC Leadership Team and others have asked what, specifically, would a Georgia Right to Clean Water constitutional amendment look like.

Georgia Citizen Rights to Clean Water, Air, and Soil must be up there with other basic rights in:

Article I. **Bill of Rights.** Section 1. **Rights of Persons**

Could be as simple as this in Article I:

*“Environmental rights. Each person [or each citizen or the people] shall have a right to clean surface and underground water, air, and soil, and a healthy environment.”*

However, “arguably at least the major such issues should be addressed textually to spare the affected parties and the courts a potentially long period of uncertainty.”<sup>52</sup>

Should it also have more about what a healthy environment means, trustee, posterity, self-executing, inherent and inalienable, standing, remedies, local laws, and prohibition of state pre-emption?

Remember, “Where the constitution is silent, the decisions are mixed.”<sup>53</sup>

So perhaps something longer:

- a) *Each person has an inherent and inalienable right to a clean and healthy environment, including clean air and soil, pure surface and underground water, and healthy ecosystems, and to the conservation of the natural, cultural, scenic and healthful qualities of the environmental life support system.*
- b) *The state shall not infringe upon these rights by action or inaction. The state’s public natural life support systems, including its waters, air, soils, flora, fauna, climate, and public lands, are the common property of the people, including both present and future generations. As trustee of these systems, the state shall conserve, maintain, and restore them for the health and benefit of all the people.*
- c) *This provision and the rights stated herein are self-executing.*
- d) *The reserved rights stated herein are equivalent to other protected inherent and inalienable rights.*
- e) *Any resident, nongovernmental organization, or government entity of this state shall have standing to enforce and defend the rights secured by this section in any court possessing proper jurisdiction.*
- f) *Any Georgia county, city, and town may enact local laws providing additional protections for clean water provided that those local laws do not establish standards and requirements that are lower or less stringent than those imposed by this Section or by state law.*
- g) *Local laws adopted pursuant to subsection (f) of this section shall not be subject to preemption by state law.*

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<sup>52</sup> CRS Report, *op cit.*, page 6.

<sup>53</sup> CRS Report, *op cit.*

See also this checklist,<sup>54</sup> which in addition to all of the above suggests “The provision should necessitate a pre-action analysis that ensures actions taken and decisions made do not infringe upon environmental rights.”

## How

- What else?
- How can you help?
- How can we help you?

## Some tactics

Build as big a tent as possible.

Every county or city that passed a water trail resolution is a candidate for supporter.

Cultivate allies in hunting, fishing, farming, forestry, realtors.

- E.g., Foresters worry about development encroachment, e.g., prescribed burns are becoming increasingly difficult
- Realtors know nature helps sell houses
- Scan their public statements and reports.
- What about wetlands? CAFOs? Pipelines? Wastewater?

Include local participation in conservation and stewardship.

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<sup>54</sup> FTG, accessed October 24, 2021, GREEN AMENDMENT CHECKLIST: Essential Elements of an Effective Environmental Rights Amendment, [https://forthegenerations.org/wp-content/uploads/FTG\\_Checklist2021.pdf](https://forthegenerations.org/wp-content/uploads/FTG_Checklist2021.pdf)

# Example state provisions that protect human rights to a clean environment

Summary by Karen Graine and John S. Quarterman for GWC Rights to Clean Water Committee

First we list existing constitutional amendments, good ones first, followed by not-so-good ones. Then we list proposed amendments and international precedents.

## Existing constitutional amendments that provide bona fide environmental rights

### Pennsylvania

See [Pennsylvania 1971](#) in State Precedents.

### Montana

See [Montana 1972](#) in State Precedents.

### New York

See [New York 2021](#) in State Precedents.



# Existing constitutional amendments lacking bona fide environmental rights

## Illinois 1970

It looks good,<sup>55</sup> but it has some defects:

### *Article XI, Environment*

#### **SECTION 1. PUBLIC POLICY - LEGISLATIVE RESPONSIBILITY**

*The public policy of the State and the duty of each person is to provide and maintain a healthful environment for the benefit of this and future generations. The General Assembly shall provide by law for the implementation and enforcement of this public policy.*

#### **SECTION 2. RIGHTS OF INDIVIDUALS**

*Each person has the right to a healthful environment. Each person may enforce this right against any party, governmental or private, through appropriate legal proceedings subject to reasonable limitation and regulation as the General Assembly may provide by law.*

It's in a separate article, not in the article with other human rights. It doesn't say the state is the trustee.

It does not say it is self-executing.

”Where the constitutional provision expressly states a right to enforce, that statement, of course, must be given effect. Thus, courts have assumed section 2 of Article XI of the Illinois Constitution to be self-executing.”<sup>56</sup>

Yet, the “Illinois Constitution, while (as noted above) deemed to be self-executing, has been held not to create any new remedies.”<sup>57</sup>

Legal questions include self-executing, private right of action, and standing.

“If the constitution is self-executing and creates, of itself, a private right of action, follow-up issues include who can sue (Private individuals only? Government agencies, too?) and against whom the right may be enforced (Legislature only? Executive branch? Private polluters?).

“Courts in two states have addressed whether the constitutional right-to-a-clean environment provision was intended to alter standing doctrine in the state. Official commentary in the Illinois state code explains that Art. XI, section 2 of that state's constitution was only intended to enlarge

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<sup>55</sup> Illinois General Assembly, accessed November 24, 2021, Constitution of the State of Illinois, Adopted at special election on December 15, 1970, <https://www.ilga.gov/commission/lrb/conent.htm>

<sup>56</sup> CRS Report, *op cit.*, See, e.g., *People v. Fiorini*, 574 N.E.2d 612, 625 (Ill. 1991).

<sup>57</sup> CRS Report, *op cit.*, See *City of Elgin v. County of Cook*, 660 N.E.2d 875, 891 (Ill. 1995); *Morford v. Lensey Corp.*, 442 N.E.2d 933, 937 (Ill. App. 1982).

standing.<sup>58</sup> It does not (as noted) establish a new remedy. More specifically, it cancels the judicial requirement that the plaintiff have suffered “special damage” before he/she has standing to bring an action against alleged polluting activities. That prerequisite foreclosed lawsuits by an individual who is among many persons similarly affected by pollution. Similarly, the constitution of Hawaii provision has been held to enlarge plaintiff standing.”<sup>59</sup>

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<sup>58</sup> CRS Report, *op cit.*, The commentary follows the cited constitutional provision in the state code. *See also* Fiedler v. Clark, 714 F.2d 77, 80 (9th Cir. 1983) (“legislative history of article XI, section 9 of the Hawaii Constitution suggests the legislature was attempting to remove barriers to standing to sue”); *Life of the Land v. Land Use Comm’n*, 623 P.2d 431, 441 (Haw. 1981) (accord).

<sup>59</sup> CRS Report, *op cit.*, Fiedler v. Clark, 714 F.2d 77 (9th Cir. 1983). *But see* *Community College of Delaware County v. Fox*, 342 A.2d 468, 474 (Pa. Commw. Ct. 1975) (constitutional provision making state trustee of natural resources does not expand standing for purposes of review actions challenging agency decisions).

## Massachusetts 1972

This early state constitutional amendment<sup>60</sup> has some defects.

*Article XCVII.*

*The people shall have the right to clean air and water, freedom from excessive and unnecessary noise, and the natural, scenic, historic, and esthetic qualities of their environment; and the protection of the people in their right to the conservation, development and utilization of the agricultural, mineral, forest, water, air and other natural resources is hereby declared to be a public purpose.*

*The general court shall have the power to enact legislation necessary or expedient to protect such rights.*

*In the furtherance of the foregoing powers, the general court shall have the power to provide for the taking, upon payment of just compensation therefor, or for the acquisition by purchase or otherwise, of lands and easements or such other interests therein as may be deemed necessary to accomplish these purposes.*

*Lands and easements taken or acquired for such purposes shall not be used for other purposes or otherwise disposed of except by laws enacted by a two thirds vote, taken by yeas and nays, of each branch of the general court.*

It's quite odd to put "conservation, development and utilization" all on the same level as rights. It doesn't say the state is trustee.

It doesn't say self-executing. "Contrariwise, the Massachusetts Constitution comes close to stating that its declared right to clean air and water is not self-executing."<sup>61</sup>

It doesn't say for future generations or posterity.

And there seem to be few court cases based on it.

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<sup>60</sup> Mass. Const., Part the First, Art. XCVII. <https://malegislature.gov/laws/constitution>

<sup>61</sup> CRS Report, *op cit.*, page 4, footnote 17, Following the constitutional language quoted on page 3 of this report, the Massachusetts Constitution states "The general court [i.e., legislature] shall have the power to enact legislation necessary or expedient to protect such rights."

## Rhode Island 1978

This section is in the right article, but the courts have made it useless:<sup>62</sup>

*Article I, Section 17. It shall be the duty of the general assembly to provide for the conservation of the air, land, water, plant, animal, mineral, and other natural resources of the state, and to adopt all means necessary and proper by law to protect the natural environment of the people of the state by providing adequate resource planning for the control and regulation of the use of the natural resources of the state and for the preservation, regeneration and restoration of the natural environment of the state.*

Courts have decided the above only applies to fisheries.<sup>63</sup>

This sounds good, but it's in the wrong place in the state constitution:<sup>64</sup>

### 2010 Rhode Island Code

#### Title 10 Courts and civil procedure—Procedure in particular actions

#### CHAPTER 10-20 State Environmental Rights

**§ 10-20-1 Legislative findings and purpose.** – *The general assembly finds and declares that each person is entitled by right to the protection, preservation, and enhancement of air, water, land, and other natural resources located within the state and that each person has the responsibility to contribute to the protection, preservation, and enhancement thereof. The legislature further declares its policy to create and maintain within the state conditions under which man and nature can exist in productive harmony in order that present and future generations may enjoy clean air and water, productive land, and other natural resources with which this state has been endowed. Accordingly, it is in the public interest to provide an adequate civil remedy to protect air, water, land and other natural resources located within the state from pollution, impairment, or destruction.*

It goes on for pages, unfortunately including too-specific clauses such as this:

**§ 10-20-8 Administrative and licensing proceedings – Intervention by environment advocate.** –  
*(a) Except as otherwise provided in § 10-20-9, in any administrative, licensing, or other similar proceedings and in any action for judicial review thereof which is made available by law, the environmental advocate may intervene on such terms as the court may deem just and equitable in order to effectuate the purposes and policies set forth in § 10-20-1.*

*(b) In any administrative, licensing, or other similar proceedings, the agency shall consider the alleged impairment, pollution, or destruction of the air, water, land, or other natural resources*

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<sup>62</sup> Sheila Birnbaum, Mark Cheffo, Allie Ozurovich, Rachel Passaretti-Wu, Marina Schwarz, and Lincoln Wilson, Dechert LLP, accessed November 24, 2021, New York's Green Amendment: How Guidance from Other States Can Shape the Development of New York's Newest Constitutional Right, <https://www.jdsupra.com/legalnews/new-york-s-green-amendment-how-guidance-2462721/>

<sup>63</sup> See, e.g., *Riley v. Rhode Island Dept. of Environmental Management*, 941 A.2d 198, 208 (defining section 17 as “the ‘right of fishery’”)

<sup>64</sup> Justia, accessed November 24, 2021, 2010 Rhode Island Code, Title 10 Courts and civil procedure—Procedure in particular actions, CHAPTER 10-20 State Environmental Rights, <https://law.justia.com/codes/rhode-island/2010/title10/chapter10-20/>

*located within the state and no conduct shall be authorized or approved which does, or is likely to have, such effect so long as there is a feasible, prudent, and economically viable alternative consistent with the reasonable requirements of the public health, safety, and welfare.*

The judge gets to decide what intervention is just and equitable. Requiring “a *feasible, prudent, and economically viable alternative*” is how many a subdivision and pipeline has gotten approved without an Environmental Rights Amendment.

The environmental advocate is a specific governmental position:

**§ 10-20-3 Civil actions – Environmental advocate – Notice – Intervention.** – (a) *Any city or town may maintain an action in a court of competent jurisdiction against any person to enforce, or to restrain the violation of, any environmental quality standard which is designed to prevent or minimize pollution, impairment, or destruction of the environment.*

(b) *Except in those instances where the conduct complained of constitutes a violation of an environmental quality standard which establishes a more specific standard for the control of pollution, impairment, or destruction of the environment, any city or town may maintain an action in any court of competent jurisdiction for declaratory and equitable relief against any other person for the protection of the environment, or the interest of the public therein, from pollution, impairment, or destruction.*

(c) *Within the department of attorney general there shall be an environmental advocate, to be appointed by the attorney general from among the assistant and special assistant attorneys general.*

Cities or counties at least seem to have standing, but only to enforce specific environmental quality standards, and non-governmental entities don’t even get that. And the environmental advocate is an attorney working for the government. This is a far cry from an effective environmental rights amendment.

An ongoing Rhode Island court case, *Rhode Island v. Chevron Corp.* (filed 2018)<sup>65</sup> that has already been up to Federal Circuit Court and back, with input from the U.S. Supreme Court, plus amicus briefs by other states, may clarify some of the actual scope and effect of the Rhode Island Environmental Rights Act.

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<sup>65</sup> ClimateCaseChart.com, accessed November 24, 2021, Rhode Island v. Chevron Corp., Filing Date: 2018, <http://climatecasechart.com/climate-change-litigation/case/rhode-island-v-chevron-corp/>

## Hawaii 1978

This language is already in the Hawaii state constitution, but is not strong enough:

*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.*

(Haw. Const. Art. XI § 9. Adopted 1978)

The wording about “Any person can enforce... “ apparently was clear enough:

Similarly, the constitution of Hawaii provision has been held to enlarge plaintiff standing.”<sup>66</sup>

A decade after it was enacted, a court found this provision to be lacking regarding private action.

*The Hawaii Constitution's provision also has been construed by a court (without discussion) to create no private right of action<sup>67</sup> -- a dubious result, it would seem, in light of the "Any person may enforce this right ..." language following the sentence stating the right to a healthful environment.*

Yet two more decades later, the reverse was held:<sup>68</sup>

*“In Hawai’i, the Supreme Court held its environment-focused constitutional provision allows for private enforcement of environmental laws, absent legislative or regulatory limitations. County of Hawaii v. Ala Loop Homeowners, 235 P.3d 1103, 1120-34 (Haw. 2010), abrogated on other grounds by Tax Found. of Hawai’i v. State, 439 P.3d 127, 141 (Haw. 2019).”*

For a potential solution to all this court case confusion, see below, [Hawaii proposed](#).

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<sup>66</sup> CRS Report, *op cit.*, Fiedler v. Clark, 714 F.2d 77 (9th Cir. 1983). *But see* Community College of Delaware County v. Fox, 342 A.2d 468, 474 (Pa. Commw. Ct. 1975) (constitutional provision making state trustee of natural resources does not expand standing for purposes of review actions challenging agency decisions).

<sup>67</sup> CRS Report, *op cit.*, Stop H-3 Ass'n v. Lewis, 538 F. Supp. 149, 175 n.31 (D. Haw. 1982), *rev'd on other grounds*, 740 F.2d 1442 (9th Cir. 1984), *cert. denied*, 471 U.S. 1108 (1985).

<sup>68</sup> Brown, *op cit.*

## Proposed constitutional amendments

States are listed in alphabetical order below, including a few (Delaware, Maryland) that are not in the summary table in **Pending state Right to Clean Water amendments**.

### Delaware

*“Green amendment legislation has been introduced in Delaware and West Virginia but gained little traction.”*<sup>69</sup>

According to Delaware Public Media:<sup>70</sup>

The Delaware Legislative Black Caucus has announced some policy priorities for the future — and several of those target environmental issues.

Delaware Public Media’s Sophia Schmidt talks with State Rep. Larry Lambert, a long-time environmental justice advocate, about those priorities.

The lawmakers’ legislative priorities include a Green Amendment—which would grant current and future generations the right to a stable and healthy environment—and a focus on Cumulative Health Impacts.

The latter is a policy idea that could change the way permitting is done for polluting facilities, in an effort to protect communities where several are located. New Jersey passed a similar law last year.

“You hear about disproportionate rates of asthma,” said State Rep. Larry Lambert (D-Claymont), one of the lawmakers leading the effort. “There’s a chronic stress in some of our communities where they don’t think *if* there’s going to be another hazardous chemical incident, they think of *when* is there going to be another hazardous chemical incident.”

No bill has been filed yet. Lambert emphasizes that he and other lawmakers are still talking with stakeholders, but says the legislation could seek a change in the permitting process by state environmental regulators.

“If these communities are already overburdened with a number of polluters, ... we want to make sure that other factors are taken into account, such as the cumulative health impacts on these communities, before legacy companies are allowed to expand or before more companies are allowed to come in,” Lambert said.

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<sup>69</sup> Jeremy Cox, Bay Journal, July 14 2021, “Push is on for ‘green amendments’ in four Bay state constitutions,” [https://www.bayjournal.com/news/policy/push-is-on-for-green-amendments-in-four-bay-state-constitutions/article\\_6bea6c4e-de78-11eb-a03e-37aac2b667b0.html](https://www.bayjournal.com/news/policy/push-is-on-for-green-amendments-in-four-bay-state-constitutions/article_6bea6c4e-de78-11eb-a03e-37aac2b667b0.html)

<sup>70</sup> [Sophia Schmidt](https://www.delawarepublic.org/post/delaware-legislative-black-caucus-seeks-more-focus-environmental-justice-issues), Delaware Public Media (DPM), July 9, 2001, Delaware Legislative Black Caucus seeks more focus on environmental justice issues, <https://www.delawarepublic.org/post/delaware-legislative-black-caucus-seeks-more-focus-environmental-justice-issues>

## Florida

A 2021 petition did not get enough signatures. However, its organizers started another petition for Rights to Clean Water in May, 2022, and focusing on that one petition. See also [Florida](#) in Pending state Right to Clean Water amendments.

This is the complete text of the 2022 petition:

### *Right to Clean and Healthy Waters*

*Ballot summary: This amendment creates a fundamental right to clean and healthy waters. The amendment may be used to sue State executive agencies for harm or threatened harm to Florida's waters, which include aquatic ecosystems. This amendment defines terms, identifies affected constitutional provisions in Article IV governing the executive branch, provides for civil action enforcement, allows attorney's and expert witness fees for prevailing plaintiffs, and provides equitable remedies including restoration of waters. (70)*

### *Full text: Art I, Sect. 28 - Right to Clean and Healthy Waters*

*(a) PURPOSE. Waters sustain all forms of life. Clean and healthy waters protect and promote substantial interests, including human health, safety and welfare, fish and wildlife, conservation of natural resources, outdoor recreation, aesthetic values, business opportunities, property values, and economic interests throughout the State. Although considerable attention has been given to protect and conserve waters in the State, including Article II, Section 7 of this Constitution and a comprehensive body of State environmental laws and regulations, such attention has not corrected the continuing decline in the condition of waters in the State. The poor condition of many important waters throughout the State has led the people of Florida, in their inherent political power, to create this fundamental right to clean and healthy waters. State executive agencies are instrumental to the effort to protect Florida waters from harm and threatened harm. Consequently, to promote the interests of Florida's people, businesses, organizations, communities, and economies in clean and healthy waters, this Section provides for equitable remedies against the actions or inactions of State executive agencies that harm or threaten harm to Florida waters, with the goal of clean and healthy waters and the aspiration that waters in the State will one day flourish.*

*(b) DECLARATION OF RIGHT. The people have the inherent political power pursuant to Article I, Section 1 of this Constitution to create the fundamental right to clean and healthy waters. The people hereby declare this fundamental right, which is inalienable.*

*(c) HARM PROHIBITED. It shall be unlawful, and considered a violation of the right to clean and healthy waters, for a State executive agency, as defined herein, to harm or threaten to harm Florida waters by action or inaction, including by regulation, rule, policy, plan, standard, permit, practice including management practice, activity, agreement, memorandum of understanding, order; or by inaction that permits harm or threatened harm about which the State executive agency knew or should have known.*



(d) ENFORCEMENT

(1) A person, to include a business, nonprofit, tribal, and governmental entity, may bring a civil action for injunctive or declaratory relief in a court of competent jurisdiction against a State executive agency for violating this Section. Exhaustion of administrative remedies and notification time periods shall not be required. A plaintiff is not required to allege special or direct injury to state a claim.

(2) Any violation under this Section will be considered *de novo*. Due to the fundamental nature of this right, to avoid liability where a violation is shown, a State executive agency shall be required to demonstrate that its action or inaction, as described in subsection (c), was necessary to promote a compelling government interest and was narrowly tailored to advance that interest. Where a party's action or inaction is found to be a substantial factor in a violation of this Section, that party shall be liable for the violation and shall not avoid liability on the basis that the action or inaction of another party or nonparty has also contributed to the violation.

(3) A prevailing plaintiff shall be entitled to appropriate declaratory relief and to such equitable relief as may be appropriate to remedy the violation including, without limitation, injunctive relief to restore waters to the condition that existed prior to the proven violation. In addition, a prevailing plaintiff shall be entitled to reasonable attorney's and expert witness fees.

(e) DEFINITIONS. For purposes of this Section, the following words and terms shall have the stated meanings:

(1) "Clean and healthy waters" are waters free from harm or threat of harm that occurs after the effective date of this Section. Indicators of clean and healthy waters include: water quality safe for native fish and wildlife and human recreation, and regarding drinking water sources, safe for human consumption; sufficient habitats, water filtration, and element cycling to support thriving populations and diverse communities of native fish and wildlife; natural flow regimes, to include recharging groundwater; and other ecological processes and functions to be intact.

(2) "Harm" means the introduction of pathogens, contaminants, or toxins into waters or the disruption of hydrological or ecological processes or functions of waters. This term includes but is not limited to such chemical, biological, or physical stressors to waters that contribute to unnatural water levels or nutrient loads; that remove, fragment, or degrade habitat; that disturb vegetation or soil near the edge of waters; that introduce exotic or invasive species; that obstruct or divert natural flow; that overexploit native species; and that negatively affect the health of humans, wildlife, or native fish.

(3) "State executive agencies" shall mean the following governmental entities and officers: The Governor; the Cabinet and members of the Cabinet; each State executive officer and State executive department, and each State executive departmental unit described in s. 20.04; the Fish and Wildlife Conservation Commission; each water management district; and each officer and governmental entity of the executive branch having statewide jurisdiction or jurisdiction in more than one county.

(4) “Waters” refers to the aquatic ecosystems of aquifers, bays, creeks, estuaries, estuarine systems, lagoons, lakes, rivers, riverine systems, springs, streams, wetlands, intracoastal and coastal waters within the boundaries of the State of Florida, and shall include the natural tributaries and artificial waterways which impact these water bodies. This term shall include fresh, brackish, saline, tidal, surface, ground and underground water associated with these water bodies.

(f) OTHER CONSTITUTIONAL PROVISIONS. This Section affects constitutional provisions of the executive branch: Article IV, Section 1 (Governor); Article IV, Section 4 (Cabinet); Article IV, Section 6 (Executive departments); Article IV, Section 9 (Fish and wildlife conservation commission).

(g) SELF-EXECUTING. Implementing legislation is not required in order to enforce this Section. This Section is remedial and shall be given a liberal construction to fully effectuate its purpose.

(h) SEVERABILITY. If any part of this Section, or the application of this Section to any person or circumstance, is held invalid, the remainder of this Section, including the application of such part to other persons or circumstances, shall not be affected by such a holding and shall continue in full force and effect. To this end, the parts of this Section are severable.

This is the complete text of the Right to Clean Water for the 2021 petition:<sup>71</sup>

(a) Every Floridian has a right to clean water.

(b) The Everglades, Florida Springs, the Indian River Lagoon, the St. Johns River, the Caloosahatchee River, the Suwanee River, the Santa Fe River, Apalachicola Bay, Biscayne Bay, Tampa Bay, Pensacola Bay and all other Florida waters have a right to clean water, and that right shall include the rights of those waters to exist, flow, be free from pollution, and maintain a healthy ecosystem.

(c) Any resident, nongovernmental organization, or government entity of this state shall have standing to enforce and defend the rights secured by this section in any court possessing proper jurisdiction.

(d) Waters may enforce and defend the rights secured by this Section through an action brought by any resident, nongovernmental organization, or government entity of this state pursuant to (c), in any court possessing proper jurisdiction, in the name of the waters as the real party in interest. Damages awarded under this section shall be measured by the cost of fully restoring the waters to their pre-damaged state, and shall be paid to an appropriate governmental or nongovernmental entity, as designated by the court, to be used exclusively for the full restoration of the waters.

(e) The rights secured in this section shall not be interpreted to confer liabilities, duties, obligations, or responsibilities on waters.

(f) Any Florida county, city, and town may enact local laws providing additional protections for clean water provided that those local laws do not establish standards and requirements that are lower or less stringent than those imposed by this Section or by state law.

(g) Local laws adopted pursuant to subsection (f) of this section shall not be subject to preemption by state law.

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<sup>71</sup> FL5.org, accessed November 25, 2021, Right to Clean Water, <https://fl5.org/right-to-clean-water>

(h) *The provisions of this section shall not apply to constructed wetlands, which means a non-natural pool and any artificial wetland that uses natural processes involving wetland vegetation, soils, and their associated microbial assemblages to treat domestic wastewater, industrial water, greywater or stormwater runoff, to improve water quality.*

(i) *To the extent that any provision of this amendment is deemed by a court to impermissibly conflict with federal law, such provision shall be severable and all other provisions shall remain fully enforceable.*

(j) **Definitions.** (1) *“Clean Water” shall mean waters free of the non-natural presence of any one or more substances, contaminants, or pollutants in quantities which are or may be potentially harmful or injurious to human health or welfare, animals, fish, plant life, and water quality or which may unreasonably interfere with the enjoyment of life or property, including outdoors recreation.*

Clause (g) about local laws not being subject to pre-emption is necessary because in 2020 Florida passed SB 712<sup>72</sup>, including a subsection with such pre-emption. The proposed constitutional amendment would supersede that pre-emption.

403.412 *Environmental Protection Act.—*

2371 (9)(a) *A local government regulation, ordinance, code,*  
2372 *rule, comprehensive plan, charter, or any other provision of law*  
2373 *may not recognize or grant any legal rights to a plant, an*  
2374 *animal, a body of water, or any other part of the natural*  
2375 *environment that is not a person or political subdivision as*  
2376 *defined in s. 1.01(8) or grant such person or political*  
2377 *subdivision any specific rights relating to the natural*  
2378 *environment not otherwise authorized in general law or*  
2379 *specifically granted in the State Constitution.*

2380 (b) *This subsection does not limit the power of an*  
2381 *adversely affected party to challenge the consistency of a*  
2382 *development order with a comprehensive plan as provided in s.*  
2383 *163.3215 or to file an action for injunctive relief to enforce*  
2384 *the terms of a development agreement or challenge compliance of*  
2385 *the agreement as provided in s. 163.3243.*

2386 (c) *This subsection does not limit the standing of the*  
2387 *Department of Legal Affairs, a political subdivision or*  
2388 *municipality of the state, or a citizen of the state to maintain*  
2389 *an action for injunctive relief as provided in this section.*

A Florida petition for a constitutional amendment must have as many signatures as 8% of the total votes cast in the preceding presidential election, which for the 2024 ballot means 891,589

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<sup>72</sup> “Clean Waterways Act”, FL SB 712 (2020), approved by Governor June 30, 2020,,  
<https://www.flsenate.gov/Session/Bill/2020/712/BillText/er/HTML>

signatures.<sup>73</sup> Plus, “Proponents must obtain signatures equaling at least 8 percent of the district-wide vote in the most recent presidential election in at least half (14) of the state's 28 congressional districts. Signatures remain valid until February 1 in even-numbered years. Signatures must be verified by February 1 of the general election year the initiative aims to appear on the ballot. . . . County supervisors of elections have a maximum of 30 days to verify signatures and submit them to the secretary of state. . . .”

There’s also a judicial review that takes 30 days,<sup>74</sup> so the actual petition deadline for the 2024 ballot is December 1, 2023.

### **Florida Supreme Court Review and Fiscal Impact Statement**

Once a sponsoring political committee obtains verified signatures on petitions equal to 10% of the number of signatures required statewide and in at least 25% of Florida’s congressional districts, the Secretary of State will send the petition to the Attorney General. Within 30 days of receipt, the Attorney General will petition the Florida Supreme Court for an advisory opinion as to whether the text of the proposed amendment complies with s. 3, Art. XI of the State Constitution and whether the proposed ballot title and summary comply with Section 101.161, Florida Statutes.

The Secretary of State also sends concurrently a copy of the petition to the Financial Impact Estimating Conference (FEIC). The FIEC reviews the proposed amendment and completes an analysis and financial impact statement, which is also submitted to the Florida Supreme Court for review. If the proposed amendment obtains ballot position, the financial impact statement will appear on the ballot under the ballot summary.

Once it’s on the ballot, about 6.7 million votes will be required to pass it:<sup>75</sup>

“A proposed amendment requires at least 60% approval from voters to pass [see Florida Constitution, [Article XI, Section 5\(e\)](#)].”

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<sup>73</sup> Ballotpedia, accessed November 25, 2021, Signature requirements for ballot measures in Florida, [https://ballotpedia.org/Signature\\_requirements\\_for\\_ballot\\_measures\\_in\\_Florida](https://ballotpedia.org/Signature_requirements_for_ballot_measures_in_Florida)

<sup>74</sup> Florida Division of Elections, March 16, 2017, 2018 Initiative Petition Handbook, Page 2, What Are the Steps in the Initiative Petition Process?, <https://files.floridados.gov/media/697659/initiative-petition-handbook-2018-election-cycle-eng.pdf>

<sup>75</sup> Florida Division of Elections, August 24, 2021, Constitutional Amendments/Initiatives, <https://dos.myflorida.com/elections/laws-rules/constitutional-amendmentsinitiatives/>

## Hawaii proposed

“The Hawaii State Legislature can put a proposed amendment on the ballot upon either a two-thirds (66.67%) majority vote in both chambers of the legislature in the same session or two simple majority votes in both chambers held in two successive sessions.” This proposed amendment as SB 502 passed the Hawaii Senate 24:1 on March 9, 2021.<sup>76</sup> The House has not voted yet.

*Each person has a right to a clean and healthy environment, including pure water, clean air and healthy ecosystems, and to the preservation of the natural, cultural, scenic and healthful qualities of the environment. This provision and the rights stated herein are self-executing. The reserved rights stated herein are equivalent to other protected inherent and inalienable rights.*

Note the addition of “self-executing” and “inherent and inalienable rights”.

This amendment will supersede the existing language shown above in [Hawaii 1978](#).

## Iowa

*Every person has the right to a clean and healthy environment, including pure water, clean air, ecologically healthy habitats, and the preservation of the natural, scenic, historic, and aesthetic qualities of the environment. The state shall not infringe upon these rights by action or inaction. The state’s public natural resources, including its soils, waters, air, flora, fauna, climate, and public lands, are the common property of the people, including both present and future generations. As trustee of these resources, the state shall conserve, maintain, and restore these resources for the health and benefit of all the people. This section and the rights stated herein are self-executing and shall be in addition to any rights conferred by the public trust doctrine or common law.*

(HJR 12 proposed on Earth Day 2021. Supported by [Sierra Club Iowa](#).)

## Kentucky

*“a right of the people to have a clean and healthy environment with the preservation of the natural, scenic and cultural values of the environment, and for the Commonwealth to serve as the trustee for the conservation and maintenance of the environment and its natural resources for the benefit of all people.”*

(HB107)

## Maine

*The people of the State have the right to a clean and healthy environment and to the preservation of the natural, cultural and healthful qualities of the environment. The State may not infringe upon these rights. The State shall conserve, protect and maintain the State’s natural resources, including, but not limited to, its air, water, land and ecosystems for the benefit of all the people, including generations yet to come.*

(LD489 called the Pine Tree Amendment)

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<sup>76</sup> Ballotpedia, accessed November 24, 2021, Hawaii Environmental Rights Amendment (2022), [https://ballotpedia.org/Hawaii\\_Environmental\\_Rights\\_Amendment\\_\(2022\)](https://ballotpedia.org/Hawaii_Environmental_Rights_Amendment_(2022))

## Maryland

According to *Bay Journal*:<sup>77</sup>

*For anyone who believes that Maryland's laws adequately protect the environment and people's health, state Del. Wanika Fisher has an invitation: Come visit her legislative district.*

*In District 47B, which lies in Prince George's County inside the DC Beltway, about 90% of the residents are Black or Hispanic. Many, she said, suffer from ailments related to pollutants legally emitted by the beltway's traffic, nearby concrete plants and other industrial facilities.*

*Among them is Fisher, who has asthma. "I am a Black woman statistic in health," said Fisher, a 33-year-old criminal defense and personal injury attorney who was first elected to the House as a Democrat in 2018.*

*The problem is too big to deal with at the statute level, as she sees it. That's why Fisher is trying to rally her fellow lawmakers around changing the state constitution. Like the U.S. Constitution's right to free speech or bear arms, an environmental rights amendment would treat clean air and water as a fundamental guarantee, supporters say.*

*"This bill allows an avenue for people to get justice," said Fisher, who plans to refile the bill during next year's legislative session after it was drowned out last spring by COVID-19 relief and police reform efforts. "When you put in the constitution that everyone has a right to a healthy environment, it's a higher level [of legal power]."...*

*Green amendment legislation has been introduced in Delaware and West Virginia but gained little traction. In Maryland, legislation has been filed in three consecutive sessions — and failed to get past the committee level each time.*

*"When something is fundamental and so essential and so necessary, you can't give up," said Rabbi Nina Beth Cardin, the co-founder of the Maryland Campaign for Environmental Human Rights, the amendment's primary promoter.*

*Cardin, the cousin of U.S. Sen. Ben Cardin of Maryland, sees brighter prospects for the amendment in 2022. It's an election year, so the referendum can be printed on the statewide ballot in November. And it will be about a year removed from the height of the COVID-19 pandemic, perhaps enabling legislators to concentrate on a broader raft of issues, she said.*

*New York's progress may help nudge Maryland forward as well, said Fisher, the Maryland state delegate. "I think this will help Maryland and create pressure to move and make constituents reach out that we want to see this on our ballot next year," Fisher said.*

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<sup>77</sup> Jeremy Cox, *Bay Journal*, July 14 2021, "Push is on for 'green amendments' in four Bay state constitutions," [https://www.bayjournal.com/news/policy/push-is-on-for-green-amendments-in-four-bay-state-constitutions/article\\_6bea6c4e-de78-11eb-a03e-37aac2b667b0.html](https://www.bayjournal.com/news/policy/push-is-on-for-green-amendments-in-four-bay-state-constitutions/article_6bea6c4e-de78-11eb-a03e-37aac2b667b0.html)

## New Jersey

ACR 72<sup>78</sup> and SCR 15<sup>79</sup> died in committee January 2022.

ACR 80 and SCR 30 died in committee January 2021.

1. Every person has a right to a clean and healthy environment, including pure water, clean air, and ecologically healthy habitats, and to the preservation of the natural, scenic, historic, and esthetic qualities of the environment. **The State shall not infringe upon these rights, by action or inaction.**
2. The State's public natural resources, among them its waters, air, flora, fauna, climate, and public lands, are the common property of all the people, **including both present and future generations.** The State shall serve as **trustee** of these resources, and shall conserve and maintain them for the benefit of all people.
3. This paragraph and the rights stated herein are (1) **self-executing**, and (2) shall be in addition to any rights conferred by the public trust doctrine or common law.

## New Mexico

SJR 2 died in House, February 2022.<sup>80</sup> Committee substitute removes C and guts B:

*A JOINT RESOLUTION PROPOSING TO AMEND THE CONSTITUTION OF NEW MEXICO BY ADDING A NEW SECTION OF ARTICLE 2 THAT PROVIDES THE PEOPLE OF THE STATE WITH ENVIRONMENTAL RIGHTS, INCLUDING THE RIGHT TO CLEAN AND HEALTHY AIR, WATER, SOIL AND ENVIRONMENT, AND DIRECTS THE STATE TO SERVE AS TRUSTEE OF THE NATURAL RESOURCES OF NEW MEXICO FOR THE BENEFIT OF ALL THE PEOPLE AND BY REPEALING THE CURRENT POLLUTION CONTROL PROVISIONS OF ARTICLE 20, SECTION 21.*

*BE IT RESOLVED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:*

*SECTION 1. It is proposed to amend Article 2 of the constitution of New Mexico by adding a new section to read:*

*"A. The people of the state shall be entitled to clean and healthy air, water, soil and environment; a stable climate; and self-sustaining ecosystems, for the benefit of public health, safety and general welfare. The state, including its political subdivisions, shall serve as trustee of these resources and shall conserve, protect and maintain them for the benefit of all the people, including present and future generations.*

*B. The provisions of this section are self-executing. Monetary damages shall not be awarded for a violation of this section."*

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<sup>78</sup> Legiscan, 2022-2023 Regular Session, accessed April 19, 2022, New Jersey Assembly Concurrent Resolution 72 <https://legiscan.com/NJ/bill/ACR72/2022>

<sup>79</sup> Legiscan, 2022-2023 Regular Session, accessed April 19, 2022, New Jersey Senate Concurrent Resolution 15 <https://legiscan.com/NJ/bill/SCR15/2022>

<sup>80</sup> New Mexico Legislature, Regular Session 2022, Accessed April 19, 2022, HJR 2, <https://www.nmlegis.gov/Legislation/Legislation?chamber=H&legType=JR&legNo=2&year=22>

*SECTION 2. It is proposed to amend Article 20 of the constitution of New Mexico by repealing Section 21.*

*SECTION 3. The amendment proposed by this resolution shall be submitted to the people for their approval or rejection at the next general election or at any special election prior to that date that may be called for that purpose. - 2*

SJR 3 died in House, February 2021.

- A. *The people of the state, including future generations, have the right to a clean and healthy environment, including pure water, clean air, healthy ecosystems and a stable climate, and to the preservation of the natural, cultural, scenic and healthful qualities of the environment.*
- B. *The state, including each branch, agency and political subdivision, shall serve as trustee of the natural resources of the state, among them its waters, air, flora, fauna, climate and public lands. The state shall conserve, protect and maintain these resources for the benefit of all the people, including generations yet to come.*
- C. *The rights stated in this section are inherent, inalienable and indefeasible, are among those rights reserved to all the people and are on par with other protected inalienable rights. The provisions of this section are self-executing."*

## Ohio

Ohio demonstrates the danger of what can happen without a constitutional amendment when those in power feel threatened by local attempts to strengthen environmental protection and the rights of citizens to go to court to protect vital resources.

On July 17, 2019, the Ohio legislature, reacting to a local effort in Toledo to protect Lake Erie and a grassroots campaign to protect the Michindoh Aquifer in northwest Ohio, passed a budget bill containing the following language:<sup>81</sup>

*"Nature or any ecosystem does not have standing to participate in or bring an action in any court of common pleas...." and "No person, on behalf of or representing nature or an ecosystem, shall bring an action in any court of common pleas."*

## Oregon

SJR 5 died in the Senate Committee on Energy and Environment in June 2021.<sup>82</sup>

To go in a new Article I, Section 47: *(1) The people of this state have the right to a clean and healthy environment, including pure water, clean air, healthy ecosystems and a stable climate, and to the preservation of the natural, cultural, scenic, recreational and healthful qualities of the environment. The state shall not infringe upon these rights, by action or inaction.*

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<sup>81</sup> James Proffitt, GreatLakesNow, August 19, 2019, Rights of Nature: Gaining traction around the world while facing serious opposition almost everywhere, <https://www.greatlakesnow.org/2019/08/rights-of-nature/>

<sup>82</sup> Sen. Jeff Golden, Oregon State Legislature, accessed December 10, 2021, Proposing amendment to Oregon Constitution relating to right of people to clean and healthy environment, <https://olis.oregonlegislature.gov/liz/2021R1/Measures/Overview/SJR5>



(2) The state, including each branch, agency and political subdivision, shall serve as trustee of all the natural resources of this state. The trust assets to be protected shall include this state's waters, air, wildlife, fisheries, atmosphere, climate, public lands and natural ecosystems. The state shall conserve, protect and maintain these natural resources for the benefit of all the people, including generations yet to come.

(3) The rights stated in this section are self-executing, inherent and indefeasible, are among those rights reserved to the people and are in addition to, and may not be constrained by or limited to, those rights conferred by the state's public trust doctrine or wildlife trust doctrine.

Unusual that this one calls out by name the state's public trust doctrine and wildlife trust doctrine.

Maybe they'll try again in a later year.

Meanwhile, new law, effective June 3, 2022, HB 4077 renames and reorganizes Environmental Justice Council to be Environmental Justice Council.<sup>83</sup>

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<sup>83</sup> Oregon State Legislature, 2022 Regular Session, accessed April 19, 2022, HB 4077  
<https://olis.oregonlegislature.gov/liz/2022R1/Measures/Overview/HB4077>

## South Carolina

H.3382<sup>84</sup>

### **A JOINT RESOLUTION**

*PROPOSING AN AMENDMENT TO THE CONSTITUTION OF SOUTH CAROLINA, 1895, BY ADDING SECTION 26 TO ARTICLE I SO AS TO ENACT THE ENVIRONMENTAL BILL OF RIGHTS, TO GRANT STANDING TO THE PEOPLE OF THIS STATE TO ENFORCE THEIR RIGHT TO CONSERVE AND PROTECT THE ENVIRONMENT, AND TO GRANT LOCAL GOVERNMENTS THE POWER TO ENACT LAWS, REGULATIONS, ORDINANCES, AND CHARTER PROVISIONS THAT ARE MORE RESTRICTIVE AND PROTECTIVE OF THE ENVIRONMENT THAN LAWS ADOPTED BY THE STATE GOVERNMENT.*

*Be it enacted by the General Assembly of the State of South Carolina:*

*SECTION 1. It is proposed that Article I of the Constitution of this State be amended by adding the following new section:*

*"Section 26. (A) The people of the State of South Carolina find and declare that South Carolina's environment is the common property of all South Carolinians. The conservation of South Carolina's environment, including its clean air, pure water, and natural and scenic values, is fundamental and it should be protected and preserved for all South Carolinians, including generations yet to come.*

*(B) The people of the State of South Carolina have a right to South Carolina's environment. The people of this State have the authority and legal standing to enforce this right. As trustees of this resource, the State and local governments shall conserve South Carolina's environment, including its clean air, pure water, and natural and scenic values for the benefit of all people. This section applies to the State of South Carolina and to every city, town, and county in the State.*

*(C) All provisions of this section are self-executing and severable. To facilitate the conservation of South Carolina's environment, local governments have the power to enact laws, regulations, ordinances, and charter provisions that are more restrictive and protective of the environment than laws or regulations enacted or adopted by the state government. If any local law or regulation enacted or adopted pursuant to this article conflicts with a state law or regulation, the more restrictive and protective law or regulation governs."*

*SECTION 2. The proposed amendment must be submitted to the qualified electors at the next general election for representatives. Ballots must be provided at the various voting precincts with the following words printed on the ballot:*

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<sup>84</sup> South Carolina General Assembly, 123rd Session, 2019-2020, H. 3382, [https://www.scstatehouse.gov/sess123\\_2019-2020/bills/3382.htm](https://www.scstatehouse.gov/sess123_2019-2020/bills/3382.htm)

*"South Carolina's environment is an asset to all current and future South Carolinians. Do you favor expanding the power of local governments to protect the environment and granting legal standing to the citizens of this State to enforce the conservation of the environment?"*

This was in 2019.<sup>85</sup> It's not clear whether a similar bill has since been proposed.

South Carolina Rep. Leo Woodberry is proposing every state have an Environmental Rights Amendment for environmental justice; he and other people proposing that should be good contacts.<sup>86</sup>

## Vermont

PR. 9 died in the Senate Committee on Natural Resources and Energy in February 2020:<sup>87</sup>

To go in Article I, Section 23: *That the people have a right to clean air and water and the preservation of the natural, scenic, and cultural values of the environment. The State of Vermont's natural resources are the common property of all the people. The State shall conserve and maintain the natural resources of Vermont for the benefit of all people.*

It does not seem to have been re-introduced yet.

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<sup>85</sup> Conservation Voters of South Carolina, Good Green Deeds 2015-2016, <https://www.cvsc.org/scorecard/good-green-deeds/> "Representatives Neal, Henegan, Whipper, Gilliard, Clyburn, Hosey, Mack, and McKnight introduced H.4894, an environmental bill of rights that would have allowed local governments to enact environmental regulations more protective than state laws. "Reps. Neal, Henegan, Whipper, Gilliard, Clyburn, Hosey, Mack, and McKnight also supported H.4985, a similar bill that would have established citizens' environmental property rights."

<sup>86</sup> Andrea Cooper, Sierra Club, August 30, 2018, "A Nuclear Energy Meltdown Scrambles Southern Politics: South Carolinians have some of the highest electricity bills in the country, thanks in part to nuclear energy," <https://www.sierraclub.org/sierra/2018-4-september-october/feature/nuclear-energy-meltdown-scrambles-southern-politics>

<sup>87</sup> [Sen. Christopher Bray](https://legislature.vermont.gov/bill/status/2020/PR.9), et. al, Vermont Legislature, accessed December 10, 2021, Status of Bill PR.9, <https://legislature.vermont.gov/bill/status/2020/PR.9>

## Washington

“The Green Amendment has been re-proposed in 2022 with the [text] modified in meaningful ways based on input during the 2021 hearings.”<sup>88</sup> HJR 4209 died in committee in February 2022.<sup>89</sup>

*H-1782.1 HOUSE JOINT RESOLUTION 4209 State of Washington 67th Legislature 2022 Regular Session By Representatives Lekanoff and Berry Prefiled 01/07/22. Read first time 01/10/22. Referred to Committee on Environment & Energy. p. 1 HJR 4209*

*1 BE IT RESOLVED, BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE 2 STATE OF WASHINGTON, IN LEGISLATIVE SESSION ASSEMBLED:*

*3 THAT, At the next general election to be held in this state the 4 secretary of state shall submit to the qualified voters of the state 5 for their approval and ratification, or rejection, an amendment to 6 Article I of the Constitution of the state of Washington by adding a new section to read as follows:7*

*8 Article I, section . . . (1) The people of the state, including 9 future generations, have the right to a clean and healthy 10 environment, including pure water, clean air, healthy ecosystems, and 11 a stable climate, and to the preservation of the natural, cultural, 12 scenic, and healthful qualities of the environment.*

*13 (2) The state, including each political subdivision of the state, 14 shall serve as trustee of the natural resources of the state, among 15 them its waters, air, flora, fauna, soils, and climate. The state, 16 including each political subdivision of the state, shall conserve, 17 protect, and maintain these resources for the benefit of all the people, including generations yet to come. 18*

*19 (3) The rights stated in this section are inherent, inalienable, 20 and indefeasible, are among those rights reserved to all the people, 21 and are on par with other protected inalienable rights. The state, including each political subdivision of the state, shall equitably 22 protect these rights for all people regardless of their race, 23 ethnicity, geography, or wealth, and shall act with prudence, 24 loyalty, impartiality, and equitable treatment of all beneficiaries 25 in fulfilling its trustee obligations. The provisions of this section are self-executing. 26*

*7 BE IT FURTHER RESOLVED, That the secretary of state shall cause 8 notice of this constitutional amendment to be published at least four 9 times during the four weeks next preceding the election in every legal newspaper in the state.*

HJR 4205 died in committee in February 2021.<sup>90</sup>

*(1) The people of the state, including future generations, have the right to a clean and healthy environment, including pure water, clean air, healthy ecosystems, and a stable climate, and to the preservation of the natural, cultural, scenic, and healthful qualities of the environment.*

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<sup>88</sup> Green Amendments Advancing in Washington, accessed April 19, 2022, Washington [State] Overview, <https://wagreenamendment.org/overview>.

<sup>89</sup> Washington State legislature, accessed April 19, 2022, Bill Information > HJR 4209, <https://app.leg.wa.gov/billsummary?BillNumber=4209&Initiative=false&Year=2021>

<sup>90</sup> Washington State legislature, accessed November 25, 2021, Bill Information > HJR 4205, <https://app.leg.wa.gov/billsummary?BillNumber=4205&Year=2021>

(2) The state, **including each branch, agency, and political subdivision**, shall serve as **trustee** of the natural resources of the state, among them its waters, air, flora, fauna, climate, and public lands. The state shall conserve, protect, and maintain these resources for the benefit **of all the people, including generations yet to come.**

(3) The rights stated in this section are **inherent, inalienable, and indefeasible**, are among those rights reserved to all the people, and are on par with other protected inalienable rights. The state shall equitably protect these rights for **all people regardless of their race, ethnicity, geography, or wealth**, and shall act **with prudence, loyalty, impartiality, and equitable treatment of all beneficiaries in fulfilling its trustee obligations.** The provisions of this section are self-executing.

Here's how<sup>91</sup> it must get passed.<sup>92</sup>

“The state Constitution provides a method for the adoption of amendments to the Constitution. In order to amend the Constitution, a joint resolution must be passed by a two-thirds majority of both houses of the Legislature. To be enacted, the proposed amendment must be placed on the next general election ballot and must be approved by a simple majority of the voters.”

## West Virginia

*“Green amendment legislation has been introduced in Delaware and West Virginia but gained little traction.”<sup>93</sup>*

This is the actual proposal, HJR 25, which died in committee in January 2020.<sup>94</sup>

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

## International

Here we include selected examples of previous efforts in other countries, some successful.

Unlike most of these international examples, our approach is focused on human rights, protecting water, soil, air, and a healthy environment to support citizens.

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<sup>91</sup> Washington State House of Representatives Office of Program Research, February 15, 2021, Bill Analysis, HJR 4209, <https://lawfilesexternal.wa.gov/biennium/2021-22/Pdf/Bill%20Reports/House/4209%20HBA%20ENVI%2022.pdf>

<sup>92</sup> Washington State House of Representatives Office of Program Research, February 15, 2021, Bill Analysis, HJR 4205, <https://lawfilesexternal.wa.gov/biennium/2021-22/Pdf/Bill%20Reports/House/4205%20HBA%20ENVI%2021.pdf>

<sup>93</sup> Jeremy Cox, Bay Journal, July 14 2021, “Push is on for 'green amendments' in four Bay state constitutions,” [https://www.bayjournal.com/news/policy/push-is-on-for-green-amendments-in-four-bay-state-constitutions/article\\_6bea6c4e-de78-11eb-a03e-37aac2b667b0.html](https://www.bayjournal.com/news/policy/push-is-on-for-green-amendments-in-four-bay-state-constitutions/article_6bea6c4e-de78-11eb-a03e-37aac2b667b0.html)

<sup>94</sup> West Virginia Legislature, accessed November 25, 2021, Bill Status - 2020 Regular Session, House Joint Resolution 25, [http://www.wvlegislature.gov/Bill\\_Status/resolution\\_history.cfm?year=2020&sessiontype=rs&input4=25&billtype=jr&houseorig=h](http://www.wvlegislature.gov/Bill_Status/resolution_history.cfm?year=2020&sessiontype=rs&input4=25&billtype=jr&houseorig=h)

# Philippines

## United Nations

Much preamble, then:

1. Recognizes the right to a safe, clean, healthy and sustainable environment as a human right that is important for the enjoyment of human rights;
2. Notes that the right to a safe, clean, healthy and sustainable environment is related to other rights that are in accordance with existing international law;
3. Encourages States:...

<https://undocs.org/a/hrc/48/l.23/rev.1>

It goes to the U.N. General Assembly next.

A typical news story:

<sup>95</sup><https://www.commondreams.org/news/2021/10/08/historic-vote-un-human-rights-council-recognizes-right-clean-environment>

**The United Nations Human Rights Council** on Friday **voted** for the first time to formally recognize the right to a clean and sustainable environment, a move that climate campaigners applauded as the hard-won result of activism from grassroots groups and small-island countries.

"Today's historic decision is the culmination of over 40 years of efforts to recognize the right to a safe, clean, healthy, and sustainable environment," Sébastien Duyck, senior attorney at the Center for International Environmental Law (CIEL), said in a **statement**.

"Even though the vast majority of the world recognizes this right, until this afternoon, universal recognition remained elusive," Duyck added. "Now, thanks to the leadership of a core group of countries including Costa Rica, the Maldives, Morocco, Slovenia, and Switzerland, the right is recognized at the United Nations. This new recognition will serve as a catalyst for institutions and other stakeholders to take steps that better respect, protect, and fulfill the right. It includes, but is not limited to the mobilizing of resources and political will."

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<sup>95</sup> Jake Johson, Common Dreams, October 8, 2021, In 'Historic' Vote, UN Human Rights Council Recognizes Right to Clean Environment: "A victory for every person across the world over profiteering polluters."  
<https://www.commondreams.org/news/2021/10/08/historic-vote-un-human-rights-council-recognizes-right-clean-environment>

# GWC Criteria for Determining Legislative Priorities

## Is this issue addressed in the Biennial Report/Strategic Plan?

Not directly, but RTCW would provide the GWC and its members the legal standing needed to fulfill its mission, as stated in the Biennial Report, “to protect and care for Georgia’s surface water and groundwater resources, which are essential for sustaining economic prosperity, providing clean and abundant drinking water, preserving diverse aquatic habitats for wildlife and recreation, strengthening property values, and protecting the quality of life for current and future generations.”

The RTCW aligns with all the GWC’s overarching goals.

In particular,

- It reinforces the goal to **“maintain water as a public resource, not a private commodity”** because it creates a legal framework inhospitable to the privatization of water.
- It has the potential to alleviate the institutional and systemic obstacles that stand in the way of achieving the overarching goal to **“create, expand, and strengthen environmental justice measures that protect Georgians and their water resources in a just and equitable way”** because it expands the opportunity to seek redress.
- It would obligate the state to honor the GWC’s overarching goals to **“protect and restore healthy natural systems ... provide future generations with a heritage of plentiful fresh water .. [and] make clean water a statewide regulatory priority”**.

RTCW would also aid many of the ten GWC Recommendation topics, as mentioned in the next section below.

## Can we quantify or demonstrate how the priority/proposed priority impacts any of

the following: the health, safety, quantity, quality of Georgia’s water, public health, property rights?

Here we provide some examples.

### Strip mine next to Okefenokee Swamp

Some state legislators in nearby districts claim the burden of proof is on opponents of the mine to prove the mine would harm the Swamp, the St. Marys or Suwannee River that flow from it, or

the underlying Floridan Aquifer, from which all of south Georgia drinks. RTCW would shift the burden of proof onto anyone whose activities might harm any of those waters.

GWC policies mention mining only once:

*6.g. The state should prohibit the location of any municipal solid waste disposal facility, coal combustion residual landfill, mine, fossil fuel pipeline, compressor station, gas liquefaction or storage facility, or other industrial facilities capable of having significant adverse effects on water quality or quantity, within a certain distance of that part of a blackwater river or swamp which flows through the coastal plain within the borders of this state.*

Nonetheless, GWC has adopted as one of its two 2022 legislative priorities a ban on mining on Trail Ridge on the east side of the Swamp. Beyond such partial stopgap measures, RTCW would protect the entire Swamp, and all Georgia rivers, as well as the aquifers. The 2020 Navigable Waters Protection Rule (NWPR) promulgated by EPA and USACE severely contracted the Waters of the U.S. (WOTUS) related to the Clean Water Act (CWA), and USACE in October 2020 used that as an excuse to abandon oversight of the mine site, leaving GA-EPD to attempt to handle a process like the Corps' Environmental Impact Statement. A District Court has now remanded and vacated that NWPR,<sup>96</sup> and EPA is rolling back WOTUS to an earlier status, but the Corps has not rescinded its abdication. RTCW would give GA-EPD incentive to deny the miners' permits.

## **Property rights against pipelines**

Pipelines feature in two GWC policies:

*5. Eliminate or substantially minimize the adverse impacts of energy development, production, and transmission on Georgia's waters. ...Pipelines carrying petroleum fuels and natural gas leak contaminants into waterways and groundwater and divide communities and natural landscapes.*

*h. New or expanded pipelines with questionable need or with unacceptable impacts or risks to Georgia's water resources must be prohibited.*

**6. Strengthen water quality protections for rivers, lakes, and streams.**

*g. The state should prohibit the location of any municipal solid waste disposal facility, coal combustion residual landfill, mine, fossil fuel pipeline, compressor station, gas*

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<sup>96</sup> Sophia E. Amberson, Rachael L. Lipinski, Duncan M. Greene, and Jenna R. Mandell-Rice, National Law Review, September 2, 2021, "UPDATED: Rough Waters Ahead, Once Again: A District Court Vacates the 2020 Navigable Waters Protection Rule as the EPA and Corps WOTUS Definition Rulemaking Continues; Updated: On September 3, 2021, the EPA announced that the EPA and Corps have halted the implementation of Navigable Waters Protection Rule and will be applying the pre-2015 WOTUS definition." <https://www.natlawreview.com/article/rough-waters-ahead-once-again-district-court-vacates-2020-navigable-waters>



*liquefaction or storage facility, or other industrial facilities capable of having significant adverse effects on water quality or quantity, within a certain distance of that part of a blackwater river or swamp which flows through the coastal plain within the borders of this state.*

With RTCW pipelines such as Sabal Trail probably never would have been built. In 2016, the Georgia House declined to provide easements under Georgia rivers, largely because of property rights.<sup>97</sup> Sabal Trail sued in county Superior Courts and got the easements anyway, because the state did not defend.<sup>98</sup> With RTCW, anyone would have standing to defend. The Georgia Attorney General's office used the excuse that Sabal Trail had Federal eminent domain from the Federal Energy Regulatory Commission (FERC). But FERC did not and actually could not let Sabal Trail commence drilling under Georgia rivers until those Superior Court cases were resolved.<sup>99</sup> Without river crossings there could have been no Sabal Trail pipeline. In addition, the U.S. Army Corps of Engineers typically will not issue a water permit for a pipeline, including stream crossings, without all state permits and easements in hand.

Lack of a New York State permit stopped the Constitution Pipeline, which also had federal eminent domain.<sup>100</sup> Unlike Georgia, New York State insisted on evaluating its own permit applications, which actually FERC must take into account before letting a pipeline proceed. FERC ruled that New York was too late denying a state permit, but the pipeline company folded anyway, before what would probably have been a protracted federal court battle on that point, after there had already been years of delay.

The Mountain Valley pipeline in Virginia has been delayed for years due to lack of some stream crossing permits, the Corps has not yet issued a permit,<sup>101</sup> and even industry press admits that pipeline's costs have doubled, largely due to opposition by environmental groups.<sup>102</sup> RTCW would have given GWC members and others standing and a defense for Georgia rivers against Sabal Trail in the river crossing lawsuits, as well as other state permits, and that might have stopped that pipeline.

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<sup>97</sup> John S. Quarterman, WWALS, March 28, 2016, It's the most votes I've ever gotten on anything. –Neill Herring, about GA House against Sabal Trail easements, <https://wwals.net/?p=19192>

<sup>98</sup> John S. Quarterman, WWALS, August 25, 2016, Judge Gives Sabal Trail Withlacoochee River Easement 2016-07-29, <https://wwals.net/?p=21750>

<sup>99</sup> John S. Quarterman, WWALS, August 27, 2016, FERC Authorization for Sabal Trail to Commence Drilling under Georgia Rivers 2016-08-25, <https://wwals.net/?p=21993>

<sup>100</sup> Reuters, Pipeline & Gas Journal, February 24, 2020, "Williams Cancels N.Y. Constitution Pipeline," <https://pgionline.com/news/2020/02-february/williams-cancels-ny-constitution-pipeline>

<sup>101</sup> Mike Tony, The Charleston Gazette-Mail, November 2, 2021, Environmental concerns dominate Army Corps public comment hearing on key permit for Mountain Valley Pipeline, [https://www.wvgazette.com/news/energy\\_and\\_environment/environmental-concerns-dominate-army-corps-public-comment-hearing-on-key-permit-for-mountain-valley-pipeline/article\\_db7a8046-dc06-5678-9b1c-590cbc893fe6.html](https://www.wvgazette.com/news/energy_and_environment/environmental-concerns-dominate-army-corps-public-comment-hearing-on-key-permit-for-mountain-valley-pipeline/article_db7a8046-dc06-5678-9b1c-590cbc893fe6.html)

<sup>102</sup> Marcellus Drilling News, November 24, 2021, FERC Defends Decision to Approve Mountain Valley Pipeline in 2nd Circuit, <https://marcellusdrilling.com/2021/11/ferc-defends-decision-to-approve-mountain-valley-pipeline-in-2nd-circuit/>

RTCW also would have given another legal argument to landowners trying to stop pipeline easement lawsuits.<sup>103</sup>

## PFAS

GWC in 2021 adopted a policy for Per- and Polyfluoroalkyl Substances (PFAS): [Cite GWC policy and indicate how RTCW would provide standing and impetus to get something done.]

*10.o. The state should provide funding for, through EPD or other channels, and develop maximum contaminant levels, adopt monitoring and screening standards, and sample for Per- and Polyfluoroalkyl Substances (PFAS) in waterways, animals, groundwater, drinking water wells, soil, milk, and landfill leachate near known actual and potential sources of PFAS contamination. The state should also urge the U.S. Department of Defense to allocate funds to and for its current and former facilities and direct them to do such testing, and, where bad results are found, to follow up with amelioration such as new wells, filters, or other water supplies. The state should legislate and fund protections of workers with PFAS, such as firefighters or military personnel.*

The only lawsuits to date about PFAS in Georgia appear to be by a personal injury law firm against PFAS manufacturers, and a few lawsuits by cities and citizens in Georgia and Alabama about carpet manufacturers. The latter had an unfortunate development in June 2021:<sup>104</sup>

*...a Georgia federal judge suggested at hearings for motions to dismiss that a PFAS chemical manufacturer may be able to escape liability because it is too far removed in the commerce chain and from the harms alleged in the case. This seemingly small legal nuance regarding liability under the law will have enormous impacts on the future of the PFAS litigation, as it presents the possibility that the PFAS chemical manufacturers (who have thus far born the brunt of legal liability for PFAS environmental pollution claims) may in some instances be off the hook, with downstream companies and water utilities left with legal liability.*

In September, an 180-page written order “dismissed various claims against PFAS manufacturers such as 3M and DuPont.... The PFAS Georgia rulings could have enormous ripple effects on PFAS litigation nationally, although it is important to note that the ruling relied on Georgia law to reach its conclusion.”<sup>105</sup> RTCW would change Georgia law and provide another legal basis for such lawsuits.

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<sup>103</sup> Press Release, WWALS, September 13, 2018, All settled with Sabal Trail without jury 2018-09-13, <https://wwals.net/?p=45833>

<sup>104</sup> John Gardella, National Law Review, June 10, 2021, Georgia PFAS Lawsuits Will Impact Product Manufacturers, <https://www.natlawreview.com/article/georgia-pfas-lawsuits-will-impact-product-manufacturers>

<sup>105</sup> John Gardella, National Law Review, September 27, 2021, PFAS Georgia Rulings Open Door To Downstream Liabilities, <https://www.natlawreview.com/article/pfas-georgia-rulings-open-door-to-downstream-liabilities>

Meanwhile, Georgia legislative action has been tepid, amounting to GA HB 458 in 2019, which outlawed using PFAS in firefighting foam except in controlled training facilities, or to fight an actual fire emergency.<sup>106</sup> GA-EPD has done little beyond a “targeted PFAS monitoring project [initiated] in the autumn of 2020.”<sup>107</sup> Meanwhile, five years after a U.S. EPA warning, PFAS in Georgia remain unregulated.<sup>108</sup> RTCW would provide impetus for the Georgia legislature to require doing something and for GA-EPD to do it.

## Coal ash

GWC policies include four paragraphs about coal ash in **5. Eliminate or substantially minimize the adverse impacts of energy development, production, and transmission on Georgia’s waters.** It seems likely that RTCW would streamline the protracted struggle to get Georgia to do something about this toxic residue its utilities have produced.

## Nuclear

GWC policies consider nuclear power and water:

*5.b. The state must consider and develop less water-intensive energy technologies, such as solar and wind, and transition away from permitting water-intensive fossil fuel and nuclear power plants. The state should require existing power plants to implement new technologies that use less water, such as dry-cooling technology.*

Giving priority to public rights to water quality would likely reduce the availability of water for cooling power-plants, especially in periods of drought. But with increasing weather extremes brought by climate change, extended drought is likely to impair the viability of heat-intensive nuclear plants anyway. Unless alternative cooling methods are developed, opposition to nuclear power will grow due to the importance of water quality priorities being advanced by RTCW.

## Wetlands

GWC has a lot to say about wetlands in policy **9. Strengthen environmental protections for coastal waters and wetlands.**

Legal protection of wetlands is often compromised by the use of mitigation credits, which has a tendency to enable courts to undervalue or neutralize harms done by filling or dredging specific

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<sup>106</sup> Charles M. Denton, Barnes & Thornburg, LLP, April 15, 2019, Georgia Enacts Prohibition on PFAS Firefighting Foam, <https://btlaw.com/en/insights/blogs/environmental/2019/georgia-enacts-prohibition-on-pfas-firefighting-foam>

<sup>107</sup> GA-EPD, accessed January 18, 2022, Collecting Finished Drinking Water Samples for PFAS Analysis, <https://epd.georgia.gov/collecting-dw-pfas>

<sup>108</sup> Lindsey Basye, Andy Pierrotti, 11Alive, May 7, 2021, Cancer causing chemical found in Ga. drinking water remains unregulated five years after EPA warning: Five years after an EPA warning, PFAS remains unregulated. The man-made chemical has been found to cause liver damage, low birth weight, and cancer. <https://www.11alive.com/article/news/investigations/the-reveal/rome-contaminated-water-investigation/85-273c7fdd-1097-4b26-b3cf-0242231762a4>

wetlands with unique value to local ecosystems, causing such harms to be inadequately addressed in ill-considered rulings. Adopting the proposed amendment could compel courts to consider more thorough scrutiny of the unique adverse impacts caused by impairment or destruction of specific wetlands under threat from proposed permitted activities.

## **Groundwater**

As the GWC 2021 Biennial Report says:

### ***8 Improve groundwater quality protections***

*Many of Georgia's underground water supplies are pristine and provide the public with water for numerous purposes. But Georgia's current laws and regulations do not adequately protect groundwater resources, including aquifers, significant recharge areas, and concentrated recharge areas.*

Georgia needs RTCW to fix this regulatory gap.

## **Aquifer Storage and Recovery (ASR)**

The GWC 2021 Biennial Report says:

*8.e. Prohibit aquifer storage and recovery (ASR) in Georgia. ASR requires injecting water from a river, lake, or aquifer into a separate aquifer for later use. These projects are often proposed as a means to protect against future drought, but the risks of contaminating the "storage" aquifer and unfounded assertions of property rights outweigh any benefits.*

RTCW could make ASR much more difficult.

## **LAS and CAFO fights**

The GWC 2021 Biennial Report says:

***7. Reduce the adverse effects on water resources from septic systems, land application systems (LASs), concentrated animal feeding operations (CAFOs), and sludge.***

RTCW could give GA-EPD and the legislature incentive to get on with all the specific GWC recommendations on this subject, as well as providing standing and a basis for lawsuits where laws and regulations are lacking.

## **Oxidation Ponds**

These are like a septic tank with no drain field, and hundreds of them need oversight, related to GWC policy **7. Reduce the adverse effects on water resources from septic systems, land application systems (LASs), concentrated animal feeding operations (CAFOs), and sludge.**

E.g., one in Suwannee watersheds for a store, and municipal ones, such as in Rochelle, at the top of the Alapaha River Basin.<sup>109</sup> One in St. Marys River watershed for some mobile homes.

## **Water quality testing**

The state needs to test all our rivers, lakes, and streams frequently to find out if they are clean. The GWC 2021 Biennial Report says **6. Strengthen water quality protections for rivers, lakes, and streams**. How can the state or the citizens know whether such waterways are being protected without water quality monitoring? See also GWC Recommendation:

*10.c. The state should protect water quality through expanded state-level monitoring of rivers, lakes, and streams that is comprehensive both in frequency of monitoring and the number of monitoring sites. All state-level data must be published in print and online for the public.*

RTCW could provide incentive for GA-EPD to get on with that, and for the legislature to fund it. GA-EPD sometimes requires counties to do water quality sampling, as it did with Lowndes County under its stormwater permit, revealing spikes in Fecal coliform coming down Franks Creek from Hahira's LAS.<sup>110</sup> However, quarterly testing is not enough to reveal contamination timely enough for use by those recreating on waterways. Failing those actions, RTCW could provide standing and a legal basis for lawsuits to get it done.

## **Rayonier**

During a court challenge to an NPDES permit for discharge by Rayonier to the Altamaha River at Jesup, attorneys/advocates for the Rayonier paper mill were able to convince the Board of GADNR to make a fundamental change to Georgia's water-quality rules. Specifically, the narrative rule about water color was changed such that regulation was relaxed statewide. This process (rule change) could have met a direct challenge from Altamaha Riverkeeper and other citizens' groups and citizens if a RTCW amendment had been in place, and indeed might never have been attempted in the first place.

## **Milliken fishkill Ogeechee River 2011**

After the worst fish kill in Georgia, EPD issued one of the most restrictive permits in its history. However, the permit isn't so restrictive when compared to similar facilities in other states. With RTCW, advocates may have gotten a more restrictive permit or a denial of any permit. Since that permit was issued in 2014 the facility has had dozens of permit violations and has been discharging PFAS chemicals contaminating fish tissue. With these continued violations and fish contamination RTCW would be helpful in any future litigation to hold the facility accountable,

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<sup>109</sup> John S. Quarterman, WWALS, January 26, 2019, Rochelle, GA, spills again 2019-01-24, <https://wwals.net/?p=48093>

<sup>110</sup> John S. Quarterman, WWALS, April 9, 2021, 2020 ANNUAL REPORT, Lowndes County Impaired Streams Monitoring 2020-04-07. <https://wwals.net/?p=55320>

particularly paired with the right to hunt and fish. That is assuming that the right to fish includes the ability to consume the fish the harvest.

### **Valdosta sewage spill fishkill 2019**

In another in a decades-long string of massive sewage spills, Valdosta caused a fish kill in the Withlacoochee River in December 2019, as revealed in the Enforcement Order GA-EPD subsequently levied.<sup>111</sup> For the first time, Valdosta was fined (\$112,000), and required to implement a range of sewer system upgrades, plus to test forty river miles of the Withlacoochee River to the GA-FL line three times a week. That Order happened only after massive pressure from a dozen downstream Florida counties, and from irate citizens and state and national elected officials in both Georgia and Florida, backed up with water quality testing by Suwannee Riverkeeper and several Florida agencies and Lowndes County, Georgia. With RTCW, all that might have been easier. Now, Valdosta says it will continue with the water quality testing after the four years required by the Order, apparently because it has discovered that testing, in conjunction with continued testing by WWALS Watershed Coalition, Inc. (WWALS, the parent organization of Suwannee Riverkeeper) and some Florida agencies, demonstrates that most river contamination is not coming from Valdosta, rather from cattle manure, mostly coming from Brooks County down Okapilco Creek, where Valdosta also tests. Valdosta has developed an interest in river eco-tourism, which requires repairing the generational stigma its sewage spills caused. All this would have been more obvious with RTCW.

### **River road closings**

Lowndes County in October 2021 attempted to close a road that would have closed one of only two county access points to the Little River (of the Withlacoochee River), closing off fishing, swimming, boating, on behalf of absentee owners of part of the road. Fortunately, with input from other local landowners, Suwannee Riverkeeper, and people who swim and fish there, they realized their error and unanimously voted to leave it open.<sup>112</sup> But if they had voted to close it, RTCW would have provided a basis for appeal. This could also be considered to be an environmental justice issue, since closing that road would also have denied access to the Mary Turner Lynching Site memorial. That vote may not be the end of the matter. Back in 2010, the Commission voted not to close the only Lowndes County access to the Alapaha River, on Old State Road.<sup>113</sup> Yet three years later they did exactly that, on behalf of the same absentee

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<sup>111</sup> Albany Herald, May 9, 2020, [Deadline set to comment on Valdosta EPD Enforcement Order](https://www.albanyherald.com/features/deadline-set-to-comment-on-valdosta-epd-enforcement-order/article_9ead8c4e-900c-11e1-a-b7cf-6f43ed80ebef.html), [https://www.albanyherald.com/features/deadline-set-to-comment-on-valdosta-epd-enforcement-order/article\\_9ead8c4e-900c-11e1-a-b7cf-6f43ed80ebef.html](https://www.albanyherald.com/features/deadline-set-to-comment-on-valdosta-epd-enforcement-order/article_9ead8c4e-900c-11e1-a-b7cf-6f43ed80ebef.html)

<sup>112</sup> John S. Quarterman, WWALS, October 13, 2021, Videos: Wells Road remains open, Folsom Bridge Landing on the Little River 2021-10-12, <https://wwals.net/?p=56861>

<sup>113</sup> John S. Quarterman, Lowndes Area Knowledge Exchange (LAKE), February 5, 2013, Video, hearing about abandoning Old State Road at the Alapaha River @ LCC 2010-10-26, <http://www.l-a-k-e.org/blog/?p=147>

landowner, despite a packed room and 400 petition signatures against.<sup>114</sup> RTCW might have provided a basis for an appeal, beyond shock and surprise.<sup>115</sup>

### **Subdivision rezonings with water consequences**

Lowndes County on 12 October 2021 approved by 3:2 a rezoning for a subdivision far out of any appropriate Comprehensive Plan character area, with very likely surface and underground water consequences, despite a petition signed by 1,000 local residents.<sup>116</sup> According to a very experienced local attorney, an appeal would have been very unlikely to succeed unless the Commissioners had been found to have done something clearly illegal, and rezoning outside a Comprehensive Plan Character Area Map is within their authority as elected officials. However, a rezoning is an implementation of a zoning ordinance. As the legal brief in [Legal Implications of a Right to Clean Water Amendment](#) says, “Statutes, rules, and local ordinances will be held unconstitutional if they are violative of a “right to clean water.”” So RTCW would have given an appeal some chance.

In a similar rezoning before the Greater Lowndes Planning Commission (GLPC) on November 29, 2021, WWALS spoke against because the subject property is in an aquifer recharge zone.<sup>117</sup> Maybe that helped with the unanimous GLPC vote to recommend denial. But being able to point to RTCW and say an appeal would have a chance to succeed based on that would have been more effective. RTCW would also help head off the developers’ next step, which is to ask for 2.5 acre lots instead of 1 acre, which is still inappropriately small, but is the same size the County Commission approved in the October rezoning case.

### **Standing or leverage for all of the above**

In any legal or political fight based on EPD regulations or state law or local ordinance, such as narrative standards, river segment classifications, etc., legally defending water and other natural resources is impaired by restrictive legal “standing” requirements as applied in Georgia courts and in southern districts of federal court. With the adoption of state legislation establishing rights to clean water, legal standing would tend to be more readily granted in cases that jeopardize water resources, and thus legal protections would be enhanced. See [Legal Implications of a Right to Clean Water Amendment](#). While legal standing is only rarely successfully blocked (it has occurred), challenges to such are quite common and burn valuable fiscal/legal resources of

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<sup>114</sup> John S. Quarterman, Lowndes Area Knowledge Exchange (LAKE), February 27, 2013, Videos: Commission voted against the people @ LCC 2013-02-26, <http://www.l-a-k-e.org/blog/?p=74>

<sup>115</sup> John S. Quarterman, Lowndes Area Knowledge Exchange (LAKE), February 27, 2013, Really, really, shocking and surprising that this road would be closed as much public purpose that it serves —April Huntley @ LCC 2013-02-26, <http://www.l-a-k-e.org/blog/?p=70>

<sup>116</sup> John S. Quarterman, Lowndes Area Knowledge Exchange (LAKE), October 13, 2021, Videos: Subdivision way out of bounds approved, and million-dollar water main, but Wells Road stays open 2021-10-12, <http://www.l-a-k-e.org/blog/?p=22409>

<sup>117</sup> John S. Quarterman, Lowndes Area Knowledge Exchange (LAKE), December 1, 2021, An inappropriate rezoning unanimously opposed, but beware return with different acreage @ GLPC 2021-11-29, <http://www.l-a-k-e.org/govt/glpc/2021-11-29--glpc-videos>

plaintiffs (and the court and defendants for that matter). A RTCW amendment holds the possibility of ending or at least minimizing such maneuvers.

## **Legislative and judicial rhetoric**

According to the Congressional Research Service in a survey of related state constitutional amendments:<sup>118</sup>

*Beyond these issues, arguments in favor of a constitutional amendment include, first, its considerable symbolic value. As a rhetorical flourish in congressional debate, even a relatively undefined and non-self-executing right to a clean environment has a compelling quality. Such a provision could also tip the balance in executive and judicial branch decision making — again, even were the provision but a non-self-executing declaration rather than a binding mandate.*

CRS says “congressional debate,” but the same should apply to debates in the state legislature or state courts: a legislator could say, we already put Rights to Clean Water on the ballot and the voters overwhelmingly passed it, so now we need to do it! Even more so if it is self-executing with a binding mandate.

## **What groups/communities in Georgia are working on this issue? Which are opposed? Who is not working on it?**

The groups with members of this Committee are for it, plus some others:

- Suzanne Welander’s group,
- Center for a Sustainable Coast,
- Coosa River Basin Initiative,
- Delaware Riverkeeper Network,
- Georgia Wildlife Federation,
- Flint Riverkeeper,
- Ogeechee Riverkeeper,
- Satilla Riverkeeper,
- Savannah Riverkeeper,
- Suwannee Riverkeeper,
- National Sierra Club,

<https://www.sierraclub.org/sierra/green-life/when-rivers-are-granted-legal-status-persons>

We can continue to add others.

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<sup>118</sup> CRS Report, *op cit.*, page 6.



Not sure it's a good idea to list groups opposed to it, because some of them may not be if we approach it right. Also, we don't know yet, since none of them have seen what we are proposing.

## **Is there a non-legislative (eg., local ordinance, DNR rulemaking, litigation, etc.) strategy that takes precedence over and/or complements a legislative strategy?**

No. The main point is that so many of the current laws and regulations are heavily tilted towards development at the expense of clean water, air, and soil.

It would be possible to try local city or county charter amendments to gradually build up pressure on the state, but that could take many more years than going through the legislature.

## **Why is a legislative action necessary?**

### **No Georgia statewide petition process**

There is no statewide petition process to get a constitutional amendment on the ballot: two-thirds approval in both houses of the legislature followed by a majority of the voters is the only statewide path (other than a constitutional convention); at least the governor cannot veto such a ballot item nor the resulting amendment.<sup>119</sup> GWC is familiar with this process, having used it several times recently, for trust funds and the Georgia Outdoor Stewardship Program (GOSP).

We could as a tactic try a statewide petition to influence the legislature, but that would not actually get it on the ballot, just help.

### **Constitutional amendment, not just legislation**

Beyond simple legislation, consider that Florida already has an **Outstanding Florida Water** (OFW) designation, which applies among others to the Apalachicola, Aucilla, Suwannee, and Ochlockonee Rivers,<sup>120</sup> all of which originate in Georgia. OFW is supposed to require developers to prove no harm. Actually, that does not happen. For example, in 2015 a representative of the Florida Department of Environmental Protection in 2015 testified under oath that the Sabal Trail natural gas pipeline met all the OFW criteria, yet a year later that pipeline caused one of the things that wasn't supposed to happen, in very similar geography in Georgia: a frackout sending drilling mud up into the Withlacoochee River.<sup>121</sup> That Florida water protection failure contributed to Sabal Trail being in the 2016 GWC Dirty Dozen.

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<sup>119</sup> Ballotpedia, accessed November 26, 2021, Laws governing ballot measures in Georgia, [https://ballotpedia.org/Laws\\_governing\\_ballot\\_measures\\_in\\_Georgia](https://ballotpedia.org/Laws_governing_ballot_measures_in_Georgia)

<sup>120</sup> Florida Department of Environmental Protection, accessed November 25, 2021, Outstanding Florida Waters, <https://floridadep.gov/dear/water-quality-standards/content/outstanding-florida-waters>

<sup>121</sup> Press Release, WWALS, November 11, 2016, Drilling mud oozing up into the Withlacoochee River from Sabal Trail HDD, <https://wwals.net/?p=25475>

A constitutional amendment is needed for the same reason freedom of speech is in the state and national Bills of Rights: mere legislation is too easy to subvert.

## **How does this priority include engaged diverse voices, create equity, and include more voices in our network?**

RTCW would assist environmental justice<sup>122</sup> and many of other existing GWC priorities. For environmental justice, it is important for the state to be the trustee.

Including air should help bring in more voices. Besides, much of what's in our rivers comes out of the air, such as mercury.

Land use comes in due to runoff and exchange of groundwater and surface water.

The whole trust fund issue might never have had to be fought separately.

Fishing would be less likely to be damaged by coal ash, landfills, or strip mines.

The environmental benefits are legion, each bringing in related voices and communities: see [Can we quantify or demonstrate how the priority/proposed priority impacts any of the following: the health, safety, quantity, quality of Georgia's water, public health, property rights?](#)

## **Are there impacted communities already working on this? Does this issue “excite” our members?**

There hasn't been much done in Georgia yet, but when such an amendment has been introduced in other states and countries, it has become very popular very quickly.

## **Are there funding opportunities for this issue?**

There are opportunities for funding for campaigning for this amendment such as billboards and social media.

However, this amendment would not implement anything that would require state funding.

Actually, the reverse: the more the state conserves the environment, the fewer lawsuits they will have to defend.

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<sup>122</sup> CRS Report, *op cit.*, Neil A.F. Popovic, *Pursuing Environmental Justice with International Human Rights and State Constitutions*, 15 Stan. Envtl. L. J. 338 (1996).

And better environment boosts the economy: eco-tourism, quality of life, companies wanting to locate or stay here. Need numbers on eco-tourism employment and economic benefits.

## **How do we define a “win” on this priority issue?**

A constitutional amendment on the ballot and then passed by the voters.

It is not even necessary for a similar bill to pass for it to be useful. As Savannah Riverkeeper can attest, having such a bill in the South Carolina legislature was a powerful negotiating tool in getting coal ash cleaned up in that state. Let’s get some additional perspectives on this. And try to find some other examples.

Merely having such an RTCW policy would permit GWC to argue for certain bills on the basis that if they don’t pass, maybe GWC will have to go for a constitutional amendment for Right to Clean Water.

## **What are the chances of making progress/incremental wins/overall win?**

Pretty good for the overall win, with the approach we recommend.

Incremental means mostly horse-trading as in the example above. It’s not like coal ash with many possible incremental wins to the main goal.

## **What is the timeframe to achieve this “win”? Incremental wins along the way?**

If it becomes a GWC policy in 2022, it could get proposed in the legislature in 2023, and ideally the amendment could be on the ballot in 2023.

Incremental wins could involve using this proposed amendment as leverage to get other priorities passed, as has already happened in South Carolina.

*(Need to make sure we communicate with funders so they understand the long game.)*

## **What resources are needed (technical, communications, etc.) to achieve our goal?**

Mostly communications, marketing, and advertising. Maybe polling. Might need a campaign manager; \$20-25,000. Maybe minimum \$40,000 total budget over 4 years. Plus legal review.

## Questions for law students

Among other legal issues, adopting a state law establishing a right to clean water would strengthen standing in cases when harm is imposed, or evidence of pending harm is compelling, to enable Georgians to more effectively defend their water resources.

To avoid reinventing the wheel, see the overview articles, some of which go into depth, footnoted in [State Precedents: Right to Clean Water](#).

See also the summaries footnoted in [Pending state Right to Clean Water amendments](#).

### Strategy of [Iowa CCI & FWW v. State of Iowa](#)

Why did they not use federal Clean Water Act? Does the CWA require a "special damage"? If yes, that could be an argument why it alone is insufficient.

Why did they bring the suit based on state laws?

Why not partner with private property owners?

### [Rights to Hunt and Fish](#)

Look for court cases on environmental grounds.

Would adding RTCW to the Georgia rights to hunt and fish work?

## GWC Criteria

### [Are there incremental wins along the way?](#)

[South Carolina](#) as an example of RTCW uses even if not passed

Need testimonials on how the RTCW bill was used for horse trading, e.g., to get coal ash cleaned up. Try Rev. Leo Woodberry.

### How RTCW affects [specific topics of GWC concern](#)

Flesh out examples with details and put summary in main body of white paper.

For a law student, need examples of RTCW being used matching the topics of GWC concern.

## Environmental Justice and Equity

GWC Criterion: [How does this priority include engaged diverse voices, create equity, and include more voices in our network?](#)

Work in examples we've found of several states where environmental justice is the main reason RTCW is wanted: [Maryland](#) and [Delaware](#).

For a law student, find examples of RTCW actually being used for environmental justice or equity.

## Basic questions

### Why aren't existing laws good enough?

That would seem to be pretty obvious to anybody who's tried to do environmental work under the existing laws, but that's the question we get all the time.

See above about GWC topics of concern, but for a law student, we could also use an overarching argument.

### How can RTCW help?

Again see above about GWC topics of concern, but we need a pithy and compelling high-level argument.

Imagine trying to argue for free speech without the First Amendment. The First Amendment is not perfect, and laws get passed all the time that violate it, such as criminalizing demonstrations against pipelines. But at least the First Amendment provides something to appeal to and a possibility of overturning such bad laws. RTCW is similar. A law student should be able to provide a compelling argument.

## Wording of Georgia RTCW amendment

We do not have to have this by the November 2021 GWC Member meeting.

- Should we spell out self-executing? (Probably yes, to avoid the [Pennsylvania](#) decades of doubt.) Or is there a precedent in Georgia that says anything in the Bill of Rights (Article I) is self-executing?
- Should we spell out standing? See esp. [Montana](#) standing for pre-emptive action before fish kills.
- Should we explicitly say the state is the trustee?
- Should we mention future generations?
- Should we spell out what clean and healthy mean? See New York ballot approval for why.
- Etc.

Since many people, especially lawyers, think in a detailed step-by-step manner, and we keep getting questions of what exactly would this look like and how would it work, it wouldn't hurt to have pretty well worked-out wording with legal and political rationale for every bit of it.