

CLI RECOMMENDATION NO. 2

Adopt Model State Constitutional Provisions to Implement an Environmental Right for Present and Future Generations* (with commentary)

Article I: Inalienable Right

§ 1: Right to an Ecologically Healthy Environment

- (1) Present and future generations of citizens of the State have the right to an ecologically healthy environment. This right includes but is not limited to: the enjoyment of clean air, pure water, and scenic lands; freedom from unwanted exposure to toxic chemicals and other contaminants; and a secure climate.
- (2) This right is self-executing although it shall be maintained and strengthened under the guidance of the State Legislature.
- (3) Individuals and groups who believe their environmental right has been violated may seek redress in state courts against alleged violators, both public and private. The State Attorney General is also charged with the enforcement of this provision, with or without additional legislative guidance, on behalf of all citizens, including future generations.
- (4) The environmental right enumerated in this section is held to be fundamental to present and future generations of citizens and shall be weighed equally with other rights found by state courts to be fundamental.

Discussion of § 1

Article 1, Section 1(1) establishes an environmental right for present and future generations. This commentary focuses on future generations, but to protect the environment and fill a hole in existing law more completely this article encompasses present generations as well. Section 1(1) gives some examples of what specific rights fall within the more general right, but explicitly articulates that the general right is not limited to the enumerated 10 An Environmental Right for Future Generations applications. This provision balances the need for some generality while providing specificity so as to avoid being overly vague. Courts may find a right that is too general to be overly broad and may impose limitations that undermine some of the purposes of granting the right. An overly general right might also cause courts to ignore it altogether, assuming it to be merely hortatory in scope. In contrast, a right that is too specific may signal would-be violators that courts may be unwilling or unable to enforce violations unless they fall under the clear, specific constitutional guidelines. It might also have the unintended consequence of a temporal restraint, meaning new discoveries that arise potentially involving the right might not be accounted for in a constrained list of enumerated applications of the right. Section 1(1) seeks balance: it lists examples of how the general right should apply, but clearly establishes that other applications exist.¹

* The result of collaboration between the Science and Environmental Health Network (SEHN) and the International Human Rights Clinic of the Human Rights Program of Harvard Law School, this recommendation was researched and written by Jason Steffan, J.D. Harvard Law School '07, a former student in the Clinic. Bonnie Docherty, Lecturer on Law and Clinic, edited the paper and supervised the collaborative efforts that led to its creation. Carolyn Raffensperger, Executive Director of SEHN, Joseph H. Guth, Legal Director of SEHN, and Tyler Giannini, Clinical Director of the Harvard Human Rights Program, also helped formulate the ideas in the document, providing additional suggestions and edits. James Cavallaro, Executive Director of the Human Rights Program, assisted with editing, and Nancy Myers of SEHN proofread the document. The Climate Legacy Initiative (CLI) thanks the

Section 1(2) declares the right to a healthy environment to be self-executing, so there is no ambiguity for courts surrounding this issue.² Section 1(3) creates causes of action independent of those specified by the legislature and allows individuals or groups to promote enforcement of the right. States employ a variety of methods to address such causes of action.³ Section 1(3) clearly authorizes enforcement of the self-executing provision, such as through the use of citizen suits. Furthermore, it charges the attorney general with additional enforcement power. Finally, Section 1(3) holds both public and private actors liable for violations of constitutional environmental rights, preventing courts from having to consider such questions.⁴

Section 1(4) directly addresses the question of balancing potentially conflicting rights. It categorizes environmental rights as fundamental and establishes that other fundamental rights, which may include religion and speech, shall not supercede the environmental right of future generations. This provision follows precedent set by the Montana Constitution and its courts.⁵

Harvard Human Rights Program and Clinic as well as Carolyn Raffensperger and Joseph H. Guth, both members of the CLI research team, for permission to include this material in the CLI Policy Paper. Except for footnote renumbering and minor reformatting, the recommendation is here presented exactly as published by its SEHN and Harvard co-sponsors.

¹ Several constitutions list clean air and water as specific manifestations of the right to a clean environment. *See, e.g.*, PA. CONST. art. 1, § 27. Others add rights that implicate “scenic beauty,” FLA. CONST. art. II, § 7; freedom from “excessive noise,” *id.*; preservation of “minerals and energy sources,” HAW. CONST. art. XI, § 1. This Model Constitution enumerates air, water, and scenic lands (common choices), but also adds freedom from exposure to toxic chemicals (which is becoming an increasingly visible environmental problem), as well as a reference to climate change. Most environmental problems have interstate (and even international) effects and are still addressed on a local level.

² A self-executing constitutional provision is one that has legal force absent legislative implementation. Some state constitutions are ambiguous on this point while the following constitutions contain explicitly non-self-executing environmental provisions. *See, e.g.*, LA. CONST. art. IX, § 1; MICH. CONST. art. IV, § 52; N.Y. CONST. art. XIV, §§ 4–5; R.I. CONST. art. I, § 17; S.C. CONST. art. XII, § 1; VA. CONST. art. XI, §§ 1–2.

³ Hawaii’s constitution states that “[a]ny person may enforce this right [i.e. to a clean and healthful environment] against any party, public or private, through appropriate legal proceedings.” HAW. CONST. art. XI, § 9. Hawaiian courts have acknowledged that this provision permits the public to use the courts to enforce laws intended to protect the environment. *Kahana Sunset Owners Ass’n v. Maui County Council*, 948 P.2d 122 (Haw. 1997); *see also Fiedler v. Clark*, 714 F.2d 77 (9th Cir. 1983).

The Illinois Constitution pronounces a non-self-executing environmental right but grants citizens the power to sue subject to reasonable legislative limitations. ILL. CONST. art. XI, §§ 1, 2. One Illinois court dealt with ambiguity by holding that the provisions did not create any causes of action but rather did away with the special injury requirement typically employed in environmental nuisance cases; thus, while a plaintiff need not allege special injury to bring an environmental claim, there must nevertheless exist a cognizable cause of action apart from the constitutional provisions at issue. *City of Elgin v. County of Cook*, 169 Ill. 2d 53, 58 (Ill. 1995).

New York’s constitution provides for citizen enforcement of environmental legislation. *See* N.Y. CONST. art. XIV, §§ 4–5. Note, however, that this citizen suit provision has been interpreted to mean that citizens may only bring suits to restrain actions violating Article XIV “if the Attorney General defaults” on his or her duty to do so. 55 N.Y. Jur Environmental Rights and Remedies § 290. Still, the citizen suit provision has been used effectively by the attorney general to bring suit on behalf of citizens. *See, e.g.*, *People v. System Props., Inc.*, 281 A.D. 433 (N.Y. App. Div. 1953). One New York court allowed a public-interest corporation to bring suit under this section against the state to prevent it from granting certain logging permits. *Oneida County Forest Preserve Council v. Wehle*, 309 N.Y. 152 (N.Y. 1955).

⁴ For example, two Montana Supreme Court cases established that the environmental rights guaranteed in the Montana Constitution were enforceable against public and, later, private actors. *See* *Montana Env’tl. Info. Center v. Dep’t. of Env’tl. Quality*, 988 P.2d 1236 (Mont. 1999); *Cape-France Enterprises v. In re Estate of Peed*, 29 P.3d 1011 (Mont. 2001). Note that §1(3) enumerates who may seek redress for violation of the stated right.

⁵ MONT. CONST. art. II, §§ 2–6. Environmental rights in Montana appear after the right to self-government, but before the rights to non-discrimination, religion, assembly, etc. They are in the same section as rights to liberty, property, and happiness. One commentator claims that because of this placement, environmental rights have “priority” over these other rights. C. Louise Cross, *The Battle for the Environmental Provisions in Montana’s 1972 Constitution*, 51 MONT. L. REV. 449 (1990). Another article observes

Article II: Responsibilities

§ 1: Environmental Responsibilities

The State holds its natural resources in trust for its people and has the duty to use its powers to conserve, protect, and improve these resources for the benefit of present and future generations. In furtherance of this duty, the State shall take a precautionary approach to the use of natural resources and the development and proliferation of new technologies.

Discussion of § 1

Article II, Section 1 employs a “public trust” doctrine, which is used in many state constitutions.⁶ It gives the state responsibility for preserving the environment for future generations.⁷ Several states, including Colorado, Hawaii, and Pennsylvania, have constitutionalized concepts of public trust.⁸ Article I, Section 3 provides that concerned citizens can sue the state for failing to uphold its duties as trustee of the environment for present and future generations.

Article II, Section 1 also specifically upholds the precautionary principle as one method of implementing the State’s duties toward future generations.⁹ No state has mandated this formula at the constitutional level, although some statutes have employed it and courts have inferred it.¹⁰

that “while the [Montana Supreme] Court . . . [has] concluded that the environmental rights in Montana’s 1972 Constitution are fundamental and that they create enforceable limits at least on legislative action, the Court has also held that these rights are subject to a balancing against other, important public values such as economic and social development. As with other fundamental rights, they are subject to infringement in appropriate circumstances.” John L. Horwich, *MEIC v. DEQ: An Inadequate Effort to Address the Meaning of Montana’s Constitutional Environmental Provisions*, 62 MONT. L. REV. 269 (2001).

⁶ See, e.g., ALA. CONST. art. XI, § 219.07; COLO. CONST. art. IX, § 10; HAW. CONST. art. XI, § 1; PA. CONST. art. 1, § 27. Other states have established public trusts via statute. See, e.g., MONT. CODE ANN. § 75–1–103 (2005); N.Y. CLS ECL § 1-0101 (2006); N.C. GEN. STAT. § 113A–3 (2006).

⁷ According to this view, the environment is a “trust’ under the stewardship of the state . . . to be managed for the benefit of the public.” C. Louise Cross, *The Battle for the Environmental Provisions in Montana’s 1972 Constitution*, 51 MONT. L. REV. 449, 450 (1990).

⁸ See, e.g., COLO. CONST. art. IX, § 10; HAW. CONST. art. XI, § 1; PA. CONST. art. 1, § 27. Montana’s strong constitutional protections do not contain a public trust provision, despite the fact that such a proposal was on the table prior to that state’s 1972 constitutional convention. For an explanation of the politics behind the decision not to include a public trust doctrine, see Cross, *supra* note 7, at 450–55.

⁹ See, e.g., Wingspread Statement on the Precautionary Principle, Wingspread Conference Center, Racine, Wis., Jan. 23–25, 1998, available at <http://www.gdrc.org/u-gov/precaution-3.html> (last visited Dec. 9, 2006) (“When an activity raises threats of harm to the environment or human health, precautionary measures should be taken even if some cause and effect relationships are not fully established scientifically.”); Rio Declaration on Environment and Development, U.N. ESCOR princ. 4, 14, U.N. Doc. A/ CONF.151/26 (Vol. I) (1992), princ. 15 (“In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.”).

¹⁰ See, e.g., CAL. HEALTH & SAFETY CODE § 25531; 410 ILL. COMP. STAT. 48/5; *In re Water Use Permit Applications*, 9 P.3d 409 (Haw. 2000).