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NEW YORKERS VOTED TO PUT ENVIRONMENTAL RIGHTS IN THEIR CONSTITUTION — BUT THE ATTORNEY GENERAL IS FIGHTING BACK

Residents say a hazardous waste incinerator’s emissions violate their new constitutional right to a “healthful environment.”



Rebecca Redelmeier

COHOES, N.Y. — **IN A SMALL** city in upstate New York, just a few miles from Albany, the Norlite hazardous waste incinerator sputters and groans. The sound punctures the eerie silence of a deserted public housing complex next door, separated from the plant by only a fence and some railroad tracks.

No children play on the jungle gym here anymore, and no families bustle in and out of front doors. Last year, after mounting concern from the community over Norlite’s air emissions, the Cohoes Housing Authority began relocating all residents of the 70-unit Saratoga Sites complex. The city now plans to raze the homes.

For more than 30 years, the New York Department of Environmental Conservation, or DEC, has attempted to force Norlite to comply with state environmental laws, issuing the plant hundreds of thousands of

dollars in penalties. But even dozens of violations [dating back to the 1990s](#) have failed to stop Norlite from polluting. Last year, when New York Attorney General Letitia James and the DEC took the extra step of [suing the plant](#), alleging its emissions endangered the health of the surrounding community, many nearby residents welcomed the escalation. But as the lawsuit plays out, the state has allowed Norlite to remain in operation, even as the plant continues to violate environmental laws – a move that many community members see as a capitulation.

“We should be able to breathe clean air, and we’re not,” said Ed Sokol, 89, who has lived near the plant his entire life and is active with Lights Out Norlite, a group of former Saratoga Sites residents and local advocates. “This has been going on for years, and it’s about time – if they’re violating all these laws, shut them down.”

Now, Lights Out Norlite is turning to a new constitutional provision – dubbed the “Green Amendment” – in the hopes that it will finally help them do just that.

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Passed by voters in 2021, the Green Amendment enshrines New Yorkers’ fundamental and inalienable right to clean air, water, and a “healthful environment” in the state constitution. As an addition to the bill of rights, the amendment grants environmental rights the highest constitutional protections, akin to freedom of speech or religion.

The state, however, has called on the court to dismiss Lights Out Norlite’s Green Amendment claim entirely – and the attorney general is arguing to limit the amendment’s reach.

The showdown between the state and Lights Out Norlite is one of the first tests of New York’s Green Amendment, and the court’s decision could have reverberations around the country. If the court sides with

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the attorney general, legal scholars and advocates say that interpretation could topple the amendment's promise. Since New York is only the third state to enshrine a Green Amendment in its bill of rights – and the first to do so in 50 years – the results of these early cases could impact ongoing efforts to pass similar amendments in more than a dozen states across the country.

Attorney Maya K. van Rossum, founder of the national advocacy group Green Amendments For The Generations, said that the DEC and attorney general “are really trying to just diminish their obligations to protect the environmental rights of the people” with an argument that would “render impotent the New York Green Amendment.”

But if the court sides with Lights Out Norlite, van Rossum added, the outcome would “provide real inspiration and power for other states that are pursuing this pathway.”

Endless Violations

In Cohoes, a working-class city of fewer than 20,000 residents, Norlite's emissions have long been a source of concern. The DEC has [designated](#) several neighborhoods surrounding the plant as “potential environmental justice areas,” meaning nearly a quarter of household incomes are below the federal poverty level or a high proportion of residents are members of minority groups.

The Norlite facility burns hazardous waste, including waste fuels and used building heating oils, in order to create a popular construction material called lightweight aggregate. According to the U.S. Environmental Protection Agency, there are [27 plants nationwide](#) that burn hazardous waste, and Norlite is the only one permitted to do so in all of New York.



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For decades, the state has found that Norlite's process has frequently sent dust, including particles of carcinogenic crystalline silica, into the surrounding area. For violating the conditions of its permit as well as the state's air pollution control law, the DEC has issued nearly \$1 million in fines against Norlite.

In 2020, Norlite came under increased scrutiny for [burning a toxic firefighting foam](#) that contained a class of industrial chemicals [known as PFAS](#). Those chemicals don't easily break down in the environment

and scientists have found they are associated with numerous health concerns, including cancers and infertility. After the plant was found to have incinerated more than 2 million pounds of the foam through a contract with the Department of Defense, the state banned incinerating the material.



Saratoga Sites, a public housing complex in Cohoes, N.Y. , was recently closed due to community concerns over air pollution from the nearby Norlite hazardous waste-burning plant .

For Joe Ritchie, 23, who grew up at the Saratoga Sites public housing complex, dust from the plant was a part of everyday life. Small specks would regularly settle on homes and cars in clumps. When he took a paper towel to wipe down his windows, it would turn black.

Ritchie worries that his former neighbors' health conditions, including frequent nosebleeds and asthma attacks, could have been a result of living next to Norlite. Across the courtyard from his former house, he points out the home of a neighbor who died from lung cancer just a few months ago; he knows state data shows the area has a [higher than expected](#) rate of lung cancer, and wonders how much Norlite may have contributed to those conditions.

The DEC's [monitoring of the plant's emissions](#) in recent years has found that large inhalable dust particles from Norlite reach Saratoga Sites. "Holding Norlite accountable for its environmental violations impacting surrounding communities, including frontline environmental justice neighborhoods, is a top priority for the Department of Environmental Conservation," a department spokesperson said in a statement about those results earlier this year.

The state health department said it is aware of DEC's site monitoring data and supports the agency's effort to regulate Norlite. In a report on cancer rates and health outcomes in the area released in September,

the agency said its review could not prove whether “specific exposures,” like Norlite’s emissions, contributed to health conditions.

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In response to The Intercept’s request for comment, Norlite spokesperson Richard Bamberger pointed to the health department’s recent review. “There is no evidence of any negative health effects from the Norlite facility,” he said.

Ritchie hopes the case, by invoking the Green Amendment, will finally provide some relief for the community that long lived next door. “I just want there to be justice for the people of Saratoga Sites, who lived here for generations,” he said, “who have been voiceless for forever.”

Permitting Polluters

In the months after the state filed its lawsuit, the DEC and Norlite reached an agreement: In exchange for additional monitoring and dust control measures, the plant could continue operating while the lawsuit winds its way through the courts.

But even after being sued, Norlite has continued to violate state law. In May, emissions of inhalable particles from the site exceeded the state’s air pollution limits and violated the site’s permit. According to the state’s [notice of violation](#), Norlite’s emissions reached levels that the federal government deems “unhealthy,” putting vulnerable groups like children and those with severe health conditions particularly at risk.

The attorney general’s office said it cannot comment on ongoing litigation and did not respond to questions about how it interprets the Green Amendment. The DEC also declined to comment on the pending litigation.

Lights Out Norlite has now intervened in the state’s lawsuit, claiming [in a legal filing](#) that both Norlite and the DEC are responsible for the incinerator’s ongoing harm to the community. The group alleges that, by permitting the plant to operate and failing to bring it into compliance, the DEC has violated their Green Amendment rights.

So far, the state has vehemently disagreed with Lights Out Norlite’s position. In an [August court filing](#), Attorney General Letitia James

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argued that the courts cannot order the DEC to enforce applicable laws and regulations against Norlite, even under the Green Amendment. It is solely the DEC's decision whether and how to enforce the state's environmental laws – the new amendment does not alter that discretion, the state argued.

James's response is not surprising, since it's the attorney general's responsibility to protect state agencies, said Nicholas Robinson, a professor of environmental law at Pace University. But, if a judge agrees with the state's argument, it would be extremely damaging to the amendment's strength for the people of New York.



State Attorney General Letitia "Tish" James at the New York State Supreme Court in New York City on Nov. 8, 2023.

"Once the amendment was passed, the rights of an individual shifted," Robinson said. He added that the DEC "can no longer permit, under the constitution, an enterprise to cause damage to the environment, or the air quality, or the health of a person."

The state also argued that the new amendment does not empower courts to compel actions from agencies, such as shutting down the Norlite plant. James said in the filing that though the DEC may ultimately decide to revoke the plant's permits, the court may not direct it to do so.

However, legal experts and advocates say the attorney general's interpretation doesn't reflect how the courts have interpreted other constitutional rights. For those protections, like freedom of speech or freedom of religion, the state has an obligation not to infringe on them.

“Yes, the agency has discretion,” said Rachel Spector, a senior attorney with the Northeast office of Earthjustice, an environmental law advocacy organization. “But its discretion has limits. It doesn’t have discretion to violate the state constitution.”

Already, a separate judge has rejected part of the state’s argument in a previous Green Amendment case. In that [case](#), brought by a group opposing a landfill in western New York, the judge ruled that the amendment could compel the state to take action – and explicitly called out the state’s push to weaken it.

“Indeed, the vigor of the State’s opposition to this lawsuit does not bode well for its enforcement of the Green Amendment,” Judge John Ark wrote in the decision.

The state has since appealed his ruling.

A National Movement

New York’s attempt to limit the scope of its Green Amendment follows other states, seen as much less environmentally progressive, that have sought [to weaken or ignore](#) their own constitutional environmental protections. However, in Pennsylvania and Montana, the only states with similar amendments in their respective bills of rights, recent court rulings have begun to turn that tide.

Courts have begun to force states to recognize the amendments as meaningful and enforceable, adding momentum to a national movement, said van Rossum, of Green Amendments For the Generations. Most recently, in August, a Montana judge’s landmark ruling found that a state law that prohibited agencies from considering climate impacts when permitting energy projects violated the young plaintiffs’ rights to a “clean and healthful environment” under its Green Amendment.

Now, 15 other states have proposed similar amendments, according to van Rossum’s count. Though the language of each differs slightly, and their legal interpretations lie with each state’s judges, many are looking to New York to see how its courts interpret the nation’s newest Green Amendment, she said.

The judge is expected to rule on New York’s motion to dismiss Lights Out Norlite’s Green Amendment claims later this year. To those living nearby, the

“It seems like they’re carving out a position that a

health of the community may hang in the balance. And for others across the country, the decision of New York courts will set an example for how powerful constitutional Green Amendment rights can be – and how strongly states will fight to limit their reach.

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"It seems like they're carving out a position that a change in the constitution doesn't affect their discretion at all, which is clearly not true," said Rebecca Bratspies, founding director of the Center for Urban Environmental Reform at the City University of New York School of Law. "To suggest that their discretion doesn't need to be rethought and reexamined in light of this profound change in New York law seems to me really misguided."

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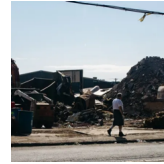
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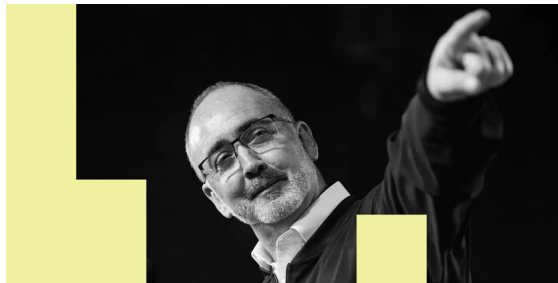


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