

Table of Analysis: Holland & Hart memo of December 2022

Allegation	“Supporting Evidence”	Response (with Supporting Evidence)
The Broad and Ambiguous Standards of the Green Amendment Would Create Significant Legal Uncertainty and Risk and Lead to Unnecessary Delay and Litigation	(None) (Just noting that courts might review and interpret the meaning of constitutional language, which is their purview is not evidence of a problem.)	The Green Amendment is not intended to replace the entire body of law and regulations relevant to environmental protection. The language has been carefully crafted to ensure the People of New Mexico have an effective and accessible tool to question authority when there’s sufficient evidence of improper, harmful government decisions – decisions that hurt the People of New Mexico. If government agencies, for example, missed the mark in how they interpreted any word or phrase in the amendment, the court will review the matter and require a remedy accordingly. Over time, and as the U.S. legal system has been intentionally designed, the jurisprudence of these issues will work its way toward properly balanced interests of all concerned. If the Legislature wishes to mitigate the uncertainty, it has the power to implement strong protections that will be abundantly clear and, importantly, in compliance with New Mexico’s constitutional environmental right.
Existing Environmental Statutes Do Not Resolve the Uncertainty and Legal Risk	(None)	See above. Statutes don’t have to, but they can provide greater certainty in clearly-constitutional standards. When the legislature fails to address and protect a constitutional entitlement, the courts can highlight that deficiency and mandate compliance with the constitution by mandating the government actors involved address the unconstitutional outcome that results – this can take the form of legislative action, regulatory action, etc.
<ul style="list-style-type: none"> The Green Amendment does not define its terms by reference to existing laws. 	(None)	The Hawaii Constitution does not currently have a Green Amendment, as has been defined. The courts in Pennsylvania, Montana and New York, however, have proven to clearly counter this point with all branches of government undertaking their roles to ensure the rights are defined, understood and securing needed protections.].
<ul style="list-style-type: none"> Other states have rejected interpretations of their environmental rights amendments that determine constitutionality of an action based on compliance with existing environmental laws. 	(None) (Confusingly pointed to a Pennsylvania case in 2017 which rejected a three-part test which limited the right to judicial relief, equating that to a rejection of the premise that	First, the Pennsylvania court in 2013, affirmed in 2017, wisely decided that statutes are not more powerful than its state constitution. Second, compliance with statutes is clearly not enough. This presumption does not hold true in every case, especially when considering evolving science, technology and new emerging families of chemical cocktails. The People of New Mexico need and deserve a clear, constitutional “catch all” to help fill in the gaps of environmental protection.

	compliance with statutes is compliance with the constitution, and warning “New Mexico courts could easily reach the same conclusion.”)	Third, it is foreseeable that every court in New Mexico jurisprudence evolves and corrects over time, with each case offering helpful precedent and clarity; a constitutional entitlement provides a critical tool for New Mexico’s system of governance to ensure needed protections in every context.
<ul style="list-style-type: none"> Courts will be faced with situations where no environmental statute clearly applies or where multiple statutes are competing. 	(None)	This hypothetical possibility ignores the role of courts in harmonizing statutory provisions and determining legislative intent. The Constitution will be a guidestar in interpreting the statutory conflicts to protect our air, land and water.
<ul style="list-style-type: none"> It is entirely possible that well-crafted, long-standing provisions of existing environmental statutes would be found to be in conflict with the...Green Amendment. 	(None)	<p>Yes. The constitutional, fundamental rights found in the Green Amendment would take priority over conflicting statutes or statutory provisions, as long-standing principles of statutory construction provide. When unconstitutional conflict is identified, appropriate government actors would be required to take steps to remedy the unconstitutional outcome</p> <p>Also, the authors failed to mention another long-standing aspect of strict scrutiny of fundamental rights in judicial review: NO RIGHT IS ABSOLUTE. (...or “unfettered.”) Courts are well-versed in applying the strict scrutiny standard of ensuring the harmful action or policy of inaction that is at issue serves a “compelling government interest through narrowly tailored means,” maintaining an overarching need to protect the fundamental right at issue. As Green Amendments are enacted throughout the country, courts will be creating tests and standards of analysis to provide legal frameworks to achieve this objective; again, through the natural development of jurisprudence on the matter. All constitutional rights are a balance of the right and other state interests.</p>
Relying on Judicial Interpretation of the Green Amendment Would Cause Numerous Problems	(None)	<p>“Difficulties” for “regulators, government officials, private parties, and every other person or entity who would be attempting to understand the requirements of the Green Amendment” are only found among those who value the profits saved by shifting the costs and burdens of externalities onto the New Mexico taxpayers, more than their lives, livelihoods and other liberty interests associated with a clean and healthy environment.</p> <p>Yes, there is a paradigm shift here, and that may be uncomfortable for those who have been benefiting off the backs of the People of New Mexico, but the Green Amendment helps correct these systemic injustices. Arriving at governmental accountability will assuredly be a “problem”</p>

		<p>for some, but not for those who seek to truly serve the public interest.</p> <p>If a renewable energy development project does no harm to the environment, so much so as to infringe on the rights of the New Mexico people, it has nothing to worry about. If it does, the project managers should reconsider the details and remedy the problems it would be creating for New Mexico’s communities and environment.</p>
<ul style="list-style-type: none"> Judicial interpretation would result in patchwork lawmaking 	(None)	<p>Having the judiciary weigh in to determine when government action overreaches and infringes on environmental rights will result in a growing and cohesive body of law and understanding regarding the environmental rights protections and the state’s obligations for protecting natural resources.</p>
<ul style="list-style-type: none"> Courts lack the necessary technical expertise for this task 	(None)	<p>No one should be fearful of normal court processes, both criminal and civil, where scientific expert testimonies and other evidence are presented and considered before arriving at a decision. Courts are well-versed in considering science-heavy environmental issues, in many areas of law, including constitutional. Lawyers are familiar with expert testimony and how to present and refute it.</p>
<ul style="list-style-type: none"> Courts are not well equipped to make difficult environmental policy decisions 	(None)	<p>Contrary to the assertion, courts are well equipped to make legal determinations regarding fundamental rights based on the text of a constitutional amendment, legal principles and developing precedent.</p>
<ul style="list-style-type: none"> The Green Amendment Would Place a Heavy Burden on State and Local Government 	(None)	<p>See above regarding the notion of “burden,” costs, duty and priorities.</p> <p>In citing (arguably “cherry picking”) an excerpt written by “one legal scholar,” Michelle Bryan Mudd (FN16), the Holland & Hart memo authors fail to mention that the published piece actually calls for local governments to help fill the gap between the “constitutional right to a healthful environment and its regulatory implementation,” stating that “environmental rights cannot be fully protected without the strong engagement of local government.” She does not frown upon environmental rights amendments, nor does she believe them to be too burdensome, as the memo implies.</p> <p>Finally, the memo conflates cases with legitimate issues to litigate (those listed in FN18) with potential cases of a frivolous nature or disjointed cause. The latter type is properly addressed through routine court processes (motions to dismiss, summary judgments, deterrence against frivolous claims, etc.) and not something to fear.</p>

<p>The Green Amendment Would Open the Door for Litigation Challenges to Renewable Energy Projects</p>	<p>(None)</p>	<p>An argument that proposes certain industries should face no scrutiny or environmental impact analysis (nor threat of litigation for harming the public interest) is a poor argument.</p> <p>Courts will review the compelling government interest served (such as those furthered by renewable energy projects) and ensure the means have been narrowly tailored (causing the least amount of harm possible). Only if and when renewable energy projects unnecessarily cause harm to the environment, to the extent where they infringe on the rights of the People of New Mexico, will an issue be subject for litigation under the Green Amendment. If an unconstitutional infringement is identified, the court will mandate a remedy to be crafted by the government actors who caused/allowed the infringement as mandated by constitutional law.</p> <p>Ironically, the renewable energy industry could be one of the top beneficiaries of the Green Amendment, as it helps to protect and promote the compelling government interest of fighting climate change against contrary statutes or regulations. Without it, permitting processes will be subject to political winds – which isn't good for business.</p>
<p>The Green Amendment Would Not Address the Difficult Problem of Climate Change</p>	<p>(None)</p>	<p>See above.</p>

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<p>The Broad and Ambiguous Standards of the Green Amendment Would Create Significant Legal Uncertainty and Risk and Lead to Unnecessary Delay and Litigation</p>	<p>(None)</p> <p>(Just noting that courts might review and interpret the meaning of constitutional language, which is their purview is not evidence of a problem.)</p>	<p>The Green Amendment is not intended to replace the entire body of law and regulations relevant to environmental protection. The language has been carefully crafted to ensure the People of New Mexico have an effective and accessible tool to question authority when there's sufficient evidence of improper, harmful government decisions – decisions that hurt the People of New Mexico. If government agencies, for example, missed the mark in how they interpreted any word or phrase in the amendment, the court will review the matter and require a remedy accordingly. Over time, and as the U.S. legal system has been intentionally designed, the jurisprudence of these issues will work its way toward properly balanced interests of all concerned.</p> <p>If the Legislature wishes to mitigate the uncertainty, it has the power to implement strong protections that will be abundantly clear and, importantly, in compliance with New Mexico's constitutional environmental right.</p>
<p>Existing Environmental</p>	<p>(None)</p>	<p>See above. Statutes don't have to, but they can provide greater</p>

<p>Statutes Do Not Resolve the Uncertainty and Legal Risk</p>		<p>certainty in clearly-constitutional standards. When the legislature fails to address and protect a constitutional entitlement, the courts can highlight that deficiency and mandate compliance with the constitution by mandating the government actors involved address the unconstitutional outcome that results – this can take the form of legislative action, regulatory action, etc.</p>
<p>The Green Amendment does not define its terms by reference to existing laws.</p>	<p>(None)</p>	<p>The Hawaii Constitution does not currently have a Green Amendment, as has been defined. The courts in Pennsylvania, Montana and New York, however, have proven to clearly counter this point with all branches of government undertaking their roles to ensure the rights are defined, understood and securing needed protections.</p>
<p>Other states have rejected interpretations of their environmental rights amendments that determine constitutionality of an action based on compliance with existing environmental laws.</p>	<p>(None) (Confusingly pointed to a Pennsylvania case in 2017 which rejected a three-part test which limited the right to judicial relief, equating that to a rejection of the premise that compliance with statutes is compliance with the constitution, and warning “New Mexico courts could easily reach the same conclusion.”)</p>	<p>First, the Pennsylvania court in 2013, affirmed in 2017, wisely decided that statutes are not more powerful than its state constitution.</p> <p>Second, implementation of existing legislation and regulation has been unable to ensure all New Mexicans enjoy the benefits of clean and healthy water, air, soils, ecosystems and environments and in some instances, legislation might be non-existent to address a critical issue of concern. The People of New Mexico need and deserve a clear, constitutional “catch all” to help fill in the gaps of environmental protection.</p> <p>Third, i New Mexico jurisprudence evolves and corrects over time, with each case offering helpful precedent and clarity; a constitutional entitlement provides a critical tool for New Mexico’s system of governance to ensure needed protections in every context.</p>
<p>Courts will be faced with situations where no environmental statute clearly applies or where multiple statutes are competing.</p>	<p>(None)</p>	<p>This hypothetical possibility ignores the role of courts in harmonizing statutory provisions and determining legislative intent. The Constitution will be a guidestar in interpreting the statutory conflicts to protect our air, land and water.</p>
<p>It is entirely possible that well-crafted, long-standing provisions of existing environmental statutes would be found to be in conflict with the...Green Amendment.</p>	<p>(None)</p>	<p>Yes. The constitutional, fundamental rights found in the Green Amendment would take priority over conflicting statutes or statutory provisions, as long-standing principles of statutory construction provide. When unconstitutional conflict is identified, appropriate government actors would be required to take steps to remedy the unconstitutional outcome</p> <p>Also, the authors failed to mention another long-standing aspect of strict scrutiny of fundamental rights in judicial review: NO RIGHT IS ABSOLUTE. (...or “unfettered.”) Courts are well-versed in applying the strict scrutiny standard of ensuring the harmful action or policy of inaction that is at issue serves a “compelling government interest through narrowly tailored means,” maintaining an</p>

		<p>overarching need to protect the fundamental right at issue. As Green Amendments are enacted throughout the country, courts will be creating tests and standards of analysis to provide legal frameworks to achieve this objective; again, through the natural development of jurisprudence on the matter. All constitutional rights are a balance of the right and other state interests.</p>
<p>Relying on Judicial Interpretation of the Green Amendment Would Cause Numerous Problems</p>	(None)	<p>“Difficulties” for “regulators, government officials, private parties, and every other person or entity who would be attempting to understand the requirements of the Green Amendment” are only found among those who value the profits saved by shifting the costs and burdens of externalities onto the New Mexico taxpayers, more than their lives, livelihoods and other liberty interests associated with a clean and healthy environment.</p> <p>Yes, there is a paradigm shift here, and that may be uncomfortable for those who have been benefiting off the backs of the People of New Mexico, but the Green Amendment helps correct these systemic injustices. Arriving at governmental accountability will assuredly be a “problem” for some, but not for those who seek to truly serve the public interest.</p> <p>If a renewable energy development project does no harm to the environment, so much so as to infringe on the rights of the New Mexico people, it has nothing to worry about. If it does, the project managers should reconsider the details and remedy the problems it would be creating for New Mexico’s communities and environment.</p>
<p>Judicial interpretation would result in patchwork lawmaking</p>	(None)	<p>Having the judiciary weigh in to determine when government action overreaches and infringes on environmental rights will result in a growing and cohesive body of law and understanding regarding the environmental rights protections and the state’s obligations for protecting natural resources.</p>
<p>Courts lack the necessary technical expertise for this task</p>	(None)	<p>No one should be fearful of normal court processes, both criminal and civil, where scientific expert testimonies and other evidence are presented and considered before arriving at a decision. Courts are well-versed in considering science-heavy environmental issues, in many areas of law, including constitutional. Lawyers are familiar with expert testimony and how to present and refute it.</p>
<p>Courts are not well equipped to make difficult environmental policy decisions</p>	(None)	<p>Contrary to the assertion, courts are well equipped to make legal determinations regarding fundamental rights based on the text of a constitutional amendment, legal principles and developing precedent.</p>
<p>The Green Amendment Would Place a Heavy Burden on State and Local Government</p>	(None)	<p>See above regarding the notion of “burden,” costs, duty and priorities.</p> <p>In citing (arguably “cherry picking”) an excerpt written by “one legal scholar,” Michelle Bryan Mudd (FN16), the Holland & Hart memo authors fail to mention that the published piece actually calls for</p>

		<p>local governments to help fill the gap between the “constitutional right to a healthful environment and its regulatory implementation,” stating that “environmental rights cannot be fully protected without the strong engagement of local government.” She does not frown upon environmental rights amendments, nor does she believe them to be too burdensome, as the memo implies.</p> <p>Finally, the memo conflates cases with legitimate issues to litigate (those listed in FN18) with potential cases of a frivolous nature or disjointed cause. The latter type is properly addressed through routine court processes (motions to dismiss, summary judgments, deterrence against frivolous claims, etc.) and not something to fear.</p>
The Green Amendment Would Open the Door for Litigation Challenges to Renewable Energy Projects	(None)	<p>An argument that proposes certain industries should face no scrutiny or environmental impact analysis (nor threat of litigation for harming the public interest) is a poor argument.</p> <p>Courts will review the compelling government interest served (such as those furthered by renewable energy projects) and ensure the means have been narrowly tailored (causing the least amount of harm possible). Only if and when renewable energy projects unnecessarily cause harm to the environment, to the extent where they infringe on the rights of the People of New Mexico, will an issue be subject for litigation under the Green Amendment. If an unconstitutional infringement is identified, the court will mandate a remedy to be crafted by the government actors who caused/allowed the infringement as mandated by constitutional law.</p> <p>Ironically, the renewable energy industry could be one of the top beneficiaries of the Green Amendment, as it helps to protect and promote the compelling government interest of fighting climate change against contrary statutes or regulations. Without it, permitting processes could be subject to political winds – which isn’t good for business.</p>
The Green Amendment Would Not Address the Difficult Problem of Climate Change	(None)	<p>While certainly there are other actors and contributors to climate change that need to be addressed, the NM Green Amendment will ensure that New Mexico government officials do their part to help prevent, address and correct decisions that can contribute and/or exacerbate the climate crisis. Just as the climate crisis has been caused by cumulative impacts from numerous sources, including government decisions and actions, the solution also lies in the cumulative benefits of actions and decisions that are responding to the crisis. It is immoral to suggest that just because New Mexico cannot alone address the ravages of the climate crisis that therefore the state should not do all it can to address its part of this growing existential crisis for present and future generations.</p>