



Joint Resolution 3: Constitutional Environmental Rights
Implementing the New Mexico Green Amendment
 Frequently Asked Questions and Answers – Part 2

Will the proposed Green Amendment inspire an unacceptable rush of lawsuits or onslaught of frivolous litigation?

While the constitutional language will support important legal claims essential to address environmental pollution and degradation harmful to the lives of the people of New Mexico, it is not expected to support a sudden rush of litigation and will certainly not support an onslaught of frivolous litigation.

In Pennsylvania and Montana, the two states that have constitutional Green Amendments, the legal actions filed have been to address serious issues of public concern such as:

- ✓ protecting drinking water,
- ✓ securing government action needed to ensure clean-up of toxic contamination by responsible parties,
- ✓ protecting local zoning authority,
- ✓ preventing agency overreach that circumvents existing law or ignores relevant science and environmental impacts,
- ✓ preventing powerlines that will harm the environment and for which there is no demonstrated need.

We do not see a pattern of frivolous lawsuits with regards to other constitutional rights in New Mexico; there is no reason to believe this unethical pattern of behavior would result from passage of constitutional environmental rights protection. Further:

- ⇒ Ethical obligations, fines and sanctions for filing frivolous litigation are in place to prevent such abuses.
- ⇒ In PA & MT, the two states with similar amendments, there are zero constitutional environmental rights claims dismissed by a court as frivolous.

How are terms like ‘pure water’, ‘clean air’, ‘healthy ecosystems’, a ‘stable climate’ defined? Aren’t these terms too broad for a constitutional provision?

The broad language in the proposed environmental rights amendment is characteristic of New Mexico Article II Bill of Rights language. The terms ‘pure water’, ‘clean air’, ‘healthy ecosystems’, ‘stable climate’ are no less clear than the right to be free from “unreasonable searches and seizures”, the right to “freely speak”, that private property may not be taken for “public use” without “just compensation”; the right “to be free to Worship”; that victims of crime are to be treated with “fairness and respect” -- all of these on their face are broad and in need of additional definition. This overarching language ensures they will accomplish the protections the people seek and ensure they can withstand the evolutions and test of time.

More info & Resources at: www.NMGreenAmendment.org

It is the process for securing the definition which should be the key focus. As with other Article II rights:

- ✓ definition will begin with the legislative and executive arms of government through passage of legislation, regulations, policies, and decision-making that respects and protects the rights.
- ✓ It is then incumbent on the people and the courts to challenge and/or support such decisions through the judicial system, which will provide further refinement, guidance and understanding as to how these terms are to be applied and fulfilled.

Notably, the inclusion of trust language in the NM Green Amendment provides meaningful guidance. By including trustee language, courts are able to consider whether, in the context of environmental decision-making, government officials fulfilled the fiduciary obligations of prudence, loyalty and impartiality, which can help guide the courts in determining whether or not the government (the trustee) engaged in legally appropriate decision-making when seeking to define environmental rights and how best to protect them. If a robust, transparent and informed process was followed, the courts will most certainly be inclined to defer to the state.

Why is a Green Amendment beneficial for environmental justice protection?

By recognizing environmental rights as individual rights that belong to all people, it becomes clear that government decisions and actions must protect these rights *for all people* regardless of race, ethnicity, wealth, or generation, and that government is not entitled to undermine/sacrifice/minimize the rights of one beneficiary community in order to enhance/protect the rights of another beneficiary community.

Including a trust obligation in a Green Amendment ensures that all government officials have a clear fiduciary duty to act with loyalty and impartiality for the benefit of all beneficiaries, including present and future generations and regardless of race, ethnicity, geography or wealth. The duties of prudence, loyalty and impartiality will, among other things, ensure a duty of equitable treatment ensuring that the rights of all beneficiaries are considered, respected and protected equitably.

Specific recognition of the cultural values of a healthy environment for indigenous communities ensures that their cultural values and sacred sites are included as priority values to be protected. Recognizing the healthful values of the environment ensures priority consideration and protection of human health as relates to the environment in government actions.

In order to fulfill the constitutional obligations of protecting environmental rights and serving as trustee of the states' natural resources in a way that treats/protects the environmental rights of all beneficiaries equitably, a Green Amendment should ensure a pre-action analysis that considers: 1) the current status of potentially impacted people's environment and environmental rights (e.g., what pollution burdens residents already bear); and 2) the impacts of a proposed action or activity on their environment. Only by having an understanding of the current situation and the potential ramifications of the proposed action/decision/permit/legislation, can decisionmakers be said to have fulfilled their fiduciary duties of prudence, loyalty, and impartiality.

Government will need to take the results of the pre-action analysis seriously, including the consideration of impacts, and may not allow proposed projects to proceed if they would violate residents' right to a healthy environment unless they can demonstrate a compelling state interest and an intentional effort to minimize the infringement on environmental rights. This science-based, fact-based assessment will ensure that some communities do not shoulder all the pollution burden under the guise of "jobs" or convenience so that other communities may enjoy the benefits of clean water and air, and healthy environments.

How will the proposed amendment impact government decision-making in a way that is meaningful as opposed to merely aspirational?

The proposed New Mexico Environmental Rights Amendment will provide important substantive and procedural guidance to government officials that ensures it is not just an aspirational goal, but brings forth clear, meaningful, and enforceable requirements for government decision-making.

- ⇒ Placement in the Bill of Rights section ensures the Green Amendment is a limitation on government authority, not an expansion thereof.

- ⇒ The Amendment language will ensure government decision-making seeks to prevent and avoid environmental harm as opposed to after-the-fact management.
- ⇒ Trust language in the proposal brings forth the duties of prudence, loyalty and impartiality, which compliments and solidifies the obligation to make informed decisions and to treat all impacted people and communities equitably under the law regardless of ethnicity, race, wealth, geography or generation. In addition, the cultural environmental values of New Mexico's Native American Communities receive explicit protection.
- ⇒ The individual rights granted to all New Mexicans, coupled with the trust obligations of the government to protect the state's natural resources for the benefit of all the people, will prioritize environmental justice considerations and ensure environmental justice protection.
- ⇒ The trustee language will require consideration of potential environmental consequences, relevant science, specific site operations, local environmental conditions, and cumulative impacts as part of government decision-making (whether legislating, regulating, permitting, etc.) in order to ensure informed decisions, a focus on avoiding environmental harm, and to ensure a decision can withstand judicial scrutiny.
- ⇒ Environmental impacts that are anticipated to infringe on the constitutional environmental rights will require a compelling state interest to support that intrusion and a demonstration that the least restrictive means were used, i.e., the environmental and community harm was minimized.
- ⇒ Environmental rights are placed on par with other Article II rights, including property rights which is often important in the environmental context; it ensures there is a balance in decision-making and litigation between these two fundamental rights.

Will the Green Amendment Over Extend or Overwhelm the State Budget?

By its terms the proposed constitutional language is not calling for outlays of government funds to address environmental issues.

The most important values of a Green Amendment are about changing government decision-making in order to address, avoid and remedy environmental harms advanced by government action which overreaches and results in constitutional environmental rights violations.

As written, the remedies for constitutional violations will be equitable and focus on remedying legislative/regulatory language or gaps; remedying or rescinding permitting or other actions to avoid rights violations and/or ensure appropriate advance review of relevant conditions, data and impacts to ensure informed and constitutionally justified decision-making; providing for environmental protections when there are gaps in the law that fail to protect environmental rights; supporting/protecting local and state environmental protection authorities; ensuring government is fully and fairly implementing existing laws in order to ensure constitutional level protection, etc.

So, for example,

- ⇒ When there are gaps in the law – e.g., the failure to issue drinking standards for PFAS as is the case in many states – the remedy could be to ensure government action that would address the gap such as passing needed regulations or legislation.
- ⇒ If a law was passed that was advancing industry in a way that is rising to the level of being unconstitutional – e.g., when PA passed a law that overrode municipal zoning authority intended to protect environmental and property rights and instead mandated fracking operations be allowed within 300 feet of homes regardless of local conditions, or environmental and property right impacts – the remedy was to have the unconstitutional provisions declared unconstitutional and therefore not applied.

- ⇒ In the context where the government is failing to act in a way that is addressing an ongoing violation – for example failing to secure clean-up of a highly contaminated site causing water or community contamination and illness – the remedy could be focused on ensuring that government uses existing legal authority to hold responsible parties accountable for cleaning up the contamination.
- ⇒ If an agency issues a permit that will allow mining in places that are environmentally harmful to the degree that it results in a constitutional violation or they failed to consider the science and impacts before issuing the permit, the remedy would be a rescission of the permit to that industry, either permanently or until the government engaged in the consideration of sciences, facts and impacts necessary to ensure that there would be no constitutional violation and that the permit could be defensibly issued.

As you can see in all of these examples, the equitable remedy is ensuring government render decisions or actions that will cure a constitutional violation.

Notably, avoiding or remedying environmental harm is beneficial for protecting jobs, economic development, property values and associated tax revenues. For example water contamination by a manmade family of chemicals known as Perfluorinated chemicals (PFC) is making affected New Mexicans sick, [forcing dairy farmers to shut down operations rather than sell PFC contaminated milk](#), and dropping the resale value of impacted properties. Government action that could have prevented the contamination or that puts in place protections moving forward will provide economic value and protect jobs.

Will the New Mexico Green Amendment Harm Economic Development in New Mexico?

Overall, a New Mexico Environmental Rights amendment will enhance economic development, not harm it, by encouraging sustainable, environmentally protective, and innovative development, industry, and business growth that both supports jobs and economic growth but at the same time avoids the economic, health and safety harms that result from environmental pollution and degradation, and associated human health and safety consequences. As explained by a conservative Pennsylvania Supreme Court Chief Justice:

The Environmental Rights Amendment was not intended to “deprive persons of the use of their property or to derail development leading to an increase in the general welfare, convenience, and prosperity of the people.”

And the “Environmental Rights Amendment does not call for a stagnant landscape; nor ... for the derailment of economic or social development; nor for a sacrifice of other fundamental values.”

But it does *make clear that* “... to achieve recognition of the environmental rights enumerated ... as ‘inviolable’ necessarily implies that economic development cannot take place at the expense of an unreasonable degradation of the environment. As respects the environment, the state’s plenary police power, which serves to promote said welfare, convenience, and prosperity, must be exercised in a manner that promotes sustainable property use and economic development.”

Robinson Twp., Delaware Riverkeeper Network v. Commonwealth, 623 Pa. 564, 83 A.3d 901, 954 (2013).

The Green Amendment can also be a positive foundation for advancing positive economic development such as policies, programs, and legislation designed to help advance clean and renewable energy projects.

Is a Green Amendment only forward looking – does it only deal with future pollution and government action or can it be used to remedy existing and ongoing problems created in the past?

The Green Amendment will address government action in the present and future that result (or are anticipated to result) in a constitutional violation. The Green Amendment can also help remedy constitutional violations that were created by past action but are being left unaddressed in the present; i.e. existing constitutional violations aren’t grandfathered in.

The constitutional Bill of Rights is focused on government action; therefore, enforcement to prevent or remedy a constitutional environmental rights violation requires a government act or omission that is causing or perpetuating a constitutional violation. If there is an ongoing violation created in the past, either a direct action in the present like renewing a permit, or a failure act such as failing to enforce existing law requiring clean-up of a toxic site by responsible parties, could be the kind of present-day action or omission that could support a constitutional claim.

As explained by the Pennsylvania supreme court when discussing language identical to that found in the New Mexico Green Amendment proposal – i.e., that the state must serve as “trustee” of the state’s natural resources and “conserve, protect and maintain” them for the benefit of present and future generations:

“As trustee, the Commonwealth is a fiduciary obligated to comply with the terms of the trust and with standards governing a fiduciary's conduct. The explicit terms of the trust require the government to “conserve and maintain” the corpus of the trust. See Pa. Const. art. I, § 27. The plain meaning of the terms conserve and maintain implicates a duty to **prevent and remedy** the degradation, diminution, or depletion of our public natural resources.”

(emphasis added) *Robinson Twp., Delaware Riverkeeper Network v. Commonwealth*, 623 Pa. 564, 83 A.3d 901, 954 (2013).

New Mexico has a well-developed system of laws, why do we need a constitutional amendment?

While New Mexico has a well-developed system of environmental laws, there is still important reason to recognize and protect the rights of the people to a healthy environment.

A constitutional amendment allows New Mexicans of today to lock in our commitment to environmental protection, making it harder for future legislatures to roll back protections installed to protect the rights of the people to pure water, clean air, a stable climate and healthy environments.

New chemicals and industries are constantly evolving and being advanced and it can take time for laws to catch up and ensure protections are in place to prevent harm. The NM Green Amendment language will ensure protections are always in place, even for new unregulated threats. For example, if New Mexico had a constitutional environmental rights amendment in place years ago, there could have been the tool in place necessary to avoid the harms of PFAS contamination.

New Mexico’s current system of laws relies heavily on permitting and managing pollution, and places too little emphasis on considering cumulative impacts, environmental justice, and preventing harm. As a result, communities across the state are impacted by contaminated drinking water; forced to live next to highly contaminated sites that are harming human health and reducing property values; are breathing polluted air harming their health and making them more vulnerable to the ravages of COVID-19; and there are plant and animals species being harmed by damage to the critical natural environments they need to survive and thrive. In addition, poor implementation and politically expedient rollbacks of protections are too commonplace. As we see in other areas of law, such as civil rights, these deficiencies can best be addressed by the overarching protections a constitutional amendment provides– i.e., a Green Amendment