



New Mexico Green Amendment Frequently Asked Questions & Answers

What is a Green Amendment?

A Green Amendment is a self-executing provision placed in the Bill of Rights section of a constitution that recognizes and protects the inalienable rights of all people, including future generations, to clean water and air, a safe climate, and healthy flora, fauna, ecosystems and environments. Green Amendments serve as a check on government authority, and make clear government's duties, as trustee, to equitably protect the environment for the benefit of all the people of the state regardless of race, ethnicity, tribal membership status, socioeconomics, or generation.

How is a Constitutional Amendment Better Than Legislation for Environmental Protection?

Our state and federal constitutions provide the overarching legal structure, principles and obligations to which all branches of government must conform. All government action, including the passage of laws, regulations, policies and programs are done in service to advancing government's constitutional obligations – government officials cannot change or violate the constitution, they must honor and implement it. Passage of a New Mexico Green Amendment will ensure that every government official in the state will work to advance environmental protection at every level of the decisionmaking process, rather than wait until the end of the process when the focus is necessarily on acceptance and management through permitting rather than prevention.

Having a Green Amendment will help ensure that existing environmental laws and regulations are implemented to their full potential; will provide a basis for advancing new needed protections (e.g. through legislation, regulation or government action); will provide a basis to secure protective government action when a gap in the law is identified (such as the case with PFAS contamination); and will strengthen the ability of communities to gain access to courts when their rights have been infringed upon by government action, inaction and/or activities.

Why is a Green Amendment beneficial for environmental justice protection?

By recognizing environmental rights as individual rights that belong to all people, it becomes constitutionally mandated that government decisions and actions protect these rights for all people 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. To ensure absolute clarity, the NM Green Amendment explicitly requires equitable protection of environmental rights and natural resources for all people and communities regardless of race, ethnicity, tribal affiliation or socioeconomics and ensures a duty to

protect these rights for present and future generations.

Including a trust obligation in the Green Amendment ensures that all government officials have a clear fiduciary duty to act with prudence, loyalty and impartiality for the benefit of all beneficiaries when acting to protect natural resources. The trust obligation of impartiality ensures a duty of equitable treatment owed to all communities – no one community is entitled to better or worse protection than the others, all are entitled to the same duty of care and equitable protection. The duty of prudence – i.e. informed decisionmaking before action is undertaken – ensures consideration of existing conditions, and the impacts and benefits from a proposed action including cumulative impacts across geography and time. Given that the fiduciary obligation is owed to all beneficiaries it also prevents the government from justifying harms to one community by pointing to benefits to another.

Why does the NM Green Amendment require that environmental rights be protected “equitably” instead of “equally”?

The difference between “equal” and “equitable” is important. While “Equal” means that all people have the same opportunity to enjoy and benefit from healthy natural resources their right to a clean and healthy environment, “Equitable” recognizes the different and disparate existing conditions of communities when it comes to accessing or enjoying healthy environments. “Equitable” recognizes that not all people or communities have the same access to healthy natural environments, nor the same ability to ensure their rights are enforced and respected. Utilizing the term “equitable” recognizes that some individuals and communities do not have the same access to legal resources, money and political power as others. Equity also recognizes that some communities have been polluted much more than others and to achieve a fair environmental outcome requires considering and addressing that historic and existing condition. By ensuring an obligation for “equitable” protection, the NM Green Amendment will require that government take a particular community’s history of pollution, environmental degradation, discrimination and access to resources (natural financial and political) into consideration when making and implementing actions and decisions that affect the environment. Mandating “equitable” protection will ensure that conscious actions and steps are taken to achieve fair access to, and benefits from, clean, safe and healthy environments and the many benefits they provide.

If a Violation of the Amendment Is Found What Will Be The Remedy?

Violations of the NM Green Amendment will be addressed through equitable remedies/relief meaning the government will be required to undertake action, or refrain from action, that is causing the constitutional violation. For example, provisions of a law declared to be unconstitutional cannot go into force and effect; a permit issued that will cause an unconstitutional violation is declared invalid/void until/unless the constitutional infirmity is remedied; a law that requires clean-up of a toxic site by responsible parties must be enforced. The amendment is specifically written so the redress will not take the form of money damage payouts but will ensure the harm that is impacting individuals/communities is remedied.

How Will a NM Green Amendment Affect Government Decisionmaking and Activities?

A NM Green Amendment will provide critical guidance that ensures state, county and municipal government decisionmaking - substantively and procedurally - considers environmental impacts early in the process when prevention of pollution, degradation and environmental harm is most possible; requires equitable protection of all communities strengthening environmental justice; ensures consideration of cumulative impacts over space and time; considers the protection of present and future generations; and considers science, facts and impacts as part of the decisionmaking process in order to fulfill the government’s trust obligations. The amendment will ensure that all impacted rights are balanced and addressed and will only allow for infringement when there is a demonstrated compelling state interest and genuine effort to

minimize the harm. When all else fails, a NM Green Amendment will provide a backstop that can be used by community, public, government and business interests to provide a check on government authority that overreaches and fails to protect environmental rights. In addition, because it is self-executing, a NM Green Amendment can help address community harms that have not been addressed by existing legislation, regulation or government action. In addition, A NM Green Amendment will encourage sustainable, environmentally protective, and innovative development, industry, and business growth.

How can legislators be responsible for protecting the right to clean water and air or a safe climate when these are not entirely within the control of any one state?

Rights enumerated in the Bill of Rights are inalienable rights that the people reserve unto themselves to be protected from government infringement. Just as with other rights in the Bill of Rights, government has a duty to take what actions it can to protect these rights within its jurisdiction and to ensure that its own actions do not induce, garner or allow for infringement. But just as government officials in one state do not have the power to prevent acts or activities outside the boundaries of their jurisdiction that might overreach and affect constitutional rights in another jurisdiction, the same holds true for environmental rights. Each state is bound to take what action it can to respect and protect the environmental rights of the people within its jurisdiction, and to ensure that its own actions or activities do not cause or contribute to infringement.

Do any states currently recognize environmental rights and natural resource protections in this way?

Pennsylvania, Montana, and New York have constitutional language that fulfill the definition of a Green Amendment. (See the Green Amendment checklist at: <https://nmgreenamendment.org/wp-content/uploads/sites/8/GREEN-AMENDMENT-Check-List-only-smaller.pdf>). Cases that have interpreted and applied existing Green Amendments can be found at the resources tab of the www.NMGreenAmendment.org website.

How will terms like ‘clean’ or ‘healthy’ be defined?

The language in the proposed NM Green Amendment is characteristic of New Mexico Article II Bill of Rights language. The terms “*clean and healthy*” or “*self-sustaining*” 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 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.

The same process used to inform and define these other constitutional terms and rights will ensure proper interpretation and definition of the Green Amendment. As with other Article II rights:

- ✓ definition will begin with the legislative and executive arms of government through passage of legislation, regulations, policies, and decisionmaking that respects and protects the rights. In fact, “self-sustaining ecosystem” is a term already used in New Mexico’s Mining Act and receives a level of definition in implementing regulations. That existing definition will provide a starting place for the legislature and the courts.
- ✓ 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 taking action with regards to the state's natural resources. If a robust, transparent and informed process was followed, the courts will be more inclined to grant deference.

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 New Mexico Green Amendment is not retroactive. But, the Amendment can help remedy constitutional violations that were created by past action but are being perpetuated in the present by new government approvals or affirmations. For example, when a permit is renewed that will allow the perpetuation of pollution discharges so severe they result in a constitutional violation, that permitting decision made today should be guided by, and protective of, the constitutional environmental rights protected by the amendment.

Does a Green Amendment mean government can never infringe on constitutional environmental rights?

As explained by the Montana Supreme Court, when a fundamental right articulated in the Bill of Rights is at issue, court review requires strict scrutiny, meaning that any demonstrated infringement can withstand constitutional challenge if “the State establishes a compelling state interest and that its action is closely tailored to effectuate that interest and is the least onerous path that can be taken to achieve the State's objective.” (Montana Env'tl. Info. Ctr. v. Department of Env'tl. Quality, 1999 MT 248 (1999).) It is expected that this well-recognized principle of constitutional law will similarly apply in New Mexico.

Will the proposed Green Amendment inspire an unacceptable rush of lawsuits or 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, Montana, and New York, the three 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, and supporting government enforcement against environmental law violations. New Mexico, like all states, have standards of conduct with serious ramifications for violation, that prevent lawyers from pursuing frivolous lawsuits. Notably, in PA, MT and NY, the three states with similar amendments, there are zero constitutional environmental rights claims dismissed by a court as frivolous.

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. By preventing harmful and costly environmental degradation, the NM Green Amendment will protect state, county and local government budgets and people.

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.