

Green Amendment Frequently Asked Questions & Answers

What is a Green Amendment?:

Green Amendments are self-executing provisions placed in the Declaration of Rights/Bill of Rights section of a constitution that recognize and protect the inalienable rights of all people, including future generations, to clean water, clean air, a stable climate and healthy environments. Green Amendments serve as a check on government authority, and make clear government's duties, as trustee, to protect the environment for the benefit of the beneficiaries, i.e. the people of the state, including future generations.

What states have Green Amendments currently?

Only Pennsylvania and Montana have constitutional language that fulfill the definition of a Green Amendment. Both states have state Supreme Court rulings that interpret and apply the constitutional language in keeping with the legal interpretation and application of other constitutional bill of rights/declaration of rights provisions.

Pennsylvania's Constitutional Provision is the most recent (within the past 5 years) to advance legally and provides strong recent judicial interpretation and guidance for the values, benefits and limitations of such a Green Amendment provision:

Pennsylvania's Green Amendment was passed unanimously by both houses of the PA Legislature in 1971 but was quickly declared to be a simple statement of public policy by the Pennsylvania courts. It was only as the result of a 2013 PA Supreme Court decision written by the conservative Chief Justice R. Castille that legal recognition of environmental rights in Pennsylvania was restored. The 2013 decision has since been reaffirmed by the PA Supreme Court with a different composition of justices and is already having a significant positive effect on positive environmental decision-making and the rule of law in PA.

The goals of a Green Amendment are:

- To advance better government decision-making that will advance economic development, business and community interests in a way that avoids environmental pollution and harm and as a result avoids the costs, health harms, lost property values, diminished quality of life, and other adverse impacts that pollution and environmental degradation cause;
- To support government actions, community and business interests that are beneficial for environmental protection – such as advancing clean energy projects, environmentally beneficial development, plastic ban bills or other government efforts intended to proactively advance environmental protection and benefits;
- To provide an opportunity to impacted municipalities, business, communities, individuals and families to seek court intervention when government officials render decisions, actions or laws

that are so harmful they rise to the level of infringing on the constitutional rights to clean water, clean air, a stable climate and/or a healthy environment.

Why do we need a Green Amendment, when our state already has a well-developed set of environmental protection laws?

While states have well-developed systems of environmental protection laws, they also all have a significant number of devastating environmental problems: – communities with contaminated drinking water; communities forced to live next to highly contaminated sites that are harming human health and reducing property values; schools located in areas with such severe air quality issues that the air pollution is impacting the health of students; and ongoing environmental justice issues as minority, indigenous and immigrant communities continue to be target for highly polluting and environmentally degrading activities. It is clear there are multiple gaps in the law. 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, that the deficiencies can best be addressed by the overarching protections constitutional protection provides– i.e. a Green Amendment.

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

Broad language in a constitution’s Declaration of Rights/Bill of Rights is characteristic of all state and the federal constitutions. The purpose of the Declaration of Rights/Bill of Rights is to identify those rights that “the people” reserve unto themselves as being protected from government infringement. The terms ‘pure water’, ‘clean air’, ‘ecologically healthy habitats’, a ‘stable climate’ are no less clear than the language in other Declaration of Rights/Bill of Rights provisions, e.g. “right to a speedy ... trial”, “excessive bail shall not be required”, “people have the right freely to assemble” -- all of these on their face are quite broad, but have received definition through government action and judicial determinations.

It becomes government’s job to, in the first instance, seek to provide 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.

The inclusion of trust language in a Green Amendment helps to provide further legislative and judicial guidance that can help guide both its implementation and interpretation.

Why Must a Green Amendment be Placed in the Bill of Rights/Declaration of Rights Section of the Constitution?

The rights described in the Bill of Rights/Declaration of Rights section are those rights that are recognized as natural and unalienable rights that are to be protected from government infringement.

Clean water, clean air, a stable climate and healthy environments are essential for supporting healthy human lives – in terms of physical health, mental health, and economic health. Without an environment in which human life can thrive, a person is deprived of all other rights. As such, it is the basic human right that should be given the highest priority, recognition, and protection.

The rights identified in Bill of Rights/Declaration of Rights are reserved by the people for the people to be protected from illegitimate government interference. As such, placement in Bill of Rights/Declaration of Rights ensures we are recognizing that this constitutional amendment is a restraint on government action and overreach, and not a grant of new authority or new rights.

Placement in Bill of Rights/Declaration of Rights ensures that the right to pure water and clean air and a healthy environment are legally recognized and protected on par with other fundamental rights like the right to free speech, due process rights, freedom of religion, and property rights. This is particularly important in order to prevent the argument that environmental rights are of lesser legal importance than property rights, and it is essential for ensuring proper and equitable balancing of these rights in the eyes of legislators and the courts.

Given that pure water, clean air and healthy environments are essential for sustaining healthy human life, it is only appropriate that these rights be placed in the Bill of Rights/Declaration of Rights.

Placement in Bill of Rights/Declaration of Rights confirms the self-executing nature of the constitutional provision – i.e. that the legislature does not need to pass laws in order to activate these rights, they become defensible and actionable by virtue of the fact that they are in constitution. For those who want to be crystal clear on this point, by placing language that specifically recognizes the amendment as self-executing, we can ensure there is no question or doubt as to the intent of the framers or the people when they voted to add the Green Amendment.

How will the provision change/affect government decision-making?

Green Amendments provide broad overarching guidance that ensures government decision-making considers environmental impacts early in the process, provide a focus on preventing degradation, and provide a back stop that can be used by community, public, government and even business interests to provide a check on government authority that overreaches and fails to protect environmental rights.

- A trust obligation included in a Green Amendment instills a fiduciary duty of prudence, mandating that government actors act in an informed and cautious way. In practice, this should result in government officials considering local conditions in the areas to be impacted by proposed actions as well as the resulting impacts. In order to ensure prudent and informed decision-making, government actors will need to secure, consider, and incorporate relevant science into decision-making processes.
- A trust obligation included in a Green Amendment instills a fiduciary duty of loyalty requiring that government actors administer the trust solely in the interest of the beneficiaries, which is all the people, including future generations. In practice, this means government cannot prioritize the goals or needs of a single industry or actor above the interests of the people to a clean and healthy environment.
- A trust obligation included in a Green Amendment instills a fiduciary duty of impartiality mandating that the trustee treat all beneficiaries equitably. In practice this means that

government actions and decisions cannot target or sacrifice a single community with repeated environmental harm in order to better protect the interests of another community. This has powerful environmental justice implications in that now all individuals and communities -- regardless of ethnicity, income or address -- have the same rights and must be treated equitably.

- It will require government officials – before passing a law, issuing a permit, or approving a new industrial operation – to consider compliance with their constitutional duty, not simply the applicability of existing legislation and regulations. This ensures a bigger picture consideration and investigation into the ramifications of the proposed action *prior* to acting and mandates consideration of how environmental impacts can be avoided as part of the decision-making process.
- It clarifies that there is a constitutional duty of environmental protection on all government officials operating at the state, county and local level.
- It ensures that when there may be serious environmental consequences from government action, government must demonstrate that there is a compelling state interest that supports such action and that the government has taken the necessary steps to avoid and minimize the environmental impacts as much as possible.
- It focuses government decisionmakers on preventing degradation of the environment rather than setting aside environmental considerations and simply relying on permitting and regulations to manage the environmental harm that will result.

Will this cause an onslaught of frivolous lawsuits?

Green Amendments do not support an onslaught of frivolous litigation. In Pennsylvania and Montana, where Green Amendments now exist, there has not been an onslaught of frivolous litigation relying on constitutional environmental rights. Rather, the lawsuits brought have been reasonable and helped to shape the understanding of the constitutional requirement.

There already exist other meaningful tools that prevent frivolous litigation in any context, including where there are Green Amendments. Attorneys are subject to ethical and legal standards that prohibit advancing frivolous litigation and can be enforced through a variety of sanctions from fines to implications for their law license in egregious situations. And attorneys who pursue frivolous legal actions will inevitably lose their cases which will anger the fee-paying clients and result in a bad reputation that will most certainly impact the attorneys' business and ability to attract clients. There are ethical considerations, the threat of sanctions, and the expectations of legal clients who are paying the bill that serve as a check on attorney misuse and frivolous lawsuits.

Will the Constitutional language force commercial, energy or economic development to grind to a halt?

A constitutional environmental right will encourage sustainable, environmentally protective, and innovative development, industry, and business growth. It will also provide a powerful incentive for government officials to render decisions and advance businesses in ways that accomplish economic and business objectives, while at the same time protecting water, air, soils, food, forests, wetlands, climate and other natural resources critical to sustaining healthy, safe and successful lives and economies.

Will the amendment stop residential or commercial property development?

As well-explained by the Pennsylvania Commonwealth Court when speaking about development proposals in the context of that state's Green Amendment:

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.” Robinson Twp. v. Commonwealth, 623 Pa. 564, 83 A.3d 901, 954 (2013). It does, however, require that economic development not take place at the expense of an “unreasonable degradation of the environment.” Id. (emphasis added). Furthermore, with respect to the environment, “the state’s plenary police power ... must be exercised in a manner that promotes sustainable property use and economic development.” Id.

(Feudale v. Aqua Pennsylvania, Inc., 122 A.3d 462 (Pa. Commw. Ct. 2015).

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* 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 prudence, loyalty and impartiality for the benefit of all beneficiaries, including present and future generations. This ensures a duty of equitable treatment, and careful and informed decision-making. Given that the fiduciary obligation is owed to all beneficiaries it also prevents the government from justifying harms to one community in order to benefit another.

In order to ensure fulfillment of the constitutional obligation and to do so in a way that treats/protects the environmental rights of all beneficiaries equitably, a Green Amendment requires 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 – operating without information or based on assumptions and presumptions cannot support the informed decision-making required by the constitutional obligation. This pre-action analysis necessarily requires data and science, and must include consideration of cumulative impacts (both near term and long term). It is not simply a process-focused inquiry.

Government must 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. This science-based, fact-based assessment helps to ensure that some communities do not simply 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 can legislators be responsible for protecting the right to a stable climate, to access clean air, or to protect species when these are not entirely within the control of any one state, or even country?

Rights enumerated in the Bill of Rights/Declaration of Rights are inalienable rights that the people reserved unto themselves to be protected from government infringement by direct action or through the acts of third parties. Just as with other fundamental freedoms in the Bill of Rights/Declaration 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, to ensure that its actions or activities do not result in infringement, but they are not duty bound (nor are they necessarily able) to take or prevent actions outside of their jurisdictional boundaries (e.g. state borders) in order to address/prevent infringement in other jurisdictions (e.g. states).

For example, the constitutional right to due process means government officials can and should fulfill their obligation to ensure their own laws/actions/decisions within their own jurisdictions (state) do not infringe on the constitutional rights to due process and to be free from illegal searches and seizures. The same goes for the environment – when included in the Bill of Rights/Declaration of Rights section of the state constitution, government officials are prohibited from undertaking actions/activities/laws that will infringe upon these rights directly or through the actions of third parties within their jurisdictional boundaries; the fact that they do not directly control actions of persons outside of their state jurisdictional reach that may have an impact on these rights in no way changes their own constitutional obligation within the state.

Will the Federal Supremacy Clause prevent states from being able to pass and enforce State Constitutional Green Amendments?

No. It is common for states, particularly in their constitutions, to provide more rights and/or protections than the federal constitution or laws. This has included providing greater protection for fundamental rights than the U.S. Constitution, including in their Bill of Rights/Declaration of Rights. This legal and constitutional ability to provide greater protections includes the environmental context. Only if there were an unavoidable or irreconcilable conflict between a state constitutional provision (e.g. addressing environmental rights) and a federal statute or federal Constitutional provision, would the state provision yield to the federal law under the Supremacy Clause and then the yield would only be in that context, not across the board in every instance where the environment or environmental rights were implicated. While there are many federal laws in place that implicate the environment, generally a state Green Amendment would provide a higher level of protection and not result in a direct contradiction with the federal law at issue.

In specific instances where a federal statute or constitutional provision is alleged to conflict with a state Green Amendment, federal courts will still attempt to give meaning to both unless it

is impossible to comply with both provisions or to otherwise reconcile the provisions. Such a scenario has yet to arise or be identified.

Particularly in the environmental context, the rights of states to provide greater protections to their citizenry, to address the special conditions and contexts of their state that warrant greater protections, and to be more responsive to in-state environmental concerns, is widely recognized and protected. For example, environmental statutes, such as the federal Clean Water Act and Clean Air Act, are generally written so as to promote cooperative federalism (i.e. federal, state and local governments all share in the responsibility of addressing common problems, issues and/or concerns).

Does a State Green Amendment mean that state government actions/activities/laws can never infringe on the constitutional environmental right?

No. As well-explained by the Montana Supreme Court, when a fundamental right articulated in the Bill of Rights/Declaration of Rights section is at issue, court review requires strict scrutiny, meaning that any demonstrated infringement can only 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).)