



Is a New Mexico Green Amendment purely aspirational? Or will it have real and meaningful impact?

The New Mexico Green Amendment is an important recognition of basic human rights, and a recognition of substantive legal rights that brings with it clear directives on how the rights can be recognized and protected in everyday government actions and decision-making.

Executive Summary:

A New Mexico Green Amendment will provide important substantive and procedural guidance to government officials that ensures it is not just an aspirational goal, but with its passage brings forth clear, meaningful, and enforceable requirements for government decision-making that guides and ensures protection of the constitutional right.

Placement in the Bill of Rights section ensures the Green Amendment is a limitation on government authority, not an expansion thereof. These rights would be treated the same as other Bill of Rights protections.

- ✓ A Green Amendment will require greater consideration of potential environmental consequences, relevant science, applicable facts, specific site operations, local environmental conditions, and cumulative impacts prior to government decision-making in order to ensure informed decision-making, a focus on avoiding environmental harm, and to ensure a decision that can withstand judicial scrutiny.
- ✓ Trust language in the constitutional provision 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.
- ✓ An anti-degradation approach to decision-making, used for over 40 years in environmental protection legislation, will be required and will ensure scientific and data-driven consideration of the level of impact a particular natural resource can scientifically withstand without being degraded or depleted, will require an understanding of the pollutants/degradation already affecting natural resources, and a consideration of the ability of the environment to assimilate – or deal with – the anticipated/proposed pollutants/degradation.
- ✓ 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 protection.
- ✓ Anticipated environmental impacts that are anticipated to infringe on the constitutional environmental right will require a compelling state interest to support that intrusion and a demonstration that the least restrictive means were used – e.g. 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.

The New Mexico Green Amendment has a Real & Meaningful Impact:

The NM Green Amendment will provide important guidance in how government can meet its obligation to respect and protect the inalienable rights of all people to pure water, clean air, a stable climate and the natural, cultural, scenic and healthful qualities of the environment. This guidance includes the clear language of the amendment, complimented by legal principles of interpretation (including constitutional law and trust law) that guide government officials in achieving their constitutional duties to respect and protect environmental rights. The NM Green Amendment offers important clarity on how NM government officials should approach legislating, permitting, and decision-making when the fundamental rights of people to pure water, clean air and healthy environments are at stake.

While the Green Amendment can serve as a check on governmental action that overreaches and violates constitutional rights, the primary goal is to secure better decision-making that respects and protects environmental rights and negates the need for litigation. When properly recognized by government officials, the NM Green Amendment will result in decision-making that will advance economic, business, energy, development, and other objectives, but ensure they proceed in a way that is environmentally protective.

Applicable legal principles of constitutional interpretation, in combination with established principles of trust law, mean that **the NM Green Amendment lays out procedural and substantive obligations with regards to how government officials must perform their duties when pollution and environmental impacts are involved**. Broadly speaking, the NM Green Amendment should ensure that the consideration of proposed government action (whether legislation, regulation, permitting, policies, programs, funding) clearly focuses on how the action can be undertaken in a way that avoids environmental pollution and degradation.

New Mexico's proposed amendment language parallels the language found in Pennsylvania's Environmental Rights Amendment, but is enhanced with clarifying language borne out of judicial decisions interpreting and implementing the Pennsylvania provision, and with modern day issues and experiences. And so, in addition to looking to standard legal principles of interpretation, we can look to the interpretation and application of Pennsylvania's Green Amendment, including recent PA Supreme Court jurisprudence, to guide our understanding of New Mexico's Green Amendment proposal.

As is the case with other fundamental rights protections articulated in the Bill of Rights/Declaration of Rights section of the New Mexico Constitution, **the NM Green Amendment, is first and foremost, a limitation on government authority**. As discussed by Chief Justice Ronald Castille in Robinson Township, Delaware Riverkeeper Network v. Commonwealth,¹ (talking about the Pennsylvania Constitution which contains only one of two Green Amendments that exist currently in the U.S.), "[t]he Declaration of Rights assumes that the rights of the people articulated in Article I of our Constitution . . . are inherent in man's nature and preserved rather than created by the Pennsylvania Constitution." 83 A.3d at 948 & n.36 (plurality). "The Declaration of Rights is that general part of the Pennsylvania Constitution which **limits the power** of state government . . ." 83 A.3d at 948 (plurality)(emph. added). In keeping with these legal principles, the NM Green Amendment is intended to protect environmental rights by limiting/preventing government actions or activities that overreach – whether through direct government action or the action of others, or through government inaction – and inflicts constitutional-level harm on the inalienable right to pure water, clean air and/or healthy environments.

¹ 83 A.3d 901 (Pa. 2013)

Among the clear mandates that emanate from the proposed NM Green Amendment that make the passage of this amendment procedurally and substantively meaningful, not just aspirational, are the following:

⇒ **Environment protected as part of decision-making.**

The Green Amendment will require decisionmakers to **consider environmental implications as part of their decision-making process**, considering impacts in a much more serious and significant way because there is a heightened duty of care, a duty of prudence, and an obligation to minimize the risk of a constitutional violation.

⇒ **Pre-action analysis required.**

The Green Amendment should focus attention on **pre-action decision-making**, based on all relevant information, in order to ensure an outcome that will avoid environmental harm rather than simply accept and manage harm.

⇒ **Science, site specific facts, cumulative impacts essential – unsupported assumptions prohibited.**

The Green Amendment will ensure that **data, science and demonstrated facts are a cornerstone of government decision-making**. Government action/decisions/activities will consider, up front, potential environmental consequences, relevant science and facts, specific site operations, local and existing environmental conditions, and cumulative impacts – a robust environmental review will now become part of regular decision-making. Governmental entities and officials will not be able to rely on unsupported assumptions to defend their actions. Government entities will only be able to defend a challenged decision/action/activity when they can demonstrate informed decision-making, including pre-action analysis.

⇒ **Duties of prudence, loyalty, impartiality implicated.**

Trust language in the constitutional provision brings forth the **duties of prudence, loyalty and impartiality, which complements and solidifies the obligation to make informed decisions** with regard to environmental impacts and ensures all communities (regardless of race, ethnicity or income) are treated equitably in the decision-making process.

⇒ **Anti-degradation focus prioritized.**

The Green Amendment will **advance an anti-degradation approach to decision-making** – focusing decision-making on the avoidance of harm first. Anti-degradation decision-making is a long-used, effective and well understood approach to pursuing and achieving environmental protection in both state and federal law. This approach to water protection has been applied effectively and successfully for over forty years. An anti-degradation standard focuses on what level of impact a particular natural resource can scientifically withstand without being degraded or depleted. An anti-degradation analysis requires understanding what pollutants or levels of degradation are already affecting a public natural resource, whether it be air, water, soil, or natural habitats such as forests or wetlands; how much of those pollutants or that degradation is present; and the ability of the environment to assimilate/accommodate the anticipated/proposed pollutants/degradation. It also requires determining a baseline of what level of air, water, soil, forest, wetland or environmental quality is necessary for healthy humans and wildlife to ensure that human activities do not degrade or deplete the natural resources to our detriment. Anti-degradation advances sustainable development/operations/activities.

⇒ **Environmental Justice prioritized.**

The individual rights granted to all New Mexicans, coupled with the trust obligations of the government to protect the public natural resources for the benefit of all the beneficiary communities (which is all the people including future generations), will **ensure that environmental justice considerations are given high priority in the decision-making process**, and that when considering benefits and impacts, government officials treat all potentially impacted communities equitably. This provides additional meaning and strength to our state's commitment to environmental justice and ensures that government action cannot repeatedly sacrifice the environmental rights and health of one community in order to benefit the environmental rights and health of others – all communities must be considered and protected equitably.

⇒ **Compelling state interest and minimizing impacts required if violation anticipated.**

If government anticipates a significant impact from its proposed actions that will infringe on the constitutional environmental right, government will have to ensure there is a **compelling state interest** to support that intrusion and that officials ensured that they used the least restrictive means to accomplish the intended goal – e.g. the environmental and community harm was minimized. This standard will ensure government officials have given careful thought regarding community costs, benefits, and impacts. Notably, enhancing industry profits is not a compelling state interest.

There are **many significant benefits** that will result from passage of the NM Green Amendment, including, but not limited to:

- Reduced enforcement costs from ill-informed approval of a project, permit or program.
- Fewer complaints from communities located too close to an industrial facility and experiencing health or property value impacts, from communities located downstream of flood-inducing development, from farmers harmed by neighboring land uses (e.g. organic farmers located next to landowners inappropriately using herbicides) whose concerns/impacts were not considered/addressed during the permitting process.
- Higher property tax revenue through healthier, more livable communities with businesses that do not detract from the quality of the local environment.
- Development, industry and business being proactive in efforts to utilize and develop practices and operations that are protective of health, safety, the environment, communities and future generations thereby avoiding harms that are difficult or impossible to redress later, avoiding legal costs responding to future legal actions by communities harmed by contamination and safety issues, avoiding expensive clean up costs of contaminated sites, and saving government on the costs of future response.
- A more robust decision-making process that mandates consideration of individual and cumulative impacts as well as the most up-to-date and applicable science will reduce government costs for responding to health harms, flood damages, environmental cleanups, restoration of adequate drinking water supplies, conflicting land uses, etc.

As with other inalienable rights in the Bill of Rights section of a Constitution, there is no expectation that the Green Amendment will result in a blanket prohibition or grant of authority to protect the enumerated rights. And the Green Amendment will not be an instant panacea with regards to pollution and degradation. However, the proposed Green Amendment will ensure that the rights to access clean water and air, and to secure the benefits that come from healthy environments, are given high level recognition as inalienable rights and are provided the same constitutional recognition, protection and respect given to other inalienable rights in government decision-making and in the courts.

The **upfront goal of a Green Amendment is to ensure good decision-making** that results in meaningful environmental protection at the same time business growth, economic growth, and development projects are advanced. This interpretation has been confirmed by the Pennsylvania Supreme Court, including the case *Robinson Twp., Delaware Riverkeeper Network, et al v. Commonwealth*, 83 A.3d 901 (Pa. 2013)(*Robinson II*), where justices emphasized that Article I Section 27 -- i.e. Pennsylvania's Green Amendment -- was never designed to stop all development; rather, it constrains governmental entities to exercising authority "in a manner that promotes sustainable property use and economic development."²

In *Feudale v. Aqua Pennsylvania, Inc.*, 122 A.3d 462 (Pa. Commw. Ct. 2015), a zoning case that considered Pennsylvania's Environmental Rights Amendment, the Commonwealth Court, siding with the developer, clearly stated:

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).

² *Robinson Township*, 83 A.3d at 954; see also *id.* at 958 ("Of course, the trust's express directions to conserve and maintain public natural resources do not require a freeze of the existing public natural resource stock; rather, as with the rights affirmed by the first clause of Section 27, the duties to conserve and maintain are tempered by legitimate development tending to improve upon the lot of Pennsylvania's citizenry, with the evident goal of promoting sustainable development").