



For the Generations
Pure Water. Clean Air. Healthy Environment.



HOW TO IMPLEMENT AND APPLY A GREEN AMENDMENT



An effective Green Amendment should be placed in the Bill of Rights/Declaration of Rights section of a Constitution, should include language that recognizes and protects both individual as well as community rights to a clean and healthy environment, and should advance an anti-degradation approach to environmental protection without relying on other state or federal legislation. The language should include both an individual rights clause and a public trust clause. This approach will provide courts with the necessary guidance for understanding how to ensure proper implementation of environmental rights, based on existing case law.

INCLUDING AN ANTI-DEGRADATION STANDARD

Anti-degradation is a long-used, effective and well understood approach to pursuing and achieving environmental protection in both state and federal law.

There is nothing radical or unfamiliar about ensuring that an activity will not lead to degradation. Such a standard does not mean “no activity.” Rather, anti-degradation allows for sustainable development/operations/activities, that is, development/operations/activities that do not harm the quality and quantity of the water, air, fish, or other aspects of the local environment both in the short-term and long-term. It means governmental entities cannot permit an activity when they lack information on specific site operations, local environmental conditions, and potential environmental consequences. Further, they cannot rely on assumptions instead of data, and cannot reject or ignore available science and data demonstrating degradation is likely.

An anti- or non-degradation standard focuses on what level of impact a particular natural resource can withstand, scientifically, without being degraded or depleted. Anti/non-degradation standards are currently used for surface water standards under the Clean Water Act and state water protection laws. In some states, the standard applies to groundwater in addition to surface waters. Under these existing statutory frameworks, the anti-degradation standard mandates the use of science to identify when a pollution discharge to a stream will lower the water quality below its current condition. Science and data are used to identify the current condition of the streams, the numerous other activities impacting the streams, and to what extent a new proposed discharge will affect the current water quality condition of the stream when accounting for these two existing factors. This approach to water protection has been applied effectively and successfully for over forty years.

HOW TO APPLY AN ANTI-DEGRADATION STANDARD

What does anti-degradation mean when it comes to protecting the environment more broadly? What if anti-degradation applied to more than just water? What if it applied to the other public natural resources we rely on, such as air, soil, scenic vistas, and other aspects of the local environment?

When applied to other areas of the environment, an anti-degradation analysis will require 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 are present; and the ability of the air, water, soil, forest, wetland, or environment to assimilate – or deal with – the 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.

A Green Amendment provides a means to establish a constitutional anti-degradation standard that applies regardless of state regulatory protections because a science- and data-driven pre-action analysis is necessary to determine if a government action may potentially tread on protected rights, whether under the Green Amendment’s individual environmental rights protections or under the public trust protections.

HOW THE COURTS INTERPRET/ASSESS/REVIEW COMPLIANCE WITH THE ANTI-DEGRADATION STANDARD

Implementing an antidegradation standard plays out similarly, although with different analyses, under both the individual environmental rights and trust components of a Green Amendment. An individual environmental rights component refers to protections of each person's inherent right to a clean and healthy environment in which to live. The trust component establishes that the government, at all levels and throughout all branches of government, is a trustee of public natural resources and must conserve and maintain (i.e. prevent degradation and depletion) of those resources for the benefit of both present and future generations.

Under the Green Amendment's individual environmental rights protections, the courts will use what is known as strict scrutiny review. A strict scrutiny review means that: 1) any intrusion on an individual's right to a healthy environment must serve a compelling government interest (this purpose cannot simply be an economic development goal); 2) the proposed action uses the least restrictive means, i.e. inflicts the least detrimental impact on the environment, which includes analyzing whether the means chosen actually achieve the identified purpose of the action; and 3) the compelling government interest is deemed consistent with the purposes of the Green Amendment, i.e. nondegradation and equity in terms of impact on communities.

Under the first step of the analysis, the government will fail to meet its constitutional obligation if there is environmental degradation with no compelling government interest for the action proposed/taken. Because the environment right is being given the highest legal level of recognition and protection, on par with other rights such as property rights, this means that government cannot permit or pursue an activity merely to serve an economic interest or because it is in keeping with the historic environmental abuses already imposed on a community. Rather, the government will need to show that the activity serves a compelling government interest, e.g. public health or safety concerns.

The second step of the analysis requires that the government show it used the least restrictive means possible to achieve the compelling government interest in question, e.g. when considering implementing the proposed action, did government choose the route that provided the least degradation. Additional considerations during this component of the analysis include whether the government will actually achieve its identified purpose (including through the means chosen) and whether the means used are overbroad or under-inclusive.

Lastly, step 3 of the analysis will require that the government demonstrate the compelling government interest it seeks to achieve is consistent with the purposes behind the Green Amendment e.g. it will prohibit degradation and ensure equitable access to a clean environment. While some will argue that this bars economic development, that is simply not true. In fact, many forms of economic development, and/or approaches to economic development, do not lead to degradation or equity concerns.

It is important to note that from a constitutional rights perspective, the courts do not recognize economic development generally (including claims of job creation) as a "compelling government interest" because the point of having individual rights protections is to elevate the rights of individuals – whether it be property ownership or environmental rights – above other interests, such as economic development. For instance, taking land for private purposes via eminent domain is not allowed in many states, even if the taking would spur economic development. The same idea applies to environmental rights. Treating economic development as a compelling government interest would let it trump environmental rights, contrary to the purpose of elevating environmental rights in the first place. To the extent there is conflict between the use and enjoyment of property thru some form of development and environmental rights, state courts have ways of giving room for each, but not in a way that diminishes one set of rights over another.

In addition to the individual environmental rights protections, a Green Amendment should also offer protections for individuals by establishing a public trust for current and future generations to the public natural resources of the state/nation. To uphold this requirement, courts will require government entities to prevent and remedy degradation to public natural resources and ensure that every individual has access to a clean and healthful environment. Under such a trust obligation, government must comply with fiduciary duties, which include the duties of prudence, loyalty, and impartiality. Such duties will mandate that actions taken with the potential to have environmental effects, occur in an informed and cautious way, creating a burden on government officials similar to the protections offered by the individual environmental rights analysis. Government also must account for the rights of all residents, present and future, and thus address whether an action will result in some communities bearing heavier environmental burdens than others. The trust protection also provides a means for government to act proactively to both protect the environment and to correct past actions that have caused heavier burdens on individuals or communities within the state. These protections will work to undo past decisions that have led to environmental injustices and protect future generations from bearing disproportionate environmental consequences.

Therefore, the Green Amendment in the courts will operate within existing standards of individual environmental rights protections and trust duties to prevent government actors from allowing activities when government lacks crucial information on likely degradation or that will likely lead to unconstitutional environmental degradation. In addition, an effective Green Amendment will create a duty to undo the wrongs of the past. Green Amendments will ensure that both present and future generations are provided with the inherent right to a healthy environment.