

A GREEN AMENDMENT IS A RESTRAINT ON GOVERNMENTAL AUTHORITY

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This article provides an overview of the role of a Green Amendment as an important limitation on governmental authority, as are all other fundamental rights protections in a state Constitution. This article begins by discussing Pennsylvania's history and experience with its Environmental Rights Amendment. It then discusses the important components of a Green Amendment, and the central role of a Green Amendment's antidegradation standard in checking governmental authority and promoting healthy communities and sustainable economies.

I. THE PENNSYLVANIA EXPERIENCE

The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.
Pa. Const. art. I, § 27.

Approximately 47 years ago, in 1971, the people of Pennsylvania overwhelmingly voted to enshrine in the Declaration of Rights of the Pennsylvania Constitution their inherent right to a healthy environment and to a healthy community in which to live. By adopting Article I, Section 27, also known as the Environmental Rights Amendment, the people put their environmental rights on par with other inherent rights such as freedom of speech, the right to bear arms, religious liberty, and the right to privacy.

However, within a few short years, the Amendment was essentially relegated to a policy statement via judicial decisions that sidelined the plain language of the Amendment, and instead relied on judicially-created tests that largely equated the Amendment with statutes and regulations.

In 2013, the Pennsylvania Supreme Court rendered a decision in Robinson Township, Delaware Riverkeeper Network v. Commonwealth,² in which a plurality of Justices, for the first time ever, struck down a state law for violating the Environmental Rights Amendment. In so doing, the author of the plurality opinion – former-Chief Justice Ronald Castille – returned to the plain language of the Amendment and the reasons for its enactment, and thus expounded on the role of the Environmental Rights Amendment in preventing and redressing governmental overreach. The opinion also laid the foundation for a later case that cemented the Environmental Rights Amendment as a meaningful protection for individual rights and the protection of the public natural resources key to human life and happiness.

A. The Environmental Rights Amendment as Limitation on Governmental Authority

Robinson Township, Delaware Riverkeeper Network v. Commonwealth involved a constitutional challenge³ to Act 13 of 2012, which imposed a one-size-fits-all zoning scheme for oil and gas operations across the entire Commonwealth of Pennsylvania. The challenge was brought by the Delaware Riverkeeper Network, Maya van Rossum-the Delaware Riverkeeper, multiple municipalities, two municipal officials, and a physician. Among other aspects of the statewide

1. The authors are the attorneys who argued before the Pennsylvania Supreme Court in the case that returned life to the Pennsylvania Constitution's Environmental Rights Amendment, Robinson Township, Delaware Riverkeeper Network v. Commonwealth (Pa. 2013).

2. 83 A.3d 901 (Pa. 2017).

3. Several arguments targeted the zoning framework under the law, with the challengers' substantive due process argument winning the case at the intermediate appellate court level, and garnering the support of one Supreme Court Justice, making the decision to invalidate the zoning provisions a majority. In relying upon alternative constitutional grounds to invalidate the challenged provisions, this concurring justice did not, in any way, express disagreement with the environmental rights grounds of the plurality. Rather, he simply chose a different constitutional grounding for his opinion.

zoning scheme, Act 13 required all municipalities in the Commonwealth to allow oil and gas wells in every zoning district, including residential districts and near schools, playgrounds, and hospitals. The full industrial array of gas development, including drilling and fracking well pads, were required to be allowed within close proximity to homes. For example, wastewater impoundments and wellpads could be less than a football field's distance from someone's home. Compressor stations could be 750 feet from someone's home or their child's school. The law also blocked local governments from applying to oil and gas operations stormwater management, grading, and other typical local requirements for industrial operations.

In striking down key provisions of Act 13, the plurality expounded on the text, history, significance, and function of the Environmental Rights Amendment. In so doing, the plurality noted:

In the process of interpretation, “[o]ur ultimate touchstone is the actual language of the Constitution itself.” [Stilp v. Com., 905 A.2d 918, 939 (Pa. 2006)] (quoting *Ieropoli v. AC & S Corp.*, 577 Pa. 138, 842 A.2d 919, 925 (2004)). “[T]he Constitution’s language controls and must be interpreted in its popular sense, as understood by the people when they voted on its adoption.” *Id.* Towards this end, we avoid reading the provisions of the Constitution in any “strained or technical manner.” *Jubelirer v. Rendell*, 598 Pa. 16, 953 A.2d 514, 528 (2008). Indeed, “we must favor a natural reading which avoids contradictions and difficulties in implementation, which completely conforms to the intent of the framers and which reflects the views of the ratifying voter.” *Commonwealth ex rel. Paulinski v. Isaac*, 483 Pa. 467, 397 A.2d 760, 766 (1979).

83 A.3d at 943–44 (emph. added). “[T]he overarching task is to determine the intent of voters who ratified the constitution. In furtherance of this aim, courts reference, inter alia, text; history (including ‘constitutional convention debates, the address to the people, [and] the circumstances leading to the adoption of the provision’); structure; underlying values; and interpretations of other states.” *Id.* at 944 (internal citations omitted). Lastly, the plurality also included “any relevant decisional law and policy considerations argued by the parties, and any extrajurisdictional caselaw from states that have identical or similar provisions, which may be helpful and persuasive.” *Id.* Accordingly, the Court looked to jurisprudence under Montana’s environmental rights amendment in its analysis.⁴ *Id.* at 953.

Justice Castille repeatedly emphasized that the Environmental Rights Amendment is first and foremost a limitation on government authority, just like other fundamental rights protections in Article I of the Pennsylvania Constitution.

He explained this by first reviewing the structure of the Pennsylvania Constitution itself. The Pennsylvania Constitution essentially has two parts: 1) Article I – the Declaration of Rights; and 2) the rest of the document, which establishes a government via powers delegated by the people to particular governmental entities, such as the General Assembly. 83 A.3d at 946-48.⁵ Article I, however, “as a general matter, is not a discrete textual source of police power delegated to the General Assembly,” or to any governmental entity. *Id.* at 947; Pa. Const. art. I, § 25. Rather, “[t]he 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).

Thus, the people “excepted out of the general powers of government” the fundamental rights set forth in Article I “[t]o guard against transgressions of the high powers which [the people] have delegated.” Pa. Const. art. I, § 25. In other words, the people hold the ultimate “check” against governmental action by expressly withholding from government the authority to trample on their fundamental rights, including the right to a clean and healthy environment. Likewise, “[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).

Thus, the government lacks the authority to conduct “unreasonable searches and seizures.” Pa. Const. art. I, § 8. Pennsylvania governmental entities have no authority to compel any Pennsylvanian to attend a particular church or worship a particular deity, or to infringe on the people’s rights to free speech, bear arms, and petition the government. Pa. Const. art. I, §§ 3, 7, 20, 21. Likewise, the people did not delegate to government – at any level or in any branch – the authority to trample on their right to a clean and healthy environment. Pa. Const. art. I, § 27.

4. Montana is one of three states, including Pennsylvania and New York, that have an environmental rights provision in its Declaration of Rights.

5. For instance, Justice Castille stated: “[O]urs is a government in which the people have delegated general powers to the General Assembly, but with the express exception of certain fundamental rights reserved to the people in Article I of our Constitution.” *Robinson Twp.*, 83 A.3d at 947 (plurality); see also Pa. Const. art. I, § 2 (“All power is inherent in the people, and all free governments are founded on their authority and instituted for their peace, safety and happiness. For the advancement of these ends they have at all times an inalienable and indefeasible right to alter, reform or abolish their government in such manner as they may think proper.”); Pa. Const. art. I, § 25.

The plurality elaborated on the text of the Environmental Rights Amendment and what it protected. The Amendment contains three clauses. The “initial, prohibitory clause . . . affirms a limitation on the state’s power to act contrary to” the people’s⁶ right to “clean air and pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment.” 83 A.3d at 951 (plurality). This clause resembles the structure of other rights set forth in Article I by specifying a particular right. Not surprisingly, the plurality found that this clause “affirms a limitation on the state’s power to act contrary to this right. While the subject of the right certainly may be regulated by the Commonwealth, any regulation is ‘subordinate to the enjoyment of the right ... [and] must be regulation purely, not destruction’; laws of the Commonwealth that unreasonably impair the right are unconstitutional.” *Id.*, quoting *Page v. Allen*, 58 Pa. 338, 1868 WL 7243, *8 (1868)). Likewise, as with other constitutional provisions:

Although the first clause of Section 27 does not impose express duties on the political branches to enact specific affirmative measures to promote clean air, pure water, and the preservation of the different values of our environment, the right articulated is neither meaningless nor merely aspirational. The corollary of the people’s Section 27 reservation of right to an environment of quality is an obligation on the government’s behalf to refrain from unduly infringing upon or violating the right, including by legislative enactment or executive action.

Id. at 951–52 (plurality). Further, the plurality clarified that, just as governmental entities must consider in advance whether an action may violate, for instance, free speech rights, or property rights, they must do the same for environmental rights:

Clause one of Section 27 requires each branch of government to consider in advance of proceeding the environmental effect of any proposed action on the constitutionally protected features. The failure to obtain information regarding environmental effects does not excuse the constitutional obligation because the obligation exists a priori to any statute purporting to create a cause of action.

Id. at 952 (plurality). The last sentence was significantly earth-shattering because it affirmed that the Environmental Rights Amendment – like all other constitutional provisions – stood above statutes and regulations. Until this case, the Environmental Rights Amendment had been lowered to the level of statutes and regulations, at best.

Clauses 2 and 3 of the Pennsylvania Environmental Rights Amendment establish limitations on governmental authority. Clauses 2 and 3 establish a trust framework in which “public natural resources” (e.g. air, water, fish, and wildlife, among other resources) are the body (or corpus) of the trust and the common property of all Pennsylvanians, including future generations. Further, the Commonwealth (all branches and levels of government) is set as the trustee and must “conserve and maintain” those resources “for the benefit of all the people.” Thus, the duty to “conserve and maintain” means that government must “prevent and remedy the degradation, diminution, or depletion of our public natural resources” and do so in a way that is consistent with its fiduciary obligations as a trustee, including the duties of prudence, loyalty, and impartiality. *Id.* at 957 (plurality). This includes a “a duty to refrain from permitting or encouraging the degradation, diminution, or depletion of public natural resources, whether such degradation, diminution, or depletion would occur through direct state action or indirectly, e.g., because of the state’s failure to restrain the actions of private parties.” *Id.* at 957 (plurality).

Thus, the Environmental Rights Amendment restrains government from pursuing actions or approving projects that infringe on the people’s protected rights. Such action could be leasing state lands for fracking, or approving a permit for a high pollution activity that would rise to the level of constitutional violation. In *Robinson Twp., Delaware Riverkeeper Network*, such action involved Act 13, which “command[ed] municipalities to ignore their obligations under Article I, Section 27 and further direct[ed] municipalities to take affirmative actions to undo

6. The plurality also compared Section 27 to Section 8 of the Declaration of Rights, which establishes an individual right to privacy. Noting the parallel use of the word “the people,” the plurality determined that the right set forth in clause 1 was an individual right, not merely a collective right of all Pennsylvanians. *Id.* at 951 n.39.

7. As explained further in *Page*:

For the orderly exercise of the right [to vote] resulting from these qualifications, it is admitted that the legislature must prescribe necessary regulations, as to the places, mode and manner, and whatever else may be required, to insure its full and free exercise. But this duty and right, inherently imply, that such regulations are to be subordinate to the enjoyment of the right, the exercise of which is regulated. The right must not be impaired by the regulation. It must be regulation purely, not destruction. If this were not an immutable principle, elements essential to the right itself might be invaded, frittered away, or entirely excised under the name or preten[s]e of regulation, and thus would the natural order of things be subverted by making the principle subordinate to the accessory.

existing protections of the environment in their localities. The police power, broad as it may be, does not encompass such authority to so fundamentally disrupt these expectations respecting the environment.” Id. at 978 (plurality) (emph. added).

Thus, if the government overreaches or otherwise acts in such a way that steps beyond the bounds of the authority that the people granted, the people generally⁸ have the ability to bring an action in court to enforce the constitutional limitations they established on their government. The Environmental Rights Amendment is no different.

B. Cementing the Environmental Rights Amendment as a Constitutional Limitation on Governmental Authority

The 2013 plurality opinion in *Robinson Township, Delaware Riverkeeper Network* was, as Justice Baer later stated, a “jurisprudential sea-change” – a landmark change in the trajectory of court decisions up until that point. Pa. Env’tl. Def. Found. v. Commonwealth (“PEDF”), 161 A.3d 911, 940 (Pa. 2017) (Baer, J., concurring). As Justice Baer wrote, the 2013 opinion “rejuvenated Section 27 and dispelled the oft-held view that the provision was merely an aspirational statement.” Id.

On June 20, 2017, the Pennsylvania Supreme Court, in a majority decision, explicitly adopted a textual analysis of the Environmental Rights Amendment, relying heavily on what the 2013 plurality opinion in *Robinson Township, Delaware Riverkeeper Network* had first stated. See, e.g., id. at 930-40.

In *PEDF*, the Court definitively said that the words of Section 27 mean what they say and that they establish a limitation on the authority of all branches and levels of government, including their agencies and officials. Id. at 931-33. It definitively rejected the judicially-created test that had reigned for decades because it was “unrelated to the text of Section 27 and the trust principles animating it,” and thus “strips the constitutional provision of its meaning.” Id. at 930. “Instead, . . . the proper standard of judicial review lies in the text of Article I, Section 27 itself as well as the underlying principles of Pennsylvania trust law in effect at the time of its enactment. We must therefore carefully examine the contours of the Environmental Rights Amendment to identify the rights of the people and the obligations of the Commonwealth guaranteed thereunder.” Id. at 930.

II. A GREEN AMENDMENT – BUILDING ON THE PENNSYLVANIA EXPERIENCE TO BRING FUNDAMENTAL RIGHTS PROTECTIONS TO OTHER STATES

A Green Amendment like that in Pennsylvania provides a means for state residents to check governmental action that goes beyond the authority government has to act. Rather than waiting for a harmful law to be repealed, residents can challenge the law directly, and prevent harm from occurring to their communities sooner rather than later. This is no different than other provisions of a state Constitution’s Bill of Rights or Declaration of Rights. The fact that such rights are enshrined as fundamental in state constitutions is an insurance policy for the people that they have the ultimate last say, through the judiciary, on their government’s actions or lack thereof. As the Pennsylvania Supreme Court stated, “the constitutional limitations on governmental power exist to protect against potential abuse. One does not throw out the raincoat just because the weather is nice today.” *Mesivtah Eitz Chaim of Bobov, Inc. v. Pike Cty. Bd. of Assessment Appeals*, 44 A.3d 3, 8 n.3 (Pa. 2012).

A. Basic Building Blocks of a Green Amendment

Based on the *Robinson Township, Delaware Riverkeeper Network* and *PEDF* decisions, we have identified important principles that should be included in any Green Amendment to ensure that residents of other states enjoy the same protection of fundamental rights that Pennsylvanians do. Those principles are as follows:

- The provision should clearly be grounded in response to environmental degradation that has occurred in the state. Clear legislative history about the origins of the amendment will help guide future legislative efforts and judicial interpretation.
- The provision must ensure that the environmental rights asserted are characterized as “rights reserved to the people.” One way to accomplish this is to place the provision in the Declaration of Rights section of the constitution, as long as that section is clear that the rights enumerated are reserved rights that are inherent and inalienable and

8. The only exceptions to this are when a constitutional provision is not “self-executing,” meaning that the provision expressly or by some other indication in the constitutional text, requires further governmental action usually by the state legislature, to be effective. The plurality in *Robinson Township, Delaware Riverkeeper Network* found that the Environmental Rights Amendment was self-executing and that Pennsylvanians could bring actions to enforce the Environmental Rights Amendment’s prohibitions on government authority. This was later confirmed, at a minimum as to the trust components, in a 2017 Pennsylvania Supreme Court decision, discussed later in this document.

belong to the people regardless of constitutional pronouncement.

- The provision must be self-executing so it does not require passage of laws in order for it to take effect and for the people to use the provision to vindicate their environmental rights in the face of government abuses of power. It is beneficial to include an explicit statement of the self-executing nature of the provision.
- The provision should mention specific environmental values to be protected such as pure water, clean air, ecologically healthy habitats, etc., while also being clear about when courts are not to limit themselves to the items listed in the amendment.
- The provision should include a broad holistic perspective on the values of protecting a healthy environment.
- The provision should be generational in focus (i.e. it should explicitly acknowledge that the environmental rights belong to both present and future generations and therefore must be protected for all generations).
- The provision should recognize that environmental rights are inherent, inalienable, and indefeasible rights of all people.
- The rights provision should be drafted so that it is on equal footing with other political rights such as property rights and freedom of speech.
- The provision should serve as a limitation on government action or inaction that would otherwise infringe on these rights.
- The provision should identify environmental rights as being rights of every individual, not just collective rights of the state as a whole.
- The provision should recognize a state's public trust duties, broadly defining the body of the trust to include public natural resources and environmental values and not simply state-owned land.
- The responsibilities to protect the environmental values should clearly apply to all branches and all levels of government.
- The language should specifically use the word "trustee" to solidify the relationship between the government and the citizenry – the government is not the proprietor of the environment, but is the trustee. Using trustee language implicates traditional trustee duties such as loyalty, prudence, impartiality, and providing the necessity for an accounting of the trust.
- The provision should include both affirmative duties to protect the environment and prohibitory duties (i.e., governmental actors have an obligation to refrain from legislative enactments, executive action, permitting or otherwise encouraging the degradation, diminution, or depletion of public natural resources that would occur through direct state action or indirectly, because of the state's failure to restrain the actions of others).
- The provision should necessitate a pre-action analysis that ensures actions taken and decisions made do not infringe upon environmental rights.
- The provision should be written in such a way that the court can use the plain language of the provision for its interpretation and application – this means clear language that can be easily interpreted and applied without reference to other rules of statutory construction.
- It should also be clear from the legislative history, the language of the Amendment, and/or the case law on interpretation of state constitutional provisions that state trust law supply additional standards that can supplement the standards that flow from the plain language of the Amendment.
- The provisions should be phrased such that it is clear that any money the government obtains from the sale or leasing, for example, of public natural resources belongs to the corpus of the trust, and that the funds cannot simply be used for any purpose. See PEDF, 161 A.3d at 934-35.⁹

9. "[T]he Environmental Rights Amendment mandates that the Commonwealth, as a trustee, "conserve and maintain" our public natural resources in furtherance of the people's specifically enumerated rights. Thus understood in context of the entire amendment, the phrase "for the benefit of all the people" is unambiguous and clearly indicates that assets of the trust are to be used for conservation and maintenance purposes."

B. Implementing a Green Amendment

This section discusses one of the central parts of a Green Amendment: the requirement of antidegradation. It also addresses how this standard can be integrated into government decisionmaking, and provides additional specifics of how the antidegradation analysis proceeds under a Green Amendment.

I. Antidegradation – A Crucial Part of a Green Amendment

A key part of a Green Amendment and how it operates is the requirement of antidegradation. Antidegradation is a long-used, effective and well understood approach to pursuing and achieving environmental protection in both state and federal law.

An antidegradation standard does not mean “no activity.” Rather, antidegradation 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, governmental entities and officials cannot rely on assumptions (e.g. that no harm will occur) instead of data, and cannot reject or ignore available science and data demonstrating degradation is likely. Including trust language in the constitutional provision that brings forth the duties of prudence, loyalty and impartiality compliments and solidifies this obligation to make informed decisions with regard to environmental impacts.

An antidegradation 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 antidegradation 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.

What does antidegradation mean when it comes to protecting the environment more broadly? What if antidegradation 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 through a Green Amendment, an antidegradation 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 are present; and the ability of the air, water, soil, forest, wetland, or environment to assimilate – or deal with – 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.

A Green Amendment provides a means to establish a constitutional antidegradation 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.

2. Benefits of an Antidegradation Standard in Governmental Decisionmaking

A Green Amendment is not simply a means to provide a check on governmental actions that have already occurred, and may infringe on people’s rights. As with other fundamental rights protections, a Green Amendment should focus attention on pre-action decisionmaking and what an agency or legislature or other governmental official may need on the front end of the process to minimize the risk of a constitutional violation. Further, integrating antidegradation into governmental decisionmaking may not necessarily require extensive changes in governmental agency processes for those agencies that already carefully gather the necessary information to inform about impacts of a proposed action.

There are benefits to governmental entities to “front-loading” environmental and public health considerations in the manner that a Green Amendment requires. Benefits could include reduced enforcement costs that might result from an ill-informed approval to site an industrial facility on a property that simply cannot handle the level of activity that the facility entails. It could be fewer complaints from a community located too close to an industrial

facility, whose proximity to the facility (including the health impacts of the facility) were not addressed during the permitting process. It could even include higher property tax revenue through healthier, more livable communities with businesses that do not detract from the quality of the local environment.

Having good-paying jobs and a healthy place are not mutually exclusive. A Green Amendment upholds the truth – that healthy people and communities and economically-strong communities go together, and indeed must go together.

A Green Amendment forces government to consider the environmental degradation that may result from a proposed project, both now and into the future, before deciding whether that project can go forward without harming the natural resources that residents and their children and grandchildren rely on or will rely on. Taking such an approach not only protects fundamental rights, but it is also fiscally wise, for it helps prevent shifting to taxpayers the costs of pollution from the person or industry responsible for creating it.

3. Nuts and Bolts of a Green Amendment Analyses

Implementing an antidegradation standard plays out similarly 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.

When fundamental rights are jeopardized, the courts use what is known as strict scrutiny review. A strict scrutiny review would mean 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. A Green Amendment should ensure this framework is incorporated into governmental decisionmaking to help guide public officials' evaluation and analysis of science and data relative to a proposed action.

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. 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.

In addition to 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. To uphold this requirement, courts will require government entities to prevent and remedy degradation to public natural resources. 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 obligations 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.

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. Green Amendments will ensure that both present and future generations are provided with the inherent right to a healthy environment.