

# Green Amendments for Climate Protection – An Overview



**Green Amendments help address a State's contribution to climate disruption through multiple pathways, including:**

- ⇒ By creating an enforceable individual right of all people and communities in the state to a clean and healthy environment including a safe climate, which must be protected from government infringement;
- ⇒ By creating a right that must be equitably protected for future generations, including the right to a safe climate, thereby ensuring the long-term, cumulative impacts of proposed government action– positive and negative– must be considered and will not result in future unconstitutional harm.
- ⇒ By creating a trustee obligation on government officials to protect the environment and natural resources of the state.

Note: Some states explicitly mention climate in the recognition and protection of these rights and obligations; but even when not explicitly mentioned, the harmful impacts of climate change for all aspects of our environment necessarily implicates the obligation to address climate change.

**Green Amendments create substantive and procedural entitlements that help ensure government officials address climate change when taking action – including legislating, regulating, permitting and more.**

## **The Substantive Right**

By creating a substantively recognized right to healthy environments, including climate (whether or not specifically mentioned as previously noted), Green Amendments prohibit government action that would infringe on the right to a safe climate, can create an affirmative obligation to advance action that addresses climate change, and should prioritize climate protection when government is faced with competing alternative options.

If government action results in an infringement of the right to a healthy environment, including a safe climate, the action can only withstand constitutional challenge if the government can demonstrate it meets the requirements of legal strict scrutiny meaning there is a compelling state interest that is being served (e.g. company profits alone are not a compelling state interest) AND the government can demonstrate it has taken the steps necessary to minimize infringement on the rights violated (which would necessarily mean minimizing the level of environmental or climate harm that will result).

*For more information, visit [www.GreenAmendment.org](http://www.GreenAmendment.org).*

## **The Procedural Right**

Green Amendments also create a procedural obligation to undertake a pre-action analysis that evaluates environmental impacts of a decision (near term, long term, individually and cumulatively), including other less impactful options, and to use this information to ensure it is not taking action that infringes on the constitutional right, i.e. the action itself does not infringe, the action has been modified to avoid impacts and therefore prevent infringement, or the action as proposed meets the compelling state interest and minimized harm requirements of strict scrutiny legal review.

**Passage of a Green Amendment will ensure government does not act contrary to the people's right to a safe climate, will ensure government does not act in ways that unconstitutionally exacerbates climate disruption, and that it takes appropriate affirmative steps to protect the climate for present and future generations. Among the climate benefits that may result from Green Amendment protections:**

- Government officials will be able to use the constitutional environmental obligations to support and defend proactive government action to protect against, and address, climate disruption, including advancing good quality (properly sited, constructed, operated) clean energy projects.
- Government must analyze the impact of its actions on climate as part of the decision-making/governing process to ensure it will fulfill its constitutional environmental obligations, including to protect future generations and ensure a safe climate.
- Existing laws, regulations, and authorities must be interpreted, applied and utilized in ways that reduce and eventually eliminate a state's contribution to climate disruption in order to protect the environmental rights of the people and help government fulfill its trustee obligation to protect the state's natural resources.
- Creates a duty to address a state's contribution to climate disruption, including greenhouse gas emissions, but does not mandate any specific type of action/approach.
- Laws or mandates that prohibit/block government officials from taking action to address climate disruption will be constitutionally infirm, e.g. legislation that would prevent local government or regulatory agencies from using their existing authorities to consider and address climate change.
- Government action – e.g. legislation, regulation, permitting -- that will unconstitutionally infringe upon the rights of people to a clean and healthy environment, which includes a safe climate, may raise constitutional concerns that need to be addressed.
- Good government actions and decisions that advance protections for the climate, such as good quality renewable energy projects and programs – including in legislation and regulations passed/implemented, permitting decisions, and programs – can secure constitutional support against inappropriate legal or political challenge.



***How can a safe climate be defined?***

***How will government know what level of protection is required?***

● As with the protection of other natural resources mandated by state and federal law, scientific data, analysis, and guidance will be primary pathways for setting government goals and actions necessary to ensure environmental sustainability, healthy ecological function and human health protections. In all areas of environmental law, science helps determine levels of pollution and/or environmental harm that are unsustainable and ecologically disruptive, the same will be true for constitutional environmental rights and natural resource protection. In the climate context, international and national scientific experts have identified temperature and emissions goals necessary to appropriately address and limit anthropogenic greenhouse gases through reduced emissions and increased natural greenhouse gas sinks including vegetation and soils.

***How can legislators be responsible for protecting the right to a safe climate when the climate does not know state boundaries and is impacted by the actions of governments all over the world?***

● Rights enumerated in a constitution's Bill of Rights/Declaration of Rights are those rights that the people reserve unto themselves to be protected from government infringement. Just as with other fundamental rights, government has a duty to ensure its actions do not directly, or through the actions of others, violate the constitutional right. The fact that others, outside of the control of a Green Amendment state, may be causing or contributing to a violation of protected environmental rights does not alleviate the government within the Green Amendment state from ensuring its own actions comply with its constitutional obligations and do not infringe on the constitutional rights of its constituents; they are not constitutionally bound to prevent actions outside of their jurisdiction.

***What does it mean to have an obligation to protect environmental rights for future generations an/or to be the trustee of natural resources for present and future generations? What if the rights of a future generation somehow conflict with those of the current generation?***

● Creating an obligation to protect the environmental rights of future generations does create an enforceable obligation on government officials to ensure their actions and decisions are equitably protecting the rights of future generations to a clean, safe and healthy environment. The mandate to protect the rights of all communities and all generations does, by its terms, require protection of present generations as much as it requires protection of future generations – this necessarily requires a balancing of benefits and impacts, and an obligation to ensure that government does not act in a way that sacrifices one community or one generation for the benefit of another.

Trustee language in a proposed Green Amendment provides additional important and helpful legal guidance and reduces vagueness. By using trust language, governmental entities, as trustee, must abide by the fiduciary duties of prudence, loyalty, and impartiality, when carrying out their obligation to conserve and maintain their state's natural resources for the benefit of current and future generations.

The combination of a constitutional right of each person to a clean and healthy environment, complemented by the government's fiduciary duty as a trustee of the state's natural resources to treat all beneficiaries equitably – including both present and future generations – does put in place a strong obligation to consider the ramifications of government action and decision-making on future generations and to ensure protection of their climate rights.

As with other areas of law, the courts are obliged to consider impacts, to balance rights, and to ensure equitable justice under the law for all. Courts and judges are as well equipped to handle this judicial obligation in the environmental rights context, including for climate, as they are to handle this obligation in every other constitutional, legislative, or private dispute contexts.

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

As explained by the Montana Supreme Court, when a fundamental right articulated in the Bill of Rights/Declaration of Rights 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.”<sup>(1)</sup> This guidance and balancing should prove helpful when assessing the potential impacts of clean and renewable energy options with localized environmental impacts but also demonstrated long-term climate and generational benefits. It will similarly prove beneficial when considering false climate solutions that create near term and long term harms for the environment and climate in a way that exacerbates climate instability and violates environmental rights.



(1) Montana Env'tl. Info. Ctr. v. Department of Env'tl. Quality, 1999 MT 248 (1999).

Additional helpful resource: J.C. Dernbach, R.B. McKinstry, Applying the Pennsylvania Environmental Rights Amendment Meaningfully to Climate Disruption, Widener University Commonwealth Law School Legal Studies Research Paper, Series no. 18-06