



**GREEN AMENDMENTS  
FOR THE GENERATIONS**  
Pure Water. Clean Air. Healthy Environment.



**House Bill 472 — Constitutional Amendment — Environmental Rights**

Committee: Environment and Transportation

February 20, 2019

**Position: SUPPORT**

from Maya K. van Rossum, Founder of *Green Amendments For The Generations*, Author of *The Green Amendment, Securing Our Right to a Healthy Environment*; & the Delaware Riverkeeper, leader of the Delaware Riverkeeper Network.

Dear Chairman Barve, and members of the Committee;

I write in support of the proposed Maryland Healthy Green Amendment, HB 472. I am the leader of *Green Amendments For The Generations*, a national movement to advance the passage of Green Amendments in every state across the nation. I am also author of the award-winning book, *The Green Amendmen; Securing Our Right to a Healthy Environment*, focused on the power and importance of constitutional recognition and protection of environmental rights in the Declaration of Rights sections of our state and federal constitutions. And both I in my role as the Delaware Riverkeeper, and my organization the Delaware Riverkeeper Network, were the lead plaintiffs in the case that breathed legal life into Pennsylvania's long ignored environmental rights provision in the landmark case of *Robinson Township, Delaware Riverkeeper Network, et. al. v Commonwealth of Pennsylvania*, 83 A.3d 901 (Pa. 2013), decided December 18, 2013. Since I and my organizations (*Green Amendments For The Generations* and the Delaware Riverkeeper Network) have been working to inspire and advance a national Green Amendment movement, there have been Green Amendment proposals in four states – in the order of their proposal those states are New York, New Jersey, Maryland, and West Virginia.

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At present, there are in fact *only 2 states* with Green Amendments: Pennsylvania and Montana. A Green Amendment is a constitutional provision placed in the declaration of rights/bill of rights section of the constitution that is self-executing, and recognizes and protects environmental rights as inalienable rights legally protected in the same way the other rights in the Declaration of Rights section are protected. There are 43 other states that talk about the environment in their constitutions in a variety of different ways, but they do not rise to the level of being a Green Amendment for various clear and demonstrated reasons.

I am pleased to support what I hope will be a historic step for the state of Maryland in recognizing and protecting the rights of the people to healthy environments essential to sustaining healthy lives and economies including,

- ✓ pure water,
- ✓ clean air,
- ✓ healthful environments,
- ✓ ecosystems that sustain the state's natural resources, and
- ✓ the natural, scenic, historic and aesthetic values of the environment.

As Franklin Kury recognized when he, as a state legislator, proposed Article 1, Section 27, the Pennsylvania Green Amendment:

*"If we are to save our natural environment we must ... give it the same Constitutional protection we give to our political environment."*

I would like to thank Delegate Stephen Lafferty for his leadership in advancing this proposed amendment at such a critical time in history. With the proposal of this Green Amendment, Maryland is poised to become a national leader in recognizing and protecting environmental rights.

Pure water, clean air, and healthy soils in which to grow healthy foods, are fundamental necessities to support our own healthy lives. Healthy forests, wetlands, streams, and rivers are essential to protecting us from flooding and the devastations of climate change; they provide critical and irreplaceable recreational opportunities that we can enjoy alone, or while bonding with family and friends. A diversity of healthy species and animal populations contribute to the quality of our lives,

and, through activities such as pollination, they sustain human life while at the same time enjoying their own moral right to life. Enacting this amendment will ensure the people of Maryland have, among other things, the right to, drink clean water from their faucets, breathe clean air in their neighborhoods, and have their children play and grow in a community with natural resources free of dangerous contaminants and degradation.

As written, HB 472 properly places the environmental rights provision in the Declaration of Rights section of the Maryland Constitution, as article 48. This placement, in the Declaration of Rights, is essential for ensuring that the right to a healthy environment is given the proper recognition and protection as an inalienable human right, that rises to the same level of community and constitutional importance as other fundamental rights enumerated in the State's Declaration of Rights such as the right to free speech; the right to freedom of religion; the right to be free from unreasonable searches and seizures; the right of victims of crime to be treated with dignity, respect, and sensitivity; private property rights and more.

**How will a constitutional provision change things in the state?**

The proposed Green Amendment will have important impacts on environmental decision-making and protection in the state, and has powerful implications for enhancing environmental justice protections.

As placed and written, HB 472 provides an important opportunity to address environmental justice concerns in the state. By ensuring that environmental rights are recognized as belonging to "every person", and entrusting the state to act as trustee of the state's natural resources for the benefit of every person including present and future generations, HB 472 ensures that environmental rights are addressed and protected equitably across the state and across communities, regardless of race, income, address or past practices. No longer will industrial operations and polluting entities be consolidated into targeted communities, creating environmental sacrifice zones. In practice, this tactic of consciously consolidating polluting and degrading operations into targeted areas as a means of preserving other communities and environments, targets communities of color and low income communities and should never be allowed; with the passage of HB 472, Maryland's Green Amendment, there will be a strong constitutional obligation to avoid this practice.

The proposed Maryland Healthy Green Amendment will include important and transformational obligations that will enhance environmental decision-making and community protections. As written, HB 472:

- ⇒ will ensure government is focused on preventing pollution and environmental degradation rather than accepting it as a foregone conclusion and simply working to manage it;
- ⇒ will ensure the importance of science-based decision-making;
- ⇒ will ensure that government officials are considering the individual and cumulative impacts of the decisions they are making;
- ⇒ will make clear that environmental rights must be honored and protected by every government official at every level of government here in Maryland;
- ⇒ will ensure communities are treated equitably in terms of environmental decision-making.
- ⇒ will ensure that in those instances when government does knowingly infringe on environmental rights that they only do so if there is a compelling state interest and there has been a conscious effort to minimize the impacts on the right;
- ⇒ includes a trust obligation that will instill 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;
- ⇒ includes a trust obligation that will instill 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;
- ⇒ includes a trust obligation that will instill 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 environment, health, goals, and rights of another community. This has powerful environmental justice implications;
- ⇒ will require government officials – before passing a law, issuing a permit, or approving a new industrial operation – to consider compliance with applicable legislation, regulations AND the

constitutional obligation to protect environmental rights. It ensures a bigger picture consideration and investigation into the ramifications of the proposed action.

The goal of the constitutional amendment is to advance better decision-making on the front end that will advance development, business and community interests in a way that also 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. But it will provide a backstop when needed, allowing impacted members of our community, including municipalities, individuals, families and business, to seek court intervention when government officials get it wrong in rendering decisions and taking actions that adversely affect the environment.

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

While Maryland has a well-developed system of environmental laws, it still has a significant number of devastating environmental problems -- including communities with contaminated drinking water, families forced to live next to highly contaminated sites, and pollution that is affecting the health of Maryland residents. A look at the news headlines make clear that our current system of environmental protection laws in Maryland, including applicable federal legislation, are not doing the job of ensuring healthy environments that protect and sustain our health, quality of life, or their strong economic benefits. Examples of headlines that make this point:

- ⇒ Maryland Deaths from Air Pollution Highest in U.S., Maryland Reporter, September 13, 2013
- ⇒ 11 Pollutants Found in Maryland Drinking Water, Study Shows, Columbia Patch, July 26, 2017
- ⇒ Report says toxic runoff in Maryland threatens drinking water, food, WBAL Baltimore, Nov 16, 2017
- ⇒ Lead Contamination Forces Water Shut off at Prince George Co. Elementary School, WUSA9, October 10, 2016
- ⇒ Tests Find Bacteria Levels In Maryland Bodies of Water Far Above Federal Safety Standards, Fox – Baltimore, August 24, 2016

- ⇒ 5.7 million gallons of sewage flows into *Baltimore's* waterways, Baltimore Sun, Feb 14, 2018
- ⇒ Baltimore's dirtiest air and asthma hot spots are in same neighborhoods, Baltimore Brew, December 18, 2017
- ⇒ Investigation: Baltimore Scrapyard Violations Raise Question about Md. Pollution Enforcement, Maryland Reporter, November 2, 2017
- ⇒ Baltimore Inner Harbor Water Quality Failing, Report Says, The Daily Record, May 9, 2016
- ⇒ Industrial Runoff Fouls Bay, Threatens Communities, Reports Says, Maryland Reporter, November 17, 2017
- ⇒ Chesapeake Bay Dead Zone this Summer Worst Since 2014, Baltimore Sun, October 9, 2017
- ⇒ Large Chicken Houses Spur Health Concerns, Maryland Reporter, February 28, 2017
- ⇒ Toxic Algae Bloom, Unusual for this Time of Year, Reported in Baltimore Harbor, Baltimore Sun, December 1, 2017
- ⇒ Acid cloud leaks from chemical plant in South *Baltimore*, prompting shelter in place alert, Baltimore Sun, Sep 18, 2017
- ⇒ Fairfield junkyard's pollution violations met with lax state response, Baltimore Brew-Nov 1, 2017
- ⇒ Industrial runoff fouls Chesapeake Bay, threatens health, report says, Baltimore Brew, Nov 17, 2017
- ⇒ In urban streams, pharmaceutical pollution is driving microbial resistance, Science Daily, Jan 9, 2018: "Researchers evaluated the presence of pharmaceuticals -- including painkillers, stimulants, antihistamines, and antibiotics -- in four streams in Baltimore, Maryland. "
- ⇒ Baltimore smog meets federal limit, but people still at risk from pollution, Baltimore Sun, Jun 4, 2015
- ⇒ Code Orange Air Quality Alert In Effect For Friday, CBS Baltimore/WJZ, Jun 29, 2017: "The Maryland Department of the Environment has issued a code orange air quality alert for the Baltimore metro area for Friday. This means air pollution around the area may become unhealthy for sensitive groups including children, people suffering from asthma, heart disease or other lung diseases and the elderly."
- ⇒ New climate study: Annapolis might feel like Mississippi in 60 years, Capital Gazette, February 12, 2019.

- ⇒ After millions spent, MD's solution for excess manure still elusive, Bay Journal, February 6, 2019
- ⇒ Air Quality Grades Of 'F' Go To 8 Maryland Jurisdictions, Patch, April 19, 2018
- ⇒ Measuring smog and particulates, report ranks Baltimore air pollution among worst in U.S., Baltimore Brew, June 27, 2018

In short, there are clear gaps in the system that would be well filled by the proposed constitutional amendment.

### ***Does a Green Amendment Really Make a Difference?***

As noted above, a properly written and placed Green Amendment, as is being proposed in Maryland, has immediate implications for enhanced decision-making when it comes to environmental protection, environmental justice, community health and quality of life. Pennsylvania agencies are starting to incorporate their constitutional obligation in decision-making, and the courts are providing necessary guidance and protections that are increasing environmental and community protections. Discussion of specific decisions can be found at: <https://forthe generations.org/wp-content/uploads/2018/12/FTG-Resources-Guide-of-Decisions-Using-PA-Green-Amendment-Since-Dec-2013-Revival.pdf>

Beyond that, many of you may wonder, if Pennsylvania has had a Green Amendment for nearly 50 years, how come the environment isn't better protected in that state – isn't that proof that a Green Amendment does not work? The fact is, almost as soon as Pennsylvania's Green Amendment was passed, there was overreach by the state itself in its use, and in response the Pennsylvania courts, including its state Supreme Court, declared the provision merely a statement of public policy – as the Chief Justice of the court said at the time in a dissenting opinion, the court “emasculated” the provision. As a result, Article 1, Section 27 was not given the legal stature the provision was due given its placement in the Bill of Rights section of the constitution and the clear language provided regarding the environmental rights of the people of Pennsylvania and the obligations of government to protect those rights. It was not until December of 2013 when the Pennsylvania Supreme Court revisited the constitutional language in response to litigation my organization and 7 towns brought to challenge a piece of pro-fracking legislation—which included eminent domain language, stripped municipalities of their zoning powers over the industry, and included a gag rule on physicians seeking

to treat impacted patients—that the provision was properly interpreted using standard constitutional law principles. And so, for all intents and purposes in terms of its legal application, Pennsylvania’s provision is relatively new, but it is already providing important benefits in protecting the rights of the people of that state to healthy water, air, soils, and environments in order to protect their health, their property rights, their quality of life, and local economies that would otherwise be damaged, even devastated, by environmental degradation.

### **How will the Maryland Green Amendment Impact Business?**

The constitutional environmental right will 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 and other natural resources critical to sustaining healthy lives and economies. As a result, HB 472 will encourage innovative development, industry and business growth, while protecting the environment at the same time.

While it has been suggested that a Green Amendment such as HB 472 will stymie development, the advancement of industry or other business operations in the state – this is simply not true.

HB 472 will allow for development, industry, and business growth. It will simply require that these interests be pursued using standards and practices that best protect the environment and other constitutional rights, like the property rights of those that would be harmed by migrating pollution for example. As explained by the Commonwealth Court in *Feudale v. Aqua Pennsylvania, Inc.*, 122 A.3d 462 (Pa. Commw. Ct. 2015) discussing Pennsylvania’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.* Thus, [t]he Environmental Rights Amendment does not call for a stagnant landscape; nor, as we explain [above], for the derailment of economic or social development; nor for a sacrifice of other fundamental values. But, when government acts, the action must, on balance, reasonably account for the environmental features of the affected locale, ... if it is to pass constitutional muster. *Id.* at 953. In sum, the Environmental Rights Amendment “do[es] not require a freeze of the existing public natural resource stock; rather, ... 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." *Id.* at 958.

And in those instances when the Maryland Healthy Green Amendment may require that a new industrial operation be rejected, a development project be re-sited, government be required to act to ensure that a highly contaminated site is cleaned up, it will be in those instances when there is critical and just cause – for example to avoid dangerous and unavoidable levels of contamination to drinking water supplies.

**How does the proposed Green Amendment text in HB 472 compare with other constitutional provisions?**

The proposed amendment recognizing the right to a healthy environment is as detailed as all other statements of fundamental rights in the state's constitution and the courts are well equipped to apply constitutional and other principles of law to interpret and protect these rights. The assertion that the proposed provision does not have the requisite level of detail or guidance to render it enforceable is a false narrative.

In addition, the language in proposed HB 472 parallels in significant part the language found in the Pennsylvania Green Amendment and/or the decisions rendered by the Pennsylvania Supreme Court regarding proper interpretation of, and implementation of, Pennsylvania's provision. As a result, the Maryland Green Amendment has both traditional constitutional principles to apply, as well as the benefit of constitutional jurisprudence recently developed with regards to specific implementation of a state Green Amendment.

I would like to note that any assertion that the proposed Maryland Green Amendment should include different standards for standing is a red herring that will in fact cloud and/or undermine the provision rather than clarify it. There is no justifiable reason why the right to a healthy environment should be legally interpreted and applied differently than other inalienable rights in the state constitution. In fact, for clarity, equity and fair application of the constitutional right, it is essential that the environmental rights included in HB 472 be given the same respect, application and interpretation with regards to its implementation, including standing, as the other Declaration of Rights provisions in the Maryland Constitution.

**Will the Green Amendment trigger frivolous litigation?**

It has been suggested by opponents that Green Amendments become a driver of frivolous litigation. This is simply not true, and is a false excuse offered by those that can't find a legitimate reason not to recognize the people's right to pure water, clean air and healthy environments. Frivolous litigation has not been the experience in the two states that have Green Amendments (Pennsylvania and Montana). And to the extent some unscrupulous attorneys seek to use the provision in that way, they would quickly find themselves facing adverse court decisions, unhappy plaintiffs with high legal bills, and potentially the attorneys themselves facing sanctions or fines for misusing the law to intimidate and harm. The result will be decisions and reactions that dissuade others from similarly misusing the law.

**Given that we all depend upon clean water, clean air & a healthy environment to support and sustain our very lives, it is right and appropriate that they should be protected with the same legal vigor and strength that we protect the other political rights, civil rights and human rights we hold dear.**

I hope the Committee will join with the community and support HB 472, a Healthy Green Amendment for the people of Maryland.

Respectfully submitted,



Maya K. van Rossum

*Founder of the Green Amendments For The Generations initiative – the Delaware Riverkeeper & leader of the Delaware Riverkeeper Network – author of The Green Amendment, Securing Our Right to a Healthy Environment.*

Attachments:

*Demanding and Defending Your Rights to Clean Water, Clean Air & a Healthy Environment, For the Generations*

*Green Amendment Checklist, Essential Elements of an Effective Environmental Rights Amendment, For the Generations*

*How to Implement and Apply a Green Amendment, For the Generations*

*A Constitutional Right to an Environmental Public Trust, Protections Offered by Incorporating Trust Language in a State's Green Amendment, For the Generations*

*A Green Amendment: Making Environmental Justice a Real Obligation of Government, For the Generations*

*Benefits of a Constitutional Provision Protecting Environmental Rights, For the Generations*

*A Green Amendment is a Restraint on Governmental Authority, Not a Grant of New Authority, Jordan B. Yeager and Lauren M. Williams, Curtin & Heefner LLP, John Smith, Smith Butz LLC, and Jonathan Kamin, Goldberg Kamin & Garvin, LLP, January 8, 2019*



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



DEMANDING AND  
DEFENDING YOUR  
RIGHTS TO  
CLEAN WATER,  
CLEAN AIR &  
A HEALTHY  
ENVIRONMENT

Our rights to free speech, to a free press, to religious freedom, and property rights are among the many fundamental rights guaranteed by our federal and state constitutions. However, across the nation our rights to pure water, clean air, and healthy environments, are not recognized or protected — even though they are essential to our health and our lives.

Some state constitutions reference varying levels of environmental entitlement, but only two states — Pennsylvania and Montana — clearly identify the rights to a clean and healthy environment as fundamental, inalienable, and individual rights that must be protected by the government to the same degree we protect these other fundamental rights.

**Article 1, Section 27 of the Pennsylvania Constitution promises: “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.”**

Until 2013, despite over 40 years of having a Green Amendment (i.e. an Environmental Rights Amendment in the bill of rights section of a constitution) in the Pennsylvania Constitution, government officials and the courts did not give constitutional recognition or protection to the fundamental right to pure water, clean air and a healthy environment in the state. That changed as the result of a legal action brought by the Delaware Riverkeeper Network and seven towns challenging a very pro-fracking piece of Legislation.

In the case, titled *Robinson Township, Delaware Riverkeeper Network, et al. v. the Commonwealth of Pennsylvania*, the Pennsylvania Supreme Court declared constitutional recognition and protection for the rights of all Pennsylvanians to pure water, clean air and a healthy environment. The court made clear that by virtue of Pennsylvania’s constitutional provision there is a duty on all government officials to engage in informed decisionmaking with regards to the environment, to “refrain from unduly infringing upon or violating the right” to a healthy environment, and that there is a duty on government “to prevent and remedy the degradation, diminution, or depletion of our public natural resources” (with public natural resources being more broadly defined than just those owned by the state). A plurality of the court made clear that our environmental rights are not granted to us by law, but are in fact inherent and inalienable rights. And the plurality of the court said that these environmental rights belong not just to present generations, but they are rights that must be protected for the future generations yet to come.

## WHY IS ALL OF THIS IMPORTANT?

Because, every day, local, state, and federal governments are granting permission to industries to pollute, deforest, denigrate, and despoil our environments, which is having serious effects on our planet and our bodies.

Often, the permission to pollute is defended by the assertion that it will create jobs, or that the near-term gain of a new energy source overshadows the need to consider environmental degradation and its harmful impacts. These kinds of excuses do not justify the harms that polluting industries create. After all, what good is a job if you don't have the health needed to take advantage of it, or if you have to sacrifice your parent, child, friend, or neighbor in order to have it?

The truth is that most goals can be achieved in a way that protects the environment, communities, jobs and economies at the same time. For example:

- Instead of drilling and fracking, which irreparably pollutes our water, air, and lands, we could shift to meeting our energy needs through clean energy technologies, such as wind, water, solar, and geothermal (achievable by 2050). The clean energy approach will meet our energy needs while at the same time creating good paying and enduring energy jobs and simultaneously avoiding the devastating pollution and climate changing impacts of drilling and fracking for gas or pursuing other dirty fossil fuel options.
- Instead of developing land by cutting down all of the trees, which creates floods, pollution, and erosion of our public and private lands, developers could use building practices that protect trees, protect the absorbency of the soils and capture rainfall in a way that allows the water to soak into the ground. Such development practices restore natural and human water supplies and do not create or exacerbate devastating floods and damaging pollution. At the same time, such strategies save on development and infrastructure costs and often increase the marketability and market value of the newly constructed buildings.

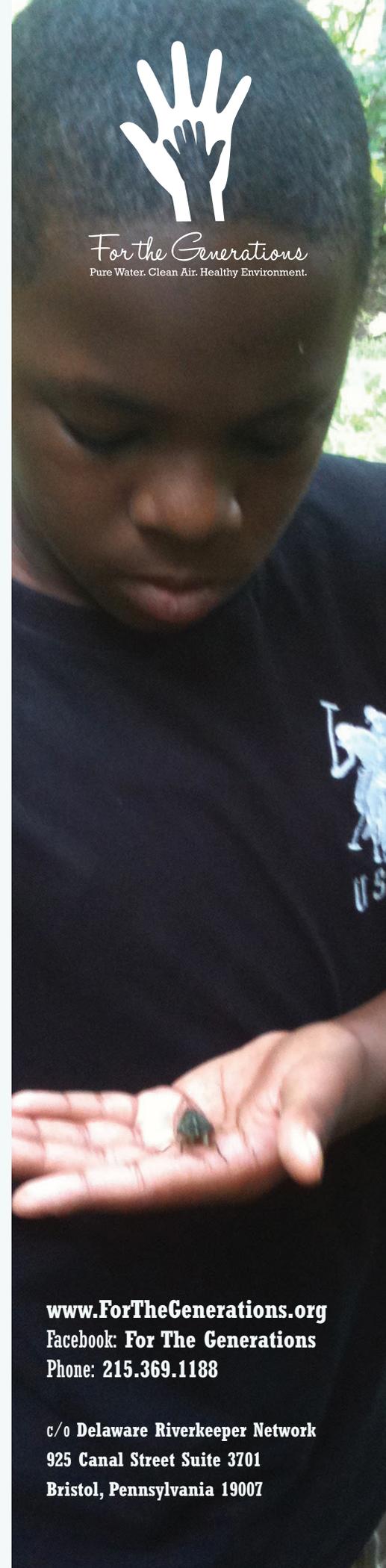
Other states offer varying environmental recognitions in their constitutions, but they are written in such a way that they can be easily ignored: they talk about environmental protection and rights as good public policy, or that should be protected by state legislatures through laws, policies, and funding, but they do not recognize them as self-executing inalienable rights that must be protected on par with other fundamental freedoms like the rights to free speech and freedom religion. And there are many states whose constitutions don't talk about the environment or environmental protection in any meaningful way at all, just as our federal constitution fails to include clear recognition and protection of environmental rights.

By contrast, two states – Pennsylvania and Montana – do provide the highest level of protection; in constitutional language, placement and through court decisionmaking.

The time has come for communities across the nation to demand that their environmental rights be recognized and protected at the highest level under the law; in the declaration of rights section of our state and federal constitutions. It's time for us all to embrace the truth stated by Pennsylvania's Supreme Court Chief Justice, that we as people have an inherent and infeasible right to pure water, clean air, and healthy environments and that these are rights which must be protected for those of us here today and the generations yet to come.



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Pure Water. Clean Air. Healthy Environment.



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# GREEN AMENDMENT CHECKLIST

Essential Elements of an Effective  
Environmental Rights Amendment



Every state across the nation needs a Green Amendment ... a constitutional provision that recognizes and protects each person's right to clean water, clean air and a healthy environment as an inalienable right on par with other fundamental freedoms we hold dear like the rights to free speech, freedom of religion and private property rights.

And when the people are ready and the time is right, the United States also needs a Green Amendment added to our federal constitution.

Only two states currently have Green Amendments as defined by the For The Generation's Green Amendment movement: Pennsylvania and Montana. While other states talk about the environment in their constitution's, they do not protect the right to clean water, clean air and a healthy environment as an inalienable right giving it the highest level of legal recognition and protection; instead they talk about them as good policy or in need of state legislation. Some states don't mention the environment at all.

This checklist will help your state create a true Green Amendment. For further assistance in crafting the perfect Green Amendment for your state email [ForTheGenerations@delawareriverkeeper.org](mailto:ForTheGenerations@delawareriverkeeper.org) or phone 215-369-1188.

- ✓ The provision should be placed in the Declaration of Rights/Bill of Rights section of the constitution and make clear that the rights enumerated are reserved rights that are inherent and inalienable and belong to the people, e.g. are "rights reserved to the people".
- ✓ 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 should mention specific environmental values to be protected such as pure water, clean air, ecologically healthy habitats, stable climate, etc.
- ✓ The provision should include a broad holistic perspective on the values of protecting a healthy environment.
- ✓ The provision must be self-executing so it does not require passage of laws in order for it to take effect and for the environmental rights of the people to be vindicated.
- ✓ 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. Placing environmental rights protections in the Declaration of Rights/Bill of Rights section of a Constitution helps achieve this goal.
- ✓ 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 the government's public trust duties, broadly defining the body of the trust to include public natural resources and environmental values and not simply publicly-owned land, navigational waters, and/or tideland resources.
- ✓ The responsibilities to protect the environmental values, including trustee obligations, 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 government action or indirectly, because of the government'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.



## *For the Generations*

Our right to pure water, clean air and a healthy environment are inherent, inalienable and fundamental rights retained by the people of all Generations. There can be no life, liberty or happiness without a healthy environment.

**[www.forthegenerations.org](http://www.forthegenerations.org)**

Facebook: For The Generations Phone: 215.369.1188

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For the Generations  
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## 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.



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## A CONSTITUTIONAL RIGHT TO AN ENVIRONMENTAL PUBLIC TRUST Protections Offered by Incorporating Trust Language in a State's Green Amendment

**The incorporation of trust language in a Green Amendment will create a different dynamic when it comes to all actions concerning the environment by mandating the government work proactively to prohibit degradation and ensure that all residents have equitable access to a healthy environment.**

The incorporation of trust language in a Green Amendment is not the same thing as simply incorporating the public trust doctrine. As defined, the Public Trust Doctrine embodies “the principle that certain natural and cultural resources are preserved for public use, and that the government owns and must protect and maintain these resources for the public’s use.”<sup>1</sup> But, for the most part, the public trust doctrine has been legally interpreted and applied as being more limited in scope, e.g. as applying to tidal and submerged lands, and/or navigable waterways. By directly using trust language, rather than simply referencing the public trust doctrine, Green Amendments more explicitly confirm an obligation to protect and maintain all public natural resources (not just submerged lands and identified water resources) for the benefit of all the people, and brings with it well understood legal mandates and guidelines regarding the obligations of the trustee (i.e. government officials) as pertains to the beneficiaries of the trust (i.e. every member of the public.) Establishing all residents of a state as beneficiaries implicitly includes future generations because trustees are under certain legal obligations to prevent waste as to the trust corpus. However, the express inclusion of future generations is advisable to ensure cross-generational protections.

### A TRUST FOR PUBLIC NATURAL RESOURCES

In law, a trust is a collection of assets (also called a corpus or body of the trust) entrusted to an individual or group to manage for the benefit of others. The individual who is charged with watching over the assets is a trustee and those who enjoy the benefit are known as beneficiaries. In taking care of the assets, a trustee’s duty is to ensure that, through proper management of the assets, beneficiaries receive the most benefit from those assets, in both the short and long term. Under trust law, trustees have fiduciary duties that limit their authority and discretion in order to protect the beneficiaries’ interests and ensure that the trustee abides by the terms of the trust. Examples of fiduciary duties include that a trustee must act with prudence, loyalty, and impartiality in making decisions concerned with the trust.

- Prudence mandates that the trustee act in an informed and cautious way.
- Loyalty requires that the trustee administer the trust solely in the interest of the beneficiaries.
- Impartiality mandates that the trustee treat all beneficiaries equitably.

Use of trust language in the context of Green Amendments establishes a trust in which the government is the trustee, the public are the beneficiaries, and the assets are the environment. 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 public natural resources for the benefit of current and future generations.

<sup>1</sup> [https://www.law.cornell.edu/wex/public\\_trust\\_doctrine](https://www.law.cornell.edu/wex/public_trust_doctrine)

## A GREEN AMENDMENT INCORPORATING TRUST RIGHTS

Placing trust language in a Green Amendment will make trust obligations a constitutional duty of governmental actors that cannot simply be brushed aside in decision-making. Such obligations will require that governmental entities prohibit and remedy degradation, whether it is perpetrated through the government or a private actor, and act affirmatively to protect the environment from further degradation through legislative or other action. The trust language will mandate that government ensure that it acts for the benefit of current and future generations, which helps guarantee that all residents have equitable access to a healthy environment. These obligations will not be vested in any single branch of government, but rather, command all branches of government at all levels, including local government, to conserve and maintain public natural resources.

Implications of public trust obligations are many. Two examples include implications flowing from the fiduciary duties of prudence and impartiality.

- First, both of these duties require a scientific, data-driven pre-action analysis to determine a proposed action's impact on the local environment. This pre-action analysis requires that decisions occur only after governmental entities have determined (among other factors) the current environmental conditions of a locality, and effects a proposed action will have on residents. This pre-action analysis must account for all current local environmental impacts to understand how and to what extent the proposed project/action will increase existing pollution/degradation and thus harm to the air, water, and other public natural resources. This pre-action analysis ensures that individual environmental impacts will not amount to unknown or unaccounted for environmental degradation in the aggregate.

A defensible pre-action analysis must ensure that short-term and long-term cumulative impacts are analyzed in order to understand whether an action may disproportionately impact overburdened communities now and/or in the future. Such an analysis will ensure the compounding effects of projects will not lead to unaccounted-for pollution and/or more detrimental effects for current and/or future generations.

- Second, these obligations will ensure decisions on whether to allow a proposed action are equitable and based on facts. As a result, in making decisions, no longer can a lack of evidence be used to say that something is safe, and no longer can future impacts simply be ignored in favor of short-term benefits. In addition, government cannot ignore unfavorable information in an effort to allow an action or decision to advance regardless of the impacts. Furthermore, additional pollution or degradation in a community cannot be excused by that community's history of environmental degradation or for economic reasons. This is because each resident has a right to a clean environment, and the trustee must treat all beneficiaries equitably.

These obligations thus require that government officials understand the impacts of proposed actions or activities, and provides a means to hold government accountable for continuing to burden certain communities with environmental harm.

Other obligations flowing from the public trust involve protections on the usage of funds gained from any exploitation or activity utilizing state natural resources. Often, public natural resources are seen as an easy way to address budgetary shortfalls. However, a Green Amendment with public trust language prevents such diversions, and requires that funds gained from the exploitation of public natural resources are put towards protection and conservation of those resources. Such a mandate ensures that government priorities are to protect the rights of the public to a clean and healthy environment, rather than merely prioritizing the plans of private and public actors to exploit these resources for their own gain and/or to pad the government budget.

Therefore, adding trust language to a Green Amendment will make real the right to a clean and healthy environment for all people in all parts of the government's jurisdiction, no matter their economic status, the environmental history of where they live, their skin color, their mental or physical capabilities, or their education level. It will mandate that government work proactively to prohibit and remedy degradation and ensure that all residents have equitable access to a healthy local environment.



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**A Green Amendment provides a way to embed in a state Constitution principles that ensure environmental justice is a substantive obligation of government, not merely an aspirational goal, an obligation focused primarily on process, or an inequity only corrected through policy initiatives. A Green Amendment will create a constitutional mandate that each person, regardless of who they are or where they live, has a right to clean water, clean air, and a clean and healthy environment.**

An effective Green Amendment should be placed in the Bill of Rights/Declaration of Rights section of a Constitution and should include both an individual rights clause and a public trust clause thereby ensuring protection of individual as well as community rights, and ensuring government has a legal obligation to treat all people and communities equitably when it comes to protecting their rights to a clean and healthy environment.

## THE IMPORTANCE OF THE ENVIRONMENTAL JUSTICE MOVEMENT

Practices such as housing discrimination, redlining, zoning focused on repeatedly locating polluting operations in the same communities, and institutional racism have resulted in minority and/or low-income communities being situated in highly-polluted areas with decaying infrastructure and toxic sites, such as landfills, superfund sites, industrial operations and major roadways. Additionally, communities that depend on a limited set of industries for jobs such as mining or factory work, suffer environmentally and economically when the operations close down, leaving behind high levels of environmental damage and a lack of other economic opportunities until some new industry comes to town. In addition to the role of government in advancing unjust environmental decisionmaking, polluting industries often target minority and low-income communities under the guise of jobs, attempting to get residents to rationalize detrimental impacts to their health and their community for short-term economic payoffs. Such practices have led to wide-spread, disproportionate environmental inequities, resulting in some communities being seen as expendable so that others may live in clean and healthy environments. The environmental justice movement has been a response to these tremendous environmental, health, and safety inequities.

## HOW CAN A GREEN AMENDMENT ADVANCE ENVIRONMENTAL JUSTICE?

Wherever there are disproportionate environmental burdens, a Green Amendment can provide a way to push back against further degradation as well as focus efforts on needed restoration. Embedding environmental rights in a state Constitution will provide a powerful tool to focus government decision-makers directly on the immense health and environmental burdens that many communities face and to hold governmental officials accountable when they continue actions, activities, and decisions that increase that burden. Green Amendments will help to *prevent* potentially-vulnerable areas from taking the brunt of adverse environmental impacts. Green Amendments also focus government on the need to restore healthy environments in order to ensure equitable access to, and enjoyment of, healthy environments and environmental rights.

**A GREEN AMENDMENT:  
Making Environmental Justice A Real Obligation of Government**

Two central elements of a Green Amendment establish a government's obligation to ensure environmental justice:

- 1) the constitutional right of each resident to a clean and healthy environment; and
- 2) government's fiduciary duty as a trustee of public natural resources to treat all beneficiaries – including both present and future generations, as well as communities across their jurisdiction – equitably.

Equity is thus inherent in each component of a Green Amendment.

## WHAT DOES IT MEAN TO TREAT PEOPLE “EQUITABLY”?

“Equitably” is concerned with what is fair and just. This is different from treating people “equally,” which means treating each person the same, regardless of circumstance.

- *Equitable* treatment requires that government look at the different environmental and public health burdens borne by some residents versus others and account for and address that inequity.
- *Equitable* treatment may require different methods and courses of action in different communities.
- *Equitable* treatment may involve differing levels of effort in different areas, including enhanced efforts needed to remedy past damage.
- To be equitable, environmental protection must be balanced fairly and justly, across all communities, and with other rights enshrined in the Constitution.
- Equitable treatment seeks to ensure that some communities aren't simply shouldering all the pollution burden under the guise of “jobs.”
- Environmental justice and equity say that residents have a right to live in a healthy place while also having the means to feed their children.
- Equitable treatment seeks to prevent current generations from passing the buck to later generations.

In order to ensure equitable treatment and fulfillment of the constitutional obligation to protect environmental rights, a Green Amendment requires a pre-action analysis considering the current status of residents' environment and environmental rights, as well as the impacts of a proposed action or activity on their local environment. This analysis necessarily requires data and science. It is not simply a process-focused inquiry.

Government must take the results of the pre-action analysis, including the consideration of impacts, seriously and may not allow proposed projects to proceed if they would violate residents' right to a healthy environment. This science-based, fact-based assessment (the pre-action analysis including the impacts analysis) 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.

From an environmental justice perspective, advance consideration of the environmental impacts from a proposed action or activity on individuals' environmental rights necessarily must address *what is already in the community* and adversely affecting residents. This is necessary both to: 1) understand how much more government would interfere with individuals' environmental rights if it were to permit a particular operation or advance a particular decision; and 2) comply with the government's trustee duties. A governmental entity cannot just look at an operation, action, or decision in isolation. It must understand what pollution, industrial, and environmental burdens a community already bears. It must also look into the future to consider the impact that adding another pollution burden has on the affected community and on future generations. It must address cumulative impacts – both immediate and long-term – in the analysis and the final outcome decided upon and advanced.

A Green Amendment provides a way to make environmental justice more than just a buzzword or a hot topic. It provides a means for making it real for communities across the country that have borne the weight of pollution and environmental degradation for too long. This will greatly enhance the tools available to communities to remedy current degradation and push back against further devastation, to make real a fundamental human right that no person should suffer disproportionate environmental, health and quality of life burdens because of who they are, their income, or where they live.



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## BENEFITS OF A CONSTITUTIONAL PROVISION PROTECTING ENVIRONMENTAL RIGHTS

### BENEFITS OF AND BEYOND VICTORY

- Environmental protection given the **highest level of protection under the law.**
- People and politicians receive and must embrace the concept that environmental rights are **inherent and infeasible and on par with other political rights** (free speech, religion, property, etc.).
- Public and political messaging that embraces environmental rights. People and politicians learn to embrace the concept that environmental rights are inherent and infeasible and on par with other political rights (free speech, religion, property, etc.)
- Government Officials learn the importance of protecting our water, air, natural resources and environment for present and future generations while seeking to achieve other community goals. Environmental protection is given the highest level of protection under the law.

### HOW A STRONG ENVIRONMENTAL RIGHTS AMENDMENT PROVIDES GREATER ENVIRONMENTAL PROTECTIONS

#### Environmental Rights are Recognized as Inherent & Infeasible

“The Declaration of Rights assumes that the rights of the people ... are inherent in man’s nature and preserved rather than created by the Pennsylvania Constitution.”<sup>1</sup>

#### Environmental Rights are On Par with Political Rights

“It is not a historical accident that the Pennsylvania Constitution now places citizens’ environmental rights on par with their political rights.”<sup>1</sup>

#### Government Has A Duty to Refrain from Violating Environmental Rights

“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.”<sup>1</sup>

#### A Limit on Governmental Authority

“...sections of the Declaration of Rights represent specific limits on governmental power.”<sup>1</sup>

#### Environmental Protection is the Responsibility of Every Government Official

...“public trustee duties were delegated concomitantly to all branches and levels of government in recognition that the quality of the environment is a task with both local and statewide implications, and to ensure that all government neither infringed upon the people’s rights nor failed to act for the benefit of the people in this area crucial to the well-being of all Pennsylvanians.”<sup>1</sup>

#### A Duty to Act on State

“[T]he Environmental Rights Amendment places an affirmative duty on the Commonwealth to ‘prevent and remedy the degradation, diminution, or depletion of our public natural resources’—i.e., to conserve and maintain...”<sup>2</sup>

## All Levels of Government, Including Local Officials, have an Obligation to Protect Constitutional Environmental Rights

- “The protection of environmental and esthetic interests is...a key part of local government’s role.”<sup>1</sup>
- ...“public trustee duties were delegated concomitantly to all branches and levels of government in recognition that the quality of the environment is a task with both local and statewide implications, and to ensure that all government neither infringed upon the people’s rights nor failed to act for the benefit of the people in this area crucial to the well-being of all Pennsylvanians.”<sup>1</sup>

## A Duty to Refrain from Permitting Environmental Degradation

“As trustee, the Commonwealth has 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.”<sup>1</sup>

## A Thumb on the Scale of Environmental Protection

“If anything, when environmental concerns of development are juxtaposed with economic benefits of development, the Environmental Rights Amendment is a thumb on the scale, giving greater weight to the environmental concerns in the decision-making process.”<sup>2</sup>

## Science-Based Decision Making

As a trustee, government must consider before acting whether the proposed action (such as legislation or permitting) would cause “actual or likely” “degradation, diminution, or depletion” of the people’s public natural resources either now, or in the future.<sup>1</sup>

## Individual and Cumulative Impacts Must be Considered; Must Protect Environmental Quality for Future Generations

“Moreover, the constitutional provision directs the ‘preservation’ of broadly defined values of the environment, a construct that necessarily emphasizes the importance of each value separately, but also implicates a holistic analytical approach to ensure both the protection from harm or damage and to ensure the maintenance and perpetuation of an environment of quality for the benefit of future generations.”<sup>1</sup>

## A Duty to Restore

“[T]he Environmental Rights Amendment places an affirmative duty on the Commonwealth to ‘prevent and remedy the degradation, diminution, or depletion of our public natural resources’—i.e., to conserve and maintain . . . .”<sup>2</sup>

## Citizens Can Enforce Their Environmental Rights

“The Commonwealth’s obligations as trustee to conserve and maintain the public natural resources for the benefit of the people, including generations yet to come, create a right in the people to seek to enforce the obligations.”<sup>1</sup>



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<sup>1</sup> Robinson Township, Delaware Riverkeeper Network, et al v. Commonwealth, 83 A.3d 901 (Pa., Dec. 19, 2013).

<sup>2</sup> Pennsylvania Env'tl. Def. Found. v. Commonwealth, 108 A.3d 140 (Pa. Commw. Ct. 2015).

# **A Green Amendment is a Restraint on Governmental Authority, Not a Grant of New 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

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<sup>1</sup> 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).

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,<sup>2</sup> 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 challenge<sup>3</sup> to Act 13 of 2012, which imposed a one-size-fits-all zoning scheme for

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<sup>2</sup> 83 A.3d 901 (Pa. 2017).

<sup>3</sup> 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

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 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).*

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environmental rights grounds of the plurality. Rather, he simply chose a different constitutional grounding for his opinion.

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 extrajudicial 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.<sup>4</sup> *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.<sup>5</sup>

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<sup>4</sup> Montana is the only other state besides Pennsylvania that has an environmental rights provision in its Declaration of Rights.

<sup>5</sup> 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.

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.

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’s<sup>6</sup> right to “clean air and pure water,

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<sup>6</sup> 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

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)).<sup>7</sup> 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.

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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.

<sup>7</sup> 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.

Page, 58 Pa. at \*8.

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 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 generally<sup>8</sup> 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

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<sup>8</sup> 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.

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 PEDEF, 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 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, indefeasible, and inalienable 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.<sup>9</sup>

## 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.

### 1. 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

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“[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.”

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.