



## **The Nebraska Green Amendment Frequently Asked Questions & Answers**

### ***What is a Green Amendment?***

A Green Amendment is a self-executing provision placed in the Bill of Rights section of a constitution that recognizes and protects the inalienable rights of all people, including future generations, to pure water, clean air, a safe climate, and healthy flora, fauna, ecosystems and environments. Green Amendments serve as a check on government authority, and make clear government's duties, as trustee, to equitably protect the environment for the benefit of all the people of the state regardless of race, ethnicity, tribal membership status, socioeconomics, or generation.

### ***How is a Constitutional Amendment Better Than Legislation for Environmental Protection?***

Our state and federal constitutions provide the overarching legal structure, principles and obligations to which all branches of government must conform. All government action, including the passage of laws, regulations, policies and programs are done in service to advancing government's constitutional obligations – government officials cannot change or violate the constitution, they must honor and implement it. Passage of a Nebraska Green Amendment will ensure that every government official in the state will work to advance environmental protection at every level of the decision-making process, rather than wait until the end of the process when the focus is necessarily on acceptance and management through permitting rather than prevention.

Having a Green Amendment will help ensure that existing environmental laws and regulations are implemented to their full potential; will provide a basis for advancing new needed protections (e.g. through legislation, regulation or government action); will provide a basis to secure protective government action when a gap in the law is identified (such as the case with PFAS contamination); and will strengthen the ability of communities to gain access to courts when their rights have been infringed upon by government action, inaction and/or activities.

### ***Why is a Green Amendment beneficial for environmental justice protection?***

By recognizing environmental rights as individual rights that belong to all people, it becomes constitutionally mandated that government decisions and actions protect these rights for all people and that government is not entitled to undermine/sacrifice/minimize the rights of one beneficiary community in order to enhance/protect the rights of another beneficiary community.

Including a trust obligation in the Green Amendment ensures that all government officials have a clear fiduciary duty to act with prudence, loyalty and impartiality for the benefit of all beneficiaries when

acting to protect natural resources. The trust obligation of impartiality ensures a duty of equitable treatment owed to all communities – no one community is entitled to better or worse protection than the others, all are entitled to the same duty of care and equitable protection. The duty of prudence – i.e. informed decisionmaking before action is undertaken – ensures consideration of existing conditions, and the impacts and benefits from a proposed action including cumulative impacts across geography and time. Given that the fiduciary obligation is owed to all beneficiaries it also prevents the government from justifying harms to one community by pointing to benefits to another.

***Why does the Nebraska Green Amendment require that environmental rights be protected “equitably” instead of “equally”?***

The difference between “equal” and “equitable” is important. While “Equal” means that all people have the same opportunity to enjoy and benefit from healthy natural resources and their right to a clean and healthy environment, “Equitable” recognizes the different and disparate existing conditions of communities. “Equitable” recognizes that not all people or communities have the same access to healthy natural environments, nor the same ability to ensure their rights are enforced and respected. “Equitable” recognizes that some individuals and communities do not have the same access to legal resources, money and political power as others. “Equitable” also recognizes that some communities have been polluted much more than others and to achieve a fair environmental outcome requires considering and addressing that historic and existing condition.

***If a Violation of the Amendment Is Found What Will Be The Remedy?***

Violations of the Nebraska Green Amendment will be addressed through equitable remedies/relief, meaning the government will be required to undertake action, or refrain from action, that is causing the constitutional violation. For example, provisions of a law declared to be unconstitutional cannot go into force and effect; a permit issued that will cause an unconstitutional violation will be declared invalid/void until/unless the constitutional infirmity is remedied; a law that requires clean-up of a toxic site by responsible parties must be enforced.

***How Will a Nebraska Green Amendment Affect Government Decision-making and Activities?***

A Nebraska Green Amendment will provide critical guidance that ensures all government decision-making – both substantively and procedurally; across state and local government - considers environmental impacts early in the process when prevention of pollution, degradation and environmental harm is most possible; requires equitable protection of all communities strengthening environmental justice; ensures consideration of cumulative impacts over space and time; considers the protection of present and future generations; and considers science, facts and impacts as part of the decision-making process in order to fulfill the government’s trust obligations. The amendment will ensure that all impacted rights are balanced and addressed and will only allow for infringement when there is a demonstrated compelling state interest and genuine effort to minimize the harm. When all else fails, a Nebraska Green Amendment will provide a backstop that can be used by community, public, government and business interests to provide a check on government authority that overreaches and fails to protect environmental rights. In addition, because it is self-executing, a Nebraska Green Amendment can help address community harms that have not been addressed by existing legislation, regulation or government action. In addition, A Nebraska Green Amendment will encourage sustainable, environmentally protective, and innovative development, industry, and business growth.

***How can legislators be responsible for protecting the right to pure water, clean air or a safe climate when these are not entirely within the control of any one state?***

Rights enumerated in the Bill of Rights are inalienable rights that the people reserve unto themselves to be protected from government infringement. Just as with other rights in the Bill of Rights, government has a duty to take what actions it can to protect these rights within its jurisdiction and to ensure that its own actions do not induce, garner or allow for infringement. Just as government officials in one state do not have the power to prevent acts or activities outside the boundaries of their jurisdiction that might overreach and affect constitutional rights in another jurisdiction, the same holds true for environmental rights. Each state is bound to take what action it can to respect and protect the environmental rights of the people within its jurisdiction, and to ensure that its own actions or activities do not cause or contribute to infringement.

***Do any states currently recognize environmental rights and natural resource protections in this way?***

Pennsylvania, Montana, and New York have constitutional language that fulfill the definition of a Green Amendment. (See the Green Amendment checklist at: [bit.ly/GreenAmdChecklist](http://bit.ly/GreenAmdChecklist)). Cases that have interpreted and applied existing Green Amendments can be found at the resources tab of the [www.NEGreenAmendment.org](http://www.NEGreenAmendment.org) website.

***How will terms like ‘clean’ or ‘healthy’ be defined?***

The language in the proposed Nebraska Green Amendment is characteristic of Nebraska Article I Bill of Rights language. The terms “*pure*”, “*clean*”, “*healthy*” or “*balanced*” are no less clear than the right to be free from “*unreasonable searches and seizures*”, the right to “*freely speak*”; the right to worship “*according to the dictates of their own consciences*”; or to be free from “*excessive bail*”. All of these on their face are in need of additional definition. This overarching language ensures they will accomplish the protections the people seek and ensure they can withstand the evolutions and test of time.

The same process used to inform and define these other constitutional terms and rights will ensure proper interpretation and definition of the Green Amendment. As with other Article I rights:

- ✓ Definition will begin with the legislative and executive arms of government through passage of legislation, regulations, policies, and decisionmaking that respects and protects the rights.
- ✓ It is then incumbent on the people and the courts to challenge and/or support such decisions through the judicial system, which will provide further refinement, guidance and understanding as to how these terms are to be applied and fulfilled.

Notably, the inclusion of trust language in the Nebraska Green Amendment provides meaningful guidance. By including trustee language, courts are able to consider whether, in the context of environmental decision-making, government officials fulfilled the fiduciary obligations of prudence, loyalty and impartiality. This legal clarity can help guide the courts in determining whether or not the government (the trustee) engaged in legally appropriate decision-making when taking action with regards to the state’s natural resources. If a robust, transparent and informed process was followed, the courts will be more inclined to grant deference.

***Is a Green Amendment only forward looking – does it only deal with future pollution and government action or can it be used to remedy existing and ongoing problems created in the past?***

The Nebraska Green Amendment is not retroactive. However, the Amendment can help remedy constitutional violations that were created by past action but are being perpetuated in the present by new government approvals or affirmations. For example, consider an existing permit that has allowed perpetual pollution discharges at a serious and severely detrimental level harming the health and safety of an environmental justice community. When that permit is up for renewal, the determination of how to consider, and potentially modify, a permit renewal that may be given, will now be guided by, and protective of, the constitutional environmental rights protected by the Green Amendment.

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

As explained by the Montana Supreme Court, when a fundamental right articulated in the Bill of Rights is at issue, court review requires strict scrutiny meaning that any demonstrated infringement can withstand constitutional challenge if “the State establishes a compelling state interest and that its action is closely tailored to effectuate that interest and is the least onerous path that can be taken to achieve the State's objective.” (Montana Env'tl. Info. Ctr. v. Department of Env'tl. Quality, 1999 MT 248 (1999).) It is expected that this well-recognized principle of constitutional law will similarly apply in Nebraska.

***Will the proposed Green Amendment inspire an unacceptable rush of lawsuits or frivolous litigation?***

While the constitutional language will support important legal claims essential to address environmental pollution and degradation harmful to the lives of the people of Nebraska, it is not expected to support a sudden rush of litigation and will certainly not support an onslaught of frivolous litigation. In Pennsylvania, Montana, and New York - the three states that have constitutional Green Amendments - the legal actions filed have been to address serious issues of public concern such as protecting drinking water, securing government action needed to ensure clean-up of toxic contamination by responsible parties, protecting local zoning authority, and supporting government enforcement against environmental law violations. Nebraska, like all states, has standards of conduct with serious ramifications for violation, that prevent lawyers from pursuing frivolous lawsuits. Notably, in Pennsylvania, Montana, and New York, there are zero constitutional environmental rights claims dismissed by a court as frivolous.

***Will the Green Amendment Over-extend or Overwhelm the State Budget?***

The most important values of a Green Amendment are about changing government decision-making in order to address, avoid and remedy environmental harms advanced by government action which overreaches and results in constitutional environmental rights violations. By preventing harmful and costly environmental degradation, the Nebraska Green Amendment will protect state and local government budgets and people.

The remedies for constitutional violations will be equitable and focus on remedying legislative/regulatory language or gaps; remedying or rescinding permitting or other actions to avoid rights violations and/or ensure appropriate advance review of relevant conditions, data and impacts to ensure informed and constitutionally justified decision-making; providing for environmental protections when there are gaps in the law that fail to protect environmental rights; supporting/protecting local and state environmental protection authorities; ensuring government is fully and fairly implementing existing laws in order to ensure constitutional level protection, etc.