



## ***Responding to Legislative Questions Regarding the Proposed New Jersey Green Amendment/Environmental Rights Amendment***

- 1. By using the word “person” as opposed to “the people” (which is the terminology used in the Pennsylvania Green Amendment) it is possible the New Jersey provision could be used by individuals as well as corporations, companies, associations, societies, firms, partnerships and others. Is this the intent?***

The term “person” versus “people” was used to be in keeping with other Bill of Rights/Declaration of Rights provisions in the NJ Constitution. It is not the intent to necessarily limit the use of the constitutional right just to individuals. There may in fact be instances when a society or association would be the most suitable party to assert a constitutional environmental rights claim, because a legal challenge may be brought on behalf of a community of impacted individuals or interests – there are many instances when this may be more efficient and cost efficient for those impacted. Businesses that are being harmed by significant water or air pollution, or other environmentally destructive activities may want to bring an environmental rights claim to protect important economic, business community and job interests. In fact, in the landmark Pennsylvania case Robinson Township, Delaware Riverkeeper Network v. Commonwealth, (PA Supreme Court, 2013) – the case that breathed legal strength into Pennsylvania’s environmental rights amendment after 42 years of being treated as a mere statement of policy -- a key plaintiff recognized as having standing was the non-profit corporation the Delaware Riverkeeper Network who was deemed to have the standing necessary to pursue the constitutional claims on behalf of its impacted membership.

If the New Jersey legislature wants to limit the constitutional environmental right to only private individuals, that is a change that can certainly be entertained and addressed in modified language.

- 2. How are terms such as “pure water”, “clean air”, “clean and healthy environment, “ecologically healthy habitats” defined? Are these terms too broad for a constitutional provision?***

Broad language in a constitution’s Declaration of Rights/Bill of Rights is characteristic of all state constitutions and the federal constitution. For instance, the guarantee of “due process” is broad; it requires delineation by agencies and courts as well as legislative

enactments to define its contours. All rights fall into this category, even when they are self-executing. The purpose of the Declaration of Rights/Bill of Rights is to identify those rights that “the people” reserve unto themselves as being protected from government infringement. The terms ‘pure water’, ‘clean air’, ‘ecologically healthy habitats’, ‘clean and healthy environment’, are no less clear than the language in other Declaration of Rights/Bill of Rights provisions. For instance, the right “against unreasonable searches and seizures” has evolved and also has many exceptions, as do the right to “freely speak”, right to “a speedy” trial, to “freely assemble”, and to “just compensation” for private property taken for a public use -- all of these on their face are appropriately broad and their evolution depends on the context and times in which they are interpreted by courts or defined by legislation. Additional definition is a positive development, not a reason to withhold recognition of the fundamental right. Each of these terms, and others found in the NJ Bill of Rights/Declaration of Rights have been further defined through government action or inaction and judicial and legislative determinations. The NJ courts are no less equipped to help define environmental rights as they are to help define these other inalienable human, civil and political rights found in Article 1 of the NJ Constitution.

When defining terms found in Article 1 of the NJ Constitution, it is government’s job to, in the first instance, seek to provide legislation, regulations, policies, and decision-making 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. This same pathway for definition will apply to the environmental rights articulated in the proposed amendment.

The inclusion of trust language in the NJ Green Amendment (not the public trust doctrine relating to beach access and use of the foreshore, but the legal principle of a trust to be protected by a trustee for the benefit of identified beneficiaries) helps to provide further guidance that can help guide both its interpretation and its implementation. 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, which can help guide the court’s in determining whether or not the government (the trustee) engaged in legally appropriate decision-making when seeking to define environmental rights and how best to protect them.

***3. When guaranteeing the right to “ecologically healthy habitats” is the provision guaranteeing the right for animals or humans? Can the Humane Society sue a developer for reducing the habitat of a threatened species?***

As with all challenges, statutory or constitutional, or based on common law, in order to gain access to the court, a plaintiff will have to demonstrate standing by showing that the plaintiff has, or its members have, among other things, been particularly injured by the action challenged. The plaintiffs are humans, not animals. The NJ Green Amendment, as proposed,

will not change this. The proposed NJ amendment is not a rights of nature provision, it recognizes and protects the environmental rights of people. Therefore, a legal challenge under the proposed constitutional amendment must be brought on behalf of a person or persons whose rights have been infringed upon, or for which there is a legitimate claim of infringement.

Under current law (with or without the proposed NJ Green Amendment), the Humane Society, if its members have standing, can sue a defendant under the Endangered Species Act, if the society believes that statute has been transgressed.

In the scenario raised by the question, if the DEP had issued a permit that threatened the habitat of a threatened species, in order to support an additional claim under the State Constitution, in addition to the statutory claim, the Humane Society would have to be able to demonstrate that a legally defined “person” had been impacted in a way that fulfilled the legal requirement of standing. It would not be sufficient simply to show that a species or plant or animal was impacted as they are not included in the definition of “person”.

**4. Does the self-executing statement in the proposed NJ Green Amendment/Environmental Rights Amendment make the provision more expansive than the constitutional provision in the Pennsylvania constitution and enable it to be used more readily?**

The substance of the New Jersey amendment language is largely based on Pennsylvania’s Green Amendment language (Article 1, Section 27), with minor additions, such as the addition of “climate” to the definition of natural resources in order to offer greater specificity and clarity. The language modifications on the environmental protection elements will help lawmakers, the public and the courts to better interpret the amendment language, rather than significantly expanding its meaning beyond what is found in Pennsylvania.

Adding language that makes clear the provision is self-executing is similarly included in order to provide clarity, not because it is an expansion on the language found in Pennsylvania’s constitution. The Pennsylvania Supreme Court has made clear that Article 1, Section 27 of the Pennsylvania constitution (PA’s Green Amendment / Environmental Rights Amendment) is self-executing by its terms and as a result of its placement in the Declaration of Rights section of the constitution. Therefore, the addition of this language to the NJ provision does not make it distinctly different from Pennsylvania’s provision, it simply offers clarity and negates the need for people or the courts to invest time in arguing or considering the self-executing nature of the provision and the right.

**5. Given that the constitutional amendment is self-executing and so will not require implementing legislation to be legally actionable, will the NJ Supreme Court become the entity that will decide how clean the air and water need to be, displacing the current role of the Legislature and DEP? Is the NJ Supreme Court qualified to do so?**

The proposed constitutional amendment, as with all constitutional rights provisions, does not displace the important role of the Legislature and regulatory agencies of the state. The laws and regulations that currently exist will continue to exist. In fact, the constitutional amendment will help the Legislature and agencies by providing additional guidance for how they can best pursue their government activities in a way that respects and protects the inalienable environmental rights of their constituents. It also provides additional guidance to the courts so they can help be a check on government overreach when it comes to environmental impacts. Just as with other provisions in the constitution's declaration of rights, as well as under existing legislation and regulations that result in environmental impact, the responsibility lies with the Legislature and regulators in the first instance to seek to properly interpret and apply the constitutional obligation with the court's playing the critical role of helping to provide a check in those instances when there is government overreach and a failure to fulfill the constitutional duty.

As written, the NJ Green Amendment language provides helpful guidance on how the government can fulfill its constitutional duty to respect and protect environmental rights, and also helps guide what must be demonstrated when the government knowingly undertakes actions that will infringe on the constitutional right. The NJ Green Amendment, by its terms and placement, helps to ensure that government decision-making considers environmental impacts early in the process, provides a focus on preventing degradation, and ensures that all communities are treated equitably thereby helping to advance environmental justice goals of the state. The constitutional amendment also provides a back stop 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.

**6. Can the proposed amendment be used as a shield to protect property owners and polluters from having to address pollution and degradation for which they are legally responsible? In posing the question, reference is made to a Montana case where a property owner was allowed to breach a contract rather than drill a water well that could endanger the drinking water supply of an entire community by helping advancing a pollution plume.**

The New Jersey Green Amendment, as is the case with Pennsylvania's amendment and the declaration of rights portion of the Montana amendment, are a restraint on government action. There is no obvious path for the NJ Green Amendment, as proposed, to be used as a shield by private actors or property owners from environmental cleanup responsibilities. It will apply in those instances when government action, or inaction, results in the degradation of the environment such that it amounts to an infringement of the constitutional environmental right to a clean and healthful environment.

In addition, the inclusion of the language that "the state shall not infringe upon these rights, by action or inaction" helps to clarify that the focus of the NJ amendment is a restraint on government infringement, as opposed to third parties – e.g. legal challenges are to be focused

on government action or inaction; not the action or inaction of others – and as a result provides important clarification on the focus of the amendment. This is helpful in those instances when people will seek to stretch the amendment to allow for constitutional challenges to directly challenge the actions or activities of private parties, as opposed to challenging the action of government actors that advances constitutionally harmful actions/activities.

In the Montana case (Cape France Enterprises v. Estate of Peed, Supreme Court of Montana, 2001), the plaintiffs sought specific performance of a contract to buy and subdivide property. They were responsible for developing water as there was no city water, and they planned to drill a well to test the water. The Montana DEP informed the owner of a PCE plume in the area and that drilling a well could exacerbate the plume. It would also subject the owner to cleanup requirements if its water underlying the tract was found to be contaminated already. The Supreme Court agreed with the trial court that the contract should be voided because performance was impossible or impracticable because of the impending consequences of the well investigation. The court ruled that, “Causing a party to go forward with the performance of a contract where there is a very real possibility of substantial environmental degradation and resultant financial liability for clean-up is not in the public interest; is not in the interests of the contracting parties; and is, most importantly, not in accord with the guarantees and mandates of Montana's Constitution, Article II, Section 3 and Article IX, Section 1.” The case does not stand for the principle that the constitution can be used to allow private individuals or entities to remain ignorant of environmental conditions in land or in water under their control as a means of avoiding liability (although that is the case now, if the individual or entity has not investigated or IS ignorant of the condition). The Peed case stands for the principle that an environmental rights amendment can be relied upon to, in advance, prevent actions that could knowingly advance serious environmental consequences. Of particular importance, in Montana the declaration of rights section of that state’s promise of environmental rights was specifically identified by the court as being a limitation/restraint on government action.

**7. Is there concern that the reference to “scenic”, “esthetic” and “historic” qualities of the environment will have a significant impact on the construction industry?**

Looking to Pennsylvania and Montana, the only two states that have state Green Amendments, as a guide, we do not see a significant focus on the amendments affecting the construction industry one way or the other; scenic and historic properties already have state and federal statutory protection under the N.J. Register of Historic Places Act, the National Historic Preservation Act, and various scenic protection acts. These terms should be viewed in context, with a focus on the environmental ramifications of government decision-making (including legislation and permitting) that rises to the level of a constitutional violation. It is a high bar to demonstrate a constitutional violation and this language would not prevent the construction, or destruction, of buildings absent a significant environmental impact. Therefore, it is unlikely that this amendment could be successfully used to challenge construction projects in the absence of the project at issue having serious and significant consequences.

**8. Does the specific reference to both state action and inaction make the NJ Green Amendment proposal broader than Pennsylvania’s?**

In short, the answer is No. While the Pennsylvania Green Amendment does not specifically mention state inaction as a grounds for claiming a violation of the environmental rights amendment, the courts have made clear that, as is the case in many areas of environmental law, “inaction” can be deemed to be “action” in appropriate contexts.

In Delaware Riverkeeper Network v. DEP, (Pa. Commw. Ct. July 25, 2018), plaintiffs brought claims under both state law and the environmental rights amendment asserting, in part, that the state’s failure to take any meaningful action – i.e. “doing almost nothing” as discussed by the state in the case – to clean up significant and wide-spread hazardous contamination at a site for over 30 years was a violation of both the statutory and constitutional environmental duties of the state. The court refused to dismiss the case as the state requested, leaving this case to stand for the principle that chronic inaction that infringes on protected environmental rights and public natural resources can support both legal and constitutional causes of action. In this case (that is still ongoing) the request for a judicial order that the state must take action to address the hazardous conditions at the site did not request that the state take any specific action, all that was being sought is a judicial determination that the government must take some meaningful action to protect the statutory and constitutional environmental rights of impacted community members.

The inclusion of the language in the NJ Green Amendment that “the state shall not infringe upon these rights, by action or inaction” helps to clarify that the focus of the amendment is a restraint on government infringement, as opposed to third parties – i.e., legal challenges are to be focused on government action or inaction; not the action or inaction of others – and as a result provides important clarification on the focus of the amendment.

**9. Can the failure to pass legislation or regulation be challenged as state “inaction” that violates the constitutional right?**

It is unlikely, as demonstrated in the case discussion in 8, that courts would rely upon the failure to undertake a *specific* act or action or to pass or not pass specific legislation as the reason for finding a constitutional violation. By contrast, the environmental right focuses on the rights of the community to pure water, clean air and healthy environments and the duty of the government to refrain from any action or inaction that would infringe on those rights. While chronic inaction that allows for a continuing or growing violation of the constitutional right can be the underpinning of a constitutional claim, the violation can be remedied by any meaningful action or response that fulfills the constitutional duty; i.e., the constitution does not require a certain type of action or activity and the failure to do exactly what a plaintiff wants, in the way the plaintiff wants it done, is unlikely to be a supportable interpretation of the constitutional obligation. The constitution requires the government to fulfill its duty as trustee to conserve and maintain the public natural

resources of the state and to take no action or inaction that would infringe on the individual environmental rights of every person in the state – this cannot be interpreted as requiring specific and defined activities which, if not undertaken, can be deemed a constitutional violation; as long as the state is not infringing on the right directly through action or inaction, and is not taking action that results in infringement by others, the constitutional obligation is fulfilled.

**10. What does it mean to be the trustee of natural resources for future generations? What if the rights of a future generation somehow conflict with those of the current generation? Could someone sue for future generations in order to force the state to take stronger action on climate change, even if it meant raising exorbitant taxes on the current generation?**

New Jersey’s proposed amendment language closely parallels the language found in Pennsylvania’s Environmental Rights Amendment, and is enhanced with clarifying language borne out of judicial decisions interpreting and implementing the Pennsylvania provision. Therefore, NJ’s proposed language is actually more clear (as opposed to vague) than what is found in both Pennsylvania and Montana. Given the closeness to Pennsylvania’s language, in addition to looking to standard legal principles of interpretation, we can look to the interpretation and application of Pennsylvania’s Green Amendment to guide our understanding of New Jersey’s Green Amendment proposal.

As is the case with other fundamental rights protections articulated in the Bill of Rights/Declaration of Rights section of the New Jersey Constitution, and as is the case with the Pennsylvania amendment, the NJ Green Amendment, is first and foremost, a *limitation* on government authority. Therefore, it is unlikely there would be a successful legal action for the government to undertake a specific task, tax, action or activity; instead the focus will be on preventing specific actions (inactions) that are resulting in an infringement of the right, and to the degree that action is necessary to protect the right the courts will not require a specific act – e.g. a specific tax – it will simply compel that action be taken (as opposed to specific action be taken) which protects, conserves, maintains the rights and resources enumerated.

The trustee language in the proposed Green Amendment actually provides important and helpful legal guidance and reduces vagueness. Everyone knows what the duties of a trustee are. 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. The combination of the constitutional right of each person to a clean and healthy environment; complemented by the government’s fiduciary duty as a trustee of public natural resources to treat all beneficiaries – including both present and future generations – equitably does put in place a strong obligation to consider the ramifications of government action and decision-making on future generations. But the mandate to protect the rights of all communities and all generations does, by its terms, require protection of present generations

as much as it requires protection of future generations – this necessarily requires a balancing of benefits and impacts, and an obligation to ensure that government does not act in a way that sacrifices one community or one generation for the benefit of another.

As with other areas of law, the courts are obliged to consider impacts, to balance rights, and to ensure equal justice under the law for all. The NJ Supreme Court and all inferior courts are as well equipped to handle this judicial obligation in the environmental rights context as they are to handle this obligation in every other constitutional, legislative, or private dispute context. In fact recently, the Attorney General and its client, NJDEP, have begun bringing enforcement proceedings against individuals or entities that have missed cleanup deadlines, in municipal court, and a recent decision from the Appellate Division has confirmed that municipal courts now have jurisdiction to hear these environmental disputes, just as municipal courts decide every day, like the trial division of the Superior Court, important rights such as due process, speech, assembly, speedy trial, etc. The proposed amendment recognizing a personal right to a healthy environment is as detailed or more detailed as other statements of fundamental rights and the courts are well equipped to apply constitutional and other principles of statutory and common law to interpret and protect these rights.

#### **11. How can the State be the trustee of the climate, when the climate does not know State or national borders?**

Rights enumerated in the Bill of Rights/Declaration of Rights are inalienable rights that the people reserved unto themselves to be protected from government infringement by direct action or through the acts of third parties. Just as with other fundamental freedoms in the Bill of Rights/Declaration 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. Each state is bound to take what action it can to respect and protect the environmental rights of the people within its jurisdiction, to ensure that its actions or activities do not result in infringement, but they are not duty bound (nor are they necessarily able) to take or prevent actions outside of their jurisdictional boundaries (e.g. state borders) in order to address/prevent infringement in other jurisdictions (e.g. states).

For example, the constitutional right to due process means government officials can and should fulfill their obligation to ensure their own laws/actions/decisions within their own jurisdictions (state) do not infringe on the constitutional rights to due process and to be free from illegal searches and seizures. The same goes for the environment – when included in the Bill of Rights/Declaration of Rights section of the state constitution, government officials are prohibited from undertaking actions/activities/laws that will infringe upon these rights are directly or through the actions of third parties within their jurisdictional boundaries; the fact that they do not directly control actions of persons outside of their state jurisdictional reach that may have an impact on these rights in no way changes their own constitutional obligation within the state.



**12. Can the NJ Green Amendment be forced to require the Legislature to increase funding for the maintenance of state parks? As trustee of the fauna, can the State still have a bear hunt? Can the DEP still permit hunting of any kind?**

It is important to think about these issues in the context of the constitutional rights of the people and the duty of the government to act as trustee. Again, the amendment language puts in place an obligation to not infringe on the constitutional rights of the people and to conserve and maintain the public's natural resources in a way that treats all beneficiaries equitably. Park users do not have a constitutional right to a specific level of funding for parks, or even to preclude hunting. While there is a duty to maintain the natural resources of the state there are many ways to accomplish that with funding being just one, so it should not be presumed that a court would seek to use the Green Amendment to infringe on the Legislature's budgeting authority and obligation, on the other hand, as in Pennsylvania, it may be used to prevent the Legislature from usurping funds that were specifically created by the legislature in order to protect the natural resources of the state for the benefit of all the people.

When considering hunting and impacts on natural resources and rights, there is the obligation to protect the rights of all the people equitably, and therefore it should not be assumed that the constitution will be interpreted in a way that forces one community to forego their rights for the benefit of another. There will be interpretation and balancing – to this end, both the language of the constitution and the implementation of similar language in Pennsylvania and Montana can provide solid guidance. When we look to Pennsylvania and Montana we can see that the courts have used the constitutional Green Amendments judiciously and thoughtfully in ways genuinely focused on protecting environmental rights as opposed to trying to stretch the provision or language to reach beyond the bounds of the reasonable and sensible.

**13. Is this NJ Green Amendment language broader than that of Pennsylvania?**

The NJ Green Amendment language is not broader than Pennsylvania's language, it is clearer. New Jersey's proposed amendment language closely parallels the language found in Pennsylvania's Environmental Rights Amendment, but is enhanced with clarifying language borne out of judicial decisions interpreting and implementing the Pennsylvania provision. Where in Pennsylvania the self-executing nature of the amendment was clarified by the court's in New Jersey it is specifically stated in the amendment. While in Pennsylvania the amendment was determined by the courts to apply to inaction as well as action, in New Jersey we offer that clarifying information within the body of the amendment. While in Pennsylvania the court's made clear the provision was deemed a restraint on government authority, not a grant of authority, in New Jersey's provision there is language to support that interpretation. While in Pennsylvania there is no mention of the public trust doctrine, given the importance of that doctrine in certain contexts of New Jersey law, the amendment specifically notes the ongoing importance of the public trust doctrine in the state.