



A Hawaii Green Constitutional Amendment Frequently Asked Questions & The Answers

Proposed Hawaii Green Amendment Language:

Article I of the Constitution of the State of Hawaii is amended by adding a new section as follows:

ENVIRONMENTAL RIGHTS

All people have an inherent and inalienable right to clean water and air and health* ecosystems, including climate, flora, fauna and soil, and to the preservation of the natural, cultural, scenic and healthful qualities of the environment. These rights belong to both present and future generations. The State and its subdivision shall protect and not infringe upon these rights.

**Note: should be "healthy"*

What is a Green Constitutional 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 a clean and healthy environment, including essentials like water, air, climate, flora, fauna, soils and ecosystems. They can also protect special values of the environment important to the values of the people of the state such as the natural, cultural, scenic and human health qualities of the environment. Green Amendments ensure environmental rights are given highest constitutional recognition and protection, on par with other fundamental rights such as speech, property and religious freedoms.

Doesn't Hawaii already have a constitutional Green Amendment?

While Hawaii has in place important environmental protections in its constitution as recognized and applied by the courts, the proposed Green Constitutional Amendment will help fill an important gap that will strengthen the goal of enforceable environmental rights.

Article XI, Section 1 establishes the state of Hawaii to be a trustee of the natural resources of the state to be protected for present and future generations. The courts have effectively interpreted this trustee obligation as providing important substantive and procedural protections. Generally, we recommend that Green Amendments include trust language along with protecting individual rights, but because that important legal obligation and recognition is already addressed in Hawaii it was not included in the Green Constitutional Amendment language being advanced.

The individual right to a clean and healthy environment found in Article XI, Section 9 is limited to those protections provided by legislation, rather than being a true right of, by and for the people. In

addition, its placement in Article XI versus Article 1 means it is not on par with other fundamental rights; and thereby can be subject to different legal standards of protection. While Article XI, Section 9 promises that “Each person has the right to a clean and healthful environment” that right is defined by the laws passed by state government. That dependence on legislation can subject environmental rights to the politics of the day, and can deny critical protections in those areas where the law is not strong enough or there is a gap in legislative protection – essentially the right is for the legislature to legislate, even if they do it poorly. By contrast, the Green Constitutional Amendment will put in place a self-executing right to a healthy environment that belongs to all the people of Hawaii and will ensure that environmental rights are to be protected by all levels of government and given the same strength and constitutional standing as other fundamental rights such as speech, religion, property, and civil rights.

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 their constitutional obligations – government officials cannot change or violate the constitution, they must honor and implement it. Passage of a Hawaii Green Amendment will ensure that every government official in the state will work to advance environmental protection at every level of the decisionmaking 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 (e.g. demonstrate standing or bring a constitutionally-based challenge) when their rights have been infringed upon by government action.

How does Article I protection of environmental rights make a difference?

Article I placement, as with other fundamental rights in the bill of rights, will ensure that government prioritize environmental protection and work to avoid environmental pollution and degradation as part of the decision-making process, when there is the best opportunity for preventing harm including (but not limited to) when crafting and implementing legislation and regulations, when issuing permits, approving development, and considering how to address ongoing environmental concerns.

Article I placement will help ensure that in those instances when government does knowingly infringe on environmental rights there is a compelling state interest and there has been a conscious effort to minimize the impacts on the right, i.e., minimize environmental harm.

Article 1 placement will ensure the right belongs to all people and must be protected equitably by all government officials at every level of government regardless of race, ethnicity, socioeconomics and geography, and may not consistently/repeatedly sacrifice the rights of one person or community for the benefit of others.

Placement in Article I ensures environmental rights are protected on par with other fundamental rights (e.g., speech, due process, property rights) and ensures fair balancing of

rights when needed. For example, if both property and environmental rights might be affected by government action then both must be considered, balanced and protected by the final outcome.

Why is a Green Amendment beneficial for environmental justice protection?

By recognizing environmental rights as individual rights that belong to all people, it becomes clear that government decisions and actions must 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.

If a Violation Is Found What Will Be The Remedy?

Violations of the HI 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 is declared invalid/void; a law that requires clean-up of a toxic site by responsible parties must be enforced.

How Will a HI Green Amendment Affect Government Decisionmaking and Activities?

A HI Green Amendment will provide broad guidance that ensures government decisionmaking - substantively and procedurally - 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; considers the protection of present and future generations; and considers science, facts and impacts as part of the decisionmaking process in order to fulfill the government's trust obligations. Because the HI Green Amendment is not limited to just the state legislature, as is the case with Article XI Section 9, it means that all levels of government and all government officials, including at the county and the state level, including elected officials as well as regulatory agencies, will have the obligation and opportunity to address environmental rights protections throughout the decisionmaking process, giving greater opportunity for successful environmental protection. When necessary, a HI 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 HI Green Amendment can help address community harms where there is a gap in existing law.

How can legislators be responsible for protecting the right to clean water and air or issues related to the 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. But 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, 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 in order to address/prevent infringement in or from other jurisdictions.

The language in the proposed amendment is appropriately broad.

Broad language is characteristic of protected Article I rights. The terms ‘clean water’, ‘clean air’, ‘healthy ecosystems’ are no less clear than the language in other Hawaii Bill of Rights provisions, e.g., the right to “peaceably to assemble”, the “right of the people to privacy”, the right to be free from “excessive bail”; these terms are all open to interpretation.

As with other language in the Bill of Rights, there is a well exercised and understood process for defining key terms as these:

- ⇒ definition will begin with the legislative and executive arms of government through passage of 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.

Hawaii’s government officials, courts and justices are well-equipped to define, interpret and apply constitutional environmental rights language using standard principles of legislative interpretation, constitutional law and trust law.

What states have Green Amendments currently?

Pennsylvania, Montana, and New York have constitutional language that fulfill the definition of a Green Amendment. (See the Green Amendment checklist at: https://www.forth generations.org/wp-content/uploads/2020/04/FTG_Checklist-2020-04.pdf). Cases that have interpreted and applied existing Green Amendments can be found at the resources tab of the www.NMGreenAmendment.org website.

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/Declaration of Rights is at issue, court review requires strict scrutiny, meaning that any demonstrated infringement can only withstand constitutional challenge if “the State establishes a compelling state interest and that its action is closely tailored to effectuate that interest and is the least onerous path that can be taken to achieve the State's objective.” (Montana Env'tl. Info. Ctr. v. Department of Env'tl. Quality, 1999 MT 248 (1999).)

How Are Green Amendments Affecting Environmental Protection in Pennsylvania, Montana and New York?

Green Amendments have been used by residents, township officials, administrative agencies, elected officials and organizations to: protect state government from enforcing well-testing that could contaminate an entire town’s drinking water supply with cancer causing toxins; prevent permitting for dangerous industrial gold mining operations that would decimate critical natural resources and contaminate highly prized river systems recreationally and economically important, including resources important to Yellowstone National Park; ensure agency action to secure responsible industries cleanup a highly contaminated site with a spreading toxic pollution plume; prevent legislative overreach that usurped town zoning authority, infringed on residential homeowner expectations and rights, and put in place automatic waivers of environmental standards in the context of fracking operations; to support attorney general environmental enforcement actions; to support town council decisionmaking.