



Oregon's Constitutional Right to a Clean, Safe & Healthy Environment

(aka Oregon's version of a Green Amendment)

Frequently Asked Questions & Answers

What is special about Oregon's Proposed Constitutional Right to a Clean, Safe & Healthy Environment?

Not all constitutional environmental rights provisions are created equal. Many states have environmental rights amendments, but only 3 states in the U.S. have constitutional amendments that meet the Green Amendment definition. Green Amendments give environmental rights highest constitutional standing. Unlike other constitutional environmental rights provisions that relegate environmental rights to just good policy or empower state legislators to define the extent of the right, Green Amendments ensure that environmental rights are an entitlement of, and there are enforceable by, the people of the state when the people have determined that government officials, agencies and officers have failed to properly define or enforce the right.

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 environmental essentials of life such as clean water and air, thriving ecosystems, a safe climate, and healthy environments. Green Amendments serve as a check on government authority, and make clear government's duties, to equitably protect the environment for the benefit of all the people of the state regardless of race, ethnicity, socioeconomics, or generation. Oregon's provision, as proposed, meets the definition of a Green Amendment and therefore ensures the rights protected belong to, and can be enforceable by, the people of the state when government officials take action (or fail to act) in a way that infringes upon the right.

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 Oregon's proposed Constitutional Right to a Clean, Safe and Healthy Environment 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.

Oregon's proposed Constitutional Right to a Clean, Safe and Healthy Environment 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 environmental rights have been infringed upon by government action, inaction and/or activities.

Why is Oregon’s proposed Constitutional Right to a Clean, Safe and Healthy Environment 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. To ensure absolute clarity, the Oregon amendment explicitly requires equitable protection of environmental rights for all people and communities and ensures a duty to protect these rights for present and future generations.

Why does Oregon’s proposed Constitutional Right to a Clean, Safe and Healthy Environment 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, safe and healthy environment; “Equitable” recognizes the different and disparate existing conditions of communities when comes to accessing or enjoying healthy environments. “Equitable” protection 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. Utilizing the term “equitable” recognizes that some individuals and communities do not have the same access to legal resources, money and political power as others. Equity 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. By ensuring an obligation for “equitable” protection, the Oregon amendment will require that government take a particular community’s history of pollution, environmental degradation, discrimination and access to resources (natural, financial and political) into consideration when making and implementing actions and decisions that affect the environment and environmental rights. Mandating “equitable” protection will ensure that conscious actions and steps are taken to achieve fair access to, and benefits from, clean, safe and healthy environments and the many benefits they provide. By ensuring those who pursue environmental rights legal claims successfully are entitled to the costs of litigation (including attorney and expert witness fees) the amendment is strengthening the ability of historically marginalized communities to access legal representation and resources and thereby to secure the equitable environmental protection the constitutional amendment entitles them to.

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

Violations of the Oregon Constitutional Right to a Clean, Safe and Healthy Environment 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 until/unless the constitutional infirmity is remedied; a law that requires clean-up of a toxic site by responsible parties must be enforced. The amendment is specifically written so the redress will not take the form of money damage payouts but will ensure the harm that is impacting individuals/communities is remedied.

Allowing those who successfully pursue environmental rights legal claims to be awarded the costs of litigation (including attorney and expert witness fees) does not provide an economic windfall to prevailing parties awarded such fees. Allowing successful plaintiffs to secure return of the funds they invested to pursue an environmental rights claim simply allows them to be made whole, and ensures they are not forced to bear the burden of both the harms caused by the violation and the costs of securing the protection and rights the constitution entitles them to. This award of litigation costs to prevailing parties is also a

benefit to all the people of Oregon. Litigation is costly. Often those most harmed by environmental rights violations are those least able to bear the financial burden of defending themselves. When environmental rights violations are left unaddressed, the circle of harms transcends just those most directly impacted – often the impact can reverberate across the landscape, across communities and across generations. Allowing frontline communities to be alleviated of the significant cost burden of seeking to protect their environmental rights strengthens their ability to pursue such claims. When successful actions are pursued, all those who are impacted by the violation – not just the plaintiffs in the case – are benefitted; and the precedent that is set by the case can provide further protection for other communities by preventing a replay of the violation in other communities and contexts.

How Will Oregon’s proposed Constitutional Right to a Clean, Safe and Healthy Environment Affect Government Decision-Making and Activities?

A proposed Oregon amendment will provide critical guidance that ensures state, county and municipal government decision-making - 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; ensures consideration of cumulative impacts over time (i.e. generational protection); 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 constitutional obligations. The amendment will ensure environmental rights protection is a priority for all government officials, including the courts, including when there are competing interests at stake – government decisionmakers will not be able to simply set aside environmental considerations and protections, without consideration, explanation or limitation. When all else fails, the Oregon amendment will provide a backstop that can be used by community, public, government and even business interests to provide a check on government authority that overreaches and fails to protect environmental rights. In addition, because it is self-executing, the amendment can help address community harms that have not been addressed by existing legislation, regulation or government action. The OR amendment will encourage sustainable, environmentally protective, and innovative development, industry, and business growth that benefits all the people of Oregon.

How can Government be Responsible for Protecting the Right to Clean Water and Air, or a Safe Climate When These are not Entirely within the Control of any One State or Governmental Jurisdiction?

Rights enumerated in the constitution’s Bill of Rights are inalienable rights reserved by the people to be protected absolutely. Provisions in this section of the constitution are inalienable, human rights that the people of the state are not ceding to the government for unilateral control, but instead are making clear that these are fundamental rights to be protected from infringement as the result of direct government action, a failure of government to act, or actions by third parties that government has empowered or allowed.

With the passage of Green Amendment constitutional protections, government officials within the state are obligated to respect and protect the enumerated environmental rights of the people within their jurisdiction, and to ensure that their government actions or activities do not cause or contribute to infringement of these rights.

The Bill of Rights obligation requires that government officials ensure that their actions protect, and do not infringe upon, the protected rights; it does not create an obligation on the government to act beyond its authority. Therefore, just as with other rights in the Bill of Rights, government will now have a duty to take appropriate actions to protect the enumerated environmental rights within its jurisdiction and to ensure that its own actions do not induce, exacerbate, cause, contribute to or allow for infringement. In the context of environmental rights, government officials will need to ensure they give full consideration to

the impacts of their proposed actions on environmental rights and will need to ensure that their actions – or omissions – do not result in infringement.

Furthermore, just as government officials in one state or jurisdiction 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. For example, while government officials in Oregon cannot – by virtue of state laws or the constitution – prevent Washington from dumping so much pollution into the Columbia River it infringes on an Oregon constitutional right to clean water – Oregon legislators and regulators can ensure that their own government actions do not allow water pollution at levels that would violate environmental rights. The same principle holds true for impacts to air, climate, biodiversity, ecosystems and the overall environment.

In summary, the constitutional right creates an obligation on government officials with respect to their own actions and constituents. It does not grant Oregon government officials an overarching authority to address actions outside of its jurisdiction or control.

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 here: tinyurl.com/GAFTGChecklist). Cases that have interpreted and applied existing Green Amendments can be found at the resources tab of the www.ORGGreenAmendment.org website.

How will Terms like ‘Clean’, ‘Healthy’, ‘Thriving’ be Defined?

The broad language in the proposed amendment is characteristic of Oregon Article I Bill of Rights language. The terms ‘*clean*’, ‘*healthy*’ or ‘*thriving*’ are no less clear than the right to worship according to “*the dictates of one’s own conscience*”, be free from “*unreasonable search, or seizure*”, the right to “*speak, write or print freely*”, the right to be protected from “*excessive fines*”, the guarantee that private property shall not be taken for “*public use*” without “*just compensation*” – all of these, on their face, are broad and in need of additional definition. This overarching language ensures the amendment 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 environmental rights guaranteed in the Oregon Right to a Clean, Safe & Healthy Environment. As with other Article I rights:

- ✓ 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.
- ✓ Legislation, regulations, policies, and programs will be applied in context – for example through the issuance of a permit determining exactly how a particular regulation applies to a particular facility in a particular location.
- ✓ 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.

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?

As written, the Oregon amendment can help remedy constitutional violations that were created by past action but are being left unaddressed in the present. For example, when a permit is renewed that will allow the perpetuation of pollution discharges so severe they result in a constitutional violation, that permitting decision made today should be guided by, and protective of, the constitutional environmental rights protected in the amendment.

Will the Proposed OR 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 Oregon, 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. Oregon, like all states, have standards of conduct with serious ramifications for violation, that prevent lawyers from pursuing frivolous lawsuits. Notably, in PA, MT and NY, the three states with similar amendments, there are zero constitutional environmental rights claims dismissed by a court as frivolous.

Will the Proposed Oregon Right to a Clean, Safe & Healthy Environment Over-Extend or Overwhelm the State Budget?

By its terms the proposed constitutional language is not calling for outlays of government funds to address environmental issues. 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 OR Green Amendment will protect state, county and local government budgets and people.

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.