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The Negative Impacts of the Proposed Green Amendment in New Mexico on Renewable Energy Development

In recent years, legislators have introduced resolutions to amend the New Mexico Constitution to include certain new environmental rights. This amendment is commonly referred to as the "Green Amendment."

The proposed Green Amendment would add a new section to the New Mexico Bill of Rights that creates an entitlement "to clean and healthy air, water, soil and environment; a stable climate; and self-sustaining ecosystems" and obligates the state to "protect these rights equitable for all people." It also would require the state, counties, and municipalities to "serve as trustees" for the state's natural resources and to "conserve, protect and maintain" those resources for present and future generations. Finally, the Green Amendment would delete existing Article XX, Section 21 of the Constitution regarding pollution control.

Although the goals of achieving a clean and healthy environment and a stable climate are laudable, the Green Amendment would not serve these goals. The proposed Green Amendment provides no explanation as to how aspirations of a clean and healthy environment, self-sustaining ecosystems, and a stable climate would be achieved. As a result, the Green Amendment would having a chilling effect on renewable energy development by creating uncertainty as to the standards that apply to renewable energy projects and by opening the door for anti-renewable interests to bring legal challenges against such projects. For those reasons, New Mexico should not adopt the proposed Green Amendment.

I. Executive Summary

The proposed Green Amendment establishes new constitutional rights and obligations that are too broadly worded to be understood or implemented. If adopted, the amendment would leave governments and private parties guessing: What actions are state and local governments required to take to protect people's right to a "stable climate"? What is promised by the right to "self-sustaining ecosystems"? If a county approves a land use permit for a solar project, and construction of the project disrupts native vegetation, does that violate the new right to "self-sustaining ecosystem"? Rather than addressing complicated environmental issues through detailed and thoughtful legislation and regulations, the Green Amendment kicks them to the courts to be resolved through litigation.

To be sure, courts are regularly tasked with interpreting constitutional rights. But the scope of existing constitutional rights, such as the freedom of speech, do not require the scientific expertise and difficult policy choices necessary to define environmental standards, such as a clean and healthy environment, stable climate, and self-sustaining ecosystems. Instead of helping attain those standards, the Green Amendment opens the door wide for lawsuits to fight over their meaning.

This will create costs for state regulators and local governments—who must defend against such lawsuits—and will discourage or halt needed projects such as renewable energy facilities. These effects have been observed in other states with environmental rights amendments. Further, history shows that anti-renewable interests will latch on to open-ended standards, like those in the Green Amendment, to bring challenges against renewable energy projects. Ultimately, this creates the opposite effect from that intended by the Green Amendment; i.e., it further slows the deployment of renewable energy and harms New Mexico's ability to make progress toward a stable climate.

II. The Broad and Ambiguous Standards of the Green Amendment Would Create Significant Legal Uncertainty and Risk and Lead to Unnecessary Delay and Litigation

The scope of rights and prohibitions in the proposed Green Amendment are so broad that it is impossible to prospectively determine what they mean. Absent legislation, the meaning of these terms can only be decided by courts through litigation. This creates considerable uncertainty for renewable energy companies and regulators in the development and permitting process for renewable energy projects, which leads to unnecessary expense and delay that can jeopardize project success. It also invites project opponents to capitalize on this uncertainty in legal challenges to renewable energy projects.

Even among reasonable minds, the following terms in the Green Amendment can be interpreted multiple ways:

- "clean and healthy air, water, soil and environment"
- "stable climate"
- "self-sustaining ecosystem"
- "equitable for all people"
- "natural resources"
- "conserve, protect, and maintain . . . [for] present and future generations"

Take a simple term—"natural resources." What is included in the definition of "natural resources," besides the air, water and soil referred to in the text? Some may expect natural resources to include materials that may be used for economic production or consumption, such as minerals and forests. Others may define natural resources more broadly, to include natural assets such as biodiversity or scenic or aesthetic values. Similarly, is the term "environment" limited to outdoor environments only, or does it include indoor environments? Montana courts have had to consider this issue in the context of that state's constitutional right to a "clean and healthful environment."[1]

"Clean" and "healthy" provide even more difficult examples. And the dictionary is no help. Merriam-Webster defines "clean" as "free from dirt or pollution." No reasonable person would apply this definition to the Green Amendment, however, since it would be impossible to implement a zero-percent pollution standard for the state's air and water. Instead, the term "clean" requires a technical definition, since it depends, to some extent, on the technological state of the science of purification. Likewise, the meanings of "clean" and "healthy" require value choices. What is "clean and healthy" for one person may not be for another. For example, would "clean and healthy" air be measured based on every citizen, including those highly sensitive to pollution, or the average citizen?

These simple examples illustrate that, if the Green Amendment were adopted, further interpretation would be necessary to translate the amendment into legally enforceable principles. Until courts interpret the Green Amendment, neither government decisionmakers nor private entities could accurately guess at what it requires, leading to incredible inefficiencies, uncertainty, and legal risk in the context of renewable energy development.

[1] *See Netzer Law Office, P.C. v. State*, 410 Mont. 513, 522 (Mont. 2022) (reviewing district court decision as to whether the term "environment" in Montana Constitution includes indoor environments).

III. Existing Environmental Statutes Do Not Resolve the Uncertainty and Legal Risk

Proponents of the Green Amendment claim that concerns about how to interpret the amendment's broad terms are much ado about nothing. They say that courts will simply look to existing environmental statutes to determine whether a challenged action complies with the Green Amendment's mandates.[2] But it is not at all clear that compliance with existing laws creates such a safe harbor.

First, the Green Amendment does not define its terms by reference to existing laws. This is in contrast to the Hawaii Constitution, which provides that: "[e]ach person has the right to a clean and healthful environment, *as defined by laws relating to environmental quality* . . . ."[3] The Green Amendment does not define "clean and healthy" or any of its other standards based on existing environmental laws, and so a court interpreting the Green Amendment would not be required to do so.

Second, other states have rejected interpretations of their environmental rights amendments that determine constitutionality of an action based on compliance with existing environmental laws. Only three states—Montana, Pennsylvania and New York—have established the right to a clean environment in their bill of rights,[4] and New York did so only last year.[5] In the years since Pennsylvania and Montana adopted their environmental rights amendments, in 1971 and 1972 respectively, the tests applied by courts to interpret those amendments have constantly evolved and changed. For at least four decades, Pennsylvania courts applied a three-part test to evaluate the constitutionality of actions under the state's environmental rights amendment. The first prong of that test asked whether there was compliance with all applicable statutes and regulations relevant to the protection of the states' public natural resources.[6] In 2017, however, the Pennsylvania Supreme Court formally rejected the three-part test, holding that state environmental statutes cannot limit the right to judicial relief under the state's environmental rights amendment.[7] Thus, Pennsylvania courts have rejected the premise that compliance with environmental statutes determines compliance with the state's constitutional environmental rights amendment. New Mexico courts could easily reach the same conclusion.

Third, courts will be faced with situations where no environmental statue clearly applies or where multiple statutes are competing. Indeed, this is the main purpose of the Green Amendment according to its proponents—to "gap fill" in the absence of applicable state or federal law. In these cases, courts will be called upon to interpret the Green Amendment's requirements as a matter of first impression,

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[2] *Proposed Green Amendment: Fourth Meeting of the Radioactive & Hazardous Materials Comm.*, at 9:30 (Nov. 14, 2022) (statement of Sen. Antoinette Sedillo Lopez) ("[I]t was said that this is a vague amendment . . . in every single one of the cases [applying a state environmental rights amendment] where [the court] looks for standards . . . [the court] look[s] to state or federal law . . and [the court] enforces those laws and those provisions"); *House Joint Resolution 2: Hearing before the House Judiciary Comm.*, 2022 Leg., 55th Sess., at 6:30 (Feb. 11, 2022) (statement of Sen. Antoinette Sedillo Lopez) ("[C]lean water would be what is defined by state law, or even perhaps federal law, or if there was a local regulation . . . that is what the courts would always look to first . . . [courts] don't create new standards.").

[3] Haw. Const. art. XI, § 9 (emphasis added).

[4] Penn. Const. art. I, § 27; Mont. Const. art. II, § 3; N.Y. Const. art. 1, § 19.

[5] Other states, such as Hawaii, have provisions in their constitutions discussing environmental protections, but these provisions are not in the bill of rights.

[6] *Payne v. Kassab*, 312 A.2d 86, 94 (Pa. Commw. Ct. 1973), *aff'd* 361 A.2d 263 (Pa. 1976).

[7] *Pa. Envtl. Def. Found. v. Commonwealth*, 161 A.3d 911, 930 (Pa. 2017); *see also Robinson Twp. v. Commonwealth*, 83 A.3d 901, 966-67 (Pa. 2013) (plurality) (recognizing that "precedent has tended to define the broad constitutional rights in terms of compliance with various statutes and, as a result, to minimize the constitutional import of the Environmental Rights Amendment," which "has impeded efforts to develop a coherent environmental rights jurisprudence.").

resulting in uncertain outcomes, potential conflicting interpretations, and problems with judicial interpretation described in the next section.

Finally, it is entirely possible that well-crafted, long-standing provisions of existing environmental statutes would be found to be in conflict with the broadly worded rights under the Green Amendment. For instance, consider the entitlement to "self-sustaining ecosystems" created in the first section of the proposed Green Amendment. New Mexico's mining reclamation statutes require a mining closure plan to specify work to be done to "reclaim the physical environment . . . to a condition that allows for reestablishment of a self-sustaining ecosystem on the permit area following closure . . . unless conflicting with the post-mining land use[.]"[8] The requirement may be waived, however, if achieving a self-sustaining ecosystem is not technically or economically feasible, or if it is environmentally unsound, so long as the closure will comply with state and federal environmental protection laws. If the Green Amendment were adopted, compliance with this provision of the mining statutes would arguably be insufficient to demonstrate compliance with the unfettered constitutional right to a self-sustaining ecosystem in light of the statute's waiver.[9] Similar conflicts are likely to arise in other environmental statutes that allow for some environmental degradation that is inherent in any natural resources development project.

For those reasons, proponents are wrong in arguing that existing environmental statutes will provide the necessary interpretation of the Green Amendment. Where an existing statute is on point, a court may (if it chooses) look to that statute to interpret the Green Amendment. But nothing in the text of the Green Amendment requires courts to do so, and courts in other states have struck down tests that determine constitutionality based on compliance with existing statutes. Moreover, proponents' reasoning ignores one of the key functions of the Green Amendment—to establish environmental standards where none exist.

IV. Relying on Judicial Interpretation of the Green Amendment Would Cause Numerous Problems

Relying on courts to interpret the mandates and prohibitions of the broadly and vaguely worded Green Amendment would present innumerable difficulties, not only for the courts, but for regulators, government officials, private parties, and every other person or entity who would be attempting to understand the requirements of the Green Amendment. A few of these difficulties are described below.

A. Judicial interpretation would result in patchwork lawmaking

As an initial matter, judicial interpretation of the Green Amendment would result in patchwork lawmaking, whereby an opposer brings a lawsuit against a state or local government actor, and the court evaluates whether the specific challenged action satisfies the mandates of the Green Amendment, and the process is repeated for an infinite variety of actions that are made at all levels of state government, ranging from state agencies to municipalities. In the meantime, private and public actors cannot anticipate how the expansive standards of the Green Amendment will be applied or what the Green Amendment requires. This lack of clarity creates, among other problems, delays which can

[8] N.M. Stat. Ann. § 69-36-11(B)(3). Indeed, in a nationwide search of statutes, the term "self-sustaining ecosystem" seems to appear only in the context of mining reclamation.

[9] In fact, it is entirely possible, if not likely, that proponents of the Green Amendment would use that amendment to challenge the constitutionality of the mining statute and other environmental protection statutes that allow any environmental impacts. *Cf. Montana Envtl. Info. Ctr. v. Dep't of Envtl. Quality*, 988 P.2d 1239 (Mont. 1999) (holding that Montana's water quality statute, as applied, violated the constitutional right to a "clean and healthful environment").

compromise project development, particularly in the context of renewable energy development. Without a stable business environment or definite timelines for judicial action, renewable energy businesses' ability to seek financing would be compromised.

B. Courts lack the necessary technical expertise for this task

In addition to this undesirable piecemeal approach, judges lack the scientific and technical background to interpret and apply environmental standards like "stable climate" and "self-sustaining ecosystem." As one New Mexico court explained, "[a]s a court, we are hampered in this task [of interpreting an environmental standard] because we do not have technical expertise in hydrology, geology, or other applicable scientific topics."[10]

For the sake of example, let's return to the interpretation of "self-sustaining ecosystems." In 2021, the Mining and Minerals Division of the New Mexico Energy, Minerals and Natural Resources Department (EMNRD) published draft guidelines on the meaning of "self-sustaining ecosystems" in the context of mining closeout and reclamation plans.[11] Those draft guidelines discussed "self-sustaining ecosystems" in the context of reclaimed mined lands, including concepts such as "vegetative success," "life zone of the surrounding area," and "biological diversity" and established criteria for when and how EMNRD would apply the self-sustaining ecosystem standard to post-mining land use, including suggestions such as sampling for soil microbes, vegetation, and animal communities. EMNRD provided public notice of the guidelines, and commenters provided detailed feedback, including critique on the scientific reports referenced, questions regarding the meaning of certain terms in the draft guidelines, and suggestions for evaluating whether a self-sustaining ecosystem has been achieved.[12]

Compare the process utilized by EMNRD to the process a court would undertake to determine whether an action violates the entitlement to "self-sustaining ecosystems." Unlike EMNRD, a court does not have the benefit of technical expertise or scientific studies. Nor may a court utilize an iterative public notice and comment process, like the process used by EMNRD. Perhaps most importantly, while EMNRD was applying "self-sustaining ecosystem" in the narrow context of reclaimed mining lands, a court would be required to apply that term in a wide range of contexts, encompassing any action by a state or local government with potential to impact ecosystems. It is far from clear how a court would apply the highly technical concept of a "self-sustaining ecosystem" in those contexts.

C. Courts are not well equipped to make difficult environmental policy decisions

Judges are likewise not well positioned to make the policy choices needed to assign meaning to broad environmental standards. There is far less societal consensus on terms such as "stable climate" and "self-sustaining ecosystems" than rights such free speech and due process. Environmental policy—like economic policy, education policy, and most of social policy in general—is defined by hard choices and

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[10] *Phelps Dodge Tyrone, Inc. v. N.M. Water Quality Control Comm'n*, 143 P.3d 502, 511 (N.M. Ct. App. 2006); *see also State ex rel. Norvell v. Ariz. Pub. Serv. Co.*, 510 P.2d 98, 105 (N.M. 1973) (noting that it is unrealistic to assume that appellate judges can unravel complex issues, and therefore such matters are better left to agencies with special expertise).

[11] Mining and Minerals Division of the New Mexico Energy, Minerals and Natural Resources Department, *Self-Sustaining Ecosystem Guidelines: In the Context of the New Mexico Mining Act Rules* (Draft April 2021), https://www.emnrd.nm.gov/mmd/wp-content/uploads/sites/5/Combined-Public-Comments-on-SSE-Guideline.pdf.

[12] *See id.* (attaching public comments on the proposed guidelines that suggested, among other things, that the final Guidelines should include more detail on how the agency will evaluate the presence of wildlife in reclaimed areas).

complicated, multidimensional problems. Legislative and executive branches are better suited to make many decisions on these issues than the judges, who may not be held politically accountable and lack scientific expertise.

As an example of this policy concern, consider the application of this entitlement in the context of agriculture. In a committee hearing concerning the Green Amendment, one legislator inquired whether irrigated agriculture is "self-sustaining." The vast majority of New Mexico's crops require irrigation water (and lots of it) and could not be dryland farmed. So, if the New Mexico Office of the State Engineer were to issue a permit for water to irrigate crops, a court could easily be called upon to determine whether such a permit is inconsistent with the constitutional right to self-sustaining ecosystems, effectively requiring the court to make a policy judgment regarding the societal benefits of agriculture in New Mexico as compared to constitutional rights under the Green Amendment. As with the agriculture example, a lawsuit challenging a wind project could require a court to make policy judgments about the environmental impacts versus the environmental benefits of renewable energy under the guise of a constitutional challenge.

In sum, the Green Amendment would force courts to interpret broadly worded and ambiguous environmental standards, which judges would be challenged to do. This judicially created hodge-podge of environmental obligations and policy would result in a high level of uncertainty that would have a chilling effect on project development, including renewable energy projects.

V. The Green Amendment Would Place a Heavy Burden on State and Local Government

In addition to creating patchwork environmental policy, the Green Amendment would place a heavy burden on government decisionmakers, including local governing bodies. Proponents of the Green Amendment have insisted that all it will require is for government actors to *consider* the environment in their decision-making.[13] It is unclear how proponents have reached this conclusion, since it is not reflected in the proposed Green Amendment text. The Green Amendment would create rights "to clean and healthy air, water, soil and environment; a stable climate; and self-sustaining ecosystems" and provides that the "state *shall protect* those rights." (Emphasis added.)

For local governments, the Green Amendment would establish a new set of criteria that must be layered upon all local government decision-making—ranging from adoption of a new zoning ordinance to issuance of a land use permit. It also would create new grounds for challenges to such decision-making. These types of challenges are common under the environmental rights amendments in Montana and Pennsylvania, where constitutional obligations bind all government, state or local, concurrently.[14] Unfortunately, even in those states where similar green amendments have been in place for decades,

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[13] *Proposed Green Amendment: Fourth Meeting of the Radioactive & Hazardous Materials Comm.: Proposed Green Amendment*, at 9:29-9:30 (Nov. 14, 2022) (statement of Rep. Joanne J. Ferrary) (the proposed Green Amendment "makes so that [state and local governments must] *consider* the [environmental] impacts . . . just saying 'you have to consider what this does in a more meaningful manner'"); *id.* at 9:38 (statement of Rep. Joanne J. Ferrary) (in other states with environmental rights amendments, cases have "just pointed to the green amendment—they did not sue because of the green amendment").

[14] *See, e.g.*, *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 952 (Pa. 2013) (environmental rights amendment binds all levels of government, state and local, concurrently); *Clark Fork Coal. v. Mont. Dep't of Nat. Res. & Conservation*, 481 P.3d 198, 217 (Mont. 2021) ("The right to a clean and healthful environment is a fundamental right which government action may not infringe except as permissible under strict constitutional scrutiny.").

courts have observed that "[t]he precise duties imposed upon local governments by the [environmental rights amendment] are by no means clear."[15]

As one legal scholar noted:

> [When applying the environmental rights amendment in their state constitution,] [l]ocal governments struggle with the practical realities of how to assess environmental impacts alongside a host of other considerations, including landowner and community interests in using land. These struggles often take place under state enabling legislation that does not expressly address constitutional obligations, or may even undermine those obligations.[16]

Proponents of the Green Amendment say that there will be no added costs to state and local governments, because the Green Amendment does not allow for recovery of monetary damages.[17] This line of reasoning wholly disregards the substantial costs that would be incurred by governing bodies to (1) to determine the additional layers of environmental review required by the Green Amendment and to apply those layers of review and (2) to defend decisions against challenges brought in court based on the mandates in the Green Amendment.

Case law in Montana and Pennsylvania illustrates a parade of lawsuits brought against towns and counties based on the state's environmental rights amendment.[18] Contrary to claims by proponents of the Green Amendment, not all of actions are based on noble causes.[19] For example, in a Montana case, landowners argued that a county's creation of water and sewer district violated the landowners' right to a clean and healthful environment because the sewer district did not encompass the landowners' properties.[20] Importantly, even in cases when the local government's decision is upheld, the

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[15] *Frederick v. Allegheny Twp. Zoning Hearing Bd.*, 196 A.3d 677, 694 (Pa. Commw. Ct. 2018).

[16] Bryan Mudd, Michelle, *A "Constant and Difficult Task": Making Local Land Use Decisions in States with a Constitutional Right to a Healthful Environment*, 38 Ecology L.Q. 1, 4 (2011).

[17] *Proposed Green Amendment: Fourth Meeting of the Radioactive & Hazardous Materials Comm.*, at 9:20 (Nov. 14, 2022) (statement of Sen. Antoinette Sedillo Lopez) ("This amendment will not cost the state one dollar in damages."); *id.* at 9:27 (statement of Sen. Antoinette Sedillo Lopez) ("it is an incorrect narrative . . . that [the Green Amendment] will cost the state"); *id.* at 9:38 (statement of Sen. Antoinette Sedillo Lopez) (arguing that litigation costs are not a concern because "the state already has attorneys on its payroll to defend agency action").

[18] The following cases provide just a few examples of lawsuits challenging city or county land use decisions based on the state's environmental rights amendment: *Elliott v. Powell Cty. Planning Bd.*, 420 P.3d 511 (Mont. 2018) (challenge to conditional use permit); *Ravalli Cnty. v. Bitterroot Good Neighbors Coal.*, No. DV-06-260, 2006 Mont. Dist. LEXIS 843 (Mont. Dist. Ct. Oct. 27, 2006) (challenge to interim zoning decision)*; Swan Lakers v. Lake County Bd. of Comm'rs*, No. DV-05-143, 2007 Mont. Dist. LEXIS 750 (Mont. Dist. Ct. Oct. 9, 2007) (challenge to approval of a subdivision); *Citizens for a Better Flathead v. Bd. of County Comm'rs*, 381 P.3d 555 (Mont. 2016) (challenge to county growth policy); *Flathead Citizens for Quality Growth, Inc. v. Flathead Cty. Bd. of Adjustment*, 175 P.3d 282 (Mont. 2008) (challenge to conditional use permit); *Del. Riverkeeper Network v. Middlesex Twp. Zoning Hearing Bd.*, 215 A.3d 96 (Pa. Commw. Ct. 2019) (challenge to town ordinance); *Protect PT v. Penn Twp. Zoning Hearing Bd.*, 238 A.3d 530 (Pa. Commw. Ct. 2020) (challenge to special use permit); *Protect PT v. Penn Twp. Zoning Hearing Bd.*, 220 A.3d 1174 (Pa. Commw. Ct. 2019) (challenge to zoning ordinance); *In re Appeal of Andover Homeowners' Ass'n, Inc.*, 217 A.3d 906 (Pa. Commw. Ct. 2019) (challenge to permit).

[19] *Proposed Green Amendment: Fourth Meeting of the Radioactive & Hazardous Materials Comm.*, at 9:27 (Nov. 14, 2022) (statement of Sen. Antoinette Sedillo Lopez) ("I have read every single published case involving the Green Amendment. . . . [T]hey've all brought light on very important constitutional issues.").

[20] *Lohmeier v. Gallatin Cty.*, 135 P.3d 775 (Mont. 2008).

government is still on the hook for the attorneys' fees and costs necessary to defend against those challenges.

VI. The Green Amendment Would Open the Door for Litigation Challenges to Renewable Energy Projects

The Green Amendment likewise would open the door for new challenges to state and local government approvals of infrastructure projects, including renewable energy and transmission facilities.

Renewable energy and energy transmission projects are subject to project siting and environmental protection regulatory regimes just like other development and infrastructure projects. They are similarly subject to opposition in the form of litigation. Even when best practices are followed for siting and construction of renewable energy projects, environmental and aesthetic impacts can occur. For example, wind and solar projects can take up large areas and are often highly visible; wind turbines can impact avian species; and solar arrays can cover the habitat of desert species. These effects have "led to tensions within the environmental movement between the efforts to fight climate change and to protect biodiversity," and "[t]hese tensions have inevitably led to a large volume of litigation."[21]

In fact, opponents of renewable energy and transmission projects commonly rely on environmental and siting approval laws to block or delay such projects. One expert in the field observed: "it is clear that environmental law has been used as a pawn by some interests to impede renewable energy or make sure it is located 'somewhere else[.]'"[22]

Ambiguous environmental standards, like those in the proposed Green Amendment, would provide an easy legal hook to delay or stop renewable energy and transmission projects. Consider an example of wind energy facility that results in bat or bird fatalities. Opponents of the project could easily rely on those mortalities to file a lawsuit alleging a violation of the Green Amendment's provisions regarding "self-sustaining ecosystems" and the governments' obligation to "conserve" and "protect" the state's natural resources, despite the project's climate benefits. Even if the courts eventually rejected the opponents' arguments, the delay resulting from protracted litigation could be enough to kill the project.[23]

Indeed, environmental rights amendments have been used against renewable energy projects in other states. The Laurel Hill Wind Energy project in Pennsylvania provides an example. In that case, opponents used Pennsylvania's environmental rights amendment to try to stop a wind energy project.[24] The case concerned a challenge to a county zoning ordinance that allowed the use of wind energy facilities by

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[21] Michael Gerrard, *Legal Pathways for a Massive Increase in Utility-Scale Renewable Generation Capacity*, 47 Envtl. L. Rep. 10591 (2017).

[22] J.B. Ruhl & James Salzman, *What Happens When the Green New Deal Meets the Old Green Laws?,* 44 Vt. L. Rev. 693, 715-16 (2020).

[23] Even if litigation does not block a project directly, delay from litigation can block a project indirectly. Gerrard, *supra* note 17, at 10,591 ("Approval delays are costly in several ways. Construction costs may escalate. New technologies or requirements may compel a revision in designs, leading to further delays. Applicants may become so discouraged that they give up, or their financing may vanish, or local opposition to siting may grow. Lenders who require speedy returns may be deterred from engaging at all. During the years that a renewable facility is not yet operating, the energy needs it will fill may be provided by fossil fuel facilities that add to the cumulative load of greenhouse gases.").

[24] *Plaxton v. Lycoming Cty. Zoning Hearing Bd.*, 986 A.2d 199, 213 (Pa. Commw. Ct. 2009), *appeal denied* 8 A.3d 900 (Pa. 2010).

right in certain zoning districts. Opponents argued, among other issues, that the zoning ordinance denied them of their right to preservation of the natural and aesthetic values of the environment in violation of state's environmental rights amendment. The court ultimately rejected opponents' arguments, and the project was constructed, but not until after several years of litigation and associated litigation costs on behalf of the project operator and the county.

Interestingly, proponents of the Green Amendment argue, on one hand, that the amendment will not result in additional litigation, and, on the other hand, that the purpose of identifying the Green Amendment as "self-executing" is to make clear that private parties have the right to bring lawsuits based on its provisions.[25] As recently as 2007, the Montana Supreme Court had not even decided whether Montana's environmental rights amendment was self-executing.[26] Further, the recently enacted New Mexico Civil Rights Act may increase the likelihood of lawsuits brought under the Green Amendment, since the Act allows prevailing plaintiffs who show a violation of a right in the bill of rights to recover attorneys' fees.[27] All these factors suggest that proponents of the Green Amendment may have underestimated the litigation—including against renewable energy projects—likely to result from the Green Amendment.[28]

VII. The Green Amendment Would Not Address the Difficult Problem of Climate Change

Finally, proponents of the Green Amendment advocate its adoption as a tool to address climate change.[29] But the Green Amendment does not provide any workable solutions to the complex and urgent problem of climate change. It only creates potential hurdles for renewable energy development, which is a cornerstone of climate change mitigation strategy.

The most recent scientific studies conclude that climate change is already impacting every corner of the world, and much more severe impacts are in store if we fail to drastically reduce greenhouse gas (GHG) emissions.[30] And rapid deployment of renewable energy technology is key to achieving GHG emission

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[25] A constitutional provision is self-executing when it takes immediate effect and corresponding legislation is not necessary to enable individuals to assert a claim based on the provision. *State v. Rogers*, 247 P. 828, 831 (N.M. 1926). Said another way, a self-executing constitutional provision creates a legally enforceable right in and of itself.
[26] *Sunburst Sch. Dist. No. 2 v. Texaco, Inc.*, 165 P.3d 1079, 1093 (Mont. 2007) (declining to decide whether Montana Constitution article II, section 2 is self-executing).
[27] N.M. Stat. Ann. § 41-4A-5.
[28] Proponents of the proposed Green Amendment have asserted that no lawsuits have been filed under New York's newly enacted environmental rights amendment. *Proposed Green Amendment: Fourth Meeting of the Radioactive & Hazardous Materials Comm.: Proposed Green Amendment*, at 9:39 (Nov. 14, 2022) (statement of Rep. Joanne J. Ferrary). This statement is wrong. New York's environmental rights amendment, adopted in 2021, has already been invoked to challenge the operation of a landfill. *See Fresh Air for the Eastside, Inc. v. State of New York*, Index No. E2022000699 (N.Y. Sup. Ct. Monroe Co.), available at http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2022/20220128_docket-E2022000699-_complaint.pdf. It was also recently invoked to challenge a development project that, prior to adoption of New York's environmental rights amendment, had already been tied up in court for six years. *See* Verified Complaint for Declaratory and Injunctive Relief, *Councilmember Christopher Marte v. City of New York* (N.Y. Sup. Ct.), *available at* https://www.aaldef.org/uploads/221021_verified_complaint_against_two_bridges_final.pdf.
[29] *House Joint Resolution 2: Hearing before the House Judiciary Comm.*, 2022 Leg., 55th Sess., at 6:58 (Feb. 11, 2022) (statement of Sen. Antoinette Sedillio Lopez) ("Climate change is upon us. We should [pass the proposed Green Amendment] now.").
[30] Intergovernmental Panel on Climate Change, Climate Change 2022: Impacts, Adaption and Vulnerability, 8-28 (2022) [hereinafter, "2022 IPCC Report"] (summarizing climate change risks and adaptations).

reduction targets.[31] In 2022, the Intergovernmental Panel on Climate Change (IPCC) reported that all global modelled pathways that limit global warming to 2°C involve "rapid and deep and in most cases immediate GHG emission reductions" and the supply of almost all electricity from zero or low-carbon sources by 2050.[32]

As discussed above, the Green Amendment increases opportunities for anti-renewable interests to bring legal challenges against approvals required for renewable energy projects. History shows that opponents can be expected to use this hook to delay or halt development of renewable energy facilities. Such opposition fails to recognize that climate change itself will, of course, cause many species to go extinct.[33] The use of the Green Amendment to block renewable energy, however, ultimately undermines the energy transition needed to mitigate climate change and protect the resources that are at stake for the long term. Thus, the additional layer of environmental scrutiny established by the Green Amendment is at odds with the rapid pursuit of climate change mitigation.

VIII. Conclusion

In sum, the Green Amendment promises more than it delivers. Rather than securing environmental rights for the people of New Mexico, it would create uncertainty and would require parties to fight over those rights in courts. Rather than establishing sound environmental policy, it would result in scattered judicial decisions. Rather than mitigating climate change, it would create vulnerability for important climate solutions, including renewable energy projects, thereby slowing the deployment of needed renewable energy. For those reasons, New Mexico should not adopt the proposal for a Green Amendment.

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[31] *Id*. at 313 (renewable energy is a large and essential element of climate change mitigation); *id*. at 1129 ("Transitioning away from internal-combustion vehicles and fossil fuel-powered generating stations to renewable energy mitigates greenhouse gas emissions, improves air quality and lowers the risks of respiratory illnesses.").

[32] Intergovernmental Panel on Climate Change, Summary for Policymakers: Climate Change 2022 – Mitigation of Climate Change, SPM-32 (2022).

[33] 2022 IPCC Report, 9.