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To: New Mexico Legislature

By:

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Re:

The many values of the New Mexico Green Amendment for securing climate justice, environmental justice, and advancing clean and renewable energy in New Mexico; including addressing the false claims in the Holland and Hart memo.

The New Mexico Green Amendment Will Support Needed Progress Towards Clean Energy Solutions & a Just Energy Transition.

A legal memo written by Holland and Hart repeats the same tired and false tropes advanced by oil and gas industry opponents. Contrary to the false assertions advanced in the lobbyists' memo, the New Mexico Green Amendment will provide a strong foundation upon which to advance a just transition to clean and renewable energy in New Mexico while ensuring equitable environmental protection for all communities. Protecting our environment as a fundamental right that guides all government action will ensure New Mexico's people are healthier, its communities are safer, that New Mexico's economy is robust and sustainable, and that all New Mexicans can enjoy the stable and steady economic growth a healthy environment provides.

Recognizing the right of the people of New Mexico to a clean, safe and healthy environment, including a stable climate, and creating a trustee obligation with clear fiduciary obligations to engage in informed decision-making, equitable protection, and ensuring that protecting people is given priority in government decision-making will strengthen clean energy progress in the state.

Historically, New Mexico laws and governance have prioritized the oil and gas industry in government decision-making and permitting, and have done so in ways that sacrifice Black, Indigenous, People of Color (BIPOC) and low income communities' health in devastating ways. In contrast, NM's Green Amendment protections will place a priority focus on good government programs and decision-making that support a measured and just transition to clean and renewable energy. Furthermore, the conservative legal principles embraced by the Green Amendment language and constitutional Bill of Rights position complement our current system of governance that includes an irreplaceable role for all branches of government, including the judiciary, and is well suited for protecting the inalienable right of people to a clean, safe and healthy environment.

The New Mexico Green Amendment will be a powerful tool for advancing genuinely clean and renewable energy projects designed to equitably protect NM's natural resources, communities, and both present and future generations.

The NM Green Amendment has all of the elements essential for advancing appropriately sited, constructed and operated, clean and renewable energy projects in New Mexico that ensure all communities experience the environmental benefits of these projects, rather than allowing BIPOC and low income communities to continue to be disproportionately impacted. Recognizing that environmental degradation and climate change inflict human suffering, irreversible natural resources damage, economic harm, and generational harm still unfolding, *supporting truly clean and renewable energy is one of the best values of the amendment as proposed. New Mexico should not allow its people or environment to be exploited by entities that do not value our environment.*

By recognizing and protecting the rights of all New Mexicans to clean water and air, healthy ecosystems and environment, and a stable climate; and complementing this recognition of individual rights with a trustee obligation to protect the state's natural resources for present and future generations, the New Mexico Green Amendment incentivizes government support of clean and renewable energy projects, and actually prioritizes clean energy over the perpetuation and ongoing creation of new dirty energy projects. When legitimate claims arise regarding a proposed clean energy project proposal, the environmental entitlements of the people will help ensure projects advance with minimal environmental and economic disruption. Given the compelling state interest in addressing the climate crisis, including drought, flooding, wildfires, ecosystem, human health, environmental justice and environmental harms caused by climate disruption, it is disingenuous to view the recognition of constitutional environmental rights as an impediment to clean energy projects.

Among the specific outcomes with regard to the climate that may result from the NM Green Amendment:

- Government officials will be able to use the constitutional environmental obligations to support and defend proactive government action to advance clean energy projects that will provide good jobs;

- Existing laws, regulations, and authorities will now be interpreted, applied and utilized in ways that are beneficial for addressing climate disruption, to protect the environmental rights of the people and to help government fulfill its trustee obligation to protect the state's natural resources; thereby creating new and strengthened opportunities for advancing clean energy projects;
- There can be a pathway to check government action – e.g. legislation, regulation, permitting -- if it will unreasonably impair¹ the rights of people to a clean and healthy environment, including climate; thereby helping to keep the playing field level and clear for advancing clean energy rather than the current prioritization of fossil fuel development;
- Government will be incentivized to analyze climate impacts as part of all decision-making, thereby strengthening the obligation and opportunity for supporting clean energy, and disincentivizing climate disrupting actions and decisions;
- The obligation to protect the right of the people to a healthy environment, including climate, and the duty to protect natural resources equitably for all communities, including future generations, provides not just the framework, but the constitutional duty, to prioritize government initiatives and decisions that proactively support and advance well planned, sited, and implemented clean energy projects; and
- Recognizing that all energy projects will bring a level of environmental impact – positive and negative - the constitutional obligation to guarantee equity in the implementation of the constitutional right will ensure that the impacts and protections of such projects are equitably advanced across New Mexico's communities.

If a clean/renewable energy project is sited in a location where water pollution will inflict significant harm individually and/or cumulatively for an environmental justice community; where a species is placed in jeopardy of extinction; where the proposal calls for serious degradation such as massive tree clearing that cannot be defended scientifically, factually or legally; then there is potential for a meaningful constitutional claim to advance. In such situations rigorous judicial oversight is appropriate and should be embraced by good government officials as helpful to advancing a sound project that protects the environment overall, rather than as a negative because it may require a corporation or government regulators to undertake essential due diligence to ensure a cleaner and more environmentally sensitive project. New Mexicans deserve no less.

The NM courts are just 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.

¹ *Robinson Twp, Delaware Riverkeeper Network, et.al. v. Commonwealth*, 83 A.3d 901 (2013) at page 951, regarding the proper interpretation and application of Pennsylvania's Green Amendment.

How the NM Green Amendment will help secure a clean and healthy environment for the people of New Mexico is well defined in law.

The NM Green Amendment fills a gap in the New Mexico legal system that will, by its very constitutional nature, help to effectively deliver a clean and healthy environment. The failure to recognize environmental rights was an oversight of history that the people of the state are now seeking to remedy. The right to clean water and air, a stable climate and healthy environment are essential human rights, no less deserving of constitutional protection than other civil and political rights. Given that the state constitution is a document of, by, and for the people, it is most appropriate that they be given the opportunity to vote on its passage.

The passage of a constitutional entitlement to a clean and healthy environment does not displace or throw into disarray current environmental protections in New Mexico; to the contrary, it strengthens the system by providing constitutional guidance for how government officials can best carry forward their obligation to protect the environment their constituents deserve, need and are entitled to. It can also help to protect against attempts to dismantle important regulations that the Lujan Grisham administration has put into place. This is because state officials will have to consider and address the constitutional impact of dismantling the regulations which protect our air, land and water and cannot, for purely political gain or posturing, render them null and void through either rescission, or lack of meaningful interpretation or enforcement.²

As it is written, the NM Green Amendment proposal provides important substantive and procedural guidance to government officials that bring forth clear, meaningful, and enforceable requirements for government decisionmaking that guides and ensures protection of the constitutional right. For example:

Placement in the Bill of Rights section ensures the Green Amendment is a limitation on government authority, not an expansion. As with other rights embodied in the state Bill of Rights, the Green Amendment would have limits that benefit from the strict scrutiny legal standard - e.g. a compelling state interest that is well served by the proposed government action, and an outcome that minimizes government infringement on rights, when potential infringement may be anticipated.

The trustee obligation clarifies governmental actors' fiduciary duties of prudence, loyalty and impartiality, which complements and solidifies the obligation to make informed decisions and to treat all impacted people and communities equitably under the law. For centuries courts have successfully and effectively assessed the actions of trustees in a wide range of scenarios; including in the environmental context where the public trust doctrine and constitutional environmental trusts have supported a robust and well understood body of law. *See, e.g., Adobe Whitewater Club of NM v. NM State Game Comm'n*, 2022-NMSC-020 (interpreting the public trust doctrine to allow the

² Sanders Reed v. Martinez (Martinez administration reversed Richardson administration's environmental and climate change regulations within 7 months.)

public reasonable access to river beds for recreation and fishing); *State ex rel. Bliss v. Dority, et al.*, 1950-NMSC-066, ¶ 11 (public waters of New Mexico are owned by the state as trustee for the people).

Full and fair consideration of the ramifications of a decision as part of decision-making to ensure the best decision is made. Fulfilling the constitutional obligations articulated in the amendment legally requires government officials to consider foreseeable environmental consequences, relevant science, applicable facts, specific site operations, local environmental conditions, and cumulative impacts prior to government decisionmaking in order to ensure informed decisions, a focus on avoiding environmental harm, and to a decision that can withstand judicial scrutiny. These are the very same kinds of considerations required in many existing legal constructions, such as the National Environmental Policy Act, but with the caveat that the assessment is not merely procedural but must demonstrably inform the outcome so it cannot be deemed arbitrary, capricious, or not supported by substantive science, data, information and/or legal analysis.

The NM Green Amendment will reorient government decision-making so it is focused on an anti-degradation approach that will ensure scientific and data-driven consideration of the level of impact a particular natural resource can scientifically withstand without being degraded or depleted, will require an understanding of the pollutants/degradation already affecting natural resources, and a consideration of the ability of the environment to assimilate – or deal with – the anticipated/proposed pollutants/degradation. Anti-degradation regulatory approaches are nothing new – they have been used for over 40 years in environmental protection legislation, such as the federal Clean Water Act.

Environmental justice protections will become a priority part of decision-making, rather than an after-the-fact concern or consideration. The individual rights granted to all New Mexicans, coupled with the trust obligations of the government to protect the state’s natural resources, will prioritize environmental justice considerations and protections - a high priority goal of New Mexico government officials.

For attorney lobbyists to suggest that the carefully crafted language and its constitutional placement is devoid of clear and well understood standards of legal interpretation and application is simply wrong.

Moreover, the repeated assertion that courts are not competent to make legal determinations in the context of environmental rights is both absurd and disdainful of the role the judiciary plays in state government. New Mexico judges regularly make policy choices and balance divergent interests when interpreting the New Mexico Constitution. For example, when interpreting Article II, § 10 of the New Mexico Constitution, which guarantees the right of individuals to be free from unreasonable searches and seizures, courts must balance an individual’s right to privacy in their person and materials with the governmental interest in promoting crime prevention and detection. *State v. Tapia*, 2018-NMSC-017, ¶ 46 (citations omitted). Similarly, in interpreting Article II, § 17 of the state constitution, New Mexico

courts are regularly called upon to balance individuals' right to free speech with the government's legitimate interest in public safety, health, welfare, and preservation of natural beauty. *Stuckey's Stores, Inc. v. O'Chesky*, 1979-NMSC-060, ¶ 20.

The Green Amendment would not present a substantively different scenario. In evaluating a challenge to a renewable energy project, for example, courts would weigh the plaintiff's environmental rights against the government's legitimate interests in providing clean and affordable electricity that does not contribute to global climate disruption. Environmental impacts that are anticipated to infringe on the constitutional environmental right will require a compelling state interest to support that intrusion and a demonstration that the least intrusive means were utilized in support of the government action. Advancing clean and renewable energy projects that will protect the environment and help address the climate crisis is certainly a compelling state interest that can strengthen the determination of government decision-making advancing well designed and effective systems. To explicitly state that the New Mexico judiciary is incapable of weighing these competing interests ignores decades of constitutional jurisprudence.

The NM Green Amendment terminology is appropriate and in keeping with appropriate constitutional drafting.

The standards set forth in the NM Green Amendment as state policy are appropriately broad, and are no more vague than the language in other rights enumerated in the New Mexico Constitution's Bill of Rights. New Mexico courts have not balked at deciding what constitutes an "unreasonable" search or seizure and what constitutes "excessive" bail or fines in the context of Article II, § 13. Indeed, it is the core function of the judiciary to define the boundaries of constitutional rights based on the broad language approved by the people of New Mexico.

Utilizing appropriately broad language ensures the constitutional right and obligation serves as a guide for legislative, executive and judicial government action and does not seek to displace it. Just as it is impossible to imagine and address every instance regarding the Article II, § 6 right to bear arms, and so the legislature, the agencies, the executive branch, and the courts have all weighed in over the decades to offer clarity regarding the right, it is equally impossible to imagine every scenario involving the environment and the implications for human health and safety, BIPOC or low income communities, or natural resources; and so here too all branches of government have a role in defining and implementing the right. But the suggestion that the constitution is the place to lay out individual standards for siting of clean energy projects, their construction and/or operation; as well as standards for every other industry, site determination, emerging contaminant, or natural resource issue is absurd to say the least – such a dictate is not provided for gun rights, civil rights, property rights, victims' rights, speech rights, religious freedom rights or any of the other New Mexico fundamental entitlements; it would be similarly inappropriate to mandate this for the basic essentials of life like clean water, clean air, a stable climate and healthy environment.

In addition, the trustee language in the proposed NM Green Amendment provides important and helpful legal guidance and reduces vagueness. 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 the state's 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 the state's natural resources to protect all beneficiaries – including both present and future generations – equitably puts in place a strong obligation to consider the ramifications of government action and decision-making on future generations and to ensure protection of their climate rights.

The terms used in the NM Green Amendment are perfect for accomplishing the constitutional goal of ensuring all people have a protected right to the basic environmental essentials critical to healthy lives, healthy workers, a healthy economy, and for honoring our obligation to a safe future for our children and future generations.

It is cynical for opponents to suggest that words like “clean”, “healthy” or “stable” are neither clear nor understandable. Terms such as these are used throughout state and federal environmental protection laws. Do the opponents suggest that the NM Solid Waste Act, NMSA, Sec. 74-2-9(C) (to enhance the beauty and quality of the environment; conserve, recover and recycle resources; and protect the public health, safety and welfare); the Night Sky Protection Act, NMSA, Sec. 74-12-2 (the purpose of the Night Sky Protection Act is to regulate outdoor night lighting fixtures to preserve and enhance the state's dark sky while promoting safety, conserving energy and preserving the environment for astronomy); the NM Air Quality Control Act, NMSA, Sec. 74-2-5(A) (the environmental improvement board or the local board shall prevent or abate air pollution) are of no value because they use similar terminology that has to be defined by further government action? That is exactly what happens with constitutional terminology for all fundamental rights.

As with other constitutional rights, the legislature will use its inherent constitutional power to pass laws that regulatory agencies will then further refine, in order to define the constitutional right. The judiciary will only be involved when there is a challenge based on evidence supported concerns. The judiciary will instruct all involved whether the constitutional obligations have been achieved or the government actors involved need to take additional action to ensure the constitutional rights and obligations have been achieved. There is nothing unique about environmental rights, this is the same process used for all fundamental rights.

One of the irreplaceable values of the Green Amendment language is that it is self-executing, and as a result it is not simply defined by what the current legislative body or political process deems it to mean, but instead provides the overarching guidance and individual rights protections essential for addressing those scenarios when existing law or governance are unable or unwilling to address

a serious issue of environmental concern. Legislative, executive and judicial action will set helpful precedent that will advance an increasingly clear and cohesive body of law that prioritizes and protects the rights of people to a clean, safe and healthy environment while New Mexico's government officials advance the myriad priorities essential for the state.

We can see that across New Mexico there are many communities suffering from pollution and environmental degradation and as a result there is a need for a fundamental right to secure protections when the laws do not provide it for any number of reasons.

When government is taking action to address environmental concerns, as with other areas of law, it will be guided by existing state and federal law, scientific data, analysis, and cumulative impacts analysis, and information on ecological and health implications of the actions taken to ensure essential environmental sustainability, healthy ecological functioning and human health protections. When legal counsel is able to demonstrate that government has not acted to consider relevant science or facts, that the ramifications of the action at issue inflict pollution or environmental degradation results in ecological disruption or serious health consequences for people and communities, judges will be able to render a decision that requires the government actors at issue to revisit, revise, and address the constitutional concerns.

Having the judiciary weigh in to determine when government action overreaches and infringes on environmental rights will result in a growing and cohesive body of law and understanding regarding the environmental rights protections and the state's obligations for protecting natural resources. Just as with other bill of rights entitlements, every determination that is rendered, regardless of its outcome, will set precedent that will inform and strengthen every government action moving forward – those that are interpreting and applying existing New Mexico environmental laws as well as those interpreting and applying the constitutional right. Securing precedents over time that protect civil rights, the rights to free speech, private property rights, the right to bear arms and other fundamental entitlements did not result in a patchwork body of law; to the contrary each decision offered clarity and cohesiveness and understanding for all government action moving forward.

Looking to a state like Hawaii, is not sufficient. Hawaii, does not in fact create a fundamental right to a clean and healthy environment its provision simply restates the existing obligation and entitlement of state government to use its legislative authority and police powers to put in place environmental protections. Article XI, Section 9 of the Hawaii constitution is framed to acknowledge the rights and duties of state government to protect the environment, and the ability of people to enforce existing environmental protection laws, but it does not in fact recognize the inalienable rights of people to a clean and healthy environment ensuring that recognition of rights guides government action. Because Hawaii does not currently have a full Green Amendment, one has been proposed and is being pursued in the state.

It is un-American to suggest that the courts should have no role in overseeing government action by the legislative and/or executive branches of government. The NM Green Amendment will not displace the leadership role of the legislature, local government, the executive branch, or regulatory agencies; it simply embraces the proper inclusion of the judiciary to ensure the proper balance of power and protection of the fundamental rights of the people.

There is nothing radical about the proposition that the judiciary has a role to play in reviewing whether government action has infringed on a fundamental right - whether that right regards the environment or other fundamental freedoms. In fact, suggesting that it is inappropriate to allow the people of New Mexico to turn to their judiciary to address issues of constitutional and inalienable rights concern is itself a repudiation of our very system of law here in New Mexico and the United States.

New Mexico law, like U.S. law overall, is clear on the roles of each branch of government and puts forth clear criteria that guide when and how the judiciary should involve itself in constitutional questions of concern. It is absurd for anyone to suggest that the judiciary should play no oversight role in the arena of environmental rights; to do so, by extension, would mean that there is also no role for the judiciary when it comes to other, similarly broadly described, fundamental rights.

In fact, the role of the judiciary in the field of constitutional law is clear and applies equally effectively in the arena of environmental rights. As the U.S. Supreme Court has so clearly put forth:

“The idea that any legislature, state or federal, can conclusively determine for the people and for the courts that what it enacts in the form of law, or what it authorizes its agents to do, is consistent with the fundamental law, is in opposition to the theory of our institutions. The duty rests upon all courts, federal and state, when their jurisdiction is properly invoked, to see to it that no right secured by the supreme law of the land is impaired or destroyed by legislation. This function and duty of the judiciary distinguishes the American system from all other systems of government. The perpetuity of our institutions, and the liberty which is enjoyed under them, depend, in no small degree, upon the power given the judiciary to declare null and void all legislation that is clearly repugnant to the supreme law of the land.” *Smyth v. Ames*, 169 U.S. 466, 527-28 (1898)

The importance of scientific consideration in environmental decision-making does not negate the need for judicial oversight, nor does it render the courts unable to perform their judicial function. Courts in New Mexico have a long history of effectively reviewing environmental concerns; the introduction of constitutional protection does not suddenly render the NM judiciary impotent when it comes to environmental challenges.

The suggestion that because issues involving the environment include consideration of science and policy somehow should exempt the environment from constitutional inclusion and oversight is an absurd suggestion by NM Green Amendment opponents. The natural extension of this assertion is that the

courts should never have a role in any environmental oversight – legislative, regulatory, permitting, or otherwise.

In fact, the judicial system has a long history of effectively considering environmental claims in the courts around a wide variety of issues. There is nothing different about the courts being able to utilize their judicial oversight responsibilities in the constitutional context, versus when they consider legislation, regulation, permits or other issues involving the environment. The Courts have created guidance for ensuring that scientific claims constitute reliable evidence. See e.g. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); *Acosta v. Shell Western Exploration & Production, Inc.* (NM Supreme court)

The duty of government to address this compelling state interest, to protect future generations, and to honor its role in addressing climate impacts, will actually strengthen the hand of well designed, well sited, and effective renewable energy projects that will displace the ongoing reliance on dirty fossil fuels or destruction of ecosystems that help address climate issues such as healthy forests and well-functioning soil ecosystems.

The NM Green Amendment will not create uncertainty that will chill clean and renewable energy projects - there is simply no evidence of such an impact in any Green Amendment state. In fact, the amendment will do just the opposite, by emphasizing the obligation of government decision-making, policy making, permitting, determinations and programs that help alleviate the climate crisis and not exacerbate it.

There is nothing in the experience of Pennsylvania, Montana or New York to suggest that Green Amendment protections will do anything but support the strong and needed progress of clean and renewable energy projects. In fact, the memo submitted by Green Amendment opponents making this claim point to just a single case, brought over a decade ago. In fact, in that case, the government action to support and advance clean energy projects won the day. In this one cited case, the government action that supported advancement of clean energy was upheld due to both existing legal mandates and the constitutional environmental right, and actually supports the value of having a New Mexico Green Amendment that will similarly encourage and support clean and renewable energy.

In addition, the cited case demonstrates the expertise of the courts in navigating issues involving the environment, environmental rights, and the role of the legislative arm of government. The concluding paragraph upholding the challenged government action in support of wind energy reads:

“Moreover, in its decision here, the ZHB explained the zoning ordinance requires an applicant seeking to construct a wind energy facility to submit detailed information including, among other things, a site plan but also hydrologic and geologic analysis, land use impacts, transportation impacts, wildlife impacts, and community impacts. See Section

3230C.1(3) of the zoning ordinance. In addition, the zoning ordinance prescribes certain supplemental controls in the nature of performance criteria for the zoning administrator to apply through permitting, construction and operation. See Section 3230C.1(4) of the zoning ordinance. Further, the ordinance prohibits the construction of wind towers in any location mapped “Scenic Area” or any state-designated “Natural” or “Wild” area. Section 3230C.1(4)(e) of the zoning ordinance. ***Based on these provisions, the ZHB determined that the ordinance amendments adequately take into account environmental factors, including the environmental rights of the citizens of the Commonwealth.*** See F.F. Nos. 13–15, 20, 23; Concl. of Law. No. 10. No error is apparent in the ZHB's determinations.” *Plaxton v. Lycoming County Zoning Hearing Bd.*, 986 A.2d 199 (2009) (emphasis added)

The NM Green Amendment appropriately operates within the New Mexico legal and judicial system, offering the same overarching guidance and protections as other fundamental constitutional rights.

The New Mexico Green Amendment uses appropriately broad, but well understood terminology that, with appropriate legislative, executive and judicial government action, will provide the clarity essential for all impacted parties. The NM Green Amendment is not intended to, nor will it, alter the functions of NM’s government branches. It is a tool of equitable remedy to ensure the branches do what they should be doing in the public interest, squarely drawing from and resting within their police powers to protect and promote the People’s health, safety and well-being. It is a tool of government accountability, useful only when a government official or entity infringes on the rights of the People, causing harm to them or future generations that violates the high bar of protection the constitution provides.

The NM Green Amendment will, like other Bill of Rights entitlements, be subject to judicial strict scrutiny that will ensure the inalienable right is prioritized for protection, while at the same time, when appropriate, provide balancing to protect other fundamental freedoms that may be impacted.

It is understandable and a constitutional principle that all actors are entitled to sufficient notice of prohibited conduct. That notice and definition will, as we have discussed, be developed in the same way for environmental rights as other fundamental entitlements. Therefore, it is perplexing to hear opponents suggest that the broad language used in the NM Green Amendment renders the right unclear or unenforceable. Imagine the right to the free exercise of religion being thrown out because some could assert there are different meanings of the word, “religion.” Similarly, what if the freedom of speech was determined to be too vague, or that “press” was subject to multiple interpretations and therefore these fundamental rights were unworthy of constitutional recognition. Should the right to assemble or petition have been discarded because of the “significant legal uncertainty” it created when first put forth? Should the fact that the right to bear arms has been litigated for over a century be a reason in hindsight to not have the right at all?

To suggest that allowing the people of New Mexico to decide whether they want their inalienable human right protected by the state constitution is anything but positive is a slap in the face to the people of the state who are benefited by good government actions that protect the environment. It is tremendous value added for New Mexico's government leaders to allow the people of the state to determine whether to open an opportunity to check government action that sacrifices BIPOC and low income communities to disproportionate environmental harms; that allows a remedy for toxic soil contamination unaddressed by existing law; that will ensure people are drinking healthy water and breathing clean air that does not cause health harms, learning disabilities, or long term health consequences such as cancer; that will ensure that present and future generations can enjoy the irreplaceable benefits of healthy biodiversity and ecosystems including protection from floods, drought, agricultural losses or the irreplaceable values they provide; and that will allow New Mexicans to ensure government is supporting a robust and just transition to clean and renewable energy options and climate protecting environmental strategies.

The renewable energy industry could be one of the top beneficiaries of the New Mexico Green Amendment, as it helps to protect and promote the compelling government interest of fighting climate change against contrary statutes or regulations. Without it, permitting processes will be subject to political winds – which isn't good for business – renewable or otherwise. The NM Green Amendment will help ensure that all government action prioritizes effective and protective clean and renewable energy and that such projects are given heightened priority in their own right, as well as over and above projects, initiatives and actions that exacerbate the climate crisis.

Respectfully Submitted,

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For legislators interested in additional information, a helpful resource is: J.C. Dernbach, R.B. McKinstry, [Applying the Pennsylvania Environmental Rights Amendment Meaningfully to Climate Disruption](#), Widener University Commonwealth Law School Legal Studies Research Paper, Series no. 18-06

The following table provides point-to-point analysis of and response to each assertion in the memo. We welcome the opportunity to meet and discuss.

Table of Analysis: Holland & Hart memo of December 2022

Allegation	“Supporting Evidence”	Response (with Supporting Evidence)
<p>The Broad and Ambiguous Standards of the Green Amendment Would Create Significant Legal Uncertainty and Risk and Lead to Unnecessary Delay and Litigation</p>	<p>(None) (Just noting that courts might review and interpret the meaning of constitutional language, which is their purview is not evidence of a problem.)</p>	<p>The Green Amendment is not intended to replace the entire body of law and regulations relevant to environmental protection. The language has been carefully crafted to ensure the People of New Mexico have an effective and accessible tool to question authority when there’s sufficient evidence of improper, harmful government decisions – decisions that hurt the People of New Mexico. If government agencies, for example, missed the mark in how they interpreted any word or phrase in the amendment, the court will review the matter and require a remedy accordingly. Over time, and as the U.S. legal system has been intentionally designed, the jurisprudence of these issues will work its way toward properly balanced interests of all concerned.</p> <p>If the Legislature wishes to mitigate the uncertainty, it has the power to implement strong protections that will be abundantly clear and, importantly, in compliance with New Mexico’s constitutional environmental right.</p>
<p>Existing Environmental Statutes Do Not Resolve the Uncertainty and Legal Risk</p>	<p>(None)</p>	<p>See above. Statutes don’t have to, but they can provide greater certainty in clearly-constitutional standards. When the legislature fails to address and protect a constitutional entitlement, the courts can highlight that deficiency and mandate compliance with the constitution by mandating the government actors involved address the unconstitutional outcome that results – this can take the form of legislative action, regulatory action, etc.</p>
<p>The Green Amendment does not define its terms by reference to existing laws.</p>	<p>(None)</p>	<p>The Hawaii Constitution does not currently have a Green Amendment, as has been defined. The courts in Pennsylvania, Montana and New York, however, have proven to clearly counter this point with all branches of government undertaking their roles to ensure the rights are defined, understood and securing needed protections.</p>
<p>Other states have rejected interpretations of their environmental rights amendments that determine constitutionality of an action based on compliance with existing environmental laws.</p>	<p>(None) (Confusingly pointed to a Pennsylvania case in 2017 which rejected a three-part test which limited the right to judicial relief,</p>	<p>First, the Pennsylvania court in 2013, affirmed in 2017, wisely decided that statutes are not more powerful than its state constitution.</p> <p>Second, implementation of existing legislation and regulation has been unable to ensure all New Mexicans enjoy the benefits of clean and healthy water, air, soils, ecosystems and environments and in some instances, legislation might be non-existent to address a critical issue of concern. The People of New Mexico need and deserve a clear, constitutional “catch</p>

	equating that to a rejection of the premise that compliance with statutes is compliance with the constitution, and warning “New Mexico courts could easily reach the same conclusion.”)	all” to help fill in the gaps of environmental protection. Third, i New Mexico jurisprudence evolves and corrects over time, with each case offering helpful precedent and clarity; a constitutional entitlement provides a critical tool for New Mexico’s system of governance to ensure needed protections in every context.
Courts will be faced with situations where no environmental statute clearly applies or where multiple statutes are competing.	(None)	This hypothetical possibility ignores the role of courts in harmonizing statutory provisions and determining legislative intent. The Constitution will be a guidestar in interpreting the statutory conflicts to protect our air, land and water.
It is entirely possible that well-crafted, long-standing provisions of existing environmental statutes would be found to be in conflict with the...Green Amendment.	(None)	Yes. The constitutional, fundamental rights found in the Green Amendment would take priority over conflicting statutes or statutory provisions, as long-standing principles of statutory construction provide. When unconstitutional conflict is identified, appropriate government actors would be required to take steps to remedy the unconstitutional outcome Also, the authors failed to mention another long-standing aspect of strict scrutiny of fundamental rights in judicial review: NO RIGHT IS ABSOLUTE. (...or “unfettered.”) Courts are well-versed in applying the strict scrutiny standard of ensuring the harmful action or policy of inaction that is at issue serves a “compelling government interest through narrowly tailored means,” maintaining an overarching need to protect the fundamental right at issue. As Green Amendments are enacted throughout the country, courts will be creating tests and standards of analysis to provide legal frameworks to achieve this objective; again, through the natural development of jurisprudence on the matter. All constitutional rights are a balance of the right and other state interests.
Relying on Judicial Interpretation of the Green Amendment Would Cause Numerous Problems	(None)	“Difficulties” for “regulators, government officials, private parties, and every other person or entity who would be attempting to understand the requirements of the Green Amendment” are only found among those who value the profits saved by shifting the costs and burdens of externalities onto the New Mexico taxpayers, more than their lives, livelihoods and other liberty interests associated with a clean and healthy environment.

		<p>Yes, there is a paradigm shift here, and that may be uncomfortable for those who have been benefiting off the backs of the People of New Mexico, but the Green Amendment helps correct these systemic injustices. Arriving at governmental accountability will assuredly be a “problem” for some, but not for those who seek to truly serve the public interest.</p> <p>If a renewable energy development project does no harm to the environment, so much so as to infringe on the rights of the New Mexico people, it has nothing to worry about. If it does, the project managers should reconsider the details and remedy the problems it would be creating for New Mexico’s communities and environment.</p>
Judicial interpretation would result in patchwork lawmaking	(None)	Having the judiciary weigh in to determine when government action overreaches and infringes on environmental rights will result in a growing and cohesive body of law and understanding regarding the environmental rights protections and the state’s obligations for protecting natural resources.
Courts lack the necessary technical expertise for this task	(None)	No one should be fearful of normal court processes, both criminal and civil, where scientific expert testimonies and other evidence are presented and considered before arriving at a decision. Courts are well-versed in considering science-heavy environmental issues, in many areas of law, including constitutional. Lawyers are familiar with expert testimony and how to present and refute it.
Courts are not well equipped to make difficult environmental policy decisions	(None)	Contrary to the assertion, courts are well equipped to make legal determinations regarding fundamental rights based on the text of a constitutional amendment, legal principles and developing precedent.
The Green Amendment Would Place a Heavy Burden on State and Local Government	(None)	<p>See above regarding the notion of “burden,” costs, duty and priorities.</p> <p>In citing (arguably “cherry picking”) an excerpt written by “one legal scholar,” Michelle Bryan Mudd (FN16), the Holland & Hart memo authors fail to mention that the published piece actually calls for local governments to help fill the gap between the “constitutional right to a healthful environment and its regulatory implementation,” stating that “environmental rights cannot be fully protected without the strong engagement of local government.” She does not frown upon environmental rights amendments, nor does she believe them to be too burdensome, as the memo implies.</p> <p>Finally, the memo conflates cases with legitimate issues to litigate (those listed in FN18) with potential cases of a</p>

		frivolous nature or disjointed cause. The latter type is properly addressed through routine court processes (motions to dismiss, summary judgments, deterrence against frivolous claims, etc.) and not something to fear.
The Green Amendment Would Open the Door for Litigation Challenges to Renewable Energy Projects	(None)	<p>An argument that proposes certain industries should face no scrutiny or environmental impact analysis (nor threat of litigation for harming the public interest) is a poor argument.</p> <p>Courts will review the compelling government interest served (such as those furthered by renewable energy projects) and ensure the means have been narrowly tailored (causing the least amount of harm possible). Only if and when renewable energy projects unnecessarily cause harm to the environment, to the extent where they infringe on the rights of the People of New Mexico, will an issue be subject for litigation under the Green Amendment. If an unconstitutional infringement is identified, the court will mandate a remedy to be crafted by the government actors who caused/allowed the infringement as mandated by constitutional law.</p> <p>Ironically, the renewable energy industry could be one of the top beneficiaries of the Green Amendment, as it helps to protect and promote the compelling government interest of fighting climate change against contrary statutes or regulations. Without it, permitting processes could be subject to political winds – which isn’t good for business.</p>
The Green Amendment Would Not Address the Difficult Problem of Climate Change	(None)	<p>While certainly there are other actors and contributors to climate change that need to be addressed, the NM Green Amendment will ensure that New Mexico government officials do their part to help prevent, address and correct decisions that can contribute and/or exacerbate the climate crisis. Just as the climate crisis has been caused by cumulative impacts from numerous sources, including government decisions and actions, the solution also lies in the cumulative benefits of actions and decisions that are responding to the crisis. It is immoral to suggest that just because New Mexico cannot alone address the ravages of the climate crisis that therefore the state should not do all it can to address its part of this growing existential crisis for present and future generations.</p>