

## Nature Deserves Rights, Too: The Case for a 'Rights of Nature' Constitutional Amendment

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# NATURE DESERVES RIGHTS, TOO: THE CASE FOR A ‘RIGHTS OF NATURE’ CONSTITUTIONAL AMENDMENT

MICHELLE MANDLER\*

## INTRODUCTION

Picture this: Every day, millions of Americans enjoy the great outdoors. People of all ages dive into cool, blue oceans and babbling rivers across the United States. Others visit local and National parks, hiking steep mountains and running through green fields sprinkled with tall trees and sweet-smelling flowers in every color. They pick and snack on apples and berries along their paths, breathing in the crisp outdoor air. Birds soar overhead. Insects buzz and flutter through the breeze. Sunshine gleams down upon the earth.

Now, picture this: The surrounding environment is actually deteriorating—silently suffering—and harming these people all the while. The waters are polluted with gas and oil fuel from boats. The foliage is covered with herbicides and pesticides. The “crisp” outdoor air is filled with smoke and smog from factories and motor vehicles. The animals become sickened. The sun’s rays continually overheat the earth. The cause of this destruction: humans.

The environment suffers every day as a result of human actions, and humans alike suffer from our own destructive tendencies. Air is polluted from human actions like driving cars<sup>1</sup> and operating

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\* Thank you to Rosa Castello, Professor of Law at St. John's University, for all of her appreciated suggestions, edits, and time throughout the note-writing process. And thank you to my wonderful family for their unconditional encouragement and support. I love them more than they know.

<sup>1</sup> See Janvier Gasana, Deepa Dillikar, Angelico Mendy, Erick Forno, & Edgar Ramos Vieira, *Motor Vehicle Air Pollution and Asthma in Children: A Meta-Analysis*, 117 ENVTL. RES. 36, 36 (2012).

fossil fuel-burning power plants;<sup>2</sup> breathing in that polluted air leads to lung diseases like asthma.<sup>3</sup> Water is polluted from human actions like hydraulic fracturing (commonly known as fracking<sup>4</sup>) and dumping chemicals; drinking polluted water leads to cancers.<sup>5</sup> Humans and the environment are not separate. They are intertwined. We are a part of nature and rely on nature to exist.

Environmental problems are not new.<sup>6</sup> But the environment has been evolving into a deeply partisan issue since the 1980s.<sup>7</sup> Democrats primarily believe that environmental problems exist and are harmful while Republicans tend to not believe or care that environmental problems exist.<sup>8</sup> This polarization has even made

<sup>2</sup> See Allison S. Larr & Matthew Neidell, *Pollution and Climate Change*, 26 THE FUTURE OF CHILD 93, 93 (2016) (finding that “[f]ossil fuel-burning power plants . . . emit high levels of nitrogen dioxide and sulfur dioxide, which play a role in forming ozone and particulate matter” in the air that leads to lung diseases such as asthma).

<sup>3</sup> See Gasana et al., *supra* note 1, at 36.

<sup>4</sup> See DANIEL RAIMI, THE FRACKING DEBATE: THE RISKS, BENEFITS, AND UNCERTAINTIES OF THE SHALE REVOLUTION 53 (Jason Bordoff ed., 2018) (stating that fracking has caused contamination in groundwater both from pumping problems and spills of oil, chemicals, and salty brine).

<sup>5</sup> See David A. Keiser & Joseph S. Shapiro, *US Water Pollution Regulation over the Past Half Century: Burning Waters to Crystal Springs?*, 33 J. ECON. PERSP. 51, 58-59 (2019) (finding that per- and polyfluoroalkyl substances, which are not currently regulated in the United States and are common contaminants in drinking water, have been linked to cancer).

<sup>6</sup> Environmental problems first started on a grand scale around the time of the European Industrial Revolution in 1830. See ADAM C. MARKHAM, A BRIEF HISTORY OF POLLUTION 8-9 (1st ed. 1994).

<sup>7</sup> See Jaime Fuller, *Environmental Policy is Partisan. It Wasn't Always.*, WASH. POST (June 2, 2014, 6:30 AM), <https://www.washingtonpost.com/news/the-fix/wp/2014/06/02/support-for-the-clean-air-act-has-changed-a-lot-since-1970/>. “Conservatives had been tiptoeing away from environmentalism since President Reagan took office in 1981” as complaints from businesses and coal companies increased. *Id.* By 2012, Republican candidates campaigned on abolishing the Environmental Protection Agency. *See id.*

<sup>8</sup> See Brian Kennedy & Meg Hefferon, *U.S. Concern About Climate Change is Rising, but Mainly Among Democrats*, PEW RES. CTR. (Aug. 28, 2019), <https://www.pewresearch.org/fact-tank/2019/08/28/u-s-concern-about-climate-change-is-rising-but-mainly-among-democrats/>. Pew Research Center surveys show that “[t]he share of Americans calling global climate change a major threat to the well-being of the United States has grown from [forty percent] in 2013 to [fifty-seven percent in 2019],” but this increase largely comes from Democrats only. *Id.* Eighty-four percent of Democrats and Democratic-leaning independents believe that climate change is a major threat to the United States’ well-being as of July 2019, which is up from fifty-eight percent in March of 2013. *See id.* Views on climate change among Republicans and those who lean Republican, however, remain relatively stagnant and starkly oppositional to the reality of climate change. *See id.* Only twenty-seven percent of Republicans and those who lean Republican believed that climate change was a major threat to the country as of 2019; the percentage in 2013 was twenty-two percent. *See id.*; see also *Republicans and Democrats are Deeply Divided on Whether Climate Change Should be a Top Priority*, PEW RES. CTR. (Aug. 27, 2019), [https://www.pewresearch.org/fact-tank/2019/08/28/u-s-concern-about-climate-change-is-rising-but-mainly-among-democrats/ft\\_19-08-28\\_climatechange\\_republicans-democrats-deeply-divided-whether-climate-change-top-priority/](https://www.pewresearch.org/fact-tank/2019/08/28/u-s-concern-about-climate-change-is-rising-but-mainly-among-democrats/ft_19-08-28_climatechange_republicans-democrats-deeply-divided-whether-climate-change-top-priority/) (depicting graphical data indicating

its way into the court system. In fact, the conservative 2009 Supreme Court decision in *Summers v. Earth Island Institute* constrained the ability of plaintiffs to bring successful environmental lawsuits by implementing higher standing and ripeness requirements.<sup>9</sup> And more recently, the Trump Administration and numerous Republican politicians have pushed for fewer environmental regulations, in part by supporting rollbacks on existing regulations.<sup>10</sup> These rollbacks include repealing the Clean Power Plan<sup>11</sup> and the Stream Protection Rule.<sup>12</sup> This partisan divide has led to an increase in environmental problems and, by extension, an increase in human health problems.<sup>13</sup>

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that (1) more Democrats and Democratic-leaning independents than Republicans and Republican-leaning independents believe global climate change should be a top priority for the President and Congress, and (2) the number of Democrats and Democratic-leaning independents who believe this has grown significantly compared to the number of Republicans and Republican-leaning independents).

<sup>9</sup> See *Summers v. Earth Island Inst.*, 555 U.S. 488 (2009); see also *infra* Parts IV.A and IV.B.

<sup>10</sup> See Nadja Popovich et al., *The Trump Administration Rolled Back More Than 100 Environmental Rules. Here's the Full List*, N.Y. TIMES, <https://www.nytimes.com/interactive/2019/climate/trump-environment-rollbacks.html> (last updated Jan. 20, 2021).

<sup>11</sup> “The Clean Power Plan was the key [U.S.] effort to reduce carbon emissions and meet international climate commitments, promising to lower emissions from the power sector [thirty-two percent] from 2005 levels by 2030.” Caitlin McCoy & Robin Just, *Clean Power Plan/Carbon Pollution Emission Guidelines*, ENVTL. & ENERGY L. PROGRAM (Sept. 26, 2017), <https://eelp.law.harvard.edu/2017/09/clean-power-plan-carbon-pollution-emission-guidelines/>. The rule allowed states “flexibility” to create their own plans to achieve the necessary reductions. See *id.* The rollback of the Plan “undermines [U.S. emission-reduction] targets and creates uncertainty for power producers.” *Id.* The Trump administration’s replacement, the Affordable Clean Energy rule, is projected to reduce carbon emissions by only 0.7% by 2030. *Id.*

<sup>12</sup> The Stream Protection Rule was developed “to avoid or minimize impacts on surface water, groundwater, fish, wildlife, and other natural resources from coal mining. In particular, it was designed to prevent mountain-top mining operations – where the top of a mountain is blown off with dynamite to reach underground coal seams – from dumping the mountain rubble in nearby valleys and waterways.” Caitlin McCoy & Robin Just, *Stream Protection Rule*, ENVTL. & ENERGY L. PROGRAM (Oct. 3, 2017), <https://eelp.law.harvard.edu/2017/10/stream-protection-rule/>. For more Trump Administration rollbacks, see Harvard Law School’s *Regulatory Rollback Tracker*, ENVTL. & ENERGY L. PROGRAM, <https://eelp.law.harvard.edu/regulatory-rollback-tracker/>.

<sup>13</sup> See David B. Resnik & Christopher J. Portier, *Environment, Ethics, and Human Health*, THE HASTINGS CTR. (Sept. 23, 2015), <https://www.thehastingscenter.org/briefingbook/environmental-health/> (listing environmental-related illnesses, including cancer, heart disease, diabetes, asthma, chronic obstructive pulmonary disease, arthritis, and depression and stating that “[c]limate change is likely to cause tremendous harm to the environment and human health”); see also *id.* (stating that environmental risk factors for disease include pollution, food contaminants, and pesticides). Environmental rollbacks by the Republican-dominated Trump Administration include twenty-eight rollbacks on air pollution and emissions alone, with two more rollbacks currently in progress. See Nadja Popovich et al., *supra* note 10. Rollbacks on air pollution and emissions restrictions under the Trump administration lead to increased air pollution in the United States; air pollution is an environmental problem and causes health complications. See *id.*; see also Resnik

Additionally, the United States is one of the highest-polluting nations in the world,<sup>14</sup> despite environmental statutes enacted to abate pollution.<sup>15</sup> The earth's average temperature is consistently rising as a direct result of air pollution and greenhouse gas emissions,<sup>16</sup> which scientists agree is causing a massive, human-induced climate change crisis.<sup>17</sup> Efforts to roll back clean air protections will only exacerbate this problem.<sup>18</sup> As climate change worsens, human health will worsen, and countless lives will be at risk.<sup>19</sup> In fact, climate change is already devastating countries around the world.<sup>20</sup> Although many of the United States' biggest

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& Portier, *supra* note 13. Thus, the logical inference can be drawn that partisanship increases environmental problems, which increases human health problems.

<sup>14</sup> See *Environmental Performance Index 2020*, YALE UNIV. (2020), [epi.yale.edu](http://epi.yale.edu); see also Umair Irfan, *Why the US Bears the Most Responsibility for Climate Change, in One Chart*, VOX (Dec. 4, 2019, 2:56 PM), <https://www.vox.com/energy-and-environment/2019/4/24/18512804/climate-change-united-states-china-emissions>.

<sup>15</sup> See generally, Clean Air Act, 42 U.S.C. § 7401 et seq. (1970). Broadly speaking, the Clean Air Act aims to set the primary and secondary standards for pollution that are necessary to protect public health and public welfare, respectively. See *id.* These standards consist of harm-based regulations and technology-based regulations that apply differently to existing and new/modified sources of air pollution. See *id.* They also apply differently to stationary and mobile sources. See *id.* Stationary sources must work toward attaining National Ambient Air Quality Standards (NAAQS) set by the United States Environmental Protection Agency (EPA) for listed criteria pollutants, including sulfur dioxide, nitrogen dioxide, and carbon monoxide. See *id.* States must promulgate State Implementation Plans (SIPs) for implementing, maintaining, and enforcing the NAAQS within their jurisdictions. See *id.* If a state fails to submit a SIP to the EPA, or if the EPA determines that the plan is inadequate to meet the minimum statutory criteria and the deficiency is not corrected, then the EPA must promulgate a Federal Implementation Plan for that State. See *id.* Clean Air Act violators may face civil and/or criminal penalties. See *id.*

<sup>16</sup> See *Climate Change*, UNITED NATIONS, <https://www.un.org/en/global-issues/climate-change>. According to the United Nations, "greenhouse gases in the atmosphere have risen to record levels not seen in three million years." *Id.* The cumulative level of greenhouse gas emissions grows as populations, economies, and standards of living grow. See *id.* There is a well-established scientific link between the concentration of greenhouse gases in the earth's atmosphere and the average global temperature on Earth; that concentration has been steadily increasing since the Industrial Revolution. See *id.* In fact, the Fifth Assessment Report by the United Nations Intergovernmental Panel on Climate Change states that the average global temperature increased by 0.85 degrees Celsius between 1880—just several decades following the Industrial Revolution—and 2012. See *id.* In addition, carbon dioxide, which is the most abundant greenhouse gas, largely results from the human-specific action of burning fossil fuels. See *id.*

<sup>17</sup> See Marcos Lutyens, Andrew Manning & Alessandro Marianantoni, *CO2morrow: Shedding Light on the Climate Crisis*, 46 LEONARDO 125, 132 (2013) (stating that climate change is real and "is directly caused by human actions emitting greenhouse gases into the atmosphere.").

<sup>18</sup> See *infra* Part IV.A.

<sup>19</sup> See *infra* Part II. Island communities are particularly at risk because climate change causes rising sea levels that threaten to partially or completely submerge these communities. See Heather Lazrus, *Sea Change: Island Communities and Climate Change*, 41 ANN. REV. OF ANTHROPOLOGY 285, 286 (2012).

<sup>20</sup> See *infra* Part II.

polluters deny that their actions contribute to climate change, the evidence proves otherwise—these polluters engaged in well-organized campaigns to convince the public that their actions were harmless, all the while knowing the damage caused by their industries.<sup>21</sup>

Humans, first and foremost, are responsible for nature’s destruction,<sup>22</sup> yet we rely on nature for survival. Thus, the more we harm nature the more we harm ourselves, whether or not we realize it.<sup>23</sup> Many people do realize these harms and try to rectify them with lawsuits and new environmental statutes, but recent Supreme Court decisions have created new challenges that make rectification difficult.

The current standing and ripeness requirements for Americans to bring citizen suits on environmental issues are quite high,<sup>24</sup> which is one reason why present and future legislation will never

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<sup>21</sup> See Benjamin Franta, *Shell and Exxon’s Secret 1980s Climate Change Warnings*, THE GUARDIAN (Sept. 19, 2018), <https://www.theguardian.com/environment/climate-consensus-97-per-cent/2018/sep/19/shell-and-exxons-secret-1980s-climate-change-warnings>. “In the 1980s, oil companies like Exxon and Shell carried out internal assessments of the carbon dioxide released by fossil fuels, and forecast the planetary consequences of these emissions.” *Id.* For example, in 1982, “Exxon predicted that by about 2060, CO2 levels would reach around 560 parts per million – double the [pre-industrial] level – and that this would push the planet’s average temperatures up by about [2 degrees Celsius] over then-current levels (and even more compared to pre-industrial levels).” *Id.* In 1988, “Shell projected similar effects but also found that CO2 levels could double even earlier, by 2030.” *Id.* However, Shell kept this information private within the company. See *id.* Neither company “dispute[d] the links between their products, global warming, and ecological calamity,” and, in fact, their research confirmed these connections. *Id.* But neither company warned the public about their researchers’ predictions. See *id.* The research was never actually intended for external distribution, but rather was leaked two decades later. See *id.*

<sup>22</sup> See *‘We Are Destroying Our Own Home’: UN Report Reveals Nature Crisis*, ALJAZEERA (May 6, 2019), <https://www.aljazeera.com/news/2019/05/destroying-home-report-reveals-nature-crisis-190506141326359.html>. While devastating natural events, such as wildfires and earthquakes, occur without human actions, studies show these events are exacerbated by human actions; see also Dale Smith, *Deadly Fires, Hurricanes, Floods: Here’s Why the Situation is Getting Worse*, CNET (Aug. 24, 2020) <https://www.cnet.com/how-to/deadly-fires-hurricanes-floods-heres-why-the-situation-is-getting-worse/>.

<sup>23</sup> See SANDRA DIAZ ET AL., *The Global Assessment Report on Biodiversity and Ecosystem Services*, INTERGOVERNMENTAL SCIENCE-POLICY PLATFORM ON BIODIVERSITY AND ECOSYSTEM SERVICES, 29 (2019) (“The dynamics of ocean and airborne transport of pollutants mean that the harm from inputs of plastics, persistent organic pollutants, heavy metals and ocean acidification is felt worldwide, including with consequences for human health.”).

<sup>24</sup> See *Summers v. Earth Island Inst.*, 555 U.S. 488 (2009) (holding that plaintiffs only have standing if they have “such a personal stake in the outcome of the controversy’ as to warrant [their] invocation of federal-court jurisdiction,” and the cases are only ripe when plaintiffs have standing and the issue has not yet been settled in a previous suit) (citing *Warth v. Seldin*, 422 U.S. 490, 498-99 (1975)).

be enough. Regardless of current robust environmental statutes, the standing and ripeness requirements will always significantly limit whatever positive outcomes the legislation intended. Additionally, because each new presidential administration—and the political party that has the majority in the House of Representatives and the Senate—has the power to make drastic legislative changes, environmental legislation will continue to oscillate between strong and lax, depending on which party is in power. Giving constitutional rights to nature itself will alleviate those stringent requirements, allowing citizens to bring lawsuits on nature's behalf.

This Note proposes a constitutional amendment giving rights to nature to help the environment, and thus help us—humans. To understand the need for this amendment, Part I discusses the serious social costs resulting from human-induced environmental problems. Part II then illuminates the United States' history of environmental policy and partisanship by explaining the United States Environmental Protection Agency and exploring modern environmental law. To clarify environmental law today, Part III specifically examines two prominent environmental statutes: The Clean Air Act and the Clean Water Act. Part IV then explains citizen suits and other lawsuits in environmental law and the ways the Supreme Court has thwarted peoples' ability to bring them as a result of stringent standing and ripeness requirements. Part V discusses Rights of Nature in the United States to give an overview of how this concept is not new and actually already exists in twenty-three local ordinances throughout the country. And finally, Part VI analyzes Ecuador's Rights of Nature constitutional amendment and proposes that the United States ratify a Rights of Nature constitutional amendment to solve the problems that environmental statutes simply cannot.

## I. SOCIAL PROBLEMS STEM FROM ENVIRONMENTAL PROBLEMS

Environmental changes directly and indirectly impact human life, health, and well-being.<sup>25</sup> Ironically, human actions including industrialization, deforestation, and large-scale agriculture cause environmental changes.<sup>26</sup> These actions result in increased greenhouse gas emissions.<sup>27</sup> Increased emissions greatly contribute to climate change,<sup>28</sup> and climate change harms humans globally, in unprecedented ways.<sup>29</sup>

Scientists extensively agree that climate change impacts fundamental natural resources on which we necessarily rely.<sup>30</sup> Water will become particularly problematic.<sup>31</sup> Scientists predict that flooding will increase in areas with water flows in high latitudes, droughts will increase in mid-latitude dry areas, and both glacial and snow melting will increase and change downstream river

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<sup>25</sup> See Matilda van den Bosch, *Natural Environments, Health, and Well-Being*, OXFORD RSCH. (Mar. 29, 2017), <https://oxfordre.com/environmentalscience/view/10.1093/acrefore/9780199389414.001.0001/acrefore-9780199389414-e-333> (stating that “nature is fundamental to human life, health, and well-being” and affects them both directly and indirectly). For example, industrialization and the widespread use of automobiles create air pollution, which increases incidences of asthma, particularly in children. See Gasana et al., *supra* note 1, at 36.

<sup>26</sup> See *Sustainable Development Goals: 13 Climate Action*, UNITED NATIONS, <https://www.un.org/sustainabledevelopment/climate-change/>; see also Lutyens et al., *supra* note 17, at 132 (“The Intergovernmental Panel on Climate Change (IPCC) assessment reports have presented a clear, consensus opinion, from the largest body of scientists ever assembled in history, that climate change is directly caused by human actions emitting greenhouse gases into the atmosphere.”); VALÉRIE MASSON-DELMOTTE, ET AL., IPCC, 2018: GLOBAL WARMING OF 1.5°C. AN IPCC SPECIAL REPORT ON THE IMPACTS OF GLOBAL WARMING OF 1.5°C ABOVE PRE-INDUSTRIAL LEVELS AND RELATED GLOBAL GREENHOUSE GAS EMISSION PATHWAYS, IN THE CONTEXT OF STRENGTHENING THE GLOBAL RESPONSE TO THE THREAT OF CLIMATE CHANGE, SUSTAINABLE DEVELOPMENT, AND EFFORTS TO ERADICATE POVERTY 4 (MASSON-DELMOTTE ET AL. EDS., 2019) (“Human activities are estimated to have caused approximately one degree Celsius of global warming above pre-industrial levels.”).

<sup>27</sup> See UNITED NATIONS, *supra* note 26.

<sup>28</sup> See *id.*

<sup>29</sup> See Roger D. Peng & Bo Li, *Guest Editors’ Introduction to the Special Issue on Climate Change and Human Health*, 17 J. AGRIC., BIOLOGICAL, AND ENVTL. STAT. 311, 311-12 (2012) (stating that data on climate change and health are currently being collected globally, and research is being conducted on the link between local climate and certain diseases and threats to human health).

<sup>30</sup> See SIRI GLOPPEN & ASUNCION LERA ST. CLAIR, CLIMATE CHANGE LAWFARE 173-74 (Oliver C. Ruppel, Christian Roschmann, Katharina Ruppel-Schlichting eds., 2013).

<sup>31</sup> See *id.* at 174. Some water-related problems are already occurring, such as more frequent droughts in certain areas and hurricanes in others. See *id.*

flows.<sup>32</sup> These three scenarios will prove detrimental to humans and, in fact, already do.<sup>33</sup>

In the United States alone, climate change has already created problems. Droughts occur more frequently in the west, severely affecting crop yields.<sup>34</sup> Further, less snowpack water is now stored in Alaska, signifying less water for later use.<sup>35</sup> Additionally, climate change destroys fisheries and coastal ecosystems,<sup>36</sup> resulting in fewer fish, other marine animals, and plants for humans to consume.<sup>37</sup>

Climate change also causes higher temperatures.<sup>38</sup> An increased worldwide temperature of just 1.5 to 2.5 degrees Celsius is predicted to have devastating effects, including a change in the onset and end of seasons, increased wildfires, changes in ecosystem structures, less biodiversity, and disease mutations.<sup>39</sup> Poor and marginalized communities are among the most vulnerable to the initial impacts of climate change, though no area of the world will be safe.<sup>40</sup> Scientists predict that if greenhouse gases are not quickly and substantially reduced, their effects will be catastrophic and potentially irreversible.<sup>41</sup>

Needless to say, the problem of climate change is perhaps the most vexing threat to those most responsible for its cause.<sup>42</sup>

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<sup>32</sup> See *id.*

<sup>33</sup> See *id.* at 173-74; see also *Climate change impacts*, NOAA, <https://www.noaa.gov/education/resource-collections/climate-education-resources/climate-change-impacts> (stating that climate change already impacts ecosystems and communities around the world by affecting water, energy, transportation, wildlife, agriculture, ecosystems, and human health).

<sup>34</sup> See NOAA, *supra* note 33.

<sup>35</sup> See *id.*

<sup>36</sup> See Gloppen, *supra* note 30, at 174.

<sup>37</sup> Fewer fish for consumption is particularly problematic because fish is a staple food in countries and communities worldwide. See Georgina Gustin, *Climate Change Threatens the World's Fisheries, Food Billions of People Rely On*, INSIDE CLIMATE NEWS (Sept. 29, 2019), <https://insideclimatenews.org/news/29092019/ocean-fish-diet-climate-change-impact-food-ipcc-report-cryosphere/>.

<sup>38</sup> See *The Effects of Climate Change*, NASA, <https://climate.nasa.gov/effects/>.

<sup>39</sup> See Gloppen, *supra* note 30, at 174. Among such diseases are dengue fever, malaria, and cardiovascular problems related to heat. See *id.* Further consequences include destroyed infrastructure incapable of surviving the changing weather patterns and decreased tourism due to harsher weather and flooding of islands. See MASSON-DELMOTTE ET AL., *supra* note 26, at 213.

<sup>40</sup> See Gloppen, *supra* note 30, at 175.

<sup>41</sup> See *id.*

<sup>42</sup> See Thom Brooks, *Introduction to Climate Change Justice*, 46 PS: POL. SCI. AND POL. 9, 9 (2013).

Scientists agree that climate change is global and is worsening.<sup>43</sup> Without substantial change and accountability, all countries and all people—regardless of socioeconomic status—will become victims of their own demise. Although the United States has a federal environmental agency<sup>44</sup> and a multitude of federal and state environmental statutes, none have proven successful thus far to curb climate change.

## II. THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, AND MODERN ENVIRONMENTAL LAW AND PARTISANSHIP

President Richard M. Nixon established the United States Environmental Protection Agency by executive order in 1970 following public outcry for an improved environment.<sup>45</sup> Prior to 1970, the United States lacked beneficial environmental legislation. Legislation that did exist was essentially unenforceable;<sup>46</sup> air pollution became so problematic that smog enveloped city skylines.<sup>47</sup> In 1970, following the passage of the Clean Air Act,<sup>48</sup> the smog began dissipating.<sup>49</sup> But as skylines became more visible, so did the divide between Democrats and Republicans on environmental issues.<sup>50</sup>

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<sup>43</sup> See *id.*

<sup>44</sup> See *infra* Part II.A.

<sup>45</sup> See Reorganization Plan No. 3 of 1970, 35 Fed. Reg. 15,623 (July 9, 1970).

<sup>46</sup> See *infra* Part III.A.

<sup>47</sup> See, e.g., *PHOTOS: Los Angeles Under Cover, Smog Through the Years*, L.A. TIMES, <https://www.latimes.com/local/la-me-air-pollution-0428-pictures-photogallery.html> (last visited Mar. 16, 2021).

<sup>48</sup> See *infra* Part III.A.

<sup>49</sup> See *United States: Clean Air Act (1970)*, AQLI, <https://aqli.epic.uchicago.edu/policy-impacts/united-states-clean-air-act/> (last visited Mar. 16, 2021).

<sup>50</sup> See *infra* Part II.B.

A. *The United States Environmental Protection Agency: An Overview*

The United States Environmental Protection Agency (EPA) is primarily responsible for protecting both the environment and human health.<sup>51</sup> Prior to the EPA's creation, little legislation existed in the United States to protect either.<sup>52</sup> And without such legislation, people began suffering and dying from a number of environmental causes.<sup>53</sup> Once the public realized the detriments of a deteriorating environment, it pushed Congress and President Nixon to take serious action.<sup>54</sup> Thus, the EPA was born.<sup>55</sup>

To carry out its dual mission of protecting human health and the environment,<sup>56</sup> the EPA issues regulations in response to environmental laws passed by Congress.<sup>57</sup> The EPA additionally enforces its own regulations, as well as the regulations set by states and tribes in response to federal environmental statutes.<sup>58</sup> In particular, the EPA strives to (1) ensure that Americans have clean resources, such as air and water, (2) reduce environmental risks, (3) administer and enforce environmental laws for the benefit of human health, and (4) provide access to environmental information to people across the United States.<sup>59</sup>

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<sup>51</sup> See *U.S. Environmental Protection Agency*, DOI, <https://www.doi.gov/recovery/about-us/primary-agencies/EPA> (last visited Mar. 16, 2021).

<sup>52</sup> See *The Modern Environmental Movement*, PBS, <https://www.pbs.org/wgbh/americanexperience/features/earth-days-modern-environmental-movement/> (last visited Mar. 16, 2021).

<sup>53</sup> See *id.* "Smog episodes" in the 1950s and 1960s killed several hundred people in New York alone, and the levels of pesticide chemicals found in human tissue between 1950 and 1962 had tripled. See *id.*

<sup>54</sup> See *The Origins of EPA*, EPA, <https://www.epa.gov/history/origins-epa> (last visited Mar. 16, 2021).

<sup>55</sup> See *id.*

<sup>56</sup> See *About EPA*, EPA, <https://www.epa.gov/aboutepa/our-mission-and-what-we-do> (last visited Mar. 16, 2021).

<sup>57</sup> See *id.*

<sup>58</sup> See *id.* For example, under the Clean Air Act, the federal government sets National Ambient Air Quality Standards (NAAQS) and then determines which areas of the country are "in attainment" or "out of attainment." See Clean Air Act, 42 U.S.C. § 7401 et seq. (1970). States must then submit State Implementation Plans (SIPs), which detail how they plan on achieving attainment according to the NAAQS. See *id.* The EPA must approve or disapprove of each SIP, and the EPA may issue administrative orders against any person not in compliance with the Clean Air Act. See *id.* Further intricacies of the Clean Air Act go beyond the scope of this Note.

<sup>59</sup> See *About EPA*, *supra* note 56.

The EPA is an independent agency.<sup>60</sup> While it exists within the Executive Branch, it is not represented in the Executive Office of the President or the President's cabinet.<sup>61</sup> The President does, however, appoint the EPA Administrator, and the Senate confirms or denies this appointment.<sup>62</sup> So although the EPA itself is an independent agency, it is still wildly subject to partisanship.<sup>63</sup> In other words, if the President wants an EPA administrator who favors business and industry over environmental science, then the President can appoint such an administrator. And as long as the Senate confirms the appointment, the EPA will essentially function contrary to scientific environmental data.<sup>64</sup>

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<sup>60</sup> See William D. Ruckelshaus, *EPA's First Administrator on the Establishment of EPA*, EPA (Dec. 16, 1970), <https://archive.epa.gov/epa/aboutepa/epas-first-administrator-establishment-epa.html>.

<sup>61</sup> See *Branches of the U.S. Government*, USA.GOV, <https://www.usa.gov/branches-of-government>.

<sup>62</sup> See *EPA's Administrator Andrew Wheeler*, EPA, [https://19january2021snapshot.epa.gov/aboutepa/epas-administrator\\_.html](https://19january2021snapshot.epa.gov/aboutepa/epas-administrator_.html) (last updated Jan. 11, 2021).

<sup>63</sup> A common defining feature of independent agencies is their insulation from "political pressure and direct control by either Congress or the President," but their structure often also determines if they are an independent agency (as opposed to an executive branch agency). KRISTIN E. HICKMAN & RICHARD J. PIERCE, JR., *FEDERAL ADMINISTRATIVE LAW* 14 (Saul Levmore et al. eds., 3d ed. 2020). However, "there is no precise set of features that designates an agency as independent." *Id.* Thus, although the EPA is political, it is still an independent agency.

<sup>64</sup> Up until the Trump Administration, environmental laws and the EPA worked well to protect the environment and human health under both Democratic and Republican presidents (although there may have been more rollbacks under President Reagan had he been able to work with a Republican Congress). See Robinson Meyer, *How the U.S. Protects the Environment, From Nixon to Trump*, THE ATLANTIC (Mar. 29, 2017), <https://www.theatlantic.com/science/archive/2017/03/how-the-epa-and-us-environmental-law-works-a-civics-guide-pruitt-trump/521001/>. Under the Trump Administration, however, it became clear that the Administration would not support the environment. See *id.* In 2017, the EPA recommended eliminating the EPA's scientific research efforts and cutting expert EPA staff from 15,000 to 5,000. See Gina McCarthy & Thomas A. Burke, *We Need a Strong Environmental Protection Agency: It's About Public Health!*, 107 AM. J. PUB. HEALTH 649, 649 (2017). So the Trump Administration may have set a precedent indicating that the EPA will be merely another partisan entity and will no longer serve the American people the way in which it was intended. See Brady Dennis, *Scott Pruitt, Long-time Adversary of EPA, Confirmed to Lead the Agency*, WASH. POST (Feb. 17, 2017, 6:49 PM), <https://www.washingtonpost.com/news/energy-environment/wp/2017/02/17/scott-pruitt-long-time-adversary-of-epa-confirmed-to-lead-the-agency/>. In February 2017, the Senate confirmed Donald Trump's appointee, Scott Pruitt, as the new leader of the EPA. See *id.* Pruitt had a known reputation for repeatedly suing the EPA for its regulatory efforts. See *id.* He believed that President Obama unnecessarily and onerously regulated the fossil fuel industry and, unsurprisingly, fossil fuel companies welcomed Pruitt's nomination. See *id.* Trump made it no secret that he wanted to eliminate much of the EPA and its work. See *id.* (stating that Trump made a campaign promise to "get rid of [the EPA] in almost every form"). Trump's pick demonstrated that he intentionally chose someone with a record of favoring the fossil fuel industry over the environment, and Pruitt's record proved just that. See *id.*

Because the EPA may function in a partisan manner, its regulations and implementations of environmental policies become subject to the wills of whichever political party is in the majority at the time of appointment and thereafter, up until a new president is elected.<sup>65</sup> Partisanship in the EPA illustrates the broader partisan nature of environmental law.

*B. A Brief History of Modern Environmental Law and Partisanship*

On September 27, 1962, Rachel Carson's *Silent Spring* catalyzed modern environmentalism.<sup>66</sup> The book sold rapidly, and Americans across the country became increasingly concerned about the deterioration of city air, the contamination of urban water supplies, and the effects of pesticides on human health.<sup>67</sup> President Nixon catered to public concerns by enacting a number of environmental executive orders, including establishing Earth Day<sup>68</sup> and the EPA.<sup>69</sup> He also signed statutes into law, including the Clean Air Act<sup>70</sup> and the 1972 amendments to the Federal Water Pollution Control Act of 1948.<sup>71</sup> But out of this environmentalism movement grew its antithesis: The business and industry lobbies.<sup>72</sup>

Throughout the 1980s and 1990s, business, coal, and chemical lobbies engaged in a "well-financed counterreaction" in response to environmentalism.<sup>73</sup> These lobbying groups opposed the environmental movement because it interfered with their abilities to

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<sup>65</sup> See *supra* note 64.

<sup>66</sup> See Eliza Griswold, *How 'Silent Spring' Ignited the Environmental Movement*, N.Y. TIMES MAG. (Sept. 21, 2012), <https://www.nytimes.com/2012/09/23/magazine/how-silent-spring-ignited-the-environmental-movement.html>.

<sup>67</sup> See EPA, *supra* note 54; see also Griswold, *supra* note 66.

<sup>68</sup> See *Today in History – April 22*, LIBRARY OF CONGRESS, <https://www.loc.gov/item/today-in-history/april-22/>.

<sup>69</sup> See Reorganization Plan No. 3 of 1970, 35 Fed. Reg. 15,623 (July 9, 1970).

<sup>70</sup> See Clean Air Amendments, 84 Stat. 1676 (1970).

<sup>71</sup> See Clean Water Act, 33 U.S.C. § 1251 et seq. (1972). These amendments are known as the Clean Water Act today. See *History of the Clean Water Act*, EPA, <https://www.epa.gov/laws-regulations/history-clean-water-act>.

<sup>72</sup> See Griswold, *supra* note 66. In particular, chemical companies responded aggressively to *Silent Spring* by threatening lawsuits against the book's publisher and attacking Carson personally. See *id.* The companies feared losing business if their products were deemed unsafe. See *id.*

<sup>73</sup> *Id.*

continue profiting in ways that ultimately harmed the environment, *i.e.*, by utilizing industrialization methods that contributed to air and water pollution.<sup>74</sup>

This opposition soon caught on in politics. Conservative politicians first began “tiptoeing away from environmentalism” after President Ronald W. Reagan’s 1981 election.<sup>75</sup> Then, in the 1990s, President George H. W. Bush (Bush I) began denouncing environmental activists like Al Gore despite initially supporting environmental policies during his 1988 presidential campaign.<sup>76</sup> Bush I’s stance on the environment likely changed following the 1990-91 economic recession.<sup>77</sup> When that downturn hit, the Republican Party turned in part to businesses and coal companies to regrow the economy.<sup>78</sup> The obvious outcome was a shift away from environmentalism. As the economy improved, environmental policy switched back toward protection under President William J. Clinton in the 1990s.<sup>79</sup>

The administrations of George W. Bush (Bush II) and Barack Obama split along party lines in their approaches to environmental legislation, akin to the split between the Bush I and Clinton Administrations. Bush II began promoting industry over the environment,<sup>80</sup> likely to maintain political support in the 2004

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<sup>74</sup> See William F. Pedersen, Jr., *Why the Clean Air Act Works Badly*, 129 U. PENN. L. REV. 1059, 1059 (1981) (discussing how “[e]conomic concerns, a general anti-regulatory mood, and . . . the election in 1980 of a more conservative President and Congress all suggest” that the Clean Air Act, as amended in 1970, would need to be amended again to satisfy the conservative political climate at that time).

<sup>75</sup> Fuller, *supra* note 7.

<sup>76</sup> See *id.*

<sup>77</sup> However, at this point in time, the topic of the environment was not nearly as partisan as it is today. For instance, the 1990 amendments to the Clean Air Act passed in both congressional houses with overwhelming bipartisan support. See Richard Schmalensee & Robert N. Stavins, *Policy Evolution under the Clean Air Act*, 33 J. ECON. PERSP. 27, 30 (2019). However, between 1990 and 2009, the topic of the environment gradually polarized, especially concerning the use of coal. See *id.*

<sup>78</sup> See *id.*

<sup>79</sup> See Sheila M. Cavanagh, et al., NATIONAL ENVIRONMENTAL POLICY DURING THE CLINTON YEARS 2-4 (Resources for the Future, 2001). In July 1997, during Clinton’s presidency, the EPA issued National Ambient Air Quality Standards for ambient ozone and particulate matter in an effort to reduce air pollution. See *id.* at 2. Additionally, natural resource policy during the Clinton years weighed heavily in favor of environmental protection. See *id.* President Clinton “also designated more than [twenty] new national monuments, thus restricting the use of [six] million additional acres of Federal lands.” *Id.* Also during the Clinton years, the “EPA expanded the list of chemicals to be reported under the Toxics Release Inventory.” *Id.* at 3. These are just some of the positive environmental impacts made under the Clinton Administration.

<sup>80</sup> See Katharine Q. Seelye, *President Distances Himself From Global Warming Report*, NYTIMES (June 5, 2002), <https://www.nytimes.com/2002/06/05/us/president->

presidential election and preserve a lasting legacy as a pro-industry president. He did so despite an EPA report on the dangers of climate change in the early 2000s.<sup>81</sup>

Then, throughout his two terms, President Obama and his administration implemented numerous provisions fostering environmental improvements throughout the country<sup>82</sup> and worked to undo much of the anti-environment legislation executed under his predecessor. The Trump Administration, by contrast, rolled back environmental policies to favor industry over the environment and human health.<sup>83</sup> A clear pattern has been established since the 1980s when it comes to environmental law: Republicans favor anti-environmental regulations, while Democrats favor pro-environmental regulations. The topic of the environment has become more politicized and partisan with every presidential election since President Nixon, and therein lies the problem: the legislation is subject to whichever political party is in power at the time and that party can therefore implement its own self-interested legislation while revoking laws with which it does not agree. This creates an unstable fluctuation that ultimately harms human health because, even when pro-environmental legislation is in place, it may take years to effect true environmental changes. By the time these changes would begin, a new Administration may be in power, working to undo the environmental legislation and leaving the environment even worse off. For this reason, environmental

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distances-himself-from-global-warming-report.html (stating Bush II signaled to conservatives and industries that he did not believe in global warming and thus distanced himself from an EPA report warning about the dangers that global warming might have on the United States).

<sup>81</sup> See *id.* The EPA had drafted a report stating that global warming would substantially change the United States in the next few decades. See *id.* Following publication of the report, conservatives and industries pressured Bush II to distance himself from that report. See *id.* President Bush responded in their favor by indicating that he would not promote or support the report. See *id.*

<sup>82</sup> See *A Historic Commitment to Protecting the Environment and Addressing the Impacts of Climate Change*, THE WHITE HOUSE, <https://obamawhitehouse.archives.gov/the-record/climate>. Several examples of the Obama Administration's environmental initiatives include: (1) cutting carbon pollution, in part by creating new energy-efficiency standards for appliances and equipment; (2) expanding the clean energy economy, in part by investing in clean energy and performing energy-efficiency upgrades throughout the United States; (3) leading global efforts on climate change, in part by working on joint efforts with countries around the world to reduce carbon emissions; and (4) protecting treasured natural resources, in part by signing the Omnibus Public Land Management Act of 2009, which designated more than 2 million acres of Federal wilderness and protected thousands of miles of trails and rivers. See *id.*

<sup>83</sup> See Popovich et al., *supra* note 10.

legislation may be one answer to the world's environmental problems (climate change in particular<sup>84</sup>), but more than malleable legislation is needed for operative changes to occur.

### III. A LOOK AT CURRENT ENVIRONMENTAL STATUTES: THE CLEAN AIR ACT AND THE CLEAN WATER ACT

Several dozen federal environmental statutes and executive orders currently exist.<sup>85</sup> The primary aim of these statutes and executive orders is to protect both human and environmental health.<sup>86</sup> After all, studies show that negative changes in the environment both directly and indirectly impact human health.<sup>87</sup> The federal government has thus implemented these statutes and executive orders to protect human lives. Among the most used and well known are the Clean Air Act and the Clean Water Act.<sup>88</sup>

#### A. *The Clean Air Act*

The Clean Air Act (CAA) was originally promulgated in December of 1963 following the discovery of a link between smog and car emissions.<sup>89</sup> Before that, the Air Pollution Control Act of 1955 existed to try to remedy air pollution.<sup>90</sup> However, neither statute

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<sup>84</sup> Legislation has been used as a solution to environmental problems largely because it is quicker to pass and implement than a federal constitutional amendment. *See* Mary Frances Berry, *AMENDING THE CONSTITUTION; How Hard It Is To Change*, N.Y. TIMES MAG. (Sept. 13, 1987), <https://www.nytimes.com/1987/09/13/magazine/amending-the-constitution-how-hard-it-is-to-change.html>. Additionally, environmental legislation currently exists, so adding another statute would comport with the current method of curbing environmental problems. *See infra* Part VI.C. But legislation is more subject to change over time, so it may be an unstable solution. *See supra* Part II.B. Further analysis of the positives and negatives of implementing further environmental legislation is beyond the scope of this Note.

<sup>85</sup> *See Laws and Executive Orders*, EPA, <https://www.epa.gov/laws-regulations/laws-and-executive-orders> (last visited Mar. 14, 2021).

<sup>86</sup> *See* DOI, *supra* note 51.

<sup>87</sup> *See* van den Bosch, *supra* note 25; *see also* Gasana et al., *supra* note 1.

<sup>88</sup> *See* EPA, *supra* note 85.

<sup>89</sup> *See* Clean Air Act, 42 U.S.C. § 7543 et seq. (1990); *see also* PBS, *supra* note 52. By 1963, approximately 83 million Americans owned automobiles, which likely contributed greatly to smog and illnesses such as asthma. *See id.*

<sup>90</sup> *See* Air Pollution Control Act, 42 U.S.C. § 7401 et seq. (1955); *see also* Schmalensee & Stavins, *supra* note 77, at 27.

allowed for a serious regulatory role by the federal government.<sup>91</sup> Visible air pollution led to growing concerns over air quality.<sup>92</sup> Congress passed the Clean Air Act of 1970, giving the federal government substantial regulatory authority over the environment for the purpose of protecting and maintaining human health.<sup>93</sup> Since then, the CAA has been amended twice.<sup>94</sup>

The 1970 CAA contained four prominent provisions that are still largely in effect today.<sup>95</sup> First, the EPA was required to identify “criteria air pollutants” that have an “adverse effect on public health or welfare” and to create National Ambient Air Quality Standards (NAAQS) for these pollutants.<sup>96</sup> Second, states had to develop State Implementation Plans (SIPs) detailing how they would attain the federal NAAQS.<sup>97</sup> Third, the EPA was tasked with creating national New Source Performance Standards (NSPS) for stationary sources of pollution,<sup>98</sup> and emissions standards for new motor vehicles.<sup>99</sup> And fourth, the EPA had to develop National Emission Standards for Hazardous Air Pollutants.<sup>100</sup>

In 1977, Congress passed the first amendments to the Clean Air Act, which were partially driven by politics.<sup>101</sup> These amendments were meant to essentially strike a balance between emissions and the building of new stationary sources of air pollution—primarily business and industry buildings.<sup>102</sup> Then, through the rest of the

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<sup>91</sup> See Schmalensee & Stavins, *supra* note 77, at 27.

<sup>92</sup> See *id.* at 28-29.

<sup>93</sup> See Clean Air Act, 42 U.S.C. § 7401(a)(2) (1990) (“[T]he growth in the amount and complexity of air pollution . . . has resulted in mounting dangers to the public health and welfare, including injury to agricultural crops and livestock, damage to and the deterioration of property, and hazards to air and ground transportation”); see also 42 U.S.C. § 7401(a)(3) (“air pollution prevention . . . and air pollution control at its source is the primary responsibility of States and local governments”).

<sup>94</sup> See Clean Air Act, 42 U.S.C. § 7401 et seq. (1977); see also Clean Air Act, 42 U.S.C. § 7543 et seq. (1990).

<sup>95</sup> See Clean Air Act, 42 U.S.C. § 7401 (1990).

<sup>96</sup> *Id.* See Clean Air Act, 42 U.S.C. § 7408(a)(2)(B), (g) (1970).

<sup>97</sup> See Clean Air Act, 42 U.S.C. § 7410(a)(1) (1990); see also Schmalensee & Stavins, *supra* note 77, at 29.

<sup>98</sup> Stationary sources, like power plants, are sources that are not mobile. See *Stationary Sources of Air Pollution*, EPA, <https://www.epa.gov/stationary-sources-air-pollution> (last visited Mar. 15, 2021).

<sup>99</sup> See Clean Air Act, 42 U.S.C. § 7521(a)(1) (1990); see also Schmalensee & Stavins, *supra* note 77, at 29.

<sup>100</sup> See Clean Air Act, 42 U.S.C. § 7412(b)(2) (1990); see also Schmalensee & Stavins, *supra* note 77, at 29.

<sup>101</sup> See Clean Air Act, 42 U.S.C. § 7401 et seq. (1977); see also Schmalensee & Stavins, *supra* note 77, at 29.

<sup>102</sup> See Schmalensee & Stavins, *supra* note 77, at 29.

1970s and 1980s, acid rain became a prominent issue and led to the second amendments to the Clean Air Act in 1990.<sup>103</sup> The Clean Air Act has not been amended since. Its original passage and the passage of its amendments had bipartisan support.<sup>104</sup> Since 1990, however, the topic of the environment (and air in particular) has polarized greatly, especially because of the coal industry.<sup>105</sup>

So, while the Clean Air Act remains in effect today, the political climate surrounding clean air and the environment overall has changed immensely.<sup>106</sup> No major changes have been effected to strengthen the Clean Air Act,<sup>107</sup> and the Trump Administration, in fact, repealed a waiver granted to California under CAA § 209.<sup>108</sup> Section 209 allowed California to adopt emissions standards for new motor vehicles and new motor vehicle engines that were more stringent than federal standards.<sup>109</sup> The Trump Administration's actions demonstrate how statutes remain subject to the will of the party in power.

### *B. The Clean Water Act*

Like the Clean Air Act, the Clean Water Act (CWA) had an “almost unenforceable” predecessor<sup>110</sup>—the Federal Water Pollution Control Act of 1948.<sup>111</sup> Interestingly, the CWA was not primarily promulgated to protect human health because earlier federal

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<sup>103</sup> See Clean Air Act, 42 U.S.C. § 7409 (1990); see also Schmalensee & Stavins, *supra* note 77, at 29-30.

<sup>104</sup> See Schmalensee & Stavins, *supra* note 77, at 30.

<sup>105</sup> See *id.* In fact, when the House of Representatives passed the American Clean Energy and Security Act of 2009—an Act created to curb carbon dioxide emissions and global climate change—the legislation only passed by seven votes. See *id.* Eighty-three percent of Democrats supported the Act compared to merely four percent of Republicans. See *id.* It is theorized that five of the eight supporting Republicans only supported this bill because they were from heavily Democratic states, and a vote against the bill would have had negative political consequences, such as hurting their chances of reelection. See *id.* Likewise, twenty-five of the forty-four Democrats who opposed the bill were from heavily Republican, coal-dependent states. See *id.*

<sup>106</sup> See *id.* at 30-31.

<sup>107</sup> See *id.* at 31.

<sup>108</sup> See Clean Air Act, 42 U.S.C. § 7543 (1990); see also 40 C.F.R. §§ 85–86 (2019) (waiver was repealed).

<sup>109</sup> See Clean Air Act, 42 U.S.C. § 7543 (1990); see also 40 C.F.R. §§ 85–86 (2019).

<sup>110</sup> See Keiser & Shapiro, *supra* note 5, at 54.

<sup>111</sup> Today, this Act is the Clean Water Act. See generally, Clean Water Act, 33 U.S.C. § 1251 et seq. (1972).

investments such as chlorinating and filtering drinking water had already helped nearly eliminate water-borne diseases.<sup>112</sup> Instead, the environmental movement of the 1960s and 1970s pushed for more stringent federal laws for clean water following pollution-induced river fires and the 1969 Santa Barbara oil spill.<sup>113</sup>

Following public outcry for cleaner waters, the federal government passed the Clean Water Act of 1972 to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”<sup>114</sup> While the CWA has contributed to improved water conditions throughout the United States, the progress made by the CWA is “incomplete.”<sup>115</sup> Perhaps one of the CWA’s biggest downfalls is its later-added agriculture exemption: “agricultural storm-water discharges and irrigation return flows from irrigated agriculture” are explicitly exempt from CWA regulation.<sup>116</sup> This exemption is troublesome because agricultural pollution contributes to surface water quality problems at exceptionally high levels.<sup>117</sup>

The CWA term “waters of the United States” further derails the Act’s potential environmental benefits because of the Supreme Court’s holdings in *Rapanos v. United States*<sup>118</sup> and *Solid Waste Agency of North Cook County v. United States Army Corps of*

<sup>112</sup> See Keiser & Shapiro, *supra* note 5, at 54. Such diseases include cholera and typhoid. *See id.*

<sup>113</sup> *See id.*

<sup>114</sup> Clean Water Act, 33 U.S.C. § 1251(a) (1972). *See* Keiser & Shapiro, *supra* note 5, at 52 (stating that the CWA “regulates ‘surface waters’—rivers, lakes, and some ocean areas”). Whether groundwater may be regulated under the CWA is legally disputed and is also regulated under the Safe Drinking Water Act. *See id.*; *see also* Safe Drinking Water Act, 42 U.S.C. § 300f et seq. (1974). The CWA as it was originally passed in 1972 contained “implausibly ambitious” goals. *See* Keiser & Shapiro, *supra* note 5, at 55. Its original deadlines were nearly impossible to satisfy, and it called for elimination of discharge of all pollutants into navigable waters. *See id.* at 54-55. As a result, the CWA has been amended several times since 1972. *See Clean Water Act (CWA)*, BOEM, <https://www.boem.gov/environmental-assessment/federal-water-pollution-control-act-1972-or-clean-water-act> (last visited Mar. 16, 2021). Although the CWA today still mandates elimination of pollutants by deadlines that have long past, the Act’s cleanup goals and its prohibitions are still in play. *See* 33 U.S.C. § 1251(a)(1), (7). For example, “it is [still] the national goal that the discharge of pollutants into the navigable waters be eliminated” and “it is [still] the national policy that areawide waste treatment management planning processes be developed and implemented to assure adequate control of sources of pollutants in each State.” 33 U.S.C. § 1251(a)(1), (5).

<sup>115</sup> Keiser & Shapiro, *supra* note 5, at 53.

<sup>116</sup> *See* Clean Water Act, 33 U.S.C. § 1362(14); *see also* Clean Water Act, 33 U.S.C. § 1342(l)(l).

<sup>117</sup> *See* Keiser & Shapiro, *supra* note 5, at 56. Among these problems is a “Dead Zone” in the Gulf of Mexico where oxygen shortages kill much aquatic life.” *Id.*

<sup>118</sup> 547 U.S. 715 (2006). Note that *Rapanos* is a plurality opinion. *See id.*

*Engineers*.<sup>119</sup> The Court held that “waters of the United States” does not encompass most wetlands, headwaters, and intermittent stream waters.<sup>120</sup> Despite the Obama Administration’s issuance of a rule to reinstate particular protections of these waters, the Trump Administration worked to rescind or revise it.<sup>121</sup>

Perhaps one of the CWA’s greatest downfalls is that it was not promulgated primarily for health purposes. Because of this, people may overlook that many bodies of water in the United States are unsafe. Even though we no longer contract cholera and typhoid from polluted water, waters throughout the country are still polluted with toxic chemicals that harm human health.<sup>122</sup>

Thus, although the CWA has noticeably improved surface waters, the Act’s shortcomings illuminate the reasons why further, and more permanent, actions must be taken to keep water conditions safe.

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<sup>119</sup> 531 U.S. 159 (2001).

<sup>120</sup> See Keiser & Shapiro, *supra* note 5, at 56-57. The plurality in *Rapanos* primarily used statutory construction and dictionary definitions to come to its decision. It focused heavily on the phrase “the waters” in the CWA and found that the use of the word “the”—the definite article—and the plural use as “waters” both show that the CWA does not refer to water *in general*. See *Rapanos*, 547 U.S. at 732. Rather, “the waters” refers more narrowly to water found in streams and bodies forming geographical features—waters stated in Webster’s Dictionary. See *id.* The plurality further stated that “navigable” waters must refer to areas that have an ordinary presence of water and that a wetland must have a “continuous surface connection” with waters of the United States such that “where the water ends and the wetland begins” is difficult to determine. *Id.* at 742. See *Solid*, 531 U.S. at 162-63, 167-68 (holding that “permanent and seasonal ponds” are not “waters of the United States” because there exists no “significant nexus” between the ponds and other navigable waters).

<sup>121</sup> See Keiser & Shapiro, *supra* note 5, at 57 (stating that the Trump Administration issued an executive order in 2017 to “rescind or revise” the Obama Administration’s “Waters of the United States Rule”); see also *generally*, Clean Water Rule, 80 Fed. Reg. 37,054 (June 29, 2015); Definition of “Waters of the United States”—Recodification of Pre-Existing Rules, 84 Fed. Reg. 56,626 (Oct. 22, 2019).

<sup>122</sup> *Report on the Environment*, EPA <https://www.epa.gov/report-environment/drinking-water> (last visited Mar. 16, 2021). Drinking water with unsafe levels of contaminants can cause gastrointestinal illnesses, nervous system or reproductive effects, and cancers. See *id.* Exposure to chemicals, specifically, can cause both short- and long-term health problems, including skin discoloration, organ damage, developmental or reproductive effects, and cancers. See *id.*

## IV. CITIZEN SUITS IN ENVIRONMENTAL LAW

Citizen suits in environmental law “allow private citizens to sue the EPA to require it to carry out its statutory duties.”<sup>123</sup> Citizen suit provisions are ordinarily written into environmental statutes, including the CAA<sup>124</sup> and CWA.<sup>125</sup> But citizen suits have their limitations. The CAA, for example, permits citizens to bring suit only if they are adversely affected by a CAA violation.<sup>126</sup> Such citizens must then comply with a sixty-day notice requirement and a delay period, which put the government on notice of the alleged violation and allow the government to take corrective actions within that time frame.<sup>127</sup> If the government moves forward with correcting the violation, or if the EPA or the State is already pursuing such a civil action, then the citizen suit may not go forward.<sup>128</sup>

So, while citizen suits appear to be an advantageous enforcement tool, the truth is more complex. To actually bring citizen suits, plaintiffs must meet the high standing and ripeness requirements set forth in *Summers v. Earth Island Institute*,<sup>129</sup> and the issue in the case must be justiciable.

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<sup>123</sup> Katherine A. Rouse, *Holding the EPA Accountable: Judicial Construction of Environmental Citizen Suit Provisions*, 93 N.Y.U. L. REV. 1271, 1274 (2018).

<sup>124</sup> See, e.g., Clean Air Act, 42 U.S.C. § 7604 (1970).

<sup>125</sup> See, e.g., Clean Water Act, 33 U.S.C. § 1365 (1972).

<sup>126</sup> See Clean Air Act, 42 U.S.C. § 7604(a) (1970).

<sup>127</sup> See *id.* § 7604(b).

<sup>128</sup> See *id.*

<sup>129</sup> See *Summers v. Earth Island Inst.*, 555 U.S. 488, 490 (2009). A discussion on additional citizen suit restrictions is beyond the scope of this Note, but for more information on this topic, see generally Rouse, *supra* note 123.

### A. *The Standing Requirement*

A plaintiff must have standing to bring suit in any case.<sup>130</sup> The *Summers* Court defined “standing” in environmental lawsuits as a plaintiff having “such a personal stake in the outcome of the controversy’ as to warrant *his* invocation of federal-court jurisdiction.”<sup>131</sup> That “plaintiff must show that he is under threat of suffering ‘injury in fact’ that is concrete and particularized” in order to seek injunctive relief.<sup>132</sup> “[T]he threat must be actual and imminent, not conjectural or hypothetical; it must be fairly traceable to the challenged action of the defendant; and it must be likely that a favorable judicial decision will prevent or redress the injury.”<sup>133</sup> The plaintiff “bears the burden of showing that he has standing for each type of relief sought.”<sup>134</sup>

### B. *The Ripeness Requirement*

An issue must be ripe for a plaintiff to bring suit in any case. Ripeness is “[t]he state of a dispute that has reached, but has not passed, the point when the facts have developed sufficiently to permit an intelligent and useful decision to be made.”<sup>135</sup> Courts will

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<sup>130</sup> See U.S. CONST. art. III, § 2 (“The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states; between a state and citizens of another state; between citizens of different states; between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.”). See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992); see also Rourke Donahue, *Kids Take a Stand Against Climate Change, but Do They Have Standing?*, GEO. ENV’T L. REV. (Jan. 25, 2019), <https://www.law.georgetown.edu/environmental-law-review/blog/kids-take-a-stand-against-climate-change-but-do-they-have-standing/> (“Under Article III of the United States Constitution, plaintiffs in any case must prove that (1) they have suffered an injury in fact that is concrete, particularized, and imminent; (2) the injury was caused by the defendant; and (3) the injury can be redressed by the court.”).

<sup>131</sup> *Summers*, 555 U.S. at 493 (emphasis in original) (citing *Warth v. Seldin*, 422 U.S. 490, 498-99 (1975)).

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> Ripeness, *Black’s Law Dictionary* (11th ed. 2019), available at Westlaw.

not hear cases that are not ripe.<sup>136</sup> Once an issue has been settled, it is no longer ripe for others to bring suit, despite the requisite harm having been suffered (*i.e.*, having standing to bring suit).<sup>137</sup>

### C. *Thwarted Citizen and other Environmental Suits*

The Supreme Court has effectively thwarted many citizens' abilities to bring citizen and other environmental suits due to these high standing and ripeness requirements. Now, federal courts across the United States follow this precedent. The Eastern District of Louisiana in *In re Oil Spill* and the United States Court of Appeals for the Ninth Circuit in *Juliana v. United States* are exemplary.

#### i. *In re Oil Spill*

In *In re Oil Spill*, over 100,000 individual claimants brought hundreds of cases throughout multiple districts following the April 20, 2010 explosion, fire, and capsizing of the Deepwater Horizon offshore drilling unit.<sup>138</sup> Millions of gallons of oil spilled into the Gulf of Mexico as a result.<sup>139</sup> The plaintiffs sued in part for injunctive relief pursuant to citizen suit provisions of several environmental statutes, including the Clean Water Act.<sup>140</sup> The plaintiffs had to show that their alleged injuries would be redressed if they prevailed.<sup>141</sup> The court noted that "an injunction need not return the waters to the pre-spill state," but it must "provide some benefit or reduction in pollution."<sup>142</sup> Because the vessel itself sank to the

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<sup>136</sup> See *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967) (stating that ripeness is a twofold inquiry, requiring courts "to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.").

<sup>137</sup> See *Summers*, 555 U.S. at 494.

<sup>138</sup> See *In re Oil Spill*, 792 F. Supp. 2d 926 (E.D. La. 2011).

<sup>139</sup> See *id.*

<sup>140</sup> See *id.* at 930.

<sup>141</sup> See *id.*

<sup>142</sup> *Id.*

ocean floor and no oil remained in the well to be released into the water, the court held that the injunction would be useless.<sup>143</sup>

Additionally, the oil spill was being cleaned up at the time of the suit.<sup>144</sup> Because “[a]n injury is not redressable by a citizen suit when the injury is already being redressed,” the court further held that the plaintiffs could not bring suit because there was no deficiency in remediation efforts.<sup>145</sup> Thus, the court held that the plaintiffs lacked standing.<sup>146</sup>

## ii. *Juliana v. United States*

The United States Court of Appeals for the Ninth Circuit recently remanded *Juliana v. United States* to the district court with instructions to dismiss for plaintiffs’ lack of standing, finding that the relief sought was not redressable by an Article III court.<sup>147</sup>

In *Juliana*, an environmental organization, twenty-one individual plaintiffs, and a “representative of future generations” brought suit against the United States for claimed injuries resulting from climate change.<sup>148</sup> They alleged that their injuries were caused by the federal government’s support for and subsidization of the fossil fuel industry and sought declaratory relief and an injunction requiring the federal government to phase out fossil fuel emissions and reduce carbon dioxide in the atmosphere.<sup>149</sup> The plaintiffs claimed numerous injuries, including psychological harms and exacerbated medical conditions and illnesses.<sup>150</sup> The court held that

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<sup>143</sup> *See id.*

<sup>144</sup> *See id.*

<sup>145</sup> *See id.*

<sup>146</sup> *See id.* at 931. The court also held that the plaintiffs’ claims should be dismissed because there was no *ongoing* violation of the Clean Water Act, the Endangered Species Act, the Emergency Planning and Community Right-to-Know Act, or the Comprehensive Environmental Response, Compensation, and Liability Act. *See id.* at 932-33.

<sup>147</sup> *See generally* *Juliana v. United States*, 947 F.3d 1159 (9th Cir. 2020); *see also* *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (stating the three-part test for constitutional standing: (1) injury in fact, (2) a causal connection between the injury and the action of the defendant, and (3) redressability of the injury by a court. Although the third part of this test was a plurality opinion, redressability remains part of the standing inquiry).

<sup>148</sup> *See Juliana*, 947 F.3d 1159 at 1165.

<sup>149</sup> *See id.* at 1164.

<sup>150</sup> *See id.* at 1165. The plaintiffs claimed their injuries were caused by climate change and that climate change was caused in large part by the fossil fuel industry and the United States’ dependence on fossil fuels. *See id.* at 1169. The court found this causal chain

evidence in the record demonstrated that climate change is presently and persistently occurring—in part due to the extensive use of fossil fuels—and that the government “affirmatively promotes fossil fuel use in a host of ways.”<sup>151</sup> And the court held that the plaintiffs satisfied their burden of showing “injury-in-fact” and that those injuries were not “conjectural” or “hypothetical.”<sup>152</sup> However, the court ultimately held that it did not have the authority to “order, design, supervise, or implement” the plaintiffs’ remedial plan for the government.<sup>153</sup>

Redressability is only established when plaintiffs demonstrate that the relief sought is both “(1) substantially likely to redress their injuries; and (2) within the district court’s power to award.”<sup>154</sup> The court stated that the relief sought would undoubtedly benefit the plaintiffs psychologically but probably could not remediate their other injuries without further court action.<sup>155</sup> Additionally, the court stated that the injunctive relief sought<sup>156</sup> would prevent “the Executive from exercising discretionary authority expressly granted by Congress,” would prevent “Congress from exercising power expressly granted by the Constitution over public lands,” and likely would not stop climate change or remedy the plaintiffs’ injuries.<sup>157</sup> Thus, the court concluded that because the relief sought by the plaintiffs was non-redressable, they lacked standing and their claims were nonjusticiable.<sup>158</sup>

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sufficiently established, as the United States accounted for more than twenty-five percent of worldwide emissions between 1850 and 2012 and currently accounts for approximately fifteen percent. *See id.* The court even accepted the plaintiffs’ evidence showing that federal subsidies of the fossil fuel industry increased those emissions. *See id.*

<sup>151</sup> *Id.* at 1167.

<sup>152</sup> *Id.* at 1168.

<sup>153</sup> *Id.* at 1171.

<sup>154</sup> *Id.* at 1170. “Redress need not be guaranteed, but it must be more than ‘merely speculative.’” *Id.* (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)).

<sup>155</sup> *See id.* at 1170.

<sup>156</sup> *See id.* The injunction would require the government to “cease permitting, authorizing, and subsidizing fossil fuel use” and “prepare a plan subject to judicial approval to draw down harmful emissions.” *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *See id.* at 1167. The court stated that the plaintiffs should instead make their case to the Legislature and the Executive, but that those branches “may have abdicated their responsibility to remediate the [climate] problem does not confer on Article III courts . . . the ability to step into their shoes.” *Id.* at 1175.

## V. RIGHTS OF NATURE IN THE UNITED STATES

The suggestion that nature should be given rights is not novel. In fact, as a law student, Christopher Stone proposed the idea of rights of nature in his 1972 article, “Should Trees Have Standing?—Toward Legal Rights For Natural Objects”<sup>159</sup> Stone argued that legal rights be given to the natural environment, including to “forests, oceans, rivers and other . . . ‘natural objects.’”<sup>160</sup> Stone’s argument became a reality in several local ordinances throughout the United States beginning in 2006, but these ordinances remain weak.<sup>161</sup>

A. *Rights of Nature in the 1970s*

Stone set forth two primary arguments in favor of giving rights to nature. First, nature should have rights for its own sake. Nature can and does communicate its “wants (needs)” to humans, often conspicuously.<sup>162</sup> For example, a person’s front lawn silently “communicates” with the homeowner when it requires water by drying, yellowing, and balding.<sup>163</sup> He posited that when nature is harmed or dying, it should be able to sue to be restored.<sup>164</sup> The environment should not be considered merely of indirect importance or as someone’s lost profits—the cost “*to the environment*” should suffice as a cognizable reason to bring suit.<sup>165</sup>

Second, other non-human entities have legal rights, so nature should as well.<sup>166</sup> “Corporations . . . states, estates, . . . municipalities [and] universities” cannot speak; lawyers speak for them.<sup>167</sup>

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<sup>159</sup> See generally Christopher D. Stone, *Should Trees Have Standing?—Toward Legal Rights For Natural Objects*, 25 S. CAL. L. REV. 450 (1972).

<sup>160</sup> *Id.* at 456.

<sup>161</sup> See *infra* Part V.B.

<sup>162</sup> Stone, *supra* note 159, at 471.

<sup>163</sup> See *id.*

<sup>164</sup> See *id.* at 475-76.

<sup>165</sup> See *id.* at 474 (emphasis in original).

<sup>166</sup> See *id.* at 464.

<sup>167</sup> *Id.*

Because these entities are allowed representation, nature should likewise be afforded representation.<sup>168</sup>

Stone explained that giving rights to the natural environment should necessarily be limited and accordingly does not equate to “anything as silly as that no one should be allowed to cut down a tree.”<sup>169</sup> He emphasized how human beings have rights, yet can be executed, and how fifteen-year-olds have certain rights, but cannot vote.<sup>170</sup> Thus, Stone importantly illustrated the ways in which those given rights are contemporaneously limited by particular restrictions, so rights given to the natural environment would likewise have limits.<sup>171</sup> Accordingly, damages would not be awarded unless actual damage to the ecosystem occurred, and cutting down one tree in a forest likely would not meet the requisite damage on which to sue.<sup>172</sup>

Stone authored *Should Trees Have Standing?* to influence the United States Supreme Court in *Sierra Club v. Morton*.<sup>173</sup> In *Morton*, a ski resort was scheduled for construction in California.<sup>174</sup> The Sierra Club<sup>175</sup> brought suit to block construction because of the environmental damage that would result.<sup>176</sup> But because the resort did not present a specific injury to the Sierra Club itself, the Court held that the Sierra Club lacked legal standing and ruled in favor of construction.<sup>177</sup>

Stone’s article, however, was not lost on Justice William Douglas, whose famous dissent in *Morton* embraced rights of nature.<sup>178</sup> Attuned to increasing public concerns for environmental protection, Justice Douglas believed that standing should be conferred

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<sup>168</sup> See *id.*

<sup>169</sup> See *id.* at 457.

<sup>170</sup> See *id.*

<sup>171</sup> Stone also posits that not everything in the “environment should have the same rights as every other thing in the environment.” See *id.* at 457-58.

<sup>172</sup> See *id.* at 457, 479 n.92.

<sup>173</sup> See Julie Turkewitz, *Corporations Have Rights. Why Shouldn't Rivers?*, N. Y. TIMES (Sept. 26, 2017), <https://www.nytimes.com/2017/09/26/us/does-the-colorado-river-have-rights-a-lawsuit-seeks-to-declare-it-a-person.html>.

<sup>174</sup> See *Sierra Club v. Morton*, 405 U.S. 727, 729 (1972).

<sup>175</sup> The Sierra Club is a grassroots environmental organization, originally formed in 1892, that works to protect the natural and human environment by defending natural resources and everyone’s right to enjoy them. See *About the Sierra Club*, SIERRA CLUB, <https://www.sierraclub.org/about-sierra-club> (last visited Mar. 8, 2021).

<sup>176</sup> See *Morton*, 405 U.S. at 729-30.

<sup>177</sup> See *id.* at 739-41.

<sup>178</sup> See *Sierra Club v. Morton*, 405 U.S. 727, 741 (1972) (Douglas, J., dissenting).

upon environmental objects for the sake of their preservation.<sup>179</sup> He also echoed Stone’s argument that inanimate objects are already parties in litigation, “[s]o it should be as respects valleys, alpine meadows, rivers, lakes . . . or even air that feels the destructive pressures of modern technology and modern life.”<sup>180</sup> “The river as plaintiff,”<sup>181</sup> he penned, “speaks for the ecological unit of life that is part of it.”<sup>182</sup> The river “is the living symbol of all the life it sustains or nourishes,” including humans.<sup>183</sup> Therefore, we “must be able to speak for the values which the river represents and which are threatened with destruction.”<sup>184</sup>

### B. Rights of Nature Today

Presently, twenty-six local governments in twelve different States<sup>185</sup> have implemented or proposed Rights of Nature ordinances.<sup>186</sup> The first was passed in Tamaqua Borough in Schuylkill

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<sup>179</sup> *Id.* at 741-42.

<sup>180</sup> *Id.* at 742-43.

<sup>181</sup> *Id.* at 743

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> See *Rights of Nature Law, Policy and Education*, UNITED NATIONS, <http://harmonywithnatureun.org/rightsOfNature/>. These states are California, Florida, Idaho, Maryland, New Hampshire, New Jersey, New Mexico, New York, Ohio, Pennsylvania, Wisconsin, and Virginia. See *id.*

<sup>186</sup> See Craig M. Kauffman & Pamela L. Martin, *Constructing Rights of Nature Norms in the US, Ecuador, and New Zealand*, 18 GLOB. ENV’T. POL. 43, 50 (2018); see also, e.g. TOWN OF WALES, N.Y., LOC. LAW NO. 3-2011, § 4(b) (2010) (“Ecosystems and natural communities possess the right to exist and flourish within the Town. The residents of the Town of Wales have the inalienable right to enforce and defend those rights to protect all ecosystems, including, but not limited to, wetlands, streams, rivers, aquifers, and other water systems, within the Town of Wales.”); CITY OF BROADVIEW HEIGHTS, OHIO, ORDINANCE NO. 115-12, § 1(d) (2012) (“Natural communities and ecosystems, including, but not limited to, wetlands, streams, rivers, aquifers, and other water systems possess inalienable and fundamental rights to exist and flourish within The City of Broadview Heights. Residents of the City shall possess legal standing to enforce those rights on behalf of those natural communities and ecosystems.”); COUNTY OF MORA, N.M., ORDINANCE 2013-01, § 4.3 (2013) (“Natural communities and ecosystems, including, but not limited to, wetlands, streams, rivers, aquifers, and other water systems, possess inalienable and fundamental rights to exist and flourish within Mora County against oil and gas extraction. Residents of the County, along with the Mora County Commission, shall possess legal standing to enforce those rights on behalf of those natural communities and ecosystems. Natural communities and ecosystems protected by this ordinance shall be protected on all lands within Mora County, including those owned by the state and federal government.”).

County, Pennsylvania in 2006.<sup>187</sup> In 2019, three were passed or proposed in California and Ohio.<sup>188</sup> However, despite the upward trajectory of including Rights of Nature in local ordinances throughout the country, these ordinances are weak.<sup>189</sup> For instance, a 2018 report conducted by Craig M. Kauffman and Pamela L. Martin found that no court had upheld a single Rights of Nature ordinance in effect at the time of the study.<sup>190</sup>

And, to date, no state constitution has implemented a Rights of Nature amendment, but one such amendment was proposed in Colorado in 2014.<sup>191</sup> However, that amendment ultimately failed.<sup>192</sup> A later Colorado lawsuit, *The Colorado River Ecosystem v. State of Colorado*, strove to implement Rights of Nature through the court system by means of a case of first impression.<sup>193</sup> However, the case was dismissed.<sup>194</sup>

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<sup>187</sup> See SCHUYLKILL COUNTY, PA, ORDINANCE no. 612, § 7.6 (2006) (“Borough residents, natural communities, and ecosystems shall be considered to be ‘persons’ for purposes of the enforcement of the civil rights of those residents, natural communities, and ecosystems.”).

<sup>188</sup> See UNITED NATIONS, *supra* note 185.

<sup>189</sup> See Kauffman & Martin, *supra* note 186, at 50-51.

<sup>190</sup> See *id.*

<sup>191</sup> See COLO. CONST. art. II, § 32 (proposed 2014); see also UNITED NATIONS, *supra* note 185.

<sup>192</sup> See UNITED NATIONS, *supra* note 185; see also *Colorado Environmental Rights Amendment (2014)*, BALLOTPEDIA, [https://ballotpedia.org/Colorado\\_Environmental\\_Rights\\_Amendment\\_\(2014\)](https://ballotpedia.org/Colorado_Environmental_Rights_Amendment_(2014)) (last accessed Mar. 14, 2021) (stating that the amendment did not make it onto the 2014 ballot for a vote after state leaders realized the amendment could cause a reduction in or an elimination of fracking and, thus, harm Colorado’s economy).

<sup>193</sup> See *Colorado River Ecosystem et al. v. Colorado*, No. 17-cv-02316 (D. Colo. Sept. 25, 2017); see also *infra* ANALYSIS: ECUADOR HAS A ‘RIGHTS OF NATURE’ CONSTITUTIONAL AMENDMENT, AND THE UNITED STATES SHOULD, TOO.

<sup>194</sup> See *Order, Colorado River Ecosystem et al. v. Colorado*, No. 17-cv-02316-NYW (D. Colo. Dec. 4, 2017); see also *infra* ANALYSIS: ECUADOR HAS A ‘RIGHTS OF NATURE’ CONSTITUTIONAL AMENDMENT, AND THE UNITED STATES SHOULD, TOO.

VI. ANALYSIS: ECUADOR HAS A ‘RIGHTS OF NATURE’  
CONSTITUTIONAL AMENDMENT, AND THE UNITED  
STATES SHOULD, TOO

A. *Ecuador: Rights of Nature and the Vilcabamba River*

In 2008, Ecuador amended its constitution to include a “Rights of Nature” amendment<sup>195</sup> to facilitate a harmonious and sustainable lifestyle between humans and the natural environment.<sup>196</sup> The constitution’s Preamble celebrates nature, referred to as “Pacha Mama,” and emphasizes that because humans are a part of nature, nature is thus “a vital part of human existence.”<sup>197</sup> In four Articles,<sup>198</sup> the Rights of Nature amendment “recognizes rights for all of [n]ature,”<sup>199</sup> not merely a human right to a clean environment.<sup>200</sup> Translated into English, they read as follows:

<sup>195</sup> See Kauffman & Martin, *supra* note 186, at 46.

<sup>196</sup> Craig M. Kauffman & Pamela L. Martin, *Testing Ecuador’s Rights of Nature: Why Some Lawsuits Succeed and Others Fail*, Paper Presented at the International Studies Association Annual Convention Atlanta, GA 1, 1 (Mar. 18, 2016), <https://static1.squarespace.com/static/55914fd1e4b01fb0b851a814/t/5748568c8259b5e5a34ae6bf/1464358541319/Kauffman++Martin+16+Testing+Ecuador’s+RoN+Laws.pdf>. The Rights of Nature amendment likely passed for two reasons. See Kyle Pietari, *Ecuador’s Constitutional Rights of Nature: Implementation, Impacts, and Lessons Learned*, WILLAMETTE ENV’T. L.J. 37, 48 (2016). First, numerous culturally indigenous communities exist in Ecuador, and its indigenous population has persuasive political influence. See *id.* The very concept of treating nature with rights and respect comes directly from the indigenous population. See *id.* Second, the election of President Rafael Correa in late 2006 allowed for the propagation of his populist agenda. See *id.* President Correa seemingly wanted to commence more progressive policies and satisfy the indigenous electorate. See *id.*

<sup>197</sup> See CONSTITUCION DE LA REPUBLICA DEL ECUADOR 2008 [CONSTITUTION] Oct. 20, 2008, pmb1.

<sup>198</sup> See *id.* at arts. 71-74.

<sup>199</sup> Kauffman & Martin, *supra* note 186, at 46.

<sup>200</sup> This is significant because people may bring suit on behalf of the environment when the environment is harmed, even when those people themselves are not harmed or suffering from an injury-in-fact (setting aside that a specific standing requirement in Ecuador may differ from the “injury-in-fact” requirement in the United States). If rights were granted to people for a clean environment, then fewer cases could be brought, and the environment and humans alike would likely suffer more. For example, if a dying forest existed geographically far from humans, and humans had a right to a clean environment, a person bringing suit on behalf of the trees or forest ecosystem would probably lose because the injury-in-fact to that person is too attenuated or may not exist at all. But if nature has rights for its own sake, then a person could bring suit and probably win because the injury-in-fact would be cognizable to the forest; any injury-in-fact to the person suing would not matter.

Article 71. Nature, or Pacha Mama, where life is reproduced and occurs, has the right to integral respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions and evolutionary processes.

All persons, communities, peoples and nations can call upon public authorities to enforce the rights of nature. To enforce and interpret these rights, the principles set forth in the Constitution shall be observed, as appropriate.

The State shall give incentives to natural persons and legal entities and to communities to protect nature and to promote respect for all the elements comprising an ecosystem.

Article 72. Nature has the right to be restored. This restoration shall be apart from the obligation of the State and natural persons or legal entities to compensate individuals and communities that depend on affected natural systems.

In those cases of severe or permanent environmental impact, including those caused by the exploitation of nonrenewable natural resources, the State shall establish the most effective mechanisms to achieve the restoration and shall adopt adequate measures to eliminate or mitigate harmful environmental consequences.

Article 73. The State shall apply preventive and restrictive measures on activities that might lead to the extinction of species, the destruction of ecosystems and the permanent alteration of natural cycles.

The introduction of organisms and organic and inorganic material that might definitively alter the nation's genetic assets is forbidden.

Article 74. Persons, communities, peoples, and nations shall have the right to benefit from the

environment and the natural wealth enabling them to enjoy the good way of living.

Environmental services shall not be subject to appropriation; their production, delivery, use and development shall be regulated by the State.<sup>201</sup>

Rights of Nature in Ecuador is primarily enforced using several different legal mechanisms.<sup>202</sup> These mechanisms are (1) civil lawsuits, which seek to restore damaged ecosystems through restitution or seek protective action to avoid expected future violations; (2) criminal lawsuits, which punish people guilty of environmental crimes; and (3) administrative action by a government agency, which seeks to institute punitive measures (*e.g.*, fines, license removal, eviction from ecological reserves, or restoration of damaged ecosystems) for Rights of Nature violations.<sup>203</sup>

A particular 2010 Rights of Nature civil lawsuit is illustrative. Two landowners in Ecuador brought suit for protective action on behalf of the Vilcabamba River.<sup>204</sup> After the local government impermissibly dumped road construction debris into the river, its flow increased and its path changed.<sup>205</sup> Consequently, the river began flooding, which damaged the landowners' property as well as the surrounding ecosystem.<sup>206</sup> On appeal, the court held that the Rights of Nature amendment provided the requisite standing *to the environment* on which these landowners could sue.<sup>207</sup> The landowners were not required to prove harm to themselves but only harm to nature.<sup>208</sup> The court found that the Vilcabamba River

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<sup>201</sup> CONSTITUCIÓN DEL ECUADOR [CONSTITUTION] art. 71-74, *translated in Constitution of the Republic of Ecuador*, POLITICAL DATABASE OF THE AMERICAS, <https://pdba.georgetown.edu/Constitutions/Ecuador/english08.html> (last updated Jan. 31, 2011).

<sup>202</sup> Kauffman & Martin, *supra* note 195, at 5.

<sup>203</sup> *See id.*

<sup>204</sup> *See id.* at 6.

<sup>205</sup> *See id.*

<sup>206</sup> *See id.*

<sup>207</sup> *See id.*

<sup>208</sup> *See id.*

was indeed being damaged and ruled in favor of the River and ecosystem.<sup>209</sup> Importantly, this case succeeded because of the Rights of Nature amendment. Had this amendment never passed, the landowners would have been forced to sue on their own behalf and likely could have only recovered personal damages without remedying the environmental harm.

*B. The United States: No Federal or State Rights of Nature, and The Colorado River Ecosystem*

A case similar to the Vilcabamba River case—*The Colorado River Ecosystem v. State of Colorado*<sup>210</sup> was brought in the United States in 2017 on behalf of the Colorado River and its surrounding ecosystem.<sup>211</sup> Deep Green Resistance (DGR)<sup>212</sup> and several of its members represented the Ecosystem’s interests as “next friends”<sup>213</sup> by bringing suit against Colorado Governor John Hickenlooper.<sup>214</sup> “Next friends” claimed that the River itself has a right to “exist, flourish, regenerate, [and] naturally evolve,”<sup>215</sup> which the state violated.<sup>216</sup> “Next friends” thus sought recognition and

<sup>209</sup> *See id.* The judge ordered the government to restore the ecosystem. *See id.*

<sup>210</sup> *See* Amended Complaint for Declaratory and Injunctive Relief at 3, *The Colorado River Ecosystem v. State of Colorado*, No. 1:17-02316 (D. Colo. Sept. 25, 2017).

<sup>211</sup> *See id.*; *see also* Julie Turkewitz, *Corporations Have Rights. Why Shouldn't Rivers?*, N. Y. TIMES (Sept. 26, 2017), <https://www.nytimes.com/2017/09/26/us/does-the-colorado-river-have-rights-a-lawsuit-seeks-to-declare-it-a-person.html> (stating that *Colorado River Ecosystem* is a “first-of-its-kind federal lawsuit” in which the plaintiffs sought to have the Colorado River recognized as a person with rights). The Colorado River and its ecosystem are hereinafter referred to as the “Ecosystem.”

<sup>212</sup> Deep Green Resistance is an environmental grassroots organization with worldwide membership. *See* Amended Complaint for Declaratory and Injunctive Relief at 9, *Colorado River Ecosystem*, (No. 1:17-02316).

<sup>213</sup> *See id.*

<sup>214</sup> *See id.* at 16. The plaintiffs argued that because the Colorado River Ecosystem is vital to both human and nonhuman life, “[t]hreats to the Colorado River Ecosystem are threats to life.” *Id.* at 23. Therefore, the Ecosystem “must possess the ability to protect itself from threats to its survival,” as guaranteed by the Fifth and Fourteenth Amendments of the United States Constitution. *Id.* The plaintiffs argued that in failing to recognize the Ecosystem’s rights, while recognizing and “elevating corporate rights,” the State of Colorado violated the Ecosystem’s right to equal protection. *See id.* at 27.

<sup>215</sup> *Id.* at 3.

<sup>216</sup> *See id.* The violations include pollution of the River with topsoil and runoff. *See id.* at 10. The plaintiffs also argued that the State’s failure to recognize rights possessed by the Ecosystem resulted in further harms, such as injury to downriver communities resulting from the 2015 breach of the Gold King Mine portal. *See id.* at 28. This breach caused millions of gallons of mine wastewater and nearly one million pounds of heavy metals to flow into the Colorado River. *See id.*

declaration that the Colorado River possessed rights comparable to those of a person.<sup>217</sup> They argued that if such rights were not found, then “existing environmental laws [would] continue to fail to protect the Colorado River, and thus, continue to fail to protect the human and natural communities that are dependent on the River.”<sup>218</sup> After all, the Colorado River is vital to human and non-human life in the American Southwest.<sup>219</sup> Indeed, the Colorado River provides the vast majority of its water to surrounding agricultural endeavors, including those located in major cities like Denver, Los Angeles, and Salt Lake City.<sup>220</sup>

“Next friends” additionally argued that if corporations, which are non-human, have rights<sup>221</sup> and legal standing, then ecosystems should as well.<sup>222</sup> If corporations, which can be created in a mere fifteen minutes and do not sustain human life, have rights, then surely million-year-old ecosystems, which do sustain human life, should have rights.<sup>223</sup> Ultimately, however, “next friends” could not rely on an American Rights of Nature amendment (because no such federal constitutional amendment currently exists in the United States) and its attorney, Jason Flores-Williams, moved to dismiss the case due partly to threatened sanctions by the Colorado attorney general’s office.<sup>224</sup> The judge granted “next friends” motion.<sup>225</sup>

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<sup>217</sup> *See id.* at 2.

<sup>218</sup> *Id.* at 3.

<sup>219</sup> *See id.*

<sup>220</sup> *See id.* at 6.

<sup>221</sup> *See* *Citizens United v. FEC*, 558 U.S. 310, 365 (2010) (holding that political speech is indispensable regardless of if that speech comes from a corporation or an individual).

<sup>222</sup> *See* Complaint for Declaratory Relief, *supra* note 210, at 13.

<sup>223</sup> *See id.*

<sup>224</sup> *See* Order Granting Motion to Dismiss at 1, *Colo. River Ecosystem v. Colo.*, ECF 25, (Dec. 4, 2017) (Civil Action No. 17-cv-02316-NYW); *see also* Lindsay Fendt, *Colorado River ‘Personhood’ Case Pulled by Proponents*, ASPEN JOURNALISM (Dec. 5, 2017), <https://www.aspenjournalism.org/2017/12/05/colorado-river-personhood-case-pulled-by-proponents/>.

“Next friends” brought suit to expand rights to nature—rights that did not exist at the time of the suit (and which still do not exist today). *See* Unopposed Motion to Dismiss Amended Complaint with Prejudice at 3, ECF 24, (Dec. 3, 2017) (Civil Action No. 17-cv-02316-NYW). Expanding rights “is a difficult and legally complex matter.” *Id.* As written in “next friends” motion to dismiss, “[w]hen engaged in an effort of first impression, the [attorney] has a heightened ethical duty to continuously ensure that conditions are appropriate for our judicial institution to best consider the merits of a new canon.” *Id.* Due to the complexities of a case of first impression, and potential sanctions against Flores-Williams, “next friends” moved to dismiss the case with prejudice. *See* Fendt, *supra* note 224.

<sup>225</sup> *See* Order Granting Motion to Dismiss 1, *The Colorado River Ecosystem v. State of Colorado*, 1:17-cv-02316-NYW (D. Colo. Dec. 4, 2017), ECF 25 (“Though dismissal pursuant to [Federal Rule of Civil Procedure] 41(a)(1)(A)(i) should be self-effectuating, out of an

C. *A “Rights of Nature” Amendment in the United State Would Prove Beneficial*

The opposite outcomes in the Vilcabamba River case and the Colorado River case exemplify exactly why the United States should adopt a Rights of Nature constitutional amendment. Polluting rivers undeniably affects not just the rivers but their surrounding ecosystems as well. These ecosystems consist of all forms of life within the rivers and outside of them, including humans. And these ecosystems are becoming damaged and harmed as a result of human actions (*e.g.*, dumping wastes) and inactions (*e.g.*, failure to pass more stringent legislation). Had the Vilcabamba River case occurred in the United States, the landowners likely could have brought a property suit. But they could not have brought suit on behalf of the surrounding ecosystem. So only a relatively small area of land would have been involved in the suit rather than the entire ecosystem, which would not have been as beneficial an outcome. And because the landowners themselves were not injured, the high standing requirements in the United States may have prevented them from bringing suit at all.

A Rights of Nature amendment would alleviate these problems by allowing a party to sue under the amendment alone, rather than attempting to sue under multiple environmental statutes where the requisite standing requirements may not exist. Under Rights of Nature, plaintiffs would simply need to prove environmental harm akin to the harm in the Ecuadoran Vilcabamba River case.<sup>226</sup> The simplicity of such an amendment would greatly and effectively benefit the environment and human health, which is already a main goal of environmental legislation.<sup>227</sup> So passing a Rights of Nature amendment would simply further environmental policy goals. Because of the success and breadth of Ecuador’s

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abundance of caution, **IT IS ORDERED** that: 1. Plaintiff’s Motion to Dismiss the Amended Complaint [#24] is **GRANTED** . . .”).

<sup>226</sup> See Kauffman & Martin, *supra* note 196, at 5, 6.

<sup>227</sup> Because helping (1) the environment and (2) human health are already goals of environmental legislation, it logically follows that this goal should be the aim of a Rights of Nature amendment. See Thomas O. McGarity, *The Goals of Environmental Legislation*, 31 B.C. ENVTL. AFF. L. REV. 529, 529 (2004). The purpose of a Rights of Nature amendment is to continue alleviating environmental problems in an easier and more beneficial manner, *i.e.*, by maintaining this two-fold goal. See Kauffman & Martin, *supra* note 196, at 1.

Rights of Nature Amendment, the United States' Rights of Nature amendment should be closely modeled after it.<sup>228</sup>

"Next friends" in *Colorado River Ecosystem* would only have had to show that the river and/or the surrounding ecosystem—nature—was harmed. And instead of having its efforts thwarted as a case of first impression, "next friends" would have been able to rely on a Rights of Nature amendment to bring suit, and Flores-Williams would not have felt pressured to move to dismiss his own case. The probable outcome of *Colorado River Ecosystem*, had it been brought pursuant to a Rights of Nature amendment, would have been like the Vilcabamba River case—the plaintiffs ("next friends") would have succeeded. So, a Rights of Nature amendment would (1) alleviate the high standing requirement for individuals, (2) allow suit on behalf of humans and nature, and (3) better the lives and health of humans and nature, given that the two are intertwined.

Additionally, a Rights of Nature amendment would substantially alleviate the partisan problems afflicting environmental legislation. While such an amendment would be subject to judicial interpretation, an extensive effort would be needed to repeal it.<sup>229</sup> In other words, a Rights of Nature amendment would not easily be subject to the will of whichever political party is in power. It would, however, be left up to the courts to interpret the amendment and decide in favor of or against the environment. It is possible that a negative precedent could be set if courts rule against plaintiffs bringing Rights of Nature suits. But because judges

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<sup>228</sup> The United States should recognize ecosystems in the same way that Ecuador recognizes ecosystems, as living spiritual beings. See Kauffman & Martin, *supra* note 186, at 49-50. Importantly, Ecuador defines nonliving elements, such as rocks, soil, and water, as "living" and having metaphysical characteristics worthy of moral consideration. See *id.* As such, lawsuits may be brought on behalf of an ecosystem—its living and nonliving counterparts equally accounted for. So, a lawsuit may be brought on behalf of an ecosystem with a polluted river, dry soil, and sickened trees rather than having to bring an individual lawsuit (or some kind of nature class action) on behalf of each harmed living being within the ecosystem. This will allow for simplicity in lawsuits and more effective results for the environment. Given the current state of the environment, a broad environmental amendment is best so that lawsuits will be more far-reaching; it will benefit the environment and humans more if entire forests, rivers, or even ecosystems are represented rather than an individual tree.

<sup>229</sup> A constitutional amendment must be passed to repeal an existing amendment. See U.S. CONST. amend. V. First, passing an amendment requires two-thirds of each house of Congress to first propose the amendment. See *id.* Second, legislatures of three-fourths of the states, or conventions in three-fourths of the states, must ratify it. See *id.* This process is extensive because far more than a simple majority is required to propose and to ratify an amendment. See *id.*

interpret the law based on evidence and precedent, they will not be ruling strictly in accordance with their political preferences. Thus, even conservative judges may set precedents in favor of Rights of Nature, so long as the plaintiffs prove environmental harm. An amendment will therefore have more success than further environmental legislation and will concurrently benefit both humans and the environment.

#### *D. We Need Not Fear the Counterarguments*

Proponents of an American Rights of Nature amendment need not fear critics' slippery slope argument. These critics believe that a Rights of Nature amendment would allow suits to be brought for trifle environmental occurrences, such as suing on behalf of pebbles that have been stepped on.<sup>230</sup> Flores-Williams has directly responded to the notion of pebbles having standing by adamantly explaining the ridiculousness of such an argument.<sup>231</sup> He explains that the purpose of such an amendment is not to preserve pebbles but rather to preserve the “dynamic systems that exist in the ecosystem upon which we depend.”<sup>232</sup> In other words, a Rights of Nature amendment is about big-picture environmental problems and solutions that will significantly and directly benefit humans. At least seventy-five percent of Ecuador's Rights of Nature lawsuits have succeeded in favor of the environment over the past twelve years.<sup>233</sup> This percentage demonstrates that Rights of Nature is successful and also has limitations—not every Rights of Nature lawsuit has been decided in favor of the environment, so a suit on behalf of pebbles would likely fail under this amendment, as would other relatively insignificant claims.

In fact, the United States already has safeguards against plaintiffs bringing frivolous claims, such as court-ordered sanctions.<sup>234</sup>

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<sup>230</sup> See Turkewitz, *supra* note 173.

<sup>231</sup> See *id.*

<sup>232</sup> *Id.*

<sup>233</sup> See Kauffman & Martin, *supra* note 186, at 50.

<sup>234</sup> *E.g.*, Fed. R. Civ. P. 11(a)-(b)(2) (stating that an attorney or unrepresented person must present to the court “a pleading, written motion, or other paper . . . [with] claims, defenses, and other legal contentions [that] are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new

So even if a plaintiff attempted to bring suit on behalf of a pebble, the case would likely be dismissed and the plaintiff's attorney could face serious consequences (*e.g.*, sanctions), or the plaintiff may not even find representation because of the threat of sanctions.

Additionally, people may fear that a Rights of Nature amendment will interfere with activities such as hunting, fishing, and boating. But such an amendment would not be meant to interfere with these activities unless their actions constitute the requisite harm to nature. For example, if a person is killing off an animal on the endangered species list (and no Endangered Species Act exception applies), then the Endangered Species Act would allow for a lawsuit on behalf of the animal and a Rights of Nature claim on behalf of the ecosystem in which the animal lives. But if a person attains a fishing permit and fishes in accordance with that permit, then Rights of Nature would not be applicable. Again, Ecuador's legal system demonstrates that Rights of Nature has limitations.<sup>235</sup>

We have to use and rely on the environment and its resources for survival. Most people eat both plants and animals for sustenance. We also use wood for myriad purposes, including for books, furniture, and houses. There is an important difference between using the environment and overusing or harming it.<sup>236</sup>

The time is right for an American Rights of Nature amendment. The United States already has several dozen environmental statutes,<sup>237</sup> as well as several weak local Rights of Nature ordinances.<sup>238</sup> Without a doubt, the United States has had environmental protection and human health as goals for decades, and a Rights of Nature amendment is the appropriate next step to further these goals. In fact, because the United States pollutes on such a large scale,<sup>239</sup> it may even have a global duty to implement this amendment for the sake of people around the world who are suffering as a result of its widespread pollution. Successful cases

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law."); *see also* Fed. R. Civ. P. 11(c)(1) (stating that if "the court determines that Rule 11(b) has been violated, the court may impose an appropriate sanction on an attorney, law firm, or party that violated the rule or is responsible for the violation.").

<sup>235</sup> *See* Kauffman & Martin, *supra* note 196, at 15, 19.

<sup>236</sup> But a further analysis of this distinction is beyond the scope of this Note.

<sup>237</sup> *See generally*, *supra* Part IV.

<sup>238</sup> *See* Kauffman & Martin, *supra* note 186, at 50.

<sup>239</sup> *See* 2018 EPI Report *supra* note 15; *see also* Irfan, *supra* note 14.

in Ecuador show that a Rights of Nature amendment can and will succeed from the start, and for years to come.<sup>240</sup> With climate change continuously ravaging the earth, a Rights of Nature amendment is desperately needed in the United States.

### CONCLUSION

Passing a Rights of Nature amendment is pivotal because humans' relationship with nature is intertwined. Such an amendment has already been proving effective and critical in Ecuador, in ways that legislation alone cannot accomplish. A Rights of Nature amendment will effectively alleviate the high standing and ripeness requirements that citizens presently face in order to bring environmental suits under various environmental statutes, while additionally helping humans and the environment simultaneously. Given that *The Colorado River Ecosystem v. State of Colorado* has recently reignited the discussion on rights of nature, and Christopher Stone's "Should Trees Have Standing" article from 1972, and given that several local governments have already implemented Rights of Nature ordinances, now is the time for the United States to embrace and pass its own Rights of Nature amendment.

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<sup>240</sup> See Kauffman & Martin, *supra* note 186, at 50.