

What if We Could Sue the Hurricanes?
The Necessity of Recognizing the Rights of Natural Entities
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¹ J.D. Candidate, May 2009, Barry University, School of Law in Orlando, Florida. B.S. Finance, University of Central Florida, December 2001. I would like to thank my son for giving me the inspiration to take this class and write this article. Ensuring the health of the Earth for the future of every child should be the goal of the human race.

On August 29, 2005, Hurricane Katrina slammed into the Northern Gulf Coast. In the next several days, the residents of New Orleans dealt with rising floodwaters, atrocious living conditions at the Superdome, and the inadequacy of government response. Away from ground zero, the government infighting was immediately apparent. Finger pointing abounded at all levels: City, State, and Federal ~ even the individual citizens who apparently should have been better prepared.² The director of FEMA resigned in the aftermath, and President George Bush was heavily criticized.³

What if we could have just sued Katrina? The storm was really the source of all of these problems. A storm cannot argue its own case; it would be an easy scapegoat. Yet, it is possible, careful attorneys would argue, that since humans are real players in global warming, it is partly our fault that the hurricane existed in the first place. Would an attorney even take the case? Moreover, would a court even hear it? Are these monstrous storms a symptom of the bigger problem of climate change in the world? Are these natural disasters Earth's way of crying out and pleading with humans to think about the environmental destruction they have released upon her?

Obviously, suing a hurricane is a fanciful notion. Besides the fact that the storm is judgment proof, no fault lies in the hurricane itself. It does not act with a will, it does not make choices. That is the major difference between nature and the human race. We act with free will; we make choices and decide the course of our destiny. Thus, it is our duty to care for the Earth and make sure we are protecting her from ourselves.

² See Hurricane Katrina: What Next?, http://news.bbc.co.uk/1/hi/talking_point/4207856.stm (March 18, 2008, 18:31 EST) (with criticisms targeted at the individual to the local and state governments through the federal governments).

³ Richard W. Stevenson, *After Days of Criticism, Emergency Director Resigns*, N.Y. Times, Sept. 13, 2005, Available at www.nytimes.com/2005/09/13/national/nationalspecial/13brown.html.

This paper will discuss the concept of recognizing the rights of nature and allowing nature to sue on behalf of itself when its rights are violated. Section I will discuss the emerging field of Earth jurisprudence and what those ideas contribute to the concept of recognizing the rights of nature. Section II will briefly discuss the meaning of standing in the United States courts' system. This section will also analyze Justice Antonin Scalia's perspective on standing, as his views are critical to the modern definitions of the doctrine, especially how it relates to environmental litigation. Section III will look at the history of natural beings and standing in the American court system. The section will briefly discuss the Endangered Species Act. Section IV will discuss how the American courts can facilitate nature's standing through the vehicle of guardianship. This section will discuss the ramifications of proceeding with that idea. The section will also touch upon whether a constitutional amendment is needed to ensure the rights of nature. This section will also address the concept of a global guardian and how the International Monetary Fund (IMF) and the World Bank could play an integral role in the concept of a global guardian. Section V will discuss the problem of agencies in relation to environmental law and what Congress can do to ensure that agencies are meeting their mandate of protecting the environment. Section VI will conclude the article with a critique of my own proposals and a discussion of whether a grass roots approach is the most effective solution.

Section I: Earth Jurisprudence – The Idea

“Your true modern is separated from the land by many middlemen...He has no vital relation to it...Land is something he has outgrown...”⁴

The natural beauty of the Earth is something many humans have outgrown. We can learn volumes by watching the most innocent, unspoiled of ourselves: our children. I have taken time to purposefully connect with nature over the last few months while writing this paper. I find it

⁴ ALDO LEOPOLD, *The Land Ethic in A SAND COUNTY ALMANAC* 189 (1949).

increasingly hard not only to locate a purely natural place, but also to block out the modern world and truly enjoy it. My own communes with nature have subsequently been disappointing and unsuccessful for the most part.

Then, I watched my son. At eighteen months, most everything in the world is new and interesting to him. A piece of paper on the ground fascinates him. If I give him a water bottle to hold, he carefully rolls it in his palms, observing every last inch of the plastic. He ponders a copper doorstep for hours, gently flicking it with his fingers, laughing heartily at the sound it makes. A true sense of wonder appears whenever we step outdoors. Even walking to the mailbox becomes an adventure. He wants to chase the lizards that cross our path. He wants to pick leaves off the bushes and put them in his mouth, thoughtfully tasting them. He is simply fascinated by the look and feel of raindrops and will gleefully stomp in puddles, not worrying about wet socks or how dirty the water is. He is fascinated by animals, calling anything furry a “Gogie” (translation: Doggie) and quacking incessantly at the ducks that live in the pond near our home. He has taught me to appreciate nature the way he does, to see it through his eyes. He is not destructive. He does not seek to conquer the world around him. He uses it as his playground, his stage, as a source of endless possibilities for imagination.

Adults have lost that sense of wonder. We plunder the Earth relentlessly. It cries out to us through dying grasslands, barren soil and the smoldering embers of a devastated forest. It rebels against us through monstrous storms, ravaging fires and sweltering heat. It tries to please us with beautiful rainbows, breathtaking sunsets and the twinkling night sky. We are deaf to its voice, we feign ignorance to its plight, we choose not to view its suffering. We have lost our connection with the Universe around us.

Earth jurisprudence seeks that reconnection. It attempts to change the way that humans view the Earth and realign our values so that our laws can be revamped to support our environment.⁵ It encourages humans to realize the intrinsic value of the natural world and connect with the universe the way our ancestors did and indigenous people still do.⁶

One of the revolutions that led to the creation of Earth jurisprudence was the Earth Charter.⁷ The seeds of the idea for the Charter began in 1987 during a meeting of The World Commission on Environment and Development.⁸ The Commission called for a “new charter” to address the sustainability of human existence.⁹ An Earth Charter Commission was formed and many drafts later, the Earth Charter was born in March 2000 at a meeting held at The United Nations Educational, Scientific and Cultural Organization (UNESCO) headquarters in Paris.¹⁰

In my opinion, the general population would not be receptive to a document like the Earth Charter. Personally, I believe it is a rather idealistic, utopian piece whose lofty goals could never be achieved simply because of human nature.¹¹ The United Nations World Charter for Nature, another basis for the Earth jurisprudence movement, is a more concrete, useful document. It would probably find more support in the general population. The Charter is a general roadmap of sorts for participating nations to follow when applying the principles of environmental conservation. The document regards humans as the primary species, an anthropocentric focus that does not really coincide with Earth jurisprudence. However, the

⁵ Center for Earth Jurisprudence, www.earthjuris.org/home.htm (Last visited Apr. 1, 2008).

⁶ *Id.*

⁷ What’s the Center for Earth Jurisprudence About?, www.earthjuris.org/about.htm (stating that the Center for Earth Jurisprudence strives to promote the principles of the Earth Charter).

⁸ Earth Charter In Action: About the Earth Charter, www.earthcharterinaction.org/about_charter.html (Last visited Apr. 1, 2008).

⁹ *Id.*

¹⁰ *Id.*

¹¹ The Earth Charter, www.earthcharterinaction.org/2000/10/the_earth_charter.html (Such aspirational, but implausible to most people and, at times, anti-capitalistic goals include preventing pollution of any part of the environment, “recogniz[ing] the ignored”, equitable distribution of wealth, securing human rights of women, strengthening families, eliminating discrimination, etc.).

Charter emphasizes humans' relationship to the environment and what steps they can take to lessen their impact.¹² Although a much more focused and pragmatic application of important principles of Earth jurisprudence than the Earth Charter, the World Charter for Nature originated in 1982 and judging by the current state of the environment, still has not had nearly as big of an impact as it should. Yet, it is foolhardy to believe that a document can change the Earth. As the Center for Earth Jurisprudence advocates, a new field of law can only be designed through participation of all members of society: lawyers, scientists, philosophers, theologians and poets to name a few.¹³

Earth jurisprudence strives to take the emphasis off of the industrial world and put it back on our connection to the Universe. It promotes humans living in harmony with the rest of the natural world and recognizing the interdependence of all of the species on Earth including humans.¹⁴ Industry provides for our lifestyle, the clothes on our back, the electricity in our home, the computer I am composing this paper on. But what provides for our soul? "There is in the Industrial Process, no poetry, no elevation or fulfillment of mind or emotions comparable to that experienced in response to the magnificence of the sea, the mountains, the sky, the stars at night, the flowers blooming in the meadows, the flight and song of the birds."¹⁵

¹² U.N. World Charter for Nature, *available at* www.un.org/documents/ga/res/37/a37r007.htm.

¹³ Center for Earth Jurisprudence, www.earthjuris.org (last visited April 1, 2008) (Curiously, the most important group in my opinion, teachers, are left off this list).

¹⁴ THOMAS BERRY, *EVENING THOUGHTS* 109-110 (2006).

¹⁵ *Id.* at 109.

Theories for Recognizing the Rights of Nature.

Thomas Berry, one of the foremost authors on Earth jurisprudence, sets forth some simple principles of the movement. In his book, *Evening Thoughts*, he creates sort of a Bill of Rights for Nature.¹⁶ Some of these principles are discussed below.

First, there are three rights intrinsic in all beings: the right to live, the right to habitat and the right to fulfill one's role in the natural process.¹⁷ These rights are fundamental to all nature and are used as the basis for my discussion of recognizing nature's rights.

Second, rights originate where existence originates. Therefore, if humans have rights, all other Earth beings also have rights.¹⁸ As Cormac Cullinan, another leading scholar of the Earth jurisprudence movement noted, a tree has always known it has rights, we as humans just have not figured it out yet.¹⁹ Yet, in our system, the only rights recognized by law are those enforceable in a court.²⁰ Thus, even if the tree knows it has rights, that fact does not prevent humans from destroying it. The human race needs to recognize that the laws of the Universe are not going to change; instead we need to adapt our laws to meet hers.²¹

Third, nature is a communion of subjects, not a collection of objects.²² Humans need to change from conquerors of the Earth to citizens of the Earth. This requires an integral change in our intellectual emphasis, loyalties, affections and convictions.²³

¹⁶ *See id.* at 149-150.

¹⁷ *Id.* at 149.

¹⁸ *Id.*

¹⁹ Here, I am paraphrasing his statement from a lecture he gave at the Earth Jurisprudence Symposium at Barry University, School of Law on February 29, 2008, available at <http://www.earthjuris.org/events/02-08symposium/videostream.htm>.

²⁰ CORMAC CULLINAN, *WILD LAW* 68 (2003).

²¹ *Id.* at 90.

²² BERRY, *supra*, at 149.

²³ LEOPOLD, *supra*, at 171.

Fourth, every member of the Earth community is dependent on the rest of the members.²⁴ The ecosystem cannot survive except through the cooperation of its parts.²⁵ The health and integrity of the entire system is premised on what we, as humans, do with the Earth.²⁶

The principles of Earth jurisprudence are stark departures from traditional principles of law. They are ingeniously innovative and refreshingly simple. While the principles may seem wholly impractical, exceedingly far-fetched and dismally lacking any application in reality, thoughtful consideration of the mandates actually reaps a multitude of possibilities.

Section II: Standing

*“Congress made clear that citizen groups are not to be treated as nuisances or troublemakers, but rather as welcomed participants in the vindication of environmental interests.”*²⁷

A. Basics of Standing

Standing is one of most ambiguous concepts in the modern legal system.²⁸ Black's Law defines it as being proper when a party “has sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy.”²⁹ It comes from the Cases and Controversies Clause of the United States Constitution.³⁰ Standing is the determination of whether a specific party can bring a specific cause of action to court.³¹

There are several values served by limiting standing. These include assurance of separation of powers, meaning, limiting judicial review to only those cases Congress intended.³²

²⁴ BERRY, *supra*, at 150.

²⁵ CULLINAN, *supra*, at 112.

²⁶ *Id.* at 90.

²⁷ *Friends of the Earth v. Carey*, 535 F.2d 165, 172 (2d Cir. 1976).

²⁸ *Ass'n of Data Processing Serv. Org. v. Camp*, 397 U.S. 150, 151 (1970) (“Generalizations about standing to sue are largely worthless as such.”).

²⁹ Black's Law Dictionary 1405 (6th ed. 1990). This definition actually comes from *Sierra Club v. Morton*, 405 U.S. 737 (1972) discussed *infra* Section III.A.

³⁰ U.S. Const. art. III, § 2, cl. 1.

³¹ ERWIN CHEMERISNKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 60 (3d ed. 2006).

³² *Id.* at 60-62.

In addition, standing promotes judicial efficiency and assures an adversarial proceeding by requiring parties to have a significant stake in the litigation.³³ Finally, it preserves values of fairness by compelling parties to raise their own rights and not the rights of others.³⁴

There are three constitutional requirements to standing. The plaintiff must have suffered or will immediately suffer an injury, the injury is fairly traceable to defendant's conduct and will be adequately redressed by the relief sought, and the complaint raises a claim in the zone of interests of the statute.³⁵ The zone of interests has traditionally been read extremely broadly.³⁶ In addition to constitutional standing, a party must also have statutory standing³⁷; meaning Congress conferred standing on them through the relevant statute.³⁸ Third party standing is generally not allowed except in narrow exceptions.³⁹

B. Justice Antonin Scalia's Definition of Standing⁴⁰

“No political truth is certainly of greater value.”⁴¹ That sentence, written by James Madison, encapsulates Justice Scalia's belief in standing. Justice Scalia believes the disregard of

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 63.

³⁶ In *Data Processing*, 397 U.S. at 153, the standard was espoused as “*arguably* within the zone of interests” (emphasis added). In *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 385, 399 (1987), the Court defined the test for exclusion from the zone of interests as the plaintiff's interest being “so marginally related...that it cannot be reasonably assumed that Congress intended to permit the suit.”

³⁷ Of course, the party only needs statutory standing if a statute is at issue.

³⁸ *Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1175 (9th Cir. 2004).

³⁹ *CHEMERISNKY, supra*, at 83-88. The four narrow exceptions are where the third party is not able to sue; where there is a close relationship between the plaintiff and the third party (as in the case of doctor and patient); the Overbreadth Doctrine (which essentially allows anyone to sue under a First Amendment claim whether or not it is unconstitutional as applied to them); and standing for associations.

⁴⁰ A big thank you to Katherine A. Burke, whose law review article *Can We Stand For It? Amending the Endangered Species Act with an Animal Suit Provision*, 75 U.COLO. REV 633 (2004) gave me the inspiration to investigate further Justice Scalia's views on standing.

⁴¹ THE FEDERALIST NO. 47 (James Madison).

standing leads to the “over-judicialization of the process of self-governance.”⁴² That is quite a mouthful, but broken down into layman terms, he believes that legislating should be left up to Congress and protecting the minority from the majority is the goal of the judiciary. Judges should not decide public policy disputes, thus turning their courts into political forums.⁴³ Noting the judiciary’s “love affair”⁴⁴ with environmental cases about the time of his article, he stressed the view that the “objects”⁴⁵ of a regulation have the presumption of standing, whereas beneficiaries of a regulation (as in organizations that bring cases asking for a court to enforce environmental laws against other parties) have to meet a more stringent, “injury in fact” test.⁴⁶ He clarified the constitutional constraints of standing by requiring a plaintiff to show clear proof of a particularized and concrete injury that is not conjectural or hypothetical, but actual or imminent.⁴⁷ Justice Scalia also stated that although Congress can give statutory standing, they must adhere to the requirements of constitutional standing; therefore, the courts should not embrace Congress’ definition of standing if it is so broad it effectively includes the entire population.⁴⁸

There are several critiques of Justice Scalia’s article. First, he noted that a looser definition of standing brings in parties with “less than worthy motives.” He gives a competing

⁴² Antonin Scalia, *The Doctrine of Standing As An Essential Element of the Separation of Powers*, 17 SUFFOLK U.L. REV 881, 881 (1983). This article was a precursor to the Supreme Court’s decision in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), the opinion of which he authored.

⁴³ *Id.* at 892-94. This is rarely an opinion held today. See NATURAL RES. DEF. COUNCIL, HOSTILE ENVIRONMENT: HOW ACTIVIST JUDGES THREATEN OUR AIR, WATER AND LAND (July 2001) available at www.nrdc.org/legislation/hostile/hostile.pdf.

⁴⁴ *Id.* at 884.

⁴⁵ The “objects” of a regulation are the actual entities being regulated. For example, the object of a corporate governance statute is a corporation. The objects of the Endangered Species Act are threatened and endangered species.

⁴⁶ *Id.* at 894-95; *Defenders of Wildlife*, 504 U.S. at 560.

⁴⁷ *Defenders of Wildlife*, 504 US at 560.

⁴⁸ Scalia, *supra*, at 896. Congress would then be, for all practical purposes, abdicating their duty to legislate to the judiciary. Congress is the only branch that can confer standing; the judiciary cannot.

mining company as an example.⁴⁹ That illustration is particularly troublesome. Assuming that he meant the competitor would sue the competing company to enjoin its activities as violative of a federal environmental statute, the question becomes - Why? What motivation would a competitor have in attempting to enjoin activities that they themselves may also be undertaking? They would be creating case law disadvantageous to their own interests. If they are trying to enjoin activities because they feel they are harmful and not in the best interests of the environment, that does not appear to be a “less than worthy motive.” Second, he acknowledged that a goal of standing is to ensure the adversarial process, and the organizations that typically bring environmental cases are usually the best adversaries.⁵⁰ If that is the case, and the goal is to enforce laws, rather than let them wallow uselessly in the federal statutes, what is wrong with stretching the meaning of standing to include those who clearly have an interest in the animals or natural land at stake? Finally, his categorization of the charitable organizations in these cases as the beneficiaries rather than the objects of the regulation, thus subject to an exceedingly strict standing standard, frustrates the purpose of an act like the Endangered Species Act (ESA). The ESA is heralded as one of the few statutes that are purely targeted at saving non-human species rather than protecting a human-based value.⁵¹ If the charitable organizations find their attempts at bringing suits thwarted by the strict standing test, the objects of the regulation become the only proper parties. Since those objects are animals, who enjoy no standing under the law, the ESA becomes ineffective. Maybe Justice Scalia would prefer a system of giving rights to animals and other aspects of nature to ensure that these laws are enforced. That seems doubtful.

⁴⁹ *Id.* at 885.

⁵⁰ *Id.* at 891.

⁵¹ The purpose of the ESA is to protect the species listed as threatened or endangered, regardless of any human impact. *See* 16 U.S.C. § 1531 (2006). A statute like the Clean Water Act imposes the strictest standards for a knowing endangerment of another human. *See* 33 U.S.C. 1390(c)(3)(B)(i) (2002). In addition, the Clean Water Act authorizes some pollution. *See* 33 U.S.C. § 1302 (2002).

He did make some compelling arguments that are hard to ignore at the end of his article. He argued that judges, who are generally well-educated elitists, are not the best protectors of the rights of the majority. In his view, if judges are allowed to expand laws beyond what Congress intended, that is exactly what they would be doing. He stated that the world had tried that before and it did not work: Monarchy.⁵² He also noted that environmental decisions that engage in this type of expansion are heralded in classrooms in Cambridge, but do not face such a glowing response in the factories of Detroit.⁵³

Section III: A Brief History of Nature and Standing

*“By conducting ourselves ethically toward all creatures, we enter into a spiritual relationship with the universe.”*⁵⁴

A. Cases Regarding the Right of Charitable Organizations to Sue on Behalf of Nature

Consolidated Edison Co. v. Scenic Hudson Preservation Conference is one of the first cases to embrace the issue of standing of charitable organizations to enforce environmental legislation.⁵⁵ The Court found that Scenic Hudson was an “aggrieved party” within the meaning of Section 313(b) of the Federal Power Act.⁵⁶ Thus the group could proceed based on their interest in the “aesthetic, recreational and conservational aspects” threatened by the power development.⁵⁷

⁵² Scalia, *supra*, at 896. Here, Justice Scalia is comparing “legislating from the bench” to the Monarchy believing that neither elitist judges nor monarchs are the proper governors of the people.

⁵³ *Id.* at 897.

⁵⁴ Albert Schweitzer, origin unknown.

⁵⁵ 354 F.2d 608 (2d Cir. 1965). A thank you to Christopher Stone for directing me to these cases in his article, *Should Trees Have Standing?* CHRISTOPHER STONE, *Should Trees Have Standing? SHOULD TREES HAVE STANDING? AND OTHER ESSAYS ON LAW, MORALS AND THE ENVIRONMENT* (25th Anniversary ed. 1996).

⁵⁶ *Id.* at 615. A similar provision is included in the Administrative Procedure Act, 5 U.S.C. § 702 (1976).

⁵⁷ *Id.* at 616.

The landmark case for nature and standing was *Sierra Club v. Morton*.⁵⁸ This case concerned a proposed ski resort in Mineral King Valley in the Sequoia National Forest.⁵⁹ Sierra Club vociferously opposed the development and argued that the ski resort would harm their aesthetic and recreational interest in the area.⁶⁰ This case was not a landmark for what the Court said about standing, *Scenic Hudson* had already said as much.⁶¹ The true jurisprudential breakthrough ~ even if not followed by the majority ~ came by way of Justice Douglas' dissent.⁶² He argued that humans are a part of the ecological unit of the Mineral King area and, therefore, should be able to argue the case of the voiceless valley.⁶³ Using Christopher Stone's article *Should Trees Have Standing?*, he contended that non-human, natural beings should have the right to sue.⁶⁴ A quote from his dissent concisely sums up his opinion:

“The voice of the inanimate object, therefore, should not be stilled. That does not mean that the judiciary takes over the management functions from the federal agency. It merely means that before these priceless bits of Americana (such as a valley, an alpine meadow, a river or a lake) are forever lost or are so transformed as to be reduced to the eventual rubble of our urban environment, the voice of existing environmental beneficiaries should be heard.”⁶⁵

B. Cases that Considered Recognizing the Rights of Nature

There are other instances where suits were brought in name of an actual animal or an aspect of nature. Courts have mostly failed to address the presence of the animal or natural being

⁵⁸ 405 U.S. 727 (1972).

⁵⁹ *Id.* at 728.

⁶⁰ *Id.* at 730.

⁶¹ *Id.* at 734-735. Acknowledging that injury to aesthetics and an interest in ecology may be an “injury in fact.”

⁶² The Court ruled against Sierra Club because they did not show they used the valley for any purpose. A “mere interest” in the problem is not enough. *Id.* at 739.

⁶³ Maybe Justice Douglas was the first proponent of Earth jurisprudence with his belief that all aspects of nature, including humans, were interdependent on each other.

⁶⁴ *Morton*, 405 U.S. at 742. He noted that other inanimate objects like ships and corporations already have the right to sue. He would have styled the case as *Mineral King v. Morton*. (For clarity in this paper, I use the term “natural beings” rather than the term “natural objects” used by both Justice Douglas and Professor Stone.)

⁶⁵ *Id.* at 749.

as plaintiffs as long as another party named was human.⁶⁶ In *Palila v. Hawaii Dep't of Land & Natural Resources*, the Ninth Circuit took a surprising turn.⁶⁷ The Sierra Club and others brought suit to stop the Department from letting feral sheep and goats run wild, damaging the Palila bird's critical habitat.⁶⁸ The court found "the bird...also has legal status and wings its way into federal court as a plaintiff in its own right."⁶⁹ The court went on to note that "The Palila (which has earned the right to be capitalized since it is a party to this proceeding)..."⁷⁰ Clearly the court viewed the Palila as having standing independent of the Sierra Club, the National Audubon Society and the Hawaii Audubon Society, who were also named plaintiffs.

The case was cited by two other organizations as support for the proposition that animals could bring suit in their own right. In *Hawaiian Crow v. Lujan*, the McCandless' refused to let the government enter their land and remove the Hawaiian crows (or Alala) in accordance with the Alala Recovery Plan. The government took no action against the McCandless' and the Hawaii Audubon Society brought suit, naming the bird as one of the plaintiffs.⁷¹ The McCandless' then moved to dismiss the bird from the suit and delete its name in the caption.⁷² The court found that section 1532(13) of the ESA⁷³ did not include the bird under its definition of a person. When the Hawaii Audubon Society argued the language in the *Palila* case, the court

⁶⁶ Or human based in the case of organizations. See *Byram River v. Vill. of Port Chester*, 394 F. Supp. 618 (D.C.N.Y. 1975) and *Sun Enter. v. Train*, 532 F.2d 280 (2d Cir. 1976) (bringing suit in the name of Brown Brook and No Bottom Marsh).

⁶⁷ 852 F.2d 1106 (9th Cir. 1988).

⁶⁸ *Id.* at 1107.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ 906 F. Supp. 549, 551 (D. Haw. 1991).

⁷² *Id.*

⁷³ "The term 'person' means an individual, corporation, partnership, trust, association or any other private entity..." 16 U.S.C. §1532(13) (1988). The court stated that Federal Rule of Civil Procedure 17(c) only speaks of incompetents and infants and the bird is neither. *Haw. Crow*, 906 F. Supp. at 551.

stated that since the Hawaii Audubon Society had standing to bring the original *Palila* suit, the statements by the court were only *dicta*.⁷⁴

Yet, that was not the last time a group would attempt to try a case in the name of an animal. In *Cetacean Community v. Bush*, the plaintiff (only named as the Cetacean Community) challenged the Navy's use of low frequency sonar because it jeopardized the health of the cetacean community. They asked that George W. Bush and Donald Rumsfeld undertake a review of the technology since they had excepted the use of this technology from regulations that may have otherwise prohibited it.⁷⁵ The threshold issue, as framed by the court, was whether the Cetacean Community had standing to sue in its own name under various federal acts.⁷⁶ Plaintiffs brought up the *Palila* case which the court quickly dismissed as non-binding *dicta*.⁷⁷

Interestingly, the court went on to say that nothing in Article III prevents Congress from conferring standing on non-humans.⁷⁸ "If Congress and the President had intended to take the extraordinary step of authorizing animals as well as people and legal entities to sue, they could, and should, have said so plainly."⁷⁹ After an exhaustive review of all the statutes and all the possible intentions of Congress behind the statutes, the court concluded that the Cetacean Community simply did not have standing to sue and granted the government's motion to dismiss.⁸⁰

⁷⁴ *Id.* at 552.

⁷⁵ *Cetacean Cmty.*, 386 F.3d at 1172.

⁷⁶ *Id.* at 1209-11. The acts included the ESA, The Marine Mammal Protection Act, the National Environmental Protection Act and the Administrative Procedure Act.

⁷⁷ *Id.* at 1210.

⁷⁸ *Id.* at 1211. (Discussing their hesitation to confer standing on the Cetacean Community without a clear intent from Congress).

⁷⁹ *Id.* (quoting *Citizens to End Animal Suffering & Exploitation, Inc. v. New England Aquarium*, 836 F. Supp. 45 (D. Mass. 1993)).

⁸⁰ *Id.* at 1214. The court was clearly running into a separation of powers obstacle. See Justice Scalia's view discussed *supra* Section II.B. Whether or not they were attempting to allow standing on behalf of the Cetacean Community is not clear, but their exhaustive treatment of the statutes showed their belief that it was at least worthy of debate.

C. A Unique Protection for Natural Beings: The Endangered Species Act

The Endangered Species Act is a remarkable document. The principles of Earth jurisprudence abound in the statute. The Act finds that certain threatened and endangered species “are of esthetic, ecological, educational, historical, recreational and scientific value to the Nation and its people.”⁸¹ The Act goes on to state one of its purposes as providing “a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved...”⁸² The Act even allows for a regulated taking in an “extraordinary case.”⁸³ There is no human basis for the statute; it concerns only the protection of species listed as endangered or threatened.⁸⁴ The courts have upheld the Endangered Species Act as a valid exercise of Congressional power through the commerce clause.⁸⁵

In addition, the requirement of harm is read fairly broadly. The Act prohibits any taking of an endangered species.⁸⁶ The statutory term “take” means to “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect...”⁸⁷ The word “harm” is further described as an act that actually injures or kills wildlife through significant habitat destruction or modification that limits essential behavior including breeding, gathering of food and seeking shelter.⁸⁸ In *Babbitt v.*

⁸¹ The Endangered Species Act, 16 U.S.C. 1531(a)(3) (2003).

⁸² *Id.* at 1531(b).

⁸³ *Id.* at 1532(3). Regulated takings are a fairly new area of the law. Some sacrifice of private property rights is acceptable without being a recognized taking if it is within the police powers of the state. If the regulation goes outside the acceptable limits of the police powers of the state, it will then be deemed a regulated taking and a public purpose and just compensation will be required. *See Penn. Coal Co. v. Mahon*, 260 U.S. 393 (1922) (hailed as the first regulatory taking decision, the Supreme Court looked at a law which stripped citizens of subsurface coal rights when the mining threatened the stability of the surface structures. The Supreme Court stated that this was a regulated taking – a regulation that had simply gone too far, depriving citizens of their property rights in the subsurface coal.). *Compare Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978) (holding that New York City’s Landmark Preservation Law which severely curtailed the developer’s proposed expansion of Penn Central Station was not a taking. The states can enact laws that protect the health, safety and welfare of their citizens without a “taking.”)

⁸⁴ See discussion *supra* note 51.

⁸⁵ *E.g., Gibbs v. Babbitt*, 214 F.3d 483, 492 (4th Cir. 2000).

⁸⁶ *Id.* at § 1538(a)(1)(B).

⁸⁷ *Id.* at § 1532(19).

⁸⁸ 50 C.F.R. § 17.3 (1994).

Sweet Home Chapter of Communities for a Greater Oregon, the Court upheld the Secretary's definition of harm that included indirect as well as direct harm to an endangered species. They found that the possibility of a future harm was enough to meet the prohibitions in the Act.⁸⁹ In a Ninth Circuit case, the court upheld an injunction against a lumber company because the destruction of the marbled murrelet's habitat would impair breeding.⁹⁰ The court recognized that the *Sweet Home* holding did not reach the issue of whether impaired breeding should be included in the word harm, but since the *Sweet Home* Court upheld the Secretary's definition of harm which included impairment of breeding, the court held the lumber companies were in violation of the ESA.⁹¹

One of the apparently commendable aspects of the ESA is the citizen suit provision.⁹² The provision allows "any person" to bring a suit on his own behalf to enjoin any other person or entity from undertaking activities violative of the Act.⁹³ It allows the plaintiff to compel the Secretary⁹⁴ to apply the prohibitions in the Act and seek enforcement.⁹⁵ Thus, from the plain words of the statute, it appears that anyone can sue to enjoin activities they believe are prohibited by the ESA. Yet, the Court in *Lujan v. Defenders of Wildlife* mandated that in order for the citizen to have standing, they must meet the heightened standard as beneficiaries of the statute, regardless of any citizen suit provision in the statute.⁹⁶ Commentators on this development have

⁸⁹ 515 U.S. 687, 703 (1995). The case concerned several parties that were dependent on the logging industry and challenged the statutory validity of the Secretary's rule as promulgated in 50 C.F.R. § 17.3. *See also Forest Conservation Council v. Rosboro Lumber Co.*, 50 F.3d 781 (9th Cir. 1995).

⁹⁰ *Marbled Murrelet v. Babbitt*, 83 F.3d 1060 (9th Cir. 1996).

⁹¹ *Id.* at 1067.

⁹² The citizen suit provision is found at § 1540(g) of the Act.

⁹³ *Id.* at § 1540(g)(1)(A).

⁹⁴ The "Secretary" is defined as the Secretary of the Interior, the Secretary of Commerce or the Secretary of Agriculture, depending up on the situation. *Id.* at § 1532(15).

⁹⁵ *Id.* at § 1540(g)(1)(B).

⁹⁶ *Defenders of Wildlife*, 504 U.S. at 562-66, discussed *supra* Section II.B.

advocated everything from reinterpreting the statute to giving animals standing to sue under the Act.⁹⁷

From an Earth jurisprudence perspective, the judicial avoidance of Congress' citizen suit provision is just one of many concerns. The Act only protects animals that are already at the threatened or endangered level.⁹⁸ Further, the listing of species as threatened and endangered is within the discretion of the agency listing the species. The decision is set aside only if the agency acted arbitrarily or capriciously in either listing the species, or, what is more often the challenge, not listing the species at all.⁹⁹ Thus, the ability for a court to require the agency to take another look at its evaluation of any particular species is severely curtailed. Political factors also play a role in designating a species endangered or threatened. During George W. Bush's presidency, the number of animals placed on the lists has plummeted.¹⁰⁰ Documents established that agencies were prohibited from using certain information that might have supported listing various species.¹⁰¹ Many of Bush's appointees ignored scientific evidence to the contrary and prevented certain species from earning a place on the list, and even sought to remove species already on the list.¹⁰² Several species, including the Sammamish Kokanee sockeye salmon and

⁹⁷ See Cass R. Sunstein, *What's Standing after Lujan? Of Citizen Suits, "Injuries" and Article III*, 91, MICH. L. REV. 163 (1992); Katherine A. Burke, *Can We Stand For It? Amending the Endangered Species Act with An Animal-Suit Provision*, 75 U. COLO. L. REV. 633 (2004).

⁹⁸ § 1531(b).

⁹⁹ *Moden v. U.S. Fish and Wildlife Serv.*, 281 F. Supp. 1193, 1200 (D. Or. 2003). In *Moden*, the court recognized that the Administrative Procedure Act's deferential standard of review prevented them from setting aside an agency decision unless they found it was arbitrary or capricious. The court is not allowed to substitute its own judgment for that of the agency. (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971)).

¹⁰⁰ Juliet Eilperin, "Since '01, Guarding Species is Harder." *The Washington Post*, March 23, 2008. Available at www.washingtonpost.com/wp-dyn/content/article/2008/03/22/AR2008032202204.html. Interestingly, the administration has seen the greatest rise of emergency listings that are only issued when the species is on the brink of extinction.

¹⁰¹ *Id.*

¹⁰² *Id.*

the genetically pure Columbia Basin pygmy rabbit have subsequently become extinct after being denied a spot on the list during George W. Bush's tenure.¹⁰³

While the ESA clearly encapsulates some of the basic principles of Earth jurisprudence, its practical application tends to limit any of its worthy objectives. The biggest obstacle to the enforcement of the statute is the difficulty of humans proving they have standing to bring suits to enjoin activities violative of the Act. They are the beneficiaries of the statute, not the objects of the regulation. As discussed earlier, the species themselves are the objects of the regulation, and since they have no standing under American law, the effectiveness of the ESA is reduced. Recognizing the rights of nature will consequently confer standing on the actual animal and plant species and correct this deficiency.

Section IV: Facilitating Standing for Natural Beings through a Guardianship Theory

*“While the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world, it is impossible that it should be otherwise.”*¹⁰⁴

If natural beings were granted standing, how would the legal system facilitate such an approach? Obviously a tree cannot file a complaint against a homebuilder; the atmosphere cannot argue its case against a polluting factory. Guardianship provides a vehicle for the arguments of natural beings to be heard. Appointing guardians to advocate on behalf of natural beings is the best way to ensure that the impact upon nature is considered in every case where such an impact is contemplated. Guardianship exists in American law for various individuals and entities. For example, in Florida, a guardian can be appointed when an individual is adjudicated incapacitated or voluntarily

¹⁰³ *Id.*

¹⁰⁴ *Euclid v. Ambler*, 272 U.S. 365, 387 (1926).

relinquishes control to a guardian.¹⁰⁵ These guardians can be appointed for a range of reasons, including mental incapacity due to age, disability or illness.¹⁰⁶ Those who speak on behalf of a corporation, a non-human entity, can also be conceptualized as guardians, as can trustees in bankruptcy or trustees of a trust. Applying these theories to natural beings is a logical outgrowth of our emerging recognition of the rights of beings other than humans.

A. Our Emerging Social Sympathies to Nature

To understand the growing sympathies for natural beings, primarily animals, all one has to do is look around at the explosion of animals rights and environmental groups over the past few decades. In a 2002 New York Times article, fifty-one percent of adults felt that primates should deserve the same rights as children.¹⁰⁷ Charles Darwin wrote that our social sympathies evolve because of the “power of reflection” all humans possess.¹⁰⁸ Past experiences are constantly running through the minds of humans, allowing them to realize the exceedingly remote consequences of their actions.¹⁰⁹ For the early human, when he received a positive response in return for doing some action, after some time, it became habit.¹¹⁰ He now began to crave praise and fear condemnation from his peers.¹¹¹ As increased experience and reason provided insight into remote consequences of his actions, his sympathies became more widely distributed spreading to

¹⁰⁵ FLA. STAT. § 744 (2006).

¹⁰⁶ *Id.*

¹⁰⁷ Michael Pollan, *An Animal's Place*, N.Y. Times Magazine, (Nov. 10, 2002) available at www.nytimes.com/2002/11/10/magazine/10ANIMAL.html?ex=1037940019&ei=1

¹⁰⁸ CHARLES DARWIN, *The Descent of Man*. FROM SO SIMPLE A BEGINNING: THE FOUR GREAT BOOKS OF CHARLES DARWIN 836 (Edward O. Wilson ed., W.W. Norton & Co. 2006).

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 870.

¹¹¹ *Id.*

all facets of human existence including the elderly, disabled, mentally disturbed, etc.¹¹² These social sympathies spread outside one's own race and nation and finally to other beings, passed down through the generations through example to the young, education and public policy.¹¹³ Darwin even hypothesized that some of these sentiments extend to higher animals that possess human qualities like love, memory, attention, curiosity, imitation or reason.¹¹⁴

Darwin's hypothesis has become reality today. The human race does relate to animals, their feelings, their needs and wants. The Endangered Species Act is a wholly nature-based protection act not related to any human-based cause of action.¹¹⁵ The logical outgrowth from this evolution of social sympathies is to extend those sympathies to inanimate, natural beings. This can be achieved by appointing guardians to look after the best interests of ecosystems.

B. Guardianship for Natural Beings – The Theory

Christopher Stone wrote the pioneering and pivotal article about nature and standing, *Should Trees Have Standing?* Stone believed one of the biggest problems with environmental law was the concept of selling out nature.¹¹⁶ For example, if a corporation is polluting a river and a down-river resident brings or threatens suit, the two private parties can resolve the dispute between themselves instead of through the courts. The river would not necessarily have to be cleaned up, the corporation would not be adequately punished, and the business may even continue to pollute. Stone believed that allowing nature to sue on behalf of itself would fully

¹¹² *Id.* at 871-873.

¹¹³ *Id.* at 834-835.

¹¹⁴ *Id.* at 837.

¹¹⁵ *Supra*, note 51. Although the Endangered Species Act protects species outside of the animal kingdom, many of the cases involve animals rather than plants. The act does not protect natural beings like rivers, mountains, forests, etc. Although there are acts that protect inanimate, non-human, natural beings, those acts focus on the human impact of environmental damage instead of, for example, protecting a river because it is a river.

¹¹⁶ STONE, *supra*, at 11.

internalize the cost of pollution to big business.¹¹⁷ He espoused three criteria in order to effectuate a guardian system. The natural being must be able to bring actions on behalf of itself, the court must take into account the injury to the natural being instead of to any human, and relief must run to the natural being.¹¹⁸ Stone suggested that this would eliminate the *res judicata* problem of suits brought by charitable organizations, as the natural being will be bound by any decision rendered by the courts.¹¹⁹ For example, if the Audubon Society brings a suit against a corporation for destroying a forest and thereby infringing their rights to enjoy the aesthetic beauty of nature, what is to stop the Sierra Club from bringing another suit? Since the injury to the Audubon Society is independent of the injury to the Sierra Club, nothing would stop it. And nothing would stop hundreds of other organizations from suing as well. If the forest were allowed to bring suit on behalf of itself, there would be one suit and one suit only. All issues would be resolved and all damages would be awarded once. The idea promotes judicial efficiency and, in essence, makes the most sense.

As Stone pointed out, many other non-human entities have rights under the law.¹²⁰ Corporations, in particular are one such entity. A corporation is a person under the United States Constitution within the meaning of the Fifth and Fourteenth Amendments.¹²¹ Of note, a corporation is protected under the equal protection clause of the Fourteenth Amendment.¹²² The analogy of a corporation to a tree is somewhat misplaced. Even though corporations are literally non-human, they are run by humans and can only carry out their actions through humans. For this reason, it is a logical outgrowth of American law, and human reasoning, that the entities are

¹¹⁷ *Id.* at 21.

¹¹⁸ *Id.* at 8.

¹¹⁹ *Id.* at 18.

¹²⁰ *Id.* at 12 (these other entities include states, cities, estates, universities, corporations, trusts, etc.).

¹²¹ *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978); *Brooks v. State Bd. of Funeral Dir. and Embalmers*, 195 A.2d 728 (1963).

¹²² *Gorsjean v. Am. Press Co.*, 297 U.S. 233 (1936); *Louis K. Liggett Co. v. Lee*, 288 U.S. 517 (1933).

given rights and charged with responsibility as well. In the instance of a tree, there is no human basis for its existence; therefore it is harder to imagine the being as capable of holding rights. Since humans view themselves as the center of the universe, it is logical (at least logical in a human sense) that their laws will only extend to humans and human controlled entities.

Yet, with the difficulties of enforcing environmental laws and the great need for a change in the way humans treat the Earth today, guardianship for natural beings makes sense. Inevitably, it can become complicated. For example, if a mining company causes severe damage to an area of land, would a guardian have to be appointed for every species, rock, tree, river, etc. that exists in the area? The resolution of such a suit would be mind-bogglingly difficult. The infighting would be apparent immediately. Every species would be arguing its own case. How would a judge decide who deserves what, which animal is more deserving, whether the river should be compensated at the same rate as the forest. Instead of increasing judicial efficiency, this concept would likely bog down the courts.

Instead of appointing a guardian for each and every species, plant, rock, mountain or river in an area, a guardian should be appointed for the entire affected ecosystem. The Gaia hypothesis argues that the Earth is one being, made up of interconnected, and more importantly, interdependent, beings and ecosystems.¹²³ The health of the Earth depends on the smooth functions of all of its parts.¹²⁴ Thus, instead of appointing a guardian for each natural being in an ecosystem, a guardian should be appointed for the ecosystem itself. That guardian will decide what is best for the ecosystem as whole instead of what is good for each of its parts, balancing the rights of each natural being. Whether a certain species or river will be fully restored to its pre-damaged state would be immaterial. Instead of the judge sifting through mountains of

¹²³ JAMES LOVELOCK, *GAIA: A NEW LOOK AT LIFE ON EARTH* (1987).

¹²⁴ *Id.*

evidence of harm to each individual being, he or she would hear one, concise argument from the guardian appointed to represent the ecosystem. He or she would weigh that argument against the arguments of other affected parties to come to the best possible resolution of the problem.

Judicial efficiency would be ensured and the rights of nature would be recognized

C. Would Nature have Liabilities as Well?

When recognizing rights inherent in natural beings, the inevitable question becomes whether they should be subject to liabilities as well. Christopher Stone briefly noted such an argument in *Should Trees Have Standing*.¹²⁵ The main problem with such a theory is that natural beings do not possess consciousness therefore they do not possess fault. There is no tort theory under the present American law that would apply to such acts by a natural being.

Intentional torts would clearly not apply. By definition, an intentional tort requires a state of mind about the consequences of an act or omission.¹²⁶ It extends not only to having in mind a purpose to bring about a set of consequences, but having a belief that such consequences will result.¹²⁷ The requirement of the state of mind is an instant obstacle to even considering the issue. Rivers, trees, even animals, do not possess a consciousness that allows them to understand the consequences of their actions or even fully desire what consequences result.

Would negligence apply? Negligence requires a duty recognized by law where failure to comply with that duty creates an injury.¹²⁸ That injury must have a causal connection to the conduct and be proximately caused by the conduct.¹²⁹ There must be actual loss and cause in fact.¹³⁰ If the law can grant nature rights, it can certainly bestow duties as well. The law might

¹²⁵ STONE, *supra*, at 27. The article briefly discusses the idea that the money a natural being recovers from being harmed could be used for “the satisfaction of judgments against the environment” making a claim for “Acts of God.”

¹²⁶ DAN B. DOBBS, *et. al.*, PROSSER & KEETON ON TORTS 34 (W. Page Keeton, ed., West Publishing 1984).

¹²⁷ *Id.*

¹²⁸ *Id.* at 164.

¹²⁹ *Id.*

¹³⁰ *Id.*

look to a reasonable ecosystem standard. Yet, a being cannot be judged as failing to comply with a duty when it has no concept of the duty itself. In actuality, the reasonable ecosystem is a misnomer. It implies the possibility of an ecosystem to behave unreasonably. Ecosystems behave as they were designed to behave. Thus, all ecosystems are reasonable by default. Therefore, this theory fails.

The closest approximation to liability that would fit is strict liability. It does not require any moral wrongdoing or departure from legal standards of conduct.¹³¹ Strict liability is usually associated with abnormally dangerous conduct.¹³² It applies often to animals, but it is the owner that is held strictly liable, not the animal itself.¹³³ It also can apply to fire. The owner of the place where the fire started will be held liable even if he was not negligent.¹³⁴ Yet, strict liability comes from the basis that someone, somewhere intended some act that eventuated in harm to someone else. There is no intention on the part of a storm; there is no conscious choice on the part of a river. Therefore, strict liability, although the closest to approximation of liability for natural beings and events, still falls short.

So, what can be done with the money a river is awarded when a corporation or an individual pollutes it? Christopher Stone had a few ideas in his article. He mentioned that the money could be put into a trust fund and initially used to pay the legal fees and costs the guardian incurred in the lawsuit.¹³⁵ The next most obvious step would be to use the money to clean up the river and restore it as nearly as possible to its state before the pollution occurred.¹³⁶ Finally, he mentioned using the money to develop environmentally friendly technologies that

¹³¹ *Id.* at 536.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ STONE, *supra*, at 25.

¹³⁶ *Id.*

may prevent such pollution from occurring in the future.¹³⁷ In addition, the money could be used to help out after a natural disaster. Instead of suing the river after it floods, the money could simply be used to help out the affected residents, without a lawsuit. In addition, the money could be used to buy up environmentally sensitive land and place it in a trust to protect it from development and exhaustion of its natural resources. Instead of developing the river bank for homes, businesses and recreation, the land could remain vacant to allow the river to flood in observance of its natural process.

D. Do we need a Constitutional Amendment?

A constitutional amendment is the perfect vehicle for ensuring rights are protected. The amendments encapsulate rules or principles that society deeply regards.¹³⁸ These principles are usually entrenched in constitutions so that they are not easily taken away.¹³⁹ Such an important principle as the rights of natural beings should logically be included in a constitutional amendment. Such an amendment could encompass Thomas Berry's three natural mandates: (1) The right to live, (2) the right to habitat and (3) the right to fulfill their roles in the natural process.¹⁴⁰

Yet, passing a constitutional amendment is no easy feat. There are two methods to passing a constitutional amendment. In the first, Congress proposes an amendment with a two-third vote of both the Senate and the House.¹⁴¹ After the proposal passes, it must then be ratified by three-fourths of the states either in statewide conventions or by votes in the states' legislatures.¹⁴² The second method requires two-thirds of the legislatures of the states to request

¹³⁷ *Id.*

¹³⁸ CULLINAN, *supra*, at 60.

¹³⁹ *Id.*

¹⁴⁰ BERRY, *supra* at 149.

¹⁴¹ 1 TOM PENDEGAST, *et. al.*, CONSTITUTIONAL AMENDMENTS: FROM FREEDOM OF SPEECH TO FLAG BURNING xlv (2001).

¹⁴² *Id.*

Congress to call for a Constitutional Convention.¹⁴³ If a proposal passes through the Convention, it then has to be ratified by three-fourths of the states.¹⁴⁴ The Constitution has only been amended according to the first method.¹⁴⁵

Obviously this is an extremely difficult process calling for an enormous amount of agreement at both the state and federal level. With such a controversial subject as rights for nature, it is very unlikely such an amendment would pass. In addition to the problems with passing the constitutional amendment, would Thomas Berry's three mandates even make sense in the context of constitutional law? What sort of right to live would nature have? Would killing a cockroach be considered infringing on its constitutional rights? Would cutting down a tree subject the person to liability for "killing" the tree? Would we grant nature due process? Would it be based on a *Matthews v. Eldridge* concept or a *Goldberg v. Kelly* variation?¹⁴⁶

As discussed before, corporations obtained protection through the Fourteenth Amendment.¹⁴⁷ A similar vehicle could be used to give nature rights, though a detailed discussion is beyond the scope of this paper. Or, as discussed in *Cetacean Community v. Bush*, Congress could simply include nature in the definition of a "person" under their statutes.¹⁴⁸ There are many other viable alternatives than creating a constitutional amendment.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ In *Matthews v. Eldridge*, 424 U.S. 319 (1976), the Court set forth a balancing test to determine if the individual received their due process rights. In this case, the discontinuation of disability benefits was not seen as more important than the governmental interest involved to give the individual any more due process than the post termination hearing given by the agency. In *Goldberg v. Kelly*, 397 U.S. 254 (1970), the termination of welfare benefits was seen as important enough an interest to warrant more due process than just a post termination hearing.

¹⁴⁷ See discussion Section IV.B. *supra*.

¹⁴⁸ *Cetecean Cnty*, 389 F.3d at 1211.

E. Global Guardians

In *How to Heal the Planet*, Christopher Stone addressed whether or not we should have global guardians.¹⁴⁹ His description of what a global guardian would be seemed fairly ineffective. There are other organizations in incredible positions to further the goals of a global guardian. The International Monetary Fund (IMF) is one such organization. The goal of the IMF is to foster economic growth and provide temporary assistance for countries in need.¹⁵⁰ One of the ways they do this is through a Poverty Reduction & Growth Facility (PRGF).¹⁵¹ In conjunction with the World Bank, the IMF helps governments struggling with poverty to restructure their country. They work with the government to develop the macroeconomic, structural and social policies and programs of the country.¹⁵² The implementation of these policies and programs is a condition of the loans provided to the country.¹⁵³

What better way to introduce environmentally friendly policies into a country? By making the implementation of environmentally friendly policies and programs throughout the county's political structure conditions of their loans, the IMF can ensure that the environment will be protected by these developing countries. The main goal of the poor countries of the world is to lift their citizens out of poverty. They are most likely not as concerned about the environment. By tying their loans to the implementation of these policies, the IMF and the world can ensure that those countries are doing their part to help the environment and recognize nature's rights.

¹⁴⁹ CHRISTOPHER STONE, *How to Heal the Planet, SHOULD TREES HAVE STANDING? AND OTHER ESSAYS ON LAW, MORALS AND THE ENVIRONMENT* 87-90 (25th Anniversary, ed. 1996).

¹⁵⁰ The International Monetary Fund, *available at* www.imf.org/external/about.htm.

¹⁵¹ The International Monetary Fund, *How Do They Lend? Available at* www.imf.org/external/np/exr/facts/howlend.htm.

¹⁵² *Id.*

¹⁵³ *Id.*

When I was a senior in college at the University of Central Florida, I took International Finance with Professor Richard Ajayi.¹⁵⁴ In one of his lectures in 2001, he spoke about innovative strategies to assist developing countries in obtaining economic progress. He told the class about certain African countries that did not have any infrastructure in place. Telephone infrastructure (lines, poles, facilities, etc.) was extremely expensive to build. Instead of building traditional ground lines, the countries began installing cellular service alone. It was much cheaper and obviously the future of telephone communication. The point is that cellular technology at first was awkward, evolving and expensive. Today it is cheap, reliable and entrenched in the modern social and economic environment. It made sense to pursue the new technology over the old. In the same way, environmentally friendly technologies, although still evolving, are generally easier to introduce into countries that are not ensconced in any particular way of doing things. How much easier will it be to introduce the concept of green building when it is not necessary to retrofit old buildings? How much simpler will it be to set a limit for carbon emissions for a country that does not depend on industry for its economy? Yet, the time is now. Once these countries get caught up in the whirlwind of “progress”¹⁵⁵ it will be almost impossible to ask them to change.

SECTION V: THE PROBLEM OF AGENCIES

“They were careless people...They smashed up things and creatures and then retreated back into their money or their vast carelessness...and let other people clean up the mess they had made”¹⁵⁶

¹⁵⁴ More information on Professor Ajayi available at www.bus.ucf.edu/ajayi.

¹⁵⁵ Which often means industrial progress.

¹⁵⁶ F. SCOTT FITZGERALD, *THE GREAT GATSBY* (1925).

A. The Autonomous Agency

Justice Scalia believes that standing is essential to ensure that separation of powers is adhered to.¹⁵⁷ This has put obstacles in front of environmental litigation in other ways than just standing. When Congress creates an agency, they need to do no more than set down an “intelligible principle” for the agency to follow.¹⁵⁸ This is a rather broad term and since 1935, the Supreme Court has not struck down a single organic act¹⁵⁹ as an invalid delegation of power. Obviously a wide grant of discretion gives the agency more flexibility and defers to their expertise in the task at hand. It also lends itself to the autonomy of agencies which is augmented by the level of deference given to agency decisions.

In the 1960’s and 1970’s, the level of deference given to agency decisions was challenged. The D. C. Circuit led the way in this trend:

“These cases are only the beginning of a flood of new litigation – litigation seeking judicial assistance in protecting our natural environment. Several recently enacted statutes attest to the commitment of the government to control, at long last, the destructive engine of material ‘progress’...Our duty, in short, is to see that important legislative purposes, heralded in the halls of Congress, are not lost or misdirected in the vast hallways of federal bureaucracy.”¹⁶⁰

During this time, the D.C. Circuit consistently struck down agency decisions they felt were wrong.¹⁶¹ In 1978, the Supreme Court stopped the circuit in its tracks with *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.* The Court stated that absent exceptional circumstances, the agency should be free to dictate their

¹⁵⁷ See discussion Section II.B. *supra*.

¹⁵⁸ *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928).

¹⁵⁹ An organic act “creates, empowers, defines and limits” the agency. GARY LAWSON, FEDERAL ADMINISTRATIVE LAW 5 (2007).

¹⁶⁰ *Calvert Cliffs Coordinating Comm’n v. Atomic Energy Comm’n*, 449 F.2d 1109, 1111 (D.C. Cir. 1971).

¹⁶¹ See *NRDC v. NRC*, 547 F.2d 633 (D.C. Cir. 1976); *Home Box Office, Inc. v. FCC*, 568 F.2d 9 (D.C. Cir. 1977); *Ethyl Corp. v. EPA*, 541 F.2d 1 (D.C. Cir. 1976); *Automotive Parts & Accessories Ass’n v. Boyd*, 407 F.2d 330 (D.C. Cir. 1968); *Portland Cement Ass’n v. Rukelshaus*, 486 F.2d 375 (D.C. Cir. 1973).

own rules of procedure free from interference from the court.¹⁶² The Court reprimanded the circuit and ordered them to refrain from substituting their own judgment for the judgment of the agency.¹⁶³ Where does that leave agencies now? Generally, absent a showing that a decision is arbitrary or capricious, unconstitutional, or outside statutory authority,¹⁶⁴ the agency is free to do as they see fit.

B. Changing the Agency's Rules to Ensure the Rights of Natural Beings

Since the protection of nature's rights will fall onto agencies in most situations, what can be done to ensure that these agencies will follow the spirit of that command? A common critique of agencies is that their policies are aligned with the goals of the industries they regulate.¹⁶⁵ In order to make sure an environmental agency will serve its purpose, the agency will have to be specifically structured to effectuate its goals.

The first question is whether it is possible to change the oversight of the agency. The level of deference given to agencies will most likely stay the same. As mentioned previously, this is a separation of powers issue that judges will be loath to violate. Thus, changing the level of discretion given to agencies by Congress is the logical place to start.

Congress can put whatever they want in the organic acts that create the agencies. They usually structure those acts to give the agencies the maximum amount of flexibility and efficiency. Yet, there are situations where Congress deems the subject matter to be so important, they initiate more control over the agency's procedures. For example, the Food, Drug and Cosmetic Act requires the Food and Drug Administration to engage in

¹⁶² *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 543-544 (1978).

¹⁶³ *See id.*

¹⁶⁴ 5 U.S.C. § 706(2)(A-C).

¹⁶⁵ *See Home Box Office*, 567 F.2d at 53.

formal rulemaking when promulgating rules.¹⁶⁶ Congress believes their actions are of such public importance that a formal rulemaking procedure, rarely required for agencies, is necessary to facilitate public participation and approval.

Congress could apply the same reasoning to an overhauled Environmental Protection Agency.¹⁶⁷ They could confer standing for ecosystems and then require formal rulemaking every time the EPA promulgates a rule that would adversely impact the rights of the ecosystem in question. In addition, Congress could require other more formalized procedures. For example, when an agency is going to impact an ecosystem, they are usually required to do an Environmental Assessment (EA) to study the possible impacts and determine if a more formal Environmental Impact Statement (EIS) is warranted.¹⁶⁸ The EA, a less formal and less rigorous document than the EIS, establishes whether or not there is sufficient evidence to determine if an EIS is needed.¹⁶⁹ In *Nat'l Parks & Conservation Ass'n v. Babbitt*, the Alaskan Parks Service wanted to increase the number of cruise ships entering Glacier Bay.¹⁷⁰ An EA was performed and the report acknowledged increasing the number of cruise ships would increase the likelihood of vessel impacts, noise pollution, air pollution and spills of contaminants.¹⁷¹ The report further acknowledged that there was no way to know at the EA level the seriousness of all the risks.¹⁷² The Parks Service ignored the EA, skipped performing an EIS and declared that there would be no impact on the environment (FONSI) and implemented

¹⁶⁶ See 21 U.S.C. § 371(e-h) (2002).

¹⁶⁷ See discussion of the overhauled EPA in Section V.C.

¹⁶⁸ See 42 U.S.C. § 4332(2)(C) (1975); 40 C.F.R. 1508.27 (1978).

¹⁶⁹ 40 C.F.R. § 1508.9(a); See also *Conner v. Burford*, 848 F.2d 1441, 1446 (9th Cir. 1988).

¹⁷⁰ 241 F.3d 722, 725 (9th Cir. 2001).

¹⁷¹ *Id.* at 728

¹⁷² *Id.*

their plan.¹⁷³ The Ninth Circuit found that an EIS is required under these situations, especially if the impacts on the environment are uncertain.¹⁷⁴ Although the agency had their order reversed, the level of egregious indifference shown by the Parks Service was incredible. How many times have other similar agencies violated their rules in this fashion and got away with it?

C. The New EPA: Guardianship in Action

Are there any agencies that actually work efficiently and are immune from political pressures? The Federal Reserve is an example of such an agency. The Federal Reserve has always been immune to any sort of political influence, unlike many of the other agencies that exist today.¹⁷⁵ The Federal Reserve has seven members that are appointed by the President, but they have fourteen year, staggered terms.¹⁷⁶ This allows them to make the tough decisions without risking subsequent defeat at the polls.¹⁷⁷ What if such a board could be created to replace the EPA and ensure the rights of nature are observed? This would require a total overhaul of the EPA.

The new EPA could be modeled after the United States Forestry Service (USFS). The USFS is structured using a three-tiered system.¹⁷⁸ A similar tiered approach could be utilized to structure the EPA. At the top tier would be the Federal Reserve-like Board that would make the overreaching policy decisions to govern the entire agency. The Board members would have twenty-year terms and could not be reappointed. Half of the Board would be comprised of non-

¹⁷³ *Id* at 729.

¹⁷⁴ *Id.* at 731.

¹⁷⁵ PETER BARNES, *CAPITALISM 3.0* 40 (2006).

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ For an in depth coverage of this system, please see *Citizens for Better Forestry v. U.S. Dept of Agric.*, 341 F.3d 961, 965 (9th Cir. 2003).

industry, non-government scientists. The rest of the Board would be made up of various other individuals representing industry, economics and law.

The second tier would be the regional planning commissions. These commissions would make zoning-like decisions that affect the area they govern and be more autonomous than the current agency head of the EPA, to resolve problems discussed above. For example, if a certain by-product of a factory adversely affects a species, the commission could rezone them to another area where the impact would not be so severe. This tier would have a similar make-up of the first tier, but with a more targeted industry component that represents the industries in the area. They are subject to the rules of the first tier and oversee the guardianship aspect of the third tier.

The third and bottom tier is comprised of the site-specific commissions. There would be one for every area of the United States. They would have a similar make-up of the first and second tiers, but with at least one citizen member. They would decide which factories or plants could be built, preside over disputes as to pollution, etc. It would be their job to appoint a guardian (if one has not already volunteered) to represent an ecosystem that is affected by actions of corporations or individuals. For example, if a corporation wanted to build a nuclear power plant, the site specific commission responsible for the area would appoint a guardian to investigate the area and represent the best interests of the ecosystem at peril. The judge would consider the ecosystem's rights, just like the rights of any other party to the action when making his or her decision.

SECTION VI: WHAT IS IT REALLY GOING TO TAKE?

*“I know of no safe repository of the ultimate powers of the society but the people themselves; and if we think them not enlightened enough to exercise their discretion; the remedy is not to take it from them, but to inform their discretion.”*¹⁷⁹

I have, concededly, always believed in the top-down approach. I have always thought that in order for rights to be granted to nature, the government would simply need to impose the idea on its citizens. After writing this article and investigating the incredible difficulty of changing the way the government functions, I am much less in favor of a top-down approach. The judiciary will not act without a clear intent from Congress.¹⁸⁰ Congress is more apt to act in the face of an organized constituency than citizen apathy.

The incredible part about my revelation of the importance of a grass roots approach is it is already happening. Tamaqua Borough led the way in 2006 by stripping sewage sludge corporations of their rights.¹⁸¹ In addition, they recognized that ecosystems possess enforceable rights and allowed residents to bring suit against corporations on behalf of themselves or on behalf of nature.¹⁸² In Nottingham, New Hampshire, the town council passed an ordinance that established strict liability for corporations that facilitate the privatization of water.¹⁸³ The ordinance stripped the corporations from constitutional protections inside the town and recognized the rights of nature.¹⁸⁴ In Mahanoy Township, PA, the town passed an ordinance that

¹⁷⁹ Thos. Jefferson to William Charles Jarvis, 28 Sept. 1820.

¹⁸⁰ *Cetacean Community*, 389 F.3d at 1211.

¹⁸¹ The Community Environmental Legal Defense Fund, *Pennsylvania Borough Strips Sludge Corporations of “Rights”*, Sept. 19, 2006, available at www.celdf.org/PressReleases/TamaquaLawRecognizesRightsofNature/tabid/367/Default.aspx.

¹⁸² *Id.*

¹⁸³ The Community Environmental Legal Defense Fund, *Nottingham, NH Joins Barnstead, NH in Recognizing Rights of Nature; Bans Corp-Water Taking*, March 21, 2008, available at www.celdf.org/Default.aspx?tabid=518.

¹⁸⁴ *Id.*

prohibited sewage sludge corporations from dumping sewage sludge as fertilizer.¹⁸⁵ They too stripped corporations of various rights and recognized the rights of local ecosystems.¹⁸⁶

Of special note to me are the activities of the Mahanoy Township. My father grew up in the very poor, mining town of Mahanoy. His father was a coal miner who died when my father was only seventeen from complications of black lung due to his employment. Although not directed at the coal companies, it was incredibly heart warming and poignant to hear that this little mining town in the middle of Pennsylvania was beginning to stand up to the same corporations that had provided for their employment yet expedited the ends of their lives. These towns are not only doing what is right for the environment; they are doing what is right for their citizens that have been exploited for generations.

Although these ordinances are certain to be challenged in court, that is not the point. The towns are finally fed up with the flagrant disregard corporations have shown for them and are fighting back. They are sending a message to the Nation about what is happening to small town America and empowering other Americans to stand up for their rights. Nottingham, New Hampshire became the eleventh municipality in America to do this when they passed their ordinance.¹⁸⁷ Americans at the local level must see these actions by these municipalities as an example, band together and force the legislatures at the state and federal levels to change the way they have always done it into the way it should be done.

¹⁸⁵ The Community Environmental Legal Defense Fund, *Mahanoy Township, PA, Bans Corporate Sewage Sludge Dumping; Becomes Second Community in Nation to Ban Chemical Body Trespass; Strips Corporations of Claim to "Rights"*, February 21, 2008 available at www.celdf.org/Default.aspx?tabid=507.

¹⁸⁶ *Id.*

¹⁸⁷ *Nottingham, NH Joins Barnstead, NH in Recognizing Rights of Nature*, *supra* note 184.

CONCLUSION

*“We are confronted with insurmountable opportunities.”*¹⁸⁸

Recognizing the rights of nature will definitely be an uphill battle. Our current legal system does not have anything that even resembles such a concept. Animals, plants and other aspects of nature have consistently been found to possess no standing under our laws. Frustration manifests when courts continually deny causes of actions by organizations desperately trying to protect the environment, because they lack the requisite standing. If the objects of a regulation have the presumption of standing, why do we not grant the objects of environmental regulation the power to bring cases? As this paper has explored, the concept would lead to much more judicial efficiency, many more completely resolved issues, and require that businesses internalize the full cost of polluting our Earth. In the current state of peril in which the planet exists, the human race needs to recognize the importance of the health of the ecosystems we coexist with and give them the rights they so desperately need.

“I speak for the trees, for the trees have no tongues.”¹⁸⁹ That famous quote from Dr. Seuss’, *The Lorax* sums up the basic premise of this article as no other scholarly work could. Created many years before its time, Dr. Seuss tells the story of a Once-ler who does not listen to the Lorax, a speaker for trees, and ends up destroying a natural area, the beauty of which attracted him there in the first place.¹⁹⁰ Thus, the words of the Once-ler at the very end of the story should be inspiration for the entire human race: “Unless someone like you cares a whole awful lot, nothing is going to get better, its not.”¹⁹¹

¹⁸⁸ Pogo, origin unknown.

¹⁸⁹ DR. SEUSS, *THE LORAX* (1971).

¹⁹⁰ *Id.*

¹⁹¹ *Id.*