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A CHANGING ENVIRONMENT IN CHINA: THE RIPE OPPORTUNITY FOR ENVIRONMENTAL LAW CLINICS TO INCREASE PUBLIC PARTICIPATION AND TO SHAPE LAW AND POLICY

Nicholas J. Schroeck

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INTRODUCTION

The 2014 revision of China’s Environmental Protection Law provides greater opportunity for Chinese environmental law clinics to participate in the development of environmental law and policy and to train the next generation of Chinese environmental advocates. The revisions to the Environmental Protection Law allow clinics increased access to pollution data and more information on government decision-making and enforcement. Building on the experiences of United States environmental law clinics, China can develop or expand existing clinics to help navigate

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the political and economic barriers to change. As environmental law clinics in China grow in strength and effectiveness, they will likely face the same headwinds that have often plagued clinics in the United States. During this era of great change in China, partnership opportunities abound for United States law schools and Chinese law schools to learn bilaterally from faculty exchanges, litigation trainings, and collaborative scholarship.

I. ENVIRONMENTAL POLLUTION AND FUNDAMENTAL CHANGES TO CHINESE ENVIRONMENTAL LAW

Decades of dynamic economic growth have created an environmental crisis for the People’s Republic of China (PRC). Years of corruption, failed enforcement, and political barriers have produced an environmental and public health emergency. Less than one percent of the 500 largest cities in the PRC meet the air quality standards recommended by the World Health Organization. Seven of these cities rank among the ten most polluted cities in the world. Coal consumption provides 70 percent of China’s energy needs, which is a main culprit in the degradation of air quality. Approximately 4,384 deaths per day result from the effects of these severe air pollution conditions. Further, in 2006 China surpassed the United States to become the world’s largest emitter of greenhouse gases.

Regrettably, air quality degradation is only one of a multitude of serious environmental crises facing the PRC. A 2006 report released from the Chinese Embassy in Great Britain revealed that 70 percent of China’s rivers and lakes are polluted. In addition, 90 percent of underground water

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4. Id.
5. Albert & Xu, supra note 1.
resources in Chinese cities are contaminated.\textsuperscript{9} The Embassy estimates that more than 300 million PRC citizens have no access to clean water.\textsuperscript{10}

Land degradation has further exasperated the environmental crisis in China. The Chinese State Forestry Administration has stated that due to climate change, population increase, and economic development, desertification affects some 400 million PRC citizens.\textsuperscript{11} As of 2013, desertification has consumed 27.36 percent of the total land area in China.\textsuperscript{12} Contamination of agriculture production is a significant problem facing the PRC. Significant mining, metal smelting, and industrial processes have contaminated soil in the PRC with heavy metals, including cadmium.\textsuperscript{13} In 2006, the PRC commissioned a special investigation conducted by the Ministry of Environmental Protection and the Ministry of Land and Resources to examine the levels of heavy metal contamination in the PRC’s soil.\textsuperscript{14} Nevertheless in 2013, following the completion of the investigation, the PRC refused to release the results and declared their findings a national secret.\textsuperscript{15} However, Zhou Shengxian, the head of the Ministry of Environmental Protection, revealed that heavy metals pollute 12 million tons of crops each year.\textsuperscript{16} Furthermore, irrigation crops with polluted water or solid waste contaminates 150 million metric units\textsuperscript{17} of arable land each year.\textsuperscript{18} Severe pollution has prompted over 51,000 public disputes, which the PRC views as a “great threat to public stability.”\textsuperscript{19}

\textit{China’s Revised Environmental Protection Law}

In light of these many challenges, the year 2014 brought pivotal change to Chinese environmental law and policy. Following years of debate, the Central People’s Government of the PRC passed the first revision to

\begin{itemize}
\item \textsuperscript{9} Id.
\item \textsuperscript{10} Id.
\item \textsuperscript{11} Elizabeth Economy, \textit{The Case of China and the Global Environment}, in \textit{POWER REALIGNMENTS IN ASIA: CHINA, INDIA AND THE UNITED STATES} 70, 73 (Alyssa Ayres & C. Raja Mohan eds., 2009).
\item \textsuperscript{13} \textsc{Jennifer Holdaway} \& \textsc{Lewis Husain}, \textit{SOC. SCI. RESEARCH COUNCIL, FOOD SAFETY IN CHINA: A MAPPING OF PROBLEMS, GOVERNANCE AND RESEARCH} 27 (2014).
\item \textsuperscript{14} Id.
\item \textsuperscript{15} Id. at 28.
\item \textsuperscript{16} Id.
\item \textsuperscript{17} Converts to 38,610 square miles.
\item \textsuperscript{18} Id. at 28.
\item \textsuperscript{19} Hong, \textit{supra} note 8.
\end{itemize}
China’s original 1989 Environmental Protection Law (EPL). The 2014 revision delivers numerous updates to China’s environmental law and has transformed the original EPL from 47 articles within six chapters, to 70 articles within seven chapters. The most notable additions include increasing civil society’s role in environmental protection, a greater level of regulatory specificity, and new accountability provisions.

Chapter V of the revised EPL provides several improvements to the availability of environmental information and data. The Chapter V articles guarantee rights to environmental information requested by the public, require applicable departments to disclose the requested data, and mandate that industry disclose their emissions. The process for preparing an environmental impact statement must include public engagement and publishing the statement upon completion. The revised law further provides for fines for the failure to disclose this important information.

The revised EPL also provides standing for public interest environmental organizations to engage in litigation. In granting standing, the law requires that the organization must specialize in environmental protection and public welfare activities, and must have done so for at least five years with no record of offense. However, as discussed by Professor Tseming Yang, the success of public interest litigation has been quite limited. “There is limited availability of trained environmental lawyers to bring such cases. The courts have limited capacity to properly adjudicate them, in part because of pressing needs for judicial training on issues such as natural resource damages assessment and other technical . . . issues.”

A judiciary willing to find parties liable for their actions is essential to the purpose and success of the revised articles. While Article 59 of the EPL imposes compounding penalties against polluters, it only obligates parties to pay penalties upon the order of a court. Unfortunately, external

21. Id. at 2.
22. Id.
24. Id. at art. 54.
25. Id. at art. 55.
26. Id. at art. 56.
27. Id. at art. 62.
28. Id. at art. 58.
29. Yang, supra note 20, at 4.
30. 8 P.R.C. LAWS 12 EPL art. 59.
interference in judicial decisions is commonplace in China. Local
governments often interfere in judicial decisions in order to protect
industries or litigants, or in the case of administrative lawsuits, to shield
themselves from liability.\textsuperscript{31} The Communist Party further influences the
judiciary through party discipline and approval of judicial appointments and
decisions.\textsuperscript{32} The revised EPL’s intent is to promote compliance and reduce
delay in corrective action, but success depends on greater independence of
the judiciary system.

The 2014 revisions to the EPL provide hope for the future. The new
law delivers enhanced resources and opportunities for environmentalists,
and reduces barriers to the enforcement and prosecution of offenders. These
changes open the door for Chinese environmental law clinics to participate
in the development of environmental law and policy, and to train the next
generation of Chinese environmental advocates.

\section*{II. ENVIRONMENTAL POLICY AND THE ESSENTIAL ROLE OF
ENVIRONMENTAL LAW CLINICS}

The experience of United States environmental law clinics provides a
model for the continued development of environmental law clinics in
China. Clinical legal education in the United States is a relatively new
concept. While the theory of introducing clinical experience into the legal
curriculum dates back to the 1920s,\textsuperscript{33} the concept did not become reality
until the 1960s.\textsuperscript{34} More recently, clinics formed to focus specifically on
protecting the natural resources of the United States. The University of
Oregon and the University of Colorado, in collaboration with the National
Wildlife Federation, were the first universities to create environmental
clinics during 1975 and 1978 respectively.\textsuperscript{35} Today, approximately one out
of five law schools in the United States operate environmental law clinics.\textsuperscript{36}

Environmental law clinics now serve an integral role in the protection
of natural resources and in the prevention of pollution. The purpose of these
clinics is two-fold. Foremost, clinical experience serves to train effective

\begin{itemize}
\item \textsuperscript{31} Judicial Independence in the PRC, CONG.-EXECUTIVE COMMISSION ON CHINA,
\item \textsuperscript{32} Id.
\item \textsuperscript{33} Peter A. Joy & Robert R. Kuehn, The Evolution of ABA Standards for Clinical Faculty,
\item \textsuperscript{34} Id. at 187–88.
\item \textsuperscript{35} Robert F. Kennedy Jr. & Steven P. Solow, Environmental Litigation as Clinical
\item \textsuperscript{36} Hope M. Babcock, How Judicial Hostility Toward Environmental Claims and
Intimidation Tactics by Lawyers Have Formed the Perfect Storm Against Environmental Clinics: What’s
\end{itemize}
and ethical lawyers by guiding law students through actual client representation.\textsuperscript{37} Further, the clinics work to “expand access to the legal system, either through development of new law or active representation, especially for those who could not otherwise afford legal help on environmental issues.”\textsuperscript{38}

Law clinics have shaped environmental law and policy in a variety of ways. For example, the Michigan Environmental Protection Act of 1970 (MEPA), was a pivotal law that gave standing to any citizen to bring an environmental suit to protect against the pollution, impairment, or destruction of the environment.\textsuperscript{39} In collaboration with multiple environmental organizations, University of Michigan School of Law environmental students assisted in drafting the MEPA language and testified before the Michigan legislature in support of the Act. MEPA’s passage was in large part thanks to the work of law students. Their testimony addressed the fears and concerns of many parties who would have otherwise opposed the Act’s passage.\textsuperscript{40} Environmental law clinics across the country have been similarly instrumental in effecting positive changes to federal and state environmental laws.

The function of environmental law clinics in the United States is fairly straightforward. The clinics may represent individuals, communities, and environmental organizations before state and federal courts and agencies. In the clinics, law students work under the supervision of licensed attorneys and professors.\textsuperscript{41} Clinical education offers students experience in the practice of environmental law and shaping of environmental policy. In many environmental law clinics, students begin their involvement in a project with research, factual investigations, interviews, and memorandum drafting. Early in the information gathering process, clinic students may submit Freedom of Information Act\textsuperscript{42} requests to state and federal agencies, and appeal information request denials if appropriate. Clinic students may also draft comment letters on permit applications, attend public meetings

\textsuperscript{37} Adam Babich, Twenty Questions (and Answers) About Environmental Law School Clinics, 22 PROF. LAW. 45, 46 (2013).
\textsuperscript{38} Id.
\textsuperscript{39} MICH. COMP. LAWS § 324.1701 (1994).
\textsuperscript{41} See, e.g., Environmental & Natural Resources Law Clinic, VT. L. SCH., http://www.vermontlaw.edu/academics/clinics-and-externships/ENRLC (last visited Oct. 10, 2016) (explaining the experience that law students gain through learning under the supervision of licensed attorneys and professors).
and hearings, provide legislative testimony, and advise clients throughout the process.

Under the guidance and supervision of a licensed supervising attorney, the students may draft Notice of Intent to Sue letters and participate in all phases of litigation from drafting and filing complaints, motions, and briefs, all the way to settlement negotiations. Depending on the forum, students may participate in hearings and oral argument. The students participate in the full judicial process, and gain unparalleled experience in litigation and legal strategy.  

The growth and expansion of environmental law clinics in the United States has not been without controversy. Clinics have faced interference from individual politicians, and local, state, and federal legislators due to the sometimes controversial environmental law and policy matters that they are engaged in. Those opposed to the clinics’ work have applied political and economic pressure, seeking to limit the clinics’ ability to properly represent clients. Attacks on clinics have included attempts to defund the host law school, disqualify the clinic from suit, enact legislation severely restricting students from practice, and dismiss clinical directors. In 2010, in response to the work of the Tulane Environmental Law Clinic, the Louisiana legislature introduced Senate Bill 549. This Bill would have eliminated an estimated $45 million in state funds for Tulane University, and prohibited civil clinics from filing suits, seeking monetary damages, or raising constitutional challenges. Eventually, the Bill was struck down in Committee. Further in 2010, the University of Maryland School of Law faced a similar attack when their environmental clinic took on a case adverse to large agricultural interests, namely chicken growers. The

43. See Mich. Ct. R. 8.120 (permitting law students and law graduates to participate in judicial processes in Michigan courts).
45. Id. at 1982, 1986.
46. Id. at 1981–82.
47. Id. at 1984.
48. Id. at 1976.
50. See Gabriel Nelson, Law Students’ Role in the Farm Pollution Suit Angers Md. Lawmakers, Sparks Nat’l Debate, N.Y. Times (Apr. 8, 2010), http://www.nytimes.com/gwire/2010/04/08/08greenwire-law-students-role-in-farm-pollution-suit-anger-96381.html?pagewanted=all (describing how the Maryland state Senate passed a bill threatening to remove $250,000 from the University of Maryland’s budget after the University of Maryland Environmental Law Clinic filed suit against the chicken farmers and requiring the clinic to report budgets and clients); see also Waterkeeper All., Inc. v. Alan & Kristin Hudson Farms, 278 F.R.D. 136, 137 (D. Md. 2011) (listing the University of Maryland Environmental Law Clinic as counsel for the plaintiff against a local chicken farm as well as Perdue Farms, Inc.).
Maryland House of Delegates threatened to withhold funding from the University if the clinic continued representing its clients in the matter. The House of Delegates ultimately dropped its threat.

Additionally, early attacks on law school clinics stemmed from the belief that clinics were pilfering business from licensed members of the bar. More recent attacks have generally stemmed from the “desire to protect the financial interests of clients, alumni, and university donors.” Unfortunately, this interference—be it political or financial—will likely continue to impact environmental law clinic work so long as clinics continue to advocate in the public interest on law and policy development and enforcement of existing environmental laws.

Despite these headwinds, environmental law clinics in the United States have continued to play an important role in strengthening environmental law and policy and in holding government agencies accountable for regulatory failures and polluters responsible for their actions.

**United States Environmental Law Clinics Working for Environmental Justice**

Working toward environmental justice is an important mission for many environmental law clinics. Environmental justice has been defined as the “fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income, with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.” Generally, law school clinics provide legal services to those who would otherwise be shut out of the legal system while providing students with hands on legal training. Environmental clinics are no exception; they allow students to deal with important environmental justice and policy issues. For example, the Transnational Environmental Law Clinic at Wayne State University Law School works closely with the Great Lakes Environmental Law Center to help solve the serious environmental problems facing low income Detroiters and Michiganders, who would

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52. Babcock, supra note 36, at 261.
53. Id.
otherwise be shut out of the legal system due to lack of resources and access.56

Georgetown University Law Center became a leader in the environmental justice movement by creating an environmental justice clinic in 1991.57 In the beginning, the school’s Institute for Public Representation housed the clinic, which had traditionally emphasized civil rights and administrative law clinical practice.58 Now, it is part of Georgetown Law’s Community Justice Project.59 Georgetown’s Environmental Justice Clinic works to improve the public health and environmental conditions of economically disadvantaged and minority communities in the District of Columbia and to broaden support for environmental protection by linking community and grassroots activists in the environmental, public health, civil rights, and legal services areas.60 The clinic procures its projects in different ways, including through its own research of environmental threats, community and neighborhood activists, local and national environmental groups, and political organizations.61 Specific projects have included representing residents of a housing project located near an abandoned coal plant in a clean-up effort,62 seeking correction of inappropriate pesticide use and handling of underground storage tanks near the Anacostia River.63 As a result, the Environmental Justice Clinic at Georgetown Law has continuously provided students with practical training from fellows and faculty by working on their individual projects, attending seminars, drafting documents, and representing clients in both hypothetical and actual negotiations.64

The University of Maryland Law School Environmental Law Clinic (Maryland Clinic) has also been engaged in environmental justice work. The Clinic recently released an environmental justice report for the state of Maryland,65 finding that communities of color and low income communities often bear a disproportionate burden of environmental and

57. Babcock, supra note 54, at 33.
58. Id.
60. Babcock, supra note 54, at 38.
61. Id. at 40–41.
62. Id. at 45–46.
63. Id. at 46.
64. Id. at 51.
public health hazards.\textsuperscript{66} Through independent research of published studies and reports, interviews, and community meetings, students in the Maryland Clinic identified a number of examples of environmental injustice. The Students found that the state has done little to address the disparities seen in racially and economically vulnerable communities.\textsuperscript{67}

As in the United States, equal access to the decision-making process is essential to long term growth and prosperity in China. The struggle for environmental justice in the United States has demonstrated that equal access to decision-makers is easier in theory than in practice. Environmental law clinics in the United States have increasingly taken up the fight of environmental justice as part of their public interest mission.\textsuperscript{68} They have developed the skills and strategies necessary to “offer high quality legal services to communities at risk from the disproportionate distribution of environmental harms, and they can function as catalysts for reform of the legal framework and institutions creating the disparities.”\textsuperscript{69}

High poverty communities and areas with predominately minority populations are most at risk of disproportionate distribution of environmental harms.\textsuperscript{70} While China has a vastly different racial and ethnic fabric than the United States, there are lessons that Chinese environmental law clinics can draw upon from their American counterparts to address the many environmental justice concerns in a rapidly growing society. Environmental law clinics can play an important role in providing access and influence in environmental decision-making for underrepresented communities and to ensure fair treatment for marginalized citizens.

III. UNITED STATES ENVIRONMENTAL LAW CLINICS AS A MODEL FOR CHINA TO CONFRONT THE PERSISTENT CHALLENGE OF ENVIRONMENTAL PROTECTION

The rapid transformation necessary to steer China’s environment back from the brink will require massive expenditure of political and economic capital. Environmental law clinics can, and should, play an ever-expanding role in this necessary shift in Chinese environmental law and policy.

\textsuperscript{66} See generally Jane F. Barrett et al., Envtl. Law Clinic at Univ. of Md. Francis King Carey Sch. of Law, Environmental Justice in Maryland 1 (Sept. 2015), http://www.law.umaryland.edu/programs/environment/documents/Envl_Justice_in_Md_0915.pdf (stating that negative environmental effects disproportionately affect low income communities).

\textsuperscript{67} Id. at 7–9.

\textsuperscript{68} See, e.g., Environmental Justice Clinic, Yale L. Sch., https://www.law.yale.edu/clinics/environmental-justice (last visited Oct. 10, 2016) (illustrating that this particular clinic’s work addresses issues of environmental injustice).

\textsuperscript{69} Babcock, supra note 54, at 23.

\textsuperscript{70} Id. at 12 n.36.
Due to existing political and legal barriers in China, environmental law clinics face an uncertain future. The first major barrier for Chinese environmental law clinics, based on the United States model, is the Chinese political system. The Communist Party dominates the Chinese state and society. Its power rests on four pillars: control of the People’s Liberation Army, the State Council, the National People’s Congress (NPC), and the Chinese People’s Political Consultative Conference.\footnote{Susan V. Lawrence & Michael F. Martin, Cong. Research Serv., R41007, Understanding China’s Political System 3–4 (2013).} China’s 1982 Constitution describes the NPC as the “highest organ of state power.”\footnote{Id. at 7.} The Constitution provides the NPC with the power to,

\begin{itemize}
  \item [\hspace{1em}] amend the constitution; supervise its enforcement; enact and amend laws; ratify and abrogate treaties; approve the state budget and plans for economic and social development; elect and impeach top officials of the state and judiciary; and supervise the work of the State Council, Military Commission, Supreme People’s Court, and Supreme People’s Procuratorate.\footnote{Id. at 8.}
\end{itemize}

While the Constitution gives the NPC the right to “elect” top state officials, the Communist Party decides who will fill important positions, with the NPC merely ratifying those decisions.\footnote{Id.} Accordingly, with this structure, 85 percent of the current NPC deputies hold concurrent posts in the Communist Party, as state officials or civil servants.\footnote{Id. at 8.} As a guarantee of Communist Party control of the legislature, a member of the Communist Party’s highest committee, the seven-man Politburo Standing Committee, serves concurrently as chairman of the NPC Standing Committee.\footnote{Id.}

Since the 1989 Tiananmen Square protests, the Communist Party has made maintenance of social stability one of its top priorities, deploying an 800,000-strong police force under the Ministry of Public Security and a 1.5 million-strong paramilitary force to head off protests, or once protests erupt, to prevent them from spreading.\footnote{Id. at 13.} In addition, the Communist Party’s Propaganda Department plays an essential role in censoring the media to prevent discussion of subjects, including environmental issues, which may
incite movements for change. It is widely understood in the PRC that demanding political change is akin to “stroking a tiger’s whiskers and asking it for its fur.” With a population of over one billion, the PRC currently has a mere 2,000 officially registered NGOs, while several thousand environmental organizations and businesses operate unregistered.

In addition to its political supremacy, the Communist Party maintains economic rule by controlling the issuance of loans from state-owned banks. By controlling loan issuance, the Communist Party manages where and when investment occurs. In order to insure proper capitalization within the state-owned banks, the Communist Party significantly restricts investment options of the people of the PRC. However, the Communist Party permits investment in real estate and wealth management products. Party leaders believe that by allowing these investments, citizens will earn more and therefore consume more, increasing economic output. However, as production increases, so too does the risk of harm to the environment. It is too soon to tell whether the current economic downturn in China will significantly reduce consumption and production.

Another barrier to the growth of Chinese environmental law clinics is students’ ability to participate in client representation. Students at United States law schools, pursuant to Student Practice Rules, have the ability to represent clients in litigation under the supervision of licensed attorneys. Chinese law students are not currently allowed similar participation due to laws imposed by the NPC. Chinese law students may appear in court only in the role of a citizen representative, with limited access to documents and,

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78. Id.
82. Id.
83. Id.
84. Id.
Law Clinics and Public Participation in China

in some instances, clients.\textsuperscript{87} Currently, among the clinics that do involve live client representation, most are oriented toward litigation and consultation; however, some focus more on policy-oriented projects.\textsuperscript{88} The Committee of Chinese Clinical Legal Education has provided statistics showing that the vast majority of student interaction with clients is limited to legal advice and consultation.\textsuperscript{89} For example, at the University of Zhongshan, the role of the environmental clinic is to conduct surveys of residents, enterprises, and government agencies for evidentiary use in policymaking.\textsuperscript{90} Additionally, the students at the environmental law clinic at Renmin University seek to educate the public about relevant environmental laws and create “publicity” for the clinic.\textsuperscript{91} These clinics are in their infancy and may evolve and grow along with the laws in China aimed at environmental protection.\textsuperscript{92}

The EPL was originally passed by the NPC in 1983, and has had limited effect on protecting the environment in China. In contrast, the United States has implemented multiple, enforceable federal environmental laws. The suite of laws passed during the past half-century include: An Act to Improve, Strengthen, and Accelerate Programs for the Prevention and Abatement of Air Pollution (the Clean Air Act);\textsuperscript{93} Federal Water Pollution Control Act (the Clean Water Act);\textsuperscript{94} Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, Superfund);\textsuperscript{95} Resource Conservation and Recovery Act of 1976 (RCRA);\textsuperscript{96} Endangered Species Act of 1973 (ESA);\textsuperscript{97} National Environmental Policy Act of 1969 (NEPA);\textsuperscript{98} Federal Land Policy and Management Act of 1976 (FLPMA);\textsuperscript{99} Toxic Substances Control Act of 1976 (TSCA);\textsuperscript{100} and Marine Mammal

\textsuperscript{87.} Cecily E. Baskir, Crossing Borders: Creating an American Law Clinic in China, 19 CLINICAL L. REV. 163, 177 (2012).
\textsuperscript{88.} Id.
\textsuperscript{89.} Id.
\textsuperscript{90.} Cecily E. Baskir et al., Chinese Clinical Legal Education: Globalizing and Localizing, in CLINICAL LEGAL EDUCATION IN ASIA: ACCESSING JUSTICE FOR THE UNDERPRIVILEGED 37, 42 (Shuvro Prosun Sarker ed., 2015).
\textsuperscript{92.} Id.
\textsuperscript{93.} Clean Air Act, 42 U.S.C. § 7401 (2012).
\textsuperscript{94.} Federal Water Pollution Control Act, 33 U.S.C. § 1251 (2012).
Protection Act of 1972 (MMPA), among others. Importantly, many of the United States federal environmental laws include citizen-suit provisions, providing opportunities for citizen enforcement. Even with the 2014 revisions, the EPL is still far less reaching and lacks the total scope of the network of interconnected environmental laws established in the United States.

Significant failures in enforcement will continue to persist until the Communist Party changes its attitude toward accountability, or is forced to change by public pressure. Failed enforcement, intentional misreporting, corruption, and cover-ups have been normal business as usual in China. China’s decentralized economic strategy promotes local governments to collect taxes and introduce local policies, which are often counteractive to the Communist Party’s stated environmental goals. Local governments have favored rapid economic growth while disregarding environmental protection.

The Communist Party recognized these enforcement challenges when amending the EPL. The revised law increases transparency by requiring local governments and enterprises to make public environmental information, including information on environmental quality, environmental monitoring, incidents, licensing, penalties, and fees. Heavy polluting enterprises are required to publicly disclose the names of principal pollutants discharged, method of discharge, concentration and amount of discharge, discharge that exceeds standards, and the construction or operation of pollution control technologies. If properly enforced, these laws will facilitate greater public scrutiny of environmental pollution while facilitating enforcement actions aimed at restricting the activities of polluting enterprises.

The revised EPL provides protection to whistleblowers in an attempt to encourage officials from the Ministry of Environmental Protection to carry out their duties properly and lawfully. Any citizen, legal person, or other

103. C. Fred Bergsten et al., China’s Rise: Challenges and Opportunities 80 (2009).
105. Id.
106. Hogan Lovell, Clearing the Air on China’s New Environmental Protection Law 1 (2014).
107. Id.
108. Id. at 2.
109. Id.
organization has the right to report environmental pollution or ecological
damage caused by any institution or individual and the failure of any
environmental regulatory body to perform its legal duties. In addition,
local governments and local officials will be assessed on attainment of
environmental protection targets as part of their performance evaluations,
and the results will be made available to the public. Government officials
will be subject to heavier penalties for committing unlawful acts, such as
granting permits where criteria are not met, covering up violations, failing
to issue an order to suspend or cease operations in accordance with the law,
or failing to disclose environmental information that is subject to public
disclosure. These changes to the EPL provide an opportunity for
environmental law clinics to assist clients with information requests,
analyze pollution data, and work to hold public officials accountable for
failure to follow the law.

Increased Opportunity for United States and Chinese Law Schools to
Partner on Environmental Law Clinics

As China becomes an ever-larger player on the world stage, the
government will face increased pressure to adopt international legal
customs and rule of law. The notion of a formal legal system is still
blossoming in Chinese culture. Chinese society increasingly understands
the importance of the rule of law, and there is great opportunity for United
States environmental law clinics to partner with Chinese institutions to
share experience and strategies for shaping environmental law and policy.
Many law schools have already taken the lead and partnered with Chinese
universities. Since the year 2000, over eighty law schools in the PRC have
developed some type of clinical program.

One encouraging partnership has developed between Vermont Law
School (VLS) and Renmin University in Beijing. Since 2006, the two
schools have worked together to further the actions of governmental and
private organizations that address critical environmental and energy
practices. The U.S.-Asia Partnership for Environmental Law at VLS

110. 8 P.R.C. LAWS 12 EPL art. 57.
111. 8 P.R.C. LAWS 12 EPL art. 26.
112. 8 P.R.C. LAWS 12 EPL art. 68, at 117.
114. Id. at 122.
describes itself as working “collaboratively with government institutions, non-government organizations, lawyers, judges, lawmakers and others to promote good environmental governance in Asia.” 117 This two-way collaboration involves Renmin hosting American students, while VLS in turn hosts a number of Chinese judges.118 In an effort to address the lack of Chinese judicial knowledge on environmental law, the Chinese judges learn about American environmental law and adjudication.119 Thanks to a $1.5 million federal grant, VLS also established the first public interest environmental law firm in the PRC, working in conjunction with the clinic at Renmin Law School.120

The success of Chinese environmental law clinics will depend in large part on the emergence of highly skilled Chinese practitioners trained to ably navigate Chinese environmental law. There is a great opportunity for United States law schools to partner with Chinese law schools on faculty exchanges, litigation trainings, and collaborative scholarship. These partnerships provide mutual learning opportunities and assist Chinese clinicians with the growth of their programs.

CONCLUSION

The rapid expansion of China’s economy in the past few decades has created an imbalance of wealth distribution while at the same time causing significant environmental harm. The social and economic welfare of many Chinese citizens is in jeopardy from increased health problems, forced resettlement, and social unrest.121 As Chinese industry expands and the wealth gap increases, those unable to protect themselves from environmental hazards are often left defenseless. In many of these cases, environmental justice principles will play an important role in guiding representation and resources to underserved PRC citizens.

With the revisions to the EPL and the additional requirements placed on local and central governments, the environmental law clinic model has never had greater potential in China. The public and clinics, will have increased access to pollution and monitoring data than ever before. Chinese

117. Id.
119. Id.
law clinics will be able to analyze data and to “watch the watchers” in government to ensure that proper enforcement takes place. Using the experiences of United States environmental law clinics as a guide, China can develop or expand clinics to help their country navigate the political and economic barriers to change.

There are significant challenges in creating Chinese environmental law clinics based upon the United States model. The Chinese legal system limits the ability of citizens and public interest advocates to affect social change. Control still ultimately rests with the Communist Party, with minimal rights for citizens. Corruption is still a significant barrier. But as China continues to reform its legal system to combat the current environmental and public health emergency, the opportunity for Chinese environmental law clinics to build upon the United States model and to influence and shape future law and policy is ripe for the taking.
ENVIRONMENTAL AND BIODIVERSITY LAW CLINIC AT SOUTHWEST FORESTRY UNIVERSITY: A NEW ENVIRONMENTAL LAW CLINIC MODEL IN CHINA

Yanmei Lin *

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INTRODUCTION

No national comprehensive legal-aid system existed in China until 2003 when the State Council adopted the National Legal Aid Regulations. The Regulations outlined the roles of the legal-aid centers affiliated with local justice bureaus, eligibility for legal aid, and the application procedure. The Regulations also encouraged legal-aid services provided by organizations established by law schools and other non-governmental organizations. In fact, the movement for legal-aid systems in mainland China was first started by law schools. The first legal-aid center, Shehui Rouzhe Quanli Baohu Zhongxin (the Center for Protection of Rights of Disadvantaged Citizens), was established at Wuhan University in 1992. A group of Fudan University law students created Shanghai’s first legal-aid center in 1996, even before the official legal-aid center was launched. In 1998, Professor Wang Canfa from China University of Political Science and Law initiated the first legal-aid center for pollution victims to address China’s daunting environmental problems, which is now known as the Center for Legal Assistance to Pollution Victims (CLAPV).

The growth of these legal-aid centers at the universities and the law students’ desire to promote social justice through the application of law in the classroom to everyday realities sparked a great need for clinical education in China. With the support from the Ford Foundation and the China Law Society, clinical education was formally introduced at law schools in China in 1999. In September of 2000, seven different law schools located in Beijing, Wuhan, and Shanghai began to deliver clinical courses to their students, including classroom sessions and practical work in cooperation with the legal-aid centers.

CLAPV was the first legal-aid center established to fight against pollution by using private tort law to seek compensation for poor victims.

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4. Id. at 118 n.2.
5. Fudan University Student Legal Aid Center, ZHICHENG PUB. INT. BLOG (July 18, 2012), https://perma.cc/S9CZ-A94W.
7. Phan, supra note 3, at 119.
8. Zhen Zhen, Clinic Legal Education in China, McGeorge Sch. L., HTTPS://PERMA.CC/97QY-7JCJ (last visited Nov. 29, 2016).
suffering from pollution.\textsuperscript{9} China University of Political Science and Law, which CLAPV is affiliated with, created China’s first environmental law clinical course in September of 2003.\textsuperscript{10} The clinicians’ work mainly focused on answering questions from individual pollution victims, assisting staff attorneys at CLAPV in providing consultations to walk-in clients or answering hotline inquiries, and occasionally working on environmental tort cases. When CLAPV was established, the environmental legal system in China had not opened the door for legal advocates promoting citizen participation, such as requesting environmental information, participating in administrative approval processes, and requesting environmental law enforcement.\textsuperscript{11} Very few environmental NGOs even existed at that time. The first grassroots environmental NGO in China, Friends of Nature, was founded in 1995.\textsuperscript{12} Since the first clinical course was introduced in cooperation with CLAPV, more environmental law clinics have been established.\textsuperscript{13} However, different from CLAPV’s legal assistance model, most of those environmental law clinics are either legislative clinics, focused on research and legislative services for government agencies, or simulation clinics, providing simulations, role-play, and mock-trial types of practical trainings to students.

After decades of rapid economic development, China faces considerable environmental and health challenges: public health is reeling. Cancer is now the leading cause of death in China and the Ministry of Environmental Protection has admitted that pollution can lead to cancer.\textsuperscript{14} Ambient air pollution alone is blamed for hundreds of thousands of deaths each year and nearly 100 million people lack access to safe drinking

\bibliography{references
water.\textsuperscript{15} Faced with these pressing environmental problems, China’s central government is now giving increased priority to environmental protection, pledging to strengthen environmental governance through rule of law and stronger public participation.\textsuperscript{16} It has engaged in legislative reform and, in some instances, has permitted local authorities to develop innovative measures to address these problems.\textsuperscript{17} The local innovations include establishing specialized environmental courts and expanding the standing doctrine to allow environmental NGOs to bring enforcement actions.\textsuperscript{18} In order to make these innovations work, many places in China need legal institutions and advocates to test the boundaries of the new laws and regulations in both administrative and judicial forums.

This Article aims to introduce a new environmental law clinic in Yunnan Province, which represents a new clinical education model in China that may address these critical needs. Part I of this article provides an overview of the background, establishment, and operation of the Environmental and Biodiversity Law Clinic (EBLC) at Southwest Forestry University. Part II focuses on innovative methods that the EBLC uses in training the students and acts as an advocacy center, linking stakeholders in the region to enhance enforcement and implementation of environmental laws and promoting public interest litigation and public participation in environmental decision making. Part III briefly describes the capacity building and technical assistance role that United States institutions can play to promote the development of environmental law clinics in China. While this article recognizes the challenges facing the new environmental law clinic, it concludes that new models of environmental legal clinical education programs are a preliminary and necessary step toward environmental legal reform in China.


\textsuperscript{16} Barbara Finamore, New Weapons in the War on Pollution: China’s Environmental Protection Law Amendments, NAT. RESOURCES DEF. COUNCIL (Apr. 25, 2014), https://perma.cc/534G-7FAN.

\textsuperscript{17} See generally RACHEL E. STERN, ENVIRONMENTAL ENFORCEMENT AND THE RULE OF LAW IN CHINA 32–35 (2013) (giving a broad overview of the Chinese government’s turn toward environmental protection).

\textsuperscript{18} Alex L. Wang & Jie Gao, Environmental Courts and the Development of Environmental Public Interest Litigation in China, 3 J. CT. INNOVATION 37, 38–39, 47 (2010).
I. PARTNERSHIP FOR ENVIRONMENTAL JUSTICE: THE ENVIRONMENTAL AND BIODIVERSITY LAW CLINIC IN YUNNAN PROVINCE, CHINA

A. Background

Yunnan Province, China’s southwestern frontier, has vast reserves of biological, mineral, and hydro-energy resources and is home to the largest number of ethnic minority groups in China. Yunnan is habitat for more than 60 percent of China’s bio-species. However, as an underdeveloped province in western China, Yunnan has been plagued by rapid urbanization, deforestation, and development of large-scale, extractive industries and hydro-power projects. Approximately 25 percent of the bio-species in Yunnan are threatened with extinction in this century due to human impact on the ecosystem. This degradation of natural resources and other environmental problems—such as water and air pollution, land erosion, flooding, and loss of species—directly impact the health, safety, and livelihood of Yunnan residents. Indigenous communities, as well as people in the neighboring provinces and countries are particularly affected.

Facing the challenges of economic development and conservation of ethnic culture and biodiversity, the Yunnan government has taken a number of progressive measures to advance environmental protection and conservation. In 2008, Yunnan established its first specialized environmental court in the Kunming Intermediate Court to hear these cases. However, creating these courts has failed to generate the changes that the government intended, mainly that more cases would be brought to seek redress for many of the existing environmental and natural resource issues. The reasons for this are manifold and include: a lack of experienced legal advocates, the difficulties of bringing and proving an environmental tort, and the lack of a cause of action similar to citizen suits in the United States that enable a party to sue on behalf of the public interest to enforce the law and to seek remediation to protect the

19. Jianchu Xu et al., Integrating Sacred Knowledge for Conservation: Cultures and Landscapes in Southwest China, 10 ECOLOGY & SOC’Y 151, 156 (2005).
22. Id. at 817.
23. Id. at 821.
24. Wang & Gao, supra note 18, at 40.
25. Id. at 41–42.
environment.\textsuperscript{26} To overcome some of these barriers, the Yunnan judiciary, in 2009, issued a set of guidelines that explicitly encouraged courts in Yunnan to accept cases brought by environmental NGOs and procuratorates on behalf of the public interest to protect the environment. \textsuperscript{27} The Intermediate Court in Yunnan’s capital, Kunming, promulgated court rules that broadened the legal standing for NGOs, relevant government agencies, and procuratorates to sue on behalf of the public interest to address environmental and natural resource problems.\textsuperscript{28}

These measures recognize that civil society has a role to play in advancing environmental governance. Taking advantage of this unique opportunity, the U.S.-China Partnership for Environmental Law at Vermont Law School and Southwest Forestry University (SWFU) developed a partnership for environmental justice projects.\textsuperscript{29} The key component of this partnership is to create an environmental law clinical program at SWFU, which will become an environmental legal resource center for the region and open new doors for citizens to gain access to legal services, affect the implementation of existing laws, and cultivate a legal ecosystem that will enable and encourage the citizenry to be legal actors who serve the public interest.\textsuperscript{30}

The Environmental and Biodiversity Law Clinic at SWFU was formally launched on January 16, 2013.\textsuperscript{31} The clinic, the first of its kind in Yunnan Province, aims to: train students to become innovative legal advocates; provide legal and technical services to NGOs, communities, and underserved, vulnerable citizens; and link actors and stakeholders to address the environmental problems in Yunnan Province.\textsuperscript{32} The launch event also served as a forum, engaging stakeholders in the region to build connections, share experiences, and collaborate on advocacy projects.\textsuperscript{33}

\textit{B. Operations}

Led by Professor Chen Yue, an attorney and the project leader from SWFU, the EBLC team consists of the program director, a faculty fellow

\begin{footnotesize}
\begin{itemize}
\item[26.] See generally id. at 47–50 (explaining the uncertainty in the new environmental court system).
\item[27.] Id. at 47.
\item[28.] Id.
\item[30.] Id.
\item[32.] Id.
\item[33.] Id.
\end{itemize}
\end{footnotesize}
from the Environmental Science and Engineering Department, a staff attorney, an environmental impact assessment consultant as program officer, a full-time program coordinator, and a part-time program assistant.

EBLC’s environmental law clinical education is a year-long program. The clinic recruits student clinicians generally in March, the beginning of the spring semester of the academic year. In addition to law students, the clinic also recruits students with backgrounds in environmental engineering, forestry, and ecological science with enthusiasm in environmental public interest activities, strong social responsibility, and teamwork spirit. Four cohorts of student clinicians have completed the clinical course since 2013. On average, each cohort has sixteen students and nine students are enrolled in the 2016 session.

The clinical course is comprised of both classroom training and practical case/project work. The classroom training includes two components. The first component is made up of five sessions that focus on basic lawyering skills, professionalism and ethical rules, China’s environmental legal framework, basic regulatory instruments and administrative procedures, and litigation related skills. The second component is comprised of another four sessions that focus on specific environmental legal advocacy tools, such as public participation in Environmental Impact Assessments (EIA), access to environmental information, learning to read environmental quality and emission reports, gaining familiarity with wetland and biodiversity protection laws. In addition to classroom trainings, student clinicians also participate in case strategy meetings and team and individual supervision meetings. The students work in teams of three or four on at least one case or project. Student teams perform some of their case or project work during regularly-scheduled office hours in the clinic space, currently housed in SWFU’s International and Exchange Building. Students also work on their cases and projects on their own, outside of office hours.

As of the end of March of 2016, the clinic had opened 89 cases in which clinicians provided legal representation and consultation to individuals and NGOs related to environmental information disclosure, environmental enforcement requests, application for administrative reviews, strategic impact litigation, and legal assistance to workers suffering from the effects of pollution. Among these 89 cases, 24 resulted in a positive

34. ENVIRONMENTAL AND BIODIVERSITY LAW CLINIC AT SOUTHWEST FORESTRY UNIVERSITY, STUDENT HANDBOOK 1.
35. Id. at 2.
36. Id. at 7–10.
37. Id. at 3–5.
outcome for clients or the environment. Many of these cases are either open government information requests (OGI requests) to obtain environmental information related to pollution sources or enforcement requests filed with environmental protection bureaus to urge them to take enforcement actions. In these cases, the clinic worked closely with six national and local environmental NGOs, and one international NGO. By filing these OGI requests and enforcement requests, the students experience the process and reality of government information disclosure and the administrative enforcement system. The students also learn to interact with government officials and to integrate the information that they obtained into advice for the NGOs’ decision-making process. Some examples of these cases and projects are illustrated in the next section.

In addition, the clinic helped create an environmental legal professionals network in Yunnan Province. The clinic, collaborating with legal practitioners in the network, also worked on a legislative research project and provided comments on pending pieces of legislation. The clinic submitted comments to nine pending pieces of legislation, including the amendments to China’s Environmental Protection Law and the Judicial Interpretation on Environmental Public Interest Litigation. The clinic provided assistance to two NGOs to propose legal reform on wetland law and public participation in the EIA approval process.

C. Challenges

One of the key challenges that the EBLC faced when it began operation was a lack of cases and clients. The reason is threefold. First and foremost, very few environmental NGOs exist and operate in a limited space in Yunnan Province. Most environmental NGOs engage in environmental education rather than advocacy. They are skeptical about using legal advocacy tools due to lack of capacity or fear of confrontation with local governments. Environmental government information requests, enforcement requests, and environmental public interest litigation tools are new to most of the environmental NGOs in China. Second, those national environmental NGOs that aim to promote environmental rule of law and are active in legal advocacy, do not have local knowledge of environmental problems in Yunnan Province. Third, citizens suffering from the effects of pollution in Yunnan province tend to seek remedies through government mediation or petition instead of resorting to legal action. In the past three years, CLAPV only provided legal-aid support to a group of Tibetans in
Yunnan Province on an allegedly illegal mining case.\(^{38}\) The main task for the clinic when it first started was to create opportunities for students to learn from practice, addressing real environmental problems in the region.

Another challenge is that the student clinicians are undergraduate students. Different from the United States law school system, Chinese schools offer a basic law degree at the undergraduate level.\(^{39}\) Most of the clinicians enrolled in the program are in their third and fourth year of their legal studies. Compared to graduate students, they are less mature and have limited knowledge of laws and society. The clinic needs to identify cases and projects that are suitable for undergraduate students in order to provide an enhanced learning experience and training for them.

Because the clinic recruits non-law students and believes that an interdisciplinary approach to address environmental problems will be more effective, the clinic also uses methods that can enable non-law students to apply their specialized fields to legal and policy issues, and teaches all students to communicate effectively and work productively in an interdisciplinary setting.

II. A NEW ENVIRONMENTAL LEGAL CLINIC MODEL IN CHINA

A. Proactively Identify Environmental Problems, Develop Legal Advocacy Cases, and Partner with NGOs to Address the Problems

To counter the challenges mentioned above, the first innovative method the clinic tried, which is very different from other environmental legal clinics in China, was to proactively identify environmental problems and make the information available to local communities and NGOs. The clinic teaches the students to use OGI requests and conduct field investigations to understand the environmental problems that impact the local communities.\(^ {40}\) When it first started, EBLC identified Fuxian Lake in Yuxi City as the focal area to collect information and make OGI requests to identify environmental problems.\(^ {41}\) EBLC made requests for and collected: records and documents related to pollution sources around the lakes, records of compliance, municipal and county-level development plans, and

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\(^{38}\) Case Chart, Ctr. for Legal Assistance to Pollution Victims (unpublished excel spreadsheet) (on file with journal).


\(^{40}\) PowerPoint Presentation, Yue Chen, Associate Professor, Environmental and Biodiversity Law Clinic in Yunnan Province (July 25, 2013), https://perma.cc/7SLH-H6HX.

\(^{41}\) Id.
water quality monitoring results.\footnote{Id.} EBLC made this information available to NGOs and the communities near the lakes to empower them to develop and participate in future water quality monitoring and enforcement actions.\footnote{Id.} In addition, EBLC organized field investigations at the sites to conduct interviews with local residents and collect water samples to understand the problems.\footnote{Id.}

These initial OGI requests and field investigations led to three specific environmental problems that the clinic addressed by developing legal advocacy cases and partnerships with NGOs and local communities. First, the clinic located real-estate development projects under construction around the protected zone of Fuxian Lake.\footnote{Zhou Dequn, Why Can’t We Protect China’s Cleanest Freshwater Lake?, EAST BY SOUTHEAST (July 1, 2013 3:27 PM), https://perma.cc/3HRD-SMNV.} These luxury, lake-view villas, five-star hotels, resorts, and golf courses were built or being constructed without proper EIA approvals and water extraction permits.\footnote{Id.} The clinic developed a partnership with Chongqing Liangjiang Voluntary Service Center (CLVSC), a Chongqing-based environmental NGO, to develop legal advocacy cases on this matter.\footnote{Chen , supra note 40.} The student clinicians, supervised by staff attorneys, helped CLVSC file OGI and enforcement requests to urge local authorities to take enforcement actions against these illegal development projects.\footnote{See generally Chongqing Liangjiang Voluntary Service Center, SOUTH CHINA ENV’T. FUND, HTTPS://PERMA.CC/FU75-2U96 (last visited Nov. 29, 2016) (explaining the actions that the Service Center takes).} They obtained many important documents that were not disclosed to the public, including the Control Plan for Fuxian-Xingyun Lake Ecological Construction and Tourism Development Experiment Zone; Fuxian Lake’s 12th Five-Year Plan on Water Pollution Control; the EIA report on Xianhu Shanshui International Recreation and Tourist Park; and the EIA report on Chengjiang County Industry Park (2007-2020).\footnote{QUARTERLY REPORT NO. 6, ENVTL. & BIODIVERSITY LAW CLINIC 4 (Jan.-Mar. 2014) (unpublished report) (on file with journal).} Due to media attention and the clinic’s efforts in monitoring the real-estate development projects around Fuxian Lake, the Fuxian Lake Management Bureau recently took enforcement actions against four developers who violated the law.\footnote{Fuxian Illegal Filling the Kowloon Sheng Jing was Fined 50,000, YUNNAN NEWS ONLINE (Oct. 30, 2014, 10:33 AM), https://perma.cc/BT36-YFBW.} On October 28, 2014, in a press conference, the Fuxian-Xingyun Lake Reform Committee of the Yuxi Prefecture Government announced that the government had issued fines and orders to those four
developers.\textsuperscript{51} The government orders required the developers to take certain corrective actions for illegally filling the lake and wetlands, withdrawing water from the lake without a permit, and expanding the construction projects in violation of the EIA approval and the construction permit.\textsuperscript{52}
Another example of an environmental problem discovered through this innovative approach is the Dongxishao Phosphorus Industry Park pollution problem near the Fuxian Lake. Through the site visits and interviews with local residents, the clinic discovered that a wastewater treatment plant in the Dongxishao Phosphorus Industry Park had not obtained “inspection approval” to verify that it had complied with the “three simultaneous” requirements. These requirements are that construction projects must be designed, constructed, and operated simultaneously with the design, construction, and operation of waste treatment facilities. The residents believed that the plant had been discharging wastewater collected from facilities in the park into Fuxian Lake without proper treatment. In addition, local residents reported that the facilities in the park did not have proper environmental and safety measures in place to protect workers and residents from exposure to yellow phosphorus, a major raw material processed by the facilities that is listed as a hazardous chemical in China.

Student clinicians at EBLC mapped Dongxishao Industry Park and its surrounding villages using the Google Earth application.

54. See CHARLES R. McELWEE, ENVIRONMENTAL LAW IN CHINA: MANAGING RISK AND ENSURING COMPLIANCE 163-64 (2011) (describing the “three simultaneous” system under a patchwork of regulations and the Environmental Protection Law in China that requires any pollution control measures in an Environmental Impact Assessment to “be designed, constructed, and placed into operation simultaneously with the design, construction, and operation of the facility itself”).
55. Id.
Some local villagers complained that the pollution from the Industry Park caused negative impacts on their health. The clinic then initiated a case to investigate and address this matter. They developed relationships with local residents, assisted local residents with filing numerous OGI requests at various levels of government, filed administrative review requests, took water samples, and developed a long list of instances where the facilities in the Industry Park were not in compliance with the regulatory requirements. After almost a year of legal advocacy efforts, the local Environmental Protection Bureaus (EPBs) finally took concrete enforcement actions in August of 2015. The local EPB, along with local township government and other government agencies, issued enforcement and corrective orders to the ten phosphorus fertilizer companies and three cement plants located in the Industry Park. The purpose of these orders was to control air, water, and solid waste pollution in accordance with regulatory requirements. The EPB also acknowledged the wastewater treatment plant’s leakage problem in the Industry Park and ordered the plants to install proper technology to prevent further leakage. The correction plan and the subsequent enforcement orders by local government and EPB comprehensively addressed the key issues that the clinic raised in its enforcement requests and represented an important victory for the clinic’s team and the local communities near the Industry Park.

Dongxishao Phosphorus Industry Park. Photo by LIU Xiang

59. Chen, supra note 40.
60. 2015 ANNUAL REPORT, supra note 53, at 8.
B. Multidisciplinary Approach

The EBLC collaborated with ecological and social scientists from Minzu University of China, Yunnan Agriculture University, Yunnan University, and the Geology Monitoring Station to conduct a study on the sustainability of the social and ecological systems (SESs) at Fuxian Lake. This SES sustainability study involves a team of scholars and practitioners from the legal and scientific disciplines. They have been reviewing and analyzing the data that EBLC has collected over the past two years concerning pollution sources around the lake, compliance records, municipal and county-level development plans, and water quality monitoring results. The study aims to evaluate the data, identify the problems and potentialities of the complex systems at the lake, and to understand how a particular action or proposed solution may affect the SES. From this understanding, the collaboration aims to develop an advocacy strategy to protect the systems. Based on the initial study, the EBLC submitted comments on the draft amendments to Yunnan Province’s Regulations on the Protection of Fuxian Lake in July of 2015.

The draft regulations highlight a key issue with the way the government approaches the protection of natural resources. The draft regulations designate the areas within 100 meters of the entire shoreline as a protected zone and require all current residents to move out of the protected areas. However, the draft regulations allow real-estate development companies to build residential and commercial buildings just outside the protected zone. This approach reflects a policy of favoring development over protecting the rights of the local residents, many of whom have been in the area for many years.

65. QUARTERLY REPORT NO. 10, supra note 64, at 5; FUXIAN LAKE SCIENTIFIC REPORT, supra note 64.
66. FUXIAN LAKE SCIENTIFIC REPORT, supra note 64.
67. Id.
68. Id. at 20.
69. 2015 ANNUAL REPORT, supra note 53, at 19.
70. See Table Comparing Pre and Post-Amendment Text to the Amendments to the Fuxian Lake Protection Regulations, YUNNAN PROVINCIAL GOV’T LEGISLATIVE OFFICE (July 8, 2015, 2:39 PM), https://perma.cc/V97S-RQYH (comparing the text of the regulations before and after the amendments).
72. Dequn, supra note 45.
generations. It also fails to respect the local residents’ traditional land-use practices and to assess whether these practices could contribute to the protection of the wetlands. The EBLC’s comments focus, among other things, on the 100-meter protection provision and suggest that the regulations provide for procedural rights for the public to be involved in the decision-making process before new management and development plans for Fuxian Lake are adopted.

C. Collaboration: Serving a Supporting Role in Environmental Public Interest Litigation

China’s new Environmental Protection Law, which took effect on January 1, 2015, and the new Civil Procedure Law, together, provide standing for environmental NGOs that meet certain requirements to bring environmental civil public interest litigation (EPIL) across China. To test the effectiveness of this new tool, CLAPV and Friends of Nature formed a national EPIL advocacy and support network to support NGOs who have standing to file EPIL test cases in courts. EBLC actively participates in this network and collaborates with NGOs in the network serving a supporting role in identifying potential cases, drafting memoranda to develop a legal course of action, and drafting petition letters and litigation-related documents. The clinic is currently working on three such cases, one of which challenges a chemical plant that is being built along the Nu River. The plant allegedly poses serious environmental risks to the Lishu ethnic communities and the Nu river.

74. Id.
75. See Opinions and Recommendations on the Draft Amendments to the Fuxian Lake Protection Regulations from the Envtl. & Biodiversity Law Clinic to the Standing Comm. of Yunnan People’s Cong. 1–2 (Dec. 20, 2015) (on file with journal) (explaining that the residents were required to relocate and, therefore, no longer had control over the land).
78. See id. (describing the course and generalizing the work done by students).
80. Id.
III. THE ROLE OF TECHNICAL ASSISTANCE TO BUILD THE CAPACITY OF THE NEW CLinic

A. Train the Trainer

In 2013, Professor Chen Yue spent two-and-a-half months in residency at VLS to receive hands-on training on how to run an environmental law clinic. VLS also supported the clinic’s staff by observing the operation of CLAPV and the Huanzhu Law Firm, attending its case discussion sessions, and discussing cases for the clinic and collaborations with CLAPV’s leading attorney, LIU Xiang. The VLS Partnership also assisted the EBLC team with developing its syllabus and student handbook.

B. On-Site and Long-Distance Training Programs

From 2013 to 2015, VLS delivered four on-site, three to four-day clinic capacity-building workshops to EBLC’s staff, clinicians, and other advocates from NGOs. These trainings modeled the clinical education methods in the classroom setting and provided teaching instructions as well as case and research supervision.

For example, the first training sessions were held from January 16th through the 19th. Jack Tuholske (VLS Professor), Professor Liu Xiang (Managing Attorney at Huanzhu Law Firm), and Attorney Xia Jun (experienced environmental lawyer from Beijing Zhongzi Law Firm) were the primary trainers. The workshop trained a total of nine student clinicians, seven faculty members from the clinic, NGO advocates, and lawyers. The first two sessions included: an overview of environmental law practice in the United States and China, important elements of case analysis and litigation strategy, and the legal tools used in environmental enforcement actions brought by Chinese NGOs. The third session focused on evidence gathering, working with experts, conducting field investigations, case studies, and analysis of potential cases the clinic could handle. The workshop demonstrated to EBLC faculty and students how to initiate a case and discussed the pros and cons of taking on a particular case or project. The trainers also gave feedback about the clinic’s draft curriculum and the strategy for finding potential cases and developing partnerships with local NGOs. The final session was a field trip to Fuxian Lake and Xingyun Lake.

81. Winter 2014: Asia Partnerships Newsletter, supra note 31, at 1, 3.
82. Id. at 3.
In addition to on-site training, VLS also used online training methods. EBLC currently handles cases related to wetlands protection and developing a comparative research project to design better legal tools for wetlands protection.\textsuperscript{83} In order to build EBLC’s capacity on wetlands protection law and offer perspective from the United States, VLS Professor Jack Tuholske provided an online training session to the clinic students on the United States legal regime on wetlands protection.\textsuperscript{84} Professor Tuholske first assigned the students a briefing paper on Section 404 of the United States Clean Water Act, which regulates the filling and dredging of wetlands.\textsuperscript{85} He then delivered an audio PowerPoint presentation to students to illustrate different types of wetlands, a permitting program for wetlands development, and enforcement of United States wetlands law. Professor Tuholske also designed a case scenario to test students’ understanding of the materials. After the students completed the assignments, the VLS

\textsuperscript{83} Winter 2015: Asia Partnerships Newsletter, supra note 29, at 3.

\textsuperscript{84} Id.

\textsuperscript{85} Id.
Partnership and EBLC convened a virtual question and answer session between Professor Tuholske and the students in December of 2013. Despite the long distance, the students were able to raise questions and have a discussion with Professor Tuholske on issues, such as how to determine whether a piece of land is a wetland that requires a permit to develop, and how to mitigate the negative impact on wetlands through a permitting system. After the lesson, student clinicians were divided into four groups and tasked with writing an essay to analyze the difference between China’s wetlands law and United States wetlands law. EBLC provided feedback to the Partnership that the exercise had enhanced students’ understanding of wetlands regulations from a comparative perspective.

C. Participation in Case Strategies Discussion and Program Development

The Partnership program staff and faculty from VLS participated in the development discussions for the clinic’s key case/project strategy and assisted the clinic with creating plans to ensure the clinic’s sustainability.

CONCLUSION

The feature of EBLC at SWFU that makes it unique is that it works closely with environmental NGOs and local communities to tackle environmental problems. This represents a new environmental law clinic model that can promote the development of environmental civil public interest litigation and other public legal advocacy tools in the upcoming years. The Chinese government opened political and legal space for citizens to appeal for action by amending the Environmental Protection Law and
issuing judicial interpretations that permit environmental NGOs meeting certain requirements to bring EPIL. As of December 28, 2015, the Supreme People’s Court reported that forty-five EPIL cases had been filed by community service organizations (CSOs) and accepted by the courts under the new Environmental Protection Law. However, the majority of these cases were brought by only two national environmental groups—Friends of Nature and a government-sponsored non-governmental organization, the China Biodiversity Conservation and Green Development Foundation. One of the key challenges that local CSOs and national CSOs identified is that they lack experience and knowledge of legal advocacy, such as turning identification of environmental problems into potential EPIL cases. While there might be lawyers who are interested in representing them in litigation, there are very few lawyers who can help them to develop the case by filing OGI requests and environmental enforcement requests. Environmental legal clinical education programs, such as the EBLC at SWFU, will be able to fill the gap. Therefore, more efforts are needed to help China’s law schools create new environmental law clinics and cultivate partnerships between NGOs and legal clinics in the same region. Although the new model of environmental legal clinical education programs in China is at a preliminary stage, it has the potential to play an important role in the development of China’s environmental rule of law.

87. Zheng Chen Siyi, Supreme Court: This Year the Court Received a Total of 45 Cases of Environmental Public Interest Litigation, SINA (Dec. 29, 2015, 11:55 AM), https://perma.cc/LF4K-QHPA.
90. Id.
A COMPARATIVE ANALYSIS OF THE EVOLUTION OF ENVIRONMENTAL LAW IN THE DOMINICAN REPUBLIC AND THE EUROPEAN UNION

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CONCLUSION

INTRODUCTION

In 1968, Sweden suggested that the United Nations Economic and Social Council hold a conference focused on human interactions with the environment.¹ By 1972, the United Nations (UN) held the first worldwide conference on the environment, the Conference on the Human Environment, which was held in Stockholm.² Representatives from 113 countries, 19 inter-governmental agencies, and more than 400 inter-governmental and non-governmental organizations attended this Conference; it is widely recognized as “the beginning of modern political and public awareness of global environmental problems.”³ The Declaration of the UN Conference on the Human Environment brought to the forefront

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2. Id.
the problems that developed and developing nations were facing regarding the protection and improvement of the human environment, which “affects the well-being of peoples and economic development throughout the world.” Under-development created most of the environmental problems developing countries faced—the natural growth of the population continuously presented problems for the preservation of the environment. As a result, it was declared that:

Through ignorance or indifference we can do massive and irreversible harm to the earthly environment on which our life and well-being depend. Conversely, through fuller knowledge and wiser action, we can achieve for ourselves and our posterity a better life in an environment more in keeping with human needs and hopes.

Therefore, “man must use knowledge to build, in collaboration with nature, a better environment,” because “defend[ing] and improv[ing] the human environment for present and future generations has become an imperative goal for mankind—a goal to be pursued together with, and in harmony with, the established and fundamental goals of peace and of worldwide economic and social development.

Environmental law in the Dominican Republic and the European Union (EU) was originally scattered and uncoordinated. During the 1970s, specifically after the Conference on the Human Environment, environmental law in the Dominican Republic and the EU began to take shape and has evolved into its present state. However, the approaches taken have been very different. The Dominican Republic’s environmental law primarily focuses on protection, conservation, and education. Tied to the internal market, EU law has a stronger focus on economic

5. Id.
6. Id.
7. Id.
Moreover, both the EU and the Dominican Republic have taken it upon themselves to include environmental issues in the objectives for their future development. This article analyzes the similarities and differences regarding the evolution of environmental law in the Dominican Republic and the EU. Part I addresses the development of environmental law in the Dominican Republic and the EU. Part II analyzes Dominican Republic Law 64-00 and its aftermath, and environmental law in the EU following the Treaty of Lisbon. Finally, Part III examines access to environmental justice in the Dominican Republic and the EU.

I. THE EVOLUTION OF ENVIRONMENTAL LAW IN THE DOMINICAN REPUBLIC AND THE EUROPEAN UNION

A. Dominican Republic

In order to understand current environmental law in the Dominican Republic and the EU, knowledge of internal and external influences is important. The foundation of environmental law in the Dominican Republic can be traced back to the Royal Decree of 1539, when Spanish Emperor Carlos V ordered the tainos (the indigenous population of the Dominican Republic) to replant trees around town. During Haiti’s occupation of the Dominican Republic, it implemented the Rural Code of 1826, which led to the deterioration of natural resources in the country. As a result in 1844, after the Dominican Republic gained its independence from Haiti, the Dominican Republic implemented Decree No. 2295 on October 3, 1844, regarding the conservation of forests and jungles.

From 1930 to 1961, under Dictator Trujillo’s regime, various laws were implemented in order to prevent the deforestation of the Dominican Republic. These laws include: Law No. 1321 of 1937, reinforcing...
prohibition of cutting down trees unless one planted 20 trees for each tree cut down; Law No. 1464 of 1938, prohibiting cutting down coffee and cacao trees without authorization from the Secretary of State for Agriculture;\textsuperscript{17} and Law No. 4371 of 1956, declaring reforestation as a national interest and prohibiting clearing trees for cultivation.\textsuperscript{18} Concern for the protection and conservation of natural resources and the environment became evident with the implementation of Law No. 85/31, regarding hunting and fishing.\textsuperscript{19} Forestry Law No. 5856 of 1962 created the General Forest Directorate (DGF).\textsuperscript{20} Law No. 331 of 1968 regulated the indiscriminate use of pesticides.\textsuperscript{21} Decree No. 2550 of 1970 created a Commission charged with providing information about contaminants in the environment.\textsuperscript{22}

The Dominican Republic began to promote environmental education after participating in the Stockholm Conference of 1972.\textsuperscript{23} The Universidad Nacional Pedro Hern Dios Ureña held the Symposium Towards 2000 and the conference entitled “del Mar,” addressing two categories of problems facing the Dominican Republic.\textsuperscript{24} The Symposium focused on physical and biological changes in the environment, and the conference analyzed the country’s pollution problem.\textsuperscript{25} This led to the creation of the first environmental groups in the northern part of the Dominican Republic.\textsuperscript{26} Law No. 67 of 1974 created the National Park Directorate to protect and conserve the country’s recreational and historic areas.\textsuperscript{27} Decree No. 114 of 1975 created the National Zoo in order to promote environmental education.\textsuperscript{28} The Ecological Society of Cibao (SOECI) and the Ecological Society of Santo Domingo, created in 1977, paved the way for environmental awareness in the Dominican Republic.\textsuperscript{29}

Between 1977 and 1982, the government emphasized development programs and projects for environmental education.\textsuperscript{30} The Dominican

\textsuperscript{17} LEY NO. 4371 QUE DECLARA DE INTERÉS NACIONAL LA REPOBLACIÓN FORESTAL, EN TODO EL TERRITORIO DE LA REPÚBLICA. [LAW NO. 4371 DECLARING REFORESTATION AS A NATIONAL INTEREST] [CIVIL CODE] (Feb. 4, 1956) (Dom. Rep.).
\textsuperscript{18} Id.
\textsuperscript{19} Gonzalvo, supra note 16.
\textsuperscript{20} Id.
\textsuperscript{21} Id.
\textsuperscript{22} Id.
\textsuperscript{23} Id.
\textsuperscript{24} Id.
\textsuperscript{25} Id.
\textsuperscript{26} Id.
\textsuperscript{27} Id.
\textsuperscript{28} Id.
\textsuperscript{29} Id.
\textsuperscript{30} Id.
Republic promulgated Law No. 295 to make environmental education a mandatory part of public and private school curriculums; however, the law was not well-received by the public. In 1990, the National Commission for Environmental Education was created in collaboration with the UN Educational, Scientific and Cultural Organization (UNESCO). The government worked alongside nongovernmental organizations and universities to promote environmental education. The Rio Conference in 1992 influenced the Dominican Republic’s implementation of Law 300-98 in 1998, which required the teaching of environmental issues in all school curriculums. In the same year, President Leonel Fernandez issued Decree No. 152-98, creating the Coordinating Committee of Natural Resources and the Environment to draft an environmental law. This led to the implementation of General Environmental Law 64-00 in 2000. The objective of Law 64-00 is to establish norms for the conservation, protection, betterment, and restoration of the environment and natural resources, ensuring their sustainable use.

B. European Union

EU environmental law also began to take shape during the 1970s, expanding dramatically after the first Environmental Action Programme in 1973, which established the Environment and Consumer Protection Service. However, to understand why economic development is tied to EU environmental law, it is important to regress to 1957. The original text of the European Economic Community Treaty, signed on March 25, 1957, did not contain any explicit provision regarding the protection of the environment. Originally, the EU’s goal was to create a common market through integration. This becomes evident in Article 2 of the Treaty of Rome, which states:

31. Id.
32. Id.
33. Id.
34. Id.
35. Id.
36. Id.
37. LEY 64-00 [CIVIL CODE] art 1 (Dom. Rep.).
38. Id.
40. Id.
The Community shall have as its task, by establishing a common market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the States belonging to it.\(^\text{41}\)

Moreover, at that time, environmental concerns were not a priority.\(^\text{42}\) The first significant political statement on environmental issues that the EU made was the Commission on a Community Environmental Programme’s communication on a community environmental policy adopted in 1971.\(^\text{43}\) The Member States reached a political agreement on the guiding principles of a community environmental policy in 1972 at the Paris Summit, leading to the first Environmental Action Programme in 1973.\(^\text{44}\) The Environmental Action Programme of 1973 declared:

Whereas in particular, in accordance with Article 2 of the Treaty; the task of the European Economic Community is to promote throughout the Community a harmonious development of economic activities and a continuous and balanced expansion, which cannot now be imagined in the absence of an effective campaign to combat pollution and nuisances or of an improvement in the quality of life and the protection of the environment;

Whereas improvement in the quality of life and the protection of the natural environment are among the fundamental tasks of the Community; whereas it is therefore necessary to implement a Community environment policy.\(^\text{45}\)

However, “according to the principle of conferral, which governs EU action internally, . . . the EU may legislate only on the basis of explicit powers endowed by the treaties and within the objectives, procedures and conditions set out therein.”\(^\text{46}\) In the absence of express authority, former


\(^{42}\) See EEC Treaty (as in effect 1958) (repealed by TFEU) (omitting any mention of the environment in the treaty’s text).


\(^{44}\) Id.

\(^{45}\) Id.

\(^{46}\) Orlando, supra note 10, at 3.
Article 100 of the Treaty Establishing the European Economic Community created the first EU environmental measures. The treaty stated: “The Council, acting by means of a unanimous vote on a proposal of the Commission, shall issue directives for the approximation of such legislative and administrative provisions of the Member States as have a direct incidence on the establishment or functioning of the Common Market.”

One example is Directive 70/220, which addresses air pollution from motor vehicles and was intended to prevent enacting different emission standards that “could create indirect trade barriers.” While Directive 70/220 had an “important environmental impact, it was adopted under Article 100 on the approximation of national legislations for the creation of a single market,” as evident in the preamble to the directive. Article 100 provided the legal coverage necessary to implement environmental measures by linking the policies to the smooth functioning of the internal market.

Moreover, Article 235 of the Treaty Establishing the European Economic Community, states:

If any action by the Community appears necessary to achieve, in the functioning of the Common Market, one of the aims of the Community in cases where this Treaty has not provided for the requisite powers of action, the Council, acting by means of a unanimous vote on a proposal of the Commission and after the Assembly has been consulted, shall enact the appropriate provisions.

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47. EEC Treaty art. 100 (as in effect 1958) (repealed by TFEU).
49. Id.
50. See Council Directive 70/220 of Mar. 20, 1970 on the Approximation of the Law of the Member States Relating to Measures to be Taken Against Air Pollution by Gases from Positive-Ignition Engines of Motor Vehicles, pmbl., 1970 O.J. Spec. Ed. (L 76) 1 (EC) (“Whereas those provisions are liable to hinder the establishment and proper functioning of the common market; whereas it is therefore necessary that all Member States adopt the same requirements, either in addition to or in place of their existing rules, in order, in particular, to allow the EEC type - approval procedure which was the subject of the Council Directive (3) of 6 February 1970 on the approximation of the laws of the Member States relating to the type approval of motor vehicles and their trailers to be applied in respect of each type of vehicle.”).
51. Id.
52. Id.
The EU used Article 235 "as a legal basis for adopting directives that were not concerned with 'the operation of the common market, as such.'" One example is, Directive 75/440/EEC of June 16, 1975, concerning the disparity between the provisions on the quality of surface-water intended for drinking in Member States. Additionally, Directive 76/160 of December 8, 1975, concerns the quality of bathing water. Directive 79/409, also known as the “Birds Directive,” created a regime of protection for a number of species of wild birds.

During the 1980s, EU environmental policy started to become more consistent. This was due to the successful use of Articles 100 and 235, and the European Court of Justice playing a crucial role in invoking environmental protection as one of the objectives of general interest. In *Commission of the European Communities v. Kingdom of Denmark*, the European Court of Justice held that the protection of the environment is “one of the Community's essential objectives.” The objective justifies certain limitations of the free movement of goods, a view that the Single European Act confirms. Moreover, the European Court of Justice, in the *Danish Bottle* case,

made one of the first applications of the environmental integration principle... and held that environmental protection constituted one of the mandatory requirements which, according to the *Cassis de Dijon* case,... could under certain circumstances justify the imposition of trade restrictions on goods from other member states.

In 1986, the Single European Act was adopted, which introduced an “explicit legal basis for environmental legislation at the European level, thus representing a significant step forward in the process of progressive

54. Id.
55. Council Directive 76/160 of Dec. 8, 1975, Concerning the Quality of Bathing Water, pmbl., 1975 O.J. (L 31) 1 (EC) (stating that surveillance of bathing water is necessary in order to attain, within the framework of the operation of the common market, the Community's objectives as regards the improvement of living conditions, the harmonious development of economic activities throughout the Community and continuous and balanced expansion).
59. Id.
60. Orlando, supra note 10, at 5.
consolidation of European environmental policy.” 61 Previously, the EU used Articles 100 and 235 of the Treaty to implement environmental instruments, but the Articles were heavily biased toward, and dependent on, economic integration being the legislation. 62 Under Article 100A, the Act introduced the “qualified majority voting rule for harmonization measures, in order to accelerate the realization of the Single Market.” 63 The Single European Act “also added Title VII to the Rome Treaty, whereby a shared competence to legislate, by unanimous vote, on environmental matters was granted to the Community.” 64 Moreover, the “Fourth EAP (1987-1992), […] acknowledged environmental regulation as a ‘pillar for a lasting economic and social progress.’” 65

The 1990s saw the further “communitarization” of EU environmental law. 66 A prime example is the France v. Commission decision, 67 where the European Court of Justice clarified that, deviations from the harmonised rules should be notified to the Commission that must give its reasoned approval to the exceptions applied at the Member State level. This decision is relevant since it regarded a more restrictive[—more environmentally friendly[—]regime on the use of pentachlorophenol (PCP) applied by Germany in contradiction with the European directive[,] Directive 91/173. 68

Moreover in case C-435/97, the Court stated, “a Member State cannot undermine the attainment of a directive’s objective by applying an alternative regime when the case at hand would instead require the application of European rules.” 69

In 1993, with the entrance into force of the Treaty of Maastricht, 70 the protection of the environment finally received a permanent place in Article 2, stating:

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62. Id.
63. Id. at 14.
64. Orlando, supra note 10, at 5.
65. Id.
67. Id.
68. Id.
69. Id.
The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing the common policies or activities . . . to promote throughout the Community a harmonious and balanced development of economic activities, sustainable and non-inflationary growth respecting the environment, [and] a high degree of convergence of economic performance . . . 71

Finally, in 1999 under the Treaty of Amsterdam, the “strategic environmental impact assessment was introduced.” 72 Article 6 mandated that Article 3 integrate environmental protection requirements into the definition and implementation of EU policies and activities. 73 The objective was to promote balanced and sustainable development. 74

II. DOMINICAN REPUBLIC LAW 64-00 AND EUROPEAN UNION ENVIRONMENTAL LAW POST-LISBON

After 30 years of diverse laws and regulations, Law 64-00 became the Dominican Republic’s first general environmental law; Law 640-00 created the Secretary of State for the Environment and Natural Resources, which helped regulate and control environmental activities in the country. 75 Article 6 of Law 64-00 states that the liberty of citizens to use natural resources is based on every individual’s right to enjoy a safe environment. 76 As a result, the government will ensure the country’s communities and inhabitants participate in the conservation, management, and sustainable use of natural resources and the environment, as well as have the right to information. 77 Some of the main objectives of Law 64-00 are set out in Article 15 and include the prevention, regulation, and control of any activities that deteriorate the environment, contaminate the ecosystem, or destroy national and cultural heritage. 78 Law 64-00 also established the methods, forms, and opportunities for conservation and sustainable use of natural resources, the correct use of physical space, and strengthened the

73. Orlando, supra note 10, at 6.
74. Id.
75. LEY 64-00 [CIVIL CODE] art. 1 (Dom. Rep.).
76. Id. at art. 6.
77. Id.
78. Id.
National System of Protected Areas to guarantee biodiversity. This ensured sound management of watersheds and water systems, and promoted environmental education as a means to encourage a society in harmony with nature.

From 2002 to 2004, the Dominican Republic along with international and local environmental specialists, designed a strategic plan to mobilize and sensitize the Dominican population and teach them the benefits of conserving and protecting the environment. On January 26, 2010, a new Constitution entered into force in the Dominican Republic. The Constitution designated Chapter IV to natural resources, protected areas, and the enjoyment of natural resources and constitutionally recognized the importance of protecting the environment for the first time in Dominican history. Thus, the Dominican Republic recognized “protection, conservation and sustainable use of natural resources for the good of humanity.” It created the “effective protection of the environment as an essential duty of the State” by adopting a policy related to the environment and the general population, recognizing the principle of caution and requiring all institutions to participate in its execution. Article 66 of the 2010 Dominican Republic Constitution “recognizes collective and diffusive rights and interests, which are executed in the conditions and limitations established by the law” and as a result, protects and conserves the ecological equilibrium of the flora, fauna, and the environment.

Moreover, Article 67 specifically provides for the protection of the environment, making pollution prevention and environmental protection for present and future generations a duty of the State. As a result,

Every person has the right, both individually and collectively, to the sustainable use and enjoyment of the natural resources; to live in a healthy, ecologically balanced and suitable environment for the development and preservation of the various forms of life, of the landscape and of nature.

79. Id. at art. 15.
80. Id.
81. Gonzalvo, supra note 16.
82. LEY 64-00 [CIVIL CODE] art. 14, 16, 18 (Dom. Rep.).
83. Id.
84. Legal Framework for Business Activities Environmental Protection: Law 64-00, PELLERANO & HERRERA, DOMINICAN TODAY (Aug. 6, 2015, 2:56PM), https://perma.cc/MUF5-A8UP.
85. Id.
86. Constitución de la Dominican Republic, art. 66, Gaceta Oficial No. 10561, 26-01-2010.
87. Id. at art. 67.
88. Id.
Article 75 of the Dominican Constitution states that the fundamental rights recognized in this Constitution determine the existence of an order of judicial responsibility and morality, which forces the conduct of the man and woman in society. As a result, the development and dissemination of Dominican culture and protection of the country’s natural resources were declared fundamental duties of the people, guaranteeing the conservation of a clean and safe environment.\(^{89}\)

Finally, the Ministry of Environmental and Natural Resources, in accordance with the goals set out in Law No. 1-12, which established the 2030 National Strategy for Development, will seek to promote a society of environmentally sustainable production and consumption that adapts to climate change.\(^{90}\) Three of the Ministry’s major goals are environmental sustainability, effective risk management to minimize economic and environmental casualties, and adequate adaptation to climate change.\(^ {91}\)

While Law 64-00 reaffirmed the Dominican Republic’s longtime commitment to the preservation and conservation of the environment and education, the Lisbon Treaty “reaffirmed the EU commitment to environmental protection and sustainable development and expressly emphasize[d] the internal and external dimensions of [EU] action in the field.”\(^ {92}\) The Lisbon Treaty introduced a specific European competence in the field of energy policy and investments, and “extended the ordinary co-decision procedure to the fields of transport, energy, fisheries, external trade, [and] regional and agricultural policy.”\(^ {93}\) The importance of environmental protection in the EU is seen in the preamble of the Treaty on European Union (TEU), which states that the EU is: “DETERMINED to promote economic and social progress for their peoples, taking into account the principle of sustainable development and within the context of the accomplishment of the internal market and of reinforced cohesion and environmental protection.”\(^ {94}\)

Article 4 of the Treaty on the Functioning of the EU (TFEU) lists the environment as one of the shared competences between the EU and the

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89. Id.
90. LEY 1-12 [CIVIL CODE] art. 10 (Dom. Rep.).
91. Id.
93. Id. at 13.
Member States.\textsuperscript{95} Article 11, one of the horizontal clauses, declares that environmental protection must be integrated into EU policies and activities.\textsuperscript{96} Additionally, Articles 191 to 193 set out the main elements of EU environmental policy, ranging from its objectives to the legislative procedure applicable when adopting environmental laws.\textsuperscript{97} In the TEU, Articles 3 and 21 “confer constitutional relevance to the EU[‘s] intention to play a leadership role in the promotion of sustainability at the global level and in its relations with third countries, and reaffirm its commitment to multilateralism.” \textsuperscript{98} Moreover, Title XX specifically deals with the environment.\textsuperscript{99} Article 191 of the TFEU states that:

1. Union policy on the environment shall contribute to pursuit of the following objectives:
   - preserving, protecting and improving the quality of the environment,
   - protecting human health,
   - prudent and rational utilisation of natural resources,
   - promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change.

2. Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union.

   In this context, harmonisation measures answering environmental protection requirements shall include, where appropriate, a safeguard clause allowing Member States to take provisional measures, for non-economic environmental reasons, subject to a procedure of inspection by the Union.\textsuperscript{100}

Article 193 also allows Member States to maintain or introduce more stringent, protective environmental measures than the ones introduced by the EU.\textsuperscript{101} Although the EU has implemented more than 200 regulations and directives in order to help harmonize environmental standards and create the regulatory framework for environmental protection in the EU, the

\textsuperscript{95} Consolidated Version of the Treaty on the Functioning of the European Union art. 4, June 7, 2016, 2016 O.J. (C 202) 51 [hereinafter TFEU].
\textsuperscript{96} \textit{Id.} at art. 4.
\textsuperscript{97} \textit{Id.} at art. 191–94.
\textsuperscript{98} Orlando, \textit{supra} note 10, at 16.
\textsuperscript{99} TFEU tit. XX.
\textsuperscript{100} \textit{Id.} at art. 191.
\textsuperscript{101} \textit{Id.} at art. 193.
regulations still have a focus on economic development and the internal market.\textsuperscript{102} As a result, environmental concerns become secondary, making the legislation less successful.

Finally, the Seventh Environmental Action Programme, which entered into force in January 2014, guides European environmental policy until 2020 and sets out a vision for the growth of environmental law through 2050.\textsuperscript{103} According to the Seventh Environmental Action Programme: “In 2050, we live well, within the planet’s ecological limits. Our prosperity and healthy environment stem from an innovative, circular economy where nothing is wasted and where natural resources are managed sustainably, and biodiversity is protected, valued and restored in ways that enhance our society’s resilience.”\textsuperscript{104}

Our “low-carbon growth has long been decoupled from resource use, setting the pace for a safe and sustainable global society.”\textsuperscript{105} The Programme identifies three key objectives: “to protect, conserve and enhance the Union’s natural capital, to turn the Union into a resource-efficient, green, and competitive low-carbon economy, and to safeguard the Union's citizens from environment-related pressures and risks to health and well-being.”\textsuperscript{106} Although key objectives include protecting and conserving the environment, it all circles back to the internal market. The Dominican Republic’s 2030 National Strategy for Development also mentions the economy, but instead of being the central focus of the policy, it is secondary.\textsuperscript{107} Its primary goal is still the protection of the environment and natural resources and the promotion of environmental education.\textsuperscript{108}

\section*{III. ACCESS TO JUSTICE IN THE DOMINICAN REPUBLIC AND THE EUROPEAN UNION}

Environmental law in the Dominican Republic and the EU has the conservation of the environment for the good of its citizens as one of its main objectives.\textsuperscript{109} As a result, both have created institutional structures and systems in order to help hold natural and legal persons accountable for

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\textsuperscript{102} \textit{ENVIRONMENT, INCENTIVES AND THE COMMON MARKET} 5 (Frank J. Dietz et al. eds., 1995).
\textsuperscript{104} \textit{Id.}
\textsuperscript{105} \textit{Id.}
\textsuperscript{106} \textit{Id. at 174.}
\textsuperscript{107} \textsc{LEY 1-12 [CIVIL CODE]} pmbl. (Dom. Rep.).
\textsuperscript{108} \textit{See generally id.} (explaining that protecting the environment and natural resources is one of the Constitution’s main objectives).
\end{footnotesize}
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violating environmental law. Law 64-00 provides that any person or association of citizens has a legitimate right to file a grievance or complaint for any act or failure to act that has caused, is causing, or will cause damage, contamination, or deterioration of the environment and natural resources. Any natural or legal person with a legitimate interest in enforcing environmental law may intervene by providing evidence relevant to the case and may challenge an act. On the other hand, the protection of individuals against breaches of EU environmental law by public authorities of the Member States or by other individuals, “through the doctrines of direct effect, consistent interpretation and state liability, is largely effected through national procedures.” However, if an individual objects to the very substance of EU environmental law, he or she has few means to obtain a remedy at the national level, because the national court is not competent to pronounce its validity. Therefore, the national court must avail itself of Article 267 of the TFEU and refer the matter to the European Court of Justice. Unlike Law 64-00, which offers individual direct legal protection when an individual objects to the substance of an environmental law, EU treaties do not offer such direct legal protection. However, under Article 263(4) of the TFEU, “[a]ny natural or legal person may . . . institute proceedings against an act addressed to that person or which is of direct and individual concern to them . . .” Like Law 64-00, EU environmental law, under the Plaumann doctrine, allows “persons other than those to whom a decision is addressed [to] claim to be individually concerned.” However, the decision must affect “them by reason of certain attributes[,] which are peculiar to them[,] or by reason of circumstances in which they are differentiated from all other persons.”

Under Law 64-00, the Ministry of the Environment and Natural Resources, the Prosecutor for the Defense of the Environment and Natural Resources, and courts are in charge of ensuring the implementation of Law 64-00 and preventing violations of said law. The National Service for the Protection of the Environment is part of the Ministry of the Environment

112. LEY 64-00 [CIVIL CODE] art. 180 (Dom. Rep.).
114. Id.
115. Id.
116. TFEU art. 263(4).
117. JANS & VEDDER, supra note 113, at 239.
118. Id.
119. Duaret, supra note 111.
and Natural Resources.\textsuperscript{120} It takes preventative measures necessary to avoid violations of Law 64-00, receives complaints, and gathers preliminary evidence to present to the Prosecutor in charge of environmental crimes.\textsuperscript{121} The Prosecutor for the Defense of the Environment and Natural Resources is in charge of prosecuting environmental crimes.\textsuperscript{122} Finally, the Courts of First Instance have the competence to judge any violation of Law 64-00.\textsuperscript{123} On the other hand, according to Article 19(1) of the TEU, Member States are responsible for providing sufficient remedies to ensure effective legal protection in the fields covered by EU law.\textsuperscript{124} Therefore, private individuals are dependent on the legal procedures established under national law. Although the implementation of EU environmental law is at the discretion of the Member States, increasingly, the Commission “possess powers to take acts in the field of or related to the environment.”\textsuperscript{125} For example, Articles 107 and 108 of the TFEU give the Commission “the power to approve national environmental aids, not to approve them or to make aid subject to certain conditions, and other, more procedural decisions can also be taken.”\textsuperscript{126} Moreover, persons to whom acts of the Commission with an environmental impact are addressed can file appeal under Article 263 of the TFEU before the General Court of the European Court of Justice.\textsuperscript{127}

With regard to criminal matters in environmental law, Article 170 of Law 64-00 states that in order to determine the magnitude of the damages incurred, the court must take into account the reports prepared by inspectors and the formal reports provided by the Secretariat of the Environment and Natural Resources and any other environmental agencies of the State.\textsuperscript{128} Article 174 states that anyone who violates Law 64-00 has committed a crime against the environment.\textsuperscript{129} Articles 176 and 183 set out sanctions that may be imposed on natural and legal persons, including a prison sentence or a fine based on the minimum public sector salary.\textsuperscript{130} Article 176 states that a legal person will be subject to a fine of 5,000 to 20,000 pesos when the damages result in the poisoning of individuals, the destruction of habitats, or the irreversible contamination.\textsuperscript{131} The activity causing the

\textsuperscript{120} Id.
\textsuperscript{121} Id.
\textsuperscript{122} LEY 64-00 [CIVIL CODE] art. 165 (Dom. Rep.).
\textsuperscript{123} Id. at art 177.
\textsuperscript{124} TEU art. 19.
\textsuperscript{125} JANS & VEDDER, supra note 113, at 238.
\textsuperscript{126} Id.
\textsuperscript{127} Id.
\textsuperscript{128} LEY 64-00 [CIVIL CODE] art. 170 (Dom. Rep.).
\textsuperscript{129} Id. at art. 174.
\textsuperscript{130} Id. at arts. 176, 183.
\textsuperscript{131} Id. at art. 176.
damage will be prohibited for a period of one month to three years, or the judge can order the person to cease and desist the harmful activity.\footnote{132} Article 183 states that the Court of First Instance can subject legal or natural persons to the following sanctions:

1. a prison sentence of six days to three years; and/or
2. a fine of \(\frac{1}{4}\) of the minimum public sector salary up to 10,000 public sector salaries; . . .
4. the obligation to economically indemnify the people who have suffered damages; . . .
11. the obligation to respect, restore, redress, or rehabilitate to its original state, as far as possible, the natural resource damaged, destroyed, impaired, or adversely modified.\footnote{133}

These sanctions are meant to have a chilling effect and deter future offenders from committing a crime against the environment, in order to preserve a healthy environment and natural resources.

On the other hand, tackling environmental crime in the EU had primarily been left to the Member States. However, in 2008, the EU adopted Directive 2008/99/EC to protect the environment through criminal law because it was “concerned [with] the rise in environmental offences and . . . their effects, which are increasingly extending beyond the borders of the States in which the offences are committed. Such offences pose a threat to the environment and therefore call for an appropriate response.”\footnote{134} The Directive forces Member States to “provide for criminal penalties in their national legislation in respect of serious infringements of provisions of Community law on the protection of the environment.”\footnote{135} Moreover, “[s]pecific environmental offences listed in the directive, such as particular discharges or emissions, shipment of waste or operation of a plant in which a dangerous activity is carried out, must have been committed unlawfully and intentionally, or at least with gross negligence, to meet the criminal law provisions.”\footnote{136} However, the Directive does not stipulate what kind of sanctions or penalties can be imposed, leaving it to the Member States and in turn, creating disparity among them.\footnote{137}
CONCLUSION

Environmental law in the Dominican Republic and the EU was originally scattered and uncoordinated. The Conference on the Human Environment served as the steppingstone for the evolution of environmental law in the EU and the Dominican Republic. However, both of their legal systems are products of their unique histories. Environmental conservation and preservation in the Dominican Republic dates back to 1844, and has continued to play a central role in the development of environmental law and education in the country. Likewise, the EU cannot escape its economic roots; therefore, over 200 directives and regulations on the environment are tied to economic development and the common market.138 One can argue that implementation problems regarding environmental law arise because of the “overspecification and rigidity of goals,” and “the failure to engage relevant actors in decision-making.”139 The Dominican Republic has been able to overcome this problem by creating General Environmental Law No. 64-00. Environmental law in the EU, however, remains scattered. Moreover, the leeway given to Member States to implement directives, and Member States transposing EU environmental regulations without properly enforcing them, results in disparities. Effectively implementing environmental law in the Dominican Republic and the EU is contingent upon citizens, institutions, and governments cooperating on access to information, knowledge of the law, and deterrence.

138. ENVIRONMENT, INCENTIVES AND THE COMMON MARKET, supra note 102, at 5.
ENDANGEROSED SPECIES ACT OR EXTRADITION?:
PROTECTING FOREIGN SPECIES IN THE AFTERMATH OF
THE CECIL THE LION CONTROVERSY

Wyatt Smith

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INTRODUCTION

In July of 2015, news outlets throughout the western world placed Minnesota dentist Walter Palmer in the spotlight for killing a thirteen-year-old male lion named Cecil. Cecil was a major tourist attraction in Zimbabwe’s Hwange National Park and was wearing a tracking collar as part of an Oxford research project. His death sparked an international phenomenon that placed trophy hunters in the crosshairs of animal lovers and conservationists worldwide. The manner of Cecil’s death resonated with the American public, prompting many debates about the humanity of killing for sport and sparking legislative attacks on trophy hunting. When

1. Editorial Board, The Death of Cecil the Lion, N.Y. TIMES (July 31, 2015), https://perma.cc/WYA4-SXFV.
2. Kerry Howley, What We Mourned When We Mourned Cecil, NEW YORKER (Sept. 29, 2015), https://perma.cc/TER2-HB2J.
3. Lucy Westcott, Cecil the Lion’s Research Team Looks for Hope in Death of Beloved Predator, NEWSWEEK (July 29, 2015, 2:02 PM), https://perma.cc/643P-HGDX.
4. See Alex Wolf, Cecil the Lion’s Death Spurs Talk of Game Trophy Airport Ban, LAW360 (July 30, 2015, 7:39 PM), https://perma.cc/UBX4-4JS6. For example, following Cecil’s “tragic demise,” New Jersey assemblyman, Tim Eustace introduced legislation in July of 2015 that would ban
Zimbabwe officials called for Palmer’s extradition for violating domestic hunting laws, the lion’s death presented legal implications. Later, Zimbabwe’s government cleared Palmer of any wrongdoing. Yet five months after Cecil’s death, in an effort to make it more difficult for hunters to bring lion trophies into the United States, the United States Fish and Wildlife Service (FWS) officially extended the protections of the Endangered Species Act (ESA) to the African lion. The response to the Cecil controversy raises important questions regarding the United States’ commitment to protecting biodiversity under the ESA, addressing wildlife crime on an international level and using extradition in the prosecution of wildlife crime.

Enacted in 1973, the ESA attempts to preserve biodiversity by criminalizing conduct that jeopardizes particular species listed under the Act. Currently, the ESA falls under a judge-made rule that interprets statutes to apply domestically absent clear congressional intent to apply extraterritorially. This means the ESA applies exclusively within United States territory. Still, the drafters of the ESA clearly wished to protect foreign species, and the FWS currently lists foreign species for protection. Despite this, if United States citizens go abroad and kill an endangered species, they will not face prosecution under the ESA for that action. This legal loophole is troubling because it undermines the ESA’s goal of preserving protected species and safeguarding biodiversity.

the transportation of game trophies of threatened or endangered species through New York and New Jersey’s international airports. Id.

5. Andrea Noble, Cecil the Lion Extradition Request from Zimbabwe Likely Going Nowhere, WASH. TIMES (Sept. 8, 2015), https://perma.cc/NTS7-WCAP.
6. Farai Mutsaka, Minnesota Dentist Who Killed Cecil the Lion Cleared of Wrongdoing, PORTLAND PRESS HERALD (Oct. 12, 2015), https://perma.cc/USM6-HF9J.
8. J. PEBTON DOUB, THE ENDANGERED SPECIES ACT: HISTORY, IMPLEMENTATION, SUCCESSES, AND CONTROVERSIES 2 (2013) (“Like other environmental regulations, the Endangered Species Act is an imperfect attempt to balance the interests of those who admire the natural world as the shared heritage of us all and those who work to meet the economic challenges of supporting our advanced standard of living.”).
12. But c.f. U.S. FISH AND WILDLIFE SERV., BRANCH OF FOREIGN SPECIES, ENDANGERED SPECIES PROGRAM (Apr. 2011) [hereinafter Endangered Species Fact Sheet] (providing that individuals may be prosecuted under the ESA or the Lacey Act if they transport any portion of their kill).
13. See DOUB, supra note 8, at 40 (explaining how new stresses impact species’ populations).
This Note’s objective is to explore the legal, cultural, and conservational implications of two potential solutions to this problem. First, the United States could expand the ESA’s jurisdiction to cover citizens that kill endangered species in foreign countries. Alternatively, the United States could pursue a strict policy of extradition for those cases and encourage foreign nations to prosecute the offender under their own wildlife protection laws. At first glance, both solutions seem trivial. Yet, as the Cecil controversy demonstrates, the United States’ position on international wildlife crime is capable of attracting national attention and sparking legal reform. The United States is a global leader in wildlife conservation. Therefore, strengthening its stance on endangered species protection would not only deter its own citizens from committing wildlife crimes, but also help legitimize wildlife protection within the world of criminal justice and influence the policy decisions of other nations.

Using the Cecil controversy as a springboard, this Note repeatedly uses the African lion as an example of a protected foreign species because of the difficulties associated with its conservation. The United States cannot ignore trophy hunting because it is a large piece of the conservation puzzle for many foreign species and lies at the intersection of international and domestic policy. In theory, hunting can help support the conservation of wildlife. Yet poaching and other illegal takings of wildlife hurt both environmentalists’ efforts to sustain biodiversity and hunters’ abilities to maintain their sport for future generations. Thus, how the United States deals with its own citizens who legally and illegally hunt foreign species becomes integral to the ESA’s purpose.

When United States citizens hunt endangered species in other nations, the United States is left with two options to achieve the policy objectives of

14. See ANGUS NURSE, POLICING WILDLIFE: PERSPECTIVES ON THE ENFORCEMENT OF WILDLIFE LEGISLATION 70 (2015) (discussing some wildlife scholars’ argument that conduct deemed environmentally harmful is “shaped by what gets publicly acknowledged to be an issue or problem warranting social attention”).
16. See infra note 69 (discussing how criminal justice frameworks downplay international wildlife crime).
17. See generally W.G. Crosmary et al., The Assessment of the Role of Trophy Hunting in Wildlife Conservation, 18 ANIMAL CONSERVATION 136 (2015) (stating that trophy hunting may be a viable alternative to conservation in areas of dense wilderness or scarce wildlife).
18. DOUB, supra note 8, at 40.
the ESA: expand the ESA to apply extraterritorially or embrace an aggressive policy of extradition. Part I of this Note provides necessary background and is split into two subparts: an examination of the ESA and the United States’ stance on species preservation, and an overview of United States’ extradition law. Part II discusses the possibility of expanding the ESA to cover the actions of United States citizens in foreign nations, and it considers the implications of pursuing an aggressive policy of extradition for such cases. Ultimately, this note weighs the two options, and it concludes the overall discussion by offering suggestions on how the United States can best protect endangered species that live in biospheres outside its sovereign territory.

I. LEGAL BACKGROUND

A. The Endangered Species Act and Other Conservation Efforts

Congress passed the ESA in 1973 in a flurry of political action focused on environmental regulation. The ESA has been called the “pit bull” of environmentalism not only because it provides criminal penalties for harming endangered or threatened species, but also because it requires government agencies to consult with an expert wildlife agency before undertaking any action that may harm a listed species or its habitat. Together, these two simple concepts have enormous consequences for individuals, corporations, and government bodies. ESA expert Peyton Doub notes that preserving biodiversity nearly always involves economic trade-offs and sometimes even results in the loss of freedom. However, as discussed below, the United States’ pit bull lacks teeth when it comes to punishing United States citizens who kill endangered species in foreign lands.

The ESA affords protection to species once they are designated as “threatened” or “endangered.” Expert natural resource agencies, primarily the FWS and the National Marine Fisheries Service, are responsible for listing and delisting species under the Act. The ESA protects listed

23. Id. § 1536(a)(2).
24. DOUB, supra note 8, at 39.
25. Id. at 49. The agencies add and remove species by rulemaking procedures provided by the Administrative Procedure Act. Id. at 58–60. The agencies make recommendations by following a formal rule-making process and publishing notices in the Federal Register. Id. at 39.
species through § 9, which prohibits the take of such species. While the term “take” covers traditional poaching like the shooting or trapping of an animal, its definition under the act is significantly broader; it means “to harass, harm, pursue, shoot, wound, kill, trap, capture, or collect or attempt to engage in any such conduct.”

Section 11 gives the ESA its teeth by authorizing civil and criminal penalties for violations of the Act. The maximum civil penalty for violating the ESA is a fine of $25,000 for each violation, while the maximum criminal penalty for violating the ESA is a fine of $50,000, a year in prison, or both. The federal government rarely tries criminal cases for wildlife crime, and instead pursues the vast majority of penalties imposed for violating the ESA’s take prohibition under the civil penalties provision or the citizen suit provision. Weak precedent hinders the prosecution of wildlife crime and the sentencing of persons convicted of wildlife crimes. As a result, the government only tends to pursue criminal charges when the unlawful conduct is particularly egregious.

Despite the ESA’s under-enforcement, criminal sanctions are critical to the Act’s success because they “communicate disincentives to commit the criminal act by identifying the distinction between acceptable and unacceptable behaviors.” To enhance prosecution efforts and increase deterrence, many environmental advocates encourage increased sanctions. Prosecuting wildlife crime is undoubtedly critical to achieve deterrence. Regardless of the severity of the sanctions for committing wildlife crime, Akella and Allen, advisors to the World Wildlife Fund, insist that

26. Id. at 51. Importantly, though not the focus of this note, the Act also protects the species’ critical habitat which is essential for the species survival. Id.
28. Id. §§ 1540(a)-(b).
29. Id. § 1540(a)(1); see also David Miller, U.S. Fish and Wildlife Service Increases Civil Penalties, NOSSAMAN (June 30, 2016), https://perma.cc/6ZHL-TFUQ (stating that the statutory maximum civil penalties under the ESA increases after July 28, 2016).
33. Nurse, supra note 14, at 150; see WYATT, supra note 31, at 119 (discussing the roadblocks to successful prosecution); see also WSAZ News Staff, NEW INFO: Pair Sentenced for Killing Endangered Bats at Carter Caves, WSAZ (Mar. 18, 2010, 1:58 PM), https://perma.cc/7793-DCJEB (noting that it was only the second successful ESA prosecution by local authorities, implying a weak desire to prosecute).
34. See Rubin, supra note 32 (showcasing criminal penalties for two men who pled guilty after slaughtering 100 endangered bats).
35. Nurse, supra note 14, at 72.
36. WYATT, supra note 31, at 150–51.
“investment in patrols, intelligence-led enforcement and multi-agency enforcement task forces will be ineffective in deterring wildlife crime, and essentially wasted if cases are not successfully prosecuted.”

Because of the relative impunity enjoyed by the perpetrators of wildlife crime, high-profile cases of the type exemplified in the Cecil controversy are prime targets for federal prosecution because of their high potential for deterrence through widespread media coverage. To facilitate and legitimize wildlife prosecution, both from utilitarian and retributivist perspectives, closing loopholes in existing legislation should be a top priority.38

Yet the United States—a nation with clear policy goals and fairly strict penal provisions under the ESA—does not criminalize a large swath of wildlife crime. Currently, the ESA’s take prohibition only applies domestically and on the high seas.39 While the Supreme Court did not rule on the merits of the controversial case Lujan v. Defenders of Wildlife,40 Justice Stevens’ concurrence concluded that § 7 of the ESA did not apply extraterritorially.41 Indeed, a “fair and sober” reading of the statute shows that Congress did not intend it to apply extraterritorially.42 In fact, under a judge-made rule of statutory interpretation, courts apply a presumption against extraterritoriality.43 Absent a clear indication by Congress, courts interpret statutes with the assumption that Congress only intends federal statutes to apply domestically.44 Thus, the ESA’s take prohibitions do not apply to the actions of a United States citizen who knowingly kills an endangered species in a foreign country.

However, it is clear that Congress was not indifferent to the survival of foreign species at the time of the ESA’s enactment. Section 8 of the ESA addresses species living in foreign lands.45 Part A gives the President the means to provide financial assistance to conservation programs overseas.

38. See Nurse, supra note 14, at 181 (discussing the evidence and implications of loopholes in existing wildlife legislation).
39. See, e.g., Endangered Species Fact Sheet, supra note 12 (showing the FWS’s position that the ESA does not apply extraterritorially to encompass foreign species).
41. Id. at 585 (Stevens, J., concurring).
42. Boudreaux, supra note 21, at 1130.
43. See id. at 1108–11 (discussing the Supreme Court’s uneasy history with the presumption against extraterritoriality); Foley Bros., Inc. v. Filardo, 336 U.S. 281, 285 (1949) (“A canon of construction . . . teaches that legislation of Congress, unless contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States,” so the presumption arises from an “assumption that Congress is primarily concerned with domestic conditions.”).
44. M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE 414 (6th ed. 2014); see, e.g., Small, 544 U.S. at 391 (holding that the phrase “convicted in any court” encompasses only domestic, not foreign, convictions).
“[a]s a demonstration of the commitment of the United States to the worldwide protection of endangered and threatened species.” Part B calls for foreign countries to implement their own laws and conservation programs to protect the ESA’s listed species, and Part C and D authorize the United States to provide assistance to foreign governments and to conduct research and investigations abroad to fulfill the purpose of the Act. In addition, Congress has ratified multiple treaties to protect migratory species. It is axiomatic that part of the difficulty of protecting wildlife is that mobile species do not live neatly within the lines on maps that delineate sovereign borders.

As a consequence, the FWS has listed many species under the ESA that do not actually live within the United States. It can be explained that this conduct is “largely because of the U.S.’ obligations under . . . treaties governing trade in and migration of imperiled species.” Section 4 of the ESA, which provides for the listing of endangered species, also takes foreign nations into account. In determining whether to list a species, the government must consider whether a foreign nation has identified the species “as in danger of extinction,” and whether any foreign nation has implemented conservation measures to protect the particular species. In a FWS distribution concerning the protection of foreign species, the Branch of Foreign Species explains that the “ESA helps to ensure that people under the jurisdiction of the U.S. do not contribute to the further decline of these species.” The distribution also notes that listing foreign species under the ESA can help protect those species by increasing awareness about their endangerment, prompting research into conservation, and helping fund conservation efforts overseas. It warns that listing these species is important for United States citizens because without proper permits importing or exporting listed species is illegal. Yet, the informational distribution also admits that the ESA’s take prohibition only applies to activities within the United States, which clearly underscores the Act’s shortcoming.

46. Id. § 1537(a).
47. Id. § 1537(b).
48. Id. §§ 1537(c)-(d).
49. Id. § 1531(a)(4).
50. Id. § 1532(15).
51. Boudreaux, supra note 21, at 1129.
52. 16 U.S.C. § 1533(b).
53. Id.
54. Endangered Species Fact Sheet, supra note 12.
55. Id.
56. Id.
57. Id.
The ESA works in tandem with other environmental legislation, so a brief detour into these interconnected laws explains why the ESA’s shortcoming is not addressed elsewhere. The other influential piece of domestic legislation in the United States is the Lacey Act of 1900, which makes it a federal offense to transport any fish or wildlife through interstate commerce if taken or possessed illegally under United States or foreign law. The Lacey Act imposes civil violations upon parties who should have known that the plant or wildlife they were transporting was against the law and imposes criminal sanctions upon parties that knowingly do so. Thus, while the Lacey Act implicates foreign species under foreign wildlife law, the Lacey Act only concerns the transport—not the actual killing—of wildlife.

In addition to domestic legislation, the United States is a party to many international conventions and treaties. Perhaps the most significant is the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). CITES is an international treaty that regulates trading in endangered and threatened species to ensure that commercial activity does not threaten their survival. Currently, CITES has 182 parties, showing wide adoption by the international community. CITES is the only international treaty that outlines specific violations relating to wildlife crime, and it enables countries to confiscate illegally obtained animal and plant products more easily.

Being an international treaty, CITES has many limitations. CITES’ jurisdiction only covers international trade. Thus, it is fairly narrow in scope like the United States’ Lacey Act. In addition, CITES is not self-executing and requires nations to implement their own domestic legislation. The ESA fills this role for the United States. Yet, there is a
fundamental policy difference between CITES and the ESA. The latter focuses solely on conserving species, whereas CITES is focused on regulating the trade of protected species.\textsuperscript{69} While there are many different motivations for protecting endangered species\textsuperscript{70} and many different justifications for criminalizing conduct that jeopardizes those species,\textsuperscript{71} a species-centric approach makes the ESA unique among environmental regulatory regimes. Indeed, the ESA is different from most other environmental regulations because it focuses solely on conserving biodiversity for the sake of biodiversity.\textsuperscript{72}

B. Extradition and International Cooperation

Extradition is the process by which a state surrenders a person to another state based on a treaty, national legislation, or principles of international law.\textsuperscript{73} States use extradition as a means of cooperation in the fight against domestic and international criminality.\textsuperscript{74} The legal doctrines that underlie international extradition are centuries old.\textsuperscript{75} Pursuant to the maxim \textit{aut dedere aut judicare}, states have a duty to prosecute the accused themselves or extradite the offender to the requesting state; in contemporary practice, this remains true for \textit{jus cogens} international crimes, but extradition for domestic crimes usually rests upon explicit agreements between states.\textsuperscript{76} In the United States, as in most other common law countries, extradition relies exclusively on treaties.\textsuperscript{77} Alternatively, civil law countries justify extradition based on comity or reciprocity and do not necessarily rely upon treaties.\textsuperscript{78}

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\textsuperscript{68} 16 U.S.C. §§ 1537(a)–(b) (2012); DOUB, supra note 8, at 14.

\textsuperscript{69} 16 U.S.C. §§ 1537(a)–(b) (2012); DOUB, supra note 8, at 14; see also NURSE, supra note 14, at 57 (explaining that from a green criminological perspective, the importance of international wildlife crime is often downplayed within criminal justice frameworks because CITES enforcement is largely concerned with regulatory breaches; failing to comply with quotas or similar conduct is not viewed as traditionally criminal).

\textsuperscript{70} See DOUB, supra note 8, at 205 (discussing the four different motivations for saving endangered species: moral, aesthetic, ecological, and practical).

\textsuperscript{71} See NURSE, supra note 14, at 19 (discussing the three main criminological perspectives on wildlife crime: environmental justice, ecological justice, and species justice).

\textsuperscript{72} Nat’l Ass’n of Home Builders v. Babbitt, 130 F.3d 1041, 1052 (D.C. Cir. 1997) (holding that the chief reason for the ESA was to preserve a pool of genetic biodiversity for the future).

\textsuperscript{73} BASSIOUNI, supra note 44, at 2.

\textsuperscript{74} Id.

\textsuperscript{75} See id. at 4 (stating that the earliest recorded extradition appears in the Old Testament). For a concise history on the origins and first instances of extradition see pages 4–7.

\textsuperscript{76} See id. at 9 (discussing the origins and meaning of the maxim \textit{aut dedere aut judicare}).

\textsuperscript{77} 18 U.S.C. § 3181(a) (2012).

\textsuperscript{78} BASSIOUNI, supra note 44, at 8.
The very nature of extradition makes the entire process incredibly political. While the modern trend is to place enhanced duties on states through bilateral treaty obligations, many states take a state-centric approach that favors political considerations over accountability. 

A state can reject the hosting country’s assertion that the alleged conduct falls within an exception or limitation to the applicable treaty, and states often do so when such refusals align with their own political standards and agenda.

As such, extradition has yet to be wholly accepted as a process that serves the international community; it is hindered from achieving this status because of the “diverse political interests of states and absence of commonly shared interests and values in enforcing international criminal law as well as certain violations of national criminal laws.”

This is particularly relevant when discussing extradition in the context of wildlife crime, because states have drastically different views on the usage and treatment of animals.

Extradition has four substantive requirements: an extraditable offense, dual criminality, specialty, and non-inquiry.

Fundamentally, dual criminality is the principle that the crime charged by the requesting state is also a crime in the requested state. The crime need not be identical, but only “substantially analogous.” The practice in the United States is to analyze the underlying facts of the case and determine whether they constitute a crime in both states’ legal systems, regardless of the crimes’ labeling.

The punishment for the crime need not be identical in both states to meet dual criminality.

Conflating the requirement of an extraditable offense with dual criminality is common, but they are conceptually distinct: dual criminality is a fundamental requirement for extradition regardless of how the treaty defines extraditable offense. In other words, treaties list or otherwise designate extraditable offenses while simultaneously requiring dual criminality.

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79. Id. at 10.
80. Id. at 53.
81. Id.
82. See Boudreaux, supra note 21, at 1114 (explaining that cattle, horses, and pigs are viewed differently around the world).
83. BASSIOUNI, supra note 44, at 497.
84. Id. at 500.
85. See, e.g., Manta v. Chertoff, 518 F.3d 1134, 1141–43 (9th Cir. 2008) (explaining dual criminality).
86. BASSIOUNI, supra note 44, at 505; see also In re Extradition of Molnar, 202 F. Supp. 2d 782, 785–86 (N.D. Ill. 2002) (analyzing the issue of dual criminality).
88. See BASSIOUNI, supra note 44, at 500 (explaining that a treaty typically defines what offenses are extraditable while also requiring dual criminality).
criminality. The enumerative method is where the extradition treaty lists the extraditable offenses, and the eliminative method is where the treaty designates a formula to determine if a crime is extraditable. In addition to requiring dual criminality, contemporary treaties usually employ an eliminative method, which simply requires the crime be punishable by at least one year in prison. This formula rids the cumbersome method of enumerating specific offenses and reduces unnecessary litigation associated with constantly evolving penal systems.

Specialty is the principle that the requesting state can only prosecute the offender for the offense that the requested state surrendered him for. The requesting state must also limit their penalties in any ways established by the surrendering state. This principle upholds the integrity of the extradition process by establishing trust between states and eliminating the possibility of prosecutorial abuse by the requesting state. It is commonplace for United States’ treaties to contain explicit provisions, which outline the requirement of specialty. In addition, 18 U.S.C. § 3186 codifies specialty to some degree.

Lastly, the rule of non-inquiry respects each state’s sovereignty. While the requirement is intended to ensure that “[n]o state can sit in judgment of another state’s legal system or process,” a limited inquiry allows for compliance with international human rights laws. United States courts have refused to inquire into the requesting state’s process for acquiring evidence of probable cause to request extradition, the foreign state’s methods of conviction, or the punishment that the accused may receive if convicted. Codified in 18 U.S.C. § 4100, United States courts cannot question the transferring state’s method of finding the offender guilty if the offender is fulfilling her sentence in the United States.

89. Id. at 500.
81. BASSIOUNI supra note 44, at 508.
82. Id. at 511.
83. Gallo-Chamorro v. United States, 233 F.3d 1298, 1305 (11th Cir. 2000).
84. BASSIOUNI, supra note 44, at 541.
85. See Extradition Treaty Between the Government of the United States of America and the Government of the Republic of Italy, Italy-U.S., art. XVI, Oct. 13, 1983, 35.3 UST 3023; see also United States v. Rauscher, 119 U.S. 407, 420 (1886) (deciding that a defendant who was extradited to the U.S. could only be tried for the offenses that he had been extradited for).
86. 18 U.S.C. § 3186 (2012) (“The Secretary of State may order the person committed . . . to be delivered to any authorized agent of such foreign government, to be tried for the offense of which charged.”).
87. BASSIOUNI, supra note 44, at 633.
88. Id. at 632.
89. Id. at 636–37.
II. FINDING A SOLUTION

A. Amend the ESA to Apply Extraterritorially

One way of fixing the loophole is simply to ensure that certain provisions in the ESA apply overseas. To do this, Congress need only amend the ESA to include a provision that explicitly states that §§ 9 and 11 apply extraterritorially. Explicit textual intent would override the principle of statutory interpretation that forces courts to presume that the statute does not apply extraterritorially. With this amendment, the government would be able to prosecute United States citizens for killing endangered species outside of the United States whether or not they ship any animal parts back to the United States.

The first advantage to this amendment is its holistic approach. Simply applying the ESA extraterritorially would help mitigate the need to amend the ESA so as to strengthen it only in the particular areas of enforcement that resonate with the public. It would also eliminate the genesis of other regulatory laws that would only deemphasize the importance of wildlife crime. Indeed, public support can be critical in sparking legal reform.

As Wyatt notes, “[c]itizens [can] play a key role in supporting the work of NGOs, pressuring their governments for action against wildlife trafficking and acting as guardians of wildlife.” But the downside is that the public may miss the forest for the trees. Extending extra protection to only one species, like the African lion following the Cecil controversy, is prohibitively narrow in scope.

100. Such an amendment would not interfere with government funded projects overseas, but only private takings.

101. See Bassiouuni, supra note 44, at 414 (stating that the United States has a presumption against interpreting a statute to apply extraterritorially); see Boudreaux, supra note 21, at 1108–11 (discussing the Supreme Court’s uneasy history with the presumption against extraterritoriality); see also Small, 544 U.S. at 391 (holding that the phrase “convicted in any court” encompasses only domestic, not foreign, convictions).


103. Alyana Alfaro, Lesniak Wants to End Shipment of Endangered ‘Trophy’ Animals to NJ, Observer (Aug. 10, 2015), https://perma.cc/A7MZ-ZN93. One such example is when, following the Cecil controversy, Senator Raymond Lesniak authored a bill to prohibit the transport and possession of trophy animals. Id.; see also Wolf, supra note 4 (demonstrating that New Jersey attempted to apply its own laws regarding treatment of endangered animals to international actions).

104. Westcott, supra note 3 (“If that enthusiasm and attention can be converted into a conservation effort then that would be a wonderful consolation, a wonderful memorial to the unfortunate death of this one animal.”).

105. Wyatt, supra note 31, at 125.
This is particularly true because every species in an ecosystem is connected. Doub highlights this problem: “Scientists, politicians, and the American public may desire to preserve a species, designate it as endangered or threatened, and extend regulatory procedures to protect it. However, they cannot remove that species from its biological and physical environment; they cannot parse individual species out.”

On the other hand, this is a criticism of the ESA in general; some proponents of reform believe the ESA should refocus on protecting biodiversity through the protection of entire ecosystems, rather than individual species. However, rallying around one specific species is a common tactic that conservationists and lawmakers use.

Gunn, an environmental scholar, notes that western environmentalists and trophy hunters are usually concerned with “charismatic megafauna”: large animals that because of their size or special qualities inspire a special type of awe for nature. As an archetypal charismatic megafauna, Cecil the lion was capable of capturing widespread sympathy. Indeed, Doub notes that most of the best known endangered species are K-selected species, meaning that they have slower reproductive rates, longer life cycles, and tend to be at the top of food chains, so their populations take longer to recover after conditions are restored or limitations are removed.

This means, at least from certain biological perspectives, that K-selected species—which are most charismatic mega fauna—should indeed be a conservation priority. Yet, an extraterritorial amendment would be consistent with the policy objectives behind the ESA because, by extending an increased measure of protection to all listed species found outside the United States, it would holistically protect the world’s biodiversity. The ESA, rather controversially, protects a wide range of animals, the vast majority of which are not well known and are perhaps rather unsympathetic. These species also require protection, and amending the ESA to apply extraterritorially will theoretically allow prosecutors to protect these species as well as their charismatic counterparts.

Perhaps more importantly, expanding the ESA would allow the United States to retain control of prosecutions. While some foreign nations have

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106. Doub, supra note 8, at 19.
108. See Nurse, supra note 14, at 31 (discussing how specific nature or wildlife offenses appear in legislation).
110. Wyatt, supra note 31, at 76.
111. Doub, supra note 8, at 22.
very little environmental legislation and little in the way of wildlife protections, other nations have very strict wildlife laws. Under a controversial new Kenyan law, the maximum penalty for crimes involving endangered species is life imprisonment and a fine in the amount of roughly $230,540.112 This reflects the nation’s “ecocentric view that Kenyan wildlife is a valued resource integral to a functioning economy and that political will exists to deal with wildlife crime both as a national problem and as a serious crime deserving of stiff penalties.”113 The United States’ ESA does not come close to this type of sanction, with § 9 only warranting a maximum penalty of a single year in prison and a $50,000 fine.114 Expanding the ESA to apply extraterritorially would ensure that the United States would be able to deal with these cases on its own terms, ensuring that United States citizens are not prosecuted under wildlife laws that many may find draconian.

Another important benefit related to prosecutorial discretion is that in picking and choosing which cases to actually investigate and prosecute, the United States also has the luxury of more resources than many other nations. Funding for environmental protection will always face the inevitable hurdle of competing national priorities.115 A lack of resources is the primary reason why wildlife laws are inadequately enforced even within more affluent nations.116 This underfunding contributes to why “[e]nvironmental and wildlife law enforcement as well as wildlife forensics are on the margins within the law enforcement community.”117

The United States, in having more resources than many other countries, may actually be able to prosecute a case for which the requesting state may not have resources. In the limited number of cases where United States citizens violate both foreign law and the ESA extraterritorially, the foreign nation can be assured that the perpetrator will be punished without spending their own precious resources to conduct the prosecution. John M. Sellar, a Chief of Enforcement Support for CITES, states that “[i]n several countries in Africa and Asia, wildlife law enforcement is propped up by NGOs and foreign aid. Historically, next to no wildlife law enforcement is provided.”

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113. NURSE, supra note 14, at 74.
115. See SALZMAN, supra note 107, at 289 (noting that “Congress has never provided the funds needed to ensure full recovery of endangered species under the ESA—reflecting an implicit judgment that other budgetary items are more important”).
116. NURSE, supra note 14, at 77.
117. WYATT, supra note 31, at 118.
occurred in some countries had it not been for NGO support and lobbying."  

Thus, for many foreign nations that already rely upon foreign aid for conservation, United States involvement in the prosecution of wildlife crime may simply be an extension of pre-existing practices.

In addition, the United States will also be able to handle cases where corruption within the foreign nation’s government allows the perpetrator to skate prosecution. According to Craig Packer, a lion expert who ran the Serengeti Lion Project in Tanzania for 35 years, corruption “subverts any good conservation practices in [big-game] hunting blocks.” In many nations, corruption is a persistent problem because low-paid officers are in charge of enforcing wildlife crime and smuggling laws. In the proposed rule that added the African lion to the endangered species and threatened species lists, the FWS reported that “corruption is common in some areas within the range of the African lion,” and that the inability to control corruption in areas of extreme poverty has “a negative impact on decisions made in lion management by overriding biological rationales with financial concerns.” By spearheading the prosecution of its own citizens, the United States can help eliminate the chance that corruption will allow offenders to escape punishment once their transgression is identified.

Naturally, this solution is not without its problems. From an ideological perspective, expanding the ESA to apply extraterritorially could be criticized as a kind of “cultural imperialism.” Fundamentally, it drastically expands the reach of a western version of environmentalism that values biodiversity at a fundamental level. This flavor of environmental concern has the controversial tendency to place human needs beneath those of plants and animals.

If a nation has a different outlook toward wildlife and animals in general, then that value system will be reflected in their laws. Certainly, nations’ attitudes toward animals and their roles within society vary widely. A cursory survey of the world’s attitudes toward animals reveals fundamental clashes concerning certain species such as cattle and pigs.

Though CITES has many members, CITES requires its member states to

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120. See, e.g., Wyatt, supra note 31, at 132. (alluding to Cambodia as an example of law enforcement corruption).
122. Boudreaux, supra note 21, at 1114.
123. Id.
adopt their own wildlife crime legislation, so its efficacy in deterring wildlife crime and aiding the prosecution of wildlife crime is largely slave to the strength of its members’ domestic legislation. Reflecting on this, Dr. Angus Nurse, a professor of criminology and wildlife crime scholar, observes, “there is no binding international treaty for the protection of animals and thus no clear legal standard on animal protection.”\textsuperscript{124} This in itself is indicative that animal protection laws vary widely because they are rooted in cultural and societal values.\textsuperscript{125}

This is unsurprising given that criminal law is socially constructed and varies based on society’s notion of proper behavior: “[T]he nature of criminal offences and punishments in respect of wildlife varies commensurate with each society’s notion of wildlife’s ‘value’, the need for its protection, and a consensus on how wildlife offenders should be punished.”\textsuperscript{126} In fact, the ESA may be the exception to the rule in terms of how wildlife is valued because property law still dominates the realm of animal protection, and people who use or own animals are usually the focus of moral concern.\textsuperscript{127} Within Wyatt’s anthropocentric “hierarchy of victims,” humans who depend on wildlife for their livelihood occupy the top of the hierarchy.\textsuperscript{128}

Doub reiterates this truth about wildlife legislation: “A nation can afford to focus on ambitions such as preserving bio-diversity only when it enjoys an adequately high standard of living not to be preoccupied with basic survival, even though that survival may in fact be partially dependent on preserving biodiversity.”\textsuperscript{129} Even within countries with high standards of living, legislators can simply disagree about how wildlife crime should be addressed:

[W]hile some policymakers might consider poaching to be serious wildlife crime deserving of punishment through the criminal law, others might consider this to be property crime which can either be dealt with by the aggrieved ‘owner’ through the civil law, or which constitutes a ‘lesser’ regulatory offence worthy only of a fine.\textsuperscript{130}

\begin{thebibliography}{99}
\bibitem{124} Nurse, supra note 14, at 41.
\bibitem{125} Id.
\bibitem{126} Id. at 70.
\bibitem{127} Id. at 41 (noting that international law clearly reflects this because the strongest forms of international wildlife law are protective measures that allow for the continued use of wildlife as a resource).
\bibitem{128} Wyatt, supra note 31, at 74.
\bibitem{129} Doub, supra note 8, at 39.
\bibitem{130} Nurse, supra note 14, at 70.
\end{thebibliography}
Given these cultural and political considerations, it is unsurprising that the majority of CITES parties do not impose jail time on offenders and remain consistent with the legal tradition of imposing minimal fines for wildlife crimes.\textsuperscript{131}

Boudreaux argues that, starting with the proposition that the presumption currently bars the ESA from applying extraterritorially, American law has the best chance of being applied where American values do not clash with the foreign nation’s values and there is “factual spillover” that implicates the United States directly.\textsuperscript{132} He reasons that “[i]f applying law extraterritorially would insinuate American social standards into a foreign society, the more likely it is that there would be a direct clash of cultures, and the more sensible it is to apply the Presumption.”\textsuperscript{133} Indeed, in \textit{Foley Bros., Inc. v. Filardo}, the Supreme Court referred to this policy-based argument for the presumption against applying statutes extraterritorially.\textsuperscript{134}

As one author put it, the Court showed a concern regarding “the potential cultural troubles that might be stirred up by imposing the values and requirements of United States law inside the borders of another nation.”\textsuperscript{135}

Importantly for Boudreaux, if the “clash” is a “true conflict” of colliding laws, it is consistent with international comity to give precedent to the “home” nation’s law; if however, the “clash” is merely “indirect social friction,” where the other country simply does not understand American law, then it may not always make sense to default to the other country’s law.\textsuperscript{136}

In extending the ESA to apply to every nation in the world, there will undoubtedly be “clashes” between how the ESA values endangered species and how the host nation values them—if at all. While this cultural divide is certainly a valid concern, most nations are likely to share values concerning endangered species. This is because there is greater international consensus when dealing specifically with endangered species: CITES protects them; there is a retributivist element that indicates predation on endangered species is a more serious crime; and there exists a general conception that

\begin{itemize}
\item \textsuperscript{131} Torpy, supra note 62, at 65.
\item \textsuperscript{132} Boudreaux, supra note 21, at 1116.
\item \textsuperscript{133} Id. at 1123.
\item \textsuperscript{134} \textit{Foley Bros.}, 336 U.S. at 285 (“A canon of construction . . . teaches that legislation of Congress, unless contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States,” so the presumption arises from an “assumption that Congress is primarily concerned with domestic conditions.”).
\item \textsuperscript{135} \textit{See} Boudreaux, supra note 21, at 1123 (stating also that this policy reasoning for the presumption was reaffirmed by the Supreme Court in \textit{Equal Emp’t Comm’n v. Arabian Am. Oil Co.}, 499 U.S. 244, 258 (1991)).
\item \textsuperscript{136} Id. at 1113.
\end{itemize}
endangered species are less capable of withstanding criminal activity.\textsuperscript{137} Thus, the threat of a cultural clash may be smaller than anticipated with regard to the taking of individual members of an endangered species.

Here, it is worth noting how the FWS has worked around this jurisdictional problem by regulating foreign species in United States territory. As established earlier, the ESA already lists species that are not native to United States soil. Yet, because the ESA does not apply extraterritorially, the listing of these species only affects the shipping and trading of the listed animal and their byproducts within the United States’ jurisdiction. As such, the United States does not interfere directly with other nations’ laws, but simply regulates the species within its own borders.\textsuperscript{138} An expansion of the ESA as proposed will have a similar effect. In practice, it will only be used to prosecute United States citizens, so rather than imposing western values on the rest of the world, it would only regulate United States citizens’ conduct.

These regulations also highlight the apparent practical difficulties associated with attempting to protect a species that only lives on foreign soil. Despite the fact that the United States may have more resources to dedicate to wildlife crime, the United States will largely be reliant on the foreign government itself for evidentiary matters. Witnesses and physical evidence may be thousands of miles away from the nearest United States courtroom, creating significant difficulties for the prosecution. Wildlife crime means that investigations are burdensome because

\begin{quote}
several agencies may be involved in enforcement including customs, border and immigration agencies, police, environmental protection agencies and conservation monitoring agencies. The international law mechanisms . . . are usually not applicable to individual and corporate wildlife crimes and so this form of wildlife offending becomes an international crime problem.\textsuperscript{139}
\end{quote}

Thus, United States investigations usually entail an international component.\textsuperscript{140} That this practice already exists, however, is not telling. The United States may still be entirely subject to the cooperation of the foreign government for much of its case. This completely undermines one of the

\textsuperscript{137} NURSE, supra note 14, at 152.
\textsuperscript{138} See infra Part II.B (discussing extradition and international cooperation).
\textsuperscript{139} NURSE, supra note 14, at 61.
\textsuperscript{140} See St. Cloud State University Professor Pleads Guilty to Trafficking in Elephant Ivory and Rhinoceros Horn, U.S. FISH & WILDLIFE SERV. (Jan. 14, 2016), https://perma.cc/4BC9-ZB69 (discussing how the convicted individual smuggled and illegally exported elephant ivory into and out of the U.S.).
fundamental reasons for expanding the ESA to apply extraterritorially: independent action.

B. Pursue an Aggressive Policy of Extradition for Wildlife Crime

Rather than amending the ESA to apply extraterritorially, the United States could adopt a hardline policy on extraditing offenders who commit wildlife crime in other nations. Extradition is not an entirely uncommon process, and while there are no official statistics, it is estimated that the United States is likely involved with 300 extradition cases a year. States have extradited offenders solely for wildlife crime. Obviously, the foreign nation requesting the United States citizen would be responsible for the prosecution. For endangered species-based wildlife crime, the four substantive requirements of extradition are likely to be met. First, most modern extradition agreements use the eliminative method for determining what constitutes an extraditable offense, requiring the crime to be punishable in both nations by at least one year in prison. Because the ESA does allow for a criminal sanction of a year in prison, the extraditable offense requirement is likely to be met in most scenarios where the foreign government is requesting extradition.

Second, the same reasoning provides that dual criminality is also likely to be unproblematic because most nations have wildlife crime laws for endangered species, and the foreign government would not have made the request if it lacked applicable laws to prosecute the offender. The last two requirements for extradition, specialty and the rule of non-inquiry, are also unproblematic when the harboring nation is willing to extradite the accused for a specific crime.

Since extradition is technically a function of the executive branch, adopting this kind of foreign affairs policy is possible. Ultimately, the executive’s decision to grant extradition or to refuse extradition—even

141. BASSIOUNI, supra note 44, at 52 n.291.
143. BASSIOUNI, supra note 44, at 497.
144. Id. at 514.
146. See Member Countries, CITES, https://perma.cc/BRW7-26Y3 (last visited Sept. 1, 2016) (showing an increase in the number of Parties to CITES since commencement).
147. BASSIOUNI, supra note 44, at 499.
148. See infra Part II.B (discussing extradition and international cooperation).
149. See BASSIOUNI, supra note 44, at 974–75. Executive discretion is exercised by the secretary of state and is derived from the Constitution, which authorizes the president to conduct foreign affairs. Id.
though the offender may be deemed extraditable—is unreviewable.\textsuperscript{150} The
Supreme Court, however, has held that the President does not have the
power to extradite outside of treaty or legislative power.\textsuperscript{151} While extremely
unlikely, the United States could also implement legislation to try to foster
this type of international cooperation and establish extradition treaties.\textsuperscript{152}
As stated before, the United States already has a wide network of bilateral
extradition treaties in place.\textsuperscript{153} Of course, there are certainly many nations
where extradition treaties are not in effect.\textsuperscript{154} Certain political realities may
mean that negotiating extradition treaties with certain nations is simply
impossible and that extraditing United States citizens to those countries for
any crime whatsoever would be politically irresponsible.\textsuperscript{155} In any event,
utilizing extradition for this purpose would strengthen the United States’
role as a leader in conservation efforts and increase the level of
international cooperation in fighting wildlife crime.

Using extradition to prosecute wildlife crime would also increase the
United States’ credibility on the international stage because adopting this
approach respects foreign nations’ sovereignty to the utmost degree. Rather
than encounter a slew of jurisdictional issues when attempting to prosecute
a United States citizen for a crime committed in another jurisdiction, the
extradition process remains remarkably simple.\textsuperscript{156} If the offense occurred
within a sovereign nation and impacted wildlife within its sovereign
borders, that nation has the privilege of enforcing its own rule of law.\textsuperscript{157}
There is no chance that the United States oversteps any boundaries,
jurisdictional or cultural. The United States need not worry about embarking on a kind of cultural imperialism because American values
become irrelevant when the prosecuting nation has their own version of the
ESA.

\begin{itemize}
\item \textsuperscript{150} \textit{Id.} at 975.
\item \textsuperscript{151} \textit{Id.} at 91.
\item \textsuperscript{152} \textit{See id.} at 71. Federal legislation supplements extradition treaties rather than replacing
them, and if a treaty provision foreign conflicts with legislation, the treaty prevails. \textit{Id.}
\item \textsuperscript{153} \textit{See Doyle, supra} note 102, at 29 (stating that the United States has bilateral
extradition treaties with two-thirds of the world).
\item \textsuperscript{154} \textit{Bassiouni, supra} note 44, at 1036–37 (providing a list of countries with which the
U.S. does not have a bilateral extradition treaty).
\item \textsuperscript{155} \textit{See id.} at 499 (explaining that the United States does not have to extradite its citizens to
a foreign jurisdiction unless a treaty requires it to extradite the citizen).
\item \textsuperscript{156} \textit{Id.} at 362. The requesting state has subject-matter jurisdiction and the requested state
has in \textit{persona}\textsuperscript{m} nudarium jurisdiction—the requesting state then has in \textit{persona}\textsuperscript{m} jurisdic- 
tion once the extradition
has taken place. \textit{Id.}
\item \textsuperscript{157} \textit{Sovereignty}, \textit{Black’s Law Dictionary} (10th ed. 2014) (defining sovereignty as the
international independence of a country with the “right and power of regulating its internal affairs”).
\end{itemize}
Nor is there the chance that the United States offends a foreign nation by commandeering its right to determine how to use its own natural resources. Across Africa, trophy hunting generates around $200 million dollars each year.\(^{158}\) Killing a single lion, after trophy fees and the price of a several day safari, can cost a hunter up to $71,000 dollars.\(^{159}\) In summarizing the relationship between the state and wildlife, Wyatt notes that “[l]ive wildlife has economic value to the state and to people so when they are threatened or stolen, people become victims of these crimes because of the financial loss.”\(^{160}\) From this standpoint, using extradition to fight wildlife crime is logical because it allows the governing body of the people wronged by the crime to distribute justice.\(^{161}\) The loss of threatened or endangered species can lead to further forms of economic victimization because extinctions or decreasing populations can limit the economic benefits generated by wildlife, like eco-tourism.\(^{162}\) For this reason, the rarity of endangered species alone can create incentives for their home nations to protect them, just as it may simultaneously increase the incentive for poachers to target them.\(^{163}\)

Once wildlife is viewed as a natural resource, it follows that each nation should be able to determine how they will use and protect that resource. Threats to endangered species come from many sources, the largest of which is usually habitat loss, but the taking of species can also contribute to biodiversity loss.\(^{164}\) These takings occur in the form of legal hunting and illegal killings. Organizations have made different determinations as to whether legal hunting negatively impacts conservation efforts.\(^{165}\) Extending the ESA to reach animals around the world will inevitably conflict with nations’ hunting laws, many of which actively permit the hunting of


\(^{159}\) Id.

\(^{160}\) Id. supra note 31, at 66.

\(^{161}\) See United States v. Cotroni, [1989] 1 S.C.R. 1469 (Can.) (allowing Canada to extradite defendant to the U.S. because that is where the harmful impact occurred).

\(^{162}\) Id. supra note 31, at 132.

\(^{163}\) Id. at 107.

\(^{164}\) Impact of Habitat Loss on Species, WORLD WILDLIFE FUND, https://perma.cc/KU9B-VVFJ (last visited Sept. 20, 2016); Nurse, supra note 14, at 40.

\(^{165}\) See, e.g., N. Leader-Williams, Trophy Hunting of Black Rhino Diceros Bicornis: Proposals to Ensure Its Future Sustainability, 8 J. INT’L WILDLIFE L. & POL’Y 1, 4 (2005) (explaining how trophy hunting can benefit conservation efforts); See also, e.g., Teresa M. Telecky, Hunting is a Setback to Wildlife Conservation, EARTH ISLAND J., https://perma.cc/XRX4-3MNK (last visited Oct. 24, 2016) (explaining why trophy hunting, even when done in an effort to conserve a species, does not work to conserve species).
protected species.\textsuperscript{166} The result in many instances, would be interference with other nation’s self-determined policy on wildlife conservation.

Undoubtedly, illegal takings harm endangered species, but it is critical to recognize that most takings are inextricably tied to the local communities that are in physical proximity to the species. Impoverished hunters and traders may use the income from illegally poached wildlife to help supplement their incomes.\textsuperscript{167} In Wyatt’s “hierarchy of victims,” poachers are conceptualized as victims because they may commit wildlife crime out of economic necessity.\textsuperscript{168} Alternatively, indigenous people may consider hunting protected animals as part of their tradition or religion.\textsuperscript{169}

Yet, the illegal taking of endangered species also occurs for non-economic reasons. Nurse notes that even Interpol’s definition of wildlife crime that focuses on “wildlife trafficking, illegal exploitation, and trade” is restrictive and misleading because wildlife crime extends beyond activities for economic gain.\textsuperscript{170} Collectors who illegally take wild eggs for example, are not known to sell their collection.\textsuperscript{171} A study conducted on convicted poachers in Kentucky suggests that a significant number of offenders knew they were violating regulations but insisted that they were minor or technical infractions.\textsuperscript{172} While financial gain was one motivation for their offense, others included pursuing a tradition or hobby, or feeling power or excitement.\textsuperscript{173} These motivations, seen by many as reprehensible,\textsuperscript{174} are likely to create repeat offenders and increase the illegal killings that occur under the guise of legal hunting.\textsuperscript{175} Unlike legal trophy hunting, which can benefit the species, these illegal takings do not benefit the species nor are they linked to the perpetrator’s economic need.

The types of killings that result from human conflict are also distinct from legal hunting, like when a farmer kills a lion to protect his cattle. According to the FWS, human conflict is the greatest threat to remaining

\begin{itemize}
  \item \textsuperscript{166} Wyatt, supra note 31, at 107. Rather controversially, there are exceptions in place so that CITES Appendix I species, those with the utmost international protection, may be hunted. Id. One example is trophy hunting of rhinoceroses. Id. Despite their dwindling numbers, some regulated hunting of rhinos remains legal. Id.
  \item \textsuperscript{167} Torpy, supra note 62, at 63.
  \item \textsuperscript{168} Wyatt, supra note 31, at 75.
  \item \textsuperscript{169} Torpy, supra note 62, at 63–64.
  \item \textsuperscript{170} Nurse, supra note 14, at 23.
  \item \textsuperscript{171} Id. at 27.
  \item \textsuperscript{172} Id. at 102–04.
  \item \textsuperscript{173} Id.
  \item \textsuperscript{174} See generally Gunn, supra note 109 (discussing the implications and views of hunting when used to promote or protect nontrivial human interest).
  \item \textsuperscript{175} Nurse, supra note 14, at 103.
\end{itemize}
lion populations. Alastair Gunn, an environmental ethicist, insists that the vast majority of people, “unlike Western environmentalists, are poor and the loss of even a small proportion of their crops or flocks may mean disaster. Therefore, unlike ‘us,’ they need to kill their animal competitors.” This is where advocates of trophy hunting find their footing: arguing for an alignment of incentives. Advocates insist that trophy hunting provides value to wildlife because it incentivizes individuals to protect wildlife. Take the poor farmer that Gunn envisions, whose cattle are being eaten by a lion, provided that the farmer can profit immensely if the lion stays alive—by for example, selling the right to hunt the big cat on his land—he lacks incentive to kill the lion.

Indeed, there are instances in which regulated hunting on private game preserves has led to great conservation success. Though listed on Appendix I on CITES from overhunting, moving White Rhino populations to private lands and permitting regulated trophy hunting helped the rhino’s population increase from 840 in 1960 to 6,770 in 1994. While the public becomes more sensitive to federal spending, private game preserves may help government agencies conserve wildlife by reducing spending and more efficiently allocating resources through responsible oversight of private ownership. One proponent sums it up succinctly: “Turning a profit . . . is sometimes the only way to compel people to respect and value underappreciated assets.”

The newly accepted regulations concerning the African lion demonstrate that the FWS accepts that trophy hunting can have conservational benefits. Five months after Cecil was shot and killed in Zimbabwe, the Obama Administration finally approved a proposed rule that placed the African lion under the protection of the ESA.

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177. Gunn, supra note 109, at 81–82.
178. Falk, supra note 112, at 1353; see also Gunn, supra note 109, at 89 (“Africans, like Western environmentalists, are entitled to a materially adequate standard of life. They cannot and should not be expected to protect wildlife if it is against their interest to do so.”).
180. Falk, supra note 112, at 1357.
181. Id. at 1358.
182. Id. at 1362.
183. Goode, supra note 7.
East Africa will be classified as threatened.\textsuperscript{184} Notably, the rule allows trophies to be imported from nations where lions are listed as threatened so long as the lions are hunted legally and the countries have “scientifically sound management program[s] that benefit the subspecies in the wild.”\textsuperscript{185} Generally speaking, this is the United States’ policy for all vulnerable species that can be used for trophy hunting.\textsuperscript{186}

Thus, the new rule attempts to minimize United States involvement in the decreasing lion populations by generally prohibiting lion imports but allowing an exception for hunting trophies where the state can show hunting will actually benefit conservation efforts.\textsuperscript{187} This type of regulation faces much criticism. Trophy hunting legitimizes the killing of endangered species, and it allows for poached animals to be fraudulently labeled as legally obtained.\textsuperscript{188} It also blurs the line between what activity is moral and what is not, so it deemphasizes the importance of wildlife crime by reemphasizing the framework of regulation.\textsuperscript{189} Importantly, however, this kind of policy does not address the killing itself—only the ability to bring back trophies—and therefore does not address the individuals who hunt or commit wildlife crime for excitement or to feel powerful.

Whether or not trophy hunting is a positive tool in protecting endangered species,\textsuperscript{190} an extradition-focused approach will not create inherent conflict between domestic conservation strategy and United States law. Such a conflict can already be seen wherever the FWS determines that a nation’s trophy hunting does not support conservation efforts, but the host country continues to condone the practice.\textsuperscript{191} An extraterritorial expansion

\textsuperscript{184} Id.
\textsuperscript{185} Id.
\textsuperscript{186} Shaban, supra note 158.
\textsuperscript{187} Id.
\textsuperscript{188} Wyatt, supra note 31, at 111.
\textsuperscript{189} See Gunn, supra note 109, at 76 (commenting that for many game parks that are permitted to sustain populations of trophy species, the “animals are usually drawn from surplus national park populations, or are purpose bred like Christmas trees”).
\textsuperscript{190} See generally Fred Nelson et al., Trophy Hunting and Lion Conservation: A Question of Governance?, 47 ORYX 501 (2013) (reviewing the impact of trophy hunting in conservation efforts); see generally L. Palazy et al., Rarity, Trophy Hunting and Ungulates, 15 ANIMAL CONSERVATION 4 (2012) (discussing the effects that the demand of trophy hunting has on trophy species); see generally P.A. Lindsey et al., Economic and Conservation Significance of the Trophy Hunting Industry in Sub-Saharan Africa, 134 BIOLOGICAL CONSERVATION 455 (2007) (reviewing the scale of the trophy hunting industry and assessing positive and negative issues related to hunting and conservation in Africa); see generally R. Buckley & A. Mossaz, Hunting Tourism and Animal Conservation, 18 ANIMAL CONSERVATION 133 (2015) (proposing the need for a broad analytical approach to resolve disputes between proponents and opponents of hunting tourism for animal conservation); W.G. Croasmary et al., supra note 17, at 139.
of the ESA would increase, rather than decrease, this conflict of laws. An extradition-based approach also enjoys the benefit of encouraging states’ experimentation with different systems of conservation, like one based on the commoditization of wildlife.

Lastly, foreign nations are best suited to deal with species that live within their borders. If a nation contains habitat for a certain species, then not only is that nation best able to implement programs to protect that species, but that nation is also physically and lawfully in control of that species.\footnote{David Hayes, a former Deputy Secretary of the United States Department of the Interior, oversaw the regulation of sport-hunted trophy imports under Presidents Clinton and Obama, and admits that it is “tough because these are [FWS] biologists sitting here in the United States, making decisions about what [i]s going on over in Africa.”\footnote{Shaban, supra note 158.}} Physical access to the species’ habitat allows the host nation to be in the best position to conduct research and keep up to date on current events and trends.

Just like expanding the ESA to apply extraterritorially, pursuing a policy of extradition for suspects wanted for committing wildlife crime does have its drawbacks. The largest concern is the number of nations eligible to participate in this kind of policy. Given that the majority of CITES’ parties do not impose jail time on offenders,\footnote{See, e.g., Sophia Yan, How China’s Booming Panda Business Works, CNN (Oct. 15, 2013, 5:00 AM), https://perma.cc/NG9F-APVY (noting that China lends out its rare pandas at $1 million per year per pair).} killing an endangered species will only be considered an extraditable offense in less than half of the world’s nations. This is extremely problematic because it significantly narrows the number of countries that could participate in a United States-led extradition policy for wildlife crime. In turn, this drastically reduces the amount of habitat—and therefore endangered species—that can arguably be extended protection. As such, even though countries with sufficiently punitive wildlife crime laws can partake in this kind of international cooperation with the United States, they would be a minority in the world at large.

Another concern is the quality of other nations’ criminal justice systems. While Kenya is an extreme case,\footnote{Shaban, supra note 158.} nations may have very severe sanctions for wildlife crime that the United States may not condone. Additionally, there may be concerns about a United States citizen being in poor incarceration conditions once they are convicted. While a limited review of the other nation’s practices may be permissible to determine if...
their criminal justice system violates basic human rights, the rule of non-inquiry forbids United States courts from inquiring into the state’s criminal procedure and punishments. In certain cases, however, the rule of specialty will mitigate this problem, which will allow the United States to limit the crimes that the requesting state can prosecute and even limit sanctions for those crimes if the accused is convicted. Of course, this kind of mitigation is problematic because it begs the question as to whether it is more functional for the United States to punish the perpetrator itself under morally and culturally accepted sanctions.

Costs, both monetary and political, are also an important consideration. Practically speaking, extradition is very costly. As touched on before, a massive amount of resources goes into the incredibly burdensome process of creating and updating treaties. The United States’ practice of relying on treaties is burdened by state succession, war, dying diplomatic relations, and the practice of constantly updating and amending a plethora of treaties with a growing number of nations. There is also the worry that nations can shirk their treaty obligations, despite being legally bound. In comparison to the behind-the-scenes work involved with diplomatic relations and treaty creation and maintenance, the literal costs of extradition are small. But in addition to monetary cost, there is also risk that exposes the United States to political cost. As international crime grows and domestic criminals become increasingly mobile, the need for extradition procedures increases. A major concern is that in the face of limited resources and capabilities, states may use informal processes and bend or break international treaty obligations and procedural safeguards. This is something the United States must be wary of, particularly if it wants to polish, and not tarnish, its international reputation.

In addition to costs to the United States, extradition may also impose unbearable costs on the requesting state. In a world with limited resources, the requesting nation may not have sufficient resources to prosecute wildlife crimes. Wildlife crime simply may not be a priority, particularly in impoverished countries or those facing political or civil unrest. As the FWS

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197. Id. at 632–33.
198. Supra Part I.B.
199. Supra Part II.A.
201. Id.
203. See 18 U.S.C. § 3195 (2012) (stating that costs and expenses incurred during the extradition process will be paid by the requesting government).
204. Bassiouni, supra note 44, at 58.
reported in their proposed rule to protect the African lion under the ESA, “[s]everal of the range countries of African lion have experienced political instability for many years. . . . Political instability results in wars and famine, which essentially halt conservation efforts and the enforcement of existing wildlife protection laws.” Of course, as discussed above, protecting wildlife through commoditization may be a way to combat poverty. Yet, introducing conservation or privatization programs and prosecuting those who violate wildlife laws may be impossible in areas of the world where government itself is unstable. In those circumstances, the animals that require protection are left without sanctuary or guardian.

CONCLUSION

This Note was designed to tackle one question: given the many moving parts of endangered species conservation, what can the United States do to better protect endangered species abroad? Both amending the ESA to apply extraterritorially and extraditing United States citizens wanted for wildlife crime are possible approaches to ensure United States citizens do not escape prosecution for killing endangered species in foreign lands. Both approaches have clear strengths and weaknesses.

On paper, extending the ESA to apply extraterritorially has remarkably few downsides. It allows the United States to prosecute United States citizens for violating the underlying policy objectives of the Act, including media-covered cases that are ripe with deterrent utility. Since it would only be used to prosecute United States citizens, it would constitute a limited intrusion into another nation’s sovereignty. Many nations already depend upon foreign aid for wildlife conservation and protection, so this process would be a natural extension of that dependence. Further, because the FWS already accepts that trophy hunting can actually promote the conservation of protected species if handled correctly, it does not appear that the ESA would conflict with a state’s right to determine how best to protect its resources.

Logistically however, the extraterritorial application of the ESA may be burdensome. If the FWS does not condone the hunting program of a certain nation, then United States law and foreign law would conflict. This is particularly troublesome in light of the fact that the foreign nation has the best access to their own species, and their determination as a sovereign should arguably be respected at all costs. In addition, the United States

would have significant trouble prosecuting unlawful takings under the ESA under these circumstances, because the United States will need the cooperation of the foreign government for evidentiary purposes.

Extradition on the other hand, is attractive because it respects traditional state roles and the foreign nation’s sovereignty is left intact. The nation can administer justice for the violation of its laws and the loss of its precious resource. Yet, cultural and conservational differences mean that the majority of the nations in the world will not sufficiently punish endangered species violations to consider them an extraditable offense. This severely limits extradition as a means of ensuring wildlife crime offenders do not escape punishment.

From the foregoing discussion, it is clear that both of the outlined approaches face the same difficulty: international cooperation. In either scenario, the United States cannot and should not act alone. By its nature, the process of extradition is one of international cooperation. It is limited, however, by each nation’s set of priorities as well as procedural components, which allow nations to pass on their obligations to their fellow sovereigns. Even if the ESA is given extraterritorial application, from a logistical standpoint, United States authorities will be unable to prosecute without some form of international cooperation.

As a result, a combination of both methods may be the best solution. This way, the United States at least has a legal apparatus in place to prosecute United States citizens who kill endangered species and then return home. It can use its extraterritorial reach in circumstances where the foreign nation requires help in safeguarding its endangered species. Prosecutorial discretion would be key to ensuring that sovereignty is not infringed upon or that cultural values are not stomped underfoot. On the other hand, if a state does request extradition, then the United States should comply in order to set an example for the international community. This multi-faceted approach would need to be conscientious and flexible. Indeed, as Nurse notes, “the enforcement of wildlife law at an international level may need to strike a balance between conserving resources, respecting state sovereignty and allowing for cultural differences in the treatment of and respect for animals as having intrinsic value.”

The hardest case would be when foreign law conflicts with the ESA or a FWS determination that hunting of the species in a foreign nation is unsustainable and contrary to conservation. In this case, it is a dicey proposition for the United States to prosecute independently, and it seems that legally it may be safest to

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206. BASSIOUNI, supra note 44, at 494.
207. NURSE, supra note 14, at 56.
defer to the nation’s determination about the best way to rule the kingdom of creatures within its borders.

With these difficulties in mind, the United States should look outside of the four corners of the ESA to preserve biodiversity internationally. In addition to the measures discussed in this Note, the United States should use its leadership position in conservation to leverage CITES as a mechanism for international cooperation and intelligence gathering. It should use CITES to spur nations to ratchet up their criminal penalties for wildlife crime violations so that they become part of the extradition network. The United States should also spearhead other international projects that encourage states to join the fight against wildlife crime. To give one successful example, CITES has recently joined with the International Consortium on Combating Wildlife Crime (ICCWC) to “provide globally-coordinated support to national law enforcement agencies and a more integrated response to wildlife and forest crime.”

The consortium has provided hands-on training in specialized investigation techniques to law enforcement from 28 countries. ICCWC is credited with orchestrating and funding Operation COBRA III in 2015, which resulted in 139 arrests and over 247 seizures of blacklisted animal products. The problems discussed in this Note indicate that, in an age of increased mobility and global interconnectedness, worldwide teamwork is needed to successfully fight wildlife crime and ensure that wildlife offenders are prosecuted to the fullest extent of the law.

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209. Id.

INTRODUCTION

In 1926, the landmark case Village of Euclid v. Ambler Realty Co. established that local zoning ordinances that preserve the common welfare are a proper use of police power.\(^1\) In 2011, Munroe Falls—another small town in Ohio—enacted a local municipal ordinance seeking to prevent Beck Energy Corporation from drilling for gas or oil within its city limits.\(^2\) However, in February of 2015, the Ohio Supreme Court decided that a state statute preempts local hydraulic fracturing (fracking) bans, striking down such an ordinance.\(^3\) In this decision, State ex rel. Morrison v. Beck Energy Corp., the Ohio Supreme Court overturned a local ban on fracking.\(^4\) The court rejected the city’s, Munroe Falls’s, argument that the Home Rule Amendment to the Ohio Constitution allowed the city to enforce its own permitting system beyond the requirements of the Ohio state system of permitting.\(^5\) The decision in Morrison seems to contradict the basic principles of zoning laws and of Home-Rule authority that were upheld in Euclid, as it stripped citizens’ rights to decide what happens in their own hometown.\(^6\)

This concerns many Ohio communities because the increasing use of fracking to extract natural gas from shale rock formations deep within the earth has raised many public health and environmental issues in the past few years.\(^7\) These issues range from potential water contamination, air pollution, noise, dust, truck traffic, groundwater spills, methane emission leaks, and even earthquakes.\(^8\) This is why many citizens want to keep fracking away from their homes.\(^9\)

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1. Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 388–90 (1926) (upholding a local zoning ordinance against apartment housing that would be a nuisance to single-family housing, thus finding that the use of the police power to protect the public welfare in this manner is proper).
3. See State ex rel. Morrison v. Beck Energy Corp., 143 Ohio St. 3d 271, 272, 2015-Ohio-485, ¶ 4, 37 N.E.3d 128, 131 (holding that the City of Munroe Falls’s ordinances requiring Beck energy to obtain permits from the city were preempted by state law, ORC 1509, which grants ODNR the sole authority to regulate oil and gas activities in the state).
4. Id. at 272, 2015-Ohio ¶ 4, 37 N.E.3d at 131; 15 OHIO REV. CODE ANN. § 1509.02 (LexisNexis 2013).
5. Morrison, 143 Ohio St. 3d at 280, 2015-Ohio ¶ 34, 37 N.E.3d at 138.
6. See Euclid, 272 U.S. at 388–90 (holding that a town’s use of zoning regulations is proper use of its police power).
8. Id. at 70; see generally U.S. ENVTL. PROT. AGENCY, ASSESSMENT OF THE POTENTIAL IMPACTS OF HYDRAULIC FRACTURING FOR OIL AND GAS ON DRINKING WATER RESOURCES, EPA/600/R-15/047a (2015) (providing a review and synthesis of available scientific data to assess the
Proponents of fracking claim that the technology brings economic benefits to communities. However, the economic benefits are outweighed by the substantial harms. Royalty payments from oil and gas developers only go to those who own the rights to the oil and gas on their properties. Unfortunately for most people in the country, “the legal doctrine of split estates allows one party to own the rights to minerals and other resources below the surface while someone else hold[s] the rights to property above ground.” Therefore, when oil and gas companies encroach upon a town, split estates leave millions, all without compensation, to deal with the adverse impacts of drilling, such as increased truck traffic, chemicals, lights at all hours of the night, noise from heavy equipment and construction, dust and noxious air emissions, and water contamination.

This article first explains why the Ohio Supreme Court’s decision in *Morrison* is mistaken because it takes away local communities’ Home-Rule authority. Next, this article offers examples of how other states have properly interpreted local ordinances with respect to oil and gas development. And finally, this article explains what local communities can do, in light of this decision, to regain some control over the way they use their land.

I. THE OHIO SUPREME COURT TOOK AWAY LOCAL ZONING AUTHORITY IN *STATE EX REL. MORRISON V. BECK ENERGY CORP.*

The issue in *Morrison* was “whether the Home Rule Amendment to the Ohio Constitution grants to the city of Munroe Falls the power to enforce its own permitting scheme atop the state [permitting] system.” In 2011, the Ohio Department of Natural Resources (ODNR) issued the appellee, Beck Energy Corporation (Beck), a permit to drill an oil and gas well on property within the corporate limits of the appellant, the city of Munroe Falls. This permit was issued through Chapter 1509 of the Ohio Revised Code (ORC), which was amended in 2004 to provide statewide regulation of oil and gas production within Ohio and repealed “all provisions of law

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11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Morrison*, 143 Ohio St. 3d at 272, 2015-Ohio ¶ 1, 37 N.E.3d at 131.
16. *Id.* at 272, 2015-Ohio ¶ 2, 37 N.E.3d at 131.
that granted or alluded to the authority of local governments to adopt concurrent requirements with the state.\footnote{17} After Beck started drilling, the city of Munroe Falls issued a stop-work order and filed a complaint seeking an injunction in the Summit County Court of Common Pleas.\footnote{18} The city claimed that Beck violated at least five provisions of the Munroe Falls’s Codified Ordinances, which were passed between 1980 and 1995.\footnote{19}

First, the city claimed that Beck violated a zoning ordinance that prohibited construction or excavation without a zoning certificate issued by the zoning inspector.\footnote{20} The other violations specifically relate to oil and gas drilling, in that

Munroe Falls Codified Ordinances 1329.03 prohibits any person from drilling a well for oil, gas, or other hydrocarbons “until such time as such persons have wholly complied with all provisions of this chapter and a conditional zoning certificate has been granted by Council to such person for a period of one year.”\footnote{21}

An applicant pays a fee and deposit for a performance bond under Munroe Falls Codified Ordinances 1329.04 and 1329.06.\footnote{22} “Finally, Munroe Falls Codified Ordinances 1329.05 requires a public hearing at least three weeks prior to drilling and requires the permit applicant to schedule the hearing and notify all property owners and residents within 1,000 feet of the well head.”\footnote{23}

The trial court granted the city’s request for a permanent injunction, prohibiting Beck from drilling until it complied with all of the city’s ordinances.\footnote{24} Beck then appealed.\footnote{25} The court of appeals reversed the decision, denying the city’s request for injunctive relief.\footnote{26} On appeal, the court “rejected the city’s argument that the Home Rule Amendment allowed it to impose its own permit requirements on oil and gas drilling.

\begin{footnotes}
\item[17] Id. at 272, 2015-Ohio ¶ 3, 37 N.E.3d at 131 (quoting H. Legis. Serv. Comm’n 125-278, at 3 (Ohio 2004); OHIO REV. CODE ANN. § 1509.02).
\item[18] Id. at 273, 2015-Ohio ¶ 7, 37 N.E.3d at 132.
\item[19] Id.
\item[20] MUNROE FALLS, OHIO, Code of Ordinances § 1163.02(a) (2005).
\item[21] Morrison, 143 Ohio St.3d. at 274, 2015-Ohio ¶ 9, 37 N.E.3d at 133.
\item[22] Id.
\item[23] Id.
\item[24] Id. at 274, 2015-Ohio ¶ 11, 37 N.E.3d at 133.
\item[25] Id.
\item[26] Id.
\end{footnotes}
operations.” 27 Instead, they agreed with Beck’s assertion that the city’s argument conflicted with the state statute, ORC Chapter 1509. 28

The city appealed and the Ohio Supreme Court affirmed, stating that the Home Rule Amendment to the Ohio Constitution, Article XVIII, Section 3, did not allow a municipality to discriminate against, unfairly impede, or obstruct oil and gas activities and production operations that the state permitted under ORC Chapter 1509. 29 The court noted that the Home Rule Amendment allows municipalities the authority to exercise all powers of local self-government and to create any local police, sanitary, or other similar regulations so long as they do not conflict with general laws. 30 This broad power, however, does not allow municipalities to exercise their police powers in a manner that would conflict with an Ohio general law. 31

“Therefore, a municipal ordinance must yield to a state statute if (1) the ordinance is an exercise of the police power, rather than of local self-government, (2) the statute is a general law, and (3) the ordinance is in conflict with the statute.” 32 The court held that the ordinances were an exercise of police power, the statewide oil and gas drilling statute was general law, and the ordinances conflicted with the state statute. 33

The court found that a state law qualifies as a general law if it satisfies four conditions:

It must (1) be part of a statewide and comprehensive legislative enactment, (2) apply to all parts of the state alike and operate uniformly throughout the state, (3) set forth police, sanitary, or similar regulations, rather than purport only to grant or limit legislative power of a municipal corporation to prescribe those regulations, and (4) prescribe a rule of conduct upon citizens generally. 34

The court found that the city’s ordinances conflicted with ORC 1509.02 because it prohibits state-licensed oil and gas production, which ORC 1509.02 allows. 35

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27. Id. at 274, 2015-Ohio ¶ 12, 37 N.E.3d at 133.
28. Id.
29. Id. at 280, 2015-Ohio ¶ 34, 37 N.E.3d at 138.
30. Id. at 274–75, 2015-Ohio ¶ 14, 37 N.E.3d at 133.
31. Id.
32. Id. at 275, 2015-Ohio ¶ 15, 37 N.E.3d at 133.
33. Id. at 277, 2015-Ohio ¶ 24–25, 37 N.E.3d at 135.
34. Id. at 275, 2015-Ohio ¶ 19, 37 N.E.3d at 134.
35. Id. at 277, 2015-Ohio ¶ 25, 37 N.E.3d at 135.
But the city ordinances would render the permit meaningless unless Beck Energy also satisfied the permitting requirements in Chapters 1163 and 1329 of the Munroe Falls Ordinances. Section 1163.02(a) prohibited Beck Energy from building any structure or beginning “any excavation” until it followed all of the procedures necessary to obtain a zoning certificate. Even if Beck Energy were to satisfy the conditions of Chapter 1163 without violating the 67 conditions of its state permit, Beck Energy still could not “drill a well for oil, gas, or other hydrocarbons” until it “wholly complied with all provisions” in Chapter 1329. To comply with these provisions, Beck Energy would need to (1) wait one year after the city council approved the conditional zoning certificate, 1329.03(a), (2) pay a nonrefundable $800 application fee, 1329.04, (3) deposit a $2,000 “performance bond,” 1329.06, and (4) schedule a public meeting at least three weeks prior to drilling, 1329.05(a).

The court relied on Clermont Environmental Reclamation Co. v. Weiderhold, in which the court rejected a Home-Rule challenge involving a similar provision. In Clermont, the township enacted a zoning ordinance that prohibited any political subdivision from requiring additional zoning or other approval for the construction and operation of a state-licensed hazardous-waste facility. Here, the court found that the zoning ordinance’s language was sufficient to supplant “any conflicting municipal ordinance,” which is why the court determined that the state law preempted the local ordinances.

Despite striking down Munroe Falls’s ordinances, the lead opinion notes, “[w]e make no judgment as to whether other ordinances could coexist with the General Assembly’s comprehensive regulatory scheme. Rather, our holding is limited to the five municipal ordinances at issue in this case.” This is critical because it means that there are other options for municipalities to use zoning ordinances in order to prevent fracking activities. There is still hope for Home-Rule authority in Ohio.

36. Id. (citations omitted).
37. See Clermont Envtl. Reclamation Co. v. Wiederhold, 442 N.E.2d 1278, 1280 (Ohio 1982) (finding that state laws are “general laws” to carry out these statewide legislative goals, and municipalities are subject to its provisions notwithstanding the provisions of Section 3, Article XVIII of the Ohio Constitution).
38. Id. at 1282.
39. Morrison, 143 OhioSt.3d at 280, 2015-Ohio ¶ 33, 37 N.E.3d at 137.
II. THE OHIO SUPREME COURT MISTAKENLY FOUND THAT CHAPTER 1509 PREEMPTS ALL LOCAL ZONING ORDINANCES BECAUSE IT IS INCONSISTENT WITH OHIO’S HOME RULE.

The Home Rule Amendment of the Ohio Constitution states that “[m]unicipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws.” 40 The Ohio Supreme Court’s broad interpretation of the ORC 1509.02 clause contradicts this provision. While ORC 1509.02 grants ODNR the authority to supervise oil and gas drilling, it does not take authority away from municipalities in enacting their own police, sanitary, and other regulations that have traditionally been areas of local concern. Further, the statute does not explicitly mention preemption local zoning laws. As the Ohio Supreme Court stated in Cincinnati v. Hoffman, in order for a conflict to exist between state laws and local ordinances, “the state statute must positively permit what the ordinance prohibits, or vice versa, regardless of the extent of state regulation concerning the same object.” 41

The court determined that the ordinances conflicted with ORC 1509.02 because the General Assembly must have “intended to preempt local regulation on the subject.” 42 They found that ORC 1509.02 not only gives ODNR the “sole and exclusive authority to regulate the permitting, location, and spacing of oil and gas wells and production operations’ within Ohio,” but it also “explicitly reserves for the state, to the exclusion of local governments, the right to regulate ‘all aspects’ of the location, drilling, and operation of oil and gas wells, including ‘permitting relating to those activities.’” 43 While ORC 1509.02 preserves the extensive regulatory control given to municipalities over a wide range of infrastructure—from alleys to aqueducts—it explicitly prohibits them from exercising those powers in a way that “discriminates against, unfairly impedes, or obstruct[s]” the activities and operations covered. 44

40. OHIO CONST. art. XVIII, § 3.
42. See Morrison, 143 Ohio St.3d at 279, 2015-Ohio ¶ 29, 37 N.E.3d at 137 (quoting Westlake v. Mascot Petroleum Co., 573 N.E.2d 1068, 1071 (Ohio 1991)).
43. Id. at 279, 2015-Ohio ¶ 30, 37 N.E.3d at 137 (quoting OHIO REV. CODE ANN. § 1509.02).
44. See also Jamal Knight & Bethany Gullman, The Power of State Interest: Preemption of Local Fracking Ordinances in Home-Rule Cities, 28 TUL. ENVTL. L.J. 297, 305–06 (2015) (addressing the Ohio state law that grants the ODNR sole authority to regulate fracking and finding that the Munroe Falls ordinance violated § 1509.02 restrictions).
If the General Assembly had intended to specifically prohibit local zoning ordinances as part of a statewide and comprehensive legislative scheme, then it would have stated so explicitly, as it has done in other Ohio statutes that clearly preempt local zoning ordinances. For example, ORC 3734.05(E), which regulates hazardous waste, states that “[n]o political subdivision of this state shall require any additional zoning or other approval, consent, permit, certificate, or condition for the construction or operation of a hazardous waste facility”; 45 ORC 3772.26(A), which regulates casinos, states that “no local zoning, land use laws, subdivision regulations or similar provisions shall prohibit the development or operation of the four casino facilities”; 46 ORC 5103.0318, which regulates foster homes, states that “[n]o municipal, county, or township zoning regulation shall require a conditional permit or any other special exception certification for any certified foster home”; 47 ORC 5104.054, which regulates day-care homes, states that “[n]o municipal, county, or township zoning regulations shall require a conditional use permit or any other special exception certification for any such type B family day-care home.” 48 These all show that the General Assembly knows how to prohibit local zoning authority because when they intend to, they state it explicitly within the statute. ORC 1509.02 does not contain this language; therefore, it was unreasonable for the court to read it in.

Furthermore, Section 4 of Article XVIII of the Ohio Constitution provides,

Any municipality may acquire, construct, own, lease and operate within or without its corporate limits, any public utility the product or service of which is or is to be supplied to the municipality or its inhabitants, and may contract with others for any such product or service. The acquisition of any such public utility may be by condemnation or otherwise, and a municipality may acquire thereby the use of, or full title to, the property and franchise of any company or person supplying to the municipality or its inhabitants the service or product of any such utility. 49

Thus, municipalities have authority to own and operate utilities under the Ohio Constitution, which specifically grants municipal corporations the

45. OHIO REV. CODE ANN. § 3734.05(E).
46. Id. § 3772.26.
47. Id. § 5103.0318.
48. Id. § 5104.054.
49. OHIO CONST. art. XVIII, § 4.
right to operate utilities. The Ohio Supreme Court was mistaken to find that local authority is preempted from prohibiting fracking.

_The Ohio Supreme Court should have followed the examples of other states that have reconciled state and local oil and gas regulations._

1. New York

The decision in _Morrison_ is a problem because many other Ohio citizens are concerned about what is going to happen to their environment, water, land, and health. 50 Other states have not viewed the preemptive language in oil and gas regulations to preclude all local regulation of oil and gas drilling as irreconcilable with local laws. 51 In _Wallach v. Dryden_, the Court of Appeals of New York held that a statute expressly superseding all local laws “relating to the regulation of the oil [and] gas industry . . . preempt[s] only local laws that purport to regulate the actual operations of oil and gas activities, not zoning ordinances that restrict or prohibit certain land uses within town boundaries.” 52 In _Wallach_, the New York Court of Appeals was asked to determine whether towns may ban or limit oil and gas production within their boundaries under their Home-Rule authority by adopting local zoning laws. 53 The court concluded that the statewide Oil, Gas and Solution Mining Law (OGSML) does not preempt the Home-Rule authority vested in municipalities to regulate land use. 54 The facts in this case are nearly identical to the situation in _Morrison_, which is why the Ohio Supreme Court should have followed this precedent.

Similar to Ohio, municipal Home-Rule authority in New York arises from the state’s Constitution. Under the New York Constitution, “every local government shall have power to adopt and amend local laws not inconsistent with the provisions of this constitution or any general law . . . except to the extent that the legislature shall restrict the adoption of such a local law.” 55 The adoption of zoning ordinances is viewed as one of

50. See George L. Blum, _Validity of Zoning Regulations Prohibiting or Regulating Removal or Exploitation of Oil and Gas, Including Hydrofracking_, 84 A.L.R.6th 133 (explaining validity and supporting local regulations on fracking).

51. See Travis H. Eckley, _Developing Jurisprudence in the Marcellus and Utica Shale_, 33_ Energy & Min. L. Inst._ 445, 454 (2012) (explaining the preemption rulings in Ohio and West Virginia where courts have been holding state law preempts local law, compared to New York where two cases held local zoning laws that were not preempted).


53. _Id._

54. _Id._ at 1191.

55. N.Y. CONST. art. IX, § 2.
the core powers of local governance. The appellants had acquired oil and gas leases in municipalities that banned such activity and claimed that local zoning was preempted by the OGSML, which states that “[t]he provisions of this article shall supersede all local laws or ordinances relating to the regulation of the oil, gas and solution mining industries; but shall not supersede local government jurisdiction over local roads or the rights of local governments under the real property tax law.”

The New York Court of Appeals rejected the energy company’s argument that the preemption clause should be read broadly to preempt local zoning ordinances. It found that the preemption clause was “most naturally read as preempting only local laws that purport to regulate the actual operations of oil and gas activities, not zoning ordinances that restrict or prohibit certain land uses within town boundaries.” The court also stated that unlike the OGSML’s preemption clause, other statutes had clearly preempted Home-Rule zoning power, while taking into account “local considerations that otherwise would have been protected by traditional municipal zoning powers.” The court held that because there was no inconsistency between the preservation of local zoning authority and the OGSML’s policies of preventing waste and promoting recovery of oil and gas, local zoning would not be preempted without a clear expression of that intent. A similar conclusion in Morrison would have been with Ohio’s Home Rule Amendment and consistent with principles of local governance over public utilities and public health and safety.

2. Colorado

The Colorado Supreme Court also found that state regulation of the oil and gas industry did not preempt a county’s land-use authority in La Plata County Board of Commissioners v. Bowen/Edwards Association Inc. The Colorado Supreme Court rejected an oil and gas company’s argument that the Colorado Oil and Gas Conservation Act preempts local counties’ land-use regulations pertaining to oil and gas activities. The court stated, “We reasonably may expect that any legislative intent to prohibit a county from exercising its land-use authority over those areas of the county in which oil development or operations are taking place or are contemplated would be

56. Wallach, 16 N.E.3d at 1194–95.
57. Id. at 1195 (citing N.Y. ENVTL. CONSERV. LAW § 23-0303(2) (McKinney 2016)).
58. Id. at 1197.
59. Id. at 1198.
clearly and unequivocally stated. The court concluded that state and local interests could be distinguished from each other but not in express conflict, stating:

While the governmental interests involved in oil and gas development and in land-use control at times may overlap, the core interests in these legitimate governmental functions are quite distinct. The state's interest in oil and gas development is centered primarily on the efficient production and utilization of the natural resources in the state. A county's interest in land-use control, in contrast, is one of orderly development and use of land in a manner consistent with local demographic and environmental concerns. Given the rather distinct nature of these interests, we reasonably may expect that any legislative intent to prohibit a county from exercising its land-use authority over those areas of the county in which oil development or operations are taking place or are contemplated would be clearly and unequivocally stated. We, however, find no such clear and unequivocal statement of legislative intent in the Oil and Gas Conservation Act.

3. Pennsylvania

Similarly, the Pennsylvania Supreme Court concluded that a statute superseding all municipal ordinances purporting to regulate oil and gas well operations does not preempt a local zoning restriction excluding oil and gas wells from certain residential districts in Huntley & Huntley, Inc. v. Oakmont Borough Council. The Pennsylvania Supreme Court agreed with the Colorado Supreme Court’s reasoning in La Plata. The preemptive language in Pennsylvania’s Oil and Gas Act is limited to certain subjects, such that the state law did not preempt all matters in the city’s ordinance. In this case, the zoning ordinance was found to serve a different purpose from those enumerated in the Oil and Gas Act. Thus, the ordinance in question could not be preempted without clear guidance from the legislature that the restriction in the ordinance was among the subjects covered by the preemption.

61. Id.
63. Id.
III. THERE IS STILL HOPE: MUNICIPALITIES CAN STILL CREATE ZONING ORDINANCES THAT DO NOT CONFLICT WITH GENERAL LAW.

In Morrison, Justice French conceded that while these five specific ordinances may be preempted, local authorities still have the right to invoke their Home-Rule authority over other areas.\(^{64}\) This may include some ordinances that would permissibly limit or impede upon fracking in an area. Ohio municipalities’ authority to enact zoning ordinances in ORC 713.07 states, “municipalities, ‘in the interest of the promotion of the public health, safety, convenience, comfort, prosperity, or general welfare, may regulate and restrict the location of buildings and other structures.’”\(^{65}\) What can Ohioans do, then, to invoke the Home Rule Amendment to regulate land uses within zoning districts to promote the public health, safety, convenience, comfort, prosperity, and general welfare?

Traditionally, courts have found that there is a strong presumption in favor of the validity of local ordinances.\(^{66}\) This is because each local legislative body is familiar with local conditions and is, therefore, better suited than the courts to determine the character and degree of regulation required.\(^{67}\) In Hudson v. Albrecht, the Ohio Supreme Court further noted that “the right of the individual to use and enjoy his private property is not unbridled, but is subject to the legitimate exercise of the local police power.”\(^{68}\) This power includes the right to create zoning regulations.\(^{69}\) The ultimate purpose of the police power is to protect “public health, safety and general welfare, and its exercise in order to be valid must bear a substantial relationship to that object and must not be unreasonable or arbitrary.”\(^{70}\)

Justice O’Donnell even wrote separately to emphasize the limited scope of the court’s decision in Morrison.\(^{71}\) The decision in Morrison does not mean that ORC 1509.02 preempts local land use ordinances that address only the traditional concerns of zoning laws, such as ensuring compatibility with local neighborhoods, preserving property values, or effectuating a

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64. Morrison, 143 Ohio St.3d at 280, 2015-Ohio ¶ 34, 37 N.E.3d at 137.
65. Id. at 281, 2015-Ohio ¶ 41, 37 N.E.3d at 139 (O’Donnell, J., concurring) (citing OHIO REV. CODE ANN. § 713.07 (LexisNexis 2013)).
67. Id.
68. Id. (citing OHIO CONST. art. XVIII, § 3).
69. Id.
70. Id. (citing Cincinnati v. Correll, 49 N.E.2d 412 (1943)).
71. Morrison, 143 Ohio St.3d at 281, 2015-Ohio ¶ 38, 37 N.E.3d at 138.
municipality's long-term plan for development, by limiting oil and gas wells to certain zoning districts without imposing a separate permitting regime applicable only to oil and gas drilling.\footnote{Id.}

Therefore, other options may permissibly protect local Ohio communities based on traditional zoning concerns. The following are zoning options that Ohio communities may still enact in light of the \textit{Morrison} decision.

\textit{There are options for local zoning ordinances that will limit or restrict fracking in communities.}

1. Site Access/Restrictions on Road Usage

Ohio municipalities may permissibly create zoning ordinances to prohibit access to well sites across public property, including public roads, without prior consent of the municipality. Local authorities and the Ohio Department of Transportation have the power under ORC 4513.34 to grant permits for oversize vehicles to use the roads in their respective jurisdictions.\footnote{Id. § 4513.34 (LexisNexis 2013).} Additionally, ORC 723.01 provides that “[m]unicipal corporations shall have special power to regulate the use of the streets. . . . [T]he legislative authority of a municipal corporation shall have the care, supervision, and control of the public highways, streets, avenues, alleys, sidewalks, public grounds, bridges, aqueducts, and viaducts within the municipal corporation.”\footnote{Id. § 723.01.}

As section 1509.02 states, “Nothing in this section affects the authority granted to the director of transportation and local authorities in section 723.01 or 4513.34 of the Revised Code,” so long as the regulations do not “discriminate[] against, unfairly impede[], or obstruct[] oil and gas activities and operations regulated.”\footnote{Id. § 1509.02.} Fracking operations require hundreds of “trucks . . . to bring water, sand, chemicals, and equipment to . . . well sites and to haul wastewater away from well sites.”\footnote{Sorell E Negro, \textit{Man Camps, Boomtowns, and the Boom-and-Bust Cycle: Learning from Rifle, Colorado, and Williams County, North Dakota, in Beyond the Fracking Wars: A Guide for Lawyers, Public Officials, Planners and Citizens}, 193, 203–04 (Erica Levine Powers & Beth E. Kinne eds., 2013).} This increased road use heavily impacts road infrastructure and increases traffic and congestion.\footnote{Id.} To drill a well in the Marcellus Shale, approximately 5.6
millions of gallons of water is required, which is delivered by hundreds of truckloads. Once fracking begins in an area, roads require more maintenance due to increased intensity of use.78 Maintaining infrastructure becomes extremely costly for communities; for example, “Sublette County, Wyoming, spent over $60 million on its roads and water and sewage systems in 2009 alone, and it still needed an additional $160 million.”79 Local roads are typically not built to withstand the compression of such heavy truck use.80 Therefore, to protect local roads, ordinances may be enacted that would apply “to all truck traffic, not just [those] related to the oil and gas industry.” 81 Municipalities may create ordinances “establish[ing] weight, height, and length limitations.”82 Then, a fee may be charged to any vehicle not meeting those standards.83 Enforcing penalties and permit fees for trucks ensures that local roads are protected, ensures compliance, and also limits or impedes the oil and gas industry if they do not want to pay for such permits.84

The court has also stated in City of Dublin v. State that a municipality’s power of self-government includes the power to control its “public ways” by utility service providers and cable operators.85 When the use involves installing and operating their equipment and facilities within the town border, state law does not preempt the town’s rules.86 Municipalities have enacted regulations to minimize the impacts from trucks, such as regulations that restrict when trucks are permitted on the roads. For example, Collier Township, Pennsylvania requires the following information when applying for a gas drilling permit:

(1) the proposed routes of all trucks to be used for hauling; (2) the trucks’ estimated weights; (3) evidence of compliance with weight limits on its streets, or a bond and an excess maintenance agreement to ensure repair of road damage; and (4) evidence that

78. Id. at 203.
79. Id.
81. Id.
82. Id.
83. Id.
84. Id.
86. Id. at 468.
the intersections on the proposed routes have a sufficient turning radius.\textsuperscript{87} Therefore, other municipalities may be able to control the “number of truck trips and which routes will be used, as it can help regulators understand how each operator will impact roads.”\textsuperscript{88} This will not prevent fracking operations entirely, but it will ensure minimal harm to the community.

2. Distance Requirements

Ohio municipalities can—and should—require wells and other “equipment be located a minimum distance from specified locations or structures.”\textsuperscript{89} The Ohio Supreme Court has ruled that distance requirements are not preempted by ORC 1509.02 or by the Ohio Administrative Code (OAC) 1501: 9-1-05, which authorizes Ohio municipalities to do this.\textsuperscript{90} In \textit{Smith Family Trust v. City of Hudson Board of Zoning & Building Appeals}, the Court held that distance requirements are left up to local authorities to decide because distance requirements are not addressed by state regulations.\textsuperscript{91}

As fracking increasingly moves into densely populated areas, many municipalities throughout the country have started creating setback requirements as “recent developments in technology have revealed more oil and gas deposits in shale and have allowed a single well to extract gas from one to two miles away.”\textsuperscript{92} Such setback or distance requirements can prevent fracking operations that are located too close to vulnerable areas that present special health, safety, or environmental concerns.\textsuperscript{93} For example, some setback regulations “require[] that wells be kept away from watercourses, parks, inhabited buildings, public buildings, or schools.”\textsuperscript{94}

\begin{thebibliography}{99}
\bibitem{87} Negro, \textit{supra} note 76, at 204.
\bibitem{88} \textit{Id.}
\bibitem{90} \textit{Smith Family Tr. v. City of Hudson Bd. of Zoning \\& Bldg. Appeals, 2009-Ohio-2557, }\hspace{1em} \S\hspace{1em} 12 (Ohio Ct. App. 2009).
\bibitem{91} \textit{Id.} \hspace{1em} \S\hspace{1em} 11–12.
\bibitem{93} \textit{Id.} at 295.
\bibitem{94} Goho, \textit{supra} note 89, at 5.
\end{thebibliography}
3. Noise Standards

Cities should adopt a noise ordinance to ensure a proper limit on noisy activities within their community. Oil and gas drilling creates a significant amount of noise from construction, traffic, pump jacks, engines, and compressor stations. Even after drilling and fracking, compressor stations, which push gas through pipelines, remain in place and create loud humming noises for years—even decades. Residents' actual perception of the noise levels, however, “depend on the distance between the receptor and the equipment, the topography, vegetation, and meteorological conditions,” such as wind speed and direction, temperature, and humidity. A recent study done in La Plata County, Colorado indicates that a required “45 dBA [decibels] (or lower) residential noise standard is reasonable, but will ensure residents’ health, safety, and enjoyment of property are not significantly harmed.” Therefore, to protect the communities’ peace and enjoyment of their land, ordinances should be adopted to require maximum noise levels that would apply to any industry—or even private—use of land.

4. Aesthetic Requirements

Cities in Ohio may enact zoning ordinances that relate to aesthetic considerations. In *Hudson v. Albrecht*, for example, the Ohio Supreme Court found that aesthetic considerations could be taken into account by the legislative body in enacting zoning legislation because there is a legitimate governmental interest in maintaining the aesthetics of a community. The court also found that aesthetics of the community relates to property values, which is also a legitimate concern because protecting real estate from impairment and destruction of value are “includable under the general welfare aspect of the municipal police power and may therefore justify its

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97. *EARTHWORKS*, supra note 95.

98. *Id.*

99. *See, e.g.*, Arlington, Tex., Nuisance Ordinance § 7.01(A)(21), (F) (1989) (requiring mufflers on all engines and setting maximum noise levels); FORT WORTH, TEX., REV. ORDINANCES ch. 15, art. II, § 42(a)(25), (b) (requiring mufflers on all engines and setting maximum noise levels); Twp. of Cecil, Pa., Ordinance No. 2-2010, § 3(16) (2010) (setting maximum noise levels and prescribing mitigation measures).

100. *Vill. of Hudson*, 458 N.E.2d at 856.

101. *Id.*
reasonable exercise."^{102} Also, in State v. Buckley, the court stated that the appearance of a community relates closely to its citizens' happiness, comfort, and general well-being.^{103}

Accordingly, Ohio municipalities should enact aesthetic requirements for any property because there is a legitimate governmental interest in maintaining the aesthetics of the community; thus, aesthetic considerations may legally be taken into account by the legislative body in enacting zoning legislation.^{104} In Ohio, land-use regulations related to aesthetic considerations are valid if the regulation is substantially related to a legitimate public purpose (other than aesthetics), or if the regulation is based on purely aesthetic considerations, then it can be valid so long as the harm to the aesthetic character of the surrounding area that the regulation prevents is "generally patent and gross, and not merely a matter of taste."^{105}

Aesthetic regulations have been found to be within the scope of police power regulation.^{106} Such aesthetic regulations include: screening fences; parking; the size, type, and location of signs and billboards; and the architectural style of structures on the land.^{107} The validity of an aesthetic regulation, therefore, is judged on whether the effect of the regulation on the particular land use prevents an appearance that is "patently or grossly out of harmony with the visual character of the surrounding area."^{108}

Fracking operations often destroy land and create dust, vibrations, and odors that cause people to view these drill sites as being grossly out of harmony with the visual character of any given area.^{109} Therefore, zoning ordinances should "require drill sites to be free of high grass, weeds, and trash and impose fence and screen requirements."^{110} Aesthetic ordinances are more likely to be permissible when they also reflect the "monetary interests of protecting real estate from impairment and destruction of value."^{111} The Ohio Supreme Court stated that the goal of protecting property values is "includable under the general welfare aspect of the municipal police power and [thus] . . . justifies the reasonable exercise."^{112}

\[^{102}\text{Id.}\]
\[^{103}\text{State v. Buckley, 243 N.E.2d 66, 71 (Ohio 1968).}\]
\[^{104}\text{Id. at 70.}\]
\[^{106}\text{Id. at 2.}\]
\[^{107}\text{Id.}\]
\[^{108}\text{Grubb, supra note 80, at 217.}\]
\[^{109}\text{Vill. of Hudson, 458 N.E.2d at 857.}\]
\[^{110}\text{Id.}\]
\[^{111}\text{Id.}\]
\[^{112}\text{Id.}\]
Further, fracking operations decrease property values because nobody wants to live near the noise, odors, traffic, or chemicals.\textsuperscript{113} For example, in April of 2014, a Texas family was awarded nearly $3 million after their health and lives were ruined by emissions coming from dozens of wells that had been drilled near their home.\textsuperscript{114} This verdict included $275,000 for the loss in market value of their property caused by all the drilling.\textsuperscript{115} Further, a 2013 study published in the Journal of Real Estate Literature reveals that a strong majority of people would decline to buy a home near drilling sites.\textsuperscript{116} The study also showed that people who would bid on a home near a fracking location would diminish their offer by up to 25 percent.\textsuperscript{117}

5. Use of Public Water Supplies

Ohio municipalities could also require state and local permits for accessing public water supplies for fracking operations; therefore, prohibiting access to the water supply without securing necessary permits.\textsuperscript{118} Water is the largest component of fracking fluids.\textsuperscript{119} A drilling operation consumes approximately “6,000 to 600,000 US gallons of fracking fluids, but over its lifetime an average well may require up to an additional 5 million gallons of water for full operation and possible restimulation frac jobs.”\textsuperscript{120} Thus, without access to water, energy companies would not be able to perform the operation.

6. Dust, Vibration, and Odors

Cities should establish “a best practice standard to minimize the generation of dust, vibration and offensive orders and further require operators to incorporate reasonable feasible technological improvements in industry standards in the future to accomplish these goals.”\textsuperscript{121} The current debate around nuisance suits against fracking companies is “whether [the] industry’s interest in producing natural gas outweighs residents’ interest in

\textsuperscript{113} Drilling vs. the American Dream, supra note 10.
\textsuperscript{115} Id.
\textsuperscript{116} Ron Throupe et al., A Review of Hyrdo “Fracking” and its Potential Effects on Real Estate, 21 J. REAL ESTATE LITERATURE 1, 16 (2013).
\textsuperscript{117} Id.
\textsuperscript{118} Grubb, supra note 80, at 216.
\textsuperscript{120} Id.
\textsuperscript{121} Grubb, supra note 80, at 216.
peace and quiet.” A mass litigation suit for nuisance against an oil and gas company, Antero and Hall, for fracking in neighborhoods is set for trial in West Virginia in 2016. The main complaints are about traffic, noise, and odors from the natural gas wells, compressor stations, and pipelines. This case may serve as a model for evaluating fracking nuisances under the common law nuisance question: “Does an action unreasonably interfere with the enjoyment of one’s property?” The fact that there are so many plaintiffs involved in this case shows how undesirable it is to live near fracking sites.

7. Lighting

Because oil and gas extraction occurs at all hours, lights are left on throughout the night. Cities can prohibit lighting from shining directly on public roads, adjacent property, or property within 300 feet of the site. These provisions can require that the site lighting be directed downward and internally so as to avoid glare on public roads, adjacent dwellings and other buildings, and any such dwellings or buildings within 300 feet of the site. This would prevent the nuisance of heavy lighting disrupting the community all throughout the night.

8. Lobby!

In Morrison, the city presented strong “policy reasons [for] why local governments and the state should work together, with the state controlling the details of well construction and operations and the municipalities designating which land within their borders is available for those activities.” The court thought that the issue in Morrison was not whether the law should allow municipalities to have concurrent regulatory authority

123. Id.
124. Id.
125. Id.
126. See Drilling vs. the American Dream, supra note 10 (explaining that even Exxon Mobile’s CEO and board chairman Rex Tillerson is “suing to stop construction of a water tower that would supply nearby drilling operation because of the nuisance of, among other things, heavy truck traffic, noise and traffic hazards from the fracking operations the tower would support because even “the head of the single largest drilling company in the world acknowledges the ‘constant and unbearable nuisance’ that would come from having ‘lights on at all hours of the night . . . traffic at unreasonable hours . . . noise from mechanical and electrical equipment.’”).
127. Grubb, supra note 80, at 216.
128. Id.
129. Morrison, 143 Ohio St.3d at 279, ¶ 33, 37 N.E.3d at 137.
but whether ORC 1509.02 and the Home Rule Amendment allow the situation of double licensing. Instead, they indicated that the city’s policy ideas should be presented to the “elected representatives in the General Assembly, not the judiciary.” Grassroots movements are powerful tools deeply rooted in American society to lobby for more just laws. Concerned citizens in Ohio, therefore, must act quickly to lobby their Home-Rule concerns at each legislative level to ensure that the laws are clarified and are reevaluated or rewritten such that principles of Home-Rule authority, as well as public health and safety, may be restored.

CONCLUSION

The court’s decision in *Morrison v. Beck Energy* is mistaken in finding that the Ohio state statute preempts local towns from creating their own oil and gas regulations. The court misinterpreted ORC 1509.02 when it found that the state law preempts any and all local ordinances because it did not explicitly state so, as the General Assembly has done in other statutes that were intended to preempt local authority. Additionally, the Ohio State Constitution grants municipalities the authority to regulate utilities in the Home Rule Amendment.

The concerns about fracking are reasonable, and citizens in Ohio and other states have the right under the Home Rule Amendment to create land use regulations in the interest of public health, safety, and to avoid nuisances. Although in this case, the Ohio Supreme Court found that state law preempted Munroe Falls’s local ordinances, the court noted that “[w]e make no judgment as to whether other ordinances could coexist with the General Assembly’s comprehensive regulatory scheme. Rather, our holding is limited to the five municipal ordinances at issue in this case.” This is critical because it means that there are other options for municipalities to use zoning ordinances in order to prevent fracking activities.

Cities must act quickly to enact ordinances that will still protect their health, safety, environment, and enjoyment of land. Creating zoning ordinances for rights-of-way or road restrictions, distance or setback requirements, noise standards, aesthetic requirements, dust, vibrations, or odor limitations, lighting restrictions, and restrictions on the use of public water supplies will all ensure the safety and wellbeing of Ohio.

130. *Id.* at 279–80, 2015-Ohio ¶ 33, 37 N.E.3d at 137.
131. *Id.* at 280, 2015-Ohio ¶ 33, 37 N.E.3d at 137.
132. OHIO CONST. art. XVIII, § 3.
133. *Id.*
communities. Furthermore, citizens should lobby the legislature so that Home-Rule power may be returned to the people of Ohio.
RATS AND TREES NEED LAWYERS TOO: COMMUNITY RESPONSIBILITY IN DEODAND PRACTICE AND MODERN ENVIRONMENTALISM

Trayce A. Hockstad

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INTRODUCTION

Since humanity first began to establish legal norms and regulate community relationships through law, we have struggled to understand how our concept of order applies to the environment. Legal traditions from centuries ago demonstrate human attempts to address conflict with the natural world in a systematic way. Despite a sense of powerlessness to prevent devastation and accidental fatalities from chaotic forces of nature, ancient and modern societies alike have created intricate legal processes for resolving tension with the environment. Why?

Historians often posit that early efforts to impose law on animals and other natural objects, like trees, reflect a need in society to find closure after catastrophe or to exact vengeance after wrongdoing. Medieval deodand law, inspired by ancient near-eastern traditions, demanded full trials and executions for non-human things involved in the death of human beings. These proceedings were conducted at the expense of the local community and included funding court-appointed attorneys who advocated vehemently on behalf of their non-human clients. This effort to provide non-humans a place in the legal system and impose a human concept of order on the natural world has been considered primitive and infantile in the philosophical development of the law. Early twentieth century scholars mocked these legal practices as futile pantomimes reflective of superstitious cultures. But despite the apparent absurdities of deodand practice, the

2. Id. at 478–85.
3. E.P. EVANS, THE CRIMINAL PROSECUTION AND CAPITAL PUNISHMENT OF ANIMALS 190 (1906) (describing the objective of laws intended to punish nature as one “to atone for the taking of life in accordance with certain crude conceptions of retribution”).
6. EVANS, supra note 3, at 186; see Jacob J. Finkelstein, The Goring Ox: Some Historical Perspectives on Deodands, Forfeitures, Wrongful Death and the Western Notion of Sovereignty, 46 TEMP. L.Q. 169, 170 (1973) (noting the “universal condemnation [deodand] has received by those who have paid it even the least attention in recent times”).
tradition makes an important societal statement: it is the responsibility of the local community to provide legal protection for the environment. Recent developments in environmental law have found fresh motivation for humanity’s initiative to find a place for ecology in our legal systems: the preservation of our home. Today, we just as often find ourselves abusers of the natural world as victims of it. Our growing understanding of human impact on the environment has led us to reevaluate our relationship as humans with other living members of the community. In the last fifty years, American courts have entertained a variety of proposals from environmentalists on the best ways to recognize and protect the welfare of the natural world in our legal system. The conversation of the last few decades, however, has shown little consensus over proper methods of litigating environmental interests.

Numerous legal and philosophical issues exist in the debate over how the law should address human conflict with the environment. While an understanding of our interdependent relationship with nature has grown, legally complicated standing requirements remain problematic in environmental litigation. Satisfactorily answering (1) “[w]hose interests are injured by environmental harm?” and (2) “[w]ho may properly represent this injury in court?” has not proven an easy task for environmentalists. The lack of successful litigation on behalf of natural habitats and their members has driven the environmental agenda to focus not on the human interests at stake in the loss of biodiversity, but on granting legal rights to various non-human species. Instead of emphasizing humanity’s benefits and responsibility for ensuring protection of natural resources, the present discourse has removed human interests from the preservation equation, forcing the environmental movement into a legally untenable position.

8. David Favre, *Wildlife Jurisprudence*, 25 J. ENVT'L. L. & LITIG. 459, 468 (2010) (“For the first 100 years of American history, wildlife was generally considered a consumptive resource. . . . Beginning in the 1880s, new . . . perspectives said that wildlife should not be left to the settlers, trappers, and the market hunters, but should be protected.”).

9. See, e.g., *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972) (denying standing to an environmental special interest organization on the grounds that it lacked an injury in fact).

10. Wise, *supra* note 1, at 543–46 (arguing that an anthropocentric worldview has skewed the development of the law away from more educated and scientific perspectives that would extend legal values, principles, and rights to non-human animals).

11. See *Bennet v. Spear*, 520 U.S. 154, 161–62 (1997) (showing that proving injury and the right to represent is extremely complex); see also *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 555–56 (1992) (showing an example of a case in which environmentalists failed to prove injury or right to represent); *Sierra Club*, 405 U.S. at 728; *Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1171 (3d Cir. 2004).

12. Favre, *supra* note 8, at 462 (“[T]o better understand the presence of wildlife within our jurisprudence, it is necessary to adopt a broader definition of legal rights. . . . [R]ights for wildlife should be considered to exist when a court . . . takes into account the interests of wildlife and gives some weight to those interests.”).
This article examines a history of community responsibility in legal representation for non-human parties in the environment. A correct understanding of humanity’s relationship to the natural world underscores a premise that has been present instinctively in societies across the world for many centuries: humans are responsible for providing sustainable legal protection to the environment. This article suggests that, in the wake of current challenges with environmental standing and litigation, courts should appoint local counsel to advocate for the protection of non-human members of the environment based on the human interests at stake in the preservation of the natural world. For centuries, communities were obligated to participate in trials and provide legal representation for parties in the form of court-appointed counsel. These practices accurately demonstrate that proper legal treatment of the natural world is the concern of local populations.

Although the recent ecological conversation has centered on rights for natural objects and the idea that environmental interests should be separated from human interests, these propositions have diluted the correct understanding of environmental responsibility. We need not attempt to divorce the interests of the environment from those of humanity, because humanity is utterly dependent on the preservation of natural resources. Instead of isolating environmental interests in the name of pursuing rights for non-human objects, counsel should be appointed to advocate for the injury caused to local citizens by loss of biodiversity in the affected area. This approach toward environmental litigation is best, because (1) it acknowledges the responsibility of the human community to care for the environment based on a sense of order common in legal history, and (2) it best satisfies modern standing requirements for litigation, enabling effective and sustainable environmental protection for the community.

I. A HISTORIC LOOK AT LEGAL REPRESENTATION FOR NON-HUMAN OBJECTS: COMMUNITY RESPONSIBILITY

A. Deodand Practice

In 1522, Bartholomew Chassenée began preparing for a trial that would define his career as an attorney and later a French jurist.13 A complaint had been filed with the bishop’s vicar.14 Chassenée had been appointed defense counsel for a group of nefarious community members and was to appear in

13. EVANS, supra note 3, at 18.
14. Id.
ecclesiastical court to plead their desperate case. Under threat of excommunication for having eaten the barley crop of the province, the rats of Autun had been summoned to court.

On the first day, the rats did not appear in court. Chassenée argued that their citation was insufficient; it had not been posted in the surrounding villages where the rats were known to roam, and they likely had not read it. Finding this an acceptable defense, the court ordered that citations be sent to the neighboring towns, so that all the rats might be notified. After another default on the part of his clients, Chassenée insisted that the rats could not make the journey to appear in court for the perils along the road. Dogs and cats might devour them on the way, and the rats were not required to appear in court if they could not do so without risking their lives.

Strange as this legal proceeding may sound, granting court-appointed representation to non-human parties on trial was once a commonplace practice under the law of deodand. This practice required that chattels convicted by a coroner’s jury of causing the death of a human being be forfeited to the king. The word deodand was created from the Latin phrase deo dandum, meaning “to be given to God.” If the item that was found to be deodand was unable to be physically taken, its value was to be paid to the crown by the owners, or if they were indigent, by the community. Theoretically, this payment was to be applied for some pious use for the good of the town. However, the process of trying and convicting a deodand was not a mere formality or a means to an end for achieving valid

15. Id. at 19.
16. Id.
17. Id.
18. Id.
19. Id.
20. Id.
21. Id.
23. Id.
24. See Edmund W. Burke, Deodand: A Legal Antiquity that May Still Exist, 8 CHI.-KENT L. REV. 15, 15–16 (1929) (noting various definitions of deodand including a “personal chattel whatever, animate or inanimate, which, becoming the immediate instrument by which the death of a human creature was caused, was forfeited to the king for sale, and a distribution of the proceeds in alms to the poor by his high almoner, for the appeasing of God’s wrath” and “every beast or thing movable inanimate which occasions the death of a man within the body of a county without the default of himself or another, shall be forfeited to the king as a deodand”).
25. See id. at 16 (describing a case in which a man was killed by his own cart, a deodand, and the price was allotted to his children, not by being heirs to their father’s estate, but because they were likely to be needy and such use of the funds was sufficiently pious); Pervukhin, supra note 22, at 237.
forfeitures. If a specific animal was charged with the crime of injuring a human, it was often imprisoned alongside criminal individuals until tried by a secular tribunal and, if convicted, hanged. If a threat existed to the community at large, as in the case of the Autun rats, the proceedings were conducted in ecclesiastical courts. In these cases, the defendants were often vermin or insects accused of depleting a food supply and were summoned to court to prevent continued destruction. In both situations, defense counsel was appointed for the accused parties at the expense of the town.

While deodand practice reached its height in the early 1600s, laws and legal processes for dealing with offending non-human objects occurred far earlier. Under the Laws of Alfred the Great of Britain, written circa 900 A.D., a tree that fell on a man and killed him was to be cut down and given to his family within thirty days of the accident. This practice was known as “noxal surrender” and was not meant to restore the value of the lost life, but was considered a ransom for the evil done by the tree. Turning over the wrongdoing chattel to the injured party prevented further legal action against the chattel’s owners, because the offending “agent” had been surrendered. This idea of enacting legal punishment on an offending natural object also appears in India. The Kukis believed that if a man fell from a tree and died, the spirit of the tree had caused the event, and the wood must be cut up and spread across the land before the wrong was properly rectified. The Athenians publicly condemned weapons that had

26. Girgen, supra note 5, at 111 (noting that a jailer charged the same daily fee for boarding a pig as that for boarding a human prisoner).
27. Id. at 99–100 (noting that secular tribunals heard criminal cases against animals, whereas ecclesiastical courts conducted proceedings against pestilence and hordes of animals accused of causing damage to the community, similar to a public nuisance proceeding).
29. Girgen, supra note 5, at 99, 102; Evans, supra note 3, at 31.
30. Evans, supra note 3, at 3; Hyde, supra note 4, at 703 (“[A]ll wild animals of the noxious sort, such as rats, locusts, etc., were tried in the ecclesiastical courts and their punishment was either death or excommunication and banishment by formal decree.”).
32. Id. at 117 (noting that deodand practice “reached its climatic point—with both the ecclesiastical and secular trials reaching their point of frequency and greatest geographic spread—in the early 1600s, an age of relative enlightenment”).
33. Finkelstein, supra note 6, at 181.
34. Id.
35. Id.; see Burke supra note 24, at 16 (arguing that the implication of deodand practice was that even if the owner of a chattel employed in the killing of another was not involved in the act, the instrumentality “was morally effected from having caused the death”).
36. Girgen, supra note 5, at 108 (stating that the family of a man killed by a tiger must chase and kill it or else be disgraced in society).
37. E.P. Evans, Bugs and Beasts Before the Law, 11 Green Bag 33, 37 (1899).
caused death and threw them outside their borders.\textsuperscript{38} In 1591, a Russian tribunal banished a bell to Siberia for having been rung in announcement of a political assassination.\textsuperscript{39} In China as recently as 1888, idols and corpses were tried and sentenced to decapitation.\textsuperscript{40} In American tradition, ships at sea robbed of their cargo by pirates were condemned and sold without the owners’ consent because the proceedings were “against the vessel for an offense committed by the vessel.”\textsuperscript{41}

These roots and remnants of deodand practice undoubtedly seem eccentric in a modern context. The idea of putting a non-human thing on trial appears perhaps as ludicrous as imagining rats avoiding a court summons for lack of posted notice. Nevertheless, the earnestness and longevity of this type of proceeding warrants a closer look at the implications of deodand. What is really going on in society behind the apparent absurdity?

\textbf{B. Implications of Deodand}

Deodand tradition was influenced most likely by the biblical practice of stoning oxen known to have gored men to death.\textsuperscript{42} These Judeo-Christian laws can be traced to the Noahic covenant,\textsuperscript{43} but similar edicts can be found in the Laws of Eshnunna and the Laws of Hammurabi,\textsuperscript{44} indicating that legal regulation of human conflict with nature was a community goal that transcended religion and culture.\textsuperscript{45} Over time, laws addressing non-human

\begin{footnotes}
\item[38.]
EVANS, supra note 3, at 172; see also Hyde, supra note 4, at 696 (noting that the Athenians had a distinct court, the Prytaneum, for trials of murder cases in which the murderer was unknown or could not be found, an inanimate thing had caused the death, or an animal had caused the death).

\item[39.]
EVANS, supra note 3, at 175 (“After a long period of solitary confinement it was partially purged of its iniquity . . . and suspended in the tower of a church in the Siberian capital; but not until 1892 was it fully pardoned and restored to its original place in Uglic.”).

\item[40.]
Id. at 110.

\item[41.]

\item[42.]
Wise, supra note 1, at 514; J.W. Goldsmith, Jr.-Grant Co. v. United States, 254 U.S. 505, 511 (1921) (citing scripture for justification of deodand practice, “[a] like punishment is in like cases inflicted by the Mosaical law: ‘If an ox gore a man that he die, the ox shall be stoned, and his flesh shall not be eaten’”).

\item[43.]

\item[44.]
Jacob J. Finkelstein, The Ox That Gored, 71 TRANSACTIONS AM. PHIL. SOC’Y 1, 29 (1981).

\item[45.]
Esther Cohen, Law, Folklore and Animal Lore, 110 PAST & PRESENT 6, 9 (1986) (“While legal processes may have sprung from certain beliefs, rituals and perceptions that form part of the general expression of spirit commonly termed culture, those processes in themselves consist equally of a cultural manifestation, not only in so far as they stem from a specific cultural environment, but also because they contribute to the formation of the same environment.”).
\end{footnotes}
offenders expanded to include various kinds of accidental human deaths and unnatural acts of animals. With the exception of the Mesopotamian culture, these laws of ancient near-eastern civilizations directing human interaction with the natural world indicate a strong sense of hierarchy in responsibility and authority. This sense of vertical structure in creation—with humanity at the pinnacle—was clearly sustained in Western development and reflected in early legal procedures concerning non-human parties, but perhaps with surprising results. The precision and importance evident in deodand proceedings reflect an understanding of our complex relationship with the environment, and our duty as humans to ensure justice and peace in the community. Because they recognized human beings as supreme caretakers of our natural surroundings, early legal jurists placed the burden for ensuring functional and sustainable relations with non-human things on local governments and legal systems.

Early criminal prosecutions of non-human offenders clearly reflect a desire for vengeance after catastrophe, but other motivations are apparent. The language of deodand law emphasized wrongdoing when the object in question had “moved to the death” in causing the accident. For instance, it might be relevant whether the inanimate object or animal had shifted on its own, or whether it was stationary during the calamitous event. Any movement was considered evidence of malevolence for which the object could be held accountable. While this search for volition in non-human

46. Pervukhin, supra note 22, at 238.
47. EVANS, supra note 3, at 162 (describing how in 1474 a rooster was burned at the stake for laying an egg).
48. Finkelstein, supra note 44, at 8–13 (describing how Mesopotamian concepts of deity and society departed from what would become the Western world’s understanding of a vertical hierarchy of order and noting that “Mesopotamian cosmology, on the other hand, was an attempt to resolve the tension between consciousness and society by effecting the submersion of the self in society and by assimilating the phenomenon of man—individually and in the aggregate—to the external and objective universe of nature”).
49. Wise, supra note 1, at 477–88; Cohen, supra note 45, at 15.
50. Finkelstein, supra note 44, at 83; see Cohen, supra note 45, at 36 (arguing that medieval scholastics “viewed justice as a universal attribute, applicable to all nature” and believed that “[i]f man was to rule nature, he must do so according to the same principles that governed his relationships with fellow humans”).
52. EVANS, supra note 3, at 147, 190; see Finkelstein, supra note 6, at 197 (“The unnatural death of a human being was, at the very least, a quasi-crime; the effect of it transcended mundane considerations, and entailed expiation in one form or another.”).
53. Pervukhin, supra note 22, at 252; EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND 57 (1628) (“Deodands when any moveable thing inanimate, or beast animate, do move to, or cause the untimely death of any reasonable creature by mischance in any county of the realm.”).
54. Pervukhin, supra note 22, at 252.
55. Id.
defendants at times manifested in procedure as a warped anthropomorphism, the contrast of providing a standard legal process for a thing accused of chaotic savagery was perhaps an attempt to distinguish humanity from the rest of the environment and stabilize our relationship with the natural world. In an effort to acknowledge the value and interests of the offender and ensure a just judicial process, non-human defendants were afforded the protection of legal representation. Pronouncing and enacting punishment on non-human offenders was taken very seriously, and vigilant justice on the environment was not tolerated. It would have been far easier and more economically efficient simply to kill offending non-human parties. Instead, non-human members of the environment were also entitled to legal protection, despite having violated human interests.

A mutual concern for the interest of humans and non-humans is most clearly demonstrated by medieval ecclesiastical proceedings. When a complaint was filed, an investigator was sent to examine the alleged damage, usually to land or crops, and defense counsel was appointed to represent the non-humans’ interest in continuance of whatever action had caused the disturbance. Defense attorneys, like Chassenée, took their role as advocates seriously, employing a variety of legal strategies to vindicate their clients.

In 1338, a complaint was filed in the ecclesiastical court at Kaltern, Italy, against a swarm of locusts that were devouring crops and laying eggs in the ground, likely causing continuous agricultural devastation. In a rather lengthy and dramatic speech, the locusts’ attorney argued that the insects were only acting as God intended them to behave.

56. EVANS, supra note 3, at 140 (describing a trial where a pig was convicted of disfiguring a child and dressed in a man’s clothes before hanged).
57. Finkelstein, supra note 44, at 83; see Cohen, supra note 45, at 10–11 (describing the trial and conviction of a pig accused of murdering a five-year-old boy and the acquittal of her six piglets, who were found covered in blood but not witnessed to have bitten the child, as “typical in its painstaking insistence upon the observance of legal custom and proper judicial procedure” and “neither a vindictive lynching nor the extermination of a dangerous beast”).
58. Girgen, supra note 5, at 104; see also Hyde, supra note 4, at 704 (“If the grounds for bringing the animal to trial were found to be sufficient, an advocate would be named to defend them or to show cause why they would not be summoned.”).
59. EVANS, supra note 3, at 147 (describing how a hangman who killed a sow without a trial was excommunicated for his act of vengeance).
60. Girgen, supra note 5, at 101; see also Hyde, supra note 4, at 704 (“If the grounds for bringing the animal to trial were found to be sufficient, an advocate would be named to defend them or to show cause why they would not be summoned.”).
61. Girgen, supra note 5, at 101–02; see also Hyde, supra note 4, at 13 (“The arguments between the lawyers on both sides, duly presented in writing, considered and rebutted, cover a wide range of issues.”).
62. EVANS, supra note 3, at 93–100.
and such conduct could not be curtailed simply because it was offensive to man. Similar arguments were made in defense of weevils, moles, slugs, and a wide variety of unsavory members of the environment that were considered a public nuisance.

The remedy for these actions if decided in favor of the plaintiffs, as in the case of our locusts, was excommunication from the land in question by a given date, on pain of being anathematized. Such a sentence likely seems as rational to us as it was effective in its day. Some jurists, including Chassenée, who later served on the judicial assembly of the Parliament of Provence, speculated about the authority and success of such environmental censures, questioning human capacity and correctness in cursing natural beings. This struggle to resolve practical and philosophical flaws in environmental legal proceedings reflects early legal thinkers’ understanding that settling conflict with the natural world was a serious responsibility of the human community. Despite imperfections in the process, deodand law required court-appointed counsel to make a case for the environmental interests at stake when a conflict arose between humans and the natural world.

C. What Happened to Deodand?

Notwithstanding issues of practicality and efficacy, deodand practice remained part of English law until 1846 when it was abolished by Parliament. Was it some revolution of thought that put an end to legally processing crises with non-human material objects? Not quite. With the coming of the railroad came an influx of accidental human deaths, and railway cars proved too expensive to condemn and forfeit to the state. Other advances in the technology and machinery of the Industrial Revolution led to numerous inadvertent deaths, compensation for which would have jeopardized the financial stability of manufacturing markets.

63. Id.
64. Id. at 38–49; Hyde, supra note 4, at 705.
65. EVANS, supra note 3, at 106; Cohen, supra note 45, at 15.
66. EVANS, supra note 3, at 36–37 (noting that slugs were warned repeatedly after ignoring a court’s instructions to vacate an area).
67. Id. at 22–23; see also Hyde, supra note 4, at 717 (noting that among the critics of the practice of cursing animals was Thomas Aquinas).
68. Pervukhin, supra note 22, at 249; Finkelstein, supra note 6, at 170.
69. Pervukhin, supra note 22, at 249; Finkelstein, supra note 6, at 172–73 (noting that in Regina v. Eastern Counties Railway Co. (1842) 152 Eng. Rep. 380, 382; 10 M. & W. 58, 60 a jury awarded £500 for the value of an engine, the boiler of which had exploded during the train’s derailment).
70. William Pietz, Death of the Deodand: Accursed Objects and the Money Value of Human Life, 31 RES: ANTHROPOLOGY & ATHLETICS 97, 105 (1997); Finkelstein, supra note 6, at 170
Although local governments historically initiated deodand proceedings for the protection of the community from a perceived threat, this same rationale was used to abolish the practice in England.\(^{71}\) State officials feared that forcing railroad corporations to pay the price of their cars for each death resulting from train wrecks would bankrupt the industry.\(^{72}\) The economic disruption that was sure to follow led to a prompt dismissal of the entire deodand practice.\(^{73}\) Legal representation and due process for non-human objects languished in the shadow of industrialization and, almost at once, society began to consider deodand practice an embarrassing past pursuit.\(^{74}\) In their move to eradicate the deodand, members of Parliament criticized the practice for its absurdity and argued that it should have been eliminated long before.\(^{75}\)

Although the practice of deodand has been described as “a childish disposition to punish irrational creatures and inanimate objects, which is common to the infancy of individuals,”\(^{76}\) there are hidden merits of the tradition. As long as law has existed, it has attempted to resolve human conflict with the natural world in an orderly and just manner.\(^{77}\) Historically, this meant sincerely-conducted legal proceedings, trials, and court-appointed counsel for non-human members of the environment.\(^{78}\) By funding court-appointed representation for the offender\(^{79}\) and possibly the price of the deodand if it were condemned,\(^{80}\) the law recognized that regulating conflict with the environment was the community’s responsibility. These laws are best understood not as products of irrational minds, but as communal efforts to restore order when an imbalance had

\(^{71}\) Pietz, supra note 69, at 106.
\(^{72}\) Id.; Sutton, supra note 4, at 46–47 (describing the language of deodand cases involving multiple deaths from railroad car derailments as pointing toward “the two key reasons why the deodand was abolished in 1846 — that it was an expensive inconvenience for some transport enterprises and that a more appropriate means of dealing with fatal accidents was now required”).
\(^{73}\) Sutton, supra note 4, at 46 (noting the particular influence of the Sonning railway disaster in which a train from Paddington carrying a number of laborers employed at the Houses of Parliament struck a landslip on Christmas Eve and killed or injured some twenty-five people, each of which were potentially entitled to the price of the deodand).
\(^{74}\) Id. (citing a parliamentary debate in which Deodand practice was described as “extremely absurd and inconvenient”).
\(^{75}\) Pietz, supra note 69, at 106.
\(^{76}\) EVANS, supra note 3, at 186.
\(^{77}\) Finkelstein, supra note 44, at 19–20 (noting the similarity of laws of ancient cultures in prescribing procedures for non-human offenders in the environment).
\(^{78}\) Girgen, supra note 5, at 99.
\(^{79}\) Id.
\(^{80}\) Pervukhin, supra note 22, at 237.
occurred.\footnote{Cohen, supra note 45, at 8, 15 (“[T]he increasing frequency of animal trials was contemporaneous with the so-called revival and acceptance of Roman law, with the great codifications of criminal law and altogether with an ever-increasing coherence of rational systems of law and thought.”).} Humanity used the law both to distinguish itself as the rational capstone of an earthly hierarchy and to correct disturbances in the environmental community.\footnote{Id. at 8.}

II. MODERN LAWS OF NATURE: ENVIRONMENTAL STANDING IN THE UNITED STATES

A. Ideological Shifts

After the abolition of the deodand, legal prosecution of non-human objects dwindled in Western law.\footnote{See Girgen, supra note 5, at 122 (citing only five cases between 1906 and 1927 in which animals were known to have been prosecuted).} Instead of reacting to catastrophic events in nature, the law began to perceive and address threats to the environment by protecting ecosystems and conserving natural resources.\footnote{Favre, supra note 8, at 468 (noting the development of conservation as a legal concept through efforts like the Lacey Act).} Although Western law had regulated the community’s use of common resources since at least 1016,\footnote{Geer v. Connecticut, 161 U.S. 519, 533 (1896).} judicial opinions for these restrictions predominantly discussed the state’s police power\footnote{Favre, supra note 8, at 468 (discussing the seminal case of the time regarding state’s police power rather than the merits of preserving the natural world).} and sparsely recognized the merits of preservation of the natural world.\footnote{Endangered Species Act, 16 U.S.C. § 1531(a)(3) (2012).} By the mid-twentieth century, however, an ideological shift began to take place in the federal government’s approach to environmentalism. In passing the National Environmental Policy Act (NEPA) and the Endangered Species Act (ESA), Congress officially recognized the “esthetic, ecological, educational, historical, recreational, and scientific value” of wildlife and plants.\footnote{Favre, supra note 8, at 476.} Part of this newfound appreciation for the natural world included efforts to grant legal “personality” to things other than humans, much like what had been done already for corporations.\footnote{Favre, supra note 8, at 476.} Although animal-interest activists sought greater protection in the form of legal rights for individuals and species of...
wildlife, it was not until 1972 that this argument was made for inanimate objects in the environment.

Christopher Stone first posed the question, “[s]hould trees have standing?” when he argued that elements of inanimate nature should be granted legal rights in order to sue on their own behalf through volunteer representation. It was this article that inspired Justice Douglas’s well-known dissent in Sierra Club v. Morton, in which he stated: “Contemporary public concern for protecting nature’s ecological equilibrium should lead to the conferral of standing upon environmental objects to sue for their own preservation.” The central theme of this argument was that natural objects had the capacity for legal rights in much the same way as a corporation or even a fetus does, and as such, they should be legally recognized without being tied to the interest of any human person. Although Stone’s arguments for legal rights for trees have never found their way into a majority opinion from the Court, the decades since Sierra Club have only seen an increase in litigation regarding environmental issues. Unfortunately, environmental plaintiffs have struggled to effectively represent the interests of nonhumans. However, despite progressively stringent standing requirements, the mainstream environmental agenda has adhered to Stone’s proposition of “rights for natural objects,” ironically stunting enhanced legal protection for the natural world.

90. See id. at 462 (providing an excerpt from an article written by an animal interest activist supporting legal rights for wildlife).
91. Christopher D. Stone, Should Trees Have Standing?—Toward Legal Rights for Natural Objects, 45 S. CAL. L. REV. 450, 456 (1972) (“I am quite seriously proposing that we give legal rights to forests, oceans, rivers, and other so-called ‘natural objects’ in the environment—indeed, to the natural environment as a whole.”).
93. Stone, supra note 91, at 464–73 (arguing that each prior extension of legal rights, whether granted to women, children, racial minorities, or corporations, has been unthinkable in its day, so the strangeness of the notion of granting legal rights to the environment should not warrant dismissal).
95. See Stone, supra note 91, at 467–70 (discussing multiple cases in which environmental plaintiffs had a difficult time representing the interest of nonhumans).
96. See Defs. of Wildlife, 504 U.S. at 555–56; see Lujan v. Nat’l Wildlife Fed’n, 497 U.S. 871, 872 (1990); see generally Sierra Club, 405 U.S. 727 (referring to denial of standing due to no individualized harm to petitioner or its members); see generally Cetacean Cmty., 386 F.3d 1169 (resulting in the denial of standing to humans suing for harm to the environment based on a very weak or altogether absent showing of harm to any recognized human interest in the name of advancing legal recognition of the natural world).
B. Where Do We Stand?

The problem of standing is at the heart of resolving legal issues on environmental harm.\(^{97}\) The law has long recognized suits over injury to our common natural surroundings through the public nuisance doctrine,\(^ {98}\) but who can bring such a claim in court? Stone argued that courts should allow organizations to apply to represent natural objects and be appointed as guardians with the ability to bring suit.\(^ {99}\) This premise relied on the legal recognition of injury to the environment without an individual human asserting a claim of harm against a polluter or other such offender.\(^ {100}\) To date, however, courts have refused to grant non-human members of the environment standing to bring suit on their own behalf, even with the presence of volunteer counsel.\(^ {101}\)

Since the United States Supreme Court denied standing to the Sierra Club—acting as a representative of the public to prevent environmental destruction for the development of a ski resort—private parties have attempted a variety of strategies to circumvent the lack of standing for natural objects.\(^ {102}\) According to \textit{Sierra Club}, among other standing requirements, the party bringing suit must be among the injured.\(^ {103}\) This showing of individual injury has proven to be the most difficult element for environmental activists to show during the litigation process.\(^ {104}\) Although some government policies include citizen-suit provisions allowing for private parties to enforce environmental regulations,\(^ {105}\) individual suits have not been very successful absent a strong showing of economic injury.\(^ {106}\)

\(^{97}\) See generally \textit{Sierra Club}, 405 U.S. at 740 (articulating a standard for establishing standing based on a showing of injury-in-fact to the party bringing suit).


\(^{99}\) \textit{Stone}, supra note 91, at 462–70 (“On a parity of reasoning, we should have a system in which, when a friend of a natural object perceives it to be endangered, he can apply to a court for the creation of a guardianship.”).

\(^{100}\) Id. at 458–74 (“If the environment is not to get lost in the shuffle, we would do well, I think, to adopt the guardianship approach as an additional safeguard, conceptualizing major natural objects as holders of their own rights, raisable by the court-appointed guardian.”).

\(^{101}\) \textit{Cetacean Cmty.}, 386 F.3d at 1179.


\(^{103}\) \textit{Sierra Club}, 405 U.S. at 735.


\(^{105}\) Endangered Species Act, § 1540(a); Clean Air Act, 42 U.S.C. § 7604 (2012).

\(^{106}\) \textit{Compare Nat’l Wildlife Fed’n}, 497 U.S. at 876–87 (1990) (explaining that affidavits of individual injury were considered insufficient because plaintiffs alleged recreational use of land “in the
Is this evidence that American law and policy tend to be hostile toward expanding environmental legal protection? Not necessarily. Shortly after the Court denied standing to the Sierra Club, it found that a group of law students, together with the Environmental Defense Fund, had standing to sue the Interstate Commerce Commission for failure to prepare an environmental impact statement mandated by the EPA for a rate increase of railroad operations. The plaintiffs argued that the cost of recycled material would increase, and their enjoyment of local forests and streams would be diminished by the destruction of natural resources from the non-use of the more expensive recycled material. The Court accepted this showing of injury and specifically noted that courts should not deny standing just because many people suffer the same injury.

In 1995, the Ninth Circuit found that a county had standing to allege a procedural injury for the United States Fish & Wildlife Service’s failure to prepare an environmental document according to NEPA standards. The court agreed with Douglas County that the county’s lands might be affected by the supervision of the neighboring federal property, and thus, its interests were in the recognized zone of concern for the environment. Whether the issue in an environmental case appears to be procedural (such as noncompliance with federal regulations regarding paperwork) or substantive (such as a threat to a species), courts stress the importance of actual use and the existence of a geographical nexus to the affected area. It appears that the judicial system is prepared to grant standing to a wide variety of potential plaintiffs bringing suits for environmental harm.

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108. Id. at 676.
109. Id. at 685–86.
110. Douglas Cty. v. Babbitt, 48 F.3d 1495, 1495 (9th Cir. 1995).
111. See, e.g., Sw. Ctr. for Biological Diversity v. Fed. Energy Regulatory Comm’n, 967 F. Supp. 1166, 1171 (D. Ariz. 1997) (showing that because members live in the state where the endangered species is found, visit the specific area, and maintain a factual and scientific understanding of the species, plaintiff has shown sufficient direct contact for standing); Comm. to Save the Rio Hondo v. Lucero, 102 F.3d 445, 449–51 (10th Cir. 1996) (explaining that plaintiffs must establish a geographical nexus to or actual use of the site where alleged injury will occur, and explaining how affiants established geographical nexus near site); Sierra Club v. Cedar Point Oil Co., 73 F.3d 546, 555–58 (5th Cir. 1996) (showing that living near the source, using it for recreational activities, and being dependent upon decent water quality is sufficient to establish a fairly traceable injury in fact); Didrickson v. Dep’t of the Interior, 982 F.2d 1332, 1340–41 (9th Cir. 1992) (stating that those who work or observe the threatened animal in the very area of the world where the species is threatened will have an injury).
provided that there is a showing of actual human injury. A few courts have even declined to challenge standing *sua sponte* when species of the environment themselves were named as plaintiffs and defendants did not raise the issue. In other words, when humans bring a cause of action based on injury to their local environmental communities, courts have treated this close relationship to the affected area as substantial in granting standing to sue. Individual parties who regularly interact with local ecosystems most effectively prove injury sufficient to satisfy legal requirements.

A desire to increase individual awareness and accountability for human impacts on the environment also can be found in legislative policies. From the citizen-suit provisions of the ESA and NEPA, to the passing of the Clean Water Act and Clean Air Act, environmental concerns have become increasingly prioritized. Federal protocols have not focused exclusively on the plants and animals of the ground but have extended to the skies in regulating pollution of the atmosphere through Tradable Emission Permits. Efforts to understand and ensure a plan for maintaining a healthy, natural world are present on the international stage as well. The United Nations Educational, Scientific, and Cultural Organization created a controlled ecosystem study known as “Man in the Biosphere” to better observe the role of human impact in ecology and to develop and improve ecological sustainability options based on the data. In 1992, the Convention on Biological Diversity adopted the Biodiversity Treaty, recognizing an international focus on conservation of natural resources and preservation of balanced ecosystems as global goals.

Despite this growing global sentiment for ecological responsibility, a tension exists in the current environmental conversation. Because finding appropriate legal representation for the environment has proven difficult, environmental theorists have fixated on the need to separate the interests of non-humans in nature from humanity and grant them distinct recognition under the law in the form of rights. But, the language in legal debates between human interests and interests of natural objects often sounds

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113. See, e.g., Mt. Graham Red Squirrel v. Madigan, 954 F.2d 1441, 1447–48 n.13 (9th Cir. 1992) (stating that the court is not considering the standing of the Mt. Graham Red Squirrel because the issue was not raised); see also N. Spotted Owl v. Hodel, 716 F. Supp. 479, 479 (W.D. Wash. 1988) (showing a case where standing was not addressed even though the northern spotted owl was listed as plaintiff).

114. See generally Clean Air Act, 42 U.S.C. §§ 7651(a)–(o), 7661 (2012) (discussing the ability for companies to buy or sell emission permits).


irreconcilable because we are not even comparing apples and oranges but humans and trees. It is not hard to imagine that in any case where the interests of the environment are pitted against those of humanity, the latter will trump the former almost without exception. So, what is the problem in the current conversation about the place of the non-human members of the environment in the law? Many environmentalists have focused their agendas on achieving “legal rights” for natural objects and have neglected a more important and more challenging dialogue, implicating the interests and responsibilities of the human role in the natural community.\textsuperscript{117}

III. THE DANGER OF DIVORCING COMMUNITY INTERESTS

A. Philosophical Motivations

Distinctions in the law between “personhood” and “thinghood” can be traced back to Roman and Greek jurisprudence.\textsuperscript{118} Beings that lacked free will were considered \textit{res} and not \textit{personae}, indicating their property status in society.\textsuperscript{119} Things considered property were incapable of possessing legal rights.\textsuperscript{120} Roman tradition further designated some things as \textit{res communes} (things owned in common), which included the air, the seas, and running water.\textsuperscript{121} The idea that the natural world existed as community property prevailed in the development of common law regarding nature as existing for the purpose of human use and therefore, subservient to humanity’s interests.\textsuperscript{122} Undoubtedly, this perception skewed the language of early judicial opinions to spend more words explaining the concepts of governmental regulation and police power doctrine than our

\textsuperscript{117} See Favre, \textit{supra} note 8, at 507–08 (arguing that rights for animals and ecosystems will provide sustainable protection for the environment); Wise, \textit{supra} note 1, at 544 (arguing that denying legal rights to non-human animals is part of a primitive hierarchical worldview that hinders the development of the law); Cormac Cullinan, \textit{Do Humans Have Standing to Deny Trees Rights?}, 11 \textit{BARRY L. REV.} 11, 14–15 (2008) (arguing that non-human things in the environment possess inalienable rights by virtue of existence).

\textsuperscript{118} Wise, \textit{supra} note 1, at 493 (“From the beginning, ‘person’ in Roman law comprehended every being who had rights, while ‘thing’ included everything that could be considered as the object of the right of a person.”).

\textsuperscript{119} Id. at 493 (“Nonhuman animals never shed their property status, never had rights, and never were subject to duties.”).

\textsuperscript{120} Id. (“The legal right even arbitrarily to deprive nonhuman animals of their lives and liberties and to exert total control over those nonhuman animals that they allowed to live was so ingrained in Roman law that history reveals not a single instance of a Roman jurist questioning its legality.”).

\textsuperscript{121} Id. at 503.

\textsuperscript{122} Id. at 543 (“It was only in the eighteenth century that Western legal philosophy commenced its long separation from a theology that was seen as the ultimate source of law and posited the inherent and immutable superiority of human over nonhuman animals.”).
interdependence on nature and our need to protect the environment.\textsuperscript{123} This anthropocentric approach in law that regarded nature as a collection of resources for human use and management became known as conservationism.\textsuperscript{124}

It was in reaction to this human-centered tone of the law that early and mid-twentieth century environmental writers, like Aldo Leopold and John Muir, began to talk about the ethics of preservation.\textsuperscript{125} Preservationists seek to shape environmental law and policy around the idea of ecological equality, believing that nature exists for its own sake and humans are not inherently superior to other living things.\textsuperscript{126} Although not necessarily dominant, this perspective greatly influenced the tone of environmental legal ethics in the latter half of the twentieth century and directed the mainstream environmental movement away from a conglomerate assessment of community interests when determining the value of natural resources.\textsuperscript{127}

\textbf{B. What’s Wrong with Rights?}

Ever since Stone argued for legal rights in the form of personhood for natural objects, environmentalists have attempted to assimilate plants and animals with humanity in a way that echoes the bizarre anthropomorphization of deodand practice.\textsuperscript{128} Stone analogizes the denial of legal rights for natural objects to the once-unrecognized legal personhood of children, prisoners, women, and racial minorities.\textsuperscript{129} Recently, a converse approach to expanding legal personhood has been attempted by arguing that

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\textsuperscript{123} See Geer v. Connecticut, 161 U.S. 519, 522 (1896) (concluding that the solution to the issue “involves a consideration of the nature of the property in game and the authority which the state had a right lawfully to exercise in relation thereto”).
\textsuperscript{124} Carlson, supra note 102, at 965 (describing the motivation of conservationists as “not to consume . . . resources until depletion, but rather to manage them wisely for human use”).
\textsuperscript{125} Id. at 964-65.
\textsuperscript{126} See PAUL W. TAYLOR, RESPECT FOR NATURE: A THEORY OF ENVIRONMENTAL ETHICS 13 (1986) (arguing that “living things of the natural world have a worth that they possess simply in virtue of their being members of the Earth’s Community of Life” and that their worth “does not derive from their actual or possible usefulness to humans, or from the fact that humans find them enjoyable to look at or interesting to study”).
\textsuperscript{127} Cullinan, supra note 117, at 11 (noting Stone’s influence in Sierra Club and continued impact on environmental discussion); Carlson, supra note 102, at 970 (arguing that Stone’s and other preservationists’ agenda to separate environmental interests from human interests will, over time, erode environmental protection).
\textsuperscript{128} See, e.g., Cullinan, supra note 117, at 20 (referring to trees as “our ancient elder cousins”); see Steven M. Wise, Legal Personhood and the Nonhuman Rights Project, 17 ANIMAL L. 1, 6 (2010) (arguing that great apes and cetaceans as well as humans possess significant bodily integrity and bodily liberty to create autonomy and dignity).
\textsuperscript{129} Stone, supra note 91, at 451.
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humans are not entitled to personality merely by being *Homo sapiens.*

Arguments for granting personhood to non-human animals often take on an urgent feel and deny the efficacy of alternative proposals for enhancing legal protection of the environment.

This strain of discussion presents serious philosophical issues that confuse an already tangled legal situation and distract from the proper focus of environmental policy. Despite exhaustive lists of similar biological functions, it is by no means commonly recognized in law or philosophy that animals are as autonomous as human beings and should, therefore, be granted personhood. In fact, humanity’s rationality has long been considered the dividing factor between mankind and the rest of nature.

In an effort to obliterate the longstanding notion of hierarchy in the natural world, proponents of rights for natural objects employ a Darwinian cosmology that blurs the distinction between humanity and other species. But if we accept Darwin’s position that the difference between the rationality of humans and other species is “one of degree and not of kind,” the debate will merely refocus on varying degrees of autonomy, which perhaps adds more levels in the pyramid but does little to create a horizontal cosmology. It is virtually impossible to argue that all living things exist at one level of autonomy and deserve equal protection under the law. The impulse to reject hierarchy in environmental dialogue has extended as far as arguing that there is “a logical duty to limit human

130. Wise, *supra* note 128, at 7 (“I have never encountered either a philosophical or jurisprudential argument—as opposed to a mere declaration—that rationally claims that such a *Homo sapiens* human merely in form, is entitled to legal personhood solely because she is a member of the species *Homo sapiens.*”).

131. See Favre, *supra* note 8, at 476 (arguing “the future of wildlife within our legal system turns upon the issue of legal personality”).

132. Id. at 477–78.

133. Wise, *supra* note 1, at 543; Keith Thomas, *Man and the Natural World: Changing Attitudes in England* 17–30 (1983) (describing numerous historically accepted distinctions between humans and animals including the belief that “animals were prisoners of their instinct, guided only by appetite and incapable of free will”).

134. Wise, *supra* note 1, at 524; see Cohen, *supra* note 45, at 36 (arguing that medieval practices of providing trials and representation to non-human parties “did not mean that animals deserved the same rights as people” and that animals “were subject to the universal law that had placed them below man, and must refrain from harming him”).

135. Wise, *supra* note 1, at 544–45 (“The twentieth century also has witnessed the birth of the scientific disciplines and discoveries that have powerfully supported Darwin’s notion of evolution by natural selection and have steadily and more truly revealed the natures of both human and non-human animals. . . . Because law values the past merely for having been, and because judges routinely misconstrue humanity’s place in Darwin’s world, judges routinely rely upon the prior judicial decisions and jurisprudential writings of those who lacked any modern scientific knowledge.”).


137. See, e.g., Favre, *supra* note 8, at 508 (“[T]he ethical logic of equality diminishes when faced with the reality of politics and resource limitations that define the legal world.”).
population growth” to sustain wildlife habitat and support biodiversity.\textsuperscript{138} That impulse has also likened the human presence on earth to that of a pathogen, which the planet will exterminate by raising temperatures beyond hospitable levels unless we become more symbiotic.\textsuperscript{139}

In law, the push for rights for non-human objects does nothing to advance the goal of finding a way to provide increased environmental representation in litigation that is both functional and sustainable. Although many have advocated that the environment should be granted personhood in the same way the law was willing to recognize corporations,\textsuperscript{140} it is because corporations are institutions of people that they have legal personality.\textsuperscript{141} It has been proposed that natural objects should be given rights but perhaps not to the extent of recognized human rights.\textsuperscript{142} One does not have to ponder the concept of “limited rights” for the environment for very long to find that there is hardly an articulable conversation to be had on the subject. Should a river be granted the right to flow but not to flood? Should courts recognize a tree’s right to grow and not be cut down but only if it remains healthy or does not pose a threat to a human dwelling? If a tree is granted rights, will it not also incur prosecutable liabilities and perhaps return us to absolute deodand practice of old?\textsuperscript{143}

This line of thinking not only quickly leads to, perhaps, insurmountable legal problems\textsuperscript{144} but also, sadly, has distractingly diverted the environmental conversation since first proposed in 1972. Very few other proposals have received significant attention from the environmental

\begin{itemize}
  \item[138.] Id. at 484.
  \item[139.] See, e.g., Cullinan, supra note 117, at 18 (arguing that “[c]ompliance with the organizing principles of the higher order holon is a condition of continued membership in it” and that if we do not become more symbiotic, the Earth, “like a host animal infected with pathogens, must either kill the pathogen [for example, by global warming that raises average temperatures to levels inhospitable to human life], or enter into a new symbiotic relationship with it” perhaps on the basis of a far lower human population).
  \item[140.] Favre, supra note 8, at 499; Stone, supra note 91, at 457.
  \item[142.] Stone, supra note 91, at 457–58 (suggesting that “to say the environment should have rights is not to say that it should have every right we can imagine, or even the same body of rights as human beings have . . . [or] that everything in the environment should have the same rights as every other thing”).
  \item[143.] Id. at 481 (noting that “if ‘rights’ are to be granted to the environment, then for many of the same reasons it might bear ‘liabilities’ as well” given that “[r]ivers drown people, and flood over and destroy crops; forests burn, setting fire to contiguous communities”).
  \item[144.] Potts, supra note 98, at 576 (arguing that “[g]ranting legal standing to animals and inanimate natural resources would require a great shift in the legal system” and that it “would be difficult to persuade a legislature, much less the judicial system or people in general, to accept it”).
\end{itemize}
community, though not for lack of meritorious arguments. 145 Most disturbingly, in our efforts to find the correct legal place for non-human members of the environment, we may have forgotten our own. In this attempt to reorganize a natural order perceived by societies across the globe and structured in their laws for thousands of years, we have neglected our role as caretakers responsible for our surroundings and lost a proper understanding of the value of our home. 146 To be a tree is not to be human, but perhaps, it is still something to be a tree.

C. Restoring Humanity with Hierarchy

In 1998, Ann Carlson offered a fresh perspective on the issue of environmental standing. 147 In contrast to the negative view of most environmentalists concerning the heightened standing requirements in the wake of court rulings since the 1970s, 148 Carlson argued that the stricter regulations would provide unanticipated advantages for environmental plaintiffs. 149 Specifically, Carlson believed that a standing requirement that focused on human injury would lead plaintiffs to show why environmental resources deserved protection and would expand consideration of who is affected by the degradation of those resources, which would inspire greater environmental protection in time. 150

Because the issue of standing is one of jurisdiction and may be raised at any time, including by the court sua sponte, 151 environmental plaintiffs often make a weak showing of injury at early trial stages in an attempt to

145. See id. at 577 (arguing, based on the Coase Theorem, that allowing individuals to purchase rights to natural resources in a form of free market environmentalism would increase environmental protection).

146. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 133 (C. & J. Rivington et al. eds., 1824) (explaining that humans, even in a state of liberty, do not have the liberty to destroy “any creature in his possession” unless “some nobler use than its bare preservation calls for it”).

147. Carlson, supra note 102.

148. Id. at 933–34 (noting that most commentators regard the increasingly strict standing requirements since Sierra Club as “damaging to the environmental cause” and have sought “either to eliminate the central standing requirement that environmental plaintiffs demonstrate ‘injury in fact,’ or to render the requirement essentially meaningless”).

149. Id. at 935 (“By making the requirement more stringent, the Lujan cases may actually push environmental groups to grapple more seriously with the relationship between humans and environmental resources. That grappling, I argue, may help environmental plaintiffs win more cases and achieve deeper, broader relief in the cases they do win.”).

150. Id. at 936 (“Stricter standing rules could even lead environmentalists to think differently both about who is affected by the degradation of an environmental resource. . . . [A] change in focus could, in turn, help environmental groups reach beyond their traditional constituencies to people who have not previously considered themselves environmentalists.”).

151. See FED. R. CIV. P. 12(h)(3) (“If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.”).
bypass the issue unless forced to offer evidence.\textsuperscript{152} This strategy of alleging general and seemingly unsubstantiated harm has neither yielded favorable litigation results \textsuperscript{153} nor enhanced awareness of the common goal of humanity to protect natural resources.\textsuperscript{154} It is Carlson’s position that environmental litigation and law would be greatly enhanced by “a stronger focus on the human relationship with the environmental resource at issue.”\textsuperscript{155} Because this interdependence has been largely ignored and legal discussion of environmental protection so often has pitted the rights of humans against the interests or “rights” of natural objects, it has been argued that there is “no shared, positive understanding of the human relationship to the natural world” in the environmental movement.\textsuperscript{156}

It is clear that preservationists, who advocate for rights for the environment, and conservationists, who focus on human interests at stake in environmental litigation, share a common goal of enhancing legal protection for the natural world.\textsuperscript{157} Nevertheless, the philosophical distinction between the two streams of thought may prove important for understanding the power of the connection between humanity and nature.\textsuperscript{158} If standing were granted to non-human objects to sue in their own capacity, what need would there be to present testimony at trials of human reliance on natural resources? Even the citizen-suit provisions of the Clean Water Act and the ESA, heralded as profound developments in environmental law, do not require such showing of the value of the natural resource in question, provided some satisfactory measure of human harm has been shown.\textsuperscript{159} Embracing an anthropocentric approach to standing in environmental law, however, forces plaintiffs to examine and explain the injury borne by specific communities or individuals in the degradation of our ecosystems.\textsuperscript{160} It is almost impossible that these efforts would not raise widespread

\begin{thebibliography}{99}
\bibitem{152} Carlson, supra note 102, at 953.
\bibitem{153} See Wilderness Soc’y v. Griles, 824 F.2d 4, 12 (D.C. Cir. 1987) (dismissing for lack of standing for plaintiff having “not pointed to any specific lands that they wish to use” that would have been reclassified).
\bibitem{154} Carlson, supra note 102, at 934–35 (“[E]nvironmental organizations have, at the Supreme Court level, also consistently advocated either a very loose application of the injury-in-fact standard or its elimination.”).
\bibitem{155} Id. at 963.
\bibitem{156} BRYAN G. NORTON, TOWARD UNITY AMONG ENVIRONMENTALISTS 9 (1991).
\bibitem{157} Carlson, supra note 102, at 967.
\bibitem{158} Id. at 967 (“Believing that a species should be preserved because it has an inherent right to exist is quite different from believing that species preservation is important because of the benefits biodiversity may produce for humans.”).
\bibitem{159} Id. at 977.
\bibitem{160} Id. at 986–87 (“A standing inquiry focused on injury in fact will obviously not transform national environmental groups into organizations focused only on the concerns of the common person. . . . But a human-centered standing inquiry at least pushes environmental groups to think about who benefits from environmental protection and how they benefit.”).
\end{thebibliography}
awareness of the importance of humanity’s impact on the environment and our responsibility to guard our natural resources vigorously on every front available to us.

For example, in 1973, a group of citizens brought suit under the ESA to stop the Tennessee Valley Authority (TVA) from constructing a dam in the Little Tennessee River because damming the water would totally destroy the habitat of a local endangered species, the snail darter minnow.\textsuperscript{161} The case drew heavy criticism as an example of environmentalism gone wild, immortalized under the slogan “fish bites dam.”\textsuperscript{162} When viewed from the perspective of “minnow interests” versus “human interests,” undoubtedly, it seems impossible to find those interests equal, if even comparable. Less discussed in the discourse of those who followed the case, however, were the interests of the families in the Tennessee Valley who depended on the river for watering farms, fishing, or recreational and esthetic uses.\textsuperscript{163} Because it served as both a feeder and food supply for many species, the absence of the snail darter would have caused a severe crisis in the local ecosystem, as had already happened in other parts of the Little Tennessee River.\textsuperscript{164}

Although later superseded by a congressional bill exempting the TVA project from the ESA, the Supreme Court affirmed the injunction prohibiting construction of the dam.\textsuperscript{165} Sadly, mainstream media chose to ridicule the case and its outcome as extremist environmentalism instead of emphasizing the importance of biodiversity in the local ecosystem and explaining the potentially devastating effects on the river and the human way of life dependent on it.\textsuperscript{166} In order to combat such skeptical social attitudes, litigators should present a more compelling legal and moral narrative by highlighting human interests at stake in the preservation of the natural world instead of downplaying humanity’s relationship to the environment in favor of inflating the proposed interests of non-human objects.\textsuperscript{167}

Even accepting that a human-centered approach to environmental standing provides the best long-term perspective on legal representation for

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\textsuperscript{163} Carlson, supra note 102, at 973.
\textsuperscript{164} Id.
\textsuperscript{165} Hill, 437 U.S. at 153.
\textsuperscript{166} Carlson, supra note 102, at 973.
\textsuperscript{167} Id. at 976 (“[H]ighlighting the complex human relationship with an environmental resource in a way that is either explicitly human-centered or that embodies a more nuanced notion of the role environmental resources play in human existence seems more compelling and persuasive than ignoring or downplaying that human relationship.”).
natural objects, the question becomes: Who should represent the human interests at stake? Perhaps it was once fathomed that the national government in the form of the Department of Interior would be capable to protect public lands.\textsuperscript{168} But that has proven to be an impossible goal, as shown by federal policies that include provisions for citizen suits regarding violations of environmental regulations.\textsuperscript{169} Yet, individual citizen suits have had limited success and have often failed to show sufficient injury for standing requirements.\textsuperscript{170}

These failures to find sufficient standing have caused environmentalists to hone in on Stone’s suggestion that interested private parties should apply to courts to be appointed legal guardians for natural resources.\textsuperscript{171} He suggested that there would be no shortage of organizations willing to play such a role, referencing the Sierra Club, Environmental Defense Fund, and Natural Resources Defense Counsel.\textsuperscript{172} In seeking to represent environmental interests, however, national establishments have often failed to provide sufficient showing of injury in the aftermath of \textit{Sierra Club}.\textsuperscript{173} Perhaps the quest for appropriate legal representation of environmental interests can be answered by asking whose interests are being represented. Focusing on natural objects’ interests in existing has led to currently unsolvable legal issues and seemingly irreconcilable philosophical disputes. But there are also human interests at stake. Whose? Everyone’s.

IV. WHY LOCAL COURT-APPOINTED COUNSEL BEST SERVES ENVIRONMENTALISM

\textbf{A. What Deodand Got Right}

It would seem that modern environmentalism has brought us almost full circle to medieval deodand practice in our efforts to color Western law with recognition of our responsibility to preserve the natural world. While the practical implications of some of the more extreme of these proposals (granting legal personhood to trees) may rightly give us pause; perhaps there is a reason we find ourselves returning to courts to iron out our

\begin{itemize}
\item \textsuperscript{168} Stone, \textit{supra} note 91, at 472; Knight v. U.S. Land Ass’n, 142 U.S. 161, 181 (1891).
\item \textsuperscript{170} See \textit{Defs. of Wildlife}, 504 U.S. at 555–56 (giving an example of a case failing to show sufficient injury for standing requirements); \textit{Nat’l Wildlife Fed’n}, 497 U.S. at 872.
\item \textsuperscript{171} Stone, \textit{supra} note 91, at 465.
\item \textsuperscript{172} \textit{Id.} at 466 (“The potential ‘friends’ that such a statutory scheme would require will hardly be lacking.”).
\item \textsuperscript{173} See, e.g., \textit{Defs. of Wildlife}, 504 U.S. at 555–56 (denying standing to individual members of national organizations).
\end{itemize}
relationship with the environment. What does deodand practice tell us about how humanity sought to resolve conflicts with non-human objects in our surroundings historically? It was the responsibility of the community to ensure order and justice in the local environment through legal processes.\(^{174}\)

Not only were trial practices and penalties for non-human offenders mandated by the law, but communal funds paid for court-appointed counsel to represent the interests of the human complainants and the non-human defendants.\(^{175}\) Non-human offenders in the environment were not to be punished without proper presentations of evidence, fair trials, and substantiated convictions.\(^{176}\) Humans were not permitted to bypass legal processes for resolving conflicts with the natural world,\(^{177}\) and defense attorneys performed their duty to represent their non-human clients earnestly.\(^{178}\) However oddly these practices played out, it is certain that they were an attempt to ensure that conflicts between humans and the natural world were addressed justly, procedurally, and according to the requirements of the law that applied to the entire community. These legal traditions were based on a hierarchical understanding of the natural world,\(^{179}\) which viewed humans as rationally supreme caretakers responsible for providing sustainable protection to the interests of the entire community.\(^{180}\)

It is not coincidence that today the actions brought by local communities of affected areas accomplish more through litigation than the

\(^{174}\) Pervukhin, supra note 22, at 253; Stone, supra note 91, at 475. This sense of responsibility even in the midst of advocating for rights for natural objects: “Indeed, one way—the homocentric way—to view what I am proposing so far, is to view the guardian of the natural object as the guardian of unborn generations, as well as of the otherwise unrepresented, but distantly injured, contemporary humans.” \textit{Id.}

\(^{175}\) Girgen, supra note 5, at 99 (noting that “[i]n spite of their nontraditional defendants, both the ecclesiastical and secular courts took these proceedings very seriously and strictly adhered to the legal customs and formal procedural rules that had been established for human criminal defendants” and that “[t]he community, at its own expense, provided the accused animals with defense counsel, and these lawyers raised complex legal arguments on behalf of the animal defendants”).

\(^{176}\) \textit{Id.} at 101 (describing how a complaint alleging harm must be brought, a judge must send someone to investigate the damage allegedly caused by the defendants, a procurator must be appointed to represent the defendants, and a full trial must be held before any judgments could be pronounced).

\(^{177}\) EVANS, supra note 3, at 147.

\(^{178}\) Girgen, supra note 5, at 101 (noting that defense counsel “could avoid all arguments by the use of dilatory tactics” or “claim that the court had no jurisdiction over the animals” and “try to vindicate their clients’ actions”).

\(^{179}\) Wise, supra note 1, at 488; Finkelstein, supra note 44, at 83; see Cohen, supra note 45, at 37 (arguing that animal trials “defined man’s relationship with the animal kingdom by virtue of his judicial rights over it” and “reaffirmed society’s self-image as universally just” while providing “the setting for a communal ritual of self and environment purification from inimical forces”).

\(^{180}\) Cohen, supra note 45, at 15.
actions brought by individual private parties or national organizations.\textsuperscript{181} Both county prosecutors and groups of community members have successfully met standing requirements when suing for environmental harm. Procedurally, this reflects the preference for a geographical nexus to the natural resource in question so often stressed in judicial opinions discussing standing since the 1970s and present in ecclesiastical deodand proceedings.\textsuperscript{182}

When human interests propose to alter the local ecosystem in an irreversible way, a case should be made for the interests of communities affected by the loss of biodiversity or degradation of natural resources. Many federal regulations already require proponents of industrial expansions to conduct studies on estimated ecological impacts.\textsuperscript{183} The results of these studies should be carefully considered and debated before decisions to jeopardize or destroy wildlife habitats are made. In many cases, once the ecological impacts are understood, it is likely that interested parties will petition courts to grant standing to sue for the imminent harm. Germany has embraced this outcome with its Verbandsklagerecht laws, which grant standing to organizations who seek to promote nature conservation for non-pecuniary purposes.\textsuperscript{184} But, it should not be left up to volunteer counsel or national organizations to represent the interests of the community in preserving the natural environment in these situations. Instead, courts should appoint local counsel to represent the human interests at stake in the loss of or abuse to the natural resource in question.

\textsuperscript{181} Compare Students Challenging Regulatory Agency Procedures, 412 U.S. at 670 (granting standing to a group of individuals who made regular use of the locally affected area), and Douglas Cty., 48 F.3d at 1495, with Sierra Club, 405 U.S. at 727 (denying standing to a national organization suing over a specific plot of land), and Cetacean Cnty., 386 F.3d at 1179 (granting standing to a group of individuals who made regular use of the local affected area and to a county prosecutor who proved land within the county’s borders would be affected, but not to a national organization suing over a specific plot of land or to a private party seeking to represent the entire cetacean community).

\textsuperscript{182} See, e.g., National Environmental Policy Act, 42 U.S.C. § 4321 (2012) (requiring companies seeking to build certain types of industrial and commercial operations, particularly manufacturing structures, to conduct extensive surveys and evaluations of probable and possible effects on the surrounding natural habitats and the potential degradation in environmental quality for specific ecosystems and species, particularly if a protected area or endangered species is jeopardized).

\textsuperscript{183} See, e.g., National Environmental Policy Act, 42 U.S.C. § 4321 (2012) (requiring companies seeking to build certain types of industrial and commercial operations, particularly manufacturing structures, to conduct extensive surveys and evaluations of probable and possible effects on the surrounding natural habitats and the potential degradation in environmental quality for specific ecosystems and species, particularly if a protected area or endangered species is jeopardized).

\textsuperscript{184} Magnotti, supra note 104, at 492 (describing how the German Federal Nature Conservation Act allows for an organization that has not been subjected to any violation of its rights and that wishes to “promote for non-pecuniary purposes and not merely for a limited period of time, the causes of nature conservation” to file for a legal remedy).
This idea is not unprecedented in legal thought or in state legislation. The California Water Code allows the state attorney general to petition a court to impose civil liability on citizens who violate the code’s provisions concerning pollution and unauthorized discharge into communal water systems. Similarly, some states have begun to facilitate the idea of localized environmental litigation by creating trust funds for the benefit of non-human legal representation. Legal efforts like these, recognizing community responsibility to ensure environmental protection, remain our best hope for restoring a correct understanding of the role of humanity in protecting the natural world and sustaining a thriving ecology.

B. Sustainable Legal Protection for the Environmental Community

Because we are currently experiencing an increase in environmental litigation, it is crucial that we understand our role as protectors and careful managers of the natural world and that this understanding manifests in our legal systems. The goal of modern environmentalism should be to enhance the most effective and sustainable legal representation for ecological injuries. Despite the trend of current environmental conversation, it is in the best interest of environmental plaintiffs to focus on human interests at stake in the loss of biodiversity in our ecosystems rather than seek individual redress for the interests of non-human parties. For example, scientists who study climate change have argued that increasing individual awareness of human impacts on nature is the only viable option for ensuring clean-air sustainability and reducing atmospheric pollution. Divorcing human and

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185. See Burke, supra note 24, at 29–30 (arguing that deodand practice has not expired in the United States because the Attorney General or States Attorney has essentially replaced the function of the sovereign in prosecuting accidental deaths).
186. CAL. WATER CODE § 13385(b)(2) (Deering 2016).
188. Carlson, supra note 102, at 976 (arguing that “a human-centered approach to environmental standing at least offers the potential to reach beyond old environmental constituencies and to see the human complexity in environmental policy” and that “[r]esource-centered litigation makes no room for such perspectives”).
189. Michael P. Vandenergh, From Smokestacks to SUV: The Individual as Regulated Entity in the New Era of Environmental Law, 57 VAND. L. REV. 515, 517–18 (2004) (“If asked to envision a polluter, most of us would describe a tall stack from a large industrial facility billowing smoke or a pipe releasing foaming liquid into a stream. The environmental laws and academic commentary of the last thirty years reflect this common conception. With few exceptions the environmental laws enacted since the 1970s have directed command and control requirements at large industrial sources of pollution... We are polluters. Each of us... Industrial sources continue to be major sources of pollution, and other important pollution sources exist, but individuals are now the largest remaining source of many pollutants.”) Debates over effective measures to combat climate change have, until recently, centered on restrictions for large corporations and apparent mass polluters. In the last several years, however, an increasing awareness of the imprint of the individual human on the planet has shifted the nature of concern. Id.
environmental interests likely will do more to harm than to help lasting protection of natural resources.

The interests at stake belong not only to the current members of the community who avail themselves of the esthetic, ecological, educational, historical, recreational, and scientific value of natural resources but also to future inhabitants who one day would do the same. In the summer of 2015, Pope Francis released his encyclical letter, *Laudato Si’*, which focused exclusively on the moral imperative of environmentalism. Pope Francis describes the responsibility to ensure functional human interaction with the natural world as one common to all people as members of the human race. Thousands of years have passed since the earliest societies instituted laws regulating the relationship of humanity and our surroundings, and still we are searching for the best processes to maintain order and justice in our ecological communities. Perhaps it is currently even more essential that we understand our role and responsibility in guaranteeing legal protection to the environment because lately we have found ourselves to be masters of the natural world, quite capable of its subjugation and destruction, and not so often victims of it.

**CONCLUSION**

Far from being a novel concept, wildlife and biodiversity have long been considered an indicator of society’s attentiveness to environmental stability and have been afforded legal processes and protections for thousands of years. By recognizing the value of non-human members of the environment and the connectedness of human interests to natural resources, we assume our responsibility to care for the natural world and afford the collective community a place under the law. By allowing court-appointed counsel to represent the value and importance of the non-human environment to humanity, we are essentially litigating for our own posterity.

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191. *Id.* ¶ 13–14 (“The urgent challenge to protect our common home includes a concern to bring the whole human family together to seek a sustainable and integral development, for we know that things can change. . . . We need a conversation which includes everyone, since the environmental challenge we are undergoing, and its human roots, concern and affect us all.”).
192. *Michael J. Manfredo, Who Cares About Wildlife?: Social Science Concepts for Exploring Human-Wildlife Relationships and Conservation Issues* 2 (2008) (“People worldwide have different reasons for caring about wildlife: Wildlife are a source of attraction and fear, they have utilitarian value and symbolic meaning, they have religious or spiritual significance, and they are a barometer measuring people’s concern for environmental sustainability.”).
and fostering healthy, societal relationships for the future. And in the process, we cannot help but extend legal protection and generate concern for the other non-human members of our environmental communities, as has been the habit and goal of the law in countless cultures over the centuries. Because the law does and should seek to provide sustainable protection for the well-being of our communities, rats and trees need lawyers too.

194. See Cohen, supra note 45, at 35 (describing uses of justice as "excellent mirrors of the mentality of an age" and stating that "they delineate man’s concept of necessary and desirable societal relationships" and "reveal man’s view of his place within the universal scheme").
**Fragmentation of International Environmental Law and the Synergy: A Problem and a 21st Century Model Solution**

*John Carter Morgan III*

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INTRODUCTION

International environmental law focuses on promoting the wellbeing of humans and the environment, yet it is composed of moving parts that are complex and multi-level. While its goal is “to promote cooperation among states in order to achieve joint gains,”¹ international environmental law notoriously treats issues in isolation and lacks the capacity to deal with the constant push and pull between humans and nature.² The international agreement method allows any number of parties to negotiate and agree to any combination of terms and to make relationships on the international stage between local, national, and regional parties, whose interests and mutual obligations vary. Parties can continue to create multilateral environmental agreements (MEAs) even if they overlap, contradict, and yield less-than-satisfactory results. The outcome of the international agreement method is the proliferation of MEAs, which inevitably creates fragmented regimes. Fragmentation leads to the disarray of regulated entities and a lack of foundation and legal order for the international community, which “jeopardizes the credibility, reliability, and, consequently, the authority of international law.”³

Although fragmentation is a persistent feature of international environmental law, the cooperation and coordination measures implemented among three conventions that regulate chemicals, called the

². Cinnamon Carlarne, Delinking International Environmental Law & Climate Change, 4 MICH. J. ENVTL. & ADMIN. L. 1, 18 (2014) (describing international law as “an essential but idealized system that often conceptualizes and treats issues in isolation”).
“Synergy,” is a pragmatic example of how to solve problems associated with fragmentation. When the parties to the Basel, Rotterdam, and Stockholm Conventions created the Synergy, they avoided creating duplicate institutions. Instead, they undertook the greatest international treaty merger of the 21st century by enhancing information-sharing measures and strengthening their core administrative relationships. The Synergy is the leading example of how to solve the problem of fragmentation throughout international environmental law.

While its primary focus is on how the Synergy overcame the problem of fragmentation in chemical regulation, this article also sheds light on the inherent problems fragmentation creates for international environmental law. The Synergy is a formal cooperation and coordination between the Stockholm, Rotterdam, and Basel Conventions. The Synergy’s governing body is similar to the governing body of any other MEA because it has a Secretariat and a Conference of the Parties (COP). But the parties did not have to rewrite the texts of the three chemical conventions to create the Synergy. Instead, the Synergy combines the Secretariats and the COPs of the three chemical conventions, which met simultaneously for the first time in 2010. Individually, each convention remedies different harms posed by hazardous chemicals. Together as the Synergy, they increase international efficiency, decrease international costs, and provide standards that protect humanity and the environment. This article concludes that synergies between MEAs should be created as a step toward reducing fragmentation in other areas of international environmental law, and it provides two case studies to illustrate areas of international environmental law that are ripe to form synergistic characteristics.

This article differs from past scholarship about fragmentation because it is the first to use the Synergy as a model solution for reducing fragmentation in other areas of international environmental law. Daniel C.


6. Id. at 5.

7. Id. at 1.
Esty’s work leads academia by utilizing the Global Environment Organization (GEO) as a model to remedy deficiencies in international environmental law.\(^8\) Forming a GEO involves consolidating organizations that oversee truly transnational issues, such as preserving global commons resources.\(^9\) But forming synergies between MEAs that oversee similar environmental issues is a more pragmatic and realistic solution than forming a GEO. A GEO would be too cumbersome due to the sheer number of environmental issues looming over the 21st century. This is the first full-length article to analyze the Synergy in depth and apply the characteristics that led to its creation to other areas of international environmental law.

Part I begins by explaining how the current international agreement method leads to fragmented international regimes. Many areas of international environmental law are fragmented. The Basel, Rotterdam, and Stockholm Conventions were a perfect example of fragmentation before they became the Synergy. Part II explains how the three chemical conventions became the Synergy. It analyzes the natural relationships between the three conventions prior to forming the Synergy and shows how the Synergy increased efficiency for global chemical regulation. Part III analyzes and rebuts competing theories to reduce fragmentation, such as creating a GEO and redrafting MEAs altogether. It also provides factors parties can use to determine whether other areas of international environmental law are ripe to synergize. Part IV contains two case studies that provide practical examples of where forming synergies can solve the problem of fragmentation in other areas of international environmental law.

I. Fragmentation of International Environmental Law

Fragmentation of international environmental law is the result of “the emergence of specialized and relatively autonomous spheres of social action and structure.”\(^10\) Parties create ad hoc agreements to solve international problems. This ad hoc agreement method creates confusion for regulated entities due to the sheer amount of resulting agreements and their overlapping, duplicative, and contradictory nature. Further, the current international agreement method enables parties to satisfy their self-serving motives to solve impending problems without considering the totality of the

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9. Id. at 848–49.

environmental circumstances. This current method results in apparent inequities to the parties involved in negotiating the MEAs.

A. The Flawed Ad Hoc Approach to Creating MEAs

International environmental law “has never had the luxury of mapping out the field and developing a comprehensive strategy for addressing environmental problems in a pre-crisis, joined-up, and efficient way. Rather, [it] arose out of an immediate need to address pre-existing and rapidly worsening environmental degradation.”

The proliferation of ad hoc agreements is rampant. It is estimated that “states have negotiated more than 1100 multilateral, 1500 bilateral, and 250 ‘other’ environmental treaties, with the vast majority of these being negotiated since 1960.”

Each of the approximately 1,100 MEAs typically has its own institutional arrangements, including a COP, a secretariat, advisory bodies, and technical expert groups. The administrative processes of the institutional arrangements alone take time and manpower to implement and carry out.

Unfortunately, it is easy to address international environmental issues with ad hoc agreements, because each issue only gains public attention once it enters crisis mode and states act only according to public demand. When states make agreements about individual topics to please the public, they cut short-term costs. Because parties to MEAs typically do not take entire issues under consideration at once, the agreement method forces the proliferation of MEAs and ultimately leads to fragmentation.

Fragmentation of international environmental law does not create a foundation with which future generations can successfully solve international environmental problems, because it requires perpetually establishing new institutions.

B. The Result of the Ad Hoc Approach to Creating MEAs

If parties opt for entering into new MEAs and establishing new institutions to handle impending issues in lieu of condensing and combining

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12. Id. (citing Ronald B. Mitchell, International Environmental Agreements Database Project, U. Or., https://perma.cc/5XXA-FUUB (last visited Nov. 6, 2014)).
14. See Bodansky supra note 1, at 35 (describing “treaty congestion” as a similar result of the proliferation of MEAs, which “creates the potential for duplication in effort, lack of coordination, and even conflict between different environmental regimes”).
existing institutional structures, they will inevitably endorse inconsistencies. New MEAs and institutions will undoubtedly overlap, contradict, yield less-than-satisfactory and binding results, and splinter international relationships. At the core of the agreement method comes the problem: the ad hoc method will not yield sustainable international relationships because it inherently lays fragmented and dysfunctional foundations. Parties inevitably agree to terms they cannot uphold because of the ever-increasing amount of MEAs that the current agreement method permits. The buildup of inconsistent international institutions will become unmanageable, and eventually force parties to renege on promises.

Fragmentation frustrates efforts to implement international agreements because “the provisions of the different MEAs and the decisions of the different environmental processes are often inconsistent.” For example, the Convention on Biological Diversity (CBD) seeks to promote, enhance, and maintain plant species diversity in forests. But climate change regimes, such as the United Nations Framework Convention on Climate Change (UNFCCC) and the Kyoto Protocol to the United Nations Framework Convention on Climate Change (Kyoto Protocol), also consider forests and their role in global warming. To climate change regimes, forests with young trees and other young plant life act as carbon sinks, which have the potential to absorb carbon dioxide throughout their lifetime. On the other hand, while old-growth forests accumulate large amounts of carbon dioxide over time, they eventually disperse carbon back into the atmosphere when they are harvested, burned, or when they die and decompose. Climate change regimes do not seek to maintain a balance between young and old growth forests; instead, they incentivize parties to reduce emissions. The UNFCCC requires its parties to publicly report annual carbon dioxide emissions by sources and carbon dioxide removal by

15. Roch & Perrez, supra note 13, at 6 (citing Hilary French, Reshaping Global Governance, in STATE OF THE WORLD 174, 177 (Linda Starke ed., 2002)).
20. Asselt, supra note 19.
In addition, the Kyoto Protocol allows its parties to consider carbon sinks to achieve their required emissions reduction targets. The provisions of the Kyoto Protocol and UNFCCC may incentivize their parties to maintain forests of young species, but they enable their parties to take actions that directly contradict the in situ protections guaranteed by the CBD.

Inconsistencies weaken the binding nature of MEAs, which is why individual MEAs are typically criticized for having soft provisions that lack the teeth or legal backbone to be legally enforceable. Parties lack a sense of responsibility to fulfill commitments under MEAs that have inconsistent terms. For example, suppose a party acts consistent with Agreement A, but that act is simultaneously inconsistent with Agreement B. Alternatively, the party acts consistent with Agreement B, but that act is also inconsistent with Agreement A. This scenario creates a lose-lose situation for all parties to Agreement A and Agreement B. Parties to both agreements lack a sense of responsibility to fulfill their obligations because any action will put them out of compliance with one of the agreement’s provisions.

The current fragmented regime certainly results in inequities for the parties that negotiate MEAs. For example, parties may choose to opt out of an obligation created by a specific provision within an MEA—escaping that provision’s restrictions—but remain associated with and protected by the international community that adopted the MEA. Also, countries may choose not to ratify an MEA—completely escaping the MEA’s binding nature—but still benefit from the cooperation of others that choose to ratify the MEA. Because it is up to the parties to comply with and enforce MEA provisions on their own, parties may use the current agreement method to take advantage of one another. This further frustrates parties’ willingness to

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21. See UNFCCC, supra note 17, at art. 4 ¶ 1(a) (stating that parties must update and publish greenhouse gas sources and sinks).
23. See CBD, supra note 16, at art. 8 (stating the in-situ conservation responsibilities of parties to the CBD).
25. See, e.g., Commercial Whaling, INT’L WHALING COMM’N, https://perma.cc/QYZ8-87TS (last visited Sept. 1, 2016) [hereinafter IWC]. In 1946, Norway signed the International Convention for the Regulation of Whaling, and is therefore part of the International Whaling Commission (IWC). Id. However, when the IWC “paused” commercial whaling in 1982, Norway filed a timely objection, so it is not subject to the commercial whaling moratorium. Id. Norway benefits from being a member of the IWC because its “catch” is still protected by the moratorium—other states are prohibited from whaling. Id.
26. See, e.g., Anilla Cherian, Grappling with the Global Climate Challenge, in GLOBAL ENVIRONMENTAL ISSUES 65, 73–74 (Frances Harris ed., 2d ed. 2012). In 1997, the UNFCCC fully negotiated the Kyoto Protocol, which sets a binding emissions reduction of 5% of 1990 levels by 2012 for developed states. Id. They must achieve this goal between 2008 and 2012 through both domestic and international action. Id.
comply with MEAs, because the extent to which parties comply depends partially on the extent to which parties involved think that they are taking part in a fair deal.  

Similarly, when an MEA does not provide a remedy to the international problem that the negotiating parties sought to solve, it creates inequities for the parties, degrades the MEA’s authority, and ultimately increases fragmentation. When the Organization for Economic Cooperation and Development (OECD) adopted the Decision and Recommendation on Transfrontier Movements of Hazardous Waste (1984 Final Decision), an early international agreement addressing transboundary movement (TBM) of hazardous waste, the OECD failed to remedy one of the main problems with TBM of hazardous waste: that developed states flagrantly disposed of hazardous waste in developing states’ territory without receiving prior informed consent. Just two years after its adoption, the Khian Sea waste disposal incident proved that the agreement was inadequate to regulate TBM of hazardous waste. States continued to dishonestly dispose of hazardous waste within other states’ borders and had no structure with which to ensure proper disposal elsewhere. The agreement missed the mark and enabled states to dispose of hazardous wastes in prohibited territories, shifting the burden to other states. The Basel Convention ultimately remedied this problem by prohibiting TBM of hazardous waste if the parties to the transaction fail to comply with the notification requirements in the Convention. Indeed, parties that continue to create ad hoc institutions will encounter problems similar to preceding parties that also created ad hoc agreements.

Despite the inherent problems that result from ad hoc agreements, proponents argue that ad hoc agreements are an adequate device for making agreements on the international stage and that they actually may benefit the
international environmental community. Proponents suggest that the current agreement method upholds cultural “norms”\textsuperscript{32} and state sovereignty. They also argue that fragmented agreements increase efficiency and flexibility of international institutions. But the proponents’ arguments ignore and contradict the facts of the international legal system: fragmentation of international environmental law “leads to inefficiencies, a lack of synergy, fragmentation of rules, and a proliferation of institutions.”\textsuperscript{33}

Proponents argue that the international agreement method upholds cultural norms because it gives parties the autonomy to agree to whatever terms they choose. Parties to an MEA expect their norms to be binding because, to those parties, norms’ “status as law constitutes an independent reason for action.”\textsuperscript{34} However, norms do not have legal status for parties that do not adopt them.\textsuperscript{35} Because there is no international legal dispute settlement mechanism to resolve violations of legal norms,\textsuperscript{36} a party may simply choose not to follow the terms of an agreement if it has not adopted the norms in question.\textsuperscript{37} Thus, the proponents’ argument is flawed because MEAs only bind “those states that have given their explicit consent through ratification or accession.”\textsuperscript{38} In addition, because parties are free to reject provisions of MEAs, it is difficult to truly agree to norms on the international stage. Therefore, the agreement method does not necessarily uphold norms. Parties uphold norms if they choose to follow the agreement’s terms, or parties can simply choose not to comply. The current agreement method may allow parties to agree to norms, but it does not give norms the force of law.

Proponents support the ad hoc approach to international environmental law as essential to maintaining state sovereignty because the primary decision-making process within MEAs is through the parties’ national
As demonstrated by the United States’ lack of participation in the Kyoto Protocol, the current agreement method may uphold sovereignty, but at what cost to the international community and to the environment? The main reason parties meet to make agreements is because they hope for a mutual, positive outcome. When parties are allowed to withdraw whenever they please, they undermine one another, demonstrate unreliability, and ultimately increase costs for all other parties involved.

Proponents also argue that, under the current international agreement method, efficiency is increased and transaction costs are reduced because ad hoc institutions are equipped to deal with one issue at a time. This assertion, however, ignores the realities of the international stage: newly created institutions pile on top of one another and continue to pile until they overlap and contradict. For example, the Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal Protocol) and the Kyoto Protocol both aim to reduce the effects of climate change on the atmosphere. However, the Montreal Protocol prescribes substituting hydrofluorocarbons (HFCs) for other ozone-depleting substances, while the newer Kyoto Protocol phases out the use of HFCs because they are destructive greenhouse gases (GHGs). Instead of these contradictory ad hoc institutions, permanent, centralized, and coordinated institutions based on subject matter are best equipped to handle international environmental issues. Such centralized institutions make predictable decisions and increase international efficiency because they receive the long-term experience necessary to make forward-looking decisions that provide necessary support now and into the future. While the current international agreement method deals with problems as they arise, it does not create long-term efficiency.

Finally, while proponents believe the inner-workings of international institutions allow for flexibility through quick responses to issues or imminent threats, the increasing number of institutional components only increases the likelihood for contradiction or duplication. COPs are the most


42. See Kyoto Protocol, supra, note 18, at art. 3 ¶ 8; Harro van Asselt, Center for Climate & Energy Solutions, Alongside the UNFCCC: Complimentary Venues for Climate Action 2 (2014).

43. See Bodansky, supra note 1, at 120.
vital component to an international institution’s success. COPs typically meet once a year to discuss amending terms of agreements, adding new terms, or even creating new agreements altogether. As demonstrated by the Synergy, a single COP and secretariat to oversee an entire field of international issues is more efficient than multiple secretariats and COPs for each sub-issue.

C. The Old Fragmented Chemical Regulation Regime

For decades, international chemical regulation has been particularly subject to fragmentation because of its complexity—the multiple treaty regimes must cover all forms of hazardous chemicals and wastes during international trade and other transboundary movements, from their production to their disposal. While the existing international chemical laws were created with human and environmental protection as their goal, each one was passed to address a direct need or to solve an impending problem. Therefore, they have different structures, and they approach their goals in different ways. Individually, the major MEAs governing chemicals were a perfect example of fragmentation in international environmental law, but together they are leading the international community in remedying the problem of fragmentation.

Initially, the three major chemical conventions were created and functioned separately. The Basel Convention, which entered into force in 1992, aims to reduce TBM of hazardous wastes and ensure environmentally sound management (ESM) of hazardous wastes. As global economies grew, TBM of hazardous waste from developed states to developing states increased, and the developing states had trouble implementing ESM practices for the wastes they received. Some parties to the Basel Convention adopted the Ban Amendment, which prohibits exports of hazardous wastes from developed states into developing states and solidifies Basel’s original efforts to implement ESM to all TBM of hazardous waste. Although the Ban Amendment is not binding on all parties to the Basel Convention, it has currently been ratified and

44. See id. at 121 (pointing out that regular meetings of the COP are so important that the parties to the Ramsar Convention initially failed to provide for such meetings but “went to elaborate lengths to amend the convention in order to correct this omission”).

45. See Karen N. Scott, International Environmental Governance: Managing Fragmentation Through Institutional Connection, 12 MELBOURNE J. INT’L L. 177, 196 (2011) (“This process began what is arguably evolving into the most successful cooperative arrangement to date.”).


48. Id.
implemented by 87 parties. Next, the Rotterdam Convention, which entered into force in 2004, responds to the increased global trade in hazardous chemicals. It includes a legally binding Prior Informed Consent (PIC) procedure that allows states to deny imports of a volatile list of hazardous substances that are banned by the Rotterdam Convention or banned by the individual states. Finally, the Stockholm Convention, which entered into force in 2004, eliminates or reduces the release into the environment of Persistent Organic Pollutants (POPs). POPs are chemicals that: exist in the environment for extended periods of time; accumulate in the fatty tissue of humans and wildlife; multiply from one host to the next; and cause cancers, birth defects, and other health problems in a variety of species.

Each of the separate chemical conventions sought important solutions to impending issues within international chemical law. The Conventions’ common goal is to protect human health and the environment from hazardous chemicals. But when they were implemented individually, they forced unnecessary administrative costs on governing bodies and industries that sought to comply with their terms because three separate entities oversaw international chemical regulation as opposed to one overseeing body. For example, the three individual conventions require the secretariats to collect information about hazardous substances and submit reports to the parties. The individual conventions imposed excess administrative burdens on the parties because they created three separate databases designated for exchanging hazardous chemical information. Individually, the three separate administrations created more friction than inertia for the international chemical industry. The Synergy remedied fragmentation in chemical regulation, because it combined the functions of the three secretariats and created a single clearing-house mechanism to provide data storage and information exchange required by the three conventions.
Indeed, the method in which the Synergy combines international administrative resources provides a model approach for the 21st century’s crusade away from fragmented, independently created MEAs and toward an era of large-scale cooperation and coordination between MEAs.

II. OVERVIEW OF THE SYNERGY

Although international environmental law has historically been controlled by a great number of regulatory entities, the Synergy demonstrates that a single regulatory entity has an advantage to successfully implement MEAs and other international environmental agreements. The Synergy represents supreme international cooperation and coordination between three conventions that regulate hazardous chemicals on a global scale. Around the year 2002, the COPs of the three conventions each favored exploring the possibility of a Synergy, in hopes of reducing the excess administrative costs associated with similar information exchange and reporting requirements between the parties and the conventions’ respective secretariats.  

It took nearly ten years to combine all of the moving parts, from the first discussion about synergizing to the legal act of combining the three secretariats. While the provisions of the three conventions cover different aspects of chemical regulation, the Synergy promotes a natural give and take between them, and regulates hazardous chemicals from cradle to grave. The Synergy reduces fragmentation by ameliorating the administrative deficiencies for the parties to the conventions and the three secretariats. The experience with chemical regulation shows that coordination and cooperation between MEAs, rather than further proliferation of ad hoc agreements, provides the necessary inertia to cultivate international environmental relationships into the 21st century.

A. Forming the Synergy

The formation of the Synergy was a multistep process. In 2002, the first discussion between the parties about the Synergy began following the World Summit on Sustainable Development. In 2005, the parties to each convention decided to explore the idea of creating the Synergy and asked the three respective secretariats to collect and present information about how a synergy between the three conventions would function. Next, in

55. RISBY & AMADOR, supra note 5, at 2.
56. Id.
57. Id.
2006, the parties to each convention created the first formal body of the Synergy, the Ad-hoc Joint Working Group (AHJWG), which is composed of 45 representatives of the parties, 15 from each convention.\(^\text{58}\)

Ultimately, the AHJWG’s recommendations constitute the “backbone” of the Synergy’s process.\(^\text{59}\) The AHJWG’s recommendations uphold the centrality of the individual COPs, but also recognize the need for a new decision-making structure by adding three Extraordinary meetings of the Conferences of the Parties (ExCOPs) to the three original COPs.\(^\text{60}\) The parties of each convention adopted the AHJWG’s recommendations in 2008 and 2009 through their decisions on coordination and cooperation on the global, national, and regional level.\(^\text{61}\) Thereafter, in 2010, the parties convened the ExCOPs,\(^\text{62}\) the outcome of which was the “omnibus decision.”\(^\text{63}\) The omnibus decision created a documented, formal foundation for the Synergy, but it did not rewrite the text of the three conventions. Fundamentally, the three conventions still operate as they did before the Synergy, but now many of their administrative functions are combined.

Next, the parties aimed to centralize control. In 2011, the parties established a joint Executive Secretary\(^\text{64}\) of the Synergy for a two-year period to be reviewed by the ExCOPs in 2013, and adopted decisions to further enhance cooperation and coordination between the parties.\(^\text{65}\) In 2012, the joint Executive Secretary implemented a proposal for a single secretariat,\(^\text{66}\) which “represented a shift from the programmatic structure consisting of three separate Secretariats dedicated to each respective Convention with a joint convention services group to a single Secretariat matrix structure based on functions.”\(^\text{67}\) Subsequently, the COPs and ExCOPs met consecutively in 2013,\(^\text{68}\) and only the COPs met in 2015.\(^\text{69}\)

\(^{58}\) Id.

\(^{59}\) Id. at 3.

\(^{60}\) Id. at 2–3.

\(^{61}\) Id. at 3.

\(^{62}\) Id.

\(^{63}\) Id. The omnibus decision elaborated on the 2008–2009 synergies decisions and called upon parties, other stakeholders, and the secretariats to undertake cooperative and coordinated activities to implement the synergies decisions at all levels and to establish the joint services on a permanent basis. Id.

\(^{64}\) Id. at 3–4.

\(^{65}\) Id. at 4.

\(^{66}\) Id.


\(^{68}\) See History of the Synergies Process, Synergies Among Basel, Rotterdam & Stockholm Conventions, https://perma.cc/6AFM-UA2G (last visited Sept. 2, 2016) (citing BC.Ex-2/1, RC.Ex-2/1 and SC.Ex-2/1). The dual meetings in 2013 allowed for more effective decision-making on policy, technical and budgeting matters, and joint activities. Id. In addition, each Party adopted new omnibus decisions to enhance coordination and cooperation, endorsed the organization of the new
With a single secretariat to oversee matters pertaining to all three conventions, the Synergy has centralized control rooted in its foundation. The strong foundation combined with centralized control allows the Synergy to function smoothly as a single, complex entity.

B. The Natural Relationship Between the Three Chemical Conventions

The Synergy is a successful product of three separate conventions that merged into one coherent regulatory approach, ensuring the protection of human health and the environment and reducing fragmentation of international chemical regulation. The Synergy took MEAs governing hazardous chemical regulation, that were created with little foresight about their potential relationships, and aligned them into a unified structure with which the parties can operably regulate hazardous chemicals from their inception to their disposal. The Synergy successfully overcomes fragmentation because it allows a unified entity to regulate hazardous chemicals. The resulting fluidity ultimately reinforces protections for human health and the environment, because it provides oversight for chemicals from the beginning to the end of their lives.

Each convention individually regulates a unique aspect of hazardous chemicals, but together they support a "life-cycle" approach to chemical regulation, in which each convention has a role in regulating a chemical throughout its lifespan. While the Stockholm Convention’s provisions seek to prohibit or eliminate use of a relatively short list of POPs, the Rotterdam Convention’s provisions supersede those of Stockholm if a

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69. See id. In 2015, the individual COPs made six identical decisions to enhance coordination and cooperation among the parties: (1) international cooperation and coordination (BC-12/17, RC-7/9, SC-7/27); (2) implementation of the integrated approach to financing (BC-12/18, RC-7/8, SC-7/22); (3) enhancing cooperation and coordination among the Basel, Rotterdam, and Stockholm Conventions (BC-12/20, RC-7/10 and SC-7/28); (4) clearing-house mechanism for information exchange (BC-12/20, RC-7/11, SC-7/29); (5) from science to action (BC-12/22, RC-7/12, SC-7/30); (6) venue and date of the next meetings of the conferences of the parties to the Basel, Rotterdam, and Stockholm Conventions (BC-12/22, SC-7/31, RC-7/13). Id.

70. Risby & Amador, supra note 5, at 25–26 (“Life-cycle management of toxic and hazardous chemicals in the interests of protecting health and environment refers to both prevention and control measures undertaken from a chemical’s development to its ultimate destruction. Management is therefore comprehensive (‘cradle-to-grave’”).

71. See Stockholm Convention, supra note 4, at arts. 3, 5 (explaining measures that the parties must take to eliminate or reduce hazardous substance releases from intentional and unintentional production and use of POPs).

POP is also listed in Rotterdam’s Annex III. The Basel Convention is much broader than Stockholm and Rotterdam, and acts as a final backstop to regulate chemicals with ESM practices once they are in waste form. The Basel Convention regulates wastes whether such wastes contain POPs or listed Annex III chemicals—Basel’s provisions will supersede those prescribed by both Rotterdam and Stockholm in the context of hazardous wastes. Further, Basel’s provisions extend to a TBM even if only one party to the transaction considers the substance a “waste” or “hazardous.” The outcome of the Synergy is a unified system that carefully regulates chemicals throughout their entire lifespans. The Synergy models the precautionary principle because it seeks to eliminate risks to humans and the environment instead of trying to eliminate existing harms. Accordingly, a party to the Synergy will not create a hazardous chemical, export or import a hazardous chemical, or dispose of a hazardous chemical without the Synergy regulating that chemical at some point during its life.

C. The Synergy as the Remedy to Fragmentation

In addition to decreasing the inherent administrative burden of holding three sets of meetings between three separate COPs, there are three ways the unified entity behind the Synergy increases administrative efficiency, reduces fragmentation, and improves chemical regulation. First, the single

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73. See Secretariat, supra note 72, at 6–7 (explaining that Rotterdam will supersede Stockholm if “the POPs fall within the scope of the ... Rotterdam Convention” and that, as of 2013, Annex III lists “13 of the 19 intentionally produced POPs covered by the Stockholm Convention”); see also Rotterdam Convention, supra note 4, at art. 8 (applying PIC procedures to chemicals listed in Annex III).

74. Secretariat, supra note 72, at 2. The Basel Convention regulates TBM of hazardous waste by ensuring that states agree to chemical waste disposal within their borders, and making all participants in the disposal process follow a standard of ESM for disposal of hazardous wastes. Id.

75. Basel Convention, supra note 4, 1673 U.N.T.S. at 131–32 (giving the parties general authority to prohibit importing substances that the party deems hazardous).

76. Secretariat, supra note 72, at 7 (explaining that Basel will supersede Rotterdam and Stockholm in the context of wastes).

77. Secretariat of the Basel Convention, Controlling Transboundary Movements of Hazardous Wastes, UNEP/SBC/2011/10, at 3–4 (Dec. 2011) (“Under paragraph 1 (b) of Article I of the Convention, Parties have the right to define as ‘hazardous wastes’ wastes other than those listed in the Annexes of the Convention.”). Article 6, of the Basel Convention aims to provide clarity in circumstances when solely the state of export, solely the state of import, or solely the state of transit have different definitions of “hazardous” or “waste.” Id.

78. BODANSKY, supra note 1, at 61.

79. Basel Convention, supra note 4, at 131. So long as a party has a substance listed as hazardous, if that party is ever involved with the transaction for the disposal of that substance, at least one of the conventions will apply to that substance at a point during its lifespan. Id.
secretariat is best equipped to provide information and education to the parties and other entities involved with international chemical trade. Second, the clearing-house mechanism improves uniformity of information consolidation measures, which creates inertia for data transfers between the parties and all regulated entities. Finally, unified oversight of regional centres provides superior localized technical assistance and ensures parties and interested private entities each have equal access to support. Although deconstruction of the three secretariats initially burdened the offices, the establishment of a single secretariat facilitates information flow, which reduces the deficiencies created by the fragmented regimes.

Prior to the Synergy, the conventions did not coordinate attempts or try to build a common strategy for public outreach and awareness. But with one secretariat there is a common approach to educate parties about chemicals and the impacts that chemical releases have on human health and the environment. The single Secretariat maintains records that were previously held by the three secretariats and is able to provide information based on those records. The centralized control of a single secretariat is best equipped to draw conclusions from the information it collects and determine how to provide such information to the regulated community, because it has access to all relevant data and is not constrained to a certain mold. The establishment of a single secretariat ultimately reduces the effects of fragmentation by facilitating “the exchange of relevant information between the technical and scientific bodies of the three Conventions through the sharing of information with one another, . . . and with other relevant intergovernmental bodies.”

The Synergy reduces the effects of fragmentation through the clearing-house mechanism, which ensures close cooperation and coordination between the parties and facilitates information sharing nationally within and

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80. Risby & Amador, supra note 5, at 54 (“In the transitional phase however the administrative burden has increased with staff allocating a significant amount of their time to administrative issues, dismantling the old platforms and creating an integrated one, etc.”).

81. Id. at 42.

82. Id.; see, e.g., Webinar Library, Synergies Among Basel, Rotterdam, & Stockholm Conventions, https://perma.cc/PC76-SJIP (last visited Sept. 1, 2016) (linking to the Webinars Library where a party may view webinars about issues arising under each of the Conventions); Manual for Customs Officers, Secretariat Among Basel, Rotterdam, & Stockholm Conventions, https://perma.cc/A4PV-5BIK (last visited Nov. 3, 2016) (“The interactive Manual for Customs on hazardous chemicals and wastes . . . will enhance your knowledge of the three global treaties that contribute to safely managing the production, movement, use and disposal of hazardous chemicals and wastes.”).

83. For example, the Secretariat to the Basel Convention would be constrained to collecting and providing information about hazardous wastes.

84. Risby & Amador, supra note 5, at 5.
internationally between all interested entities. The clearing-house mechanism is operated by the Secretariat under oversight of the parties. It combines the information exchange requirements of each convention into a single multi-stakeholder mechanism that consolidates available resources about the three conventions, facilitates sharing of information about good management practices between the parties, and facilitates transfer of expertise. Because data previously collected by the three individual secretariats is now held by a single entity, the information consolidation measures incentivize information flow by increasing the ability of the parties and interested private entities to reach pertinent information about chemical trade. The clearing-house mechanism reduces fragmentation by coordinating the relationship between national regulations, which helps industry stay in compliance and ultimately increases protections for human health and the environment. Indeed, the clearing-house mechanism provides a uniform method for the parties to access information, which allows the parties to make informed decisions when handling hazardous substances.

Finally, the Synergy reduces fragmentation because it provides unified oversight of regional centres, increasing the flow of technical assistance among the parties through collaboration at the local level. Regional centres work within their regions to deliver training sessions and develop and maintain regional networks of experts and institutions. They provide technical assistance at the parties’ requests or based on the parties’ special needs. This technical assistance gives parties the genuine opportunity to implement coherent and uniform environmentally sound practices, which ultimately improves industry’s ability to comply with international chemical regulation. Under each convention, developed states provide technical assistance to developing states to assist them in building their

86. Id.
87. Id.
88. Basel Convention, supra note 4, 1673 U.N.T.S. at 142–43; Rotterdam Convention, supra note 4, 2244 U.N.T.S. at 396; Stockholm Convention, supra note 4, at art. 8 (stating the Secretariat’s role in providing information to the parties when it lists new chemicals into Annexes A, B, and C); see also Stockholm Convention, supra note 4, at art. 20(2)(a)-(f) (providing that the Secretariat will ensure all information collected pursuant to Article 15 is available to the parties).
89. See Regional Centres, supra note 4 (“There are a total of 23 regional centres of which 14 are Basel Convention Regional Centres (BCRCs) and 16 are Stockholm Convention Regional Centres (SCRCs). Seven of the centres serve both Conventions.”).
90. See RISBY & AMADOR, supra note 5, at 5.
ability to handle hazardous substances, and the localized support from regional centres helps all states achieve this mission.92

Under the current regime, regional centres reduce the effects of fragmentation, because prior to the Synergy, they were operated under their respective secretariats; however, now their management is unified.93 Management under a single secretariat frees up resources otherwise necessary to disperse technical assistance to the parties, increasing global, regional, and national capacity to manage hazardous substances.94 Regional centres enhance protections to human health and the environment, because they provide the necessary foundation for developed states to lend extra support to developing states.95 The positive effect that the Synergy has had on reducing fragmentation of international chemical regulation shows that closely coordinated institutions have the potential to be the key for forward-looking attempts to remedy the problem of fragmentation in other areas of international environmental law.

III. THE SYNERGY’S LESSONS FOR OTHER AREAS OF INTERNATIONAL ENVIRONMENTAL LAW

Although there are competing theories to the Synergy that merit review, the most efficient way to reduce fragmentation in international environmental law is by creating synergies among similar MEAs. While creating a GEO may pose certain benefits, the value of creating a GEO weighed against the likelihood of a GEO’s success, proves that a GEO is not a realistic remedy for fragmentation.96 Similarly, redrafting MEAs may seem like an attractive, less-complex option to reduce fragmentation; however, redrafting MEAs poses problems because changing an MEA’s language may not have the desired effect.97 Instead, to increase efficiency between regimes, parties must establish which MEAs are ripe to synergize by determining which MEAs have similar institutional arrangements and

92. See id. (explaining that in addition to regional centres, parties may also increase their technical abilities by discussing technical innovation through face-to-face or through online training).
93. Regional Centres, supra note 4, at 88.
94. But see Risby & Amador, supra note 5, at 31 (“[Regional centres] reported similar constraints to supporting synergies activities such as lack of regular budgetary resources; staff and capacity to deliver technical assistance, collate and disseminate guidance and good practices; competition between [regional centres] and between UN agencies and [regional centres] for project funds; and lack of participatory approach to the synergies decision-making process.”).
95. See Technical Assistance, supra note 91 (stating that technical assistance is provided to developing country parties and parties with economies in transition in order to assist them in building their capacity [human resources, policy, legal and institutional frameworks] to fulfill their obligations in protecting human health and the environment from hazardous chemicals and wastes).
96. Infra Part IV.A.1.
fundamental principles. After determining which MEAs are ripe to synergize, parties can create close relationships that increase administrative efficiency, which will enhance their capacity to ameliorate international environmental problems.

A. Competing Proposals to the Synergy

The Synergy demonstrates the advantage that a single regulatory entity has over ad hoc counterparts, which is why it should be used as a model for relationship-building between MEAs in the 21st century. But the synergies approach is not without competition. The distinguished international environmental scholar, Daniel C. Esty, argues that creating a GEO is necessary to handle urgent environmental issues.98 Because the GEO approach seeks to centralize nearly all of the functions of existing MEAs across different subject areas, it will create an entity that will bite off more environmental responsibility than it can chew. Therefore, the GEO approach is not compatible with the synergies approach. In lieu of creating a GEO or forming synergies, simply rewriting MEAs may seem to provide an avenue to reduce fragmentation. But redrafting MEA language would be time intensive and likely result in unwanted changes that affect the ability to implement existing MEAs. While these two approaches warrant analysis, they do not yield the same potential as the synergies approach for efficient and forward-looking international relationships.

1. Creating a GEO

If parties decided to create a GEO, it would address purely global issues.99 The GEO would address issues such as climate change,100 the oceans, and other global commons resources, with a limited scope over issues that are “common across nations but not transboundary—such as water quality, water availability, and local air pollution.”101 The GEO

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98. See Esty, supra note 8, at 838 (positing that global response to climate change requires global governance).
99. See Daniel C. Esty & Maria H. Ivanova, Making International Environmental Efforts Work: The Case for a Global Environmental Organization, YALE CTR. FOR ENVT. L. & POL’Y, Oct. 6–8, 2001, at 13 (Document Prepared for Presentation at Opening Meeting of Global Environmental Change Research Community, Rio de Janeiro) (explaining that a GEO should not be confused with a World Environment Organization (WEO), which is a global organization formed to address “issues that span the globe but have only local impact”).
100. See generally Daniel C. Esty, Revitalizing Global Environmental Governance for Climate Change, 15 GLOBAL GOVERNANCE 427, 427–28 (2009) (arguing that a new global environmental governance would better address climate change).
101. Esty, supra note 8, at 849.
would be a centralized agency comprised of experts with numerous extensions into all of the matters that affect the global environment. Proponents of the GEO advocate for creating a GEO that is “focused, network-based, and largely ‘virtual.’” The experts that lead the GEO would have access to extensive databases of information, so that they can make streamlined decisions. Indeed, a GEO is similar to creating synergies, except that a GEO seeks to combine existing institutions, even if their subject matter is not compatible.

The proposition for creating a GEO may be widely popular, yet it misses the mark in several respects. Proponents argue that a GEO is a better option than having a few decentralized institutions for trying to ameliorate transnational environmental problems, due to the nature of environmental issues exceeding national borders. Yet, this argument is flawed for three reasons.

First, the proponents do not account for the complexity of, and incompatibility between, transnational environmental problems. The nature of transnational environmental issues requires separate governance structures to ensure precision in the remedies that organizations create. Proponents argue that a GEO will be “a streamlined agency . . . supported by a decentralized and largely virtual structure of outside experts.” GEOs will also provide the mechanism to store environmental data and likely will centralize information exchange. But these proffers lack a realistic foundation, because they do not account for the efficiency created when organizations set goals to ameliorate problems in specific issue areas.

Second, a single entity to regulate all transboundary issues is impractical because of the sheer number of international environmental issues that a GEO would have to address. Forming a GEO would include: consolidating existing secretariats to the MEAs that govern global issues, creating a permanent staff to draw on expertise from around the world, and developing clear goals, strong commitments, and core principles. All of the existing institutions have goals and priorities for each issue they are

102. Id.
103. Id. at 838.
104. Id. at 848–49.
105. Id. at 840 (“The bottom-line is straightforward: if we take seriously the idea that smaller scale problems argue for decentralized regulatory authority, the parallel logic says that when the scope of a harm extends beyond national borders, policy activity needs to be taken at a supranational level.”).
106. Id. at 848.
107. See id. at 849 (describing a GEO as the core of an extensive data network).
108. Esty, supra note 100, at 428 (“[T]he new international organization would need clear goals, a compelling set of core principles, carefully specified functions and capacities, and a strong commitment to ‘good governance.’”).
assigned; yet, the GEO expects to consolidate them all, while keeping up with new issues as they arise. Individual institutions based on subject matter are flexible and can preemptively address issues as they arise. But the increasing number of international environmental issues that a single organization would have to consider will undermine the GEO’s ability to efficiently create solutions to environmental problems. Therefore, a GEO on any scale would be inadequate to ameliorate environmental issues, because a single organization could not efficiently address every transboundary environmental issue.

Third, the experts within a GEO would not be able to provide the same degree of specificity to each issue they seek to regulate. To truly implement “best available techniques,” an entity must be assigned a specific set of tasks and approach such tasks with a group of specialized research personnel. Conversely, individual entities created solely to respond to international environmental issues arising out of a single subject area are best equipped to respond to such problems. A GEO would be stricken with many tasks, such as reaching climate change goals and ameliorating problems arising in the sea. Alternatively, a synergy would facilitate relationships between all entities involved with climate change without forcing them to combine resources with entities that consider wholly different issues. Although the GEO would consolidate several fragmented institutions, its power would be spread too thin to be effective.

2. Redrafting the Language of MEAs

Redrafting the language of MEAs is not the most practical way to increase efficiency in international environmental law, because redrafting leaves open questions about who would draft the language and what the language would say. Parties would likely have to go through the amendment process of their MEAs in order to change the language of the MEA. Redrafting language of MEAs cannot solve the problem of fragmentation, because it will not reduce the number of institutions that MEAs create. Even if parties sought to redraft their MEAs and combine them into a single agreement whereby the institutional arrangements merged as well, rewriting an MEA could change its substance and function, ultimately causing problems for implementing the MEA’s provisions. Redrafting MEA language could be disastrous, especially if the substance of the MEA is altered. Such changes would cause ripple effects throughout the MEA’s institutions and would ultimately affect the industry that the MEA regulates. Therefore, instead of creating a GEO or redrafting their MEAs, parties should seek out the ripest areas of international

environmental law to form synergistic relationships and begin to implement cooperation and coordination measures among them.

B. Determining Which Areas of Law Are Ripe for Synergies

The flexibility guaranteed by the synergies approach offers a pragmatic vehicle to reduce fragmentation in the 21st century, because environmental institutions “wax and wane in terms of their capacity to solve problems.”

To use synergies efficiently in other areas of international environmental law, the first step is to determine the issue areas that are ripest to develop synergies between them. MEAs that are ripest to form synergies are those that contain similar, fundamental problem-solving principles, including MEAs that have compatible rules and norms. In addition, the extent to which MEAs’ institutional arrangements coincide will help determine how ripe they are to form synergies. Forming synergies where issue areas are ripe is a pragmatic approach to ameliorating problems associated with fragmentation.

1. The Relationships Between Institutional Arrangements

The extent to which MEAs’ institutional arrangements coincide will help parties determine which MEAs are ripe enough to synergize. MEAs typically designate a secretariat or leave the appointment decision up to the COP, and many MEAs appoint secretariats from existing intergovernmental organizations. Individually, Basel, Rotterdam, and Stockholm use the United Nations Environment Programme (UNEP) as the Secretariat, with the exception that Rotterdam jointly uses the UNEP and the Food and Agriculture Organization. Together, they use a single joint secretariat with a “matrix structure.” As demonstrated by the previous compatibility between the individual secretariats of Basel, Rotterdam, and Stockholm, the

109. Young, supra note 27, at 19855.
110. See id. at 19858 (“What we need to know here is more about the conditions leading to synergy rather than interference in institutional interactions and the conditions under which regime complexes produce flexibility and adaptability rather than chaos and confusion.”).
111. See Kristin Rosendal, Impacts of Overlapping International Regimes: The Case of Biodiversity, 7 GLOBAL GOVERNANCE 95, 97–98 (2001) (explaining that overlapping and compatible rules and overlapping and compatible norms create the ripest scenario to form synergies).
113. Basel Convention, supra note 4, 1673 U.N.T.S. at 143; Stockholm Convention, supra note 4, 2256 U.N.T.S. at 112; Rotterdam Convention, supra note 4, 2244 U.N.T.S. at 404.
114. Functional Organigram, supra note 67 (showing the matrix structure of the single Secretariat).
compatibility between MEAs’ designated secretariats is one factor that helps determine whether MEAs are ripe to form synergies.

In addition to the relationship between the secretariats, the relationship between the institutional arrangements of the COPs will help determine how ripe MEAs are for synergistic relationships. The COP is the supreme, autonomous institution of an MEA. Because the powers MEAs afford to COPs are internal and external, the extent to which those powers are related, help determine whether the MEAs are ripe to synergize. For example, internal COP procedural decisions are generally taken by a majority vote, so “quite extensive powers may be exercised by majority voting, such as adopting a binding work program for developing new substantive commitments, establishing subsidiary organs and determining their composition, and, presumably, expelling states parties.” Although it is not always the case, most COPs make internal decisions in a similar fashion.

In contrast, external powers of COPs, such as the ability to seek and build relationships with parties in the international community, can be limited by the text of an MEA. Although some MEAs may not afford COPs broad external powers, COPs are the supreme, autonomous institutions of MEAs. Therefore, at a minimum, COPs hold the power to enter into agreements proposed by other COPs. In addition, broad language in the text of MEAs grants a COP its authority to operate and can show the COP’s power. While the relationships between institutional arrangements of COPs help determine whether MEAs are ripe to synergize, other compatibilities are important considerations as well.

2. The Relationships Between MEAs’ Fundamental Principles

The relationship between the fundamental problem-solving approaches of MEAs is also a factor that helps determine whether MEAs are ripe
enough to synergize. For example, while an MEA that provides incentive mechanisms may increase ongoing innovation and decrease the chance that the MEA results in the tragedy of the commons, incentive mechanisms may not benefit other MEAs that cover subject areas plagued with scientific and financial uncertainty. Because some issues do not have the required flexibility to allow for any leniency through incentives, command and control measures may be an imperative alternative to ameliorate certain issues. Where one MEA provides incentives to remedy a problem and another MEA uses a command and control approach, the two MEAs may not be ripe to form a synergy because they take fundamentally different approaches to address environmental issues. Their diametrically opposed approaches prevent a close relationship even if the two MEAs seek to achieve similar goals and are otherwise compatible.

If MEAs are not fundamentally incompatible, a look at the relationship between their rules and norms will help determine whether they are ripe to synergize. Here, “norms” refer to the principles and policies embedded in MEAs that their parties consider valid, and “rules” are the specific regulations that parties implement pursuant to an MEA’s underlying norms. For example, Basel’s, Rotterdam’s, and Stockholm’s norms overlap because they each seek to reduce environmental harms posed by hazardous substances in international trade. In addition to other overlapping rules, Basel’s and Rotterdam’s rules overlap because they require PIC, and Basel’s and Stockholm’s rules overlap because they provide measures for POPs waste management. Although formation of the Synergy highlighted the ripe relationships between the three chemical Conventions, two other areas of international environmental law are exceptionally ripe to form synergies: the governmental institution and MEAs that preserve the Arctic, and the MEAs that maintain biodiversity.

123. Young, supra note 27, 19858.
124. See id. (“There are important cases (e.g. climate change) in which it is difficult to make calculations regarding both the costs of leaving the problem unattended and the costs of taking effective action to alleviate the problem.”).
125. See Rosendal, supra note 111, at 97 (explaining how rules and norms form the basis for analyzing institutional overlap).
126. Id.
127. Id.
129. Rotterdam Convention, supra note 4, 2244 U.N.T.S. at 396; Basel Convention, supra note 4, 1673 U.N.T.S at 134.
130. See Basel Convention, supra note 4, at 134 (requiring a disposer to have “environmentally sound management” of hazardous waste); see also Stockholm Convention, supra note 4, at 9 (stipulating the creation of disposal strategies for wastes and stockpiles containing chemicals listed in Annex I and II, including POPs).
IV. THE CASE STUDIES

The following two case studies illustrate how the synergies approach is the key to reducing fragmentation in other areas of international environmental law. The first case study analyzes the potential for synergies between three MEAs that protect biodiversity: the CBD,\textsuperscript{131} the Convention on Wetlands of International Importance especially as Waterfowl Habitat (Ramsar Convention),\textsuperscript{132} and the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).\textsuperscript{133} It depicts how the three biodiversity MEAs can form synergistic relationships. The second case study analyzes the potential for synergies between the Arctic Council and MEAs that reduce environmental degradation and conserve biodiversity in the Arctic. It describes how the problems facing the Arctic’s environment would be best addressed through synergies that coordinate the Arctic’s existing governance structures.

A. Case Study #1: Synergies Between MEAs that Protect Biodiversity

This case study analyzes the three biodiversity MEAs and explains how they can form close synergistic relationships. The three key components that highlight the existing relationships between these MEAs are compatible fundamental principles, similar institutional arrangements, and information reporting requirements. The analysis of these three components shows that there is potential to reduce fragmentation and strengthen international cooperation and coordination between the three biodiversity MEAs by forming synergies between them.

1. The Fundamental Principles of the Biodiversity MEAs

Currently, the CBD, Ramsar, and CITES are three of the ripest MEAs to develop synergistic characteristics.\textsuperscript{134} These three biodiversity MEAs each take their own approach to alleviate burdens that humanity imposes on nature. The CBD has three goals: conservation of biodiversity, sustainable use of biodiversity, and equitable benefit sharing of genetic resources.\textsuperscript{135} It

\begin{footnotesize}
\begin{enumerate}
\item CBD, supra note 16.
\item CITES, supra note 122.
\item Rosendal, supra note 111, at 98.
\item See CBD, supra note 16, at 3 (providing that the objectives of the CBD are to reach sustainable use and fair and equitable sharing of genetic resources of plants and animals).
\end{enumerate}
\end{footnotesize}
accomplishes these goals by providing measures for technology transfer, sustainable use of biodiversity, and benefit sharing.\textsuperscript{136} CITES, however, has just one goal: to maintain all species of plants and animals by protecting them from becoming or remaining subject to unsustainable international trade.\textsuperscript{137} It accomplishes its goal through three strict permitting schemes laid out in the three appendices to the MEA.\textsuperscript{138} Finally, Ramsar’s goal is to protect wetlands and maintain their function as habitats for migratory species.\textsuperscript{139} It accomplishes this goal by requiring its parties to create a list of at least one designated wetland that needs protection\textsuperscript{140} and allowing its parties to create nature reserves on listed and non-listed wetlands to promote conservation of waterfowl and the wetlands themselves.\textsuperscript{141} While these three MEAs do not create identical requirements for their parties, their rules and norms contain apparent similarities.

The norms that the three biodiversity MEAs promote are compatible because they each provide protections for wildlife. They seek to ensure that species can continue to flourish by decreasing trafficking of endangered species,\textsuperscript{142} conserving habitats of certain species,\textsuperscript{143} and maintaining genetic diversity of species.\textsuperscript{144} Their rules are also compatible because the CBD encourages its parties to create and implement rules to “integrate . . . the conservation and sustainable use of biological diversity into relevant sectoral or cross-sectoral plans, programmes and policies.”\textsuperscript{145} Pursuant to the CBD, these policies include implementing legislation for the protection of endangered species.\textsuperscript{146} It is quite possible for a party to implement a policy under the CBD that is compatible with the permitting scheme that

\textsuperscript{137} CITES, supra note 122, at art. 2.\textsuperscript{138} See Lohan, supra note 136, at 11 (“Appendix I lists species whose commercial trade is prohibited, while Appendix II lists species whose controlled trade is permitted. Appendix III allows a Party to list species to which it grants protection under domestic legislation but which are not listed in Appendix I or II.”).
\textsuperscript{139} Ramsar Convention, supra note 132, at 246.
\textsuperscript{140} See id. at 247 (providing protections over wildlife found in wetlands that are parties to the Convention included on the List of Wetlands of International Importance, which are protected under the treaty).
\textsuperscript{141} See id. (“Each Contracting Party shall promote the conservation of wetlands and waterfowl by establishing nature reserves on wetlands, whether they are included in the List [of Wetlands] or not . . . .”).\textsuperscript{142} CITES, supra note 122, at art. 3.
\textsuperscript{143} See generally Ramsar Convention, supra note 132 (promoting the conservation of wetlands habitat, especially for waterfowl).
\textsuperscript{144} See CBD, supra note 16, at 3 (describing “conservation of biological diversity” as a primary objective of the CBD).
\textsuperscript{145} Id. at 5.
\textsuperscript{146} Id. at 7.
parties implement pursuant to CITES to protect endangered species. In addition, Ramsar’s rules are compatible with the “in-situ conservation” measures prescribed by the CBD because its parties should “[r]ehabilitate and restore degraded ecosystems and promote the recovery of threatened species.” These fundamental similarities only scratch the surface of the compatibilities that exist between the three MEAs.

2. The Institutional Arrangements of the Biodiversity MEAs

The respective secretariats of CITES, the CBD, and the Ramsar Convention are potentially ripe to form synergistic characteristics. While CITES and the CBD use the UNEP as the Secretariat, Ramsar uses a nongovernmental organization called the International Union for the Conservation of Nature as its secretariat. However, as shown by the Synergy, if the secretariats to MEAs have different institutional arrangements, it does not necessarily proscribe a synergistic relationship. For the parties to CBD, the Ramsar Convention, and CITES to form synergistic characteristics between the three conventions, they must determine how to maintain the Secretariats’ key functions and efficiently synchronize the respective secretariats’ components.

In addition, the external powers of the three biodiversity MEAs’ COPs provide a forum where synergies can occur. For example, under the CBD, the COP shall contact executive bodies of conventions dealing with similar matters covered by the CBD to establish “appropriate forms of cooperation with them.” Therefore, the COP of the CBD has express authority to implement external measures toward cooperation and coordination with parties of similar MEAs. The COP of the CBD has broad external authority. For example, at their 12th meeting in 2014, the COP collaborated with the Secretariat and decided to form an additional advisory group tasked with preparing a workshop to include elements of a road map for parties to the various biodiversity conventions—including the Ramsar Convention and CITES—to enhance synergy and efficiency between

147. See generally CITES, supra note 122, at 3 (requiring presentation of an import permit and an export permit to import any species included in Appendix I).
149. CITES, supra note 122, at art. 12; Ramsar Convention, supra note 132, at 248 (stating that the International Union for the Conservation of Nature will execute the Convention’s “continuing bureau duties”); CBD, supra note 16, at 16; Churchill & Ulfstein, supra note 112, at 627.
them. In addition to the implied authority to accept an offer from the CBD’s COP, the Ramsae’s COP also has external authority to cooperate with outside organizations. Although CITES does not explicitly grant external authority to the COP, the COP has in fact established relationships with pertinent organizations. The relationships between these external powers show that the COPs of the three biodiversity MEAs are ripe to form synergistic relationships.

Another relevant factor is the internal power that the biodiversity MEAs grant their COPs to amend their MEAs. Where CITES and Ramsar allow their COPs to amend by a two-thirds majority vote of the parties present and voting, the CBD allows the COP to amend by a two-thirds majority vote of the parties present and voting only if the COP has exhausted all efforts to reach a consensus. If these three conventions seek to synergize, the parties must consider which amendment procedures to carry forward into the new relationship. They must determine whether to keep the CBD’s provision requiring the parties to exhaust all possibilities of reaching a consensus before making an amendment. The issue here is which internal powers of the individual institutions are going to transfer into the newly synergized arrangement. The existing amendment process is one of many factors to consider when determining the compatibility between MEAs’ institutional arrangements.

152. See CBD COP Dec. XII/6, Doc. UNEP/CBD/COP/12/29, at 57–59 (2014) (reaffirming CBD COP Decision X/20, which recognizes the need for the Secretariat to review and update working arrangements between CBD and Ramsar, and CBD and CITES and also requesting the informal advisory group to consider opportunities for new synergies by taking into account “the experience of the Chemicals conventions in improving synergies”) (citing CBD COP Dec. X/20, Doc. UNEP/CBD/COP/10/27, at 180 (requesting the Secretariat of the CBD to collaborate with the Secretariat of CITES to develop working arrangements that are mutually supportive to the implementation of both Conventions)); CBD COP Dec. III/21, at ¶ 2, Doc. UNEP/CBD/COP/3/38, at 112 (1996); CBD COP Dec. IV/15, at ¶ 3 (1998) (noting that Article 23(4)(h) of the CBD is also the basis for an older memorandum of cooperation between the Secretariat of the CBD and the Secretariat of the Ramsar Convention, and the Secretariat of the CBD and the Secretariat of CITES).

153. Ramsar Convention, supra note 132, at 248 (allowing the conferences “to request relevant international bodies to prepare reports and statistics on matters . . . affecting wetlands”).

154. Lohan, supra note 136, at 16 n.67 (citing Telephone Interview with Tom De Meulenaer, Secretariat, CITES (Oct. 18, 2002)).

155. CITES, supra note 122; Ramsar Convention, supra note 132, at 248, art. 7.

156. See CBD, supra note 16, at 19 (describing the convention or protocol amendment process and parameters).
3. The Information Reporting Requirements of the Biodiversity MEAs

The CBD, the Ramsar Convention, and CITES each prescribe information reporting requirements to the parties of the conventions. Synergistic characteristics between CBD, the Ramsar Convention, and CITES would certainly centralize data transfers between the three conventions. A synergistic relationship between the biodiversity MEAs requires that the respective parties determine how to use large shared databases. This will ensure that all entities have access to pertinent information related to biodiversity protection, preservation, and conservation. Indeed, as demonstrated by the Synergy, close relationships between information sharing and reporting requirements will be the crux of synergies between all international institutions.

B. Case Study #2: Synergies Between Institutions that Protect the Arctic

This case study analyzes the institutions that protect the Arctic and provides a framework for them to increase efficiency through synergistic relationships. Although at first glance the issues in the Arctic are regional, remedying inefficiencies in the Arctic’s environmental governance system should be a global priority. The Arctic’s regional problems precipitate threats to greater humanity. Because the Arctic is mostly composed of ice, it is not land in the traditional sense. Therefore, all MEAs that promote oceanic conservation and biodiversity, and protect oceans from marine pollution also contain protections for the Arctic.

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157. See CBD, supra note 16 (“Contracting Parties shall facilitate the exchange of information, from all publicly available sources, relevant to the conservation and sustainable use of biological diversity, taking into account the special needs of developing countries.”); see Ramsar Convention, supra note 132, at 247, art. 3 (“Each Contracting Party shall arrange to be informed at the earliest possible time if the ecological character of any wetland in its territory and included in the List [of Wetlands] has changed, is changing[,] or is likely to change as the result of technological developments, pollution[,] or other human interference.”); see CITES, supra note 122, at art. 7 (“Each Party shall prepare periodic reports on its implementation of the present Convention and shall transmit to the Secretariat: (a) an annual report containing a summary of the information specified in subparagraph (b) of paragraph 6 of this Article; and (b) a biennial report on legislative, regulatory and administrative measures taken to enforce the provisions of the present Convention.”).

158. See Richard J. Ansson, Jr., The North American Agreement on Environmental Protection and the Arctic Council Agreement: Will These Multinational Agreements Adequately Protect the Environment?, 29 CAL. W. INT’L L.J. 101, 120 (1998) (“[A]s these [Arctic] States become more active in the Arctic region, risks to the environment increase . . . . In the Arctic, human interaction and activity has become more prevalent and has increased the likelihood of potential international environmental concerns.”).

159. See id. at 117 (stating that “the Arctic is an ocean”).

160. See id. (Naming a few of the various MEAs protecting the Arctic).
Most of the MEAs that lend protections to the Arctic do not address problems in the Arctic as a specific region, yet the Arctic Council, which is not an MEA, is an organization established solely to maintain the Arctic’s environment. Synergies between all of the institutions that lend protections to the Arctic will utilize the Arctic Council as the hub of data collection and information sharing procedures. Indeed, parties to the synergies discussion in the Arctic must narrowly tailor their approaches to increase administrative efficiency and effectiveness in an effort to create concrete protections and maintain the fragile balance of the Arctic’s environment.

1. The Relationship Between Current Arctic Regimes

Currently, the Arctic is governed by many MEAs that do not specifically address issues in the context that they arise. First, the United Nations Convention on the Law of the Sea (UNCLOS) is an overarching MEA that pertains to all oceans and “establishes rights and duties regarding navigation, pollution, conservation, deep seabed mining, dispute resolution, jurisdiction, and exploitation of resources.” UNCLOS prevents the Arctic’s environment from being degraded by creating duties for its parties “to prevent, reduce, and control pollution; and to refrain from introducing harmful alien species.” In addition to the general protections that UNCLOS guarantees the Arctic region and its wildlife, many other MEAs offer protections for wildlife in the Arctic.

Second, although UNCLOS does not detail pollution standards, the MEAs that reduce marine dumping also protect the Arctic’s environment

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163. Bonnie A. Malloy, *On Thin Ice: How a Binding Treaty Regime Can Save the Arctic*, 16 Hastings W.-NW. J. Envtl. L. & Pol’y 471, 482 (2010). In addition to creating environmental responsibilities, UNCLOS sets forth jurisdictional measures for all of the world’s oceans. *Id.* at 482–84 (explaining the jurisdictional zones of UNCLOS).
164. *Id.* at 484 (citing UNCLOS, *supra* note 162, at 481–85).
165. *See, e.g.*, United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, *opened for signature* Dec. 4, 1995, Hein’s No. KAV 6137, 2167 U.N.T.S. 88 (seeking to conserve and manage migratory fish stocks); *see, e.g.*, Ramsar Convention, *supra* note 132 (protecting wetland habitat, especially for waterfowl, which could be in the Arctic region); *see generally* CITES, *supra* note 122 (protecting biodiversity generally regardless of region); *see also* CBD, *supra* note 16 (promoting the protection of “ecosystems,” including the Arctic).
from degradation due to pollution. The International Convention for the Prevention of Pollution from Ships (MARPOL 73/78) is a marine dumping convention that provides pollution regulations for ships, including for accidental spills and operational dumping. Of all the marine dumping conventions, MARPOL 73/78 has the strongest force of law. Annexes I and II of MARPOL 73/78 ban releases of oil and noxious liquids in certain oceanic zones and are not optional provisions for the Parties.

Third, the UNFCCC prevents environmental degradation in the Arctic caused by the albedo effect. All of these MEAs protect the Arctic’s environment by using core principles, such as conserving and protecting biodiversity, and reducing and preventing environmental degradation. However, these MEAs are all flawed as applied to the Arctic, because they aim to address broader problems in the global environment. None are specifically tailored for issues as they arise in the Arctic region.

When the eight Arctic States created the Arctic Environmental Protection Strategy (AEPS) in 1991, they formed an MEA that would later become the foundation for the most prominent institution, giving its parties tailored responsibilities toward the many problems facing the Arctic’s environment. AEPS’s priorities include reducing: oil pollution, heavy
metals, noise, radioactivity, acidification, and POPs that reach the Arctic. The responsibilities AEPS imposes are very broad. They include increased data collection, sharing between parties, and general duties to comply with current international environmental standards. Consequently, AEPS has been criticized as “a fairly low-committal exercise with weak institutional structure.” The criticisms of the AEPS led the Arctic States to subsequently create the Arctic Council, which is an effort to maximize their potential under the AEPS to lend concrete aid and oversight to the Arctic’s environment.

Although it has apparent shortcomings, the Arctic Council is currently the strongest international attempt to address regional issues and provide tailored remedies to environmental problems as they arise in the Arctic. In addition to six international organizations that represent Arctic indigenous people, the Arctic States all participate as members of the Arctic Council. The Arctic Council gives the Arctic States a forum to take action in the Arctic, such as overseeing existing programs and creating new initiatives. The Arctic Council maintains the same institutional structure as the AEPS by incorporating the four environmental working groups of AEPS along with two new working groups. The six working groups have their own individual research bodies and secretariats and create programs aimed at protecting the Arctic’s environment.

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173. Id. at 1633–34 (stating that the six pollution “issues [shared by all eight nations] were associated with persistent organic contaminants, oil, heavy metals, noise, radioactivity, and acidification”).
174. Id. at 1661–63 (outlining the future actions and responsibilities for all parties).
175. T. Koivurova et al., Canada, the EU, and Arctic Ocean Governance: A Tangled and Shifting Seascape and Future Directions, 18 TRANSNAT’L L. & POL’Y 247, 260 (2009).
177. See Ansson, supra note 158, at 103 (“[The Arctic Council] agreement seeks to protect the Arctic’s pristine environment through a quasi-legislative intergovernmental forum charged with recommending, implementing, and developing environmental policies.”).
179. Id. at 1388–1389.
180. See Koivurova et al., supra note 175, at 260. The original four Working Groups are Conservation of Arctic Flora and Fauna (CAFF), Protection of the Arctic Marine Environment (PAME), Emergency Prevention, Preparedness and Response (EPPR), and the Arctic Monitoring and Assessment Programme (AMAP). Id. The two new Working Groups are the Sustainable Development Working Group (SDWG), and the Arctic Contaminants Action Program (ACAP). Id.
181. Malloy, supra note 163, at 487 (citing Erika Lennon, A Tale of Two Poles: A Comparative Look at the Legal Regimes in the Arctic and the Antarctic, 8 SUSTAINABLE DEV. L. & POL’Y 32, 34 (2008)).
182. See Timo Koivurova, Environmental Protection in the Arctic and Antarctic: Can the Polar Regimes Learn from Each Other?, 33 Int’l J. LEGAL INFO. 204, 211 (2005) (showing two of the
original focus under the AEPS from protecting the environment to also promoting sustainable development in the Arctic. However, while the Arctic Council successfully applies preliminary considerations, such as taking a truly regional approach and using a few existing structures, it has been criticized for lacking the force of law. The Arctic Council certainly underutilizes the potential to tap existing frameworks in its effort to prevent environmental degradation and protect biodiversity in the Arctic.

2. The Inadequacy of the Current Arctic Regimes

The lack of cohesion between the working groups and all of the MEAs that protect the Arctic leaves the Arctic’s environment vulnerable. There is yet to be a truly effective policy or framework to protect the Arctic’s environment. The numerous overlapping marine pollution MEAs and the MEAs aimed at preserving biodiversity are patchwork attempts to create effective measures to protect the Arctic’s environment. The powers of such MEAs extend further than just the Arctic, which is why they create a hodge-podge of inadequate protections for the fragile region. All of the MEAs have varying degrees of national participation, which further dilutes their territorial authority. The working relationship between the MEAs becomes even more convoluted when their efforts are not coordinated with the Arctic Council or the individual working groups. The number of entities with a stake in Arctic governance makes it difficult to establish binding policies for the Arctic’s environment and leaves the Arctic with an array of mismatched regulations and inadequate supplemental protections.

The Arctic Council does not create laws to regulate the region, rather it sets environmental priorities for the working groups. The working groups’ purpose is to treat issues that face the Arctic in an organized

programmes are the Arctic Council Action Plan to Eliminate Pollution in the Arctic (ACAP) and the Arctic Climate Impact Assessment (ACIA)).

183. Member States, supra note 178, at 138.

184. See Koivurova et al., supra note 175, at 260 (criticizing the Arctic Council as a “soft-law” organization without power to make binding decisions and pointing out “that the Arctic Council is fairly resistant to change” but predicting that over time the Arctic Council will become a “stronger forum for cooperation”).

185. Koivurova, supra note 182, at 214.

186. Michael T. Geiselhart, Note, The Course Forward for Arctic Governance, 13 Wash. U. Global Stud. L. Rev. 155, 171 (2014) (explaining that the numerous MEAs that govern the Arctic “are not specifically designed for the Arctic region, taking into account the unique needs of the Arctic context. One criticism leveled against UNCLOS as a method of regulating in the Arctic is the fact that its scope is worldwide, not specifically focused on the regulatory and governance needs of the Arctic”).

187. Koivurova, supra note 182, at 214; see Malloy, supra note 163, at 491 (“The current legal framework in the Arctic, with its mixed sources and non-binding nature, leaves compliance up to the individual.”).
fashion pursuant to an individualized and tailored plan; however, their efforts are futile because they lack authority to establish rules that are binding on interested parties. Although the working groups each have their own individual tasks, the Arctic States apply their mismatched national laws to oversee the Arctic, which is why “the most the Arctic Council has been able to do - as a soft-law organization - has been to adopt guidelines and recommendations on how the Arctic [S]tates should apply their regulations in those areas.” 188 The Arctic Council is constrained to activities, such as studying international laws to see which apply to the Arctic and creating manuals on various subjects to propose remedies for environmental concerns. 189 However, the manuals do not account for the fact that even when the Arctic Council accomplishes its goals, the Arctic’s environment remains in the same vulnerable position. While these manuals are an important part of information reporting in the Arctic, they do not provide the real-time data transfers that are necessary to ameliorate urgent environmental issues that face the region.

Information reporting is an essential function of an effective regime, yet data transfers need to be coordinated between all entities involved with regulation. Therefore, the working groups’ attempts to address environmental concerns are inadequate because they do not coordinate with other institutions that have similar priorities in the Arctic and lead to binding regulations based on their findings. To truly protect the Arctic, the Arctic Council must centralize its control over the working groups, coordinate practices between the working groups, and encourage the working groups to coordinate and consolidate information sharing measures with external institutions that also lend protections to the Arctic region.

3. The Method to Synergize the Current Arctic Regimes

The most efficient method to synergize the institutions that protect the Arctic will involve top-down coordination between the Arctic Council Secretariat (ACS) and the working groups, and bottom-up coordination between the external MEAs that protect the Arctic and the working groups. First, the ACS must provide top-down control and act as a central data center for the working groups to collect and share information. A single ACS is the best entity to control information flow between the working groups and keep data transfers centralized. Second, the working groups will determine which external MEAs are compatible with their objectives and

188. Koivurova, supra note 182, at 214.
189. Id.
collect information from those MEAs in a bottom-up fashion. Compatible external MEAs are in the best position to provide data to each of the working groups, because each working group has issue-specific goals toward protecting the Arctic’s environment. The working groups will enter the external information into the Arctic Council’s database and use the information to draw conclusions and create protective measures. Third, once the parties coordinate and are ready to ameliorate problems within the Arctic’s environment, they must implement protective measures that are narrowly tailored to individual issues affecting the Arctic.

The first step to increase efficiency in the Arctic is to replace the individual secretariats of the working groups with a single ACS. The ACS should take the sole responsibility of facilitating information flow between the working groups. The ACS currently serves as the liaison of the Arctic Council, and it facilitates communication and availability of the Arctic Council’s information. In addition to other administrative tasks, the ACS transmits reports to and from the Arctic States, working groups, task forces, and other bodies. However, the ACS is in the best position to coordinate information transfers within and between each of the individual working groups and to provide substantive oversight of their objectives. Having a single ACS to oversee all of the working groups will reduce administrative processes and ensure each working group is functioning toward a unified goal. With a top-down approach to controlling its working groups, the Arctic Council will be better organized, and Arctic governance will have a better chance at addressing urgent environmental issues. A consolidated ACS will also allow the Arctic Council to concentrate its resources in the working groups, which will execute programs that are necessary for the Arctic’s protection. While a single ACS is in the best position to facilitate data transfers among the working groups and the Arctic States, the working groups are equipped to conduct studies, use resources, and implement measures based on information that they collect from internal and external sources.

The second step to increase efficiency in the Arctic is to determine which working groups and external MEAs are ripe to form synergies. For example, because the Protection of the Arctic Marine Environment working group takes integrated approaches and addresses new and old issues that

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191. Id.
arise due to human activity in the marine environment, it would benefit from information reporting and close coordination with the marine dumping conventions, including MARPOL 73/78. Similarly, because the Conservation of Arctic Flora and Fauna working group maintains biodiversity in the Arctic, studies habitat and ecosystem health, and communicates its findings to the Arctic States and residents of the Arctic, it would benefit from information sharing with the three biodiversity conventions. Although only one of Sustainable Development Working Group’s (SDWG’s) many tasks is to implement adaptation strategies related to climate change, it would be beneficial for the SDWG to coordinate with climate change conventions to promptly share new information. Furthermore, the Arctic Contaminants Action Program, with the primary purpose of reducing chemicals in the Arctic’s environment, would benefit from closer relationships with the Synergy. Finally, functions of the Arctic Monitoring and Assessment Programme and the Emergency Prevention, Preparedness and Response working group could collapse into the single ACS, which would ensure that the ACS remains accountable to the individual missions of each working group. These potential relationships demonstrate a portion of the potential external relationships that the working groups should consider. Ultimately, the working groups must be able to tailor their attempts to address issues as they arise in the Arctic.

The final step for the synergies process in the Arctic is to determine which solutions are most appropriate for the Arctic’s environmental problems. The issues that face the Arctic are so unique that the working groups must consider the circumstances surrounding their specific issues in order to develop amelioration measures. For example, Oran Young argues

194. See MARPOL 73/78, supra note 167, at 1406 (stating that Regulation 13(4) develops guidelines for the parties engaged in dumping at sea, which certainly is a human activity in the marine environment).
196. See, e.g., CBD, supra note 16 (promoting the protection of “ecosystems,” including the Arctic).
197. Sustainable Development Working Group (SDWG), ARCTIC COUNCIL (June 29, 2015), https://perma.cc/LPK3-BP9M.
198. Arctic Contaminants Action Program (ACAP), ARCTIC COUNCIL (June 29, 2015), https://perma.cc/Z7VC-ECWT.
199. See Arctic Monitoring and Assessment Programme (AMAP), ARCTIC COUNCIL (Dec. 11, 2015), https://perma.cc/4C32-Z57H. The AMAP currently produces scientific reports about the Arctic on which other working groups rely. Id. In addition to the AMAP’s working with the various groups, the EPPR works with the remainder of the working groups to help ensure emergencies are addressed in their activities. Id.
that anticipatory and adaptive measures are necessary to deal with degradation of the Arctic due to climate change.\textsuperscript{200} Young explains that adaptive measures in the Arctic would account for the fact that the yearly reduction in permafrost and sea ice makes nonrenewable resources even more valuable to sustain the Arctic’s ecosystem.\textsuperscript{201} Anticipatory measures include developing the response capacity to deal with abrupt yet unavoidable changes in the environment that occur in situations of scientific uncertainty.\textsuperscript{202} Young ultimately argues that a regime complex is best suited for handling the impending problem of climate change in the Arctic, thereby ruling out a single, comprehensive agreement and accepting fragmentation between Arctic agreements.\textsuperscript{203}

While his approach to address climate change in the Arctic fails because it results in fragmented regimes, Young frames the issue involved with reducing fragmentation: whether the parties that synergize will implement measures that have the capacity to adapt to current dilemmas and anticipate future changes in light of scientific uncertainty. These issue-specific considerations are exactly what the working groups must consider when determining how to remedy individual problems in the Arctic. The Arctic institutions’ capacity to synergize and address existing and future issues will be yet another pivotal factor in determining the success of Arctic governance.

### CONCLUSION

Although fragmentation is an imminent problem of global significance, there is hope. Proliferation of institutions only stifles efficiency and the ability to address issues, yet humanity is moving toward an era of supreme technological organization. Luckily, the Synergy shows the way toward a more efficient future for international environmental law. The Synergy also shows that it is possible to look back in time and apply forward-looking

\begin{footnotesize}
\textsuperscript{200} Oran R. Young, \textit{Arctic Tipping Points: Governance in Turbulent Times}, 41 ROYAL SWEDISH ACADEMY OF SCI. 75, 78 (2012) (“An adaptive approach centers on efforts to adjust, reform, or even replace existing governance arrangements to address changes already occurring. An anticipatory approach . . . emphasizes responses to changes expected to occur in the future.”).

\textsuperscript{201} See id. at 79 (“The prominent roles of sea ice, permafrost, and photoperiodicity in this region heighten the importance of minimizing environmental impacts associated with the extraction of the region’s nonrenewable resources.”).

\textsuperscript{202} See id. at 80 (explaining that rapid response systems are needed in the face of unpredictable change).

\textsuperscript{203} See id. at 82-83 (“The result, at least for now, will be a regime complex located somewhere in the middle of the continuum ranging from unacceptable fragmentation to unattainable integration.”).
\end{footnotesize}
techniques to correct deficiencies that the international agreement method creates.

With the large number of functioning, yet overlapping international institutions, there is no longer the opportunity to create a panacea agreement to face impending environmental challenges. A panacea agreement will also ultimately overlap, contradict, and create a range of problems that result from the fragmented system. Now, the international community must address deficiencies through cooperation and coordination between existing MEAs wherever feasible.

The synergies approach trumps all other methods of reducing fragmentation. This flexible, 21st century approach will ensure compliance by considering the extent to which parties are involved with the creation of synergies and whether the parties think that the synergistic relationships are fair deals. Moreover, because “it would be unfortunate if this issue were to lead to a situation in which one set of tools dominates our thinking about governance to the exclusion of others,” the key to reducing fragmentation is the willingness and ability of parties to make use of a well-stocked toolkit. Synergies provide the arena to forge unique relationships, depending on the circumstances between the existing institutions.

Indeed, “[i]t is generally a mistake to assume that there is one true path that must be identified and followed in efforts to solve specific environmental problems.” With an international stage that is constantly expanding and contracting, there are ever-increasing opportunities for parties to take steps in the right direction: away from fragmented and broken regimes and toward unified systems of international governance with common goals and innovative technologies. The Synergy is certainly not the last of its kind.

204. Young, supra note 27.
205. Id. at 19858.
206. Id.
207. Id. at 19856.