



Wild Law Weekend Workshop September 21 – 23 2007 Lea Green Centre Derbyshire

Workshop papers and associated articles

The edited papers will appear in *Environmental Law and Management* in due course

Over forty people from thirteen countries joined in the third annual Wild Law event



A mock trial was held on the case of the disappearing rainforest, the fate of the orangutan and the biofuel business

Speakers left to right:
Brian Goodwin, Schumacher College; Elizabeth Rivers, facilitator; Cormac Cullinan, author of *Wild Law*; Andrew Kimbrell, US attorney; Peter Roderick, Climate Justice Programme UK



GETTING REAL ABOUT CLIMATE CHANGE

by Cormac Cullinan

Introduction

One of the primary purposes of this Wild Law weekend is to explore the extent to which the ideas outlined in *Wild Law*, and in particular the philosophy of law referred to as “Earth jurisprudence” is helpful in understanding and responding to the challenge of climate change.

Some (but by no means all) readers of *Wild Law* become impatient with the philosophical musings in the book and have expressed to me their frustration that I have not enumerated precisely what practical steps ought to be taken to give effect to Earth Jurisprudence and to design and implement wild laws. My response is usually along the lines that *Wild Law* is about drawing attention to the shortcomings inherent in how most cultures understand the role of law and the environmentally and socially destructive implications of those approaches, and also about beginning the process of creating a vision of what law and governance might be if we approached it from an Earth-centric rather than a purely anthropocentric perspective. In other words it is explicitly about the philosophical or jurisprudential aspects of law and governance and it should not be evaluated as a programme for legal and institutional reform of a governance system.

Nevertheless, a desire for practical ways to express these ideas is entirely understandable and indeed Earth jurisprudence will not be of much use if it does not provide a basis for practical action. Therefore it seemed to us that a useful way of furthering the debate would be to test the Earth jurisprudence approach against one of the most significant and intractable challenges currently facing our governance systems to see whether or not this approach provides any useful insights and helpful guidance in developing responses to climate change. I do not think it is an exaggeration to say that the reality that we face in the early years of the 21st Century is that climate change and associated environmental impacts, pose a very significant, and potentially fatal, challenge to civilisation in the form that we know it. Therefore the question of whether or not Earth jurisprudence can be of assistance in guiding our analysis of, and response to, this issue is of far more than academic interest.

While it is unrealistic to expect that we could develop a coherent programme of legal reform over the course of the next few days, I hope that our discussions will provide greater clarity as to how the ideas in *Wild Law* could be applied to this pressing issue.

I am mindful of the fact that some people in the audience have thought long and hard about these issues while others are relatively new to the Earth jurisprudence approach. Consequently please do not hesitate to ask for clarification if I skim too lightly over ideas or concepts and bear with me if I belabour aspects of Wild Law and Earth jurisprudence that you are already very familiar with.

The context for the discussion

Earth jurisprudence is about re-contextualising human governance systems within the wider system of order that regulates the cosmos of which we form part. To some extent, it can be characterised as a “systems approach” to law and governance in that it seeks to move beyond reductionist, mechanistic approaches to understanding reality, society and law and to incorporate the insights of systems thinking. In particular, Earth jurisprudence embodies the recognition that the behaviour of any one part of a system is largely determined by the functioning of the system as a whole and cannot be fully understood without an understanding of that system. From this perspective, in order to respond appropriately to climate change we must start by understanding the wider system within which this problem arises, accurately diagnose the nature of this particular pathology and on the basis of that diagnosis devise interventions designed to restore the health (i.e. the integrity and proper functioning) of the

system as a whole. This is what is required to “get real” in dealing with the reality of climate change and to respond appropriately.

The nature of the system

Sadly, summing up the nature and functioning of the cosmos in a few paragraphs is rather beyond my abilities! However, like most humans, my limitations have not stopped me speculating the nature of reality and the universe and sometimes reading the views of others on this mysterious subject. In doing so I have been particularly struck by the understanding that we are part of an evolving universe composed of entities which are simultaneously distinguishable as having their own separate identity, and as forming part of greater wholes. Arthur Koestler coined the expression “holon” for an entity that is itself a whole and simultaneously part of some other whole and described the way in which holons are organised and relate to each other as a “holarchy”.¹ A holarchy is distinct from a hierarchy because instead of a series of levels of different entities arranged in a manner that ensures that upper levels dominate the levels below, in a holarchy, each level both includes the less complex holons of which it is constituted, and transcends them in that it displays emergent or novel properties which were not exhibited by any of the holons which compose it.

Seen from this perspective, evolution is a process whereby holons emerge and are progressively organised into larger holons that include more and more levels of holons, thereby manifesting greater degrees of “wholeness”, and hence “depth”. For example, the evolution of Earth has seen atoms forming themselves into molecules, these in turn becoming organised into simple living cells (which developed the emergent property of being able to replicate themselves), these in turn became incorporated within multi-cellular organisms of increasing complexity which in turn developed more and more sophisticated brains which in turn produced new emergent properties such as consciousness.

It is important to appreciate that, as prominent American thinker Ken Wilber has pointed out,² each holon has two tendencies or drivers. The first is to maintain its own autonomy and identity as a “part”, and the second is to maintain its connection or communion with, and place in, a greater whole. In order to do this information must flow back and forth between each holon and the holon of which it forms part. If this flow of information is compromised the lower-level holon may cease to respond to the organising authority of the holon of which it forms part and that holon may fail to recognise its dependency on the holons that constitute it. This inevitably leads to a break down in the system. Put another way, if a holon is not able to maintain either its autonomous identity, or its place within the whole, the holarchy will begin to disintegrate.

Should a holon be destroyed, because it is an integral part of all higher holons, the higher holons will also be destroyed, while the holons below it will be unaffected. For example, if we regard the human being as a holon, it is easy to see that if humans cease to exist, the higher holons of which they form part, such as families, nation states, bodies of scientific knowledge etc. would cease to exist while other holons such as insects would continue functioning quite happily.

If we translate these concepts into a language more familiar to lawyers, it can be said that in order to maintain its identity, a holon must have certain rights (i.e. the conditions necessary to maintain its wholeness, autonomy or agency) while to maintain its place within the greater whole it has certain responsibilities in the sense of conditions which it must meet in order to continue to be part of that whole.³ In exploring these ideas I find it useful to think in terms of communities, since it is clear that a healthy human community requires both that the basic rights of its members (e.g. to food and shelter) are protected, and that each member of the

¹ The word “holon” (from the Greek holos, meaning “whole”) was coined by Arthur Koestler in his 1967 book *The Ghost in the Machine* (p. 48) to refer to something that is simultaneously a whole and a part..

² Wilber K, *A Brief History of Everything*, Gateway, 2nd Edition 1996, Dublin.

³ See Wilber, *ibid* at p 303.

community acts in a socially responsible manner and contributes in some way to the well-being of that community.

In certain circumstances, a holon may “rebel” against the order imposed by a higher order holon and seek to dominate the holon of which it forms part. For example, a leader in a society may seek to become a dictator or a cell in a body may begin to proliferate excessively and so become cancerous. In other words, one of the holons disrupts the mutually beneficial relationship and either fails to recognise its dependency on the holons of which it is composed or the organising authority of the larger holon of which it is part. This causes the system to deteriorate and breakdown. In these circumstances, the solution is not to do away with the offending holons (i.e. cells or leaders) but rather to check and limit the behaviour which is detrimental to the maintenance of the higher level holon and to reintegrate the lower order holon so that it once more functions as an integral part of the whole.

Again, if we use the human as an example of a holon, it is not too difficult to see that we have placed too much emphasis on our rights to autonomy and agency and too little on our responsibilities to the Earth community of which we form part. We have sought to appropriate excessive rights to ourselves without the corresponding responsibilities which must balance those rights if we are to maintain our membership of higher order holons such as the biosphere. From this perspective, it is unsurprising that we see an increase in pathological symptoms both in human communities (e.g. crime and polarisation of the rich and the poor) and in the biosphere (e.g. global warming).

To sum up therefore, in discussing the question of climate change, it is important to appreciate that it is occurring within a greater system of order consisting of holons arranged in holarchies and that if humans and other holons of which humans form part (e.g. communities, states etc.) do not respond to the information from higher holons such as the biosphere and submit to its organising authority, the biosphere will begin to deteriorate and a new holon will emerge that does not include the “rebel” human holons. Like a host animal infected with pathogens, we must either be killed by Gaia (or example by global warming that raises average temperatures to levels inhospitable to human life), or enter into a new symbiotic relationship with Gaia (perhaps on the basis of a far lower human population). Furthermore, in approaching these issues we should be mindful that since humans are holons with great depth (in the sense that they include many levels of holons) and a high degree of consciousness, we have correspondingly greater responsibilities to maintain the whole.

The nature of climate change

One of the most interesting things about climate change and the reason why it is so difficult for our governance systems to respond to is that it is not an isolated and discrete “mischief” that can be dealt with by simply prohibiting the harmful activity. Climate change is a symptom of systemic societal problems that cannot be successfully addressed without changing the nature and functioning of our social systems and the cultures that inform them. It is, I think, particularly important to appreciate that climate change is a symptom of more fundamental problems and that any attempt to merely address the symptoms cannot be successful in the long term unless the underlying causes are addressed simultaneously. Merely mopping the brow of the fevered patient is of little value without discovering the cause of the fever and addressing that. An accurate diagnosis is obviously vital since if the fever is caused by an infected wound the appropriate response will be very different from that if the fever were caused by influenza.

We are all by now familiar with many of the specific symptoms associated with climate change including: the increased incidence and severity of extreme weather events like hurricanes, floods and droughts, the melting of the polar ice caps, sea level rise, and the spread of invasive species and pathogens. The proximate causes for this we are told, is an increase in the concentration of CO₂ and other greenhouse gases in the atmosphere. This is in turn caused by a wide variety of human behaviour, principally the excessive burning of fossil fuels and wood and the destruction of forests and other ecosystems that sequester CO₂. Human behaviour of this kind is clearly a bad idea both for humans and for other

species. As a policy document on the impacts of climate change on Africa succinctly puts it: "Climate change is happening and when all the impacts are added up, everyone will lose out sooner or later".⁴ So why do we persist in acting in this manner?

One of the reasons is that our political, legal, economic and other societal structures legitimate, encourage and facilitate this behaviour. Power companies that burn fossil fuels are subsidised, virtually all aspects of Earth are legally defined as "natural resources" to be "exploited" by humans, or more usually, by those strange legal entities called corporations which are legally required to prioritise the pursuit of profit for shareholders above all else. All aspects of nature other than humans, are defined as objects incapable of holding rights and consequently legally incompetent to enforce the due performance of the responsibilities which are essential for the maintenance of the community of life on Earth.

However it is important to appreciate that the external manifestations of inappropriate behaviour and maladapted social structures reflect the inner worldviews, beliefs and values that are held both by us each as individuals and collectively by our cultures. Ultimately, the drivers of climate change reside in erroneous personal and collective beliefs that, despite all the evidence to the contrary, more material wealth and consumption will lead to greater human happiness and welfare even as it destroys the environment that sustains us.

In other words, I am suggesting that although climate change can, to a large extent, be attributable to the failures of our governance systems, it cannot be successfully addressed merely by addressing the symptoms (e.g. by technological innovation), or by changing laws, but must also be addressed by changing personal and cultural world views, values and ethics. The Earth jurisprudence approach is therefore inherently concerned with addressing both the inner worlds of the individual and of society and the external manifestations of that world in the behaviour of individuals and the structure and functioning of the governance systems of our societies.

Doing something about climate change

If one believes that understanding climate change within the wider context of the functioning of natural systems and the ongoing evolutionary story of our planet provides a valid starting point, and the diagnosis that I have outlined is broadly correct, the next question to answer is: "How does this diagnosis or perspective help us to begin rectifying the problem?"

A new vision

One of the difficulties I believe that we face in this regard is that it has been so long since most cultures attempted to regulate themselves with the purpose of fitting in with, and playing a mutually beneficial role within, the larger community of life on Earth, that most of us have only the vaguest notion of what we are aiming at. In other words, it is important for us to begin to develop plausible and realistic visions of what the "healed state" that we are aiming at might look like. We need to actively envision a range of attractive and desirable futures where human beings live fulfilled lives as responsible members of the Earth community if we are going to be successful in orienting our governance systems towards the attainment of those objectives and to motivate people to strive for those ends. I do not believe that the politics of fear and the rhetoric of deprivation and scarcity will get us where we need to go. While we need to look the challenge of climate change squarely in the eye and not to water down the harsh scientific data with political compromises, the magnitude of the task at hand requires that we inspire and transform people rather than seek to drive them through fear.

Building new social movements

Once we make the shift to considering ourselves part of the Earth community, the injustices and inadequacies of our existing governance systems becomes increasingly clear. It also becomes apparent that we cannot rely on governments to reform our laws and political

⁴ Africa – Up in Smoke? The second report from the Working Group on Climate Change and Development New Economics Foundation and International Institute for Environment and Development, June 2005.

systems – we need to begin building social movements capable of driving through the necessary changes and to articulate the principles that we will apply in redesigning them.

Discussing the nature and forms of the social movement that will be required to bring wild laws into being is beyond the scope of this talk. However, in the interests of contributing to later debates I will leave you with an interesting point of view advocated by Thomas Linzey, the director of the Community Environmental Legal Defence Fund in Pennsylvania. Many of you may be aware of the CELDF's work in supporting local communities to enact by-laws that provide for rights for Nature and strip corporations of civil liberties and rights in certain circumstances. Tom Linzey is fond of making the point that there has never been a proper environmental movement in the United States because social movements fight for rights and drive these into the Constitution. The abolitionists and the suffragettes were not deterred by the fact that the Constitution allowed slavery and did not grant voting rights to women. Furthermore, they did not campaign for a government agency to ameliorate the condition of slaves or of women – the equivalent of the Environment Protection Agency. Instead, they said “this is fundamentally wrong and we will fight for slavery to be outlawed and for civil rights to be afforded to all citizens”.

Perhaps it is time to reinvigorate community based, environmental and animal welfare organisations world-wide by forming coalitions to co-operate on a common agenda of driving rights for natural communities and local human communities into the constitutions of our nations and at the international level.

Designing wild laws to address climate change

Turning now to the question of how to design wild laws to address climate change, I wish to touch briefly on four general principles which I think we can use as design principles.

The context of the Earth community

The first principle to appreciate is that, as Thomas Berry has observed: “the Universe is a communion of subjects not a collection of objects”. This changes everything. It means that other species and aspects of natural systems are subjects that have “rights” which originate from the fact that they have co-evolved as part of the Earth system (or if you like, are holons within the holarchy of the biosphere). If we are dealing with other subjects instead of inert “natural resources” it means that instead of developing laws that define our relationships with the environment in terms of mechanistic specifications (e.g. emission standards), we need laws that promote good relationships based on the recognition of basic rights, mutual interdependence and respect. We need legal and social systems that can resolve apparent conflicts between the interests of humans and the interests of other members of the Earth Community not by reference to rigid rules and specifications but in manners that seek to foster healthy relationships. In other words we need to resolve our differences like lovers rather than like lawyers. This obviously suggests that traditional adversarial litigation may not be appropriate and we may need to develop new forms of mediation and decision-making to achieve decision-making that is more equitable to all members of the Earth Community and to promote restorative justice.

At present there is very little recognition in our governance systems of the need for human beings to respect the rights of members of the Earth community. For example, there is no regime which prohibits any state or human community from damaging the climate system or imposes liability for harm done to the Earth community as a whole, or even to other states such as the lesser developed countries. From an Earth jurisprudence perspective, this is a glaring “gap” in our legal systems.

The purpose of human governance systems

The second important design principle is that each law must reflect the understanding that we humans are an integral part of the Earth community and as such, the fundamental purpose of human governance systems must be to ensure that the pursuit of human well-being does not undermine the integrity of the Earth Community which is the only possible source of our well-

being. This means that our legal systems must not only protect the rights of humans but must also ensure that we fulfil our responsibilities to that Earth community. Indeed doing so is an essential precondition for our continued membership of the community.

Align human laws with Nature's laws

The third overarching principle is that human governance systems should be designed to be consistent with the principles and functioning of the natural systems of which they form part (what I've referred to in *Wild Law* as the "Great Jurisprudence"). In discussing principles of ecological design, Nancy Jack Todd and John Todd propose a similar principle when they state:

"Design should follow, not oppose, the laws of life".⁵

This general principle has many different facets. For example, we observe that nature has a tendency towards diversity and that greater diversity within a natural community is associated with increased resilience as well as harmony and beauty. This suggests that our legal systems should be designed to embrace diversity and to reflect the particular characteristics of the bioregions to which they apply. In embracing diversity, we need to recognise that in the same way as progressive constitutions now outlaw racism, and sexism, we need to develop new legal mechanisms to outlaw the domination and exploitation of other species. This is a tough ask, but if we are serious about being responsible members of the Earth community, we need to attempt to view things from this perspective of other members of the community as well as our own.

We might also observe that natural processes tend to be cyclical rather than linear. For example, each species and the waste from each species, provides food for another and because the nutrients can circulate indefinitely, the system is sustainable. On the other hand, human systems tend to be linear. We dig minerals out of the ground and harvest trees, discard most of these materials in the process of manufacturing goods, use the goods briefly and then bury the lot in landfill sites where it cannot be re-used. In the process we discharge vast amounts of greenhouse gasses into the atmosphere which destabilise the climate. It is clear that for human systems to function as part of a greater whole, we need to eliminate waste, promote cyclical processes and seek to maintain dynamic balances rather than continuing to pursue the absurd ideal of maintaining infinite consumption of "resources" on a finite planet.

Use methodologies that are consistent with your principles

The fourth principle is to develop and apply new methodologies and ways of working (including new formats to replace the conventional conference format). One cannot achieve fundamentally new results with old methodologies. As has been pointed out, the means are the ends in the making and the means that are employed will have a fundamental impact on the end result. This new methodology must involve a new humility as we seek to listen and hear the voice of the natural world more clearly. It will also involve us seeking to foster our own connection with the natural world and to hear what it needs in order to heal.

A few ideas for wild laws

I do not want to pre-empt our discussions this weekend by giving specific prescriptions for the use of law in addressing climate change at this stage. However, I thought it might be useful at this stage to throw out a few ideas for further discussion.

Less law may be better

Firstly I suspect that responding effectively to climate change may well require a simplification of the legal system so that it is oriented towards fulfilling human responsibilities to the community of life as a whole and maintaining the quality of those relationships. If these

⁵ From *Eco – Cities to Living Machines. Principles of Ecological Design*, North Atlantic Books, Berkley, California, 1993.

fundamental issues are addressed the symptoms such as climate change will begin to disappear.

We should be wary of knee-jerk responses that simply increase red tape and place too much faith in more detailed rules and standards and more advanced technology. For example, is it really important at this critical stage in our planet's history to devote huge amounts of attention to determining precisely what emission standards should be imposed on a particular company at a particular site and training an army of inspectors and developing increasingly complex technology to enforce those laws? Perhaps it would be better to refuse to authorise any new projects that emit greenhouse gases in significant quantities and require municipalities to take whatever measures may be necessary (within certain democratic limits) to reduce net emissions from their area to zero?

Enshrining Nature's limits in law

Perhaps it is time to take Nature's limits and enshrine them in law. We already know that continuing to emit CO₂ and other greenhouse gases into the atmosphere will produce unacceptable climate changes and that we need to reduce the concentration of these gases in the atmosphere.

Perhaps we should consider establishing the principle that the emission of more than a certain amount of greenhouse gases per person is prima facie unlawful and place an onus on each person and social unit (e.g. companies, local authorities, states etc) to justify any excessive emissions. A legal defence would only be available to those who could demonstrate, for example, that they had done everything reasonably possible to contribute to the quality of their relationship with other members of the Earth community and the net impact of their activities was beneficial from the perspective of the Earth community as a whole. Corporations that are unable to conform to the limits within a prescribed transition period should be wound up or their founding documents amended to transform them into public interest organisations dedicated to repairing the damage caused. However drastic this sounds, in my view it is clearly more desirable to close down legal entities that cannot demonstrate that they are playing a beneficial role on Earth than for our species to lose its membership of the Earth community

These are radical ideas and they may not be the best way of approaching these issues. However I believe that it is important to face the fact that the magnitude and urgency of the challenge requires far bolder and more imaginative legal and institutional reforms than those currently touted in mainstream political debate. We should not shrink from debating ideas on their merits however radical they may seem at first.

Reclaiming local democracy

I also suspect that the application of the design principles discussed above may inevitably lead to a strengthening of the rights of smaller human communities to govern themselves and to prohibit activities that they believe are harmful. In this regard it is important to appreciate that from an Earth Jurisprudence perspective, since the Universe (and by proxy, Earth) is the fundamental source of human rights, this process should be seen as one of reclaiming those rights from distant political structures rather than petitioning for the devolution of power.

If this process occurs, it will have important ramifications for issues such as bioregional planning, food production, energy and transport.

Conclusions

In conclusion, there is no legal silver bullet that will stop global climate change. Even if there were, we would be left with many other pressing and life-threatening environmental issues to address such as the over use of water, the loss of fertile soils, the poisoning of the biosphere, the collapse of fish stocks, the catastrophic loss of biodiversity and so on. Climate change is but one aspect of a wider process of fundamental change within the Earth community caused and fuelled by human activities based on a faulty understanding of our place in the cosmos

and our responsibilities as members of the Earth community. The primary role of what may be termed “wild lawyers” is to begin the process of re-orientating our human governance systems so that their primary purposes is to enable us to remain in communion with the rest of the Earth community, to fulfil our responsibilities in relation to it, and to begin to heal the damage that we have done to that community.

In doing so we need to take the following six steps:

1. firstly, appreciate the context within which our governance systems exist;
2. secondly, analyse the real nature of the problem;
3. thirdly, identify the nature of the society we want to create;
4. fourthly, devise an appropriate approach with principles to guide the detailed design of wild laws;
5. fifthly, build a constituency that will support the necessary changes; and
6. sixthly, begin the process of restructuring our governance systems.

Climate change is real and if we do not want our civilisations to collapse we will have to submit to the authority of Earth and do whatever it takes to honour our responsibilities to the other members of the Earth community. This may seem difficult and costly but it is the price of continued membership of that Community. In my view it is a fair price to pay for the privilege of living on a planet of breathtaking beauty and magic – and for a sense of belonging, identity, meaning, and fulfilment.

Halting the Global Meltdown: Can Environmental Law play a Role?

Andrew Kimbrell

INTRODUCTION AND PART ONE: THE STORY OF *MASS V. EPA*

On April 2, 2007 the United States Supreme Court¹ handed down its decision in Massachusetts vs. Environmental Protection Agency, its first case dealing with the issue of global warming. The decision was a landmark victory for environmentalists: it legitimized the urgency of the global warming crisis and the claim that the Bush Administration was illegally withholding regulation that could help address this crisis. Whether this decision will actually spur significant action by the U.S. on climate change is yet to be seen. However there is general agreement that the when the Supreme Court gave its imprimatur to the legitimacy and unprecedented importance of global warming, the public policy debate in the US was altered permanently.

I had a personal and professional stake in this legal battle over global warming. Twenty years before this decision I had co-founded the Greenhouse Crisis Foundation and organized the first local summit on global warming, attended by more than fifty mayors from around the world. A few years later I initiated the filing of the first-ever lawsuits challenging US federal agencies' failures to include global warming impacts in their environmental analyses. After some initial legal success, the courts ruled against these attempts on jurisdictional and procedural grounds, a problem I will address later in this paper. Then, almost a decade ago, my legal partner Joseph Mendelson III and I conjured up this case's genesis: the idea of forcing the Environmental Protection Agency (EPA) to regulate carbon dioxide (CO₂) and other greenhouse gases under the Clean Air Act (CAA).²

In 1999, our organization, the International Center for Technology Assessment (ICTA), filed a formal legal petition with the EPA demanding that they regulate greenhouse gas emissions from motor vehicles as required by the CAA.³ It was the start of an eight-year long struggle by our organization.⁴ The Clinton Administration responded to the petition by holding several meetings with us to discuss initiating this historic regulation.

¹ Massachusetts et al. v. EPA et al., ___ U.S. ___, 127 S. Ct. 1438 (2007).

² 42 U.S.C. §§ 7401 *et seq.*

³ The original 1999 ICTA petition, formally entitled "Petition for Rulemaking and Collateral Relief Seeking the Regulation of Greenhouse Gas Emissions from New Motor Vehicles Under § 202 of the Clean Air Act" (Greenhouse Gas Petition), is available at <http://www.icta.org/doc/ghgpet2.pdf>⁴ A chronology for the case is available at <http://www.icta.org/doc/Chronology%20Short%208-31-06.pdf>

A public notice and comment process was undertaken, with over fifty thousand public comments received by the agency in a five-month period. However, with the advent of the George W. Bush Administration in 2000, all communication ceased. In 2003, we were forced to sue the EPA for unreasonable delay in even responding to our petition. As a result of that lawsuit the Bush EPA finally did respond to the petition, denying our demands. The Administration claimed that: 1) EPA lacked the necessary statutory authority to deal with global warming; and 2) even if it did have that authority, regulating global warming was not appropriate for a number of policy reasons including their view that the science was too uncertain to be a basis for regulation.

Joined by a number of other environmental groups and several US States, we appealed this denial by filing a petition for review in the US Court of Appeals for the District of Columbia (D.C. Circuit). After briefing and oral argument, an ideologically divided three-judge panel of that appellate court upheld the EPA decision to deny our Greenhouse Gas petition by a 2-1 margin. The full D.C. Circuit then declined to reconsider the panel decision *en banc* by an equally-narrow margin of 4-3. Ultimately, we and our environmental non-profit and State partners appealed to the US Supreme Court. Surprisingly the High Court granted review. Oral argument was held in December 2006, and after five months of deliberation and waiting, the Court announced its decision in April of this year: a stunning victory for us, reversing the agency and the lower court, by a narrow 5-4 margin. Writing for the five-judge majority, Justice Stevens held that EPA did indeed have the authority to regulate greenhouse gases as air pollutants under the CAA and that EPA had illegally failed to meet their statutory obligations. Stevens was joined by Justices Breyer, Souter, Ginsburg and Kennedy. The remaining four justices (Chief Justice Roberts, and Justices Scalia, Thomas and Alito) each joined two dissenting opinions: one, authored by Chief Justice Roberts arguing that the petitioners lacked standing to sue; and a second dissent written by Justice Scalia reaching the merits and agreeing with EPA's policy assertions (including scientific uncertainty) for not regulating global warming.

Legally, the global warming case is hugely important, a momentous decision. While Justice Stevens' majority is thin, there is nothing thin about the sweeping nature of the ruling: the Court ruled in our favor on all counts. The historic case recognized the right to sue because of injuries caused by global warming. Further, the Court held that the Bush Administration had

⁵ See 68 Fed. Reg. 52924 (2003).

⁶ See 68 Fed. Reg. 52922.

⁷ *Id.*

⁸ *Mass v. EPA*, 415 F.3d 50 (D.C. Cir. 2005). The court voted along essentially party lines: the two republican-appointed judges (Randolph, Sentelle) ruled against us and the judge appointed by a democratic president (Tatel) voted in our favor. *Id.* at 61-82 (Tatel, J., dissenting).

⁹ See *Mass v. EPA*, 433 F.3d 66 (D.C. Cir. 2005).

¹⁰ *Mass v. EPA*, 126 S. Ct. 2960 (June 26, 2006).

¹¹ *Massachusetts et al. v. EPA et al.*, ___ U.S. ___, 127 S. Ct. 1438 (2007).

¹² *Id.* at 1438-63.

¹³ Id. at 1463-71 (Roberts, C.J., dissenting).

¹⁴ Id. at 1471-78 (Scalia, J., dissenting).

¹⁵ Id. at 1438.

¹⁶ Id. at 1452-59 (the majority's standing analysis).

illegally resisted efforts to regulate global warming pollution.¹⁷ The case defines a major new arena for EPA regulations, namely addressing global warming. Subsequent demands to the agency by other groups and political entities will have to be respected by the agency and acted upon. Finally, with regard to the science of climate change, the decision fundamentally altered the nation's discourse on climate change. The Court definitively declared: "The harms associated with climate change are serious and well recognized," and quoting at length from studies cataloging present and future harms.¹⁸ However for me and some other observers, the most remarkable aspect of this case was what lurked behind the actual legal holdings: a implicit understanding of nature that comports with ecological reality and the relevance of this ecological world view vis-à-vis the rule of law.

The "ecological model" views nature as a complex series of interdependent dialectical relationships. It sees industrial production as a profound disruption of those relationships and supports the view that these disruptions will cause significant harm even if such harm is not immediately apparent and may be distant in time or even location. Obviously this "precautionary principle"-based ecological approach has important implications for the law. For example, accepting such a premise leads one to a broad interpretation of access to courts for those who object to activities potentially harmful to the environment. Furthermore, such a view is far-sighted, seeing future secondary and tertiary injuries as potentially sufficient bases for action --even though these harms may be uncertain or difficult to measure in the present.

The Court's majority opinion is unique among recent Supreme Court rulings for its internalization of this ecological point of view. The holding begins in striking fashion, repeating the petitioner's view that global warming is "the most pressing environmental challenge of our time" and emphasizing the "unusual importance of the underlying issue."¹⁹ The Court then proceeds to find standing for the State of Massachusetts (and thereby all petitioners) based on the Court's ability to assume injury from the human disturbance of the earth's climate system.²⁰ This included the acceptance of significant climate impacts that are not easily quantifiable or immediate. The Court recognized that the problem was "widely shared," but held that the shared nature of the harm did not negate the petitioners' specific injury and standing.²¹ Finally, the Court properly recognized the global scope of the problem while still holding EPA could help remedy it the problem: "A reduction in domestic emissions would slow the pace of global emissions increases, no matter what happens elsewhere."²² In sum, the Court's grant of standing is based on an interpretation of the law (here the jurisdictional bar of standing) and of the facts that is relatively consistent with the aforementioned ecologically sound model.

²³ We can see a similar ecological approach in majority's analysis of the merits of the case. The Court did not allow EPA unfettered discretion in the decision on whether to regulate greenhouse gases under the CAA. EPA could not rely on a "laundry list" of impermissible

factors that "have nothing to do with whether greenhouse gas emissions contribute to climate

change.”²⁴ As in the standing discussion, the Court’s analysis recognized the international, interconnected nature of the global warming problem, eviscerating arguments from the Bush Administration and industry that the worldwide nature of the problem negated any government duty to regulate. For example the Court held that the president’s “broad authority in foreign affairs” did not “extend to the refusal to execute domestic laws” with regard to alleviating global climate change.²⁵ Moreover the Court’s views are framed with the sense of urgency about global warming and the need to quickly begin addressing the crisis. The Court is clearly frustrated with the EPA’s refusals, as the nation’s leading environmental protection agency, to take adequate oversight steps.

Even as the Court’s adoption of this implicitly ecological approach is a welcome change, it is a fragile one. The decision was after all 5-4. Additionally the four dissenters left little doubt that should there be a change in the Court’s personnel in their favor this precedent would soon be reversed or marginalized. Thus, ironically, as positive as the Court’s ruling is for global warming and environmental law at large, it also clearly indicates how our current legal framework does not adequately address the current decimation of the natural world caused by our industrial production system. Here we have the most unprecedented environmental threat yet experienced by human society, the very biochemistry of the planet compromised, and the highest court in the US only orders regulation by a single vote margin! We have the earth in peril and perhaps the future of the planet in the balance and lawyers are fighting for the high ground in the interstices of administrative law to try and find some remedy, some regulatory framework trigger or hook. How can Western law begin to resolve its own crisis and make itself relevant to most pressing environmental issues of our time? How can the “ecological” approach implicit in *Mass v. EPA* be amplified to provide a contextual model for future environmental jurisprudence?

PART TWO: THE REDISCOVERY OF NATURAL LAW

Fortunately, the history of Western Law provides us with such a potential context for the next stage of environmental law. A central concept in the development of law in ancient Greece was the idea of a “Natural Law.” The Greeks were not satisfied with simply ad hoc legal systems but rather sought a basis for all law in the “order” of nature. Following the Platonic lead they found such ordering in the “telos” of nature—the belief that every element in nature has a meaning and is interconnected with the meaning of the whole. They saw an ultimate design and hierarchy in nature and sought to comport their laws with this design. In a number of different incarnations natural law came to be viewed as a body of rules for the making, administration, and the adjudication of positive laws. Natural law was not seen as a set of rules which precisely dictated positive law, but rather as a set of principles that sets the processes of law in operation and directs their influence through dialectic, analogy, and example (the bases for the art of rhetoric). In the memorable phrase of philosopher Scott Buchanan, “Natural law, as does reason, sits within the mind of the magistrate, lawyer, and citizen as the internal teacher.”

Throughout the subsequent history of Western jurisprudence when the governing law ceased to be relevant to the needs of a society they re-examined Natural Law to rediscover that “internal teacher” who would guide them. I think this is at least in part the road we must take again as we face the environmental crisis of today and the inadequacy of our legal

system to deal with this crisis. Here are a couple of common definitions of Natural Law:

"Natural law" is defined by BLACK'S LAW DICTIONARY as

- 1 A physical law of nature (Ex. gravity);
- 2 A philosophical system of legal and moral principles purportedly deriving from a universalized conception of human nature or divine justice rather than from legislative or judicial action; moral law embodied in principles of right and wrong (Cf. positive law).²⁶

More from A DICTIONARY OF MODERN LEGAL USAGE:

Historically a number of senses have been attributed to the term; today the prevailing sense especially in legal contexts is "law that determines what is right and wrong and that has power or is valid by nature, inherently, hence everywhere and always." L. Strauss, *Natural Law*, 11 International Encyclopedia of the Social Sciences 80, 80 (1968). Because *natural law* and *positive law* are not mutually exclusive, a rule such as, "Thou shalt not kill,"²⁷ might be a rule equally in both systems.

Evident in these definitions of Natural Law we see the ecological approach amplified. Natural Law is understood to reflect or be validated by the Laws of Nature. The tenets of Natural Law at their core then give legal status to the "telos" of every element in nature means that under the law no aspect of nature can be viewed merely as a "means" (i.e., a resource for exploitation), but must also be legally understood as an end in itself. Moreover, we can now bolster the teleological tenets of Natural Law with the profound insights offered by modern ecology, effectively marrying Natural Law with the Law of Nature.

Here then are new versions of the three generally agreed upon basic formulations of Natural Law (with apologies to Immanuel Kant) which reflect how they could be used as the context for new and effective environmental laws:

First Formulation: This is meant for legislators and judges.

"Choose the maxims of your acts as if they were to serve as universal laws of nature." (*To be relevant this formulation must now be informed with the science of ecology and our deepening understanding of the "laws of nature."*)

Second Formulation: This is for legal philosophers.

²⁶ BRYAN GARNER, ED., BLACK'S LAW DICTIONARY 467-68
(2nd Ed. 2001). ²⁷ BRYAN GARNER, A DICTIONARY OF
MODERN LEGAL USAGE 581-82 (2nd Ed. 2001).

"All maxims ought to by their own legislation harmonize with the understanding of life as a kingdom of ends." (*This again should be amplified by the "surreptitious" teleology of ecology.*)

Third Formulation: This is for all citizens and all private and public entities.

"Each natural thing must be treated as an end in itself, not merely as a means." (*Actions violate this formation if any aspect of nature is treated merely as means. This does not mean that they can never be treated as means. Rather that subjects act reciprocally as a*

means and ends regarding one another, or as mutual means or a common end, as the organs in an organism, or as members of a free community. They may serve each other but the "royalty" in each must be respected under the law.)

PART THREE: EMBODYING THE NATURAL LAW APPROACH

Current positive law is becoming more and more irrelevant in addressing the environmental crises engulfing us. Clearly we need new legal principles on which to base a new wave of environmental laws and regulations which are effective in halting the exploitation and devastation of the natural world endemic to our technological system, including of course the most profound threat --global warming. Rather than attempting to invent new legal principles "from scratch," I believe that the long tradition of Natural Law which has been the basis for Western law for millennia can now come to our aid, as it has during many other legal crises in the past (including being the legal basis for democracy and the US Constitution).

To be effective, Natural Law must be rediscovered and re-envisioned. The recovery involves extending natural laws teleological vision to the entire community of nature (as the Greeks did) and not just to human subjects as has been the habit since the enlightenment (as codified by Kant). The re-envisioning involves amplifying the teleological bases of Natural Law with the modern understanding of ecology, thereby marrying Natural Law with the Laws of Nature.

Here is a sampling of existing normative law concepts that can be drawn from used as manifestations of this new Natural Law approach.

1. The Public Trust Doctrine

The public trust doctrine is a common law property concept with roots extending back to Roman law holding that mankind has a common right to the use of resources such as air, wildlife, running water, and the oceans and their shores and not have these destroyed through private ownership and exploitation.²⁸ Natural Law has often been associated with the public trust doctrine. Under this doctrine an aspect of nature cannot be so used as to fundamentally alter its character and usefulness. The basic understanding is that the sovereign holds certain common properties in trust, barring destructive exploitation, so that they can exist in their useful state in perpetuity. The doctrine protects the public resources, preventing the government from adversely affecting those rights. As stated by the U.S. Supreme Court in 1892: "absolute private dominion over property impressed with the public trust can never be granted unless it is in the public interest to do so."²⁹

²⁸ See generally ZYGMUNT PLATER, ENVIRONMENTAL LAW AND POLICY: NATURE, LAW, AND SOCIETY 365-412 (1992) (discussing the past and recent application of the public trust doctrine to traditional resources such as navigable waters as well as to non-navigable and non-water resources); Joseph L. Sax, The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention, 68 Mich. L. Rev. 471 (1970) (providing a comprehensive survey of the public trust doctrine and its judicial development).

The doctrine was “rediscovered” in the U.S. in a 1970 article by University of Michigan law professor and water law scholar Joseph Sax, who suggested it could be used to address a number of environmental problems. It is fundamentally a judicial doctrine and courts have decided whether and to what extent it applies in a given state. Although originally water-resource use based (e.g., navigation, commerce and fisheries), courts have expanded the doctrine in cases dealing with both water and land-based public resources and an increasing array of public activities and interests when the existing regulatory framework was not sufficient to protect and preserve vital public resources. These contexts include but are not limited to: state parks, fish, marine life, sand and gravel in water beds, all waters capable of recreational use, national parks, wildlife, and a historic battlefield. States have recognized that public trust resources’ uses are sufficiently flexible to encompass the changing public needs and held that those uses extend to ecological, scenic, and intrinsic public interests. In addition, U.S. States have incorporated public trust principles into their laws and constitutions. Finally, academic scholarship has explored the doctrine’s potential application to a myriad of additional

²⁹ Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 433 (1892). In this landmark case, the Supreme Court held that a state legislature could not grant ownership of land under navigable water to a private party. In 1869, the Illinois legislature had granted the railroad more than a thousand acres of shoreline and underwater land. The Court ruled the grant invalid, holding that the State’s “abdication” of control over the underwater land was inconsistent with its responsibility “to preserve such waters for the use of the public.” Joseph L. Sax, The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention, 68 MICH. L.REV. 471 (1970). Gould v. Greylock Reservation Comm’n, 215 N. E. 2d 114, 121-26 (Mass. 1966).

³² Nash v. Vaughn, 182 So. 827, 828 (Fla. 1938).

³³ New Jersey Dep’t of Env’tl. Protection v. Jersey Cent. Power & Light Co., 308 A. 2d 671, 673 (N.J. 1973).

³⁴ Warren Sand & Gravel Co. v. Commonwealth Dep’t of Env’tl. Resources, 341 A. 2d 556, 560 (Pa. 1975).

³⁵ Montana Coalition for Stream Access v. Curran, 682 P. 2d 163, 167-71 (Mont. 1984).

³⁶ Sierra Club v. Department of Interior, 398 F. Supp. 284, 287 (N.D. Cal. 1975).

³⁷ Wade v. Kramer, 459 N.E. 2d 1025, 1027 (Ill. App. Ct. 1984).

³⁸ Commonwealth v. National Gettysburg Battlefield Tower, Inc., 311 A. 2d 588, 591 (Pa. 1973).

³⁹ Marks v. Whitney 6 Cal. 3d 251, 259 (Cal. 1971).

⁴⁰ See National Audubon Soc’y v. Alpine County, 33 Cal. 3d 419, 435 (1983) (declaring that recreational and ecological values, such as scenic views of a lake and its shore, the purity of the air, and the use of a lake for nesting and feeding by birds, are protected by the public trust). ⁴¹ See, e.g., Owsichek v. State Guide Licensing & Control Bd., 763 P.2d 488, 493 (Alaska 1988) (noting that the purpose of the Alaska Constitution’s “common use” clause “was achieved by constitutionalizing common law principles imposing upon the state a public trust duty with regard to the management of fish, wildlife and waters”); Penn. Const. Art. 1, § 27 (“The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania’s public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.”).

environmental issues, including but not limited to: open ocean aquaculture or fish farming,⁴² protection of coral reefs,⁴³ the environmental impacts of snowmaking,⁴⁴ the protection of biodiversity,⁴⁵ and the alleviation of agricultural irrigation and waste-caused water pollution,⁴⁶ the wireless electromagnetic spectrum,⁴⁷ and as nothing short of a governmental duty to maintain a healthy environment.⁴⁸

2. The Guardian Ad Litem Concept

A central problem for the idea of giving rights to the “telos” of natural things or places as required under natural law is the problem of agency. A tree, mountain, insect or ecosystem cannot argue for itself in court. One solution to this might be an expanded use of the *guardian ad litem* (Latin for “guardian at law”) concept. A *guardian ad litem* is defined as a “guardian, usually a lawyer, appointed by the court to appear in a lawsuit on behalf of an incompetent or minor party.”⁴⁹ For example, a guardian ad litem is often appointed by courts in divorce proceedings to represent the interests of minor children. The guardian ad litem is charged to represent the best interests of the minor child alone, separate from the position of the state or government agency or the interest of the parents. In addition, guardians ad litem can also be appointed in probate matters to represent the interests of unknown or unlocated heirs to an estate.

This basic jurisprudential tool from divorce and probate law could be extrapolated and put to work in an amended or new environmental protection framework. One major current failing of U.S. constitutional law is that only people can file lawsuits or have constitutional “standing” to sue. In general, in order to challenge any private or governmental action potentially damaging to some aspect of environment in a court of law, environmental protection advocates must first meet a number of judicially-mandated procedural hurdles showing they have a sufficient interest in the dispute and their personal interest will be damaged.⁵⁰ These “standing” prerequisites include injury in fact, causation, and redressability.⁵¹ Importantly, these requirements are jurisdictional; if they are not met, the case is tossed out. The result is that many actions cannot be challenged and are never adjudged on their merits because the interested humans are judged not to be closely enough connected to the action to challenge it.

⁴² Hope Babcock, Grotius, Ocean Fish Ranching, and The Public Trust Doctrine: Ride'em Charlie Tuna, 26 STAN. ENVTL. L.J. 3 (2007) (explaining why the doctrine could and should be expanded to apply to ocean fish ranching). ⁴³ J.C. Sylvan, How to Protect a Coral Reef: The Public Trust Doctrine and the Law of the Sea, 7 SUSTAINABLE DEV. L. & POL'Y 32 (2006). ⁴⁴ Alethea O'Donnell, Something Old, Something New: Applying the Public Trust Doctrine to Snowmaking, 24 B.C. ENVTL. AFF. L. REV. 159 (1996). ⁴⁵ Ralph Johnson, Protection of Biodiversity Under the Public Trust Doctrine, 8 TUL. ENVTL. L.J. 21 (1994). ⁴⁶ Ralph Johnson, Water Pollution and the Public Trust Doctrine, 19 ENVTL. L. 485 (1989). ⁴⁷ Patrick Ryan, Treating the Wireless Spectrum as a Natural Resource, 35 ELR 10620 (2005).

⁴⁸ Peter Manus, To a Candidate in Search of an Environmental Theme: Promote the Public Trust, 19 Stan. Envtl. L. J. 315 (2000). ⁴⁹ BRYAN GARNER, ED., BLACK'S LAW DICTIONARY 313 (2nd Ed. 2001).

⁵⁰ On problems with standing doctrine generally, see, e.g., William A. Fletcher, The Structure of Standing, 98 YALE L.J. 221, 224 (1988); for a comparison with other nations' views on access to courts in

environmental cases, see Matt Handley, Why Crocodiles, Elephants, and American Citizens Should Prefer Foreign Courts: A Comparative Analysis of Standing to Sue, 21 REV. LITIG. 97 (2002).⁵¹ See generally Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., 528 U.S. 167, 180-81 (2000).

A couple of examples may be helpful. Imagine two corporations are in litigation over ownership of a mountain property. One corporation wishes to strip mine the mountain the other to use it for recreational camping. Here a Court in making its decision could appoint a guardian ad litem to represent the mountain's best long-term interest, and as in a divorce proceeding, the decision of the guardian could be dispositive. Another example might involve a federal agency determination that it must cut down an old-growth forest on a remote U.S. protectorate island in order to build a military base. This island is not inhabited by humans and is off-limits to public visitors. Very likely opponents of the clearcutting would lack standing to challenge the action because they would be unable to show that they – rather than the forest itself—would be injured.⁵² (If they could visit the island's forests they could argue their recreational and aesthetic enjoyment in the forest is sufficient interest to challenge.)

There is a further, connected problem. The second above example is an extreme one; normally some interested party can make a non-frivolous argument their interest is damaged by the proposed action. Yet even in those cases the result is that the focus of the case (and often its outcome) turns on and emphasizes whether those artificial “standing” benchmarks for human impact are met (are people impacted, is the action the cause of their injury, and will the revocation of the action redress the people's injury) and not whether an action will negatively impact the ecosystem in question, in and of itself. As noted this was certainly the case with *Mass v. EPA*, where the Justices on both sides focused a great deal on whether the petitioners had met the necessary standing hurdles before addressing the merits of the case.⁵³ This structural weakness in the U.S. jurisprudential framework creates a kind of legal fiction in which the injury alleged and analyzed is usually not the injury to which the parties are concerned.

In order to have a system of law that accounts for the interconnectedness of species and internalizes environmental impacts, the guardian ad litem concept could be useful. In this form, environmental advocates/scientific experts appointed by the court or chosen by the people would represent the interests of the natural world – specific plants, animals, or ecosystem – impacted by the proposed action. This guardianship-for-the-environment model is not new: proponents include no less than U.S. Supreme Court Justices William Douglas and Harry Blackmun, who advocated for the concept in a famous 1972 environmental case, *Sierra Club v. Morton*.⁵⁴ Academic scholarship has also long explored the idea.⁵⁵

⁵² See, e.g., Humane Soc'y of the United States v. Babbitt, 46 F. 3d 93 (D.C. Cir. 1995) (holding no aesthetic injury where organizations' members had not visited the animal in question). ⁵³ Id. at 1453-58; id. at 1464-71 (Roberts, C.J., dissenting). ⁵⁴ *Sierra Club v. Morton*, 405 U.S. 727, 741-55 (1972) (Douglas, J., dissenting) (“The critical question of ‘standing’ would be simplified and also put neatly in focus if we fashioned a federal rule that allowed environmental issues to be litigated before federal agencies or federal courts in the name of the inanimate object about to be despoiled, defaced, or invaded by roads and bulldozers and where injury is the subject of public outrage. 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.”); id. at 755-59 (Blackmun, J., dissenting) (“Do we need any further indication and proof that all this means that the area will no longer be one ‘of

great natural beauty' and one 'uncluttered by the products of civilization?' Are we to be rendered helpless to consider and evaluate allegations and challenges of this kind because of procedural limitations rooted in traditional concepts of standing?").

⁵⁵ See generally Christopher D. Stone, Should Trees Have Standing?--Toward Legal Rights for Natural Objects, 45

S. CAL. L. REV. 450 (1972); see also Cass R. Sunstein, Standing for Animals (with Notes on Animal Rights), 47 UCLA L. REV. 1333 (2000); Joyce S. Tischler, Rights for Nonhuman Animals: A Guardianship Model for Dogs and Cats, 14 SAN DIEGO L. REV. 484 (1977); Elizabeth L. Decoux, In the Valley of the Dry Bones: Reuniting the Word "Standing" with its Meaning in Animal Cases, 29 WM. & MARY ENVTL. L. & POL'Y REV. 681 (2005); Lauren Magnotti, Pawing Open the Courthouse Door: Why Animals' Interests Should Matter When Courts Grant Standing, 80 ST. JOHN'S L. REV. 455 (2006). ⁵⁶ *Id.* at 464.

⁵⁷ See Douglas L. Parker, Standing to Litigate "Abstract Social Interests" in the United States and Italy: Reexamining "Injury in Fact," 33 COLUM. J. TRANSNAT'L L. 259, 289-92 (1995). ⁵⁸ See generally MICHAEL AXLINE, ENVIRONMENTAL CITIZEN SUITS (3d ed. 1993). ⁵⁹ See, e.g., Jeffrey Miller, Theme and Variations in Statutory Preclusions Against Successive Environmental Enforcement Actions By EPA and Citizens: Part One: Statutory Bars in Citizen Suit Provisions, 28 HARV. ENVTL.

L. REV. 401, 414-429, 424 (2004) (discussing the legislative history of citizen suit provisions and concluding that "One clear purpose was to be a vehicle for citizen participation in government, with broader goals of providing transparency and openness in government, in turn promoting public ownership of and trust in government. Another was to assure compliance with environmental statutes by encouraging government enforcement and providing default enforcers when the government chose not to enforce or lacked the resources to do so.").

And the idea is not without precedent: other nonhuman entities such as corporations, states, estates, and municipalities have standing to bring suit on their own behalf, though a representative.⁵⁶ (This uneven application creates the absurd result that currently inanimate objects like corporations and ships possess more rights than beings that share key human characteristics: the capacity for rational thought and ability to feel pain.) The inclusion of the aforementioned citizen suit provisions in most U.S. environmental laws such as the Endangered Species Act is further evidence that Congress intended citizen participation in environmental protection litigation on behalf of wildlife. Finally, at least one other country, Italy, uses a type of guardian system in environmental disputes where certified environmental organizations possess a right to participate in environmental disputes without standing injury showings.⁵⁷

3. Citizen Suit Provisions

Perhaps the most available legal avenue to embody the ecological Natural Law approach would be by expanding the legal rights of citizens to protect the environment through citizen suit provisions in environmental legislation. Citizen suit provisions are statutory provisions that grant the right of private citizens to bring suit to enforce that particular federal law in certain cases. They are also sometimes referred to as “private attorney general” provisions.

Citizen suits provide private citizens the right to bring a lawsuit against a citizen,⁵⁸ corporation, or government body for engaging in conduct prohibited by the statute. For example, a citizen can sue a private company under the Clean Water Act for illegally polluting a waterway. Alternatively or additionally, pursuant to some citizen suit provisions, a private citizen can bring a lawsuit against a government body for failing to perform a nondiscretionary duty. For example, a private citizen could sue the Environmental Protection Agency for failing to promulgate regulations that the Clean Water Act required it to promulgate.

The main purpose of citizen suit provisions is twofold: to supplement and/or prod government enforcement actions and to prod violators to achieve statute compliance.⁵⁹ More generally, citizen suits foster environmental stewardship, agency accountability, representational democracy, and the rule of law.⁶⁰ There are normally two procedural prerequisites: Citizen enforcement actions can only be commenced in the absence of appropriate state or federal enforcement and citizens must give notice to both the violator and the governmental enforcement authorities prior to filing suit.⁶¹

The Clean Air Act, passed in 1970, was the first time a citizen suit provision was incorporated into U.S. federal law and is generally representative of the provisions. CAA § 304 allows any person to commence a civil action on his own behalf:

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the Eleventh Amendment to the Constitution) who is alleged to have violated (if there is evidence that the alleged violation has been repeated) or to be in violation of (A) an emission standard or limitation under this

chapter, or (B) an order issued by the Administrator or a State with respect to such a standard or limitation.⁶²

After the passage of the Clean Air Act, similar citizen suit provisions were included in all but one subsequently-enacted U.S. federal environmental statutes, in chronological order:⁶³

- 1 The Clean Water Act (CWA), 33 U.S.C. § 1365 (enacted 1972)
- 2 The Marine Protection, Research, and Sanctuaries Act (Ocean Dumping Act), 33 U.S.C § 1415(g) (enacted 1972)
- 3 The Noise Control Act of 1972, 42 U.S.C. § 4911 (enacted 1972)
- 4 The Endangered Species Act (ESA), 16 U.S.C. § 1540(g) (enacted 1973)
- 5 The Safe Drinking Water Act, 42 U.S.C. § 300j-8 (enacted 1974)
- 6 The Deepwater Port Act, 33 U.S.C. § 1515 (enacted 1975)
- 7 The Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6972 (enacted 1976)
- 8 The Toxic Substances Control Act (TSCA), 15 U.S.C. § 2619 (enacted 1976)
- 9 The Surface Mining Control and Reclamation Act, 30 U.S.C. § 1270 (enacted 1977)
- 10 The Outer Continental Shelf Lands Act, 43 U.S.C. § 1349 (enacted 1978)
- 11 The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9659 (enacted 1986)
- 12 The Emergency Planning and Community Right-to-Know Act, 42 U.S.C. § 11046(a)(1) (enacted 1986)
- 13 The Hazardous Liquid Pipeline Safety Act of 1979, 49 U.S.C. § 60121 (enacted 1994)⁶⁴

⁶⁰ See David R. Hodas, Enforcement of Environmental Law in a Triangular Federal System: Can Three Not be a Crowd When Enforcement Authority is Shared by the United States, the States, and Their Citizens?, 54 MD. L. REV.1552 (1995). ⁶¹ See, e.g., 42 U.S.C. § 7604(b)(1)(A-B).

⁶² 42 U.S.C. § 7604(a)(1).

⁶³ The one substantive environmental protection statute sans citizen suit provision is the Federal Fungicide, Insecticide, and Rodenticide Act (FIFRA), 7 U.S.C. §§ 136 et seq. (enacted 1947, substantially amended 1972 and again several times thereafter). In addition, some non-environmental statutes also include citizen suit provisions, see, e.g., the False Claims Act, 31 U.S.C. § 3730(b) (enacted 1982) (allowing private enforcement to increase prevention of procurement fraud); the Americans with Disabilities Act, 42 U.S.C. § 12101 (enacted 1990).

In addition to federal statutes, sixteen U.S. States have environmental citizen suit statutes in some form or another.⁶⁵

Commentators and scholars have explored applying the concept and effects of citizen suits in various other related jurisprudential and socioeconomic arenas, including animal welfare,⁶⁶ climate change,⁶⁷ access to justice⁶⁸ and environmental sustainability,⁶⁹ war and the military,⁷⁰ and international trade agreements.

CONCLUSION

The Supreme Court's recent decision *Mass v. EPA* is an important precedent for environmental law in the United States. Its ecologically sound view of plaintiff standing,

holistic view of modern environmental problems, and willingness to challenge recalcitrant environmental agencies are all welcome precedents. However the case also demonstrates the difficulties and pitfalls in using our current legal frameworks, in their current form and interpretations, to address the complex and interconnected environmental problems of our times. The ecological philosophy implicit in the Court's ruling could be used as a springboard for change, including the revitalization of the concept of Natural Law and its marriage to the Laws of Nature, as understood through modern ecology. Such rethinking should begin with tools already existing in our laws, ready to be redeployed in new and improved ways. These important new normative law advances and adaptations include new applications of the public trust doctrine, the guardian ad litem concept, and citizen suit standing.

⁶⁵ State Environmental Resource Center, Website, Issue: Citizen Suits, at <http://www.serconline.org/citizensuits/stateactivity.html>

⁶⁶ Joshua E. Gardner, At the Intersection of Constitutional Standing, Congressional Citizen Suits, and the Humane Treatment of Animals: Proposals to Strengthen the Animal Welfare Act, 68 GEO. WASH. L. REV. 330 (2000).⁶⁷ Richard W. Thackeray, Jr., Struggling for Air: The Kyoto Protocol, Citizens' Suits under the Clean Air Act, and the United States' Options for Addressing Global Climate Change, 14 IND. INT'L & COMP. L. REV. 855 (2004).⁶⁸ John C. Dernbach, Citizen Suits and Sustainability, 10 WIDENER L. REV. 503 (2004).⁶⁹ Scott M. Palatucci, The Effectiveness of Citizen Suits in Preventing the Environment from Becoming A Casualty of War, 10 WIDENER L. REV. 585 (2004).⁷⁰ Martha Siefert, The NAFTA's Environmental Side Agreement: Is the Mandatory Arbitration Procedure Fact or Fiction? A Proposal to Allow for Citizen Suits in the Greening of Mexico, 3 SW. J.L. & TRADE AM. 467 (1996).

Climate change in the courts Summary of cases

Wild Law Conference, September 2007

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Synopsis: Over the last few months, judgments against the Bush Administration in two leading US climate change cases have seen climate science being judicially accepted. We have known since 2001 that most of the global warming since 1950 has been due to greenhouse gas concentrations as a result of human activities, mainly the burning of fossil fuel. This finding has been made with sufficient, legally-relevant, scientific certainty, assessed both quantitatively and qualitatively, even before the IPCC's 90% confidence rating in February 2007. The need to reduce emissions promptly has been urged by the world's top scientists, and in June 2007 the G8 nations agreed that "emissions must stop rising, followed by substantial global emission reductions". There has also, since 2001, been a strengthening of the scientific evidence for human influence at sub-global levels, for example in Europe, North America and California. Against this background, and in the face of inadequate political and industry response, about 20 climate change legal actions have begun around the world over the last few years, using a variety of legal theories under statutes, common law and international law, including the first serious climate change damages case filed by the State of California.

1. Judgments in seven cases so far.....

....four of which have been in the two major countries that have rejected the Kyoto Protocol – the US and Australia:

(1) Environmental impact assessment

Australian Conservation Foundation v Minister for Planning⁶

Held: greenhouse gas (GHG) emissions from burning coal must be taken into account in a planning decision to approve a coal mine extension – i.e., the use to which the coal would be put must be taken into account in determining the environmental effects.

Gray v The Minister for Planning⁷

Held: that the GHG impacts of burning coal must be taken into account in the environmental impact assessment of new coal mines in New South Wales, under Part 3A of the Environmental Planning and Assessment Act 1979. The judge (Justice Pain) applied two common environmental law concepts that are receiving increased judicial attention: inter-generational equity (IGE) and the precautionary principle (PP).

Finding that IGE required assessment of cumulative impacts, she approved a recent article⁸ in which:

⁶ [2004] VCAT 2029, judgment of Justice Stuart Morris, available here:
<http://www.austlii.edu.au/au/cases/vic/VCAT/2004/2029.html>

⁷ [2006] NSWLEC 720, judgment of Justice Pain, available here:
<http://www.lawlink.nsw.gov.au/lecjudgments/2006nswlec.nsf/2006nswlec.nsf/WebView2/DC4DF619DE3B3F02CA257228001DE798?OpenDocument>

“three fundamental principles underpinning the principle of intergenerational equity are identified: (i) the conservation of options principle which requires each generation to conserve the natural and cultural diversity in order to ensure that development options are available to future generations; (ii) the conservation of quality principle that each generation must maintain the quality of the earth so that it is passed on in no worse condition than it was received; (iii) the conservation of access principle which is that each generation should have a reasonable and equitable right of access to the natural and cultural resources of the earth.....

In terms of environmental impact assessment which takes into account the principle of intergenerational equity, as set out above, one important consideration must be the assessment of cumulative impacts of proposed activities on the environment.” [paras 119 & 122]

And she set out how the PP shifts the burden of proof:

“the function of the precautionary principle is to require the decision-maker to assume that there is, or will be, a serious or irreversible threat of environmental damage and to take this into account, notwithstanding that there is a degree of scientific uncertainty about whether the threat really exists or its extent. As identified in *Telstra v Hornsby* at [150], if the two conditions precedent or thresholds are satisfied so that there is a threat of serious or irreversible environmental damage and there is the requisite degree of scientific uncertainty the principle will apply so that the shift in an evidentiary burden will occur meaning that the proponent for the development has to demonstrate that the threat does not exist or is negligible.” [para 127]

***Friends of the Earth et al., v. Mosbascher and Merrill*⁹**

Held: the US National Environmental Policy Act (NEPA) applies to major federal government projects that contribute to climate change. After noting recent developments the judge said that:

“it would be difficult for the Court to conclude that Defendants have created a genuine dispute that [greenhouse gases] do not contribute to global warming.”

The judgment was given in a case brought by Friends of the Earth USA, Greenpeace USA and the cities of Arcata, Boulder, Oakland and Santa Monica, against the US export credit agencies, the Export-Import Bank and the Overseas Private Investment Corporation.

In an earlier judgment in the case¹⁰, dismissing the export credit bodies' motion to dismiss, and granting standing, the judge said:

“The Court concludes that Plaintiffs' evidence is sufficient to demonstrate it is reasonably probable that emissions from projects supported by OPIC and Ex-Im supported projects will threaten Plaintiffs' concrete interests.”

⁸ By Preston J *“The Role of the Judiciary in Promoting Sustainable Development: The Experience of Asia and the Pacific”* (Asia Pacific Journal of Environmental Law, Vol 9, Issues 2 & 3, p 109)

⁹ US District Court for the Northern District of California, 30th March 2007, judgment of Judge Jeffrey S. White, Case No. C 02-04106 JSW. See the judgment here:

<http://www.climatelaw.org/media/OPIC%20NEPA%20SJ%20decision%20March%202007>

¹⁰ US District Court for the Northern District of California, 23rd August 2005, summary judgment of Judge Jeffrey S. White, Case No. C 02-04106 JSW. See the judgment here:

<http://www.climatelawsuit.org/documents/ruling82305.pdf>

In this case, the Department of Justice had argued that:

“the basic connection between human-induced greenhouse gas emissions and observed climate change itself has not been established.”¹¹

(2) Regulating GHG emissions from motor vehicles

***Commonwealth of Massachusetts et al. v. EPA*¹²**

Held (5/4): the US Supreme Court has held that carbon dioxide is an air pollutant under section 202(a)(1) of the Clean Air Act which provides that the EPA “shall by regulation prescribe...standards applicable to the emission of any air pollutant from...new motor vehicles...which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.”

This ruling was made in a case brought by 12 US States, 4 local authorities and 13 NGOs and overruled the US Court of Appeals’ decision of 15th July 2005¹³.

Giving the majority judgment, in a major blow to the Bush Administration’s position on climate change, Justice Stevens noted that:

“[t]he harms associated with climate change are serious and well recognized”,
that the:

“EPA does not dispute the existence of a causal connection between man-made greenhouse gas emissions and global warming”,

and that the:

“EPA has offered no reasoned explanation for its refusal to decide whether greenhouse gases cause or contribute to climate change”.

14 scientists had filed an *amicus curiae* brief with the Supreme Court, stating that:

“the Earth’s climate is changing in ways that are significantly increasing the risk of adverse impacts on public welfare. Time is of the essence because delay in greenhouse gas regulation will only accelerate global climate change. EPA must begin regulating greenhouse gas emissions from motor vehicles now to slow climate change in time to reduce the risk of adverse impacts.”¹⁴

and saying the Court of Appeals’ majority judgment given by Judge Randolph **“significantly misrepresented the findings”** of the 2001 National Academies’ report, **“emphasizing uncertainties in climate change science while failing even to mention the existence of fundamental areas of certainty or consensus.”**

Furthermore, in April 2006, 12 US States and cities and 3 NGOs sued the EPA for not regulating carbon dioxide from power plants under the Clean Air Act, in an attempt to determine definitively whether the EPA has authority to regulate global warming¹⁵.

¹¹ Motion for Summary Judgment and Memorandum in Support, 3rd November 2004, section 2, page 15.

¹² The judgment of 2nd April 2007 is available from here:

<http://www.climatelaw.org/media/Mass.v.EPA.USSC>

¹³ Court of Appeals for the District of Columbia Circuit, Judges Randolph, Sentelle and Tatel, Case No. 03-1361. Judgment and other documents are available here:

http://www.icta.org/global/actions.cfm?page_id=2§ion_title=Global%20Warming%20&%20Air%20Pollution

¹⁴ At pages 6/7 of the 38-page Brief, available here:

<http://www.climatewatch.org/index.php/csw/details/amici-curiae-climate-scientists/>

¹⁵ http://www.oag.state.ny.us/press/2006/apr/apr27a_06.html

(3) Suing power companies in public nuisance

State of Connecticut, et al. v. American Electric Power Company, Inc., et al.; Open Space Institute, Inc. et al. v. American Electric Power Company Inc., et al.¹⁶

Held: cases brought on the basis of the common law tort of public nuisance, by 8 US States, New York City and 3 NGOs against the 5 biggest US power companies (and one subsidiary), were dismissed as raising “non-justiciable political questions”. The plaintiffs’ appeal hearing took place in June 2006 and the outcome is awaited. On 21st June 2007, the Court of Appeals ordered the parties to make submissions on the implications of the Supreme Court judgment in *Massachusetts et al. v. EPA* for the case. These submissions were filed on 6th July 2007.

The plaintiffs argue that the huge emissions from the defendants’ power plants – some 650 million tons of carbon dioxide annually, making them the 5 largest emitters of carbon dioxide in the US, and approximately 10% of all carbon dioxide emissions from human activities in the United States – are a public nuisance, in that:

- they are causing injury and a significant threat of injury to the plaintiffs by their emissions of carbon dioxide from burning fossil fuel in their power stations, and are knowingly, intentionally or negligently creating, maintaining or contributing to a public nuisance – global warming – injurious to the plaintiffs and their citizens and residents; and
- these emissions, by contributing to global warming, are a substantial and unreasonable interference with public rights in the plaintiffs’ jurisdictions, including, *inter alia*, the right to public comfort and safety, the right to protection of vital natural resources and public property, and the right to use, enjoy, and preserve the aesthetic and ecological values of the natural world.

They argue that each defendant is jointly and severally liable for creating, contributing to, and/or maintaining a public nuisance; and ask the court for an order requiring each defendant to abate its contribution to the nuisance by requiring it to cap its carbon dioxide emissions and then reduce them by a specified percentage each year for at least a decade. No damages are claimed.

In her judgment, the judge accepted that:

“Congress has recognized that carbon dioxide emissions cause global warming and that global warming will have severe adverse impacts in the United States, but it has declined to impose any formal limits on such emissions.”

But she considered that the case involved non-justiciable political questions, particularly because, in her view, of “the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion”.

She said:

“Plaintiffs advance a number of arguments why theirs is a simple nuisance claim of the kind courts have adjudicated in the past, but none of the pollution-as-public-nuisance cases cited by Plaintiffs has touched on so many areas of national and international policy. The scope and magnitude of the relief Plaintiffs seek reveals the transcendently legislative nature of this litigation. Plaintiffs ask this Court to cap carbon dioxide emissions and mandate annual reductions of an as-yet-unspecified percentage. Such relief would, at a minimum, require this Court to: (1) determine the appropriate level at which to cap the carbon dioxide emissions of these Defendants; (2) determine the appropriate

¹⁶ US District Court for the Southern District of New York, 15th September 2005, Judge Loretta A. Preska, Cases Nos. 04 Civ. 5669 (LAP) and 04 Civ. 5670 (LAP). Judgment is here: http://www.nysd.uscourts.gov/rulings/04cv5669_04cv5670_091505.pdf, and other documents are available here: <http://www.pawalaw.com/html/cases2.htm>

percentage reduction to impose upon Defendants; (3) create a schedule to implement those reductions; (4) determine and balance the implications of such relief on the United States' ongoing negotiations with other nations concerning global climate change; (5) assess and measure available alternative energy resources; and (6) determine and balance the implications of such relief on the United States' energy sufficiency and thus its national security—all without an “initial policy determination” having been made by the elected branches.” (refs omitted)

(4) Violations of rights to life and dignity

Gbemre v. Shell Petroleum Development Compnay of Nigiera Ltd et al.¹⁷

Held: the flaring of gas in a Niger Delta community by Shell Nigeria is a “gross violation” of the constitutionally-guaranteed rights to life and dignity of Mr Jonah Gbemre and the Iwherekan community in Delta State.

Nigerian flaring contains a toxic cocktail which exposes residents to an increased risk of premature deaths, child respiratory illnesses, asthma and cancer – while having contributed more greenhouse gases than all other sub-Saharan sources combined, and losing the country annually US \$2.5 billion.

This was the first time a Nigerian court has applied the rights to life and dignity in an environmental case. Shell Nigeria was ordered to stop flaring in the community immediately. Justice C.V. Nwokorie found the gas flaring laws to be “unconstitutional, null and void”, and ordered the Attorney General to meet with President Obasanjo et al to set in motion the necessary processes for new gas flaring legislation that is consistent with the constitution.

Contempt of court proceedings were filed in December 2005, as the flaring was continuing 32 days after the judgment without a stay of execution in place. In April 2006, in determining the stay application, the Federal High Court granted a stay on ending the flaring till the end of April 2007, and ordered the CEOs of Shell Nigeria and the Nigerian National Petroleum Corporation, and the Petroleum Minister, to appear personally before him on 31st May 2006 with a detailed, clear plan for putting out the flares within 12 months. On 23rd May 2006, the Court of Appeal overturned the first instance court's order in respect of the personal appearances of the CEOs and Minister.

In a further gas flaring case, by 4 individuals and communities against Shell, Chevron, Agip and Total, a judge in the Federal High Court of Nigeria in Port Harcourt in September 2006 declined to follow Justice Nwokorie's judgment, and dismissed the action. This is being appealed.

(5) Access to information

Bundes fur Umwelt und Naturschutz Deutschland e.V. & Germanwatch e.V., v. Bundesrepublik Deutschland, vertreten durch Bundesminister fur Wirtschaft und Arbeit¹⁸

¹⁷ Federal High Court of Nigeria, Benin City, 14th November 2005, Justice C.V. Nwokorie, Suit No: FHC/B/CS/53/05. The judgment is here: <http://www.climatelaw.org/media/media/gas.flaring.suit.nov2005/ni.shell.nov05.judgment.pdf>

¹⁸ Verwaltungsgericht Berlin, 10th January 2006, Judge Gaudernack, Ref: VG 10 A 215.04. Beschluss (judgment) in German, and an unofficial English translation, available from here: <http://www.climatelaw.org/media/Germany>

In June 2004, Germanwatch and BUND (Friends of the Earth Germany) began a legal action to require the German Economic Ministry to disclose the contribution to climate change made by energy production projects supported by the German taxpayer through its export credit agency Euler Hermes AG. In a legal judgment as part of the court settlement in January 2006, the Berlin Administrative Court rejected the German government's arguments that it was not subject to the freedom of environmental information laws (derived from the EU and the Aarhus Convention) and that it did not affect climate change and the environment.

2. ...as well as two administrative determinations...

Threatened species – coral and polar bears

Listing of Elkhorn and Staghorn Coral as threatened species under the US Endangered Species Act¹⁹

On 9th May 2006, the US National Marine Fisheries Service (NMFS) published their decision to list two Caribbean coral species, elkhorn and staghorn coral, as threatened species under the Endangered Species Act²⁰, following a petition in March 2004 from the Center for Biological Diversity. These are the first species listed under the ESA for which global warming is recognized as a primary threat: in its determination, the NMFS identified disease, hurricanes and elevated sea surface temperature as the three “major threats” to these species, which were “severe, unpredictable, likely to increase in the foreseeable future, and, at current levels of knowledge, unmanageable”.

The ESA requires all federal agencies to ensure that their actions do not jeopardize any listed species or adversely modify its critical habitat.

Proposed listing of the polar bear as threatened species under the ESA

On 9th January 2007, the US Department of the Interior's Fish and Wildlife Service published in the Federal Register its finding that listing the **polar bear** as a threatened species under the ESA is “warranted”, and its proposal to list the species throughout its range²¹. After an extensive analysis of the evidence, the Service concluded that polar bears are “threatened by ongoing and projected changes in their sea ice habitat”, and by “inadequate regulatory mechanisms to address sea ice recession”. This proposed listing was the result of a petition filed in February 2005 by the Center for Biological Diversity²², subsequently joined by Greenpeace and the Natural Resource Defense Council.

3. ...with several other initiatives underway

(1) Human rights

¹⁹ Federal Register / Vol. 71, No. 89 / Tuesday, May 9, 2006 / Rules and Regulations, page 26852.

²⁰ Under the ESA, a “threatened species” means any species or subspecies that is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range. The term “endangered species” means any species that is in danger of extinction throughout all or a significant part of its range.

²¹ Federal Register / Vol. 72, No. 5 / Tuesday, January 9, 2007, page 1064, 50 CFR Part 17. According to the proposed rule document, there are about 20 – 25,000 polar bears in 19 populations in the US, Canada, Russia, Greenland and Norway.

²² Petition available from here:

<http://www.biologicaldiversity.org/swcbd/species/polarbear/index.html>

In December 2005, Sheila Watt-Cloutier, with the support of the **Inuit** Circumpolar Conference, filed a petition to the Inter-American Commission on Human Rights seeking relief from human rights violations resulting from global warming caused by acts and omissions of the US, on behalf of all Inuit of the Arctic regions of the US and Canada. Global warming violates their culture, life, food, and health by melting ice, snow and permafrost, changing the weather, and radically altering every aspect of the Arctic environment on which Inuit lives and culture depend.²³ The Commission is reported to have technically dismissed the petition in December 2006, but held a hearing in Washington DC at which the petitioners made their case, on 1st March 2007.

(2) World Heritage

The UNESCO World Heritage Convention, Parties have a legal duty to protect and transmit WH Sites to future generations. This duty is placed primarily on the host States. It extends, secondarily, to all State Parties, whose activities are damaging or could damage Sites situated in other countries. The main GHG emitting States are Parties to the Convention and will not fulfil this duty without significant cuts in their emissions.

Since 2004, about 40 organizations and individuals have drawn attention to this legal duty as it relates to some of the most outstanding mountain areas and coral reefs facing climate damage. They have submitted 6 petitions to the World Heritage Committee to add **Mount Everest, the Peruvian Andes, the Blue Mountains, US and Canadian glaciers, and the Great Barrier and Belize Barrier Reefs** to the List of World Heritage in Danger because of climate change. The Committee decides whether to give a Site extra protection by adding it to the Danger List, and allocates funding.

In July 2006 in Lithuania, the Committee adopted a world heritage and climate change strategy focusing on adaptation. This was followed in July 2007 in New Zealand by the Committee calling for States Parties to participate in the UN Climate Change conferences with a view to achieving a comprehensive post-Kyoto agreement, and endorsed a policy document on the impacts of climate change on world heritage for presentation at the General Assembly of States Parties in autumn 2007.

(3) Damages in California

On 20th September 2006, the State of California sued General Motors, Toyota, Ford, Honda, Chrysler and Nissan for damages for contributing to a public nuisance, namely global warming, citing particularly reduced Sierra snowpack which contributes 35% of California's water supply and re-building levees protecting the Sacramento Bay-Delta area from salt water infiltration and other sea level rise impacts²⁴. Judgment is awaited on the defendants' motion to dismiss.

²³ The 175-page petition can be accessed from here:
<http://www.climatelaw.org/media/inuit.iachr>

²⁴ The complaint is here:
<http://www.climatelaw.org/media/CA%20auto%20companies/california.complaint.pdf>

(4) Canada

In May 2007, Friends of the Earth Canada, with Sierra Legal, filed a case against the Environment and Health Ministers alleging that the federal government has a duty to take action to control greenhouse gas emissions under section 166 of the Canadian Environmental Protection Act 1999.²⁵

Under that unusual section, if Ministers have reason to believe that a substance released from a source in Canada into the air creates, or may reasonably be anticipated to contribute to, air pollution in a country other than Canada; or, to air pollution that violates, or is likely to violate, an international agreement binding on Canada in relation to the prevention, control or correction of pollution, then a duty to act to control the releases arises.

The Canadian Commissioner of the Environment and Sustainable Development reported in September 2006²⁶ that the gap between Canada's GHG emissions and its Kyoto commitments is growing: Canada's GHG emissions in 2004 were 26.6% above 1990 levels, resulting in a gap of 34.6% from Canada's Kyoto target of a 6% reduction by 2008-2012.

In October 2006, an international legal opinion²⁷ had been presented to the Canadian government indicating, *inter alia*, that it was in breach of the 1992 UN Framework Convention on Climate Change (UNFCCC) obligations, by not having established measures that would lead to a reversal of the long-term trend of increasing GHG emissions in order to stabilize atmospheric concentrations, contrary to Article 4.2(a) and (b), in conjunction with Article 2; and was in breach of the Kyoto Protocol obligation to demonstrate progress in achieving its 6% reduction target by 2005 and, is likely to violate that 6% reduction target by 2012.

A submission was also made in October 2006 to the facilitative branch of the Compliance Committee in respect of the Kyoto Protocol²⁸. No response has been received.

(5) Car companies and the OECD Guidelines for Multinational Enterprises

NGOs in Europe have begun initiatives against car companies in the light of the failure of the industry to live up to its voluntary agreements with the European Commission to reduce average CO2 emissions from new cars to 140g/km by 2008/9²⁹.

In May 2007, Germanwatch filed a complaint against Volkswagen with the German OECD National Focal Point, arguing several violations of the OECD Guidelines for Multinational Enterprises³⁰. Although the Guidelines are not legally binding, there is a complaints mechanism hosted by governmental bodies, and legal implications can flow from the manner in which the complaints are dealt with.

Under the Guidelines, companies are requested, "within the framework of laws, regulations and administrative practices in the countries in which they operate, and in consideration of relevant international agreements, principles, objectives, and standards, [to] take due account

²⁵ The application for judicial review is available from here:

<http://www.foecanada.org/index.php?option=content&task=view&id=318&Itemid=135>

²⁶ The report is here: http://www.oag-bvg.gc.ca/domino/reports.nsf/html/c2006menu_e.html

²⁷ The opinion is available from here: <http://www.climatelaw.org/media/Canada>

²⁸ The submission, made pursuant to Section VIII, paragraph 4, of the Procedures and mechanisms relating to compliance under the Kyoto Protocol, is here:

<http://www.climatelaw.org/media/Canada/canada.compliance.pdf>

²⁹ There are 3 voluntary agreements, with the European, Japanese and Korean trade bodies. The agreements and more information can be found here:

http://ec.europa.eu/environment/co2/co2_agreements.htm. Information on the CO2 performance of the industry is here: <http://www.transportenvironment.org/Article250.html>

³⁰ More information, including an English language version of the complaint are available from here: <http://www.germanwatch.org/corp/vw.htm>

of the need to protect the environment, public health and safety, and generally to conduct their activities in a manner contributing to the wider goal of sustainable development.” (SectionV). They also are requested to comply with other detailed provisions, such as evaluating the environmental impacts of their products and conducting life cycle assessments³¹.

In July 2007, Friends of the Earth wrote to the top six UK car makers (Nissan, Toyota, Honda, Ford, BMW, Vauxhall), investigating compliance with, essentially, the same provisions³².

³¹ More information, and the Guidelines, are available here:

<http://www.berr.gov.uk/europeandtrade/trade-policy/oecd-multinat-guidelines/page10203.html>

³² More information, including the letters, are available here:

http://www.foe.co.uk/campaigns/transport/news/car_letters.html#letters

UKELA Wild Law Meeting.

The Great Work of Transformation

By Brian Goodwin

In this short paper I shall explore paths of transformation in which we may participate to bring about a deep shift of focus and activity in our culture, from a position of dominance and control on the planet to one of appropriate participation. Many voices are engaged in this enterprise which has the form of a radical transition, like a phase transition from one state of matter to another that lies a hairsbreadth away but expresses a very different way of being in the world. This type of change has been characterised in the past as an engagement with the Great Work, the Magnum Opus of the alchemists who used the symbolism of base metals transmuting into gold in the practitioner's crucible. However, the alchemist's laboratory was a place of labour and a place of prayer, *labor and oratorium*, since no transmutation would occur in the crucible unless the worker simultaneously underwent transformation from a lower to a higher, more responsible form of participation in the process. It is this engagement with a changing worldview that is emerging in our culture, and the practical work of shifting the focus of our activities in simple, direct and realisable ways, that I wish to explore here. This process involves learning directly from the natural world by engaging in forms of conversation with 'the other', leading to direct insight into appropriate or skilful action in context.

Ways of Knowing

September 11th, 2001 has already entered human consciousness and the annals of our time as a turning point in global culture, the apogee of a particular development symbolised by the Twin Towers of the World Trade

Centre in New York. They expressed unlimited confidence in the power of democracy, human rights, economics and trade to transform all cultures according to the vision that had emerged in "the West". Their sudden, dramatic destruction in an extraordinary attack by an alienated cultural group that saw these as symbols of an evil power that had gripped the West and was threatening the world was the most dramatic wake-up call by humans to humans that the new 21st century is ever likely to experience. There will be plenty of more dramatic events in this century that follow indirectly from human activity, but no cultural actions are likely to equal this in its significance.

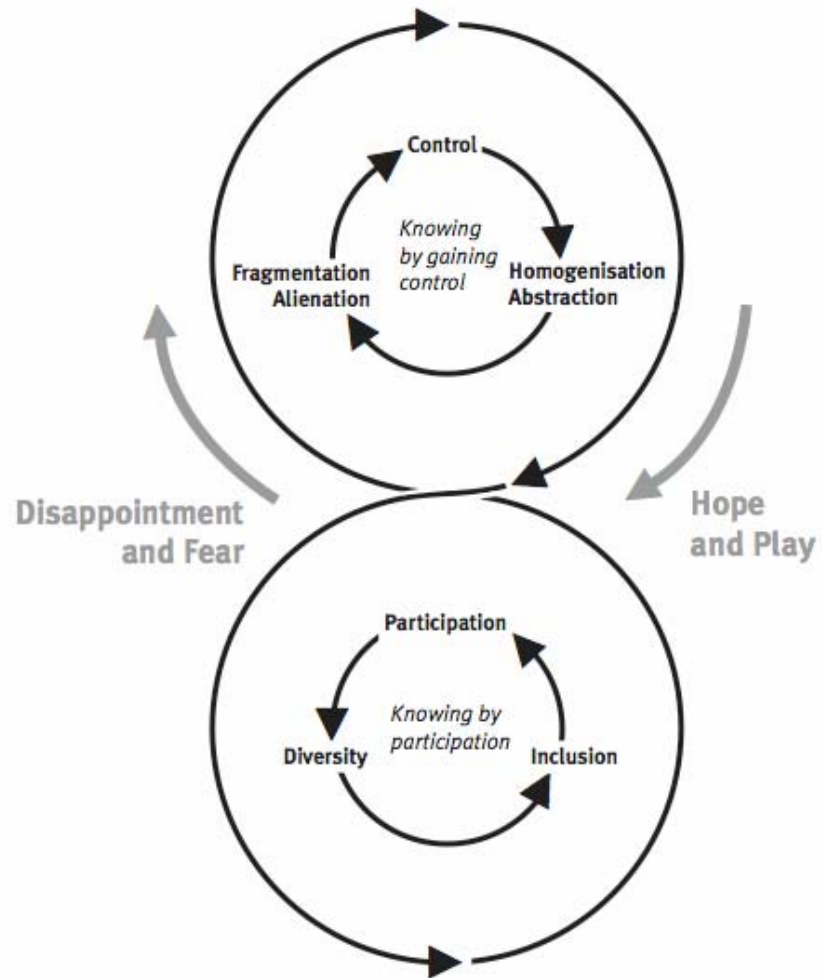
I have a dramatic memory of the news of this event entering my awareness, At Schumacher College in Devon, where I learn and teach, a group of us had been on a field trip that day to Dartmoor, a bit of local wilderness in the south-west, We returned late in the afternoon to the College to be told the news, and then to watch it, shocked but not entirely surprised, on TV. The following morning we gathered, a group of nine students and three faculty participating in the MSc in Holistic Science, for a philosophy class. The leader of the class was Jordi Pigem from Barcelona, who taught philosophy at the College. He lit a candle, read a poem by the Buddhist monk Thich Nhat Hanh entitled 'Call Me By My True Name', and asked "How did we get here?", the question that was on everyone's mind. The searching discussion that followed led to an image that encapsulated the deeper aspects of the questions we had been pursuing in Jordi's philosophy classes, and took us beyond into an emergent realisation. We were acutely aware that the way of knowing the world developed by Western science was a very limited, though powerful one, driven by the desire to gain control over nature. This works, but gains control through abstraction and reduction, which separates the knower from the known and tends to alienate rather than unite them through an empathic relationship of respect and acknowledgement. This is the upper loop in the figure that appears below. The process is driven by fear and suspicion of the unknown.

We realised that there is another way of gaining knowledge of the world that depends on participation. This is the Goethean way of direct knowing that recognises the other as a legitimate and unique being, an "I-thou" relationship as Martin Buber would have described it. Instead of abstracting and homogenising nature into general categories, this acknowledges uniqueness, difference, and diversity as the expression of creativity. The result is a sympathetic union of the knower and the known without losing their distinctness. This process of knowing through participation is driven by love and trust of the real. The loop of fear and the loop of love are connected dynamically, with transitions from one to the other occurring when confidence in knowing by control results in hope and play, which takes the person into the participation through love loop; or conversely, disappointment and fear can shift a person out of participation into control. Fear is a legitimate feeling that needs to be respected and honoured, but mustn't dominate continuously, as it tends to in our culture. Love can be reached and expressed in participation and it can be held as the wider and deeper context of skilful action, but it can give way to fear through disappointment. The loops are reflective of the Yin-Yang dynamics of ancient China or the Brahma-Kali polarity of the Hindu

cosmology, which inevitably arise in cultures and have emerged in our own, with its own distinctive qualities.

The practical exercises that we will engage in are based on a union of these different ways of knowing the world, cultivating our capacity to place the attitude of love and trust before that of fear and control. At the same time it recognises the power and the value of the ego in protecting us from what appears to be threatening. When we realize that there is really nothing to fear, we will be free to love.

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The Nature of Knowledge

Community Ecological Governance (CEG) Methodology to achieve our goals

The Gaia Foundation

This methodology evolved out of a joint search for an endogenous development path in the Colombian Amazon with indigenous shamans and elders, Gaia Amazonas and the Gaia Foundation over the last 16 years.

Africa - Amazon dialogues, which began in 2003, initiated a process in Africa to adapt this methodology and innovate others, based on an 'elder-centred approach.'

The core guiding principles are:

- ❖ A commitment to a long term process of jointly evolving a pathway with interested rural communities to find their own sustainable solutions to their problems, recognizing that change must come from within.
- ❖ A common aim to revive and strengthen traditional ecological knowledge and equitable governance systems, as the basis for rebuilding community cohesion, ecological integrity, and food and livelihood security, in the context of climate change.
- ❖ A recognition that knowledge holders are custodians of a long heritage and therefore need to be at the centre, leading the process. This is urgent as elders are dying out, taking libraries of social and ecological wisdom with them. Intergenerational transfer of knowledge is therefore critical for drinking from the pool of knowledge from the elders.
- ❖ To be an active part of a wider regional and global movement, which provides mutual support and learning to catalyze a critical mass for change.

CEG: An evolving process

These phases are indicative of the process which unfolds according to each context:

Restoring Community Cohesion: Phase 1

- ❖ Knowledge holders lead a participatory process of dialogue and analysis
- ❖ Various intergenerational learning processes initiated
- ❖ Gender balancing incorporated in all processes
- ❖ Legal studies on opportunities and challenges to recognize community rights to govern their natural resources
- ❖ Protection of sacred sites as vital nodes in environmental management
- ❖ Community learning exchanges to catalyze action
- ❖ Restoration of critical ecosystems – forests, gullies, watersheds, sacred sites.
Protection of fragile ecosystems and ecologically sensitive areas.

Strengthening Ecological Governance: Phase 2

- ❖ Ecological mapping used as a powerful remembering tool
- ❖ Territorial management plans jointly developed and agreed
- ❖ Community traditional governance structures re-established and enhanced, with the participation of women and youth

- ❖ Paralegal and advocacy training
- ❖ Legal support as required
- ❖ Advocacy and negotiation with government
- ❖ Legal recognition

Rehabilitating ecosystems / Responding to climate change / Alleviating poverty: Phase 3

- ❖ Livelihood challenges identified through community dialogue and analysis
- ❖ Traditional ecological knowledge and practices revived to restore ecosystems and diversify livelihood options
- ❖ Seed and livestock diversity, and related practices for food security regained
- ❖ Biodiversity restored and protected, through a range of methodologies e.g. composting and controlled grazing.
- ❖ Climatic changes monitored and strategies to deal with instability collectively defined
- ❖ Income needs analyzed and opportunities identified to strengthen autonomy
- ❖ Income generation through restoring diversity, innovation and adding value
- ❖ Diverse economic opportunities sought to build local economies e.g. barter, exchange, local markets and limited exports.

Climate Change and the Courts – If The Suit Fits

Wild Ideas from the United States?

By Deborah Smith

This is the unedited version of an article which appeared on the www.ClimateChangeCorp.com website

Does any country have courts that offer a useful forum for achieving environmental justice on climate change? The international legal debate is hotting up on this question, with more than a few solar-powered lights flickering along the long, jurisprudential tunnel in the US. If recent legal decisions there are any guide, it seems that parts of the North American judiciary and some governmental bodies at least, are starting to take climate change seriously.

A recent conference, organised by the UK Environmental Law Association and sponsored by the Body Shop Foundation highlighted some of these cases and brought together leading environmental lawyers from the USA, South Africa and the UK to challenging the legal status quo and its' approach to climate change. Expounding the concept of "Wild Law", the event discussed an approach to global governance which would require new legal principles and procedures in order to "enshrine nature's limits into law". This could mean, for example expanding the use of citizen suit provisions - allowing any citizen to commence legal action against an organization or person committing a violation or not enforcing a much wider range of environmental regulations than is currently the case. Another notion gaining credibility after years in the cold is to extend the "guardian ad litem" concept (a person appointed by the court to protect the interests of a child). This could enable third parties to legally represent the interests of others who cannot speak for themselves – non-human animal species, mountains, fields, forests. The limited number of cases where NGO's have so far been able to get a legal hearing, such as Greenpeace's successful legal petition this year to ensure the polar bear is listed by the US as a threatened species, could be dramatically increased this way.

Stuff too radical for some maybe, but beyond the philosophical level, real-life developments in the US suggest that the inherent value of natural resources and the threats of climate change may be getting some recognition in law.

Climate Change Does Exist after All

Andrew Kimbrell, a US public interest attorney spoke in depth about a significant case this year – *Massachusetts vs. Environmental Protection Agency*, in which he was heavily involved. The EPA was the main organisation being sued by twelve US States, four local authorities and thirteen NGO's (including the Sierra Club and Friends of the Earth) for failure to regulate CO2 and other greenhouse gases under the Clean Air Act.

The case was inspired by the regulator's lack of pressure upon the car industry to reduce its carbon emissions, therefore failing to take action against contributory factors to global warming (other respondents to the petition included motor industry bodies such as the Alliance of Automobile Manufacturers). Since 1999 various US appeal courts had refused to accept there was any legal basis for the case. They stated that there was inadequate scientific acceptance of global warming and that any ensuing environmental problems were not specific enough to those particular States and NGO's to enable them to proceed in court. Finally, this April, on ultimate appeal to the Supreme Court – it was decided, by a narrow margin that they *did* have the right to sue, and that the EPA was *not* justified in arbitrarily neglecting to regulate GHG's from cars, or anywhere else for that matter. The ruling does not require the regulator to act but has in effect been viewed as compelling pressure on Congress to empower the EPA by setting new, more detailed carbon- capping policies. Indeed there has already been a reaction from the Bush administration – in May the President signed an Executive Order requiring the EPA and Department of Transportation to draft new GHG emission and gasoline-reduction limits for vehicles.

For Whom the Environmental Justice Bell Tolls?

Andrew Kimbrell and lawyers like Peter Roderick, who is co-Director of the international Climate Justice Programme, see this ruling as significant - it was the first legal judgment to treat global warming and climate change as sufficiently urgent and factual to require regulatory action., Also, for the first time it has been acknowledged that a global environmental problem can be litigated at a regional or local level, even if the particular source of the emissions (in this case traffic) are only a partial contributor to total GHG emissions.

Although there are legal complexities in the detail of who can bring such cases, *Massachusetts v EPA* seems to have created a precedent in the US at least, for those community and environmental groups who would not historically have been given access to the courts. It appears they can now legitimately join with regional authorities and claim that their interests are damaged by the actions or inactions of key state and corporate bodies. And even though it is as yet unclear what the ramifications for GHG-emitters will be of regulators who are increasingly forced down a legal route in order to implement their own rules more effectively, a snowball effect is clearly underway. Only this month (November) an emboldened Massachusetts has joined California in a further legal attempt to force the still recalcitrant EPA to grant them the individual power to establish air pollution regulations more stringent than the federal prescription. At the corporate end, there is a case pending against five major US power companies, brought by the State of Connecticut and others. It alleges that their lack of controls on carbon dioxide emissions amount to creating a public nuisance – global warming. The case was initially rejected on the basis that the issues were beyond the scope of the courts, as they involved government policy. However this may change as the parties have now been given the chance to submit new arguments for their respective positions based on the outcome of *Massachusetts etc al.* In addition, judgement is still awaited as to whether California's well known attempt last year to sue North America's six largest car companies for contributing to global warming can proceed or be thrown out of court.

Although there are obvious reasons why corporations don't want to invest large amounts in carbon-cutting technologies, it has to be asked why a powerful body like the EPA seems unable or unwilling to implement its own regulations in a way that is satisfactory to so many stakeholder groups. It has been suggested that top-line goals issued by national governments regarding pollution and climate change (where they exist at all) are too vague. Andrew Kimbrell argues that, for example, what is being considered by the UK - a reduction of 60% in CO₂ by 2050 - could create problems. Important details about which greenhouse gases to regulate or how to set specific targets for all GHG's across the many sectors responsible for producing them should arguably not be left open to interpretation by resource-starved public agencies. Notoriously vulnerable to legal threat, political conflict and corporate pressure it seems inevitable that regulators will make inappropriately pragmatic compromises with big business - surely undesirable if there is to be a serious impact on climate change.

The unavoidable conclusion is that the ever-melting ice-baton of the climate change challenge must be handed back to our democratically elected legislators, who need to make difficult and detailed regulatory choices which will not please everyone but may save the day.

The 2007 Wild Law Workshop was held with the help of:



Thank you.

And the organising committee of volunteers:

Simon Boyle of Argyll Environmental and UKELA Council; Lesley Fairbairn; Begonia Filgueira of Gaia Law and UKELA Council; Guy Fisher of the Gaia Foundation; Sarah Longhurst of the Environmental Law Foundation; Elizabeth Rivers; Deborah Smith; Melanie Strickland

And thanks to all those others who have helped by providing meeting rooms or behind the scenes advice