

ENVIRONMENTAL RIGHTS AND DEFENDERS

**A HANDBOOK FOR THE NORTH
AMERICAN JUDICIAL FORUM**

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**Judicial Handbook
on
Environmental Rights and Defenders**

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Table of Contents

Introduction to Rights-Based Approaches to Environmental Harm in North America . 1
Chapter 1: The Judiciary and Environmental Rights 8
Chapter 2: Environmental Human Rights Defenders 18
Case Study..... 31
Notes..... 39

Introduction to Rights-Based Approaches to Environmental Harm in North America

North America is beset by environmental challenges, including air and water pollution, contaminated drinking water, poisoned land, climate change, and the loss of Nature. Here, we consider rights-based approaches to environmental challenges – that is, ways of framing the legal interests implicated in environmental harms as violations of human and constitutional rights. This introduction aims to orient environmental rights by explaining what they are, what they aren't, and what issues arise in invoking or enforcing them, including a foretaste of the unique vulnerabilities of those who defend environmental human rights. In much of the world, threats against environmental human rights defenders take the form of violence, whereas in North America, efforts to silence and squelch the protection of environmental human rights is done through the courts.

I. What Are Environmental Rights?

Rights-based approaches use existing rights to address current environmental harms.

As environmental conditions in North America and throughout the world become more grave and more complex, litigants are increasingly using rights-based approaches to environmental protection. And courts around the world are responding. In these cases, courts are using the language of human rights to protect the environment. Because rights-based approaches have been a mainstay of judicial decision-making for centuries and are therefore familiar to courts and well entrenched in legal canons, many courts have recognized that environmental human rights are within the family of rights already recognized. Environmental rights jurisprudence shows that the natural environment should be protected not only for its own sake but also because of the impact that environmental degradation (including climate change) has on people and on their protected rights including their rights to life, liberty, property, privacy, health, and a host of others, as well as rights specific to indigenous populations. Thus, environmental rights combine the best of human rights law (embodying an established catalogue of rights, expressed in constitutions and treaties, that humans have *just by virtue of being born human*) and environmental law (which aims to protect the natural environment for present and future generations).

Environmental rights encase substantive and procedural rights. Substantively, rights can be explicit or implicit. An example of the former would be “everyone is entitled to clean air, clean water, and a healthy environment,” or a “every person has right to adequate water.” An example of an implicit right would entail, for example, a construction of the Due Process Clauses of the U.S. Constitution to accommodate an unenumerated but implied right to a stable climate. Procedural rights relate to process and may involve juridical matters such as a right to a fair trial or to a jury, or broader social rights such as

that “everyone is entitled to information, participation and access to justice in environmental matters.”

Human rights exist as a matter of international law to which the entire world adheres, regional law which govern in parts of the world such as Europe, Africa, and the Americas, and national constitutional law. At the international level, for example, the United Nations’ Universal Declaration of Human Rights (1948) marks the first serious effort to identify a set of global human rights. Subsequent efforts have encoded human rights into international treaties, in the twin covenants on Civil and Political Rights and on Economic, Social, and Cultural Rights, and in treaties specific to certain global problems, such as race discrimination, discrimination against women, and torture, among others. To date, however, no international treaty protects the human right to a healthy environment.

Though not a binding treaty, the Stockholm Declaration (1972) was the first international instrument to acknowledge a basic human right to a healthy environment: “Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations.” This sentiment is echoed in the Earth Summit (1992). Four of five regional human rights treaties (e.g., the Inter-American Convention on Human Rights) recognize such a right, as do both the Aarhus Convention (entered into force 1994) and Escazú Agreement (entered into force 2021). In 2021, the UN Human Rights Council issued a Resolution recognizing the right to a clean, healthy and sustainable environment, a matter the United Nations General Assembly will take up later this year.

At the national level in the United States, the American Bar Association issued a Resolution recognizing a right to a healthy environment in 2021.

For the most part, environmental rights are enforced (to the extent they are) constitutionally and under national law. By our count, 84 of the 193 UN-recognized countries have constitutions that afford an express right to a healthy environment. Courts in at least another half-dozen have construed other rights – such as right to life, dignity, health or well-being – as implicitly incorporating a right to a healthy environment. About another two dozen countries have done so legislatively. In addition, regional tribunals, including the Inter-American Court of Human Rights, have recognized the right to a healthy environment. In all, more than one-half of the planet’s nearly 8 billion inhabitants live in places that recognize environmental rights.

Neither the U.S. Constitution nor Canada’s Charter of Rights and Freedoms explicitly recognizes environmental rights. Consequently, most of the developments about environmental rights in these countries are likely to involve judicial interpretation of other rights.

So far, courts in the United States have not read the Constitution to afford implicit environmental rights under the 9th Amendment. Environmental rights-based claims thus potentially derive from other sources, including:

- **Substantive Due Process.** Echoing the Fifth Amendment, the Due Process Clause of the 14th Amendment provides that “nor shall any State deprive any person of life, liberty, or property, without due process of law.” Courts have long recognized a substantive dimension to this clause, relying upon the concept of Substantive Due Process for securing “fundamental rights.” At least one federal court so far has found “fundamental rights” to include a right to a stable climate system. The Supreme Court of Michigan recently held that knowingly subjecting residents of Flint, Michigan, to contaminated drinking water violated Substantive Due Process rights to bodily integrity. Moreover, claims asserting Rights of Nature have, for the most part, been based on the Due Process Clause. Most SDP causes of action sound in “liberty,” rather than “life” or “property” although all may be implicated in environmental rights claims.
- **Equal Protection Clause.** The Equal Protection Clause of the 14th Amendment provides “nor shall any state deny to any person within its jurisdiction the equal protection of the laws.” The same principle is, of course, implied into the 5th amendment for protection against federal action. The Supreme Court has interpreted this to require evidence of “invidious” express or intentional racial discrimination to warrant heightened scrutiny to discriminatory governmental action. While there has been a notable lack of success so far in applying Equal Protection principles to the environmental justice context, civil rights advocates have found some success in establishing intentional race discrimination through application of the factors identified by the Supreme Court in *Village of Arlington Heights v. Metropolitan Housing Development Corp.* Among other contexts, the *Arlington Heights* factors have been used to indicate invidious intent in contexts of travel, voting, education, and even religious exercise. This could be applied as well to protect the rights of those living in majority minority communities where permitting, zoning, and other decisions with environmental rights impacts may be shown to be invidiously discriminatory.
- **Civil Rights Act of 1964.** Title VI prohibits recipients of federal financial assistance from discriminating based on race, color, or national origin. Claims under Title VI have historically related to (1) disparate treatment (discriminatory actions with clear discriminatory intent), or (2) disparate impact (facially neutral program or policy, with discriminatory outcomes). Federal and state claims under Title VI have been filed, for example, to address concerns with state permitting of air pollution sources, as well as other claims not directly related to environmental concerns. Yet, in *Alexander v. Sandoval*, the Supreme Court held that intentional discrimination is a necessary component of claims under Title VI and disparate impacts were insufficient grounds for private causes of action. This has raised the standard of proof needed to establish a violation to the constitutional standard and has effectively foreclosed environmental justice claims, except in very limited circumstances where proof of intentional racial discrimination is available.

- **Other Federal Civil Rights Laws.** 42 U.S.C. § 1983 provides a basis for environmental rights-based claims. Under this provision, “[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory ... subjects ... any citizen of the United States ... to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law....” For example, the Sixth Circuit recently sustained claims under § 1983 against state actors responsible for providing contaminated drinking water to residents of Flint, Michigan. In addition, Title VIII of the Civil Rights Act of 1968 (also known as the Fair Housing Act) can provide grounds for civil and administrative claims against federal financial recipients on grounds of discriminatory sale, rental and financing of dwellings, which may have environmental and environmental justice implications. Such claims are made against government actors, not private individuals or corporate entities.
- **State Constitutional Provisions.** While neither the United States nor Canada afford express environmental rights at the national level, subnational recognition is evident. Seven state constitutions in the U.S. recognize environmental rights. Illinois in 1970 became the first state to recognize the right, eventually joined by Pennsylvania, Montana, Hawai’i, Massachusetts, Rhode Island, and most recently New York in 2021. Of these, courts in Pennsylvania have been the most active in engaging environmental rights, principally due the Pennsylvania Supreme Court’s 2013 finding that such rights are enforceable and “on par” with others.
- **Constitutional law in Canada.** Courts in Canada have little more to work with. Like the US Constitution, Canadian constitutional documents, including the British North America Act of 1867 and the Canadian Charter of Rights and Freedoms, are silent on environmental matters. And as in the United States, the principal sources of rights available to environmental plaintiffs lie in section 7 of the Charter, which provide the right to life, liberty and security of the person and in section 15, which provides for equal protection under the law; unlike its US counterpart, the Canadian right to equal protection includes the possibility of a “law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.” This could not only permit the invalidation of environmental injustice but could allow measures designed to promote environmental justice. Moreover, the constitutional language that has been so impactful in Pennsylvania does not exist at the provincial level in Canada where constitutions are largely unwritten and uncodified.

Despite the slim constitutional pickings in North America, litigants in the United States and Canada increasingly asserting rights-based approaches to address environmental problems, both chronic and acute, including problems associated with the increasing

impacts of climate change. These cases are replicated in courts throughout the world that are increasingly recognizing implicit and explicit rights to a healthy environment.

II. What Environmental Rights Are Not

A helpful way to think about environmental-rights based causes of action is to consider all the things they are not. Rights-based environmental claims are not based on:

- **Pollution Control Laws.** For the most part during the 1970's, Congress enacted a variety of pollution-control and conservation-based statutes, including the Clean Air Act, Clean Water Act, Safe Drinking Water Act, Resource Conservation and Recovery Act (the nation's hazardous waste disposal law), Comprehensive Environmental Response, Compensation and Liability Act (the nation's toxic clean-up law) and the Oil Pollution Act. Most of these statutes have "citizen suit" provisions that permit affected parties to enforce pollution-control requirements in the absence of government enforcement. At the subnational level, most states have enacted environmental laws of their own governing much of the same media (water, air, soil, species) as do federal statutes.
- **Conservation and Planning Laws.** Again, for the most part dating back to the early 1970's, Congress enacted a series of conservation-based statutes, including the Endangered Species Act, Marine Mammal Protection Act. Congress also enacted the National Environmental Policy Act, a federal environmental planning statute, which requires environmental impact analysis for certain federal actions.
- **Common Law.** State common law affords potential causes of action that could be invoked to address environmental challenges, including public and private nuisance, trespass, and strict liability for abnormally dangerous activities. For one recent example, a state court in North Carolina affirmed a judgment for nuisance against industrial hog farms in rural communities in the eastern part of the state. Such tort actions potentially provide a basis for damages. Federal common law is more limited, tending to involve the public trust doctrine in environmental cases. Although these cases implicate rights-based approaches under the common law, we focus here on rights deriving from constitutional and human rights.

II. Litigation Issues in Rights-Based Approaches

Some issues facing rights-based environmental cases are like those facing any case, such as justiciability issues concerning personal and subject matter jurisdiction, venue, *forum non conveniens*, standing, removal and remand; pleading issues, including plausibility and remedy; discovery issues, including relevance, privilege and proportionality; and motion practice, including failure to state a claim and summary judgment; and appeals and respect for prior judgments. For example, in a rights-based case,

as in any case, the court must be satisfied that exercising personal jurisdiction comports with traditional notions of fair play and substantial justice under the Due Process Clause of the 14th Amendment by examining whether the non-resident defendant has sufficient contacts, ties and relations with the forum state that arise from or relate to the claims.

Rights-based approaches also present unique challenges. For instance, many cases raise issues of first impression, and require courts to ascertain the meaning as applied to certain broad terms (such as “environment”) or to appreciate the links between environmental degradation and cultural opportunities (particularly in indigenous communities), or the links between health and human dignity. Some courts may need to interpret and apply standards pertaining to “clean” air, “healthy” environment, or “sustainable” climate. And then there is the question of remedy, which unless otherwise provided is injunctive relief and may require courts to maintain jurisdiction in cases to ensure compliance with remedial orders which can be far-reaching and complex.

Courts in Pennsylvania have been at the forefront of protecting environmental rights, in large part due to clear constitutional language and to a state Supreme Court judgment declining to impose judicially created limitations or obstructions to the application of the constitutional mandate. Adopted by referendum in 1971, Pennsylvania’s constitution affirms that:

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.

Courts in other jurisdictions have thus far been rather shy about engaging rights-based environmental cases. The reasons are manifold. First, only about one-half the time do environmental rights appear in the presumptively enforceable provision of the national constitution. Second, there are myriad obstacles to enforcement, including jurisdiction, standing, separation of powers and federalism. Third, constitutional litigation is often out of reach to those most impacted by government action that might otherwise induce a rights-based claim. Fourth, the lack of precedent and controlling if not compelling case decisions can thwart engagement if not enthusiasm for environmental rights. Simply, converting ideas into words – the engineering of thoughts, phonemes, and etymology – can have a dampening effect. Last, rights-based litigation most often if at all produces injunctive relief and neither compensatory damages, punitive damages, nor attorney fees. Simply, rights-based cases are challenging to prepare, commence, maintain, and afford, making them all but out of reach to those most affected by adverse government action, that is, the poor, disenfranchised, and otherwise burdened.

III. The Unique Vulnerabilities of Environmental Human Rights Defenders

Environmental rights-based claims present unique challenges to those bringing them. The UN defines environmental human rights defenders (EHRDs) as “individuals and

groups who, in their personal or professional capacity and in a peaceful manner, strive to protect and promote human rights relating to the environment, including water, air, land, flora and fauna.” They are especially vulnerable to attack and violation because they use the language of rights to challenge powerful public and private authorities whose actions adversely affect environmental resources.

Attacks on EHRDs can be violent or non-violent. The former category includes not only actual violence including rape and murder against EHRDs and their families, but true threats of violence as well. The principal tool in the latter category is litigation, often by powerful corporate interests against those who could speak out against them. These harms to EHRDs are most common in North America; violence and threats of violence is most common in other parts of the world, including most prominently, Mexico, Colombia, and the Philippines.

The Judiciary plays a critical role in the protection of EHRDs insofar as the attacks on them, whether violent or not, are contrary to law. Judges can protect EHRDs simply doing what judges do: adhere to the principles of rule of law, remain vigilant in situations where people are threatened, and insist on civil and criminal accountability of those who threaten them.

Chapter 1: The Judiciary and Environmental Rights

Introduction

The world is beset by environmental challenges, including climate change, flooding, fires, food scarcity, drought, and loss of biodiversity. This chapter explores the role of the judiciary in engaging rights-based approaches to address environmental challenges.

The judiciary plays a crucial role in environmental outcomes. Courts often serve as the last best chance for the environment. To paraphrase Chief Justice John Marshall, a right is hardly such without a remedy. A legislature can make a law, but it takes the executive to implement it and a judiciary to interpret and enforce it. There are almost as many environmental laws as there are songs about love. The United States has the Clean Air Act, Clean Water Act, Safe Drinking Water Act, Resource Conservation and Recovery Act (the nation's hazardous waste disposal law), Comprehensive Environmental Response, Compensation and Liability Act (the nation's toxic clean-up law) and the Oil Pollution Act. Both the U.S. and Canada have an Environmental Protection Agency to carry out these laws. Most states have analogues to all this, and many municipalities and local governments do too.

But for the most part, our statutory and regulatory framework focus on the environmental element itself (air, water, the habitats of endangered species) and not on the human beings who live in and near those environments and who depend on environmental quality and sustainability for the life, their health, and their dignity. Simply, environmental rights-based approaches focus on the government's responsibility to uphold a right rather than to regulate its violation. For example, while the federal Clean Water Act in the U.S. provides a comprehensive regulatory approach for regulating discharges of pollution, it does not provide a private cause of action to uphold a right to clean water. Do people have a right to a healthy environment? To clean water? Does Nature have rights? If so, what is the role of the judiciary in upholding such environmental rights? This chapter focuses on these and similar questions.

Rights-based approaches use existing rights to address current environmental harms. They provide a direct means of environmental protection for people and are especially important for people who are already overburdened, disenfranchised, or disproportionately adversely affected by environmental policies. Rights-based approaches to environmental challenges can also provide a means to uphold basic human rights to life, dignity, safety, health, education, employment, and family. Already, the turn toward rights-based approaches to environmental harms has encouraged courts to address claims about environmental conditions in important and effective ways.

This chapter has four parts. Part I provides a brief overview of the recognition of environmental rights in international, foreign and domestic arenas. Part II explores challenges in environmental rights-based litigation. Parts III and IV address judicial engagement and enforcement of rights-based approaches to environmental harms, respectively. What we see is that rights-based approaches are receiving more attention in

courts across North America and across the world. For example, several pending lawsuits claim that the Due Process Clause affords a right to a stable climate. Others claim that environmental harm disproportionately affects children in violation of the Equal Protection Clause. Others argue that the drought in the American southwest implicates the right to water recognized under state law in California and elsewhere, and in British Columbia Canada, that deforestation and climate change implicate the Charter of Fundamental Rights and Freedoms. Simply, rights-based claims raise unique opportunities and challenges for the judiciary.

I. Environmental Rights in International, Foreign, and Domestic Arenas

Traditionally, the domains of environmental protection and human rights barely acknowledged each other. On one hand, substantive environmental laws at the international or national level have barely mentioned the human beings who bear the brunt of environmental deterioration: the Paris agreement, for instance, mentions human rights only in passing and only in the Preamble.¹ The human right to enjoy or live in harmony with a healthy environment, acknowledged sporadically in the early in 1970s, has only been widely recognized at the domestic² and international levels³ in recent years. On the other hand, traditional human rights law has failed to acknowledge environmental conditions explicitly, having been omitted from the major international human rights instruments beginning with the Universal Declaration of Human Rights. Even where it could be plausibly implied – such as in the International Covenant of Economic, Social and Cultural Rights’ guarantee of the “highest attainable standard of physical and mental health,” absent is reference to environment outcomes as a source or purpose of or impediment to achievement of socioeconomic rights. And a human right to a healthy environment is only recently under consideration in the international community, resulting recognition by the U.N. Human Rights Council in 2021, and consideration by the U.N. General Assembly later this year.⁴

A. Right to a Healthy Environment

The first major international conference on the environment was called “Conference on the Human Environment” and it produced a Declaration whose first principle recognized that: “Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and bears a solemn responsibility to protect and improve the environment for present and future generations.”⁵

But this turned out to be a false start, as the environmental movement of the 1970s did not align itself with the human rights movement that was growing up alongside.⁶ While the emphasis on the environmental conditions helped to foreground the value of a healthy environment on its own terms (or for the use of humans), there was little acceptance that socioeconomic rights include a right to a healthy environment.⁷ It would take another 30 years, for instance, before the UN Committee on Economic, Social and Cultural Rights (CESCR) would recognize the human right to water.⁸

By now, however, legal recognition of environmental rights is common the world over. According to the United Nations Environmental Programme (UNEP), more than 150 countries include environmental provisions of some variety in their constitutions, ⁹ including 84 that instantiate a substantive right to a healthy environment.¹⁰ In addition, again according to UNEP, two-thirds of all countries (130) have joined supra-national regional agreements that either expressly or by interpretation recognize a right to a healthy environment.¹¹ In six other countries where environmental rights are not explicit, courts have regularly inferred that a constitutionally protected right to life and/or a right to dignity includes a right to live in a healthy environment.¹² Countries are more likely to add a substantive right to a healthy environment if they have already recognized multiple other socioeconomic rights.¹³

Constitutionalizing environmental rights is important for several reasons.¹⁴ First, constitutions are fundamentally human rights documents: they represent the structures and fundamental values of states, but they typically also protect the rights of present and future generations. To include protection for the environment indicates that the environment is being protected not only for its own sake but also as a right of the people. Thus, environmental constitutionalism recognizes that the condition of the environment affects people.¹⁵ Moreover, the constitutional amalgamation of environmental and human rights reinforces the linkages between environmental rights and other rights that constitutions typically enumerate, including but not limited to socioeconomic rights. As we see below, the right to dignity, flourishing contemporaneously in constitutional texts around the world, exemplifies these linkages and has buttressed the premise that constitutional rights are best understood as inter-dependent on one another.

B. Right to Water

The right to water can be thought of as symbiotic with a substantive right to a healthy environment. As an international human right, water is recognized as a necessity for life to be allocated for adequate access to maximum numbers of people. In 2002, the Committee on Economic, Social and Cultural Rights issued General Comment 15, which confirmed a “human right to water” as “indispensable for leading a life in human dignity” and a “prerequisite for the realization of other human rights.”¹⁶ This is probably the strongest statement to date at the international level of the human right to water and has been reinforced by a 2009 Human Rights Council Resolution (adopted by the General Assembly in 2010) on access to safe drinking water and sanitation. This Resolution calls on states to, among other things, “develop appropriate tools and mechanisms, which may encompass legislation, comprehensive plans and strategies for the sector, including financial ones, to achieve progressively the full realization of human rights obligations related to access to safe drinking water and sanitation, including in currently unserved and underserved areas” and to “ensure effective remedies for human rights violations by putting in place accessible accountability mechanisms at the appropriate level.”¹⁷

Rights to water also have constitutional currency. The term “water” or “waters” appears in the constitutions of almost half the countries of the world, cumulatively more

than 300 times. The constitutions from at least 14 countries instantiate a human right to a fair distribution of clean, safe, or potable water.¹⁸ For example, South Africa’s constitution makes a strong commitment to acknowledging water as a fundamental human right by asserting an enforceable individual right to drinking water.¹⁹ Some states, including California, recognize a right to water constitutionally.

Courts have engaged many of these provisions. The Colombian Constitutional Court has given content to the right to water by defining it as involving “availability, quality, access, and non-discrimination in distribution, consistent with the obligation to use maximum available resources to effectuate the right to water for all.”²⁰ Three of these requirements are necessarily and exclusively for the benefit of humans; the requirement of quality may be to ensure that the access people have is to water of a certain quality so that it is in fact potable and available for use for washing and other purposes, but ensuring the quality of water may also promote the environmental interest in protecting the quality of an ecosystem. And indeed, while Colombia has recognized the interests of nature *per se*, the emphasis in the water cases is on a human right to water. In fact, the constitutional court has recognized that it is a human right on its own merit, as well as being implicit in other fundamental human rights. As a result, the Constitutional Court has recognized that it can be enforced by any person through the informal mechanisms of the *tutela* action or, when the right is collective, through an *acción de inconstitucionalidad*.²¹ In a 2010 case, for instance, the court ordered a water company to supply water to an apartment building, inferring the right to water from the well-recognized rights to life, health, and dignity.²²

Rights to water can be symbiotic with or in tension with other environmental human rights. Typically, environmental human rights produce win-win results: the healthier the environment, the healthier the people living within it. But because water rights entail usage of often limited quantities, the over-protection of the human right *to* water can in some instances – particularly in the Western United States beset by water scarcity – detract from the right to live in a safe, healthy, and sustainable environment.

C. Rights of Nature

Some nations have recognized that Nature itself, or natural elements, have rights that are legally cognizable, and sometimes permitting rights-based claims brought *on behalf of* Nature. In 2008 Ecuador became the first country to do so under its constitution.²³ Other States are considering such measures, including The Republic of Turkey.²⁴ In 2010, Bolivia recognized the rights of Nature.²⁵ In 2017, the New Zealand Parliament enacted the *Te Awa Tupua Act*, which recognized the legal status of the Whanganui River.

Nature has found additional legal recognition sub-nationally. In 2006, Tamaqua Borough, Schuylkill County, Pennsylvania (US), became the first community to recognize the Rights of Nature under law.²⁶ In 2010, the City of Pittsburgh, Pennsylvania (US), followed suit.²⁷ In 2017, Mexico City “recognize[d] the broader protection of the rights of nature.”²⁸ In 2019, the Municipality of Florianopolis (Brazil) recognized the rights of Nature,²⁹ and Toledo, Ohio (US) adopted a Lake Erie Bill of Rights.³⁰ In 2020, Curridabat, Costa Rica granted citizenship to pollinators, trees and native plants, and the Nez Perce

Tribe General Council granted rights to the Snake River. In 2021, the Muteshekau-shipu (Magpie River) in Canada was recognized as possessing legal rights by joint resolution of local and municipal councils.³¹ And this is only a partial list.

Courts play a key role in recognizing the rights of Nature: “On a jurisprudential plane, a judge today must be conscious and alive to the beauty and magnificence of nature, the interconnectedness of life systems on this planet and the interdependence of ecosystems.”³² In 2018, the Colombian Supreme Court of Justice held that the Colombian Amazon enjoys legal rights.³³ And in 2016 the Colombian Constitutional Court recognized the rights of the Atrato River.³⁴ Another court ordered mining operations despoiling the Santiago, Bogotá, Ónzole, and Cayapas Rivers to cease immediately “for the protection of the rights of nature and of the people.”³⁵ Courts elsewhere have recognized the rights of Nature. In 2011, a court in Ecuador invoked the constitutional right to Nature to protect the Vilcabamba River.³⁶ In 2017, a court in India held that the Rivers Ganges and Yamuna, along with their tributaries, are juristic persons,³⁷ and that “Rivers, Forests, Lakes, Water Bodies, Air, Glaciers, and Springs have a right to exist.”³⁸

Rights of Nature are being tested in courts in the United States as well. At this writing, a case brought by the White Earth Nation of Ojibwe against the Minnesota Department of Natural Resources alleging violations against wild rice is winding its way through the courts. And in Florida, lawyers have recently filed suit on behalf of Mary Jane Lake which claims rights to exist, against the threats caused by new development.³⁹

II. Obstacles to Rights-Based Environmental Litigation

Applying rights-based approaches, whether on behalf of humans or nature, to environmental degradation in the courtroom can be challenging.⁴⁰ Petitioners invoking judicial power to protect against environmental harms or to seek protection from climate change face hurdles at every stage of litigation, some of which are relevant in non-environmental cases but all of which are exacerbated when litigation concerns the condition of the environment and the impact of environmental degradation on human life and well-being. We highlight a few of the more prominent considerations below before addressing the cases where these challenges are overcome.

The first hurdle is of course getting into court. Beyond considerations of time and cost that can deter potential plaintiffs in all types of litigation, environmental plaintiffs face evidentiary burdens more extreme than in most contexts.⁴¹ For example, it is difficult to prove that the harms suffered by plaintiffs – whether an illness or a health condition, or the inadequacy of fresh water for drinking and sanitation, or the deprivation of land that stresses not only livelihood but cultural experiences, or something else – is caused by a particular action of a private or public authority. It is the rare plaintiff who can show the source of their cancer or the cause of their cultural poverty. And making the showing can be extremely costly in environmental litigation, as scientific experts and studies must often be secured and be persuasive enough to countermand those of the commonly better resourced, politically-connected and powerful defendants.⁴² In jurisdictions with rigorous

standing requirements, like the United States, these challenges can result in the dismissal of litigation prior to the merits stage.⁴³

Second, environmental cases raise especially daunting interpretive challenges for courts, as they find themselves having to refine and define amorphous concepts like the “environment” and develop measurable benchmarks for standards like ‘healthful’, ‘beneficial’, ‘adequate’, ‘harmonious’, ‘balanced’, and so on to determine whether constitutional or statutory norms have been violated.⁴⁴ For instance, the very word “healthy” that often qualifies “environment” in constitutional texts is ambiguous: is the aim to have an environment that is healthy for its own sustainability and reproduction, or is it to have an environment that is healthy for humans to live in? Moreover, environmental provisions in constitutions typically have little or no drafting history to guide judicial interpreters.

The third important hurdle to rights-based environmental litigation involves the fashioning and enforcement of remedies. We take a closer look at this in Part IV below.

III. Judicial Engagement of Environmental Rights-Based Claims

The challenges to vindicating environmental rights are significant but not insuperable. Some courts – in different parts of the world, operating in dramatically different social and legal cultures and facing very different political and economic headwinds⁴⁵ – have engaged constitutional environmental rights claims. We turn next to examine that engagement, whether in the context of a stand-alone right to a healthy environment or implied from other constitutional protection.

The most straightforward way for a court to recognize the economic and social right to a healthy environment is for the domestic constitution to provide an explicit self-executing right.⁴⁶ And yet there are very few lawsuits that rest solely on a constitutionally instantiated right to a healthy environment. An early landmark decision in this field, *Oposa v Factoran*, was based on Section 16 of the Philippine Constitution – “The State shall protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature”⁴⁷ – which was not formally judicially enforceable. In language that is often quoted, the Supreme Court of the Philippines remarked that it was nonetheless as important as any other constitutionally protected right, including civil and political rights:

Such a right belongs to a different category of rights altogether for it concerns nothing less than self-preservation and self-perpetuation — aptly and fittingly stressed by the petitioners — the advancement of which may even be said to predate all governments and constitutions.

This Court explained that “these basic rights need not even be written in the Constitution for they are assumed to exist from the inception of humankind” and thus should shape political priorities lest “the day would not be too far when all else would be lost not only for the present generation, but also for those to come — generations which

stand to inherit nothing but parched earth incapable of sustaining life.”⁴⁸ Even here, though, the Court tethered the environmental claim to a constitutionally recognized right to health.

Thus, the typical case marries environmental and socio-economic interests and rights. For instance, the Colombian Constitutional Court vindicated environmental rights in tandem with other economic and social and cultural rights, in holding that the “Colombian government had violated the rights of its citizens to a clean environment, life, health food, and water by failing to prevent deforestation which is contributing to climate change.”⁴⁹ Thus, the environmental right is one of several social rights implicated by environmental degradation; in some cases, similar results can be reached even when the environmental right itself is not actionable.

A number of constitutional courts have found that environmental health is essential to human dignity – an enumerated right or fundamental value found in more than 170 constitutions around the world.⁵⁰ Dignity rights can be actionable in and of themselves or they can embody the full complement of other human rights.⁵¹ But because they tend to touch on the most important and fundamental aspects of the human experience, courts have been open to recognizing the dignity of living in a healthful environment. Dignity rights are thus a relatively and increasingly common way for courts to advance environmental protection through the logic of socio-economic rights.

An early portent of the trend began in 2005 in Nigeria, where a federal high court recognized that “the constitutional guarantee of right to life and dignity of the human person available to [plaintiffs] as citizens of Nigeria includes the right to a clean, poison-free and pollution-free air and healthy environment conducive for human beings to reside in for our development and full enjoyment of life...” and thus enjoined the gas flaring that was ruining the plaintiff’s land and adversely affecting his health and well-being.⁵² A number of other courts have more recently recognized that living in dignity encompasses a stable and healthy environment, particularly against the backdrop of the increasing threats caused by the changing and warming global climate. In Pakistan, the High Court of Lahore explained that “[c]limate Justice and Water Justice go hand in hand and are rooted in articles 9 (right to life) and 14 (right to dignity) of our Constitution and stand firmly on our preambular constitutional values of economic and social justice.”⁵³ Likewise, the Supreme Court of Nepal said in 2015 that: “It should be understood that all rights necessary for living a dignified life as a human being are included in [the right to dignity.] Not only that, it cannot be imagined to live with dignity in a polluted environment...”⁵⁴ A more recent example comes from the German Constitutional Court⁵⁵ which took the nonjusticiable Art. 20a (“Mindful also of its responsibility toward future generations, the state shall protect the natural bases of life by legislation and, in accordance with law and justice, by executive and judicial action, all within the framework of the constitutional order”), and combined it with a right to dignity (“Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority”) and a right to the full development of the personality (“Every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral

law”) to recognize a justiciable right to government action to protect against climate change.⁵⁶

The Constitutional Court of Colombia, operating under a constitution that expressly recognizes a right to a healthy environment, has also nonetheless tied environmental claims to constitutionally protected rights to health and well-being. In the Rio Atrato case, mentioned above, the Court recognized the juridical personality and legal rights of the Atrato River:

[T]he concept of general well-being must include, in turn, material well-being, understood as quality of life - in terms of good nutrition, education and safety -, and decent income, based on the guarantee of a stable job; whereas physical, psychological and spiritual well-being is represented by access to health, culture, the enjoyment of the environment and the legitimate aspiration to happiness; and in any case, the ability - and also the possibility - to participate in civil society through democratic institutions and the rule of law.⁵⁷

As the global recognition of the right to dignity grows, it increasingly encompasses environmental concerns.

IV. Enforcement in Environmental Rights-Based Cases

A. Fashioning and Enforcing Remedies

If petitioners manage to persuade a court that an environmental violation has occurred, whether under environmental or human rights legal standards or both, a final set of challenges presents itself at the remedial stage of litigation.⁵⁸ Yet, despite these challenges, some courts have committed to devising thoughtful yet holistic and ambitious remedial orders to implement environmental human rights. Again, the Indian Supreme Court has led the way. In one early environmental case, the Court ordered the temporary closure of limestone quarries and further study to determine if they should be reopened and on what conditions. But, recognizing that those employed at these quarries would be either temporarily or permanently “thrown out of work,” the court insisted that “as far as practicable and in the shortest possible time, [they] be provided employment in the afforestation and soil conservation programme to be taken up in this area.”⁵⁹ Similarly, when landfills were being closed in Colombia, the Court’s extensive remedial order required each affected municipality to, within a few months, adopt necessary measures to “protect the recyclers’ rights to health, education, dignified living, and food, ensuring in each particular case that the means were connected to specific social programs.”⁶⁰

Although courts have been creative in fashioning remedies for environmental violations, they are aware of the challenges of implementation. For instance, the South African Constitutional Court has explained that the constitutional right to water “does not require the state upon demand to provide every person with sufficient water without more.”⁶¹ Rather, the court said, “it requires the state to take reasonable legislative and other measures progressively to realise the achievement of the right of access to sufficient water, within available resources.”⁶² Indeed, the Constitution of South Africa requires that “[t]he

state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.”⁶³ Yet the court explained that a state’s compliance with this requirement would be measured by the reasonableness of its efforts, not by their success, reasoning that courts “are ill-suited to adjudicate upon issues where Court orders could have multiple economic and social consequences for the community. The Constitution contemplates rather a restrained and focused role for the Courts, namely, to require the State to take measures to meet its constitutional obligations and to subject the reasonableness of these measures to evaluation.”⁶⁴ This “restrained” position remains the norm in environmental cases.

For many reasons, including some mentioned above, cases seeking to protect the environment from degradation or to remedy degradation that has happened are notoriously difficult to implement. This is true for legal, social, political, economic, and other reasons. A recent study of 15 countries shows that in none of these countries has the promise of environmental rights been yet fulfilled,⁶⁵ regardless of whether the countries have extensive catalogues of constitutional environmental rights such as France, South Africa, and Brazil, or whether the constitutions are silent or subdued on the question of environmental protection, such as India and the United States. In fact, the pattern persists in countries across the spectrum of development and socio-economic status from Nigeria to the United States, and it is true in countries of all legal traditions from civil code to common law to countries with mixed systems.⁶⁶

B. The Impetus of Judicial Authority

Courts can buttress the impact of their decisions in several ways. Although courts are only one small part of the machinery of public policy making, and in environmental cases, they often operate against the grain of political will, their decisions can have greater impact if they coordinate across sectors and institutions, or, for instance, require independent audits and institutional review.⁶⁷ Without these elements, a court decrying a government’s environmentally destructive policies is likely to be shouting into the wind.⁶⁸

Some have argued that implementation gaps may be bridged by shifts in the cultural mindset about environmental issues.⁶⁹ In Nigeria, for instance, “what is required is a more environmentally jurisprudential judiciary [and] the promotion of effective awareness among the Nigerian citizenry; otherwise victims of environmental degradation would remain at the mercy of poorly enforced (and sometimes, fundamentally flawed) environmental protection statutes.”⁷⁰

In addition, there are procedural ways to buttress substantive environmental rights including by vindicating the rights to information about environmental matters, to participation in environmental decision-making, and access to justice if those rights are not respected. At present, of the 36 constitutions that explicitly guarantee procedural environmental rights, 35 also guarantee substantive environmental rights.⁷¹ Moreover, the exercise of procedural rights is itself a manifestation of human dignity: members of the public exercise their rights to free speech and to public participation both because they have dignity and for the purpose of promoting and protecting it.⁷² In this way, procedural

rights are understood not as distinct from substantive economic and social rights but as working in tandem with such rights to scaffold and reinforce them.

Conclusion

Despite the challenges, a growing number of judges across the globe are acting however and whenever they can. In the United States District Court in the Juliana case, Judge Aiken, upon finding that the right to liberty might encompass a right to a stable climate, reflected on her profession's responsibility in environmental matters:

Federal courts too often have been cautious and overly deferential in the arena of environmental law, and the world has suffered for it.... The current state of affairs ... reveals a wholesale failure of the legal system to protect humanity from the collapse of finite natural resources by the uncontrolled pursuit of short-term profits [T]he modern judiciary has enfeebled itself to the point that law enforcement can rarely be accomplished by taking environmental predators to court.⁷³

Likewise, Brazilian Justice Antonio Herman Benjamin has also called on his fellow judges to take responsibility for the gap between aspiration and result:

Judges ... are on the front lines of filling the implementation gap.... Judges should assert their authority to enforce all aspects of the constitution, especially those parts most necessary to secure a dignified life for all citizens. They need to be “protagonists” in order to protect the planet, using the legal tools they have – written laws and jurisprudence to be applied according to their true and ecological purposes. This is not a call to activism, but rather a reminder that judges are charged with the responsibility of implementing the law, even where it is difficult to interpret, uncertain in consequence, politically controversial, and even when it goes against centuries-old traditions of legal thinking and jurisprudence.⁷⁴

Courts in the United States and Canada have been deciding the rights of individuals for centuries. Rights-based approaches to environmental conditions simply ask courts to apply the same legal reasoning to environmental rights as courts routinely do for other kinds of rights.

Environmental rights protect what is of fundamental importance and what cannot be relegated to protection in the political branches alone. Environmental conditions satisfy both and do so arguably more than anything else in history. Protection against the degradation of the environment is precisely the kind of problem that the political branches are *least* likely to be able to protect; it requires long-term thinking for the benefit of those who have no political voice (because they are young, or not yet born). Environmental rights are therefore among the most pressing rights that courts can vindicate.

Chapter 2: Environmental Human Rights Defenders

Introduction

Environmental human rights defenders (EHRDs) seek to protect the local or global environment as a human right. They act through legal challenges, using the tools of the legal system and the tools of political activism. They are especially vulnerable to attack and violation because they use the language of rights to challenge powerful public and private authorities whose actions adversely affect environmental resources. Being an EHRD can come with a price, however, including harassment, reprisal, retaliation, violence, and worse.

The judiciary plays a critical role in the protection of EHRDs insofar as the attacks on them, whether violent or not, are contrary to law. Judges can protect EHRDs simply doing what judges do: adhere to the principles of rule of law, remain vigilant in situations where people are threatened, and insist on civil and criminal accountability of those who threaten them.

EHRDs are all around the world. The UN defines EHRDs as “individuals and groups who, in their personal or professional capacity and in a peaceful manner, strive to protect and promote human rights relating to the environment, including water, air, land, flora and fauna.”⁷⁵

Attacks on EHRDs can be violent or non-violent. The former involves not only actual violence, including rape and murder against EHRDs and their families, but true threats of violence as well. The principal tool in the latter category is litigation, often by powerful corporate interests against those who could speak out against them. These harms to EHRDs are most common in North America; violence and threats of violence are more common in other parts of the world, including most prominently, Mexico, Colombia, and the Philippines.

This chapter describes both kinds of harms to EHRDs because both implicate basic rights including the right to life; the right to freedom of movement; the right to freedom of speech, assembly, and petition; the right to due process of law; and the right to live with human dignity, as well as non-constitutional rights common law rights such as privacy and reputational torts, interference with contract, and assault and battery; as well as criminal violations. And both forms of attacks have the same purpose and effect: to silence opposition and shut down the political and legal actions that pose a challenge corporate and political power.

This chapter provides a brief introduction to the plight of EHRDs, particularly in North America, and to the opportunities that courts have at their disposal to protect their lives and their rights to defend the human and natural environment in which we all live. First, the chapter will provide some basic information about the scope and nature of the issues, and then it will survey the legal protections that exist for EHRDs and the legal

systems that foster and protect the defense of environmental human rights. In Part IV, we examine the vulnerabilities of EHRDs and in Part V, we explain the physical and legal threats that EHRDs regularly face. Part VI provides a general overview of some of the legal protections available in the United States for EHRDs that courts should be aware of. At the end, we provide some additional resources.

I. The Basics

A. Who are EHR Defenders?

EHRDs are farmers whose land is threatened by pollution, agribusiness, and the impacts of climate change. They are members of communities situated near mines, dams, factories, polluted rivers and decimated forests whose livelihoods are threatened by environmental and climate recklessness. They are journalists who witness environmental degradation. They are scientists who can document and diagnose impacts of environmental despoliation in our oceans, rivers, forests, and other ecosystems. They are lawyers and other advocates who seek redress for individual clients, to prosecute environmental crimes, or to reform legal regimes to stop future harms and politicians who recognize that governance has for too long encouraged or allowed environmental degradation for short term gain at the expense of generational harms. They are doctors and nurses who identify patterns of cancer, respiratory diseases, cognitive impairments, and other health effects of environmental degradation. They are family members and friends of other EHRDs, galvanized by the injustices they have witnessed against those who have gone before them and they are religious leaders who sense the immorality of environmental damage. They are children.

B. What work do EHR Defenders do?

Environmental human rights defenders organize meetings among victims and survivors and with politicians and businesses. They file suit against governments and businesses. They seek information about governmental programs and policies, about business activities, about health impacts and changes in the local environment and they share information through local and global networks. They seek to draw attention to the injustices they see so that through peaceful political action, the course of events may change.

C. Where do EHR Defenders work?

Everywhere. In cities and states, in small towns and rural communities, on tribal lands and near rivers and oceans throughout North America and the world.

D. Why do people risk everything they have to protect the environment and those who live in it?

Because it is a matter of human dignity to exercise democratic rights for all purposes including to secure the right to live in a healthy environment. And because the law, in principle, promotes, supports, and protects them those who exercise their democratic rights in this way.

II. Legal Protection for EHRDs

International, regional, and domestic law, as well as the most fundamental principles of law, encourage participation in governance. As the Professor John Knox, the former Special Rapporteur for Human Rights and the Environment, has observed,

For example, rights of freedom of expression, freedom of peaceful assembly and association, participation in government and effective remedies for violations of rights are recognized in the Universal Declaration of Human Rights (arts. 7, 8, 19, 20 and 21) and elaborated in the International Covenant on Civil and Political Rights (arts. 2, 19, 21, 22 and 25), both of which also make clear that the rights are not subject to discrimination.⁷⁶

In addition, as UN Environment reports, “Article 1 of both international human rights covenants guarantees people the right to self-determination and to make decisions about their own natural wealth and resources.”⁷⁷ Moreover, the 1948 American Declaration of the Rights and Duties of Man also recognizes these rights, as does the American Convention on Human Rights. Specifically, the American Convention on Human Rights recognizes the right to freedom of expression (art. 13), rights of freedom of assembly and association (arts. 15, 16), the right to participate in government (art. 23), and the right to effective recourse to courts for protection against acts that violate fundamental human and constitutional rights (art. 25).⁷⁸

Knox calls these the “baseline” rights that every person has “to take part in the government of their country and in the conduct of public affairs.”

In the specific context of environmental protection, international, regional, and domestic law has gone even further to protect rights of democratic participation for more than 50 years.

- In 1972, the United Nations Conference on the Human Environment issued a Declaration affirming, as its first Principle, that “Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations.”⁷⁹
- In 1992, the United Nations "Conference on Environment and Development" (UNCED) issued the “Rio Declaration” which, in Principle 10, states that:

Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to

judicial and administrative proceedings, including redress and remedy, shall be provided.⁸⁰

- Regional human rights bodies followed suit establishing the value of procedural environmental rights and effective mechanisms for implementation and enforcement, first in Europe with the 1998 Aarhus Convention⁸¹ and then in the Americas, with the Escazú Agreement, adopted in 2018 and entered into force in 2021.⁸²
- Participatory (often called procedural) environmental rights are also protected in approximately 36 domestic constitutions so far.⁸³ These provisions usually complement substantive environmental rights, as well as procedural constitutional rights (such as due process rights, or rights to information) that pertain generally rather than to environmental matters specifically.

Rights of participation in environmental matters are also supported by fundamental human rights principles including the right to dignity. Dignity – defined by the American Bar Association as the “inherent, equal, and inalienable worth of every person”⁸⁴ — is, according to the ABA, “foundational to a just rule of law.”⁸⁵ In the words of the great 20th century philosopher Hannah Arendt, dignity embodies the “right to have rights”⁸⁶ and the right to have rights entails the right to claim them for oneself and for others in present and future generations.

Dignity rights reflect the full panoply of human rights because dignity encapsulates the full spectrum of the human experience. The architects of the American Constitution believed that dignity primarily entail civil and procedural rights, whereas in the rest of the world dignity rights also include social, economic, cultural, and environmental rights.⁸⁷ Either way, the fundamental notion of living with dignity includes and is manifested by the ability to speak out for what one believes is true and right – whether it is a particular creed or a healthy and sustainable environment. Participatory dignity requires judges to ensure that people can engage fully in public acts of decision-making about issues essential to their identity and well-being.

III. What Makes *Environmental* Human Rights Defenders More Vulnerable

Like defenders of all human rights (e.g., those who defend the rights of prisoners or of the LGBTQ+ community), environmental human rights defenders face challenges to their work and threats to their lives and livelihoods by those who prefer the status quo or who themselves feel threatened by the form of change advocated by human rights defenders. But those who defend and advocate for the protection of *environmental* human rights face additional challenges and are especially vulnerable.

A. EHRDs are less likely to be included in general human rights protections.

First, international human rights law obligations do not typically specifically mention environmental rights. Environmental concerns and environmental rights are

absent from the Universal Declaration of Human Rights and every international human rights treaty, including treaties prohibiting discrimination and protecting livelihoods and other forms of dignity. Importantly, environmental concerns are included in neither of the International Covenants, even though they are central to both civil and political rights and to economic, social, and cultural rights. The United Nations Declaration on Human Rights Defenders (1998) doesn't mention environmental rights defenders, and Fact Sheet No. 29 mentions the environment only 3 times in 61 pages, all in passing.⁸⁸

That may be slowly changing. In October 2021, the U. N. Human Rights Council established the basis for global protection of environmental human rights and their defenders with the anticipated that the matter will soon be taken up by the General Assembly. At the regional level, the Escazú Agreement, for Latin America and the Caribbean, is the first to specifically address the need for protection of environmental human rights defenders.

B. Opponents are more powerful.

Not only are EHRDs less protected by law, they are also more vulnerable to attack and face greater legal challenges. Environmental human rights defenders face opponents who are more powerful and far better resourced than those typically faced by other human rights advocates. Their opponents are big agribusiness, oil companies, extractive industries, and other major business interests, as well as the government officials who collaborate or collude with them, and sometimes the courts whose independence is compromised. UNEP reports that “corruption is frequently present and can be aggravated by large sums of money invested in and flowing from the projects, as well as poor governance and a lack of transparency.”⁸⁹ For instance, the Supreme Court of North Carolina recently held that the state legislature acted within its power when it acted to *limit nuisance lawsuits* against the state's hog farmers – after environmental groups and individual plaintiffs had sued hog farmers for pollution and foul odors⁹⁰ and made claims based on environmental justice principles. Defendants had threatened plaintiffs with criminal prosecution.⁹¹

Consider these vulnerabilities and imbalances in power and resources on a global scale:

- 1% of the people of the world have *twice as much wealth as 6.9 billion people*.
- 22 men own more than all the wealth of *all the women* in Africa.
- Indigenous peoples now make up only 5% of the world's populations but have been the victims of *37% of the murders* of EHRDs.

C. EHRDs are protecting a more complex and extensive web of rights.

EHRDs seek to protect *a broader, interlocking span of interests*. Whereas many human rights defenders focus on a single right, such as abolition of the death penalty or the right to housing or health care or discrimination against a specific group, EHRDs seek to protect *all* of the rights that are implicated when the environment is spoiled: not only are

life and health affected, but the availability of healthy food and clean water can be compromised, access to education can be limited and employment opportunities reduced or limited. Cultural rights may be implicated, as well as traditional or formal property rights. These are all independent rights, but they are inter-related and can be interdependent and indivisible. Moreover, many substantive claims also implicate equality rights because of the way abuses and violations of environmental human rights fall disproportionately on those who are already disempowered: women, children, and poor and Black, Indigenous and People of Color. Moreover, as seen above, environmental human rights implicate both substantive and procedural claims, including the rights to information, participation, and access to justice. In addition, EHR defenders seek to protect the rights of all those in their communities, and often seek to protect the rights of generations yet to come. This web of interests makes the work of EHRDs far more challenging, more complex, more costly, and more sensitive than the work of those who would protect specific and well-established civil and political rights and social, economic, and cultural rights.

D. EHRDs face greater legal hurdles.

1. Environmental human rights defenders face greater challenges getting to court

Cascading and overlapping but distinct challenges of endemic poverty and environmental despoliation – relating to food, health, education, housing, privacy, and safety or security can make it hard for environmental defenders to identify the most pressing needs and strategies for action. And it can be difficult for environmental activists, particularly environmental justice activists, to secure legal representation, in part due to costs and payment structures, particularly where economic recovery is time-consuming unlikely.

Moreover, information necessary to establish standing or to prevail on the merits tends to be difficult to access in environmental human rights cases because it is often held by those public and private entities who gain from its concealment. Decision-makers in business and government may obscure documents to hide adverse environmental impacts, to such an extent that rights advocates may not even know what documentation exists. Moreover, many environmental impacts are local and remote, making it harder to develop networks and support systems and to reach the MAPA (“most affected people and areas”).

Challenges in obtaining evidence of specific individualized harm and causation attributed to the defendant can preclude access to court, particularly in the United States, where standing requirements can preclude access to justice. Likewise, under current standing doctrine, plaintiffs must be able to identify and fashion a judicial remedy that the defendant(s) can be ordered to implement, which can be difficult when the harm is broadly environmental or health related. The youth climate change case, *Juliana v. United States*, was ultimately dismissed on standing grounds for lack of redressability, and now awaits resolution of the plaintiffs’ motion to amend under Rule 15.⁹²

2. Environmental human rights defenders face greater challenges in court

It can be difficult to obtain evidence for environmental human rights claims than for other types of claims, even other human rights claims. Threats to and violations of environmental human rights cause harms that may take long to manifest and when they do, they are difficult to attribute to a single bad actor. In addition, obtaining such scientific data is extremely costly and time-consuming, particularly with respect to environmental health consequences which can have long latency periods and can manifest differently in different people. These challenges can be particularly acute for many of the world's most vulnerable and least powerful people, including especially women and girls, who are the most likely to suffer from environmental consequences. Consequences to the environment itself can be even more difficult to trace back to a particular actor.

And, again, the imbalance in financial resources between the environmental and environmental justice plaintiffs and corporate or government defendants can pose insuperable challenges for those seeking to protect environmental human rights in judicial fora. We address below situations where the use of such resources is strategically played to subvert the EHRDs' efforts.

IV. Harms and threats against EHRDs

According to the Ford Foundation, EHR defenders are especially vulnerable to attack: Of the 281 extrajudicial killings of rights activists in 2016, nearly half (136) were of *environmental* rights activists.⁹³

A. Physical violence

Global Witness, an international NGO, reporting on threats against EHRDs, has documented 227 deaths in 2021, or 2 deaths of EHR defenders every 3 days of 2021.⁹⁴ Ten percent of the murder victims were women and 37% were indigenous people, who constitute 5% of the world's population. More than half of these murders took place in Mexico, Colombia, and the Philippines, and the remainder (except for 1) in other countries of the Global South. Per capita, the countries that saw the greatest numbers of murders of EHRDs were Nicaragua, Honduras, Colombia, Guatemala, and the Philippines. In Colombia, for instance, of the 65 defenders killed, 1/3 are indigenous and Afro-descendent people, 1/2 are small scale farmers, and 17 are linked to coca crop substitution programs under the Peace Agreement. One killing took place in Canada.

In addition, there have been countless non-lethal attacks, including sexual attacks against women. These numbers don't account for the innumerable unreported threats of violence to defenders and their families, and threats of sexual violence made against defenders who are women.

As John Knox has explained, “for every 1 [EHRD] killed, there are 20 to 100 others harassed, unlawfully and lawfully arrested, and sued for defamation, amongst other intimidations.”⁹⁵

B. Litigious attacks

In the United States, the most common form of intimidation against environmental human rights defenders is through the courts: this means that judges are on the front lines of defending the defenders who use only peaceful and legally sanctioned means to protect environmental human rights.

Among the most common forms of intimidation in the United States is the use of SLAPP suits – strategic lawsuits against public participation. SLAPP suits are designed not to redress legally actionable behavior but to silence activists and advocates. These lawsuits, brought by well-funded industrial interests, often fail in court, but they succeed in their aims to silence opponents by the sheer burden and cost of defending such a suit.⁹⁶

SLAPPs often take the form of defamation suits, or suits for tortious interference with business or trade.⁹⁷ Examples include the following:

- Furnas County Farms Co. filed a lawsuit for defamation against two farmers in Nebraska “for defamation arising from written comments the farmers had filed about Furnas’ environmental record with state regulators.” Ultimately, the SLAPP suit and the countersuit were settled, after 8 years of litigation.⁹⁸
- The “oil refinery Tosco sued Communities for a Better Environment (CBE), claiming that CBE had libeled and slandered Tosco in the course of Clean Air Act lawsuits CBE had brought against Tosco.” The case was litigated for two years before the federal court dismissed it for lack of subject matter jurisdiction.⁹⁹
- The Western Fuels Association, an arm of the power industry that purchases hundreds of millions of dollars of coal annually sued several environmental groups for defamation based on an ad plaintiffs took out in the New York Times. The Wyoming district court ultimately dismissed for improper venue.¹⁰⁰

SLAPP suits can also take advantage of other laws as well. For instance, after eight California cities and counties sued Exxon for misstatements and other malfeasance relating to the suppression of information about climate change, Exxon, rather than simply defending the suit on its merits, brought a counter suit against the municipalities for violating Exxon’s constitutional rights to freedom of speech. Exxon’s suit, claims that the California municipalities used “tort suits as pretext to suppressing Texas speech and policy.”¹⁰¹ As an example of Exxon’s energetic use of judicial process, its petition, filed more than 4 years ago and now before the Texas Supreme Court, requested “an order allowing the company to conduct pre-suit depositions and obtain documents

pertaining to potential claims of abuse of process, civil conspiracy,” and violations of Exxon’s constitutional rights in connection with “abusive law enforcement tactics and litigation in California” that were “attempting to stifle ExxonMobil’s exercise, in Texas, of its First Amendment right to participate in the national dialogue about climate change and climate policy.”¹⁰² The Complaint claims that “questioning these officials is necessary to collect evidence of “potential violations of ExxonMobil’s rights in Texas to exercise its First Amendment privileges.”¹⁰³ The law under which the suit was filed, known as Rule 202, “in effect allows corporations to go on a fishing expedition for incriminating evidence [and] question individuals under oath and demand access to documents even before any legal action is filed against them.”¹⁰⁴ Texas Governor Abbott has supported Exxon’s suit, as did the Appeals Court, which acknowledged “an impulse to safeguard an industry that is vital to Texas’s economic well-being,” remarking that “lawfare is an ugly tool by which to seek the environmental policy changes” pursued by California municipalities. But the appeal court ruled that the defendants did not have sufficient direct connection to Texas for the case to be heard in the state.¹⁰⁵

In addition to SLAPP suits, some environmental offenders use the ordinary processes of litigation to silence their critics – but in extraordinary ways. Three recent cases exemplify the extent to which litigious defendants will go to protect their interests while using dilatory tactics and imposing excessive costs on environmental defenders. This can occur whether the defendant is government or corporate, or both. In any case, the plaintiff targets struggle to find the resources – either in terms of time or money – to defend themselves.

First, in *Juliana v. United States*, 21 then-youths filed suit in 2015 against the Obama administration alleging that the U.S. government had, for decades, adopted policies that contributed to climate change, endangering their health, lives, and liberty rights, among other things. The government – through 3 administrations – argued that the plaintiffs lacked standing and that the case presented a political question and made a host of other procedural and substantive arguments including that the district court lacked jurisdiction to hear a claim brought under the Fifth Amendment. In addition to ordinary motions to dismiss and appeals, the federal government has sought interlocutory appeals, emergency stays, two writs of mandamus, and made two trips to the Supreme Court. After seven years of litigation, the case still has not gone to trial, despite a court order in November 2016 that it should.¹⁰⁶

The most egregious case of the use of litigation resources to silence a defender of environmental human rights is the case of Steven Donziger, the lawyer who represented 30,000 indigenous Ecuadorians in their case against Chevron (then Texaco) over the spillage of 16 billion gallons of crude oil and 18 billion gallons of polluted wastewater into the lands and waterways of indigenous communities in the Amazon rainforest. The case has been going on for decades, in the United States and Ecuador and in international tribunals, but after a multi-billion judgment was issued against Chevron, the company instigated criminal and civil proceedings against Donziger (including a 2011 RICO claim for \$60 million), resulting in the loss of his law license and his passport, more than 2 years

under house arrest as well as several months in prison in 2021, and the freezing of his bank accounts, among other things.¹⁰⁷

A third recent example, which includes the defensive interests of both corporate and government authorities, involves the litigation brought by the Lakota Tribe to protect themselves and their land from the construction and operation of the Dakota Access Pipeline. They brought a variety of claims, including procedural claims and claims based on the cultural value of the land and waters to the people who have lived there.¹⁰⁸ Begun in July 2016, the case continues to this day in both judicial and administrative fora without proper resolution, even as the pipeline expands, and irremediable damage is being done to the lands and waters of the Tribe.

Since these defensive tactics use judicial resources, judicial vigilance regarding the legitimacy of claims, counterclaims, and lawsuits at the earliest moment— sometimes required by state Anti-SLAPP legislation — can avoid the waste and misuse of private and judicial resources if the suit is brought for the improper purpose of silencing critics.

C. Surveillance

In coordination with agricultural interests, France has established an agency within its internal security force called “Demeter Cell” (named after the Greek god of the Harvest) which protects agricultural interests against threats. Its charges include carrying out intelligence actions and fighting against harmful “actions of an ideological nature” which may include “symbolic actions of denigration” — that is, criticism of agricultural practices. This part of the agency’s charge was struck down in February 2022 by a French administrative court in an action brought by environmental groups who argued the agency was “an enterprise of “intimidation” against activists denouncing industrial farming. The French government is appealing the judgment.

D. Threats

Threats alone — even when they are not carried out — can cause harm and violate rights. Issued by a coalition of environmental human rights defenders, the Esperanza Protocol explains that:

Threats not only indicate an intention to cause harm to the HRD but can themselves violate rights: the right to defend rights; the rights to life, security, integrity, dignity, and privacy; the right to be free from torture and cruel, inhuman and degrading treatment; freedom of opinion, expression, information, assembly and association; the right to access to justice at the national and international level; and freedom of movement and residence, among others. Threats against HRDs are thus a pressing human rights issue.¹⁰⁹

V. Judicial Opportunities and Obligations

As one environmental journalist in Nigeria put it, “The law is clear: it needs to be enforced.”¹¹⁰ This sentiment is echoed throughout the world, and at all levels: Arnold Kreilhuber, Deputy Director, Law Division, at UNEP has noted that even though environmental rights are now common in constitutional law and elsewhere, “the enforcement part of such initiatives has been a challenge.”¹¹¹ For many, precisely because the law is clear that the lives and livelihoods of any person should be protected, the judiciary holds the key to protection of EHRDs.

Substantive law supports the defense of environmental human rights, as does international and regional human rights law and environmental law, which can apply as a matter of hard law or soft law. This robust architecture of rights and legal protections “identifies State obligations to respect rights, comply with reinforced and specific due diligence obligations toward [human rights defenders (HRDs)], ensure non-discrimination, and ensure adequate reparation to threats against HRDs.”¹¹²

Domestic law in the United States that potentially protect the rights of EHRDs include:

- **Constitutional** provisions protecting rights under the First, Fourth, Fifth, and Fourteenth Amendments.
- **Criminal and tort law.**¹¹³ According to the Esperanza Protocol, “[c]riminal policies should include considerations on data collection, protection, and analysis, and the need to ensure proactive analysis of criminal threats; victims’ services and protection mechanisms; training; and ensuring adequate human and financial resources to implement the policy.”¹¹⁴
- **Environmental laws** including the whistleblower provisions of 1978 Fish and Wildlife Improvement Act,¹¹⁵ Clean Air Act, CERCLA, Toxic Substances Control Act, Water Pollution Act and the Whistleblower Act of 1978.
- **Administrative law**, including the rights of notice and comment and other forms of public participation in government decision-making including in the Freedom of Information Act and the Government in the Sunshine Act, as well as due process rights.
- **Anti-SLAPP** protections, which vary state by state.
- **Procedural rules** against vexatious litigation and frivolous actions.

Investigatory authority matters, too; the Esperanza Protocol recommends that “investigations take into consideration the HRD’s work as a possible line of inquiry and be directed toward identifying both physical perpetrators and indirect perpetrators; that investigations consider the context in which threats against HRDs are made, relevant patterns or trends in criminality, and characteristics of alleged perpetrators; and that States ensure victim services and the participation of victims in proceedings. It also develops specific considerations based on particular characteristics of victim identity, perpetrators

(e.g., State, criminal group, or business actors), and modalities of threats (e.g., online, offline).”¹¹⁶

Moreover, courts have opportunities to help protect civil society and civic spaces. According to Global Witness, “[t]here is a clear link between the availability of civic space and attacks against defenders – the most open and tolerant societies see very few attacks, whereas in restricted societies, attacks are much more frequent.”¹¹⁷ Therefore, it is imperative that courts not only enforce that directly hold accountable governments and businesses that independently or in collusion threaten the lives and livelihoods of EHR defenders, but that they also attend in their cases to the implications for civic space more generally so that the defense of environmental human rights can be debated democratically. Protecting the dignity-based rights of democratic participation in both environmental and non-environmental cases can scaffold these efforts. Indeed, courts must ensure that they are not complicit in or supportive of policies and practices that allow companies to “cause, contribute to, and benefit from human rights abuses and environmental harms, particularly across borders,”¹¹⁸ even when legislation permits such laxity.

Conclusion

Environmental Human Rights Defenders are people who take the responsibility to try to protect environmental resources for their communities and for future generations because they understand that a healthy environment and stable climate are essential for the enjoyment of all other human rights. And yet, as they fight these battles in judicial and non-judicial arenas, they are opposed by powerful corporate and governmental interests. They depend on courts to protect their ability to exercise their democratic rights. In turn, courts can protect them simply by adhering to rule of law, and by ensuring that their courts are not used to silence or suppress those who defend human and constitutional rights.

Additional resources on Environmental Defenders

- Special Rapporteur for Human Rights Defenders, mandate page: (established 2000)
<https://www.ohchr.org/en/issues/srhrdefenders/pages/srhrdefendersindex.aspx>
- Women Human Rights Defenders:
<https://www.ohchr.org/en/issues/women/wrgs/pages/hrdefenders.aspx>
- 2020 Priorities of the Mandate Holder <https://undocs.org/en/A/75/165> 53/144. Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (1998)
<https://www.ohchr.org/Documents/Issues/Defenders/Declaration/declaration.pdf>

- Pictograph:
<https://www.ohchr.org/Documents/Issues/Defenders/Declaration/summaries/english.pdf>
- Commentary:
<https://www.ohchr.org/EN/Issues/SRHRDefenders/Pages/CommentarytotheDeclarationonHumanRightsDefenders.aspx>
- A Model Law for the Recognition and Protection of Human Rights Defenders (2017) <https://ishr.ch/defenders-toolbox/resources/model-law/>
- UNEP First Global Environmental Rule of Law Report
<https://www.unep.org/resources/assessment/environmental-rule-law-first-global-report>
- UNEP Defenders Policy
- Knox, Environmental Human Rights Defenders: A Global Crisis, Policy Brief (2017) Conclusions and Recommendations (pp. 21-24)
<https://www.universal-rights.org/urg-policy-reports/environmental-human-rights-defenders-ehrds-risking-today-tomorrow/>

Case Study

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OLD UNION

Tracy Mills :
2200 Franklin Parkway :
Dalytown, Old Union 02211 :

Elvis Mills :
2200 Franklin Parkway :
Dalytown, Old Union 02211 :

Eddie Aquifer :
Understory :
New and Old Union :

Plaintiffs. :

Civil Action No: 92661

v. :

United States Environmental Protection :
Agency :
1200 Pennsylvania Ave :
Washington, DC :

DuPlant, Inc. :
1 Headquarter Way :
Mayville City :
New Union 19801 :

Dalytown Water Authority :
Arendt Building :
61 Human Rights Way, SW :
Dalytown, Old Union 02211 :

Defendants. :

COMPLAINT

1. Plaintiffs contend that federal and state action and inaction in the face of DuPlant Corporation's ongoing and continuous contamination of the Edie Aquifer contravenes various rights afforded by the U.S. Constitution and the Constitution of the State of Old Union.

PARTIES

2. Tracy Mills has lived in Dalymtown, a rural town in the State of Old Union, for 25 years. She has been working at the DuPlant facility for 15 years. Her employment evaluations have been strong. She is up for promotion.
3. Elvis Mills is an 8-year-old who lives with his mother Tracy Mills. Elvis is cognitively developmentally disabled.
4. Edie Aquifer is a natural underground water body that lies about 1 mile beneath the surface of both the States of New Union and Old Union. and is operated by the Dalymtown Public Authority.

JURISDICTION AND VENUE

5. The Court has personal jurisdiction because DuPlant has sufficient contacts, ties and relations to Old Union.
6. The Court has subject matter jurisdiction over Plaintiffs' claims pursuant to 28 U.S.C. § 1332 (diversity of citizenship) and 28 U.S.C. § 1331 (federal question).
7. Venue is appropriate in this judicial district and in this Court because the events or omissions giving rise to the claims asserted occurred in Dalymtown, Old Union. 28 U.S.C. § 1391(e)(3).

FACTUAL BACKGROUND

8. DuPlant is a multi-billion-dollar, multi-national company. It is incorporated in Delaware with a principal place of business in Mayville City, the capital of State of New Union. DuPlant makes products for home use, including non-stick pots and pans and fire-retardant materials. Perfluoroalkyl and polyfluoroalkyl substances (PFAS) is a chemical agent that helps to make non-stick cookware.
9. PFAS are known as "forever chemicals" because they take hundreds or even thousands of years to break down in the environment. They are found in countless other products, including firefighting foam, cosmetics, carpet treatments and even dental floss. And in people, too. See "EPA, PFAS Explained," available at: <https://www.epa.gov/pfas/pfas-explained>,
10. That PFAS do not degrade in the environment results in ongoing, renewed, and compounded exposure in humans.
11. The U.S. Centers for Disease Control and Prevention (CDC) has found links between PFAS and many health concerns, including kidney and testicular cancer,

thyroid disease, liver damage, developmental toxicity, high cholesterol, pregnancy-induced preeclampsia and hypertension, and immune dysfunction. Exposure in children has also been linked to cognitive impairments and developmental disabilities according to some studies.

12. DuPlant operates a facility in New Union that applies PFAS to various products. This facility has been a boon for Mayville City. Mayville City has about 100,000 residents, about 2,000 of whom work at the DuPlant facility in New State. Mayville City had first grown as a suburb in the 1950s because of “white flight.” Many of its residents were able to secure well-paying management positions at DuPlant’s corporate headquarters.
13. Mayville’s schools performed far above the state average; in addition, Mayville provided many new amenities for residents including a state-of-the-art recreation center, a large public library, and an art gallery.
14. Mayville City is located across the border from Dalymtown, in the neighboring State of Old Union. Dalymtown is 65% African American and more than two-thirds of the city’s residents now live below the poverty line. Lower tax revenues have resulted in underfunding of schools and now, of all the school districts in the state, Dalymtown has the highest drop-out rate, an average math proficiency score of 7% (meaning 7% of students score at or above grade level, compared with a state average of 45%) and a reading proficiency of 24% (compared with 62% statewide average). There is no art gallery in Dalymtown and the recreation center closed five years ago due to flooding.
15. Dalymtown residents receive their drinking water from the Edie Aquifer, a natural underground water body that lies about 1 mile beneath the surface of both the States of New Union and Old Union. It is operated by the Dalymtown Public Authority. Mayville’s water is filtered and is provided by the Mayville Public Authority.
16. Although the U.S. Environmental Protection Agency (EPA) sets standards for safe drinking water under the Safe Drinking Water Act (SDWA), it has not set safe levels for PFAS. It has, however, established health advisories suggesting PFAS are considered safe at levels below 70 ppt. In August 2018, the CDC suggested a threshold for PFAS that was about 7 ppt, but the EPA has not acted on CDC’s suggestions. The EPA has said: “Aggressively addressing PFAS in drinking water continues to be an active and ongoing priority for the EPA. The agency has taken significant steps to monitor for PFAS in drinking water and is following the process provided under the Safe Drinking Water Act to address these chemicals.”
17. The *Dalymtown Dispatch* recently ran a story about the prevalence of PFAS in the Edie Aquifer, and thus in Dalymtown’s drinking water. The *Dispatch* article was based on research done by a New State University scientist, Dr. Evers, who began testing water safety in 2013, when she found 631 parts per trillion (ppt), with some samples as high as 4,500 ppt in the Edie Aquifer. However, in October 2019, new findings uncovered much higher PFAS levels—up to 130,000 ppt in Edie Aquifer.
18. Shortly after the publication of the *Dispatch* article, Old Union officials decided to set a health goal of 140 ppt or less for PFAS in drinking water.

19. Old Union legislators have also, for the first time, allocated funding for water sampling and testing alternative technologies for treating local drinking water.
20. Ms. Mills is an outspoken advocate on behalf of the community. Shortly after the *Dispatch* article was published, Mills contacted Dr. Evers to ask about the health implications of her findings. Dr. Evers arranged for voluntary testing of residents at the University to determine the levels of contaminants in their bodies. Among the residents who were tested, the median level of PFAS was four times higher than the median level of PFAS nationwide. The levels were higher among those residents who worked at the DuPlant facility.
21. Mills began meeting at a local coffee shop with fellow employees before and after work to inform them about the situation, sharing her view that she thought DuPlant had known for decades about the harm caused by consuming PFAS-laden drinking water, but covered it up.
22. On the day that Mills' supervisor learned about the meetings and about the accusation of a cover-up, he waited for her by the door at the end of the shift and, in front of everybody, told her she was fired and not to return. Her termination left her without health insurance, making it nearly impossible for her to manage her own thyroid disease. Nonetheless, Mills has continued to speak with her neighbors and DuPlant employees about what she believes to be DuPlant's ongoing violations.

LEGAL BACKGROUND

23. This case involves or invokes the following aspects of the Constitution of the State of Old Union:

§ 1 Dignity

The dignity of the human being is inviolable. All people are equal before the law. No discrimination shall be made on account of race, color, sex, birth, social origin or condition, or political or religious ideas. Both the laws and the system of public education shall embody these principles of equal human dignity.

§2 Free public elementary and secondary schools; discrimination.

The people have a right to education, and it is the duty of the State to guard and maintain that right.

The legislature shall maintain and support a system of free public elementary and secondary schools as defined by law. Every school district shall provide for the education of students without discrimination as to religion, creed, race, color or national origin.

§3 Health

As the physical and mental health and morality of the people are essential to their well-being, it shall be the duty of the legislature to protect and promote these vital interests.

§ 4. Environment

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.

§5. Work

The right of every employee to choose their occupation freely and to resign therefrom is recognized, as is their right to equal pay for equal work, to a reasonable minimum salary, and to protection against risks to their health or person in their work or employment.

§6 Well-being

The right of every person to a standard of living adequate for the health and well-being of each person, and especially to food, clothing, housing and medical care and necessary social services, is guaranteed.

§ 7 Due Process

(Same as U.S. Constitution)

§ 8 Equal Protection

(Same as U.S. Constitution)

CLAIMS

- Claim 1:
24. EPA’s failure adequately to regulate PFAS to protect Tracy Mills violates the Due Process of the U.S. Constitution.
- Claim 2:
25. EPA’s failure adequately to regulate PFAS to protect Elvis Mills violates the Equal Protection Clause of the U.S. Constitution.
- Claim 3:
26. EPA’s failure to protect the Edie Aquifer violates the Due Process Clause of the U.S. Constitution.
- Claim 4:
27. Old Union’s failure to protect Tracy Mills from PFAS exposure violates her rights to dignity, a healthy environment, and to work guaranteed by the state constitution.
- Claim 5:
28. Old Union’s failure to protect Elvis Mills from PFAS exposure violates his rights to health, education and well-being guaranteed by the Constitution of the State of Old Union.
- Claim 6:
29. EPA’s failure to regulate PFAS violates Edie Aquifer’s right to Due Process and Equal Protection under the U.S. Constitution.

- Claim 7:
30. Old Union's failure to protect the Edie Aquifer violates its rights to a healthy environment and well-being under the Constitution of the State of Old Union.
- Claim 8:
31. New Union's economic advantages due to exploiting Old Union's environment violates the Equal Protection Clause of the U.S. Constitution.

REQUEST FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that the Court grant the following relief:

1. Order EPA to enjoin further releases of PFAS from the DuPlant facility.
2. Order Old Union to secure alternate sources of drinking water.
3. Order Old Union to make health assessment and treatment available.
4. Order New Union to cover the costs of 3 & 4 above.

Respectfully submitted,

James R. May & Erin Daly
77 New Union St.
New Union State,
Attorneys for Plaintiffs
March 27, 2022

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OLD UNION**

Tracy Mills :
2200 Franklin Parkway :
Dalytown, Old Union 02211 :

Elvis Mills :
2200 Franklin Parkway :
Dalytown, Old Union 02211 :

Eddie Aquifer :
Understory :
New and Old Union :

Plaintiffs. :

v. :

United States Environmental Protection :
Agency :
1200 Pennsylvania Ave :
Washington, DC :

DuPlant, Inc. :
1 Headquarter Way :
Mayville City :
New Union 19801 :

Dalytown Water Authority :
Arendt Building :
61 Human Rights Way, SW :
Dalytown, Old Union 02211 :

Defendants. :

Civil Action No: 92661

ANSWER

1. Conclusory, to which no response is due.

PARTIES

2. Admit.
3. Admit.
4. Admit.

JURISDICTION AND VENUE

5. Deny.
6. Deny.
7. Deny.

FACTUAL AND LEGAL BACKGROUND

Defendants admit to averments 8-23, except as to agreeing to application or admitting to liability.

Defendants deny all claims and request for relief.

DEFENSES AND MOTIONS

1. The court lacks personal jurisdiction over DuPlant.
2. Plaintiffs have failed to state a claim upon which relief may be granted.
3. Plaintiffs lack standing.

COUNTERCLAIM

1. DuPlant countersues Mills for \$10 million for defamation and interference with business relations.
2. DuPlant files a motion for sanctions under F.R.Civ. P. 11 for plaintiffs filing claims that lack bases in law.

Respectfully submitted,

Romulus and Remus
66 New Union St.
New Union State,
Attorneys for Defendants
April 21, 2022

Notes

¹ Human rights are mentioned in the 11th of 16 paragraphs of the Preamble. Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1104, Preamble (“Acknowledging that climate change is a common concern of humankind, Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity,…”).

² See generally James R. May and Erin Daly, *Global Environmental Constitutionalism* (Cambridge: Cambridge University Press, 2015), hereinafter “GEC.”

³ United Nations General Assembly (UNGA), *Towards a Global Pact for the Environment*, UN Doc A/RES/72/277 (Enabling Resolution). 10 May 2018. Available online: <https://digitallibrary.un.org/record/1486477?ln=en>

⁴ See e.g. Maria Antonia Tigre, *Gaps in International Environmental Law: Toward a Global Pact for the Environment* (Washington D.C., ELI Press, 2020).

⁵ Stockholm Declaration on the Human Environment, in Report of the United Nations Conference on the Human Environment, UN Doc. A/CONF. 48/14, at 2 and Corr. 1 (1972), Principle 1, at <https://undocs.org/en/A/CONF.48/14/Rev.1> (accessed May 29, 2021).

⁶ See James R. May & J. Patrick Kelly, *The Environment and International Society: Issues, Concepts, and Context* in *Routledge Handbook of International Environmental Law* Shawkat Alam eds., (Abingdon: Routledge 2012).

⁷ For an examination of this constitutional environmental litigation, see May and Daly, GEC.

⁸ UN Committee on Economic, Social and Cultural Rights, General Comment 15: The Right to Water E/C.12/2002/11 (2002) para 2. See also at para. 11: “The elements of the right to water must be adequate for human dignity, life and health, in accordance with articles 11, paragraph 1 [“The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.”], and 12 [“The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.”]” at <https://www.undocs.org/e/c.12/2002/11>, accessed May 29, 2021.

⁹ See United Nations Environment Programme, *Environmental Rule of Law, First Global Report* (“EROL First Global Report”) (2019): 159.

https://www.eli.org/sites/default/files/docs/erol/EnvironmentalRuleofLaw_%20FirstGlobalReport.pdf (accessed May 26, 2019). For the text of the provisions, see May and Daly, GEC, Appendices A-I.

¹⁰ See James R. May, *The Case for Environmental Human Rights: Recognition, Implementation and Outcomes*, 42 *Cardozo L. Rev.* 101 (2021) (Appendix) (hereinafter “The Case for EHR”).

¹¹ EROL First Global Report, 161. See e.g. Additional Protocol to the American Declaration of the Rights and Duties of Man (“Everyone shall have the right to live in a healthy environment …”) Available at: <https://www.oas.org/en/iachr/mandate/Basics/sansalvador.asp> (accessed May 26, 2019); the African Charter on Human and Peoples’ Rights (“all peoples shall have the right to a general satisfactory environment favorable to their development”) <http://www.achpr.org/instruments/achpr/> (accessed May 26, 2019); the Arab Charter on Human Rights (“Every person has … the right to a healthy environment”) <http://www.humanrights.se/wp-content/uploads/2012/01/Arab-Charter-on-Human-Rights.pdf> (accessed May 26, 2019); and the Association of South East Asian Nations (ASEAN) Human Rights Declaration (“Every person has … the right to a safe, clean and sustainable environment”) https://www.asean.org/storage/images/ASEAN_RTK_2014/6_AHRD_Booklet.pdf (accessed May 26, 2019).

¹² See May, “The Case for EHR,” (Appendix). In the dignity context, see Erin Daly & James R. May, *Bridging Constitutional Dignity and Environmental Rights Jurisprudence*, *Journal of Human Rights and the Environment*, vol. 7 no. 2 (2016): 218–242 (hereinafter “Bridging”).

¹³ May & Daly, GEC, 60-62, citing TIESR; see TIESR DATASET, <https://web.archive.org/web/20180901081122/http://tiesr.org/data.html> (archived Sept. 1, 2018).

¹⁴ See e.g., Klaus Bosselmann, “Global Environmental Constitutionalism: Mapping the Terrain,” *Widener L. Rev.* vol. 21 (2015): 171, 185; See generally May, *The Case for EHR*.

¹⁵ Dina L. Townsend, *Human Dignity and the Adjudication of Environmental Rights* (Cheltenham: Edward Elgar, 2020) 133 (“dignity is a concept that may accommodate accounts of humanness that recognise us as embedded in and constituted by our engagements with the environment in which we live.”) (hereinafter “Dignity and Adjudication”).

¹⁶ United Nations Economic and Social Council. ‘General Comment no. 15: The Right to Water.’ E/C.12/2002/11, at para 1, January 20, 2003.

¹⁷ United Nations Human Rights Council. ‘Human Rights and Access to Safe Drinking Water and Sanitation.’ A/HRC/RES/15/8, at para 9(a) and (f), September 30, 2010.

¹⁸ These are: BOLIVIA CONST. art. 16, COLOMBIA CONST. art. 366, THE DEMOCRATIC REPUBLIC OF CONGO CONST. art. 48, ECUADOR CONST. art. 12, ETHIOPIA CONST. art. 90(1), GAMBIA CONST. art. 216(4), THE MALDIVES CONST. art. 23), PANAMA CON. arts. 110 and 118, SWAZILAND CONST. art. 215, SWITZERLAND CONST. art. 76, UGANDA CONST. arts. XIV(b) and XXI, URUGUAY CON. art. 47, VENEZUELA CONST. arts. 127 and 304, and ZAMBIA CONST. art. 112(d);

¹⁹ SOUTH AFRICA CONST. art. 27 (1)(b): ‘Everyone has the right to have access to— (b) sufficient food and water . . .’

²⁰ *Sentencia T-616/10*, at 2.3 (Colombia Constitutional Court, 2010).

²¹ *Id.*

²² *Id.*

²³ Constitución Política de la República del Ecuador. title II, ch. seven, arts. 71-74.

²⁴ See Global Alliance for the Rights of Nature. Turkey calling for ecological constitution. <http://therightsofnature.org/rights-of-nature-laws/turkey-ecological-constitution/>.

²⁵ See Vidal, John. “Bolivia enshrines natural world’s rights with equal status for Mother Earth.” <http://www.guardian.co.uk/environment/2011/apr/10/bolivia-enshrines-natural-worlds-rights>.

²⁶ See <http://files.harmonywithnatureun.org/uploads/upload666.pdf>.

²⁷ See: <http://files.harmonywithnatureun.org/uploads/upload673.pdf>

²⁸ See: <http://files.harmonywithnatureun.org/uploads/upload687.pdf>

²⁹ See <http://files.harmonywithnatureun.org/uploads/upload885.pdf>

³⁰ <http://files.harmonywithnatureun.org/uploads/upload763.pdf>

³¹ <https://www.centerforenvironmentalrights.org/rights-of-nature-law-library>

³² *Ashgar Leghari v. Federation of Pakistan* (2018)

³³ Corte Suprema de Justicia [C.S.J.] [Supreme Court], STC4360-2018, Apr. 5, 2018 (Colom.).

³⁴ Corte Constitucional [Constitutional Court], *Sentencia T-622/16*, Nov. 10, 2016 (Colom.).

³⁵ República del Ecuador Asamblea Nacional, Comisión de la Biodiversidad y Recursos Naturales. Acta de Sesión No. 66 (June 15, 2011), available at <http://asambleanacional.gov.ec/blogs/comision6/files/2011/07/acta-66.pdf>.

³⁶ *Wheeler c. Director de la Procuraduría General Del Estado de Loja* Juicio No. 11121-2011-0010, available at <http://blogs.law.widener.edu/envirolawblog/2011/07/12/ecuadorian-courtrecognizes-constitutional-right-to-nature/>.

³⁷ *Salim v. State of Uttarakhand*, (2017) WPIL No. 126/2014 (Uttarakhand at Nainital HC), at ¶ 17–19 (India), <https://www.nonhumanrights.org/content/uploads/WPIL-126-14.pdf>.

³⁸ *Miglani v. State of Uttarakhand*, LNIND 2017 UTTAR 331.(Uttarakhand HC) (India). The Supreme Court subsequently reversed and dismissed this decision, <https://www.bbc.com/news/world-asia-india-40537701>.

³⁹ <https://www.newyorker.com/magazine/2022/04/18/a-lake-in-florida-suing-to-protect-itself>

⁴⁰ See generally, James R. May & Erin Daly, “Vindicating Fundamental Environmental Rights: Judicial Acceptance of Constitutionally Entrenched Environmental Rights,” *Oregon Rev. Intl. L.* no. 11 (2009): 365 (Hereinafter “Vindicating.”). There are broader questions about the justiciability of any socio-economic rights – whether or not they are interpreted to encompass economic interests – and about whether litigants are advantaged by expressly justiciable environmental rights in constitutions or framework legislation, or whether an international treaty is needed to bind nations to more broadly normative environmental commitments. These are important questions and we have addressed many of them in other writings, notably in May and Daly, GEC, as have others, see, e.g., Michael Burger, *Bi-Polar and Polycentric Approaches to Human Rights and the Environment*, *Colum. J. Envtl. L.* vol. 28 (2003): 371. We therefore limit our analysis in this Chapter to the protection of environmental interests in the adjudication of socio-economic rights.

⁴¹ See also James R. May, Bruce Terris, Zygmunt Plater, J. B. Ruhl, Ann Powers, Michael D. Axline, David Bookbinder, Peter Lehner, Robert F. Kennedy, *Environmental Citizen Suits at Thirtysomething: A Celebration and Summit*, *Environmental Law Reporter*, vol. 33 (2003): 10721, at SSRN: <https://ssrn.com/abstract=1333866> (examining hurdles posed by standing doctrine in the United States)

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- ⁴² Lavanya Rajamani, Public Interest Environmental Litigation in India: Exploring Issues of Access, Participation, Equity, Effectiveness and Sustainability, *Journal of Environmental Law*, vol. 19 no. 3 (2007): 293, at <https://doi.org/10.1093/jel/eqm020>; See generally, May and Daly, GEC.
- ⁴³ Robin Kundis Craig, “Standing and Environmental Law” in May, ed., *Principles of Constitutional Environmental Law* (American Bar Association, 2011) 195.
- ⁴⁴ May and Daly, *Vindicating*, 365.
- ⁴⁵ For an extensive survey of political and legal obstacles to implementation of environmental rights, see May and Daly, GEC. See also Varun Gauri and Daniel M. Brinks, D., eds., *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World* (Cambridge: Cambridge University Press, 2008) doi:10.1017/CBO9780511511240.
- ⁴⁶ The term “self-executing” has a meaning in international law that refers to whether an international law instrument must be separately legislated or otherwise incorporated into domestic law or whether it becomes a part of domestic law by virtue of ratification by the domestic authority as required by the terms of international law. Here, however, it refers to whether the constitutional provision requires separate legislative adoption or whether it becomes effective by virtue of its incorporation into the Constitution. See e.g. *Robinson Township v. Commonwealth of Pennsylvania* (PA Supreme Court), 83 A.3d 901 (2013) for an interpretation of the Pennsylvania Constitution’s Environmental Rights Amendment as self-executing, rejecting previous judicial pronouncements to the contrary.
- ⁴⁷ Philippine Constitution, Sec. 16.
- ⁴⁸ *Oposa v. Factoran*, 224 SCRA 792 (Philippines Supreme Court, 1993).
- ⁴⁹ Michael Burger and Jessica Wentz, Climate Change and Human Rights, in May and Daly, *Encyclopedia*, 205, citing *Future Generations v. Ministry of the Environment and Others*, [2018] SCT4360-2018.
- ⁵⁰ <https://docs.google.com/spreadsheets/d/1qTzxpKXyvNE3PTpj7PD8YwRF1IEsIQhzGMBNd3eWvxg/edit#gid=0>; see also Daly and May, “Environmental Dignity Rights,” in May and Daly, *Encyclopedia*, 325-334; Daly and May, *Bridging*; and Townsend, *Taking Dignity Seriously: A Dignity Approach to Environmental Disputes before Human Rights Courts*, *Journal Human Rights and the Environment*, vol. 6. (2015): 204. See also database of constitutional dignity provisions at dignityrights.org.
- ⁵¹ See e.g. James R. May and Erin Daly, *Advanced Introduction to Dignity and Law* (Cheltenham: Edward Elgar, 2020); Townsend, *Human Dignity and Adjudication*; see also Erin Daly, *Dignity Rights: Courts, Constitutions and the Worth of the Human Person* (Philadelphia: University of Pennsylvania Press, 2020).
- ⁵² *Gbemre v Shell Petroleum Development Co.* (Federal High Court of Nigeria, 2005).
- ⁵³ *Ashgar Leghari v. Federation of Pakistan*. W.P. No. 25501/2015 (Lahore High Court, 2015 and 2018). This was noted in the same case in 2015 and reiterated when the case again came before the Court in 2018.
- ⁵⁴ *Pro Public v Godavari Marble Industries Pvt. Ltd. and Others* (Supreme Court of Nepal, 2015).
- ⁵⁵ Decision of the First Senate of 24 March (1 BvR 2656/18, 1 BvR 78/20, 1 BvR 96/20, 1 BvR 288/20) (Constitutional Court of Germany, 2021).
- ⁵⁶ *Id.*
- ⁵⁷ *Rio Atrato Case*, para. 4.8. See also Opinion of April 5, 2018 recognizing the right of nature of the Amazon River in Colombia. César Rodríguez Garavito, “Here is how litigation for the planet won in Colombia,” (May 7, 2018) <https://www.dejusticia.org/en/asi-se-gano-en-colombia-un-litigio-por-el-planeta/>.
- ⁵⁸ For a study of a remedial efforts to clean up the Rio Matanza-Riachuelo in Argentina, see Martín Sigal, Julieta Rossi, Diego Morales, “Argentina: Implementation of Collective Cases,” in Malcolm Langford, Cesar Rodríguez-Garavito, and Julieta. Rossi, eds., *Social Rights Judgments and the Politics of Compliance: Making it Stick* (Cambridge: Cambridge University Press 2017) 140-176. doi:10.1017/9781316673058.006. See also Daniel Gutman, “Argentina’s Never-ending Environmental Disaster,” *Inter Press Service* (February 11, 2017) <http://www.ipsnews.net/2017/02/argentinas-never-ending-environmental-disaster/>
- ⁵⁹ *M.C. Mehta v. Union of India and Others*. 1991 SCR (1) 866 1991 SCC (2) 353 JT 1991 (1) 620 1991 SCALE (1) 427 at 4 (Supreme Court of India, 1991).
- ⁶⁰ *Sentencia T-291/09* (Colombia Constitutional Court, 2009).
- ⁶¹ *Mazibuko and Others v City of Johannesburg and Others* (CCT 39/09) [2009] ZACC 28; 2010 (3) BCLR 239 (CC) ; 2010 (4) SA 1 (CC) (Constitutional Court of South Africa, 2009), para. 50.
- ⁶² *Id.*
- ⁶³ *Id.* At 56.
- ⁶⁴ *Id.* At 56, quoting *Minister of Health and Others v Treatment Action Campaign and Others* [2002] ZACC 15; 2002 (5) SA 721 (CC); 2002 (10) BCLR 1033 (CC) at para. 38.

⁶⁵ Erin Daly and James R. May, *Implementing Environmental Constitutionalism: Current Global Challenges* (Cambridge: Cambridge University Press, 2018) (hereinafter “Implementing”) (surveying implementation of environmental constitutionalism in France, Colombia, Nigeria, Brazil, South Africa, and the United States as well as the nine countries of Amazonia).

⁶⁶ See *id.*

⁶⁷ Ahuja, Bruch, Kreilhuber, Mrema, and Pendergrass, “Advancing human rights through environmental rule of law,” in May & Daly, *Encyclopedia*, 13.

⁶⁸ On catalytic courts, see Katharine G. Young, *Constituting Economic and Social Rights* (Oxford: Oxford University Press, 2009). DOI:10.1093/acprof:oso/9780199641932.003.0006

⁶⁹ See Marcelo Buzaglo Dantas, “Implementing Environmental Constitutionalism in Brazil,” in Daly & May, *Implementing*, 129.

⁷⁰ *Ibid.*

⁷¹ May & Daly, *GEC*, 244; See also *id.*, Appendix I. See also David Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment*. (UBC Press, 2012), 66-67. See James R. May, *Constitutional Directions in Procedural Environmental Rights*, 28 *J. Env'tl. L. & Lit.*, vol. 28 (2013) 101.

⁷² Erin Daly, “Judicial Activity/Democratic Activity: The Democratising Effects of Dignity,” in Bedford, Kapotas, Dupré, and Halmai, eds., *Human Dignity and Democracy in Europe: Identity, Citizenship and Solidarity* (Cheltenham: Edward Elgar, 2021).

⁷³ *Juliana v. U.S.* (D.Or. 2016), quoting Alfred T. Goodwin, *A Wake-Up Call/or Judges*, 2015 *Wis. L. Rev.* 785, 785-86, 788 (2015).

⁷⁴ Benjamin, *Foreword*, in Daly and May, *Implementing*, xxii.

⁷⁵ <https://www.unep.org/explore-topics/environmental-rights-and-governance/what-we-do/advancing-environmental-rights/who#:~:text=The%20UN%20defines%20environmental%20human,land%2C%20flora%20and%20fauna%E2%80%9D>.

⁷⁶ Knox, *The Development of Environmental Human Rights*. Fourth meeting of the focal points appointed by the Governments of the signatory countries of the Declaration on the application of Principle 10 of the Rio Declaration on Environment and Development in Latin America and the Caribbean. Santiago, Chile, 2014.

⁷⁷ UNEP EROL Report, at 173, citing International Covenant on Civil and Political Rights, art. 1; International Covenant on Economic, Social, and Cultural Rights, art 1.

⁷⁸ Knox, *The Development of Environmental Human Rights*. Fourth meeting of the focal points appointed by the Governments of the signatory countries of the Declaration on the application of Principle 10 of the Rio Declaration on Environment and Development in Latin America and the Caribbean. Santiago, Chile, 2014. He further explained that the protection of procedural and substantive environmental rights create a “virtuous circle” whereby each set of rights supports and reinforces the other set: “States have obligations under human rights law to protect the environment in order to safeguard other human rights, including [the right to a quality environment and] rights to life and health. ... Therefore, some human rights bodies have, in effect, closed the circle between the substantive rights that are most likely to suffer environmental harm, such as rights to a healthy environment, to life, and to health, and the procedural rights whose implementation helps to ensure environmental protection. In order to safeguard the environment from the types of harm that violate [substantive environmental], they have concluded that States have obligations to respect and ensure [procedural environmental] rights.” Knox, “Access Rights as Human Rights.” Third meeting of the focal points appointed by the Governments of the signatory countries of the Declaration on the application of Principle 10 of the Rio Declaration on Environment and Development in Latin America and the Caribbean, 2013, at 2.

⁷⁹ Stockholm Declaration on the Human Environment, in Report of the United Nations Conference on the Human Environment, UN Doc. A/CONF. 48/14, at 2 and Corr. 1 (1972).

⁸⁰ 1992 United Nations Declaration on Environment and Development, 13 June 1992, U.N. Doc A/conf.151/156rv.1 (1992) 31 ILM 876, principle 10 (“Rio Declaration”).

⁸¹ Aarhus Convention on Access to Information, Public Participation in Decisionmaking and Access to Justice in Environmental Matters, June 25, 1998, 38 I.L.M. 517 (entered into force Oct. 30, 2001) .

⁸² Economic Commission for Latin America and the Caribbean, *Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean*. (“Escazú Agreement”): 4 March 2018.

⁸³ May and Daly, *Global Environmental Constitutionalism*, Cambridge University Press, 2015; see also May, *Constitutional Direction in Procedural Environmental Rights*. *Journal of Environmental Law & Litigation* 28 (2013): 27-58. Procedural environmental rights have also been addressed in “The Future We Want and

Constitutionally Enshrined Procedural Rights in Environmental Matters,” in GLOBAL ENVIRONMENTAL LAW AT A CROSSROADS, Chapter 2 (Robert V. Percival, Jolene Lin, and William Piermattei, eds., (Edward Elgar 2014 IUCN Series); and in May and Daly, “Vindicating Fundamental Environmental Rights: Judicial Acceptance of Constitutionally Entrenched Environmental Rights” Oregon Review of International Law, Vol. 11, p. 365, 2009.

⁸⁴ ABA Resolution 113b (2019) <https://www.americanbar.org/content/dam/aba/directories/policy/annual-2019/113b-annual-2019.pdf>

⁸⁵ Id.

⁸⁶ Arendt, Hannah. *The Origins of Totalitarianism*. New York: Meridian Books, 1958.

⁸⁷ Daly & May, *Dignity Law: Global Recognition, Cases, and Perspectives* (Hein 2020).

⁸⁸ <http://olddoc.ishr.ch/hrdo/documents/FactSheet29.pdf>

⁸⁹ UNEP Environmental Rule of Law Report at 172.

⁹⁰ “Court of Appeals backs North Carolina legislature’s limits on hog nuisance lawsuits,” December 21, 2021 available at <https://www.newsobserver.com/news/politics-government/article256766867.html#:~:text=The%20North%20Carolina%20Court%20of,justice%20group%20in%20Duplin%20County.>

⁹¹ “Here are the rural residents who sued the world’s largest hog producer over waste and odors – and won.” December 20, 2019 <https://thefern.org/2019/12/rural-north-carolinians-won-multimillion-dollar-judgments-against-the-worlds-largest-hog-producer-will-those-cases-now-be-overturned/> (reporting that one plaintiff received a letter threatening her with prison and describing the close relationship between the hog farmers and the state legislature and its benefit to the former).

⁹² *Juliana v. United States*, 947 F.3d 1159 (9th Cir. 2020).

⁹³ How companies are using law suits to silence environmental activists—and how philanthropy can help,” at <https://www.fordfoundation.org/news-and-stories/stories/posts/how-companies-are-using-law-suits-to-silence-environmental-activists-and-how-philanthropy-can-help/>.

⁹⁴ <https://www.globalwitness.org/en/campaigns/environmental-activists/last-line-defence/>

⁹⁵ <https://www.unep.org/explore-topics/environmental-rights-and-governance/what-we-do/advancing-environmental-rights/who#:~:text=The%20UN%20defines%20environmental%20human,land%2C%20flora%20and%20fauna%E2%80%9D.>

⁹⁶ See generally, Reporters’ Committee for Freedom of the Press, <https://www.rcfp.org/anti-slapp-legal-guide/>.

⁹⁷ See also Vinti, SLAPP suits as a ‘weapon’ against environmental activism in South Africa, available at <https://gnhre.org/community/blog-slapp-suits-as-a-weapon-against-environmental-activism-in-south-africa/> (15 February 2021)

⁹⁸ *Sand Livestock Sys. v. Svoboda*, 756 N.W.2d 299 (2008), reported in <https://anti-slapp.org/slapps-filed-to-silence-individuals-fighting-to-protect-the-environment>

⁹⁹ *Tosco v. Communities for Better Environments*, 236 F.3d 495 (2001) reported in <https://anti-slapp.org/slapps-filed-to-silence-individuals-fighting-to-protect-the-environment>

¹⁰⁰ See *Western Fuel Association v. The Turning Point, et. al.*, 2001 U.S. Dist. LEXIS 26301 (D. Wyo. March 31, 2001) reported in <https://anti-slapp.org/slapps-filed-to-silence-individuals-fighting-to-protect-the-environment>.

¹⁰¹ http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2021/20210910_docket-20-0558_brief.pdf

¹⁰² <http://climatecasechart.com/climate-change-litigation/case/re-exxon-mobil-corp/>

¹⁰³ <https://www.wfaa.com/article/tech/science/climate-change/climate-change-exxonmobil-unique-legal-argument-defense/287-65cd1d24-8c6b-49a7-b971-a6dd02d75231>

¹⁰⁴ How Exxon is using an unusual law to intimidate critics over its climate denial,” January 18, 2022 at <https://www.theguardian.com/environment/2022/jan/18/exxon-texas-courts-critics-climate-crimes>

¹⁰⁵ Id.

¹⁰⁶ *Juliana v. United States*, 947 F.3d 1159 (9th Cir. 2020); see also

<https://normandychairforpeace.org/2022/01/26/litigating-climate-change/#do.>

¹⁰⁷ “This lawyer should be world-famous for his battle with Chevron – but he’s in jail,” *Erin Brockovich*, The Guardian, February 8, 2022 (<https://amp.theguardian.com/commentisfree/2022/feb/08/chevron-amazon-ecuador-steven-donziger-erin-brockovich>); see also “Reversal of Fortune,” Patrick Radden Keefe, The New Yorker, January 1, 2012 (<https://www.newyorker.com/magazine/2012/01/09/reversal-of-fortune-patrick-radden-keefe>).

¹⁰⁸ For a full review of the litigation, see <https://earthjustice.org/features/faq-standing-rock-litigation>; see also https://www.americanbar.org/groups/gpsolo/publications/gp_solo/2018/may-june/standing-rock-case-study-civil-disobedience/

¹⁰⁹ Esperanza Protocol at iv (Center for Justice and International Law (CEJIL)) 2021, at <https://esperanzaprotocol.net/wp-content/uploads/2021/12/AN-EFFECTIVE-RESPONSE-DIC-16.pdf?x97536&x58469>

¹¹⁰ Interview with Erin Daly, February 4, 2022

¹¹¹ <https://www.unep.org/explore-topics/environmental-rights-and-governance/what-we-do/advancing-environmental-rights/who#:~:text=The%20UN%20defines%20environmental%20human,land%2C%20flora%20and%20fauna%E2%80%9D.>

¹¹² Esperanza Protocol at viii, <https://esperanzaprotocol.net/>.

¹¹³ “Regular criminal law: the rights of redress and accountability are central to protection of environmental defenders.” UNEP Environmental Rule of Law Report at 175.

¹¹⁴ Esperanza Protocol at viii.

¹¹⁵ 16 U.S.C. sec. 7421 (k).

¹¹⁶ Esperanza Protocol at viii.

¹¹⁷ <https://www.globalwitness.org/en/campaigns/environmental-activists/last-line-defence/>

¹¹⁸ <https://www.globalwitness.org/en/campaigns/environmental-activists/last-line-defence/>