



ARGUMENTS RELATED TO THE DRAFT ORGANIC LAW AMENDING THE ORGANIC ENVIRONMENT CODE REGARDING THE RIGHTS OF NATURE

*Proposals for legal reform submitted to the Biodiversity Commission of the
National Assembly of Ecuador, August 2020.*

BACKGROUND

The Constitution of the Republic of Ecuador is the first in the world to recognize and guarantee rights to nature. These rights are provided for in articles 71 and 72 of the Constitution.

In accordance with the Constitution of the Republic of Ecuador, the exercise of constitutional rights must be regulated by law¹; and, specifically, by organic law.² As such, the Organic Code of the Environment includes in its object³ and purposes⁴ the regulation of rights, guarantees and principles related to nature.

An Organic Law Reform Project to the Organic Environmental Code, presented by this Legislative Commission to the Presidency of the National Assembly, recognizes that the current law "lacks some key provisions for the effective protection of the environment and the rights of nature."⁵ This appreciation, which is shared by CDER, justifies legal reform, which is why said Bill has included the rights of nature among its normative basis, "in order to provide more content to the rights of nature."⁶

This proposal was reviewed by Katty Coral and Carolina Zurita, teachers at the Faculty of Environmental Engineering of the SEK International University - Ecuador, some of whose inputs have been incorporated into this proposal. CDER expressly certifies their academic contribution.

¹ Constitution of the Republic of Ecuador. Article 132 numeral 1.

² Ibid. Article 133 numeral 2.

³ Organic Code of the Environment. Article 1.

⁴ Ibid. Article 3 numeral 1.

⁵ Biodiversity and Natural Resources Commission. Organic Law Reform Project of the Organic Code of the Environment. 11/28/2019 - scope 02/04/2020. Statement of reasons.

⁶ Ibid. Second axis: strengthening the rights of nature.

Regarding the proposal to provide content to the rights of nature, CDER presented legal arguments before this Commission, which synthesize constitutional jurisprudence, which indicates that “the *principle of legal reserve* intends that certain areas of law be regulated only by means of a legal provision to ensure its legitimacy by being subject to the democratic principle...”;⁷ and that the essential content of constitutional rights constitutes that part that gives life to the rights, so that they are “real, concretely and effectively protected.”⁸ As such, and in accordance with the provisions of article 3 of the Organic Code of the Environment, which includes the guarantee of the rights of nature among its purposes, it is necessary that their exercise be regulated by organic law, as has been reiterated by constitutional jurisprudence:

*“The constitutional principle of reserve is a normative guarantee, within Ecuadorian constitutionalism, that implies that the bodies in charge of the infra-constitutional normative production must observe and maintain prima facie coherence with the content of the Constitution of the Republic when time to produce normative provisions. That denotes that the legislature within this democratic context must guarantee rights through laws...”*⁹

It should be remembered that these legal arguments were presented in writing to this Commission on January 20, 2020.

Based on these antecedents, CDER raises the following proposal for reforms to the Organic Code of the Environment, regarding the rights of nature, which is based on four fundamental aspects:

1. The application of a preventive approach to the rights of nature, not only to guarantee its restoration, but to avoid its significant alteration¹⁰ through strict environmental management. As such, and in application of article 71 of the Constitution, it proposes the maintenance of the current conditions of nature (cycles, structure and functions), as well as the recovery of currently degraded ecosystems as a state and citizen obligation, derived from the duty constitutional respect for nature, assigned to the State¹¹ and citizens.¹²

⁷ Constitutional Court of Ecuador. Sentencia No. 023-16-SIN-CC.

⁸ Constitutional Tribunal. Resolución No. 0002-2004-TC.

⁹ Constitutional Court of Ecuador. Sentencia No. 023-16-SIN-CC.

¹⁰ The Organic Code of the Environment defines environmental damage as “any significant alteration that, by action or omission, produces adverse effects on the environment and its components, affects species, as well as the conservation and balance of ecosystems...”

¹¹ Constitution. Article 277 numeral 1.

¹² Ibid. Article 83 numeral 6.

2. Environmental evaluation and management must incorporate parameters of environmental quality, which are in accordance with the rights of nature. As such, and in application of the second paragraph of Article 72 of the Constitution, measures are proposed to eliminate or mitigate the consequences of serious or permanent impacts¹³ on nature.

3. The establishment of higher or stricter environmental evaluation and management procedures in protected natural areas, fragile ecosystems and threatened wild species. As such, and, in application of articles 73 and 405 of the Constitution, restrictions are proposed to avoid the destruction of ecosystems, the extinction of species or the permanent alternation of natural cycles in these areas.

4. The restoration of nature caused by environmental damage should be considered a right of nature, and not only as a measure associated with environmental reparation. In addition, it must be complemented with the recovery of historically degraded natural spaces. As such, and in application of articles 72 and 396 numeral 2 of the Constitution, the restoration is to be considered autonomously; and, compensation restoration schemes must prioritize the damage *in situ*, contiguous or adjacent areas and these degraded natural spaces.

The proposals made below are based on the provisions of the Constitution of the Republic of Ecuador, the Organic Code of the Environment and its implementing regulations.

PROPOSALS FOR REFORM TO THE ORGANIC ENVIRONMENT CODE

TOPICS OF ANALYSIS

Next, seventeen proposals for reform of the Organic Code of the Environment are proposed, which refer to:

- a. Scope of the rights of nature (art. 6).
- b. State responsibility for the rights of nature (art. 8).
- c. Rights of nature and conservation of biodiversity, including ecosystems and species (arts. 34, 35, 37).
- d. Rights of nature and more demanding standards for the management of protected natural areas, special conservation areas, protective forests and fragile ecosystems (arts. 53, 57, 91 and 104).

¹³ Article 72, second paragraph, of the Constitution refers to serious and permanent impacts. In contrast, article 172 of the Organic Code of the Environment classifies environmental impact as insignificant, low, medium or high, stating that only medium and high impacts are subject to environmental authorization through environmental licensing.

- e. Rights of nature and more demanding standards for the environmental management of activities, civil works or projects (arts. 179, 181, 185, 186 and 188).
- f. Nature's right to restoration within the framework of repairing environmental damage (art. 292).

STATEMENT OF MOTIVES

Scope of the rights of nature (arts. 6 and 8).

This provision must provide content to the rights of nature, so that they are actually, concretely and effectively protected. As such, the law must develop the concepts and requirements, as well as indicate the aspects that these rights comprise (as it does in article 9 to characterize environmental rights). In this sense, the proposal is based on article 71 of the Constitution, and refers to concepts such as resilience to provide content to these rights; and, it also raises a preventive perspective, which emphasizes the maintenance and improvement of natural conditions. This proposal is based on the state duties of protection and conservation, which the Constitution assigns to the State and citizens, respectively.

Rights of nature and conservation of biodiversity, including ecosystems and species (arts. 34, 35, 37).

Based on articles 73 and 400 of the Constitution, this proposal articulates the rights of nature with the normative framework applicable to the conservation of biodiversity, emphasizing the reinforced protection that species threatened with extinction must receive, as well as environmental management needing to be reinforced in areas of high biodiversity.

Rights of nature and more demanding standards for the management of protected natural areas, special conservation areas, protective forests and fragile ecosystems (arts. 53, 57, 91 and 104).

Based on articles 71 and 397 numeral 4 of the Constitution, this proposal articulates the rights of nature with the management and handling of protected natural areas, in which the environmental management standards must be stricter than in the rest of the country.

Rights of nature and more demanding standards for the environmental management of activities, civil works or projects (arts. 179, 181 and 188).

Based on article 71 of the Constitution, this proposal proposes an adaptation of the environmental management instruments, especially the environmental impact assessment, not only to the standards of environmental law (protection of nature) but to the standards of the rights of nature (with respect to nature). In this sense, additional or

complementary requirements and instruments are proposed, which allow the comprehensive evaluation of the impacts of a project, work or activity in nature.

Nature's right to restoration within the framework of repairing environmental damage (art. 292).

Based on article 72 and 397 numeral 2 of the Constitution, this proposal proposes the application of restoration as a constitutional right, and not only as an environmental repair measure.

PROPOSALS

Based on this background, the following proposals are formulated:

FIRST PROPOSAL

Replace article 6 by the following:

Art. 6.- Rights of nature. The rights of nature are those recognized in the Constitution. These rights include:

- a) The right to its existence, in form, biophysical conditions and characterization, so that it can perform its functions without human intervention or interference.*
- b) The right to the preservation of the natural dynamics of its evolutionary cycles and processes, without human intervention or interference.*
- c) The right to once again enjoy conditions that allow their adequate development in relation to their vital cycles, structure, functions and evolutionary processes.¹⁴*
- d) The right to restoration to its state prior to the damage. The restoration will be comprehensive and will guarantee the exercise of the other recognized rights to nature.*

SECOND PROPOSAL

Add after article 6, the following articles:

Art. 6.A.- The State will not authorize or execute civil works, projects or activities that do not conform to the established standards or limits¹⁵ of conformity with the Constitution, to guarantee of the rights of nature.

Art. 6.B.- The State and the citizens will maintain the current conditions of nature. The State will recover currently degraded natural spaces. Citizens will recover currently degraded natural spaces within their property.

¹⁴ Constitutional Court of Ecuador. Sentencia No. 166-15-SEP-CC.

¹⁵ To date, the Constitutional Court has selected cases to establish standards and limits regarding the rights of nature.

To guarantee environmental and nature rights, the civil works, activities or projects that generate medium or high environmental impact¹⁶ will include, in the management plans, measures to avoid negative alterations to said conditions and to recover currently degraded natural spaces located in the area of influence; and, if any, specific measures for their strict management. If the alterations are significant, the provisions of the second paragraph of article 292 of this Law will be applied, in relation to environmental damage. This, without prejudice to the right to the restoration of nature.

THIRD PROPOSAL

Replace numeral 3 of article 8 with the following:

Art. 8 numeral 3. Guarantee the effective protection of the right to live in a healthy environment and the rights of nature, which allow citizens to enjoy the right to health, collective well-being and good living; ***and, to nature, the enjoyment of the right to comprehensive respect for its existence, maintenance and regeneration of its vital cycles, structure, functions, evolutionary processes and their restoration.***

FOURTH PROPOSAL

Replace article 34 by the following:

Art. 34.- Regulatory means. ***To guarantee environmental and nature rights***, the National Environmental Authority will be responsible for the conservation and sustainable use of biodiversity ***and for the maintenance of the current conditions of nature***, as well as the recovery of degraded natural spaces, to which may establish ***additional or complementary*** obligations and conditions in the management plans.

FIFTH PROPOSAL

Replace the first subsection of article 35 with the following:

Art. 35.- On the protection of wildlife species. For the protection of wildlife, the following conditions are established for ***the State***:

SIXTH PROPOSAL

Replace the first paragraph of article 37 by the following:

Art. 37.- Of the National System of Protected Areas. The National System of Protected Areas will be made up of the state, decentralized autonomous, community and private subsystems. Its declaration, categorization, recategorization, regulation and

¹⁶ The Organic Code of the Environment provides for an environmental impact study only for civil works, activities and projects of medium and high impact. Hence, the proposal is restricted to medium and high impacts.

administration must guarantee *the rights of nature and* the conservation, management and sustainable use of biodiversity, as well as the functional connectivity of terrestrial, insular, marine, marine-coastal ecosystems.

SEVENTH PROPOSAL

Add after the first subsection of article 53, the following subsections:

To guarantee the rights of nature in these areas, authorization will be issued in exceptional circumstances and will include conditions, obligations or technical requirements additional or complementary to those provided by the law and the regulations for environmental licensing.

Within these areas, no civil works, projects or activities will be authorized or executed in:

- 1. Protection zones or recovery zones, in accordance with the natural area management plan.¹⁷*
- 2. Areas where there are fragile ecosystems.¹⁸*
- 3. Critical or strategic sites of biological importance for the conservation of wildlife species.¹⁹*
- 4. Areas that constitute the habitat of native, threatened, endemic or migratory species threatened with extinction.²⁰*

EIGHTH PROPOSAL

Add after the third paragraph of article 57, the following paragraph:

To guarantee the rights of nature within these areas, no civil works, projects or activities will be authorized or executed in:

- 1. Areas where there are fragile ecosystems.*
- 2. Critical or strategic sites of biological importance for the conservation of wildlife species.*
- 3. Areas that constitute the habitat of native, threatened, endemic or migratory wild species threatened with extinction.*

¹⁷ In accordance with article 142 of the Law of the Organic Code of the Environment, the zoning of protected areas includes a protection zone and a recovery zone, which are strictly conserved.

¹⁸ In accordance with article 406 of the Constitution, the State can limit domain (property) uses in fragile ecosystems, even if they are outside protected areas, for conservation purposes.

¹⁹ In accordance with article 90 of the Law of the Organic Code of the Environment, the National Environmental Authority will identify critical or strategic sites of biological importance for the conservation of wildlife species.

²⁰ In accordance with Article 87 of the Law of the Organic Code of the Environment, all species of wildlife are protected by the State and native, threatened, endemic or migratory species will have a higher degree of protection.

NINTH PROPOSAL

Add after the first paragraph of article 91, the following paragraph:

To guarantee the rights of nature in natural forests, no civil works, projects or activities will be authorized or executed in:

- 1. Areas where there are fragile ecosystems.*
- 2. Critical or strategic sites of biological importance for the conservation of wildlife species.*
- 3. Areas that constitute the habitat of native, threatened, endemic or migratory wild species threatened with extinction.*

TENTH PROPOSAL

Eliminate numeral 7 of article 104 that indicates:

Art. 104.- Activities allowed in the mangrove ecosystem. The activities allowed in the mangrove ecosystem, from the effective date of this law, will be the following: 7. Other productive activities or public infrastructure that have the express authorization of the National Environmental Authority and that offer reforestation programs.

ELEVENTH PROPOSAL

Replace the second paragraph of article 179 with the following:

The studies must contain the description of the activity, work or project, geographical area, ***description of the way in which they will respect and guarantee the rights of nature***, compatibility with nearby land uses, project life cycle, methodology, tools of analysis, environmental management plan, mechanisms for socialization and citizen participation, and other aspects provided for in the technical standard.

Add after the second subsection of Article 179, the following subsections:

The studies must also contain a baseline diagnosis of the physical, biotic and abiotic components, ***their ecological interactions***, including the identification and evaluation of the impact on fragile ecosystems and native, endemic, migratory or endangered species; as well as the current conditions of nature, including the resilience and functioning of its ecological processes and natural systems.

These studies will contain a forecast of the impacts that the project will cause, based on scientific and technical studies.

TWELFTH PROPOSAL

Add the following text to the first paragraph of article 181, after the "purpose of the management plan" will be: ***"the determination of how the rights of nature will be respected and guaranteed."***

Add after the first subsection of article 181, the following subsections:

The management plan must also include a specific sub-plan for the prevention of critical environmental aspects and impacts on the area of ***direct and indirect influence, including specific measures for protection, management, rescue and restoration, as applicable, of fragile ecosystems and species. native, endemic, migratory or threatened with extinction identified in the baseline.***

THIRTEENTH PROPOSAL

Replace the second paragraph of article 185 by the following:

Once the Competent Environmental Authority verifies that the requirements established in this Code and other secondary regulations have been met, ***including those related to guaranteeing the rights of nature***, the corresponding administrative authorization will be issued.

FOURTEENTH PROPOSAL

Add after the first subsection of article 186, the following subsection:

To guarantee the rights of nature, the closure and abandonment plan must include specific measures related to the restoration of nature and the recovery of degraded natural spaces.

The Competent Environmental Authority will control the closed or abandoned sites; and degraded natural spaces.

FIFTEENTH PROPOSAL

Replace the first subsection of article 188 with the following:

The revocation of an environmental permit will proceed when major areas of non-compliance are determined ***that include a violation of the rights of nature, or imply serious alteration of the ecosystem or of the fauna or flora, as well as*** non-compliance with the environmental management plan, repeated on two occasions, without the corrections having been adopted within the established deadlines.

SIXTEENTH PROPOSAL

Add after article 292, the following text:

Art. 292.A. Without prejudice to the provisions of this Law, the restoration of nature may also be arranged autonomously and independently, in cases where it is required. The object of restoration will be the state of conservation prior to the environmental damage, or the best possible state of conservation, in accordance with article 72 of the Constitution.

For this purpose, the following attributes will be considered: a) elimination of threats; b) physical conditions; c) species composition; d) structural diversity; e) ecosystem functionality; and f) external exchanges.

Art. 292.B. The restoration of nature will be carried out on site. If the damage is permanent or irreversible, the restoration will be carried out in a contiguous or adjacent or nearby place. Among the restoration measures, the establishment of special areas for the conservation of biodiversity will be applied, including connectivity corridors²¹; or, buffer zones²² if the zone adjoins a protected area.

FINAL PROPOSAL

Transitional provision

Within ___ the National Assembly, through the Legislative Technical Unit, will prepare a legal report on current legislation, which determines its formal and material adaptation to the rights recognized and guaranteed to nature by the Constitution of the Republic of Ecuador, including parameters applicable to protected natural areas, fragile ecosystems and native, endemic, migratory and threatened wild species. This report will be sent to the President of the National Assembly for its consideration in the approval of laws relating to natural resources.

²¹ Article 60 of the Organic Code of the Environment establishes connectivity corridors as special areas for the conservation of biodiversity.

²² Article 59 of the Organic Code of the Environment establishes the buffer zones as special areas for the conservation of biodiversity.