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## HOW MANY ENVIRONMENTAL PLAINTIFFS ARE STILL STANDING?

ANDREW D. DORN\*

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### INTRODUCTION

Let me introduce you to Steven Pollack. Pollack is a resident of Highland Park, Illinois.<sup>1</sup> He is also an environmentalist, who enjoys drinking clean water, eating uncontaminated fish and observing wildlife on the great lakes near his home.<sup>2</sup> For a long time, the United States has operated a firing range next to the lake thirteen miles north of Highland Park.<sup>3</sup> Over the years, errant bullets have escaped the confines of the range and entered Lake Michigan.<sup>4</sup> These bullets break down over time and release lead into the lake, which is the source of drinking water for millions of people, including Pollack.<sup>5</sup> Pollack decided that he would put an end to this polluting, and he filed suit against the government seeking an injunction and civil penalties for

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\* J.D. candidate, May 2010, Chicago-Kent College of Law, Illinois Institute of Technology. I would like to thank Prof. Hal Morris, Paul Forster, and Sarah Kaplan for their invaluable help and encouragement.

<sup>1</sup> Pollack v. U.S. Dep't of Justice, 577 F.3d 736, 738 (7th Cir. 2009), *cert. denied*, 130 S. Ct. 1890 (2010).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.* at 737–38.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

alleged violations of the Clean Water Act.<sup>6</sup> In Pollack's case, the United States government admitted to dumping tons of lead into the water, but it took the position that there was nothing Pollack could do about it because he was neither sufficiently exposed to the toxic chemicals leaching into Lake Michigan, nor had he concretely or specifically described his leisure time pursuits to show that they were harmed by the lead.<sup>7</sup> Pollack's claims were dismissed for want of standing before his suit even began.<sup>8</sup>

Standing is easy to describe but difficult to apply. At a minimum, standing requires three elements: (1) injury-in-fact; (2) traceability to conduct of the defendant; and (3) that a favorable decision could provide redress for the injury.<sup>9</sup> Environmental cases offer a unique challenge because the harms are generally to nature, not the individual. Courts agree that an aesthetic injury, such as the death of a few trees, constitutes an injury; however, the question remains: who is injured?

At common law, many of these aesthetic injuries were not sufficient to support a claim. However, over time, Congress has pronounced these injuries to be important. Congress has the power to create and quantify "new" injuries, as well as address the mechanism for causation of those injuries. In most environmental cases, Congress has used this power to provide statutes to exactly describe these injuries, like the Clean Water Act or the Endangered Species Act. At the same time, the courts have attempted to maintain their independence by leaving the greater environmental policy to the legislature and the executive and refusing to hear any complaint that does not present a case or controversy.<sup>10</sup> In environmental litigation, a plaintiff can only allege his subjective loss of these new rights. Often, a plaintiff must prove that he enjoys seeing or feeling these natural wonders and that his injury comes from the damage that those

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<sup>6</sup> *Id.*

<sup>7</sup> *See id.*

<sup>8</sup> *Id.* at 743.

<sup>9</sup> *Id.* at 739 (quoting *Summers v. Earth Island Inst.*, 129 S. Ct. 1142, 1148 (2009)).

<sup>10</sup> *See generally* *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

wonders will suffer.<sup>11</sup> Concededly, this is a standard where the injury rests solely on the personal preferences of the plaintiff.

In its current form, the standing doctrine allows judges to apply their own standards and decide who gets into court.<sup>12</sup> Where the court wishes to preclude a case, it may require strict proof of the elements supporting standing; in many cases, it effectively requires the plaintiff to prove its case at the pleading stage. Other courts have applied a more lenient, sliding standard, demanding more proof as the case proceeds through each successive procedural step.<sup>13</sup> This approach requires such a minimal showing that it allows almost anyone to survive a motion to dismiss. This Note proposes that the strict standard be used where there is only a procedural injury, but that a sliding scale be used where there may be an independent basis for standing.

The next section of this Note outlines the development of the standing doctrine from *Lujan v. Defenders of Wildlife*<sup>14</sup> through *Summers v. Earth Island Institute*<sup>15</sup> and examines how several courts have applied this standard to their cases. Section II provides a statement of the case for *Pollack v. Department of Justice*. Section III provides an analysis of the difficulty of applying the standing doctrine and proposes an approach that demands more than pleadings, but removes the court's license to pre-litigate the merits of the case under the guise of the standing doctrine.

## I. STANDING

Standing is a judicially created doctrine that operates to limit the types of cases that the court may hear. Courts use it to protect the validity of the adversarial process by determining whether there is an actual controversy and whether each side can be adequately

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<sup>11</sup> See generally *Summers v. Earth Island Inst.*, 129 S. Ct. 1142 (2009).

<sup>12</sup> See, e.g., *Pollack*, 577 F.3d at 741.

<sup>13</sup> See, e.g., *Ctr. for Biological Diversity v. Kempthorne*, 588 F.3d 701 (9th Cir. 2009).

<sup>14</sup> 504 U.S. 555 (1992).

<sup>15</sup> 129 S. Ct. 1142 (2009).

represented.<sup>16</sup> The requirements for standing are not found in the Article III, Section 2 of the United States Constitution, which limits the courts to hearing cases or controversies,<sup>17</sup> but rather find their genesis with Justices Brandeis and Frankfurter.<sup>18</sup> Today, Justice Scalia is considered the expert on the issue of standing. However, as argued later in this Note, Justice Kennedy, who rarely writes for the Court, may have had a greater influence on standing doctrine through his additions and clarifications to the majority opinion.<sup>19</sup>

Standing has three fundamental elements:

[A] plaintiff must show that he is under threat of suffering “injury in fact” that is concrete and particularized; the threat must be actual and imminent, not conjectural or hypothetical; it must be fairly traceable to the challenged action of the defendant; and it must be likely that a favorable judicial decision will prevent or redress the injury.<sup>20</sup>

The landmark decision addressing environmental standing is *Sierra Club v. Morton*, in which the Supreme Court recognized that plaintiffs may bring an action based purely on aesthetic harms.<sup>21</sup> Next, in *United States v. Students Challenging Regulatory Agency Procedures*, the high water mark of environmental standing, the Court found that a group of students had standing to challenge the Interstate Commerce Commission’s rates, which made it less expensive to ship

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<sup>16</sup> See *Pollack*, 577 F.3d at 738.

<sup>17</sup> See U.S. CONST. art. III, § 2.

<sup>18</sup> Kelly D. Spragins, Note, *Rekindling an Old Flame: The Supreme Court Revives Its “Love Affair with Environmental Litigation”* in *Friends of the Earth v. Laidlaw Environmental Services*, 37 HOUS. L. REV. 955, 968 (2000). The doctrine of standing was developed to prevent activist judges from declaring New Deal legislation unconstitutional. *Id.*

<sup>19</sup> See, e.g., *Summers v. Earth Island Inst.*, 129 S. Ct. 1142, 1148 (2009).

<sup>20</sup> *Pollack*, 577 F.3d at 739 (quoting *Summers v. Earth Island Inst.*, 129 S.Ct. 1142, 1149 (2009)).

<sup>21</sup> 405 U.S. 727, 741 (1972).

new metal than scrap metal.<sup>22</sup> The Court held that the students demonstrated an injury by showing that they used the forests, streams, mountains, and other resources for outdoor recreation, and that the new rates would make it more expensive to recycle, leading to more litter in these areas.<sup>23</sup>

### A. *Standing in the Supreme Court*

#### 1. *Lujan v. Defenders of Wildlife*

*Lujan v. Defenders of Wildlife* marked the beginning of the modern approach to standing in environmental cases.<sup>24</sup> In *Lujan*, several environmental groups brought an action challenging a regulation promulgated by the Secretary of the Interior that required other agencies to engage in a consultation with the Secretary under the Endangered Species Act, but only when a federal project occurred within the United States or at sea.<sup>25</sup> The Endangered Species Act sought to protect listed species of animals against threats to their continued existence that are directly attributable to the actions of humans.<sup>26</sup> Therefore, every federal agency must engage in a consultation with the Secretary of the Interior and ensure that any activity it authorizes, funds, or carries out will not jeopardize the continued survival of an endangered species.<sup>27</sup> Originally, the Secretary's expert agencies, the Fish and Wildlife Service and the National Marine Fisheries Service, promulgated regulations extending this duty to projects occurring on foreign soil.<sup>28</sup> However, in 1986, these agencies promulgated new regulations, which removed the requirement for consultation when an activity was conducted on

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<sup>22</sup> 412 U.S. 669, 688 (1973).

<sup>23</sup> *Id.*

<sup>24</sup> *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

<sup>25</sup> *Id.* at 558–59.

<sup>26</sup> Endangered Species Act, 16 U.S.C. § 1531–1544 (1988).

<sup>27</sup> 16 U.S.C. § 1536(a)(2).

<sup>28</sup> *Id.*

foreign soil.<sup>29</sup> Thereafter, the plaintiffs, organizations dedicated to the protection of wildlife, filed an action seeking a declaratory judgment that the new regulation was in error, as well as an injunction forcing the Secretary to promulgate new regulations extending the duty to engage in a consultation to activities occurring on foreign soil.<sup>30</sup>

At the outset, the Secretary challenged the plaintiffs' standing to bring this suit, and the district court, agreeing, dismissed the suit for lack of standing.<sup>31</sup> On appeal, however, the Eighth Circuit reversed, finding that the plaintiffs had standing.<sup>32</sup> After remand, the district court granted the plaintiffs' motion for summary judgment and ordered the Secretary to promulgate new regulations.<sup>33</sup> The Eighth Circuit affirmed summary judgment for the plaintiffs.<sup>34</sup> The Supreme Court granted certiorari and addressed the Secretary's standing arguments.<sup>35</sup>

Justice Scalia wrote for the majority, holding that the plaintiffs lacked standing to challenge the Secretary's regulations.<sup>36</sup> He stated:

Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements: . . . [f]irst, . . . an 'injury in fact'<sup>37</sup> . . . [s]econd, . . . a causal connection between the injury and the conduct complained

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<sup>29</sup> *Lujan*, 504 U.S. at 559.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 557, 562. Justice Scalia was joined by Chief Justice Rehnquist, Justice White, Justice Thomas, Justice Souter, and Justice Kennedy, who wrote a concurrence joined by Justice Souter on the issue of redressibility. Justice Stevens filed a separate concurrence and concurrence in judgment. Finally, Justice Blackmun and Justice O'Connor dissented.

<sup>37</sup> *Id.* at 560 (citing *Allen v. Wright*, 468 U.S. 737, 756 (1984)).

of<sup>38</sup> . . . [and t]hird, it must be likely . . . that the injury will be redressed by a favorable decision.”<sup>39</sup>

The party invoking the federal jurisdiction has the burden of satisfying these elements, and since they are not merely pleading requirements, “each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of litigation.”<sup>40</sup> At the pleadings stage, general factual allegations of injury may suffice because the court should “presume that general allegations embrace those specific facts that are necessary to support the claim.”<sup>41</sup> However, in response to a motion for summary judgment, the general allegations will no longer be sufficient, and the plaintiff will be required to set forth specific facts, which should be taken as true.<sup>42</sup>

Where the government directly regulates an individual, standing is ordinarily found.<sup>43</sup> The problem arises when a plaintiff claims injury by government regulation of someone else.<sup>44</sup> In these cases, standing hinges on the actions of the regulated third party and the unrestricted actions of the plaintiff; therefore, the court will require the plaintiff to “adduce facts showing that those choices have been made or will be made in such manner as to produce causation and permit redressibility of injury.”<sup>45</sup>

In *Lujan*, the plaintiffs alleged that the Secretary’s failure to consult before funding a project in Sri Lanka would increase the rate

<sup>38</sup> *Id.* (citing *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41–42 (1976)).

<sup>39</sup> *Id.* at 560–61 (internal quotations omitted).

<sup>40</sup> *Id.* at 561 (citing *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 883–89 (1990)).

<sup>41</sup> *Id.* (internal quotations omitted).

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 561–62.

<sup>44</sup> *Id.* at 562.

<sup>45</sup> *Id.* (citing *Warth v. Seldin*, 422 U.S. 490, 508 (1975)).



of extinction of endangered species by destroying critical habitat.<sup>46</sup> However, according to the Court, although the general desire to observe endangered species, even for purely aesthetic reasons, is a cognizable interest, the plaintiffs must demonstrate how they will be among those injured by the action.<sup>47</sup> One of the plaintiffs asserted that she had visited the site of the proposed project and had intended to observe endangered species, including the Asian elephant and leopard; that the proposed project would damage the habitat of those species; and that she had been injured because she “intends to return to Sri Lanka in the future and hopes to be more fortunate in spotting at least the endangered elephant and leopard.”<sup>48</sup> However, the difficulty of returning to Sri Lanka became apparent when the plaintiffs were deposed.<sup>49</sup> Another plaintiff could not clarify when she wished to return to Sri Lanka: “I don’t know [when]. There is a civil war going on right now. I don’t know. Not next year, I will say. In the future.”<sup>50</sup> Justice Scalia found that these “some day” intentions to return to Sri Lanka—“without any description of concrete plans, or indeed even any specification of *when* the some day will be—do not support a finding of the ‘actual or imminent’ injury that our cases require.”<sup>51</sup>

The ecosystem nexus theory, argued by the plaintiffs, where damage in one part of an ecosystem will result in damage to the whole, was also dismissed by Justice Scalia. According to the Justice, “a plaintiff claiming injury from environmental damage must use the area affected by the challenged activity and not an area roughly ‘in the vicinity’ of it.”<sup>52</sup> At the summary judgment stage, a factual showing of perceptible harm is required.<sup>53</sup>

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<sup>46</sup> *Id.* at 562.

<sup>47</sup> *Id.* at 563.

<sup>48</sup> *Id.* (internal quotations omitted).

<sup>49</sup> *Id.* at 563–64.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 564.

<sup>52</sup> *Id.* at 565–66.

<sup>53</sup> *Id.* at 566.

In addition, Justice Scalia, writing for the plurality<sup>54</sup>, found that the injury was not redressible because the agency being sued was not the agency funding the project; it was merely required to provide information to the agency that was supplying the funding.<sup>55</sup> Furthermore, the amount of funding provided by the agency was a small fraction of the total funding for the project.<sup>56</sup> Therefore, Justice Scalia found that even if the plaintiffs prevailed, any relief granted was unlikely to have an impact on whether the project was built.<sup>57</sup>

Finally, Justice Scalia addressed the plaintiffs' claim to a "procedural injury" stemming from the right to comment on the proposed funding of the Sri Lankan project.<sup>58</sup> Under the citizen suit provision of the Endangered Species Act, "any person may commence a civil suit on his own behalf . . . to enjoin any person, including the United States and any other governmental instrumentality or agency . . . who is alleged to be in violation of any provision of this chapter."<sup>59</sup> The lower court had held that this provision allowed anyone to sue when the consultation requirement was violated.<sup>60</sup> Justice Scalia, however, found the plaintiffs' claims to be a generalized grievance, which will not support a finding of a controversy.<sup>61</sup> Justice Scalia analogized this approach to that in *Massachusetts v. Mellon*, where the Court held that an individual taxpayer did not have standing to challenge federal expenditures because the plaintiff only suffered an indefinite injury, which was shared with all taxpayers.<sup>62</sup> Additionally, allowing the suit would impermissibly intrude on the executive

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<sup>54</sup> *Id.* at 570 (plurality) (this portion was joined only by Chief Justice Rehnquist, Justice White and Justice Thomas).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 571.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 571–72.

<sup>59</sup> Endangered Species Act, 16 U.S.C. § 1540(g) (1988).

<sup>60</sup> *Lujan*, 504 U.S. at 572.

<sup>61</sup> *Id.* at 572–73.

<sup>62</sup> *Id.* at 574 (citing *Massachusetts v. Mellon*, 262 U.S. 447 (1923)).

branch.<sup>63</sup> According to Justice Scalia, protecting the public interest is the duty of Congress and the President.<sup>64</sup> Therefore, a procedural right, such as the right to comment or to require information gathering, will not give rise to standing without a particularized injury.<sup>65</sup>

In his concurrence, Justice Kennedy, joined by Justice Souter, agreed with the essential portions of the majority, but wrote to clarify two main points.<sup>66</sup> First, Justice Kennedy discussed the importance of requiring the plaintiffs in this case to announce a “date certain” for their return to Sri Lanka.<sup>67</sup> The reason that the Court required more concrete plans is because in this case, it is not “reasonable to assume that the affiants will be using the sites on a regular basis.”<sup>68</sup> However, Justice Kennedy was unwilling to completely foreclose any of the environmental nexus theories, which may give rise to standing under the right set of facts.<sup>69</sup> Under these facts, Justice Kennedy agreed that the plaintiffs failed to demonstrate a concrete injury sufficient to support standing.<sup>70</sup>

Second, as government becomes more complex and far-reaching, the Court must “be sensitive to the articulation of new rights of action that do not have clear analogs in our common-law tradition.”<sup>71</sup> Congress has the power to define new injuries and describe the chain of causation that can give rise to these injuries.<sup>72</sup> While not the case in *Lujan*, a newly recognized injury could give rise to standing.

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<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 576.

<sup>65</sup> *Id.* at 578.

<sup>66</sup> *Id.* at 579 (Kennedy, J., concurring in part and concurring in the judgment).

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* (citing *Japan Whaling Ass’n v. Am. Cetacean Soc’y*, 478 U.S. 221, 231 n.4 (1986)).

<sup>70</sup> *Id.* at 580.

<sup>71</sup> *Id.* (“Modern litigation has progressed far from the paradigm of *Marbury* suing Madison to get his commission, *Marbury v. Madison*, 5 U.S. 137 (1803), or Ogden seeking an injunction to halt Gibbons’ steamboat operations, *Gibbons v. Ogden*, 22 U.S. 1 (1824).”).

<sup>72</sup> *Id.*

By contrast, Justice Stevens' concurrence reads more like a dissent.<sup>73</sup> Justice Stevens would find standing in this case, but would affirm on the merits, holding that the Endangered Species Act does not apply to actions taken in other countries.<sup>74</sup> He wrote, “[i]n my opinion a person who has visited the critical habitat of an endangered species has a professional interest in preserving the species and its habitat, and intends to revisit them in the future has standing to challenge agency action that threatens their destruction.”<sup>75</sup> Justice Stevens argues that the plaintiffs should have standing based on their interest in observing wildlife since Congress has found value in protecting endangered species.<sup>76</sup> In Justice Stevens' view, the injury is measured by the environmental harm, rather than the ability of the plaintiffs to expeditiously visit the affected area.<sup>77</sup>

Noting that the Court has found standing to be lacking where the environmental harm is speculative, Justice Stevens found that under these facts, the harm to the environment was practically certain.<sup>78</sup> Citing the dissent, Justice Stevens believed that the plaintiffs have at least created a question of fact: “a reasonable finder of fact could conclude, from their past visits, their professional backgrounds, and their affidavits and deposition testimony, that [plaintiffs] will return to the project sites and, consequently, will be injured by the destruction of the endangered species and critical habitat.”<sup>79</sup> Further, Justice Stevens argues that requiring consultation is itself redress for the alleged injury: “[I]f Congress required consultation between agencies, we must presume that such consultation will have a serious purpose that is likely to produce tangible results.”<sup>80</sup>

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<sup>73</sup> *See id.* at 582 (Stevens, J., concurring in the judgment).

<sup>74</sup> *Id.* at 582, 590.

<sup>75</sup> *Id.* at 582.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 583.

<sup>78</sup> *Id.* (distinguishing *Whitmore v. Arkansas*, 495 U.S. 149, 158–159 (1990)).

<sup>79</sup> *Id.* at 584.

<sup>80</sup> *Id.* at 585.

Justice Blackmun dissented and found that the majority sought to impose “fresh limitations” on the constitutional authority of Congress to allow citizen suits for procedural injuries.<sup>81</sup> His dissent focused on identifying the appropriate standard for reviewing a motion for summary judgment.<sup>82</sup> In order to survive a motion for summary judgment, a plaintiff only needs to show that there is a genuine issue of material fact.<sup>83</sup> According to Justice Blackmun, the Court’s “function is not [it]self to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.”<sup>84</sup> The majority never mentions this standard.<sup>85</sup> Accordingly, the majority requires a standard that is too high.<sup>86</sup> If the Court applied the “proper standard,” Justice Blackmun argues that it would conclude that the plaintiffs have advanced sufficient facts to create a genuine issue for trial concerning whether one or both plaintiffs would be injured.<sup>87</sup>

In Justice Blackmun’s view, requiring a “description of concrete plans” or “specification of *when* the some day [for a return visit] will be” ends up being a mere formality because nothing prevents plaintiffs from purchasing plane tickets.<sup>88</sup> Additionally, Justice Blackmun takes issue with the majority’s disregard for the potential for nexus harms.<sup>89</sup> While in some cases, a plaintiff must be in close proximity to the damage to be affected—for example, a person claiming aesthetic damages from mining activities must be close enough to see the ruined

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<sup>81</sup> *Id.* at 589–90 (Blackmun, J., dissenting).

<sup>82</sup> *Id.* at 590.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 591.

<sup>88</sup> *Id.* at 592. Justice Blackmun worries that this requirement will revive formalistic code-pleading, in the worst case requiring that “a Federal Tort Claims Act plaintiff alleging loss of consortium . . . furnish this Court with a ‘description of concrete plans’ for her nightly schedule of attempted activities.” *Id.*

<sup>89</sup> *Id.* at 594.

landscape—in many cases, an environmental harm in one area may spread to other areas, giving rise to everyone in its wake.<sup>90</sup>

## 2. *Friends of the Earth v. Laidlaw*

Standing was once again the central issue in *Friends of the Earth, Inc. v. Laidlaw Environmental Services*.<sup>91</sup> In *Laidlaw*, plaintiff environmental groups sued under the citizen suit provisions of the Clean Water Act, alleging a violation of the defendant's permitted mercury discharge limits.<sup>92</sup> The plaintiffs sought declaratory and injunctive relief, as well as civil penalties.<sup>93</sup> In *Laidlaw*, the defendant purchased an incineration facility in South Carolina and promptly secured a permit allowing the facility to discharge a limited amount of effluent into the North Tyger River.<sup>94</sup> The defendant exceeded its permit limits on several chemicals, including mercury.<sup>95</sup> However, the defendant convinced the state to file an enforcement action against it, and it agreed to pay a limited civil penalty and “to make every effort to comply with its permit obligations.”<sup>96</sup> The plaintiffs also filed suit under the citizen suit provisions of the Clean Water Act.<sup>97</sup> The defendant moved to dismiss the action based on the settlement with the state, but the district court held that the state had not diligently

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<sup>90</sup> *Id.* (citing *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221 (1986) (harm to American whale watchers from Japanese whaling activities) and *Arkansas v. Oklahoma*, 503 U.S. 91 (1992) (harm to Oklahoma residents from wastewater treatment plant located thirty-nine miles from the border)).

<sup>91</sup> *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs. (TOC), Inc.*, 528 U.S. 167 (2000). Justice Ginsburg delivered the opinion of the Court and was joined by Chief Justice Rehnquist, Justice Stevens, Justice O'Connor, Justice Kennedy, Justice Souter, and Justice Breyer. Justice Stevens and Justice Kennedy each filed concurrences, and Justice Scalia, joined by Justice Thomas, dissented. *Id.* at 171.

<sup>92</sup> *Id.* at 173, 176.

<sup>93</sup> *Id.* at 177.

<sup>94</sup> *Id.* at 175–76.

<sup>95</sup> *Id.* at 176.

<sup>96</sup> *Id.* at 176–77 (internal quotations omitted).

<sup>97</sup> *Id.* at 177.

prosecuted the violations; therefore, the court allowed the plaintiffs' citizen suit.<sup>98</sup> During the litigation, the defendant ceased all of its continuing violations.<sup>99</sup> Two years later, the district court instituted a civil penalty against the facility, but it did not grant an injunction because the permit violations had ceased.<sup>100</sup> The plaintiffs appealed the size of the civil penalty, and the defendant argued on appeal that the plaintiffs lacked standing to bring the suit.<sup>101</sup> The Fourth Circuit assumed, without deciding, that the plaintiffs had standing, but held that the case became moot because institution of civil penalties payable to the federal government would not redress the plaintiffs' injuries.<sup>102</sup>

The statutory foundation for this suit is the Clean Water Act's citizen suit provision.<sup>103</sup> Under the Clean Water Act, a discharger must secure a permit under the National Pollution Discharge Elimination System (NPDES), which imposes strict limits on the amount of pollutant that can be discharged.<sup>104</sup> Discharge of a pollutant in excess of a facility's permit limit constitutes a violation of the Act.<sup>105</sup> Under § 505 of the Act, citizens may bring suit to enforce any limitation in an NPDES permit.<sup>106</sup> "Citizen" is defined as "a person or persons having an interest which is or may be adversely affected."<sup>107</sup> Prior to filing a complaint, the plaintiff must send a sixty-day notice of intent to sue to the Environmental Protection Agency (EPA) and to the alleged violator, in order to allow sixty days for the EPA to intervene and give the violator enough time to comply with its permit.<sup>108</sup> The Supreme

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<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 179.

<sup>100</sup> *Id.* at 178.

<sup>101</sup> *Id.* at 179.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 173.

<sup>104</sup> Clean Water Act, 33 U.S.C. § 1342 (1994).

<sup>105</sup> 33 U.S.C. § 1342(h).

<sup>106</sup> 33 U.S.C. § 1365(a).

<sup>107</sup> 33 U.S.C. § 1365 (g).

<sup>108</sup> 33 U.S.C. § 1365 (b)(1)(A).

Court has held that a plaintiff lacks standing to sue if a defendant, after receiving a notice from a citizen plaintiff, ceases its alleged violation by the time the plaintiff files its complaint.<sup>109</sup>

Justice Ginsburg, writing for the majority, held that the plaintiffs had demonstrated that the case was not moot because permit compliance after a suit is filed does not moot an action for civil penalties.<sup>110</sup> However, the Court first needed to determine whether the plaintiffs had standing at the beginning of the case.<sup>111</sup> The defendants first claimed that there could be no injury in fact because the district court concluded that there was “no demonstrated proof of harm to the environment.”<sup>112</sup> The Court held, however, that the relevant showing for Article III purposes was not the injury to the environment, but the injury to the plaintiff.<sup>113</sup> In this case, one of the plaintiffs alleged that he lived a half-mile from the facility; that he occasionally drove over the river and it smelled polluted; that he would like to fish, camp, swim and picnic near the river (between three and fifteen miles downstream of the facility), as he did when he was a teenager, but would not do so because he was concerned that the water was polluted by the defendant’s discharges.<sup>114</sup> The Court found that the plaintiffs had standing because these individuals averred that the “aesthetic and recreational values of the area will be lessened” by the alleged discharges.<sup>115</sup> Although these harms were subjective, they were reasonable fears that prevented the plaintiffs from full use and enjoyment of the river.<sup>116</sup> Finally, the Court held that the imposition of civil penalties provided a deterrent effect on potential future

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<sup>109</sup> *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 174 (2000) (citing *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found.*, 484 U.S. 49, 60 (1987)).

<sup>110</sup> *Id.* at 180.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 181.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 181–82. Other members of the plaintiff organization made similar allegations. *Id.*

<sup>115</sup> *Id.* at 183.

<sup>116</sup> *Id.* at 184.



discharges, which was sufficient to support the standing element of redressibility of the alleged injury.<sup>117</sup>

Both Justice Kennedy, in his concurrence, and Justice Scalia, in his dissent, raised the issue of whether a citizen suit provision was an unconstitutional delegation of power by the legislature; however, neither Justice found *Laidlaw* to be an appropriate case to address that issue.<sup>118</sup>

Justice Scalia's argument in dissent boils down to a conclusion that there cannot be an injury to a person if there has been no injury to the environment.<sup>119</sup> He found that the "concern" that the plaintiffs exhibited is "woefully short on 'specific facts,' and the vague allegations of injury they do make are undermined by the evidence adduced at trial."<sup>120</sup> This argument is based on the fact that the district court concluded that there was no demonstrable harm to the environment and that the permit violations did not result in a risk to human health.<sup>121</sup> The district court's finding is based on the fact that the water quality levels in the river are better than the limits placed for the safety of water bodies that support recreation in and on the water.<sup>122</sup>

Justice Scalia would require the plaintiffs to make some evidentiary showing that their alleged harms were, in fact, occurring.<sup>123</sup> He argued that the plaintiffs made nothing more than conclusory allegations in their affidavits.<sup>124</sup> And, as a matter of public policy, he believes that the standard endorsed by the majority allows too many people to assert standing.<sup>125</sup>

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<sup>117</sup> *Id.* at 187.

<sup>118</sup> *Id.* at 197 (Kennedy, J., concurring); *id.* at 209–10 (Scalia, J., dissenting).

<sup>119</sup> *Id.* at 198–99.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 199.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 200.

<sup>124</sup> *Id.* at 201.

<sup>125</sup> *Id.*

### 3. *Summers v. Earth Island Institute*

Most recently, the Court narrowed standing in *Summers v. Earth Island Institute*.<sup>126</sup> In *Summers*, the plaintiff environmental organizations challenged regulations promulgated by the United States Forest Service, which exempted salvage timber sales of less than 250 acres from the notice and comment provisions of the National Environmental Policy Act (NEPA).<sup>127</sup> NEPA requires that the federal agency acting as the project proponent engage in an analysis of the potential environmental impacts of its proposed project and evaluate the feasibility of potential alternatives.<sup>128</sup>

In the summer of 2002, fire burned a significant area within the Sequoia National Forest, which included the Burnt Ridge area.<sup>129</sup> After the fire, the Forest Service approved the salvage sale on 238 acres of the forest without requiring notice or comment.<sup>130</sup> In response, the plaintiffs filed their complaint alleging that the Forest Service failed to follow its own NEPA regulations in approving the sale.<sup>131</sup> The district court granted a preliminary injunction relating to the Burnt Ridge portion of the sales.<sup>132</sup> The parties settled their dispute with regard to one of the parcels, after which the Forest Service argued that the plaintiffs lacked standing to maintain their action.<sup>133</sup> The district court found for the plaintiffs and invalidated the regulations at issue.<sup>134</sup> The Ninth Circuit held that the plaintiffs lacked standing,

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<sup>126</sup> *Summers v. Earth Island Inst.*, 129 S. Ct. 1142 (2009).

<sup>127</sup> *Id.* at 1147.

<sup>128</sup> Forest Service Decisionmaking and Appeals Reform Act (Appeals Reform Act), Pub. L. No. 102-381, tit. III, § 322, 106 Stat. 1419 (note following 16 U.S.C. § 1612.).

<sup>129</sup> *Summers*, 129 S. Ct. at 1147.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 1148.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

except for the regulations applying to the Burnt Ridge project, and upheld the nationwide injunction on two of the five regulations.<sup>135</sup>

Justice Scalia, back in control of the majority, focused on the affidavit of plaintiff Bensman in concluding that the plaintiffs lacked standing because the members of the plaintiff organization did not allege that they were impacted by a specific timber sale.<sup>136</sup> According to Justice Scalia, “[i]t is a failure to allege that *any* particular timber sale or other project claimed to be unlawfully subject to the regulations will impede a specific and concrete plan of Bensman’s to enjoy the National Forests.”<sup>137</sup> Bensman alleged only that he had visited many National Forests and planned to visit several unnamed National Forests in the future.<sup>138</sup> While there may be a chance that Bensman’s travels in the National Forests will intersect with a parcel that is about to be affected by the regulations, “without further specification it is impossible to tell *which* projects are (in respondents’ view) unlawfully subject to the regulations.”<sup>139</sup> Justice Scalia found that it was unlikely that Bensman’s trips would intersect a Forest Service timber sale.<sup>140</sup> While the Bensman affidavit referred to several projects occurring in the National Forest, it did not show any firm intention to visit those locations.<sup>141</sup> The vague desire to return for a some-day visit was insufficient to support standing.<sup>142</sup>

Finally, the plaintiffs lacked standing to assert a procedural right.<sup>143</sup> The majority held that “deprivation of a procedural right without some concrete interest that is affected by the deprivation—a

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<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 1149–51.

<sup>137</sup> *Id.* at 1150 (emphasis in original).

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* (emphasis in original).

<sup>140</sup> *Id.* (citing *Los Angeles v. Lyons*, 461 U.S. 95 (1983)). Justice Scalia found it would be less likely for Bensman to wander into a timber sale than it would be for Lyons to be put into a chokehold by police for a second time. *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 (1992)).

<sup>143</sup> *Id.*

procedural right *in vacuo*—is insufficient to create Article III standing.”<sup>144</sup> And, while a procedural right may lessen the causation and redressibility hurdles, a plaintiff must still demonstrate a concrete injury.<sup>145</sup> Because there was no concrete injury to the plaintiffs in this case, they could not maintain standing for the procedural violation.<sup>146</sup>

Justice Kennedy, in his concurrence, stated, “[t]his case would present different considerations if Congress had sought to provide redress for a concrete injury ‘giv[ing] rise to a case or controversy where none existed before.’”<sup>147</sup>

In dissent, Justice Breyer outlined a probabilistic approach to determining injury in fact.<sup>148</sup> Justice Breyer argued that the sheer number of members in the plaintiff organizations meant that it is more likely than not that one or more of the members will be affected by the timber sales.<sup>149</sup> Justice Breyer stated that this probability should satisfy the requirement of imminence.<sup>150</sup> In other words, because the plaintiffs have demonstrated a realistic threat of injury, they should have standing.<sup>151</sup>

With regard to the procedural injury, Justice Breyer argued that the plaintiffs have standing because (1) members of the group have used affected parcels in the past and are likely to do so again in the future; and (2) the group’s members have opposed the Forest Service’s activities in the past using procedural methods and will likely use these methods in the future.<sup>152</sup> He would find this sufficient to

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<sup>144</sup> *Id.* at 1151.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* at 579–80 (Kennedy, J., concurring).

<sup>148</sup> *Id.* at 1156–58 (Breyer, J., dissenting).

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at 1158 “Many years ago the Ninth Circuit warned that a court should not ‘be blind to what must be necessarily known to every intelligent person.’” *Id.* (citing *In re Wo Lee*, 26 F. 471, 475 (1886)).

<sup>152</sup> *Id.*

demonstrate that the plaintiffs have received a concrete injury with the deprivation of their right to comment.<sup>153</sup>

### *B. Post-Summers Application of the Standing Doctrine*

Although *Summers* can be seen as a reaffirmation of *Lujan*, the federal circuits continue to apply the doctrine of standing haphazardly in environmental cases. What follows is a discussion of recent cases, which allow some plaintiffs to bring their cases and preclude others.

#### *1. Connecticut v. American Electric Power*

Eight states, a city, and three land trusts separately sued six of the largest energy companies and alleged that the defendants' operations contributed to the public nuisance of global warming.<sup>154</sup> The plaintiffs sought an abatement of the defendants' ongoing operations of fossil fuel generation units, which were responsible for at least a portion of global warming emissions.<sup>155</sup> According to the plaintiffs, these ongoing operations cause and will continue to cause serious harms affecting human health and natural resources.<sup>156</sup> The defendants moved to dismiss the complaint, and the district court, agreeing, held that the plaintiffs' complaint presented a non-justiciable political question.<sup>157</sup> The court refused to address the standing issue because "it [wa]s so intertwined with the merits and required the court to address a political question."<sup>158</sup> On appeal, the defendants again argued that the plaintiffs lacked standing.<sup>159</sup>

The Second Circuit reversed the lower court; it held first, that global warming does not present a non-justiciable political question,

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<sup>153</sup> *Id.*

<sup>154</sup> *Connecticut v. Am. Elec. Power Co., Inc.* 582 F.3d 309, 315 (2d Cir. 2009).

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 332.

<sup>159</sup> *Id.*

and second, that the plaintiffs had standing to pursue these claims.<sup>160</sup> In examining the plaintiffs' standing, the court stated, "[t]he Supreme Court has commented on the lowered bar for standing at the pleading stage, stating that general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim."<sup>161</sup> Further, under Second Circuit precedent, "at the pleading stage, standing allegations need not be crafted with precise detail, nor must the plaintiff prove his allegations of injury."<sup>162</sup>

First, the court addressed the ability of the states to bring the suit in *parens patriae*.<sup>163</sup> *Parens patriae* is a common law doctrine where the sovereign state can sue to protect the interests of its citizens, "for the prevention of injury to those who cannot protect themselves."<sup>164</sup> This allows a state to short cut the *Lujan* standing test.<sup>165</sup> A state must have a quasi-sovereign interest to protect.<sup>166</sup> Because of the damage to these states from global warming, and because the individuals involved could not seek individual redress, the states involved had standing *parens patriae*.<sup>167</sup>

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<sup>160</sup> *Id.*

<sup>161</sup> *Id.* at 333 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)) (internal quotations omitted).

<sup>162</sup> *Id.* (citing *Bldg. & Constr. Trades Council of Buffalo v. Downtown Dev., Inc.*, 448 F.3d 138, 145 (2d Cir. 2006)).

<sup>163</sup> *Id.* at 334.

<sup>164</sup> *Id.* (citing *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1, 57 (1890)). This doctrine is demonstrated in *Georgia v. Tennessee Copper Co.*, where the State of Georgia sued to enjoin Tennessee Copper from emitting noxious fumes that would travel into the borders of Georgia. 206 U.S. 230 (1907). *Parens patriae* standing is found when a state (1) has an interest apart from the interests of particular private parties, (2) expresses a quasi-sovereign interest, and (3) alleges injury to a substantial segment of its population. *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 603 (1982).

<sup>165</sup> *American Electric Power*, 582 F.3d at 337.

<sup>166</sup> *Id.* at 338.

<sup>167</sup> *Id.* at 339.

Second, the court addressed whether all of the plaintiffs had proprietary (*Lujan*) standing.<sup>168</sup> In this case, the plaintiffs clearly alleged harms resulting from climate change.<sup>169</sup> For example, California alleged that it already was experiencing decreased mountain snowpack, which leads to declining water supplies available to the state's residents. However, the bulk of the alleged harms were based on the future impacts of global warming.<sup>170</sup> The defendants argued that the injuries were too speculative. The court, looking to *Massachusetts v. EPA*, held that the risk of global warming was real and that the plaintiffs therefore had sufficiently alleged injury-in-fact to support their standing.<sup>171</sup>

In addition, the court held that the plaintiffs satisfied the element of causation.<sup>172</sup> The court stated that this element is “in large part designed to ensure that the injury complained of is not the result of the independent action of some third party not before the court.”<sup>173</sup> In this case, plaintiffs sued the “five largest emitters of carbon dioxide in the United States.”<sup>174</sup> The defendants argued that the plaintiffs could not identify their individual portions of the harm, nor could the plaintiffs say that abatement of their individual emissions would prevent future harms caused by global warming.<sup>175</sup> However, the court held that for standing purposes, the plaintiffs were not required to meet the same causation requirements as those of a nuisance claim in order to support their standing.<sup>176</sup> In addition, the plaintiffs did not need to sue each and every polluter since the pollution of any one may be shown to

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<sup>168</sup> *Id.*.

<sup>169</sup> *Id.* at 341–42.

<sup>170</sup> *Id.* at 342.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* at 345.

<sup>173</sup> *Id.* (citing *Friends of the Earth v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 161 (4th Cir. 2000)) (internal quotations omitted).

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.* at 346.

cause some or part of the injury suffered.<sup>177</sup> Therefore, the plaintiffs met their burden.<sup>178</sup> According to the court, “they are not required to pinpoint which specific harms of the many injuries they assert are caused by particular Defendants, nor are they required to show that Defendants’ emissions alone caused their injuries.”<sup>179</sup>

Finally, the court found that the injuries were redressable because any decrease in emissions would lessen the impact of global warming.<sup>180</sup>

## 2. *The Wilderness Society v. Kane County, Utah*

*The Wilderness Society v. Kane County, Utah* provides an example of a sufficient affidavit alleging aesthetic injury.<sup>181</sup> In *Wilderness Society*, the plaintiff environmental organizations brought an action against the county government and claimed that a county ordinance, which opened preserved lands to the use of off-road vehicles, was preempted by the Federal Land Policy and Management Act.<sup>182</sup> The district court granted summary judgment for the plaintiffs, and the Tenth Circuit affirmed.<sup>183</sup>

In this case, the plaintiffs were able to support their standing by alleging harms to their “health, recreational, scientific, spiritual, educational, aesthetic, and other interests.”<sup>184</sup> One plaintiff stated specifically, “I have visited public lands in Kane County, and particularly lands within the Monument, at least four times per year for multiple days since 2003, and intend to return as often as possible, and

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<sup>177</sup> *Id.* at 347 (citing *Pub. Interest Research Group of N.J., Inc. v. Powell Duffryn Terminals, Inc.*, 913 F.2d 64 (3d Cir. 1990)).

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> 581 F.3d 1198 (10th Cir. 2009).

<sup>182</sup> *Id.* at 1208.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.* at 1210. The other affidavits alleged similar uses and harms. *Id.* at 1211.



certainly within the next six months.”<sup>185</sup> She actively “seek[s] out and prefer[s] to use those federal public land[s] that are more wild; in other words, those lands that are not burdened by [off-road vehicle] use.”<sup>186</sup> Finally, she stated that she was less likely to return to these impacted sites because of the disruptions caused by the off-road vehicles.<sup>187</sup>

The Tenth Circuit held that these allegations were more than sufficient: the plaintiffs stated that they had visited the impacted sites; those sites would be negatively impacted by the allowance of off-road vehicles; and the plaintiffs intended to visit those sites again, but were less likely to do so because of the off-road vehicles.<sup>188</sup> The dissent argued that there was no legally protected right at issue in this case.<sup>189</sup> However, according to the court, a plaintiff’s injury is judicially cognizable if it “is simply the sort of interest that courts think to be of sufficient moment to justify judicial intervention.”<sup>190</sup> And, under Tenth Circuit precedent, injury to recreational and aesthetic interests is a sufficiently protectable interest.<sup>191</sup>

### 3. *Center for Biological Diversity v. Kempthorne*

In *Center for Biological Diversity v. Kempthorne*, the plaintiff environmental organizations sued the Fish and Wildlife Service for promulgating regulations that allowed oil and gas companies to make non-lethal takings (incidental harassment) of polar bears and pacific

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<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> *Id.* at 1210.

<sup>189</sup> *Id.*

<sup>190</sup> *Id.* (citing *In re Special Grand Jury 89-2*, 450 F.3d 1159, 1172 (10th Cir. 2006)) (internal quotations omitted).

<sup>191</sup> *Id.* at 1212 (citing *San Juan Cnty., Utah v. United States*, 503 F.3d 1163 (10th Cir. 2007)) In addition, the court cited a leading treatise: “[T]he phrase ‘legally protected interest’ provides ‘ample opportunity for mischief should a court be bent on denying the reality of a sufficient injury-in-fact.’” *Id.* (citing 13A CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 3531.4, at 149 (3d ed. 2008)).

walrus in the Beaufort Sea during their oil and gas exploration activities on the northern coast of Alaska.<sup>192</sup> Similar to the allegations in *Lujan* and *Summers*, the plaintiffs alleged that these regulations violated the Marine Mammal Protection Act and the National Environmental Policy Act.<sup>193</sup> The district court upheld the regulations and granted summary judgment to the Fish and Wildlife Service.<sup>194</sup> The Ninth Circuit affirmed the decision, finding that the Fish and Wildlife Service did not act arbitrarily and capriciously in finding that the oil and gas activities would have a negligible impact on the affected endangered species.<sup>195</sup>

Before reaching the merits of the case, the court first had to address a challenge to the plaintiffs' standing to bring the case.<sup>196</sup> Following *Summers*, the court sought to determine whether any of the plaintiffs had "such a personal stake in the outcome of the controversy as to warrant *his* invocation of federal-court jurisdiction."<sup>197</sup> Although generalized harm to the environment is insufficient to confer standing, "[t]he interest that individuals have in observing a species or its habitat, 'whether . . . motivated by esthetic enjoyment, an interest in professional research, or an economic interest in preservation of the species' is sufficient to confer standing."<sup>198</sup>

In this case, the plaintiffs alleged that "they have viewed polar bears and walrus in the Beaufort Sea region, enjoy doing so, and have plans to return."<sup>199</sup> Moreover, if the plaintiffs' allegations are proven true, the governmental regulations will create an imminent and

<sup>192</sup> 588 F.3d 701 (9th Cir. 2009).

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> *Id.* at 711–12.

<sup>196</sup> *Id.* at 707. The Service raised the standing issue for the first time on appeal, after *Summers* was decided; however, challenges to standing can be raised at any time. *Id.* (citing *United States v. Viltrakis*, 108 F.3d 1159, 1160 (9th Cir. 1997)).

<sup>197</sup> *Id.* (citing *Summers v. Earth Island Inst.*, 129 S.Ct. 1142, 1149 (2009)) (citations omitted) (emphasis in original).

<sup>198</sup> *Id.* (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 582 (1992) (Stevens, J., concurring)).

<sup>199</sup> *Id.*

concrete harm to those interests by allowing others to harm those endangered species.<sup>200</sup> “Unlike the alleged injury in *Summers*, this injury is geographically specific, is caused by the regulations at issue, and is imminent.”<sup>201</sup> Overall, the plaintiffs were not simply challenging the regulations in the abstract.<sup>202</sup> Unfortunately for the environmental plaintiffs, the regulations themselves were upheld by the court.<sup>203</sup>

#### 4. *Comer v. Murphy Oil USA*

In *Comer v. Murphy Oil USA*, the class of environmental plaintiffs, a group of landowners with property located along the Mississippi Gulf coast, sued several energy, fossil fuel, and chemical companies, for the emission of greenhouse gases by the defendants that allegedly contributed to global warming.<sup>204</sup> According to the plaintiffs, those emissions increased surface air and water temperatures, which in turn caused a rise in sea levels and added to the ferocity of Hurricane Katrina, all of which combined to destroy the plaintiffs’ private property, as well as public property used by members of the class.<sup>205</sup> The class of plaintiffs alleged common law nuisance, trespass, negligence, unjust enrichment, fraudulent misrepresentation, and civil conspiracy.<sup>206</sup> The defendants moved to dismiss these claims on the grounds that the plaintiffs lacked standing and that the case presented non-justiciable political issues.<sup>207</sup> The

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<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> *Id.* at 712.

<sup>204</sup> 585 F.3d 855, 859 (5th Cir. 2009), *vacated for rehearing en banc*, 598 F.3d 208 (5th Cir. 2010), *appeal dismissed for lack of quorum*, 607 F.3d 1049 (5th Cir. 2010). N.B. The Fifth Circuit dismissed the appeal after the Spring 2010 semester had ended.

<sup>205</sup> *Id.*

<sup>206</sup> *Id.* at 859–60.

<sup>207</sup> *Id.* at 860.

district court granted this motion and dismissed the claims.<sup>208</sup> The Fifth Circuit reversed with respect to the nuisance, trespass, and negligence claims; it held that the plaintiffs had standing and that the issue of global warming was not a political question.<sup>209</sup>

In addressing the standing challenge, the court first noted that because this was a diversity case based on state common law claims, the plaintiffs must satisfy both state and federal standing requirements.<sup>210</sup> However, Mississippi's standing requirements are very liberal: "[a]ll courts shall be open; and every person for an injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law, and right and justice shall be administered without sale, denial, or delay."<sup>211</sup> Therefore, the main focus was whether the plaintiffs had standing under federal law.<sup>212</sup>

In determining standing, "[t]he claimant bears the burden of establishing standing, and 'each element [of the three-part standing inquiry] must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation."<sup>213</sup> According to the Sixth Circuit, "[a]t the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presum[e] that general allegations embrace those specific facts that are necessary to

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> *Id.* at 861 ("Where, as here, jurisdiction is predicated on diversity of citizenship, a plaintiff must have standing under both Article III of the Constitution and applicable state law in order to maintain a cause of action." (citing *Mid-Hudson Catskill Rural Migrant Ministry, Inc. v. Fine Host Corp.*, 418 F.3d 168, 173 (2d Cir. 2005)).

<sup>211</sup> *Id.* (citing MISS. CONST. art. III, § 24); *see also* *State v. Quitman Cnty.*, 807 So. 2d 401, 405 (Miss. 2001) ("In Mississippi, parties have standing to sue 'when they assert a colorable interest in the subject matter of the litigation or experience an adverse effect from the conduct of the defendant, or as otherwise provided by law.'").

<sup>212</sup> *Id.*

<sup>213</sup> *Id.* at 862 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)).

support the claim.”<sup>214</sup> In addition, the court differentiated between the standing inquiry for common law claims and injury to public rights.<sup>215</sup> In this case, the plaintiffs’ claims were based on common law theories of nuisance, and the defendants’ challenges were based on causation; this “essentially calls upon [the court] to evaluate the merits of plaintiffs’ causes of action,” which at the early stages of the litigation is “misplaced.”<sup>216</sup> The absence of a valid cause of action is not a question of standing: “jurisdiction . . . is not defeated . . . by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover.”<sup>217</sup> The court held that the plaintiffs, relying on scientific reports, had standing, and while they will be required to substantiate their assertions at a later time, at the pleading stage, at least, the court must accept their allegations as true.<sup>218</sup>

#### 5. *Native Village of Kivalina v. Exxonmobil Corp.*

Villagers inhabiting a small arctic island sued many of the country’s largest emitters of greenhouse gases and alleged that these emissions contributed to global warming, which in turn caused a loss of sea ice on their island and exposed them to greater dangers.<sup>219</sup> The sea ice protects the village from winter sea storms, and the erosion of the sea ice will force the village to relocate at a cost of 95 to 400 million dollars.<sup>220</sup> The Kivalina alleged causes of action in federal common law and state common law nuisance, civil conspiracy, and

<sup>214</sup> *Id.* (citing *Bennett v. Spear*, 520 U.S. 154, 168 (1997)).

<sup>215</sup> *Id.* The court discusses various articles in coming to the conclusion that when a case presents a common-law tort claim, standing will be found. *Id.* at 862 n.3.

<sup>216</sup> *Id.* at 864.

<sup>217</sup> *Id.* (citing *Bell v. Hood*, 327 U.S. 678, 685 (1946)).

<sup>218</sup> *Id.*

<sup>219</sup> *Native Vill. of Kivalina v. Exxonmobil Corp.*, 663 F. Supp. 2d 863 (N.D. Cal. 2009).

<sup>220</sup> *Id.*

concert of action.<sup>221</sup> The defendants filed various motions to dismiss; they argued that the case presented a political question because there were no judicially discoverable standards upon which to adjudicate it case and that the plaintiffs lacked standing.<sup>222</sup> The court agreed with the defendants and therefore, it dismissed the suit.<sup>223</sup>

When a defendant challenges subject matter jurisdiction (*i.e.*, standing), a plaintiff “must show in his pleading, affirmatively and distinctly, the existence of whatever is essential to federal jurisdiction, and if he does not do so, the court, on having the defect called to its attention or discovering the same, must dismiss the case, unless the defect be corrected by amendment.”<sup>224</sup> In a Rule 12(b)(1) challenge, the court should “assume[] all factual allegations to be true and draw[] all reasonable inferences in [the plaintiff’s] favor.”<sup>225</sup> However, if the moving party makes a “speaking” motion and submits materials outside of the pleadings, “it then becomes necessary for the party opposing the motion to satisfy its burden of establishing that the court, in fact, possesses subject matter jurisdiction.”<sup>226</sup> The challenge in this case was facial only.<sup>227</sup>

The crux of the standing issue in this case was that the plaintiffs were unable to trace their alleged injuries to any particular defendant.<sup>228</sup> However, they argued that environmental plaintiffs suing under the Clean Water Act have standing where they show that each “defendant (1) discharged some pollutant in concentrations greater than allowed by its permit, (2) [the discharge was] into a waterway in which the plaintiffs have an interest that is or may be adversely

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<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> *Id.* (citing *Tosco Corp. v. Cmtys. for a Better Env’t*, 236 F.3d 495, 499 (9th Cir. 2001)).

<sup>225</sup> *Id.* (citing *Doe v. See*, 557 F.3d 1066, 1073 (9th Cir. 2009) and *Castaneda v. United States*, 546 F.3d 682, 684 n.1 (9th Cir. 2008)).

<sup>226</sup> *Id.* (citing *Colwell v. Dep’t of Health and Human Servs.*, 558 F.3d 1112, 1121 (9th Cir. 2009)) (internal quotations omitted).

<sup>227</sup> *Id.*

<sup>228</sup> *Id.*

affected by the pollutant[,] and (3) that this pollutant causes or *contributes* to the kinds of injuries alleged by the plaintiffs.”<sup>229</sup> The court, however, distinguished between violations of the Clean Water Act and the discharge of greenhouse gases, finding that contrary to the specific limits set for dischargers to water, there are no standards governing the amount of greenhouse gases that may be emitted.<sup>230</sup> In addition, each defendant could point out several more emitters of greenhouse gases, which prevented the plaintiffs from demonstrating that the named defendants were the seed of their injury.<sup>231</sup>

Additionally, the plaintiffs failed to demonstrate that they fell within the “zone of discharge.”<sup>232</sup> In order to satisfy the “fairly traceable” requirement for standing, the court must draw a distinction between “the plaintiffs who lie within the discharge zone of a polluter and those who are so far downstream that their injuries cannot fairly be traced to that defendant.”<sup>233</sup> The court gives examples: an eighteen-mile distance between the point of discharge and the area of plaintiff’s use of the body of water would be too much,<sup>234</sup> and where the bodies of water used run hundreds of miles, discharges in those bodies are insufficient.<sup>235</sup> In this case, the court found that everyone would fall within the relevant geographical zone, which would effectively

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<sup>229</sup> *Id.* (citing *Pub. Interest Research Group v. Powell Duffryn Terminals, Inc.*, 913 F.2d 64, 72 (3d Cir. 1990)) (emphasis in original); *but see* *Tex. Indep. Producers and Royalty Owners Ass’n v. E.P.A.*, 410 F.3d 964, 974 (5th Cir. 2005) (holding that this presumption can be overcome if the defendant can point to another potential seed cause of the injury).

<sup>230</sup> *Native Vill. of Kivalina v. Exxonmobil Corp.*, 663 F. Supp. 2d 863 (N.D. Cal. 2009).

<sup>231</sup> *Id.*

<sup>232</sup> *Id.*

<sup>233</sup> *Id.* (citing *Pub. Interest Research Group of N.J., Inc. v. Powell Duffryn Terminals, Inc.*, 913 F.2d 64, 72 (3d Cir. 1990)) (internal quotations omitted).

<sup>234</sup> *Id.*

<sup>235</sup> *Id.* (citing *Tex. Indep. Producers and Royalty Owners Ass’n v. E.P.A.*, 410 F.3d 964, 974 (5th Cir. 2005)).

eliminate the issue of geographic proximity, thereby allowing anyone to sue.<sup>236</sup>

Finally, the court was not persuaded by the claims of “special solicitude” similar to *Massachusetts v. EPA*.<sup>237</sup> Here, the plaintiffs were not challenging the actions of the United States government; they were simply seeking tort damages.<sup>238</sup> Because they are not seeking to have the government enforce a right that they gave up to enter the union, they cannot pursue this case under the guise of the quasi-sovereign “special solicitude.”<sup>239</sup>

## II. STATEMENT OF THE CASE

### A. Background

In the nine-month period leading up to Pollack’s lawsuit, the United States Coast Guard discharged 62,584 bullets, consisting mostly of lead, into the Great Lakes.<sup>240</sup> Lead has been listed as a toxic chemical under the Emergency Planning and Community Right-to-Know Act.<sup>241</sup> It is a toxic metal that, even at low levels, may cause a range of health effects, including behavioral problems and learning disabilities.<sup>242</sup> The health effects of lead are most severe for infants and children.<sup>243</sup> For these receptors, exposure to high levels of lead in drinking water can result in delays in physical and mental development.<sup>244</sup> In adults, lead can cause kidney problems or high

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<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

<sup>238</sup> *Id.*

<sup>239</sup> *Id.*

<sup>240</sup> Pollack v. U.S. Dep’t of Justice, No. 08 C 320, 2008 WL 4286577, at \*1 (N.D. Ill. Sept. 12, 2008).

<sup>241</sup> See 42 U.S.C. § 11002; 40 C.F.R. § 372.65; Pollack v. U.S. Dep’t of Justice, No. 08 C 320, 2008 WL 4286577, at \*1 (N.D. Ill. Sept. 12, 2008).

<sup>242</sup> *Lead in Drinking Water*, U.S. ENVTL. PROTECTION AGENCY, <http://www.epa.gov/safewater/lead/> (last visited April 26, 2010).

<sup>243</sup> *Id.*

<sup>244</sup> *Id.*



blood pressure.<sup>245</sup> Although the main sources of exposure to lead are ingesting paint chips and inhaling dust, the EPA estimates that ten to twenty percent of human exposure to lead may come from lead in drinking water.<sup>246</sup>

### 1. The Clean Water Act

The original goals of the Clean Water Act (CWA) were to make all United States waters fishable and swimmable by 1983 and to eliminate the discharge of all pollutants into navigable waters by 1985.<sup>247</sup> In order to accomplish this objective, the CWA regulates several types of discharges. At issue in this case are point sources, which include “any discernible, confined and discrete conveyance.”<sup>248</sup> A typical point source would be the discharge pipe from a factory. Point sources are regulated under the National Pollutant Discharge Elimination System (NPDES), which sets stringent limits on a facility’s right to discharge. A discharge of any pollutant in excess of the allotment in the facility’s NPDES permit is a violation of the CWA.<sup>249</sup> If a facility does not have an NPDES permit, any discharge is illegal.<sup>250</sup>

The CWA requires that the EPA enforce the terms of the NPDES permit.<sup>251</sup> In addition, citizens may act as private attorneys general and sue a discharger who operates in violation of its permit.<sup>252</sup> However, unlike the United States Attorney who may bring a suit on behalf of the Sovereign, a citizen must have interests and have been negatively impacted in order to have standing under the act.<sup>253</sup>

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<sup>245</sup> *Id.*

<sup>246</sup> *Id.*

<sup>247</sup> 33 U.S.C. §§ 1251(a)(1)–(2) (2006).

<sup>248</sup> *See* 33 U.S.C. § 1362(14).

<sup>249</sup> 33 U.S.C. § 1311(a).

<sup>250</sup> *Id.*

<sup>251</sup> 33 U.S.C. § 1319.

<sup>252</sup> 33 U.S.C. § 1365.

<sup>253</sup> *Id.*

## 2. Rule 12(b)(1): A Civil Procedure Primer

A motion to dismiss based on Federal Rule of Civil Procedure 12(b)(1) is a challenge to the subject matter jurisdiction of the court, commonly in the form of an attack on the standing of the plaintiff.<sup>254</sup> Rule 12(b)(1) motions come in two forms: first, those that attack the sufficiency of the jurisdictional allegations, and second, those that attack the facts asserted as the basis for jurisdiction.<sup>255</sup> Facial attacks are subject to the same familiar standard as a Rule 12(b)(6) motion: the court must accept as true all well-pled factual allegations and provide all reasonable inferences in the plaintiff's favor.<sup>256</sup> By contrast, when the facts themselves are challenged, "the court is not bound to accept the truth of the allegations in the complaint."<sup>257</sup> The plaintiff bears the burden of establishing the court's jurisdiction by competent proof.<sup>258</sup> And the court may look to evidence beyond the face of the complaint.<sup>259</sup>

### *B. The District Court Opinion*

Pollack's first claims of injury relate to impacts to drinking water.<sup>260</sup> However, the court reasoned that Pollack lives in Highland Park, thirteen miles south of the North Chicago water intakes.<sup>261</sup> Highland Park's water supply comes from intakes different from North

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<sup>254</sup> FED. R. CIV. P. 12(b)(1).

<sup>255</sup> Pollack v. U.S. Dep't of Justice, No. 08 C 320, 2008 WL 4286577, at \*2 (N.D. Ill. Sept. 12, 2008)

<sup>256</sup> *Id.* at \*2 (citing United Phosphorus, Ltd. v. Angus Chem. Co., 322 F.3d 942, 946 (7th Cir. 2002)).

<sup>257</sup> *Id.* (citing Commodity Trend Serv., Inc. v. Commodity Futures Trading Comm'n, 149 F.3d 679, 685 (7th Cir. 1998)).

<sup>258</sup> *Id.*

<sup>259</sup> *Id.*

<sup>260</sup> *Id.* at \*2.

<sup>261</sup> *Id.*

Chicago.<sup>262</sup> In addition, Highland Park’s latest water quality sampling results showed that Highland Park had three sampling sites with lead in excess of fifteen parts per billion (“ppb”), the federal limit for drinking water, but the overall lead level in the city’s drinking water is below that level.<sup>263</sup>

Pollack also contended that North Chicago’s drinking water has a higher concentration of lead, and given the dynamic nature of the lake, there is a real risk that lead from North Chicago will migrate to Highland Park.<sup>264</sup> The court found that, even assuming that the plaintiff’s contention about the movement of water in the lake was accurate, both North Chicago and Highland Park would still have lead levels below the federal limit.<sup>265</sup>

As an alternative injury, Pollack alleged that he experienced aesthetic injuries: (1) the enjoyment he gets from observing the migration of shorebirds and water fowl to and from the Great Lakes watershed is lessened by his concern that the lead munitions will harm the birds; (2) he is less likely to use the public areas along the Illinois portion of Lake Michigan because he fears that the lead munitions at Foss Park and the beach below the range will harm visitors to those areas; and (3) his desire to consume fish from waters of the United States is decreased because he fears that the fish are coming into contact with water contaminated by bullets from North Chicago range.<sup>266</sup>

While the court agreed that there is “no question that injury to aesthetic interests, like enjoying wildlife and the natural environment, can be sufficient to confer standing,” Pollack had nonetheless failed to make a requisite showing of injury-in-fact.<sup>267</sup> An injury-in-fact

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<sup>262</sup> *Id.* at \*2 (citing CITY OF HIGHLAND PARK, 2008 DRINKING WATER QUALITY REPORT 1, <http://www.ci.highland-park.il.us/pdf/pw/waterQualityReport.pdf>) (URL leads to the most recent water quality report).

<sup>263</sup> *Id.*

<sup>264</sup> *Id.* at \*3.

<sup>265</sup> *Id.* at \*3.

<sup>266</sup> *Id.* at \*4.

<sup>267</sup> *Id.* at \*4.

requires more than an injury to a cognizable but abstract interest; it requires that the person seeking redress must be among those injured.<sup>268</sup>

In evaluating his affidavit, the court focused on what Pollack did not say.<sup>269</sup> Pollack did not say that he “(1) watches birds that feed at, nest on or routinely use the land or water near the range and his pursuit is being tarnished by fear that the bullets will harm the birds; (2) has stopped using the land near the range, or uses it less, because of his fears of contamination; or (3) has stopped consuming, or decreased his consumption of, Lake Michigan fish because he fears that the bullets have contaminated it.”<sup>270</sup> The court held that Pollack’s claimed injuries were more of a generalized interest in the health of the Great Lakes, not a specific harm that affected him in any personal way.<sup>271</sup>

### C. The Seventh Circuit Opinion

#### 1. Majority Opinion by Judge Manion

The Seventh Circuit affirmed the dismissal of Pollack’s claims.<sup>272</sup> Judge Manion, writing the opinion, found that Pollack failed to demonstrate injury-in-fact.<sup>273</sup> The majority begins with a citation to the Supreme Court’s most recent standing decision, *Summers v. Earth Island Institute*.<sup>274</sup> Judge Manion focused on limitations of judicial power and avoidance of infringement of the legislative and executive branches.<sup>275</sup>

<sup>268</sup> *Id.* at \*4.

<sup>269</sup> *Id.* at \*4.

<sup>270</sup> *Id.* at \*4.

<sup>271</sup> *Id.* at \*4. The other Blue Eco member’s affidavit was virtually identical to Pollack’s. *Id.* Therefore, because none of the members of Blue Eco had standing, Blue Eco cannot have standing. *Id.*

<sup>272</sup> *Pollack v. U.S. Dep’t of Justice*, 577 F.3d 736, 737 (7th Cir. 2009).

<sup>273</sup> *Id.*

<sup>274</sup> *Id.* at 739.

<sup>275</sup> *Id.*

The court first reviewed several precedents.<sup>276</sup> First is *Summers*, where the Supreme Court held that the vague desire to return to an affected area was insufficient to satisfy the requirements of standing.<sup>277</sup> The majority then discussed *Sierra Club v. Franklin Power*, which found standing for a plaintiff based on her likely exposure to pollutants coming from a plant that would be built.<sup>278</sup> In addition, the court discussed *Friends of the Earth v. Gaston Copper Recycling Corp.*, where the Fourth Circuit held that a plaintiff had standing when he was located downstream of a facility that was violating its permit.<sup>279</sup>

However, the court determined that Pollack's exposure was not as likely as the plaintiffs in *Franklin Power* and *Gaston Copper*. Pollack's distance is much farther than that of the plaintiff in *Gaston Copper*.<sup>280</sup> In addition, according to the court, everybody knows that air pollution can spread the three miles in *Franklin Power*, but the same cannot be said for water pollution.<sup>281</sup> Because Pollack can prove neither that he is downstream of the site of the discharges, nor that the lead will spread the thirteen miles, he lacks an injury in fact.

Taken to the extreme, Pollack's argument for standing would allow anyone on Lake Michigan, even those living 250 miles away, to sue.<sup>282</sup> The majority also held that Pollack's aesthetic injuries are too uncertain to provide standing.<sup>283</sup> His desire to eat fish is similar to the allegations in *Lujan* and *Summers* in that he alleges merely a generalized injury.<sup>284</sup>

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<sup>276</sup> *Id.* at 739–40.

<sup>277</sup> *Id.* (citing *Summers v. Earth Island Inst.*, 129 S. Ct. 1142 (2009)).

<sup>278</sup> *Id.* at 740 (citing *Sierra Club v. Franklin Cnty. Power*, 546 F.3d 918 (7th Cir. 2000)).

<sup>279</sup> *Id.* at 741 (citing *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 546 F.3d 918 (4th Cir. 2008)).

<sup>280</sup> *Id.*

<sup>281</sup> *Id.*

<sup>282</sup> *Id.* at 742.

<sup>283</sup> *Id.* at 742–43.

<sup>284</sup> *Id.*

Pollack also failed to demonstrate that he has an actual aesthetic interest in the affected area because at the time of filing, Pollack had never been to Foss Park, nor did he have any plans to visit.<sup>285</sup> However, Pollack's allegations stated that he enjoys the entire Illinois coastline, or on a larger scale, the Great Lakes watershed.<sup>286</sup> For these reasons, Pollack's interests were too generalized to grant standing.<sup>287</sup> "At bottom [the plaintiffs] appear to seek the simple satisfaction of seeing the [environmental] laws enforced."<sup>288</sup>

## 2. Concurrence by Judge Cudahy

To Judge Cudahy, "[t]his is without question a close case."<sup>289</sup> In general, standing seems to "appear and disappear from one case to the next depending on subtle twists in the allegations, turning between the real and the hypothetical."<sup>290</sup> Judge Cudahy wrote separately to "make the point that the Supreme Court's case law on [the] subject is both unclear in purpose and extraordinarily difficult to reconcile."<sup>291</sup> Standing becomes a particular problem when a citizen-suit provision potentially sets the injury bar below what the Court requires to demonstrate standing.<sup>292</sup>

The CWA provides that "any citizen may commence a civil action on his own behalf against any person . . . who is alleged to be in violation of an effluent standard or limitation under this chapter."<sup>293</sup> The act also incorporates a citizen suit provision, granting standing to

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<sup>285</sup> *Id.* Subsequently, Pollack visited Foss Park; however, the Court held that a plaintiff cannot manufacture standing once the suit has commenced. *Id.* at 743 n.2.

<sup>286</sup> *Id.*

<sup>287</sup> *Id.*

<sup>288</sup> *Id.* (citing *Jaramillo v. Fed. Commc'ns Comm'n*, 162 F.3d 675, 677 (D.C. Cir. 1998)).

<sup>289</sup> *Id.* at 743 (Cudahy, J., concurring).

<sup>290</sup> *Id.*

<sup>291</sup> *Id.*

<sup>292</sup> *Id.*

<sup>293</sup> 33 U.S.C. § 365(a)(1) (2006).

any “person or persons having an interest which is or may be adversely affected.”<sup>294</sup> This provision has been interpreted to confer standing to the constitutional limit.<sup>295</sup>

After reviewing the cases, Judge Cudahy stated: “These statements raise more questions than they answer. What is an ‘affected area’? How do we determine whether someone’s aesthetic or recreational values will be ‘lessened’ other than by their say-so? What counts as a ‘trifle’ sufficient to place someone ‘among the injured’?”<sup>296</sup> “Is Highland Park, thirteen miles away, close enough to be ‘among the injured’?”<sup>297</sup>

Judge Cudahy first probed the majority’s engagement of the relevant case law.<sup>298</sup> He pointed out that Pollack’s facts are similar to those in *Franklin Power*, in that the court cannot determine, from the evidence before it, the extent of the impact of the contamination.<sup>299</sup> Further, he attacked the majority decision as a departure from its precedent in *Franklin Power* by implementing a narrower and more demanding requirement.<sup>300</sup>

Judge Cudahy asserted that the Supreme Court in *Laidlaw* found that affidavits attesting to a reduced use of a natural resource out of a reasonable fear and concern were adequate to document an injury in fact.<sup>301</sup> However, in this case, there is a factual challenge to Pollack’s standing.<sup>302</sup> Because it is undisputed that the defendants regularly discharge lead into the lake, Judge Cudahy found that the narrower

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<sup>294</sup> 33 U.S.C. § 365(g).

<sup>295</sup> *Pollack*, 577 F.3d at 743 (citing *Friends of the Earth v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 152 (4th Cir. 2000)).

<sup>296</sup> *Id.* at 744.

<sup>297</sup> *Id.*

<sup>298</sup> *Id.*

<sup>299</sup> *Id.*

<sup>300</sup> *Id.* at 745.

<sup>301</sup> *Id.* (citing *Friends of the Earth v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 159 (4th Cir. 2000)).

<sup>302</sup> *Id.*

question is whether Pollack had a reasonable fear that his drinking water was unsafe.<sup>303</sup>

Judge Cudahy then analyzed the majority's fact-finding and came to the conclusion that the majority was simply incorrect in its assessment of the flow of the lake.<sup>304</sup> Further, it served no purpose to take Pollack's standing arguments to the extreme.<sup>305</sup>

According to Judge Cudahy, the focus of this exercise should have been the evidence that the defendants presented to refute Pollack's allegations.<sup>306</sup> Judge Cudahy argued that the defendants proved that Highland Park draws its water from a discrete area of the lake different from the area presumably affected by the firing range.<sup>307</sup> In addition, Highland Park attributes the lead in its own system to corrosive pipes, not water pollution.<sup>308</sup> In this case, the defendants were able to demonstrate that the plaintiff's fears were not "reasonable."<sup>309</sup>

Judge Cudahy agreed with the majority that Pollack's affidavit did not give standing with regard to his aesthetic injury.<sup>310</sup> Because Pollack did not allege that he uses the affected area, his affidavit alleged too generalized of an injury to support standing.<sup>311</sup>

### III. ANALYSIS

Standing is used by judges to ensure that the parties have a reason to be in court. It is used to weed out the plaintiffs with too little at issue. In the environmental context, this often leaves the activist outside of the courthouse. At the same time, it prevents sham plaintiffs

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<sup>303</sup> *Id.* at 743.

<sup>304</sup> *Id.* at 745.

<sup>305</sup> *Id.* at 746.

<sup>306</sup> *Id.*

<sup>307</sup> *Id.*

<sup>308</sup> *Id.*

<sup>309</sup> *Id.*

<sup>310</sup> *Id.*

<sup>311</sup> *Id.*



from entering a case that may allow a polluter to escape the full weight of its liabilities.

*A. Determining the Appropriate Standard of Review When the Facts Themselves are Challenged*

Standing challenges are generally seen through three lenses: facial, factual, and summary judgment. At one end, where the defendant brings a facial attack, the court must merely look at the allegations and determine whether the plaintiff has alleged the necessary elements to support its standing. This process is similar to the familiar Rule 12(b)(6) Motion to Dismiss. In this case, the court should assume that all of the allegations are true and take all reasonable inferences in favor of the plaintiff.<sup>312</sup> Courts have even gone so far as to assume that a general allegation of harm will encompass a specific and concrete injury under this standard.<sup>313</sup>

At the opposite end is *Lujan*, where standing was challenged by a motion for summary judgment.<sup>314</sup> In this case, the Court demanded concrete evidence of a future injury.<sup>315</sup> This standard was appropriate because the harms to the environment were a substantial distance from the plaintiffs' homes, which made it reasonable for the Court to infer that the alleged harms to the plaintiffs would not actually occur because it was unlikely that the plaintiffs would make the trip again.<sup>316</sup> The *Lujan* approach results in a mini-trial by affidavit, which places the burden on the plaintiff to prove its evidence to the judge. It presents a higher hurdle for the plaintiff than the traditional summary judgment standard, where the plaintiff survives if it can show that a reasonable jury *could* find in its favor. Application of the *Lujan*

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<sup>312</sup> See *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 333 (2d Cir. 2009).

<sup>313</sup> See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992); *American Electric Power*, 582 F.3d at 333; *Comer v. Murphy Oil USA*, 585 F.3d 855, 859 (5th Cir. 2009).

<sup>314</sup> See *Lujan*, 504 U.S. at 562–64.

<sup>315</sup> See *id.*

<sup>316</sup> See *id.* at 579–80 (Kennedy, J., concurring).

standard has allowed courts to pre-litigate claims and act as fact-finders, effectively removing the role of the jury from these cases. However, as argued by the dissent, this standard does not truly fit within the summary judgment framework.<sup>317</sup> It is dangerous to apply, especially where the elements of standing are necessarily intertwined with the merits of the case, because it requires too much from the plaintiff by shifting the burden of proof before trial.

Adding to the confusion is *Laidlaw*, where the court broadened standing by evaluating subjective harms. *Laidlaw* is laudable because it opens the courthouse to environmental plaintiffs and effectively gives meaning to the words that Congress provided in the citizen suit provisions of the CWA. The rule in *Laidlaw* is that plaintiffs will have standing if their reasonable fears of contamination adversely affect their use and enjoyment of nature.<sup>318</sup> This provides an acceptable objective method of evaluation for alleged subjective harms.

At the same time, *Laidlaw* demonstrates the problem with judicial fact-finding. *Laidlaw* remains a missed opportunity in this respect. In this case, the Court began with the factual proposition, found by the district court, that no measurable injury to the environment occurred as a result of the defendant's violation of the CWA. This finding is in contrast with the will of Congress, which declared that any violation is an injury.<sup>319</sup> The Court could have addressed this fundamental fact-finding directly and held that any violation of the CWA is an injury because Congress says it is. It is Congress that has the power to define new injuries.<sup>320</sup> However, the Court tiptoes around this finding of fact and instead finds standing based on a reasonable fear of contamination.

The failure of the majority to address this issue was pointedly raised in dissent by Justice Scalia, who argued that if there is no harm,

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<sup>317</sup> See *id.* at 589–90 (Blackmun, J., dissenting).

<sup>318</sup> See *Friends of the Earth, Inc. v. Laidlaw Env'tl Serv. (TOC), Inc.*, 528 U.S. 167, 183–84 (2000).

<sup>319</sup> See *id.* at 174 (citing Clean Water Act, 33 U.S.C. §§ 1342, 1365).

<sup>320</sup> See *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in the judgment).

there can be no foul.<sup>321</sup> The problem with this argument, in this case, is that Congress legislated the harm and called the discharge of mercury in excess of a permit allowance a foul. It is not for a district court to find facts contrary to a lawful enactment of the legislative branch. However, *Laidlaw* remains the law and has led to much confusion, especially for Steven Pollack.

The Court again addressed standing in *Summers*.<sup>322</sup> This time, the Court required the plaintiff to allege specific facts in order to survive a motion to dismiss. In *Summers*, Justice Scalia found that because the amount of challenged timber sales was so small in relation to the total amount of preserved forest, the likelihood that a given timber sale would impact any of the plaintiffs was incredibly small. This approach is similar to the approach taken in *Lujan*, which demanded concrete plans to visit a project site. This represents a weak factual comparison by the Court. Justice Breyer, writing in dissent, argued that the probabilities actually favor the plaintiffs: based on the sheer number of member plaintiffs, it was very likely that at least one of the members will be impacted by a timber sale. This probability alone should have provided standing for the plaintiffs under the facts of this case.

Justice Kennedy, again in concurrence, could have voted and decided this case. However, he explained that the burden-shifting was again appropriate because the injury, the right to comment on a given timber sale, was procedural in nature.<sup>323</sup> Presumably, Justice Kennedy required a greater showing for a procedural injury because Congress has spoken on the causation and redressibility issues by lowering the bar on those prongs. However, he hinted at the possibility that the result would be different if the injury claimed was more than just a right to be heard.

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<sup>321</sup> *Laidlaw*, 528 U.S. at 198–99.

<sup>322</sup> See *Summers v. Earth Island Inst.*, 129 S.Ct. 1142 (2009).

<sup>323</sup> *Id.* at 1153 (Kennedy, J., concurring).

*B. Application of the Standing Doctrine to Pollack v. United States*

By demanding specific facts, the Seventh Circuit applied an unfair standard to Steven Pollack's affidavits.<sup>324</sup> This burden-shifting standard is only appropriate where the likelihood of injury is small. The environmental injury in this case is not on the other side of the world. Pollack lives within thirteen miles of the alleged contamination. Compared to the plaintiffs in *Lujan*, Pollack merely has to hop into his car to be exposed. Under Justice Kennedy's concurrence in *Lujan*, this level of burden-shifting is not appropriate when the proximity to the harm is that close.<sup>325</sup> Nor is Pollack attempting to hit a moving target, like the plaintiffs in *Summers*. In fact, based on the proximity and certainty of the environmental harm, the burden should actually shift in the other direction, favoring Pollack.<sup>326</sup>

*Pollack* is factually similar to *Summers*, in that the potentially affected area is very large, but the actually affected area is very small. In *Summers*, the national forests covered millions of acres, but the challenged timber sales accounted for a very small portion of the forest. Similarly, the Great Lakes are a vast expanse of fresh water, and the government's actions impacted only a small portion of the lakes. However, the factual similarities end there. *Summers* is distinguishable because there, the possibility of harm was far from certain to happen, and it was even more difficult to pinpoint where it would happen if it did. By contrast, the government's actions in *Pollack* had already happened in a discrete location, less than twenty minutes by car from Pollack's home.<sup>327</sup>

More importantly, Pollack's alleged harms are not procedural in nature. Procedural injuries relate to information-gathering, such as the right to comment on a proposed agency action or the requirement that one agency consult with another to help it determine whether its

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<sup>324</sup> *Pollack v. U.S. Dep't of Justice*, 577 F.3d 736, 742 (7th Cir. 2009).

<sup>325</sup> *See Lujan*, 504 U.S. at 579–80 (Kennedy, J., concurring).

<sup>326</sup> *Compare Lujan*, 504 U.S. 555 *with Pollack*, 577 F.3d 736.

<sup>327</sup> *Compare Summers v. Earth Island Inst.*, 129 S.Ct. 1142 (2009) *with Pollack*, 577 F.3d 736.

actions will impact endangered species.<sup>328</sup> Pollack has alleged that the federal government illegally dumped lead into Lake Michigan in violation of the CWA.<sup>329</sup> Pollack has a statutory right to clean water under the CWA, and Congress has declared that any violation of the CWA is an injury. There is nothing procedural about it. And again, according to Justice Kennedy's concurrence, this time in *Summers*, burden-shifting is not the appropriate standard.<sup>330</sup>

Under the facts of this case, Pollack alleged that he was exposed to elevated levels of lead, above the ambient levels of the lake, in his drinking water. This is a particularized injury, meeting the first part of the test.

The problem with standing in this case is actually the issue of causation and redressibility.<sup>331</sup> By citing the City of Highland Park's water quality report, the government argued that it did not cause the increases in lead in Pollack's drinking water. In response, Pollack failed to provide anything more than conclusory allegations to support his claims of causation. Further, because Pollack could not show that the removal of the lead source would decrease the amount of lead in his drinking water, his injury was not redressible. Pollack was unable to point to any question of fact with regard to this allegation. At a typical summary judgment hearing, the court would enter summary judgment for the government. Therefore, in this case, the dismissal of Pollack's claims relating to drinking water impacts was appropriate, albeit under the wrong standard.

Similarly, the Seventh Circuit applies this unfair standard to Pollack's aesthetic injuries. Although they are also not procedural injuries, the court again demanded concrete allegations, misapplying

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<sup>328</sup> Compare *Summers*, 129 S.Ct. 1142 (injury includes right to comment on timber sales) with *Pollack*, 577 F.3d 736 (injury includes exposure to a toxic chemical).

<sup>329</sup> *Pollack*, 577 F.3d at 741.

<sup>330</sup> See *Summers*, 129 S.Ct. at 579-80 (Kennedy, J., concurring).

<sup>331</sup> See *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 345-47 (2d Cir. 2009).

*Summers* to allow it to read Pollack's affidavit into absurdity.<sup>332</sup> This approach is clearly at odds with the Ninth Circuit's decision in *Center for Biological Diversity v. Kempthorne*.<sup>333</sup> Factually, the cases are the same: a group of environmental plaintiffs challenge the actions of the government that affect a large body of water. Based on the early posture of the case, the court should assume all allegations to be true and give the plaintiff the benefit of all reasonable inferences.<sup>334</sup> More specifically, the court should assume that general allegations encompass more specific allegations.<sup>335</sup> Pollack's use of the Illinois portion of the coast of Lake Michigan would include Foss Park, not the entire seventy-plus-mile coastline. Pollack's enjoyment in observing wildlife in the Great Lakes region would include those migratory birds who fly south in the winter and are exposed to lead before crossing Pollack's path in Highland Park. And as for Pollack's desire to eat freshwater fish, the court should have found that this necessarily includes Lake Michigan fish, including those exposed to lead.

In fairness, it is not the court's burden to produce appropriate affidavits. However, the court took the time to address what could have been alleged to prove his standing. Despite the fact that the district court entered its dismissal and the case was appealed and argued before *Summers*, the court did not give a second thought to applying *Summers* to this case. Pollack's affidavits, which focused on his reasonable fears of impacts, were clearly tailored to the Court's standard in *Laidlaw*. A better course of action would have been to remand and allow Pollack to resubmit his affidavit for conformance with *Summers*.

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<sup>332</sup> See Pollack v. U.S. Dep't of Justice, 577 F.3d 736, 742 (7th Cir. 2009) ("Taken to its extreme, Pollack's argument would permit any person living on or near Lake Michigan to assert that he has been harmed by the bullets, because the lead could potentially have been carried to every part of the lake.").

<sup>333</sup> See 588 F.3d 701 (9th Cir. 2009).

<sup>334</sup> *Id.* at 711.

<sup>335</sup> See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992); *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 333 (2d Cir. 2009); *Comer v. Murphy Oil USA*, 585 F.3d 855, 859 (5th Cir. 2009).

### *C. Use of State Courts as an Alternate Remedy*

For every wrong, there should be a right. This is a fundamental principal of many state constitutions.<sup>336</sup> It is even truer in the case of environmental harms, where the fish and trees cannot march into court to protect their rights. Environmentalists may find friends in some state court systems. A litigant who lacks standing in federal court may find redress in the state court system by suing his or her own state. *Massachusetts v. EPA* has been widely read as finding a special right of the state to bring an action on behalf of its citizens.<sup>337</sup> Under the right circumstances, an environmental plaintiff may be able to force the hand of his state.

Notably, in *Pollack*, the court failed to consider whom Pollack sued. Pollack sued the President, who is both responsible for violating and enforcing the law. This case set up an interesting conflict of interest within the government; however, if the government is taking Pollack's water, Pollack should be compensated.<sup>338</sup> Takings problems are often brought to the courts.

Therefore, one seeking to have environmental laws enforced can possibly muster standing by suing the state and alleging that the state failed to protect his interests. Then, whether by settlement or judgment, the state could be forced—by its own courts—to file an action against the polluter. Further, standing can be found under the state's special solicitude.

Additionally, extending this "special solicitude" to larger non-governmental organizations (NGOs) may provide a better way to support standing. Many people join NGOs precisely because they feel that their government is failing to protect their environmental interests.

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<sup>336</sup> See, e.g., ILL. CONST. art. I, § 12 ("Every person shall find a certain remedy in the laws for all injuries and wrongs which he receives to his person, privacy, property or reputation. He shall obtain justice by law, freely, completely, and promptly.").

<sup>337</sup> See, e.g., *American Electric Power*, 582 F.3d at 337-38.

<sup>338</sup> See U.S. CONST. amend. V ("... nor shall private property be taken for public use, without just compensation.").

The commonality of interest among a diverse body of membership makes it more likely that the group as an entity will be impacted. Additionally, that commonality of interest may make many “non-concrete” future plans more concrete. The probabilistic injury requirement is not as persuasive when applied to an individual or small group. However, with larger groups, there may be more members than certain states have citizens. In these cases, it is more probable that a member of Sierra Club will be impacted than a citizen of Vermont.<sup>339</sup> However, the state of Vermont would have standing, where the Sierra Club would not. At the very least, a suit on behalf of a large environmental group should swing the probabilities and not require concrete plans like in *Lujan* or *Summers*.

#### *D. Is Standing Still Relevant?*

Whether standing is still relevant seems to be a question that no one asks before reciting the rule from *Lujan*. Fundamentally, the standing doctrine has lost its purpose. Originally developed to prevent rogue courts from declaring acts of Congress unconstitutional, it is now more often used to frustrate the will of individuals attempting to enforce the acts of Congress. In general, the environmental plaintiff will sue because he feels that the executive, usually the EPA, has failed to enforce a given statute or regulation.<sup>340</sup> He does not seek to invalidate an act of Congress itself.

Standing is constitutional in nature, but it is not itself of the Constitution. It is common law and nothing more. Properly understood, standing is the judiciary interpreting its role under the Constitution. Congress is equally allowed to interpret the Constitution, and it has clearly done so by passing environmental statutes. Under these statutes, Congress has allowed citizens to enforce these provisions. Despite the clear intent of Congress to change the common

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<sup>339</sup> Compare the Sierra Club, with over 700,000 members (*Summers v. Earth Island Inst.*, 129 S.Ct. 1142, 1151 (2009)), with Vermont, having 631,760 citizens, (*National and State Population Estimates*, U.S. CENSUS BUREAU, <http://www.census.gov/popest/states/NST-ann-est.html> (last visited Apr. 26, 2010)).

<sup>340</sup> *E.g.*, *Lujan v. Defenders of Wildlife*, 504 US. 555 (1992).



law where the environment is concerned, the courts continue to apply the same common law of standing to these new statutory rights.

Additionally, science has improved and has been incorporated into the laws. We have a better understanding of the complexity and interconnectedness of our natural world than we had during the New Deal or even at the first Earth Day. We now understand how the aquatic systems interconnect and how greenhouse gas emissions can affect an entire planet. Despite all of this, courts have refused to recognize environmental nexus harms.

Maybe it is time to retire standing as a hurdle in environmental cases. It served well in preventing a few activist judges from frustrating the will of Congress, but it has now outlived its usefulness. As applied, standing allows these same types of activist judges to override the careful deliberations of Congress by reasoning that a given plaintiff does not fall within a radius of injury. In many cases, standing is used to pre-litigate the fundamental elements of a case. The courts pay lip service to the requirements that the burden of proof for standing is not the same as for negligence causation or injury, but something lower. However, in many instances, the courts require a higher burden and shift it to the plaintiffs earlier in the litigation.

In addition, all too often, standing is confused with the political question doctrine, with the court avoiding the appearance that it is interfering with the executive's discretionary decision-making.<sup>341</sup> However, most traditional environmental cases no longer pose a political question. Congress has already spoken. Because Congress has spoken so clearly on the issue of environmental contamination of our nation's air, water, and land, the political question doctrine is simply inapplicable to these cases.

Finally, environmental settlements may be set aside if it can be shown that there was a lack of prosecution by the plaintiff.<sup>342</sup> This prevents sham suits by requiring the defendant to ensure that there is a

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<sup>341</sup> See, e.g., *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309 (2d Cir. 2009) (greenhouse gases do not present a political question).

<sup>342</sup> See, e.g., *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs. (TOC), Inc.*, 528 U.S. 167, 177 (2000).

real plaintiff. No longer must the court take this role. Therefore, without the historic considerations supporting the doctrine of standing in the environmental context, standing should be retired, as it is an impediment to environmental plaintiffs suing to protect our air, water, and other natural resources.

### CONCLUSION

Despite an impressive catalogue of precedent, the application of standing remains haphazard. Moving forward, courts need to separate actual physical injuries from procedural injuries. The CWA provides a right to water free from unlawful discharges; NEPA, on the other hand, provides parties with the right to review and comment on proposed actions. Under *Lujan* and *Summers*, CWA violations should be subject to a different, less stringent standard.

Second, standing is far from certain; however, courts need not engage the facts of the case to make appropriate decisions because aesthetic injuries provide a subjective injury. The plaintiff is the only party with knowledge of the areas that it has used in the past, as well as the areas that it intends to use in the future. The appropriate legal standard is whether a reasonable jury *could* find an injury.

Third, if all else fails, an environmental plaintiff may seek a remedy at the state level. Many state constitutions profess to provide their citizens with a right to every wrong. Under the right set of circumstances, this may allow a plaintiff citizen to sue his government in order to force the state to protect its own environmental interests; in doing so, the plaintiff gains the state's special solicitude to garner standing.

Finally, although it remains highly contested, standing is no longer relevant in the context of traditional environmental claims. The doctrine, which was originally developed to protect Congress from the judiciary itself, has now been hijacked by the executive to avoid the will of Congress. Additionally, Congress, interpreting the Constitution for itself, has clearly spoken on most environmental issues. The courts should defer to Congress, instead of allowing outdated conventions of

common law to prevent the stated purposes of improving the environmental quality of this country.