



2001

## Stand By Me: The Fourth Circuit Raises Standing Requirements in Friends of the Earth, Inc. v. Gaston Copper Recycling Corp. - Just as Long as You Stand, Stand by Me

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### Recommended Citation

Amanda Masucci, *Stand By Me: The Fourth Circuit Raises Standing Requirements in Friends of the Earth, Inc. v. Gaston Copper Recycling Corp. - Just as Long as You Stand, Stand by Me*, 12 Vill. Envtl. L.J. 171 (2001).

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STAND BY ME:  
THE FOURTH CIRCUIT RAISES STANDING  
REQUIREMENTS IN *FRIENDS OF THE EARTH, INC. v.*  
*GASTON COPPER RECYCLING CORP.*

*JUST AS LONG AS YOU STAND, STAND BY ME*<sup>1</sup>

I. INTRODUCTION

Congress created the Federal Water Pollution Control Act of 1972 (“CWA”)<sup>2</sup> because of national outrage and disgust over the condition of the nation’s waters.<sup>3</sup> CWA marked a new chapter in the quest to eliminate water pollution by including a citizen suit provision that allows citizens to bring suit for violation of an effluent limitation and discharge permit.<sup>4</sup> The success of a citizen suit depends upon whether an organization or person is able to establish standing by fulfilling the requirements set forth in Article III of the United States Constitution.<sup>5</sup>

The various interpretations of the standing requirement, however, have resulted in inconsistent holdings throughout the circuit courts.<sup>6</sup> The United States Court of Appeals for the Fourth Circuit, for example, chose not to “stand by” its sister circuits on the requirements of organizational and representational standing in a cit-

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1. BEN E. KING, *Stand By Me*, ON THE BEST OF BEN E. KING (CURB Records 1993).

2. Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1374 (1997). For a further discussion of CWA, see *infra* notes 19-52 and accompanying text.

3. See Al Gore, *Clean Water Act Remarks: The Clean Water Act A Snapshot of Progress in Protecting America's Waters* (visited Sept. 25, 1999) <<http://www.epa.gov/owow/cwa/25report.html>> [hereinafter *Clean Water Act Remarks*] (providing CWA was response to growing public health concern for water pollution).

4. See John Dolgetta, Notes and Comments, *Friends of The Earth v. Crown Central Petroleum: The Surrogate Enforcer Must Be Allowed to “Stand Up” For The Clean Water Act*, 15 PACE ENVTL. L. REV. 707, 710 (Summer, 1998) (explaining Congress created citizens suit provision because it viewed public participation as essential to CWA’s success). For a further discussion of citizens suits, see *infra* notes 46-52 and accompanying text.

5. See generally *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) (noting party who invokes federal jurisdiction bears burden of establishing standing). For further discussion of Article III and the doctrine of standing, see *infra* notes 53-77 and accompanying text.

6. For background on the judicial confusion surrounding standing, see *infra* notes 78-95 and accompanying text.

izen suit, adding to the pervasive confusion surrounding the standing doctrine.<sup>7</sup>

This Note considers the Fourth Circuit case of *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*<sup>8</sup> Section II provides a background of CWA and the requirements for establishing individual and representational standing and injury in fact, while also describing the judicial confusion surrounding those requirements.<sup>9</sup> Section III summarizes the facts of the case.<sup>10</sup> Section IV details the rationale of the Fourth Circuit's holding and provides a critical analysis of the circuit's contribution to the confusion surrounding the standing requirements.<sup>11</sup> Finally, section V discusses the impact that *Gaston Copper's* holding will have on future standing jurisprudence.<sup>12</sup>

## II. BACKGROUND

In recent years, federal circuit courts have debated the general requirements of the standing doctrine.<sup>13</sup> The standing requirement derives from Article III of the Constitution, which provides that courts should hear only "cases and controversies."<sup>14</sup> To estab-

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7. See *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 179 F.3d 107, 116 (4th Cir. 1999) (holding organizations did not demonstrate injury in fact or fairly traceable requirements needed to establish representational standing).

8. 179 F.3d 107 (4th Cir. 1999).

9. For a discussion of the standing doctrine, see *infra* notes 13-18, 53-100 and accompanying text.

10. For a discussion of the facts of *Gaston Copper*, see *infra* notes 101-22 and accompanying text.

11. For narrative and critical analyses of the *Gaston Copper* decision, see *infra* notes 105-62, 172-74 and accompanying text.

12. For a discussion of the impact of the *Gaston Copper* decision on federal jurisprudence, see *infra* notes 197-205 and accompanying text.

13. See Patrick McDermott, Note, *Environmental Groups, Aesthetic Injury, and Citizens Suits: Standing Takes a Stand Under PIRG v. Powell Duffryn Terminals*, 12 J. ENERGY NAT. RESOURCES & ENVTL. L. 521, 542 (1992) (stating "[E]nvironmental group standing is in a state of transition."); see also Arthur G. Carine, III, Note, *The Clean Water Act, Standing, and the Third Circuit's Failure to Clean Up the Quagmire: Public Interest Research Group of New Jersey, Inc. v. Powell Duffryn Terminals, Inc.*, 4 VILL. ENVTL. L.J. 179, 205-06 (1993) (remarking that Third Circuit, in *Public Interest Research Group of New Jersey, Inc. v. Powell Duffryn Terminals, Inc.*, 913 F.2d 64 (3d Cir. 1990), failed to clarify needed requirements surrounding standing doctrine and only added to growing "standing quagmire").

14. See *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471 (1982) (citing "Article III of the Constitution limits the 'judicial power' of the United States to the resolution of 'cases' and 'controversies.'"); *Sierra Club v. Morton*, 405 U.S. 727, 732 (1972) (noting standing analysis focuses on party having personal stake in case or controversy); *Natural Resources Defense Council, Inc. v. Texaco Refining and Marketing, Inc.*, 2 F.3d 493, 504-05 (4th Cir. 1992) (asserting that party's interest in case or controversy determines their standing); *Public Interest Research Group of New Jersey*,

lish a case or controversy for standing, plaintiffs in all cases must suffer an "injury in fact," the injury must be "fairly traceable" to the defendant's action and a decision in favor of the plaintiff must be "likely" to redress the injury.<sup>15</sup> If the plaintiff in the citizen suit is an organization or association, the organization has standing only if one or more of the organization's members possesses individual standing to bring the suit.<sup>16</sup> Because the United States Supreme Court has laid only the basic groundwork for the standing requirements, circuit courts have had to fill in the gaps, resulting in both inconsistent holdings and forum shopping.<sup>17</sup> To add to this confusion, CWA contains a special citizen suit provision, which has its own idiosyncratic standing requirements.<sup>18</sup>

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Inc. v. Powell Duffryn Terminals, Inc., 913 F.2d 64, 70 (3d Cir. 1990) (emphasizing party must assert sufficient stake in outcome of case or controversy); see also Dolgetta, *supra* note 4, at 714 (commenting that Congress mandates citizens suits under CWA fulfill Article III standing requirements).

15. See *Marshall v. Meadows*, 105 F.3d 904, 906 (4th Cir. 1997) (asserting three components of standing plaintiff must establish to bring suit are injury, causation and redressability).

16. See *Public Interest Research Group of New Jersey v. Magnesium Elektron, Inc.*, 123 F.3d 111, 119 (3d Cir. 1997) (noting that to meet requirements of representational standing, organizations need only show their members possess "indicia of membership" in their organizations); cf. *Carine*, *supra* note 13, at 183 (providing other requirements exist where court considers limitation prudent to case or when Congress requires that plaintiff be within "zone of interest" protected by specific legislation). See generally Kristen L. Melton, *Recent Developments, Friends of the Earth, Inc. v. Chevron Chemical Co.: The United States Court of Appeals for the Fifth Circuit Extends Associational Standing to a Nonmembership, Nonprofit Corporation*, 72 TUL. L. REV. 1875, 1880 (1998) (stating representational standing is area of standing doctrine where courts modify prohibition of claims on basis of third parties' rights).

17. See *Friends of the Earth, Inc. v. Laidlaw*, 149 F.3d 303, 306 (4th Cir. 1998) (noting standing has always been critical part of case or controversy requirement of federal jurisdiction); see also *Natural Resources Defense Council, Inc. v. Watkins*, 954 F.2d 974, 978 (4th Cir. 1992) (commenting that organizations may have standing in federal courts to bring suit based on either injury to organization in its own right or as representative of its members who have been injured). For further discussion of the Supreme Court's ruling on standing requirements and circuit courts' interpretations of these requirements, see *infra* notes 135-67, 171-74 and accompanying text.

18. See *Friends of the Earth, Inc. v. Crown Central Petroleum Corp.*, 95 F.3d 358, 360-61 (5th Cir. 1996) (asserting in citizens suits under CWA, plaintiffs must demonstrate that "a defendant has (1) discharged some pollutant in concentrations greater than allowed by its permit; (2) into a waterway in which the plaintiffs have an interest that is or may be adversely affected by the pollutant; and that (3) the pollutant causes or contributes to the kinds of injuries alleged by the plaintiffs.").

## A. Clean Water Act

By the early 1970s, Congress found its previous attempts to regulate water pollution ineffective.<sup>19</sup> CWA is a direct response to the shortcomings of prior legislation that attempted to eliminate pollutants from navigable waters.<sup>20</sup> Congress enacted CWA in 1972 to remedy the shortcomings of prior legislation.<sup>21</sup> By enacting CWA, Congress created “the primary federal law that protects the health of our nation’s waters, including lakes, rivers and coastal areas.”<sup>22</sup> Specifically, Congress intended CWA to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”<sup>23</sup> CWA’s most radical departure from prior legislation was its shift in focus from water quality standards to effluent limitations.<sup>24</sup>

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19. See Dolgetta, *supra* note 4, at 710 (providing that Congress created CWA in response to growing public concern over water pollution); see also Michael I. Krauthamer, Note and Comment, Public Interest Research Group v. Magnesium Elektron, Inc.: *Undetectable Injury, A Loophole in Citizen Suit Standing*, 50 ADMIN. L. REV. 837, 852-53 (Fall, 1998); see also *Clean Water Act Remarks*, *supra* note 3 (comparing today’s figure that two-thirds of nation’s waters are safe for recreational activities with 1970s’ figure of only one-third).

20. See 33 U.S.C. § 1251 (explaining coverage of CWA extends to all waters and waterways of United States and discharges into waterways); see also Dolgetta, *supra* note 4, at 710 (stating deficiencies in water quality standards resulted from difficulties in establishing reliable and enforceable effluent limitations); Krauthamer, *supra* note 19, at 852-53 (noting legislation prior to CWA relied on assessing water quality standards by testing water samples where effluents flowed rather than implementing effluent limitations); Stanley A. Millan, *Fifth Circuit Symposium: Environmental Law: Fifth Circuit Decisions on Water, Waste, and States’ Rights*, 44 LOY. L. REV. 415 (1998) (discussing CWA programs designed to protect nation’s waters); Carine, *supra* note 13, at 180-81 (providing Congress’ intent behind CWA was to restore national waterways and to eliminate discharge of effluents from navigable waters by 1985).

21. See 33 U.S.C. § 1251 (stating goal of CWA is to repair damage inflicted upon Nation’s waterways); see also Public Interest Research Group of New Jersey, Inc. v. Powell Duffryn Terminals Inc., 913 F.2d 64, 68 (3d Cir. 1990); *Clean Water Act: Federal Water Pollution Control Act* (visited Sept. 21, 1999) <<http://www.manhattan.edu/engineer/envn/matysuk/env141/cwa2.htm>> (detailing CWA’s purpose and scope). See generally *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co.*, 73 F.3d 546, 564-69 (5th Cir. 1996) (remarking on amount of discretion Congress gave EPA in interpreting and enforcing CWA).

22. *Clean Water Act Remarks*, *supra* note 3 (quoting Vice President Al Gore’s remarks upon 25th Anniversary of CWA).

23. 33 U.S.C. § 1251 (providing national goals and objectives of CWA include restoring and maintaining national water quality); see also *Powell Duffryn Terminals*, 913 F.2d at 68 (noting one goal of CWA to eliminate effluent discharge into navigable waters by 1985).

24. See Carine, *supra* note 13, at 180-81 (discussing alteration in pollution control from water quality standards to effluent limitations); see also Krauthamer, *supra* note 19, at 853 (providing CWA now relies on effluent limitations rather than water quality standards to control water pollution).

### 1. *Effluent Limitations*

Rather than using water quality standards to measure pollution, CWA implemented effluent limitations.<sup>25</sup> Congress thereby shifted the focus of environmental legislation from detection to prevention.<sup>26</sup> Accordingly, “the ultimate goal of the CWA is to focus attention and resources on controlling the amount of pollution that an entity can discharge rather than attempting to control and measure pollution when it has already entered the waterways.”<sup>27</sup> Section 301(a) of CWA strictly forbids the discharge of pollutants unless authorized by a National Pollutant Discharge Elimination System (“NPDES”) Permit obtained from either the Environmental Protection Agency (“EPA”) or a state agency with a federally approved discharge program.<sup>28</sup>

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25. See Dolgetta, *supra* note 4, at 710-11 (commenting that CWA’s implementation of effluent limitations focuses attention on controlling types and concentration of effluents entity can discharge); see also Krauthamer, *supra* note 19, at 853 (stating Congress requires Discharge Monitoring Reports (DMRs) to observe and regulate amounts of effluents discharged into waters); *National Pollutant Discharge Elimination System (NPDES) Permitting Program* (visited Sept. 25, 1999) <[wysiwyg://89/http://www.epa.gov/owm/npdes.htm](http://www.epa.gov/owm/npdes.htm)> [hereinafter *NPDES Permitting Program*] (listing common effluents discharged into waters as: human wastes, laundry and bath waters, oil and grease, toxic chemicals, metals and pesticides).

26. See Carine, *supra* note 13, at 180-81 (noting prior to CWA, focus of water pollution control centered on water quality standards); see also Dolgetta, *supra* note 4, at 710 (providing water quality standards resulted in tests that could not be defended in court because of imprecise models that could not provide correct effluent limitations).

27. *Sierra Club v. Simkins Industries, Inc.*, 847 F.2d 1109, 1111 (4th Cir. 1988) (remarking that CWA forbids effluent discharge without permit obtained from either EPA or authorized state agency); see also Dolgetta, *supra* note 4, at 710-11 (explaining NPDES permit system was created to administer change in water pollution control from water quality standards to effluent limitations).

28. See 33 U.S.C. § 1311(a) (criminalizing discharge of effluents without obtaining permit). This section of CWA also provides a timetable for achieving the objectives and goals with regard to the elimination of effluent discharges. See *id.* (providing specific dates such as July 1, 1977 for setting effluent limitations for point sources and publicly owned treatment works in existence); see also *Public Interest Research Group of New Jersey, Inc. v. Powell Duffryn Terminals Inc.*, 913 F.2d 64, 68 (3d Cir. 1990) (stating NPDES permits are required under CWA for person to discharge effluents into navigable waters). A NPDES permit not only allows for the discharge of effluents into waters, but also places limitations on the types and concentrations of the effluents. See *id.* (explaining person who complies with permit parameters also complies with CWA); see also *Simkins*, 847 F.2d at 1111 (noting effluent discharge is forbidden unless point source received permit from EPA or authorized state agency); Carine, *supra* note 13, at 181 (stating CWA forbids discharge of effluents without NPDES permit and additionally requires installation of equipment to monitor pollution levels); see also *Major Environmental Law: Clean Water Act* (visited Oct. 6, 1999) <<http://www.epa.gov/region5/defs/html/cwa.htm>> [hereinafter *Major Environmental Law*] (noting CWA bestowed authority to EPA to set effluent standards on industry basis and to determine standards for

NPDES permits provide detailed limitations on the types and strength of pollutants a permit holder may discharge into waters.<sup>29</sup> Essentially, NPDES permits tailor the general requirements of CWA into specific guidelines for each entity's discharge of pollutants.<sup>30</sup> Permits also require permit holders to regulate effluent discharges, file test results and other data with EPA, and cooperate with state agencies to make Discharge Monitoring Reports ("DMRs") and other information available to the public.<sup>31</sup>

A violation of a NPDES permit, regardless of whether a state or federal official issued the permit, is a violation of CWA which subjects the permit holder to liability under Section 505 of the Act.<sup>32</sup> CWA also compels its permit holders to install and maintain the equipment necessary to test and monitor effluent discharges.<sup>33</sup>

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effluents in surface waters); *NPDES Permitting Program*, *supra* note 25 (commenting that Congress intended NPDES to "protect human health and the environment").

29. See *Powell Duffryn Terminals*, 913 F.2d at 68 (noting NPDES permits state parameters on type and concentration of effluents permit holder may discharge); see also Carine, *supra* note 13, at 181 (commenting that permit stipulates permit holder must install and maintain equipment on premises to test and monitor effluent pollution level); *NPDES Permit Program: Frequently Asked Questions* (visited Sept. 25, 1999) <wysiwyg://12/http://www.epa.gov/owm/faq.htm> [hereinafter *Frequently Asked Questions*] (remarking that NPDES permit contains limitations on "... what you can discharge, monitoring and reporting requirements, and other provisions to ensure that the discharge does not hurt water quality or people's health").

30. See *Frequently Asked Questions*, *supra* note 29 (providing that permits customize general requirements of CWA to individual permit holders).

31. See *Powell Duffryn Terminals*, 913 F.2d at 68 (noting test results are reported to EPA, which makes use of DMRs by comparing permit limits with concentration reports that quickly indicate whether permit holder is in compliance with permit); see also *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co. Inc.*, 73 F.3d 546, 563-64 (5th cir. 1996) (stating Congress granted EPA discretion over regulation of effluents under NPDES program); *Dolgetta*, *supra* note 4, at 711 (remarking DMRs available to public, reports can be used as evidence to establish reporting and discharge violations); *Krauthamer*, *supra* note 19, at 853 (remarking Congress requires DMRs to state amount of pollution in effluents upon discharge from point source before merging with waterway).

32. See 33 U.S.C. § 1365 (stating language of § 505 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 . . . or an order issued by the Administrator or a State with respect to such a standard or limitation"); see also *Sierra Club v. Simkins Industries, Inc.*, 847 F.2d 1109, 1111 (4th Cir. 1988) (providing that under §402 of CWA, 33 U.S.C. §1342, EPA has authority to administer and enforce NPDES program or to delegate this authority to state agencies); *Dolgetta*, *supra* note 4, at 711 (noting permit violators can be subject to both criminal and civil liability under CWA).

33. See *Powell Duffryn Terminals*, 913 F.2d at 64 (stipulating permit holder must not only comply with effluent limitations, but also needs to include on premises equipment to monitor effluent discharge); see also Carine, *supra* note 13, at 181 (stating DMR tests are based on effluent pollution levels established by equipment that permit holder is required to maintain on facility).

Thus, an entity or person who complies with permit parameters is in compliance with CWA.<sup>34</sup>

## 2. Amendments to CWA and its Future

At the time of CWA's enactment, approximately two-thirds of the nation's waterways were unsafe for recreational activities.<sup>35</sup> From the time of implementation of CWA, however, water quality dramatically improved nationwide.<sup>36</sup> While CWA, as originally enacted, constituted a "quantum leap for environmental protection," its subsequent amendments increased its power even further.<sup>37</sup> For example, the 1977 Clean Water Act Amendments provided additional limitations on the discharge of effluents and allowed states to take responsibility for the implementation of federal programs.<sup>38</sup>

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34. See *Powell Duffryn Terminals*, 913 F.2d at 68 (stating if permit holders meet effluent limitations along with maintaining equipment to monitor and test discharges, then permit holder in compliance with CWA); see generally Dolgetta, *supra* note 4, at 710-11 (remarking that CWA's goal is to focus attention on effluent limitation standards in order to reduce amount of pollution entering waterways).

35. See *Clean Water Act Remarks*, *supra* note 3 (providing that 25 years ago wetlands lost 460,000 acres annually, sewage treatment plants serviced only 85 million people, and agricultural runoff resulted in toxic pollutants into waterways).

36. See *id.* (remarking on water quality improvements in rivers, lakes and bays resulting from cooperative efforts by federal, state and local government programs established by CWA); see also *Water Environment WEB: Clearing the Way for Clean Water* (visited Oct. 6, 1999) <<http://www.epa.org/docs/cwhistory.html>> [hereinafter *Water Environment WEB*] (commenting on progress made in cleaning up polluted water). According to EPA, since the enactment of CWA, 60% of U.S. waters met CWA's designated-use goals in 1992, as compared with 36% in 1972. See *id.* (noting in same time period, water quality in 98% of river miles and 96% of lake acreage remained same or improved).

37. See *Clean Water Act: Major Legislative Milestones in Protecting the Nation's Waters* (visited Sept. 25, 1999) <<http://www.epa.gov/owow/cwa/timeline.html>> [hereinafter *Major Legislative Milestones*] (providing that although creation of CWA in 1972 criminalized discharging effluents without permit, amendments to CWA strengthened these limitations).

38. See *id.* (noting amendments to CWA not only further initial goals, but also allow for states to contribute and participate in CWA programs); see also *Water Environment WEB*, *supra* note 36 (stating Congress amended CWA in 1977 to promote delegation of NPDES program to states and expand EPA's ability to monitor discharge of toxic pollutants into collection systems and surface waters). Other amendments and additions to CWA include the 1987 Water Quality Act and the 1990 Coastal Zone Act Reauthorization Amendments. See *Major Legislative Milestones*, *supra* note 37 (providing 1987 Water Quality Act supported state and local governments' new efforts to deal with pollution runoff). Additionally, the Water Quality Act implemented a loan fund to continue the construction of treatment plants and created programs protecting specific estuaries of national importance. See *id.* (explaining that Act catalyzed action to address pollution from runoff). Both of these amendments were legislative milestones that continue to strengthen and execute CWA's water quality standards and goals. See *Major Legislative Milestones*, *supra* note 37 (stating Coastal Zone Act focused attention on reducing pollution runoff in 29 coastal states).



Although CWA's effect on the nation's waterways is significant, much work remains unfinished.<sup>39</sup> CWA enters this next century with a focus on three specific goals: the protection of public health,<sup>40</sup> a reduction in polluted runoff<sup>41</sup> and a restoration of unhealthy waters.<sup>42</sup> One enforcement provision of CWA that will help achieve these goals is its citizen suit provision.<sup>43</sup>

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39. See *Water Environment WEB*, *supra* note 36 (stating primary goals of 1972 CWA are yet to be achieved). These goals included the elimination of effluent discharges into navigable waters by 1985, achieving a water quality level that protects aquatic organisms by July 1, 1983 and the prohibition of toxic effluents in large amount. See *id.* (listing three original goals of CWA).

40. See *Clean Water Act: Future Challenges* (visited Sept. 25, 1999) <<http://www.epa.gov/owow/cwa/future.html>> [hereinafter *Future Challenges*] (noting future plans for CWA will continue to protect public health because "clean water is essential to the health [and well being] of all Americans"). To meet this challenge, Congress' plans for CWA include working in conjunction with communities and individuals to protect their sources of water. See *id.* (commenting on how clean water program will strive to protect locations and sites where communities receive their water supplies). While state and local authorities are primarily responsible for protecting their citizens' health, EPA will provide additional assistance in developing tests to detect harmful water pollutants. See *id.* (discussing EPA's role in assisting state and local authorities to develop methods to test fish and shellfish for harmful pollutants). Furthermore, EPA will provide support to develop protective and timely warnings about the quantities and type of fish and shellfish that are safe for consumption. See *id.*

41. See *Future Challenges*, *supra* note 40 (stating that Congress hopes CWA will reduce polluted runoff because, according to various state and local agencies, "pollution runoff is . . . the leading cause of water pollution"). Congress intends CWA to remedy this situation by reducing polluted runoff from urban areas and animal feed operations, the leading contributors to the problem. See *id.* (explaining that through movement across fields, streets and other areas, runoff gathers soil particles, pesticides, fertilizers, animal wastes and other pollutants).

42. See *id.* (describing areas and methods CWA plans to focus its attention on for next century). Congress' future plans for CWA are to identify the specific bodies of water that citizens cannot use for recreational enjoyment and develop plans for their restoration. See *id.* (discussing waters singled out for restoration shall be those unable to support basic recreational uses such as fishing and swimming). To accomplish this task, EPA and state officials will work together to calculate water pollution levels and develop the means to restore the individual water bodies. See *id.* (explaining that to restore rivers, lakes and bays, federal, state and local governments must work together for restoration of rivers, lakes and bays).

43. See *Public Interest Research Group of New Jersey, Inc. v. Magnesium Elektron, Inc.*, 123 F.3d 111, 114-15 (3d Cir. 1997) (remarking that Congress enlisted public assistance with creation of citizen suit); see also Sam Kalen, *Standing on its Last Legs: Bennett v. Spear and the Past and Future of Standing in Environmental Cases*, 13 J. LAND USE & ENVTL. L. 1, 4 (noting development of citizen suit is viewed as victory because it results in increased citizen participation in governmental programs); Krauthamer, *supra* note 19, at 858 (stating Congress included citizen suit provision in CWA to allow private citizens and executive branch to bring suit against violators).

### 3. Citizen Suits

Congress included in CWA a provision allowing citizens to either bring suit or report alleged violations of CWA.<sup>44</sup> CWA's citizen suit provision states: "[A]ny citizen may commence a civil action on his own behalf . . . against any person . . . who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued . . . with respect to such a standard or limitation."<sup>45</sup> Accordingly, a citizen suit helps the government enforce CWA.<sup>46</sup>

Section 505(g) defines a "citizen" as "a person or persons having an interest which is or may be adversely affected" by an alleged violation of CWA.<sup>47</sup> Thus, by this simple and broad definition, Congress vested American citizens with tremendous and unique powers

44. See 33 U.S.C. § 1365(a)(1) (providing that under CWA, "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 . . . an order issued by the Administrator or a State"); see also *Magnesium Elektron*, 123 F.3d at 114-15; *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co. Inc.*, 73 F.3d 546, 560 n.27 (remarking that citizens are given authority under section 1365(f) to bring enforcement actions under CWA for violation of effluent standards or limitations); *Natural Resources Defense Council, Inc. v. Texaco Refining and Marketing, Inc.*, 2 F.3d 493, 497-98 (3d Cir. 1993) (stating section 505 allows citizen to bring suit on his own accord); *United States v. The Metropolitan St. Louis Sewer District*, 883 F.2d 54, 56 (8th Cir. 1989) (noting plain language of section 1365 allows citizens to intervene in civil action); *Dolgetta*, *supra* note 4, at 712-13 (noting CWA "empowers citizens to bring suits . . .").

45. 33 U.S.C. § 1365(a)(1). The section states in whole:

[A]ny citizen may commence a civil action on his own behalf against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the 11th Amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation.

*Id.* Cf. *Carine*, *supra* note 13, at 182 (noting citizens suit provision of CWA resulted from compromise between House of Representatives and Senate). The House bill proposed restricting standing to only citizens within a certain geographical range of the alleged violation, whereas the Senate bill allowed any person to bring suit. See *id.*

46. See *Magnesium Elektron*, 123 F.3d at 114 (recognizing importance of citizens' interest in implementing CWA); *Dolgetta*, *supra* note 4, at 712 (recognizing Congress looked to citizens for additional assistance in implementation and enforcement of CWA). See generally Sharon Elliot, *Citizens Suits Under the CWA: Waiting for Godot in the Fifth Circuit*, 62 TUL. L. REV. 175 (1987) (depicting role citizens play in CWA).

47. 33 U.S.C. § 1365 (a)(1); see also *Friends of the Earth v. Consolidated Rail Corp.*, 768 F.2d 57, 60 (2d Cir. 1985); *Public Interest Research Group of New Jersey, Inc. v. Powell Duffryn Terminals, Inc.*, 913 F.2d 64, 70 n.3 (3d Cir. 1990); *Carine*, *supra* note 13, at 182 (noting definition of "person" under CWA includes corporations and associations). Environmental groups also qualify under the citizens definition for CWA. See *id.* (explaining environmental groups are persons).

to enforce CWA or to prevent and remedy violations of CWA.<sup>48</sup> The bestowal of these powers did not come easily and are still the source of great debate and compromise among the members of the House of Representatives and the Senate.<sup>49</sup>

The legislative history of CWA demonstrates that Congress intended the citizen suit provision to provide additional support in the implementation and execution of CWA's goals.<sup>50</sup> The Senate report illustrates that an "essential element in any control program involving the nation's waters is public participation."<sup>51</sup> The legislative history demonstrates not only the importance of the citizen suit provision, but also that Congress felt courts should not capriciously constrain citizens' ability to bring suits under CWA.<sup>52</sup>

## B. Article III and the Doctrine of Standing

Although Congress granted citizens the power to bring suit under CWA, Article III of the United States Constitution still re-

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48. See Dolgetta, *supra* note 4, at 713 (noting Congress limited grant of power to enforce violations under CWA to citizens with interests which may be adversely affected by violation); Krauthamer, *supra* note 19, at 849 (remarking citizen suit provision of CWA applies to members with adversely affected interests resulting from pollution violations).

49. See Carine, *supra* note 13, at 182 (contrasting House of Representatives proposal, which promoted restriction of citizens suits to only those affected individuals or groups, with Senate proposal, which allowed anyone to bring suit); Dolgetta, *supra* note 4, at 713 (noting debate and disagreement between House of Representatives and Senate regarding citizens suits).

50. See S. REP. NO. 92-414, 2, 10 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3676 [hereinafter S. REP. NO. 92-414] (noting Congress looked to citizens directly impacted by discharge of effluents for assistance in enforcement of CWA); *see also Cedar Point Oil Co.*, 73 F.3d at 560 (providing legislative history of CWA stating Congress delayed availability of citizens suits to give EPA and states additional time to issue permits required by CWA); Dolgetta, *supra* note 4, at 712 (noting Congressional intent with regards to citizen suit provision); McDermott, *supra* note 13, at 532 (remarking on Congress' intent in designing citizen suit provision of CWA).

51. S. REP. NO. 92-414, *supra* note 50, at 7-11; *see also* Public Interest Research Group of New Jersey, Inc. v. Magnesium Elektron, Inc., 123 F.3d 111, 114 (3d Cir. 1997) (stating Congress enlisted citizens to participate in CWA by allowing them to bring suits against those who violate CWA); *Powell Duffryn Terminals*, 913 F.2d at 74 (discussing Congress' scheme of supplementing government action with citizen suits); Dolgetta, *supra* note 4, at 712 (discussing Congress' intentions for enacting CWA).

52. See S. REP. NO. 92-414, *supra* note 50, at 76; *see also* Dolgetta, *supra* note 4, at 712 (emphasizing importance of citizen suits and stressing citizens should be unconstrained to bring these suits). It is also mentioned in the legislative history that courts should not hesitate to hear and try citizen suits. *See id.* (explaining role Congress wanted courts to play). With the establishment of CWA and the citizen suit provision, "Congress has expressed its enthusiastic support for the cleansing of our nation's waterways." Kalen, *supra* note 43, at 4 (stating litigants began to view courts as possible arbiters to environmental disputes in 1960s); *see also* McDermott, *supra* note 13, at 532.

quires citizens to establish standing as a prerequisite.<sup>53</sup> The standing doctrine derives from the Article III requirement that courts may only hear “cases and controversies”; a plaintiff that fails to demonstrate standing does not present the court with a “case or controversy,” and the court must consequently dismiss the suit.<sup>54</sup> While the element of standing is critical in any lawsuit, that requirement is paramount in most environmental law cases.<sup>55</sup>

A standing analysis centers on whether a party has sufficient interest in the controversy.<sup>56</sup> In order to demonstrate a sufficient

53. See *Friends of the Earth, Inc. v. Laidlaw*, 149 F.3d 303, 306 (4th Cir. 1998) (stating action becomes moot if standing elements are not present at all times throughout suit); *Marshall v. Meadows*, 105 F.3d 904, 906 (4th Cir. 1997) (remarking that case will be dismissed if plaintiff lacks standing); see also *Powell Duffryn*, 913 F.2d at 70-71; *Melton*, *supra* note 16, at 1878 (noting fundamental question in determining standing is whether party bringing suit possesses personal stake in outcome of case or controversy).

54. See U.S. CONST. art. III, § 2, cl. 1 stating:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; to all Cases affecting Ambassadors, other public Ministers and Consuls; to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a Party; to Controversies between two or more States; between a State and Citizens of another State; between Citizens of different States; between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

See also *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-60 (1992) (commenting that Article III limits jurisdiction of federal courts to “cases” and “controversies,” but injury by executive branch can possess title of case); *Allen v. Wright*, 468 U.S. 737, 751 (1984) (noting core component of subject matter jurisdiction is element of standing); *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471-72 (1982) (remarking it is not clear whether particular features of standing requirement are compelled by Article III or by Supreme Court); *Warth v. Seldin*, 422 U.S. 490, 508 (1975) (defining standing as mix of constitutional requirements and jurisprudential considerations); *Sierra Club v. Morton*, 405 U.S. 727, 732 (1972); *Kalen*, *supra* note 43, at 2 (providing standing is part of judicial jurisdiction law that determines whether courts hear arguments and cases).

55. See *Dolgetta*, *supra* note 4, at 714 (asserting establishment of standing as key to success in most environmental cases). The judicial system plays an integral role in determining if a particular plaintiff possesses standing. See *id.* (reporting on requirements and tests resulting from number of cases heard by Supreme Court regarding both individual and representational standing); see also *Krauthamer*, *supra* note 19, at 854 (providing that establishing standing in environmental law cases is difficult because no person has greater claim over environment than another); *McDermott*, *supra* note 13, at 536-37 (acknowledging that demonstrating standing is difficult barrier for most environmental plaintiffs to overcome). *But see* *Millan*, *supra* note 20 at 424 (describing that outcome of *Friends of the Earth v. Chevron Chemical Co.*, 129 F.3d 826 (5th Cir. 1997) relaxed membership requirements for establishment of standing).

56. See *Public Interest Research Group of New Jersey, Inc. v. Magnesium Elektron, Inc.*, 123 F.3d 111, 119-20 (3d Cir. 1997) (remarking that Third Circuit in

interest, associations and organizations must establish both individual standing and representational standing.<sup>57</sup> To establish standing in federal courts, an organization must demonstrate three requirements: (1) its members would have individual standing to sue on their own rights; (2) the interests the organization seeks to protect are related to the organization's purpose; and (3) the claim does not include the participation of individual members in the lawsuit.<sup>58</sup> This Note focuses upon individual standing, the first requirement of this test. In order to satisfy individual standing, an organization must show three additional requirements: (1) its members personally suffered an actual or threatened injury in fact as a result of the illegal conduct of the defendant; (2) the injury is "fairly traceable" to the contested action; and (3) a favorable decision is likely to compensate or redress the injury.<sup>59</sup>

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*Magnesium* ruled that if plaintiff could not meet injury-in-fact requirement he lacked standing); see also *Lujan*, 504 U.S. at 566 (commenting that Supreme Court rejected argument that statute's purpose, protection of ecosystems, granted plaintiffs standing to protect animals on other side of world); *Sierra Club v. Simkins Industries, Inc.*, 847 F.2d 1109, 1113 (4th Cir. 1988) (noting citizen suit provision of CWA does not automatically establish Article III standing); *Krauthamer*, *supra* note 19, at 854 (asserting general grievances of public at large do not provide parties with standing); *Melton*, *supra* note 16, at 1878 (providing that relation between status of plaintiff and claim presented is essential to guarantee plaintiff is proper and appropriate party to bring suit).

57. See *Lujan*, 504 U.S. 555, 569 (1992) (holding environmental groups lacked standing to bring suit challenging regulation by Secretary of Interior dealing with Endangered Species Act and funding for projects that harm animals); *Magnesium Elektron*, 123 F.3d at 119 (providing organizations must not only establish representational standing, but individual standing as well); *Friends of the Earth, Inc. v. Crown Central Petroleum Corp.*, 95 F.3d 358, 360 (5th Cir. 1996); *Sierra Club v. Cedar Point Oil Co. Inc.* 73 F.3d 546, 555-56 (5th Cir. 1996); *Natural Resources Defense Council, Inc. v. Watkins*, 954 F.2d 974, 978 (4th Cir. 1992); *Powell Duffryn*, 913 F.2d at 70; see also *Dolgetta*, *supra* note 4, at 714-15 (commenting that Congress created distinct role for private enforcement under CWA's citizens suits and national environmental groups have seized every opportunity to bring suit).

58. See *Powell Duffryn*, 913 F.2d at 70 (commenting if organization's members did not have individual standing then organization lacks standing); see also *Magnesium*, 123 F.3d at 119 (providing that standing comprises of both jurisprudential and constitutional requirements); see also *Crown Central*, 95 F.3d at 360; *Cedar Point*, 73 F.3d at 555; *Watkins*, 954 F.2d at 978 (discussing that organization did not claim injury in its own capacity, but rather for its members, thus it needed to fulfill representational and individual standing tests); *Kalen*, *supra* note 43, at 9-10 (discussing that Supreme Court in *Sierra Club v. Morton*, 405 U.S. 727, 740-41 (1972), established three requirements that guided standing in environmental cases for next 25 years); *Melton*, *supra* note 16, at 1881-84 (commenting that representational standing by organizations in environmental law cases offers advantages to members represented and to judicial system because members might lack resources or experience needed to bring suit).

59. See *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 471-73 (1982) (stating Article III limits federal judicial reach and power to only those disputes that confine federal courts to roles consistent with separation of powers doctrine and that are traditionally viewed as

### 1. *Injury in Fact*

The first prong of the individual standing requirement, whether the plaintiff has suffered an actual or threatened injury, is commonly known as "injury in fact."<sup>60</sup> Injury in fact requires that a plaintiff suffer "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not 'conjectural' or 'hypothetical.'"<sup>61</sup> The Supreme Court first articulated this requirement for standing in *Association of Data Processing Service Organization, Inc. v. Camp*,<sup>62</sup> and then later defined and ex-

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capable of resolution through judicial system); see also *Lujan*, 504 U.S. at 560 (remarking that Supreme Court precedent has established that the irreducible constitutional minimum required in standing constitutes three elements: injury in fact, fairly traceable connection to defendant's action and that injury is likely to be redressed with favorable court decision); Carine, *supra* note 13, at 183 (commenting additional requirements for standing also exist where court contemplates jurisprudential limitations or where Congress mandates plaintiff be within zone of interest protected by specific legislation).

60. See *Warth v. Seldin*, 422 U.S. 490, 508 (1975) (articulating Supreme Court's theory behind representational standing). The Supreme Court stated:

Even in the absence of injury to itself, an association may have standing solely as the representative of its members . . . . The association must allege that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make [our] a justiciable case had the members themselves brought suit . . . . So long as this can be established, and so long as the nature of the claim and of the relief sought does not make the individual participation of each injured party indispensable to the proper resolution of the cause, the association may be an appropriate representative of its members, entitled to invoke the court's jurisdiction.

*Id.* at 511; see also *Magnesium*, 123 F.3d at 119-20 (providing that neither Congress nor CWA authorize private causes of action against polluters absent some showing of injury or threatened injury); *Cedar Point*, 73 F.3d at 555-56 (noting unimportance of injury couched in terms of future injury rather than past injury). See generally *Lujan*, 504 U.S. at 578 (explaining injury required by Article III may exist solely by virtue of statutes that create legal rights); Carine, *supra* note 13, at 182-84 (noting prior legal interest test inappropriately investigated merits of case).

61. See *Valley Forge Christian College*, 454 U.S. at 473 (noting injury in fact requirement is designed to limit access of courts to those with sufficient stake in outcome); see also *Babbitt v. United Farm Workers National Union*, 442 U.S. 289, 307 (1979) (discussing that inquiry is whether injury presents real, substantial controversy between parties that possess adverse legal interests and dispute is definite and concrete rather than hypothetical or abstract); *Cedar Point*, 73 F.3d at 556-57 (commenting size of injury is not important and identifiable small injury will suffice); *Dolgetta*, *supra* note 4, at 716 (explaining that particularized means injury must affect plaintiff in personal and individual way); *Kalen*, *supra* note 43, at 14 (adding injury in fact requires more than mere injury to cognizable interest) (quoting *Sierra Club v. Morton*, 405 U.S. 727, 731 (1972)). See e.g., *Powell Duffryn*, 913 F.2d at 71 (providing pollution is considered injury that interferes with enjoyment of natural resources).

62. 397 U.S. 150, 152-54 (1970) (explaining that Court's decision to abandon old legal interest test represented not simply incremental development, but rather divergence in axioms of legal thinking); see also *Kalen*, *supra* note 43, at 5 (providing that *Data Processing* broadened class of individuals entitled to seek judicial re-

panded the injury in fact element in *Sierra Club v. Morton*.<sup>63</sup> In *Sierra Club*, the Court broadened the scope of the injury in fact requirement to include aesthetic injuries.<sup>64</sup> The Court articulated that the degree of injury was unimportant, so long as “some identifiable injury” resulted from the defendant’s actions.<sup>65</sup>

## 2. Fairly Traceable

The second individual standing element requires that the cause of the plaintiff’s injury be fairly traceable to the defendant’s illegal conduct.<sup>66</sup> The plaintiff need not show to a scientific cer-

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view under Administrative Procedure Act (“APA”) to include party with injury in fact that is within zone of interest protected by statute or constitutional provision at issue).

63. 405 U.S. 727, 738 (1972) (stating while sincere interest in situation was insufficient for Article III standing, aesthetic injury could amount to injury in fact); see also Carine, *supra* note 13, at 185 (emphasizing that in *Sierra Club*, Supreme Court stated that standing would not be denied on basis that many individuals could allege similar injury); Kalen, *supra* note 43, at 5 (discussing that broadening class of plaintiffs increased citizens access to courts); McDermott, *supra* note 13, at 527 (remarking that courts willingness to hear aesthetic injury cases opens door to more citizens).

64. See *Sierra Club*, 405 U.S. at 734-35 (articulating injury to aesthetic, environmental or recreational interests is enough to establish standing provided party seeking review has sustained injury); see also *Cedar Point*, 73 F.3d at 557 (observing low threshold for injury requirement of standing that *Sierra Club* created in its holding); *Sierra Club v. Simkins Industries, Inc.*, 847 F.2d 1109, 1113 (4th Cir. 1988) (noting aesthetic and non-economic injury satisfies injury in fact requirement of standing); Carine, *supra* note 13, at 188 (commenting that *Sierra Club* ruling fashioned more liberal environmental standing doctrine); Kalen, *supra* note 43, at 14 (stating aesthetic, environmental and economic well-being are key elements of quality of life in contemporary society) (quoting *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972)). See generally *Friends of the Earth v. Consolidated Rail Corp.*, 768 F.2d 57, 61 (2d Cir. 1985) (providing organization whose members claim interest but no injury are not adversely affected and do not have standing); Millan, *supra* note 20 (noting citizens do not have to show injury from effluents approaching limitation levels to prevail in personal injury suits).

65. See *Sierra Club*, 405 U.S. at 734-35 (affirming Supreme Court’s endorsement of requirement that party bringing suit be among injured); see also *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 (1992) (asserting “some day” intentions without more definite plans or more specifics do not support finding of actual or imminent injury standing cases require); *Village of Elk Grove Village v. Evans*, 997 F.2d 328, 329 (7th Cir. 1993) (confirming even small probability of injury is sufficient to create case or controversy); *Powell Duffryn*, 913 F.2d at 71 (commenting that plaintiffs’ interests are more than trifles and therefore injuries need not be large to satisfy injury in fact requirement of standing); McDermott, *supra* note 13, at 527 (remarking that Court in *Sierra Club* denied standing to plaintiffs because no individual member stated use of contested area in any way that would be negatively impacted by proposed actions of defendants).

66. See *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472 (1982) (noting while exercise of judicial power is ultimate and supreme function of court, it is also formidable means of vindicating individual rights when employed unnecessarily, therefore party evoking federal jurisdiction must meet requirements); see also *Warth v. Seldin*, 422 U.S.

tainty that the defendant's actions caused the precise harm suffered by the plaintiff.<sup>67</sup> Rather, the plaintiff must only establish that there exists a "substantial likelihood" that the defendant's conduct caused the plaintiff's harm.<sup>68</sup>

In environmental law cases dealing with CWA, such as *Gaston Copper*, a substantial likelihood is demonstrated by showing that: (1) a defendant discharged an effluent in concentrations greater than allowed by its permit; (2) the plaintiff possessed an interest in the waterway that is or may be adversely affected by the effluent; and (3) this effluent caused or contributed to the plaintiff's alleged injuries.<sup>69</sup> Although a plaintiff must only demonstrate a substantial likelihood, a plaintiff must nonetheless show more than a "mere exceedance of a permit limit" to meet these criteria.<sup>70</sup>

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490, 508 (1975) (providing focus of standing is whether party has sufficient stake in outcome to obtain judicial resolution of dispute); *Powell Duffryn*, 913 F.2d at 72 (asserting in this case court expanded fairly traceable requirement in citizens suits to further enforce CWA); Jim Irvin, Recent Developments in Case Law, *Fourth Circuit Finds That to Establish Standing, Environmental Injury Plaintiffs Need Only Show "Fairly Traceable" Causation By Establishing the Defendant's Pollutant "Causes or Contributes to the Kinds of Injuries Alleged"*, 2 S.C. ENVTL. L. J. 95, 96 (Winter, 1992) (stating plaintiffs must demonstrate they personally suffered injury fairly traceable to illegal conduct of defendants to establish standing).

67. See *Powell Duffryn*, 913 F.2d at 72 (noting fairly traceable requirement does not require plaintiff to demonstrate that defendant's actions and defendant's actions alone caused plaintiff's injuries); see also Public Interest Research Group of New Jersey, Inc. v. Magnesium Elektron, Inc., 123 F.3d 111, 121-22 (3d Cir. 1997) (explaining that fairly traceable requirement enables plaintiff to link environmental injury to defendant when plaintiff is unable to demonstrate defendant's actions caused injuries); Natural Resources Defense Council, Inc. v. Texaco Refining and Marketing, Inc., 2 F.3d 493, 505 (3d Cir. 1993); Carine, *supra* note 13, at 187 (asserting question of whether environmental group's injuries were fairly traceable to defendants' action is more difficult requirement to satisfy); Irvin, *supra* note 66, at 96 (explaining that to establish individual standing plaintiffs must show they personally suffered injury fairly traceable to defendant's conduct).

68. See *Powell Duffryn*, 913 F.2d at 72; see also *Texaco Refining*, 2 F.3d at 505; Natural Resources Defense Council v. Watkins, 954 F.2d 974, 980 (4th Cir. 1992) (explaining that to establish standing for environmental injury, plaintiffs need not demonstrate that particular defendant caused their injury, rather absent defendant's activities plaintiff would enjoy unaffected use of their resource). See generally *Friends of the Earth, Inc. v. Crown Central Petroleum*, 95 F.3d 358, 361-62 (5th Cir. 1996) (stating, at some point, court can no longer assume that injury is fairly traceable to defendant's conduct solely on basis of observation).

69. See *Powell Duffryn*, 913 F.2d at 72; see also *Magnesium Elektron*, 123 F.3d at 121-22 (commenting that substantial likelihood test does not replace test for standing under Article III of Constitution); see also *Sierra Club v. Cedar Point Oil Co. Inc.*, 73 F.3d 546, 557 (5th Cir. 1996) (stating Third Circuit in *Powell Duffryn* created three-part test to establish injury is fairly traceable to defendant's discharge in CWA citizen suit); cf. *Texaco Refining*, 2 F.3d at 505 (explaining that if testimony links defendant's actions to injuries asserted by plaintiff then nothing more is needed to establish standing).

70. See *Powell Duffryn*, 913 F.2d at 72 (noting under CWA, if plaintiff alleges injury, but fails to show defendant's effluent contains pollutants that harm ecosys-



### 3. Redressability

The final prong needed to establish individual standing requires that the injury be redressable by a favorable judicial decision.<sup>71</sup> This requirement is closely related to the fairly traceable factor.<sup>72</sup> The salient difference between the two elements is that the fairly traceable component centers on the connection between the plaintiff's injury and the defendant's action, whereas the redressability requirement focuses on the nexus between the plaintiff's injury and the judicial relief sought.<sup>73</sup> The probability of redressability with a favorable court decision must be "likely" as opposed to merely "speculative."<sup>74</sup> The redressability requirement of stand-

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tem, plaintiff lacks standing); see also *Magnesium Elektron*, 123 F.3d at 121 (asserting legal right to have corporations obey environmental laws cannot by itself establish standing); *Cedar Point*, 73 F.3d at 557 (noting overly broad application of test may be problematic); Carine, *supra* note 13, at 188-89 (stating historically environmental group plaintiffs had not encountered much difficulty fulfilling standing requirements; however, there now appears movement toward more rigorous standing requirements).

71. See *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976) (articulating that federal court acts only to redress injury that fairly can be traced to contested action of defendant, and not injury that results from independent action of some third party); see also *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982) (commenting that Article III limits federal power of courts to rule consistent with system of separation of powers); *Cedar Point*, 73 F.3d at 556 (noting the elements needed to establish individual standing); Carine, *supra* note 13, at 183 (providing along with these three criteria for individual standing, other requirements such as prudential limitations and zone of interests protected also exist).

72. See *Valley Forge Christian College*, 454 U.S. at 758-59 (concluding redressability requirement assures actual factual setting where plaintiff asserts claim of injury); see also *Powell Duffryn*, 913 F.2d at 73 (explaining that under CWA if plaintiff complains of harm to water because defendant exceeded its permit limits injunction will redress that particular injury in part); Kalen, *supra* note 43, at 24 (stating fairly traceable and redressability represent one causation requirement).

73. See *Allen v. Wright*, 468 U.S. 737, 759 n.24 (articulating three core constitutional standing requirements). If a difference exists between the two requirements, "it is that [fairly traceable] examines the causal connection between the assertedly unlawful conduct and the alleged injury, whereas [redressability] examines the causal connection between the alleged injury and the judicial relief requested." *Id.* at 753 n.19; see also *Warth v. Seldin*, 422 U.S. 490, 499 (1975) (asserting plaintiff must assert individual legal rights and not rest upon relief of third parties).

74. See *Simon*, 426 U.S. at 1926 (explaining redressability is not mere pleading requirement, but rather element indispensable to plaintiff's case); see also *Valley Forge Christian College*, 454 U.S. at 472 (remarking that redressability requirement serves several purposes embodied in Article III). See generally *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) (commenting that party invoking federal jurisdiction bears burden of establishing elements of standing).

ing tends to assure that legal questions will be resolved in a concrete forum of a courtroom rather than a debating society.<sup>75</sup>

### C. Judicial Confusion Surrounding Standing

The Supreme Court has fashioned separate tests for individual and representational standing in federal court.<sup>76</sup> In *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*,<sup>77</sup> the Supreme Court articulated the “irreducible minimum” test for standing.<sup>78</sup> While this test represents the threshold requirements that all plaintiffs must meet to establish standing, the additional standing requirements for environmental groups seeking to bring suit on behalf of their members were enunciated in *Sierra Club v. Morton*.<sup>79</sup> Although the Court has created these tests, it has yet to provide much guidance as to what, specifically, will satisfy

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75. See *Valley Forge Christian College*, 454 U.S. at 472-73 (explaining that if federal courts were forums for ventilation of public grievances then concept of standing would not be necessary); see also *Simon*, 426 U.S. at 41-42 (providing purpose of standing doctrine is to filter actual cases and controversies from general grievances).

76. See *Powell Duffryn*, 913 F.2d at 70 (noting that to meet requirements of representational standing, organizations need only show their members possess “indicia of membership” in their organizations); see also *Marshall v. Meadows*, 105 F.3d 904, 906 (4th Cir. 1997) (asserting three components of standing that plaintiff must establish to bring suit are injury, causation and redressability); *Friends of the Earth v. Crown Central Petroleum Corp.*, 95 F.3d 358, 360 (5th Cir. 1996) (providing that standing comprises of both jurisprudential and constitutional requirements); *Sierra Club v. Cedar Point Oil Co. Inc.*, 73 F.3d 546, 555 (5th Cir. 1996) (discussing that organization did not claim injury in its own capacity, but rather for its members, thus it needed to fulfill representational and individual standing tests); *Melton*, *supra* note 16, at 1881-84 (noting organization must establish both representational and individual standing in order to bring suit on behalf of members).

77. 454 U.S. 464 (1982).

78. See *Valley Forge Christian College*, 454 U.S. at 471-73 (stating Supreme Court has always required that plaintiff have standing to bring action before court); see also *Lujan*, 504 U.S. at 560 (remarking that Supreme Court precedent established irreducible constitutional minimum required in standing that constitutes three elements: injury in fact, fairly traceable nexus to defendant’s action and that injury is likely to be redressed with favorable court decision); *Carine*, *supra* note 13, at 183 (remarking that additional requirements for standing exist when courts contemplate jurisprudential limitations or where Congress requires plaintiff be within zone of interest protected by legislation).

79. See 405 U.S. 727, 733-38 (1972) (articulating type of injury to support standing could be aesthetic and non-economic type of injury); see also *Public Interest Research Group of New Jersey, Inc. v. Powell Duffryn Terminals Inc.*, 913 F.2d 64, 70-71 (3d Cir. 1990) (noting holding in *Sierra Club* allows for harm to aesthetic and recreational interest to satisfy injury in fact requirement of standing); *Carine*, *supra* note 13, at 184-85 (noting Supreme Court in *Sierra Club* further defined and enlarged injury in fact requirement of standing); *Kalen*, *supra* note 43, at 9-10 (explaining *Sierra Club* decision launched modern law of environmental standing).

each separate element of standing.<sup>80</sup> In fact, even the Supreme Court has been unable to define the elements to its satisfaction.<sup>81</sup> Examples of cases that illustrate the Supreme Court's vacillation over the precise contours of the standing requirement include: *Association of Data Processing Service Organizations, Inc. v. Camp*,<sup>82</sup> *Sierra Club v. Morton*,<sup>83</sup> *United States v. Student Challenging Regulatory Procedures* ("SCRAP"),<sup>84</sup> *Warth v. Seldin*<sup>85</sup> and *Duke Power Co. v. Carolina Environmental Study Group*.<sup>86</sup>

In *Data Processing*, the Supreme Court articulated the "injury-in-fact" requirement to determine whether the plaintiff has shown actual or personal injury.<sup>87</sup> The Supreme Court broadened its injury-in-fact requirement in *Sierra Club* by allowing an aesthetic injury to qualify as an injury-in-fact.<sup>88</sup> The Supreme Court revisited the injury-in-fact requirement again in *SCRAP*, where it stated that the magnitude of the injury was irrelevant so long as some identifiable

80. See *Valley Forge Christian College*, 454 U.S. at 472-75 (providing judicial power affects lives, liberty and property of those to whom it extends); see also *Lujan*, 504 U.S. at 560-61 (stating standing elements must be supported in same way as any other matter plaintiff bears burden of proof); *Babbitt v. United Farm Workers National Union*, 442 U.S. 289, 298 (1979) (explaining basic inquiry in standing analysis is whether conflicting issues between parties present real, substantial controversy); Kalen, *supra* note 43, at 3 (commenting that Supreme Court's decisions have led to considerable confusion and disagreement among lower federal courts).

81. See McDermott, *supra* note 13, at 522 (commenting on continued state of transition that standing requirements have been in since late 1960s).

82. 397 U.S. 150 (1970) (establishing injury requirement for Article III standing).

83. 405 U.S. 727 (1972) (providing expanded notion of standing by allowing injury to be aesthetic or environmental harm).

84. 412 U.S. 669 (1973) (remarking that injury to environment was very general and still qualified for standing).

85. 422 U.S. 490 (1975) (noting Supreme Court articulated that plaintiff must allege specific, concrete facts for injury requirement of standing).

86. 438 U.S. 59 (1978) (asserting more flexible standard for environmental groups that allege injury with highly attenuated causation).

87. See *Data Processing*, 397 U.S. at 152 (noting that Supreme Court replaced the legal interest test with the injury-in-fact requirement due to criticism that it inappropriately investigated merits of case to determine standing); Carine, *supra* note 13, at 183 (remarking that injury-in-fact was first part of three-part standing test).

88. See *Sierra Club*, 405 U.S. at 734-35 (explaining that while aesthetic and environmental harm can qualify for injury-in-fact, plaintiff must be among injured); see also Kalen, *supra* note 43, at 9-10 (noting that principles established in *Sierra Club* guided environmental cases for preceeding 25 years); McDermott, *supra* note 13, at 527 (remarking that *Sierra Club* was landmark case which formulated specific requirements for environmental organizations bringing suits on behalf of their members).

injury existed.<sup>89</sup> Then in *Warth*, the Supreme Court created a strict causation requirement for standing which stated plaintiffs must allege specific harms and not simply generalized grievances shared by all citizens.<sup>90</sup> Finally, the Court in *Duke Power*, reduced the *Warth* test and allowed a more flexible causation requirement for environmental groups that asserted an injury with a highly attenuated causal chain.<sup>91</sup>

The sum of these cases is a dearth of guidance for circuit courts struggling to reconcile the Supreme Court's cases.<sup>92</sup> Due to this lack of guidance, the circuit courts have taken it upon themselves to define the elements of standing, resulting in inconsistent holdings.<sup>93</sup> While all the circuits agree on the requirements needed to establish standing, they clearly disagree over the definition and application of those requirements.<sup>94</sup> For example, in *Pub-*

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89. See *SCRAP*, 412 U.S. at 688-89 (stating that "standing is not to be denied simply because many people suffer the same injury . . ."); see also Carine, *supra* note 13, at 185-86 (noting plaintiffs had standing in this case even though causation chain was more attenuated than that of *Sierra Club's* plaintiffs); McDermott, *supra* note 13, at 527-28 (commenting that even Supreme Court admitted that injury to environment was very general and could have been alleged by any citizen who frequented area).

90. See *Warth*, 422 U.S. at 502 (commenting that when harm alleged by plaintiff is one shared by many people, that harm alone does not confer standing without more particularized facts); see also McDermott, *supra* note 13, at 525 (asserting that more than generalized grievance must be alleged to confer standing); Melton, *supra* note 16, at 1881 (indicating that representational standing does not eliminate requirement that members must assert individual injuries).

91. See *Duke Power*, 438 U.S. at 67 (noting Supreme Court found that there was substantial likelihood that injuries were fairly traceable to defendant's plant operations); see also Carine, *supra* note 13, at 187-88 (remarking that standing requirement for environmental plaintiffs in 1970s was easily met through careful pleading).

92. See Dolgetta, *supra* note 4, at 714-15 (quoting Roger Beers, noted scholar who remarked in course study presented by American Law Institute, "there has been little consistency and considerable confusion in past judicial opinions regarding the elements of standing . . ."); see also McDermott, *supra* note 13, at 522 (emphasizing that depending on how Supreme Court interprets standing requirements, courts may require specific injury or will allow generalized grievance); Melton, *supra* note 16, at 1890-91 (discussing how Fifth Circuit's extension of associational standing in *Friends of the Earth v. Chevron Chemical Co.* improperly interpreted past Supreme Court's rulings regarding associational standing).

93. See Kalen, *supra* note 43, at 2 (explaining Supreme Court needs to reconsider prudential and constitutional aspects of standing); see also Krauthamer, *supra* note 19, at 859 (remarking that unless Congress clearly states what constitutes injury in fact under CWA's citizens suit provision, then courts will construe what is needed for requirements at their discretion). Cf. *Crown Central*, 95 F.3d at 361 (noting while test in *Powell Duffryn* is helpful for analyzing injury in fact and fairly traceable, it may not be useful in other CWA cases).

94. See *Friends of the Earth v. Laidlaw*, 149 F.3d 303, 306 (4th Cir. 1998) (articulating three elements needed to establish standing are: (1) actual or threatened injury in fact; (2) plaintiff's injury must be caused by defendant's conduct; and (3)

*lic Interest Research Group v. Powell Duffryn*,<sup>95</sup> the Court of Appeals for the Third Circuit ruled that scientific certainty was not necessary for a plaintiff to prove causation; rather a plaintiff must only demonstrate that there exists a "substantial likelihood" that the defendant's action caused the alleged harm.<sup>96</sup> The Court of Appeals for the Fifth Circuit in *Sierra Club v. Cedar Point Oil Co.*,<sup>97</sup> elaborated on the *Powell Duffryn* test by holding an environmental group satisfies the fairly traceable requirement simply by demonstrating that the defendant's pollution contributes to the plaintiff's harm.<sup>98</sup> Moreover, the Court of Appeals for the Fourth Circuit, in *Sierra Club v. Simkins Industries, Inc.*,<sup>99</sup> allowed a mere exceedance of an effluent limit to qualify for injury-in-fact.<sup>100</sup> These liberal rulings have led to forum shopping and inequity, making judicial clarification of the standing doctrine important.<sup>101</sup>

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injury must be redressable by relief requested); see also *Public Interest Research Group of New Jersey v. Magnesium Elektron*, 123 F.3d 111, 119 (3d Cir. 1997) (remarking standing requirements were formulated from Supreme Court decisions and criteria); *Friends of the Earth v. Crown Central Petroleum*, 95 F.3d 358, 360 (5th Cir. 1996) (establishing that all circuit courts adhere to standing requirements provided by Supreme Court decisions).

95. 913 F.2d 64 (3d Cir. 1990).

96. See *id.* at 71-73 (reiterating that while plaintiff's injuries must be fairly traceable to defendant's conduct, this does not mean plaintiff must show to scientific certainty that defendant and defendant alone caused plaintiff's harm); see also *Magnesium Elektron*, 123 F.3d at 121-22 (noting that while substantial likelihood test does not replace standing test under Article III, its purpose is to allow plaintiffs to link environmental harms to defendants' actions when plaintiffs cannot establish scientific certainty of causation); Dolgetta, *supra* note 4, at 719-20 (providing that while plaintiff need not prove causation with scientific certainty, more than mere exceedance of permit was needed for fairly traceable requirement).

97. 73 F.3d 546 (5th Cir. 1996).

98. See *id.* at 558 (ruling that "it is sufficient for Sierra Club to show that Cedar Point's discharge of produced water contributes to the pollution that impairs [plaintiff's] use of the bay"); see also Dolgetta, *supra* note 4, at 723-24 (commenting on Fifth Circuit's interpretation of what qualifies for Supreme Court's injury-in-fact requirement); Millan, *supra* note 20 (stating that plaintiff bringing citizen suit need not prove individual harm, only that illegal effluent discharge contributed to pollution that impaired plaintiff's use of waterway).

99. 847 F.2d 1109 (4th Cir. 1988).

100. See *id.* at 1113 (stating "actual injury stemming from reporting and sampling violations, coupled with the threatened injury stemming from the failure to report . . . levels of harmful effluents, establishes injury . . .").

101. See Melton, *supra* note 16, at 1891 (providing when Supreme Court continuously qualifies holding to situation of particular case, lower courts should not extend holding without good cause); see also Carine, *supra* note 13, at 199-200 (stating it remains unclear under CWA if standing elements require specificity); Dolgetta, *supra* note 4, at 730 (commenting that Fifth Circuit in *Crown Central*, 95 F.3d 358 (5th Cir. 1996), chose not to apply *Powell Duffryn* test to determine whether element of fairly traceable was satisfied).

## III. FACTS

Gaston Copper Recycling Corporation (“Gaston Copper”) operates a non-ferrous metals smelting plant on Lake Watson in Gaston, South Carolina.<sup>102</sup> The facility was covered by a NPDES permit granted by the South Carolina Department of Health and Environmental Control (“DHEC”).<sup>103</sup> This permit authorized Gaston Copper to discharge treated contaminated storm water into Lake Watson.<sup>104</sup>

Friends of the Earth (“FOE”) and Citizens Local Environmental Action Network, Inc. (“CLEAN”) brought a citizen suit against Gaston Copper under CWA on behalf of their members.<sup>105</sup> Their complaint alleged Gaston Copper violated its NPDES permit.<sup>106</sup> Specifically, plaintiffs claimed Gaston Copper continuously violated the permit by failing to: (1) obey the discharge limitations for certain pollutants; (2) comply with specific pollutant requirements; and (3) adhere to a schedule that would limit the discharge of harmful pollutants.<sup>107</sup>

To bolster the allegations made by FOE and CLEAN, three of the organizations’ members testified that they “each had a legally protected interest in the waterways that were harmed by Gaston Copper’s . . . violations.”<sup>108</sup> Wilson Shealy claimed a protected in-

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102. See *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 179 F.3d 107, 109 (4th Cir. 1999) (noting that plant’s location is on Lake Watson, which is wholly contained).

103. See *id.* (explaining when Gaston Copper purchased facility in 1990, facility was covered by National Pollutant Discharge Elimination System (“NPDES”) Permit). The DHEC reissued Gaston Copper’s Permit on February 13, 1991, with a renewal date of March 1, 1991. See *id.*

104. See *id.* (stating Gaston Copper’s Permit required: treatment of contaminated storm water prior to discharge into Lake Watson, discharge of limited quantities of effluents, schedule for compliance with effluent limitations, and reporting and monitoring of effluent discharges).

105. See *id.* For a further discussion of citizens suits, see *supra* notes 44-52 and accompanying text.

106. See *Gaston Copper*, 179 F.3d at 109-10 (stating FOE and CLEAN in their citizens suits allege Gaston Copper violated and continued to violate its March 1, 1991 Permit). FOE and CLEAN claimed Gaston Copper’s violations “affected their ‘ability to protect and improve the waters of South Carolina’ and affected the ‘health, economic, recreational, aesthetic and environmental interests’ of their members.” *Id.* at 110. FOE and CLEAN also claimed that Gaston Copper’s violations interfered with their members’ “ability to take action on their own behalf.” *Id.*

107. See *id.* (noting FOE and CLEAN sought civil penalties, declaratory and injunctive relief, and court fees in their citizens suits due to Gaston Copper’s Permit violations).

108. *Id.* (noting not all three members belonged to both organizations). Wilson Otto Shealy is a member of CLEAN, William McCullough, Jr. is a member of FOE and Guy Jones belongs to both FOE and CLEAN. See *id.*

terest in the lake on his property, which was located four miles downstream from Gaston Copper's facility.<sup>109</sup> Guy Jones claimed a protected interest deriving from the Edisto River because he made his living by giving guided tours on the river.<sup>110</sup> Finally, William McCullough, Jr. claimed he possessed a protected interest because he used the Edisto River to scuba dive.<sup>111</sup> All the members claimed that their "protected recreational and economic interests in the waterways that they used were injured in fact by Gaston Copper's . . . violations."<sup>112</sup>

To prove Gaston Copper violated its permit and injured the protected interests of the organizations and their members, FOE and CLEAN introduced expert testimony and two environmental studies during trial.<sup>113</sup> Dr. Bruce Bell stated that Gaston Copper's permit, although not specifying toxicity limits, did provide water quality limits and required Gaston Copper to monitor its toxicity limits by conducting total effluent toxicity tests.<sup>114</sup> According to Dr. Bell, the tests conducted by Gaston Copper for DHEC, which evaluated the concentration of certain pollutants in fish tissue from Lake

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109. See *Gaston Copper*, 179 F.3d at 110 (mentioning Shealy's family engaged in recreational activities on their 67 acre lake, such as fishing and swimming). Wilson Shealy believed his lake contained mercury after reading a local newspaper article that stated all area lakes contained mercury, and DHEC testing on his lake prior to suit revealed the presence of effluents. See *id.* at 110-11. Shealy claims Bull Swamp and several other waterways, Boggy Branch included, are the source of his lake. See *id.* at 110 n.2. For a further discussion of Shealy's claim, see *supra* note 107 and *infra* note 112.

110. See *id.* at 110 (reporting Guy Jones is owner and president of canoe company which provides guided tours on Edisto River). For a further discussion of Jones' claim, see *supra* note 107 and *infra* note 112.

111. See *id.* For a further discussion of McCullough's claim, see *supra* note 107 and *infra* note 112.

112. See *Gaston Copper*, 179 F.3d at 110 (explaining various community concerns for polluted lakes). For example, Shealy states his property value has diminished because of Gaston Copper's discharges and public remarks that his lake is "polluted". See *id.* at 111. Jones stated his concern about the impact of Gaston Copper's discharges arises out of the inability of his company to provide quality tours where his clients' health would not be threatened. See *id.* Finally, McCullough expressed his concern about "all waters in South Carolina that [he] dives having contaminants, especially heavy metals, [and] pesticide runoff." *Id.*

113. See *id.* at 111 (noting FOE and CLEAN relied upon expert testimony of Dr. Bruce Bell and two studies conducted by Gaston Copper to illustrate their members' protected interests were injured in fact).

114. See *id.* (noting Dr. Bell's testimony revealed that Gaston Copper's 1991-1995 toxicity tests for DHEC indicated discharged effluents had "observable effect" on nearby waters). The Fourth Circuit determined that while Dr. Bell testified about the negative impact these toxicity tests disclosed, he "was unable to relate the toxicity tests to the alleged . . . [P]ermit water quality effluent limit violations." *Id.*

Watson, revealed three important findings.<sup>115</sup> First, concentrations of heavy metals existed in the tissue of the fish inhabiting the lake.<sup>116</sup> Second, the discharges from Gaston Copper created no “apparent degradation” of the fish.<sup>117</sup> Finally, although the tests demonstrated that lead and copper were at detectable concentrations in the sediment, the tests also mentioned that “these concentration [levels] were less than previous years, and ‘similar to values seen throughout South Carolina.’”<sup>118</sup>

The United States District Court for the District of South Carolina dismissed the suit for lack of subject matter jurisdiction.<sup>119</sup> According to the district court, “FOE and CLEAN failed to establish standing in their own right or representational standing to bring their claim representing the interests of their members.”<sup>120</sup> The district court also noted that the two organizations did not properly demonstrate that the alleged injuries suffered by their members were fairly traceable to Gaston Copper’s permit violations.<sup>121</sup> On appeal, the Fourth Circuit, despite a vocal dissent by Chief Justice Wilkinson, affirmed the district court’s holding.<sup>122</sup> Specifically, the Fourth Circuit held that the organizations established neither in-

115. *See id.* (discussing Gaston Copper’s two studies for DHEC that FOE and CLEAN relied upon in suit). These two studies, the “1993 and 1994 Water Quality Stud[ies] to Evaluate the Fish Tissue, the Macroinvertebrate Community and Sediments at Gaston Copper Recycling Corporation,” analyzed Lake Watson, Boggy Branch and Bull Swamp Creek. *Id.*

116. *See id.* (discussing how studies indicated specific heavy metal concentrations in fish tissue from Lake Watson, but no fish tissue studies were conducted in Boggy Branch or Bull Swamp Creek).

117. *See Gaston Copper*, 179 F.3d at 111. (concluding both studies showed no indication of fish decline in numbers or health due to Gaston Copper’s discharges in Lake Watson).

118. *Gaston Copper*, 179 F.3d at 112 (quoting *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 179 F.3d 107 (J.A. 944,960,972,990)) (stating studies showed small levels of copper, lead and mercury in Lake Watson, but only revealed lead and copper in sediment of Boggy Branch and Bull Swamp Creek). The studies also concluded that “these concentrations were less than previous years, and ‘similar to values seen throughout South Carolina.’” *Id.*

119. *See id.* (asserting district court concluded FOE and CLEAN failed to establish either individual or representational standing and, therefore, district court had no subject matter jurisdiction to hear case).

120. *Id.* (remarking that FOE and CLEAN’s members neglected to present evidence that Gaston Copper’s discharges injured or threatened their members’ waterways). The Court noted that Shealy, Jones and McCullough’s testimony alone were not sufficient evidence of “adversely affected” waterways. *Id.*

121. *See id.* (commenting on district court’s determination that injuries to FOE and CLEAN’s members were not fairly traceable to Gaston Copper’s discharges).

122. *See Gaston Copper*, 179 F.3d at 116 (noting Fourth Circuit agreed with district court that FOE and CLEAN lacked standing to bring citizens suit).



jury in fact on behalf of their members nor that the injuries were fairly traceable to Gaston Copper's conduct.<sup>123</sup>

#### IV. ANALYSIS

##### A. Narrative Analysis

###### 1. *The Standing Requirement*

The Fourth Circuit appropriately began its analysis by reviewing whether the plaintiffs had established standing.<sup>124</sup> The *Gaston Copper* court noted that organizations such as FOE and CLEAN may have standing to bring suit in federal courts either individually or as a representative of its members.<sup>125</sup> The organizations brought citizen suits on behalf of their members, as a result the Fourth Circuit first considered whether the organizations' members would have had individual standing to bring suit on their own behalf.<sup>126</sup> For an individual to have standing, the individual must demonstrate: (1) an actual or threatened injury resulted from illegal conduct; (2) that the injury must be "fairly traceable" to the illegal conduct; and (3) that the injury is likely to be remedied by a favorable judicial decision.<sup>127</sup> Consequently, the *Gaston Copper* court considered whether these three requirements had been satisfied, and determined the organizations fell short on the first two prongs.<sup>128</sup>

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123. *See id.* (stating organizations failed to establish Gaston Copper's Permit violation contributed to supposed pollution which injured members' protected interest waterways).

124. *See id.* at 113 (beginning its analysis of case by reviewing whether FOE and CLEAN established necessary standing to bring citizens suit under CWA).

125. *See id.* at 112 (citing Natural Resources Defense Council v. Watkins, 954 F.2d 974, 978 (4th Cir. 1992)).

126. *See id.* at 113 (discussing that to establish representational standing, organizations first must establish "their members would have an individual right to sue").

127. *See Gaston Copper*, 179 F.3d at 113 (setting forth individual standing requirements set forth by Supreme Court in *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, (1982)). The Fourth Circuit quoted the Supreme Court's opinion in *Valley Forge*.

[A]t an irreducible minimum, Art. III requires the party who invokes the court's authority to 'show [1] that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant, and [2] that the injury 'fairly can be traced to the challenged action' and [3] 'is likely to be redressed by a favorable decision.'

*Id.* (quoting *Valley Forge Christian College*, 454 U.S. at 472).

128. *See Gaston Copper*, 179 F.3d at 113 (determining whether FOE and CLEAN established injury in fact requirement).

a. *Establishing Injury in Fact*

The *Gaston Copper* court observed that to prove an injury in fact, plaintiffs must demonstrate an infringement of a legally protected interest, that is “(a) concrete and particularized and (b) actual or imminent, not . . . hypothetical.”<sup>129</sup> While the Fourth Circuit recognized the members’ waterway interests were legally protected, it found a lack of sufficient evidence to prove that Gaston Copper’s conduct posed an actual or potential threat to the waterways.<sup>130</sup>

In *Gaston Copper*, the Fourth Circuit found no evidence to confirm the existence of pollutants in Shealy’s lake or the sections of the Edisto River used by Jones and McCullough.<sup>131</sup> In fact, the *Gaston Copper* court observed that no type of toxicity test had been conducted on these waters.<sup>132</sup> In addition, none of the members’ testimonies revealed any apparent or noticeable negative impact on the waters or the surrounding areas.<sup>133</sup> Although the members testified they were “concerned that Gaston Copper’s conduct has resulted in pollution of water in which Shealy and McCullough recreated and of water in which Jones’ company used,” the *Gaston Copper* court concluded neither waterway sustained actual or concrete injury.<sup>134</sup>

As a result, the Fourth Circuit decided the FOE and CLEAN organizations based their claims on “mere speculation . . . without any evidence to support their fears or establish the presence of pol-

129. *Id.* Although the Supreme Court has stated some invasions of economic interests may constitute injury in fact, the Fourth Circuit has acknowledged certain invasions of environmental and aesthetic interests may also comprise injury in fact. *See id.*; *see, e.g.*, *Natural Resources Defense Council, Inc. v. Watkins*, 954 F.2d 974, 980 (4th Cir. 1992) (providing that organization’s members had standing if pollution discharge affected area where members engaged in recreational activities); *Sierra Club v. Simkins Industries, Inc.*, 847 F.2d 1109, 1113-14 (4th Cir. 1988) (holding Fourth Circuit acknowledges aesthetic and environmental harm as satisfying injury-in-fact requirement of standing).

130. *See Gaston Copper*, 179 F.3d at 113-14 (commenting that plaintiffs’ affidavits indicated observations of waterways conditions yet did not show pollution resulted from defendant).

131. *See id.*

132. *See id.* at 114 (remarking no toxicity test or studies were performed on FOE and CLEAN members’ protected interest waterways).

133. *See id.* at 113-14 (finding “none of the members even testified there was an observable negative impact on the waters that they used or surrounding ecosystem of such waterways”).

134. *Id.* at 114 (noting Shealy, Jones and McCullough’s testimonies stated they possessed concerns regarding Gaston Copper’s discharges, but could not provide actual or specific evidence of harm to their waterways as result of discharges).

lutants in the allegedly affected waters.”<sup>135</sup> The Fourth Circuit stated that, aside from mere “concerns” of injury to the waterways, no persuasive evidence indicated any negative effect on the waters due to pollutants.<sup>136</sup>

*b. Traceability of Gaston Copper’s Conduct.*

Finding that the plaintiffs failed to establish an actual injury or threat of injury to the protected waters of FOE and CLEAN’s members, the Fourth Circuit asked, in the alternative, whether the organizations had provided sufficient evidence that the alleged injuries were fairly traceable to Gaston Copper’s conduct.<sup>137</sup> FOE and CLEAN contended their members’ injuries were “fairly traceable” to Gaston Copper’s violations of its permit because the harmful discharges occurred upstream from the waterways where their members had protected interests.<sup>138</sup> The organizations presented evidence that demonstrated how the runoff of water from Lake Watson flows to Boggy Branch, Bull Swamp Creek and then to the Edisto River.<sup>139</sup> FOE and CLEAN contended this evidence conclusively proved the pollutants Gaston Copper discharged in Lake Watson threatened their members’ protected interests in their respective waterways.<sup>140</sup>

The *Gaston Copper* court noted, however, that to fulfill the fairly traceable requirement of standing, a plaintiff must illustrate the existence of a “substantial likelihood” that the harm caused was the result of the defendant’s conduct.<sup>141</sup> The Fourth Circuit held that

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135. *Gaston Copper*, 179 F.3d at 114 (remarking that FOE and CLEAN did not present tests or studies to indicate negative impact caused to their members’ protected interest waterways as result of Gaston Copper’s conduct).

136. *See id.* at 114 (providing testimonies of “mere speculation” about negative impact on waterways was not enough evidence to establish standing for Fourth Circuit to conclude Gaston Copper’s discharges polluted waterways).

137. *See id.* at 115. For a discussion of the fairly traceable requirement for establishing standing, see *supra* notes 68-72 and accompanying text.

138. *See id.* (noting FOE and CLEAN’s theory was based upon notion that water flows downstream). Gaston Copper’s Facility is located upstream from the protected interest waterways of FOE and CLEAN’s members. *See id.* (remarking that Shealy’s lake sits only four miles from Gaston Copper’s facility).

139. *See Gaston Copper*, 179 F.3d at 112 (stating FOE and CLEAN presented evidence that DHEC hearing officer testified “runoff flows from Lake Watson to Boggy Branch, to Bull Swamp Creek, and to the Edisto River”).

140. *See id.* at 112 (discussing how FOE and CLEAN based their claims on DHEC officer’s testimony and argued Gaston Copper’s discharge flows downstream thus injuring their members’ protected interest waterways).

141. *See id.* at 115 (stating Fourth Circuit held FOE and CLEAN neglected to establish second requirement of substantial likelihood analysis which requires waterway where plaintiff has protected interest to be negatively affected by pollutant discharged by defendant).

FOE and CLEAN presented no evidence to illustrate the waterways possessed the type of pollutants discharged by Gaston Copper.<sup>142</sup> Because “FOE and CLEAN did not present evidence that the allegedly affected waterways . . . contained effluents of the type Gaston Copper discharges”, they failed to satisfy the substantial likelihood requirement.<sup>143</sup>

Furthermore, the *Gaston Copper* court stated neither Gaston Copper’s toxicity tests nor its studies were conducted on Shealy’s lake or the protected interest portions of the Edisto River.<sup>144</sup> The Fourth Circuit acknowledged the undeniable fact that water flows downstream; it concluded, however, “the distances between the source of the alleged pollution and the protected waterways . . . [are] simply too great to infer causation.”<sup>145</sup> The *Gaston Copper* court concluded that, although no absolute mileage limit precludes a plaintiff’s satisfaction of the fairly traceable requirement of standing, the mere assertion that water flows downstream does not satisfy the requirement.<sup>146</sup>

## 2. *The Dissenting Opinion*

The dissent in *Gaston Copper*, authored by the Fourth Circuit’s Chief Justice Wilkinson, charged that the majority’s interpretation of the standing requirement made it impossible to bring a citizen suit under CWA.<sup>147</sup> Although the dissent disagreed with the majority’s result, the dissent found fault only with the dismissal of CLEAN’s suit on behalf of Wilson Shealy.<sup>148</sup> According to Chief

142. *See id.* at 115 (noting FOE and CLEAN neglected to present evidence that their members’ waterways possessed effluents found in Gaston Copper’s discharges into Lake Watson).

143. *Id.*

144. *See Gaston Copper*, 179 F.3d at 115 (revealing “[n]either Gaston Copper’s laboratory toxicity tests, nor its 1993 and 1994 studies, was performed on Shealy’s lake or portions of the Edisto River” used by Jones and McCullough).

145. *Id.* (acknowledging that portions of Edisto River used by Jones and McCullough are 10 to 15 miles from Gaston Copper’s facility). Although Shealy’s lake is only four miles from Gaston Copper’s facility, 31 ponds intervene and three other streams deposit into his lake. *See id.*

146. *See id.* at 115 n.7 (explaining there is no mileage requirement for fairly traceable element of standing). The Fourth Circuit stated “FOE and CLEAN’s reliance on the proposition that water flows downstream is, however, simply insufficient to establish the fairly traceable element of standing.” *Id.*

147. *See Gaston Copper*, 179 F.3d at 116-17 (Wilkinson, C.J., dissenting) (accusing majority of raising standing requirements to level that would essentially eliminate citizens suits under CWA). Chief Justice Wilkinson states “[t]oday’s holding set courts up for the litigation of scientific facts as a matter of standing — facts unnecessary to the ultimate questions presented in these cases.” *Id.* at 117-18.

148. *See id.* at 117-18 (Wilkinson, C.J., dissenting) (remarking that dissent agreed with dismissal of suits brought on behalf of other two members). The dis-

Justine Wilkinson's dissent, the majority's ruling diverged from other circuits' decisions in three important ways: (1) it required additional scientific proof although a clear nexus exists between "the claimant and the area of environmental impairment"; (2) it failed to acknowledge the harm caused by the threatened injury; and (3) it required tort-like causation to prove the traceability of harm.<sup>149</sup> Chief Justice Wilkinson consequently lamented the majority's unnecessary divorce from the majority of other circuits.<sup>150</sup>

## B. Critical Analysis

The Fourth Circuit, in *Gaston Copper*, unnecessarily adds to the judicial confusion surrounding the elements of standing.<sup>151</sup> First, the majority seems to have usurped Congress' authority by raising the requirement levels for both the injury in fact and fairly traceable elements of standing.<sup>152</sup> Second, the Fourth Circuit fails to stand by its sister circuits' rulings by suggesting that a threatened harm will not be recognized unless a plaintiff presents conclusive proof that harm exists.<sup>153</sup> Thus, unlike its sister circuits, the major-

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sent states, in a footnote, that the lack of evidence presented places Jones' and McCullough's waterways within Gaston Copper's discharge zone. *See id.* at 117 n.1.

149. *See id.* at 121-22 (Wilkinson, C.J., dissenting). Essentially, the dissent points out that "no court has seen fit to restrict citizens such as Wilson Shealy from vindicating their legal rights under the Clean Water Act, and many [courts] routinely consider similar claims." *Id.* at 122.

150. *See Gaston Copper*, 179 F.3d at 117-23 (Wilkinson, C.J., dissenting) (providing majority in *Gaston Copper* departs from other circuits by requiring scientific certainty of standing requirements). In his dissent, Chief Justice Wilkinson states the majority's divorce from other circuits' holding creates a "super standing requirement [that] renders Shealy's legal rights — and hence *Gaston Copper*'s legal obligations — null in all but a word." *Id.* at 117.

151. *See id.* at 116 (Wilkinson, C.J., dissenting) (requiring plaintiffs in environmental suits to not only demonstrate elements of injury in fact and fairly traceable but to prove them with scientific evidence). For discussion of what is required by the Supreme Court to establish standing and the confusion about the requirements see *supra* notes 76-100 and accompanying text.

152. *See id.* at 116-17 (Wilkinson, C.J., dissenting) (remarking that by "erecting standing hurdles so high as to effectively excise the citizen suit provision from the Clean Water Act", *Gaston Copper*'s majority intrudes upon Congressional powers). For a discussion of *Gaston Copper*'s majority encroaching on Congress' authority with the raising of the standing requirements, see *infra* notes 137-46 and accompanying text.

153. *See id.* at 122 (Wilkinson, C.J., dissenting) (stating "the majority's virtual silence on the issue of threatened injury is at odds with the wide recognition that threats or increased risk constitute cognizable harm"). For a discussion of threatened harm satisfying the injury in fact element of standing, see *infra* notes 160-65 and accompanying text.

ity in *Gaston Copper* appears to now require tort-like causation to satisfy the fairly traceable element of standing.<sup>154</sup>

Chief Justice Wilkinson's dissent in *Gaston Copper*, not Judge Hamilton's majority, better accords with the majority of circuits.<sup>155</sup> Chief Justice Wilkinson correctly contends that the majority overlooks the basic reality that Gaston Copper's discharges did violate its permit.<sup>156</sup> The dissent also accurately emphasized that scientific facts are not necessary to prove either the injury in fact or the fairly traceable requirements of standing.<sup>157</sup>

### 1. *The Majority Decision*

The standing doctrine is premised on the Article III concept of separation of powers.<sup>158</sup> Although Article III of the Constitution grants the judicial branch the right to enforce laws created by the legislative branch, it does not grant courts the power to make laws more onerous and burdensome.<sup>159</sup> The Fourth Circuit's ruling in *Gaston Copper*, however, has taken the injury in fact and fairly trace-

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154. See *Gaston Copper*, 179 F.3d at 122 (Wilkinson, C.J., dissenting) (noting that no other court requires additional tort-like causation to establish traceability). For a discussion on causation needed to establish fairly traceable requirement of standing, see *infra* notes 66-67 and accompanying text.

155. See *id.* at 117-22 (Wilkinson, C.J., dissenting) (emphasizing that *Gaston Copper* court's additional requirement of scientific proof to establish injury-in-fact and traceability departs from other circuits holdings). For a discussion of Chief Justice Wilkinson's dissent and how it better accords with the majority of the circuit courts, see *infra* notes 186-96 and accompanying text.

156. See *id.* at 118 (Wilkinson, C.J., dissenting) (quoting dissent, "[I]ost in the majority's rendition of the record is a simple reality: Gaston Copper has been accused of violating its discharge permit . . ."). For a discussion of how the majority in *Gaston Copper* overlooked the NPDES permit violation, see *infra* notes 173-78 and accompanying text.

157. See *id.* at 117 (Wilkinson, C.J., dissenting) (noting that "[n]othing in Article III suggests that our jurisdiction hinges on such elevated standards of [scientific] proof"). For a discussion on the injury in fact and fairly traceable requirements and the alleged need of proof with scientific evidence, see *infra* notes 173-86 and accompanying text.

158. See U.S. CONST. art. III, § 2, cl. 1; see also *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-60 (1992) (commenting that Article III requires federal courts to hear all "cases" and "controversies"); see also *Allen v. Wright*, 468 U.S. 737, 751 (1984) (providing key factor of subject matter jurisdiction is standing); *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471-72 (1982) (noting uncertainty whether particular features of standing requirement are mandated by Article III or by Supreme Court); *Krauthamer*, *supra* note 19, at 854 (asserting standing is part of determination of whether courts hear particular case); *Melton*, *supra* note 16, at 1878 (explaining relation between asserted claim and plaintiff is to guarantee appropriate party is bringing suit).

159. See *Melton*, *supra* note 16, at 1877 (stating case and controversy requirement of Article III limits federal courts from intruding into areas allocated to other branches of federal government); see also *McDermott*, *supra* note 13, at 530-31

able requirements to an improperly heightened level that would preclude plaintiffs with meritorious claims from obtaining legal redress.<sup>160</sup>

Despite the *Gaston Copper* majority's recognition of these tests, it incorrectly applied them and thereby wrongly dismissed CLEAN's suit on behalf of Wilson Shealy.<sup>161</sup> Instead of allowing a threatened injury to qualify as injury in fact, as articulated in the "irreducible minimum" test, the majority required some tangible evidence of injury before it would acknowledge the injury.<sup>162</sup> Additionally, the majority incorrectly held that even if Shealy possessed an injury in fact, CLEAN did not provide sufficient evidence that the alleged injuries were fairly traceable to Gaston Copper's conduct.<sup>163</sup> These heightened requirement levels undermine Congress' intent of CWA's citizen suit provision.<sup>164</sup> Thus, by requiring CLEAN to demonstrate more than the circumstantial evidence presented, the *Gaston Copper* majority encroached upon Congress' power by raising the standing requirements and thus offended notions of separation of powers.<sup>165</sup>

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(providing courts can not intervene in actions that are designated for other branches of government).

160. See *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 179 F.3d 107, 117 (4th Cir. 1999) (Wilkinson, C.J., dissenting) (explaining by requiring tangible evidence for injury in fact and fairly traceable, majority in *Gaston Copper* ignores separation of powers principles).

161. See *Gaston Copper*, 179 F.3d at 113-15 (noting although Fourth Circuit recognizes that invasions of aesthetic and environmental interests may satisfy injury in fact, FOE and CLEAN's members claims of economic and recreational interest did not establish injury in fact).

162. See *id.* at 113-14 (emphasizing that since no tests, studies or other forms of evidence were presented to demonstrate injury to FOE and CLEAN's members' waterways, they failed to establish injury in fact).

163. See *id.* at 115 (finding that since FOE and CLEAN failed to present evidence that linked members' waterways with type of effluents Gaston Copper's facility discharged they did not satisfy fairly traceable requirement).

164. See 33 U.S.C. § 1365(a)(1)(A) (noting statute allows any citizen to bring suit against any person who is "alleged to be in violation of an effluent standard or limitation"); see also Dolgetta, *supra* note 4, at 732 (commenting Congress has specifically provided citizens role in enforcing environmental laws with citizen suit provision); Kalen, *supra* note 45, at 4 (noting since creation of citizen suit provision litigants now view courts as arbiters to environmental conflicts); McDermott, *supra* note 13, at 532 (explaining by Congress' enactment of CWA's citizen suit, it has expressed enthusiastic support for cleansing of nation's waters).

165. See *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471 (1982) (articulating that judicial power as defined by Article III is not unconditional authority to determine constitutionality of legislative or executive acts); see also Lujan v. *Defenders of Wildlife*, 504 U.S. 555, 559-60 (1992) (providing Constitution's central mechanism of separation of powers depends mainly upon understanding of what actions are designated to legislature, executive and judicial branches); Krauthamer, *supra* note 19, at 859 (noting unless Congress specifically states its intent as to what constitutes an injury,

a. *The Injury in Fact Requirement*

Since the Supreme Court's announcement of the irreducible minimum requirements necessary to satisfy standing in *Valley Forge Christian College*, the circuit courts have adopted various interpretations of these requirements.<sup>166</sup> The Supreme Court, in *Lujan v. Defenders of Wildlife*,<sup>167</sup> held that a threatened injury would qualify as injury in fact so long as it was "actual or imminent, not conjectural or hypothetical."<sup>168</sup> Although other circuits, such as the Court of Appeals for the Seventh Circuit in *Village of Elk Grove Village v. Evans*,<sup>169</sup> the Fifth Circuit in *Sierra Club v. Cedar Point Oil Co.*<sup>170</sup> and even the Fourth Circuit in *Sierra Club v. Simkins Indus.*,<sup>171</sup> a case that pre-dates *Gaston Copper*, have acknowledged the difficulty in proving

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courts will use their discretion to construe definition of injury); McDermott, *supra* note 13, at 530-31 (stating court will not intervene in administration of laws unless Congress allows them).

166. See *Valley Forge Christian College*, 454 U.S. at 472 (stating party who invokes court's authority to hear and decide case must demonstrate at irreducible minimum that: (1) party personally suffered actual or threatened injury as result of illegal conduct of defendant; (2) plaintiff's injury is fairly traceable to defendant's conduct; and (3) favorable decision by court will redress injury); see generally, Carine, *supra* note 13, at 196 (noting Third Circuit acknowledged that harm to aesthetic and recreational interest were sufficient to provide standing); Dolgetta, *supra* note 4, at 727-28 (commenting that Fifth Circuit denied standing to environmental group plaintiff because it did not demonstrate with scientific evidence that defendant's discharge negatively affected plaintiffs waters); Irvin, *supra* note 66, at 96-97 (observing Fourth Circuit's ruling that for plaintiff to establish fairly traceable he/she needed to show defendant's pollutant was responsible for kinds of injuries alleged by plaintiff); see also Kalen, *supra* note 43, at 3 (explaining that as result of Supreme Court's decisions, there is confusion and disagreement among lower courts on how to apply rules of standing); McDermott, *supra* note 13, at 542 (providing that environmental group standing is in state of transition and there are several possibilities for increased access to judicial review).

167. 504 U.S. 555 (1992) (holding that environmental group seeking to challenge regulation pursuant to Endangered Species Act lacked standing).

168. *Id.* at 560 (discussing established irreducible minimums of constitutional standing). The actual and imminent requirements exist to guarantee that "courts do not entertain suits based on speculative or hypothetical harms." Public Interest Research Group of New Jersey, Inc. v. Magnesium Elektron, Inc., 123 F.3d 111, 122 (3d Cir. 1997) (adding although evidence of generalized harm might support standing, it fails to support claims of threatened injury once defendant demonstrates to court those injuries are unlikely).

169. 997 F.2d 328 (7th Cir. 1993) (holding that appeal to enjoin Army Corps of Engineers from granting permit for construction of radio tower in flood plain near municipality without complying with executive order regarding flood plain development was rendered moot by abandonment of radio tower project).

170. 73 F.3d 546 (5th Cir. 1996) (affirming finding of standing for environmental group based on affidavits of members alleging injuries to aesthetic interests).

171. 847 F.2d 1109 (4th Cir. 1988) (holding that failure to file reports which were required by discharge permit could be subject of citizen suit).



a threatened injury, they have also recognized that threats and increased risks qualify as injury in fact.<sup>172</sup>

The majority in *Gaston Copper* wrongly rejected CLEAN and Shealy's evidence of past pollution on the grounds that the DHEC toxicity tests were conducted before Gaston Copper purchased its facility.<sup>173</sup> Other circuits would find the evidence that pollution from this facility reached Shealy's lake in the past is sufficient evidence to demonstrate that the plaintiff's fears and concerns are based on more than mere speculation.<sup>174</sup> The Fourth Circuit majority, however, would wrongly require CLEAN to submit scientific proof that effluents found in Shealy's lake resulted in fact from the Gaston Copper plant before the Fourth Circuit would recognize threatened harm.<sup>175</sup> This newly required threshold is in direct opposition to standards set forth by the Supreme Court in *Babbitt v. United Farm Workers National Union*,<sup>176</sup> which does not require plain-

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172. See *Sierra Club v. Cedar Point Oil*, 73 F.3d 546, 557 (5th Cir. 1996) (providing that injury to aesthetic, environmental or recreational interests is sufficient to establish standing and these injuries need not be substantial); see also *Village of Elk Grove Village v. Evans*, 997 F.2d 328, 329 (7th Cir. 1993) (emphasizing that "even a small probability of injury is sufficient" to confer standing to plaintiff); *Sierra Club v. Simkins Indus.*, 847 F.2d 1109, 1113 (4th Cir. 1988) (noting that threat of future injury from failure to report effluent permit violation qualifies as injury in fact for standing); Carine, *supra* note 13, at 185 (stating Supreme Court declared that magnitude of alleged injury is not important for standing purposes as long as some identifiable injury was present); Krauthamer, *supra* note 19, at 845 (providing if courts ignore injury requirement, then they would abandon critical fact of case and controversy clause that distinguishes judiciary from legislative and executive branches).

173. See *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 179 F.3d 107, 114 n.6 (4th Cir. 1999) (explaining majority rejected 1990 DHEC tests that Shealy and CLEAN presented because they were dated before Gaston Copper purchased facility and past evidence of pollutants is not sufficient for imminent threat of harm requirement); see also Millan, *supra* note 20, at 419 (remarking that it is not relevant for standing requirement purposes whether injury is past or future impairment).

174. See *Gaston Copper*, 179 F.3d at 120 (noting CLEAN's suit was filed in 1992, shortly after Gaston Copper had purchased facility, and from 1990 through 1993 Gaston Copper operated its facility using same treatment system that its prior owner had used); see also *Public Interest Research Group of New Jersey, Inc. v. Magnesium Elektron, Inc.*, 123 F.3d 111, 124 (3d Cir. 1997) (remarking that effluent discharges pose real threats to environment, thus qualifying them as threatened injury for standing purposes); *Public Interest Research Group of New Jersey, Inc. v. Powell Duffryn Terminals Inc.*, 913 F.2d 64, 71 (3d Cir. 1990) (stating pollution in protected interest waterway is sufficient to establish standing).

175. See *Gaston Copper*, 179 F.3d at 115-16 (explaining *Gaston Copper* court requires plaintiff to present sufficient tangible evidence and facts illustrating actual or imminent injury that is fairly traceable to defendant's conduct in order to have standing).

176. 442 U.S. 289 (1979) (reversing district court finding that Arizona farm labor statute was unconstitutional).

tiffs to wait until harm occurs before seeking judicial relief.<sup>177</sup> Therefore, by demonstrating that Gaston Copper is violating its effluent permit by polluting nearby water, CLEAN and Shealy established a threatened injury that should satisfy the injury in fact requirement.<sup>178</sup>

*b. Causation and the Fairly Traceable Requirement*

The majority in *Gaston Copper* was also misguided in its interpretation of the fairly traceable requirement.<sup>179</sup> As the Third Circuit stated in *Public Interest Research Group v. Powell Duffryn Terminals Inc.*,<sup>180</sup> “the requirement that plaintiffs’ injuries be fairly traceable to the defendant’s conduct does not mean that plaintiffs must show to a scientific certainty that defendant’s effluent, and defendant’s effluent alone, caused the precise harm suffered by the plaintiffs.”<sup>181</sup> The Fourth Circuit, in *Natural Resources Defense Council, Inc.*

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177. *Compare Babbitt*, 442 U.S. at 298 (asserting plaintiff does not have to wait for harm to occur before seeking judicial relief), *with Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 (1992) (commenting that past exposure to illegal conduct does not show present case or controversy); *see also Sierra Club v. Cedar Point Oil Co. Inc.*, 73 F.3d 546, 556-57 (5th Cir. 1996) (stating injury can be for future harm rather than past harm); Dolgetta, *supra* note 4, at 728-29 (noting plaintiff can simply assert that harm may take place and that future impairment is sufficient to establish injury); Kalen, *supra* note 43, at 51-52 (remarking that *Lujan* requires plaintiff to demonstrate increased risk of environmental harm affects plaintiff’s concrete and particularized interest); Krauthamer, *supra* note 19, at 850 (providing where actual injury is absent, imminence is required).

178. *See Gaston Copper*, 179 F.3d at 120 (Wilkinson, C.J., dissenting) (explaining that Gaston Copper’s permit violations create concrete threats to waters with range of its discharge, which Shealy’s lake falls within); *see also Magnesium Elektron*, 123 F.3d at 124 (commenting that it is possible for plaintiff in future to allege injury from defendant’s failure to monitor and report effluent discharges); *Sierra Club v. Simkins Industries, Inc.*, 847 F.2d 1109, 1113 (4th Cir. 1988) (stating under application of Fourth Circuit’s past precedent, individual has standing to pursue monitoring and reporting claims regardless of whether toxins have yet reached waterway); Krauthamer, *supra* note 19, at 849 (observing CWA citizen suit provision requires only that person be adversely affected by illegal pollution).

179. *See Gaston Copper*, 179 F.3d at 115 (mentioning CLEAN did not satisfy substantial likelihood part of fairly traceable because it did not present tests or studies that demonstrated effluents discharged by Gaston Copper were present in Shealy’s lake).

180. 913 F.2d 64 (3d Cir. 1990) (holding that plaintiff need not prove causation with absolute scientific rigor to defeat motion for summary judgment).

181. *Id.* at 72; *see also Natural Resources Defense Council, Inc. v. Texaco Refining and Marketing, Inc.*, 2 F.3d 493, 505 (3d Cir. 1993) (acknowledging that while plaintiffs need not establish causation to scientific certainty, they must show substantial likelihood that defendant’s conduct caused their harm); *Magnesium Elektron*, 123 F.3d at 121-22 (explaining substantial likelihood test of fairly traceable allows plaintiff to link environmental injury to defendant’s pollution when plaintiff is unable to prove to scientific certainty that defendant’s discharges caused plaintiff’s injury); *Marshall v. Meadows*, 105 F.3d 904, 906 (4th Cir. 1997) (observing plaintiff is only required to prove that injury can be fairly traced to contested ac-

*v. Watkins*,<sup>182</sup> also agreed with its sister circuits that “[t]he fairly traceable requirement . . . is not equivalent to a requirement of tort causation.”<sup>183</sup> Rather, the *Watkins* court noted that plaintiffs need only show that “a defendant discharges a pollutant that ‘causes or contributes to the kinds of injuries alleged by the plaintiffs.’”<sup>184</sup>

The majority in *Gaston Copper*, however, improperly held that Shealy’s injury was not fairly traceable to Gaston Copper’s discharge because CLEAN did not submit any scientific proof that the effluents from Gaston Copper’s facility were present in Shealy’s lake.<sup>185</sup> By requiring plaintiffs to demonstrate causation of harm with scientific proof, the majority in *Gaston Copper* failed to stand by its sister circuits’ rulings that have not restricted citizens such as Shealy from bringing suit under CWA.<sup>186</sup>

tion to establish causation); Dolgetta, *supra* note 4, at 728 (noting that “[e]xisting case law consistently stresses that the plaintiffs do not have to establish to a scientific certainty that the defendant’s discharge is adversely affecting the waterway in question”).

182. 954 F.2d 974 (4th Cir. 1992).

183. *Id.* at 980 n.7 (quoting *Powell Duffryn*, 913 F.2d at 72). For the establishment of standing to redress an environmental injury, a plaintiff does not need to prove that a specific defendant is the only cause of their injury. *See id.* at 980 (adding that plaintiff must simply demonstrate that defendant’s effluent discharges causes or contributes to types of injuries claimed by plaintiff); *see also Powell Duffryn*, 913 F.2d at 72 (stating plaintiff need not establish causation with absolute scientific certainty to defeat motion for summary judgment); Carine, *supra* note 13, at 197 (observing that strict tort causation is not needed for fairly traceable requirement).

184. *Watkins*, 954 F.2d at 980 (quoting *Powell Duffryn*, 913 F.2d at 72). To establish standing for environmental injury, plaintiffs need not demonstrate that a particular defendant caused their injury; rather, absent defendant’s activities, plaintiff would enjoy unaffected use of their resource. *See id.* (agreeing with Third Circuit’s holdings regarding standing requirements); *see also Texaco Refining*, 2 F.3d at 505 (explaining that Third Circuit expounded fairly traceable requirement for CWA’s citizens suits); *Powell Duffryn*, 913 F.2d at 72 (stating that citizen suit’s fairly traceable requirement was furthered by Third Circuit). *See generally Friends of the Earth, Inc. v. Crown Central Petroleum Corp.*, 95 F.3d 358, 361-62 (5th Cir. 1996) (stating that, at some point, court can no longer assume that injury is fairly traceable to defendant’s conduct solely on basis of observation).

185. *See Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 179 F.3d 107, 115 (4th Cir. 1999) (stating neither toxicity tests nor studies were performed on Shealy’s lake and that CLEAN neglected to present any evidence that Gaston Copper’s discharges adversely affected Shealy’s protected interest in his lake); *see also Magnesium Elektron*, 123 F.3d at 121-22 (explaining fairly traceable requirement enables plaintiff to link environmental injury to defendant when plaintiff unable to demonstrate defendant’s actions caused injuries); *Powell Duffryn*, 913 F.2d at 72 (noting fairly traceable requirement does not require plaintiff to demonstrate that defendant’s actions and defendant’s actions alone caused plaintiff’s injuries); Milan, *supra* note 20, at 421 (observing that citizens “do not have to prove injury from pollutants approaching levels necessary to prevail in personal injury cases”).

186. *See Gaston Copper*, 179 F.3d at 115-16 (stating CLEAN did not establish Wilson Shealy suffered injury in fact or that alleged injury was fairly traceable to Gaston Copper’s discharge violations); *cf. Sierra Club v. Cedar Point Oil Co.*, 73

## 2. Judge Wilkinson's Dissent

Chief Justice Wilkinson, writing the lone dissent in *Gaston Copper*, more accurately portrayed the sentiment of the majority of circuit courts.<sup>187</sup> The dissent correctly noted that *Gaston Copper's* majority opinion completely overlooked the basic fact that Gaston Copper violated its NPDES permit by exceeding its effluent discharge limitation.<sup>188</sup> Wilkinson stressed the important fact that Wilson Shealy lives a mere four miles downstream from Gaston Copper's facility, and concluded that evidence of Gaston Copper's polluting nearby waters makes Shealy's fears and concerns of threatened injury both reasonable and substantiated.<sup>189</sup> The Su-

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F.3d 546, 556 (5th Cir. 1996) (finding citizens' concern about water was sufficient for standing); see also *United States v. Metropolitan St. Louis Sewer District*, 883 F.2d 54, 56 (8th Cir. 1989) (approving standing of citizens' group who claimed recreational and aesthetic injuries); *Friends of the Earth v. Consolidated Rail Corp.*, 768 F.2d 57, 61 (2d Cir. 1985) (granting standing to two members who allege recreational and aesthetic injuries); Carine, *supra* note 13, at 188 (providing that environmental group plaintiffs have not encountered much difficulty in satisfying standing requirements); Dolgetta, *supra* note 4, at 728 (acknowledging that existing case law emphasizes that plaintiffs need not establish to scientific certainty that defendant's discharges adversely affect plaintiff's waterways); Irvin, *supra* note 66, at 96-97 (observing that in environmental injury cases, majority of courts have held plaintiffs only need to fulfill fairly traceable requirement by demonstrating that defendant's effluent discharge causes or contributes to types of injuries claimed by plaintiffs).

187. See *Gaston Copper*, 179 F.3d at 117 (Wilkinson, C.J., dissenting) (commenting that *Gaston Copper's* majority departs from other circuits by refusing to consider claim of citizen living within known discharge range of polluting facility); see also Carine, *supra* note 13, at 184 (providing that affidavits stating environmental group members used area for recreational enjoyment is sufficient to meet injury in fact requirement); Dolgetta, *supra* note 4, at 719 (noting Supreme Court declared harm to recreational and aesthetic interests is sufficient for establishing standing); Kalen, *supra* note 43, at 48 (observing that D.C. Circuit held showing of environmental harm to identifiable area coupled with geographical nexus to actual use of affected area was sufficient for standing); see generally Krauthamer, *supra* note 19, at 858 (remarking that under current judicial interpretation, CWA's citizen suit provision is only applicable where legally cognizable injury occurs); McDermott, *supra* note 13, at 530-31 (stating courts will not intervene in administration of laws in some circumstances unless Congress directs them).

188. See *Gaston Copper*, 179 F.3d at 118 (Wilkinson, C.J., dissenting) (stating that majority ignores facts in record and by doing so averts its gaze from Shealy's downstream interest).

189. See *id.* (explaining Gaston Copper's discharge affects or has potential to affect waterways for 16.5 miles downstream and Shealy sits only four miles away from mouth of discharge pipe); see also *Magnesium Elektron*, 123 F.3d at 121-22 (explaining substantial likelihood requirement enables plaintiff to link environmental injury to defendant when plaintiff is unable to demonstrate defendant's actions caused injuries); *Natural Resources Defense Council, Inc. v. Watkins*, 954 F.2d 974, 980 (4th Cir. 1992) (explaining that to establish standing for environmental injury, plaintiffs need not demonstrate that particular defendant caused their injury, but rather absent defendant's activities plaintiff would enjoy unaffected use of their resource); Carine, *supra* note 13, at 187 (asserting question of whether environ-

preme Court has long held that a threatened injury qualifies as an injury in fact so long as it is actual or imminent.<sup>190</sup> By holding otherwise and requiring additional scientific evidence, the *Gaston Copper* majority ignored legitimate health and environmental concerns, and unnecessarily raised the standards required to establish standing.<sup>191</sup>

The *Gaston Copper* majority denied that CLEAN presented any substantial evidence that implied Gaston Copper's discharges impacted any other waterway besides Lake Watson.<sup>192</sup> Tort-like causation and scientific certainty, however, are not necessary to establish the injury in fact and fairly traceable requirements of standing.<sup>193</sup>

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mental group's injuries were fairly traceable to defendants' action is more difficult requirement to satisfy); Irvin, *supra* note 66, at 96 (explaining to establish individual standing plaintiffs must show they personally suffered injury fairly traceable to defendant's conduct).

190. See *Cedar Point*, 73 F.3d at 556-57 (commenting size of injury is not important and identifiable small injury will suffice); see also *Babbitt v. United Farm Workers National Union*, 442 U.S. 289, 298 (1979) (discussing that inquiry is whether injury presents real, substantial controversy between parties that possess adverse legal interests and dispute which is definite and concrete rather than hypothetical or abstract); see also *Magnesium Elektron*, 123 F.3d at 122 (noting when plaintiff asserts that defendant's threatened injury is source of plaintiff's standing, plaintiff must demonstrate that threatened injury is imminent); Dolgetta, *supra* note 4, at 716 (explaining that particularized means injury must affect plaintiff in personal and individual way); Kalen, *supra* note 43, at 14 (discussing court's finding that injury in fact requires more than mere injury to cognizable interest). See generally *Public Interest Research Group of New Jersey, Inc. v. Powell Duffryn Terminals Inc.*, 913 F.2d 64, 71 (3d Cir. 1990) (providing pollution is considered injury that interferes with enjoyment of natural resources).

191. See *Gaston Copper*, 179 F.3d at 118 (Wilkinson, C.J., dissenting) (providing that record is full of evidence that Gaston Copper is polluting its receiving waters). The plaintiffs produced discharge monitoring reports over a four year period which they claim showed over 500 violations of effluent discharge limits. See *id.* (observing that plaintiffs also presented evidence as to adverse health and environmental effects of these discharges); cf. Krauthamer, *supra* note 19, at 844 (providing that Congress legislates policies to which courts can cite in finding standing in cases where standing might not otherwise be established); Dolgetta, *supra* note 4, at 715 (remarking that standing has been denied in few environmental cases).

192. See *Gaston Copper*, 179 F.3d at 113-14 (noting that although majority concluded CLEAN only presented evidence of its members' concern regarding waterways, it overlooked past evidence of pollution emanating from Gaston Copper's facility).

193. See *Powell Duffryn*, 913 F.2d at 72 (stating fairly traceable requirement does not mean plaintiffs must demonstrate to scientific certainty that defendant and defendant alone caused plaintiff's injury); see also *Magnesium Elektron*, 123 F.3d at 124 (remarking that effluent discharges pose real threats to environment, thus qualifying them as threatened injury for standing purposes); *Cedar Point*, 73 F.3d at 557 (providing that injury to aesthetic, environmental or recreational interests is sufficient to establish standing and these injuries need not be substantial); *Village of Elk Grove Village v. Evans*, 997 F.2d 328, 329 (7th Cir. 1993) (emphasizing that probability of injury is enough to grant standing to plaintiff); *Sierra Club v. Simkins Industries, Inc.*, 847 F.2d 1109, 1113 (4th Cir. 1988) (allowing threat of future

The dissent properly noted that CLEAN submitted evidence which clearly demonstrated the presence of past pollution from Gaston Copper's plant in Wilson Shealy's lake.<sup>194</sup> The dissent further noted that CLEAN provided evidence at trial of Gaston Copper's own studies, which indicated elevations in effluent concentrations in fish tissue from Lake Watson as well as the facility's failure of forty-one toxicity tests between 1991 and 1995.<sup>195</sup> Despite this compelling evidence, the majority held that the evidence CLEAN introduced was not sufficient to constitute standing, and wrongly dismissed the suit.<sup>196</sup> Based on the plaintiffs' presentation of evidence, Chief Justice Wilkinson astutely asserted that "no court has seen fit to restrict citizens such as Wilson Shealy from vindicating their legal rights under the Clean Water Act, and many routinely consider similar claims. In finding that this claim fails to confer standing, the majority stands alone."<sup>197</sup>

## V. IMPACT

The *Gaston Copper* decision improperly requires plaintiffs to prove standing requirements to a scientific certainty.<sup>198</sup> This

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injury of effluent permit violation coupled with actual injury stemming from reporting and sampling violations to qualify for injury in fact requirement); see generally *Babbitt*, 442 U.S. at 298 (asserting plaintiff does not have to wait for harm to occur before seeking judicial relief); Carine, *supra* note 13, at 185 (stating Supreme Court has declared that magnitude of alleged injury is not important for standing purposes as long as some identifiable injury was present); Millan, *supra* note 20, at 419 (remarking that it is not relevant for standing requirement purposes whether injury is past or future impairment).

194. See *Gaston Copper*, 179 F.3d at 119 (Wilkinson, C.J., dissenting) (noting evidence that DHEC employees analyzed water quality in Shealy's lake and reported presence of copper, zinc, nickel, iron and PCBs, all chemicals Gaston Copper's facility had discharged in past).

195. See *id.* at 118-19 (Wilkinson, C.J., dissenting) (concluding that Gaston Copper's permit violation bears direct relationship to health of downstream waters and ecosystems). The toxicity tests Gaston Copper failed between March of 1991 and 1995 consisted of placing small organisms in samples of the effluent and counting the number that became sick as result of the effluent. See *id.* (noting that despite these tests and studies, majority found no degradation to ecosystems downstream and concluded Gaston Copper was not performing worse than in previous years).

196. See *id.* at 119-20 (Wilkinson, C.J., dissenting) (stating majority rejects Shealy's evidence of past pollution strictly on basis that DHEC's tests occurred prior to Gaston Copper purchase of facility in 1991). According to the dissent, for the majority to find standing, they would require evidence that it can touch and feel before it is willing to recognize a threatened injury. See *id.* (comparing majority's approach in *Gaston Copper* to Constitution's, which does not require plaintiffs to wait until injury occurs before plaintiff may seek relief in court).

197. *Gaston Copper*, 179 F.3d at 122 (Wilkinson, C.J., dissenting).

198. See *id.* at 116-18 (Wilkinson, C.J., dissenting) (commenting that as result of Fourth Circuit's holding in *Gaston Copper*, courts should now expect "battles of

heightened requirement will, in effect, prevent plaintiffs with legitimate claims from obtaining relief, and frustrate the Congressional intent behind the citizen suit provision of CWA.<sup>199</sup> Thus, the Fourth Circuit in *Gaston Copper* improperly added a new hurdle to the requirements of standing.<sup>200</sup>

The true impact of the *Gaston Copper* case, however, lies in its inability to clarify the issue of standing.<sup>201</sup> The federal circuits' inability to agree upon the standing requirements will lead to inconsistent rulings which will inevitably lead to forum shopping.<sup>202</sup> The Supreme Court should grant certiorari to a circuit opinion on the issue of standing under CWA in order to resolve the confusion surrounding the representational standing requirements and to prevent these inconsistencies.<sup>203</sup> Although the Supreme Court has provided the circuits with rudimentary requirements and criteria for establishing standing, a more decisive decision is needed.<sup>204</sup>

As a result of this judicial confusion, the various circuit courts' interpretations of the standing doctrine have, not surprisingly,

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the experts" over standing requirements). For a discussion of the Fourth Circuit's decision in *Gaston Copper* to raise the standing requirements, see *supra* notes 101-22 and accompanying text.

199. See *id.* (Wilkinson, C.J., dissenting) (remarking that *Gaston Copper's* majority's holding will result in "expensive, lengthy sideshows to the straightforward issue under the Clean Water Act - namely, whether a defendant is violating its discharge permit"). For a discussion of Congress' intent behind the citizen suit provision of CWA, see *supra* notes 44-52 and accompanying text.

200. See *Gaston Copper*, 179 F.3d at 116 (noting Fourth Circuit's "opinion simply stands for the basic proposition that if a plaintiff organization craves standing, it must allege sufficient facts . . . demonstrating actual or imminent injury fairly traceable to the defendant's conduct before standing attaches").

201. See *id.* (finding that *Gaston Copper* decision only added to confusion surrounding standing requirements).

202. See Carine, *supra* note 13, at 205-06 (noting that circuit courts have not ruled uniformly on standing requirements, but instead have individually attempted to define elements of standing); see also Dolgetta, *supra* note 4, at 726-27 (finding circuit courts do not always address issues regarding each requirement of standing, rather they attempt to further define or create new requirements for standing); Kalen, *supra* note 43, at 3 (finding Supreme Court decisions regarding standing are flawed).

203. See Kalen, *supra* note 43, at 3 (providing that Supreme Court decisions have led to confusion and disagreement among lower courts on application of standing requirements); Krauthamer, *supra* note 19, at 859 (stating that until Congress clarifies its intent behind CWA, courts will "do their part and liberally construe their discretion in defining as legally cognizable injuries those actions that are harmful yet undetectable").

204. See *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982) (stating requirements for individual standing); see also *Sierra Club v. Morton*, 405 U.S. 727, 733-38 (1972) (listing elements needed for representational standing). For a discussion regarding requirements for establishing standing, see *supra* notes 53-75 and accompanying text.

been the topic of many symposiums and journal articles.<sup>205</sup> These jurisprudential discussions, however, have yet to clarify the standing doctrine to the satisfaction of the circuit courts; only a Supreme Court decision with binding effect on the circuit courts will accomplish this end. If the Supreme Court fails to clarify the standing requirements, the confusion and uncertainty surrounding the doctrine will continue, leaving citizens like Wilson Shealy and environmental groups like CLEAN without redress.<sup>206</sup>

*Amanda J. Masucci*

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205. See Millan, *supra* note 20 (detailing Fifth Circuit Symposium in Fall of 1998 which debated and reviewed various circuit courts interpretations and holdings of standing requirements); see, e.g., Carine, *supra* note 13, at 179-80 (explaining that standing doctrine has been harshly criticized by legal scholars because of federal courts' manipulation in determining requirements needed). In fact, an article published in 1993 by Arthur Carine, a past member of the Villanova Environmental Law Journal, discussed the confusion surrounding the requirements of standing. See *id.* It has been almost seven years since that article and yet there is still no further clarification on the topic.

206. See, e.g., *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 179 F.3d 107, 122-23 (4th Cir. 1999) (Wilkinson, C.J., dissenting) (explaining plaintiff not redressed because Fourth Circuit held he lacked standing).



