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Standing in Environmental Citizen Suits: *Laidlaw*'s Clarification of the Injury-in-Fact and Redressability Requirements

by Michael P. Healy

In its first week of business during the new millennium, the U.S. Supreme Court decided *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*,[1] and provided important clarifications about the law of standing in environmental citizen suits.[2] Specifically, the Court rejected the narrow view of environmental injury-in-fact advocated by Justice Scalia and instead adhered to the broader view of injury-in-fact established in a nonenvironmental context by the Court's decision in *Federal Elections Commission v. Akins*.[3] As importantly, the Court also addressed the redressability requirement of Article III standing in *Laidlaw*. Here too, the Court did not apply the narrow view of redressability that Justice Scalia had defined for the Court in *Steel Co. v. Citizens for a Better Environment*,[4] and instead found that the deterrence afforded by civil penalties was sufficient redress for environmental injury-in-fact.

This Article will analyze the Court's quite generous view of citizen suit standing in *Laidlaw*. After presenting the legal background to the *Laidlaw* decision in the first part of this Article, I will turn to an analysis of the Court's holdings in *Laidlaw*. To be sure, the Court's decision was adumbrated in important ways by the Court's broader conception of standing articulated in *Akins*. Nevertheless, the decision will be welcomed by environmentalists who had been concerned, viewing the apparent "slash and burn" assault on environmental standing[5] in *Steel Co.* and *Defenders of Wildlife v. Lujan*,[6] that the Court was ready to foreclose citizen suits when the defendant was unable to demonstrate that the statutory violations giving rise to the suit would recur causing measurable harm.[7]

Factual and Legal Background

The Court's Conception of Environmental Citizen Suits

Before turning to a summary of standing law prior to *Laidlaw*, the standing issue needs to be framed by an appreciation of the environmental citizen suit context in which it arises. In *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation*,[8] the Court considered the scope of the citizen suit provision of the Clean Water Act (CWA).[9] The Court concluded that Congress intended the provision to be forward looking; that is, a citizen suit claim cannot be based on a violation that has completely ceased at the time that the complaint is filed. In *Gwaltney*, both lower courts had held that a citizen suit could be brought under the CWA based on violations that were wholly past.[10] The Court rejected this interpretation, holding that the Act requires a claimant to make a good-faith allegation that the defendant is in violation of the Act at the time that the claim is filed.[11]

The Court decided, based on "the language and structure" of the citizen suit provision, that the Act foreclosed claims based on wholly past violations.[12] The Court concluded, moreover, that allowing claims to be based on wholly past violations would be inconsistent with the "supplementary role" that Congress intended citizen suits would play in the enforcement of the Act, and "would change the nature of the citizens' role from interstitial to potentially intrusive."[13]

The *Gwaltney* Court also addressed the relation between mootness and standing in response to the defendant's contention that the Act had to be construed to require "ongoing noncompliance" during the action to prevent evasion of the

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Professor of Law, University of Kentucky College of Law. I wish to thank my colleague, John Rogers, for discussing the subject of this Article with me and for providing very helpful comments on a previous draft. Any errors are my own.

1. 120 S. Ct. 693, 30 ELR 20246 (2000).
2. Several members of the Fourth Circuit would disagree with the statement that *Laidlaw* merely clarified standing law. *See* Friends of the Earth v. Gaston Copper Recycling Corp., 204 F.3d 149, 164, 30 ELR 20369, 20375 (4th Cir. 2000) (en banc) (Niemeyer, J., concurring) ("the decision in *Laidlaw* represents a sea change in constitutional standing principles"); *id.* at 165, 30 ELR at 20375 (Luttig, J., concurring) (a "significant change in environmental standing doctrine [is] worked by" *Laidlaw*); *id.* (Hamilton, J., concurring) (*Laidlaw* "has unnecessarily opened the standing floodgates").
3. 524 U.S. 11 (1998).
4. 523 U.S. 83, 28 ELR 20434 (1998).
5. Defenders of Wildlife v. Lujan, 504 U.S. 555, 606, 22 ELR 20913, 20927 (1992) (Blackmun, J., dissenting) ("I cannot join the Court on what amounts to a slash-and-burn expedition through the law of environmental standing.").
6. *Id.*
7. *See, e.g.*, John D. Echeverria & Jon T. Zeidler, *Barely Standing*, ENVTL. F., July/Aug. 1999, at 20, 21 ("Beneath the cumulative weight of a serres of recent Supreme Court decisions, citizen standing is rapidly eroding."). *But see id.* at 22 ("The Court's decision to review this ruling [by the court of appeals in *Laidlaw*] may be a signal of the justices' willingness to halt, or even possibly reverse, the loss of ground.").
8. 484 U.S. 49, 18 ELR 20142 (1987).
9. 33 U.S.C. §1365(a), ELR STAT. FWPCA §505(a).
10. *See* 484 U.S. at 55, 56, 18 ELR at 20143.
11. *See id.* at 64-65, 18 ELR at 20146. The Court was insistent that the good-faith allegation of a present violation was what the Act required: "The statute does not require that a defendant 'be in violation' of the Act at the commencement of suit; rather, the statute requires that a defendant be '*alleged* to be in violation.'" *Id.* at 64, 18 ELR at 20146. Justice Scalia, concurring along with Justices Stevens and O'Connor, rejected this interpretation, concluding instead that:

    > [T]he issue to be resolved by the Court of Appeals on remand of this suit is not whether the allegation of a continuing violation on the day suit was brought was made in good faith after reasonable inquiry, but whether the petitioner was in fact "in violation" on the date suit was brought.

    Id. at 69, 18 ELR at 20147.
12. *Id.* at 59, 18 ELR at 20145.
13. *Id.* at 60-61, 18 ELR at 20145.

"case or controversy" requirement of Article III,[14] an issue also considered in *Laidlaw*.[15] The Court rejected this concern, stating that a live controversy is only mooted by the defendant's compliance upon defendant's showing "that it is absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur."[16]

In sum, the CWA requires that a defendant be in violation at the time the complaint is filed. Once that requirement is met, the defendant must meet a very high standard to demonstrate that, because the violations will not recur, the controversy is no longer live.

The Court's Conception of Article III Standing

Having established the forward-looking nature of the environmental citizen suit, we turn to a summary of how the Court viewed Article III standing in environmental cases prior to *Laidlaw*. It is now well established that a "triad of injury in fact, causation, and redressability comprises the core of Article III's case-or-controversy requirement, and the party invoking federal jurisdiction bears the burden of establishing its existence."[17] This summary will consider two of these requirements, injury-in-fact and redressability, because the Court has focused on them in its more recent standing cases, particularly its environmental cases.

The Injury-in-Fact Requirement

To define the injury-in-fact requirement in the context of environmental citizen suits, two different issues have been the focus of Court analysis. First, the Court has focused on the type of environmental impact that may constitute an injury for purposes of the Article III injury-in-fact requirement. Second, the Court has addressed the class of claimants that may properly claim an injury-in-fact. Informing the Court's approach to both of these issues has been a long-standing concern that a litigant should not be able to establish an injury-in-fact based on a generalized grievance. The following summary of the state of the law relating to both injury-in-fact issues, as well as the Court's concerns about generalized grievances, provides background for an understanding of the significance of *Laidlaw*.

☐ *The Broad Range of Cognizable Environmental Injuries.* In its important early environmental standing case, *Sierra Club v. Morton*,[18] the Court viewed broadly the range of impacts to the environment that would give rise to an injury-in-fact for purposes of Article III:

> The injury alleged by the Sierra Club will be incurred entirely by reason of the change in the uses to which Mineral King will be put, and the attendant change in the aesthetics and ecology of the area. Thus, in referring to the road to be built through Sequoia National Park, the complaint alleged that the development "would destroy or otherwise adversely affect the scenery, natural and historic objects and wildlife of the park and would impair the enjoyment of the park for future generations." We do not question that this type of harm may amount to an "injury in fact" sufficient to lay the basis for standing under § 10 of the APA. Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process.[19]

Later in the opinion, the Court reiterated both components of its broad view of cognizable injuries: they "may reflect aesthetic, conservational, and recreational as well as economic values," and they may be "widely shared."[20]

The Court's broad recognition of the status of environmental injuries as cognizable under Article III was consistently reiterated in cases decided after *Sierra Club*.[21] Indeed, the Court's broad acceptance of environmental injury as injury-in-fact can be seen in the Court's recent acceptance, in its "slash and burn" standing decision in *Defenders of Wildlife*,[22] of the proposition that "the desire to use or observe an animal species, even for purely esthetic purposes, is undeni-

14. *Id.* at 66, 18 ELR at 20147.

15. *Laidlaw*'s analysis of mootness is discussed *infra*.

16. 484 U.S. at 66-67, 18 ELR at 20147 (citations, internal quotations and footnote omitted).

Gwaltney's interpretation of the scope of the citizen suit provision did not turn on the Court's view of the scope of Article III standing. Justice Scalia, who concurred in *Gwaltney* in an opinion joined by Justices Stevens and O'Connor, addressed standing, however. Justice Scalia argued that, to ensure that the plaintiff had Article III standing, the Court should require a plaintiff to demonstrate that the defendant was "in violation" at the time the citizen suit was filed, rather than require only a good-faith allegation of a present violation. *See* 484 U.S. at 70-71, 18 ELR at 20147 (Scalia, J., concurring). In later citizen suit standing cases, Justices disagreeing with the approach of the Court majority have made arguments analogous to the argument presented in Justice Scalia's *Gwaltney* concurrence. Indeed, Justices Scalia and Stevens, on opposite sides of the constitutional issue in later cases, have argued that the Court should interpret citizen suit provisions narrowly to avoid having to address the constitutional question of Article III standing. *Compare* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 132-33, 28 ELR 20434, 20444 (1998) (Stevens, J., concurring) (Even if Congress did not intend to confer jurisdiction over citizen suits for wholly past violations, the Court's "settled policy of adopting acceptable constructions of statutory provisions in order to avoid the unnecessary adjudication of constitutional questions—here, the unresolved standing question—strongly supports a construction of the statute that does not authorize suits for wholly past violations.") *with* Federal Elections Comm'n v. Akins, 524 U.S. 11, 32 (1998) (Scalia, J., dissenting) ("a narrower reading of 'party aggrieved' [in the text of the Federal Election Campaign Act citizen-suit provision] is supported by the doctrine of constitutional doubt, which counsels us to interpret statutes, if possible, in such fashion as to avoid grave constitutional questions.") (citation omitted). *Cf.* Defenders of Wildlife v. Lujan, 504 U.S. 555, 585, 22 ELR 20913, 20922 (1992) (Stevens, J., concurring) ("Although I believe that respondents have standing, I nevertheless concur in the judgment of reversal because I am persuaded that the Government is correct in its submission that §7(a)(2) does not apply to activities in foreign countries.").

The debate between Justices Scalia and Stevens in these cases has the effect of transforming the old saw, when you don't have the facts argue the law, into "when you can't win the constitutional debate argue statutory construction." Justice Scalia interestingly brands this approach by Justice Stevens in *Steel Co.* as "ultra vires," 523 U.S. at 102, 28 ELR at 20437, based on his view that the Court is duty bound to decide whether there is standing before it has the judicial power to interpret the scope of the statute's citizen suit provision. *See id.* at 101-02, 28 ELR at 20437.

17. *Steel Co.*, 523 U.S. at 103-04, 28 ELR at 20438 (footnote and citation omitted).

18. 405 U.S. 727, 2 ELR 20192 (1972).

19. *Id.* at 734, 2 ELR at 20194.

20. *Id.* at 738, 2 ELR at 20195 (internal quotations and citation omitted).

21. *See, e.g.*, Lujan v. National Wildlife Fed'n, 497 U.S. 871, 886, 20 ELR 20962, (1990) (expressing "no doubt" that among interests statutes protected were "'recreational use and aesthetic enjoyment'"); United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 3 ELR 20536 (1973).

22. *See* Defenders of Wildlife v. Lujan, 504 U.S. 555, 22 ELR 20913 (1992).

ably a cognizable interest for purpose of standing."[23] In sum, the Court has consistently viewed a broad range of environmental impacts as constituting injury-in-fact for purposes of Article III.

The Court interestingly had no occasion in these cases to identify the existence of any clear limits on the types of environmental injuries that are cognizable under Article III. This is because, as will soon be discussed,[24] all but one of these cases resulted in decisions that the plaintiffs lacked standing, not because the injuries they sought to protect were inadequate, but because the plaintiffs adduced insufficient proof that they had an actual interest in the environmental amenity or resource being affected. The one exception, *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*,[25] also did not result in the Court's articulation of limits, because the standing issue was resolved on the pleadings and the plaintiff had alleged that cognizable interests would be affected by the claimed illegality.

Moreover, the Court was not concerned in these cases about relating the injury claimed by the plaintiffs to the statutory schemes that gave rise to the claims of illegality.[26] The Court may have seen no need for such an analysis both because the types of harms being claimed by the plaintiffs appeared to be traditional sorts of injuries even in the absence of statutory protection, and because the Court viewed it as plain that the statutes at issue were protecting these sorts of interests.[27] In the Court's recent decision in *Akins*,[28] however, the Court gave specific attention to the relationship between a congressionally defined injury and the Article III requirement of injury-in-fact. Plaintiffs in that case brought a citizen suit, alleging that the Federal Election Commission (FEC) violated the Federal Election Campaign Act of 1971 (FECA) when it declined to find that a political action committee, the American Israel Political Affairs Committee (AIPAC), had violated FECA and refused to order that group to comply with FECA's public reporting requirements.[29]

The Court held that the plaintiffs had demonstrated a cognizable Article III injury, given the purpose of the statutory scheme enacted by Congress:

> The "injury in fact" that respondents have suffered consists of their inability to obtain information—lists of AIPAC donors . . . and campaign-related contributions and expenditures—that, on respondents' view of the law, the statute requires that AIPAC make public. There is no reason to doubt their claim that the information would help them (and others to whom they would communicate it) to evaluate candidates for public office, especially candidates who received assistance from AIPAC, and to evaluate the role that AIPAC's financial assistance might play in a specific election. Respondents' injury consequently seems concrete and particular. Indeed, this Court has previously held that a plaintiff suffers an "injury in fact" when the plaintiff fails to obtain information which must be publicly disclosed pursuant to a statute.[30]

Notwithstanding the fact that the injury in *Akins* was effectively defined by the nature of the statute's requirements of reporting and disclosure, the Court held that Congress had not exceeded its constitutional power as limited by Article III, because the statutorily defined injury met Article III's particularity requirement: "The informational injury at issue here, directly related to voting, the most basic of political rights, is sufficiently concrete and specific such that the fact that it is widely shared does not deprive Congress of constitutional power to authorize its vindication in the federal courts."[31]

In short, the Court has accepted in environmental cases that a broad range of environmental impacts constitute cognizable injuries under Article III. Outside of the environmental context, the Court has indicated a willingness to take the lead from Congress in accepting as cognizable under Article III injuries that are defined by statute.[32]

☐ *Proper Parties for Asserting a Claim of Injury*. Notwithstanding the Court's acceptance of environmental injuries as injuries-in-fact under Article III, some of the Court's most prominent modern standing cases have held that plaintiffs claiming environmental injuries resulting from statutory violations failed to meet the injury-in-fact requirement. Indeed, what the Court gave in *Sierra Club*, when it catalogued the broad range of environmental injuries cognizable under Article III, it largely withdrew by circumscribing the parties who could assert those interests.[33] The Court specifically distinguished between the requirement of a cognizable injury and the requirement of actual injury, stating that "broadening the categories of injury that may be alleged in support of standing is a different matter from abandoning

23. *Id.* at 562-63, 22 ELR at 20916 (citation omitted). The Court has held, moreover, that when established, environmental injuries are commonly irreparable. *See* Amoco Prod. Co. v. Village of Gambell, 480 U.S. 531, 17 ELR 20574 (1987). The Court did not reach the issue of environmental injury-in-fact in Steel Co. v Citizens for a Better Env't, 523 U.S. 83, 105, 28 ELR 20434, 20439 (1998).

24. *See* the discussion *infra*.

25. 412 U.S. 669, 689, 3 ELR 20536, 20540 (1973): ("[W]e deal here simply with the pleadings in which the [plaintiffs] alleged a specific and perceptible harm that distinguished them from other citizens who had not used the natural resources that were claimed to be affected.") (footnote omitted).

26. *See* William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 260 (1988) ("the Court did not engage in serious statutory analysis in" either *Sierra Club* or *SCRAP*).

27. The Court's lack of concern in these environmental cases may be contrasted with its statutory analysis in Hardin v. Kentucky Utilities Co., 390 U.S. 1 (1968). There, the Court stated that injuries resulting from competition would not generally "confer standing on the injured business to question the legality of any aspect of its competitor's operations." *Id.* at 6 (citations omitted). The Court concluded that prudential standing was present "when the particular statutory provision invoked does reflect a legislative purpose to protect a competitive interest." *Id.* In that circumstance, "the injured competitor has standing to require compliance with that provision." *Id.* (citation omitted).

28. 524 U.S. 11 (1998) (Breyer, J.).

29. *See id.* at 14-16.

30. *Id.* at 21 (citation omitted).

31. *Id.* at 24-25.

32. *Cf.* Fletcher, *supra* note 26, at 253 ("when the Court has decided actual cases involving statutory rights, it has never required any showing of injury beyond that set out in the statute itself."). Because the Court in *Akins* held that the injury asserted was cognizable under Article III because it was concrete, it did not go as far as to accept Judge Fletcher's opinion that "[w]hen Congress passes a statute conferring a legal right on a plaintiff to enforce a statutorily created duty, the Court should not require that the plaintiff show 'injury in fact' over and above the violation of the statutorily conferred right." *Id.*

33. *See* 405 U.S. at 734-35, 2 ELR at 20194 ("the 'injury in fact' test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured.").

the requirement that the party seeking review must himself have suffered an injury."[34] The Sierra Club's complaint failed with regard to this latter requirement:

> The impact of the proposed changes in the environment of Mineral King will not fall indiscriminately upon every citizen. The alleged injury will be felt directly only by those who use Mineral King and Sequoia National Park, and for whom the aesthetic and recreational values of the area will be lessened by the highway and ski resort. The Sierra Club failed to allege that it or its members would be affected in any of their activities or pastimes by the Disney development. Nowhere in the pleadings or affidavits did the Club state that its members use Mineral King for any purpose, much less that they use it in any way that would be significantly affected by the proposed actions of the respondents.[35]

The Court believed that this "requirement that a party seeking review must allege facts showing that he is himself adversely affected . . . does serve as at least a rough attempt to put the decision as to whether review will be sought in the hands of those who have a direct stake in the outcome."[36]

In two more recent decisions, the Court relied upon this personal effect requirement to hold that environmental claimants had failed to establish an injury-in-fact. In *Lujan v. National Wildlife Federation*,[37] the Court held that the plaintiff had failed to establish an injury-in-fact, where its proof of injury was affidavits of members who stated that they used and enjoyed federal lands "in the vicinity of" lands to be affected by the challenged government action.[38]

Similarly, the Court concluded that the plaintiff failed to demonstrate an injury-in-fact in *Lujan v. Defenders of Wildlife*.[39] Although the Court accepted that the underlying injuries would, if proved, constitute Article III injuries,[40] it concluded that

> To survive the Secretary's summary judgment motion, respondents had to submit affidavits or other evidence showing, through specific facts, not only that listed species were in fact being threatened by funded activities abroad, but also that one or more of respondents' members would thereby be "directly" affected apart from their "special interest" in th[e] subject.[41]

The Court concluded that this direct effects test had not been met in the circumstances of the case, because the affidavits supporting the plaintiff's claim for standing stated only that the affiants had plans to return "some day" to the foreign nations where the animals of interest to those members lived and any injury was accordingly not imminent[42]: "Such 'some day' intentions—without any description of concrete plans, or indeed even any specification of *when* the some day will be—do not support a finding of the 'actual or imminent' injury that our cases require."[43] The Court stated that the purpose of a requirement of imminence "is to insure that the alleged injury is not too speculative for Article III purposes. . . ."[44] The claimed injury was, in the Court's view, too speculative because "the plaintiff alleges only an injury at some indefinite future time, and the acts necessary to make the injury happen are at least partly within the plaintiff's own control."[45] In his concurring opinion, Justice Kennedy clarified why he had concluded that the plaintiffs' claimed injuries were too speculative in this case:

> While it may seem trivial to require that Mss. Kelly and Skilbred acquire airline tickets to the project sites or announce a date certain upon which they will return, this is not a case where it is reasonable to assume that the affiants will be using the sites on a regular basis, nor do the affiants claim to have visited the sites since the projects commenced.[46]

The *Defenders of Wildlife* Court also addressed the plaintiffs' claim that they suffered injury-in-fact because they were interested in the study and protection of an ecosystem that is part of an interconnected global ecosystem, so that harms to species in a foreign locale by the challenged government action also harm the rest of the ecosystem in which plaintiffs claim an interest. The Court rejected this claim of an injury, because the plaintiffs had failed to meet the perceptible effect requirement: "To say that the Act protects ecosystems is not to say that the Act creates (if it were possible) rights of action in persons who have not been injured-in-fact, that is, persons who use portions of an ecosystem not perceptibly affected by the unlawful action in question."[47] Given how remote the plaintiffs were from the place where the animal species of concern to them were arguably being harmed, the plaintiffs could show no such perceptible effect:

> It is clear that the person who observes or works with a particular animal threatened by a federal decision is facing perceptible harm, since the very subject of his interest will no longer exist. It is even plausible—though it goes to the outermost limit of plausibility—to think that

34. *Id.* at 738, 2 ELR at 20195.
35. *Id.* at 735, 2 ELR at 20194 (footnote omitted).
36. *Id.* at 740, 2 ELR at 20195-96.
37. 497 U.S. 871, 20 ELR 20962 (1990).
38. *See id.* at 886, 20 ELR at 20964. *See also id.* at 889, 20 ELR at 20966 (the standing requirement is not met "by averments which state only that one of respondent's members uses unspecified portions of an immense tract of territory, on some portions of which mining activity has occurred or probably will occur by virtue of the governmental action.").
39. 504 U.S. 555, 22 ELR 20913 (1992).
40. *See* Federal Elections Comm'n v. Akins, 524 U.S. 11 (1998).
41. 504 U.S. at 563, 22 ELR at 20916 (citation and internal quotations omitted).
42. The Court focused its concern about the showing of a direct injury on whether the affiants would personally experience the reduced numbers of animals, rather than whether that reduction would actually occur:

> We shall assume for the sake of argument that these affidavits contain facts showing that certain agency-funded projects threaten listed species—though that is questionable. They plainly contain no facts, however, showing how damage to the species will produce "imminent" injury to [the affiants].

Id.

43. *Id.* at 564, 22 ELR at 20916 (citation omitted).
44. *Id.* at 564 n.2, 22 ELR at 20916 n.2.
45. *Id.*
46. *Id.* at 579, 22 ELR at 20920 (citations omitted). Justice Stevens rejected this concern, concluding that the affiants' interests and previous visits to view the species at issue were sufficient to establish imminence. *See id.* at 584 n.2, 22 ELR at 20921 n.2 (Stevens, J., concurring) ("[R]espondents would not be injured by the challenged projects if they had not visited the sites or studied the threatened species and habitat. But, . . . respondents did visit the sites; moreover, they have expressed an intent to do so again.").
47. *Id.* at 566, 22 ELR at 20917.

a person who observes or works with animals of a particular species in the very area of the world where that species is threatened by a federal decision is facing such harm, since some animals that might have been the subject of his interest will no longer exist. It goes beyond the limit, however, and into pure speculation and fantasy, to say that anyone who observes or works with an endangered species, anywhere in the world, is appreciably harmed by a single project affecting some portion of that species with which he has no more specific connection.[48]

In sum, although the Court has concluded that a broad range of environmental impacts may give rise to an Article III injury-in-fact, the Court has sought to ensure that the particular plaintiff claiming an injury from such an impact will be imminently affected in a perceptible way.

☐ *Generalized Grievances*. The purpose of the Court's requirement that plaintiffs demonstrate that they will suffer an actual injury-in-fact is to foreclose the judiciary from being used by claimants "to do no more than vindicate their own value preferences."[49] This bar against the judicial resolution of generalized grievances[50] was applied in the first great environmental standing case, *Sierra Club*,[51] to reject the Sierra Club's effort to establish standing doctrine that would permit that organization to bring a public action.[52]

More recently, the bar against the litigation of generalized grievances has been debated by the Court when it has resolved standing issues in environmental and nonenvironmental contexts. The opposing sides of the debate about the scope of the generalized grievances bar have a sharp fundamental disagreement about the types of injuries that give rise to injury-in-fact. Although the views of Justice Scalia, who wrote for the majority in *Defenders of Wildlife* and advocates a broad scope to the generalized grievance bar, appeared to be prevailing in the early 1990s, the views of Justice Breyer, who wrote for the majority in *Akins* and views the bar more narrowly, have more recently driven the Court's approach to this issue.

In *Defenders of Wildlife*, the Court's consideration of the generalized grievance bar arose in the context of the lower court's view that "the injury-in-fact requirement had been satisfied by congressional conferral upon *all* persons of an abstract, self-contained, noninstrumental 'right' to have the Executive observe the procedures required by law."[53] Writing for the Court, Justice Scalia rejected this view, finding that a plaintiff could bring suit based on the government's failure to conform to procedures mandated by statute only when the failure to comply with the required procedures resulted in direct and tangible injury.[54] The Court grounded this requirement in separation-of-powers limits on the judiciary that translate into limits on Congress' power to define cognizable injury:

The question presented here is whether the public interest in proper administration of the laws (specifically, in agencies' observance of a particular, statutorily prescribed procedure) can be converted into an individual right by a statute that denominates it as such, and that permits all citizens (or, for that matter, a subclass of citizens who suffer no distinctive concrete harm) to sue. If the concrete injury requirement has the separation-of-powers significance we have always said, the answer must be obvious: To permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an "individual right" vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to "take Care that the Laws be faithfully executed," Art. II, § 3.[55]

Justice Scalia's broad view of the generalized grievance bar shaped his reading for the Court majority of the Court's previous decision in *United States v. Richardson*[56] and what he viewed as the broad precedential value of that case. In *Richardson*, the Court decided that the plaintiff failed to demonstrate standing in a suit claiming that the government's failure to disclose expenditures of the Central Intelligence Agency violated the statement and account clause of the U.S. Constitution.[57] In *Defenders of Wildlife*, Justice Scalia read *Richardson* as establishing that standing was lacking because "such a suit rested upon an impermissible 'generalized grievance,' and was inconsistent with 'the framework of Article III' because 'the impact on [plaintiff] is plainly undifferentiated and common to all members of the public.'"[58]

Only six years later, however, Justice Scalia found himself in the minority when the Court again addressed the generalized grievance bar to standing. In *Akins*,[59] Justice Breyer, writing for the majority, acknowledged that "[t]he FEC's strongest argument is its contention that this lawsuit involves only a 'generalized grievance.'"[60] The Court then held that the generalized grievance bar did not apply to injuries that, while widely shared, are "sufficiently concrete and specific."[61] Justice Breyer, on behalf of the *Akins* majority,

48. *Id.* at 566-67, 22 ELR at 20917 (citation and footnote omitted).
49. Sierra Club v. Morton, 405 U.S. 727, 740, 2 ELR 20192, 20196 (1972).
50. The Court often contrasts the noncognizable generalized grievance with particularized injury. *See Defenders of Wildlife*, 504 U.S. at 560 n.1, 22 ELR at 20915 n. 1 ("By particularized, we mean that the injury must affect the plaintiff in a personal and individual way.").
51. 405 U.S. at 727, 2 ELR at 20192.
52. *Id.* at 736, 2 ELR at 20194.
53. 504 U.S. at 573, 22 ELR at 20918.
54. *Id.* at 573-74, 22 ELR at 20919:

We have consistently held that a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy.

The Court noted that its standing decisions have adhered to a requirement that a plaintiff show personal injury: "The dissent is unable to cite a single case in which we actually found standing solely on the basis of a 'procedural right' unconnected to the plaintiff's own concrete harm." *Id.* at 573 n.8, 22 ELR at 20918-19 n.8.

55. 504 U.S. at 567-77, 22 ELR at 20918.
56. 418 U.S. 166 (1974).
57. Art. I, §9, cl. 7 ("a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time").
58. 504 U.S. at 579, 22 ELR at 20919 (quoting *Richardson*, 418 U.S. at 176-77).
59. 524 U.S. 11 (1998).
60. *Id.* at 23.
61. The Court stated that:

[W]here a harm is concrete, though widely shared, the Court has found injury in fact. Thus the fact that a political forum may be more readily available where an injury is widely shared (while counseling against, say, interpreting a statute as conferring standing) does not, by itself, automatically dis-

rejected the applicability of *Richardson*, which had been cited by neither party.[62] The Court concluded that Congress had established through FECA a concrete right to particular information viewed by the claimants as important to their exercise of the right to vote. It stated that in *Akins*, unlike *Richardson*, "there is a statute which . . . does seek to protect individuals such as respondents from the kind of harm they say they have suffered, i.e., failing to receive particular information about campaign-related activities."[63] This left Justice Scalia able only to chide the Court for abandoning *Richardson*[64] and to decry the Court's acceptance of a role for the judiciary defined by Congress that conflicts descriptively and normatively with the governmental structure.[65]

In sum, the Court's approach to injury-in-fact in environmental cases has accepted a broad range of impacts as constitutionally sufficient, while it has sought to ensure that the claimant is a directly affected party. The Court has recently been engaged in a spirited and closely divided debate about whether a claimant who has brought a citizen suit is asserting a generalized grievance that is not a cognizable injury-in-fact.

The Redressability Requirement

Redressability is the other standing requirement that the Court has considered recently in the context of environmental citizen suits. In *Steel Co.*,[66] the plaintiff's citizen suit claimed that the defendant had violated the Emergency Planning and Community Right-To-Know Act of 1986 (EPCRA)[67] by failing to prepare required reports on its inventory of hazardous substances and release of toxic substances.[68] After receiving the required notice of the plaintiff's planned citizen suit, the defendant issued the required reports prior to the filing of the complaint.[69] The Court assumed that the plaintiff had demonstrated injury-in-fact,[70] but held that the plaintiff lacked standing because none of the forms of relief it had sought would redress the injury caused by the defendant's filing of its unlawfully late reports.[71]

The form of relief that the Court analyzed most closely regarding redressability was the plaintiff's request for civil penalties imposed for statutory violations.[72] Justice Scalia's opinion for the majority relied upon, this time in the

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> qualify an interest for Article III purposes. Such an interest, where sufficiently concrete, may count as an injury in fact. This conclusion seems particularly obvious where (to use a hypothetical example) large numbers of individuals suffer the same common-law injury (say, a widespread mass tort), or where large numbers of voters suffer interference with voting rights conferred by law. We conclude that similarly, the informational injury at issue here, directly related to voting, the most basic of political rights, is sufficiently concrete and specific such that the fact that it is widely shared does not deprive Congress of constitutional power to authorize its vindication in the federal courts.

Id. at 24-25 (citations and internal quotations omitted); *see also id.* at 23 ("The kind of judicial language to which the FEC points, however, invariably appears in cases where the harm at issue is not only widely shared, but is also of an abstract and indefinite nature—for example, harm to the 'common concern for obedience to law.'" (citation omitted)).

62. *See id.* at 21.

63. *Id.* at 22 (citation omitted).

64. In his dissent, Justice Scalia argued that, "[f]airly read, and applying a fair understanding of its important purposes, *Richardson* is indistinguishable from the present case." 524 U.S. at 34 (Scalia, J., dissenting). I should note that it is nice to see, if only in this limited context, Justice Scalia taking a purposivist approach to interpretation, after rejecting such an approach to the interpretation of statutes. *See, e.g.*, Chisom v. Roemer, 501 U.S. 380, 417 (1991) (Scalia, J. dissenting) (criticizing the Court's purposivist interpretation of the Voting Rights Act).

65. *See id.* at 36-37 (Scalia, J., dissenting):

> If today's decision is correct, it is within the power of Congress to authorize any interested person to manage (through the courts) the Executive's enforcement of any law that includes a requirement for the filing and public availability of a piece of paper. This is not the system we have had, and is not the system we should desire.

See also id. at 36 (Scalia, J., dissenting):

> When the Executive can be directed by the courts, at the instance of any voter, to remedy a deprivation which affects the entire electorate in precisely the same way—and particularly when that deprivation (here, the unavailability of information) is one inseverable part of a larger enforcement scheme—there has occurred a shift of political responsibility to a branch designed not to protect the public at large but to protect individual rights.

66. 523 U.S. at 83, 28 ELR at 20434.

67. 42 U.S.C. §§11001-11050, ELR Stat. EPCRA §§301-330.

68. 523 U.S. at 87-88, 28 ELR at 20434.

69. *Id.* at 88, 28 ELR at 20434.

70. *Id.* at 105, 28 ELR at 20438.

71. The court concluded that:

> The complaint asks for (1) a declaratory judgment that petitioner violated EPCRA; (2) authorization to inspect periodically petitioner's facility and records (with costs borne by petitioner); (3) an order requiring petitioner to provide respondent copies of all compliance reports submitted to the EPA; (4) an order requiring petitioner to pay civil penalties of $25,000 per day for each violation of §§11022 and 11023; (5) an award of all respondent's "costs, in connection with the investigation and prosecution of this matter, including reasonable attorney and expert witness fees, as authorized by Section 326(f) of [EPCRA]"; and (6) any such further relief as the court deems appropriate. None of the specific items of relief sought, and none that we can envision as "appropriate" under the general request, would serve to reimburse respondent for losses caused by the late reporting, or to eliminate any effects of that late reporting upon respondent.

Id. at 105-06, 28 ELR at 20438 (citation and footnotes omitted).

72. The brevity of the Court's analysis of the lack of redress associated with the other forms of relief sought by the plaintiff is an indication of the Court's view of the insufficiency of the claim. The Court found that the declaratory relief sought by the plaintiff would be "worthless" because there was "no controversy over whether petitioner failed to file reports, or over whether such a failure constitutes a violation. . . ." *Id.* at 107, 28 ELR at 20438. The Court viewed the second and third items of relief sought by the plaintiff to be "injunctive in nature." *Id.* at 108, 28 ELR at 20439. The Court concluded that, "[i]f respondent had alleged a continuing violation or the imminence of a future violation, the injunctive relief requested would remedy that alleged harm. But there is no such allegation here—and on the facts of the case, there seems no basis for it." *Id.* The Court rejected in this context the Solicitor General's argument that future illegal activity should be presumed when illegal activity only ceases in response to litigation. *See id.* at 109, 28 ELR at 20439. The final specified form of requested relief was the recovery of the costs of litigation. The Court rejected that form of relief as redress, because "a plaintiff cannot achieve standing to litigate a substantive issue by bringing suit for the cost of bringing suit." *Id.* at 107, 28 ELR at 20438. The plaintiff also sought other unspecified, "appropriate" relief, but the Court concluded that no relief "that we can envision as 'appropriate' under the general request, would serve to reimburse respondent for losses caused by the late reporting, or to eliminate any effects of that late reporting upon respondent." *Id.* at 106, 28 ELR at 20438.

redressability context, the principle that the Constitution does not permit adjudication based on a generalized grievance. Because the civil penalties available under the statute would be paid to the federal government, rather than to the plaintiff, the Court stated that, "[i]n requesting them, . . . respondent seeks not remediation of its own injury—reimbursement for the costs it incurred as a result of the late filing—but vindication of the rule of law—the 'undifferentiated public interest' in faithful execution of EPCRA."[73]

Although the Court then referred to Justice Stevens' contention that the civil penalties provided by the statute are adequate redress because of their deterrent effect, the Court's analysis actually rejected only his claim that such penalties are adequate redress because of the "psychic satisfaction" they yield:

> Justice Stevens thinks it is enough that respondent will be gratified by seeing petitioner punished for its infractions and that the punishment will deter the risk of future harm. If that were so, our holdings in *Linda R.S. v. Richard D.*, and *Simon v. Eastern Ky. Welfare Rights Organization*, are inexplicable. Obviously, such a principle would make the redressability requirement vanish. By the mere bringing of his suit, *every* plaintiff demonstrates his belief that a favorable judgment will make him happier. But although a suitor may derive great comfort and joy from the fact that the United States Treasury is not cheated, that a wrongdoer gets his just deserts [sic], or that the nation's laws are faithfully enforced, that psychic satisfaction is not an acceptable Article III remedy because it does not redress a cognizable Article III injury. Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement.[74]

As this passage explains, Justice Scalia's redressability analysis for the majority was dependent on the fact that the civil penalties available under EPCRA were inadequate redress for past violations because they had to be paid to the federal government, rather than to the plaintiff. Justice Scalia therefore acknowledged that the lack of redressability would be cured if Congress had provided that part of the penalties, even perhaps a peppercorn, be paid to the plaintiff for the statutory violations proved in the case.[75] This concession, which likely reflects the historical acceptance of *qui tam* actions, has the effect of recognizing broad congressional authority to define constitutionally adequate redress. Given this acceptance of congressional power by the *Steel Co.* majority, Justice Scalia's concerns about the impact of broadened citizen suit standing appear to be nothing more than policy arguments relevant to Congress' decisions about proper redress, rather than necessary limitations on citizen litigation mandated by our constitutional structure.[76]

In sum, the Court's analysis of the redressability requirement in the context of environmental citizen suits appeared to limit standing because succeeding in having statutory civil penalties imposed on a violator of environmental laws was found to be inadequate redress for the plaintiff's claimed environmental injury.

Laidlaw and Its Impact on Standing in Environmental Citizen Suits

Against this unsettled legal background, the Court has now decided *Laidlaw*.[77] Laidlaw operated a point source that had received a national pollution discharge elimination system (NPDES) permit to discharge pollutants into waters of the United States as required by the CWA.[78] Laidlaw thereafter "repeatedly" violated the emissions limitations established by the permit over an eight-year period.[79] Several of these violations occurred after the plaintiff had filed the complaint.[80] Laidlaw moved for summary judgment in district court, contending that the plaintiff did not demonstrate a cognizable Article III injury-in-fact.[81] Friends of the Earth responded by submitting affidavits and depositions of its members describing their use of and interest in the waterway receiving Laidlaw's unlawfully high pollutant discharges.[82] "After examining this evidence, the District Court denied Laidlaw's summary judgment motion, finding—albeit 'by the very slimmest of margins'—that FOE had standing to bring the suit."[83]

73. *Id.* at 107, 28 ELR at 20438 (citations omitted).

74. *Id.* at 106-07, 28 ELR at 20438 (citations omitted).

75. *See id.* at 107, 28 ELR at 20438 ("[T]he civil penalties authorized by the statute . . . might be viewed as a sort of compensation or redress to respondent if they were payable to respondent."). Justice Stevens chided the majority for this view:

> Yet it is unclear why the separation of powers question should turn on whether the plaintiff receives monetary compensation. In either instance, a private citizen is enforcing the law. If separation of powers does not preclude standing when Congress creates a legal right that authorizes compensation to the plaintiff, it is unclear why separation of powers should dictate a contrary result when Congress has created a legal right but has directed that payment be made to the federal Treasury.

Id. at 127, 28 ELR at 20443 (Stevens, J., concurring).

76. *Cf. id.* at 127, 28 ELR at 20443 ("[I]n this case (assuming for present purposes that respondent correctly reads the statute) not only has Congress authorized standing, but the Executive Branch has also endorsed its interpretation of Article III. It is this Court's decision, not anything that Congress or the Executive has done, that encroaches on the domain of other branches of the Federal Government.") (citation and footnote omitted).

77. 120 S. Ct. at 693, 30 ELR at 20246.

78. *See* 33 U.S.C. §§1311(a), 1342(a), ELR STAT. FWPCA §§301(a), 402(a).

79. *See Laidlaw*, 120 S. Ct. at 701-02, 30 ELR at 20247:

> Once it received its permit, Laidlaw began to discharge various pollutants into the waterway; repeatedly, Laidlaw's discharges exceeded the limits set by the permit. In particular, despite experimenting with several technological fixes, Laidlaw consistently failed to meet the permit's stringent 1.3 ppb (parts per billion) daily average limit on mercury discharges. The District Court later found that Laidlaw had violated the mercury limits on 489 occasions between 1987 and 1995.

(Citation omitted.)

80. *See id.* at 702, 30 ELR at 20247:

> The record indicates that after FOE initiated the suit, but before the District Court rendered judgment, Laidlaw violated the mercury discharge limitation in its permit 13 times. The District Court also found that Laidlaw had committed 13 monitoring and 10 reporting violations during this period. The last recorded mercury discharge violation occurred in January 1995, long after the complaint was filed but about two years before judgment was rendered.

(Citations omitted.)

81. *Id.*

82. *Id.*

83. *Id.* (citation omitted).

In January 1997, the district court entered judgment against Laidlaw, finding that the defendant had repeatedly violated its permit limitations, and ordered Laidlaw to pay a civil penalty of $405,800.[84] In setting the penalty at that level, the district court accounted for the statutory factors, including the "total deterrent effect"[85] and its finding that "there has been 'no demonstrated proof of harm to the environment' from Laidlaw's mercury discharge violations."[86] In resolving Laidlaw's subsequent appeal, the Fourth Circuit Court of Appeals relied on the Supreme Court decision in *Steel Co.* and "reasoned that the case had become moot because 'the only remedy currently available to [FOE]—civil penalties payable to the government—would not redress any injury [FOE has] suffered.' The court therefore vacated the District Court's order and remanded with instructions to dismiss the action."[87]

Given the defendant's contentions regarding standing and the decision of the court of appeals, *Laidlaw* presented the Court with the opportunity to address both the injury-in-fact and redressability requirements of Article III standing.

Injury-in-Fact in Environmental Cases

As decided by the Court, *Laidlaw* had much to say about the constitutional sufficiency of an injury premised on adverse environmental impacts. *Laidlaw* differed from the earlier environmental standing cases, in which the Court found no injury-in-fact, because members of the plaintiff organization had identified a desire to use the local resource being impacted by the allegedly unlawful activity. For example, the Court referred to statements of one such member in affidavits and a deposition that he resided near Laidlaw's facility and the affected waterway and that he refrained from using the waterway for recreation "because of his concerns about Laidlaw's discharges."[88] In the Court's view, the evidence of direct injury to the plaintiff in *Laidlaw* took the case wholly out of the improper party category that the Court had framed in *National Wildlife Federation* and *Defenders of Wildlife*.[89]

The critical injury-in-fact issue resolved in *Laidlaw* instead concerned the nature of the environmental injuries that are cognizable under Article III. On this issue, as we discussed earlier, the Court had consistently stated that degradation of the environment claimed as injurious to a plaintiff constituted a cognizable Article III injury-in-fact.[90] Indeed, Justice Ginsburg, writing for the *Laidlaw* majority, relied on the watershed decision in *Sierra Club* to support the conclusion that there was an injury-in-fact: "We have held that environmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity."[91]

The problem for the *Laidlaw* majority, though, was identifying how such values of the receiving waterway were "lessened" given the district court's finding that Laidlaw's illegal discharges had neither actually harmed nor increased the risk of harm to the environment.[92] This finding is somewhat surprising, but no doubt attributable to the limited evidence presented by Friends of the Earth in response to the motion for summary judgment on standing. The plaintiff was apparently unable to demonstrate that the permit violations had caused violations of the applicable water quality standards.[93] More surprising, though, was the plaintiff's apparent failure to claim injury based on the nature of the toxic effects of the pollutant (mercury) or the increased risk of

84. *Id.* at 703, 30 ELR at 20247 (citing Friends of the Earth v. Laidlaw Envtl. Servs. (TOC), Inc., 956 F. Supp. 588, 27 ELR 20976 (D.S.C. 1997)).

85. *Id.*

86. *Id.* at 704, 30 ELR at 20247 (quoting 956 F. Supp. at 602, 27 ELR at 20982). The Court also quoted the district court's statement in the context of determining the civil penalty that "'[t]he NPDES permit violations at issue in this citizen suit did not result in any health risk or environmental harm.'" *Id.* at 704, 30 ELR at 20248.

87. *Id.* at 703, 30 ELR at 20248 (citation omitted).

88. *Id.* at 704, 30 ELR at 20248:

> [T]he District Court found that FOE had demonstrated sufficient injury to establish standing. For example, FOE member Kenneth Lee Curtis averred in affidavits that he lived a half-mile from Laidlaw's facility; that he occasionally drove over the North Tyger River, and that it looked and smelled polluted; and that he would like to fish, camp, swim, and picnic in and near the river between 3 and 15 miles downstream from the facility, as he did when he was a teenager, but would not do so because he was concerned that the water was polluted by Laidlaw's discharges. Curtis reaffirmed these statements in extensive deposition testimony. For example, he testified that he would like to fish in the river at a specific spot he used as a boy, but that he would not do so now because of his concerns about Laidlaw's discharges.

(Citations omitted.)

89. *See id.* at 705-06, 30 ELR at 20249, where the Court stated that:

> [T]he affidavits and testimony presented by FOE in this case assert that Laidlaw's discharges, and the affiant members' reasonable concerns about the effects of those discharges, directly affected those affiants' recreational, aesthetic, and economic interests. These submissions present dispositively more than the mere "general averments" and "conclusory allegations" found inadequate in *National Wildlife Federation.* Nor can the affiants' conditional statements—that they would use the nearby North Tyger River for recreation if Laidlaw were not discharging pollutants into it—be equated with the speculative "'some day' intentions" to visit endangered species halfway around the world that we held insufficient to show injury in fact in *Defenders of Wildlife.*

(Citations omitted.) In this regard, the members of Friends of the Earth were like the plaintiffs in Japan Whaling Ass'n v. American Cetacean Soc., 478 U.S. 221 (1986), and Robertson v. Methow Valley Citizens Council, 490 U.S. 332 (1989). Even Justice Scalia had not raised any concerns about standing in those cases because of the plaintiffs' obvious interest in the affected resource. *See* Defenders of Wildlife v. Lujan, 504 U.S. 555, 573 n.8, 22 ELR 20913, 20918-19 n.8 (1992). That the *Laidlaw* Court distinguished *Defenders of Wildlife* on this ground makes the earlier decision more "plausible." *See* Cass R. Sunstein, *What's Standing After* Lujan? *Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 203 (1992) ("if the outcome in [*Defenders of Wildlife*] turns on the fact that plaintiffs made an inadequate showing that they would indeed return to the relevant sites, the Court's decision is hardly implausible.").

90. *See* discussion *supra.*

91. *Id.* at 705, 30 ELR at 20249 (quoting *Sierra Club*, 405 U.S. at 735, 2 ELR at 20194).

92. *See supra* note 86 and accompanying text.

93. *See* 33 U.S.C. §1313, ELR STAT. FWPCA §303. *Cf.* Friends of the Earth v. Gaston Copper Recycling Corp., 204 F.3d 149, 157, 30 ELR 20369, 20372 (4th Cir. 2000) (en banc) (in finding injury-in-fact, the court relies on the fact that permit limitations violated by the defendant were set at a level needed to ensure water quality standard compliance).

their occurrence given the unlawfully increased amounts of the pollutant in the waterway.[94]

The Court found an injury-in-fact in *Laidlaw* by employing the analytic method it had utilized in *Akins* and by relying on its own long-standing conception of environmental injury. As we will see, both parts of the Court's analysis were necessary to its conclusion that Friends of the Earth had identified a cognizable injury-in-fact. First, the Court proceeded as it had in *Akins* to follow the lead of Congress in identifying a cognizable injury-in-fact[95] and held that

> The relevant showing for purposes of Article III standing . . . is not injury to the environment but injury to the plaintiff. To insist upon the former rather than the latter as part of the standing inquiry . . . is to raise the standing hurdle higher than the necessary showing for success on the merits in an action alleging noncompliance with an NPDES permit.[96]

The nature of the Court's analysis—both matter-of-fact and brief—shows the effect that *Akins* has had in relating statutory violation to injury-in-fact: injury-in-fact was present because the effect that Congress sought to prevent by its statutory requirement—increased pollutant levels in a waterway resulting from the defendant's permit violations—was felt to be injurious to those who wished to use the affected local resource.

Akins, of course, did not hold that an Article III injury-in-fact was present simply because the plaintiffs claimed that they were harmed by the statutory violation. The Court required that the injury be sufficiently concrete to be cognizable under Article III. This leads to the second part of the *Laidlaw* Court's analysis in support of its finding of Article III injury-in-fact. Here, the Court relied on the conception of environmental injury to which it has consistently adhered and which resulted in the decision that the injury at issue in *Laidlaw* was concrete. At bottom, *Laidlaw* demonstrates very nicely that the Court's conception of environmental injury reflects a property-rule, rather than liability-rule, paradigm.[97] As Judge Calabresi and Mr. Melamed describe these two types of rules in their famous article, when an entitlement is protected by a property rule, its value is determined by the person who holds the entitlement; that person will not sell the entitlement unless she receives what she believes the entitlement is worth.[98] The authors contrast this regime with a regime that protects an entitlement by a liability rule; under such a regime, the value of the entitlement is "objectively determined" rather than determined by the owner's subjective valuation.[99]

Laidlaw is exceptionally instructive in this regard, because the case implicated the issue of injury both at the constitutional threshold of standing and at the later stage of the assignment of liability. On the threshold standing issue, the Court focused on the articulated belief of the members of the plaintiff organization themselves that the local environment that they planned to use and enjoy recreationally was being harmed as a result of the defendant discharging unlawfully high amounts of pollutants into the resource. For the Court, the important fact is the objective illegal increase in the level of pollutants in the waterway: The members' feeling of aggrievement in response to that illegally high pollution level is then accepted as "reasonable" by the Court.[100] Although the Court claimed that it was demanding objectivity,[101] its analysis reflects an unstated vision of environmental injury that accepts the subjectivity of an individual's response to prohibited environmental impacts. This is the Court's own understanding of injury; it does not arise out of the Court's understanding of the interests that Congress intended to protect.[102]

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94. The district court found that "'[t]he NPDES permit violations at issue in this citizen suit did not result in any health risk . . . .'" 120 S. Ct. at 704, 30 ELR at 20247 (quoting 956 F. Supp. at 602, 27 ELR at 20982). For an example of a case in which the plaintiffs presented such evidence of increased risks of harm due to increased pollutant levels, see *Gaston Copper*, 204 F.3d at 157, 30 ELR at 20372.

The *Laidlaw* Court's conclusion of an injury-in-fact would have been less noteworthy if the plaintiffs had adduced evidence about the increased risk created by increased levels of mercury in the receiving waters and the Court had found an injury based on that heightened risk. *See* Sunstein, *supra* note 89, at 203-04 (arguing that injury-in-fact may be identified based on conduct creating environmental risks); *see also Gaston Copper*, 204 F.3d at 160, 30 ELR at 20373 ("Threats or increased risk . . . constitutes cognizable harm. Threatened environmental injury is by nature probabilistic."). For a discussion of "the 'multiple warhead' nature of the Clean Water Act's approaches to [limiting] toxic pollution," *see* Oliver A. Houck, *The Regulation of Toxic Pollutants Under the Clean Water Act*, 21 ELR 10528, 10528 (Sept. 1991).

95. *See supra* note 64 and accompanying text.

96. *Laidlaw*, 120 S. Ct. at 704, 30 ELR at 20248.

97. *See generally* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972). For a discussion of an environmental context in which legislatures have differed in their adherence to a property-rule approach rather than liability-rule approach in defining a regulatory regime, *see* Michael P. Healy, *England's Contaminated Land Act of 1995: Perspectives on America's Approach to Hazardous Substance Cleanups and Evolving Principles of International Law*, 13 J. NAT. RESOURCES & ENVTL. L. 289, 298-99 & n.48 (1997-1998) (arguing that England's statutory scheme for cleaning up hazardous substances reflects a liability rule, while the American federal statutory scheme reflects a property rule).

98. *See* Calabresi & Melamed, *supra* note 97, at 1092; *see also id.* at 1106-08.

99. *Id.* at 1092. *See also id.* at 1106-08 (describing eminent domain as a valuation method that relies on a liability rule).

100. *See Laidlaw*, 120 S. Ct. at 706, 30 ELR at 20249, where the Court stated that:

> [I]t is undisputed that Laidlaw's unlawful conduct—discharging pollutants in excess of permit limits—was occurring at the time the complaint was filed. Under *Lyons*, then, the only "subjective" issue here is "[t]he reasonableness of [the] fear" that led the affiants to respond to that concededly ongoing conduct by refraining from use of the North Tyger River and surrounding areas. Unlike the dissent, we see nothing "improbable" about the proposition that a company's continuous and pervasive illegal discharges of pollutants into a river would cause nearby residents to curtail their recreational use of that waterway and would subject them to other economic and aesthetic harms. The proposition is entirely reasonable, the District Court found it was true in this case, and that is enough for injury in fact.

(Citation omitted.)

101. *See id.*

102. The Court's own property-rule paradigm for understanding environmental injury may be contrasted with an argument about environmental injury that Judge Fletcher presented in his well-known article on standing. *See* Fletcher, *supra* note 26. There, Judge Fletcher argued that the Court properly demanded little proof of the actual threatened injury in United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 3 ELR 20536 (1973), because the statutory scheme that plaintiffs relied upon for protection was the National Environmental Policy Act (NEPA), 42 U.S.C. §§4321-4370d, ELR STAT. NEPA §§2-209. *See* Fletcher, *supra* note 26, at 259-60. Judge Fletcher argued that Congress had enacted that statute to compel agencies to develop information about the expected environmental impacts of their actions and the Court should accordingly limit the required showing of injury-in-fact given that statutory purpose, because the agency is supposed to develop that very evidence of injury during its environmental review. *Id.* Judge Fletcher recognized that the Court did not engage in this analysis. *Id.* at 259.

Justice Scalia's criticism in *Laidlaw* that the plaintiffs' grievance is widely shared and thus generalized because the plaintiffs failed to adduce evidence of objective harm to the environment[103]—proof, for example, that the excess mercury discharged by Laidlaw resulted in the hospitalization of children or caused dead or injured fish—was beside the point for the majority: The majority believed that environmental injury for Article III purposes follows from property-rule subjectivity, rather than Justice Scalia's liability-rule objectivity. For the Supreme Court and the district court in *Laidlaw*, that concern about objective indicia of harm, of which there was none, was defined by Congress to be a factor in calculating the amount of the penalty (i.e., the liability)[104]; it was not determinative of the standing question.[105] The Court's analysis of injury-in-fact in *Laidlaw* is consistent with the approach that Justice Scalia (ironically) had presented for the Court in *Defenders of Wildlife*.[106] There, in response to Justice Blackmun's complaint that the Court's narrow limit on the parties that could demonstrate injury-in-fact would necessitate a very specific description of actual injury in a loss of consortium case before standing could be found,[107] Justice Scalia had distinguished the requisite proof of injury for standing, which looks to the existence vel non of injury, from the proof of injury for liability, which depends on the precise extent of injury and is considered in the damages aspect of the case.[108] Because Friends of the Earth proved in *Laidlaw* that its members were personally affected by the increased pollution levels because of their intended use of the impacted resource, the Court concluded that injury-in-fact was present under the CWA—proof of its precise extent was relevant only to the penalty.

This approach of the *Laidlaw* majority in accepting the injury to plaintiffs as cognizable under Article III because it is subjectively concrete thus conforms to previous environmental standing decisions of the Court. For the Court, just as a claimant is injured-in-fact when a forest she uses will have fewer trees because of the action being challenged as unlawful, a claimant is injured when a waterway she uses has higher pollution levels because of NPDES permit violations. In the former context, the Court has never required the plaintiff to show either the specific trees that would be removed by the government action or that removal of those specific trees would objectively impair the area's aesthetics by, for example, offending a reasonable observer of nature or reducing the market value of the property. In the permit violation context, of course, a claimant meeting the proper party requirements of *National Wildlife Federation* and *Defenders of Wildlife* is by definition able to demonstrate that the resource of interest has illegally high pollutant levels; the *Laidlaw* Court's decision conformed to its earlier holdings that proof of further harm was not necessary to show injury-in-fact.[109]

In short, the Court's injury-in-fact analysis in *Laidlaw* is important for two reasons. First, the Court again decided to follow Congress' lead by accepting as an injury-in-fact under Article III an effect that is more clearly injurious because it is a legal violation. As in *Akins*, the Court did not hold that Congress had power to define injuries that are cognizable under Article III.[110] On the other hand, *Laidlaw* also did not undermine the CWA regulatory scheme by holding that, notwithstanding the broadly protective purposes of the CWA,[111] a citizen suit claimant is able to bring an action

103. *See id.* at 714, 30 ELR at 20252 (Scalia, J., dissenting):

> At the very least, in the present case, one would expect to see evidence supporting the affidavits' bald assertions regarding decreasing recreational usage and declining home values, as well as evidence for the improbable proposition that Laidlaw's violations, even though harmless to the environment, are somehow responsible for these effects.

(Citation omitted.)

104. *See Laidlaw*, 120 S. Ct. at 701, 30 ELR at 20247 ("In deterring the amount of any civil penalty, the district court must take into account 'the seriousness of the violation or violations, . . .'" (quoting 33 U.S.C. §1365(d))); Friends of the Earth v. Laidlaw Envtl. Servs. (TOC), Inc., 956 F. Supp. 588, 602-03, 27 ELR 20976, 20982 (D.S.C. 1997) (evaluating the extent of "demonstrated adverse affect [sic] on the environment" in determining the amount of the civil penalty), *rev'd on other grounds*, 149 F.3d 303, 28 ELR 21444 (4th Cir. 1998), *rev'd on other grounds*, 120 S. Ct. 693, 30 ELR 20246 (2000).

105. Congress' decision to employ a liability rule for determining the penalty for violations is consistent with the view of Calabresi and Melamed that such a rule "facilitates a combination of efficiency and distributive results which would be difficult to achieve under a property rule." Calabresi & Melamed, *supra* note 97, at 1110.

106. See *Defenders of Wildlife*, 504 U.S. at 564 n.2, 22 ELR at 20916 n.2.

107. *See id.* at 593, 22 ELR at 20924 (Blackmun, J., concurring) (under the Court's approach to injury-in-fact, "a Federal Tort Claims Act plaintiff alleging loss of consortium should make sure to furnish this Court with a 'description of concrete plans' for her nightly schedule of attempted activities.").

108. *See id.* at 564 n.2, 22 ELR at 20916 n.2:

> Our insistence upon these established requirements of standing does not mean that we would, as the dissent contends, "demand . . . detailed descriptions" of damages, such as a "nightly schedule of attempted activities" from plaintiffs alleging loss of consortium. That case and the others posited by the dissent all involve *actual* harm; the existence of standing is clear, though the precise extent of harm remains to be determined at trial. Where there is no actual harm, however, its imminence (though not its precise extent) must be established.

(Citation omitted.)

109. The degree to which the *Laidlaw* result is bounded in this respect depends on the environmental medium affected by the unlawful pollution. Other waterways may be less bounded than the waterway at issue in *Laidlaw*. For example, the court's decision that the plaintiff demonstrated injury-in-fact in Friends of the Earth v. Gaston Copper Recycling Corp. was based on its view that excessive pollutant levels resulting from the defendant's permit violations affected a "discharge zone" extending 16.5 miles from a lake into which the defendant's effluent flowed. *See* 204 F.3d 149, 158, 30 ELR 20369, 20373 (4th Cir. 2000). Because the plaintiff's property was well within that area, the court concluded that the plaintiff suffered injury-in-fact. *See id.* When air is the affected medium, the effects are far less bounded. *See infra* note 126.

110. The *Laidlaw* Court thus did not make the argument that the court seemed to make in *Gaston Copper*. There, when the Fourth Circuit explained its conclusion that the plaintiff demonstrated injury-in-fact, the court suggested a willingness to find an Article III injury-in-fact simply on the basis of a statutory violation. *See* 204 F.3d at 163, 30 ELR at 20375:

> To deny standing to Shealy here would further thwart congressional intent by recreating the old system of water quality standards whose failure led to the enactment of the Clean Water Act in the first place. An important reason for Congress' shift to end-of-pipe standards was to eliminate the need to address complex questions of environmental abasement and scientific traceability in enforcement proceedings.

(Citation omitted.)

111. One purpose of the CWA is to move toward the zero discharge of pollutants into waters of the United States. *See* 33 U.S.C. §1251(a)(1), ELR STAT. FWPCA §101(a)(1) ("[I]t is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985.").

only upon proof that the permit violations are causing water quality standard violations, or some other objective harm.

Second, because the Court decided to accept the statutory injury in *Laidlaw* as cognizable under Article III and because the district court made the fact-finding that the statutory violation caused no measurable environmental degradation, the Court had to identify more clearly the limits of Article III injury in this environmental context. The Court accepted as sufficiently concrete an injury that arises because of a subjective response to illegally high pollution levels. The Court's acceptance improves our understanding of the contours of Article III injury-in-fact, because the case demonstrates that aggrievement as a result of a statutory violation is sufficient when it lessens environmental value to users of the affected resource, even if it is lessened only as a subjective matter.[112]

This conception of injury-in-fact is arguably both narrower and broader than the injury determined to be cognizable in *Akins*. It is narrower because in *Laidlaw* the aggrieved plaintiff had to be a proper party by showing that the subjective injury resulting from illegally high levels of pollution actually affected a particular resource used by the plaintiff. Only those using this resource would have standing to assert the subjective injury. In contrast, the class of those who might claim an injury due to nondisclosure of information under *Akins* does not seem similarly constrained: any person can claim an interest in information the disclosure of which is required by the statute and *Akins* accordingly appears broader than *Laidlaw*.[113] *Laidlaw*, though, is arguably broader than *Akins* along a different axis. *Laidlaw* does not require any proof of objective, that is measurable, environmental degradation. *Laidlaw* would thus appear to permit any person with a proper interest in a resource affected by pollution levels that are illegally high as a result of defendant's statutory violations to show injury-in-fact as long as the person feels injured by that higher level of pollution. This aspect of *Laidlaw* may be seen as broader than *Akins*, because the injury-in-fact in *Akins* was grounded on a deprivation of actual information claimed to be important to voting. Thus, *Akins* defines a largely unbounded class of persons who would be able to claim injury, while *Laidlaw* defines actual injury in a way that appears unbounded once a proper party demonstrates a statutory violation.

Redressability in Citizen Suit Cases

Unlike the injury-in-fact context, where the recent *Akins* precedent was available to help the plaintiff's claim for standing, recent precedent in the redressability context was far less favorable. The Court in *Steel Co.* had only recently relied on a lack of redressability to hold that there was no standing when the plaintiff was complaining about past violations of an environmental reporting statute.[114] In particular, the Court had concluded that payment of civil penalties to the federal fisc would not redress the plaintiff's injury by giving them psychic satisfaction.[115]

Perhaps because the plaintiff in *Steel Co.* had not claimed that there was a likelihood of future statutory violations given the company's prior failures to submit the required reports, the *Steel Co.* Court never specifically rejected the argument that civil penalties were sufficient redress due to the deterrence of future violations.[116] The factual context of the claim in *Laidlaw* differed significantly from *Steel Co.* in this regard. Because of the convergence of the Court's statutory decision in *Gwaltney* that a CWA citizen suit is forward looking with the mootness doctrine, which provides that "a defendant claiming that its voluntary compliance moots a case bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur,"[117] the *Laidlaw* plaintiffs had a live claim based on the violations at the time the claim was filed unless the defendant met its "formidable burden" of showing that permit violations would not recur in the future. It was in this context of the reasonable threat that future injuries would result from permit violations that the *Laidlaw* Court considered whether civil penalties offered sufficient redress for the plaintiffs.[118]

In this context, the Court thought it straightforward that penalties provide reasonable deterrence against future violations and accordingly redress injuries that result from violations:

> It can scarcely be doubted that, for a plaintiff who is injured or faces the threat of future injury due to illegal

112. In some cases, proof of a statutory violation may necessitate proof of actual harm to the environment. For example, a plaintiff may bring a citizen suit based on a claim that the defendant's discharge of pollutants has caused a violation of state water quality standards, when compliance with water quality standards is a condition of the defendant's NPDES permit. For a discussion of the statutory permissibility of such citizen suits, see Michael P. Healy, *Still Dirty After Twenty-Five Years: Water Quality Standard Enforcement and the Availability of Citizen Suits*, 24 ECOLOGY L.Q. 393 (1997). In that circumstance, proof of the statutory violation would be sufficient for Article III injury without any need to rely on subjective perceptions.

113. The degree to which the *Laidlaw* result is bounded in this respect depends on the environmental medium affected by the unlawful pollution. The air medium is, for example, far less bounded than a river. *See infra* note 126.

114. *Steel Co.* is discussed *supra* at notes 65-75 and accompanying text.

115. *See supra* note 74 and accompanying text.

116. Justice Scalia disagreed with this reading of *Steel Co.*, and he contended, when dissenting in *Laidlaw*, that *Steel Co.* had decided the redress question. *See* 504 U.S. at 715, 30 ELR at 20253 ("Only last Term, we held that such penalties do not redress any injury a citizen plaintiff has suffered from past violations.").

117. 120 S. Ct. at 709, 30 ELR at 20250 (citation omitted). The Court explained in this regard that "there are circumstances in which the prospect that a defendant will engage in (or resume) harmful conduct may be too speculative to support standing, but not too speculative to overcome mootness." *Id.* This greater willingness to permit resolution of a pending case than to accept a case at the outset reflects in part the value of judicial efficiency:

> Standing doctrine functions to ensure, among other things, that the scarce resources of the federal courts are devoted to those disputes in which the parties have a concrete stake. In contrast, by the time mootness is an issue, the case has been brought and litigated, often (as here) for years. To abandon the case at an advanced stage may prove more wasteful than frugal.
>
> *Id.* at 710, 30 ELR at 20250.

118. This contextual difference was the ground on which the *Laidlaw* Court distinguished *Steel Co. See Laidlaw*, 120 S. Ct. at 708, 30 ELR at 20249-50:

> In short, *Steel Co.* held that private plaintiffs, unlike the Federal Government, may not sue to assess penalties for wholly past violations, but our decision in that case did not reach the issue of standing to seek penalties for violations that are ongoing at the time of the complaint and that could continue into the future if undeterred.
>
> (Footnote omitted.)

conduct ongoing at the time of suit, a sanction that effectively abates that conduct and prevents its recurrence provides a form of redress. Civil penalties can fit that description. To the extent that they encourage defendants to discontinue current violations and deter them from committing future ones, they afford redress to citizen plaintiffs who are injured or threatened with injury as a consequence of ongoing unlawful conduct.[119]

In addition to relying on the inherent plausibility of the deterrent effect of penalties, the Court supported its conclusion of deterrent effect by reference to previous decisions of the Court.[120] Perhaps more importantly in the context of its conclusion that Article III standing was present, the Court twice relied on Congress' own determination that the civil penalties available under the CWA would deter future violations.[121] The *Laidlaw* decision thereby built upon the Court's approach in *Akins* and the analysis of injury-in-fact in *Laidlaw* itself, which followed Congress' lead in identifying an injury cognizable under Article III, by relying on a congressional determination of deterrence to find constitutionally adequate redress.[122] The *Laidlaw* Court thus effectively held that, by both providing that civil penalties are available in the forward-looking CWA citizen suit and finding that civil penalties deter future violations, Congress has provided at least the peppercorn of redress that the Court found lacking in *Steel Co.*[123] Finally, the Court supported its intuitive view that penalties would provide redress by relying on the fact that the district court had factored the deterrent effect of the penalty on *Laidlaw* when it fixed the proper amount of Laidlaw's civil penalty.[124]

For the Court, therefore, this was the "ordinary case" in which penalties would be reasonably expected to yield deterrence of future violations that would give rise to injury-in-fact to the plaintiff.[125]

Conclusion

All told when read in the light of recent standing cases, *Laidlaw* is very much a clarification of how that law applies in the context of likely future violations of statutory standards intended to protect against pollution of the environment. The case does not establish new doctrine, but rather extends the *Akins* rationale to define a cognizable injury-in-fact to the context of environmental injury. The case also confirms the Court's property-rule paradigm for identifying environmental injury, so that measurable degradation in environmental or health quality is not necessary to demonstrate injury-in-fact. *Laidlaw*'s effect therefore is to focus claimants in environmental citizen suits on demonstrating that they are proper parties by showing a real interest in the resource or environmental amenity being affected by the

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119. *Id.* at 706-07, 30 ELR at 20249.

120. *See id.* at 706, 30 ELR at 20249 ("We have recognized on numerous occasions that 'all civil penalties have some deterrent effect.'") (citations omitted).

121. *See id.* at 707, 30 ELR at 20249:

> Congress has found that civil penalties in Clean Water Act cases do more than promote immediate compliance by limiting the defendant's economic incentive to delay its attainment of permit limits; they also deter future violations. This congressional determination warrants judicial attention and respect.
>
> . . . .
>
> [I]t is reasonable for Congress to conclude that an actual award of civil penalties does in fact bring with it a significant quantum of deterrence over and above what is achieved by the mere prospect of such penalties. A would-be polluter may or may not be dissuaded by the existence of a remedy on the books, but a defendant once hit in its pocketbook will surely think twice before polluting again.

Id. (footnote omitted).

122. For Justice Scalia in dissent, this extension of the *Akins* rationale meant that the Court's improper allowance of injury-in-fact based on a generalized grievance in *Akins* was now extended to an unconstitutional recognition of generalized redress. *Id.* at 716, 30 ELR at 20253 (Scalia, J., dissenting):

> Just as a "generalized grievance" that affects the entire citizenry cannot satisfy the injury-in-fact requirement even though it aggrieves the plaintiff along with everyone else, so also a generalized remedy that deters all future unlawful activity against all persons cannot satisfy the remediation requirement, even though it deters (among other things) repetition of this particular unlawful activity against these particular plaintiffs.

(Citation omitted.)

123. *See supra* note 75 and accompanying text. Justice Scalia was adamant in his view that Congress has no authority under the constitutional structure to make a civil penalty serve the purpose of the peppercorn:

> In seeking to overturn that tradition by giving an individual plaintiff the power to invoke a public remedy, Congress has done precisely what we have said it cannot do: convert an "undifferentiated public interest" into an "individual right" vindicable in the courts. The sort of scattershot redress approved today makes nonsense of our statement in *Schlesinger v. Reservists Comm. to Stop the War* that the requirement of injury in fact "insures the framing of relief no broader than required by the precise facts." A claim of particularized future injury has today been made the vehicle for pursuing generalized penalties for past violations, and a threshold showing of injury in fact has become a lever that will move the world.

120 S. Ct. at 716-17, 30 ELR at 20253 (citations omitted); *see also id.* at 717, 30 ELR at 20253 ("[I]t is my view that a plaintiff's desire to benefit from the deterrent effect of a public penalty for past conduct can never suffice to establish a case or controversy of the sort known to our law.").

124. *Id.* at 707, 30 ELR at 20249:

> Here, the civil penalties sought by FOE carried with them a deterrent effect that made it likely, as opposed to merely speculative, that the penalties would redress FOE's injuries by abating current violations and preventing future ones—as the District Court reasonably found when it assessed a penalty of $405,800.

(Citation omitted.)

125. *See id.*

> We recognize that there may be a point at which the deterrent effect of a claim for civil penalties becomes so insubstantial or so remote that it cannot support citizen standing. The fact that this vanishing point is not easy to ascertain does not detract from the deterrent power of such penalties in the ordinary case.

Justice Scalia ridiculed the idea that the case could be viewed as an ordinary one for purposes of the value of deterrence for the plaintiff. *Id.* at 718, 30 ELR at 20254 (Scalia, J., dissenting):

> [I]f this case is, as the Court suggests, within the central core of "deterrence" standing, it is impossible to imagine what the "outer limits" could possibly be. The Court's expressed reluctance to define those "outer limits" serves only to disguise the fact that it has promulgated a revolutionary new doctrine of standing that will permit the entire body of public civil penalties to be handed over to enforcement by private interests.

statutory violation.[126] Finally as to the Article III redressability requirement, *Laidlaw* wholly marginalizes *Steel Co.* by concluding that the civil penalties that Congress provides in citizen suits offer sufficient redress by deterring future violations (that must be threatened in any event to avoid mootness).[127]

126. The limits of the Court's willingness to find injury-in-fact in such suits may be more likely to be identified in citizen suits under the Clean Air Act, 42 U.S.C. §§7401-7671q, ELR STAT. CAA §§101-618, where the affected resource is far less cabined than a waterway and the permit violations have arguable effects in areas that are far distant from where the source is located. Regarding the uncabined nature of air quality impacts, *see* P. WILLIAMSON & P.S. LISS, *Understanding the Earth System, in* POLICY MAKING IN AN ERA OF GLOBAL ENVIRONMENTAL CHANGE 23 (R.E. Munn, J.W.M. la Riviere & N. van Lookeren Campagne eds., 1996):

> In every breath we take there are around 10^{19} atoms of oxygen; it is therefore a statistical near-certainty that at least one of these oxygen atoms has been previously breathed by Confucius—and another by Albert Einstein, or anyone else who lived more than a few decades ago (to allow for worldwide mixing within the atmosphere).

Cf. Battle over Older Coal Plants Widens as States File Their Own Clean Air Act Suits, 1999 UTIL. ENV'T REP. (McGraw-Hill), Dec. 3, 1999, at 1 (describing actions brought by northeastern states claiming violations by midwestern power plants of new source permit requirements based on ozone impacts in the northeastern states). The *SCRAP* Court suggested that there may be pragmatic limits on standing when an action with an allegedly unlawful environmental impact has an exceptionally widespread impact, at least when the impact is "less direct and perceptible." *See* United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 3 ELR 20536 (1973). *Cf.* Arkansas v. Oklahoma, 503 U.S. 91, 112 (1992) (upholding EPA interpretation of CWA regulations requiring a showing that a source's discharge caused a "detectable change in water quality" 39 miles downstream before more stringent water quality-based limitations would be required.

127. The *Laidlaw* Court thereby limited the effect of *Steel Co.* to the narrow circumstances of a citizen suit based on a wholly past violation. As a statutory matter, the Court had, of course, previously foreclosed such actions under the CWA. *See* Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., 484 U.S. 49, 64-65, 18 ELR 20142, 20145 (1987).