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Comments

Standing at the Edge of a New Millennium: Ending a Decade of Erosion of the Citizen Suit Provision of the Clean Water Act

Introduction

In *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*,[1] the United States Supreme Court, in its first environmental decision of the twenty-first century, ended a decade of erosion of citizens' rights to enforce environmental laws. The Court's decision restored the ability of citizens living near sources of environmental risk to ensure that the sources of those risks comply with all applicable environmental regulations. Throughout the 1990s, federal courts employed the standing doctrine to erect new barriers to citizen access to the courts.[2] *Laidlaw* reversed this trend and created profound implications concerning the role of citizens in our federal system.

Thirty years ago, environmental standing doctrine presented no more than a small hindrance to a plaintiff bringing a citizen suit.[3] By the end of 1992, however, the standing question was a tremendous barrier to a citizen plaintiff attempting to present the merits of a case.[4] With the advent of *Laidlaw*, the Supreme Court has reached out to stop the use of fact-based tortlike mini-trials to determine standing at the pre-merits stage of litigation.[5]

The standing requirement, which is grounded in Article III of the Constitution,[6] ensures that plaintiffs meet the case-or-controversy re-

1. 120 S. Ct. 693 (2000).

2. The standing issue is "whether the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant *his* invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf" because standing imports justiciability in its constitutional dimension. Warth v. Seldin, 422 U.S. 490, 498-99 (1975) (quoting Baker v. Carr, 369 U.S. 186, 204 (1962)). The "threshold question in every federal case" to determine the ability of the court to hear a particular suit is "whether the plaintiff has made out a 'case or controversy' between himself and the defendant within the meaning of Art. III." *Id.* at 498.

3. *See* discussion *infra* notes 23-29 and accompanying text.

4. *See* discussion *infra* notes 47-58 and accompanying text.

5. *See Laidlaw Envtl. Servs., Inc.*, 120 S. Ct. at 705 (finding sworn statements averring "injury in fact" of persons "for whom the aesthetic and recreational values of the area will be lessened" to be in evidence and to satisfy the first prong of the standing requirement); *see also infra* text accompanying note 52.

6. U.S. Const. art. III, § 2 (providing in part that judicial power extends over "Cases" and "Controversies").

quirement prior to litigating a case.[7] Courts developed this requirement to prevent courtrooms from being flooded with litigation.[8] Additionally, the standing requirement ensures that the proper parties are before the court.[9] Based on the history and purpose of the standing requirement, courts are required to address the standing question *before* addressing the merits of a case.[10] Accordingly, it is not usually necessary for a court to see scientific evidence or hear testimony to determine whether a citizen plaintiff has met the case-or-controversy requirement.[11]

The Clean Water Act (CWA) provides a good case study for examining environmental citizen suit provisions.[12] Congress enacted the Federal Water Pollution Control Act (Clean Water Act)[13] "to restore and maintain the chemical, physical, and biological integrity of the

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7. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (stating that "the core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III") (citation omitted). In addition to meeting the requirements for constitutional standing, plaintiffs must also satisfy any statutory requirements for standing before bringing suit. *See* Friends of the Earth v. Gaston Copper Recycling Corp., 204 F.2d 149, 155 (4th Cir. 2000). The CWA confers standing to the full extent of the Constitution, however. *Id.* ("Thus, if a Clean Water Act plaintiff meets the constitutional requirements for standing, then he *ipso facto* satisfies the statutory threshold as well.").

8. *See* Warth v. Seldin, 422 U.S. 490, 500 (1975) (explaining that without the standing requirement, courts would be open to deciding issues of wide public significance that are better suited for being addressed by other governmental institutions).

9. *See id.* at 499 (explaining that plaintiffs generally are barred from resting their claims for relief upon legal rights or interests held by third parties, thus the standing requirement insures that only harmed parties are allowed to pursue their claims in court).

10. *See id.* at 498 (describing the standing question as a "threshold" one).

11. *See generally* JOHN D. ECHEVERRIA & JON T. ZEIDLER, BARELY STANDING: THE EROSION OF CITIZEN "STANDING" TO SUE TO ENFORCE FEDERAL ENVIRONMENTAL LAW 15 (1999) (stating that "once standing was established under [the broad standard of the 1970s], the plaintiff's right to seek the various remedies authorized by the CWA was essentially unquestioned").

12. The focus of this Comment has been confined to the Clean Water Act for three reasons. First, more than half of all environmental citizen suits are brought under the CWA. *See* Courtney M. Price, *Private Enforcement of the Clean Water Act*, NAT. RESOURCES & ENV'T, Winter 1986, at 32 (stating that "[m]ore than 65 percent of all citizen actions have been brought under the . . . [CWA] and the percentage has been increasing since 1981"). Second, until the mid-1980s, the CWA was the only statute that allowed citizens to seek civil penalties. *See id.* at 33. Congress has since amended other environmental statutes to include this remedy. *See, e.g.*, Clean Air Act § 304(a), 42 U.S.C. § 7604(a) (1994); Safe Drinking Water Act § 1449(j-8), 42 U.S.C. § 300(j-8) (1994); Emergency Planning and Community Right-to-Know Act § 326(c), 42 U.S.C. § 11046(c) (1986); Resource Conservation and Recovery Act § 7002(a), 42 U.S.C. § 6972(a) (1994). Finally, the CWA citizen suit provision does not require an additional discussion of statutory standing. *See supra* note 7. Although this Comment is limited to the Clean Water Act, the theories presented herein are applicable to the citizen suit provisions in other environmental statutes.

13. 33 U.S.C. §§ 1251-1387 (1994).

Nation's waters."[14] The CWA forbids the discharge of pollutants from point sources into navigable waters without a National Pollutant Discharge Elimination System (NPDES) permit.[15] The permits specify limitations on the types and concentrations of pollutants that the permit holder can discharge.[16] Permit holders are required to record test results and other data with the United States Environmental Protection Agency (EPA) and to cooperate with state agencies by keeping information up to date on Discharge Monitoring Reports (DMRs).[17] If a permit holder fails to comply with any of the conditions of its permit, the holder has violated the CWA.[18] Finally, the CWA allows state agencies or citizens to bring suits against violators.[19]

The CWA authorizes citizens who bring suits to request civil penalties, declaratory and injunctive relief, as well as reasonable attorneys fees, expert witness fees, and other costs of litigation.[20] Proving the source of an environmental hazard in court, however, can be a very trying experience. Trials can be long and expensive, and environmental advocates have limited resources as compared to large corporations. In this regard, the Supreme Court's decision in *Laidlaw* will help to ease the evidentiary burden on citizen plaintiffs. The *Laidlaw* Court found that citizen plaintiffs presented adequate evidence to satisfy the standing requirement where they asserted no more than rea-

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14. *Id.* § 1251(a).

15. *Id.* §§ 1311(a), 1342(a)-(b), 1362(12)(a).

16. *See* Public Interest Research Group v. Magnesium Elektron, Inc., 123 F.3d 111, 115 (3d Cir. 1997).

17. *See id.* (citing 40 C.F.R. §§ 122.41(j), 122.48 (1989)).

18. *See id.* (equating compliance with "the terms and conditions of the permit" with compliance with the CWA (citing 33 U.S.C. § 1342(k))).

19. *See* 33 U.S.C. § 1365 (1994). It is easier for plaintiffs to prove violations in CWA cases because dischargers must file publicly accessible reports of their discharges. *See* PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 1078 (2 ed. 1996). These reports can serve as prima facie evidence of permit discharge violations. *See id.*

20. *See* 33 U.S.C. §§ 1365(a), 1365(d). Specifically, the citizen suit provision of the Clean Water Act states that

> any citizen may commence a civil action on his own behalf—
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> (1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh 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, or
>
> (2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

Id. § 1365(a)-(b).

sonable concerns about the effects of discharges affecting their recreational, aesthetic, and economic interests.[21]

I. COURT DECISIONS SHAPING ENVIRONMENTAL STANDING DOCTRINE

A. *The Beginning of the Modern Environmental Era: A Moderate Obstacle*

The early 1970s marked the beginning of the modern environmental era,[22] and the standing decisions of the Supreme Court presented environmental groups with only a low threshold to overcome. In 1970, the Court formulated the "injury in fact" requirement for Article III standing in *Data Processing Service Organizations, Inc. v. Camp.*[23] In *Data Processing,* the petitioners claimed that injurious harm to their competitive position in the computer-servicing market had resulted from the Comptroller's decision to allow national banks to perform data-processing services for their customers.[24] The Court began its opinion by noting that "the question of standing in the federal courts is to be considered in the framework of Article III which restricts judicial power to 'cases' and 'controversies.'"[25] The Court then questioned whether the interest that the petitioners sought to protect was entitled to judicial review under the statute invoked, the Administrative Procedure Act (APA).[26] Finding that Data Processing's allegations of the potential loss of future profits and the confiscation of contractually bound clients was a sufficient "injury in fact,"[27] and that it fell within the "zone of interests" sought to be protected by the APA,[28] the Court held that the petitioners had standing to sue.[29]

Two years later, in *Sierra Club v. Morton,*[30] the Court began to clarify some of the issues left open by the *Data Processing* decision. *Sierra Club* involved a challenge by the Sierra Club seeking an injunction to prevent Walt Disney Enterprises, Inc. from building and operating a

21. *See* Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 120 S. Ct. 693, 705 (2000).

22. *See* PERCIVAL ET AL., *supra* note 19, at 106 ("The rapid growth of environmental legislation in the 1970s was accompanied by a parallel opening up of the courts to judicial review of agency decisions that affected the environment.").

23. 397 U.S. 150, 152 (1970).

24. *Id.*

25. *Id.* at 151.

26. *See id.* at 153.

27. *See id.* at 152 (finding that petitioners suffered economic harm from the challenged action sufficient to constitute an actual injury).

28. *See id.* at 157 (stating that petitioners were within the class of "aggrieved" persons contemplated by the Act, and were thus entitled to judicial review of "agency action").

29. *Id.* at 158.

30. 405 U.S. 727 (1972).

ski resort and summer recreation area in the Mineral King Valley of the Sierra Nevada Mountains in California.[31] The issue before the Supreme Court was whether the Sierra Club had standing to sue under the Administrative Procedure Act where the Sierra Club "alleged facts that entitle[d] it to obtain judicial review of the challenged action."[32] For the first time, the Court addressed what must be alleged by "persons who claim injury of a noneconomic nature to interests that are widely shared."[33] The Court declared that "[a]esthetic 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."[34] Even though *Sierra Club* actually broadened the standing doctrine by recognizing the sufficiency of an allegation of aesthetic injury, the Court nonetheless found that the Sierra Club did not satisfy the injury requirement.[35] Justice Stewart, writing for the Supreme Court, concluded that the Sierra Club and its members had failed to show that Disney's proposal would adversely affect them.[36]

The *Sierra Club* Court determined that a party had standing to seek judicial review under the Administrative Procedure Act only if he himself had suffered or would suffer injury.[37] The Court found that the Sierra Club did not present sufficient evidence that it or its members would be affected in any of their activities or pastimes, or that the Walt Disney project would decrease the aesthetic and recreational values of the area.[38] The Court noted that had the Sierra Club alleged that its members used the Mineral King Valley for recreational purposes, rather than simply alleging the public interest, the complaint might have satisfied the "injury in fact" requirement.[39]

Shortly after the *Sierra Club* decision, the Supreme Court again addressed the question of standing in environmental actions in *United States v. Students Challenging Regulatory Agency Procedures* (*SCRAP*).[40] In *SCRAP*, a group of law students alleged that they "used the forests,

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31. *Id.* at 729-30.
32. *Id.* at 731.
33. *Id.* at 734.
34. *Id.*
35. *Id.* at 735.
36. *See id.* at 741.
37. *Id.* at 735 (stating that standing doctrine requires that "the party seeking review be himself among the injured").
38. *See id.*
39. *Id.* at 735 n.8.
40. 412 U.S. 669 (1973).

streams, mountains, and other resources in the Washington metropolitan area for camping, hiking, fishing, and sightseeing, and that this use was disturbed by the adverse environmental impact caused by the nonuse of recyclable goods brought about by a rate increase on those commodities."[41] The Supreme Court held that SCRAP had sufficient standing to bring an action where an Interstate Commerce Commission order on railroad freight rates undermined the market for recycled materials.[42] The Court distinguished the claim here from the one advanced in *Sierra Club*, explaining that while the Sierra Club had "failed to allege that it or its members would be affected in any of their activities or pastimes by the . . . [challenged development],"[43] in this case, SCRAP "claimed that the specific and allegedly illegal action of the Commission would directly harm them in their use of the natural resources" of the affected area.[44] The Court also reiterated that SCRAP was not to be denied standing merely because the injury it alleged was one suffered by many people.[45] This case represented the "high-water mark" of environmental standing doctrine.[46]

B. *The Past Decade: A Higher Threshold*

During the 1990s, the decisions of the Supreme Court and the courts of appeal set a higher threshold for plaintiffs bringing actions charging government agencies with failing to perform nondiscretionary duties or enforcing environmental laws against private corporations.[47] In *Lujan v. Defenders of Wildlife*,[48] the Supreme Court held that

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41. *Id.* at 685.

42. *Id.* at 690.

43. *Id.* at 687 (internal quotation marks omitted) (alteration in original) (quoting *Sierra Club*, 405 U.S. at 735).

44. *Id.*

45. *Id.*

46. PERCIVAL ET AL., *supra* note 19, at 725 (noting that while *SCRAP* has never been overruled, the Court's subsequent jurisprudence has indicated a withdrawal from the case's holding and underlying rationale).

47. This trend may be "one of the least noted but most profound setbacks for the environmental movement in decades." William Glaberson, *Novel Antipollution Tool Is Being Upset by Courts*, N.Y. TIMES, June 5, 1999, at A1. Some attribute the erosion of citizen standing to "a determined effort at jurisprudential reform, spearheaded by U.S. Supreme Court Justice Antonin Scalia," as Justice Scalia has authored the majority opinion in "*all* of the Court's major environmental standing cases" since his appointment to the Court in 1986. ECHEVERRIA & ZEIDLER, *supra* note 11, at 2. Indeed, in 1983, then-Federal appellate Judge Scalia set out his agenda for overhauling the law of standing and essentially closing the doors of the courts to environmental advocates. *See* Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 895 (1983) (stating that "the doctrine of standing, as applied to challenges to governmental action, is an essential means of restricting the courts to their assigned role of protecting minority rather than majority interests"); *see also* Glaberson, *supra*, at A1 (noting the argument that

the respondents, organizations dedicated to wildlife conservation and other environmental causes, did not have standing to seek judicial review of a regulation promulgated by the Secretary of the Interior.[49] The regulation interpreted a section of the Endangered Species Act of 1973 such that it was applicable only to actions within the United States or the high seas.[50] In determining whether the respondents had standing, the Court stated that there were three elements that must be satisfied to meet the threshold for constitutional standing.[51] First, "the plaintiff must have suffered 'injury in fact.'"[52] Second, "the injury has to be 'fairly . . . trace[able] to the challenged action of the defendant.'"[53] Last, "it must be 'likely' . . . that the injury will be 'redressed by a favorable decision.'"[54] In restating this "irreducible minimum," the Court diverged from the previous two decades of environmental standing doctrine.[55]

Justice Scalia, writing for the Court, concluded that the Defenders of Wildlife had failed to establish the type of "imminent" injury necessary to satisfy the "injury in fact" required for Article III standing.[56] Justice Scalia explained that to satisfy the "injury in fact" test the "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.'"[57] Because individual members of the Defenders of Wildlife expressed only an intent to return to foreign countries that deprived endangered species of their natural

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Justice Scalia had set forth his plan to change the law of standing in his 1983 law review article).

48. 504 U.S. 555 (1992).

49. *Id.* at 578.

50. *See id.* at 557-58.

51. *See id.* at 560-61 (noting that "[o]ur cases have established that the irreducible constitutional minimum of standing contains three elements"). These elements were originally laid out in *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982).

52. *Lujan*, 504 U.S. at 560. The court explained that to satisfy the "injury in fact" element, the plaintiff had to have suffered "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) 'actual or imminent, not conjectural or hypothetical.'" *Id.* (citation omitted) (internal quotation marks omitted).

53. *Id.* (quoting Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 41-42 (1976)).

54. *Id.* at 560-61 (quoting *Simon*, 426 U.S. at 38, 43).

55. *See* Karl S. Coplan, *Refracting the Spectrum of Clean Water Act Standing in Light of* Lujan v. Defenders of Wildlife, 22 COLUM. J. ENVTL. L. 169, 191 (1997).

56. *Lujan*, 504 U.S. at 564.

57. *Id.* at 563 (internal quotation marks omitted) (alteration in original) (quoting Sierra Club v. Morton, 405 U.S. 727, 735, 739 (1972)).

habitat, the Court found that their allegations did not support a finding of the "'actual or imminent' injury that . . . [its] cases require."[58]

Justice Kennedy, joined by Justice Souter, concurred in *Lujan*.[59] Their opinion was distinct from that of the majority on the issue of congressional authority to confer standing through citizen suit provisions.[60] The majority rejected the view that Congress could confer standing "upon *all* person[s] of an abstract, self-contained, noninstrumental 'right' to have the Executive observe the procedures required by law."[61] In addition, the majority rejected the possibility that Congress could convert by statute "the public interest in proper administration of the laws" into an individual right.[62]

Justice Kennedy left open the possibility that Congress could enact legislation conferring standing to sue on a citizen suit plaintiff.[63] He agreed with the majority, however, that there is a limit to congressional power.[64] He opined that "Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before, and I do not read the Court's opinion to suggest a contrary view."[65]

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58. *Id.* at 564. Even if the respondents had demonstrated injury, they faced a bigger battle with the redressability requirement. *See id.* at 568 (stating that "[b]esides failing to show injury, respondents failed to demonstrate redressability"). According to Justice Scalia, writing for himself and three other Justices, to redress the injury that the respondents claimed, action by the individual funding agencies would be required. *Id.* Justice Scalia asserted that "any relief the District Court could have provided in this suit against the Secretary was not likely to produce that action" because the Secretary's regulations were not binding on the agencies. *Id.* at 570-71. As the agencies funding the projects were not parties to the case, the only relief that could have been granted by the district court would have been against the Secretary. *See id.* Therefore, Scalia's plurality opinion concluded, the respondents' alleged injury would not be remedied by the relief requested. *Id.* at 568-71; *see also supra* note 51 and accompanying text.

59. *See Lujan*, 504 U.S. at 579-81 (Kennedy, J., concurring).

60. *See id.* at 580 (joining in all but the redressability discussion of Justice Scalia's opinion, including the portion of the majority opinion reaffirming the denial of relief to a plaintiff raising only a generalized grievance, but adding that Congress may exercise its power to confer standing where it defines injuries and chains of causation).

61. *Lujan*, 504 U.S. at 573.

62. *Id.* at 576.

63. *Id.* at 580 (Kennedy, J., concurring).

64. *See id.*

65. *Id.*; *see also Lujan*, 504 U.S. at 578 (noting that the "injury required by Art. III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing"). Earlier D.C. Circuit cases had also suggested that Congress has the ability to legislate policies on which courts may rely in assisting them to find standing in situations where standing might not otherwise have been obvious. *See, e.g.*, National Wildlife Fed'n v. Hodel, 839 F.2d 694, 708 (D.C. Cir. 1988) (recognizing that Congress can provide "legislative assessments which courts can credit in making standing determinations"); Autolog Corp. v. Regan, 731 F.2d 25, 31 (D.C. Cir. 1984) (finding that courts should give great weight to Congressional determinations on issues such as standing).

In 1998, the Supreme Court, in *Steel Co. v. Citizens for a Better Environment*,[66] addressed the third prong of the standing doctrine, that injuries be "redressable."[67] This decision marked the first time that the Court addressed the redressability requirement in the context of a citizen enforcement action against a private party.[68] In *Steel Co.*, an environmental organization, Citizens for a Better Environment, sought to enforce the Emergency Planning and Community Right to Know Act (EPCRA), which requires companies to file annual reports with the EPA on their discharges of toxic and hazardous chemicals into the environment.[69] Justice Scalia, delivering the opinion for the Court, held that Citizens for a Better Environment lacked constitutional standing because they had alleged injuries that were no longer redressable.[70] The company had complied with the Act before the lawsuit was filed, so the Court determined that there was no longer a basis for either injunctive or declaratory relief.[71] Additionally, the Court rejected the argument that the deterrent effect of requiring the company to pay civil penalties to the United States Treasury, not to the plaintiff, would redress the plaintiff's injuries.[72] The Supreme Court's decision in *Steel Co.* further limited standing in citizen enforcement actions by focusing on the redressability requirement. This decision represented the first time that the Court denied standing because of a lack of redressability when the defendant is a private party whose violation of the law allegedly has caused injury to the plaintiff.

II. INTERPRETATION OF THE SUPREME COURT DECISIONS BY THE APPELLATE COURTS

A. *Pre*-Lujan

Throughout the 1980s, the federal appellate courts generally followed the Supreme Court's lead in interpreting standing doctrine

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66. 523 U.S. 83 (1998).

67. *See id.* at 105.

68. *See* Coplan, *supra* note 55, at 169 (stating that pre-1998 Supreme Court cases denying standing because of a lack of redressability did not involve an attempt by one private party to enforce environmental laws against another private party); *see also* Steel Co. v. Citizens for a Better Env't, 523 U.S. at 125 (Stevens, J., concurring in judgment) ("In every previous case in which the Court has denied standing because of a lack of redressability, the plaintiff was challenging some governmental action or inaction." (citing Leeke v. Timmerman, 454 U.S. 83, 85-87 (1981) (per curiam); Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 28 (1976); Linda R.S. v. Richard D., 410 U.S. 614, 615-16 (1973))).

69. *Steel Co.*, 523 U.S. at 86.

70. *Id.* at 109-10.

71. *See id.* at 105-06.

72. *Id.*

generously.[73] In the 1989 decision of *United States v. Metropolitan St. Louis Sewer District*,[74] the Eighth Circuit found sufficient injury to provide constitutional standing where the plaintiffs alleged that the defendant had discharged pollutants into the Mississippi River without a permit.[75] The court held that where the plaintiffs "visit[ed], cross[ed], and frequently observ[ed] the bodies of water" and alleged that their interests were "adversely affected by the pollution" in the same bodies of water, the allegations were sufficient to satisfy the standing test.[76]

In *Public Interest Research Group, Inc. v. Powell Duffryn Terminals, Inc.*,[77] the Third Circuit held that the Public Interest Research Group of New Jersey, Inc. (PIRG) and Friends of the Earth, Inc. (FOE), two nonprofit organizations concerned with environmental issues, satisfied the three elements of representational standing required to bring a citizen suit under the Clean Water Act.[78] First, the court found that the affidavits of members of the nonprofit organizations stated an injury sufficient to satisfy the requirements of Article III.[79] For instance, one member of the group was particularly offended by the "brown color and bad odor of the water" and stated that he would "birdwatch more frequently and enjoy his recreation on the Kill Van Kull more if the water were cleaner."[80] Several other members indicated that they would "boat, fish or swim [in Kill Van Kull] if the water were cleaner."[81] The court explained that the alleged injuries "need not be large, an 'identifiable trifle' will suffice," and that the interests asserted here were "more than trifles."[82] Second, although the court recognized that a permit exceedence alone was not sufficient to satisfy the "fairly traceable" prong of the standing test,[83] it found that PIRG's and FOE's allegations were sufficient to trace the alleged injuries to

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73. *See* ECHEVERRIA & ZEIDLER, *supra* note 11, at 14 (describing the Court's interpretation of standing for the two decades preceding *Lujan* as requiring that plaintiffs establish "only that they had some geographical relationship with the affected waterbody and that the defendant polluter had violated an effluent limitation"). *But see* Coplan, *supra* note 55, at 200 (describing the development of citizen's standing doctrine during the 1980s as running the gamut from strict to liberal).

74. 883 F.2d 54 (8th Cir. 1989).

75. *Id.* at 56.

76. *Id.*

77. 913 F.2d 64 (3d Cir. 1990).

78. *Id.* at 73 ("Under current constitutional requirements, this plaintiff has standing.").

79. *Id.* at 71.

80. *Id.*

81. *Id.*

82. *Id.* (quoting United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 689 n.14 (1973)).

83. *See supra* note 51.

the discharges of Powell Duffryn, a zirconium carbonate manufacturer.[84] The court stated that "[t]he requirement that plaintiff's 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."[85]

This case also sets out that for plaintiffs to establish that injuries are "fairly traceable" to the defendant and that they are more than "concerned bystanders,"[86] they need only show that there is a "substantial likelihood" that defendant's conduct caused plaintiffs' harm.[87] The court clarified that such a likelihood could be established in a CWA case by showing that a defendant had "1) discharged some pollutant in concentrations greater than allowed by its permit 2) into a waterway in which plaintiffs have an interest that is or may be adversely affected by the pollutant and that 3) this pollutant causes or contributes to the kinds of injuries alleged by the plaintiffs."[88]

In *Natural Resources Defense Council, Inc. v. Watkins*,[89] the Fourth Circuit considered whether the Natural Resources Defense Council, Inc. (NRDC) and the Energy Research Foundation (ERF) had standing to bring a suit for a violation of the CWA.[90] In this 1992 case, the two organizations requested an injunction and summary declaratory relief to block the Department of Energy's proposed reopening of a nuclear reactor at the Savannah River Site in South Carolina on the grounds that the operation of the reactor would be in violation of the CWA.[91] On appeal, the Court of Appeals for the Fourth Circuit reversed the district court's determination that the plaintiffs lacked standing, holding that the plaintiffs' members' affidavits were sufficient to establish standing because they demonstrated that the nu-

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84. *See Powell Duffryn Terminals, Inc.*, 913 F.2d at 72.

85. *Id.* The court explained that the "fairly traceable" requirement "is not equivalent to a requirement of tort causation." *Id.* (citing Duke Power Co. v. Carolina Envtl. Study Group, Inc., 428 U.S. 59, 78 (1978)).

86. The court noted that the standing requirement ensures that parties will not "convert the judicial process into no more than a vehicle for the vindication of the value interests of concerned bystanders." *Id.* (internal quotation marks omitted) (quoting Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 473 (1982)).

87. *Id.* (citing *Duke Power Co.*, 438 U.S. at 75 n.20).

88. *Id.*

89. 954 F.2d 974 (4th Cir. 1992).

90. *Id.* at 978.

91. *See id.* at 976.

clear reactor had discharged harmful pollution into publicly accessible portions of the Savannah River basin.[92]

According to the Fourth Circuit, the district court in *Watkins* had ruled that the plaintiffs had not met the "fairly traceable" requirement because their affidavits did not allege with sufficient specificity that they utilized portions of the Savannah River which the nuclear reactor's discharge affected.[93] Discrediting this assertion as being based on an inappropriately stringent standard for determining standing under the CWA, the Fourth Circuit emphasized that "[t]o establish standing to redress an environmental injury, plaintiffs need not show that a particular defendant is the only cause of their injury, and that, therefore, absent the defendant's activities, the plaintiffs would enjoy undisturbed use of a resource."[94] While the court acknowledged that it was likely that other parties had contributed to the polluted state of the river, it concluded that to satisfy the "fairly traceable" element, plaintiffs only needed to show that discharge from the defendant's reactor was present in publicly accessible portions of the river.[95]

The district court also concluded that the plaintiffs did not meet the "fairly traceable" requirement because any environmental damage resulting from the reactor's discharge was confined to the property limits of the Savannah River Site, from which members of the general public were restricted access.[96] On appeal, the Fourth Circuit rejected this conclusion.[97] The court noted that NRDC's affidavits were "sufficient to create a material issue of fact regarding the potential for cognizable harm to the Savannah River."[98] Thus, summary judgment on this issue was inappropriate.[99]

B. Post-Lujan

Since the *Lujan* decision in 1992, several federal appellate courts required plaintiffs to show demonstrable harm to the affected waterway even though, by its plain language, the CWA primarily relies on

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92. *Id.* at 980.

93. *Id.* at 979.

94. *Id.* at 980 (citing Public Interest Research Group, Inc. v. Powell Duffryn Terminals, Inc. 913 F.2d 64, 72 (3d Cir. 1990)).

95. *Id.*

96. *See id.* NRDC had argued that even though there were no direct adverse effects on the river as a result of the discharge from the reactor, the destruction of the wetlands at the reactor's site would have "adverse indirect effects on the river." *Id.*

97. *See id.*

98. *Id.*

99. *See id.* at 981.

technology-based standards and not on harm to the resource.[100] Specifically, the Courts of Appeal for the Third, Fourth, and Fifth circuits followed the Supreme Court's lead in eroding the citizen suit provision of the Clean Water Act.

The issue on appeal to the Fifth Circuit in *Friends of the Earth, Inc. v. Crown Central Petroleum Corp.*,[101] was whether FOE's members had standing to sue in their own right under the Clean Water Act.[102] In that case, FOE had alleged injuries at a lake located eighteen miles and three tributaries away from the source of Crown Central Petroleum's plant.[103] The Fifth Circuit did not find it necessary to address the injury requirement of the standing test because the court found that the plaintiffs had failed to satisfy the traceability requirement.[104] Applying the three-part traceability test enunciated in *Powell Duffryn*,[105] the court determined that the plaintiffs' interest in the "waterway" at issue was not specific enough for Article III purposes.[106] The court explained that even if it was to assume that the lake used by the plaintiffs was part of the same "waterway" as the polluted creek, that this "waterway" would be "too large to infer causation solely from the use of some portion of it."[107] Therefore, the court concluded that because the plaintiffs presented no evidence that the defendant's discharges made their way into or affected the lake used by plaintiffs, they failed to satisfy the "fairly traceable" requirement.[108]

The court qualified its holding, however, by stating that it was not imposing "a mileage or tributary limit for plaintiffs proceeding under

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100. *See, e.g.*, CWA § 301, 33 U.S.C. § 1311 (establishing effluent standards based on the best available technology); § 304, 33 U.S.C. § 1314 (requiring the EPA to establish technology-based effluent standards); § 306(a)(1), 33 U.S.C. § 136(a)(1) (explaining that "standard of performance" provides a standard "for the control of the discharge of pollutants which reflects the greatest degree of effluent reduction which the Administrator determines to be achievable through application of the best available demonstrated control technology, processes, operating methods, or other alternatives, including, where practicable, a standard permitting no discharge of pollutants"), § 402, 33 U.S.C. § 1342 (providing a permitting scheme for discharges, and requiring compliance with effluent standards provided in § 301, 33 U.S.C. § 1311, and § 304, 33 U.S.C. § 1314 (1994)). Technology-based standards focus on what it is actually feasible to do with current technology, in the case of the CWA, to protect navigable waters. *See* PERCIVAL ET AL., *supra* note 19, at 151.

101. 95 F.3d 358 (5th Cir. 1996).

102. *Id.* at 360.

103. *Id.* at 359.

104. *Id.* at 360.

105. *See supra* note 89 and accompanying text (setting forth the three-part traceability test).

106. *Crown Cent. Petroleum Corp.*, 95 F.3d at 361.

107. *Id.* (citing Friends of the Earth, Inc. v. Chevron Chem. Co., 900 F. Supp. 67, 75 (E.D. Tex. 1995)).

108. *Id.*

the CWA."[109] The court explained that "plaintiffs who use 'waterways' far downstream from the source of unlawful pollution may satisfy the 'fairly traceable' element by relying on alternative types of evidence,"[110] including "water samples showing the presence of a pollutant of the type discharged by the defendant upstream or . . . expert testimony suggesting that pollution upstream contributes to a perceivable effect in the water that the plaintiffs use."[111] These statements reflect that the Fifth Circuit requires the equivalent of a mini-trial to demonstrate scientific evidence of harm to the environment prior to conferring standing to sue, but only at the point where it can "no longer assume that an injury is fairly traceable to a defendant's conduct solely on the basis of the observation that water runs downstream."[112]

Seven years after its *Powell Duffryn* decision[113] and shortly after *Lujan*, the Third Circuit held that the environmental organizations PIRG and FOE lacked standing in *Public Interest Research Group, Inc. v. Magnesium Elektron, Inc.*[114] In *Magnesium Elektron*, the court decided that, although Magnesium Elektron (MEI) had violated the terms of its NPDES permit under the CWA, neither the organizations nor their members had shown any actual injury or threat of injury to the Delaware River.[115] The district court had found that MEI's permit violations had caused no harm and had posed no threat to the waterway into which MEI discharged its effluent.[116] Upon review, the Third Circuit reiterated that they had "no doubt that PIRG's members use the Delaware River," but concluded that they were "less confident that MEI's discharges have or will cause any injury to that waterway."[117]

The court stated that the plaintiffs could not establish standing simply because they knew that MEI discharged effluents into the Delaware River in excess of its permit.[118] The court explained that "absent a showing of actual, tangible injury to the River or its immediate surroundings," the plaintiffs were little more than "concerned bystand-

109. *Id.* at 362.

110. *Id.* (citing Sierra Club v. Cedar Point Oil Co., Inc., 73 F.3d 546, 558 n.24 (5th Cir. 1996)).

111. *Id.*

112. *Id.*

113. *See supra* notes 76-86 and accompanying text (discussing Public Interest Research Group, Inc. v. Powell Duffryn Terminals, Inc., 913 F.2d 64 (3d Cir. 1990)).

114. 123 F.3d 111, 123 (3d Cir. 1997).

115. *Id.*

116. *See id.* at 114.

117. *Id.* at 120.

118. *Id.*

ers" without standing to sue.[119] The court distinguished this situation from the one in *Powell Duffryn*, noting that while the plaintiffs here had demonstrated that they "reduced certain of their recreational activities near the Delaware River," they had not alleged that the River suffered from "particular types of pollution" like the "'brown color and the bad odor of' the water alleged in *Powell Duffryn*."[120] The court concluded by stating that "the reduction in a person's recreational activity cannot support the injury prong of standing when a court also concludes that a polluter's violation of an effluent standard has not posed a threat to the affected waterway."[121]

By holding as it did, the court in *Magnesium Elektron* misinterpreted the injury-in-fact requirement of Article III standing. The court should not have required the plaintiffs to prove perceptible injury to their sense of sight and smell. The plaintiffs' concern and diminished use of the resource should have been sufficient to satisfy the threshold for standing.[122] This case provides another example of how far the courts have gone in demanding levels of proof for demonstrating standing that are akin to those levels for required individualized causal injury.[123]

III. THE RECENT FOURTH CIRCUIT DECISIONS

On October 25, 1999, the Court of Appeals for the Fourth Circuit, sitting en banc, heard oral arguments in *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*[124] In this case, the Fourth Circuit considered whether two environmental organizations, Friends of the Earth, Inc. (FOE) and Citizens Local Environmental Action Network, Inc. (CLEAN) had standing to sue in federal court.[125] Pursuant to the citizen suit provision of the CWA,[126] FOE and CLEAN brought an action against Gaston Copper Recycling Corporation (Gaston Copper) for violations of its March 1, 1991 National Pollutant Discharge Elimination System (NPDES) permit covering its South Carolina smelting fa-

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119. *Id.* at 121.

120. *Id.*

121. *Id.*

122. *See supra* notes 34-35 and accompanying text (discussing the adequacy of aesthetic injury); *see also* discussion *infra* Part D.

123. *See* ECHEVERRIA & ZEIDLER, *supra* note 11, at 15 ("This requirement of some demonstrable environmental injury undermines the CWA technology-based regulatory strategy . . .").

124. 204 F.3d 149 (4th Cir. 2000).

125. *Id.* at 156-64.

126. 33 U.S.C. § 1365 (1994); *see also supra* notes 12-20 (discussing the CWA and its citizen suit provision).

cility.[127] In the original panel decision, the court held that FOE and CLEAN had failed to establish that their members suffered injuries that were fairly traceable to Gaston Copper's conduct.[128] Before being vacated and reheard en banc,[129] this panel decision made the Fourth Circuit part of a growing number of federal courts that had greatly diminished the ability of citizens to vindicate their rights through the citizen suit provision of the Clean Water Act.[130]

Gaston Copper owns and operates a smelting facility in Gaston, South Carolina which sits on Lake Watson.[131] In 1990, when Gaston Copper purchased its smelting facility, a NPDES permit issued by the South Carolina Department of Health and Environmental Control (DHEC) already covered the facility.[132] On February 13, 1991, DHEC reissued a permit effective as of March 1, 1991, to Gaston Copper for the smelting facility.[133] The 1991 permit required "contaminated storm water to be treated prior to discharge into Lake Watson; authorized the discharge of limited quantities of effluents, including biochemical oxygen demand, cadmium, copper, lead, zinc, and pH, after treatment from the [smelting facility] into Lake Watson; contained a schedule for compliance with the effluent limitations; and required monitoring and reporting for the effluent discharges."[134]

FOE and CLEAN, two nonprofit environmental organizations dedicated to protecting and improving water quality, brought a citizen suit under the CWA against Gaston Copper in the United States District Court for the District of South Carolina for allegedly violating its 1991 permit.[135] The organizations alleged that the company repeatedly violated its 1991 permit by exceeding effluent limits for certain pollutants, by not complying with monitoring and reporting requirements, and by not following a compliance schedule regarding effluent limits.[136] FOE and CLEAN sought civil penalties, declaratory and injunctive relief, fees, and costs.[137]

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127. *See Gaston Copper Recycling Corp.*, 204 F.3d at 152.

128. Friends of the Earth, Inc., v. Gaston Copper Recycling Corp., 179 F.3d 107, 116 (4th Cir. 1999), *rev'd en banc*, 204 F.3d 149 (4th Cir. 2000).

129. *See* discussion *infra* Part E.

130. *See supra* notes 100-123 and accompanying text.

131. *See Gaston Copper Recycling Corp.*, 179 F.3d at 109.

132. *See id.*

133. *See id.*

134. *Id.*

135. *See id.*

136. *See id.* at 110.

137. *See id.*

The two environmental organizations supplied the testimony of three members to support their complaint.[138] The members contended that they each had a "legally protected interest in the waterways" and were "harmed" by Gaston Copper's alleged permit violations.[139] One member of CLEAN, Wilson Otto Shealy, claimed that because Gaston Copper contaminated his lake with mercury and effluents, he limited the amount of fish he ate from the lake and the frequency with which he swam in the lake.[140] Shealy also testified that DHEC tested his lake in 1990 and determined that there were effluents in his lake of the type that were discharged by Gaston Copper in the past.[141] A member of both CLEAN and FOE, Guy Jones, testified that he owned a canoeing company that had guided trips on the Edisto River and that his enjoyment of canoeing and swimming was adversely affected by his concern that Gaston Copper discharged effluents into the Edisto River.[142] Finally, William McCullough, Jr., a member of FOE, testified that he was a scuba diver in the Edisto River and would be less likely to dive in the water if he knew it contained contaminants.[143]

FOE and CLEAN also presented testimony from an expert, Dr. Bruce Bell, who said that Gaston Copper's laboratory toxicity tests showed that the company's effluents had "observable effects" on the test organism.[144] To support the assertion that their members' injuries were "fairly traceable to Gaston Copper's conduct," FOE and CLEAN asserted that Gaston Copper discharged harmful effluents into waterways upstream from where the three members had interests.[145]

In the original panel decision, Judge Hamilton, joined by Judge Williams, utilized the requirements for individual standing that the Supreme Court laid out in *Lujan*.[146] The panel first determined that

138. *See id.*

139. *Id.*

140. *See id.*

141. *See id.* at 110, 120 n.3.

142. *See id.* at 110, 111.

143. *See id.*

144. *See id.*

145. *Id.* at 112.

146. *See id.* at 113 (defining the requirements for standing as: injury, traceability, and redressability). In keeping with precedent, the court required the organizations to show that "1) [their] own members would have standing to sue in their own rights; 2) the interests the organization seeks to protect are germane to the organization's purpose; and 3) neither the claim asserted nor the relief sought requires the participation of individual members in the lawsuit." *Id.* (internal quotation marks omitted) (alteration in original) (quoting Natural Resources Defense Council, Inc. v. Watkins, 954 F.2d 974, 978 (4th Cir. 1992)). The *Gaston Copper* panel decision focused on the first part of the above test. *Id.*

the organization had failed to establish injury in fact, reasoning that while the members of the organization had expressed legally protected interests, "the evidence failed to establish that the waters . . . used were actually, or in imminent threat of being, adversely affected by pollution."[147] The two judges emphasized that "there were no toxicity tests, or tests or studies of any kind, performed on waters from Shealy's lake or the portions of the Edisto River that Jones and McCullough used" and that "none of the members even testified that there was an observable negative impact on the waters that they used or the surrounding ecosystem of such water."[148] Judge Hamilton analogized the situation in the present case to the one in the Third Circuit case of *Public Interest Research Group, Inc. v. Magnesium Elektron, Inc.*,[149] explaining that the plaintiffs in both cases "failed to establish that defendant's admitted violations of permit's effluent standards harmed the waterway or posed a threat to the waterway."[150]

According to the panel, the organizations also failed to establish that the alleged injuries were fairly traceable to Gaston Copper's conduct.[151] The Fourth Circuit panel followed the "substantial likelihood" standard set out in the Third Circuit case of *Public Interest Research Group, Inc. v. Powell Duffryn Terminals, Inc.*[152] The Fourth Circuit panel also noted that in order to meet these requirements, "a plaintiff must show more than 'a mere exceedence of a permit limit.'"[153] Applying these standards, a divided panel concluded that the plaintiffs in the case had failed to prove a "substantial likelihood" that the defendants caused their harm.[154] The panel based this determination on the plaintiffs' failure to present evidence that the "allegedly affected waterways . . . contained effluents of the type that Gaston Copper discharges," and the distance between the affected waterways and the alleged source of pollution.[155]

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147. *Id.*
148. *Id.* at 114.
149. 123 F.3d 111 (3d Cir. 1997).
150. *Gaston Copper Recycling Corp.*, 179 F.3d at 114.
151. *Id.* at 114-15.
152. *Id.* at 115 (stating that the "fairly traceable" requirement "require[s] the plaintiff to show that there is a 'substantial likelihood' that the defendant's conduct caused the plaintiff's harm" (citing Natural Resources Defense Council, Inc. v. Watkins, 954 F.2d 974, 983 (4th Cir. 1992); Public Interest Research Group, Inc. v. Powell Duffryn Terminals, Inc., 913 F.2d 64, 72 (3d Cir. 1990))); *see also supra* note 88 (discussing *Powell Duffryn*'s creation of the "substantial likelihood" test).
153. *Gaston Copper Recycling Corp.*, 179 F.3d at 115 (quoting *Powell Duffryn Terminals, Inc.*, 913 F.2d at 72).
154. *Id.*
155. *Id.* (explaining that the ten to fifteen mile distance between the affected waterways and Gaston Copper was "simply too great to infer causation").

Chief Judge James Harvie Wilkinson dissented from Judge Hamilton's panel opinion, arguing that the majority's ruling set hurdles "so high as to effectively excise the citizen suit provision from the Clean Water Act."[156] Additionally, he criticized the majority for departing from other circuits by not considering the "claims of a citizen living within the known discharge range of a polluting industrial facility."[157] Judge Wilkinson explained that litigation of scientific facts as a matter of standing was unnecessary, and he adamantly defended CLEAN representative William Shealy's right to judicial review.[158]

Just a year earlier, the Fourth Circuit, in *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*,[159] had extended the Supreme Court's holding in *Steel Co.* by finding that civil penalties could not redress the plaintiffs' injuries even when NPDES permit violations were ongoing at the time the complaint was filed.[160] Laidlaw Environmental Services, a hazardous waste incinerator facility, operated a plant in Roebuck, South Carolina that discharged into the North Tyger River.[161] Plaintiffs, FOE and CLEAN, brought an action against Laidlaw under the CWA seeking declaratory and injunctive relief, as well as civil penalties and attorneys' fees.[162] The district court found that Laidlaw's discharges exceeded the limits set by its NPDES permit, including exceedences of the permit's mercury limitations on 489 occasions between 1987 and 1995, and imposed damages in the amount of $405,000.[163] On appeal, the Fourth Circuit reversed the district court's determination, concluding that the plaintiffs lacked standing to bring suit because they failed to meet the redressability require-

156. *Id.* at 117 (Wilkinson, C.J., dissenting).

157. *Id.*

158. *Id.*

159. 149 F.3d 303 (4th Cir. 1998), *cert. granted*, 525 U.S. 1176 (1999). *Laidlaw* implicitly abrogated the Fourth Circuit's earlier decision in *Sierra Club v. Simkins Industries, Inc.*, 847 F.2d 1109 (4th Cir. 1988). In *Simkins*, the Sierra Club filed a citizen's suit seeking declaratory relief, injunctive relief, and civil penalties against a paper manufacturer. *Simkins*, 847 F.2d at 1112. The Fourth Circuit determined that "the actual injury stemming from reporting and sampling violations, coupled with the threatened injury stemming from failure to report on maximum levels of harmful effluents, establishes injury traceable to Simkins' actions." *Id.* at 1113. The court then acknowledged that "the judicial relief of civil penalties, even if payable only to the United States Department of the Treasury, is causally connected to a citizen-plaintiff's injury." *Id.* at 1113. Because the three prongs of the *Lujan* test had been satisfied, the court held that the Sierra Club had standing. *Simkins*, 847 F.2d at 1112.

160. *Laidlaw Envtl. Servs., Inc.*, 149 F.3d at 306-07.

161. *See* Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 956 F. Supp. 588, 593 (D.S.C. 1997), *vacated*, *Laidlaw Envtl. Servs., Inc.*, 149 F.3d 303.

162. *See id.* at 591-92.

163. *See id.* at 600, 612.

ment.[164] The court explained that because the polluter came into compliance with the CWA before the trial court entered a final judgment, the only potential relief was civil penalties payable to the United States Treasury, which could not redress the plaintiffs' injuries.[165] The Fourth Circuit also denied the plaintiffs' attorneys' fees, finding that awarding fees to the losing party would be unacceptable.[166] The Supreme Court granted a petition for certiorari on March 1, 1999,[167] heard oral arguments on October 12, 1999, and issued its decision on January 12, 2000.

IV. *LAIDLAW:* THE SUPREME COURT DECISIONS

The Supreme Court provided long sought after protection to environmental citizen suit provisions in the 7-2 majority opinion of *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*[168] The Supreme Court held that the environmental organizations FOE and CLEAN had standing to bring a citizen suit under the CWA.[169] Even though the groups sued a corporation that voluntarily came into compliance with the Act after the suit was filed, the Court held that the plaintiffs had suffered an "injury in fact" that was still "redressable."[170] This decision, authored by Justice Ginsburg, is likely to reduce greatly the amount of litigation on the question of whether a citizen plaintiff has standing to sue under the CWA.[171] Under the standing doctrine reinstated by *Laidlaw,* 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."[172] If properly interpreted, this decision will put an end to the mini-trials required by the federal courts of the 1990s.[173]

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164. *See Laidlaw,* 149 F.3d at 306.

165. *Id.*

166. *See id.* at 306 n.5.

167. Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 525 U.S. 1176 (1999).

168. 120 S. Ct. 693 (2000).

169. *Id.* at 700. The Court also held that a citizen suitor's claim for civil penalties need not be dismissed as moot when the defendant has come into compliance with the terms of its permit. *Id.*

170. *Id.* at 707.

171. Cases currently pending in the lower courts will be shaped by the Supreme Court's decision in *Laidlaw* and will be resolved more quickly because of the direction provided.

172. *Id.* at 705 (quoting Sierra Club v. Morton, 405 U.S. 727, 735 (1972)).

173. *See* discussion *supra* Parts A.2, B.2 (discussing cases requiring scientific evidence of damage to the environment to satisfy the standing requirement).

Reversing the decision of the Fourth Circuit Court of Appeals, the Supreme Court in *Laidlaw* concluded that the "relevant showing for purposes of Article III standing . . . is *not* injury to the *environment* but injury to the *plaintiff*."[174] The Court stated that insisting upon injury to the environment was "to raise the standing hurdle higher than the necessary showing for success on the merits in an action alleging noncompliance with an NPDES permit."[175] In other words, meeting the threshold level necessary to satisfy the standing requirement should require less evidence than is necessary to win the case.

The Court found that the members of FOE and CLEAN averred sufficient injury in their affidavits to satisfy the standing requirement.[176] The majority specifically pointed to the sworn statements of FOE members Kenneth Lee Curtis and Linda Moore and CLEAN members Angela Patterson, Judy Pruitt, and Gail Lee.[177] Mr. Curtis testified that he would like "to fish, camp, swim and picnic in and near the river between 3 and 15 miles downstream from the facility . . . but would not do so now because he was concerned that the water was polluted by Laidlaw's discharges."[178] Similarly, Ms. Pruitt attested that she would like "to fish, hike, and picnic along the North Tyger River, but has refrained . . . because of the discharges."[179] Ms. Patterson and Ms. Moore alleged similar concerns.[180] Ms. Lee claimed that her property value was lessened because of the discharges from the nearby Laidlaw facility.[181]

The Court contrasted the above allegations with prior Supreme Court cases where environmental plaintiffs had lost on the standing question.[182] For example, the Court noted that the *Laidlaw* plaintiffs' assertions that they would recreate in and around the North Tyger River if the facility ceased to discharge illegal pollutants was quite different than the "speculative 'some day intentions' to visit endangered species halfway around the world that . . . [were] insufficient to show injury in fact in" *Lujan*.[183]

174. 120 S. Ct. at 704 (emphasis added).

175. *Id.*

176. *Id.* at 705.

177. *Id.* at 704-05.

178. *Id.* at 704.

179. *Id.* at 705.

180. *See id.* at 704-05.

181. *See id.* at 705.

182. *See id.* at 705-06.

183. *Id.* (internal quotation marks omitted) (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 564 (1992)).

On the redressability prong, the majority opinion also distinguished the Court's prior decision in *Steel Co. v. Citizens for a Better Environment*[184] as extending only to wholly past violations and not to those that are ongoing at the time the suit is filed.[185] In ruling that a citizen does not lose standing to sue a company for proven NPDES permit violations where the company has not ceased those violations when the complaint is filed, the *Laidlaw* Court explained that civil penalties may provide a form of redress to the citizen plaintiff "[t]o the extent that they encourage defendants to discontinue current violations and deter them from committing future ones."[186] The Court rejected the dissent's argument that "it is the *availability* rather than the *imposition* of civil penalties that deters any particular polluter from continuing to pollute."[187] The Court reasoned that first, a threat has no deterrent value unless it has a credible chance to be carried out, and also, that it was reasonable for Congress to conclude that an actual award of damages would provide a greater deterrent effect than the mere prospect of a penalty.[188] Thus, the *Laidlaw* Court recognized that civil penalties can promote compliance and have a deterrent effect on future violations by removing the economic benefit of the illegal activity.[189] In other words, the Court acknowledged that Laidlaw would have an incentive to comply with the CWA if the cost of paying penalties for violations outweighed the cost of keeping their effluent discharges beneath their permit's specified limitations.[190]

Not surprisingly, Justice Scalia, joined by Justice Thomas, chose to dissent from the Court's decision in *Laidlaw.*[191] Justice Scalia first attacked the majority for its leniency in concluding that the plaintiffs

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184. 523 U.S. 83 (1998).

185. *Laidlaw Envtl. Servs., Inc.*, 120 S. Ct. at 708 (noting that the *Steel Co.* decision "established that citizen suitors lack standing to seek civil penalties for violations that have abated by the time of suit" (citing Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 106-07 (1998))).

186. *Id.* at 706-07.

187. *Id.* at 707 (citing *Laidlaw Envtl. Servs., Inc.*, 120 S. Ct. at 718-19 (Scalia, J., dissenting)).

188. *See id.*

189. *See id.*

190. *See id.* (noting that "a defendant once hit in its pocketbook will surely think twice before polluting again").

191. *See id.* at 713-22 (Scalia, J., dissenting); *see also supra* notes 47-72 and accompanying text (discussing Scalia's majority opinion in such cases). *Laidlaw* is the first major environmental standing case since Justice Scalia's appointment to the Court in 1986 where he has not authored the majority opinion.

had satisfied the burden of demonstrating injury in fact.[192] He argued that most often "a lack of demonstrable harm to the environment will translate . . . into a lack of demonstrable harm to citizen plaintiffs," and that such was the case in the situation presently under review.[193] Justice Scalia also disagreed with the majority's determination that FOE and CLEAN had met the redressability requirement.[194] Justice Scalia asserted 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."[195] Finally, Justice Scalia argued that the majority's decision effectively changed the constitutional structure set out in Article III.[196] Justice Scalia explained that "permitting citizens to pursue civil penalties payable to the Federal Treasury" resulted in "turn[ing] over to private citizens the function of enforcing the law" and that under this decision "[e]lected officials are entirely deprived of their discretion to decide that a given violation should not be the object of a suit at all, or that the enforcement decision should be postponed."[197]

The viewpoint Justice Scalia advocated, the same one adopted by several appellate courts in the 1990s,[198] results in a waste of time, money, and judicial resources on developing sufficient affidavits to overcome the standing burden. Although it is true that "[t]ypically, an environmental plaintiff claiming injury due to discharges in violation of the Clean Water Act argues that the discharges harm the envi-

192. *See id.* at 713, 715 (asserting that "[t]he plaintiffs in this case fell far short of carrying their burden of demonstrating injury in fact" and arguing that "it would be difficult not to satisfy [the majority's] lenient [injury in fact] standard").

193. *Id.* at 714 (noting that in the present case "[a]t the very least . . . 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").

194. *See id.* at 715 (arguing that "[t]he Court's treatment of the redressability requirement . . . is equally cavalier").

195. *Id.* at 717. Justice Scalia also pointed out that he saw no distinction between the doctrines of standing and mootness. *Id.* at 720-21 ("I am troubled by the Court's too-hasty retreat from our characterization of mootness as 'the doctrine of standing set in a time frame.'" (citation omitted)). This is not the first time he has expressed this viewpoint. *See* Gwaltney of Smithfield Ltd. v. Chesapeake Bay Found., 484 U.S. 49, 70 (1987) (Scalia, J., concurring) (noting that evidence of a state of noncompliance is "required in order to establish [a] plaintiff's standing [under CWA § 505]").

196. *Laidlaw Envtl. Servs., Inc.*, 120 S. Ct. at 719 (Scalia, J., dissenting). Justice Kennedy agreed, writing that "[d]ifficult and fundamental questions are raised when we ask whether exactions of public fines by private litigants . . . are permissible." *Id.* at 713 (Kennedy, J., concurring).

197. *Id.* at 719 (Scalia, J., dissenting).

198. *See* discussion *supra* Parts B.2, C.

ronment,"[199] courts should not require plaintiffs with limited resources to demonstrate that injury to the environment. It defeats the preventive purpose of environmental regulation not to allow enforcement of the laws until harm is demonstrated. This does not mean that injury to the environment does not occur, it merely means that the reasonable standing question, and the only one Article III requires, is a showing of injury to the plaintiff.

If environmental plaintiffs could not satisfy the redressability requirement merely because a corporation came into compliance with the CWA at any time during litigation, cases could come to an end briefly during compliance only to be renewed again at the time of future noncompliance. Without the use of deterrent civil penalties, defendants could take advantage of the system and avoid final resolution of cases against them for their violations. It is necessary that the federal courts permit citizens and environmental organizations to utilize the power granted to them in the citizen suit provision of the CWA to ensure that the Act is enforced. The Supreme Court majority made the responsible and constitutionally appropriate decision in *Laidlaw*.

V. *GASTON COPPER:* THE EN BANC DECISION

The Fourth Circuit recognized and respected the Supreme Court's decision in *Laidlaw* in its en banc decision in *Gaston Copper*. All twelve judges sitting en banc held that Wilson Shealy, and hence CLEAN, had standing to sue Gaston Copper for discharging pollutants in excess of its permit limitations.[200] Chief Judge Wilkinson wrote the majority opinion, in which eight other judges joined.[201] His opinion reflected the same reasoning as his dissent in the 1999 panel decision,[202] and he incorporated the Supreme Court's *Laidlaw* decision for no other purpose than to provide additional examples to his earlier dissenting opinion.[203]

The Fourth Circuit first set forth the three elements forming the constitutional minimum for standing: injury in fact, traceability, and

199. *Laidlaw Envtl. Servs., Inc.*, 120 S. Ct. at 713.

200. *See* Friends of the Earth v. Gaston Copper Recycling Corp., 204 F.3d 149, 150 (4th Cir. 2000). The court did not address the claims of FOE members Jones and McCullough because their assertion of standing presented "closer questions" better left to the discretion of the district court. *See id.* at 161 n.1.

201. *See id.*

202. *See supra* notes 156-158 and accompanying text (defending CLEAN's standing).

203. *See Gaston Copper Recycling Corp.*, 204 F.3d at 157, 159, 161 (using *Laidlaw* to provide quotes and examples). Chief Judge Wilkinson did recognize, however, that the district court "has not had an opportunity" to view the case "in light of" *Laidlaw*. *Id.* at 161 n.1.

redressability.[204] The court recognized, however, that the proof for satisfying each element "often overlaps" and that their common purpose is "to ensure that the judiciary . . . is the appropriate forum in which to address a plaintiff's complaint."[205] The court then presented a detailed analysis of each element individually and CLEAN's demonstration of it.

After evaluating the evidence presented for "injury in fact," the court concluded that Shealy was "anything but a roving environmental ombudsman," but rather "a real person who owns a real home and lake in close proximity to Gaston Copper."[206]

The court then cited to that same evidence, namely, the past presence of metals in Shealy's lake of the type discharged by Gaston Copper, Gaston Copper's own toxicity tests, and a discharge travel distance well past Shealy's lake as meeting the traceability prong of the standing analysis.[207] Finally, the court held that CLEAN presented claims of redressable injury, reasoning simply that "CLEAN has sought relief for continuing and threatened future violations at every stage of this litigation."[208]

Instead of viewing *Laidlaw* as a return to a prior conception of standing doctrine, or simply a continuation of it, the three concurring judges in *Gaston Copper* saw *Laidlaw* as a fundamental shift in the Supreme Court's evaluation of standing. Judge Hamilton, who wrote the majority opinion in the panel decision finding that FOE and CLEAN lacked standing, stated that *Laidlaw* "has unnecessarily opened the standing floodgates, rendering our standing inquiry 'a sham' . . . [but] being bound by *Laidlaw Envtl. Servs.*, I concur."[209] Judge Niemeyer found that "the decision in *Laidlaw* represents a sea change in constitutional standing principles."[210] Similarly, Judge Luttig, joined by Judge Niemeyer, stated that the *Gaston Copper* majority "persist[ed] in the fiction . . . that *Laidlaw* was part of the fabric of standing jurisprudence at the time of argument is this case, or worse . . . that that decision was merely an unexceptional reaffirmation of the Court's previous precedent."[211]

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204. *See id.* at 154.
205. *Id.* (citing Allen v. Wright, 468 U.S. 737, 752 (1984)).
206. *Id.* at 157.
207. *Id.* at 161.
208. *Id.* at 163.
209. *Id.* at 165 (Hamilton, J., concurring).
210. *Id.* at 164 (Niemeyer, J., concurring).
211. *Id.* at 164-65 (Luttig, J., concurring).

CONCLUSION

Although the decision of the Supreme Court in *Laidlaw* indicates a shift in the swift currents of CWA standing decisions, there are still questions that remain unanswered after *Laidlaw*.[212] The Supreme Court failed to address the second of the three elements of standing: the traceability requirement. This inattention was likely due in part to the facts specific to this case. The Court may also have intentionally left the question open to the lower courts. Nevertheless, some courts may find that this gap provides enough leeway for them to follow Justice Scalia and to continue, at least to some degree, the restrictive trend of the 1990s.

The Supreme Court has shifted the focus of the standing question to injury in fact and almost entirely away from traceability.[213] This shift may allow courts to second-guess the objective "reasonableness" of fears by citizens due to environmental violations, which Ginsburg cited as "injury in fact." The lower courts should do their best to uphold *Laidlaw*'s sentiment, however, and accept affidavits similar in content to those presented by the plaintiffs in that case as satisfying the standing question.

The government has limited resources, and Congress has given citizens an important and vital role in enforcing environmental laws through citizen suit provisions such as the above provision of the CWA. This role was designed to ensure diligence in environmental enforcement. It is true that a CWA "plaintiff pursuing civil penalties acts as a self-appointed mini-EPA."[214] This practice, however, is not unconstitutional where the citizen plaintiffs are harmed and when the Environmental Protection Agency lacks the resources to enforce environmental laws.[215]

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212. One question not entirely resolved is that of mootness. As the majority in *Laidlaw* stated, Laidlaw's permit compliance could possibly have mooted the case if it were absolutely clear that "violations could not reasonably be expected to recur." *Laidlaw Envtl. Servs., Inc.*, 120 S. Ct. at 711 (citation omitted).

213. *See id.*

214. *Id.* at 719.

215. One scholar reasoned that "Congress should be permitted to grant standing to citizens," because the "text and history of Article III provide no support for judicial invalidation of congressional grants of citizen standing" and England, the American colonies, and early Congresses actually all "granted standing to strangers." Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 236 (1992). Other scholars would take Justice Scalia's position and find that the use of citizen suit provisions to enforce environmental regulations is not within congressional authority. *See, e.g.*, Charles S. Abell, Note, *Ignoring the Trees for the Forests: How the Citizen Suit Provision of the Clean Water Act violates the Constitution's Separation of Powers Principle*, 81 VA. L. REV. 1957 (1995). Abell stated:

Decisions like those of the Fourth Circuit in the original *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*[216] and *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*[217] at the end of the last millennium had eroded the ability of citizens to vindicate their rights under the citizen suit provision of the CWA. The Supreme Court's decision in *Laidlaw* ended this erosion. By following *Laidlaw* into the new millennium, citizens will once again be able to vindicate their right to a cleaner, healthier, and safer environment.

EMILY A. BERGER

> The emergence of the citizen suit as a powerful enforcement mechanism raises serious issues about congressional infringement on the Constitution's separation of powers principle and the role private citizens may play in exercising prosecutorial authority. Statutes such as the Federal Water Pollution Control Act, commonly known as the Clean Water Act (CWA), empower private citizens to seek not only injunctive relief, but also civil penalties payable to the United States Treasury.

Id. at 1957-58.

216. 179 F.3d 107 (4th Cir. 1999), *rev'd en banc*, 204 F.3d 149 (4th Cir. 2000).

217. 149 F.3d 303 (4th Cir. 1998), *cert. granted*, 525 U.S. 1176 (1999).