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# A “Green” Lining: Closing the Door on Environmental Litigants in *Bellon* Could Lead to More Successful Environmental Challenges in the Future

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# A “GREEN” LINING: CLOSING THE DOOR ON ENVIRONMENTAL LITIGANTS IN *BELLON* COULD LEAD TO MORE SUCCESSFUL ENVIRONMENTAL CHALLENGES IN THE FUTURE

BRIAN BIESCHKE\*

**Abstract:** In *Washington Environmental Council v. Bellon*, the U.S. Court of Appeals for the Ninth Circuit addressed the issue of Article III standing with respect to environmental organizations filing suit under the Clean Air Act. The organizations alleged that Washington state agencies were required to regulate the greenhouse gas emissions of five oil refineries, and that the agencies’ failure to do so caused particularized injuries to plaintiffs’ health and recreational enjoyment because of the impacts of those greenhouse gas emissions on climate change. Applying a three-pronged test requiring plaintiffs to establish injury in fact, causality, and redressability, the court determined that the plaintiffs failed to satisfy the latter two requirements, and therefore lacked the Article III standing necessary to pursue their claims in federal court. This Comment argues that the Ninth Circuit was correct in its standing analysis, and further that it might lead to new research into tracking the localized effects of greenhouse gas emissions, and thus open the door to successful environmental challenges in the future.

## INTRODUCTION

Many aspects of the Earth’s climate are changing rapidly.<sup>1</sup> The evidence unambiguously shows that the Earth’s temperature is rising.<sup>2</sup> The implications of rising temperatures are vast and diverse.<sup>3</sup> Damage to public and private property due to increased flooding,<sup>4</sup> increased vulnerability to respiratory ailments and even death due to increases in wildfires,<sup>5</sup> and exposure to food and water-borne diseases due to fluctuations in water temperatures,<sup>6</sup> are just a few

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\* Staff Writer, BOSTON COLLEGE ENVIRONMENTAL AFFAIRS LAW REVIEW, 2014–2015.

<sup>1</sup> JERRY M. MELILLO ET AL., U.S. GLOBAL CHANGE RESEARCH PROGRAM, CLIMATE CHANGE IMPACTS IN THE UNITED STATES: THE THIRD NATIONAL CLIMATE ASSESSMENT 22 (2014).

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

<sup>3</sup> *See id.* at 22–23. Examples of changing trends in the Earth’s climate are decreasing snow and ice cover, rising sea levels, increasing extremes of heat and heavy precipitation events, and decreases in extreme cold. *Id.*

<sup>4</sup> *Id.* at 493.

<sup>5</sup> *Id.* at 223.

<sup>6</sup> *Id.* at 226.

of the local effects of rising global temperatures that can be felt in the United States.<sup>7</sup> The emission of greenhouse gases (“GHG”) into the atmosphere is one of many factors that are contributing to the global temperature rise.<sup>8</sup> When emitted into the atmosphere, GHGs absorb heat and prevent it from escaping into space.<sup>9</sup> This is known as the “greenhouse effect,” and it is one of the most significant causes of global warming.<sup>10</sup> Carbon dioxide—the most significant GHG<sup>11</sup>—is emitted in the United States more than any other GHG.<sup>12</sup> Among the various anthropogenic sources of carbon dioxide emissions are the burning of coal, natural gas, and oil.<sup>13</sup> In fact, the energy sector accounted for nearly thirty percent of global GHG emissions in 2010.<sup>14</sup>

In 1970, Congress enacted the Clean Air Act (“CAA”) to regulate emissions from various sources of air pollution in an effort “to enhance the quality of the Nation’s air resources so as to promote the public health and welfare . . . .”<sup>15</sup> The CAA authorizes the Environmental Protection Agency (EPA) to establish National Ambient Air Quality Standards (“NAAQS”) for regulating the emissions of certain air pollutants.<sup>16</sup> To achieve these standards, the CAA directs states to develop state implementation plans (“SIP”), which enforce the NAAQS, and which are federally enforceable upon approval by EPA.<sup>17</sup>

Five oil refineries operate in the state of Washington, and each refinery emits substantial GHGs.<sup>18</sup> The agencies responsible for enforcing Washington’s SIP—the Washington State Department of Ecology, the Northwest Clean

<sup>7</sup> See *id.* at 22–23.

<sup>8</sup> *Causes of Climate Change*, ENVTL. PROT. AGENCY, <http://www.epa.gov/climatechange/science/causes.html> (last updated Mar. 18, 2014), archived at <http://perma.cc/9F3Y-ZSCG>.

<sup>9</sup> See *id.*; *Wash. Envtl. Council v. Bellon*, 732 F.3d 1131, 1135 (9th Cir. 2013), *reh’g denied en banc*, 741 F.3d 1075, 1076 (9th Cir. 2014).

<sup>10</sup> See *Bellon*, 732 F.3d at 1135; *Causes of Climate Change*, *supra* note 8.

<sup>11</sup> *Bellon*, 732 F.3d at 1135; Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496, 66,499 (Dec. 15, 2009) (to be codified at 40 C.F.R. ch. I). “Greenhouse gases also include methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride, among others.” *Bellon*, 732 F.3d at 1135.

<sup>12</sup> See *Overview of Greenhouse Gases*, ENVTL. PROT. AGENCY, <http://www.epa.gov/climatechange/ghgemissions/gases.html> (last updated Apr. 15, 2014), archived at <http://perma.cc/S8PW-B4DP>. According to EPA estimates, carbon dioxide emissions accounted for eighty-two percent of U.S. GHG emissions in 2012. See *id.*

<sup>13</sup> See *id.*

<sup>14</sup> NIKLAS HÖHNE ET AL., UNITED NATIONS ENVTL. PROGRAMME, THE EMISSIONS GAP REPORT 2012, at 11 (2012), available at <http://www.unep.org/pdf/2012gapreport.pdf>, archived at <http://perma.cc/CQ7C-NFM2>.

<sup>15</sup> See Clean Air Act, 42 U.S.C. § 7401(b)(1) (2012).

<sup>16</sup> See *Bellon*, 732 F.3d at 1136 (citing 42 U.S.C. §§ 7408–7409).

<sup>17</sup> See *id.* at 1137 (citing 42 U.S.C. §§ 7401–7431).

<sup>18</sup> See *id.* at 1136. The five Washington oil refineries are BP Cherry Point, ConocoPhillips, Shell Oil, Tesoro, and U.S. Oil. *Id.* Collectively, they belong to a trade organization called the Washington State Petroleum Association, which, in *Washington Environmental Council v. Bellon*, successfully intervened as a defendant. *Id.* These oil refineries were responsible for approximately five-point-nine percent of the state’s total GHG emissions in 2008. *Id.*

Air Agency, and the Puget Sound Clean Air Agency (the “responsible agencies”)<sup>19</sup>—have never applied the plan’s standards to the GHG emissions of the aforementioned oil refineries.<sup>20</sup> In an effort to reduce or eliminate the refineries’ emissions, in *Washington Environmental Council v. Sturdevant*, two environmental conservation organizations—the Washington Environmental Council and the Sierra Club (the “conservation organizations”)—filed claims in the U.S. District Court for the Western District of Washington, alleging a violation of the CAA, and seeking to compel the responsible agencies to set and apply certain air quality standards to the refineries’ emissions.<sup>21</sup> The district court agreed with the conservation organizations that a provision in the Washington SIP required the responsible agencies to set and implement the standards.<sup>22</sup>

In *Washington Environmental Council v. Bellon*, however, the U.S. Court of Appeals for the Ninth Circuit held that the conservation organizations lacked standing to bring suit under the CAA because they failed to show that their members’ localized injuries could be fairly traced to the unregulated GHG emissions of the Washington refineries.<sup>23</sup> This Comment argues that the Ninth Circuit’s decision was legally sound and that it will avoid a flood of speculative environmental claims under the CAA.<sup>24</sup> Further, it argues that the decision in *Bellon* should incentivize interested parties to invest in the scientific and technological research that will unlock the remaining mysteries about the localized effects of GHG emissions, thus paving the way for successful environmental challenges in the future.<sup>25</sup>

## I. FACTS AND PROCEDURAL HISTORY

The Washington Environmental Council (“WEC”)—a Washington state-based environmental advocacy organization—has been trying to protect, restore, and sustain Washington’s environment since it was established in 1967.<sup>26</sup> The Washington State Chapter of the Sierra Club (collectively with WEC, the

<sup>19</sup> *Id.* at 1135 n.1.

<sup>20</sup> *Id.* at 1138. Washington’s revised SIP was approved by EPA in 1995. Approval and Promulgation of State Implementation Plans, 60 Fed. Reg. 28,726, 28,728 (June 2, 1995) (codified at 40 C.F.R. pt. 52).

<sup>21</sup> *Wash. Envtl. Council v. Sturdevant*, 834 F. Supp. 2d 1209, 1220 (D. Wash. 2011), *rev’d by sub nom.* *Wash. Envtl. Council v. Bellon*, 732 F.3d 1131, 1136 (9th Cir. 2013); *see Bellon*, 732 F.3d at 1135. The responsible agencies were the Washington State Department of Ecology, the Northwest Clean Air Agency, and the Puget Sound Clean Air Agency. *Bellon*, 732 F.3d at 1135 n.1.

<sup>22</sup> *Sturdevant*, 834 F. Supp. 2d at 1220.

<sup>23</sup> *Bellon*, 732 F.3d at 1147. The change in the named defendant, from “Sturdevant” to “Bellon,” is the result of the replacement of Theodore L. Sturdevant with Maia D. Bellon as director of the Washington State Department of Ecology. *Id.* at 1135 n.1.

<sup>24</sup> *See infra* notes 98–121 and accompanying text.

<sup>25</sup> *See infra* notes 115–121 and accompanying text.

<sup>26</sup> *About WEC*, WASH. ENVTL. COUNCIL, <http://wecprotects.org/about-wec> (last visited Mar. 10, 2015), *archived at* <http://perma.cc/RFV5-MBBP>.

“conservation organizations”) has similar priorities, such as keeping air and water clean and protecting wildlife and forests in Washington.<sup>27</sup> At direct odds with the aspirational goals of these organizations are the industrial practices of Washington’s five oil refineries, which collectively produce a substantial amount of GHG emissions.<sup>28</sup> EPA has announced that the combined effects of the six listed GHGs,<sup>29</sup> “may reasonably be anticipated both to endanger public health and to endanger public welfare,”<sup>30</sup> and the Ninth Circuit has assumed that GHG emissions are contributing to global climate change, and specifically the rising global temperature.<sup>31</sup>

As the result of rising global temperatures, members of the conservation organizations allegedly suffered recreational, aesthetic, economic, and health injuries.<sup>32</sup> These alleged injuries range from a resident’s diminished ability to engage in snowshoeing due to reduced snow pack,<sup>33</sup> to her son’s increased susceptibility to respiratory problems.<sup>34</sup> Asserting that their members’ injuries were caused by the failure of the responsible agencies to set and implement air quality standards for the oil refineries’ GHG emissions, the conservation organizations filed suit in March of 2011 in the U.S. District Court for the Western District of Washington under the CAA’s citizen-suit provision.<sup>35</sup>

The CAA authorizes EPA to establish NAAQS for a number of air pollutants.<sup>36</sup> GHGs, however, are not among the pollutants for which EPA has established NAAQS.<sup>37</sup> Under the federal-state scheme established by the CAA, Washington submitted its revised SIP to EPA, which was approved and became federally enforceable in 1995.<sup>38</sup> Washington’s SIP obligates the responsible agencies to implement the federal CAA and ensure Washington air pollutant

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<sup>27</sup> See *Promoting Conservation*, SIERRA CLUB WASH. CHAPTER, <http://www.sierraclub.org/washington/promoting-conservation> (last visited Mar. 10, 2015), *archived at* <http://perma.cc/WUB3-4GH3>.

<sup>28</sup> See *Wash. Envtl. Council v. Bellon*, 732 F.3d 1131, 1136 (9th Cir. 2013), *reh’g denied en banc* 741 F.3d 1075, 1076 (9th Cir. 2014).

<sup>29</sup> Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496, 66,497 (Dec. 15, 2009) (to be codified at 40 C.F.R. ch. I) (noting that the six GHGs “referred to in CAA section 202(a) to be the mix of six long-lived and directly-emitted [GHGs]: carbon dioxide . . . , methane . . . , nitrous oxide . . . , hydrofluorocarbons . . . , perfluorocarbons . . . , and sulfur hexafluoride . . .”).

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

<sup>31</sup> See *Bellon*, 732 F.3d at 1135–36.

<sup>32</sup> *Id.* at 1140.

<sup>33</sup> See *id.*

<sup>34</sup> See *id.* at 1141.

<sup>35</sup> *Id.* at 1138; see Clean Air Act, 42 U.S.C. § 7604(a)(1) (2012). The citizen suit provision in the CAA allows members of the public to sue any entity allegedly violating the Act, or any agency not enforcing the Act’s mandates. 42 U.S.C. § 7604(a)(1).

<sup>36</sup> *Bellon*, 732 F.3d at 1136.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 1137.

emitters comply with the air quality standards set forth in the SIP.<sup>39</sup> More specifically, the SIP requires the permitting authority “to define [reasonably available control technologies (“RACT”)] for each source or source category and issue a rule or regulatory order requiring the installation of RACT.”<sup>40</sup> The SIP also states that “[n]o person shall cause or allow the emission of any air contaminant from any source if it is detrimental to the health, safety, or welfare of any person, or causes damage to property or business.”<sup>41</sup> Arguing that the responsible agencies’ undisputed failure to regulate GHG emissions from the oil refineries demonstrated the responsible agencies’ failure to enforce either provision, the conservation organizations moved for summary judgment in July 2011.<sup>42</sup>

At the same time, the Washington State Petroleum Association (“WSPA”)—a trade association in which all of the oil refineries are members—successfully intervened as a defendant and filed a cross-motion for summary judgment.<sup>43</sup> WSPA argued that the responsible agencies were not required under the CAA to set and enforce GHG compliance provisions as part of Washington’s SIP.<sup>44</sup> In addition to the conservation organizations’ and WSPA’s respective motions for summary judgment, the responsible agencies moved to dismiss the case, arguing that the conservation organizations had failed to state a claim upon which relief could be granted.<sup>45</sup> In December 2011, the district court judge partially granted the motion for summary judgment in favor of the conservation organizations on their claim under the Washington SIP.<sup>46</sup> Both parties appealed the decision to the Ninth Circuit, and for the first time, WSPA and the responsible agencies argued that members of the conservation organizations did not have standing to bring their claims.<sup>47</sup>

Agreeing with defendants, in *Washington Environmental Council v. Bellon*, the Ninth Circuit found that the causal nexus between the conservation organization members’ particular injuries was too attenuated to be fairly traceable to the specific GHG emissions of the oil refineries.<sup>48</sup> Therefore, the court held that the organizations failed to satisfy the causality and redressability re-

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<sup>39</sup> *See id.*

<sup>40</sup> WASH. ADMIN. CODE § 173-400-040(1) (2015).

<sup>41</sup> *Id.* § 173-400-040(6).

<sup>42</sup> *See Bellon*, 732 F.3d at 1138.

<sup>43</sup> *Id.*

<sup>44</sup> *See id.*

<sup>45</sup> *Id.*; *see* FED. R. CIV. P. 12(b)(6).

<sup>46</sup> *Bellon*, 732 F.3d at 1138.

<sup>47</sup> *Id.* at 1138–39. The Federal Rules of Civil Procedure require a court to dismiss an action if the court determines at any time that it lacks subject matter jurisdiction. FED. R. CIV. P. 12(h)(3). An appeals court has “an independent duty to assure that standing exists, irrespective of whether the parties challenge it.” *Bellon*, 732 F.3d at 1139.

<sup>48</sup> *Bellon*, 732 F.3d at 1143.

quirements necessary to establish Article III standing.<sup>49</sup> Accordingly, the court vacated the district court's order enjoining the responsible agencies to comply with the GHG provision of the Washington SIP, and remanded the case back to the district court with instructions to dismiss the conservation organizations' claims.<sup>50</sup> In February of 2014, the Court of Appeals denied a rehearing en banc on the standing issue.<sup>51</sup>

## II. LEGAL BACKGROUND

The United States federal court system only has jurisdiction to entertain a limited variety of "Cases" and "Controversies" under Article III, Section 2 of the U.S. Constitution.<sup>52</sup> Specifically, Section 2 provides in pertinent part, "[t]he judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the laws of the United States . . . [and] to Controversies . . . ."<sup>53</sup> In *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, the U.S. Supreme Court interpreted this "cases and controversies" language to allow organizations to bring suit on behalf of the members they represent.<sup>54</sup> In *Laidlaw*, two environmental organizations brought claims under the Clean Water Act ("CWA") against Laidlaw Environmental Services, Inc. ("Laidlaw"), which operated a wastewater treatment plant in South Carolina.<sup>55</sup> The environmental organizations alleged that Laidlaw had discharged hazardous waste into a waterway in excess of the limits proscribed in its permit, in violation of the CWA.<sup>56</sup> The Court held that,

[A]n association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.<sup>57</sup>

Prior to the *Laidlaw* decision, the requirements for an individual environmental plaintiff to establish standing under Article III were outlined by the Court in *Lujan v. Defenders of Wildlife*.<sup>58</sup> In that case, organizations dedicated

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<sup>49</sup> See *id.* at 1147.

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

<sup>51</sup> Wash. Envtl. Council v. Bellon, 741 F.3d 1075, 1076 (9th Cir. 2014) (denying rehearing en banc of Wash. Envtl. Council v. Bellon, 732 F.3d 1131 (9th Cir. 2013)).

<sup>52</sup> See U.S. CONST. art. III, § 2.

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

<sup>54</sup> See 528 U.S. 167, 181–82 (2000).

<sup>55</sup> See *id.* at 175, 177.

<sup>56</sup> See *id.* at 176–77.

<sup>57</sup> *Id.* at 181. Therefore, an organization may only bring suit on behalf of their members if those members would be allowed to sue in their individual capacity. See *id.*

<sup>58</sup> See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).

to wildlife conservation and other environmental causes sued the Secretary of the Interior, challenging a regulation interpreting the Endangered Species Act (“ESA”).<sup>59</sup> The Supreme Court’s opinion articulated the three “irreducible constitutional minimum” requirements for environmental plaintiffs to establish Article III standing: (1) injury in fact; (2) causality; and (3) redressability.<sup>60</sup>

Since the Court’s decision in *Lujan*, several environmental cases have hinged on plaintiffs’ ability or inability to meet the *Lujan* standing requirements.<sup>61</sup> In 2007, in *Massachusetts v. EPA*, Massachusetts and several other states and private organizations brought suit against the Environmental Protection Agency (EPA), seeking review of EPA’s order denying the private organization’s petition for rulemaking to regulate automobile carbon dioxide emissions.<sup>62</sup> The case involved motor vehicle carbon dioxide emissions that amounted to 1.7 billion metric tons in 1999—over six percent of world-wide carbon dioxide emissions.<sup>63</sup> After determining that Massachusetts was entitled to a relaxed standing requirement because of its special interest as a “sovereign state,” the Court applied the *Lujan* factors and held that motor vehicle pollution amounting to over six percent of world-wide carbon dioxide emissions was sufficiently linked to the petitioner’s climate change-related injuries to satisfy *Lujan*’s causality requirement.<sup>64</sup>

In 2008, the U.S. Court of Appeals for the Ninth Circuit decided *Natural Resources Defense Council v. EPA*.<sup>65</sup> Natural Resources Defense Council and several other environmental organizations (collectively the “environmental organizations”) sued in district court to compel EPA to promulgate new standards to regulate the water pollution discharges of the construction and development industry under the CWA.<sup>66</sup> The court partially granted the plaintiffs’ motion for summary judgment and ordered an injunction compelling EPA to promulgate discharge standards under the CWA.<sup>67</sup> The court also rejected defendants’ contention that plaintiffs’ lacked standing and accordingly, denied

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<sup>59</sup> See *id.* at 558–59.

<sup>60</sup> See *id.* at 560–61.

<sup>61</sup> See *Massachusetts v. EPA*, 549 U.S. 497, 521, 526 (2007) (finding that Massachusetts established injury in fact, causality, and redressability, and therefore had standing to sue for injuries from unregulated national automobile emissions that constituted over six percent of global carbon dioxide emissions); *Natural Res. Def. Council v. EPA*, 542 F.3d 1235, 1248 (9th Cir. 2008) (emphasizing that the causality requirement of *Lujan* focuses on the injury to the plaintiff, and not the environment, and thus concluding that environmental groups had standing where polluted waterways used by the groups’ members caused redressable injury).

<sup>62</sup> See 549 U.S. at 497, 514.

<sup>63</sup> See *id.* at 524.

<sup>64</sup> See *id.* at 523–25 (holding that the rise in sea levels caused by increasing concentrations of global GHG emissions constituted a real harm to the state of Massachusetts that was likely to be partially remedied by regulation of automobile carbon dioxide emissions).

<sup>65</sup> *Natural Res. Def. Council*, 542 F.3d at 1253.

<sup>66</sup> See *id.* at 1237–38.

<sup>67</sup> *Id.* at 1248.



defendants' motion to dismiss.<sup>68</sup> On appeal, the Ninth Circuit confirmed that the environmental organizations had standing because plaintiffs' recreational enjoyment of waterways polluted by toxics was an actual injury traceable to construction site runoff, and was likely redressable by discharge regulations.<sup>69</sup> In its analysis of the causality and redressability requirements, the court observed that "[w]here Congress has expressed the need for specific regulations relating to the environment, that expression supports an inference that there is a causal connection between the lack of those regulations and adverse environmental effects."<sup>70</sup> Despite this observation, the court cautioned in its injury in fact analysis that, "[t]he injury to the plaintiff, not to the environment, is the relevant showing."<sup>71</sup>

### III. ANALYSIS

The United States federal court system is an institution for dispute resolution, but like any other such institution, it has limited resources and must regulate the type and amount of suits that it is willing to entertain.<sup>72</sup> The federal system must weed out frivolous claims so that federal resources can be allocated to legitimate claims.<sup>73</sup> Standing is one of the institutional barriers derived from the Constitution to achieve that balance.<sup>74</sup> The standing doctrine cannot be disregarded just because the scientific background presented by the petitioning parties was not sophisticated enough to discern the local effects of climate change caused by specific GHG emitters.<sup>75</sup> The *Washington Environmental Council v. Bellon* court upheld this foundational principle, and thus reinforced an important and predictable precedent: access to federal courts will be denied to plaintiffs who cannot prove their injuries are causally linked to a defendant's alleged misconduct.<sup>76</sup>

In deciding *Bellon*, the U.S. Court of Appeals for the Ninth Circuit addressed the application of the three standing requirements set forth in *Lujan v. Defenders of Wildlife* to environmental plaintiffs seeking relief from localized

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

<sup>69</sup> *See id.* at 1248.

<sup>70</sup> *Id.* at 1248.

<sup>71</sup> *Id.* at 1245.

<sup>72</sup> *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

<sup>73</sup> *See* FED. R. CIV. P. 11 advisory committee's note (explaining that the purpose of Rule 11 sanctions is to "discourage dilatory or abusive tactics and help to streamline the litigation process by lessening frivolous claims or defenses"); *see also Lujan*, 504 U.S. at 560 (recognizing the "prudential considerations" of the standing requirement).

<sup>74</sup> U.S. CONST. art. III; *see Lujan*, 504 U.S. at 560.

<sup>75</sup> *See* U.S. CONST. art. III; *Lujan*, 504 U.S. at 560; *Wash. Envtl. Council v. Bellon*, 732 F.3d 1131, 1135 (9th Cir. 2013), *reh'g denied en banc*, 741 F.3d 1075, 1141–42 (9th Cir. 2014).

<sup>76</sup> *See Lujan*, 504 U.S. at 560; *Bellon*, 732 F.3d at 1144; *see supra* notes 72–75 and accompanying text.

injuries allegedly caused by the unregulated emission of greenhouse gases (“GHGs”) by oil refineries.<sup>77</sup> Despite finding that the plaintiffs satisfied the injury in fact prong under *Lujan*,<sup>78</sup> the Ninth Circuit held that the plaintiffs failed to satisfy the causality and redressability prongs.<sup>79</sup>

The Ninth Circuit then proceeded to reject plaintiffs’ contention that their members’ injuries were sufficiently causally linked or “fairly traceable” to the alleged misconduct of Washington’s environmental agencies (the “responsible agencies”).<sup>80</sup> Even assuming that GHG emissions had contributed to global climate change,<sup>81</sup> the court found that general injury to the environment is not enough to satisfy the causation prong of the standing test.<sup>82</sup> The environmental organizations’ unsupported conclusory statements that their members’ local injuries were caused by the unregulated emissions of the five local Washington oil refineries were held to be similarly insufficient.<sup>83</sup> The court’s understanding with respect to GHG emissions was that the science was not, at the time, capable of “assessing, detecting, or measuring the relationship between a certain GHG emission source and localized impacts in a given region.”<sup>84</sup> Based on this understanding, the court reasoned that science could not discern the specific source of plaintiffs’ injuries from among the countless global emitting sources.<sup>85</sup> The court therefore reasoned that the causal chain between the oil refineries’ emissions and the plaintiffs’ injuries was too tenuous to support standing.<sup>86</sup>

The *Bellon* court next determined that the conservation organizations had failed to establish *Lujan*’s final standing requirement: substantial likelihood that the injury would be redressed with a favorable judgment.<sup>87</sup> Application of the redressability prong requires a similar analysis to that of the causality prong because it depends in part on the causal connection between the injury and the alleged misconduct.<sup>88</sup> The Ninth Circuit found the record was devoid of evidence that regulation would likely reduce the precise pollution causing

<sup>77</sup> *Lujan*, 504 U.S. at 560–61; *Bellon*, 732 F.3d at 1139; see *supra* notes 58–60 and accompanying text.

<sup>78</sup> *Bellon*, 732 F.3d at 1141 (citing *Lujan*, 504 U.S. at 560). None of the defendant oil refineries in *Bellon* disputed the alleged injuries claimed by members of the conservation organizations. *Id.* Therefore, the court held that the plaintiff conservation organizations satisfied the injury in fact requirement under *Lujan*. *Id.*

<sup>79</sup> *Id.* at 1144, 1147 (citing *Lujan*, 504 U.S. at 560–61).

<sup>80</sup> *Id.* at 1144.

<sup>81</sup> *Id.* at 1135–36.

<sup>82</sup> *Id.* at 1144.

<sup>83</sup> *Id.* at 1142–43.

<sup>84</sup> *Id.* at 1143.

<sup>85</sup> *Id.* at 1144.

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

<sup>87</sup> *Id.* at 1146, 1147.

<sup>88</sup> See *id.* at 1146 (citing *Allen v. Wright*, 468 U.S. 737, 753 n.19 (1984)).

plaintiffs' specific injuries.<sup>89</sup> Therefore, the court concluded that plaintiffs' injuries were likely to continue unabated even if the GHG emissions of the refineries were regulated.<sup>90</sup>

In light of the aforementioned analysis, the court remanded the case to the district court for dismissal.<sup>91</sup> In sum, the *Bellon* case was remanded for dismissal because the Ninth Circuit did not find a sufficient causal connection between specific injuries of plaintiffs' members and the state agencies' failure to regulate the GHG emissions of five state oil refineries.<sup>92</sup> Unfortunately for local conservation organizations like the plaintiffs, the ability to prove causality is limited by the current state of science and technology relating to global warming.<sup>93</sup> A valid causal connection may very well have existed between plaintiffs' local injuries and the specific GHG emissions of the five Washington oil refineries, but plaintiffs were still denied relief because they were either unable to, or failed to, provide the evidentiary support necessary to prove that connection.<sup>94</sup>

Under the limitations imposed by the U.S. Constitution and years of federal precedent, the Ninth Circuit's holding that plaintiff-conservation organizations in *Bellon* lacked standing was legally sound.<sup>95</sup> Furthermore, the court's decision is consistent with the policy of avoiding potentially frivolous claims.<sup>96</sup> Although the decision is a practical loss for the environment, it might nonetheless instigate new research on the local effects of climate change caused by GHG pollution from particular sources, which would then enable environmental challenges like the one in *Bellon* without having a significant destabilizing effect on the well-settled doctrine of standing.<sup>97</sup>

The U.S. District Court for the Western District of Washington is limited, by Article III of the U.S. Constitution, to hearing "cases" and "controversies"

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<sup>89</sup> *Id.* at 1146–47.

<sup>90</sup> *See id.* at 1147.

<sup>91</sup> *Id.*

<sup>92</sup> *See id.* at 1141–47.

<sup>93</sup> *See id.* at 1143–44. Defendant's expert asserted that the effect of the oil refineries' emissions on global climate change is "scientifically indiscernible," given the emission levels, the dispersal of GHGs worldwide, and "the absence of any meaningful nexus between Washington refinery emissions and global GHG concentrations now or as projected in the future." *Id.*

<sup>94</sup> *See id.* at 1142–43.

<sup>95</sup> *See* U.S. CONST. art. III, § 2, cl. 1; *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559–606 (1992); *Bellon*, 732 F.3d at 1141–43.

<sup>96</sup> *See* FED. R. CIV. P. 11 advisory committee's note; *supra* notes 72–76 and accompanying text.

<sup>97</sup> *See Bellon*, 732 F.3d at 1141–43 (noting the court's current understanding that scientific capabilities may be insufficient to support a fairly traceable causal connection between defendants' pollution and plaintiffs' injuries); Katherine Noyes, *Big Data's Biggest Challenge: Climate Change*, *FOR-TUNE* (Jun. 23, 2014, 10:36 AM), <http://fortune.com/2014/06/23/big-data-climate-change-map-sea-levels/>, archived at <http://perma.cc/6ZZT-ND3Y> (discussing the difficulties of compiling and interpreting climate change data, including the difficulties of understanding local impacts).

sies.”<sup>98</sup> Thus, regardless of whether or not the environmental organization’s standing was an issue at the district court level, the Ninth Circuit properly exercised its independent duty to evaluate plaintiffs’ standing to bring suit on appeal.<sup>99</sup>

The Ninth Circuit was required to dismiss the action if the conservation organizations failed to satisfy, with regard to their members, any of the three Article III standing requirements articulated by the Supreme Court in *Lujan*.<sup>100</sup> Specifically with respect to the causality requirement, the *Bellon* court had to dismiss the action because the plaintiffs failed to show that their members’ injuries were causally linked or fairly traceable to the responsible agencies’ failure to regulate the particular GHG emissions of the five local Washington oil refineries.<sup>101</sup> Causal connections strung together in a long chain of speculation are often, as was the case in *Bellon*, conclusory, and thus insufficient to establish standing.<sup>102</sup> The Ninth Circuit was thus bound to dismiss claims that were linked together piecemeal and asserted with theretofore scientifically unsupported conclusory statements.<sup>103</sup> Although it renders an environmentally repugnant result, the state of science and technology being inadequate to provide the requisite evidentiary support for a fairly traceable causal connection—here between the injuries of Washington plaintiffs and the specific local emissions of the five refineries—is not a justification for ignoring constitutional and precedential limitations.<sup>104</sup>

Restrained by the limits of contemporary science and technology, the plaintiffs in *Bellon* were unable to illustrate a sufficient causal link between the local emissions of the five Washington oil refineries and their members’ injuries.<sup>105</sup> Courts currently understand global warming to be a result of GHG emissions from innumerable worldwide sources, which mix in the atmosphere over time and are difficult to differentiate.<sup>106</sup> Accordingly, in the absence of any contrary evidence from plaintiffs, the Ninth Circuit properly concluded that the GHG emissions of the five Washington oil refineries were indiscernible amongst the emissions of worldwide GHG emitters.<sup>107</sup> As such, the court was correct in finding the environmental organizations could not prove causa-

<sup>98</sup> See U.S. CONST. art. III.

<sup>99</sup> See FED. R. CIV. P. 12(h)(3); *Bellon*, 732 F.3d at 1139.

<sup>100</sup> See *Lujan*, 504 U.S. at 560–61 (finding that the “irreducible constitutional minimum of standing” contains three necessary elements: (1) injury in fact; (2) causality; and (3) redressability); *Bellon*, 732 F.3d at 1139–40.

<sup>101</sup> *Lujan*, 504 U.S. at 560; *Bellon*, 732 F.3d at 1141–42.

<sup>102</sup> See *Lujan*, 504 U.S. at 560–61; *Bellon*, 732 F.3d at 1142–43.

<sup>103</sup> See *Lujan*, 504 U.S. at 560–61; *Bellon*, 732 F.3d at 1142–43.

<sup>104</sup> See *Lujan*, 504 U.S. at 560–61; *Bellon*, 732 F.3d at 1143.

<sup>105</sup> See *Bellon*, 732 F.3d at 1143–44.

<sup>106</sup> See *id.* at 1143 (citing *Native Vill. of Kivalina v. Exxonmobil Corp.*, 696 F.3d 849, 868 (9th Cir. 2012)).

<sup>107</sup> *Id.* at 1143–44.

tion, and thus did not have standing to bring a suit alleging their injuries were caused by the five oil refineries.<sup>108</sup>

Nevertheless, the plaintiffs could have overcome the scientific deficiency in their claim by showing that the emissions of the five Washington oil refineries were significant enough to constitute a meaningful contribution to cumulative global GHG concentrations.<sup>109</sup> In so doing, plaintiffs would have been able to link their members' localized injuries to general global climate change sufficiently enough to satisfy the *Lujan* causality requirement.<sup>110</sup> In *Massachusetts v. EPA*, that is exactly what the state of Massachusetts demonstrated with respect to the national automobile emissions, which, at 1.7 billion metric tons in 1999, constituted over six percent of global carbon dioxide emissions, and was thus a sufficiently "meaningful contribution" to global emissions to establish causality under the *Lujan* test.<sup>111</sup>

The Ninth Circuit properly distinguished the environmental organizations' claims from the *Massachusetts v. EPA* claims.<sup>112</sup> Although the Washington oil refineries emissions constituted nearly six percent of the GHG emissions in the state of Washington, the court properly found that plaintiffs did not provide any evidence to contextualize those emissions in terms of their effect on the larger global concentration of GHGs.<sup>113</sup> Therefore, the court wisely chose not to blur the lines of the required showing of causation to establish standing in lawsuits, environmental or otherwise.<sup>114</sup>

Furthermore the Ninth Circuit's decision may encourage interested parties to invest in research to unlock the scientific mysteries that prevent environmental organizations from succeeding on the merits of their claims.<sup>115</sup> What remains is to scientifically link the emissions of specific sources to their local effects.<sup>116</sup> For example, many data compilations tracking climate change are incomplete or inaccurate.<sup>117</sup> Nonetheless, progress, which appears attainable, could help illuminate the local effects of global climate change in a more concrete way.<sup>118</sup> Just like any other trend, the rate of technical progress with re-

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<sup>108</sup> *Id.*; see *Lujan*, 504 U.S. at 560–61.

<sup>109</sup> See *Massachusetts v. EPA*, 549 U.S. 497, 524–26 (2008); *Lujan*, 504 U.S. at 561–62.

<sup>110</sup> See *Massachusetts v. EPA*, 549 U.S. at 524–25.

<sup>111</sup> See *id.* at 524–26.

<sup>112</sup> See *id.*; *Bellon*, 732 F.3d at 1145–46.

<sup>113</sup> See *Bellon*, 732 F.3d at 1145–46.

<sup>114</sup> See *id.*; *Massachusetts v. EPA*, 549 U.S. at 524–25.

<sup>115</sup> See *Bellon*, 732 F.3d at 1143 (noting that current science was insufficient to prove sufficient causality between defendants' polluting and plaintiffs' injuries); Noyes, *supra* note 97 (discussing the technological difficulty of discerning a specific source of pollution).

<sup>116</sup> See *Bellon*, 732 F.3d at 1143.

<sup>117</sup> See Noyes, *supra* note 97.

<sup>118</sup> See *id.*

spect to understanding climate change can be measured.<sup>119</sup> It is possible that, continuing at the current rate, “in a few generations our major sociotechnical systems will perform” inconceivably better than they do today.<sup>120</sup> Thus, instead of investing in ultimately futile litigation now, interested environmental parties should consider using their own limited resources to invest in the research and technology that will open the gates to litigation on the merits of their claims in the nearest possible future.<sup>121</sup>

### CONCLUSION

The U.S. Court of Appeals for the Ninth Circuit’s decision in *Washington Environmental Council v. Bellon* closed the doors of an Article III court on environmental conservation organizations because the organizations failed to establish a sufficient causal connection between their members’ injuries and the specific local greenhouse gas emissions of five local oil refineries in the state of Washington. In so doing, the Ninth Circuit protected the stability and predictability of a well-settled procedural doctrine: standing. Further, the court may well have avoided an onslaught of tenuous environmental claims premised on untraceable injuries.

Although it is unfortunate that some legitimate and important environmental legal claims might be deprived of the opportunity to be heard on their merits—due to scientific and technological limitations largely out of litigants’ control—the *Bellon* decision should inspire similarly situated parties to invest in the research necessary to scientifically connect the injuries caused by global warming with the global warming-causing emissions of specific local sources. Such information would provide plaintiffs like those in *Bellon* with the evidentiary support necessary to establish their standing to bring substantive claims against such local greenhouse gas emitters.

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<sup>119</sup> See Jesse H. Ausubel, *Technical Progress and Climatic Change*, 23 ENERGY POL’Y 411, 416 (1995), available at [http://ac.els-cdn.com/0301421595901665/1-s2.0-0301421595901665-main.pdf?\\_tid=9921d912-c792-11e4-bb1e-00000aab0f6c&acdnat=1426039497\\_2721587c4e3eda26d3c5245f063cb650](http://ac.els-cdn.com/0301421595901665/1-s2.0-0301421595901665-main.pdf?_tid=9921d912-c792-11e4-bb1e-00000aab0f6c&acdnat=1426039497_2721587c4e3eda26d3c5245f063cb650), archived at <http://perma.cc/689P-GRLL>.

<sup>120</sup> See *id.*

<sup>121</sup> See *id.*; *Bellon*, 732 F.3d at 1143–44; Noyes, *supra* note 97.