ENVIRONMENTAL LAW MOOT COURT

The 1992 Problem and Competition

by Adam Torem

Each year Pace University, located in White Plains, New York, receives a moot court problem drafted by the Environmental Law Institute and Pace University's own faculty. The problem always deals with a timely issue in environmental law and stands out because it has three different sides, instead of the usual two: Plaintiff, Defendant, and Intervenor or an additional co-party. Law schools from around the United States and Canada choose a side, write a brief for that side, and then converge on Pace in February for the oral argument competition, in which all 3 sides are argued.

This year's event was the 4th annual competition and the second time that U.C. Davis has entered a team. Sixty-four teams entered the competition with the U.C. Davis team of Dawn Andrews, Daniel Muller, and Adam Torem coming in 10th overall, missing the semi-final round by a single point. This year's problem focused on two issues: standing to sue for environmental plaintiffs and the applicability of the National Environmental Policy Act (NEPA) to federal actions overseas; review articles on each of these topics follow this column.

THE PROBLEM

The parties to this year's problem were the Department of Defense (Appellee), the Defense Contractors Association (Appellant), and Environmental Friends (Appellant).[1] Briefly, the problem was set out as follows: the U.S. Army wants to close down a missile base it has been utilizing in Venice, Italy, since the end of hostilities in World War II. The base is currently used only for missile storage and, after cleanup and renovation, might be returned to the Italian government. The soil at the site is contaminated with high levels of missile fuel, a probable carcinogen, and the Army wants use a revolutionary Army-developed technique to clean up the soil: Biocore. Biocore is a strain of genetically engineered microorganisms which, according to laboratory results, eats only missile fuel and dies if none is present. The cost of having the Army's own employees apply Biocore to clean up the site is estimated at $500,000, ten times less than the $5 million cost of the more traditional incineration by subcontractor method. One other interesting detail adds a sense of urgency to the matter: the base lies in the 100-year floodplain.

The Army wants use a revolutionary Army-developed technique to clean up the soil: Biocore.

The Army conducted some environmental research into the problem and, in compliance with Executive Order 12114,[2] issued a "Summary Environmental Analysis" of the site. The document was not circulated for public comment but when questioned in a congressional hearing, the Army completed a Finding of No Significant Impact (FONSI). Both Environmental Friends and the Defense Contractors Association filed suit against the Army, alleging that the proposed application of Biocore was a major federal action under NEPA and that without a full Environmental Impact Statement (EIS), the Army had not complied with NEPA.

Environmental Friends (EF) is a worldwide environmental organization with 75,000 members, 5,000 of which live abroad, including 500 in Italy and 4 in Venice itself. Individual affidavits demonstrated that several EF members lived quite close to the Venice missile base, visited the area frequently, or at least planned to go to Venice sometime in the future.

The Defense Contractors Association (DCA) is a consortium of over 3000 defense contractors, accounting for nearly 70% of the Defense Department's contracting budget. DCA

If the Army would create an EIS for the same project in Wyoming, *it certainly owed a similar amount of care and respect to Italians.*

contests the safety of applying the relatively untested Biocore when much more proven methods, which they could supply, were available. Individual affidavits from some of its members attest to their readiness and availability to clean up the Venice site.

In the district court, the Department of Defense (DOD) filed a motion for summary judgment under Federal Rule of Civil Procedure 56, alleging that neither EF nor DCA were actually affected by the plans to clean up the Venice site. Further, DOD contested the applicability of NEPA to their actions, especially in light of their attempt to satisfy Executive Order 12114. The district court, however, disagreed with DOD on both grounds and refused to grant the motion. DOD appealed this decision, and each side was requested to submit briefs on both issues: standing and NEPA's extraterritorial application.

THE COMPETITION

U.C. Davis wrote their brief for Environmental Friends, taking the position that EF had alleged a specific enough injury to gain standing and that NEPA did apply abroad, especially since no foreign policy conflict stood in its way. If the Army would create an EIS for the same project in *Wyoming*, it certainly owed a similar amount of care and respect to Italians.

At Pace University, U.C. Davis went through three preliminary rounds of competition, representing a different side in each round. First, Daniel Muller and Adam Torem argued for the Defense Contractors Association, finishing second in the match; Dawn Andrews and Daniel Muller then argued for Environmental Friends, winning that round; and finally, Dawn Andrews and Adam Torem argued for the Department of Defense, strongly winning the final preliminary round. These results positioned U.C. Davis at 12th place overall and earned an invitation to be one of the 27 teams in the Quarter Final round.

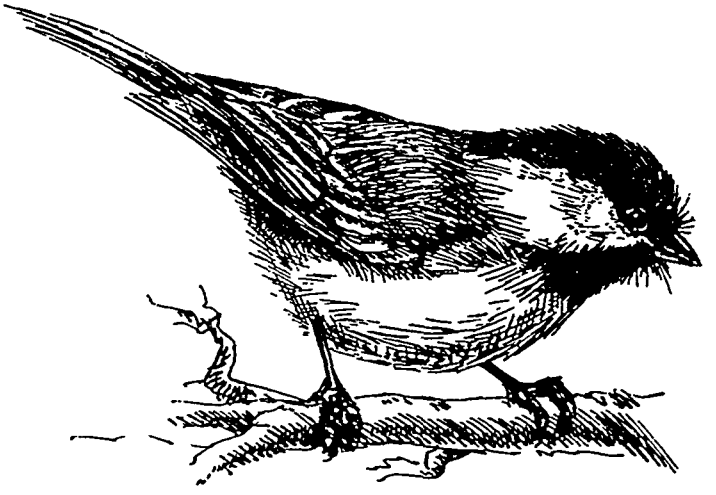
In the Quarter Finals, U.C. Davis was assigned to argue DOD again, with Andrews and Torem anxious to repeat their performance from earlier in the day. Only 9 teams could move on to the Semi Final round and, as noted above, U.C. Davis was ranked 10th after the Quarter Finals. Overall, the University of Maine won the final round with their arguments for Environmental Friends.

Adam Torem *is a graduating 3L. He will be attending Lewis & Clark College, Northwestern School of Law's LL.M. program in Environmental Law and Natural Resources next year and then entering the U.S. Air Force Judge Advocate General's Corps (JAG).*

ENDNOTES

[1]The best briefs for each side are published annually in Pace University's Law Review and can be found therein.

[2]"Environmental Effects Abroad of Major Federal Actions," 3 CFR 356 (1980), *reprinted in* ELR Admin. Materials 45023.



CLOSING THE DOORS OF JUDICIAL REVIEW

by Daniel Muller

Introduction

The concept of "standing to sue" is an important aspect of the "case or controversy" limitation on federal jurisdiction within Article III of the Constitution. Standing requirements assure that only persons with a direct stake in the outcome of a dispute may invoke the jurisdiction of a court to resolve it.[1] Standing maintains the separation of powers among the branches of government by limiting the involvement of courts in legislative and executive actions.[2] While it applies to every subject matter of litigation, standing has rarely played as decisive a role in shaping a body of law as in the environmental field. According to one author, "the expansion of standing...has made possible the veritable revolutions that have occurred in environmental law" over the past two decades.[3]

Only someone with a direct stake in a dispute may invoke a court's jurisdiction.

The recent Supreme Court decision Lujan v. National Wildlife Federation, 110 S.Ct. 3177, 20 ELR 20962 (1990) poses a serious threat to the "revolution". Justice Scalia, Lujan's primary author, denied standing to environmental plaintiffs challenging the Bureau of Land Management's (BLM) method of handling public lands. Justice Scalia's denial of standing largely reflects his vision of the limited role of the judiciary in reviewing administrative programs, a job he feels is better performed by the legislative branch. As one commentator noted, "the case offered the chance to disavow (liberal standing cases such as) United States v. Students Challenging Regulatory Agency Procedures (SCRAP I) 412 U.S. 669 (1973), and to set more stringent standards for demonstrating the injury-in-fact requirement of standing. Although the decision shocked many (observers), the Court's ruling reflects a trend in lower courts requiring plaintiffs alleging injury to environmental interests in public lands to establish a direct connection between the use of the lands and the governmental action challenged."[4] The decision raises serious questions regarding the shape of future environmental litigation. Indeed, the environmental citizen suit movement is entering the most difficult phase in its brief history.[5]

Standing To Bring Suit: A Primer

Standing requirements can be crudely simplified as follows: Article III demands that a plaintiff establish an actual injury, caused by the agency action challenged, and redressable by a favorable decision.[6] Further, prudential considerations dictate that a plaintiff must assert her own legal interests rather than those of a third party. The plaintiff's complaint must fall within the "zone of interests" to be protected by the statutory or constitutional guarantee in question. Finally, the interests must be specific, not "abstract questions of wide public significance" which amount to "generalized grievances" most appropriately addressed by legislators.[7]

Congress may eliminate prudential requirements altogether and confer standing by statute, subject only to the injury-in-fact requirement of Article III. It has frequently done so, particularly in environmental statutes, through "citizen suit" provisions.[8] However, because the statutes allegedly violated by the BLM in Lujan do not contain citizen suit provisions of their own, the plaintiff environmental organization relied on the general statutory standing provisions of the Administrative Procedure Act (APA).[9] To have standing, §10(a) of the APA requires a plaintiff to show that (1) there is a final agency action, and (2) the action injures or