ARTICLES

FRIENDS OF THE EARTH V. LAIDLAW ENVIRONMENTAL SERVICES: A NEW LOOK AT ENVIRONMENTAL STANDING

BY
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I. Introduction

As a result of intense public pressure in the early 1970s, Congress passed a number of major environmental statutes aimed at protecting and preserving the environment. Many of these environmental laws had lofty goals, such as the Clean Water Act's goal to eliminate the discharge of pollutants into the nation's waters by 1985 — a goal that remains unfulfilled.[1] Most of the laws gave citizens the tools to directly enforce environmental laws through citizen suit provisions.[2]

Since the passage of these modern environmental laws, the United States Supreme Court has gone through two eras of environmental standing analysis and application. Through the 1970s, the Court expanded its notions of standing to accommodate environmental plaintiffs and recognized that the unique nature of environmental law required a lenient application of the standing doctrine. However, the Court's attitude toward environmental plaintiffs dramatically shifted

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[1] 33 U.S.C. § 1251(a)(1) (2000).

[2] Statutes containing citizen suit provisions include: Toxic Substances Control Act, 15 U.S.C. § 2619 (1994); Endangered Species Act, 16 U.S.C. §§ 1531-44 (1994); Surface Mining Control and Reclamation Act, 30 U.S.C. § 1270 (1994); Clean Water Act, 33 U.S.C. § 1365 (1994); Marine Protection, Research and Sanctuaries Act, 33 U.S.C. § 1315(g)(1) (1994); Safe Drinking Water Act, 42 U.S.C. § 300j-8 (1994); Noise Control Act, 42 U.S.C. § 4911 (1994); Energy Policy and Conservation Act, 42 U.S.C. § 6305 (1994); Solid Waste Disposal Act, 42 U.S.C. § 6972 (1994); Clean Air Act, 42 U.S.C. § 7604 (1994 & Supp. 1990); Powerplant and Industrial Fuel Use Act, 42 U.S.C. § 8435 (1994); Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9659 (1994); Emergency Planning and Community Right-to-Know Act, 42 U.S.C. § 11046(a)(1) (1994); Outer Continental Shelf Lands Act, 43 U.S.C. § 1349 (1994) Hazardous Liquid Pipeline Safety Act, 49 U.S.C. § 2014 (1994).

in the 1990s, when it applied stringent standing requirements in several decisions and repeatedly denied access to the court system on standing grounds.

This Article addresses the Court's recent decision, *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*[3] In this decision, the Court held that the proper inquiry for deciding injury in fact is injury to the plaintiff, not injury to the environment, and that civil penalties payable to the U.S. Treasury redress a plaintiff because they provide deterrence in the context of ongoing violations.

Laidlaw represents a distinct change in how the Court applies standing requirements in environmental cases. *Laidlaw* signals a retreat from the Court's recently strict approach to environmental standing law. *Laidlaw* takes a more receptive approach to accommodating standing requirements with the unique nature of environmental cases. The Court in *Laidlaw* also respects Congress' intent in passing environmental laws. While the Court does not return to the initial receptive welcome it gave environmental plaintiffs in the early 1970s, *Laidlaw* signals that plaintiffs will no longer be denied access to court due to an overly stringent application of standing.

Part II of the Article discusses the policies and constitutional requirements of standing. This section also evaluates the history and theory of citizen suit enforcement, as well as the particular difficulties in establishing environmental standing. This includes a discussion of the major Supreme Court environmental standing cases that helped shape *Laidlaw*. Part III discusses *Laidlaw* itself, including the facts of the case, the district court's opinion, the Fourth Circuit's decision, and the Supreme Court's majority and dissenting opinions. Part IV addresses how *Laidlaw* has changed the law, including an analysis of its consistency with prior environmental standing decisions, the Fourth Circuit's application of *Laidlaw* to a recent similar case, and *Laidlaw*'s practical effects.

II. BACKGROUND

A. Constitutional Standing Requirements

Standing involves a court's determination of whether the plaintiff is the proper party to adjudicate the action.[4] To have standing a plaintiff must satisfy

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[3] 528 U.S. 167, 120 S. Ct. 693 (2000).

[4] *See* Flast v. Cohen, 392 U.S. 83, 95 (1968).

both Constitutional and prudential requirements.[5] The party seeking to establish standing to sue bears the burden of proving the standing requirements.[6] As originally understood, the courts interpreted standing in a way to further Congress' intent, rather than as a strictly confined constitutional doctrine.[7]

Professor Sunstein delineates the doctrine of standing into five eras.[8] The first stage spans from English practice through 1920. During this era, standing was not considered to be based on the Constitution or whether the plaintiff could demonstrate an injury.[9] Rather, courts during this era decided if a plaintiff was entitled to seek redress in the courts by examining whether Congress or any other source of law granted the plaintiff the legal right to sue.[10] The court would grant a plaintiff the right to sue if a law gave her a cause of action.[11] The second stage of standing development, from the 1920s through the 1930s, came about as an attempt to protect New Deal legislation from judicial attack.[12] During this era, standing emerged as a distinct doctrine through which the Court prevented citizens from challenging legislation by holding that they had no personal stake in the controversy.[13] In the third stage of standing, from the 1940s until the 1960s, the courts interpreted the Administrative Procedure Act (APA) that granted plaintiffs the right to sue if they suffered a legal wrong due to agency action.[14] A plaintiff could demonstrate that she suffered a legal wrong because of agency action in three categories.[15] First, a plaintiff could show she suffered a legal wrong if her complaint involved an invasion of a common law interest.[16] Second, a plaintiff could show legal wrong if she had an interest protected by a statute that was invaded.[17] Finally, a plaintiff could sue if she could show that a

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[5] *See* Warth v. Seldin, 422 U.S. 490, 498 (1975).

[6] *See* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83 (1998).

[7] *See* Cass R. Sunstein, *What's Standing After* Lujan? *Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 168-197 (1992) (arguing that the Constitution does not limit Congress' power to grant standing, and that throughout standing's five stages of development, only recently has the Court interpreted standing requirements as solely stemming from the Constitution and not from Congress).

[8] *See id.* at 168.

[9] *See id.* at 170.

[10] *See id.*

[11] *See id.*

[12] *See id.* at 179.

[13] *See id.* citing Massachusetts v. Mellon, 262 U.S. 447, 479-480 (1923).

[14] *See id.* at 181.

[15] *See id.*

[16] *See id.*

[17] *See id.* at 182.

statute, other than the APA, granted her standing.[18] This third category did not involve a legal wrong, but recognized that Congress could give people a cause of action.[19] Injury in fact was not part of the court's inquiry during this era.[20]

During the fourth stage of standing evolution, from the 1960s to 1975, the courts recognized that congressional purpose could be frustrated by inadequate agency regulation.[21] Courts began to expand interpretation of the APA to apply to beneficiaries of agency action, as well as the objects the agencies regulate.[22] The modern notion of injury originated from granting agency beneficiaries standing because they suffered legal injury from faulty agency action.[23] The Supreme Court radically changed the framework of modern standing law through its ruling in *Association of Data Processing Service Organizations v. Camp.*[24] While interpreting the APA in *Data Processing*, the Court found that standing was not related to whether the plaintiff could assert a legal wrong under the APA, nor whether Congress had created a legal interest for the plaintiff to enforce.[25] Instead, the standing inquiry turned on if the plaintiff could show an "injury in fact."[26] This new injury in fact test changed the focus regarding who was allowed to bring suit, from plaintiffs who could show a legal interest in the suit, to those who could show an injury in fact.[27] As will be explained below, this interpretation of injury as a factual matter, rather than a legal one determining if any source of law grants the plaintiff right to sue, greatly expands judicial power. It allows courts to define what they consider to be the requisite injury to support standing.[28]

The fifth and final stage of standing development reflects current law: to show standing, a plaintiff must demonstrate injury in fact, causation, and

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[18] *See id.*
[19] *See id.*
[20] *See id.* at 182.
[21] *See id.* at 183.
[22] *See id.*
[23] *See id.*
[24] *See id.* at 185.
[25] Ass'n of Data Processing Serv. Org., Inc. v. Camp, 397 U.S. 150 (1970).
[26] *Id.* at 152.
[27] *See* Sunstein, *supra* note 7, at 185 (noting that the injury in fact test was essentially "made up" by the Court).
[28] *See id.* at 189.

redressability. In contrast to the early ideas of standing, the Court now views standing requirements as firmly circumscribed by the Constitution.[29]

The current constitutional requirements of standing stem from Article III, section 2, which confines federal judicial power to "cases and controversies."[30] Prudential standing requirements are not constitutionally required, but rather are articulated by the courts and therefore are subject to change by Congress.[31] These requirements include, for example, whether the alleged injury falls within the "zone of interest" protected by the statute, whether the plaintiff is raising only generalized grievances, and if the plaintiff is asserting her own rights rather than those of third parties.[32] This note addresses only what is now considered constitutional standing.

The Supreme Court has held that to have Article III standing, a plaintiff has the burden of establishing: 1) injury in fact, 2) causation; that the injury is fairly traceable to the injury, and 3) redressability.[33] This note focuses on the injury in fact and redressability requirements.

1. Injury in Fact

The injury in fact requirement was first articulated as a specific prerequisite for standing in *Data Processing*.[34] To demonstrate injury in fact, a plaintiff must allege that she suffers an injury that is imminent, not speculative, conjectural, or hypothetical.[35] The Supreme Court has held that at the "irreducible minimum," the party must show that she has "personally suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant."[36] The injury must be an invasion of a legally protected interest that is both "concrete and particularized."[37] The injury may be either economic or noneconomic.[38]

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[29] *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) ("[T]he Core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III.").

[30] U.S. CONST. art. III, § 2.

[31] *See* Warth v. Seldin, 422 U.S. 490, 501 (1975).

[32] *See* Allen v. Wright, 468 U.S. 737, 751 (1984).

[33] *See Defenders of Wildlife*, 504 U.S. at 560.

[34] Ass'n of Data Processing Serv. Org, Inc. v. Camp, 397 U.S. 150 (1970).

[35] *See* Whitmore v. Arkansas, 495 U.S. 149, 155 (1990) (citing City of Los Angeles v. Lyons, 461 U.S. 95, 102 (1983)).

[36] *Defenders of Wildlife*, 504 U.S. at 560 (quoting Valley Forge Christian College v. Americans United for the Separation of Church and State, 454 U.S. 464, 472 (1982)).

[37] *Id.*

[38] Sierra Club v. Morton, 405 U.S. 727, 734 (1972).

2. Redressability

In addition to showing injury in fact and that the injury is fairly traceable to defendant's conduct (causation), a plaintiff must also show that a court's favorable decision is likely to redress the alleged injury.[39] In 1976, the Supreme Court first specified redressability as an element of Article III standing in *Simon v. Eastern Kentucky Welfare Rights Organization*.[40] In this case, several social welfare organizations sued the Commissioner of the Internal Revenue Service and the Secretary of the Treasury, challenging a Revenue Ruling that allowed favorable tax status to nonprofit hospitals that offered only emergency room services to poor persons, rather than full services.[41] The Court denied standing because the plaintiffs could not show that a favorable court decision would result in hospital access for poor people.[42] The Court reasoned that a favorable decision would not necessarily provide the plaintiffs with relief since the hospitals were not named defendants, and the Revenue Ruling only discouraged, but did not prohibit, nonprofit hospitals from giving full low income care.[43] A favorable court decision must likely, not merely speculatively, redress the plaintiff's injury.[44]

B. Policies Behind Standing Requirements

A core purpose of standing is to ensure that the plaintiffs have the "concrete adverseness" that clarifies the issues in dispute for the court.[45] Standing also helps to guarantee that the parties will be effective advocates.[46]

Another policy of standing is to adhere to the separation of powers doctrine by ensuring that the judiciary does not infringe upon the powers of the executive branch.[47] Article II, section 3 of the Constitution requires the Executive Branch to "take care that the laws be faithfully executed."[48] Under the sepa-

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[39] 426 U.S. 26, 38 (1976).
[40] *See id.* at 43.
[41] *See id.* at 28.
[42] *See id.* at 45-46.
[43] *See id.* at 41-43.
[44] *See id.* at 38; Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992).
[45] *See* Baker v. Carr, 369 U.S. 186, 204 (1962).
[46] *See id.*
[47] *See* Warth v. Seldin, 422 U.S. 490, 498-99 (1975).
[48] U.S. CONST. art. II, § 3.

ration of powers argument, enforcement of public interests by private citizen lawsuits, such as environmental citizen suits, violates Article II by transferring power over law enforcement away from the executive branch and into the hands of the judiciary.[49] Commentators assert that the strict adherence to the doctrine of separation of powers is important because it prevents the judiciary from encroaching on the executive's power.[50] Commentators also assert that separation of powers provides for more effective and consistent law enforcement and helps guarantee that laws will not be enforced arbitrarily.[51] For example, when the executive branch alone has the power to enforce environmental laws, it has the power to declare that some polluters are worth prosecuting, while some are not. The current Court has used the separation of powers principle as a policy of standing.[52] Additionally, Justice Scalia, who has authored many of the recent standing decisions, views separation of powers as a key standing concern.[53]

However, other commentators have criticized standing requirements as not promoting the policy of separation of powers. While the Court ostensibly requires an injury in fact in part to further the policy of separation of powers and prevent the "overjudicialization of the process of self-governance,"[54] this requirement actually has the effect of enlarging the Court's power.[55] When the Court analyzes whether a plaintiff has presented an injury in fact, it is using its own normative judgement on whether the injury will support standing, before analyzing the statute on which the plaintiff's claim is based to determine if Congress intended to protect against the injury.[56] By doing so, the Court is limiting Congress' power to define the injuries it wants protected.[57] A strict interpretation of the injury in fact requirement thus limits the power of Congress to define injuries that are cognizable through citizen suits.

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[49] *See, e.g., Defenders of Wildlife*, 504 U.S. at 577.

[50] *See* Charles S. Abell, *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, 1964 (1995).

[51] *See id.*

[52] *See, e.g., Defenders of Wildlife*, 504 U.S. at 559-560.

[53] *See* Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881 (1983).

[54] *Id.* at 881.

[55] *See* William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 233 (1988).

[56] *See id.*; Laveta Casdorph, *The Constitution and Reconstitution of the Standing Doctrine*, 30 ST. MARY'S L.J. 471, 495 (1999).

[57] *See* Fletcher, *supra* note 55, at 233 (stating limitations on Congressional grants of standing, "limit the power of Congress to define and protect against certain kinds of injury that the Court thinks it is improper to protect against").

Similar criticisms have been made about the redressability requirement. If redressability is not analyzed in the context of the plaintiff's claim, the court independently determines redressability.[58] Additionally, one commentator has argued that once a plaintiff has demonstrated that she falls within the protection of a law, she should not be denied standing simply because the particular relief she seeks is not expressly given or is unlikely to occur.[59] This is because the legislature determines what injuries are covered by a statute when it writes the statute, but not necessarily what remedy is given.[60]

C. Environmental Citizen Suit Standing

1. Background of Environmental Citizen Suit Provisions

A citizen suit provision is a statutory grant of a right of action to enforce a regulatory law to a certain class of individuals.[61] Today's major environmental statutes were passed in the early 1970s after a growing public awareness of environmental degradation and the resulting public pressure to protect and preserve the environment.[62] Congress added citizen suit provisions to allow the public to ensure that governmental agencies enforce environmental laws.[63] The Clean Air Act was the first environmental statute to contain a citizen suit provision, and today every major environmental statute, with the exception of the Federal Insecticide, Fungicide, and Rodenticide Act, authorizes citizen enforcement.[64] Citizen involvement in environmental enforcement has become a "central element" in environmental law.[65]

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[58] *See* Casdorph, *supra* note 56, at 498.

[59] *See* Fletcher, *supra* note 55, at 242 (arguing that once a plaintiff's injury comes within a defined right, "it cannot be a valid standing objection in a particular case where plaintiff who is otherwise entitled to enforce the clause wants something beyond that which is provided directly by the clause, or that the enforcement of the clause is unlikely to provide it in her particular case.").

[60] *See id.*

[61] *See* Casdorph, *supra* note 56, at 507.

[62] *See* Elizabeth Rae Potts, *A Proposal for an Alternative to the Private Enforcement of Environmental Regulations and Statutes Through Citizen Suits: Transferable Property Rights in Common Resources*, 36 SAN DIEGO L. REV. 547, 549 (1999).

[63] *See* Casdorph, *supra* note 56.

[64] *See* Sunstein, *supra* note 7, at 165.

[65] *See* George Van Cleve, *Congressional Power to Confer Broad Citizen Standing in Environmental Cases*, 29 ENVTL. L. REP. 10028, 10038 (1999).

2. Underlying Theories of Citizen Enforcement

A major reason for citizen suit provisions is to provide supplemental enforcement and fill the gaps in government enforcement actions.[66] This function is particularly important since governmental agencies may not always be able to fully enforce environmental laws due to budget constraints.[67]

Citizen suits allow plaintiffs to enforce environmental laws when government agencies are unresponsive.[68] During the 1970 debate on the Clean Air Act, members of Congress argued that it would be "impossible" for the government alone to control all pollution.[69] Government agencies may be unresponsive because they are staffed by unelected people who may lack motivation to enforce environmental laws.[70] Citizen suits provide a venue for citizens to protect their own rights in the face of agency apathy.[71] Finally, citizen suits provide for more effective environmental law enforcement because they are less susceptible to political pressure than agency enforcement.[72]

Citizen suits, which typically allow "any person" to sue for statutory violations,[73] are attempts by Congress to define injuries it wants the courts to protect against. In many instances, Congress has also provided that civil penalties may provide one form of redress by allowing citizen suitors to sue for civil penalties.[74]

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[66] *See* Casdorph, *supra* note 56, at 547 (citing H.R. REP. NO. 94-1491, pt. 1, at 50 (1976) ("These citizen suit provisions are valuable for plugging holes that develop in a Federal enforcement program.")).

[67] *See id.* (citing S. REP. NO. 103-257, at 79 (1994) ("[C]itizens enforce against violations that otherwise might not be addressed due to the resource limitations of State and Federal authorities. . . .")).

[68] *See* Potts, *supra* note 62, at 554; *see also* Sunstein, *supra* note 7, at 193 ("Congress was especially enthusiastic about (citizen suits) in the environmental area, addressing the fear that statutory commitments would be threatened by bureaucratic failure.").

[69] *See* 116 CONG. REC. 33104 (1970), *reprinted in* 1 CAA Legislative History, at 355 (1974) (statement of Sen. Hart, quoting Mr. Ramsey Clark).

[70] *See id.*

[71] *See* Potts, *supra* note 62, at 554.

[72] *See id.* at 555.

[73] *See, e.g.*, 33 U.S.C. § 1365(a)(1) ("[A]ny citizen may commence a civil action on his own behalf. . . .").

[74] *See id.* at § 1365(a)(2) (stating that in the case of a violation of the Clean Water Act, the court may apply civil penalties).

3. Example of a Citizen Suit Provision: the Clean Water Act

Under the Clean Water Act (CWA), the discharge of any pollutant from a point source into the waters of the United States without a National Pollution Discharge Elimination System (NPDES) permit is unlawful.[75] These permits implement pollution limits through two different approaches. Section 301 of the CWA requires that NPDES permits include technology-based discharge limits.[76] For example, new point sources are limited to discharging what a facility would discharge if it used the "best available technology."[77] Additionally, permits must include discharge limits necessary to protect the designated uses of a water body.[78] These limits may be expressed in numeric terms, such as a specific amount of a pollutant that may be discharged, in bioassay terms,[79] such as a test on the effect of the discharge on aquatic organisms, or in narrative terms, for example, prohibiting the discharge of pollutants in toxic amounts.

Section 505(a) of the CWA authorizes "any citizen" to bring suit against any person, including a discharger, who is alleged to be in violation of an effluent standard or an order with respect to such standard, or against the Administrator of the Environmental Protection Agency (EPA) who allegedly fails to perform any nondiscretionary duty.[80] At least sixty days before bringing suit, the citizen must give notice to the alleged violator, the EPA Administrator, and the state where the alleged violation occurred, their intent to sue.[81] A citizen may sue only if the violation is recurring or ongoing after the sixty day notice period or if the citizen can make good faith allegations of continuing violations, not for wholly past violations.[82] In *Gwaltney of Smithfield*, the Court held that under the citizen suit provision of the Clean Water Act, a plaintiff may sue for relief, including civil penalties, for violations that are occurring at the time of suit or are reasonably likely to recur in the future, but not for wholly past violations.[83] The

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[75] *See id.* at § 1311(a).
[76] 33 U.S.C. § 1311(b)(2)(A).
[77] *Id.*; existing point sources must achieve "best practicable control technology." 33 U.S.C. § 1311(b)(1)(A).
[78] § 1311(b)(1)(C).
[79] § 1313(c)(2)(B).
[80] § 1365(a)(1)-(2).
[81] § 1365(b)(1).
[82] *See* Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49 (1987).
[83] *See id.* at 58-59, 64.

citizen suit is barred if the EPA or the state is "diligently prosecuting" a civil or criminal action against the discharger.[84]

4. Difficulty in Establishing Environmental Standing Due to the Unique Nature of Environmental Issues

Section 505(g) of the CWA defines "citizen" broadly as any person whose "interest is or may be adversely affected."[85] However, before a court will determine if a plaintiff has met the statutory requirements to bring suit, the plaintiff must demonstrate that she has standing to sue. Standing can be especially difficult to show in environmental cases. Although Congress has defined injury broadly by granting any citizen the right to sue for a statutory violation, the Supreme Court in recent years has not been generous in its granting citizens standing to sue.

Environmental standing is more difficult for plaintiffs to establish than standing in other types of cases. Unlike traditional lawsuits, where plaintiffs sue to redress personal wrongs, citizen suits allow plaintiffs to enforce the law on the public's behalf.[86] Additionally, many environmental laws are designed to prevent and remedy injury to the environment itself, rather than to human injury.[87] Many of these environmental laws protect human health only to the extent that the harm results from environmental damage.[88] True to the nature of environmental law, environmental plaintiffs usually have not suffered an individual harm, but sue to prevent or remedy an environmental injury, which makes establishing a traditional injury in fact difficult.[89] The unique qualities of environmental injury also make redress a challenge.

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[84] 33 U.S.C. § 1365(b)(1)(B).

[85] § 1365(g).

[86] *See* Michael S. Greve, *The Private Enforcement of Environmental Law*, 65 TUL. L. REV. 339, 341 (1990) (arguing that citizen suit provisions are intended to enforce environmental laws and not personally reward individuals).

[87] *See* Richard J. Lazarus, *Restoring What's Environmental About Environmental Law in the Supreme Court*, 47 UCLA L. REV. 703, 744-745 (2000) (noting that most environmental laws are solely concerned with impacts on the natural environment, and those laws that address human injury do so only as the environmental impacts affect human health. "A common denominator, therefore, for environmental law is the ecological injury that serves as the law's threshold and often exclusive focus.").

[88] *See id.*

[89] *See* Greve, *supra* note 86, at 340 (stating that plaintiffs in citizen suits sustain no or only minimal injury in fact).

Professor Richard Lazarus has defined several unique aspects of environmental harm that make establishing injury in fact and redressability difficult.[90] First, many environmental laws seek to prevent catastrophic harm, rather than remedy an injury that has already occurred.[91] As explained below, this conflicts with the Court's requirement of a concrete injury before it will grant standing.[92] Environmental injury also frequently cannot be physically contained, but rather spreads over distant geographic areas.[93] The Court's decision in *National Wildlife Federation* which rejected plaintiffs' injury in fact over a vast area of land, indicates that geographically large environmental injury may go unrecognized by the Court for standing purposes.[94]

Environmental harm is often not imminent, but builds over time.[95] This type of environmental injury may start by causing only a small harm and as time passes grow into a large, potentially irreversible, injury.[96] Because the Court now requires proof of an imminent harm, many environmental injuries will not satisfy the Court's standing requirements.[97] Additionally, environmental injury may be uncertain due to the complexity of the environment and the scientific inability to accurately predict the environmental impact of certain actions.[98] Adding to this uncertainty is the fact that environmental injury often results from the cumulative effect of many actions spread over time.[99] For example, a waterway may be polluted from many sources, including non-point source pesticide run-off and point source discharge pollution. Over time, these pollutants accumulate in the water and this cumulative effect may compound the harm to the environment. Because of these unique qualities of environmental harm, compliance with the Court's strict notions of redressability will be difficult. Because the injury has uncertain and cumulative causes, it may be speculative that a favorable court decision will remedy the harm.[100]

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[90] *See* Lazarus, *supra* note 87, at 745-49.
[91] *See id.* at 745.
[92] *See infra* at 18.
[93] *See* Lazarus, *supra* note 87, at 745.
[94] *See* Lujan v. National Wildlife Federation, 497 U.S. 871, 889 (1990).
[95] *See* Lazarus, *supra* note 87, at 746.
[96] *See id.*
[97] *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 564 (1992); Lazarus *supra* note 87, at 752.
[98] *See* Lazarus, *supra* note 87, at 747.
[99] *See id.*, at 747-48, 752.
[100] *See id.* at 752; *see infra* at 19.

Finally, many environmental injuries are not easy to value in monetary terms because there is no direct market comparison.[101] For example, it is difficult to determine the economic value of preventing a species from becoming extinct. Many environmental laws purposely do not consider economics.[102] These laws protect the environment out of a concern for the uncertain effects of what will happen if the environment is not protected, and on the philosophical and moral ground that the environment has inherent value.[103]

5. The Court's Two Eras of Environmental Standing

Since the inception of modern environmental law in the early 1970s, the Court has gone through two eras of application and analysis in environmental standing. In the early years, while the Court did not alter the fundamental requirements of standing, it was responsive to the unique nature of environmental issues, and applied standing requirements leniently.[104] In order to promote the new environmental objectives of Congress, the Court was receptive to suits by environmental plaintiffs during the late 1960s and 1970s.[105] The Court's early acceptance of relaxed environmental standing requirements culminated with the lenient grant of standing in *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*.[106]

Since the *SCRAP* decision, the Court has withdrawn from its initial accommodation of environmental law and how it applies standing requirements. During this second era of environmental standing, the Court has applied increasingly stringent interpretations of both the injury in fact and redressability requirements, which has greatly narrowed the availability of environmental standing.[107] Additionally, the Court has begun to use the separation of powers argu-

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[101] *See id.* at 748.
[102] *See id.*
[103] *See id.*
[104] *See* Lazarus, *supra* note 87, at 744-745.
[105] *See* Robert L. Glicksman, *A Retreat from Judicial Activism: The Seventh Circuit and the Environment*, 63 CHI. KENT L. REV. 209 (1987).
[106] *See* United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669 (1973); *see infra* at 17.
[107] *See* Lazarus, *supra* note 87, at 750.

ment to restrict the availability of judicial review.[108] The Court has gone so far as to as to imply that citizen suits are an impermissible exercise of Congress' power.[109]

In *Laidlaw*, the Court signals a retreat from its recent stringent interpretation of standing requirements. While not fully returning to its initial environmental responsiveness of the early 1970s, the *Laidlaw* Court recognizes the need to cut back on the extreme, stringent requirements of environmental standing due to the unique nature of environmental law and respects Congress' intent in environmental laws.

a. The First Era: 1970–1989

In *Sierra Club v. Morton*, the Sierra Club sued under the Administrative Procedure Act to stop the Forest Service from approving Walt Disney's development of Mineral King Valley, an area of "great natural beauty," into a ski resort.[110] The Court rejected the Sierra Club's attempt to obtain standing based on its interest in the environment alone, stating, "the 'injury in fact' test requires more than an injury to a cognizable interest."[111] The injury in fact test "requires that the party seeking review be himself among the injured."[112] The Court found that in order to show it was injured by the development, Sierra Club had to show that some of its members used the Mineral King area.[113] The Court held that the Sierra Club was not injured by the development because it did not show that any of its members used the area and, therefore, its members would not be affected by the proposed development.[114] While the Court followed its standing doctrine in requiring the plaintiff to be among those injured, the decision was a victory for environmental plaintiffs because the Court recognized that an injury can involve harm to aesthetic and environmental values, not only economic values.[115]

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[108] *See* Sunstein, *supra* note 7, at 194 (noting that *Lujan v. National Wildlife Federation* used Article II in part to reason that the plaintiffs could not demonstrate standing).
[109] *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 576-77 (1992).
[110] Sierra Club v. Morton, 405 U.S. 727, 728 (1972).
[111] *Id.*
[112] *Id.* at 734-35.
[113] *See id.*
[114] *See id.* at 735.
[115] *See id.* at 743.

The Court applied its requirements for injury in fact the next year in *United States v. Students Challenging Regulatory Agency Procedures.*[116] In *SCRAP*, a group of law students, joined by other environmental groups, sued under the National Environmental Policy Act[117] to enjoin enforcement of new increased railroad freight rates that the Interstate Commerce Commission had approved.[118] The students alleged that the increased freight rates would discourage the use of recyclable materials and encourage the use of non-recycled raw materials, resulting in an increase of mining, logging, and other extractive activities that would harm the environment.[119] SCRAP alleged that each of its members used the "streams, mountains, and other natural resources surrounding the Washington Metropolitan area," and that the increased extractive activities would harm these interests.[120]

In a very lenient application of the injury in fact requirement, the Court held that SCRAP had sufficiently demonstrated injury in fact to survive a motion to dismiss.[121] Although the Court admitted that the injury was less "direct and perceptible" than the injury in *Morton*, *SCRAP* demonstrated that it was among those persons "injured in fact" by the increased rate of extractive activities and was entitled to review.[122] Commentators and the Court itself have noted that *SCRAP* is the pinnacle of relaxation of the injury in fact requirement.[123]

For the next seventeen years, the Supreme Court did not decide another major environmental standing case. Pleading amounted to a "pro forma recitation of the *Morton* formula."[124] Then, in 1990, the Supreme Court began its dramatic cutback in the availability of environmental standing with the case of *Lujan v. National Wildlife Federation.*[125]

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[116] 412 U.S. 669 (1973).
[117] 42 U.S.C. §§ 4321-4330.
[118] *SCRAP*, 412 U.S. at 669-678.
[119] *See id.* at 675.
[120] *See id.* at 678.
[121] *See id.* at 690.
[122] *See id.*
[123] *See, e.g.*, Karin P. Sheldon, Steel Company v. Citizens for a Better Environment: *Citizens Can't Get No Psychic Satisfaction*, 12 TUL. ENVTL. L.J. 1, 27 (1998) (noting that while *SCRAP* has never been explicitly overturned, the Court has made clear that it will not find injury in fact so leniently again); *see also National Wildlife Federation*, 497 U.S. at 889 (1990) (Justice Scalia writing for the majority stated that the expansive expression of standing under *SCRAP* has "never since been emulated by this Court.").
[124] Sheldon, *supra* note 123, at 29.
[125] 497 U.S. 871 (1990).

b. The Second Era: the 1990s

Beginning in the early 1980s, two successive Republican administrations appointed several conservative Justices in an attempt to further their agendas, which included a desire to curtail environmental protection programs.[126] As shown by the environmental standing opinions during this era, the Court withdrew from its earlier lenient application of standing requirements to accommodate the unique nature of environmental law. Justice Scalia has authored several opinions for the Court restricting environmental standing. These opinions are overtly colored by his beliefs regarding separation of powers.[127] Justice Scalia believes that the Court needs to adhere to a strict view of the separation of powers because it is the sole responsibility of the executive branch and not the courts to enforce the laws.[128] The first of these opinions was *Lujan v. National Wildlife Federation*.[129]

In *National Wildlife Federation* the Court, while reciting the same elements articulated in *Morton*, dramatically tightened the requirements for demonstrating injury in fact. The National Wildlife Federation alleged that the U.S. Bureau of Land Management's "land-withdraw review program" injured the aesthetic and recreational interests of its members in the area.[130] In a 5 to 4 decision, the Court held that the asserted injuries were not specific enough to support standing.[131] The Court found that the National Wildlife Federation could not claim injury over such a vast area of land, stating that injury in fact was not satisfied when a member alleged use of an "unspecified portion of an immense tract of territory. . . ."[132]

Just two years after *National Wildlife Federation*, the Court decided *Lujan v. Defenders of Wildlife*,[133] which severely restricted environmental standing. In *Defenders of Wildlife*, the plaintiff sued under the citizen suit provision of the

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[126] *See* Casdorph, *supra* note 56, at 503.

[127] *See National Wildlife Federation*, 497 U.S. 871; Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992); Steel Co. v. Citizens for a Better Env't, 523 U.S. 83 (1998); *see also* Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U.L. REV. 881 (1983).

[128] *See* Scalia, *supra* note 53.

[129] 497 U.S. 871 (1990).

[130] *See id.* at 885.

[131] *See id.* at 890.

[132] *Id.* at 889.

[133] Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).

federal Endangered Species Act (ESA)[134] to compel the U.S. Department of Interior to revise its regulations. The plaintiff alleged that the ESA was wrongly interpreted to apply only to domestic projects, not foreign ones.[135]

Justice Scalia, joined by Justices Rehnquist, White, and Thomas, denied the plaintiff standing on both injury in fact and redressability grounds.[136] Justice Scalia began his opinion by discussing the proper separation of powers through asserting the importance of standing requirements in confining the judiciary to its proper role in deciding cases or controversies.[137] He admitted that standing requirements as articulated by the Court do not appear in the Constitution, but declared that the "central mechanism of separation of powers depends largely upon common understanding of what activities are appropriate to legislatures, to executives, and to courts."[138] Justice Scalia went on to state that the "irreducible constitutional minimum of standing" is injury in fact, causation, and redressability.[139]

To support standing, Defenders of Wildlife submitted affidavits of two members who had visited the habitat of the endangered animals that were likely to be affected by the regulation.[140] The members claimed they had plans to return to that habitat.[141] However, they could not give an exact departure date, in part, because there was a civil war occurring in one of the affected countries.[142] The Court found that the alleged injury did not meet Article III requirements because it was not imminent; the members had no concrete plans to return.[143] Justice Scalia wrote that "some day" intentions to return without concrete plans do not support the "actual or imminent" requirement of injury in fact.[144]

The Court also found that Defenders of Wildlife did not satisfy the redressability requirement of standing since it could not show that a change in ESA regulations would necessarily alter or stop the overseas projects that threat-

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[134] 16 U.S.C. §§ 1531-1544 (2000).
[135] 504 U.S. at 557-58.
[136] *See id.* at 564-69.
[137] *See id.* at 559-60.
[138] *Id.*
[139] *Id.* at 560.
[140] *See id.* at 563.
[141] *See id.*
[142] *See id.*
[143] *See id.* at 564.
[144] *See id.*

ened to harm the endangered species.[145] The Court noted that the federal agencies funding the disputed projects were not parties to the action and would not be bound by ESA regulations.[146] In addition, those agencies supplied less than ten percent of the project funding so even if they pulled out, the project would likely continue.[147]

The Court additionally rejected plaintiffs' claim of procedural injury under the ESA. The Court found that the plaintiffs did not assert a specific injury in fact resulting from a procedural violation, and only asserted a generalized grievance.[148] The Court found that it could not vindicate a general grievance because it would violate the separation of powers principle and the judiciary may not vindicate a public interest.[149] The Court heavily criticized citizen suits and stated that Congress could not abrogate the injury in fact requirement by articulating its own interpretation of an injury.[150] The Court claimed that Congress' conversion of the public interest in compliance with the laws into an individual right would violate the Article II requirement that it is the executive branch's duty to execute the laws.[151]

Many commentators heavily criticized the Court's narrow interpretation of Article II in *Defenders of Wildlife* in rejecting Congress' broad grant of standing in the ESA.[152] *Defenders of Wildlife* was the first Supreme Court case to find that Congress may not overcome the Court's standing requirements.[153]

The next environmental standing case the Court decided was *Bennett v. Spear*.[154] This case demonstrates how the Court will grant or deny standing based in part on the majority's view of the merits of a case. Unlike prior environmental standing cases, *Bennett* involved a challenge to protect private property interests rather than to protect the environment. In cases involving environmen-

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[145] *See id.* at 568.
[146] *See id.* at 568-571.
[147] *See id.*
[148] *See id.* at 573-74, 576.
[149] *See id.*
[150] *See id.* at 576-77.
[151] *See id.*
[152] *See* Gene Nichol, *Justice Scalia, Standing, and Public Law Litigation*, 42 DUKE L.J. 1141, 1142-1143 (1993) (stating that *Defenders of Wildlife* is inconsistent with the language and history of Article III and ideas of public law litigation); *see also* Sunstein, *supra* note 7 (arguing that *Defenders of Wildlife* misinterpreted the Constitution).
[153] *See* Sunstein, *supra* note 7, at 163-65, 209 (noting that in *Defenders of Wildlife*, the Court articulated the "novel holding that Congress cannot grant standing to citizens").
[154] 520 U.S. 154 (1997).

tal plaintiffs, the Court rigidly applied standing requirements. In *Bennett,* however, the Court went against previous decisions to accommodate private interest and applied lenient standards to the injury in fact and redressability requirements. The Court showed that it will apply standing requirements differently depending on its views of the merits of the case.

In *Bennett*, Oregon ranchers and irrigation districts challenged the determination of the U.S. Fish and Wildlife Service (the Service) that the release of water from an irrigation project would jeopardize endangered fish.[155] The plaintiffs also claimed that the action involved an implicit critical habitat determination that violated the requirements of the ESA.[156] Due to the Service's recommendation, the Bureau of Reclamation opted to increase water levels at two reservoirs.[157] The plaintiffs alleged that this action would injure them by reducing their quantity of irrigation water use.[158]

In stark contrast to *Defenders of Wildlife*, Justice Scalia, writing for the majority, used an expansive definition of environmental injury. He reasoned that Congress intended to confer the broadest standing possible, since all persons have an interest in the environment and the statute used the term "any person."[159] Rather than emphasize the separation of powers requirement that the executive branch has the sole responsibility to enforce the laws, Justice Scalia asserted that the purpose of the citizen suit provision is to encourage "private attorney general" suits.[160] The Court found that the plaintiffs satisfied injury in fact, even though it was uncertain that the plaintiffs' share of water would necessarily be decreased.[161] Conversely, in *Defenders of Wildlife,* the Court rejected the plaintiffs' injury in fact because it was uncertain exactly when they would return to the affected area.

The *Bennett* Court also held that a favorable decision would redress the plaintiffs' injury even though the Bureau of Reclamation was not a party to the action, nor would it be bound by the Service's recommendation.[162] This contrasts with the reasoning in *Defenders of Wildlife* where the Court did not find

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[155] *See id.* at 160.
[156] *See id.*
[157] *See id.* at 159.
[158] *See id.* at 160.
[159] *See id.* at 165.
[160] *See id.*
[161] *See id.* at 168.
[162] *See id.* 169-171.

redressability because the agencies funding the disputed projects were neither parties to the action, nor bound by ESA regulations.[163]

The recent series of increasingly restrictive Supreme Court environmental standing cases culminated with *Steel Co. v. Citizens for a Better Environment.*[164] In *Steel Co.*, Citizens for a Better Environment (CBE) sued Steel Co., a manufacturing company in Chicago, under the citizen suit provision of the Emergency Planning and Community Right-To-Know Act (EPCRA).[165] CBE alleged that Steel Co. failed to submit hazardous-chemical inventory and toxic-chemical release forms.[166] Steel Co. had failed to file the requisite forms since 1988, the first year of EPCRA's deadlines.[167] Only when Steel Co. received notice of CBE's intent to sue did it file all of the overdue forms.[168] EPA did not bring action against the Steel Co., and CBE filed suit at the end of the sixty-day notice period.[169] Steel Co. argued that the court did not have jurisdiction to hear the case since it was no longer in violation of EPCRA at the time the plaintiff filed suit, and EPCRA did not authorize suits for wholly past violations.[170] The District Court agreed, but the Seventh Circuit reversed. The case came to the Supreme Court on appeal from a motion to dismiss under Rule 12(b) of the Federal Rules of Civil Procedure, so the Court assumed the facts in the complaint supported the plaintiffs' allegations.[171] Rather than addressing the statutory issue of EPCRA's application to past violations, the Court held that CBE did not have standing because it did not meet the redressability requirement of standing.[172]

Justice Scalia wrote for the Court and upheld the defendant's motion to dismiss, denying CBE standing on the basis of redressability.[173] The Court found that plaintiff's claim for declaratory relief was "worthless" to the plaintiff and "all the world," since it was not disputed that Steel Co. failed to file the reports on time in violation of EPCRA.[174] The Court held that civil penalties did not pro-

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[163] *See id.* 169-171.
[164] Steel Co. v. Citizens for a Better Env't, 523 U.S. 83 (1998).
[165] 42 U.S.C. § 11046 et seq.
[166] 523 U.S. at 87.
[167] *See id.*
[168] *See id.* at 88.
[169] *See id.*
[170] *See id.*
[171] *See id.*
[172] *See id.* at 105.
[173] *See id.*
[174] *Id.* at 106.

vide redress to the plaintiffs because the money went to the U.S. Treasury, and not to the plaintiffs.[175] The Court found that by requesting civil penalties, CBE did not seek to remedy its own injury, but rather sought "vindication of the rule of law—the 'undifferentiated public interest' in faithful execution of EPCRA."[176] Justice Scalia rejected the dissent's argument that civil penalties provide redress because they will deter future violations.[177] The Court went on to state that "psychic satisfaction" that laws are properly enforced is not an acceptable remedy.[178]

Justices Stevens, Souter, and Ginsburg concurred on the statutory ground that EPCRA does not authorize suits for wholly past violations,[179] but disagreed on the standing issue. Justice Stevens noted that the redressability requirement does not appear in the Constitution, but rather is a "judicial creation of the past 25 years. . . . "[180] Justice Stevens disagreed with the Court's analysis of redressability, finding that deterrence, both of the specific defendant in the case at issue and general deterrence to all potential violators, can provide redressability.[181] Stevens criticized the Court for failing to articulate why payment to the plaintiff, even if only a "peppercorn" would provide redress, while payment to the U.S. Treasury would not.[182]

Before *Laidlaw*, the prospect for environmental standing was not bright.[183] In *National Wildlife Federation*, *Defenders of Wildlife*, and *Steel Co.*, the Court narrowed the concept of environmental standing by requiring an imminent and specific injury in fact, and by finding that general deterrence, does not provide redress. However, the Court signaled a new willingness to support environmental standing in *Laidlaw*.[184]

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[175] *See id.*

[176] *Id.*

[177] *See id.*

[178] *Id.* at 107.

[179] *See id.* at 112.

[180] *Id.* at 124.

[181] *See id.* at 127.

[182] *Id.*

[183] *See* Sheldon, *supra* note 123, at 56 ("It is clear from *National Wildlife Federation*, *Defenders of Wildlife* and *Steel Company* that Justice Scalia is on a 'slash and burn' expedition through the law of environmental standing."); *see also* Casdorph, *supra* note 56, at 547 (stating that even if Congress alters citizen suit statutes, the struggle over standing will not end, noting the finality of the judiciary's voice and the unlikelihood of a constitutional amendment).

[184] Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. Inc., 120 S. Ct. 693 (2000).

III. *LAIDLAW*

A. Facts of Laidlaw

In 1986, Laidlaw Environmental Services, Inc. (Laidlaw) purchased a hazardous waste incinerator facility and wastewater treatment plant.[185] In 1987, it received a National Pollution Discharge Elimination System permit under the Clean Water Act authorizing the discharge of treated water into a nearby river.[186] Laidlaw repeatedly exceeded the discharge limits set by the permit. Specifically, it "consistently failed" to meet its discharge limit on mercury, violating this limit 489 times in the years between 1987 and 1995.[187] In 1992, plaintiffs Friends of the Earth and Citizens Local Environmental Action Network, Inc. (later joined by Sierra Club, collectively referred to as FOE) sent a sixty-day notice letter of intent to file a citizen suit under the CWA.[188]

After receiving the notice of intent to sue, Laidlaw contacted the South Carolina Department of Health and Environmental control (DHEC) to request a state enforcement action that would bar FOE's suit.[189] When DHEC agreed to sue Laidlaw for violation of its NPDES permit, Laidlaw's company lawyer drafted the complaint and paid the filing fee.[190] The day before the expiration of the sixty-day notice of intent to sue, Laidlaw and DHEC agreed on a settlement calling for $100,000 in civil penalties and requiring Laidlaw make "every effort" to comply with its permit in the future.[191] Three days later, FOE filed suit against Laidlaw for violations of the NPDES permit.[192]

B. District Court

In its suit, FOE sought declaratory relief, injunctive relief, and civil penalties. The District Court rejected Laidlaw's motion for summary judgement and found that FOE had standing.[193] FOE appealed the civil penalty as inadequate

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[185] *See id.* at 701.
[186] *See id.* at 701-02.
[187] *Id.*
[188] *See id.* at 702.
[189] *See id.*; *See supra* at 12-14.
[190] *Laidlaw*, 120 S. Ct. at 702.
[191] *Id.*
[192] *See id.*
[193] *See id.*

and Laidlaw cross-appealed arguing that FOE lacked standing to bring the suit.[194] In the time between the filing of the suit and the entry of judgement, Laidlaw violated its mercury discharge limit 13 times, and committed 13 monitoring violations and 10 reporting violations.[195]

C. Fourth Circuit's Application of Steel Co.

Laidlaw offered the Fourth Circuit one of the first opportunities to apply the Supreme Court's *Steel Co.* decision at the circuit level.[196] Upon applying *Steel Co.*, the court found that FOE did not demonstrate redressability because the only potential relief available was civil penalties payable to the U.S. Treasury.[197] The court concluded that the case was moot because civil penalties would not redress FOE's alleged injuries and because the plaintiffs did not appeal the district court's denial of declaratory and injunctive relief.[198] In a far-reaching decision, the Supreme Court reversed.

D. The Supreme Court Decision

The Supreme Court granted certiorari to address whether the Fourth Circuit properly dismissed the case as moot. The Court addressed whether Laidlaw had achieved substantial compliance with its permit at the time the appeals court decided the case, and whether civil penalties may provide redress for injured plaintiffs.[199] Justices Rehnquist, Stevens, O'Connor, Kennedy, Souter, and Breyer joined the majority opinion written by Justice Ginsburg.[200] The majority reversed the Fourth Circuit's decision and held that the case was improperly dismissed as moot, and that civil penalties may provide redress because they deter future violations.[201] Justice Kennedy concurred with the majority, but wrote separately to emphasize his concern that plaintiffs suing for public fines, such as in *Laidlaw*, may violate the separation of powers idea that it is the executive's

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[194] *See id.* at 703.
[195] *See id.* at 702.
[196] Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 149 F.3d 303, 306-307 (4th Cir. 1998).
[197] *See id.* at 306.
[198] *See id.* at 306-07.
[199] Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. Inc., 120 S. Ct. 693, 700 (2000).
[200] *See id.* at 699-700.
[201] *See id.* at 700.

duty to enforce the laws.[202] Justice Scalia and Justice Thomas dissented.[203] The dissent sharply disagreed with the majority and found that the plaintiffs could not demonstrate injury in fact because they could not show harm to the environment.[204] The dissent also found that civil penalties may not provide redress.[205]

1. Majority Opinion

Rather than limiting its consideration to the mootness issue upon which the Fourth Circuit based its decision, Justice Ginsburg, in writing for the majority, took the opportunity to perform an extensive analysis of standing, including injury in fact and redressability.[206] The court began its analysis by detailing the now familiar factors of Article III standing: injury in fact, causation, and redressability.[207]

a. Injury in Fact

The Court clarified that the proper focus for the injury in fact requirement is harm to the plaintiff, not necessarily harm to the environment.[208] The Court rejected Laidlaw's argument that the plaintiffs did not suffer any injury because there was no "demonstrated proof of harm to the environment" from its NPDES violation.[209] To support injury, FOE members stated in affidavits that they were "concerned about the harmful effects from discharged pollutants," and that they avoided using the water downstream from Laidlaw's discharge for recreational and aesthetic purposes because of their concern of pollution.[210] One FOE member also claimed that the market value of her home had been reduced by its close proximity to the polluting Laidlaw facility and that the pollution likely accounted for this discrepancy.[211]

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[202] *See id.* at 713.
[203] *See id.*
[204] *See id.*
[205] *See id.* at 715.
[206] *See id.* at 704-05.
[207] *See id.* at 704.
[208] *See id.*
[209] *Id.*
[210] *Id.* at 704-05.
[211] *See id.* at 705.

The Court found that the plaintiffs demonstrated injury in fact by showing, not harm to the environment, but harm to the plaintiffs themselves.[212] The Court held that plaintiffs had satisfied the specific injury requirement articulated in *National Wildlife Federation*, since they showed that their reasonable concerns about the adverse effect of Laidlaw's discharges directly affected their recreational, aesthetic, and economic interests.[213] Additionally, the Court found that the Laidlaw plaintiffs had satisfied the requirement of showing imminent injury as defined in *Defenders of Wildlife*.[214] The Court noted that the plaintiffs' assertions that they would use the river for recreation, if not for Laidlaw's pollution, were different than Defenders of Wildlife's "some day" intentions to visit the affected countries.[215]

Justice Ginsburg firmly rejected Justice Scalia's assertion that the plaintiffs' concern of pollution was unrealistic:

> Unlike the dissent . . . we see nothing "improbable" about the proposition that a company's continuous and pervasive illegal discharges of pollutants into a river would cause nearby residents to curtail their recreational use of that waterway and would subject them to other economic and aesthetic harms. The proposition is entirely reasonable . . . and that is enough for injury in fact.[216]

Absent from the Court's discussion of injury in fact was any mention of the separation of powers argument: whether the citizen suit provision of the CWA violated the Executive's duty to execute the laws.

b. Redressability

After finding that CBE had demonstrated injury in fact, the Court went on to analyze redressability. In contrast to the Court's position in *Steel Co.*, Justice Ginsburg found that civil penalties in the face of ongoing violations have a deterrent effect.[217] The Court stated that it has found on "numerous occasions" that civil penalties have some deterrent effect while Congress similarly has found

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[212] *See id.*
[213] *See id.*
[214] *See id.* at 706.
[215] *See id.*
[216] *Id.*
[217] *See id.* at 706-07.

that civil penalties in the Clean Water Act deter violations.[218] The Court stated "[t]o the extent (civil penalties) encourage defendants to discontinue current violations and deter them from committing future ones, they afford redress to citizen plaintiffs. . . ."[219].

Justice Ginsburg then distinguished *Steel Co.*[220] She clarified that *Steel Co.* did not stand for the proposition that deterrence from civil penalties never provided redressability. Rather, *Steel Co.* prohibited the plaintiff from receiving civil penalties for violations that had ceased by the time of suit.[221] The Court deferred to Congress by noting that it is appropriate for Congress to conclude that civil penalties provide deterrence.[222]

Justice Ginsburg disagreed with Justice Scalia's dissent that it is the availability, not the imposition, of civil penalties that provides deterrence.[223] Justice Ginsburg did admit that civil penalties may not provide deterrence where they are "insubstantial" or "remote."[224] However, "[t]he fact that this vanishing point is not easy to ascertain does not detract from the deterrent powers of such penalties in the ordinary case."[225] This statement makes clear that the Court will likely find that civil penalties provide redress in the normal situation. Justice Ginsburg specifically declined to address the "outer limits" of the civil penalty deterrence principle.[226] Given the Court's hostility toward environmental plaintiff standing in the last twenty years, this issue is likely to appear again.

Justice Ginsburg also disagreed with the dissent's claim that citizen suits for civil penalties interfere with separation of powers.[227] The Court noted that the Executive Branch had endorsed such citizen suits and submitted amicus briefs in support of FOE's standing in this case.[228]

In a brief concurring opinion, Justice Kennedy voiced his concern about the possible infringement on the executive's duty under Article II and the sepa-

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[218] *Id.* at 706.
[219] *Id.* at 706-707.
[220] *See id.* at 707-08.
[221] *See id.*
[222] *See id.* at 707.
[223] *See id.*
[224] *Id.*
[225] *Id.*
[226] *Id.*
[227] *See id.* at 708 n.4.
[228] *See id.*

ration of powers issue when private plaintiffs are allowed to sue for public fines.[229] However, Justice Kennedy joined the Court's opinion because the questions presented in the petition for certiorari did not identify the separation of powers issue in particular.[230] His focus on the separation of powers issue signifies that he will likely be more willing to side with Justices Scalia and Thomas in future cases that deal squarely with the issue of whether public fines gained by private litigants violate separation of powers.

2. Dissent's Analysis

a. Injury in Fact

Justice Scalia was joined by Justice Thomas in a vigorous dissent that accused the Court of making a "sham" out of the injury in fact requirement.[231] Justice Scalia believed that the plaintiffs "fell far short" of establishing injury in fact as defined in *Defenders of Wildlife*.[232] While acknowledging that the focus of the injury in fact requirement is harm to the plaintiff, Justice Scalia rejected the majority's holding that a plaintiff may demonstrate injury without showing harm to the environment.[233] Justice Scalia admitted that it is possible a plaintiff could be harmed without harm to the environment; however, such a plaintiff has the burden of demonstrating the injury, which Justice Scalia found the plaintiff did not do here.[234] The dissent described the plaintiff's allegations of injury as nothing but "subjective apprehensions," similar to the "conclusory allegations" that were insufficient to support injury in fact in *National Wildlife Federation*.[235] Clearly, the dissent did not agree with the majority that the plaintiffs' concern over the defendant's statutory violations, and the resulting water pollution, constituted injury in fact.

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[229] *See id.* at 713.
[230] *See id.*
[231] *Id.* at 715.
[232] *Id.* at 713.
[233] *See id.* at 714 (noting that "We have certainly held that a demonstration of harm to the environment is not *enough* to satisfy the injury-in-fact requirement unless the plaintiff can demonstrate how he personally was harmed.").
[234] *See id.*
[235] *Id.* at 715.

b. Redressability

Justices Scalia and Thomas also rejected the Court's holding that civil penalties payable to the U.S. Treasury provided redress for FOE's injury.[236] The dissent criticized the majority's interpretation that *Steel Co.* only held that civil penalties do not provide redress in the context of past violations rather than continuing ones.[237] The dissent found that the holding of redress here expanded standing beyond constitutional limits and that it has "grave implications for democratic governance."[238] Justice Scalia articulated three reasons why the majority's finding of redressability in *Laidlaw* presents such a threat to a democratic system of government.

First, Justice Scalia noted that a general injury that affects citizens equally, including the plaintiff, does not constitute an injury in fact.[239] Therefore, Justice Scalia reasoned, a generalized remedy in the payment of civil penalties to the U.S. Treasury, rather than to the plaintiff himself, does not provide redressability.[240] The dissent asserted that by giving plaintiffs the power to sue for such a general public remedy, civil penalties in the CWA, Congress had unconstitutionally converted a public interest into an individual right.[241]

Secondly, the dissent claimed that any deterrent benefit from civil penalties was "speculative as a matter of law."[242] The dissent found that civil penalties are not likely to redress plaintiffs' injury because such penalties provide only a marginal increase in deterrence.[243] The dissent reasoned that the polluter was already sufficiently deterred from violating its permit since it was subject to a regulatory program and had been sued for an injunction.[244] Because the Court declined to define the scope of civil penalties' deterrence, while holding that civil penalties will deter polluters in the normal situation, Justice Scalia accused the majority of creating a "revolutionary new doctrine of standing that will per-

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[236] *See id.*
[237] *See id.*
[238] *Id.*
[239] *See id.* at 716.
[240] *See id.*
[241] *See id.* at 717.
[242] *Id.*
[243] *See id.* at 718.
[244] *See id.* at 718.

mit the entire body of public civil penalties to be handed over to enforcement by private interests."[245]

Lastly, the dissent attacked the Court's decision as violating the structure of government.[246] Justice Scalia found that statutes, such as the Clean Water Act, which allow citizens to sue for civil penalties payable to the U.S. Treasury, violate the separation of powers principle because they "turn[] over to private citizens the function of enforcing the law."[247] The dissent complained that the availability of civil penalties to an environmental plaintiff turns the plaintiff into a "self-appointed mini-EPA."[248] Justice Scalia argued that these penalties will give plaintiffs "massive bargaining power" in proportion to their injury, allowing them to choose their own targets without public control.[249] Justice Scalia dismissed the control the EPA may have over the case by intervening because the choice over when to enforce remains with the private plaintiff.[250] For example, if the EPA decides not to initially prosecute a polluter or chooses not to intervene in a citizen suit, a private plaintiff may sue independently under the citizen suit provision.

IV. How Has *Laidlaw* Changed The Law?

A. Prior Supreme Court Cases

Laidlaw significantly differs from prior Supreme Court environmental standing decisions in several respects. First, the general tone and emphasis of the *Laidlaw* decision, authored by Justice Ginsburg, is different from the three prior environmental-plaintiff standing cases written by Justice Scalia. Where the prior decisions applied progressively more stringent standards of both injury in fact and redressability, the *Laidlaw* Court lightened the standing burden on environmental plaintiffs in order to accommodate the unique nature of environmental law. Moreover, *Laidlaw* is the first case where the Court has upheld public-interest environmental plaintiff standing in ten years.

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[245] *Id.* at 719.
[246] *See id.*
[247] *Id.*
[248] *Id.*
[249] *Id.*
[250] *See id.*

1. Injury in Fact

In *Laidlaw*, the Court significantly loosened the injury in fact requirement. In contrast with prior cases, the Court gave substantial deference to Congress in defining an injury. In essence, the Court will find an injury if a defendant violated a statute, and the plaintiff can demonstrate reasonable concern of personal harm from this statutory violation. The Court did not focus on whether Laidlaw caused demonstrable harm to the environment and did not discuss background pollution levels or whether the plaintiffs could detect any pollution. By focusing on whether there had been a statutory violation, the Court respected Congress' language in citizen suit provisions that typically state any person may sue for statutory violations. Additionally, by applying a lenient injury in fact standard, the Court accommodated the unique qualities of environmental harm. Deference to Congress' definition of injury also addresses commentators' criticisms of the injury in fact requirement enlarging the Court's power because the Court can independently define what it believes to be a cognizable injury, without reference to a statute.[251] While on its face *Laidlaw* does not specifically contradict the standing decisions in *National Wildlife Federation* or *Defenders of Wildlife*, the decision dramatically differs from prior decision in its lenient application of the injury in fact requirement.

The Court's decision should have the practical effect of lowering environmental plaintiffs' litigation costs. Because the Court can find injury in fact when a plaintiff shows that a defendant has violated a statute, environmental plaintiffs probably will no longer have to hire expert witnesses and pay for extensive technical studies to demonstrate harm to the environment.

Laidlaw liberalized standing from prior restrictive decisions, but it did not open the door for environmental standing completely. The Court leaves open the possibility for defendants to argue that a plaintiff's fear of pollution from the defendant's statutory violation is not reasonable, and therefore not sufficient to show injury in fact.[252] In *Laidlaw*, the discharger violated its permit 489 times between 1987 and 1995 and the Court found the plaintiffs' concerns about polluted water were "entirely reasonable."[253] As explained above, the Court will probably find a plaintiff's concerns reasonable if the defendant has violated an

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[251] *See supra* pp. 8-10 (discussing commentator criticism of Court's self-definition of injury).
[252] *Laidlaw*, 120 S. Ct. at 706.
[253] *See id.* at 706.

environmental statute, and the plaintiff can demonstrate she used or would otherwise use the water if not for the pollution. *Laidlaw* appeared to be a relatively easy case upon which to find the plaintiffs' concerns reasonable due to the extent of the discharger's violations. However, other situations may not be so clear. The dissent indicates that at least two members of the Court, Justice Scalia and Justice Thomas, will be hard pressed to find any concern about environmental harm to be reasonable without proof of injury to the environment itself.

Justice Ginsburg makes clear in *Laidlaw* that the proper focus for injury in fact is not the environment itself, but harm to the plaintiff.[254] However, if the Court again shifts away from respecting Congress' intent that plaintiffs have a right to sue for statutory violations, there is a risk that the reasonable concern analysis may shift the focus back to harm to the environment as a virtual prerequisite to harm to the plaintiff. For example, the Court may consider the plaintiff's concern unreasonable unless there is demonstrable harm to the environment. It is clear that if Justice Scalia's opinion prevails, injury to the plaintiff will depend on demonstrable harm to the environment.[255] Luckily for environmental plaintiffs, seven members of the Court agreed that the plaintiffs satisfied the injury in fact requirement by alleging their concerns about pollution caused by the defendant's violation, even without showing harm to the environment.

2. Redressability

Laidlaw's holding that the deterrence from civil penalties in the context of an ongoing violation provides redress to a plaintiff diverges from *Steel Co.*'s holding on redressability. In *Steel Co.*, the Court emphasized that civil penalties do not remedy the plaintiff's injury because they are payable to the U.S. Treasury.[256] Justice Scalia reasoned that, therefore, civil penalties can only vindicate the rule of law, not redress individual injury.[257] In finding that civil penalties do not provide redress, the Court did not specifically distinguish between entirely past and ongoing violations.

However, in *Laidlaw*, Justice Ginsburg was able to distinguish *Steel Co.* because Laidlaw continued to violate mercury limits until well after the suit was

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[254] *See id.* at 704.
[255] *See id.* at 714.
[256] Steel Co. v. Citizens for a Better Environment, 118 S. Ct. 1003, 1018 (1998).
[257] *See id.*

filed. The Court found *Steel Co.* "established that citizen suitors lack standing to seek civil penalties for violations that have abated by the time of the suit."[258] This reasoning reflects the decision in *Gwaltney* that a plaintiff may not sue if violations have ceased at the time of filing.[259] Justice Ginsburg essentially interpreted *Steel Co.* as a statutory decision about when citizen suitors may file suit.

In his dissent, Justice Scalia, who authored *Steel Co.*, did not find the distinction between ongoing violations and violations that had stopped at the time of filing persuasive. Justice Scalia stated that the Court's decision on redressability had "no precedent in our jurisprudence. . . ."[260] The dissent found that a public remedy, in the form of civil penalties payable to the U.S. Treasury, can never remedy a private harm, even if Congress so declares.[261]

By allowing public penalties to remedy a private harm, at least in the context of ongoing violations, the Court in *Laidlaw* took a step away from a strict private law theory of judicial interpretation. While it did not endorse individuals suing for the public good in all situations, the Court moved away from the reasoning that individuals may never sue to vindicate a public interest. *Laidlaw*'s interpretation of redressability respects Congress' intent in passing citizen suit provisions that private remedies may rectify public harm in certain contexts such as environmental law.[262]

Absent from the majority's analysis of both injury in fact and redressability was any discussion about separation of powers. Unlike *Defenders of Wildlife*, the majority did not question Congress' power to enact citizen suit provisions. The Court's lack of discussion regarding the relationship between Article II and Article III may signal a move away from the Court's focus on the separation of powers policy argument as a way to deny environmental plaintiffs standing under citizen suits.

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[258] Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. Inc., 120 S. Ct. 693, 707 (2000).
[259] *See* Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., 484 U.S. 49 (1987).
[260] *Laidlaw*, 120 S. Ct. at 707.
[261] *Id.* at 715-717.
[262] *See* Casdorph, *supra* note 56, at 507-08.

B. Cases After Steel Co.

In the time between *Steel Co.* and *Laidlaw,* there were three published decisions that interpreted *Steel Co.* In the two cases that involved ongoing violations, the courts held that *Steel Co.* did not apply, as the Supreme Court did in *Laidlaw.*

In *Natural Resources Defense Council v. Southwest Marine, Inc.*, a California district court held that *Steel Co.* was not applicable because the defendant violated the Clean Water Act after the plaintiff filed suit.[263] The defendant argued that *Steel Co.* represented a "new overarching principle of constitutional jurisprudence" in that citizen suit plaintiffs may never show redressability where the penalties are payable to the U.S. Treasury.[264] The court disagreed with the defendant and found that the imposition of civil penalties would specifically deter defendant's ongoing violations, and thereby provide the required redress.[265] The court reiterated *Steel Co.*'s holding that penalties that only deter polluters as a whole, providing general deterrence, do not satisfy redressability, whereas penalties that specifically deter the defendant do.[266]

In *Southwest Marine*, the plaintiff requested that some of the penalties be applied to local projects benefiting the San Diego Bay.[267] The court seemed to assume the use of direct penalties in this manner was appropriate. Interestingly, because some of the penalty would directly compensate the plaintiffs rather than go to the U.S. Treasury, the court could have used this factor to distinguish the case from *Steel Co.* However, it declined to do so. This indicates an attempt to limit a broad reading of *Steel Co.* that would interpret civil penalties payable to the U.S. Treasury as never providing redress to private plaintiffs.

Two months after *Southwest Marine*, another California district court interpreted *Steel Co.*, and reached the same conclusion as the *Southwest Marine* court: civil penalties provide deterrence and therefore redress a plaintiff in the context of ongoing violations.[268] The court reasoned that *Steel Co.* did not affect the Court's decision in *Gwaltney*[269] which held a plaintiff may seek civil penalties

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[263] Natural Resources Defense Council v. Southwest Marine, Inc., 39 F. Supp. 2d 1235, 1237 (S.D. Cal. 1999).

[264] *See id.*

[265] *See id.* at 1238.

[266] *See id.*

[267] *See id.*

[268] San Francisco BayKeeper v. Vallejo Sanitation and Flood Control Dist., 36 F. Supp. 2d 1214, 1215 (E.D. Cal. 1999).

[269] Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., 484 U.S. 49 (1987).

under the Clean Water Act if the violation is continuing at the time of suit.[270] The court also stated that civil penalties for ongoing violations are similar to injunctive relief because both remedies deter future violations and redress the plaintiff.[271]

The court found that BayKeeper satisfied the injury in fact requirement since it had proven Clean Water Act violations after the complaint was filed.[272] The court applied a loose interpretation of the injury in fact requirement, because there was no mention that the violations had caused demonstrable harm to the environment or how the violations harmed BayKeeper members.

Similarly, a New Hampshire district court interpreted *Steel Co.* in *Dubois v. U.S. Department of Agriculture*.[273] In *Dubois*, the plaintiff sued the defendant for failing to obtain a NPDES permit for discharging pollutants from its snow-making pipes into a pond.[274] The plaintiff appealed to the First Circuit after the district court granted summary judgment for the co-defendant, the U.S. Forest Service.[275] The First Circuit reversed the order and directed the district court to enter injunctive relief, but it did not address the plaintiff's claim for civil penalties.[276] On remand, the district court found, pursuant to *Steel Co.*, that because the violations were ongoing until the injunction, but were now past because they had been stopped by the injunction, the case was moot; therefore, civil penalties would not provide redress.[277] However, as the court in *Southwest Marine* noted, the New Hampshire court declined to interpret *Steel Co.* in the case of ongoing violations.[278]

C. Practical Implications

The Court's decision in *Laidlaw* eases standing requirements for environmental plaintiffs. Environmental plaintiffs no longer must show demonstrable harm to the environment, but may gather affidavits from individuals who have

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[270] *San Francisco BayKeeper*, at 1215.
[271] *See id.*
[272] *See id.* at 1216.
[273] 20 F. Supp. 2d 263 (D.N.H. 1998).
[274] *See id.* at 265.
[275] *See id.*
[276] *See id.*
[277] *See id.* at 268.
[278] *See id.* at 267 n.3.

reasonable concerns about the effect of the defendant's violation. This shifts the inquiry away from harm to the environment, to whether or not there has been a statutory violation of an environmental law. As mentioned above, plaintiffs only must ensure that their concerns are reasonable. The Court's requirement for demonstrating injury in fact lessens plaintiff's litigation costs since they do not have to hire expert witnesses to demonstrate harm to the environment. This decision also means that plaintiffs will spend less court time clearing the standing hurdle, and more time on the merits of the case. Moreover, it is now clear that civil penalties payable to the U.S. Treasury can redress environmental injuries in the case of ongoing violations because they provide deterrence.

Notably lacking from the two California cases that interpreted *Steel Co.* is any lengthy discussion of the separation of powers argument that occurred in some Supreme Court environmental standing cases prior to *Laidlaw*. This may indicate that the district courts were not anxious to embrace Justice Scalia's severely restrictive interpretation of standing requirements, but were rather attempting to establish law in their districts that accommodated the particular nature of environmental law to grant standing to environmental plaintiffs. They also specifically declined to extend *Steel Co.*'s interpretation that civil penalties for past violations do not redress ongoing violations. Surely they could have done so, since *Steel Co.* made no distinction based on past or continuing violations. This may also indicate an attempt to loosen standing restrictions. The practical effect of *Laidlaw* on lower courts is that they may now grant environmental standing without fashioning such exceptions and limits to standing requirements.

Of course, the main beneficiary of the more lenient standing requirements will be environmental plaintiffs, and thus the environment itself. In *Laidlaw*, the Court made the first move in 10 years in favor of environmental standing and respecting the intent in Congress when it passed environmental statutes. This effect has been demonstrated in later cases.

D. Friends of the Earth v. Gaston Copper

A good example of the effects of *Laidlaw* comes from examining a case which produced two Fourth Circuit decisions, one before and one after *Laidlaw*. Since the Fourth Circuit was also the appeals court in *Laidlaw*, its interpretation after the Supreme Court decision is telling. This decision shows that even those

courts that welcomed prior restrictive Supreme Court standing decisions will now have to impose more lenient standing requirements.

In *Friends of the Earth, Inc. v. Gaston Copper Recycling Corporation (Gaston I)*, decided before the Supreme Court's *Laidlaw* opinion, two environmental groups, Friends of the Earth and Citizens Local Environmental Action Network (CLEAN) brought a citizen suit under against Gaston Copper for violating its NPDES permit under the Clean Water Act.[279] Gaston had violated its discharge limits for pollutants over 500 times in four years.[280]

To show injury in fact, plaintiffs submitted affidavits of members who were harmed by the pollution, including a Mr. Shealy who lived and owned property four miles downstream from Gaston Copper.[281] Shealy's property included a lake into which polluted water drained, where he and his family enjoyed fishing and swimming.[282] Shealy testified that their use and enjoyment of the lake had fallen due to fears that the lake was polluted, and that his property value had been decreased due to the pollution.[283]

Judge Hamilton, writing for the majority, held that the plaintiffs failed to show injury in fact because they did not show that members' interests were actually, or imminently threatened with being, adversely affected by pollution.[284] The court found that because there was no proof of any negative impact on the waters that the plaintiffs used, the plaintiffs had not sustained any injury.[285] The court stated, "[o]bviously, the three members' 'concerns,' without some evidence concerning an observable negative impact on the waterways in which the members recreated or used, is not enough to establish that the waterways in which the members recreated or used, were in fact adversely affected by pollution."[286]

Chief Judge Wilkinson dissented and found that CLEAN member Shealy's interests were injured as a result of Gaston Copper's discharge violations.[287] The dissent stated that injury in fact may exist solely by virtue of a statute, and the

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[279] Friends of the Earth, Inc. v. Gaston Copper Recycling Corp., 179 F.3d 107, 109 (4th Cir. 1999), *rev'd en banc* 204 F.3d 149 (4th Cir. 2000).
[280] 179 F.3d at 118.
[281] *See id.* at 110.
[282] *See id.*
[283] *See id.* at 111.
[284] *See id.* at 113.
[285] *See id.* at 114.
[286] *Id.*
[287] *See id.* at 117.

Clean Water Act grants citizens the right to sue for violations of a discharger's NPDES permit.[288] Judge Wilkinson emphasized that Shealy lived four miles downstream from the discharge pipe, and Gaston Copper was accused of violating its NPDES permit. The dissent went on to state that, "[w]hether we characterize the harm as the actual pollution of the waterway, Shealy's reasonable fear and concern, or Gaston Copper's threat to the waterway is unimportant. Shealy has proven injury in fact."[289]

Judge Wilkinson also criticized the level of proof that would be required under the majority's interpretation of injury in fact, since it would become a lengthy "sideshow" to the relatively simple issue of whether the discharger has violated its NPDES permit.[290] The dissent argued that under the majority's holding, the parties will be required to litigate complex scientific facts to prove environmental harm simply to satisfy standing, before moving to the merits of the case.[291]

After the Supreme Court's *Laidlaw* decision, the Fourth Circuit granted rehearing en banc (*Gaston II*),[292] and reversed its earlier decision, finding that CLEAN had "surpassed" the requirements of Article III.[293] In the first part of the opinion, Judge Wilkinson, now writing for the majority, expressed deference to Congress by criticizing the earlier opinion for "erecting barriers to standing so high as to frustrate citizen enforcement of the Clean Water Act."[294]

In an about-face from the previous decision, the court cited *Laidlaw* for the rule that to demonstrate injury in fact a plaintiff need not prove harm to the environment, but only that his use of the environment was reduced due to a reasonable concern of pollution.[295] Judge Wilkinson noted that in *Laidlaw*, "[t]he Court required no evidence of actual harm to the waterway. . . ."[296] The court found that Shealy had presented evidence of injury in fact, echoing language from *Laidlaw* that his fears were reasonable, not merely conjectural.[297] The court

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[288] *See id.*
[289] *Id.* at 118.
[290] *Id.* at 117.
[291] *See id.*
[292] Friends of the Earth, Inc. v. Gaston Copper Recycling Corp., 204 F.3d 149 (4th Cir. 2000).
[293] *See id.* at 155.
[294] *Id.* at 151.
[295] *See id.* at 159.
[296] *Id.* at 156-57
[297] *See id.* at 157-58.

also noted that the plaintiffs had shown that Gaston Copper's discharge violations caused environmental degradation.[298] The court reasoned that the state had established Gaston Copper's discharge limits to protect a certain level of water quality, and that discharge violations "necessarily mean[] that these uses may be harmed."[299] The court's reasoning shows that it used the benchmark of whether the discharger violated the law in determining whether the plaintiff established an injury, not demonstrable harm to the environment.

Because the plaintiffs were suing Gaston Copper for injunctive and other relief from Gaston's continuing violations, the court did not address whether civil penalties alone would provide redressability.[300]

In the last section of the opinion, Judge Wilkinson used the opportunity to criticize the court's prior decision. Judge Wilkinson stated that courts are not free to impose their own evidentiary prerequisites for standing when they are not required to do so by Article III or the Clean Water Act and that the case "illustrates at the heart the importance of judicial restraint."[301] To require proof of demonstrable harm to the environment, Judge Wilkinson found, would "thwart congressional intent" of the CWA.[302] In concluding, Judge Wilkinson noted that Article III standing is premised on the idea of separation of powers, and that "[c]ourts must avoid infringing this principle . . . by refusing to decide concrete cases that Congress wants adjudicated."[303]

Three judges reluctantly concurred in the judgment because of *Laidlaw*, but openly disagreed with *Laidlaw* itself. Judge Niemeyer argued that as the scope of Article III power expands, the courts will become "super-legislative" bodies, going beyond their constitutional roles.[304] Judge Niemeyer would have not found injury in fact prior to *Laidlaw*, but stated that *Laidlaw* "represents a sea change in constitutional standing principles. . . ."[305] Judge Luttig criticized the court for analyzing the case as if *Laidlaw* did not drastically change prior standing doctrine.[306] Finally, Judge Hamilton was harshly critical of *Laidlaw*, citing

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[298] *See id.* at 157.
[299] *Id.* at 163.
[300] *See id.*
[301] *Id.*
[302] *Id.* at 164.
[303] *Id.*
[304] *Id.*
[305] *Id.* at 164.
[306] *See id.* at 164-65

Justice Scalia's dissent in arguing that *Laidlaw* has "opened the standing floodgates, rendering our standing inquiry 'a sham.'"[307]

By comparing the Fourth Circuit's decision in *Gaston I* to *Gaston II*, it is clear that *Laidlaw* has already had a strong impact on the injury in fact requirement of standing. Now, to show injury in fact, the focus is on harm to the plaintiff, demonstrated by a plaintiff's reasonable concern or fear of pollution, which will hinge on whether the defendant has violated a statute. In *Gaston II*, the court found Mr. Shealy's fear of pollution was reasonable because Gaston Copper had frequently violated its NPDES permit, discharging pollutants into the water that flowed directly into Mr. Shealy's lake. The court deferred to Congress' definition of what constitutes an injury under the Clean Water Act, a statutory violation. It is also interesting to note that Judge Wilkinson specifically criticized the earlier decision as an intrusion on the separation of powers principle by not recognizing injuries that Congress defines. This is a very different tone than some recent Supreme Court decisions that have used the separation of powers argument to prevent judicial review.

A possible issue for future cases may be the reasonableness of plaintiff's environmental concern. Here, the court easily found Mr. Sealy's concern was reasonable since Gaston Copper had violated its permit 500 times in four years.

V. CONCLUSION

Laidlaw is a good decision for environmental plaintiffs. It gives much needed relief from the recent increasingly stringent environmental standing requirements. The Environmental Protection Agency's budget has steadily decreased since the early 1980s, resulting in a decline in the EPA's ability to enforce environmental laws.[308] In light of governmental agencies' decreasing ability to enforce environmental laws, citizen suits to enforce these laws need to play an increasing role in protecting the environment. *Laidlaw* provides easier access for environmental

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[307] *Id.* at 165, quoting Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., 120 S. Ct. 693, 715 (2000) (Scalia, J., dissenting).

[308] *See, e.g.*, Greve, *supra* note 86, at 382 (arguing that Congress could remedy underenforcement of environmental laws in part by increasing the EPA's enforcement budget.); Boyer & Meidinger, *Privatizing Regulatory Enforcement: A Preliminary Assessment of Citizen Suits Under Federal Environmental Laws*, 34 BUFF. L. REV. 833, 838 (1985) (noting that federal budget deficits in the 1980s make clear that environmental agencies will not be able to perform their enforcement duties in the foreseeable future).

plaintiffs to enforce these laws. The Court in *Laidlaw* recognizes the particular difficulties plaintiffs face in establishing environmental standing, and respects Congress' intent in allowing for such standing through citizen suit provisions.

Laidlaw is a good decision because it lowers the standing hurdles environmental plaintiffs must surmount to take advantage of the Congressionally granted rights to sue for the environment. The Court's more lenient definition of injury in fact indicates that now a plaintiff must show that the defendant violated the environmental statute at issue, and that the plaintiff is reasonably personally concerned about his injuries due to this violation. Additionally, the Court clarified that the redressability requirement for an ongoing violation is satisfied by the payment of civil penalties to the government.

Laidlaw is also a good decision because it signifies a move away from the Court's use of Article II and the separation of powers argument to deny environmental plaintiff standing. This is both good for environmental plaintiffs and also good for respecting Congress' intent in providing for environmental citizen suits.