BARELY STANDING:

The Erosion of Citizen “Standing”
to Sue to Enforce Federal
Environmental Law

Environmental Policy Project
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The Environmental Policy Project conducts research and education on legal policy issues relating to protection of the environment and preservation of natural resources

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Cartoon by Jeff Danziger
Introduction

The ability of American citizens to vindicate their legal rights to a clean and healthy environment is rapidly eroding.

One of the basic features of our nation’s environmental protection system has been the right of citizens to sue in federal court to force polluters to comply with environmental standards. Congress included citizen suit provisions in the major environmental laws, including the Clean Water Act and the Clean Air Act, for example, so that citizens could act as “private attorneys general” supplementing the government’s limited enforcement resources. In addition, Congress believed that granting citizens a direct right to sue would temper the risk that changing political winds and special interest influence could undermine diligent enforcement of environmental laws.

Citizen enforcement suits have proven to be a valuable mechanism for implementing federal environmental laws. Individual citizens and groups have brought hundreds, if not thousands, of successful lawsuits that have forced polluters to comply with the law. In addition, the threat of potential citizen enforcement suits has served as a powerful deterrent.

Currently, however, the effectiveness of citizen suit provisions is weakening under the cumulative weight of recent U.S. Supreme Court decisions limiting citizen “standing” to sue. As a result of these decisions, even if Congress has expressly authorized citizens to sue, the courts are rejecting more and more citizen suits because the plaintiffs lack “standing” to sue under the U.S. Constitution. Thus, major environmental problems can no longer be remedied through citizen suits, and the deterrent effect of the citizen suit mechanism has been dramatically weakened.

For example:

* The U.S. Supreme Court recently held that an organization representing citizens living near an industrial plant in Illinois lacked standing to challenge a company’s failure, over a period of seven years, to file public reports documenting the use and storage of hazardous chemicals at the plant;¹
* A federal appeals court ruled that citizens living along a river in New Jersey lacked standing under the Clean Water Act to sue a chemical company for making discharges into the river resulting in 155 separate permit violations;\(^2\)

* Another federal appeals court ruled that citizens living adjacent to a polluted river in South Carolina lacked standing under the Clean Water Act to sue a hazardous waste operator for some two thousand violations, including 489 illegal discharges of mercury;\(^3\) and

* A federal trial court ruled that a San Francisco Bay environmental group did not have standing to seek civil penalties from a salt manufacturer who had dumped tons of mud and waste into public waters included within a national wildlife refuge.\(^4\)

The erosion of citizen standing to sue has taken place in relatively small, almost imperceptible increments. Only when one stands back and surveys the change in legal doctrine over the last decade does the magnitude of the change become apparent. The erosion has also gone largely unnoticed because, for most groups and individuals concerned about the environment, the standing issue is peripheral to more central environmental issues and, therefore, not the focus of sustained attention.

The erosion of citizen standing is the result of an unusually focused and determined effort at jurisprudential reform, spearheaded by U.S. Supreme Court Justice Antonin Scalia. Prior to his appointment to the Court, then court of appeals Judge Scalia articulated a comprehensive argument for thoroughly overhauling the law of standing to limit environmental advocates’ access to the courts. Since his appointment to the Court in 1986, Justice Scalia has demonstrated an extraordinary commitment to this issue by authoring the majority opinion in all of the Court’s major environmental standing cases. Through these decisions, Justice Scalia has substantially revised the Court’s standing doctrine to match his own views and has closed the doors of the courthouse to many environmental advocates.

Despite this clear pattern, the scope of citizen standing remains a matter of continuing debate on the U.S. Supreme Court, and the Court will likely have the opportunity to shape standing doctrine significantly over the next several years. While Justice Scalia has clearly succeeded in transforming the Court’s standing jurisprudence, it remains uncertain whether a majority of the Court fully embraces his restrictive theory of citizen standing, as discussed in greater detail below. On March 1, 1999, the Court
agreed to hear the case of *Friends of the Earth v. Laidlaw Environmental Services*, in which a federal appeals court applied unusually strict standing requirements. The Court's decision to review this ruling may be a signal of the Court's willingness to halt, or even possibly reverse, the erosion of citizen standing to sue.

In addition, as also discussed below, Congress can – if the political will exists – take several steps to counter, at least in part, the Court's recent standing decisions.
An Overview of Standing Doctrine

Standing doctrine involves the issue of who (if anyone) is entitled to prosecute a particular legal claim in court.

The concept of “standing” is relatively modern. The majority of legal scholars who have studied the issue have concluded that the framers of the Constitution never intended standing, a term absent from the Constitution, to serve as an independent test for identifying who can properly bring a legal claim in federal court. Instead, the framers believed that Congress should have broad power to enact legislation granting citizens the right to sue.

Nevertheless, the U.S. Supreme Court has clearly established a standing requirement and has grounded this requirement in Article III, section 2 of the Constitution, which grants the judiciary the power to hear “cases” and “controversies.” The requirement that litigants demonstrate their standing to sue under the Constitution, the Court has said, confines the judiciary to its properly limited role in our system of separated powers, and helps ensure that cases filed in federal court involve the type of well-defined, adversarial contests which the courts are institutionally competent to resolve.

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The Court has said that a plaintiff must meet three requirements to have Article III standing. First, the plaintiff must show that she has suffered an “injury in fact.” Second, she must establish causation, that is, show that the injury “fairly can be traced to the challenged action.” Third, the plaintiff must show that the injury “is likely to be redressed by a favorable decision” of the court.

In addition to these constitutional requirements, the Court also has developed so-called “prudential” limits on standing — judicially self-imposed limits which are subject to modification or abrogation by Congress. Most importantly, the Court has said that a litigant suing a federal agency under federal law must establish that the
interest being asserted is within the "zone of interests" of the statute allegedly being violated.\textsuperscript{8}

U.S. Supreme Court standing decisions at the beginning of the modern environmental era were relatively accommodating to environmental interests. In the landmark case of \textit{Sierra Club v. Morton},\textsuperscript{9} decided in 1971, the Court ruled that, although the Sierra Club could not establish standing based only on its "special interest" in conservation, the Club could establish standing by alleging that its members made use of the recreational resources in the forest that would be affected by a proposed ski development in the Mineral King Valley of California. While the requirement that the plaintiff demonstrate some "injury in fact" has developed into a problematic barrier to citizens' suits, the requirement originally presented only a modest obstacle.\textsuperscript{10} In the \textit{Morton} case itself, on remand, the Sierra Club simply amended its complaint to allege that its members used Mineral King for recreational purposes and the case continued.\textsuperscript{11}

In 1973, in \textit{United States v. Students Challenging Regulatory Agency Procedures (SCRAP)},\textsuperscript{12} the Supreme Court applied this test in an expansive fashion. A group of law students challenged an Interstate Commerce Commission order on railroad freight rates on the ground that the order would undermine the market for recycled materials. The Court rejected the argument that the plaintiffs lacked standing to challenge the ICC's failure to prepare an environmental impact statement under the National Environmental Policy Act, observing that the plaintiffs alleged that they "used the forests, streams, mountains, and other resources in the Washington metropolitan area for camping, hiking, fishing, and sightseeing, and that this use was disturbed by the adverse environmental impact caused by the nonuse of recyclable goods brought about by a rate increase on these commodities." While acknowledging that these allegations rested on an "attenuated line of causation," the Court found them sufficient to satisfy \textit{Morton}.
Justice Scalia’s New Theory of Standing.

It is a testament to Justice Scalia’s intellectual powers and persuasive skills that he has almost single-handedly transformed the law of citizen standing in environmental cases.

In 1983, several years before his appointment to the Supreme Court, then Judge Scalia published a law review article criticizing the federal judiciary for what he called its "long love affair with environmental litigation." He argued that environmental standing doctrine needed to be revised to conform to a proper understanding of the principle of separation of powers. According to this view, the courts had exceeded their properly limited role and had been "converted into political forums" by routine judicial challenges to governmental actions affecting the environment. Standing doctrine, in Judge Scalia’s view, needed to be reformed in order to "restrict[] courts to their traditional undemocratic role of protecting individuals and minorities against impositions of the majority, and [to] exclud[e] them from the even more undemocratic role of prescribing how the other two branches should function in order to serve the interest of the majority itself."

In practical terms, Judge Scalia meant that when a claim is brought by a firm or individual who is "the very object of a law’s requirement or prohibition," then the plaintiff will "always" have standing. In that circumstance, the claim presents a "classic case of the law bearing down upon the individual himself, and the court will not pause to inquire whether the grievance is a ‘generalized’ one." On the other hand, according to Judge Scalia, when the plaintiff "is complaining of an agency’s unlawful failure to impose a requirement or prohibition upon someone else," standing should be much more difficult to establish. A legal challenge based on non-enforcement asserts an essentially majoritarian interest which should ordinarily be addressed, not by the courts, but by the majoritarian branches — the Congress or the executive branch. In this circumstance, a plaintiff should be recognized as having standing only if he can demonstrate that the government’s failure to regulate resulted in some special and distinctive harm to him.

The implications of this theory for environmental advocates are disastrous. According to this view, timber companies, mining firms, industrial manufacturers, and so on — the objects of environmental regulation — should routinely be granted standing to challenge regulatory requirements. On the other hand, environmental groups, which
commonly complain about inadequate regulation resulting in widespread environmental harms, should routinely be denied standing. The upshot of this theory is a dramatic redefinition of the role of the federal judiciary in environmental disputes, to the benefit of those who are subject to (and sometimes object to) environmental standards, and to the detriment of those seeking to enforce environmental standards.

Judge Scalia acknowledged that his theory would lead to less effective law enforcement. He asked rhetorically: "Does what I have said mean that, so long as no minority interests are affected, ‘important legislative purposes, heralded in the halls of Congress, [can be] lost or misdirected in the vast halls of the federal bureaucracy?’" And he answered: "Of course it does – and a good thing, too," because there is no harm done when legislative mandates “get lost or misdirected.” Indeed, “[t]he ability to lose or misdirect laws can be said to be one of the prime engines of social change, and the prohibition against such carelessness is (believe it or not) profoundly conservative.” In short, standing requirements should be demanding in order to encourage executive branch disregard of congressional mandates!

“The erosion of citizen standing is the result of an unusually focused and determined effort at jurisprudential reform, spearheaded by U.S. Supreme Court Justice Antonin Scalia.”

These striking remarks were a response to Judge Skelly Wright’s opinion in Calvert Cliffs Coordinating Comm. v. U.S. Atomic Energy Comm’n, one of the first federal appellate decisions interpreting the National Environmental Policy Act. After observing that the enactment of NEPA and other new environmental laws “attest[ed] to the commitment of the Government to control, at long last, the destructive engine of material ‘progress,’” Judge Wright wrote that “it remains to be seen whether the promise of this legislation will become a reality. Therein lies the judicial role.” “[O]ur duty,” he concluded, “is to see that important legislative purposes, heralded in the halls of Congress, are not lost or misdirected in the vast hallways of the federal bureaucracy.” Judge Scalia, obviously, believed otherwise.

While Justice’s Scalia’s theory of standing has a simplistic appeal, it is also open to obvious criticisms. First, his theory undermines the principle that the courts are
dedicated to upholding the rule of law. In *SCRAP*, the Court said: "To deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread Government actions could be questioned by nobody. We cannot accept that conclusion." Today, as a result of Justice Scalia's efforts, the Court has begun to embrace this very idea.

Furthermore, the notion that those asserting widely shared injuries, like many environmental advocates, should pursue their interests through the political process ignores the relative disadvantages the advocates of these interests confront in political forums. It is a commonplace observation that the diffuse nature of environmental harms makes environmental interests relatively difficult to organize into an effective political force.\textsuperscript{15} Narrower and more easily organized economic interests can often be more effective in political terms than larger, but politically diffuse interests. Thus, Justice Scalia's theory of standing, rather than compensating for political weakness, actually confers broader standing on interests that already have a relative advantage in the political process.

In addition, over time, granting different interests differential access to the courts creates the risk that administrative agencies will not deal evenhandedly with all members of the public. Administrative agencies can be expected to pay relatively greater attention to those participants in a proceeding likely to have standing to sue the agencies, and relatively less attention to those unlikely to have standing. Ultimately, a skewed theory of standing leads to skewed administrative process.\textsuperscript{16}
Recent Supreme Court Standing Decisions.

Over the last decade, the U.S. Supreme Court has issued a series of decisions ratcheting up the standing requirements for plaintiffs contending that government agencies or private firms are acting illegally and harming the environment. At the same time, consistent with Justice Scalia’s theory of the distinction between the objects and beneficiaries of regulation, the Court has liberalized standing requirements for plaintiffs complaining about excessive economic burdens as a result of environmental regulation. For environmental advocates, the evolution of standing doctrine over the last decade has been a case of heads we lose, tails they win.

*Lujan v. National Wildlife Federation (Lujan I).* The Court, by a vote of 5 to 4, ruled that the National Wildlife Federation lacked standing to challenge a decision of the Bureau of Land Management (BLM) to review the classification of federal lands and open them to various kinds of resource development. The Federation contended that the BLM had acted in violation of the Federal Land Policy and Management Act and had failed to prepare an environmental analysis as required by the National Environmental Policy Act. To establish its standing, the Federation filed affidavits of several of its members who asserted that they used land “in the vicinity” of federal lands affected by the agency’s decision, and that opening these lands to development would interfere with “recreational use and aesthetic enjoyment” of the lands.

The Court, reversing a federal appeals court, ruled that the government was entitled to summary judgment based on the standing issue. The Court concluded that the affidavits pointed to *types* of injuries that would ordinarily be sufficient to establish standing. But the Court ruled that the members’ assertions that they used lands “in the vicinity” of the specific lands allegedly threatened by the agency decision were inadequate to demonstrate that they were “actually affected” by the BLM’s decision.

*Lujan v. Defenders of Wildlife (Lujan II).* Two years later, the Court expanded upon *Lujan I* by ruling that Defenders of Wildlife lacked standing to challenge a determination by the U.S. Fish and Wildlife Service and the National Marine Fisheries Service that the consultation requirement of section 7 of the Endangered Species Act (ESA) did not apply to federal government actions in foreign nations.
Justice Scalia, speaking for the Court, concluded that Defenders had failed to establish the type of "imminent" injury necessary to satisfy the "injury in fact" requirement for Article III standing. Defenders relied on several affidavits of members who were interested in endangered species conservation and had visited the sites of two foreign development projects which threatened particular species, but who could not specify when they planned to return to these sites. Justice Scalia said that this type of "some day" intention was inadequate to confer standing. Moreover, Justice Scalia said that a demonstrated professional interest in a particular species was insufficient, by itself, to establish standing to challenge a foreign development project which threatened the species.  

Speaking for himself and three other Justices, Justice Scalia also concluded that Defenders failed to satisfy the "redressability" requirement for standing. He stated it was unclear whether other federal agencies would believe they were bound by a revised regulation, or whether these foreign development projects (which were also receiving support from other nations) would actually be halted if the U.S. withdrew its support.

Justice Scalia laid out the theory of standing he outlined prior to his appointment to the Court and made it a formal part of U.S. Supreme Court standing doctrine. He said that standing

"depends considerably upon whether the plaintiff is himself an object of the action (or foregone action) at issue. If he is, there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it. When, however, as in this case, a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of someone else, much more is needed."

The most significant aspect of Lujan II is Justice Scalia's rejection of the idea that Congress can confer standing by adopting an expansive citizen suit provision. Defenders sought to establish its standing based on the provision of the Endangered Species Act which authorizes "any person" to bring a civil suit "to enjoin any person . . . who is alleged to be in violation of any provision of this chapter." To permit Congress to confer standing through such a provision, Justice Scalia said, would authorize individuals to sue to enforce the "undifferentiated public interest" in seeing that the laws are enforced. This would violate the principle of separation of powers, according to
Justice Scalia, by "enabl[ing] the courts, with the permission of Congress, to assume a position of authority over the governmental acts of another and co-equal department."

Justice Kennedy (and Justice Souter) joined in most of Justice Scalia's majority opinion, but filed a separate concurrence. Significantly, they qualified Justice Scalia's discussion of the issue of Congress' authority to confer standing by enacting citizen suit provisions. Justice Kennedy wrote that "Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before, and I do not read the Court's opinion to suggest a contrary view." He emphasized that "as government programs and policies become more complex and far reaching, we must be sensitive to the articulation of new rights of action that do not have clear analogs in our common-law tradition." Thus, to an important, if uncertain degree, Justice Kennedy (and Justice Souter) left open the possibility that Congress can still enact legislation conferring standing to sue.

"For environmental advocates, the evolution of standing doctrine over the last decade has been a case of heads we lose, tails they win."

_Bennett v. Spear._ 20 Next in chronological order, the Supreme Court issued an opinion unanimously supporting the standing of ranchers and irrigation districts to challenge proposed modifications of the Bureau of Reclamation's operation of a water project on the California/Oregon border in order to comply with the ESA. This result is, of course, consistent with Justice Scalia's view that the objects of environmental regulation should have preferred access to the courts relative to citizens who benefit from the implementation of environmental laws. But in this case, in which the plaintiffs were not actual objects of regulation, Justice Scalia apparently expanded the theory to encompass all economic interests that could potentially be injured by the implementation of environmental laws.

The Court's analysis focused on the prudential "zone of interest" test for standing. Based on the expansive language of the ESA citizen suit provision, the Court concluded that this provision granted ranchers and irrigation districts standing to assert ESA violations, observing that the conclusion that the plaintiffs had standing was reinforced by the fact that the environment "is a matter in which it is common to think all persons
have an interest." The Court also ruled that the plaintiffs had standing to challenge the implementation of the ESA under the judicial review provision of the Administrative Procedure Act. The Court rejected substantial prior precedent suggesting that only those individuals and organizations seeking to advance environmental protection are within the environmental laws’ zone of interest. Focusing on the language of a particular ESA provision related to the potential economic impacts of agency action under the ESA, the Court ruled that the ranchers and irrigation districts had standing because their interests were within this particular provision’s zone of interest.

Steel Company v. Citizens for a Better Environment. Finally, in June 1998, at the end of the Supreme Court’s last term, the Court issued a decision dealing another major blow to citizen standing to sue in environmental cases. The case involved a suit by a Chicago-based environmental group seeking to enforce the Emergency Planning and Community Right to Know Act. This law requires polluters to file regular reports with the Environmental Protection Agency on their discharges of toxic and hazardous chemicals into the environment. The Steel Company failed to comply with the Act for seven years, and came into compliance only after Citizens for a Better Environment had investigated the company’s violations and filed a formal notice of its intent to bring suit.

The Court ruled that the plaintiff lacked Article III standing because the plaintiff’s alleged injuries were no longer “redressable.” Because the company had already acknowledged its violations and come into compliance, and the plaintiff had not alleged any continuing or imminent injury, there was no basis for either injunctive or declaratory relief. The Court also ruled that the plaintiff’s request that the court order payment of civil penalties to the U.S. Treasury, as authorized by the citizen suit provision, could not satisfy Article III standing. Civil penalties could not serve to “redress” the plaintiff’s injuries, the Court said, because they would be paid into the federal treasury, not to the plaintiff. The Court also rejected the argument that the deterrent effect of the requirement to pay civil penalties was sufficient, by itself, to satisfy the redressability requirement.

*   *   *

In sum, over the last decade, the U.S. Supreme Court has issued a series of decisions limiting citizen standing to enforce environmental laws while simultaneously expanding the standing of firms and individuals that can suffer economic harm as a result of the implementation of environmental laws.
At the same time, the Court remains divided on the standing issue, and the future course of Supreme Court rulings in this area is unpredictable. As discussed, the actual meaning of the Court’s ruling in *Lujan II*, arguably the most important standing decision of the last decade, is clouded by the separate concurring opinion issued by Justice Kennedy (and joined by Justice Souter). While Justice Scalia appeared to reject altogether the notion that Congress could confer standing on private litigants, Justice Kennedy’s concurring opinion disagrees with that proposition.

Furthermore, the Supreme Court has recently demonstrated greater receptivity to citizen standing in other contexts, a development which might eventually benefit environmental litigants. For example, in *Akins v. Federal Election Commission*, decided in 1998, the Court upheld the standing of a non-profit public interest organization to sue the Federal Election Commission for improperly failing to categorize an organization as a “political” organization that could potentially be subjected to public disclosure requirements. While the plaintiff was arguably suing over an injury shared by the public generally, a majority of the Court concluded that the requirements of Article III were satisfied. Justice Scalia dissented, possibly indicating the emergence of a new divide on the Court on standing issues.
Obstacles to Environmental Standing in the Lower Federal Courts.

Taking the lead from the Supreme Court, lower federal courts have been ruling that environmental litigants lack standing with increasing frequency.

The most serious recent erosion of citizen standing has occurred in the context of citizen suits to enforce the Clean Water Act (CWA).

In 1972, Congress amended the Clean Water Act, expanding and thoroughly revising federal efforts to address pollution of the nation's waterways. Prior to 1972, the federal water pollution control program relied upon elaborate and time-consuming efforts to determine acceptable levels of pollution in particular water bodies and to assign appropriate pollution abatement responsibilities to individual polluters. In practice, uncertainties in determining the capacity of specific waters to absorb pollution, and the difficulty of tracing pollution impacts to specific polluters, made this approach unworkable. In 1972, Congress adopted a new approach relying on technology-based effluent limitations that could be applied uniformly to discharges all across the country. Under this approach, the key consideration is whether effluent limitations are being exceeded, regardless of the actual effects a particular polluter may be having on a particular waterbody.

To bolster enforcement of the Clean Water Act, the 1972 amendments authorized "any citizen" to bring a civil enforcement action against any person "who is alleged to be in violation" of an effluent limitation. The Act defines a citizen as "a person or persons having an interest which is or may be adversely affected." Plaintiffs suing under the citizen suit provision are specifically authorized to seek injunctive relief, civil penalties payable to the United States treasury, and reimbursement of legal costs and attorneys fees.

For more than two decades, the courts interpreted the CWA citizen enforcement provision in accordance with its broad scope. To establish standing, plaintiffs generally were required to establish only that they had some geographical relationship with the affected water body and that the defendant polluter had violated an effluent limitation. Thus, the courts recognized standing where the plaintiffs alleged that they lived adjacent to, walked along, and swam in the waters that received the discharges, or where the plaintiffs simply alleged that they "live in the region adjacent to [the waterbody] downstream from the defendant's facility and describe[d] various actual and potential
detrimental impacts on their aesthetic, recreational, conservational, economic, and health interests.\textsuperscript{27} Once standing was established under this standard, the plaintiff’s right to seek the various remedies authorized by the CWA was essentially unquestioned.

But, following the lead of the Supreme Court, the lower federal courts have recently raised the bar for citizen standing in CWA cases, undermining the regulatory scheme established by Congress.

\begin{quote}
"Under [Laidlaw], even if a company is flagrantly violating the law, it can escape liability, including any obligation to pay attorneys’ fees, so long as it can extend the litigation long enough to provide time to come into compliance by the time final judgment is entered."
\end{quote}

For example, relying principally on Lujan II, some courts have required a showing of some demonstrable harm to the affected waterbody, notwithstanding the CWA’s explicit reliance on technology-based standards. In Public Interest Research Group v. Magnesium Elektron,\textsuperscript{28} a federal appeals court held that an environmental group had no standing to sue a manufacturer (engaged in zirconium chemical production) which had violated the Clean Water Act 155 times. The environmental group and its members alleged that these types of discharges caused contamination of fish and produced adverse human health effects. But, consistent with the CWA regulatory scheme, the plaintiffs did not seek to produce specific evidence that this particular polluter had caused specific harms to the resource. The defendant, on the other hand, produced an affidavit by a scientific expert asserting that the discharges had not caused any demonstrable harm to the waterbody.

On the basis of this evidence, the federal appeals court vacated the trial court’s award of civil penalties. Following Lujan II, the court said that Congress had no authority to “create a private cause of action in the absence of actual or threatened injury.” This requirement of some demonstrable environmental injury undermines the CWA technology-based regulatory strategy, effectively amending the CWA to conform to the earlier, failed approach to pollution control which Congress rejected in 1972. In
addition, this requirement sharply increases the burden on those seeking to establish standing under the CWA, and bars some citizens' access to the courts completely.

The reasoning of the court in Magnesium Elektron has been followed by other lower federal courts interpreting the CWA. For example, in Friends of the Earth v. Gaston Copper Recycling Corp., the court concluded that the plaintiffs lacked standing to challenge CWA violations when they failed to establish that the violations had any actual adverse impact on the creek into which the pollutants were discharged. See also Informed Citizens United, Inc. v. USX Corp., in which the court reached an even more extreme result, ruling that a landowner lacked standing to challenge the allegedly illegal filling of nearby wetlands based on allegations that the filling would interfere with the plaintiff's ability to view wildlife, allegations which were supported by expert affidavits documenting the adverse effects of wetland-filling on habitat values. The court concluded that plaintiff's allegations "fall far short" of establishing an injury in fact, and that, in any case, the injury alleged was not the type of injury "which the Clean Water Act . . . was designed to address."

The same restrictive analysis can be applied in a Clean Air Act ("CAA") context. Indeed, at least one federal court has invoked Lujan II to justify dismissing a citizen suit under the CAA. In Ogden Projects, Inc. v. New Morgan Landfill Co., the court ruled that the individual plaintiffs, who lived in the vicinity of a landfill, lacked standing to challenge the landfill operator's alleged failure to obtain an air pollution permit because they could not demonstrate how the allegedly illegal air emissions adversely affected their health, environmental, and recreational interests. Ironically, and consistent with Justice Scalia's theory that the regulated community is entitled to greater access to the courts than the public, the court found standing for a rival waste disposal company which alleged that it suffered an economic injury because it incurred the expense of obtaining the required permit whereas the defendant did not.

Other lower federal courts have applied the Steel Company decision broadly, concluding that civil penalties are insufficient to establish redressability, not only in cases involving wholly past violations, as in Steel Company, but also when the polluter was continuing to violate the law at the time the suit was filed. Thus, in Friends of the Earth, Inc. v. Laidlaw Environmental Services, a federal appeals court ruled that an environmental group had no standing to seek civil penalties under the CWA against the operator of a hazardous waste incinerator who had committed over 1,800 permit violations.
The polluter came into compliance with the CWA during the course of the litigation, but before the trial court issued its final judgment. The trial court concluded that injunctive relief was no longer necessary in light of the polluter’s compliance efforts, but nonetheless awarded substantial civil penalties and attorneys’ fees. The federal appeals court vacated this decision on the ground that the case was moot. Extending Steel Company, the appeals court concluded that civil penalties could not satisfy the redressability requirement even when the violations were ongoing at the time the complaint was filed.

In addition, the court of appeals reversed the trial court’s award of attorneys’ fees to the plaintiffs. The court reasoned that, since it could no longer award the plaintiffs any substantive relief, it would be inappropriate to award the plaintiffs attorneys’ fees. Thus, even though the polluter had only come into compliance in response to and as a result of the lawsuit, the plaintiffs were entitled to no recovery to cover the time spent by their attorneys in achieving that result.

Under this ruling, even if a company is flagrantly violating the law, it can escape liability, including any obligation to pay attorneys’ fees, so long as it can extend the litigation long enough to provide time to come into compliance by the time final judgment is entered. This ruling seriously undermines polluters’ incentive to come into voluntary compliance with the CWA, and creates a perverse incentive for polluters to prolong citizen suits. The risk that substantial attorney time and effort can go completely uncompensated undermines the goal of the CWA citizen suit provision to encourage “private attorneys general” to help enforce the law.

Other lower courts, following both the Steel Company and Laidlaw decisions, have reached even more draconian results. For example, in San Francisco Bay Keeper, Inc. v. Cargill Salt Division, a federal trial court ruled that plaintiffs can never seek civil penalties in a CWA citizen suit, directly contradicting Congress’ express determination that civil penalties should be assessed in CWA citizen suits. The defendant polluter had illegally discharged tons of mud and waste from its refinery into sensitive marsh habitat now included within the Don Edwards San Francisco Bay National Wildlife Refuge. The plaintiffs argued, unsuccessfully, that without the threat of civil penalties the polluter would have no financial incentive to clean up its discharges until it had exhausted its final appeal, which could be many years later.

In addition, in Dubois v. U.S. Dep’t of Agriculture, a federal trial court dismissed a claim for civil penalties under the CWA after granting injunctive relief earlier in the
same litigation. The court concluded that, once it had provided injunctive relief, the injury had been redressed, and the polluter should therefore escape all responsibility for paying any civil penalties.

While the most dramatic erosion of citizen standing has occurred in cases involving plaintiffs who invoked the citizen suit provisions of federal environmental laws, a similar erosion has occurred in suits brought to challenge violations of the National Environmental Policy Act (NEPA). For most of the nearly 30 years since NEPA’s enactment, citizens have had standing under the Administrative Procedure Act to challenge government agency compliance with NEPA’s environmental analysis requirement based on a showing of some geographical relationship to the resource at issue and an allegation that the agency has done an inadequate job of evaluating the risk of environmental harm. Principally relying upon Lujan II, some lower federal courts have begun requiring that plaintiffs show not only that the agency has failed to conduct a proper environmental analysis, but that particular environmental harms will likely result from the agency’s lapse.

Thus, in Florida Audubon Society v. Bentsen, a federal appeals court concluded that environmental plaintiffs lacked standing under the National Environmental Policy Act to challenge the Department of Treasury’s authorization of a tax credit to producers of the fuel additive ETBE. The environmental plaintiffs argued that the tax credit would lead to increased production of certain crops, which in turn would allegedly lead to various adverse environmental impacts. The court ruled that, even assuming the tax credit would lead to adverse environmental consequences generally, the plaintiffs, who lived in areas which would likely experience increased agricultural production, failed to show “a substantial probability” that the tax credit would lead to a “demonstrably increased risk of serious environmental harm” to their “particular interests.”

Similarly, in Broadened Horizons Riverkeepers v. U.S. Army Corps of Engineers, the court ruled that environmental groups lacked standing to challenge issuance of permits for dock construction on the ground that the Army Corps of Engineers had not conducted the necessary environmental analysis mandated by the National Environmental Policy Act. The court ruled that a plaintiff suing to enforce NEPA must demonstrate a “substantial probability” that adverse consequences will flow from the challenged action in the event the environmental analysis is not conducted, a requirement which the court ruled the plaintiffs had not met.
Possible Future Steps.

While the recent trend of U.S. Supreme Court decisions is clear, it is uncertain how far the present Court intends to go in limiting citizen access to the courts or whether, instead, the Court might be prepared to begin to reverse course. On March 1, 1999, the U.S. Supreme Court granted a petition for certiorari in Friends of the Earth v. Laidlaw Environmental Services, which will be argued in Fall 1999. The case is significant, in part, because it is one of the very few Supreme Court cases in recent memory in which the Court has agreed to review a case at the request of an environmental plaintiff. While the Court’s decision to review a case is no indication of how the Court intends to rule on the merits, the particularly harsh character of the lower court’s rulings has encouraged speculation that the Supreme Court may reverse. The basic issues presented in the petition for certiorari include: (1) whether the court of appeals erred in dismissing the case as moot despite the fact that the violations were ongoing at the time the suit was filed and the plaintiff sought and obtained a declaratory judgment that the company had violated the law; and (2) whether plaintiffs were in any event entitled to attorney’s fees. The Court might confine itself to these specific issues, or might instead revisit some of the broader questions addressed in the Court’s prior standing decisions.

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In addition, a number of proposals for congressional action have been advanced to remedy, at least in part, the adverse effects of the Supreme Court’s recent standing decisions.38

1. Penalty Provisions. One proposed solution to the redressability problem created by the Steel Company decision would be to amend citizen suit provisions to authorize payment of a monetary penalty, or bounty, to a prevailing plaintiff. The size of the penalty might be calculated in a number of different ways. For example, the penalty
could be a liquidated sum, or the plaintiff might receive some fixed percentage of the
civil penalties payable to the government. The Supreme Court has, on several occasions,
suggested that the availability of a penalty would serve to solve the redressability issue.39

2. Citizen Damages Remedies. Another potential fix to the redressability problem
would be to redraft existing citizen suit provisions to allow citizens to sue for damages
caused by violations of environmental statutes. There is precedent for this approach in
the Surface Mining Control and Reclamation Act, for example, which provides: “Any
person who is injured in his person or property through the violation by any operator of
any rule, regulation, order, or permit issued pursuant to this chapter may bring an action
for damages (including reasonable attorney and expert witness fees) only in the judicial
district in which the surface coal mining operation complained of is located.”40

3. Environmental Clean Up/Restoration Projects. Yet another potential solution to
the redressability problem would be to amend the citizen suit provisions to authorize the
courts to order defendants to conduct projects to mitigate the adverse effects of their
illegal actions. At present, citizens groups and polluters frequently agree to
“supplemental environmental projects” in settling citizens’ suits, and these agreements are
routinely upheld by the courts. However, federal environmental statutes do not generally
include a provision authorizing a court, in order to redress a violation of an
environmental standard, to order a polluter to carry out mitigation projects. Legislation
adopting this approach might authorize courts to require the polluter to correct the
specific environmental harms caused by the defendant’s violation, or might instead
authorize payment into a general environmental restoration or clean up fund.41

4. Legislative Definition of Injury/Causation. A potential legislative solution to
the injury/causation aspect of the standing issue, suggested by Justice Kennedy’s
concurring opinion in Lujan II, is more detailed legislative definition of the injury and
chains of causation Congress is seeking to address. Justice Kennedy indicated that, in
order to ensure that citizens have standing to enforce a particular law, Congress should
“identify the injury it seeks to vindicate and relate the injury to the class of persons
entitled to bring suit.” Thus, for example, in the course of reauthorizing the Endangered
Species Act, Congress could restore that Act’s broad citizen suit provision, at least to
some degree, by more carefully defining the types of injuries the provision is intended to
vindicate.
Footnotes


11. While the Court in Morton focused on the issue of “representational” standing, the Court also recognized that in some circumstances an organization may be able to sue on its own behalf.


14. 449 F.2d 1109 (D.C. Cir. 1971).


19. While he concluded that plaintiffs failed to establish the type of "imminent" injury necessary to confer standing, Justice Scalia also wrote that the "normal standards" of immedlacy (and redressability) do not apply to a litigant alleging a procedural injury. Thus, a plaintiff asserting that an agency has violated NEPA's environmental analysis requirements, for example, need not demonstrate that some particular regulatory action is imminent, or that an agency action that complied with NEPA would necessarily result in a different agency decision.


22. Although not, strictly speaking, a standing decision, the Supreme Court's decision in Gwaltney v. Chesapeake Bay Foundation, 484 U.S. 49 (1987), is consistent with the recent direction of Supreme Court standing doctrine. In that case, the Court held that the Clean Water Act citizen suit provision does not authorize filing suit based on violations which occurred wholly prior to the filing of the suit. Subsequent to Gwaltney, Congress amended the Clean Air Act to authorize citizen suits based on wholly past violations, and similar amendments to the Clean Water Act have been proposed. The effectiveness of this type of legislative fix is now in doubt as a result of the Court's decision in Steel Company.

23. 118 S.Ct. 1777.


28. 123 F.3d 111 (3rd Cir. 1997).


32. 149 F.3d 303 (4th Cir. 1998), cert. granted, 67 U.S.L.W. 3397 (March 1, 1999).


35. See, e.g., City of Los Angeles v. NHTSA, 912 F.2d 478 (D.C. Cir. 1990); City of Davis v. Coleman, 521 F.2d 661 (2nd Cir. 1975).

36. 94 F.3d 658 (D.C. Cir. 1996).

37. 8 F.Supp.2d 730 (E.D. Tenn. 1998).


39. See Lujan II, 504 U.S. at 573; Steel Company, 140 L.Ed2d at 235.


41. A recent amendment to the Clean Air Act adds a provision authorizing the courts to order that at least a portion of the civil penalties payable under this act “be used in beneficial mitigation projects.” 42 U.S.C. 7604(g)(2).
For further reading about standing:


"The erosion of citizen standing to sue has taken place in relatively small, almost imperceptible increments. Only when one stands back and surveys the change in legal doctrine over the last decade does the magnitude of the change become apparent."

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