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FRIENDS OF THE EARTH v. LAIDLAW AND THE INCREASINGLY BROAD STANDARD FOR CITIZEN STANDING TO SUE IN ENVIRONMENTAL LITIGATION

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ABSTRACT

In Friends of the Earth v. Laidlaw Environmental Services, Inc., *the United States Supreme Court created a framework through which citizen groups may sue those who violate environmental protection statutes such as the Clean Water Act. The Court held that citizens may obtain "standing" to bring an enforcement action if (1) they are "injured in fact," even if that injury amounts to no more than "concerns" about the polluter's activities; (2) the polluter "causes" that concern; and (3) the harm can be "redressed" by forcing the polluter to pay a fine, even if the proceeds are not paid to the plaintiffs themselves. This decision created a broad standard that will allow more private citizens to enforce environmental laws when the government fails to do so. The Court could have reached the same result in this case, however, without defining injury so broadly. This decision also missed an opportunity to clarify the causation requirement. Perhaps the most well-reasoned and significant holding of this opinion is that fines paid to the government will satisfy the redressability requirement because of their deterrence value to the polluter and others.*

INTRODUCTION

We all wish that polluters would obey environmental laws such as the Clean Water Act and refrain from harming the fragile ecosystems in our nation's waterways. However, industry does not always do as it should. The federal government and the states are then forced to sue those who break these laws, so that the courts will impose sanctions on them and make clean operation of factories more profitable than simply spewing toxins into our rivers. But who else should be allowed to sue those who violate environmental laws? Should any citizen who feels the inclination be ***416** allowed to "prosecute" polluters as well? Or should there be some minimum standard of connection to the specific problem that a plaintiff must have before being allowed to sue?

In a perfect world, the government would have all of the resources it needs to catch those who break environmental laws and prosecute them to the fullest extent possible. In the real world, however, that is simply not possible. Government enforcement agencies are too over-taxed to deal with this problem completely. Therefore, the Clean Water Act includes a provision that allows any person "having an interest which is or may be adversely affected" to sue polluters who violate the Act.[1] Environmental groups have seized upon this power given to them and have performed a great service by bringing countless enforcement actions against polluters whose actions slip by government officials.

The inquiry does not end, however, simply because a federal law says that any interested person can sue. The U.S. Constitution also puts limits on who can bring suit. The Supreme Court has used the "case or controversy" clause of the Constitution[2] to create the doctrine of "standing." This doctrine requires that anyone who brings a legal action must have a significant stake in the controversy to be allowed to use the judicial system to force someone else to obey the law.

In the recent case of *Friends of the Earth v. Laidlaw Environmental Services, Inc.*, the U.S. Supreme Court clarified how this doctrine should be applied in the context of citizen suits to enforce environmental laws. Three criteria must be met for citizens to obtain "standing" to sue: (1) injury in fact, (2) causation, and (3) redressability.[3] In this case, the Court essentially glossed over the second requirement, that the polluter actually cause the harm to the plaintiff. Rather, the Court allowed

citizens to sue who were simply "concerned" about a defendant's emissions and found that those "concerns" caused the citizen to suffer an injury. This kind of indirect linkage between the defendant's violation of the Act and the plaintiff's alleged injury resulted in the plaintiffs being allowed to sue, even when the defendant's activities did nothing to directly affect the plaintiffs whatsoever.

This latest definition of standing may create greater predictability in determining when private citizens may sue under laws such as the Clean Water Act. Yet, the Court has missed an opportunity to put meaningful limits on the doctrine of standing by not addressing the second element, ***417** causation. If the Court had engaged in a more detailed and sophisticated analysis of the type of harm that a plaintiff should suffer before being granted standing to sue, the end result would have been much better. The specific polluter in this case would have still been held liable for its violation of the Clean Water Act and future litigation would be meaningfully limited, so that only those who are injured by actions of the defendant might sue. By equating a plaintiff's concern about harm, real or imagined, with actual harm, the Court significantly broadened the pool of people who can sue in such cases.

This article will discuss the factual situation leading up to this case, as well as the opinions and reasoning of the courts below. Following that, I will discuss how the standing doctrine has been altered by this case and how the court might have better articulated the standard.

STATEMENT OF THE CASE

This case arose because Laidlaw Environmental Services owned and operated a wastewater treatment plant in South Carolina on the banks of the North Tyger River. The plant had a permit to discharge treated wastewater into the river so long as the discharge met certain criteria imposed by a National Pollutant Discharge Elimination System (NPDES) permit that was issued by state authorities pursuant to the Clean Water Act (CWA).[4] The permit limited the amounts of certain chemicals that Laidlaw could discharge into the river.[5]

When the NPDES permit was issued, it was uncertain whether any technology existed that could allow Laidlaw to meet the stringent standards established.[6] The permit set forth the amounts of mercury Laidlaw could discharge; therefore, the permit included a "reopener clause" that would have allowed Laidlaw to petition to be allowed to discharge more mercury if it was determined that it would be impossible to meet the mercury discharge standard.[7] Laidlaw hired a consulting firm in the fall of 1986 to conduct a feasibility study. That study concluded that it would be extremely ***418** difficult, if not impossible, to meet this standard.[8] Nonetheless, Laidlaw installed a "carbon adsorption unit," which showed very promising results for allowing it to meet the mercury standard. Therefore, Laidlaw chose not to petition for a higher limit, as the permit allowed.[9]

Unfortunately, Laidlaw's efforts did not lower the discharge amount, as required by the initial permit, and mercury emissions would have still been too high, even with the new filtering system. Therefore, Laidlaw went back to the proverbial drawing board and attempted to reduce the mercury emissions in other ways. After much effort in attempting to resolve this problem, however, the plant still could not meet the mercury emission standards set by the NPDES.

Because its efforts failed, Laidlaw finally petitioned the state authorities to raise the site-specific mercury emission standard in June of 1991.[10] It argued that the existing permit's limits were more stringent than necessary to keep the Tyger River within water quality standards.[11] However, it abandoned this request after the state authorities rejected the fish study that Laidlaw submitted in support of its claim.

Laidlaw continued to operate the facility and allowed mercury to reach the river in excess of the limits; consequently, the state sued to force compliance.[12] Laidlaw continued to research other methods of reducing its mercury output, and through a variety of methods it eventually achieved the permit's requirements. As a result, the State dropped its enforcement action against Laidlaw.[13]

In 1994, the South Carolina Department of Health and Environmental Control issued a new permit to Laidlaw that contained higher limits for mercury emissions. This permit increased Laidlaw's daily maximum more than seven times for mercury discharge into the river.[14] After the new permit was issued, Friends of the Earth (FOE) and Citizens Local Environmental Action Network (CLEAN), two non-profit environmental citizens groups, entered the scene. Initially, these two groups filed a petition for administrative review with a state administrative law judge, alleging that the new mercury emission limit violated the "anti-backsliding" rule.[15] The administrative law judge assigned to that case ***419** found that the anti-backsliding rule did not apply to this case and upheld the permit.[16]

FOE and CLEAN then brought suit against Laidlaw in federal district court under the citizen suit provision of the CWA, asking the court to impose civil penalties for the permit violations and for declaratory and injunctive relief along with attorney fees and costs. The suit was brought on the basis of a provision in the CWA that states, "any citizen may commence a civil action on his own behalf ... against any person ... who is alleged to be in violation of ... an effluent standard or

limitation under this chapter ...."[17] The CWA defines "any citizen" as a person or persons having an interest that is or may be adversely affected. However, citizens may not bring suit if the state administrator "has commenced and is diligently prosecuting" the party responsible for the violation.[18]

While the trial court did conclude that Laidlaw violated the permit limitations, it found inconclusive a "fish tissue study" done by the environmental groups and concluded that Laidlaw's effluent had no demonstrated adverse effect on the environment.[19] However, the court went on to calculate a civil penalty for the violations anyway, based on the economic benefit that Laidlaw received by not complying with the permit, as well as other factors.[20] The court reduced the penalty amounts due to Laidlaw's good faith efforts in attempting to keep emissions within the permit restrictions and finally assessed Laidlaw $405,800 in penalties.[21] In addition, the court denied injunctive relief because Laidlaw was in substantial compliance with the requirements of the 1994 permit, with its much less stringent mercury allowance.[22]

***420** Plaintiffs then appealed to the Fourth Circuit Court of Appeals claiming that the penalty imposed by the district court was inadequate. The defendant cross appealed, claiming that the plaintiffs lacked standing to bring the action in the first place because they were not "injured in fact." Laidlaw also claimed that the South Carolina state officials diligently prosecuted the violations, hence the suit should have been barred.[23]

The court of appeals reversed the district court on the grounds that the third element of Article III standing, "redressability," was not satisfied in this case.[24] (FOE had not appealed the denial of declarative and injunctive relief claim, only the amount of the civil penalties.) The court reasoned that the three requirements of standing must be satisfied throughout the litigation, or the case will become moot.[25] Civil penalties would no longer redress plaintiffs' injuries because the defendant had achieved substantial compliance with the permit.

To reinforce its reasoning, the court of appeals quoted a Supreme Court decision that had actually been issued after the trial court had decided this case. In *Steel Co. v. Citizens for a Better Environment*, the Court stated,

Although a suitor may derive great comfort and joy from the fact that the United States Treasury is not cheated, that a wrongdoer gets his just deserts, or that the nations laws are faithfully enforced, that psychic satisfaction is not an acceptable Article III remedy because it does not redress a cognizable Article III injury.[26]

The court of appeals went on to vacate the district court's order and remand it with instructions to dismiss the action.[27]

*421 THE SUPREME COURT OPINION

The Supreme Court granted certiorari, and eventually reversed the court of appeals, based on the notion that citizen suits do not become moot under the CWA simply because the violator achieves substantial compliance with its obligations under the Act.[28] In order to reach this holding regarding mootness, however, the Supreme Court first had to analyze whether the plaintiffs had standing at all to bring suit. If standing requirements were not met, then whether the claim was moot or not would have itself been an irrelevant issue. The plaintiffs would necessarily be dismissed from the action if they did not have standing.

To begin its analysis of whether FOE and CLEAN were proper plaintiffs in this action, the Court reiterated that there are three requirements that plaintiffs must satisfy to have constitutional standing. The Court stated that

a plaintiff must show (1) it has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.[29]

The Court then went on to explain that associations, such as Friends of the Earth in this case, will have standing to bring suit on behalf of their members if their members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.[30]

The Court analyzed separately two of the three requirements for standing. First, the court addressed the question of whether the plaintiffs suffered "injury in fact." In support of its position, the defendant argued that even the district court agreed that there had been "no demonstrated proof of harm to the environment."[31] The Court reasoned that this is ***422** inconsequential, however, because the proper test is not injury to the environment but injury to the plaintiff.[32]

As examples of injuries that the members of the plaintiff organizations suffered, the Court pointed out that one person who lived a half-mile from the facility and occasionally drove over the North Tyger River attested that the river looked and smelled polluted. This person would like to fish, camp, swim, and picnic at the river but would not do so because he "was concerned that the water was polluted by Laidlaw's discharges." Several other CLEAN members demonstrated injury because they wished to picnic, walk, bird watch, camp, swim, drive near, and wade in the river; however, none of them would do these things because they were "concerned about harmful effects from discharged pollutants." One other CLEAN member claimed that her home near the facility was reduced in value due to the defendant's discharges into the river.[33]

The Court held that all of these allegations were sufficient to establish injury in fact. It reasoned that if a challenged activity

lessens the aesthetic and recreational values of the area to the plaintiffs, the injury requirement is satisfied. Although the Court had previously found, in *Lujan v. National Wildlife Federation*,[34] that "general averments" and "conclusory allegations" are insufficient to prove injury, these plaintiffs alleged sufficiently direct injuries that were distinguishable from those in *Lujan*.[35]

Without addressing whether the second aspect of standing, causation, was met, the Court went directly to an analysis of the third element, redressability. The defendant argued that civil penalties would not redress the plaintiff's injuries, because the judgment would be paid to the government, not the plaintiffs. However, the Court did not find this reasoning persuasive. Rather, it pointed out that civil penalties will have a deterrent effect. It may seem that deterrence cannot happen when the defendant already has achieved compliance with the Act. However, the penalty will also deter any future violations by the company, whether those violations might occur at this specific location or somewhere else. The Court pointed out that the congressional intent behind the penalty provisions of the CWA included retribution, deterrence, and restitution. As the Court stated, "a defendant once hit in its pocketbook will surely think twice before polluting again."[36]

Having satisfied itself that the plaintiffs in this case had standing to bring this action in the first place, the Court moved on to consider whether ***423** the case had become moot because Laidlaw had closed the facility since the litigation began, and it was no longer discharging any pollutants into the river. Previously, the Court had defined mootness as "standing set in a time frame." In other words, an action can become moot, even if the parties met the requirements to have standing at one time, but one or more of those elements is no longer satisfied at later stages of litigation, such as on appeal.[37] In this case, however, the Court distanced itself from this interpretation. When an unlawful activity is capable of repetition, such as in this case, the courts must be able to review that activity. This is true even if one of the elements of standing, such as redressability of the specific harm complained of, no longer exists. In this case, although Laidlaw had closed the plant in question and was no longer discharging toxins into the river, Laidlaw still retained its permit to discharge certain pollutants into the river. Therefore, it was possible that the permit violations could occur once again. As a consequence, the action was not moot, and the Supreme Court reversed the court of appeals and remanded the case to the district court to re-enter its judgment.[38]

Justice Scalia dissented on both issues, *i.e.*, that the plaintiffs had standing to bring suit and that the case was not rendered moot by Laidlaw's compliance with the permit. Regarding standing, he argued that neither injury in fact nor redressability was satisfied. Justice Scalia was joined by Justice Thomas in his dissent.

Citing *Lujan v. Defenders of Wildlife*,[39] the dissent argued that injury in fact must be "concrete and particularized." Additionally, the evidence produced at trial must support those facts adequately. However, the plaintiffs in this case only asserted that their enjoyment of the river was diminished due to "concern" that the water was polluted, and that they "believed" the pollution had reduced the value of their homes. The dissent argued that the evidence to support an injury was insufficient in this case because the district court had stated that there had been "no demonstrated proof of harm to the environment" and the permit violations did not cause any health risk or environmental harm.[40]

Although the majority opinion had disposed of this argument by stating that the correct measure of harm is harm to the plaintiff, not the environment, the dissent pointed out that a lack of harm to the environment will typically translate into a lack of harm to the plaintiff. Quoting *Los **424** Angeles v. Lyons*,[41] Justice Scalia stated that "it is the reality of the threat of repeated injury that is relevant to the standing inquiry, not the plaintiff's subjective apprehensions."

Although still discussing the first prong, injury in fact, the dissent went on to implicitly address the causation aspect of standing by stating,

At the very least, in the present case, one would expect to see evidence supporting the affidavits' bald assertions regarding decreasing recreational usage and declining home values, as well as evidence for the improbable proposition that Laidlaw's violations, even though harmless to the environment, are somehow responsible for these effects.[42]

In addition, Justice Scalia attacked the majority's viewpoint on redressability. In essence, he reasoned that when the civil penalty is paid to the government, not the citizen instituting the suit, the plaintiff receives no benefit from the outcome. Additionally, he argued that there must be evidence that the deterrent effect of the civil penalties must be likely to redress the plaintiffs' injuries. In this case, he thought that the evidence was too speculative. However, the fear of a penalty for future pollution is not strong enough, and the deterrence that the plaintiffs would achieve by additional penalties would be marginal.[43]

ANALYSIS

This decision broadened the standard for citizen standing as a whole by clarifying two of the three elements, namely injury in fact and redressability. After this case, if a citizen has mere concerns about a polluter's activities, this will qualify as an injury in fact. Further, causation will not be a difficult element to prove. This is demonstrated by the fact that the Court did not even consider causation to be an issue in this case, despite the fact that this element appears attenuated at best for some of the plaintiffs. Finally, the fact that a citizen does not expect to actually receive any money from the judgment against the

defendant does not mean that the injury will not be redressed in other ways.

***425 Injury In Fact**

As early as 1972, in *Sierra Club v. Morton*, the Court has recognized harm to aesthetic and environmental interests as being sufficient to establish injury in fact, so long as the party making the allegation is in fact among the injured.[44] Therefore, for example, the construction of a road through a wilderness area can be sufficient to create an injury because it would impair the enjoyment of the park.[45] However, if the plaintiff cannot show a particularized injury that would incur as a result of the defendant's actions, the claim must fail.[46] It is not sufficient for a plaintiff to claim that he or she is a "representative of the public" that will be harmed in order to prove a specific injury.[47] Plaintiffs may only argue that the public interest will be affected *after* they have established standing to bring the suit, and they must demonstrate that standing by showing a particularized injury.[48] Once a citizen establishes standing, then that person can take the position of a "private attorney general" and seek justice for the community as a whole.[49]
Probably the most important decision to explain standing prior to *Laidlaw* was *Lujan v. Defenders of Wildlife*; in which the plaintiff environmental group challenged an agency's interpretation of the Endangered Species Act that limited the Act's application to actions within the United States or on the high seas.[50] The plaintiffs asserted injury because the regulation would increase the rate of extinction of endangered and threatened species.[51] While this type of interest hypothetically could have been sufficient under *Morton*, the plaintiffs did not demonstrate that the regulation would adversely affect them specifically. There, one of the plaintiffs stated that she would like to visit the habitat of the endangered Nile crocodile but failed to state that she *would* be in the position to do so. Another member of the plaintiff group claimed injury because a project that was partially funded by the United States would seriously reduce endangered, threatened, and endemic species habitat including areas that she had visited in Sri Lanka. She intended to return to Sri Lanka but had no immediate plans to do so. The court dismissed these allegations as ***426** insufficient to show an actual injury on the part of the plaintiff. It stated that "such 'some day' intentions without any description of concrete plans, or indeed even any specification of when the some day will be—do not support a finding of the 'actual or imminent' injury that our cases require."[52]

The plaintiffs in *Laidlaw* had more than "someday" intentions of returning to the river that they claimed to be polluted, so they passed the hurdle that *Lujan* set up.[53] The court therefore had to engage in a deeper analysis of whether these plaintiffs suffered an injury. Here, the Court made the blanket proposal that the sworn statements of the members of the Plaintiff group were sufficient to demonstrate injury in fact.[54] It should be noted, however, that the Court did not engage in an analysis of each of the individual claims. Rather, the Court accepted the district court's determination that all the plaintiffs listed had demonstrated injury in fact.

Based on prior precedent, we know that aesthetic or environmental interests can amount to an injury sufficient for standing purposes. In addition, economic injuries also suffice to establish injury in fact.[55] The plaintiffs claimed two basic types of injuries here. For five out of the six individuals mentioned by the court, the injuries amounted to "concerns" due to the discharges by the defendants.[56] All of these plaintiffs alleged specific activities that they would have engaged in at or near the river if it weren't for these concerns. The sixth plaintiff, Gail Lee, claimed that the injury she suffered was a reduced value for her house.[57] Therefore, the first prong of the standing inquiry seems to have been met quite easily by these plaintiffs.
Categorizing these *concerns* as *injuries*, however, is perhaps too broad. Rather, the *result of* those concerns, instead of the concerns themselves, is the harm that the plaintiffs experience. Considering the case of plaintiff Angela Patterson demonstrates this point. She was concerned about harmful effects from Laidlaw's pollutants. Therefore, she no longer ***427** picnicked, walked, bird watched, or waded near the river. It seems that the real injury was not her concern, but rather her inability to take part in the recreational activities that she used to do. Concerns, in and of themselves, seem to be more analogous to "general averments" that the Court has specifically held are insufficient to demonstrate injury in fact.[58] The real harm is the consequences of the concern that the plaintiffs experience. In order to suffer an "injury," a person should suffer some harm or loss.[59] While a "concern" may be characterized as harm, when taken to the logical extreme, it would be more appropriate to classify concern as just that, "an uneasy state of blended interest, regard, uncertainty and apprehension about a present condition or future development."[60]

Every one of the plaintiffs in this case alleged some specific injury, such as Ms. Patterson's, that was concrete and particularized. Except for Gail Lee, they all stated that they would engage in some activity at or near the river if Laidlaw had not polluted the river. Ms. Lee alleged that her house was diminished in value due to Laidlaw's actions. All of these are specific harms that seem to adequately fulfill the injury-in-fact requirement, even if the injury is defined as the actual harm rather than the concerns that led to those harms.

Causation

The second element of standing—causation—presents the real problem with the *Laidlaw* analysis. This is a necessary element of standing and is defined as a fairly traceable connection between the injury in fact and the conduct of the defendant.[61] Conspicuously, however, neither the majority nor the dissent opinion explicitly addressed causation, even though it is a necessary element for plaintiffs to gain standing. Perhaps this is due to an assumption that redressability encompasses causation, because if the requested relief against the alleged violator would not redress the grievance, then that person could not have caused the harm. These are still separate inquiries, however, and should be treated as such.[62] Causation ***428** does not necessarily lead to redressability even though redressability may prove causation. Obviously, a defendant may cause harm to the plaintiff in some way but be totally within the defendant's legal right to do so. In that case, no court could redress the harm done to the plaintiff, even though the defendant caused that harm.

Causation is an important element that, if considered properly, would limit the holding of *Laidlaw* so that it does not seem so broad, yet the ultimate result the case would have reached would be the same. This inquiry is also linked to the injury-in-fact analysis, because the cause of the first injury (the concern) is different from the cause of the second injury (the activity the plaintiff can no longer do). If the concerns are the injuries, then the defendants surely caused them; however, if the activities that the plaintiffs are no longer able to do compose the injuries, then for several of them the *concerns themselves* are the cause of the injuries rather than Laidlaw's permit violations.

Consider the alleged injuries of a few of the individual plaintiffs. Kenneth Lee Curtis stated that he would like to fish, camp, swim, and picnic near the river. In fact, there was a specific spot where he had fished as a child where he would have liked to fish again. However, he would not do these activities because of his concerns about the river's pollution. This seems entirely reasonable as a legitimate injury that was in fact caused by Laidlaw's discharges. The major chemical that Laidlaw had let into the river in large amounts was mercury. This is an extremely toxic substance that fish can carry in their systems, essentially making them inedible because of the risk of poisoning to the person who eats them. Accordingly, there is a direct link between Laidlaw's permit violations and Mr. Curtis's injury. His concerns were merely a direct response to the effect that the mercury poisoning could have on his activities. Therefore, the court could have stopped with this plaintiff, from a causation standpoint, without considering the five others.
In contrast, Angela Patterson's alleged injury was that she could no longer picnic, walk, bird watch, or wade along the river because of her concerns about the harmful effects from the discharged pollutants. Additionally, she would have liked to purchase a home near the river but would not do so because of Laidlaw's discharges. Notably, the court opinion does not provide any evidence of how the discharges actually affected these activities. For instance, how does mercury in the river harm the activity of bird watching? One can theorize that birds might eat the fish that are poisoned and thereby be poisoned themselves, killing the birds. The problem with this hypothesis, however, is that the court found "no demonstrated proof of harm to the environment." The district court found that "the overall quality of the river exceeds levels necessary to support ***429** propagation of fish, shellfish, and wildlife, and recreation in and on the water."[63]

It seems that the real events to blame for Ms. Patterson's injuries were not the permit violations themselves, which would have had no effect on the activities that she wished to do. Rather, her concerns about those violations caused her injuries; however, her concerns were not logically connected to any actual consequences of Laidlaw's discharges. Therefore, Laidlaw did not *cause* her injuries, she did. Her concerns had no basis in the actual condition of the river. Because the causation prong was not met for this individual, the court should have dismissed her as a member of the plaintiff class who could demonstrate standing.

Similarly, Linda Moore stated that she would like to hike, picnic, camp, swim, boat, and drive near or in the river were it not for her concerns about illegal discharges. Again, most of these activities could not have been actually affected by the pollutants. For example, hiking and picnicking could not have been affected, because the pollutants were in the water, not the air. There is simply nothing the pollutants could do to a person who does not come into contact with them. However, two of the activities she listed, swimming and boating, could easily have resulted in Ms. Moore actually coming into contact with those pollutants. Regardless of whether the mercury discharges met the EPA's threshold of making the water dangerous, there would still be a strong chance that Ms. Moore could accidentally ingest the mercury, especially while swimming. Repeated exposure to the chemical could be hazardous to her health, even if at any one time the mercury level was considered safe enough for a person to come into contact with it. Therefore, it seems that Ms. Moore, like Mr. Curtis, experienced injuries that were genuinely caused by the permit violations, rather than concerns that had no basis in the actual environmental conditions.

Because the Court simply skipped the causation issue without analysis, the opinion reads as standing for the proposition that

it does not matter if the defendant actually caused the plaintiffs' injuries. It is only necessary that the plaintiffs *felt* injured. Whether the defendant's actions could have actually been responsible for those injuries seems to be beside the point. This is particularly disappointing because this element could have been used to distinguish between the valid claims, *i.e.*, those based on factual injuries and those that were not. Those who were actually harmed by the unlawful conduct should have had standing, while those whose activities were really unaffected should not have.

***430** **Redressability**

The Court concluded that civil penalties imposed on Laidlaw would redress the plaintiff's injuries, even though those penalties are paid to the government, not to those injured by the pollutants.64 This conclusion has a strong policy basis in deterring future violations of the law. It is important to note that the Court concluded that redressability exists, even if there is no risk that this particular defendant will continue to discharge the pollutants. The civil penalty imposed on this defendant will serve to deter other potential polluters as well.

During the appeal process for this case, the defendant permanently closed and dismantled the facility that was responsible for the mercury discharge.65 At first glance, this may seem to negate any possibility that the plaintiffs' injuries could be redressed by a favorable judgment since the pollution of the river is no longer occurring. As the court points out, however, the deterrent effect that an adverse judgment can have will both deter this defendant from engaging in unlawful practices again and deter others from doing the same. Although this particular facility was dismantled and therefore would likely never pollute the river again, the Court focused on the general deterrent effect that the judgment would have. Additionally, the specific deterrence value of civil penalties should not be discounted. Laidlaw still retained NPDES permits for other facilities that continued to operate. A penalty for this violation would deter Laidlaw itself from violating the terms of those permits.66

The weight that the Court gives to the general deterrent effect as sufficient to support redressability makes sense from a practical standpoint. The plaintiffs can now be assured that the Tyger River will not be polluted with high amounts of mercury by this defendant. In addition, others who might be in a position to violate the CWA will now have motivation to comply with the law because they know that the federal government, or a citizen, can bring a suit and impose heavy fines. This deterrent effect should give the citizens who brought this suit confidence that they can now participate in the activities that they wish to do at the river without worry that they are at risk to be poisoned by mercury.

The general deterrent effect as a satisfaction of the redressability requirement should also avoid the negative consequences that could occur if specific deterrence were required. Consider the result if deterrence of this specific defendant were required to achieve redressability. In that scenario, any company could violate the Clean Water Act and take the chance that no ***431** citizen would file suit to try and stop it. If a citizen were to file suit, however, the company could simply cease operations, and the citizen would lose standing because his or her grievance could no longer be redressed. As a result, the suit would be dismissed, and the polluter would not even be subject to civil penalties for the destruction that it caused.

Conversely, with the rule that the Court laid out in this case, polluters are put on notice that if they violate the CWA (or any act that allows for citizen suits) they can be held accountable for those actions. They will not be able to circumvent the imposition of civil fines that the act permits by simply closing their operations when a citizen brings a suit. As the Court said, "Congress wanted the district court to consider the need for retribution and deterrence, in addition to restitution, when it imposed civil penalties."67 The Court's definition of redressability as "being satisfied by general deterrence" ensures that these goals will be reached if necessary.

CONCLUSION

The Supreme Court has now identified a very broad standard for obtaining citizen standing under Article III of the Constitution. Environmental concerns, regardless of their validity or basis in fact, will satisfy the first prong of "injury in fact." Similarly, the second prong, causation, is adequately shown if the plaintiff can prove that the unlawful conduct of the defendant caused the concern, even if it did not cause the injury. The third prong, redressability, is met regardless of whether the specific defendant has ceased violating the Act because of the general deterrent effect that the judgment will have on both the defendant and others who wish to break the law.

The Court could have reached the same conclusion that it did in this case, that is that the defendant should pay civil penalties for its violations of the CWA, without resorting to such a broad holding. If the Court had considered the consequences of the plaintiffs' concerns as the injury, rather than the concerns themselves, many of them could still have demonstrated injury with ease. If the Court had considered those consequences, causation would also have been satisfied for some of these plaintiffs. Citizens who were at actual risk of being poisoned by the mercury discharges would have no problem demonstrating that the defendant caused their injury. However, the others who merely stopped going near the river because of

their concerns really had suffered injury because of their *knowledge* of the pollutants, rather than the pollutants themselves. Because the pollutants were demonstrated not to have harmed ***432** the environment, they could not have had any appreciable effect on those plaintiffs' activities.

In contrast, the Court articulated a well reasoned and workable standard to demonstrate redressability and, thus, close out the standing analysis. General deterrence of like conduct by this specific defendant, or others similarly situated, is sufficient to redress the plaintiffs' injuries. This rule sends a message to companies that they should think twice before violating the CWA, due to the possibility of citizen suits such as this. As a result, the Act has real "teeth" both because it will help keep our country's waters from being polluted and because those who violate the Act will be subject to serious monetary fines.

Footnotes

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1 33 U.S.C. § 1365(a), (g) (1994).

2 Article III of the U.S. Constitution states that "[t]he judicial power shall extend to all cases, in Law and Equity, arising under this Constitution, the Laws of the United States, ... [and] to Controversies ...." U.S. CONST. art. III, § 2, cl. 2.

3 *See* Friends of the Earth v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167, 180-81 (2000) [hereinafter *Supreme Court Opinion*].

4 NPDES permits are authorized by Section 402 of the Clean Water Act. *See* 33 U.S.C. § 1342(k) (1994).

5 *See* Friends of the Earth v. Laidlaw Envtl. Servs., Inc., 956 F. Supp. 588, 593 (D.S.C. 1997) [hereinafter *District Court Opinion*].

6 The permit required that Laidlaw limit its discharge of the following chemicals: antimony, arsenic, cadmium, chromium, copper, lead, mercury, nickel, total organic carbon, total dissolved solids, total suspended solids, and zinc. The mercury limit was greatly reduced in this permit from 20 parts per billion to 1.3 parts per billion; however, the state imposed an interim limit of 10 parts per billion for the year 1987 only. *Id.*

7 *See id.* at 593-94.

8 *See id.* at 594.

9 *See id.*

10 *Id.* at 595.

11 *See id.*

12 *See id.*

13 *See id.* at 596.

14 *See id.*

15 An anti-backsliding rule is a regulation that prohibits the issuance of a permit with less stringent limits than the limits imposed by a previous permit. There are several exceptions to these rules. *See id.* at 596, n.9.

16 *See id.* at 597.

17 33 U.S.C. § 1365(a) (1994). This citizen suit provision is modeled on the citizen suit provision of the Clean Air Act. *See* Sen. Rep. No. 414, 92d Cong., 1st Sess. 79 (1971). That provision was enacted because the government does not have the resources to take action against the numerous violators that are likely to exist. *See* 116 Cong. Rec. 33104 (1970) (statement of Sen. Hart). Although this statutory standard may be broader than that of the Constitution, plaintiffs must still meet constitutional standing requirements. That is why the statutory standing clause is not analyzed whatsoever by the courts in this case; instead they focus on the constitutional requirements.

18 33 U.S.C. § 1365(g).

19 *See District Court Opinion*, 956 F. Supp. at 600. The court observed that the mercury levels present in the sampled fish were less than one quarter of the amount necessary to trigger FDA action. *See id.*

20 *See id.* at 610-11. The CWA set forth six factors for courts to consider when calculating penalty amounts: (1) the seriousness of the violation or violations, (2) the economic benefit (if any) resulting from the violation, (3) any history of such violations, (4) any good-faith efforts to comply with the applicable requirements, (5) the economic impact of the penalty on the violator, and (6) such other matters as justice may require. *See* 33 U.S.C. § 1319(d) (1994).

21 *See District Court Opinion*, 956 F. Supp. at 612.

22 *See id.* at 611.

23 *See* Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 149 F.3d 303, 305 (4th Cir. 1998) [hereinafter *Fourth Circuit Opinion*]. The district court previously held that the state had *not* diligently prosecuted Laidlaw for the violations. In fact, it even hinted at collusion between Laidlaw and the state authorities, which would have barred the citizen suit from commencing. The district court found that "Laidlaw drafted the state-court complaint and settlement agreement, filed the lawsuit against itself, and paid the filing fee." *District Court Opinion*, 890 F. Supp. at 489. *See also* Reply Brief for Petitioners at 1, *Supreme Court Opinion* (No. 98-822) (stating that "[w]hen Laidlaw received the notice of intent to sue from [FOE], Laidlaw set out to manufacture a preclusion defense. Since state suits can bar citizen suits if filed before the citizen suit, Laidlaw sought and was able to convince DHEC to bring suit ...." (citations omitted)).

24 *See Fourth Circuit Opinion*, 149 F.3d at 306-07. The court stated, "we conclude that this action is moot because the only remedy currently available to Plaintiffs—civil penalties payable to the government—would not redress any injury Plaintiffs have suffered." *Id.*

25 *See id.* at 306.

26 Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 107 (1998).

27 *See Fourth Circuit Opinion*, 149 F.3d at 307.

28 The asserted reason for granting certiorari was to "resolve the inconsistency between the Fourth Circuit's decision in this case and the decisions of several other courts of appeals, which have held that a defendant's compliance with its permit after the commencement of litigation does not moot claims for civil penalties under the Act." *Supreme Court Opinion*, 528 U.S. 167, 179-80 (2000).

29 *Id.* at 180-81 (2000).

30 *See id.* at 181 (citing Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 343 (1977)).

31 *See id.* (quoting *District Court Opinion*, 956 F. Supp. 588, 602 (1997)).

32 *See id.*

33 *See id.* at 181-83.

34 497 U.S. 871, 889 (1990).

35 *See Supreme Court Opinion*, 528 U.S. at 183-84.

36 *Id.* at 186.

37 *See id.* at 189-90.

38 *See id.* at 195.

39 504 U.S. 555, 560 (1992). *Lujan* is the seminal case regarding citizen standing in the context of the violation of a Federal statute.

40 *See Supreme Court Opinion*, 528 U.S. at 199 (Scalia, J., dissenting) (quoting *District Court Opinion*, 956 F. Supp. 588, 602 (D.S.C. 1997).

41 461 U.S. 95 (1983). *Lyons* involved a suit by a citizen against the Los Angeles police department. The plaintiff accused the officers of essentially using abusive procedures to restrain him during a routine traffic stop. The Court held that the citizen did not have the requisite standing to seek injunctive relief because it was unlikely that he would ever be subjected to this treatment again. The Court dismissed the argument that the injury was "capable of repetition, yet evading review" because the plaintiff was not barred from bringing a suit for damages. *See id.* at 109.

42 *Supreme Court Opinion*, 528 U.S. at 199-200 (Scalia, J., dissenting).

43 *Id.* at 208.

44 *See* Sierra Club v. Morton, 405 U.S. 727, 734-35 (1972).

45 *See id.*

46 *See id.* at 735.

47 *See id.* at 736.

48 *See id.* at 737.

49 The term "private attorney general" is used in a variety of contexts whenever a private citizen is allowed to bring a lawsuit because that person believes that the state did not perform its duties properly. *See id.* at 737-38 (stating that "we have used the phrase 'private attorney general' to describe the function performed by persons upon whom Congress has conferred the right to seek judicial review of agency action").

50 Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).

51 *See id.* at 562.

52 *Id.* at 564.

53 In fact, the requirement in *Lujan* that the plaintiffs have specific plans to return to a place that had suffered environmental damage, rather than "some day intentions," may not have changed the equation at all. Now, plaintiffs just needed to adjust their affidavits to make sure that they stated that they would return, not just that they hoped or wished to do so.

54 *See Supreme Court Opinion*, 528 U.S. 167, 183 (2000).

55 *See* Sierra Club v. Morton, 405 U.S. 727, 734-35 (1972).

56 *See Supreme Court Opinion*, 528 U.S. at 181-83. *See also* Petitioner's Brief at 6, *Supreme Court Opinion* (No. 98-822) (stating that "[t]he members would like to picnic, birdwatch and hike near, boat on, and eat fish from the North Tyger River and downstream waters but do not do so or are concerned when they do so because of the pollution in the River. They are also concerned about the impact of that pollution on the value of their homes and on their dairy products because cows drink from the River.").

57 *See Supreme Court Opinion*, 528 U.S. at 182-83.

58 *See* Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 888 (1990).

59 Injury is defined as "hurt, damage, or loss sustained." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1164 (1981).

60 *Id.* at 470.

61 Vt. Agency of Natural Res. v. United States *ex rel.* Stevens, 525 U.S. 765, 770 (2000).

62 *See* Allen v. Wright, 468 U.S. 737, 753 n.19 (1984) (stating that "[t]he 'fairly traceable' and 'redressability' components of the constitutional standing inquiry were initially articulated by this Court as 'two facets of a single causation requirement.' To the extent there is a difference, it is that the former examines the causal connection between the assertedly unlawful conduct and the alleged injury, whereas the latter examines the causal connection between the alleged injury and the judicial relief requested." (citations omitted)).

63 *See District Court Opinion*, 956 F. Supp. 588, 600 (D.S.C. 1997).

64 *See* *Supreme Court Opinion*, 528 U.S. 167, 185-86.

65 *See* *id.* at 179.

66 *See* Petitioner's Brief, *supra* note 56, at 8, n.7.

67 *See* *Supreme Court Opinion*, 528 U.S. at 185 (quoting Tull v. United States, 481 U.S. 412, 422-23 (1987).

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