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The Pendulum Swings Back: Standing Doctrine After *Friends of the Earth v. Laidlaw*

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Summary

On January 12, 2000, the Supreme Court held in *Friends of the Earth v. Laidlaw* that plaintiffs had standing to pursue a Clean Water Act citizen suit, despite the fact that (1) the company-defendant had achieved compliance prior to the district court's decision, (2) plaintiffs sought only civil penalties payable to the U.S. Treasury, and (3) plaintiffs had demonstrated only reasonable concern, not physical injury to the environment. In so holding, the Court appeared to retrench substantially from its environmental standing decisions of the 1990s, which had all gone against plaintiffs. In the wake of *Laidlaw*, environmental citizen suits will be easier to bring. This report will not be updated.

During the 1990s, Supreme Court decisions heightened the “standing” hurdle for plaintiffs alleging environmental injury in federal courts. These rulings called into question the viability of many citizen suits under federal environmental statutes. On January 12, 2000, however, the Court appeared to shift course in *Friends of the Earth v. Laidlaw Environmental Services*,¹ liberalizing certain elements of standing doctrine. This report reviews the Supreme Court's treatment of the standing issue prior to *Laidlaw*, describes the *Laidlaw* litigation, and speculates as to the decision's implications for environmental citizen suits.

By way of background, standing doctrine is concerned with *who is a proper party to raise a particular issue in the federal courts*. The doctrine demands a plaintiff who has “such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends”² Some precepts of standing are viewed as merely “prudential” – that is, developed by the courts as part of their inherent power of judicial self-management. Our target here is those aspects of standing mandated by Article III of the Constitution – that is, its confinement of the jurisdiction of courts created under that article to “Cases” and

¹ 120 S. Ct. 693 (2000).

² *Baker v. Carr*, 369 U.S. 186, 204 (1962).

“Controversies.” This restriction, in the Supreme Court’s eyes, means that a plaintiff in an Article III court (such as a federal district court) must show that (1) he/she has suffered an “injury in fact” that is concrete and particularized (not common to the entire public), and actual or imminent; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely that the injury will be redressed by a favorable decision.

Like all suits in federal district court, citizen suits must at a minimum meet these constitutionally mandated prerequisites.

Environmental Standing Prior to *Laidlaw*

The environmental-standing case law prior to *Laidlaw* divides into two historical phases. In the first, standing was easily obtained. In *Sierra Club v. Morton*,³ the Supreme Court in 1972 made clear that injury to aesthetic and environmental well-being may constitute “injury in fact” for purposes of establishing standing to seek judicial review under the Administrative Procedure Act (APA).⁴ Moreover, the fact that the injury was “shared by the many” did not make it less deserving.⁵ The following year, in what is generally regarded as the apogee of relaxed standing law, the Court in *United States v. SCRAP*⁶ found APA standing based on an attenuated argument by a group seeking to compel the ICC to suspend a proposed freight rate increase. The group argued that the rate increase would raise the price of recyclable materials, which would discourage their use, which would result in increased use of nonrecyclable materials, which would lead to adverse environmental impacts (e.g., increased litter) on the forests and streams in the D.C. area that group members used for recreation.

Following *Sierra Club* and *SCRAP*, the standing hurdle remained an easily surmounted one in environmental cases for almost two decades. In 1983, however, then-Judge Antonin Scalia argued in a law review article that federal courts were conferring standing too liberally.⁷ For one thing, he said, courts need to accord greater weight to the traditional requirement that plaintiff’s alleged injury be a particularized one, which sets him or her apart from the public at large. For another, he asserted that courts should be less intrusive into executive branch affairs, particularly when the plaintiff seeks to vindicate majoritarian interests. The law of standing, in Judge Scalia’s view, should restrict courts

³ 405 U.S. 727 (1972).

⁴ Section of the APA requires that those seeking review under that statute have “suffer[ed] legal wrong,” or be “adversely affected” or “aggrieved,” by the challenged agency action. 5 U.S.C. § 702.

⁵ To be sure, the Court denied the Sierra Club standing, because the Club had failed to allege that it or its members were among the injured. This deficiency was easily remedied by the Club’s amending its complaint to allege recreational harm to those of its members who visited the affected area.

⁶ 412 U.S. 669 (1973).

⁷ Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk L. Rev. 881 (1983).

to protecting the minority against the majority. Important here, he seemed to place many environmental suits in the undesirable vindication-of-the-majority category.⁸

When Judge Scalia ascended to the Supreme Court in 1986, this article assumed some significance. And, indeed, now-Justice Scalia authored the majority opinions in each of the Supreme Court's environmental standing decisions in the 1990s. Not surprisingly, these opinions reflect his law review article, and define the second phase of the Court's environmental standing jurisprudence.

All three decisions in this second phase found the environmental plaintiff to lack standing. In *Lujan v. National Wildlife Federation*,⁹ the Court held 5-4 that where individual plaintiffs averred only that they recreated on unspecified portions of public land, there was insufficient *geographic* specificity to say they were "adversely affected" under the APA by a Bureau of Land Management action affecting particular tracts. Similarly, in *Lujan v. Defenders of Wildlife*,¹⁰ the Court held 7-2 that allegations by the environmental group's members that they intended "some day" to visit an area where endangered species might be harmed by the challenged federal action, lacked the *temporal* specificity needed to meet the "injury in fact" prong of Article III standing. Finally, in *Steel Co. v. Citizens for a Better Environment*,¹¹ the Court ruled 6-3 that where the defendant came into compliance during the 60-day notice period before the citizen suit could be filed, the plaintiffs failed the "redressability" component of Article III standing. For example, the civil penalties sought by the suit were payable to the U.S. Treasury, not the plaintiffs, and so could not redress any lingering injury plaintiffs may suffer from the former violation.

The stage was now set for *Laidlaw*.

The Laidlaw Litigation

Laidlaw operated a hazardous waste incinerator that discharged wastewater into the Tyger River in South Carolina. In 1992, Friends of the Earth (FOE) brought a Clean Water Act (CWA) citizen suit against Laidlaw,¹² alleging that the incinerator had committed hundreds of violations of its effluent permit. FOE submitted the affidavits of several of its members alleging that they were injured by the violations in that they used the river downstream of Laidlaw's point of discharge and had curtailed their use because of concerns about the effect of the violations on human health and fish.

⁸ Also underlying Justice Scalia's narrow view of standing is his dissent in *Morrison v. Olson*, 487 U.S. 654, 697 (1988). There, he opined that the Constitution permits only the executive branch to enforce a public law.

⁹ 497 U.S. 871 (1990).

¹⁰ 504 U.S. 555 (1992).

¹¹ 523 U.S. 83 (1998).

¹² CWA § 505(a); 33 U.S.C. § 1365(a).

In 1997, the district court found that Laidlaw had violated the mercury limits in its permit 489 times, the monitoring requirements 420 times, and the reporting requirements 503 times.¹³ Some of these violations occurred after the citizen suit was filed. The district court denied injunctive relief, since there was substantial compliance by the time the court issued its order, but ordered Laidlaw to pay \$405,800 in civil penalties.

The Fourth Circuit vacated.¹⁴ In its view, the case became moot once the defendant fully complied with its permit and FOE declined to appeal the district court's denial of injunctive relief. FOE was only seeking a higher civil penalty than the district court imposed, and under *Steel Co.*, civil penalties do not meet redressability requirements since they are not payable to the plaintiff. Nor could plaintiffs recover their attorneys fees, since the CWA citizen suit provision limited such recovery to instances where the plaintiff prevailed.

On January 12, 2000, the Supreme Court reversed. Writing for a 7-justice majority, Justice Ginsburg held that the Fourth Circuit erred in concluding that a citizen suit claim for civil penalties must be dismissed as moot when the defendant, after filing of the suit, comes into compliance.

The majority opinion first resolves the Article III standing question. As for injury in fact, it ruled that the relevant showing is injury to the *plaintiff*, not injury to the *environment*. Thus, it was sufficient that FOE members lived downstream from the point of discharge and were concerned enough by the defendant's discharges that they curtailed their use of the river. As for redressability, the Court declared that all civil penalties have some deterrent effect. Indeed, Congress had said so in the specific context of CWA enactment and "[t]his congressional determination warrants judicial attention and respect."¹⁵ *Steel Co.* does not dictate otherwise, said the Court, since that decision denied standing for citizen suitors seeking civil penalties for violations *that had abated by the time of suit*. It did not reach the issue here: standing to seek penalties for violations ongoing at such time. Thus, plaintiffs had standing.

Turning to the mootness issue (again, raised by the defendant's coming into compliance during the district court's deliberations), the Court charged the Fourth Circuit with confusing standing and mootness. The confusion was understandable, the Court conceded, given its past characterization of mootness as "standing set in a time frame." In *Laidlaw*, the Court backed away from that description. It noted, for example, that the prospect of future noncompliance may be too speculative to support standing, but not too speculative to overcome mootness. Then, too, the underlying purpose of the two doctrines counsels greater hesitancy in dismissing a case on mootness, as opposed to absence of standing, grounds. Standing doctrine acts to ensure that the scarce resources of the federal courts are devoted to disputes in which the parties have a concrete interest.

¹³ 956 F. Supp. 588, 600-601 (D.S.C. 1997). There is some overlap in the monitoring and reporting violations, and a significant number of them involve only technical errors in the forms used to report compliance.

¹⁴ 149 F.3d 303 (4th Cir. 1998). An earlier CRS report addresses this Fourth Circuit ruling: (name redacted) *The Future of the Citizen Suit After Steel Co. and Laidlaw*, CRS Report RS20012 (Jan. 5, 1999).

¹⁵ 120 S. Ct. at 706.

In contrast, by the time mootness is an issue, the case may have been in the courts for years, making abandonment without compelling reason a wasteful practice.

That the facility in question had since been closed, however, gave the majority pause. The closure might indeed moot the case if this event made it “absolutely clear” that Laidlaw’s permit violations could not reasonably be expected to recur. This factual issue, not explored by the district court, was found to be open for consideration on remand.

Finally, the Court declined to resolve the important attorneys’ fees issue. FOE argued that it is entitled to attorneys’ fees on the theory that it was the “prevailing party” under the CWA citizen suit provision because it was the “catalyst” that brought about Laidlaw’s compliance. Suggesting that the catalyst theory is viable in general, the Court nonetheless refused to address its validity in this case. That determination, it concluded, was initially for the district court.

In a concurrence, Justice Stevens found an absence of precedent for the proposition that post-complaint compliance that moots a claim for injunctive relief also moots one for monetary relief. Justice Kennedy, also concurring, asked whether allowing private litigants to seek public fines glibed with the Article II enforcement responsibilities committed to the Executive Branch.

Dissenting, Justice Scalia, joined by Justice Thomas, agreed with the majority that “injury in fact” relates to harm to the plaintiff, rather than to the environment. Here, however, the district court had found no harm to the environment, in Scalia’s view precluding a finding that plaintiff had been harmed. Moreover, the majority, in his view, had accepted hopelessly vague claims of injury. As to redressability, Scalia felt that the indirect private consequences of the civil penalty being sought (its alleged deterrent effect) failed to satisfy Article III, particularly here where they were so speculative. And like Justice Kennedy, Justice Scalia raised but did not answer the Article II question: Can we “turn[] over to private citizens the function of enforcing the law”?

Implications for Environmental Citizen Suits

The *Laidlaw* decision is universally seen as a significant win for the plaintiff side of the environmental citizen suit, likely to make such suits much easier to bring. Moreover, it now appears that only a minority of the justices are sympathetic to Justice Scalia’s view that the Constitution prohibits a private party from enforcing a public law. Some specific implications of the *Laidlaw* decision are –

1. It will be easier for plaintiffs to demonstrate the “injury in fact” component of standing. The *Laidlaw* majority asserts that where the injury to plaintiff results from a reasonable concern, there is little need for plaintiff to demonstrate injury to the environment as a predicate. This will alter the current situation, where plaintiff’s attorneys were expending substantial effort (lab analysis of water samples, ecological testing, witness depositions) just to get past this threshold issue in the case.

Laidlaw has already borne fruit. One month after the decision, the en banc Fourth Circuit reversed the panel decision in *Friends of the Earth v. Gaston Copper Recycling*

Corp. denying standing to bring a CWA citizen suit.¹⁶ The en banc court noted that on the facts presented, denying standing “encroaches on congressional authority by erecting barriers to standing so high as to frustrate citizen enforcement of the Clean Water Act.” The citizen suit provision at issue, it observed, uses language that cannot be reconciled with the strict standard of injury used by the decisions below. To Gaston Copper’s defense that plaintiff had not adequately proved environmental degradation to show injury in fact for Article III purposes, the court held up *Laidlaw*’s focus on injury to the plaintiff. “[Plaintiff’s] reasonable fear and concern about the effects of Gaston Copper’s discharge, supported by objective evidence ... constitutes injury in fact.”

Laidlaw also calls into question the no-standing holding in *Public Interest Research Group of New Jersey, Inc. v. Magnesium Elektron, Inc.*,¹⁷ yet another CWA citizen suit. There, the Third Circuit correctly noted that the mere knowledge that a company has polluted is insufficient to confer standing, since this is a generalized grievance shared by the public at large. In conflict with the future *Laidlaw* decision, however, the court went on to conclude that standing requires a showing of actual, tangible injury to the environment. This aspect of the *Magnesium Elektron* decision no longer appears to be good law.

2. It will be easier for plaintiffs seeking civil penalties to satisfy the “redressability” component of standing, even though the penalties are not payable to the plaintiff. The Court’s statement that “all civil penalties have some deterrent effect” is a powerful one for citizen suitors. There are currently several citizen suit provisions that allow claims for money penalties payable to the U.S. Treasury. Note also: because the Court seems inclined to defer to congressional findings, it may be useful in the future to accompany new citizen suit provisions authorizing civil penalties with assertions of deterrent effect.

3. The majority retained the traditional view that makes it hard for a defendant to obtain a dismissal based on mootness once a plaintiff has established standing.

4. On remand, the resolution of the attorneys’ fees issue in *Laidlaw* will be important, since many citizen suit law firms are funded largely through recovery of attorney’s fees from defendants. The Supreme Court’s endorsement of the “catalyst theory” suggests that the district court may be positively disposed to awarding fees in this case.

5. Two facts suggest that *Laidlaw*’s reversal of the 1990s trend toward higher standing hurdles may be more than temporary. First, the Court did not have to decide the standing question at all in the case; mootness was the principal issue presented, and the petitioner’s briefs were focused there. That Justice Ginsburg reached out to resolve the standing issue when it was unnecessary to do so points to a desire on the part of at least some justices to move the pendulum back to some extent. Second, it may be significant that the majority opinion commanded fully 7 votes, including some justices normally on the no-standing side of the Court’s decisions.

¹⁶ 2000 Westlaw 204559 (4th Cir. Feb. 23, 2000) (en banc).

¹⁷ 123 F.3d 111 (3rd Cir. 1997).

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