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Laidlaw and the Clean Water Act: Standing in the Bermuda Triangle of Injury in Fact, Environemntal Harm, and Mere Permit Exceedances

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LAIDLAW AND THE CLEAN WATER ACT: STANDING IN THE BERMUDA TRIANGLE OF INJURY IN FACT, ENVIRONMENTAL HARM, AND "MERE" PERMIT EXCEEDANCES

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I. INTRODUCTION

"What's it to you?" is the question that then Judge Antonin Scalia, sitting on the District of Columbia Court of Appeals in 1983, said should be asked of plaintiffs in citizen suits under environmental statutes.[1] This "rude question" is appropriate, wrote Justice Scalia, to ensure that plaintiffs can demonstrate sufficient injury in fact to satisfy a court's standing analysis.[2] Standing, in general, refers to the ability of a plaintiff to bring a lawsuit against a particular defendant.[3] The concept of standing serves a gate-keeping function that ensures that only those who have an interest in the outcome of litigation be allowed to participate in it.[4] Modern standing analysis utilizes a three-pronged scheme that asks whether a plaintiff has suffered injury in fact, whether the defendant caused the injury, and if the court can redress the plaintiff's injury.[5] Because standing analysis is used as a safeguard to prevent courts from becoming "debating societies,"[6] an insufficient answer to Justice Scalia's question threatens to toss environmental plaintiffs out of court before getting to the merits of their claims. If making such a direct inquiry became standard, the judiciary could put a dagger into the heart of its "long love affair with environmental litigation."[7]

Congress enacted many of the modern environmental statutes during the 1970's on the heels of the popular support that followed the first Earth Day on April 22, 1970.[8] Seeking to protect the nation's water-

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1. Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 882 (1983).

2. *See* Steve France, *What's It To You?*, 85 A.B.A. J., Oct. 1999, at 36, 36.

3. *See* KENNETH DAVIS, ADMINISTRATIVE LAW TREATISE §§ 24:1-24:36 (2d ed. 1982).

4. *See id.*

5. *See* Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 472 (1982).

6. *Id.* at 477.

7. Scalia, *supra* note 1, at 882.

8. *See* ROBERT PERCIVAL ET AL., ENVIRONMENTAL REGULATION 4 (1992).

ways, Congress enacted the Federal Water Pollution Control Act in 1972 (also called the Clean Water Act or CWA).[9] The Clean Water Act of 1972 changed the legal scheme for protecting the nation's water supply from a singular assessment of water quality standards to one establishing effluent limitations.[10] By shifting the focus from water quality standards to effluent limitations, Congress sought to eliminate the imprecision associated with water quality standards and increase the level of enforcement of the CWA.[11] With its goal "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters,"[12] the focus on effluent limitations in the CWA began a new era in the prevention of water pollution.

The change in the scheme for protecting the nation's waterways went hand in hand with a change in the enforcement of environmental laws. In the 1960s, for example, governmental agencies failed to enforce federal environmental legislation with dispatch or vigor.[13] "Cumbersome and ineffective" procedures caused the enforcement of environmental laws to fall far below an acceptable standard.[14] Given the failure to enforce the laws, Congress designed an alternative to governmental enforcement—the citizen suit.[15] By enacting citizen suit provisions, Congress gave citizens the right to enforce environmental laws and seek remedies for violations of them. First drafted into the Clean Air Act of 1970, Congress envisioned that citizen suits would be "an efficient policy instrument and . . . a participatory, democratic mechanism that allows 'concerned citizens' to redress environmental pollution."[16] Moreover, citizen suits provided the answer to the failed enforcement measures of the past "whether caused by lack of will or lack of resources."[17] Despite limited governmental resources, Congress thought that citizen suits could spur governmental enforcement or provide an alternative method

9. *See* FREDERICK R. ANDERSON ET AL., ENVIRONMENTAL PROTECTION: LAW AND POLICY 590 (1999).

10. *See* John Dolgetta, Friends of the Earth v. Crown Central Petroleum: *The Surrogate Enforcer Must Be Allowed to "Stand Up" for the Clean Water Act*, 15 PACE ENVTL. L. REV. 707, 710 (1998) (noting that water quality standards relied on the assimilative capacity of the body of water while effluent limitations focus on the amount of pollutant that a polluter may discharge into any given body of water).

11. *See id.*

12. 33 U.S.C. § 1251(a) (1994).

13. *See* JEFFREY G. MILLER, CITIZEN SUITS: PRIVATE ENFORCEMENT OF FEDERAL POLLUTION CONTROL LAWS 3 (Wiley Law Publications 1987). Miller cites *United States v. Bishop Processing Co.*, 423 F.2d 469, 470-72 (4th Cir. 1970), as an example of the previous ineffective federal enforcement procedures. *See id.* In that case, the plant emitted a "horrible interstate stench," but due to the enforcement procedures, plaintiffs failed to obtain a remedy for at least eight years. *Id.* (internal quotations omitted).

14. MILLER, *supra* note 13, at 3.

15. *See id.* at 4.

16. Michael S. Greve, *The Private Enforcement of Environmental Law*, 65 TUL. L. REV. 339, 340 (1990).

17. MILLER, *supra* note 13, at 4.

to penalize violators.[18] As a result, Congress created citizen suits in many of the environmental statutes enacted during the environmental decade.[19]

With the authorization of citizen suits in the major environmental statutes, private citizens undertook the task of enforcing their regulations. To augment this effort, courts initially subscribed to a broad understanding of what had to be shown to satisfy the injury in fact prong of standing analysis. In *Sierra Club v. Morton*,[20] the Supreme Court held that injuries to abstract concepts such as aesthetics qualified as injury in fact under environmental statutes.[21] Although Justice Stewart noted in a subsequent case that the standing inquiry must be more than an "ingenious academic exercise in the conceivable," the Court nonetheless continued to hold that subjective injuries affecting many individuals met the requirements to obtain standing.[22]

While courts subscribed to a broad concept of standing under the environmental statutes in the past, recent developments in standing jurisprudence restricted access to the courts for environmental plaintiffs. Three opinions penned by Justice Scalia curtailed the broad requirements for standing recognized in cases such as *Sierra Club v. Morton* and *United States v. Students Challenging Regulatory Agency Proceedings (SCRAP)*.[23] Despite the recent constriction of standing for citizens under environmental statutes, the Supreme Court had an opportunity to clarify the confusion about the issue this term in *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*[24] While *Laidlaw* involved important issues of mootness and the propriety of civil fines paid to the United

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18. *See id.*

19. *See, e.g.*, Toxic Substances Control Act § 20, 15 U.S.C. § 2619(a) (1988); Endangered Species Act § 11(g), 16 U.S.C. § 1540(g)(1) (1988); Surface Mining Control and Reclamation Act of 1977 § 520, 30 U.S.C. § 1270(a) (1988); Surface Marine Protection, Research, and Sanctuaries Act § 105(g), 33 U.S.C. § 1415(g)(1) (1988); Resource Conservation and Recovery Act § 7002, 42 U.S.C. § 6972(a) (1982 & Supp. V 1987); Clean Air Act § 304, 42 U.S.C. § 7604(a) (1982); Safe Drinking Water Act § 1449, 42 U.S.C. § 300j-8(a) (1982 & Supp. V 1987); Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9659(a) (1982 & Supp. V 1987); Noise Control Act § 12, 42 U.S.C. § 4911(a) (1982); Outer Continental Shelf Lands Act § 23, 43 U.S.C. § 1349(a) (1982); Deepwater Port Act § 16, 33 U.S.C. § 1515(a) (1988). The only major environmental statute without a citizen suit provision is the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), 7 U.S.C. § 3136(g) (2000). The absence of such a citizen suit section is the result of political differences in the enacting legislative committees. The Agriculture Committee enacted FIFRA in both Houses while the other statutes were enacted by the Senate Environment and Public Works Committee and the House Commerce and Transportation Committee. See MILLER, *supra* note 13, at 6.

20. 405 U.S. 727 (1972).

21. *Id.* at 734.

22. *See* United States v. Students Challenging Regulatory Procedures, 412 U.S. 669, 688 (1973) [hereinafter *SCRAP*]; *infra* notes 70-73 and accompanying text.

23. 412 U.S. 669, 688 (1973). The three opinions are *Lujan v. National Wildlife Fed'n*, 497 U.S. 871 (1990); *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); and *Bennett v. Spear*, 520 U.S. 154 (1997).

24. 120 S. Ct. 693 (2000).

States Treasury to redress public wrongs, the Court examined the issue of standing as a precursor to these issues.[25]

Although the Court found that the plaintiffs in *Laidlaw* had standing to pursue the case, the Court did little to quell the confusion regarding the standing of citizen suit plaintiffs. The purpose of this paper is to examine the injury in fact requirement for standing under the Clean Water Act after *Laidlaw*. Part II of this paper briefly describes the history of standing jurisprudence, particularly that which involves injury in fact. Part III traverses the familiar case law involving the issue of standing under the environmental statutes in general. Part IV briefly describes the goals and provisions of the CWA. Part V canvasses cases involving the standing of citizens to pursue violations of the CWA in court and includes a description of the *Laidlaw* decision. The portion of the *Laidlaw* decision regarding the injury in fact prong of standing analysis is analyzed in Part VI. This Article argues that citizens should have broad standing to pursue violators of the Clean Water Act because of its text, legislative history, and the evidence presented to courts to support a finding of injury in fact. The paper concludes that the failure to grant standing to its full extent under the Clean Water Act is a violation of the separation of powers by the federal courts, a charge typically levied at Congress for enacting the citizen suit provisions themselves.

II. A BRIEF HISTORY OF STANDING

In early American courts, the concept of standing as a limit on the ability of courts to try cases did not exist.[26] Early American courts focused on whether a plaintiff had a legal cause of action vindicable by the courts instead of using the modern doctrine of standing.[27] Courts simply looked to see whether Congress or the common law conferred a right to sue upon the plaintiff.[28] In fact, the concept of injury in fact played no role in determining whether or not a cause of action existed.[29] Thus, courts made "a sharp distinction between an injury on the one

25. *Id.* at 703-04.

26. *See* Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 170 (1992) (noting that nobody believed that the Constitution limited Congress's power to confer causes of action from the founding era through 1920).

27. *See id.*

28. *See* William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 224 (1985) (stating that the courts looked to common law, statutory, constitutional rights, or a mix of statutory and constitutional prohibitions along with common law remedial principles).

29. *See* Sunstein, *supra* note 26, at 170.

hand (a 'harm') and a legal injury on the other."[30] A court had the power to remedy a legal injury, but could do nothing about indiscriminate harm.

While courts initially focused on legal injury to determine who could lawfully bring suit, that focus began to shift during the 1930s. Faced with a failing economy in the wake of the Depression, President Franklin D. Roosevelt attempted to stimulate the economy via government intervention.[31] However, government intervention into the economic affairs of the nation contravened legal policy at the time, which heralded individual freedom in the marketplace.[32] Nevertheless, President Roosevelt set forth an ambitious series of programs designed to bolster the ailing economy.[33] Some measures met fierce resistance, such as the court-packing plan,[34] and the overall aggressive nature of New Deal reforms occasioned the retirement of several Supreme Court Justices.[35] As a result of Court turnover, two Supreme Court Justices, Brandeis and Frankfurter, obtained the power necessary to check Court intrusion into governmental policy.[36] The doctrine of standing stood chief among the doctrines developed to curb Court oversight of governmental action.[37]

With the growth of the administrative state caused by New Deal reforms, the question of who could bring suit to enforce agency duties became a pressing concern.[38] To tackle this problem, Congress enacted the Administrative Procedures Act (APA) in 1946.[39] The APA, codifying

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30. *Id.* at 171 (noting that such is a case of *damnum absque injuria* [harm without injury in the legal sense]).

31. *See* Laveta Casdorph, *The Constitution and Reconstitution of the Standing Doctrine*, 30 ST. MARY'S L.J. 471, 485 (1989) (citing KERMIT L. HALL, THE MAGIC MIRROR: LAW IN AMERICAN HISTORY 241-42 (1989)).

32. *See id.* (discussing how *Lochner v. New York*, 198 U.S. 45 (1905), allowed Court intrusion into legislation regulating the work environment).

33. *See id.* (noting that Roosevelt's actions challenged historical relationships between politics and law).

34. RICHARD B. MORRIS, ENCYCLOPEDIA OF AMERICAN HISTORY 356 (1961) (asserting that the plan involved mandatory retirement for judges once age 70 is reached or an expansion of the Court from 9 to 15 members if judges at age 70 refused to retire, adding up to 50 judges at all levels of the federal judiciary, routing appeals of lower court constitutional decisions directly to the Supreme Court, a requirement that government attorneys argue a case before a lower court issues an injunction in a constitutional case, and reassignment of district judges to expedite the judicial process); LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 685-86 (2d ed. 1985) (noting that the plan backfired but Roosevelt had the last laugh despite the rejection of the plan because he outlasted "nine old men").

35. *See* MORRIS, *supra* note 34, at 357.

36. *See* Sunstein, *supra* note 26, at 179.

37. *See id.* at 180 (observing that Justices Brandeis and Frankfurter invoked the justiciability doctrines to limit attacks on legislative and administrative action in key cases).

38. *See* Fletcher, *supra* note 28, at 225 (stating that determining who could sue to enforce the legal duties of an agency was one of the important questions during the 1930s).

39. Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 243 (1946) (codified as amended at 5 U.S.C. § 702 (1994)).

"judge-made" standing law,[40] provided that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."[41] By enacting the APA, Congress recognized that causes of action could be created by common law principles, legal wrongs based upon statutory provisions, or express grants of causes based upon statutes other than the APA.[42] Thus, the APA authorized a wide range of individuals to participate in rulemaking or enforcement activity in the burgeoning administrative state.

As time passed, the increase in administrative regulation combined with public enforcement of the APA to create more litigation to enforce public values.[43] In the hallmark case of *Flast v. Cohen*,[44] the Supreme Court allowed a plaintiff to challenge the distribution of federal monies to parochial schools on Establishment Clause grounds.[45] Although the plaintiff did not suffer an injury distinct from the public at large, the Court found a sufficient nexus between the plaintiff's status as a taxpayer and the claim for purposes of standing. The Court held that the taxpayer had a "clear stake" in maintaining the boundary between the Establishment Clause and the taxing and spending power of Congress.[46] In short, the Court advanced the idea that not only those who suffered a legal wrong had the ability to bring suit, but that ability should also be available to those who benefited from statutory law.[47]

Soon after *Flast v. Cohen*, the Court decided a case that would turn the law of standing on its head. In *Association of Data Processing Service Organizations v. Camp*,[48] the Court broke with the past view of standing and laid down the underpinnings of the modern idea of the concept. In *Data Processing*, a group of data processors sought a declaratory judgment

40. *See* Sunstein, *supra* note 26, at 181-82. Sunstein asserts that the drafters of the APA designed the statute to recognize three types of cases that had been established under previous law. *See id.* First, a plaintiff could gain standing by showing that he had suffered a "legal wrong." *Id.* Second, a plaintiff obtained standing by showing that statutory interests were at stake. *See id.* Third, plaintiffs could bring suit if they showed that a statute other than the APA entitled them to bring suit. *See id.*

41. Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 243 (1946) (codified as amended at 5 U.S.C. § 702 (1994)).

42. *See* Sunstein, *supra* note 26, at 181-82.

43. *See* Fletcher, *supra* note 28, at 227 (observing that federal suits during the 1960s and 1970s sought to establish and enforce public or constitutional values by litigants who were not affected by the acts complained of in a way different from the rest of the general population).

44. 392 U.S. 83 (1968).

45. *Id.* at 102-03.

46. *See id.* at 105-06 (holding that a taxpayer may challenge the constitutionality of a taxing and spending program implemented by Congress if a logical connection existed between the status as a taxpayer and the claim made by plaintiffs).

47. *See* Sunstein, *supra* note 26, at 184 (noting that this arose in part due to the recognition of the difficulty plaintiffs faced when attempting to organize which allowed agencies to succumb to political pressure).

48. 397 U.S. 150 (1970).

invalidating a rule allowing banks to provide data processing services to their customers.[49] Although the lower courts found that the plaintiffs had standing to bring their case, the Supreme Court reversed their decision in an opinion by Justice Douglas.[50] Because, according to the Court, the traditional "legal interest" test for standing went to the merits of the case, it constituted an inappropriate inquiry to determine who could properly bring suit.[51] Instead, the Court fashioned a two-pronged test to determine who had standing to sue. To establish standing, a plaintiff needed to show "injury in fact" and an injury "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."[52] In sum, standing moved from being an issue based upon law to one based upon the facts of each case.[53]

While the idea of injury in fact had been floating about since *Baker v. Carr*,[54] *Data Processing* was the first case to hold that plaintiffs must suffer "injury in fact" to have standing.[55] Although intended to broaden the class of people capable of bringing suit against an agency, the test outlined by the Court had the perverse effect of denying standing to some groups seeking to enforce various statutes.[56] Nonetheless, *Data Processing* and its "injury in fact" inquiry is a key component of the modern understanding of "injury in fact" as a requirement of Article III.[57] Indeed, a case often cited to illustrate the modern standing doctrine, *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*,[58] cites *Data Processing* as a predecessor.[59] Enumerating the modern requirements for standing in *Valley Forge*, the Court asserted that a plaintiff must have suffered (1) injury in fact, (2) traceable to the defendant, (3) that is redressable by a court.[60] Thus, the modern test for standing incorporates the injury in fact requirement from *Data*

49. *Id.* at 155 (challenging the Bank Service Corporation Act of 1962, which stated that no bank "may engage in any activity other than the performance of bank services for banks").

50. *See id.* at 154.

51. *See id.* at 153.

52. *Id.* at 152, 156.

53. *See* Sunstein, *supra* note 26, at 185 (characterizing the decision as "a remarkably sloppy opinion").

54. 369 U.S. 186 (1962).

55. *See* Fletcher, *supra* note 28, at 230 (citing Baker v. Carr, 369 U.S. 186 (1962), and stating that the "injury in fact" test owes its life in part to Professor Davis, who stressed that APA §10(a) should be understood to require "injury in fact").

56. *See* Scalia, *supra* note 1, at 889-90 (criticizing the *Data Processing* test for creating the "weird" effect of denying standing).

57. *See* Fletcher, *supra* note 28, at 230 (citing examples of its usage in Warth v. Seldin, 422 U.S. 490, 498-99, 501 (1975), and Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 218 (1974)).

58. 454 U.S. 464 (1982).

59. *Id.* at 475 (reiterating the "zone of interests" requirement).

60. *See id.*

Processing, a decision that has allegedly done "[m]ore damage to the intellectual structure of the law of standing . . . than . . . any other single decision."[61]

III. THE HISTORY OF STANDING UNDER ENVIRONMENTAL STATUTES

The starting point for any discussion of standing of environmentally minded plaintiffs must be the Supreme Court's decision in *Sierra Club v. Morton*. In *Sierra Club*, an environmental organization sought judicial relief to prevent the proposed development of the Mineral King Valley by Disney Enterprises.[62] To combat the proposed development, the plaintiffs sought a declaratory judgment claiming that a portion of the plan violated federal laws governing the preservation of national parks, forests, and game refuges.[63] Addressing the issue of the plaintiff's standing to sue, the Court noted that:

> Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process.[64]

While the Court recognized aesthetic and other noneconomic interests as meeting requirements for standing, the Court's broad pronouncement did not help the Sierra Club. The Court continued, "[b]ut the 'injury in fact' test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured."[65] The Sierra Club failed to claim that any of its members would be harmed by the proposed development.[66] As a result, the Court upheld the denial of standing to the Sierra Club and did not reach the merits of the case.[67]

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61. Fletcher, *supra* note 28, at 229.

62. Sierra Club v. Morton, 405 U.S. 727, 729-30 (describing the $35 million Disney plan as using 80 acres of land for motels, restaurants, swimming pools, parking lots and other structures for 14,000 daily visitors).

63. *See id.* at 730 (stating that the Sierra Club brought suit as a membership corporation with a "special interest in the conservation and the sound maintenance of the national parks, game refuges and forests of the country" and used APA § 10(a) as the basis for its claim).

64. *Id.* at 734.

65. *Id.* at 734-35.

66. *See id.* at 735 (noting that the Sierra Club did not "allege that it or its members would be affected in any of their activities or pastimes by the Disney development. Nowhere in the pleadings or affidavits did the Club state that its members use Mineral King for any purpose, much less that they use it in any way that would be significantly affected by the proposed actions of the respondents").

67. *See id.* at 741.

The Supreme Court's standing jurisprudence reached its outermost limits the following year in *United States v. Students Challenging Regulatory Agency Proceedings (SCRAP)*. In *SCRAP*, a group of law students asserted that a freight rate increase proposed by the Interstate Commerce Commission discouraged the use of recycled goods.[68] Because of the failure to use recycled materials, the students argued that the amount of litter in the area would increase and that the usage of local natural resources would increase.[69] Learning from *Sierra Club*, the students alleged that they themselves used the affected area for various outdoor activities.[70] Although the Court characterized the students' injury as "far less direct and perceptible" when compared to that in *Sierra Club*, it nonetheless granted standing to the students to pursue the case.[71]

Given the broad interpretation of standing in *Sierra Club* and *SCRAP*, standing for plaintiffs asserting environmental claims reached its "high water mark."[72] However, the Supreme Court began to let the air out of the environmental movement's balloon in *Lujan v. National Wildlife Federation*.[73] In *Lujan*, an environmental organization challenged the Department of Interior's decision to reclassify protected lands for use in the public domain.[74] According to the plaintiffs, the reclassification "would open the lands up to mining activities, thereby destroying their natural beauty."[75] Applying lessons from other cases, the plaintiff submitted affidavits of two of its members stating that they used lands "in the vicinity" of withdrawn lands for recreational and aesthetic enjoyment.[76]

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68. *SCRAP*, 412 U.S. 669, 675-76 (1973).

69. *See id.* The students alleged that the added cost would cause members to suffer "economic, recreational and aesthetic harm." *Id.* Moreover, members asserted the rate increase decreased the usage of recyclable materials, which ultimately encourage mining and lumbering among other activities that harmed the environment. *See id.* The students alleged they would be forced to pay more for finished products as economic harm and the destruction of the natural environment by mining or other acts harmed their recreational and aesthetic interests. *See id.*

70. *See id.* at 678. The group asserted that each of its members used the portions of the environment affected by the damage around the Washington metropolitan area and that each member resided in the same area. *See id.* Moreover, the claimants stated that they breathed the air in the affected area and that pollution had accumulated as a result of the increased rate. *See id.*

71. *Id.* at 687-88. The Court observed that the students alleged that the specific acts of the respondent would harm them in their use of the natural resources of the affected area. *See id.* Moreover, the Court held that it would not deny standing simply because injury was widespread because to do so "would mean that the most injurious and widespread Government actions could be questioned by nobody." *Id.*

72. PERCIVAL, *supra* note 8, at 726.

73. 497 U.S. 871 (1990).

74. *Id.* at 875. The plaintiffs asserted violations of the Federal Land Policy and Management Act of 1976, the National Environmental Policy Act of 1969, and APA § 10(e). *See id.*

75. *Id.* at 879.

76. *Id.* at 884-88. The affidavits belong to members Peggy Peterson and Richard Erman. In the affidavits themselves, Peterson claimed that lands "in the vicinity" of the affected area in Wyoming had

Although the Court of Appeals held that the affidavits supported a finding of injury in fact to support standing, the Supreme Court disagreed.[77] The Supreme Court opined that the affidavits failed to demonstrate that the members were "adversely affected or aggrieved" within the meaning of section 702 of the APA.[78] Instead the affidavits stated only that the members used "unspecified portions of an immense tract of territory, on some portions of which mining activity has occurred or probably will occur by virtue of the governmental action."[79] Distinguishing this case from *SCRAP*, the Court declared that the broad concept of standing applied in that case did not apply to this case because *SCRAP* involved a Rule 12(b)(6) motion to dismiss while this case involved a summary judgment motion.[80] In short, the Court restricted its expansive view of standing by requiring specific facts to support a finding of injury in fact.

The shaky ground on which environmental plaintiffs stood further crumbled away in *Lujan v. Defenders of Wildlife*.[81] In 1983, the Department of the Interior decided that the Endangered Species Act (ESA) only applied to governmental projects within the United States or on the high seas.[82] As a result, developers or other businesses working on overseas projects did not have to consult with the Fish and Wildlife Service despite a threat to endangered species.[83] An environmental group brought suit under the citizen suit provision of the ESA asserting that the new regulation violated the ESA itself.[84] To demonstrate injury in fact, the plaintiff submitted two affidavits from its members.[85] Joyce Kelly said she had visited the habitat of the Nile Crocodile in 1986 and "intend[ed] to do so again, and hop[ed] to observe the crocodile

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"been opened to the staking of mining claims and oil and gas leasing, an action which threatens the aesthetic beauty and wildlife habitat potential of these lands." Erman made similar assertions about lands "in the vicinity" of the affected lands in Arizona. *See id.*

77. *See id.* at 888.

78. *Id.* at 889.

79. *Id.*

80. *See id.* (noting that "[a]t the margins there is some room for debate as to how 'specific' must be the 'specific facts' that Rule 56(e) requires in a particular case. But where the fact in question is the one put in issue by the § 702 challenge here—whether one of respondent's members has been, or is threatened to be, 'adversely affected or aggrieved' by Government action—Rule 56(e) is assuredly not satisfied by averments" of this general nature).

81. 504 U.S. 555 (1992).

82. *See id.* at 558-59.

83. *See id.*

84. *See id.* at 559. Plaintiffs asserted a violation of § 7(a)(2) which states that each Agency in consultation with the Secretary should insure that Agency action "is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical." *Id* at 558.

85. *See id.* at 563.

directly."[86] Following a similar path, Amy Skilbred declared that she viewed the Asian elephant and leopard in 1981 while visiting Sri Lanka and intended to return for further observation.[87] Thus, the affidavits attempted to apply the rule of specificity from *National Wildlife Federation v. Lujan*.

Despite their attempts to show injury in fact, the Supreme Court found that none existed. After restating the well-known requirements for standing, the Supreme Court stated that injury in fact required more than an injury to a cognizable interest.[88] The injury suffered must be "actual or imminent."[89] In this case, the affidavits did not aver that the members had definite plans to return to the allegedly affected areas.[90] Not only did the affidavits fail to show plans to return to the affected areas, but they did not demonstrate that they used any portion of the lands "perceptibly affected by the unlawful action."[91] In sum, the affidavits failed to describe a "factual showing of perceptible harm."[92]

While this conclusion swept Defenders of Wildlife out of court, the Court's next conclusion altered the ability of citizen plaintiffs to bring claims under environmental statutes in general. Although the Court of Appeals found that plaintiffs had standing by procedural operation of the ESA's citizen suit provision, the Supreme Court thought otherwise.[93] The Court stated that "a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws . . . does not state an Article III case or controversy."[94] To support its reasoning, the Court embraced the doctrine of the separation of powers by noting that "[v]indicating the *public* interest (including the public interest in Government observance of the Constitution and laws) is the function of Congress and the Chief Executive."[95] Further, the Court opined that turning the "undifferentiated public interest in executive officers' compliance with the law into an 'individual right' vindicable in

86. *Id.*

87. *See id.* at 563-64. Ms. Skilbred also declared that she did not know when she would return to Sri Lanka because of the civil war at the time. *See id.* She merely stated that she would return "[i]n the future." *Id.*

88. *See id.* at 563.

89. *Id.* at 564.

90. *See id.* (declaring that the affidavits stating that the two women "had visited" foreign lands proved nothing). Citing *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983), the Court opined that "[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects."

91. *Lujan*, 504 U.S. at 566.

92. *Id.*

93. *See id.* at 571-73 (characterizing the nature of the Court of Appeals' holding as "remarkable").

94. *Id.* at 573-74.

95. *Id.* at 576.

the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to 'take Care that the Laws be faithfully executed.'"[96] Thus the Court feared that citizen suits would give courts the authority to monitor the propriety of executive acts, which is an impermissible delegation of authority.

IV. THE CWA AND ITS NPDES

Because the CWA authorizes citizen suits to enforce its provisions, the language of the CWA holds the key to the ability of plaintiffs to obtain standing in court. The Clean Water Act begins by boldly declaring that its objective is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[97] Furthermore, it is a "national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983."[98] While these statements have been criticized as overly ambitious,[99] they demonstrate the serious nature of the water pollution problem in congressional minds at the time of enactment.

The centerpiece of the CWA is its establishment of water quality related effluent limitations for point source discharges.[100] An effluent limitation is a "restriction . . . on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources."[101] A point source is defined as "any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged."[102] The effluent limitations themselves are technology-based and vary by industry.[103] For example, the CWA required some industrial polluters operating at the time of its enactment to use the best practicable technology to reduce water pollution by 1977 and the best available technology by 1983.[104] Thus, technology plays a critical role in achieving the lofty goals of the CWA.

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96. *Id.* at 577.

97. 33 U.S.C. § 1251(a)(1) (1994).

98. *Id.* § 1251(a)(2).

99. *See* PERCIVAL, *supra* note 8, at 882 (noting that the goals contained in §101(a) have been widely criticized by economists who question the wisdom of such a standard without reference to cost); Greve, *supra* note 16, at 378 (suggesting that the goals of the CWA are "unattainable even in theory").

100. *See* 33 U.S.C. § 1311 (1994).

101. *Id.* § 1362(11).

102. *Id.* § 1362(14).

103. *See* PERCIVAL, *supra* note 8, at 880.

104. *See* 33 U.S.C. § 1311. The deadlines changed with subsequent amendments of the CWA. For industrial facilities, BAT applied to toxics by 1984 and BCT to conventional pollutants in the 1977 amendments. In the 1987 amendments, BAT applied to toxics no later than March 31, 1989. *See id.*

To administer the effluent limitations, Congress established the National Pollution Discharge Elimination System (NPDES) in Section 402 of the CWA.[105] Under the NPDES, polluters must obtain a permit stating the allowable amount of pollutant that the polluter may discharge into waterways.[106] The EPA is responsible for granting permits in general, but states may take responsibility for that task if their water pollution control programs meet minimum federal standards.[107] In addition, polluters must periodically file discharge monitoring reports that list the actual and permitted levels of pollutant discharged over a given time.[108] These discharge monitoring reports are public information and can be used as evidence in enforcement actions.[109]

While the EPA or the states have the ability to enforce the effluent limitations, the CWA also contains a citizen suit provision like many of the other environmental statutes.[110] The CWA authorizes citizens to bring civil actions against "any person . . . who is alleged to be in violation of . . . an effluent standard."[111] The word "citizen" is specifically defined in the CWA's citizen suit provision as "a person or persons having an interest which is or may be adversely affected."[112] Furthermore, citizens may bring a civil action against the EPA Administrator for an alleged failure to perform a nondiscretionary duty under the CWA.[113] Before bringing any action, however, citizens must provide sixty days notice to the EPA Administrator, the state in which the alleged violation occurs, and to the violator.[114] Also, a citizen suit is banned if the EPA Administrator or the state is "diligently prosecuting" a civil or criminal enforcement action.[115] If a citizen suit is successful, courts may issue injunctive relief or civil penalties to punish violators.[116] In addition to these penalties, courts are authorized to award litigation costs to any prevailing or substantially prevailing party if such is appropriate.[117]

105. 33 U.S.C. § 1342 (1994).
106. *See id.*
107. *See id.* § 1342(b).
108. *See id.* § 1318(a), (b).
109. *See* Dolgetta, *supra* note 10, at 711.
110. See *supra* note 19 (listing the other environmental statutes).
111. 33 U.S.C. § 1365(a) (1994).
112. *Id.* § 1365(g).
113. *See id.* § 1365(a)(2).
114. *See id.* § 1365(b)(1)(A).
115. *Id.* § 1365(b)(1)(B).
116. *See id.* § 1365(a).
117. *See id.*

V. STANDING CASES UNDER THE CLEAN WATER ACT

Given the uncertainty regarding the standing of plaintiffs in environmental cases in general, the standing of citizens bringing suit to remedy permit discharge violations is predictably unstable. Some courts have required plaintiffs to demonstrate that a permit violation damaged the environment in a scientifically proven manner before granting standing to plaintiffs under the CWA. In contrast, other courts have taken a broader view of standing by reasoning that mere permit exceedances meet the requirements for standing. Because of the wavering requirements for standing that depend upon the location of the court, plaintiffs are uncertain about their collective right to enforce the CWA. In short, the law of standing under the CWA leaves plaintiffs in limbo because cases proceed based upon the biases of the courts hearing the cases.

A. Environmental Harm

In *Public Interest Research Group of New Jersey v. Magnesium Elektron*,[118] two citizen groups brought suit against the defendant for violating its NPDES permit and failing to follow reporting requirements.[119] To support a motion for declaratory judgment on the issue of standing, the plaintiffs offered four affidavits from their members.[120] The affidavits generally stated that the members recreated on the affected waters and that their enjoyment of these activities decreased because they knew the water contained pollution.[121] One affiant stated that she avoided eating fish from the affected waters because she was "concerned that those fish might be contaminated with harmful pollutants."[122] Another affiant avoided drinking water from the affected waters because she was "concerned that the water might be contaminated."[123] Based upon these affidavits, the district court found that the plaintiffs met the injury in fact requirement to obtain standing and the court assessed a $2.625 million dollar penalty.[124]

During the penalty phase of the hearing, the defendant presented expert testimony in an attempt to decrease the amount of the penalty. A limnologist for the defendant stated that the discharge violations

118. 123 F.3d 111 (3d Cir. 1997).

119. *Id.* at 114.

120. *See id.* at 115.

121. *See id.* (describing other activities affected by the defendant's violation as including "studying nature").

122. *Id.* Affiant Sandra Silverstone avoided the fish from the Delaware River. *See id.*

123. *Id.* (affidavit of Julie Howat).

124. *See id.* at 116. *See* Public Interest Research Group, Inc. v. Magnesium Elektron, Inc., No. 89-3193, 1995 U.S. Dist. LEXIS 20748 (D.N.J. Mar. 9, 1995)).

caused no harm to the waterway.[125] Moreover, the expert asserted that the violations might have improved the ecosystem by providing nutrients in which it was lacking.[126] Although the expert performed her studies almost ten years prior to the violations, the parties agreed that the study provided adequate evidence of the environmental impact of the discharges.[127] As a result, the defendant gained a valuable weapon to be used on appeal.

On appeal, the defendant argued that the plaintiffs did not have standing because they did not demonstrate injury in fact.[128] Because the discharges did not harm the environment, the defendants argued, they did not injure the plaintiffs. After dancing around the law of the case doctrine,[129] the United States Court of Appeals for the Third Circuit proceeded to rule on the defendant's assertion. The court first examined the Congressional intent underlying the Clean Water Act and found that the "Act does not authorize private causes of action against polluters absent some showing of injury or threat of injury."[130] Noting that generalized grievances are insufficient to support standing, the Court reasoned that the affidavits failed to demonstrate injury in fact beyond that which is shared generally.[131] The court opined that the "right" to have businesses comply with environmental laws does not meet the requirements to obtain standing.[132] Plaintiffs must show "more than 'a mere exceedance of a permit limit' to prove a judicially cognizable injury."[133] In this case, the plaintiffs did not allege any injury to the waterway such as a salinity change or a decrease in the number of fish.[134] The members only pointed to a decrease in recreational activity to show injury, but that did not support standing when the waterway itself suffered no injury.[135]

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125. *See Public Interest Research Group*, 123 F.3d at 116.

126. *See id.*

127. *See id.* The violations occurred in 1989.

128. *See id.* at 114.

129. *See id.* at 116-18. The law of the case doctrine prevents courts from reexamining issues resolved earlier in the history of the litigation. Here, the court asserted that the new evidence showing a lack of environmental harm justified their inquiry into the standing of the plaintiffs to pursue the case because it undermined the conclusion of the lower court.

130. *Id.* at 120.

131. *See id.* at 121 (stating that "[t]he *knowledge* that a corporation has polluted waters is an 'injury' suffered by the public generally. An environmentalist in Colorado or a botanist in California may feel just as strongly about MEI's violation of its discharge permit as do the plaintiffs in this case. Nevertheless, absent a showing of actual, tangible injury to the River or its immediate surroundings, PIRG's members are no less 'concerned bystanders' than any other citizen who takes an interest in our environment").

132. *See id.*

133. *Id.* (citing Public Interest Research Group of New Jersey, Inc. v. Powell Duffryn, 913 F.2d 64, 72 (3d Cir. 1990)).

134. *See id.* (comparing *Powell Duffryn* where plaintiffs complained of the color and smell of the water).

135. *See id.* (observing that not only did the violations not harm the waterway, but they also posed no threat to the waterway).

Although the discharge violations resulted in no environmental harm, the Third Circuit suggested that the plaintiffs could obtain standing if a threat of injury existed.[136] In considering whether a threat of injury existed, the court construed the meaning of the phrase "may be adversely affected" in the CWA's definition of "citizen" as being "inherently limited by the injury prong of the constitutional test for standing."[137] Not only must plaintiffs show that they "may be adversely affected," according to the court, but they must also show that "their threat of injury is imminent."[138] Moreover, the injury must be "so imminent as to be 'certainly impending'" to prevent ruling on speculative claims.[139] In this case, the district court could not have reasonably concluded that the threat of injury was "certainly impending" given that the evidence demonstrated no environmental harm resulted from the discharges.[140] In the end, the Third Circuit ruled that the plaintiffs lacked standing to pursue their claim and vacated the judgment of the lower court.[141]

While some courts require environmental harm before granting standing to plaintiffs, other courts take a broader view of the standing requirements. In *Student Public Interest Research Group of New Jersey, Inc. v. Georgia-Pacific Corp.*,[142] for example, the plaintiffs submitted nine affidavits to support their claim of standing to pursue the lawsuit.[143] According to the court, these affidavits described various "actual and potential detrimental impacts on their aesthetic, recreational, conservational, economic and health interests due to pollution of the Delaware River."[144] Challenging the issue of causation, the defendant offered

136. *See id.* at 122.

137. *Id.*

138. *Id.*

139. *Id.* (citing Whitmore v. Arkansas, 495 U.S. 149, 155-58 (1990)).

140. *Id.* ("Although evidence of generic harm might support standing in other contexts, it fails to support a claim of threatened injury once the defendant proves in the particular case before the court that those harms are unlikely.").

141. *See id.* at 125; *see also* Friends of the Earth, Inc. v. Gaston Copper Recycling Corp., 9 F. Supp. 489 (D.S.C. 1998) (holding that plaintiffs did not have standing because they did not show harm to the waterway in the form of a decrease in salinity, etc.); Natural Resources Defense Council, Inc., Energy Research Found. v. Watkins, 954 F.2d 974 (4th Cir. 1992) (reporting that the lower court held that the plaintiffs failed to demonstrate injury in fact because they did not "allege with sufficient specificity" that the river was harmed by pollutants); Citizens for a Better Env't v. Caterpillar, Inc., 30 F. Supp. 2d 1053, 1066 (C.D. Ill. 1998) (scrutinizing an expert's testimony to determine if injury exists); Concerned Area Residents for the Env't v. Southview Farm, 834 F. Supp. 1410, 1415 (W.D.N.Y. 1993) (referring to geology and soil chemistry experts to support its finding of standing for plaintiffs); American Ass'n v. City of Wilson Wastewater Treatment Plant, consolidated case Nos. 5:96-CV-838-BR(2), 5:97-CV-471-BR(2), 5:97-CV-665-BR(2), 1998 U.S. Dist. LEXIS 7766, at *15 (E.D.N.C. Mar. 31, 1998) (stating that plaintiff had standing because "[p]laintiff has established violations, and has shown harm to the creek").

142. 615 F. Supp. 1419 (D.N.J. 1985).

143. *Id.* at 1423.

144. *Id.*

expert testimony stating that the pollution level was "so small that it is not discernible" and that the pollution itself could not "change the nature of the water."[145] Recognizing the defendant's attempt to raise the injury in fact hurdle, the court declared that the defendant sought to use "language concerning causation in order to veil an attempt to impose a quantitative test for proof of an injury-in-fact."[146] The court rejected the defendant's argument and found that the plaintiffs had standing to pursue their case.[147]

B. Permit Exceedances

By requiring environmental harm for standing, courts implicitly reject the notion that permit violations alone constitute injury in fact or causation sufficient to satisfy standing inquiries. Without a showing of environmental harm, the only harm upon which plaintiffs may base a claim is the exceedance of a NPDES permit limit. Because such a claim involves no real world consequences, it is akin to a procedural violation of the law. This view of permit violations transforms concrete environmental harms into generally shared grievances about the failure to comply with the law and these generally shared grievances are barred by modern standing analysis. As a result, the dispositions of cases solely involving permit violations vary depending upon the court's conception of the breadth of the standing doctrine.

In *Public Interest Research Group of New Jersey, Inc. v. Powell Duffryn Terminals, Inc.*,[148] an environmental group brought suit to penalize a business for dumping pollutants into a body of water in excess of its NPDES permit limit.[149] To meet the requirements of the standing analysis, the plaintiffs submitted affidavits averring various aesthetic harms that resulted from the permit exceedances.[150] However, the court opined that "a permit exceedance alone is not sufficient" to confer

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145. *Id.*

146. *Id.* at 1424.

147. *See id.* at 1425; *see also* Sierra Club v. Cedar Point Oil Co., 73 F.3d 546, 556 (5th Cir. 1996) (refuting defendant's argument that more must be shown than a mere interest in the water to obtain standing); Hudson River Keeper, Inc. v. Yorktown Heights Sewer Dist., 949 F. Supp. 210, 212 (S.D.N.Y. 1996) (holding that plaintiffs had standing to pursue claim without showing environmental harm but denying preliminary injunctive relief without such a showing); Natural Resources Defense Council, Inc. v. Texaco Ref. & Mktg., Inc., 800 F. Supp. 1, 9 (D. Del. 1992) (holding that plaintiffs had standing to pursue a suit based upon permit violations despite evidence that the waterway was allegedly swimmable and fishable).

148. 913 F.2d 64 (3d Cir. 1990).

149. *Id.* The violations occurred during the transfer of stored products from tanks to other containers. *See id.* The plaintiffs alleged more than 200 violations. *See id.*

150. *See id.* at 71. The affidavits alleged a decrease in recreational usage of the waterway and that the brown color of the water and its odor offended the plaintiffs. *See id.*

standing, and went on to state that it "will require more than showing a mere exceedance of a permit limit" to obtain standing to pursue a case.[151] Despite this pronouncement, the court found that the plaintiff's affidavits met the requirements for standing and allowed the case to proceed.[152]

Other courts, however, take a broader view of the standing requirements as they relate to violations of NPDES permits. In *Student Public Interest Research Group of New Jersey, Inc. v. P. D. Oil & Chemical Storage, Inc.*,[153] an environmental group brought suit against the defendant alleging that the defendant violated its NPDES permit 154 times.[154] The violations resulted from spillage during the transfer of liquid commodities from storage tanks to railcars and runoff from outfall pipes connected to an overflow tank system.[155] Challenging the standing of plaintiffs to bring suit, the defendant asserted that the plaintiffs did not suffer injury in fact and could not show a connection between the violations and the harm allegedly done.[156] Reviewing affidavits submitted by the plaintiffs to demonstrate injury in fact, the court found that the plaintiffs showed injury according to *Sierra Club v. Morton*.[157] Taking a lenient view of standing, the court stated that "[p]laintiffs show causation merely by showing violations of the discharge permits."[158] To rule otherwise "*would have the Court apply a stricter test for standing than for liability itself.*"[159] Thus, this court weighed permit violations in a manner more favorable to environmental plaintiffs by holding that permit violations alone satisfied various aspects of the standing inquiry.

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151. *Id.* at 72-73. The court was discussing the second prong of standing analysis, however. *See id.*

152. *See id.* at 73; *see also* American Canoe Ass'n v. City of Wilson Wastewater Treatment Plant, consolidated case Nos. 5:96-CV-838-BR(2), 5:97-CV-471-BR(2), 5:97-CV-665-BR(2), 1998 U.S. Dist. LEXIS 7766, at *12 (E.D.N.C. Mar. 31, 1998) (reiterating the rule that a plaintiff must show more than a mere permit exceedance to obtain standing); Public Interest Research Group of New Jersey, Inc. v. Magnesium Elektron, Inc., 123 F.3d 111, 121 (3d Cir. 1997) (stating a plaintiff must show "actual, tangible injury to the River or its immediate surroundings," and "more than a mere exceedance of a permit limit" for standing purposes.); Friends of the Earth, Inc. v. Gaston Copper Recycling Corp., 9 F. Supp. 489, 600 (D.S.C. 1998) (stating that "knowledge that defendant has exceeded the effluent limits set by its NPDES Permit does not, standing alone, demonstrate injury or threat of injury").

153. 627 F. Supp. 1074 (D.N.J. 1986).

154. *Id.* at 1080.

155. *See id.*

156. *See id.*

157. *See id.* at 1081-82 (describing the various recreational and aesthetic interests that had been harmed by the permit violations).

158. *Id.* at 1083.

159. *Id.* (citing Student Pub. Interest Research Group of New Jersey, Inc. v. Georgia-Pac. Corp., 615 F. Supp. 1419, 1424 (D.N.J. 1985)).

C. The Laidlaw Decision

Given the confusion in the lower courts as to what is required to show injury in fact, the Supreme Court had the opportunity to clarify the issue in *Friends of the Earth, Inc. v. Laidlaw Environmental Services(TOC), Inc.*[160] In *Laidlaw*, the plaintiffs sought declaratory relief, an injunction, and civil penalties as a result of defendant's repeated violations of its NPDES permit.[161] To demonstrate standing at trial, the plaintiffs submitted affidavits of its members that allegedly showed injury in fact.[162] One affiant stated that the waterway "looked and smelled polluted" and refrained from recreational activity on the water because he was "concerned that the water was polluted by Laidlaw's discharges."[163] Another affiant claimed that he would fish in a spot like he did as a boy but for his "concerns about Laidlaw's discharges."[164] Similarly, the plaintiffs provided the trial court with five other affiants who claimed to have decreased recreational usage of the waterway and "concerns" about the pollution in the water.[165]

To counter these claims of injury in fact in the district court, the defendant offered expert testimony suggesting that the violating discharges caused no environmental harm. To make its claim, the defendant introduced the results of various scientific tests performed on the indigenous fish of the waterway.[166] Based upon these tests, the court found that the "overall quality of the river" surpassed "levels necessary to support propagation of fish, shellfish, and wildlife, and recreation in and on the water."[167] In fact, one test showed that the level for one pollutant (mercury) in fish did not accumulate in their tissues to a point even close to the FDA action level.[168] In a broader study, the defendant's tests showed "no adverse effect on the indigenous biological community" of the affected waterway.[169] Thus, the district court concluded that there had been "no showing of any significant harm to the environment in this case."[170]

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160. 120 S. Ct. 693 (2000)

161. *Id.* at 701-02. There were 489 alleged violations between 1987 and 1995. *See id.*

162. *See id.* at 704-05 (reviewing six affidavits in total).

163. *Id.* at 704.

164. *Id.*

165. *See id.* at 704-05.

166. Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 956 F. Supp. 588, 600 (D.S.C. 1997).

167. *Id.* (arising from nine years of semiannual acute and chronic toxicity tests).

168. *See id.* The level of mercury in the fish study showed mercury about .25mg/kg, which is less than 25% of the level required to trigger FDA action. *See id.*

169. *Id.*

170. *Id.*

Despite its conclusion that no environmental harm occurred to the waterway, the district court proceeded to assess a civil penalty. In fact, the district court decision contains no discussion regarding the standing of the plaintiffs to bring the case. The court merely counted the lack of environmental harm as one of the factors used to determine the amount of the civil penalty.[171] Noting that the defendant had substantially complied with its permit limit since the initiation of the case, the court imposed a civil penalty of $405,800.[172] Turning its attention to the requests for equitable relief, the court refused to grant an injunction or other equitable relief because of the absence of environmental harm and the defendant's substantial compliance with its permit limit since the inception of the case.[173]

While the district court used the lack of environmental harm as a factor to mitigate the civil penalty, the United States Court of Appeals for the Fourth Circuit used it as the foundation for its decision. After enumerating the general requirements for standing, the court noted that the plaintiffs failed to appeal the denial of equitable relief.[174] However, the court assumed "without deciding that Plaintiffs had standing to initiate this action and have proven a continuous injury in fact."[175] As a result, the court shifted its focus from the first prong of standing analysis to the third prong. Based upon the decision in *Steel Co. v. Citizens for a Better Environment*,[176] the court decided that the plaintiffs' case was moot because the payment of a civil penalty to the U.S. Treasury was not a remedy for a cognizable Article III injury.[177] The Fourth Circuit vacated the district court decision and instructed it to dismiss the

171. *See id.* at 602-03 (examining the seriousness of violations, economic benefit of noncompliance, the history of violations, good faith compliance efforts, the economic impact of the penalty upon the defendant, and other matters as justice required to determine the amount of the penalty).

172. *See id.* at 610 (calculating the penalty based upon mercury exceedances and monitoring/reporting violations).

173. *See id.* at 611 (observing that the defendant had substantially complied with its permit limits since 1992).

174. *See* Friends of the Earth, Inc. v. Laidlaw Envtl. Serv. (TOC), Inc., 149 F.3d 303, 306 (4th Cir. 1998).

175. *Id.* at 306 n.3.

176. 523 U.S. 83 (1998).

177. *See Laidlaw*, 149 F.3d at 306. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998), involved a citizen suit under the Emergency Planning and Community Right-To-Know Act of 1986. A majority of six Justices held that Article III concerns prohibited litigation to penalize "wholly past" violations of an environmental statute. *Id.* at 91. Furthermore, the Court held that a citizen suit plaintiff lacked standing to pursue a case without alleging the existence of a continuing violation or a threat of a future violation. The majority found the issue to be moot despite recognizing that the plaintiffs had suffered a judicially cognizable injury as a result of the violation because an injunction could not redress the past injury of the plaintiffs. *See id.*

case—a result that left the plaintiffs with even less than they had before the appeal.[178]

By appealing the case to the Supreme Court, the plaintiffs offered the Court the opportunity to clarify the standing doctrine as applied in environmental cases. After reciting the facts, the Court declared that it had an "obligation" to assure itself that the plaintiffs had standing at the beginning of the case.[179] As a result, the court began by reiterating the general requirements for standing.[180] Noting that the lack of environmental harm played a role in lower court decisions, the Court announced that "[t]he relevant showing for purposes of Article III standing, however, is not injury to the environment but injury to the plaintiff."[181] The Court believed that "[t]o insist upon the former rather than the latter . . . is to raise the standing hurdle higher than the necessary showing for success on the merits in an action alleging noncompliance with an NPDES permit."[182] After reviewing the affidavits submitted by the plaintiffs to demonstrate injury in fact, the Court found that they documented injury in fact under *Sierra Club v. Morton*.[183] In the end, the Supreme Court held that the plaintiffs had standing to bring the case thereby confirming the mere assumption of the Fourth Circuit Court of Appeals.[184]

Writing in dissent, Justice Scalia criticized the reasoning of the majority for their failure to require specific allegations of injury in fact. In general, wrote Justice Scalia, an environmental plaintiff points to environmental harm that leads to injury to him.[185] However, this argument could not be made in this case because of the district court's conclusion that the discharges caused no environmental harm. While the dissent agreed that injury to the plaintiff and not to the environment was the relevant showing under Article III, the plaintiff must show personal harm.[186] As a result, "a lack of demonstrable harm to the environment will translate . . . into a lack of demonstrable harm to citizen plaintiffs."[187] For the dissent, "[i]t is the *reality* of the threat of

178. *See Laidlaw*, 149 F.3d at 307.

179. *See* Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 120 S. Ct. 693, 703-04 (2000) (noting that the lower courts did not examine the issue of standing and apparently assumed its existence).

180. *See id.* (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992); Hunt v. Washington State Apple Adver. Comm'n, 432 U.S. 333, 343 (1977)).

181. *Laidlaw*, 120 S. Ct. at 704.

182. *Id.*

183. *See id.* at 705 (citing decreased recreation, fears about pollution, etc.).

184. *See id.* at 707-08.

185. *See id.* at 713-14 (Scalia, J., dissenting) (joined by Justice Thomas).

186. *See id.* at 714 (Scalia, J., dissenting) (stating that the majority statement regarding the relevant showing for Article III as being injury to the plaintiff and not injury to the environment "is correct, as far as it goes").

187. *Id.* (Scalia, J., dissenting).

repeated injury that is relevant to the standing inquiry, not the plaintiff's subjective apprehensions."[188]

To demonstrate the flimsy nature of the plaintiffs' injury in fact, the dissent examined the affidavits submitted by the plaintiffs. One affiant who said she would recreate on the water but for her concern about pollution had only been to the river a total of two times.[189] The affiant who claimed to be deprived of a favorite boyhood fishing spot had not been there since he was a boy and stated that the pollution did not cause him to stop visiting the water. Moreover, the dissent noted that other affiants testified to similar "concerns" or beliefs regarding the pollution.[190] However, these subjective apprehensions could not have been caused by the permit exceedances because the lower court found that they "did not result in any health risk or environmental harm."[191] Giving weight to these averments of general harm contravened the command in *Lujan* that plaintiffs suffer a "'concrete and particularized' injury."[192] According to the dissent, the Court's decision made the "injury-in-fact requirement a sham," because "it would be difficult not to satisfy" the Court's "lenient standard."[193]

VI. ANALYSIS

Because of its impact on citizen enforcement of environmental statutes, *Laidlaw* is an important addition to modern standing jurisprudence. Indeed, the fear existed that an unfavorable decision would further restrict the access to courts for environmental plaintiffs.[194] Although the result of *Laidlaw* is certainly not a loss for environmental plaintiffs, it is a mixed blessing in terms of standing. For purposes of standing, environmental plaintiffs chalked up a victory on the issue of proving environmental harm. The Court, however, failed to extend standing to the proper scope intended by Congress under the CWA. As a result, environmental plaintiffs remain in danger of being tossed out of court because of imprecise pleading.

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188. *Id.* (Scalia, J., dissenting) (alteration and emphasis in original) (citing Los Angeles v. Lyons, 461 U.S. 95, 107 n.8 (1983)).

189. *See Laidlaw*, 120 S. Ct. at 714 (Scalia, J., dissenting). The affiant stated that she had been to the river once in 1980 and once after the initiation of the lawsuit.

190. *See id.* at 713 (Scalia, J., dissenting) (stating that plaintiffs must assert specific facts to demonstrate injury in fact and not simply set forth general allegations of injury).

191. *Id.* at 714 (Scalia, J., dissenting).

192. *Id.* at 713 (Scalia, J., dissenting).

193. *Id.* at 715 (Scalia, J., dissenting).

194. *See* France, *supra* note 2, at 36 (recording a statement by plaintiff's attorney describing the fear that a requirement of environmental harm be shown to obtain standing to sue would be prohibitively expensive for plaintiffs).

A. Environmental Harm

With the holding that environmental harm need not be shown to obtain standing, environmental plaintiffs achieved a significant victory in *Laidlaw*. Although significant, the result is easily reached. To decide the issue of citizen standing in CWA cases, courts generally cite to the traditional prongs of analysis—injury in fact, causation, and redressability.[195] Unfortunately, lower courts have held that damage to the environment must be shown, but that is not supported by Supreme Court precedent. Even the recent cases restricting standing for environmental plaintiffs, such as *Lujan* and *Defenders of Wildlife*, do not raise the standing hurdle to such an elevated height. No mention is made of showing injury in fact plus or causation plus to achieve standing. Thus, the decision in *Laidlaw* is a partial return to the broader view of standing in the mold of *Sierra Club v. Morton*.

The refusal to require environmental harm is not only justified by precedent, but also by the CWA itself. Section 309(d) of the CWA enumerates the factors to be considered when determining the amount of a civil fine for a violation.[196] A court should "consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require" to determine the penalty amount.[197] The consideration of "the seriousness of the violation or violations" contemplates an evaluation of the environmental harm done at the penalty phase of environmental litigation and not during standing inquiries.[198] If environmental damage exists, its extent is taken into account in the penalty itself. On the other hand, if no environmental harm occurred, such a fact merely serves to reduce potential penalties. The absence of environmental harm does not mean that there is no penalty (*i.e.* no standing) because it is only one of several factors used to determine the fine. For example, a violation could cause no environmental harm and yet economically benefit the violator. In such a case, a court may still impose a penalty on the violator. In short, environmental harm is relevant to the penalty amount and not to the standing of plaintiffs to pursue their claims.

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195. *See, e.g.*, *Laidlaw*, 120 S. Ct. 693.

196. 33 U.S.C. § 1319(d) (1994).

197. *Id.*

198. Michael D. Montgomery, *Raising the Level of Compliance with the Clean Water Act By Utilizing Citizens and the Broad Dissemination of Information to Enhance Civil Enforcement of the Act*, 77 WASH. U. L.Q. 533, 548 (1999).

In addition to recognizing its relevance to the imposition of penalties, refusing to require environmental harm for standing purposes remains faithful to the goals of the CWA. Congress chose to pursue the laudable goals of eliminating the discharge of pollutants and making the nation's waters fit for recreation.[199] To supplement enforcement of the Act's regulations, Congress called on citizens to actively participate in the enforcement efforts because of the limited resources of the government.[200] To require environmental harm to obtain standing would frustrate the intention of Congress. Although the monitoring reports often used by citizen plaintiffs to prove exceedances are public information, information costs still exist and can be high.[201] Requiring environmental harm adds another cost to the plaintiff's account because not only must information be gathered, but those violations must also produce environmental harm. To prove environmental harm, plaintiffs would have to hire experts to perform tests on the affected waters to determine the extent of damage, if any. Depending upon their resources, these costs could make litigation cost-prohibitive for some plaintiffs.[202] It would be counterproductive for Congress to have lofty goals whose attainment will be achieved with the aid of the public and then make public participation exceedingly costly. Costly prosecution leads to the potential for some violators to escape penalty, which prevents the achievement of the CWA's goals.

B. Permit Exceedances

Despite its refusal to require environmental harm for standing, the Supreme Court's decision in *Laidlaw* fails to extend standing to its proper limit. After reasoning that environmental harm is not required for standing, the Supreme Court reiterated that injury in fact remains as the bedrock of standing analysis. As a result, the decision leaves open the possibility that polluters who violate their NPDES permits will go unpunished unless plaintiffs can show personal injury through proper pleading. Indeed, many courts have stated that more than a "mere exceedance" of a permit limit is required to show injury in fact. However, these courts fail to acknowledge that Article III does not require an injury beyond the invasion of a right created by Congress

199. *See* 33 U.S.C. § 1251(a)(2) (1994).

200. *See supra* notes 13-19 and accompanying text.

201. *See* Montgomery, *supra* note 198, at 543-44.

202. *See* Richard E. Schwartz & David P. Hackett, *Citizen Suits Against Private Industry Under the Clean Water Act*, 17 NAT. RESOURCES J. 327, 341 (1984).

that is enforceable by a citizen suit.[203] As a result, the failure to punish "mere exceedances" contravenes both the plain text of the CWA and its legislative history while misapprehending the fundamental claims set forth in affidavits to support standing.

1. Text

Given the power of Congress to bestow causes of action on citizens in statutory form, "the starting point for interpreting a statute is the language of the statute itself."[204] The citizen suit provision of the CWA states that "any citizen may commence a civil action."[205] Later in the same section, "citizen" is defined as a "person or persons having an interest which is or may be adversely affected,"[206] a phrase taken directly from the APA.[207] Indeed, the APA grants standing to a person or persons who may be "adversely affected or aggrieved . . . within the meaning of a relevant statute."[208] In terms of the CWA, the concept of injury must be determined by reference to its provisions and not to factual details that can be parsed as finely as the observer desires. Exceeding an effluent limitation contained in a NPDES permit violates the CWA. Congress extended enforcement powers to citizens who may or may not be actually injured or threatened with injury. Because citizen suit provisions have not been ruled unconstitutional, a permit exceedance is injury in fact sufficient to sustain standing inquiries under the CWA for citizen suit plaintiffs.

In addition to finding injury within the CWA itself, the definition of "citizen" in the citizen suit section counsels that permit exceedances are redressable by court action. The use of the words "is" and "may" in the definition of "citizen" indicates a temporal aspect to the affected interest. While "is" refers to a present injury, the word "may" refers to the mere threat of an injury in the present or future. According to one court, Congress used the word "to provide the courts with broad equitable powers that . . . extend to eliminating any risk posed."[209] Past or present

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203. *See* Peter A. Alpert, *Citizen Suits Under the Clean Air Act: Universal Standing for the Uninjured Private Attorney General?* 16 B.C. ENVTL. AFF. L. REV. 283, 303 (1988).

204. Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., 484 U.S. 49, 56 (1987) (quoting Consumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980)).

205. 33 U.S.C. § 1365(a) (1994).

206. *Id.* § 1365(g).

207. *See* 1 A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 221(1973) [hereinafter CWA LEG. HIST.].

208. 5 U.S.C. § 702 (1982).

209. Local Envtl. Awareness Dev. Group v. Exide Corp., No. 96-3030, 1999 U.S. Dist. Lexis 2672, at *23 (E.D. Pa. Feb. 19, 1999) (interpreting the Resource Conservation and Recovery Act (RCRA) and quoting United States v. Price, 688 F.2d 204, 214 (3d Cir. 1982)).

permit violations threaten future violations because violations indicate technological or process failures that are generally not quickly corrected. Keeping in mind that any "identifiable trifle" of an injury will support standing,[210] a permit exceedance creates a risk of injury that should be remedied by the broad equitable powers of the judiciary.

In the case of these subsections, use of the word "may" evinces Congressional intent to establish injury in fact for a broad class of plaintiffs. In fact, the final citizen suit provision resulted from a compromise between House and Senate bills.[211] The House bill severely restricted access to courts by providing that only those in the geographic region of the violation should have access to the court.[212] Conversely, the Senate bill mirrored the provisions of the APA in terms of who had access to the courts.[213] In the end, the final provision is much closer to the broad understanding of the Senate bill than the restricted view offered by the House bill. Moreover, broad access to judicial relief comports with the laudable goal of the CWA to eliminate "the discharge of pollutants into the navigable waters" of the nation.[214] To have any hope to achieve such a goal, Congress required the aid of a broad class of injured plaintiffs because of limited governmental resources.[215] As a result, the word "may" must be construed to have a broad meaning within the CWA and include permit violations with or without accompanying environmental harm.

To reinforce the breadth of the CWA's citizen suit provision, Congress specifically defined the word "citizen" within the citizen suit subsection. Notably, other environmental statutes do not contain a definition of "citizen" and simply use the word "person" in its place.[216] While "person" has the same general meaning in all of the environmental statutes, the CWA goes one step further and defines "citizen" in broad, sweeping terms. Thus, placing a broad definition

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210. *SCRAP*, 412 U.S. 669, 689 n.14 (1973).

211. *See* 1 CWA LEG. HIST., *supra* note 207, at 328 (listing the House and Senate bills along with the compromise contained in the conference substitute).

212. *See* H.R. 11,896, 92d Cong. § 505(g) (1972), *reprinted in* 1 CWA LEG. HIST., *supra* note 207, at 1077.

213. *See* S. 2770, 92d Cong. (1972), *reprinted in* 2 CWA LEG. HIST., *supra* note 207, at 1703-04.

214. 33 U.S.C. § 1251(a)(1) (1994).

215. *See* Dolgetta, *supra* note 10, at 712.

216. *See, e.g.*, Toxic Substances Control Act § 20, 15 U.S.C. § 2619(a) (1988); Endangered Species Act § 11(g), 16 U.S.C. § 1540(g)(1) (1988); Resource Conservation and Recovery Act § 7002, 42 U.S.C. § 6972(a) (1982 & Supp. V 1987); Clean Air Act § 304, 42 U.S.C. § 7604(a) (1982); Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9659(a) (1982 & Supp. V 1987); Safe Drinking Water Act § 1449, 42 U.S.C. § 300j-8(a) (1982 & Supp. V 1987); Surface Mining Control and Reclamation Act of 1977 § 520, 30 U.S.C. § 1270(a) (1988); Surface Marine Protection, Research, and Sanctuaries Act § 105(g), 33 U.S.C. § 1415(g)(1) (1988) (generally allowing "any person" to commence a civil action as opposed to the usage of the word "citizen" in the Clean Water Act).

of "citizen" within the citizen suit section demonstrates the Congressional intent to have a broad range of plaintiffs aid in the enforcement of the CWA.

Despite the Congressional creation of injury for purposes of standing, courts insist upon winnowing down the range of plaintiffs able to pursue claims. However, these restrictions frustrate the intent of Congress because when it wanted to place limits upon plaintiffs, it included those limits within the statute itself. The citizen suit provision contains two express limitations on the ability of plaintiffs to enforce the CWA. The first of these limits is the sixty-day notice requirement contained in §505(b)(1)(A). A plaintiff cannot file suit before giving sixty days notice to the Administrator, the state in which the violation occurred, and the violator.[217] The second limit bans a plaintiff from initiating a suit if the Administrator or state has commenced and is "diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or order."[218] Despite recognizing injury in the form of a violation of a standard, limitation, or order, Congress explicitly barred citizen enforcement in some cases in favor of governmental action.

The ability of Congress to limit citizen plaintiffs is not only present in the CWA, but also exists in many of the environmental statutes. Indeed, many of the environmental statutes contain similar sixty-day notice and diligent prosecution limits.[219] However, Congress knew how to enact more stringent conditions when it desired, and did so in the Resource Conservation and Recovery Act (RCRA). To establish a claim under RCRA, plaintiffs must allege that a defendant's acts "may present an imminent and substantial endangerment to health or the environment."[220] The presence of the phrase "imminent and substantial endangerment" requires that a greater degree of harm must be alleged to make a claim actionable. Instead, the citizen suit provision of the CWA does not contain a phrase mandating that an escalated harm be present for a plaintiff to claim injury. In comparison, injury under the CWA is a broad concept without limitations other than those listed in

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217. *See* 33 U.S.C. § 1365(b)(1)(A) (1994).

218. *Id.* § 1365(b)(1)(B).

219. *See, e.g.*, Toxic Substances Control Act § 20, 15 U.S.C. § 2619(b) (1988) Endangered Species Act § 11(g), 16 U.S.C. § 1540(g)(2)(A) (1988); Resource Conservation and Recovery Act § 7002, 42 U.S.C. § 6972(b) (1982 & Supp. V 1987); Clean Air Act §304, 42 U.S.C. § 7604(b) (1982); Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9659(d) (1982 & Supp. V 1987); Safe Drinking Water Act § 1449, 42 U.S.C. § 300j-8(b) (1982 & Supp. V 1987); Surface Mining Control and Reclamation Act of 1977 § 520, 30 U.S.C. § 1270(b) (1988); Surface Marine Protection, Research, and Sanctuaries Act § 105(g), 33 U.S.C. § 1415(g)(2) (1988) (generally employing notice and diligent prosecution limitations).

220. 42 U.S.C. § 6972(a)(1)(B) (1994).

the CWA. As a result, injury in fact includes permit exceedances by reference to the provisions of the CWA itself.

Despite the absence of words implying that an elevated level of harm be present to sustain a case, courts impermissibly read them into the CWA. In *Public Interest Research Group, Inc. v. Magnesium Elektron, Inc.*,[221] for example, the court stated that the threatened injury due to a NPDES permit violation must be so imminent as to be "certainly impending."[222] The court embraced this requirement because it prevented courts from hearing cases about speculative injuries.[223] Contrary to this understanding, the CWA contains no such imminence requirement. Furthermore, neither *Sierra Club v. Morton* nor the APA, upon which the CWA is based, contains such a stringent temporal requirement. Engrafting an imminence requirement onto the CWA violates the written text of the CWA and Congressional intent. If Congress intended to limit citizens in their efforts to enforce the CWA, it knew how to do so.

2. Legislative History

After examining the text of the statute, investigating the legislative history reinforces the notion that Congress intended that a broad class of plaintiffs have access to the courts to remedy effluent violations. The citizen suit provision began as a restricted concept in the House of Representatives. The House bill provided for citizen suits against violators of effluent standards, but defined "citizen" in a narrow fashion. House Resolution 11896 defined "citizen" as one in the "geographic area and . . . having a direct interest which is or may be affected."[224] The House believed that such a restriction did not provide a major obstacle to plaintiffs because conservation groups could easily find a local citizen to bring suit.[225] Moreover, the restriction prevented the courts from hearing frivolous claims brought by those not directly affected by the pollution.[226] Notably, the House believed its provision

221. No. 89-3193, 1995 U.S. LEXIS 20748 (D.N.J. 1995).

222. *See supra* notes 118-26 and accompanying text.

223. *See supra* notes 118-26 and accompanying text.

224. 1 CWA LEG. HIST., *supra* note 207, at 1077.

225. *See* 1 *id.* at 663 (stating that "[t]he fact that suits must be brought by residents of the geographical area . . . is not an unreasonable diminution of the right to sue. Conservation groups should experience no difficulty in finding a qualified local citizen to bring a suit").

226. *See* 1 *id.* at 663, 674 (observing that "harassing lawsuits which would glut court calendars could not be filed across the entire Nation by individuals from areas not affected." To the contrary, the House believed restrictions necessary to limit the expanse of citizen suits. Discussing its definition of "citizen" in lieu of its usage of "person" elsewhere, the House feared that development would be stalled. Without words of limitation, Mr. Edmondson asserted that "anyone 3,000 miles away who wants to come in and file one these lawsuits" would do so. *Id.* at 674. In response, Mr. Hosmer retorted that "[w]e already have itinerant

explicitly provided standing to citizen plaintiffs without judicial interference. A report on the House bill states that "[t]he bill grants standing to citizens of the area having a direct interest which is or may be affected . . . ."[227] Thus, the House bill purported to grant standing to citizens so long as they met the bill's requirements.

In contrast to the restrictive House bill, the Senate bill tracked the language of the citizen suit provision in the Clean Air Act of 1970. The original Senate bill stated that "any person may commence a civil action . . . against any person . . . alleged to be in violation of . . . an effluent standard or limitation under this Act."[228] Describing the provision, the Senate Committee on Public Works noted that "[a]nyone may initiate a civil suit against any person who is alleged to be in violation of an effluent limitation."[229] Although the Committee shared the House's concern about frivolous litigation, it reasoned differently and found it unnecessary to restrict its provision as the House did. The Committee noted that it had "added a key element in providing that the courts may award costs of litigation, including reasonable attorney and expert witness fees, whenever the court determines that such action is in the public interest."[230] As a result, the courts could award these costs to defendants if litigation proved frivolous, which provides the necessary deterrent to such litigation.[231]

Given the discrepancy between the House and Senate bills, the conference substitute reflects a compromise between the two. The resulting citizen suit provision gave a "citizen" a right to commence a civil action without geographic or direct interest limitations.[232] Furthermore, the compromise defined "citizen" in its present-day form as "a person or persons having an interest which is or may be adversely affected."[233] Moreover, the definition of the word "citizen" reflected the decision in *Sierra Club v. Morton* in terms of what qualified as an interest under the CWA. As a result, the compromise that emerged from the conference committee greatly expanded the House bill and very closely resembled the broad understanding of the Senate.

The most important portion of the legislative history occurred during enactment debates and sheds light on the Conference Committee's

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intervenors who go around the country and persons meddling in problems that have significance locally and not nationally for purposes where they are worthy").

227. H.R. 11,896, 92d Cong. § 505(g) (1972), *reprinted in* 1 CWA LEG. HIST., *supra* note 207, at 1077.

228. S. 2770, 92d Cong. (1972), *reprinted in* 2 CWA LEG. HIST., *supra* note 207, at 1703-04.

229. 2 CWA LEG. HIST., *supra* note 207, at 1497.

230. 2 *Id.* at 1499.

231. 2 *Id.* (noting that "[t]his should have the effect of discouraging abuse of this provision, while at the same time encouraging the quality of the actions that will be brought").

232. 1 CWA LEG. HIST., *supra* note 212, at 221; *see also* text accompanying note 212.

233. 33 U.S.C. § 1365(g) (1994).

understanding of *Sierra Club v. Morton.* During debate, Senator Bayh inquired as to the meaning of "an interest which is or may be adversely affected" by asking "[w]ould an interest in a clean environment—which would be invaded by a violation of the Federal Water Pollution Control Act or a permit thereunder—be an 'interest' for purposes of this section?"[234] In reply, Senator Muskie stated "[t]hat is the intent of the conference."[235] After noting that the Court interpreted section 10 of the APA much like section 505(g) of the CWA, Senator Muskie quoted extensively from *Sierra Club v. Morton.*[236] Senator Muskie noted that the Supreme Court held that "[a]esthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the legal process."[237] Senator Muskie continued by saying "it is clear that under the language agreed to by the conference, a noneconomic interest in the environment, in clean water, is a sufficient base for a citizen suit under section 505."[238] Concluding, Senator Muskie noted that he would "presume that a citizen of the United States, regardless of residence, would have an interest as defined in this bill regardless of the location of the waterway and regardless of the issue involved."[239] In response, Senator Bayh stated that he believed "that the conference provision will not prevent any person or group with a legitimate concern about water quality from bringing suit against those who violate the act or a permit."[240]

Although the search for legislative intent can often be a mysterious misadventure, this is not such a case. Congress unequivocally intended an "interest" in a clean environment, or more narrowly, in clean water to be sufficient to meet the requirements of the meaning of "citizen" in the CWA. To support its understanding, the Conference Committee noted that even the Court in *Sierra Club* held that such broadly shared interests could provide a judicially cognizable interest to support litigation. Notably, the Conference Committee did not define interests such as recreational activities to be required to bring suit, although those certainly qualify under *Sierra Club.* Moreover, these comments make clear that the Conference Committee understood that a simple violation

234. 1 CWA LEG. HIST., *supra* note 207, at 221 (noting that the two differences between the Senate bill and the conference substitute involve the notice requirement before bringing suit and the definition of "citizen").

235. 1 *Id.*

236. *See* 1 *id.*

237. 1 *Id.*

238. 1 *Id.*

239. 1 *Id.*

240. 1 *Id.*

of a permit limit would be actionable by a very broad class of plaintiffs and did not understand permit violations to go without a remedy because they were "mere exceedances."[241] Because Congress voted the result of the House and Senate Conference Committee into law, those understandings lay the foundation for the interpretation of its provisions. Simply put, Congress specifically gave citizens an interest in clean water that is invaded by permit violations and these violations are subject to suit in the courts of this nation. To hold otherwise frustrates Congressional intent and the law.

Reviewing the legislative history, it is clear that Congress intended to define the injuries that qualified for standing purposes under the CWA. The Conference Committee, for example, explicitly referred to injuries such as those in *Sierra Club v. Morton* when deciding about what could be redressed by judicial action. Indeed, many courts refer to that case when ruling on issues of standing.[242] However, Congress went one step further in defining injury under the CWA. According to the legislative history, an interest in clean water that is violated by a permit exceedance is an injury remediable by the courts. Defining such an interest is merely a form of "environmental well-being" contemplated by *Sierra Club v. Morton*. Polluted water, whether environmental damage exists or not, harms the well-being of the environment. In fact, one court noted that "[a]ny violations of these water quality based effluent limitations causes some degree of harm . . . ."[243] Because the effects of pollution are cumulative, to allow even minute transgressions of the law to go unpunished threatens to swallow pollution prevention laws as a whole. While the harm might be minute, harm (*i.e.* injury) exists nonetheless and qualifies as such under the CWA. Given the ambitious goals of the CWA, permit violations alone must be understood to be injury in fact for those seeking to enforce the CWA.

By refusing to apply the letter and intent of the CWA, courts violate the principle of the separation of powers. Ironically, this claim is frequently leveled at Congress in its enactment of the citizen suit provisions themselves.[244] However, history and past judicial practice

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241. *See supra* notes 234-40 and accompanying text. *But cf.* Schwartz & Hackett, *supra* note 207, at 334 (stating that Senator Muskie's expansive view of standing "was explicitly rejected in *Sierra Club v. Morton*").

242. *See, e.g.*, Concerned Area Residents v. Southview Farm, 834 F. Supp. 1410, 1414 (W.D.N.Y. 1993); Citizens for a Better Env't v. Caterpillar, Inc., 30 F. Supp. 2d 1053, 1069 (C.D. Il. 1998); Arkansas Wildlife Fed'n v. Backaert Corp., 791 F. Supp. 769, 776 (W.D. Ark. 1992); Hawaii's Thousand Friends v. City & County of Honolulu, 806 F. Supp. 225, 231 (D. Haw. 1992).

243. American Canoe Ass'n v. City of Wilson Wastewater Treatment Plant, consolidated case Nos. 5:96-CV-838-BR(2), 5:97-CV-471-BR(2), 5:97-CV-665-BR(2), 1998 U.S. Dist. LEXIS 7766, at *16-17 (E.D.N.C. Mar. 31, 1998).

244. *See generally* Scalia, *supra* note 1; Harold J. Kent & Ethan G. Shenkman, *Of Citizen Suits and Citizen Sunstein*, 91 MICH. L. REV. 1793, 1806 (1993) (claiming that Congress cannot delegate enforcement duties

demonstrate that "[t]here is no evidence of constitutional limits on the power to grant standing."[245] Indeed, the recent development of Article III limitations on the ability of plaintiffs to bring suits counsels that even the judiciary did not recognize any constitutional standing limitations in the past.[246] Moreover, courts did not generally require facts demonstrating injury other than a simple showing of a statutory violation until the 1990s.[247] Thus, the new fascination with the concept of injury, particularly in environmental cases, began a new era of increased power for the judges in the federal system.

Because of the structure of our system of government, an expansion of power by one branch comes at the expense of another. In the case of standing inquiries under the CWA, that other branch of government is Congress itself. Creating an injury in fact test under the CWA that limits the groups of people eligible to bring claims in spite of contrary legislative intent enlarges judicial power at the expense of Congress. The legislative history demonstrates that Congress deemed a simple interest in clean water sufficient to satisfy the "interest" requirement for standing purposes.[248] However, courts repeatedly fail to acknowledge these Congressional understandings by making plaintiffs demonstrate some type of intimate personal harm via the form of fact-filled affidavits. Showings of this nature have no basis in the text or legislative history of the CWA. In effect, the courts are restricting "the power of Congress to define and protect against certain kinds of injury that the Court thinks it improper to protect against."[249]

Given the nature of interests that currently qualify as injury under modern analysis of the CWA, courts cannot help but inject their own views into their decisions. For example, an interest in aesthetics is purely subjective and will differ from person to person. Because of this subjectivity, judges have wide latitude under current injury in fact analysis to determine if injury exists. When deciding cases, courts inject a "normative structure of what constitutes a judicially cognizable injury."[250] Because of the malleability of the concept of injury in fact,

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to disinterested citizens); Charles S. Abell, *Ignoring the Trees for the Forests: How the Citizen Suit Provision of the Clean Water Act Violates the Constitution's Separation of Powers Principle*, 81 VA. L. REV. 1957, 1966 (1995) (arguing that the provisions undermine the power of the Presidency, violate the Appointments Clause, and Article III in general).

245. Sunstein, *supra* note 26, at 171.

246. *See* Fletcher, *supra* note 28, at 224 ("It is at least clear that current standing law is a relatively recent creation.").

247. Karin P. Sheldon, Steel Company v. Citizens for a Better Environment: *Citizens Can't Get No Psychic Satisfaction*, 12 TUL. ENVTL. L.J. 1, 29-30 (1998).

248. *See supra* notes 234-40 and accompanying text.

249. Fletcher, *supra* note 28, at 233 (comparing the usage of the injury in fact test to a form of substantive due process).

250. *Id.*

the standard for determining injury "has failed to provide a neutral and objectively ascertainable method of measuring access to the federal courts."[251] In the end, the absence of an objective standard of injury allows courts to manipulate the tests for standing when deciding whether to examine the merits of the case.[252]

3. Evidence

In addition to honoring Congressional intent, recognizing a permit exceedance as injury in fact disposes of the inquiries into the questionable affidavits submitted to support standing. Although well-intentioned, the affidavits of environmental plaintiffs frequently boil down to an "academic exercise in the conceivable."[253] In *Laidlaw*, for example, Justice Scalia's criticism of the plaintiff's affidavits is well-founded. After all, one of the plaintiffs said that she did not use the water and another said that pollution did not play a role in his decreased usage.[254] It certainly strains reason to suggest that these individuals have suffered injury in fact as the phrase is commonly understood.

Examining other cases demonstrates the malleable nature of the concept of injury in fact. In some cases, injury in fact fits the traditional model of the concept. In *Local Environmental Awareness Development Group of Berks v. Exide Corp.*,[255] the court found that two of fifteen affidavits submitted by plaintiffs demonstrated injury in fact.[256] One affidavit alleged a decrease in recreation because a park had been closed as a result of lead contamination.[257] A second affiant stated that the water had caused "dead patches of grass" in her back yard and that "wild ducks" had been driven away.[258] The affiant attributed these injuries to the defendant because she, being more industrious than most plaintiffs, found elevated levels of lead in her yard after having it tested.[259] As a result, these plaintiffs easily demonstrated that they had suffered injury in fact.

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251. Gene R. Nichol, Jr., *Rethinking Standing*, 72 CAL. L. REV. 68, 78-79 (1984) (observing that "[a]s standing jurisprudence began to embrace subjective and intangible interests, the term 'injury in fact' offered little guidance in measuring the scope of the case or controversy requirement").

252. *See* LAURENCE H. TRIBE, CONSTITUTIONAL CHOICES 100 (1985).

253. *SCRAP*, 412 U.S. 669, 688 (1973).

254. *See supra* notes 189-94 and accompanying text.

255. No. 96-3030, 1999 U.S. Dist. Lexis 2673 (E.D. Pa. Feb. 19, 1999)

256. *Id.* at *54 (finding that the other affiants failed to make specific allegations to support their water pollution claims).

257. *See id.* (asserting that soil samples revealed lead contamination).

258. *Id.* at *55.

259. *See id.* (testing revealed 3,600mg/kg in the upper 3 inches of soil and 2,100mg/kg between depths of 3 to 10 inches beneath the surface).

In contrast to the clear showing of injury in fact in *LEAD of Berks*, the plaintiff's claim in *Friends of Earth v. Consolidated Rail Corp.*[260] presents an assertion of standing at the other end of the spectrum. In that case, an affiant testified that "he passes the Hudson [River] regularly and find[s] the pollution in the river offensive to [his] aesthetic values."[261] The Second Circuit found this flimsy allegation sufficient for standing purposes for this plaintiff.[262] Unlike the plaintiffs in *LEAD of Berks*, this affiant suffered no physical invasion of property or claim that his recreational use of the water decreased. This affiant merely drove over the river regularly and did not like what he saw. The sight of the water offended his "aesthetic values." However, an offense to one person's sense of aesthetics is another's Venus de Milo. It is precisely because of a case like *Friends of the Earth v. Consolidated Rail Corp.* that standing inquiries under the CWA are criticized as exercises in pleading. Determining whether a plaintiff has standing boils down to which facts are selected for inspection and the value given to them.

Because courts require plaintiffs to leap through moving hoops to show standing, the facts used to support standing appear distorted and the underlying reasoning is tortured. Recognizing that permit violations constitute injury in fact per se does away with the need for these questionable assertions submitted to show standing. Indeed, such recognition only explicitly confirms what courts currently allow without the need for pleading exercises. Plaintiffs often claim that they are "concerned" about pollution, "believe" a waterway is polluted, or "know" that the affected water is polluted. Of course, plaintiffs are typically aware of this because a corporation or industry has a NPDES permit to pollute the water. What these plaintiffs are really asserting is that a corporation has polluted in an amount greater than that which is allowed by its NPDES permit. In other words, plaintiffs simply assert that permit exceedances violate the CWA. Removing these affidavits not only codifies common practice, but also saves time because courts need not sift through them. In sum, recognizing permit violations as injury in fact injects common sense into citizen suit proceedings, a commodity sorely lacking in some cases.

VII. CONCLUSION

Because *Laidlaw* keeps the standing hurdle at a reachable height, it must be viewed as a favorable decision for environmental plaintiffs.

260. 768 F.2d 57 (2d Cir. 1985).

261. *Id.* at 61 (second and third alterations in original).

262. *See id.*

Indeed, the *Laidlaw* decision has already had an impact on lower court standing decisions for environmental plaintiffs. The plaintiffs in *Friends of the Earth, Inc. v. Gaston Copper Recycling Corporation*,[263] for example, reaped the benefits of *Laidlaw* upon appeal of their case.[264] The lower court held that the plaintiffs lacked standing to pursue their claim because they failed to show injury in fact as a result of defendant's permit exceedances.[265] The district court declared that the plaintiffs failed to present evidence "concerning the chemical content of the waterways affected by the defendant's facility. No evidence of any increase in the salinity of the waterways, or any other negative change in the ecosystem of the waterway was presented."[266] However, the appellate court reversed the lower court and held that the plaintiffs had standing to continue the litigation.[267] Applying *Laidlaw*, the Fourth Circuit opined that an environmental plaintiff need not show environmental harm to obtain standing.[268] Thus, the reversal in cases like *Gaston Copper* demonstrates the importance of *Laidlaw's* environmental harm holding.[269]

Despite the favorable impact of its holding, *Laidlaw* fails to expand standing to the extent intended by Congress. Congress clearly intended to expand the number of potential plaintiffs beyond the number permitted by *Laidlaw*. It did not, however, intend to blow the court doors wide open so that anyone can bring a claim. The chief obstacle standing in the way of a rush to the courthouse is the award of litigation costs and attorney fees if justice requires. When all is said and done, litigation costs and attorney fees can be exceptionally high. Despite not having to show environmental harm, plaintiffs will continue to perform scientific tests on affected waters because they are relevant to the penalty assessed by the court. Furthermore, defendants will conduct similar tests to reduce the potential penalty. As a result, the threat of paying for a defendant's testing and attorney fees instructs plaintiffs to pursue only cases with merit.

In addition to deterring frivolous claims, the award of litigation costs and attorney fees forces plaintiffs to choose cases in which they have a direct interest because it is too costly to choose otherwise. So, a person in Idaho will not be a plaintiff in a permit violation case in Florida because it is too costly. An Idaho plaintiff would not only bear the

263. 204 F.3d 149 (4th Cir. 2000).

264. *Id.*

265. Friends of the Earth, Inc. v. Gaston Copper Recycling Corp., 9 F. Supp. 589 (D.S.C. 1998).

266. *Id.* at 600.

267. *See Friends of the Earth*, 768 F.2d at 45.

268. *See id.* at 35.

269. *See, e.g.*, Piney Run Ass'n v. County Comm'n, No. 82, F. Supp. 2d 464 (D. Md. 2000) (holding that plaintiffs had standing to pursue their claim after citing to *Laidlaw*).

threat of litigation costs and attorney fees, but would also bear the financial burden of pursuing the case in Florida. For example, the plaintiff from Idaho would have to pay travel, eating, and accommodation expenses in Florida while pursuing the case. When added to the "frivolous lawsuit" costs, the risk for plaintiffs is too great. By adding these costs to the CWA, Congress has in effect ensured that courts have jurisdiction over potential plaintiffs. Much of environmental law is about economics and it is those same economics that prevent plaintiffs from bringing groundless or harassing claims.

The failure to recognize that Congress defined injury in fact within the Clean Water Act not only ignores the frivolous litigation safeguards in the CWA, but also disregards the nature of public law litigation. Public law litigation enforces broadly held values whose importance is reflected in legislation enacted by democratically elected individuals. Moreover, it is well established that an "injury required by Art[icle] III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing.'"[270] Although the injuries suffered by environmental plaintiffs are of a different kind, litigation to enforce generally held environmental values embodied in statutes is nonetheless a result of the democratic process.[271] Voters elect public officials who sponsor legislation that generally comports with public consciousness. Indeed, among the reasons that Congress enacted environmental measures in the 1970's with little opposition were the political consequences of opposition in light of public awareness of environmental problems.[272]

Because the environmental statutes resulted from the democratic process, this type of public law litigation is not "a smokescreen that hides the public policy oriented nature of the suit" by allowing courts to look at form over substance.[273] In fact, the opposite is true for environmental plaintiffs enforcing the CWA. Courts look at the substance of the injury suffered and ignore that Congress defined the form of the injury that allows a plaintiff to bring suit. By doing so, "politically unaccountable federal judges . . . substitute their policy preferences for those of politically accountable institutions."[274] The restriction of standing for environmental plaintiffs is just such an example of the judicial usurpation of Congressional power. So, when asked "What's it to you?" an environmental plaintiff enforcing the CWA should take the CWA in one

270. Warth v. Seldin, 422 U.S. 490, 500 (1975).

271. *See* Sheldon, *supra* note 247, at 40.

272. *See* MILLER, *supra* note 13, at 5.

273. Abell, *supra* note 244, at 1985 n.168.

274. Richard J. Pierce, Jr., *The Role of the Judiciary in Implementing an Agency Theory of Government*, 64 N.Y.U. L. REV. 1239, 1277 (1989).

hand and its legislative history in the other and reply, "Congress historically has the power to confer legal interests upon citizens and it has done so according to the text and legislative history of the CWA itself."