

U.S. Supreme Court Revives Citizen Suit Standing

In a reversal of its decade-long trend of disfavoring citizen suits, the U.S. Supreme Court has overturned a lower court's decision that had dismissed a Clean Water Act (CWA) citizen suit on the ground that the suit was "moot" because the defendant had ceased its violations. The case is likely to revive the all-but-dead citizen suit as a weapon of choice for environmental groups against business that have allegedly violated environmental laws.

In the case, Laidlaw Environmental Services (TOC), Inc. (Laidlaw), began to discharge treated wastewater from a treatment plant in 1987 under authority of a National Pollutant Discharge Elimination System (NPDES) permit issued by the South Carolina Department of Health and Environmental Control (DEHC). The facility repeatedly discharged higher concentrations of mercury than the permit allowed. In 1992, Friends of the Earth and others (FOE) notified Laidlaw of their intention to file a citizen suit against it under Section 505(a) of the CWA after the expiration of the required 60-day notice period.

Before the expiration of the notice period, Laidlaw asked DEHC to file suit against it for the alleged violations. The DEHC did so, and the parties quickly entered into a settlement requiring Laidlaw to pay \$100,000 in civil penalties and to make "every effort" to comply with its permit obligations (in fact, the violations continued until January 1995). On June 12, 1992, FOE filed its citizen suit, alleging noncompliance with the NPDES permit and seeking declaratory and injunctive relief and an award of civil penalties. Laidlaw moved to dismiss the action on the ground that the citizen suit was barred under CWA Section 505(b)(1), which bars citizen suits where the U.S. or a state "has commenced and is diligently prosecuting a civil or criminal action" to require compliance. The federal district court held that DEHC's action had not been "diligently prosecuted" and, therefore, FOE's action was not barred by CWA Section 505(b)(1).

Laidlaw also moved for summary judgment on the ground that FOE lacked "standing" to bring its suit because FOE's members had not suffered any "injury in fact" from the violations. The district court denied this motion also, finding that FOE had standing to bring the suit based on affidavits from FOE members alleging harm to their interests. The court then rendered its decision, imposing a civil penalty of \$405,800 for the violations.

Both FOE and Laidlaw appealed to the Court of Appeals for the Fourth Circuit. FOE claimed that the civil penalty was inadequate, and Laidlaw argued, among other things, that FOE lacked standing to bring the suit and that DEHC's action qualified as diligent prosecution precluding FOE's litigation. The court assumed without deciding that FOE had standing to bring the action, but then held that the case had become moot. The court stated that the elements of standing – injury, causation, and redressability – must exist at every stage of review, or else the action becomes moot. The court noted that the Supreme Court's 1998 decision in *Steel Co. v. Citizens for a Better Environment*, meant that the "redressability" element of the standing test does not exist where the only remedy available to the citizen suit plaintiff would be civil penalties payable to the government, because such penalties would not redress any injury that the citizen has suffered. Because FOE could not receive money under the CWA for its injuries, the

court held, the action was moot. The court vacated the district court's order and remanded with instructions to dismiss the action.

The U.S. Supreme Court (Court) reversed the Fourth Circuit's decision. The Court first observed that, although the Fourth Circuit had assumed that FOE had standing, the Court had an obligation to assure itself that FOE had standing at the outset of the litigation. The Court noted that, to have "standing" to bring an action in federal court, a plaintiff must show that: (1) it has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Laidlaw contended that no "injury in fact" existed because there was no proof of harm to the environment from the violations – a claim that had been accepted by the district court. The Court, however, held that the relevant inquiry is not injury to the environment, but injury to the plaintiff. The Court held that "environmental plaintiffs adequately allege injury in fact when they [allege] that they use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity." The Court found that FOE members had demonstrated sufficient injury by claiming that they lived near Laidlaw's facility and avoided recreating in or near the waters to which Laidlaw discharged and, that, in some cases, home values were lowered, because of concerns about pollution from the facility.

The Court distinguished its 1990 holding in *Lujan v. National Wildlife Federation*, in which the Court had denied citizen suit standing to an environmental group that challenged a government decision that would open public lands to mining activities. The Court stated that the plaintiff in that case did not survive the government's motion for judgment before trial "merely by offering '[claims] which state only that one of [the organization's] members uses 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.'" Similarly, in *Lujan v. Defenders of Wildlife* (1992), the plaintiffs lacked standing because their claim of injury rested on "'some day' intentions" to visit endangered species in foreign countries.

In the case at hand, in contrast, the Court found "nothing 'improbable' about the proposition that a company's continuous and pervasive illegal discharges of pollutants into a river would cause nearby residents to curtail their recreational use of that waterway and would subject them to other economic and aesthetic harms." Because of the FOE members' "reasonable concerns" about the effects of Laidlaw's discharges, the Court held they had demonstrated an injury in fact.

Laidlaw next argued that, even if FOE had standing to seek injunctive relief, it lacked standing to seek civil penalties. Civil penalties offer no redress to private plaintiffs, Laidlaw argued, because they are paid to the government and, therefore, a citizen plaintiff can never have standing to seek them.

Although the Court agreed that a plaintiff must demonstrate standing separately for each form of relief sought, the Court disagreed with the argument "that citizen plaintiffs facing

ongoing violations never have standing to seek civil penalties” because payment of penalties to the government cannot redress the plaintiffs’ injuries. Rather, the Court stated, “[t]o the extent that [civil penalties] encourage defendants to discontinue current violations and deter them from committing future ones, they afford redress to citizen plaintiffs who are injured or threatened with injury as a consequence of ongoing unlawful conduct.” The Court deflected Laidlaw’s argument that its 1998 *Steel Co.* decision requires a different result by limiting that case to its particular facts: *Steel Co.*, the Court held, denies standing only where the citizen plaintiffs are seeking civil penalties for violations that have ended by the time of suit.

The Court did allow that, in some cases, the deterrent effect of a claim for civil penalties may be so insubstantial that it cannot support citizen standing, but, it held, that was not the case here.

Having found that FOE had standing to bring its action, the Court turned to the question of mootness. Laidlaw argued that the case was moot because it had achieved substantial compliance in 1992 and later shut down the facility in question. The Court observed that “a defendant claiming that its voluntary compliance moots a case bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur.” The Court was not satisfied with Laidlaw’s claim that the closure of the facility permanently prevented future violations, noting that Laidlaw still retained its NPDES permit. Because “[t]he effect of both Laidlaw’s compliance and the facility closure on the prospect of future violations is a disputed factual matter,” the Court sent the case back to the district court for further consideration.

In a scathing dissent, Justice Scalia, joined by Justice Thomas, charged that the Court had created new standing law that will “place the immense power of suing to enforce the public laws in private hands.” Scalia’s dissent leaves no doubt that, in his view, at least, *Laidlaw* represents a significant rollback of the standing principles enunciated by the Court only a few years ago in the *Lujan* and *Steel Co.* cases discussed above. *Laidlaw* represents an ideological setback for Scalia, who authored those earlier cases.

Implications: It appears that the pendulum has swung back in the direction of the Court’s support of citizen standing to enforce environmental laws. If, as the Court held, citizens may have standing without proving environmental injury, “injury in fact” may no longer be a meaningful hurdle for citizen plaintiffs. As Scalia stated in his dissent, under the Court’s “lenient standard,” purely “subjective apprehensions” of environmental harm now may be sufficient to demonstrate injury in fact.

Further, *Steel Co.* no longer seems to be good law. As Scalia noted, the Court, “by approving the novel theory that public penalties can redress anticipated private wrongs, . . . has come close to ‘mak[ing] the redressability requirement vanish.’”

Importantly, *Laidlaw* was decided by a solid 7-2 majority of the Court. It seems clear, therefore, that the Court is re-thinking the significant limitations on citizen standing imposed by the two *Lujan* cases and *Steel Co.* Whether *Laidlaw* harkens a complete return to the easy-standing days of the pre-1990s remains to be seen.

Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc., 2000 U.S. Lexis 501, 2000 WL 16307 (Jan. 12, 2000).

This article was prepared by Kenneth C. Gold, a partner in our Environmental Department, and previously appeared in the March, 2000 edition of the Michigan Environmental Compliance Update, a monthly newsletter prepared by the Environmental Department and published by M. Lee Smith Publishers.