

ESCAPING THE COMMON LAW'S SHADOW: STANDING IN THE LIGHT OF *LAIDLAW*

ROBERT V. PERCIVAL* AND JOANNA B. GOGER**

INTRODUCTION

The case poses—if only we choose to reach them—significant aspects of a wide, growing, and disturbing problem, that is, the Nation's and the world's deteriorating environment with its resulting ecological disturbances. Must our law be so rigid and our procedural concepts so inflexible that we render ourselves helpless when the existing methods and the traditional concepts do not quite fit and do not prove to be entirely adequate for new issues?¹

Justice Blackmun's complaint, voiced nearly three decades ago in *Sierra Club v. Morton*,² reflected the difficulty the legal system then was having in adapting to burgeoning public concern for the environment. At the time it decided *Morton*, the Supreme Court had just begun to open up the courts to the beneficiaries of new federal regulatory programs, discarding the common law notion that only the targets of regulation could suffer “legal wrong” entitling them to seek judicial redress.³ *Morton* represented a significant step forward because a majority of the Court expressly acknowledged that injuries to aesthetic and environmental interests were judicially cognizable even when those interests were “shared by the many rather than the few. . . .”⁴ But the Court also held that the Sierra Club lacked standing to challenge construction of a ski resort in a national game refuge in the Mineral King Valley of the Sierra Nevada Mountains, giving rise to Justice Blackmun's complaint.⁵ The Court's holding ultimately did not pose a significant barrier to environmental interests

* Professor of Law, Robert Stanton Scholar and Director, Environmental Law Program, University of Maryland School of Law.

** Law Clerk to The Honorable Frederic N. Smalkin, United States District Judge for the District of Maryland.

1. *Sierra Club v. Morton*, 405 U.S. 727, 755-56 (1972) (Blackmun, J., dissenting).

2. 405 U.S. 727 (1972).

3. *See Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150 (1970).

4. *See Morton*, 405 U.S. at 734-35.

5. *See id.* at 735-36.

seeking judicial redress, because it was based on the Sierra Club's failure to allege how its interests would be adversely affected. On remand the Sierra Club easily established standing by alleging that its members regularly visited the Mineral King area.⁶

Liberalized standing, coupled with citizen-suit provisions in newly-enacted regulatory legislation, provided citizens with significant legal tools for ensuring that national environmental programs were implemented and enforced during the 1970s and early 1980s. However, in subsequent years standing jurisprudence traveled a more twisted path, much like the road that today still provides the only motorized access to Mineral King.⁷ At the behest of Justice Antonin Scalia, the Supreme Court resurrected private law notions of standing to limit access to courts by environmental interests.⁸ By insisting that plaintiffs make detailed showings of individualized, causal injury in order to establish standing, the Court made it more difficult for citizens to bring suits to enforce the environmental laws.⁹ Justice Scalia's vision of standing, founded on an undisguised hostility toward the purposes of the environmental laws,¹⁰ reinjected into citizen suits the very kind of factual inquiries about individualized injury that had rendered the common law inadequate to protect against environmental harm.¹¹ In January 2000, the Supreme Court abruptly repudiated this vision with its decision in *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*¹²

This paper discusses the impact of *Laidlaw* on citizen suits to enforce environmental standards. It argues that *Laidlaw* is best understood *not* as having worked a fundamental change in standing doctrine, but rather as a rejection of the extreme consequences of

6. On remand from the Supreme Court the Sierra Club was able to amend its complaint to establish standing by alleging that its members regularly visit the area where the ski resort would be built. See ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE & POLICY 1037 (3d ed. 2000).

7. See *id.* at 1037-38.

8. See Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432 (1988).

9. See *Lujan v. National Wildlife Fed'n*, 497 U.S. 871 (1990) (requiring allegations of use and injury to specific tracts of more than 1,200 parcels of land subject to disposition by the Bureau of Land Management); *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) (requiring purchase of plane tickets to visit endangered wildlife abroad).

10. See Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881 (1983); see also *infra* note 75 and accompanying text.

11. See Sunstein, *supra* note 8, at 1433-36 (arguing that "under this model, a nineteenth century private right is a predicate for judicial intervention; as a result, courts may not redress the systemic or probabilistic harms that Congress intended regulatory schemes to prevent").

12. 528 U.S. 167 (2000).

employing a private law model in assessing litigants' standing. *Laidlaw* returns standing jurisprudence to a model more consistent with the realities of the modern regulatory state. This paper concludes that, at least in the context of citizen enforcement actions, standing doctrine serves as a useful vehicle for ensuring that litigants have some connection to the resources or the community sought to be protected by the public laws they seek to enforce. As a result of *Laidlaw*, citizens who live near sources of pollution or who recreate in areas affected by violations of environmental law may sue to enforce the laws without having to demonstrate observable impacts of the illegal acts.

Part I of this paper traces the early evolution of standing doctrine. Part II examines why the rise of national regulatory legislation made a private law model of standing inappropriate for rationing citizen access to courts. Part III traces Justice Scalia's campaign to reinject private law concepts into standing analysis. Part IV discusses how *Laidlaw* repudiates this vision and Part V explores the implications of *Laidlaw* for the future of citizen suits to enforce environmental laws.

I. THE EARLY EVOLUTION OF STANDING DOCTRINE

Standing to sue is a fairly recent concept in American jurisprudence, as several scholars have noted.¹³ "Standing," which is not mentioned in the Constitution, was not discussed in the context of Article III's "case or controversy" requirement until 1944, and it was not until the 1970s that standing doctrine became widely used in the federal courts.¹⁴ Courts traditionally focused on whether a litigant had a cause of action under principles of common law or by statute.¹⁵ While most early private actions were based on common law, some statutes created private rights of action, including statutes authorizing

13. See Raoul Berger, *Standing to Sue in Public Actions: Is It a Constitutional Requirement?*, 78 YALE L.J. 816 (1969); Louis J. Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265, 1269-82 (1961); Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 168-97 (1992); Stephen L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1394-1425 (1988).

14. See Sunstein, *supra* note 13, at 169. Professor Sunstein cites *Stark v. Wickard*, 321 U.S. 288 (1944), as the first case to discuss the concept of standing in the Article III context, and *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970), as the case that first employed the "injury in fact" concept in assessing whether a plaintiff was within the "zone of interests" protected by a statute.

15. See Sunstein, *supra* note 13, at 170 ("Without a cause of action, there was no case or controversy and hence no standing.").

qui tam or informers' actions. *Qui tam* statutes allowed citizens to bring civil suits against private parties for violations of federal laws; informers' actions could be brought against both public officials and private parties to enforce public duties.¹⁶ Successful plaintiffs were allowed to keep a portion of the resulting recoveries or fines.

Standing first emerged as a distinct legal concept during the New Deal period as courts struggled to digest a flood of new regulatory legislation.¹⁷ Justices Brandeis and Frankfurter sought to "insulate progressive and New Deal legislation from frequent judicial attack" by invoking justiciability doctrines, including what is known now as standing, to bar challenges to the legislation.¹⁸ The opinions from this time period continued to assert that a plaintiff must have some legal right, whether by common law or statute, to bring a cause of action in federal court.¹⁹ Thus, this original private law model was transferred to a public law setting, and only those parties to whom the government had breached a duty had standing to sue.²⁰ These included "objects" of regulation whose common law liberty and property rights had the potential to be affected by overzealous regulation. This model, however, did not confer standing on beneficiaries of regulation whose common law interests were not cognizably injured.

Erosion of the private law model of standing began in 1940 when the Supreme Court upheld the right of a competing radio station to challenge implementation of a national regulatory statute.²¹ In *FCC v. Sanders Bros. Radio Station*,²² the Court conferred standing upon a competitor of a radio station who did not have a legal injury protected at common law but who nonetheless was a party "aggrieved

16. *See id.* at 173-178.

17. *See id.* at 179.

18. *See id.*

19. *See Tennessee Elec. Power Co. v. Tennessee Valley Auth.*, 306 U.S. 118, 137-38 (1939) (finding that the plaintiff must have a "legal right,—one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege"); Sunstein, *supra* note 8, at 1438. Sunstein argues that the private model of standing was a culmination of two seemingly adverse viewpoints. A belief in the superiority of common law rights of freedom of liberty, property, and contract over rights conferred by social regulation was grounded in the *Lochner* era and its accompanying rejection of state and federal statutes. On the other hand, as New Deal legislation was passed and judges began to invoke the illegitimacy of the *Lochner* era in their rulings, the Court sought to use standing as a means of insulating legislation from review. Thus, both supporters and opponents of the regulatory state sought to limit standing to those with common law interests at stake.

20. *See* Sunstein, *supra* note 8, at 1435.

21. *See* PERCIVAL ET AL., *supra* note 6.

22. 309 U.S. 470 (1940).

or whose interests are adversely affected” as defined in the statute under which he sought review.²³ Furthermore, the statute under which he sought review, the Communications Act of 1934, had as its purpose the protection of the public’s interest in adequate communications service.²⁴ This decision established a precedent for standing by the beneficiaries of regulatory legislation designed to vindicate public interests.

The Administrative Procedure Act (APA), enacted in 1946, provided a codification of the categories of standing that had previously been articulated by the federal courts.²⁵ The APA provides that “[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of the relevant statute, is entitled to judicial review thereof.”²⁶ The APA recognizes that a citizen suffering a legal wrong could bring suit while also recognizing that Congress could authorize a cause of action even though no “legal wrong” had been suffered.²⁷

The Court’s interpretation of the “legal wrong” requirement was extended beyond mere objects of regulation to encompass beneficiaries of regulations in the 1960s, signaling an even more significant abandonment of a model of standing grounded in the common law.²⁸ This development significantly broadened standing doctrine in the regulatory context, as standing had previously been conferred only upon those whose common-law property and liberty interests were affected by overzealous regulation.²⁹ As a result, beneficiaries of regulation whose interests had previously been

23. *See id.* at 477. The Court concluded that “[i]t is within the power of Congress to confer such standing to prosecute an appeal.”

24. *See id.* at 475-76.

25. *See* Sunstein, *supra* note 13, at 181.

26. 5 U.S.C. § 702 (1994).

27. *See id.*

28. *See* Citizens for Allegan County, Inc. v. Federal Power Comm’n, 414 F.2d 1125, 1134 (D.C. Cir. 1969) (“Various decisions recognize the broad principles of standing applicable to consumers of a service under regulatory control.”); Office of Communication of the United Church of Christ v. Federal Communications Comm’n, 359 F.2d 994, 1004-05 (D.C. Cir. 1966) (adopting the Supreme Court’s reasoning in *FCC v. Sanders* and concluding that “unless the listeners . . . can be heard, there may be no one to bring programming deficiencies or offensive overcommercialization to the attention of the Commission in an effective manner”); *Bebchick v. Public Utils. Comm’n*, 287 F.2d 337, 338-39 (D.C. Cir. 1961) (finding that public transit rider had standing to appeal a rate increase); *Coalition for United Community Action v. Romney*, 316 F. Supp. 742, 747 (N.D. Ill. 1968) (conferring standing upon citizens to challenge housing program).

29. *See* Sunstein, *supra* note 8, at 1439-40 (noting that denial of judicial review to regulatory objects would have constitutional ramifications).

considered as “privileges or legal gratuities, . . . to be vindicated through the political process or not at all” would have standing to sue.³⁰ This enabled citizens frustrated by the failure of government agencies to address rising environmental concerns to seek judicial redress.³¹

The common law underpinnings of standing doctrine were substantially altered by the Supreme Court’s 1970 opinion in *Association of Data Processing Organizations, Inc. v. Camp*.³² In this case, the Court “signal[ed] a departure from the private-law underpinnings of previous law.”³³ In so doing, the Court abandoned its focus on a cognizable legal interest and shifted the focus of the inquiry to a determination of whether the interest is “arguably within the zone of interests” of the statute.³⁴ This stemmed from a realization that “whether A has violated a duty to B does not quite capture the dynamics of public-law cases, in which disputes cannot so readily be understood in terms of clear rights and duties.”³⁵ Although it appeared that the Court was finally adapting standing doctrine to the realities of the administrative state by abandoning its reliance on the existence of a concrete legal interest, the adoption of an “injury in fact” requirement shifted the focus of the inquiry from a legal to a factual one. This left the door open for reinjecting private law notions into standing analysis when courts later insisted on increasingly detailed demonstrations of individualized, causal injury.³⁶

This new focus for standing doctrine initially proved to be relatively unproblematic for environmental plaintiffs. To be sure, when it lost in *Sierra Club v. Morton*,³⁷ the Sierra Club failed in its gambit to acquire automatic standing in environmental cases by dispensing with any allegations of how it would be injured. However,

30. *See id.* at 1436, 1442. *See also* Environmental Defense Fund v. Hardin, 428 F.2d 1093, 1097 (D.C. Cir. 1970) (“Consumers of regulated products and services have standing to protect the public interest in the proper administration of a regulatory system enacted for their benefit.”).

31. *See* Sunstein, *supra* note 13, at 183; *see also* Scenic Hudson Preservation Conf. v. Federal Power Comm’n, 354 F.2d 608, 615-617 (2d Cir. 1965) (“In order to ensure that the Federal Power Commission will adequately protect the public interest . . . those who by their activities and conduct have exhibited a special interest in such areas, must be held to be included in the class of ‘aggrieved’ parties . . .”).

32. 397 U.S. 150 (1970).

33. Sunstein, *supra* note 8, at 1445.

34. *See Data Processing*, 397 U.S. at 153.

35. Sunstein, *supra* note 8, at 1446.

36. *See* Sunstein, *supra* note 13, at 190-91.

37. 405 U.S. 727 (1972).

the Court's recognition that aesthetic interests are judicially cognizable for purposes of standing, even when shared by many, made it relatively easy for bona fide environmental groups to establish standing. The Court's subsequent decision in *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*³⁸ seemed to confirm that the injury in fact test would be very easy to satisfy even with an allegation of an "attenuated line of causation." In *SCRAP*, environmentally concerned law students alleged that a freight rate increase would harm them by discouraging the use of recycled materials leading to increased litter and resource consumption. The Court held this sufficient to give the students standing to challenge a federal agency's decision to approve the rate increase.

II. THE RISE OF NATIONAL ENVIRONMENTAL LEGISLATION

As standing doctrine continued to evolve, Congress responded to public concern for the environment by enacting far-reaching national environmental legislation during the decade of the 1970s. The first of these statutes, the National Environmental Policy Act (NEPA),³⁹ sought to require federal agencies to incorporate consideration of environmental concerns into their decision-making processes. Responding to an early claim that a federal agency was violating NEPA, Circuit Judge J. Skelly Wright predicted that the judiciary would play a major role in determining whether the wave of new environmental legislation would achieve its promises. He emphasized that it was the duty of courts "to see that important legislative purposes, heralded in the halls of Congress, are not lost or misdirected in the vast hallways of the federal bureaucracy."⁴⁰

Litigation to enforce NEPA was brought under the judicial review provisions of the Administrative Procedure Act, the very vehicle the Sierra Club used to gain access to court when it sought to block Disney's Mineral King project. As noted above, the APA allows a person "adversely affected or aggrieved by agency action within the meaning of a relevant statute" to seek judicial review. Shortly after enacting NEPA, Congress responded to an outpouring of environmental concern by creating national regulatory programs, including the Clean Air Act and Clean Water Act. These laws

38. 412 U.S. 669 (1973).

39. 42 U.S.C. § 4321 (1994).

40. *Calvert Cliffs Coordinating Comm. v. United States Atomic Energy Comm'n*, 449 F.2d 1109, 1111 (D.C. Cir. 1971).

represented a dramatic shift toward precautionary regulation that sought to overcome the deficiencies of the common law in protecting the environment.⁴¹

Recognizing the difficulty of getting government bureaucracies to respond to environmental concerns, Congress sought to enlist the public in the task of ensuring that the new legislation was implemented and enforced. Beginning with the Clean Air Act in 1970, virtually all of the major federal environmental statutes included their own citizen suit and judicial review provisions.⁴² These generally authorize citizens to sue both government officials who fail to perform non-discretionary duties and private parties who violate the statutes.⁴³ By providing express rights of action that the beneficiaries of regulation could use to ensure that statutes were implemented and enforced,⁴⁴ Congress hoped to end the well-known

41. See, e.g., *Ethyl Corp. v. EPA*, 541 F.2d 1, 15, 28 (D.C. Cir. 1976) (stating that the precautionary nature of the Clean Air Act “would seem to *demand* that regulatory action precede, and, optimally, prevent” harm and therefore courts should “not demand rigorous step-by-step proof of cause and effect” because “[s]uch proof may be impossible to obtain if the precautionary purpose of the statute is to be served”) (emphasis in original); *City of Milwaukee v. Illinois*, 451 U.S. 304, 325 (1981) (finding that the Clean Water Act preempted the federal common law of nuisance, whose application had been “peculiarly inappropriate in areas as complex as water pollution control”).

42. See, e.g., Federal Water Pollution Control (Clean Water) Act, 33 U.S.C. § 1365 (1994); Endangered Species Act of 1973 (ESA), 16 U.S.C. § 1540(g) (1994); Air Pollution Prevention and Control (Clean Air) Act, 42 U.S.C. § 7604 (1994); Resource Conservation and Recovery Act, 42 U.S.C. § 6972 (1994); Toxic Substances Control Act, 15 U.S.C. § 2619 (1994); Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9659 (1994). See also PERCIVAL ET AL., *supra* note 6, at 1056-57 (explaining that Congress enacted a citizen-suit provision as part of virtually every major environmental law except the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136 (1994)).

43. See PERCIVAL ET AL., *supra* note 6, at 1056-57.

44. Citizen-suit provisions in some environmental laws broadly authorize suits by “any person.” See, e.g., ESA, 16 U.S.C. § 1540(g) (1994). For purposes of the ESA, “person” is defined as “an individual, corporation, partnership, . . . or any officer, employee, agent, department or instrumentality of the Federal Government” 16 U.S.C. § 1532(13) (1994). The citizen-suit provision of the Clean Water Act contains slightly different language. The statute authorizes “any citizen” to file suit, as opposed to “any person.” See Clean Water Act, 33 U.S.C. § 1365(a) (1994). A “citizen” is defined as “a person or persons having an interest which is or may be adversely affected.” 33 U.S.C. § 1365(g) (1994). The legislative history demonstrates that this definition was meant to reflect the interpretation adopted in the Supreme Court’s opinion in *Morton*. See Karl S. Coplan, *Refracting the Spectrum of Clean Water Act Standing in Light of Lujan v. Defenders of Wildlife*, 22 COLUM. J. ENVTL. L. 169, 175 (1997) (citing the Senate Conference Committee report for its conclusion that “the definition of the term ‘citizen’ reflects the decision of the U.S. Supreme Court in the case of *Sierra Club v. Morton*.” S. Conf. Rep. No. 92-1236 (1972), reprinted in 1972 U.S.C.C.A.N. 3776, 3823). Furthermore, by adopting this definition the Committee intended that injuries to aesthetic, noneconomic interests could also serve as the basis for a citizen suit under the Clean Water Act. See Coplan, *supra*, at 172-75.

tendency for regulatory agencies to become captives of the industries they regulate.⁴⁵ The notion that the more diffuse interests of the public who were beneficiaries of regulation were worthy of judicial protection was an important development for a modern regulatory state that sought to protect the environment, consumers, and the poor.⁴⁶ The environmental laws that were passed beginning in the 1970s were a reflection of the goals of the modern regulatory state, which included a desire to protect public values. Thus, environmental law developed as a form of “social regulation,” designed to improve society as a whole rather than focusing on the needs of particular individuals.⁴⁷

As noted above, citizen suits had long been a part of English and American legal practice. English courts conferred broad standing on citizens to bring public actions through the use of the writs of prohibition, certiorari, mandamus, quo warranto, and habeas corpus.⁴⁸ These writs could be used by “strangers” to the action who may not have been able to allege a concrete interest that was adversely affected, but who instead had an interest in securing a “public right.”⁴⁹ In particular, the writ of mandamus could be used to compel government officials to perform a duty required by law.⁵⁰

45. See JOSEPH SAX, *DEFENDING THE ENVIRONMENT: A STRATEGY FOR CITIZEN ACTION* 60-61 (1970) (arguing that mission-oriented administrative agencies had been notoriously unresponsive to the public to the detriment of environmental concerns).

46. See Sunstein, *supra* note 13, at 187. See also Sunstein, *supra* note 8, at 1444 (“This conclusion was a natural—indeed inevitable—outgrowth of the New Deal, which arose from a belief that the common-law catalogue of interests was inadequate.”).

47. See MARK SAGOFF, *ECONOMY OF THE EARTH* 1 (1988) (defining social regulation as the governmental initiatives of the 1960s and 1970s designed to afford protection to the environment, workplace safety, consumer product safety, and housing and employment equality).

48. See George Van Cleve, *Congressional Power to Confer Broad Citizen Standing in Environmental Cases*, 29 ENVTL. L. REP. 10,028, 10,029 (1999). Van Cleve defines “public actions” as “those actions where the plaintiff’s claim is not founded on a traditional common-law private right” but rather on “rights belonging to the public generally . . .” *Id.* at 10,029 n.8. In addition to the prerogative writs, the English courts also allowed citizens to bring public actions through the use of informers’ actions and relator actions. See *id.* at 10,030-31. These actions could be brought against private individuals and public officials who violated their duties. See *id.* See also Sunstein, *supra* note 13, at 171-72.

49. See, e.g., *Union Pac. R.R. v. Hall*, 91 U.S. 343, 355 (1875) (finding that there is “a decided preponderance of American authority in favor of the doctrine, that private persons may move for a mandamus to enforce a public duty, . . . without the intervention of the government law-officer”).

50. See Sunstein, *supra* note 13, at 172.

While these writs were used only infrequently in the United States, early Congresses created numerous *qui tam* actions.⁵¹ *Qui tam* actions give citizens the right to bring civil suits against violators of certain federal laws.⁵² For example, the False Claims Act⁵³ authorizes *qui tam* actions by citizens against persons who knowingly present false or fraudulent claims to the government.⁵⁴ Under the Act, the *qui tam* relator can receive a percentage of the proceeds of the government's recovery.⁵⁵ *Qui tam* actions provide further support for Congress' ability to confer standing through citizen-suit provisions without violating Article III of the Constitution.⁵⁶ They also provide

51. See *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 541 (1943) (“*Qui tam* suits have been frequently permitted by legislative action, and have not been without defense by the courts.”)(italics added).

52. See Sunstein, *supra* note 13, at 175 (noting that *qui tam* actions were authorized under many statutes, including statutes involving illegal importation of liquor, trade with Indian tribes, and illegal slave trading).

53. 31 U.S.C. § 3729 (1994 & Supp. IV 1998).

54. See 31 U.S.C. § 3730(b)(1) (1994) (authorizing “[a] person [to] bring a civil action for a violation of section 3729 for the person and for the United States government. The action shall be brought in the name of the Government”).

55. See 31 U.S.C. § 3730(d) (1994). The Supreme Court avoided the question whether the 11th Amendment bars a *qui tam* action brought against a state agency to enforce the False Claims Act by holding that a state is not a “person” for purposes of *qui tam* liability. See *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 120 S. Ct. 1858 (2000). The Court reversed a second circuit decision that held that *qui tam* actions against state agencies are not barred by the Eleventh Amendment because they are actions brought to vindicate the rights of the United States, and not the rights of the private individual bringing the suit. Standing had been challenged in several cases brought under the False Claims Act. Several courts had held that the citizen plaintiff automatically derives standing as a representative of the government who is the real party in interest. Others had relied on the theory that the financial interest acquired by the citizen plaintiff through the specific provisions of the FCA confers standing. This argument found support in the Supreme Court’s opinions in *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 106-07 (1998) (suggesting that civil penalties might satisfy the redressability requirement for standing if they were payable to the plaintiff), and *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573 (1992) (distinguishing citizen suits from *qui tam* actions in which “Congress has created a concrete private interest in the outcome of a suit against a private party for the government’s benefit, by providing a cash bounty for the victorious plaintiff”). In *Vermont Agency*, the Court upheld the standing of the plaintiffs to bring *qui tam* actions based on the theory that the injury in fact suffered by the federal government confers standing on them as assignees of the government’s claim. In his majority opinion, Justice Scalia disputed the notion that the financial interest of the relator could serve as a sufficient basis for standing, equating it with the interest of “someone who has placed a wager on the outcome” of the litigation. Justice Scalia argued that “[t]he interest must consist of obtaining compensation for, or preventing, the violation of a legally protected right,” though he acknowledged that Congress may be able to define new legal rights that would “confer standing to vindicate an injury caused to the claimant.” *Vermont Agency*, 120 S. Ct. at 1862.

56. See Sunstein, *supra* note 13, at 177-78. Sunstein argues that “[t]here is absolutely no affirmative evidence that Article III intended to limit congressional power to create standing.” *Id.*

strong support for the use of citizen suits against private defendants because *qui tam* actions historically were brought against private parties.⁵⁷

Congress added citizen-suit provisions to virtually all the major federal environmental laws to ensure that they were implemented and enforced. The regulatory legislation adopted in the 1970s sought to address environmental risks capable of affecting large groups of people and vast stretches of the natural environment. The common law was not well suited to addressing these risks, as the common law of trespass and nuisance tended to focus on discrete, individualized injuries rather than broad-based environmental harms. Furthermore, in keeping with the purpose of providing broad based protection to the environment, several environmental statutes, such as the Clean Water Act, explicitly focus on systemic, rather than singular environmental harms.⁵⁸

The Clean Water Act was passed in 1972 in response to legislative findings that demonstrated that a large portion of the nation's waterways were severely polluted and that the federal program in place to control water pollution was "inadequate in every vital aspect."⁵⁹ The Act sought to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters"⁶⁰ by enacting a system of technology-based limits on dischargers and a national permit program to limit discharges of water pollutants by individual sources.⁶¹ It prohibits all unpermitted discharges into navigable waters, without requiring any showing that the discharge will harm receiving waters.⁶² "Whereas the previous scheme required proof of actual injury to a body of water to establish a violation, Congress now instituted a regime of strict liability for illegal pollutant discharges."⁶³ Thus, the Act sought to largely displace the common law's unwieldy causation and harm requirements with a regulatory system more suited to systemic environmental problems.

57. *See id.* at 176.

58. *See* Clean Water Act, 33 U.S.C. § 1251 (1994); ESA, 16 U.S.C. § 1531 (1994); Federal Land Management and Policy Act, 43 U.S.C. § 1701 (1994).

59. *See* S. REP. NO. 92-414 (1971), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3674.

60. 33 U.S.C. § 1251(a) (1994).

61. *See* PERCIVAL, ET AL., *supra* note 6, at 639.

62. *See* 33 U.S.C. § 1311 (1994) (making it unlawful for a person to discharge any pollutant). *See also* Coplan, *supra* note 44, at 175-76 (noting that the Clean Water Act's prohibition on discharge of pollutants sets up a "strict liability" regime).

63. *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 151 (4th Cir. 2000) (en banc).

In the 1970s, citizens suits were used primarily as an “action-forcing device” against agencies that had failed to perform duties mandated by the environmental laws. They were rarely invoked to sue private parties who were in violation of the laws’ requirements.⁶⁴ Beginning in the early 1980s, this private enforcement mechanism proved to be a successful method of enforcing the law against private parties for violations of NPDES (National Pollution Discharge Elimination System) permits.⁶⁵ These violations were easy to prove by studying the permittees discharge monitoring reports (DMRs), reports that companies are required to keep and which are available for public review.⁶⁶

The legislative history of the Clean Air Act, the first environmental statute to contain a citizen-suit provision, confirms that Congress recognized the importance of citizen enforcement, stating that “[g]overnment initiative in seeking enforcement under the Clean Air Act has been restrained. Authorizing citizens to bring suits for violations of standards should motivate governmental agencies charged with the responsibility to bring enforcement and abatement proceedings.”⁶⁷

Citizen enforcement actions were designed to “supplement rather than to supplant governmental action.”⁶⁸ Thus, citizen enforcement actions, as contemplated by Congress when it enacted citizen-suit provisions, serve as a check and balance on government enforcement efforts.⁶⁹ Both the federal and state governments have

64. See PERCIVAL ET AL., *supra* note 6, at 1057.

65. See *id.* The first compilation of citizen enforcement data was produced by the Environmental Law Institute in 1984. See ENVIRONMENTAL LAW INSTITUTE, *CITIZEN SUITS: AN ANALYSIS OF CITIZEN ENFORCEMENT ACTIONS UNDER EPA-ADMINISTERED STATUTES* (1984). The study relied on notices of intent to sue sent to EPA headquarters and regional offices, interviews, as well as case reporters, and periodicals. See *id.* at II-2. The study concluded that a marked increase in the number of citizen suits brought occurred beginning in 1982, particularly under the Clean Water Act. See Jeffrey Miller, *Private Enforcement of Federal Environmental Pollution Control Laws, Part III*, 14 ENVTL. L. REP. 10,407, 10,424-25 (1984). The study found that most notices of intent to sue involved alleged violations of the Clean Water Act. See *id.* See also *infra* notes 70-71 and accompanying text (discussing the relative ease of bringing these suits); Barry Boyer & Errol Meidinger, *Privatizing Regulatory Enforcement: A Preliminary Assessment of Citizen Suits Under Federal Environmental Laws*, 34 BUFF. L. REV. 833, 870-72 (1985).

66. See PERCIVAL ET AL., *supra* note 6, at 1057.

67. S. REP. NO. 91-1196, at 36-37 (1970), *reprinted in* 1970 U.S.C.C.A.N. 5356.

68. See *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 60 (1987).

69. See *Supporters to Oppose Pollution, Inc. v. Heritage Group*, 973 F.2d 1320, 1322 (7th Cir. 1992) (suggesting that citizen-suit provisions serve as “goats to both the EPA and polluters without displacing the federal agency as the principal enforcer”).

been openly supportive of the citizen enforcement role, as evidenced by the government's filing of amicus briefs in some citizen suits.⁷⁰ In fact, the legislative history of RCRA's citizen-suit provision shows that Congress sought to encourage government agencies to file amicus briefs in citizen suits to promote consistency in enforcement.⁷¹ Furthermore, government agencies support citizen enforcement action in circumstances where the government lacks the resources to respond to a violation.⁷² The EPA acknowledges that its enforcement efforts can target only the most significant dischargers.⁷³

III. THE RESURRECTION OF A PRIVATE LAW MODEL OF STANDING

The Supreme Court's decisions liberalizing standing doctrine opened the doors to citizen enforcement action to protect the environment. Beginning in 1990, however, the Court began to chip away at citizens' ability to sue to protect the environment, leading the lower federal courts to apply a much more restrictive standing framework in citizen enforcement actions.

A. *Competing Visions of the Role of Citizen Suits*

Efforts to restrict the standing of environmental plaintiffs have been championed by critics of citizen suits who argued that citizen suits are improper or illegitimate, despite their long tradition in Anglo-American jurisprudence. Some of the more extreme critics have argued that citizen plaintiffs are seeking to infringe on the

70. The United States filed amicus briefs on behalf of the appeals of Friends of the Earth in the Fourth Circuit's consideration of *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 179 F.3d 107 (4th Cir. 1999), *rev'd en banc*, 204 F.3d 149 (4th Cir. 2000), and during the Supreme Court's review of the decision in *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, 149 F.3d 303 (4th Cir. 1998). See *Laidlaw*, 528 U.S. 167, 188 n.4 (2000). In its decision in *Laidlaw*, the Court referred to the federal government's filing of amicus briefs to support the notion that the Executive Branch does not believe that citizen suits encroach on its ability to enforce the law. See *id.* See also David Hodas, *Enforcement in a Triangular Federal System*, 54 MD. L. REV. 1552, 1576 (1995) (discussing the EPA's public recognition of the importance of citizen enforcement).

71. See H.R. Rep. No. 98-198, *reprinted in* 1984 U.S.C.C.A.N. 5576, 5612.

72. See *id.* (noting that expansion of the RCRA citizen-suit provision "will complement rather than conflict with, the Administrator's efforts . . . particularly where the Government is unable to take action because of inadequate resources"); see also Dale D. Buss, *New waves of lawsuits: Business' decks are awash with environmental accusations*, CORP. REP. WIS., Sept. 1993, at 28 (quoting a Wisconsin assistant state's attorney who acknowledged the "'strong need for . . . citizen groups to bring actions" in light of limited state budgets).

73. See ENFORCEMENT AND COMPLIANCE ASSURANCE, ACCOMPLISHMENTS REPORT FY98, EPA 300-R-99-003, at 8 (June 1999) ("OECA's first objective envisions a targeted effort to reduce significant noncompliance (SNC) in high priority areas. . .").

property rights of defendants, ignoring the fact that citizen suits may only be brought to require implementation of non-discretionary duties or enforcement of existing regulatory requirements. While others portray citizen-suit plaintiffs as primarily motivated by the prospects for obtaining attorneys' fees awards, they ignore the fact that attorneys' fees may only be obtained by successful litigants,⁷⁴ which virtually guarantees that repeat plaintiffs will not be fully compensated for their efforts.

What appears to be at the root of most criticisms of citizen enforcement actions is deep hostility toward the underlying laws that citizens seek to enforce. This was quite evident in a 1983 law review article by then Circuit Judge Antonin Scalia. Justice Scalia argued that the standing doctrine was a "critical and inseparable element" of separation of powers principles that should be more rigidly interpreted by the courts to reduce judicial intrusion into the operations of the other branches.⁷⁵ What is remarkable about this article is Justice Scalia's expression of hostility toward enforcement of the environmental laws. Scalia argued that judges who enforce environmental laws are "likely (despite the best of intentions) to be enforcing the political prejudices of their own class."⁷⁶ He explained that "[t]heir greatest success in such an enterprise—ensuring strict enforcement of the environmental laws . . . met with approval in the classrooms of Cambridge and New Haven, but not in the factories of Detroit and the mines of West Virginia."⁷⁷ Quoting the language of Judge J. Skelly Wright in the *Calvert Cliffs* decision, he asked:

Does what I have said mean that, so long as no minority interests are affected, 'important legislative purposes, heralded in the halls of Congress, [can be] lost or misdirected in the vast hallways of the federal bureaucracy?' Of *course* it does—and a good thing, too. Where no peculiar harm to particular individuals or minorities is in question, lots of once-heralded programs ought to get lost or misdirected, in vast hallways or elsewhere. . . . The ability to lose or misdirect laws can be said to be one of the prime engines of social change, and the prohibition against such carelessness is (believe it or not) profoundly conservative. Sunday blue laws, for example, were widely unenforced long before they were widely repealed—and had the first not been possible the second might never have occurred.⁷⁸

74. See *Ruckelshaus v. Sierra Club*, 463 U.S. 680 (1983).

75. See Scalia, *supra* note 10.

76. See *id.* at 896.

77. *Id.* at 897.

78. *Id.* at 897 (emphasis in original).

Congress, however, had a profoundly different vision in mind when it incorporated citizen-suit provisions into the environmental laws. Indeed, the fact that Congress also authorized awards of attorneys fees to successful citizen litigants demonstrates that it viewed citizen suits and enforcement of the environmental laws to be highly desirable and in need of encouragement.⁷⁹ The Senate Report on the Clean Water Act citizen-suit provision states that “[c]ourts should recognize that in bringing legitimate actions under this section citizens would be performing a public service and in such instances, the courts should award the costs of litigation to such party.”⁸⁰ Thus, Congress clearly contemplated that citizen enforcement actions were a necessary supplement to suits by government authorities against private parties who violate the provisions of the Act.⁸¹

Standing doctrine should not be manipulated to serve as an obstacle to enforcement of laws that certain members of the judiciary view with disfavor.⁸² In setting up a regulatory framework with broad based environmental goals and mechanisms for citizen enforcement, Congress intended to supplant the common law framework with a regime that recognized the public nature of environmental harm, and the accompanying interest of citizens to enforce the laws as “representatives of the public.” According to the Senate committee report on the citizen-suit provision of the Clean Water Act, “citizens should be unconstrained to bring these actions”, and “the courts should not hesitate to consider them.”⁸³ Thus, legislative history clearly demonstrates that Congress meant for citizens to be able to enforce the environmental laws when government authorities failed to pursue violators.

Each time it has reauthorized the environmental laws, Congress has strengthened their enforcement provisions and reaffirmed its support for citizen suits as a supplement for government enforcement. This is reflected in the 1990 Clean Air Act Amendments, which

79. See Robert V. Percival & Geoffrey P. Miller, *The Role of Attorney Fee Shifting in Public Interest Litigation*, 47 LAW & CONTEMP. PROBS. 233 (1984).

80. S. Rep. No. 92-414, at 75 (1972), reprinted in 1972 U.S.C.C.A.N. 3668, 3747.

81. See, e.g., *Friends of the Earth, Inc. v. Carey*, 535 F.2d 165, 172 (2d Cir. 1976) (“Congress made clear that citizens groups are not to be treated as nuisances or troublemakers but rather as welcomed participants in the vindication of environmental interests.”).

82. See Jonathan Poisner, Comment, *Environmental Values and Judicial Review after Lujan: Two Critiques of the Separation of Powers Theory of Standing*, 18 ECOLOGY L.Q. 335, 401 (1991) (stating that the Court’s rejection of public values as a basis to bring suit “denigrates citizenship and the concept of altruism”).

83. See S. Rep. No. 92-414, reprinted in 1972 U.S.C.C.A.N. 3668, 3746. This language is also part of the Senate Report on the Clean Air Act, S. Rep. No. 91-1196, at 37 (1970).

responded to the Supreme Court's decision in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*⁸⁴ by amending the citizen-suit provision to make it easier to bring citizen suits in the wake of this decision. In *Gwaltney* the Court held that the "alleged to be in violation" language of the Clean Water Act's citizen-suit provision barred suits for violations that had been cured at the time the lawsuit was filed. In the 1990 Amendments, Congress replaced the same "alleged to be in violation" language contained in the Clean Air Act with the phrase "alleged to have violated (if there is evidence that the alleged violation has been repeated) or to be in violation," allowing citizen suits for repeated past violations.⁸⁵

B. *The Return to a Private Law Model of Standing*

In 1982, the Supreme Court had consolidated the requirements for standing which had been developed by the Court in the 1970s and which would become the basis for modern standing doctrine. In *Valley Forge Christian College v. Americans United for Separation of Church and State*,⁸⁶ the Court determined that

at an irreducible minimum, Art. III requires the party who invokes the court's authority to "show [1] that he has personally suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant," and [2] that the injury "fairly can be traced to the challenged action" and [3] "is likely to be redressed by a favorable decision."⁸⁷

In addition to these constitutional requirements of injury in fact, traceability, and redressability, the Court also added the fourth "prudential" requirement, articulated in *Data Processing*, that the injury is to an interest arguably within "the zone of interests" to be protected by the statute the defendant allegedly violated.⁸⁸

As the Court began to apply this test in environmental cases, it began to limit the ability of plaintiffs to sue to prevent environmental harms. In the process, the Court adopted a model of standing grounded on individualized notions of injury and causation that made it more difficult for plaintiffs in environmental law cases to bring citizen suits. A study of citizen enforcement under the federal environmental laws conducted in 1984 by the Environmental Law

84. 484 U.S. 49 (1987).

85. See Clean Air Act, 42 U.S.C. § 7604(a)(1) (1994).

86. 454 U.S. 464 (1982).

87. *Id.* at 472 (internal citations omitted).

88. See *id.* at 474-75 (quoting *Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 n.12 (1970)).

Institute found that environmental groups then believed standing requirements to be a “non-issue” in citizen enforcement actions.⁸⁹ During the 1990s, however, environmental groups came to consider standing to be one of the most significant barriers to citizen actions to enforce the environmental laws.⁹⁰ As a result of Supreme Court decisions adopting a more restrictive vision of citizen standing, some lower federal courts required plaintiffs to make exceedingly particularized showings of causation and harm in order to demonstrate standing.

In *Lujan v. National Wildlife Federation*,⁹¹ decided in 1990, the Court began to place geographical limitations on the ability of users of environmental areas to sue. In this case, the National Wildlife Federation challenged the Bureau of Land Management’s decision to reclassify thousands of acres of public lands, thereby opening them up to mining activities that could hamper the natural environment.⁹² Members of the group alleged that they recreated in areas “in the vicinity” of the areas to be opened up to mining.⁹³ The Court held that this allegation was insufficient to confer standing on the plaintiffs, concluding that the plaintiffs failed to show use of the specific areas where mining would be allowed.⁹⁴

In refusing to confer standing on a citizen who alleged use of land “in the vicinity” of the lands on which the challenged activity took place, the Court narrowed the scope of user standing set forth in *Sierra Club v. Morton*.⁹⁵ In addition to requiring use of an area, such as hiking or camping, the Court’s decision in *Lujan* appeared to require plaintiffs to prove that they actually carried out such activity at the specific location where the challenged activities would take place. This requirement was somewhat counterintuitive because it required a citizen who is attempting to protect wilderness lands from human encroachment to actually use those lands. Taking this test to

89. ENVIRONMENTAL LAW INSTITUTE, *CITIZEN SUITS: AN ANALYSIS OF CITIZEN ENFORCEMENT ACTIONS UNDER EPA-ADMINISTERED STATUTES*, V-30 (1984).

90. See John D. Echeverria & Jon T. Zeidler, *Barely Standing: The Erosion of Citizen “Standing” to Sue to Enforce Federal Environmental Law* at 9 (Envtl. Policy Project, Georgetown University Law Ctr., June 1999) (“For environmental advocates, the evolution of standing doctrine over the last decade has been a case of heads we lose, tails they win.”).

91. 497 U.S. 871 (1990).

92. See *id.* at 879.

93. See *id.* at 880.

94. See *id.* at 889. The Court held that the use of “unspecified portions of an immense tract of territory” was not sufficient to confer standing.

95. 405 U.S. 727 (1972).

its extreme might require a citizen to pitch a tent in the heart of a roadless wilderness area in order to challenge the legality of decisions that open the area to development.

Furthermore, this test appeared to be partially at odds with the purpose of one of the laws allegedly violated in the case, the Federal Land Policy and Management Policy Act (FLPMA). The Act favors multiple use management, a management tool that recognizes that lands must be managed for their ecological and environmental value as much as they must be managed for some human use.⁹⁶ Thus, by requiring the plaintiffs to actually use the area where the alleged violation took place in order to establish an injury, the Court ignored the goal of the statute under which the suit was brought.⁹⁷ Furthermore, the Court set a difficult use standard for those wishing to challenge actions occurring on wilderness lands.

The case that confirmed the most significant shift toward a private law model of standing was *Lujan v. Defenders of Wildlife*,⁹⁸ decided by the Court in 1992. In this case, Defenders of Wildlife challenged the Secretary of the Interior's interpretation of a regulation that excluded activities occurring outside of the United States from the requirement that federal agencies consult with the Secretary when making decisions that may destroy the critical habitat of endangered species.⁹⁹ As a result of this interpretation of the Endangered Species Act, federal agencies funding foreign projects were no longer required to consult with the Department of the Interior even if their projects would jeopardize endangered species and their habitats. To establish their standing to sue, two members of the Defenders of Wildlife alleged that they had traveled to foreign countries, had observed the habitat of several endangered species, and intended to return to observe these species in the future.¹⁰⁰ Both members observed the endangered wildlife in areas where U.S.

96. See 43 U.S.C. § 1701 (1994). Section 1701(a)(8) of FLPMA states:

One primary goal of the statute provides that "public lands be managed in a way that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values; that, where appropriate, will preserve and protect certain public lands in their natural condition; that will provide food and habitat for fish and wildlife and domestic animals; and that will provide for outdoor recreation and human occupancy and use. . . ."

97. See Poisner, *supra* note 82, at 399 (noting that many environmental laws "serve to advance values beyond mere human use").

98. 504 U.S. 555 (1992).

99. See *id.* at 559.

100. See *id.* at 563.

agencies were funding projects that could have adversely affected the species observed.¹⁰¹

While acknowledging that the desire to observe an animal species was a cognizable interest for purposes of standing, the Court nonetheless determined that the plaintiffs failed to allege an injury in fact that was “imminent” because they failed to allege any “concrete plans” to return to the site where they had observed the animals before.¹⁰² In a opinion by Justice Scalia, the Court rejected the plaintiff’s theory that an “ecosystem nexus” should provide them with standing.¹⁰³ Under this theory, a person who uses part of a “contiguous ecosystem” that is adversely affected by some agency action would have standing even if she is not geographically connected to the action or activity.¹⁰⁴ In rejecting this theory, the Court relied on its opinion in *Lujan v. National Wildlife Federation*, which required plaintiffs to actually use the affected area in order to have standing to sue.¹⁰⁵ More importantly, while acknowledging that the purpose of the statute in issue, the Endangered Species Act, is to conserve the ecosystems upon which endangered and threatened species depend, the Court nonetheless held that the purpose of protecting ecosystems does not confer a right to sue upon “persons who use portions of an ecosystem not perceptibly affected by the unlawful action in question.”¹⁰⁶ Thus, the Court rejected the primary purpose of the law the citizens sought to enforce as a basis for standing.

Following *Lujan*, several U.S. Courts of Appeal issued decisions illustrating the potentially extreme consequences of using a private law model of standing. In *Public Interest Research Group of New Jersey, Inc. v. Magnesium Elektron, Inc.*,¹⁰⁷ the Third Circuit concluded that a citizens’ group lacked standing to sue a corporation for violating the terms of its NPDES Clean Water Act permit because scientific evidence demonstrated that the polluter’s discharge was not causing harm to the waterway used by the plaintiffs.¹⁰⁸ Thus, despite the fact that the plaintiffs had stopped fishing and swimming and had

101. *See id.*

102. *See id.* at 564.

103. *See id.* at 565-66.

104. *See id.* at 565.

105. *See id.* at 565-66.

106. *See id.* at 566.

107. 123 F.3d 111 (3d Cir. 1997).

108. *See id.* at 121.

stopped eating fish and drinking water from the waterway because of their knowledge that an unpermitted pollutant was being discharged, they nonetheless lacked standing to sue.¹⁰⁹ According to the court, “knowledge that a corporation has polluted waters is an ‘injury’ suffered by the public generally” and is thus not sufficient to confer standing absent an “actual, tangible injury to the River or its immediate surroundings.”¹¹⁰ Furthermore, the court held that the plaintiff’s ability to allege it would suffer an “imminent” injury was limited by evidence which tended to show that the defendant’s discharges were not harming the ecosystem.¹¹¹ In *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*,¹¹² a panel of the Fourth Circuit adopted a similar argument, concluding that the plaintiffs lacked standing to sue a Clean Water Act violator because they failed to present evidence demonstrating an “observable negative impact on the waterways.”¹¹³

The adoption of a “harm to the resource” requirement by both the Third and Fourth Circuits created a high hurdle for citizen plaintiffs seeking to sue to enforce the Clean Water Act. The Clean Water Act prohibits the discharge of pollutants into navigable waters regardless of whether the discharge actually can be shown to harm the waterbody. Thus, by requiring plaintiffs to prove harm to the resource these courts undermined the statutory purpose of the Act.¹¹⁴ In shifting the focus of the standing inquiry from harm to the plaintiff to harm to the resource, these courts failed to acknowledge that the plaintiff’s interest in using the waterway may have been cognizably injured despite a lack of detectable harm to the resource.

Furthermore, the citizen-suit provision of the Clean Water Act defines a “citizen” as “a person or persons having an interest which is or may be adversely affected,” thus codifying the focus on harm to the plaintiff.¹¹⁵ By requiring specific evidence of adverse impacts to the resource these lower courts required the parties to present scientific evidence at the standing stage that has no bearing on the ultimate issue to be determined in the case, whether the defendant

109. *See id.* at 115.

110. *See id.* at 121.

111. *See id.* at 122.

112. 179 F.3d 107 (4th Cir. 1999), *rev’d en banc* 204 F.3d 149 (4th Cir. 2000).

113. *See id.* at 113-114.

114. *See* Coplan, *supra* note 44, at 201 (“The Clean Water Act clearly intends to make such violations enforceable immediately, and not only after proof of damage to the ecosystem arises.”).

115. 33 U.S.C. § 1365(g) (1994).

violated the Clean Water Act by discharging a pollutant in violation of its permit.¹¹⁶

In *Friends of the Earth, Inc. v. Crown Central Petroleum Corp.*,¹¹⁷ the Fifth Circuit was faced with the issue of whether a citizens group had standing to sue a private party for violations of the Clean Water Act. In this case, the plaintiffs alleged use of a lake which was located “some 18 miles and three tributaries” downstream from the defendant’s refinery.¹¹⁸ In questioning whether the lake was even part of the same “waterway,” the court found that the waterway was “too large to confer causation solely from the use of some portion of it.”¹¹⁹ By doing so, the court implicitly determined that the effects of illegal discharges could not be felt 18 miles away, though they could be at a distance 2-4 miles away.¹²⁰ Although it is certainly true that chemicals dissipate in water, this is hardly evidence that one who uses an area more than 4 miles from a pollution source cannot be affected by it, whether through fear of swimming in the water or an actual exposure to contaminated water. The Court making this determination asserted that it was not placing a mileage or tributary limit on plaintiffs seeking to sue under the Clean Water Act. However, this seems to be the practical effect of the court’s decision. Similarly, in *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*,¹²¹ a Fourth Circuit panel argued that it was not imposing a tributary or mileage limitation after finding that a citizens’ group lacked standing because the river used by one of its members was four miles from the source of the pollution.¹²² In *Public Interest Research Group of New Jersey, Inc. v. Magnesium Elektron, Inc.*,¹²³ the Third Circuit relied on the eight mile distance between the point of discharge and the portion of the waterway used by the plaintiffs to determine that “the River

116. See *Gaston Copper*, 179 F.3d at 117-118 (Wilkinson, J., dissenting) (arguing that “[t]oday’s holding sets courts up for the litigation of scientific facts as a matter of standing—facts unnecessary to the ultimate questions presented in these cases”).

117. 95 F.3d 358 (5th Cir. 1996).

118. See *id.* at 359.

119. See *id.* at 361.

120. See *id.* at 361. The court cites by comparison to a case in which causation could be inferred for standing purposes when the plaintiffs used the waterway two to four miles from the source of the pollution. See *id.* (citing *Friends of the Earth, Inc. v. Chevron Chem. Co.*, 900 F. Supp. 67, 75 (E.D. Tex. 1995)).

121. 179 F.3d 107 (4th Cir. 1999).

122. See *id.* at 115.

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

could not possibly have been affected” by the discharge of heated wastewater.¹²⁴

By requiring plaintiffs to establish a geographic nexus between their use of an affected resource and the defendant’s alleged harm, the courts added an element to the standing analysis that is neither required by the Clean Water Act nor the case and controversy requirement of Article III. Furthermore, in rejecting the “water flows downstream” argument,¹²⁵ the courts failed to acknowledge that pollutants discharged into waterways can be transferred far from their source, a problem which the Clean Water Act clearly sought to address.

The redressability requirement, which played a minimal role in early environmental standing decisions, began to play a decisive role in standing analysis.¹²⁶ In *Steel Company v. Citizens for a Better Environment*,¹²⁷ citizen plaintiffs brought suit against a private party for failure to comply with reporting requirements for storage of toxic and hazardous chemicals under the Emergency Planning and Community Right to Know Act (EPCRA).¹²⁸ On the issue of standing, the Court declined the opportunity to decide whether a violation of reporting requirements would constitute a sufficient injury in fact and instead concluded that the citizens lacked standing to sue because their injury could not be redressed by a court decision.¹²⁹ Among other things, the Court held that any civil penalties awarded would be deposited with the United States Treasury and would thus not be payable to the plaintiffs.¹³⁰ As such, the penalties would not be a payment for the injury the plaintiffs suffered individually, but would instead be a means of

124. *See id.* at 123. *See also* *Informed Citizens United, Inc. v. USX Corp.*, 36 F. Supp. 2d 375, 378 (S.D. Tex. 1999) (denying standing to a plaintiff who owned property located “more than a mile from the filled wetlands, next to which runs an unnamed tidal creek”).

125. *See, e.g., Gaston Copper*, 179 F.3d at 115 n.7 (determining that plaintiff’s reliance on the theory that water flows downstream does not satisfy the fairly traceable element of standing); *Magnesium Elektron*, 123 F.3d at 123 (finding that plaintiffs argument that water flows downstream does not alone satisfy the injury in fact requirement); *Crown Central*, 95 F.3d at 361 (finding that the plaintiffs inference that injuries suffered downstream may be caused by discharges upstream was not enough to satisfy the requirements of Article III standing).

126. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 568 (1992). The heightened importance of the redressability requirement began with *Lujan*. In that case, a plurality of the Supreme Court found that the plaintiffs failed to demonstrate redressability. *See id.*

127. 523 U.S. 83 (1998).

128. *See id.* at 86-87. The EPCRA’s citizen-suit provision is 42 U.S.C. § 11046(a)(1) (1994).

129. *See id.* at 107.

130. *See id.*

“vindicat[ing] . . . the ‘undifferentiated public interest’ in faithful execution of EPCRA,” a means that does not satisfy the redressability requirement for standing.¹³¹ In addition, the Court held that injunctive relief could not redress an injury for past violations.¹³² In so holding, however, the Court clarified that injunctive relief could remedy the alleged harm resulting from “a continuing violation or the imminence of a future violation.”¹³³

IV. THE LAIDLAW DECISION

The Supreme Court’s decision in *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*¹³⁴ has helped bring standing doctrine out of the shadow of private law by rejecting the notion that plaintiffs must demonstrate specific harm from violations of discharge standards in order to be able to establish standing. In *Laidlaw*, the Supreme Court reversed a Fourth Circuit decision that had held that a Clean Water Act citizen suit had become moot when the defendant came into compliance after the litigation had commenced. In 1992 Friends of the Earth (FOE) filed a Clean Water Act citizen suit against Laidlaw, a company that owned a hazardous waste incinerator. The trial court ultimately found that the company had violated its NPDES permit on 489 occasions between 1987 and 1995 and it imposed a civil penalty of \$405,800. On appeal, the Fourth Circuit, relying on the Supreme Court’s *Steel Company* decision, held that the litigation had become moot because FOE had not appealed the trial court’s denial of injunctive relief and because the civil penalties were payable to the U.S. government and not to FOE.

In the Supreme Court, Laidlaw argued that FOE lacked standing because it failed to demonstrate that it had suffered any continuing injury that could be redressed by judicial action. The Court rejected

131. See *id.* at 106 (quoting *Lujan*, 504 U.S. at 577). “Psychic satisfaction” is not an adequate remedy according to the Court. See *Steel Co.*, 523 U.S. at 107. But see *id.* at 127 (Stevens, J., dissenting) (arguing that punishment or prevention of future harm can redress an injury).

132. See *id.* at 109.

133. See *id.* at 108. Several lower federal court decisions have applied this dicta to citizen suits involving current violations. See *San Francisco Baykeeper v. Vallejo Sanitation and Flood Control Dist.*, 36 F. Supp. 2d 1214, 1215 (E.D. Cal. 1999) (“There is no question that Baykeeper has standing to seek injunctive relief based on its claim of present and future violations.”); *Natural Resources Defense Council v. Southwest Marine, Inc.*, 28 F. Supp. 2d 584, 585 (S.D. Cal. 1998) (finding *Steel Company* to be distinguishable in terms of the redressability analysis from a case involving present violations of an environmental statute).

134. 528 U.S. 167 (2000).

this argument and upheld FOE's standing to bring the action.¹³⁵ On the issue of injury in fact, the Court responded to the defendant's allegations that the plaintiffs failed to demonstrate any harm to the environment by concluding that "[t]he relevant showing for purposes of Article III standing, however, is not injury to the environment but injury to the plaintiff."¹³⁶ The Court determined that requiring a showing of harm to the environment would "raise the standing hurdle higher than the necessary showing for success on the merits in an action alleging noncompliance."¹³⁷ Thus, the Court implicitly recognized that employing a private law model requiring proof of individualized, causal injury would defeat the purposes of the environmental laws.

The Court held that affidavits of FOE's members who maintained that they no longer recreated as frequently in the area due to concerns about illegal discharges from the plant were sufficient to demonstrate injury in fact.¹³⁸ Citing *Sierra Club v. Morton*, the Court stated that "environmental plaintiffs adequately allege injury in fact when they aver 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."¹³⁹ The Court distinguished the allegations in *Laidlaw* from those found insufficient in *Lujan v. National Wildlife Federation* and *Lujan v. Defenders of Wildlife* concluding they were not "conclusory allegations" or "speculative 'some day' intentions to visit endangered species halfway around the world," but rather represented "reasonable concerns" about discharges that affected their "recreational, aesthetic, and economic interests."¹⁴⁰ Thus, an allegation that members of a plaintiff organization who live near or use an area in proximity to illegal discharges have changed their behavior as a result of reasonable concerns about the discharges should be sufficient to satisfy the injury in fact requirement.

Perhaps the most significant aspect of the *Laidlaw* decision is its treatment of the redressability prong of standing doctrine. Citing the

135. *See id.* at 180-188.

136. *See id.* at 181.

137. *See id.*

138. The affidavits of the citizen-plaintiffs included one citizen who lived one-half mile from Laidlaw's facility and who used an area 3-15 miles from the facility, another who citizen lived two miles from the facility, and another who canoed 40 miles downstream from the facility and would canoe closer to the facility if it were not for his fear of the pollution. *See id.* at 181-82.

139. *Id.* at 183.

140. *See id.*

deterrent effect of civil penalties, the Court rejected the notion that because the money would be payable to the U.S. Treasury, FOE had no injury that could be redressed by the payment of civil penalties. The Court noted that all civil penalties have some deterrent effect and that it was reasonable for Congress to conclude that civil penalties would properly redress the plaintiff's injuries "by abating current violations and preventing future ones."¹⁴¹

The Court distinguished its decision in *Steel Company* by noting that the violation there had been cured by the time the citizen suit had been filed. Thus, although the redressability prong of the standing analysis appears as if it will be satisfied when ongoing injuries are alleged, standing may be denied on redressability grounds if the violator has come into compliance by the time the suit is filed. The juxtaposition of *Steel Company* and *Laidlaw* actually may create a very powerful incentive for violators to come into compliance soon after they receive 60-day notice letters since they may defeat a plaintiff's standing if they comply before the citizen suit is filed.

V. THE IMPACT OF LAIDLAW ON CITIZEN SUITS

Any doubt that *Laidlaw* would halt the trend toward restricting citizen standing in environmental enforcement actions was quickly dispelled a month later when the Fourth Circuit, sitting en banc, relied upon *Laidlaw* to reverse its *Gaston Copper* decision.¹⁴² In a unanimous decision written by Chief Judge Wilkinson, the dissenter in the *Gaston Copper* panel decision, the court upheld FOE's standing to bring a citizen suit based on the affidavits of its members who live and recreate near a smelter that had repeatedly violated its NPDES discharge permit.

The Fourth Circuit's en banc decision reflects an appreciation of why it is inappropriate to apply a private law model of standing in the context of enforcing the Clean Water Act. Chief Judge Wilkinson noted that the Federal Water Pollution Control (Clean Water) Act of 1972 was enacted in reaction to the failure of a water-quality based approach to pollution control. "Whereas the previous scheme required proof of actual injury to a body of water to establish a violation, Congress now instituted a regime of strict liability for illegal pollutant discharges."¹⁴³ As the Chief Judge noted, Congress made

141. *See id.* at 187.

142. *See Friends of the Earth, Inc., v. Gaston Copper Recycling Corp.*, 204 F.3d 149 (4th Cir. 2000).

143. *Id.* at 151.

this choice because a water-quality approach had proved “inadequate in every vital respect” because of the difficulty in determining precisely what discharges would be harmful.¹⁴⁴ Discussing the injury in fact requirement, the court noted that “this standard is one of kind and not of degree” and that “the claimed injury ‘need not be large, an identifiable trifle will suffice.’”¹⁴⁵

Applying these principles in light of *Laidlaw*, the Fourth Circuit had no difficulty in upholding the standing of the *Gaston Copper* plaintiffs. The court noted that one plaintiff’s organization included a member who “is a real person who owns a real home and lake in close proximity to Gaston Copper” and that his “fears are reasonable and not based on mere conjecture.”¹⁴⁶ Citing *Laidlaw*, the court pointedly rejected the suggestion that plaintiffs must demonstrate specific changes in the chemical content of waterways or specific harms to the ecosystem. Noting that “[t]hreatened environmental injury is by nature probabilistic,” the court concluded that plaintiff’s member “need not wait until his lake becomes barren and sterile or assumes an unpleasant color and smell before he can invoke the protections of the Clean Water Act.”¹⁴⁷

Discussing the traceability requirement, the Fourth Circuit explicitly rejected the notion that plaintiffs must demonstrate that illegally discharged pollutants actually reached their property. “Where a plaintiff has pointed to a polluting source as the seed of his injury, and the owner of the polluting source has supplied no alternative culprit, the ‘fairly traceable’ requirement can be said to be fairly met.”¹⁴⁸ Thus, plaintiffs were not required to provide chemical analyses of the fate and transport of the discharge because this “would necessitate the litigation of complicated issues of scientific fact that are entirely collateral to the question Congress wished resolved—namely, whether a defendant has exceeded its permit limits.”¹⁴⁹ The court reserved the question whether a different conclusion would be made for plaintiffs “so far downstream that their injuries cannot fairly be traced to” the polluter, noting that the

144. *See id.* (citing S. Rep. No. 92-414, at 7 (1971), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3674).

145. *See id.* at 156 (quoting *Sierra Club v. Cedar Point Oil Co.*, 73 F.3d 546, 557 (5th Cir. 1996)).

146. *See id.* at 157.

147. *Id.* at 160.

148. *See id.* at 162.

149. *Id.*

plaintiffs' members "sit squarely in the discharge zone of a polluting facility. . . ."¹⁵⁰

The Fourth Circuit's en banc decision in *Gaston Copper* indicates that *Laidlaw* has helped restore common sense to the interpretation of standing requirements in environmental citizen suits. The court expressly rejected the imposition of detailed requirements for demonstrating individualized, causal injury in such actions, recognizing that they would defeat the purposes of the statutes these actions are designed to help enforce. The court noted:

An important reason for Congress' shift to end-of-pipe standards was to eliminate the need to address complex questions of environmental abasement and scientific traceability in enforcement proceedings. To have standing now turn on direct evidence of such things as the chemical composition and salinity of receiving waters would throw federal legislative efforts to control water pollution into a time warp by judicially reinstating the previous statutory regime in the form of escalated standing requirements. Courts would become enmeshed in abtruse scientific discussions as standing questions assumed a complicated life of their own.¹⁵¹

In light of *Laidlaw* and *Gaston Copper*, standing requirements in environmental citizen suits now can be met through use of "circumstantial evidence such as proximity to polluting sources, predictions of discharge influence, and past pollution," which may be used to prove injury in fact and traceability.¹⁵²

Dissenting in *Laidlaw*, Justice Scalia argued that the majority "makes the injury in fact requirement a sham. If there are permit violations and a member of a plaintiff environmental organization lives near the offending plant, it would be difficult not to satisfy" the majority's standard.¹⁵³ Concurring in *Gaston Copper*, Judge Hamilton expressly agreed with Justice Scalia's view, observing that *Laidlaw* "has unnecessarily opened the standing floodgates. . . ."¹⁵⁴ While joining the Fourth Circuit's unanimous en banc opinion in *Gaston Copper*, Judge Niemeyer decried *Laidlaw* as having worked "a sea change in constitutional standing principles."¹⁵⁵

Has *Laidlaw* really effected such a profound transformation in this area of constitutional law? Although it certainly appears to have

150. *See id.*

151. *Id.* at 163.

152. *Id.*

153. 528 U.S. at 201 (Scalia, J., dissenting).

154. *See* 204 F.3d at 165 (Hamilton, J., concurring in the judgment).

155. *See* 204 F.3d at 163 (Niemeyer, J., concurring in the judgment).

worked an abrupt change in the way in which some lower courts are applying standing doctrine, this may be a product of the extreme manner in which some members of these courts had been applying restrictive conceptions of standing founded on a private law model insisting on individualized proof of causal injury. While Justice Scalia clearly had been pushing standing doctrine in this direction, even in *Lujan v. Defenders of Wildlife*, two members of his 6-Justice majority—Justices Kennedy and Souter—indicated that they would have upheld the plaintiffs’ standing had they simply purchased airline tickets or announced a definitive date to return to the sites where endangered animals allegedly were threatened.¹⁵⁶ This is a far cry from requiring plaintiffs to make detailed demonstrations of causal injury that approach common law tort standards.

Now that *Laidlaw* has confirmed that such detailed showings are unnecessary, standing once again may be founded on proximity to, or use of resources, as had been understood following *Sierra Club v. Morton*. This will not prove to be a great hurdle for environmental plaintiffs to satisfy. Indeed, the application of more restrictive standing rules probably did more to raise the cost of Clean Water Act litigation than it did to reduce the number of citizen suits. A 1995 analysis of citizen actions brought under the Clean Water Act revealed that the number of citizen suits filed under the Act had increased through 1993, with citizen-suit enforcement “nearly equal[ing] all CWA judicial enforcement efforts brought throughout the nation by all the states and the federal government combined.”¹⁵⁷ The trend appeared to continue through the late 1990s.¹⁵⁸ For example, in 1997 and 1998 the number of Clean Water Act citizen-suit complaints that resulted in consent decrees nearly equaled the number of EPA civil judicial settlements reached in those years.¹⁵⁹

156. See 504 U.S. 555, 579 (1992) (Kennedy, J., concurring).

157. See Hodas, *supra* note 70, at 1620. Hodas’ data was based on citizen 60-day notices maintained by the EPA Office of Water Enforcement. See *id.* at Table 1.

158. According to Hodas’ table, the following number of CWA notices were sent to EPA: 1990 - 200, 1991 - 177, 1992 - 189, 1993 - 300. According to data maintained by the EPA Water Enforcement Division, Office of Regulatory Enforcement, the following CWA notices were sent to EPA during the period from 1995-1998: 1995 - 108, 1996 - 395, 1997 - 318, 1998 - 125. See Letter from Donald M. Olson, Chief, Industrial Enforcement Branch (January 2000) (on file with authors). The data does show several deviations, with lower numbers of notices filed in 1995 and 1998.

159. See ENFORCEMENT AND COMPLIANCE ASSURANCE, *supra* note 73, at 92; Letter from Donald M. Olson, Chief, Industrial Enforcement Branch (January 2000) (on file with authors). In 1997, consent decrees were reached in 38 citizen actions under the Clean Water Act. In that same year, EPA reached 35 civil settlements. In 1998, consent decrees were reached in 26

Citizen suits brought under other statutes also increased in numbers in the 1990s, despite more restrictive interpretations of standing. The enhanced availability of monitoring data, permit information,¹⁶⁰ and the implementation of the Emergency Planning and Community Right to Know Act may help explain the continued upward trend in the number of citizen suits in the 1990s. An analysis of case law from the 1980s and 1990s revealed that the number of suits brought pursuant to the citizen-suit provisions of the major environmental statutes may have doubled from the 1980s to the 1990s.¹⁶¹

Laidlaw probably will have little impact on the number of citizen suits brought, though it should reduce the time and expense of litigating them. Fears that liberalized standing will lead to more citizen suits being brought for trivial violations of the environmental laws ignore the important role that courts play in determining the appropriate penalties for violations. If violations that are truly trivial become the targets of citizen suits, courts are fully capable of adjusting the penalties imposed for them to trivial levels. Environmental groups have scant incentive for filing citizen suits that will accomplish little in terms of improving environmental protection. It is noteworthy that in cases like *Laidlaw* and *Gaston Copper*, battles over environmental standing were waged by the defendants largely to escape having to pay large penalties for hundreds of significant violations that occurred over periods of several years.

citizen actions. In the same year, EPA reached 33 civil settlements. One caveat to this data is that EPA enforcement data is recorded by fiscal year, while the data on citizen enforcement is recorded by calendar year.

160. See CITIZEN ENFORCEMENT: TOOLS FOR EFFECTIVE PARTICIPATION, EPA 315-B-98/010, November 1998, at 4-5. One of the central goals of EPA's Office of Enforcement and Compliance Assurance (OECA) is to expand citizens' right to know about their environment. In fiscal year 1998, the EPA developed several new internet-based programs to provide information to the public. See ENFORCEMENT AND COMPLIANCE ASSURANCE, *supra* note 73 at 18-20.

161. This was determined through a general Westlaw search on the citizen-suit provisions of the major environmental statutes: the Safe Drinking Water Act, 42 U.S.C. § 300j-8 (1994 & Supp. IV 1998); Toxic Substances Control Act, 15 U.S.C. § 2619 (1994); Resource Conservation and Recovery Act, 42 U.S.C. § 6972 (1994); Clean Water Act, 33 U.S.C. § 1365; Endangered Species Act, 16 U.S.C. § 1540(g); Air Pollution Prevention and Control (Clean Air) Act, 42 U.S.C. § 7604 (1994); Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9659 (1994); and the Emergency Planning and Community Right-to-Know Act, 42 U.S.C. § 11046 (1994). This search did not differentiate between citizen enforcement actions and citizen suits challenging government activity. A search of appellate decisions involving citizen standing under these statutes also showed that the number of cases doubled.

By focusing the injury in fact inquiry on whether the members of plaintiff environmental organizations had “reasonable concerns” about the effects of illegal pollutant discharges, *Laidlaw* returns environmental standing to a focus on the *risk* of threatened harm. Justice Scalia’s campaign to require more definitive demonstrations of *actual* or *imminent* harm as a predicate for standing undermined the very purpose of environmental regulation—to require dischargers to adhere to standards designed to prevent harm before it occurs. Adopting standing rules that would preclude citizen suits until illegal discharges have resulted in actual or visible harm would be inconsistent with the purpose of citizen-suits provisions. While defendants in citizen suits now may try to challenge the reasonableness of plaintiffs’ concerns, only in very rare cases should it be possible to demonstrate that concerns about the effects of nearby, substantial, illegal discharges are unfounded.¹⁶³

Perhaps the most significant result of *Laidlaw* is its repudiation of the extreme lengths to which Justice Scalia was pushing the redressability prong of standing doctrine. The majority’s receptivity to Congress’s judgment that imposition of civil penalties will deter future violations¹⁶⁴ is a welcome departure from recent decisions rejecting the adequacy of legislative findings supporting regulatory initiatives in areas as diverse as the effect of development on coastal erosion,¹⁶⁵ traffic congestion,¹⁶⁶ the substantiality of the effect on interstate commerce of gun possession near schools¹⁶⁷ or violence against women.¹⁶⁸ In contrast to Justice Scalia’s skepticism of legislative findings, Justice Ginsburg’s majority opinion in *Laidlaw* states that Congressional findings that civil penalties deter future

163. Cf. *Adkins v. Thomas Solvent Co.*, 487 N.W.2d 715 (Mich. 1992) (holding that 22 property owners could not recover for the diminution in their property values due to their proximity to a dumpsite leaking toxic chemicals because it was impossible that the contaminants actually would migrate to their property given the existence of a hydrogeological barrier between their property and the contaminant plume).

164. The Court majority observes that “it is reasonable for Congress to conclude that an actual award of civil penalties does in fact bring with it a significant quantum of deterrence over and above what is achieved by the mere prospect of such penalties.” *Laidlaw*, 528 U.S. at 186. While Justice Scalia argues in dissent that deterrence is not specifically mentioned in § 309(d) of the Clean Water Act as a factor to be considered in determining civil penalties, this argument is curious given that the factors that are mentioned in this section (economic benefit of the violation, history of violations, economic impact of the penalty on violator) are relevant primarily to whether the penalty is adequate to deter the offender.

165. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

166. See *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

167. See *United States v. Lopez*, 514 U.S. 549 (1995).

168. See *United States v. Morrison*, 529 U.S. 598 (2000).

violations “warrants judicial attention and respect.”¹⁶⁹ The extent to which the Court will respect legislative judgments concerning the relationship between regulated activities and the harm sought to be prevented remains a crucial factor in future battles over environmental regulation.

While the *Laidlaw* Court’s attempt to distinguish *Steel Company* is unpersuasive, the distinction the two cases draw between citizen suits filed before a violator has come into compliance and citizen suits filed afterwards may make notice of violations letters uniquely powerful tools for encouraging compliance. As a result of the juxtaposition of *Steel Company* and *Laidlaw*, a violator who receives a 60-day notice letter knows that if he comes into compliance before the citizen suit is filed he will be able to defeat the plaintiffs’ standing, but that if he does not do so he will be unable to escape civil penalties even if he later complies.

In a concurring opinion in *Laidlaw*, Justice Kennedy signaled a willingness to question the constitutionality of citizen suits on Article II grounds. “Difficult and fundamental questions are raised when we ask whether exaction of public fines by private litigants, and the delegation of Executive power which might be inferable from the authorization, are permissible in view of the responsibilities committed to the Executive by Article II” to take care that the laws be faithfully executed.¹⁷⁰ This suggestion, which Justice Scalia cites with approval in his dissent,¹⁷¹ may presage a new constitutional challenge to citizen suits. However, this concern is particularly ironic in light of the federal government’s continued support for citizen suits in *Laidlaw* and other environmental cases. Indeed, Justice Scalia’s charge that the *Laidlaw* decision has “grave implications for democratic governance”¹⁷² has it backwards—citizen suits actually have worked well to promote principles of federalism and separation of powers and to empower citizens to seek redress for official failures to carry out the democratically expressed will of Congress.

Justice Scalia’s continued hostility toward citizen suits and the underlying environmental laws whose enforcement they authorize is reflected in his dissent in *Laidlaw* when he asserts that the citizen-suit provisions of the Clean Water Act are used to “regularly and

169. See 528 U.S. at 185.

170. *Id.* at 197 (Kennedy, J., concurring).

171. See *id.* at 209 (Scalia, J., dissenting).

172. See *id.* at 202 (Scalia, J., dissenting).

notoriously” enforce the Act. Yet the facts of *Laidlaw*¹⁷³ and the track record of some state enforcement agencies,¹⁷⁴ illustrate the importance of providing citizens with a mechanism for redressing significant environmental violations neglected by government officials. Only when Laidlaw received a notice of a citizen suit did it approach state authorities and ask to be sued over its violations. While Laidlaw’s sole purpose was to avoid the citizen suit, something Justice Scalia apparently deems admirable,¹⁷⁵ if citizen suits were unconstitutional, there would have been no impetus for the company to have come into compliance.

Citizen enforcement can serve as a valuable supplement to government efforts by allowing for the devotion of more attention to local and regional concerns.¹⁷⁶ Local citizens know best the conditions of their local resources and may be in a better position than the states or the federal government to bring enforcement actions.¹⁷⁷ When arguing before the en banc Fourth Circuit as an *amicus* in support of citizen standing in *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*,¹⁷⁸ a Department of Justice lawyer was asked why the federal government chose not to prosecute the defendant. He responded that local residents are better informed about local conditions than federal officials.

173. In *Laidlaw*, South Carolina environmental officials did not take enforcement action against the company’s notorious environmental violations until the company approached the state and asked to be sued in order to preclude the citizen suit. The state agreed on the condition that the company would prepare all the papers and even pay the filing fee for the action against itself. The trial court ultimately rejected this gambit on the ground that it did not constitute the kind of “diligent prosecution” required to preclude a citizen suit. *See id.* at 177 n.1, 186 n.2.

174. For example, a state legislative audit in Virginia found “major deficiencies” in the state’s enforcement policies, including the fact that in fiscal year 1996 the state collected only a total of \$4,000 in civil penalties for Clean Water Act violations under a long-standing policy that the state will not even seek to recoup from violators the economic benefit of violations. *See* JOINT LEGISLATIVE AUDIT AND REVIEW COMMISSION, REVIEW OF THE DEQ, 119-120 (1996).

175. Justice Scalia apparently finds it admirable that Laidlaw went to the state to seek preclusive suit—he analogizes this to a prisoner helping the authorities by confessing. *See id.* at 211 n.4 (Scalia, J., dissenting). A more appropriate analogy might be to a violator seeking a pardon from a corrupt executive and offering to draft the pardon papers and pay the costs of printing them.

176. *See* Hodas, *supra* note 70, at 1655.

177. *See* CITIZEN ENFORCEMENT, *supra* note 160, at 1. *See also* Hodas, *supra* note 70, at 1654 (arguing that citizens may be in a better position than government inspectors to discover unpermitted discharges because companies may be discharging “at odd hours in hidden locations”).

178. 179 F.3d 107 (4th Cir. 1999).

Laidlaw's recognition that standing can be premised on a citizen's relationship to a resource and her concerns over how illegal activity may change it helps to remove citizen suits from the shadow of the common law's focus on private injuries. However, as other commentators have noted,¹⁷⁹ the Court's apparent commitment to the "injury in fact" prong of its current standing doctrine indicates that the Court has not fully embraced the implications of a public law model of standing. Plaintiffs still will have to establish that their relationship to a resource is sufficiently close to qualify them to enforce laws designed to protect that resource. Proximity to, or prior use of, a resource are not bad proxies for establishing such a relationship. Except in cases involving truly remote wilderness areas, a fair case can be made that if no one who has used, lives, works or recreates near a resource wants to join an enforcement action to protect it, perhaps the litigation should not be pursued. Community-based environmental groups should have no problem establishing standing to sue violators who pollute local resources in light of *Laidlaw*. These groups should understand the importance of protecting natural resources in their communities.¹⁸⁰ Citizens who live near or use an area that is in the discharge zone of a pollution source should have a sufficient relationship with the local resources to establish standing to vindicate public environmental interests.

Laidlaw has clarified that the proper showing for injury in fact is harm to the plaintiff and not harm to the environment. Thus, it will not be necessary for a plaintiff to prove demonstrable harm to the resource as a result of the defendant's alleged violation. Rather, the plaintiff must prove only that her proximity to the pollution or area threatened by development has or would diminish her use and enjoyment of the resource.

As established in *Sierra Club v. Morton*,¹⁸¹ a plaintiff's use of an area where a violation of law is allegedly occurring should be sufficient to demonstrate that he or she is adversely affected for

179. See Daniel A. Farber, *Environmental Litigation After Laidlaw*, 30 ENVTL. L. REP. 10,516 (2000) (noting the inherent tensions between the "injury in fact" requirement of current standing doctrine and the purposes of enforcing public law).

180. David Bolling encourages citizens groups to monitor their local resources, obtain reports, and if necessary sue the alleged violators under the citizen-suit provisions. See DAVID M. BOLLING, *HOW TO SAVE A RIVER* 159 (1994). The book describes the requirements for standing in a Clean Water Act citizen action as follows: "if you can demonstrate that you fish, swim, boat, or otherwise regularly and currently use the river at the affected site, you probably have standing to sue."

181. 405 U.S. 727 (1972).

standing purposes.¹⁸² In citizen suits challenging actions on wilderness lands, past use of specific parcels should not be required. Rather, plaintiffs should only be required to demonstrate that they have visited some part of the allegedly affected area.¹⁸³

It is not necessary for a citizen to live in the area in order to be adversely affected by the violation. Citizens who do not live in an area but who use or recreate in an area have a sufficiently demonstrated injury in fact.¹⁸⁴ It is clear, however, that those who live close to the problem or who use the resource on a more frequent basis may have suffered a more serious injury from the violation and will also have the best knowledge of the problem. Furthermore, current users as well as those who wish to enjoin the activity so that they may use the resource again in the future have alleged a sufficient injury in fact.¹⁸⁵ This means that citizens who have stopped their use because of their concern over a violation are still injured for standing purposes.¹⁸⁶ As one district court aptly and concisely stated, if a plaintiff uses the area allegedly affected by the violation, plans to use it in the future, but the defendant's activity has diminished his use and enjoyment she should have standing to sue.¹⁸⁷ Thus, although factors such as frequency and timing of use may be considered, these factors should not be a limiting factor if use of the resource is demonstrated.

It is clear from both Supreme Court precedent and the language of the authorizing environmental statutes that threatened injuries are sufficient to establish injury in fact. Thus, as *Laidlaw* confirms, citizen plaintiffs are not required to wait for resources to suffer visible harm. If a plaintiff can demonstrate that she has reasonable concerns or fears arising from the challenged activity, this should be sufficient

182. See *id.* at 739-40.

183. Some would argue they need not visit the area at all. According to Aldo Leopold, “[t]o those devoid of imagination, a blank place on the map is a useless waste; to others, the most valuable part. Is my share in Alaska worthless to me because I shall never go there?” ALDO LEOPOLD, SAND COUNTY ALMANAC 294 (1949).

184. See *Morton*, 405 U.S. at 751-52 (Douglas, J., dissenting) (“Those who hike the Appalachian Trail into Sunfish Pond, New Jersey . . . or who canoe and portage the Quetico Superior in Minnesota, certainly should have standing to defend those natural wonders before courts or agencies, though they live 3,000 miles away.”).

185. In economic terms, this interest in future use is like “option value” which a citizen is willing to pay for future use. See Daniel A. Farber, *Stretching the Margins: The Geographic Nexus in Environmental Law*, 48 STAN. L. REV. 1247, 1254 (1996).

186. See 528 U.S. at 184 (finding that “we see 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 . . . and would subject them to other economic and aesthetic harms”).

187. See, e.g., *Stone v. Naperville Park Dist.*, 38 F. Supp. 2d 651, 654 (N.D. Ill. 1999).

for standing purposes.¹⁸⁸ This is consistent with the framework and purpose of environmental law, which is designed to overcome the deficiencies of the common law by regulating multiple sources of diffuse risks to prevent harm before it occurs rather than requiring after-the-fact proof of individualized causal injury.

VI. CONCLUSION

By specifying that citizens with reasonable concerns about environmental violations occurring near where they live, work or recreate have standing to sue violators, the *Laidlaw* decision helps remove standing doctrine from the shadow of the common law. The decision makes standing analysis more consistent with the purposes of environmental law, which seeks to prevent harm from multiple sources of diffuse risk by regulating emissions that escape the common law's reach. *Laidlaw* repudiates Justice Scalia's campaign to bar citizens from enforcing the environmental laws by clarifying that individualized proof of imminent, tort-like causal injury is not a prerequisite for suing violators. Rather than threatening "democratic governance,"¹⁸⁹ *Laidlaw* empowers citizens to ensure that politically powerful interests will not be able to pollute their neighborhoods in violation of environmental standards. It will reduce the cost of litigating citizen suits, which play an important role in supplementing government enforcement of environmental law, particularly in situations where citizens are in a better position to appreciate the effects of local pollution problems.

In *Laidlaw*, Justices Kennedy and O'Connor and Chief Justice Rehnquist abandoned Justice Scalia's campaign to restrict citizen standing. Justice Kennedy had foreshadowed his unwillingness to follow Justice Scalia's quest all the way to its most extreme destination. In his concurring opinion in *Lujan* he observed that "[a]s government programs and policies become more complex and far-reaching, we must be sensitive to the articulation of new rights of action that do not have clear analogs in our common-law tradition."¹⁹⁰ Justice Kennedy went on to observe that "Congress has the power to define injuries and articulate chains of causation that will give rise to

188. See *Laidlaw*, 528 U.S. at 183 (finding that "reasonable concerns" about the effects of the defendant's alleged discharges were sufficient to establish injury in fact); *Sierra Club v. Cedar Point Oil Co.*, 73 F.3d 546, 556-57 (5th Cir. 1996).

189. See *Laidlaw*, 528 U.S. at 202 (Scalia, J., dissenting).

190. *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring).

a case or controversy where none existed before . . .”¹⁹¹ Yet *Laidlaw* is significant precisely because it did not involve any newly-created federal right of action or any newly-defined injury. Rather the Court recognized the extreme consequences of basing standing on a common law model of injury that would preclude citizens living and recreating near the site of environmental violations from subjecting repeat violators to substantial civil penalties. *Laidlaw* removes citizen suits from the shadow of the common law, reflecting a welcome appreciation of the precautionary purposes of federal environmental regulation.

191. *Id.*