

Standing Up for the Environment: Justices Should Welcome Green Groups into Court

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The following opinion piece on the Laidlaw citizen standing case now pending before the U.S. Supreme Court appeared in the Washington Legal Times on Monday, October 11. This piece argues that the Supreme Court should reverse the 4th circuit decision, and halt the erosion of citizen standing to sue in environmental cases.

By: John D. Echeverria

Over the last decade, the Supreme Court has issued a series of decisions significantly eroding the rights of citizens to sue to enforce federal environmental statutes.

On October 12th, the Court will hear arguments in another case involving citizen "standing" to sue, Friends of the Earth v. Laidlaw Environmental Services, Inc., No. 98- 822. The Court's willingness to take this case could signal the Justices' intent to halt, or possibly even reverse, this trend. We can only hope that the Court will stop interfering with Congress' clear intent to grant citizens access to the courts to protect their interests in a clean environment.

The case involves a citizen suit under the Clean Water Act brought by Friends of the Earth and other groups against Laidlaw Environmental Services, Inc. , the operator of a hazardous waste treatment facility in Roebuck, S.C. FOE alleged that the facility's discharges of mercury into the North Tyger River violated the company's Clean Water Act permit.

After five, hard-fought years of litigation, the U.S. District Court in South Carolina found that the company had committed numerous violations and imposed a penalty of \$405,000, payable to the U.S. Treasury. Most of the violations occurred prior to the filing of the suit but some occurred afterward. However, by the time the suit was resolved, the company had been in substantial compliance for several years. The District Court accordingly rejected as unnecessary FOE's request for injunctive relief. Finally, the District Court determined that FOE was entitled to compensation for its reasonable attorney fees.

The U.S. Court of Appeals for the Fourth Circuit reversed, relying on the Supreme Court's intervening decision in *Citizens for a Better Environment v. Steel Company*, 118 S.C. 1003 (1998). In CBE, the Justices ruled that an environmental group lacked "standing" under Article III of the Constitution to sue for civil penalties under an environmental statute, at least when the alleged violations all preceded the filing of the suit. The Court said that an assessment of penalties payable to the government simply would "vindicate ... the undifferentiated public interest" in faithful execution" of the law and, therefore, could not satisfy the standing doctrine requirement that the relief requested actually "redress" the plaintiff's injury.

In *Laidlaw*, 149 F.3d 303 (1998), the Fourth Circuit ruled that the case was "moot" because the only type of relief FOE was still pursuing on appeal was civil penalties. Based on CBE, the court reasoned that a request for civil penalties was insufficient to support standing, notwithstanding the fact that, unlike the wholly past violations in CBE, the violations in *Laidlaw* were ongoing and continued after the lawsuit was filed. In a footnote, the Fourth Circuit also concluded that the mootness of the case precluded recovery of attorney fees.

PERVERSE INCENTIVE

As a practical matter, this ruling significantly undermines effective enforcement of the Clean Water Act. Even if a company is flagrantly violating the law when the suit is filed, the company can escape liability so long as it comes into compliance during the (sometimes protracted) course of the litigation. This obviously undermines polluters' willingness to comply with the Clean Water Act, and creates a perverse incentive

for polluters to prolong litigation. The ruling also means that groups that mount even highly successful litigation under the Clean Water Act will be unable to obtain reimbursement of their attorney fees, undermining Congress' intent to encourage "private attorneys general" to help enforce the law. If the Fourth Circuit's extreme ruling is upheld, it is a certainty that fewer citizen enforcement actions will be filed in the future. In the Supreme Court, FOE has sought to distinguish CBE, arguing that if violations are ongoing when the suit is filed, an assessment of civil penalties does redress the plaintiff's injuries. To support this argument, FOE points out that the standard for determining whether a suit is moot (the issue in *Laidlaw*) is different and far more flexible than the standard for determining whether a plaintiff lacks standing at the outset of litigation (the issue in CBE). In addition, FOE contends that, even if the case is moot and FOE is entitled to no formal relief, the group is at least entitled to reimbursement of its attorneys fees because its lawsuit was the catalyst that brought the company into compliance.

The Fourth Circuit ruling builds upon the recent series of Supreme Court decisions cutting back on citizen standing to sue to enforce federal environmental laws. Indeed, during the last decade, the Court has ruled against citizen interests in every environmental standing case, while simultaneously expanding the standing of businesses to challenge the enforcement of environmental laws against them.

The Court's recent standing decisions are the result of an unusually determined and focused effort spearheaded by Justice Antonin Scalia. As a judge, Scalia formulated his comprehensive theory of environmental standing in a 1983 article in the *Suffolk University Law Review*. See *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 *Suffolk U.L.Rev.* 881 (1983). In a nutshell, Scalia argued that the courts should focus on their traditional function of protecting minorities, and limit access for individuals suing over widely shared public injuries who, in his view, should ordinarily pursue their goals through the political process. Under this theory of unequal standing, citizens advocating protection of the environment should ordinarily be denied standing while businesses challenging environmental regulation should ordinarily be granted standing.

In his 1983 article, Judge Scalia frankly acknowledged that limiting citizen standing to sue could result in "important legislative purposes... being lost or misdirected in the vast halls of the federal bureaucracy." But that would be a "good thing," he declared, because 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." In short, citizen standing to sue should be limited to encourage creative agency disregard of congressional mandates.

There are several potential objections to Scalia's theory. It has no particular support in either the language or original understanding of Article III, as numerous scholars have observed. Moreover, this theory would appear to encourage disrespect for the rule of law.

In addition, Justice Scalia's anti-majoritarian theory ignores the realities of the American political process. The so-called "free rider" problem and the high transaction costs associated with organizing a diffuse constituency, such as supporters of clean water and clean air, make it difficult to mobilize this type of constituency into an effective political force. Congress included a citizen suit provision in the Clean Water Act precisely because it believed that the act's implementation would not otherwise reflect the broad public interest in a clean environment. Scalia's theory of unequal standing compounds the disadvantages faced by environmental advocates within our political system.

Another problem is that his theory -- though ostensibly designed to enforce the principle of separation of powers reflected in Article III -- actually violates that principle by encroaching on Congress' broad authority to craft effective legislation to achieve legitimate public goals. The Clean Water Act reflects Congress' conclusion that granting citizens the opportunity to enforce the law directly when government is unable or unwilling to do so would help achieve the goals of the statute. The unelected federal judiciary simply has no legitimate authority to use standing doctrine to choose those particular legislative policies that it believes should be "lost or misdirected."

While the recent trend of Supreme Court environmental standing decisions is clear, the Court may be prepared to pull back from Justice Scalia's anti-majoritarian theory of standing. In *Federal Election Commission v. Akins*, 118 S.Ct. 1777 (1998), the Court upheld the standing of voters to challenge the FEC's classifications of an organization under the federal election laws, rejecting the argument that the plaintiffs lacked standing because they were asserting a "generalized grievance" that was "shared in substantially equal measure by all or a large class of citizens." So long as an injury is "concrete," the Court ruled, there is no Article III standing problem simply because the injury is "widely shared."

PENALTIES REDRESS INJURY

Akins appears to undermine the idea expressed in the Court's environmental standing decisions that plaintiffs asserting widely shared injuries cannot satisfy Article III requirements. If Congress can confer standing to vindicate broadly shared injuries, as *Akins* establishes, it is difficult to see why the assessment of civil penalties in *Laidlaw* cannot also meet the redressability requirement, regardless of whether the deterrent and punitive effects of the assessment accrue to the benefit of the plaintiff as well as other citizens.

The Court could reach the conclusion that the "redressability" requirement is satisfied in *Laidlaw* by several different paths. The most straightforward approach would rely on the important differences between initial standing and mootness. Even if civil penalties by themselves cannot satisfy standing requirements at the outset of litigation, it is reasonable to conclude that penalties provide appropriate redress in the form of deterrence and punishment when the violations continued after the suit was filed. Alternatively, building upon the reasoning in *Akins*, the Court could arrive at the same result by limiting, if not overturning, CBE and the Court's other recent standing decisions and rejecting the unequal theory of standing upon which they rest.

Finally, there remains the question of attorney fees, an issue on which FOE should prevail in any event. The Fourth Circuit concluded, in mechanical fashion, that because FOE was not entitled to any formal relief, the group was necessarily barred from obtaining reimbursement of its attorney fees. However, this ruling contradicts substantial precedent granting fees when a lawsuit achieved the plaintiff's actual litigation objective, even if the defendant's belated efforts to comply with the law made other relief unnecessary at the final judgment stage.

Common sense is certainly offended by the notion that a plaintiff who pursues litigation to a successful conclusion should receive reimbursement of fees, but that a plaintiff who pursues an even more effective litigation effort that forces the defendant to comply with the law prior to a formal court order should come up empty-handed.

The Court should use *Laidlaw* to reconsider its flawed environmental standing decisions of the past decade. The Court should reverse the 4th Circuit's ruling, which effectively invalidates the Clean Water Act's citizen suit provision. The principle of separation of powers underlying Article III requires that the judiciary not second-guess the policy decisions of the legislative branch. Nothing in the Constitution compels the courts to reject Congress' determination that citizens should have access to the courts to protect the environment.

For more information, please contact John Echeverria or Jon Zeidler at the Environmental Policy Project:
Georgetown University Law Center
600 New Jersey Ave., N.W.
Washington, D.C. 20001
tel: (202) 662-9850
fax: (202) 662-9497
E-mail: envpoly@law.georgetown.edu