

STANDING AND MOOTNESS DECISIONS IN THE WAKE OF *LAIDLAW*

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This paper presents the results of a relatively simple, but hopefully useful, project: an assessment of how the lower federal courts have applied *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*¹ in evaluating environmentalists' standing to sue to enforce federal environmental laws. To confine the project to manageable proportions, I have focused exclusively on decisions issued by the courts of appeals during the three years since *Laidlaw* was handed down.²

The Supreme Court's 2000 decision in *Laidlaw* was unquestionably an important event, bringing about what has been described as a "sea change" in the law of standing.³ Over the prior decade, the Court had issued a relentless string of decisions whittling away at environmentalists' standing to sue. *Laidlaw* reached the opposite conclusion from these earlier decisions and affirmed Friends of the Earth's standing to sue a polluter. In the process, the Court arguably undid much of the damage the Court had wreaked on standing law over the previous decade.

However, *Laidlaw* also raised two major, troubling questions. The first was how exactly had the decision changed the legal standard for determining standing and, more fundamentally, what theoretical foundation (if any) supported the Court's new approach to standing. My own assessment immediately after the decision was that the Court had plainly liberalized standing requirements but that the environmentalists' victory was fragile because the Court's decision lacked a strong theoretical justification.⁴ The second question, more narrowly focusing on citizen civil-penalty actions, was whether the Court, despite giving environmentalists a win on standing, might actually have helped polluters escape financial liability for certain environmental violations.⁵ The basis for this concern was that the decision could be read as making it easier for defendants to obtain dismissal of citizen suits on mootness grounds than it had been before *Laidlaw* was decided. I harbored the hope that, despite some troublesome language in *Laidlaw*, the lower federal courts would continue to follow the unanimous pre-

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1. 528 U.S. 167 (2000).

2. This research included cases decided through February 2003. I am grateful to Alexander Reisen for excellent research assistance on this article.

3. *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 164 (4th Cir. 2000) (en banc) (Niemeyer, J., concurring).

4. See John D. Echeverria, *Critiquing Laidlaw: Congressional Power To Confer Standing and the Irrelevance of the Mootness Doctrine to Civil Penalties*, 11 DUKE ENVTL. L. & POL'Y F. 287, 289-301 (2001).

5. *Id.* at 301-19.

Laidlaw view that a defendant's post-complaint actions could not render moot an otherwise viable claim for penalties under the environmental laws.

How, then, have the courts of appeals addressed standing and mootness in environmental cases in the wake of *Laidlaw*? More specifically, how have they dealt with the two troublesome questions raised by the *Laidlaw* decision discussed above?

I. WHAT IS THE STANDARD FOR ESTABLISHING STANDING TO SUE TO PROTECT THE ENVIRONMENT?

The significance of *Laidlaw* can only be appreciated against the backdrop of the Supreme Court rulings on standing in environmental cases that preceded it. Between 1990 and 2000, the Court significantly raised the bar to citizen standing to sue under the environmental laws. In *Lujan v. National Wildlife Federation*⁶ and *Lujan v. Defenders of Wildlife*,⁷ the Court ruled that Article III⁸ requires an environmental plaintiff to establish a relatively close individual association with a particular resource and to make a clear demonstration of how the challenged action effects the plaintiff's interests in the resource. In *Steed Co. v. Citizens for a Better Environment*,⁹ the Court went even further, suggesting that citizens might never have standing to pursue litigation seeking civil penalties. The Court's theory was that penalties are paid to the government, not the citizen-plaintiff, and therefore the suit, even if successful, cannot provide "redress" to the plaintiff.¹⁰ More generally, the Court had suggested in increasingly explicit terms that it should be irrelevant for the purpose of standing analysis whether Congress intended to confer standing on a particular category of persons in order to promote compliance with the law.¹¹ Under this view, the scope of citizen standing was to be determined exclusively by the courts based on the judiciary's interpretation of Article III.¹²

Taking their lead from the Supreme Court, some of the federal courts of appeals had begun to reject citizen standing to sue to enforce environmental laws on a regular basis. In some instances, the standard for establishing standing had become so high that it was more difficult to establish standing than it was to demonstrate a substantive violation of the environmental law that provided the basis for the suit.¹³

6. 497 U.S. 871 (1990).

7. 504 U.S. 555 (1992).

8. U.S. CONST. art. III.

9. 523 U.S. 83 (1998).

10. *Id.* at 106.

11. *Id.*

12. *Id.* at 106-07.

13. See, e.g., *Pub. Interest Research Group of N.J., Inc. v. Magnesium Elektron, Inc.*, 123 F.3d 111 (3d Cir. 1997) (holding that an environmental group lacked standing to sue a firm for

In *Laidlaw*, in an opinion authored by Justice Ruth Bader Ginsburg, the Supreme Court changed course. The Court ruled that environmental organizations with members who resided near a polluted river or who used it for various recreational purposes could meet the “injury in fact” requirement with good faith allegations that they had a “reasonable concern[]” that the defendant’s illegal water pollution adversely affected their economic, aesthetic, or recreational interests.¹⁴ Squarely rejecting the position advocated by Justice Antonin Scalia in the dissent, the Court ruled that the plaintiffs did not need to demonstrate actual harm to the environment to establish standing.¹⁵ In addition, contradicting the contrary suggestion in *Steel Co.*, the Court said that citizens do have standing to sue for civil penalties, at least when the violations are ongoing when the suit was filed.¹⁶ The Court reasoned that the threat of financial liability can redress a plaintiff’s injuries by deterring the defendant from committing future violations.¹⁷ Finally, the Court repudiated its prior position, most clearly expressed in *Defenders of Wildlife*, that there is “absolutely no basis”¹⁸ to think that Article III standing should turn on congressional intent. To the contrary, stated Justice Ginsburg, a congressional judgment on standing “warrants judicial attention and respect.”¹⁹

More broadly, the Court’s decision in *Laidlaw* implicitly rejected the crabbed approach to environmental standing which then Judge Scalia articulated in a notorious 1983 law review article²⁰ and then implemented, once he was appointed to the Supreme Court, as the author of each of the Court’s environmental standing decisions of the 1990’s. In a nutshell, Scalia believes that polluters should routinely be granted standing to challenge environmental laws as overly restrictive, but that environmentalists should rarely be accorded standing to challenge regulations as too lax.²¹ He justifies this differential treatment on the theory that environmentalists (unlike polluters) represent majoritarian interests.²² Because the interest in environmental protection is widely shared in society, he reasons environmentalists should be able to obtain relief from the legislative branch and do not need the protection of the courts. In fact, dispersed environmental interests suffer under serious disadvantages in the political process relative to narrow, but well-heeled, special interests, including polluting industries.

illegal discharges of a chemical that allegedly caused fish contamination and adverse human health effects, because the plaintiff failed to produce evidence of demonstrable harm to the water body).

14. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 183-84 (2000).

15. *Id.* at 184-85.

16. *Id.* at 187-88.

17. *Id.* at 187.

18. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 576 (1992).

19. *Laidlaw*, 528 U.S. at 185.

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

21. *Id.* at 894-97.

22. *Id.* at 894-95.

Environmentalists cannot count on the legislative process to address their concerns if the court house doors are closed to them. Thus, Justice Scalia's standing theory is both illogical and a prescription for disempowering environmentalists across the board. In *Laidlaw*, by contradicting much of what it had said in its prior standing decisions authored by Justice Scalia, the Court effectively repudiated Scalia's theoretical approach to the standing issue.

The federal courts of appeals appear to have taken the lesson of *Laidlaw* to heart. Out of twenty-two reported and unreported post-*Laidlaw* appellate decisions focusing on environmentalist standing to sue, the courts have upheld standing in seventeen cases.²³ Whereas there are apparently *no* post-*Laidlaw* cases in which a federal appeals court has reversed a district court ruling that environmental plaintiffs *possessed* standing, there are seven cases in which appeals courts reversed district court rulings that environmental plaintiffs *lacked* standing.²⁴ There is only one instance in which a district court ruling that the plaintiffs lacked standing has been upheld by an appellate court.²⁵ These statistics reflect several instances in which the district courts denied standing prior to the Supreme Court decision in *Laidlaw* and the courts of appeals, equipped with the new guidance provided by that decision, reversed.

The courts of appeals now routinely uphold environmentalists' standing to challenge, on either substantive or procedural grounds, private business conduct harming their personal interests in the environment, broadly defined, or government decisions approving specific developments or other actions with clearly foreseeable environmental impacts. Thus, for example, the D.C. Circuit recently upheld the standing of a former elephant trainer with Ringling Brothers Circus to challenge the circus's alleged mistreatment of animals under the Endangered Species Act (ESA),²⁶ on the theory that the plaintiff wished to attend the circus in the future and would be able to observe the physical and emotional effects of the alleged mistreatment.²⁷ The Ninth Circuit upheld the standing of citizens who live along the U.S.-Mexico border to challenge the Department of Transportation's failure to prepare an environmental impact statement on the air quality effects of allowing more Mexican trucks to cross the border pursuant to the North American Free Trade Agreement (NAFTA).²⁸ And the Fourth Circuit, which had issued the appeals court ruling in *Laidlaw*, issued an en banc ruling following the Supreme Court decision in *Laidlaw* upholding an environmental

23. See Appendix, listing all of the post-*Laidlaw* appeals court decisions involving claims brought by environmental plaintiffs and addressing standing or mootness questions.

24. *See id.*

25. *See id.*

26. 16 U.S.C. §§ 1531-1545 (2000).

27. *Am. Soc'y for the Prevention of Cruelty to Animals v. Ringling Bros. & Barnum & Bailey Circus*, 317 F.3d 334 (D.C. Cir. 2003).

28. *Pub. Citizen v. Dep't of Transp.*, 316 F.3d 1002 (9th Cir. 2003).

group's standing to sue to enforce the Clean Water Act²⁹ based on the alleged adverse effects of water pollution on the recreational and aesthetic interests of some of its members.³⁰ There are numerous additional decisions in the same vein.³¹

The one post-*Laidlaw* case in which an appeals court upheld a district court decision that the plaintiff lacked standing to sue under an environmental law involved what can charitably be described as thin claims. The unpublished Second Circuit decision in *Mancuso v. Consolidated Edison Co.*³² resolved a *pro se* suit by former landowners seeking civil penalties for PCB³³ pollution under the Clean Water Act. The defendant utility had apparently polluted the site twenty years earlier and had since engaged in successful clean-up efforts.³⁴ The court ruled that the plaintiffs could not state a viable claim for civil penalties under the Clean Water Act based on wholly past violations.³⁵ In addition, the court ruled that the plaintiffs lacked standing, observing that they “do not currently reside, own property, or recreate in” the area of the alleged pollution and had not visited the area for any purpose “other than to obtain evidence to support [the] lawsuit.”³⁶ If it takes extreme, essentially frivolous, claims such as these to defeat standing, then contemporary standing doctrine is capacious indeed.

Overall, the current appellate precedents demonstrate that an environmental group which can allege some colorable injury to its members who live or work in the vicinity of a particular resource, or who use or otherwise enjoy the resource, should have no difficulty establishing standing to sue. As Justice Scalia correctly predicted in his dissent in *Laidlaw*, addressing citizen suits to address illegal pollution, “[i]f 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] lenient standard” established in *Laidlaw*.³⁷

On the other hand, the handful of appellate decisions in which standing has been denied (five out of twenty-two—all but one of which involved petitions for review filed directly in the courts of appeals) reveal that environmentalists are still struggling to establish standing in at least one important category of cases: challenges to general agency rules granting more lenient regulatory treatment to

29. 33 U.S.C. §§ 1251-1387 (2000).

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

31. *See* Appendix.

32. No. 01-7319, 2002 WL 15505 (2d Cir. Jan. 2, 2001).

33. Polychlorinated biphenyls.

34. *Mancuso*, 2002 WL 15505, at **1.

35. *Id.*

36. *Id.*

37. *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs. (TOC), Inc.*, 528 U.S. 167, 201 (2000) (Scalia, J., dissenting).

certain categories of polluters or pollutants.³⁸ A brief discussion of these post-*Laidlaw* environmentalist defeats will illustrate the problem.

In *Sierra Club v. EPA*,³⁹ the D.C. Circuit ruled that the Sierra Club lacked standing to challenge an EPA rule categorizing certain wastewater treatment sludge as “non-hazardous” under the Resource Conservation and Recovery Act (RCRA).⁴⁰ Wastes classified as “hazardous” are subject to elaborate regulations requiring safe disposal, whereas nonhazardous wastes are subject to looser requirements. To support its standing, the Club submitted a lawyer’s affidavit and an affidavit of an expert witness with various attachments, but submitted no evidence based on personal knowledge of any of its members.⁴¹ As a result, the court ruled that the Club failed to establish injury and fact.⁴² In addition, however, the court ruled that the evidence, even if it were otherwise competent, failed to point to any specific instance in which the failure to categorize the particular waste as hazardous actually caused harm to any Club member.⁴³ Even with a more serious effort it would have been difficult for the Sierra Club to identify locations where specific waste was being deposited, demonstrate how its treatment varied from the treatment it would have received under a hazardous classification, and explain how this difference in treatment generated a “reasonable” concern that affected some Club member’s use or enjoyment of some particular environmental resource.⁴⁴

38. *See* Appendix.

39. 292 F.3d 895 (D.C. Cir. 2002).

40. 42 U.S.C. §§ 6921-34 (2000).

41. *Sierra Club*, 292 F.3d at 901.

42. *Id.* at 901-02.

43. *Id.* at 902.

44. This case is also noteworthy because it addressed the long simmering question of how, as a matter of procedure, environmental litigants are supposed to establish standing in a case based on a petition for review. The court recognized that environmental litigants do not need to establish Article III standing in order to participate in administrative proceedings, but nonetheless ruled that “[w]hen the petitioner later seeks judicial review, the constitutional requirement that it have standing kicks in, and that requirement is the same . . . as it would be if such review were conducted in the first instance by the district court.” *Id.* at 899. Accordingly, the court said, a petitioner in the appeals court “must either identify in that record evidence sufficient to support its standing to seek review or, if there is none because standing was not an issue before the agency, submit additional evidence to the court of appeals.” *Id.* While the procedure was not followed in this case, the court instructed that in the future,

a petitioner whose standing is not self evident should establish its standing by the submission of its arguments and any affidavits or other evidence appurtenant thereto at the first appropriate point in the review proceeding.

In some cases that will be in response to a motion to dismiss for want of standing; in cases in which no such motion has been made, it will be with the petitioner’s opening brief – and not, as in this case, in reply to the brief of the respondent agency.

Id. at 900. In *City of Waukesha v. EPA*, 320 F.3d 228 (D.C. Cir. 2003), the D.C. Circuit ruled that

In *American Petroleum Institute (A PI) v. United States EPA*, also decided by the D.C. Circuit and also involving a classification issue under RCRA, the court ruled that environmental plaintiffs lacked standing to challenge the EPA's failure to categorize sediment from unleaded gas storage tanks as a "hazardous waste" or its decision not to regulate certain wastes used as feedstock in a petroleum coking process.⁴⁵ As to the storage-tank sediment, the court ruled that the plaintiffs failed to establish a probability that the landfills they identified actually received this particular petroleum waste, in part because the records on waste disposal were not sufficiently fine-grained to demonstrate that *this* petroleum waste, as opposed to petroleum waste generally, was deposited at any particular landfill.⁴⁶ In addition, although members of the environmental-group plaintiffs contended that their use of certain resources was influenced by concerns about pollution, the court ruled that their statements were insufficient to demonstrate standing because they could not trace these concerns to the disposal of this particular waste.⁴⁷ As to the waste feedstock, the court ruled that affidavits submitted by individuals who live near refineries or coke storage facilities and are exposed to coke products, along with evidence that the use of this waste as feedstock "is potentially unhealthy and environmentally unsound," was not sufficient to establish standing.⁴⁸ The missing element, the court ruled, was a showing that it was "substantially likely" that this particular waste was used at the particular facilities of concern to these affiants.⁴⁹

The *A PI* decision erects an extraordinarily high barrier to citizen standing to challenge rules which allegedly under-regulate pollutants. The D.C. Circuit's demand for pollutant-specific evidence for standing purposes ignores the reality that ordinary citizens may have legitimate concerns about a particular facility, but rarely have the knowledge or resources to dissect a pollution waste stream with the meticulousness demanded by the D.C. Circuit. The D.C. Circuit's requirement that a plaintiff demonstrate, at the threshold, that the owner of a particular facility not only has the incentive and the capacity to use some procedure leading to pollution, but a substantial probability that it has actually done so, demands information from citizens about a company's operations that is difficult, if not impossible, for citizens to obtain. The upshot of the D.C. Circuit's crabbed view of citizen standing was that industry petitioners were permitted to proceed to challenge this set of RCRA regulations (and, on some claims, succeed on the merits), whereas the environmental litigants were blocked at the court house door and their substantive objections to the rules were left unaddressed.

these procedures also apply to industry petitioners challenging environmental rules.

45. 216 F.3d 50 (D.C. Cir. 2000).

46. *Id.* at 64.

47. *Id.* at 66.

48. *Id.* at 67.

49. *Id.* at 68.

Following a similar line of reasoning, the Fifth Circuit held in *Central & South West Services, Inc. v. United States EPA*,⁵⁰ that the Sierra Club lacked standing to challenge an EPA rule concerning the use and disposal of PCB's. The court ruled that the Club had failed to demonstrate a substantial probability that the waste would leach into the groundwater and inflict harm on the Club's members.⁵¹ As to PCB disposal in landfills, the court ruled that the Club had failed to establish a sufficient risk of groundwater contamination because the affiant had produced "no facts establishing the relative location of the landfill and the aquifer so that it is purely conjectural that PCB's could leach from the landfill and contaminate [the] town's water supply."⁵² As to the use of PCB's in road-bed material, the court again found the expressions of concern too conjectural since there was no showing that PCB's would actually be used on roads above the aquifer, that the PCB's would come into contact with solvents which would trigger leaching, or that the PCB's would ultimately reach the aquifer.⁵³ Again the upshot of this crabbed view of citizen standing was that environmental litigants were barred from obtaining a resolution of their substantive challenges to the rule, whereas industry petitioners could proceed with and succeed (at least in part) on the merits on their claims.

These decisions⁵⁴ appear to demonstrate that, whereas an environmental litigant's need to show a significant injury represented the primary barrier to citizen standing pre-*Laidlaw*, the principal obstacle to standing now may be the need to show a causal link between the challenged action and the alleged harm. Not surprisingly perhaps, this issue has arisen in petition cases challenging agency rules, where the environmental litigant is not suing based on some government action directly affecting the environment, or even a government decision authorizing such action, but rather a government refusal to regulate. It is debatable whether these decisions are consistent with the spirit of *Laidlaw*, although that decision did not focus on the permissible length or complexity of the chain of causation for standing purposes. As a matter of legal policy, these decisions are problematic because, like Justice Scalia's discredited theory of standing, they systematically disadvantage environmental advocates relative to polluting industries.

50. 220 F.3d 683 (5th Cir. 2000).

51. *Id.* at 700.

52. *Id.*

53. *Id.* at 701.

54. For a fourth, brief decision in the same vein, see *Hdstosky v. EPA*, No. 01-1069, 2001 WL 799950 (D.C. Cir. June 29, 2001), in which the court held that an individual citizen lacked standing to challenge a rule establishing testing guidelines for chemicals on the theory that the guidelines would incorrectly indicate that certain chemicals are safe and, therefore, lead to plaintiff being exposed to dangerous chemicals. The court ruled that "[t]his scenario is too attenuated to establish standing to challenge the substance of the testing guideline." *Id.* at *1.

Ultimately, these decisions reflect the larger problem of the Supreme Court's inability to articulate a coherent theory for deciding standing questions in the environmental context. *Laidlaw* changed the tone of standing jurisprudence without altering its underlying substance. The Court indicated that its standing decisions had been too restrictive, or at least had been interpreted too restrictively by the lower federal courts.⁵⁵ However, the Court did not change the basic architecture of the standing inquiry.⁵⁶ The Court apparently decided to accord greater weight to congressional judgments about who should be granted standing to sue, but the Court did not embrace the recommendation of many commentators⁵⁷ that it defer to congressional judgments on the definition of standing. The upshot is that standing law has improved from an environmental standpoint, although it is not exactly clear why. The court of appeals decisions to date basically reflect, rather than attempt to grapple with this muddle. For the foreseeable future, standing issues will need to be litigated, often at significant expense, on a case by case basis with few definitive guideposts.

II. CAN CIVIL PENALTY CLAIMS BE MOOTED BY THE DEFENDANT'S POST-COMPLAINT ACTIONS?

The second important question in the aftermath of *Laidlaw* was whether a citizen's claim for civil penalties under the Clean Water Act can become moot because, following the filing of the complaint, the defendant ceases violating the Act.

Prior to *Laidlaw*, the unanimous view of the federal appeals courts which had addressed the issue was that a civil penalty claim cannot be mooted by post-complaint compliance efforts.⁵⁸ As Justice Stevens accurately stated, "the Courts of Appeals . . . [had] uniformly concluded [that] . . . a polluter's voluntary postcomplaint cessation of an alleged violation will not moot a citizen-suit claim for civil penalties. . . ."⁵⁹ The Fourth Circuit in *Laidlaw*, ostensibly relying on the then relatively recent Supreme Court decision in *Steel Co.*, ruled that a citizen suit under the Clean Water Act automatically becomes moot if the only remaining live

55. *Helstosky*, 2001 WL 799950.

56. *Id.*

57. *Sæ, eg.*, Richard J. Pierce, Jr., *Is Standing Law or Politics?*, 77 N.C. L. REV. 1741 (1999).

58. *Sæ, eg.*, *Natural Res. Def. Council, Inc. v. Texaco Ref. & Mktg., Inc.*, 2 F.3d 493, 503 (3d Cir. 1993) ("We . . . hold that claims for damages are not moot because an intervening NPDES permit eliminates any reasonable possibility that [the defendant] will continue to violate specified parameters."); *Atl. States Legal Found., Inc. v. Pan Am. Tanning Corp.*, 993 F.2d 1017, 1021 (2d Cir. 1993) ("We hold therefore that a defendant's ability to show, after suit is filed but before judgment is entered, that it has come into compliance with limits on the discharge of pollutants will not render a citizen suit for civil penalties moot.")

59. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 196 (2000) (Stevens, J., concurring).

claim in the case is a claim for civil penalties.⁶⁰ The court reasoned that penalties payable to the government cannot redress the plaintiff's injury and, therefore, if that is the only type of relief the plaintiff is still pursuing, there is no longer any viable case.⁶¹ The Supreme Court reversed.⁶²

There are two possible interpretations of how the Supreme Court's decision may—or may not—have altered the previously established rule that a civil penalty claim can never become moot. The first theory is that the Court, even though it overruled the Fourth Circuit's dismissal of the case on mootness grounds, also implicitly overruled the previous rule that a civil penalty claim can never become moot. Under this view, the Court adopted a middle position between the previous rule and the Fourth Circuit approach, making it difficult—but not impossible—to establish that a case seeking civil penalties is moot.

This interpretation is supported by the Court's instruction that on remand the lower courts should evaluate the plaintiff's case by determining whether it was “absolutely clear” that the company's permit violations would not recur in the future.⁶³ To be sure, the Court indicated that establishing mootness under this standard would not be easy; the fact that the company had decided to close the facility and even dismantle its equipment was not sufficient, the Court indicated, to conclusively establish mootness.⁶⁴ Nonetheless, because the “absolutely clear” standard creates the possibility that a civil penalty claim can become moot in *some* circumstance, the standard articulated in *Laidlaw* arguably represented a backward step, from an environmentalist perspective, from the previous mootness rule.

The second theory is that *Laidlaw* cannot fairly be read as rejecting the previous rule. This theory is supported by the fact that it is difficult to square the idea that the Court implicitly overruled the previous rule on mootness with the fact that the Court reversed the Fourth Circuit's novel departure from that rule. Moreover, if the Court had intended to adopt a new, middle-ground rule, one would anticipate that the Court would have observed that its new rule departed from the previous rule. The Court made no such observation. In addition, the only issue the Court had to address in order to decide that the Fourth Circuit had erred was

60. *Laidlaw*, 528 U.S. at 173.

61. *Id.*

62. *Id.*

63. *Id.* at 193.

64. In several subsequent decisions relying on *Laidlaw*, the Supreme Court has emphasized the difficulty of establishing mootness under the “absolutely clear” standard. In *City of Erie v. Pap's A.M.*, 529 U.S. 277, 287 (2000), the Court ruled that closure of a nude dancing establishment did not moot the case, given that the plaintiff corporate entity remained in existence and “could again decide to operate a nude dancing establishment.” In *A. J. D'Amico Constructors, Inc. v. Slater*, 528 U.S. 216, 222 (2000), also relying on *Laidlaw*, the Court ruled that the State of Colorado's certification of the plaintiff subcontractor as a disadvantaged business enterprise pursuant to new procedures adopted in response to the suit did not moot the plaintiff's equal protection challenge to a minority set aside program.

whether the Fourth Circuit was wrong in concluding that a citizen suit under the Clean Water Act is *automatically* moot when the claimant's only remaining claim is for civil penalties. Because the Court had no need to decide whether claims for civil penalties can *never* become moot to decide the case, its suggestive statements on that separate issue were arguably dictum. In any event, they certainly do not represent a considered resolution of the issue in a case which squarely presented the question.

Ultimately it seems fair to conclude that the lower federal courts can regard both readings of *Laidlaw* as permissible. The explicit language of the Court's opinion provides powerful support for the view that the Court adopted a standard under which it is not impossible to establish mootness. On the other hand, it is difficult to believe that the Court accomplished such a significant change in mootness doctrine without explicitly saying so, particularly in a case that did not squarely present the issue. The United States Supreme Court will eventually have to decide the issue—or perhaps definitively declare whether it has already done so.

As a matter of legal policy, civil penalty claims should not be subject to the mootness doctrine. It would seriously weaken citizen suits' enforcement function if an acknowledged violator of an environmental law could escape liability for civil penalties as a result of post-complaint actions. If that were the rule, the threat of liability for civil penalties would obviously be less serious and have a less powerful deterrent effect on potential violators. Furthermore, if civil penalty claims could be mooted, defendants would be encouraged to use dilatory tactics to delay litigation. As one court observed, "dischargers could intentionally violate the Clean Water Act until they are sued and then obtain a stay while continuing their violations until they eventually are in compliance with the law. At this point, the case would be dismissed and they would have escaped all penalties."⁶⁵ Finally, if penalties could be rendered moot, citizens would have less incentive to file claims for civil penalties in the first place, further undermining the effectiveness of citizen suits.

There are two basic legal arguments for why civil penalties should not be considered moot as a result of post-complaint actions. The first is that liability for a civil penalty permanently "attaches" at the time the violation occurs and any subsequent actions cannot relieve the defendant of liability. This argument has straightforward textual support in the Clean Water Act, which states that "[a]ny person who violates [a permit] shall be subject to a civil penalty."⁶⁶ Because the Act uses the present tense ("violates"), it implies that the civil penalty accrues at the time the violation occurs.

The conclusion that civil penalties attach when the violation occurs is also supported by the understanding that civil penalties serve a deterrent function. As the Court explained in *Laidlaw*, it is the deterrent effect of civil penalties that

65. *Atl. States Legal Found., Inc. v. Tyson Foods, Inc.*, 897 F.2d 1128, 1137 (11th Cir. 1990).

66. 33 U.S.C. § 1319(d) (2000).

allows claims for penalties to “redress” the claimants’ injuries.⁶⁷ “To the extent that [civil penalties] encourage defendants to discontinue current violations and deter them from committing future ones, they afford redress to citizen plaintiffs who are injured or threatened with injury as a consequence of ongoing unlawful conduct.”⁶⁸ The deterrent function of penalties obviously operates at the time the firm or individual avoids—or does not avoid—the actions producing the illegal pollution. If the firm or individual complies with the law, there is, of course, no liability; there is only liability when a violation occurs, that is, when the prospect of a penalty has failed its intended deterrent purpose. Because deterrence operates (or fails to operate) when the firm decides whether or not to pollute, it makes sense for liability for civil penalties to attach at the point in time when the penalty is supposed to have its intended deterrent effect.

This reasoning is not undermined by the fact that the vagaries of the litigation process may mean that it will be several years before the defendant has to make payment. Paying for a violation does not itself have any deterrent function because the violation is long past. On the other hand, the deterrent function of civil penalties depends on the reasonable certainty that, if and when a violation occurs, the penalty will eventually have to be paid. The fact that the actual payment has to be made years later does not alter the fact that the liability logically must attach when the violation occurs.

The second reason civil penalty claims cannot become moot is that penalties are designed to serve as punishment for past legal violations and penalties serve this purpose regardless of whether the illegal conduct subsequently ceased. The language and the legislative history of the Clean Water Act support the conclusion that punitive retribution is one of the purposes of the Act. For example, the Act states that, in fixing the amount of the penalty, courts are permitted to consider, among other things, “the seriousness of the violation or violations, . . . any history of such violations, any good faith efforts to comply with the applicable requirements, . . . and such other matters as justice may require.”⁶⁹ All of these factors suggest that retribution is at least one of the permissible purposes of civil penalties. In any event, in *Laidlaw*, the Court embraced this interpretation of the Act, stating that “[t]he legislative history of the Act reveals that Congress wanted the district court to consider the need for retribution and deterrence, in addition to restitution, when it imposed civil penalties.”⁷⁰ Justice Stevens arrived at the same result by a different route, by equating civil penalties with punitive damages.⁷¹

The counter to the argument that the punitive function of civil penalties should prevent penalty claims from becoming moot is that punishment expresses the

67. *Laidlaw*, 528 U.S. at 185.

68. *Id.* at 186.

69. 33 U.S.C. § 1319(d) (2000).

70. *Laidlaw*, 528 U.S. at 185 (quoting *Tull v. United States*, 481 U.S. 412, 422-23 (1987)).

71. *Id.* at 197 (Stevens, J., concurring).

broad public interest in enforcement of the law and only the government, not individual citizens, has standing to vindicate that interest in court. Under this reasoning, since the function of penalties as punishment does not support initial standing, neither can it save penalty claims from becoming moot. In *Steel Co.*, Justice Scalia specifically rejected the idea that citizens should be able to establish standing based on the ostensible punitive function of civil penalties, because on that theory plaintiffs could seek to vindicate “the ‘undifferentiated public interest’ in faithful execution” of the law.⁷²

One counter-response is that *Steel Co.* may not have survived *Laidlaw*. Another is that *Laidlaw*, at a minimum, confined *Steel Co.* to the circumstance where there are no ongoing violations at the time the suit is filed. Furthermore, even if, as the Court said in *Steel Co.*, the punitive function of civil penalties may not be sufficient, by itself, to support initial standing, punishment is arguably part of the relief to which a plaintiff who otherwise meets the standing requirements should be entitled. It is logical to suppose that the punitive function of civil penalties can have a different significance in the context of deciding initial standing than in deciding mootness.⁷³ Therefore, the punitive function of penalty claims can plausibly preclude a finding of mootness.

Not surprisingly perhaps, the federal appeals courts have split on how *Laidlaw* affects mootness analysis in Clean Water Act citizen enforcement suits. In *Mississippi River Revival, Inc. v. City of Minneapolis*,⁷⁴ the Eighth Circuit, reversing its prior position that a civil penalty claim can never be rendered moot,⁷⁵ adopted the analytically plausible but ultimately improbable conclusion that *Laidlaw* “overruled” the previous rule that civil penalty claims can never become moot. The city made a timely and apparently proper application to the state water quality agency for a permit to discharge storm waters.⁷⁶ The state agency failed to act on the application within the prescribed time period, with the result that the city continued to discharge without a permit in violation of the Act.⁷⁷ Given the inevitability of rain and storm water discharges, there was nothing the city could do to avoid violating the law pending the conclusion of the state agency’s decision-making process.⁷⁸ When, during the course of the litigation, the city

72. *Steel Co. v. Citizens for a Better Env't.*, 523 U.S. 83, 106 (1998) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 577 (1992)).

73. *Cf. Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 222 (2000) (recognizing that considerations which might defeat standing are not necessarily sufficient to support a finding of mootness).

74. 319 F.3d 1013 (8th Cir. 2003).

75. *See Comfort Lake Ass'n v. Dresel Contracting, Inc.*, 138 F.3d 351, 356 (8th Cir. 1998) (“When there is no agency enforcement action in the picture, a polluter should not be able to avoid otherwise appropriate civil penalties by dragging the citizen suit plaintiff into costly litigation and then coming into compliance before the lawsuit can be resolved.”).

76. *City of Minneapolis*, 319 F.3d at 1015.

77. *Id.*

78. *Id.*

finally obtained the necessary permits, the district court dismissed the suit as moot.⁷⁹

The Eighth Circuit, in a brief discussion, rejected the argument that the penalty claims could not become moot because they “attached” at the time the violations occurred.⁸⁰ The Court viewed this position as inconsistent with the express statement in *Laidlaw* that penalty claims can become moot if it becomes “absolutely clear” that the illegal pollution will not recur.⁸¹ The Court distinguished suits for civil penalties brought by the United States, which could be based on wholly past violations, and which the Court believed the government was entitled to pursue regardless of any post-complaint compliance efforts by the defendant.⁸²

The Eighth Circuit also rejected the punishment argument, though somewhat cryptically. First, the court expressed doubt that the ostensible punitive purpose of civil penalties affected the mootness question, as opposed to the extent of the defendant’s liability once liability has been established.⁸³ Second, the court said that, “even if the argument is relevant to the issue of mootness, we conclude it is without merit.”⁸⁴ The court did not further explain its reasoning on this point.

Finally, applying the “absolutely clear” standard, the Eighth Circuit ruled that the plaintiffs could not avoid a mootness determination by pointing to the city’s alleged violations of the permits they had ultimately received from the state.⁸⁵ The court ruled that these allegations were outside the scope of the plaintiffs’ lawsuit, which focused on the city’s discharge without any permit whatsoever, and they could not be relied upon to save the plaintiffs’ initial claims from mootness.⁸⁶

Though the court’s reasoning can hardly be explained away on this basis, it is possible that the outcome was influenced by the court’s assessment of the equities of the case. The Eighth Circuit made clear that it thought the imposition of civil penalties for “technical and unavoidable” violations in the circumstances of this case would be grossly unfair.⁸⁷

On the other hand, the Ninth Circuit has issued two decisions which reaffirm the previous rule that civil penalties can never be mooted. In *San Francisco Baykeeper, Inc. v. Tosco Corp.*, the court, reversing a district court dismissal on mootness grounds, ruled that a claim for civil penalties based on a company’s operation of a petroleum coke facility in violation of the Clean Water Act was not moot, notwithstanding the fact that the company had sold the facility to another

79. *City of Minneapolis*, 319 F.3d at 1014.

80. *Id.* at 1017.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *City of Minneapolis*, 319 F.3d at 1017.

86. *Id.*

87. *Id.* at 1018.

company.⁸⁸ Emphasizing that *Laidlaw* had highlighted that civil penalties deter violations, the court held that the deterrent function prevented penalty claims from becoming moot.⁸⁹ While acknowledging that the defendant's sale of the facility could not deter any future violations at the facility by the defendant itself, the court reasoned that "an imposition of civil penalties against [the defendant] for its pollution at the facility will demonstrate to [the new owner] and any future owner that violations at this same facility will be costly."⁹⁰

In addition, the court stated that the claim was not moot because liability for civil penalties "attaches" at the time of the violation.⁹¹ The court supported this conclusion principally on policy grounds, reasoning that allowing a polluter to escape liability by selling its facility would undermine enforcement of the Clean Water Act.⁹² "A finding of mootness here could . . . allow repeated violations that would evade review," the court said, "and would substantially weaken the ability of citizen suits and civil penalties to police and deter the conduct forbidden under the Act."⁹³

In *Ecological Rights Foundation v. Pacific Lumber Co.*, the Ninth Circuit, again reversing a district court ruling, held that the plaintiff environmental groups' civil penalty claims for violations of the Clean Water Act were not mooted by the fact that, during the course of the litigation, a new, stricter permit was issued superseding the original permit that was the basis for the lawsuit.⁹⁴ The Ninth Circuit ruled that civil penalty claims "attach" at the time of the violation, "[a]s is ordinarily the case with monetary relief."⁹⁵ Even if the new permit made injunctive relief unnecessary, the court observed, imposing financial liability would serve both a specific and a general deterrent effect.⁹⁶ The court concluded,

There is no basis for believing that the bare fact of a new, stricter permit makes future permit violations any less likely, deterrence any less necessary, or the deterrent effect of civil penalties any less potent. We must conclude that civil penalties, if appropriate on the merits, would serve their deterrent purposes in this case.⁹⁷

Finally, in an unreported decision, in *Tamaska v. City of Bluff City*, the Sixth Circuit reaffirmed the previous rule. Landowners sued a city based on the city's discharges of partially treated sewage and wastewater onto the plaintiffs'

88. *S.F. Baykeeper*, 309 F.3d 1153, 1160 (9th Cir. 2002).

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. 230 F.3d 1141, 1153 (9th Cir. 2000).

95. *Id.*

96. *Id.*

97. *Id.*

property.⁹⁸ During the course of the Clean Water Act enforcement suit, the parties entered into a consent agreement and the city connected to a regional sewage treatment system, apparently eliminating the pollution of plaintiffs' property and the risk of its future recurrence.⁹⁹ Nonetheless, citing the long list of pre-*Laidlaw* precedents holding that "compliance with the Act's requirements after the filing of a suit does not moot an otherwise valid claim for civil penalties,"¹⁰⁰ the court ruled that the claim for civil penalties was not moot.¹⁰¹ "[W]e believe that a defendant's voluntary cessation of a challenged practice after the filing of suit, but before entry of judgment, should not deprive the court of the ability to impose civil penalties for violations of the Act."¹⁰² The court said that "to hold otherwise would encourage polluters to delay litigation as long as possible, knowing that they could escape all liability for even post-complaint violations by simply coming into compliance with the Act before the suit came to trial."¹⁰³

In sum, the courts of appeals have embarked on a lively debate over whether civil penalty claims can become moot as a result of post-complaint actions. This debate has important implications for the effectiveness of civil-penalty suits as a law enforcement tool, and will likely be hotly contested by both industry and environmental advocates. Ultimately, the Supreme Court may be required to step in to resolve the issue.

ARTICLE II POSTSCRIPT

In *Laidlaw*, Justice Kennedy, while joining in the opinion for the Court, wrote a short concurring opinion posing the question of whether Article II's Take Care Clause, which commits to the President the responsibility to "take Care that the Laws be faithfully executed,"¹⁰⁴ might pose an independent constitutional impediment to citizen suits seeking civil penalties.¹⁰⁵ Justice Kennedy wrote,

Difficult and fundamental questions are raised when we ask whether exactions of public fines by private litigants, and the delegation of Executive power which might

98. Nos. 00-5179, 00-5244, 2002 WL 22003 at *483 (6th Cir. Jan. 4, 2002).

99. *Id.*

100. *Id.* at *485.

101. *Id.*

102. *Id.* at 486.

103. *Id.* In line with these decisions favorable to environmental groups, the Eleventh Circuit recently stated in dictum that, "Where a defendant voluntarily ceases challenged conduct, the case is not moot because nothing would prevent the defendant from resuming its challenged action." *Sierra Club v. United States EPA*, 315 F.3d 1295, 1303 (11th Cir. 2002).

104. U.S. CONST. art. II, § 3.

105. *Id.*

be inferable from the authorization, are permissible in view of the responsibilities committed to the Executive by Article II of the Constitution of the United States.¹⁰⁶

However, he thought the issue “best reserved for a later case,” given that the issue was not identified in the petition for certiorari, and had not been discussed by the court of appeals or been briefed by any of the parties.¹⁰⁷ Justice Scalia, in his dissenting opinion, stated that, “[a]s Justice Kennedy’s concurrence correctly observes, the question of the conformity of this legislation with Article II has not been argued – and I, like the Court, do not address it.”¹⁰⁸

Several other Supreme Court opinions also indicate some receptivity to consideration of the Article II issue. In *Vermont Agency of Natural Resources v. United States ex rel. Stevens*,¹⁰⁹ which addressed whether an individual can bring a *qui tam* suit under the False Claims Act¹¹⁰ against a State, the Court “express[ed] no view on the question whether *qui tam* suits violate Article II.”¹¹¹ In *Federal Elections Commission v. Akins*,¹¹² Justice Scalia argued in dissent that allowing the plaintiff to sue the FEC violated the Take Care Clause because it allowed citizens to enforce an “undifferentiated public interest in . . . compliance with the law. . . .”¹¹³ Despite these high-level expressions of interest in the Article II issue, the lower federal courts have, so far, not given any support to the argument. Prior to the decision in *Laidlaw*, more than half a dozen federal district courts had rejected the argument.¹¹⁴ Following *Laidlaw*, federal district courts have rejected Article II challenges to environmental citizen suits in at least three additional cases.¹¹⁵ The Article II argument may strike pay dirt in some future case, though in my view, it would be remarkable if citizen suit provisions which are acceptable under Article III were struck down under Article II. Given all of the other things environmentalists have to worry about today, Article II probably should not keep them up at night.

106. *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs. (TOC), Inc.*, 528 U.S. 167, 197 (2000) (Kennedy, J., concurring).

107. *Laidlaw*, 528 U.S. at 197.

108. *Id.* at 209 (Scalia, J., dissenting).

109. 529 U.S. 765 (2000).

110. 31 U.S.C. §§ 3729-3731 (2000).

111. *Vt. Agency of Natural Res.*, 529 U.S. at 778 n.8.

112. 524 U.S. 11 (1998).

113. *Id.* at 36 (Scalia, J., dissenting).

114. Robin Kundis Craig, *Will Separation of Powers Challenges “Take Care” of Environmental Citizen Suits? Article II, Injury-in-Fact, Private “Enforcers,” and Lessons From Qui Tam Litigation*, 72 U. COLO. L. REV. 93 (2001).

115. *See* N.C. Shellfish Growers Ass’n v. Holly Ridge Assocs., L.L.C., 200 F. Supp. 2d 551 (E.D.N.C. 2001); *Water Keeper Alliance, Inc. v. Smithfield Foods, Inc.*, Nos. 4:01-CV-27-H(3), 4:01-CV-30-H(3), 2001 WL 1715730 (E.D.N.C. Sept. 20, 2001); *Miss. River Revival, Inc. v. City of Minneapolis*, 145 F. Supp. 2d 1062 (D. Minn. 2001).

APPENDIX

POST-*Laidlaw* APPELLATE CASES DISCUSSING ENVIRONMENTALIST
STANDING TO SUE

1. *Am. Soc'y for the Prevention of Cruelty to Animals v. Ringling Bros. & Barnum & Bailey Circus*, 317 F.3d 334 (D.C. Cir. 2003) (D.C. Circuit, reversing the district court's dismissal of the case for lack of standing, ruled that former elephant handler had standing to bring ESA suit based on alleged mistreatment of elephants, on the theory that he planned to attend the circus in the future and would observe the ill effects of the circus' mistreatment of individual animals).
2. *Pub. Citizen v. Dep't of Transp.*, 316 F.3d 1002 (9th Cir. 2003) (on a petition for review, the Ninth Circuit held that a public interest organization with members residing along the United States-Mexico border had standing to challenge the Department of Transportation's failure to prepare an environmental impact statement on the air quality effects of a regulation, adopted pursuant to the North American Free Trade Agreement, permitting Mexican trucks to operate in the United States).
3. *Kootenai Tribe v. Veneman*, 313 F.3d 1094 (9th Cir. 2002) (the Ninth Circuit, affirming the trial court, ruled that defendant-intervenors possessed standing to pursue an appeal in defense of the United States Forest Service's roadless rule, on the ground that members of the plaintiff organizations alleged that they used areas covered by the rule for outdoor recreation and nature appreciation).
4. *Nat'l Audubon Soc'y, Inc. v. Davis*, 307 F.3d 835 (9th Cir. 2002) (the Ninth Circuit, affirming the trial court, ruled that the National Audubon Society had standing to challenge a ballot measure prohibiting certain kinds of animal traps, on the theory that eliminating the traps would increase the number of bird predators and therefore reduce the number of birds available for observation).
5. *Hodges v. Abraham*, 300 F.3d 432 (4th Cir. 2002) (the Fourth Circuit, affirming the trial court, held that South Carolina Governor had standing to bring a National Environmental Policy Act claim based on the Department of Energy's alleged failure to properly consider the environmental effects of transferring plutonium into the state, on the theory that the Governor could sue to protect the state's property from risks of contamination).
6. *City of Olmstead Falls v. Fed. Aviation Admin.*, 292 F.3d 261 (D.C. Cir. 2002) (on a petition for review, the D.C. Circuit held that a city located two miles from an airport had standing to challenge FAA approval of a runway improvement

project, based on the alleged harm the project would impose on the city's economic interests).

7. *Sierra Club v. EPA*, 292 F.3d 895 (D.C. Cir. 2002) (on a petition for review, the D.C. Circuit held that Sierra Club lacked standing to challenge the allegedly improper classification of wastes under the Resource Conservation Recovery Act, on the ground that the Club submitted no evidence based on personal knowledge demonstrating a substantial probability of actual or imminent injury to any of its members).

8. *Piney Run Pres. Ass'n v. County Comm'rs of Carroll County*, 268 F.3d 255 (4th Cir. 2001) (the Fourth Circuit, affirming the trial court, ruled that a local preservation association had standing to challenge county's operation of waste treatment plant under the Clean Water Act, based on showing that the alleged pollution adversely affected the ability of one member of the plaintiff organization to use and enjoy a river).

9. *Save Our Heritage, Inc. v. Fed. Aviation Admin.*, 269 F.3d 49 (1st Cir. 2001) (on a petition for review, the First Circuit held that nearby towns and organizations owning historic sites had standing to challenge an FAA order authorizing a commuter airline to provide service from a municipal airport in Massachusetts to New York, on the theory that the plaintiffs would be affected by the noise, air pollution, and traffic congestion caused by additional flights).

10. *Helstosky v. EPA*, No. 01-1069, 2001 WL 799950 (D.C. Cir. June 29, 2001) (unpublished order) (on a petition for review, the D.C. Circuit held that an individual lacked standing to challenge rule for establishing testing guidelines for chemicals; the plaintiff claimed standing on the theory that the guidelines would incorrectly indicate that certain chemicals are not a threat to public health and therefore lead to plaintiff's exposure to dangerous chemicals; the court of appeals described these allegations as "too attenuated" to support standing).

11. *Hall v. Norton*, 266 F.3d 969 (9th Cir. 2001) (the Ninth Circuit, reversing the district court's dismissal of the case for lack of standing, held that a local resident had standing to challenge the Bureau of Land Management's failure to complete an environmental impact statement under the National Environmental Policy Act, prior to approving an exchange of public lands with a land developer, on the ground that development of the property would generate additional air pollution which would adversely affect the plaintiff's interests).

12. *Pye v. United States*, 269 F.3d 459 (4th Cir. 2001) (the Fourth Circuit, reversing the district court's dismissal of the case for lack of standing, ruled that landowner had standing to challenge the Army Corps of Engineers' issuance of a permit for construction of a road without complying with the requirements of

the National Historic Preservation Act, based on the alleged adverse effects of the proposed road and the historic value of the plaintiff's property).

13. *1000 Friends of Md. v. Browner*, 265 F.3d 216 (4th Cir. 2001) (on a petition for review, the Fourth Circuit held that a statewide conservation organization had standing to challenge the EPA's determination that Maryland's transportation program conformed with the requirements of the Clean Air Act, on the theory that transportation projects constructed in violation of the Act would increase the level of motor vehicle emissions to which plaintiff's members are exposed).

14. *Cantrell v. City of Long Beach*, 241 F.3d 674 (9th Cir. 2001) (the Ninth Circuit, reversing the district court's dismissal of the case for lack of standing, held that birdwatchers had standing to challenge adequacy of environmental impact statement prepared under the National Environmental Policy Act on the Navy's proposed closure of a base and subsequent development of the site as a marine container terminal, on the ground that the development would impair bird habitat and adversely affect birdwatchers' recreational and aesthetic interests).

15. *Mancuso v. Consol. Edison Co.*, No. 01-7319, 2002 WL 15505 (2nd Cir. Jan. 2, 2001) (unpublished) (the Second Circuit, affirming the trial court, ruled that a former landowner and his family lacked standing to challenge PCB pollution where pollution had occurred twenty years earlier; the plaintiffs did not currently reside, own property, or recreate in the area; and their only recent use of the area had been to gather evidence to support the lawsuit).

16. *Natural Res. Def. Council v. Southwest Marine, Inc.*, 236 F.3d 985 (9th Cir. 2000) (the Ninth Circuit, upholding the trial court, ruled that environmental organizations and individual citizens had standing to challenge shipyard operator's alleged violations of the Clean Water Act, based on a showing that the alleged pollution adversely affected individuals' ability to enjoy the recreational and aesthetic values of the area).

17. *Am. Petroleum Inst. v. United States EPA*, 216 F.3d 50 (D.C. Cir. 2000) (on a petition for review, the D.C. Circuit held that environmental groups lacked standing to challenge regulations governing the treatment of petrochemical wastes under the Resource Conservation and Recovery Act, on the ground that the groups failed to demonstrate any causal connection between the regulations and the alleged harms identified by the organizations' members).

18. *Ecological Rights Found. v. Pac. Lumber Co.*, 230 F.3d 1141 (9th Cir. 2000) (the Ninth Circuit, reversing the trial court's dismissal of the case for lack of standing, ruled that environmental groups had standing to challenge a logging company's alleged Clean Water Act violations, based on members' allegations that

they used a stream for recreational purposes and the pollution impaired their use of the resource).

19. *Heartwood, Inc. v. United States Forest Serv.*, 230 F.3d 947 (7th Cir. 2000) (the Seventh Circuit, reversing the trial court's dismissal of the case for lack of standing, ruled that an environmental group and other plaintiffs had standing to challenge the United States Forest Service's decision to adopt "categorical exclusions" exempting certain activities from review under NEPA, on the theory that plaintiffs' use of forest resources would be adversely affected by activities authorized as a result of these exemptions).

20. *Cent. & S.W. Servs., Inc. v. United States EPA*, 220 F.3d 683 (5th Cir. 2000) (on a petition for review, the Fifth Circuit held that Sierra Club lacked standing to challenge a rule regarding disposal of PCB wastes, on the ground that the Club could not demonstrate a substantial possibility that PCB waste would leach into the ground water and inflict harm on the plaintiffs).

21. *Texans United for a Safe Econ. Educ. Fund v. Crown Cent. Petroleum Corp.*, 207 F.3d 789 (5th Cir. 2000) (the Fifth Circuit, reversing the trial court's dismissal of the suit, ruled that an environmental organization and individual plaintiffs had standing to challenge an oil refinery's violation of the Clean Air Act, based on affidavits asserting that repeated exposures to sulfurous odors diminished their enjoyment of their surroundings).

22. *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149 (4th Cir. 2000) (en banc) (the Fourth Circuit, reversing the trial court's dismissal of the case for lack of standing, ruled that environmental groups had standing to challenge company's alleged violations of the Clean Water Act, based on their members' allegations that water pollution impaired their recreational and aesthetic interests in the body of water).

POST-*Laidlaw* APPELLATE CASES DISCUSSING MOOTNESS

1. *Miss. River Revival, Inc. v. City of Minneapolis*, 319 F.3d 1013 (8th Cir. 2003) (the Eighth Circuit, affirming the trial court's dismissal of the case on mootness grounds, held that environmental organizations' suit for civil penalties under the Clean Water Act, based on city's discharge of storm waters without required permits, was rendered moot by the state pollution agency's issuance of permits during the course of the litigation).
2. *Sierra Club v. United States EPA*, 315 F.3d 1295, 1303 (11th Cir. 2002) (the Eleventh Circuit, in dictum, stated that "[w]here a defendant voluntarily ceases challenged conduct, the case is not moot because nothing would prevent the defendant from resuming its challenged action.").
3. *S.F. Baykeeper, Inc. v. Tosco Corp.*, 309 F.3d 1153 (9th Cir. 2002) (the Ninth Circuit, reversing the trial court's dismissal of the case on mootness grounds, held that environmental groups' civil-penalty suit under the Clean Water Act was not rendered moot by the defendant's sale of the facility during the course of the litigation, on the theory that liability for civil penalties attaches at the time of the violation and, since the plant was still operating, the imposition of penalties would still have a deterrent effect).
4. *Tamaska v. City of Bluff City*, Nos. 00-5179, 00-5244, 2002 WL 22003 (6th Cir. Jan. 4, 2002) (unpublished) (the Sixth Circuit, affirming the trial court, ruled that Clean Water Act civil-penalty suit brought by landowners was not rendered moot by city's cessation of operation of waste treatment facility, on the ground that post-complaint compliance with the law cannot moot an otherwise valid claim for civil penalties).
5. *Ecological Rights Found. v. Pac. Lumber Co.*, 230 F.3d 1141, 1153 (9th Cir. 2000) (the Ninth Circuit, reversing the trial court, ruled that Clean Water Act civil-penalty suit was not rendered moot by the state's issuance of a new permit superceding the permit which provided the original basis for the plaintiff's lawsuit; the court said that "[t]here is no basis for believing that the bare fact of the new, stricter permit makes future violations any less likely, deterrence any less necessary, or the deterrent effect of civil penalties any less potent").