
Nicholas J. DeIuliis

Follow this and additional works at: https://dsc.duq.edu/dlr

Part of the Law Commons

**Recommended Citation**


This Recent Decision is brought to you for free and open access by Duquesne Scholarship Collection. It has been accepted for inclusion in Duquesne Law Review by an authorized editor of Duquesne Scholarship Collection.

**Environmental Law — Clean Water Act (“CWA”) — Mootness and Standing Issues for Citizen Suits Under the CWA —** The Supreme Court of the United States ruled that citizen suits brought under the CWA are moot due to subsequent compliance with permit limits or subsequent facility closure only if it is absolutely clear that the permit violations cannot reasonably be expected to recur, that organizations have standing to seek civil penalties under the CWA if the penalties deter ongoing permit violations that could continue in the future and create the likelihood of redressing the organization members’ injuries, and that plaintiff’s failure to appeal a federal court’s denial of injunctive relief does not moot a civil penalties claim on appeal.


Laidlaw Environmental Services (“Laidlaw”) was cited by the South Carolina Department of Health and Environmental Control (“DHEC”) for numerous mercury limit violations of the National Pollutant Discharge Elimination System (“NPDES”) permit for a Roebuck, South Carolina, wastewater treatment plant.¹ Within a year of the date Laidlaw purchased the Roebuck Plant, the South Carolina DHEC issued the NPDES permit for the wastewater facility with new and more stringent limits for discharges into the

---

North Tyger River. The NPDES permit was issued to Laidlaw by the DHEC pursuant to the CWA and the delegation authority of the United States Environmental Protection Agency ("EPA"). The NPDES permit regulated a range of discharge parameters that included metal discharge concentrations, effluent flow rate, discharge temperature, and discharge pH. As a condition related to the 1987 mercury permit limits, the South Carolina DHEC called for feasibility studies to be performed by Laidlaw to assess potential technologies that could achieve the long-term mercury limit of 1.3 parts-per-billion ("ppb"). Pursuant to the DHEC directive, Laidlaw retained Environmental Technology Engineering ("ETE") to evaluate potential technologies to control mercury emissions. ETE concluded that installing a second carbon absorption unit at the plant should allow the facility to meet the 1.3 ppb mercury limit. Based on this recommendation, Laidlaw purchased and installed a second carbon absorption unit in early 1988.

Operation with the second carbon absorption unit in 1988 and 1989 did not result in consistent compliance with the 1.3 ppb mercury limit. After a major fish kill on the North Tyger River in May, 1988, the South Carolina DHEC initiated an administrative action and obtained a consent order on September 7, 1988, that required Laidlaw to investigate alternative technologies for attaining

---

2. Id. at 475. After Laidlaw's initial purchase of the facility and for most of 1986, the wastewater plant operated under the prior permit issued to ABCO. Id. Relative to the prior ABCO permit, the most significant reduction found in the 1987 Laidlaw permit was for mercury. Id. The ABCO NPDES permit had a mercury limit of 20 parts per billion ("ppb") while the 1987 Laidlaw NPDES permit instituted an interim limit of 10 ppb for 1987 and a long-term limit of 1.3 ppb to be effective on January 1, 1988. Id.

3. Id. EPA delegation of permit issuance and enforcement responsibilities to the DHEC pursuant to section 402(b) of the CWA occurred on June 10, 1975. Id. at 484 n.5. Section 402(b) of the CWA authorizes each state to develop and monitor its own NPDES permit program. Id. The state program is subject to approval and review by the EPA. Id.

4. Id. at 475. Regulated metals under the permit included antimony, arsenic, cadmium, chromium, copper, lead, mercury, and nickel. Id. The NPDES permit also imposed a range of monitoring and reporting requirements for compliance management. Id.

5. Id. At the time of the issuance of the initial NPDES permit, the wastewater plant was equipped with a neutralization system and a carbon absorption filter. Id. at 476.


7. Id.

8. Id. The 1987 NPDES permit contained an option that allowed Laidlaw to request a higher mercury limit pending the results of the directed feasibility studies. Id. at 475-76. However, based on ETE's recommendation that compliance with the mercury permit limit should be attainable via the additional carbon absorption unit, Laidlaw chose not to request a higher mercury discharge limit. Id. at 476.

9. Id.
permit compliance.\textsuperscript{10} In response to the consent order, Laidlaw retained RMT, Inc., to study and pilot test possible solutions to the ongoing metals discharge problems.\textsuperscript{11} In December, 1989, the RMT, Inc. study results, which recommended the Lancy System as the most promising choice for controlling and reducing wastewater emissions, were provided to the DHEC.\textsuperscript{12} On July 10, 1990, the South Carolina DHEC granted approval and a construction permit for the installation of the Lancy System at the Roebuck Plant.\textsuperscript{13} The Lancy System was installed by the end of February, 1991; even though compliance with all non-mercury metal permit limits was achieved, it was evident that the wastewater facility could not meet the 1.3 ppb mercury limit.\textsuperscript{14} Laidlaw submitted a request on June 26, 1991, for modification of the existing NPDES permit to reflect a higher mercury emission limit and also conducted a study that investigated mercury levels in North Tyger River fish.\textsuperscript{15} The permit modification request was denied by the DHEC.\textsuperscript{16}

On April 10, 1992, the environmental organization Friends of the Earth, Inc., ("FOE") sent a letter to Laidlaw, the DHEC, and the EPA that gave notice of FOE's intention to file a citizen suit under the CWA after expiration of the required sixty day waiting period.\textsuperscript{17} The DHEC commenced a formal Notice of Enforcement Action against Laidlaw on May 21, 1992, and issued a Notice of

\textsuperscript{10} Id. The South Carolina DHEC concluded the fish kill resulted from a swing in the pH level of the plant discharge. Id. The South Carolina DHEC also imposed a $20,000 penalty and required Laidlaw to replace the killed fish. Id.

\textsuperscript{11} Friends of the Earth, Inc., 890 F. Supp. at 476.

\textsuperscript{12} Id. RMT, Inc., evaluated through pilot testing the Unipure, Lancy, and Mem Tek metal removal systems. Id. Each of these systems utilized a different process concept and design for metal removal and water treatment. Id.

\textsuperscript{13} Id.

\textsuperscript{14} Id. Operational testing by Laidlaw and the manufacturer of the Lancy System failed to improve mercury removal performance to the level required for permit compliance. Id.

\textsuperscript{15} Id.

\textsuperscript{16} Friends of the Earth, Inc., 890 F. Supp. at 477.

\textsuperscript{17} Id. The sixty-day notice period expired on June 9, 1992. Id. The CWA provides the following guidelines regarding who may bring a citizen suit and what notice guidelines must be met:

\begin{quote}
[\textit{Any citizen may commence a civil action on his own behalf ... against any person who is alleged to be in violation of ... an effluent standard or limitation under this Act or ... an order issued by the Administrator or a State with respect to such a standard or limitation. No action may be commenced prior to sixty days after the plaintiff has given notice of the alleged violation to the Administrator, to the State in which the alleged violation occurs, and to any alleged violator of the standard, limitation, or order} ...]
\end{quote}

Enforcement Conference. The Notice of Enforcement Action charged Laidlaw with 223 violations of the mercury permit limit and two violations of the antimony permit limit since April, 1991. An enforcement conference was held between Laidlaw and the DHEC on June 5, 1992, and the parties reached a final consent agreement on June 8, 1992, that imposed a $100,000 penalty on Laidlaw, that was approved by a state circuit judge on June 10, 1992. Counsel for Laidlaw requested that the DHEC file a suit against Laidlaw instead of pursuing the more common approach of proceeding with an administrative action in order to bar the threatened citizen suit by FOE. Laidlaw filed the judicial complaint that led to judge-approval on behalf of the DHEC on June 9, 1992, in the Court of Common Pleas of Spartanburg County, South Carolina. Even though a $100,000 penalty was imposed, the consent order did not declare an injunction of the Roebuck facility; but instead it required Laidlaw to make every effort to comply with the order, and it also provided that the terms of the order would shelter Laidlaw from all liability that arose from violations occurring during the periods covered by the order. An economic benefit of noncompliance analysis, which is a financial assessment procedure to estimate the economic gain of a polluter resulting from delayed compliance or noncompliance and which the EPA advises state agencies to employ when estimating penalties for NPDES permit violations, was not performed by the DHEC. Imposing the economic benefit of noncompliance as a penalty on Laidlaw would have amounted to a greater punishment than the $100,000 penalty imposed by the DHEC in the consent agreement.

After the consent order, Laidlaw continued to struggle to meet the NPDES permit limit for mercury, continued to experiment with

19. Id. The fact sheet reflecting Laidlaw’s discharge monitoring reports that accompanied the Notice of Enforcement Conference served as the documentation for the alleged permit violations. Id. The DHEC did not allege in the notice any monitoring or reporting violations by Laidlaw. Id.
20. Id. at 477, 479. Although the enforcement conference was commenced on June 5, 1992, subsequent negotiations to reach a final consent agreement occurred on June 8, 1992. Id. at 477. The DHEC initially sought a $120,000 penalty but the parties later settled on a $100,000 penalty. Id. at 479.
21. Id. at 478. The DHEC agreed to file the suit as long as any additional expense incurred in filing and commencement was paid for by Laidlaw. Id.
22. Id. at 479. The consent order was entered on June 10, 1992. Id.
24. Id. at 480-81.
25. Id. at 482.
design and operational modifications to the wastewater facility, and elected to allow the incinerator and wastewater plant to sit idle for substantial periods during the latter half of 1992 to avoid violating the consent order. Finally, after extensive testing, Laidlaw was able to meet the mercury permit limit on a consistent basis by installing activated carbon filters at the backend of the Lancy Process and by adding a micro-filter and an ion resin exchange unit after the carbon filters. After Laidlaw demonstrated compliance with the NPDES permit mercury limit, the DHEC expressed their intent to allow the consent order to expire.

Plaintiffs FOE filed a citizen suit against Laidlaw on June 12, 1992, in the United States District Court for the District of South Carolina, two days after the court-approved final consent agreement between Laidlaw and the DHEC and two days after the expiration of the sixty day CWA notice period for citizen suits. The FOE alleged at least 1044 discharge violations of the NPDES permit by Laidlaw since the granting of the 1987 NPDES permit. The FOE complaint also alleged additional NPDES permit violations related to monitoring and reporting requirements. On July 1, 1992, the defendant Laidlaw moved to dismiss the FOE action per section 505(b)(1)(B) of the CWA, arguing that the citizen suit should be barred since state action had been commenced to prosecute Laidlaw for noncompliance with the DHEC permit. The federal district court later granted a motion by FOE to join the Sierra Club as an additional plaintiff. On December 14, 1992, the court denied Laidlaw the requested motion to dismiss and ordered an evidentiary hearing on the issues of citizen suit proceedings and whether the DHEC “diligently prosecuted” the consent order

27. Id. at 595-96.
28. Id. at 596. A DHEC attorney notified the state court of the DHEC’s intent to allow the consent order to expire in an August 6, 1993, letter. Id. The consent order explicitly stated that it would terminate when Laidlaw complied with its terms. Friends of the Earth, Inc., 890 F. Supp. at 480.
30. Id. The FOE complaint also alleged a long history of permit violations by Laidlaw and that most of the permit violations were for mercury. Id. FOE alleged that Laidlaw violated the mercury permit level on almost a daily basis from early 1991 through June 18, 1992. Id. Thirty-one discharge violations were alleged to have occurred after the final consent agreement between the DHEC and Laidlaw. Id.
31. Id. at 477-78. Plaintiffs FOE alleged at least 676 monitoring violations and 615 reporting violations. Id.
33. Id.
against Laidlaw.\textsuperscript{34}

On April 7, 1995, the district court issued its opinion relating to the evidentiary hearing.\textsuperscript{35} The decision stated that although phrased in the present tense in the CWA, section 505(b)(1)(B) should be read to bar citizen suits during and after state agency prosecution as long as diligent prosecution was evident.\textsuperscript{36} In addition, the court concluded that because the CWA is a federal statute, a federal standard should be used to determine what constitutes diligent prosecution.\textsuperscript{37} The district court ruled that the burden of showing lack of diligent prosecution is on the plaintiff, that this is a heavy burden because diligence is presumed, and that the statutory grant of a sixty day notice period prior to the commencement of citizen suits indicates that Congress intended to give the state agency the first opportunity at enforcing permit violations.\textsuperscript{38}

Despite the heavy burden that FOE had to meet to show lack of diligence on behalf of the DHEC, the court ruled that this burden was met due to the numerous procedural deficiencies that were present in the consent order litigation.\textsuperscript{39} Specific instances enumerated in the opinion included the lack of injunctive relief, the vague requirement of "making every effort towards compliance" to be demonstrated by Laidlaw, the inability to specify penalty provisions for future violations, and the discharge of all other related liabilities for the period of the consent order.\textsuperscript{40} In addition, the court found that the most serious evidence of a lack of diligent prosecution on the part of the DHEC was the relatively small penalty of $100,000 that was imposed on Laidlaw under the consent order relative to what the penalty would have been under the economic benefit of noncompliance analysis.\textsuperscript{41} Finally, the court stated that violations of the NPDES permit are strict liability offenses and, as such, Laidlaw's reasonableness or good faith efforts toward compliance are irrelevant for determining liability and should only impact the amount of the penalty imposed.\textsuperscript{42} Since the DHEC did not demonstrate diligent prosecution of the Laidlaw

\textsuperscript{34} Id. at 697.
\textsuperscript{35} Friends of the Earth, Inc., 890 F. Supp. at 486.
\textsuperscript{36} Id.
\textsuperscript{37} Id. at 486 n.8.
\textsuperscript{38} Id. at 486-87.
\textsuperscript{39} Id. at 498.
\textsuperscript{40} Friends of the Earth, Inc., 890 F. Supp. at 490-91.
\textsuperscript{41} Id. at 497-98. The court estimated that under the South Carolina Pollution Control Act, a $2,270,000 penalty could have been assessed. Id. at 491.
\textsuperscript{42} Id. at 496.
violations under the consent order, FOE was allowed to proceed with the citizen suit.43

After the decision of the district court concerning the existence of diligent prosecution, the defendant Laidlaw moved the court to reconsider or, in the alternative, to certify an order for an interlocutory appeal.44 The motion to reconsider was denied due to the rejection of the defendant's argument that the finding of non-diligence on the part of the DHEC solely hinged upon the assessed penalty under the consent order not being equivalent to the amount of economic benefit from non-compliance.45 The motion for interlocutory appeal was not granted because of the incentive to avoid piecemeal appeals where possible and because of the low likelihood that the litigation would be shortened substantially by the granting of the motion.46 Subsequently, Laidlaw moved for summary judgment on grounds that FOE failed to demonstrate injury-in-fact and, as a result, lacked Article III standing to bring the suit.47 FOE, in opposition to the motion, submitted numerous affidavits and deposition testimony from members of the organization that alleged loss of recreational benefits and economic harm resulting from the environmental impact of the permit violations.48 Upon reviewing the evidence supplied by members of FOE, the district court found that FOE had standing and denied Laidlaw's motion for summary judgement.49

After the court's finding of lack of diligent prosecution by the DHEC and the ruling that FOE could proceed with its citizen suit, the district court entered its final judgement in January, 1997, and imposed a $405,800 penalty on Laidlaw for the NPDES permit violations.50 Key findings included that Laidlaw committed 489

43. Id. at 498.
44. Id. Both defendant motions were denied on July 7, 1995. Id. at 499.
46. Id.
47. Friends of the Earth, Inc., 120 S. Ct. at 702.
48. Id. at 696-97. FOE member Kenneth Lee Curtis averred in an affidavit that he thought the river looked and smelled polluted and that he would no longer camp or fish downstream from the Roebuck facility due to concerns about pollution from the plant. Id. at 704. Citizen Local Environmental Action Network ("CLEAN") member Angela Patterson stated that she no longer picnicked near or walked/waded along the river due to concerns about the plant discharges. Id. at 704-05. Patterson also stated that her original intention to buy a home near the river was extinguished by her concerns about the discharges from the Laidlaw facility. Id. CLEAN member Gail Lee averred that her home near the river had a lower value than similar homes away from the river, due partly to the community's knowledge of and collective concern about the Laidlaw facility discharges. Id.
49. Id. at 705.
violations of the mercury limit in the 1987 permit and that only nine of the violations occurred after the Lancy System was in place and had undergone start-up testing.\textsuperscript{51} Laidlaw was also found to be in violation of 420 monitoring and 503 reporting requirements.\textsuperscript{52} Based on these violations and using the economic benefit of noncompliance approach to assess penalties, the court determined that the gross penalty that should have been imposed on Laidlaw, excluding other mitigating factors, was $1,092,581.\textsuperscript{53} However, in assessing the penalty, the court factored into the calculation a number of mitigating factors, including Laidlaw's reasonable and good-faith selection and start-up operation of the Lancy system, the non-serious nature of the monitoring and reporting violations, and the lack of data indicating that the facility's mercury emissions adversely affected the environment or fish population.\textsuperscript{54} These mitigating factors were used to adjust and reduce the penalty from $1,092,581 to $405,800 plus a significant portion of the legal fees of FOE.\textsuperscript{55} Injunctive relief was denied to FOE and was not deemed applicable since Laidlaw was in substantial compliance with the NPDES permit at the time of the ruling and there was no demonstrated harm to the environment by the plaintiffs.\textsuperscript{56}

Following the decision of the district court, FOE appealed the amount of the penalty to the United States Court of Appeals for the Fourth Circuit.\textsuperscript{57} The appellate court found that the plaintiffs lacked standing since the redressability requirement was not met because FOE only appealed the amount of the penalty, which was to be paid to the government and, therefore, could not be used to redress any injury to the plaintiffs.\textsuperscript{58} An appeal challenging the denial of injunctive relief would have met the redressability requirement for standing, but FOE chose not to appeal that ruling.\textsuperscript{59} The appellate court remanded the case to the district court and instructed the district court to reverse its prior decision.\textsuperscript{60}

Upon the Fourth Circuit's decision, FOE requested a writ of

\begin{itemize}
  \item \textsuperscript{51} Id. at 600.
  \item \textsuperscript{52} Id.
  \item \textsuperscript{53} Id. at 603.
  \item \textsuperscript{54} Id. at 602, 603, 607.
  \item \textsuperscript{55} Friends of the Earth, Inc., 956 F. Supp. at 610-11.
  \item \textsuperscript{56} Id. at 611.
  \item \textsuperscript{57} Friends of the Earth, Inc. v. Laidlaw Envtl. Services (TOC), Inc., 149 F.3d 303, 305 (4th Cir. 1998).
  \item \textsuperscript{58} Id. at 306.
  \item \textsuperscript{59} Id.
  \item \textsuperscript{60} Id. at 307.
\end{itemize}
certiorari to the United States Supreme Court.\textsuperscript{61} During this same period, Laidlaw idled and partially dismantled the Roebuck Plant and placed the facility on the market for sale.\textsuperscript{62}

Upon granting certiorari, the Supreme Court reversed the Fourth Circuit's ruling and found that the controversy was not moot and, in addition, that FOE had standing under the citizen suit provision of the CWA.\textsuperscript{63} Justice Ginsberg, writing for the majority, stated that an organization has standing on behalf of its members if the members would have standing to sue in their own right, the interests in question are pertinent to the organization's primary objectives, and the individual participation of members in the suit is not required.\textsuperscript{64} Also, the majority ruled that it is injury to the plaintiff and not injury to the environment that is critical to determining whether the injury-in-fact requirement for standing is present.\textsuperscript{65} Using the affidavits and depositions of members of FOE that were submitted during the Fourth Circuit's review of the case, the majority concluded that injury-in-fact to FOE was present in the form of lost recreational, aesthetic, and economic interests tied to the North Tyger River.\textsuperscript{66} An additional element required for standing, redressability of the plaintiff's injury, was found to be present by assuming that the civil penalties that were imposed upon Laidlaw as a result of permit violations would serve as a deterrent to future harm to the plaintiff and would provide redress even though the penalty was paid to the government as opposed to the plaintiff.\textsuperscript{67}

The majority rejected Laidlaw's claim that subsequent and substantial compliance with the NPDES permit made the issues on appeal automatically moot.\textsuperscript{68} For a case to become moot through voluntary cessation of the behavior in question, it must be absolutely clear that the behavior could not be reasonably expected to recur.\textsuperscript{69} The Court determined that the adoption of the Fourth Circuit's definition of mootness as standing set in a time frame could be erroneous because behavior that is capable of repetition

\textsuperscript{61} Friends of the Earth, Inc., 120 S. Ct. at 703.
\textsuperscript{62} Id.
\textsuperscript{63} Id. at 704, 711.
\textsuperscript{64} Id. at 704.
\textsuperscript{65} Id.
\textsuperscript{66} Friends of the Earth, Inc., 120 S. Ct. at 705.
\textsuperscript{67} Id. at 706.
\textsuperscript{68} Id. at 711.
\textsuperscript{69} Id.
yet evades review may not be moot. Of particular interest to the Court was Laidlaw's decision to keep its NPDES permit after the Roebuck facility was idled because such a decision could be interpreted to threaten future facility operation and subsequent permit violations. The Supreme Court, by deferring to the district court, passed on deciding FOE's request for reimbursement of its legal fees by Laidlaw under the catalyst theory of the CWA.

In a concurring opinion, Justice Stevens stated that the issue of the proper amount of damages for permit violations is analogous to punitive damages issues and, as such, the case would not be moot even if it was absolutely clear that Laidlaw had permanently gone out of business and threatened no future permit violations. A second concurring opinion by Justice Kennedy raised a concern that delegation of administrative authority to citizens via the citizen suit provision of the CWA could potentially violate the constitutional concept of separation of powers. Since this issue was not raised in either the petition for certiorari or the lower court decisions, Justice Kennedy reserved review for a future case.

In the dissenting opinion, Justices Scalia and Thomas argued that FOE as plaintiffs failed to demonstrate injury-in-fact and, thus, did not have standing. The affidavits and depositions supplied by the members of FOE that alleged decreased recreational and economic use were vague, non-quantifiable, and should be treated as no more than general averments. Although the dissent agreed with the majority's view that injury to the plaintiff and not injury to the environment is critical for determining injury-in-fact, the dissent argued that there was no quantifiable injury to the environment caused by Laidlaw and, therefore, there could be no injury to the

---

70. Id. at 709.
71. Friends of the Earth, Inc., 120 S. Ct. at 711.
72. Id. at 711-12. Under the CWA, legal fees may be recovered by the citizen plaintiff from the violating defendant if the plaintiff was a prevailing party and if the plaintiff was the catalyst that triggered the enforcement of the CWA: "The court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing or substantially prevailing party, whenever the court determines such award is appropriate." 33 U.S.C. § 1365(d) (2000).
73. Friends of the Earth, Inc., 120 S. Ct. at 712 (Stevens, J., concurring). Justice Stevens did note that the case would be moot if the only issue on appeal concerned injunctive relief. Id.
74. Id. at 713 (Kennedy, J., concurring).
75. Id.
76. Id. at 713-14 (Scalia & Thomas, JJ., dissenting).
77. Id.
plaintiff because the plaintiff's interest in the case was tied to the environment. The dissent concluded that adopting the majority's standard for assessing injury-in-fact will make that requirement of standing nothing more than a technicality that can be met with ease.

Justices Scalia and Thomas also argued that even if the injury-in-fact requirement is ignored, there is still a problem with the plaintiff's standing as it relates to redressability. FOE's claim of a particularized future injury was used to secure generalized penalties for past violations. In the eyes of the dissent, the majority has developed a boundless form of deterrence standing that will permit private parties to enforce and impose penalties that are public in nature. This would give prospective plaintiffs great power in choosing targets for enforcement violations and may create separation of powers problems by allowing private citizens to act as quasi-governmental agencies.

Article III, Section 2 of the United States Constitution requires that judicial authority be limited to cases or controversies. An element for meeting this case or controversy requirement is standing, part of which is injury-in-fact. One of the primary United States Supreme Court cases that discussed the level of particularized injury-in-fact that is necessary to meet the standing requirement for plaintiffs bringing suit under environmental laws is the 1972 case of Sierra Club v. Morton. The issue under review was whether a plaintiff adequately alleged injury-in-fact when he averred that the challenged activity negatively impacted upon the

---

78. Friends of the Earth, Inc., 120 S. Ct. at 714 (Scalia & Thomas, JJ., dissenting).
79. Id. at 715. Justice Scalia referred to the majority's standard as a "sham" requirement that would most closely resemble pleading requirements. Id.
80. Id.
81. Id.
82. Id. at 719 (Scalia & Thomas, JJ., dissenting).
83. Friends of the Earth, Inc., 120 S. Ct. at 719. This argument is similar to the concern presented in Justice Kennedy's concurring opinion. Id. at 713 (Kennedy, J., concurring).
86. Sierra Club v. Morton, 92 S. Ct. 1361 (1972). A conservation club brought suit against federal officials in the United States District Court for the Northern District of California, seeking declaratory and injunctive relief against the granting of approval and issuance of permits for mining activities in Mineral King Valley, a national game refuge. Id. at 1363-64. Although the suit was dismissed for lack of standing because the plaintiff Sierra Club asserted no individualized harm to itself or to its members, the Court affirmed that injury-in-fact need not be purely economic in nature. Id. at 1366, 1367, 1369.
plaintiff's use or enjoyment of the land. The Supreme Court reasoned that the injury-in-fact element of standing can be met by alleging harm to purely aesthetic or recreational interests. Environmental well-being, like economic well-being, was determined to be an important element of society. In addition, the Court concluded that even though certain environmental interests are common to society as a whole, this will not prevent a plaintiff from bringing suit as long as the plaintiff has suffered personal injury.

The Supreme Court carefully differentiated between a plaintiff's subjective apprehensions of harm from a defendant's conduct and the reasonable probability of such harm occurring in the 1983 case of *City of Los Angeles v. Lyons*. Justice White, writing for the majority, stated that a plaintiff's subjective apprehensions concerning the potential results of a defendant's conduct are not enough, in themselves, to show imminent injury-in-fact for standing. Instead, there must be some showing of a realistic threat or reasonable expectation of injury. This reasoning was used to deny the equitable remedy of an injunction where the plaintiff was unable to show any real or immediate threat of imminent or future harm. The Court ruled that a likelihood of immediate and substantial harm needs to be present to support the injury-in-fact requirement for standing.

Subsequently, the Supreme Court in the 1992 case of *Lujan v. Defenders of Wildlife* analyzed whether a plaintiff, who intended to engage in future recreational and outdoor activities in an area, could be harmed by a defendant's conduct in that area to such a degree as to meet the injury-in-fact requirement. Justice Scalia, in

87. *Id.* at 1366.
88. *Id.* at 1368.
89. *Id.*
90. *Id.*
91. 103 S. Ct. 1660 (1983). This action was a citizen suit that sought an injunction, declaratory relief, and damages against the City of Los Angeles. *Id.* at 1663. The City allowed its police officers to employ a choke-hold on suspects when faced with non-deadly force. *Id.* at 1664. The plaintiff Lyons suffered damage to his larynx from the hold during a traffic stop and sought the injunction out of fear of future encounters with police officers. *Id.* at 1663.
92. *Id.* at 1668 n.8.
93. *Id.* at 1668.
94. *Id.* at 1670.
95. *Id.*
97. *Lujan*, 112 S. Ct. at 2138. The plaintiffs filed an action against the Secretary of the Interior in the United States District Court for Minnesota seeking a declaratory judgment that a regulation defining the Secretary's power to review government involvement with projects
writing the Court's opinion, stated that an injury-in-fact must be concrete and particularized and that general claims of future plans to travel and view ecological areas or wildlife are not sufficient by themselves.98 The Court's opinion explained that a nexus theory, standing by itself, that attempts to show injury-in-fact by the harm to a contiguous system that the plaintiff is only distantly connected to will fail to meet the standing burden without a showing of particularized and concrete injury.99 The Supreme Court reasoned that the ecosystem, animal, and vocational nexus theories fail to demonstrate injury-in-fact without the showing of a more proximate, immediate, and specific harm to the plaintiff.100

More recently, in the 1998 case of *Steel Co. v. Citizens for a Better Environment*,101 the Supreme Court addressed the issue of whether a defendant's failure to meet reporting requirements in a timely fashion constitutes an injury-in-fact to an environmental organization plaintiff that had an interest in the information and in deterring the defendant from future reporting violations.102 The majority ruled that under a citizen suit provision, an organization's general interest in the deterrence of future defendant violations is not enough, in itself, to create the requisite injury-in-fact.103 In addition, the organization's attempt to include the litigation costs as an additional form of injury-in-fact did not pass the standing analysis.104 However, the Court did point out that costs incurred by the organization through the investigation of whether the defendant violated the reporting requirements could constitute an injury-in-fact.105

An additional element required to show plaintiff-standing is redressability, which is the likelihood that the requested relief will

---

98. *Id.* at 2138. Examples of the evidence offered by the plaintiff to establish injury-in-fact and standing was an affidavit of a member who intended to travel to Egypt to observe the endangered Nile crocodile and an affidavit of a member who planned to travel to Sri Lanka to observe the Asian elephant and leopard. *Id.* at 2137, 2138.

99. *Id.* at 2139.

100. *Id.* at 2140.


102. *Steel Co.*, 118 S. Ct. at 1017-18. The respondent had an interest in using information that must be disclosed by the petitioner under the Emergency Planning and Community Right to Know Act of 1986. *Id.* at 1017.

103. *Id.* at 1019.

104. *Id.*

105. *Id.*
remedy the alleged injury. In the 1973 Supreme Court case of Linda R. S. v. Richard D., the Court investigated how distant the nexus between the plaintiff’s redress and the sought after relief could be before the redress element of standing would not be satisfied. The majority held that a mother-appellant’s failure to effectively show that enforcement of a state statute, that punished a parent for willfully neglecting child support obligations, would result in the support of her child rather than in the mere jailing of the child’s father caused a lack of redressability. Justice Marshall, writing for the Court, expressed the view that the mere prospect that prosecution could result in the redress of the plaintiff’s injury is too speculative, by itself, to meet the redress requirement for standing. According to the Court, private citizens do not have a judicially recognized interest in the mere prosecution of another citizen.

The notion that mere speculation concerning possible redress is not sufficient to meet standing requirements that was expressed by the Supreme Court in Linda R. S. in 1973 was echoed in 1992 in Lujan. The Lujan majority reiterated that it must be likely and not merely speculative that the plaintiff’s injury will be redressed by a favorable judicial decision. Redress was deemed not likely
to occur since the government agencies involved in the conduct in question were not parties to the case and the agencies only provided a fraction of the total funding for the foreign projects that allegedly caused the plaintiff's injury-in-fact. According to the Court, the relief requested by a plaintiff must be likely to not only redress an injury-in-fact, but it also must be likely to redress the particular injury-in-fact alleged.

The United States Supreme Court in Steel Co. analyzed whether redressability may not be present even when a defendant has directly injured the plaintiff. The majority stated that where there can be no controversy as to whether the defendant violated a law, there is no redress if the plaintiff seeks equitable relief through a declaratory judgment or if the plaintiff seeks injunctive relief with no continuing violation or imminence of future violations. More importantly, according to the Steel Co. Court, an environmental organization's request for civil penalties as a result of a defendant's failure to meet statutory reporting requirements will not redress the plaintiff's injuries because the money will be paid to the government. In addition, the Court found that a plaintiff's quest for judicial vindication under an existing law will not provide a legitimate form of redress to meet standing requirements even if the punishment of a defendant may deter future harm.

Mootness has been defined by the United States Supreme Court as the point when the case in question no longer presents a live controversy that a court may settle or when the parties lack a legally recognizable interest. In 1968, the Supreme Court expressed a stringent standard for finding mootness when the defendant ceases the activity in question after litigation has commenced in United States v. Concentrated Phosphate Export

---

114. Id. at 2140, 2142.
115. Id. at 2136.
117. Steel Co., 118 S. Ct. at 1020. An environmental organization that used data reported under the Emergency Planning and Community Right-To-Know Act of 1986 ("EPCRA") brought suit in federal district court under the EPCRA's citizen-suit provision against the defendant. Id. at 1008-09. The complaint alleged that the manufacturer failed to file timely chemical reports required under the EPCRA and that the defendant's failure to provide information in a timely fashion constituted injury-in-fact to the organization and its members. Id. at 1009. The organization requested relief in the form of a declaratory judgment, injunctive relief, and civil penalties authorized by the EPCRA. Id. at 1018.
118. Id. at 1019.
119. Id.
120. Id.
The Court's opinion explained that the test for mootness in cases seeking injunctive relief against allegedly illegal conduct is stringent, and voluntary cessation of the conduct in question does not moot the case. The Court reasoned that to allow otherwise would be to leave the defendant free to return to the prior conduct and, thus, free to continually evade review. Ultimately, the Court determined that a case may become moot if subsequent events make it absolutely clear that the conduct in question cannot reasonably be expected to recur.

The issue of whether voluntary cessation of challenged conduct will moot a case was revisited by the Court in 1982 in *City of Mesquite v. Aladdin's Castle, Inc.* Justice Stevens, writing the opinion for the Court, noted that a defendant's voluntary cessation of a questioned activity does not deprive a court of the ability to rule on the legality of the activity. According to the Court, a finding of mootness in all situations where the defendant voluntarily ceases the conduct in question would allow defendants to consistently and effectively evade review and still perform the conduct in question. However, the Court did state that voluntary cessation of questioned conduct by a defendant is an important factor that should be taken into account in determining whether a court should enjoin a defendant from renewing a challenged practice.

---

122. 89 S. Ct. 361 (1968). An export association made numerous sales of concentrated phosphate, supplied by its members, to South Korea under the United States foreign aid program. Id. at 363. The federal government filed a civil antitrust suit for injunctive relief in the United States District Court for the Southern District of New York, contending that the concerted activities of the association and its members in regard to such sales violated the Sherman Act. Id. The association claimed that the sales were exempted from antitrust liability by the Webb-Pomerene Act as "acts done in the course of export trade." Id.

123. Id. at 364.
124. Id.
125. Id.
126. 102 S. Ct. 1070 (1982). A city's licensing ordinance for amusement businesses required the police to consider whether a license applicant had any "connection with criminal elements." Id. at 1072. A corporation's application for a license was refused when the Chief of Police concluded that the corporation was connected with criminal elements. Id. at 1073. After the corporation successfully brought suit in a Texas state court challenging the ordinance and obtained an injunction requiring the city to issue it a license, the city adopted a new ordinance that defined the term "connected with criminal elements" in more detail than before. Id. at 1074. The corporation commenced an action in the United States District Court for the Northern District of Texas, seeking an injunction against enforcement of the new ordinance. Id.

127. Id. at 1074.
128. Id.
129. Id.
The application of the mootness doctrine to a situation wherein a defendant terminates the conduct in question was addressed by the Supreme Court in the 1983 case of *City of Los Angeles v. Lyons*. Justice White stated that the doctrine that a claim does not become moot when it is capable of repetition yet evades review applies only in exceptional situations. According to the Court, even when the doctrine applies, the plaintiff must make a reasonable showing that he will be subjected to the alleged illegal activity again. Finally, Justice White stated that mooting a request for injunctive relief will not automatically moot a claim for penalties or damages.

The dual nature of the mootness doctrine was presented in the 1987 Supreme Court case of *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.* Justice Marshall, in the majority opinion, stated that the mootness doctrine protects plaintiffs from defendants who attempt to evade review of their actions and, likewise, defendants from plaintiffs who attempt to bring suit for conduct that is not connected to any current or future wrongdoing. The majority explained that a plaintiff's case for injunctive relief will be moot when there is no reasonable expectation that a wrong will be repeated. Justice Marshall, however, placed the burden upon the defendant to demonstrate that it is absolutely clear that the alleged wrongful behavior cannot be reasonably expected to recur.

The 1987 Supreme Court case of *Tull v. United States* explores how a defendant's post-complaint conduct can affect mootness.

---

130. 103 S. Ct. 1660.
131. Id. at 1669.
132. Id.
133. Id.
134. 108 S. Ct. 376 (1987). Between 1981 and 1984, the defendant repeatedly violated the conditions of a pollutant discharge permit issued for a meat-packing plant. Id. at 379. However, the company's last reported violation of the permit occurred in May, 1984. Id. at 380. In June, 1984, two environmental groups filed a citizen suit under the CWA against the defendant company in the United States District Court for the Eastern District of Virginia. Id. at 379-80. The plaintiffs alleged that the company had violated, and would continue to violate, the CWA. Id. at 380.
135. Id. at 386.
136. Id. See also *City of Los Angeles*, 103 S. Ct. at 1665 (1983), where the Court stated that requests for injunctive relief that hinge solely on past exposure to illegal conduct do not meet the case and controversy requirement if they are unaccompanied by continuing adverse effects in the present. Id.
137. Id.
determinations when a plaintiff requests civil damages. According to the Court, a defendant's post-complaint conduct should not moot a claim by the plaintiff for civil damages under the provisions of the CWA. The Court reasoned that claims for civil damages under the citizen suit provision of the CWA are analogous to claims for punitive damages that should not be deemed moot due to post-complaint conduct. Because both forms of sought after penalties are legal remedies that are not fixed by their nature, the Court concluded that neither type of claim should be mooted by the defendant's post-complaint conduct.

More recently, in the 1997 case of Atlantic States Legal Foundation, Inc. v. Stroh Die Casting Co., the United States Court of Appeals for the Seventh Circuit reviewed the circumstances wherein the voluntary cessation of a challenged practice will moot a controversy. The Seventh Circuit held that injunctive relief could be denied if it is clear that the wrongful behavior cannot reasonably be expected to recur. However, civil penalties can be recovered for any time during which the defendant was in violation of an environmental law. Thus, the Seventh Circuit differentiated between the standards for mooting a case seeking injunctive relief and one seeking civil damages.

The Supreme Court's ruling in Friends of the Earth should have a significant impact on the analysis of standing requirements for citizen suits commenced under federal environmental protection laws. When contrasted with prior precedent, one concludes that the most immediate impact of the decision will be its relatively relaxed injury-in-fact requirements that must be met by plaintiffs. Under the majority's reasoning, practically any individual citizen or environmental organization can demonstrate injury-in-fact by simply arguing that harm was suffered via the loss of aesthetic value and

139. Tull, 107 S. Ct. at 1888. The federal government sued a real estate developer for dumping fill on wetlands without a permit in violation of the CWA. Id. at 1833. The government sought both injunctive relief and civil penalties. Id. at 1834.
140. Id.
141. Id.
142. Id.
143. 116 F.3d 814 (7th Cir. 1997).
144. Atlantic States Legal Found., 116 F.3d at 818. This case was brought by the plaintiff environmental organization under the citizen suit provision of the CWA and dealt with the defendant's violation of its NPDES permit. Id. at 816.
145. Id. at 820.
146. Id.
147. Id.
148. 120 S. Ct. 693 (2000).
the future loss of recreational use. If injury-in-fact is averred through loss of economic value, the plaintiff may not be required to quantify to-date losses. Instead, estimating potential future economic harm or current loss of economic value might be sufficient. This reasoning allows for a nexus argument to demonstrate injury-in-fact and runs counter to prior Supreme Court decisions such as *Lujan*,\(^{149}\) which required the plaintiff to show particularized harm.\(^{150}\)

In addition, the ruling as it pertains to standing requirements also relaxes the redressability element for prospective plaintiffs. A party bringing an action under a citizen suit provision can meet redressability requirements by suggesting that the threat of future injury by the defendant should allow for the imposition of additional monetary penalties for past violations. Whether the penalties are paid to the plaintiff or to the government is irrelevant. This relaxing of the injury-in-fact and redressability elements of standing is, in effect, a delegation of federal and state administrative powers to citizens and runs counter to prior decisions such as *Steel Co.*\(^{151}\)

The decision in *Friends of the Earth*\(^{152}\) is not a major deviation from prior Supreme Court precedent with regard to mootness. A defendant's voluntary cessation of a challenged practice will not moot the plaintiff's case unless it becomes absolutely clear that the challenged conduct can not be expected to recur in the future. Any standard less than this would allow the defendant to evade review by temporarily ceasing the challenged practice and then restarting the practice at a later time.

*Nicholas J. DeIuliis*

---

150. *Id.*
152. *Friends of the Earth*, 120 S. Ct. at 693.